

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>Court Address: City &amp; County Building 1437 Bannock Street Denver, Colorado 80202</p> <p><b>Plaintiff:</b></p> <p>POWERTECH (USA) INC., A SOUTH DAKOTA CORPORATION</p> <p>v.</p> <p><b>Defendant:</b></p> <p>STATE OF COLORADO MINED LAND RECLAMATION BOARD AND MIKE KING, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES</p>	<p><b>EFILED Document</b> <b>CO Denver County District Court 2nd JD</b> <b>Filing Date: Mar 31 2011 9:51AM MDT</b> <b>Filing ID: 36782843</b> <b>Review Clerk: Nancy E Magdaleno</b></p> <hr/> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2010CV8615</p> <p>Ctrm.: 215</p>
<p><b>ORDER</b></p> <p><b>Re: State Defendants' Motion to Dismiss Plaintiff's Claims Against Defendant Mike King</b></p>	

**THIS MATTER** comes before me pursuant to Defendants' Motion to Dismiss Plaintiff's Claims Against Defendant Mike King (the Motion). Being sufficiently advised, I **GRANT** the Motion. I find and order as follows:

**FACTUAL AND PROCEDURAL BACKGROUND**

On November 1, 2010 Plaintiff, Powertech Inc., filed a complaint challenging the validity of rules promulgated by the Mined Land Reclamation Board ("Board"). The Board has authority to promulgate rules under the Mined Land Reclamation Act ("Act"), C.R.S. § 34-32-101, *et seq.* Plaintiff named as Defendants the Board and Mike King in his capacity as Executive Director of the Department of Natural Resources.

Defendants collectively filed a Motion to Dismiss claims against Defendant Mike King for lack of subject matter jurisdiction, pursuant to C.R.C.P. 12(b)(1). At the time the challenged rules were promulgated Defendant King was the Executive Director of the Department of Natural Resources, a Member and Secretary of the Board, and the Hearing Officer for the rulemaking procedure.

## STANDARD OF REVIEW

A plaintiff has the burden of demonstrating that the trial court has subject matter jurisdiction to hear the case. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). Where a statute contains explicit requirements in order to invoke the court's jurisdiction, the plaintiff must demonstrate those requirements are met. *See Adams County Dep't of Soc. Servs. v. Huynh*, 883 P.2d 573, 574 (Colo. App. 1994).

## ANALYSIS

Defendants argue that dismissal is appropriate pursuant to C.R.C.P. 12(b)(1) because Defendant King could not, and did not, take final agency action as required under C.R.S. § 24-4-106(2). Under C.R.S. § 24-4-106(2), courts may only review "final agency action." "A final decision marks the consummation of the agency's decision-making process and is one from which legal consequences flow." *MDC Holdings Inc. v. Town of Parker*, 223 P.3d 710, 721 (Colo. 2010) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

Plaintiff asserts that Defendant King received letters from state representatives which became part of the rulemaking record and that the regulations were altered to reflect the content of those letters. Plaintiff also asserts that Defendant King issued an order directing the Division of Reclamation, Mining and Safety to submit information regarding five new substantive issues. The Board adopted and integrated that information into the regulations. However, these actions do not constitute final agency action.

Plaintiff argues that final action by the agency vests the court with jurisdiction, then pursuant to C.R.S. § 24-4-106(4), the court has jurisdiction over claims against individual agency members. However, in order for the court to have jurisdiction over claims against Defendant King, he himself must have taken final agency action. Here, it is undisputed that the Board took final agency action by promulgating new regulations, but Plaintiff asserts no final agency action by Defendant King.

Plaintiff relies on definitions from the Federal Administrative Procedure Act ("FAPA") for support. Under FAPA, "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. However, the Colorado Administrative Procedure Act ("CAPA") controls in this proceeding. Because Plaintiffs do not allege that Defendant King, individually, took any final agency action, preliminary, procedural, or intermediate actions by Defendant King are not reviewable under the CAPA.

Accordingly, Defendants' Motion to Dismiss is **GRANTED**.

**SO ORDERED** this 31<sup>st</sup> day of March 2011.

BY THE COURT:

A handwritten signature in black ink, appearing to read "W. W. Hood III". The signature is written in a cursive style with a horizontal line extending to the right.

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William W. Hood III  
District Court Judge

cc: Attorney for Plaintiff  
Attorneys for Defendants