

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 1

SAMANTHA FARB, by and through)
Her next friends and parents JOANN)
FARB and JOE FARB)
)
Plaintiff,)
v.)
)
STATE OF KANSAS;)
SAM BROWNBACK)
In his official capacity as Governor of)
The State of Kansas;)
KANSAS DEPARTMENT OF)
HEALTH AND ENVIRONMENT;)
and ROBERT MOSER, M.D.,)
In his official capacity as the)
Secretary of the Kansas Department)
Of Health and Environment)
)
Defendants.)
_____)

Case No. 12-C-1133

FILED BY CLERK
KS DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS
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MEMORANDUM DECISION AND ORDER

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiff's claim.

After careful consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

Plaintiff Samantha Farb is a minor who asserts that global warming effects have caused extreme heat temperatures in recent years that have impeded her ability to enjoy the outdoors and obtain produce necessary to her vegan diet, as well as increased her concern about extreme weather. Plaintiff alleges that pursuant to the common law Public Trust Doctrine, Defendants have a duty to protect and conserve the public trust in Kansas for current and future Kansans.

Plaintiff alleges that Defendants' failure to issue regulations or a plan to reduce CO2 emissions is a breach of their duty to protect public trust resources.

Plaintiff petitions the Court for a judgment declaring that the State of Kansas holds the atmosphere and all waters within the hydrologic cycle in trust for Kansans, the Defendants have a fiduciary obligation to utilize best-available science to protect the atmosphere and all other public trust resources from the impacts of climate change and human-caused greenhouse gas emissions, and that Defendants have violated their fiduciary obligation to promote the public's interest in public trust resources. Plaintiff also requests an order in mandamus and a permanent injunction directing Defendants to develop a comprehensive plan and issue regulations that promote the public's interest in public trust resources, including at least 6% annual carbon dioxide reductions, which shall be demonstrated by an annual accounting of emissions in Kansas.

Defendants filed a Motion to Dismiss, citing lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. Taking Plaintiff's allegations as true, the Court will consider Defendants' Motion to Dismiss.

STANDARD OF REVIEW

K.S.A. 60-212(b)(1) allows a party to make a Motion to Dismiss for lack of subject-matter jurisdiction. When considering a motion to dismiss, the Court must accept the well-pleaded facts as alleged by the plaintiff and draw all reasonable inferences in a light most favorable to the plaintiff. *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140, 143 (2001). "Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim." *Halley*, 271 Kan. at 656.

DISCUSSION AND CONCLUSIONS OF LAW

Defendants claim, among other reasons, that Plaintiff's claim should be dismissed on the ground that this Court lacks subject-matter jurisdiction because the Kansas Judicial Review Act (KJRA) requires a plaintiff to exhaust administrative remedies before bringing a claim. Plaintiff claims that the KJRA and its requirements are not triggered because Plaintiff is not challenging a specific agency action or agency policy. Upon the facts, Defendants are correct. A litigant is required to exhaust administrative remedies prior to seeking redress in Kansas courts: "It is well settled in this state that when an issue requires interpretation of a statute administered by an agency or *when an agency could grant relief on some ground, exhaustion of administrative remedies is required.*" *Midwest Crane and Rigging, Inc. v. Kan. Corp. Comm'n*, 38 Kan. App. 2d 269, Syl. ¶ 1, 163 P.3d 1244 (2007) (emphasis added). It is clear that not only did Plaintiff not exhaust her administrative remedies, but she did not even initiate them.

Notwithstanding the above, the issue is not fully settled. The Court must consider whether Plaintiff may seek relief through a state common law claim pursuant to the Public Trust Doctrine without first exhausting administrative remedies. If Plaintiff was required to exhaust administrative remedies before seeking relief from agency action or policy, even before bringing a state law claim that purports not to seek judicial review of agency action or policy, the Court does not have subject-matter jurisdiction and the case must be dismissed. Whether Plaintiff's claim must be dismissed depends upon whether KJRA procedural requirements, specifically K.S.A. 77-612, apply to claims not directly challenging agency action or policy. K.S.A. 77-612 states that: "A person may file a petition for judicial review under this act *only after exhausting all administrative remedies* available within the agency whose action is being challenged. K.S.A. 77-612.

American Electric Power Company, Inc. v. Connecticut involved a federal common law nuisance claim against power plant owners for contributing to global warming. 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011). The United States Supreme Court reversed the Second Circuit's holding that the federal common law is not displaced until the EPA set emission standards for the defendants' plants: "The Clean Air Act and the EPA action the Act authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Am. Elec. Power Co., Inc.*, 131 S. Ct. at Syl. ¶ 5. The Court stated that the "critical point" was that Congress had delegated the regulation of carbon dioxide emissions to the EPA, and such delegation displaces federal common law. *Am. Elec. Power Co., Inc.*, 131 S. Ct. at 2538. The Court stressed that the Clean Air Act (CAA) "provides for private enforcement," and went on to state that "[t]he Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. *We see no room for a parallel track.*" *Am. Elec. Power Co., Inc.*, 131 S. Ct. at 2538 (emphasis added). The Court explained that there was good reason for allocating regulation of greenhouse gas emissions to the EPA because an "expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Am. Elec. Power Co., Inc.*, 131 S. Ct. at 2539.

Like the CAA, the Kansas Air Quality Act (KAQA) is a delegation from the Kansas Legislature to the KDHE for the regulation of greenhouse gas emissions, and it provides avenues for enforcement. *See* K.S.A. 2011 Supp. 65-3001. Here, the Plaintiff has petitioned the Court for relief without ever attempting to seek that relief from the KDHE. Plaintiff never requested rulemaking action. The United States Supreme Court wisely explained that courts are not equipped to regulate greenhouse gas emissions, and such responsibility lies with the expert

agency. *Am. Elec. Power Co., Inc.*, 131 S. Ct. at 2539. Thus, this court also “see[s] no room for a parallel track.” *Am. Elec. Power Co., Inc.*, 131 S. Ct. at 2538. Plaintiff’s common law Public Trust claim is displaced by the KAQA.

Because Plaintiff cannot obtain judicial review of agency action and/or policy through a common law claim, she must meet KJRA requirements. If Plaintiff is dissatisfied with agency action and/or policy, she must first exhaust all administrative remedies in accordance with K.S.A. 77-612, and then she may seek judicial review provided all other procedural requirements are satisfied. The Kansas Supreme Court has advised that “[a] party aggrieved by an administrative ruling is not free to pick and choose a procedure in an action in the district court in order to avoid the necessity of pursuing his remedy through administrative channels.” *State ex rel. Smith v. Miller*, 239 Kan 187, 190, 718 P.2d 1298 (1986).

Because Plaintiff failed to exhaust all administrative remedies before seeking judicial review of agency action and/or policy, and her state common law claim is displaced by KAQA, this Court is without subject-matter jurisdiction to hear this case. The Court is unable to reach the merits of Plaintiff’s arguments pertaining to Defendants’ alleged obligations as public trustees.


Plaintiff has since filed a Motion for Oral Argument on Defendants’ Motion to Dismiss. Because the Court finds it is without subject-matter jurisdiction to adjudicate the case and must dismiss, Plaintiff’s Motion for Oral Argument is DENIED.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Plaintiff's claim is GRANTED. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

IT IS SO ORDERED.

Dated this 4 day of June, 2013.



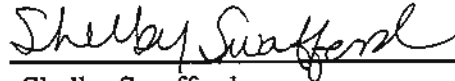
Hon. Rebecca W. Crotty
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this 4th day of June, 2013, to the following:

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