

STEVE BULLOCK  
Montana Attorney General  
JENNIFER M. ANDERS  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
Telephone: (406) 444-2026  
Fax: (406) 444-3549

COUNSEL FOR DEFENDANT  
SECRETARY OF STATE

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION

---

STEVE KELLY and CLARICE	)	Cause No. CV-08-25-BU-SEH
DREYER,	)	
	)	<b>DEFENDANT’S RESPONSE</b>
Plaintiffs,	)	<b>TO MOTION FOR</b>
v.	)	<b>ADDITIONAL RELIEF</b>
	)	
LINDA McCULLOCH, in her	)	
official capacity as Secretary of	)	
State of the State of Montana,	)	
	)	
Defendant.	)	

---

Plaintiffs seek “additional relief” that was never pled, never argued, and not part of this Court’s analysis or ruling. They ask the Court to institute a new filing deadline of August 15, 2012, for purposes of the upcoming general election, despite the Court’s admonition that it “has no desire or objective to usurp the authority of the Montana legislature in providing for and appropriately regulating

the election process to ensure its implementation and protection as part of our system of self-government.” (Doc. 130, Memo and Order, at 21). Ultimately, the question of what deadline controls is a function of state law. Unless this Court is willing to craft an alternative filing deadline in place of what the Montana legislature has provided, Plaintiffs’ motion for additional relief should be denied.

### **ARGUMENT**

#### **I. PLAINTIFFS REQUEST IS BEYOND THE SCOPE OF THE COMPLAINT OR THE COURT’S ORDER GRANTING RELIEF**

In their Complaint, Plaintiffs challenged Montana’s ballot access scheme for independent and minor-party candidates. See Doc. 1, Compl., ¶ 32. In support of their claim, Plaintiffs cited the 2007 statutes setting forth the filing deadline and signature requirement, referring specifically to these requirements as the “new ballot-access scheme.” See Doc. 1, ¶ 22. In their Motion for Summary Judgment, Plaintiffs focused exclusively on the burdens imposed by Montana’s “new ballot-access scheme” and, with respect to the new filing deadline, argued:

Ultimately, Montana’s early filing deadline is so burdensome and so discriminatory that it is probably unconstitutional standing alone. No court of which the plaintiffs are aware has ever upheld a filing deadline for independent candidates that fell so far before the general election, the primary election, and the filing deadline for qualified-party candidates.

(Doc. 116, Mot. for Summ. J. 2011, at 18). Nowhere in the Complaint or the Motion for Summary Judgment did Plaintiffs ask the Court to set a new filing deadline or invalidate the prior deadline for filing the nomination petition, which was one week prior to the primary election. See 1991 Laws, ch. 591, Mont. Laws, ch. 458; SUF ¶¶ 11-12.

In its Memorandum and Order granting Plaintiffs' Motion for Summary Judgment, the Court limited its analysis to the filing deadline imposed by the 2007 amendments to Mont. Code Ann. §§ 13-10-503 and -201(6)(a). Under those statutes, the nomination petition deadline in 2008 was March 13, 2008. (Doc. 130, Memo and Order, at 12). The Court declared that "Montana's March filing deadline statutes for independent candidates, Mont. Code Ann. §§ 13-10-503(2) and -201(6)(a), violates Plaintiff Kelly's First Amendment right to associate as an independent candidate, and Dreyer's right to vote for Kelly." (Doc. 130 at 21). There is no mention in the Court's order of Montana's June filing deadline as being constitutionally invalid or unenforceable. In fact, the Court observed that "Montana successfully employed a June filing deadline in the past," and that "[a] June filing deadline for independent and minor party candidates has been declared constitutional by a number of courts." (Doc. 130 at 20). Moreover, there is no indication that the Court was inclined to set its own filing deadline as part of the requested relief. To the contrary, the Court stated it had "no

desire or objective to usurp the authority of the Montana legislature in providing for and appropriately regulating the election process[.]” (Doc. 130 at 21).

Plaintiffs requested relief requires this Court to do exactly that.

## **II. STATE LAW PROVIDES THAT THE DEADLINE CONTAINED IN THE PREVIOUS VERSION OF THE STATUTES CONTROLS**

The Defendant interprets this Court’s ruling to enjoin her from enforcing any deadline that is calculated on the basis of the 2007 amendments to Mont. Code Ann. §§ 13-10-503 and -201(6)(a). In the absence of any declaration from this Court regarding Montana’s prior statutes, Defendant is authorized under state law to rely on previous deadlines for purposes of the upcoming election.

Montana Code Annotated, § 1-2-203, provides:

Effect of amendment of statute. Where a section or a part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amendment form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment.

The Montana Supreme Court has held that an unconstitutional amendment to a law “leav[es] the section intact as it had been before the attempted amendment.” *State ex rel. Woodahl v. District Court*, 511 P.2d 318, 322 (Mont. 1973). Similarly, a recent opinion of the Montana Attorney General held:

A judicial decision invalidating the county distribution requirements for signatures to qualify an initiative petition for the ballot, as

approved in Constitutional Amendments 37 and 38 and enacted in their implementing legislation, restores the language of the constitution and statutes as they existed before the approval of the invalid amendments.

51 Op. Atty. Gen. No 2 at 1, 5 (2005). These pronouncements of state law are sufficient to guide the Secretary of State and the Montana election administrators in their duties now that the filing deadlines in the 2007 statutes are no longer valid. Plaintiffs have cited no authority for the proposition that the Court must set a new filing deadline, rather than allowing state law to control, particularly where the Court's ruling makes no pronouncement about the constitutionality of the prior law.

### **III. PLAINTIFFS' REASONS FOR REQUESTING ADDITIONAL RELIEF ARE SUSPECT**

Plaintiffs claim they have "only four days in which to secure and submit petition signatures" which would "without question violate Plaintiffs' constitutional rights." (Doc. 133, Br. in Supp. of Mot. for Additional Relief at 3). They also suggest that other independent candidates are not afforded a sufficient opportunity to gather petition signatures. *Id.*

Plaintiff Kelly offers no evidence that he has made any effort to comply with Montana's signature requirement in Mont. Code Ann. § 13-10-502(2), which this Court found to be constitutional. (Memo and Order at 9-10). Kelly should not

have assumed that a favorable ruling would allow him to request a new deadline from the Court, as opposed to having the deadline set by operation of state law. Under these circumstances, Kelly should not be rewarded for his lack of diligence. Moreover, other independent candidates for state legislative seats have garnered the requisite number of signatures and met the filing requirements under prior law. *See* [https://app.mt.gov/cgi-bin/filing/index.cgi?ACTION=LIST\\_LEGIt](https://app.mt.gov/cgi-bin/filing/index.cgi?ACTION=LIST_LEGIt) (viewed on June 6, 2012). It would be unfair to those candidates who exercised due diligence to excuse Kelly's non-compliance simply because he is a party to this lawsuit.

### **CONCLUSION**

The motion for additional relief should be denied.

Respectfully submitted this 6th day of June, 2012.

STEVE BULLOCK  
Montana Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By: /s/ Jennifer M. Anders

JENNIFER M. ANDERS  
Assistant Attorney General  
COUNSEL FOR DEFENDANT  
SECRETARY OF STATE

**CERTIFICATE OF MAILING**

I hereby certify that on this date I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, Butte Division, by using the appellate cm/ecf system.

Participants in the case who are registered cm/ecf users will be served by the appellate cm/ecf system.

Dated: June 6, 2012

/s/ Jennifer M. Anders

JENNIFER M. ANDERS

Assistant Attorney General

Counsel for Defendant Secretary of State

**CERTIFICATE OF COMPLIANCE**

Pursuant to Pursuant to Local Rules 7.1(d)(2) and 10.1, I certify that this brief is printed , I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,138 words, excluding certificate of service and certificate of compliance.

/s/ Jennifer M. Anders

JENNIFER M. ANDERS

Assistant Attorney General

Counsel for Defendant Secretary of State