

COLORADO COURT OF APPEALS

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Trial Court:

District Court, Boulder County, Colorado
The Honorable Judge Morris Sandstead
Case No. 06 CV 1161

Plaintiffs-Appellants:

ANITA MOSS and ROBERT WESTBY

v.

Defendants-Appellees:

The members of the COLORADO WILDLIFE COMMISSION, in their official capacities; the COLORADO DIVISION OF WILDLIFE, an Administrative Agency of the State of Colorado; and the BOULDER COUNTY BOARD OF COMMISSIONERS, in their official capacities.

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Case Number: 09 CA 1262

**APPELLEE, BOULDER COUNTY BOARD OF COMMISSIONERS',
ANSWER BRIEF**

TABLE OF CONTENTS

INTRODUCTION1

STATEMENT OF ISSUES1

STATEMENT OF CASE2

SUMMARY OF ARGUMENT2

ARGUMENT2

I. The District Court did not err in dismissing Moss and Westby’s
Complaint for failing to exhaust administrative remedies.2

 A. The District Court did not make any factual findings.....2

 B. Resolution 80-52.3

 C. Interested Parties.4

 D. Enforcement Issues Not On Appeal.....5

CONCLUSION6

TABLE OF AUTHORITIES

Cases

<i>Ahern v. Baker</i> , 366 P.2d 366 (Colo.1966).....	6
<i>Kendal v. Cason</i> , 791 P.2d 1227 (Colo. App. 1990)	3
<i>Macurdy v. Faure</i> , 176 P.3d 880 (Colo.App.2007).....	6
<i>Moschetti v. Liquor Licensing Auth.</i> , 490 P.2d 299 (Colo.1971)	6
<i>People ex rel. Inter-Church Temperance Movement v. Baker</i> , 297 P.2d 273 (Colo.1956).....	5
<i>Sheeley v. Bd. Of County Comm'rs</i> , 325 P.2d 275 (Colo.1958)	6
<i>Winslow v. Romer</i> , 759 F.Supp. 670 (D.Colo. 1991)	6

Statutes

§ 30-15-302, C.R.S.	3, 6
§ 30-15-302(1), C.R.S.....	4
§ 30-15-304, C.R.S.	4

Rules

C.R.C.P. 57(j).....	1, 4
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COMES NOW the Appellee, Boulder County Board of Commissioners (hereinafter referred to as “Boulder County”), by and through Andrew R. Macdonald, Assistant County Attorney, and hereby submit their Answer Brief as follows:

INTRODUCTION

Appellants Anita Moss and Robert Westby (hereinafter referred to as “Moss and Westby”) appeal the order from Boulder District Court which dismissed their lawsuit for lack of jurisdiction over the subject matter due to their failure to exhaust administrative remedies. Moss and Westby filed their Complaint against Appellees, Colorado Wildlife Commission and Colorado Division of Wildlife (hereinafter referred to as “Wildlife”) and Appellee Boulder County. CD at 1-16. Boulder County was included as a party pursuant to C.R.C.P. 57(j). Appellants’ Opening Brief, p. 2, fn 1.

STATEMENT OF ISSUES

1. Whether the District Court properly dismissed Moss and Westby’s Complaint for lack of subject matter jurisdiction due to their failure to exhaust administrative remedies.

STATEMENT OF THE CASE

In the interest of brevity, Boulder County hereby adopts by reference Wildlife's Statement of the Case (including the following sections: I. Nature of Case; II. Course of Proceedings; III. Disposition in the Boulder County District Court; and IV. Statement of Facts). Wildlife's Answer Brief, pp. 3-11.

SUMMARY OF ARGUMENT

The trial court properly dismissed the Complaint because Moss and Westby failed to exhaust their administrative remedies. The Appellate Court should not consider any issue concerning the enforcement of Resolution 80-52.

ARGUMENT

I. The District Court did not err in dismissing Moss and Westby's Complaint for failing to exhaust administrative remedies.

A. The District Court did not make any factual findings.

The case was dismissed following oral argument at the Trial Management Conference held on June 28, 2008. *See* Transcript of Hearing, CD at 406-454. The District Court determined that it lacked subject matter jurisdiction due to Moss and Westby's failure to exhaust their administrative remedies and limited its ruling to that issue. CD at 376. The District Court did not consider any evidence at the Trial Management Conference. Moss and Westby's Motion for Summary Judgment was denied on the basis that they had to pursue appropriate

administrative remedies through the Colorado Wildlife Commission for the relief requested in their case. CD at 378. The District Court lacked subject matter jurisdiction to rule on any other aspect of the case. See *Kendal v. Cason*, 791 P.2d 1227, 1228 (Colo. App. 1990) (Generally, failure to exhaust administrative remedies prior to seeking judicial relief is a jurisdictional defect). The District Court did not conduct a factual hearing to establish any facts in this case. Because there were no factual findings below, the Appellate Court should disregard the voluminous “facts” alleged in Moss and Westby’s Opening Brief. Appellants’ Opening Brief, pp. 3-13.

B. Resolution 80-52.

Boulder County passed Resolution 80-52, “A Resolution to Limit the Discharge of Firearms in Mountain Meadows, Mountain Pines, Pride of the West, and Sugarloaf Acres Subdivisions and Surrounding Areas” (hereinafter referred to as “Resolution”) on October 8, 1980. CD at 8-9. The language contained in the Resolution mirrors the language contained in the authorizing statute, § 30-15-302, C.R.S. The Resolution makes the discharge of a firearm unlawful in the designated area subject to certain exceptions. A duly authorized law enforcement officer acting in the line of duty is not subject to the restriction. In addition, firearms may be discharged in the designated area “in shooting galleries or in any

private grounds or residence under circumstances when such firearm can be discharged in such a manner as not to endanger persons and property and also in such a manner as to prevent the projectile from any such firearm from traversing any grounds or space outside the limits of such shooting gallery, grounds, or residence.” CD at 8-9. *See also* § 30-15-302(1), C.R.S.

C. Interested Parties.

Boulder County was included as a party to the lawsuit pursuant to C.R.C.P. 57(j). Appellants’ Opening Brief, p. 2, fn 1. The “validity” of the Resolution is not in dispute. Moss and Westby do not seek “specific” relief against Boulder County. Appellants’ Opening Brief, p. 2, fn 2. Pursuant to § 30-15-304, C.R.S., the Sheriff is responsible for enforcing the Resolution. The United States Department of Agriculture, Forest Service (hereinafter referred to as "USFS") is responsible for enforcing applicable federal laws on lands subject to its jurisdiction. The USFS and the Sheriff were not parties to the proceeding in District Court. Moss and Westby seek to have the Appellate Court “clarify” an issue involving the rights of the Sheriff and USFS. Appellants’ Opening Brief, p. 16, fn 8. Moss and Westby cannot circumvent the requirements of C.R.C.P. 57(j). This Court should refuse to “clarify” issues concerning the enforcement of the

Resolution¹. *People ex rel. Inter-Church Temperance Movement v. Baker*, 297 P.2d 273, 277 (Colo.1956).

D. Enforcement Issues Not On Appeal.

The District Court properly determined that it lacked jurisdiction over the subject matter due to Moss and Westby's failure to exhaust administrative remedies. The District Court did not address any issues concerning the enforcement of the Resolution and, as detailed above, could not without additional indispensable parties including the USFS, the Sheriff and individual private landowners. The Appellate Court should refuse to address any issue concerning the enforcement of the Resolution.

If the Appellate Court is inclined to consider any enforcement issue, case law precludes a mandamus claim against Boulder County. For nearly three

¹ According to Moss and Westby: "...there is considerable confusion among the citizens as well as the sheriff's department, as to whether Resolution 80-52 can be enforced on U.S. Forest Service Lands (Plaintiffs have presented authority that it can). More evidence of this uncertainty will be introduced at trial. Accordingly, orders issued in this case may well expand what Boulder County has always believed to be the limits of its enforcement abilities with regard to Resolution 80-52. It is for this reason alone that Plaintiffs have included all Defendants in their claim under Rule 106(a)(2). An action "in the nature of mandamus" may or may not be the perfect means of requiring Boulder County to recognize that it must enforce Resolution 80-52 throughout the ban area, including Forest Service lands, but Plaintiffs are aware of no other available remedy. This appears to be an issue of first impression in Colorado and is not covered by the cases cited by Boulder County regarding mandamus". CD at 232-33.

decades, Boulder County has recognized and given effect to the Resolution. Mandamus relief is not appropriate since Boulder County properly passed the Resolution and it is not in conflict with the authorizing statute. *Sheeley v. Bd. Of County Comm'rs*, 325 P.2d 275, 277 (Colo.1958). In addition, mandamus relief is not available to compel enforcement of the Resolution. *See Ahern v. Baker*, 366 P.2d 366, 369 (Colo.1966). Finally, Moss and Westby do not have a private implied right of action under § 30-15-302, C.R.S. *Macurdy v. Faure*, 176 P.3d 880, 882 (Colo.App.2007). Moss and Westby cannot seek to enforce the Boulder County ordinance because "[c]riminal statutes cannot be enforced by civil actions." *Winslow v. Romer*, 759 F.Supp. 670, 673 (D.Colo. 1991). An appellate court may rule on the issue of lack of jurisdiction over the subject matter. *Moschetti v. Liquor Licensing Auth.*, 490 P.2d 299, 300-01 (Colo.1971). The Appellate Court should decline to consider any issue concerning the enforcement of the Resolution.

CONCLUSION

For the foregoing reasons the Board respectfully requests that this Court affirm the Order of the District Court dismissing Moss and Westby's Complaint.

Respectfully submitted this 14th day of December, 2009.

BOULDER COUNTY ATTORNEY
*Original Signature on File with
the Boulder County Attorney's
Office*

By: /S/ Andrew R. Macdonald
Andrew R. Macdonald
Assistant County Attorney

CERTIFICATE OF SERVICE

I certify that on December 14, 2009, I electronically filed the **APPELLEE, BOULDER COUNTY BOARD OF COMMISSIONERS', ANSWER BRIEF** via the LexisNexis File and Serve eFile service, who will either serve the same via e-mail or United States mail to the following:

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/S/ Kathy G. Nelson _____
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