District Court, City and County of Denver Colorado 1437 Bannock Street Denver, CO 80202	
Plaintiffs: Xiuhtezcatl Martinez, Itzcuauhtli Rosky-Martinez, Charlotte Buren-Hanley, Sonora Binkley, Aerielle Deering, Trinity Carter, Jamirah Duhamel, and Emma Bray, by and through their legal guardians v. Defendant: Colorado Oil and Gas Conservation Commission	▲ **COURT USE ONLY** ▲
Attorney for the Plaintiffs: Katherine Toan 1434 Spruce St., Ste. 223 Boulder, CO 80302 Phone No: 720-965-0854 Email: info@coloradoenvironmentallaw.com Atty. Reg. #: 45672	Case No. 2014CV32637 Div.: Ctrm:
PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS	

Youth Plaintiffs have brought this case against the Colorado Oil and Gas Conservation Commission ("Commission") for their arbitrary, capricious, and otherwise unlawful denial of Youth Plaintiffs' Petition for a Rulemaking, in violation of the Colorado Administrative Procedure Act ("APA"), C.R.S. § 24-4-101 *et seq.* The Commission's Order was based "primarily" on a memorandum that contained multiple errors of law, preventing adequate reasoned decision-making. Order at 2.[1] Youth Plaintiffs' Complaint is brought under the APA and the Colorado Oil and Gas Conservation Act ("Act"), C.R.S. § 34-60-101 *et seq.*, and not a

[1] Mr. Matter is counsel for Defendant in this case and the author of both the Motion to Dismiss, which Youth Plaintiffs are now opposing, and the Memo on which the Commission relied in their denial of the Petition for Rulemaking.

"public trust doctrine" as asserted by the Defendant in its Motion to Dismiss.[2] Therefore, the Motion to Dismiss should be denied with an order for Defendant to file an Answer to Youth Plaintiffs' Complaint.

INTRODUCTION

Youth Plaintiffs in this case originally sought agency action from the Commission to initiate a rulemaking to protect the public health, safety, and welfare from various types of harm inflicted by the development of oil and gas, including air pollution, water pollution, and climate change. Their Petition contained lengthy citations to scientific articles and other credible sources showing that these types of pollution pose grave risks to the public. Rather than address the merits of the Youth Plaintiffs' Petition, the Commission issued an Order denying the Petition that was entirely free of factual analysis, but instead articulated legal conclusions disclaiming its authority to regulate critical elements of oil and gas development, in direct contradiction to its statutory mandate. In addition, the Commission asserted that it is "working on many of the concerns" articulated by Youth Plaintiffs in an "evolutionary" manner, but that air quality protection is outside of its jurisdiction and that other, unspecified, agency priorities must take precedence over the need to protect the public from both pollution and climate change.

The Complaint in this case challenges the basis of the Commission's Order denying Youth Plaintiffs' request for a rulemaking.[3] Youth Plaintiffs' Complaint does not ask the Court to mandate the promulgation of the proposed rule in their Petition. The Complaint alleges that the Commission erred in saying it did not have the authority to do so, and in not evaluating on the

[2] Complaint at 2, ¶3 ("The Plaintiffs do not here seek judicial review of the Commission's conclusion that the public trust doctrine has not been recognized in Colorado.").
[3] The APA allows individuals and organizations adversely affected or aggrieved by a "final agency action" to seek prompt judicial review. C.R.S. § 24-4-106(1) & (2).

record why no new rule is necessary, in light of the extensive submission of factual support for such a rule.

The decision of the Commission to deny Youth Plaintiffs' Petition was based primarily on a legal memorandum from the office of the state's Attorney General ("Memo").[4] Youth Plaintiffs' Complaint asserts that the facts and statements of law raised in the Petition justify the request for rulemaking, and challenges the errors of law in both the Commission's Order and underlying Memo, portions of which were incorporated by reference.[5] Specifically, the Commission's Order is based on two conclusions: that the relief sought is "beyond the Commission's authority," and that other agencies and departments are already "dealing with" concerns raised in the Petition. Each of these conclusions has three "findings" which support it. Most or all of the findings and conclusions lack sound basis in law and legal analysis. It is arbitrary and capricious, an abuse of discretion, and otherwise contrary to law for the Commission to rely on such legal errors as a justification for agency decision. Youth Plaintiffs' Complaint therefore requests this Court to set aside the findings, conclusions, and actions of the Commission challenged in the Complaint and remand the matter to the Commission for further consideration.

If the Court finds that the Commission erroneously interpreted the law, the presumption of validity and regularity is overcome, and the agency action constitutes an abuse of discretion. Giuliani v. Jefferson County Bd. of County Com'rs, 303 P.3d 131 (Colo. App. 2012); Sheep Mountain Alliance v. Bd. of County Com'rs, Montrose County, 271 P.3d 597, 601 (Colo. App. 2011). Agency actions or inactions must conform to the authorizing statute, and the agency must

[4] "The April 11, 2014 Memo was among the 'most important pieces of information the Commission received concerning the Petition and was the *primary basis* for the Commission's denial of the Petition." Order at 2 (emphasis added).
[5] "Sections IV […] and V […] of the April 11, 2014 Memo are incorporated herein by reference." Order at 2.

offer a reasoned explanation for its decision. The purpose of judicial review in an APA case is not for the court to substitute its judgment for that of the agency, but to ensure that government agencies have conformed their decision-making to the requirements of the law. Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 245–246, 9 L.Ed.2d 207 (1962). However, "[i]n all cases under review, the court shall determine all questions of law and interpret the statutory […] provisions involved and shall apply such interpretation to the facts duly found or established." C.R.S. § 24-4-106(7). Questions of law are decided *de novo*. Gilbert v. Julian, 230 P.3d 1218, 1221 (Colo. App. 2009).

The Commission's Order and the underlying Memo contained multiple errors of law, including, *inter alia*, a novel statutory interpretation of an unambiguous statute, and the use of a single, overruled case to support one of its legal conclusions. The Commission was therefore precluded from conducting adequate and reasoned decision-making by relying on this Memo and accepting its legal conclusions as valid.

The Commission's Motion to Dismiss under C.R.C.P. Rule 12(b)(5), for failure to state a claim, argues that Youth Plaintiffs relied "solely on the 'public trust doctrine'" in their Petition for Rulemaking to the Commission. Mot. at 1, 6. This statement is misleading in more than one respect. First, it is factually incorrect: although an argument was made for recognizing the impact of oil and gas permitting on the atmosphere, and imposing public trust duties on the Commission to limit such impact, it was one of several independent justifications for agency rulemaking. Even without recognizing a public trust in atmospheric resources, the Commission has a statutory duty to protect the public health, safety, and welfare, and the environment. C.R.S. § 34-60-101 *et seq*. Youth Plaintiffs also declined to challenge the Commission's finding with regard to the public trust doctrine in their Complaint. Second, this case is seeking judicial review of

agency action, not a rehearing of the Petition or the merits of the Proposed Rule. The Commission's Order was arbitrary and capricious and otherwise contrary to law for relying on unsupported and unsupportable legal conclusions set forth in the Memo, based on multiple errors of law not involving a public trust. Youth Plaintiffs filed suit to obtain declaratory relief and remand for agency reconsideration under the correct legal standards. Because the public trust doctrine is beyond the pleadings of the complaint, and that is the sole basis for Defendant's Motion to Dismiss, the Court should disregard that argument and the Motion to Dismiss should be denied.

I. STANDARD OF REVIEW

Defendant alleges that Youth Plaintiffs' Complaint failed to state a claim upon which relief can be granted. A C.R.C.P. 12(b)(5) motion to dismiss tests the competence of a plaintiff's complaint. Dorman v. Petrol Aspen, 914 P.2d 909, 911 (Colo. 1996). When reviewing a motion to dismiss a complaint, the court may only consider matters stated within the complaint itself, and may not consider information outside of the confines of that pleading. Rosenthal v. Dean Witter Reynolds, Inc., 908 P.2d 1095, 1099 (Colo. 1995); McDonald v. Lakewood Country Club, 170 Colo. 355, 360, 461 P.2d 437, 440 (1969). When a court decides whether a complaint sufficiently states a claim upon which relief may be granted, the court may consider only those allegations made in the complaint and all material allegations must be taken as admitted. Nelson v. Nelson, 31 Colo. App. 63, 65–66, 497 P.2d 1284, 1286, (1972). However, a court is not bound by conclusory allegations, unwarranted inferences, or legal conclusions. Hackford v. Babbit, 14 F.3D 1457, 1465 (10th Cir. 1994).

Motions to dismiss under C.R.C.P. Rule 12(b)(5) are "viewed with disfavor and are rarely granted under our 'notice pleadings.'" Davidson v. Dill, 180 Colo. 123, 131 (1972);

Rosenthal, 908 at 1099; Dunlap, 829 at 1291. Only where a complaint fails to give defendants notice of the claims asserted is dismissal under C.R.C.P. 12(b)(5) proper. Shockley v. Georgetown Valley Water & Sanitation Dist., 37 Colo. App. 434, 436 (Colo. Ct. App. 1976) (citing Gold Uranium Mining Co. v. Chain O'Mines Operators, Inc., 128 Colo. 399 (1953)). It is error to grant a motion to dismiss for failure to state a claim upon which relief can be granted if in fact a "relievable" claim is stated. Gold Uranium Mining Co. v. Chain O'Mines Operators, Inc., 128 Colo. 399 (1953). Courts should not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 123, 131–32 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)). Under Colorado notice pleading rules, "all that is required is 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996) (citing C.R.C.P. 8(a)(2)). Courts must accept as true all material facts alleged by the plaintiff, view the allegations of the Complaint in the light most favorable to the plaintiff, and draw all inferences in the plaintiff's favor. Rosenthal, 908 at 1099-1100; Bell v. Arnold, 175 Colo. 277, 281 (1971).

Defendant's Motion to Dismiss addresses only the legal basis for the Commission's decision. Mot. at 2. Agency decisions to deny a petition for rulemaking are susceptible to judicial review. While the standard of review for such denials is highly deferential, this is true because an agency has wide discretion whether to initiate rulemaking. See, i.e., Mass. v. E.P.A., 549 U.S. 497, 527 (2007) (citing Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Although the review of informal agency actions is "narrow," under the 'arbitrary and capricious standard' agency decisions must be based on reasoned decision-making and must articulate a satisfactory explanation for its

action, including a rational connection between the facts found and the choice made. *See, e.g..,* Motor Vehicle Mfd. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (articulating the arbitrary and capricious standard). Agencies must apply the facts to the appropriate legal standard to justify the decision. A court must "set aside actions or interpretations that are clearly erroneous, arbitrary, or otherwise not in accordance with the law." Id. at 194; CF & I Steel, L.P. v. Pub. Utils. Comm'n, 949 P.2d 577, 585 (Colo.1997).

Where the Commission has misinterpreted and/or misapplied the law, or failed to articulate the connection between the facts found and the conclusion that was reached, the decision must be set aside. In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved. C.R.S. § 24-4-106(7). Courts are not bound by agency decisions that misconstrue or misapply the law. Bostron v. Colorado Department of Personnel, 860 P.2d 595 (Colo.App. 1993). Unlike an agency's finding of facts, an administrative agency's conclusions of law are reviewed *de novo*. Davison v. Indus. Claim Appeals Office, 84 P.3d 1023, 1029 (Colo.2004); Colo. Dept. of Labor and Employment v. Esser, 30 P.3d 189, 193 (Colo.2001); Fowler Irrevocable Trust 1992-1 v. City of Boulder, 17 P.3d 797, 802 (Colo.2001). While courts give "considerable deference" to agencies' interpretations of their own enabling statutes, the principle is limited: deference is warranted "only if [the legislature] has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." See, e.g., Presley v. Etowah County Comm'n, 502 U.S. 491, 508 (1992) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–844 (1984).Under the APA, agency actions are to be held unlawful and set aside where they are "arbitrary or capricious, […] an abuse of discretion, […] or otherwise contrary to law[.]" C.R.S. § 24-4-106(7). Where an order of an agency is issued solely as a

matter of administrative convenience, or in the absence of sufficient investigation into pertinent considerations, the order is arbitrary, capricious, and invalid. *Colorado-Ute Elec. Ass'n, Inc. v. Public Utilities Com'n of State of Colo.,* 760 P.2d 627 (Colo. 1988); *City of Montrose v. Public Utilities Comm'n,* 590 P.2d 502, 505-06 (1979).

II. ARGUMENT

The misconstruction of statutory and common law to arrive at the preferred legal conclusions of the Commission is alarming, considering the magnitude of trust and responsibility that has been placed in the Commission. The Commission regularly issues permits to develop oil and gas resources in immediate proximity to heavily populated areas. If the Commission believes that the Act says things it does not, or omits things that it does, and cites cases for propositions that they do not contain, the public cannot be justified in its reliance on the Commission's ability to fulfill the statutory obligations it has been given under the Act.

A. Plaintiffs Stated Valid Claims for Relief Because the Commission Has the Authority and Duty to Regulate Oil and Gas Development to Protect the Public Health, Safety, and Welfare, and the Environment

Defendant's Motion to Dismiss argues that the Commission properly rejected the Proposed Rule as beyond the Commission's authority and jurisdiction. In its Order, the Commission bases its denial in part on "[t]he relief sought in the Petition [being] beyond the Commission's authority." In turn, the Commission based this conclusion on three findings, namely that; 1) the legislature created a "balance" between fostering development and protecting the public health, safety, and welfare, 2) the prohibition against the delegation of agency rulemaking authority prevents agencies from utilizing third parties to determine facts to which to apply regulations, and 3) that there is no basis to support the proposed rulemaking in a "public

trust doctrine." Both the question of statutory interpretation and the analysis of the meaning and application of non-delegation to the Proposed Rule raise justiciable claims for relief under the APA.

1. The duty to protect the public is unqualified

The Commission claims that an Oil and Gas Conservation Act mandate of "balance" requires it to allow adverse impacts to the public health in order to foster development. In the portion of the Memo incorporated by reference into the Order, Order at 2, the Attorney General emphasizes the word "balanced" in the Oil and Gas Conservation Act, and argues that "balance" of development and public health is central to the Act's meaning.[6] However, the Act requires the Commission to regulate oil and gas development "in a manner consistent" with protecting the public health, safety, and welfare and the environment – only the protection of wildlife is subject to such a balancing test. The Commission is mandated to regulate oil and gas development to ensure that the manner of development is "consistent with" protection of public health, safety, and welfare, including protection of the environment. C.R.S. § 34-60-102. Despite the Memo's insistence that "conditioning new oil and gas development on a finding of no cumulative adverse impacts […] is beyond the Commission's limited statutory authority[,]" Memo at 4, there is nothing in the Act which indicates that cumulative impacts to public health, safety, and welfare, and the environment are somehow placed above the agency's authority or beneath their duty to regulate. This novel interpretation emphasizing a supposed "balance" requirement would

[6] See Memo at 4–5 ("The Commission's legislative mandate to "balance" oil and gas development: […] The Act charges the Commission with creating rules and polices that "[f]oster the responsible **balanced** development, production, and utilization of the natural resources of oil and gas […]. The "balance" required under the Act was central to the Commission's 2008 rulemaking.") (emphasis in original). The Memo also states that "[t]he "balance" required under the Act was central to the Commission's 2008 rulemaking[,]" Id. at 5, and that "[t]he Proposed Rule, if adopted, would require the Commission to readjust the balance crafted by the General Assembly under the Act." Id.

drastically undermine the public health, safety, and welfare amendments that the legislature has been strengthening since 1985. In addition to misreading the statute and contravening the will of the legislature, such an interpretation does not prevent the Commission from allowing severe public harm to accrue, on "balance" against high rates of petroleum recovery.

The Colorado legislature enacted the Oil and Gas Conservation Act, creating and empowering the Colorado Oil and Gas Conservation Commission to regulate the development of oil and gas resources in the state. This agency is responsible for carrying out the will of the legislature as expressed by the plain language of the Act. The clear, unambiguous language of a statute (using the common meanings of words and the standard rules of English grammar) controls the agency's interpretation. Where there is no ambiguity the search for meaning is at an end: judicial review of an agency's interpretation of its own statutory mandate is deferential only where a statute is ambiguous. This is known as the first law of statutory construction. See, e.g., Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) ("[I]n interpreting a statute a court should always turn to one cardinal canon before all others …. [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Where ambiguity arises, the will of the legislature is determined by investigating other portions of the Act or from the legislative history surrounding the ambiguous language. Only where the meaning of the legislature cannot be divined from any of these methods may the agency supply its own meaning. In that case, the agency's interpretation is given a high level of judicial deference, although often it will be accorded less judicial deference where it has changed over time.

Statutes are construed using the plain meaning of words and grammar. The Act, C.R.S. § 34-60-102(1)(a)(I), declares that it is in the public interest to:

> Foster 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[.]

English grammar requires that this declaration be broken into two phrases. The predicate phrase states that it is the policy of the state to "[f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado[.]"[7] The second phrase is an adverbial prepositional phrase modifying the verb "foster." Fostering must be done "in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources[.]" The legislature has declared it to be in the public interest to foster oil and gas development; however, such interest is conditional on protecting the public health, safety, and welfare, including protection of the environment.

The difference between this construction and the interpretation proffered by the Commission is meaningful. The Commission stated in its Order that it based its denial of the Rulemaking Petition primarily on the Memo. Fully one-third of that Memo was devoted to interpreting this section, concluding that the Commission has a "legislative mandate to 'balance' oil and gas development[.]"[8] The interpretation advocated by the Memo would negate the words "in a manner consistent with[,]" reducing the protection of the public from a precondition to a factor. The statute imposes a duty on the Commission to protect the public health, safety, and

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[7] The words "responsible" and "balanced" are adjectives that modify the three words which follow: "development, production, and utilization[.]"

[8] Attorney General's Memorandum at 4–5. "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 the protection of public health, safety, and welfare, including protection of the environment and wildlife resources.'" (emphasis in original). *Id*. at 5. The Memo also incorrectly conflates a later section, § 34-60-103(5.5), which requires mitigating adverse impacts on wildlife, with the declaration in § 34-60-102 that Commission regulate oil and gas development in a manner that protects the public health and welfare.

welfare. It is not within the power of either the Commission or the Attorney General's Office to qualify that mandate.

Reading the Colorado Oil and Gas Conservation Act as a "harmonious whole," it is clear that the legislature intended for oil and gas regulations to be written so as to ensure that the public health is protected without qualification. The declaration of public interest quoted above consists of four stated interests, with the first quoted above in full. The other three stated interests are to:

> (II) Protect the public and private interests against waste in the production and utilization of oil and gas;[9]
> (III) Safeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common pool […]; and
> (IV) Plan and manage oil and gas operations that balances development with wildlife conservation in recognition of the state's obligation to protect wildlife resources and the hunting, fishing, and recreation traditions they support, which are an important part of Colorado's economy and culture. […] [I]t is the policy of the state of Colorado that wildlife and their environment be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of the state and its visitors.

C.R.S. § 34-60-102 (1)(a)(II)-(IV). The section goes on to read:

> (b) […] It is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, *consistent with the protection of public health, safety, and welfare*, including the protection of the environment and wildlife resources, and subject further to the enforcement and protection of the coequal and correlative rights of the owners and producers […]. (emphasis added).

C.R.S. § 34-60-102 (1)(b).

The legislature's stated interest is to maximize production "consistent with" the protection of the public health, safety, and welfare, including protection of the environment and

[9] The definition of "waste" does not include oil or gas that is or becomes unrecoverable due to environmental, health, or safety regulations. C.R.S. § 34-60-103 (11)–(13).

wildlife resources. The qualification that development must be "consistent with" these protections is repeated twice. The necessary inference is that it is therefore *not* in the public interest to maximize production where production is *not* consistent with the public health, safety, and welfare. Furthermore, the definition of "waste," which it is in the public interest to prevent, does not include oil or gas that is or becomes unrecoverable due to environmental, health, or safety regulations. C.R.S. § 34-60-103 (11)–(13). The necessary inference from the legislative drafting is that the Commission may allow hydrocarbons to go unrecovered in order to ensure the protection of the public, where development cannot occur in a manner consistent with such protection.

The protection of wildlife resources is listed as a "state obligation" that is part of the State's tradition, economy, and culture. The protection of the environment is listed as a "policy of the state of Colorado." Although this protection is the official policy of the State, the Commission must balance the protection of wildlife against development. C.R.S. § 34-60-102(1)(a)(IV). Consistent with this policy, the Commission is given the authority to consider cost-effectiveness and technical feasibility when "minimiz[ing] adverse impacts" to wildlife. C.R.S. § 34-60-103(5.5). This is the standard applied to only to wildlife resources. Where the legislature includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion. Rodriguez v. United States, 480 U.S. 522, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987). There is no corresponding authority for the Commission to balance development against the public health, safety, and welfare, or to make such cost-benefit evaluations as is allowable when merely protecting wildlife as opposed to the public health, safety and welfare.

Although the issue goes far beyond the analysis set forth in the Memo relied upon in the Order, there is one point of ambiguity in the statute, not regarding "balance" per se, but regarding cost effectiveness and feasibility. Unlike the clear statements of public policy in C.R.S. § 34-60-102, discussed above, the statutory language *is* ambiguous where the Act expressly empowers the Commission. Per C.R.S. § 34-60-106(2)(d), the Commission:

> has the authority to regulate […] [o]il and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resources resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility. (emphasis added)

C.R.S. § 34-60-106(2)(d). In this clause "taking into consideration cost-effectiveness and technical feasibility" is ambiguous because the rules of English grammar do not tell us whether this phrase modifies the verb "regulate" or the compound noun "wildlife resources." However, the rules of statutory construction and the "Whole Act" rule tell us that it is the latter.

The Colorado Habitat Stewardship Act of 2007 required the Commission to "minimize the adverse impacts to wildlife resources affected by oil and gas operations." C.R.S. 34-60-128. "Minimize adverse impacts," in turn:

> means to, wherever reasonably practicable:
> (a) avoid adverse impacts from oil and gas operations on wildlife resources;
> (b) minimize the extent and severity of those impacts that cannot be avoided;
> (c) mitigate the effects of unavoidable remaining impacts; and
> (d) take into consideration cost-effectiveness and technical feasibility *with regard to actions and decisions taken to minimize adverse impacts to wildlife resources*.

C.R.S. § 34-60-103(5.5). The definition of minimization explicitly limits the standard to wildlife resources; it is not the standard applied to the protection of the public health, safety, welfare, or the environment.

Nowhere does the Act refer to cost-effectiveness or technical feasibility with regard to protecting human health. Instead, the legislative declaration includes subsection IV, which discusses at length the importance of protecting wildlife and the state's obligation to do so. C.R.S. § 34-60-102(1)(a)(IV). Yet the statute also declares here that protection of wildlife must be "balanced against development."[10] In order to achieve this balance the statute sets forth the "minimize adverse impacts" standard that explicitly applies only to protection of wildlife. The definition of "minimize adverse impacts" in turn includes cost-effectiveness and technical feasibility. The whole act rule is an approach to statutory interpretation that presumes a statute should be internally consistent. This rule assumes that the legislatures draft statutes in a way that is "internally consistent in its use of language and in the way its provisions work together." See, e.g., Barnhill v. Johnson, 503 U. S. 393, 406 (1992) (the same terms have the same meaning in different sections of the same statute); Sullivan v. Stroop, 496 U.S. 478 (1990) (It is a "normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning.'") (internal citations omitted). Reading the "whole act" it is clear that the legislature intended the protection of wildlife to be balanced against the policies otherwise favoring development, but the duty to protect the public health, safety, and welfare is unqualified.

The intent of the legislature in enacting C.R.S. § 34-60-102(1)(a)(I) was to ensure that the Commission protected public health and the environment.[11] Prior to 1985, the stated purpose of the Commission was to "encourage the development, production, and utilization of the natural

[10] C.R.S. § 34-60-102(1)(a)(IV) (It is in the state interest to "[p]lan and manage oil and gas operations that balances development with wildlife conservation […]."

[11] "These rules will ensure the protection of the public health, safety and welfare, including the environment and wildlife resources, while also fostering the responsible, balanced development, production, and utilization of oil and gas resources." Commission's Statement of Basis and Purpose to the 2008 Rulemaking (emphasis added).

resources of oil and gas […], to prevent waste, and to allow each owner of an interest in an oil or gas pool to obtain an equitable share of the pool's production." Osborne v. Bd. of Cnty. Comm'rs, 764 P.2d 397, 400 (1988) (citing C.R.S. § 34-60-102 (1984 Repl. Vol. 14)).). In 1985 the Colorado legislature amended the Act to explicitly require the Commission to "promulgate rules and regulations to protect the health, safety, and welfare of the general public in the drilling, completion, and operation of oil and gas wells and production facilities." 14 C.R.S. § 34-60-106(11) (1991 Supp.). The Colorado Supreme Court held that the effect of the 1985 amendments to the Act was to "vest the Commission with the authority and responsibility for developing adequate technical safeguards calculated to minimize the risk of injury to the public from oil and gas drilling and production operations." Bd. of Cnty. Com'rs v. Bowen/Edwards Associates, Inc., 830 P.2d 1045, 1059 (Colo. 1992). However, in 1994 the legislature again amended the Act. These amendments removed the "technical safeguards" limitation to require the Commission to protect the public health, safety, and welfare "in the conduct of oil and gas operations." Colo. S.B. 94-177 (codified at C.R.S. § 34-60-102).

In 2007 the legislature again strengthened the public health and environmental protection required in the regulation of oil and gas development to include additional protection for the environment and wildlife resources.[12] The amendments require that the Commission promulgate regulations to protect the health, safety, and welfare of the public through consultation with the Department of Public Health and the Environment, wherein the Department "has an opportunity to provide comments" to the Commission during the decision-making process. C.R.S. § 34-60-

[12] House Bill 07-1341, and the Colorado Habitat Stewardship Act, increased the members of the Commission from seven to nine, by including the directors of the Colorado Departments of Natural Resources and Public Health and the Environment as *ex officio* members. Colo. H.B. 07-1341 (2007) (codified at C.R.S. § 34-60-106); Colo. H.B. 07-1298 (2007) (codified at C.R.S. § 34-60-128). It also changed the state interest in "foster[ing], encourag[ing], and promot[ing]" development to "foster[ing] responsible, balanced development[.]"

106(11)(a)(II). The Commission must also "minimize adverse impacts to wildlife resources affected by oil and gas operations," C.R.S. § 34-60-128(2), consult with the Division of Wildlife when making decisions impacting wildlife, and implement best management practices and standards to conserve and minimize impacts on wildlife. C.R.S. § 34-60-128(3). The legislature has repeatedly strengthened the duty and authority of the Commission to regulate the development of oil and gas to ensure the protection of the public health, safety, and welfare, and the environment.

When an agency changes its interpretation of a statute over time, many courts have held that the changed interpretation is to be given lesser weight.[13] The Colorado APA itself contains required procedure for agency re-interpretation. The APA says that "[i]f an agency reinterprets an existing rule in a manner that is substantially different than previous agency interpretations of the rule […], the office of legislative legal services shall review the rule in the same manner as rules that have been newly adopted or amended under paragraph (d) of subsection (8) of this section upon receiving a request for such a review of the rule by any member of the general assembly. " C.R.S. § 24-4-103(1.5). In 2008, in the Statement and Purposes of a rulemaking proceeding, the Commission announced that they "will ensure the protection of the public health, safety and welfare, including the environment and wildlife resources, while also fostering the responsible, balanced development, production, and utilization of oil and gas resources." Memo

[13] *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) (an "agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held view[.]"); *Pauley v. BethEnergy Mines*, 501 U.S. 680, 698 (1991) ("the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views[.]"); Good Samaritan Hospital v. Shalala, 508 U.S. 402, 417 (1993) ("the consistency of an agency's position is a factor in assessing the weight that position is due[.]"). Other courts have disagreed. The Supreme Court has disagreed with itself on this issue in many cases.

at 5 (quoting the Commission's Statement of Basis and Purpose for the 2008 Rulemaking). (emphasis added). In 2008, the Commission agreed that the protection of human health must be ensured, while the development, production, and utilization of oil and gas must be 'responsible' and 'balanced.' Today, the Commission claims that the public health, safety, and welfare must be 'balanced' against the need for development. This is a substantial shift in the agency's position regarding their duty to the public that would result in substantial material harm if the agency was allowed to proceed with all of their administrative duties under this belief.

The plain language of a statute controls because it is assumed that the legislature says what it intends, and intends what it says. As discussed above, the plain language of the Act says that it is the policy of the State to regulate oil and gas development "in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources." The Commission has identified no ambiguity in the language that should permit a novel agency interpretation whereby protecting the public health, safety, and welfare, including the environment, must be balanced against a duty to foster development. Such an interpretation is contrary to legislative intent, based on the application of the whole act rule and a review of the legislative history. Finally, the previous position of the Commission has been that public health would be "ensured" by its regulations, "while also fostering" development.

A Motion to Dismiss for failure to state a claim is not appropriate, because Youth Plaintiffs are challenging the legal conclusions on which the Commission's denial of the Petition for Rulemaking was "primarily based."[14] The stated "need to balance" oil and gas development with protections for public health, safety, and welfare is a novel misinterpretation of the Act that was central to the denial of the Petition. Under the APA, agency decisions grounded in error of law must be set aside and remanded. Therefore, the Motion to Dismiss should be denied.

[14] Order at 2.

2. Independent Third-Party Confirmation Does Not Invoke "Non-Delegation"

Youth Plaintiffs agree that the Commission is the "sole state-level authority authorized to regulate 'oil and gas operations.'"[15] The Commission may not delegate "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[.]" C.R.S. § 34-60-105 (emphasis added). However, both the Order and the Motion to Dismiss fundamentally misrepresent the non-delegation rule set forth by Big Sandy School District No. 100-J v. Carroll, 164 Colo. 173, 433 P.2d 325 (Colo. 1967), and subsequent case law, and their applicability to the Proposed Rule. The Petition did not ask the Commission to delegate its statutory legislative or quasi-judicial authority to create or enforce administrative rules, but instead asked the Commission to utilize outside experts for the determination that the public health, safety, and welfare is protected.

In its Order denying Youth Plaintiffs' Petition, which incorporates the Attorney General's Office' Memo by reference, a *single case* was cited to support the notion that the Proposed Rule would violate a principle of non-delegation.[16] In Big Sandy, the Colorado Supreme Court was asked to weigh in on a school board that had delegated its express statutory duty to hire public school teachers to the local school superintendent. The Court, citing the general rule that:

> a municipal corporation, or a quasi-municipal corporation such as the District, may delegate to subordinate officers and boards powers and functions which are ministerial or administrative in nature, where there is a fixed and certain standard or rule which leaves little or nothing to the judgment or discretion of the subordinate. However, legislative or judicial powers, involving judgment and discretion on the part of the municipal body,

[15] Motion to Dismiss at 11.

[16] The Motion to Dismiss, along with the denial of the Petition for Rulemaking, does not distinguish between the Petition and the Proposed Rule. The Petition was the request for agency rulemaking which triggers the provisions of the APA; the Proposed Rule was simply a proposal for how the Commission could achieve the purposes of the Petition. The validity of the Petition does not hinge on the acceptance of the Proposed Rule, and therefore it is improper to suggest that the denial of the Petition was proper simply because "[t]he Commission properly rejected the Proposed Rule." Motion to Dismiss at 12.

> which have been vested by statute in a municipal corporation may not be delegated unless such has been expressly authorized by the legislature.

Big Sandy, 433 P.2d at 328. Big Sandy was explicitly overruled on other grounds in Normandy Estates Metropolitan Recreation District v. Normandy Estates Limited, 191 Colo. 292, 553 P.2d 386 (Colo. 1986) (although it was overruled on other grounds, the Court in *Normandy* did note that "since *Big Sandy* was decided, the former strictness with which the supreme court treated the non-delegation principle, [. . .] has been relaxed." (citing, inter alia, Fellows v. Latronica, 151 Colo. 300, 377 P.2d 547 (1962)). In addition to *Big Sandy*'s questionable status as good law, it can be distinguished on several grounds from the Youth Plaintiffs' proposed rule. In *Big Sandy*, the administrative body gave blank, signed employment contracts to a subordinate. The subordinate was able to fill out terms such as salary and duration of the contract, to which the state was then automatically bound to honor with the new state employee. Conversely, where an agency has not delegated either rulemaking or adjudicative functions, and does not bind the state to contractual obligations through the actions of a subordinate, it is both within the authority of an agency and common practice to rely on third parties to conduct verifications. See, e.g., Lesley McCallister, *Harnassing Private Regulation*, 3 Michigan J. Env. and Admin. L. 61 (2014) (analyzing eight different third-party verification systems developed by federal administrative agencies).

The Commission correctly states in its Order that it has a "statutory duty to '[p]romulgate rules, in consultation with the department of public health and environment, to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations.'" Order at 3, quoting C.R.S. § 34-60-106(11). In their Petition for Rulemaking, Youth Plaintiffs asked the Commission to fulfill this statutory duty by promulgating a rule that protects the health, safety, and welfare of the general public, and provided a proposed rule. The ultimate responsibility—

both for promulgating the final rules and for denying or granting oil and gas drilling permits—rests with the Commission. The inclusion of a clause on third-party confirmation[17] in the proposed rule has no effect on the valid claims for relief brought to this Court in Youth Plaintiffs' Complaint. The Complaint is not asking the Court to mandate the promulgation of the Proposed Rule; it instead alleges that the Commission erred in saying it did not have the authority to do so, and in not evaluating on the record why no new rule is necessary, in light of the extensive submission of factual support for such a rule.

Contrary to the assertion of the Motion to Dismiss, the "issuance of drilling permits" is not the "heart" of the state interests, nor does the case of *Voss v. Lundvall Bros.* ever assert such a notion. Mot. at 11–12. The state interests as articulated by the legislature in the Act, C.R.S. § 34-60-102, do not mention drilling permits, or their issuance or denial, at all. Rather, it is the regulation of oil and gas development to foster development in a manner consistent with protecting the public health, safety, and welfare and the environment, that is listed as the first interest of the state. Furthermore, the non-delegation statute cited in the Motion to Dismiss applies, by its own explicit terms, to "delegation of authority to *any other state officer, board, or commission*[.]"

3. The Public Trust Doctrine Is Irrelevant to this Complaint

Defendant's Motion to Dismiss misstates that Youth Plaintiffs relied "solely on the 'public trust doctrine,'" in their petition for rulemaking to the Commission. This statement is factually incorrect; although the public trust doctrine was raised in the Petition, it was one of four

[17] Whether this clause is characterized as "consultation" or "confirmation" is irrelevant to the facts that 1) neither the statute nor the case law cited in the Memo or the Order supports the legal conclusions argued by the Defendant, and 2) the Commission cannot base its decision – which rests entirely on the legal conclusions set forth in the Memo – on legal conclusions that are unsupported and clearly erroneous.

independent justifications for agency action set forth. Defendants also argue that a legal error contained in the Proposed Rule, but not in the Complaint, provides an adequate and independent basis for the Court to dismiss Youth Plaintiffs' Complaint.[18] This case seeks judicial review of agency action based on the errors of law set forth in the Complaint and does not seek a rehearing of the merits of the Petition. Because the Commission's decision was based in multiple errors of law, not involving the public trust, the Plaintiffs filed suit to obtain declaratory relief and remand for agency reconsideration under the correct legal standards.[19] Youth Plaintiffs' Complaint, therefore, states valid claims upon which relief can be granted.

The Petition submitted by Youth Plaintiffs set forth four grounds for the proposed rulemaking: First, Youth Plaintiffs stated that "[t]he science unequivocally shows that hydraulic fracturing is adversely impacting human health and impairing Colorado's atmosphere, water, soil, and wildlife resources." This assertion was supported by 22 paragraphs (and 39 footnotes) citing and explaining the current knowledge of the risks of hydraulic fracturing to human health and the environment. It does not relate to or mention any public trust doctrine. It rests on the statutory duty of the Commission to regulate oil and gas development in a manner consistent with protection of human health and the environment.

Second, Youth Plaintiffs stated that "[t]he science unequivocally shows that anthropogenic climate change is occurring and is threatening the stability of the global climate." Again, this assertion was supported by 57 paragraphs (and 194 footnotes) showing the current

[18] The cases Defendant relies on for this proposition are inapposite. In Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe, the Colorado Court of Appeals affirmed the trial court ruling on a dispositive issue not addressed by the trial court. 107 P3d 402, 406 (Colo. App. 2004). The public trust issue in this case is not dispositive. Even if the Court agrees with the Commission that it does not have authority to promulgate the proposed rule under the public trust doctrine, that does not have any effect on the statutory bases for the Commission's authority to promulgate the rule or the validity of the claims for relief brought in the Complaint.

[19] Complaint at 2, ¶3 ("The Plaintiffs do not here seek judicial review of the Commission's conclusion that the public trust doctrine has not been recognized in Colorado.").

knowledge of the risks of climate change, including the risks to human health and the environment. The risks of climate change, and the responsibility of the Commission to take measures to protect human health and the environment by addressing climate change also has nothing to do with the 'public trust doctrine.' It rests on the duty of the Commission to regulate oil and gas development in a manner consistent with protection of human health and the environment.

Third, Youth Plaintiffs stated that "[c]limate change is already occurring in the State of Colorado and is projected to significantly impact the state in the future." Thirty-three paragraphs and 50 footnotes addressing rising temperatures, impacts to water resources, impacts to wildlife and habitat, pest and insect outbreaks, human health impacts, and economic impacts were included to support this assertion in the Petition. This justification for the proposed rule also does not mention or rely upon any notion of a public trust. It rests on the duty of the Commission to regulate oil and gas development in a manner consistent with protection of human health and the environment. This duty is recognized by statute. Each of the first three reasons or justifications for the proposed Rulemaking stands on its own merits based on the statutory duty of the Commission to regulate oil and gas development in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.[20]

B. Youth Plaintiffs Stated a Valid Claim for Relief because the Commission Failed to Address Whether Current Oil and Gas Regulations Adequately Protect the Public Health, Safety, and Welfare

[20] In it's fourth statement of reasons, the Petitioners asked for the state to recognize an "atmospheric trust" doctrine. This doctrine has not been recognized in Colorado, nor do we expect that the Court will recognize one today. For this reason, we explicitly declined to pursue a challenge to the Agency's conclusion that an "atmospheric public trust" doctrine does not apply.

While Defendant's Motion to Dismiss asserts in its introduction that Youth Plaintiffs fail to state a claim upon which relief can be granted, the Motion does not address the claim for relief seeking a declaratory judgment that the Commission has an obligation to determine the extent of the harm to public health, safety, and welfare from current oil and gas development or provide an explanation for why it chose to forego such a factual determination.

In their Petition, Youth Plaintiffs put forward documentation, including studies, reports, data, analysis, and scientific conclusions showing that climate change is occurring, that it is caused by human activity including oil and gas development, and that it poses extreme and profound risks to human health, safety, welfare, and the environment including wildlife. In its Order, the Commission cited one Commissioner, ex-officio Commissioner King from the Department of Natural Resources, as saying that he "firmly believe[s] that we are dealing with climate change right now[,]" and that the Commission is making "evolutionary steps" in dealing with the problem. However, in violation of the APA, the Order does not make any analysis of whether the agency is fulfilling its statutory duty to protect the public health, safety, and welfare, including the environment and wildlife resources by approving thousands of permits each year for oil and gas development in the state. Evolutionary steps are not sufficient when attempting to evacuate a burning building. The public is either adequately protected from the dangers associated with oil and gas development, or it is not.

Conclusion

The questions of law which preclude dismissal for failure to state a claim are whether the Commission properly interpreted its authority and duty under the Act, and whether the Commission followed the requirements of the APA in reaching its conclusion regarding the Petition. If the Court finds that the Commission erroneously interpreted the law, the presumption

of validity and regularity of administrative actions is overcome, and the agency action constitutes an abuse of discretion and must be set aside. Giuliani v. Jefferson County Bd. of County Com'rs, 303 P.3d 131 (Colo. App. 2012); Sheep Mountain Alliance v. Bd. of County Com'rs, Montrose County, 271 P.3d 597, 601 (Colo. App. 2011).