

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway , Golden, CO 80401	DATE FILED: October 21, 2019 4:44 PM FILING ID: B3E8AA9D59F0C CASE NUMBER: 2019CV30887
BIG SKY METROPOLITAN DISTRICT NO 1, Plaintiff  v.  GREEN MOUNTAIN WATER AND SANITATION DISTRICT, Defendant	▲ COURT USE ONLY ▲
AMICUS CURIAE  John Henderson. #50508 2167 S. Juniper St. Lakewood, Colorado 80228 <a href="mailto:Jkhjr1@gmail.com">Jkhjr1@gmail.com</a> 316-295-0084	Case No. 19 CV 30887   Division 2
<b>AMICUS CURIAE BRIEF</b>	

Amicus respectfully provides the following in opposition to the plaintiff's motion for summary judgment and in support of the defendant's motion for summary judgment.

Facts

A. The Plaintiffs Have Many Ways to Obtain Sewer Without the Big Sky IGA

1. The plaintiffs in these cases repeatedly assert that they cannot develop their land without the Big Sky Intergovernmental Agreement ("Big Sky IGA"). That is not accurate.

2. As will be discussed in more detail below, the Big Sky IGA attempted to create a new sanitation district - an act reserved to the City of Lakewood and Jefferson County through a process including public hearings - not an act born of an agreement approved by directors the very night they are being voted out of office. The Big Sky IGA attempted to create a private profit sanitation district run by a single individual representing investment partners in Canada whose sole purpose is to develop the land to a point where it will generate a profit and sell it. It attempted to create a private sanitation district unaccountable for the foreseeable future to the public it ostensibly serves.

3. Although the Big Sky IGA is defective at many levels and is bad public policy, there are at least four ways for the plaintiffs to obtain sewer service for their property without the Big Sky IGA.

4. One way for the plaintiffs to obtain sewer service for their land is to apply to the Lakewood City Council for a modification to the Big Sky Metropolitan District Service Plan to make Big Sky a sanitation district and authorize the distribution and management of sewer services outside its service area. Over the past year, on at least three separate occasions, the Green Mountain Water and Sanitation District expressly encouraged Big Sky to obtain that modification to their service plan from the City of Lakewood. The process for obtaining a modification to the Service Plan requires public hearings. Big Sky failed to make the application to the City of Lakewood for a modification to its service plan.

5. A second way for the plaintiffs to obtain sewer service for their land is to make application directly to the Metro Wastewater Reclamation District to connect directly to their system without connecting to the Green Mountain system. This would also include establishing Big Sky as a new sanitation district through the processes, including public hearings before the Lakewood City Council and Jefferson County Board of Commissioners, established by the special district statutes under Title 32.

6. A third way for the plaintiffs to obtain sewer service for their land is to apply to include their land within another sanitation district such as Green Mountain. This "inclusion" process is expressly outlined in Title 32. This would also entail public hearings.

7. A fourth way for the plaintiffs to obtain sewer service for their land is to work with Green Mountain to modify Green Mountain's Service Plan to allow Green Mountain to provide sanitation service outside its service area and enter into intergovernmental agreements to provide sewer to each of the plaintiffs' separate properties. This would also entail public hearings.

B. The Public Policy Struggle Over Who Will Be Responsible for an Essential Public Service

8. The parties have been engaged over the past year in a struggle over who will determine public policy as it relates to providing a critical and essential public service - sewer.

9. The Big Sky IGA is an attempt by the private development community of plaintiffs to completely control the delivery of sanitation services to the undeveloped Rooney Valley. The Big Sky IGA establishes a private developer as the owner and operator of a brand new sanitation district. They were not elected. They will not be accountable to the public for the foreseeable future. The Big Sky IGA provides that the developer may charge whatever it deems reasonable for its services to its future customers - with no check and balance.

10. As counsel for Big Sky stated to the Lakewood City Council in briefing on this issue a year ago, Big Sky "will essentially act as a master meter for the properties". "Enabling development within the Rooney Valley has the potential to increase property values of the future residents of the [Big Sky] Districts". "The [Big Sky] IGA provides a streamlined approach to

sewer service in the Rooney Valley which has the added benefit of avoiding duplication of facilities and services, and makes sewer facility construction and transmission of wastewater to Green Mountain the most efficient and economical solution, which is all intended to benefit the Districts, the properties serviced and Green Mountain". (Memorandum White Bear to Cox October 15, 2018).

11. In other words, according to the Big Sky developer, their new sanitation district, the new master meter for Rooney Valley, is **good public policy**.

12. But the Big Sky developer was not elected. He is not accountable to the public. And the Big Sky developer procured the Big Sky IGA through an agreement approved by Green Mountain Board members the very night they were being voted out of office. No public hearings. No public accountability. No applications under Title 32.

13. On the other hand, once the newly elected Green Mountain Board members began to ask questions and learn more about the Big Sky IGA, they had significant concerns from a technological, legal, and public policy perspective which were ultimately expressed in their Resolution Terminating the Big Sky IGA on April 9, 2019. The process began in August/September, 2018, and included numerous announcements to the development community and genuine efforts to have Big Sky apply to Lakewood to permit it to become the new master meter for Rooney Valley. Eight months after raising their concerns, followed by no substantive effort by Big Sky to address those concerns other than threats to sue Green Mountain, the Green Mountain Board terminated the Big Sky IGA.

14. The citizens on the Green Mountain Board were elected. They are accountable to the citizens who they represent. They are bound to follow the rules and procedures under Title 32 for providing sanitation services to the residents of their district. They are ultimately responsible for protecting the public interest and establishing public policy for the provision of a critical and essential public service - sewer. And they decided the Big Sky IGA is **bad public policy**.

C. The Big Sky IGA Does Not Simply Provide that Big Sky May Transmit Sewage to the Green Mountain System

15. The plaintiffs go to great pains to declare that the Big Sky IGA simply provides for hooking up one set of pipes to another. Nothing could be further from the truth.

16. First, Big Sky's own attorneys declared to the City of Lakewood that the Big Sky IGA created a new sanitation district that "will essentially act as a master meter for the properties" in Rooney Valley. "The [Big Sky] IGA provides a streamlined approach to sewer service in the Rooney Valley which has the added benefit of avoiding duplication of facilities and services, and makes sewer facility construction and transmission of wastewater to Green Mountain the most efficient and economical solution . . ." (Memorandum White Bear to Cox October 15, 2018).

17. Creating a new "master meter" for Rooney Valley is much more than just hooking up one set of pipes to another.

18. Second, here are defining elements of the Big Sky IGA which provide for the creation of a new sanitation district, not just hooking up pipes:

The Big Sky Sewer System will include a lift station, reservoir, flow equalizer, force mains, monitoring stations and "appurtenant facilities". (Big Sky IGA p. 9) The lift station will move the sewage up hill. The reservoir will hold the sewage until its turn to move uphill. The flow equalizer will keep the pipes from getting overloaded. Monitoring stations will monitor the flow of sewage. All these facilities and equipment will require operational management and maintenance.

The Big Sky Sewer System will require a professional staff, administrative staff and technical staff to run the Big Sky Sewer System. By comparison, the Green Mountain Water and Sanitation District employs 22 people and has a budget of \$13.2 million for operating expenses alone.

Sections 3-1 - 3.7, pages 8-12, of the Big Sky IGA go into great detail about the construction of the new "Big Sky Sewer System" for Rooney Valley. Big Sky alone will be responsible for the construction. Big Sky alone will own the sewer system. Green Mountain will be allowed access to inspect the construction. Green Mountain will be responsible for maintaining the system. (Big Sky IGA p. 8 - 12).

Big Sky will write and enforce the rules and regulations for the Big Sky Sewer System which will comply with the Green Mountain, local, state and federal rules and regulations. (Big Sky IGA p. 19)

If Green Mountain becomes aware of a violation of the Big Sky rules and regulations, Green Mountain must give notice of the violation to Big Sky and Green Mountain may become directly involved if and only if Big Sky fails to act. Green Mountain may step in, in case of an emergency. (Big Sky IGA p. 19).

The "users" of the Big Sky Sewer System are defined as "customers" throughout Rooney Valley who are connected to the Big Sky Sewer System. (Big Sky IGA p. 4)

New customers throughout Rooney Valley must apply for sewer service first to Big Sky, Big Sky will approve or reject the applications and then pass on the approved applications to Green Mountain. The new customers will pay Big Sky for sewer service. (Big Sky IGA p. 8)

Big Sky may charge its customers throughout Rooney Valley any fee which it decides is "reasonable" for sewer services. (Big Sky IGA p. 17).

New users (customers) must also pay Big Sky a proportionate amount of money to compensate Big Sky for building the Big Sky Sewer System. (Big Sky IGA p 7 - 8).

The following additional fees will be charged to new customers: sewer service charge, Big Sky Service Fee, System Development Fee, including engineering costs, construction of a lift station, construction of a flow equalizer, construction of force mains and legal fees.

The Sewer Service Charge and the Big Sky Service Fees are initially paid to Green Mountain. Then half of the System Development Fee is rebated to Big Sky to pay for advances to cover to Green Mountain's costs in setting up the system.

Big Sky will advance itself funds and then agree with itself to pay back those funds (plus profit) in the form of a loan with interest. Then Big Sky will issue bonds to repay itself the loan. The bond debt (including interest on the loan plus interest) will then be paid through property taxes imposed on the new residents. (Big Sky IGA p. 7).

The Big Sky IGA establishing a new Big Sky Sewer System is much more than just hooking up one pipe with another. It creates a new sanitation system and a new sanitation district with all the associated costs, operational management, operational maintenance, staffing, capital investment and liabilities of a sanitation district.

D. The New Green Mountain Board Acted Consistently with Green Mountain's Prior Refusals to Provide Service to Rooney Valley

19. Until the May 8, 2018, election night Big Sky IGA, Big Sky and their derivative developers constantly pushed and prodded Green Mountain to provide sewer service to all of Rooney Valley notwithstanding the unamended limitation in the Green Mountain Service Plan restricting service to the inhabitants of the district.

20. Big Sky could have applied to be included in the Green Mountain district (through public hearings) which would have obligated Green Mountain to provide service. But Big Sky didn't.

21. Despite the constant badgering by Big Sky, Green Mountain consistently maintained, until May 8, 2018, that they would not provide the service.

22. In the two Memorandum Of Understanding between Big Sky and Green Mountain dated August 31, 2015, and April 18, 2017, Green Mountain repeated that it was not agreeing to provide service to Big Sky or the Rooney Valley.

23. In the Fossil Ridge (Solterra) IGA dated November 11, 2014, Green Mountain stated in two separate sections of the IGA that it was not agreeing to provide any sanitation service beyond the Solterra development.

24. In the Big Sky Will Serve Letter dated September 8, 2015, Green Mountain made clear it was contingent upon approval from the Town of Morrison, the City of Lakewood and by inference Jefferson County with respect servicing any property outside the limits of the City of Lakewood. The Big Sky IGA unilaterally designated (by Big Sky) Service Area - which is different from the Service Area approved by Lakewood in 2014 - included property outside Lakewood in Jefferson County and the Town of Morrison. The Will Serve Letter was also contingent upon the existence of an IGA between Big Sky and Green Mountain.

25. In the Cardel Will Serve Letter dated March 28, 2017, providing any service was again contingent upon approval from the Town of Morrison, the City of Lakewood and by

inference Jefferson County with respect to servicing any property outside the boundaries of Lakewood. The Will Serve Letter was also contingent upon the existence of an IGA between Cardel and Green Mountain.

26. The Green Tree Will Serve Letter dated November 28, 2016, providing any services was similarly contingent upon approval from the Town of Morrison, the City of Lakewood and by inference Jefferson County with respect to servicing any property outside the boundaries of Lakewood. The Will Serve Letter was also contingent upon the existence of an IGA between Cardel and Green Mountain.

27. Stream Realty's Will Serve Letter dated June 18, 2018, was from Green Tree District (Three Dinos), not Green Mountain. It stated Green Tree would obtain sewer service from Big Sky.

28. The critical evaluation of the Big Sky IGA by the new board members was not a "sudden turnabout" as alleged by Big Sky. Green Mountain was a reluctant player until May 8, 2018. They had no reason to drive and initiate the development of Rooney Valley. Their sole purpose was to provide sanitation services to the inhabitants of their district, which did not include Rooney Valley.

E. New Green Mountain Board Members Not "Anti-Development"

29. Not simply rubber stamping Big Sky's IGA, not simply going along to get along with the plaintiffs, not giving in to the relentless intimidation the past 8 months, critically thinking and evaluating the creation of a new sanitation district owned and operated for the foreseeable future by a private developer unaccountable to the public - are not equivalent to being "anti-development". It is equivalent to exercising their duty to the public they represent and protecting the public interest. The newly elected Green Mountain board members to a person are not anti-development.

30. Instead, Big Sky's unfounded fears are best illustrated by an email - sent over a year ago and only three months after the new board's election - by Big Sky's counsel, Charles Norton, to the Fossil Ridge (Solterra) District to solicit their (Solterra) filing a lawsuit in order to combat the new board members:

. . . As you may well know, an anti-development group has gained control over the Board of Directors at Green Mountain. Green Mountain has issued an RFP for special counsel to analyze the validity of the sanitary sewer service agreement between Big Sky Metropolitan District and Green Mountain. . . .

. . . I'd like to explore the current position of the Fossil Ridge Board about these issues and discuss what role, if any, Fossil Ridge might play in all of this. . . .

(Charles Norton Email to Solterra August 23, 2018.)

31. This characterization of the newly elected Green Mountain board members clearly existed before the May 8, 2019, election night agreement. This characterization clearly reflects

the reason for the election night agreement. This characterization clearly existed even before the new board members had an opportunity to evaluate the Big Sky IGA. This characterization clearly motivated this wave of lawsuits against the new board members.

## Law

### F. The Big Sky IGA Was Not a Proprietary Contract

32. The plaintiffs repeatedly argue that the Big Sky IGA was simply a contract to provide services - essentially hook up sewer pipes.

33. It was not simply a contract. It was an IGA - an Intergovernmental Agreement.

34. All the decisions cited by the plaintiffs in support of their assertion that the Big Sky IGA is a proprietary contract, not an intergovernmental agreement either predated, or the events predated, the enactment of CRS 29-1-203 which created Intergovernmental Agreements and the 1970 amendment to the Colorado Constitution Article XIV Sec. 18. None of those decisions apply or are relevant to the operation of an IGA.

35. CRS 29-1-203 provides for intergovernmental agreements:

**"(1) 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.

**(2)** Any such contract shall set forth fully the purposes, powers, rights, obligations, and the responsibilities, financial and otherwise, of the contracting parties.

**(3)** Where other provisions of law provide requirements for special types of intergovernmental contracting or cooperation, those special provisions shall control.

**(4)** Any such contract may provide for the joint exercise of the function, service, or facility, including the establishment of a separate legal entity to do so. . . ." CRS 29-1-203 (emphasis added)

36. By its own terms, an IGA is a legislative act.

37. It must be approved by a legislative body. To the extent the Big Sky District Board had only two members at the time the Big Sky IGA was signed, less than the required five members (See, CRS 32-1-305.5, 32-1-902.5 and Colorado Dept. of Local Affairs - Local Government Filings - Director Information.), there was no approval by a legislative body "or other authority" such as the City of Lakewood.

38. The new services proposed by the Big Sky IGA - creation of a new sanitation district to be the "master meter" for Rooney Valley, was not lawfully authorized by the City of Lakewood in the 2014 Big Sky Service Plan. The new Big Sky IGA service area was not lawfully authorized by the City of Lakewood in 2014.

39. The Big Sky IGA states no period of time for its existence.

40. One of the few cases, and the leading case, that describes the characteristics of an IGA is *Durango Transp., Inc. v. City of Durango*, 824 P.2d 48, 52 (Colo. Ct. App. 1991). In that case, the Court defined intergovernmental agreements as legislative acts which are by their very nature "subject to the control of the citizenry" and "since each respective group of citizenry in the City and County can effect change through the electoral process, it follows that if they are dissatisfied with an intergovernmental contract entered into by their responsible governing boards, they can also exercise their rights by recalling the elected officers who approved the contracts." *Durango Transp., Inc. v. City of Durango*, 824 P.2d 48, 52 (Colo. Ct. App. 1991).

41. In this case, the newly elected officials to the Green Mountain board were elected at the same moment the Big Sky IGA was being signed. They, on their own, began to ask questions and raise issues over 8 months giving Big Sky every opportunity to address the new board's concerns. Implicit in the right to recall the officials and the observation that the IGA is "subject to the control of the citizenry", is the right of a new board to revisit an IGA purposefully signed the very night of their election.

42. The new board held numerous public hearings regarding the Big Sky IGA and on April 9, 2019, exercised its duty as publicly elected officials exercising their studied discretion in the public interest, to terminate the Big Sky IGA. The resolution terminating the Big Sky IGA articulated the reasons for their decision.

43. Big Sky and their derivative supporters have several options listed in paragraphs 4, 5, 6 and 7 above. They and their counsel are very resourceful and likely have other alternatives which will comply with the statutes, including public hearings and vetting of the policy and technical issues.

#### G. Special Districts and The Big Sky IGA is a Material Modification

44. The plaintiffs claim that they have unlimited power to provide sanitation services to anyone they want to. That is not accurate.

45. Title 32 creates special districts. And, consistent with this country's governing principles, the statute limits the powers of these new local governments and holds them accountable. Title 32 does not give these local governments a blank check.

46. Under Title 32, the city or the county creates a special district. CRS 32-1-202. In the case of Big Sky, it was created by the City of Lakewood. In the case of Green Mountain, it was created before Lakewood existed through the County Court.



47. Under Title 32, the process begins with a developer filing a proposed Service Plan. CRS 32-202. The City contributes to the content of the Service Plan and must approve the content of the Service Plan. CRS 32-1-202(2) and 203(2). The Service Plan is like a charter, prescribing the limits of the power given to this new government.

48. There are three critical elements to the Service Plan. First and foremost is the purpose - "a description of the proposed services". CRS 32-1-202(2). The proposed services for the Big Sky District was financing construction "of all the Public Improvements for the use and benefit of all anticipated inhabitants and taxpayers of the District" . . . "The primary purpose is to provide for the Public Improvements associated with the development of the project [homes and commercial construction]". (Big Sky Service Plan, p. 1).

49. The Big Sky Service Plan itself emphasized its limited purpose: "[t]his Service Plan is intended to establish a limited purpose for the Districts and explicit financial constraints that are not to be violated under any circumstances." (Big Sky Service Plan p. 1).

50. In contrast, the limited purpose of the Green Mountain District set forth in its Service Plan was "to provide a complete waterworks distribution system for the District and the inhabitants thereof". (Green Mountain Service Plan (1951) p. 1).

51. The purpose of the Big Sky District stated in its Service Plan was to finance public improvements associated with the construction of homes and commercial for the inhabitants of the Big Sky District. The purpose of the Green Mountain District stated in its Service Plan was providing a water and sewer system for its inhabitants.

52. The second critical element is the Service Area of the district. The purpose is limited to serving the residents of that Service Area. CRS 32-1-102(1) The Service Area for Big Sky and Green Mountain are separate with no overlap.

53. The Service Area for the Big Sky IGA is also completely different from the Service Area approved by the City of Lakewood when they approved the Big Sky Service Plan in 2014. Attachment A shows the Big Sky IGA Service area created unilaterally by Big Sky and the area with the black boundary is the only Service Area approved by the City of Lakewood in 2016.

54. As to both the Service Plan for Big Sky approved in 2014 by Lakewood and the 1951 Service Plan approved for Green Mountain, they were limited to providing services to the inhabitants of the Service Area - the area of the District.

55. The Big Sky Service Plan itself emphasized this limitation: "The Districts shall not include within any of their boundaries any property outside of their Service Area without the prior written consent of the City". (Big Sky Service Plan p. 6 - 7).

56. The third critical element of the Service Plan is the financial plan. The Big Sky Service Plan provided that the cost of providing sanitation services to its inhabitants was \$415,924.00.

57. In contrast, the cost of the new "Big Sky Sewer System" proposed by the Big Sky IGA to distribute sanitation services to all of Rooney Valley as the new "master meter" sanitation district was \$3,846,528.00. This is more than nine times the budget for installing sewer pipes in the original Big Sky development.

58. There must be a public hearing to approve a Service Plan. CRS 32-1-204.

59. There must be a public hearing to approve a change to a Service Plan, such as changing the purpose or changing the territory. CRS 32-1-207.

60. Once established, a special district must conform to its service plan "so far as practicable." CRS 32-1-207(1).

61. These limiting principles were embraced and repeated by the Court of Appeals in *Bill Barrett Corp. v. Lembke*, 2019 COA 134:

"The General Assembly enacted the Special District Act (the Act) with the intent that special districts 'promote the health, safety, prosperity, security, and general welfare' of their inhabitants and of the State of Colorado. 32-1-102(1), C.R.S. 2017; see also *Sand Hills*, para.15 [*Bill Barrett Corp. v. Sand Hills Metropolitan District*, 2016 COA 144, 411 P.3d 1086]; *Todd Creek Vill. Metro. Dist. V. Valley Band & Tr. Co.*, 2013 COA 154, para. 37.

"[Special Districts] possess only those powers expressly conferred on them." *Sand Hills*, para 15.

"Once established, a special district must conform to its service plan 'so far as practicable' 32-1-207(1)"

"Any material modifications to the service plan must be approved by the appropriate governing authority. 32-1-207(2)(a)"

*Bill Barrett Corp. v. Lembke*, 2019 COA 134, p. 6 - 7.

62. From the Court of Appeals decision in the *Sand Hills* case [411 P3d 1086, 1091 - 1092 (Court of Appeals 2016, cert. den. 2017)]:

"First, the district's shift in purpose, reflected in the 2013 plan, from a localized district providing for residential and commercial development in Lochbuie to a regional district reaching beyond Lochbuie and providing regional benefits to the county constituted a change to the basic and essential nature of the 2004 plan". *Id.*

"Sand Hills argues that the inclusion or exclusion of property within a district cannot impair or affect its organization and that once formed, the district's status as a legal entity cannot be challenged.

This sort of unbounded power is not contemplated by the Act. The Act is clear that material modifications of a district's service plan can be challenged. See 32-1-207(2)(a); see also

32-1-209 (requiring districts to report to the board of county commissioners and allowing the county treasurer to withhold moneys).

To hold otherwise would lead to an absurd result, which we must avoid." Id.

63. The creation of the "Big Sky Sewer System" in the Big Sky IGA was a material modification of the 2016 Service Plan and Service Area approved by the City of Lakewood. Big Sky had no authority from its Service Plan, including the limitations of its Service Area, to create the "Big Sky Sewer System" or enter into the Big Sky IGA.

There can be no doubt that the plaintiffs were disappointed that their attempt to push through their election night IGA was challenged by the new Green Mountain board members. But, the very reason, reflected in the Charles Norton email, for attempting the election night maneuver should have given them pause as to whether or not it was the right thing to do. The fact that it didn't give them pause only reinforces the significant role of a publicly elected body in questioning such an IGA and critically evaluating whether or not the IGA is in the best interests of the public.

The plaintiffs have no limit to the available funds to sue the board members and anyone else who dares not to go along. However, at this point their intimidation campaign must end.

At this point, the Court will evaluate the merits of each parties' positions and make a decision. Amicus respectfully urges the Court to consider the facts and arguments asserted here and deny the plaintiff's motion for summary judgment and grant Green Mountain's motion for summary judgment.

\_\_\_\_\_/s/  
John Henderson #50508  
Amicus Curiae

Dated: October 19, 2019

**Certificate of Service**  
I certify that on October 19, 2019, I served the foregoing document by electronic mail through the electronic filing system /s/

