

The Coeur d'Alene, Idaho, City Election Contest Lawsuit 2009 - 2011

Introduction

Registered Idaho electors voting in any federal, state, or local election need to be aware of the city election contest lawsuit in Coeur d'Alene. The lawsuit was filed on November 30, 2009, and according to statute should have been resolved within 30 days of filing. The District Court trial began on Monday, September 13, 2010, and concluded in a rare Saturday session on Saturday, September 18, 2010. Senior District Court Judge Charles Hosack heard the case and hoped to announce his verdict in about two weeks. On October 5, 2010, Senior Judge Hosack ruled the election of November 3, 2009, had been properly conducted, and he found for the defendant Mike Kennedy. On November 15, 2010, Jim Brannon, through his attorney Starr Kelso, filed the Notice of Appeal to the Idaho Supreme Court.

The privately-funded election contest lawsuit and associated investigations have revealed the need for a comprehensive examination of Idaho's election law administration, especially pertaining to residency for voting, campaign finance, and timely resolution of election disputes. The investigation has revealed that the Kootenai County Prosecuting Attorney ought to consider felony criminal charges for perjury against at least two illegal voters who have been identified.

Local and regional news media, both print and broadcast, have failed to report the story of the election contest. Their professional dereliction of duty, based in part on economic and political biases and interests and in part on incompetence and laziness, has deprived Idaho residents of information they need to evaluate the performance of elected officials and the adequacy of existing laws. This report is not an attempt to make up for the irreparable damage done by our local news media's failures. It is only a try at providing more information.

Background

Pursuant to an August 2009 contract between the City of Coeur d'Alene and Kootenai County, the County agreed to allow the Kootenai County Clerk's Office to be an independent contractor to the City and to administer Coeur d'Alene's November 3, 2009, mayoral and city council election for three council seats. The two closest races were for council seats 2 and 6. For council seat 2, there were 6,325 votes counted, and the declared winner received 5 more votes than the loser. For council seat 6, there were 6,299 votes counted, and the declared winner received 29 more votes than the loser.

Idaho election law provides two options to dispute election results: machine (not hand) recount of ballots or file an election contest lawsuit in District Court. Though the recount is better known, it is not automatically the better option. In a recount the same election officials run the same ballots through the same counting machinery. A recount makes no distinction

between illegally and legally cast ballots; it counts them all. Idaho election law requires either option to be formally begun within 20 days of the election canvass.

On November 7, 2009, supporters of Coeur d'Alene resident Jim Brannon, who lost the council seat 2 election by 5 votes, obtained a copy of the Kootenai County Absentee Ballot Report dated November 6, 2009. That report identified several absentee ballot requesters who had registered using city addresses as their residence but who asked that absentee ballots be mailed to other locations outside Coeur d'Alene, outside Idaho, and even outside the United States. Several of the absentee ballot requesters listed questionable out-of-state or out-of-country mailing addresses. Subsequent investigation found evidence refuting requesters' sworn affidavits that they met the statutory residency requirements to be qualified electors in the city election.

On November 9, 2009, the Coeur d'Alene Mayor and City Council in their official capacity as the board of canvassers quickly rubber-stamped their certification of the city general election canvass received from the Kootenai County Clerk. In spite of the closeness of two elections, the board of canvassers made no inquiries about the accuracy and proof for the numbers in the canvass. The canvass began the 20-day countdown toward Brannon's needing to come to a decision to recount, contest, or accept the election as canvassed.

On November 16, 2009, using the Idaho Public Records Law, Brannon supporters also obtained copies of the poll books for 27 of the 28 Coeur d'Alene precincts. There was no poll book for Precinct 0073, an administratively created precinct for absentee votes. The poll book photocopies, most revealing hundreds of voters' names, addresses, and signatures as well as poll judge comments, were to become an essential part of the investigation.

Working diligently to examine and compare poll book information with the Absentee Ballot Report - Kootenai dated November 6, 2009, Brannon volunteers identified election administration anomalies sufficient to satisfy statutory criteria and provide probable cause for filing an election contest challenging the results of the city election.

On November 18, 2009, Jim Brannon sought legal counsel from Coeur d'Alene attorney Starr Kelso. Kelso undertook a detailed examination of Idaho's election statutes, primarily in Titles 34 and 50. With the 20-day countdown clock rapidly winding down, volunteers continued to regularly report their investigative results to Brannon and Kelso.

After reviewing the evidence and the law, Kelso and Brannon determined that simply recounting the ballots would not resolve the issues. Evidence showed ballots had been illegally cast and counted. An election contest was the best option. On November 30, 2009, attorney Kelso filed the election contest lawsuit papers with the First District Court in Kootenai County. The case number is CV-2009-0010010, captioned *Jim Brannon vs. City of Coeur d'Alene et al.* The extensive register of actions to date can be viewed on the internet at the [Idaho Supreme Court Data Repository](#).

On January 5, 2010, Brannon's attorney Starr Kelso sought a restraining order to prevent the City from swearing in the council members who had been elected in November 2009. Since the declared winners were incumbents, they could continue in office on a Mayoral appointment and lawfully conduct City business until the election contest was resolved. Judge Simpson rejected that request and authorized the City to swear in the new council members. Judge Simpson's decision and the swearing-in ceremony that followed within two hours definitively concluded the November 2009 city election. Any election resulting from the election contest would be a new election, not a continuation of the November 2009 election.

What Is An Election Contest In Idaho? What Are The Statutory Grounds For One?

An election contest is an examination of facts to determine if the election was conducted lawfully and if the results were legally valid. An election contest examines the legality of the voters and the votes. A recount simply recounts all the ballots cast without regard to whether the elector who cast it could lawfully vote in the election or whether the vote was itself lawful.

In Idaho, the statutory grounds for an election contest are found in Idaho Code, Title 34, Chapter 20. In general, they include:

- (1) Malconduct by election officials, fraud, or corruption [or]
- (2) The winner was ineligible to hold office [or]
- (3) The winner was a convicted felon whose franchise right had not been restored [or]
- (4) The winner gave or offered a bribe to win the election [or]
- (5) Illegal votes were received, or legal votes were rejected, in sufficient number to change the election outcome [or]
- (6) Error by the board of canvassers in counting votes or accepting results if error would have changed the outcome [or]
- (7) When the winner is in default as a collector and custodian of public money [or]
- (8) For any cause which shows another person was lawfully elected.

Results of Investigations

Information gathered by volunteers and by hired private investigators revealed evidence justifying the city election contest lawsuit. That evidence includes:

(1) A discrepancy of 10 votes between the absentee ballots validly cast and those counted and reported in the canvass.

(2) Voters whose legal residence was not in Coeur d'Alene but who voted in the city election. This includes voters who registered using their Coeur d'Alene business addresses to vote in the city election but whose residence is outside the city.

(3) Voters who have never lived in Coeur d'Alene but who voted by absentee ballot in the city election.

(4) Voters who knowingly falsely swore an affidavit of residency in Coeur d'Alene for the intended purpose of voting in the city election.

(5) Voters allowed to vote in the wrong precinct without registering from their new residence address.

(6) Voters who registered from nonexistent addresses.

(7) Voters who requested and apparently received absentee ballots by mail but who then voted in person at the polling place.

(8) One voter who apparently voted twice, both times in-person absentee but with each absentee ballot submitted at a different absentee in-person polling location.

(9) Sworn voter registration card information (concerning residence address) changed without the elector's expressed consent.

(10) "Signature" from other documents cut-and-pasted into signature block on voter registration cards.

(11) Essential information such as voter signatures, type of ballot received (city vs. county in combined city-county precinct polling places), and sequence number was omitted from some precinct poll books.

(12) One precinct's poll book had a "mystery" page added at the end. The "mystery" page was in a format inconsistent with any other poll book from any other precinct.

(13) There had been inconsistent recording of required poll book information among precincts.

(14) Voters had been given an incorrect ballot at polling places. (Voted at a combined city-county precinct and given incorrect ballot to vote.)

(15) The Kootenai County Clerk failed to keep proper absentee ballot records in office as required by state statute, Idaho Code §34-1011 and §50-451.

(16) The Kootenai County Clerk failed to verify that applicants for absentee ballots met the residency requirements to vote in the Coeur d'Alene city election as required by state statute, Idaho Code §50-402(c).

(17) The Kootenai County Clerk failed to mark incoming absentee ballot envelopes with date and time as required by state statute, Idaho Code §34-1005 and §50-447.

(18) The Kootenai County Clerk failed to disqualify absentee ballots whose affidavit had not been properly signed by the elector for whom the ballot was intended and to whom it had been sent as required by state statute, Idaho Code, Title 34, Chapter 10.

(19) The Kootenai County Clerk failed to keep a poll book for the administrative absentee ballot precinct (Precinct 0073). Idaho Code §34-111 requires a poll book for each precinct and makes no exception for administrative absentee ballot precincts.

(20) There was very questionable cooperation between the City of Coeur d'Alene, the Kootenai County Prosecuting Attorney's Civil Division, and the private attorneys for defendant Kennedy. The effect of that cooperation was to obstruct plaintiff Brannon's access to public information as well as discovery evidence. The effect of that cooperation was to conceal from the public significant information about how the Kootenai County Clerk, an elected public official, had failed to properly administer his election-related duties. Notably, the City has still not sought to enforce its election administration contract with the County. Rather, it has chosen to cooperate with the County to defeat Brannon's election contest.

(21) Defendant Kennedy filed a contempt of court complaint against one of Brannon's supporters, because that supporter had published on an Internet website a public record, an affidavit filed with the court that had also been obtained and reported days earlier by a local newspaper. The affidavit had not been sealed by the Court nor had the Court issued any order prohibiting its publication in a newspaper or the posting on the Internet of public records related to the election contest lawsuit. The affidavit contained photographs representative of approximately 877 anomalies in election administration by the Kootenai County Clerk. Several hundred of those anomalies comprise items (16), (17), and (18) *supra*. The allegedly contemptuous Internet post can be found on the post titled "[Who Decides When Violations Matter?](#)" at OpenCdA.com. The contempt trial was scheduled for Tuesday, October 12, 2010, at 4 p.m. in Kootenai County district court.

(22) During the election contest lawsuit trial, it was revealed by witnesses under oath that Kootenai County Clerk Dan English had failed to keep absentee ballot records required by Idaho Code §34-1011 and §50-451. That record, had it been kept honestly and accurately, could have obviated the need for the lawsuit. It would have almost certainly resolved the absentee ballot issues months ago. The absence of this statutorily required record means no official record exists which can substantiate the Kootenai County Clerk's count of 2051 validly cast absentee ballots certified, without question or comment, by the City's canvass board consisting of the Mayor and City Council. In the absence of this record, according to court testimony of Idaho's Chief Deputy Secretary of State Tim Hurst, the next best record of valid absentee ballots cast was in the Absentee Ballot Report - Kootenai run by the Kootenai County Clerk's office on November 6, 2009, just three days after the election and three days before the canvass. That report revealed 2041 (not 2051) valid absentee ballots cast. In his court testimony, Hurst agreed that English's failure to keep the statutorily required report was a "failure of duty."

(23) During the trial it was revealed by witnesses under oath that retired election administrator Deedie Beard had been allowed to return to the Kootenai County Elections Office long after she had retired and was allowed to delete many files that remained on her computer when she retired. These files were deleted during the election contest lawsuit.

(24) During the trial, a witness in Canada testified live and under oath via the Internet (Skype) that she is a "landed immigrant" in Canada. "Landed immigrant" is a local term in Canada for the immigration status known as "Permanent Resident." Among other requirements, a Permanent Resident is required to declare as if under oath that "I am a permanent resident of Canada." The applicant is also required to reside in Canada at least 730 days out of every five years. How can Permanent Residents of Canada declare that their permanent residence is Canada while also declaring it is Coeur d'Alene in order to be "legal" voters in Coeur d'Alene or any other Idaho city?

Lawsuit Timeline, Judicial Assignments, and Subsequent Actions

Idaho Code §34-2011 requires that the election contest "... shall stand for trial at the expiration of thirty (30) days from the time of service of the summons and complaint, if the court shall then be in session; otherwise, on the first day of the next term thereafter."

The election contest lawsuit complaint was filed on November 30, 2009. Although statute does not specify an amount for bond, and although neither the court clerk nor the judge demanded any bond, Brannon nonetheless posted a \$500 good-faith bond with the complaint. Summonses were also served on November 30, 2009. On December 4, 2009, Administrative District Court Judge John Mitchell disqualified himself. On December 7, 2009, Judge Mitchell appointed District Court Judge Charles Hosack to hear the case. On December 31, 2009, Judge

Hosack retired from the bench, and District Court Judge Benjamin Simpson was assigned by Judge Mitchell. At the time of his assignment to this unique and complex case, Judge Simpson had been a District Court Judge for two days.

Between January and April 2010 there were a series of actions and hearings on the election contest. None of those actions and hearings resulted in a trial or verdict in the election contest.

On March, 2, 2010, Judge Simpson responded to the defendants' recommendation that Brannon be required to post a \$25,000 bond to proceed. Brannon had posted a \$500 good-faith bond with the initial complaint. Judge Simpson ruled that Brannon would be required to post a \$40,000 bond. This requirement had a chilling effect on Brannon's ability to prosecute the lawsuit.

On or before April 6, 2010, Judge Simpson reduced Brannon's bond from \$40,000 to \$5,000.

On April 13, 2010, Judge Simpson disqualified himself from the case without any explanation as permitted by the Idaho Rules of Civil Procedure.

All the remaining eligible First District Court Judges apparently disqualified themselves or declined to accept the election contest case. The case file does not reflect any writings by any of these judges who supposedly self-disqualified or otherwise declined to preside. An Idaho Public Records Law request for such writings was declined with the explanation that the requested records do not exist.

The Idaho Rules of Civil Procedure provide that when no District Court Judge is available for assignment, Administrative District Court Judge Mitchell could petition the Idaho Supreme Court to appoint a district court judge from another judicial district to hear the case. Judge Mitchell made that request, and on April 29, 2010, Senior Judge Charles Hosack was assigned. This is the same Judge Hosack who had retired on December 31, 2009. On May 14, 2010, Senior Judge Hosack resumed court action in the election contest. Though Judge Hosack had arguably self-disqualified himself when he retired in December 2009 while still assigned as the case's presiding judge, his reassignment to the case by the Idaho Supreme Court apparently exempted him from disqualification by either party except for cause.

Trial in the city election contest lawsuit began on September 13, 2010, and concluded on September 18, 2010. In a 20-page memorandum decision delivered via fax on Tuesday, October 5, 2010, Senior Judge Charles Hosack confirmed "...the election result of Mike Kennedy's election to Seat #2 on the City Council for the City of Coeur d'Alene in the November 3, 2009, Municipal election." [Judge Hosack's memorandum decision can be read here on OpenCdA.com.](#)

On October 12, 2010, after ignoring the earlier motion for dismissal of the contempt charges against Brannon's supporter and twice calendaring the contempt allegations for trial but having heard no evidence supporting the motion for contempt, Senior Judge Charles Hosack abruptly dismissed the unfounded contempt allegations against Bill McCrory. Hosack's written judgment, issued October 20, 2010, noted the Court had improperly accepted [Councilman Mike Kennedy's] motion which erroneously asserted the alleged contempt was civil. The allegation should have been filed as a criminal contempt. The Court dismissed the contempt proceeding, saying it did not wish to proceed further with a criminal contempt.

In the November 2, 2010, Kootenai County General Election, challenger Cliff Hayes defeated incumbent Kootenai County Clerk Dan English. Hayes was sworn into office on January 10, 2011.

On November 8, 2010, Jim Brannon, through his attorney Starr Kelso, filed a Motion for a New Trial Pursuant to IRCP Rule 59(a)(6) & (7) or in the Alternative Motion to In the Alternative to Alter or Amend the Judgment Pursuant to IRCP Rule 59(c). The hearing on this motion was held on December 7, 2010. Senior Judge Hosack denied the plaintiff's motion for a new trial. On January 4, 2011, a final judgment was entered in the District Court.

On November 15, 2010, Jim Brannon, through his attorney Starr Kelso, filed the Notice of Appeal to the Idaho Supreme Court. The appeal is against the final judgment of Senior Judge Charles Hosack, judgment entered on November 4, 2010. The appeal cites 23 Preliminary Issues on Appeal. No date has yet been set for hearing arguments before the Idaho Supreme Court.

At its regularly scheduled meeting on December 7, 2010, the Coeur d'Alene City Council voted to approve a motion by Councilman Goodlander, seconded by Councilman Bruning, to award \$69,660 from the City's self-insurance fund to Councilman Mike Kennedy to settle his tort claim for legal fees against the City. Kennedy had filed a tort claim against the City for approximately \$103,000 to pay his private attorneys' legal fees in the election contest lawsuit. The City elected to pay the amount mediated rather than risk being sued by Councilman Kennedy.

On December 10, 2010, the Coeur d'Alene Press reported that "Three people who illegally cast ballots in the 2009 Coeur d'Alene general election are being charged with one count of illegal registration by a voter." The announcement was made by Kootenai County Prosecutor Barry McHugh who filed the charges on October 27, 2010. According to the newspaper, "Kootenai County resident Nancy E. White, 55, and Hayden couple Ronald E. Prior and Susan R. Harris each face up [to] six months in jail or \$500 in fines should they be convicted of the misdemeanor offenses."

Major Issues Of Statewide Importance

The facts uncovered since the Coeur d'Alene election contest lawsuit was filed have revealed some issues of statewide importance. This is not "just a Coeur d'Alene problem." This implicates state election laws both existing and those going into effect on January 1, 2011.

(1) Residency determines eligibility to vote in particular elections. Idaho's county clerks are "not the residency police" according to now-retired Kootenai County Clerk's Office elections manager Deedie Beard. According to Beard, Idaho's county clerks are not responsible for verifying the claims of residency by persons submitting voter registration applications and absentee ballot requests. If the county clerks are "not the residency police," then who is? If Beard is correct, then Idaho's election laws regarding all aspects of voter eligibility need to be revised by the legislature. The elections are meaningless if their outcome can be determined by illegal voters who can register falsely or illegally without risk of either detection or prosecution.

(2) The Idaho legislature must define statutorily when an election has officially ended. Did Coeur d'Alene's city election end on November 3, 2009, after the ballots had been counted? Or did it end on November 9, 2009, when Coeur d'Alene's Mayor and City Council, acting as the election canvassing board, certified the district canvass? Or did it end on January 5, 2010, when District Judge Simpson authorized the Coeur d'Alene City Clerk to swear in the re-elected mayor and three council members? This is important partly because all candidates for election are required to file campaign finance disclosure information. In the election contest lawsuit, Brannon's supporters raised money to help defray the costs of the election contest lawsuit. The Coeur d'Alene City Attorney Mike Gridley and Deputy Attorney General Brian Kane sent correspondence to supporters threatening legal action if Brannon supporters did not declare themselves to be a political action committee. Their "soft" threat was based on an incorrect assumption that Brannon would somehow automatically be a candidate if a new election were ordered at some future time.

(3) It must be established with certainty that the elector eligibility requirements of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and any other applicable federal voting statutes either do or do not "trickle down" to intrastate elections such as municipal elections. Does voter eligibility for federal and state elections automatically qualify someone to vote in an election wherein the applicant has not met local residency requirements independent of UOCAVA or other applicable federal laws? As was found in the present election contest investigation, at least one voter (the spouse of a military serviceman and therefore presumably eligible to vote in federal and state elections) has never lived in Coeur d'Alene. However she received an absentee ballot for and was allowed to vote in the Coeur d'Alene city election. Another voter is a "permanent resident" of Canada. That is an official status, not just a characterization. It requires that she must have declared Canada to be her permanent residence, and she is only allowed to leave Canada for limited periods. She must declare it her intention to return to her permanent residence, Canada, but still she was allowed to represent to the Court that her residence for voting is Coeur d'Alene.

(4) Idaho's district and supreme court judges are elected. The cowardice displayed by each of Idaho's First District Court judges in apparently disqualifying themselves from the election contest lawsuit has resulted in increased costs to plaintiff, defendant, and the taxpayers. Their decision to avoid a politically "too hot to handle" election contest was more of an exercise to secure their own future re-election than a commitment to fairly administer justice. The decision of the Idaho Supreme Court to appoint Senior Judge Charles Hosack to hear this contest after Hosack had self-disqualified by retirement in December 2009 is questionable and alarming, particularly since the Idaho Rules of Civil Procedure (Rule 40(d)(5) require the appointment to have been of a judge from outside the First District. In Idaho, election contests are very rare. Idaho's legislature and possibly the Idaho Supreme Court need to address the issue of judicial selection for election contests and, to the extent possible, for other highly sensitive political cases. Justice, not job security for judges and justices, must be the determining factor.

(5) Election contests should not be so easy that they become commonplace, but neither should they be so privately expensive and difficult that valid challenges like Jim Brannon's can be derailed because of cost. The honest administration of elections is the responsibility of the State of Idaho. Election contest thresholds need to be established which transfer duty and cost of election contest administration to the State after the original contestant has met some threshold. It is in the public's best interest that election contests be decided based on law, not on which party can defeat the other party through financial attrition. Idaho's legislature needs to work with the Secretary of State and address this.

(6) Election contests must be resolved promptly. The present 30-day statutory requirement for resolution is unreasonably short given today's court calendars, however the present contest has dragged on for nearly 10 months. Idaho's legislature needs to work with the Secretary of State and address this.

(7) During the course of this election contest, it has become imminently clear to many citizens that the Idaho Secretary of State has failed to keep the Idaho legislature properly apprised of significant problem areas in Idaho election administration. It has also become apparent that the Idaho Secretary of State and the Kootenai County Clerk have become obsessed with increasing the numbers of purportedly eligible voters while failing to take the necessary steps to ensure the statutory requirements for initial and continuing voter eligibility are being met. These public officials have become ignorant and indifferent to the vulnerabilities they are creating in their obsessions to make election office operations easy and convenient for county workers and delivering election results moments after the polls close. They are sacrificing election integrity for convenience and speed.

(8) Encouraging voter participation is the responsibility of individuals and civic organizations. It is not the job of either the Secretary of State or the Kootenai County Clerk to spend taxpayer dollars to "get out the vote." Rather, it is their duty to ensure that

those citizens who choose to lawfully register and vote are provided with the means and materials to vote lawfully and without unreasonable or unlawful impediments. The Idaho legislature needs to conduct a comprehensive performance audit on the Office of the Idaho Secretary of State's Elections Division. That Office and Division are statutorily charged (See Idaho Code, Title 34, Chapter 2) with duties that affect the conduct and integrity of elections throughout the state. The audit must include a critical examination of all election guidance provided by the Secretary of State's office to determine if that guidance is completely consistent with the Idaho Constitution and Idaho statutes. Particular attention must be paid to ensure the Secretary of State's office policies and guidance have not usurped the Legislature's constitutional authority to make and amend election laws. The results of the audit, without redaction, must become public record immediately.

(9) Kootenai County Clerk Dan English admitted under oath in Court that he had failed to maintain the absentee ballot voting records required by Idaho Code §34-1011 and §50-451. Chief Deputy Secretary of State Timothy Hurst testified under oath in Court that English's failure was a failure of duty. At some point, the Idaho legislature needs to demand that Idaho's election laws be rigidly enforced, not conveniently ignored or unilaterally amended by county clerks and the Secretary of State. In violation of Article II of the Idaho Constitution, the Idaho Secretary of State is usurping the authority granted to the Legislature when he issues policies and directives that amend or negate statutes lawfully passed by the Legislature and signed by the Governor.

Conclusion

The Coeur d'Alene election contest has been long and costly. It has revealed major flaws in the former Kootenai County Clerk's administration of elections. Senior Judge Charles Hosack's gratuitous comment in his decision notwithstanding, this election was not well run by the now-former Kootenai County Clerk Dan English and his Elections Office staff.

The lawsuit has revealed concerns about the professional conduct of Idaho's First District Court judges.

The lawsuit has revealed the failure of the Idaho Attorney General and the Idaho Secretary of State to keep Idaho's legislators properly and timely informed of needed amendments to Idaho's election administration laws. It has revealed the need for procedural and legislative changes to the election contest process and statutes.

The lawsuit has revealed the flawed logic and failed processes used by Secretary of State Ben Ysursa and now-former Kootenai County Clerk Dan English used to support their reckless and headlong rush into exclusively vote-by-mail elections.

As a result of these failures by elected public officials, failures far in excess of what could by any account be dismissed as “human error,” it is indisputable that illegal votes were cast and counted in the November 3, 2009, Coeur d’Alene city election. Every illegal vote cast and counted effectively disenfranchised a voter who voted lawfully. Every illegal vote counted nullified a legal vote. It happened in Kootenai County. It can happen anywhere in Idaho.