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' OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with all requirements of C.A.R. 28 and 32. and that it contains approximately 9,251 words, inclusive of footnotes, exclusive of caption, Table of Contents and Table of Authorities.

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the trial court erred in granting the state agencies' motion to dismiss, and denying Appellants' motion for summary judgment, by failing to conclude as a matter of law that firearm hunting is prohibited in areas closed to firearm discharge under C.R.S. §30-15-302 and Boulder County Resolution 80-52.

B. Whether the trial court further erred in failing to conclude that, under the undisputed facts, C.R.S. §30-15-32 and Resolution 80-52 operationally conflict with the agencies' hunting licensing regulations, rendering the regulations void.

C. Whether the trial court properly dismissed the Complaint for failure to exhaust administrative remedies.

II. STATEMENT OF THE CASE

A. The Nature of the Case.

In a case of first impression, Anita Moss and Robert Westby (sometimes collectively "Moss"), challenge the regulatory allowance of firearm hunting by the Colorado Wildlife Commission ("CWC") and Division of Wildlife ("DOW") ("the agencies") in a populated area of Sugar Loaf Mountain in Boulder County.

The community is comprised predominantly of foothills residential subdivisions. Due to population density a county firearm discharge prohibition under C.R.S. §30-15-302 has been in effect since 1980, and substantial additional residential development has occurred since that time. Nonetheless, the agencies

continue to license and allow firearm hunting in the area (part of Game Management Unit #29).

Appellants contend that the plain language of the statute and resolution, as well as practical conflict with the regulations, render the hunting licensing regulations void and hunting unlawful in the subject area (the "ban area").[1]

B. The Course of Proceedings.

The agencies moved to dismiss arguing in part that Moss was required to exhaust her administrative remedies. CD at 105-9.[2] Moss simultaneously filed a motion for summary judgment arguing that as a matter of law the agencies cannot affirmatively allow hunting in the ban area. CD at 131. She also moved *in limine* opposing testimony of agency witnesses as to the "safety" of hunting. CD at 310.

C. Disposition in the court below.

The trial court held a trial management conference on June 27, 2008, which was converted into a hearing on the dispositive motions. It agreed that hunting in

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[1] Moss asserted three claims: (a) for declaratory judgment under C.R.C.P. 57, that the agencies' regulations as in effect in ban area are in excess of its jurisdiction; arbitrary and capricious; an abuse of discretion, and otherwise contrary to law; (b) for relief pursuant to C.R.C.P. 106(a)(2) in the nature of mandamus to compel the agencies to recognize and give effect to the County firearms ban; and (c) for injunctive relief pursuant to C.R.C.P. 65 prohibiting the agencies' issuance of firearm hunting licenses in the County firearms ban area. The Boulder County Commissioners were joined as interested parties pursuant to C.R.C.P. 57(j).

[2] Boulder County moved to dismiss premised on a concern that Moss was seeking specific mandamus relief that the sheriff issue citations. *Id.* at 127. Moss has clarified that she does not seek such specific relief.

the ban area presents a significant safety issue. However, it granted the motion to dismiss, ordering Moss to exhaust her administrative remedies through rulemaking with the CWC. CD at 376. It vacated the trial and also denied Moss's motion for summary judgment. CD at 378; *see* Transcript, 405-454.

Moss appealed, 2008CA1671, but that initial appeal was dismissed for lack of a proper final order. In the interim Moss petitioned the CWC (under protest) to close the ban area to hunting through rulemaking. On July 9, 2009, it denied her request. Moss subsequently obtained a final and appealable order from the trial court and this appeal followed. CD p. 487-8**.**

On August 18, 2009 Moss move for a stay or injunction prohibiting hunting in the ban area pending appeal. CD at 549. This effectively gave the trial court an opportunity to revisit the merits of the case for purposes of a temporary injunction, and Moss provided additional evidence that had developed since the trial court's previous dismissal order. However, it did not analyze the merits and denied the motion without comment. Moss then so moved in this Court, pursuant to the rules. This Court also denied the motion without comment.

III. STATEMENT OF FACTS

A. Overview of State and County Firearm Discharge Prohibition.

Section 30-15-302(1), C.R.S., provides that boards of county commissioners "may designate, by resolution, areas of unincorporated territory in which it is

unlawful for any person to discharge any firearms." It excepts law enforcement officers acting in the line of duty, and firearm discharge in "shooting galleries" or on private property if such firearm can be discharged in such a manner that 1) it does not leave the property from which it is discharged, and 2) even then, only if it can be done safely. *Id*. The county must find that the designated area "has an average population density of not less than one hundred persons per square mile" and hold public hearing. *Id.* The state is excused from liability for property damage by wild animals in the designated area. §30-15-302(2).

On October 8, 1980, Boulder County, after public hearing, enacted Resolution 80-52, prohibiting firearm discharge for the central area of Sugar Loaf Mountain, encompassing 4.5 square miles. It determined that the area had in excess of 100 persons per square mile, and that the closure of the area to firearm discharge would promote the public health, safety and welfare. *See* **Appendix A**.

However, the agencies continue to allow seasonal firearm hunting in the ban area. *See e.g*., CD at 26, ¶14;[3] Section 00 of the agency regulations, **Appendix B**, The regulations are silent on county firearm closure areas. *See especially* Art. III, License Types & Requirements, #001 – Hunt Codes (the entire chapter is attached, but sections 001 and 023 are the most relevant.)

[3] The state is divided into Game Management Units. Sugar Loaf lies in GMU 29, which extends to the northern end of Boulder County, west to Interstate 25, south almost to Interstate 70, and west to the Continental Divide. GMU 29 encompasses about 1200 square miles. App. B, at 45 (Art. III, #023, B); *see also* CD at 6 (map).

Appellants, a married couple, have resided in the 80-52 ban area since 1977. *See* CD at 150, ¶ 1. They experience firsthand the fear, uncertainty and frustration that Sugar Loaf residents feel from the agencies' allowing high powered rifles to be fired in close proximity to their home and vehicles, when their elected representatives have determined firearm discharge is too dangerous in the area.

B. Nature of Hunting Activity in the Restricted Area.

The facts demonstrate that hunters routinely violate Resolution 80-52; the DOW will not cite violators; and as a practical matter the Sheriff's Department ("BCSD") cannot enforce the firearms ban while hunting is allowed. These facts are established in portions of the agencies' administrative records, the records of the BCSD, and Appellants' affidavits.

1. Previously developed administrative record.

In 2005, two years prior to this lawsuit, a group of 190 Sugar Loaf residents called Sugar Loaf Citizens for Safety, unsuccessfully petitioned the CWC to close to hunting an eight-square mile area of Sugar Loaf – almost twice the area covered by Resolution 80-52. The petitioners did not raise the applicability of Resolution 80-52 because the DOW had wrongfully informed them it did not impact hunting. However, parts of the record from that proceeding are relevant here.

On August 26, 2005 Jeffrey Crawford, then CWC Chairman, wrote to Boulder County stating that the county not only had the right to close the area to

hunting, but that closure was solely for the County, not the CWC: "[T]he matter of the safe discharge of firearms [is] within the purview of the … boards of county commissioners who have instituted firearms bans pursuant to statute." CD at 12. He acknowledged "public safety concerns" and that deference would be given "the statute specifically granting the authority to implement firearms closures." *Id.*

The County Commissioners replied to Crawford on September 6, 2005, strongly supporting the citizens' petition, stating that that the citizens had "made the case that a major safety issue currently exists" and that continued hunting was "a disaster waiting to happen" (CD at 14; 173):"

> With the dramatic increase in houses on Sugar Loaf, more than 100 new houses since 1993, as well as a huge jump in the number of recreationists … we feel that the probability of an accident happening during hunting season has increased exponentially…The written documentation of Boulder County School Transportation manager Stanley Wolaniuk, describing potential near misses between hunters and children loading and off loading their busses is a dramatic illustration of a disaster waiting to happen.

Id. They also explained the "nightmare for enforcement:"

> The "endangerment of persons or property" becomes an element of the crime, which must be proven beyond a reasonable doubt. When the situation involves the shooter's word against the complainant's, obtaining a conviction is extremely difficult.
> …
> A sheriff's officer …must somehow determine that the bullet left the property where the firearm was discharged, or that it came close enough to other persons on that property as to endanger them or their property.

Id.

Boulder County's reference to the comments of Stanley Wolaniuk, Boulder Valley School District transportation manager and a former school bus driver for Sugar Loaf for 20 years, pertained to a letter Mr. Wolaniuk had written directly to the CWC in passionate support of the 2005 petition for closure. He stated that not only "*can* [a dangerous situation occur, putting the lives of children at risk, but it *will* occur. CD at 177 (emphasis original). Wolaniuk cited several examples where hunters targeted or hit animals in close proximity to children getting off the bus, and he was so concerned for their safety he drove them home. On one occasion children were directly in the line of fire and the situation was saved only when the bus "spooked" the animal away. *Id*.[4]

2. Boulder County's inability to enforce Resolution 80-52 in face of the agencies' issuance of licenses.

Boulder County's expressed frustration in enforcing Resolution 80-52 while the agencies still permit hunting, also is exhibited in BCSD records. For example, on September 15, 2004, BCSD Officer Jones confronted a hunter in the ban area. He reported the hunter told him a DOW wildlife officer had checked his permit and said "everything was okay for him to be in that area." The officer further reports his belief that if the DOW had given the hunter permission, then that permission was controlling. CD at 181-2.

[4] Appellants have heard shots fired in the morning at the time school bus comes, within the ban area. CD at 157, ¶7.

Several days later a BCSD officer encountered the same hunter in roughly the same area, and again explained the discharge ordinance. The hunter replied that "he was getting sick of being harassed by [the BCSD]…." The DOW "confirmed" a "legal kill" and DOW Officer Solohub "stated that the hunters were legally on public property and they had the right to be hunting in this location." CD at 185.

The next day BCSD Officer Simpson encountered two hunters in the ban area with a dead bear. When challenged on the legality of the shoot, the men reported that DOW Officer Solohub had advised it was legal to hunt. CD at 186.

BCSD records also disclose that family dogs have been shot within the ban area. BCSD documented two such occurrences in 2005. In September a malamute owned by the Plywaski family was fatally shot in the ban area by persons unknown, and for unknown reasons. The extensive BCSD report notes the possibility of a hunter in light of the significant hunting activity in the area. However, without leads the case was closed. CD at 192.

In November of 2005 a Labrador was shot and killed by a hunter personally known to the DOW. The hunter admitted killing the dog because it had interfered with his hunt. Again, Officer Soluhub, without regard for 80-52, concluded he was within his rights. CD at 188-91.[5]

[5] Officer Solohub filed no report on the incident. This is typical. If, as the agencies suggest, none of these occurrences appear in their records, it is by choice. It

3. Illegal hunting activity documented by Appellants and others.

Additional facts demonstrating illegal hunting and inattention of the DOW officers to such activity, appear in Westby's Affidavit, and Westby and Moss's joint Verified Statement.[6] Every autumn during hunt season Appellants witness hunters cruising or parked on the roads within the ban area. CD at 150-1, ¶¶2 - 4. This has continued despite the DOW's warnings the area is "high conflict" and that hunters are more educated about the ban. *Id.* In some cases the vehicle occupants hold poised guns. *Id*. They often drive slowly on the roads looking for game. Hunters also stalk game on private property (CD at 151, ¶5). Westby relates finding a hunter on his own 3-acre parcel, crouching with his gun poised. *Id*, ¶ 10. He also tells of the shootings of two dogs belonging to the Hill family, in addition to those reported by BCSD. *Id.*, ¶11.

Westby also references disturbing comments found in the agency administrative record for the 2005 petition, regarding hunters threatening residents and willfully ignoring posted warning signs. For example, Gerry Avery reported

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appears that DOW habitually does not report complaints or conflicts, allowing it to claim later to have no record of complaints.

[6] Westby's Affidavit was submitted with Appellants' Motion for Summary Judgment and Motion for Stay or Injunction Pending Appeal. The Verified Statement, pertaining to factual developments after summary judgment was denied and the case dismissed, was submitted with the Motion for Stay. CD at 150, 549. As noted, it gave the trial court an additional opportunity to review the ongoing illegal activity, and at least enter a temporary injunction.

to the CWC having witnessed a hunter sitting in a truck near her home within the ban area, with a rifle pointed out the window. As she walked by he told her to get out of the way or he would shoot her and her dogs." CD at 152, ¶12.

Further, DOW officers respond to complaints, not by cautioning hunters, but by warning the residents against "harassing" hunters. One such incident involved John Satkowski, who lives in the center of the ban are. Satkowski has a disabled son and specifically requested certain hunters not to shoot near his home. The hunters refused and complained to the DOW. DOW Officer Solohub came to Satkowski's home and advised him not to harass hunters. *Id.* ¶ 12.

Appellants have found unequivocal evidence of shots taken from the road[7] or across private property that could not have been lawful under Resolution 80-52. They testify as to refusal by the DOW officers, and sometime the BCSD officers, to investigate illegal activity, much less issue citations. For example, in the early morning of August 30, 2008 Appellants witnessed a man and woman illegally parked and hunting from Sugar Loaf Road. Meanwhile another resident, a Mr. Neitenbach, had called the BCSD to report the same couple illegally hunting near Mountain Pines Road. According to the BCSD CAD report, the BCSD later responded to a call from the female hunter who had been the subject of the Neitenbach complaint, asking *for DOW assistance* in tracking a deer she had

[7] Shots taken from, upon or across a road are illegal everywhere in Colorado. C.R.S. §33-6-126.

wounded. The deer carcass was not located on the private property of the hunter, and the shot was clearly taken from the road. Nonetheless, BCSD Officer Koehler determined that it was a legitimate kill – and the hunter complained that she had been "harassed" by Neitenbach. Moss later questioned the officer's conclusion, as the shot plainly did not stay on private land, as required by the ordinance. He declined to revisit the incident. CD at 592-3.

Several weeks later a resident reported to Appellants having heard loud gunshot near her home. Appellants discovered a puddle of fresh blood on nearby Mountain Pines Road, within the ban area. DOW Officer Rogstaad was nearby and he and Appellants searched the adjacent area. The officer located a deer gut bag, but did not mention it. A few moments later Appellants found the bag and told Rogstaad, who admitted seeing it. He refused further discussion or investigation and left the scene. Appellants personally measured the distance from the deer remains to the road, which was 36 yards. Again the shot was in plain violation of Resolution 80-52 – i.e., was not made on private property and did not stay on private property. CD at 594-5.

Appellants filed a complaint on this incident with the BCSD. An officer arrived and confirmed the gut bag was just yards from the road and the deer likely was shot in the road. However, confirming what County Commissioners had told the CWC about the County's inability to enforce the Resolution, the officer

concluded that because no one witnessed the shoot, there was no "proof" the ordinance was violated. CD at 595.

In October of 2008, resident Eric Stone reported to the DOW three hunters, carrying rifles, trespassing across his property and that of three other homeowners on Mountain Pines Road – within the ban area. DOW Officer Rogstaad responded and traced the hunters' vehicle to a business in Frederick, likely an outfitter. He said he would advise the business of the complaint. However, he issued no citations, and Appellants repeatedly saw the same vehicle later cruising the ban area. Once it was seen pulling into a homeowner's driveway where its three male occupants got out to stalk deer grazing behind the home. CD at 595-6.

Hunters routinely ignore posted signage. In 2008 Appellants saw a likely outfitter (its license plate repeatedly noted) parked within the ban area, directly in front of a County "NO DISCHARGE OF FIREARMS" notice. He drove onto Sugar Loaf Road adjacent to USFS land, pulled partially off and loaded a deer carcass (legs removed) into the truck. At the time the road was heavily trafficked, and school buses passed the hunting vehicle on both Mountain Pines and Sugar Loaf Roads. The deer's legs were found less than 300 feet from either road. Appellants requested DOW Officer Koehler to investigate this obviously unsafe and illegal shoot, given the geography of the area. He refused. CD at 596.

Appellants learned of another incident from the Kirk Parker family, who

encountered four hunters while walking in the heart of the ban area with their two small children. Mr. Parker related having a contentious conversation with the three men about their hunting in this populated area. Mrs. Parker spoke to a woman driving the truck as to the dangers of hunting in this area, pointing out a nearby DOW sign reading: "High Conflict Area - Recommended No Hunting." The woman driver simply replied that the sign did not say "no" hunting. CD at 593-4.

In short, there is obvious hunting activity violating Resolution 80-52, just in the areas that Appellants frequent, and it is reasonable to assume it occurs throughout the ban area. CD at 151, ¶¶8, 9. In addition, "it is common knowledge in the Sugar Loaf area that there have been many [conflicts and confrontations between residents and hunters.]" *Id*. at ¶12.

IV. ARGUMENT

A. Summary Of Argument

Moss contends that under a plain reading of C.R.S. §30-15-302, hunting is prohibited in the area covered by Boulder County Resolution 80-52. Further, there is such magnitude of practical conflict between the agency hunting regulations and state and county legislation that the two cannot co-exist and the regulations are null and void. Thus, the agencies' continued authorization of hunting in the ban area is arbitrary, capricious and an abuse of discretion, and Moss is entitled to a permanent injunction against the issuance of hunting permits for the ban area.

The trial court never reached the merits of Moss's case. Instead it dismissed her claims and denied her motion for summary judgment on the basis that it could not determine whether hunting was "safe" in the ban area. It thereby concluded that Moss must first exhaust her administrative remedies with the CWC.

This was error. Independent agency (or court) findings as to "safe" hunting in the ban area are irrelevant and improper, as both the General Assembly and Boulder County have already legislatively determined the threshold of population beyond which firearm discharge may be presumed to present a safety threat. Moss's claims require resolution of the conflict between the agency regulations and state/county law, matters not within the authority and ability of the agencies.

B. Standard of Review

The court applies a *de novo* standard of review to questions of statutory interpretation. *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350, 352 (Colo. App. 2005); *Colorado Common Cause v. Coffman*, 85 P.3d 551, 554 (Colo. App. 2003). The standard of review for either the granting or denial of a motion for summary judgment also is *de novo. Feigin v. Digital Interactive Assoc., Inc.,* 987 P.2d 876, 880 (Colo. App. 1999).

An appellate court employs a mixed standard of review to dismissals for lack of subject matter jurisdiction. *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006); *Egle v. City & County of Denver,* 93 P.3d 609

(Colo. App. 2004). It reviews the trial court's factual findings under the clear error standard, but its legal conclusions are reviewed *de novo*. *City of Aspen, supra*.

Here, because the trial court made no factual findings review of jurisdictional issues is necessarily *de novo.*

C. Moss Was Entitled To Summary Judgment Finding Hunting Prohibited Under C.R.S. §30-15-302 and Boulder County Resolution 80-52.

1. The denial of summary judgment is reviewable.

Preliminarily, in a case such as this where a denial of summary judgment effects a final order, it is reviewable on appeal. *Furlong v. Gardner*, 956 P.2d 545, 547 (Colo. 1998); *see Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1247-8 (Colo. 1996) (normally summary judgment denial orders are not reviewed because they are matters of pre-trial procedure, simply directing the case to trial; the rule avoids piecemeal appeals and absurd results). Here the trial court dismissed the case for failure to exhaust administrative remedies, and as an element of that ruling denied consideration of Moss's summary judgment arguments (it did not rule on the merits of her motion), ending the litigation. CD at 376,78; 406-54 (transcript). Failure to review the summary judgment denial would thus deny Moss her day in court. There is no risk of piecemeal appeals.

2. Hunting is prohibited in the Sugar Loaf ban area under a plain reading of the statute and resolution.

As an essential aspect of their police power, states have the power to

regulate hunting on both public and private lands. *Collopy v. Wildlife Comm'n*, 625 P.2d 994, 1001 (Colo. 1981). Except under rare specific Congressional declarations, wildlife is a state managed resource. *Geer v. Connecticut*, 161 U.S. 519, 528 (1896); *Kleppe v. New Mexico*, 426 U. S. 529, 543-4 (1976) (state is free to enforce its criminal and civil laws on federal lands absent specific Congressional preemption); *see* Memorandum of Understanding between the U.S. Forest Service and the DOW (Forest Service relies entirely on the DOW to ensure hunting activity is lawful). CD 155-71 (esp. 157-8).[8]

However, C.R.S. §30-15-302 is outside the agencies' organic statutes and the state wildlife regulatory scheme. It establishes a statewide threshold of population density beyond which firearms discharge may be presumed unsafe. It

[8] The Sugar Loaf residential areas are interspersed with tracks of Roosevelt National Forest. Forest Service regulation also broadly prohibits shooting in congested areas. *See* 36 C.F.R. Chapter II, Section 261.10, CD at 120 ("[i]n or within 150 yards of a residence, building, campsite, developed recreation site or occupied area… and [generally] in any manner or place whereby any person or property is exposed to injury or damage as a result in such a discharge"); *see also,* Deputy Smith's report, CD at 180 (there is a central part of the Sugar Loaf subdivisions where any discharge of firearm would likely violate the 150 yard prohibition and would risk safety.)

Federal law does not affect this case because, as noted, the federal government does not regulate traditional hunting. Moreover, the Weeks Act 16 U.S.C. §480, specifically allows states to maintain concurrent civil and criminal jurisdiction over Forest lands. However, one of the problems associated with hunting in the ban area is that both the DOW and the BCSD peace officers have been under the mistaken belief that a state law/county ordinance doesn't apply on federal lands. *See e.g.*, CD at 180 (deputy states in report, without explanation, that Resolution 80-52 does not apply to Forest Lands). This is plainly incorrect and it is appropriate for the Court to clarify this matter.

provides broad authority to Colorado counties to determine areas that should be restricted to all manner of firearm discharge.

A natural reading of C.R.S. §30-15-302 and Boulder County Resolution 80-52, bolstered by a heavy dose of common sense, is that firearm hunting is unlawful in areas closed to firearm discharge.

Legislative intent is the polestar of statutory construction. *Schubert v. People,* 698 P.2d 788, 793 (Colo. 1985). To ascertain intent the courts first apply the plain and ordinary meaning of the words used. *Holcomb v. Jan-Pro Cleaning Systems of Southern Colorado*, 172 P.3d 888, 894 (Colo. 2007). "We do not add words to the statute or subtract words from it." *Id.*

When examining a statute's plain language, the court presumes that the entire statute is intended to be effective. C.R.S. § 2-4-201. It gives effect to every word and renders none superfluous, never presuming that the legislature used language idly. *Colorado Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist*., 109 P.3d 585, 597 (Colo. 2005). Words and phrases are read in context and construed literally according to common usage "unless they have acquired a technical meaning by legislative definition." *Id*. (citations omitted). Under CRS § 2-4-212, all general terms are liberally construed, taking into account the context of the entire title or article. *Bob Blake Builders, Inc. v. Gramling*, 18 P.3d 859, 862 (Colo. App. 2001).

Section 30-15-302, C.R.S., is a not a complex statute. It allows "any county" to designate "unincorporated territory," "in which it is unlawful for *any person* to discharge *any firearms.*" *See* C.R.S. §30-15-302(1) (emphasis added). "Firearm" is defined as "*any* pistol, revolver, rifle, or other weapon *of any kind* from which *any shot, projectile or bullet* may be discharged." C.R.S. §30-15-301 (emphasis added). The term "any" can be interpreted to mean "all." *Catholic Media Groups, Inc. v. Meyer*, 879 P.2d 480, 482 (Colo. App. 1994). Thus, in the first instance the statute casts a very wide net, encompassing all persons and weapons from which any discharge of any projectile may ensue.

It then lays out carefully circumscribed exceptions. In addition to excluding "a duly authorized law enforcement officer acting in the line of duty," it provides:

> 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*
> *[a] such firearm can be discharged in such a manner as not to endanger persons or property* and
> *[b] 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*.

§30-15-302(1) (emphasis added). Thus, under a plain reading the only allowed shooting in a ban area is where it is insured that the projectile stays within the private grounds of origin, and even then, only if done without endangering persons or property.

There is no pretense that the agencies' licensing scheme complies with these restrictions. Licensing is carried out only with reference to the larger GMU, and there are no special rules applicable to county closure areas. *See supra*, at p. 5. Indeed, as described above, DOW officers routinely advise hunters that shots not complying with the 80-52 restrictions are lawful. *See* pp. 9-13 *supra*.

3. The agencies have elsewhere represented that county firearm bans control hunting.

The agencies have never explained why the statute does not mean what it says – that *any* discharge of any firearm is prohibited unless meeting one of the narrowly exceptions. In fact, they have several times represented that a county does have the right to close an area to hunting by resolution. As noted, Commissioner Crawford stated to the Boulder County Commissioners in 2005 that, "the enabling statutes…place the matter of the safe discharge of firearms within the purview of the various boards of County Commissioners…. *See* §30-15-302, C.R.S." He continues:

> [G[iven the public safety concerns … and with due deference to the statute specifically granting the authority to implement firearms closures to boards of county commissioners, …the issue [of extending the closure] might be one that the Boulder County Commissioners would want to consider.

Recently, in another case involving a proposed hunting closure, the agencies also represented that county firearm bans did indeed control whether hunting could occur. *Castle Pines Homes Ass'n, Inc. v. King* (Douglas County District Court,

2008CV2948) began as a private dispute between Castle Pines and the adjacent rancher. Castle Pines sought to enjoin hunting on the ranch, adjacent to the subdivided neighborhood.

The agencies intervened, asserting as here that the plaintiffs were required to exhaust their administrative remedies. However, unlike here they represented that the required administrative procedures *included* "invok[ing] Douglas County's authority to regulate the discharge of firearms on unincorporated property… [under] C.R.S. §30-15-302" (**Order**, CD at 573) – notwithstanding having just argued here that county firearm discharge closures do *not* prohibit hunting. *See also* **Motion,** CD at 583 ("the discharge of firearms in unincorporated territory in any county is subject to restriction by resolution of the board of county commissions of said county," and **Reply Brief**, CD at 576 ("Castle Pines could also have sought relief [to end hunting on the adjacent parcel] from the Board of County Commissioners of Douglas County pursuant to §30-15-302, C.R.S.")).[9]

The agencies' counsel also testified to the CWC in the 2005 rulemaking that counties have this power and it properly releases the DOW from game damage payment. CD at 227:15 – 229:24 (see discussion *infra*, at 24).

[9] Castle Pines also petitioned under protest to the CWC. Undersigned counsel was present at the July 9, 2009 hearing and attests that the CWC announced its denial was based in part on the conclusion that Castle Pines should have sought relief with the County for the hunting closure – i.e., to obtain the exact ordinance which the CWC had just concluded was irrelevant to Sugar Loaf hunting.

The agencies' position in this case is not credible, given their adoption of another interpretation when if it suits their advantage.

4. Finding the statute inapplicable to hunting licensure would render the statute superfluous and without purpose.

Putting aside the agencies' varying versions of the impact of the statute on hunting, they have argued here that the mere fact that Sugar Loaf lies in a GMU for which hunting permits are issued is of no consequence to the county's enforcement of its resolution, and it is not their responsibility to enforce the resolution. They also suggest that because a private owner cannot be completely banned from shooting on his own land, hunting does not actually conflict with the statute or resolution. In other words, the exception swallows the entire statute and ordinance.

This is an absurd result that the legislature did not intend. *See Smith v. Zufelt,* 880 P.2d 1178, 1185 (Colo. 1994); *Catholic Media Groups, Inc. v. Meyer*, *supra,* 879 P.2d at 481 (The courts must presume that the General Assembly intended a just and reasonable result and will seek to avoid an absurd result or interpretations that negate the obvious effect of the statute); *State v. Nieto,* 993 P.2d 493, 505 (Colo. 2000) (the courts must give consistent, harmonious, and sensible effect to all parts of the statute.)

The absurdity of the agencies' interpretation is demonstrated in several ways. First, they have provided no rationale for why hunting, probably the most

common use of firearms, would be excepted from a blanket firearms ban.

Further, if county firearm bans under §30-15-302 were not intended to prevent hunting (through the agencies' licensing, which is the only way it can occur), then to what *were* they intended to apply? Knowing and reckless discharge of a firearm towards a dwelling, building or occupied structure is a statewide felony under C.R.S. §18-12-107.5. The random firing of weapons is a reckless or criminally negligent discharge of a firearm and a statewide Class 2 misdemeanor under C.R.S. §18-12-106(b). The use of road signs and such things as targets would constitute the illegal defacing of public or private property under C.R.S. §18-4-509, and also is a statewide misdemeanor. And obviously the shooting of or at people is prohibited under other the criminal statutes.

Target shooting in galleries is explicitly *excepted* under §30-15-302, as long as the shot is done safely and stays on the property of origin, as is shooting by a peace officer in a line of duty. Clearly these were not the focus of the statute.

What is left? Hunting – and perhaps target shooting where the shot is not guaranteed to stay on the private property of origin. But if the legislature intended "out of bounds" target shooting to be the sole statutory focus, it would not have given the statute such broad brush – it would be narrowly tailored to such conduct.

Even more cogently, the General Assembly took great care to carve out the peace officer and the private property "origin of discharge" exceptions. If it had

intended to create any exception or special rules for an activity as widespread as hunting, why did it not explicitly do so? *See Holliday v. Bestop*, 23 P.3d 700, n. 5 (Colo. 2000) (*inclusio/expressio unius est exclusio alterius* is the maxim that the inclusion, or expression, of one thing implies the exclusion of the other). The agencies offer no explanation.

Also, the circumstances under which a lawful shot at an animal could be taken are so limited it strains credulity to believe lawmakers saw even greatly restricted hunting as a legitimate exception to the statute. The discharge is unlawful unless the projectile *is* contained within a single piece of private property of origin – not "may be contained," "likely to be contained," or "with the intent that it be contained," and even if contained it must at all times be safely done.

A high-powered deer rifle has a range of at least 1.5 miles. CD p. 562. Yet no properties within the 80-52 area extend this distance. CD p. 564**;** *see also* n. 8 *supra.* Most are 1-3 acre subdivided lots. Accordingly, a hunter could not lawfully fire a rifle at a target animal unless a) the animal were at the base of a cliff, b) on the same parcel from which the shot is fired, and c) the shot were fired into the cliff to be assured not to leave the property, 4) by the owner or with the owner's permission. Even if this perfect storm of conditions existed, only that owner could be issued a hunting license, for his own land. But where are the licensing restrictions for such conduct? And who can or monitor this activity to assure

compliance? No one.

The statute is clear and contains no ambiguity; it must be applied as written to all firearms and hunting is facially prohibited. *See Cartwright v. State. Bd. of Accountancy*, 796 P.2d 51, 52 (Colo. App. 1990).

5. The statute's excusing of DOW from game damage payments is clear evidence of intent to exclude hunting in county closure areas.

Only if a statute is ambiguous, i.e., capable of more than one meaning, does the reviewing court consider extrinsic sources to assist in ascertaining its meaning. *In re Title for 1999-2000,* 999 P.2d 819, 820 (Colo. 2000).

Section §30-15-302 is not genuinely susceptible to more than one meaning as to whether county imposed firearms closures apply to hunting, and the licensing of hunting. But assuming, *arguendo*, that it were, related statutory provisions and other extrinsic aids confirm the legislature's intention to prohibit this activity.

Most critically, §30-15-302(2) excuses the DOW from having to make game damage payments for any such county closure area. It provides that:

> 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.

The clause refers to C.R.S. §33-3-101 through 204, under which the DOW compensates landowners for excessive damage to property from allowing wildlife – particularly game animals – to forage and thrive on private land. The game

damage statute recognizes that having game on one's property can be both a benefit and a burden and that hunting is one of the management tools for such combating excessive damage. For example, no compensation is available to a landowner who unreasonably restricts hunting, or to persons who profit from such animals. C.R.S. §33-3-103(1)(f) and (g).

The natural understanding – indeed the only rationale – for excusing DOW from game damage payments in closure areas is because it no longer has hunting available to regulate game populations. It therefore would not be fitting to require the DOW to pay for "excessive" wildlife use. *See* counsel's testimony and admission, CD at 227-29.

Again, it is common sense that if it had intended that the agencies could conduct hunting business as usual in these closed areas, there would be no point in its release of the game damage payment requirement.

6. **Other rules of construction require the same conclusion, that hunting is prohibited.**

Interpretations that defeat a statute's obvious purpose should be avoided. *McCallum v. Dana's Housekeeping*, 940 P.2d 1022, 1024 (Colo. App. 1996). The courts look at the overriding goal of a statute, promoting its spirit and not just its letter. *People v. Manzanares*, 85 P.3d 604, 606 (Colo. App. 2003) *Bob Blake Builders, Inc. v. Gramling*, 18 P.3d 859, 862 (Colo. App. 2001); *Grant v. People*, 48 P.3d 543, 547 (Colo. 2002).

It is clear that in passing §30-15-302 the legislature sought to establish a baseline for population density beyond which firearm discharge could be presumed to pose a risk – 100 persons or more per square mile. Of all the kinds of firearm discharge in semi-rural areas, by far the most widespread is the hunt. Taking a broad view of the goal of the statute, i.e. not to put citizens at risk of being hurt by guns, it is inconceivable that lawmakers intended the agencies be allowed to continue licensing such areas for hunt, wholly disregarding County wishes.

D. Agency Regulations Are Void If They Conflict With A Municipal Ordinance Passed Under The Police Power Or Statute.

To date, the agencies have not argued that their regulations would take precedence over C.R.S. §30-15-302 and Resolution 80-52 in the event of conflict. However, it is to be noted that the rules with regard to such conflicts plainly require the regulations to be rendered null and void.

Where a local ordinance, passed either under its own police power or pursuant to direct statutory authority, conflicts with agency regulation, the ordinance preempts state regulation. *See U.S. West Communications v. City of Longmont*, 948 P.3d 509, 519-20 (Colo. 1997) (although the [PUC] has broad power to regulate public utilities, that power is delimited by both Longmont's general police power to regulate the health, safety, and welfare of its citizens and the specific statutory authority …")

A corollary rule is that administrative regulations have no effect if they add to, modify, or conflict with an existing statute. *Martinez v. Dept. of Personnel*, 159 P.3d 631, 633 (Colo. App. 2006). Agencies are powerless to act contrary to legislative intent or exceed their authority, and such acts are not merely erroneous but void. *Flavell v. Dept. of Welfare*, 144 Colo. 203, 355 P.2d 941, 943 (1960); *Cartwright v. State Bd. of Accountancy*, *supra,* 796 P.2d at 53. A regulation must always further the will of the legislature and may not modify or contravene an existing statute. *Miller Internat'l, Incl. v. People*, 646 P.2d 341, 344 (Colo. 1982). The Colorado Supreme court has said:

> [A]dministrative regulations are not absolute rules. They may not conflict with the design of an Act, and when they do the court has a duty to invalidate them. [Citation omitted]. Furthermore, when an administrative official misconstrues a statute and issues a regulation beyond the scope of a statute, it is in excess of administrative authority granted.

Travelers Indemnity Co. v. Barnes, 191 Colo. 278, 552 P.2d 300, 303 (Colo. 1976).

Although the CWC has general regulatory authority over wildlife, the legislature gave counties explicit authority to prohibit the discharge of firearms in populated areas, under their police power. The hunting regulations, by sanctioning and promoting hunting in the ban area, plainly contravene and modify what the legislature established and are void.

E. Summary Judgment Should Have Been Entered In Moss's Favor As To The Factual Conflict Between The Statute/Resolution And The Agency Regulations.

Even if the Court were not to find an absolute prohibition on hunting there is such enormous practical conflict between the statute/ordinance and the agency regulations that it is fundamentally impossible for the agencies lawfully to continue to license hunters for the ban area.

The agencies' position as to the fact of conflict is best summed up by ¶14 of their Answer, that Resolution No. 80-52 "only restrict[s] the possible discharge of firearms," and therefore neither "prohibits or otherwise prevents Wildlife from continuing to issue hunting licenses as a matter of law or fact." CD at 26. They seem to claim that because Moss can't demonstrate that *all* shots fired violate 80-52, she is entitled to no relief at all.

There is neither legal nor factual support for such a defense. By analogy, if this rule had been applied in *U.S. West*, the court would have concluded that because the PUC's "could" place its utility lines underground, the municipal ordinance requiring underground lines was not violated, even though the PUC's proposal was to place the lines *above* ground, in direct conflict with the ordinance.

Such a result would have been ridiculous, just as it is here. The facts must prevail. If the CWC required its licensing to track the statutory requirements, and the DOW fully enforced the firearm discharge ban and made clear to their hunters

that their activity was unlawful, then the analysis might be different. But they have not and will not do either of these. The facts produced by Moss demonstrate that the agencies permit widespread hunting in violation of the statute and resolution, conflict, and rampant confusion over competing jurisdictional authorities. Shifting the burden to Boulder County eliminates none of this. The County has made clear that as a practical matter it cannot enforce the ordinance while hunting continues.

The agencies have produced only their opinion, not yet subjected to exposure at trial, that the area experiences no hunter/resident conflicts, and that hunters shoot safely. These opinions are not only facially incredible, they are not evidence to refute the concrete facts provided by Appellants. Further, the agencies do not seriously suggest that their licensed hunters comply with the Resolution – indeed, to do would be specious. Whether the hunters "need not" violate the Resolution is irrelevant, just as it would be irrelevant that the PUC "need not" violate the underground power line ordinance. Accordingly, the hunting regulations are void, and the agencies have acted in excess of their authority and abused their discretion.

F. The Trial Court Erred In Granting The Agencies' Motion To Dismiss For Failure To Exhaust Administrative Remedies.

The trial court expressed concern over the safety of hunting in the Sugar Loaf area. However, it concluded that it was not equipped to make factual

determinations on this issue, and directed Moss to exhaust her administrative remedies with the CWC. *See gen.*, CD at 406-54. This was error.

1. Neither the Agencies nor the Court can supplant existing legislative findings that hunting may be presumed unsafe in the ban area.

The agencies led the trial court astray in casting this suit as one for a factual determination as to whether hunting can occur safely in the ban area. While many of the facts Moss has presented touch on unsafe hunter practices in the Sugar Loaf ban area (for example, shooting near school buses or from roads), and are important for the Court and public to be aware of, she does not present them because safety is to be decided by the Court. Instead they demonstrate the insurmountable conflict between the hunting regulations and the statute/resolution, and therefore the preeminence of the latter. They also demonstrate the CWC's abuse of discretion in continuing to allow hunting in the face not just of the statute and ordinance, but also the County's objections and the citizens' concerns.[10]

The trial court erred by misconstruing its duties and the relief requested. It

[10] *See* letter from Stan Wolaniuk, school district Transportation Manager, CD 177, discussed *supra* at 7-8. The agencies' callously dismissed Wolaniuk's concerns for school children, demonstrating a remarkable disassociation with public safety concerns in favor of the hunter. Wildlife Manager Mark Leslie testified repeatedly that such comments were purely "anecdotal" and "hearsay" and could be disregarded because he and his staff had not witnessed the noted occurrences. CD at 305 [32: 10-21; 33: 11-20; 37: 1-22.] Leslie asserted that even if Wolaniuk testified his opinion would not change. *Id*. at 37:13-22. While reluctant to have to answer the question, Leslie further testified that even the shooting of a child would not sway his opinion on closure. *Id*. at 35: - 36:18).

failed to appreciate that both the General Assembly and Boulder County already made the factual legislative determination as to when, due to population levels, hunting activity tips the scales of being "more safe than not" to "too dangerous."[11]

Courts should not be asked to substitute their judgment for the judgment of the legislature. In *People v. Summit*, 183 Colo. 421, 517 P.2d 850, 852 (1974) the court stated pointedly:

> As we are but one of three branches of government in this state, Colo. Const., art. III, we have said on more than one occasion that we do not substitute our judgment for that of the legislature. The legislature is an elected body with full accountability to the democratic process. It is equipped through its legislative council, its interim study committees, and its standing committees with the means to engage in extensive fact-finding processes which the judicial system could never duplicate.

Over 90 years ago, in *Van Kleeck v. Ramer*, 62 Colo. 4, 10-11, 156 P. 1108 (1916) the court also eloquently described the legislature's superior fact finding abilities, represented its legislation:

> During the process of the enactment of a law the legislature is required to pass upon all questions of necessity and expediency connected therewith. The existence of such necessity is a question of fact, which …cannot be reviewed, called in question, nor be determined by the courts. It is a question of which the legislature alone is the judge … [T]o review its action upon a question of fact, would be a collateral attack upon its judgment…*[W]hen [the legislature] decides by declaring in the body of an act that it is necessary for the immediate preservation of the public peace, health or safety, it exercises a constitutional power exclusively vested in it,*

[11] The trial court did seem to understand that the agencies cannot actually prove that hunting is safe is Sugar Loaf, or that hunters don't violate the Resolution.

and hence, such declaration is conclusive upon the courts…

(Emphasis added.) Moss is not required to prove whether hunting is a good or bad idea, or "safe," in the ban area. While no one can know if or when a hunting accident will occur, the General Assembly recognized in passing C.R.S. §30-15-302 that counties must be allowed, within constitutional safeguards, to restrict firearm activity in more densely populated unincorporated areas. It drew the line in the sand, concluding that where the population density exceeds 100 persons per square mile, the counties must, in the reasonable exercise of their police power, be allowed to impose the stated restrictions as necessary. No one questions that Boulder County followed the proper procedure and exercised its police power for "the public health, safety and welfare." These legislatively determined matters cannot be called into question, and the agencies' claims as to the feasibility of safe hunting in congested areas therefore are not "material" and summary judgment was warranted. *Svanidze v. Kirkendall,* 169 P.3d 262, 264 (Colo. App. 2007) ("Factual disputes will not defeat … summary judgment if the disputed facts are not material to the outcome of the case.")

2. **Moss was not required to exhaust administrative remedies.**

The trial court's mistake in assuming the case required fact findings as to the safety of hunting in Sugar Loaf caused it to erroneously dismiss Moss's claims for failure to exhaust administrative remedies, believing that the CWC more equipped

to decide such matters in the first instance. Because the claims actually present legal issues beyond the authority and expertise of the agencies, this was error.

A plaintiff's failure to exhaust administrative remedies may deprive a court of jurisdiction to grant the requested relief, unless there is grave doubt as to the agency's authority to grant relief. *Gramiger v. Crowley,* 660 P.2d 1279, 1281 (Colo. 1983). The principal policies underlying the exhaustion doctrine are to prevent premature interference with the agency process; afford the parties and courts the benefit of its experience and expertise, and to compile a record adequate for judicial review. *Golden's Concrete Co. v. People*, 937 P.2d 789, 792 (Colo. App. 1996) ("*Golden's Concrete I*"), *reversed on other grounds*, 962 P.2d 919 (Colo. 1998) ("*Golden's Concrete* II"). However, "[t]here are few absolutes in the law and the rule that an administrative remedy must be exhausted before recourse is had to the courts is not one of them." *Collopy,* 625 P.2d 994, 1006 (Colo. 1983) (citation omitted).

Notably, the policies underlying the exhaustion doctrine become "less persuasive" when existing administrative remedies are "ill-adapted to provide the relief sought," and the matter in controversy "raises questions of law not within the agency's expertise rather than issues committed to administrative discretion and expertise." *Collopy*; *Hamilton v. City and County of Denver,* 176 Colo. 6, 11, 490 P.2d 1289, 1292 (1971); *Golden's Concrete I,* 937 P.2d at 792. As to questions of

statutory interpretation, resolution of such a dispute

> does not require any particular expertise on the part of the [agency]; the proper interpretation is not a matter of discretion. . . . Since judicial review would not be significantly aided by an additional administrative decision of this sort, we cannot see any compelling reason why plaintiff's failure to appeal [an administrative decision] should bar his …defense.

McKart v. U.S., 395 U.S. 185, 197-99, 89 S.Ct. 1657 (1969). Thus, a party need not exhaust available administrative remedies when the agency does not have the authority to pass on the question raised (*Fred Schmid Appliance & Television Co. v. City and County of Denver,* 811 P.2d 31, 33 (Colo. 1991); *Horrell v. Dept. of Administration*, 861 P.2d 1194, 1197 (Colo. 1993)), and when no public policy would be served. *Crow v. Penrose-St. Francis Healthcare System*, 169 P.3d 158, 165 (Colo. 2007). *See also Golden's Concrete II,* 962 P.2d at 923 (doctrine applies to statutory administrative remedies, and "a court may determine that exhaustion is unnecessary when the matter in controversy raises questions of law").

This case requires a legal determination regarding the interface of the agency regulation with a state law and is not within the expertise of the CWC. It is far beyond the technical capabilities of the sportsmen, ranchers, farmers, and county commissioners who comprise the Commission. C.R.S. §33-1-103.

Further, the agencies' rulemaking is quasi-legislative in character rather than quasi-judicial because it does not resolve issues as to a particular person. *Ground Water Comm'n v. Eagle Park Farms, Ltd*., 919 P.2d 212, 216-17 (Colo. 1996).

There is no established statutory procedure under the Administrative Procedures Act for obtaining rulemaking relief, other than that interest persons "may petition." C.R.S. §24-4-104(5). *See Golden's Concrete II, supra* (doctrine applies where there are prescribed statutory remedies.)

The Court may ask, is this issue still in play, given that Moss petitioned the CWC and was denied relief? It is indeed imperative that this issue be addressed. What the agencies want is to require Moss to file a new case, based on judicial review of agency action – an entirely different character of suit, the result of which would be to wholly deny Moss a proper trial or hearing of any factual issues. *See* arguments of counsel Monahan, CD at 544:16-22. In the rulemaking process Moss was given approximately 30 minutes to make her entire case; no witnesses were allowed and no evidence was taken. Indeed, no one on the Commission is a legal professional. A CWC rulemaking is in no manner equivalent to even the most basic trial procedure, and no authority suggests that the serious legal questions presented here may decided under the limited scope of review of agency action.

V. CONCLUSION AND RELIEF SOUGHT.

Appellants were entitled to summary judgment that under C.R.S. §30-15-302 the CWC's regulations allowing hunting in the ban area are contrary to law. Every indication is that the legislature intended the statute, as adopted by a county, to prohibit hunting, and there is no contrary indication. The statute is broadly

worded, carries a few carefully constructed exceptions, and the legislature would not have intended hunting to be excluded without specifically so stating. Moreover, its excusing of the DOW from game damage payments is proof positive that it contemplated the DOW would not have hunting as a game management tools in these areas.

The agencies have not adopted and show no willingness to adopt any regulations or enforcement protocol that would give effect to the statute and resolution. Their regulations fundamentally conflict with the statute and ordinance and are necessarily void. Appellants request an order:

(1) Reversing the trial court's denial of summary judgment and directing judgment in Appellant's favor, finding as a matter of law that the agencies' hunting regulations impermissibly conflict with the statute and resolution and are void, and that hunting is unlawful in the ban area;

(2) In the alternative to (3), remanding the case to the trial court for any necessary factual determinations.

(3) Reversing the trial court's dismissal for failure to exhaust administrative remedies.

(4) Permanently enjoining hunting in the Resolution 80-52 ban area.

Dated this 2nd day of November, 2009.

Respectfully submitted,
SUSAN MORATH HORNER, P.C.

/s/Susan Morath Horner
(Original signature on file at the offices of Susan Morath Horner, P.C.)

_____
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2009, I submitted a true and accurate copy of the foregoing to the following via LexisNexis File & Serve:

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