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## Chapter 28: A Special Election's Special Exception

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## **Chapter 28: A Special Election's Special Exception**

*Ashley Bonnett*

### *Code Section Affected*

Elections Code § 15360.5 (new).

AB 46 (Monning); 2010 STAT. Ch. 28 (*Effective June 22, 2010*).

### I. INTRODUCTION

On April 27, 2010, Governor Schwarzenegger announced that a special runoff election to fill Lieutenant Governor Abel Maldonado's former Senate seat in District Fifteen would occur on August 17, 2010.<sup>1</sup> Some speculated the Governor called the special election to give Republicans an advantage because Republicans are typically more likely to vote,<sup>2</sup> and because the highly competitive Republican Gubernatorial and United State Senate primary election on June 8, 2010, would increase Republican turnout.<sup>3</sup> Regardless of the Governor's motives, the fact remained that "his decision . . . [would] cost county Registrars of Voters millions of dollars."<sup>4</sup> In consideration of the special election's heavy cost, the Legislature enacted Chapter 28 to allow Senate District Fifteen counties to conduct separate vote by mail manual tallies in specified upcoming elections.<sup>5</sup>

### II. LEGAL BACKGROUND

Senate District Fifteen counties faced serious concerns over the estimated cost and manpower required for holding two June elections.<sup>6</sup> The counties, however, worked with California's Secretary of State to develop a plan that allowed them to streamline the normal one percent manual tally procedure for the elections held on June 8, 2010, June 22, 2010, and August 17, 2010.<sup>7</sup>

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1. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 46, at 2 (June 21, 2010).

2. Editorial, *Blakeslee and Laird Should Debate in Public*, SAN JOSE MERCURY NEWS, July 21, 2010, at A16 (on file with the *McGeorge Law Review*).

3. Steven Maviglio, *The District Fifteen Senate Primary Race was Indeed a "Special" Election—and it Won't Happen Again*, CAL. MAJORITY REP., July 20, 2010, available at <http://www.camajorityreport.com/index.php?module=articles&func=display&aid=4430&ptid=9> (<http://www.camajorityreport.com/index.php?module=articles&func=display&aid=4430&ptid=9>) (on file with the *McGeorge Law Review*).

4. Press Release, Bill Monning, Cal. State Assembly Member, Assemblymember Monning Issues Statement in Response to Governor's Decision Not to Consolidate 15th Senate District Special Election (Apr. 27, 2010) (on file with the *McGeorge Law Review*).

5. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 46, at 2 (June 21, 2010).

6. *Id.*

7. *Id.*

A. *Special Election*

Because the Governor set the special runoff election for August 17, 2010, the special primary election took place on June 22, 2010—only two weeks after the state’s gubernatorial primary election.<sup>8</sup> Unfortunately, a special election meant the counties needed to spend an estimated \$6.5 million to hold the election<sup>9</sup> during a financial crisis that had already led to reduced services and employee lay-offs.<sup>10</sup> The counties lacked the necessary funds to pay for the election upfront and wait for the state to reimburse them in the future.<sup>11</sup> They also feared there was a lack of trained and experienced election staff to hold two different elections in one month.<sup>12</sup> Moreover, the counties had difficulty “securing sufficient warehouse space to prepare, deploy, receive back, and audit voting equipment and polling place supplies for two elections.”<sup>13</sup>

The counties were also concerned about voter turnout and disenfranchising military and overseas voters.<sup>14</sup> Janet Wolf, Chair of the Santa Barbara County Board of Supervisors, feared four elections in six months would create an unnecessary demand on voters and therefore diminish voter turnout.<sup>15</sup> Furthermore, the U.S. Post Office reported that it required forty-five days to mail ballots to military and overseas voters, but the counties had only forty-three days to mail the ballots.<sup>16</sup>

These concerns led affected county officials to lobby for consolidation of the special election with November’s general election to save considerable time and money.<sup>17</sup> However, Governor Schwarzenegger rejected the idea, explaining the need to “fill that seat as quickly as possible.”<sup>18</sup> Because the counties in Senate District Fifteen were faced with the difficult task of funding and carrying out two elections nearly back-to-back, with a third scheduled to take place just two months later, the counties were desperate for a solution.<sup>19</sup> As a result, counties in

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8. *Id.*

9. Robert Cuthbert, *CA Assemblymember Monning Critical of Special Election Costs*, EXAMINER, Apr. 28, 2010, available at <http://www.examiner.com/x-23530-Central-Coast-Democrat-Examiner-y2...4d28-CA-Assemblymember-Monning-critical-of-special-election-costs> (on file with the *McGeorge Law Review*).

10. Press Release, Bill Monning, *supra* note 4.

11. Letter from Paul McIntosh, Executive Dir., Cal. State Ass’n of Counties, to Arnold Schwarzenegger, Governor of Cal. (Apr. 28, 2010) [hereinafter Letter from Paul McIntosh to Arnold Schwarzenegger] (on file with the *McGeorge Law Review*).

12. *Id.*

13. *Id.*

14. Letter from Janet Wolf, Chair, Santa Barbara County Bd. of Supervisors, to Arnold Schwarzenegger, Governor of Cal. (May 10, 2010) [hereinafter Letter from Janet Wolf to Arnold Schwarzenegger] (on file with the *McGeorge Law Review*); Letter from Paul McIntosh to Arnold Schwarzenegger, *supra* note 11.

15. Letter from Janet Wolf to Arnold Schwarzenegger, *supra* note 14.

16. Letter from Paul McIntosh to Arnold Schwarzenegger, *supra* note 11.

17. Cuthbert, *supra* note 9.

18. *Id.*

19. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 46, at 2 (June 21, 2010) (stating that concerns over the cost and man power required for two June elections induced the counties and Secretary of State to form

Senate District Fifteen collaborated with the Secretary of State's office to create a proposal to aid in managing the election schedule.<sup>20</sup>

*B. One Percent Manual Tally*

Existing law requires election officials to conduct manual tallies of ballots at the conclusion of every election using a voting system.<sup>21</sup> The tally must occur in public, and an election official must give public notice at least five days in advance, announcing the date, time, and location at which the tally will take place.<sup>22</sup> The election officials must tally the ballots cast in at least one percent of the precincts.<sup>23</sup> The public tally requires one person to read the ballot aloud, another two people to keep the tally, and a fourth person to watch for any errors.<sup>24</sup> However, counties must sort vote-by-mail ballots by precinct before conducting the manual tally.<sup>25</sup> Between the manual tally and the machine count, the election officials must report the results of the manual tally and identify discrepancies.<sup>26</sup>

III. CHAPTER 28

Chapter 28 provides San Luis Obispo County, Santa Barbara County, Santa Clara County, and Santa Cruz County with a one-time exception to the usual manual tally law for the elections "conducted on June 8, 2010, June 22, 2010, or August 17, 2010."<sup>27</sup> It allows the official conducting the election to exclude vote-by-mail ballots in the initial one percent public manual tally of randomly chosen precincts.<sup>28</sup> Instead, Chapter 28 creates a separate public manual tally of at least one percent of the mailed ballots.<sup>29</sup> This separate public manual tally eliminates the need for election officials to sort the vote-by-mail ballots by precinct.<sup>30</sup>

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a proposal that would help the counties manage the compacted election schedule).

20. *Id.*

21. CAL. ELEC. CODE § 15360(a) (West Supp. 2010). A voting system is "any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast and/or tabulate votes." SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1235, at 2 (Aug. 27, 2006).

22. CAL. ELEC. CODE § 15360(d).

23. *Id.* § 15360(a).

24. *Id.* § 15102.

25. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 46, at 2 (June 21, 2010).

26. CAL. ELEC. CODE § 15360(e).

27. *Id.* § 15360.5(a) (enacted by Chapter 28).

28. *Id.* § 15360.5(a)(1) (enacted by Chapter 28).

29. *Id.* § 15360.5(a)(2) (enacted by Chapter 28).

30. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 46, at 2 (June 21, 2010).

## IV. ANALYSIS

Chapter 28's primary benefit is saving the Senate District Fifteen counties a considerable amount of time, thus allowing the election officials to complete election certification "in the short time allotted for that process."<sup>31</sup> The one percent public manual tally is "laborious and painstaking work."<sup>32</sup> The tallies can also be prohibitively expensive, because the election officials must sort out the ballots by precinct.<sup>33</sup> Furthermore, separating vote-by-mail ballots is particularly time-consuming given the increasing number of mailed ballots.<sup>34</sup> Senate District Fifteen's special primary election had 113,322 vote-by-mail voters, making up over seventy-seven percent of the overall vote.<sup>35</sup> The special general election had 127,245 vote-by-mail voters, amounting to nearly seventy-one percent of the overall vote.<sup>36</sup> Because Chapter 28 eliminates the need to separate the mailed ballots, it could potentially reduce the time required to complete the tallies for all three of the elections by ninety percent.<sup>37</sup>

Although Chapter 28 removes a step in the manual tally process, the change does not affect the tally's purpose.<sup>38</sup> The one percent public manual tally serves to verify that the voting system used to count the ballots was accurate.<sup>39</sup> Chapter 28 still requires election officials to manually tally one percent of the vote-by-mail votes and to verify the voting system's accuracy by comparing the manual tallies with the voting system's results.<sup>40</sup> By preserving the function of verifying accuracy, the change in procedure does not affect the function of a manual tally.<sup>41</sup>

However, Chapter 28 does not address all of the issues voiced by the affected counties, such as concern over voter turnout, because, due to the special election, voters "would have to go to the polls an additional two more times before

31. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 46, at 3 (June 16, 2010).

32. JUDY BERTELSEN, 1% MANUAL TALLY OBSERVER REPORT CONGRESSIONAL DISTRICT 11 (2007), available at [http://www.countedascast.com/docs/CD11\\_Manual\\_Tally\\_Report\\_Jan01.pdf](http://www.countedascast.com/docs/CD11_Manual_Tally_Report_Jan01.pdf) (on file with the *McGeorge Law Review*).

33. *Id.*

34. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 46, at 3 (June 16, 2010).

35. CALIFORNIA SECRETARY OF STATE, OFFICIAL CANVASS: STATE SENATOR 15TH SENATE DISTRICT SPECIAL PRIMARY ELECTION (2010), available at <http://www.sos.ca.gov/elections/Special/sd15/final-official-primary-results.pdf> [hereinafter OFFICIAL CANVASS: SPECIAL PRIMARY ELECTION] (on file with the *McGeorge Law Review*).

36. CALIFORNIA SECRETARY OF STATE, OFFICIAL CANVASS: STATE SENATOR 15TH SENATE DISTRICT SPECIAL GENERAL ELECTION (2010), available at <http://www.sos.ca.gov/elections/Special/sd15/gen-official-canvass.pdf> [hereinafter OFFICIAL CANVASS: SPECIAL GENERAL ELECTION] (on file with the *McGeorge Law Review*).

37. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 46, at 2 (June 21, 2010).

38. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 46, at 3 (June 16, 2010).

39. Kim Alexander, *Public Verification of Software Vote Counts and California's Manual Count Law*, CAL.VOTER FOUND., <http://www.calvoter.org/issues/votingtech/manualcount.html> (last visited July 28, 2010) (on file with the *McGeorge Law Review*).

40. CAL. ELEC. CODE § 15360.5 (enacted by Chapter 28).

41. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 46, at 3 (June 16, 2010).

November.”<sup>42</sup> Chapter 28 does not consolidate the special election with the November general election; therefore, voter turnout could still be affected.<sup>43</sup> Moreover, Chapter 28 does not address the issue of disenfranchising military and other overseas voters because it does not change the date of the special primary election.<sup>44</sup> As such, the districts still have only forty-three days to mail overseas ballots, which is less than the forty-five days required by the U.S. Post Office.<sup>45</sup>

## V. CONCLUSION

Chapter 28 took effect on June 22, 2010.<sup>46</sup> Although it did not eliminate the need to have a separate special election, as consolidation with the November general election would have, its provisions enabled Senate District Fifteen counties to avoid sorting 113,322 ballots by precinct during the June 22, 2010 election and 127,245 ballots during the August 17, 2010 election.<sup>47</sup> Chapter 28 provided a solution for the counties, because the election officials did not have to “conduct the labor intensive and lengthy sorting process” of the vote by mail ballots,<sup>48</sup> which constituted a large majority of the ballots.<sup>49</sup> Moreover, although Chapter 28 removed a step in the manual tally process, the purpose of the tally remained intact.<sup>50</sup> Even though Senate District Fifteen counties had to hold a special election, Chapter 28 enabled the counties to “save hundreds of hours in staff time during the three elections.”<sup>51</sup>

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42. Letter from Janet Wolf to Arnold Schwarzenegger, *supra* note 14.

43. See CAL. ELEC. CODE § 15360.5 (enacted by Chapter 28) (lacking a provision that consolidates the special election with the November general election).

44. See *id.* (lacking a provision that pushes the special primary election back from June 22, 2010).

45. Letter from Paul McIntosh to Arnold Schwarzenegger, *supra* note 11.

46. CAL. ELEC. CODE § 15360.5 (enacted by Chapter 28).

47. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 46, at 2 (June 21, 2010) (“[E]lections officials will not have to conduct the . . . sorting process.”); OFFICIAL CANVASS: SPECIAL PRIMARY ELECTION, *supra* note 35 (listing 113,322 as the total number of vote by mail voters in the special primary election on June 22, 2010); OFFICIAL CANVASS: SPECIAL GENERAL ELECTION, *supra* note 36 (listing 127,245 as the total number of vote by mail voters in the special general election on August 17, 2010).

48. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 46, at 2 (June 21, 2010).

49. See OFFICIAL CANVASS: SPECIAL PRIMARY ELECTION, *supra* note 35 (stating that the percent of vote by mail voters was 77.48% in the special primary election on June 22, 2010); OFFICIAL CANVASS: SPECIAL GENERAL ELECTION, *supra* note 36 (stating that the percent of vote by mail ballots was 70.99% in the special general election on August 17, 2010).

50. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 46, at 3 (June 16, 2010).

51. *Id.*

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