

Signed
Minutes


**Minutes of Regular Meeting of the Board of Directors
of the Wood River Valley Irrigation District # 45
November 12, 2013**

A Regular Meeting of the Board of Directors of the Wood River Valley Irrigation District # 45, noticed for November 12, 2013, was **called to order** by Director Wilson at 5:00 p.m. on November 12, 2013 at its regular place of meeting located at 110 Honeysuckle Street, Bellevue, Idaho.

Director Wilson declared that a **quorum** was present, consisting of Directors Wilson, Super and Gardner.

The minutes of the meeting of Oct 16, 2013 were read, approved and signed by the Directors. The minutes of the meeting of October 3, 2013 remain in process.

OPENING PUBLIC COMMENT TIME:

Poppy Englehardt expressed her appreciation for the efforts of the all the people who worked on the recent election. At Director Gardner's request, Ms. Englehardt's statement shall be set forth in the Appendix to these minutes and to become part thereof.

Barbara Browning read a letter and she asked that it become a part of the minutes. Pepin Corso-Harris and Grace Eakin also provided statements to the Directors. The Directors instructed the Secretary to set forth all three letter in the Appendix to these minutes and to become part thereof.

Ray Goettsch read an e-mail he had sent in response to the letters from Barbara Browning, Pepin Corso-Harris and Grace Eakin and he asked that it become a part of the record, a copy of which shall be set forth in the Appendix to these minutes and become part thereof.

Mr. Super requested that the matter of canvassing the results of the election be addressed next, to which all directors agreed.

ELECTION MATTERS:

RAY GOETTSCH, Chairman of the Election Judges, reported on the results of the election held on November 5, 2013, reporting that all three of the Election Judges (Mr. Goettsch, Ms. Browning and Ms. Aiken) had confirmed on the night of the election that Mr. Frugard had received 86 votes and Ms. Englehardt had received 85 votes and that all three judges had signed a certification to that effect.

There was discussion about a ballot cast at the election, which was determined by the election judges, as addressed in the letters and statements described, to be a spoiled ballot. The discussion included a recognition that had the spoiled ballot not been spoiled, the vote would have been tied. Mr. Wilson announced that he had requested and received an email from Andy Waldera, the district's attorney, on the subject of the ballot cast at the election which the Judges had determined to be spoiled. Mr. Wilson read Attorney Waldera's email aloud in its entirety and instructed that a copy of which be set forth in the Appendix to these minutes and become part thereof.

On the advice of counsel, the Board instructed Mr. Goettsch to open the valid ballot box and retrieve the Judges' certification of the election results therefrom, but to keep the spoiled ballot box sealed at this time.

Mr. Goettsch then unsealed the box containing the validly cast ballots and the other election materials placed therein and provided the Board with the Judges' certification of the results which certified that Mr. Frugard had received 86 votes and Ms. Englehardt had received 85 votes.

Mr. Wilson announced that the certification of the judges of the results of the election on November 5, 2013 confirmed and assert that

Mr. Frugard had received 86 votes and Ms. Englehardt had received 85 votes.

Mr. Super moved that the Board, having canvassed the returns provided by the judges, that Mr. Frugard be declared elected. Ms. Gardner seconded the motion. After discussion, including consideration of the letters, e-mail and statements provided to the Board, and the availability of statutory provisions allowing for the filing of a legal petition for a court contest which may be filed within 20 days after the canvassing of the returns by the Board, upon the advice provided by the District's attorney, Mr. Waldera, particularly to the effect that by the disclosed act of the elector having marked his or her initials on the ballot in question, that ballot could not be considered as a secret ballot and in light of state statutes and case law compelling an election process whereby for a ballot to be considered as potentially valid, it must, in addition to all other legal requirements, be cast as a secret ballot, and whereas the ballot in question which disclosed as having been marked by the voter with his or her initials, it was properly treated by the three judges together with Ms. Englehardt's designated poll watcher, Ms. Corso-Harris, on the night of the election as a spoiled ballot, whereupon, the Board then voted on the motion and the motion was unanimously passed by all three directors voting in favor of the motion, and

WHEREUPON, THE BOARD, having conducted a Canvassing of the Returns, as required by law and as certified by the three election judges on the night of the election, Director Wilson then announced and declared that Mr. Frugard had been elected as a director of the Wood River Valley Irrigation District # 45 to be sworn and to take office in January of 2014 in accordance with statutory procedures.

On motion by Mr. Super, seconded and unanimously carried, the Board requested and instructed Mr. Goettsch to return the Judges certification to the opened ballot box and to take possession of the unopened spoiled ballot box and take possession of the opened valid ballot box and all election materials contained therein and deliver them to the County Clerk for safekeeping by the county clerk during the 20 day period of time allowed by law for the filing of a legal

petition to contest the election results to allow for such petition to be formally filed by Ms. Englehardt or any other qualified elector so desires to contest the results.

Whereupon, Mr. Goettsch took possession of the ballot boxes as instructed for delivery to the County Election Clerk.

REPORTS:

MANAGER KELLY SHANNON: Updated the Directors on ditch matters, including his recommendation to sell the district's unused truck, whereupon the board agreed and authorized that it be sold; that he is staying in touch with the parties pursuing a possible plan for a white water park in the Wood River in the vicinity of the District's main head-gate in Bellevue which if approved and constructed as currently described, may benefit the district in a replacement of the main head-gate, all without interruption to the operations of the district and at no cost to the district; that he is working with the owner of the Tedesco property for running an underground pipe pursuant to a survey that he has obtained, all work to be done at no cost to the district; that he has personally acquired a used ATV which he will use for district use if the district will pay for a new seat and some needed minor repair expenses, the bill for which is to be submitted to the Board for consideration; that he was also instructed to investigate the insurance requirements and provide insurance on the ATV if it to be used in the course of district work; that he has the survey documentation for the Beck project which he will forward to Mr. White; that the Highway 75 leg of the ditch is nearly clear of cottonwoods; that continuing ditch work includes working with the engineer to certify additional measuring devices which have been recently uncovered; and that he will meet with Keith Myers to continue ditch clean out efforts.

SEC-TREAS JIM WHITE: Reported as follows: that the October financial were circulated to the Directors; that the 2014 Assessment Invoices have been prepared and mailed together with an additional sheet as to each invoice containing specific additional information as requested by Director Super; that December 9, 2013 should be set as

the date for Board of Corrections Meeting per Statute; that the proper notice has been published in the local newspaper; that bookkeeping matters are transitioning smoothly from Stacie Brew to Linda Gates; that the District has sufficient cash on hand to carry operations thru the end of year; that his analysis and research into past overcharges, delinquency lists issues and board action to correct past overcharges on accounts with outstanding but incorrect balances is nearing completion; that the insurance carrier has settled the Bloomfield Insurance Claim without cost to the District; that as a result of recent events, he will be making recommendations shortly regarding multiple matters, including the Election process and procedures, recommendations for formation of an Election and District Map committee to address the need for a reliable map, in general and specifically as to Griffin Ranch parcels; that as Chairman of the dormant Communications committee and as Secretary of the District he sent a news letter of October 10, 2013 to members; that among other matters learned at this election is that the District does not yet have a map that can be relied upon fully, and the situation with the properties in Griffin Ranch is of particular concern and warrants the time and expense next year as necessary to procure a fully reliable map sufficient to identify not only the proper external boundaries of the district as set by the governing order of the County from 1915, but to also identify those lots within the external boundaries which may not have been included in the district in the first instance when it was formed or may have been excluded in some manner or another and that further investigation in this regard is necessary and warranted.

MARK GOWER, the BY-LAW COMMITTEE chair reported no change in that the By Laws committee is on hold awaiting results of on-going negotiations between Messrs Wilson, Super and Beavers.

OLD BUSINESS REPORTS regarding alternative ways to resolve differences between large and small land owners:

DIRECTOR SUPER reported on the ongoing efforts and status of his negotiations and a discussion points memo in process with Steve Beevers re possible Memorandum of Understanding and a possible By-Law based approach; these matters will continue to be the subject

of negotiations; reported on his straw poll efforts; that the discussion needs to take into account the fact that many new people were just identified as eligible to vote and their positions are as yet unknown and thus their preferences on these matters cannot reasonable be evaluated at this time.

DIRECTOR WILSON invited Mr. Beevers to comment. Mr. Beevers commented that he saw two primary issues: one, acreage weighted voting and two, protections for the assessment model; that he thought the straw poll effort would not be as broad based as Mr. Super had discussed; that he perceives that there is a group of “influencers” and he would be open to a discussion with such persons before proceeding further with a new Petition for Partition.

DIRECTOR SUPER offered to provide a list to Mr. Beevers of persons which Mr. Super thought Mr. Beavers might be interested in talking to in these respects.

Mr. Beevers suggested that further discussion of the matter be tabled and the board concurred.

The introduction of an alternative method, as suggested by Mr. White, (using Idaho Code Section 43-730 authorizing contract(s) between District and other entities, – *e.g.*, HOA’s and other “associations” – and as compared and contrasted with Petition to Modify District by the removal of lands from District previously submitted by Ray Goettsch pursuant to Idaho Code section 43-1301 with proposed By-Law allowing subscription rights for transit of water to land removed) was also tabled.

DIRECTOR SUPER moved to thank John Stevenson for irrigating the District’s Gannett Road property, Director Wilson indicated he would send a thank you letter to Mr. Stevenson thanking him for irrigating the District’s Gannett Road property.

NEW BUSINESS:

CHAIRMAN WILSON called for the discussion time for goals and

projects be tabled and the directors concurred.

CLOSING PUBLIC COMMENT TIME:

Jan Super commented that she believed that a person in addition to Mr. Beevers alone should be brought into the discussions with the “influencers”.

Mr. Beevers reiterated his willingness to partner up with Steve Wilson and Jim Super on conference calls with “influencers”.

Ray Goettsch commented on an election issues as to how a secret ballot could be created in an acreage weighted voting system. Mr. Wilson responded that he is informed that a system has been designed to accomplish this. Mr. Goettsch also reported that he believed, as Mr. Waldera had noticed, several people appeared to be engaged in “gamesmanship” by creating new trusts with the goal being to increase votes allocated to the property owners who created multiple trusts and that in other situations persons provided conflicting information respecting marital status and that in his personal opinion a certain trust would not have qualified to vote, but because the voter was willing to sign a declaration under penalty of perjury, the voter was allowed to vote, as the Judges were instructed; accordingly, Mr. Goettsch suggested, that after additional investigation, the board should consider referring the matter of the “gamesmanship” of creating multiple trusts and the matter of perjured declarations of voters to the district’s attorney for guidance and possible referral to the prosecutor’s office.

Mark Gower commented he wanted people to understand that he did not have a problem with acreage weighted voting, provided there was, what he referred to as “weighted paying”, so as to not require small users to have to subsidize large farmers for projects of no value to the small users.

Mr. White reiterated Mr. Goettsch’s observation that there was significant “gamesmanship” by property owners establishing multiple trusts to garner more votes and thus, possible perjury by certain

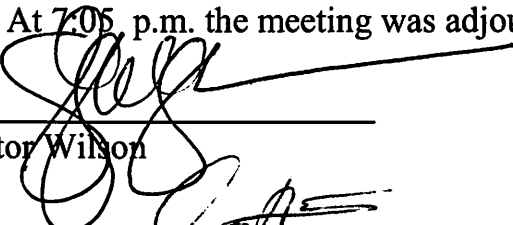
voters; that he invited Mr. Beevers to visit the valley soon and he indicated that his personal opposition as to acreage weighted voting is not set in concrete and that he believes Idaho Code Section 43-730 authorizing contract(s) between the District and other entities is an excellent solution that needs to be evaluated by interested parties, particularly by the Board and by Mr. Beevers and that Mr. White invited a discussion with Mr. Beevers to explain the code section to him and to demonstrate how that approach could work in a way that could keep the district together as one district, protect the small users and allow for the possibility of acreage weighted voting, if approved by a 2/3 vote of the electors. The directors indicated they would read and study the section. Mr. Beevers indicated he was open to all options being considered and was open to having further discussions.

NEXT MEETING DATE CONFIRMED

Mr. Wilson announced that the date for the next regular meeting is set for Monday, December 9, 2013, to commence at 5:00 p.m. at 110 Honeysuckle St., Bellevue, Idaho.

ADJOURNMENT

At 7:05 p.m. the meeting was adjourned.



Director Wilson



Director Super



Director Gardner

APPENDIX

Poppy Englehardt's Statement is as follows:

"Thank you to the Board for allowing public comment at the beginning of the meeting. After the election last week, I was made aware that I had lost by one vote. Following that I was told there had been a vote that was considered spoiled at the time of the count. Two of the judges and the poll watcher stated that they considered the vote to have been for me, but as they had only worked at elections with punch ballots, they did not know it could be considered in the count. The Secretary of State was contacted and the rule was shown to be that if the ballot is clearly for one candidate it should be counted. I am asking the Board to please do what is right and legal in this situation, and to look at the ballot to determine if you believe it is truly clear whom the ballot was for. Someone had taken the time to come vote and their voice should be heard. No where was it stated that if any extra marks were on the ballot that it would not be counted. Normally, in legal documents, initials are considered to be regarded as legal changes.

Gary and I are both excellent candidates and want to do what is right for the board. I am not trying to wrestle myself into a place where I was not selected to be. I only am hoping that the district which has been clouded with a history of questionable behavior, will agree that doing the right thing is more important than getting a certain person to a place of power for some exertion of control.

A lot of work went into the election. Mr. White and the judges and poll watchers did an excellent job. It was a learning process for everyone and we continue to learn more as time goes on. I think it was a good example of the strides we are making together as a district. I'm hoping tonight that that spirit continues and that it won't come to dragging out this process with lawyers and judges. I appreciate your time in considering this. Thank you."

[SECRETARY'S NOTE: Ms. Englehardt's statement incorrectly asserted that there were multiple "poll watchers". There was only one poll watcher, being Ms. Corso Harris having been designated by Ms. Englehardt.]

ADDITIONAL ITEMS IN THE APPENDIX:

Letter read by Ms. Browing (attached)

Letter sent by Ms. Corso-Harris (attached)

Letter sent by Ms. Eakin (attached)

E-mail read by Mr. Gottsch (attached)

E-mail from Attorney Waldera, read by Mr. Wilson (attached).

WRVID Board of Directors
P.O. Box 2223
Hailey, ID 83313

November 10, 2013

To Whom It May Concern:

I am writing on behalf of the November 5th Irrigation District election results. It has since come to my attention that the rules for optical scanning ballots, used by the Blaine County election office, are not the same as the paper ballots that were used for this election. I have helped with local elections for over twenty years now. I was instructed that when a ballot had more than one mark on it, the ballot would be considered "spoiled". From that, it was determined that the ballot in question was rendered "spoiled", though it was clear to me that the voter wanted to vote for Poppy Englehardt.

I would like to tell you what I remember in the order it happened. The chief judge, Ray Goettsch, opened each ballot and read off the name next to the checked box. He showed the ballot to both Grace Eakin and me. Grace then took the ballot and placed it in the appropriate stack. One pile for Gary Frugard and one for Poppy Englehardt. I was keeping tally on the tally sheet provided to me by Jim White. Towards the end of the count Ray pulled out the ballot in question. He didn't say a name either way just showing it to Grace and me. It was clear to me that the voter's intention was to vote for Poppy. He/she had marked off the box (several times) next to Gary's name then initialed it. He/she then marked the box next to Poppy. I could tell that the voter intended to vote for Poppy but was concerned about the legality of the ballot given my training from previous county elections. I remember looking over at Pepin Corso-Harris at that point. We both agreed that since the ballot had two marks on it, it would be considered spoiled. Ray set it off to the side then continued on with the counting. At the end, Ray picked up the ballot for us to examine once again. I was still torn as to what was the "right/ethical" thing to do. Jim White spoke up saying that we already said it was spoiled. At that point, it was agreed that it would go into the "Spoiled" ballot box. If we had counted it for Poppy, the result would have been a tie between Gary and Poppy.

After reading the following from the Idaho procedural manual I strongly believe that the ballot should be counted as a vote for Poppy E. It reads:

Section 34-1203, Idaho Code, sets the statutory standards for counting ballots i.e., "Any ballot or part of a ballot from which it is impossible to determine the elector's choice, shall be void and shall not be counted. When a ballot is sufficiently plain to determine therefrom a part of the voter's intention, it shall be the duty of the judges to count such

part.” Therefore, a ballot shall not be rejected for a technical error that does not make it impossible to determine the voter’s intent.

In determining the intent of the voter, the following principles apply:

1 – 5 (The first five do not apply to this ballot)

6. Attempted erasures or cross outs. *If the names of two candidates have been marked and an attempt has been made to erase or obliterate one of the marks, a vote shall be counted for the remaining marked candidate. If an attempt has been made to obliterate a write-in name, a vote shall be counted for the remaining name or marked candidate.*

Sincerely yours,

Barbara S. Browning
PO Box 259
Bellevue, ID 83313

WRVID Board of Directors
P.O. Box 2223
Hailey, ID 83313

woodriver45@gmail.com

November 11, 2013

RE: The November 5, 2013 Election's Spoiled Ballots

For the record, as a Challenger at the November 5, 2013 election, I would like to state what I observed concerning three (3) alleged spoiled ballots.

Two of the spoiled ballots were turned in at the judges table, the electors stating that they had made an error on the ballot and requesting a new one. The last ballot that was labeled "spoiled" was found in the ballot box during the tally of the ballots by the judges.

The ballot in question had both boxes marked. Gary Frugard's box was marked over multiple times to obscure the mark of a choice and this was initialed. Poppy Englehardt's box was clearly selected. There was discussion about this because the voter's intention was clear, but the way it was done was in question. There was confusion of what to do with it. If there had been no chance of determining who the vote was for, there would not have been any discussion at all. Ray Goettsch did not voice an opinion one way or another, but in the end the Blaine County Election Office training that prohibits more than one mark on a ballot was the basis for determining that this ballot was spoiled. This was to be proven inaccurate in this case because as the Blaine County Elections Office uses an optical scanner and these were paper ballots. There are rules that allow judges to take the elector's intent into consideration on paper ballots.

Section §34-1203 sets the standard for counting paper ballots and states in part:

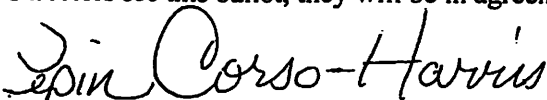
"Any ballot or part of a ballot from which it is impossible to determine the elector's choice, shall be void and shall not be counted. When a ballot is sufficiently plain to determine therefrom a part of the voter's intention, it shall be the duty of the judges to count such part."

In the Idaho Procedure Code Manual, the guidelines for a paper ballot states:

#6. "Attempted erasures or cross outs. If the names of two candidates have been marked and an attempt has been made to erase or obliterate one of the marks, a vote shall be counted for the remaining marked candidate."

It should be noted that the elector even initialed their error, as one would on documents to affirm that they are aware and responsible for a change that might be taken as ambiguous.

In my mind, what I saw was clearly a vote for Poppy Englehardt and my thoughts and stating at the time that this was a spoiled ballot were based on a lack of familiarity with §34-1203. As the canvassing is to verify the correct ballot count, I am confident that when the head judge, Ray Goettsch, and the Board of Directors see this ballot, they will be in agreement and declare a tie.



Pepin Corso-Harris
11 Purple Sage Lane
Bellevue, ID 83313

To: The WRVID Board of Directors

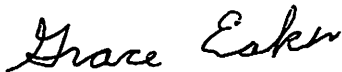
November 11, 2013

I have been told that the head judge of the November 5, 2013 election, Ray Goettsch, believes that there were (3) ballots that did not qualify to be counted in this election. One of those (3) ballots was clearly marked as a vote for Poppy Englehardt, but it had other marks and the voter's initials as well. I have learned since the election that if the candidate the voter wishes to vote for is clear on the ballot, that the vote should be counted.

At the tallying, Mr. Goettsch as head judge pulled the ballots out of the ballot box, called the vote for either Poppy Englehardt or Gary Frugard and handed the ballots to me while Barbara Browning recorded the tally. When he pulled that ballot out of the box and looked at it, he did not call it one way or another. He simply handed it to me. Discussion between the three judges followed, with some confusion of what to do with it. Barbara Browning and I stated that our Blaine County training prohibited more than one mark on a ballot and that we felt this ballot was spoiled.

However, there is no question from what was on that ballot that Poppy Englehardt was the person the voter wanted to chose.

Sincerely,



Grace Eakin
WRVID Judge
28 Pero Road
Bellevue, ID 83313

From: stingraygoettsch@gmail.com
To: tgraves@co.blaine.id.us
Cc: [Sarah Gardner](#); [Jim Super](#); [Steve Wilson](#)
Subject: FW: Irrigation District Election
Date: Sunday, December 01, 2013 10:09:34 AM

To Whom It May Concern:

Upon re-reading my summary, I think that I would be remiss if I did not add one clarification. I do not know, in fact, if the two gentlemen in question were or are married in another jurisdiction. Presumably, this would be the subject of any ensuing investigation if this matter is pursued.

Raymond H. Goettsch

Sent from Windows Mail

From: stingraygoettsch@gmail.com
Sent: November 28, 2013 9:46 AM
To: tgraves@co.blaine.id.us
CC: [Sarah Gardner](#); [Steve Wilson](#); [Jim Super](#)
Subject: Irrigation District Election

To Whom It May Concern:

Pursuant to the request of Steve Wilson for the Wood River Valley Irrigation District No. 45, I am explaining an incident that occurred at the November 5, 2013 election for a member of the board of directors of the District. I acted as a judge at that election, and I was appointed chairman of the three-judge panel.

During the election, a gentleman reported that he was designated to vote on behalf of a trust in the name of a second gentleman. I checked the first gentleman's driver's license to confirm his residency in Blaine County, and I also confirmed that he was a registered voter in Blaine County. In addition, I confirmed the trust's ownership of property in the District. Since a trust can only vote in a water district election if all beneficiaries are natural persons related by blood or marriage, I asked the gentleman if all of the beneficiaries of the trust were related by blood or marriage. He responded that they were not. I then explained that he could not vote. At this point, the gentleman stated that he was married to the second gentleman. I pointed out to him that he had just previously told me that they were not related by blood or marriage, and he reiterated that the second gentleman and he were, in fact, married. I then told him that if her were willing to swear to that fact under oath, he

would be allowed to vote, but that I would be challenging his right to vote based upon the inconsistent information he had provided to me. The gentleman then executed an oath in which he swore that all beneficiaries of the trust were related by blood or marriage, he was given a ballot and he voted.

By way of explanation, the attorney for the district had instructed before the election that if a person were willing to state her or his qualifications under oath, that person should be allowed to vote. The attorney explained that the only remedy for false swearing under oath would be a potential criminal prosecution for perjury.

At the November 12, 2013 canvas of the election vote by the board of directors, I brought this incident to the attention of the board, because of the blatant nature of the first gentleman's conduct and his apparent false swearing.

On November 18, 2013, I learned for the first time that the first gentleman and the second gentleman might actually be married, albeit in a jurisdiction other than Idaho. Had I known this information prior to November 12, 2013, I would not have brought the incident to the attention of board. My reasoning in this regard is as follows. First, although the first gentleman stated orally first that the second gentleman and he were not married and then contradicted himself orally, these oral statements were not made under oath. Second, although the first gentleman stated under oath in writing that the second gentleman and he were married, he did not state under oath that they were married "under Idaho law." As a result, if the second gentleman and the first gentleman were married in another jurisdiction, his statement under oath would not be false.

That said, it is my understanding that the district's attorney has opined that this incident should still be brought to the attention of the prosecuting attorney.

Finally, I have not used the names of the two gentlemen; however, I can provide the names if a criminal investigation and/or prosecution ensues. Moreover, relevant documentation would reveal these names in any ensuing criminal investigation and/or prosecution.

If I can be of further assistance, please do not hesitate to contact me.

Raymond H. Goettsch

Sent from Windows Mail

James White

From: Andy Waldera <AJW@moffatt.com>
Sent: Tuesday, November 12, 2013 3:42 PM
To: Steve Wilson; Jim Super; Sarah Gardner
Cc: James White
Subject: District 45 Election Questions/Issues

Importance: High

Good afternoon everyone.

While the process of the recent Board of Directors election went smoothly, questions have arisen over what should (or can) be done with a previously-ruled spoiled ballot apparently cast for Poppy Englehardt.

I offer the following analysis and recommendation under various headings more or less matching questions that have been posed to me in the wake of the November 5 election:

1. Is the District subject to the Idaho Secretary of State's Office Election Procedure Manual for Paper Ballots?

Yes, I believe that the District is subject to the Manual, and the corresponding provisions of Idaho Code Section 34-1203, providing in part:

"When a ballot is sufficiently plain to determine therefrom a part of the voter's intention, it shall be the duty of the judges to count such part."

See also, Manual, p. 73, providing in part:

"DETERMINING VOTER'S INTENT . . . **Attempted erasures or cross outs.** If the names of two candidates have been marked and an attempt has been made to erase or obliterate one of the marks, a vote shall be counted for the remaining marked candidate."

I believe that the District is subject to the statute (34-1203) and the Manual because of the repeated references Idaho Code Title 43 (governing irrigation districts) makes to the general election laws of the state and/or Title 34 of Idaho Code. *See*, e.g., Idaho Code Sections 43-111; 43-112; 43-201; 43-207; and 43-210.

Please note, however, irrigation districts are expressly exempt from Idaho's Uniform District Election law under Idaho Section 34-1401. Please further note that to the extent there are conflicts between provisions of Title 34 (the general election laws of the state) and Title 43, the provisions of Title 43 will govern because they are the most specific statutes dealing with any given election-based issue from the irrigation district perspective. However, Title 34 will govern any "gap-filling" that needs to occur where Title 43 is silent on any particular election issue.

My response to this question militates in favor of counting the ballot in question as a vote for Poppy provided the voter's intent can be clearly ascertained. **However, this is not the full story, nor my final recommendation (see Question No. 4 below).**

2. What does the Board do when canvassing election results (i.e., can the Board second guess the Judges of Election)?

The Board and the Secretary do not second guess the official findings and certifications of the election judges decided on the night of the election. Under Idaho Code Section 43-206, the judges comprise the Board of Election and the District Board of Directors simply announces the result and makes the result official (in tandem with the Secretary's certifications under 43-208 and 43-213). For example, though Idaho Code Section 43-212 uses the term "counting," the District Board

does not “count” anything. Rather, the “counting” refers to the District’s canvass of the certified returns, and the making of a formal announcement (“declaration”) regarding the number of votes received by each candidate. Neither 43-208 or 43-212 refer to the boards of irrigation districts canvassing the ballots, rather they both speak in terms of the boards canvassing the “returns.”

My interpretation of the statutes is further supported by my discussions with Betsie Kimbrough of the Idaho Secretary of State’s Office earlier today. Betsie is the Elections Division Supervisor, who also addressed my questions with the Deputy Secretary of State. While the Secretary of State’s Office does not oversee irrigation district elections (which Betsie acknowledged in her November 7, 2013 letter to Sarah), Idaho Code Section 43-208 does expressly provide that irrigation district boards of directors canvass election returns “in the same manner and with like effect, as near as may be, as the board of county commissioners in canvassing the returns of general elections.” Under Idaho Code Section 34-1203, the election judges, not the county commissioners, count and tally the votes, and later post a copy of the result. Then under Idaho Code Section 34-1206, the commissioners make their official declaration of the results, as marked and tabulated by the judges, after which the County Clerk issues his/her statements/certifications under 34-1208.

According to Betsie and the Deputy Secretary of State, the returns are the returns. The Board of County Commissioners (and an irrigation district board of directors by analogy) do not inject themselves into the process. Instead, the boards make the return results “official” through their formal declarations and the clerk’s/secretary’s statements and certifications. The real work is done by the Board of Election (the judges) ahead of time after the polls close. Thus, an aggrieved candidate’s recourse is found in Idaho Code Section 34-2001, *et seq.*, and not through any action of the District Board (a point again confirmed by Betsie’s November 7 letter to Sarah).

This being said, Idaho Code Section 43-211 does provide irrigation district electors an additional, more immediate remedy that does not appear to exist in Title 34 (the general election laws). 43-211 allows one to challenge the veracity of a ballot count and demand a recount, during tonight’s board meeting. However, the issue facing District 45 as I understand it is not a counting problem, but a ballot validity problem/question.

So, to recap, the Board only reviews and officially declares the results of the returns. It does not second guess the results or determinations of the election judges made on election night (i.e., the Board does not attempt to separately ascertain the intent of the voters or substitute its views for those of the judges).

3. What happens if the Election Judges change their minds post counting, tallying, and result certification on the night of the election?

This question is raised in the context of the letters Sarah received from Barbara Browning (an election judge), Pepin Corso-Harris (Poppy’s poll challenger), and Grace Eakin ((an election judge).

There are no statutes or cases that I can find addressing the “change of mind” issue in light of the application of the paper ballot methodology under Idaho Code Section 34-1203. So, the next best source was posing the question to Betsie and the Chief Deputy Secretary of State. The response I got was that the judges are to make their determinations on the night of the election after the polls close. Quite literally, their collective job as the Board of Election is to “judge” the process and the outcome, and make the best, fairest, and honest decisions they can *at that point in time*.

After describing the situation to Betsie, including the apparent application of Idaho Code Section 34-1203 to the ballot interpretation issue, she replied that the arguable mistake did not undermine the validity of the election or create any unfair advantage to one candidate over the other (i.e., the decisions made on election night were not biased—all of the judges present agreed). And, if someone feels differently, it is up to the Court’s to decide under 34-2001, *et seq.* Betsie’s closing remark was that it is up to the judges to determine the intent of the voters at the time, and none of a board of county commissioners or the Secretary of State’s Office is charged with overruling those election night determinations.

If the election judges have changed their minds, that is something to be sorted out in an election contest context under Title 34, Chapter 20 *after* the Board canvasses and announces the result tonight . . . if someone chooses to undertake such a challenge.

4. The secret ballot concern: Did the voter’s initials spoil the ballot due to the Idaho Constitution’s “absolutely secret ballot” requirement?

This question, in my mind, is the most important question to ask; and it is determinative of the controversy from my perspective.

In full, Article VI, Section 1 of the Idaho Constitution provides:

“All elections by the people must be by ballot. An absolutely 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.”

To be clear, the issue in my mind is not whether the District (or the judges) did something to compromise the secrecy of the ballot in question (it/they did not), but whether the voter’s own initialing of the ballot compromised the ballot. The fact that the subject ballot was initialed by the voter is confirmed in each of the letters received by Sarah.

The Secretary of State’s Office acknowledged my concern, but was not willing to render a decision on the matter saying that it is in no better position to make a decision than the District and, if push comes to shove, the Courts must decide in the form of an election contest.

There is no question that the initialed ballot is no longer a secret ballot. The nature of the vote, and the identity of the person casting the vote is directly traceable due to the initialing, and this is precisely what the secret ballot requirement seeks to avoid (the tracking of how any individual voter voted).

There is case law confirming that the Idaho Constitution’s secret ballot requirement applies to irrigation district elections. *See, e.g., Pioneer Irr. Dist. v. Walker*, 20 Idaho 605 (1911). That same case makes clear that marking a ballot in a way that can be used to track how an individual voter voted violates the secret ballot requirement.

The issue in the Pioneer case involved a newly enacted statute in 1911 that allowed irrigation district landowners to vote in proportion to the number of inches of water they were entitled to receive from the irrigation district (essentially a precursor to today’s acreage-weighted voting regime under Idaho Code Section 43-111). So, if a patron was entitled to the delivery of 400 inches of water, he received a ballot identifying that number of inches of water, which in turn meant that the ballot was worth 400 votes. Thus, the “identifying” ballot marking at issue was not a voter’s own initials, but the inches of water entitlement which could, in turn, be tied back to any individual voter through use of the District’s assessment book.

The Idaho Supreme Court held that the water/acreage-marked ballots were illegal because they violated the constitutional guarantee of a secret ballot. According to the Court, an “absolutely secret ballot” means just that. The Court stated that where a ballot is marked in a manner where “there is an identification of the particular vote cast,” the “secrecy of the ballot is completely annulled and a publicity given of such vote.” 20 Idaho at 618.

In all candor, the thrust of the case was the testing of the 1911 legislation that led to the marking of ballots, and the ruling that such legislation violated Article VI, Section 1 of the Idaho Constitution (i.e., I acknowledge that the case does not directly address the situation currently facing the District). However, the case also underscores the constitutional sanctity of the secret ballot requirement—a protection that can no longer be provided to the District ballot at issue given the voter’s initials on the same. At this time, the District is dealing with the direct identifying effect of one’s own personal initials, not even the more anonymous “inches of water” marking.

Though I know this is not going to be a popular decision with the election judges, or, perhaps the Board of Directors, my recommendation in this matter is that the subject ballot be considered spoiled because there is no way to preserve the constitutional mandate of “absolute” ballot secrecy. On the one hand, my recommendation arguably takes the vote away from the person who cast it. On the other hand, the District is poised to take official action declaring and certifying the election results under Title 43, and I do not want the District to incur potential liability for violating the applicable constitutional mandate by counting a readily traceable (i.e., non-secret) ballot. In my opinion, preservation of the constitutional secret ballot mandate takes precedence over the situation. However, I also acknowledge that the matter is a difficult call to make.

5. If the District decides to declare a tie, notwithstanding my secret ballot concern:

Should the Board decide to review and count the ballot assuming that the voter's intent can be easily ascertained therefrom, then a tie would be the result. In that situation, and for the reasons discussed in my answer to Question No. 1 above, Idaho Code Section 34-1216's coin toss provision applies for purposes of breaking the tie.

I hope this e-mail finds you all well. Please let me know if you have any questions.

Should you want to contact me during the tonight's Board meeting, please contact me on my cell phone (724-7287).

Regards,

Andy

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