Colorado Court of Appeals Colorado State Judicial Building 2 E. 14th Avenue, 3rd Floor Denver, CO 80203	
Boulder County District Court P.O. Box 4249 Boulder, Colorado 80306 (303) 441-3750 Lower Court Judge: Hon. Morris Sandstead Lower Court Case Number: 07 CV 845	
Appellants: **ANITA MOSS and ROBERT WESTBY, Plaintiffs below.** **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,** **Defendants below.**	**▲COURT USE ONLY▲**
Attorneys for Appellants: Susan Morath Horner, #13783 SUSAN MORATH HORNER, P.C. Attorneys & Counselors at Law 1942 Broadway, Suite 314 Boulder, Colorado 80302 Telephone: (303) 541-0055 Fax: (303) 938-6850	Case Number: 2009CA1262
APPELLANTS' COMBINED REPLY	

CERTIFICATION

The undersigned certifies that this document complies with the requirements of C.A.R. 28 and 32, and contains approximately 5,587 words, exclusive of caption, tables and signatures.

/s/Susan Morath Horner
(Original signature appearing in paper-filed document)

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I. REPLY TO ANSWER OF THE CWC AND DOW

A. THE AGENCIES' "STATEMENT OF ISSUES" INCORRECTLY DESCRIBES THE CASE AS ONE FOR ADMINISTRATIVE CLOSURE

The Colorado Division of Wildlife ("CWC") and Division of Wildlife ("DOW") (collectively "the agencies") incorrectly characterize the suit as one in which Appellants Moss and Westby seek an "administrative closure" of the Sugar Loaf area to hunting. Agency Answer Brief ("Answer"), at 1, 2. Presumably they adopt this term to make their exhaustion of remedies argument, *infra*, more appealing. But it is inaccurate. The fundamental premise of this lawsuit is that the area is and has been closed to firearm discharge, through C.R.S. §30-15-302 and Boulder County Resolution 80-52, since 1980. Accordingly, the agencies' administrative allowance of hunting in the area is unlawful.

B. THE AGENCIES' "STATEMENT OF FACTS" REJECTS THE FACTS IN THE RECORD

The agencies largely decline to respond to Appellants' factual assertions, arguing that they are either of no value, or not subject to review. This matter is addressed at Part C, Section 7, *infra*, in connection with Appellants' discussion of summary judgment issues.

C. THE AGENCIES' ARGUMENTS

1. Conflict between the statute/resolution, and the agency regulations.

The agencies admit that the statute and resolution control hunting. However, the central theme of their Answer is that hunting should not be considered unlawful in the ban area because theoretically hunting "can" occur within the confines of the statute and the Resolution, i.e., the very limited exception for activity in the nature of target shooting, safely confined to a single parcel of private land. C.R.S. §30-15-302(1). They assert that "if a firearm can be discharged in compliance with the exception, it should not make any difference if the shot was taken at an animal standing at the base of a cliff or a target at the base of a cliff." Answer at 29.

While perhaps theoretically true, the crucial fallacy of the agencies' reasoning is that nothing in their regulatory scheme limits hunting in this manner, nor do they present any factual support that hunters self-limit their activities to comply with the County law. The record reflects that the agencies actively promote traditional hunting and allow hunters to shoot on public property, private property, across property lines, and otherwise within the vicinity of homes, vehicles, school buses, and indeed directly in front of signs saying "no firearm discharge allowed," without any specialized

restriction for county closure areas. *See* Opening Brief at 5-13 and record references therein.

The state agencies sweepingly dismiss *U.S. West Communications v. City of Longmont*, 948 P.2d 509 (Colo. 1997), concluding it is not analogous because "there is no conflict" between the regulation and statute here. This of course simply begs the question. But their cursory treatment of this very relevant authority demonstrates an inability to find a way around it.

U.S. West held that a PUC regulation that was in practical conflict with a Longmont ordinance requiring the burial of power and communications lines, passed pursuant to state statute, was invalid. More difficult analytically than this case, it involved arguments of preemption of state regulated PUC tariffs over municipal ordinances. (The agencies have made no similar argument here.) But stated succinctly it stands for the proposition that where a municipality acts pursuant to its police powers, and particularly where it does so pursuant to an authorizing state statute, a conflicting agency regulation is of no effect.

The Longmont ordinance was not absolute, just Resolution 80-52 is not absolute here. It offered procedures that the utilities could follow to mitigate the financial impact of the ordinance, yet still comply. 948 P.2d at 513.

The court held that the ordinance clearly took precedence over the PUC regulation. It relied on the courts' long recognition that regulations of other entities cannot be permitted to seriously interfere with a municipality's regulatory and police powers (*citing Moffat v. City & County of Denver*, 57 Colo. 473, 143 P. 577, 579 (1890)), noting the "chaotic" results that can follow. *Meadow-Brook Fairview Metrop. Dist. v. Bd. of County Comm'rs Jefferson County*, 910 P.2d 681, 683 (1996).

These cases do not suggest that a municipal law must be shown to be wholly at odds with the competing regulation. The question is one of whether the local law is undermined.

When applied here, the term "chaotic" strikes a particularly strong chord. This is an excellent description of what has occurred and continues to occur in the Resolution 80-52 ban area, while hunting continues. None of the acting peace officers has known what law controls, and the result has been a void of enforcement. Nor have the CWC and the County Commissioners known, as dramatically demonstrated by the correspondence exchanged in 2005. CD at 12-16.

2. Absurd result

The agencies claim that disallowing firearm hunting would lead to an absurd result because other kinds of firearm discharge could still be allowed.

Answer at 29. This is nonsensical. As explored in Appellants' Opening Brief ("Opening Brief), at 22, the only firearm discharges that could be allowed under the statute and Resolution, together with other existing state laws, are those in the nature of target shooting, and only when safely and assuredly confined to a single parcel of private property. There is no discriminatory effect on hunters versus any other group of firearm users, and indeed the agencies do not identify who these other users might be.

Conceivably, Appellants might have no objection to a regulatory scheme that effectively controls and limits firearm hunting to actually comply with the firearm prohibition statute and any county closure ordinance – for example, giving licenses only to residents or their guests, confined in use to the resident's single parcel of property, AND requiring the agencies to utilize their enforcement personnel to actively enforce these restrictions, rather than flaunt them. But unless and until the agencies take these steps their actions are unlawful.

3. Inconsistent position taken in Douglas County.

The agencies sidestep their inconsistent position recently taken in the Douglas County case, *Castle Pines Homes Ass'n, Inc. v, King*, 2008CV2948. They insist they never conceded that a county firearm ban would resolve a hunting challenge, but merely argued "as a matter of public policy" that the

plaintiffs there should have first approached the Douglas County Commissioners for a closure resolution under the statute.

This gloss is not convincing. The agencies' legal argument to the Douglas County District Court, as grounds for dismissal of the suit, was that county closure under the statute would have resolved the plaintiffs' objection to the hunting activities. *See* Opening Brief at 20, and record cites therein. Their argument there, as here, was that this was a legal requirement for exhaustion of administrative remedies. If they now claim it was merely a policy stance, then it was seriously misleading to present it to the Douglas County Court as fatal jurisdictional flaw.

4. Exhaustion of administrative remedies.

While outlining the general benefits of the exhaustion doctrine, the agencies nevertheless fail adequately to explain why it is applicable here – 1) in a rulemaking rather than an adjudicatory context, and 2) where the issues presented are legal questions regarding the conflict of statutory provisions with the agency regulations. They also do not remark on the fact that Moss and Westby did petition the CWC for an administrative closure during the interim in which they were awaiting a final appealable order from the trial court. and were rejected by a unanimous vote (just as the Castle Pines plaintiff was).

The agencies refer a number of times to *City & County of Denver v. United Airlines*, 8 P.3d 1206 (Colo. 2000) but speak only to the broad purposes of the doctrine as set forth in that case, and avoid the distinctions. *United Airlines*, like all other cases relied on by the agencies on this issue, concerned an individualized quasi-judicial proceeding, not an agency rulemaking.

i. Rulemaking versus adjudication.

The distinction between adjudication and rulemaking is crucial. Rulemaking is a quasi-legislative procedure involving broad agency policies and goals, but does not determine the rights of any specific individual. *See Collopy v. Wildlife Comm'n,* 625 P.2d 994,1003 (Colo. 1981) (agency "[r]ule-making is quasilegislative, not quasi-judicial, in character.") In Colorado rulemaking is governed by §24-4-103, C.R.S., of the Colorado Administrative Procedures Act. The agency generally is required to permit interested persons the opportunity to submit views or data. §24-4-104(2), (4). However, while it may do so, it is not required to take sworn testimony or authenticated exhibits. §24-4-103(13).

Quasi-judicial administrative proceedings are covered under C.R.S. §24-4-104 through 105. In contrast to rulemaking, they function in the nature of court proceedings, whereby a hearing officer or administrative law

judge takes sworn testimony, applies rules of evidence, hears motions and enters orders, as in any other civil proceeding. §24-401-5(3) - (7). Further, they determine the rights, duties or obligations of specific parties applying existing legal standards to past or present facts to resolve the particular interest. *Native American Rights Fund v. City of Boulder*, 97 P.3d 293, 287 (Colo. 2004). Thus, they are not subject to random change or modification on the petition of any person but are altered only by agency appeal and then judicial review. §24-4-105(14).

Unlike a quasi-judicial adjudicatory order, a completed rulemaking procedure by the CWC, ending in the promulgation of an agency regulation, can be undone or reconsidered at any time, upon the petition of any person. §24-4-103(7). Accordingly, there can never be any true "exhaustion." While the CWC might one year determine to "close" the area to hunting, the next year, a set of different commissioners might very well reverse the decision. Yet if the agencies' exhaustion argument were to be held correct, every time the Sugar Loaf residents were to seek a true and final resolution of the statutory conflict between hunting and §30-15-302 they would encounter the same argument – they must go to the CWC first. Obviously, this would be a senseless and wasteful exercise that would not in any way support the rationale behind the exhaustion doctrine.

ii. The Agencies' authority to make statutory interpretations.

The agencies assert that policies support the requirement of exhaustion of administration remedies, "despite Moss and Westby raising a question of statutory interpretation." Answer at 19. However, they do not actually provide authority for this conclusion, or refute cases cited by Appellants that where a controversy presents legal questions regarding the agencies right to take the action at all, there can be no requirement of exhaustion of administrative remedies. *See* Opening Brief at 32-34. It is firmly established that exhaustion of administrative remedies is not a prerequisite to judicial review when the issues presented to the court depend upon determination as to the limits of an agency's statutory authority. *Gramiger v. Crowley,* 660 P.2d 1279, 1281 (Colo. 1983); *Colorado-Ute Electric Assoc. Inc. v. Air Pollution Control Comm'n Colorado Dept. of Health*, 648 P.2d 150, 153 (Colo. App. 1981); vacated on other grounds, 672 P.2d 993 (Colo. 1983); *see also Dill v. Bd. of County Comm'rs Lincoln County*, 928 P.2d 809, 815 (Colo. App. 1996) (no exhaustion required where issues presented call for interpretation of legislation). Thus, Moss and Westby did not need to exhaust administrative remedies because the question presented in the suit is whether the agencies have any authority to pass on the matter presented.

The agencies go very astray in their reliance on *Larimer County School Dist. v. Industrial Comm'n*, 727 P.2d 401, 403 (Colo. App. 1986),[1] and *Kendal v. Cason*, 791 P.2d 1227, 1229 (Colo. App. 1990). They argue that under these cases even where pure questions of law are involved, the courts benefit from the agency's "considered interpretation" and should be given deference. Answer at 18. But the cited cases apply only to enabling statutes with which the agency is charged with enforcing. *Larimer County*, 727 P.2d at 403; *Kendal*, 791 P.2d at 1229. Section 30-15-302, C.R.S., is not the CWC and DOW's enabling statute, nor is Resolution 80-52. The CWC has no authority, statutory mandate or expertise to render legal interpretation of its terms.

The agencies cite *Downy v. Department of Revenue*, 653 P.2d 72, 74 (Colo. App. 1982) for the proposition that application of the exhaustion doctrine "becomes more persuasive" when the controversy raises "precise questions which are within the expertise of the administrative agency and are of the very nature the agency was designed to resolve." Answer, at 18-19. *Downy*, like the other cases relied upon by the agencies, involved at quasi-judicial matter (license suspension), and the record review of a hearing

[1] *Larimer County* was partially overruled in *L.E.I. Construction v. Goode*, 857 P.2d 875, n. 5 (Colo. 1994).

officer, and is inapposite to the rulemaking question here. The agencies also omit reference to the rule of law stated just before their quoted excerpt, that:

> [The] justification [for application of the exhaustion doctrine] becomes *less persuasive* when existing administrative remedies are ill-adapted to providing the relief sought [citation omitted], and when the matter in controversy raises questions of law rather than issues committed to administrative discretion and expertise, [Citation omitted].

Downy, 653 P.2d at 73-4 (emphasis added). Under *Downy*, questions of statutory interpretation and authority, such as those here, are not issues which the agency was designed to resolve.

The agencies also confuse the question of their being "in a position to grant the relief requested by Moss and Westby" (Answer at 14), with 1) whether they have the authority to do anything but grant relief, and 2) whether Moss and Westby were required to proceed to the agencies for relief prior to seeking judicial relief, rather than simply being permitted to do so. While the agencies may have the ability to close areas to hunting activity for their own reasons, this does not imply that they have the sole ability, or any ability, to determine whether a state and county law demand a closure. Indeed, the case begs the question as to how the agency could pretend to undertake review as to whether an area should be closed to firearm hunting when state and county law have already closed it to firearm usage.

iii. Remedies have been exhausted

The agencies don't comment on the fact that while the trial court proceedings were still being resolved, and this appeal pending, the Appellants did petition to the CWC, and were denied. However, because review of agency action could be different procedurally than an action for declaratory relief, it is still necessary for the Court to address the issue.

5. Safety of hunting.

The agencies assert they are uniquely positioned to address safety issues. Answer at 15. Appellants explored earlier the "safety issue", explaining that this factual determination has been legislatively determined and is not open to question. *See* Opening Brief at 30-32. The agencies avoid discussion of this weakness in their argument. They suggest that having the ability to require hunters take safety courses or wear orange somehow trumps a County's determination that an area is too densely populated for firearms discharge. Clearly it is not the province of CWC or the DOW, or even the courts, to second-guess the wisdom of a state statute, and a county ordinance passed pursuant to it.

Appellants have never advocated the view that hunting must be presumed unsafe. (Answer at 16, n. 9). What they have said, as a reasonable interpretation of §30-15-302, is that the legislature intended that if certain

population density thresholds are met in unincorporated areas, the counties may presume that firearm discharge (not restricted to hunting) is unsafe, and therefore have been given the authority under their police power to prohibit such discharge, within the confines of the statute. No more and no less. Accordingly, when the county so acts, it clearly has made the determination, in its rightful legislative capacity and after public hearing, that firearm discharge is unsafe in the subject area. This is not an extreme notion, but a reasonable recognition that firearm discharge is dangerous in congested areas.

6. Exemption for DOW from paying for game damage in areas closed to firearms under §30-15-302(2).

The agencies offer an alternative interpretation of the game damage payment exemption under §30-15-302(2), arguing that instead of demonstrating the legislature's intent that the DOW will not have hunting available as a game management tool because hunting will be unlawful, it "can be" read merely as a "disincentive" to the counties to adopt a firearm prohibition. Answer at 28-29.

While this is an interesting theory, it is a very peculiar one, which sheds a very unfavorable light on the legislature for no reason. It suggests the General Assembly would grant the counties the right to take this

important action in furtherance of their police power and public safety, and then immediately create a "disincentive" – truly a financial punishment, not on the county but on the citizenry – for doing so. The argument necessarily implies that the legislature only half-heartedly gave the power, and that it places other unidentified goals, strategies and policies, nowhere suggested in the statute, above those of the state's and county's police power.

Absent some direct indication of this purpose in the statute, it simply cannot be swallowed. It is inconceivable the legislature would act in this obtuse manner with regard to something so critically important to human safety as the protection of life and property as the restriction in the use of firearms. And there is no explanation as to why would it choose the somewhat obscure game damage law under the wildlife statutes as a vehicle for such retribution.

7. Denial of Appellants' Motion for Summary Judgment

The agencies dispute that the denial of Appellants' Motion for Summary Judgment is correctly part of this appeal. They argue that it was merely a natural consequence of the dismissal for failure to exhaust administrative remedies. Answer at 22, n. 12. They also contend that because the trial court did not make factual findings with regard to summary judgment, there are no facts in the record for purposes of review. Finally

they try to undermine the facts themselves, arguing that Moss' and Westby's affidavits are "nothing but simple allegations replete with hearsay, speculation, hyperbole and innuendo and have no place in this appeal."

These three notions are confused, on multiple fronts: 1) as to the basis for Moss and Westby's motion summary judgment; 2) as to the appellate court's standard of review; and 3) as to their own obligations as opponents of the motion.

First, as is apparent throughout their briefs, both here and below, Appellants' primary argument has always been that the agencies' regulations are facially unlawful in light of C.R.S. §30-15-302 and Resolution 80-52. The agencies do not attempt to argue that hunting is regulated in any manner that would call for compliance with these laws. Thus, in the first instance, the question is purely one of law and Moss and Westby do not need to make any other factual allegations at all. They have made clear that their submission of factual observations is to provide additional support for the seriousness of the conflict between and among the residents, the hunters, the DOW officers, and the sheriff's deputies, as to who is right and who is wrong, who has violated the law and who has not.

Second, the agencies provide no legal authority for the extreme proposition that a trial court's failure to consider facts in the record on

summary judgment somehow eliminates a party's right to appeal. The trial court made a final, appealable ruling on both motions. *See* Opening Brief at 15 (summary judgment denial is reviewable where the orders effectively end the litigation).

It is true that the trial court gave no written analysis of the merits of Appellants' summary judgment motion in its order, but this is not a ground for denying Appellants their right of review. If it were, a trial court could simply avoid appellate review of summary judgment determinations by declining to make findings.[2]

What Appellees fail to acknowledge is that appellate review of both a denial or a grant of summary judgment is *de novo*. *Geiger v. American Standard Ins. Co.*, 192 P.3d 480, 482 (Colo. App. 2008.); *Lutfi v. Brighton Community Hosp. Ass'n,* 40 P.3d 51, 54 (Colo. App. 2001). Thus, the same standards for reviewing summary judgment motions that apply in the trial court, apply on appeal; the Court of Appeals reviews the motion and sworn facts in the record as for the first time to determine whether there are material factual disputes, and whether the moving party should have prevailed as a matter of law. *Churchey v. Adolph Coors Co*., 759 P.2d 1336,

[2] At the June 27, 2008 hearing the trial court participated in a spirited discussion of factual issues, to the point it failed to recall that the question presented was one of statutory interpretation. CD at 406-54.

1340 (Colo. 1988). If this Court agrees that the question is purely one of law, it can and should decide the question here – there is no value to sending the case back to the trial court to begin the process again.

As to the agencies' challenge to the character of Appellants' supporting factual material for their motion for summary judgment, C.R.C.P. 56 requires a party to submit affidavits as necessary to demonstrate that there is no genuine issue of material fact and that as a matter of law the party is entitled to prevail. C.R.C.P. 56(c) and (e). It is then up to the opposing party to demonstrate that there is indeed a dispute of fact relevant to the legal issues at hand. C.R.C.P. 56(e). The "adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings," but "must set forth [by affidavit] specific facts showing that there is a genuine issue for trial." *Id.*

Thus, unverified statements and arguments of counsel, whether to the trial court or on appeal, are not competent under C.R.C.P. 56 to successfully oppose the movant's sworn statements. *Sullivan v. Davis*, 172 Colo. 190, 474 P.2d 218, 221 (1970); *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 215 P.3d 1163, 1170 (Colo. App. 2008). Nor does the mere discrediting of testimony defeat the motion. *Kelly v. Central Bank and Trust Co.*, 794 P.2d 1037, 1041 (Colo. App. 1989). If the movant has shown that genuine issues

are absent, the burden shifts, and unless the opposing party demonstrates true factual controversy, summary judgment is proper. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 713 (Colo. 1987); *Schultz v. Wells*, 13 P.3d 846, 848 (Colo. App. 2000).

While to be sure the Appellees would just as soon avoid the contents of Westby's Affidavit and Moss and Westby's joint Verified Statement, they cannot defeat them by mere argument of counsel that they are somehow no good. The affidavits are factual accounts of matters directly witnessed by Moss or Westby, derived from public records, or related to them by other Sugar Loaf residents. Even if the affidavits carried a degree of emotion or opinion, Appellees have never denied and cannot deny, through their own affidavits or testimony, that the reported observations in fact happened or happen. Moss and Westby's sworn statements merely act as confirmation that general hunter activity indeed occurs across property lines, on public property, and even (illegally) from and across roads.

II. REPLY TO ANSWER OF BOULDER COUNTY COMMISSIONERS

A. THE AGENCIES' CHARACTERIZATION OF THE POSITION OF BOULDER COUNTY IS INACCURATE.

With regard to the Answer of the Boulder County Commissioners, as a preliminary matter Appellants note that the state agencies imply that they

and Boulder County are at least somewhat on the same side, and that Boulder County itself does not interpret Resolution 80-52 as "a complete prohibition on hunting with firearms as Moss and Westby have." Answer at 25, n. 14 (citing to pages 15-16, 258-59, and 450-51 of the record). The record does not support this.

The first reference is to the letter written by the County Commissioners to the CWC in 2005, supporting the earlier citizens' petition for closure of an even larger area of Sugar Loaf than is covered by Resolution 80-52. The document speaks for itself, but nowhere do the Commissioners suggest the Resolution should not apply to hunting. To the contrary, they express their enormous frustration at not being able to adequately enforce the firearm ban while the DOW continues to allow hunting. Moreover, they specifically state that the ordinance was passed to address "the County's concern for the mix of hunting practices with urban communities as long as 25 years ago." CD at 15 (emphasis added).

The second reference pertains to letter written by an assistant county attorney, Barbara Andrews. The letter is an analysis of what constitutes "private grounds." Ms. Andrews says nothing whatsoever about hunting.

The third reference is to some comments to the court by Assistant County Attorney Andrew MacDonald. Mr. MacDonald merely states that is his view the County does what it can to enforce the ordinance.

What the record shows is that County officials, from the Commissioners, to the Sheriff, to the Assistant County Attorney, and down to the Sheriff's deputies, simply have not known what their rights and abilities are to enforce the Resolution against hunting. The issue has never been litigated. Ms. Andrews remarks in the above-referenced letter that the County had never even researched the Resolution's applicability. Seemingly, all that the Commissioners and peace officers have known is that it is impossible to enforce the Resolution in light of the agencies' regulatory approval of hunting. *See, e.g.*, Commissioners' letter referenced above; CD at 14-15, and generally Opening Brief at 5-13, and record references therein

The communication that transpired in 2005 with CWC and Boulder Commissioners could not have demonstrated more powerfully why this issue needs to be judicially resolved: 1) the CWC advised the County that in its opinion the County was the entity with both the ability and the duty to control hunting under the statute and Resolution, and indeed encouraged it to do so (CD at 12-13); 2) the Commissioners replied that they cannot possibly enforce the firearms ban when the CWC and DOW continue to allow

hunting as usual (CD at 14-15); and 3) the Assistant Attorney General advised the CWC in hearing that it was indeed the County's responsibility to close areas to firearm discharge enforce its firearms ban.

In short, there is intergovernmental gridlock, crying out for court intervention.

B. BOULDER COUNTY ANSWER

The arguments of the Boulder County Attorney in this matter have been unusual, in light of their statutory mandate and both the official and official positions taken by the County Commissioners over the years. It appears that fear of court intrusion into their day to day duties has caused the County to "sit on the fence," without really discussing the fundamental premise of the suit – that hunting and the firearms ban cannot co-exist.

What is curious is that, rather than defending a valid Resolution passed by the County Commissioners, the County through its counsel seemingly has argued from the viewpoint of the Boulder County Sheriff's Department ("BCSD"), and its concern that the suit will foist upon it burdens it would rather not have. The BCSD may also feel some discomfiture in that for so many years it assumed without ever exploring the question that it couldn't really enforce the law in the face of hunting. The County does not advocate in an obvious way on behalf of the Appellees

Boulder County Commissioners, whose predecessors passed and must be presumed to have believed in the merits and enforceability of Resolution 80-52 and, as the Commissioners noted in 2005, that it was passed for the direct purpose of addressing hunting. CD, at 14-15.

The County is concerned that the lawsuit will result in an order to the Sheriff's department what it must do to enforce Resolution 80-52. This is a groundless concern in a suit for statutory interpretation. However, it the Court determines, as Appellants believe it must, that the current regulatory allowance of hunting is unlawful, then the BCSD naturally must face the fact that its citizens quite reasonably will expect them to enforce the Resolution.

The County also seems concerned that it will be ordered to enforce the Resolution on federal lands, referring to the Opening Brief, n. 8. There is nothing in the footnote requesting an order "for enforcement" on federal lands. But the law is what it is. Section 30-15-302, C.R.S., and Resolution 80-52 do apply on federal lands, and neither the agencies nor Boulder County argue to the contrary. How the County decides to enforce it is within their discretion. But political subdivisions and their officials have no legally protected interest to challenge their legal mandates, and no discretion to ignore them. *See Mesa Verde Co. v. Montezuma County Bd. of Equalization*, 831 P.2d 482, 484-5 (Colo. 1992); *Board of County Comm'rs*

v. Fifty-First Gen. Assembly, 198 Colo. 302, 599 P.2d 887, 889 (1979). Public officers must perform their statutorily defined ministerial duties promptly and efficiently. *Fifty-First Gen. Assembly, supra*; *see also Ames v. People,* 26 Colo. 83, 90, 56 P. 656 658 (1899) (public policy and necessity require prompt and efficient action from government officers).

Thus, to the extent that the County seeks to avoid responsibility for enforcement of the statute and Resolution 80-52, or suggest the law is inferior in some way to the state agencies' regulation, it simply has no ability to do this. The door to the courtroom, in this regard, is shut. *Fifty-First Gen. Assembly*, *supra*.

The County contends very briefly and without citation of legal authority that the Forest Service is an indispensable party to the action. Answer at 4 - 5. No party raised this as an issue on appeal, and the trial court did not consider the point.

Rule 19(a), C.R.C.P., provides:

> A person who is properly subject to service of process in the action shall be joined as a party in the action if:
>
> (1) In his absence complete relief cannot be accorded among those already parties, or
>
> (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, or

(B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party….

The test for determining indispensability under C.R.C.P. 19 is whether the absent person's interest in the subject matter of the litigation is such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the right of such absent person. *Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1080 (Colo. App. 2005). Factors to consider include: (1) the extent to which a judgment rendered in the person's absence might be prejudicial to the person or to those already parties; (2) the extent to which prejudice can be lessened or avoided by protective provisions in the judgment, by the shaping of relief, or by other measures; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. C.R.C.P. 19(b); *Cruz-Cesario, supra*.

First, the County offers no analysis as to whether the federal government even could be joined in this action in state court. It also does not explain how a state court's interpretation of a state law, addressing the

police powers of a local government, and potentially striking down a state regulation, impedes any ability of a federal agency to protect its own interests. Appellants seek no enforcement orders against the Forest Service, and it can enforce its own laws or the laws of overlapping jurisdictions as it sees fit and it will be bound by no inconsistent or additional obligations.

There is no dispute that state and local laws apply on federal lands unless there has been direct contrary congressional intent. Opening Brief at 16 (especially the Weeks Act, 16 U.S.C. §480.) Appellees have never argued such intent exists.

Like the agencies, the County asks the Court to disregard Moss and Westby's affidavits showing hunter violations of the Resolution, conflict between the DOW and County law enforcement, and the County's inability to enforce the resolution, because the trial court did not conduct a factual hearing. This is fully addressed above, at pp. 16-20, and has no merit.

Finally, the County briefly argues that Appellants have no private right of action under C.R.S. §30-15-302 or the Resolution. This argument has never been made before in this litigation. But it is not on point. The courts' limiting of statutory claims to situations where there is a "private right of action" in the statute, applies where there is a claim for damages or other direct relief to an individual for breach of a statutory duty, not in a

declaratory judgment action. *Macurdy v. Foure*, 176 P.3d 880, 882 (Colo. App. 2007).

III. CONCLUSION

The agencies make no effort through their regulatory structure to prevent full-scale firearm hunting in the Resolution 80-52 firearm closure areas, in violation of law. The CWC has also ignored the statute and Resolution in their "rulemaking," unanimously denying Appellants' petition for a specific closure.

It is untenable for the CWC, through the guise of its limited authority on wildlife issues, to be allowed to override a county's closure of a congested area to firearm use.

Appellants request the relief as set forth in their Opening Brief.

Dated this 18th day of January, 2010.

Respectfully submitted,
SUSAN MORATH HORNER, P.C.

/s/Susan Morath Horner
(Original signature appearing in paper-filed document)

_____
Susan Morath Horner, #13783
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, I submitted a true and accurate copy of the foregoing to the following via LexisNexis File & Serve:

Timothy Monahan
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/s/Susan Morath Horner
(Original signature appearing in paper-filed document)