DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway Golden, CO 80401 Ph: (303) 271-6154 DATE FILED: October 16, 2019 1:47 PM FILING ID: F20C020C7D3CA CASE NUMBER: 2019CV30887	
Plaintiffs: BIG SKY METROPOLITAN DISTRICT NOS. 1-7, a quasi-municipal corporation and political subdivision of the State of Colorado **Defendant:** GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado	**▲COURT USE ONLY▲**
Attorneys For Defendant: Mary Joanne Deziel Timmins, #13859 DEZIEL TIMMINS LLC 450 East 17th Avenue, Suite 210 Denver, Colorado 80203 **Telephone:** (303) 592-4500 **Facsimile:** (303) 592-4515 **E-mail:** jt@timminslaw.com	**Case Number:** 2019-CV-030887 **Division: 2** **Courtroom: 4B**
REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	

Green Mountain Water and Sanitation District ("Green Mountain") hereby submits its Reply:

I. BACKGROUND

This litigation is the result of Plaintiff, Big Sky Metropolitan District No. 1 ("Big Sky"), and a group of developers, attempting to get around the laws applicable to them, particularly the public notice and hearing requirements, necessary to achieve their development objectives. Most notable is Big Sky's violation of the long-established requirement, set down by the Colorado Supreme Court, that fixing of boundaries of governmental entities, whether cities, towns or districts, must be by *the electors* of the territory within the limits of the proposed city or town. *Rhodes v. Fleming*, 16 P. 298 (Colo. 1887) (Organization of new town or city requires petition with attached "accurate map" and proof of number of "qualified electors residing within the territory" who fix the boundaries of the new town or city through petition and vote.) Governmental entities are *geographically* defined by law so that elected officials who govern can

be held accountable by their electorate. The electorate is defined by the status of voters as "residents," which requires property ownership or occupancy, which is defined geographically. *Id.* ("The fixing of the boundaries of . . . cities and towns . . . must be performed by . . . the electors of the territory within the limits of the proposed city or town.")

Big Sky Unlawfully Expanded its Boundaries

One of the reasons for the Green Mountain Resolution declaring the Big Sky IGA void, which is at the heart of these cases, is that Big Sky tried to *unilaterally* expand its boundaries, *without the petition or vote of the electors*, in violation of the Special District Act, which codifies the requirements of *Rhodes v. Fleming.* Under the Big Sky IGA, Big Sky tried to delegate its sanitary sewer function to Green Mountain, obligating Green Mountain to serve an area of land that was not within Big Sky's jurisdiction. Big Sky's disregard for the law was consistent with the plaintiff/developers having proceeded all along with Green Mountain, and their development plans, as if they were dealing with the "private sector," and not governmental entities. This misconception led to numerous failures to follow rules for dealing with public entities, particularly public notice and hearing requirements.

The Fossil Ridge IGA

The "Fossil Ridge IGA," an intergovernmental agreement between Green Mountain and the Fossil Ridge Metropolitan District, referred to repeatedly in the parties' briefs, is irrelevant to this case. Nevertheless, it is an example of an intergovernmental agreement that complies with the boundary requirements. While governmental entities are not permitted to operate outside their boundaries (see discussion above), governmental entities have been constitutionally authorized to cooperate and delegate their functions with other governmental entities, so long as the functions delegated are "lawfully authorized to each." Colo. Const. Art. XIV, §18(2)(a),

codified in C.R.S. §29-1-203. Therefore, even though the Fossil Ridge service area is outside the Green Mountain boundaries, Fossil Ridge is permitted to delegate to Green Mountain the duty to provide sanitation services to the Fossil Ridge citizens because Fossil Ridge is authorized to provide such sanitation services to its citizens in the first place. An intergovernmental agreement regarding the *delegation* of a core governmental function to serve its *citizens* is distinguishable from a contract for the *sale* of governmental functions to *non-citizens*. Much confusion has been created by Big Sky, and the other plaintiffs, by failing to distinguish between these concepts.

As discussed below, the Big Sky IGA is *not* analogous to the Fossil Ridge IGA, because Big Sky tried to delegate to Green Mountain the duty to provide sanitation services to a large geographic area *outside* the boundaries of the Big Sky Service Plan. Big Sky was not authorized to provide sanitation services to that geographic area in the first place, and therefore, the delegation of those services was not "lawfully authorized" to Big Sky.

The claims in the Complaint are dismissible under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction. In the alternative, there are no disputed issues of material fact, and Green Mountain is entitled to judgment as a matter of law under C.R.C.P. 56(b).

II. DISCUSSION

A. This Court Lacks Subject Matter Jurisdiction Over the Claims in the Complaint

Big Sky seeks a declaration under C.R.C.P. 57 that Green Mountain's adoption of its Resolution, declaring the Big Sky IGA void and unenforceable, is "null, void, and of no legal force or effect." Complaint at ¶84(a) ("for a declaration . . . that the Resolution is null, void, and of no legal force or effect."). As a matter of law, this is a request for certiorari review by the district court of Green Mountain's Resolution which is only available under Rule 106(a)(4).

Benson v. Eagle County, 2017 Colo. Dist. LEXIS 1364 *12 (Eagle County) ("Plaintiffs . . . specifically request that the Court declare the 2009 Amendment 'invalid, null and void,' . . . This is a request for certiorari review" under Rule 106(a)(4)). See also *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 676-77 (Colo. 1982) (Party may not seek review of quasi-judicial decisions indirectly through a Rule 57 declaratory judgment if its claim under C.R.C.P. 106(a)(4) was time barred). Therefore, the exclusive remedy for reviewing the quasi-judicial decision of the Green Mountain Board is C.R.C.P. 106(a)(4). *Board of County Comm'rs v. Sundheim,* 926 P. 2d 545, 548 (Colo. 1996).

Moreover, Colorado law requires the joinder of all causes of action in a single Rule 106(a)(4) complaint. *Sundheim, supra.* The joinder requirement reflects the strong public policy interest in judicial economy and efficiency. *Gale v. City & County of Denver*, 923 F. 3d 1254, 1256 (10th Cir. 2019). Rule 106(a)(6) requires all actions under Rule 106(a)(4) be brought within 28 days of the governmental decision that is being reviewed. If a plaintiff fails to seek review of a governmental body's decision within 28 days, the district court lacks subject matter jurisdiction, and the claims must be dismissed under Rule 12(b)(1). *JJR 1, LLC v. Mt. Crested Butte*, 160 P. 3d 365 *4 (Colo. App. 2007) ("If claims are not timely filed, the district court lacks jurisdiction to hear them. See C.R.C.P. 106(b).")

1. <u>The Big Sky IGA is Not a Proprietary Matter.</u>

Big Sky asserts that the "Big Sky IGA was entered into as part of the proprietary powers of Big Sky and Green Mountain," and therefore the termination of the IGA was a proprietary matter not reviewable under Rule 106(a)(4). Response at p. 8. The parties' actions were not "proprietary," and even if they were, Rule 106(a)(4) still applies.

a. Provision of Core Governmental Function to Citizens is Not Proprietary. Special districts are creatures of statute and possess only those powers expressly conferred on them. *Bill Barrett Corp. v. Sand Hills Metropolitan District,* 411 P. 3d 1086 (Colo. App. 2016). Big Sky's and Green Mountain's only authority to enter into an IGA is granted under Colo. Const. Art XIV §18 and C.R.S. §29-1-203, permitting governmental entities to delegate functions to each other that are lawfully authorized to each. Therefore, entering into the Big Sky IGA was done as part of the parties' constitutional powers, and not as part of their "proprietary powers."

Moreover, there is nothing "proprietary" about an "intergovernmental" agreement between two governmental bodies regarding the delegation and sharing of their respective core governmental functions in the service of their citizens. The cases cited by Big Sky in its Response deal with contracts between a governmental entity and a *private* party, for the *sale* of services to *non-citizens*. See Response at p. 8 and cases cited therein including *National Food Stores, Inc. v. North Washington Street Water and Sanitation District,* 429 P. 2d 283(Colo. 1967) (contract for sale of sewage treatment services to private corporation). Colorado courts recognizing the distinction between proprietary and governmental agreements define "proprietary" contracts as those between a governmental entity, and a *private* party, such as a coal supplier. *Colowyo Coal Co. v. City of Colorado Springs,* 879 P. 2d 438 (Colo. App. 1994). See also *Bennett Bear Creek Farm Water & Sanitation District v. City & County of Denver,* 928 P. 2d 1254, 1266 (Colo. 1996) (Discussion regarding meaning of "proprietary" actions). Big Sky has not cited any authority to support its position that an intergovernmental agreement between two governmental entities for the provision of core governmental functions to their citizens is a "proprietary" matter.

b. In Any Event, "Proprietary" Does Not Define the Standard for Judicial Reviewability, and a "Proprietary" Contract is Still Subject to Rule 106

While the term "proprietary" may describe a type of contract with a private party, or services delivered thereby to non-citizens, it does not define the judicial standard for reviewing governmental actions taken thereunder. *Bennett Bear Creek Farm Water & Sanitation District v. City & County of Denver*, 928 P. 2d 1254, 1266 (Colo. 1996) ("While the term 'proprietary' describes a type of service, . . . it does not define the . . . judicial standard to be applied when reviewing local government . . . actions"). Therefore, when a governmental entity interprets a contract to which it is a party, even if the contract is with a private corporation and therefore "proprietary," and even if the governmental entity finds the private contracting party to be in breach, such interpretation is a judicial action subject to exclusive review under Rule 106(a)(4). *Ad Two, Inc. v. City & County of Denver,* 9 P. 3d 373 (Colo. 2000) (City Manager's determination that airport concessionaire was in breach of Concession Agreement with City is judicial action reviewable under Rule 106(a)(4)).

2. There is no "Breach of Contract" Exception to Rule 106(a)(4)

Big Sky asserts that breach of contract claims are excluded from Rule 106(a)(4), because a breach of contract claim is a "plain, speedy and adequate remedy," citing *Wilson v. Town of Avon*, 749 P. 2d 990 (Colo. App. 1987). This position is incorrect and not supported by *Wilson.*

Rule 106(a)(4) provides for judicial review in the district court:

> 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*. (emp. added).

The "adequate alternative remedy" language of Rule 106(a)(4) refers to the requirement that a plaintiff exhaust any statutory avenues for review of the judicial body's decision at the local or administrative level, before filing an action in the district court. See *Martin v.*

Arapahoe County Court, 405 P. 3d 356, 359 (Colo. App. 2016) (Dismissal upheld of plaintiff's Rule 106(a)(4) action seeking review of temporary protection order because governing statutes permit further review at permanent order hearing, which is "plain, speedy and adequate remedy otherwise provided by law" under Rule 106(a)(4)). See also *Kirbens v. Martinez*, 742 P. 2d 330 (Colo. 1987) (Dismissal of Rule 106(a)(4) action seeking review of county court jail sentence upheld because review by Denver Superior Court under Colorado Municipal Court Rules 235, was a "plain, speedy and adequate remedy" for review, prior to filing Rule 106 action).

The case cited by Big Sky is inapplicable. In *Wilson v. Town of Avon*, 749 P. 2d 990, 992 (Colo. App. 1987), the Rule 106(a)(4) action was dismissed because the court held that a "plain, speedy and adequate remedy" for denial of unemployment benefits was available under the statutory review procedures of C.R.S. §8-74-103 (review by industrial claim appeals office), and also held that the lower body's decision was an "administrative" decision, and not a "quasi-judicial" decision, and therefore not reviewable under Rule 106(a)(4) for this reason as well.

In fact, breach of contract claims are *not* excepted from Rule 106(a)(4) review. See *Ad Two, Inc. v. City & County of Denver*, 9 P. 3d 373 (Colo. 2000) (City Manager's finding airport concessionaire in breach of Concession Agreement contract with City is judicial action reviewable exclusively under rule 106(a)(4); *City of Colorado Springs v. Givan*, 897 P. 2d 753, 761 (Colo. 1995) (Breach of employment contract claims resolved in Rule 106 action); *Widder v. Durango Sch. Dist. No. 9-R*, 85 P. 3d 518, 522 (Colo. 2004) (Review of employment contract "pre-termination" process reviewed under Rule 106(a)(4)).

Big Sky's argument that breach of contract claims are excepted from Rule 106(a)(4) because they are a "speedy and adequate alternative remedy" would make the Colorado court's joinder of all claims requirement under Rule 106(a)(4) meaningless. *Powers v. Bd. of Cty.*

Comm'rs, 651 P. 2d 463 (Colo. App. 1982) (Rule 106(a)(4) requires joinder of all plaintiff's claims in one action). See also *Norby v. City of Boulder,* 577 P. 2d 277 (Colo. 1978) (Under Rule 106, one "must prosecute all of his causes, including constitutionality, in one action, which must be brought within [28] days. . . .")

Rule 106(a)(4) requires joinder of *all* the plaintiff's claims in one action based on the "strong public policy interest in judicial economy and efficiency." *Board of County Comm'rs v. Sundheim* , 926 P. 2d 545, 548 (Colo. 1996); *Snyder v. Lakewood,* 542 P. 2d 371, *14 (Colo. 1975); *Gale v. City & County of Denver,* 923 F. 3d 1254, 1256 (10th Cir. 2019). Otherwise, extending the time for review of governmental decisions would require local bodies to live "under a cloud of uncertainty which is not compatible with modern comprehensive planning." *Snyder v. City of Lakewood,* 542 P. 2d371, 376 (Colo. 1975).

Big Sky's confusion may have arisen from *dicta* in *Wilson v. Avon, supra,* in which the Court stated that a breach of contract claim provided a "plain, speedy and adequate remedy," rendering Rule 106(a)(2) review unavailable citing *Ebke v. Julesburg School District No. RE-1,* 550 P. 2d 355 (Colo. App. 1976). In *Ebke,* the Court was reviewing a *mandamus* claim under Rule 106(a)(2), and not a *certiorari* claim under Rule 106(a)(4). Because the time limits under Rule 106(a)(6) do not apply to mandamus actions under Rule 106(a)(2), and because extraordinary mandamus relief is only available when no other legal actions exist, the Court reversed the lower court decision dismissing the complaint. This line of authority relating to mandamus claims is not applicable to this case. *Wilson* does not apply to this case.

3. The Adoption of the Resolution Was a Classic Quasi-Judicial Action

The Colorado Supreme Court has defined "quasi-judicial" action of a governmental body to involve "a determination of the rights, duties, or obligations of specific individuals on

the basis of the application of presently existing legal standards . . . to past or present facts developed at a hearing conducted for the purpose of resolving particular interests in question." *Cherry Hills Resort Dev. Co. v. Cherry Hills Village*, 757 P. 2d 622, 625 (Colo. 1988). By adopting the Resolution at issue, the Green Mountain Board determined that the rights, duties and obligations of the parties under the Big Sky IGA were unenforceable based on applicable legal standards, including the Special District Act and the Colorado Constitution Article XIV §18, among other things. See Resolution, attached to Big Sky Complaint at Exhibit 8. This determination was made after actual notice was sent to Big Sky (and others), and after Big Sky was given the opportunity to be heard, and Big Sky was heard, at a publicly held meeting, prior to the Resolution being adopted. MSJ at pp. 6-7. The decision of the Green Mountain Board was classic "quasi-judicial" action, and therefore is solely reviewable under Rule 106(a)(4). See also *Ad Two, Inc. v. City & County of Denver*, 9 P. 3d 373 (Colo. 2000) (City Manager's finding airport concessionaire in breach of Concession Agreement contract with City is judicial action reviewable exclusively under rule 106(a)(4)).

Big Sky asserts that adoption of the Resolution was not "quasi-judicial" because no state law mandated notice and a hearing prior to the decision adopting the Resolution, that no notice and hearing were actually provided, and that the Resolution is "legislative in character." Big Sky's arguments are incorrect, and contrary to the undisputed facts admitted in its Response.

a. Statutorily Prescribed Notice and Hearing, and Actual Notice and Hearing, Given to Big Sky

Although the existence of a statute or ordinance mandating notice and a hearing to those persons likely to be affected by the decision is a clear sign that the governmental decision is "quasi-judicial" for purposes of Rule 106, "the fact that there is no such statute or ordinance

does not detract from the quasi-judicial nature of the proceeding." *Cherry Hills Resort Dev. Co. v. Cherry Hills Village,* 757 P. 2d 622, 627 (Colo. 1988).

The Colorado Sunshine Law requires resolutions of a special district be taken at publicly held meetings that have been the subject of "full and timely" public notice. C.R.S.§24-6-402(2)(c). The Resolution by the Green Mountain Board was adopted at a publicly held meeting that was the subject of public notice. MSJ at pp. 6-7. Therefore, the Colorado Sunshine Law required that notice be given prior to the adoption of the Resolution, and Big Sky is incorrect in arguing that "no state or local law required notice to be given" prior to adoption of the Resolution. Even if such notice was not required, statutorily mandated notice is not determinative of whether the action was quasi-judicial. *Cherry Hills, supra.*

More importantly, Big Sky received *actual* notice from the Green Mountain Board in September 2018, months prior to the adoption of the Resolution in April 2019, that the Big Sky IGA was being suspended, and was under review for its validity and enforceability under Colorado law. MSJ at pp. 6-7. Big Sky, as well as all members of the public, were given the opportunity to be heard at all publicly held meetings of the Green Mountain Board, on the matter of the Big Sky IGA. Big Sky, acting through its counsel, availed itself of the opportunity to be heard, and was heard, at the publicly held meeting on January 8, 2019. Big Sky admits that its attorney "signed up to speak" at the January 8, 2019, Regular Meeting, and gave a presentation to the Green Mountain Board, and therefore was heard on the issue of the validity of the Big Sky IGA. Response at p. 12-13 ("Mr. Norton [attorney for Big Sky] 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.") Big Sky cannot now claim it did not receive "statutory notice," when it received actual notice, and cannot claim it did not have a hearing, when it was heard.

To the extent the Court determines that prior notice of the Board's decision, or the extent of Big Sky's hearing, creates a disputed issue of fact, a trial court has discretion to hold a *Trinity* hearing to determine disputed facts relevant to a motion to dismiss based on lack of subject matter jurisdiction under C.R.C.P. 12(b)(1). *Consol. Case v. City of Aspen,* 2018 Colo. Dist. LEXIS 574 *9; *Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P. 2d 916, 925 (Colo. 1993).

b. Adoption of Resolution Was Not Legislative Action In direct conflict with its previous position that termination of the Big Sky IGA was a "proprietary action," Big Sky argues that termination of the IGA was a "legislative action" of the Board, thus not reviewable under Rule 106(a)(4). In support of this position, Big Sky cites the Green Mountain Resolution which referred to Green Mountain's "legislative authority." See Response at p. 13.

The Green Mountain Board is comprised of laypersons and citizens of the Green Mountain district, who serve voluntarily as elected officials. The fact that the Board characterized its authority as "legislative" in the Resolution is irrelevant to the determination of whether adoption of the Resolution constituted a judicial action. See *City & County of Denver v. Eggert,* 647 P. 2d 216, 223 (Colo. 1982) (Board of County Commissioners' adoption of resolution was quasi-judicial even though it was characterized by Commissioners as a "legislative" act.)

Big Sky cites *State Farm v. City of Lakewood,* for the proposition that the exercise of "discretion" in adopting the Resolution renders the decision a "legislative act." This is incorrect.

By definition, judicial actions are discretionary because Rule 106(a)(4) permits district court review of "judicial actions" to determine whether such actions were "an abuse of discretion."

B. THE BIG SKY IGA IS VOID IN VIOLATION OF NUMEROUS LAWS WHICH REQUIRED PUBLIC NOTICE AND A PUBLIC HEARING

Even if the Court exercises jurisdiction over the Complaint, Green Mountain is entitled to judgment as a matter of law because the Big Sky IGA was void, and the Resolution was proper.

1. Big Sky IGA Unlawfully Expanded Big Sky's Boundary Without Going Through Public Notice and Public Hearing Requirements.

A special district is limited by, and must conform to, its service plan as was approved by the district court, which includes a geographic boundary of its service area. C.R.S. §32-1-207(1). Any material modification to the service plan must be made by petition to, and approval of, the governing authority. C.R.S. §32-1-207(2)(a). If a special district proposes to furnish sanitary sewer service to an unincorporated area of a county beyond the geographic boundary in its service plan, such modification constitutes a material modification under the Special District Act, *by definition*, and such material modification must be approved by the board of county commissioners *after public notice and pubic hearing*. C.R.S. §32-1-207(2)(b) and (c).

There are no disputed issues of fact that Big Sky tried to expand its boundaries under the Big Sky IGA because Big Sky admits the area to be served under the Big Sky IGA is more than double the size of its authorized service are, or at least 280 acres larger than the area outlined in its Service Plan. Response at p. 16-17. Big Sky also admits that the additional acreage is located in unincorporated Jefferson County, and that notice was never sent to the Jefferson County Board of County Commissioners, as required under the Special District Act. Response at p. 17. In defense of its unauthorized doubling of its boundaries, Big Sky cites *Bill Barrett Corp. v. Lembke*, 2018 COA 134, for the proposition that "no material modification of the service plan is

involved" if the expansion of boundaries "does not involve a change in the type of service provided, but rather just the geographic area." *Lembke* does not support Big Sky's unauthorized expansion In *Lembke*, a case in which a special district's expansion of its boundary was challenged, the court upheld the boundary expansion because, to effectuate the expansion, the special district had (1) submitted its revised service plan showing the expanded boundary to the County for approval, and (2) included the additional acreage into its service area by going through the statutory inclusion process under §32-1-401 *which requires public notice and public hearing*. Big Sky has taken neither of these steps, and therefore its attempt to expand its boundaries is not controlled by *Lembke* and is unauthorized.

Big Sky further argues it is not required to comply with the notice requirements for expansion of sanitary sewer boundaries under C.R.S. §32-1-207(b) and (c) because the Big Sky IGA does not require "direct service" of sanitary sewer services, but rather "will simply be accepting wastewater." Response at p. 17. Big Sky's semantics are not recognized under the Special District Act. "Accepting wastewater" is the essence of providing direct sewer services.

2. Big Sky IGA is Void Under the Local Government Budget Law Because "Off Budget" Expenditures and Revenues Violate the Public Notice and Hearing Process

Big Sky does not deny that under the Big Sky IGA Green Mountain was to collect tap fee revenues and be required to make certain payments thereunder. Big Sky also does not deny that the IGA was not made subject to annual appropriation, even though it required multiple-year expenditures. Response at p. 18. Therefore, under the Big Sky IGA, none of the revenues nor expected payments were required to be reported in the Green Mountain fiscal year budgets, and therefore were not required to go through the *public notice and public hearing requirements* for special district budget approval. Big Sky argues the Big Sky IGA did not need to be reported on the annual budget because payments to Big Sky were either "rebates" of fees that Green

Mountain would "refund" to Big Sky, or that Big Sky was ultimately "responsible" for all Green Mountain's expenditures. Response at p. 19.

Big Sky's position is that Green Mountain was permitted to collect millions of dollars in tap fee revenues, and pay millions of dollars in rebate payments to Big Sky, *entirely off budget*. Collecting and paying such amounts, without reporting the revenues or payments transparently on the budget, is unlawful under the Local Government Budget Law which requires that all anticipated revenues for the budget year be reported, C.R.S. §29-1-103(1)(b), and that all expenditures be appropriated, C.R.S.§29-1-110. The purpose of requiring that revenues be reported, and expenditures be appropriated, is to keep proper and accurate records of the unexpended balance of funds. C.R.S. §29-1-114 ("record shall be kept so that it will show at all times the unexpended balance in each of the appropriated funds. . . .") If all amounts under the Big Sky IGA were kept *off budget*, millions of dollars of unexpended dollars, and payouts to Big Sky, would be unreported in violation of §29-1-114. Such agreements are void under §29-1-110.

3. Big Sky IGA Is Void as Unlawful Delegation of Powers Big Sky Did Not Possess

The Big Sky IGA is void under C.R.S. §29-1-203 and Colo. Const. Art. XIV §18 because Big Sky attempted to delegate to Green Mountain the power to provide sanitation services to at least 280 acres of land that is not included in the Big Sky service area. Therefore, the delegation of powers under the IGA was not "lawfully authorized to each," as required under C.R.X.§29-1-203 and Colo. Const. Art. XIV §18. This issue is discussed above.

4. The Big Sky IGA Was, at Most, an Executory Contract With Unexecuted Conditions

Even if the Big Sky IGA is not void, it is at most an executory contract for the reasons set forth in detail in the MSJ, including among other things the omission of material cost information in the missing Exhibits C and E. Big Sky admits Exhibits C and E were

intentionally missing, and states that such exhibits "were to be attached after the execution of the agreement," and Green Mountain "doesn't have to serve Big Sky until it has given its approval" of Exhibit C. Response at p. 21. Therefore, Big Sky admits that approval and attachment of additional terms was a condition precedent to the Big Sky IGA becoming a binding agreement, and therefore, based on Big Sky's admissions, the Big Sky IGA is not binding as a matter of law and judgment should be entered in favor of Green Mountain on the breach of contract claims.

C. Big Sky Acknowledges That Specific Performance is Not A Permitted Remedy

Big Sky acknowledges the Colorado courts have held there is no authority to order specific performance as a remedy against a governmental entity. Response at p. 23. In support of its request for specific performance, Big Sky cites case law from other jurisdictions and speculates that when parties agree to specific performance as a remedy, such agreement might be enforceable. Neither of these positions provides authority for this Court to enter a decree of specific performance. Moreover, an agreed remedy in a void agreement is not enforceable because the whole agreement is void and unenforceable. The case cited by Big Sky, *National Food Stores, Inc.*, involved an award based on unjust enrichment. Green Mountain has not been unjustly enriched, and none of the plaintiff/developers have made that allegation.

D. No Disputed Issues of Fact Regarding Promissory Estoppel Claim

Big Sky has not responded to the arguments in the MSJ that Big Sky failed to state a claim for relief, or create any disputed issue of material fact, relating to its promissory estoppel claim. In its Complaint, Big Sky fails to allege the existence of any promises made by Green Mountain to Big Sky that predate the Big Sky IGA, as required to state a promissory estoppel claim. *Skanchy v. Calcados Ortope SA*, 952 P. 2d 1071, 1077-8 (Utah 1998) (Promissory estoppel damages not proper if plaintiff fails to allege reliance on a promise which predated the contract.)

Moreover, Big Sky does not dispute that the Big Sky Will Serve Letter does not constitute a promise to support its promissory estoppel claim. *Alf Equinox Todd Creek Vill. N. v. Todd,* 2014 Colo. Dist. LEXIS 2584 (Weld County) *5 (Will serve letter from sanitation district is not a promise to provide sewer service, but rather an offer of a unilateral contract). Therefore, judgment on the Fourth Claim for Relief, for promissory estoppel, should be entered in favor of Green Mountain.

III. CONCLUSION

For the reasons set forth herein, Green Mountain requests the claims in the Complaint be dismissed under C.R.C.P. 12(b)(1) because of this Court's lack of subject matter jurisdiction. In the alternative, Green Mountain requests that judgment be entered in favor of Green Mountain because Big Sky has failed to raise any material issues of disputed fact, and Green Mountain is entitled to judgment as a matter of law under C.R.C.P. 56(b).

Respectfully filed with the Court this 16th day of October, 2019

DEZIEL TIMMINS LLC

/s/ Mary Joanne Deziel Timmins
Mary Joanne Deziel Timmins #13859

CERTIFICATE OF SERVICE

I certify that, on October 16, 2019, a true and correct copy of the foregoing was served on the following via the Colorado Courts E-Filing System and/or by email:

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/s/ Mary Joanne Deziel Timmins
Mary Joanne Deziel Timmins