

## State Court Ballot Litigation and the Federal Deadline for Overseas Ballots

*Board of County Commissioners v. Duran*  
(1:14-cv-844) and *New Mexico ex rel. Salazar*  
*v. Duran* (1:14-cv-848) (Karen B. Molzen, D.N.M.)

Three days in advance of the September 20, 2014, federal deadline for mailing absentee ballots overseas for the 2014 general election, New Mexico’s secretary of state filed an injunction motion in the District of New Mexico challenging a state court action by Bernalillo’s county clerk as improperly delaying the printing of ballots in Bernalillo County.<sup>1</sup>

Bernalillo’s county clerk had filed a mandamus petition with New Mexico’s supreme court on September 15, challenging the secretary of state’s refusal to place advisory questions on Bernalillo’s ballots.<sup>2</sup> New Mexico’s supreme court set the matter for hearing on September 23 and stayed final printing of ballots for Bernalillo County.<sup>3</sup> The secretary removed this action to federal court on September 16.<sup>4</sup> On the following day, the county clerk moved for a remand.<sup>5</sup> Magistrate Judge Karen B. Molzen set the motions for hearing at 4:00 that afternoon.<sup>6</sup>

In the District of New Mexico, civil cases other than prisoner petitions are assigned to magistrate judges, who preside over the cases with the parties’ consent.<sup>7</sup> In this case, the parties consented.<sup>8</sup>

Overseas ballots were the subject of litigation for 2010 and 2012 elections. On October 14, 2010, Judge Martha Vázquez issued a consent decree<sup>9</sup> binding New Mexico and the U.S. Justice Department to remedies for New Mexico

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1. Injunction Motion, *Bd. of Cnty. Comm’rs v. Duran*, No. 1:14-cv-844 (D.N.M. Sept. 17, 2014), D.E. 5.

2. Mandamus Petition, *Bd. of Cnty. Comm’rs v. Duran*, No. 34,890 (N.M. Sept. 15, 2014), *also filed as Ex. A, Notice of Removal, Bd. of Cnty. Comm’rs*, No. 1:14-cv-844 (D.N.M. Sept. 16, 2014), D.E. 1 [hereinafter *Bernalillo County Notice of Removal*].

“One of the two non-binding Bernalillo County questions would center on marijuana decriminalization, while the other would be on raising taxes for mental-health programs.” Dan Boyd, *Debate Heats Up on Easing Pot Penalties*, Albuquerque J., Sept. 17, 2014, at A1.

3. Order, *Bd. of Cnty. Comm’rs*, No. 34,890 (N.M. Sept. 16, 2014), *also filed as Ex. B, Bernalillo County Notice of Removal, supra* note 2; *see* Dan McKay, *High Court Will Hear Bern. Ballot Arguments*, Albuquerque J., Sept. 16, 2014, at A1.

4. Bernalillo County Notice of Removal, *supra* note 2.

5. Remand Motion, *Bd. of Cnty. Comm’rs*, No. 1:14-cv-844 (D.N.M. Sept. 17, 2014), D.E. 7.

6. Order, *id.* (Sept. 17, 2014), D.E. 8.

Tim Reagan interviewed Judge Molzen for this report by telephone on September 21, 2015.

7. Interview with Hon. Karen B. Molzen, Sept. 21, 2015.

8. Minutes, *Bd. of Cnty. Comm’rs*, No. 1:14-cv-844 (D.N.M. Sept. 17, 2014), D.E. 9.

9. Consent Decree, *United States v. New Mexico*, No. 1:10-cv-968 (D.N.M. Oct. 14, 2010), D.E. 7, *also filed as Ex. A, Injunction Motion, Bd. of Cnty. Comm’rs*, No. 1:14-cv-844 (D.N.M. Sept. 17, 2014), D.E. 5; *see* Complaint, *id.* (Oct. 12, 2010), D.E. 1.

election officials' sending some overseas voters late absentee ballots in violation of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),<sup>10</sup> as amended by the Military and Overseas Voter Empowerment Act of 2009 (MOVE Act).<sup>11</sup> A supplemental consent decree covered the 2012 election cycle.<sup>12</sup>

On the day after Bernalillo filed its action with New Mexico's supreme court, Santa Fe County filed a similar mandamus action,<sup>13</sup> which the supreme court set for hearing on September 19, 2014.<sup>14</sup> New Mexico's secretary of state removed this action on September 17,<sup>15</sup> and Santa Fe County moved for a remand on September 18.<sup>16</sup> Assured that the parties in the second case also consented to magistrate judge jurisdiction, Judge Molzen consolidated the Bernalillo action and the Santa Fe action.<sup>17</sup> She held a second hearing on September 18.<sup>18</sup>

Finding that the federal court lacked subject-matter jurisdiction over the cases, following the well-pleaded complaint rule, Judge Molzen remanded the two cases on the day of the second hearing.<sup>19</sup>

On September 19, New Mexico's supreme court ruled in favor of nonbinding questions on the counties' ballots.<sup>20</sup> Judge Molzen was pleased that the state court was able to resolve the cases promptly.<sup>21</sup>

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10. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311, *formerly* 42 U.S.C. §§ 1973ff to 1973ff-7 (2013).

11. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2318–35.

12. Supplemental Consent Decree, *United States v. New Mexico*, No. 1:10-cv-968 (D.N.M. Aug. 1, 2011), D.E. 12.

13. Mandamus Petition, *New Mexico ex rel. Salazar v. Duran*, No. 34,893 (N.M. Sept. 16, 2014), *also filed as* Ex. A, Notice of Removal, *New Mexico ex rel. Salazar v. Duran*, No. 1:14-cv-848 (D.N.M. Sept. 17, 2014), D.E. 1 [hereinafter *Santa Fe County Notice of Removal*]; *see* Boyd, *supra* note 2 (“Earlier this month, the Santa Fe commission voted to include a question on the ballot asking voters whether the commission should support city, county and statewide efforts to decriminalize possession of one ounce or less of marijuana.”).

14. Order, *Salazar*, No. 34,893 (N.M. Sept. 17, 2014), *also filed as* Ex. B, *Santa Fe County Notice of Removal*, *supra* note 13.

15. *Santa Fe County Notice of Removal*, *supra* note 13.

16. Remand Motion, *Salazar*, No. 1:14-cv-848 (D.N.M. Sept. 18, 2014), D.E. 4.

17. Order, *Bd. of Cnty. Comm'rs v. Duran*, No. 1:14-cv-844 (D.N.M. Sept. 18, 2014), D.E. 13; Docket Sheet, *Salazar*, No. 1:14-cv-848 (D.N.M. Sept. 17, 2014) (D.E. 5 to 7); Interview with Hon. Karen B. Molzen, Sept. 21, 2015; *see* Joint Motion to Consolidate, *Salazar*, No. 1:14-cv-848 (D.N.M. Sept. 18, 2014), D.E. 9.

18. Minutes, *Bd. of Cnty. Comm'rs*, No. 1:14-cv-844 (D.N.M. Sept. 18, 2014), D.E. 14.

19. Order, *id.* (Sept. 18, 2014), D.E. 15; Interview with Hon. Karen B. Molzen, Sept. 21, 2015; *see* Scott Sandlin, *Ballot Issue Back in State Court*, Albuquerque J., Sept. 19, 2014, at C1 (“A case may be removed by the defendant only if it could have been filed in federal court in the first place, she said.”).

20. Order, *Bd. of Cnty. Comm'rs v. Duran*, No. 34,890 (N.M. Sept. 19, 2014); *see* Thomas J. Cole, *Ballot Fight Comes Down to “Other Questions,”* Albuquerque J., Sept. 29, 2014, at A1; Dan McKay, *Court Puts Pot Questions Back on Ballot*, Albuquerque J., Sept. 20, 2014, at A1.

21. Interview with Hon. Karen B. Molzen, Sept. 21, 2015.