February 3, 2004

OPINION
OF
PATRICIA A. MADRID

Opinion No. 04-01

By: Jon Adams
Assistant Attorney General

To: The Honorable Joseph J. Carraro
State Capitol Bldg., Room 110
Santa Fe, NM 87503

QUESTION:
What grounds exist in New Mexico to undertake a recount in a constitutional amendment election?

CONCLUSION:
There are currently no lawful grounds for a recount in New Mexico of a constitutional amendment election.

FACTS:

An election was conducted on September 23, 2003 regarding two proposed amendments to the Constitution of New Mexico. One proposal created a Department of Education, and it passed. The second proposal, "Amendment 2", increased the yearly allotment from the Permanent School Fund to provide for additional services related to education. However, the Amendment 2 election was very close, and its fate was mired in uncertainty for a number of days after the election. During this time, provisional and absentee ballots were counted. The counting of these ballots and the checking of results prior to final certification caused the total number of votes in favor of and against Amendment 2 to change over time. Senator Carraro requested an Attorney General opinion on whether there were any grounds in New Mexico for a recount of the election.

ANALYSIS:

The request here references a "recount". A recount is defined in the Election Code as "pertain[ing] to emergency paper ballots and absentee ballots and means a re-tabulation and re-tallying on individual ballots." NMSA 1978, Section 1-1-6(B) (1977). In contrast, "recheck" "pertains to voting machines and means a verification procedure where … the results of the balloting as shown on the counters of the machine are compared with the results shown on the official returns." NMSA 1978, § 1-1-6(A) (1977).

The Election Code provides the exclusive procedures for contesting an election. Currently there are no procedures provided in the Election Code to authorize a challenge, whether by means of a recount or recheck, of constitutional amendment elections.
It is, of course, true that a lawsuit can always be brought. While the ultimate decision thereon would be made by a court, under existing law the general recount and recheck statutes do not

apply to a special election such as this one. Further, there is no procedure in the Election Code, and there is no right to contest this special election in the statutes or on constitutional grounds. Unless there were a misprinted ballot or a similar implication of the Free and Open Clause, infra, we believe it would be unprecedented for a court to take any action regarding a recount, recheck or election contest of a constitutional amendment election.

I. Statutory Authority To Contest, Recount Or Recheck

Our inquiry begins with New Mexico statutory law. The "right to contest an election is entirely statutory; such a proceeding was unknown at common law." Dinwiddie v. Board of County Commissioners, 103. N.M. 442, 445, 708 P.2d 1043, 1046 (1985). The only method to contest an election would be statutory and not through court-fashioned or judge-made law. And, "[t]he statutory provisions for an election contest must be strictly followed." Id. "This Court [the Supreme Court of New Mexico] has long recognized that an election contest may not be brought absent statutory authority." Id.

Initially, we note that New Mexico has no automatic recount statute for elections that are tied or very close. Compare ARIZ. REV. STAT. § 16-661 (1993) (automatic recount if election is closer than one-tenth of one percent of vote); TEX. ELEC. CODE. ANN. § 216.001 (2003) (automatic recount if election is a tie). The New Mexico Legislature could provide for a fully automatic recount in cases of close elections. Such an automatic recount could take place without regard to whether a candidate requested it or even whether there was a candidate. However, the Legislature has not passed such an automatic recount law.

NMSA 1978, Section 1-14-1 (1969), (Contest of elections; who may contest), provides that "[a]ny unsuccessful candidate for nomination or election to any public office may contest the election of the candidate to whom a certificate of nomination or a certificate of election has been issued." Upon proper application, "the candidate, within six days after completion of the canvass by the proper canvassing board, may have a recount of the emergency paper ballots or absentee ballots, or a recheck of the votes shown on the voting machines, that were cast in the precinct." NMSA 1978 § 1-14-14 (1969). Section 1-14-14 contemplates challenges by "any candidate for any office for which the state canvassing board or county canvassing board issues a certificate of nomination or election."

A statute should be read according to its plain, written meaning. See Wilson v. Denver, 125 N.M. 308, 314, 961 P.2d 153 (1998). The plain meaning of NMSA 1978, Section 1-14-1 provides only for an "unsuccessful candidate" to contest an election. The plain meaning of NMSA 1978, Section 1-14-14 provides only for "any candidate" to contest an election. By negative inference, all other entities or individuals that may wish to contest an election are excluded pursuant to NMSA 1978, Section 1-14-1; and all other entities or individuals that may wish a recount or recheck in an election are excluded pursuant to NMSA 1978, Section 1-14-14. Accordingly, there is no procedure for contesting the results of a constitutional amendment election.[1]

In Montoya v. Gurule, 39 N.M. 42, 38 P.2d 1118 (1934), the Supreme Court of New Mexico considered a challenge to the election of members of the board of trustees for the Tecolote land grant. The Court dismissed the case, reasoning that the Election Code at that time provided no right to challenge such an election.

In Denton v. Vinyard, 55 N.M. 205, 230 P.2d 238 (1951), the Supreme Court considered a lawsuit demanding a recount in a local option election regarding the question of whether liquor could be sold in the City of Clovis. The main arguments in Denton were:

…(a) that the general statutes authorizing recount of ballots and election contest apply to local option elections; (b) that the actions should have been treated by the court either as proceedings in mandamus or for declaratory judgment; and (c) that the court should have exercised general equity jurisdiction.
55 N.M. at 207, 230 P.2d at 239.
The Court ruled against all of these arguments. This is directly relevant to the present situation because, just as the election on the question of whether liquor should be sold in the City of Clovis was to be conducted under general election statutes, so was the constitutional amendment election here conducted under the general election statutes. This mandate comes from NMSA 1978, Section 1-24-3 (1989), governing special elections, which states:

Special elections shall be conducted and canvassed in the same manner that regular elections are conducted in the local government or special district; provided, the governing body may, as set forth in the proclamation, consolidate precincts.

The Denton Court held that while the election on the liquor question in Clovis "shall be conducted in the manner as provided by general laws, *it does not follow that general laws grant the right of recount or contest*." 55 N.M. at 209, 230 P.2d at 240 (emphasis added). This means that for a constitutional amendment special election, like the Clovis liquor election, while both must be conducted according to the general provisions of the Election Code – in neither case is the right of recount or contest granted.
As the Denton Court explained, "If recount and contest had been intended, especially in view of previous decisions quoted, supra, holding them inapplicable in like situations, *the legislature undoubtedly would have made known its wishes by clearer language*." Id. (emphasis added). Applying this holding to the present circumstances, arguments for a recount or contest in this case would be expected to similarly fail.

## II. Constitutional Claim For Deprivation Of Right To Vote

The Supreme Court of New Mexico has shown some willingness to consider constitutional arguments in cases in which voters are denied the right to vote because a ballot lists the wrong names. In Gunaji v. Macias, 130 N.M. 734, 2001-NMSC-028 (2001), the Court considered a challenge by unsuccessful candidates based on the fact that a ballot with the wrong names was used in one of the precincts. Grounding its decision on Article II, Section 8 of the Constitution of New Mexico,[2] the Court rejected the votes from the offending precinct, which remedy it derived from NMSA 1978, Section 1-14-13(B) (1969). Although the Court explained in dicta that "it is the procedure [found in the Election Code] in an election contest which is exclusive, not the grounds and the remedy", the Court applied an Election Code remedy. 130 N.M. at 741, 2001-NMSC-028 ¶ 26. Moreover, Gunaji concerned an election with candidates, and with individuals being deprived of the right to vote where ballots were printed wrong.
The Gunaji Court looked to Kentucky, which had a similar constitutional provision, for guidance, stating that, at that point, the Supreme Court of Kentucky had invalidated elections three times based on Article 6 of the Constitution of Kentucky ("all elections shall be free and equal"). In all three Kentucky cases, the ballots were printed incorrectly and the voters were deprived of their right to vote for the candidate whose name did not appear on the ballot.[3]
Despite Gunaji's suggestion that a constitutional challenge might proceed, Gunaji itself did not go beyond the Election Code. This is consistent with the proposition that, "[i]f recount and contest had been intended, especially in view of previous decisions quoted, supra, holding them inapplicable in like situations, *the legislature undoubtedly would have made known its wishes by clearer language*." Denton v. Vinyard, 55 N.M. 205, 209, 230 P.2d 238, 240 (1951).[4]

No action outside of what is provided in the Election Code may be undertaken, with the narrow exception that where ballots have been misprinted – or presumably in another similar situation in which the Free and Open Clause were significantly implicated – courts in New Mexico may hear a constitutional challenge and consider an Election Code remedy.

## III. Conclusion

There can be no recount under existing law in this constitutional amendment special election because there is not a candidate and because there is no evidence or even an allegation implicating the Free and Open Clause. Even if there were an allegation implicating the Free and Open Clause, there is no provision in the Election Code for a recount in a constitutional amendment special election, and courts have not gone outside the Election Code even when the Free and Open Clause was implicated. While a lawsuit could always be brought, it is clear that it would have to overcome significant hurdles – including the implication of the Free and Open Clause, the lack of a candidate, the fact that it is well established in New Mexico that recount provisions for regular elections do not apply to special elections, and the lack of any other provision in the Election Code creating a basis for a recount here.

Pursuant to Senator Carraro's letter dated October 3, 2003, no voters were alleged to have been deprived of their right to vote. Rather, the letter indicates an interest in bolstering the credibility of the election results by recounting the votes or contesting the election. The Legislature may provide for a fully automatic recount if it so chooses. Until then, however, no statutory or constitutional authority provides for a recount or contest under these circumstances. See Denton, 55 N.M. at 209, 230 P.2d at 240; Montoya, 39 N.M. at 42, 38 P.2d at 1118.

PATRICIA A. MADRID
Attorney General

JON ADAMS
Assistant Attorney General

---

[1] This interpretation is supported by the principle of *expressio unius est exclusio alterius.* See Bettini v. Las Cruces, 82 N.M. 633, 485 P.2d 967 (1971). "Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded." 82 N.M. at 635, 485 P.2d at 969 [internal quotations omitted].

[2] This is the "Free and Open Clause", which states that "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage".

[3] It should be noted that the Gunaji decision is not at odds with Dinwiddie, Montoya, or Denton because a statutory or constitutional challenge is not a common law challenge. The reasoning that common law challenges without statutory or constitutional grounding cannot proceed remains valid.

[4] The "like situations" referenced in Denton are cases in which recounts or contests were sought despite the absence of statutory provisions authorizing them. In Montoya, supra, the Court held that it had no jurisdiction to entertain a recount or contest because there was no statutory authority. In Crist v. Abbott, 22 N.M. 417, 163 P. 1085 (1917), the Court held that it was without jurisdiction to consider a challenge to a district attorney election because, while there were statutory provisions for challenges in other elections, there was no statute for challenging district attorney elections.