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Supreme Court, State of Colorado Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	
Court of Appeals, State of Colorado Case Number 15CA1055 Judges Freyre, Taubman, and Dailey	
District Court, Park County Case Number 14CV30056 Judge Stephen A. Groome	
Petitioner: Indian Mountain Metropolitan District v. **Respondent:** Indian Mountain Corp.	▲ **COURT USE ONLY** ▲
Attorney for Respondent Indian Mountain Corp.: Adam C. Davenport 112 North Rubey Drive, Ste. 101 Golden, Colorado 80403 Office: 720-627-6151 Fax: 720-216-2055 Email: adam.davenport@dtservices.com Atty. Reg. #: 45342	Case Number: 16SC879
RESPONDENT'S OPPOSITION TO CERTIORARI	

Respondent Indian Mountain Corp ("IMC"), through undersigned counsel submits this Opposition to Certiorari of Petitioner Indian Mountain Metropolitan District ("IMMD") and states as follows:

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with all requirements of C.A.R. 32 and 53, including all formatting requirements set forth in those rules. Specifically, undersigned counsel certifies that:

- The brief complies with C.A.R. 53(c) because it contains 3,770 words, exclusive of the Caption, Certificate of Compliance, Table of Contents and Authorities, and Certificate of Service.
- Citations to "Appendix" refer to Appendix A or B to the Petition.

Undersigned counsel acknowledges that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and 53.

/S *Adam C. Davenport*
Adam C. Davenport, #45342
Attorney for Respondent Indian Mountain Corp

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Court of Appeals' reversal of the trial court's order that was unsupported by evidence in the record was in accordance with the applicable standard of review and Colorado case law?

II. Whether the Court of Appeals erred in refusing to allow IMMD, for the first time, on remand, to pursue alternative claims for relief that IMMD did not present at trial?

STATEMENT OF THE CASE

I. Statement of Facts and the Case[1]

IMC has owned and operated the augmentation plan decreed in Case Number W-7389 (the "Plan") and its associated water rights since the decree was entered in 1974. Appendix A, ¶¶ 6, 11. Since that time, IMC has paid for the operation and maintenance of the Plan out-of-pocket despite repeatedly requesting compensation for the same from IMMD. Appendix A, ¶¶ 6, 13, 15.

[1] IMMD purports to cite to the Court of Appeals' Opinion for its "Relevant Facts" in Section IV. However, many if not most of these "facts" cannot be found in the Opinion. Due to word count restrictions, undersigned counsel is unable to rebut each of these "facts" but encourages the Court to review IMMD's citations, particularly beginning at page 5 of the Petition.

In 2013, IMC invoiced IMMD for providing augmentation service to IMMD's constituents' in 2012 and 2013; IMMD refused to pay the invoices. Appendix A, ¶ 19. IMC then sued IMMD for a determination that as between the two entities, IMC owned the Plan and that IMMD was not in compliance with its amended service plan which required it to provide "water service." Appendix A, ¶ 20. IMMD counterclaimed, requesting a finding that the Plan was held in constructive trust for the benefit of Indian Mountain subdivision lot owners (the "Lot Owners") thereby restricting the amount IMC could receive for operation and maintenance of the Plan. *Id*. In the alternative, IMMD sought a ruling that if the Plan was not held in constructive trust, that IMC be subject to regulation by the Colorado Public Utility Commission (the "PUC Counterclaim"). Appendix B, p. 6.

After a four-day bench trial, the trial court concluded that the Plan was held in constructive trust and that IMMD was providing "water service" – and thereby complying with its service plan – by maintenance of certain wetlands and seasonal ponds within the subdivision. Appendix A, ¶ 21; Appendix B, p. 1. IMC appealed, asking that the trial court order imposing a constructive trust upon the Plan and determining IMMD in compliance with its service plan be reversed because neither decision was supported by evidence in the record. Appendix A, ¶ 1. The Court of Appeals affirmed in part and reversed in part, agreeing that the trial court's

imposition of a constructive trust was not supported by evidence in the record but affirming the trial court's order regarding IMMD's service plan. Appendix A, ¶ 67.

SUMMARY OF ARGUMENT

IMMD has not stated a basis for this Court's review pursuant to C.A.R. 49 because the Court of Appeals' decision is in accord with Colorado case law regarding constructive trusts, unjust enrichment, and the applicable standard of review. IMMD relies upon familiar tactics in an effort to create an issue reviewable by this Court: fabrications of "fact," misstatements of law, citation to matters outside the appellate record, and fearmongering. None of these, however, are a basis for this Court's review pursuant to C.A.R. 49 and as such, IMC respectfully requests that the Petition be denied.

ARGUMENT

I. Neither the Court of Appeals nor the Trial Court Resolved a Matter of Colorado Water Law and IMMD has Misstated the Law

IMMD claims that certiorari is warranted in this case because the Court of Appeals' Opinion runs afoul of numerous principles of Colorado water law. In addition to misstating Colorado law, IMMD is precluded by basic precepts of

appellate practice from raising new and additional issues for the first time on appeal to this Court.

a. IMMD did not Preserve any of the Issues in Section VI.A. for Appeal

With its trial positions discredited, IMMD now presents new and different arguments to this Court in its continued campaign to wrest the Plan from IMC. For the first time, IMMD now argues that (A) the Lot Owners are parties to this case, and (B) that IMC's ownership of the Plan presents a takings issue. Petition, p. 9. This however is impermissible: "Arguments never presented to, considered or ruled upon by a trial court may not be raised for the first time on appeal." *Estate of Stevenson v. Hollywood Bar and Café, Inc.*, 832 P.2d 718, 721 n. 5 (Colo. 1992); *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, LLC*, 287 P.3d 842, 847 (Colo. 2012) ("axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal").

The Court of Appeals made extensive findings regarding IMMD's failure to join the Lot Owners as parties to this litigation. Appendix A, ¶¶ 24, 45-46. Similarly, IMC and IMMD stipulated prior to trial that the case involved an ownership dispute between those two entities, not an unconstitutional taking as it now argues. Appendix B, p. 2, ¶ 11. The arguments made by IMMD in Section

VI.A. of the Petition concerning matters of Colorado water law were never considered by the parties, the trial court, or the Court of Appeals and are therefore not preserved for review in this Court on certiorari. *Hannon Law Firm, LLC*, 287 P.3d at 847.

b. IMMD's Recitation of Law is Incorrect

Even if IMMD can now, for the first time, completely change the positions it took at trial, it misstates several principles of Colorado water law. IMMD asserts that (1) *Jacobucci v. District Court* stands for the proposition that the Lot Owners "are the actual owners of the water right because they beneficially use the water provided for by the Plan;" and (2) that the Colorado Constitution gives the Lot Owners the right to use IMC's water rights (impliedly, for free). Petition, pp. 9-10.

First, *Jacobucci* is inapposite because the case turned on "whether the individual shareholders of a mutual ditch company are indispensable parties in an action to condemn the shareholders' decreed water priorities" not whether owners of augmented wells have an ownership interest in the plan that allows them to operate. 541 P.2d 667, 670 (Colo. 1975). Moreover, the portions of the opinion quoted by IMMD make clear that the holding is limited to the facts of the case because of the "unique character" of mutual ditch companies. *Id*. 672–73.

This case does not involve shareholders of a mutual ditch company who pay to own a portion of the company. Even if augmented well owners are somehow analogous to ditch company shareholders – an argument that has never been made in this case – the parties stipulated prior to trial that IMMD has never paid any money to IMC. Appendix B, p. 3, ¶ 21; Appendix A, ¶ 46. The parties also stipulated that prior to March 31, 2014, no lot owner had paid IMC in exchange for replacement water or operation of the Plan. Appendix B, p. 3, ¶ 22. In sum, this novel analogy – if that is even IMMD's argument – is inapplicable because the parties stipulated that IMMD has not paid any money to IMC for operation, maintenance, or use of IMC's water rights to augment its wells. Appendix A, ¶ 46.

Next, IMMD proclaims that the non-party Lot Owners have a "constitutional right to beneficially use the water provided by the Plan." Petition, p. 10. This too is a gross misstatement of Colorado law. In reality, "[t]he right guaranteed under the Colorado Constitution is to the appropriation of unappropriated waters of the natural stream, not to the appropriation of appropriated waters." *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1147 (Colo. 2001) (emphasis added); Colo. Const. art. XVI, § 5 ("The water of every natural stream, not heretofore appropriated within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to

appropriation as hereinafter provided.") (emphasis added); Colo. Const. art. XVI, § 6 ("The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.") (emphasis added).

The non-party Lot Owners do not have a constitutional right to use the water rights owned by IMC because those rights have already been appropriated as evidenced by the W-7389 Decree. *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 53-54 (Colo. 1999).

Similarly, the implication that IMC has not, and is not making a beneficial use of the water rights is contrary to well established principles of Colorado water law. Once a decree is entered, the doctrine of *res judicata* bars any subsequent argument that the requisite steps to effect the appropriation have been completed, including application of water to beneficial use. *Southeastern Colorado Water Conservancy Dist. v. Rich*, 625 P.2d 977, 979 (Colo. 1981). Entry of the W-7389 decree in 1974 precludes IMMD's argument that IMC is not placing the water to beneficial use.

IMMD's newfangled construction of Colorado water law would also be dangerous precedent to entities such as Headwater Authority of the South Platte and Upper Arkansas Water Conservancy District, both of which testified at trial that the owners of wells augmented by the plans they own and operate do not have an

ownership interest in the augmentation plan itself. The drastic change in law that IMMD now advocates – for the first time in the Petition – places entities at risk of losing decades and millions of dollars of investment in developing water rights relied on by thousands of people across the state. In short, the time to challenge the W-7389 decree or that operation of an augmentation plan is not a beneficial use has long since passed. *See In re Midway Ranches*, 938 P.2d 515, 525 (Colo. 1997) ("The application of *res judicata*, including its collateral estoppel component, in appropriate circumstances is important to the stability and reliability of Colorado water rights.").

c. Anti-Speculation Doctrine Does Not Apply to the Facts of this Case

IMMD's assertion that the Court of Appeals' Opinion creates an exception to the anti-speculation doctrine is meritless. *See* Petition, p. 11. The anti-speculation doctrine is codified at C.R.S. § 37-92-103(3)(a) which provides that "no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation." (emphasis added). By its terms, the anti-speculation doctrine prevents a new conditional or absolute appropriation when the would-be appropriator cannot demonstrate a

"specific plan and intent to divert, store, or otherwise capture, possess or control" quantities of water. C.R.S. § 37-92-103(3)(a)(II).

The W-7389 Decree was entered in 1974, has been continuously owned by IMC, and IMC has continually used the decreed water rights for their intended purpose, which is to offset out-of-priority depletions caused by pumping wells within the Indian Mountain subdivision. Appendix A, ¶ 11. There is no question of speculative intent because IMC has been placing the water rights to their intended, actual beneficial augmentation use for over 40 years. The anti-speculation doctrine prevents a would-be appropriator from obtaining a water right with only the hopes to sell it, not to mount a collateral attack against a decree 40 years after it was entered.

Finally, IMMD's assertion that the Court of Appeals Opinion "judicially sanctions unregulated private water monopolies, and is rife with the potential for future abuses by developers" is a strawman. This argument is premised on the unfounded belief that paying for services to a home – when it has been explicitly explained that those services will be born entirely by the homeowner (Appendix A, § 39) – is somehow outlandish, unreasonable, or unheard of. Being upset about having to pay for water service either from IMC or some other water service

provider, after receiving that service without paying for it for 40 years, is not grounds for this Court to grant review pursuant to C.A.R. 49.

d. The Court of Appeals Opinion Does Not Create "a State of Public Emergency"

IMMD's claim that the Court of Appeals' Opinion "creates a state of public emergency that threatens IMMD's constituents' access to water" lacks credibility and represents nothing more than fearmongering. It was undisputed in both the trial court and the Court of Appeals that no well within Indian Mountain Subdivision has ever been curtailed thanks to IMC's operation of the augmentation plan, at its own cost, since the W-7389 Decree was entered. Appendix A, ¶ 11. It was also undisputed that, unlike the Lot Owners, other Park County residents pay for water service to maintain domestic groundwater wells, including through contracts with other augmentation service providers. Appendix A, ¶ 43.

IMMD goes on to argue, without citation to authority or to the record, that there is "not a competitive market for domestic water services in Indian Mountain [subdivision]." Petition, pp. 12-13. When asked directly by the Judges at oral argument whether Indian Mountain subdivision lot owners could, if they did not wish to purchase augmentation service from IMC, purchase that service from some other provider, counsel for IMMD not once, but twice conceded that they could.

Disagreement between IMMD's appellate counsel on this point is not grounds for review pursuant to C.A.R. 49.

IMMD's assertion that lot owners are without redress if IMC refuses to operate the Plan is also without merit. First, IMC and IMMD stipulated that no Lot Owner well has ever been curtailed by the Colorado Division of Water Resources due to IMC's refusal or inability to operate the Plan. Appendix B, p. 3, ¶ 20. Moreover, the undisputed evidence in the record demonstrates that if IMC does not operate the augmentation plan pursuant to the terms of the decree that the Division of Water Resources would bring an enforcement action to force IMC to operate the Plan. Appendix A, ¶ 49. A brief review of the record indicates that IMMD's implication that Lot Owners are somehow at the mercy of IMC is completely unfounded, and the Court of Appeals agreed. *Id*.

Finally, it is worth noting that IMC has repeatedly offered to sell the W-7389 water rights to IMMD. Appendix A, ¶¶ 13, 15, 17, and 18. There was no "public emergency" when IMC was forced to pay, out-of-pocket, for the last 40 years, to divert water to and from storage, maintain the approximately 7 miles of Slater Ditch, its headgate, flume, the Tarryall Ranch Reservoir where the water rights are stored, and to incur legal fees protecting the Plan and clearing its legal title at IMMD's request. Now, when faced with the requirement to actually pay for this service like

every other resident of Park County, IMMD asks this Court to intervene to grant the extraordinary relief requested in its Petition.

The Petition does not present any grounds for granting certiorari under C.A.R. 49 and IMC respectfully requests that this Court not grant IMMD another forum to avoid paying the company that has allowed its constituents' wells to operate without interruption for 40 years.

II. The Trial Court's Order was Contrary to Long-Settled Principles of Colorado Law and the Court of Appeals Applied the Correct Standard of Review to Reverse the Order

The Court of Appeals reversed the trial court order after reviewing the record and determining that the evidence introduced at trial did not support the trial court's order, leaving the Judges with the "firm and definite conviction that a mistake ha[d] been made." This was the appropriate standard of review.

a. The Court of Appeals did not Adopt a New Standard of Review

IMMD goes to extraordinary lengths to argue that the Court of Appeals adopted a new standard of review in its Opinion. Petition, pp. 14-18. It did not. IMC asked the Court of Appeals to reverse the trial court's order because there was no factual support in the record for the trial court's conclusion that IMC would be

unjustly enriched by charging a modest fee for augmenting wells within the Indian Mountain subdivision. The Colorado Appellate Handbook states:

> [I]f an issue is raised on appeal as to sufficiency of the evidence to support factual findings, an appellate court may review the record to determine whether there is sufficient evidence to support those findings, and it may reverse the lower court's factual determination if it concludes that there is no evidence to support it.

Colorado Appellate Handbook, 2015 Ed. (Hon. Alan M. Loeb ed., CLE in Colo., Inc. 2015) (citing *Wright v. Horse Creek Ranches*, 697 P.2d 384, 390 (Colo. 1985) ("A thorough canvassing of the evidence in this case leads inescapably to the conclusion that the trial court erred")).

Here, the Court of Appeals followed "handbook law" when it found that the trial court's conclusion that IMMD provided a benefit to IMC – a necessary requisite for a finding of unjust enrichment – was wholly unsupported by the record and that the parties stipulated to the contrary. Appendix A, ¶ 45 ("The district court's order did not address how IMC benefitted *at IMMD's expense*. Indeed, the order stated the contrary: 'IMMD has not paid any money to IMC.'") (emphasis in original). This would leave any reasonable person "with a firm and definite conviction that a mistake has been made and that the evidence does not support the court's finding of unjust enrichment." Appendix A, ¶¶ 33, 46. Finally, at oral argument the Judges asked repeatedly where in the record there was any testimony or documentary

evidence that subdivision lots included free, perpetual augmentation service or that IMMD conveyed a benefit to IMC. IMMD could not direct the Court to a single piece of evidence in the record.

The Court of Appeals reviewed the record and properly concluded that there was no evidence to support the trial court's conclusion that IMMD or subdivision lot owners conferred a benefit on IMC which led to "a firm and definite conviction that a mistake has been made."

b. The Trial Court Order Was Contrary to Long-Settled Colorado Law

For all its complaints about the Court of Appeals' Opinion, IMMD fails to address why this Court should allow the trial court order to stand when it is flatly contrary to Colorado law. The trial court imposed a constructive trust upon the Plan to prevent IMC from allegedly being unjustly enriched by charging a fee for use of the Plan. Appendix B, p. 8. However, to properly find that IMC was unjustly enriched in this case, the trial court would have had to find that, (A) At IMMD's expense, (B) IMC received a benefit, (C) under circumstances that would make it unjust for IMC to retain the benefit. *Lawry v. Palm*, 192 P.3d 550, 564 (Colo. App. 2008). This the trial court did not do.

Instead, the trial court found that the "benefit" that IMC received was payment for the purchase of lots by the non-party Lot Owners. Moreover, the parties stipulated, and the trial court found that IMMD has never paid any money to IMC. In *Page v. Clark*, this Court explained that lower courts are not at liberty to simply cast aside the legal elements that have "enabled the courts to prevent unjust enrichment for nearly half a millennium." 592 P.2d 792, 799 (Colo. 1979).

In short, IMMD now asks this Court to reverse the Court of Appeals opinion that was legally and factually sound, and to reinstate the trial court's order that was contrary to long-settled Colorado law.

III. IMMD Did Not Pursue its Alternative Claims at Trial and a Remand to Now Pursue These Claims is an Impermissible "Second Bite at the Apple"

IMMD asks to be allowed, on remand, to pursue alternative counterclaims that it did not bother to present at trial. IMMD's request is little more than a "second bite at the apple" and is not grounds for this Court to grant certiorari pursuant to C.A.R. 49. *Hannon Law Firm, LLC*, 287 P.3d at 847 ("axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal").

a. IMMD Had "Its Day in Court"

IMMD proclaims that it is being denied its "day in court" if it is not allowed to present its alternative counterclaims, for the first time, on remand. Petition, p. 18. IMMD had its day in court, in fact it had several of them; namely March 9-12, 2015 when this matter went to trial. IMC presented all its claims at that time, as well as evidence to rebut IMMD's claims, including the PUC Counterclaim IMMD suddenly would like to pursue.

The only evidence at trial related to the PUC Counterclaim was in response to IMC's question to a representative from a nearby subdivision that owns and operates its own augmentation plan. When asked whether that subdivision was regulated by the PUC, the representative responded that it was not. IMMD did not follow up on this questioning or present any other evidence at trial. At oral argument, when asked by the Judges directly whether Headwater Authority of the South Platte – owner and operator of a similar blanket augmentation plan – is regulated by the Public Utility Commission, opposing counsel responded that he was unsure.

IMMD elected to not pursue its alternative counterclaims at trial. This Court should not allow IMMD a "second bite at the apple" to now pursue alternative claims when it's original strategy has proven faulty.

b. The Cases Cited by IMMD are Inapplicable

Finally, none of the cases cited by IMMD stand for the proposition that IMMD can now, for the first time, pursue its alternative counterclaims on remand. In both *Busse v. City of Golden*, and *Rosane v. Senger*, one party's claim(s) were dismissed prior to trial pursuant to C.R.C.P. 12. *Busse*, 73 P.3d 660, 662 (Colo. 2003); *Rosane*, 149 P.2d 372, 365 (Colo. 1944). Despite IMC's best efforts, none of IMMD's claims were dismissed prior to trial and IMMD had every opportunity to present evidence on those claims, but failed to do so. This is not grounds for certiorari pursuant to C.A.R. 49.

CONCLUSION

The Petition does not state one basis that is grounded in fact or law that warrants review pursuant to C.A.R. 49. As such, IMC requests that the Petition be denied.

Dated: December 1, 2016

Attorney for Respondent Indian Mountain Corp
s/ *Adam C. Davenport*
Adam C. Davenport, #45342
112 North Rubey Drive, Ste. 101
Golden, Colorado 80403
720-627-6151

CERTIFICATE OF SERVICE

I certify that on the 1st day of December, 2016, a true and correct copy of the above Opposition to Petition for Certiorari, was served by e-filing via ICCES and addressed to the following:

Peter J. Ampe
David Robbins
Matthew Montgomery
Hill & Robbins, P.C.
1660 Lincoln Street, Suite 2720
Denver, CO 80264

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