

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Elections Code Sections 15111, 15321, and
21000; Statutes 1999, Chapter 697

Filed on March 12, 2001,

By County of Orange, Claimant.

No. 00-TC-08

Absentee Ballots II

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 on April 24, 2003)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on April 25, 2003.

PAULA HIGASHI, Executive Director

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STATEMENT OF DECISION

The Commission heard and decided this test claim on April 24, 2003, during a regularly scheduled hearing. Pam Stone, Steve Rodermund, and Rosalyn Lever appeared for claimants, County of Orange. Susan Geanacou and Thomas Lutzenberger, appeared on behalf of the Department of Finance (DOF).

At the hearing, testimony was given, the test claim was submitted, and the vote was taken.

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 section 17500 et seq., and related case law.

The Commission approved this test claim by a 5-0 vote.

BACKGROUND

The Legislature is required by the state Constitution to "provide for registration and free elections."¹ Accordingly, the law requires an absentee ballot be made available to any registered voter.² Absentee ballots account for 20 to 30 percent of all ballots cast.³

The test claim legislation⁴ (Stats. 1999, ch. 697) requires county elections officials, for statewide elections or certain special elections conducted between June 1, 2000, and January 1, 2001, to

¹ California Constitution, article II, section 3.

² Elections Code section 3003. All further statutory references are to the Elections Code unless otherwise indicated.

³ Senate Committee on Elections and Reapportionment, analysis of Assembly Bill No. 1530 (1999-2000 Reg. Sess.) June 16, 1999.

⁴ An earlier test claim entitled Absentee Ballots (02-PGA-02), approved by the Board of Control in 1981, concerned test claim legislation (Stats. 1978, ch. 77) that required local agencies to

tabulate, by precinct, votes cast by absentee ballot and votes cast at the polling place.⁵ The test claim legislation also requires the county elections official to make each precinct's election results available to the Legislature and appropriate legislative committees for use in district reapportionment.⁶ Finally, the test claim legislation requires the elections official's list of absentee voters to include the voter's election precinct.⁷

Under preexisting law, elections officials⁸ are required to keep an accurate list of all voters who have received and voted an absentee ballot at each election and compare the list with the roster of voters.⁹ Elections officials are also required to compile and make available to the Legislature any information and statistics that may be necessary for use in reapportioning legislative districts.¹⁰

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the following activities:

- Tabulating ballots by precinct;
- Compiling and making available to the Legislature any statistics and information necessary for reapportionment.

Claimant states that the test claim legislation only applies to statewide or special elections to fill congressional and legislative vacancies held between June 1, 2000, and January 1, 2001, so as to specifically include the presidential general election.

Claimant states that prior to the test claim legislation, absentee ballots were tabulated by "ballot style" determined by the combination of assembly, congressional, supervisorial, judicial, and other districts in which a voter resides. Claimant has 273 active ballot styles. By contrast, claimant has 1,677 polling place precincts. Thus, claimant asserts that instead of tabulating absentee ballots by 273 categories, they had to be sorted into 1,677 categories.

Claimant responded to the observation of the Secretary of State (SOS) stated below regarding a county's authority to bill local governments for the cost of elections, stating that it does not bill its 93 consolidating districts for costs incurred with absentee ballots. Regarding SOS's comment

make absentee ballots available on request to all registered voters. That test claim legislation amended Elections Code section 3003.

⁵ Election Code section 15321, subdivision (a).

⁶ Election Code section 15321, subdivision (b).

⁷ Election Code section 15111.

⁸ An "elections official" is defined as a clerk or any person charged with the duty of conducting an election, or 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. (Elec. Code, § 320.)

⁹ Elections Code section 15111.

¹⁰ Elections Code section 21000.

that “expenses for absentee voting are already reimbursed by the state, so it may be appropriate to include this requirement in the existing reimbursement,” claimant states it would be simpler to keep the test claims separate since this one covers only one fiscal year.

Claimant did not provide written comments on the draft staff analysis.

Department of Finance’s Position

In its comments on the test claim, the DOF states that the test claim statute may have resulted in costs mandated by the state, but notes that:

[T]hose costs are reimbursable only to the extent that they are incurred as a result of sorting the absentee ballots by precinct and presenting the specific information to the Legislature, since counting and compiling voting data for the Legislature is already a county responsibility.¹¹

DOF did not provide written comments on the draft staff analysis.

Secretary of State’s Position

In its comments on the test claim, the SOS commented that its analysis of Assembly Bill No. 1530 (before it became Stats. 1999, ch. 697), indicated the legislation would create a state mandate and it continues to believe so. The SOS notes that prior to enactment of the test claim legislation, some counties sorted absentee ballots by precinct, although they were not required to do so.¹² The SOS states that some counties out-source the precinct sorting, while others set up systems for it within their own offices.

The SOS observed, “expenses for absentee voting are already reimbursed by the state, so it may be appropriate to include this requirement in the existing reimbursement.” Finally, the SOS said that counties bill other local jurisdictions for the costs of elections, including the apportioned costs associated with absentee ballots, so some of the costs of apportioning absentee ballots in the November 2000 presidential general election may or may not have been included in the billing to those local jurisdictions.

The SOS did not provide written comments on the draft staff analysis.

COMMISSION FINDINGS

In order for the test claim legislation to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, the statutory language must mandate a new program or create an increased or higher level of service over the former required level of service. “Mandates” as used in article XIII B, section 6, is defined to mean “orders” or “commands.”¹³ The California Supreme Court has defined “program” subject to article XIII B, section 6 of the California Constitution as a program that

¹¹ Elections Code section 21000.

¹² If counties perform an activity that later becomes mandated, it does not preclude reimbursement. “If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ...for those costs incurred after the operative date of the mandate.” (Gov. Code, § 17565.)

¹³ *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174.

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.¹⁴ To determine if the “program” is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.¹⁵ Finally, the new program or increased level of service must impose “costs mandated by the state.”¹⁶

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a new program or higher level of service on county elections officials within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose “costs mandated by the state” within the meaning of Government Code sections 17514 and 17556?

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

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a “program,” defined as a program 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.¹⁷ Only one of these findings is necessary to trigger article XIII B, section 6.¹⁸

The test claim legislation concerns duties of elections officials in tabulating ballots and providing voter information to the Legislature, which are programs that carry out the governmental function of providing election and redistricting services to the public. The administration of an election is a basic governmental function.¹⁹ Moreover, the test claim legislation imposes unique requirements on county elections officials that do not apply generally to all residents and entities in the state. Therefore, the Commission finds that the test claim activities of tabulating ballots by precinct and compiling statistical information for the Legislature and legislative committees constitute a “program” within the meaning of article XIII B, section 6 of the California Constitution.

¹⁴ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

¹⁵ *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

¹⁶ Government Code section 17514.

¹⁷ *County of Los Angeles, supra*, 43 Cal.3d 46, 56.

¹⁸ *Carmel Valley Fire Protection Dist.* (1987) 190 Cal.App.3d 521, 537.

¹⁹ California Constitution, article II, section 1.

Issue 2: Does the test claim legislation impose a new program or higher level of service on county elections officials within the meaning of article XIII B, section 6 of the California Constitution?

Article XIII B, section 6 of the California Constitution states, “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 determine if the “program” is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.²⁰

List modification: Elections Code section 15111 requires the elections official to “keep an accurate list of all voters who have received and voted an absentee ballot at each election and compare the list with the roster of voters as provided in Section 15278.”²¹ The test claim legislation added a requirement that the list “include the election precinct of the voter.”

Prior law did not require the elections official’s absentee ballot list to include the precinct of each voter.

Therefore, the Commission finds that because it is a new requirement, the activity of including the precinct of each absentee voter on the elections official’s absentee ballot list constitutes a new program or higher level of service within the meaning of article XIII B, section 6. Section 15111, as amended by chapter 697, has not been repealed. Therefore, the Commission finds that this requirement -- to include on the list of absentee voters the precinct of each voter -- is ongoing.

Tabulation by precinct: The test claim legislation temporarily added section 15321 to the Elections Code. Subdivision (a) creates a new requirement that in statewide elections or special elections to fill a congressional or legislative vacancy conducted on or after June 1, 2000, votes cast by absentee ballot or at the polling place must be tabulated by precinct. This requirement was in effect from June 1, 2000, until January 1, 2001.²²

Prior law did not require tabulating votes by precinct in statewide elections or special elections to fill a vacant congressional or legislative office, conducted from June 1, 2000, to January 1, 2001.

Therefore, the Commission finds that because this is a new requirement, the activity of tabulating votes by precinct in statewide elections or special elections to fill a vacant congressional or legislative office, for elections conducted between June 1, 2000, and January 1, 2001, constitutes a new program or higher level of service.

Returns available to the Legislature: The test claim legislation also temporarily²³ added subdivision (b) in section 15321 of the Elections Code. Subdivision (b) states that the elections returns tabulated by precinct pursuant to subdivision (a) “shall be made available to the

²⁰ *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 835.

²¹ The comparison with section 15278 is to determine if any voter cast more than one ballot in the election.

²² Elections Code section 15321, subdivision (c).

²³ Prior to its repeal, Elections Code section 15321, subdivision (c), stated it was to remain in effect until January 1, 2001.

Legislature or any appropriate committee of the Legislature for use in connection with reapportionment of legislative districts pursuant to Section 21000.”

The test claim legislation also added a nearly identical requirement to section 21000. The amendment to section 21000 adds to the list of information the county elections official must compile and make available to the Legislature or any appropriate committee of the Legislature “...election returns for each precinct reflecting the vote total for all ballots cast, including both absentee ballots and ballots cast at polling places, compiled pursuant to subdivision (a) of Section 15321.” The Commission finds that sections 21000 and 15321, subdivision (b), as amended, contain the same requirement, so they are analyzed together here.

Prior law (Elec. Code, § 21000) required county elections officials to compile and make available to the Legislature “any information and statistics that may be necessary for use in connection with the reapportionment of legislative districts including, but not limited to, precinct maps...[and] ...lists showing the elections returns for each precinct.” Prior law did not require that the election returns reports to the Legislature include “election returns for each precinct reflecting the total for all ballots cast, including both absentee ballots and ballots cast at polling places, compiled pursuant to subdivision (a) of Section 15321.”

DOF commented that the costs of this activity “are reimbursable only to the extent that they are incurred as a result of sorting the absentee ballots by precinct and presenting the specific information to the Legislature, since counting and compiling voting data for the Legislature is already a county responsibility.”

The Commission agrees. Only the new activity not previously required is considered the new program or higher level of service.

Therefore, because it is a new requirement, the Commission finds that making available to the Legislature and appropriate legislative committees election returns for each precinct reflecting the total for all ballots cast, including both absentee ballots and ballots cast at polling places, in statewide elections or special elections to fill a vacant congressional or legislative office, is a new program or higher level of service.

The final issue regarding making precinct tabulations available to the Legislature is whether the duty is imposed only between June 1, 2000, and January 1, 2001, or is ongoing. Section 15321, which requires votes to be tabulated by precinct, was repealed effective January 1, 2001. However, section 21000, which has not been repealed, still contains the reference to section 15321, as follows:

The county elections official in each county shall compile and make available to the Legislature or any appropriate committee of the Legislature any information and statistics that may be necessary for use in connection with the reapportionment of legislative districts, including, but not limited to, ...lists showing the election returns for each precinct, *and election returns for each precinct reflecting the vote total for all ballots cast, including both absentee ballots and ballots cast at polling places, compiled pursuant to subdivision (a) of Section 15321* in the county at each statewide election. [Emphasis indicates text added by the test claim legislation.]

Based on rules of statutory construction, the Commission finds that the activity of making precinct tabulations available to the Legislature was required only until January 1, 2001. Regarding incorporation by reference, the California Supreme Court, in *Palermo v. Stockton*

Theatres, held that “where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified.”²⁴ At the time of its incorporation into section 21000, section 15321 by its express terms was to sunset January 1, 2001. This supports interpreting section 21000’s reference to section 15321 to be without effect because of section 15321’s repeal.

Some courts have distinguished the *Palermo* rule and have held that the statutory interpretation “turns on legislative intent in light of all relevant evidence.”²⁵

In this case, the legislative history of the test claim legislation (Assem. Bill No. 1530) further supports the conclusion that the activity of making precinct tabulations available to the Legislature was meant to be temporary. Two legislative committee reports describe the relevant portion of the bill as follows: “Requires returns for these elections to be made available to the Legislature for use in connection with reapportionment of legislative districts. Repeals these provisions on January 1, 2001.”²⁶

Moreover, the Senate Elections Committee report stated of the April 28, 1999 version of Assembly Bill No. 1530, “Barring a legislative or congressional vacancy, this bill will apply only to the 2000 General Election. ... The Committee may wish to consider whether to make reporting absentee results by precinct permanent.”²⁷ The bill was not amended after that analysis. Also, the Assembly Appropriations Committee characterized the cost of the Assembly Bill No. 1530 as “one-time.”²⁸ Thus, the legislative history of the test claim legislation indicates that the Legislature intended for the duty to provide tabulations by precinct of absentee and non-absentee ballots to apply only to elections conducted between June 1, 2000 and January 1, 2001.

In summary, the Commission finds the following activities constitute new programs or higher levels of service on elections officials within the meaning of article XIII B, section 6:

- **List modifications:** Including the precinct of each absentee voter on the elections official’s absentee ballot list. (Elec. Code, § 15111.) This activity is ongoing.
- **Tabulation by precinct:** Tabulating by precinct the votes cast by absentee ballot and ballots cast at the polling place in statewide elections or special elections to fill a vacant congressional or legislative office, for elections conducted between June 1, 2000, and January 1, 2001. (Elec. Code, § 15321, subd. (a).)

²⁴ *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59.

²⁵ *People v. Frawley* (2000) 82 Cal.App.4th 784, 794.

²⁶ Senate Rules Committee, Office of Senate Floor Analyses, 3d reading analysis of Assembly Bill No. 1530 (1999-2000 Reg. Sess.) as amended April 28, 1999, page 2. Also see the Assembly floor analysis, which summarized the bill the same way.

²⁷ Senate Committee on Elections and Reapportionment, analysis of Assembly Bill No. 1530 (1999-2000 Reg. Sess.) as amended April 28, 1999, page 2.

²⁸ Assembly Committee on Appropriations, analysis of Assembly Bill No. 1530 (1999-2000 Reg. Sess.) as amended April 28, 1999, page 1.

- **Returns available to the Legislature:** Making available to the Legislature and appropriate legislative committees election returns for each precinct reflecting the total for all ballots cast, including both absentee ballots and ballots cast at polling places, in statewide elections or special elections to fill a vacant congressional or legislative office for elections conducted between June 1, 2000, and January 1, 2001. (Elec. Code, § 15321, subd. (b), and Elec. Code, § 21000.)

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

In order for the activities listed above to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, the activities must also impose costs mandated by the state.²⁹ Further, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 17514 defines “costs mandated by the state” as follows:

[A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

In its test claim, the claimant stated that it would incur approximately \$55,000 in increased costs as a result of the test claim legislation.

Fee authority: In its comments on the test claim, the SOS noted that counties bill local agencies for the costs of elections, including absentee ballot costs. According to the SOS, “some of the costs of apportioning absentees [ballots] may or may not have been included in the billing to those local election jurisdictions.”

Government Code section 17556, subdivision (d), reads:

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 that: [¶]...[¶]
 (d) The local agency or school district has the authority to levy services charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

County elections officials have authority to bill a city or district for election services if the governing bodies have effected procedural requirements. Elections Code section 10002 provides:

The governing body of any city or district³⁰ may by resolution request the board of supervisors of the county to permit the county elections official to render specified services to the city or district relating to the conduct of an election. Subject to approval of the board of supervisors, these services shall be performed by the county elections

²⁹ *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 835. Government Code section 17514.

³⁰ "District," for purposes of initiative and referendum under Chapter 4 (commencing with Section 9300) of Division 9, includes any regional agency that has the power to tax, to regulate land use, or to condemn and purchase land. (Elec. Code, § 317.)

official. The resolution of the governing body of the city or district shall specify the services requested. ... **Unless other arrangements satisfactory to the county have been made, the city or district shall reimburse the county in full for the services performed upon presentation of a bill to the city or district.** [emphasis added].

In addition, Elections Code section 13001 requires a city to pay the costs of elections called by its governing board.

Likewise, section 10416 provides:

Except as otherwise provided in this part, when elections are consolidated, the governing body ordering consolidation may, in the territory affected thereby, provide for: [¶]...[¶]
(c) The **expenses of the election.** [emphasis added].

The authority to contract with county elections officials also extends to county superintendents of education.³¹ Election costs of school district and community college district elections are generally borne by those districts,³² except costs already reimbursed by the state pursuant to the Absentee Ballots mandate (02-PGA-02), for which the county does not have fee authority. Election costs of special district elections are borne by the special district.³³

These statutes provide counties with authority to bill cities, districts, or school or community college districts for the city or school or community college district's share of local elections expenses. The test claim legislation primarily applies to "any statewide election or special election to fill a vacancy in a congressional or legislative office, conducted on or after June 1, 2000..."³⁴ Thus, because the activities of (1) tabulation by precinct and (2) making returns available to the Legislature only apply to statewide or special elections, those activities would not be subject to the county's fee authority, because they do not pertain to any local candidates.

Therefore, the Commission finds that the fee authority does not preclude reimbursement for the activities of (1) tabulation by precinct and (2) making returns available to the Legislature.

However, the activity of including the precinct of each absentee voter on the elections official's absentee ballot list pursuant to section 15111 is not limited to statewide or special elections. Therefore, the Commission finds that counties have fee authority to bill other local agencies for the cost of modifying absentee ballot lists to include the precinct only for those ballots that include city, school district, community college district, or special district issues or candidates. However, the fee authority does not extend to county, statewide, or federal elections.

³¹ Education Code section 1258.

³² Education Code sections 5421 to 5424 and 5227. The costs of administering absentee ballots pursuant to the Absentee Ballots mandate (02-PGA-02) are not prorated to school districts. (Elec. Code, § 3024). Those costs are already reimbursed by the state and the county has no fee authority for administering absentee ballots for school districts.

³³ Government Code section 53072. Also see 32 Ops. Atty. Gen. 224 regarding municipal utility district elections.

³⁴ Statutes 1999, chapter 697, section 2.

Therefore, the Commission finds that there are costs mandated by the state, and Government Code section 17556, subdivision (d), does not apply to deny the test claim because the fee authority is not “sufficient to pay for the mandated program or increased level of service.”

The county fee authority identified in Elections Code sections 10002, 13001 and 10416, in addition to fee authority in the Education and Government Code sections cited above, would be properly identified as an offset³⁵ in the parameters and guidelines for the activity required by the test claim statute (Elec. Code, § 15100).

Claimant stated that it does not bill its jurisdictions for absentee ballots. However, the exercise of the fee authority is not required for it to be an offset.³⁶

In summary, the Commission finds that the test claim legislation imposes costs mandated by the state pursuant to Government Code section 17514.

CONCLUSION

Based on the foregoing analysis, the Commission finds that the test claim legislation imposes a reimbursable state-mandated program on elections officials within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities:

- **List modifications:** Including the precinct of each absentee voter on the elections official’s absentee ballot list. (Elec. Code, § 15111.) This activity is ongoing.
- **Tabulation by precinct:** Tabulating by precinct the votes cast by absentee ballot and ballots cast at the polling place in statewide elections or special elections to fill a vacant congressional or legislative office, for elections conducted between June 1, 2000, and January 1, 2001. (Elec. Code, § 15321, subd. (a).)
- **Returns available to the Legislature:** Making available to the Legislature and appropriate legislative committees election returns for each precinct reflecting the total for all ballots cast, including both absentee ballots and ballots cast at polling places, in statewide elections or special elections to fill a vacant congressional or legislative office for elections conducted between June 1, 2000, and January 1, 2001. (Elec. Code, § 15321, subd. (b), and Elec. Code, § 21000.)

³⁵ California Code of Regulations, title 2, section 1183.1, subdivision (a), paragraphs (8) and (9).

³⁶ In *Connell v. Santa Margarita Water District* (1997) 59 Cal. App. 4th 382, 401, the court found that a water district with authority to charge fees could not be reimbursed due to the fee authority, even though it was economically impractical to charge the full cost of service. If the authority to charge fees could bar reimbursement for a new program or higher level of service, such authority could also offset reimbursement for county elections officials.