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| Court of Appeals, State of Colorado<br>Ralph L. Carr Judicial Center<br>2 East 14th Avenue<br>Denver, Colorado 80203 | |
| District Court, Park County<br>Honorable Stephen A. Groome | |
| **Plaintiff-Appellant/Cross-Appellee:**<br>Indian Mountain Corp.<br><br>v.<br><br>**Defendant-Appellee/Cross-Appellant:**<br>Indian Mountain Metropolitan District | **▲ COURT USE ONLY ▲** |
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| **OPENING BRIEF** | |

Plaintiff-Appellent/Cross-Appellee Indian Mountain Corp ("IMC"), through undersigned counsel submits its Opening Brief and states as follows:

## CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with all requirements of C.A.R. 28, 28.1, and 32, including all formatting requirements set forth in those rules. Specifically, undersigned counsel certifies that:

- The brief complies with C.A.R. 28(g) and 28.1(g)(1) because it contains 9,494 words.
- The brief complies with C.A.R. 28(a)(7)(A) because it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p. ____), not to an entire document, where the issue was raised and ruled on.

Undersigned counsel acknowledges that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, 28.1, and 32.

__/S Adam C. Davenport___
Adam C. Davenport, #45342
Attorney for Plaintiff-Appellant/Cross-Appelle Indian Mountain Corp

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## STATEMENT OF THE CASE

### I. Nature of the Case

IMC filed the case below to confirm that, as between it and Defendant-Appellee Indian Mountain Metropolitan District (the "District"), IMC owns the water rights that comprise the augmentation plan, decreed by the Division 1 Water Court in case number W-7389 (the "Plan"). R. CF, p. 5, First Claim for Relief. IMC also sought a declaration that the District had failed to provide augmentation service to the Indian Mountain subdivision as required by its amended and restated service plan ("Service Plan") and C.R.S. § 32-1-1004 and requested that the District be enjoined from any further activity as a metropolitan district. *Id*. at p. 6-8, Third and Fourth Claims for Relief.

The District answered and counterclaimed for a declaratory judgment that it owned the Plan by virtue of a constructive trust. R. CF, p. 88-89.

The matter proceeded to trial in March 2015. At the close of IMC's case-in-chief, pursuant to C.R.C.P. 41(b), the District moved *inter alia* to dismiss IMC's third and fourth claims for relief related to the District's alleged non-compliance with its Service Plan and accompanying request for an injunction. R. Tr. 3/11/2015, p. 533, l. 5-12. The trial court dismissed IMC's third and fourth claims for relief, finding that the District was providing "water service" as that term is used in the

District's Service Plan by virtue of the District's maintenance of two seasonal ponds and ownership of three well permits. R. Tr. 3/11/2015, p. 549, l. 13 to p. 551, l. 21.

At the conclusion of the trial, the court entered its written Findings, Conclusions and Orders. R. CF, p. 4997. Regarding ownership of the Plan water rights – "the central issue of the case" – the trial court found and ordered 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." R. CF, p. 5004. As a result, the court concluded that "IMC holds title to the [Plan] and its associated rights as trustee for the express benefit of the Indian Mountain property owners, the beneficiaries." *Id*.

This conclusion and the factual findings upon which the trial court relied, form the basis of this appeal by IMC.

## II. Statement of Facts

During the 1970s and 1980s, IMC – and its corporate predecessors Meridian Properties, Inc. ("Meridian") and Park Development Company ("Park Development") – platted and sold lots in the Indian Mountain subdivision in Park County, Colorado, located generally east of Como and Fairplay (the "Subdivision"). R. CF, p. 4843, l. 3-8. The Subdivision consists of 2,450 lots, and some lot owners have constructed dwellings on their lots. R. CF, p. 4997. The water supply for

individual lots comes from wells that owners drill on their lots; there is no central potable water supply for the subdivision. *Id*. at ¶ 3; *Id*. at p. 5000, ¶ 28.

Well pumping in the subdivision causes depletions to Tarryall Creek, which depletions are frequently "out-of-priority," depriving downstream, senior water rights of their lawful water supply. R. Tr. 3/10/2015, p. 288, l. 12-25. In the mid-1970s, the law changed in Colorado requiring out-of-priority depletions from ground water pumping to be replaced to the affected stream system. R. CF, p. 4872, l. 10-19. As a result, sales in the subdivision were halted until Meridian developed and adjudicated the Plan. *Id*.

To do so, Meridian changed irrigation water rights it owned to be either left undiverted in Tarryall Creek or stored in a reservoir and later released to Tarryall Creek to replace the out-of-priority depletions from the wells in the Subdivision. *See* R. CF, p. 1090 (IMC-36); R. Tr. 3/9/2015, p. 53, l. 19 to p. 55, l. 23. The costs of initial platting and development of the Subdivision, combined with the unanticipated cost of obtaining the Plan took a heavy financial toll on Meridian and Park Development. R. CF, p. 4846, l. 14 to p. 4847, l. 21; *Id*. at p. 4867, l. 1-14; *Id*. at p. 4872, l. 10-19. IMC was formed as a successor company to Meridian and Park Development, assuming the debts of its predecessors and taking title to the platted and unplatted lands that would comprise the Subdivision as well as the Plan water

rights. *Id*. IMC continued to plat lots and sell the same, eventually paying off the debt incurred by Meridian and Park Development. *Id*. In the late 1980's James Campbell became the sole shareholder of IMC. R. CF, p. 4890, l. 16-22.

IMC has owned and operated the Plan at its own expense since the Plan was adjudicated. *See* R. CF, p. 4999, ¶ 15. Modern subdivisions often, but are not required to, create a home or property owners' association with mandatory membership to purchase the water rights and operate the augmentation plan for a subdivision that is reliant upon groundwater pumping, such as Indian Mountain. *See* R. CF, p. 5000. However this never occurred in Indian Mountain. *Id*. Over the last 30 years, there have been occasional discussions between IMC and the District (and its predecessor entity) regarding the sale and transfer of the Plan, which eventually led to the District amending its service plan and name to legally become authorized to own and operate the Plan. *See* R. CF, p. 4886, l. 5-20.

As recently as May 2013, James Campbell, on behalf of IMC, had offered to sell the Plan to the District, however the District failed to respond to the offer. R. Ex. IMC-225, p. 1; admitted R. Tr. 3/11/2015, p. 721, l. 5-24; *Id*. at p. 723, l. 18 to p. 724, l. 9. Campbell was subsequently approached by Bar Star Land, LLC ("Bar Star") who offered to purchase the Plan, an outlot in the subdivision and the land underlying the reservoir in which the Plan water rights are stored. R. CF, p. 4926, l.

7-15; *Id*. at p. 4927, l. 9 to p. 4928, l. 20. Tired of operating the Plan at his own expense, Campbell agreed to sell IMC to Bar Star via a stock purchase agreement. *Id*.; *See also* R. CF, p. 4930, l. 12-22. Bar Star and Campbell closed on the deal in August 2013. R. CF, p. 4999, ¶¶ 16 and 19. At the time it purchased IMC, Bar Star was comprised of two partners, James Ingalls and Mark Goosmann; subsequently, Ingalls purchased Goosmann's interest becoming the sole shareholder of IMC. *Id*.

Shortly after the sale, Ingalls attempted to negotiate a lease or sale of the Plan water rights to the District but the parties were unable to agree on terms. R. Tr. 3/11/2015, p. 756, l. 1-11. When it appeared that the parties were not going to come to an agreement on either a lease or purchase of the Plan by the District, IMC billed the District for its operation of the Plan in 2012 and 2013. R. CF, p. 1304 to 1305 (Ex. IMC-64 and 65); R. Tr. 3/9/2015, p. 81, l. 9 to p. 83, l. 12. When the District refused to pay the invoices, IMC elected to sell augmentation service directly to lot owners on a willing-buyer, willing-seller basis. R. Tr. 3/9/2015, p. 87, l. 4 to p. 89, l. 16. IMC sent letters to lot owners explaining that while they did not have to purchase augmentation service from IMC, depletions from their wells had to be replaced or else the well may be curtailed by the State. *Id*.; *See also* R. CF, p. 4465-4468 (Ex. IMMD-AA and BB); R. Tr. 3/9/2015, p. 99, l. 5-23.

Despite acknowledging on numerous occasions that IMC owned the Plan, the District began to assert that it in fact owned the Plan by virtue of a constructive trust. R. CF, p. 1593 (Ex. IMC-99); R. Tr. 3/9/2015, p. 196, l. 9-13; R. CF, p. 4356 (Ex. IMMD-V) , ¶ 5; R. Tr. 3/9/2015, p. 182, l. 14-23; R. CF, p. 2347 (Ex. IMC-257); R. Tr. 3/9/2015, p. 153, l. 6-10; R. Tr. 3/11/2015, p. 756, l. 1-11. In the face of the District's threat to sue IMC to take the water rights, IMC filed this action to *inter alia*, confirm its ownership of the Plan. *See* R. CF, p. 5-8; R. CF, p. 2346 (Ex. IMC-256); R. Tr. 3/9/2015, p. 169, l. 14-18.

## SUMMARY OF ARGUMENT

In this case, IMC merely seeks judicial confirmation of its right to do what every other augmentation plan owner in the state can do: charge a reasonable rate for the use and maintenance of the Plan water rights. The record demonstrates that there is nothing extraordinary about this concept and that subjecting IMC's property to a constructive trust is not warranted.

### I. The court abused its discretion by allowing a District witness to testify regarding matters to which he did not have personal knowledge and basing its ruling on the same.

The court made extensive factual findings regarding IMC's development of the Subdivision which became the basis for its imposition of a constructive trust

upon IMC's water rights. Much of the court's findings are taken verbatim from one of the District's witnesses, Glenn Haas. Over IMC's objection, the court allowed Haas to testify at length about matters that allegedly occurred decades before he knew the subdivision existed. Unsurprisingly, this testimony painted IMC and its former principles in a terrible light to the prejudice of IMC. The trial court abused its discretion by allowing this testimony into the record – and then relying upon the same in its order – because the testimony lacked any foundation in personal knowledge.

## II. There is insufficient evidence in the record to support the court's conclusion that IMC would be unjustly enriched by charging for the use of the Plan.

The court imposed a constructive trust on the Plan to prevent IMC from charging lot owners for the use of IMC's water rights. The court found that IMC had been compensated for the development of the Plan when it sold lots in the subdivision and that now charging lot owners for use of the Plan would result in unjust enrichment. However, there is no basis in the record to support the court's conclusion. To the contrary, the record demonstrates that IMC managed to pay off the debts of its corporate predecessors and has subsequently gone into debt operating and maintaining the Plan at its own expense. Since there is no evidence in the record to support the court's conclusion that IMC would be unjustly enriched by charging

lot owners – on a willing-buyer, willing-seller basis – for use of the Plan, imposition of a constructive trust upon IMC's property was unjustified.

### III. The record fails to demonstrate that "IMC has the Indian Mountain lot owners 'over a barrel.'"

One of the court's rationales for its finding that a constructive trust is warranted in this case is that IMC has Indian Mountain lot owners "over a barrel." In support of this contention, the trial court relies on three findings: (1) that IMC has retained legal title to the Plan; (2) the Plan was established so that lot owners could drill wells on their lots; and (3) that lot owners can obtain augmentation service from other sources, albeit at prices greatly higher than what IMC intends to charge. There is no support in the record for any of these conclusions.

First, the record demonstrates that the Plan was never intended to be conveyed to the District or any other entity. Barring any such obligation, IMC may dispose of its property, or not, just as any other property owner. Second, all augmentation plans in this state are "for" someone and this fact does not lead to an implication that the beneficiaries of the plan have any ownership interest in the water rights that comprise the plan. Third, it is true that lot owners *can* purchase augmentation service from some other entity at vastly higher costs, however the record does not demonstrate that lot owners will be forced to do so, or purchase augmentation service at all, as is their prerogative. The record demonstrates that if this Court overturns the trial

court's imposition of a constructive trust, IMC intends to offer augmentation service on a willing-buyer, willing-seller basis at rates below market. In sum, there is simply no evidence in the record to demonstrate that IMC has lot owners "over a barrel."

## IV. The trial court erred by finding that the Interstate Land Sales Act creates strict liability for omissions in property disclosures given by IMC to original lot purchasers.

The trial court found that IMC was strictly liable under the Interstate Land Sales Act, 15 U.S.C. § 1701, *et seq.* ("ILSA") for failing to mention that it would charge for the use of the Plan in property disclosures in the 1970s and 1980s. Neither party had raised a claim under the ILSA; the court injected this issue into the case during closing argument. Regardless, the court erred in holding IMC strictly liable for omissions in the property disclosures because any claim the District may have had by virtue of taking title to property from IMC has long since been time barred. As a result, any alleged violations of the ILSA do not justify imposition of a constructive trust in this case.

## V. The District is not providing "water services" to the Indian Mountain community and therefore should be enjoined from any further activity as a metropolitan district.

The trial court found that the District was providing "water service" pursuant to its Service Plan by maintaining two seasonal ponds and its ownership of three well permits. There is no support in the record for this conclusion because the

District has abandoned the seasonal ponds and IMC provides augmentation service to two of the three wells allowing them to pump. As a result, the court erred by finding that the District is providing "water service" to the community.

## ARGUMENT

### I. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING A DISTRICT WITNESS TO TESTIFY REGARDING EVENTS TO WHICH HE DID NOT HAVE PERSONAL KNOWLEDGE

***Standard of Review and Preservation.*** This Court reviews evidentiary rulings for an abuse of discretion. *Wal-Mart Stores, Inc. v. Crossgrove*, 276 P.3d 562, 564 (Colo. 2012). The trial court abuses its discretion when its determination is manifestly arbitrary, unreasonable, or unfair. *Goodman Associates, LLC v. WP Mountain Properties, LLC,* 222 P.3d 310, 314 (Colo. 2010). This issue was raised and ruled upon at R. Tr. 3/10/2015, p. 391, l. 9-11.

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The trial court made extensive factual findings regarding James Campbell's history with the Indian Mountain community. *See generally*, R. CF, p. 5001-5002. Many, if not all of these findings were taken verbatim from the trial testimony of Glen Haas. The trial court abused its discretion by allowing Haas to testify regarding events that allegedly took place decades before Haas was aware of the subdivision's

existence. This error was prejudicial to IMC because the trial court relied upon Haas's baseless rendition of history when it found that IMC is "bound by the significant history of [the subdivision's] development, marketing and sale of lots, and use of the Augmentation Plan for the benefit of lot owners" in imposing a constructive trust on IMC's water rights. R. CF, p. 5004.

At trial, District's counsel asked Haas to opine as to the "bad feelings" held by the community toward Campbell. R. Tr. 3/10/2015, p. 391, l. 3-4. Haas responded by discussing a matter that occurred "[w]hen the Special District was formed . . . in 1975" at which point IMC's counsel objected for lack of foundation, which the court summarily overruled. *Id*. at l. 5-11. Thereafter Haas proceeded to opine on matters that allegedly took place from 1976 to 1984 (Campbell's alleged conflicts of interest (*Id*. at p. 391, l. 19 to p. 392, l. 1)); the 1990's (litigation that "bloodied the relationship between the community [and Campbell] (*Id*. at p. 392, l. 2-9)); and the late 1980's (*Id*. at 394, l. 4-10).

This ruling was manifestly arbitrary, unreasonable and unfair because Haas had *previously testified* that he was not even aware of the subdivision's existence, until 2002, let alone events that occurred in the 70's, 80's and 90's. R. Tr. 3/10/2015, p. 385, l. 17-23. Haas had also previously testified that he didn't purchase a lot in the Subdivision until 2003 or construct a residence until 2005. *Id*. at p. 386, l. 9-13.

As a result, Haas's testimony failed to comply with C.R.E. 602, which forbids a witness to testify "to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." C.R.E. 602.

## II. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE COURT'S CONCLUSION THAT IMC WOULD BE UNJUSTLY ENRICHED BY CHARGING LOT OWNERS FOR USE OF THE PLAN

***Standard of Review and Preservation.*** This Court reviews the trial court's factual findings and disturbs the same only if they are clearly erroneous and not supported by the record. *Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008). This issue does not arise as described in C.A.R. 28(a)(7)(A). The basis for the trial court's imposition of a constructive trust was the court's determination that IMC was compensated for the value of the Plan from lot sales in the Subdivision. The trial court's findings regarding compensation for lot sales can be found in its Findings, Conclusions and Orders. R. CF, p. 5004.

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In this case, the trial court imposed a constructive trust on the water rights owned by IMC in order to prevent what the court characterized as unjust enrichment. The trial court concluded 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 the use of the augmentation water." *Id*.

However, other than speculation and hearsay, there is no support in the record for the contention that IMC profited or otherwise received proceeds from sale of lots such that charging for use of the Plan would now result in unjust enrichment. To the contrary, the evidence in the record demonstrates that IMC paid off the debts of its predecessors and has subsequently gone into debt continuing to operate the Plan at its own expense.

**a. There is no evidence in record – and trial court failed to address – how IMC received a benefit at IMMD's expense**

The trial court imposed a constructive trust upon IMC's water rights to prevent what it considered to be 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 for the defendant to retain the benefit without paying.'" R. CF, p. 5003 (emphasis added) (quoting *Lawry v. Palm*, 192 P.3d 550, 564 (Colo. App. 2008)). However, the record is devoid of any evidence that the District conferred any benefit on IMC, nor did the trial court find that any such benefit had been conferred.

In fact, the parties stipulated prior to trial that "[the District] has not paid any money to IMC" and that "[b]efore March 31, 2014, no lot owner paid money to IMC in exchange for replacement water or operation of the [Plan]." R. CF. pp., 4999 to 5000, ¶¶ 21-22; *See also* R. Tr. 3/10/2015, p. 439, l. 24 to p. 440, l. 3; *Id*. at p. 440,

l. 13 to p. 441, l. 2. The court made similar findings that, "[f]rom the 1970's to 2013, IMC maintained and operated the Plan at its own expense." *Id*. at p. 5001.

Even if this Court were to find that IMC received some benefit from Indian Mountain *lot owners* – a finding that the trial court simply does not make – this still does not justify imposition of a constructive trust upon IMC's property as this benefit is not being conferred **at the District's expense**. *Lawry v. Palm*, 192 P.3d 550, 564 (Colo. App. 2008). The District appears to agree; it has strenuously argued on numerous occasions that Indian Mountain lot owners are *not parties to this action*. R. Tr. 3/11/2015, p. 536, l. 9-12 (benefit conferred on lot owners, not District); R. CF, p. 255, § I ("[Indian Mountain lot owners] are not parties to this case and this court does not have jurisdiction over those homeowners."). Without evidence that the District has conferred some benefit on IMC, there is no basis for the trial court's imposition of a constructive trust upon IMC's water rights.

**b. There is no evidence in the record to support the trial court's conclusion that IMC "already received compensation via sale of the lots"**

The foregoing notwithstanding, there is simply no evidence that IMC received compensation from lot sales such that IMC should now be precluded from selling augmentation service to lot owners.

The only witness that could testify with personal knowledge of the proceeds or profits from the original sale of lots in the Subdivision was James Campbell, the former owner of IMC. The parties were unable to compel Campbell's appearance at trial, however the District deposed Campbell and the parties stipulated to the entry of their respective designations of Campbell's preserved testimony. R. Tr. 3/11/2015, p. 530, l. 6 to p. 532, l. 17. The testimony developed by the District during the deposition reveals that while IMC received consideration for lot sales, at best IMC managed to pay off the debts of its predecessors. Conversely, there is no documentary evidence or testimony in the record that IMC profited from the development of the subdivision or would somehow now receive a windfall by selling augmentation service to those lot owners who wish to have their wells augmented by IMC.

Specifically, Campbell testified that when lot sales were halted for development of the Plan, it became impossible for the original developers to service the debt incurred in the initial development of the Subdivision and a new entity – IMC – needed to be formed to finance the design, construction and development of the Plan. R. CF, p. 4847, l. 8-21. When asked whether IMC took title to the original developers' assets, Campbell testified that "more importantly, [IMC] took over their liabilities, which were enormous." R. CF, p. 4860, l. 11-16. "At the time this took

place," Campbell continued, "we had a negative net worth of three and a half million dollars." *Id*. at l. 16-18. The debt IMC assumed from the original developers was eventually paid off via sale of Subdivision lots. *Id*. at l. 18-22; R. CF, p. 4867, l. 11-14; *Id*. at p. 4868, l. 14-16.

Conspicuously absent from this testimony is any indication that IMC profited or was even reimbursed for the cost of securing the Plan; in fact, Campbell's testimony indicates the opposite is true. Campbell went on to explain that after the original developers' debt was paid, IMC "incurred the cost, Indian Mountain Corp. incurred the cost of final platting, putting in the roads, all the services that had been promised." R. CF, p. 4861, l. 10-13. It certainly was not as though, Campbell explained, there were simply lots in the subdivision to be sold when IMC succeeded the original developers. *Id*. at l. 13-15; *See also* R. CF, p. 4872, l. 10-19 (requirement to obtain augmentation plan "nearly bankrupt[ed]" project).

Further, it is undisputed that Campbell and IMC incurred the costs of maintaining and operating the Plan out-of-pocket since its inception. R. CF, p. 4888 l. 3 to p. 4890, l. 10; *Id*. at p. 4891, l. 4-10. As a result, the only assets remaining in IMC at the time it was sold to Bar Star and Ingalls was "a limited amount of real estate and the plan of augmentation." R. CF, p. 4928, l. 2-6.

Undeterred by the foregoing testimony, the District resolutely asserted at trial that IMC was reimbursed for its investment in the Plan via sales of lots despite the utter lack of factual evidence to support this theory. For instance, with no further support or evidence, Glenn Haas testified at trial that "our position is that the property owners paid for the Indian Mountain water Augmentation Plan as part of their original purchase price." R. Tr. 3/9/2015, p. 179, l. 11-13. Haas continued "[a]nd that Indian Mountain Corporation benefited, profited, at that point in time." *Id*. at l. 13-14. Haas alternately characterized the District's "position" that lot owners paid for the Plan through the purchase of their lots as a "belief." R. Tr. 3/10/2015, p. 420, l. 20-22; *Id*. at p. 423, l. 15. At no point however did Haas offer any evidence or justification for this "belief" and "theory" despite Campbell's extensive testimony that IMC barely managed to break even on the endeavor, if at all.

The District made numerous other unfounded statements regarding proceeds IMC allegedly received as a result of lot sales. For instance, Haas further opined on IMC's original business model in the 1970's as one designed to increase sales and profits from completion of certain community amenities. R. Tr. 3/10/2015, p. 416, l. 8-21. After counsel objected as to the basis for Haas's narrative (which objection was overruled), the witness conceded that in fact he was only referencing the original service plan for the Recreation and Park District. *Id*. at p. 417, l. 5-6. Haas later

conceded that in fact, the original Service Plan does not mention profits or any profit motives. *Id*. at p. 437, l. 5-8. Haas was not the only witness for the District to offer unsubstantiated testimony regarding IMC's profits.

When Roger Mattson was asked by opposing counsel whether IMC had already profited from the Plan, Mattson responded "oh my, yes, they couldn't have sold the subdivision without the Aug. Plan." R. Tr. 3/11/2015, p. 697, l. 17-21. Mattson offered no explanation for (1) how it was that he had personal knowledge of IMC's finances, or (2) how the requirement to obtain the Plan equated to IMC making an alleged profit. Mattson did go on to speculate aloud, "I don't know why you are allowed a profit twice for doing the same thing. I never got profits twice for doing the same thing." *Id*. at p. 698, l. 1-3. The testimony in the record – at least the testimony based on personal knowledge – indicates that IMC is still awaiting the compensation that Mattson and Haas adamantly allege has already occurred.

On rebuttal, Ingalls responded to the District's allegations that IMC profited with the initial sale of Subdivision lots and confirmed that no profit had been had. R. Tr. 3/11/2015, p. 752, l. 15-16. Not only has IMC not made a profit, Ingalls continued, IMC has "been in the hole since I purchased it, and quite a bit in the hole." *Id*. at p. 752, l. 17-19. Consistent with Campbell's testimony that IMC's only assets were limited amounts of real estate and the Plan, Ingalls further testified that there

were no operating funds in the company when it was purchased from Campbell, despite needing such funds to continue to operate the Plan. R. Tr. 3/11/2015, p. 752, l. 20 to p. 753, l. 2. Ingalls' testimony on rebuttal is corroborated by Campbell's deposition testimony that he had operated the Plan out of his own pocket since its inception. R. CF, p. 849, l. 4-10.

In sum, other than unfounded assertions and speculation, there is simply no evidence in the record to support the trial court's conclusion 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." R. CF, p. 5004. As a result, the trial court lacked a valid basis to impose a constructive trust upon IMC's property.

## III. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT "IMC HAS THE INDIAN MOUNTAIN PROPERTY OWNERS 'OVER A BARREL'"

***Standard of Review and Preservation.*** This Court reviews the trial court's factual findings and disturbs the same only if they are clearly erroneous and not supported by the record. *Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008). This issue does not arise as described in C.A.R. 28(a)(7)(A). The trial court found that "IMC has the Indian Mountain property owners 'over a barrel'" in its Findings, Conclusions and Orders. R. CF, p. 5004.

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In support of its conclusion that "IMC has Indian Mountain property owners 'over a barrel'" the trial court relies on three findings: (1) that IMC has retained legal title to the Plan; (2) the Plan was established so that lot owners could drill wells on their lots; and (3) that lot owners can obtain augmentation service from other sources, albeit at prices greatly higher than what IMC intends to charge lot owners. None of these assertions however have any support in the record and in fact, the evidence in the record leads to the opposite conclusion. R. CF, p. 5004.

This error was prejudicial to IMC because the court's finding that IMC has lot owners "over a barrel" is the court's fourth justification for imposition of the constructive trust. *Id*. at p. 5004.

**a. IMC has done nothing wrong by not conveying the Plan because it was never intended to be given to the District or any other entity**

First, the trial court implies that IMC has done something wrong by retaining title to the Plan. R. CF, p. 5004. However, the record demonstrates that the Plan was never intended to be conveyed to the District or anyone else for that matter. Specifically, the August 26, 1982 "HUD report" states, under the heading "Transfer of Facilities," "[t]he facilities owned by the Indian Mountain Metropolitan Recreation and Park District have been conveyed by us to the Indian Mountain

Metropolitan Recreation and Park District free and clear of encumbrances. **No other transfers of any remaining facilities are contemplated by us to the Indian Mountain Metropolitan Recreation and Park District or any other entity.**" R. CF, p. 4571 (Ex. IMMD-LL) (emphasis added); R. Tr. 3/11/2015, p. 598, l. 9-24. The proceeding page lists the facilities that were, or were to be owned by the District: ski area, golf course, fishing pond, and riding stables. *Id*. at p. 4570. Absent from this list are any of the structures related to the Plan. In sum, there is no basis in the record for the proposition that IMC should have conveyed the Plan to the District or some other entity when the evidence demonstrates that this was never intended.

Further, there was no one for IMC to convey the Plan *to* prior to the District's conversion from a recreation and park district to a metropolitan district in 2013. R. Tr. 3/11/2015, p. 724, l. 10-19. Moreover, the trial court acknowledged that IMC has never been under any obligation to convey the Plan to the District or lot owners. R. CF, p. 5003. Absent any such obligation, IMC has the same rights with respect to the Plan as any other property owner who may retain, sell, convey or abandon their property as they see fit. *See City of Denver v. Bayer*, 2 P. 6, 6-7 (Colo. 1883).

### b. Principles of Colorado water law require that all augmentation plans be "for" something or some group of people

The trial court next supports its conclusion that IMC has lot owners "over a barrel" due to the fact that the Plan was established to replace depletions from the Subdivision. While true, the trial court attempts to prove too much with this fact: tenets of well-established Colorado law require that all augmentation plans be "for" something lest the appropriation of water be found speculative.

C.R.S. § 37-92-103(3)(a) defines "appropriation" as the "application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law." However, no appropriation of water may occur where "the purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, posses, and control a specific quantity of water *for specific beneficial uses*." C.R.S. § 37-92-103(3)(a)(II)(emphasis added); *See also High Plains A&M, LLC v. Southeastern Colorado Water Conservancy Dist*., 120 P.3d 710, 720 (Colo. 2005).

In *High Plains* the Supreme Court affirmed the Water Court's dismissal of an application seeking to change irrigation rights to practically every other conceivable use of water, in practically every county along the Front Range. *Id*. at 715. In upholding the dismissal, the Court found that "the anti-speculation doctrine is rooted

in the requirement that an appropriation of Colorado's water resource must be for an actual beneficial use." *Id*. at 714.

The fact that the Plan was adjudicated for the express purpose of replacing out-of-priority depletions from well pumping in the Subdivision does not give rise to an inference that the District somehow has an equitable interest in the Plan. In fact, the record is replete with examples of other augmentation plans that are "for" certain groups of people, which groups do not have any ownership interest in the plan itself:

- Head Water Authority of the South Platte ("HASP") augmentation plan established for residents of Park County. R. Tr. 3/10/15, p. 463, l. 23 to p. 464, l. 12; *Id*. at p. 474, l. 11-23 (participation in augmentation plan does not convey ownership interest in augmentation plan water rights).
- Upper Arkansas Water Conservancy District's blanket augmentation plan is for residents within a designated "blue line" in Chaffee and Western Fremont counties. R. Tr. 3/10/15, p. 369, l. 20-23; *Id*. at p. 375, l. 1-11 (no ownership interest in water rights).
- Lost Park Ranch Subdivision's augmentation plan owned by the subdivision's HOA. R. Tr. 3/10/15, p. 354, l. 1-14; *Id*. at p. 358, l. 14-19 (no lot owner claims to own augmentation plan).

Even though the augmentation plans described above are "for" a certain group of people, in no case does this imply that the beneficiaries of the plan somehow receive an ownership interest in the water rights that make up the plan. Third-party ownership of an augmentation plan established for the benefit of others is not unique in Colorado and does not lead to an implication that lot owners (or a district in which they live) are entitled to own the plan.

### c. Lot owners do not have to purchase augmentation water from IMC or any other provider

The court correctly noted that Subdivision lot owners can purchase augmentation service from entities other than IMC at "considerable expense." R. CF, p. 5004. However, there is no evidence in the record that lot owners will be forced to do so or to purchase augmentation service from IMC if they do not wish.

The record indicates that prior to the trial court's imposition of a constructive trust, IMC was providing augmentation service to lot owners on a willing-buyer, willing-seller basis for $300 per year, which included operation and maintenance. R. Tr. 3/9/2015, p. 87, l. 4 to p. 89, l. 16; R. Ex. IMC-363, p. 1; R. Ex. IMMD-AA, p. 1; R. Ex. IMMD-BB, p. 1. If successful in overturning the constructive trust imposed by the trial court, the evidence further demonstrates that IMC intends to continue to offer augmentation service on a willing-buyer, willing-seller basis. R.

Tr. 3/9/2015, p. 90, l. 8-11. IMC intends to do this knowing full well that not all lot owners will sign up for augmentation service and will instead seek augmentation service from other providers or simply not augment their wells (or lots without wells), as is their prerogative. R. Tr. 3/9/2015, p. 114, l. 6-17.

It is true that – prior to imposition of the constructive trust – there is no legal restraint on how much IMC may attempt to charge for augmentation service, however the record indicates that IMC is bound by conventional market forces; charging exorbitant or usurious rates will simply drive lot owners to competitors. R. Tr. 3/9/2015, p. 121, l. 22 to p. 122, l. 10.

Finally, there is no evidence in the record that would support an inference that the amounts that IMC has charged (and seeks to charge in the future) are somehow meant to take advantage of lot owners. In fact, the record demonstrates that IMC's prices are substantially below market value. Jim Culichia testified that it costs $2,000 for augmentation service through HASP, with an annual administrative fee of $150 (R. Tr. 3/10/15, p. 471, l. 4-9), and requires customers to install and maintain a meter. R. Tr. 3/10/15, p. 473, l. 18-23. IMC should not be punished for offering a valuable service below market value under procedures less onerous than its competitors.

**d. There is no evidence in the record that supports the conclusion that lot owners reasonably believed they would receive augmentation water for free, forever by virtue of their purchase of a lot**

In its Order, the court implies that lot owners "reasonably believed they bargained for" free augmentation service when they purchased lots in the Subdivision. R. CF. p. 5004. However, there is no evidence in the record to support this conclusion.

The District could have easily located a lot owner that believed – reasonable or not – that it had purchased augmentation service when they purchased their lot. No such lot owners were produced and no such testimony was given. Instead, the District chose to rely upon the self-serving testimony of its own members who "believe" and take the "position" that lot owners paid for augmentation service when they purchased their lots. *See* Section II.b, *supra*. In sum, not one lot owner testified to their "reasonable belief" other than the District principals who admitted that their constructive trust theory did not come into being until they had hired opposing counsel. R. Tr. 3/10/2015, p. 426, l. 1-5.

Moreover, the record indicates that no consideration was paid for water, water rights, or augmentation service when lot owners purchased their lots. Glenn Haas was asked to locate where in the deeds for his lots there was any mention of water

or water rights; Haas conceded that there was no such language in the deed. R. CF, p. 4093-4095 (Ex. IMC-361); R. Tr. 3/10/2015, p. 444, l. 13 to p. 445, l. 23. Whatever belief Haas or any other lot may have regarding a claim to free water, it cannot be attributed to the documents by which they took title to their property.

Further, it was undisputed that each plat filed by IMC contained a disclaimer that all utilities would be provided at the individual lot owner's expense. Specifically, each plat states, "All utilities, electric, water, sewer, gas, and telephone shall be provided at the individual lot owner's expense." R. CF, 3597 (Ex. IMC-315); R. Tr. 3/11/2015, p. 734, l. 17-25; *Id*. at p. 735, l. 24 to p. 736, l. 1; *Id*. at p. 736, l. 17-24. The District admitted that this disclaimer was consistent with the property disclosures provided to the original lot purchasers. R. Tr. 3/11/2015, p. 736, l. 9-10; *Id*. at p. 737, l. 10-12. Again, whatever belief the District or lot owners have regarding a claim to free water, it cannot be attributed to the documents that created the lots or the documents that contained disclosures about the same.

Finally, the record reveals that this mistaken belief as to ownership of an augmentation plan is not limited to Indian Mountain. Lot owners in the nearby Saddle Mountain subdivision made similar assertions that the augmentation plan that covers their lots was paid for by the proceeds from the initial sale. R. CF, p. 341 (Ex. IMC-211, p. 2); R. Tr. 3/10/2015, p. 341, l. 12-16; *Id*. at p. 343, l. 20 to p. 344,

l. 21. However, in that instance, the Division Engineer made clear that lot owners could either buy into the plan – which was owned and operated by an entity not associated with the subdivision – or create their own augmentation plan. *Id*.

In sum, there is no evidence in the record to support the court's conclusion that IMC has Indian Mountain lot owners "over a barrel." The record reveals that the Plan was never intended to be conveyed to the District (or its predecessor) and that well-established principles of Colorado water law require that an augmentation plan be "for" something or else the appropriation will be deemed speculative. The record also indicates that no one will be forced to purchase augmentation water from IMC if they should so choose. Finally, there is no evidence in the record indicating that lot owners "reasonably believed" that they had purchased the Plan when they bought their lots.

## IV. THE TRIAL COURT ERRED IN FINDING THAT THE CONTENTS OF THE "HUD DOCUMENTS" WARRANT IMPOSITION OF A CONSTRUCTIVE TRUST.

***Standard of Review and Preservation.*** This Court reviews questions of statutory interpretation de novo. *Land Owners United, LLC v. Waters*, 293 P.3d 86, 90 (Colo. App. 2011). This issue does not arise as described in C.A.R. 28(a)(7)(A) or (b). The trial court raises this issue in closing argument (R. Tr. 3/12/2015, p. 849, l. 23 to p. 851, l. 10) and in its Findings, Conclusions and Orders (R. CF, p. 5004).

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During closing arguments, the court injected a new legal issue into the proceedings: developer disclosure requirements pursuant to the Interstate Land Sales Act ("ILSA"). *See* 15 U.S.C. § 1701, *et seq*; R. Tr. 3/12/2015, p. 849, l. 23 to p. 851, l. 10. In its written order, the trial court interpreted the ILSA to create strict liability for IMC's alleged failure to warn lot owners regarding the cost of augmentation service. R. CF, p. 5004 ("[the HUD disclosures] 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 for use of the augmentation water."). The court erred however because, no party to this case could have stated a claim pursuant to that Act.

"In order to prove an ILSA claim, plaintiffs must first show that they qualify for ILSA protection." *Gibbes v. Rose Hill Plantation Development Co.*, 794 F. Supp. 1327, 1333 (D. South Carolina, Charleston Division 1992). "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." *Id*. § 1711 provides for a three year limitations period from the date of the signing of the contract or from the discovery of an alleged violation of the Act. 15 U.S.C. § 1711(a).

The District was conveyed certain properties within the Subdivision by IMC. However, any claim the District had for alleged improper disclosures has long since been time barred by the ILSA. R. Tr. 3/10/2015, p. 389, l. 1-15 ("issue of water" apparent in 2007). As a result, any claim the District had for strict liability based on property disclosures mandated by the ILSA are time barred.

## V. THE TRIAL COURT ERRED IN FINDING THAT THE DISTRICT WAS PROVIDING "WATER SERVICE" AS CONTEMPLATED IN C.R.S. §§ 32-1-1004(2)(J), 32-1-103(25) AND THE DISTRICT'S SERVICE PLAN

***Standard of Review and Preservation.*** The trial court's interpretation of a special district's service plan as well as the law governing special districts are both reviewed de novo. *Plains Metropolitan District v. Ken-Caryl Ranch Metropolitan District*, 250 P.3d 697, 699 (Colo. App. 2010). At the close of IMC's case-in-chief the District, pursuant to C.R.C.P. 41(b), moved to dismiss IMC's third and fourth claims for relief related to the District's non-compliance with its amended service plan and C.R.S. § 32-1-1004. R. Tr. 3/11/15, p. 533, l. 9-12. The trial court granted the motion at R. Tr. 3/11/15, p. 549, l. 13-24 and CF, p. 5005.

*** * ***

### a. Approval of the Service Plan does not preclude this Court's review

At trial the District argued that approval of the Service Plan by the Park County District Court in case number 75CV4062 was *res judicata* as to the validity

of the plan, preventing any subsequent review. R. Tr. 3/11/2015, p. 535, l. 20-23; *See also* R. CF., p. 502. Approval by the Park County Board of County Commissioners and the Park County District Court does not preclude subsequent review by this court (or any other) to determine if the District is in compliance with its Service Plan.

C.R.S. § 32-1-207 provides that "upon the motion of any interested party" a special district may be enjoined from "any material departure from [its] service plan . . . as modified." As a property owner within the District, IMC is an "interested party" as that term is defined in § 32-1-204(1) of the Act. *See* C.R.S. § 32-1-204(1). A "material departure" from a modified service plan is defined by § 32-1-207(2)(a) to include "a decrease in the level of services." As set forth below, the primary purpose of amending the District's Service Plan was to provide water augmentation service to the entire Subdivision. The District is admittedly not providing such service and therefore has materially departed from the terms of the Service Plan and may be enjoined from further operating as a metropolitan district pursuant to C.R.S. § 32-1-207. Finally, the evidence in the record demonstrates that the District is only providing parks and recreation service which also amounts to a material departure from the Service Plan and provides further grounds for an injunction.

### b. The trial court erred interpreting the Service Plan in a manner that renders much of the document meaningless

The trial court found that, "the primary purpose" for amending the Service Plan "was so [the District] could take over management and operation of the [Plan]" however, the District was not required to do so because the Service Plan "merely permitted [the District] to perform that function." R. CF, p. 5005. This interpretation is improper because it renders large portions of the Service Plan meaningless.

The court uses normal rules of construction when interpreting the terms of a special district's service plan. *Plains Metropolitan Dist. v. Ken-Caryl Ranch Metropolitan Dist.*, 250 P.3d 697, 700 (Colo. App. 2010). The court's primary goal is to determine and effectuate the intent and reasonable expectations of the parties. *Copper Mountain, Inc. v. Industrial Systems, Inc.*, 208 P.3d 692, 697 (Colo. 2009). The intent of the parties is determined by giving effect to the plain and generally accepted meaning of the language used. *Id*. Therefore, courts endeavor to interpret documents in a manner that gives harmony to all provisions and renders none meaningless. *Pepcol Mfg. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984). This is accomplished by examining the document as a whole and not viewing

clauses or phrases in isolation. *U.S. Fidelity & Guar. Co. v. Budget Rent-a-Car Systems, Inc.*, 842 P.2d 208, 213 (Colo. 1992).

The Service Plan's plain language indicates that the District was reformed so that it could provide augmentation service to the Subdivision. R. CF, p. 4356 (Ex. IMMD-V) (Service Plan amendment will "enable community to own and administer the [Plan]"); *Id*. at p. 4358. Attached to the Service Plan is the water court decree for the Plan (*Id*. at p. 4399) as well as a letter from the Division 1 Engineer explaining that his office could not "wrest control of the plan from" IMC. *Id*. at p. 4430. In sum, when read as a whole and to give meaning to all of its provisions, the purpose of amending the Service Plan was to allow the District to provide augmentation service to the entire Indian Mountain community.

In addition, the trial court's finding that provision of augmentation service is optional rather than mandatory reads out of the Service Plan the desire of Indian Mountain residents that the District secure augmentation service for the entire community. At trial, Glenn Haas testified that surveys of Indian Mountain residents indicate that securing the ownership of the Plan is the primary concern of those living in the subdivision. R. CF, p. 2331 (Ex. IMC-250); R. Tr. 3/9/2015, p. 164, l. 10-14; *Id*. at p. 163, l. 2-18. Despite knowledge that securing augmentation service for the community is the paramount concern of its constituents and amending the Service

Plan so that it could legally take title to the Plan, the District readily admits that it does not now, nor does it have any obligation in the future, to provide this water service. R. Tr. 3/9/2015, p. 156, l. 14-15 (District has no obligation); *Id*. at, p. 178, l. 24-25; *Id*. at p. 179, l. 1-2 (District has not operated augmentation plan); R. CF, 2346 (Ex. IMC-256) (If constructive trust claim not successful, "[District] has no responsibility or obligation and IMC can go to our 2200 property owners, bill them, put liens or whatever ---good luck."). Unless it is successful in taking the Plan from IMC via its constructive trust claim, the District has no intent to provide augmentation service to the Indian Mountain community. The trial court's ruling that the District has no obligation to provide augmentation service makes meaningless much of the Service Plan, trivializes the desires of the community, and is contrary to the reasonable expectations of the parties, all of which conflict with traditional canons of construction.

**c. The "services" cited by the trial court are not "Water Services" as that term is used in C.R.S. § 32-1-103(25)**

Colorado's Special District Act mandates that metropolitan districts provide two or more services from a list of eleven specific services, including "water as specified in section 32-1-103(25)." C.R.S. § 32-1-1004(2)(j). "Water district" is defined in C.R.S. § 32-1-103(25) as "a special district which supplies water for

domestic and other public and private purposes by any available means and provides all necessary or proper reservoirs, treatment works and facilities, equipment, and appurtenances incident thereto." Once established, a special district must comply with the terms of its approved service plan so far as reasonably practicable. C.R.S. § 32-1-207(1).

Here, the sum total of evidence relied upon by the court in determining that the District was providing "water service" to the Subdivision's 2,450 lots was that (1) the District maintains two earthen dams (R. Tr. 3/11/15, p. 550, l. 21-22); and (2) that the District owns three well permits that supply water to the Indian Mountain Community Center, the Ski Lodge, and "Comfort Station." *Id.* at p. 551, l. 2-13. However, the record establishes that the District has abandoned the seasonal ponds behind the dams and IMC provides augmentation water for two of the three well permits. The evidence further demonstrates that the third well permit is for a well that the District specifically states is not for public use.

**i. The District has abandoned the seasonal ponds behind the dams that the trial court found provides "water service"**

While the District readily admits that it does not provide augmentation service, it is quick to point out that it "may manage two earthen-dams with associated seasonal ponds, wetland corridors, a section along the Tarryall Creek, and seasonal

springs and ponds." R. CF, p. 4358 (Ex. IMMD V); R. CF, p. 1861 (Ex. IMC-144, ¶ 13). The trial court found that maintenance of these two earthen dams, along with ownership of the three well permits discussed in subsection ii below, satisfied the District's mandate to provide "water service" to the community. R. Tr. 3/11/15, p. 550, l. 21-22. However, the record demonstrates that the District no longer maintains the seasonal ponds[1] behind these two dams and has allowed them to return to meadow. R. Tr. 3/9/2015, p. 153, l. 21 to p. 154, l. 21; R. CF, p. 2350 (Ex. IMC-257). At trial, the District attempted to demonstrate that it had not abandoned the structures outright: the dams are still inspected by the State of Colorado but there was no evidence as to what, if any maintenance the District actually takes on the dams as a result of these inspections. R. Tr. 3/9/2015, l. 13-25.

Further, the District characterizes Gold Pan Park – its access point to "a section along the Tarryall Creek," as its "newest outdoor recreation asset" instead of a "water service." R. CF, p. 2351 (Ex. IMC-257); R. Tr. 3/9/2015, p. 147, l. 8-16. The remaining "water services" cited by the District in the Service Plan – "wetland corridors . . . and seasonal springs and ponds" – all occur naturally in the Subdivision and in any event, there is no evidence that the District actually does anything to

[1] Testimony confirms that the "seasonal" nature of the ponds means that they fill on their own during wet years. R. Tr. 3/9/2015, p. 199, l. 1-6.

"manage" these areas. R. Tr. 3/9/2015, p. 199, l. 7-10 (District has "a lot of runoff down on our out lots; lots of vegetation and wildlife").

### ii. IMC provides augmentation water for two of the three permits relied upon by the District to demonstrate it provides "water service" to the Subdivision

Other than the abandoned ponds, the court's only other basis for finding that the District is providing "water service" to the Subdivision is its ownership of three well permits that service the Community Center, Ski Lodge and "comfort station," respectively. As to the Ski Lodge Well and the "comfort station" well, the record demonstrates that those wells are only able to operate by virtue of IMC's ownership and operation of the Plan. R. Tr. 3/9/2015, p. 146, l. 1-8; *Id*. at p. 149, l. 9-13. Stated another way, IMC provides augmentation service to those two wells.

As to the Community Center well, the record demonstrates augmentation service is provided by HASP and that pumping is limited to 0.024 acre-feet of groundwater per year. R. Tr. 3/9/2015, p. 145, l. 2-4. By way of comparison, the Division 1 Water Court has determined that at full build out, greater than 33 acre-feet of water will be needed to offset groundwater pumping in the subdivision. T. CF, p. 4104 (Ex. IMMD-A). The District conceded that the minor amount of water available from the Community Center well is insufficient to satisfy the Subdivision's needs. R. Tr. 3/9/2015, p. 145, l. 5-9. Even if the augmentation certificate for the

Community Center well can properly be considered a "water resource"[2], because it is not being used to provide the Subdivision water, it should not be considered as providing a "water service": the District has specifically stated that "water at the Community Center will not be available for public use." R. CF, p. 2352 (Ex. IMC-257) (under the heading "The Comfort Station").

In sum, there is insufficient evidence to support the court's conclusion that the District is providing any of the "water services" listed in its Service Plan. This lack of water service to the community represents a "material departure" from the Service Plan and a violation of C.R.S. § 32-1-1004 which requires a metropolitan district to provide at least two services. As a result, the District should be enjoined from any further activities as a metropolitan district.

## CONCLUSION

There is insufficient evidence in the record to support the court's conclusion that IMC would be unjustly enriched by charging for use of the Plan and that the

[2] During argument on the District's C.R.C.P. 41(b) motion, the trial court asked counsel whether the augmentation certificate for the Community Center well could properly be considered a "water resource." R. Tr. 3/11/2015, p. 540, l. 3. Counsel responded, "I believe the certificate probably is a water resource." *Id*. at p. 540, l. 4-5. Owning a "water resource" is not the same as providing a "water service" – the standard by which the District's conduct is judged – and should not be construed as such.

District is providing water service to the Subdivision. WHEREFORE IMC respectfully requests the Court REVERSE the order of the trial court and REMAND WITH DIRECTION to DISMISS the District's constructive trust counterclaim and GRANT IMC's first, third and fourth claim for relief and finding IMC as the prevailing party for purposes of awarding costs.

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Dated: November 27, 2015

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## CERTIFICATE OF SERVICE

I certify that on the 27th day of November, 2015, a true and correct copy of the above Opening Brief, together with complete copies of all attachments was served by e-filing via ICCES and addressed to the following:

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