

Marilyn R Marks

Subject: FW: Questions concerning not only Saguache but all of Colorado's voters

Harvie Branscomb's open letter to Secretary Gessler and my comments.

From: coloradovoter@ [mailto:coloradovoter@colorado.gov] **On Behalf Of** Marilyn R Marks

Sent: Wednesday, March 23, 2011 6:57 AM

To: Harvie Branscomb; Scott.Gessler@SOS.STATE.CO.US

Cc: Large group of officials and interested citizens. Email addresses suppressed to prevent spam to recipients.

Subject: RE: Questions concerning not only Saguache but all of Colorado's voters

Harvie's questions below are excellent, and merit thoughtful responses.

Some Saguache citizens are gathering a list of additional questions arising during and after the Town Hall meeting which will hopefully also shape the SOS response.

I believe that it is equally important for the SOS review to include an objective examination of why the SOS Election Division apparently gave undocumented advice and direction to the County Clerk, initiating the highly irregular "re-tabulation" of the election, without written rules or security protocols. It was that November 5 "re-tabulation" with only hours of semi-public notice, which overturned the prior results in two races, performed on a faulty machine using compromised memory cards and election management software lacking security on any of the components or certain batches of ballots.

Those candidates, challengers to the incumbents, who suddenly "lost" in the over-turning of results through this illicit "re-tabulation," approved by the Elections Division, had no practical ability to contest the outcome, given the Election Division's stance that required little documentation, no security, no clear rules, no testing of the system, but garnered accolades of "great faith in the outcomes" from senior SOS officials. When the bi-partisan canvass board refused to certify the "re-tabulated" election results or the poorly executed November 29 recount of three races, SOS officials agreed by formal letter that the local contests were not certified. Incumbent local officials nevertheless proceeded to install themselves in office based on uncertified, highly questionable results. We learned at that town hall meeting last week that the SOS officials had secretly "deferred the certification decision" to the "local officials" and their legal counsel, unbeknownst to the challengers or the public. Using arbitrary, undocumented, invented procedures, the SOS handed the incumbents insurmountable advantage, putting a realistic court action far out of reach for those challengers who could have protested the results in court if some logical procedure had been followed. It is still unclear whether the results have been certified and whether the available protest period has even begun. We only know that somehow the incumbents took office and new taxes and debt were incurred, based on local ballot measures.

The local press and citizens' efforts to inform the public and expose the irregularities was made even more difficult by the public misrepresentations of SOS officials who falsely claimed that they were present, assisting with the "re-tabulation," testing the machines and gaining confidence in the process and tabulations before the results were made public. Despite a nearly lawless rogue process for achieving the outcomes, SOS officials publicly attested to the "correctness" of the outcomes using the mantle and power of the office to grant unfounded assurance in the results—results and a process of which they had little meaningful knowledge.

As Harvie indicates below, the two mysteriously overturned races should not be the sole focus of the Secretary's review. Far more went wrong with the process. The two races merely create the tangible starting point with obvious egregiously flawed processes. To prevent the repeat of such system breakdowns, the Secretary's review must consider not only the irregularities which occurred in Saguache County, but also the actions of the Election Division staff which helped facilitate and conceal those irregularities.

There is great benefit that can be derived from a thorough review of how the Saguache election went off the rails. Documentation of the problems, solutions and future confirmation that remedies have been installed are all necessary to prevent potential system failures that await future elections across the state. To achieve the broader, more important goals, the review must go far beyond a hand count of ballots for two races, and undertake a candid, independent look at the real causes of this election process meltdown that wouldn't pass muster in most third world developing democracies.

Will Colorado officials acknowledge the fundamental problems and address them, or sweep them under the rug along with the embarrassment and remind us how important "voter confidence" is?

Marilyn Marks
Aspen, CO

From: coloradovoter [mailto:coloradovoter] **On Behalf Of** Harvie Branscomb
Sent: Tuesday, March 22, 2011 10:37 PM
To: Scott.Gessler@SOS.STATE.CO.US
Cc: Large group of officials and interested citizens. Email addresses suppressed to prevent spam to recipients.
Subject: [Colorado Voter].3501 Questions concerning not only Saguache but all of Colorado's voters

These questions are posed in reaction to the unique Saguache Town Meeting with Secretary Gessler on March 16, 2011:

The Colorado Secretary of State undertook a probably unprecedented visit to Saguache County on March 16 2011 to speak to citizens concerned about the November election. He answered numerous questions including some from County Clerk Melinda Myers against whom he had just filed suit to gain access to Saguache election records. Although the Secretary's talk was very wide ranging, well received and much appreciated, some questions remain. On my way home I wrote some notes about my own lingering concerns. I think each of these merit consideration and in some cases a documentary response from the Office of Secretary of State.

1) Why are SOS lawyers using confusing terminology?

"Any secrecy of ballot" is a phrase used in the Gessler v. Myers filing. What is the meaning and purpose of this phrase? Is this intended to imply that there is something about "secrecy of ballot" in the constitution or statutes? (I couldn't find it.) I become concerned when an official document implies that there might be a consideration about "secrecy of ballots". This topic is more constructively framed as "privacy in voting" and "anonymity of ballots." Both privacy and anonymity serve the purpose of preserving "secrecy in voting." The constitution says "secrecy in voting" not "secrecy of ballots". There is a crucial distinction to be made.

2) What is the SOS doing to protect "purity of elections"?

I understood the Secretary to say that the reason for the Saguache review and its focus on only two county contests is the fact that the public learned about the turnover of the two outcomes between Nov. 2 and 5 and remains concerned. I certainly hope that is not the sole reason. If so, it is too intangible and undependable to be the primary justification for the review. Is the SOS taking extra steps just because of a mistake by election staff that happened to come to light? Or is there mundane documentary evidence collected by the election process that the election may have been tabulated incorrectly or improperly? (this is not the same as incorrect outcome).

Actually there is tangible evidence that the election may have been tabulated incorrectly- the audit report. The audit report contains sufficient evidence of a need for escalation. How will this review help improve election credibility for the future if the citizens in future elections are depending only on a spectacular turnover of

outcome to inspire extra attention and sufficient citizen access to be assured of the correct outcome? What if the errors in tabulation had been made, but the outcome didn't turn over after election night but election results were materially incorrect? What if a dumb mistake existed and the outcome was wrong, but the mistake wasn't noticed and the election wasn't close enough for a recount? How do we know when to review or look closer at any election other than the (rarely triggered) recount process? The audit is intended, and if properly performed, could and ought to be relied upon. Why isn't the failed Saguache audit being followed up? The requisite observation work and complaint investigation was not done by the canvass board, and the audit report was not even signed by the clerk. It should be the reason for the SOS intervention and review... a normal response to indications of discrepancies in the election audit that were not followed up in Saguache, and in the case of multi county contests could not have been solely followed up in Saguache.

3) **Why aren't at least seven contests being rigorously reviewed?**

The Secretary's answer to my question about the response to the audit and why aren't 7 contests being reviewed does suggest that the Dept. of Elections response might be substantially a PR action to bolster confidence rather than a process of exercising authority and responsibility to address alarm indicators for the election, of which there are now many. I am hoping for some specific evidence that these alarm indicators do work to produce extra and sufficient oversight. In the case of Saguache it appears that the alarm was shut off by the officials and only citizen activists and as of the March 16 town meeting, Secretary Gessler himself, have responded.

There are superficially three levels of response to these alarm indicators. One would be to simply restore voter confidence by the quickest means, e.g. some limited action and substantial PR. A deeper level would be to find out what happened and what might have been done incorrectly and to make this public, without taking remedial action. A third and much to be preferred would be to build a structure and precedent for a system that, based on a factual understanding of what happened, ensures that future election irregularities will become known through citizen involvement, thus also improving the performance of future elections, and as a result, restoring voter confidence through meaningful remedial action. Which route is the Division of Elections taking?

4) **Where is the policy clarifying which "election records" are public, private, or proprietary?**

Clerk Myers has offered all but the ballots to the Div. of Elections. That presumably means the digital data (contents of the Unity laptop and or Zip disks, backed up purportedly on a thumb drive). If so, can and will the Secretary obtain access to the digital files on these media? And will the SOS help the citizens to get access to this crucial data (data that would have been publicly available as printouts that have apparently been destroyed). There is probably additional technical data that might never have been printed out that the public deserves to have access to.

We have been informed by Clerk Myers in responses to records requests and in personal conversation that the contents of Zip media and the thumbdrive are protected as proprietary property of ES&S. I asked the Secretary to query ES&S on this topic and to determine if there is any proprietary software on the media, and if so, how to separate it so that the public information can be exported and made public as intended by Rule 45. I understand that these data files are human readable. Without a uniform and clear policy across the state, citizens must file expensive legal actions in every county to access such records.

5) **Is this Secretary of State working to serve the people or the government?**

What is the new system the Secretary spoke about? We have seen no sanctions related to previous actions taken. I understand this may take time, but concerned citizens are patiently waiting to see how the Gessler administration differs from the Buescher administration in terms of provision for transparency, support of

citizen oversight, and responses to election errors, omissions, inadequate election law and rules. I for one am optimistic for great improvements.

6) Without maximum transparency and citizen oversight at every stage, who will report clerical errors and abuses, and holes in the election system?

The Canvass board does have an oversight function, as acknowledged in the Gessler v. Myers filing. The SOS has many opportunities to exercise judgments based on “substantial compliance” but there is no bi-partisan oversight for actions taken by the Div. of Elections and decisions made by the Secretary of State. This kind of oversight is present in other states. It is specifically needed to perform similar functions that the county canvass board perform, such as management of recounts including resolution of voter intent, where the election district crosses county boundaries, and for management of audit escalation. Colorado is ill prepared for multi county audits and recounts.

7) Who is accountable for recording, analyzing, resolving, and reporting each election issue?

Will the Best Practices and Vision commission be asked to be involved in the creation of structure to resolve issues like those brought up by Saguache including those referred to above? The Chair of the Best Practices and Vision Commission has apparently deflected attention away from such topics in the past.

8) Has the term “certified” already lost its meaning?

How did the county portion of the Saguache election obtain the status: “certified”? How did the BOCC and County Attorney override the SOS’ letter acknowledging non-certification? Did this happen with the consent of the SOS but in private, with only selective disclosure to some of the interested parties?

9) Are Colorado’s election cross checks gradually being removed as elections become more centralized?

There seem to be several agendas to remove checks and accounting throughout the election system in Colorado, often motivated by saving cost. In one example, the Secretary seemed initially dismissive of the benefits of using the stub on ballots- a long lasting measure to preserve proof that the correct ballot styles are being provided to voters at polling places, and that mail-in voters are returning the correct ballot style in their envelopes. As mail-in becomes more popular, and more ballots appear in the post offices trash cans, this safety check is only more important, not less. Citizens are told in occasional conversations that the clerks have decided that stubs are not important... that electronic data kept in SCORE (the voter registration database) is sufficient. This is a decision on which the citizens deserve a voice. The topic ought to be discussed in public, and not simply decided by the clerks and then turned into law with the help of the SOS. By the time the bill to make the change is submitted, citizens will be on the defensive trying to protect their election system. I hope that this pattern for changing election practices will not be pursued in the future and that citizens will be involved in the early discussions. On the question of stubs, citizens have not been sufficiently involved, to my knowledge.

10) How should the public communicate?

What is the process for citizens to voice their concerns to the SOS regarding the work to be performed in Saguache and its implications for Colorado elections going forward? Citizens were told to “wait for a process to be put in place,” before voicing specific concerns. What is that process and when will it be announced?

Respectfully submitted,
Harvie Branscomb
3/22/2011

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