

<b>DISTRICT COURT, PARK COUNTY, STATE OF COLORADO</b> P. O. Box 190 Fairplay, Colorado 80440	DATE FILED: March 16, 2015 CASE NUMBER: 2014CV30056
<b>Plaintiff: INDIAN MOUNTAIN CORP.</b>  v.  <b>Defendant: INDIAN MOUNTAIN METROPOLITAN DISTRICT</b>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <hr/> Case No. 14CV30056
<b>FINDINGS, CONCLUSIONS, AND ORDERS</b>	

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 6<sup>th</sup> 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 11<sup>th</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> claim for relief)

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

F. IMMD's Third Claim for Injunctive Relief

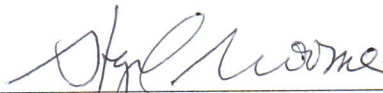
IMMD's claim pertains to requiring IMC to continue operating the Augmentation Plan. Since the court has dealt with continuing operation of the Augmentation Plan above, the court need not address this claim.

#### 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 16<sup>th</sup> day of March, 2015

BY THE COURT:

  
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Stephen A. Groome  
District Court Judge