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Commission on
State Mandates

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December 12, 2013

Ms. Heather Halsey
Executive Director
Commission on State Mandates
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Re: **Comments on Draft Staff Analysis and Proposed Statement of Decision**
***Post Election Manual Tally (PEMT)* (10-TC-08)**

Dear Ms. Halsey:

The California State Association of Counties respectfully submits these comments in response to the draft staff analysis issued in the above-named case. Although the deadline for comments has been extended, we know staff is pressed for time and we wanted to be sure to get these comments to you as soon as possible. If you or your staff have any questions about the information below, please feel free to get in touch with us at any time.

The draft analysis recommends that the Commission deny the claim. It says that the regulations only apply to "county election officials in counties that use a…voting system" and also that "counties are not required by state law to use…voting systems," and therefore, it reasons, "counties are not legally or practically compelled by state law to comply with the regulations."

The web of laws and regulations governing elections in California are particularly complex, and as representatives of counties across the state, we think that we are in a position to provide some information that staff preparing the analysis might not have been aware of. Once you are aware of some of these complexities, we think you will agree that the regulation did impose a mandate that is fully reimbursable. In fact, we think that any single one of the points we make below would be enough for the Commission to determine that the regulation's mandates are fully reimbursable.

First of all, presuming that counties could have chosen whether or not to use a voting system, by the time the regulatory action took effect, any choice wither to do so was irrevocable. In fact, the statewide election in question (November 2008) had already been conducted in part on a voting system, eliminating any ability to avoid the mandated activities.

The emergency regulatory action became effective on October 20, 2008, sixteen days before the only statewide election that took place during the period the regulation was effective. By October 20, every county's decision to use a voting system for that election was certified by the Secretary of State and was irrevocable.

If a local agency can avoid a mandate by making one decision or another, they must have a reasonable opportunity to make or change that decision after the law implementing the mandate is passed. If a choice is already irrevocable before the promulgation of a regulation, then it rings hollow to claim that a county could have avoided the regulation's requirements by making a different decision, under the same principle that prohibits charging people with crimes for actions they took prior to the actions being outlawed.

In some counties, votes had already been cast by use of a voting system before October 20. State law defines a voting system partially by it being used to "cast or tabulate votes, or both." Some counties were certified by the Secretary of State to use a voting system that includes the use of direct recording electronic (DRE) voting machines. Voters cast their ballots on directly on DREs. Some counties that employ DREs use them to offer early voting to vote-by-mail voters. Early voting began as early as October 6. By October 20, thousands of voters had cast their votes on DREs. Therefore, the November 4, 2008 statewide election had already been "conducted…in part on a voting system" before the regulations became effective, thus triggering the regulations immediately upon their enactment and contradicting any claim that counties could have chosen to avoid them.

Also, four counties in California—Kings, Merced, Monterey, and Yuba— are "preclearance" counties. These counties must obtain permission (called "preclearance") from the Civil Rights Division of the United States Department of Justice or from the United States District Court for the District of Columbia before making any change to their voting procedures. Preclearance is required for "any change affecting voting, even though it appears to be minor or indirect…[or] ostensibly expands voting rights." [Source: www.justice.gov/crt/about/vot/sec_5/types.php.] The USDOJ is required to respond within 60 days. A jurisdiction can request that preclearance be expedited, but expedited review is not guaranteed. On such short notice, these four counties could not have changed the method by which votes were cast or tabulated without preclearance.

Furthermore, each county must have the Secretary of State certify the component of their elections regarding provisions for voters with disabilities. This certification includes a component describing how these voters' ballots will be cast and tabulated. The process must be certified by the Secretary of State long before sixteen days prior to an election, and could not have been changed on such short notice. In the case of the November 2008 election, the Secretary of State had already certified every county's use of a voting system, and knew when promulgating the regulation that these counties decisions on this matter would be irrevocable when the regulation purporting to give them a choice became effective, so to have included the language in question that seems to give counties an option is puzzling.

Lastly, to the point that any choice was irrevocable, every county had already used a "voting system" to begin conducting the election. In 2008, Elections Code 362 read: "'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." (Emphasis added.) Elections Code

355 states: "'Software' includes all programs, voting devices, cards, ballot cards or papers, operating manuals or instructions, test procedures, printouts, and other nonmechanical or nonelectrical items necessary to the operation of a voting system."

As noted above, the regulations in question took effect very close to the election. Since "software" is expressly included in the definition of a "voting system," and since "ballot cards" and "test procedures" are expressly included in the definition of "software," the fact that ballot cards had already been issued—and in some cases returned—and test procedures had already been performed mean that, at the time the regulations became effective, the election had already been conducted, in part, on "voting systems" in every county.

Secondly, aside from the fact that any choice on a county's part was irrevocable, the way the regulation was written, any single county's use of a voting system would have meant every county was subject to the regulation. The requirement to incur costs was therefore not in the hands of the local governing board, but rather in the hands of other jurisdictions over which the county's governing board had no control.

The language in the regulation that the draft analysis cites as giving counties an option states that the regulation applies "to *all* elections officials within the State of California for all elections in this state conducted in whole or in part on a voting system" (emphasis added). In the case of a statewide election, this language does not leave the option to each county individually. For a statewide election, any single county's decision to use a voting system would make the regulation apply to every county, because the statewide election would have been conducted "in part" on a voting system. As noted above, when the regulations became effective, the election had already been conducted in part on a voting system, because votes had been cast and because ballot cards had been issued and returned and test procedures had been carried out. Thus, no county had an option to evade the required activities.

Thirdly, counties were required by the compound requirements of federal and state law to use voting systems for the election in question.

Counties were required by federal law to buy and use voting systems for federal elections. The November 2008 election was a federal election. As the Secretary of State notes, "*HAVA required county elections officials to buy and deploy new voting systems* designed to improve the voting process and enable voters to vote independently and privately." (Emphasis added; source: http://www.sos.ca.gov/elections/hava.htm.)

The California Elections Code also requires the use of certain elements of voting systems at each polling place. Elections Code Section 19227(b) states: "At each polling place, at least one voting unit approved pursuant to subdivision (a) by the Secretary of State shall provide access to individuals who are blind or visually impaired." Subdivision (c) makes that requirement optional under certain circumstances, but it is only a ministerial option based on whether sufficient funds

are available, not a discretionary option. A voting unit is a component of a voting system, and the Secretary of State certifies their use *only* as part of a voting system. Thus, state statute requires every county to use a device that they may only use as part of a voting system, therefore requiring use of a voting system.

Also, under federal law, HAVA, counties must have a DRE (referenced above) or AutoMARK (a particular brand of ballot marking machine) at each polling place by 2006 at the latest. In California, the Secretary of State has only authorized the use of DREs and AutoMARKs in conjunction with a voting system, not independently. Therefore, every county in California, in order to be in compliance with federal and state law, must use a voting system.

Lastly, even if a county decided to tabulate ballots by hand instead of using a voting system, but still use a DRE or AutoMARK in each polling place to comply with state and federal law, the ballots themselves would still have to be designed in conjunction with a voting system. Voting system software is the only way to program DREs and AutoMARKs to mark and (in the case of DREs) tabulate the appropriate spot on the ballot to represent the choice the voter has indicated. With this use also, the election would have been conducted, in part, using a voting system, even if that system was not used to tabulate the ballots.

Our last point is more abstract. We would point out that the "choice" counties supposedly had amounted to either complying with the required activities by choice or else because the regulation required it, and therefore did not amount to a choice at all.

According to the draft analysis, prior to the enactment of the regulation counties had an *option* whether to tabulate votes by hand or use a voting system. The regulation instead *requires* tabulation by hand, but only if a county is not tabulating by hand. In other words, the "choice" that a county supposedly had was to either tabulate votes by hand of its own volition, or else tabulate votes by hand on the state's orders.

Any law or rule could be written so that it only applies when the affected person or agency already doing it. Indeed, that's the whole point of imposing a rule. Imagine income tax law was drafted to say "For any year in which a person doesn't pay 25% of their income to the government, they must follow the requirement below," followed by a regulation requiring people to pay 25% of their income to the government. That wording doesn't make the payment optional, it requires the payment.

Applying the reasoning in the draft analysis to another mandate might help illustrate the counterpoint in more familiar terms. The animal control mandate required local agencies to hold animals for at least 72 hours before euthanizing them. This unquestionably constituted a reimbursable mandate over the preexisting requirement of at least 24 hours, and the commission determined that it was. Imagine that the law had been written slightly differently, and read "In the case of any animal that a county does not hold for at least 72 hours before euthanizing, the

following requirement applies: Animal control officers must hold animals for at least 72 hours before euthanizing them." Would that then mean that that mandate would not have been reimbursable, since the mandate purported to hinge on a local decision? Of course not. The choice is a false one: whether to hold an animal for 72 hours of one's own volition or else hold an animal for 72 hours because the state required it.

Likewise, the regulation here at issue here says that counties must either tabulate votes by hand of their own volition, by not using a voting system, or else tabulate votes by hand when the state requires it. It was not a choice in any real sense of the word, because the requirements enacted by the regulation only applied when counties were not already complying with them.

We hope the points offered above are helpful in your ongoing analysis of the PEMT test claim. We think that, combined with the analysis you and your staff have already performed, the points above show that the Commission should approve the test claim in full. In fact, we think that any one of the reasons in this letter is sufficient to warrant full reimbursement.

If you have any questions about our comments or anything else related to this mandate, please feel free to contact Geoff Neill at gneill@counties.org or 916/327-7500 x567.

Thank you.

Respectfully,

Jean Kinney Hurst
Senior Legislative Representative

cc: Renee Bischof, County of Santa Barbara

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento 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 December 13, 2013, I served the:

> **California State Association of Counties Comments on Draft Staff Analysis and Proposed Statement of Decision.**
> *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

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 December 13, 2013 at Sacramento, California.

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 12/13/13

Claim Number: 10-TC-08

Matter: Post Election Manual Tally (PEMT)

Claimant(s): County of Santa Barbara

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