

COMMISSION ON STATE MANDATES

980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov



November 18, 2013

Ms. Renee Bischof
Elections Division Manager
County of Santa Barbara
4440 Calle Real - A
Santa Barbara, CA 93110

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: **Draft Staff Analysis, Schedule for Comments, and Notice of Hearing**
Post Election Manual Tally (PEMT), 10-TC-08
Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122,
20123, 20124, 20125, 20126 and 20127;
Register 2008, No.43
County of Santa Barbara, Claimant

Dear Ms. Bischof:

The draft staff analysis for the above-named matter is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **December 9, 2013**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Please see <http://www.csm.ca.gov/dropbox.shtml> on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.2.)

If you would like to request an extension of time to file comments, please refer to section 1183.01(c)(1) of the Commission's regulations.

Hearing

This matter is set for hearing on **Friday, January 24, 2014**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The final staff analysis will be issued on or about January 10, 2014. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

Please contact Eric Feller at (916) 323-3562 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Heather Halsey'.

Heather Halsey
Executive Director

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On November 18, 2013, I served the:

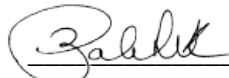
Draft Staff Analysis, Schedule for Comments, and Notice of Hearing

Post Election Manual Tally (PEMT), 10-TC-08

Office of Administrative Law File No. 2008-2009-002E, effective October 20, 2008;
California Code of Regulations, Title 2, Division 7, Chapter 3, Post Election Manual
Tallies Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127
County of Santa Barbara, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 18, 2013 at Sacramento, California.



Heidi J. Palchik
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

Commission on State Mandates

Original List Date: 4/13/2011
Last Updated: 11/15/2013
List Print Date: 11/15/2013
Claim Number: 10-TC-08
Issue: Post Election Manual Tally

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. However, this requirement may also be satisfied by electronically filing your documents. Please see <http://www.csm.ca.gov/dropbox.shtml> on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.2.)

Ms. Marianne O'Malley Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: (916) 319-8315 Email: marianne.O'malley@lao.ca.gov Fax: (916) 324-4281
Ms. Annette Chinn Cost Recovery Systems, Inc. 705-2 East Bidwell Street, #294 Folsom, CA 95630	Tel: (916) 939-7901 Email: achinnrcs@aol.com Fax: (916) 939-7801
Mr. Allan Burdick 7525 Myrtle Vista Avenue Sacramento, CA 95831	Tel: (916) 203-3608 Email: allanburdick@gmail.com Fax:
Mr. Matthew Schuneman MAXIMUS 900 Skokie Boulevard, Suite 265 Northbrook, IL 60062	Tel: (847) 513-5504 Email: matthewschuneman@maximus.com Fax: (703) 251-8240
Mr. J. Bradley Burgess MGT of America 895 La Sierra Drive Sacramento, CA 95864	Tel: (916) 595-2646 Email: Bburgess@mgtamer.com Fax:
Mr. Andy Nichols Nichols Consulting 1857 44th Street Sacramento, CA 95819	Tel: (916) 455-3939 Email: andy@nichols-consulting.com Fax: (916) 739-8712
Ms. Harmeet Barkschat Mandate Resource Services, LLC 5325 Elkhorn Blvd. #307	Tel: (916) 727-1350 Email: harmeet@calsdrc.com Fax: (916) 727-1734

Sacramento, CA 95842

Ms. Kathy Lynch Department of Finance (A-15) 915 L Street, Suite 1280 Sacramento, CA 95814	Tel: (916) 445-3274 Email Kathleen.lynch@dof.ca.gov. Fax:
Mr. Brian Uhler Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: (916) 319-8328 Email brian.uhler@lao.ca.gov Fax:
Ms. Kathy Rios State Controllers Office Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 324-5919 Email krios@sco.ca.gov Fax: (916) 323-4807
Ms. Marieta Delfin State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 323-0706 Email mdelfin@sco.ca.gov Fax: (916) 322-4404
Mr. Geoffrey Neill California State Association of Counties 1100 K Street, Ste 101 Sacramento, CA 95814	Tel: (916) 327-7500 Email gneill@counties.org Fax: (916) 321-5070
Mr. Edward Jewik Los Angeles County Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: (213) 974-8564 Email ejewik@auditor.lacounty.gov Fax: (213) 617-8106
Mr. Mark Rewolinski MAXIMUS 625 Coolidge Drive, Suite 100 Folsom, CA 95630	Tel: (949) 440-0845 Email markrewolinski@maximus.com Fax: (916) 366-4838
Ms. Ferlyn Junio Nimbus Consulting Group, LLC 2386 Fair Oaks Boulevard, Suite 104 Sacramento, CA 95825	Tel: (916) 480-9444 Email fjunio@nimbusconsultinggroup.com Fax: (800) 518-1385
Mr. Lee Scott Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: (916) 445-3274 Email Lee.Scott@dof.ca.gov Fax:

Mr. Dennis Speciale State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 324-0254 Email DSpeciale@sco.ca.gov Fax:
Ms. Jill Kanemasu State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 322-9891 Email jkanemasu@sco.ca.gov Fax:
Mr. Tom Dyer Department of Finance (A-15) 915 L Street Sacramento, CA 95814	Tel: (916) 445-3274 Email tom.dyer@dof.ca.gov Fax:
Ms. Lacey Baysinger State Controller's Office Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 324-0254 Email lbaysinger@sco.ca.gov Fax:
Mr. Lowell Finley Secretary of State's Office (D-15) 1500 11th Street Sacramento, CA 95814	Tel: (916) 653-7244 Email lowell.finley@sos.ca.gov Fax:
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1280 Sacramento, CA 95814	Tel: (916) 445-3274 Email susan.geanacou@dof.ca.gov Fax: (916) 449-5252
Ms. Socorro Aquino State Controller's Office Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 322-7522 Email SAquino@sco.ca.gov Fax:
Mr. Eric Feller Commission on State Mandates 980 9th Street, Suite 300 Sacramento, CA 95814	Tel: (916) 323-3562 Email eric.feller@csm.ca.gov Fax:
Mr. Mark Ibele Senate Budget & Fiscal Review Committee (E-22) California State Senate State Capitol, Room 5019 Sacramento, CA 95814	Tel: (916) 651-4103 Email Mark.Ibele@sen.ca.gov Fax: (916) 323-8386
Ms. Renee Bischof County of Santa Barbara 4440 Calle Real - A	Tel: (805) 696-8957 Email rbischo@co.santa-barbara.ca.us Fax: (805) 568-2209

Ms. Jolene Tollenaar MGT of America 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: (916) 443-9136 Email jolene_tollenaar@mgtamer.com Fax: (916) 443-1766
Ms. Jean Kinney Hurst California State Association of Counties 1100 K Street, Suite 101 Sacramento, CA 95814-3941	Tel: (916) 327-7500 Email jhurst@counties.org Fax: (916) 321-5070
Mr. Jay Lal State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 324-0256 Email JLal@sco.ca.gov Fax: (916) 323-6527
Ms. Evelyn Tseng City of Newport Beach 100 Civic Center Drive Newport Beach, CA 92660	Tel: (949) 644-3127 Email etseng@newportbeachca.gov Fax: (949) 644-3339
Mr. Jim Spano State Controller's Office (B-08) Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 323-5849 Email jspano@sco.ca.gov Fax: (916) 327-0832
Ms. Gwendolyn Carlos State Controllers Office Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916) 324-5919 Email gcarlos@sco.ca.gov Fax: (916) 323-4807
Mr. Jai Prasad County of San Bernardino Office of Auditor-Controller 222 West Hospitality Lane, 4th Floor San Bernardino, CA 92415-0018	Tel: (909) 386-8854 Email jai.prasad@atc.sbcounty.gov Fax: (909) 386-8830
Ms. Michelle Mendoza MAXIMUS 17310 Red Hill Avenue, Suite 340 Irvine, CA 92614	Tel: (949) 440-0845 x 101 Email michellemendoza@maximus.com Fax: (614) 523-3679
Ms. Meg Svoboda California Senate Office of Research 1020 N Street, Suite 200 Sacramento, CA 95814	Tel: (916) 651-1500 Email Meg.Svoboda@sen.ca.gov Fax:

Mr. Michael Byrne
Department of Finance
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-3274
Email michael.byrne@dof.ca.gov
Fax:

Ms. Hortencia Mato
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

Tel: (949) 644-3000
Email hmato@newportbeachca.gov
Fax:

Ms. Anita Worlow
AK & Company
3531 Kersey Lane
Sacramento, CA 95864

Tel: (916) 972-1666
Email akcompany@um.att.com
Fax:

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
3609 Bradshaw Road, Suite H-382
Sacramento, CA 95927

Tel: (916) 368-9244
Email dwa-david@surewest.net
Fax: (916) 368-5723

Ms. Hasmik Yaghobyan
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Tel: (213) 893-0792
Email hyaghobyan@auditor.lacounty.gov
Fax: (213) 617-8106

ITEM _
TEST CLAIM
DRAFT STAFF ANALYSIS
AND
PROPOSED STATEMENT OF DECISION

Former California Code of Regulations, Title 2, Sections 20120, 20121,
20122, 20123, 20124, 20125, 20126 and 20127¹

Register 2008, No. 43

Post Election Manual Tally (PEMT)

10-TC-08

County of Santa Barbara, Claimant

Attached is the draft proposed statement of decision for this matter. This draft proposed statement of decision also functions as the draft staff analysis, as required by section 1183.07 of the Commission on State Mandates' (Commission) regulations.

EXECUTIVE SUMMARY

The test claim seeks reimbursement for counties to comply with procedures to conduct specified new post election manual tallies (PEMT) of votes, for those races with very narrow margins of victory where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The emergency regulations, which are the subject of this claim, were effective from October 2008 until April 2009, coinciding with the November 2008 Presidential General Election.

Background

A. Preexisting Law Required Election Canvassing and, for Counties With Voting Systems, a One-Percent Manual Tally.

In California, elections are administered at the county level and either the county clerk or registrar of voters is required to perform the duties imposed by the Elections Code.² For every election, the county elections official is required by the Elections Code to conduct a semifinal official canvass and an official canvass of ballots by processing, tabulating, and compiling

¹ The regulations were adopted as emergency regulations by Register 2008, No. 43, operative October 20, 2008. They were repealed by operation of Government Code section 11346.1 (g) (Register 2009, No. 31).

² Government Code section 26802 states: "Except as provided by law, the county clerk shall register as voters any electors who apply for registration and shall perform any other duties required of him or her by the Elections Code. In those counties in which a registrar of voters office has been established, the registrar of voters shall discharge all duties vested by law in the county clerk that relate to and are a part of election procedure."

election results. When performing these duties, counties are authorized to use any kind of voting system, any combination of voting systems, or any combination of voting system and paper ballots, provided that the use of the voting system or systems has been approved by the Secretary of State (SOS) or specifically authorized by law. "Voting system" means "any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast or tabulate votes, or both."³ The authority to use voting systems is provided in Elections Code section 19210, enacted in 1994 and derived from a 1976 statute, which states the following:

The governing board may adopt for use at elections any kind of voting system, any combination of voting systems, any combination of voting system and paper ballots, provided that the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law. The voting system or systems may be used at any or all elections held in any county, city, or any of their political subdivisions for voting, registering, and counting votes cast. When more than one voting system is used to count ballots, the names of the candidates shall, insofar as possible, be placed upon the primary voting system. When more than one voting system or combination of voting system and paper ballots is used to count ballots, a single ballot measure or the candidates for a single office may not be split between voting systems or between a voting system and paper ballots.

Voting systems must be approved by the SOS through a process that includes examination by expert electronic technicians, a written report that is sent to county boards of supervisors, and a public hearing. The systems must also be inspected for accuracy and periodically reviewed to determine if they are defective, obsolete, or otherwise unacceptable.

Counties may also count and process ballots by hand and not use a voting system. The Elections Code establishes procedures for counting ballots by hand for the semifinal official canvass and official canvass.

If a county uses a mechanical, electromechanical, or electronic voting system during the official canvass, Elections Code section 15360 requires the official conducting the election to conduct a *manual* tally of the ballots tabulated by those devices cast in one percent of the precincts chosen at random by the elections official to verify the accuracy of the automated count.⁴ The manual tally is a public process, with the election official providing at least a five-day public notice of the time and place of the manual tally and of the time and place of the selection of the precincts, batches, or direct recording electronic voting machines subject to the public manual tally.

B. The Secretary of State's Review of Voting Systems Led to the Adoption of PEMT Requirements that Were Later Invalidated in Court Because They Were Not Adopted in Accordance With the Administrative Procedures Act.

In 2007, the SOS conducted a "top-to-bottom review" of several voting machines certified for use in California. The purpose of the review was to determine whether currently certified voting systems provide acceptable levels of security, accessibility, ballot secrecy, accuracy and usability

³ Elections Code section 362, as added by Statutes 1994, chapter 920.

⁴ Elections Code section 336.5.

under federal and state standards. At the conclusion of the review, the SOS decertified and conditionally recertified three voting systems. The SOS simultaneously issued a conditional re-approval of each of the voting systems that set forth approximately 40 preconditions to their use. One of the conditions required counties that chose to use voting systems that were subject to the “top-to-bottom-review” to follow “post-election manual count auditing requirements” in addition to the one-percent manual tally required by existing law. In October 2007, the conditional re-approvals were amended, with the post election manual count condition revised to state that “Elections officials must comply with requirements as set forth by the Secretary of State in the document entitled ‘Post-Election Manual Tally Requirements’ and any successor document.” In addition, the SOS issued a stand-alone document entitled “Post-Election Manual Tally Requirements.” The PEMT requirements were implemented for the June 2008 Statewide Direct Primary Election in seven counties where a margin of victory that was less than .5% required manual tallies of those counties in 10% of the precincts.

The County of San Diego challenged the PEMT requirements in court, and on August 31, 2008, the Fourth District Court of Appeal held that the SOS had authority to institute PEMT requirements under its general authority provided in the Elections Code, but should have done so by adopting regulations using the procedures in the Administrative Procedures Act. The court held that the PEMT requirements adopted in 2007 were therefore void.

C. The Test Claim Regulations Were Adopted to Increase the Accuracy of, and Public Confidence in, California Elections.

The SOS adopted the test claim regulations as emergency regulations effective October 20, 2008 so that the PEMT requirements would apply to the November 2008 Presidential General Election. The regulations expired in 2009, and new PEMT requirements have not been established by statute or by regulation.

The test claim regulations establish specified new standards and procedures to conduct post election manual tallies, for those races with very narrow margins of victory where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The test claim regulations impose the following requirements on county election officials in counties that use a mechanical, electromechanical, or electronic voting system:

- Determine the margin of victory in each contest based upon the semifinal official canvass results, and for any contest in which the margin of victory is less than one half of one percent (0.5%), require elections officials to conduct a manual tally of 10% of randomly selected precincts, as specified.
- In any contest voted upon in more than one jurisdiction, or for a legislative or statewide contest, in each jurisdiction in which votes were cast in the contest, determine whether a ten percent (10%) manual tally is required, as specified.
- Document and disclose to the public any variances⁵ between the semifinal official canvass results and the manual tally results.

⁵ A “variance” is any difference between the machine tally and the manual tally for a contest. For purposes of determining whether additional precincts must be manually tallied under section 20124, variances found in the manual tally sample for a given contest are presumed to exist in at

- Calculate the variance percentage for any contest with one or more variances, as specified. If any variance is found between manually tallied voter verifiable paper audit trail (VVPAT) records and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem, preserve the VVPAT records, memory cards and devices, and direct recording electronic (DRE) voting machines and notify the Secretary of State in order to allow for an investigation to determine the cause of the problem.
- Keep a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken, and make the log available to the public.
- Track, record in the log, and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.
- Make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins, and comply with the notice requirements established in Elections Code section 15360 when conducting any post-election manual tallying required.
- Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows them to verify the tally.
- Prohibit members of the public from touching ballots, voter verifiable paper audit trails or other official materials used in the manual tally process or to interfere in any way with the process.
- Complete all tasks and make all reports required by the regulations within the canvass period established by Elections Code sections 10262 and 15372.

Procedural History

On October 22, 2009, the California State Association of Counties (CSAC) notified Commission staff of its intent to develop a legislatively determined mandate (LDM) for the test claim regulations. On November 12, 2009, Commission staff notified CSAC and the Department of Finance (Finance) that the statute of limitations for filing a test claim would be tolled as of October 22, 2009 pursuant to Government Code section 17573(b). On March 11, 2011, Commission staff was notified that the parties were no longer negotiating an LDM. On March 28, 2011 the County of Santa Barbara filed the test claim with the Commission. On May 11, 2011, Finance requested an extension of time to comment on test claim. On June 13, 2011, Finance submitted comments on the test claim. On July 12, 2011, the claimant submitted rebuttal comments. On November 5, 2013, a notice of dismissal of test claim was issued on the ground that the notice to develop an LDM was filed more than 12 months after the regulations became effective and, thus, after the statute of limitations expired. On November 6, 2013, the notice of dismissal was rescinded on the assertion that the notice to develop an LDM was filed before the expiration of the statute of limitations, when calculated

least the same proportion in the remaining ballots cast in the contest. (Former Cal. Code Regs., tit. 2, § 20123.)

based on the date the claimant first incurred costs, rather than 12 months after the effective date of the regulations. Notice was also provided that the test claim was set for hearing on January 24, 2014. On November 18, 2013, a draft staff analysis and proposed statement of decision was issued for comment.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.⁶

Claims

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

Subject	Description	Staff Recommendation
CCR, title 2, former sections 20120 – 20127, as adopted by Register 2008, No. 43.	The regulations require elections officials to determine the margin of victory in each contest based upon the semifinal official canvass results, and for any contest in which the margin of victory is less than one half of one percent (0.5%), require elections officials to conduct a manual tally of 10% of randomly selected precincts. They also require elections officials to document and disclose to the public any variances between the semifinal official canvass results and the manual tally results, and impose related record keeping and public notice requirements.	Deny. The regulations do not impose a state-mandated program on county elections officials because the regulations only apply to counties that have decided to adopt mechanical, electromechanical, or electronic voting systems for casting ballots or tabulating votes and use the voting system in an election. Counties are not legally required to adopt voting systems, and there is no evidence in the record that counties are practically compelled to adopt voting systems.

⁶ *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802.

Analysis

A. The Commission Has Jurisdiction to Hear and Determine This Claim.

The PEMT regulations were adopted and became operative on October 20, 2008. The claimant incurred actual costs as a result of the regulations one month later beginning November 10, 2008. The test claim was filed on March 28, 2011. Although the test claim was filed nearly two and a half years after the effective date of the regulations and the date actual costs were incurred, the Commission has jurisdiction to hear and determine this test claim.

Government Code section 17551(c) states that a test claim shall be filed not later than 12 months following the effective date of a statute or executive order, which in this case, would be October 20, 2009. Government Code section 17551(c) also allows test claims to be filed within 12 months of incurring increased costs as a result of a statute or executive order if that date occurs later than a year after the effective date of the statute or executive order. Under the section 1183(c) of the Commission's regulations, "within 12 months of incurring increased costs" means that the test claim can be filed by "June 30 of the fiscal year *following* the fiscal year in which increased costs were first incurred by the test claimant," thus increasing the time to file a test claim by another fiscal year. In this case, the deadline using the second provision would be June 30, 2010.

The parties to this claim, however, attempted to negotiate an LDM pursuant to Government Code sections 17573 and 17574 for the reimbursement of costs for the PEMT regulations. Under Government Code section 17573(b), the statute of limitations in section 17551 for filing a test claim is tolled during those negotiations *from* the date a local agency contacts Finance or responds to a Finance request to initiate a joint request for a LDM - *to* the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted to the Legislature, *or to* the date on which one of the parties notifies the other of its decision to not submit a joint request to the Legislature for an LDM.

The courts have explained that when the Legislature "tolls" the statute of limitations, it means that the clock has stopped and will start when the tolling period has ended. Whatever period of time that remained when the clock is stopped is available when the clock is restarted to file the claim.

In order for the Commission to have jurisdiction to hear and determine a test claim when negotiations for a joint request for an LDM are underway and ultimately fail, parties are required to either (1) file a test claim within the statute of limitations provided in section 17551(c), continue negotiations with the state, and request that the Commission stay its proceedings on the test claim pursuant to section 17573(h); or (2) file the notice required under section 17573(b) with the Commission before the statute of limitations on the test claim statute or executive order expires showing that negotiations for an LDM have started. Pursuant to section 17573(b), the parties are required to provide written notification to the Commission of the date local agencies initiate or respond to a request to initiate a joint LDM, and in this case, notice was provided that the LDM process started on October 22, 2009 – two days *after* the statute of limitations would have expired if the statute of limitations is based on 12 months following the effective date of the regulations pled in the claim (which would be October 20, 2009). Under the first provision of section 17551(c), then, the Commission would not have jurisdiction of this test claim.

The claimant alleges, however, that it first incurred costs on November 10, 2008, and requests that the statute of limitations be determined based on the second provision in Government Code section 17551(c), allowing test claims to be filed within 12 months of incurring increased costs, which extends the statute of limitations from October 20, 2009, to June 30, 2010. Since the notice of intent to develop an LDM was filed on October 22, 2009, *before* the June 30, 2010 deadline for filing the test claim, the notice would be considered timely and the statute of limitations properly tolled until March 11, 2011, when the parties decided to not submit a joint request for an LDM to the Legislature and the tolling period ended. Under the law, whatever period of time that remained when the clock was stopped was available when the clock was restarted after the tolling period ended. The test claim here was filed on March 28, 2011, just two weeks after the tolling period ended.

Because the Legislature has provided two alternative statutes of limitation to be used by a claimant, without any express limitation as to which option a claimant may use, staff finds that the test claim was timely filed and the Commission has jurisdiction to hear and determine the claim.

B. The Test Claim Regulations Do Not Impose a State-Mandated Program on Counties within the Meaning of Article XIII B, Section 6 of the California Constitution.

The test claim regulations establish standards and procedures for post election *manual* tallies (PEMT) of votes, in addition to those already required by law, for those races with very narrow margins of victory, and where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system.

Although the regulations require new activities to be performed related to the manual tally of votes, those activities are triggered and apply *only* to those counties that have made the local decision to adopt a “voting system” and use the voting system in an election. Counties are not required by state law to use mechanical, electromechanical, or electronic voting systems during the elections process. The Elections Code authorizes counties to choose whether to count ballots manually, or automatically using voting systems, or to use both methods as long as the precinct results are determined in accordance with the law. Elections Code sections 15270, et seq. and 15290, et seq., establish procedures for counting ballots by hand for the semifinal official canvass and official canvass. Thus, counties are not legally compelled by state law to comply with the regulations. Moreover, claimant does not argue, nor is there any evidence in the record to support a finding, that counties are practically compelled to comply with the regulations. There are no penalties in the law if a county chooses to manually count ballots and tabulate votes, rather than use a voting system. Although, as a practical matter, many counties may depend on voting systems to save time and money, there is no concrete evidence in the record showing that certain and severe penalties or other draconian consequences will occur from a local decision to manually tabulate votes.

Therefore, counties are not legally or practically compelled by state law to comply with the regulations and, thus, the regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Conclusion

Staff finds that California Code of Regulations, title 2, sections 20120, 20121, 20122, 20123, 20124, 20125, 20126, and 20127 (Register 2008, No. 43) do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Staff Recommendation

Staff recommends that the Commission adopt this analysis to deny the test claim.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

California Code of Regulations, Title 2,
Sections 20120, 20121, 20122, 20123, 20124,
20125, 20126 and 20127⁷

Register 2008, No. 43

Filed on March 28, 2011

By County of Santa Barbara, Claimant.

Case No.: 10-TC-08

Post Election Manual Tally (PEMT)

STATEMENT OF DECISION PURSUANT
TO GOVERNMENT CODE SECTION
17500 ET SEQ.; CALIFORNIA CODE OF
REGULATIONS, TITLE 2, DIVISION 2,
CHAPTER 2.5, ARTICLE 7.

(Adopted January 24, 2014)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 24, 2014. [Witness list will be included in the final statement of decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the proposed statement of decision to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

Summary of the Findings

The test claim regulations establish specified new standards and procedures for post election *manual* tallies (PEMT) of votes, for those races with very narrow margins of victory where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The regulations were adopted based on findings by the Secretary of State's Office (SOS) that voting systems in widespread use throughout California are vulnerable to error and tampering. Thus, the regulations are intended to ensure the accuracy and integrity of election results in close contests, and to ensure public confidence in those results.⁸

⁷ The regulations were adopted as emergency regulations by Register 2008, No. 43, operative October 20, 2008. They were repealed by operation of Government Code section 11346.1 (g) (Register 2009, No. 31).

⁸ SOS, Finding of Emergency and Informative Digest for the emergency PEMT regulations (Cal. Code Regs., tit. 2, §§ 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127), October 9, 2008.

Although the regulations require new activities to be performed related to the manual tally of votes, those activities are triggered and apply *only* to those counties that have made the local decision to adopt a “voting system” and use the voting system in an election. Counties are not required by state law to use mechanical, electromechanical, or electronic voting systems during the elections process. The Elections Code authorizes counties to choose whether to count ballots manually, or automatically using voting systems, or to use both methods as long as the precinct results are determined in accordance with the law. Elections Code sections 15270, et seq. and 15290, et seq., establish procedures for counting ballots by hand for the semifinal official canvass and official canvass. Thus, counties are not legally compelled by state law to comply with the regulations. Moreover, there is no evidence that counties are practically compelled to comply with the regulations. There are no penalties in the law if a county chooses to manually count ballots and tabulate votes, rather than use a voting system. Although, as a practical matter, many counties may depend on voting systems to save time and money, claimant has not alleged, nor is there is any evidence in the record to support a finding, that certain and severe penalties or other draconian consequences will occur from a local decision to manually tabulate votes.

Therefore, counties are not legally or practically compelled by state law to comply with the regulations and, thus, the regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. Accordingly, the Commission denies this test claim.

COMMISSION FINDINGS

I. Chronology

- | | |
|----------|--|
| 10/22/09 | California State Association of Counties (CSAC) notified Commission staff of its intent to develop a legislatively determined mandate (LDM) for the test claim regulations. |
| 11/12/09 | Commission staff notified CSAC and the Department of Finance (Finance) that the statute of limitations for filing a test claim would be tolled as of October 22, 2009 pursuant to Government Code section 17573(b). |
| 03/28/11 | Commission staff notified that the parties were no longer negotiating an LDM. |
| 03/28/11 | Claimant, County of Santa Barbara, filed test claim <i>Post Election Manual Tally</i> , 10-TC-08 with the Commission. |
| 05/11/11 | Finance requested an extension of time to comment on test claim. |
| 06/13/11 | Finance submitted comments on the test claim. |
| 07/12/11 | Claimant submitted rebuttal comments. |
| 11/05/13 | Notice of dismissal of test claim issued based on the ground that the notice to develop an LDM was filed more than 12 months after the regulations became effective and, thus, after the statute of limitations expired. |

11/06/13

Notice of dismissal rescinded because the notice to develop an LDM was filed before the expiration of the statute of limitations based on when the claimant first incurred costs.

II. Introduction

The test claim seeks reimbursement for specified new standards and procedures to conduct post election manual tallies (PEMT), for those races with very narrow margins of victory, and where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The emergency regulations were effective from October 2008 until April 2009, coinciding with the November 2008 Presidential General Election.

A. Preexisting Law Required Election Canvassing and, for Counties With a Voting System, a One-Percent Manual Tally.

The PEMT regulations are best explained in context of the prior law applicable to counting or “canvassing” ballots, voting systems, and manual tally requirements.

1. Election Canvassing

In California, elections are administered at the county level and either the county clerk or registrar of voters is required to perform the duties imposed by the Elections Code.⁹ The Elections Code requires county elections officials in every election to conduct a semifinal official canvass and an official canvass of ballots by processing, tabulating, and compiling election results. The semifinal official canvass¹⁰ begins immediately upon the close of the polls and continues until all precincts are accounted for.¹¹ County elections officials are required to tabulate all vote-by-mail ballots and precinct ballots, compile the results, and then transmit the semifinal official results for candidates for office and ballot measures to the SOS in the manner and according to the schedule prescribed by the SOS. Although most of the activities required to complete the semifinal official canvass occur once the polls are closed on election day, counties may begin processing vote-by-mail ballots seven business days before the election. County elections officials verify the signatures on the return envelopes for the vote-by-mail ballots, remove the voted ballots, and process them through their vote tallying system. The results from these ballots, however, are not tabulated until after the close of polls on election day. Vote-by-mail ballots that are not counted by election day and those ballots received on

⁹ Government Code section 26802 states the following: “Except as provided by law, the county clerk shall register as voters any electors who apply for registration and shall perform any other duties required of him or her by the Elections Code. In those counties in which a registrar of voters office has been established, the registrar of voters shall discharge all duties vested by law in the county clerk that relate to and are a part of election procedure.”

¹⁰ Elections Code section 353.5 defines the “semifinal official canvass” as “the public process of collecting, processing, and tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on election night. The semifinal official canvass may include some or all of the vote by mail and provisional vote totals.”

¹¹ Elections Code sections 15150, *et seq.*

election day, either through the mail or at the precincts, are tabulated during the official canvass of the vote.¹²

The official canvass begins no later than the Thursday following the election, is open to the public, and continues daily until completed.¹³ County elections officials must complete the official canvass no later than the 28th day after the election and submit a certified statement of the results of the election to the SOS by the 31st day.¹⁴ The activities undertaken during the official canvass include, but are not limited to, the following listed in Elections Code section 15302:

- Processing and counting any valid vote-by-mail and provisional ballots not included in the semifinal official canvass. Provisional ballots are cast by voters whose names do not appear on the precinct roster.
- Inspecting all materials and supplies returned by poll workers.
- Reconciling the number of signatures on the roster with the number of ballots recorded on the ballot statement.
- Reconciling the number of ballots counted, spoiled, canceled, or invalidated due to identifying marks or overvotes with the number of votes counted, including vote-by-mail and provisional ballots.
- Counting any valid write-in votes.
- Reproducing any damaged ballots, if necessary.
- Hand counting the ballots cast in one (1) percent of the precincts, chosen at random by the elections official.
- Reporting final results to the Secretary of State, as required.¹⁵

Elections officials are required to adopt semifinal official and official canvass procedures to conform to the applicable voting systems procedures that have been approved by the SOS. The procedures must be available for public inspection no later than 29 days before each election.¹⁶

2. Voting Systems and the One-Percent Manual Tally

Counties are authorized to use any kind of voting system, any combination of voting systems, or any combination of voting system and paper ballots, provided that the use of the voting system or systems has been approved by the SOS or specifically authorized by law. “Voting system” means “any mechanical, electromechanical, or electronic system and its software, or any

¹² California Secretary of State, “The Official Canvass of the Vote”
<<http://www.sos.ca.gov/elections/official-canvass.htm>> as of September 1, 2013.

¹³ Elections Code section 15301.

¹⁴ Elections Code sections 15372 and 15375.

¹⁵ See California Secretary of State, “The Official Canvass of the Vote”
<<http://www.sos.ca.gov/elections/official-canvass.htm>> as of September 1, 2013.

¹⁶ Elections Code section 15003.

combination of these used to cast or tabulate votes, or both.”¹⁷ The authority to use voting systems is provided in Elections Code section 19210, enacted in 1994 and derived from a 1976 statute, which states the following:

The governing board may adopt for use at elections any kind of voting system, any combination of voting systems, any combination of voting system and paper ballots, provided that the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law. The voting system or systems may be used at any or all elections held in any county, city, or any of their political subdivisions for voting, registering, and counting votes cast. When more than one voting system is used to count ballots, the names of the candidates shall, insofar as possible, be placed upon the primary voting system. When more than one voting system or combination of voting system and paper ballots is used to count ballots, a single ballot measure or the candidates for a single office may not be split between voting systems or between a voting system and paper ballots.

Voting systems must be approved by the SOS through a process that includes examination by expert electronic technicians, a written report that is sent to county boards of supervisors, and a public hearing.¹⁸ The systems must also be inspected for accuracy and periodically reviewed to determine if they are defective, obsolete, or otherwise unacceptable. The SOS has the right to withdraw approval previously granted of any voting system if it is defective or unacceptable after review.¹⁹

Counties may also count ballots by hand and not use a voting system. Elections Code sections 15270, et seq. and 15290, et seq., establish procedures for counting ballots by hand for the semifinal official canvass and official canvass.

If a county uses a voting system during the official canvass, Elections Code section 15360 requires the official conducting the election to conduct a *manual* tally of the ballots tabulated by those devices cast in one percent of the precincts chosen at random by the elections official to verify the accuracy of the automated count.²⁰ Elections Code section 15360(a) states:

In every election in which a voting system is used, the election official shall conduct a public manual tally of the ballots tabulated by those devices cast in 1 percent of the precincts chosen at random by the elections official. If 1 percent of the precincts is less than one whole precinct, the tally shall be conducted in one precinct chosen at random by the elections official. In addition, the elections official shall, for each race not included in the initial group of precincts, count one additional precinct. The manual tally shall apply only to the race not previously counted. Additional precincts for the manual tally may be selected at the discretion of the elections official.

¹⁷ Elections Code section 362, as added by Statutes 1994, chapter 920.

¹⁸ Elections Code sections 19204, 19206, 19207, 19208 and 19209.

¹⁹ Elections Code sections 19220-19222.

²⁰ Elections Code section 336.5.

The manual tally is a public process, with the election official providing at least a five-day public notice of the time and place of the manual tally and of the time and place of the selection of the precincts, batches, or direct recording electronic voting machines subject to the public manual tally prior to conducting the selection and tally.²¹

B. The Secretary of State’s Review of Voting Systems Led to the Adoption of PEMT Requirements that Were Later Invalidated in Court Because They Were Not Adopted in Accordance With the Administrative Procedures Act.

In 2007, the SOS, pursuant to the authority in Elections Code section 19222, conducted a "top-to-bottom review" of several voting machines certified for use in California. The purpose of the review was "to determine whether currently certified voting systems provide acceptable levels of security, accessibility, ballot secrecy, accuracy and usability under federal and state standards." At the conclusion of the review, the SOS decertified and conditionally recertified three voting systems. The SOS also decertified a fourth voting system that was not able to be tested during the review, but was later conditionally recertified.²² The SOS simultaneously issued a conditional re-approval of each of the voting systems that set forth approximately 40 preconditions to their use. One of the conditions required counties that chose to use the machines subject to the "top-to-bottom-review" to follow "post-election manual count auditing requirements" in addition to the one-percent manual tally required by existing law. In October 2007, the conditional re-approvals were amended, with the post election manual count condition revised to state that "Elections officials must comply with requirements as set forth by the Secretary of State in the document entitled 'Post-Election Manual Tally Requirements' and any successor document." In addition, the SOS issued a stand-alone document entitled "Post-Election Manual Tally Requirements."²³ The PEMT requirements were implemented for the June 2008 Statewide Direct Primary Election in seven counties where a margin of victory that was less than .5% required manual tallies of those counties in 10% of the precincts. The other counties had no margin of victory below the .5% threshold.²⁴

The County of San Diego challenged the PEMT requirements in court, and on August 31, 2008, the Fourth District Court of Appeal held that the SOS had authority to institute PEMT requirements under its general authority provided in the Elections Code, but should have done so by adopting regulations using the procedures in the Administrative Procedures Act.²⁵ The court held that the PEMT requirements adopted in 2007 were therefore void.²⁶

²¹ Elections Code section 15360 (d).

²² Senate Committee on Elections, Reapportionment, and Constitutional Amendments, Analysis of AB 2023 (2009-2010 Reg. Sess.) amended April 27, 2010, pages 3-4.

²³ SOS, Informative Digest, for the emergency PEMT regulations (former Cal. Code Regs., tit. 2, §§ 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127), October 9, 2008.

²⁴ Letter from Lowell Finley, Deputy Secretary of State, to the Office of Administrative Law Research Attorney, regarding the proposed emergency regulations, October 17, 2008.

²⁵ *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501.

²⁶ *Id.* at page 520.

C. The Test Claim Regulations Were Adopted to Increase the Accuracy of, and Public Confidence in, California Elections.

Effective October 20, 2008, the SOS adopted the emergency regulations at issue in this test claim (title 2, §§ 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127) so that the PEMT requirements would apply to the November 2008 Presidential General Election. The emergency regulations expired in 2009,²⁷ and new PEMT requirements have not been established by statute or by regulation.²⁸

The purpose of the regulations was to increase the accuracy, as well as public confidence in the accuracy, of California elections. According to the SOS, electronic voting systems pose a risk of being tampered with, and are prone to errors and inaccuracies.²⁹ PEMT tallies were cited as a particularly effective risk mitigation procedure to ensure the trustworthiness and accuracy of election results. The SOS also stated that the existing one-percent manual tally was not adequate in contests with a very narrow margin of victory.³⁰

The regulations establish standards and procedures for conducting increased manual tallies in contests in which the margin of victory is very narrow.³¹ Section 20120(b) states that the regulations apply to the SOS and all elections officials in California “for all elections in this state conducted in whole or in part on a voting system, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory.”

III. Positions of the Parties

A. Claimant’s Position

The claimant, County of Santa Barbara, alleges that the test claim regulations impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution. According to the claimant, “the additions of § 20121 – Increased manual tally in contests with narrow margins of victory, and § 20124 – Manual tally escalation requirements for variances had the greatest impact on elections officials.”³² Claimant states that it had three

²⁷ The emergency regulations were readopted and renumbered operative April 13, 2009, but were repealed operative July 13, 2009 (Register 2009, No. 16, repealed by operation of Government Code section 11346.1(g), Register 2009, No. 31, July 13, 2009) because no Certificate of Compliance was filed.

²⁸ In 2010, the Legislature enacted Statutes 2010, chapter 122 (AB 2023), sponsored by the SOS, that authorized the SOS to conduct a pilot project in five or more counties to evaluate post canvass risk-limiting audits of election results

²⁹ SOS, Finding of Emergency and Informative Digest for the emergency PEMT regulations (Cal. Code Regs., tit. 2, §§ 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127), October 9, 2008.

³⁰ Letter from Lowell Finley, Deputy Secretary of State, to the Office of Administrative Law Research Attorney, regarding the proposed emergency regulations, October 17, 2008.

³¹ California Code of Regulations, title 2, section 20123.

³² County of Santa Barbara, Test Claim 10-TC-08, *Post Election Manual Tally (PEMT)* page 7.

contests in which the PEMT regulations applied. Claimant requests reimbursement for the following new activities performed between November 10, 2008 and November 26, 2008:³³

1. Conducted internal meetings with other counties and with the Secretary of State to clarify the requirements outlined in the emergency regulations.
2. Conducted meetings with Elections Division staff to determine activities to be completed in preparation for the manual tally.
3. Identified which local contests are required to be tallied.
4. Coordinated with Sheriff for security of ballots at offsite location.
5. Identified location for conducting manual tally and complete contract for location.
6. Recruited staff from poll worker list and temporary agencies.
7. Organized manual tally boards; ensured poll workers do not tally ballots for precincts they worked on Election Day.
8. Prepared Poll and Vote by Mail boxes for transport.
9. Prepared spreadsheet to track results of manual tally.
10. Boxed up tally sheets and supplies for transport to offsite tally location.
11. Ensured secure transport of ballots to/from offsite manual tally location.
12. Setup tables with board numbers and supplies.
13. Called roll and assign staff to their tally board/table.
14. Updated spreadsheet with Vote by Mail ballot manual tally results.
15. Checked totals to determine if variance exists and if escalation of precincts tallied is required.
16. Randomly selected precincts in 5% increments for contests requiring escalation.
17. Prepared report of cost for Post Election Manual Tally.

Claimant also lists the following modified activities to complete the PEMT within the canvass period:

1. Prepared notice of date and time of random selection of manual tally precincts for publication/posting.
2. Generated random precinct numbers for tally.
3. Generated machine count reports for precincts selected.
4. Generated central count deck reports for the precincts selected.
5. Identified staffing needs for supervision and manual tally boards.
6. Prepared notice of dates, times and locations of manual tally for publication/posting.

³³ County of Santa Barbara, Test Claim 10-TC-08, Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara (Exhibit A.)

7. Escorted public observers.
8. Located and pull counted poll ballots for selected precincts.
9. Prepared supply list and order supplies for manual tally process.
10. Prepared tally sheets for each contest/precinct selected for both poll and Vote by Mail ballots.
11. Prepared pull list to track precincts and contests tallied.
12. Trained boards on manual tally process.
13. Provided tally boards working on Vote by Mail ballots with deck report for central count and tally sheets for a selected precinct.
14. Located central count deck in box of Vote by Mail ballots, one at a time.
15. Sorted vote by mail ballots by precinct.
16. Conducted manual tally on Vote by Mail ballots.
17. Supervisor compared manual tally with machine count for Vote by Mail ballots by precinct.
18. Provided tally board with polling place ballots and tally sheets for a selected precinct.
19. Sorted polling place ballots by precinct.
20. Conducted polling place ballot manual tally.
21. Supervisor compared manual tally with machine count for polling place ballots by precinct.
22. Investigated any variances.
23. Reconciled and resolved variances if necessary.
24. Prepared tally reports for Secretary of State.

Claimant states that it incurred costs of \$250,126.09, which “represents the lowest possible expenditure in order to completely comply with the requirements set forth in the Post Election Manual Tally Requirements in Close Contest Emergency Regulations.”³⁴

In rebuttal comments submitted in July 2011, claimant responded to Finance’s position that the PEMT regulations may be required pursuant to *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501. Claimant contends that the court found the PEMT requirements promulgated by the SOS to be void because the Administrative Procedure Act procedures were not followed. Thus, the PEMT requirements outlined in the emergency regulations were not required or declared existing law by the court, and Government Code section 17556(b) does not preclude reimbursement for this test claim.

B. Department of Finance’s Position

In comments submitted in June 2011, Finance requests that the Commission:

³⁴ *Id.* at page 9.

... consider whether the regulations merely adopt the already-promulgated post election manual tally requirements in close contests pursuant to *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501.

Should the CSM ... find that to be the case, the emergency regulations would then not impose a reimbursable state mandate on local elections officials within the meaning of article XIII B, section 6 of the California Constitution because the requirements of the emergency regulations would already be required by the above court case. As such, the claim would then be denied pursuant to the court decision exception in Government Code section 17556, subdivision (b) ...

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

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 such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 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.”³⁵ Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”³⁶

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.³⁷
2. The mandated activity either:
 - a. Carries out the governmental function of providing a service to the public; or
 - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.³⁸
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.³⁹

³⁵ *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

³⁶ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

³⁷ *San Diego Unified School Dist. v. Commission on State Mandates (San Diego Unified School Dist.)* (2004) 33 Cal.4th 859, 874.

³⁸ *San Diego Unified School Dist., supra*, 33 Cal.4th at pgs. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

³⁹ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig*, (1988) 44 Cal.3d 830, 835.

4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.⁴⁰

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 6.⁴¹ The determination of whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.⁴² 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.”⁴³

A. The Commission Has Jurisdiction to Hear and Determine This Test Claim.

The PEMT regulations were adopted and became operative on October 20, 2008.⁴⁴ The claimant incurred actual costs as a result of the regulations one month later, beginning November 10, 2008.⁴⁵ The test claim was filed on March 28, 2011. Although the test claim was filed nearly two and a half years after the effective date of the regulations and the date actual costs were incurred, the Commission has jurisdiction to hear and determine this test claim.

Government Code section 17551(c) states that a test claim shall be filed not later than 12 months following the effective date of a statute or executive order, which in this case, would be October 20, 2009. Government Code section 17551(c) also allows test claims to be filed within 12 months of incurring increased costs as a result of a statute or executive order if that date occurs later than a year after the effective date of the statute or executive order. Under the section 1183(c) of the Commission’s regulations, “within 12 months of incurring increased costs” means that the test claim can be filed by “June 30 of the fiscal year *following* the fiscal year in which increased costs were first incurred by the test claimant,” thus increasing the time to file a test claim by another fiscal year. In this case, the deadline using the second provision would be June 30, 2010.

The parties to this claim, however, attempted to negotiate an LDM pursuant to Government Code sections 17573 and 17574 for the reimbursement of costs for the PEMT regulations. Under Government Code section 17573(b), the statute of limitations in section 17551 for filing a test claim is tolled during those negotiations *from* the date a local agency contacts the Department of

⁴⁰ *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; Government Code sections 17514 and 17556.

⁴¹ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

⁴² *County of San Diego, supra*, 15 Cal.4th 68, 109.

⁴³ *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.

⁴⁴ Register 2008, No. 43, operative October 20, 2008.

⁴⁵ County of Santa Barbara, Test Claim 10-TC-08, Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara (Exhibit A.)

Finance or responds to a Finance request to initiate a joint request for a LDM - to the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted to the Legislature, or to the date on which one of the parties notifies the other of its decision to not submit a joint request to the Legislature for an LDM. Section 17573(b) states the following:

The statute of limitations specified in Section 17551 shall be tolled from the date a local agency, school district, or statewide association contacts the Department of Finance or responds to a Department of Finance request to initiate a joint request for a legislatively determined mandate pursuant to subdivision (a), to (1) the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted pursuant to subdivision (a), or (2) the date on which the Department of Finance, or a local agency, school district, or statewide association notifies the other party of its decision not to submit a joint request. A local agency, school district, or statewide association, or the Department of Finance shall provide written notification to the commission of each of these dates.

The courts have explained that when the Legislature “tolls” the statute of limitations, it means that the clock has stopped and will start when the tolling period has ended. Whatever period of time that remained when the clock is stopped is available when the clock is restarted to file the claim.

Under California law, tolling generally refers to a suspension of a statute of limitations. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 674, 108 Cal.Rptr.3d 171, 229 P.3d 83 citing *Woods v. Young* (1991) 53 Cal.3d 315, 326, fn. 1, 279 Cal.Rptr. 613, 807 P.2d 455 [“Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.”]; *Cuadra v. Millan* (1998) 17 Cal.4th 855, 72 Cal.Rptr.2d 687, 952 P.2d 704, overruled on a different point in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4, 91 Cal.Rptr.2d 273, 989 P.2d 701, citing 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 407, p. 513 [“The statute [of limitations] may be tolled (i.e., *its operation suspended*) by various circumstances, events or acts.”].) Federal decisional authority is in accord. (*Chardon v. Soto* (1983) 462 U.S. 650, 652, fn. 1, 103 S.Ct. 2611, 77 L.Ed.2d 74; *Board of Regents v. Tomanio* (1980) 446 U.S. 478, 486, 100 S.Ct. 1790, 64 L.Ed.2d 440.)⁴⁶

Thus, in order for the Commission to have jurisdiction to hear and determine a test claim when negotiations for a joint request for an LDM are underway and ultimately fail, parties are required to either (1) file a test claim within the statute of limitations provided in section 17551(c), continue negotiations with the state, and request that the Commission stay its proceedings on the test claim pursuant to section 17573(h); or (2) file the notice required under section 17573(b) with the Commission before the statute of limitations on the test claim statute or executive order expires showing that negotiations for an LDM have started. Pursuant to section 17573(b), the parties are required to provide written notification to the Commission of the date local agencies

⁴⁶ *Don Johnson Productions, Inc. v. Rysher Entertainment* (2012) 209 Cal.App.4th 919, 929.

initiate or respond to a request to initiate a joint LDM, and in this case, notice was provided that the LDM process started on October 22, 2009 – two days *after* the statute of limitations would have expired if the statute of limitations is based on 12 months following the effective date of the regulations pled in the claim (which would be October 20, 2009). Under the first provision of section 17551(c), then, the Commission would not have jurisdiction of this test claim.

The claimant alleges, however, that it first incurred costs on November 10, 2008, and requests that the statute of limitations be determined based on the second provision in Government Code section 17551(c), allowing test claims to be filed within 12 months of incurring increased costs, which as defined in section 1183(c) of the Commission’s regulations, means the test claim can be filed by “June 30 of the fiscal year *following* the fiscal year in which increased costs were first incurred by the test claimant.” Using the second provision of section 17551(c) extends the statute of limitations from October 20, 2009, to June 30, 2010. Since the notice of intent to develop an LDM was filed on October 22, 2009, *before* the June 30, 2010 deadline for filing the test claim, the notice would be considered timely and the statute of limitations properly tolled until March 11, 2011, when the parties decided to not submit a joint request for a legislatively determined mandate to the Legislature and the tolling period ended. Under the law, whatever period of time that remained when the clock was stopped was available when the clock was restarted after the tolling period ended. The test claim here was filed on March 28, 2011, just two weeks after the tolling period ended.

Since the Legislature has provided two alternative statutes of limitation to be used by a claimant, without any express limitation as to which option a claimant may use, the Commission finds that the test claim was timely filed and the Commission has jurisdiction to hear and determine the claim.

B. The Test Claim Regulations Do Not Impose a State-Mandated Program on Counties within the Meaning of Article XIII B, Section 6 of the California Constitution.

The plain language of the test claim regulations requires county elections officials, in counties that use a voting system in an election, to perform the following activities:

- Determine the margin of victory in each contest based upon the semifinal official canvass results, and for any contest in which the margin of victory is less than one half of one percent (0.5%), and to conduct a manual tally of 10% of randomly selected precincts, as specified.⁴⁷
- In any contest voted upon in more than one jurisdiction, or for a legislative or statewide contest, in each jurisdiction in which votes were cast in the contest, determine whether a ten percent (10%) manual tally is required, as specified.⁴⁸
- Document and disclose to the public any variances⁴⁹ between the semifinal official canvass results and the manual tally results.⁵⁰

⁴⁷ Former California Code of Regulations, title 2, section 20121.

⁴⁸ Former California Code of Regulations, title 2, section 20122.

⁴⁹ A “variance” is any difference between the machine tally and the manual tally for a contest. For purposes of determining whether additional precincts must be manually tallied under section 20124, variances found in the manual tally sample for a given contest are presumed to exist in at

- Calculate the variance percentage for any contest with one or more variances, as specified. If any variance is found between manually tallied voter verifiable paper audit trail (VVPAT) records and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem, preserve the VVPAT records, memory cards and devices, and direct recording electronic (DRE) voting machines and notify the Secretary of State in order to allow for an investigation to determine the cause of the problem.⁵¹
- Keep a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken, and make the log available to the public.⁵²
- Track, record in the log and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.⁵³
- Make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins, and comply with the notice requirements established in Elections Code §15360 when conducting any post-election manual tallying required.⁵⁴
- Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows them to verify the tally.⁵⁵
- Prohibit members of the public from touching ballots, voter verifiable paper audit trails or other official materials used in the manual tally process or from interfering in any way with the process.⁵⁶
- Complete all tasks and make all reports required by the regulations within the canvass period established by Elections Code sections 10262 and 15372.⁵⁷

Finance argues that the PEMT requirements were already declared to be existing law by the court's decision in *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, and, thus, the requirements imposed by the emergency regulations, listed above, are be reimbursable pursuant Government Code section 17556(b). Section 17556(b) states:

least the same proportion in the remaining ballots cast in the contest. (Former Cal. Code Regs., tit. 5, § 20123.)

⁵⁰ Former California Code of Regulations, title 2, section 20123(b).

⁵¹ Former California Code of Regulations, title 2, section 20124.

⁵² Former California Code of Regulations, title 2, section 20125(a).

⁵³ Former California Code of Regulations, title 2, section 20125(b).

⁵⁴ Former California Code of Regulations, title 2, section 20126(a).

⁵⁵ Former California Code of Regulations, title 2, section 20126(c).

⁵⁶ Former California Code of Regulations, title 2, section 20126(c).

⁵⁷ Former California Code of Regulations, title 2, section 20127.

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

[¶] . . . [¶]

(b) The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.

In *County of San Diego v. Bowen*, the court held that the SOS had statutory authority to adopt the PEMT requirements, but that they must be adopted as regulations based on the procedures in the Administrative Procedure Act. The court held that the 2007 PEMT requirements were void.⁵⁸ The court did not find that the requirements imposed by the test claim regulations were existing law, or that the SOS was required to adopt the regulations at all. Therefore, Government Code section 17556(b) is not relevant and does not apply to this test claim.

However, the PEMT regulations do not impose a state-mandated program on county elections officials because the regulations only apply to counties that have decided to adopt mechanical, electromechanical, or electronic voting systems for casting ballots or tabulating votes and use the voting system in an election.⁵⁹ Counties are not required to adopt voting systems.

The California Supreme Court, in *Department of Finance v. Commission on State Mandates (Kern High School Dist.)*, held that when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled. As the court said:

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.⁶⁰

Thus, the Supreme Court in *Kern* held that participation in the underlying program must be considered:

[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

⁵⁸ *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 520.

⁵⁹ Elections Code section 362.

⁶⁰ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 743. (Emphasis in original.)

participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.*⁶¹

Here, the plain language of section 20120(b) of the regulations states that the regulations apply to all elections conducted in whole or in part on a voting system:

This chapter [former Chapter 3 of Division 7 of Title 2] applies to the Secretary of State and all elections officials in the State of California **for all elections in this state conducted in whole or in part on a voting system**, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory. [Emphasis added.]

Elections Code section 19210 authorizes county governing boards to adopt voting systems for use in elections as follows:

The governing board *may* adopt for use at elections any kind of voting system, any combination of voting systems, any combination of a voting system and paper ballots, provided the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law. [Emphasis added.]

Elections Code section 354, a statute that provides definitions for the interpretation of the Code, states that "'Shall' is mandatory and 'may' is permissive."

Thus, counties are not legally compelled by state law to use mechanical, electromechanical, or electronic voting systems to tabulate votes, but make a local decision to adopt them. A local decision requiring a county to incur costs does not result in a reimbursable state-mandated program.⁶²

Additionally, there is no evidence that elections officials are practically compelled to use voting systems. Practical compulsion requires a concrete showing, with evidence in the record, that a county faces certain and severe penalties, such as double taxation or other draconian consequences for not using voting systems, or that a county is left with no reasonable alternative but to use a voting system in order to carry out its core mandatory function to provide election services to the public.⁶³ In the 2009 case, *Department of Finance v. Commission on State Mandates (POBRA)*, the court addressed the issue of the evidence needed to support a finding of practical compulsion. In that case, it was argued that districts "employ peace officers when necessary to carry out the essential obligations and functions established by law."⁶⁴ The Commission found that the POBRA statutes constituted a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace

⁶¹ *Id.* at page 731. (Emphasis added.)

⁶² *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 880.

⁶³ *Kern High School Dist., supra*, 30 Cal.4th 727, 731, 743, 749-754; *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 884-887; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1362-1368.

⁶⁴ *Id.* at page 1368.

officers.⁶⁵ In 2006, the Commission reconsidered the claim, as required by Government Code section 3313, and found that *San Diego Unified* supported the Commission's 1999 Statement of Decision. Specifically, with regard to schools, the Commission found that districts were practically compelled to employ peace officers based upon the district's "obligation to protect pupils from other children, and also to protect teachers themselves from the violence by the few students whose conduct in recent years has prompted national concern."⁶⁶

The Commission's Statement of Decision on reconsideration pointed out that its decision was supported by the fact that the California Supreme Court found that the state "fulfills its obligations under the safe schools provision of the Constitution (Cal. Const., art. I, § 28, subd. (c)) by permitting local school districts to establish a police or security department to enforce rules governing student conduct and discipline."⁶⁷ The Commission relied on a general requirement in the law (i.e. to provide safe schools) to support a finding of practical compulsion to perform specific activities (i.e. to hire police officers and comply with the down-stream requirements of hiring those officers). This line of reasoning was rejected by the appellate court.

The court in *POBRA* found that the superior court erred in concluding as a matter of law that, "[a]s a practical matter, the employment of peace officers by the local agencies is 'not an optional program' and 'they do not have a genuine choice of alternative measures that meet their agency-specific needs for security and law enforcement.'" Moreover, the *POBRA* court did not find any evidence in the record to support a finding of legal or practical compulsion and the court provided some guidance regarding the kind of evidentiary showing required to make such a finding. Specifically, the court stated:

The 'necessity' that is required is facing 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences.' That cannot be established in this case without a concrete showing that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences.⁶⁸

Thus, practical compulsion must be demonstrated by specific facts in the record showing that unless the alleged activity is performed, here the activity of using a voting system, which would in turn trigger the requirement to comply with the PEMT requirements, the county faces "certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences.'" Only a showing that relying on paper ballots would result in such severe consequences will meet the practical compulsion standard. Here, however, there is no concrete showing, as required by the *POBRA* court, that reliance upon paper ballots would result in severe adverse consequences.

The law does not penalize a county if it chooses to not use a voting system to tabulate votes. Instead, the Elections Code provides an alternative and expressly authorizes counties to count

⁶⁵ See Commission on State Mandates, Decision CSM-4499.

⁶⁶ Commission on State Mandates, Decision CSM 05-RL-4499-01, p. 26, citing *In re Randy G.* (2001) 26 Cal.4th 556, 562-563.

⁶⁷ *Id.*

⁶⁸ *POBRA*, *supra*, 170 Cal.App.4th 1355, 1368, (*POBRA*) citing *Kern*, *supra*, 30 Cal.4th at p. 754, quoting *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.) Exhibit S.

ballots by hand rather than use a voting system. Elections Code sections 15270, et seq. and 15290, et seq., establish procedures for counting ballots by hand for the semifinal official canvass and official canvass. Counties are authorized to choose whether to count ballots manually, or automatically using voting systems, or use both methods so long as the precinct results are determined in accordance with the article of the Elections Code applicable to the precinct.⁶⁹ And although, as a practical matter, counties may depend on voting systems to save time and money,⁷⁰ there is no concrete evidence in the record showing that certain and severe penalties or other draconian consequences will occur from a local decision to manually tabulate votes.

Accordingly, the Commission finds that the test claim regulations do not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

V. Conclusion

Based on the analysis above, the Commission concludes that California Code of Regulations, title 2, sections 20120, 20121, 20122, 20123, 20124, 20125, 20126, and 20127 (Register 2008, No. 43) do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

⁶⁹ Elections Code section 15212. This is consistent with section 19210 that authorizes counties to “adopt for use at elections any kind of voting system, any combination of voting systems, any combination of a voting system and paper ballots, provided the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law.”

⁷⁰ In 2002, the Legislature enacted the Voting Modernization Bond Act of 2002 that allows counties to purchase updated voting systems with bond money. (Elections Code sections 19230, et seq.)