DISTRICT COURT, PARK COUNTY, COLORADO Court Address: P.O. Box 190 Fairplay, CO 80440 **Plaintiffs: ELK FALLS PROPERTY OWNERS ASSOCIATION, a Colorado corporation; KATHRYN WELLS; THE PAUL VASTOLA and SUZANNE G. NELSON LIVING TRUST, U/A; ROBERT W. PHELPS; and KEVIN O'CONNELL,** **vs.** **Defendant: VERA B. DUNWODY; DRAYTON D. DUNWODY; and FARM CREDIT OF SOUTHERN COLORADO, ACA, an agricultural credit association; and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PARK.** **Plaintiffs in Intervention: PETER J. BRAUN AND RENAE J. BRAUN.**	▲ COURT USE ONLY ▲ Case Number: 10-CV-65 Division B

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MOTION TO RECONSIDER ORDER GRANTING DEFENDANT'S AMENDED MOTION TO JOIN BOARD OF COUNTY COMMISSIONERS OF PARK COUNTY AS A PARTY OR, IN THE ALTERNATIVE, TO DISMISS BOARD OF COUNTY COMMISSIONERS AS A PARTY PURSUANT TO C.R.C.P. 12(b)(6)

DEFENDANT BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PARK ("Park County") by its attorneys Hayes, Phillips, Hoffmann & Carberry, P.C., moves the Court to reconsider its September 29, 2010 Order Granting Defendant's Amended Motion to Join Board of County Commissioners of Park County as a Party or, in the alternative, to dismiss Park

County as a party in this case pursuant to C.R.C.P. 12(b)(5) and, as cause therefore, shows the Court as follows:

C.R.C.P. 121 § 1-15 ¶ 8 Certification: Plaintiff's counsel has attempted to confer in good faith with all counsel about this motion. Counsel for Plaintiffs indicates that Plaintiffs take no position on the motion. Counsel for Defendants opposes the motion.

INTRODUCTION

Park County was joined as a defendant in this case based upon Defendants' Motion to Join Board of County Commissioners of Park County as a Party (the "Joinder Motion"). Park County had no realistic opportunity to respond to the Joinder Motion since it only learned of the filing of the Joinder Motion a few days before the Court granted it.

The Joinder Motion should have been denied as untimely since it was brought after the time allowed for the filing of such motions by C.R.C.P. 16.

Moreover, the Joinder Motion , which by its own terms was brought pursuant to C.R.C.P. 19(a) and 20(a), fails to allege, much less establish, any of the reasons for involuntarily joining a party in a pending case set forth in those Rules.

Finally, dismissal of Park County as a partying this case is required by C.R.C.P. 12(b)(5) since neither the Amended and Restated Complaint nor the Counterclaim on file herein states a claim for relief against Park County upon which relief can be granted. Indeed, no party in this case states any claim against, or seeks any relief from, Park County at all. Park County's participation in this case is purely superfluous and merely adds to the cost and complexity of the litigation. Park County should be dismissed as a party.

ARGUMENT

1. The Joinder Motion should be denied as untimely.

On March 25, 2010 this Court entered its standard Delay Reduction Order in this case. That Delay Reduction Order stated, in pertinent part, that: "The parties shall be subject to the presumptive case management order set forth in C.R.C.P. Rule 16." Subsequently, on May 27, 2010 and June 10, 2010 respectively, Plaintiffs and Defendants each filed a Notice to elect Exclusion From C.R.C.P. 16.1 Simplified Procedure. Thus, it is indisputable that this case is governed by the presumptive case management order of C.R.C.P. 16.

This case became "at issue" for purposes of C.R.C.P. 16 on April 26, 2010, when the Plaintiffs filed their Reply to Counterclaim.[1] C.R.C.P. 16(b)(8) states as follows:

> **(8) Time to Join Additional Parties and Amend Pleadings.** No later than 120 days after the case is at issue, all motions to amend pleadings and add additional parties to the case shall be filed.

The 120th day after this case was at issues was August 24, 2010. The Joinder Motion was not filed until September 8, 2010, well after the deadline established by C.R.C.P. 16(b)(8).

Defendants have not requested an extension of the C.R.C.P. 16(b)(8) deadline. Nor have they offered any explanation for their delay in seeking to add Park County as a Defendant. What few purported facts are recited in the Joinder Motion in support of the involuntary joinder of Park County in this case were surely known to Defendants at the commencement of the case. If Park County is a necessary party now (a dubious proposition as discussed below) it was surely a

necessary party months ago. There is simply no reason why the Defendants could not have complied with the Rule 16 presumptive case management order and moved to join Park County in a timely manner. Their failure to do so is certainly prejudicial since the County must now wade through nearly a year of pleadings and proceedings in order to come to speed on this case. The simple fact is that the Joinder Motion is untimely and should be denied.

2. Joinder of Park County in this case is not warranted by C.R.C.P. 19(a) or 20(a).

The Joinder Motion, on its face, is made "pursuant to C.R.C.P. 19(a) and 20(a)." Neither Rule even arguably justifies involuntarily dragging Park County into this proceeding.

C.R.C.P. 19(a) states, in pertinent part and as quoted by Defendants in the Joinder Motion, as follows:

> [a] person who is properly subject to service of process in an action shall be joined as a party in the action if: . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest . . . . If he has not been so joined, the court shall order that he be made a party.

The Defendant, in support of joining Park County as a party defendant, then boldly argues that the language quoted above applies in this case because:

> 3. The Board of County Commissioners of Park County have an interest in the outcome of this litigation since such Board has the right to have judicial determination as to the character of the Disputed Roads, and if found to be public, to have injunctive relief against those who would interfere with the consistent use thereof. *Leach v. Manhart,* 96 Colo. 397, 400, 43 P.2d 959, 960 (1935). *Accord, Dept. of Natural Resources, Wildlife Commission, Division of Wildlife v. Cyphers,* 74 P.3d 447, 449 (Colo. App. 2003).

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[1] "For the purposes of this Rule [16], a case shall be deemed at issue at such time as all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against all non-appearing parties, or at such other time as the court may direct." C.R.C.P. 16(b)(1).

Joinder Motion, ¶3.

The fly in the ointment is, of course, that the Defendants have presented no evidence that Park County has "an interest in the outcome of this litigation." If Park County did, in fact, have such an interest it would certainly have intervened in this case, which is precisely the import of the case cited by Defendants. In *Leach v. Manhart,* a copy of which is attached hereto for the Court's convenience, Douglas County filed a motion to intervene in a pending case asserting that the road that was the subject of the case was a public road in which Douglas County had an interest. The trial court denied the motion to intervene and the Colorado Supreme Court reversed, holding that the County had a sufficient interest in the case to allow intervention. In *Dept. of Natural Resources, Wildlife Commission, Division of Wildlife v. Cyphers* the Division of Wildlife was the actual plaintiff in a public highway doctrine case with the result that the case is completely inapposite to the issue presented here since it did not involve the joinder of any party.

Whether Park County could intervene in this case is utterly irrelevant. It has decided not to do so. The question presented here is whether Park County is a necessary party to this litigation under C.R.C.P. 19(a) and the answer is that it is not. **There is simply no evidence before the Court that Park County "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . [a]s a practical matter impair or impede [its] ability to protect that interest.**" C.R.C.P. 19(a). Indeed, the very parties that request that Park County be brought into this case as an involuntary party, the Defendants, emphatically claim that the Disputed Roads are not public roads with the result that neither the Plaintiffs nor, presumably, Park County, have any interest in them at all. **In other words, for the Defendants to prevail on their Joinder Motion they must effectively confess**

judgment in this case that the Disputed Roads are public roads. If they are not, then Park County obviously has no interest in the outcome of the case and is not a proper party.

Turning to Defendants somewhat half-hearted suggestion that permissive joinder of Park County is allowed by C.R.C.P. 20(a), a simple reading of the Rule establishes that it has no applicability here and cannot form the basis for Park County's involuntary joinder in this case as a party defendant. The Rule states, in pertinent part, as follows:

> **(a) Permissive Joinder . . . .** All persons may be joined in one action as defendants **if there is asserted against them jointly, severally, or in the alternative, any right to relief** in respect of or arising out of the same transaction, occurrence, or series of transaction or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded.

C.R.C.P. 20(a) (emphasis added).

Here, no "right to relief" is "asserted" against Park County, either "jointly, severally, or in the alternative" by any party to the case. Thus, the joinder of Park County as a defendant in this case is clearly inappropriate, as will be further discussed below.

The involuntary joinder of Park County in this case is clearly improper under either C.R.CP. 19(a) or 20(a). Had Park County wished to incur the time and expense of intervening or participating in this case it would certainly have done so. It did not, and it is somewhat absurd for the Defendants, whose entire defense is premised on the argument that no one but they has any interest in the Disputed Roads, to then suggest that Park County must be brought into the case because the County has an interest in the Disputed Roads. The Joinder Motion should be denied.

3. Dismissal of Park County as a Defendant is required by C.R.CP. 12(b)(5).

C.R.C.P. 12(b)(5) authorizes dismissal for "failure to state a claim upon which relief can be granted." In considering a motion pursuant to C.R.C.P. 12(b)(5) the Court must accept all matters of material fact in the complaint as true. *See Asphalt Specialties Co. v. City of Commerce City*, 218 P.3d 741 (Colo. App. 2009).

Here there can be no dispute that the pleadings on file in this case fail to state a claim against Park County on which relief can be granted for the entirely obvious reason that **absolutely no relief against Park County is requested in either Plaintiffs' Amended and Restated Complaint or Defendants' Counterclaim.** There is simply nothing for Park County to defend in this case and the County's involuntary participation as a defendant is nothing more than a waste of judicial and legal resources and of taxpayer money. Dismissal of Park County as a Defendant pursuant to C.R.C.P. 12(b)(5) is required.

CONCLUSION

For the reasons set forth above, Park County respectfully requests that the Court reconsider its September 29, 2010 Order Granting Defendant's Amended Motion to Join Board of County Commissioners of Park County as a Party, deny the Joiner Motion or, in the alternative, dismiss Park County as a party in this case pursuant to C.R.C.P. 12(b)(5). A proposed form of Order is attached for the Court's consideration.

Respectfully submitted this 3rd day of November, 2010.

HAYES, PHILLIPS HOFFMANN & CARBERRY, P.C.

By: s/ Herbert C. Phillips
Herbert C. Phillips, Attorney for Plaintiff Park County Board of County Commissioners
E-FILED PER RULE 121. ORIGINAL SIGNED COPY ON FILE AT THE OFFICES OF HAYES, PHILLIPS, HOFFMANN & CARBERRY, P.C.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of November, 2010, a true and correct copy of the within **MOTION TO RECONSIDER ORDER GRANTING DEFENDANT'S AMENDED MOTION TO JOIN BOARD OF COUNTY COMMISSIONERS OF PARK COUNTY AS A PARTY OR, IN THE ALTERNATIVE, TO DISMISS BOARD OF COUNTY COMMISSIONERS AS A PARTY PURSUANT TO C.R.C.P. 12(b)(6)** was served via Lexis Nexus upon the following:

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