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STATE OF IDAHO)
COUNTY OF KOOTENAI) ss
FILED:

2010 FEB 19 PM 2:53

CLERK DISTRICT COURT
DEPUTY

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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, a municipal corporation, et al.,

Defendants.

Case No. CV-09-10010

MEMORANDUM IN SUPPORT OF I.R.C.P. 26(c) MOTION FOR PROTECTIVE ORDER

COMES NOW Kootenai County, by and through John A. Cafferty, Civil Deputy Prosecuting Attorney, and submits the following Memorandum in Support of I.R.C.P. 26(c) Motion for Protective Order.

I. PROCEDURAL HISTORY

1. On or about October 6, 2009, the City of Coeur d'Alene contracted with Kootenai County, pursuant to Idaho Code § 67-2332 and § 50-404, as well as Titles 34 and 50 of the Idaho Code, for Kootenai County to conduct the city election to take place on November 3, 2009. *See* Exhibit "A" to Mr. Brannon's Complaint and Amended Complaint.

2. On or about November 3rd, 2009, the election for the City of Coeur d'Alene took place and was conducted by Kootenai County, pursuant to the aforementioned agreement.

3. That there were a total of 6,370 votes cast in the city election. Of those votes, 3,160 votes were cast for Jim Brannon in the City Council Seat 2 position, and 3,165 votes were cast in favor of Mike Kennedy for the City Council Seat 2 position, the result being Mike Kennedy was the winner of the City Council Seat 2 election. *See* Exhibits "C" and "D" to Mr. Brannon's Complaint and Amended Complaint.

4. The aforementioned vote tallies were tabulated using a machine count as allowed for by Idaho Code § 50-474 and Idaho Code § 34-2401, et seq.

5. There was not a request filed for a recount by Mr. Brannon for the City Council Seat 2 election in accordance with Idaho Code § 50-471 and/or Idaho Code § 34-2301.

6. That on or about November 9, 2009, at approximately 2:15 p.m., the Coeur d'Alene City Council canvassed the November 3, 2009, election. *See* Exhibit "D" to Mr. Brannon's Complaint and Amended Complaint.

7. That on or about November 30, 2009, Mr. Brannon filed a Complaint pursuant to Title 50, Chapter 4 (specifically I.C. §50-405) naming, among others, Kootenai County as a defendant.

8. That on or about December 10, 2009, Mr. Brannon filed an Amended Complaint removing Kootenai County as a defendant in the action.

9. That on or about January 5, 2010, Mr. Brannon's Motion for a Temporary Restraining Order was denied and the elected city officials, who were elected at the November 3, 2009, city election, were seated.

10. That on or about January 13, 2010, Mr. Brannon filed a "Motion to Compel a Count of Total Absentee Ballots Received as Through Close of Election on November 3, 2009, and a Count of Total Absentee Ballot Envelopes so Received." Mr. Brannon's "Motion" is effectively a request for a judicial recount.

11. That on or about January 14, 2010, Judge Simpson signed an Order vacating Defendant Mike Kennedy's Summary Judgment hearing which was scheduled on January 28, 2010, and set a status conference. In the Order Vacating Summary Judgment Hearing, several references are made by Judge Simpson to Idaho Code § 34-2001, et seq., and its applicability to the pending matter at bar.

12. Some time after January 25, 2010, Notices of Deposition Duces Tecum for Deedie Beard and Dan English were issued; copies of said notices are attached hereto for reference. Neither Mr. English nor Ms. Beard are named parties in the Amended Complaint.

13. That on or about February 12, 2010, a hearing was held on Mr. Brannon's Motion to "Compel Production by the City of Coeur d'Alene." It should be noted that Kootenai County was not present at the hearing, nor given formal notice of said hearing, however, at the hearing Judge Hosack determined that Kootenai County should provide certain documents, the subject of which are the basis for this Motion for Protective Order, as well as the Deposition Duces Tecum for Deedie Beard and Dan English.

II. ISSUES

A. Compliance with Judge Hosack's February 16, 2010, Order is prohibited by the Idaho Constitution and Idaho Code. The Idaho Constitution, Article VI, Section 1, and McGrane v. County of Nez Perce, 18 Idaho 714, 112 P.2d 312 (1910), dictate that the privacy of the voters and their interests in maintaining the anonymity in their votes is of singular importance within the democratic process. Idaho Code § 34-2018 further requires great diligence in the handling and accountability of voted ballots and therefore a protection order should be issued pursuant to I.R.C.P. 26(c).

B. Any attempt to recount the ballots in this matter is statutorily prohibited due to a lack of compliance with the statute and the timeline set forth therein, see Idaho Code § 34-2301, et seq. and § 50-471, and therefore this requested discovery should not be had at all pursuant to I.R.C.P. 26(c).

C. The time period imposed by the Subpoena Duces Tecum to Kootenai County and delivered to Kootenai County on February 16, 2009, does not afford Kootenai County adequate time to respond, is unduly burdensome, is

not admissible in the present matter, and is not reasonably calculated to lead to the discovery of admissible evidence, and therefore should not be allowed.

III. DISCUSSION

A. Compliance with the February 16, 2010 Order is Constitutionally and Statutorily Prohibited.

Article VI, Section 1, Secret Ballot Guaranteed, states:

> "All elections by the people must be by ballot. **An absolute secret ballot is hereby guaranteed,** and it shall be the duty of the Legislature to enact such laws as shall carry this section into effect."
> *Emphasis added.*

One of the earliest opportunities for the Idaho Supreme Court to interpret the Constitution on this issue can be found in McGrane v. County of Nez Perce, 18 Idaho 714, 112 P.2d 312 (1910), wherein the Court stated that:

> " The Constitution guarantees the electors an absolute secret ballot..."

See McGrane, supra, at 314, 716.

In holding that the right to a secret ballot was an absolute right, but that the harm from numbering ballots would only be worse if all of the ballots were thrown-out, the Court found that:

> "The wrong of the officers cannot be visited upon the electors, so as to deprive them of the right of suffrage, where the electors themselves have not been parties to the wrong. Two wrongs will no more make a right in law and government than in morals. To follow up the wrongful preparation of ballots with setting aside the election would only be adding another injury to another already outraged electorate."

See McGrane, supra, at 316, 719. *See also* Huffaker v. Edgington, 30 Idaho 179, 163 P. 793 (1917); Taylor v. Girard, 54 Idaho 787, 36 P.2d 773 (1934); and McNamara v. Wayne, 67 Idaho 410, 182 P.2d 960 (1947).

McGrane stands for the proposition that while inadvertent mistakes may occur which, on their face, could have the potential to call into question the secrecy of the ballot, the single most important factor is to ensure that the right of suffrage is afforded to the populous in as close as is practicable to the constitutional intentions. This Court should not and, in accordance with the Idaho Constitution, cannot allow the nonchalant and unsupervised visitation of the voted ballots by a party when the result has the potential to undermine the constitutionally guaranteed right of a secret ballot.

The importance of limiting access to the voted ballots is articulated at a level not often seen today by the McGrane Court wherein it states:

> "Now, it is quite clear that the handwriting of almost any elector may be identified, not only by the person himself, but by others who are acquainted and familiar with his handwriting. It is not only true that identification may be had through this means, but it may be made by the manner or method of marking the ballot, and yet those marks may have been made in substantial compliance with the statute. Again, the man fresh from the field, the forge, the carpenter shop, or the mason's trade, may leave the imprint of his fingers on his ballot, so that not only he, but the election officers and bystanders, may be able to identify the ballot, and still this has been done unintentionally and innocently, and without any purpose or intent of leaving distinguishing marks upon the ballot. The purpose of the law in pronouncing against distinguishing marks and requiring secrecy was to guard against the corrupt voter selling and delivering his vote to the vote purchaser, so that he might not identify the article that he was selling to the purchaser. . . . These are some of the things the law intends to protect people at large against, and at the same time it intends to guard the individual elector from intimidation and undue influence and greater temptation that

> he is able to withstand. It leaves the voter so that he does not run the risk of losing a position, being thrown out of employment, or subjected to various annoyances on account of having cast his vote in a given way, or having failed to vote as he has promised to do."
>
> McGrane, *id.* at 719, 317.

As the Supreme Court aptly noted, given enough opportunity, parties can evaluate the cast ballots to determine the identity of the castor of a ballot. By allowing Mr. Brannon (or anyone else for that matter) unfettered access to the cast ballots, such fears could very well be realized. It is for that reason that Kootenai County moves this Court for its Order denying access to the cast ballots.

Idaho Code § 34-2018 is very clear on how cast ballots are to be handled. To the extent that this court determines that the cast ballots, or any portion thereof, are to be examined, it is the duty of the Court to oversee the examination and safe keeping of the ballots. I.C. § 34-2018 does not allow for the delivery of the cast ballots to anyone other than the court, and any action that is contrary to that, based upon an order or otherwise, would be a clear violation of the plain language of the statute which states in no uncertain terms that the auditor "...shall deliver them [the ballots] unopened to such presiding judge." I.C. § 34-2019 goes on to state that the judge is the only proper party to actually examine the cast ballots.

It is for the above reasons that Kootenai County respectfully objects to the Court's February 16, 2010, Order, and requests that the subpoenas be quashed pursuant to IRCP 26(c) and none of the requested ballots be delivered.

Alternatively, if the Court determines that the ballots should be delivered, Kootenai County respectfully requests that any such order that is issued addressing the issue be in strict conformance with I.C. § 34-2018 and § 34-2019, and require that the ballots be delivered to the presiding Judge who will then ensure the ballots are properly handled, accounted for and monitored until they are returned by the Judge to the auditor. Further, to the extent that any discovery is to be had that discovery, under the election contest statute, is to be limited to the poll books and ballots, see I.C. §34-2018.

B. Any Attempt to Recount the Ballots in this Matter is Statutorily Prohibited.

Applications for a recount of ballots are controlled by Idaho Code § 50-471 which requires that "any candidate desiring a recount of the ballots in a general city election may apply to the Attorney General therefore within 20 days of the canvass of such election by the City Council." Additionally, Idaho Code § 50-471 provides that Idaho Code § 34-2301, et seq., is further applicable to recounts. According to the January 13, 2010, motion entitled "Motion to Compel a Count of Total Absentee Ballots Received as Through Close of Election on November 3, 2009, and a Count of Total Absentee Ballot Envelopes so Received," the title of the caption alone clearly evidences the intent and request of Mr. Brannon to-wit: a recount of the ballots in the election.

As stated previously, when quoting to the applicable recount statutes, Idaho Code § 50-471 and § 34-2301, the time to file for a recount is within 20 days of the canvass of the election. The canvass of the Coeur d'Alene City

election took place on or about November 9, 2009, as evidenced by Exhibit "D" to Mr. Brannon's Complaint and Amended Complaint. Clearly, more than 20 days has passed since November 9, 2009, and the appropriate time to have filed a request for a recount, with the Attorney General's office, would have been November 30, 2009, at the latest. As clearly stated in both Idaho Code § 50-471 and § 34-2301, the Idaho Attorney General is the only body with the authority to perform a recount. This Court has authority over city elections, see Idaho Code § 34-2006, however, this Court lacks the power to perform a recount as requested by Mr. Brannon. The only person (office) that is permitted to conduct recounts is the Office of the Attorney General.

As this Court lacks the statutory authority to allow or compel a recount of the Coeur d'Alene City General Election, or any part thereof, this Court would therefore lack the authority to compel the production of documents necessary for the recounting. Since there can be no recount, any evidence of a recount would be inadmissible at the time of trial, and, further, any information flowing therefrom could not reasonably be calculated to lead to the discovery of admissible evidence. Therefore, Kootenai County moves for a Protective Order pursuant to I.R.C.P. 26(c), ordering that the discovery and therefore the delivery of the cast ballots not be had.

C. The Requested Discovery, as Drafted, is Overly Broad, Unduly Burdensome, Will be Inadmissible at the Time of Trial, and is Not Reasonably Calculated to Lead to the Discovery of any Admissible Evidence.

As noted previously when discussing recounts, the information sought, i.e., a recounting by hand of the ballots, whether absentee or all ballots, is not within the Court's authority to allow. Beyond the pure lacking of statutory authority and the resultant lack of admissibility, the information sought is so vast and entirely irrelevant to the case at bar as to require, at a minimum, modification of the request. As stated in the Complaint, this is an appeal under Idaho Code § 50-405. On numerous occasions it has been represented by Mr. Brannon that this is not an election contest. Only an election contest or a recount could allow access to cast ballots. Idaho Code § 50-405 does not permit access to cast ballots.

In addition, the information sought through the Subpoenas Duces Tecum is so unduly burdensome and so unrelated to the Complaint filed as to be unduly burdensome and unreasonable, to-wit: in some fashion or another, this case is an attack on the city election for the City of Coeur d'Alene specific to the City Council Seat 2 race between Mr. Brannon and Mr. Kennedy. That being said, the Subpoena Duces Tecum to Kootenai County issued on the 16th day of February, 2010, requests all documents relating to the entire November 3, 2009, General Election, to-wit: all poll books, all absentee ballots, all absentee ballot requests, all absentee ballot return envelopes, all absentee ballot applications, all voter registration cards, all documents related to the total number of ballots ordered for the November 3, 2009, General Election, all unused ballots, all documents related to ballot management, all documents related to election audits, all ballots that were damaged, all ballots that were rejected, all ballots that

were voided, all unaccounted ballots, all ballot stubs, all ballots counted, all postcards, all instructions provided to any poll worker or poll judge, and the list goes on, and on, and on. The Subpoenas Duces Tecum to Ms. Beard and Mr. English, filed sometime after January 25, 2010, are equally irrelevant to the case at bar in that they request only information and materials that occur after the November 3, 2009 election.

As is obvious to the Court by this time, Kootenai County does not believe any of these documents would be proper articles for discovery in the present case for the City of Coeur d'Alene November 3, 2009 General Election, or a lawsuit filed under I.C. §50-405. To expand beyond the City of Coeur d'Alene to include every document within the possession of the County, which would include all County elections and election materials as well as numerous city elections beyond the City of Coeur d'Alene, is clearly beyond the scope of the present lawsuit, and can be of no purpose other than to embarrass, harass and annoy Kootenai County. It is for that reason that again, Kootenai County respectfully requests that the discovery not be had at all, or in the alternative, that the discovery be limited in its scope to matters relating directly and only to I.C. §50-405 or the City of Coeur d'Alene November 3, 2009 election.

Assuming that the Court allows this matter to go forward under Idaho Code § 34-2001, et seq., Election Contest, and does not enforce the action under Idaho Code § 50-405, as pled by Mr. Brannon, then Mr. Brannon is liable for the costs, in the event he is not successful, of this election contest and therefore must post a bond. See Idaho Code § 34-2020 and § 34-2008. At this time, the

bond posted by Mr. Brannon is in the amount of $500. It is anticipated, based upon full compliance with the requested discovery, Subpoena Duces Tecum to Kootenai County, Idaho, signed on February 16, 2009, that the production of the requested documents will require over 1,000 person hours and cost over $30,000. The majority of this anticipated cost is directly related to the production of voter registration cards. While it is anticipated that the County can work with Mr. Brannon to greatly reduce these costs, given the short time period within which Kootenai County is afforded the opportunity to object and respond, it was deemed necessary to raise this argument at this point.

The request to produce "all voter registration cards for every person who registered an absentee ballot for the November 3, 2009, General Election," is the impetus for the majority of the time and costs. Idaho Code § 34-416 requires that certain voter information not be released that is contained within the registration cards, to-wit: the voter's driver's license number, date of birth, and potentially physical residence address. See also Idaho Code § 9-340(C)(25).

Based upon a conservative estimate of the Kootenai County Election's office, there are in excess of 70,000 cards which will need to be copied, redacted, and then recopied before they can be delivered to Mr. Brannon. If it is truly the desire of Mr. Brannon, and the intention of the Court, to produce these documents, it is anticipated that it will take up to six months and require the hiring of additional personnel to comply with this request. It is for that reason that Kootenai County specifically requests that a Protective Order be had with respect to the voter registration cards pursuant to I.R.C.P. 26(c)(3). Further, assuming

that the production is so ordered, Kootenai County would respectfully request that the costs for this reproduction and compiling of information be paid to Kootenai County in advance of the copying in according with I.R.C.P. 45(b)(2), or, at the Court's discretion, that the amount of the bond filed in this case be increased to cover these expenses.

Kootenai County further requests that the previously noticed Subpoenas Duces Tecum of Beard and English be quashed for the same reasons as stated above.

III. CONCLUSION

The matter presently pending before this Court is pled under Idaho Code § 50-405. It is not a recount under Idaho Code § 50-471, nor is it a recount under Idaho Code § 34-2301, nor is it an election contest under Idaho Code § 34-2001. Under Idaho Code § 50-405, none of the requested documents are allowed and therefore Kootenai County respectfully requests that a Protective Order be issued pursuant to I.R.C.P. 26(c) prohibiting the discovery in its entirety.

If this Court finds that the present matter be an election contest under Idaho Code § 34-201, et seq., contrary to the face and plain language of the pleadings, then discovery should be limited in its scope to what is permitted in an election contest, to-wit: poll books and ballots of particular election districts, but only if delivered to the judge unopened as required by Idaho Code § 34-2018.

Additionally, to the extent discovery is allowed to be had against Kootenai County, the costs must be ordered paid in advance, in accordance with I.R.C.P. 45(b)(2). Presently, the conservative estimate is that the requested documents,

as drafted, will cost, at a minimum, $30,000 to produce. Alternatively, the Court could conceivably require the posting of an additional bond to cover the costs as envisioned by Idaho Code § 34-2008 and § 34-2020.

Clearly, as Judge Simpson stated in his Order of January 14, 2010, the Legislature contemplated an expedited time frame for matters of this nature. The expedited time frame is clearly necessary in order to avoid the disruption and ensure the continued operation of a democratic government. To allow the present witch hunt to continue in its existing fashion not only flies in the face of the Idaho Constitution and the Legislators' clearly articulated intent, but is a large and irretractable step down a slippery slope which any disgruntled candidate will be happy to lead future courts, to the detriment of all electors. To quote McGrane, *id*, one last time, "Two wrongs will no more make a right in law and government than in morals."

DATED this 19th day of February, 2010.

Kootenai County Prosecuting Attorney

John A. Cafferty, Civil Deputy Prosecutor
Attorney for Plaintiff