

Preclearance for a Special Election

Buell v. Monterey County
(Jeremy Fogel, N.D. Cal. 5:10-cv-1952)

A federal complaint alleged that polling place consolidations and the date of the election had not been precleared for a special election to fill a vacancy in the state senate, as required by section 5 of the Voting Rights Act for a county overlapping with the senate district. By the time a three-judge court met to hear the case, the special election had been precleared.

Subject: Election dates. *Topics:* Poll locations; section 5 preclearance; three-judge court; enjoining elections; intervention.

On May 6, 2010, voters filed a federal complaint in the Northern District of California's San Jose courthouse to challenge special election procedures planned to fill a vacancy in California's senate.¹ The plaintiffs claimed that the date of the election and the limited number of polling places planned for it had not been precleared pursuant to section 5 of the Voting Rights Act, as required for elections in Monterey County.² The senate district and Monterey County overlap.³

The special election was necessary because President Obama appointed Ellen Tauscher, a member of Congress, to be Under Secretary of State for Arms Control and International Security.⁴ On November 3, 2009, Lieutenant Governor John Garamendi won a special election for her seat.⁵ On April 26, 2010, California's legislature confirmed Governor Arnold Schwarzenegger's appointment of Abel Maldonado to replace Garamendi.⁶ That left Maldonado's seat in the state senate vacant, which the governor could fill either by special election or by consolidating the election with the regular June 8 pri-

1. Complaint, *Buell v. Monterey County*, No. 5:10-cv-1952 (N.D. Cal. May 6, 2010), D.E. 1; see Amended Complaint, *id.* (May 13, 2010), D.E. 24; see also Bob Egelko, *Dems Sue to Halt Election for Maldonado Seat*, S.F. Chron., May 8, 2010, at C2.

2. Complaint, *supra* note 1; see Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, as amended, 52 U.S.C. § 10304 (2015) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge court).

3. web.archive.org/web/20100428055427/www.legislature.ca.gov/legislators_and_districts/districts/senatedistricts.html (15th district).

4. See Dan Walters, *2 Vacancies Give Governor Opportunity*, Sacramento Bee, June 1, 2009, at A3.

5. See Joe Garofoli, *Democrat Wins Easy House Victory*, S.F. Chron., Nov. 4, 2009, at A1; Lisa Vorderbrueggen, *Garamendi Easily Defeats Surprisingly Tough GOP Rival*, San Jose Mercury News, Nov. 4, 2009, at 4B.

6. See Patrick McGreevy, *Maldonado Takes Office as Lieutenant Governor*, L.A. Times, Apr. 27, 2010, at 6; Torey Van Oot, *Maldonado Wins Senate Confirmation as Lieutenant Governor*, Sacramento Bee, Apr. 27, 2010.

mary and November 2 general election.⁷ The governor chose to go special: a June 22 first round and an August 17 runoff.⁸

The court assigned the case to a magistrate judge,⁹ but the plaintiffs sought reassignment to a district judge.¹⁰ The court reassigned the case to Judge Jeremy Fogel,¹¹ because of his experience in 2003 with section 5 litigation.¹² On the case's second day, the plaintiffs moved for a temporary restraining order.¹³ On May 10, three voters moved to intervene as defendants.¹⁴

On May 12, Judge Fogel granted intervention,¹⁵ set a hearing for May 20,¹⁶ and asked the circuit's chief judge to designate a three-judge court to hear the section 5 claim.¹⁷ "Pending the hearing, the County is restrained from sending any absentee ballots to voters registered in Monterey County until Section 5 preclearance has been obtained or until further order of the Court."¹⁸ At the hearing, the U.S. Department of Justice announced that it had precleared the special election.¹⁹ The three-judge court determined on

7. See McGreevy, *supra* note 6.

8. See Laith Agha, *Special Election Likely to Cost County \$500K*, Monterey Herald, Apr. 28, 2010, at A1; Kurtis Alexander, *Special Election on Aug. 17*, San Jose Mercury News, Apr. 28, 2010, at 5B; Egelko, *supra* note 1.

9. Initial Case Management Order, *Buell v. Monterey County*, No. 5:10-cv-1952 (N.D. Cal. May 6, 2010), D.E. 3.

10. Declination, *id.* (May 6, 2010), D.E. 4.

11. Reassignment Order, *id.* (May 6, 2010), D.E. 7.

Tim Reagan interviewed Judge Fogel for this report at the Federal Judicial Center on August 2, 2012. Judge Fogel has been the Center's director from October 3, 2011, through September 14, 2018. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/judges; see Supreme Court Press Release, July 25, 2018, www.fjc.gov/sites/default/files/07.25.18-Press%20Release-FJCAnnouncement.pdf (announcing General John Cooke as Judge Fogel's successor).

12. Interview with Hon. Jeremy Fogel, Aug. 2, 2012; see Temporary Restraining Order, *Oliverez v. California*, No. 5:03-cv-3658 (N.D. Cal. Aug. 15, 2003), D.E. 20, 2003 WL 22025009 (concerning the holding of a special recall election); Temporary Restraining Order, *Salazar v. Monterey County*, No. 5:03-cv-3584 (N.D. Cal. Aug. 15, 2003), D.E. 20, 2003 WL 22025010 (concerning the moving of a ballot initiative election from a primary election to an earlier special recall election).

13. Temporary Restraining Order Motion, *Buell*, No. 5:10-cv-1952 (N.D. Cal. May 7, 2010), D.E. 8.

14. Intervention Motion, *id.* (May 10, 2010), D.E. 14.

15. Order, *id.* (May 12, 2010), D.E. 19.

16. Order to Show Cause, *id.* (May 12, 2010), D.E. 21; see Larry Parsons, *Hearing Set on Election Suit*, Monterey Herald, May 13, 2010, at A4.

17. Letter, *Buell*, No. 5:10-cv-1952 (N.D. Cal. May 12, 2010), D.E. 22; see Order, *id.* (May 19, 2010), D.E. 32 (chief circuit judge's designation of a three-judge court).

18. Order to Show Cause, *supra* note 16, at 4.

19. Notice, *Buell*, No. 5:10-cv-1952 (N.D. Cal. May 20, 2010), D.E. 36; see Bob Egelko, *Special Election for Senate Seat Vacated by Maldonado OK'd*, S.F. Chron., May 21, 2010, at C7.

the following day that the plaintiffs, therefore, were not entitled to immediate injunctive relief.²⁰

This case did not get as much public attention as a section 5 case seven years previously involving the recall of Governor Gray Davis and election of Schwarzenegger as his replacement.²¹ For the state senate case, a regular courtroom could be used, and the circuit judge member of the panel participated by video conference.²² The court's and the county's experience with the earlier case helped to make this case run more smoothly.²³

The governor's party won the special election.²⁴ Judge Fogel approved a voluntary dismissal of the case on September 27.²⁵

20. Order, *Buell*, No. 5:10-cv-1952 (N.D. Cal. May 21, 2010), D.E. 37; see Kurtis Alexander, *Special Election for Senator OK'd*, Monterey Herald, May 22, 2010, at A2.

21. Interview with Hon. Jeremy Fogel, Aug. 2, 2012.

22. *Id.*

23. *Id.*

24. See Robin Hindery, *Laird Concedes Senate Election*, Monterey Herald, Aug. 19, 2010, at A1.

25. Order, *Buell*, No. 5:10-cv-1952 (N.D. Cal. Sept. 27, 2010), D.E. 49.