

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<p>EFILED Document CO Court of Appeals 09CA1262 Filing Date: Dec 9 2009 4:40PM MST Transaction ID: 28435076</p>
<p>Boulder County District Court Honorable Morris Sandstead, Judge Case No. 07 CV 845</p>	
<p>ANITA MOSS AND ROBERT WESTBY, Plaintiffs Below,</p> <p>Appellants,</p> <p>v.</p>	
<p>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,</p> <p>Appellees.</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case No.: 09 CA 1262</p>
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<p style="text-align: center;">ANSWER BRIEF OF DEFENDANT COLORADO WILDLIFE COMMISSION AND THE COLORADO DIVISION OF WILDLIFE</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 5171 words.

The brief complies with C.A.R. 28(k).

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Tim Monahan

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INTRODUCTION

Appellants Anita Moss and Robert Westby (hereinafter referred to as “Moss and Westby”) seek to close a 4½ square mile area of public land and private property located northwest of Boulder, Colorado, in unincorporated Boulder County (hereinafter referred to as the “Sugar Loaf Mountain Area”) to all hunting with firearms. Before submitting any request for relief to the administrative agencies with jurisdiction over hunting in Colorado - the Appellees, Colorado Wildlife Commission and Colorado Division of Wildlife (hereinafter referred to as “Wildlife”), - Moss and Westby filed their action for declaratory judgment and injunctive relief against Wildlife in the Boulder County District Court. The Boulder County District Court properly dismissed the action for failure to exhaust administrative remedies and required Moss and Westby to first proceed administratively with Wildlife before proceeding judicially. The Court of Appeals should affirm the Boulder County District Court and dismiss Moss and Westby’s appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Boulder County District Court properly dismissed Moss and Westby’s action for declaratory and injunctive relief for their failure to exhaust

administrative remedies and initially submit their request to close the Sugar Loaf Mountain Area to hunting with firearms to Wildlife for its review and consideration?

Whether the establishment of a county firearms restriction pursuant to § 30-15-302, C.R.S., which by its own terms continues to allow for some discharge of firearms on private property, should as a matter of law be interpreted as closing the designated area to all hunting with firearms?

STATEMENT OF CASE

I. Nature of the case

Moss and Westby filed a complaint for declaratory and injunctive relief in the Boulder County District Court seeking to have the Sugar Loaf Mountain Area - a 4½ square mile area of public land and private property located in unincorporated Boulder County - closed to all hunting with firearms. CD at 1. The Sugar Loaf Mountain Area is, and for over 25 years has been, subject to a firearms restriction imposed in 1980 by Appellee Boulder County Board of County Commissioners (hereinafter referred to as “Boulder County”) pursuant to § 30-15-302, C.R.S. A copy of § 30-15-302, C.R.S., is attached as Addendum 1.

The firearms restriction is generally known and is designated as Boulder County Resolution 80-52 (hereinafter referred to as the “Resolution”). A copy of the Resolution is attached as Addendum 2. The Resolution generally restricts the discharge of firearms on private property within the Sugar Loaf Mountain Area for all purposes, including hunting, but allows for the continued discharge of firearms provided it occurs in compliance with the terms and conditions set forth in § 30-15-302(1), C.R.S., which statutory terms and conditions are repeated in the Resolution.¹

The Resolution was the primary basis for Moss and Westby’s request for declaratory and injunctive relief closing the Sugar Loaf Mountain Area to hunting with firearms. Moss and Westby generally argue that, as a matter of law, any hunting with firearms within the Sugar Loaf Mountain Area is inconsistent with or in conflict with the Resolution and that the issuance by Wildlife of any firearms hunting licenses, which would facially allow hunting within the Sugar Loaf Mountain Area, or are not otherwise restricted to prohibit hunting with firearms in

¹ The discharge of firearms on the Public Lands owned by the U.S. Forest Service within the Sugar Loaf Mountain Area is subject to federal regulation. See 36 CFR 261.10.

the Sugar Loaf Mountain Area, is in excess of Wildlife's jurisdiction, arbitrary and capricious, an abuse of discretion, and otherwise contrary to law.

On the issue of the Resolution, Wildlife has consistently argued that hunting with firearms within the Sugar Loaf Mountain Area is subject to the Resolution and must be conducted in compliance with the Resolution. However, the Resolution itself allows for the continued discharge of firearms on private property subject to specified terms and conditions set forth in § 30-15-302(1), C.R.S., and such exception also supports a continuation of hunting with firearms, provided it occurs in compliance with those terms and conditions.²

Hunting with firearms occurred in the Sugar Loaf Mountain Area prior to

² Wildlife currently issues hunting licenses for Game Management Unit 29 of which the Sugar Loaf Mountain Area is a small part. Such GMU 29 licenses do not have or contain any restriction regarding their use in the Sugar Loaf Mountain Area.

the adoption of the Resolution and has continued to occur since its adoption.³

Moss and Westby now seek to prohibit that hunting.

II. Course of proceedings

Subsequent to the filing of the complaint, Wildlife filed its answer and then moved to dismiss the action on a number of grounds, including Moss and Westby's failure to exhaust their administrative remedies with Wildlife. CD at 24 and 105. Boulder County also filed its answer and then moved to dismiss. CD at 20 and 127. Moss and Westby also filed a motion for summary judgment. CD at 131.

³ Wildlife has not taken inconsistent positions regarding the legal impact of such county imposed firearm restrictions as Moss and Westby claim in their Opening Brief. See Opening Brief, pp. 19-21. In the Douglas County case referenced by Moss and Westby, the Wildlife Commission simply argued as a matter of public policy that the plaintiffs there should have approached their board of county commissioners for a firearms restriction to see if that would have addressed their issue before proceeding to exhaust their administrative remedies with the Wildlife Commission. The Wildlife Commission has never taken the position in either the Douglas County case or this case that such a firearm restriction supplants Wildlife Commission authority. In that regard, Boulder County has also consistently interpreted its Resolution as not completely banning the discharge of firearms within the Sugar Loaf Mountain Area, but as allowing for the continued discharge of firearms, including for hunting purposes, provided it occurs in accordance with the terms and conditions of the Resolution. See CD at 15-16, 258-259, and 450, ln 23-25, and 451, ln 1-6.

No trial or other evidentiary hearing was ever held by the Boulder County District Court. The Boulder County District Court held a trial management conference on June 27, 2008. CD at 406-454.

III. Disposition in the Boulder County District Court

At its June 27th Trial Management conference the Boulder County District Court requested and heard argument on the dispositive motions before it, and ultimately ordered Moss and Westby to exhaust their administrative remedies with Wildlife. CD at 452, ln. 23-25, and 453, ln. 1-3. However, the Boulder County District Court did not formally dismiss the action at that time. CD at 453, ln. 7-10.

Moss and Westby attempted to appeal the order of the Boulder County District Court, but that initial appeal was dismissed for lack of a final order. CD at 485. Subsequent to the dismissal of the initial appeal, Moss and Westby requested a final order from the Boulder County District Court dismissing the action for failure to exhaust administrative remedies, which request was granted and the

Action was formally dismissed.⁴ CD at 460 and 487.

Moss and Westby then brought the present appeal and moved for injunctive relief prohibiting hunting with firearms within the Sugar Loaf Mountain Area pending this appeal first with the Boulder County District Court and then with this Court. CD at 549 and Appellants' Motion for Stay and Injunction Pending Appeal. Both the Boulder District Court and this Court denied Moss and Westby's request for injunctive relief. CD at 659 and Order of Court (denying Appellants' Motion for Stay and Injunction Pending Appeal).

IV. Statement of Facts

No trial or other evidentiary hearing was ever held by the Boulder County District Court. The Boulder County District Court made no specific findings of

⁴ In issuing its order, The Boulder County District Court made no specific ruling with regard to Moss and Westby's Motion for Summary Judgment other than to note that, in light of the granting of Wildlife's Motion to Dismiss for failure to exhaust administrative remedies and the court being without subject matter jurisdiction, the Motion for Summary Judgment was denied. See CD at 460-461. As part of its Response to Moss and Westby's Motion for Summary Judgment, Wildlife disputed and continues to dispute the factual allegations made by Moss and Westby in their Motion for Summary Judgment. See generally CD at 235-259. Wildlife did, however, as part of its Response, request a determination by the Boulder County District Court that, as a matter of law, there was no conflict between the Resolution and continued hunting with firearms in the Sugar Loaf Mountain Area. CD at 237-238 and 243.

fact or any other factual determinations in dismissing Moss and Westby's complaint for failure to exhaust their administrative remedies.⁵

As such, there is absolutely no support in the record for any of the allegations made by Moss and Westby throughout their Opening Brief regarding, among other topics, the level of residential development in the Sugar Loaf Mountain Area,⁶ the basis for the adoption of the Resolution, the nature of hunting activity in the Sugar Loaf Mountain Area, enforcement of the Resolution in the Sugar Loaf Mountain Area, or any illegal hunting activity in the Sugar Loaf Mountain Area.

Moss and Westby's "Statement of Facts" and other assertions made throughout their Opening Brief are not facts at all, but are simple allegations replete with hearsay, speculation, hyperbole and innuendo and have no place in an appeal of the dismissal of their action for failure to exhaust administrative remedies. The two legal issues on appeal are easily and properly addressed based

⁵ Moss and Westby agree that the Boulder County District Court made no factual findings with regard to the dismissal of their complaint. See Opening Brief, p. 15.

⁶ Wildlife does not dispute the initial finding by Boulder County as part of its Resolution that the private lands in the area met the "100 persons per square mile" standard set forth in § 30-15-302(2), C.R.S.

on a review of the statutes involved alone and resort to such “facts” is unwarranted.⁷

As such, Wildlife does not believe any response to Moss and Westby’s allegations is necessary here. However, should the Court desire a response, Wildlife would simply direct the Court to the two affidavits previously filed by Division of Wildlife officers in the Boulder County District Court and this Court regarding the physical and environmental attributes of the Sugar Loaf Mountain Area, the history of safe hunting in the area, their law enforcement activities and the activities of other state and federal law enforcement officers, their wildlife management activities, the review of rule-making petitions by the Wildlife Commission concerning areas in and around the Sugar Loaf Mountain Area (including the petition ultimately filed by Moss and Westby), and the actions the Division of Wildlife undertook to address concerns raised by residents in the Sugar

⁷ Curiously, and without any basis for doing so, Moss and Westby characterize the allegations made by them in the Boulder County District Court and throughout their Opening Brief as “facts” and similar allegations made by Wildlife as “opinions” and “facially incredible opinions” at that. See Opening Brief, p. 29. Moss and Westby can’t have it both ways. The Court should consider their allegations for what they are - statements that have no factual determinations in the record to support them.

Loaf Mountain Area regarding hunting with firearms. See CD at 251-257 and 625-643.

ARGUMENT

I. Summary of the Argument

The Boulder County District Court properly dismissed Moss and Westby's complaint for their failure to exhaust administrative remedies. Wildlife has exclusive regulatory authority over wildlife management and the hunting of wildlife in Colorado, has recognized expertise with regard to hunting and safe hunting practices and has the authority to grant the relief requested by Moss and Westby - to close the Sugar Loaf Mountain Area to hunting with firearms. Further, requiring Moss and Westby to exhaust their administrative remedies respects the notions of separation of powers and preservation of judicial resources that are the established foundations of the exhaustion doctrine.

Moss and Westby failed to establish any exception to the application of the exhaustion doctrine. Certainly Moss and Westby raise a question of statutory interpretation regarding § 30-15-302, C.R.S. and the Resolution, but that is insufficient in and of itself to avoid the requirement that they exhaust their administrative remedies, particularly where the subject matter and disputed facts

that may affect a proper interpretation and application of the Resolution to the Sugar Loaf Mountain Area were more appropriately addressed by Wildlife.

However, should the Court find that a legal determination of the statutory interpretation question is warranted, and despite the absence of any prior administrative consideration and determination, Moss and Westby have wildly mischaracterized § 30-15-302, C.R.S., and the Resolution. Neither the statute nor the Resolution completely prohibits the discharge of firearms; both allow for some continued discharge of firearms. As a matter of law, hunting with firearms can continue in the Sugar Loaf Mountain Area provided it occurs in accordance with the terms and conditions expressed in § 30-15-302 and the Resolution. There is no conflict between the issuance of firearm hunting licenses that could be used in the Sugar Loaf Mountain Area and § 30-15-302 or the Resolution, and Wildlife is under no obligation, as a matter of law or otherwise, to specifically restrict or prohibit the use of such licenses in the Sugar Loaf Mountain Area.

II. Exhaustion of Administrative Remedies

A. Standard of review

Wildlife agrees with Moss and Westby that appellate courts employ a mixed standard of review for a dismissal for failure to exhaust administrative remedies

(lack of subject matter jurisdiction) and that the issue was properly preserved for appeal. See City of Aspen v. Kinder Morgan, Inc., 143 P.3d 1076, 1078 (Colo. App. 2006) (The appellate court reviews the trial court's factual findings under the clear error standard, but its legal conclusions are reviewed *de novo*).

B. The doctrine of exhaustion of administrative remedies is soundly established in Colorado case law and enforced by the courts.

If complete, adequate and speedy administrative remedies are available, a party must pursue those remedies before filing suit in district court. City and County of Denver v. United Air Lines, 8 P.3d 1206, 1212 (Colo. 2000). If a party fails to satisfy the exhaustion of administrative remedies requirement, the district court is without jurisdiction to hear the action. State v. Golden's Concrete Co., 962 P.2d 919, 923 (Colo. 1998). The general rule is that a court lacks jurisdiction to grant relief if a plaintiff has not exhausted his administrative remedies. Hoffman v. Colorado State Board of Assessment, 683 P.2d 783, 785 (Colo. 1984).

The exhaustion doctrine promotes several important and related policy interests. United Air Lines, p. 1212. The exhaustion doctrine allows agencies with expertise in a particular subject matter to develop the necessary factual record upon which the agency and subsequent reviewing courts may base their decisions. Id. The exhaustion doctrine promotes efficiency and the integrity of the administrative

forum. United Air Lines, p. 1213. In addition to protecting the interests of the administrative agencies, the requirement of exhaustion conserves judicial resources by insuring that courts intervene only if the administrative process fails to provide adequate remedies. Id.

C. Wildlife has both the expertise in the subject matter and the ability to grant Moss and Westby effective relief.

Moss and Westby sought the closure of the Sugar Loaf Mountain Area to hunting with firearms. Wildlife is the state agency charged with the administration of all wildlife-related outdoor recreational activities, including the establishment and regulation of state hunting programs. See § 33-1-104, C.R.S. Wildlife has the specific authority to “determine under what circumstances, when, in which localities, [and] by which means ... wildlife of this state may be taken ... and to shorten, extend or **close seasons on any species of wildlife in any specific locality...**” See § 33-1-106(1)(a), C.R.S. (emphasis added). Wildlife clearly was in a position to grant the relief requested by Moss and Westby.⁸

⁸ In fact, Wildlife has on multiple occasions implemented closures or significant restrictions on the use of firearms to take wildlife. See e.g. 2 CCR 406-0, Regulation No. 020.E.4 and 5, 2 CCR 406-2, Regulation No. 209.E.1, and 2 CCR 406-5, Regulation No. 504.I.

Further, Wildlife is the state agency charged with the establishment and administration of the state's hunter education program, including the requirement that all hunters prior to purchasing any license must complete at least ten hours of instruction in safe hunting practices. See § 33-6-107(8), C.R.S. Wildlife is also the state agency charged with administration and enforcement of all "safe hunting" statutes and regulations. See § 33-6-101, C.R.S.; see e.g. § 33-6-121 (Hunters to wear daylight fluorescent orange garments), 122 (Hunting in a careless manner), 123 (Hunting under the influence), 125 (Possession of a loaded firearms in a motor vehicle) and 126, C.R.S. (Shooting from a public road). Wildlife is uniquely positioned and has the necessary expertise to address the numerous safety issues

raised by the complaint filed by Moss and Westby.⁹

D. Moss and Westby failed to establish any applicable exception to the exhaustion doctrine that would excuse their failure to proceed administratively before proceeding judicially.

Wildlife recognizes that the exhaustion doctrine is not absolute; it is subject to limited exceptions. United Air Lines, p. 1213. For example, exhaustion is not necessary when it is “clear beyond a reasonable doubt” that further administrative

⁹ Wildlife is the state agency with expertise in the area of hunting, safe hunting practices, and methods of take for wildlife, including the ballistics of the firearms used to take wildlife in Colorado, and in that regard has adopted voluminous regulations addressing those topics. See e.g. 2 CCR 406-2 (Big Game). Moss and Westby’s argument that areas designated by a county pursuant to § 30-15-302(1), C.R.S., should be “presumed unsafe” and that a trial court should not require administrative consideration or take any evidence in that regard is completely misplaced. See Opening Brief, pp. 14 and 16. First, the continued discharge of firearms including hunting with firearms pursuant to the exceptions expressed in § 30-15-302(1), C.R.S. and the Resolution, should be presumed safe because it has been expressly provided for in statute and ordinance. The Court should not presume that the General Assembly would provide for something to continue if it was believed to be unsafe. Second, Boulder County made no specific finding as part of adopting the Resolution that hunting with firearms was contrary to the public health, safety or welfare. The reference in the Resolution as “[promoting] the public health, safety and welfare” is clearly a reference to the fact that in adopting the Resolution, Boulder County was acting pursuant to its general police powers. See Appendix 2. Further, it is clear from the Resolution itself that the only evidence provided to Boulder County during consideration of the Resolution was with regard to the area meeting the “a population of not less than 100 persons per square mile” standard. Id. There is no specific mention of any evidence regarding public safety.

review by the agency would be futile because the agency will not provide the relief requested. Id. Exhaustion is also unnecessary when the matters in controversy are matters of law that the agency lacks the authority or capacity to determine, such as constitutional issues. Id. However, neither exception applies here.

Moss and Westby have not raised any futility defense much less presented any showing that a resort to the administrative process available through Wildlife would have been futile beyond a reasonable doubt. Wildlife has, in fact, established numerous local closures and other significant restrictions on hunting wildlife with firearms. See e.g. 2 CCR 406-0, Regulation No. 020.E.4 and 5, 2 CCR 406-2, Regulation No. 209.E.1, and 2 CCR 406-5, Regulation No. 504.I.

Moss and Westby argue that their failure to exhaust their administrative remedies with Wildlife should be excused because they raised a question regarding the proper interpretation of § 30-15-302, C.R.S. on Wildlife's regulatory authority over hunting with firearms. Their issue is not constitutional in nature. It is a simple question of statutory interpretation.

Raising an issue of statutory interpretation is not an automatic exception to the exhaustion doctrine. Even to the extent that questions of statutory interpretation have been raised by plaintiff's claims, such does not exempt the

matter from administrative review. Kendal v. Cason, 791 P.2d 1227, 1229 (Colo. App. 1990). Even if pure questions of law are concerned, agency review of the challenged action is desirable in order to provide the court with the benefit of the agency's considered interpretation of its enabling statute. Id.¹⁰ See also Larimer County School District v. Industrial Commission, 727 P.2d 401, 403 (Colo. App. 1986), cert. denied, 752 P.2d 80 (Colo. 1988) (Construction of statute by administrative officials charged with its enforcement shall be given deference by the courts).

Exemptions to the exhaustion doctrine should only be applied to situations in which the policies underlying the doctrine would not be served by requiring a party to exhaust their administrative remedies. See generally United Air Lines, p. 1213. Further, while the exhaustion doctrine is not absolute, the need for its application becomes more persuasive when the matter in controversy raises precise questions which are within the expertise of the administrative agency and are of the very

¹⁰ Admittedly, § 30-15-302, C.R.S., specifically authorizes counties, not Wildlife, to designate firearm restricted areas. However, Wildlife should be considered an implementing agency in the sense that it must consider the impact, if any, of such a designation on its authority to regulate the taking of wildlife in the area in question pursuant to 33-1-106(1)(a), C.R.S.

nature the agency was designed to resolve. Downy v. Department of Revenue, 653 P.2d 72, 74 (Colo. App. 1982).

Here there is an administrative agency - Wildlife - with specific expertise with regard to the subject matter at hand - hunting and safe hunting practices - and it is positioned and authorized to grant relief to the party asserting the exemption to the doctrine of exhaustion of administrative remedies. Further, there is a specific regulatory process available to Moss and Westby to request the relief they sought - a closure of the Sugar Loaf Mountain Area to hunting with firearms. See § 24-4-103(7), C.R.S.; see also Denver-Laramie-Walden Truck Line, Inc. v. Denver Fort Collins Freight Service, Inc., 399 P.2d 242, 243 (Colo. 1965) (Where administrative remedies are provided by statute, statutory procedure must be followed when the matter complained of is within the jurisdiction of the administrative authority). The policies underlying the exhaustion doctrine - respecting the administrative process and the preservation of judicial resources - support its application in the Boulder County District Court proceeding despite Moss and Westby raising a question of statutory interpretation.

E. The Boulder County District Court properly dismissed Moss and Westby's complaint for their failure to exhaust administrative remedies.

Case law clearly placed the obligation upon Moss and Westby to seek administrative relief regarding their concerns over hunting within the Sugar Loaf Mountain Area before proceeding to district court. Wildlife clearly had the expertise in the subject matter involved and the ability to grant Moss and Westby the relief they sought. The Boulder County District Court recognized the complexity of the hunting related issues posed by Moss and Westby and the expertise of Wildlife in that regard. See CD at 417, ln. 6-15, 432, ln. 5-8, 433, ln. 21-25, and 434, ln. 1-5.

The dismissal of the complaint filed by Moss and Westby by the Boulder District Court was entirely consistent with controlling case law, honored and otherwise avoided any interference with the executive authorities and responsibilities granted to Wildlife by the General Assembly, and served to preserve judicial resources. The granting of Wildlife's Motion to Dismiss for Failure to Exhaust Administrative Remedies by the Boulder County District Court

should be affirmed.¹¹

III. Interpretation of § 30-15-302, C.R.S., and the Resolution

A. Standard of review

Should the Court find that Moss and Westby were not required to exhaust their administrative remedies due to the raising of a statutory interpretation question concerning § 30-15-302, C.R.S., and the Resolution, Wildlife recognizes that the interpretation of § 30-15-302, C.R.S. - specifically, whether there is any conflict between § 30-15-302, C.R.S., and the Resolution, and continued hunting

¹¹ Subsequent to the May 11, 2009 Order of Dismissal and Entry of Final Judgment by the Boulder District Court dismissing Moss and Westby's action for failure to exhaust administrative remedies, Moss and Westby completed an administrative proceeding with Wildlife, including consideration of a request to close the Sugar Loaf Mountain Area to hunting with firearms. However, the conduct and conclusion of that administrative proceeding should have no immediate bearing on the present appeal. The dismissal of the action by the Boulder County District Court should be reviewed based upon the circumstances before the district court at the time of its order and not based on any subsequent proceedings. Further, the rule making petition filed by Moss and Westby was ultimately denied and, most importantly, no timely challenge of that administrative action was filed by Moss and Westby pursuant to § 24-4-106, C.R.S. The denial of Moss and Westby's petition, and the findings and determinations made as part of that administrative proceeding, are no longer subject to challenge and should not be allowed to be collaterally attacked in any fashion as part of this appeal. The only issues under consideration here should be whether dismissal for failure to exhaust administrative remedies was appropriate and, if not, whether the Court will make a legal determination regarding the proper construction of § 30-15-302, C.R.S., and the Resolution.

within the Sugar Loaf Mountain Area - could be considered to be purely a question of law, and something that the Court need not defer to the Boulder County District Court on, and something the Court feels needs no factual development. See e.g. Bloomer v. Board of County Commissioners of Boulder County, 799 P.2d 942, 944 (Colo. 1990) (Interpretation of statute is question of law, and the appellate court need not defer to the trial court's interpretation). In light of that possibility, Wildlife provides the following argument with regard to the proper interpretation of § 30-15-302, C.R.S.

Wildlife agrees with Moss and Westby that appellate courts review questions of statutory interpretation, such as may be presented here, *de novo*. See Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 P.3d 350, 352 (Colo. App. 2005).¹²

¹² Other than with regard to a determination of the specific legal question presented, if such is found to be warranted, Wildlife disputes that the denial of Moss and Westby's Motion for Summary Judgment is properly part of this appeal. The Boulder County District Court made no specific ruling with regard to Moss and Westby's Motion for Summary Judgment other than to note that, in light of the granting of Wildlife's Motion to Dismiss for failure to exhaust administrative remedies and the court being without subject matter jurisdiction, the Motion for Summary Judgment was denied. CD at 460-461. Further, as part of its Response to Moss and Westby's Motion for Summary Judgment, Wildlife disputed and continues to dispute the factual allegations made by Moss and Westby in their Motion for Summary Judgment. See generally CD at 235-259.

B. Colorado case law has established clear rules with regard to the interpretation of § 30-15-302, C.R.S., and the Resolution, which control the court’s consideration of the issue here.

A court’s primary task in construing a statute is to give effect to the intent of the General Assembly, and to discern that intent, a court should look first to the plain language of the statute. Farmers Group, Inc. v. Williams, 805 P.2d 419, 422 (Colo. 1991). The goal of the court in construing a statute is to ascertain and give effect to the intent of the General Assembly; to determine legislative intent courts look first to statutory language and, if the language of statute is clear and unambiguous, there is no need to resort to interpretive rules of construction. Bloomer v. Board of County Commissioners of Boulder County, 799 P.2d 942, 944 (Colo. 1990).

To effect the General Assembly’s intent, the court will read and consider the statute as a whole, giving consistent, harmonious, and sensible effect to all its parts. O’Donnell v. State Farm Mutual Auto Insurance Company, 186 P.3d 46, 50 (Colo. 2008). Courts construe a statute so as to give effect to every word, and do not adopt a construction that renders any term superfluous. Spahmer v. Gullette, 113 P.3d 158, 162 (Colo. 2005). Only if statutory language leads itself to alternative constructions and its intended scope is unclear should courts apply rules

of statutory construction and look to pertinent legislative history to determine which alternative construction is in accordance with the objective of the legislation. People v. Terry, 791 P.2d 374, 376 (Colo. 1990).

C. The plain language of § 30-15-302, C.R.S., shows that the intent of the General Assembly was to allow counties to restrict, but not completely prohibit, the discharge of firearms in designated areas.

In clear and unambiguous terms, § 30-15-302, C.R.S., allows for the continued discharge of firearms on private property in any area designated by a county as being subject to a prohibition on the discharge of firearms, provided such firearm can be discharged:

in such a manner as not to endanger persons or 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 [private property].

See § 30-15-302(1), C.R.S.

While Moss and Westby attempt to argue that the Resolution should be considered or interpreted in effect as a complete ban on the discharge of firearms for hunting purposes, it is clear from a review of the language of § 30-15-302(1), C.R.S., that it plainly and unequivocally allows for the continued, albeit more

limited¹³, discharge of firearms in any designated area, including the Sugar Loaf Mountain Area. The language lends itself to no alternative construction and must be applied as written.¹⁴

¹³ The limitations imposed by the Resolution are not without real impact; nor is it a case as claimed by Moss and Westby that the “exception swallows the entire statute and ordinance.” See Opening Brief, p. 21. For example, in the absence of the Resolution, hunters could discharge a firearm in a manner where the projectile could cross property lines, such as where the target animal was on their property, but the safe shooting backdrop (cliff or other landform) was on the neighboring property. That is no longer possible under the Resolution; that is a significant restriction on the discharge of a firearm while hunting. And as such, recognizing the exception, and the incremental nature of county authority to restrict the discharge of firearms, does not negate the statute or somehow otherwise lead to an absurd result. The result is only absurd from Moss and Westby’s perspective because it does not lead to the complete prohibition of the discharge of firearms while hunting, which is the policy they believe is the most appropriate; a policy choice that was not, however, shared by the General Assembly in adopting § 30-15-302, C.R.S., and the exception contained therein.

¹⁴ Further, with regard to Boulder County, it is clear from the Record that it does not interpret the Resolution as a complete prohibition on hunting with firearms within the Sugar Loaf Mountain Area as Moss and Westby have. Rather, Boulder County recognizes that the exception set forth in § 30-15-302(1), C.R.S., allows for hunting with firearms to continue provided such activity complies with the terms and conditions of the exception. CD at 15-16, 258-259, and 450, ln.23-25 and 451, ln 1-6. See also Larimer County School District v. Industrial Commission, 727 P.2d 401, 403 (Colo. App. 1986), cert. denied, 752 P.2d 80 (Colo. 1988) (Construction of statute by administrative officials charged with its enforcement shall be given deference by the courts); § 2-4-203(1)(f), C.R.S.

D. Hunting with firearms can lawfully continue within any area designated by a county pursuant to § 30-15-302, C.R.S.

As Moss and Westby are forced to recognize (see Opening Brief, pp. 4, 18, and 23), under the exception plainly stated in § 30-15-302(1), C.R.S., private property owners or their invited guests are allowed to hunt with firearms, and discharge those firearms, provided the discharge occurs in compliance with the terms and condition expressed in the statute. That is, as long as the discharge can occur in a manner that does not endanger other persons or property and the bullet does not leave the private property parcel of origin, private property owners and their invited guests can continue to hunt with firearms on their property.

And as even Moss and Westby admit in their Opening Brief, it is clearly possible for a hunter (whether the owner of the private property or the owner's invited guest) to discharge a firearm at an animal where, due to the physical nature of the property, it can be done in a manner that does not endanger other persons or property and where the bullet will not leave the private parcel of origin. See Opening Brief, p. 23. The clearly stated exception in § 30-15-302(1), C.R.S., itself resolves any issue, but such admission completely undermines any argument by Moss and Westby that "hunting is facially prohibited." Id., p. 24.

There is no conflict, practical or otherwise, between § 30-15-302, C.R.S. and the Resolution and continuing to allow some limited amount of hunting with firearms within the Sugar Loaf Mountain Area.¹⁵ Such hunting with firearms must comply with the terms and conditions expressed in the statute and the Resolution, but as a matter of law allowing it to continue is entirely consistent with § 30-15-302, C.R.S., and the Resolution. The plainly stated exception must be given effect.

E. Wildlife’s release of liability for game damage does not require a conclusion that hunting with firearms is prohibited in an area designated under § 30-15-302, C.R.S.

By statute, Wildlife is required to pay for damage to private property, primarily agricultural products and property, caused by certain species of wildlife in specified and limited circumstances. See generally §§ 33-3-101 to 204, C.R.S. Moss and Westby point to a release of liability for such game damage in § 30-15-302(2), C.R.S., as evidence of the General Assembly’s intent to completely prohibit hunting with firearms in any area designated pursuant to § 30-15-302(1), C.R.S.

¹⁵ The local preemption case, U.S. West Communications v. City of Longmont, 948 P.2d 509 (Colo 1997) cited by Moss and Westby is not analogous to, nor does it apply to the case at hand, because there is no conflict.

In effect, Moss and Westby argue that Wildlife's authority to regulate the taking of wildlife as set forth in § 33-1-106(1)(a), C.R.S., including the authority to close any specific locality to hunting, has been repealed by implication. In the first instance, repeals by implication are disfavored. See City of Florence v. Pepper, 145 P.3d 654, 657 (Colo. 2006) (A statutory construction that effects a repeal by implication is not favored unless unavoidable). And the intent to repeal by implication must appear clearly, manifestly and with cogent force. Id. Section 30-15-302, C.R.S., does not even reference Wildlife's general regulatory authority, much less establish a clear and manifest statement of intent to place a limit upon that authority. Certainly, had the General Assembly intended to impose such a limit on Wildlife, it could have easily do so, but did not.

However, and more importantly, § 30-15-302, C.R.S. can be read in a manner that avoids any issue of repeal by implication or conflict with § 33-1-106(1)(a), C.R.S. See City of Florence v. Pepper, 145 P.3d 654, 657 (Colo. 2006) (If two acts of the General Assembly may be construed to avoid inconsistency, the court is obligated to construe them in that manner). The release from liability can easily be, and should be to avoid any statutory conflict, read as a simple disincentive for counties to adopt blanket designation under § 30-15-302, C.R.S.,

for any and all areas that might meet the population density of “not less than one hundred persons per square mile.” See § 30-15-302(2), C.R.S. That is, the loss of game damage payments should be considered by counties as a factor in deciding whether to exercise the authority in any case regardless of the area meeting the population density.

Further, finding that an area designated pursuant to § 30-15-302, C.R.S., is closed to all hunting with firearms because of the release of liability creates an absurd result. See Avicomm, Inc. v. Colorado Public Utilities Commission, 955 P.2d 1023, 1031 (Colo. 1998) (A statutory interpretation that defeats the legislative intent or leads to an absurd result will not be followed). That is, hunting with firearms could not occur despite the discharge exception discussed above, but non-hunting discharges of firearms could continue. There is no rational basis for treating one discharge differently from another under the statute. 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. See Opening Brief, p. 23.

Interpreting the release of liability as a simple disincentive to wholesale designation of areas under § 30-15-302, C.R.S., avoids this absurd result,

recognizes and gives effect to the exception plainly stated in § 30-15-302, C.R.S., and properly reconciles or avoids any conflict between county authority under § 30-15-302, C.R.S., and Wildlife's authority under § 33-1-106, C.R.S.

CONCLUSION

Based on the above, Wildlife respectfully requests that the Boulder County District Court's dismissal of Moss and Westby's action for failure to exhaust administrative remedies be affirmed and the appeal be dismissed. Alternatively, if exhaustion was not required, and should this Court proceed with construing § 30-15-302, C.R.S., and the Resolution, Wildlife respectfully requests a legal determination that, as a matter of law, hunting with firearms is not facially prohibited in any area designated pursuant to § 30-15-302, C.R.S., such as the Sugar Loaf Mountain Area, and such hunting can continue provided that it occurs in compliance with the terms and conditions expressed in the statute and any implementing ordinance.

Dated this 9th day of December, 2009.

JOHN W. SUTHERS
Attorney General

*E-filed in accordance with C.R.C.P. 121, § 1-26; duly signed original
on file with the Office of Attorney General for the State of Colorado*

/s/ Timothy J. Monahan

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First Assistant Attorney General
State and Trust Lands Unit
Natural Resources & Environment Section
Attorneys for Colorado Department of Natural
Resources, Division of Wildlife
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF OF DEFENDANT COLORADO WILDLIFE COMMISSION AND THE COLORADO DIVISION OF WILDLIFE** upon all parties herein via LexisNexis File and Serve or, as indicated, by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 9th day of December, 2009, addressed as follows:

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*E-filed in accordance with C.R.C.P. 121, § 1-26; duly signed
original on file with the Office of Attorney General for the State of
Colorado*

/s/ David Canaday

➔ **§ 30-15-302. Board of county commissioners to designate area**

(1) The board of county commissioners of any county in this state may designate, by resolution, areas in the unincorporated territory of such county in which it is unlawful for any person to discharge any firearms, except a duly authorized law enforcement officer acting in the line of duty, but nothing in this subsection (1) shall prevent the discharge of any firearm 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 or 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.

(2) No area shall be so designated under authority of subsection (1) of this section unless it has an average population density of not less than one hundred persons per square mile in the area designated, and, before making any such designation, the board of county commissioners shall hold a public hearing thereon at which any interested person shall have an opportunity to be heard. The provisions of article 3 of title 33, C.R.S., concerning the state's liability for damages done to property by wild animals protected by the game laws of the state shall not apply to any area designated by a board of county commissioners under authority of this part 3.

(3) Nothing in this section shall be construed to restrict or otherwise affect any person's constitutional right to bear arms or his right to the defense of his person, his family, or his property.

HISTORICAL AND STATUTORY NOTES

2002 Main Volume

Derivation:

C.R.S.1963, § 36-22-2.

Laws 1966, S.B.4, § 1.

LIBRARY REFERENCES

2002 Main Volume

[Weapons](#)  [15](#).

Westlaw Topic No. [406](#).

[C.J.S. Weapons § 20](#).

C. R. S. A. § 30-15-302, CO ST § 30-15-302

Current through the end of the First Regular Session of the 67th General Assembly (2009)

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END OF DOCUMENT

A RESOLUTION TO LIMIT THE DISCHARGE OF FIREARMS IN MOUNTAIN MEADOWS, MOUNTAIN PINES, PRIDE OF THE WEST AND SUGARLOAF ACRES SUBDIVISIONS AND SURROUNDING AREAS

WHEREAS, the Board of County Commissioners is authorized to designate areas in the unincorporated territory of the county, in which it is unlawful for any person to discharge firearms, except for duly authorized law enforcement officials; and

WHEREAS, the Board of County Commissioners has received a petition signed by homeowners and residents of the following areas, which include Mountain Meadows, Mountain Pines, Pride of the West and Sugarloaf Acres Subdivisions:

S $\frac{1}{2}$, Sec. 24, T1N, R72W
Sec. 25, T1N, R72W
N $\frac{1}{2}$, Sec. 36, T1N, R72W
S $\frac{1}{2}$, Sec. 19, T1N, R71W
W $\frac{1}{2}$, Sec. 29, T1N, R71W
Sec. 30, T1N, R71W
N $\frac{1}{2}$, Sec. 31, T1N, R71W

to designate those areas as areas in which it is unlawful to discharge firearms; and

WHEREAS, the Board of County Commissioners has heard testimony from the petitioners and has received evidence from the Planning Department that the area described above has a population density of not less than 100 persons per square mile; and

WHEREAS, a public hearing to consider the petition for closure was held on Wednesday, October 8, 1980; and

WHEREAS, the Board of County Commissioners has determined that closure of the area described to discharge of firearms would promote the public health, safety and welfare,

NOW, THEREFORE, BE IT RESOLVED THAT the area described above, which includes Mountain Meadows, Mountain Pines, Pride of the West and Sugarloaf Acres subdivisions, be designated as an area in which it shall be unlawful for any person to discharge any firearms, save and excepting a law enforcement officer acting in the line of duty, but that nothing in this Resolution shall prevent the discharge of any firearm in shooting galleries or in any private grounds or residences under

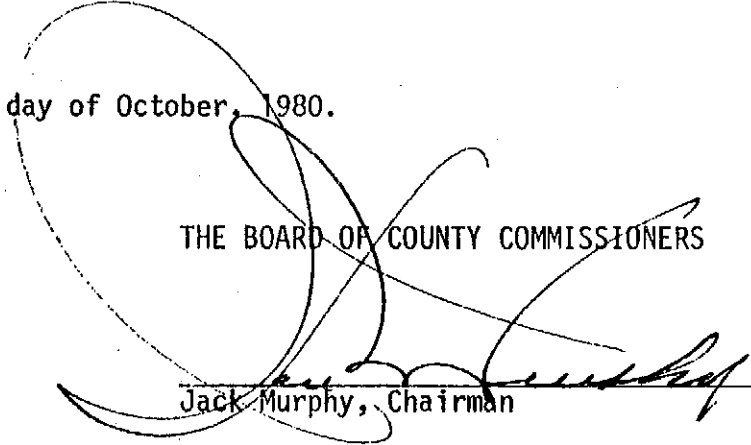
circumstances when such firearms can be discharged in such a manner so as not to endanger persons or property and also in such a manner as to prevent the projectile from any such firearm from traversing any grounds or space outside the limits of said shooting gallery, grounds or residence; and

BE IT FURTHER RESOLVED THAT nothing in this Resolution shall be construed to restrict or otherwise affect any person's constitutional right to bear arms or his right to the defense of his person, his property or his family; and

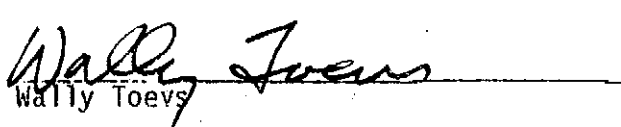
BE IT FURTHER RESOLVED THAT such area shall remain as an area in which it shall be unlawful to discharge firearms until further resolution of the Board of County Commissioners.

ADOPTED this 8 day of October, 1980.

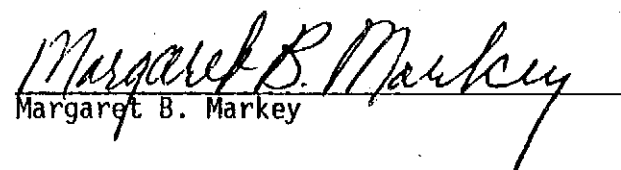
THE BOARD OF COUNTY COMMISSIONERS



Jack Murphy, Chairman




Wally Toevs



Margaret B. Markey

ATTEST:



Viki S. McKinney
Clerk to the Board