



**GRANTED  
WITH  
AMENDMENTS**

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

*M. A. Gonzales*

<b>District Court, Saguache County, Colorado</b> Court Address: 501 Christy P.O. Box 197 Saguache, CO 81149	<b>Martin A. Gonzales</b> <b>Judge</b> DATE OF ORDER INDICATED ON ATTACHMENT
<b>SCOTT GESSLER</b> , in his official capacity as Secretary of State of the State of Colorado,  Plaintiff,  <b>v.</b> <b>MELINDA MYERS</b> , in her official capacity as Clerk and Recorder for the County of Saguache,  Defendant.	<b>▲ COURT USE ONLY ▲</b>  <b>Case Number: 2011CV9</b>  Div.: 3
<b>FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER</b>	

**THIS MATTER** came on before the Court for a hearing on May 31, 2011. The Plaintiff, Scott Gessler, appeared through his office and counsel, Maurice G. Knaizer, of the Colorado Attorney General's office. The Defendant, Melinda Myers, appeared in person and with counsel, Benjamin F. Gibbons, Saguache County Attorney. The Court, having heard the testimony and evidence presented and having considered all matters of record herein, enters the following Findings of Fact, Conclusions of Law, Judgment and Order.

**FINDINGS OF FACT:**

The Court makes the following findings:

1. The Court has jurisdiction over the parties and subject matter of this case.
2. Scott Gessler is the Colorado Secretary of State (hereinafter "the Secretary" and is acting in his official capacity in this action.

3. Melinda Myers is the duly elected Clerk and Recorder for Saguache County (hereinafter “the Clerk”) and has been named in this action in her official capacity.
4. Among other duties, the Clerk conducts elections within Saguache County with upon consultation with the Secretary and by following the applicable election statutes, election rules and orders from the Secretary. Section 1-1-110(1), C.R.S. (2010)
5. This matter is before the Court on the Secretary’s request for an injunction requiring Clerk Myers to permit an “inspection and review” of her practices and procedures as related to elections. This action has been brought pursuant to §§ 1-1-107(1)(b) and (2)(d), C.R.S.
6. As part of the “inspection and review” of practices and procedures, the Secretary proposes to conduct a hand recount of the County Commissioner and Clerk and Recorder 2010 general election contest.
7. The Secretary of State has the power and duty to supervise the conduct of primary, general, congressional vacancy, and statewide ballot issues elections in Colorado.
8. Clerk Myers is the chief local election official for Saguache County and is responsible for conducting elections in the County.
9. After the primary election in Saguache County in 2010 and again after the general election conducted in Saguache County on November 2, 2010, the Secretary received complaints that the Clerk’s office had violated certain statutes and regulations governing the preparation for, and the conduct of said elections. The Secretary sent observers to examine, investigate allegations of non-compliance, and be present in Saguache County at various times during the 2010 election cycle.
10. A member of the Secretary’s staff was present during the general election.

11. On November 3, 2010, the Clerk informed the Secretary that the ballot totals from the tabulation that that occurred on election night did not balance with the number of electors voting through early mail, by mail and at the polls on Election Day. The Clerk determined that it was necessary to retabulate the ballots. The retabulation reversed the results in a county commissioner race and the race for Clerk and Recorder.
12. The Clerk was the Democratic candidate for Clerk and Recorder. She was declared the winner of the race after the retabulation.
13. On November 15, 2010, the Secretary sent representatives to assist the Clerk and her staff with a physical count of the total number of ballots cast during the 2010 General Election. The representatives were sworn in as election judges.
14. Upon review of the tabulation process, the Secretary concluded that an error occurred when the county improperly loaded a zip disk into the computer system.
15. The Secretary's staff also assisted the Clerk and her staff in counting the number of ballots cast through early voting, by mail and at the polling places.
16. The number of ballots counted in this process matched the totals reported from the tabulation done on November 5, 2010, except that the judges and staff counted ten fewer mail-in page 1 ballots than the machine count.
17. On November 22, 2010, the Secretary received Saguache County Abstract of Votes Cast from the Canvass Board. The Abstract was signed by all six members of the Canvass Board.
18. The Secretary subsequently received a letter signed by five members of the Canvass Board in which they stated that they were rescinding their approval of the election certification due to perceived improprieties. The Secretary informed the Canvass Board

that the letter would be treated as a statement of non-certification by a majority of the Canvass Board.

19. The ambulance district ballot issue, the County Clerk and Recorder's election and the District 3 County Commissioner's Office were subject to recounts.
20. On December 2, 2010, the Secretary received an amended Abstract of Votes Cast, which was signed by two of the six members of the Canvass Board. The recount did not alter the outcome of the clerk's race, although the margin of votes separating the candidates increased from 61 to 66 votes. The result in the county commissioner's race did not change, but the margin of votes separating the candidates increased from 26 votes to 38 votes. The vote count for the ambulance district ballot issue remained the same.
21. On December 3, 2010, the Secretary received correspondence from four members of the Canvass Board in which they identified additional concerns regarding the conduct of the election.
22. The Secretary issued a report on December 10, 2010 concerning the election in 2010 Saguache election.
23. After the issuance of the December 10, 2010 report, received more complaints about the 2010 election in Saguache and the Secretary informed the Clerk that he intended to conduct additional inspections and reviews of her practices and procedures. This inspection was stated with an intention to include a hand review of the voted ballots in the 2010 election.
24. The Clerk initially agreed to allow the inspection of her procedures and policies with respect to the conduct of the 2010 election processes in Saguache County.

25. The Clerk subsequently refused to allow the inspection and review because she could not agree to the Secretary's demands that members of the public be allowed to inspect voted ballots.
26. In addition, the Clerk notified the Secretary that she would not comply because (a) the deadline for contesting the election had passed; (b) the Attorney General's office is investigating the election; (c) sealed voted ballots are sensitive documents and are historically treated as confidential; and (d) without clear guidance from the courts on the legality of the proposed hand count, she is obligated to protect voters' ballots.
27. At the at the Court hearing held on May 31, 2011, the Clerk clarified that she objected only to a hand count in the presence of members of the public who may be able to observe the ballots and potentially discern the identity of the voters. It however, appears (without clarity) that she also but asserts that the Secretary's authority to inspect practices and procedures does not include voted ballots
28. No formal election contest has been filed by a qualified voter pursuant to §1-11-201, et. seq, C.R.S.
29. The Secretary has informed the Clerk that he intended to conduct a hand recount and that this recount would include public participation.
30. Testimony established that the Secretary of State's Office has previously conducted investigations of election practices and procedures of County Clerk and Recorders, specifically Mesa County in 2002 and Garfield County in 2003.
31. The Secretary's investigations of Mesa and Garfield County elections have included a hand recount of voted ballots conducted by staff of the Secretary's office. These

investigations included the transportation of voted ballots to the Secretary's office in Denver.

32. The Secretary does not routinely engage in such a process for a hand recount.
33. The parties agree that conducting a hand recount of the cast ballots will not legally change the results of the November 2, 2010 election in Saguache County.
34. There have been historic issues relating to citizens of Saguache County being able to exercise their constitutional right to vote and concerns over the viewing of cast ballots.
35. Both parties testimony and arguments acknowledge that it is important to maintain the secrecy of the ballots, both before and after an election
36. It has not been established that voted ballots can contain information that can lead to the identification of individual voters, particularly under controlled conditions, wherein persons unfamiliar with the citizens of the jurisdiction and any identifying information that may be discovered on a particular ballot.
37. Douglas County permitted approximately 30 ballots from sealed ballot boxes to be inspected pursuant to a C.O.R.A. request prior to the completion of the 2010 primary election process.
38. In prior recounts the Secretary used persons who were not state or county employees to review ballots during the course of investigations and audits. The Secretary placed these individuals under oath to ensure that confidential or privileged information was not disclosed.

## CONCLUSIONS OF LAW

The issue is whether the Secretary of State has the final authority to interpret and implement the provision of the Colorado Election Code and what is the scope of such authority.

### **1. The Secretary's authority to conduct a review of all election records, including voted ballots.**

The Secretary seeks an injunction requiring that the Clerk turn over all election materials, including the voted ballots from the 2010 General Election to his office for review.

The Secretary argues he has the ultimate authority to interpret and make decisions related to the Colorado Election Code. He further argues the Clerk does not have the ability to refuse compliance with his order to release the ballots for a hand count and the participation of the public in that procedure.

The Secretary must “supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections” and enforce the provisions of the Election Code. Section 1-1-107(1)(a), (b). The Secretary has the power “[t]o inspect, with or without the filing of a complaint by any person, and review the practices and procedures of county and clerk and recorders, election commissions, their employees, and other election officials in the conduct of primary, general and congressional vacancy elections and the registration of electors in this state.” Section 1-1-107(2)(b). The Clerk has the mandatory statutory obligation to “follow the rules and orders promulgated by the secretary of state pursuant to this [Election] code”. Section 1-1-110(1), C.R.S (2010).

Nonetheless, it is not an option for this Court to assume the Secretary is correct in his statutory construction. While construction of statute by agency charged with its enforcement is entitled to deference, courts are not bound by that construction where a result reached by agency

is inconsistent with legislative intent as manifested by statutory text. *Boulder County Bd. of Equalization v. M.D.C. Const. Co.*, 830 P.2d 975 (Colo. 1992).

The Secretary of State has the statutory authority to “supervise” the overall conduct of the 2010 general election and enforce provisions of the Colorado Election Code pursuant to §1-1-107(1)(a) thru (b), C.R.S. Critical to understanding the Secretary’s authority is the meaning of “supervise” when there is no given statutory definition. In construing the words in a statute, a court must read the statute as a whole. *Anderson v. Longmont Toyota*, 102 P.3d 323, 327 (Colo. 2004). This Court must seek to effectuate the intent of the General Assembly and, therefore, looks to the plain meaning of the statutory language considered within the context of the statute as a whole. *South Fork Water & Sanitation Dist. v. Town of South Fork*, 252 P.3d 465, 468 (Colo.2011). The Secretary’s legal interpretation of its own enabling state is to be given considerable weight, but we are not bound by the agency's legal interpretations. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d at 326.

The term “supervise” is expansive. It means “to coordinate, direct and inspect *continuously* and at first hand the accomplishment: oversee the powers of direction and decision the implementation of one’ own or another’s intention.” (Emphasis added). *Webster’s Third New International Dictionary, Unabridged* (1993) 2296.

In this statutory context the “supervise” must be taken to implicitly encompass the Secretary’s order to Clerk Myers to provide all election records, including voted ballots. This is not and unprecedented procedure. Secretary of State Donetta Davidson twice ordered clerks to provide all ballots to her representatives and removed those ballots from the clerks’ offices for the purpose of conducting an audit. Moreover, the Secretary’s actions are consistent with the

underlying purpose of the Election Code. Elections laws are designed “to secure the purity of elections, and guard against abuses of the elective franchise.” Colo. Const. art. VII, § 11.

Both the plain meaning of the term “supervise” and its statutory context are clear. The Secretary oversees clerks to ensure that they are complying with election laws and regulations. To prevent errors in future elections, the Secretary as a higher authority must be allowed review all aspects of a prior election to determine whether the clerks have complied with existing procedures. Otherwise, the errors may be repeated in future elections.

As pointed out by the Clerk, there is no specific statutory authority for the Secretary to conduct a hand count of voted ballots (except as may be ordered by the Court as part of a formal election contest pursuant to §1-11-201, C.R.S.) Nonetheless, it is clear the Secretary has the power “to inspect, with or without the filing of a complaint by any person, and review the practices and procedures of county clerk and recorders, election commissions, their employees, and other election officials in the conduct of primary, general and congressional vacancy elections and the registration of electors in this state. §1-1-107(2)(b), C.R.S. (Emphasis added.).

The terms “practices and procedures”, as used in §1-1-107(2)(b), C.R.S. are not defined in the Definitions section of the Code (§1-1-104, C.R.S.), nor anywhere else in the Colorado Election Code. This Court applies the same rules of statutory construction stated above.

The terms “practice” and “procedure” are clear and unambiguous both in their “[plain meaning” and within their statutory context. These terms are generally defined as a “form” or “mode of a proceeding” Black’s Law Dictionary 1172, 1203 (6<sup>th</sup> ed. 1990); *People v. Zhuk*, 239P.3d 437, 440 (Colo. 2010).

A public official does not have the legal ability to invent procedures that are not authorized by law *De Koevend v. Board of Education*, 688 P.2d 219, 229 (Colo. 1984). Here,

there is no stated or explicit statutory authority for the Secretary to conduct the hand recount. “[T]he General Assembly cannot delegate explicitly for every contingency.... [T]herefore, it is ... well-established that agencies possess implied and incidental powers filling the interstices between express powers to effectuate their mandates.” *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1016 (Colo.2003). Any interpretation which precludes the Secretary from viewing voted ballots would be inconsistent with the statutory obligations of the Secretary to review and inspect procedures and practices for the purpose enhancing the integrity of elections and the public’s confidence in the election process. See, *Colorado Citizens for Ethics in Gov’t v. Comm. for Am. Dream*, 187 P.3d 1207, 1217 (Colo. Ct. App. 2008). It is clear that a hand review is one way of determining whether a voting machine or an election process in general is operated properly.

This Court agrees that the Secretary’s role regarding “practice and procedures” is analogous to that of an auditor in determining whether expenditures or revenue reports and summaries are accurate by reviewing the invoices, checks and receipts. Likewise, the Secretary cannot review the adequacy of procedures used in ballot counts without reviewing the voted ballots.

## **2. Secretary’s scope of authority vis-à-vis the Clerk.**

Counties “are political subdivisions of the state existing only for the convenient administration of the state government and created to carry out the will of the state.” *Board of County Commissioners of the County of Boulder v. Hygiene Fire Protection District*, 221 P.3d 1063, 1068 (Colo. 2009).

Elected officials in subordinate political subdivisions may not disobey an order of a supervisory state agency. Such officials have “no right to refuse to perform ministerial duties prescribed by law because of any apprehension on their part that others may be injuriously

affected by it, or that the statute prescribing such duties may be unconstitutional.”” *Board of County Commissioners v. Fifty-First General Assembly of the State of Colorado*, 198 Colo. 302, 305, 599 P.2d 887, 889 (1979) (quoting *Ames v. People*, 23 Colo. 83, 90, 56 P. 656, 658 (1899)). Although county clerks are constitutional officers, they have no constitutional authority to administer elections. They are only administrative agents of the state whose authority is limited to that expressly delegated by the General Assembly. See, *Skidmore v. O’Rourke*, 152 Colo. 470, 479, 383 P.2d 473, 477 (1963). The clerk is a subordinate officer who has the “imperative duty” to obey the tribunal or officer directing the action. *People v. Pitcher*, 61 Colo. 149, 156 P. 812, 815 (1916). Clerks cannot pass on the legality actions taken by the Secretary, which is the governing entity. Accord, *Beeney v. Irvin*, 6 Colo. App. 66, 71-72 39 P. 900, 902 (1895).

The Colorado Supreme Court has consistently rejected claims by county officials that they may ignore the orders of a superior state agency. Because counties and their subordinate agencies are not independent political entities, counties and their officers have no standing to contest the directives given them by the state. The only exception is where a specific statute grants them that right. *Bd. of County Com’rs of Boulder County v. Fifty-First Gen. Assembly of State of Colo.*, 198 Colo. 302, 304-05, 599 P.2d 887, 889 (1979). There is no such statute has been cited by the Clerk in this case.

Here the request made of the Clerk is for her ministerial duties and she may not disobey valid orders from the superior Secretary of State. *People ex rel. State Bd. of Equalization v. Pitcher*, 61 Colo. 149, 158, 156 P. 812, 815 (1916), states:

“It is the imperative duty of a ministerial officer to obey the act of a tribunal invested with authority in the premises directing his action; not to question or decide upon its validity. This applies with the same force whether the direction be embodied in a legislative act or in the pronouncement of a governmental agency invested with power in

the premises. The maxim lies at the very foundation of jurisprudence, and without its observance government would cease to exist.”

The Clerk does not challenge the Secretary’s general power to inspect and review her practices and procedures. Rather, she contests the Secretary’s power to review individual voted ballots, particularly in the presence of members of the public. The Clerk’s position is based on her interpretation of statutes requiring preservation of ballots and elections, § § 1-7-801 and - 802, C.R.S (2010). The Clerk’s interpretation in this circumstance is not controlling. The Secretary is tasked with the responsibility of making uniform interpretations of the Election Code. Section 1-1-107(1)(c), C.R.S. The Secretary’s interpretation binds the clerks, and the clerks must comply with the Secretary’s interpretation. Simply put the Clerk must comply with the Secretary’s order.

What the Secretary next does with those ballots is a distinct matter. If the wording of a statute is unclear, the courts will look to the consequences of a particular interpretation. *Anderson v. Longmont Toyota*, 102 P.3d at 327. The Secretary apparently seeks to employ unnamed members of the public and/or permit members of the public to view the recount.

Voted ballots are not per se privileged. Voted ballots are “election records.” Section 1-1-104 (11), C.R.S. (2010) (“‘Election records’ includes but is not limited to accounting forms, certificates of registration, pollbooks, certificates of election, signature cards, all affidavits, mail-in voter applications, mail-in voter lists and records, mail-in voter return envelopes, voted ballots, unused ballots, spoiled ballots and replacement ballots”)(emphasis added.) This definition is incorporated into the Colorado Open Records Act (CORA). Section 24-72-204(8)(c)(II), C.R.S. (2010).

CORA exempts only certain election records from disclosure. “A designated election official shall not allow a person, other than the person in interest, to inspect election records of

any person that contain the original signature, social security number, month of birth, day of the month of birth, or identification of that person, including electronic, digital, or scanned images of a person's original signature, social security number, month of birth, day of the month of birth or identification.” Section 24-72-204(8)(a), C.R.S. (2010). An election record, including a voted ballot, may be disclosed as long as the identity of the voter is not disclosed.

This interpretation is not inconsistent with Colo. Const. art. VII, § 8. A ballot cannot “be marked in any way whereby the ballot can be identified as the ballot of the person casting it.” *Id.* An election official cannot “disclose how any elector shall have voted.” *Id.* This provision does not prohibit disclosure of ballots if the identity of the person who cast the ballot cannot be discerned.

Where the ballots, as voted, by content or structure may disclose the identity of the voter they are not public records and may not be subjected to public inspection.

The Secretary is presumed to act in compliance with the law and his oath of office. *People ex rel. Dunbar v. District Court*, 129 Colo. 203, 268 P.2d 1098, 1101 (1954). Under CORA, the Secretary is obligated to deny the right of inspection to privileged information. Section 24-72-204(3)(a)(IV), C.R.S. (2010). The Secretary has stated his intent to comply with his constitutional and statutory obligations to prevent the disclosure of how particular electors have voted. The Court has no reason to doubt that the Secretary will comply with his duty, which necessary, to this Court, means an initial review by authorized persons designated by the Secretary to ensure compliance with CORA. The Court finds that the Secretary may use persons who are not “employees” of his office to review voted ballots to assist, provided they were placed under oath to not divulge the content of the ballots. The Colorado Constitution, *Article*

VII, Section 8, reads in part, “The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted.”

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that judgment enter in favor of the Secretary and requiring the compliance by the Clerk with the Secretary’s directives, including, but not limited to, transport of all election records to Denver for review of voted ballots in a manner consistent with the opinion of this Court.

DONE this August 11, 2011

**BY THE COURT:**

 Martin A. Gonzales  
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SIGNATURE  
2011.08.11  
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**Martin A. Gonzales**  
**District Judge**

**This document constitutes a ruling of the court and should be treated as such.**

**Court:** CO Saguache County District Court 12th JD

**Judge:** Martin A Gonzales

**Alternate Judge:** Unassigned

**File & Serve**

**Transaction ID:** 39244553

**Current Date:** Aug 11, 2011

**Case Number:** 2011CV9

**Case Name:** GESSLER vs. MYERS

**Court Authorizer:** Gonzales, Martin A

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*/s/* **Judge Gonzales, Martin A**