Y DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Denver, CO 80202	
Plaintiff(s): XIUHTEZCATL MARTINEZ, et al., v. **Defendant(s):** STATE OF COLORADO, et al.	**▲COURT USE ONLY▲** Case Number: 11CV4377 Courtroom: 275

ORDER RE: DEFENDANTS' AND INTERVENOR'S MOTIONS TO DISMISS

THIS MATTER comes before the Court upon consideration of Defendants and Intervenor's Motions to Dismiss, filed July 29, 2011 (the "Motion"). The Court, having reviewed the Motions, Response, Replies, case file, and applicable legal authorities, finds, concludes and orders as follows:

LEGAL STANDARD

"When a court rules on a motion to dismiss for failure to state a claim, C.R.C.P. 12(b)(5) mandates that the court analyze the merits of the plaintiff's claims. The purpose of C.R.C.P. 12(b)(5) is to test the legal sufficiency of the complaint to determine whether the plaintiff has asserted a claim or claims upon which relief can be granted. In evaluating a motion to dismiss under C.R.C.P. 12(b)(5), the court must accept as true all averments of material fact and must view the allegations of the complaint in the light most favorable to the plaintiff. *Ashton Props., Ltd. v. Overton,* 107 P.3d 1014, 1018 (Colo.App.2004)." *Hemmann Management Services v. Mediacell, Inc.,* 176 P.3d 856, 858 (Colo.App. 2007).

"Under C.R.C.P. 12(b)(1), the plaintiff has the burden of proving jurisdiction, and the trial court is authorized to make appropriate factual findings. It 'need not treat the facts alleged

by the non-moving party as true as it would under C.R.C.P. 12(b)(5).' Thus, whereas Rule 12(b)(5) constrains the court by requiring it to take the plaintiff's allegations as true and draw all inferences in the plaintiff's favor, Rule 12(b)(1) permits the court 'to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (citations omitted).

FACTUAL BACKGROUND

Plaintiffs are several Colorado citizens and an organization, WildEarth Guardians, concerned about the state of the atmosphere and impending global warming on Earth. They have sued the State of Colorado, the Governor, and several State Departments because it is their belief that the Defendants have failed to adequately protect the atmosphere by regulating greenhouse gas emissions. Plaintiffs ask this Court to direct the Defendants to "significantly reduce Colorado's greenhouse gas emissions based upon the best available science." Mountain States Legal Foundation (MSLF) was permitted to intervene on August 18, 2011, in order to present its view that no limits on greenhouse gas emissions are necessary. The Defendants and MSLF have moved to dismiss this case.

LEGAL ANALYSIS

The Court must hold that Plaintiffs have not stated a claim under Colorado law.

I. This claim is not subject to the Colorado Governmental Immunity Act.

Under the Colorado Governmental Immunity Act (CGIA), public entities are immune from liability for all claims that could lie in tort, regardless of whether the claimant calls the action a tort, and regardless of the form of relief. C.R.S. § 24-10-105. The State Defendants argue that this action is really an action in negligence or something related to negligence, because Plaintiffs state that Defendants had a duty to protect the atmosphere, that they have

breached that duty, and that this caused Plaintiffs damages. Plaintiffs argue that they are not seeking compensatory damages, and that they simply want a declaration of rights.

Whether a claim lies in tort is a vague concept. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1172 (Colo. 2000). However, "a central legislative purpose of the CGIA is to limit the potential liability of public entities for compensatory money damages in tort." *Id*. Therefore, the CGIA grants immunity "from actions seeking compensatory damages for personal injuries." *Id*. at 1173. "[C]laims for noncompensatory relief aimed at redressing general harms do not lie in tort." *Skyland Metropolitan Dist. v. Mountain West Enterprise, LLC*, 184 P.3d 106, 131 (Colo.App. 2007) (citing *Conners*).

Because Plaintiffs are not seeking monetary damages, but simply a declaration that the Defendants are breaching their fiduciary trust duties to the public, this action is addressed at general harms and is not a tort action. Unlike a tort claim, no specific, one-time event or series of events underlie this claim. Plaintiffs seek to redress failures to act by the State. The CGIA does not apply, and this Court has jurisdiction to hear the claim.

II. Plaintiffs have failed to establish standing under the Declaratory Judgments Act.

To have standing to bring a declaratory judgment action, a plaintiff "must assert a legal basis on which a claim for relief can be grounded and must allege an injury in fact to a legally protected or cognizable interest." *Ainsworth v. Colorado Ltd. Gaming Control Com'n*, 45 P.3d 768, 772 (Colo.App. 2001), citing *Farmers Insurance Exchange v. District Court*, 862 P.2d 944 (Colo.1993). Here, the problem lies in the fact that Plaintiffs are unable to identify a legally protected interest.

A legally protected interest is "an interest emanating from a constitutional, statutory, or judicially created rule of law that entitles plaintiff to some form of judicial relief." *Dill v. Board of County Com'rs of Lincoln County*, 928 P.2d 809, 815 (Colo.App. 1996). Plaintiffs insist that the Public Trust Doctrine under which they sue was judicially created centuries ago, and that even if the Colorado courts have not expressly recognized this fact, the statutes and constitution of the State have nevertheless upheld this doctrine. This Court can find no such doctrine in existence in Colorado, either in the statutes and constitution, nor in judicial pronouncements.

First, Plaintiffs point to the general welfare clause of the Colorado Constitution. This clause says nothing about protecting the environment, as it is general in nature and does not seek to impose any particular obligation on the State. It cannot form the basis of the Public Trust Doctrine in Colorado.

Next, Plaintiffs point to C.R.S. §§ 33-10-101(1) and 33-33-102. These statutes deal with protection of recreational areas, wildlife, and certain lands and waters. They say nothing about the atmosphere. Even if the phrases "recreation areas" and "wildlife and their environment" were to be interpreted to include the atmosphere, these purpose statements do not create a public trust in the environment because they are followed by comprehensive schemes setting out exactly how the State intends to offer that protection; they do not then generally provide a cause of action for citizens who feel the state is not doing enough to protect the environment.

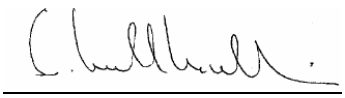
Finally, the Public Trust Doctrine has never been recognized by the Colorado courts. Plaintiffs have failed to point to a single case. Even if this Court was to apply ancient law and assume that it carries through to Colorado today, Plaintiffs have been unable to point to any authority in which the government was required to protect the atmosphere. This Court is not inclined to create new law. Therefore, Plaintiffs have failed to allege an injury to a legally protected interest.

CONCLUSION

For reasons discussed above, the Motion is **GRANTED**. This case is dismissed with prejudice.

SO ORDERED this 7th day of November, 2011.

BY THE COURT:



R. Michael Mullins
District Court Judge