

1 IN THE SUPREME COURT OF THE STATE OF MONTANA

2 No. DA 06-0634

3 MONTANANS for JUSTICE: VOTE NO ON CI-98; NOT IN MONTANA:  
4 CITIZENS AGAINST CI-97 and PROPERTY OWNERS AGAINST I-154,

5 Plaintiffs and Respondents,

6 v.

7 STATE OF MONTANA, by and through MIKE McGRATH, in his capacity  
8 as the Attorney General; and BRAD JOHNSON, in capacity as Secretary of  
9 State,

10 Defendant and Respondents,

11 MONTANANS IN ACTION, a Montana Corporation, CITIZENS RIGHT  
12 TO RECALL MONTANA, PROTECT OUR HOMES MONTANA, STOP  
13 OVER SPENDING MONTANA, Political Ballot Committees, and TREVIS  
14 BUTCHER,

15 Defendants and Appellants,

16 KENDALL COX, ERVIN J. HANKS, and ROBERT G. COOPER,  
17 Individually,

18 Intervenors and Appellants.

19 **MOTION TO SUPPLEMENT THE RECORD, OR IN THE**  
20 **ALTERNATIVE, REQUEST FOR JUDICIAL NOTICE**

21 The State moves to supplement the record on appeal pursuant to Mont.  
22 R. App. P. 9(f). In the alternative, the State requests the Court take judicial  
23 notice pursuant to Mont. R. Evid. 201 & 202.

24 The Secretary of State was unable to retabulate the petitions of all of  
25 the nonresident signature gatherers at issue in Plaintiffs-Respondents' claims  
26 prior to trial, due to the complexity of the task and the necessity of consulting  
27 with county election administrators to confirm valid signature totals. As a  
result, the district court relied upon total signatures collected in selected major  
counties. 9/13/06 Order at n.7-10.

1           However, the district court indicated that the valid signature totals  
2 “would be preferable and absolutely desired.” Trial Tr. at 261. Therefore,  
3 upon the district court’s identification of five signature gatherers responsible  
4 for most of the fraudulent activity it found, the Secretary of State began a  
5 detailed retabulation of valid signature totals for petitions submitted by those  
6 five persons. The Secretary of State completed that retabulation today, and  
7 the State attaches the official certified results for the Court’s consideration.  
8 (Certified retabulation attached.) The Court’s review of written election  
9 records is plenary, Big Spring v. Jore, 2005 MT 64, ¶¶ 13-15, 109 P.3d 219,  
10 221-22, so their absence in the district court record would not alter their  
11 evidentiary effect in this Court. Nor would the results prejudice the parties in  
12 their arguments, because the statewide valid signature totals happen to  
13 approximate the “qualification deficiency” the court inferred based on the  
14 collected signature totals. 9/13/06 Order at fig. 3.

15           Therefore, the State requests to supplement the record to include the  
16 certified retabulation results because of the public importance of this case, to  
17 avoid the erroneous invalidation of voter signatures beyond those actually  
18 implicated in the fraudulent activity found by the district court, and to ensure  
19 that the Court’s decision rests on the best available information. Mont. R.  
20 App. P. 9(f) (Court may direct that a supplemental record be certified; all  
21 questions as to the record other than what was before the district court “shall  
22 be presented to the supreme court”); State v. Erickson, No. 04-242,  
23 2005 Mont. LEXIS 457 (Nov. 1, 2005) (prior order “allowed the record on  
24 appeal to be supplemented and enlarged”).

25           In the alternative, the State requests that this Court take judicial notice  
26 of the Secretary’s certified retabulation results as an official act of an  
27 executive department and a public record. Mont. R. Evid. 201(b) (judicial

1 notice of facts); Mont. R. Evid. 202(b)(4) (judicial notice of official acts of  
2 executive departments); State v. Rensvold, 2006 MT 146, ¶ 30, 139 P.3d 154  
3 (taking judicial notice of public records on appeal); Koke v. Little Shell Tribe  
4 of Chippewa Indians of Mont., Inc., 2003 MT 121, ¶ 13, 68 P.3d 814, 817  
5 (taking judicial notice of executive agency findings on appeal).

6 Counsel for the State has contacted counsel for the other parties.  
7 Plaintiffs-Respondents do not object to this motion. Defendants-Appellants  
8 have not taken a position at the time of filing. Intervenors-Appellants object  
9 to this motion.

10 Respectfully submitted this 29th day of September, 2006.

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16 By: \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Motion to Supplement the Record, or in the Alternative, Request for Judicial Notice to be mailed to:

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