DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway, Golden, CO 80401	DATE FILED September 16, 2024 10:42 PM FILING ID: F44F7A5EB8F4A CASE NUMBER: 2019CV30887
Plaintiff: BIG SKY METROPOLITAN DISTRICT NO. 1, a quasi-municipal corporation and political subdivision of the State of Colorado, v. **Defendant:** GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and subdivision of the State of Colorado.	Case No. 2019cv30887
Plaintiff: CDN RED ROCKS, LP, a Colorado limited partnership, v. **Defendant**: GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and subdivision of the State of Colorado	Case No. 2019cv31158
Plaintiff: CARDEL HOMES U.S. LIMITED PARTNERSHIP, a Florida limited partnership, v. **Defendant**: GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and subdivision of the State of Colorado	Case No. 2019cv31250 ▲ COURT USE ONLY ▲
Attorneys for Plaintiff Big Sky Metropolitan District, No. 1 Charles E. Norton, #10633 CHARLES E. NORTON, ATTORNEY & COUNSELOR AT LAW, P.C. 600 17th Street, Suite 2150S Denver, CO 80202 Telephone: 303-292-6400 Fax: 303-292-6401 cnorton@nortonsmithlaw.com	Consolidated Case No. 2019cv30887 Division: 2

BIG SKY METROPOLITAN DISTRICT NO. 1'S TRIAL BRIEF

Plaintiff Big Sky Metropolitan District No. 1 ("Big Sky"), through its undersigned counsel, submits the following Trial Brief:

INTRODUCTION

Big Sky has brought four claims for relief in its Complaint: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing that is implied in every contract entered into in the state of Colorado; (3) that the Resolution of the Board of Directors of the Defendant Green Mountain Water and Sanitation District ("Green Mountain") enacted on April 9, 2019 and purporting to terminate the Intergovernmental Agreement for Extra-Territorial Sewer Service between Green Mountain and Big Sky that had originally been entered into on May 8, 2018 (the "Big Sky IGA") violated the provisions of Article II, section 11 of the Colorado Constitution and is null, void, and of no force or effect; (4) promissory estoppel.

For each of these claims, Big Sky will set forth the elements as stated in Colorado law and will summarize the evidence that proves those elements. Big Sky will then discuss the affirmative defenses that Green Mountain has raised against each claim and the evidence that disproves those defenses.

ARGUMENT

I. BIG SKY'S CLAIMS

A. Big Sky can prove the elements of a breach of contract.

Under Colorado law, a breach of contract claim has four elements: "(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." *Matthys v. Narconon Fresh Start*, 104 F.Supp.3d 1191, 1204 (D.C. Colo. 2015).

Further, "An anticipatory repudiation of contract may occur upon a party's definite and unequivocal manifestation of its intention that it will not perform as required by the contract, "*Johnson v. Benson,* 725 P.2d 21 (Colo.App.1986), and so long as the repudiating party refuses to retract and continues its repudiation, the nonbreaching party may still elect to treat such repudiation as a breach. *Highlands Ranch University Park, LLC v. Uno of Highlands Ranch, Inc.*, 129 P.3d 1020, 1024 (Colo. App.2005).

Existence of a Contract

Green Mountain and Big Sky had a valid contract. The evidence will show that the Big Sky IGA was approved by a unanimous vote of the Green Mountain Board of Directors on May 8, 2018, and by the Big Sky Board on May 14. The IGA was executed by Mr. Carl Mulay, President of the Green Mountain Board, and Mr. Tom Morton, President of the Big Sky Board who is also the principal development consultant for CDN Red Rocks LP ("CDN"), the owner of the property located within Big Sky. This contract is entitled to presumption of validity. "In the absence of evidence justifying a contrary inference, it will be presumed that the parties to a contract intended to form a lawful and enforceable agreement." *Great W. Producers Co-op. v. Great W. United Corp.*, 613 P.2d 873, 878 (Colo. 1980).

The Big Sky IGA was the product of full and arm's length negotiations between Green Mountain and Big Sky. Big Sky was represented by the undersigned counsel, Charles Norton, and Green Mountain was represented by Jennifer Ivey of the firm of Icenogle Seaver Pogue. Ms. Ivey and T. Edward Icenogle had represented Green Mountain for a number of years prior to the Big Sky IGA.

Ms. Ivey worked primarily from a draft of the Big Sky IGA that was patterned closely after the Fossil Ridge agreement of 2014. A comparison of the two documents reveals that a majority of the language in the Fossil Ridge IGA is also in the Big Sky IGA.

Partial Performance by Both Parties

Prior to the execution of the IGA, the parties had begun work on the lift station, force main, and flow equalization system which is the focal point of this suit as defined in the Court of Appeals opinion and mandate remanding this case for trial. Green Mountain sent Big Sky a "will-serve" letter in September of 2015, and the parties executed two documents entitled "Memorandum of Understanding," dated August 31, 2015 ("First MOU") and "Amended and Restated Memorandum of Understanding" dated April, 2017 ("Second MOU") (collectively, the "MOUs").

From 2015 through April, 2018, the parties funded all of the engineering, legal, and other expenses to develop the Big Sky IGA through deposits into the "Big Sky Deposit Fund," made upon the submission of invoices by Green Mountain. The first of these invoices, #001, was unusual in form. The bill was first sent to Norton & Smith, special counsel to the Big Sky District, and then passed on to Mr. Morton. Green Mountain then sent a second version of invoice #001, this time addressed to CDN Red Rocks, LP, which paid the invoice in full.

This invoice #001 attached two invoices for payment by CDN on behalf of Big Sky, one for legal fees rendered to Green Mountain and the other for engineering services pertaining to a trunk line analysis. Every other invoice, nos. 002 through 006, was sent to CDN and requested a deposit, from which Green Mountain drew to pay its expenses. In no other instance other than in connection with invoice #001, sent three years prior to the execution of the Big Sky IGA, did

Green Mountain send Big Sky invoices from third-party vendors for services for which Green Mountain sought "reimbursement" from Big Sky.

After the Big Sky IGA was signed in May of 2018, Big Sky and Green Mountain continued to pursue the lift station, flow equalization, and force main project. Big Sky's engineer and Board member, Mr. Todd Johnson, met with Terry Kenyon, the long-time engineer for Green Mountain, to discuss the design and timing of the project. Mr. Kenyon and his staff then prepared a site application to send to the Colorado Department of Health and Environment (CDPHE) as the initial step in obtaining review of the lift station, flow equalization, and force main project.

This work on the site application was fully cooperative. Green Mountain sent an invoice to CDN, #006, for a deposit to be applied toward this work, which was paid by CDN in full.

This work was paid for through invoice #006, sent in June of 2018, which was once again in the form of a request to CDN to make the "Big Sky Deposit" in the amount of $20,000.00. This covered all of the engineering and legal expenditures to date and also left a small surplus.

Anticipatory Repudiation and Breach of Contract

The evidence will show that Green Mountain abruptly changed course after the election of three new directors on May 8, 2018. These three individuals, Jeff Baker, Alex Plotkin, and Adrienne Hanagan ("the New Directors") were recruited to run for the Green Mountain Board by David Weichman, a former City Councilman and anti-growth activist in Lakewood. Mr. Weichman, who is also a member of the Green Mountain Board, has often expressed hostility to special districts because they allow developers to charge a lower price for homes, which Mr. Weichman believes encourages people to move to Lakewood.

After they took office in June of 2018, the New Directors held a series of meetings with anti-growth activists including Mr. Tom Stocker and Ms. Rita Bertolli. Prior to taking their oaths of office, the New Directors were ignorant of the Open Meetings Law and so simply met as a group of three in secret without posting notice of the meetings. Sometime after they took office, the New Directors employed a "traveling quorum" to make decisions in which two Board members would meet (usually Mr. Plotkin and Mr. Baker) and then inform the third person after the fact if they needed to pass a formal resolution or motion ratifying their policy. This allowed the New Directors to exclude the other two Board members, Carl Mullay and Brad Morrell, from decision making since they were holdovers from the old Board who had voted in favor of the Big Sky IGA and who also continued to believe that it was a favorable deal for Green Mountain.

On June 25, 2018, Mr. Terry Kenyon, the longtime engineer for Green Mountain who was then a principal with Merrick Engineering, gave a detailed presentation regarding the Big Sky IGA to a study session of the Green Mountain Board of Directors. Mr. Kenyon emphasized that Big Sky would be paying all costs associated with serving the development and that Green Mountain could enjoy System Development Charges (SDF's) ranging from $3,900,000.00 to $5,700,000 based on the development plans for properties within Green Mountain. This presentation was treated with indifference by the New Directors, and some of them stated the opinion that Mr. Kenyon was "on the take" from developers in Big Sky despite a complete lack of proof.

At this time, the New Directors also met with John Henderson, then a resident of Solterra and attorney with the Jefferson County Public Defender's Office. Mr. Henderson is an activist who opposes special districts and what he regards as their abuses. On September 4, 2018 Mr. Henderson presented the New Directors with a "Preliminary Evaluation" of the Big Sky IGA that

included a number of false and misleading statements, including that the proponent of the Big Sky IGA and owner of the project was Brookfield Residential Properties (it is not, CDN is, and they are wholly separate companies without common ownership), that Mr. Morton was currently an employee of Brookfield (he had separated from them some time before), that the sewer system maintained by Big Sky would be operated by it at a profit, and that the Big Sky IGA was outside the statutory authority of Big Sky under its Service Plan.

The Green Mountain Board President, Adrienne Hanagan, sent two letters on September 4 and November 2, 2018 expressing concerns about the IGA. Mr. Henderson drafted these letters, which were masterpieces of obfuscation, intended to put landowners "on notice" that the Green Mountain Board had doubts about the legality of the Big Sky IGA and that Green Mountain was in effect "suspending" the IGA. The November 2 letter purported to impose eight new "conditions precedent" on sanitary sewer service, all of which were either already addressed in the Big Sky IGA or attempts to amend an already existing contract without Big Sky's consent.

Of the eight conditions, perhaps the most cynical was number 7, which said that service was contingent upon "Confirmation by (Green Mountain) that is has sufficient capacity and that its system is engineered properly to accept the wastewater." This came no less than two weeks after the Green Mountain Board had instructed Mr. Kenyon to stop all engineering work on the lift station and flow-equalization project, which was intended entirely to address any capacity or other Green Mountain system issues that might exist.

Mr. Johnson and Mr. Morton were notified by Ms. Cudahy on October 15, 2024, that Mr. Kenyon and Green Mountain staff had been instructed by the Board of Directors of Green

Mountain to stop all work on the Big Sky project. The lift station site application process could not be completed, and Green Mountain subsequently withdrew it.

In the meantime, and following Mr. Henderson's counsel, the Green Mountain Board then decided to involve the City of Lakewood in a public hearing process before the City Council where various anti-development groups would appear to attack the Big Sky IGA. Lakewood sought an opinion from its City Attorney, Tim Cox, about the legality of the IGA and whether it was within the scope of Big Sky's Service Plan. Mr. Cox opined that the IGA was within the scope of the Service Plan, which caused him to be attacked relentlessly by Mr. Henderson, who insisted that Mr. Cox was too close to developers and that he had been in improper contact with Big Sky's general counsel, White Bear Ankele Tanaka & Waldron, P.C.

Lakewood then sought yet another opinion on the subject from a third party lawyer, Tom Mullans, who was from Pueblo and perceived as not being part of the Front Range special district community. Mr. Mullans also opined that the Big Sky IGA was within the scope of Big Sky's Service Plan. The Green Mountain Board, which was controlled by the New Directors, chose to ignore all of these lawyers and instead defer to Mr. Henderson.

The Green Mountain Board then terminated its legal counsel of many years, the firm of Icenogle Seaver Pogue, P.C., including T. Edward Icenogle and Jennifer Ivey, who had worked on negotiating and drafting the Big Sky IGA. It issued a Request for Proposal on August 15, 2018 requesting special legal counsel "for independent review of contractual agreements pertaining to extraterritorial service." Among the many issues for which the Board requested advice was the "description of any possible negative ramifications, aside from possible litigation, to the District in the event that any party sought to invalidate the IGA's or stop all work related to them." The

Green Mountain Board also sought advice about a "description of any possible litigation and likely results in the event that any party stopped all further engineering work related to the IGAs."

Green Mountain selected Brian Matisse of the firm of Burg Simpson Eldredge Hersh Jardine P.C. to act as special counsel. Because Mr. Icenogle and Ms. Ivey had been terminated as general counsel, Mr. Matisse also acted in that capacity for a few months.

Mr. Matisse then sent a carefully crafted letter to the Lakewood City Council dated January 25, 2019. In it, he noted that he had received an Executive Summary of Mr. Cox's opinion and that "I (Mr. Matisse) appreciate the work performed by your office and do not disagree with the opinions expressed in that document,…". The central opinion in the Cox letter was that "there is no hard line as to what constitutes material modification (of a special district service plan), but it is unlikely that the (Big Sky IGA) rises to that level."

Mr. Matisse then attempted to raise some additional issues that that he believed Mr. Cox had not addressed such as the multi-district structure employed by Big Sky. Mr. Mattisse also contended that the Cox opinion "was not binding on the City of Lakewood" and that Green Mountain for that reason "has requested that the Lakewood City Council formally consider a resolution that providing extraterritorial service under the IGA would not be a material modification of the Big Sky Service Plan."

Despite the modesty of Mr. Mattisse's effort, it outraged the New Directors on the Green Mountain Board. Mr. Matisse was forced to withdraw his January 25 letter and instead send a letter on February 4, 2019 stating that his previous letter had not been approved by the Green Mountain Board of Directors. Instead, he said that "It is my understanding that at that meeting 'the Board directed legal counsel to draft a letter stating that the District (Green Mountain) will take no further

action or perform any additional work as related to the Big Sky IGA until the Big Sky Metro District is brought into compliance by the City of Lakewood City Council as related to the expansion of said District Boundaries and purposes provided by the IGA,'" thus stating a direct repudiation of the Big Sky IGA by Green Mountain.

On January 28, 2019 Mr. Matisse gave notice of his intention to withdraw as special counsel to the Green Mountain Board and as interim general counsel. He was replaced by Jo Timmins, who acted as defense counsel in this lawsuit until replace by current counsel.

With Mr. Matisse, Ms. Ivey, and Mr. Icenogle safely out of the way, Green Mountain and the New Directors proceeded to implement Mr. Henderson's strategy to terminate the Big Sky IGA. Henderson drafted a Termination Resolution, which was discussed at his home using the "traveling quorum" methodology described earlier. Ms. Hanagan was present when the copies were made by Rita Bertolli at her residence. Copies of the Resolution were then distributed to the Green Mountain Directors at their meeting held on April 9, 2019.

The resolution was then approved by a 3-2 vote, with Mr. Morrell and Mr. Mullay abstaining but Mr. Mullay going on the record as noting certain objections to the Resolution. The current lawsuit was then commenced by Big Sky by filing its Complaint on June 6, 2019.

Section 10.2 of the Big Sky IGA governs termination of the contract. None of the "Events of Default" by Big Sky defined in Section 10.2 B. took place. Further, Green Mountain never gave notice by registered, certified mail of any event of default by Big Sky that it believed had taken place. The Termination Resolution of April 9, 2019 was a nullity, and amounted to anticipatory repudiation and a breach of contract by Green Mountain.

This anticipatory repudiation of the contract by the Termination Resolution, together with halting all engineering and staff work on the Big Sky IGA, suspending the IGA through the letters of September 4 and November 2, 2018, and instructing Mr. Matisse to tell the Lakewood City Council that Green Mountain would not take any further action or permit work on the Big Sky IGA until the City Council brought Big Sky into compliance with Mr. Henderson's intepretation of the Big Sky Service Plan all constituted a breach of contract, entitling Big Sky to all of the remedies outlined in Section 10.1 of the Big Sky IGA, including but not limited to an order for specific performance or damages.

B. Big Sky can prove the elements of a breach of the covenant of good faith and fair dealing.

Colorado recognizes that every contract contains an implied duty of good faith and fair dealing. *See Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995). The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations. Id. Good faith performance of a contract involves "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Id.

While the implied covenant of good faith and fair dealing may not be used to vary agreed upon terms of the contract, it may be applied to effectuate the intent of the parties or honor their reasonable expectations when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time. Id. Green Mountain has considerable discretion under the Big Sky IGA about the timing of when the lift station, flow equalization, and force main would be constructed, and, according to Mr. Kenyon, it did not have to begin any construction until after all related costs had been advanced in full by Big Sky.

Green Mountain abused this discretion and acted in bad faith. After the New Directors came into office, Green Mountain cast about for theories to justify invalidating the Big Sky IGA. No later than October 15 of 2018, and as early as September 4, 2018, it instructed its engineers and staff to halt all work on the Big Sky project, thereby forcing the cancellation of the site plan application and rendering completion of the force main, flow equalization, and lift station impossible. This was all done with the intention of depriving Big Sky of its reasonable expectations that sewer service would be extended to properties within Big Sky.

All of this constitutes a breach of the covenant of good faith and fair dealing contained in the Big Sky IGA and justifies both an award of specific performance and damages.

C. Big Sky can prove its claim under Article II, section 11 of the Colorado Constitution.

Colorado's constitution provides: "No ex post facto law, nor law impairing the obligation of contracts, *or retrospective in its operation,* ... shall be passed by the general assembly." Colo. Const. art. II, § 11 (emphasis added). A law violates article II, section 11's prohibition if it (1) impairs a vested right; or (2) creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. *Aurora Public Schools v. A.S.*, 531 P.3d 1036, 1047 (Colo. 2023). This right to be free of retrospective legislation protects political subdivisions of the state of Colorado as well as individuals. Id. at 1045. There is no "public policy exception" to the ban on retrospective laws in article II, section 11 of the Colorado Constitution; a legislative body cannot simply come up with some "rational basis" to take away a vested right and thereby salvage an otherwise unconstitutional retrospective law. Id. at 1049.

A valid contract that has been duly approved and executed creates a vested right. *City of Golden v. Parker*, 138 P.3d 285, 293 (Colo. 2006). Green Mountain simply took away Big Sky's

rights under the Big Sky IGA without any justification and to further policy goals of the New Directors about how CDN and Cardel should use their property that were contrary to the zoning put into place by the Lakewood City Council. The Termination Resolution of April 9, 2019 is null, void, and without legal force or effect.

D. Big Sky can prove its claim of promissory estoppel.

The elements of promissory estoppel are: (1) the promisor made a promise to the promisee; (2) the promisor should reasonably have expected that the promise would induce action or forbearance by the promisee; (3) the promisee in fact reasonably relied on the promise to the promisee's detriment; and (4) the promise must be enforced to prevent injustice. *Patzer v. City of Loveland*, 80 P.3d 908, 912 (Colo. App. 2003).

The evidence will support each element. Green Mountain promised many times that it would provide sanitary sewer transmission service to the Rooney Valley, including the properties within Big Sky. This included the will serve letter provided to Big Sky in August of 2015; the representations in the intergovernmental agreement with Fossil Ridge in 2014 that Green Mountain wished to serve this area and insisting that Fossil Ridge oversize its sewer system to accommodate sewage from Big Sky; statements made in the documents entered into to when the lawsuit by Green Mountain and Big Sky against Fossil Ridge was settled; and of course, in the Big Sky IGA itself.

Green Mountain clearly intended that Big Sky would rely on these promises and that they would induce action. Green Mountain caused Big Sky to fund the litigation against Fossil Ridge. It required Big Sky to enter into two memorandums of understanding, under which Big Sky was to deposit money in advance to cover Green Mountain's engineering and legal expenses incurred

to provide sewer service to Big Sky, including those incurred for the lift station, flow equalization system, and force main contemplated by the Big Sky IGA.

This reliance by Big Sky on Green Mountain's promises was reasonable. Up until the New Directors came into office in May of 2018, Green Mountain and Big Sky had worked together to provide sewer service to Big Sky. Green Mountain had been providing the Solterra subdivision with sanitary sewer service for a number of years, and Big Sky had no reason to think that Green Mountain would not want to undertake service to Big Sky as well.

Big Sky's reliance on Green Mountain's promises has proven to be detrimental to Big Sky. It has incurred significant expenses to pay for the Fossil Ridge litigation, to pay Green Mountain's engineers and lawyers, and to pay its own engineers and lawyers to pursue and draft the Big Sky IGA.

Green Mountain's promises should be enforced to avoid injustice. The lack of access to sanitary sewer service will deprive properties within Big Sky of substantially all of their market value. Trying to develop alternative ways of transmitting wastewater to Metro will involve complexity, risk, and additional expenses. Green Mountain is the logical choice to provide sanitary sewer service to Big Sky, as engineers looking at the situation have long concluded.

Green Mountain's promises must be enforced.

II. GREEN MOUNTAIN'S AFFIRMATIVE DEFENSES LACK MERIT

A. The Local Government Budget Law.

In reversing a previous order granting summary judgment in this case, the Court of Appeals left open a narrow issue under the Local Government Budget Law, section 29-10-110, C.R.S. (the "LGBL"). Focusing on the lift stations, flow equalization, and force mains that are part of the Big

Sky Sewer System, the Court of Appeals first held that the Big Sky IGA unambiguously provides that Big Sky will ultimately own and maintain that infrastructure, and that Big Sky will be responsible for any of Green Mountain's design and construction costs associated with this infrastructure. The Court further held that the Big Sky IGA was silent with respect to how Big Sky will pay Green Mountain for these design and construction costs. (Opinion of the Court of Appeals, page 12).

The Court also left open the issue of whether the LGBL applies to these types of districts and this type of contract at all. (Opinion, page 11). In passing, the Court cited section 29-1-203(1), C.R.S.

1. Section 29-1-203(1), C.R.S. takes this type of intergovernmental agreement outside of the LGBL.

Section 29-1-110(2), C.R.S. provides that multiple-year contracts for expenditures may be entered into "where allowed by law or subject to annual appropriation." However, section 29-1-110(2) further states that:

> Governments may cooperate or contract with one another to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt, only if such cooperation or contracts are authorized by each party thereto with the approval of its legislative body or other authority having the power to so approve. Any such contract providing for the sharing of costs or the imposition of taxes may be **entered into for any period**, notwithstanding any provision of law limiting the length of any financial contracts or obligations of governments. (Emphasis supplied).

These statutory sections were exhaustively argued in the summary judgment briefing and Big Sky will not repeat those arguments in detail here. By way of summary, both Green Mountain and Big Sky are authorized to carry out water and sanitation functions. In fact, their powers in this area are essentially identical, since as a metropolitan district Big Sky is authorized to exercise all

of the powers of a water and sanitation district. The Big Sky IGA involves the cooperation of both entities to provide sewer service to properties within Big Sky and in a larger Big Sky Potential Expanded Service Area. This contract could be entered into for any period without being made subject to annual appropriation.

2. The Big Sky IGA as intended by the parties did not bind either Green Mountain or Big Sky to a multiple-year fiscal obligation or expenditure prohibited by the LGBL.

Further, assuming arguendo that the LGBL does apply, the statute does not bar the Big Sky IGA. As the Court of Appeals reasoned, "whether Big Sky will reimburse or advance these costs dictates, at the very least, whether the IGA may commit Green Mountain to multiple years of expenditures without making those expenditures subject to annual appropriation…". (Opinion, page 19).

The evidence will show that from 2015 through the parties' entry into the Big Sky IGA on May 8, 2018, the preliminary engineering work for the flow equalization, force main, and lift station project was financed through advances by Big Sky pursuant to two memorandums of understanding, both of which were subject to annual appropriation and clearly not intended to constitute a multiple fiscal year obligation. After the parties entered into the IGA, they continued this practice, and Big Sky was invoiced only for deposits to be drawn down by Green Mountain at Green Mountain's own discretion. There is no evidence that the parties intended to enter into a multiple fiscal year obligation.

B. The Big Sky IGA did not violate TABOR.

Article X, section 20 of the Colorado Constitution requires voter in approval in advance for the creation of "any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever" without adequate present cash reserves pledged for its repayment.

For the reasons argued in section II A. 2, Green Mountain incurred no such obligation. It was not required to spend any given amount in any fiscal year, or to construct the facilities in any given time frame. It was not required to construct anything without Big Sky first advancing the money to do so. Its only commitment was to accept Big Sky's wastewater and to reserve capacity in its system to do so. The Big Sky IGA does not violate TABOR.

Further, the IGA did not constitute a multiple-fiscal year direct or indirect district debt or other financial obligation for Big Sky either. Instead, Green Mountain and Big Sky were to deal with each other in good faith to time the construction of the lift station, flow equalization, and force main when needed to carry out the purposes of the project. If Big Sky was ready to fund any particular stage of construction, it would advance the funds so that Green Mountain could go forward.

Equally important, assuming once again for the sake of argument that the Big Sky IGA was a multiple fiscal year obligation for Big Sky, its voters had approved the obligation in advance when the District was organized in January of 2015. While Green Mountain sneers at the number of eligible electors involved in the organizational election that was ordered by this Court in 2014, the election was perfectly regular and in accordance with Colorado law. Any multiple-year fiscal obligations for sanitary sewer service were approved in advance.

The Big Sky IGA did not violate TABOR.

C. The Big Sky IGA was not outside of the authority granted by Big Sky's Service Plan.

At various stages in this litigation, Green Mountain has argued that the Big Sky IGA was outside the scope of the authority granted by the Service Plan approved by the Lakewood City Council on September 22, 2014. The evidence will not support this theory.

First, the Service Plan clearly gives Big Sky the authority to provide service both inside and outside its boundaries. As provided in the first paragraph of Section V. A of the Service Plan, PX1, page 5, "The Districts shall have the power and authority to provide the Public Improvements and related operation and maintenance services within and without the boundaries of the (Big Sky) Districts as such power and authority is described in the Special District Act…".The Special District Act in turn provides that on behalf of the special district, the Board of Directors has the power "To furnish services and facilities without the boundaries of the special district and to establish fees, rates, tolls, penalties or charges for such services and facilities." See section 32-1-1001(k), C.R.S.

The" Public Improvements" were defined as including "part or all of the improvements authorized to be planned, designed, acquired, constructed, installed, relocated, redeveloped and financed as generally described in the Special District Act." PX 1, page 4. The Special District Act authorizes storm or sanitary sewers, or both, and treatment and disposal works and facilities, and all necessary or proper equipment and appurtenances incident thereto. *See* section 32-1-103(18), C.R.S. Big Sky was fully authorized to accept wastewater from outside its boundaries and to convey it to Green Mountain's system for transmission to Metro.

At various points in its attack on the Big Sky IGA, Green Mountain has contended that even if Big Sky has the authority to provide sewer service outside of its Service Area, the expansion

of service was of such a magnitude as to constitute a "material modification" of the Service Plan which is prohibited by section 32-1-207, C.R.S. However, Big Sky will demonstrate that this argument is without evidentiary support.

First, Green Mountain has no standing to raise this argument. Section 32-1-207(3)(a), C.R.S. provides that a motion to enjoin a material modification of a service plan could be brought in this instance only by Big Sky upon its own motion or upon the motion of an interested party as defined in section 32-1-204(1), C.R.S. Because Green Mountain does not levy an ad valorem property tax, it is not an interested party as defined in section 32-1-204(1), and it cannot take unilateral action with regard to a material modification.

Further, the purported "expansion" of service is nowhere close to a material modification. In *Bill Barrett Corporation v. Sand Hills Metropolitan District*, 411 P.3d 1086 (Colo. App. 2016) the Court of Appeals held that the relocation of the **taxing boundaries** of a metropolitan district entirely out of the Town of Lochbuie, which the Sand Hills District was originally intended to serve, to instead serve a massive area of more than 13,000 acres in unincorporated Weld County was a change of a "basic and essential" nature and a material modification of the Sand Hill's District's Service Plan.

Big Sky does not intend to expand or alter its taxing boundaries at all, and in fact under the Service Plan it could not do so without Lakewood's approval. Instead, Green Mountain insisted and Big Sky consented through the Big Sky IGA to provide extra-territorial service to an area to the west of the District which has variously been called the "3 Dinos" or "Green Tree" properties. As noted in the site plan application which Mr. Kenyon submitted to the Colorado Department of Health and Environment, PX 19, the addition of the Green Tree properties would add only 287

single family equivalent (EQR) flows to the Big Sky Sewer System, versus 1,182 EQRs for properties within the Big Sky district boundaries and 588 for the Cardel Homes property. No additional facilities would have to be built by Big Sky; instead, the Big Sky Sewer System would be oversized to accommodate the additional flows. This is not a change to the Service Plan of a basic or essential nature, and it does not constitute a material modification.

CONCLUSION

The overwhelming preponderance of the evidence will support a judgment in Big Sky's favor. This includes a decree of specific performance that the Big Sky IGA be enforced in accordance with its terms, and any reliance damages that Big Sky proves at trial.

DATED this 16th day of September, 2024.

s/Charles E. Norton
Charles E. Norton, #10633
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CERTIFICATE OF SERVICE

I certify that on the 16th day of September, 2024 a true and correct copy of the foregoing was served electronically via ICCES to the following:

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