

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>Court Address: City & County Building 1437 Bannock Street Denver, Colorado 80202</p> <p>Plaintiff:</p> <p>POWERTECH (USA) INC., A SOUTH DAKOTA CORPORATION</p> <p>v.</p> <p>Defendant:</p> <p>STATE OF COLORADO MINED LAND RECLAMATION BOARD AND MIKE KING, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES</p>	<p>EFILED Document CO Denver County District Court 2nd JD Filing Date: Apr 26 2011 8:39AM MDT Filing ID: 37235591 Review Clerk: Nancy E Magdaleno</p> <hr/> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2010CV8615</p> <p>Ctrm.: 215</p>
<p>ORDER</p> <p>Re: Colorado Mined Land Reclamation Board's Motion to Dismiss Plaintiff's Second and Fourth Claims for Relief</p>	

THIS MATTER comes before me pursuant to Colorado Mined Land Reclamation Board's Motion to Dismiss Plaintiff's Second and Fourth Claims for Relief. Being sufficiently advised, I **GRANT** Defendant's Motion to Dismiss Plaintiff's Second and Fourth Claims. 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"). Plaintiff named as Defendants the Board and Mike King. Defendant Mike King was subsequently dismissed pursuant to C.R.C.P. 12(b)(1).

The Complaint included four claims: (1) failure to comply with rulemaking requirements of the Colorado Administrative Procedures Act, (2) violation of the separation of powers clause of the Colorado Constitution, (3) the MLRB's adoption of the regulations was unreasonable, arbitrary, capricious and otherwise contrary to law, and (4) declaratory judgment. The Board filed a motion to dismiss claims two and four. Plaintiff responded with respect to claim two.

STANDARD OF REVIEW

A motion to dismiss shall be granted for “failure to state a claim upon which relief can be granted.” C.R.C.P. 12(b)(5). In determining whether a claim is stated, the court must consider only those matters asserted in the complaint itself and must accept all averments of material fact in the complaint as true. *Public Service Co. of Colorado v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). Allegations in the complaint must be considered in the light most favorable to the plaintiff. *Id.* A complaint should not be dismissed, unless it appears beyond a doubt that a plaintiff can prove no set of facts that would entitle him to relief. *Id.* at 385-86; *see also Dunlap v. Colorado Springs Cablevision*, 829 P.2d 1286, 1292 (Colo. 1992).

ANALYSIS

A. Defendant’s Motion to Dismiss Claim Two: Violation of the Separation of Powers Clause of the Colorado Constitution

Defendant argues that Plaintiff failed to state a claim against the Board for a violation of the separation of powers clause of the Colorado Constitution. Under the Colorado Constitution, “no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others” COLO. CONST. art. III. The Board may only exercise powers which have been conferred upon it under the Colorado Mined Land Reclamation Act. *See Dee Enter. v. Indus. Claim Appeals Office of the State of Colo.*, 89 P.3d 430, 437 (Colo. App. 2003). Here, the Board was granted the power and authority to promulgate rules and regulations. C.R.S. § 34-32-108(1).

Plaintiff asserts that some state legislators sent letters to the Board regarding the rulemaking. Those letters were included in the rulemaking process and their contents adopted. Plaintiff argues that the state legislators were attempting to control how executive agencies implement legislation in violation of the separation of powers clause of the Colorado Constitution. Defendant moves to dismiss on the ground that Plaintiff’s allegations are directed at state legislators, who are not a party to this action. Further, Defendant argues that the actions of the legislators were not in violation of the separation of powers clause.

In the Complaint, Plaintiff did not allege that the Board exercised power belonging to the General Assembly. Plaintiff points only to actions of the state legislators and not actions of the Board. The state legislators are not a party to this action, thus allegations against the legislators are inappropriate in this action. The allegations in the Complaint are insufficient to state a claim against the Board. Therefore, Defendant’s Motion with respect to Claim Two is **GRANTED**.

B. Defendant’s Motion to Dismiss Claim Four: Declaratory Judgment

In Claim Four, Plaintiff seeks a declaratory judgment. Defendant moves to dismiss this claim arguing that Plaintiff has adequate remedies under the APA, thus declaratory judgment under C.R.C.P. 57 is not available. Plaintiff did not respond with respect to claim four.

“When the provisions of the Administrative Procedure Act (APA) provide a claimant with relief, the extraordinary provision[] of C.R.C.P. 57 . . . [is] not available.” *Purcell v. Colo. Div. of Gaming*, 919 P.2d 905, 907 (Colo. App. 1996). The APA allows for declaratory and injunctive relief. C.R.S. § 24-4-106(7). Because the APA affords Plaintiff the opportunity to receive declaratory and injunctive relief, a declaratory judgment under C.R.C.P. 57 would not be warranted in this case. Thus, Defendant’s Motion with respect to Claim Four is **GRANTED**.

Accordingly, Defendant’s Motion to Dismiss is **GRANTED**.

SO ORDERED this 26th day of April 2011.

BY THE COURT

A handwritten signature in black ink, appearing to read "W. W. Hood III", written over a horizontal line.

William W. Hood III
District Court Judge

cc: Attorney for Plaintiff
Attorneys for Defendants