DISTRICT COURT, LARIMER COUNTY, COLORADO 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521	DATE FILED: May 16, 2014 5:16 PM FILING ID: ADA71BE0A6BF8 CASE NUMBER: 2013CV31385
Plaintiff: COLORADO OIL & GAS ASSOCIATION v. **Defendant:** CITY OF FORT COLLINS, COLORADO	▲ **COURT USE ONLY** ▲
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RESPONSE IN OPPOSITION TO MEASURE PROPONENTS' MOTION TO STAY PROCEEDINGS

Plaintiff Colorado Oil & Gas Association ("COGA"), by and through counsel, Brownstein Hyatt Farber Schreck, LLP, respectfully submits this response in opposition to the Motion to Stay Proceedings (the "Motion") filed by Citizens for a Healthy Fort Collins, the Sierra Club, and Earthworks (jointly, "Applicants").

INTRODUCTION

To support their requested stay, Applicants seek to reargue issues already resolved by the Court. In the March 27, 2014 Order Denying Motion to Intervene (the "Order"), the Court found that the sole issue in this litigation is whether Ballot Measure 2A (the "Ballot Measure") is preempted by state law, and that "[p]reemption is a legal issues that is largely defined by existing law." Order at 2. The Court rejected Applicants' attempt to inject extrinsic factual issues regarding hydraulic fracturing into the case, holding that "[t]he intervenors have failed to show how their Intervention will help advance the case or assist the Court further in making the Court's determinations." Order at 3.

Notwithstanding the Court's Order, Applicants seek to justify a stay of this litigation pending resolution of their appeal by arguing the need for "factual and descriptive richness" of the alleged impact of hydraulic fracturing on health, safety and property values — *exactly* the same factual arguments the Court has already determined are irrelevant to this case.

Applicants desire to present evidence on these matters did not support their intervention and do not justify a stay. COGA's preemption claim presents a straightforward issue of law — whether Fort Collins' five-year ban on hydraulic fracturing is preempted by the Colorado Oil and Gas Act and the Colorado Oil and Gas Conservation Commission's ("COGCC") extensive oil and gas regulations. Granting a stay would harm COGA and its members by delaying for more than a year resolution of a controversy that is of critical importance to the oil and gas industry in Colorado. In contrast, Applicants would not be harmed if the litigation proceeds because, as this Court already found, Applicants' interests are adequately represented by the City, and their

involvement would not assist the Court in determining the preemption issue. Further, economy and the public interest weigh in favor of denying a stay.

ARGUMENT

"The decision whether to stay or continue proceedings resides in the sound discretion of the trial court." *Christel v. EB Eng'g, Inc.*, 116 P.3d 1267, 1270 (Colo. App. 2005). "This discretion derives from 'the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *In re Water Rights of U.S.*, 101 P.3d 1072, 1080–81 (Colo. 2004) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Under this "highly deferential standard," a trial court's decision regarding a motion to stay will not be overturned "[a]bsent a finding that the lower court's actions were manifestly arbitrary, unreasonable, or unfair." *Id.* at 1081.

While Colorado state courts have not articulated a definitive standard when considering whether to grant a request for a stay, federal courts in Colorado have examined: (1) potential prejudice to the nonmoving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative litigation. *See, e.g.*, *Bellco Credit Union v. United States*, No. 08-cv-01071-CMA-KMT, 2009 WL 189954, at *4 (D. Colo. Jan. 27, 2009). All of these factors weigh strongly against a stay in this case.

I. A Stay Would Cause Hardship to COGA.

The Colorado Supreme Court has held that "[p]arties have the right to a determination of their rights and liabilities without undue delay." *In re Water Rights of U.S.*, 101 P.3d at 1081. Courts should be mindful of the problems associated with delay because delay "devalues judgments, creates anxiety in litigants and uncertainty for lawyers, results in loss or deterioration

of evidence, wastes court resources, needlessly increases the costs of litigation, and creates confusion and conflict in allocation of court resources." *Todd v. Bear Valley Vill. Apartments*, 980 P.2d 973, 976 (Colo. 1999).

Here, COGA and its members would suffer hardship if the Court granted a stay pending appeal. Applicant's appeal of the Order will take a substantial period time, likely from fourteen to eighteen months. If the stay is granted, COGA and its members would not have any legal guidance with respect to their ability to conduct oil and gas operations in and around Fort Collins during the entire appeal period. Additionally, this is the only litigation pending in Colorado in which a party has raised a preemption challenge to a moratorium on hydraulic fracturing. COGA and its members, as well as the City, are entitled to a prompt resolution of this precedent-setting litigation which will determine the legality of moratoria on hydraulic fracturing in Colorado.

Additionally, the City could be harmed by a stay in the event that takings cases are filed by operators and mineral interest holders within the City's boundaries, as these claims will mature and potential damages will increase during the stay period if the five-year ban is ultimately determined to be unlawful. The City would also inevitably spend significant time and resources defending multiple claims, which, as the City has recognized, "if not resolved in the City's favor, could . . . work to the detriment of the City." City of Fort Collins Res. 2013-085 (Oct. 1, 2013).

Finally, granting a stay would contravene the purpose of C.R.C.P. 57 and 56(c), which allow for expeditious resolution of legal uncertainties and controversies. Applicants have not discussed a single opinion in which a court has permitted an excluded would-be intervenor to obtain a stay of a case during the pendency of the appeal. Indeed, courts have held that such

interference is particularly inappropriate where, as here, the existing parties do not oppose proceeding with the litigation. *See Am. Mar. Transp., Inc. v. United States*, 15 Cl. Ct. 360, 361 (1988) (denying applicant's motion to stay pending appeal of court's denial of motion to intervene where the stay "would unduly delay proceedings between the directly interested parties that are otherwise ready to move forward").

Under the current litigation schedule, briefing by COGA and the City on summary judgment will be completed and ripe for resolution by the end of May. Applicants seek to delay this resolution by well over a year in order to be allowed to present evidence that is irrelevant to this proceeding. The resulting harm to COGA, COGA's members, and the City if a stay were granted is, alone, a sufficient basis to deny Applicants' Motion.

II. Denying a Stay Would Not Result in Hardship or Inequity to Applicants.

A. Applicants' Interests Would Not Be Affected by Denying a Stay.

Applicants assert that without their contribution to the factual record, "the Court will rule prematurely on dispositive issues without hearing [Applicants'] position" and that the City has "no interest in protecting the property values, health, and safety of individual citizens," as evidenced by the City's resolution urging voters to reject the Ballot Measure. Mot. at 3, 6, 7. The Court has already addressed, and rejected, this exact argument. In its Order, the Court found that the City's interests are "identical" to Applicants and that the City's "interest in protecting its right as a home rule city and to protect the health and welfare of the residents of Fort Collins coincides directly with [Applicants'] interest to defend the Measure they helped passed." Order at 2.

Applicants argue in the Motion that, because some of their members live outside Fort Collins, the City cannot adequately advocate for those non-resident members. This argument is misplaced. The *interests* of Applicants' members do not diverge and are not dependent upon their residency. Regardless of whether Applicants' members live within or outside Fort Collins city limits, all of Applicants' members still share the same interests as the City and are united in seeking a single outcome: a declaration that the Ballot Measure is not preempted. *See Great Atl. & Pac. Tea Co., Inc. v. Town of E. Hampton*, 178 F.R.D. 39, 43 (E.D.N.Y. 1998) (denying intervention where "the interests of the Group coincide with the interests of the Town in terms of the single legal issue to be determined by this lawsuit, i.e., the validity and constitutionality of the Superstore Law"); *see also U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978) (noting that there is a "presumption of adequate representation that arises when [the applicant] has the same ultimate objective as a party to the existing suit").

To the contrary, as noted by the Court, the City and Applicants have asserted some of the same defenses, the City has hired outside counsel, and the City has indicated a willingness to continue vigorously defending the Ballot Measure. Order at 2. Applicants' legitimate interests will be pursued, and will not be harmed, if this case were to proceed unimpeded by the requested stay.

B. Applicants Seek to Present Irrelevant Facts Under the Wrong Legal Standard.

Denying a stay also would not result in hardship to Applicants because they seek to raise factual issues that are irrelevant to the disposition of this litigation. Applicants argue in their Motion that if the Court determines that the five-year ban concerns a matter of mixed state and local concern, then evidence of the impact of hydraulic fracturing is necessary under the

Colorado Supreme Court's ruling in *Board of County Commissioners v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045 (Colo. 1992) ("*Bowen/Edwards*"). According to this decision, Applicants state, an operational conflict determination "must be resolved on an ad-hoc basis under a fully developed evidentiary record." *Id.* at 1060.

Applicants are arguing the merits of the wrong case. In *Bowen/Edwards*, La Plata County did not ban oil and gas operations but instead adopted regulations that imposed application and approval requirements on oil and gas operators. *Id*. at 1050. The *Bowen/Edwards* Court held that an evidentiary record was necessary to determine whether the county's requirements could be "harmonized" with state requirements or whether the county's permitting requirements "would materially impede or destroy the state interest." *Id*. at 1059.

In this case, we are dealing not with competing regulations but with an outright ban. As stated last year by the Colorado Supreme Court in *Webb v. City of Black Hawk*, in matters of mixed state and local concern involving a home rule entity, "the test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." 295 P.3d 480, 493 (Colo. 2013). The Court has consistently applied this conflict test in every instance when it has considered state preemption of a home rule local government ordinance in a matter of mixed state and local concern. *E.g.*, *City of Northglenn v. Ibarra*, 62 P.3d 153, 165 (Colo. 2003); *Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 519 P.2d 834, 836 (Colo. 1973).

Here, the City's five-year ban on hydraulic fracturing plainly forbids what state law allows, and is therefore preempted even if hydraulic fracturing is a matter of mixed state and local interest. There are no facts that would allow the City's five-year ban to be harmonized with

the state's regulations that explicitly allow hydraulic fracturing. Applicants' Motion confirms that they intend to address facts and legal theories irrelevant to and inconsistent with the well-established preemption principles applicable to this case.

III. Neither Judicial Economy Nor the Public Interest Would Be Served by Granting a Stay.

The Colorado Rules of Civil Procedure seek to "secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1. Granting a stay pending appeal would contravene judicial economy, particularly where, as here, the appellant lost at the trial court level, has little chance of succeeding at the appellate level, and does not have interests that would be harmed if the litigation proceeds. Given "the public interest in settling disputes fairly and efficiently, . . . [d]isrupting the proceedings at this time would set a dangerous precedent of encouraging the participation of parties with remote interests, such as applicants, when their interests are already adequately protected by one of the parties." *Am. Mar. Transp., Inc.*, 15 Cl. Ct. at 361–62.

CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court deny Applicants' Motion to Stay Proceedings.

DATED: May 16, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2014, I filed the foregoing **RESPONSE IN OPPOSITION TO MEASURE PROPONENTS' MOTION TO STAY PROCEEDINGS** with the clerk of Court via ICCES which will send notification of such filing to the following:

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