STATE OF CALIFORNIA – CALIFORNIA NATURAL RESOURCES AGENCY
EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF WATER RESOURCES
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Received
June 7, 2013
Commission on
State Mandates

June 7, 2013

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim Filing 10-TC-12 (Water Conservation), consolidated with 12-TC-01 (Agricultural Water Measurement)

Dear Ms. Halsey:

The Department of Water Resources (Department) reviewed the consolidated test claims regarding "Water Conservation" (12-TC-01 and 10-TC-12), and provides the following general comments.

Background

In 2009 the Legislature passed a water conservation bill identified as SB7x-7.[1] It was enacted in 2010. The 2009 Water Law, noting that "water is a public resource that the California Constitution protects against waste and unreasonable use,"[2] established water conservation measures for urban and agricultural water users and required all water suppliers – public and private – to prepare and adopt water management plans based on updated requirements. Among other provisions, the 2009 Law also directed the Department to adopt regulations providing "a range of options that agricultural water suppliers may use or implement" to satisfy the requirement that they accurately measure the volume of water delivered to customers.[3]

In 2011, four public agencies – two water districts (South Feather Water & Power Agency and Paradise Irrigation District) and two agricultural water suppliers (Richvale Irrigation District and Biggs-West Gridley Water District) – submitted test claim 12-TC-01 alleging that various provisions of the 2009 Water Law imposed unfunded state mandates to conserve and achieve water conservation goals.

In 2013, the two agricultural water suppliers filed a second test claim, 10-TC-12, alleging that the regulations that the Department adopted – effective, July 11, 2012 – imposed unfunded state mandates to, among other things, install and certify the accuracy of water measurement devices. Because the two test claims raise common issues and are based on the same underlying law, the Commission on State Mandates (Commission) consolidated the claims.

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[1] Stats.2009-2010, 7th Ex.Sess., c. 4 (S.B.7). Claimants incorrectly refer to this law as the "Water Conservation Act of 2009." The phrase "Water Conservation Act of 2009" is the title of Chapter 5.1 of Division 2 of Title 23 of the California Code of Regulations, which includes regulations on Agricultural Water Measurement (§ 597 *et seq.*), but it is not a title the Legislature gave the bill. We refer to the bill as the "2009 Water Law" or "2009 Law."

[2] Water Code, § 10608(a). All statutory citations – in text and footnotes – are to the Water Code unless otherwise cited.

[3] Section 10608.48(i)

Brief Statement of the Argument

The Department's response analyzes the legal infirmities underlying the consolidated claim and establishes that the 2009 Water Law is not a state mandate because it is neither a new program nor does it impose additional requirements on an existing program. And even if it were found to be a state mandate, not every cost associated with a government-mandated program is reimbursable. Here, the reimbursement claim must fail because non-tax revenue sources are available to pay for any compliance costs. Finally, the regulations do not create any mandate at all since they are optional and local government is not required to comply with them.

Issues

1. Because the 2009 Water Law applies to public and private entities alike, it is not a "program" – meaning a state-imposed obligation on local government – and so it cannot be an unfunded mandate.[4]

2. The 2009 Water Law does not impose a "new" program on local government. Rather it is a refinement of urban and agricultural water conservation requirements that have been part of the law for years.

3. Even if the 2009 Water Law were an unfunded state mandate, it would not be reimbursable since the water suppliers have sufficient non-tax sources to offset any implementation costs.

4. The 2012 agricultural water measurement regulation does not impose any requirements on water suppliers since they are free to choose alternative measurement methods. Nor is the regulation a "new" program or increased level of service because the law already requires agricultural water measuring.

5. The 2009 Water Law imposes no increased obligation because what is required is compliance with general and evolving water conservation standards based on the foundational reasonable and beneficial water use principle dating from before the 1928 amendment – Article X, section 2 – to California's Constitution revising water use standards.[5]

Summary of Urban and Agricultural Water Management Acts

1. Water Management Law Before the 2009 Water Bill Was Enacted

a. Urban Water Management Act

Passed in 1983, the Urban Water Management Act[6] (UWMA) promotes a policy of evolving water conservation standards that have existed since the 1928 amendment of Article 10, section 2, and that have been developed over the 30 years since it was enacted. The UWMA and related requirements have changed more than 20 times since it was enacted. But its essence has stayed the same and its requirements have yet to be challenged.

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[4] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56
[5] *See also* Section 100 (informed by *The Water Commission Act*, Stats. 1913 ch. 586)
[6] Sections 10610 - 10656

The UWMA requires all urban water suppliers to prepare urban water management plans (UWMP) to support their long-term resource planning and to ensure adequate water supplies meet existing and future water demands.

As part of the UWMA, urban water suppliers are also required to assess the reliability of their water sources every 5 years over a 20-year horizon accounting for normal, dry, and multiple dry years. They must submit the assessment to the Department for approval, which in turn submits a list of UMWPs to the Legislature. UWMPs also include information about how local agencies have established conservation pricing. A number of local agencies, including Paradise Irrigation District and South Feather Water and Power Agency have UWMPs that establish tiered water rates, which are encouraged under separate legislation. UWMPs also inform water suppliers about metered and unmetered water use.

The UWMA requires suppliers to implement demand management measures – water conservation measures that establish programs and incentives that prevent wasting water and promote the reasonable and efficient use and reuse of available water supplies. Assembly Bill 1420,[7] which predates the 2009 Law and amends the UWMA, conditions eligibility for grants and loans on compliance with demand management measures. It also requires the Department to convene an independent technical panel to provide information to the Department and report to the Legislature on new demand management measures, technologies, and approaches.[8]

b. Agricultural Water Management Statutes

The Agricultural Water Management Planning Act was enacted in 1986.[9] In 1990, the Legislature passed the Agricultural Water Suppliers Efficient Water Management Practices Act.[10] The next year it passed the Agricultural Water Conservation and Management Act of 1992.[11] Together these Acts impose various water measurement and plan preparation requirements on agricultural water suppliers. And while the requirement to prepare and adopt agricultural water plans was repealed in 1993, many provisions were later adopted in pre-2009 statutes, including those requiring standardized water management practices and water measurement.[12]

Other agricultural water management statutes that predate the 2009 Water Law address water conservation practices, including Section 531, *et seq.* Section 531.10 is important because its requirements are similar to those in the 2009 Water Law. It requires agricultural water suppliers to implement best management practices – the 2009 Law's EWMPs functional equivalent – to measure water at the farm-gate and report water delivery data to the Department.

Agencies must prepare a water supply assessment for local projects or development that are subject to the California Environmental Quality Act (CEQA) and must also account for

[7] AB 1420, Stats. 2007, c. 628 (Laird)
[8] Section 10631.5
[9] Sections 10800 et seq. (AB 1658; Stats. 1986, c. 954 (Isenberg))
[10] Sections 10900 et seq. (AB 3616; Stats. 1990, c. 739 (Kelley))
[11] Sections 10520 et seq. (AB 1160; Stats. 1991, c. 184 (Kelley))
[12] Section 531.10

agricultural water use as part of a 20-year projection analysis in the CEQA document.[13]

c. Federal Water Management Statute

The federal Central Valley Project Improvement Act of 1992 also requires urban and agricultural federal contractors to implement water use efficiency measures as a condition of Central Valley Project contract renewal.[14]

2. The 2009 Water Law's Incremental Requirements

a. Urban Water Management

The 2009 Water Law requires the state to achieve a 20 percent reduction in urban per capita water use in California by December 31, 2020, consistent with the Governor's February 2008 proposal. The Delta Vision Strategic Plan also recommended legislation requiring "urban water purveyors to implement measures to achieve a 20 percent reduction in urban per capita water use statewide throughout California by December 31, 2020." The state is required to make incremental progress towards this goal by reducing per capita water use by at least 10 percent on or before December 31, 2015. The 2009 Water Law also requires each urban retail water supplier to develop urban water use targets and an interim urban water use target.

Many of these measures – including AB 1420's demand management measures that predate the 2009 Law, discussed above – provide the basis for urban water suppliers to meet the 2009 Water Law requirement to meet a 20 percent reduction in water use by 2020. And while the law imposes no penalty for not meeting the 20 percent requirement, urban water suppliers that do not adopt these measures are ineligible for state grants and loans.

b. Agricultural Water Management

Agricultural water suppliers must prepare and adopt agricultural water management plans by December 31, 2012, and update those plans by December 31, 2015, and every five years thereafter.

On or before July 31, 2012, agricultural water suppliers must measure the volume of water delivered to their customers. The 2009 Water Law requires the Department to adopt regulations providing a range of options that agricultural water suppliers may use to comply with the measurement requirement. Suppliers must also adopt a pricing structure for water customers based in part on quantity delivered. In addition, agricultural water suppliers must implement efficient water management practices (EWMP) in two categories: (1) "critical" – that all agricultural water suppliers should implement (i.e. measurement and pricing structures); and (2) Fourteen "additional" EWMPs, if the measures are locally cost effective and technically feasible.[15] Federal water contractors, e.g. Westlands Water District and Friant Water Authority,

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[13] Section 10910 et seq.; *see also* Government Code § 66473.7 (SB 221 (2001)) and Public Resources Code § 21151.9 (SB 610 (2001)); *see also* 14 CCR § 15155

[14] Pub.L No. 102–575 (October 30, 1992) 106 Stat 4600, sections 3400 et seq.

[15] Section 10608.48(c)(1)-(14)

already must comply with the critical EWMPs under the 1992 Central Valley Project Improvement Act.

Also, any supplier that becomes an agricultural water supplier after December 31, 2012 is required to prepare and adopt an agricultural water management plan within one year of that event. The supplier is required to notify each city or county where the supplier delivers water about preparing or reviewing the plan.

The 2009 Water Law also requires the agricultural water supplier to submit copies of the plan to the Department and other entities. And, importantly, it denies agricultural water suppliers eligibility for state water grants or loans unless they comply with the bill's water management planning requirements.

3. Statutory Exclusions

The 2009 Water Law also includes several provisions excusing – or delaying – water suppliers' compliance.

An agricultural water supplier may satisfy the water management plan requirements by adopting an urban water management plan or by participating in area-wide, regional, watershed, or basin-wide water management planning if those plans meet or exceed the 2009 Law's requirements.[16]

Agricultural water suppliers may also satisfy the 2009 Water Law's requirements if they submit a water conservation plan to the United States Bureau of Reclamation under either the Central Valley Project Improvement Act[17] or the Reclamation Reform Act of 1982, or both, within the previous four years that the Bureau accepts as adequate.[18]

Agricultural water suppliers that are members of the Agricultural Water Management Council, and that submit water management plans to that council under the January 1, 1999 "Memorandum of Understanding Regarding Efficient Water Management Practices By Agricultural Water Suppliers In California," may submit water management plans identifying water demand management measures currently being implemented, or scheduled for implementation, to satisfy the requirements of section 10826 – where the agricultural management plan's list of criteria are found.[19]

The 2009 Water Law permits urban and agricultural water suppliers to submit a working plan – schedule, budget, and finance – and still be eligible for grant funds as if in compliance with the 2009 Law.[20] Water suppliers also can choose to join a broader group of suppliers to meet the targets regionally and not lose grant eligibility.[21]

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[16] Section 10610; *see also* Section 10829

[17] Pub.L No. 102–575 (October 30, 1992) 106 Stat 4600, sections 3400 et seq.

[18] Section 10828(a)(1)(2); *2009 CA S.B. 7 (Steinberg), 2009 California Senate Bill No. 7, California 2009-2010 Seventh Extraordinary Session*

[19] Section 10827; *see also 2009 CA S.B. 7 (Steinberg), 2009 California Senate Bill No. 7, California 2009-2010 Seventh Extraordinary Session*

[20] Sections 10608.56(c) (urban) and 10608.58(d) (agricultural)

[21] Sections 10608.56(f)

The Department's Legal Argument Opposing Claimants' Test Claims

1. The 2009 Water Law is not a state mandate.

The California Constitution requires that "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service. . . ."[22]

As an initial matter, the California Supreme Court has explained that a "program" refers to "the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments *and do not apply generally to all residents and entities in the state.*"[23]

A law that governs private and public entities alike – although resulting in additional costs to a local government – is not a "program" and does not create a state-imposed mandate.[24] Compliance with such laws does not call upon local government to act in its proprietary capacity, but merely imposes a civic responsibility shared with non-governmental entities. The recent appellate court case, *Carmel Valley*, holding that fire fighting was an exclusive governmental function, is instructive. Unlike here, the court in *Carmel Valley* determined "that the overwhelming number of fire fighters discharge a classical governmental function"[25] because the program did "*not apply generally* to all residents and entities in the State but only to those involved in fire fighting."[26]

The following numerous references to private and public agencies in the 2009 Water Law clearly demonstrate that water suppliers are local agencies subject to the 2009 Law's strictures and, further, establish that it is not a new program:

Urban Water Management Act:

- Section 10608.12 (p) and (r) – " . . . a water supplier, either publicly or privately owned . . . ."
- Section 10617 – Urban water suppliers include public and private suppliers.
- Industrial water user (section 10608.12(h)) – primarily a manufacturer or processor of materials as defined by North American Industry Classification System Code 31-33 (Private companies exclusively included in the definition).
- Section 10642 – Public hearing; notice; adoption – "A privately owned water supplier shall provide an equivalent notice within its service area." Public and private water suppliers subject to identical hearing, notice and plan adoption requirements.

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[22] Cal. Const., art. XIII B, §6

[23] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles*) (italics added)

[24] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 *(Carmel Valley); see also, City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 277 *(City of El Monte)* holding modified by *Department of Finance v. Commission on State Mandates* (2002) 100 Cal.App.4th 243; citing *Lucia Mar Unified School Dist. v. Honig*, supra, 44 Cal.3d at p. 835 677, 750 P.2d 318

[25] *Carmel Valley, supra* 190 Cal.App.3d at p.537

[26] *Id.*, at p.538

Agricultural Water Management Act:

- Sections 10853 and 10608.12(a) – " . . . a water supplier, either publicly or privately owned . . . ."
- Section 10841 – Public hearing; notice; adoption – "A privately owned water supplier shall provide an equivalent notice within its service area."

The 2009 Water Law, therefore, applies to all water suppliers – public and private. So it is not a state mandate and any costs incurred by the local government to comply are not reimbursable.

2. The 2009 Water Law is not a new program and does not impose a higher level of service

Even if it were determined that a local government had incurred costs due to a "program," as opposed to a law of general application, the Constitution does not require reimbursement unless the program is "new" or the state imposes an "increased level of service" on local government.[27] "The reimbursable mandate arises only when the state imposes on a local government a new program of governmental services or an increased level of service under an existing program."[28] The two concepts of what is a "new" program, and what is an "increased level of service," are inexorably linked.[29]

The state imposes a "new" program by either creating an entirely new obligation for local government or by compelling local government to accept financial responsibility for a program that was previously funded entirely by the state.[30] An existing program is obviously not "new," but even when new requirements cause local government to incur additional costs, the requirements do not invariably correspond to a "higher level of service" for purposes of the Constitution.[31]

For example, the California Supreme Court found that the state was *not* required to reimburse costs incurred by local governments arising out of a law mandating the extension of unemployment compensation coverage.[32] Likewise, the Second District Court of Appeal found that the state was not required to reimburse costs incurred by local governments arising out of a requirement that local law enforcement officers participate in two hours of domestic violence training.[33] As these examples suggest, the "higher level of service" cases sometimes reflect the natural tension between a desire to maintain the status quo on one hand, especially as it relates to questions of funding, and a need to update existing services to reflect current standards or expectations on the other.

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[27] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *see also, County of Los Angeles, supra* 43 Cal.3d at pp. 55–57; *City of El Monte, supra* 83 Cal.App.4th at p. 277

[28] *Department of Finance v. Commission on State Mandates* (2002) 100 Cal.App.4th 243 *review granted and opinion superseded sub nom. Department of Finance v. State Mandates* (2002) 126 Cal.Rptr.2d 894 and rev'd, (2003) 30 Cal.4th 727

[29] *County of Los Angeles, supra*, 43 Cal.3d at p. 56

[30] *Lucia Mar Unified School Dist. v. Honig, supra* 44 Cal.3d at p. 836

[31] *Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 173

[32] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51

[33] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176

The discussion above comparing the pre- and post-2009 Water Law requirements on water conservation makes it clear that the obligations are not significantly different before and after the change in the law. The added requirements simply acknowledge that incremental difference. And in no case is the 2009 Law a new program nor does it impose a higher level of service.

3. Even if the 2009 Water Law were an unfunded state mandate, it would not be reimbursable.

Under California law, state programs requiring local agencies to spend money are not considered to be unfunded state mandates if funds other than taxes can cover the costs. So even if a program were unfunded, it would not necessarily be reimbursable. Here, water suppliers have sufficient non-tax sources to offset any 2009 Water Law implementation costs and therefore the program is ineligible for reimbursement.

Government Code 17556(d) contains an explicit exemption defeating the four entities' claims that the costs are reimbursable. The Commission must not find costs mandated by the state in any claim submitted by a local agency if it finds that:

> The local agency . . . *has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.*[34]

In *Connell*, the Third District Court of Appeal was similarly explicit that non-tax fees are available to offset any additional program costs:

> [E]ven if the regulatory amendment is a new program for state mandated costs purposes, *the water districts' authority to levy fees defeats a determination that the costs are reimbursable.*[35]

In *Connell*, the court also put to rest the Claimant's assertion that economic factors should nullify section 17556's exemption. For the court, the only question was whether the local agency had authority to levy fees and not, as the district argued, whether it had "sufficient" authority based on the economic climate:

> [T]he sole inquiry is whether the local agency has "authority" to levy fees sufficient to pay the costs, and it does not matter whether the local agency, *for economic reasons*, finds it undesirable to exercise that authority.[36]

So even in the face of a state mandate, a new program may not invoke subvention if it does not require the local agency to expend tax monies. That is precisely the case here. The 2009 Water Law is not eligible for subvention funds because no agency taxes are required to pay any of the alleged compliance costs. Important here is Senate Bill 1017, which amended the UWMA

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[34] Government Code § 17556(d)

[35] *Connell v. Superior Court of Sacramento Co.* (1997) 59 Cal.App.4th 382, 397 (italics added)

[36] *Connell, supra,* at p.399 (italics added)

in 1994. It authorizes an urban water supplier to recover the costs of preparing its UWMP and implementing the reasonable water conservation measures included in the plan in its water rates.[37]

Claimants have not shown that any of the costs imposed by the 2009 Law cannot be funded through non-tax means. "And this basic principle flows from common sense as well. As the [State] Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[38]

a. Non-tax Revenue Sources Would Offset Any Additional Costs to Claimants

Claimants allege that they are unaware of any authority they possess to assess a fee for complying with the regulations' mandates or that they could use Proposition 218's provisions to assess fees.

Although Claimants could have, they have not attempted to seek the consent and authorization of Claimant's landowners pursuant to Proposition 218's requirements. They may also look to many non-tax revenue sources to offset costs. As discussed below, there are numerous state law provisions that allow water districts to levy fees for power charges, conservation, water delivery, or to pay for compliance costs of a state-imposed program.

Section 1009 states:

> Any supplier of water in this state for municipal use, including the state, or any city, county, city and county, *district*, individual, partnership, corporation, or any other entity, may undertake a water conservation program to reduce water use *and may require, as a condition of new service, that reasonable water-saving devices and water reclamation devices be installed to reduce water use*. (Italics added.)

All four claimants are "districts" as defined in Section 1009.[39] They are independent districts or independent special districts.[40] And they are all suppliers under this section. Claimants' districts are authorized to require water conservation measures "as a condition of new service." And because those measures would not be free, they may charge a fee to recover costs.

Also, Section 540 authorizes an agency to charge a service fee as an aggregator for power and redistribute revenue allocations to offset other agency costs, including offsetting water conservation measures. Under this section, where costs are incurred, nothing prohibits local agencies from redistributing agency revenues to offset other costs even if obtained as power savings revenues.

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[37] Section 10654

[38] *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 812

[39] Government Code, § 56044

[40] *See Claimants' Web Sites:* http://southfeather.com (South Feather Water and Power Agency; http://www.paradiseirrigation.com (Paradise Irrigation District); http://www.bwgwater.com (Biggs-West Gridley Water District; http://richvaleid.org (Richvale Irrigation District)

Districts may also use water transfer revenues to offset costs.[41] Several claimants have or are in the process of effectuating water transfers. None of the revenue from these transfers is a tax but provides a non-tax source to cover costs, if any, associated with the 2009 Water Law.

Section 10654 authorizes an urban water supplier to recover in its water rates the costs of preparing its urban water management plan and implementing the reasonable water conservation measures included in the plan. It states:

> An urban water supplier may recover *in its rates* the costs incurred in preparing its plan and implementing the reasonable water conservation measures included in the plan. (Italics added.)

Subsection 531.10(b) – part of the 2007 agricultural water measurement law – requires that best management practices be locally cost effective.[42] The Department's water measurement regulation requires suppliers to measure with sufficient accuracy to meet subsection 531.10(a)'s measurement requirements, where cost effectiveness is not mentioned.[43] But section 531.10 cannot be read in a vacuum, but as a whole. So, any requirement in the article – including subsection (a) – must consider cost effectiveness:

> b) Nothing *in this article* shall be construed to require the implementation of water measurement programs or practices that are not locally cost effective.

Because subsection 531.10(a) – the measurement requirement that the Department's regulation identifies – also resides in that article, the cost effectiveness of implementing the two "critical" EWMPs should not be ignored. Any other reading would be incongruous and violate the basic statutory interpretation principle to harmonize provisions where possible.[44] Under this interpretation, water suppliers should be able to consider cost when choosing among the regulation's water measurement range of options or other equivalent water measurement method.

Finally, Section 529.7 permits charging a fee to implement water conservation measures through volumetric pricing:

> This article does not limit the authority of a water purveyor that promotes conservation through volumetric water pricing, including, but not limited to, an urban water supplier that promotes conservation through volumetric water pricing, to determine and impose a rate, fee, or charge in addition to the charge for the actual volume of metered water delivered.

This section provides water suppliers full authority to promote conservation through volumetric water pricing by imposing a charge on top of the amount charged for metered water delivered.

Claimants have not cited any of these non-tax revenues or explained why they would be unavailable to offset any costs imposed by the 2009 Water Law.

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[41] Sections 475, 480 and 35425; *see also* Government Code § 17556 (e)

[42] Section 531.10 (added by Stats.2007, c. 675 (A.B.1404))

[43] Section 10408.48(b)(1)

[44] *Smith v. Superior Court* (2006) 39 Cal. 4th 77, 83 (citing *In re Marriage of Harris* (2004) 34 Cal.4th 210, 222)

4. The Water Code's regulatory mandate is to the Department and not to agricultural water suppliers.

The Department's regulations, adopted last year,[45] do not create an unfunded mandate. In fact, the regulations do not create any mandate at all. No local government is required to comply with those regulations. Rather, the regulations exist as a resource for agricultural water suppliers who wish to comply with certain requirements of the EWMPs described in the 2009 Water Law. But they are optional, and the suppliers are free to comply with the law in other ways.

The 2009 Water Law requires that agricultural water suppliers implement EWMPs contained in the Implementation Section. Among other things, it requires agricultural water suppliers to accurately measure the volume of water delivered to customers and to adopt a pricing structure for water customers based at least in part on the quantity of water delivered.[46] Some of the requirements of the Implementation Section are aimed at collecting information in sufficient detail so as to satisfy an annual reporting requirement that was created by a different law in 2007.[47]

The Implementation Section outlines a number of performance standards agricultural water suppliers would be expected to meet, but does not specify how agricultural water suppliers will meet them. Rather, it leaves compliance to the individual suppliers.

As discussed above in the background section, failure to comply with this and other provisions of the 2009 Water Law do not result in any penalties. But it does mean that the non-compliant agricultural water supplier may not be eligible for water grants or loans awarded or administered by the state.[48]

The Implementation Section does not mandate a particular approach to satisfying the EWMPs required by the 2009 Water Law. Rather, it requires the Department to "adopt regulations that provide for *a range of options* that agricultural water suppliers *may use or implement* to comply with" that section's measurement requirement.[49] The Department fulfilled its legislative charge in 2012 by developing the regulations that are the subject of test claim 10-TC-12 filed by agricultural water suppliers Richvale Irrigation District and Biggs-West Gridley Water District.

Although the legislation required the Department to prepare regulations (*shall* adopt), agricultural water suppliers are not required to follow them (*may use or implement*). Instead, each supplier is free to adopt its own method for complying with the EWMPs. The purpose of the regulations is not to dictate how an agricultural water supplier complies with the requirements of the 2009 Water Law, but to create a rebuttable presumption that a given supplier has done so. It is clear from the text of the law that no agricultural water supplier is required to adopt any of the options described in the Department's regulations. Rather, suppliers are free to choose from the range of options in the regulation – or some other method

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[45] Section 10608.48 (Implementation Section)
[46] Section 10608.48(b)(1)
[47] Section 531.10 (Added by Stats.2007, c. 675 (A.B.1404))
[48] Section 10608.56(b)
[49] Section 10608.48(i)(1)

– and still be in compliance so long as the method is sufficiently accurate to meet section 531.10's requirements.

5. The California Constitution Prohibits Wasting and Unreasonably Using Water

"Twas ever thus . . ."[50] These enduring and poignant words from Charles Dickens convey the overarching theme of water conservation in California. We have always conserved water in this state because without it we cannot sustain our economy, standard of living or existence. Not only is this state dry, "California will become drier."[51]

The California Constitution set a new baseline standard for water conservation throughout the state in 1928 when the people added Article X, section 2's admonition against waste and unreasonable water use:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, *and that the waste or unreasonable use or unreasonable method of use of water be prevented*, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.[52]

Notions of "reasonableness" change with the times. California once considered it "reasonable" for a riparian water user – to the exclusion of upstream appropriators – to depend upon the overflow of a river to grow grass.[53] But no more. Times change, and the general understanding of what constitutes a "reasonable" use of water has changed, too. As those concepts evolve, the courts and the Legislature define the ever-changing boundaries of "reasonableness."

The state may determine that domestic violence is an issue worthy of greater attention, and so require that law enforcement officers receive domestic violence training without that requirement amounting to a new program or increased level of service. That is because the "program" at issue – providing police protection – is not new, and the "level of service" does not consist of training police officers a set number of hours, but providing such training as the public deems necessary for those officers to discharge their responsibilities competently. If the public determines that officer training is deficient in a critical area, it can rectify that deficiency without the training requirement constituting a new program or an increased level of service. Likewise, as public standards change with regard to the "reasonable" use of water, the state may impose new limitations on the use of water by private and public entities. Those limitations, even when they entail new costs for their compliance, do not create an unfunded mandate for which the state must provide a subvention of funds to reimburse the costs incurred by local governments when complying with the new standards for reasonable water use.

More evidence of water conservation's evolution is seen in agricultural water use. The definition of agricultural water suppliers has narrowed over time, decreasing from those supplying water to

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[50] Dickens, The Old Curiosity Shop (Chapman & Hall 1841) p. 345

[51] Reisner, Cadillac Desert – The American West and Its Disappearing Water (Viking 1986) p.10

[52] Cal. Const., art. X, § 2 (italics added)

[53] *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81

50,000 acres in the 1986 Act,[54] to those supplying water to 25,000 acres in the 2009 Water Law.[55]

Conclusion

Just as water conservation has been a bedrock principle of California water law since before the amendment mandating that water be put to reasonable and beneficial use was adopted,[56] so the 2009 Water Law continues the evolution of the public policy underlying that fundamental principle.

As technology advances, population increases, and climate change's effects become more apparent, water suppliers statewide, both public and private, will have to adapt, be flexible, and innovate to meet their water supply needs. The 2009 Water Law provides the necessary guidance and tools to assist suppliers with those essential behavioral changes. Irrespective of the 2009 Water Law's requirements and whether they are reimbursable, local public and private agencies must abide by long-standing and changing water policy admonitions, and adopt what is the truly relevant mandate here: conserve or perish.

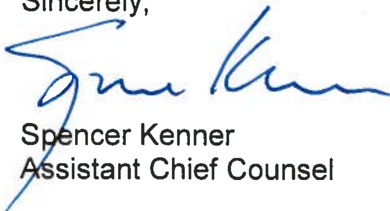
Because the 2009 Water Law is not a new program nor does it impose an increased level of service on local government, it is not a state mandate. And absent a state mandate, water suppliers have no reimbursement claim. But if the Commission were to find a state mandate, the 2009 Water Law does not create an unfunded mandate because water suppliers have alternative non-tax funding resources to offset any costs.

Nor do the Department's regulations create a mandate since no local government is required to comply with them. They are optional. And water suppliers are free to comply with the law in other ways.

The Constitution's standard of reasonable and beneficial to not waste water – predating the 2009 Law by nearly 100 years – set the state's water conservation principal in evolutionary motion. Claimants are not free to ignore this principal at the expense of state's ever-growing water demands.

In the end, the Commission must find no state mandate. But if it does, it is not unfunded and subject to reimbursement.

Sincerely,



Spencer Kenner
Assistant Chief Counsel

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[54] The Agricultural Water Management Planning Act (Stats.1986 ch. 954, section 10816; repealed)
[55] The 2009 Water Law, section 108
[56] Article X, section 2; *see also* Section 100 (informed by *The Water Commission Act*, Stats. 1913 ch. 586)