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Attorney for Plaintiff Brannon

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 FEB -9 PM 1:35

CLERK DISTRICT COURT

Sherry Huffman
DEPUTY
PH

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JIM BRANNON,
Plaintiff,

: Case No. ~~CV~~-09-10010

: MOTION TO COMPEL PRODUCTION

vs.

City of Coeur d'Alene, et al
a municipal corporation, et.al
Defendants.

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:
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:
:
:

COMES NOW the Plaintiff Jim Brannon, by and through his attorney Starr Kelso, and pursuant to I.R.C.P. Rule 34 (b) (2), Rule 37 (a) (2), the "priority" scheduling of this matter, and paragraph 5 of the Pretrial Order entered in this matter hereby moves this Court for it's Order Compelling Defendants City of Coeur d'Alene and Susan K. Weathers to produce the following requested "documents."

This Motion to Compel is being brought at this time in order to move the discovery process forward, and the position of Defendants City of Coeur d'Alene and Susan K. Weathers City Clerk, as expressed through their attorney as set forth in the attached Exhibit 1 hereto, that they do "not have possession, custody, or control of the ballots and as such is unable to accommodate your request." Because of this response there no reason to reasonably expect that these Defendants' Responses to the Requests for Production set forth below, will be anything different, and it is Plaintiff Brannon's position that there is no reason to allow these Defendants to wait until February 23, 2010 to respond to the following Requests for Production in the same or similar manner given the priority of this election contest.

"COMES NOW the Plaintiff Jim Brannon, by and through his attorney Starr Kelso, and pursuant to I.R.C.P. Rule 34 (a) and Rule 34 (b) hereby submits the following requests for production on the Defendants City of Coeur d'Alene and Susan K. Weathers in her capacity as Clerk of the City of Coeur d'Alene. Pursuant to Rule 34 (b) a response to these requests is required within 30 days of service.

Date, Time, and Place for Production and Examination:

Date: The date for production and examination shall be February 24, 2010, and continuing thereafter until such time as the examination is completed on agreed to dates thereafter.

Time: The time for production and examination shall be 10:00 a.m. and continuing thereafter until such time as the examination is completed at an agreed time(s) thereafter.

Location: The location of the production and examination shall be in the City of Coeur d'Alene's "old city council" room, unless another more convenient location for the production is designated by the City and Weathers in writing prior to February 24, 2010.

Note: The dates and times for production and examination will no doubt be subject to the Court's discretion and control pursuant to the scheduling conference currently scheduled in this matter for January 28, 2010 at 9:00 a.m.

REQUEST FOR PRODUCTION NO. 1: Please produce, the original of each of the following requested documents and specifically identify exactly what is being produced in regard to each specific request for production and examination at the time of production and examination:

(NOTE: As used herein below the term "document" is to be interpreted in its broadest possible sense and includes but is not limited to any e-mails, faxes, text messages, handwritten or digitally, mechanically, or electronically prepared and capable of reproduction through any means.)

1. All poll books for the November 3, 2009 General Election;
2. All absentee ballot requests for the November 3, 2009 General Election;
3. All absentee ballots counted in the November 3, 2009 General Election;
4. All absentee ballots received but not counted in the November 3, 2009 General Election;

5. All absentee ballot "return" envelopes (the outside envelope that lists the address returned to) received by the City or Kootenai County by anyone regarding the November 3, 2009 General Election which contained an absentee ballot envelope that contained one or more absentee ballots;
6. All absentee ballot envelopes (the inside envelope that contained one or more absentee ballots that was separated from the 'return' envelope) that were removed from the 'return' envelope and which contained one or more absentee ballots that were either counted or rejected in the November 3, 2009 General Election.
7. All absentee ballot applications received for the November 3, 2009 General Election;
8. All voter registration cards for every person who requested an absentee ballot for the November 3, 2009 General Election;
9. All voter registration cards for every person who returned an absentee ballot for the November 3, 2009 General Election;
10. All documentation that identifies the total number of ballots ordered for the November 3, 2009 General Election;
11. All November 3, 2009 General Election unused ballots, other than spoiled ballots.
12. Any documents of any nature or kind that describes how all election ballots are managed and kept from the date of their receipt from the printer through one year after the election (November 3, 2009).
13. All documents of any nature or kind that set forth any policy as to what election audits were to be conducted, by any person or entity, for the November 3, 2009 General Election;
14. All documents of any nature or kind that reflect any and all audits conducted regarding the November 3, 2009 General Election by any person or entity working on the said election.
15. All election ballots for the November 3, 2009 General Election that were damaged in any manner;
16. All election ballots for the November 3, 2009 General Election that were rejected for any reason and any documents of any nature or kind that states the reason for the rejection of each and every said rejected ballot.

17. All election ballots for the November 3, 2009 General Election that were voided for any reason and any documents of any nature or kind that state the reason for the ballot(s) being voided;
18. All election ballots for the November 3, 2009 General Election that were rejected due to a signature verification question;
19. All election ballots for the November 3, 2009 General Election that were rejected due to the elector being not authorized to vote in the said General Election based upon Idaho statutes;
20. All election ballots for the November 3, 2009 General Election that were rejected due to the elector not being properly registered to vote in said election;
21. All documents, or electronically stored information, of any nature or kind that identifies election ballots for the November 3, 2009 General Election that as of the time of the closing of the election polls on the date of the election, were not accounted for;
22. All election ballots for the November 3, 2009 General Election that were voided due to the elector not being qualified to vote in said election;
23. All election ballots for the November 3, 2009 General Election that were voided due to a county resident receiving a City ballot;
24. All documents of any nature or kind that verify what ballots each voter received at each "combined" City of Coeur d'Alene and Kootenai County precinct;
25. Any and all audit reports, whether in document form or electronically stored information, that accounts for every November 3, 2009 General Election ballot;
26. All ballots counted in the November 3, 2009 General Election;
27. All of the "ballot stubs" for each ballot cast at each precinct in the November 3, 2009 General Election;
28. All post cards sent to voters who registered on the day of the November 3, 2009 General Election and which were returned as not deliverable to the address stated on the post card;
29. Any "audit trail" conducted and documented before, during, or after the November 3, 2009 General election concerning any matter, issue, or question relating to the said election;

30. Any and all documents including but not limited to e-mails, faxes, and text messages whether handwritten or digitally, mechanically or electronically prepared and transmitted that were received by any City of Coeur d'Alene employee, or elected official, from any employee or elected official of Kootenai County that pertain to, in any manner, the November 3, 2009 General Election from, and including, November 3, 2009 through the date of this production/examination;
31. Any and all documents including but not limited to e-mails, faxes, and text messages whether handwritten or digitally, mechanically or electronically prepared and transmitted that were sent by any City of Coeur d'Alene employee, or elected official, to any employee or elected official of Kootenai County that pertain to, in any manner, the November 3, 2009 General Election from, and including, November 3, 2009 through the date of this production/examination;
32. Any and all instructions provided to any poll worker or poll judge regarding their duties in the November 3, 2009 General Election;
33. Any and all instructions, of any nature or kind, provided by any City of Coeur d'Alene employee or elected official to any Kootenai County employee regarding their duties in the November 3, 2009 General Election;
34. All instructions, of any nature or kind, provided to anyone working on the November 3, 2009 General Election that state how any voter's residence is to be verified prior to providing any said voter a ballot whether at the polling precincts or by absentee ballot.
35. All instructions, of any nature or kind, provided to anyone working on the November 3, 2009 General Election that state how any voter's signature on an absentee ballot request is verified;
36. All instructions, of any nature or kind, provided to anyone working on the November 3, 2009 General Election that state how any voter's signature on a returned absentee ballot affidavit is to be verified;
37. All documentation, of any nature or kind, that identify which, if any, absentee ballots were rejected for any reason in the November 3, 2009 General Election;
38. All e-mails, letters, memos, or documentation (including drafts thereof) of any nature or kind that reference or pertain to the November 3, 2009 General Election received by any

person working on the November 3, 2009 General Election on behalf of the City of Coeur d'Alene from any employee or elected official of the Office of the Secretary of State of Idaho from, and including, November 3, 2009 through the date of the production/examination;

39. All e-mails, letters, memos, or documentation (including drafts thereof) of any nature or kind that reference or pertain to the November 3, 2009 General Election sent by any person working on the November 3, 2009 General Election on behalf of the City of Coeur d'Alene to any employee or elected official of the Office of the Secretary of State of Idaho from, and including, November 3, 2009 through the date of the production/examination;

40. All e-mails, letters, memos, documentation (including drafts thereof) of any nature or kind that reference or pertain to the November 3, 2009 General Election sent by any Defendant in this case, or their attorneys, to any employee, elected official of the City of Coeur d'Alene, and or City of Coeur d'Alene independent contractor representative from, and including, November 3, 2009 through the date of the production/examination.

41. All e-mails, letters, memos, documentation (including drafts thereof) of any nature or kind that reference or pertain, in any manner to the November 3, 2009 General Election, sent to any Defendant in this case, or their attorneys, by any employee, elected official of the City of Coeur d'Alene, and/or City of Coeur d'Alene independent contractor representative from, and including, November 3, 2009 through the date of production/examination;

42. All files of any person working on the November 3, 2009 General Election on behalf of the City of Coeur d'Alene that contain any documentation, of any nature or kind including handwritten, printed, typed, or electronically stored, that contain any information or comments that pertain to the November 3, 2009 General Election in any manner or nature.

43. Any document, of any nature or kind, that sets forth the identity of each poll worker or election judge or other worker at each precinct for the November 3, 2009 General Election;

44. Any document, of any nature or kind, that sets forth the time of day that any poll worker or election judge or other worker at each precinct for the November 3, 2009 General Election;

45. Any document, of any nature or kind, that sets for the duties of each poll worker or election judge or other worker at each precinct for the November 3, 2009 General Election.
46. Any documentation, of any nature or kind, (other than comments in the respective poll books) that was prepared by any poll worker or election judge or other worker at each precinct for the November 3, 2009 General Election
47. Any documentation, of any nature or kind, that sets forth the name of any person who handled, in any manner, returned absentee envelopes and/or ballots.
48. Any documentation, of any nature or kind, which sets forth the exact duties of any person who handled, in any manner, returned absentee envelopes and/or ballots.”

PARTIES' RESPECTIVE CONTENTIONS:

PLAINTIFF JIM BRANNON:

It is Plaintiff Brannon's contention that, regardless of whether Title 34 or Title 50 apply to the Defendant City's manner of conducting the November 3, 2009 General Election, the City whose Election is at issue, does have "control" of all of the Election related documents sought. The City may not have "possession" or "custody" but given the fact that it is the City's Election it must have "control" of the Election related documents sought.

DEFENDANTS CITY OF COEUR D'ALENE AND SUSAN K. WEATHERS CITY CLERK:

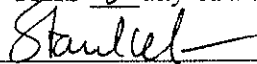
From the response of these Defendants to Plaintiff Brannon's request to arrange a time, place, and manner of counting the absentee ballots, absentee ballot envelopes, and absentee ballot return envelopes, as reflected in Exhibit 1, it is reasonably expected that their response(s) to the above set forth Requests for Production will be the same or similar to the counting request.

CERTIFICATE OF GOOD FAITH CONFERRING TO OBTAIN PRODUCTION

Starr Kelso, Counsel for Plaintiff Jim Brannon and an officer of this Court, does hereby certify that he in good faith conferred with counsel for Defendants in an effort to arrange for the production of the absentee ballots, absentee ballot envelopes, and absentee ballot return

envelopes and this good effort has been responded to in a manner leading to no reasonable alternative but to seek an Order from this Court compelling production on the documents sought. The good faith conferring is reflected and set forth in Exhibit 1 hereto.

DATED THIS 8 day of February, 2010.



Starr Kelso

CERTIFICATE OF SERVICE: A copy was faxed to Defendant City et.al.'s counsel Mike Haman and Defendant Kennedy's counsel Scott Reed and Peter Erbland on the 8 day of February, 2010.



Starr Kelso



Print

Subject **Ballots, envelopes, and deposition**

From: <starr.kelso@verizon.net>

Sent: Feb 2, 2010 01:41:20 PM

To: jcafferty@kcgov.us

CC: scottwreed@verizon.net

Mr. Cafferty and Mr. Haman:

I am following up on the comments of Judge Simpson on the 28th. I believe that he was very clear that Mr. Brannon can see the absentee ballots, absentee ballot envelopes, and the absentee return envelopes, and have them counted in his presence. In order to speed up the process I would appreciate either or both or you proposing a time, place, and manner for the counting to occur? I see no reason to wait until the responses to requests for production come in to proceed with the counting.

Mr. Cafferty, I have not heard back from you with regards to whether you are authorized to accept the service of the subpoena for Deedie Beard. Would you please clarify that point for me.

Starr Kelso

Subject Re: RE: Ballots, envelopes, and deposition
 From: <starr.kelso@verizon.net>
 Sent: Feb 4, 2010 03:23:34 PM
 To: jcafferty@kcgov.us
 CC: mlhaman.law@gmail.com

Mr. Cafferty, Mr. Haman and Mr. Reed:

Mr. Cafferty's below documented response was interesting. I did not hear from either Mr. Haman or Mr. Reed who were copied with the email.

Perhaps I dozed off during the colloquy between Mr. Cafferty and Judge Simpson. My recollection was that the ballots and their "counting" vs. "recount" was specifically discussed between Mr. Haman the Court and between Mr. Cafferty and the Court. It seems that I recall the Court being quite clear that Mr. Brannon was entitled to a "count" of the ballots and envelopes. It was also my recollection that he was inclined to grant the right to inspect the documents. It also my recollection that the Court was not going to take possession of the ballots and sit around while they were "counted."

So, in the interest of moving this matter along and without wasting further time can't we as "officers of the court" agree to some reasonable procedure as to date, time, and place of counting the ballots and the envelopes. We should also be able to agree as to who actually "touches" the ballots and envelopes and who does the counting, be that the same, or multiple persons. I can tell you that I intend to video tape the "counting" regardless of who does what.

So, I request that the three of you put your heads together and come up with a place, date, and time as well as a suggestion who should count and who should "touch." I see literally no reason why the Court need be involved in a simple project like this one.

Starr Kelso
 Feb 3, 2010 12:25:51 PM, jcafferty@kcgov.us wrote:

Mr. Kelso and others:

I do not believe that Judge Simpson addressed the ballot issue. Assuming that he is willing to take custody of the ballots, I see no reason as I sit here today why the County would not turn over the ballots (and any other documents) to the Court pursuant to a valid Court Order signed by the Judge.

I am not authorized to accept service for Ms. Beard.

John A. Cafferty

Civil Deputy Prosecuting Attorney



Print

Subject Re: Brannon v. City
From: Michael Haman <mlhaman.law@gmail.com>
Sent: Feb 4, 2010 06:43:11 PM
To: scottwreed@verizon.net
CC: starr.kelso@verizon.net, jcafferty@kcgov.us

The City does not have possession, custody or control of the ballots and as such is unable to accommodate your request. I think you have to deal with County on this. Let me know if you disagree and I will inquire further.

Mike

On Thu, Feb 4, 2010 at 4:40 PM, Scott W. Reed <scottwreed@verizon.net> wrote:
> As I volunteered without being asked at the hearing before Judge Simpson, I
> believe counting ballots and/or envelopes is meaningless. Accordingly, I do
> not wish to participate, waive attendance and will make no further comment
> on the subject.
>
> Scott

--
Michael Haman
Haman Law Office
923 North 3rd Street
P.O. Box 2155
Coeur d' Alene, Idaho 83816-2155
208 667-6287
208 660-4306 (c)
208 676-1683 (f)

COPY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

* * * * *

JIM BRANNON,

Plaintiff,

vs.

CITY OF COEUR D'ALENE, IDAHO, a
municipal corporation; SUSAN K.
WEATHERS, in her capacity as the
City of Coeur d'Alene City Clerk;
MIKE KENNEDY, in his capacity as the
incumbent candidate for the City of
Coeur d'Alene Council Seat #2; LOREN
RON EDINGER, DEANNA GOODLANDER, MIKE
KENNEDY, A.J. AL HASSELL III, WOODY
MC EVERS, and JOHN BRUNING, in their
capacities as Members of the City
Council of the City of Coeur
d'Alene; SANDI BLOEM, in her
capacity as Mayor of the City of
Coeur d'Alene; and JANE AND JOHN
DOES A THROUGH Z, whose true and
correct names are unknown,

Defendants.

Case No.
CV-09-10010

STATUS CONFERENCE

AT: Kootenai County Courthouse, Coeur d'Alene, Idaho

ON: January 28, 2010

BEFORE: The Honorable Benjamin R. Simpson

APPEARANCES:

For the Plaintiff:

STARR KELSO
Attorney at Law
1621 N. Third St., Ste. 600
P.O. BOX 1312
Coeur d'Alene, ID 83816

Exhibit 1-4

1 of art.

2 MR. KELSO: No, a physical count, not a recount,

3 a physical count. All we want to know is the total number

4 of absentee ballots that are in the stack, I presume a

5 stack. And we want to know the total number of envelopes

6 that are in the stack and the total number of return

7 envelopes that are in the stack. Because there are nine

8 from J -- I and J to the complaint.

9 THE COURT: Can you get that done through a

10 subpoena duces tecum, go to where the ballots are, look at

11 them and do what you need to do?

12 MR. KELSO: We have asked for that. We have been

13 told -- and we have a motion to compel, your Honor, that

14 has been filed in that regard to seek that -- you know,

15 what we have here is interesting, and I pointed it out in

16 my memorandum, is the city whose election this is is

17 claiming they don't have control of any of these

18 documents.

19 THE COURT: Okay. Mr. Haman, from the city's

20 perspective, is that an efficient way to get that issue

21 dealt with? And it is not that that is going to change

22 the official count or the canvas, but it amounts to a

23 physical inspection of the ballots and the envelopes.

24 MR. HAMAN: Your Honor, I have talked briefly

25 with the county on this. I think that this has to go



1 through the attorney General's office now. And granted

2 the county is not a party to this, but, as you can see,

3 the county attorney is here.

4 Maybe I hate to put you under the bus, but you

5 might have some more guidance on this than I do.

6 THE COURT: I am aware of the statute that says

7 if you want a recount of the votes that you must make

8 application to the Attorney General within 20 days after

9 the canvas. So a recount is a term of art, in my mind,

10 which is different than a physical inspection of the

11 ballots and the envelopes. Maybe we are just talking

12 semantics here.

13 MR. HAMAN: The way I looked at the motion to

14 compel which has not been noticed is for a recount. In

15 fact, I am looking at it right now. Motion to compel a

16 count of total absentee ballots received as through the

17 close of election on November 3rd, 2009.

18 I think the city's position on this is it would

19 have to work with the county and possibly the A.G.'s

20 office or at least someone from the State of Idaho as an

21 independent observer. I don't think I or anyone involved

22 with this, including the Court, wants our hands and

23 plaintiff's hands on these ballots. We probably want

24 someone independent. And now for guidance as opposed to

25 law, 34 does require that anyone who seeks a recount has

1 to pay the cost of this. So the cost of this, I think,

2 would also have to be borne by the plaintiffs.

3 THE COURT: All right. I think there is a

4 distinction here perhaps we can make. Mr. Kelso's client

5 wants a count. Okay. I don't think I have any authority

6 to compel the city or anybody else at this point to do a

7 count. On the other hand, if Mr. Kelso and his client

8 want to sit down in a room with whoever the city needs to

9 be there and they want to look at the ballots while they

10 are under control and they don't leave the possession of

11 the appropriate authorities, that's something I think they

12 may have the right to do, given the call of the complaint

13 here.

14 Mr. Cafferty.

15 MR. CAFFERTY: If I may be heard, your Honor,

16 even though, again, I am not a party, and I acknowledge

17 that. The concern that the county has had from the

18 beginning is preserving the integrity of those. What we

19 envisioned if something like this came up would be a

20 request for protective order. We would turn them over to

21 the Court and let you handle it so we absolve ourselves or

22 wrap ourselves in the cloak of judicial protection.

23 Because that is really what this turns on is the ballots.

24 Whether you call it a physical actual recount or a

25 technical term of art recount, these ballots are very

1 important.

2 There is another issue associated with this that

3 will not be -- it is highly probable will not be clarified

4 through this hand counting of the ballots without looking

5 at how they were counted which is it is almost guaranteed

6 that there will be ballots that are turned in that aren't

7 marked. They may be marked for one candidate but not for

8 all of them. So it is not going to fix the problem of how

9 they add up. It may add to more confusion. Likewise, on

10 occasion ballots get kicked out because they vote for two

11 candidates for the same office. Those are physical

12 ballots in there that aren't going to show on the tally

13 because they don't show as a vote for either candidate.

14 You will end up with likely a number of ballots that is

15 greater than the number of votes cast.

16 So, I mean, we would be happy to do it, if the

17 Court wants us. We would prefer to offer these up. We

18 have preserved them from the beginning prior to the

19 lawsuit. A question was asked can we go count them. I

20 directed my clients I didn't think that was prudent

21 because we wanted to save these and if at all possible we

22 will turn them over to the Court and let you handle that

23 issue as you see fit.

24 THE COURT: How do I handle the security to make

25 sure they are not tampered with? I am not going to sit in

Exhibit 1-5

16

1 a room with Mr. Kelso let him physically count
 2 ballots. I will tell you that.
 3 MR. CAFFERTY: That's the concern we have as
 4 well, your Honor.
 5 THE COURT: All right. Let me throw something
 6 out here that the parties might talk about. Obviously,
 7 the central issue here is Precinct 73, what ballots were
 8 theirs, why it is their discrepancy. That's one of the
 9 major issues in the case.
 10 So I think under the normal rules of discovery
 11 Mr. Kelso has a right to look at those. And I don't think
 12 there is any reason either he or his client need to
 13 physically touch them as long as we have got agents of the
 14 county present from the elections department and they sit
 15 and they go through it in a deposition-type setting
 16 relative to production and inspection of the documents.
 17 Is that something that's potentially possible with the
 18 county?
 19 MR. CAFFERTY: There may be a logistical
 20 challenge as far as once the ballots go through they are
 21 not necessarily segregated out, I was just informed. So I
 22 don't know how you could -- we can have the envelopes,
 23 presumably, with some possible consternation of people,
 24 privacy issues there, but we can evaluate that if the need
 25 arises. But a physical ballot is a physical ballot is a

18

1 done. I don't want to put your clients on the spot or you
 2 on the spot or anybody else. I just -- I think Mr. Kelso
 3 probably has the right to look at these documents in
 4 discovery, because they are at the core of his complaint.
 5 If they have been mixed in and they are no longer
 6 segregable which I would guess is probably the case, then
 7 that is something we are going to have to deal with. But
 8 I think to the extent he has got a request that he wants
 9 to see the envelopes, protect the privacy of the voters.
 10 The constitution absolutely protects the privacy of the
 11 voter. Ballots are absolutely secret.
 12 There is a contrary statute under title 34, and I
 13 think we can interpret that in a manner that maintains
 14 constitutionality. One of the things about 34 is at least
 15 three days before trial you have a duty to list the votes
 16 you are challenging by name. And if 34 applies, there is
 17 maybe a mechanism to do that, but that's clearly
 18 discoverable evidence. It may lead to something that is
 19 admissible.
 20 MR. CAFFERTY: Assuming we are under 34. And if
 21 that's where the Court is going, I appreciate that,
 22 because --
 23 THE COURT: I am not convinced we are.
 24 MR. CAFFERTY: As the pleading is drafted, I
 25 don't believe we are either. But I better sit down

17

1 physic allot. And I don't know for sure if they are
 2 still broken out into which precinct they came from.
 3 THE COURT: I think physically they go from 73,
 4 and then they are assigned to each particular precinct
 5 where the person is claimed to be a resident; is that
 6 correct?
 7 MR. CAFFERTY: I'm not sure. My understanding,
 8 your Honor, is --
 9 MR. KELSO: Your Honor, I --
 10 MR. CAFFERTY: 73 is a number assigned for the
 11 purposes of the absentee ballot so they are not mixed in
 12 with the rest of their ballots. Correct?
 13 THE COURT: But they do get mixed in when they
 14 are finally counted.
 15 MR. CAFFERTY: When they run through the machine,
 16 or the machines. I guess there are three.
 17 THE COURT: So at this point it is physically
 18 impossible to segregate those ballots that came in as
 19 absentees?
 20 MR. CAFFERTY: I don't have the knowledge to
 21 speak to that myself, your Honor. I am not sure. Would
 22 you like to hear from the elections department right now?
 23 Or do you want --
 24 THE COURT: I am just exploring how we are going
 25 to get this discovery done and if there is a way to get it

19

1 because I am not really supposed to be addressing that
 2 stuff.
 3 THE COURT: I am just trying to anticipate some
 4 of the discovery issues. I would, just for guidance for
 5 the counsel, I would probably be inclined to grant the
 6 right to inspect those documents. If the county or the
 7 city believe we have to have an A.G. there present to make
 8 sure that nobody messes with the ballots or the envelopes,
 9 that's fine with me. And we can put some protections on
 10 it. But I think he has a right to be in a room and look
 11 at them, if not touch them.
 12 Yes, Mr. Reed.
 13 MR. REED: Can I ask a question, your Honor? If
 14 I understand what's been going on back and forth here in
 15 this courtroom -- I am not talking about anything outside
 16 of the courtroom -- it appears to me that the ballots that
 17 were absentee ended up being then placed within the
 18 precinct after they were received so all you really have
 19 to count are the envelopes. And if you just count the
 20 envelopes there is a high probability that there will be
 21 more absentee envelopes than there are absentee ballots
 22 for the reasons mentioned of mistake or double vote or
 23 something like that. And what does that establish? I
 24 guess that's my question.
 25 THE COURT: That doesn't mean Mr. Kelso doesn't

Exhibit 1-6

1 have the right to look at them.
 2 MR. REED: That's entirely correct.
 3 THE COURT: What it proves is he is going to have
 4 the burden here.
 5 MR. REED: But I guess my question is is it a
 6 right to look at the envelopes or go through all 6,000
 7 votes and look at the ballots. You don't know where they
 8 came from.
 9 THE COURT: Exactly. It is a real issue, and
 10 that's something that Mr. Kelso is going to have to deal
 11 with. But he does have the burden of proof. All right.
 12 How much time are you going to need in court for
 13 your motion to dismiss? Are you ready to go?
 14 MR. HAMAN: We are ready to go on that. I think
 15 it can be safely argued in half an hour. And if for
 16 purposes of expediting the legal issues in this and
 17 trimming the fat, I would almost be willing to submit it
 18 on the brief.
 19 THE COURT: Okay. Mr. Kelso, how much time do
 20 you need to get ready to answer that motion which is a
 21 legal issue primarily?
 22 MR. KELSO: Correct. I guess I would like the
 23 time period pursuant to the rule to respond to it. I
 24 haven't even had time to respond to it yet, your Honor.
 25 In particular there is no reason for me to since it wasn't

1 set until March 2nd. I mean -- I don't remember
 2 exactly what the date is.
 3 (Judge addresses clerk)
 4 THE COURT: Which of three counties are we likely
 5 in that day?
 6 MR. HAMAN: So we would have no objection to
 7 altering the time lines for his response, if he wants to
 8 respond two days before the hearing, if it is expedited.
 9 THE COURT: We are set for 3:30. I have two
 10 other short matters for that date. Is there any reason
 11 that two and a half hours isn't going to be sufficient?
 12 MR. KELSO: No.
 13 THE COURT: Okay. How about if we move that up
 14 to 1:15 on March the 2nd, 2010. That will give you an
 15 uninterrupted two hours anyway. If we need a little more
 16 we can do that. Does that meet with your requirements,
 17 Mr. Reed? Are you available that day?
 18 MR. REED: I am available that day, your Honor.
 19 I have a question. I don't mean to complicate life here.
 20 But we were set for a hearing on motion for summary
 21 judgment that date, and you have indicated it for all the
 22 reasons you set forth in your order, the motion for
 23 summary judgment is not in any way dependent upon any
 24 count of ballots or anything like that; it is based upon
 25 the law. And I am just curious if we could at the same

1 time have this argument for motion for summary judgment.
 2 THE COURT: Is there any reasons the parties
 3 can't be ready for that?
 4 That is legal rather than fact?
 5 MR. REED: It is legal.
 6 MR. KELSO: Your Honor, I have to submit I didn't
 7 read that motion that way, motion for summary judgment, at
 8 all. Otherwise, I would have been entitled to a motion to
 9 dismiss. And the reason that we need the discovery is to
 10 respond to provide our documents. Affidavits were
 11 provided in support of that motion for summary judgment,
 12 your Honor. I don't know how we can have a representation
 13 it is legal only.
 14 THE COURT: Well, I think what I want to do is
 15 flush out which statutory scheme work we are going to
 16 proceed under. So let's stick with the motion to dismiss.
 17 Very shortly thereafter I would think we could hear the
 18 summary judgment. Mr. Kelso, how long do you anticipate
 19 is going to be necessary for you to have time to get ready
 20 for this trial so when we go to trial?
 21 MR. KELSO: As I set forth, your Honor, in
 22 documents I have set forth is that I believe, based upon
 23 the documents that need to be reviewed and examined and,
 24 frankly, my schedule, I have got a ten-day trial
 25 scheduled, again, on March 22nd. I have an administrative

1 hearing on the 18th, and a two-day trial on the 16th of
 2 March. I have got February much the same. I am trying to
 3 figure out as far as marshalling of the documents --
 4 THE COURT: I am trying to give you a chance to
 5 tell me how long you need to get ready for trial.
 6 MR. KELSO: As I said in my brief, in April would
 7 be a trial setting I think we could meet.
 8 THE COURT: April would work for you?
 9 MR. KELSO: Yes.
 10 MR. REED: As I am listening to Mr. Kelso it
 11 sounds like the end of March would also work.
 12 THE COURT: The end of March probably won't.
 13 Because of changes in how the district court schedule is
 14 handled, I am going to be the district judge in Boundary
 15 and Bonner the fourth week of each month. Steve Verby
 16 will be down here trying some of my civil cases on that
 17 fourth week. So the two of us could be in any of three
 18 counties on that fourth week, but I can't reliably set
 19 this case. I wouldn't want to hand part of this off to
 20 him.
 21 MR. REED: I apologize. I heard that yesterday,
 22 that you said --
 23 MR. KELSO: Your Honor, I guess a lot of
 24 miscommunication is going on here, for Mr. Reed to hear
 25 that the end of March works and I just said I had a

Exhibit 1-7