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November 22, 2013

Heather Halsey
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Re: Appeal of Dismissal to Commission on State Mandates
Test Claim No. 12-TC-01 (*Agricultural Water Measurement*), consolidated with
Test Claim No. 10-TC-12 (*Water Conservation*)

Dear Ms. Halsey

Biggs-West Gridley Water District and Richvale Irrigation District (collectively Districts) appeal the Executive Director of the Commission on State Mandates issuance of "Notice of Pending Dismissal of Test Claim and Notice of Opportunity for a Local Agency, Subject to the Tax and Spend Limitation of Article XIII A and B of the California Constitution and Subject to the Requirements of the Alleged Mandate to Take Over the Test Claim by a Substitution of Parties" (Notice of Pending Dismissal), on November 12, 2013.

This appeal is brought pursuant to 2 CCR § 1181(c). It has been timely filed pursuant to 2 CCR § 1181(c)(1) and served in accordance with 2 CCR §§ 1181(c)(2) & 1181.2(c)(1).

Actions Being Requested of the Commission

1. The Commission vacate the Executive Director's determination that the Districts are not eligible as claimants to maintain the Test Claims.¹

2. The Commission find that the Executive Director overstepped the authority delegated to her by 2 CCR § 1183(i) by the Commission when she dismissed the Districts as claimants for the reasons explained in the Notice of Pending Dismissal. Disposing of a test claim on those grounds is a power that is within the exclusive purview of the Commission under Government Code § 17556(d), and even the Commission may not exercise dismissal power without first holding a hearing.

3. Counsel for Districts will attempt to locate and add as a claimant an agricultural water supplier that receives a share of ad valorem property taxes. Given this, and in the interest of

¹ The consolidated test claims, 10-TC-12 and 12-TC-01, are referred to collectively as the Test Claims.

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administrative/judicial economy, the Commission should vacate the Executive Director's dismissal decision and thereafter decide the underlying merits of the consolidated Test Claims and Districts' eligibility for reimbursement at one hearing as part of one proceeding.

Background

The background of this appeal is fully explained in the documents in the docket folder for the consolidated Test Claims, which documents are incorporated herein by reference.² Specifically, the background for this appeal is detailed in the following documents: The two Test Claims, filed June 30, 2011, and February 28, 2013; comments filed by the Department of Finance on June 7, 2013, and by the Department of Water Resources on June 7, 2013; rebuttal comments filed by the claimants on August 7, 2013; a Notice of Request for Additional Information, issued by the Executive Director on August 22, 2013; additional comments submitted by the Department of Finance on September 19, 2013, and by the Department of Water Resources dated September 23, 2013; the claimants' response to the Request for Additional Information, dated September 23, 2013; comments submitted by the State Controller's Office on October 7, 2013; and the Executive Director's Notice of Pending Dismissal, dated November 12, 2013.

Basis for this Appeal

I. THE EXECUTIVE DIRECTOR EXCEEDED HER DELEGATED AUTHORITY; THE COMMISSION ALONE IS TASKED WITH DETERMINING DISTRICTS' ELIGIBILITY FOR REIMBURSEMENT OF STATE MANDATES

A. The Executive Director Did Not Have the Authority to Dismiss on these Grounds

The Executive Director exceeded the authority granted to her by the Commission's regulations when she issued the Notice of Pending Dismissal based on her own determination that the Districts were ineligible to pursue the Test Claims. The Executive Director did not dismiss the Districts on jurisdictional grounds, as she is authorized to do, but did so on the substantive merits of the Test Claims themselves. The justification for the dismissal—based on dicta in *County of Fresno v. State of California*³—was not a jurisdictional defect. The *Fresno* case reviewed the constitutionality of a test claim denial issued by the Commission after holding a hearing on the merits. That case did not authorize the Executive Director to dismiss a test claim on the same grounds, nor to do so without a hearing, nor did the case posit that those grounds were jurisdictional. Dismissing a test claim on those grounds, as they were identified in *Fresno* and in the Notice of Pending Dismissal, is an action within the Commission's exclusive purview that may only be taken after the Commission holds a hearing, as is discussed below.

² Each of these documents is available on the Commission's website, <http://www.csm.ca.gov/pendingclaims/wca.shtml>, and "need not be otherwise served on persons that have provided an e-mail address for the mailing list." 2 CCR § 1181.2(c)(1). All persons appearing on the mailing list have provided email addresses.

³ (1991) 53 Cal.3d 482, 487.

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The Executive Director overstepped her authority and dismissed the test claim without putting the matter before the Commission for a hearing and decision, in violation of the Districts' due process rights.

1. The grounds for dismissal were not jurisdictional under the statutes and regulations.

The Commission's jurisdiction to hear and decide test claims arises from Government Code § 17551. Subsections (b) through (d) of that statute delineate the jurisdictional time limits for filing test claims. Subsection (a) provides that the Commission can only hear test claims brought by a local agency that asserts that it is entitled to reimbursement under Art. XIII B, § 6 of the California Constitution.⁴ Thus, under § 17551, the Commission has jurisdiction to hear a test claim **if**: (1) The test claim was timely filed; (2) the claimant is a local agency or school district; and (3) the claimant claims to be entitled to reimbursement under Art. XIII B, § 6. The jurisdictional requirements to have a test claim heard by the Commission are reiterated in part in 2 CCR § 1183(b) & (c): Under those regulations, test claims filed with the Commission (1) must be timely (§ 1183(c)) and (2) "must allege increased costs as a result of the statute or executive order that exceed" certain amounts (§ 1183(b)). It is undisputed that Districts timely filed the Test Claims, are local public agencies, and claim reimbursement for mandates that exceed the jurisdictional amount.

Whether the claimant is *actually* entitled to such reimbursement is a question reserved solely for the Commission,⁵ and that question is the substantive issue to be resolved in the Commission's hearing and decision. There is a jurisdictional requirement that the claimant *claim that* it is entitled to reimbursement, but whether the claimant is *actually* entitled to such reimbursement is a question reserved solely for the Commission. It would be absurd and recursive if actual success on the merits of a test claim were a jurisdictional prerequisite to having the test claim considered on its merits at a hearing by the Commission. The Executive Director's finding that the Districts are not actually entitled to such reimbursement is not a finding that the Commission lacks jurisdiction, but is an adjudication of the merits of the Test Claims.

2. The *Fresno* case did not create a jurisdictional requirement.

The Executive Director relied upon dicta in *County of Fresno v. State of California*⁶ to support the notion that the grounds she relied upon were jurisdictional.⁷ However, that case did not affect

⁴ Gov. Code § 17551(a) states: "The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."

⁵ "Whether a particular cost incurred by a local government arises from carrying out a state mandate for which subvention is required under article XIII B, section 6, is a matter for the Commission to determine in the first instance." *County of Los Angeles v. Commission on State Mandates*, (2007) 150 Cal.App.4th 898, 907 (emphasis added).

⁶ *Supra*.

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or even discuss the Commission's jurisdiction. In the *Fresno* case, the Commission found that, under Government Code § 17556(d), because a claimant had the authority to charge fees sufficient to support the program at issue, the costs were not reimbursable. On appeal to the Supreme Court, the "single issue" was whether § 17556(d) was facially constitutional. The word "jurisdiction" does not appear anywhere in the opinion. And given that a test claim may not be denied under § 17556(d) until *after* the Commission holds a hearing on the merits, compliance with § 17556(d) cannot be a jurisdictional prerequisite to a hearing. The Executive Director's dismissal based on the reasoning in *Fresno* amounts to a dismissal on the merits of the Districts' test claim.

The Executive Director cited four cases in the Notice of Pending Dismissal to support her position that her grounds for dismissal were "jurisdictional" and within her authority to dismiss upon. It is notable, then, that *none* of the cases she relied upon involved a dismissal by an Executive Director. In *Fresno*,⁸ *San Marcos*,⁹ and *El Monte*,¹⁰ the Commission held a hearing and issued a decision on the merits—none of them classified these grounds for dismissal as "jurisdictional," and none of them involved a dismissal by an Executive Director. The *Placer County* case¹¹ did not mention either Art. XIII B, § 6 or the Commission. The Executive Director has not produced *any* support for her position that claimants' "eligibility" is a jurisdictional issue that she had the authority to unilaterally dismiss upon. Nor for prudential reasons should an issue of this import be decided by staff. The Executive Director's decision has far reaching implications on Districts in these Test Claims and on all other enterprise public agencies that do not receive a share of ad valorem property tax proceeds. The Executive Director's decision has the effect of permanently disqualifying these public agencies from reimbursement for approved test claims and all future mandates that may be subject to future test claims.

3. Disposing of a test claim under Gov. Code § 17556(d) is within the Commission's exclusive authority, and a claim may only be dismissed on those grounds after the Commission holds a hearing.

The Commission denied the test claim at issue in *Fresno* under Gov. Code § 17556(d). Section 17556 directs "[t]he commission" to not find costs mandated by the state "if, *after a hearing*, the commission" finds that "(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."¹² Thus, it is within the Commission's exclusive authority to deny a test claim if, after the Commission holds a hearing, it determines that subsection (d) applies.

⁷ See Notice of Pending Dismissal at 2-3

⁸ *Supra*.

⁹ *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates*, (1997) 55 Cal. App. 4th 976.

¹⁰ *County of El Monte v. Commission on State Mandates*, (2000) 83 Cal App. 4th 266.

¹¹ *County of Placer v. Corin*, (1980) 113 Cal. App. 3d 443.

¹² Emphasis added.

The grounds for dismissal in the Notice of Pending Dismissal were based on *Fresno*, which itself was based solely on a denial under § 17556(d). The statute makes clear that (1) it is within the Commission's *exclusive* authority to make this finding, and (2) this finding may only be made *after* the Commission holds a hearing.¹³ The Executive Director exceeded her authority and violated the Commission's procedural statutes and regulations when she, rather than the Commission, dismissed the Districts as claimants based on this substantive determination without the Commission holding a hearing on the merits.

To summarize, the Executive Director did not dismiss based on a jurisdictional requirement applicable to the Test Claims (that the claimant *must claim to be* entitled to reimbursement), but she dismissed on their substantive merits (i.e., whether the claimants are *actually* so entitled). The grounds for her dismissal are based on the *Fresno* case, which applied § 17556(d). Section 17556(d) directs the Commission, after it holds a hearing, to deny a claim if the Commission makes the finding in subsection (d). The Executive Director overstepped her statutory authority when she dismissed the Districts' test claim, without holding a hearing. The Executive Director's determination should be vacated and the Commission should hear and determine the substantive merits of the Test Claims and Districts' eligibility for reimbursement under the Claims in one hearing as part of one proceeding.¹⁴

B. The Executive Director May Not Overturn or Ignore Established Commission Precedent

As recently as 2010, the Commission held that where "the local agency has no authority to impose the fee without the consent of the voters or property owners" due to Proposition 218,

"[d]enying reimbursement would violate the purpose of article XIII B, section 6, which is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.[¹⁵]"

The Commission held that "local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities

¹³ See Gov. Code § 17556.

¹⁴ Districts also note that it is unclear what procedures the Executive Director was following when she dismissed the claimants and opened 12-TC-01 to other claimants. The Executive Director is authorized to dismiss *test claims*, or parts of them, not to dismiss claimants. 2 CCR § 1183(i). And the procedures for substituting a claimant apply only after a test claim has been withdrawn by written notice of the claimant. *Id.* § 1183.08. Nothing authorizes the Executive Director to dismiss a claimant, let alone dismiss on the merits, and to seek a substitute claimant.

¹⁵ Statement of Decision, *Discharge of Stormwater Runoff* – Order No. R9-2007-001, Case No. 07-TC-09, (Mar. 26, 2010), at 106

that would condition the fee or assessment on voter or property owner approval under Proposition 218.¹⁶ Importantly, the Commission's rationale extended to fees and assessments subject to an election *and* fees that can only be imposed in the absence of a majority protest:

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "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." Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.¹⁷

In the Notice of Dismissal the Executive Director states "there is no evidence that the districts have made any attempt to raise its fees to comply with the mandate, or that such an increase would be defeated by the voters."¹⁸ There is no requirement in either Proposition 218 or as part of the Commission's enabling legislation and regulations that claimants first exhaust attempts to pass the costs of state mandates onto customers before seeking relief from the Commission.¹⁹ In *Discharge of Stormwater Runoff*, 07-TC-09, the Commission determined that Proposition 218 divested local agencies of authority to pass the costs of mandates onto customers under Government Code § 17556(d). If a claimant's voters/customers under Proposition 218 accepted higher fees or assessments to fund and implement mandates, then the Commission directed that it be identified as offsetting revenue in the parameters and guidelines.²⁰

In making these statements and conclusion, the Executive Director, without any authority to do so, set aside the legal conclusion established in 07-TC-09, and replaced the Commission's analysis and conclusion with her own.

II. DISTRICTS ARE ELIGIBLE FOR REIMBURSEMENT BECAUSE ALL PUBLIC AGENCIES ARE ILL EQUIPPED IN LIGHT OF PROPOSITION 218 TO FUND AND IMPLEMENT STATE MANDATES

Even *if* the Executive Director had the authority to dismiss on the grounds explained in the Notice of Pending Dismissal (which she did *not* have), the Executive Director erred in her determination on those substantive issues for the reasons already explained in the Districts' "Claimants' Response to Request for Additional Information 10-TC-12 and 12-TC-01," filed September 23, 2013; and in "Claimants' Rebuttal

¹⁶ *Id.* at 107.

¹⁷ *Id.* p. 115.

¹⁸ Notice of Dismissal, p. 5

¹⁹ By analogy, non-enterprise agencies such as school districts are not required to first attempt to pass a new tax prior to filing test claims seeking reimbursement from the Commission for new mandates.

²⁰ *Discharge of Stormwater Runoff, supra*, pp. 107, 116.

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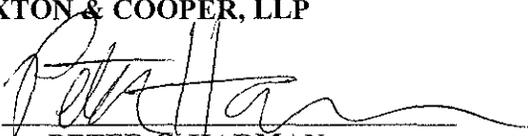
to 10-TC-12 and 12-TC-01," filed August 7, 2013. As explained therein and incorporated herein by reference, the Districts are eligible to maintain this test claim.

III. THE COMMISSION SHOULD GRANT THE APPEAL VACATING THE EXECUTIVE DIRECTOR'S DISMISSAL, THEREBY ALLOWING FOR CONSIDERATION OF DISTRICTS' ELIGIBILITY AND UNDERLYING MERITS OF THE TEST CLAIMS AT THE SAME TIME IN A HEARING BEFORE THE COMMISSION

In the interest of administrative/judicial economy, Districts intend to seek the addition of a third agricultural water supplier to the Test Claims that receives a share of ad valorem property taxes. For the reasons mentioned above, and in furtherance of economy, vacatur of the Executive Director's inappropriate decision to dismiss Districts will allow the Commission to determine the underlying merits of the Test Claims as well as the issue of the Districts' eligibility as part of one proceeding.

Very truly yours,

**MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP**

By: 

PETER C. HARMAN

PCH:aw

cc: Biggs-West Gridley Water District

Richvale Irrigation District

South Feather Water & Power Agency

Paradise Irrigation District

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Yolo 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 November 25, 2013, I served the:

Appeal of Executive Director Decision and Notice of Hearing

Agricultural Water Measurement, 12-TC-01

California Code of Regulations, Title 23, Section 597 et seq.; Register 2012, No. 28

Richvale Irrigation District and Biggs-West Gridley Water District, Co-Claimants

Richvale Irrigation District and Biggs-West Gridley Water District, Appellants

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 November 25, 2013 at Sacramento, California.



Jason Hone
Commission on State Mandates
980 9th Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 11/25/13

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Matter: Water Conservation

Claimant(s): Biggs-West Gridley Water District
Paradise Irrigation District
Richvale 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, § 1181.2.)

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