DISTRICT COURT, TELLER COUNTY, COLORADO Court address: **P.O. Box 997** **Cripple Creek, CO 80813** Phone Number: **(719) 689-2574**	FILED IN THE COMBINED COURTS OF TELLER COUNTY, COLORADO APR 07 2020 SHEILA GRIFFIN CLERK OF COURT
Plaintiffs: BERCK NASH, et al. **vs.** **Defendant: JASON MIKESELL, in his official capacity as Sheriff of Teller County, Colorado**	DATE FILED: April 7, 2020 10:45 AM CASE NUMBER: 2019CV30051 **Court Use Only** Case Number: **2019CV30051** Division **11**

ORDER

This matter comes before the court on a C.R.C.P. 12(b) Motion to Dismiss filed by the Defendant. I have reviewed the file, statement of counsel at the motion's hearing, evidence and find and order as follows:

BACKGROUND

Plaintiffs are taxpaying residents of Teller County. They filed this lawsuit against Jason Mikesell, as Sheriff of Teller County, Colorado. The Sheriff signed an agreement with Immigration and Customs Enforcement ("ICE") to cooperate with the federal government's enforcement of the immigration laws of the United States in Teller County. Plaintiffs seek a declaratory judgment and an injunction to stop the Sheriff's alleged program of illegal arrests for suspected immigration violations and his expenditures of taxpayer funds for an unconstitutional purpose. The Sheriff moves for dismissal under C.R.C.P. 12(b) for three reasons:

(1) under Rule 12(b)(1) because Plaintiffs lack standing to bring this lawsuit; (2) under Rule 12(b)(1) because federal law preempts state law in the field of immigration and a state court has no jurisdiction to rule on immigration matters which are exclusively federal in nature; and (3) under Rule 12(b)(5) because Sheriff Mikesell has authority under state and federal law to enter into a 287(g) agreement with ("ICE").

THE AGREEMENT

The agreement at issue is called a "287(g) agreement" based on the Immigration and Nationality Act ("INA") that authorizes this formal cooperative agreement between ICE and local law enforcement. The INA authorizes the Department of Homeland Security ("DHS"), through ICE, to carry out federal immigration law. The INA also authorizes DHS to enter into formal cooperative agreements with state and local law enforcement, essentially deputizing them to carry out federal immigration law. Under these 287(g) agreements, state and local authorities, under the supervision of the Secretary, are authorized to perform specific immigration enforcement functions such as investigating, apprehending, and detaining aliens.

The Teller County 287(g) Agreement was signed by Sheriff Mikesell on December 19, 2018 and countersigned by ICE on January 6, 2019. In May 2019, the 287(g)

Agreement was extended by mutual agreement through June 30, 2020. It is the only 287 (g) program in Colorado. The two selected deputies will attend out of state training at taxpayer expense in South Carolina for four weeks.

Once ICE trains and certifies the Teller County Sheriff's deputies to function as official immigration officers, they will be authorized to conduct immigration enforcement activities under the directions of ICE supervisory officers. The deputies will be authorized to perform immigration officer functions only when working under the supervision of ICE. They act under the color of federal authority, are treated as federal employees, and enjoy the same defenses and immunities from personal liability for their in-scope acts that are available to ICE officers.

Sheriff Mikesell's 287(g) Agreement with ICE is a Jail Enforcement Officer model, which is designed to identify and process aliens within the Teller County Jail who are subject to removal from the United States pursuant to ICE's civil immigration enforcement priorities. Under this Jail Enforcement Officer model, the certified deputies are delegated immigration enforcement powers, including the following:

- to interrogate any person detained in the Teller County jail who the officer believes to be an alien about his or her right to be or remain in the United States and to process for immigration violations any removable alien who has been arrested for violating a Federal, State, or local offense;
- to serve warrant of arrest for migration violations not signed by a Judge.
- to administer oaths, take and consider evidence and to complete required alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as the preparation of affidavits and the taking of sworn statements of ICE supervisory review:
- to prepare charging documents for the signature of an ICE officer;
- to issue immigration detainers; and
- to detain and transport arrested aliens subject to removal to ICE-approved detention facilities.

In addition, upon request by ICE, TCSO will provide statistical or aggregated arrest data, as well as "specific tracking data and/or any information, documents, or evidence related to the circumstances of a particular arrest...."

The 287(g) agreement also requires TCSO to meet with the ICE Field Office Director "at least annually, and as needed, to review and assess the immigration enforcement activities conducted by the participating TCSO personnel, and to ensure compliance with the terms of th[e] MOA." The agreement also requires TCSO to engage in Steering Committee meetings and other community outreach efforts.

THE TELLER COUNTY JAIL AND JAIL ENFORCEMENT MODEL

This case is unusual in that the issue of taxpayer standing is at issue as well as whether taxpayer funds are expended at the jail by deputies when they are performing their federal duties due to the unique status of the Teller County Jail. Plaintiffs assert Teller County taxpayer dollars are expended directly or indirectly at the jail. Defendants assert that no taxpayer dollars are utilized for 287(g) program or at the jail.

In 1997, the Teller County Board of County Commissioners incorporated the Teller County Facilities Corporation as an enterprise to operate the Teller County Jail. The Articles of Incorporation were filed with the Colorado Secretary of State on May 22, 1997. The Teller County Jail exists and operates as an enterprise (a government owned business) as that term is used in Article X, Sec. 20 of the Colorado Constitution (TABOR) and C.R.S. §24-77-102. Because the Teller County Facilities Corporation operates and funds the Jail as an enterprise, for County budgetary purposes, it is referred to as the Jail Enterprise Fund.

The Jail Enterprise Fund is a self-supporting government enterprise fund that sells services to various entities for a fee. The majority of its revenue comes from charging fees for housing inmates. These fees are charged to Teller County for county inmates housed at the jail and to outside entities for housing their inmates. The outside entities for whom the Jail regularly houses inmates include the United States Marshal Service, Immigration and Customs Enforcement (ICE), the Colorado Department of Corrections (DOC), Boulder County, Park County, Woodland Park, Schriever Air Force Base, the United States Air Force Academy, Peterson Air Force Base, and Prisoner Transport Services of America, LLC (PTS).

The Jail Enterprise Fund also receives minimal amounts from the State Criminal Alien Assistance Program, interest and miscellaneous revenue. The Jail Enterprise Fund revenues are received in cash, check, ACH and by journal entry transfer from the Teller County general fund for the Teller County inmate housing payments.

Because the Jail operates as an enterprise, the funding for the Jail is different from the funding for the Teller County Sheriff's Office. For budgetary purposes, the Sheriff's Office is a department of Teller County and general fund revenues are used to pay the expenses of the Sheriff's Office. General fund revenues used for the Sheriff's Office are primarily in the form of tax revenues, funding from the local E911 authority, and various fees and fines. The Sheriff's Office also receives revenue from grants and public safety service contracts with other government entities.

I gave considerable weight to the affidavit of Cheryl Decker, Teller County Administrator. She stated as an enterprise, the Teller County Jail does not receive any revenue from Teller County taxpayers and no taxpayer money is used to pay for the salaries, benefits and training expenses for jail deputies. Attached to the affidavit are Exhibits B-1 and B-2 which are the Teller County Treasurer's Semi-Annual Financial Reports from 2014 through June 20, 2019. Each report shows zero dollars from tax revenues allocated from taxpayer revenues to the Jail Enterprise Fund.

I agree and adopt Defendant's argument that fees charged for housing inmates are not taxes because it is a charge imposed for the purpose of defraying the cost of a government service of holding people in jail. A fee is distinct from a tax in that, 'unlike a tax, a special fee is not designed to raise revenues to defray the general expense of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service. *Bloom v. City of Fort Collins, 784 P.2d 304.*

I also considered the affidavit of Mr. Jahanian and 2019 Jail Enterprise fund Budget. Plaintiff's characterization of the Jail Enterprise Fund as a paper entity, mere bookkeeping technique and magic wand are not supported by the evidence and ignore

a twenty-two year history of Teller County government which predate Sheriff Mikesell and the 287 (g) Agreement.

APPLICABLE LAW REGARDING STANDING

In this case Plaintiffs claim taxpayer standing only. The proper inquiry on standing is whether the Plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions. If the Plaintiff has not, standing does not exist and the case must be dismissed. If he does, standing exists, and the case must proceed to judgment on the merits. Wimberly v. Ettenberg, 570 P.2d 535, (Colo. 1977).

In Hotaling v. Hickenlooper, 275 P.3d 723, (Colo. App 2011) plaintiff a Colorado taxpayer sought to enjoin the Colorado Department of Public Health from entering into contract for family planning services. The Colorado Constitution prohibits public funds from being used, directly or indirectly, to pay for abortions. The district court dismissed the case for lack of taxpayer standing on a C.R.C.P. 12 (b)(1) analysis and as a result did not address a C.R.C.P.12 (b)(5) for failure to state a claim. The Court of Appeals discussed prior cases that permitted taxpayer standing but concluded that because only federal funds were exclusively used the Plaintiff had not suffered an injury-in-fact and therefore did not have standing to challenge the contracts at issue and uphold the trial court decision.

In Broatman v. East Lake Creek Ranch 31 P.3d 886 (Colo 2001), the Colorado Supreme Court addressed a case with similar issues to this case. In Broatman, an adjacent landowner sued the State Board of Land Commissioner and land purchaser, seeking the enjoin an agreement that would allow the purchaser to gain title to school land managed by the Board. The Supreme Court held that the adjacent landowner lacked standing to bring the lawsuit as a taxpayer and standing as a beneficiary of federal trust over school's lands created by the Colorado Enabling Act. The Court concluded that income generated from the Land Boards Management of school lands is distinct from and in addition to income generated through taxation for schools. And no effect on the state's funding of schools through the states taxing power and therefore no affect on the Plaintiff taxpayer.

In Reeves-Toney v. School District No. 1 in City and County of Denver, 442 P. 3d 81 a taxpayer brought action for injunctive relief against the school district challenging the constitutionally of a state statute requiring hiring principals' consent to teacher assignments. The Supreme Court disagreed with the trial court's reasoning that teachers' salaries paid by the school district provide a sufficient nexus to confer taxpayer standing. The court reasoned that taxpayer standing does not flow from every allegedly unlawful government action that has a cost. If it did, taxpayers would have standing to challenge virtually every government action with which they disagreed. The Supreme Court concluded that the plaintiff had failed to demonstrate a clear nexus between her status as a taxpayer and the challenged government action and directed the trial court to dismiss the case and did not consider her claim of whether the challenged statute was unconstitutional.

Plaintiff asserts the Sheriff may use taxpayer money to pay for the costs of local transportation cabling and power upgrades at the jail, administration supplies and for managerial time associated with management of the 287 (g) Agreement. The Colorado

Supreme Court addressed a similar issue in Hickenlooper v. Freedom from Religion Found., 338 P.3d 1002 (Colo. 2014). In that case, a plaintiff brought suit against the Governor seeking declaratory and injunctive relief based upon a challenge to the constitutionality of the Governor's Office proclamation of the Colorado Day of Prayer. The court found the use of public funds to cover incidental overhead cost does not by itself constitute an injury sufficient to establish taxpayer standing and the result was the trial courts action dismissing the case for lack of standing was upheld.

Plaintiff asserts that the court should permit limited discovery and conduct a trinity hearing in regard to the standing issue. Trinity Broadcasting of Denver v. The City of Westminster 848 P.2d 916. I find there are no disputed factual issues that require discovery or a hearing.

STANDARD OF REVIEW UNDER C.R.C.P. 12 (b)(1)

a. Under Rule 12(b)(1). Issues concerning subject-matter jurisdiction may be raised at any time. *Sanchez v. State,* 730 P.2d 328, 331 (Colo. 1986). Under Rule 12 (b)(1), Plaintiffs have the burden to prove this Court has subject matter jurisdiction. *Lee v. Banner Health,* 214 P.3d 589, 594 (Colo. App. 2009). Further, this Court "may consider any competent evidence pertaining to a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction without converting the motion to a summary judgment motion." *Id.* at 593 (citing Trinity Broad of Denver v. City of Westminster, 848 P. 2d 916, 924 (Colo. 1993)). The Court "need not treat the facts alleged by the non-moving part as true as it would under C.R.C.P. 12(b)(5)." City of Lakewood v. Brace, 919 P.2d 231 (Colo. 1996). Accordingly, this Court may consider the materials submitted by Sheriff Mikesell pursuant to Rule 12(b)(1) without converting it to a motion for summary judgment.

CONCLUSION

I conclude base upon the above that the Plaintiffs do not have taxpayer standing. They have not suffered an injury in fact to a legally protected interest.

The 287 (g) Agreement is operated out of the Teller County Jail Enterprise Fund and not Teller County tax dollars. The jail is funded by fees and not by taxpayer dollars. To the extent that any incidental expenses of the program are funded by taxpayers they are insignificant and do not constitute as a injury to confer taxpayer standing.

Based upon the above I am granting the Motion to Dismiss 12(b)(1) for lack of standing. Based upon this ruling I decline to rule on the remaining claims.

SO ORDERED this 7th day of April, 2020

BY THE COURT:

District Court Judge