COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203 (720) 625-5150	
Park County 2014CV30056	
Appellant: INDIAN MOUNTAIN CORP. v. **Appellee:** INDIAN MOUNTAIN METROPOLITAN DISTRICT	▲ COURT USE ONLY ▲
Peter J. Ampe, # 23452 Matthew A. Montgomery, #44039 Hill & Robbins, P.C. 1660 Lincoln Street, Suite 2720 Denver, CO 80264 Phone: (303) 296-8100 Fax: (303) 296-2388 E-mail: peterampe@hillandrobbins.com matthewmontgomery@hillandrobbins.com	Case Number: 2015CA1055 Ctrm/Div: _____
ANSWER BRIEF	

Appellee Indian Mountain Metropolitan District, through undersigned counsel, Hill & Robbins, P.C., submits the following Answer Brief:

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 9,422 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the cross-appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Matthew A. Montgomery
Matthew A. Montgomery
Peter J. Ampe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's findings of fact regarding Indian Mountain Metropolitan District's constructive trust counterclaim are supported by the record?

2. Whether the trial court's finding of fact that Indian Mountain Metropolitan District is providing a "water service" is supported by the record?

II. NATURE OF THE CASE

This case concerns the plan for augmentation ("Plan") that permits the property owners ("Owners") within the Indian Mountain Subdivision ("Indian Mountain") to pump their residential wells at those times when the wells would otherwise be out-of-priority. Order, Mar. 16, 2015, at 2 (CF, p. 4998). Appellant Indian Mountain Corp. ("IMC")—the former developer of Indian Mountain—holds the legal title to the Plan, and has operated the Plan, at no cost to the Owners, since the 1970s. *Id.* at 7 (CF, p. 5003). IMC, however, was recently acquired by Bar Star Land, LLC ("Bar Star"). *Id.* at 6 (CF, p. 5002).

Bar Star (through IMC) now maintains that, by virtue of acquiring legal title to the Plan, it may charge the Owners an annual fee to provide water service, at whatever price IMC wants. *Id.* at 7 (CF, p. 5003; Testimony of James Ingalls (R.Tr., Mar. 9, 2015, pp. 116-17). Further, IMC asserts that, because it holds title to the Plan, it is the only entity that is authorized to provide "water service" and

therefore, the Appellee Indian Mountain Metropolitan District ("IMMD" or "District") must be enjoined from acting as a metropolitan district. *Id.* at 9 (CF, p. 5005).

The trial court disagreed. Instead, the trial court held that "IMC holds title to the Augmentation Plan and its associated rights as trustee for the Indian Mountain property owners." *Id.* at 8 (CF, p. 5004). Accordingly, the trial court concluded that "[a]s long as IMC elects to retain ownership, IMC is entitled to be reimbursed [only] for its actual and reasonable expenses for maintenance, repair and operation of the plan." *Id.* Further, the trial court found that "the evidence was uncontroverted that IMMD was performing…water services." *Id.* at 9 (CF, p. 5005).

On appeal, IMC challenges several of the trial court's predicate factual findings that led to the holding that IMC holds the Plan in trust for the Owners. Opening Br., Issues I-IV. In addition, IMC challenges the trial court's factual finding that IMMD was performing water services. Opening Br., Issue V. IMMD requests that the Court review the record and hold that it supports the trial court's factual findings.

III. RELEVANT BACKGROUND AND FACTS

Prior Appropriation. Colorado, like other western states, adheres to the prior appropriation doctrine. *See, e.g.*, *Coffin v. Left Hand Ditch Co*, 6 Colo. 443,

446 (Colo. 1882). Under this doctrine, the first appropriator of water from a natural stream for a beneficial purpose has a prior right to use the water, to the extent of the appropriation. *Id.* at 447. Thus, a second (or junior) appropriator may divert water from the stream only if there is enough water to satisfy the first (or senior) appropriator. *See Id.*

1969 Act. Until the 1960s, the prior appropriation doctrine was concerned only with water rights on the stream. *See Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1148 (Colo. 2001). However, as knowledge of hydrology advanced, it became clear that natural streams are simply surface manifestations of far more extensive systems, including underground water in stream basins. *Id.* at 1148 n.11. As a result, it also became evident that well pumping has the ability to intercept (or deplete) tributary groundwater that belongs to other senior appropriators on the stream. *Id.*

Through the Water Right Determination and Administration Act of 1969 ("1969 Act"), the General Assembly integrated wells into the priority system. *See* §§ 37-92-101 *et seq.,* C.R.S. This Act allows junior wells to come into being and operate consistent with the administration of decreed senior water rights, primarily through plans for augmentation. *Farmer's Reservoir & Irrigation Co. v. Consol. Mut. Water Co.*, 33 P.3d 799, 807 (Colo. 2001).

Plans for Augmentation. Plans for augmentation permit junior well users to divert (or pump) out-of-priority when unappropriated water is unavailable. *Id.* Plans for Augmentation typically accomplish this by requiring junior well users to deliver a substitute supply of water to the stream to offset the depletions caused by the out-of-priority well pumping. *Id.*

Senate Bill 35. In 1972, the General Assembly adopted Senate Bill 35, now codified at sections 30-28-101, *et seq.*, C.R.S. Order, Mar. 16, 2015, at 4 (CF, p. 5000). Senate Bill 35 imposes substantial restrictions on the subdivision of land into parcels of less than 35 acres. *Id.* Moreover, in keeping with the 1969 Act, Senate Bill 35 requires the owner of any parcel of less than 35 acres to obtain a court-approved plan for augmentation before a new domestic well can be drilled on the parcel. *Id.*

Modern Approach to Compliance with Senate Bill 35. Since 1975, compliance with Senate Bill 35 has been achieved through a routinized process. *See* Testimony of Park County Assessor David Wissel (R.Tr., Mar. 11, 2015, pp. 51-52, 56-57). If a developer intends to create a subdivision that relies on domestic wells, prior to development, the developer obtains a court-approved plan for augmentation for the subdivision as a whole. *Id.* at 56. The developer then establishes a mandatory homeowners' association ("HOA"), which is capable of taking control of the augmentation plan. *Id.* After the development is complete,

the developer transfers the plan for augmentation to the HOA. *Id.* There are, however, a handful of pre-1975 subdivisions in Colorado that were decreed plans for augmentation before this routinized process was established. *See Id.* This case involves one such subdivision. *See Id.; see also* Depo. of James Campbell at 35-45-46 (CF, p. 4881-82). [1]

Indian Mountain Subdivision. Indian Mountain is a large rural subdivision and recreational development located in Park County, Colorado. Order, Mar. 16, 2015, at 1, 4 (CF, p. 4997, 5000). Indian Mountain consists of approximately 2,450 lots, which are zoned for residential use; in addition there is a park, a golf course, and several other community facilities. *Id.* The development of Indian Mountain started in 1970, shortly before the adoption of Senate Bill 35. *Id.* at 1 (CF, p. 4997). Indian Mountain was originally developed by Park Development Company, in coordination with its general partner Meridian Properties, Inc. (collectively, "Park Development"). *Id.* In 1976, Park Development conveyed its interest in Indian Mountain to IMC. *Id.* at 3 (CF, p.

[1] James Campbell was unavailable at trial. (R.Tr., Mar. 11, 2015, p. 2). By stipulation of the parties, the transcript of James Campbell's January 7, 2015, deposition was admitted into evidence and both parties designated portions of the transcript. *Id.*; *see also* Depo. of James Campbell (CF, p. 4836 *et seq.*). In addition to the deposition, IMC submitted written objections to several of IMMD's designations. (R.Tr., Mar. 11, 2015, pp. 2-3); *see also* Submission of Preserved Testimony and Objections at 2-3 (CF, pp. 4832-33). The Court agreed to take these objections into consideration as it read the deposition. (R.Tr., Mar. 11, 2015, pp. 3).

4999). IMC was originally owned in partnership; but by 1986, James Campbell became the sole owner and shareholder of IMC. *Id.* Bar Star acquired IMC in 2013. *Id.* Originally Bar Star had two principals, James Ingalls and Mark Goosman; but, at present, James Ingalls is the sole owner and shareholder of Bar Star and IMC. *Id.*

Indian Mountain Wells. Indian Mountain does not have a central water distribution system. *Id.* at 4 (CF, p. 5000). Instead, the Owners rely on approximately 800 domestic wells ("Wells") to obtain potable water. *Id.* at 1 (CF, p. 4997). Because of this, the development of Indian Mountain was substantially impacted by the passage of Senate Bill 35. *Id.* at 4 (CF, p. 5000). In 1973, the State Engineer halted residential sales until Park Development obtained a plan for augmentation for Indian Mountain. *Id; see also* Depo. of James Campbell at 38-39 (CF, p. 4874-75)

Indian Mountain's Plan for Augmentation. The Plan was decreed by the Water Court for Division 1 in Case No. W-7389 (Jan. 2, 1974, *nunc pro tunc*, Oct. 1, 1973). Order, Mar. 16, 2015 at 2 (CF, p. 4998). The Plan permits the Owners to pump their Wells out-of-priority by providing for substitute water to be supplied to Tarryall Creek, a tributary of the South Platte River from Tarryall Ranch Reservoir. *Id.* at 5 (CF, p. 5001). The taxation value of the Plan is not assessed to

Tarryall Ranch Reservoir or IMC, but is separately assessed to each individual lot in Indian Mountain. Testimony of David Wissel (R.Tr., Mar. 11, p. 571).

Park Development applied for and initially held the Plan. Order, Mar. 16, 2015 at 2 (CF, p. 4998). However Park Development did not establish a mandatory HOA or otherwise arrange for the transfer of the Plan to the property owners of Indian Mountain. *See Id.* Instead, Park Development conveyed the Plan to IMC when it sold its interest in Indian Mountain. *Id.* The Plan provides that it may be used only for Indian Mountain. *Id.* at 4 (CF, p. 5000); *see also* Decree, Case No. W-7389 at 7 (CF, p. 15). Moreover, after development resumed in the 1970s, Indian Mountain was subject to the Interstate Land Sales Disclosure Act. *See, e.g.*, HUD Disclosure, IMMD Ex. LL (CF, p. 4547). Under this Act, Park Development, and then IMC, were required to provide so-called "HUD Disclosures" to prospective Indian Mountain property owners. *Id.*; *see also* Depo. of James Campbell at 35-36; 62 (CF, p. 4871-4872; 4898). These disclosures explained the potential costs of acquiring a well permit and drilling a well; but they did not mention any costs associated with augmentation water or the Plan. Order, Mar. 16, 2015, at 8 (CF, p. 5004).

Indian Mountain Property Owners Association. For some time, the Owners were generally aware of the potential problems created by IMC's ownership of the Plan. *See* Testimony of Roger Mattson (R.Tr., Mar. 11, pp. 121-

122, 124). In 1985, concerned Owners formed the Indian Mountain Property Owner's Association ("IMPOA"). *Id.* Roger Mattson is the President of the IMPOA Board. *See* Testimony of Roger Mattson (R.Tr., Mar. 11, 2015, p. 124). Glenn Haas is the Vice President of the IMPOA Board. Testimony of Glenn Haas (R.Tr., Mar. 10, 2015, p. 155).

IMPOA shares in the governance of Indian Mountain with IMMD. *Id.* But, because IMPOA was formed after Indian Mountain was substantially developed, unlike most HOAs in Colorado, IMPOA is a voluntary organization of the Owners. *Id.* Because of this, IMPOA is not authorized to hold the Plan. Depo. of James Campbell at 50 (CF, p. 4886). Accordingly, despite its efforts, IMPOA has never been able to acquire title to the Plan. Testimony of Roger Mattson (R.Tr., Mar. 11, 2015, p. 196); *see also* Depo. of James Campbell at 50 (CF, p. 4886).

Plan Compliance. From the 1976 until the early 2010s, IMC maintained and operated the Plan at its own expense. Order, Mar. 16, 2015, at 5 (CF, p 5001). James Campbell typically paid David Wilson to do this work. Testimony of David Wilson (R.Tr., Mar. 9, 2015, p. 219); *see also* Depo. of James Campbell at 82-84 (CF, p. 4918-4920). David Wilson never charged more than $4,000 in any given year for this work. Testimony of David Wilson (R.Tr., Mar. 9, 2015, 233-34). During this time, IMC never requested reimbursement of its expenses from the Owners. Depo. of James Campbell at 55 (CF, p. 4891). Instead, James Campbell

incurred these costs because he "felt that operating the plan of augmentation for Indian Mountain…was the right thing to do." *Id.*

In the spring of 2012, IMC fell out of compliance with the Plan. Testimony of Water Commissioner Garver Brown (R.Tr., Mar. 10, 2015, pp. 42-43). Later that spring, James Campbell brought IMC back into compliance with the Plan. *Id.* at 43. But the situation had put the Owners into "a tizzy." Testimony of Glenn Haas (R.Tr., Mar. 10, 2015, p. 120). The Owners were concerned that they would lose access to their drinking water. *Id.* Adding to the situation, in October 2012, the Division of Water Resources ("DWR") warned the Owners that if IMC fell out of compliance with the Plan again, DWR would issue cease and desist orders to stop pumping from the Wells. *Id.*; *see also* Ltr. from Div. Water Res. to Glenn Haas, Oct. 11, 2012, at 3 (CF, p. 221).

In response, the Owners formed an *ad hoc* Water Committee and began to explore ways that they could acquire the Plan. *Id.* at 120-21; Testimony of Susan Stoval (R.Tr., Mar 11., 2015, pp. 94-96). The result was the formation of IMMD. Testimony of Glenn Haas (R.Tr., Mar. 10, 2015, p. 121).

Indian Mountain Metropolitan District. IMMD is a special district created pursuant to the Special District Act, sections 32-1-101, *et seq.*, C.R.S. IMMD Trial Br. at 3 (CF, p. 714). Susan Stoval is the President of the IMMD Board. Testimony of Susan Stoval (R.Tr., Mar. 11, 2015, p. 92). Glenn Haas is

the Secretary of the IMMD Board. Testimony of Glenn Haas (R.Tr., Mar. 10, 2015, p. 107).

IMMD was originally organized in 1972 by Park Development, as the Indian Mountain Metropolitan Recreation and Park District ("Park District"). *Id.* In 2013, the Park District voted to reorganize as IMMD in order to, *inter alia*, take control of the Plan. Amend. & Restated Serv. Plan, IMMD, at 4 (CF, p. 41). The Park County Commissioners approved this reorganization; Resolution Regarding Approval of a Serv. Plan for IMMD at 1-3 (CF, pp. 58-60); and the District Court subsequently approved the change of name. Order to Change Name of Dist. at 2 (CF, p. 62).

Unlike IMPOA, IMMD is not a voluntary organization of the Owners; instead IMMD has taxing-authority and is funded through a mill levy. *See* Amend. & Restated Serv. Plan, IMMD Ex. V, at 7 (CF, p. 44). Under its Amended and Restated Service Plan, IMMD serves two purposes. First, IMMD continues to provide "Park and Recreation Services" to the property owners of Indian Mountain. *Id.* at 6 (CF, p. 43). Second, IMMD provides "Water Services." *Id.* at 7 (CF, p. 44).

Sale of IMC. James Campbell participated in drafting IMMD's Amended Service Plan. Order, Mar. 16, 2015, at 5 (CF, p. 5001). The understanding was that IMC would convey the Plan to IMMD after the District was reorganized.

Testimony of Glenn Haas (R.Tr., Mar. 11, 2015, p. 123); *see also* Depo. of James Campbell at 118 (CF, p. 4954).

However, in August, 2013, rather than transferring the Plan to IMMD, James Campbell sold IMC to Bar Star. Order, Mar. 16, 2015, at 6 (CF, p. 5002). Bar Star is a local ranching operation, and was interested in acquiring water rights. *See* Testimony of James Ingalls (R.Tr., Mar. 9, 2015, p. 34). Bar Star paid $290,000 for IMC, which included the Plan and its water rights, Tarryall Ranch Reservoir, the Slater Ditch, and all of IMC's mineral rights. Order, Mar. 16, 2015, at 6 (CF, p. 5002). IMMD subsequently entered into negotiations with Bar Star to acquire the Plan, but these negotiations quickly broke down. *Id.* Shortly thereafter, in November 2013, Bar Star (through IMC) sent IMMD invoices for "Water Augmentation and Maintenance" in 2012 and 2013. *Id.* Combined, these invoices sought $286,000 from IMMD. *Id.* The amount of the invoices was not based on IMC's actual expenses to operate the Plan, but instead, was calculated to provide a ten percent return on investment on the entirety of Bar Star's ranching operations. Testimony of James Ingalls (R.Tr., Mar. 9, 2012, p 94).

IV. PROCEDURAL HISTORY AND JUDGMENT

IMC filed suit in the District Court for Park County, Colorado. Compl. at 1 (CF, p. 1). First, IMC sought a declaratory judgment that it owned the Plan and that IMMD had no right, title, or interest in the Plan. *Id.* at 5 (CF, p.5). Second,

IMC sought $286,000 in damages, asserting that IMMD had been unjustly enriched by IMC's operation of the Plan. *Id.* at 6 (CF, p. 6). Third, IMC sought a declaratory judgment that IMMD had failed to comply with its Amended Service Plan because IMMD did not provide a water service. *Id.* at 7 (CF, p. 7). Finally, IMC requested an injunction against IMMD preventing IMMD from taking any action as a metropolitan district or water service provider because IMMD was not in compliance with its Amended Service Plan. *Id.* at 8 (CF, p. 8).

IMMD counterclaimed. Ans. at 1 (CF, p. 77). First, IMMD sought a declaratory judgment that IMC held title to the Plan as constructive trustee for the Indian Mountain Owners and that, as a result, IMC was required to convey the Plan to the Owners. *Id.* at 13 (CF, p. 89). Second, and in the alternative, IMMD sought a declaratory judgment the IMC was operating as a public utility and, therefore, that IMC could not charge the Owners of Indian Mountain to operate the Plan until IMC received regulatory approval from the PUC. *Id.* at 14 (CF, p. 90). Finally, IMMD sought injunctive relief requiring IMC to continue operating the Plan for the benefit of the Indian Mountain property owners, subject to reimbursement from IMMD for IMC's actual costs and expenses. *Id.* at 16 (CF, p. 92).

The case was tried in the Park County District Court. (R.Tr., Mar. 9-12, 2015). At the conclusion of IMC's case in chief, the trial court dismissed IMC's

third and fourth claims for relief under Rule 41(b). (R.Tr., Mar. 11, pp.21-23). By written order, the trial court entered judgment against IMC on its first and second claims. Order, Mar. 16, 2015, at 7-9 (CF, pp. 5003-05). In the same order, the trial court entered judgment in favor of IMMD on its first counterclaim, and declined to rule on IMMD's second and third counterclaims, as the first was dispositive. *Id.*

V. POST-TRIAL PROCEEDINGS

IMC filed a Motion for Post-Trial Relief under Rule 59(a). IMC Mot. for Post-Trial Relief at 1 (CF, p. 5010). IMC asked the trial court to amend its findings with respect to the HUD Disclosures and "to consider additional findings and an amended judgment limited to the *operation and maintenance* services IMC has provided." *Id.* at 1-2 (CF, p. 5011) (emphasis in original). The trial court denied IMC's Motion. Order, May 6, 2015, at 1 (CF, p. 5114).

Subsequently, IMC sent Letters and Invoices to the Owners. IMMD Ver. Mot. for Contempt at 2 (CF, p. 5186). The Letters and Invoices stated, in relevant part, that "[a]s a result of the Court's order finding that IMC is entitled to be reimbursed for its maintenance, repair and operation of the augmentation plan, IMC has provided the enclosed invoice. . ." *Id.* The Letters and Invoices demanded payment to IMC of $1,000 for each of the approximately 2,450 lots in the subdivision to account for the operation of the Plan from 1976 to 2012; but

noted that, if paid within 45 days, the amount would be discounted to $500 per lot. *Id.* After hearings on September 9, 2015, and October 9, 2015, the trial court held IMC in contempt of court. Order, Oct. 13, 2015, at 4.[2]

VI. SUMMARY OF THE ARGUMENT

A. IMC is not permitted to bring a piecemeal challenge against the trial court's factual findings concerning the constructive trust. Instead, this Court may review the record only as a whole. *See Page v. Clark*, 592 P.2d 792, 796 (Colo. 1979). Since IMC has challenged some, but not all, of the trial court's factual findings, IMC has not raised an issue on which this Court could reverse, and effectively conceded that there is support in the record for the trial court's findings. In any event, a review of the record demonstrates that all of the trial court's findings are supported, and in addition, that IMC has not preserved the first two arguments it raises, and that the fourth issue is addressed to a claim that was not raised in the case.

B. The trial court's finding that IMMD provides water service is supported by the record. Moreover, IMC's argument is moot, IMC has not raised an issue on which this Court could reverse, IMC's construction of the Amended Service Plan

[2] The Court's Order was issued after the record of appeal was finalized. On November 23, 2015, IMMD filed an Unopposed Motion to Supplement the Record with the Court. The trial court's Order, dated October 13, 2015, was attached to the Motion. As of the date of filing of this brief, the Court has not ruled on the Motion.

is contrary to the plain language of the Plan, and IMC conceded during oral argument before the trial court that IMMD provides at least some water services.[3]

VII. ARGUMENT

A. The trial court's findings of fact with respect to the constructive trust are supported by the record.

i. IMC has not raised an issue upon which this Court could reverse the trial court's imposition of a constructive trust.

STANDARD OF REVIEW

In reviewing the trial court's findings of fact, an appellate court cannot determine factual issues adversely to the trial court and must uphold the trial court's findings unless they are clearly erroneous and not supported by the record. *Moeller v. Colo. Real Estate Comm'n*, 759 P.2d 697, 702 (Colo. 1988).

PRESERVATION OF ISSUE

On appeal, IMC has not raised any issues of law with respect to the constructive trust imposed pby the trial court, nor has IMC challenged the trial court's legal authority to impose a constructive trust.[4] IMC has presumably made

[3] IMMD waives its Cross-Appeal on the trial court's denial of an award of attorneys' fees at trial.

[4] Issues not raised in the opening brief are deemed waived. *People v. Perez-Hernandez*, 348 P.3d 451, 455 (Colo. App. 2013). In any event, Colorado law recognizes that, in certain circumstances, the "naked title" to a water right does not dictate who is entitled to use the water. *See Jacobucci v. District Court in and for Jefferson Cnty.*, 541 P.2d 667, 673 (Colo. 1975). In this case, the trial court simply

this strategic choice because it prefers to concede to the equitable jurisdiction of the court, rather than seek a remand to address whether it should be regulated by the PUC. Instead, IMC has only challenged some, but not all, of the trial court's predicate factual findings with respect to the constructive trust. *See* Opening Br., Issues I-IV. Each of these factual challenges is addressed individually below. However, the Court does not need to reach any of IMC's issues.

An appellate court cannot reverse the imposition of a constructive trust based on an appellant's piecemeal attack of the trial court's factual findings. *See Page v. Clark*, 592 P.2d 792, 796 (Colo. 1979). Instead, the decision to implement a constructive trust is based on the "circumstances" of the case as a whole. *See Id.* As a result, the appellate court is not permitted to review specific factual findings, reverse them, and then reweigh the circumstances to determine whether a constructive trust was appropriate. *See Id.* ("we have consistently disapproved of the substitution of new factual findings by reviewing courts for those made by the trial court."). Rather, the appellate court may review the record only as a whole, and reverse only if there is no support, whatsoever, for the trial court's judgment. *See Id.* Since IMC has not asked the Court to review the record as a whole, IMC

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found that the title to the Plan, which is held by IMC, does not dictate who holds the beneficial interest in the Plan (*i.e.*, who gets to use the water represented by the water right). *Accord Page v. Clark*, 592 P.2d 792, 798 (Colo. 1979) ("When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.").

has not raised or preserved an issue upon which this Court could reverse the constructive trust. Therefore, the Court should affirm.

a. There is evidence in the record to support the trial court's imposition of a constructive trust.

Because IMC has challenged only some, but not all, of the trial court's factual findings with respect to the constructive trust, it has effectively conceded that there is support in the record for the trial court's factual findings. In any event, the trial court's factual findings are supported by the record:

1. The Plan decree provides that its purpose is to "permit the depletions associated with domestic and municipal water service…to 5,250 single-family residential equivalent units in the Indian Mountain subdivision." W-7389 Decree at 7 (CF, p. 15).

2. IMC demanded $246,000 in damages for the operation and maintenance of the Plan in 2012 and 2013. Compl. ¶ 46 (CF, p. 6); s*ee also* IMC Ex. 64 (CF, p. 1304) (2012 Invoice for $143,000); IMC Ex. 65. (CF, p. 1305) (2013 Invoice for $143,000); Testimony of James Ingalls (R.Tr., Mar. 9, 2015, pp. 82) (laying foundation for exhibits).

3. Garver Brown, the local Water Commissioner, testified that if the Plan was not operated, it was "fair enough to say" that the wells in the Indian Mountain

subdivision would be curtailed. Testimony of Garver Brown (R.Tr., Mar. 10, 2015, p. 31).

4. DWR sent a letter to Glenn Haas stating that "[i]f the Division of Water Resources determines that a plan is out of compliance with the decree…then orders to cease and desist would be issued to each owner of a well in the plan." IMC Ex. 22 (CF, pp. 1048); *see also* Testimony of Garver Brown (R.Tr., Mar. 10, 2015, p. 31) (laying foundation for the letter).

5. David Wilson testified that, in 2012, he charged IMC in the "neighborhood" of $2,000 to operate the Plan; in 2013, he charged "less than $4,000; $3,700 and some" to operate the Plan; and that he never charged more than $5,000 in any year to operate the Plan. Testimony of David Wilson (R.Tr., Mar. 9, 2015, p. 222, 234).

6. Roger Mattson testified that IMC's demand was "frankly outrageous." Testimony of Roger Mattson (R.Tr., Mar. 11, 2015, p. 169).

7. Susan Stovall testified that the Indian Mountain community was "scared" and "frightened" by IMC. Testimony of Susan Stovall (R.Tr., Mar. 11, 2015, p. 94).

8. Glenn Haas testified that he was "alarm[ed]" that "we are not going to be drinking water. We are not going to have a shower." Testimony of Glenn Haas (R.Tr., Mar. 10, 2015, p. 120).

Based on this evidence, the trial court could reasonably conclude that the circumstances of the case "cry out" for an equitable remedy. *See* Order, Mar. 16, 2015, at 7-8 (CF, pp. 5003-04). Therefore, there is no clear error, and the Court should affirm.

ii. The trial court properly admitted Glenn Haas' testimony.

STANDARD OF REVIEW

A trial court's rulings on evidentiary issues are reviewed for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002).

PRESERVATION OF ISSUE

IMC seeks review of the trial court's "extensive factual findings regarding James Campbell's history with the Indian Mountain Community" based on what IMC claims was impermissible testimony by Glenn Haas. Opening Br. at 19. IMC, however, has not preserved this issue for review. The failure to object in the trial court on the grounds asserted on appeal is deemed to be a waiver of the objection. *People v. Watson*, 668 P.2d 965, 967 (Colo. App. 1983). At trial, IMC made only a specific objection to the "lack of foundation" for the question "[y]ou [Glenn Haas] mentioned bad feelings. Can you explain that a little bit?" Testimony of Glenn Haas (R.Tr., Mar. 10, 2015, p. 111). On appeal, IMC can challenge the admissibility of the particular testimony adduced in response to this

question, but IMC cannot challenge the entirety of Glenn Haas' testimony based on this limited objection. IMC has waived this issue.

a. Glenn Haas' testimony was permissible lay opinion testimony, offered against IMC, and allowable under several hearsay exceptions.

IMC asserts that the trial court erred by permitting Glenn Haas to testify "regarding events that allegedly took place decades before Haas was aware of the subdivision's existence." Opening Br. at 19-20. A review of Glenn Haas' testimony, however, demonstrates that it was appropriate under numerous rules of evidence, including Colorado Rules of Evidence 701, 801(d)(2), and 803(20) -(21)

For example, during direct examination by IMMD, IMMD laid a foundation for lay opinion testimony.[5] First, IMMD asked Glenn Haas "[a]nd in your time in Indian Mountain, did you have personal dealings with Mr. Campbell?" Testimony of Glenn Haas (R. Tr., Mar. 10, 2015, at 109). Glenn Haas responded:

> Yes; you know, from my position on IMPOA…and my position on the District, I had to volunteer to take a lead role in some of the water discussions. So, we, we exchanged many emails, and fewer, but some phone conversations, and a meeting or two along the way.

[5] Under C.R.E. 701, "[i]f a witness is not testifying as expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge...."

Id. at 110. Second, in response to IMC's objection for lack of foundation, Glenn Haas explained that his basis for knowledge included "reading the newsletters, and talking to Mr. Campbell;" "looking at the actual budgets of the District for the first 10 years;" and what he "heard…first hand from people." *Id.* at 111.

Based on this foundation, the trial court could reasonably conclude that Glenn Haas was competent to provide lay witness opinion testimony about James Campbell's history with Indian Mountain. For example, his opinion that there was "big rift between Mr. Campbell and the Architectural Review Committee [of IMPOA]," *Id.* at 112, was rationally based on his personal conversations with James Campbell and his review of the IMPOA newsletters and budgets and did not require scientific, technical, or other specialized knowledge.

In addition, the trial court was permitted to hear hearsay statements made by James Campbell because they were offered against IMC and made while James Campbell was a representative of IMC.[6] Thus, for example, Glenn Haas' testimony about "two-hour-long conversations" with James Campbell that would run "hot and cold" was permissible. *See Id.* at 110.

Finally, Glenn Haas could offer testimony about the general history of the Indian Mountain community and James Campbell's reputation in the community

[6] Under C.R.E. 801(d)(2), a statement is not hearsay, *inter alia*, if it is offered against a party and is the party's own statement in either an individual or a representative capacity.

because these are exceptions to the hearsay rule.[7] Thus, for example, Glenn Haas' testimony that it "was 1975" when the Park District "was set up" was admissible because this is just general history. *See Id.* at 118. Similarly, Glenn Haas testimony that James Campbell "really bloodied the relationship between the community" and "there's lingering bitterness" was admissible because this is Glenn Haas' perception of James Campbell's reputation in the Community. *See Id.* at 112. Therefore, the trial court did not err by admitting any of Glenn Haas' testimony and the Court should affirm.

b. Any error was harmless.

IMC asserts that the admission of Glenn Haas' testimony "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." *Id.* at 20. However, even if the trial court erred in admitting certain testimony by Glenn Haas, any error was harmless.

A ruling erroneously admitting evidence is harmless if the reviewing court can say with fair assurance that, in light of the entire record of the trial, the error did not substantially influence the verdict. *People v. Stewart*, 55 P.3d 107, 124 (Colo. 2002).

[7] Under C.R.E. 803(20), hearsay about events of general history is not excluded. Likewise, under C.R.E. 803(21), hearsay about reputation of a person's character among his associates or in the community is not excluded.

Here, the trial court found that IMC was "bound by the significant history" of Indian Mountain's development because "when Mr. Ingalls purchased the stock of IMC, he 'stepped into James Campbell's shoes." Order, Mar. 16, 2015, at 7-8 (CF, pp. 5003-04). This finding pertains to the fact that Bar Star did not acquire IMC as a *bona fide* purchaser for value without notice. *See, e.g.*, *In re Marriage of Allen*, 724 P.2d 651, 657 (Colo. 1986) (a constructive trust "cannot operate against a third party who acquired the property in good faith, for value, and without notice of the circumstances under which the property was wrongfully acquired."). Testimony of James Ingalls (R.Tr., Mar. 9, 2015, pp. 95-96); Tarryall Resevoir Ranch Report, IMC Ex. 82 (CF, pp. 1435-41).

Even if the entirety of Glenn Haas' testimony was admitted in error, there are still substantial amounts of evidence in the record on which the trial court could base findings about James Campbell's history with Indian Mountain, including: The trial court did make a number of findings about James Campbell's history with Indian Mountain. Order, Mar. 16, 2015, at 5-6 (CF, pp. 5001-02). But these findings do not come verbatim from Glenn Haas' testimony. Instead, they come from an amalgam of sources, including the testimony of Glenn Haas, *see* Testimony of Glenn Haas (R.Tr. Mar 10, 2015, pp. 109-17); James Ingalls, *see* Testimony of James Ingalls (R.Tr., Mar. 9, 2015, pp. 38-44); David Wilson, *see* Testimony of David Wilson (R.Tr., Mar. 9, 2015, pp. 219-34); and Roger Mattson,

see Testimony of Roger Mattson (R.Tr., Mar. 11, 2015, p. 125-136), in addition to the deposition of James Campbell, *see* Depo. of James Campbell (CF, p. 4836, *et seq.*), numerous trial exhibits, and 28 paragraphs of stipulated facts. Order, Mar. 16, 2015, at 1-4 (CF, pp. 4997-5000). Without IMC setting forth the specific testimony of Glenn Haas claimed as objectionable, the specific findings of the trial court that are based on this testimony, and the specific substantial right that was affected as a result of this testimony, it is nearly-impossible to understand the basis for IMC's objection. [8]

But, in any event, Bar Star admitted that it was not a *bona fide* purchaser for value without notice. During direct examination, IMC asked James Ingalls, "as part of your discussions with Mr. Campbell in anticipation of purchasing Indian Mountain Corp., did you discuss with him the history of the Indian Mountain subdivision?" Testimony of James Ingalls (R. Tr., Mar. 9, 2015, p. 40). James Ingalls responded, "Yes, I did. And, and looking the records I found some information, as well." *Id.* In addition, this statement was corroborated by James Campbell. Depo. of James Campbell at 95 (CF, p. 4931) (acknowledging that he provided Bar Star with an assessment of the water rights by a water engineer prior

[8] Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and a timely objection appears of record stating the specific ground of objection. C.R.E. 103(a)(1)

to the sale of IMC). Therefore, the trial court did not err, and this Court should affirm.

iii. The trial court's finding that IMC would be unjustly enriched by charging ongoing fees is supported by the record.

STANDARD OF REVIEW

In reviewing the trial court's findings of fact, an appellate court cannot determine factual issues adversely to the trial court and must uphold the trial court's findings unless they are clearly erroneous and not supported by the record. *Moeller v. Colo. Real Estate Comm'n*, 759 P.2d 697, 702 (Colo. 1988).

PRESERVATION OF ISSUE

IMC asserts that there is no evidence in the record to support the trial court's conclusion that "charging for use of the Plan [on a for-profit basis] would now result in unjust enrichment." Opening Br. at 22. However, IMC's Opening Brief identifies specific testimony from both Glenn Haas and Roger Mattson that supports the trial court's finding. *Id.* at 26-27. It is, therefore, beyond dispute that there is evidence in the record to support the trial court's findings. Instead, IMC's actual objection is that the trial court erred in admitting Glenn Haas' and Roger Mattson's testimony about profits because it was based on "unfounded assertions and speculation." Opening Br. at 28. IMC, however, did not object to the

admissibility of this testimony at trial; accordingly, the issue IMC now raises has been waived. *See* C.R.E. 103(a)(1)

a. There is ample evidence in the record that IMC received a benefit from the sale of lots to the Indian Mountain Owners.

IMC asserts that "there is no support in the record for the [trial court's finding] 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." Opening Br. at 22. The trial court's conclusion, however, is supported by the record:

1. In response to the question "[s]o in your own words, can you articulate why you think the Plan resides with the Indian Mountain homeowners, the lot owners?;" Glenn Haas testified that "I believe that the Indian Mountain property owners paid Indian Mountain Corporation, and the purchase of their lots, and that money, the value of that money reflected a number of assets, you use the word commons. Not only was it the lot, but it was the availability to a ski area or a golf course reflected in that price, the availability of a Well Permit. And you cannot get a Well Permit without a Water Augmentation Plan. And there was lots of sales literature, evidence by Mr. Campbell that a Well Permit came with the property." Testimony of Glenn Haas (R.Tr., Mar. 10, 2015, pp. 140-41).

2. In response to the question "[a]nd from all of your research and hearing testimony today, does it seem Indian Mountain Corp has already profited

from the Aug. Plan from the initial sales?" Roger Mattson testified "Oh my, yes, they couldn't have sold the subdivision without the Aug. Plan. State Engineer told them that. 'I'm not going to approve any more plats until you get an Aug. Plan approved by the Water Court.' And [he] said it over and over." Testimony of Roger Mattson (R.Tr., Mar. 11, 2015, p. 169).

3. At his deposition, James Campbell stated that "[o]bviously, you can't sell [lots] without a well permit. I wouldn't be a party to a marketing company that tried to sell vacant land in the mountains without the ability to drill a well." Depo. of James Campbell at 62 (CF, p. 4898).

4. The parties stipulated that "[i]n the early 1970s, sales of the lots in the Indian Mountain subdivision were put on hold while [Park Development] obtained a plan for augmentation for wells in the Indian Mountain Subdivision…" and that "IMC provided documents to potential purchasers stating that access to well permits for a domestic water supply is 'assured by the developer.'" Order, Mar. 16, 2015, at 2 (CF, p. 4998).

5. Clayton Copeland, a long-time Indian Mountain Owner and licensed realtor with knowledge of Indian Mountain from 1969, testified that, without the ability to drill a well for household use, as protected by the Plan, the lots did not have any value and "is cow pasture." Testimony of Clayton Copeland (R.Tr., Mar. 11, 2015, p. 73).

6. James Ingalls testified that the amount of the invoices was determined from "a return on investment of 10 percent" on the entirety of his ranching operations, not just the cost of the Plan. Testimony of James Ingalls (R.Tr., Mar. 9, 2015, p. 85).

Based on this evidence, the trial court could reasonably conclude that the costs of the Plan were included in the sales prices that the Owners paid to purchase lots, and that as a result, IMC would be unjustly enriched by seeking to profit from charging additional fees, either to the Owners themselves or IMMD on behalf of the Owners.[9] Therefore, the trial court did not err and the Court should affirm.

iv. The trial court's finding that IMC has the Owners of Indian Mountain "over a barrel" is supported by the record.

STANDARD OF REVIEW

In reviewing the trial court's findings of fact, an appellate court cannot determine factual issues adversely to the trial court and must uphold the trial court's findings unless they are clearly erroneous and not supported by the record. *Moeller v. Colo. Real Estate Comm'n*, 759 P.2d 697, 702 (Colo. 1988).

PRESERVATION OF ISSUE

[9] IMC additionally argues that "the record is devoid of any evidence that the District conferred any benefit on IMC." Opening Br. at 22. This, however, distorts the trial court's reasoning. The trial court concluded that IMC would be unjustly enriched if the court permitted IMC to charge IMMD fees (*i.e.*, ordered IMMD to confer a benefit on IMC) because the property owners of Indian Mountain had already conferred a benefit on IMC by purchasing lots. A finding that IMMD conferred a benefit on IMC is not necessary to support this reasoning.

IMMD agrees with IMC that this issue has been preserved for review.

a. There is evidence in the record that the Plan was intended to benefit the property owners of Indian mountain; and that, without a legal or equitable interest in the Plan, the property owners of Indian Mountain would have to pay exorbitant prices to obtain water.

IMC asserts that there is no evidence for the trial court's finding that "IMC has Indian Mountain property owners 'over a barrel.'" The trial court's conclusion, however, is supported by the record. For one, as the evidence set forth in the sections above shows, IMC desires to charge the Owners approximately 35 times the actual cost of operating the Plan to recoup its investment in an unrelated ranching operation. *See*, *supra*, ARGUMENT §§ A.i.a, A.iii.a.

In addition:

1. Roger Mattson testified that the "Aug. Plan was intended for this Community." Testimony of Roger Mattson (R.Tr., Mar. 11, 2015, p. 134-35).

2. The Plan decree provides that its purpose is to "permit the depletions associated with domestic and municipal water service…to 5,250 single-family residential equivalent units in the Indian Mountain subdivision." W-7389 Decree at 7 (CF, p. 15).

3. At his deposition, James Campbell stated that, while he owned IMC, IMC never charged the property owners of Indian Mountain to operate the Plan

because he "felt that operating the plan of augmentation for Indian Mountain…was the right thing to do." Depo. of James Campbell at 49 (CF, p. 4885).

Based on this evidence, the trial court could reasonably conclude that the Plan was intended for the benefit of the Owners, and that, as a result, IMC was not permitted to profit from the Plan by charging the Owners exorbitant prices for water (or, in other words, that IMC was not permitted to hold the Owners over a barrel).[10] Therefore, the trial court did not err, and this Court should affirm.

v. IMMD did not bring a claim under the Interstate Land Sales Act and the trial court did not award any relief under the Interstate Land Sales Act.

STANDARD OF REVIEW

In reviewing the trial court's findings of fact, an appellate court cannot determine factual issues adversely to the trial court and must uphold the trial court's findings unless they are clearly erroneous and not supported by the record. *Moeller v. Colo. Real Estate Comm'n*, 759 P.2d 697, 702 (Colo. 1988).

PRESERVATION OF ISSUE

[10] IMC further argues that "the record is replete with examples of other augmentation plans that are 'for' certain groups of people, which do not have any ownership interest in the plan itself." Opening Br. at 32. The examples cited by IMC, however, are all special districts or statutory HOAs, which are quasi-government entities that are legally obligated to operate their augmentation plans for the benefit of their constituencies.

IMMD agrees that IMC raised this argument below; however, IMMD did not state a claim under the Interstate Land Sales Act ("ILSA"), nor did the trial court award any relief under the ILSA.

a. The record supports the trial court's finding that none of the developer's promotional materials hinted at any intent to charge Owners for the right to use augmentation water.

IMC asserts that the trial court erroneously "interpreted the ILSA to create strict liability for IMC's alleged failure to warn lot owners regarding the cost of augmentation service." Opening Br. at 38. IMMD, however, did not state a claim under the ILSA, and the trial court did not award any relief under the ILSA.

Instead, the trial court merely concluded that the HUD Disclosures were an additional piece of evidence that supported the imposition of a constructive trust.[11] Order, Mar. 16, 2015, at 8 (CF, p. 5004). Specifically, the trial court found that "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." *Id.* Based on this, the trial court reasoned that, if IMC had intended to profit from the Plan, this intent would have been disclosed on the HUD Disclosures. *Id.* This finding is reasonable and supported by the record. *See* Testimony of Glenn Haas (R.Tr., Mar. 10, 2015, p.

[11] The HUD Disclosures were admitted without objection. IMMD Exs. LL (CF, p. 4547); NN (CF, p. 4617); OO (CF, p. 4630); *see also* Testimony of Clayton Copeland (R.Tr., Mar. 11, 2015, p. 70-73) (laying foundation).

141) ("And there was lots of sales literature, evidence by Mr. Campbell that a Well Permit came with the property."); Depo. of James Campbell at 62 (CF, p. 4898). Accordingly, the trial court did not err, and this Court should affirm.

Moreover, even if the trial court impermissibly interpreted the HUD Disclosures, any error was harmless. As the foregoing sections illustrate, there was ample evidence in the record from which the trial court could infer that the circumstances of the case justified the imposition of a constructive trust. *See*, *supra*, ARGUMENT §§ A.i-A.iv. To be sure, as IMC points out throughout its Opening Brief, there was conflicting testimony in the record from which the trial court could have inferred the opposite. But the trial court resolved these conflicts against IMC, and now, both IMC and this Court are bound by the trial court's findings. *See Davis v. Holbrook*, 55 P. 730, 731-32 (Colo. 1898) ("under the firmly established rule in this court, we cannot interfere with [factual] findings [that] are sustained by legally sufficient evidence.").

B. The trial court's finding that IMMD provides a water service is supported by the record.

STANDARD OF REVIEW

Appeals courts review questions of law *de novo* and questions of fact for clear error. *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998). The power to

fashion an equitable remedy, however, lies within the discretion of the trial court. *Lewis v. Lewis*, 189 P.3d 1134, 1140 (Colo. 2008).

PRESERVATION OF ISSUE

IMC maintains that "there is no evidence" in the record that IMMD provides any water service. Opening Br. at 45. However, during oral argument before the trial court, IMC conceded that IMMD provides "minimal services." *See* Oral Argument (R.Tr., Mar. 11, 2015, at 14). Accordingly, any factual challenge has been waived.

i. This issue is moot.

IMC asks this Court to hold that IMMD is required to operate the Plan and issue an injunction preventing IMMD from acting as a metropolitan district until IMMD operates the Plan. Opening Br. at 39. However, the trial court has already provided equitable relief that achieves the same practical effect. Specifically, the trial court held that "IMC may delegate [operation of the Plan] to IMMD or turn over ownership to IMMD, after which IMC's ongoing obligations regarding the Augmentation Plan shall cease." Order, Mar. 16, 2015, at 8 (CF, p. 5004). If IMC wants IMMD to operate the Plan, it simply needs to convey the Plan to IMMD consistent with the trial court's order. This issue, therefore, is moot. *See Van Schaak Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990) ("A case is moot when the judgment, if rendered, would have no practical legal effect upon the

existing controversy."). Indeed, IMC concedes as much in its Opening Brief. *See* Opening Br. at 43 ("Unless [IMMD] 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."). Thus, the Court should affirm.

ii. The trial court properly concluded that the provision of water services includes two components.

The trial court found that "even though the primary purpose for converting the Park District to a Metropolitan District and amending the service plan was so that IMMD could take over management and operation of the Plan, the amended service plan merely permitted IMMD to perform that function." Order, Mar. 16, 2015, at 9 (CF, p. 5005). IMC asserts that this interpretation "renders large portions of the Service Plan meaningless." This, however, is incorrect.

IMMD's Amended Service Plan states, in relevant part, that:

> The District shall have the power and authority to finance, design, construct, acquire, install, maintain and provide for potable water and for the maintenance, conservation, and community access to water resources within the District. More specifically, the District may manage two earthen-dams with associated seasonal ponds, wetland corridors, a section along the Tarryall Creek, and seasonal springs and ponds....
>
> The District shall have the power and authority to finance, design, construct, acquire, install, maintain and provide services associated with the ownership and administration of the Indian Mountain water augmentation plan, including the plan's water rights, facilities, transfer system, storage reservoirs, access, easements, ditches, gates, and other incidental and appurtenant facilities....

Amend. & Restated Serv. Plan, IMMD, at 7 (CF, p. 44) (emphasis added).

The plain language of the Amended Service Plan imparts two powers on IMMD with respect to water services. First, IMMD has the power to "provide for potable water" and "community access to water." Second, IMMD has the power to provide "services associated with the ownership and administration of the…augmentation plan." The Amended Service Plan, however, does not say that IMMD must exercise all of these powers, or provide any directive on how IMMD is supposed to exercise these powers. As such, there is no textual basis for IMC's argument that IMMD must operate the Plan in order to function as a metropolitan district. To the contrary, the Amended Service Plan specifically contemplates that IMMD may "acquire" the Plan. This language would be illogical if IMMD was required to own and operate the Plan as a precondition for its existence, as there would be nothing for IMMD to acquire. To be sure, if the parties had intended IMMD to own and operate the Plan as a precondition of existence, the Park County Commissioners would not have approved the reorganization of the Park District until IMMD acquired the Plan.

Moreover, IMC's argument is misplaced. As IMC sets forth in its Opening Brief, in order to prevail, IMC was required to establish, *inter alia*, that IMMD had made a "material departure" from the Amended Service Plan. *See* C.R.S. § 32-1-207(2)(a). This was a question of fact. *See Id.* IMC does not argue that IMMD

has materially departed from its Amended Service Plan, and given the unique circumstances of this case, the trial court could reasonably conclude that IMMD has not materially departed from the Amended Service Plan. First, the trial court imposed an equitable remedy which specifically addresses IMC's and IMMD's responsibilities with respect to the operation of the Plan. Second, the only obstacle preventing IMMD from operating the Plan is IMC's unilateral decision to continue to hold title to the Plan. The trial court, therefore, did not err, and this Court should affirm.

iii. The trial court's finding that IMMD provides a water service is supported by the Record.

IMC asserts that, even if the trial court correctly interpreted the Amended Service Plan, there is no evidence in the record to support the trial court's conclusion that IMMD provides a water service. Opening Br. at 44-47. IMC, however, conceded during oral argument that IMMD provides some water service. *See* Oral Argument (R.Tr., Mar. 11, 2015, at 14). To be sure, IMC's Opening Brief lists numerous examples of water services that IMMD provides. *See* Opening Br. at 44-45. For example, IMC states that the "District maintains two earthen dams." *Id.* at 44. IMC, however, asserts that the trial court impermissibly relied on this evidence because "the record establishes that the District has abandoned the seasonal ponds behind the dams." *Id.* But IMC did not bring an

abandonment claim against the seasonal ponds; and this Court cannot pass upon such a claim for the first time on appeal. *See, e.g.*, *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 552 (Colo. 2000) (listing elements of abandonment).

Moreover, the trial court's findings are supported by the record:

1. IMMD holds three well permits for the use and benefit of the Indian Mountain Community.[12] Testimony of Glenn Haas (R.Tr., Mar. 9, 2015, p. 145).

2. The parties stipulated that IMMD is the owner of an augmentation certificate from Headwater Authority of the South Platte ("HASP"). Order, Mar. 16, 2015, at 4 (CF, p. 5000).

3. Glenn Haas testified that the HASP certificate was for "a well that's associated with a lodge in Indian Mountain. Testimony of Glenn Haas (R.Tr., Mar. 9, 2015, p. 145).

4. Glenn Haas testified that the access IMMD provides to a portion of Tarryall Creek is a "water service…for fishing and enjoyment of picnicking and things like that." *Id.* at 147.

5. Glenn Haas testified that "[o]ften times, associated with th[e] list of recreation activities, is the need or desire or wish to stop at the bathroom or to secure more water to hike up the trails of, of the mountain. So, there is a, co-

[12] IMC's assertion that the Plan provides augmentation supplies for two of these permits has no effect on their validity; IMMD may choose how to supply water under its Amended Service Plan.

mingling of interest here between these particular activities [*i.e.*, park and water services]. The sled hill is right behind the comfort station. So, people use the facilities." *Id.* at 147-48.

Based on this evidence, the trial court could reasonably conclude that IMMD had not materially departed from its Amended Service Plan. Therefore, the trial court did not err, and this Court should affirm.

VIII. ATTORNEY'S FEES

IMMD requests its reasonable attorney's fees incurred defending this appeal. *See* C.R.S. § 13-17-102. First, with respect to the constructive trust, IMC did not raise a single legitimate legal or factual issue, and instead, pursued an impermissible piecemeal attack of the trial court's findings. *Page v. Clark*, 592 P.2d 792, 798 (Colo. 1979). Moreover, even if these piecemeal attacks had been legitimate, the first two issues raised were premised on arguments that had been waived, the third was based on a claimed lack of factual support that is directly contradicted by testimony in the record, and the fourth pertained to a federal act that was not at issue in the case. Second, with respect to IMMD's alleged failure to operate the Plan, IMC's argument was moot, addressed the wrong legal and factual issues, and asserted there was no evidence in the record to support factual findings that were not only uncontroverted, but which IMC had conceded.

As such, this appeal is an enormous waste of time and resources. Nevertheless, because of the importance of this case to IMMD and the Owners, IMMD could not simply point out the *prima facie* failings of IMC's arguments. Instead, as access to drinking water is ultimately at stake, IMMD was compelled to comb through over 5,000 pages of record and four days of trial testimony to demonstrate that IMC's arguments are not only ungrounded in the law, but they do not have any basis in fact. The Owners (who are taxed to pay the legal fees incurred by IMMD) should not have to pay to defend their basic necessities against these groundless and frivolous attacks. Accordingly, IMMD respectfully requests that the Court award its reasonable attorney's fees.

IX. CONCLUSION

For any and all of the foregoing reasons, IMMD asks that this Court affirm the trial court and grant IMMD its reasonable attorneys' fees incurred in defending this appeal.

Respectfully submitted this 31st day of December, 2015.

HILL & ROBBINS, P.C.

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E-filed pursuant to C.A.R. 30
Duly signed original on file
at Hill & Robbins, P.C.

CERTIFICATE OF SERVICE

I certify that on the 31st day of December, 2015, a true and correct copy of the above Answer Brief, together with complete copies of all attachments was served by e-filing via ICCES and addressed to the following:

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