

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock St. Denver, Colorado 80202</p> <hr/> <p>SCOTT GESSLER, in his official capacity as Secretary of State for the State of Colorado,</p> <p>Plaintiff,</p> <p>v.</p> <p>DEBRA JOHNSON, in her official capacity as the Clerk and Recorder for the City and County of Denver</p> <p>Defendant,</p> <p>COLORADO COMMON CAUSE and GILBERT ORTIZ, in his official capacity as the Clerk and Recorder for the County of Pueblo</p> <p>Intervenors-Defendants.</p>	<p><b>EFILED Document</b>  <b>CO Denver County District Court 2nd JD</b>  <b>Filing Date: Dec 07 2012 02:02PM MST</b>  <b>Filing ID: 48251115</b>  <b>Review Clerk: Sean McGowan</b></p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p>JOHN W. SUTHERS, Attorney General  MAURICE G. KNAIZER, Deputy Attorney General* Reg.  No. 05264  LEEANN MORRILL, Assistant Attorney General* Reg.  No. 38742  1525 Sherman Street, 7<sup>th</sup> Floor  Denver, CO 80203  Telephone: (303) 866-5380  FAX: (303) 866-5671  E-Mail: maurie.knaizer@state.co.us  *Counsel of Record</p>	<p>Case No. 11CV6588  Courtroom: 203</p>
<p style="text-align: center;"><b>SECRETARY’S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION  TO DEFENDANT JOHNSON’S MOTION FOR SUMMARY JUDGMENT</b></p>	

Scott Gessler, in his official capacity as the Secretary of State for the State of Colorado  
(hereinafter “the Secretary”) hereby submits this Secretary’s Cross- Motion for Summary  
Judgment and in Opposition to Defendant Johnson’s Motion For Summary Judgment.

# **I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT MOTIONS**

Summary judgment is appropriate if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *In re Tonko*, 154 P.3d 397, 402 (Colo. 2007). A fact is material if it will affect the outcome of the case. *Bankruptcy Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519, 523 (Colo. App. 2008) The nonmoving party is entitled to the benefit of all favorable inferences reasonably drawn from the undisputed facts and all doubts are resolved against the moving party. *A.C. Excavating v. Yacht Club II Homeowners Ass’n*, 114 P.3d 862, 865 (Colo. 2005). Issues of statutory interpretation are particularly appropriate for resolution via summary judgment, *Cook v. City and County of Denver*, 68 P.3d 586, 588 (Colo. App. 2003), because statutory interpretation is a pure question of law. *Board of County Comm’rs v. Hygiene Fire Protection Dist.*, 221 P.3d 1063, 1066 (Colo. 2009)

## **II. STATEMENT OF FACTS**

In her motion for summary judgment, Debra Johnson, Clerk and Recorder for the City and County of Denver (hereinafter “Clerk Johnson”), sets forth facts that she argues are pertinent to the issues in this case. Most of the facts listed in Clerk Johnson’s motion pertain to activities surrounding the November 2011 election and, in particular, to her allegations regarding the Secretary’s alleged approval of Denver’s 2011 mail ballot plan. These allegations present facts that are unique to the November 2011 election and were pertinent to the Secretary’s motion for preliminary injunction. They are not material to the broader, ongoing allegations in the Secretary’s complaint. Six material and undisputed facts remain:

- The Secretary is the duly elected Secretary of State for the State of Colorado.
- Clerk Johnson is the duly elected Clerk and Recorder for the City and County of Denver.
- Pursuant to the Denver Charter and ordinances, Clerk Johnson supervises elections within the City and County of Denver.

- Clerk Johnson contests the Secretary’s assertion that the Clerk Johnson does not have the legal authority to challenge the Secretary’s legal interpretations, rules and orders under circumstances in which Denver is subject to the Uniform Election Code.
- Clerk Johnson contests the Secretary’s assertion that Clerks cannot send mail ballots to voters designated as “inactive-failed to vote” in mail ballot elections conducted pursuant to § 1-7.5-101 et seq.
- Clerk Johnson contests the Secretary’s assertion that Clerks cannot send ballots to overseas voters who have not submitted applications pursuant to § 1-8.3-101 et seq. without submitting an application.
- Clerk Johnson will continue to send ballots to voters who are designated as “inactive-failed to vote” and to overseas voters who do not submit an application.

For purposes of clarifying the record with respect to the allegations in Clerk Johnson’s motion, the Secretary responds to Clerk Johnson’s statement of facts in the order presented in Clerk Johnson’s Motion for Summary Judgment:

1. The preparation of a budget is immaterial.
2. The Secretary agrees that the Denver Clerk conducted Denver’s elections on May 3, 2011 and June 7, 2011. This fact is immaterial to the issues that remain.
3. County clerks must use the SCORE system. However, this factual allegation regarding the option to include IFTV voters is not specific to election in which mail ballot packets may not be sent to “inactive-failed to vote” electors.
4. The statement that there were no changes to the SCORE system for the November, 2011 election is not material to the ongoing dispute. A statement about changes to the SCORE system does not affect the legal authority to send mail packets to “inactive-

- failed to vote” electors. Moreover, any implication that mail ballots could be sent to such voters has been superseded by the filing of this lawsuit and promulgation of rules.
5. The Secretary does not dispute that Clerk Johnson and her staff consulted various election statutes, regulations and other materials.
  6. The Secretary disputes the allegation that his staff implicitly authorized Clerk Johnson to mail ballots to “inactive-failed to vote” electors. (See Secretary’s Answers to First Set of Interrogatories Propounded by Debra Johnson, (hereinafter “Answer”), Answer to Interrogatory, No. 10, attached as Ex. A)
  7. The Secretary disputes the allegation. The Mail Ballot Election Checklist dated June 10, 2010 was the checklist used in the 2010 primary election. In a primary election, counties are required to mail ballots to electors whose records are marked “inactive-failed to vote.” The Secretary issued a checklist that was updated prior to the filing deadline for the November 2011 election. The checklist did not include instructions to check the box to include “inactive-failed to vote records. (Ex. A, Answer, No 3)
  8. The Secretary disputes the allegation. The reference to the Answer does not accurately reflect its content. The Secretary’s Answer discusses only the approval of the written plan on September 15, 2011. It does not discuss a review of Denver’s data submission or SCORE plans.
  9. Whether the Clerk completed the process of pulling voters from the SCORE system is not a material fact.
  10. The Secretary agrees that the Clerk submitted its written mail ballot plan on September 7, 2011.

11. The fact that the form included an estimate of the number of eligible electors is immaterial. In addition, the Secretary issued a revised version of the mail ballot plan template, and the Clerk used this template to submit its plan. The revised plan removed the requirement that mail ballots must be provided to electors designated as “inactive-failed to vote.” (Ex. A, Answer No. 4)
12. The Secretary agrees that the Secretary’s office assumed that the estimated number of eligible voters included both active and inactive electors.
13. The Secretary agrees that Hilary Rudy advised Amanda Hill that the law precluded mailing ballots to “inactive-failed to vote” electors. (Ex. A, Answer No. 10)
14. The Secretary agrees that Amanda Hill contacted the SCORE desk for assistance.
15. The Secretary agrees that the SCORE desk assisted Amanda Hill with procedures to print mailing labels to send to both active and “inactive-failed to vote” electors under UMOVA.
16. The Secretary agrees that Paula Barrett referred the call to Hilary Rudy.
17. The Secretary agrees that Ms. Hill advised Ms. Rudy of Denver’s plans to send mail ballots to “inactive-failed to vote” electors. To the extent that the statement implies that Ms. Rudy acquiesced, it is incorrect. (Ex. A, Answer No. 10)
18. The Secretary agrees that Ms. Rudy spoke with Amber McReynolds.
19. The Secretary agrees that the Secretary approved Denver’s plan for the 2011 election. However, the Secretary disputes the remaining allegation. He does not ensure that the election will be conducted in a manner consistent with statutes and rules. The approval only means that the plan complies with the statute. (Ex. A, Answer, No. 11)

20. The Secretary agrees that the deadline for sending mail ballots to overseas and military voters was September 17, 2011.
21. The Secretary is not familiar with the Clerk's planning process. However, this information is immaterial because the Clerk was informed on September 12, 2012. (Ex. A, Answer No. 10)
22. The Secretary disputes this statement. The Secretary issued a Mail Ballot Election Set-up checklist specific to the 2011 coordinated election on September 2, 2011. This list did not include instructions to check the box to include "inactive-failed to vote." (Ex. A, Answer, No. 3) The Clerk submitted her plan on a revised form, which did not include a requirement that mail ballots must be mailed to electors designated as "inactive-failed to vote." (Ex. A, Answers Nos. 4 and 14)
23. The Secretary agrees that Clerk Johnson and Judd Choate conversed and that the Secretary of State's office construed the laws to mean that ballots could not be sent to "inactive-failed to vote" electors. The Secretary disagrees with the factual statement to the extent it implies that the Clerk had discretion. (Ex. A, Answer, No. 10)
24. The Secretary agrees that Clerk Johnson asked for written confirmation. Judd Choate's letter confirmed the conversation (Ex. A, Answer No. 10) The Secretary disagrees that prior conversations in any way implied that the Clerk could send ballots to "inactive-failed to vote" electors. Her office was affirmatively informed as early as September 12, 2011. (Ex. A, Answer No. 10)
25. The Secretary disagrees that the Clerk sent mail ballots to UMOVA voters prior to being informed of the Secretary's position. The Clerk was informed as early as September 12, 2011 (Ex. A, Answer No. 10).

26. The Secretary does not dispute that Mr. Choate did not provide procedures.
27. The Secretary does not dispute that Clerk Johnson received the letter on September 16, 2011 at 5:58 p.m.
28. The Secretary does not dispute the assertion concerning the content of the ballot.
29. The Secretary does not dispute that the Clerk is the elected Clerk and Recorder for Denver and that she is the chief elections official for Denver. The statement regarding her authority for matters “pertaining” to municipal elections is a legal conclusion and is not a fact.

### **III ARGUMENT**

#### **A. Introduction**

The Secretary and Clerk Johnson have three major areas of disagreement.

First, the Secretary contends that Clerk Johnson is a subordinate officer under the Uniform Election Code. The Clerk must comply with the rules or orders of the Secretary of State, even if Clerk Johnson disagrees with the Secretary’s instruction or interpretation. Clerk Johnson disagrees with this interpretation and will continue to disregard the Secretary’s interpretation if she disagrees.

Second, the Secretary interprets § 1-7.5-107(3)(a)(I), C.R.S. (2012) to preclude sending mail ballots to voters who are deemed inactive because they failed to vote at the prior general election. Clerk Johnson contends that county clerks retain the discretion to send mail ballots to such electors. Clerk Johnson will continue to send mail ballots to voters who are designated as “inactive-failed to vote.”

Third, the Secretary interprets § 1-8.3-101, et seq. to preclude the county from sending a ballot to a voter under the Uniform Military and Overseas Voters Act (UMOVA) unless and until

the voter submits an application. Clerk Johnson contends that the law allows her to send ballot to such electors without an application, and she will continue to do so.<sup>1</sup>

**B. CLERK JOHNSON MUST IMPLEMENT AND ABIDE BY THE SECRETARY’S INTERPRETATION OF THE UNIFORM ELECTION CODE.**

**i. Denver is Subject to the Uniform Election Code**

The dispute between the Secretary and the Clerk Johnson centers on their respective roles and responsibilities in the implementation and enforcement of election laws. Clerk Johnson seeks summary judgment on the ground that the Secretary cannot make her obey unenforceable and improperly issued orders or interpretations. She bases part of her argument on Denver’s status as a home rule entity. (Clerk’s Motion for Summary Judgment, pp. 20-23) In order to determine whether the statutes apply to the City and County of Denver, the court must first determine the scope and extent of the application of state election laws to home rule entities.

The City and County of Denver is a home rule entity. Colo. Const. art. XX, § 1. As a home rule entity, it has:

Powers necessary, requisite or proper for the government and administration of its local and municipal matters, including the power to legislate upon, provide, regulate, conduct and control:

...

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character.

---

<sup>1</sup> Related to both the second and third matters is whether elections laws must be applied uniformly throughout the state under § 1-1-107(1)(c), C.R.S. (2012).



Colo. Const. art. XX, § 6(d).

The power of home rule entities and their officers in election matters is limited to municipal elections only. Elections involving state matters, including those concerning statewide ballot issues and state candidates, fall outside the authority of home rule entities. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #235(a)*, 3 P.3d 1219, 1225 (Colo. 2000). For purposes of elections on statewide ballots or candidates for offices other than Denver offices, the Clerk is subject to the Uniform Election Code. When an election involves both municipal matters and state matters, the Uniform Election Code applies. See, *City and County of Denver v. Sweet*, 138 Colo. 41, 47, 329 P.2d 441, 444 (1958)

More importantly, Denver itself has adopted the Uniform Election Code. With respect to local and municipal matters, the “statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.” *Vela v. People*, 174 Colo. 465, 467, 484 P.2d 1204, 1205 (1971) Elections in Denver are “governed by the election laws of the State as now existing or hereafter amended or modified except as otherwise provided by this Charter, or by ordinance pursuant to this Charter hereinafter enacted.” Denv. Charter, § 8.2.1. Likewise, the Denver ordinances state that Denver’s elections are governed by Denver’s charter and ordinances. D.R.M.C. § 15-4(a). The Charter and ordinances do not include any provisions regarding “inactive-failed to vote” electors in mail ballot elections or election procedures under the UMOVA.

In the election context, Clerk Johnson is subject to the Uniform Election Code.

**ii. Clerk Johnson is subordinate to the Secretary and must comply with the Secretary’s orders and rules.**

Prior to 1967, almost all responsibility for the day-to-day operation of elections rested with county officials. Under Colorado's territorial laws, primary responsibility for elections rested with county officials. When Colorado was a territory, the county sheriff and the county commissioners assumed primary roles in implementing and conducting elections. R.S. 1868, chap. XXVIII, §§ 10, 11, 12 (secretary of the territory must give notice of elections to county sheriff); § 13 (Sheriff shall order special elections for county officials, and the order shall be countersigned by board of county commissioners); § 15 (county commissioners establish precincts); § 16 (county commissioners appoint election judges); § 29 (local constables responsible for ensuring order at polling places); § 30 (county clerks register electors); § 32 (county clerk opens returns); § 33 (county clerks make abstracts of votes).

In 1967, the General Assembly gave the Secretary supervisory responsibility for statewide elections. The Secretary was empowered to "supervise the conduct of primary, general and special elections," to enforce the provisions of the Election Code, to inspect and review the practices of local election officials and to bring injunctive action to enforce the provisions of the Election Code. Section 49-1-11, C.R.S. (1967 Supp.) As an adjunct to these new powers, county clerks were required to consult with the Secretary when implementing the provisions of the Election Code. Section 49-1-7, C.R.S. (1967 Supp.).

These provisions presently are codified at §§ 1-1-107 and -110, C.R.S. (2012). The Secretary has broad duties and powers under the Election Code. His duties include (1) "[t]o supervise the conduct of primary, general, congressional vacancy and statewide ballot issue elections"; (2) enforcement of the Election Code, including mail ballot election conducted under title 1, article 7.5 of the Election Code; and (3) rendering uniform interpretations of the Election

Code. Section 1-1-107(1)(a)-(c), C.R.S. (2012) His powers include (1) reviewing the practices and procedures of the county clerks and recorders; and (2) enforcing of the Election Code by seeking injunctive relief. Section 1-1-107(1)(2)(b)-(c).

The Election Code is denominated the “Uniform Election Code of 1992.” As the word “uniform” connotes, the election statutes must be implemented consistently throughout the state. The Election Code achieves this goal by giving the Secretary the power to supervise election practices. The word “supervise” means more than recommend or suggest. It means “to coordinate, direct and inspect continuously and at first hand the accomplishment of: oversee with the powers of direction and decision the implementation of one’s own or another’s intentions.” *Webster’s Third New International Dictionary (Unabridged)* 2296

The Election Code subordinates county clerks to the Secretary for purposes of implementing the Election Code. County clerks and recorders, “in rendering decisions and interpretations under this code, *shall* consult with the secretary of state and *follow* the rules and orders promulgated by the secretary of state pursuant to this code.” (Emphasis added.) Section 1-1-110(1), C.R.S. (2012). For purposes of this lawsuit, the language in the Mail Ballot Election Act reaffirms the subordinate role of the county clerks. The Secretary “supervise[s] the conduct of mail ballot elections...” Section 1-7.5-106(1)(c), C.R.S. (2012) The county clerks “shall conduct any election for the political subdivision by mail ballot *under the supervision of the secretary of state and shall be subject to rules which shall be promulgated by the secretary of state.*” Section 1-7.5-104(1), C.R.S. (2012) (Emphasis added.) Under the Colorado Election Code, county clerks and other election officials are subordinate to the Secretary.

As subordinate officials, county election officers cannot disobey or disregard a rule, order or interpretation of law proffered by the Secretary. “It is well established that as a general rule, neither a county officer nor a subordinate county agency has any standing or legal authority to question or obtain judicial review of an action taken by a superior state agency.” *Lamm v. Barber*, 192 Colo. 511, 519, 565 P.2d 538, 544 (1977). When a statute imposes upon a subordinate county officer a legal obligation to comply with a rule or order of a state official, the subordinate official must comply with the rule or order, even if the county officer believes that the order is unconstitutional or inconsistent with statute.

The *Lamm* case is dispositive. The State Board of Equalization (SBOE) sued three county assessors who refused to comply with an SBOE order. The orders were authorized by state statutes. One statute provided that the assessor “shall forthwith make the necessary changes in the abstract of assessment required to carry out such order” requiring a correction of assessment. Section 39-5-127, C.R.S. (1973). A second statute provided that assessors, upon receipt of an order from SBOE, “shall forthwith make the proper adjustment in each individual scheduled affected by such order so that the assessment roll of his county.” Section 39-9-107, C.R.S. (1973).

The assessors argued that they had the right to challenge the validity of the SBOE orders. The Court unequivocally rejected the assessors’ argument:

The respondents are incorrect. Their argument is a house of cards resting on the assumption that they have discretion to follow or disregard the State Board’s order. While it is true that they have discretion to determine the details of how they will implement the State Board ordered increases, they have no discretion to determine whether or not to implement them. Each respondent has a clear legal duty to carry out the State Board’s order by increasing the aggregate valuation of certain subclasses of property within his

county. Absent evidence of State Board interference with how discretion is exercised, case law and sound public policy require issuance of a mandamus to compel the defendants to perform their statutory duties. We hold that the respondents have no standing to question the constitutionality of the statute or the State Board's action in response to it.

*Id.* 192 Colo. at 520-21, 565 P.2d at 545. Otherwise stated, a subordinate public official must comply with the orders of the superior public official.

The Colorado Supreme Court reached the same conclusion when interpreting language similar to that in the Election Code. *Huddleston v. Grand County Board of Equalization*, 913 P.2d 15 (Colo. 1986). The legislature created the position of Property Tax Administrator to oversee the administration of the property tax valuation system. It enacted a statute that provided, "It is the duty of the property tax administrator...[t]o prepare and publish from time to time manuals...and to require their utilization by assessors in valuing and assessing taxable property." The Court found that the term "to require" authorized the Property Tax Administrator to mandate the use of the manuals, and the counties could not disregard the instructions contained in the manuals. *Id.* at 18.

The Election Code does not give the clerk and recorders discretion to ignore the orders of the Secretary. Section 1-1-110(1) states that the clerk "shall...follow...the orders promulgated by the secretary of state pursuant to this code." The word "shall" has a mandatory connotation and "is the antithesis of discretion or choice." *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987). Mail ballot elections are conducted "under the supervision of the secretary of state." Section 1-7.5-104(1). County election officials cannot ignore the interpretation or the directives of the Secretary, even if they believe the Secretary's interpretation or directive is incorrect as a matter of law.

Clerk Johnson argues that the court must ignore the common definition of the word “supervise.” (Clerk’s Motion for Summary Judgment p. 11) Her argument ignores basic tenets of statutory construction. Words should be given their commonly-accepted meaning. *Klinger v. Adams County School Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006). Courts must avoid a strained construction of language within a statute and must look to the context in which a statutory term is used. *Appelhans v. Farmers Ins. Exch.*, 68 P.3d 594, 597 (Colo. App. 2003).

When read in the context of other provisions in the Election Code, the word “supervise” connotes that one who supervises does more than recommend. Section 1-1-107 gives the Secretary the duties (1) “to enforce the provisions of this code”, and (2) “to make uniform interpretations of this code” Section 1-1-107(1)(a) and (b), C.R.S. (2012). The declaration in § 1-1.5-101(1)(h), C.R.S. (2012) states, “[i]n Colorado, the secretary of state is the chief election official and, in that capacity is charged by HAVA and *existing statutory provisions* with responsibility *for supervising the conduct of elections and for enforcing and implementing* the provisions of HAVA and *of this code.*” (Emphasis added). Moreover, the Mail Ballot Election statute at issue clearly establishes the supervisor-supervisee relationship:

In addition to other powers prescribed by law, the secretary of state may adopt rules governing procedures and forms necessary to implement this article and *may appoint the county clerk and recorder as an agent of the secretary to carry out the duties prescribed in this article.*

Section 1-7.5-106(2), C.R.S. (2012) (emphasis added)

Courts have interpreted “supervise” to include enforcement. The duty to supervise includes the “duty to enforce.” *Hoyem v. Manhattan Beach City School Dist.*, 585 P.2d 851, 854 (Cal. 1978). For example, a state agency’s duty to “supervise” special education programs under

federal law “includes not only a duty to monitor but also to enforce.” *United States v. Arkansas*, 794 F.Supp.2d 935, 983 (E.D.Ark 2011)

Clerk Johnson states that neither *Lamm* nor *Huddleston* is dispositive or persuasive because the statutory constructs are different. (Clerk’s Motion for Summary Judgment, p. 13) Clerk Johnson’s analysis misses the key common denominator. Both *Lamm* and *Huddleston* and this case address a circumstance in which a statute gives a state official authority over a local public official for the purpose of applying state laws in a uniform manner. There is no significant distinction between the statutes underlying the *Lamm* and *Huddleston* cases and the provisions of the Uniform Election Code.

Clerk Johnson attempts to support her argument by noting that clerks generally have more direct contact with the members of the public who may have questions or concerns about the election process. (Clerk’s Motion for Summary Judgment, p. 11-12) This argument does not advance Clerk Johnson’s position because it is irrelevant. The issue is not whether county clerks have greater access to the public. The question instead is whether the clerk is acting on her own or whether she is acting as an agent for the Secretary when conducting elections other than purely local elections.

The Uniform Election Code makes the Secretary the “chief election official” in charge of “overseeing and coordinating elections and in enforcing and implementing the provisions of HAVA and of this code.” Section 1-1.5-102(1)(g), C.R.S. (2012). The administration of elections is a state function. By making the Secretary the chief election official, the Election Code designates the Secretary as the principal and the clerk as the agent of the Secretary. Thus, when the clerk engages the public, the clerk is acting on behalf of the Secretary.

Clerk Johnson next argues that the Secretary cannot issue an order unless the section of the law he is enforcing order specifically mentions the word “order” (Clerk’s Summary Judgment Motion, pp. 12-13). Clerk Johnson bases her argument on the phrase “promulgated by the secretary of state pursuant to this code.” Section 1-1-110(1). This interpretation leads to an absurd result. The Secretary has the power “to inspect...and review the practices and procedures of county clerks and recorders.. and other election officials in the conduct of primary, general and congressional vacancy elections...” Section 1-1-107(2)(b), C.R.S. (2012). As noted, the secretary has the authority to enforce and implement the laws, and in the context of mail ballot election, to appoint the clerk as an agent. Clerk Johnson’s interpretation would mean that the Secretary could inspect and instruct, but could not enforce if the Clerk did not agree with the Secretary’s instruction.

Clerk Johnson also argues that the 2012 rules do not supersede the 2011 order. (Clerk’s Summary Judgment Motion, pp. 13-14). The Secretary did not cite these rules to support his argument that the County is bound by his rules. The Secretary cited the rules to support his interpretation of the provisions in the mail ballot statute.

Clerk Johnson next contends that the Election Code provides a process through which disagreements may be resolved. (Clerk’s Motion for Summary Judgment, p. 14) There is no question that the Election Code establishes a procedure through which disagreements may be brought to the attention of the courts by citizens who are eligible to vote. Eligible electors may challenge a decision by the Secretary, the clerks or other election officials. Section 1-1-113(1), C.R.S. (2012). Thus, citizens, such as members of Common Cause, may bring challenges.

What is generally not allowed is a challenge by a subordinate county official to an action taken by a state official. The Supreme Court rejected Clerk Johnson’s argument in *Board of*



*County Commissioners v. Fifty-first General Assembly*, 198 Colo. 302, 599 P.2d 887 (1979).

Two county boards sued the State Board of Equalization. The counties argued that the underlying statute was unconstitutional and that they would ignore directives from the State Board of Equalization requiring compliance. The Court rejected the counties' argument. In particular, the Court concluded, "Because counties and their subordinate agencies are not independent political entities, counties and their officers have no standing to contest directives given them by the state. *Id.* 198 Colo. at 305, 599 P.2d at 889. The Court concluded that counties are subordinate agencies and have no right to refuse to perform ministerial duties because they in good faith have concluded that others may be injuriously affected. Counties are part of the state and are subject to directives issued by state officers.

Clerk Johnson argues that the promulgation of the rules is irrelevant because the Secretary's complaint was based on an order that the Secretary issued rather than the rules that were promulgated in 2012. This argument misstates the core of the case. The Complaint is not based on the form of the instruction and mandate from the Secretary. The Complaint is based upon the failure of Clerk Johnson to obey the substance of the command from the Secretary. The form of the instruction is not material.

For these reasons, the Court must conclude that the Clerk Johnson must obey the rules and orders of the Secretary, including those regarding "inactive-failed to vote" electors, even if she believes that the Secretary's orders or interpretations are incorrect as a matter of law.

**C. THE MAIL BALLOT STATUTE DOES NOT PERMIT THE COUNTIES TO SEND MAIL BALLOTS TO VOTERS WHO ARE CATEGORIZED AS "INACTIVE-FAILED TO VOTE."**

**i. Mail Ballot Elections**

Colorado law permits counties to conduct mail ballot elections “under specified circumstances.” Section 1-7.5-102, C.R.S. (2012). A mail ballot election is “an election for which eligible electors may cast ballots by mail and in accordance with [the Election Code] in a primary election or an election that involves only nonpartisan candidates or ballot questions or ballot issues.” Section 1-7.5-103(4), C.R.S. (2012). “Election” is defined as “any election under the ‘Uniform Election Code of 1992’ or the ‘Colorado Municipal Election Code of 1965’”, article 10 of title 31, C.R.S.” Section 1-7.5-103(2), C.R.S. (2012) Mail ballot elections are optional. Section 1-7.5-104(1), C.R.S. (2012). The election official responsible for conducting a mail ballot election must notify the Secretary no later than fifty-five days prior to election. Section 1-7.5-105(1), C.R.S. (2012). For primary elections conducted as mail ballot elections, the official must notify the Secretary no later than ninety days prior to the election. Section 1-7.5-105(1.5), C.R.S. (2012) The notification must include a proposed plan for conducting the mail ballot election. Sections 1-7.5-105(1), (1.5). The plan may be based on the standard plan adopted by the Secretary. *Id.* Political subdivisions that opt to conduct a mail ballot election must do so “under the supervision of the secretary of state” and “subject to rules which shall be promulgated by the secretary of state.” Sections 1-7.5-104(1) and -106(1)(c) C.R.S. (2012).

In a mail ballot election, the election official “shall mail to each *active* registered elector a mail ballot packet” (Emphasis added) Section 1-7.5-107(3)(a)(I), C.R.S. (2012). If a primary election is conducted as a mail ballot election, ballots must be mailed to “active registered electors who are affiliated with a political party” and “to each registered elector who is affiliated with a political party and whose registration is marked as ‘Inactive-failed to vote’.” Section 1-7.5-107(3)(a)(II)(a), C.R.S. (2012).

Election officials must mail a voter information card to any registered elector whose registration is marked “Inactive-failed to vote” at least ninety days before the mail ballot election. Section 1-7.5-108.5(1), C.R.S. (2012). Subsequent to the preparation of ballots, each designated election official must “provide a mail ballot to a registered elector requesting the ballot at the designated official’s office or the office designated in the mail ballot plan filed with the secretary of state.” Section 1-7.5-108.5(2.7), C.R.S. (2012) Designated elections officials must provide mail ballots at the official’s office to those eligible electors who are not listed or are listed as “inactive.” Section 1-7.5-107(3)(c), C.R.S. (2012).

**ii. Voters Categorized as “Inactive-Failed to Vote”**

An “inactive-failed to vote” elector is defined as “a registered elector who is deemed ‘Active’ but who failed to vote in a general election in accordance with the provisions of section 1-2-605(2).” Section 1-7.5-108.5(1), C.R.S. (2012) An “inactive- failed to vote” elector is “eligible to vote in any election where registration is required [if] the elector meets all other requirements.” Section 1-2-605(3), C.R.S. (2012). When electors are designated as “inactive”:

- The county clerk and recorder must mail a confirmation card to all electors who fail to vote in the general election not later than 90 days after the general election. Section 1-2-605(6)(a), C.R.S. (2012). A confirmation card is a forwardable, postage paid mailing that is preaddressed to the sending county and that includes a voter registration form so the elector can update his or her voter registration record. Section 1-2-605(6)(b), C.R.S. (2012); Rule 2.19, 8 CCR 1505-1.
- No later than 90 days before a mail ballot election, the county clerk and recorder must mail a nonforwardable voter information card to all electors whose voter registration record is marked “Inactive-failed to vote”. Sections 1-2-605(11) and 1-7.5-108.5(1),

C.R.S. (2012). A voter information card is a postcard mailing that advises an elector of the elector's registration status, precinct number and polling location. It includes a returnable portion allowing the elector to update the elector's voter registration record. Section 1-5-206(1)(b), C.R.S. (2012).

- An elector whose record is marked "Inactive-Failed to Vote" is registered and eligible to vote in an election. However, the election official does not automatically mail a ballot to such an elector, except in primary elections. Section 1-7.5-107(3), C.R.S. (2012); Rules 2.20.2.c and 12.11.4, 8 CCR 1505-1.
- An elector who is categorized as "Inactive-Failed to Vote" may vote at a mail ballot election. The elector may receive a ballot by mail if he takes one of several actions. The elector may update the voter registration record prior to casting a ballot. Section 1-7.5-107(3); Rule 12.11 The elector may update the information by voting at the polls, by applying for a mail-in ballot, or completing a voter information card. Section 1-2-605(4), C.R.S. (2012); Rule 12.11. The elector also may update the information in the voter registration record in person, on-line at the Secretary of State's website ([govotecolorado.com](http://govotecolorado.com)) or by mail. Sections 1-2-605(4) and 1-7.5-107(3) (c), C.R.S. (2012); Rules 2.11 and 12.11.
- An elector who is designated as "Inactive-failed to vote" may vote at a mail ballot election even if the elector does not update his registration prior to the election. Election officials must make ballots available for electors who are designated as "Inactive-failed to vote" at the county elections office and at designated service centers or walk-in voting locations beginning 22 days before a mail ballot election. Section 1-7.5-107(3) (c), C.R.S. (2012).

Electors who are designated as “inactive failed to vote” become active if they timely respond to any of the aforementioned notices, take any action to update their registration, or vote. Electors retain their status as “inactive-failed to vote” because they did not vote in the prior general election and failed to heed repeated notifications of inactive status.

Electors who are designated as “inactive-failed to vote” can vote in a mail ballot election. They can receive a mail ballot if they timely update their registration or they can vote in person.

**iii. The Statutory Language Supports the Conclusion that the Clerks May Not Send Mail Ballots To Electors Designated as “Inactive-failed to vote.”**

Clerk Johnson contends that the counties may, in their discretion, mail ballots to voters who are categorized as “inactive-failed to vote.” (Clerk Johnson’s Answer, Affirmative Defense, ¶ 6; Clerk Johnson’s Response in Opposition to Motion for Preliminary Injunction, pp. 11-15; Common Cause Amended Answer and Counterclaim, ¶¶ 56-57; Clerk Johnson’s Motion for Summary Judgment, pp. 15-21)) The Secretary contends that the counties may not send mail ballots to electors designated “inactive-failed to vote.”

When construing a statute, the courts “afford the words of the statute their ordinary and common meaning and construe the statutory provisions as a whole, giving effect to the entirety of the statute.” *Lombard v. Colorado Outdoor Education Center, Inc.*, 187 P.3d 565, 570 (Colo. 2008). If the language is ambiguous or unclear, the courts will “consider the statute’s legislative history, the state of the law prior to the enactment, the problem addressed and the statutory remedy.” *Id.* “When the legislature speaks with exactitude, [the court] must construe the statute to mean that the inclusion or specification of a particular set of conditions necessarily excludes others.” *Lunsford v. Western States Life Insurance*, 908 P. 2d 79, 84 (Colo. 1995).

Section 1-7.5-107(3)(a)(I) discusses the process by which mail ballots will be sent to registered electors. It provides:

Not sooner than twenty-two days before an election, and no later than eighteen days before an election, except as provided in subparagraph (II) of this paragraph (a), the designated election official shall mail to each *active* registered elector, at the last mailing address appearing in the registration records, and in accordance with United States postal service regulations, a mail ballot packet...

(Emphasis added.) An active voter is a person who voted in the last general election, § 1-2-605(2). Conversely, a person is deemed “inactive-failed to vote” if the person has not voted in a general election. *Id.*

The adjective “active” is crucial. If the General Assembly intended to allow election officials to send packets to all registered electors, including those marked as “inactive”, it would not have used the word “active.” Instead, it would have required election officials to mail packets to “each registered elector.” Alternatively, the General Assembly could have included a reference to “inactive-failed to vote” electors, as it did for primary election mail ballot elections. Section 1-7.5-107(3)(a)(II), C.R.S. (2011). By using the word “active”, it intended to exclude “inactive” voters. “Straining the statute to read otherwise would ignore its plain language”, *In re Marriage of Chalat*, 112 P.3d 47, 57 (Colo. 2005) and expands the definition of the word “active” well beyond its generally accepted meaning.

The interpretation proffered by Clerk Johnson renders superfluous other sections of the statute. Section 1-7.5-107(3)(c) states that designated election officials must make mail ballots available “at the designated election official’s office, or the office designated in the mail ballot plan filed with the secretary of state, for eligible electors who are not listed or who are listed as ‘Inactive’ on the county voter registration records.” The county clerk and recorder must mail a

voter information card to a registered elector who is categorized as “Inactive-failed to vote.” If the counties retain the discretion to mail ballots to such electors, there is no need to make ballots available at designated locations twenty-two days before the election or to mail voter information cards ninety days before the election.

Consideration of prior versions of the law also confirms the Secretary’s interpretation. In 2008, the General Assembly enacted H.B. 08-1329. (Exhibit B) This measure added section 1-7.5-108.5(2)(b), which provided:

(I) In connection with any mail ballot election to be conducted in November 2009, a mail ballot shall be mailed to all registered electors whose registration record has been marked as “inactive-failed to vote”. Such mail ballots shall not be sent to registered electors whose registration has been marked as “inactive-undeliverable”.

(II) This paragraph (b) is repealed, effective July 1, 2011.

The General Assembly required clerks to send mail ballots to persons who were inactive and failed to vote as well as to active voters. The intent of the measure was to reduce the number of persons who were designated as “inactive failed to vote” due to unique election problems in Denver and Douglas County in 2006. The authority to send mail ballots to electors who were inactive and failed to vote expired on July 1, 2011.

The General Assembly could have achieved the result advocated by the Clerk Johnson merely by not including, or repealing, the sunset provision. Alternatively, it could have amended § 1-7.5-108.5(2)(b) to state that “a mail ballot may be mailed to all registered electors whose registration record has been marked as ‘inactive-failed to vote’ effective July 1, 2011.” Instead, it chose to include the repeal in the bill and subsequently did not take any action to reinstate the

requirement that mail ballot packets be sent to inactive voters who failed to vote after July 1, 2011.

Clerk Johnson apparently interprets the language in § 1-7.5-107(3)(a)(I) to give discretion to the clerks unless words like “only” or “solely” are used. (Clerk Johnson’s Motion for Summary Judgment, p. 16) If the court adopts the Clerk’s interpretation, then all provisions within the Code which impose certain conditions and obligations upon clerks during the course of the election process could be modified by the clerks. For example, § 1-5-410, C.R.S. (2012) states that election judges receiving sealed ballot packages provide receipts, and that such “receipts shall be filed with the designated election official.” The receiving election judges must deliver the packages “and, in the presence of all election judges, shall open the packages.” *Id.* Under her interpretation, clerks will be permitted to specify that the receipts may be filed with a person other than the designated election official, because the statute does not say “only”. Clerks would also have the discretion to permit the packages to be opened in the presence of persons other than election judges, because the statute does not use the term “only”.

More significantly, Clerk Johnson’s interpretation could result in different means by which ballots are counted. Under § 1-7-307(1), C.R.S. (2012), “election judges shall first count the number of ballots in the box” and reconcile the number of ballots with the number of names entered on each of the pollbooks. If the court adopts defendants’ theory, clerks could instruct election judges to follow different procedures. It is this type of disparity that leads to the problems and issues recited in *Bush v. Gore*, 531 U.S. 98 (2000). This court should adopt an interpretation that favors uniformity.

Clerk Johnson’s interpretation runs counter to the history and purpose of the Election Code. The law is entitled the “Uniform Election Code of 1992” for a reason. As the recitation of



the history of election laws plainly discloses, the legislature consolidated supervision and enforcement of election laws under the Secretary in order to achieve uniformity throughout the state. The defendants' interpretation undermines the purpose of the consolidation.

Clerk Johnson argues that the legislative declaration in 1-7.5-102, C.R.S. (2012) supports her broad interpretation. (Clerk Johnson's Summary Judgment Motion, p. 16) This argument ignores specific narrowing language within the legislative declaration:

The general assembly hereby finds, determines, and declares that self-government by election is more legitimate and better accepted as voter participation increases. By enacting this article, the general assembly concludes that it is appropriate to provide for mail ballot elections *under specified circumstances*.

Section 1-7.5-102. (Emphasis added) The legislative declaration does not establish an intent to mail ballots to all registered voters. Instead, the intent is to mail ballots only under the circumstances specifically mentioned in the statute.

Nor does the Secretary's interpretation violate the declaration in § 1-1-103(1). (Clerk's Motion, p. 19). This section states that the "code shall be liberally construed so that all eligible voters may be permitted to vote." The Secretary's interpretation is consistent with the declaration. Voters who are designated as inactive-failed to vote may vote in person at the clerk's office or at a place designated by the clerk, or may receive and vote a mail ballot by applying for a ballot, completing and returning a voter information card, or updating their voter registration record. § 1-7.5-107(3)(c), C.R.S. (2012); § 1-2-605(4), C.R.S. (2012).

**iv. The Demise of H.B. 12-1267 Supports the Secretary's Interpretation.**

Actions taken in the 2012 in the Colorado General Assembly also confirm the Secretary's analysis. In interpreting a statute, the court may look to the legislature's failure to amend an act

in light of its knowledge of the interpretation of the law and its implementation. *Schlagel v. Hoelsken*, 162 Colo. 142, 425 P.2d 39, 42 (1967); see also, 2B, Singer & Singer, *Sutherland Statutory Construction* (2008), § 49.10 (“where contemporaneous interpretation has been called to the legislature’s attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive evidence of its correctness”)

In 2012, the Colorado General Assembly considered H.B. 12-1267 (Exhibit C). Section 1 of the bill added section 1-2-229:

(1) Notwithstanding any other provision of law, any registered elector whose registration has been marked as “Inactive-failed to vote” as of the effective date of this section shall from that date forward be deemed to hold the status of an active elector.

(2) By August 1, 2012, the Secretary of State shall update the statewide voter registration database to reflect the elimination of “Inactive-failed to vote” voter status pursuant to subsection (1) of this section and, as appropriate, restore permanent mail-in voter status to those electors who had previously selected such status but had subsequently been marked as “Inactive-failed to vote”.

Section 2 of the bill repealed section 1-2-605(11) which governs actions involving “inactive voters” in mail ballot elections. Section 8 of the bill specifically repealed § 1-7.5-108.5, which distinguished between “active” and “inactive-failed to vote” in the mail ballot statute.

H.B. 12-1267 would have eliminated the status of “inactive-failed to vote.” The General Assembly killed the bill. By refusing to enact the bill, the General Assembly affirmed the existing interpretation of the statute.

Clerk Johnson argues that H.B. 12-1267 cannot be used to determine legislative intent. (Clerk’s Motion for Summary Judgment, p. 16) Citing *U.S. Fax Law Center v. Henry Schein, Inc.*, 205 P.3d 512 (Colo. App. 2009), she states that legislative silence is not a guide to legislative intent. In fact, the case supports the Secretary’s legal analysis. The Court of Appeals

stated, ““An inference drawn from congressional silence certainly cannot be credited *when it is contrary to all other textual and contextual evidence of congressional intent.*”” *Id.* at 516-517 (quoting *Burns v. United States*, 501 U.S. 129, 136, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991) (Emphasis added) Thus, a court may consider context when determining legislative intent. If the court determines that the legislative body was aware of a particular interpretation and subsequently rejected it, it may conclude that the legislative body intended to affirm the executive’s interpretation. *Schlagel v. Hoelsken, supra.*

Clerk Johnson also contends that the statutory interpretation at the time H.B. 12-1267 was introduced was that proffered by Judge Whitney. (Clerk’s Motion for Summary Judgment, p. 16) According to Clerk Johnson, Judge Whitney rejected the Secretary’s interpretation. This argument is incorrect. To the contrary, Judge Whitney concluded that the Secretary had proved a reasonable probability of success on the merits:

The burden under the Rathke factors talks about reasonable probability of success on the merits, which goes into legal requirements, and it goes a lot to what Mr. Knaizer talked about with the background information and all of the laws that have gone into effect concerning elections.

It is (sic) fairly easy burden to reach, and I do believe the People have reached the first prong of that, which is that there is—there’s a reasonable possibility of success on the merits. There’s a reasonable possibility of non-success on the merits. A reasonable possibility is really not that hard to get to, and so I think that factor weighs in on behalf of the State.

(Clerk’s Motion for Summary Judgment, exhibit 15, p.87, ll. 9-20)

**v. The Court Must Consider the Secretary’s Recently-Promulgated Rules**

Guidance can be obtained from the interpretation given to a statute by the implementing agency. *Colorado Mining Association v. Board of County Commissioners*, 199 P.3d 718, 731

(Colo. 2009) Courts will give significant weight to the agency's guidance, rules and determinations if they are consistent with the governing constitutional and statutory provisions they implement. *Id.*

After the demise of H.B 12-1267, the Secretary adopted rules 12.4.1(d) and 13.19 and amended Rule 12.11. (Exhibit D) Rule 12.4.1(d) provides:

(D) Request for Ballot by Inactive-failed to vote elector. In a coordinated or nonpartisan election, the designated election official may not mail a ballot to an elector whose registration record is marked inactive-failed to vote until the elector submits a registration update or a request for a ballot under section 1-7.5-107(3), C.R.S., and Rule 12.11.

Rule 12.11.4 states, in pertinent part:

An inactive elector in a nonpartisan mail ballot election will be issued a ballot if the elector submits a registration update or a ballot request.

(A) The inactive elector must submit a registration update or a written request for a ballot before the designated election official may mark the elector's record active and issue the ballot.

Rule 13.19 states, "For any election that is not a primary mail ballot election, the designated election official may not issue a mail-in ballot to an elector whose record is marked inactive-failed to vote until the elector submits a timely application for a mail-in ballot."

The language of the rules is clear. The clerks may not issue ballots in mail ballot elections that are not primary elections until the inactive elector submits a registration update or a written request for a ballot.

Clerk Johnson contests the validity of the rules. (Clerk's Motion for Summary Judgment, p. 18-20) Even though she is an officer of a home rule jurisdiction, she cannot challenge the

rules because Denver has adopted the Uniform Election Code, which requires counties to comply with the rules and orders of the Secretary. Section 1-1-110(1).

For these reasons, the Secretary is entitled to an order that mail ballots may not be sent to voters who are designated as “inactive-failed to vote” and that the county election officials do not retain the discretion to mail ballots to such voters.

#### **IV. THE SECRETARY’S INTERPRETATION DOES NOT CONTRADICT THE UNIFORM MILITARY AND OVERSEAS VOTERS ACT.**

Clerk Johnson also contends that the clerks must send ballots to all voters under the Uniform Military and Overseas Voters Act (UMOVA). (Clerk Johnson’s Motion for Summary Judgment, p. 21) The Secretary contends that the clerks may send a ballot to a voter under UMOVA only when the voter applies for a ballot.<sup>2</sup>

The usual rules of statutory construction apply to UMOVA. See pages 18-19 of the Brief.

UMOVA defines “covered voter” to mean:

(1) a uniformed-service voter “who is a Colorado resident but who is absent from the state by reason of active duty and who otherwise satisfies this state’s voter eligibility requirements”;

(2) an “overseas voter, who before leaving the United States, was last eligible to vote in this state, and except for a state residency requirement, otherwise satisfies this state’s voter eligibility requirements”;

---

<sup>2</sup> The Secretary did not raise this issue against Clerk Johnson, and she did not raise it in a counterclaim. However, the Secretary will address the issue because it was addressed by Clerk Johnson in her Motion and by the Clerk and Recorder for Pueblo County.

(3) an “overseas voter, who before leaving the United States, would have been last eligible to vote in this state had the voter then been of voting age and, except for a state residency requirement, otherwise satisfies this state’s voter eligibility requirements”; or

(4) an overseas voter who was born outside the United States and, “except for a state residency requirement, otherwise satisfies this state’s voter eligibility requirements if the last place where a parent or legal guardian of the voter was, or under this article would have been, eligible to vote before leaving the United States is within this state.” Section 1-8.3-102(2), C.R.S. (2012).

A “covered voter” includes electors who are registered. Section 1-8.3-108(1), C.R.S. (2012). A person who is identified as “inactive-failed to vote” is a registered voter. A covered voter who is registered may receive a ballot if the voter applies for a ballot.

“To receive the benefits of [UMOVA] a covered voter *shall* inform the appropriate official that the voter is a covered voter.” Section 1-8.3-108(5), C.R.S. (2012). (Emphasis added.) Upon receipt of the application, the clerk removes the designation of “inactive-failed to vote.” The voter may then vote in a mail ballot election. Section 1-8.3-108(6), C.R.S. (2012). Thus, under UMOVA, all covered voters, including ones designated as “inactive-failed to vote”, must first apply before they can receive a ballot. An application submitted by the covered voter is a condition precedent to receipt of the ballot.

For these reasons, the Secretary is entitled to an order that Clerk Johnson may not send ballots to covered voters, including those designated as “inactive-failed to vote”, without receiving an application.

**THE SECRETARY IS ENTITLED TO AN INJUNCTION IF HE PREVAILS ON THE MERITS.**

The Secretary seeks an injunction to prevent Clerk Johnson from sending ballots under the mail ballot statute to persons who are designated as “inactive-failed to vote.” Typically, a “party seeking a permanent injunction must show that: (a) the party has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.” *Dallman v. Ritter*, 225 P.3d 610, 621, n.11 (Colo. 2010).

A party is not always required to meet these four elements when seeking injunctive relief. Injunctive relief is a judicial remedy, and it may be superseded by a special statutory procedure. See, *Kourlis v. Dist. Ct.*, 930 P.2d 1329, 1335 (Colo. 1997). The supersession may be direct, implicit or both. *Id.*, at 1336. In *Lloyd A. Fry Roofing v. State Dep’t of Health Air Pollution Variance Bd.*, 191 Colo. 463, 472, 553 P.2d 800, 807-08 (1976), the statute at issue, like § 1-1-107, provided only that the agency could seek an injunction against a person who violated the Air Pollution Control Act. The statute did not specifically exclude a requirement that the agency must prove irreparable injury. The appellant argued that the agency had to show irreparable injury. The Supreme Court disagreed. It concluded “that irreparable injury need not be shown when the injunction is sought pursuant to statute rather than by the rules of civil procedure.” *Id.* 191 Colo. at 473, 553 P.2d at 808. In addition, the court noted that a party is not required to prove irreparable injury when the suit is in behalf of the public. *Id.*

The Supreme Court reached a similar result in *Kourlis*. In that case, the Commissioner of Agriculture sought a preliminary injunction authorized by statute against an unlicensed animal

refuge. The statute provided that the Commissioner did not have to plead or prove irreparable injury or the inadequacy of the remedy at law. However, it did not specifically exempt other requirements necessary to obtain a preliminary injunction. The Court concluded that the Commissioner did not have to prove the remaining elements. A showing that the refuge violated the statute was sufficient to authorize the injunction. *Id.*, at 1336.

Section 1-1-107(2)(d) gives the Secretary the authority to seek an injunction. Section 1-1-107(5), C.R.S. (2012) states that “[t]he provisions of this section [1-1-107] are enacted pursuant to section 11 of article VII of the state constitution, to secure the purity of elections and to guard against the abuses of the elective franchise.” The Secretary’s request for injunctive relief was sought on behalf of the public. He is attempting to enjoin actions that he contends are contrary to the Election Code and thereby “are imbued with great public importance.” *Lloyd A. Fry Roofing*, 191 Colo. at 473, 553 P.2d at 808.

Even if the court determines that the Secretary must meet the other three factors, the Secretary can do so.

**Irreparable injury.** The requirement that mail ballots be sent only to active voters is necessary to preserve the integrity of the election process. In *Duprey v. Anderson*, 184 Colo. 70, 518 P.2d 807, voters challenged the constitutionality of a statutory provision requiring elected official to remove the names of persons who failed to vote at the preceding biennial election from the voter registration books. The Colorado Supreme Court held that the provisions were consistent with the state’s obligation to secure the purity of elections. *Id.*, 184 Colo. at 75, 518 P.2d at 810. “[T]he election list becomes more authentic and is not susceptible to fraudulent voting practices or other abuses of the franchise. This is the legitimate state interest in the



purging procedure and in our view it far outweighs the light burden of re-registering.” *Id.*, 184 Colo. at 76, 518 P.2d at 810.

Similar to the State’s interest in the integrity of the voter registration list, the State has a strong interest in refusing to send ballots to person who failed to vote in previous elections. Only a small percentage of mail ballots are returned. The fate of most other ballots is unknown. Because the clerk cannot unilaterally track the ballots after they are mailed, there is a greater potential for fraud.

Clerk Johnson cites *Colon-Marrero v. Conty-Perez*, 2012 WL 5185997 (October 17, 2012) for the proposition that the harm is not irreparable. (Clerk’s Motion for Summary Judgment, pp. 26-27) This case differs in several significant respects. First, the voters who were removed were not allowed to vote because they were deemed to be not registered. This situation differs considerably from the case before this court. Here, electors who are designated as “inactive-failed to vote” may cast a ballot. In addition, the court did not completely dismiss the potential irreparable injury. “This does not mean, however, that there is no need to establish safeguards if the Court ultimately allows the I-8 voter the right to vote in the 2012 election.” *Id.* at 5. The Court then suggested that voters could go to the polls, present a card and vote provisional ballots. *Id.* \*\*9-10. In essence, he proposed the system similar to Colorado’s system for those who are denominated “inactive-failed to vote.”

In addition, election protocols must be implemented uniformly throughout the state. Uniformity of process is necessary to give to voters who reside in counties that opt for mail ballots to be treated equally. Clerk Johnson states that Election Code does not require uniformity because counties may opt out of mail ballot elections. (Clerk’s Motion for Summary Judgment, p. 25) This argument misses the point. All voters in counties that choose the mail ballot process

must be treated equally. If Boulder and Denver choose to use mail ballots, then inactive-failed to vote electors in both counties are entitled to be treated in a similar manner.

Clerk Johnson contends that the Secretary uses uniformity to exclude eligible voters. (Clerk's Motion for Summary Judgment, p. 25) This argument implies that the Secretary prevents "inactive-failed to vote" electors from voting. This argument is without merit. These individuals are notified long before the election. In addition, they may cast ballots. The only difference is that they are required to vote at a polling place.

Next, Clerk Johnson states that the Secretary contributed to lack of uniformity because he failed to monitor the statewide voter registration system in changes from inactive-failed to vote to active voter in El Paso county. (Clerk's Motion for Summary Judgment, p. 26) She implies, without an iota of proof, that they El Paso county officials unilaterally changed the information without a request from the elector.

Clerk Johnson argues that the Secretary claimed injury to the voter registration list. (Clerk's Motion for Summary Judgment, p. 26) This statement is incorrect. The Secretary cited a case that discussed registration lists for the proposition that the state has the power to change the status of voters who did not vote in the previous general election.

Clerk Johnson also cites Judge Whitney's ruling with respect to irreparable injury. Judge Whitney's ruling was based almost entirely on his rejection of the state's uniformity argument. He stated:

But when I look at irreparable injury and how uniformity comes into this, I'm also advised that the law that just sunset (sic), it allowed Denver to do exactly what it just did, and it sunset, and there was a reason for that law, and there was a reason for the sunset of it. But if it was good for five years, I can't imagine how it's going to create an irreparable injury if it's done one more time. And between now and the next election it's reparable.

You go back to the legislature. You have them change the statute. You implement a rule from the Secretary of State's Office and then you litigate that issue before the next election. All of the uniformity questions that came out here are reparable

(Exhibit 15, p. 89, ll.12-24 Clerk Johnson's Motion for Summary Judgment). Judge Whitney seemingly held that a violation of the uniform application of the law is not irreparable because the Secretary can return to the legislature for clarification or go to court. This ruling results in a non sequitur. A violation of existing law is not irreparable because the existing law can be changed. Moreover, Judge Whitney did not address in any detail the Secretary's concerns about potential fraud.

**Balance of harms** This factor favors the Secretary. Section 1-7.5-106(2), C.R.S. (2012) makes clerks agents of the Secretary to carry out the provisions of the Mail Ballot Election Act. As such, clerks do not have the authority to act in a manner inconsistent with the rules or orders of the Secretary for purposes of implementing the statute.

**Public Interest** This factor also favors the Secretary. The public interest lies in ensuring that public officials comply with statutes and that the Election Code is applied uniformly throughout the state.

## CONCLUSION

For the aforementioned reasons, the Court must enter summary judgment as follows:

Declare that Clerk Johnson must obey the rules, orders and directives of the Secretary, even if she believes them to be illegal or unconstitutional;

Declare that the Election Laws must be applied uniformly throughout the State;

Declare that Clerk Johnson does not have discretion to mail ballots under the Mail Ballot Act to voters who are designated as "inactive-failed to vote";

Declare that Clerk Johnson may send mail ballots to voters under UMOVA, including those who are designated as “inactive-failed to vote”, only upon receipt of an application from the voter; and

Enter an order enjoining Clerk Johnson from sending mail ballot to electors who are designated as “inactive-failed vote” and from mailing ballots to voters under UMOVA who have failed to submit an application.

JOHN W. SUTHERS  
Attorney General

/s/Maurice G. Knaizer

---

MAURICE G. KNAIZER, 05264\*

Deputy Attorney General

LEEANN MORRILL, 38742\*

Public Officials

State Services Section

Attorneys for Plaintiff

\*Counsel of Record

## **CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **BRIEF IN SUPPORT OF SECRETARY'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT JOHNSON'S MOTION FOR SUMMARY JUDGMENT** upon all parties herein by LexisNexis File and Serve or by email this 7th day of December, 2012, as follows:

Victoria J. Ortega  
Stephen Hahn  
Assistant City Attorney  
201 West Colfax Avenue, Dept. 1207  
Denver, CO 80202-5332

Daniel C. Kogovsek  
Pueblo County Attorney  
Peter S. Blood  
Assistant County Attorney  
215 West 10th Street  
Pueblo, CO 81003

J. Lee Gray  
Holland & Hart, LLP  
6380 S. Fiddlers Green Circle, Suite 500  
Greenwood Village, CO 80111

Myrna Perez (PerezM@exchange.law.nyu.edu)  
Jonathan Brater (braterj@exchange.law.nyu.edu)  
Brennan Center for Justice  
161 Avenue of the Americas, 12th floor  
New York, NY 10013

/s/ Debbie Bendell, Paralegal



Feb 14 2012  
6:36PM

**FILED Document**  
**CO Denver County District Court 2nd JD**  
**Filing Date: Dec 07 2012 02:02PM MST**  
**Filing ID: 48251115**  
**Review Clerk: Sean McGowan**

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock St. Denver, Colorado 80202</p> <p>SCOTT GESSLER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF COLORADO,</p> <p>Plaintiff,</p> <p>v.</p> <p>DEBRA JOHNSON, IN HER OFFICIAL CAPACITY AS THE CLERK AND RECORDER FOR THE CITY AND COUNTY OF DENVER</p> <p>Defendant,</p>	
<p>COLORADO COMMON CAUSE and GILBERT ORTIZ, in his official capacity as the Clerk and Recorder for the County of Pueblo</p> <p>Intervenors-Defendants.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* Reg. No. 05264 LEEANN MORRILL, Assistant Attorney General* Reg. No. 38742 1525 Sherman Street, 7<sup>th</sup> Floor Denver, CO 80203 Telephone: (303) 866-5380 FAX: (303) 866-5671 E-Mail: <a href="mailto:maurie.knaizer@state.co.us">maurie.knaizer@state.co.us</a> <a href="mailto:leeann.morrill@state.co.us">leeann.morrill@state.co.us</a> *Counsel of Record</p>	<p>Case No. 11CV6588 Courtroom: 203</p>
<p><b>SECRETARY'S ANSWERS TO FIRST SET OF INTERROGATORIES PROPOUNDED BY DEBRA JOHNSON</b></p>	

Scott Gessler, in his official capacity as the Secretary of State for the State of Colorado (hereinafter "the Secretary") hereby submits his Answers to Interrogatories Propounded by Debra Johnson.

**INTERROGATORY NO. 1:** Identify the person who answers these Interrogatories, and if more than one person supplies the information or answers these Interrogatories, please state the person who answered which portion of each Interrogatory.

**Objection:** Interrogatory No. 1 is unduly burdensome to the extent that it requires the Secretary to state the person who answered which portion of an Interrogatory when more than one person supplied the information or answer to the Interrogatory.

**Secretary's answer:** Subject to and without waiving the objection, the Secretary submits the following answer. Each answer to Interrogatories Nos. 3-26 identifies the person or persons who supplied the information or answers to the Interrogatory.

**INTERROGATORY NO. 2:** State the names and addresses of all persons who have or claim to have any information concerning the fact relevant to this litigation and state in complete detail the substance and nature of such information.

**Objection:** Interrogatory No. 2 is overbroad and unduly burdensome to the extent it seeks information relevant to claims, issues and counterclaims in this litigation raised by defendants- intervenors Ortiz and Common Cause. Defendant Johnson is not entitled to seek discovery on claims, issues or counterclaims that are unique to these other parties. In addition, the Secretary objects to the extent that the Interrogatory seeks information subject to the attorney-client privilege.

**Secretary's answer:** Subject to and without waiving the objection, the Secretary submits the following answer. The following employees have information relevant to the claims made by the Secretary against Defendant Johnson and the defenses raised by Defendant Johnson: Judd Choate, Wayne Munster, Hilary Rudy, Vicky Stecklein, Ben Schler, Richard Coolidge, Andrew Cole, William Hobbs, Gary Zimmerman, and Secretary of State Scott Gessler. The business office for each is 1700 Broadway, Denver, Colorado 80202. In addition, Defendant Johnson and members of her staff have information relevant to this litigation. The information is set forth in the answers to these interrogatories.

**INTERROGATORY NO. 3:** Describe the processes, steps, or actions you took to supervise pre-election practices related to or concerning the conduct of the Election including but not limited to processes, procedures, or other actions related to or concerning the conduct of the Election as a mail ballot election.

**Objection:** Interrogatory No. 3 is overbroad and unduly burdensome to the extent that it seeks information about practices related to all aspects of the conduct of the Election, as defined in the interrogatories. The Secretary's claims against Defendant Johnson and Defendant Johnson's defenses relate solely to actions taken by the Secretary and Defendant Johnson with regard to the Secretary's interpretation of statutes and rules governing the mailing of ballots in mail ballot elections to voters who are designated as "inactive failed to vote." The Interrogatory

seeks information about "pre-election practices" for all aspects of the Election, including but not limited to registration of voters, certification of the ballot, certification of voting machines, and training of election judges, among other matters.

**Secretary's answer:** Subject to and without waiving the objection, the Secretary submits the following answer. The customer support team for the statewide voter registration application (SCORE) responds to daily call and email inquiries regarding system functionality questions and issues. The team monitors election management activities conducted in the SCORE system, including but not limited to, detail of election setup, identifying eligible electors for participation in the election, ballot content, ballot inventory, issuance of ballots, and polling location information. A member of the team is available after business hours on weekdays and 24/7 on weekends to provide election management functional assistance to county users beginning the day of ballot certification and throughout the election cycle until each county and the Secretary have closed and certified the election in SCORE. In addition, any county can reach Judd Choate, Wayne Munster or Hilary Rudy by cell phone any time after business hours. The Division responds to one-on-one county questions throughout the year and provides ongoing guidance in the elections policy manual and the weekly newsletter to the counties called the Week-in-Brief.

The SCORE customer support team developed and provided a Mail Ballot Election Setup Checklist that was reviewed and updated prior to state and local district ballot certification to counties. The Division developed a standard mail ballot plan template that was reviewed and updated prior to the filing deadline for the November 2011 statewide election. Staff monitored submission of mail ballot plans to ensure that every county that intended to conduct a mail ballot election submitted a plan. The Division staff also reviewed the plans submitted to ensure compliance with the provisions of Article 7.5 of Title 1, C.R.S., and the Secretary's Election Rules. Staff worked with counties to revise or correct any portions of the submitted plans that were not in compliance and issued approval letters. The Division also developed a mail ballot election Quick Reference Guide and a 2011 elections calendar, both of which were updated prior to the 2011 election cycle.

Hilary Rudy, Ben Schler, and Vicky Stecklein supplied the information and answers to Interrogatory No. 3.

**INTERROGATORY NO. 4:** Describe the processes, steps, or actions you took to review and approve or disapprove Denver's written mail ballot plan for conducting the Election as a mail ballot election.

**Secretary's answer:** In 2008, the Division developed a standard fillable mail ballot plan template. The template included check boxes for designated election officials to affirm that they would comply with the requirements of Article 7.5 of Title 1, C.R.S., and the Secretary's Election Rules. The template was amended before the 2009 November election to include legislative changes from the 2009 legislative session. Specifically, the statement regarding which



electors would be mailed ballots was amended to include a statement in accordance with section 1-7.5-108.5(2)(b), C.R.S., that for "any mail ballot election to be conducted in November 2009, a mail ballot shall be mailed to all registered electors whose registration is marked as 'Inactive-failed to vote.'" The Division created a plan addendum to address legislative changes for those counties who submitted the plan before the revised template was available. Division staff provided training on conducting mail ballot elections and use of the plan template during regional trainings in the spring of 2009. The purpose of the training was to highlight the change to law requiring ballots to be mailed to inactive – failed to vote electors in the November 2009 election, as well as the new template that the counties were asked to use to submit mail ballot plans for the November 2009 election.

The template was reviewed and updated prior to the filing deadline for the November 2011 statewide election. In addition, to addressing other legislative changes, the plan template was amended to remove the statement in accordance with section 1-7.5-108.5(2)(B), C.R.S. that had "sunsetted." The statement that for "any mail ballot election to be conducted in November 2009, a mail ballot shall be mailed to all registered electors whose registration records has been marked as 'Inactive-failed to vote'" was deleted from the template.

Mail ballot plans for the November 2011 coordinated election were due on September 7, 2011. Of Colorado's 64 counties, 60 submitted mail ballot plans. Denver County submitted its mail ballot plan by email that was received by the Division at 10:33 p.m. on September 7, 2011. The Denver County mail ballot plan was submitted using the standard template. In addition to the completed mail ballot plan template, Denver submitted copies of its proposed secrecy sleeve, return envelope, and voter instructions. The Secretary's office has 15 days from the date of receipt to approve or disapprove a mail ballot plan. Therefore, the office reviews plans in the order in which they are submitted. Secretary of State staff began reviewing Denver's plan on Friday September 9, 2011. First, staff examined the plan for completeness to make sure Denver had not purposefully or mistakenly neglected to fill out one or more sections. When reviewing a plan, if staff identifies missing information, it contacts the county to ask for a complete plan. Because staff concluded that the plan was complete, Denver was not contacted.

Next, staff reviewed the content of the plan. There are 21 numbered sections in the fillable mail ballot plan, each of which must be completed by the County. Some sections require the county to enter county-specific information regarding the conduct of its election, while other sections require the county to check applicable boxes indicating that it will comply with specific provisions of Title 1, C.R.S., or the Secretary's Election Rules.

If staff identifies any issues with the content of the plan during review, it contacts the county to request amendments and resubmission of the plan. After reviewing Denver's plan, staff determined that Denver had filled in the appropriate information and checked the applicable boxes indicating that it would comply with statute and rule. Specifically, Denver indicated in section 5 of the plan that its estimated eligible number of electors would be 288,204. Section 5 did not ask counties to separately list active and inactive voters. Secretary of State staff assumed

that the number provided by Denver included both active and inactive electors. All active and all inactive electors are eligible to vote in the election. The mail ballot plan designates mail as a ballot delivery system; however, it also designates several other methods of obtaining a ballot and voting in the election. In section 8 of the plan, counties must list the address and hours of all of the drop-off locations in the county where electors can deliver their voted ballot. In section 9, counties must list the address and hours of all walk-in voting locations (or service centers) that will be open. At these locations, any registered elector can obtain and vote a ballot or vote on accessible equipment. Sections 10 and 11 require counties to outline the number of accessible pieces of equipment that will be available as well as the dates and hours the equipment will be available, and section 16 outlines the procedures for ensuring the equipment's security.

In section 5, Denver indicated by checking the appropriate box that it would "mail to each active registered elector a mail ballot packet." Denver did not indicate in section 5, or anywhere else in the plan, that the county intended to mail ballot packets to electors marked as "Inactive-Failed to Vote." Because Denver had fully completed Section 5 and all other sections of the mail ballot plan, Secretary's staff concluded that the plan complied with Article 7.5 of Title 1, C.R.S., and Election Rule 12.

After review of the mail ballot plan was complete, another Secretary of State staff member reviewed Denver's proposed secrecy sleeve, return envelope, and voter instructions and determined that they complied with statute and rule. Upon determining that Denver's plan, on its face, complied with statute and rule, the Secretary of State sent a letter approving Denver's plan on Thursday, September 15, 2011.

Hilary Rudy and Ben Schler supplied the information and answers to Interrogatory No. 4.

**INTERROGATORY NO. 5:** Describe the processes, steps, or actions you took to review and approve or disapprove written mail ballot plans submitted by other County Clerk and Recorders to conduct the Election as a mail ballot election.

**Objection:** Interrogatory No. 5 is not relevant to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence. Interrogatory No. 5 also is overbroad and unduly burdensome. Fifty-nine other counties submitted mail ballot plans. The issue in this case is primarily a legal issue: whether Colorado law precludes counties from sending ballots in a mail ballot election to voters who are designated as "inactive-failed to vote." The affirmative defenses raised by Defendant Johnson are unique to Denver County.

**Secretary's answer:** Subject to and without waiving the objection, the Secretary responds as follows. In addition to the plan submitted by Denver, the Secretary's office received 59 mail ballot plans for the November 2011 election. In general, the Secretary's staff followed the same procedure to review the plans submitted by each of the other 59 counties as it used to review Denver's plan.

**INTERROGATORY NO. 10:** Describe all communications and/or Documents you provided to County Clerks and Recorders or any other individuals or organizations concerning the mailing of ballots to eligible electors, or inactive failed to vote electors for the Election.

**Objection:** Interrogatory No. 10 is not relevant to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence. Interrogatory No. 10 also is overbroad and unduly burdensome. The issue in this case is primarily a legal issue: whether Colorado law precludes counties from sending ballots in a mail ballot election to voters who are designated as "inactive-failed to vote." The affirmative defenses raised by Defendant Johnson are unique to Denver County. Interrogatory No. 10 seeks information regarding communications or documents provided to "any other individuals or organizations." This category includes all citizens or entities that may have made any inquiry about mail ballot elections. For example, the interrogatory includes any inquiry about the location of vote centers or the deadlines for submitting ballots by mail.

**Secretary's answer:** Subject to and without waiving the objection, the Secretary submits the following answer. The SCORE Customer Support team developed and provided a Mail Ballot Election Setup Checklist that was reviewed and updated prior to state and local district ballot certification to counties. The checklist specifies that counties should include electors whose records are marked inactive – failed to vote only in primary mail ballot elections. The team began monitoring county election management setup activity in SCORE two days prior to ballot certification by the state. On August 31, 2011 the SCORE data analyst, Kathy Overman, provided the team with a list of counties that had set up the election vote method in the election management module (i.e., polling place, vote center, mail ballot). Ms. Overman also sent the team an email listing counties that set up the election method as mail ballot and had also selected the flag to include inactive – failed to vote electors in the election. When the inactive – failed to vote flag is selected in the election setup, the system automatically includes these electors in the election and prepares to issue and mail ballots once the county completes the "generate ballots" step.

Counties in this initial list included Baca, Denver, Mesa, Montrose and Pueblo. On August 31, 2011, the customer support supervisor, Vicky Stecklein, asked team members to contact these counties to advise them that they must have mistakenly selected the flag to include inactive – failed to vote electors. The team conducted these early communications to allow counties to de-select the flag prior to generating and issuing ballots. Josh Johnson called the five identified counties on August 31, 2011. Baca, Mesa, and Montrose indicated they would remove the flag before generating ballots. Denver and Pueblo confirmed they intended to mail ballots to inactive – failed to vote electors. Following the telephone conversations, Mr. Johnson emailed Ms. Stecklein to confirm that he had spoken with the counties.

When Mr. Johnson called Denver County he spoke with Vic Richardson. Mr. Johnson asked Mr. Richardson if he was aware that the flag had been selected and Mr. Richardson



responded that he was aware. Mr. Johnson then asked if the flag was selected on purpose and Mr. Richardson responded that they had intentionally selected the flag. Mr. Richardson then asked if the flag should not have been selected, and Mr. Johnson communicated that he was unable to answer that question as it was a policy question but that he would escalate the matter to his supervisor, Vicky Stecklein. Ms. Stecklein then advised the management team of the conversation.

Hilary Rudy was conferenced into a discussion between the SCORE customer support staff and Amanda Hill, an employee of the Denver Elections Division, on September 12, 2011. During that conversation, Ms. Rudy was advised that Denver County intended to mail ballots to electors whose records were marked "inactive – failed to vote" for the November 2011 election. She advised Ms. Hill, that it was the Secretary's interpretation of the Mail Ballot Election Act that ballots are mailed only to active electors in a coordinated or nonpartisan mail ballot election and that all inactive electors could receive a ballot upon request. Ms. Hill stated that her instructions were to mail ballots to all electors whose records were marked "active" and "inactive – failed to vote." At that time, Ms. Rudy asked Ms. Hill to advise the Denver Elections Director of the conversation and requested that the Director give Ms. Rudy a call to discuss the issue. On September 14, 2011, Ms. Rudy spoke with Amber McReynolds, the Denver Elections Director, who advised Ms. Rudy that Denver County's interpretation differed from the Secretary's and that the county would be mailing the ballots as planned

Judd Choate was informed September 12, 2011 when Hilary Rudy brought the matter to his attention. Then, on September 14, 2011, prior to and during breaks in interviews for the Denver Elections Director position, Debra Johnson, Pam Anderson, and Judd Choate spoke at length about the legality of sending ballots to inactive – failed to vote electors. These individuals discussed the origins of the law that sunsetted before the 2011 coordinated elections requiring ballots to be mailed to inactive-failed to vote electors, as well as the effect that Denver's decision would have on the uniform application of election laws.

Judd Choate, Wayne Munster, Hilary Rudy, and Vicky Stecklein supplied the information and answers to Interrogatory No. 10.

**INTERROGATORY NO. 11:** What is the legal effect of the Secretary's approval or disapproval of an election official's written plan for conducting a mail ballot election?

**Secretary's answer:** The Secretary's approval of a mail ballot plan means that the Secretary has determined that the plan complies with the provisions of Article 7.5 of Title 1, C.R.S. The Secretary's disapproval of a mail ballot plan means that the plan does not comply with the provisions of Article 7.5 of Title 1, C.R.S., and cannot be applied until it is corrected to comply with the provisions of Article 7.5 of Title 1, C.R.S.

Judd Choate supplied the information and answers to Interrogatory No. 11.

**INTERROGATORY NO. 12:** State the date upon which you first learned or became aware that the Denver County Clerk and Recorder planned to mail ballots to inactive failed to vote electors of the City and County of Denver for the Election and explain how you became aware of this.

**Secretary's answer:** See answer to Interrogatory No. 10.

**INTERROGATORY NO. 13:** Describe all meetings or discussions whether internal or otherwise, where the mailing of ballots to inactive failed to vote electors by the Denver Clerk and Recorder was discussed and include who discussed it, what was discussed, and where it was discussed.

**Objection:** Interrogatory No. 13 requests information subject to the attorney-client privilege. The Secretary also objects on the ground that Interrogatory No. 13 is not relevant to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence. Interrogatory No. 13 also is overbroad and unduly burdensome. The request includes all "discussions" with anyone, such as the press or a citizen, who may have made any inquiry.

**Secretary's answer:** Subject to and without waiving the objection, the Secretary responds as follows. Division staff met in the Department offices on September 12, 2011 and discussed Denver County's stated plan to mail ballots to electors whose records were marked inactive – failed to vote. These meetings included only Elections Division staff. Division staff, namely Judd Choate, Wayne Munster, and Hilary Rudy, briefed the Secretary and other members of the administration later that afternoon. Also, see answers to Interrogatories Nos. 10-12.

Judd Choate and Hilary Rudy supplied the information and answers to Interrogatory No. 13.

**INTERROGATORY NO. 14:** Describe all communications and/or Documents issued from or received by the Secretary of State regarding the mailing of ballots to inactive failed to vote electors by the Denver County Clerk and Recorder or any other County Clerks and Recorder, including communications to any elected officials in the State of Colorado.

**Objection:** Interrogatory No. 14 is not relevant to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence. Interrogatory No. 14 also is overbroad and unduly burdensome. The issue in this case is primarily a legal issue: whether Colorado law precludes counties from sending ballots in a mail ballot election to voters who are designated as "inactive-failed to vote." The affirmative defenses raised by Defendant Johnson are unique to Denver County.

Interrogatory No. 14 seeks information regarding the communications or documents issued or received by the Secretary regarding the mailing of ballots to voters designated as

"inactive-failed to vote" by any of the other 59 counties conducting mail ballot elections. Responding to this interrogatory would require review of the all documents sent by or received from the other 59 counties that conducted mail ballot elections, including those counties that agreed with the Secretary's interpretation. In addition, the request is not limited in time. It includes all elections since the inception of mail ballot elections in the state of Colorado.

**Secretary's answer:** Subject to and without waiving the objection, the Secretary responds as follows. On August 31, 2011, customer support team member Josh Johnson called Denver County and spoke with Vic Richardson. Mr. Johnson asked Mr. Richardson if he was aware the flag had been selected and Mr. Richardson responded that he was aware. Mr. Johnson then asked if the flag was selected on purpose and Mr. Richardson responded that they had intentionally selected the flag.

On Friday, September 2, 2011, The SCORE customer support team emailed the Mail Ballot Election Setup Checklist to each county. The checklist was reviewed and updated prior to state and local district ballot certification to counties, and specified that counties should include electors whose records are marked inactive – failed to vote only in primary mail ballot elections.

On September 16, 2011, Judd Choate sent a letter to the Denver County Clerk and Recorder ordering her to mail ballots only to active registered electors.

Judd Choate and Vicky Stecklein supplied the information and answers to Interrogatory No. 14.

**INTERROGATORY NO. 15:** Describe all communications and/or Documents to County Clerks and Recorders or any other individuals or organizations stating your orders and/or interpretations of Section 1-7.5-107(3)(a)(I).

**Objection:** Interrogatory No. 15 is not relevant to the subject matter of the pending action and is not reasonably calculated to lead to the discovery of admissible evidence. Interrogatory No. 15 also is overbroad and unduly burdensome. The issue in this case is primarily a legal issue: whether Colorado law precludes counties from sending ballots in a mail ballot election to voters who are designated as "inactive-failed to vote." The affirmative defenses raised by Defendant Johnson are unique to Denver County. The interrogatory is not limited to the 2011 election or to the issues before this court. It seeks information about any matter concerning mail ballot elections since the inception of the law.

**Secretary's answer:** Subject to and without waiving the objection, the Secretary responds as follows. See answer to Interrogatory No. 14.

**INTERROGATORY NO. 16:** Describe all communications and/or Documents to County Clerks and Recorders or any other individuals or organizations stating your orders and/or interpretation of Section 1-8.3-101, et. seq.

I, Judd Choate, hereby certify that my foregoing answers to Defendant Debra Johnson's First Set of Interrogatories Propounded to Scott Gessler as Secretary of State for the State of Colorado are true and complete to the best of my knowledge, information, and belief.



Judd Choate  
Director, Division of Elections  
Colorado Department of State  
1700 Broadway, Suite 270  
Denver, Colorado 80290

Subscribed and sworn before me by Judd Choate on this 14<sup>th</sup> day of February, 2012.

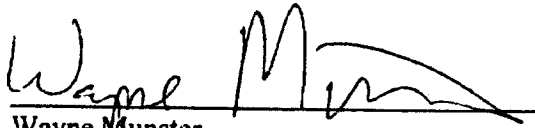
COUNTY OF DENVER                    )  
  )     [SEAL]  
STATE OF COLORADO                )

Notary Public: Kristine Reynolds

My Commission Expires: 1-2-2016



I, Wayne Munster, hereby certify that my foregoing answers to Defendant Debra Johnson's First Set of Interrogatories Propounded to Scott Gessler as Secretary of State for the State of Colorado are true and complete to the best of my knowledge, information, and belief.



Wayne Munster  
Deputy Director, Division of Elections  
Colorado Department of State  
1700 Broadway, Suite 270  
Denver, Colorado 80290

Subscribed and sworn before me by Wayne Munster on this 14<sup>th</sup> day of February, 2012.

COUNTY OF DENVER

)

[SEAL]

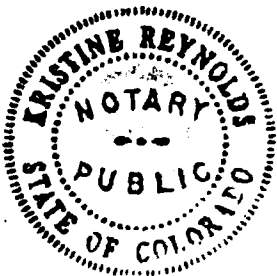
STATE OF COLORADO

)

Notary Public:




My Commission Expires: 1-2-2016





I, Hilary Rudy, hereby certify that my foregoing answers to Defendant Debra Johnson's First Set of Interrogatories Propounded to Scott Gessler as Secretary of State for the State of Colorado are true and complete to the best of my knowledge, information, and belief.

  
Hilary Rudy  
Senior Policy and Legislative Analyst  
Division of Elections  
Colorado Department of State  
1700 Broadway, Suite 270  
Denver, Colorado 80290

Subscribed and sworn before me by Hilary Rudy on this 13<sup>th</sup> day of February, 2012.

COUNTY OF DENVER                    )  
  ) [SEAL]  
STATE OF COLORADO                )

Notary Public: Kristine Reynolds

My Commission Expires: 1-2-2016



I, Vicky Stecklein, hereby certify that my foregoing answers to Defendant Debra Johnson's First Set of Interrogatories Propounded to Scott Gessler as Secretary of State for the State of Colorado are true and complete to the best of my knowledge, information, and belief.

*Vicky Stecklein*  
Vicky Stecklein  
SCORE Manager  
Division of Elections  
Colorado Department of State  
1700 Broadway, Suite 270  
Denver, Colorado 80290

Subscribed and sworn before me by Vicky Stecklein on this 13<sup>th</sup> day of February, 2012.

COUNTY OF DENVER )

STATE OF COLORADO )

[SEAL]

Notary Public: *Kristine Reynolds*

My Commission Expires: 1-2-2016



I, Ben Schler, hereby certify that my foregoing answers to Defendant Debra Johnson's First Set of Interrogatories Propounded to Scott Gessler as Secretary of State for the State of Colorado are true and complete to the best of my knowledge, information, and belief.



Ben Schler  
Ballot Access Manager  
Division of Elections  
Colorado Department of State  
1700 Broadway, Suite 270  
Denver, Colorado 80290

Subscribed and sworn before me by Ben Schler on this 13<sup>th</sup> day of February, 2012.

COUNTY OF DENVER )

STATE OF COLORADO )

[SEAL]

Notary Public:



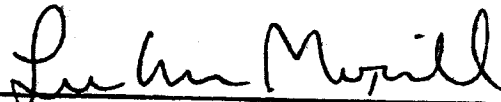
My Commission Expires:

1-2-2016



DATED this 14<sup>th</sup> day of February, 2012.

JOHN W. SUTHERS  
Attorney General



MAURICE G. KNAIZER, 05264\*

Deputy Attorney General

LEEANN MORRILL, 38742\*

Assistant Attorney General

Public Officials

State Services Section

Attorneys for Plaintiff

\*Counsel of Record

1525 Sherman Street, 7<sup>th</sup> Floor

Denver, Colorado 80203

Phone: (303)866-5380

Fax: (303)866-5671

Email: [maurie.knaizer@state.co.us](mailto:maurie.knaizer@state.co.us)

[leeann.morrill@state.co.us](mailto:leeann.morrill@state.co.us)

1742

FILED Document  
FILED Document  
CO District Court 2nd JD  
County of District Court  
Election Date: Sep 18, 2012 12:08 PM MST  
Filing ID: 46297567  
Review Clerk: Sean McGowan  
Review Clerk: Sara Bridges

CHAPTER 374

**ELECTIONS**

HOUSE BILL 08-1329

BY REPRESENTATIVE(S) Marshall, Carroll T., Curry, Kefalas, Kerr A., Labuda, Madden, Middleton, Todd, Borodkin, and May M;  
also SENATOR(S) Gordon, Groff, and Tupa

**AN ACT**

**CONCERNING PROCEDURES FOR UPDATING VOTER REGISTRATION LISTS AS APPLIED TO REGISTERED ELECTORS DEEMED INACTIVE IN CONNECTION WITH MAIL BALLOT ELECTIONS.**

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1. 1-2-605 (2), Colorado Revised Statutes, is amended to read:**

**1-2-605. Canceling registration. (2)** A registered elector who is deemed "Active" but who fails to vote in a general election shall have the elector's registration record marked "Inactive (insert date)" by the county clerk and recorder following the general election. IN THE CASE OF A REGISTERED ELECTOR TO WHOM THE COUNTY CLERK AND RECORDER MAILED A CONFIRMATION CARD PURSUANT TO PARAGRAPH (a) OF SUBSECTION (6) OF THIS SECTION NO LATER THAN NINETY DAYS AFTER THE 2008 GENERAL ELECTION AND WAS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL MARK THE REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS "INACTIVE - UNDELIVERABLE".

**SECTION 2. Article 7.5 of title 1, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:**

**1-7.5-108.5. Voter information card - verification of active status - designation of inactive status - mailing of mail ballots - repeal. (1)** NOT LESS THAN NINETY DAYS BEFORE A MAIL BALLOT ELECTION CONDUCTED PURSUANT TO THIS ARTICLE, THE COUNTY CLERK AND RECORDER SHALL MAIL A VOTER INFORMATION CARD TO ANY REGISTERED ELECTOR WHOSE REGISTRATION RECORD HAS BEEN MARKED INACTIVE - FAILED TO VOTE." FOR PURPOSES OF THIS SECTION, "INACTIVE - FAILED TO VOTE" SHALL MEAN A REGISTERED ELECTOR WHO IS DEEMED

*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

"ACTIVE" BUT WHO FAILED TO VOTE IN A GENERAL ELECTION IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1-2-605 (2); EXCEPT THAT THE TERM "INACTIVE - FAILED TO VOTE" SHALL NOT INCLUDE AN ELECTOR WHOSE PREVIOUS COMMUNICATION FROM THE COUNTY CLERK AND RECORDER WAS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE AND IS, ACCORDINGLY, REFERRED TO IN THE REGISTRATION RECORDS OF THE COUNTY AS "INACTIVE - UNDELIVERABLE" PURSUANT TO SECTION 1-2-605 (2). THE VOTER INFORMATION CARD REQUIRED BY THIS SECTION MAY BE SENT AS PART OF THE VOTER INFORMATION CARD REQUIRED TO BE MAILED PURSUANT TO SECTION 1-5-206 (1). THE VOTER INFORMATION CARD SHALL BE SENT TO THE ELECTOR'S ADDRESS OF RECORD UNLESS THE ELECTOR HAS REQUESTED THAT SUCH COMMUNICATION BE SENT TO HIS OR HER DELIVERABLE MAILING ADDRESS PURSUANT TO SECTION 1-2-204 (2) (k) AND SHALL BE MARKED "DO NOT FORWARD".

(2) (a) IF THE VOTER INFORMATION CARD REQUIRED TO BE SENT TO A REGISTERED ELECTOR WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - FAILED TO VOTE" PURSUANT TO SUBSECTION (1) OF THIS SECTION IS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL MARK THE REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS "INACTIVE - UNDELIVERABLE".

(b) (I) IN CONNECTION WITH ANY MAIL BALLOT ELECTION TO BE CONDUCTED IN NOVEMBER 2009, A MAIL BALLOT SHALL BE MAILED TO ALL REGISTERED ELECTORS WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - FAILED TO VOTE". SUCH MAIL BALLOT SHALL NOT BE SENT TO REGISTERED ELECTORS WHOSE REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - UNDELIVERABLE".

(II) THIS PARAGRAPH (b) IS REPEALED, EFFECTIVE JULY 1, 2011.

(c) IN ANY MAIL BALLOT ELECTION CONDUCTED ON OR AFTER JULY 1, 2008, IF A MAIL BALLOT SENT TO A REGISTERED ELECTOR IS RETURNED BY THE UNITED STATES POSTAL SERVICE AS UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL MARK THE REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS "INACTIVE - UNDELIVERABLE".

**SECTION 3.** 1-2-605, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

**1-2-605. Canceling registration.** (1) NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION, REQUIREMENTS PERTAINING TO THE VERIFICATION BY A COUNTY CLERK AND RECORDER OF THE STATUS OF A REGISTERED ELECTOR WHO HAS BEEN DEEMED "INACTIVE" IN PREPARATION FOR A MAIL BALLOT ELECTION SHALL BE GOVERNED BY THE PROVISIONS OF SECTION 1-7.5-108.5.

**SECTION 4.** 1-5-101 (5), Colorado Revised Statutes, is amended to read:

**1-5-101. Establishing precincts and polling places for partisan elections.** (5) NOTWITHSTANDING SECTION 1-5-103, AND EXCEPT AS OTHERWISE REQUIRED BY FEDERAL LAW, in order to facilitate the preparation of a computerized database for use in the ~~reapportionment~~ REDISTRICTING process that will take place after the decennial census in ~~the year 2000~~ YEARS ENDING IN THE NUMBER ZERO, THE

PRECINCT BOUNDARIES ESTABLISHED BY the county clerk and recorder of each county, subject to approval by the board of county commissioners, ~~shall establish precinct boundaries which~~ THAT ARE USED IN THE GENERAL ELECTION IN YEARS ENDING IN THE NUMBER EIGHT shall remain in effect until after the general election in ~~2000~~ YEARS ENDING IN THE NUMBER ZERO; except that the precincts so established may be subdivided within the boundaries of the original precinct. ~~Such precincts shall be established no later than twenty-nine days prior to the precinct caucus day in 1998; except that, in counties affected by the reapportionment plan required by Sanchez v. State of Colorado, 97 F.3d 1303 (10th Cir. 1996), such precincts shall be established within two weeks after the federal district court approves of such reapportionment plan~~ AND ADJACENT PRECINCTS MAY BE AGGREGATED FOR PURPOSES OF DATA COLLECTION. In establishing precinct boundaries pursuant to the provisions of this subsection (5), county clerk and recorders and boards of county commissioners shall, to the extent reasonably possible, utilize natural and man-made boundaries that meet the requirements for visible features adopted by the United States bureau of the census. IF THE PRECINCT BOUNDARIES USED IN THE GENERAL ELECTION IN YEARS ENDING IN THE NUMBER EIGHT ARE CHANGED PRIOR TO THE NEXT GENERAL ELECTION IN YEARS ENDING IN THE NUMBER ZERO PURSUANT TO FEDERAL LAW, THE COUNTY CLERK AND RECORDERS SHALL TIMELY SUBMIT IN WRITING TO THE DIRECTOR OF RESEARCH OF THE LEGISLATIVE COUNCIL A LIST SHOWING THE PRECINCTS FOR WHICH THE BOUNDARIES HAVE CHANGED.

**SECTION 5. Effective date - applicability.** This act shall take effect July 1, 2008, and shall apply to mail ballot elections conducted on or after said date.

**SECTION 6. Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 2, 2008



Second Regular Session  
Sixty-eighth General Assembly  
STATE OF COLORADO

FILED Document  
RECEIVED  
CO Denver County District Court 2nd JD  
Filing Date: Dec 07 2012 03:02 PM MST  
Filing ID: 49251115  
Adapted from House  
Review Clerk: Susan McGowan  
HOUSE BILL 12-1267

LLS NO. 12-0609.01 Kate Meyer x4348

HOUSE SPONSORSHIP

Coram,

SENATE SPONSORSHIP

Heath,

House Committees  
State, Veterans, & Military Affairs

Senate Committees  
State, Veterans & Military Affairs  
Appropriations

A BILL FOR AN ACT

101 CONCERNING THE SIMPLIFICATION OF CERTAIN PREELECTION  
102 PROCEDURES IN ORDER TO REDUCE THE COST OF  
103 ADMINISTERING ELECTIONS, AND, IN CONNECTION THEREWITH,  
104 MAKING AN APPROPRIATION.

Bill Summary

*(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)*

The bill:

! Allows the secretary of state to waive the requirement that

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.  
Capital letters indicate new material to be added to existing statute.  
Dashes through the words indicate deletions from existing statute.

SENATE  
3rd Reading Unamended  
May 7, 2012

SENATE  
Amended 2nd Reading  
May 4, 2012

HOUSE  
3rd Reading Unamended  
March 22, 2012

HOUSE  
Amended 2nd Reading  
March 20, 2012



a political subdivision must use a vote center in an election other than a general election before establishing a vote center for a general election;

! Repeals the requirement that ballots sent by mail contain ballot stubs;

! Consolidates voter information card mailings, adds information that must be included on such mailings, and extends the deadline by which the mailings must be made for a primary election conducted as a mail ballot election; and

! Reduces, to 7 days prior to any election, the time allotted for early voting and specifies that, while a board of county commissioners has the discretion to extend early voting hours, it may not increase the period of time for early voting.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1. In Colorado Revised Statutes, add 1-2-229 as**

3 **follows:**

4 **1-2-229. Change in status of electors deemed "Inactive - failed**  
5 **to vote" - transfer to active status - repeal. (1) NOTWITHSTANDING ANY**  
6 **OTHER PROVISION OF LAW, ANY REGISTERED ELECTOR WHOSE**  
7 **REGISTRATION RECORD HAS BEEN MARKED AS "INACTIVE - FAILED TO**  
8 **VOTE" AS OF THE EFFECTIVE DATE OF THIS SECTION SHALL FROM THAT**  
9 **DATE FORWARD BE DEEMED TO HOLD THE STATUS OF AN ACTIVE ELECTOR.**

10 **(2) (a) BY AUGUST 1, 2012, THE SECRETARY OF STATE SHALL**  
11 **UPDATE THE STATEWIDE VOTER REGISTRATION DATABASE TO REFLECT THE**  
12 **ELIMINATION OF "INACTIVE - FAILED TO VOTE" VOTER STATUS PURSUANT**  
13 **TO SUBSECTION (1) OF THIS SECTION AND, AS APPROPRIATE, RESTORE**  
14 **PERMANENT MAIL-IN VOTER STATUS TO THOSE ELECTORS WHO HAD**  
15 **PREVIOUSLY SELECTED SUCH STATUS BUT HAD SUBSEQUENTLY BEEN**  
16 **MARKED AS "INACTIVE - FAILED TO VOTE".**

17 **(b) THIS SUBSECTION (2) IS REPEALED, EFFECTIVE JULY 1, 2013.**

1        SECTION 2. In Colorado Revised Statutes, 1-2-605, amend (1)  
2        (a) (I), (1) (b), (3), (4) introductory portion, (6) (a), and (7); and repeal  
3        (2), (5), and (11) as follows:

4        1-2-605. Canceling registration - voter confirmation card.  
5        (1) (a) (I) Communication by mail from the county clerk and recorder to  
6        the registered eligible electors of a county shall be in the form of a voter  
7        information card, including but not limited to the elector's name and  
8        address, precinct number, and polling place, which shall be mailed to the  
9        elector's address of record unless the elector has requested that the card  
10       be sent to his or her deliverable mailing address pursuant to section  
11       1-2-204 (2) (k). The county clerk and recorder shall send a voter  
12       information card by forwardable mail to each active registered eligible  
13       elector of the county, as defined in section 1-1-104 (16), and by  
14       nonforwardable mail to each inactive registered eligible elector, except  
15       an elector whose previous communication from the county clerk and  
16       recorder was returned by the United States postal service as undeliverable  
17       or an elector whose registration record was marked "Inactive" by the  
18       county clerk and recorder pursuant to subsection (2) of this section before  
19       the general election of 2006.

20       (b) For all electors whose communication pursuant to paragraph  
21       (a) of this subsection (1) is returned by the United States postal service as  
22       undeliverable at the elector's voting address, the county clerk and recorder  
23       may SHALL mark the registration record of that elector with the word  
24       "Inactive" PHRASE "INACTIVE - RETURNED MAIL".

25       (2) A registered elector who is deemed "Active" but who fails to  
26       vote in a general election shall have the elector's registration record  
27       marked "Inactive (insert date)" by the county clerk and recorder following

1 the general election. In the case of a registered elector to whom the  
2 county clerk and recorder mailed a confirmation card pursuant to  
3 paragraph (a) of subsection (6) of this section no later than ninety days  
4 after the 2008 general election and was returned by the United States  
5 postal service as undeliverable, the county clerk and recorder shall mark  
6 the registration record of that elector with the words "Inactive -  
7 undeliverable".

8 (3) Any registered elector whose registration record has been  
9 marked "Inactive" "INACTIVE - RETURNED MAIL" shall be eligible to vote  
10 in any election where registration is required and the elector meets all  
11 other requirements.

12 (4) Any "Inactive" "INACTIVE - RETURNED MAIL" elector shall be  
13 deemed "Active" if:

14 (5) If a mail or mail-in ballot that was mailed pursuant to the  
15 requirements of this article to an elector who has been deemed "Active"  
16 is returned to the county clerk and recorder by the United States postal  
17 service as undeliverable, the county clerk and recorder shall send to the  
18 elector's address of record, unless the elector has requested that such  
19 communication be sent to his or her deliverable mailing address pursuant  
20 to section 1-2-204 (2) (k), a notice pursuant to section 1-2-509 by  
21 forwardable mail and a postage prepaid, preaddressed form by which the  
22 elector may verify or correct the address information. If the elector  
23 verifies that he or she resides in a county other than the county mailing  
24 the mail or mail-in ballot, the county clerk and recorder shall forward the  
25 address information to the county clerk and recorder of the county in  
26 which the voter resides. If the elector fails to respond, the county clerk  
27 and recorder shall mark the registration record of that elector with the

1 word "Inactive".

2 (6) (a) No later than ninety days after any general election, any  
3 registered elector whose registration record is marked "Inactive"  
4 "INACTIVE - RETURNED MAIL" and who has not previously been mailed a  
5 confirmation card shall be mailed a confirmation card by the county clerk  
6 and recorder.

7 (7) If the county clerk and recorder receives no response to the  
8 confirmation card and the elector has been designated "Inactive"  
9 "INACTIVE - RETURNED MAIL" for two general elections since the  
10 confirmation card was mailed pursuant to the requirements of this article,  
11 the county clerk and recorder shall cancel the registration record of the  
12 elector; except that, notwithstanding any other provision of law, no  
13 elector's registration record shall be canceled solely for failure to vote.

14 (11) Notwithstanding any other provision of this section,  
15 requirements pertaining to the verification by a county clerk and recorder  
16 of the status of a registered elector who has been deemed "Inactive" in  
17 preparation for a mail ballot election shall be governed by the provisions  
18 of section 1-7.5-108.5.

19 **SECTION 3.** In Colorado Revised Statutes, 1-5-206, amend (1)  
20 (a) as follows:

21 **1-5-206. Postcard notice - reimbursement of mailing cost.**

22 (1) (a) ~~No later than twenty-five~~ NOT LESS THAN SIXTY days before the  
23 general election or a special legislative election, the county clerk and  
24 recorder shall mail a voter information card concerning the general  
25 election or special legislative election by forwardable mail \_\_\_ to each  
26 active registered eligible elector of the county, as defined in section  
27 1-1-104 (16). ~~and by nonforwardable mail to each inactive registered~~



1 eligible elector, except an elector whose previous communication from  
2 the county clerk and recorder was returned by the United States postal  
3 service as undeliverable or an elector whose registration record was  
4 marked "Inactive" by the county clerk and recorder pursuant to section  
5 1-2-605 (2) before the general election of 2006.

6 **SECTION 4.** In Colorado Revised Statutes, 1-5-102.7, **amend** (7)  
7 as follows:

8 **1-5-102.7. Combining precincts and polling places - vote**  
9 **centers.** (7) The designated election official of a political subdivision  
10 shall not establish vote centers for a general election unless vote centers  
11 were used in a previous election held by the political subdivision in an  
12 odd-numbered year or in a primary election held on or after January 1,  
13 2006; ~~EXCEPT THAT THE SECRETARY OF STATE MAY WAIVE THIS~~  
14 ~~REQUIREMENT IF THE DESIGNATED ELECTION OFFICIAL TIMELY SUBMITS A~~  
15 ~~PLAN FOR IMPLEMENTATION THAT SATISFACTORILY DEMONSTRATES TO~~  
16 ~~THE SECRETARY OF STATE THAT THE POLITICAL SUBDIVISION IS CAPABLE~~  
17 ~~OF CONDUCTING A GENERAL ELECTION AT A VOTE CENTER.~~

18 **SECTION 5.** In Colorado Revised Statutes, 1-5-407, **amend** (1.5)  
19 as follows:

20 **1-5-407. Form of ballots.** (1.5) A ~~duplicate~~ BALLOT stub is not  
21 required for a ballot that is prepared for A MAIL-IN BALLOT OR a mail  
22 ballot election pursuant to article 7.5 of this title.

23 **SECTION 6.** In Colorado Revised Statutes, 1-5-505.5, **amend** (3)  
24 (a) and (3) (b) as follows:

25 **1-5-505.5. State reimbursement to counties for ballot measure**  
26 **elections.** (3) For any other odd- or even-numbered year election in  
27 which a state ballot issue or state ballot question is on the ballot of a

1 particular county, the state shall reimburse such county for the cost of the  
2 duties performed by the county clerk and recorder that relate to  
3 conducting the election on the ballot issue or ballot question; except that  
4 the reimbursement shall be set at the following rates:

5 (a) For counties with ten thousand or fewer active registered  
6 electors, ~~eighty cents~~ NINETY CENTS for each active registered elector as  
7 of the time of the election;

8 (b) For counties with more than ten thousand active registered  
9 electors, ~~seventy cents~~ EIGHTY CENTS for each active registered elector as  
10 of the time of the election.

11 **SECTION 7.** In Colorado Revised Statutes, 1-7.5-107, **amend**  
12 **(2.3) (a) and (3) (a) (II) (A) as follows:**

13 **1-7.5-107. Procedures for conducting mail ballot election -**  
14 **primary elections - first-time voters casting a mail ballot after having**  
15 **registered by mail to vote. (2.3) (a) Not less than thirty days nor more**  
16 **than forty-five SIXTY days before a primary election that is conducted as**  
17 **a mail ballot election pursuant to this article, the county clerk and**  
18 **recorder shall mail a notice by forwardable mail to each unaffiliated**  
19 **active registered eligible elector, and to each unaffiliated registered**  
20 **eligible elector whose registration record has been marked as "Inactive -**  
21 **failed to vote".**

22 **(3) (a) (II) (A) If a primary election is conducted as a mail ballot**  
23 **election pursuant to this article, in addition A MAIL BALLOT PACKET SHALL**  
24 **BE MAILED to active registered electors who are affiliated with a political**  
25 **party, the mail ballot packet shall be mailed to each registered elector who**  
26 **is affiliated with a political party and whose registration record has been**  
27 **marked as "Inactive - failed to vote".**

1        SECTION 8. In Colorado Revised Statutes, 1-7.5-108.5, amend  
2        (2) (c); and repeal (1) and (2) (a); and add (3) as follows:

3        1-7.5-108.5. Voter information card - verification of active  
4        status - designation of inactive status - mailing of mail ballots. (1) Not  
5        less than ninety days before a mail ballot election conducted pursuant to  
6        this article, the county clerk and recorder shall mail a voter information  
7        card to any registered elector whose registration record has been marked  
8        "Inactive - failed to vote". For purposes of this section, "Inactive - failed  
9        to vote" shall mean a registered elector who is deemed "Active" but who  
10       failed to vote in a general election in accordance with the provisions of  
11       section 1-2-605 (2), except that the term "Inactive - failed to vote" shall  
12       not include an elector whose previous communication from the county  
13       clerk and recorder was returned by the United States postal service as  
14       undeliverable and is, accordingly, referred to in the registration records  
15       of the county as "Inactive - undeliverable" pursuant to section 1-2-605  
16       (2). The voter information card required by this section may be sent as  
17       part of the voter information card required to be mailed pursuant to  
18       section 1-5-206 (1). The voter information card shall be sent to the  
19       elector's address of record unless the elector has requested that such  
20       communication be sent to his or her deliverable mailing address pursuant  
21       to section 1-2-204 (2) (k) and shall be marked "DO NOT FORWARD".

22       (2) (a) If the voter information card required to be sent to a  
23       registered elector whose registration record has been marked as "Inactive  
24       - failed to vote" pursuant to subsection (1) of this section is returned by  
25       the United States postal service as undeliverable, the county clerk and  
26       recorder shall mark the registration record of that elector with the words  
27       "Inactive - undeliverable".

1           (c) In any mail ballot election conducted on or after July 1, 2008,  
2           if a mail ballot sent to a registered elector is returned by the United States  
3           postal service as undeliverable, the county clerk and recorder shall mark  
4           the registration record of that elector with the words "Inactive -  
5           undeliverable" "INACTIVE - RETURNED MAIL". THE CLERK AND RECORDER  
6           SHALL MAIL A VOTER CONFIRMATION CARD PURSUANT TO SECTION 1-2-605  
7           (6) (b) TO ANY ELECTOR WHOSE BALLOT WAS RETURNED BY THE UNITED  
8           STATES POSTAL SERVICE AS UNDELIVERABLE.

9           (3) A VOTER INFORMATION CARD ISSUED UNDER THIS SECTION  
10          SHALL ADVISE THE ELECTOR OF HIS OR HER STATUS AS ACTIVE OR  
11          INACTIVE, PARTY AFFILIATION, WHETHER HE OR SHE WILL RECEIVE A  
12          BALLOT BY MAIL, AND, IF NOT, WHAT HE OR SHE MUST DO IN ORDER TO  
13          RECEIVE A BALLOT. THE VOTER INFORMATION CARD SHALL ALSO INCLUDE  
14          A RETURNABLE PORTION THAT THE ELECTOR MAY USE TO UPDATE HIS OR  
15          HER REGISTRATION RECORD, AFFILIATE WITH A POLITICAL PARTY, AND  
16          REQUEST A MAIL BALLOT.

17          SECTION 9. In Colorado Revised Statutes, 1-8-104.5, add (3)  
18          and (4) as follows:

19          1-8-104.5. Application for permanent mail-in voter status -  
20          legislative declaration. (3) (a) NOTWITHSTANDING ANY OTHER  
21          PROVISION OF LAW, ANY ELIGIBLE ELECTOR WHOSE REGISTRATION RECORD  
22          HAS BEEN MARKED AS "INACTIVE - FAILED TO VOTE", WHOSE STATUS HAS  
23          BEEN CHANGED TO ACTIVE IN ACCORDANCE WITH SECTION 1-2-229, AND  
24          WHO HAD PREVIOUSLY SELECTED PERMANENT MAIL-IN VOTER STATUS  
25          PURSUANT TO THE REQUIREMENTS OF THIS SECTION SHALL HAVE THE  
26          STATUS OF PERMANENT MAIL-IN VOTER RESTORED AS OF THE EFFECTIVE  
27          DATE OF THIS SUBSECTION (3).



1       **(b) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND**  
2       **DECLARES THAT THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION**  
3       **(3) ARE NECESSARY TO CLARIFY EXISTING LAW AND TO ENSURE A UNIFORM**  
4       **APPLICATION OF THE RECENT JUDICIAL DETERMINATION THAT AN**  
5       **ELECTOR'S STATUS OF "INACTIVE - FAILED TO VOTE" DOES NOT OPERATE**  
6       **TO INVALIDATE, TERMINATE, OR SUSPEND THAT ELECTOR'S REGISTRATION.**

7       **(4) IN CONNECTION WITH ANY ELECTION CONDUCTED ON OR AFTER**  
8       **THE EFFECTIVE DATE OF THIS SUBSECTION (4), IF A MAIL-IN BALLOT SENT**  
9       **TO A REGISTERED ELECTOR IS RETURNED BY THE UNITED STATES POSTAL**  
10       **SERVICE AS UNDELIVERABLE, THE COUNTY CLERK AND RECORDER SHALL**  
11       **MARK THE REGISTRATION RECORD OF THAT ELECTOR WITH THE WORDS**  
12       **"INACTIVE - RETURNED MAIL". THE CLERK AND RECORDER SHALL MAIL A**  
13       **VOTER CONFIRMATION CARD PURSUANT TO SECTION 1-2-605 (6) (b) TO**  
14       **ANY ELECTOR WHOSE BALLOT WAS RETURNED BY THE UNITED STATES**  
15       **POSTAL SERVICE AS UNDELIVERABLE.**

16  
17       **SECTION 10. Appropriation. (1) In addition to any other**  
18       **appropriation, there is hereby appropriated, out of any moneys in the**  
19       **department of state cash fund created in section 24-21-104 (3) (b),**  
20       **Colorado Revised Statutes, not otherwise appropriated, to the department**  
21       **of state, for the fiscal year beginning July 1, 2012, the sum of \$642,286,**  
22       **or so much thereof as may be necessary, to be allocated for the**  
23       **implementation of this act as follows:**

24       **(a) \$615,646 for local election reimbursement; and**  
25       **(b) \$26,640 for the information technology services division, for**  
26       **reprogramming of the statewide Colorado voter registration and elections**  
27       **system.**

1           **SECTION 11. Applicability.** The provisions of this act apply to  
2 elections conducted on or after the effective date of this act.

3           **SECTION 12. Safety clause.** The general assembly hereby finds,  
4 determines, and declares that this act is necessary for the immediate  
5 preservation of the public peace, health, and safety.

STATE OF  
COLORADO  
Department of State  
1700 Broadway  
Suite 200  
Denver, CO 80290



Scott Gessler  
Secretary of State

FILED Document  
Denny Secretary of State  
Denny Secretary of State  
Filing Date: Dec 17, 2012 02:01 PM MST  
Filing ID: 16297567  
Review Clerk: Sean McGowan  
Review Clerk: Sara Bridges

## Notice of Temporary and Permanent Adoption

Office of the Secretary of State  
Election Rules  
8 CCR 1505-1

August 15, 2012

### I. Adopted Rule Amendments

As authorized by Colorado Elections Law<sup>1</sup> and the State Administrative Procedure Act<sup>2</sup>, the Colorado Secretary of State gives notice that the following amendments to the Election Rules<sup>3</sup> are adopted on a temporary and permanent basis.

The following rules were considered at the July 23, 2012 rulemaking hearing in accordance with the State Administrative Procedure Act<sup>4</sup>.

(Additions to the current rules are reflected in SMALL CAPS and deletions from current rules are shown in ~~stricken type~~. Annotations may be included):

#### Amendments to Rule 2.7.4:

- 2.7.4 ~~If an applicant for voter registration fails to provide his or her gender the application shall be treated as "incomplete; however, if the applicant submits a photocopy of his/her driver's license or other approved form of ID which includes the applicant's gender, then the county may enter "male" or "female" as reflected on the card into the applicant's record and consider the application "complete".~~ REPEALED.

#### New Rule 2.7.5:

- 2.7.5 IF THE COUNTY CLERK AND RECORDER NOTIFIES AN APPLICANT THAT HIS OR HER APPLICATION IS INCOMPLETE, AND THE APPLICANT DOES NOT PROVIDE THE ADDITIONAL INFORMATION NECESSARY TO COMPLETE THE APPLICATION WITHIN 24 MONTHS AFTER THE COUNTY CLERK SENT THE NOTIFICATION, THE APPLICANT MUST REAPPLY IN ORDER TO REGISTER TO VOTE. (SECTION 1-2-509(2), C.R.S.)

#### Amendments to Rule 2.11:

- 2.11 CHANGES TO AN ELECTOR'S VOTER REGISTRATION STATUS.

<sup>1</sup> Sections 1-1-107(2)(a) and 1-1.5-104(1)(e), C.R.S. (2011).

<sup>2</sup> Section 24-4-103(3)(a), C.R.S. (2011).

<sup>3</sup> 8 CCR 1505-1.

<sup>4</sup> Section 24-4-103(3)(a), C.R.S. (2011).

Main Number (303) 894-2200  
Administration (303) 860-6900  
Fax (303) 869-4860

TDD (303) 869-4867  
Web Site www.sos.state.co.us  
E-mail administration@sos.state.co.us

2.11.1 ~~For the purposes of section 1-2-605(4)(a), C.R.S., an~~ AN ELECTOR MAY update to a voter's HIS OR HER INACTIVE registration information to change the voter's STATUS TO ACTIVE status ~~from inactive to active must be provided BY SUBMITTING to the county clerk and recorder by any of the following ways:~~

- (a) A signed written request, ~~delivered in person or by U.S. mail, fax, or PDF attachment to an email; or~~
- (b) AN ONLINE VOTER REGISTRATION APPLICATION; OR
- (c) AN ~~Oral~~ IN-PERSON request ~~in person when voter presents~~ WITH identification.

[SECTION 1-2-605(4)(A), C.R.S.]

2.11.2 ~~In the case of the applicant's~~ IF AN ELECTOR IS UNABLE to sign, ANOTHER PERSON MUST WITNESS the elector's mark ~~shall be witnessed by another person~~. An elector may use a signature stamp because of age, disability, or other need, ~~which shall be~~. THE STAMP IS treated as a signature and does not require a witness.

Amendments to Rule 2.19.1:

2.19.1 "Confirmation card" means a FORWARDABLE, POSTAGE PREPAID mailing USING THE FORM PRESCRIBED BY THE SECRETARY OF STATE ~~by forwardable mail that includes a registration form so that the voter may update his or her registration or request a mail-in ballot. The mailing shall be postage prepaid and have a returnable portion that is preaddressed to the sending county clerk and recorder.~~

Amendments to Rules 8.6, 8.7, and 8.8:

8.6 Watchers ~~shall be~~ ARE subject to the provisions of section 1-5-503, C.R.S.

8.6.1 THE "IMMEDIATE VOTING AREA" IS THE AREA THAT IS WITHIN SIX FEET OF THE VOTING EQUIPMENT, VOTING BOOTHS, AND THE BALLOT BOX.

8.6.2 THE DESIGNATED ELECTION OFFICIAL MUST POSITION THE VOTING EQUIPMENT, VOTING BOOTHS, AND THE BALLOT BOX SO THAT THEY ARE IN PLAIN VIEW OF THE ELECTION OFFICIALS AND WATCHERS.

8.6.3 WATCHERS ARE PERMITTED TO WITNESS AND VERIFY THE CONDUCT OF ELECTIONS AND RECOUNT ACTIVITIES. WITNESS AND VERIFY MEANS TO PERSONALLY OBSERVE ACTIONS OF ELECTION JUDGES IN EACH STEP OF THE CONDUCT OF AN ELECTION.

- (A) THE CONDUCT OF ELECTION INCLUDES POLLING PLACE AND EARLY VOTING, AND BALLOT PROCESSING AND COUNTING.
- (B) WATCHERS MUST REMAIN OUTSIDE THE IMMEDIATE VOTING AREA.
- (C) WATCHERS MAY BE PRESENT AT EACH STAGE OF THE CONDUCT OF THE ELECTION, INCLUDING THE RECEIVING AND BUNDLING OF THE BALLOTS RECEIVED BY THE DESIGNATED ELECTION OFFICIAL.
- (D) WATCHERS MAY BE PRESENT DURING PROVISIONAL BALLOT PROCESSING BUT

MAY NOT HAVE ACCESS TO CONFIDENTIAL VOTER INFORMATION.

- (E) THE NUMBER OF WATCHERS PERMITTED IN ANY ROOM AT ONE TIME IS SUBJECT TO LOCAL SAFETY CODES.

8.6.4 WATCHERS MAY WITNESS AND VERIFY ACTIVITIES DESCRIBED IN ARTICLE I, SECTION 7 THAT ARE OUTSIDE THE IMMEDIATE VOTING AREA, INCLUDING BALLOT PROCESSING AND COUNTING.

8.6.5 WATCHERS APPOINTED UNDER SECTION 1-10.5-101(1)(A), C.R.S., MAY OBSERVE THE CANVASS BOARD WHILE IT PERFORMS ITS DUTIES.

8.6.6 WATCHERS MAY TRACK THE NAMES OF ELECTORS WHO HAVE CAST BALLOTS, CHALLENGE ELECTORS UNDER SECTION 1-9-203, C.R.S., AND RULE 48, AND SUBMIT WRITTEN COMPLAINTS IN ACCORDANCE WITH SECTION 1-1.5.105, C.R.S., AND RULE 31.

8.7 ~~What Watchers May Observe. Duly appointed Watchers may observe polling place voting, early voting and the processing and counting of precinct, provisional, mail, and mail-in ballots. For mail ballot elections, or mail-in ballot processing, watchers may be present at each stage of the election including the receiving and bundling of the ballots received by the designated election official. Watchers may be present during provisional ballot processing but may not have access to confidential voter information. WATCHER OATH. IN ADDITION TO THE OATH REQUIRED BY SECTION 1-7-108(1), C.R.S., A WATCHER MUST AFFIRM THAT HE OR SHE WILL NOT:~~

8.7.1 ~~ATTEMPT TO DETERMINE HOW ANY ELECTOR VOTED OR REVIEW CONFIDENTIAL VOTER INFORMATION;~~

8.7.2 ~~DISCLOSE ANY CONFIDENTIAL VOTER INFORMATION THAT HE OR SHE MAY OBSERVE; OR~~

8.7.3 ~~DISCLOSE ANY RESULTS BEFORE THE POLLS ARE CLOSED AND THE DESIGNATED ELECTION OFFICIAL HAS FORMALLY ANNOUNCED RESULTS.~~

8.8 ~~Limitations of Watchers. Duly appointed Watchers may observe election judges but may not:~~

8.8.1 ~~interrupt~~ INTERRUPT or disrupt the processing, verification and counting of any ballots or any other stage of the election.

8.8.2 ~~Watchers may track the names of electors who have cast ballots by utilizing their previously obtained lists, but may not write~~ WRITE down any ballot numbers or any other identifying information about the electors.

8.8.3 ~~Watchers may not handle~~ HANDLE the poll books, official signature cards, ballots, mail ballot envelopes, mail-in ballot envelopes, ~~or~~ provisional ballot envelopes, voting or counting machines, or machine components.

8.8.4 ~~Watchers shall not interfere~~ INTERFERE with the orderly process and conduct of any election PROCESS, including ISSUANCE OF ballots ~~issuance~~, receiving of ballots, AND voting or counting of the ballots.

8.8.5 ~~Watchers may not be allowed to interact~~ INTERACT with election officials or election judges AS DEFINED IN SECTION 1-1-104(10), C.R.S., ~~except that each~~ EXCEPT FOR THE INDIVIDUAL designated BY THE election official. ~~shall name at least one individual in each~~



~~precinct polling place or election location to whom Watchers may direct questions or from whom watchers may seek requested information.~~

#### Amendments to Rule 8.15

#### 8.15 Removal of ~~watchers~~ WATCHERS.

8.15.1 A DESIGNATED ELECTION OFFICIAL MAY REMOVE A WATCHER UPON FINDING THAT THE WATCHER:

- (A) ~~Watchers who commit, encourage, or connive in any~~ COMMITS OR ENCOURAGES fraud in connection with ~~their~~ HIS OR HER duties; ~~who violate any of the election laws, who~~
- (B) ~~violate any of these~~ ANY OF THE LIMITATIONS OUTLINED IN Rules 8.8; ~~who~~
- (C) ~~violate their~~ HIS OR HER oath; ~~or who hamper or interfere with the election process may be removed by the designated election official OR~~
- (D) IS ABUSIVE OR THREATENING TOWARD ELECTION OFFICIALS OR VOTERS.

8.15.12 ~~If a watcher is removed~~ UPON REMOVAL OF A WATCHER, the designated election official ~~shall immediately~~ MUST inform the political party, candidate, or committee who appointed the watcher ~~via telephone, email, and/or other means.~~

~~8.15.23 A removed watcher may be replaced by an alternate watcher duly designated pursuant to IN~~ ACCORDANCE WITH sections 1-7-105, 1-7-106, or 1-7-107, C.R.S. Any designated election official who removes a watcher ~~shall~~ MUST, to the best of his/her ~~THE~~ OFFICIAL'S ability, expeditiously certify the appointment of any duly appointed person to replace a removed watcher.

#### Amendments to Rule 9.1:

#### Rule 9. Rules Concerning VOTING Assistance to ~~Disabled Voters~~ FOR ELECTORS WITH DISABILITIES

9.1 A ~~THE~~ COUNTY CLERK AND RECORDER MUST POST A sign AT THE POLLING PLACE OR VOTE CENTER ~~providing substantially as follows shall be posted at the polling place/vote center THAT~~ STATES:

##### NOTICE VOTING ASSISTANCE FOR ELECTORS WITH DISABILITIES

~~Colorado law provides that a voter has~~ PROTECTS a VOTER'S legal right to assistance in voting if assistance is needed because of blindness, ~~or other physical~~ A disability. ~~or inability to read or write. The following procedures apply:~~

1. ~~The voter must~~ IF YOU REQUIRE ASSISTANCE, PLEASE inform AN ELECTION JUDGE. ~~one of the election judges that he or she needs assistance.~~
2. ~~The voter may be assisted by any~~ ANY PERSON, INCLUDING AN election judge ~~or by any eligible elector selected by the voter~~ MAY ASSIST YOU.
3. ~~The person selected~~ IF YOU SELECT A PERSON OTHER THAN AN ELECTION JUDGE, HE OR SHE

must complete a VOTER ASSISTANCE FORM, WHICH INCLUDES AN OATH ~~'voter assistance/disabled voter self affirmation form'~~ if all of the following apply THAT STATES:

- ~~The person selected is not an election judge; and~~
  - ~~The person selected is not the spouse, parent, grandparent, sibling or child eighteen years of age or older, of the voter requesting assistance; and~~
  - ~~The person selected has assisted any other voter at the same election in the same precinct. Section 1-7-111(1)(b), C.R.S.~~
  - ~~The self affirmation form states; 'I, ....., certify that I am the individual chosen by the disabled elector to assist the disabled elector in casting a ballot.'~~
4. ~~The person selected YOU SELECT may provide any assistance needed by the voter YOU NEED, including entering the voting booth, and preparing the ballot, or operating the voting machine.~~
  5. ~~The person providing assistance shall ASSISTING YOU MAY not seek to persuade YOU or induce the voter YOU to vote in a particular manner.~~
  6. ~~The election judges JUDGE shall MUST record the name of each eligible elector assisted VOTER WHO RECEIVES ASSISTANCE and the name of each THE person assisting WHO PROVIDES ASSISTANCE by making an entry in the pollbook or list of eligible electors (or by making an entry on the signature card when IF preprinted signature cards are used in the place of a pollbook and list of eligible electors).~~

#### Amendments to Rule 10.6:

#### 10.6 Printing primary election ballots.

10.6.1 If ~~any~~-A major political party, as defined in section 1-1-104(22.5), C.R.S., has nominated NOMINATES more than one candidate for any office, ~~whether by assembly or petition, THE~~ COUNTY CLERK AND RECORDER MUST CONDUCT the primary election ~~must be conducted~~ for all major political parties.

- (a) The county clerk must ~~print the ballot to include~~ ON THE BALLOT all offices to which candidates may be nominated in the primary election.
- (b) If there are no candidates ~~on the ballot~~ for any particular office, the county clerk must print ON THE BALLOT "There are no candidates for this office".

[Sections 1-4-101 and 1-4-104.5, C.R.S.; Election Rule 10.3]

10.6.2 If ~~any~~-A minor political party, as defined in section 1-1-104(23), C.R.S., has nominated more than one candidate for any office, ~~whether by assembly or petition, THE~~ COUNTY CLERK AND RECORDER MAY CONDUCT the primary election ~~must be conducted~~ for that party only.

- (a) The county clerk must ~~print the ballot to include~~ ON THE BALLOT only the ~~faces~~ OFFICES for which there is more than one candidate ~~nominated~~-DESIGNATED.

- (b) If there is ~~not more than~~ ONLY one minor party candidate ~~nominated~~ DESIGNATED for any ~~race~~ OFFICE, the candidate ~~is~~ WILL BE certified to the general election ballot.

[Sections 1-4-101, 1-4-104.5(3), and 1-4-1304, C.R.S.]

#### New Rule 10.7

#### 10.7 VOIDING BALLOTS DUE TO TIMELY CHANGES IN ADDRESS OR AFFILIATION.

10.7.1 IF AN ELECTOR SUBMITS A TIMELY ADDRESS OR AFFILIATION CHANGE AFTER THE COUNTY MAILS BALLOTS OR SENDS THE VOTER FILE TO THE VENDOR, THE COUNTY MUST VOID THE FIRST BALLOT AND GENERATE A SECOND BALLOT.

- (A) IF THE COUNTY PROCESSES THE CHANGE TO THE ELECTOR'S RECORD AFTER IT SENDS THE VOTER FILE TO THE VENDOR BUT BEFORE THE VENDOR PRINTS BALLOTS, THE COUNTY MUST PROVIDE THE VENDOR A VOIDED BALLOT FILE TO PREVENT THE VENDOR FROM PRINTING AND PREPARING VOIDED BALLOTS FOR MAILING.
- (B) IF THE COUNTY PROCESSES THE CHANGE TO THE ELECTOR'S RECORD AFTER THE VENDOR HAS PRINTED BALLOTS BUT BEFORE THE VENDOR MAILS BALLOTS, THE COUNTY MUST WORK WITH THE VENDOR TO MAKE EVERY REASONABLE EFFORT TO REMOVE VOIDED BALLOTS BEFORE THEY ENTER THE MAIL STREAM.

---

10.7.3 IF THE COUNTY MAILS ITS OWN BALLOTS, THE COUNTY CLERK MUST REMOVE ALL VOIDED BALLOTS BEFORE MAILING.

10.7.4 IF THE COUNTY PROCESSES THE CHANGE TO THE ELECTOR'S RECORD AFTER IT MAILS BALLOTS, THE COUNTY MUST COUNT THE FIRST BALLOT RETURNED BY THE ELECTOR EXCEPT AS FOLLOWS:

- (A) IN THE CASE OF AN AFFILIATION CHANGE, THE COUNTY MUST COUNT THE BALLOT ISSUED FOR THE NEW PARTY AFFILIATION.
- (B) IN THE CASE OF AN ADDRESS CHANGE THAT RESULTS IN A CHANGE OF PRECINCT, THE COUNTY MUST COUNT THE BALLOT ISSUED FOR THE ELECTOR'S NEW ADDRESS.

#### Amendments to Rule 12.4.1(a):

#### 12.4 Mail Ballot Plans

##### 12.4.1 Coordinated and non-partisan elections.

- (a) Written plan. ~~As soon as possible, but~~ THE DESIGNATED ELECTION OFFICIAL MUST SUBMIT A MAIL BALLOT PLAN TO THE SECRETARY OF STATE no later than 55 days ~~prior to~~ BEFORE any other election, ~~not including~~ NONPARTISAN ELECTION, AND 90 DAYS BEFORE ANY ELECTION THAT IS COORDINATED WITH OR CONDUCTED BY THE COUNTY CLERK AND RECORDER. ~~a Primary Election, a written plan~~ THE DESIGNATED ELECTION OFFICIAL must be submitted to the Secretary of State which USE THE APPROVED MAIL BALLOT PLAN TEMPLATE THAT includes the following:



Amendments to Rule 12.4.1(b)(2):

- (2) Recall election. If a non-partisan recall election ~~is to~~ WILL be held as a mail ballot election, ~~the governing body~~ THE DESIGNATED ELECTION OFFICIAL ~~shall~~ MUST submit a written plan to the Secretary of State within ~~three business-FIVE CALENDAR days of~~ AFTER calling the election. The Secretary of State WILL ~~shall~~ ~~notify the governing body of the approval or disapproval~~ APPROVE OR DISAPPROVE of the plan within ~~two business-FIVE CALENDAR days OF RECEIPT IN ACCORDANCE WITH SECTION 1-12-111.5, C.R.S.~~

New Rule 12.4.1(d):

- (D) REQUEST FOR BALLOT BY INACTIVE - FAILED TO VOTE ELECTOR. IN A COORDINATED OR NONPARTISAN ELECTION, THE DESIGNATED ELECTION OFFICIAL MAY NOT MAIL A BALLOT TO AN ELECTOR WHOSE REGISTRATION RECORD IS MARKED INACTIVE - FAILED TO VOTE UNTIL THE ELECTOR SUBMITS A REGISTRATION UPDATE OR A REQUEST FOR A BALLOT UNDER SECTION 1-7.5-107(3), C.R.S., AND RULE 12.11.

Amendments to Rule 12.4.2(a):

12.4.2 Primary Elections conducted as a mail ballot election.

- (a) ~~Written plan. Pursuant to Article 7.5 of Title 1, C.R.S., no later than 120 days prior to the election -~~ The county clerk and recorder must submit a ~~written~~ MAIL BALLOT plan to the Secretary of State NO LATER THAN 90 DAYS BEFORE THE ELECTION. THE COUNTY CLERK MUST USE THE APPROVED MAIL BALLOT PLAN TEMPLATE that includes the following:

Amendments to Rule 12.11:

12.11 Request for a replacement ballot by an active elector and request for a ballot by an inactive elector

- 12.11.1 ~~Requests may be made~~ AN ELECTOR MAY REQUEST A REPLACEMENT BALLOT in-person beginning on the twenty-second day before the election and ~~until~~ ENDING AT 7:00 p.m., MT on election day. If the elector ~~wishes~~ REQUESTS to receive the ballot by mail, the HE OR SHE MUST MAKE THE request ~~must be received~~ no later than the close of business on the seventh day before the election.

- (a) ~~An active elector may request a replacement ballot in person, by mail, fax, email, or telephone.~~

- (i) ~~The elector shall complete a self affidavit, as required by section 1-7.5-107(3)(d)(I), C.R.S., on a form provided by the designated election official.~~

- (ii) ~~If the elector requests that the replacement ballot be mailed, the self affidavit may be included in the ballot packet, and must be completed and received by the designated election official on or before 7:00 p.m. MT on election day.~~

~~(iii) The outside of the return envelope shall indicate that the self-affidavit required by this Rule must be returned with the voted ballot. No replacement ballot shall be counted until it has been determined that an affidavit has been completed and returned by the deadline.~~

~~(b) Except as otherwise provided in section 1-7.5-107(3)(c), C.R.S., an inactive elector may make a written request for a ballot in person, by mail, fax, or email. The request must include the elector's name, date of birth, residence address, and signature, and must be received by the designated election official before the ballot is issued. At the time the request is received the elector's record will be marked active.~~

12.11.2 If an elector moved at least 30 days before the election, he or she may include the address change with the ballot request.

12.11.3 REQUEST FOR A REPLACEMENT BALLOT BY AN ACTIVE ELECTOR. AN ACTIVE ELECTOR MAY REQUEST A REPLACEMENT BALLOT IN PERSON, BY MAIL, FAX, EMAIL, OR TELEPHONE.

- (A) THE ELECTOR MUST COMPLETE THE SELF-AFFIDAVIT ON THE APPROVED FORM.
- (B) IF THE ELECTOR REQUESTS TO RECEIVE THE REPLACEMENT BALLOT BY MAIL, THE DESIGNATED ELECTION OFFICIAL MAY INCLUDE THE SELF-AFFIDAVIT IN THE MAIL BALLOT PACKET. THE ELECTOR MUST COMPLETE AND RETURN THE SELF-AFFIDAVIT NO LATER THAN 7:00 P.M. MT ON ELECTION DAY.

(C) THE DESIGNATED ELECTION OFFICIAL MUST INDICATE ON THE OUTSIDE OF THE RETURN ENVELOPE THAT THE ELECTOR MUST COMPLETE AND RETURN THE SELF-AFFIDAVIT.

(D) THE DESIGNATED ELECTION OFFICIAL MAY NOT COUNT A REPLACEMENT BALLOT UNLESS THE ELECTOR COMPLETED AND RETURNED THE SELF-AFFIDAVIT BY THE DEADLINE.

12.11.4 AN INACTIVE ELECTOR IN A NONPARTISAN MAIL BALLOT ELECTION WILL BE ISSUED A BALLOT IF THE ELECTOR SUBMITS A REGISTRATION UPDATE OR A BALLOT REQUEST.

(A) THE INACTIVE ELECTOR MUST SUBMIT A REGISTRATION UPDATE OR A WRITTEN REQUEST FOR A BALLOT BEFORE THE DESIGNATED ELECTION OFFICIAL MAY MARK THE ELECTOR'S RECORD ACTIVE AND ISSUE THE BALLOT.

(B) THE ELECTOR MAY SUBMIT A REGISTRATION UPDATE OR WRITTEN REQUEST FORM ONLINE, IN PERSON, BY MAIL, FAX, OR EMAIL.

(C) THE WRITTEN REQUEST FORM MUST INCLUDE THE ELECTOR'S NAME, DATE OF BIRTH, RESIDENCE ADDRESS, AND SIGNATURE.

12.11.5 A MILITARY OR OVERSEAS ELECTOR WHOSE REGISTRATION RECORD IS INACTIVE OR WHOSE BALLOT REQUEST HAS LAPSED MAY DOWNLOAD AN APPLICATION AND BALLOT USING THE ELECTRONIC BALLOT DELIVERY SYSTEM.

(A) THE ELECTOR MUST SUBMIT THE BALLOT AND APPLICATION IN ACCORDANCE

WITH THE DEADLINES IN SECTION 1-8.3-111 AND 1-8.3.113, C.R.S., FOR THE BALLOT TO BE COUNTED.

(B) EVERY COUNTY MUST USE THE APPROVED ELECTRONIC DELIVERY SYSTEM TO IMPLEMENT THIS RULE, EXCEPT THAT A COUNTY MAY OBTAIN A WAIVER. THE SECRETARY WILL CONSIDER THE FOLLOWING FACTORS IN APPROVING OR DENYING A REQUEST FOR WAIVER:

- I. NUMBER OF MILITARY OR OVERSEAS ELECTORS REGISTERED TO VOTE IN THE COUNTY;
- II. HISTORICAL DATA REGARDING THE NUMBER OF MILITARY AND OVERSEAS ELECTORS WHO HAVE REGISTERED AND VOTED IN THE COUNTY; AND
- III. STAFF OR OTHER RESOURCE LIMITATIONS.

12.11.6 IF A COUNTY CLERK AND RECORDER CONDUCTS A PRIMARY ELECTION BY MAIL BALLOT, HE OR SHE MUST MAIL A BALLOT TO AN ELECTOR WHOSE RECORD IS MARKED INACTIVE – FAILED TO VOTE IN ACCORDANCE WITH SECTION 1-7.5-107(3)(A)(II)(A), C.R.S.

New Rules 13.19 and 13.20:

13.19 FOR ANY ELECTION THAT IS NOT A PRIMARY MAIL BALLOT ELECTION, THE DESIGNATED ELECTION OFFICIAL MAY NOT ISSUE A MAIL-IN BALLOT TO AN ELECTOR WHOSE RECORD IS MARKED INACTIVE – FAILED TO VOTE UNTIL THE ELECTOR SUBMITS A TIMELY APPLICATION FOR A MAIL-IN BALLOT.

13.20 A MILITARY OR OVERSEAS ELECTOR WHOSE REGISTRATION RECORD IS INACTIVE OR WHOSE BALLOT REQUEST HAS LAPSED MAY DOWNLOAD AN APPLICATION AND BALLOT USING THE ELECTRONIC BALLOT DELIVERY SYSTEM.

13.20.1 THE ELECTOR MUST SUBMIT THE BALLOT AND APPLICATION IN ACCORDANCE WITH THE DEADLINES IN SECTION 1-8.3-111 AND 1-8.3.113, C.R.S., FOR THE BALLOT TO BE COUNTED.

13.20.2 EVERY COUNTY MUST USE THE APPROVED ELECTRONIC DELIVERY SYSTEM TO IMPLEMENT THIS RULE, EXCEPT THAT A COUNTY MAY OBTAIN A WAIVER. THE SECRETARY WILL CONSIDER THE FOLLOWING FACTORS IN APPROVING OR DENYING A REQUEST FOR WAIVER:

- (A) NUMBER OF MILITARY OR OVERSEAS ELECTORS REGISTERED TO VOTE IN THE COUNTY;
- (B) HISTORICAL DATA REGARDING THE NUMBER OF MILITARY AND OVERSEAS ELECTORS WHO HAVE REGISTERED AND VOTED IN THE COUNTY; AND
- (C) STAFF OR OTHER RESOURCE LIMITATIONS.

Repeal and relocate Rule 26.1.6

26.1.6 ~~Voter Access to Provisional Ballot Information Required by section 1-8.5-111, C.R.S.~~

~~26.1.6.1 The system shall be made available to the voter for no less than thirty (30) days following the date of the election.~~

~~26.1.6.2 The system shall provide access to information at no cost to the voter, regardless of the voter's location, by toll free telephone call, internet website, or other suitable medium, pursuant to 1-8.5-111, C.R.S. REPEALED.~~

Amendments to Rule 26.10:

26.10 Treatment of the provisional ballot affidavit as an application for, or a change to registration

26.10.1 If AN ELECTOR IS NOT REGISTERED TO VOTE AND HE OR SHE COMPLETES a provisional ballot affidavit, ~~is treated as~~ THE COUNTY CLERK AND RECORDER MUST TREAT THE AFFIDAVIT AS an application for registration for future elections. ~~in accordance with section 1-8.5-103(2), C.R.S., such~~ THE application shall be ~~is~~ subject to the requirements ~~for~~ OF any other voter registration application.

26.10.2 ~~In the case of an~~ IF A REGISTERED elector ~~who is registered, if the~~ COMPLETES A provisional ballot affidavit THAT contains changes to the elector's registration, ~~his or her record shall be updated~~ THE COUNTY CLERK AND RECORDER MUST UPDATE THE ELECTOR'S REGISTRATION RECORD accordingly BEFORE MARKING THE PROVISIONAL BALLOT AS ACCEPTED OR REJECTED IN THE STATEWIDE VOTER REGISTRATION DATABASE AND BEFORE LINKING IT TO THE ELECTOR'S RECORD.

26.10.3 If THE COUNTY CLERK AND RECORDER ~~a provisional ballot is counted because it was determined that an elector was~~ cancelled or consolidated AN ELECTOR'S RECORD in error, THE CLERK MUST REINSTATE OR UNCONSOLIDATE AND UPDATE the elector's record ~~shall be reinstated or unconsolidated and updated accordingly~~ BEFORE MARKING THE ELECTOR'S PROVISIONAL BALLOT AS ACCEPTED OR REJECTED IN THE STATEWIDE VOTER REGISTRATION DATABASE AND BEFORE LINKING IT TO THE ELECTOR'S RECORD.

New Rule 26.11:

26.11 PROCESSING PROVISIONAL BALLOT AFFIDAVITS IN THE STATEWIDE VOTER REGISTRATION DATABASE. BEFORE CLOSING AN ELECTION, THE COUNTY CLERK AND RECORDER MUST:

26.11.1 ENTER ALL PROVISIONAL BALLOT AFFIDAVITS INTO THE PROVISIONAL MODULE OF THE STATEWIDE VOTER REGISTRATION DATABASE.

26.11.2 LINK ALL PROVISIONAL BALLOT AFFIDAVITS TO THE APPROPRIATE ELECTOR'S RECORD.

New Rule 26.12:

26.12 THE COUNTY CLERK AND RECORDER MUST PROCESS ALL POLLBOOKS OR SIGNATURE CARDS IN THE STATEWIDE VOTER REGISTRATION DATABASE BEFORE PROCESSING PROVISIONAL BALLOTS.

New Rule 26.13:

26.13 VOTER ACCESS TO PROVISIONAL BALLOT INFORMATION

26.13.1 THE SECRETARY OF STATE WILL PROVIDE A PROVISIONAL BALLOT LOOKUP ON THE SECRETARY'S WEBSITE.



26.13.2 THE COUNTY CLERK AND RECORDER MUST NUMBER THE PROVISIONAL BALLOT ENVELOPE OR AFFIDAVIT STOCK USING THE STANDARD NUMBERING CONVENTION APPROVED BY THE SECRETARY OF STATE.

26.13.3 AN ELECTOR MAY ACCESS THE SYSTEM DURING THE 45 DAYS FOLLOWING THE ELECTION.

[SECTION 1-8.5-111, C.R.S.]

Amendments to Rule 29.1.1:

29.1.1 ~~When the election judge reviews the~~ IF A mail, MAIL-IN, OR PROVISIONAL ballot return envelope pursuant to section 1-7.5-107.3, C.R.S., or mail-in ballot return envelope pursuant to section 1-8-114.5, C.R.S., or the provisional ballot return envelope pursuant to section 1-8.5-105(3)(a), C.R.S., and notices that the envelope lacks a signature, the election judge ~~shall~~ MUST contact the eligible elector in writing no later than two calendar days after election day. THE DESIGNATED ELECTION OFFICIAL MUST USE THE LETTER AND FORM PRESCRIBED BY THE SECRETARY OF STATE AND KEEP A copy of the written notification ~~shall be kept in an official file, which shall become~~ AS part of the official election record. Nothing in this rule ~~shall be construed to prohibit~~ the designated election official from calling the elector; ~~however,~~ BUT a phone call ~~shall~~ MAY not substitute for notification ~~to the elector in writing~~ WRITTEN CONTACT. IF THE DESIGNATED ELECTION OFFICIAL CALLS ANY ELECTOR HE OR SHE MUST CALL ALL ELECTORS WHOSE AFFIDAVITS ARE UNSIGNED.

[SECTIONS 1-7.5-107.3, 1-8-114.5, AND 1-8.5-105(3)(A), C.R.S.]

Amendments to Rules 29.1.3 and 29.1.4:

29.1.3 The letter AND MISSING SIGNATURE AFFIDAVIT FORM ~~sent by the election official shall~~ DOES not constitute a violation of VIOLATE section 1-13-801, C.R.S.

29.1.4 The LETTER OR MISSING SIGNATURE AFFIDAVIT form ~~shall~~ MUST include the following language:

"Any person who knowingly violates any of the provisions of the election code relative to the casting of ballots or who aids or abets fraud in connection with any vote cast, or to be cast, or attempted to be cast shall be punished by a fine of not more than five thousand dollars or by imprisonment in the county jail for not more than eighteen months, or by both such fine and imprisonment. Section 1-13-803, C.R.S."

Amendments to Rule 29.8:

29.8 The ELECTION OFFICIAL MUST USE THE ~~form of the letter as well as~~ AND the SIGNATURE VERIFICATION form ~~sent to the elector shall be approved by the Secretary of State. pursuant to section 1-1-109, C.R.S.~~

29.9 The letter AND SIGNATURE VERIFICATION FORM ~~sent by the election official shall~~ DOES not constitute a violation of VIOLATE section 1-13-801 C.R.S.

Amendments to Rule 30.1.6(a):

30.1.6 "ID" as used in these rules shall mean A COPY OF ANY OF THE FOLLOWING identification as defined in ~~compliance with~~ section 1-1-104(19.5), C.R.S., ~~as a copy of one of the following:~~

- (a) A valid Colorado driver's license;
- (b) A valid identification card issued by the Department of Revenue in accordance with the requirements of Part 3 of Article 2 of Title 42, C.R.S.;
- (c) A valid U.S. passport;
- (d) A valid employee identification card with a photograph of the eligible elector issued by any branch, department, agency, or entity of the United States government or of this state, or by any county, municipality, board, authority, or other political subdivision of this state;
- (e) A valid pilot's license issued by the federal aviation administration or other authorized agency of the United States;
- (f) A valid U.S. military identification card with a photograph of the eligible elector;
- (g) A copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the elector. For example:

---

(I-I) A cable bill or telephone bill;

~~(II) Documentation from a public institution of higher education in Colorado containing at least the name, date of birth, and legal residence address of the student elector;~~

(III-II) A paycheck from a government institution or private company; OR

~~(IV-III) A Certificate of Degree of Indian or Alaskan Native Blood; or~~

~~(V) A valid identification card issued by a federally recognized tribal government certifying tribal membership.~~

- (h) A valid Medicare or Medicaid card issued by the Centers for Medicare and Medicaid Services (formerly the United States Health Care Financing Administration);
- (i) A certified copy of a U.S. birth certificate for the elector issued in the United States;
- (j) Certified documentation of naturalization; or
- (k) A valid student identification card with a photograph of the eligible elector issued by an institute of higher education in Colorado, as defined in section 23-3.1-102(5), C.R.S.;

- (L) A VALID VETERAN IDENTIFICATION CARD ISSUED BY THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS VETERANS HEALTH ADMINISTRATION WITH A PHOTOGRAPH OF THE ELIGIBLE ELECTOR; OR
- (M) A VALID IDENTIFICATION CARD ISSUED BY A FEDERALLY RECOGNIZED TRIBAL GOVERNMENT CERTIFYING TRIBAL MEMBERSHIP.

Repeal and renumber Rules 32.1, 32.2, 32.3, and 32.4:

- 32.1 ~~In any recall election of a partisan office, the successor nominee's party affiliation shall be listed with his or her name on the ballot. REPEALED.~~
- 32.23 ~~Petition sufficiency occurs when upon review, it is established that the petition contains the required number of valid signatures. REPEALED.~~
- 32.34 ~~When a protest is filed, petition sufficiency is sustained upon conclusion of the protest when the designated election official or the district judge maintains that there are sufficient valid signatures. REPEALED.~~
- 32.45 ~~When an officer subject to being recalled resigns within the five days after the sufficiency of the recall petition has been sustained, the recall election does not go forward, and the position is declared vacant and filled according to statute. REPEALED.~~

Amendments to Rule 41:

---

#### Rule 41. Rules Concerning Canvassing

##### 41.1 Definitions

- (a) ~~"Canvass" shall means the audit function of the election and the process of reconciling the number of ballots counted to the number of voters who voted. The canvass also includes the process of reconciling detailed ballot logs and Statement of Ballots Forms.~~

41.1.1 "CANVASS BOARD" MEANS A COMMITTEE COMPOSED OF THE COUNTY CLERK AND RECORDER AND THE REGISTERED ELECTORS APPOINTED BY THE MAJOR PARTIES IN ACCORDANCE WITH SECTION 1-10-101, C.R.S.

- ~~(b)~~ 41.1.2 "Canvass workers" shall means workers appointed or hired by the designated election official to assist in the preparation and conduct of the canvass.

41.1.3 "Statement of Ballots Forms" shall means the form used at the polling location pursuant to sections 1-7-505(2) and 1-7-601(2), C.R.S., that accounts for all ballots at that location AND INCLUDES ALL INFORMATION REQUIRED BY THIS RULE. ~~The form includes information required by this rule.~~

##### 41.2 APPOINTMENT TO THE CANVASS BOARD

41.2.1 IN ALL CASES, THE CANVASS BOARD MUST CONSIST OF AN ODD NUMBER OF MEMBERS, AND EACH MEMBER HAS EQUAL VOTING RIGHTS.

41.2.2 FOR A PARTISAN ELECTION, EACH MAJOR PARTY MAY HAVE NO MORE THAN TWO REPRESENTATIVES ON THE CANVASS BOARD. THE BOARD MUST INCLUDE AN EQUAL NUMBER OF REPRESENTATIVES FROM EACH MAJOR PARTY, UNLESS A MAJOR PARTY

FAILS TO CERTIFY REPRESENTATIVES FOR APPOINTMENT.

41.2.3 EACH MAJOR PARTY REPRESENTATIVE ON THE CANVASS BOARD MUST BE REGISTERED TO VOTE IN THE COUNTY WHERE THE REPRESENTATIVE WILL SERVE AND AFFILIATED WITH THE PARTY HE OR SHE REPRESENTS.

41.2.4 A CANDIDATE FOR OFFICE AND MEMBERS OF THE CANDIDATE'S IMMEDIATE FAMILY MAY NOT SERVE ON THE CANVASS BOARD.

41.3 DUTIES OF THE CANVASS BOARD

41.3.1 THE CANVASS BOARD MUST MAKE ITS DETERMINATIONS BY MAJORITY VOTE IN ACCORDANCE WITH SECTION 1-10-101.5(3), C.R.S.

41.3.2 THE CANVASS BOARD'S DUTIES ARE:

(A) CONDUCT THE CANVASS IN ACCORDANCE WITH SECTION 1-10.5-101, C.R.S., INCLUDING:

I. ACCOUNT AND BALANCE THE ELECTION AND CERTIFY THE OFFICIAL ABSTRACT OF VOTES;

II. RECONCILE THE NUMBER OF BALLOTS COUNTED TO THE NUMBER OF BALLOTS CAST; AND

III. RECONCILE THE NUMBER OF BALLOTS CAST TO THE NUMBER OF VOTERS WHO VOTED BY REVIEWING THE RECONCILED DETAILED BALLOT LOGS AND STATEMENT OF BALLOTS;

(B) OBSERVE THE POST-ELECTION AUDIT IN ACCORDANCE WITH SECTION 1-7-514(4), C.R.S., AND ELECTION RULE 11.5.4;

(C) IN COORDINATION WITH THE COUNTY CLERK AND RECORDER, INVESTIGATE AND REPORT DISCREPANCIES FOUND IN THE AUDIT UNDER SECTION 1-7-514(2), C.R.S.; AND

(D) CONDUCT ANY RECOUNT IN ACCORDANCE WITH SECTION 1-10.5-107, C.R.S., AND ELECTION RULE 14. THE CANVASS BOARD'S ROLE IN CONDUCTING A RECOUNT INCLUDES SELECTING BALLOTS FOR THE RANDOM TEST, OBSERVING THE RECOUNTING OF BALLOTS, AND CERTIFYING THE RESULTS.

41.3.3 IF THE BOARD IDENTIFIES A DISCREPANCY IN THE STATEMENT OF BALLOTS, THE BOARD MAY REVIEW THE PARTICULAR BALLOTS AT ISSUE TO IDENTIFY, CORRECT, AND ACCOUNT FOR THE ERROR.

41.3.4 THE CANVASS BOARD MAY NOT PERFORM DUTIES TYPICALLY RESERVED FOR ELECTION JUDGES, INCLUDING:

(A) DETERMINING VOTER INTENT;

(B) EVALUATING VOTER ELIGIBILITY; AND



- (C) REQUESTING NEW LOGS OR REPORTS THAT WERE NOT CREATED TO CONDUCT THE ELECTION.

#### 41.24 Detailed Ballot Log

- 41.24.1 The designated election official ~~shall~~ MUST keep a detailed BALLOT log THAT ACCOUNTS FOR EVERY BALLOT ISSUED AND RECEIVED ~~of all ballots. The designated election official shall begin~~NING the log as soon as WHEN ballots are ordered and received. ~~The log shall include the polling location and/or precinct number(s), ballot style(s), and account for every ballot that is received and distributed.~~ The ELECTION JUDGES MUST RECONCILE THE ~~detailed ballot log shall be reconciled~~ at the conclusion of each workday.
- 41.24.2 The designated election official ~~shall~~ MUST keep and reconcile daily logs of mail-in, mail, and early voting ballots.
- 41.24.3 The designated election official ~~shall~~ MUST indicate in the detailed log the number of paper ballots that are sent to each polling location for use on election day.
- 41.24.4 THE DESIGNATED ELECTION OFFICIAL MUST KEEP All-required logs ~~may be kept either by IN EITHER electronic or manual means~~ FORMAT.

#### 41.35 Election Day Tracking Process

- 41.35.1 ~~The designated election official shall~~ MUST supply each polling location with a Statement of Ballots Form. ~~Combined precincts may use one form. The form MUST include a place for the judges to account for the following information:~~
- (a) The name or number(s) of the precinct or vote center;
  - (b) The number of ballots provided to the polling location;
  - (c) The number of ballots cast;
  - (d) The number of unvoted ballots;
  - (e) The number of damaged or spoiled ballots; and
  - (f) The number of voted provisional ballots.
- 41.35.2 The ELECTION JUDGE MUST RECONCILE THE total number of voted ballots ~~should be reconciled to~~ WITH the number of voters who voted.
- 41.35.3 The ELECTION JUDGE MUST VERIFY THAT THE total number of voted ballots, spoiled or damaged ballots, provisional ballots, and unvoted ballots ~~should be reconciled to be the same as IS~~ THE SAME AS the number of total ballots ~~received at~~ SUPPLIED TO the polling location ~~before voting begins~~.
- 41.35.4 ~~The designated election official shall~~ ELECTION JUDGE MUST ensure that the total of RECONCILE the number of people who signed the pollbook ~~is reconciled to~~ the total of the number of ballots cast.

- 41.35.5 If there is a discrepancy in the numbers on the Statement of Ballots form, the judge ~~shall~~ MUST EXPLAIN THE DISCREPANCY IN WRITING ~~make written notation explaining why the numbers do not balance~~ (for example, THE voter signed in but left the polling place without voting, etc.).
- 41.35.6 The judges ~~JUDGE~~ shall MUST return the completed Statement of Ballots form to the designated election official with the other precinct supplies and mail a duplicate copy ~~pursuant to section 1-7-505, C.R.S.~~ TO THE DESIGNATED ELECTION OFFICIAL'S OFFICE.
- 41.46 Designated Election Official's Disposition of Forms
- 41.46.1 The designated election official ~~shall~~ MUST review the Statement of Ballots form and ~~ensure that it is complete and correct~~ FOR COMPLETION AND ACCURACY.
- 41.46.2 If the designated election official or the canvass board discovers a problem with the Statement of Ballots form that cannot be easily resolved, THEY ~~he or she shall have the right to~~ MAY contact the election judges and ~~ensure that~~ FOR AN EXPLANATION OR CORRECTION ~~the discrepancy is explained or corrected~~.
- 41.57 Procedures for the Day of the Canvass
- 41.57.1 ~~In order for the canvass board established pursuant to section 1-10-101, C.R.S., to perform its duties, pursuant to section 1-10-101.5, C.R.S.,~~ THE designated election official ~~shall~~ MUST provide the following information TO THE CANVASS BOARD:
- (a) The name of each candidate ~~receiving votes, the office, and the total number of~~ votes received;
  - (b) The number/letter of each ballot issue or question and ~~the votes received;~~
  - (c) The number of voters who voted early;
  - (d) The number of mail-in or mail ballots cast, including the number accepted and rejected; AND
  - (e) The number of provisional ballots counted.
- ~~41.5.2 The canvass board shall confirm that the number of ballots cast is less than or equal to the number of people who actually voted in each precinct or vote center.~~
- ~~41.5.3 The designated election official shall use a canvass form that is approved by the Secretary of State.~~
- 41.57.4-2 Any written documentation regarding official numbers ~~shall be~~ IS included as part of the canvass.
- 41.68 Official Abstract
- 41.68.1 The designated election official ~~shall~~ MUST ~~ensure that~~ INCLUDE the number of active ELIGIBLE voters on election day ~~pursuant to section 1-10-105(5)(e), C.R.S., is the number used on the official abstract.~~

41.68.2 The CANVASS BOARD MUST USE THE official abstract ~~shall be compiled on~~ IN a format approved by the Secretary of State.

41.68.3 The official abstract ~~shall~~ MUST include, by precinct/ballot style or vote center, where applicable:

- (a) The statement of votes counted by race and ballot question or issue;
- (b) The total active registered electors in the precinct and the total for the jurisdiction holding the election;
- (c) The total number of electors voting in each precinct, and the total for the jurisdiction holding the election;
- (d) The number of voters who voted early;
- (e) The number of emergency registrations;
- (f) The number of mail-in or mail ballots counted and the number rejected;
- (g) The number of provisional ballots counted and the number rejected listed by each rejection code ~~pursuant to Rule 26.5.4~~; and
- (h) The number of damaged and spoiled ballots.

---

41.79 The Abstract ~~shall be~~ IS the Official, Permanent Record.

41.79.1 The designated election official ~~shall~~ MUST keep all official canvass reports and forms as part of the official permanent election record.

41.9.2 ONCE THE CANVASS BOARD CERTIFIES THE ABSTRACT IT MAY NOT WITHDRAW THE CERTIFICATION. IN THE EVENT OF A RECOUNT, THE CANVASS BOARD MAY ONLY AFFIRM OR AMEND THE ABSTRACT.

41.810 Appointment of Canvass Workers. ~~41.10.1~~ —The designated election official may ~~utilize~~ APPOINT canvass workers to ~~assist in the preparation~~ HELP PREPARE and conduct of the canvass.

41.911 Voter History

41.911.1 After the canvass ~~process is completed~~, the designated election official ~~shall~~ MUST give credit to each voter who votes by mail, at an early voting site, or at a polling location.

41.911.2 If the voter history records do not match the number of voters who voted at that election, the designated election official ~~shall~~ MUST ensure the following:

- (a) Each voter ~~was given~~ RECEIVED credit for voting; and
- (b) All pollbooks and signature cards are accounted for.

41.911.3 All research concerning discrepancies ~~shall~~ MUST be explained and documented.

41.1012 Written Complaints. ~~In accordance with section 1-7-514(2)(b), C.R.S., the~~ THE designated election official ~~shall~~ MUST provide to the canvass board WITH any written complaint about a voting device submitted by a registered elector ABOUT A VOTING DEVICE. ~~and;~~

41.12.1 ~~if~~ IF THE COMPLAINT IS resolved, ~~how it was resolved and if~~ THE DESIGNATED ELECTION OFFICIAL MUST PROVIDE THE DETAILS OF THE RESOLUTION

41.12.2 IF THE COMPLAINT IS pending RESOLUTION WHEN THE BOARD MEETS TO CONDUCT THE CANVASS, THE DESIGNATED ELECTION OFFICIAL MUST PROVIDE a proposal for how the issue will be resolved.

41.13 ROLE OF WATCHERS. WATCHERS APPOINTED UNDER SECTION 1-10.5-101(1)(A), C.R.S., MAY OBSERVE THE BOARD WHILE IT PERFORMS ITS DUTIES, SUBJECT TO RULE 8.

41.14 ROLE OF THE SECRETARY OF STATE. AS PART OF THE SECRETARY'S DUTIES UNDER SECTION 1-1-107, C.R.S., THE SECRETARY MAY PROVIDE GUIDANCE AND INVESTIGATE IMPERFECTIONS AS OUTLINED BELOW.

41.14.1 THE COUNTY CLERK AND RECORDER OR THE CANVASS BOARD MAY REQUEST THAT THE SECRETARY OF STATE PROVIDE GUIDANCE AND SUPPORT TO THE CANVASS BOARD IN THE EXERCISE OF THE BOARD'S DUTIES.

41.14.2 IF, IN THE COURSE OF ASSISTING A CANVASS BOARD, THE SECRETARY OF STATE DISCOVERS AN IMPERFECTION THAT THE SECRETARY BELIEVES MAY AFFECT THE CONDUCT OF OTHER CANVASS BOARDS, THE SECRETARY MAY PROVIDE NOTICE TO OTHER COUNTIES REGARDING THE NATURE OF THE IMPERFECTION.

41.14.3 IMPERFECT RETURNS OR FAILURE TO CERTIFY.

(A) IF THE CANVASS BOARD FAILS TO CERTIFY OR CERTIFIES IMPERFECT RETURNS THAT HAVE NO REASONABLE POTENTIAL TO CHANGE THE OUTCOME OF ANY RACE OR BALLOT MEASURE, THE SECRETARY OF STATE AND COUNTY CLERK MUST CERTIFY THE ELECTION AND ORDER RECOUNTS, IF ANY, IN ACCORDANCE WITH PART 1, ARTICLE 11 OF TITLE 1, C.R.S.

(B) IF THE CANVASS BOARD FAILS TO CERTIFY OR CERTIFIES IMPERFECT RETURNS THAT HAVE A REASONABLE POTENTIAL TO CHANGE THE OUTCOME OF ANY RACE OR BALLOT MEASURE, THE SECRETARY OF STATE WILL CONDUCT AN INVESTIGATION TO IDENTIFY THE NATURE OF, AND ADVISE THE COUNTY CLERK AND RECORDER IN CORRECTING, THE INACCURACY.

Amendments to Rule 42.2:

42.2 "Electronic Transfer" ~~shall mean the use of facsimile and shall not include the use of FAX OR e-mail under (section 1-8-115, C.-R.-S.).~~

Amendments to Rule 42.6:

42.6 The transmission ~~shall~~ MUST also include a mail-in ballot self-affirmation pursuant to 1-8-114 (1) C.-R.-S.

Amendments to Rule 42.11.2:



42.11.2 If the designated election official is unable to provide a mail-in ballot to an elector by any other means, the designated election official may ~~seek authority from the Secretary of State to provide a~~ SEND AN EMERGENCY mail-in ballot to the elector under section 1-8-115(4), C.R.S., and this Rule.

Repeal Rules 42.11.3, 42.11.4, 42.11.5, 42.11.6, and 42.11.7:

42.11.3 ~~No later than 21 days prior to the election, the Secretary of State will post on its website and email counties a designated point of contact for each election for Emergency Electronic Transfer Requests. REPEALED.~~

42.11.4 ~~A request to send a ballot by electronic transfer must be submitted to the designated point of contact via email using the approved Emergency Electronic Transfer form posted on the Secretary of State website. If possible, the designated election official should attempt to consolidate requests to the Secretary of State. REPEALED.~~

42.11.5 ~~At a minimum, a request for an emergency electronic transfer shall include:~~

- ~~(a) Contact information, including name, address, phone number, fax number, and e-mail address for the designated election official or their designee;~~
- ~~(b) Date and time of request sent by designated election official;~~
- ~~(c) Confirmation e-mail to designated election official by Secretary of State upon receipt of request~~
- ~~(d) Justification as to why the ballot(s) need to be sent by fax, which includes the following required information:
  - ~~(i) The elector's name;~~
  - ~~(ii) When the elector applied for the mail-in ballot;~~
  - ~~(iii) The date when the designated election official sent the mail-in ballot to the elector (if applicable);~~
  - ~~(iv) The date the elector contacted the designated election official with information regarding failure to receive the ballot;~~
  - ~~(v) A suggested timeframe for the Secretary of State to respond;~~
  - ~~(vi) The quantity of ballots to be sent by fax; and~~
  - ~~(vii) Approval or disapproval by the Secretary of State; if denied, reason for the denial.~~~~
- ~~(e) Confirmation e-mail from the designated election official to Secretary of State upon receipt of approval or disapproval. REPEALED.~~

42.11.6 ~~The Secretary of State shall respond in writing to the designated election official as soon as possible, but no later than eight business hours after receipt of the request. REPEALED.~~

42.11.7 ~~The Secretary of State shall have the ability to issue a blanket approval by electronic transfer.~~ REPEALED.

**II. Basis, Purpose, and Specific Statutory Authority**

A Statement of Basis, Purpose, and Specific Statutory Authority follows this notice and is incorporated by reference.

**III. Statement of Justification and Reasons for Adoption of Temporary Rules**

A statement of the Secretary of State's findings to justify the immediate adoption of these new and amended rules on a temporary basis follows this notice and is incorporated by reference.<sup>5</sup>

**IV. Effective Date of Adopted Rules**

These new and amended rules are immediately effective on a temporary basis and will become permanently effective twenty days after publication in the Colorado Register.<sup>6</sup>

Dated this 15<sup>th</sup> day of August, 2012,



Suzanne Staiert  
Deputy Secretary of State

For

Scott Gessler  
Colorado Secretary of State

<sup>5</sup> Section 24-4-103(6), C.R.S. (2011).

<sup>6</sup> Section 24-4-103(5), C.R.S. (2011).



## Statement of Basis, Purpose, and Specific Statutory Authority

### Office of the Secretary of State Election Rules 8 CCR 1505-1

August 15, 2012

#### I. Basis and Purpose

This statement is about amendments to the Colorado Secretary of State Election Rules. The amendments are intended to ensure uniform and proper administration, implementation, and enforcement of Federal and Colorado election laws.<sup>1</sup> The revisions are also intended to improve the administration of elections in Colorado, to increase the transparency and security of the election process, and to answer questions arising under State election laws as follows:

- Rule 2.7.4 is repealed in accordance with changes made by section 3 of House Bill 12-1292, which amended section 1-2-204(2)(d), C.R.S., to make gender an optional response for a person registering to vote.
- New Rule 2.7.5 is adopted to implement changes made by section 6 of House Bill 12-1292. In accordance with amendments to section 1-2-509, C.R.S., if a county notifies an applicant that his or her voter registration application is incomplete, and the applicant does not provide the additional information necessary to complete the application within 24 months after notification is sent, the applicant must reapply.
- Amendments to Rule 2.11 clarify that an elector may apply through the online voter registration portal to update his or her inactive voter registration record to active status.
- Amendments to Rule 2.19.1 implement changes made by section 7 of House Bill 12-1292. Amendments to section 1-2-605(6)(b), C.R.S., provide that a confirmation card only needs to include information necessary to update registration rather than a complete voter registration application.
- Rule 8.6, temporarily adopted on April 2, 2012, is permanently adopted with revisions to clarify that the role and limitations of watchers. Additional revisions to Rule 8 require watchers to affirm that they will not attempt to obtain or disclose results before official results are released, or confidential voter information at any time.
- Rule 9.1 is amended to implement changes made by section 26 of House Bill 12-1292. Amendments to section 1-7-111, C.R.S., provide that an elector may receive assistance

<sup>1</sup> Article VII of the Colorado Constitution, Title 1 of the Colorado Revised Statutes, and the Help America Vote Act of 2002 ("HAVA"), P.L. No. 107-252.

from an election judge or any other person the elector selects. Additionally, any person, other than an election judge, who assists an elector must first complete a voter assistance/disabled voter self-affirmation form. Amendments to the rule heading implement the people first language requirements of House Bill 10-1137.

- New Rule 10.6, temporarily adopted on April 2, 2012, is permanently adopted with revisions to clarify that the rule applies when a major political party nominates more than one candidate for any office.
- New Rule 10.7 establishes procedures for voiding the first and generating a new ballot when an elector submits a timely address or affiliation change after the county either sends the voter file to a print vendor, prints, or mails ballots. The rule also clarifies which ballot to count when the county processes the change to the elector's record after it mails ballots.
- Rules 12.4.1(a), 12.4.1(b)(2), and 12.4.2(a) are amended to implement changes made by section 32 of House Bill 12-1292 and section 10 of House Bill 12-1293. These changes harmonize mail ballot plan deadlines for elections conducted by the county clerk. The changes also adjust the deadline for a designated election official to submit a mail ballot plan for a nonpartisan recall election and for the Secretary of State to approve or disapprove the plan.
- New Rule 12.4.1(d), amendments to Rule 12.11, and new Rules 13.19 and 13.20 are adopted to clarify when a designated election official may mail ballots to an elector ~~whose record is marked inactive – failed to vote.~~ Specifically, the changes to Rules 12.4.1(d) and Rule 12.11 clarify that a county clerk may not mail a ballot in a coordinated mail ballot election to an inactive – failed to vote elector. New Rule 13.19 clarifies that, in order to receive a mail-in ballot in a polling place or vote center election, an inactive – failed to vote elector must make a timely ballot request and update his or her record to active. The rule changes further provide that a military or overseas elector whose record is inactive or whose ballot request has expired may make obtain an application and ballot using the statewide electronic ballot delivery system. Every county must use the approved system to make these applications and ballots available to military and overseas electors unless the county requests and receives a waiver.

The Colorado General Assembly passed the Mail Ballot Act in 1990, which provided for counties choosing to conduct a coordinated election to send ballots only to active registered electors. More recently, in 2008, the General Assembly passed House Bill 08-1329, which amended section 1-7.5-108.5(2)(b), C.R.S. The changes in House Bill 08-1329 were adopted to address concerns stemming from the 2006 general election. Election day 2006 saw unusually long lines throughout the day, leading to concerns that voters had simply given up, and become inactive – failed to vote as a result. The bill created a one-time exception requiring designated election officials to send mail ballots to all inactive – failed to vote electors for mail ballot elections conducted in November 2009. The bill also added section 1-7.5-108.5(2)(b), C.R.S., which stated that on July 1, 2011, this one-time exception was repealed.

Where the General Assembly intends for counties to mail ballots to inactive – failed to vote electors, the General Assembly specifically states that intent in the language of the statute. For example, section 1-7.5-107(3)(a)(II), C.R.S., requires mailing ballots to



inactive – failed to vote electors who are affiliated with a participating party in a primary mail ballot election. In the repealed section 1-7.5-108.5(2)(b), C.R.S., the General Assembly specifically stated that counties were to mail ballots to inactive – failed to vote electors in a coordinated election. But because the requirement was for a specific period of time and has expired, county clerks may now send ballots only to active electors in a coordinated election.

In 2011, the City and County of Denver determined that it would mail ballots to inactive – failed to vote electors in the coordinated election. The Secretary of State advised Denver that the statute contemplated mailing only to active electors in a coordinated election. Denver refused to comply, and the Secretary filed a complaint in Denver district court to enjoin Denver from mailing to inactive – failed to vote electors. Denver responded and asserted several defenses, including an allegation that the Secretary failed to comply with the rulemaking requirements of the Administrative Procedure Act (APA). The changes to Rules 12.4.1(d) and Rule 12.11 address Denver's concern that the Secretary failed to comply with the APA.

- Amendments to Rule 26 clarify the procedures for processing provisional ballots in the statewide voter registration system to ensure uniformity and consistency in statewide elections. Specifically, the revisions to Rule 26.10 state that the county clerk must make updates to the appropriate voter registration records before coding the ballots and linking to the voter record. New Rule 26.11 provides that the county clerk must completely enter and code all provisional ballots in the statewide voter registration system before closing the election, and new Rule 26.12 requires the county clerk to process all pollbooks before processing provisional ballots. Repealed Rule 26.1.6 is amended and relocated to new Rule 26.13.
- Amendments to Rule 29 clarify that the designated election official must use the signature affidavit and signature verification letters and forms prescribed by the Secretary of State. These changes also clarify that if a clerk calls any elector regarding an unsigned affidavit, the clerk must call all electors whose affidavits are not signed.
- Rule 30.1.6(a) is amended to implement changes made by Senate Bill 12-062 and House Bill 12-1292. Specifically, amendments to the definition of identification in section 1-1-104(19.5)(a), C.R.S., list two additional forms of identification: (1) a valid veteran identification card issued by the United States department of veterans affairs veterans' health administration with a photograph of the eligible elector; and (2) a valid identification card issued by a federally recognized tribal government certifying tribal membership.
- Rules 32.1, 32.2, 32.3, and 32.4 are repealed. House Bill 12-1293 re-codified Part 1 of Article 12 with respect to recall elections. As a result, the Rules are no longer necessary.
- Amendments to Rule 41 clarify the role and duties of canvass boards to ensure uniform appointment and operation of canvass boards in state and federal elections. Specifically, the amendments:
  - Clarify the makeup of and appointment to the canvass board. This rule clarifies that the board is a committee composed of the county clerk and recorder and the registered electors appointed by the major parties in accordance with section

1-10-101, C.R.S. Colorado presently has more than two major political parties. This rule affords each major party an equal number of representatives on the canvass board, provided that each party submits representatives. For purposes of efficient elections administration and fairness, this rule also limits the number of representatives from each major party to two and requires the canvass board to consist of an odd number of members. Additionally, the rule clarifies that a candidate for office and members of the candidate's immediate family may not serve on the canvass board.

- Clarify the canvass board's duties under section 1-10-101.5, C.R.S. In particular, the board is tasked with reviewing the election judges' reconciliation to account and balance the election returns. The rule clarifies that where the board identifies a discrepancy in the judges' reconciliation, it may review the ballots at issue only for the purpose of correcting and accounting for the error. Clarifies the process for the Secretary of State to provide assistance and guidance to the county clerk and canvass boards. Specifically, the rule outlines the Secretary's role in the event that the board fails to certify or certifies imperfect returns. The rule provides that where imperfect returns have a reasonable potential to affect the outcome of any race or ballot measure, the Secretary will investigate and assist the county clerk and board in resolving the imperfection before the state or county certifies the election results.
  - Clarifies that watchers appointed under section 1-10.5-101(1)(a), C.R.S., may observe the board while it performs its duties, subject to Rule 8.
- 
- Revisions to Rule 42 include technical corrections and conforms the rule to changes made by section 38 of House Bill 12-1292. Changes to Rule 42.2 clarify the definition of electronic transfer for emergency ballots. Additionally, Rules 42.11.3 through 42.11.7 are repealed in accordance with amendments to section 1-8-115, C.R.S., that eliminate the requirement that the designated election official seek authority from the Secretary of State before faxing an emergency mail-in ballot to an elector.

## **II. Rulemaking Authority**

The statutory and constitutional authority is as follows:

1. Section 1-1-107(2)(a), C.R.S., (2011), which authorizes the Secretary of State "[t]o promulgate, publish and distribute...such rules as the secretary finds necessary for the proper administration and enforcement of the election laws."
2. Section 1-1.5-104(1)(e), C.R.S., (2011), which authorizes the Secretary of State to "[p]romulgate rules in accordance with article 4 of title 24, C.R.S., as the secretary finds necessary for proper administration and implementation of [the "Help America Vote Act of 2002", 42 U.S.C. 15301-15545]."
3. Section 1-7.5-106(2), C.R.S., (2011), which authorizes the Secretary of State to "adopt rules governing procedures and forms necessary to implement [Article 7.5 of Title 1, C.R.S.]."

4. Section 1-8-115(5)(d), C.R.S., (2011), which authorize the Secretary of State to "prescribe by rule any procedure or requirements as may be necessary to implement the provisions of [the emergency electronic transfer statute]."
  5. Section 1-8.5-112, C.R.S., (2011), which requires the Secretary of State to promulgate all appropriate rules...for the purpose of ensuring the uniform application of [Article 8.5 of Title 1, C.R.S.]."
  6. Section 1-10-104.5, C.R.S. (2011), which authorizes the Secretary of State to "promulgate rules...for the purpose of establishing equitable uniformity in the appointment and operation of canvass boards."
-

**STATE OF  
COLORADO**  
**Department of State**  
1700 Broadway  
Suite 200  
Denver, CO 80290



**Scott Gessler**  
Secretary of State

**Suzanne Staiert**  
Deputy Secretary of State

## **Statement of Justification and Reasons for Adoption of Temporary Rules**

**Office of the Secretary of State  
Election Rules  
8 CCR 1505-1**

**August 15, 2012**

**Amended Rules:** 2.7.4, 2.11, 2.19.1, 8.6, 8.7, 8.8, 8.15, 9.1, 10.6, 12.4.1(a), 12.4.1(b)(2), 12.4.2(a), 12.11, 26.10, 29.1.1, 29.1.3, 29.1.4, 29.8, 30.1.6(a), 41, 42.2, 42.6, and 42.11.2

**New Rules:** 2.7.5, 10.7, 12.4.1(d), 13.19, 13.20, 26.11, 26.12, and 26.13

**Repealed Rules:** 26.1.6 (relocated to new rule 26.13), 32.1, 32.2, 32.3, 32.4, 42.11.3, 42.11.4, 42.11.5, 42.11.6, and 42.11.7

In accordance with Colorado election law,<sup>1</sup> the Secretary of State finds that certain amendments to the existing election rules must be adopted and effective immediately to ensure the uniform and proper administration and enforcement of Colorado election laws during the 2012 general election. Temporary adoption is necessary both to comply with law and to preserve the public welfare generally.

A public Rulemaking hearing was conducted in accordance with the State Administrative Procedure Act<sup>2</sup> on July 23, 2012, to receive comment and testimony on the proposed rules. These rules implement the enactment of recommendations made by the Secretary of State, Elections Division staff, County Clerk and Recorders, and interested parties throughout the State of Colorado. Adoption of the rules on a temporary basis is necessary to provide clear guidance to county clerks given the close proximity of the September 10, 2012 ballot certification deadline and the November 2012 General Election.

For these reasons, and in accordance with the State Administrative Procedure Act, the Secretary of State finds that adoption and immediate effect of the amendments to existing election rules is imperatively necessary to comply with state and federal law and to promote public interests.<sup>3</sup>

<sup>1</sup> Sections 1-1-107(1)(c), 1-1-107(2)(a), 1-1.5-104(1)(e), C.R.S. (2011). The Secretary of State has the power "[t]o promulgate, publish, and distribute...such rules as [the Secretary] finds necessary for the proper administration and enforcement of the election laws" and "...[the "Help America Vote Act of 2002", 42 U.S.C. 15301-15545]...."

<sup>2</sup> Section 24-4-103(3)(a), C.R.S. (2011).

<sup>3</sup> Section 24-4-103(3)(6), C.R.S. (2011).

Main Number (303) 894-2200  
Administration (303) 860-6900  
Fax (303) 869-4860

TDD (303) 869-4867  
Web Site [www.sos.state.co.us](http://www.sos.state.co.us)  
E-mail [administration@sos.state.co.us](mailto:administration@sos.state.co.us)