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DISTRICT COURT, JEFFERSON COUNTY, STATE OF COLORADO Court Address: 100 Jefferson County Parkway, Golden, CO 80401 Telephone No.: (720) 772-2500	
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.	▲COURT USE ONLY▲ Case No.: 2019CV030887 Div./Ctrm: 2
Counsel for Plaintiff: Charles E. Norton, #10633 NORTON & SMITH, P.C. 1331 17th Street, Suite 500 Denver, Colorado 80202 Phone Number: (303) 292-6400 FAX Number: (303) 292-6401 E-mail: CNorton@NortonSmithLaw.com	

PLAINTIFF BIG SKY METROPOLITAN DISTRICT NO. 1'S RESPONSE BRIEF IN OPPOSITION TO DEFENDANT GREEN MOUNTAIN WATER AND SANITATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT

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 Defendant Green Sky Water and Sanitation District's ("Green Mountain") Motion for Summary Judgment:

RESPONSE TO INTRODUCTION AND FACTUAL BACKGROUND

In the Introduction to its Motion, Green Mountain asserts that a group of real estate developers and the metropolitan districts they organized are trying to "force Green Mountain to provide sanitary sewer service to their properties." In its "Factual Background," Green Mountain

further asserts that a prior majority of the Green Mountain Board of Directors "prematurely signed" an intergovernmental agreement with Big Sky "while the negotiations for this arrangement became more complicated and untenable." Nothing could be further from what actually happened than these fanciful assertions.

As is pled in paragraphs 11-22 of Big Sky's complaint, in 2006, Green Mountain commissioned a study regarding the feasibility of providing sanitary sewer service to the Rooney Valley, a geographic location which includes the Big Sky districts as well as properties owned by Cardel Homes and 3 Dinos LLC. Green Mountain's Board of Directors received a consultant's opinion that "The study area is contiguous to the present Green Mountain District boundaries and the District is the logical choice to provide lowest cost service."

From the time of this feasibility study in January of 2006 until May of 2018, Green Mountain worked actively to position itself to provide sanitary sewer service to the Rooney Valley. It concluded intergovernmental agreements in 2008 and 2014 with the Fossil Ridge Metropolitan District No. 1. ("Fossil Ridge"), agreeing to accept wastewater from the Solterra development, which is outside Green Mountain's boundaries. As a term and condition of this agreement, Green Mountain required Fossil Ridge to oversize its sanitary sewer collection system to include all of the properties at issue in this lawsuit, including those within the boundaries of Big Sky as well as 3 Dinos and Cardel. Green Mountain agreed to cause developers and others hooking into the Fossil Ridge system to reimburse Fossil Ridge for the cost of oversizing its system.

Big Sky was organized by principals and agents of CDN Red Rocks LP ("CDN"), the owner of property within the Big Sky districts, for the purpose of providing infrastructure for property owned by CDN within the Rooney Valley. In late 2014, Big Sky approached Green Mountain about

providing sanitary sewer service to properties within Big Sky. Green Mountain readily agreed and issued a commitment in 2015 to serve property owned by CDN.

It is important to note what is meant by "providing sanitary sewer service" in this instance. As is demonstrated by the text of the Intergovernmental Agreement for Extra-Territorial Sewer Service between Big Sky and Green Mountain (the "Big Sky IGA"), Exhibit 6 to the Complaint, both Big Sky and Green Mountain are conduit providers. Green Mountain will simply take wastewater that is generated within Big Sky, and transmit it to Metro Wastewater, a regional district providing treatment service to a majority of jurisdictions in metropolitan Denver. Metro then treats the wastewater and disposes of it according to federal and state regulations.

In the Big Sky IGA, Green Mountain agreed to reserve enough capacity (space) in its sanitary sewer lines to accommodate up to 1.267 million gallons of peak flow per day from properties within the Big Sky Expanded Service Area. This would then be transmitted along with sewage generated within Green Mountain to Metro Wastewater for treatment and disposal.

In 2015, Fossil Ridge (which was then controlled by agents of Brookfield Residential Properties, the developer of Solterra) objected to the arrangement that Big Sky and Green Mountain were trying to work out. Fossil Ridge insisted (wrongfully in the view of Big Sky and Green Mountain) that it should be reimbursed not just for sewer system oversizing but for additional oversize capacity built into the water delivery lines constructed to serve the Rooney Valley. Green Mountain wanted this dispute resolved before it would enter into a final contract with Big Sky.

Green Mountain and Big Sky then sued Fossil Ridge for a declaration that reimbursement for the water delivery system was not required and fixing the amount of reimbursement that Fossil Ridge would be legally entitled to for oversizing the sanitary sewer delivery system. After this suit

was filed, the entire Fossil Ridge Board of Directors resigned. A different division of the Jefferson County District Court, Judge Lily Oefler presiding, appointed homeowner representatives to sit on the Board of Directors of Fossil Ridge.

Green Mountain and Big Sky then reached an agreement with the homeowner Board of Fossil Ridge. On April 5, 2018 this Court approved the stipulation of the parties and entered judgment. As part of the settlement, Big Sky agreed to pay Fossil Ridge $1.3 million to reimburse it for the oversizing Fossil Ridge had done of sanitary sewer system improvements when Big Sky connected to the Green Mountain sanitary sewer system. This accounted for the entire amount required to serve the Big Sky, Cardel, and 3 Dinos properties.

Among the things that Green Mountain represented to this Court in the stipulation was that it was "organized for purposes including the provision of sanitary sewer service inside and outside its boundaries." Complaint, Exhibit 5, para. 1. Green Mountain also joined Big Sky in telling this Court that Big Sky is a "metropolitan district" within the meaning of Colorado law "because it was formed to provide two or more of the services set forth in C.R.S. §32-1-103 (10), including sanitation and water services, inside and outside its boundaries to promote the general welfare of its inhabitants." *Id.* para. 2. In addition, Green Mountain told this Court that it "desires to provide sewer service to the Future Development Area upon satisfaction of specified conditions," Id. para. 9, all of which have now been fulfilled.

The Big Sky IGA was then approved at a Green Mountain Board meeting on May 8, 2018. No material dispute exists that the Board meeting took place and that the IGA was unanimously approved. Unless a material issue is raised with regard to its validity, the Big Sky IGA is a contract, enforceable according to its terms.

Three new directors were elected to the Green Mountain Board of Directors on May 8, 2018. Very soon upon taking office on June 12, these directors set about trying to find ways to repudiate Green Mountain's obligations under the Big Sky IGA. On August 15, 2018, they issued a "Request for Proposal" ("RFP") for new general counsel. Among the issues to be addressed by candidates for the position were the validity of the Big Sky/Green Mountain IGA, the exposure to Green Mountain if any party sought to invalidate the IGA, any affirmative defenses in the event of litigation against Green Mountain, and whether insurance coverage would be available to pay the costs of litigation against Green Mountain. The RFP also indicated that the Green Mountain Board of Directors would ask special counsel to opine about the possible consequences including litigation if "one party" stopped all further engineering work regarding "the IGA's." It is interesting to note that this RFP was sent out several months before the board meetings of January 8, 2019 and April 9, 2019 that Green Mountain now claims long after the fact were "hearings" on the legal question of the validity of the Big Sky IGA. Green Mountain claims the unilateral authority to make a "quasi-judicial" decision about the validity of a contract to which it was a voluntary party and which it now does not like. The bias demonstrated in the RFP is considerable support for the notion that no party should be the judge of its own cause.

On April 9, 2019 Green Mountain enacted a "Resolution of the Green Mountain Water and Sanitation District Terminating the Intergovernmental Agreement for Extra-Territorial Sewer Service with Big Sky Metropolitan District No. 1. (the "Termination Resolution"). On page 4 of the Termination Resolution, the Green Mountain Board of Directors resolved as follows:

> Be it Resolved by the Board of Directors of the Green Mountain Water and Sanitation District, that in the exercise of its legislative authority guided by the best interests of the public, including residents of the district, customers of the district, potential future customers of the district and property owners inside and outside the district boundaries, the Green Mountain Water and Sanitation District hereby finds the Big Sky IGA to be invalid, and void since its inception, against public policy, and therefor terminates the Big Sky IGA effective immediately this 9th day of April, 2019.

The meeting of April 9, 2019 was a regular meeting of the Green Mountain Board. The Notice of Regular Meeting attached as Exhibit C to Green Mountain's Motion for Summary Judgment contains an item for "Legal Matters" "Evaluation of Validity and Decision on Big Sky IGA." No indication is given that there will be a quasi-judicial hearing on the issue presented, or that evidence will be taken, or that Big Sky, as a contracting party, will be given the opportunity to be heard. No particularized notice was given to Big Sky.

The minutes of the April 9, 2019 meeting are attached to Green Mountain's Motion for Summary Judgment as Exhibit D. Toward the start of the meeting, Board President Hanagan asked during the regular public comment period that any public comments and discussion on Big Sky be held until later during the meeting. After a discussion of routine business, the Board then took up agenda item 7, "Evaluation of the validity and decision on the Big Sky IGA."

The Green Mountain Board then immediately went into executive session "to confer with the District's legal counsel for the purpose of receiving legal advice pertaining to the Intergovernmental Agreement between Big Sky District No. 1 and the Green Mountain Water and Sanitation District." The public was excused at 7:27 P.M. and the Board remained in executive session until 9:08 P.M. After the executive session, Ms. Hanagan asked for public comment "on the Big Sky IGA." One unidentified Citizen commented.

Ms. Hanagan then moved to adopt the proposed Resolution regarding termination of the IGA with Big Sky District No. 1. The motion was seconded by Director Plotkin and passed unanimously. Citizens were invited to comment, and several stated that they would like to read the Termination Resolution. Ms. Hanagan then distributed copies to the public; it was evident that the Termination Resolution had never been given by legal counsel to anyone before the executive session that started at 7:27. No evidence was taken or requested regarding any of the propositions in the Termination Resolution.

Director Mulay did note some items in the Resolution that he took issue with; after a second vote was taken, the Termination Resolution was approved by a vote of three Green Mountain directors in favor and two abstaining. Two directors, Mr. Mulay and Ms. Hanagan, both stated that they were in favor of opening up discussions with Big Sky or renegotiating with Big Sky.

On these undisputed facts, together with a review of the Big Sky Service Plan, Green Mountain's Motion for Summary Judgment fails as a matter of law.

ARGUMENT

A. Green Mountain and Big Sky acted in a proprietary capacity when they entered into the Big Sky IGA.

Since the shift in control of Green Mountain, the District and its consultant, John Henderson, have often attacked the Big Sky IGA as an extraordinary power grab. However, the agreement is quite routine. Much of the water and sanitary sewer service offered to municipalities in the Denver metropolitan area and along the Front Range is on an extra-territorial basis. Green Mountain receives water service this way. As is recited in the in the Big Sky IGA, Denver provides water to Green Mountain within an area labeled as the "Blue Line," which is entirely outside the

City and County of Denver. Similarly, Green Mountain provides sanitary sewer collection service to Solterra which is outside its boundaries.

Because such service agreements are routine, the Colorado appellate courts have dealt with them many times. For example, in *National Food Stores, Inc. v. North Washington Street Water and Sanitation District*, 163 Colo. 178, 429 P.2d 283 (1967), the Colorado Supreme Court upheld a contract by a sanitation district requiring it to treat sewage from a private customer for 20 years at a fixed rate per gallon. In *City of Fort Collins v. Park View Pipe Line*, 139 Colo. 119, 336 P.2d 716 (1959), the Colorado Supreme Court struck down a resolution of the Fort Collins City Council terminating most contracts for the sale of City water outside the boundaries of Fort Collins, holding that the resolution violated the terms of a contract that Fort Collins had entered into permitting termination only if it was required to better serve customers in Fort Collins, which the Court said had not been proven. In *Perl-Mack Enterprises Co. v. City and County of Denver*, 194 Colo. 4, 9, 568 P.2d 468, 472 (1977), the Court held that contracts providing for sanitation services and the fees to be charged for those services are within the proper scope of the proprietary powers of a municipal corporation. For this reason, the fact that such a contract binds the municipality for a period in the future does not make it objectionable as a surrender of legislative or police powers, since those powers are not involved. *Id.* (Citations omitted).

The principle that the Big Sky IGA was entered into as part of the proprietary powers of Big Sky and Green Mountain is important to the proper resolution of this case. The relationship between Green Mountain and Big Sky is purely contractual, and the conditions and limitations imposed by the parties are valid. *Perl-Mack*, supra. at 194 Colo. 9, 568 P.2d 472. As the Colorado Supreme Court put the point in *Park View Pipe Line*, the City of Fort Collins was selling water

under the contracts with extra-territorial customers in its proprietary capacity and in contracting could impose "such conditions and limitations as the parties by their contract may agree upon." 139 Colo.at 123; 336 P.2d at 719.

The terms of the Big Sky IGA are valid and binding, and they may not be cast aside by Green Mountain in the cavalier way that it has attempted. Green Mountain's Motion for Summary Judgment must be denied as a matter of law.

B. The Termination Resolution was not reviewable under C.R.C.P. 106 (a)(4), and so the 28 day limitations period in C.R.C.P. 106 (b) is not applicable.

C.R.C.P. 106(a)(4) provides for judicial review "Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law." In passing the Termination Resolution, Green Mountain was not exercising a judicial or quasi-judicial function. Further, Big Sky has an adequate remedy provided by law. For these reasons, Rule 106 does not apply.

1. Big Sky has an adequate remedy at law through a breach of contract suit.

Big Sky's first claim for relief in the Complaint is for breach of contract. Big Sky contends that the Termination Resolution was an anticipatory breach of the Big Sky IGA. Further, the Resolution was in violation of the termination provisions of the Big Sky IGA, section 10.2, which states that termination may only take place upon the occurrence of certain conditions which have not taken place, such as the failure of Big Sky to pay required fees and costs, which Green Mountain concedes that Big Sky has done.

In section 10.1 of the Big Sky IGA, Big Sky and Green Mountain agreed that "any Party may seek monetary damages or an order for specific performance, declaratory or injunctive relief in the event of a breach of any provision of this agreement." Green Mountain seeks to strip all of these remedies out of the contract and reduce them to a review on the record of the decision to enact the Termination Resolution. However, the existence of these other remedies precludes Rule 106 review.

The Colorado Court of Appeals has held that the existence of a breach of contract suit, precludes the exercise of jurisdiction under C.R.C.P. 106(a)(4). In *Wilson v. Town of Avon*, 749 P.2d 990, 992 (Colo. App. 1987), the plaintiffs had pled that published personnel policies and procedures codified an employment agreement between the parties, and that termination of plaintiffs' employment violated this agreement. As the Court held, "Such an allegation constitutes a claim of breach of contract, and, if proven, provides the basis for a 'plain, speedy and adequate remedy.' Thus, review of this issue was unavailable to plaintiffs under C.R.C.P. 106(a)(4), and it was error to dismiss their complaint as untimely filed under the limitations in C.R.C.P. 106(b)." *Id*.

The existence of a plain, speedy, and adequate remedy at law itself precludes jurisdiction under C.R.C.P. 106(a)(4). To the extent that Green Mountain's Motion for Summary Judgment depends upon this theory, it fails as a matter of law.

2. Even assuming for the sake of argument that Big Sky did not have an adequate remedy at law, Green Mountain's action was not quasi-judicial and is not reviewable by this Court.

Even if Big Sky did not have the adequate remedy at law of a breach of contract suit, which places the matter outside of Rule 106 review, Green Mountain's action in terminating its own contract did not meet the criteria for a quasi-judicial action. Quasi-judicial action is generally characterized by the following factors: 1) a local or state law requiring that notice be given before the action is taken; 2) a local or state law requiring that a hearing be conducted before the action is taken; and 3) a local or state law directing that the action results from the application of prescribed criteria to the individual facts of the case. *Baldauf v. Roberts*, 37 P.3d 483, 484 (Colo. App. 2001), *citing Gilpin County Board of Equalization v. Russell*, 941 P.2d 257 (Colo.1997); *see also Van Pelt v. State Board for Community Colleges & Occupational Education*, 195 Colo. 316, 577 P.2d 765 (1978). At a quasi-judicial hearing where adjudicative facts are involved, "the parties must be afforded a hearing to allow them an opportunity to meet and to present evidence." *City and Ctyof Denver v. Eggert*, 647 P.2d 216, 222 (Colo. 1982) (emphasis supplied).

No state or local law requires that notice be given before a local governing body decides to terminate a contract to which it is a party. Instead, the rules for termination are set by the contract itself. In *Park View Pipe Line*, the Colorado Supreme Court considered a resolution of the Fort Collins City Council terminating most contracts for the sale of City water outside the boundaries of Fort Collins. 139 Colo. at 125, 336 P.2d at 720,The Court held that the termination of the contract with plaintiff Betz was invalid, reasoning that "it is a law of contracts applicable here that the grounds for termination of a contract under express provisions therein are controlled by such provisions, which will ordinarily be enforced according to their terms." *Id.* It is essentially conceded by Green Mountain that none of the grounds for termination specified in the Big Sky

IGA were present in this case. It is the IGA itself, and not any state or local law, that governs what notice must be given.

It is also important in considering the equities of this case that no notice of a hearing was given. Green Mountain points to two meetings of its Board of Directors at which it maintains that Big Sky was given the "opportunity to be heard." The first was on January 8, 2019, when the undersigned counsel, Charles E. Norton, signed up to speak for the maximum of five minutes allowed during the public comment period. The Notice of Regular Meeting for the January 8, 2019 meeting, as posted on the Green Mountain website, is attached to this brief as **Exhibit 1**. Nowhere does this "notice" mention a hearing; nowhere does it mention the Big Sky IGA; and nowhere does it mention Big Sky. To characterize this in any way as a notice of an evidentiary hearing is simply misleading.

The second meeting that Green Mountain characterizes as a "hearing" took place on April 9, 2019; the Notice of Regular Meeting is attached to Green Mountain's Motion as Exhibit C. Nowhere does this "notice" mention a hearing; instead, under the heading of "Legal Matters," it lists "Evaluation of Validity and Decision on the Big Sky IGA." No state or local law mandates a notice of hearing prior to terminating a governmental contract like the Big Sky IGA, and, in this instance, no notice was given.

Further, no state or local law mandates that a hearing take place before a contract for sanitary sewer service is terminated. Adhering to this standard, Green Mountain held no hearing that met the standard in *Eggert* of allowing Big Sky to present evidence concerning "prescribed criteria" that were to be "applied to the individual facts of the case." On January 8, 2019, the Big Sky IGA was in effect and Green Mountain had not yet decided to repudiate it; Mr. Norton simply

chose to respond briefly to attacks on the IGA made by citizens during the public comment period, based for the most part on a misconception by the speakers about the facts and what the IGA actually said. On April 9, 2019, the Termination Resolution was shown to the Board of Directors and the public for the first time. Indeed, the minutes of the April 9 meeting show that the Resolution was approved in the initial vote before the public had even read it or had the chance to be heard. One comment was taken from the public after that time, and the vote was re-affirmed without any opportunity to present evidence on the specific items asserted in the Termination Resolution.

Finally, the Termination Resolution itself recited, "Be it Resolved by the Board of Directors of the Green Mountain Water and Sanitation District, that in the exercise of its legislative authority guided by the best interests of the public, including residents of the district, customers of the district, potential future customers of the district and property owners inside and outside the district boundaries," the Big Sky IGA was terminated. Legislative actions, as opposed to quasi-judicial actions, are not subject to review under C.R.C.P. 106(a)(4). *See Jafay v. Bd. of Cty. Comm'rs of Boulder Cty.*, 848 P.2d 892, 897 (Colo. 1993). The Green Mountain Board expressly considered not only the rights of Big Sky and Green Mountain under the IGA in making its decision to terminate, but the Board also inserted its views regarding the interests of other customers of the district, potential future customers, property owners inside and outside the district, and the residents of Green Mountain. The Green Mountain Board overtly weighed these competing interests as a matter of judgment and discretion and decided that the Big Sky IGA was bad public policy "not in the public interest." This balancing of questions of judgment and discretion is associated with legislative and not quasi-judicial decision making. *See State Farm v. City of Lakewood*, 788 P.2d 808, 813 (Colo. 1990).

Big Sky had an adequate remedy provided by law through a breach of contract suit. No state or local law provided for notice and a hearing before the Big Sky IGA could be terminated. No notice of hearing was provided, and no evidentiary hearing was conducted. The Termination Resolution stated that it was legislative in character and it did not involve the application of evidence to pre-existing criteria. For all of these reasons, no right to review under C.R.C.P. 106(a)(4) existed in this situation, and the 28-day limitations period in C.R.C.P. 106(b) does not apply. Green Mountain's motion for summary judgment fails as a matter of law.

C. THE BIG SKY IGA IS NOT VOID OR VOIDABLE AS A MATTER OF LAW.

1. The Big Sky IGA is not a material modification of the Big Sky Service Plan.

The issue of whether the Big Sky IGA is a material modification of the Big Sky Service Plan has been briefed by the parties extensively as part of Big Sky's Motion for Partial Summary Judgment and Green Mountain's Motion to Enjoin filed in case no. 2014CV_____. Big Sky will attempt to summarize its position and respond to the points emphasized by Green Mountain in its Motion for Summary Judgment.

Whether a special district's action constitutes a "material modification" of the service plan presents a question of law. *Indian Mountain Corp. v. Indian Mountain Metro. Dist.*, 2016 COA 118M, ¶¶ 59, 61-62, 412 P.3d 881, 893 A court looks to the language of the service plan and gives effect to its plain and ordinary meaning. *See Todd Creek Village Metro. District v. Valley Bank & Trust Co.*, 2013 COA 154, ¶¶ 10-11.

Pursuant to section 32-1-1004, C.R.S., a metropolitan district shall provide two or more listed services, including "sanitation services as specified in section 32-1-103(18), C.R.S." *See* section 32-1-1004(2)(e), C.R.S. When a metropolitan district provides the services specified in

section 32-1-1004(2) (a), (c), (e), (i), or (j), C.R.S., it "shall have all the duties, powers, and authority granted to a fire protection, park and recreation, sanitation, water and sanitation, or water district by this article." For this reason, when Big Sky provides sanitation services as defined in section 32-1-103(18), C.R.S., it exercises all the powers of a sanitation district or water and sanitation district under section 32-1-1006, C.R.S. Under section 32-1-103(18), C.R.S., those services include providing storm and sanitary sewers, treatment and disposal works and facilities, and all necessary or proper equipment and appurtenances incident thereto.

On page 5 of the Service Plan as approved by the Lakewood City Council, it is stated that "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 Districts as such power and authority is described in the Special District Act." The term "Public Improvements" is defined on page 4 of the Service Plan as "a 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 . . . ." The power of a metropolitan district to provide sanitary sewer services is outlined in sections 32-1-1004 and 32-1-103(18), C.R.S. as discussed above. In addition to this specific authority, the Special District Act empowers special districts to "furnish services and facilities without the boundaries of the special district and to establish fees, rates, tolls, penalties, or charges for such services or facilities." *See* section 32-1-1001(k), C.R.S. The Service Plan therefore authorizes Big Sky to provide sanitary sewer services both inside and outside its boundaries.

This conclusion is reinforced by reading the Service Plan as a whole. In Section V, it is provided that "The (Big Sky) Districts shall not be authorized to operate and maintain any part or

all of the Public Improvements, other than park and recreation, **sewer** and landscape improvements and other improvements owned by the Districts, unless the provision of such operation and maintenance is pursuant to an intergovernmental agreement with the City (of Lakewood)." (Emphasis supplied). Exhibit D to the Service Plan is entitled "Big Sky Metropolitan District Nos. 1-7 Public Improvement Cost Estimate;" it includes a line item of $415,424 for "Sanitary Sewer," thus expressly defining the term "Public Improvements" as used in the Service Plan as including "sanitary sewer."

The central point in Green Mountain's argument, as it is now set forth in the Motion, is that Big Sky's Service Area has gone from 166 acres of land under the Service Plan to 550 acres under the Big Sky IGA, which Green Mountain says by itself is a material modification. However, Green Mountain's factual assertion is wrong. In Exhibit H attached to the Motion for Summary Judgment, Green Mountain contends that the original Big Sky Service Area described in the Service Plan was just the property that is now owned by CDN. But the Service Plan, attached hereto as **Exhibit 2**, actually contemplates the addition of another 104 acres within the boundaries of Big Sky, which would not require extra-territorial service. *See* Service Plan, p. 4, Section III., "Boundaries." This "Inclusion Area" is described in Exhibit C-2 to the Service Plan, which also includes a map of the Inclusion Area.

If the Court compares the map of the Inclusion Area to Green Mountain's doctored Exhibit H, it can be seen that the Inclusion Area corresponds to the property that is depicted on Exhibit H as the Cardel Homes property. The area contemplated in the Service Plan as being within Big Sky's district boundaries which it could tax and would have the obligation to serve is a total of 270 acres, not 166 as stated by Green Mountain.

Green Mountain's contention thus resolves itself to this: that Big Sky's providing extra-territorial sanitary sewer service to an additional 280 acres, adjacent to Big Sky, by contract is a material modification of the Big Sky Service Plan. The Court of Appeals' holding in *Bill Barrett Corp. v. Lembke*, 2018 COA 134, ¶ 4. disposes of that contention. In *Bill Barrett*, the Court held that the inclusion of the 13,000 acre "70 Ranch" site within a metropolitan district was not a material modification of the district's service plan. *Id.* Because the inclusion did not involve a change in the type of service provided, but rather just the geographic area, the Court concluded that no material modification of the service plan was involved. *Id.* Similarly, Big Sky is authorized to furnish improvements and related services "that are planned, designed, acquired, constructed, installed, relocated, redeveloped and financed as generally described in the Special District Act," including sanitary sewer service. The acceptance of wastewater from adjacent properties under an extra-territorial service agreement is no change in the program of services offered by Big Sky.

Green Mountain also argues that because it is providing extra-territorial service to properties in unincorporated Jefferson County, it should participate in the process set forth in section 32-1-207(b) and (c), C.R.S. of notifying the Jefferson County Commissioners. However, these provisions apply only to situations where the district providing service is changing its boundaries to include property within the unincorporated area of a county or is providing direct service to residents and property owners. Neither is the case here; there is no change to Big Sky's boundaries subject to taxation, and no direct service. Instead, Big Sky will simply be accepting wastewater that is collected by other quasi-municipal entities outside its boundaries. Accepting the wastewater will be pursuant to intergovernmental agreements with those entities, which further removes Big Sky from the requirements of section 32-1-207(b) and (c). *See* section 32-1-

207(2)(d)(II), C.R.S.

Finally, Green Mountain contends that Big Sky admitted that it was materially modifying its service plan by publishing notice of its intent to carry out the terms of the Big Sky IGA and furnish extra-territorial service. The notice was published pursuant to section 32-1-207(3)(b), C.R.S in the *Lakewood Your Hub* newspaper and is attached to this brief as **Exhibit 3**.

Green Mountain paraphrases 32-1-207(3)(b) as providing a "safe harbor" for material modifications of a service plan. That is not what the statute says. Instead, it provides that no action to enjoin the construction of a facility or other activity of a special district as a material modification of a service plan may be maintained after 45 days have passed from the publication of notice of intent to undertake the activity. Big Sky made it clear in Exhibit 3 that its position was that the Big Sky IGA and service under it was not a material modification of its service plan. No admission was made.

For all of these reasons, the Big Sky IGA is not void or voidable as a material modification of the Big Sky Service Plan.

2. The Big Sky IGA is not void under the Local Government Budget Law.

Green Mountain contends that the Big Sky IGA requires a number of expenditures that should have been appropriated for in fiscal year 2018 and that it also requires multiple-year expenditures, thus requiring that the IGA contain a clause making it subject to annual appropriation. Green Mountain concludes that under the Local Government Budget Law, section 29-1-110, C.R.S., the Big Sky IGA is void. However, this argument is factually inaccurate and legally unsound.

The first "expenditure" that Green Mountain identifies is its argument that under Section

6.1B of the IGA, Green Mountain is to "pay fees" to Big Sky. Green Mountain does not acknowledge that this is a rebate of tap fees that Green Mountain will collect from Big Sky's customers, refunding 50 percent of the fees to Big Sky until Big Sky is compensated for its costs in funding certain infrastructure for Green Mountain. There is thus no "payment of fees" by Green Mountain and the figure cannot be known until customers have tapped into the Green Mountain sanitary sewer system. Under section 29-1-110, C.R.S., no moneys belonging to a local government may be expended on a contract in excess of appropriations. Big Sky is entitled by contract to the rebate of tap fees; they do not belong to Green Mountain. In addition, the uncertainty of the amount to be rebated, or whether any tap fees will be collected at all, takes the Big Sky IGA out of the annual appropriations doctrine. *See Board of Comm'rs of Larimer County v. City of Fort Collins*, 68 Colo. 364, 368-369, 189 P. 929, 931 (1920) .

Green Mountain points to Section 4.5 of the IGA, arguing that it calls for the payment of certain "soft costs" by Green Mountain. However, the actual language of Section 4.5 calls for Big Sky to pay all of the costs described in the section. Green Mountain is not obligated to pay anything under Section 4.5. The same may be said of the "cost overruns" cited by Green Mountain and described in Section 4.6 of the Big Sky IGA; Big Sky is responsible for all of these cost overruns under the plain language of the agreement.

Perhaps the oddest of the "expenditures" identified by Green Mountain as requiring annual appropriation are costs incurred by Green Mountain in enforcing Green Mountain's rules and regulations or those of the EPA and Metro if they are breached by Big Sky customers. Big Sky assumes 100 percent of the costs incurred. There is no obligation for which Green Mountain must appropriate.

Unlike the situation in *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. District No. 1*, 2018 COA 92, Green Mountain makes no promise to make payments to Big Sky that would be subject to annual appropriation. No violation of the Local Government Budget Law has taken place.

3. The Big Sky IGA is not void under section 29-1-203, C.R.S. or the Colorado Constitution.

Green Mountain next asserts that the Big Sky IGA is void because neither Big Sky nor Green Mountain is "lawfully authorized to provide sanitary sewer service to that over 550 acres of land" identified in Exhibit A to the IGA, which is Exhibit G to the Motion. However, for the reasons discussed in Section C. 1 of this brief, Big Sky is fully authorized to serve this area.

Green Mountain is a water and sanitation district organized pursuant to the Special District Act. For this reason, it is authorized to furnish services and facilities "without the boundaries of the special district and to establish rates, fees, tolls, penalties, or charges for such services and facilities." *See* section 32-1-1001(k), C.R.S. The Big Sky IGA provides for such extra-territorial service by Green Mountain, and it is fully authorized by the Special District Act.

4. The Big Sky IGA is not missing essential terms.

Green Mountain's next argument about why it should simply renege on an agreement that was the product of almost five years' worth of effort and negotiation by the parties is that the Big Sky IGA is "missing essential terms." However, no essential terms are missing, and the minds fully met regarding the essential terms.

It is true that the Big Sky IGA is not for a term of years, but that does not make it "indeterminate." Under Section 10.2 of the IGA, it may be terminated if Big Sky fails to pay costs,

fees, or charges under the Agreement; or if Big Sky does not enforce applicable rules or regulations; or if Metro cancels its Special Connector's Agreement with Green Mountain or otherwise refuses to treat wastewater generated from properties within Big Sky. These negotiated conditions fully protect Green Mountain by ensuring that it only has to serve Big Sky as long as Big Sky performs its agreement and Green Mountain has a place to transmit the wastewater. When it entered into the Big Sky IGA in a proprietary capacity, it bound itself to serve Big Sky as long as the conditions in Section 10.2 did not take place. *See Park View Pipe Line*, 139 Colo. at 124-26, 336 P.2d at 719-20 (1959)(holding that City could not terminate contract to provide water for an indefinite period except in accordance with termination provisions of the contract).

Green Mountain then states that essential terms are missing because Exhibit C has not been attached to the Big Sky IGA and no costs are included with Exhibit E. However, as is expressly stated in Section 2.7 of the IGA, Exhibit C was to be attached after the execution of the agreement. It consisted of a detailed accounting of all costs that Big Sky had incurred in building the Big Sky sanitary sewer system, improving the Green Mountain system, and legal fees incurred in the litigation against Fossil Ridge. Green Mountain has the right to approve Exhibit C in its reasonable discretion, and it doesn't have to serve Big Sky until it has given its approval. Once Exhibit C is approved, then Big Sky may recover the listed costs from the property owners and special districts that Big Sky serves. Green Mountain misleadingly states that Exhibit C defines costs that Green Mountain is to pay, which simply isn't true.

Green Mountain also mischaracterizes Exhibit E. It states that the Exhibit E should have stated the amount that "Green Mountain was incurring to make necessary improvements to its own infrastructure to accommodate the extra flow from Big Sky." However, as Section 4.1 of the Big

Sky IGA clearly states, "Big Sky agrees that the planning, design, construction, acquisition, installation, upgrading or upsizing of the GM (Green Mountain) improvements are necessary for acceptance of Big Sky's Wastewater, and that it is reasonable for Big Sky to bear 100% of such expenses." Green Mountain then agrees to design and construct the improvements assuming that the costs are advanced by Big Sky. *Id*. There is no uncertainty in any of these terms about the obligations of the parties and the process they agreed to undertake.

Ironically, the only reason that no costs are associated with Exhibit E, and that there is no Exhibit C at this point in time, is because Green Mountain "suspended" the Big Sky IGA on September 4, 2018, as evidenced by Exhibit A attached to Green Mountain's Motion. Green Mountain then told its engineers not to work with Big Sky or assist in the design of the improvements listed in Exhibit C. Green Mountain thus seeks to use its own bad faith breach of contract as a defense to the Big Sky IGA. That "defense" fails as a matter of law.

D. This Court has authority to enter a decree of specific performance.

Section 10.1 of the Big Sky IGA states as follows: "In addition to the remedy set forth in Section 10.2, but subject to the provisions of Section 12.11, any Party may seek monetary damages or an order for specific performance, declaratory or injunctive relief in the event of a breach of any provision of this Agreement." Green Mountain argues that this clause is invalid, and that this Court is without authority to employ the remedy of specific performance.

Unlike a majority of states, the Colorado Supreme Court has adopted a theory of limited sovereign immunity. As such, a governmental entity waives immunity from suit upon entering into a contract, and courts have the power to enforce the contract against the public entity. *Wheat Ridge*

Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737, 774-75 (Colo. 2010); *Ace Flying Serv. v. Colo. Dep't of Agric.*, 136 Colo. 19, 22, 314 P.2d 278, 280, (1957).

Specifically, in *Ace Flying Service,* the Colorado Supreme Court found the Department was liable for breach of contract where the plaintiff entered into a contract with the Colorado Department of Agriculture for extermination services but was prevented from fully performing by the Department. The court held that a state or any of its departments entering into contracts lays aside its attributes of sovereignty, and binds itself substantially as one of its citizens does when he enters into a contract, and, in general, its contracts are interpreted as the contracts of individuals are, and are controlled by the same laws. *Ace Flying Serv.* 136 Colo. at 24, 314 P.2d at 280. This rule also applies to local governmental units, like water and sanitation districts. *Spaur v. City of Greeley*, 150 Colo. 346, 348, 372 P.2d 730, 731 (1962).

The question of whether a governmental entity waives immunity from a decree of specific performance by nature of entering into a contract has only been addressed in two Colorado appellate court decisions. In *Wheat Ridge,* a developer filed suit against the Wheat Ridge Urban Renewal Authority and the City of Wheat Ridge when the Authority failed to condemn parcels of private land as required under the parties' contract. Although the Authority waived sovereign immunity by entering into a contract, the *Wheat Ridge* court reversed the decision of the trial court, finding that there was no authority to order specific performance as a remedy to compel the sovereign to exercise its eminent domain power under the agreement. *Wheat Ridge*, 176 P.3d at 746. Likewise, in *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation District.*, 240 P.3d 554, the court of appeals upheld the trial court's denial of specific performance

against a sanitation district where a sanitation district failed to reserve taps for a real estate developer. *Thompson Creek*, 240 P.3d at 556

However, unlike the Big Sky IGA, the agreements at issue in *Wheat Ridge* and *Thompson Creek* did not contain a provision, which explicitly provided for specific performance as a remedy. As such, the *Thompson Creek* and the *Wheat Ridge* courts did not consider the legal question of whether a contract provision allowing for the remedy of specific performance is enforceable. Rather, the courts only considered whether waiver of sovereign immunity by nature of entering into a contract extended to the remedy of specific performance.

Colorado district courts have recognized this distinction, which neither *Wheat Ridge* nor *Thompson Creek* addressed. In *Rocky Mountain Natural Gas v. Colorado Mountain Junior College District*, 2013 Colo. Dist. LEXIS 1118*, the district court held that "as a matter of law, the remedy of specific performance of a contract is not available against a public entity *at least in the absence of* a governmental consent or waiver. The *Rocky Mountain* court reasoned that where the lease contained no provision explicitly giving the plaintiff a right to pursue the remedy of specific performance, despite waiving governmental immunity by entering into a contract, waiver is limited to the remedy of damages and does not extend to specific performance. *Id.* In *Woodland Park Beer Garden, LLC v Woodland Park Downtown Development Authority*, No. 2016CV30085, 2017 WL 11018064, at *2 (Colo.Dist.Ct. Mar. 14, 2017) the court held that it could order specific enforcement if expressly provided for in the agreement, and found that "neither *Thompson* nor *Wheat Ridge* are dispositive of the issue of whether the court can order specific performance under the facts presented."

Although Colorado appellate courts have not decided a case in which there was a contract provision expressly providing for specific performance as a remedy in a governmental contract, this issue has been addressed in appellate courts in other jurisdictions. *In Upper Oconee Basin Water Authority v. Jackson County*, 305 Ga. App. 409, 413, 699 S.E.2d 605, 608 (2010), the County sought a decree of specific performance against the Authority for failure to provide water to Member Counties under the terms of their agreement. In pointing to the provision in the Agreement which provided for specific performance as a remedy, the court held "the Agreement itself contemplates enforcement of the Agreement through an action for specific performance or by seeking injunctive relief in the event of an alleged default. Based on the foregoing, we find that the trial court did not err by refusing to dismiss the amended petition on the basis of sovereign immunity." *Upper Oconee Basin Water Auth.*, 305 Ga. App. at 413, 699 S.E.2d at 608.

Moreover, contrary to Green Mountain's arguments, in at least one case of the Colorado Supreme Court, the Court implicitly concluded that enforcement of specific performance is not prohibited *per se* against a governmental entity. In *National Food Stores, Inc. v. North Washington St. Water and Sanitation District*, 429 P.2d 283, where a water and sanitation district sought to renegotiate terms of contract and increase charges, the court found that a contract between a packing plant and a water and sewage district was enforceable according to its terms and remanded the case to the trial court to enter a decree of specific performance by the parties.

CONCLUSION

For all of the foregoing reasons, Big Sky requests that this Court deny Green Mountain's Motion for Summary Judgment in full.

Dated this 2nd day of October, 2019.

NORTON & SMITH, P.C.

s/ Charles E. Norton
Charles E. Norton, #10633
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 2nd day of October, 2019, a true and correct copy of the foregoing **PLAINTIFF BIG SKY METROPOLITAN DISTRICT NO. 1s RESPONSE BRIEF IN OPPOSITION TO DEFENDANT GREEN MOUNTAIN WATER AND SANITATION DISTRICTS MOTION FOR SUMMARY JUDGMENT** was served electronically and/or sent via U.S. Mail, postage prepaid to the following:

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