COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203	
On appeal from: **DISTRICT COURT, DENVER COUNTY, COLORADO** 1437 Bannock Street, Denver, CO 80202 **Trial Court Judge:** The Honorable J. Eric Elliff **Case Number**: 14CV32637	
TAMARA ROSKE, *et. al.*, Plaintiffs/Appellants v. COLORADO OIL AND GAS CONSERVATION COMMISSION, Defendant/Appellee and AMERICAN PETROLEUM INSTITUTE and the COLORADO PETROLEUM ASSOCIATION, Intervenors.	COURT USE ONLY
Attorney for Plaintiffs/Appellants: Katherine Merlin (Atty. Reg. # 45672) 479 Arapahoe Ave. Boulder, CO 80302 Phone No: (720) 965-0854 Email: katelynnmerlin@gmail.com Julia Olson (applicant *pro hac vice*) Wild Earth Advocates 1216 Lincoln St. Eugene, OR 97401 Phone No: (415) 786-4826 Email: JuliaAOlson@gmail.com James Daniel Leftwich (Atty. Reg. # 38510) MindDrive Legal Services, LLC 1295 Wildwood Road Boulder, CO 80305 Phone No: (720) 212-0831 Email: dan@minddrivelegal.com	Case Number: 2016CA564
APPELLANTS' OPENING BRIEF	

RULE 28 AND 32 CERTIFICATION

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒ It contains 8, 809 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒**For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

__ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

Original signatures on file in the office of Colorado Environmental Law, Ltd.

*/s/ Katherine Merlin*_____
Katherine Merlin, #45672
Attorney for Appellants

TABLE OF CONTENTS

Page

THE ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. Standard of Review 7

II. The Unambiguous Legislative Intent of the Colorado Oil and Gas Conservation Act Requires the Commission to Foster Oil and Gas Development "in a manner consistent with" Protecting Public Health and the Environment 10

A. The Plain Language and Structure of the Act Requires the Commission to Regulate Oil and Gas Development "in a manner consistent with" Protecting the Public and the Environment 10

B. The Legislative and History and Judicial Precedent Support Plaintiffs' Interpretation of the Act 19

C. The Colorado Oil and Gas Conservation Commission's Balancing Test is Inconsistent with the Colorado Constitution 23

III. If the Act is Determined to be Ambiguous, the Commission's Interpretation of the Act is Unreasonable and Not Entitled to Deference 31

CONCLUSION 37

TABLE OF AUTHORITIES

Cases **Page(s)**

Alamosa-La Jara v. Gould, 674 P.2d 914 (Colo. 1984) 9

Bd. of Cnty. Com'rs, La Plata Cnty. v. Bowen/Edwards Assoc., Inc.,
803 P.2d 1045 (Colo. 1992) 10–11, 20

Chase v. Colo. Oil and Gas Conservation Com'n,
284 P.3d 161 (Colo. App. 2012) 11, 20, 21

Chevron v. Nat. Res. Def. Council,
467 U.S. 837, 104 S. Ct. 2778 (1984) 8–9, 19

City of Longmont v. Colo. Oil & Gas Association,
369 P.3d 573 (Colo. 2016*)* 28–29, 31, 34–35

City of Fort Collins v. Colo. Oil and Gas Ass'n,
369 P.3d 586 (Colo. 2016) 31, 35

Citizens for Free Enterprise v. Dept. of Revenue,
649 P.2d 1054, 1063 (Colo. 1982). 8

Colo. Anti-Discrimination Comm'n v. Case, 151 Colo. 235 (1962) 24–25, 29

Colo. Div. of Emp't v. Parkview Episcopal Hosp.,
725 P.2d 787 (Colo. 1986) 8

Colo. Dept. of Labor and Emp't v. Esser,
30 P.3d 189 (Colo. 2001) 7–8

Colo. Educ. Ass'n v. Rutt, 184 P.3d 65 (Colo. 2008) 10

Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.,
311 A.2d 588 (1973) 29

Conn. Nat. Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146 (1992) 13–14

Driscoll v. Corbett, 69 A.3d 197 (Pa. 2013) 29

Droste v. Bd. of Cnty. Com'rs, Cnty. of Pitkin,
159 P.3d 601 (Colo. 2007) 11–12

Duncan v. Walker, 533 U.S. 167, 121 S. Ct. 2120 (2001) 13

Evans v. Romer, 882 P.2d 1335 (Colo. 1994) 26

Foster v. Wash. Dep't of Ecology,
No. 14-2-25295-1 SEA, 2015 WL 7721362
(Wash. Super. Ct. Nov. 19, 2015) 36

Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913 (Colo. 1997) 21–22

Hibbs v. Winn, 542 U.S. 88, 124 S. Ct. 2276 (2004) 13

Hickman v. Catholic Health Initiatives,
328 P.3d 266 (Colo. App. 2013) 9

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 32

Kain v. Dep't of Envtl. Prot., 49 N.E.3d 1124 (Mass. 2016) 36–37

Keene Corp. v. United States, 508 U.S. 200 (1993) 16–17

Klinger v. Adams Cnty. School Dist. No. 50,
130 P.3d 1027 (Colo. 2006) 7

Oposa v. Factoran, 223 S.C.R.A. 792 (Phil. S. Ct. 1993) 29

People in the Interest of J.M., 768 P.2d 219 (Colo. 1989) 25–26

People v. Nothaus, 363 P2d 180, 182 (1961) 25

People v. Vigil, 328 P.3d 1066 (Colo. App. 2013) 9

People v. Yascavage, 101 P.3d 1090 (Colo. 2004) 9

Pierce v. St. Vrain Valley Sch. Dist. RE–1J,
981 P.2d 600 (Colo. 1999) 33

Rademacher v. Becker, 374 P.3d 499 (Colo. App. 2015) 33

Rags Over the Arkansas River, Inc. v. Colo. Parks and Wildlife Bd.,
360 P.3d 186 (Colo. App. 2015) 32

Robinson Twp. v. Pennsylvania, 83 A.3d 901 (Pa. 2013) 29, 35–36

Romero v. Sandoval, 685 P.2d 772 (Colo. 1984) 10

Ross v. Blake, 136 S. Ct. 1850 (2016) 22

Russello v. United States, 464 U.S. 16 (1983) 17

Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000) 33

Sapp v. El Paso Cnty. Dep't of Human Servs.,
181 P.3d 1179 (Colo. App. 2008) 8

Simpson v. Cotton Creek Circles, LLC, 181 P.3d 252 (Colo. 2008) 9

Stone v. *INS*, 514 U. S. 386 (1995) 22

Swieckowski v. City of Fort Collins, 934 P.2d 1380 (Colo. 1997) 32

United States v. Jin Fuey Moy, 241 U.S. 394 (1916) 10

United States v. Romero, 122 F.3d 1334 (10th Cir. 1997) 9

Wallach v. Town of Dryden, 16 N.E.3d 1188 (N.Y. 2014) 36

Washington v. Glucksberg, 521 U.S. 702 (1997) 26

Constitutional Provisions

Colo. Const. Art. 2, § 3 ..... 3, 23

Colo. Const. Art. 2, § 28 24

Penn. Const. Art. I, § 1 30

Penn. Const. Art. I, § 27 29–30

Statutes

Section 2-4-201, C.R.S. 2016 10

Section 5-3.5-303, C.R.S. 2016 12

Section 6-1-902, C.R.S. 2016 15

Section 18-9-122, C.R.S. 2016 15

Section 24-4-106, C.R.S. 2016 8

Section 24-33-103, C.R.S. 2016 17–18

Section 24-68-101, C.R.S. 2016 12–13

Section 24-82-503, C.R.S. 2016 13

Section 24-91-101, C.R.S. 2016 15

Section 25-6.5-101, C.R.S. 2016 25

Section 25-7-102, C.R.S. 2016 25

Section 25-8-102, C.R.S. 2016 25

Section 29-20-104, C.R.S. 2016 12

Section 33-1-101, C.R.S. 2016 25

Section 33-33-102, C.R.S. 2016 25

Section 34-60-101, *et seq.*, C.R.S. 2016 ..... 10, 19

Section 34-60-102, C.R.S. 2016 ..... 6, 11–12, 14, 16, 17–18, 20–22, 26

Section 34-60-106, C.R.S. 2011 ..... 11, 20

Section 34-60-106, 14 C.R.S. 1991 Supp. 20

Other Authorities

Angela Neese, *The Battle Between the Colorado Oil and Gas Conservation Commission and Local Governments*, 76 U. Colo. L. Rev. 561, 576 (2005) 21

COGCC, COLORADO OIL AND GAS CONSERVATION COMMISSION ENFORCEMENT GUIDANCE AND PENALTY POLICY, *available at* http://cogcc.state.co.us/announcements/Hot_Topics/Enforcement/Enforcement_Guidance-Jan_2015.pdf (January, 2015). 6, 32–33

Freeman Klopott, *N.Y. Officially Bans Fracking with Release of Seven-Year Study,* Bloomberg (June 29, 2015) 36

N.Y.S., Dept. of Health, *A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development* (Dec. 2014), *available at* https://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf 36

1994 Colo. Legis. Serv. Ch. 314 (S.B. 94-177) 20–21

2013 Colo. Legis. Serv. Ch. 274 (S.B. 13-202) 23

2007 Colo. Legis. Serv. Ch. 20 (H.B. 07-1341) 14, 22

Plaintiffs/Appellants Xiuhtezcatl Martinez, Itzcuahtli Roske-Martinez, Sonora Brinkley, Aerielle Deering, Trinity Carter, and Emma Bray (herein referred to as "Plaintiffs"), through their legal guardians and by their attorneys Katherine Merlin, Julia Olson (applicant *pro hac vice*), and Daniel Leftwich, submit this appeal from the Denver District Court decision pursuant to Colorado Appellate Rule 4(a).

THE ISSUES PRESENTED

A. Whether under the Colorado Oil and Gas Conservation Act the Colorado Oil and Gas Conservation Commission is authorized to foster the development, production, and utilization of oil and gas resources, if to do so is inconsistent with protecting the public health, safety, and welfare, and the environment.

B. Whether the district court's and the Colorado Oil and Gas Conservation Commission's interpretation of the agency's authority and duty under the Colorado Oil and Gas Conservation Act, which would allow the Commission to balance development, production and utilization of Colorado's oil and gas resources against public health, safety, and welfare, and the environment and favor the former at the expense of the latter, is unconstitutional.

STATEMENT OF THE CASE

Despite well-documented and compelling evidence of the adverse impacts on public health, safety, and the environment of oil and gas development in Colorado, and in particular the use of hydraulic fracturing ("fracking") in combination with horizontal drilling, the Colorado Oil and Gas Conservation Commission ("Commission") continues to approve permits for new oil and gas development without regard for the dangerous health and environmental impacts. In an effort to address the human and environmental impacts of fracking, on November 15, 2013, these six Plaintiffs filed a Petition for Rulemaking to the Colorado Oil and Gas Conservation Commission pursuant to Commission Rule 529. R. Administrative Record ("AR"), p. 00850–903. The Petition for Rulemaking contained detailed factual evidence demonstrating current and threatened harms to public health, safety, and welfare, including serious and potentially irreversible impacts on the natural environment and climate system, on which the lives and futures of Plaintiffs depend. R. AR, p. 00856–893, 00901–903. The Petition challenged the Commission's ongoing practice of authorizing new oil and gas development notwithstanding the evidence of the resulting abundant harm to public health and the environment in violation of the Colorado Oil and Gas Conservation Act ("Act"), which requires the Commission to protect the public

health, safety, and welfare, and the environment, as well as the Colorado Constitution, which secures essential and inalienable rights to life, liberty, property, safety, and happiness, and other implicit natural rights. Colo. Const. Art. 2, § 3.

In their Petition for Rulemaking, Plaintiffs asked the Commission to promulgate a rule or rules that would "protect the health and safety of Colorado's residents and the integrity of Colorado's atmospheric resource and climate system, water, soil, wildlife, other biological resources, upon which all Colorado citizens rely for their health, safety, sustenance, and security." R. AR, p. 00852. The Petition also asked the Commission to suspend the issuance of hydraulic fracturing permits until oil and gas production and development can be done without further adversely impacting human health and the environment. *Id*. The Petition also cited that the Commission has a statutory duty to protect the public's health, safety, and welfare, as well as protect the environment and wildlife resources, when regulating oil and gas development. R. AR, p. 00894, 00898–900.

After receiving public comments and a legal memorandum ("Memo") from the State Attorney General's Office and holding a public hearing, the Commission denied the Petition for Rulemaking on May 29, 2014. R. AR, p. 1145–54; 1–37. Using the Memo as the "primary basis" for its decision, the Commission

determined that the proposed rule was beyond its limited grant of statutory authority, and therefore, it did not have authority to adopt the proposed rule. R. AR, p. 00003–4. That Memo, which was explicitly incorporated by reference in the Commission's Order, found that some of the Plaintiffs' proposed rule is beyond the Commission's authority because the Act requires the Commission to balance oil and gas development with public health, environmental, and wildlife considerations, and "would require the Commission to readjust the balance crafted by the General Assembly under the Act." R. AR, p. 1149–50.

Plaintiffs appealed the Commission's Order denying the Petition for Rulemaking to Denver District Court on July 3, 2014. Plaintiffs' Complaint challenged the Commission's construction of the Act that it lacks the authority, or duty, to prioritize protection of the public health and the environment because it interprets the Act to require a "balance" of oil and gas development with the protection of public health and the environment. Plaintiffs argued that the Act requires the Commission to regulate oil and gas development "in a manner consistent with," not "balanced against," protection of public health, safety, welfare, and the environment.

The case was assigned to Judge Andrew McCallin, who granted intervention to the Colorado Petroleum Association and the American Petroleum Institute and

denied the Commission's Motion to Dismiss the case on December 24, 2014. R. CF, p. 247, 249–253. The issues were fully briefed on June 3, 2015, with Plaintiffs requesting oral arguments. On January 11, 2016 Judge Eric Elliff was assigned to courtroom 215 where Plaintiffs' case was pending. Based on the papers, on February 19, Judge Eric Elliff ruled that the plain meaning of the Act was unambiguous, that the Act "requires a balance between the development of oil and gas resources and protecting public health, the environment, and wildlife," R. Court file ("CF"), p. 572, and denied Plaintiffs' appeal of the rulemaking denial.

Plaintiffs now plead for this Court to correct the Commission's and district court's erroneous interpretation of the Act, which unlawfully expands the authority of the Commission by allowing it to foster oil and gas development, production, and utilization in a manner inconsistent with protection of the public health, safety, and welfare and the environment, and ignores important conditions placed on the Commission's authority by the General Assembly and the Colorado Constitution.

SUMMARY OF THE ARGUMENT

The Colorado Oil and Gas Conservation Commission is charged by the General Assembly of the State of Colorado, through the Oil and Gas Conservation Act, to regulate the development of oil and gas resources in the state. Pursuant to

that authority, the Commission is unambiguously required by the Act to "foster the responsible, balanced development" of such activities "in a manner consistent with" protecting public health, safety, and welfare, and the environment.[1] Shortly before the district court ruled in this case, the Commission declared in a published 2015 Enforcement Guidance and Penalty Policy that "the development of these [oil and gas] resources *must be* consistent with protection of public health, safety, and welfare, including the environment and wildlife resources, *at all times*." (Emphasis added). COGCC, COLORADO OIL AND GAS CONSERVATION COMMISSION ENFORCEMENT GUIDANCE AND PENALTY POLICY, *available at* http://cogcc.state.co.us/announcements/Hot_Topics/Enforcement/Enforcement_Guidance-Jan_2015.pdf (January, 2015). Thus, the Commission's statutory interpretation and arguments here, and the district court's acquiescence with it, run counter to the agency's own policy statement interpreting the Act, which is consistent with the plain meaning of the statute and Plaintiffs arguments in this appeal.

The Commission's repudiation of its duty to protect the public and the environment from harm caused by oil and gas development is contrary to the General Assembly's intent, as evidenced by the plain language and structure of the

[1] For brevity, the phrase in C.R.S. § 34-60-102(1)(a)(I), "public health, safety, welfare, including protection of the environment and wildlife resources," is shortened to "public health and the environment" in this brief.

Act, which affirms the duty of the Commission to protect the public and the environment as a condition of oil and gas development, and the Act's history. The Commission's interpretation of its authorities and duties under the Act is also inconsistent with the Colorado Constitution, which guarantees residents certain inalienable rights, including the rights of health, safety, property, liberty, and happiness. If there is any ambiguity in the Act, which was not claimed by the Commission or found by the district court, *see, i.e.*, R. CF, p. 467, 483, 552, 555, the Commission's interpretation is unreasonable and not entitled to deference because it is unconstitutional, conflicts with prior pronouncements of Colorado courts and the Commission itself, and is contrary to the public interest.

ARGUMENT

I. Standard of Review

This appeal rests on questions of law; therefore the proper standard of review of the district court's order is de novo. *See Klinger v. Adams County School Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006) (the appellate courts review trial court's interpretation of a statute de novo). Constitutional questions are also reviewed de novo by the court. *Colo. Dept. of Labor and Employment v. Esser*, 30 P.3d 189, 193–94 (Colo. 2001) ("[C]onclusions of law, including interpretations of the constitutions and statutes, are always subject to de novo review.").

Judicial review under the Administrative Procedures Act ("APA") requires an agency action to be held unlawful and set aside if it is "contrary to constitutional right . . . in excess of statutory jurisdiction, authority, purposes, or limitations . . . or otherwise contrary to law." § 24-4-106(7), C.R.S. 2016; *see also Sapp v. El Paso County Dep't of Human Servs.*, 181 P.3d 1179, 1182 (Colo. App. 2008) (The agency action will be overturned "if the court finds the agency . . . erroneously interpreted the law, or exceeded its constitutional or statutory authority."). Courts are not bound by agency decisions that wrongly interpret or misapply statutory law, and erroneous interpretations amount to reversible errors. *See Colo. Div. of Emp't v. Parkview Episcopal Hosp.,* 725 P.2d 787, 790–91 (Colo. 1986).

When judicial review involves a question of statutory interpretation, as it does here, Colorado courts use the two-part test set forth by the United States Supreme Court.[2] *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). The first step of the *Chevron* analysis is for courts to use the traditional tools of statutory construction—including the text, structure, history, and purpose—to determine whether the legislature has spoken directly to the question at issue. *Chevron,* 467 U.S. at 842–43. If the legislative intent is plain and

[2] The Colorado APA is similar to the federal APA and Colorado courts have found federal cases instructive on review of administrative law issues. *See, e.g.*, *Citizens for Free Enterprise v. Dept. of Revenue*, 649 P.2d 1054, 1063 (Colo. 1982).

unambiguous, that is where the search for meaning ends. *See, e.g.*, *Hickman v. Catholic Health Initiatives*, 328 P.3d 266 (Colo. App. 2013); *People v. Vigil*, 328 P.3d 1066 (Colo. App. 2013); *United States v. Romero*, 122 F.3d 1334, 1337 (10th Cir. 1997); *see also People v. Yascavage*, 101 P.3d 1090, 1093 (Colo. 2004) ("In construing a statute, our goal is to determine and give effect to the intent of the legislature and adopt the statutory construction that best effectuates the purposes of the legislative scheme."). Only if the express statutory language and the other tools of statutory interpretation are not clear do courts proceed to step two, when the court considers whether the agency's interpretation was reasonable. *Chevron*, 467 U.S. at 842–43. While agencies are afforded deference in their policy judgments, that deference does not extent to the interpretation of the statutes agencies administer. *Simpson v. Cotton Creek Circles, LLC*, 181 P.3d 252 (Colo. 2008) (en banc) ("[W]hile courts defer to policy determinations in rule-making proceedings, that deference 'does not extend to questions of law such as the extent to which rules and regulations are supported by statutory authority.'") (*quoting Alamosa-La Jara v. Gould*, 674 P.2d 914, 929 (Colo. 1984)).

When interpreting statutes, courts also must ensure that the provision at issue is construed so as not to conflict with other laws or constitutional provisions. § 2-4-201(1)(a), C.R.S. ("In enacting a statute, it is presumed that . . . compliance

with the constitutions of the state of Colorado and the United States is intended . . ..”); *see also Colo. Educ. Ass’n v. Rutt*, 184 P.3d 65, 80 (Colo. 2008) (noting that courts must avoid any construction that would render a constitutional provision either superfluous or a nullity); *Romero v. Sandoval*, 685 P.2d 772, 776 (Colo. 1984); *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916).

II. The Unambiguous Legislative Intent of the Colorado Oil and Gas Conservation Act Requires the Commission to Foster Oil and Gas Development “in a manner consistent with” Protecting Public Health and the Environment

Standard of Review: See Section I above for the standard of review, which is de novo. The issue was preserved. R. CF, p. 8–12.

A. The Plain Language and Structure of the Act Requires the Commission to Regulate Oil and Gas Development “in a manner consistent with” Protecting Public and the Environment

The Colorado Oil and Gas Conservation Act (“Act”), § 34-60-101, *et seq.*, C.R.S., vests the authority and duty to regulate Colorado’s oil and gas natural resources at the state level in a single agency, the Colorado Oil and Gas Conservation Commission. *See Bd. of Cnty. Com’rs, La Plata Cnty. v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 1057 (Colo. 1992). The Commission has the authority and obligation to regulate every aspect of oil and gas operations,

including the quantity and location of development, the issuance or denial of permits, regulation and monitoring of operations, the capping of wells, and overseeing the disposal of wastes, remediation of development sites, and imposition of penalties for violations. *Id.* at 1049; *see also Chase v. Colorado Oil and Gas Conservation Com'n*, 284 P.3d 161, 165–67 (Colo. App. 2012) (citing § 34-60-106(4), C.R.S. 2011). The plain language of the Act requires the Commission to carry out its regulatory authority in a manner that protects public health and the environment. The Act declares it to be in the public interest for the Commission 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.

§ 34-60-102(1)(a)(I), C.R.S. (emphasis added).

The interpretation of this statute by the Commission and the district court erroneously ignores the meaning of "in a manner consistent with." The clause "in a manner consistent with" makes the standard, which follows, obligatory. In *Droste v. Board of County Com'rs of County of Pitkin*, the Colorado Supreme Court confirmed that "in a manner consistent with" means a condition which the otherwise valid action or authorization is "subject to." 159 P.3d 601, 608 (Colo.

2007). In *Droste*, the court ruled on the meaning of the Land Use Enabling Act, § 29-20-104, C.R.S., pertaining to the "planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment *in a manner consistent with* constitutional rights." *Id.* at 605–06 (emphasis added). The court found the planning provisions were subject to the "in a manner consistent with" condition. "The statute . . . confers comprehensive local authority to make land use decisions, *subject to* the constitutional rights of the property owner." *Id.* at 606 (emphasis added). Therefore, under *Droste* the plain meaning of § 34-60-102(1)(a)(I), C.R.S. indicates that "the protection of public health, safety, and welfare, including protection of the environment and wildlife resources" *must* be met as a condition of "responsible, balanced development, production, and utilization" of oil and gas resources of the state.[3]

[3] The Assembly commonly uses the language "in a manner consistent with" and understands its implications. *See, e.g.,* § 5-3.5-303(3), C.R.S. ("The provisions of this article shall be interpreted and applied to the fullest extent practical *in a manner consistent with* applicable federal laws and regulations, and shall not be deemed to constitute an attempt to override federal law."); § 24-68-101(c), C.R.S. ("The establishment of vested property rights will promote the goals specified in this subsection (1) *in a manner consistent with* section 3 of article II of the state constitution, which guarantees to each person the inalienable right to acquire, possess, and protect property . . . ."); § 24-82-503(3), C.R.S. ("[T]he state board of land commissioners, *in a manner consistent with* federal law and the constitution of the state, may: (a) subordinate such [property] interest to facilitate the conveyance to the federal government . . . ."). The district court's ruling that the General Assembly did not intend the phrase "in a manner consistent with" to be a

The Commission and district court read out of the Act the language "in a manner consistent with" and instead focused on the word "balanced," which affirmed the Commission's pattern of approving oil and gas development in contravention of public health and the environment. However, this interpretation, elevating the word "balance" to prominence as the conditional phrasing, treats the words "in a manner consistent with" as superfluous verbiage, which in itself renders the interpretation impermissible. *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120 (2001) (Courts have a duty, where possible, "to give effect" to all operative portions of the enacted language, including its "every clause and word."); *accord Hibbs v. Winn*, 542 U.S. 88, 101, 124 S. Ct. 2276 (2004) (citing "the rule against superfluities," which holds that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . "); *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54, 112 S. Ct. 1146, 1149 (1992) (Holding courts must disfavor interpretations of statutes that render language superfluous, and presume that a legislature "says what it means and means what it says.").

---

mandatory condition, if applied to these statutes, could lead to the untenable result that agency actions not in compliance with the state constitution or federal law could still be compliant with these statutes.

According to the district court, prioritizing protection of public health and the environment would render the word "balanced" superfluous and therefore Plaintiffs' interpretation is impermissible. R. CF, p. 554–55. However, requiring that oil and gas development be conducted in a manner consistent with protection of public health and the environment does not render the word "balanced" superfluous. The Act declares it to be in the public interest to "foster the responsible, balanced development, production and utilization" of oil and gas in Colorado. The plain language of the Act indicates that "responsible, balanced" modifies "development, production, and utilization," not public health and the environment. Put differently, the Act first requires that oil and gas development, production, and utilization are to be responsible and balanced. Pursuant to the Act, for instance, "responsible and balanced" oil and gas production is that which avoids waste. § 34-60-102(1)(a)(II), C.R.S.; *see also* 2007 Colo. Sess. Laws, ch. 20, Sec. 1 (H.B. 07-1341) (removing references to the "evils" and "prohibition" of waste, and inserting "responsible and balanced production."). If oil and gas development meets this first test, that is, it is both responsible and balanced, then the Commission must determine and ensure the second mandate is met, that is, the oil and gas development is consistent with protection of public health and the environment. If oil and gas development is inconsistent with protecting public

health and the environment, the development is not authorized under the Act and the Commission has no statutory discretion to allow it. This reading of the statute gives meaning to the word balanced, and every other word in the statute, and ensures that no words are rendered superfluous.

If the Assembly had intended to set up a balancing test, with oil and gas development on one side and public health and the environment on the other, it would have done so clearly, as it has done in numerous other statutes. For example, § 24-91-101(2), C.R.S. states: "[T]here is a substantial statewide interest in ensuring that the policy underlying the efficient expenditure of public moneys *is balanced with* the policy of fostering a healthy and viable construction industry." (Emphasis added). § 6-1-902(1)(c), C.R.S. states: "Individuals' privacy rights and commercial freedom of speech *should be balanced* in a way that accommodates both the privacy of individuals and legitimate telemarketing practices." (Emphasis added). § 18-9-122(1), C.R.S. states: "The general assembly recognizes . . . that the exercise of a person's right to protest or counsel against certain medical procedures *must be balanced against* another person's right to obtain medical counseling and treatment in an unobstructed manner." (Emphasis added). The Act does not use this plain balancing test language to require the balancing of oil and gas

development with public health and the environment, and that language may not be inserted by the Commission or the district court.

A contextual reading of § 34-60-102(1)(a)(I), C.R.S. contrasted with the Act's provisions relating to wildlife protection further supports Plaintiffs' interpretation. § 34-60-102(1)(a)(IV), C.R.S. states that all oil and gas operations are to be planned and managed:

> *in a manner 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.

(Emphasis added). The Assembly's use of the phrase "in a manner that balances" in § 34-60-102(1)(a)(IV), C.R.S. further illustrates what a clear balancing test looks like when balancing is intended. The Assembly cannot be presumed to have intended the conditional phrasing "in a manner consistent with" to create a balancing test where it later used the words "in a manner that balances" regarding a lesser degree of protection owed to wildlife resources than to protecting public health and the environment. *See Keene Corp. v. United States,* 508 U.S. 200, 208 (1993) ("Where [the legislature] includes particular language in one section of a statute but omits it in another . . . it is generally presumed that [the legislature] acts

intentionally and purposely in the disparate inclusion or exclusion.") (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)).

The district court found that Plaintiffs' analysis of the contrasting language between § 34-60-101(1)(a)(I), C.R.S and § 34-60-102(1)(a)(IV), C.R.S. disregarded other sections of the Oil and Gas Conservation Act, pointing to three sections in particular. The three provisions, however, are not inconsistent with Plaintiffs' position, which allows the statute to be given its full effect and meaning.

The district court first points to § 34-60-102(1)(b), C.R.S., which states:

> 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 protection of the environment and wildlife resources*….

(Emphasis added). This section only supports Plaintiffs' position by requiring that the "maximum efficient rate of production" must be "consistent with protection of public health, safety, and welfare and the environment." Second, the district court points to § 24-33-103, C.R.S., the Department of Natural Resources Act, which states:

> The state policy shall be to encourage, by every *appropriate means*, the full development of the state's natural resources to *the benefit of all of the citizens* of Colorado and shall include, but not be limited to, creation of a resource management plan to integrate the state's efforts

> to implement and encourage full utilization of each of the natural resources *consistent with realistic conservation principles*.

(Emphasis added). This language is also consistent with Plaintiffs' position because under it the Commission still has the full authority and duty to limit oil and gas development if necessary to protect public health and the environment, which would benefit citizens of Colorado and be consistent with conservation principles. Nothing in this language diminishes the Commission's authority and duty as articulated in § 34-60-101(1)(a)(I), C.R.S.

Finally, the district court points to § 34-60-102, C.R.S. which protects coequal and correlative rights of owners and producers to oil and gas. Possessing correlative rights means that "each owner or producer in a common pool or source of supply of oil and gas shall have an equal opportunity to obtain and produce his just and equitable share of the oil and gas . . .." § 34-60-102(1)(a)(III), C.R.S. This section is not inconsistent with the plain meaning of § 34-60-102(1)(a)(I), C.R.S., as described above, because there is no reason why owners and producers of oil and gas cannot produce their "just and equitable share of the oil and gas" so long as such production is done in a manner consistent with protection of public health and the environment. Any development under this section presumes that the conditions for protection of public health and the environment have been met. Again, this language does not restrict the Commission's authority to limit oil and

gas development if necessary to protect public health and the environment. Furthermore, this section concerns the relationship between oil and gas owners and producers with rights to develop and how they share a common pool of oil and gas; not the manner in which that oil and gas is extracted or developed.

Collectively, when read in context, the three statutory provisions that the district court points to as evidence of the General Assembly's intent to expand oil and gas development do not support that proposition, and actually bolster Plaintiffs' argument that the plain language of the statute requires oil and gas development be conducted in a manner consistent with protection of public health and the environment.

B. Legislative History and Judicial Precedent Support Plaintiffs' Interpretation of the Act

Courts also examine legislative history to determine if the legislature has expressed intent. *Chevron*, 467 U.S. at 842–43. The legislative history of § 34-60-101 *et seq.*, C.R.S., is instructive, and accords with Plaintiffs' reading of the statutory text and context, and the Colorado Supreme Court's interpretation of identical statutory language.

The origins of the Act trace back to the Interstate Oil Conservation Compact, entered into by the oil producing states and ratified by the United States Congress

in 1935. *See Chase*, 284 P.3d 165–67 (Colo. App. 2012). The Act as passed in 1951 was intended to facilitate the orderly production of petroleum, and contained no protections for public health or the environment. The first amendments to protect public health appeared in 1985, which authorized and mandated 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." *See Bd. of Cnty. Com'rs, La Plata Cnty. v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1049 (Colo. 1992) (citing § 34-60-106(11), 14 C.R.S. (1991 Supp.)).

Prior to 1994, the Act did not contain language declaring the public's interest in the protection of public health. In 1994, the General Assembly amended § 34-60-102(1), C.R.S., to read:

> It is declared to be in the public interest to foster, encourage, and promote 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*;+>> to protect the public and private interests against the evils of waste in the production and utilization of oil and gas by prohibiting waste; . . . 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 prohibition of waste, and subject further to the enforcement and protection of the coequal and correlative rights of owners and producers . . . .

1994 Colo. Legis. Serv. Ch. 314 (S.B. 94-177) (italics added to the new statutory language); *see Chase*, 284 P.3d at 166 ("The 1994 amendments to the Conservation Act enlarged the focus from promoting oil and gas production to include consideration of environmental impact and public health, safety, and welfare."); Angela Neese, *The Battle Between the Colorado Oil and Gas Conservation Commission and Local Governments*, 76 U. Colo. L. Rev. 561, 576 (2005) (One effect of Senate Bill (SB) 94-177 was to require that "development, production, and utilization must be done 'in a manner consistent with' protection of public health, safety, and welfare.'"). As of 1996, the Commission "interpreted this language to its fullest meaning, giving the Commission authority to consider all impacts of oil and gas operations on any part of the environment." Neese, *Battle*, 76 U. Colo. L. Rev. at 577 (citing an interview with Rich Griebling, then Director of the Commission). In 1997, the Colorado Supreme Court "recognize[d] that the purposes of the Act are to encourage the production of oil and gas in a manner that protects public health and safety and prevents waste." *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 925 (Colo. 1997).

Since 1997, the General Assembly has repeatedly amended the language of § 34-60-102, C.R.S. In 2007, it replaced the mandate to "foster, *encourage and promote* development, production, and utilization" with "foster *the balanced,*

responsible production, development, and utilization" of oil and gas resources. (Emphasis added). 2007 Colo. Legis. Serv. Ch. 20 (H.B. 07-1341) (codified at § 34-60-101, *et seq.*). It removed the reference to "the evils of waste," and added an additional requirement that wells are to be maximally productive, preventing but not prohibiting waste, only to the extent "consistent with protection of the public health, safety, and welfare . . .." *Id.* Even before these amendments the Colorado Supreme Court said in *Gerrity* the purpose of the Act was to "encourage the production of oil and gas in a manner that protects public health and safety and prevents waste." *Gerrity*, 946 P.2d 925 (Colo. 1997). But these amendments plainly demonstrate the intent by the General Assembly to protect public health and the environment, and the Commission must adhere to that intent.

Each amendment of the Act since 1985 has increased the duty of the Commission to protect the public and the environment, while demoting the importance of encouraging or fostering development. This is significant because "[w]hen [the legislature] amends legislation, courts must 'presume it intends [the change] to have real and substantial effect.'" *Ross v. Blake,* 136 S. Ct. 1850, 1858 (2016) (*quoting Stone v. INS*, 514 U.S. 386, 397 (1995)). If the Colorado Assembly had not intended the Commission to ensure the protection of public health and the environment, there would have been no need for the amendments.

The General Assembly has also declared that protecting public health has grown more urgent during the recent "substantial increase" in oil and gas development. *See* 2013 Colo. Legis. Serv. Ch. 274 (S.B. 13-202), § 1(1)(a)(I) ("[T]he substantial increase in oil and gas development in Colorado, while very beneficial to Colorado's economy . . . [h]as led to increased risks to Colorado's natural environment and public health . . . ."). This legislative history and judicial interpretation of the relevant laws show that the standard for the Commission's regulation of oil and gas development must be "consistent with" protection of the public health and the environment.

C. The Colorado Oil and Gas Conservation Commission's Balancing Test is Inconsistent with the Colorado Constitution

The district court's ruling that the Commission's interpretation of the Act was "not inconsistent with the Colorado Constitution," should be reversed because the interpretation is unconstitutional. R. CF, p. 556.

Colorado residents, including these Plaintiffs, have the express natural, essential, and inalienable rights to enjoy their lives and liberties, protect their property, and obtain their safety and happiness. Colo. Const. Art. 2, § 3. Furthermore, "[t]he enumeration in this constitution of rights shall not be construed to deny, impair or disparage others retained by the people." Colo. Const. Art. 2, §

28. The Colorado Supreme Court has acknowledged that certain fundamental rights exist even when not enumerated:

> We have no hesitancy in stating that there are *fundamental and inherent rights with which all humans are endowed even though no specific mention is made of them in either the national or state constitutions*. 'Truths' held to be self-evident in the language of the Declaration of Independence are that, '* * * all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness * * *.' *Natural rights—inherent rights and liberties, are not the creatures of constitutional provisions* either at the national or state level. The inherent human freedoms with which mankind is endowed are 'antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe.'

Colorado Anti-Discrimination Commission v. Case, 151 Colo. 235, 243–44 (1962) (emphasis added) (recognizing that the right to purchase property free from discrimination is an inalienable right).

Among the inalienable rights retained by the people include the right to a healthy and pleasant environment, including the right to clean air and water, and a stable climate system, which is indivisible from those rights.[4] The Colorado

[4] Examples of unenumerated fundamental rights include the right to freedom of movement, *People in Interest of J.M.*, 768 P.2d 219, 221 (Colo. 1989), and the right to acquire a home without discrimination, *Colorado Anti-Discrimination Comm'n*, 380 P.2d at 41. These rights are not absolute and may be limited by "a

General Assembly has recognized these inherent rights by enacting numerous statutes to protect the air,[5] water,[6] wildlife,[7] natural areas,[8] and public health and welfare.[9] Importantly, the Act also acknowledges the right to a healthy and pleasant natural environment by requiring that oil and gas development be allowed only to the extent that it does not infringe on the "public health, safety, and

---

proper exercise of the police power in the protection of the public health, safety and welfare." *People v. Nothaus*, 363 P.2d 180, 182 (1961).

[5] "In order to foster the health, welfare, convenience, and comfort of the inhabitants of the state of Colorado and to facilitate the enjoyment and use of the scenic and natural resources of the state, it is declared to be the policy of this state to achieve the maximum practical degree of air purity in every portion of the state . . . ." C.R.S. § 25-7-102 (2016).

[6] "In order to foster the health, welfare, and safety of the inhabitants of the state of Colorado and to facilitate the enjoyment and use of the scenic and natural resources of the state, it is declared to be the policy of this state to . . . achieve the maximum practical degree of water quality in the waters of the state consistent with the welfare of the state." C.R.S. § 25-8-102 (2016).

[7] "It is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors." C.R.S. § 33-1-101.

[8] "The general assembly hereby finds and declares that certain lands and waters of this state representing diverse ecosystems, ecological communities, and other natural features or phenomena, which are our natural heritage, are increasingly threatened with irreversible change and are in need of special identification and protection and that it is in the public interest of present and future generations to preserve, protect, perpetuate, and enhance specific examples of these natural features and phenomena as an enduring resource." C.R.S. § 33-33-102 (2016).

[9] "The general assembly hereby finds and determines that the protection of the natural environment of this state is important to the public health and welfare of the citizens of Colorado." C.R.S. § 25-6.5-101.

welfare, including protection of the environment and wildlife resources." § 34-60-102(1)(a)(I), C.R.S.

The State of Colorado, including the Commission, has a duty to protect – and cannot act in a manner that abridges – fundamental rights, both enumerated and unenumerated, absent a compelling government interest.[10] *See People in the Interest of J.M.*, 768 P.2d 219, 221 (Colo. 1989); *Evans v. Romer*, 882 P.2d 1335, 1341 (Colo. 1994) *aff'd*, 517 U.S. 620 (1996) (a "legislative enactment that infringes on a fundamental right is constitutionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible."). If the initial threshold for assertion of a fundamental right is met, no "balancing of competing interests" is needed. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[B]y establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.").

Concomitantly, Colorado citizens have the ability to ensure that statutes are interpreted and implemented in a manner consistent with their constitutional rights.

[10] The Commission has not argued, nor did the district court find, that there is a compelling government interest here sufficient to justify the abridgement of fundamental constitutional rights.

But right now, oil and gas development is endangering the health and safety of Coloradans and negatively impacting their property, liberty, and safety and happiness interests, as well as their interests in a healthy environment and clean air and water. This development harms the health and safety of citizens by exposing people to dangerous levels of pollution in water and air. *See, i.e.*, R. CF, p. 391–401, R. AR, p. 00063–64, 00070–75, 00856–861, 962–1010. It also decreases property values, impacts outdoor recreation opportunities, and disrupts wildlife resources. *See, i.e.*, R. CF, p. 401; AR 00071. Oil and gas operations also frequently result in spills and leaks, which contaminate the air and water. *See, i.e.*, R. CF, p. 394–95, 506; AR 00063, 00066–67, 00069 – 75, 00078. The venting and flaring of methane, gas leaks, and the combustion of oil and gas, are important contributors to climate change, which further endangers these constitutional rights. R. CF, p. 397. It was these impacts, among others, that prompted Plaintiffs to petition the Commission to promulgate a rule (or rules), pursuant to the Act, to address the dangers associated with oil and gas development and ensure the protection of their inalienable constitutional rights. R. AR, p. 00894. The district court did not address any of the harms that fracking is causing to Colorado citizens and the environment or how its statutory interpretation allows for infringement of constitutional rights, including those of these Plaintiffs.

The Colorado Supreme Court recently addressed Coloradans' inalienable rights in *City of Longmont v. Colo. Oil & Gas Association*, 369 P.3d 573, 585–86 (Colo. 2016), but the application here is different. In *City of Longmont*, Colorado citizens raised the inalienable rights provision of the Colorado Constitution against the Colorado Oil and Gas Association and Colorado Oil and Gas Conservation Commission in an attempt to defend a local ban on fracking from a state preemption argument. The Colorado Supreme Court determined that the inalienable rights provision was not applicable to the preemption analysis and found that state law preempted Longmont's fracking ban. *Id.* Here, Plaintiffs are not raising Article II, Section 3 in the context of state preemption of a home rule municipality's regulation, and are simply asking the Court to ensure that the interpretation of the Act is consistent with the Colorado Constitution, which is a required step of statutory interpretation. In *City of Longmont* the Colorado Supreme Court did not reach any questions pertaining to the constitutionality of statutory interpretation under the Act, as is presented here.

While the *City of Longmont* Court noted that the Colorado Constitution does not have an explicit Environmental Rights Amendment, as in Pennsylvania, and addressed in *Robinson Township v. Pennsylvania*, 83 A.3d 901 (Pa. 2013) (which the citizens raised to support their constitutional arguments), that does not diminish

the inherent and indefeasible rights of Coloradans to vital environmental resources since those rights predate the enactment of any constitution and exist even when not specifically enumerated. As the Supreme Court of Pennsylvania explained in *Robinson Township*, "the rights of the people articulated in Article I . . . are *inherent in man's nature* and *preserved rather than created* by the Pennsylvania Constitution." *Id.* at 948 (emphasis added) (plurality opinion); *see Colorado Anti-Discrimination Commission v. Case*, 151 Colo. at 243–44.[11] Because Pennsylvania's Environmental Rights Amendment is Section 27 of Article I, the rights articulated in the Environmental Rights Amendment are inherent and indefeasible.[12] The *Robinson Township* court supported the notion that

[11] *See also Driscoll v. Corbett*, 69 A.3d 197, 208 (Pa. 2013) (stating that "the concept that certain rights are inherent to mankind, and thus secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic.") (cited by Robinson Twp., 83 A.3d at 946 n. 36 (plurality opinion)); *Oposa v. Factoran*, 223 S.C.R.A. 792 (Phil. S. Ct. 1993) (The Court said that the right of future generations to "a balanced and healthful ecology," though explicitly incorporated into the Philippine Constitution, "may even be said to *predate all governments and constitutions*. In fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.") (Emphasis added).

[12] *See Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc*., 311 A.2d 588, 595 (1973) (explaining that even before Article I, Section 27 was adopted, the Commonwealth: "possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27. The express language of the constitutional amendment merely recites the 'inherent and independent rights' of mankind relative to the environment which are

environmental rights are inherent by looking to Article I, Section 1, of the Pennsylvania Constitution, which states: "All men are born equally free and independent, and have certain *inherent and indefeasible rights*, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." *Robinson Twp.*, 83 A.3d at 947–48 (emphasis added). This language accords with Article II, Section 3 of the Colorado Constitution, which states: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." Therefore, even absent an explicit Environmental Rights Amendment in Colorado, due to the parallel constitutional language, the analysis from *Robinson Township* supports Colorado Supreme Court precedent that even though some natural rights, like the right to life-supporting resources, are not explicitly recognized in the Colorado constitution, they are among the "natural, essential and inalienable rights" that arise from the inherent sovereignty of the people, and are not "given" to the people by their government.

'recognized as unalterably established' by Article I, Section 1, of the Pennsylvania Constitution.").

Since the Colorado Supreme Court upheld the Commission's unilateral delegated authority to preempt local municipalities from protecting themselves from the harms of oil and gas development, the protection of Colorado citizens from the harms associated with oil and gas development *must* come from the Commission and the Commission's interpretation of its duties under the Act must be consistent with citizen's inalienable constitutional rights. *City of Longmont*, 369 P.3d 573 (Colo. 2016); *City of Fort Collins v. Colo. Oil and Gas Ass'n*, 369 P.3d 586 (Colo. 2016). The district court's interpretation of the Act is inconsistent with the Colorado Constitution's protections of enumerated and unenumerated natural, essential and inalienable rights and should be corrected by this Court. This Court's interpretation of the Act and the Commission's constitutional obligations should be consistent with protecting Coloradans' inalienable constitutional rights from the adverse impacts of ongoing oil and gas development in Colorado.

III. If the Act is Determined to be Ambiguous, the Commission's Interpretation of the Act is Unreasonable and Not Entitled to Deference

Standard of Review: See Section I above for the standard of review, which is de novo. The issue was preserved. *See, i.e.*, R. CF., p. 333, 369, 467, 483, 554–555.

While all parties, and the district court, agree that the Act is unambiguous, if this Court determines that the language at issue is ambiguous, the Commission's interpretation of the statute should be found unreasonable and not entitled to deference, for all the reasons stated above. As further evidence of the Commission's unreasonable interpretation, the Commission has actually advanced different interpretations of § 34-60-102, C.R.S. over the past several years, which entitles the agency to far less deference. *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."); *see also Rags Over the Arkansas River, Inc. v. Colorado Parks and Wildlife Board*, 360 P.3d 186, 191 (Colo. App. 2015). Most significantly, in January of 2015 (shortly before the district court's order) the Commission issued an Enforcement Guidance and Penalty Policy Statement, which states:

> The mission of the Colorado Oil and Gas Conservation Commission ("Commission") is to foster the responsible development of Colorado's oil and gas natural resources. In Colorado, this means that the development of these natural resources must be consistent with protection of public health, safety, and welfare, including the environment and wildlife resources, *at all times*. (Emphasis added).

COGCC, ENFORCEMENT GUIDANCE AND PENALTY POLICY (January, 2015). In this statement the Commission emphasizes their clear mandate to protect public health and the environment "at all times," with no duty to balance the public health or the environment with oil and gas development. This statement on the Commission's mission supports Plaintiffs' plain reading of the Act and is further evidence of the Commission's unreasonable interpretation advanced in the context of this case.

Public policy considerations also suggest that the Commission's interpretation of the Act would be unreasonable. *Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1387 (Colo. 1997) ("We may not substitute our view of public policy for that of the General Assembly."). Colorado courts look to various sources, including statutory law, legislative direction, and common law from other jurisdictions, to discern public policy. *Rademacher v. Becker*, 374 P.3d 499 (Colo. App. 2015) (*citing Pierce v. St. Vrain Valley Sch. Dist. RE–1J*, 981 P.2d 600, 604 (Colo. 1999); *Salzman v. Bachrach*, 996 P.2d 1263, 1267–68 (Colo. 2000)).

As outlined above, the General Assembly has been amending the Act since 1985 to increase protections for the public health and the environment. Yet, despite being authorized and obligated to protect public health and the environment from the dangers of oil and gas development, the facts illustrate that the Commission is failing to do so. *See, i.e.*, R. AR, p. 00856–889. Particularly, in addition to the

direct impacts to air and water and public health, the Commission is contributing to climate destabilization, which experts say will create an uninhabitable planet for these young people before the end of the century if fossil fuels continue to be developed and burned, and certainly for future generations of Coloradoans. Already in Colorado, drought, wildfires, floods, severe weather events, pest outbreaks, and increasing temperatures, are harming the public health and safety and the environment on which all life and the economy of Colorado depend. *Id*. Future projections for the state show irreversible catastrophic impacts if fossil fuel development and the greenhouse gas emissions they produce do not cease by mid-century. *Id*. The Commission has admitted that it has never denied a permit due to concerns about impacts to public health, safety, or welfare. Reply Br. for Citizen Intervenors at 2, *City of Longmont v. Colo. Oil & Gas Association*, 369 P.3d 573, 585–86 (Colo. 2016) (Colo. Apr. 9, 2015) (citing to the record). While the Act has become more protective over the years, the Commission's actions have not followed suit and are contrary to statutory law and legislative direction.

The failure of the Commission to follow constitutional law, statutory law, and legislative direction is especially concerning given the important mandate the Commission has as the singular delegated body charged with protecting Coloradans and their natural environment from harms caused by oil and gas

development. If this Court fails to correct the Commission's erroneous reading of the Act, Plaintiffs, and all Colorado residents, will be left in a perilous situation where local regulations meant to protect public health and the environment will be preempted by the Commission's (inadequate) regulations, and the Commission's abdication of the General Assembly's mandate to protect public health and the environment. The consequence will be the infringement of these Plaintiffs' and other Colorado citizens' inalienable constitutional rights. *City of Longmont*, 369 P.3d 573 (Colo. 2016); *City of Fort Collins v. Colo. Oil and Gas Ass'n,* 369 P.3d 586 (Colo. 2016). This untenable situation is one that this Court should correct.

Courts in other jurisdictions are upholding citizen's constitutional rights in the face of dangers posed by oil and gas development and climate change. For example, the Pennsylvania Supreme Court held that a state law meant to dramatically increase oil and gas development through fracking was unconstitutional. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013). In Washington State, a judge declared that "[i]f ever there were a time to recognize through action this right to preservation of a healthful and pleasant atmosphere, the time is now . . . ." *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, 2015

WL 7721362, at * 9 (Wash. Super. Ct. Nov. 19, 2015).[13] The State of New York, and other jurisdictions, have completely outlawed fracking due to concerns about its public health and environmental impacts. *See, e.g.,* Freeman Klopott, *N.Y. Officially Bans Fracking with Release of Seven-Year Study,* Bloomberg (June 29, 2015); *see also Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014) (allowing local governments to use traditional zoning laws to protect citizens and the environment from oil and gas development); N.Y.S. Dept. of Health, *A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development* 3 (Dec. 2014), *available at* https://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf (binding recommendation that New York disallow fracking "[u]ntil the science provides sufficient information to determine the level of risk to public health . . . and whether the risks can be adequately managed."). Other state Supreme Courts have mandated reductions in greenhouse gas emissions. *See, e.g., Kain v. Dep't of Envtl. Prot.*, 49 N.E.3d 1124 (Mass. 2016) (ordering the Massachusetts Department of Environmental Protection to promulgate regulations reducing the state's greenhouse gas emissions).

[13] In a follow up order in this same case, dated April 29, 2016, the court further ordered the Washington Department of Ecology to promulgate regulations reducing the state's greenhouse gas emissions to comply with court's November 2015 order). *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 (Wash. Super. Ct. May. 16, 2016) (order granting motion for relief from judgment).

Collectively, these cases demonstrate the essential role of the courts in protecting citizen rights in the context of the growing dangers of fossil fuel development and climate change to public health and welfare and vital environmental resources. Consistent with the policies of other states, the Colorado General Assembly has repeatedly recognized this increased need for protection of public health and the environment from oil and gas development, and has explicitly directed the Commission to enforce such protections. This Court should correct the Commission's and district court's unlawful interpretation of the Act, which is contrary to the law and sound public policy.

CONCLUSION

Colorado residents are faced with a serious situation: impacts of oil and gas development are making them sick, contaminating their water, polluting the air they breathe, irreversibly and seriously contributing to dangerous climate change, degrading their lands, and lowering the property value of their homes. Yet the Commission continues to approve permits to oil and gas companies, regardless of the evidence of actual harms to the public health, safety, and welfare, and the environment from oil and gas production. Given the Commission's tremendous responsibility to oversee Colorado's oil and gas development, it is critical that this Court clarify the Commission's legal authority and obligations to protect the

public's health, safety, and welfare, and the environment. These Plaintiffs are too young to vote, yet they are the next generation and the Colorado that they inherent should not be a Colorado irreversibly degraded due to unchecked oil and gas development.

Plaintiffs respectfully request that this Court reverse the district court's February 19, 2015 decision; declare that under the Colorado Oil and Gas Conservation Act the Colorado Oil and Gas Conservation Commission cannot foster the development, production, and utilization of oil and gas resources, if to do so would be inconsistent with protecting the public health, safety, and welfare, and the environment; and declare that allowing the Commission to balance development, production and utilization of Colorado's oil and gas resources against public health, safety, and welfare, and the environment and favor the former at the expense of the latter, is unconstitutional.

Respectfully submitted this 18th day of August, 2016.

/s/ Katherine Merlin
Katherine Merlin (Atty. Reg. # 45672)
Colorado Environmental Law
479 Arapahoe Ave.
Boulder, CO 80302

Julia Olson (applicant *pro hac vice*)
Wild Earth Advocates
1216 Lincoln St.
Eugene, OR 97401

James Daniel Leftwich (Atty. Reg. # 38510)
MindDrive Legal Services, LLC
1295 Wildwood Road
Boulder, CO 80305

Attorneys for the Appellants

CERTIFICATE OF SERVICE

I certify that on August 18, 2016, I served a copy of the foregoing document on the following by Electronic Service by the Integrated Colorado Courts E-filing System (ICCES):

Jake Matter
Jake.Matter@state.co.us
Attorney for Appellee

Richard C. Kaufman
rkaufman@rcalaw.com
Julie A. Rosen
jrosen@rcalaw.com
Sarah K. Pallotti
spallotti@rcalaw.com
Attorneys for Intervenors

/s/ Katherine Merlin
Katherine Merlin