Hearing Date: October 4, 2006
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ITEM 7

TEST CLAIM
FINAL STAFF ANALYSIS

Elections Code Section 14310

Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures
(03-TC-23)

County of San Bernardino, Claimant

EXECUTIVE SUMMARY

Background

This test claim, filed by County of San Bernardino on October 1, 2003, addresses an amendment to Elections Code section 14310, regarding counting "provisional ballots." A provisional ballot is a regular ballot that has been sealed in a special envelope, signed by the voter, and then deposited in the ballot box. Provisional ballots can be required for several reasons, generally to prevent unregistered individuals from voting, or to prevent registered voters from voting twice. For example, provisional ballots may be required when poll workers cannot immediately verify an individual's name on the official roster, or if a voter requested an absentee ballot, but instead comes to the polling place without bringing the absentee ballot.

Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1), to add a requirement that elections officials "compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration."

Claimant alleges that prior to this amendment: "the county elections official was not legally required to perform provisional ballot signature comparison for voter identification purposes. ... Enactment of this statute has increased the duties of the county elections official, and requires the official to provide a higher-level of service for an existing program."

Department of Finance filed comments on November 14, 2003, agreeing with the claimant that Statutes 2000, chapter 260 "may have resulted in new state-mandated activities."

Staff finds that although prior law required that "the elections official shall examine the records with respect to all provisional ballots cast," the law did not require that each signature on a provisional ballot be directly compared to the signature on the voter's registration affidavit. This is akin to the analysis by the court in *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 173, which found a higher level of service was mandated when general law on a existing program is changed to require performance of activities in a very specific manner.

Conclusion

Staff concludes that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for performing the following specific new activity as part of statutorily-required elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

Staff concludes that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

Recommendation

Staff recommends that the Commission adopt this analysis and partially approve the test claim.

STAFF ANALYSIS

Claimant

County of San Bernardino

Chronology

10/01/03	Claimant files test claim with the Commission
10/15/03	Commission staff issues completeness review letter
11/14/03	Department of Finance (DOF) files comments on the test claim
07/21/06	Commission staff issues the draft staff analysis
08/07/06	Claimant comments on the draft staff analysis received
08/17/06	DOF comments on the draft staff analysis received

Background

This test claim addresses an amendment to Elections Code section 14310, regarding counting "provisional ballots." A provisional ballot is a regular ballot that has been sealed in a special envelope, signed by the voter, and then deposited in the ballot box. According to information from the Secretary of State's website: [1]

> A voter is asked to vote a provisional ballot at the polls due to one of the following reasons:
>
> - **The voter's name is not on the official roster of voters and the election officer cannot verify the voter's voting eligibility on Election Day.** The Elections Official's Office will check the registration records. If further research determines that the voter is eligible to vote in the election, the provisional ballot will be counted.
> - **A voter has moved within the county, but did not re-register to vote.** The Elections Official will verify the voter's prior registration before the provisional ballot will be counted. The voter's registration will then be updated with the voter's current address.
> - **Records indicate that the voter requested an absentee ballot and the voter fails to turn in the absentee ballot at the polls on Election Day.** The Elections Official's Office will check the records, and if the voter did not vote an absentee ballot, the voter's provisional ballot will be counted.
> - **The voter is a first- time Federal Election voter in the county and was unable to provide the required proof of identification.** The Elections Official's Office will verify the voter's eligibility to vote by comparing the signature on the voter's registration with the signature on the provisional ballot envelope.

[1] At < http://www.ss.ca.gov/elections/elections_provisional.htm> (as of July 5, 2006.)

Provisional ballots are counted during the official canvass[2] when:

> Prior to the completion of the official canvass (the vote tally), the Elections Official's Office establishes, from voter registration records, the claimant's right to vote the ballot.

Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1), to add a requirement that elections officials "compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration."

Claimant's Position

Claimant, County of San Bernardino, filed this test claim on October 1, 2003.[3] Claimant contends that Elections Code section 14310, as amended by Statutes 2000, chapter 260, constitutes a reimbursable state-mandated program, "by requiring the elections official to compare signatures on provisional ballot envelopes with the signatures on the voter's affidavit of registration for voter identification purposes."

Claimant's written comments, dated August 3, 2006, state that "The County of San Bernardino concurs with the draft staff analysis as written and has no further comment."

Department of Finance's Position

DOF filed comments on November 14, 2003, agreeing with the claimant that Statutes 2000, chapter 260 "may have resulted in new state-mandated activities." Comments on the draft staff analysis, dated August 14, 2006, concur with the analysis, stating:

> County elections officials were required to examine the voter's affidavit of registration and establish the provisional ballot-casting voter's right to vote. This was commonly performed by examining the voter's physical/computer-scanned registration card (affidavit of registration), but officials were not required to use a specific method of verification. Chapter 260 mandated a higher level of service by specifying that a signature comparison is the method of verification.

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[2] Elections Code section 335.5 defines "official canvass," as follows:

> The "official canvass" is the public process of processing and tallying all ballots received in an election, including, but not limited to, provisional ballots and absentee ballots not included in the semifinal official canvass. The official canvass also includes the process of reconciling ballots, attempting to prohibit duplicate voting by absentee and provisional voters, and performance of the manual tally of 1 percent of all precincts.

Elections Code section 318 provides: "'Election' means any election including a primary that is provided for under this code."

[3] Potential reimbursement period for this claim begins no earlier than July 1, 2002, based on the filing date of the test claim. (Current Gov. Code, § 17557, subd. (e).)

Discussion

The courts have found that article XIII B, section 6, of the California Constitution[4] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[5] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[6] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[7] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[8]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[9] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[10] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[11]

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[4] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[5] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[6] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[7] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[8] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar).*

[9] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[10] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[11] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[12]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[13] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[14]

Issue 1: Is the test claim statute subject to article XIII B, section 6, of the California Constitution?

In order for the test claim statute to be subject to article XIII B, section 6 of the California Constitution, it must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[15] The court has held that only one of these findings is necessary.[16]

Staff finds that verifying provisional ballots imposes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. Local elections officials provide a service to the members of the public by verifying that those who vote provisional ballots are eligible to cast a ballot. The test claim statute also requires local elections officials to engage in administrative activities solely applicable to local government, thereby imposing unique requirements that do not apply generally to all residents and entities of the state.

Accordingly, staff finds that the test claim statute constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution *if* the statute also mandates a new program or higher level of service, and costs mandated by the state.

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[12] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[13] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[14] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[15] *County of Los Angeles, supra,* 43 Cal.3d at page 56.

[16] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

Issue 2: Does the test claim statute mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Elections Code Section 14310:

As background, Elections Code section 14310, subdivision (a), provides:

> (a) At all elections, a voter claiming to be properly registered but whose qualification or entitlement to vote cannot be immediately established upon examination of the index of registration for the precinct or upon examination of the records on file with the county elections official, shall be entitled to vote a provisional ballot … .

The test claim legislation, Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1) as follows,[17] indicated in underline and strikeout:

> (c)(1) During the official canvass, the elections official[18] shall examine the records with respect to all provisional ballots cast. Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. A variation of the signature caused by the substitution of initials for the first or middle name, or both, shall not invalidate the ballot.

Claimant alleges that prior to this amendment: "the county elections official was not legally required to perform provisional ballot signature comparison for voter identification purposes. ... Enactment of this statute has increased the duties of the county elections official, and requires the official to provide a higher-level of service for an existing program."

Test claim legislation mandates a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[19] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in

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[17] Elections Code section 14310 has been subsequently amended, but the later statutes have not been included in this test claim, and this particular provision has not changed.

[18] Elections Code section 320 provides the following definition:

> "Elections official" means any of the following:
>
> (a) A clerk or any person who is charged with the duty of conducting an election.
>
> (b) A county clerk, city clerk, registrar of voters, elections supervisor, or governing board having jurisdiction over elections within any county, city, or district within the state.

[19] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 836.

existing programs."[20] A statute mandates a reimbursable "higher level of service" when the statute, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service to the public provided in the existing program.[21]

Although prior law required that "the elections official shall examine the records with respect to all provisional ballots cast," the law did not require that each signature on a provisional ballot be directly compared to the signature on the voter's registration affidavit. This is akin to the analysis by the court in *Long Beach Unified School Dist., supra,* 225 Cal.App.3d 155, 173, which found a higher level of service was mandated when general law on a existing program is changed to require performance of activities in a very specific manner:

> A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. [Citation omitted.] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. Where courts have *suggested* that certain steps and approaches may be helpful, the Executive Order and guidelines *require* specific actions. For example, school districts are to conduct mandatory biennial racial and ethnic surveys, develop a "reasonably feasible" plan every four years to alleviate and prevent segregation, include certain specific elements in each plan, and take mandatory steps to involve the community, including public hearings which have been advertised in a specific manner. While all these steps fit within the "reasonably feasible" description of *Jackson* and *Crawford*, the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts.

Staff finds that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service within an existing program by compelling local elections officials to perform the following activity when conducting the official canvass for elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected.

However, although the procedures established by Elections Code section 14310, subdivision (c)(1) are required to be followed at all elections, some elections are held entirely at the discretion of the local agency and would not result in reimbursable costs.

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[20] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

[21] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

In *Kern High School Dist., supra*, 30 Cal.4th 727, at page 743, the California Supreme Court affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777. The Court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)

Thus, the Court held as follows:

> [*W]e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs, and hence are entitled to reimbursement from the state*, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][22]

The Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[23]

In *San Diego Unified School Dist., supra*, the Court discusses the potential pitfalls of extending "the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[24] In particular, the Court examines the factual scenario from *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, in which:

> an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ--and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ

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[22] *Id.* at page 731.

[23] *Ibid.*

[24] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 887.

> firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and *hence we are reluctant to endorse, in this case,* an application of the rule of *City of Merced* that might lead to such a result. [Emphasis added.]

Yet the Court did not rely on this analysis to reach its conclusions, thus the statements are considered dicta. However, staff recognizes that the Court was giving notice that the *City of Merced* "discretionary" rationale is not without limitation. What the Court did *not* do was disapprove either the *City of Merced,* or its own rationale and holding in *Kern High School Dist.*

Rather, the 2003 decision of the California Supreme Court in *Kern High School Dist.* remains good law, relevant, and its reasoning applies here. The Supreme Court explained, "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[25] Likewise, compliance with *Voter Identification Procedures* is not a *reimbursable* state-mandated program for local special elections scheduled at the option of the local agency, *if* the issue could have legally been held for the next regular local or statewide election date.

Elections Code section 1000 provides that "The established election dates in each year are as follows:"

> (a) The second Tuesday of April in each even-numbered year.
>
> (b) The first Tuesday after the first Monday in March of each odd-numbered year.
>
> (c) The first Tuesday after the first Monday in June in each year.
>
> (d) The first Tuesday after the first Monday in November of each year.

Elections Code section 1001 provides that "Elections held in June and November of each even-numbered year are statewide elections and these dates are statewide election dates." Staff finds that eligible costs from the *Voter Identification Procedures* program for any statewide election dates, including special elections called by the Governor, are reimbursable.

Elections Code section 1002 provides that "Except as provided in Section 1003, notwithstanding any other provisions of law, all state, county, municipal, district, and school district elections shall be held on an established election date." Elections Code section 1003 provides a list of types of elections that may be held on dates other than established election dates, for example, "(e) County, municipal, district, and school district initiative, referendum, or recall elections."

Elections Code section 1300 et seq contain the general elections date provisions for local agencies and school districts. Elections Code section 1303, for example, requires that "the regular election to select governing board members in any school district, community college district, or county board of education shall be held on the first Tuesday after the first Monday in November of each odd-numbered year." Staff finds that eligible costs from the *Voter Identification Procedures* program are reimbursable, for this type of regular, statutorily-required local election.

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[25] *Kern High School Dist., supra,* 30 Cal.4th at page 743.

An example where costs of complying with the *Voter Identification Procedures* program would not be reimbursable is found in Elections Code section 9222:

> The legislative body of *the city may submit to the voters, without a petition therefor, a proposition* for the repeal, amendment, or enactment of any ordinance, to be voted upon at any succeeding regular or special city election, and if the proposition submitted receives a majority of the votes cast on it at the election, the ordinance shall be repealed, amended, or enacted accordingly. A proposition may be submitted, or *a special election may be called for the purpose of voting on a proposition*, by ordinance or resolution. The election shall be held not less than 88 days after the date of the order of election.

Using this example, if city officials call for a special municipal election for a vote on such a proposition, at a time other than a scheduled statewide election, this is a voluntary election on the part of the city. There are many such examples found in the Elections Code, where special elections may be called at the option of a local government, or they can be held and consolidated with other elections.[26] In broad terms, staff finds that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable under the *Kern* decision.

Issue 3: Does the test claim statute impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" as any *increased* cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant estimated costs of $1000 or more for the test claim allegations. The claimant also stated that none of the Government Code section 17556 exceptions apply. For the activity listed in the conclusion below, staff agrees and finds accordingly that it imposes costs mandated by the state upon local elections officials within the meaning of Government Code section 17514.

[26] Elections Code sections 1405, 1410, and 1415 hold three more examples.

CONCLUSION

Staff concludes that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for performing the following specific new activity as part of statutorily-required elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)[27]

Staff concludes that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

Recommendation

Staff recommends that the Commission adopt this analysis and partially approve the test claim.

[27] As amended by Statutes 2000, chapter 260, operative January 1, 2001.