DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202 XIUHTEZCATL MARTINEZ et al., Plaintiffs, v. COLORADO OIL AND GAS CONSERVATION COMMISSION, Defendant.	DATE FILED: August 20, 2014 4:26 PM FILING ID: 2128F50C4C4ED CASE NUMBER: 2014CV32637 ▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General JAKE MATTER, Assistant A.G. 32155 (counsel of record) Ralph L. Carr Colorado Judicial Center 1300 Broadway, 7th Floor Denver, CO 80203 Telephone: 720-508-6289 (Matter) Fax and Email: Withheld pursuant to CRCP 5(b)(2)(D)	Case No. 2014CV32637
DEFENDANT'S CRCP 12(B)(5) MOTION TO DISMISS PLAINTIFFS' COMPLAINT	

The Colorado Oil and Gas Conservation Commission ("Commission"), by and through the Colorado Attorney General's Office, files this CRCP 12(B)(5) motion to dismiss and states:

CERTIFICATE OF COMPLIANCE WITH CRCP 121, § 1-15(8)

Plaintiffs oppose the relief sought herein.

INTRODUCTION

This is a challenge to agency inaction under the State Administrative Procedures Act, §§ 24-4-101 – 108, CRS ("State APA"). Plaintiffs, relying solely on the "public trust doctrine," filed a petition for rulemaking requesting the Commission initiate a rulemaking to promulgate a rule prohibiting new oil and gas well drilling in the State until an unspecified third party organization "confirmed" certain criteria set forth in Plaintiffs' proposed rule were satisfied. Plaintiffs' proposed rule provided:

> (1) The [] Commission, as a trustee of Colorado's atmosphere, water, wildlife, and land resources, has an affirmative duty to protect and ensure the continued availability of these trust assets. Pursuant to the Oil and Gas Conservation Act (Title 34, Article 60), the Commission has a responsibility to ensure that oil and gas hydraulic fracturing does not impair these trust resources or adversely impact human health.
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> …
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> (2)(c) The Commission shall not issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change.

Exhibit B to Plaintiffs' Complaint, Appendix I: Proposed Rule, p. 47 (also labeled p. 69) ("Proposed Rule").

The Commission denied Plaintiffs' petition and rejected the Proposed Rule for legal and factual reasons. This motion addresses the purely legal bases for the Commission's decision; namely, the Commission's determination the Proposed Rule was contrary to law because Colorado has "expressly rejected the public trust doctrine," and the Commission's determination "some of the Proposed Rule was beyond the Commission's jurisdiction." Commission Order, p. 2 (attached to Plaintiffs' Compl. as Ex. A). Plaintiffs' Complaint fails to state a claim upon which relief can be granted because the conclusions of law contained in the Commission Order are legally correct.[1]

[1] Plaintiffs admit the issue before the Court is a legal issue. Compl., ¶ 3.

I. STANDARD OF REVIEW

A. CRCP 12(b)(5)

Rule 12(b)(5) motions "test the formal sufficiency of the complaint." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). The Court may dismiss a complaint where "the substantive law does not support the claims alleged," *Denver Parents Ass'n v. Denver Bd. of Educ.*, 10 P.3d 662, 664 (Colo. App. 2000), or if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992).

B. Judicial Review under the State APA

Section 106 of the State APA controls the scope of this Court's review. § 24-4-106, CRS. Under this standard, the Commission's decision "may not be reversed unless it is found to be arbitrary and capricious or contrary to rule or law." *Blake v. Dept. of Personnel*, 876 P.2d 90, 95 (Colo. App. 1994). In reviewing an administrative board's decisions, the Colorado Supreme Court has "emphasized two key principles: (1) that all reasonable doubts as to the correctness of the administrative body's ruling must be resolved in its favor; and (2) that, unless an abuse of discretion is shown, the administrative determination will not be disturbed." *Lawley v. Dept. of Higher Ed.*, 36 P.3d 1239, 1252 (Colo. 2001).

The United States Supreme Court has recently addressed the standard of review for cases challenging the propriety of an agency's decision to not initiate a rulemaking:

> There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. In contrast to non-enforcement decisions, agency refusals to initiate rulemaking are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation. They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is extremely limited and highly deferential.

Mass. v. E.P.A., 549 U.S. 497, 527-528 (2007) (emphasis added). *Compare* § 24-4-106(7), CRS (State APA judicial review standard) *with* 5 USC § 706 (Federal APA's judicial review standard); *Citizens for Free Enterprise v. Dept. of Rev.*, 649 P.2d 1054, 1063 (Colo. 1982) (federal cases instructive given the similarity between the Federal and State APAs).

II. BACKGROUND

On November 15, 2013, Plaintiffs filed their petition "for promulgation of a rule to suspend the issuance of permits that allow hydraulic fracturing until it can be done without adversely impacting human health and safety and without impairing Colorado's atmospheric resource and climate system, water, soil, wildlife, other biological resources ("Petition") (attached as Ex. B to Plaintiffs' Compl.).

On April 11, 2014, counsel to the Commission provided a legal memorandum to the Commission regarding the Petition and Proposed Rule ("AG Memo") (attached as Ex. C to Plaintiffs' Compl.).

"On and before April 28, 2014, the Commission received oral and written evidence, testimony and argument on the merits of the Petition from numerous interested persons." Order of Commission, p. 1 (attached as Ex. A to Plaintiffs' Compl.).

"On April 28, 2014, the Commission voted to deny the Petition on a 7-0 vote." *Id*. "Prior to voting, the Commission expressly waived the attorney client communication and attorney work product privileges applicable to the advice it received from the Colorado Attorney General's Office concerning the Petition. The Commission then asked counsel to advise the public in attendance of such concerns and opinions." Commission Order, p. 2, fn. 2. The AG Memo "was the primary basis for the Commission's denial of the Petition." *Id*., p. 2.

On May 29, 2014, the Commission entered the Commission Order denying the Petition.

On July 3, 2014, Plaintiffs filed their complaint seeking a declaratory order "affirm[ing] the statutory obligation of the Commission to promulgate rules that ensure the public health, safety, and welfare is protected without qualification." Compl., pp. 14-15 (emphasis added).

III. ARGUMENT

A. The Commission properly refused to adopt the public trust doctrine.

The Proposed Rule sought to codify the public trust doctrine into the Commission Rules by creating an "affirmative duty" on the part of the Commission, as "trustee", to protect various "trust assets." Proposed Rule, § (1). The Commission rightfully rejected the Proposed Rule because the "public trust doctrine has never been recognized by the Colorado courts."

Xiuhtezcatl Martinez v. Colo., No. 11CV4377, 2011 WL 11552495, at 3 (Colo. Dist. Ct., Denver Cnty., Nov. 7, 2011) (attached as **Exhibit 1**).[2] *See also, People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979) (rejecting doctrine); *Kemper v. Hamilton*, 274 P.3d 562, 570 (Colo. 2012) (Hobbs, J., dissenting, discussing attempts to amend Colorado Constitution to recognize doctrine); Gregory J. Hobbs, *Reviving the Public Ownership, Antispeculation, and Beneficial Use Moorings of Prior Appropriation Water Law*, 84 U. Colo. L. Rev. 97, 126 (2013) ("public trust doctrine … is fundamentally incompatible with the Colorado Constitution's design") (emphasis added); *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1980) (existence of legal duty is a question of law).

Plaintiffs' reliance on the public trust doctrine was the sole legal basis for the Petition, wherein Plaintiffs advocated the doctrine "demands that Colorado act to preserve the atmosphere and provide a livable future for present and future generations of Colorado residents." Petition, p. 40. Although Plaintiffs have purportedly abandoned any claim that the public trust doctrine exists in Colorado, Compl., ¶ 3, doing so does not rewrite the substance of the Proposed Rule they presented to the Commission. The central error of law contained in the Proposed Rule, *i.e.*, the existence of the public trust doctrine in Colorado, standing alone, provided an adequate and independent legal basis for the Commission to reject Plaintiffs' Proposed Rule because it is hornbook law that the doctrine "has not been recognized in Colorado." Gregory J. Hobbs, *The Public's Water Resources*, 393 (Continuing Legal Education in Colorado, Inc. 1st Ed. 2007).

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[2] Plaintiff Xiuhtezcatl Martinez was also the lead plaintiff in the case attached as **Exhibit 1**, wherein the Denver District Court, in ruling on a CRCP 12(b)(5) motion, rejected his same contentions concerning the existence of the public trust doctrine in Colorado.

Similarly, such a legal error provides an adequate and independent basis for the Court, sitting as an appellate body, to dismiss Plaintiffs' Complaint with prejudice as a matter of law. *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe,* 107 P.3d 402, 406 (2004) ("we may affirm the trial court's ruling based on any grounds that are supported by the record."); *Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 216 (Colo.1996). (in an APA review of agency action, "the court is to determine all questions of law, interpret the applicable statutes and state regulations."); *Mass. v. E.P.A.*, 549 U.S. at 527-528 ("agency refusals to initiate rulemaking are less frequent, more apt to involve legal as opposed to factual analysis").

B. The Commission properly rejected the Proposed Rule as beyond the Commission's jurisdiction.

The propriety of the Commission Order insofar as it concerns the Commission's view of the limits of its own authority under the Colorado Oil and Gas Conservation Act, §§ 34-60-101 – 128, CRS ("Act"), is a question of law and statutory interpretation, which is reviewed de novo. *Specialty Rest. Corp. v. Nelson,* 231 P.3d 393, 397 (Colo. 2010); *Davison v. Indus. Claim Appeals Office,* 84 P.3d 1023, 1029 (Colo. 2004). Courts "give considerable weight to an agency's interpretation of its own enabling statute." *Davidson*, 84 P.3d at 1029. In interpreting a statute, a reviewing court must effectuate the intent of the legislature. If the language is clear, courts interpret the statute according to its plain and ordinary meaning. Courts construe statutes as a whole, in an effort to give "consistent, harmonious and sensible effect to all its parts." *Id.*

1. Writing "balanced development" out of the Act is beyond the Commission's jurisdiction.

The Commission's statutory mandate includes "[f]oster[ing] the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources." § 34-60-102(1)(a)(I), CRS.[3]

The Commission specifically found and concluded that the Proposed Rule was contrary to the foregoing statutory mandate because:

> The Proposed Rule, if adopted, would have required the Commission to readjust the balance crafted by the General Assembly under the Act, and is therefore beyond the Commission's limited grant of statutory authority. More specifically, the Proposed Rule hinges on conditioning new oil and gas drilling on a finding of no cumulative adverse impacts, which is beyond the Commission's limited statutory authority.

Commission Order, pp. 2-3. *See also,* section IV of AG Memo, which was incorporated by reference into the Commission Order, p. 2.

[3] In 2007, the General Assembly enacted significant revisions to the Act, including amending the legislative declaration to read: "It is declared to be in the public interest to foster ~~encourage, and promote~~ the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources…." Session Laws 2007, p. 1357 (HB 07-1341) (adding underlined language and deleting strikethrough language).

The Commission correctly determined the Proposed Rule, including the "precautionary principle"[4] contained therein, ran afoul of the multifaceted purposes of the Act:

> The Act charges the Commission with creating rules and policies that '[f]oster the responsible, **balanced** development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.' § 34-60-102(1)(a)(I), C.R.S (emphasis added). The Act also charges the Commission with minimizing and mitigating adverse impacts on wildlife resources arising out of oil and gas operations, but does not condition development on a finding of no adverse impacts. § 34-60-103(5.5) C.R.S. (defining 'Minimize adverse impacts' as used in § 34-60-128(2), C.R.S., which requires the Commission to administer the Act 'so as to minimize adverse impacts to wildlife resources affected by oil and gas operations.').

AG Memo, p. 5 (attached to Plaintiffs' Complaint as Exhibit C).

The relief sought in Plaintiffs' Complaint, a declaratory order finding the Commission has an *unqualified* obligation to ensure public health, safety, and welfare, pp. 14-15, compels the conclusion that the Proposed Rule, if adopted, would have conflicted with the balance contemplated in the Act. *See* § 34-60-103(5.5), CRS (defining "Minimize adverse impacts"); CRS; § 34-60-106(2)(d), CRS (Commission must "prevent and mitigate significant adverse environmental impacts … to the extent necessary to protect public health, safety, and welfare … taking into consideration cost-effectiveness and technical feasibility"); § 34-60-117(f), CRS

[4] The Proposed Rule, ¶ (5), sought to codify the "precautionary principle," which is intertwined with the public trust doctrine. *Cordero v. Doe (In re Title, Ballot Title, and Submission Clause for 2013-2014 #103),* 2014 CO 61, P22 (Colo. 2014) (seeking constitutional amendment that the state and its agents "as trustees, shall protect public trust resources against substantial impairment…. In satisfying the state's trust responsibilities, the precautionary principle shall always be applied.").

(Commission must consider technical feasibility and cost effectiveness); *see also, Chase v. Colo. Oil and Gas Conservation Comm'n,* 284 P. 3d 161, 166 (Colo. App. 2012) (examining evolution of Commission's statutory "powers and focus" and restating maxim that "agencies must act only within the scope of their delegated authority").

The Proposed Rule sought a "revolutionary change" to the Commission's statutory mandate that the Commission rightfully determined could only come from the General Assembly. Commission Order, p. 4. The Commission, as a matter of law, acted within its statutory mandate by rejecting the Plaintiffs' invitation to rewrite the Act through the promulgation of the Proposed Rule.

2. Delegating the Commission's statutory mandate to an unidentified third party is beyond the Commission's statutory authority.

The Proposed Rule would have conditioned oil and gas development in the State of Colorado on the judgment of an unidentified third party organization:

> The Commission shall not issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change.

Proposed Rule, ¶ 2(c).

Plaintiffs' Complaint attempts to rewrite the "confirmation" element required under the Proposed Rule to a mere suggestion that the Proposed Rule would "allow for the consultation of

and independent third party." Compl., ¶ 18. Plaintiffs' attempt to revise the Proposed Rule through the complaint is unavailing because, in considering a motion under Rule 12(b)(5), the Court is not required to accept legal conclusions as true, even if they are couched as factual allegations. *W. Innovations v. Sonitrol Corp.,* 187 P.3d 1155, 1157–58 (Colo. App. 2008).

Moreover, the delegation of authority contemplated by the Proposed Rule is contrary to law. *See* Commission Order, pp. 2-3; AG Memo, p. 6; *Big Sandy Sch. Dist. v. Carroll,* 433 P.2d 325 (Colo. 1967). The Commission is the sole state-level authority authorized to regulate "oil and gas operations" as defined by the Act:

> Any delegation of authority to any other state officer, board, or commission to administer any other laws of this state relating to the conservation of oil or gas, or either of them, is hereby rescinded and withdrawn and such authority is unqualifiedly conferred upon the commission.

§ 34-60-105, CRS. *See also,* § 34-60-103(6.5), CRS (defining oil and gas operations).

Under section 106(1)(f) of the Act, no well drilling "shall be commenced … without first obtaining a permit from the Commission, under such rules and regulations as may be prescribed by the Commission." "The language of section 34-60-106(1)(f) gives the Commission broad authority to promulgate rules governing permits." *Colo. Oil & Gas Conservation Comm'n v. Grand Valley Citizens' Alliance*, 279 P.3d 646, 649 (Colo. 2012). It would be contrary to law for the Commission to delegate such authority to a third party because the issuance of drilling permits lies at the heart of the state interests codified in the Act. *See, e.g. Voss v. Lundvall Bros.,*

Inc., 830 P.2d 1061, 1068 (Colo. 1992) (state interests manifested in the Act preempted a home-rule city's drilling ban). The Commission properly rejected the Proposed Rule.

CONCLUSION

The Commission requests this Court enter an order affirming the Commission's May 29, 2014 Order and dismissing Plaintiffs' Complaint WITH PREJUDICE.

Respectfully submitted this August 20, 2014

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/s/Jake Matter

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing DEFENDANT'S CRCP 12(B)(5) MOTION TO DISMISS PLAINTIFFS' COMPLAINT upon all parties herein by e-filing and service through the Integrated Colorado Courts E-filing System (ICCES) or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 20th day of August, 2014 addressed as follows:

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/s/Linda Miller
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