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RECEIVED
October 17, 2014
**Commission on
State Mandates**

Friday, October 17, 2014

Heather Halsey
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Via Electronic Service

**RE: Environmental Law Foundation Comments on Draft Proposed Decision,
Test Claims 10-TC-12 and 12-TC-01, *Water Conservation***

Dear Ms. Halsey and Members of the Commission,

Environmental Law Foundation (“ELF”) is happy to submit these comments on the Draft Proposed Decision on the test claims entitled *Water Conservation*, 10-TC-12 and 12-TC-01 (“test claim”).

ELF is a 501(c)(3) nonprofit organization. Founded on Earth Day, 1991, ELF’s mission is to improve environmental quality by enforcing state and federal environmental laws.

ELF agrees with the decision reached by the Commission on State Mandates (“Commission”) in its Draft Proposed Decision (“Draft”), released July 31, 2014. To aid the Commission in developing its final decision, we would like to present an additional ground upon which the Commission could rely in denying the test claim as it relates to the claims targeted at the Water Conservation Act of 2009’s requirements for agricultural water suppliers.¹

ELF believes that the Commission should deny the test claim under Government Code § 17556(d) because the claimant irrigation districts have the authority to raise the funds to pay for any additional costs. Specifically, the Commission should find that charges for irrigation water are not “property-related fees” for the purposes of Article XIIIID of the California Constitution. As discussed below, this finding is expressly permitted by California case law and would support a finding that the claimant districts have authority to raise revenue.

¹ ELF also agrees with the Draft’s conclusions as they concern urban water suppliers, but our comments are directed solely at the Draft’s conclusions relating to the agricultural water suppliers.

Discussion

ELF agrees with the Draft's denial of the agricultural water districts' test claim. We will briefly review the legal background, claimant districts' contentions, and the Draft's conclusion, and then offer an additional ground that the Commission could use to dispose of the claimants' contentions.

Denial of a Test Claim Is Appropriate Where the Local Government Can Raise Revenue to Cover New Costs.

Under Article XIII B § 6 of California's Constitution, when the Legislature mandates a "new program or higher level service on any local government" the Legislature must provide a "subvention of funds" to the local government if the new program imposes costs on it. The Commission is empowered to hear and decide claims by local agencies asserting that they are entitled to be reimbursed by the State under Article XIII B § 6. (Gov't Code § 17551(a).)

Government Code § 17556(d) contains an important exception to the reimbursement requirement embodied in Article XIII B § 6. Section 17556(d) provides that the Commission shall not find that the Legislature imposed a reimbursable cost on the local government if the local government had the authority to levy fees or service charges sufficient to pay for the cost of the mandate.

The Supreme Court explained the logic of this exception when it upheld section 17556(d)'s constitutionality in *County of Fresno v. State of California* (1991) 53 Cal.3d 482. In denying a facial challenge to section 17556(d), the Court pointed out that Article XIII B § 6 was adopted by the voters as part of a larger package of taxation and government spending reforms that had the effect of severely restricting local agencies' ability to raise revenue. (*Id.* at 487; *see generally* Cal. Const., arts. XIII A, XIII B.) Because these reforms made it so difficult for local governments to raise additional revenue, the voters required the State to reimburse local agencies when it imposed costs on them that the local agencies were "ill-equipped" to pay for themselves. (*County of Fresno*, 53 Cal.3d at 487.)

But when local agencies have the authority to raise revenue to cover costs imposed by a state mandate, the Court held, Article XIII B § 6's logic no longer applies. (*Id.* at 488.) In cases where the taxation and appropriations limits in Articles XIII A and XIII B do not prevent the local governments from raising revenue, there is no reason to require the State to reimburse additional costs. (*Id.*)

In sum, when local agencies, such as claimants, have the authority to raise revenues to cover additional costs imposed on them by a state mandate, the Commission must deny a test claim for reimbursement.

The Commission Concluded that the Districts Have the Authority to Raise Funds to Cover the Cost of Compliance with the Act.

The claimant agricultural districts, Glenn-Colusa Irrigation District and Oakdale Irrigation District (collectively "Claimants") argue that Article XIII D of the Constitution divests them

of the authority to raise fees. (Claimants' Rebuttal 10-TC-12, 12-TC-01, filed August 7, 2013 ["Claimants' Rebuttal"] at 11-21.)

Voters adopted Proposition 218 in 1996, adding Article XIIIID to the Constitution. The proposition restricted local agencies from raising or imposing new assessments or "property-related charges." Under Article XIIIID, local agencies must comply with a series of procedural and substantive requirements in order to impose new assessments or property-related fees. (Cal. Const. Art. XIIIID §§ 4-6.) At issue here is the requirement that new property-related fees be submitted to the voters for approval. (Cal. Const. Art. XIIIID § 6(c).)

Claimants assert that in order to pay for the costs required to implement the Act, they must submit any new fee to the voters, under Article XIIIID § 6(c). (Claimants' Rebuttal at 18.) They argue that this requirement divests the claimant districts of the authority to raise the funds necessary to cover any additional costs because the ultimate authority to impose the fee rests in the hands of the voters, not the districts themselves. (*Id.*) Because the voters have ultimate authority, Claimants argue, the exception in Government Code § 17556(d) does not apply, and the State must therefore reimburse them. (*Id.*)

In denying the test claim, the Draft relies in part on an exemption contained in Article XIIIID § 6(c). This exemption removes property-related fees for "water service" from the voter approval requirements. (Draft at 80.) Revenue raised to cover any costs imposed by the Act would not need voter approval, meaning that the Claimants retain authority to impose the fee. Reimbursement, therefore, would be inappropriate.

Charges for Irrigation Water Are Not "Property-Related Fees" Within the Meaning of Article XIIIID.

ELF agrees with the Commission's interpretation of Article XIIIID § 6(c) and we believe that there is an additional reason why the Commission should deny the test claim: Article XIIIID compels the conclusion that charges for irrigation water are not "property-related fees" at all. As a result, raising them does not trigger the substantive or procedural requirements contained in Article XIIIID, and the claimant districts may increase them free of any constitutional obstacle. And since the claimants have plenary authority to raise these fees, the Commission is correct to deny the test claim under Government Code § 17556(d).

Article XIIIID, § 3 restricts local governments' ability to levy a new "assessment, fee, or charge" without complying with the substantive and procedural requirements of section 4 (assessments) and section 6 (property-related fees). Claimants argue that Article XIIIID places these restrictions on *all* "fees and charges." (Claimants' Rebuttal at 21.) But the plain text of the article reveals that it only restricts assessments and fees and charges that are "property-related." (Cal. Const., art XIIIID § 2(e).)

Section 2 of Article XIID makes Proposition 218's relatively limited reach abundantly clear. It defines "fee" or "charge" as any "levy... imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Cal. Const. Art. XIID § 2(e).) Not all fees and charges, therefore, require conformance with Proposition 218. Fees that are not "imposed upon a parcel" or that are

not imposed upon a “person as an incident of property ownership” or that are not a “user fee or charge for a property related service” are not subject to Article XIII D.

The Supreme Court’s rulings are consistent with this position. The Court has held that fees and charges that are not related to property are not covered by Proposition 218. In *Apartment Association of Los Angeles County v. City of Los Angeles*, the Court considered an inspection fee levied by Los Angeles on landlords. ((2001) 24 Cal.4th 830.) A landlords’ association sued the city, alleging that the fee should have complied with Article XIII D § 6’s procedural and substantive requirements. The Court ruled against the landlords.

The Court started from the idea that Proposition 218 was enacted in order to address “tax increases disguised via euphemistic relabeling as ‘fees,’ ‘charges,’ or ‘assessments.’” (*Apartment Assn.*, 24 Cal.4th at 839.) The amendment limited local governments’ ability to impose such taxes on landowners by enacting stricter requirements before raising them. But the Court emphasized that its requirements only applied to fees or charges imposed “upon a parcel or upon a person as an incident of property ownership.” (*Id.*)

The inspection fee, the Court held, did not burden the landlords as landowners: it burdened them as business owners. (*Id.* at 842.) “[T]axes, assessments, fees and charges are subject to the constitutional strictures when they burden landowners *as landowners.*” (*Id.* [emphasis in original].) In other words, in order for the fee to be “property-related,” it must be tied to the land itself, no matter its use. And the relationship between the fee and land ownership there was “indirect:” the landlords could avoid the fee by changing the use of the land. (*Id.*)

In other words, the landlords could avoid the fee by simply changing the nature of their business. If they used their land for any purpose other than renting apartments for residential use, the City would not impose the inspection fee. The fee was not “property related” because it was dependent on the property’s use – it was not imposed on the property simply as an incident of ownership. The Court therefore held that the inspection fee was not covered by Proposition 218. (*Id.*)

Fees for water delivered to irrigate fields are not imposed upon owners of fields “as an incident of property ownership.” (Cal. Const., art. XIII D § 6.) They have much more in common with the inspection fee in *Apartment Association*. Irrigation water is a business input, not a property-related service. Just as the landlords in *Apartment Association* could avoid the inspection fee by ceasing to rent out their units, rural landowners can entirely avoid any fees for irrigation water by using their land for other purposes.

The Supreme Court has held that not “*all* water service charges are necessarily subject to” Article XIII D. (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 425-27 [emphasis in original].) Rather, a water fee is subject to Proposition 218 “if, but only if, it is imposed ‘upon a person as an incident of property ownership.’” (*Id.*, quoting Cal. Const., art. XIII D § 2(e).)

Although no case has squarely addressed the issue, courts have specifically left open the possibility that charges for water used purely for irrigation are not property-related. (*Pajaro Valley Water Management Agency v. Amrheim* (2007) 150 Cal.App.4th 1364, 1389.) In that case, the court considered whether a “groundwater augmentation charge,” a charge

based on the volume of water extracted from wells, was subject to Article XIIIID. Although it held that the augmentation charge was a property-related fee, it rested that conclusion on the fact that the majority of users were residential users, not large-scale irrigators. *Id.* at 1390-91. And as the Supreme Court held in *Richmond* and a later case, fees for residential water through existing connections *are* property-related because *domestic* water service is necessary for “normal ownership and use of property.” (*Id.* at 427; *see also Bighorn Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 [holding that water rates for domestic water service were fees for the purposes of Article XIIIID].)

Other cases present no obstacle to the conclusion that irrigation water is not a property-related service. Cases such as *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 934, merely assume that such water service is property-related. In that case, the court never addressed the argument that charges for irrigation water are not property-related fees. (*Id.*) And “[c]ases are not authority for propositions not considered.” (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Because fees for irrigation water are not “property-related” for the purposes of Article XIIIID, its voter approval and other requirements do not apply. The Commission need not even reach the Article XIIIID § 6’s exemption for fees for water service in order to find that claimant irrigation districts have plenary authority to raise revenue needed to cover the costs of implementing the Act.

For this reason, in addition to those articulated by the Commission in its Draft, the Commission should deny the Test Claim.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathaniel H. Kane". The signature is fluid and cursive, with a long horizontal stroke at the end.

Nathaniel Kane
Staff Attorney
Environmental Law Foundation

PROOF OF SERVICE

I, Nicole Feliciano, hereby declare:

I am over the age of 18 years and am not a party to this action. I am employed in the county of Alameda. My business address is Public Interest Law Office, 1736 Franklin Street, Ninth Floor, Oakland, CA 94612.

On October 17, 2014, I caused to be served the attached:

Letter RE: Environmental Law Foundation Comments on Draft Proposed Decision, Test Claims 10-TC-12 and 12-TC-01, Water Conservation Dated October 17, 2014

X BY EMAIL. I caused the above identified document(s) to be sent by electronic transmission to the party(ies) listed below pursuant to Commission on State Mandates' Procedures for Electronic Filing of Documents (http://www.csm.ca.gov/drobox_procedures.shtml).

See Mailing List Below

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed at Oakland, California on October 17, 2014.



Nicole Feliciano
DECLARANT

COMMISSION ON STATE MANDATES

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Last Updated: 8/5/14

Claim Number: 10-TC-12 and 12-TC-01

Matter: Water Conservation

Claimants: Glenn-Colusa Irrigation District
Oakdale Irrigation District
Paradise Irrigation District
South Feather Water and Power Agency

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs. tit. 2, § 1181.3.)

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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On October 17, 2014, I served the:

Environmental Law Foundation Comments

Water Conservation, 10-TC-12 and 12-TC-01

Water Conservation Act of 2009 et al.

South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District, Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 17, 2014 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/25/14

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Matter: Water Conservation

Claimants: Glenn-Colusa Irrigation District
Oakdale Irrigation District
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