

INTRODUCTION

The issues and arguments set forth with extensive references in Appellant Brannon's Opening Brief were essentially avoided by the Respondents. To the limited extent that the Respondents touched on issues they are either already addressed or will be addressed in this reply with appropriate citations to the record, statutes, and case law.

WHY THE ELECTION CONTEST WAS FILED

The *possibility* that an election contest was necessary arose because City Clerk Weathers and independent contractor Kootenai County did not keep the absentee ballot record required by I. C. § 50-451 as of the close of the polls¹ and, as a result of this failure, did not compare it to the number of absentee ballots in the ballot box prior to the counting of the absentee ballots.

I.C. § 50-451 is set forth in plain, usual and ordinary wording. It requires the City Clerk to:

1. Keep a record in his office containing a list of names and precinct numbers of electors making applications for absentee electors' ballots;
2. Keep a record listing the date on which the application was made;
3. Keep a record listing the date on which the absentee ballot was returned;
4. Make a note on the kept record:
 - a. If an absentee ballot is not returned;
 - b. If an absentee ballot is rejected and not counted.²

Weathers testified that she relied upon Kootenai County representatives Dan English and Deedie Beard to keep this record but at no time did she ask to see this record which is necessary to verify that the number of absentee ballots in the absentee ballot precinct ballot box match the

¹ Tr. p. 667, l. 24-25, p. 668, l. 1-12.

² The absentee ballot record requirement set forth in 4 (a) and 4 (b) that this information "shall" be noted in the record clearly establishes that the district court's holding that "The record contemplated by Section 34-1101 turns out to be the stack of 2,050 absentee return envelopes" R. p. 2290 is clearly erroneous. Additionally since Plaintiff Brannon established that the November 6, 2009 absentee ballot record documented 9 fewer returned and not rejected absentee ballots than were counted the burden shifted to Respondents to introduce the envelopes if they felt they were evidence of anything. They did not. In fact no witness even suggested that the envelopes constituted the required absentee ballot record.

number that were returned and not rejected. English and Beard did not keep a printed 'hard copy' of the absentee ballot record separate from the Secretary of State's statewide data base.

No absentee ballot record was kept as of the close of the polls and thus no one verified, or attempted to verify, that the number of ballots in the absentee ballot box for the absentee ballot precinct 0073 matched the number of absentee ballots that had been returned and, most importantly, not rejected (voided).^{3 4} It was simply presumed that the number of absentee ballots in the ballot box equaled the number of absentee ballots returned and not rejected. All of the absentee ballots in the absentee ballot box were merely taken from the box and run through the ballot counting machines. The absentee ballot count totaled 2051. Based upon the total ballots counted it was reported that Kennedy received 5 more votes than Brannon in the race for Seat 2.

When absentee ballots are returned to the election office each one is recorded and recorded to a software database provided by the Secretary of State.⁵ Beard testified that, at that end of each day, all of the recorded returned absentee ballots were placed into the ballot box.⁶

The morning after the election the machine counted number of absentee ballots, 2051, was inserted into the "District Canvass," and it was printed it at 9:58 a.m. Beard did not recall who prepared the "District Canvass" but she did testify that the daily totals of absentee ballots returned were not added up or compared with the machine count. She also testified that the machine count was not compared with any number totals.^{7 8}

On November 6, 2009, Larry Spencer presented a public records request to the election office to obtain a list of the names of absentee voters whose ballots had been returned by 8:00

³³ Plf. Exhibit 85

⁴ See Plf. Exhibit 5, p. 175 "Total Voided".

⁵ Plf. Exhibit 90, p. 1, para. 3.

⁶ Tr. p. 624, l. 15-25.

⁷ Tr. p. 670, l. 6-14.

⁸ Tr. p. 670, l. 23-25, p. 671, l. 1-18.

p.m. on election day.^{9 10} Susan Smith had been an election clerk for over ten years and one of her primary duties was the recording of absentee ballot information into the database. Smith complied with Spencer's request and printed off the absentee ballot record from the database into which all returned absentee ballots are input, including rejected absentee ballots.¹¹

Smith gave him a public record documenting all of the names of absentee ballot voters who returned their ballots by the close of the election. The public record absentee ballot record, Plaintiff's Exhibit 5, recorded all the information required by I.C. § 50-451:

1. The name and precinct number of each elector applying for an absentee ballot;
2. The date the application was made;
3. The date the elector's absentee ballot was returned;
4. Whether the absentee ballot was rejected and should not be counted.

The database also breaks the returned absentee ballots into totals. It documented:

1. Total Requested: 2047
2. Total Issued: 2047
3. Total Returned: 2047
4. Total Voided: 5

The absentee ballot record given to Spencer, when compared with the machine count reflected on the "District Canvass", revealed that 4 more absentee ballots had been counted (2051) than the total of all absentee ballots (2047) that were returned. Since the absentee ballot record also documented that 5 of the absentee ballots returned were rejected, the comparison revealed that 9 more absentee ballots were machine counted than should have been.¹² The

⁹ Tr. p. 320, l. 2-5.

¹⁰ Tr. p. 192, l. 10-14.

¹¹ Plf. Exhibit 90, p. 1, para. 3.

¹² The following information was not known until trial and is provided here to show what the City's independent contractor knew.

a. Smith testified what occurred after she gave Spencer the absentee ballot record documenting 9 more absentee ballots were counted than should have been. She stated that after she gave Spencer the absentee ballot record that she had a "discussion with someone about this [the fact that the absentee ballot record documented that 9 more absentee ballots were counted than should have been]. Tr. p. 294, l. 20-25. She testified that she told her supervisor, Beard, that she printed off the absentee ballot record for Spencer but she could not recall if she told Beard that it documented 9 more absentee ballots were counted than should have been. Tr. p. 293, l. 2-13.

difference in votes attributed to Brannon and Kennedy in the Seat 2 race was 5 votes and the counting of 9 more ballots than should have been counted is sufficient to change the result of the Seat 2 race. After printing the absentee ballot record, election clerk Smith was aware of the discrepancy between the totals documented on the absentee ballot record and the number of absentee ballots machine counted.

On November 9, 2009, the Coeur d'Alene's City Council met for what it purported was a canvass. The meeting minutes document that the council asked no questions of the presenters Weathers, Beard, and English, that no testimony was given, and that no documents other than the "District Canvass" prepared by the election office the morning of November 4, 2009 and the summary signed by Beard of November 9, 2009, were presented to the city council.^{13 14 15} The actual "canvass" consisted of merely a motion being made to "accept the canvass of votes [by the county]".¹⁶

After Spencer realized that despite the 9 absentee ballot difference the 'count' of 2051 absentee ballots had been presented to the city council, he sent an e-mail to Kootenai County Prosecutor, Barry McHugh on November 16, 2009 at 2:42 p.m.¹⁷ Spencer informed McHugh that the "Election Canvass" documented that 9 more absentee ballots were counted than should have been. Late that same afternoon, approximately two hours later, McHugh replied to Spencer's e-mail. McHugh asked Spencer if he had talked to the "folks" at the election office, if he had

b. Beard testified that she was aware of the 9 vote difference between the 'count' and the absentee ballot record. She stated that she could not recall if she knew this before or after the City council met on November 9, 2009. Tr. p. 669, l. 1-15. This may have been due to the fact that her computer had been "cleaned" of all information before trial. Tr. p. 419, l. 19-25, p. 420, l. 1-2.

c. English testified that he knew about the 9 vote difference between the 'count' and the absentee ballot record "on or about" the day the City council met. Tr. p. 137, l. 20-22.

¹³ Plf. Exhibit 87.

¹⁴ Plf. Exhibit 85.

¹⁵ Plf. Exhibit 86.

¹⁶ Plf. Exhibit 86.

¹⁷ Plf. Exhibit 47.

spoken to them; was there a problem, and he stated that if there was a problem he would be happy to follow up with the election office.¹⁸

The next morning at 8:53 a.m., McHugh sent an e-mail to Spencer.¹⁹ Overnight he had a change of heart.²⁰ In the e-mail McHugh told Spencer:

“After reviewing the matter further, it appears that the appropriate thing for me to do is to indicate that there is a method in Idaho Code for you to contest an election. While I can’t provide you legal advice, I would suggest you look at Chapter 20 of title 34, Idaho Code. In the event such a contest was filed, my office is responsible for representing the Elections Office in the contested matter. Still, in that capacity I will review any information you provide me on this question.”

In short the message from McHugh to Spencer was, go away or file an election contest.

McHugh was not going to investigate further. Any further action on his part would be defending the election office, if an election contest was filed, and any information he received would be used for that purpose.²¹ An election contest is not something that would be favorably discussed in a seminar on how to make friends and influence people in high places and no doubt McHugh believed that this would put an end to the issue raised by the discrepancy.

When no one will address a discovered ballot and vote count discrepancy sufficient to change the result of an election, conscientious citizens are left with no choice but to file an election contest.

¹⁸ Plf. Exhibit 47.

¹⁹ Plf. Exhibit 47.

²⁰ It seems that McHugh’s change of heart came as a result of a second absentee ballot report (Plf. Exhibit 8 A) that was, unbeknownst to Spencer, printed on that same day, November 16th. The same county clerk, Smith, testified that that she printed this record but that she could not recall “if it was a request by a patron or a request by a supervisor.” Tr. p. 306. This November 16th absentee ballot record documents, consistent with testimony that absentee ballots returned after the election are recorded as rejected (Voided), that 2042 absentee ballots were returned for the election that were not rejected (Voided). Plf. Exhibit 8 A.

²¹ McHugh’s decision to defend the election office was no doubt due to the county’s liability under its contract with the city to pay for the cost of a new election. Def. Exhibit B, p. 3, para. 5 and 6.