

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-2321-JLK-KMT
COMMON CAUSE OF COLORADO, on behalf of itself and its members;
MI FAMILIA VOTA EDUCATION FUND; and
SERVICE EMPLOYEES INTERNATIONAL UNION, on behalf of itself and its members,

Plaintiffs,

v.

BERNIE BUESCHER, in his official capacity as Secretary of State for the State of Colorado,

Defendant.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR STAY

Defendant Bernie Buescher, Colorado Secretary of State, by and through undersigned, hereby responds to Plaintiffs' Motion to Stay proceedings with regard to Claims II, III and IV. For the following reasons, the Defendant requests that the Court deny the Motion to Stay.

Courts have inherent power to stay proceedings for "economy of time and effort for itself, for counsel and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). In reviewing a request for stay, the court should consider among, other things, whether, absent a stay, the requesting party will suffer irreparable harm; whether a stay will cause substantial harm to the other parties to the proceeding; and the public interests at stake. *United Steelworkers of America v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1227 (10th Cir. 2003). "When applying for a stay, a party must demonstrate 'a clear case of hardship or inequity' if 'even a fair possibility exists that the stay would damage another party.'" *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009) (quoting *Ben Ezra, Weinstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 987 (10th Cir. 2000)).

First, Plaintiffs will not suffer any irreparable harm. Plaintiffs acknowledge that the Secretary's rules enacted on December 8, 2009 resolve the substance of Claims II and III. They further acknowledge that the proposed rules, which are set for hearing in February 2, 2010, will, if promulgated, will resolve Claim IV. The Secretary maintains that Colorado's laws, policies and procedures, even prior to the enactment of the rules, were consistent with federal law. In either circumstance, Plaintiffs will not suffer harm if the parties continue to negotiate while all claims are pending before this court.

Second, the Secretary is responsible for implementing federal election law. Colo. Rev. Stat. § 1-1-107(1)(d) & (e) (2009). Consistent with these duties, the Secretary must supervise the conduct of federal elections in this state. He conducts training programs for county employees to provide information about election laws and processes. A primary and general election will be held in 2010 for federal offices in Colorado. The resolution of this case may affect processes related to these upcoming elections. Key election deadlines are imminent: the last day to register to vote in the caucuses is February 16, 2010, Colo. Rev. Stat. § § 1-3-101(1)(persons must register to vote no later than twenty-nine days before the caucus); precinct caucuses will be held on March 17, 2010, Colo. Rev. Stat. § 1-3-102(1)(a)(1)(2009); and county assemblies will be held between March 26, 2010 and April 15, 2010, Colo. Rev. Stat. § 1-4-602(1)(a)(1) (2009). The Secretary would like to have a decision on the first claim as close as possible to February 16th so that there is sufficient time to implement any new or changed processes at the county level. In any case, the Secretary would like as much time as possible to implement any changes that the court may order.

Third, it is in the public's interest to have a decision as soon as possible. Eligible electors, political parties and county clerks have a strong interest in a timely final resolution of this dispute.

Plaintiffs correctly note that the parties have stated their willingness to negotiate in good faith. The parties have worked cooperatively on most matters throughout the pendency of this case. However, the Secretary does not share Plaintiffs' confidence that a timely settlement can be reached. The difference of opinion stems from the legal implications of the newly-enacted and proposed rules. Plaintiffs ask this court to stay resolution of the Secretary's Motion for Summary Judgment on Claims II, III, and IV so that the parties may continue to negotiate (1) the nature of any declaratory or injunctive relief; (2) the extent of any remedial relief; and (3) the extent to which attorneys' fees and costs should be awarded to Plaintiffs as prevailing parties. The Secretary has argued that Colorado law and practice prior to the implementation of the rules did not contravene federal law. However, in Plaintiffs' view, the enacted rules alter (or, in the case of the proposed rules, will alter) Colorado's practices and bring Colorado in compliance with federal law. Accepting Plaintiffs' analysis, the claims are moot, and Plaintiffs are not entitled to any relief or to attorneys' fees. *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 605, 606 (2001); *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226, 1230, 1231 (10th Cir. 2008).

In addition, Plaintiffs seek an open-ended stay of Claims II, III, and IV. An open-ended stay may be counterproductive to negotiations. Deadlines tend to focus parties' attention. The last brief is due on February 2, 2010. The Secretary will conduct a rulemaking hearing on February 2, 2010. It is likely that the rules will be enacted (in some form) shortly thereafter.

The deadlines previously approved by this Court are not unduly compressed. The current schedule allows sufficient opportunity to submit briefs and simultaneously to negotiate a possible settlement.

Plaintiffs' request for an open-ended stay on Claims II, III, and IV is inconsistent with this court's stated intention to avoid piecemeal litigation. It will also likely postpone disposition of the case until after the registration deadline for participating in caucuses. Although the parties may suffer the inconvenience of briefing the case, the public's interest in a speedy resolution of this case must take precedence.

Plaintiffs have not demonstrated any hardship or inequity justifying an open-ended stay of Claims II, III, and IV. Indeed, Plaintiffs' own correspondence appears to acknowledge that these claims have been rendered moot. As such, there is no basis for Plaintiffs to claim prevailing party status or attorneys' fees on these claims. *Biodiversity Conservation Alliance*, 519 F.3d at 1230-31. Staying the litigation on these claims to negotiate declaratory or injunctive relief or attorneys' fees for Plaintiffs would serve no useful purpose under the circumstances.

The public interest and litigation efficiencies dictate the retention of the existing briefing schedule. The parties can negotiate as necessary while complying with the schedule. For these reasons the Secretary respectfully requests that the court deny Plaintiffs' Motion for Stay.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY by my signature below that on the 15th day of December, 2009, I electronically filed the foregoing ***DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR STAY*** with the Clerk of Court using the CM/ECF system, which will send the notification of such filing to the e-mail addresses listed below. Furthermore, I certify that on this same date, I e-mailed a true and accurate electronic copy of this same document to each of the persons and e-mail addresses listed below.

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