

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>POWERTECH (USA) INC., A SOUTH DAKOTA CORPORATION,</p> <p>Plaintiff,</p> <p>v.</p> <p>STATE OF COLORADO MINED LAND RECLAMATION BOARD AND MIKE KING, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES,</p> <p>Defendants.</p>	<p>FILED Document CO Denver County District Court 2nd JD Filing Date: Dec 8 2010 1:43PM MST Filing ID: 34748533 Review Clerk: Ty Khiem</p> <p>▲ COURT USE ONLY ▲</p>
<p>ATTORNEY FOR STATE DEFENDANT</p> <p>JOHN W. SUTHERS, Attorney General JEFF M. FUGATE Assistant Attorney General Reg. # 37679 CHERYL A. LINDEN First Assistant Attorney General Reg. #14185 STEVE NAGY Assistant Attorney General Reg. # 38955</p> <p>1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-5532 FAX: (303) 866-3558 E-Mail: Jeff.fugate@state.co.us</p>	<p>Case No. 2010 CV 8615</p> <p>Ctrm.:</p>
<p align="center">STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S CLAIMS AGAINST DEFENDANT MIKE KING</p>	

In accordance with C.R.C.P. 12(b)(1), Mike King, Executive Director of the Department of Natural Resources and the Mined Land Reclamation Board (collectively “Defendants”) respectfully move the Court for dismissal of Plaintiff’s claims pertaining to Mr. King and for dismissal of Mr. King as a defendant, based on the Court’s lack of jurisdiction over Mr. King’s actions in this case.

CERTIFICATE OF COMPLIANCE WITH C.R.C.P 121 § 1-15(8)

Pursuant to C.R.C.P 121 § 1-15(8) (Committee Comment), conferring is not appropriate prior to filing a motion to dismiss.

I. Background

Plaintiff filed suit challenging the validity of certain rules (“New Rules”) promulgated by the Mined Land Reclamation Board (“Board”) pursuant to its authority under the Mined Land Reclamation Act, C.R.S. §34-32-101, *et seq.* (“Act”). Complaint ¶ 39. Plaintiff has named both the Board and Mike King, in his capacity as Executive Director of the Department of Natural Resources, as defendants in this case. As fully explained below, Plaintiff must show that Mr. King took final agency action in order to vest the Court with subject matter jurisdiction to review its claims pertaining to Mr. King. Since Mr. King had no legal ability to take final agency action, and took no final agency action, this Court lacks jurisdiction over the claims against Mr. King.

II. Law and Argument

Subject matter jurisdiction concerns a court's authority to deal with a particular class of cases. *In Re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981). A judgment issued by a court without subject matter jurisdiction is void. *Id.* The plaintiff carries the burden of proving subject matter jurisdiction. *Bazemore v. Colorado State Lottery Div.*,

64 P.3d 876, 878 (Colo. App. 2002). Where a statute sets forth explicit requirements necessary to invoke the court's jurisdiction, the plaintiff must demonstrate that those requirements have been met. *See Adams County Dep't of Soc. Servs. v. Huynh*, 883P.2d 537 (Colo. App. 1994) (vacating judgment where statutory conference requirement had not been satisfied); *Trinity Broadcasting, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993) (remanding for determination of whether statutory notice requirement had been satisfied). In a motion to dismiss for lack of subject matter jurisdiction, a court is empowered to resolve factual disputes as to jurisdictional issues. *Trinity* at 924.

The State Administrative Procedure Act, C.R.S. § 24-4-101, *et seq.* ("APA"), sets forth an explicit prerequisite for invoking a court's jurisdiction, allowing courts to review only "final" agency action. C.R.S. §24-4-106(2). Final agency action under the APA represents the consummation of an agency's decision-making process. *MDC Holdings Inc. v. Town of Parker*, 223 P.3d 710, 721 (Colo. 2010) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)); *See also, Colorado Health Facilities Review Council v. District Court*, 689 P.2d 617, 621 (Colo. 1984) (explaining that the hallmarks of final agency action are either the "issuance of a general regulation" or "the determination of particular rights in adjudication"). Under the APA, a claim brought against an individual or entity who took no final agency action must fail for lack of subject matter jurisdiction. Mr. King took no final agency action in this case; therefore, Plaintiff's claims against Mr. King must be dismissed.

The Board is the sole entity vested with rulemaking authority under the Act. C.R.S. §34-32-108. Although the Board is organized as part of the Department of Natural Resources, the Board "is required to exercise its powers, duties, and functions, including rulemaking and the issuance of permits, independently of the [E]xecutive [D]irector." *Cold Springs Ranch, Inc. v. State of Colorado Dep't of Natural Resources*, 765 P.2d 1035, 1037 (Colo. App. 1988). Although Mr. King served as Executive

Director and sat on the Board at the time the New Rules were adopted, he had no legal ability to take final agency action, as an individual, regarding the New Rules.

The Board appointed Mr. King to serve as a hearing officer during the rulemaking process. However, the Board's appointment did not confer upon him any authority to make substantive decisions regarding the New Rules. As hearing officer, Mr. King's sole responsibility was to issue orders on procedural matters such as party status, scheduling, and requests for additional information (Mr. King's procedural orders are available online at <http://mining.state.co.us/Rulemaking.htm>). None of these orders represented the consummation of the Board's decision-making process regarding the New Rules. To the contrary, each of Mr. King's orders facilitated the next procedural step in the Board's decision-making process.¹ Although Mr. King assisted the Board as a procedural hearing officer during the rulemaking, he had no ability, as a hearing officer, to take final agency action regarding the New Rules.

As stated above, Mr. King served as a member of the Board during the rulemaking and adoption of the New Rules, but took no final agency action in his capacity as an individual Board member. Only the Board has rulemaking authority under the Act. Individual votes of the members of an administrative board do not constitute final agency actions; rather, it is the outcome or effect of those votes that is subject to judicial review. *See Maggard v. Department of Human Servs.*, 226 P.3d 1209, 1213 (Colo. App. 2009). Thus, the Board's adoption of the New Rules does not represent final agency action by each of its seven individual members, but as a Board as a whole. Although Mr. King was

¹ Furthermore, it should be noted that a suit for judicial review of final agency action must commence within thirty days after such agency action becomes effective. C.R.S. §24-4-106(4). Plaintiff filed its complaint on November 1, 2010 and has alleged no action by Mr. King that would fall within the statutory time limit for judicial review.

a member of the Board at the time that the New Rules were adopted, his individual vote did not constitute final agency action regarding the New Rules.

III. Conclusion

Plaintiff has the burden to prove that the Court has jurisdiction over Mr. King's actions in this case. Since Mr. King took no final agency action, the Court lacks jurisdiction. *See* C.R.S. §24-4-106. The Court has no jurisdiction to review Mr. King's actions as Executive Director as the Executive Director has no ability to take final agency action with respect to rulemaking by the Board. The Court has no jurisdiction to review Mr. King's actions as an individual member of the Board because an individual Board member cannot promulgate rules under the Act. Finally, the Court has no jurisdiction to review Mr. King's actions as hearing officer as each of Mr. King's orders merely facilitated the next procedural step in the Board's decision-making process. Accordingly, Mr. King, in his capacities as Executive Director, an individual Member of the Board, and as Hearing Officer, did not take any action that constitutes final agency action as defined in the APA. Therefore, the Court lacks jurisdiction over the claims against Mr. King.

WHEREFORE, Defendants respectfully request that the Court dismiss each of Plaintiff's claims for relief as they pertain to defendant Mike King and dismiss Mike King as a defendant in this case.

Dated this 8th day of December, 2010.

Respectfully submitted,

JOHN W. SUTHERS

Attorney General

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

/s/Jeff Fugate

JEFF FUGATE #37679

Assistant Attorney General

Resource Conservation Unit

Natural Resources and Environment Section

Attorney for Mined Land Reclamation Board

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within THE STATE OF COLORADO MINED LAND RECLAMATION BOARD MOTION TO DISMISS PLAINTIFF'S CLAIMS PERTAINING TO DEFENDANT MIKE KING upon all parties herein by LexisNexis File and Serve this 8th day of December, 2010 addressed as follows:

John D. Fognani

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Denver, Colorado 80203

Attorney for Powertech (USA) Inc.

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

/s/ Christine Batman