

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-01469-CMA-KLM

DAVID E. WILKENSON,
Plaintiff,

v.

STATE OF COLORADO, et al. and
MESA COUNTY, COLORADO, et al.,
Defendants.

STATE OF COLORADO'S RESPONSE TO PLAINTIFF'S MOTION FOR
CLARIFICATION OF FINAL JUDGMENT AND OTHER RELIEF

Defendant State of Colorado, by and through its undersigned attorney, for its response to Plaintiffs "Verified Motions 1) for Clarification of the Court's 1/10/14 Final Judgment; 2) for Finding of Specific Facts; and 3) for Court to Refer the Defendants' Crimes to the Office of the United States Attorney for Colorado for Investigation" (Doc. #33), adopts and incorporates the Response to such motion filed by Defendant Mesa County (Doc. #35) and in addition states the following:

1. This Court's "Order Adopting and Affirming December 14, 2013 Recommendation Of United States Magistrate Judge" of January 10, 2014, Doc. #30, granted the State of Colorado's motion to dismiss for lack of subject matter jurisdiction. Doc. #30 at p.3. Mr. Wilkenson's present motion nevertheless requests that this Court make findings of fact bearing on the merits of his claims pursuant to Fed.R.Civ.P. 52.

2. However, subject matter jurisdiction is a threshold question of law. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002). "Without jurisdiction the court cannot

proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). This Court's Order granting the State of Colorado's motion to dismiss under the Eleventh Amendment to the United States Constitution exactly complied with this function of the Court on a finding that it lacked jurisdiction to hear Mr. Wilkenson's claims against the State.

3. Moreover, Fed.R.Civ.P. 52 applies only "[i]n an action tried on the facts." Fed.R.Civ.P. 52(a)(1). The rule expressly excepts rulings on motions under Rule 12 or 56 from any requirement to state findings or conclusions. Fed.R.Civ.P. 52(a)(3). Because this Court ruled on Defendants' motions under Rule 12, no findings or conclusions under Rule 52 were called for.

WHEREFORE, Defendant State of Colorado requests that Mr. Wilkenson's motion (Doc. #33) be denied.

RESPECTFULLY SUBMITTED this 13th day of February 2014.

JOHN W. SUTHERS
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s/ Friedrich C. Haines

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CERTIFICATE OF SERVICE

I certify that I served the foregoing State Of Colorado's Response To Plaintiff's Motion For Clarification Of Final Judgment And Other Relief upon all parties herein by e-filing with the CM/ECF system maintained by the court or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 13th day of February 2014, addressed as follows:

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s/ Friedrich C. Haines
