

DISTRICT COURT, JEFFERSON COUNTY, STATE OF
COLORADO

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Court Address: 100 Jefferson County Parkway
Golden, CO 80401
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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.

Counsel for Plaintiff:

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Case No.: 2019CV030887

Div./Ctrm: 2

**PLAINTIFF BIG SKY METROPOLITAN DISTRICT NO. 1'S RESPONSE BRIEF IN
OPPOSITION TO JOHN HENDERSON'S MOTION TO FILE AMICUS CURIAE
BRIEF**

Plaintiff Big Sky Metropolitan District No. 1 ("Big Sky"), by and through its counsel, Norton & Smith, P.C., and pursuant to the requirements set forth in C.R.C.P. 121, Section 1-15 (a) hereby submits this Response Brief in Opposition to John Henderson's Motion to File Amicus Curiae Brief ("Motion"):

**MOVANT'S FAILURE TO COMPLY WITH THE COLORADO RULES OF CIVIL
PROCEDURE**

Before discussing the substance, Big Sky is forced to point out a number of instances where Mr. Henderson's Motion fails to comply with the requirements of the Colorado Rules of Civil Procedure. This failure is so substantial as to warrant summary denial of the Motion.

C.R.C.P. 121, section 1-15(8) mandates that moving counsel “shall confer with opposing counsel and any self-represented parties before filing a motion.” The motion shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel about the motion.

Mr. Henderson’s Motion contains no such certification, since in fact there was no effort to confer. Big Sky is aware of no effort to contact counsel regarding the Motion, whether by email, telephone, or other written communication.

Further, the brief attached to the Motion also fails to meet the requirements of C.R.C.P. 10 (3)(II), which mandates that all “Briefs and Legal Memoranda” must be double-spaced. Mr. Henderson’s Amicus Curiae Brief consists of sixty-three single spaced paragraphs, which fails to comply with the rules.

This flouting of the rules of civil procedure alone mandates denial of the Motion.

STANDARD OF REVIEW

The Colorado Rules of Civil Procedure are silent on whether amicus curiae briefs are permitted in trial court. However, in three reported cases, Colorado district courts have allowed amicus participation. *See, e.g., In re Special Assessments for Paving Dist. No. 3*, 95 P.2d 806, 807-08 (Colo. 1939) (trial court allowed amicus curiae and announced opinion in agreement with the amicus curiae position); *Lobato v. Taylor*, 13 P.3d 821, 828 (Colo. App. 2000) (amici participated in trial court and on appeal) *rev’d on other grounds*, 71 P.3d 938 (Colo. 2002); *Oborne v. Bd. of Cty. Comm’rs of Douglas Cty.*, 764 P.2d 397, 399 (Colo. App. 1988) (three amici were allowed to appear before the trial court).

While no case could be found setting forth an express standard, the rule appears to be that trial courts may accept amicus briefs if they believe they will materially assist in the decision of a case. Mr. Henderson’s “amicus brief” is a pastiche of unsworn and unsupported factual assertions, combined with some legal argument. The legal argument is sometimes repetitive of arguments made by Green Mountain in response to Big Sky’s motion for partial summary judgment and by Green Mountain in its own motion for summary judgment. Identical cases are cited in many instances, and the same phrases are quoted from those cases.

In other instances, Mr. Henderson argues Green Mountain’s case in a way that directly contradicts the position taken by Green Mountain’s counsel of record. An important example is Mr. Henderson’s emphasis that the Big Sky IGA “is a legislative act” and his contention that the IGA was terminated by the Green Mountain Board of Directors because they concluded that it was “bad public policy.” *See Amicus Brief*, paragraphs 14, 36. Mr. Henderson’s admission may well be conclusive on this issue. When Mr. Norton was attending a Green Mountain Board meeting, he was informed by Green Mountain’s counsel of record, Ms. Timmins, that Mr. Henderson had drafted the Termination Resolution of April 9, 2019 that purportedly terminated the Big Sky IGA. His authorship presumably included the recitation that the Green Mountain Board was acting in “the exercise of its legislative authority” in terminating the IGA. *See Complaint*, Exhibit 8, page 4.

MR. HENDERSON’S INTEREST IN THE CASE

The requirements of C.A.R. 29, while not directly applicable to district courts, do provide the useful standard that a motion for leave to file an amicus brief “shall identify the interest of the

applicant and shall state the reasons why a brief of an amicus curiae is desirable.” Mr. Henderson’s interests in this case are multiple and often contradictory.

Mr. Henderson is a member of the Colorado bar who is currently employed by the Jefferson County office of the Colorado State Public Defender. In the Motion, Mr. Henderson describes himself as having “litigated the principal issues raised in these cases before the Lakewood City Council and the Green Mountain Water and Sanitation District beginning in September, 2018.” *See* Motion, paragraph 2.

At the same time, Mr. Henderson attended the C.R.C.P. 16 (b)(3) conference regarding this case held at the offices of Mr. Norton on August 2, 2019 and participated in the discussions in the same manner as did Ms. Timmins, the counsel of record to Green Mountain. Mr. Henderson also attended the initial status conference held in the case on August 28, 2019. It is tempting to conclude that the Motion is really an effort by Green Mountain to submit an additional brief from someone who is acting as its consulting litigation lawyer, thereby allowing Green Mountain to exceed the page limitations on briefs imposed by C.R.C.P. 121 section 1-15 and to argue different theories than did Green Mountain’s counsel of record.

The matter is made murkier by the fact that Mr. Henderson was retained by Green Mountain as an unpaid “District Consultant,” apparently at the Green Mountain Board of Directors meeting held on March 12, 2019. *See* attached **Exhibit 1**, Minutes of the Regular Meeting of the Board of Directors of Green Mountain Water and Sanitation District, March 12, 2019, page 5. Mr. Henderson agreed at that meeting to provide an engagement letter to Green Mountain, a document which upon information and belief has not been made public but which would be useful for the Court to have in evaluating the nature of Mr. Henderson’s interest in this matter.

In evaluating that interest, it is also important to note that when Mr. Henderson “litigated” this matter in front of the Lakewood City Council and the Green Mountain Board, he was apparently representing an entity called Save Dinosaur Ridge. In his resume which is posted on the website solterracommunity.org, Mr. Henderson includes among his “Civic Activity” “Actively supporting Dinosaur Ridge Neighbors Opposition to Car-lot Up-Zoning Proposal.” *See* attached **Exhibit 2**, page 2. This refers to proceedings held in front of the Jefferson County Commissioners regarding a proposed use of property owned by 3 Dinos LLC. Big Sky would accept wastewater from the 3 Dinos property into the Big Sky Sewer System that would be conveyed to Green Mountain under the Big Sky IGA.

Before his first appearance to “litigate” “the principal issues raised in these cases” before the Lakewood City Council” on January 28, 2019, a postcard was distributed broadly by an entity called “Save Dino Ridge.org.,” urging residents to attend the meeting. The post card stated the political motives of the group with remarkable directness: “Sewer Service: A key component of future development on the Ridge and throughout the Rooney Valley. Control of the sewer equals control of future development and our sewer tax rates.” *See* Complaint, paragraph 59.

It thus appears that when Mr. Henderson was litigating the issues in these cases before the Lakewood City Council and the Green Mountain Board of Directors commencing in September of 2018 and (perhaps) ending when he was retained as an unpaid consultant by Green Mountain in February or March of 2019, he was doing so on behalf of a group seeking to control future development in the Rooney Valley. It is difficult to see how he could put that representation behind him when he became Green Mountain’s consultant on special district matters.

It is also important to note that Mr. Henderson claims that his Amicus Brief will be of particular value to the Court because he is recognized as an “expert” on special districts. *See* Motion, paragraph 3. However, to be admissible under CRE 702, expert testimony must be both reliable and relevant. *Estate of Ford v. Eicher*, 250 P.3d 262, 266 (Colo. 2011). To determine whether testimony meets these requirements, the court must consider whether: (1) the scientific, technical, or specialized principles underlying the testimony are reasonably reliable; (2) the expert is qualified to opine to the matter; (3) the expert testimony will be helpful to the jury; and (4) the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.*; *accord People v. Rector*, 248 P.3d 1196, 1200 (Colo. 2011). Mr. Henderson’s expertise appears to consist largely of posting articles in community websites and blogs (including the *Solterra Post* and the *Rooney Valley News*) that permit posting articles without restriction and which are not peer-reviewed or scrutinized in any way. His “expertise” is that of a lawyer advocating for a cause and not the kind of specialized knowledge that would be useful to the Court in resolving this dispute. Mr. Henderson is simply not qualified to serve as an expert witness in this case.

In addition, to the extent that Mr. Henderson has acted as a lawyer in these matters, he would appear to have a conflict with his current employment as a deputy Colorado public defender. *See* Henderson resume, Exhibit 2, page 1; *See* also Colorado Supreme Court website: <http://www.coloradosupremecourt.us/Search/Attinfo.asp?Regnum=50508>. (Henderson employed by Jefferson County office of the Colorado state public defender). The Office of the Colorado State Public Defender’s website states:

Employees of the Office of the State Public Defender are not subject to the Colorado State or Colorado Judicial Branch personnel systems. All employees

are at-will. Attorneys working for the State Public Defender cannot otherwise engage in the practice of law.

Office of the Colorado State Public Defender, *available at*, <http://www.coloradodefenders.us/jobs/>.

Big Sky would ask that as a condition of an order granting Mr. Henderson's motion for leave to file an amicus brief, he be required to disclose in full whom he is representing in this matter and the nature of his interest and relationship to the parties.

**BIG SKY IS PREPARED TO RESPOND TO MR. HENDERSON'S BRIEF IF
THIS COURT SO DESIRES**

Big Sky believes that there are ample grounds for this Court to simply refuse Mr. Henderson's brief. His Motion is not compliant with the Rules of Civil Procedure; his interest is that of counsel to Green Mountain, or as a consultant to Green Mountain, or as a lawyer to an undisclosed third party, and not an entity or person with an independent interest in this litigation. The "Amicus Brief" also has many unsworn factual assertions by Mr. Henderson, which raise the prospect that Mr. Henderson may contemplate being a witness in the action.

While Big Sky argues that the Brief should simply be rejected, it is also prepared to respond in full. For example, on page 4 of the proposed Brief, Mr. Henderson states that certain sections of the Big Sky IGA "go into great detail about the construction of the new 'Big Sky Sewer System' for the Rooney Valley." However, there is no such facility being proposed; instead, the "Big Sky Sewer System" is a network of pipes and sewer mains intended to collect wastewater from homes within the boundaries of the Big Sky Districts and an "Inclusion Area" defined in the Big Sky Service Plan, together with the force main and related facilities intended to deliver that wastewater to the Green Mountain system. *See* Complaint, Exhibit 1, section 3.1. While these pipes will be oversized to accept wastewater from the 3 Dinos properties, those properties will be served by a

separate metropolitan district, Green Tree, which will own the collection system within its boundaries and finance its construction.

Mr. Henderson then goes on to assert that “Green Mountain will be responsible for maintaining the system,” referring to the Big Sky Sewer System. In this instance, he mischaracterizes the IGA in a blatant fashion; section 3.7 of the Big Sky IGA plainly states “The Big Sky Sewer System shall be owned and maintained by Big Sky.” *See* Complaint, Exhibit 6, page 12.

In paragraph 25 of the Brief, Mr. Henderson asserts that in two separate sections of the November 11, 2014 intergovernmental agreement between Fossil Ridge Metropolitan District and Green Mountain, “Green Mountain stated that it was not agreeing to provide any sanitation service beyond the Solterra development.” Mr. Henderson twists a prudent reservation of rights by Green Mountain in a misleading fashion, ignoring the simple statement in section 2.6 of that same intergovernmental agreement that “Green Mountain has anticipated providing sanitary sewer service to all of the area in the Rooney Valley within the boundaries of the City of Lakewood as of the date of this Agreement, and may also provide sanitary sewer service to the proposed Rooney Property (collectively the “Future Development Area” as depicted in Exhibit B attached hereto).” *See* Complaint, Exhibit 1, page 5 (emphasis in original). As of November 11, 2014, Green Mountain anticipated serving all of the properties that would be served under the Big Sky IGA in the precise fashion contemplated by the Big Sky IGA. It was only a change in the politics of the Green Mountain Board that caused it to dramatically alter Green Mountain’s course and attempt to repudiate its prior obligations.

Mr. Henderson's misleading and, in the instance of his description of the maintenance responsibilities of Green Mountain for the Big Sky Sewer System, false assertions serve a larger narrative: that Green Mountain was the unwilling victim of a plot by Big Sky to make it serve the Rooney Valley, and that Green Mountain was rescued from this predicament by electing a publicly spirited majority to its Board of Directors that terminated the Big Sky IGA. That narrative is false. From December of 2014 through June 12, 2018, Green Mountain and Big Sky were cooperating in the effort to extend sewer service to properties in the Rooney Valley, and Green Mountain's Board was willing to accept wastewater from the Big Sky Expanded Service Area and to charge fees for that acceptance because it believed the agreement to be in the best interests of its residents and ratepayers. The New Directors at Green Mountain changed this policy; this litigation is about whether they had the power to do that in the face of a binding IGA with Big Sky. But the notion that Green Mountain was a victim in all of this is simply false.

Candidly, the proposed Amicus Brief is so riddled with inaccuracies and misstatements with regard to matters of fact and law that it will not materially assist this Court in resolving the dispute among the parties. It could safely be rejected. But should the Court allow the filing of the Amicus Brief, Big Sky is prepared to respond to it point by point and in detail.

CONCLUSION

For the reasons stated, Big Sky requests the following relief from the Court:

(1) That the Motion be denied because of its failure to comply with the requirements of the Colorado Rules of Civil Procedure;

(2) That the Motion be denied because the Amicus Brief will not materially assist the Court in resolving the issues in this case;

(3) That if the Court does exercise its discretion to accept the Amicus Brief, that Mr. Henderson be compelled to disclose his interests in this matter, including whom he is representing and in what capacity and the nature of his unpaid consulting agreement with Green Mountain;

(4) That if the Court does decide to accept the Amicus Brief, Big Sky be permitted to respond, in a brief of no more than twenty-five pages, double-spaced, in compliance with C.R.C.P. 121, section 1-15(1) and C.R.C.P. 10.

Respectfully submitted,

NORTON & SMITH, P.C.

s/ Charles E. Norton
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 12th day of November, 2019, a true and correct copy of the foregoing **PLAINTIFF BIG SKY METROPOLITAN DISTRICT NO. 1'S RESPONSE BRIEF IN OPPOSITION TO JOHN HENDERSON'S MOTION TO FILE AMICUS CURIAE BRIEF** was served electronically and/or sent via U.S. Mail, postage prepaid to the following:

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