BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Probate Code Sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d); 2352(a)-(f), 2352.5(a)-(e), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a), 2620(a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5(a)-(d), 2623(a)-(b), 2640(a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), 2920(a)-(c), and 2923; Statutes 2006; Chapter 490 (SB 1116) Statutes 2006, Chapter 492 (SB 1716) Statutes 2006, Chapter 493 (AB 1363) Filed on December 13, 2007 By the County of Los Angeles, Claimant.	Case No.: 07-TC-05 *Public Guardianship Omnibus Conservatorship Reform* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted January 24, 2014*) (*Served January 30, 2014*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 24, 2014. Hasmik Yaghobyan appeared on behalf of the claimant, County of Los Angeles. Connie Draxler, Deputy Director of the Office of the Public Guardian for County of Los Angeles, also appeared on behalf of claimant. Susan Geanacou, Michael Byrne, and Lee Scott appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the proposed statement of decision to deny the test claim at the hearing by a vote of 6-1.

Summary of the Findings

The Commission finds that the following activities are new requirements imposed by the state on the county office of public guardian:

- Comply with the continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators on or before January 1, 2008. (Prob. Code, § 2923.)
- Begin an investigation within two business days of receiving a referral for conservatorship or guardianship. (Prob. Code, § 2920(c).)

- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate in the following circumstances: the person is domiciled in the county and requires a guardian or conservator; there is no one else qualified and willing to act; the appointment as guardian or conservator would be in the best interests of the person; and there is an imminent threat to the person's health or safety or to the person's estate. (Prob. Code, § 2920(a)(1).)

All other activities pled are either not required of local government, or are triggered by a court order. Appropriations required to comply with mandates of the courts are not eligible for reimbursement under article XIII B, section 6.[1]

Although the activities bulleted above are required by the state, they are triggered by the county's discretionary decision to create the office of public guardian and therefore, the requirements do not create a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. Government Code section 27430 states that:

(a) In any county the board of supervisors ***may*** by ordinance create the office of the public guardian and subordinate position which may be necessary and fix compensation therefor.

(b) The board of supervisors ***may*** by ordinance terminate the office of public guardian.[2] (Emphasis added.)]

The decision to create the office of public guardian is a local discretionary decision based on the county's *parens patriae* power "to protect incompetent persons." Like the police powers held by local government, local legislative bodies have broad discretion in the exercise of these powers, both in determining what the interests of the public require and what measures are reasonably necessary for the protection of those interests.

The courts have made clear that reimbursement is not required when requirements are triggered by local government's voluntary decision to participate in a program, reimbursement is not required.[3]

Accordingly, the Commission finds Probate Code sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d), 2352(a)-(f), 2352.5 (a)-(e), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a); 2620 (a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5 (a)-(d), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), 2920(a)-(c), and 2923, as added and amended by the test claim statutes do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

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[1] Article XIII B, section 9 of the California Constitution.

[2] Government Code Section 27430 (Stats. 1988, ch. 1199, § 17).

[3] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777; *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355.

COMMISSION FINDINGS

I. Chronology

12/13/2007	Claimant, Los Angeles County, filed the test claim with the Commission.
12/21/2007	Commission staff deemed the filing complete and issued a notice of complete test claim filing and schedule for comments.
01/30/2008	Department of Finance (Finance) filed comments on the test claim.
04/10/2008	Claimant filed rebuttal comments on the test claim.
05/16/2008	The Imperial County Public Administrator filed comments on the test claim.
05/29/2008	The San Joaquin County Public Guardian/Conservator filed comments on the test claim.
06/09/2008	The San Diego County Counsel filed comments on the test claim.
10/11/2013	Commission staff issued the draft staff analysis and proposed statement of decision.
10/25/2013	Finance filed comments on the draft staff analysis.
10/25/2013	Claimant requested an extension of time to file comments on the draft staff analysis and postponement of the hearing.
10/28/2013	Claimant's request for an extension of time and postponement of the hearing was granted and this matter was set for hearing on January 24, 2013.
11/25/2013	Claimant requested an extension of time to file comments on the draft staff analysis.
11/26/2013	Claimant's request for an extension of time until December 13, 2013, to file comments on the draft staff analysis was granted.

II. Background

This test claim addresses three 2006 test claim statutes which are part of the Omnibus Conservatorship and Guardianship Reform Act of 2006 ("OCRA"), a package of four bills that made comprehensive reforms to California's probate system and court oversight of probate conservatorships. The test claim statutes amended and added code sections affecting county public guardians, which are county officers authorized to act as conservators in certain instances.

A probate conservatorship is a court proceeding where a judge, based upon clear and convincing evidence, appoints: (1) a conservator of the person for an adult who cannot "provide properly for his or her personal needs for physical health, food, clothing, or shelter"; (2) a conservator of the estate for "a person who is substantially unable to manage [her] own financial resources or resist fraud or undue influence"; or (3) a conservator of the person and the estate.[4] A conservator of the person has custody of the conservatee, ensures that the conservatee's daily needs are met, and

[4] Probate Code section 1801.

has charge of the conservatee's educational needs.[5] A conservator of the estate has the duty to manage and control a conservatee's estate and finances.[6]

The OCRA was enacted in response to an in-depth investigatory series published by the *Los Angeles Times* and a joint hearing held by the Assembly and Senate judiciary committees, which brought to light the following abuses in conservatorship proceedings: misuse of California's conservatorship system by private conservators; public guardians who lack the necessary resources to help truly needy individuals; probate courts which do not have sufficient resources to provide adequate oversight to catch abuses of conservatees; and a system that provides no place for those in need to turn to for help.[7]

A. History of Probate Conservatorships in California and Description of the Legal Process

Conservatorship laws are generally derived from the *parens patriae* power of the state to protect incompetent persons.[8] In 1850, the Legislature first authorized the probate court to appoint

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[5] Probate Code sections 2350 through 2359.

[6] Probate Code sections 2400 through 2595.

[7] Exhibit I, Assembly Third Reading Bill Analysis, A.B. No. 1363, as amended January 24, 2006, p. 4.

[8] *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 535, where the California Supreme Court stated that "decisions made by conservators typically derive their authority from a different basis—the *parens patriae* power of the state to protect incompetent persons."

Under English law at the time of the settling of the American colonies, the King, as *parens patriae*, had the authority to act as "the general protector of all infants, idiots, and lunatics." (*Hawaii v. Standard Oil Co.* (1972) 405 U.S. 251, 257; *Sullivan v. Dunne* (1926) 198 Cal. 183, 189-190.) After the American Revolution, the *parens patriae* power was vested in the state legislatures, which often delegated the authority to protect minors and incompetents to the courts. (*Hawaii v. Standard Oil Co*., *supra*, 405 U.S. 251, 257.) In *Late Corporation of the Church of Latter Day Saints v. United States,* the Supreme Court suggested that the *parens patriae* power is like government's police power, "inherent in the supreme power of every state … and often necessary to be exercised in the interest of humanity." ((1890) 136 U.S. 1, 57-58.)

The *parens patriae* power is recognized in existing state law. Since 1932, Welfare and Institutions Code section 17000 has generally required counties to "relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident," when those persons are not relieved and supported by some other means. To implement this provision, Welfare and Institutions Code section 17001 requires each county to adopt standards of aid and care for the indigent and dependent poor. Although this provision confers upon a county broad discretion to determine eligibility for and the types of relief, it has been held to require counties to provide medical care and general assistance to indigent persons not eligible for such care under other programs. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984.) In addition, and as described further below, Welfare and Institutions Code section 10002, as last amended in 1980, authorizes the county counsel, at the request of the county social services department, to initiate conservatorship proceedings for the appointment of a public or private conservator when an

guardians for the insane, minors, and incompetents.[9] Although the guardianship law was amended many times, guardianships remained limited to the insane, minors, and incompetents until 1957.[10]

In 1957, the Legislature established a new protective relationship of conservatorship based on the belief that the stigma of the label "incompetent" discouraged people from seeking appointment of a guardian. A fifth division was added to the Probate Code to address probate conservatorships.[11] The 1957 statutes "provided that the court could appoint a conservator for a person who was neither insane nor incompetent, but who, for a variety of other reasons, needed direction in the management of his affairs."[12] As originally enacted, conservators could be appointed for "any adult person who by reasons of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable to properly care for himself or for his property, or who for said causes or for any other cause is likely to be deceived or imposed upon by artful or designing persons …."[13]

Today, a probate conservator may be appointed by the court for "a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter," or for "a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence," or for a person who needs both types of services.[14] The appointment of a conservator affects an individual's liberty interests and, thus, due process rights must be afforded to the proposed conservatee.[15] Under these principles, the court may not establish a

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applicant or recipient of a public social services program is incapable of managing his or her own resources, care, and maintenance.

[9] Statutes 1850, chapter 115.

[10] *Board of Regents v. Davis* (1975) 14 Cal.3d 33, 37-38.

[11] *Id*.; former Probate Code sections 1701-2207 (Stats. 1957, ch. 1902).

[12] *Board of Regents, supra*, 14 Cal.3d 33, 39.

[13] Former Probate Code section 1751.

[14] Probate Code section 1801, as last amended by Statutes 1995, chapter 842. See also, *Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, 619-620, where the court explained the reason for the clear and convincing standard as follows:

> Balancing the benefit and purpose of the probate conservatorship proceedings against the adverse consequences to the individual clearly suggests the proper standard is clear and convincing proof. [Footnote omitted.] The deprivation of liberty and stigma which attaches under a probate conservatorship is not as great as under an LPS conservatorship [Lanterman-Petris-Short Act, which concerns the involuntary civil commitment to a mental health institution]. However, to allow many of the rights and privileges of everyday life to be stripped from an individual "under the same standard of proof applicable to run-of-the-mill automobile negligence actions" cannot be tolerated.

[15] *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 162. By statute, a proposed conservatee may be disqualified from voting if not capable of completing an affidavit of voter registration,

conservatorship unless there is clear and convincing evidence that a conservator is required.[16] The court's order granting or refusal to grant letters of conservatorship is an appealable order.[17]

Under current law, a petition for the appointment of a conservator filed with the court begins the process. A petition may be filed by the proposed conservatee; spouse or domestic partner of the proposed conservatee; a relative of the proposed conservatee; any interested state or local entity or agency of this state or any interested public officer or employee of this state or of a local public entity of this state; or any other interested person or friend of the proposed conservatee.[18] The petition must state the reasons why a conservatorship is required, and the alternatives to conservatorship considered by the petitioner and why those alternatives are not available. The petition must set forth the names and addresses of the proposed conservatee's spouse or domestic partner, relatives within the second degree, or other family members to the extent a spouse, domestic partner, or close relative is unknown. The petition must also state facts, if applicable, that the proposed conservatee is a patient of the State Department of Mental Health (DMH) or the State Department of Developmental Services (DDS), or receives benefits payable by the Veterans Administration (VA), and notice must be provided to all these individuals and entities.[19] If the petition is filed by a person other than the proposed conservatee, the clerk of the court is required to issue a citation to the proposed conservatee setting forth the time and place of hearing; the legal standards of conservatorship; the affects of a conservatorship; and notice that the court or a court investigator will assist in the understanding of the process and rights, that the person has the right to appear at the hearing and oppose the petition, the right to choose and be represented by legal counsel, the right to have legal counsel appointed by the court if unable to retain legal counsel, and the right to a jury trial.[20]

After the petition is filed, a court investigator is assigned to interview the proposed conservatee personally, and explain the assertions in the petition and the elements of the citation issued by the clerk. The investigator also must determine whether it appears that the proposed conservatee suffers from mental health issues that impair the ability to understand the consequences of his or her actions; whether the proposed conservatee is unable to attend the hearing or is willing to attend; and determine whether the proposed conservatee wishes to contest the petition, or needs or desires legal counsel. The court investigator is then required to report the findings to the court in writing, at least five days before the hearing.[21]

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and may be adjudged unable to provide for personal needs or to manage financial resources. In addition, the adjudication may affect or transfer to the conservator the conservatee's right to contract, to manage and control property, to give informed consent for medical treatment, and to fix a residence. (Prob. Code, § 1823.)

[16] Probate Code section 1801(e), as last amended by Statutes 1995, chapter 842.

[17] Probate Code section 1301, as last amended by Statutes 2001, chapter 417.

[18] Probate Code section 1820, as last amended by Statutes 2001, chapter 893.

[19] Probate Code section 1821, as last amended by Statutes 2002, chapter 784; Probate Code section 1822, as last amended by Statutes 2001, chapter 893.

[20] Probate Code section 1823, as last amended by Statutes 1990, chapter 79.

[21] Probate Code section 1826, as last amended by Statutes 2002, chapter 784.

The court is required to hear and determine the matter of the establishment of the conservatorship according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded by the proposed conservatee.[22] Current law requires that the proposed conservatee be produced at the hearing, except where the proposed conservatee is out of the state when served and is not the petitioner, or the proposed conservatee is unable to attend the hearing by reason of medical inability established by affidavit or certificate of a licensed medical practitioner. Emotional or psychological instability is not good cause for the absence of the proposed conservatee from the hearing, unless the instability is likely to cause serious and immediate physiological damage to the proposed conservatee. The court may order that the proposed conservatee need not attend the hearing, however, in circumstances where the court investigator reports that the proposed conservatee has expressly communicated that he or she is unwilling to attend the hearing, does not wish to contest the petition, does not object to an order of conservatorship, and either does not object to the person proposed for appointment as conservator or states a preference that another person act as conservator.[23] If the proposed conservatee attends the hearing, the court is required to inform the proposed conservatee of the effect of an order of conservatorship and shall consult with the proposed conservatee to determine his or her opinion concerning the establishment of the conservatorship, the appointment of the proposed conservator, and any order requested in the petition.[24] In addition, the following persons may appear at the hearing to support or oppose the petition: the spouse or domestic partner of the proposed conservatee, a relative of the proposed conservatee, or any interested person or friend of the proposed conservatee.[25]

The petitioner has the burden of proof by clear and convincing evidence that a conservatorship is necessary and required, and the court's determination is based on that standard.[26] On appeal, the court will look to see if there is substantial evidence in the record to support the lower court's determination.[27] In reviewing the trial court's decision, the court of appeal will view the record in the light most favorable to the judgment below and determine if a reasonable trier of fact could find that denial or approval of the petition for conservatorship is appropriate in light of the petitioners' heightened "clear and convincing" burden of proof.[28]

If there is clear and convincing evidence that the appointment of a conservator is required, the trial court exercises its discretion in selecting a conservator for the proposed conservatee, and is

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[22] Probate Code section 1827, as last amended by Statutes 2000, chapter 17.

[23] Probate Code section 1825, as added by Statutes 1990, chapter 79.

[24] Probate Code section 1828, as added by Statutes 1990, chapter 79.

[25] Probate Code section 1829, as last amended by Statutes 2001, chapter 893.

[26] Probate Code section 1801.

[27] *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881, where the court stated that "the sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal."

[28] *In re Jasmon O.* (1994) 8 Cal.4th 398, 423.

guided by what appears to be in the best interests of the proposed conservatee.[29] If the proposed conservatee has sufficient capacity at the time to form an intelligent preference, the proposed conservatee may nominate a conservator in the petition or in writing signed either before or after the petition is filed. The court is required to appoint the nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee.[30] The order of preference for the selection of conservator is (1) the proposed conservatee's nominee, the conservatee's spouse, domestic partner, or the person nominated by the spouse or domestic partner; (2) an adult child of the proposed conservatee or the person nominated by the adult child; (3) a parent of the proposed conservatee or the person nominated by the parent; (4) a sibling of the proposed conservatee or the person nominated by the sibling; (5) any other person or entity eligible for appointment or willing to act as a conservator under the Probate Code and the Welfare and Institutions Code.[31] Entities eligible for appointment as a conservator, depending on the facts, include trust companies,[32] nonprofit charitable corporations,[33] DDS,[34] DMH,[35] the VA,[36] county counsel and the county public guardian.[37] On appeal, the trial court's order appointing a conservator is reviewed for abuse of discretion, and will be reversed only if there was no reasonable basis for the trial court's action.[38]

The court order appointing the conservator identifies the duties of the conservator.[39] Before the appointment is effective, the conservator is required to take an oath to perform the duties of the office according to law and file a bond, if required.[40] The appointment is then evidenced by the issuance of letters by the clerk of the court. The appointment of conservatorship is not effective until letters have issued.[41]

Once a conservator is appointed, the conservatorship is subject to the supervision of the court and most actions require court authorization.[42] The relationship of conservator (both of the

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[29] Probate Code section 1812, as last amended by Statutes 2001, chapter 893.

[30] Probate Code section 1810, as added by Statutes 1990, chapter 79.

[31] Probate Code section 1812, as last amended by Statutes 2001, chapter 893.

[32] Probate Code section 83.

[33] Probate Code section 2104.

[34] Health and Safety Code section 416.

[35] Welfare and Institutions Code section 7284.

[36] Military and Veterans Code section 1046.

[37] Probate Code sections 2900, 2920, and 2922.

[38] *Conservatorship of Ramirez* (2001) 90 Cal.App.4th 390, 403; *Garcia v. County of Sacramento* (2002) 103 Cal.App.4th 67, 81.

[39] Probate Code section 1830, as added by Statutes 1990, chapter 79.

[40] Probate Code section 2300, as added by Statutes 1990, chapter 79.

[41] Probate Code section 2310, as last amended by Statutes 1996, chapter 862.

[42] Probate Code sections 2351, 2400, et seq.

person and of the estate) and conservatee is a fiduciary relationship.[43] Consequently, every conservator assumes the basic obligation of a fiduciary to act prudently and in good faith. A conservator of the person is responsible for "the care, custody, and control of, and has charge of the education of [the conservatee]."[44] A conservator of the person generally must:

- Determine the needs and level of care of the conservatee and develop a plan for meeting those needs;
- Manage the conservatee's living situation;
- Manage the conservatee's health care;
- Arrange for the for the conservatee's meals;
- Arrange for the for the conservatee's clothing;
- Arrange for the for the conservatee's personal care;
- Arrange for the for the conservatee's housekeeping;
- Arrange for the for the conservatee's transportation;
- Arrange for the for the conservatee's recreation and social contact.[45]

A conservator of the estate manages the conservatee's assets and uses the income for the support and maintenance of the conservatee.[46] If the income is not enough for the support and management of the conservatee, the conservator can sell or mortgage estate assets.[47] The conservator may also maintain the conservatee's home, pay debts, and pay for services for the conservatee.[48] A conservator of the estate generally must:

- Post a bond;
- Determine the needs and level of care of the conservatee and develop a plan for meeting those needs;
- Locate and take control of the assets and make sure they are adequately protected against loss;
- Make an inventory of the assets for the court;
- Collect all of the conservatee's income and other money due and apply for government benefits to which the conservatee is entitled;
- Make a budget for the conservatee, working with the conservator of the person, or, if there isn't one, working with the conservatee or his or her caregiver;
- Pay the conservatee's bills and expenses on time and in line with the conservatee's budget;
- Keep track of how trustees or other parties are managing any of the conservatee's assets;

[43] Probate Code section 2101.

[44] Probate Code section 2431.

[45] Exhibit I, Judicial Council of California's *Handbook for Conservators*, pp. 27-76.

[46] Probate Code sections 2401, 2420.

[47] Probate Code section 2420.

[48] Probate Code sections 2431, 2427.

- Invest the estate assets and income in safe investments that will meet the conservatee's needs and the court's requirements;
- Make funeral and burial arrangements;
- Periodically account to the court and to other interested persons regarding income coming into the estate, expenditures, and the remaining conservatorship property;
- Prepare a final report and accounting of the estate when the conservatorship ends.[49]

Conservators are required to make accountings of the assets of the estate to the court for settlement and allowance after one year from the time of appointment and, thereafter at least every two years unless otherwise ordered by the court.[50] Upon the death of a conservatee, a conservator must make two final accountings for the period before and the period after the date of death.[51] Only conservators of the estate need to file accountings of the assets.[52]

A conservator can be removed for mismanagement of an estate, failure to file an inventory or account, incapacity, gross immorality, a felonious conviction, adverse interest, or bankruptcy.[53] A conservator can also be removed if it is in the best interest of the conservatee.[54]

B. County Public Guardians

As set forth in detail above, conservatorships of the person or estate require conservators to perform many duties in order to care for and manage conservatees and their assets. Although conservators are often either friends or relatives of the conservatee or private professional conservators retained to serve as conservator for an individual, there are instances where no one is willing or able to serve as conservator. For example, as last amended in 1980, Welfare and Institutions Code section 10002 authorizes the county counsel, at the request of the county social services department, to initiate conservatorship proceedings for the appointment of a public or private conservator when an applicant or recipient of a public social services program is incapable of managing his or her own resources, care, and maintenance.[55]

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[49] Exhibit I, Judicial Council of California's *Handbook for Conservators*, pp. 77-142.

[50] Probate Code section 1061, as last amended by Statutes 1997, chapter 724; Probate Code section 2620, as last amended by Statutes 2001, chapter 563.

[51] Probate Code section 2620, as last amended by Statutes 2001, chapter 563.

[52] *Ibid*.; *Conservatorship of Munson* (1978) 87 Cal.App.3d 515, 518 (deciding that no guardianship or conservator *of the person* need file an accounting).

[53] Probate Code section 2650, as added by Statutes 1990, chapter 79.

[54] *Ibid*.

[55] Welfare and Institutions Code section 10002, as last amended in 1980, provides in full that:

> When an applicant for or recipient of public social services is incapable of managing his own resources and planning or carrying out arrangements for his own care and maintenance, and the applicant or recipient cannot secure the services of a private attorney, if authorized by the board of supervisors, the county counsel at the request of the county department, or the district attorney, if a

The Legislature has also authorized counties to create and terminate the office of the public guardian, appoint a public guardian to fill this position, and for the public guardian to act as a guardian or conservator in certain cases, including where no one else is willing or able to serve in that capacity.[56]

In 1945, before probate conservatorships were established, Los Angeles County sponsored Senate Bill 522, which authorized the board of supervisors to create the office of the public guardian in order to allow the county to act as guardian for indigent individuals with mental disorders committed pursuant to the former Welfare and Institutions Code.[57] According to correspondence sent by the Los Angeles County Counsel recommending that the Legislature create the office of the public guardian, County Counsel stated that:

> In a county as large as Los Angeles County and particularly in the City of Los Angeles there are many people who become mentally ill and who have considerable property but who are without friends or relatives and the public interest requires that these people and their property be protected. It is for such cases that it is necessary and essential that there be a public guardian who will be in a position to look after the person and the estate of any such person who requires such assistance.[58]

> county counsel does not exist, may initiate and carry out proceedings for the appointment of a public or private guardian or public or private conservator, or for changing the form of legal protection when this is indicated. Costs incurred in such proceedings for the protection of applicants or recipients, when not available from the person's own resources, shall be a proper welfare administrative or service cost, except where a relative engages a private attorney to accomplish this purpose. (Emphasis added.)

Welfare and Institutions Code section 10002 allows counties to initiate a guardianship or conservatorship where appropriate to administer all public social services programs available pursuant to Division 9 of the Welfare and Institutions Code, including: (1) temporary assistance to needy families (the CalWORKs program) provided pursuant to Welfare and Institutions Code sections 11200 to 11526.5; (2) supplementary assistance for the aged, blind, and disabled provided pursuant to Welfare and Institutions Code sections 12000 to 12351; and (3) financial and medical assistance for the indigent (commonly referred to as "general assistance") provided pursuant to Welfare and Institutions Code sections 17000 to 17609.1.

[56] See Government Code sections 27430-27436 (Stats. 1988, ch. 1199, § 17) and Former Probate Code section 2920 (enacted by Stats. 1988, ch. 1199, § 72.) Government Code sections 27430-27436 and Probate Code section 2920 are derived from Former Welfare and Institutions Code sections 5175-5189 (Stats. 1945, ch. 907, § 1).

[57] Exhibit I, Governor's Bill File, Statutes 1945; Chapter 907, S.B. 522 , Correspondence From Los Angeles County Counsel, dated June 8, 1945, pp. 1-3.

[58] *Id*. at p. 2.

Before the 1945 bill sponsored by Los Angeles County, former Welfare and Institution Code section 5077 provided that if a mentally disordered person was committed and found to be indigent, the county was responsible for paying for that person's maintenance.[59] Although the prior code made the county responsible for paying for such maintenance, the former Welfare and Institutions Code did not provide a means for counties to recover the costs of treatment from the person committed, who had assets, or from their estate.[60] On the other hand, section 6660 of the former Welfare and Institutions Code provided that the State Department of Institutions could be appointed guardian of the estate of an incompetent person committed to a state hospital if such incompetent person has no guardian.[61] The purpose of section 6660 was to place the state in a position to reimburse itself from the property of its wards, and for this reason, the Department was authorized to act, under given circumstances, as guardian of the estate of the ward or as administrator of the estate of a deceased ward.[62]

In response, the Legislature authorized counties to create the office of the public guardian in 1945 with the enactment of Welfare and Institutions Code sections 5175 through 5189.[63] Former Welfare and Institutions Code section 5175 authorized the board of supervisors of any county to "create the office of the public guardian…" and to "appoint a public guardian to fill such office…," but limited the authority to counties with a population of at least one million.[64] A later amendment removed the population-based limitation. The authority to establish and terminate the office of the public guardian is currently in Government Code section 27430, which provides the following:

> (a) In any county the board of supervisors may by ordinance create the office of public guardian and subordinate positions which may be necessary and fix compensation therefor.
>
> (b) The board of supervisors may by ordinance terminate the office of public guardian.[65]

In addition, former Welfare and Institutions Code section 5181, as enacted by Statutes 1945, Chapter 907, section 1, provided that:

> In proper cases any such public guardian ***may apply*** to a court of competent jurisdiction for appointment as guardian of the person and estate or person or estate of any person in the county who is a patient under the provisions hereof or

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[59] Former Welfare and Institutions Code sections 5077, enacted by Statutes 1937, chapter. 369.

[60] *Ibid*.

[61] Former Welfare and Institutions Code sections 6660, enacted by Stats.1937, chapter 369.

[62] *In re Abdale's Estate* (1943) 59 Cal.App.2d 445, 446.

[63] Statute of 1945, chapter 907, section 1.

[64] Former Welfare and Institutions Code section 5175, enacted by Statutes 1945, ch. 907, § 1. Former Welfare and Institutions section 5177 also provided that the board of supervisors "may by ordinance terminate the office of the public guardian."

[65] Government Code section 27430 (Stats. 1988, ch. 1199 § 17, operative July 1, 1989).

> who is a recipient of aid under any of the provisions of this code where it appears that such person requires a guardian and where it appears that such person's estate does not exceed five thousand dollars ($5,000) in probable value.

In 1965, the Legislature expanded the scope of the office of the public guardian by allowing the public guardian to apply in proper cases as guardian *or conservator* under the probate conservatorship program.[66] Statutes of 1988, Chapter 1199, section 72, added Probate Code section 2920, which superseded the portions of former Welfare and Institutions Code section 8006.[67] Probate Code section 2920, as enacted in 1988, similarly provided that, in cases where a person requires a conservator and there is no one else who is qualified and willing to act, the public guardian may apply for appointment as conservator and the court may appoint the public guardian if the appointment is in the best interest of the person. In addition, the statute provided that the public guardian was required to apply for appointment when ordered by the court, upon determination by the court that the appointment was necessary. Probate Code section 2920, as last amended before the 2006 test claim statutes, stated the following:

> If any person domiciled in the county requires a guardian or conservator and there is no one else who is qualified and willing to act and whose appointment as guardian or conservator would be in the best interest of the person:
>
> (a) The public guardian may apply for appointment as guardian or conservator of the person, the estate, or the person and estate.
>
> (b) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if the court so orders. The court may make an order under this subdivision on motion of an interested person or on the court's own motion in a pending proceeding or in a proceeding commenced for that purpose. The court shall not make an order under this subdivision except after notice to the public guardian for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1, consideration of the alternatives, and a determination by the court that the appointment is necessary. The notice and hearing under this subdivision may be combined with the notice and hearing required for appointment of a guardian or conservator.[68]

Under current law, if the public guardian is appointed guardian or conservator, the public guardian may recover its costs and fees from the estate or ward.[69] The amount recoverable by the public guardian includes reasonable expenses in execution of the guardianship or

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[66] Former Welfare and Institutions Code section 5081, enacted by Statutes of 1965, chapter 2055.

[67] 19 Law.Rev.Comm.Reports 721 (1988).

[68] Section 2920 superseded the first, second, and a portion of the third sentences of former Welfare and Institutions Code section 8006.

[69] Probate Code section 2942, as added by Statutes 1999, chapter 866.

conservatorship, as well as compensation for services provided by the public guardian and the attorney of the public guardian, in the amount the court determines is just and reasonable.[70]

C. Test Claim Statutes – Omnibus Conservatorship and Guardianship Reform Act of 2006

The test claim statutes, as enacted by the OCRA, amended and added several sections to the Probate Code, including Probate Code section 2920. Probate Code section 2920, as amended by the test claim statutes, provides the following (additions or changes indicated by underline):

> (a) If any person domiciled in the county requires a guardian or conservator and there is no one else who is qualified and willing to act and whose appointment as guardian or conservator would be in the best interests of the person, then either of the following shall apply:
>
> (1) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if there is an imminent threat to the person's health or safety or the person's estate.
>
> (2) The public guardian may apply for appointment as guardian or conservator of the person, the estate, or the person and estate in all other cases.
>
> (b) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if the court so orders. The court may make an order under this subdivision on motion of an interested person or on the court's own motion in a pending proceeding or in a proceeding commenced for that purpose. The court shall order the public guardian to apply for appointment as guardian or conservator of the person, the estate, or the person and estate, on behalf of any person domiciled in the county who appears to require a guardian or conservator, if it appears that there is no one else who is qualified and willing to act, and if that appointment as guardian or conservator appears to be in the best interests of the person. However, if prior to the filing of the petition for appointment it is discovered that there is someone else who is qualified and willing to act as guardian or conservator, the public guardian shall be relieved of the duty under the order. The court shall not make an order under this subdivision except after notice to the public guardian for the period and in the manner provided for in Chapter 3 (commencing with Section 1460) of Part 1, consideration of the alternatives, and a determination by the court that the appointment is necessary. The notice and hearing under this subdivision may be combined with the notice and hearing required for appointment of a guardian or conservator.
>
> (c) The public guardian shall begin an investigation within two business days of receiving a referral for conservatorship or guardianship.[71]

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[70] *Ibid*. In addition, Probate Code section 2640.1 authorizes a petitioner to file a petition for an order allowing compensation and reimbursement of costs, in specified circumstances, if the petitioner is not the one appointed by the court.

In addition to amending Probate Code section 2920, the OCRA amended and added multiple other statutes to the Probate Code. Claimant asserts that the following provisions of the Probate Code, as added or amended by the OCRA, impose new duties or higher levels of service upon public guardians:

- Probate code section 1850 requires that the court review each conservatorship at set time periods. Probate Code section 1850, as amended by the OCRA[72]: (1) requires that the court investigator visit the conservatee six months after the initial appointment of the conservator, conduct an investigation regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interest of the conservatee; (2) permits the court, upon its own motion or upon the request of any interested person, to order a review of the conservatorship; (3) permits the court to order an accounting of the estate pursuant to Probate Code section 2620; and (4) permits the court to set a timeline for subsequent review of the conservatorship.[73]
- Probate code section 1851 establishes how court investigators shall conduct investigations ordered pursuant to Probate Code 1850. Probate Code section 1851, as amended by the OCRA, requires that "[u]pon request of the investigator, the conservator shall make available to the court investigator during the investigation for inspection and copying all books and records, including receipts and any expenditures, of the conservatorship."[74]
- Probate Code section 2113, as added by the OCRA, states: "A conservator shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate."[75]

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[71] Probate Code section 2920, as amended by Statutes 2006, chapter 493. The legislative history of Assembly Bill 1363 indicates that the legislature believed that the "requirements for public guardians to begin investigations within two business days of receiving a referral for conservatorship or guardianship could drive significant reimbursable local costs." (Exhibit I, Senate Rules Committee Third Reading Bill Analysis, A.B. No. 1363, as amended August 24, 2006, p. 14.)

[72] Statutes 2006, chapters 492 (S.B. No. 1716) and 493 (A.B. No. 1363) enacted alternate versions of Probate Code sections 1850 and 1851. As A.B No. 1363 was chaptered after S.B. Bill No. 1716, the amendments codified by Statutes 2006, chapters 493, section 11.5 and 12.5 (A.B. No. 1363) are operative. See Government Code section 9605.

[73] Statutes 2006, chapter 492.

[74] Statutes 2006, chapter 492.

[75] Probate Code section 2113 (Stats. 2006, ch. 493, § 13) makes explicit a requirement that already existed in other Probate Code sections regarding a conservators fiduciary duties to a conservatee. See Probate Code sections 1800(e) (Stats. 1990, ch. 79) and 2101 (as amended by Stats. 1993, ch. 293).

- Probate Code section 2250(a)-(c), which allows for the temporary guardians and conservators, was amended by the OCRA to impose new notice requirements when filing a petition for temporary guardianship or conservatorship.[76]
- Probate Code section 2250.4, as added by the OCRA, exempts proposed temporary conservatees from attending the hearing on a petition for appointment of a temporary guardian or conservator.[77]
- Probate Code Section 2352, which provides a means for fixing the residence of a ward or conservatee and requires that the guardian select the least restrictive appropriate setting that is both available and necessary to meet the needs of the conservatee and is in the best interests of the conservatee, was amended by the OCRA to: (1) require that the residence of a ward or conservatee is the "least restrictive appropriate residence" as described in new Probate Code section 2352.5; and to (2) impose new notice requirements when the ward or conservatee's address is or may be changed.[78]
- Probate Code section 2352.5, as added by the OCRA: (1) creates a presumption that the personal residence of a proposed conservatee is the least restrictive residence for the conservatee; and (2) requires that the conservator, upon appointment, determine the appropriate level of care for the conservatee.[79]
- Probate Code section 2410, as added by the OCRA, requires the judicial council to adopt a rule of court that establishes uniform standards of conduct for actions that conservators and guardians may take on behalf of conservatees and wards to ensure that their estates are maintained and conserved and to prevent loss or harm to conservatees and wards.[80]
- Probate Code section 2540 states that the sale of a conservatee's present or former personal residence, and real or personal property, are subject to court authorization. Probate Code section 2540, as amended by the OCRA, requires the conservator to inform the court why other alternatives to the sale of a conservatee's home, "including, but not limited to, in-home care services, are not available."[81]
- Probate Code section 2543, which established the manner of sale of conservatorship property, was amended by the OCRA to require that sales and other related transactions conform to the provisions of the Probate Code concerning sales by a personal representative "as described in Articles 6 (commencing with Section 10300), 7 (commencing with Section 10350), 8 (commencing with Section 10360), and 9 (commencing with Section 10380) of Chapter 18 of Part 5 of Division 7." Probate Code

[76] Probate Code section 2250 (a), (b), and (c) (Stats. 2006, ch. 493, § 15).

[77] Probate Code section 2250.4 (Stats. 2006, ch. 493, § 16).

[78] Probate Code section 2352 (Stats. 2006, ch. 490, § 1).

[79] Probate Code section 2352.5 (Stats. 2006, ch. 490, § 2).

[80] Probate Code section 2410 (Stats. 2006, ch. 493, § 22).

[81] Probate Code section 2540 (Stats. 2006, ch. 490, § 3).

section 2543 also established a new requirement for appraisal of the conservatee's personal residence before sale.[82]

- Probate Code section 2590 allows the court the power to grant guardians and conservators the powers listed in section 2591. OCRA made minor non-substantive changes to section 2590.[83]
- Probate Code section 2591 contains the list of powers the court may grant to guardians and conservators pursuant to Probate Code section 2590. OCRA amended section 2591(d) to distinguish between the sale of generic real or personal property and sale of a conservatee's personal residence. The amendment of section 2591 also makes the power to sell the private residence of the conservatee subject to the requirements of new Probate Code Section 2591.5 and Probate Code Sections 2352.5 and 2541.[84]
- Probate Code section 2591.5, as added by the OCRA, requires conservators seeking an order under Probate Code section 2590 authorizing a sale of the conservatee's personal residence to "demonstrate to the court that the terms of sale, including the price for which the property is to be sold and the commissions to be paid from the estate, are in all respects in the best interests of the conservatee." New Probate Code section 2591.5 also establishes appraisal requirements for the sale of a personal residence, requires that notice be given prior to the close of escrow, and provides for a good cause exception for applying all the requirements of section 2591.5, except for the appraisal requirements.
- Probate Code section 2610(a), which requires that guardians and conservators file an inventory and appraisal of the estate with the court, was amended by the OCRA to require that the inventory and appraisal is mailed to the ward or conservatee and other interested parties. [85]
- Probate Code section 2620, which requires guardians and conservators to file accountings of the assets of the estate with the court, was amended by the OCRA to: (1) impose new documentation requirements for accountings; (2) make each accounting subject to random and discretionary review by the court; and (3) require guardians and conservators to make all books and records available to any person designated by the court to verify the accuracy of the accounting.[86]
- Probate Code section 2620.2, provides a remedy if the guardian or conservator fails to file an accounting as required by Probate Code section 2620. The OCRA made minor non-substantive changes to section 2620.2.[87]

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[82] Probate Code section 2543 (Stats. 2006, ch. 490, § 4).

[83] Probate Code section 2590 (Stats. 2006, ch. 490, § 5).

[84] Probate Code section 2591 (Stats. 2006, ch. 490, § 6).

[85] Probate Code section 2610 (a) (Stats. 2006, ch. 493, § 23).

[86] Probate Code section 2620 (Stats. 2006, ch. 493, § 24).

[87] Probate Code section 2620.2 (Stats. 2006, ch. 493, § 25).

- Probate Code sections 2623, 2640, 2640.1, and 2641 allow guardians and conservators to recover certain costs, expenses, and compensation for services rendered. Probate code sections 2623, 2640, 2640.1, and 2641, as amended by the OCRA, prohibit guardians and conservators from recovering costs, expenses, and compensation for services rendered unless the court determines that the services are in the best interest of the ward or conservatee.[88]
- Probate Code section 2653 allows the court to remove guardians and conservators, revoke the letters of guardianship or conservatorship, and order the guardian or conservator to file an accounting. Probate Code section 2653, as amended by the OCRA: (1) allows the court to award the party that has petitioned to remove a guardian or conservator costs and attorney's fees; and (2) prohibits guardians and conservators from deducting from, or charging to, the estate his or her cost of litigation.[89]
- Probate Code section 2923, as added by the OCRA, requires that "On or before January 1, 2008, the public guardian shall comply with the continuing education requirements that are established by the California State Association of Public Administrators, Public Guardians, and Public Conservators."[90]

III. Positions of the Parties and Interested Parties

A. Claimant's Position

Claimant alleges that the test claim statutes constitute a reimbursable state-mandated program or higher level of service within an existing program.[91] Claimant asserts that under prior law, public guardians were not required to serve as conservator for any person or estate unless ordered by the court. Although the OCRA made sweeping changes to the conservatorship process as a whole, including reforms aimed at professional conservators, probate court proceedings, and educating the public regarding conservatorships, the test claim seeks

[88] Probate Code sections 2623, 2640, 2640.1, and 2641 (Stats. 2006, ch. 493, §§ 26-29).

[89] Probate Code section 2653 (Stats. 2006, ch. 493, § 30).

[90] Probate Code section 2923 (Stats. 2006, ch. 493, § 33).

[91] Although claimant asserts that one prior test claim (*Guardianship Petitions* (CSM-4256) and two prior legislatively-determined mandates (*Developmental Disabled Attorneys' Service* (04-LM-03); *Guardianship/Conservatorship Filings* (04-LM-15)) support this test claim, the prior test claim and legislatively-determined mandates are not relevant to this test claim. The legislatively-determined mandates cited by claimant are irrelevant because the statutes at issue were not before the Commission and do not relate in any way to the public guardian's duties or functions. Prior test claim CSM-4256, regarding investigations of certain guardianship petitions, sought reimbursement for costs incurred by court staff during guardianship investigations. The Commission found that these activities were not contained in prior law and thus constituted a new program or higher level of service and a reimbursable state mandate. However, test claim CSM-4256 did not relate in any way to duties or function of public guardians.

reimbursement only for those costs incurred as a result of changes made to statutes directly affecting county public guardians.[92]

Claimant asserts that the OCRA imposes the following new requirements upon public guardians:

- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate where there is an imminent threat to the person's health or safety or to the person's estate, and if appointed to serve as guardian or conservator, comply with all activities and incur all costs imposed by Probate Code sections 1400 through 3925, which set forth requirements for all guardianships and conservatorships established under the Probate Code.
- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate when ordered by the court because there is no one else qualified and willing to act as conservator and it appears to be in the best interests of the person, and if appointed to serve as guardian or conservator, comply with all activities and incur all costs imposed by Probate Code sections 1400 through 3925, which set forth requirements for all guardianships and conservatorships established under the Probate Code.
- Begin an investigation within two business days of receiving a referral for conservatorship or guardianship.
- On or before January 1, 2008, comply with continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators.
- For all cases where the public guardian serves as guardian or conservator, whether voluntarily or as required by statute or court order, comply with new accounting, estate management, inventory and appraisal, residential placement, and temporary conservatorship requirements set forth in Probate Code sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d), 2352(a)-(f), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a); 2620 (a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5 (a)-(d), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), 2920(a)-(c), and 2923, as added and amended by the OCRA. Claimant also asserts that these code sections require public guardians to provide higher levels of service to guardianships and conservatorships established before the enactment of the OCRA.

Claimant alleges that the test claim statutes have caused claimant to incur additional costs to serve new populations of conservatees pursuant to Probate Code section 2920(a) and (b).[93] The test claim states that the amount claimant will incur to serve new populations of conservatees

[92] A full summary of the changes made by OCRA has been provided by the Administrative Office of the Courts. (Exhibit I, Administrative Office of the Courts' Summary of Omnibus Conservatorship and Guardianship Reform Act of 2006.)

[93] Exhibit A, test claim, dated December 12, 2007, section VI ("State-Wide Cost Survey"), pp. 126-176.

pursuant to Probate Code section 2920(a) and (b) will be: (1) $71,500 during the 2006-2007 fiscal year; (2) $370,500 during the 2007-2008 fiscal year; and (3) $695,500 during the 2008-2009 fiscal year.[94] The statewide cost estimate submitted by claimant, which was developed by surveying other counties, indicates that the total statewide cost for counties to serve new populations of conservatees pursuant to Probate Code section 2920(a) and (b) will be: (1) $3,884,522 during the 2006-2007 fiscal year; (2) $10,422,061 during the 2007-2008 fiscal year; and (3) $11,982,260 during the 2008-2009 fiscal year.[95]

On October 25, 2013, claimant requested an extension of time to file comments on the draft staff analysis and postponement of the hearing, which were granted and this matter was set for hearing on January 24, 2014. On November 25, 2013, claimant requested an additional extension of time to file comments on the draft staff, which was granted. Although claimant requested two extensions to file comments, claimant did not file any comments on the draft staff analysis.

B. Department of Finance's Position

Finance submitted written comments on December 28, 2007. Finance believes that the test claim statutes "may have" created a reimbursable state mandate for the following activities:

- Requiring the public guardian to apply for appointment as a guardian or conservator when there is an imminent threat to a person's health, safety or estate.
- Requiring the court to order the public guardian to apply for appointment on behalf of any person domiciled in the county if no one else is qualified and willing to act and if that appointment is in the best interest of the person.
- Beginning an investigation to determine if a conservatorship is necessary within two business days of receiving a conservatorship referral.
- Requiring the public guardian to comply with continuing education requirements.[96]

On October 25, 2013, Finance submitted comments concurring with the recommendation in the draft staff analysis that the test claim should be denied "because the activities that form the basis of the test claim are either not required of local government because they are borne out of the local agency's discretionary decision to create an office of the public guardian or are triggered by a court order."[97]

C. Position of Interested Parties

The Imperial County Public Administrator submitted written comments on May 16, 2008. The San Joaquin County Public Guardian/Conservator submitted written comments on May 29, 2008.

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[94] *Id.* at section VI, pp. 128-139.

[95] *Id*. at section VI, p. 127.

[96] Exhibit B, Department of Finance Comments on the test claim, pp. 1-2.

[97] Exhibit H, Department of Finance comments on the Draft Staff Analysis and Proposed Statement of Decision filed October 25, 2013.

The San Diego County Counsel submitted written comments on June 9, 2008.[98] The interested parties support the approval of this test claim as a reimbursable state-mandated program.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever 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 programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 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."[99] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[100]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[101]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[102]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[103]

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[98] Exhibit D, Imperial County Public Administrator's comments in support of test claim; Exhibit E, San Joaquin County Public Guardian/Conservator's comments in support of test claim; Exhibit F, San Diego County Counsel's comments in support of test claim.

[99] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

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

[101] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[102] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56.)

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[104]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[105] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[106] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[107]

A. The 2006 Test Claim Statutes Do Not Impose a Reimbursable State-Mandated Program or Higher Level of Service Upon Local Agencies Because the Required Activities are Triggered by Local Discretionary Decisions.

As described below, the test claim statutes impose new requirements on the county public guardian. The Commission finds, however, that these requirements do not result in a state-mandated new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution.

1. The test claim statutes impose some new requirements on the public guardian.

a) Probate Code sections 2920 and 2923

Probate Code section 2923, as amended in 2006, requires that the public guardian comply with the continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators on or before January 1, 2008. This requirement is new.

In addition, Probate Code section 2920(c), as added by the 2006 test claim statute, requires that "[t]he public guardian shall begin an investigation within two business days of receiving a referral for conservatorship or guardianship." The claimant acknowledges that investigations were conducted before the 2006 legislation to determine whether a petition for conservatorship should be filed by the public guardian's office, and under county policies and procedures, investigations began within *ten days* of the referral and took three to four days to complete.[108] Although an investigation would have been necessary to make that determination, investigations

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[103] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[104] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[105] *County of San Diego, supra*, 15 Cal.4th 68, 109.

[106] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[107] *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

[108] Test claim, pages 17-20.

were not expressly required by state law for probate conservatorships before the enactment of the 2006 test claim statutes.[109] The Senate Floor Analysis of the 2006 bill that added this requirement, acknowledged that the requirement to begin an investigation within two business days of the referral could increase county costs as follows:

> Requirements for public guardians to begin investigations within two business days of receiving a referral for a conservatorship of guardianship could drive significant reimbursable local costs. Los Angeles County has estimated its workload could increase by as much as 50 percent, at a cost of $1.8 million annually. If that cost were to hold true for the rest of the state, reimbursable costs could be in the $5 million range annually.
>
> There is no funding in the 2006 Budget Act for the activities required by this bill.[110]

The Commission finds the requirement to begin an investigation within two business days of receiving a referral for conservatorship is new.

The 2006 test claim statute also amended Probate Code section 2920(a) and (b), which now provides the following (new language reflected in underline):

> (a) If any person domiciled in the county requires a guardian or conservator and there is no one else who is qualified and willing to act and whose appointment as guardian or conservator would be in the best interests of the person, then either of the following shall apply:
>
> (1) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if there is an imminent threat to the person's health or safety or the person's estate.
>
> (2) The public guardian may apply for appointment as guardian or conservator of the person, the estate, or the person and estate in all other cases.
>
> (b) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if the court so orders. The court may make an order under this subdivision on motion of an interested person or on the court's own motion in a pending proceeding or in a proceeding commenced for that purpose. The court shall order the public guardian to apply for appointment as guardian or conservator of the person, the estate, or the person and estate, on behalf of any person domiciled in the county who appears to require a guardian or conservator, if it appears that there is no one else who is qualified and willing to act, and if that appointment

[109] With respect to guardianships for minors, prior state law required investigations be done by "the county agency designated to investigate potential dependency" in cases where the proposed guardian is a non-relative. (Prob. Code, § 1513.) This test claim does not seek reimbursement for the duties or appointment as guardian of a minor.

[110] Exhibit I, Senate Rules Committee Third Reading Bill Analysis, A.B. No. 1363, as amended August 24, 2006, p. 14.

> as guardian or conservator appears to be in the best interests of the person. However, if prior to the filing of the petition for appointment it is discovered that there is someone else who is qualified and willing to act as guardian or conservator, the public guardian shall be relieved of the duty under the order. The court shall not make an order under this subdivision except after notice to the public guardian for the period and in the manner provided for in Chapter 3 (commencing with Section 1460) of Part 1, consideration of the alternatives, and a determination by the court that the appointment is necessary. The notice and hearing under this subdivision may be combined with the notice and hearing required for appointment of a guardian or conservator.

Section 2920(a)(1), as amended, now requires the public guardian to file a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate in the following circumstances: the person is domiciled in the county and requires a guardian or conservator; there is no one else qualified and willing to act; the appointment as guardian or conservator would be in the best interests of the person; and there is an imminent threat to the person's health or safety or to the person's estate. In such cases, the public guardian is required to comply with the statutory process to draft and file a petition for appointment with the court, and the law and procedure for the civil trial on the petition, including a trial by jury if demanded by the proposed conservatee.[111] The public guardian has the burden of proof by clear and convincing evidence that a conservatorship is necessary and required. The requirements to file a petition for conservatorship and act as the petitioner at trial when there is no one else willing or qualified to act and there exists an imminent threat to the person's health and safety or to the person's estate, are new requirements imposed on the public guardian. Under prior law, the public guardian had the discretion to decide whether to file a petition in these circumstances.

The claimant also alleges that Probate Code section 2920(b), as amended in 2006, imposes a new requirement on county public guardians to apply for appointment as guardian or conservator of the person, the estate, or the person and estate, on behalf of any person domiciled in the county who appears to require a guardian or conservator, if it appears that there is no one else who is qualified and willing to act, and if that appointment as guardian or conservator appears to be in the best interests of the person, *when ordered by the court*. The Commission disagrees and finds that section 2920(b) does not require counties to perform any activities. Probate Code section 2920, as it existed immediately before the 2006 amendment, gave the court the authority to require the public guardian to apply for appointment as guardian or conservator in the same circumstances. Before the 2006 amendment, section 2920 stated in relevant part the following:

> If any person domiciled in the county requires a guardian or conservator and there is no one else who is qualified and willing to act and whose appointment as guardian or conservator would be in the best interest of the person:
>
> (b) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if the court so orders. The court may make an order under this subdivision on motion of an interested person or on the court's own motion in a pending proceeding or in a proceeding commenced

[111] Probate Code 1820, et seq., 1827.

> for that purpose. The court shall not make an order under this subdivision except after notice to the public guardian for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1, consideration of the alternatives, and a determination by the court that the appointment is necessary. The notice and hearing under this subdivision may be combined with the notice and hearing required for appointment of a guardian or conservator.

The 2006 amendment, with the language that begins "the court shall order," now requires *the court* to order the public guardian to apply for appointment as guardian or conservator of the person, the estate, or the person and estate, on behalf of any person domiciled in the county who appears to require a guardian or conservator, if it appears that there is no one else who is qualified and willing to act, and if that appointment as guardian or conservator appears to be in the best interests of the person. The statute continues to provide, as it did under prior law, that "the court shall not make an order under this subdivision except after notice to the public guardian …, consideration of the alternatives, and a determination by the court that the appointment is necessary." Thus, the findings of the court remain the same and the requirement for the public guardian to file a petition following the court's order is not new. Therefore, 2920(b), as amended in 2006 does not require public guardians to perform any new activities.

b) <u>The downstream activities required by remaining code sections pled are triggered by the court's order appointing the public guardian.</u>

The claimant contends that once the court approves a petition filed pursuant to Probate Code section 2920(a)(1) or (b), then the county is mandated by the state to comply with *all* activities and incur all costs imposed by Probate Code sections 1400 through 3925 to act as conservator or guardian of the person, the estate, or of the person and estate. The Commission disagrees with this position. Although the public guardian has fiduciary duties once appointed, all duties of the conservator are triggered by a court order and are not a mandate of the state.

Article XIII B, section 6 does not require reimbursement for activities or costs required by the courts. The plain language of section 6 requires state reimbursement whenever "the Legislature or any State agency" mandates a new program or higher level of service. That section was specifically designed to preclude the state from shifting financial responsibility for governmental functions to local agencies, which are ill-equipped to undertake increased financial responsibilities because they are subject to taxing and spending limitations under articles XIII A and XIII B.[112] In this regard, local revenues subject to the spending limit of article XIII B include "any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity and the proceeds of state subventions to that entity (other than subventions made pursuant to Section 6) exclusive of refunds of taxes."[113] However, some local expenditures are specifically *excluded* from the spending limit, including "appropriations required to comply with mandates of the courts or the federal government, which without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services

[112] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[113] Article XIII B, section 8(b); *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987.

more costly."[114] There is no spending limit on costs incurred to comply with the mandates of the courts. Accordingly, it has been held that state subvention is not required when the expenditures are *not* subject to limitation.[115]

In this case, Probate Code section 2920 imposes requirements only for filing a petition for appointment and does not change the court's authority to appoint a guardian or conservator under existing law, or its authority and jurisdiction once the appointment has been ordered. Pursuant to Probate Code section 1812, the selection of a conservator of the person or estate, or both, is "solely in the discretion of the court and, in making the selection, the court is to be guided by what appears to be in the best interests of the proposed conservatee." Once the court has selected the conservator, the court issues an order of appointment, which establishes the powers granted to and duties imposed on the conservator. The guardian or conservator has management and control of the estate "only to the extent specifically and expressly provided in the appointing court's order."[116] Where the court determines it appropriate in the circumstances of the particular conservatee, the court, in its discretion, may limit or expand the powers and duties of the conservator by order of the court.[117] The court may also insert in the order of appointment conditions for providing for the care, treatment, education, and welfare of the conservatee.[118] In addition, the court has the authority to include in the order modifications of the legal capacity of the conservatee by broadening or restricting the power of the conservatee, or by including limitations or conditions on the exercise of the authority granted to the conservatee as the court determines to be appropriate.[119] The court may also "insert in the order of appointment conditions not otherwise obligatory providing for the care and custody of the property of the ward or conservatee."[120]

After the initial order of appointment, the court "may authorize and instruct the guardian or conservator, or approve and confirm the acts of the guardian or conservator, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection therewith."[121] Requests to move the conservatee's residence out of state, sell the conservatee's residence, and requests to have certain medical procedures performed, are subject to the court's prior order and approval.[122]

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[114] Article XIII B, section 9(b), defining appropriations that are "not" subject to limitation.

[115] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1581.

[116] Probate Code section 2401.

[117] Probate Code sections 1830, 2351, and 2590.

[118] Probate Code section 2358.

[119] Probate Code section 1873.

[120] Probate Code section 2402.

[121] Probate Code section 2403.

[122] Probate Code sections 2352, 2357, and 2591.5.

While some actions of the conservator are authorized or required by statute without the need of a specific court order (including those related to filing and serving an inventory and appraisal of the assets 90 days after appointment, presenting an accounting of the assets of the estate to the court for settlement and allowance, and participating in the court's review of the conservatorship six months after appointment), these activities occur as a direct result of the court's order of appointment.[123]

The courts have made clear that the proper focus when determining if a state-mandated program exists is to look at the nature of the claimant's participation in the underlying program itself.[124] Here, these activities are triggered by court order and not a mandate of the state. Appropriations required to comply with mandates of the courts are not eligible for reimbursement under article XIII B, section 6.

The claimant also contends that reimbursement is required for all new activities imposed by the test claim statutes following the appointment of the public guardian by the court based on the local discretionary decisions to file a petition for conservatorship pursuant to Probate Code section 2920(a)(2), or a petition to act as a temporary guardian or conservator pursuant to Probate Code section 2250. The Commission disagrees. As stated above, the downstream activities are triggered by an order of the court, and are based on the continuing jurisdiction of the court during the term of the conservatorship or guardianship. Moreover, these costs are further triggered by the local discretionary decisions of the public guardian's office to file a petition and start the legal process. Requirements triggered by local discretionary decisions are not mandated by the state.[125]

c) Probate Code sections 1850(a), 1851(a), 2410, 2590, 2591(a)-(q), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), and 2653(a)-(c) do not require local agencies to perform activities, but impose requirements on the courts, court investigators, and judicial council.

And, finally, claimant asserts that Probate Code section 1850(a), 1851(a), 2410, 2590, 2591(a)-(q), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), and 2653(a)-(c), require the public guardian to perform new activities or higher levels of service when serving as guardian or conservator pursuant to the Probate Code. However, these Probate Code sections, as amended by the test claim statutes, do not apply to the public guardian. Rather, they require courts, court investigators, and the judicial council perform the following activities:

- Probate code section 1850(a) requires that the ***court*** review each conservatorship at set time periods. Probate Code section 1850(a), as amended by the OCRA[126]: (1) requires

[123] See, for example, Probate Code 2450 et seq., 2610, and 2620.

[124] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[125] *Ibid.*

[126] Statutes 2006, chapters 492 (S.B. No. 1716) and 493 (A.B. No. 1363) enacted alternate versions of Probate Code sections 1850 and 1851. As A.B No. 1363 was chaptered after S.B. Bill No. 1716, the amendments codified by Statutes 2006, chapters 493, section 11.5 and 12.5 (A.B. No. 1363) are operative. See Government Code section 9605.

that the *court investigator* visit the conservatee six months after the initial appointment of the conservator, conduct an investigation regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interest of the conservatee; (2) permits the *court*, upon its own motion or upon the request of any interested person, to order a review of the conservatorship; (3) permits the *court* to order an accounting pursuant to Probate Code section 2620; and (4) permits the *court* to set a timeline for subsequent review of the conservatorship.[127]

- Probate code section 1851(a) establishes how *court investigators* shall conduct investigations ordered pursuant to Probate Code 1850. Probate Code section 1851(a), as amended by the OCRA, requires that "[u]pon request of the investigator, the conservator shall make available to the court investigator during the investigation for inspection and copying all books and records, including receipts and any expenditures, of the conservatorship."[128]
- Probate Code section 2410, as added by the OCRA, requires the *judicial council* to adopt a rule of court that establishes uniform standards of conduct for actions that conservators and guardians may take on behalf of conservatees and wards to ensure that their estates are maintained and conserved and to prevent loss or harm to conservatees and wards.[129]
- Probate Code section 2590, as last amended before the 2006 test claim statutes, allows the *court* to grant guardians and conservators the powers listed in section 2591. The OCRA made minor non-substantive changes to section 2590.[130]
- Probate Code section 2591(a)-(q) contains the list of powers the *court* may grant to guardians and conservators pursuant to Probate Code section 2590. The OCRA amended section 2591(d) to distinguish between the sale of generic real or personal property and sale of a conservatee's personal residence. The amendment of section 2591 also makes the power to sell the private residence of the conservatee subject to the requirements of new Probate Code Section 2591.5 and Probate Code Sections 2352.5 and 2541.[131]
- Probate Code sections 2623(a)-(b), 2640(a)-(c), 2640.1(a)-(c), and 2641(a)-(b), as last amended before the 2006 test claim statutes, allow guardians and conservators to recover certain costs, expenses, and compensation for services rendered. Probate code sections 2623(a)-(b), 2640(a)-(c), 2640.1(a)-(c), and 2641(a)-(b), as amended by the OCRA, prohibit guardians and conservators and guardians from recovering costs, expenses, and compensation for services rendered unless the *court* determines that the services were in the best interest of the ward or conservatee.[132]

[127] Probate Code section 1850 (Stats. 2006, chapter 493 § 11.5)

[128] Probate Code section 1850 (Stats. 2006, chapter 493 § 12.5)

[129] Probate Code section 2410 (Stats. 2006, chapter 493 § 22).

[130] Probate Code section 2590 (Stats. 2006, chapter 490 § 5).

[131] Probate Code section 2591 (Stats. 2006, chapter 490 § 6).

[132] Probate Code sections 2623, 2640, 2640.1, and 2641 (Stats. 2006, chapter 493 §§ 26-29).

- Probate Code section 2653(a)-(c), as last amended before the 2006 test claim statutes, allows the *court* to remove guardians and conservators, revoke the letters of guardianship or conservatorship, and order the guardian or conservator to file and accounting. Probate Code section 2653, as amended by the OCRA: (1) allows the court to award the party that has petitioned to remove a guardian or conservator to recover costs and attorney's fees; and (2) prohibits guardians and conservators from deducting from, or charging to, the estate his or her cost of litigation.[133]

d) New requirements imposed by the test claim statutes on the county public guardian

Based on the above analysis, the Commission finds that only the following requirements are new and are imposed on the county public guardian:

- Comply with the continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators on or before January 1, 2008. (Prob. Code, § 2923.)
- Begin an investigation within two business days of receiving a referral for conservatorship or guardianship. (Prob. Code, § 2920(c).)
- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate in the following circumstances: the person is domiciled in the county and requires a guardian or conservator; there is no one else qualified and willing to act; the appointment as guardian or conservator would be in the best interests of the person; and there is an imminent threat to the person's health or safety or to the person's estate. (Prob. Code, § 2920(a)(1).)

2. The new requirements imposed upon the public guardian by the test claim statutes are not mandated by the state, since they are triggered by the counties' decision to establish the office of public guardian.

The new requirements imposed on the public guardian are not mandated by the state. Government Code section 27430 authorizes the county to create and terminate the office of the public guardian as follows:

> (a) In any county the board of supervisors *may* by ordinance create the office of the public guardian and subordinate position which may be necessary and fix compensation therefor.
>
> (b) The board of supervisors *may* by ordinance terminate the office of public guardian.[134] (Emphasis added.)

Pursuant to Government Code section 14, which states that "may is permissive," the plain language of Government Code section 27420 must be interpreted as authorizing the county to create the office of the public guardian and terminate the office of the public guardian at any

[133] Probate Code section 2653 (Stats. 2006, chapter 493 § 30).

[134] Government Code Section 27430 (Stats. 1988, ch. 1199, § 17).

time.[135] As stated the California Supreme Court, the creation of the office of public guardian is permissive:

> The provisions relating to the office of public guardian are contained in Article 9, Ch. 1, part 1, Div. 6, sections 5175-5189, added to the Welfare and Institutions Code in 1945. Stats. 1945, ch. 907. Section 5175 permitted the board of supervisors of Los Angeles county to 'create the office of public guardian and such subordinate positions as may be necessary and fix compensation therefor', and to make the necessary appointments. The use of the word 'create' does not constitute the provision an unlawful delegation of the power vested in the legislature by Article XI, section 5, of the State Constitution. *The effect of the legislative language is to create the office of public guardian with permissive utilization thereof in accordance with the Code provisions depending on subsequent local action.* There are familiar instances of the creation of offices by the state legislature with permissive establishment thereof depending on future action of the local political entity… The legislative choice of language in describing the local action is merely fortuitous. The effect of the board's ordinance was to exercise the right to establish the office of public guardian created by the legislature in adding the pertinent sections to the Welfare and Institutions Code.[136]

Thus, there is no requirement in state law forcing counties to create the office of public guardian. That decision is a local discretionary decision based on the county's *parens patriae* power "to protect incompetent persons."[137] Like the police powers held by local government, local legislative bodies have broad discretion in the exercise of these powers, both in determining what the interests of the public require and what measures are reasonably necessary for the protection of those interests.[138]

The courts have held in similar cases that reimbursement is not required in these circumstances. In *City of Merced v. State of California*, the city argued that it was subject to a reimbursable mandate when required by statute to compensate a business owner for the loss of business goodwill pursuant to exercising the power of eminent domain to take the underlying property. The court of appeal concluded that the underlying exercise of the eminent domain power was a discretionary act, and that therefore no downstream activities required by statute were mandated by the state.[139]

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[135] See also *Martello v. Superior Court of Los Angeles* (1927) 200 Cal. 400, 408 (holding that a sovereign power may abolish any office that it creates).

[136] *Brown v. Overshiner* (1952) 38 Cal.2d 432, 435 (emphasis added; internal citations omitted).

[137] *Conservatorship of Wendland*, *supra,* 26 Cal.4th 519, 535, where the California Supreme Court stated that "decisions made by conservators typically derive their authority from a different basis—the *parens patriae* power of the state to protect incompetent persons."

[138] *Saunders v. City of Los Angeles* (1969) 272 Cal.App.2d 407, 412.

[139] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

In accord is *Department of Finance v. Commission on State Mandates* (*Kern*), in which a state statute required districts maintaining school site councils to comply with the state's open meetings laws, including preparing and posting an agenda in advance, and keeping council meetings open to the public. The court recognized that the notice and hearing requirements could be found to generate activities not previously required, but there was no mandate under the law to establish a school site council in the first instance, and therefore the activities and costs claimed were not mandated by the state. The California Supreme Court reaffirmed *City of Merced*, and held that where activities alleged to constitute a mandate are conditional upon participation in another or an underlying voluntary or discretionary program, or upon the taking of discretionary action, there can be no finding of a state-mandate program.[140]

More recently, the court in *Department of Finance v. Commission on State Mandates* held that school districts that choose to employ peace officers and have a school police department are not mandated by the state to comply with the requirements of the Peace Officer Procedural Bill of Rights Act (POBRA).[141] Consistent with the prior decisions of the court, the court stated that "[t]he result of the cases discussed above is that, if a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[142] The court further held that the Legislature's recognition of the need for local governmental entities to employ peace officers when necessary to carry out their basic functions did *not* persuasively supported a claim of practical compulsion. The "necessity" that is required is facing "certain and severe penalties such as double taxation or other draconian consequences," based on concrete evidence in the record.[143] "Instinct is insufficient to support a legal conclusion" of a state-mandated program.[144]

The discretion to create the office of the public guardian is a policy decision of the county and is not mandated by the state.

Accordingly, the Commission finds that the test claim statutes do not impose a state-mandated program on counties within the meaning of article XIII B, section 6 of the California Constitution.

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[140] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 743.

[141] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1357.

[142] *Id.* at pp. 1365-1366.

[143] *Id*. at p. 1367.

[144] *Id.* at p. 1369, concurring opinion by Justice Blease and Presiding Justice Scotland.

V. Conclusion

Based on the foregoing, the Commission concludes that Probate Code sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d), 2352(a)-(f), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a); 2620 (a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5 (a)-(d), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), 2920(a)-(c), and 2923, as added and amended by Statutes 2006, chapters 490, 492, and 493 do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

STATE OF CALIFORNIA
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RE: **Adopted Statement of Decision**

Public Guardianship Omnibus Conservatorship Reform, 07-TC-05
Probate Code Sections 1850 et al.
County of Los Angeles, Claimant

On January 24, 2014, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: January 30, 2014

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Los Angeles Regional Water Quality Control Board Resolution No. R4-2008-012, adopted December 11, 2008; approved by United States Environmental Protection Agency April 6, 2010 Filed on March 30, 2011 By Santa Clarita Valley Sanitation District of Los Angeles County, Claimant.	Case No.: 10-TC-09 *Upper Santa Clara River Chloride Requirements* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Adopted January 24, 2014) (Served January 31, 2014)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 24, 2014. Claire Hervey Collins and Phillip Friess appeared for the claimant. Jennifer Fordyce and Michael Lauffer appeared for the Regional Water Quality Control Board for the Los Angeles Region. Michael Byrne and Susan Geanacou appeared for the Department of Finance. Public comment was provided by City of Santa Clarita Councilmember TimBen Boydston and Mayor Laurene Weste, and California Assembly member Scott Wilk.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed statement of decision to deny the test claim at the hearing by a vote of 6 to 0, with one member abstaining.

Summary of the Findings

This test claim alleges a reimbursable state mandate resulting from Resolution R4-2008-012, adopted December 11, 2008 by the Regional Water Quality Control Board for the Los Angeles region (Regional Board). To assist the reader, there is a glossary of frequently used water quality related terms and acronyms at the end of this document. The Resolution amended the prior Basin Plan, which imposed a maximum chloride concentration limit, or "total maximum daily load" (TMDL) of 100 mg/L for the Santa Clara River and chloride concentration discharge limits, or "waste load allocations" (WLAs) of 100 mg/L for the District's two Water Reclamation Plants (WRPs). The Resolution includes a revised, less stringent, TMDL and WLAs, providing greater flexibility to the District with regard to chloride discharges into the river and significantly reducing the costs for the District to comply with the TMDL and WLAs for the Upper Santa Clara River. The revised TMDL calls for the implementation of an Alternative Water Resources Management program (AWRM), in order to meet conditional site-

specific objectives (SSOs) for water quality in Reaches 4B, 5, and 6 of the river, and conditional WLAs of 150 mg/L for discharges to Reaches 5 and 6, and 117 mg/L for discharge to Reach 4B for the District's two WRPs.

The District alleges that meeting the SSOs and WLAs will require significant advanced treatment and other technological upgrades, and a number of water supply control measures to control chloride concentrations in the Santa Clara River, especially during periods of higher concentration in the water supply and groundwater (*i.e.*, during periods of lower precipitation). The District alleges that these upgrades and control measures result in increased costs of approximately $250.7 million. R4-2008-012 also includes a number of Implementation Tasks, primarily consisting of requirements to perform technical and scientific studies of the surface and groundwater and evaluation of appropriate chloride thresholds, which the District alleges impose increased costs of approximately $6.6 million.

The Commission finds that Resolution R4-2008-012 does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 on the following grounds: (1) several of the Implementation Tasks included in the TMDL are not new and cannot impose a *new* program or higher level of service; (2) accelerating the implementation of final waste load allocations (discharge limitations) by one year is not a new program or higher level of service, and no increased costs are alleged; (3) the Alternative Water Resources Management program is not a new program or higher level of service, but a lower level of service, and results in reduced costs with respect to prior law; and (4) even if the Alternative Water Resources Management program did impose a new program or higher level of service, there are no costs mandated by the state, because the claimant has sufficient fee authority to cover the costs of any required activities.

Because this test claim is denied on the grounds stated above, the Commission declines to make findings on whether claimant is practically compelled to implement the Alternative Water Resources Management activities or whether the Alternative Water Resources Management activities, TMDLs or WLAs are mandated by federal law.

COMMISSION FINDINGS

I. Chronology

03/30/2011	Claimant, Santa Clarita Valley Sanitation District of Los Angeles County, filed the test claim, *Upper Santa Clara River Chloride Requirements*, 10-TC-09, with the Commission on State Mandates (Commission)[1]
04/14/2011	Commission staff issued a notice of complete filing and request for comments from state agencies.
05/02/2011	The California Regional Water Quality Control Board, Los Angeles Region (Regional Board) filed a request for an extension of time to submit comments on the test claim.
05/04/2011	Commission staff granted the Regional Board's request for an extension of time to comment to July 15, 2011.

[1] Exhibit A, Test Claim.

06/23/2011	The Regional Board filed a request for an extension of time to comment on the test claim, which was granted for good cause.
07/ 29/2011	The Regional Board filed comments on test claim.[2]
08/01/2011	The Department of Finance (Finance) filed comments on the test claim.[3]
08/19/2011	Claimant filed a request for an extension of time to submit rebuttal comments to September 28, 2011, which was granted for good cause.
09/28/2011	Claimant filed rebuttal comments.[4]
09/20/2013	Commission staff issued the draft staff analysis and proposed statement of decision.[5]
10/07/2013	Finance submitted comments on the draft staff analysis.[6]
10/07/2013	Claimant requested an extension of time to October 25, 2013 to file comments on the draft staff analysis, which was granted for good cause.
10/09/2013	Ms. Lynda Cook of Santa Clarita submitted comments on the draft staff analysis.[7]
10/09/2013	The Regional Board requested an extension of time to file comments to November 1, 2013 and postponement of hearing to January 24, 2014.
10/10/2013	Commission staff granted the Regional Board's request for extension and postponement.
10/18/2013	City of Santa Clarita filed comments on the draft staff analysis.[8]
11/01/2013	The Regional Board filed comments on the draft staff analysis.[9]
11/01/2013	Claimant filed comments on the draft staff analysis.[10]

II. Introduction

A. History and Framework of Federal Water Pollution Control

Regulation of water pollution in the United States finds its beginnings in the Rivers and Harbors Appropriation Act of 1899, which made it unlawful to throw or discharge "any refuse matter of any kind or description…into any navigable water of the United States, or into any tributary of

[2] Exhibit B, LA Regional Board Comments.

[3] Exhibit C, Department of Finance Comments.

[4] Exhibit D, Claimant's Rebuttal Comments.

[5] Exhibit E, Draft Staff Analysis.

[6] Exhibit F, Department of Finance Comments on Draft Staff Analysis.

[7] Exhibit G, Public Comments on Draft Staff Analysis.

[8] Exhibit H, City of Santa Clarita Comments on Draft Staff Analysis.

[9] Exhibit I, LA Regional Board Comments on Draft Staff Analysis.

[10] Exhibit J, Claimant Comments on Draft Staff Analysis.

any navigable water."[11] This provision survives in the current United States Code, qualified by more recent provisions that outline a regime of discharge permits issued by the U.S. EPA or by states on behalf of the EPA.[12]

In 1948, the Federal Water Pollution Control Act "adopted principles of state and federal cooperative program development, limited federal enforcement authority, and limited federal financial assistance."[13] Pursuant to further amendments to the Act made in 1965, "States were directed to develop water quality standards establishing water quality goals for interstate waters." However, "[d]ue to enforcement complexities and other problems, an approach based solely on water quality standards was deemed insufficiently effective."[14] The Federal Water Pollution Control Act was therefore significantly expanded in 1972 to regulate individual point source dischargers. Later, major amendments to the Federal Water Pollution Control Act were enacted in the Clean Water Act of 1977, and the federal act is now commonly referred to as the Clean Water Act (CWA). The CWA states:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title.[15]

The United States Supreme Court observes the cooperative nature of water quality regulation under the CWA as follows:

> The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) Toward this end, the Act provides for two sets of water quality measures. "Effluent limitations" are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. (See §§ 1311, 1314.) "[W]ater quality standards" are, in general, promulgated by the States and establish the desired condition of a waterway. (See§ 1313.) These standards supplement effluent limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable

[11] United States Code, title 33, section 407 (Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152).

[12] See United States Code, title 33, sections 401; 1311-1342.

[13] Exhibit X, Statutory History of Water Quality Standards: available at http://water.epa.gov/scitech/swguidance/standards/history.cfm. (Accessed November 26, 2013.)

[14] *Ibid.*

[15] United States Code, title 33, section 1251(b).

> levels." (*EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12, 96 S.Ct. 2022, 2025, n. 12, 48 L.Ed.2d 578 (1976).)[16]

The CWA thus employs two primary mechanisms for controlling water pollution: identification and standard-setting for bodies of water, and identification and regulation of dischargers.

With respect to standard-setting for bodies of water, section 1313(a) provides that existing water quality standards can remain in effect unless the standards are not consistent with the CWA, and that the Administrator may "promptly prepare and publish" water quality standards for any waters for which a state fails to submit water quality standards, or for which the standards are not consistent with the CWA. In addition, states are required to hold public hearings "at least once each three year period" for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards:

> Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.[17]

And with respect to regulating dischargers, section 1311 requires that point source dischargers be identified and effluent limitations be set, "sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water." [18] Section 1312 provides that effluent limitations must promote the attainment of water quality objectives, while section 131.10 of the applicable regulations requires also taking into consideration the water quality standards of downstream waters.[19]

Section 303(d) of the CWA, codified at section 1313(d) of title 33 of the United States Code, requires that each state "identify those waters within its boundaries for which the effluent limitations…are not stringent enough to implement any water quality standard applicable to such waters." Waters for which the effluent limitations are not sufficient to meet water quality standards are called "impaired," and the list of "impaired" waters is also known as the "303(d)

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[16] *Arkansas v. Oklahoma* (1992) 503 U.S. 91, at pp. 101-102.

[17] United States Code, title 33, section 1313(c)(2).

[18] United States Code, title 33, section 1311.

[19] United States Code, title 33, section 1312; Code of Federal Regulations, title 40, section 131.10(b) (57 FR 60910) ["In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."].

List." The state is required by the Act to "establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters."

After the waters are ranked, the state "shall establish for the waters identified…and in accordance with the priority ranking, the total maximum daily load [known as a TMDL], for those pollutants which the Administrator identifies…as suitable for such calculation." The TMDL "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." A TMDL is defined as the sum of the amount of a pollutant allocated to *all point sources* (*i.e.*, the sum of all waste load allocations, or WLAs), plus the amount of a pollutant allocated for nonpoint sources and natural background. A TMDL should be set for each pollutant identified by the Administrator, and is essentially a plan setting forth the amount of a pollutant allowable that will attain the water quality standard necessary for beneficial uses.[20] TMDLs are required to be submitted to the Administrator "from time to time," and the Administrator "shall either approve or disapprove such identification and load not later than thirty days after the date of submission." If the Administrator disapproves the 303(d) List or a TMDL, the Administrator "shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement [water quality standards]." Finally, the identification of waters and setting of standards and TMDLs is required as a part of a state's "continuing planning process approved [by the Administrator] which is consistent with this chapter."[21]

Section 1342 provides for the National Pollutant Discharge Elimination System (NPDES). NPDES is the final piece of the regulatory framework under which discharges of pollutants are regulated and permitted, and applies whether or not a TMDL has been established. Section 1342 states that "the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title."[22] Section 1342 further provides that states may submit a plan to administer the NPDES permit program, and that upon review of the state's submitted program "[t]he Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State."[23] Whether issued by the Administrator or by a state permitting program, all NPDES permits must ensure compliance with the requirements of sections 1311, 1312, 1316, 1317, and 1343; must be for fixed terms not exceeding five years; can be terminated or modified for cause, including violation of any condition of the permit; and must control the disposal of pollutants into wells.[24] In addition, NPDES permits are generally prohibited, with some exceptions, from containing effluent limitations that are "less stringent than the comparable effluent limitations in the previous

[20] Code of Federal Regulations, title 40, section 130.2.

[21] United States Code, title 33, section 1313(d-e).

[22] United States Code, title 33, section 1342(a)(1)

[23] United States Code, title 33, section 1342(a)(5); (b).

[24] United States Code, title 33, section 1342(b)(1).

permit."[25] An NPDES permit for a point source discharging into an impaired water body must be consistent with the waste load allocations made in a TMDL, if a TMDL is approved and is applicable to the water body.[26]

B. State Water Pollution Control Program

Porter-Cologne Water Quality Control Act

California's water pollution control laws were substantially overhauled in 1969 with the Porter-Cologne Water Quality Control Act (Porter-Cologne).[27] Beginning with section 13000, Porter-Cologne provides:

> The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by all the people of the state.
>
> The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.
>
> The Legislature further finds and declares that the health, safety, and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state…and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.[28]

The state water pollution control program was again modified, beginning in 1972, so that the code would substantially comply with the federal Act, and "on May 14, 1973, California became the first state to be approved by the EPA to administer the NPDES permit program."[29]

Section 13160 provides that the state water resources control board (SWRCB or State Board) "is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act…[and is] authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) and acts amendatory thereto."[30] Section 13001 describes the state and regional boards as being "the principal state agencies with primary responsibility for the coordination and control of water quality."

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[25] United States Code, title 33, section 1342(o).

[26] Code of Federal Regulations, title 40, section 122.44(b).

[27] Water Code section 13020 (Stats. 1969, ch. 482).

[28] Water Code section 13000 (Stats. 1969, ch. 482).

[29] *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (Cal. Ct. App. 5th Dist. 2005) 127 Cal.App.4th 1544, at pp. 1565-1566. See also Water Code section 13370 *et seq*.

[30] Water Code section 13160 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats 1976, ch. 596).

In order to achieve the objectives of conserving and protecting the water resources of the state, and in exercise of the powers delegated, Porter-Cologne, like the CWA, employs a combination of water quality standards and point source pollution controls.[31]

Porter Cologne sections13240-13247 address the development and implementation of regional water quality control plans, including "water quality objectives," defined in section 13050 to mean "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."[32] Section 13241 provides that each regional board "shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." The section directs the regional boards to consider, when developing water quality objectives:

(a) Past, present, and probable future beneficial uses of water.

(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

(c) Water quality conditions that could reasonably by achieved through the coordinated control of all factors which affect water quality in the area.

(d) Economic considerations.

(e) The need for developing housing within the region.

(f) The need to develop and use recycled water.[33]

Beneficial uses, in turn, are defined in section 13050 as including, but not limited to "domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."[34] In addition, section 13243 permits a regional board to define "certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted."[35]

Sections 13260-13274 address the development of "waste discharge requirements," which section 13374 states "is the equivalent of the term 'permits' as used in the Federal Water

[31] Water Code section 13142 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats. 1979, ch. 947; Stats. 1995, ch. 28).

[32] Water Code section 13050 (Stats. 1969, ch. 482; Stats. 1969, ch. 800; Stats. 1970, ch. 202; Stats. 1980, ch. 877; Stats. 1989, ch. 642; Stats. 1991, ch. 187 (AB 673); Stats. 1992, ch. 211 (AB 3012); Stats. 1995, ch. 28 (AB 1247), ch. 847 (SB 206); Stats. 1996, ch. 1023 (SB 1497)).

[33] Water Code section 13241 (Stats. 1969, ch. 482; Stats. 1979, ch. 947; Stats. 1991, ch. 187 (AB 673)).

[34] Water Code section 13050 (Stats. 1969, ch. 482; Stats. 1969, ch. 800; Stats. 1970, ch. 202; Stats. 1980, ch. 877; Stats. 1989, ch. 642; Stats. 1991, ch. 187 (AB 673); Stats. 1992, ch. 211 (AB 3012); Stats. 1995, ch. 28 (AB 1247); Stats. 1995, ch. 847 (SB 206); Stats. 1996 ch. 1023 (SB 1497)).

[35] Water Code section 13243 (Stats. 1969, ch. 482).

Pollution Control Act, as amended."[36] Section 13263 permits the regional boards, after a public hearing, to prescribe waste discharge requirements "as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system." Section 13263 also provides that the regional boards "need not authorize the utilization of the full waste assimilation capacities of the receiving waters," and that the board may prescribe requirements although no discharge report has been filed, and may review and revise requirements on its own motion. The section further provides that "[a]ll discharges of waste into waters of the state are privileges, not rights."[37] Section 13377 permits a regional board to issue waste discharge requirements "which apply and ensure compliance with all applicable provisions of the [Federal Water Pollution Control Act]."[38] In effect, sections 13263 and 13377 permit the issuance of waste discharge requirements concurrently with an NPDES permit "if a discharge is to waters of both California and the United States."[39]

California's Antidegradation Policy (State Water Resources Control Board Resolution NO. 68-16 adopted October 24, 1968)

In 1968, the SWRCB adopted Resolution 68-16, formally entitled "Statement of Policy With Respect to Maintaining High Quality of Waters In California," to prevent the degradation of surface waters where background water quality is higher than the established level necessary to protect beneficial uses. That executive order states the following:

> WHEREAS the California Legislature has declared that it is the policy of the State that the granting of permits and licenses for unappropriated water and the disposal of wastes into the waters of the State shall be so regulated as to achieve highest water quality consistent with maximum benefit to the people of the State and shall be controlled so as to promote the peace, health, safety and welfare of the people of the State; and
>
> WHEREAS water quality control policies have been and are being adopted for waters of the State; and
>
> WHEREAS the quality of some waters of the State is higher than that established by the adopted policies and it is the intent and purpose of this Board that such higher quality shall be maintained to the maximum extent possible consistent with the declaration of the Legislature;
>
> NOW, THEREFORE, BE IT RESOLVED:
>
> Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will

[36] Water code section 13374 (Stats. 1972, ch. 1256).

[37] Water Code section 13263(a-b); (g) (Stats. 1969, ch. 482; Stats. 1992, ch. 211 (AB 3012) Stats. 1995, ch. 28 (AB 1247), ch. 421 (SB 572)).

[38] Water Code section 13377 (Stats. 1972, ch. 1256; Stats. 1978, ch. 746).

[39] Exhibit A, Test Claim, at p. 7.

not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.

Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.

In implementing this policy, the Secretary of the Interior will be kept advised and will be provided with such information as he will need to discharge his responsibilities under the Federal Water Pollution Control Act.

C. Regulatory History

The Santa Clara River is the largest river system in southern California that remains in a relatively natural state. The River originates in the San Gabriel Mountains in Los Angeles County, runs through Ventura County, and flows into the Pacific Ocean between the cities of San Buenaventura (Ventura) and Oxnard. Land uses within the watershed include agriculture, open space, and residential uses.[40] Resolution R4-2008-012, adopted by the Regional Board, states that "[r]evenue from the agricultural industry within the Santa Clara watershed is estimated at over $700 million annually, and residential use is increasing rapidly both in the upper and lower watershed."[41] Reaches 5 and 6 of the Santa Clara River are located upstream of the Blue Cut gauging station, near the Los Angeles/Ventura County line, between the cities of Fillmore (in Ventura County) and Santa Clarita in Los Angeles County; Reach 4B is in Ventura County.[42] Claimant operates two WRPs that discharge into Reaches 4B, 5 and 6.[43]

In 1975, the Regional Board established water quality objectives for chloride in the Santa Clara River. The 1975 objectives for surface waters were established, in accordance with the State Antidegradation Policy (State Board Resolution No. 68-16), and the federal antidegradation policy (40 C.F.R. 131.12), at a chloride concentration of 90mg/L in Reach 5 and 80 mg/L in Reach 6 (then known as Reaches 7 and 8).[44] The 1975 objectives were based on background concentrations of chloride and intended to protect the beneficial uses identified in the 1975 Basin Plan, including off-stream agricultural irrigation."[45] The Basin Plan included chloride objectives between 50 and 150 mg/L for the remaining reaches of the Santa Clara River.[46] When the

[40] See Exhibit A, Test Claim, at p. 34; Exhibit B, LA Regional Board Comments, at p. 1.

[41] Exhibit A, Test Claim, at p. 34.

[42] See Exhibit B, Resolution R4-2007-018, at paragraphs 4-6, describing subdividing Reach 4 into Reaches 4A and 4B, for purposes of TMDL revision.

[43] Exhibit A, at pp. 49-52, Resolution R4-2008-012, describing conditional waste load allocations for Valencia and Saugus WRPs.

[44] See Exhibit A, at p. 151, Exhibit 6, LA Regional Board Resolution 97-02.

[45] *Ibid.*

[46] *Ibid*.

SWRCB set the water quality objectives in 1975, it "assumed the chloride concentrations in imported waters would remain relatively low."[47] However, in the years following, "chloride concentrations in the imported water supply into the Los Angeles Region increased," and in 1978 the Board "modified the water quality objectives for chloride…to 100 mg/L for both reaches."[48]

In 1990 the Regional Board adopted a resolution responding to the changing conditions of the imported water supply related to drought (referred to by both the claimant and the Regional Board as the "Drought Policy"). For dischargers into the Santa Clara River who applied for relief under the Drought Policy, chloride concentrations were permitted "in the discharger's effluent to be the lesser of: (1) 250 mg/L; or (2) the chloride concentration of supply water plus 85 mg/L."[49] The board renewed the Drought Policy in 1993 and 1995 "because the chloride levels in supply waters remained higher than the chloride levels before the onset of the drought." In 1997, the Regional Board rescinded the Drought Policy and revised the water quality objectives for chloride for the Los Angeles River, Rio Hondo, and the San Gabriel River, but not for the Santa Clara River, "due to the potential for future adverse impacts to agricultural resources in Ventura County." The board "granted temporary variances to certain dischargers in the Santa Clara River watershed, including the Valencia and Saugus WRPs."[50] The interim effluent limits of 190 mg/L were applied for three years to the two facilities.[51]

In 1998 the Santa Clara River "appeared for the first time on the state's federally required 303(d) list of impaired waterbodies for chloride."[52] Reaches 5 and 6 of the Upper Santa Clara River did not meet the 100 mg/L water quality objective (WQO), and "[b]eneficial uses of the Upper Santa Clara River, including agricultural supply water and groundwater recharge were listed as impaired."[53] The Valencia and Saugus WRPs, which are owned and operated by the District, are two major point sources that discharge to the upper reaches of the River.[54] The two WRPs are responsible for approximately 70 percent of the chloride loading to the River.[55] The Valencia

[47] Exhibit B, at p. 507, L.A. Regional Board Resolution 97-02, paragraph 2.

[48] Exhibit B, at p. 502, Attachment 56, 1978 Revisions to the Water Quality Control Plan for the Santa Clara River Basin.

[49] See Exhibit B, Attachment 57, at p. 507, L.A. Regional Board Resolution 97-02, paragraph 2.

[50] Exhibit B, LA Regional Board Comments, at p. 10; Attachment 57, at p. 507 [L.A. Regional Board Resolution 97-02, paragraph 2].

[51] Exhibit B, LA Regional Board Comments, at p. 10.

[52] *Ibid* [referring to the Clean Water Act section 303(d), codified at 33 U.S.C. 1313(d), which requires states to identify and report to the EPA on those waters within its boundaries for which the effluent limitations have not proven effective "to implement any water quality standard applicable to such waters"]. See also, Exhibit A, Test Claim, at p. 9.

[53] Exhibit B, LA Regional Board Comments, at p. 10. See also Exhibit B, LA Regional Board Comments, Attachment 58, at p. 523 [L.A. Regional Board Resolution 03-088, paragraph 2].

[54] Exhibit A, Test Claim, at p. 34.

[55] Exhibit B, LA Regional Board Comments, at p. 11. See also, Exhibit A, Test Claim, at p. 48.

and Saugus WRPs were not designed to remove chloride from waste water, and in fact have been contributing to elevated chloride concentrations due to the use of chlorine disinfection.[56]

In October of 2002, the Regional Board adopted Resolution 02-018, amending the Basin Plan to include a TMDL for chloride in the Santa Clara River. The same resolution also assigned "final WLAs to the Valencia and Saugus WRPs of 100 mg/L to be included also in their NPDES permits." However, the TMDL resolution also included "interim WLAs for the [Saugus and Valencia facilities], to provide the District time to implement chloride source reduction, complete site-specific objective ("SSO") studies, and make any necessary modifications to the WRPs."[57] The District determined at the time that the TMDL would require approximately $500 million in upgrades to its treatment facilities, including advanced treatment (desalination) at both WRPs in order to meet the effluent limitations of 100 mg/L chloride. The District appealed the decision to the SWRCB, which adopted Resolution 2003-0014, remanding the TMDL to the Regional Board for reconsideration of various items including: (1) an extension of the interim chloride limits, and (2) re-evaluation of the water quality objectives accounting for the beneficial uses to be protected, the quality of the imported water supply, and the impacts of drought periods.[58] In response, the Regional Board adopted Resolution 03-008,[59] which included interim WLAs and a phased implementation plan for the chloride TMDL, including a number of required studies. On May 6, 2004, the Regional Board adopted Resolution 04-004, which revised and superseded the interim WLAs and implementation plan adopted by Resolution 03-008.The TMDL was approved by the EPA, as amended by Resolution 03-008, and Resolution 04-004, on April 28, 2005.

In 2006, the board shortened the compliance period and the interim WLAs by two years; Resolution R4-2006-016 was approved by EPA June 12, 2008.[60] And finally, in 2008, the board shortened the compliance period by an additional year, but relaxed the chloride requirements as described in the next paragraph.[61]

Between 2005 and 2008, several special studies were conducted, as required under the prior TMDL.[62] On December 11, 2008, the Regional Board adopted Resolution R4-2008-012, saying: "The completion of these TMDL special studies…has led to the development of an alternative TMDL implementation plan that addresses chloride impairment of surface waters and

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[56] Exhibit A, Test Claim, at pp. 7; 11-12; 175; Exhibit B, LA Regional Board Comments, at pp. 9-10.

[57] Exhibit A, Test Claim, at p. 10; Exhibit B, LA Regional Board Comments, at pp. 10-11.

[58] Exhibit B, at p. 523, Attachment 58, LA Regional Board Resolution 03-008.

[59] Exhibit B, at p. 523, Attachment 58, LA Regional Board Resolution 03-008.

[60] Exhibit B, Attachment 60, at p. 566, Regional Board Resolution R4-2006-016, Implementation Task 14. See also, Exhibit X, SCVSD Draft EIR, at p. 8.

[61] Exhibit B, Attachment 63, at p. 624, Regional Board Resolution R4-2006-016, Implementation Task 21.

[62] See Exhibit A, Attachment 1, at pp. 34-36 [Regional Board Resolution R4-2008-012, paragraphs 10-16].

degradation of groundwater."[63] The alternative plan is known as the Alternative Water Resources Management program; the AWRM includes:

> …the development of site-specific objectives [SSOs] for chloride while protecting beneficial uses; chloride source reduction actions through the removal of self-regenerating water softeners; a switch from chlorine-based disinfection to ultraviolet disinfection at both WRPs; chloride load reduction actions through advanced treatment (like reverse osmosis and microfiltration) of a portion of the Valencia WRP's effluent; supplemental water to enhance assimilative capacity of local groundwater or surface water; alternative water supply to protect salt-sensitive agricultural beneficial uses during drought conditions; construction of extraction wells and pipelines; and expansion of recycled water uses with[in] the Santa Clarita Valley.[64]

The SSOs adopted are 150 mg/L in Reaches 5 and 6 and 117 mg/L for Reach 4B, which is adjusted to 130 mg/L when the supply water has chloride levels above 80 mg/L.[65] The conditional WLAs for the Valencia and Saugus facilities are also 150 mg/L for discharges to Reaches 5 and 6, and 117 mg/L for discharge to Reach 4B.[66] The Resolution provides for the construction and implementation of advanced treatment (reverse osmosis desalination) at the Valencia facility, as well as a number of water supply control measures designed to attain the site specific objectives.[67] The relaxed requirements are conditioned upon "the Claimant's full and ongoing implementation of the AWRM program."[68] The 2008 resolution was approved by the State Water Board, OAL, and then finally by the U.S. EPA on April 6, 2010.[69]

This test claim was filed by Santa Clarita Valley Sanitation District on March 30, 2011. On July 29, 2011, the Regional Board filed comments on test claim.[70] On August 8, 2011, the Department of Finance (Finance) filed comments on the test claim.[71] On September 28, 2011, the District filed rebuttal comments in response to both Finance and Regional Board comments.[72]

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[63] Exhibit A, Attachment 1, at p. 36 [Regional Board Resolution R4-2008-012, paragraph 15].

[64] Exhibit A, Attachment 1, at p. 42 [Regional Board Resolution R4-2008-012, Table 3-A "Conditional Site Specific Objectives for the Santa Clara River Surface Waters].

[65] *Id*., p. 42.

[66] *Id*., at pp. 49-51.

[67] *Id*., at p. 51.

[68] Exhibit B, LA Regional Board Comments, at p. 17. See also, Exhibit A, Test Claim, at p. 11 ["If the AWRM program is not timely implemented, the water quality objectives for chloride will revert back from the conditional SSOs to the current levels of 100 mg/L."].

[69] Exhibit A, Test Claim, at p. 11; Exhibit B, LA Regional Board Comments, at p. 17.

[70] Exhibit B, LA Regional Board Comments.

[71] Exhibit C, Department of Finance Comments.

[72] Exhibit D, Claimant's Rebuttal Comments.

III. Positions of the Parties

Santa Clarita Valley Sanitation District Position

The District seeks reimbursement for costs associated with implementing the Alternative Water Resources Management program (AWRM) described in Resolution R4-2008-012. The AWRM includes technology upgrades at the two WRPs, as well as alternative water supply and groundwater management techniques in order to attain the site-specific objectives and waste load allocations of 150 mg/L for Reaches 5 and 6, and 117 mg/L for Reach 4B.[73] The District also alleges costs incurred in fiscal years 2009-2010 and 2010-2011 associated with Implementation Tasks outlined in the Resolution; these tasks primarily involve conducting studies and developing suggested revisions to the TMDL over a span of years commencing May 4, 2005.[74]

The District explains that the CWA "requires states to adopt water quality standards for the beneficial uses of waters of the United States and the water quality criteria for specific uses of those waters." The Act further requires "continuing review and revision of the standards," and requires states to "continually identify those waters of the United States within their boundaries that do not meet water quality standards (the '303(d) List'), rank them in order of priority for enforcement, and prepare TMDLs for those waters that will ensure re-attainment of the standard through action by regulated dischargers." However, the District asserts that "[w]hile the Clean Water Act mandates these planning activities, it leaves to the states their evaluation and specific determination of regulatory requirements based, in part, upon site-specific factors."[75]

The District argues that the Regional Board's determination of water quality objectives, and eventually a TMDL for chloride, was discretionary regulatory activity that was not mandated by federal law. The District bases its conclusion that the TMDL was discretionary on the fact that the TMDL and WLAs have changed over time.

The District asserts that it "now faces enormous costs to 'solve' a problem that is has not created and does not control, and has already substantially mitigated by implementing a comprehensive chloride source reduction program within the sewer service area." The District estimates its costs "to comply with the TMDL's conditional SSOs and WLAs is $250 millon."[76] The District acknowledges that "[s]ome of the compliance project costs may be paid from service charges," but the District asserts that its "elected officials could not support the proposed rate increases in the face of fierce public opposition." The District maintains that "a local agency does not fall under the fee increase exception [of section 17556(d)] if it is unable to obtain the requisite approval under the Proposition 218 process," which requires a local agency to provide notice of any new or increased assessment. The District provided the notice, as required, and alleges that it "received strong opposition amongst its constituents," and "[a]s a result, the District has been unable to successfully implement a rate increase due to public resistance."[77]

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[73] Exhibit A, Test Claim, at pp. 16; 49-51.

[74] Exhibit A, Test Claim, at pp. 13-17; 59-63.

[75] Exhibit A, Test Claim, at p. 5.

[76] Exhibit A, Test Claim, at p. 12.

[77] *Id*, at p. 25.

In response to the Regional Board's comments on the test claim, the District's rebuttal comments stress the discretion available to the Regional Board, which it believes demonstrates that the Resolution is not necessary to implement a federal mandate. The comments further state that the District's "elected officials could not implement the proposed rate increase in the face of fierce public opposition;" that the District participated in developing the AWRM "only to protect, to the best of its ability, the interests of its ratepayers;" and that therefore "the District is entitled to subvention of the costs that have been and will be incurred as a result of this mandate."[78]

In comments on the draft staff analysis, the District argues that it is "the passive recipient of imported high-chloride drinking water, which it must treat to prevent a speculative harm." The District argues that the TMDL "requires the District to pay more than its fair share of cleanup costs to prevent speculative damage." The District argues that it "has no legal authority to obtain reimbursement for the parties responsible for much of the chloride nor from the beneficiaries of the treatment," and therefore the district "is being forced to pay to solve a speculative problem with origins and effects that are outside its jurisdiction."[79] With respect to the draft staff analysis, the District argues that (1) the implementation tasks alleged in the test claim Resolution should not be denied on grounds that they are not new, because "the 2008 TMDL is the result of the final appeal of the original 2002 approval;" (2) the acceleration of implementation is a higher level of service; (3) the AWRM must be evaluated with reference to the pre-TMDL requirements, in order to determine whether it constitutes a new program or higher level of service; and (4) the District does not have sufficient fee authority to cover the costs of the program, because it is "subject to Prop. 218 protests and referenda on the rates necessary to support the TMDL facilities."[80]

Los Angeles Regional Water Quality Control Board Position

The Regional Board maintains that this test claim does not qualify for subvention. The Regional Board argues that CWA imposes a requirement to establish a TMDL for chloride for an impaired water body. In addition the Regional Board asserts that that absent the AWRM plan, the claimant would be required to meet the water quality standard established for the Santa Clara River in the 2002 TMDL (and maintained in the revisions of 2004 and 2006) by the year 2015. The Regional Board argues that it has no discretion whether to adopt water quality objectives due to the listing of the Santa Clara River under section 1313(d) of the CWA. The Regional Board asserts that "[w]ater quality standards are adopted pursuant to the Clean Water Act, and *any* TMDL is required to attain and maintain the applicable water quality standards, no matter how many times these regulatory mechanisms are modified and amended."[81] The Regional Board further argues that the alleged discretion exercised in allocating pollutant loading among various dischargers does not make the Resolution a state-mandated program: "a TMDL is not valid unless it contains wasteload and load allocations." The Regional Board holds that "to

[78] Exhibit D, Rebuttal Comments, at pp. 2-14.

[79] Exhibit J, Claimant Comments on Draft Staff Analysis, at pp. 1; 6.

[80] Exhibit J, Claimant Comments on Draft Staff Analysis, at pp. 2-6.

[81] Exhibit B, LA Regional Board Comments, at pp. 22-23.

protect beneficial uses, the Los Angeles Water Board had no choice but to assign wasteload allocations to each point source discharger, including the Claimant."[82]

In addition, the Regional Board also argues that the Resolution does not impose a new program or higher level of service. The Regional Board argues that the chloride water quality objective was first established in 1975, and the 2008 Resolution was intended "to incorporate less-stringent site-specific objectives in order to support the Claimant's AWRM program." The Regional Board continues: "[t]hus, if anything, the 2008 Resolution imposed a *lower level* of service in order to make it less expensive for the Claimant to implement the existing 100 mg/L chloride water quality objective." The Regional Board also asserts that it did not impose this program: "[t]he AWRM is the Claimant's chosen method of complying with the Chloride TMDL and the water quality objectives." Finally, the Regional Board argues that if the U.S. EPA had adopted a chloride TMDL for the Santa Clara River, which the applicable laws permit if the state fails to do so, "it would have done so without an implementation plan, since the U.S. EPA does not include implementation plans as part of their TMDLs." In other words, the District has the Regional Board to thank for the gradual and phased implementation of the TMDL, which the Regional Board implied is less burdensome and expensive than a TMDL adopted by the Administrator of the U.S. EPA.[83]

Moreover, the Regional Board argues that "the 2008 Resolution is a regulatory provision of general applicability and not a new program or higher level of service." The Regional Board asserts that "[w]ater quality objectives apply to a waterbody as a whole, and all dischargers are subject to them." The Regional Board further states that "[l]ikewise, TMDLs must assign wasteload allocations and load allocations to all sources of the pollutant, both public agencies and private industry alike." Therefore, the Regional Board concludes that "the challenged provisions treat dischargers with an even hand, irrespective of status (any point or nonpoint source) and are not peculiar to local agencies."[84]

Finally, the Regional Board argues that three of the statutory exceptions of Government Code section 17556 are applicable. The Regional Board argues that the water quality standards and the TMDL contained in the Resolution are federally mandated, and therefore section 17556(c) applies.[85] The Regional Board argues also that section 17556(a) applies to bar this test claim because "the Claimant itself developed and proposed the AWRM program and then requested the Los Angeles Water Board to adopt the AWRM as part of its 2008 Resolution."[86] And, the Regional Board argues that the District possesses fee authority within the meaning of section 17556(d). The Regional Board dismisses the claimant's assertion that "the District's board declined to adopt the proposed rate increases based on the expectations that any substantive rate increase would be overturned by way of referendum due to fierce opposition from the district's

[82] Exhibit B, LA Regional Board Comments, at p. 24.

[83] Exhibit B, LA Regional Board Comments, at p. 26.

[84] Exhibit B, LA Regional Board comments, at pp. 26-27.

[85] See Exhibit B, LA Regional Board Comments, at p. 28.

[86] Exhibit B, LA Regional Board Comments, at p. 29.

ratepayer."[87] The Regional Board argues that "[t]he plain language of this exception is based on the Claimant's authority, not on the Claimant's practical ability in light of surrounding economic circumstances, to levy fees."[88] The Regional Board concludes that "[t]he Claimant cannot rely on mere speculation as to what could happen as a defense to the fee increase exception" of section 17556(d).[89]

In comments submitted on the draft staff analysis, the Regional Board substantially concurs with the analysis below, but reiterates that the Resolution is not a reimbursable mandate because it is not unique to government, and applies to the water body generally. The Board "respectfully requests that the Commission address this argument in the context of the Resolution as a whole and determine that the Resolution does not impose requirements unique to government."[90]

Department of Finance Position

Finance argues that the TMDL does not impose a reimbursable state mandate because "(1) the regulations are required by section 303(d) of the federal Clean Water Act, (2) the regulations by themselves do not require the claimant to act, and (3) even if the regulations required action, claimant has fee authority sufficient to pay its costs." Finance also questions whether the claim may be time barred, because the Resolution was adopted by the Regional Board in December 2008, and the test claim was filed on March 30, 2011.[91]

Other Public Comment

On October 9, 2013, Ms. Lynda Cook of Santa Clarita filed comments on the draft staff analysis. Ms. Cook asserted that residents of Santa Clarita should not be responsible for the costs of removing chloride from the Santa Clara River, because the residents of Santa Clarita are not the cause of high concentrations of chloride in the Santa Clara River. Ms. Cook further asserted that increased fees for sewer services are a tax, and should be subject to voter approval.[92]

On October 18, 2013 the City of Santa Clarita submitted written comments on the draft staff analysis, in which the City argued that "compliance with the Upper Santa Clara River Chloride Total Maximum Daily Load will cost our Santa Clarita Valley residents and businesses millions of dollars." The City argued that "[i]t is essential for the vitality of our community that compliance with State-created regulations, such as this one, be supported by the State."[93]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

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[87] Exhibit B, LA Regional Board Comments, at pp. 30-31 [citing to Exhibit A, Test Claim, at p. 26].

[88] Exhibit B, LA Regional Board Comments, at p. 31 [citing *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, at pp. 401-402].

[89] Exhibit B, LA Regional Board Comments, at p. 31.

[90] Exhibit I, LA Regional Board Comments on Draft Staff Analysis, at pp. 1-2.

[91] Exhibit C, Department of Finance Comments, at pp. 1-2.

[92] Exhibit G, Public Comments on Draft Staff Analysis.

[93] Exhibit H, City of Santa Clarita Comments.

> Whenever 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 programs or increased level of service…

The purpose of article XIII B, section 6 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."[94] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[95] Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[96]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[97]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[98]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[99]

The determination of whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[100] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[101] In making its decisions, the Commission must strictly construe article XIII

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[94] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

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

[96] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[97] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.)

[98] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[99] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[100] *County of San Diego*, *supra*, 15 Cal.4th 68, 109.

[101] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[102]

A. Threshold Issues: the Santa Clarita Valley Sanitation District is an Eligible Claimant Before the Commission; Resolution R4-2008-012 is an Executive Order within the Meaning of Article XIII B, Section 6; and the Test Claim is Timely Filed.

1. The Santa Clarita Valley Sanitation District is an Eligible Claimant before the Commission.

Article XIII B, section 6 requires reimbursement for increased costs mandated by the state. "Costs mandated by the state" is defined to mean "any increased costs which a local agency or school district is required to incur…as a result of any statute…or any executive order implementing any statute…which mandates a new program or higher level of service of an existing program."[103] "Local agency," in turn, is defined to include "any city, county, special district, authority, or other political subdivision of the state."[104]

However, not every "local agency," as defined, is an eligible claimant before the Commission. In addition to an entity fitting the description above, the entity must also be subject to the tax and spend limitations of articles XIII A and XIII B. The California Supreme Court, in *County of Fresno v. State of California*,[105] explained the constitutional subvention requirement as follows:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments… Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.[106]

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,[107] the Fourth District Court of Appeal concluded that redevelopment agencies were not eligible to claim reimbursement because their funding came primarily from tax increment financing, which the court determined, due to a valid statutory exemption, was not subject to the taxing and spending limitations of articles XIII A and XIII B:

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise,

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[102] *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose*, *supra*].

[103] Government Code section 17514 (Stats. 1984, ch. 1459).

[104] Government Code section 17518 (Stats. 1984, ch. 1459).

[105] *County of Fresno*, *supra*, 53 Cal.3d 482.

[106] *Id*, at p. 487. Emphasis in original.

[107] (Cal. Ct. App. 4th Dist. 1997) 55 Cal.App.4th 976

> through tax increment financing, "general revenues for the local entity." The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...[108]

Therefore, a local agency that does not collect and expend "proceeds of taxes" is not an eligible claimant before the Commission.[109]

Here, the District receives *at least some amount* of its funding from local taxes, and is subject to an appropriations limit for at least a portion of its revenues, and is therefore an eligible claimant. The State Controller's Special Districts Annual Report for 2010-2011 indicates that the Santa Clarita Valley Sanitation District was subject to an appropriations limit for approximately one-third of its total revenue (nearly $11 million), and made total appropriations subject to the appropriations limit in the amount of $5,778,450.[110] Based on the foregoing, the Commission finds that the Santa Clarita Valley Sanitation District is an eligible claimant before the Commission.

2. The Regional Water Board's Order is an Executive Order within the Meaning of Article XIII B, Section 6.

Article XIII B, section 6 provides 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 programs or increased level of service…" Government Code section 17514 provides that costs mandated by the state includes "any increased costs which a local agency or school district is required to incur…as a result of…any executive order implementing any statute…which mandates a new program or higher level of service of an existing program…" Government Code section 17516 defines an "executive order" to mean "any order, plan, requirement, rule, or regulation issued by…[a]ny agency, department, board, or commission of state government."[111]

Because Resolution R4-2008-012 is an order of a state board, the Commission finds that Resolution R4-2008-012 is an executive order within the meaning of article XIII B, section 6.

3. The Test Claim was Timely Filed.

Section 17551 provides that "[l]ocal agency and school district claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[112]

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[108] *Redevelopment Agency of San Marcos, supra*, 55 Cal.App.4th at p. 986 [internal citations omitted].

[109] *Ibid*. See also, *County of Fresno, supra* (1991) 53 Cal.3d 482, at p. 487 ["[R]ead in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered solely from tax revenues."].

[110] Exhibit X, 2010-2011 Special Districts Annual Report Excerpts 1 and 2.

[111] Government Code section 17516 (as amended by Stats. 2010, ch. 288 (SB 1169)).

[112] Government Code section 17551 (Stats. 2007, ch. 329 (AB 1222)).

Section 1183 of the Commission's regulations states that "within 12 months," for purposes of test claim filing, "means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the claimant." [113]

Finance has raised the statute of limitations found in section 17551, arguing that the test claim was filed on March 30, 2011, while the Resolution had an effective date of December 11, 2008. Finance further argues that the District "asserts that eligible costs under the claim include those for the entire fiscal year 2009-10." Finance concludes that "[i]f no allegedly state-mandated costs were incurred until fiscal year 2009-2010, all claimed costs for that fiscal year would have had to be incurred after March 30, 2010 to not be time barred."[114]

Finance's first point, that the effective date of the Resolution would place this test claim beyond the time bar, has some merit. An effective date of December 11, 2008 would require that a valid test claim be filed by June 30, 2010.

The cover page of the test claim indicates that the Resolution was effective December 11, 2008, as Finance asserts. However, the Regional Board's comments on the test claim state that the Resolution was effective April 6, 2010, the date of US EPA's approval of the TMDL. In addition, a later settlement agreement between the District and the Regional Board is in accord, stating that the Resolution became effective April 6, 2010.[115] This is a logical conclusion because TMDLs and waste load allocations must be approved by the SWRCB, OAL,[116] and the Administrator of the US EPA.[117] An effective date of April 6, 2010, would require that a timely filed test claim be submitted on or before June 30, 2011. This test claim was filed March 30, 2011, and therefore was filed before the expiration of the statute of limitations, based on the effective date agreed upon by the parties.

Based on the foregoing, the Commission finds that this test claim was timely filed.

B. The Regional Water Board's Resolution and Order does not Impose a New Program or Higher Level of Service within the Meaning of Article XIII B, Section 6.

The District states that "Regional Board Resolution No. R4-2008-012 requires: (1) compliance with specific waste load allocations that will also be incorporated into the Saugus and Valencia WRPs' NPDES permits; and (2) specific "implementation tasks" necessary for compliance." The final waste load allocations, along with the Implementation Tasks, "are the subject of this test claim."[118]

Attachment B to Resolution R4-2008-012 outlines the conditional site-specific objectives for Reaches 4B, 5, and 6, and conditional waste load allocations for the water discharged from the

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[113] Code of Regulations, title 2, section 1183 (Register 2008, No. 17).

[114] Exhibit C, Department of Finance Comments, at p. 2. See also, Exhibit A, Test Claim, at p. 17; Exhibit D, Rebuttal Comments, at p. 13.

[115] Exhibit X, Settlement Agreement, at p. 4.

[116] Exhibit B, LA Regional Board Comments, at p. 8 [citing Water Code §§ 13245, 13246; Government Code § 11353]. See also, Exhibit A, Test Claim, at p. 6.

[117] Exhibit B, LA Regional Board Comments, at p. 8 [citing 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.20(c)]. See also, Exhibit A, Test Claim, at p. 6.

[118] Exhibit A, Test Claim, at p. 13.

Valencia and Saugus WRPs to Reaches 4B, 5, and 6. The WLAs for the District's WRP facilities are based on, and numerically identical to, the SSOs for the respective reaches (117 mg/L chloride for Reach 4B, and the discharge into Reach 4B; 150 mg/L chloride for Reaches 5 and 6, and for the discharge into Reaches 5 and 6).[119] All other point sources are assigned WLAs equal to 100 mg/L.[120] Attachment B also provides for the operation of reverse osmosis treatment at the Valencia WRP, the provision of supplemental water to Reach 4B when chloride concentrations exceed 117 mg/L, and the design and construction of advanced treatment facilities.[121] In addition, Attachment B outlines the following implementation tasks:

> *4. The SCVSD will convene a technical advisory committee or committees (TAC(s)) in cooperation with the Regional Board to review literature, develop a methodology for assessment, and provide recommendations with detailed timelines and task descriptions to support any needed changes to the time schedule for evaluation of appropriate chloride threshold for Task 6.…¶*
>
> *5. Groundwater/Surface Water Interaction Model: The SCVSD will solicit proposals, collect data, develop a model in cooperation with the Regional Board, obtain peer review, and report results. The impact of source waters and reclaimed water plans on achieving the water quality objective and protecting beneficial uses, including impacts on underlying groundwater quality, will also be assessed and specific recommendations for management developed for Regional Board consideration. The purpose of the modeling and sampling effort is to determine the interaction between surface water and groundwater as it may affect the loading of chloride from groundwater and its linkage to surface water quality.*
>
> *6. Evaluation of Appropriate Chloride Threshold for the Protection of Sensitive Agricultural Supply Use and Endangered Species Protection: The SCVSD will prepare and submit a report on endangered species protection thresholds. The SCVSD will also prepare and submit a report presenting the results of the evaluation of chloride thresholds for salt sensitive agricultural uses, which shall consider the impact of drought and low rainfall conditions and the associated increase in imported water concentrations on downstream crops utilizing the result of Task 5.*
>
> *7. Develop SSO for Chloride for Sensitive Agriculture: The SCVSD will solicit proposals and develop technical analyses upon which the Regional Board may base a Basin Plan amendment.*
>
> *8. Develop Anti-Degradation Analysis for Revision of Chloride Objective by SSO: The SCVSD will solicit proposals and develop draft anti-degradation analysis for Regional Board consideration.*
>
> *9. Develop a pre-planning report on conceptual compliance measures to meet different hypothetical final conditional wasteload allocations. The SCVSD shall solicit proposals and develop and submit a report to the Regional Board that*

[119] Exhibit A, Test Claim, at pp. 46-53.

[120] Exhibit A, Test Claim, at p. 52.

[121] Exhibit A, Test Claim, at pp. 50-52; 58; 63.

identifies potential chloride control measures and costs based on different hypothetical scenarios for chloride SSOs and final conditional wasteload allocations.

¶…¶

17. a)Implementation of Compliance Measures, Complete Environmental Impact Report: The SCVSD shall complete a Wastewater Facilities Plan and Programmatic Environmental Impact Report for facilities to comply with final effluent permit limits for chloride.

¶…¶

20. The interim WLAs for chloride shall remain in effect for no more than 10 years after the effective date of the TMDL. Conditional SSO for chloride in the USCR shall be achieved. Final conditional WLAs for chloride in Reaches 4B, 5, and 6 shall apply by May 5, 2015. The Regional Board may consider extending the completion date of this task as necessary to account for events beyond the control of the SCVSD.[122]

The District alleges the following costs mandated by Resolution R4-2008-012:

Summary of the Implementation Tasks Completed to Date:

TMDL Study/Task	Cost
TMDL Collaborative Process Facilitation Services (Task 4)	$0.8 million
Ground Water Surface Water Interaction Model (Task 5)	$3.1 million
Agricultural Chloride Threshold Study (Task 6)	$0.7 million
Threatened and Endangered Species Study (Task 6)	$0.1 million
Site Specific Objectives and Anti-Degradation Study (Task 7 & 8)	$0.3 million
Chloride Compliance Cost Study (Task 9)	$0.5 million
Facilities Plan & EIR (Task 17a)	$1.1 million
Total TMDL Study Costs to Date	$6.6 million

¶….¶

As previously indicated, the District has implemented a comprehensive chloride source reduction program within the sewer service area designed to reduce chloride levels in the WRP discharges in order to comply with final WLAs for chloride. (See Exh. 19). Specifically, the District implemented an innovative automatic water softener public outreach and rebate program, in compliance with Senate Bill 475, to remove automatic water softeners, which contribute significant amounts of chloride to the WRP discharges. The total cost of the program for removal of automatic water softeners, not including the cost of the District's staff time, is approximately $4.8 million.[123]

[122] Exhibit A, Test Claim, at pp. 59-63.

[123] Exhibit A, Test Claim, at pp. 13-16.

The District goes on to state that compliance with the conditional SSOs and WLAs will require implementation of "ultra-violet light disinfection at both WRPs;" construction of advanced treatment facilities such as microfiltration-reverse osmosis and brine disposal for desalination; salt management facilities such as extraction wells and water supply conveyance pipelines; supplemental water; and alternative water supplies for the protection of beneficial uses.[124] These activities and costs are described as the AWRM. The District's "present estimate of the cost to comply with the TMDL's conditional SSOs and WLAs is $250 million."[125]

The District estimates its costs to implement the AWRM program as follows:

AWRM Project Element	Estimated Capital Cost
Facilities Plan & Environmental Impact Report (EIR)	$2.5 million
Advanced Treatment [MF & RO]	$30.0 million
Brine Disposal (Deep Well Injection, DWI)	$53 million
Ventura Salt Export Facilities	
(a) MF/RO Conveyance Pipeline from Valencia WRP	$46.5 million
(b) GW Extraction Wells in Ventura County	$5.5 million
(c) Blend Water Pipeline from Wells to River	$52.3 million
Supplemental Water from local pumped groundwater	$30.0 million
Supplemental Water conveyance	$12.0 million
UV Disinfection Facilities at Saugus & Valencia WRP	$16.5 million
Removal of Automatic Water Softeners	$2.4 million
Total Estimated Capital Cost	$250.7 million[126]

Thus the District has alleged the above activities required by the 2008 Resolution, totaling approximately $257 million in alleged increased costs. The analysis below addresses whether the activities alleged in the Implementation Tasks and the AWRM program constitute a new program or higher level of service.

1. Some of the Implementation Tasks alleged in the Resolution are not new.

Resolution R4-2008-012 constitutes a revision to the prior chloride TMDL for the Upper Santa Clara River, and therefore many of the implementation tasks included in the resolution may have already been completed, or, at minimum, were included in earlier versions of the TMDL that continued to be required when the 2008 Resolution was adopted and which have not been pled in this test claim, and are therefore not new, with respect to prior law. Activities that are not new, as compared with an earlier order or resolution in effect at the time the 2008 Resolution was adopted, do not constitute a new program or higher level of service and, thus, are not reimbursable in the context of the current test claim.[127]

[124] Exhibit A, Test Claim, at pp. 11-12.

[125] *Id*, at p. 12.

[126] Exhibit A, Test Claim, at p. 16.

[127] *Lucia Mar Unified School District*, *supra*, (1988) 44 Cal.3d 830, at p. 835.

Implementation Tasks 4, 5, 6, 7, 8, and 9, quoted above from Resolution R4-2008-012, are found in nearly identical language in Resolution 04-004,[128] and again in Resolution R4-2006-016, both of which were approved by EPA prior to the adoption of the test claim Resolution.[129,130] Additionally, Implementation Tasks 4-9 are listed in the revised TMDL as having completion dates *prior to* the adoption and approval of the 2008 Resolution.[131] Moreover, these tasks appear to have indeed *been completed* prior to the adoption of Resolution R4-2008-012: the Resolution states that "[t]he Santa Clarita Valley Sanitation District (SCVSD) has completed all of the necessary special studies required by the Chloride TMDL (TMDL Task Nos 3, 4, 5, 6, 7, 8, 9, 10b, and 10c)." The Resolution further states that "[t]he completion of these TMDL special studies…has led to the development of an alternative TMDL implementation plan that addressed chloride impairment of surface waters and degradation of groundwater."[132]

Based on the plain language of the Resolution itself, these Implementation Tasks were completed prior to the adoption of the Resolution. It appears that the tasks were repeated in the revised TMDL adopted December 11, 2008, but activities that were completed (and the costs thereby incurred) prior to July 1, 2009 are outside the period of eligibility for this test claim.[133] Moreover, activities that were required by a prior version of the TMDL are not new. Therefore, all costs and activities alleged for Implementation Tasks 4, 5, 6, 7, 8, and 9 do not result in a state-mandated new program or higher level of service and are denied.

Implementation Task 17a, "Implementation of Compliance Measures, Complete Environmental Impact Report…" is found in Resolution R4-2006-016.[134,135] The claimant alleges $613,530 for "Facilities Plan & EIR – Task 17" and $774,890 for "Consultants (TMDL Task 17)" incurred in fiscal year 2009-2010. However, the activities of implementing compliance measures and completing an EIR are not *new*, with respect to prior law, and the resolution which first required these activities was not pled in this test claim. In fact, claimant was required to prepare the draft EIR by May 4, 2010 under prior law and an administrative civil liability complaint was brought

[128] See Exhibit B, LA Regional Board Comments, at p. 537 and following.

[129] Exhibit B, LA Regional Board Comments, at pp. 564-565.

[130] See Exhibit X, SCVSD Draft EIR, at p. 8 [stating that Resolution 04-004 was "in effect May 4, 2005," and Resolution R4-2006-016 was "in effect June 12, 2008."].

[131] E.g., Task 4: Convening a technical advisory committee to conduct literature review and develop methodology for assessment; Completion Date 05/04/2006; Task 5: Groundwater/Surface Water Interaction Model; Completion Date 11/20/2007.

[132] Exhibit A, Test Claim, at p. 36.

[133] Government Code section 17557(e) ["A test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." This test claim was submitted on March 30, 2011, establishing eligibility for reimbursement beginning July 1, 2009].

[134] Exhibit B, LA Regional Board Comments, at p. 566.

[135] Exhibit X, SCVSD Draft EIR at p. 8 [stating that Resolution R4-2006-016 was "in effect" on June 12, 2008.].

by the Regional Board against the District "for the failure to complete Wastewater Facilities Plans and Programmatic Environmental Impact Reports by the required due date in 2011."[136]

Based on the foregoing, the Commission finds that the Implementation Tasks found in the test claim Resolution, alleged to impose costs of approximately $6.6 million, are not new requirements, when compared with prior law, and therefore cannot impose reimbursable costs mandated by the state.

Finally, the default TMDL, including WLAs of 100 mg/L for the Saugus and Valencia WRPs, which takes effect "if the District cannot comply with the AWRM program," is not a new requirement. The Regional Board adopted a TMDL for Reaches 5 and 6 of the Santa Clara River in 2002, which "required the Districts to reduce the chloride levels in the Plants' discharge."[137] That TMDL was revised in 2004 and 2006, but the numerical limits were not altered. The TMDL in effect prior to the 2008 Resolution "has a numeric target of 100 mg/L, measured instantaneously and expressed as a chloride concentration, required to attain the water quality objective and protect agricultural supply beneficial use."[138] In addition, the TMDL includes "waste load allocations (WLAs) [of] 100 mg/L for Valencia WRP and 100 mg/L for Saugus WRP."[139] The numerical limits, which the parties acknowledge will control if the AWRM program is not fully and continuously implemented, were adopted in 2002, and approved by U.S. EPA in April 2005, and have not changed. The default WLAs are therefore not new, irrespective of whatever costs might be incurred to implement them.

In comments submitted in response to the draft staff analysis, the District argues that the above analysis "completely ignores the fact that the 2008 TMDL is the result of the final appeal of the original 2002 approval." The District argues that the "entire TMDL process began in 2002 with the initial adoption of the TMDL, and was repeatedly administratively appealed and negotiated over six years until the District had exhausted all of its administrative remedies and was forced to accept the 2008 order in the face of the threat of crippling fines." The District further argues that "[t]o deny the Test Claim on the grounds that the state mandate is not "new" would be a Catch-22, since any Test Claim during the appeals process would have been unripe." The District concludes that "because the 2002, 2005, and 2006 approvals are part and parcel of the 2008 TMDL, they were "pled" in this Test Claim." Therefore, the District argues that "[t]he proper measure of whether the TMDL is a new or higher level of service is to compare the TMDL's requirements with the existing or pre-TMDL requirements."

This argument does not change the above analysis. As discussed above, a test claim must be filed "not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order."[140] In addition, section 17553 and the regulations require that a claimant identify "the specific sections of statutes or executive orders and the effective date and register number of regulations alleged

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[136] Exhibit X, LA Regional Board, Enforcement News, November 26, 2012.

[137] Exhibit A, Test Claim, at p. 175.

[138] Exhibit A, Test Claim, at p. 191 [Attachment A to Resolution R 02-018].

[139] *Id*, at p. 192.

[140] Government Code 17551(c) (Stats. 2007, ch. 329 (AB 1222)).

to contain a mandate," and include a "a detailed description of new activities and costs that arise from the mandate."

Here, the District argues that the prior Basin Plan amendments are part and parcel of the 2008 Resolution, and were therefore effectively "pled." But the test claim form cites only Resolution R4-2008-012. Moreover, even if the prior Resolutions were "pled" in this test claim as imposing state-mandated activities, the activities described in Implementation Tasks 4, 5, 6, 7, 8, and 9 would be well outside the statute of limitations described in section 17551, because those activities were already completed at the time the 2008 Resolution was adopted, and thus costs for those activities would necessarily have been "first incurred" prior to the adoption of the 2008 Resolution.[141]

In addition, the District is for the first time arguing that "the 2008 TMDL is the result of the final appeal of the original 2002 approval;"[142] in essence arguing that the District was not mandated to perform any of the activities described in the 2002, 2003, 2004, or 2006 orders until the "final appeal" was exhausted in the 2008 Resolution. The record does not support this interpretation: although Resolution 2002-018 was appealed to the SWRCB, and remanded to the District, the Regional Board on remand adopted Resolution 2003-008, amending Resolution 2002-018, which was ultimately approved by EPA on April 28, 2005, thus ending the administrative appeals process for the "original" TMDL, and giving its provisions the force of law.

Accordingly, the District completed the studies required by the "original" TMDL, and those activities are no longer "new" with respect to prior law. Finally, the "proper measure of whether the TMDL is a new or higher level of service" is not, as the District suggests, to compare Resolution 2008-012 to the "existing or pre-TMDL requirements." Rather, the "proper measure" of a new program or higher level of service is, as with any other test claim, to compare the test claim statute or regulation with the law in effect immediately prior to the alleged mandate.[143] Here, the requirements of Implementation Tasks 4-9 and 17a, and the chloride WLAs of 100 mg/L were in force at the time the 2008 test claim Resolution was adopted.

Based on the foregoing, Implementation Tasks 4, 5, 6, 7, 8, 9, and 17a are not new, with respect to prior law. In addition, the waste load allocations are not new, with respect to prior law. Therefore the Commission finds that none of these provisions constitutes a state-mandated new program or higher level of service.

2. Accelerating the implementation period of the final waste load allocations under Implementation Task 20 is not a new program or higher level of service resulting in increased costs mandated by the state.

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[141] See Exhibit A, Test Claim, at pp. 34-36 [Resolution R4-2008-012, paragraphs 10; 13-15].

[142] Exhibit J, Claimant Comments on Draft Staff Analysis, at p. 4.

[143] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, at p. 835 ["Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years, *the program was new insofar as plaintiffs are concerned*, since at the time section 59300 became effective they were not required to contribute to the education of students from their districts at such schools."] (emphasis added).

Implementation Task 20 shortens the applicable period of the interim WLAs, thus accelerating the implementation of the final WLAs for the Saugus and Valencia WRPs, from 11 years to 10 years, commencing with the effective date of the 2002 TMDL.[144] The interim WLAs are designed to accommodate the time needed for the WRPs to implement desalination and other chloride reduction improvements. For the Saugus WRP, the interim WLA is described as "the sum of State Water Project treated water supply concentration plus 114 mg/L, as a twelve month rolling average," but not to exceed 230 mg/L. For the Valencia WRP, the interim WLA is described as "the sum of State Water Project treated water supply concentration plus 134 mg/L, as a twelve month rolling average," but not to exceed 230 mg/L.[145] These interim WLAs were originally intended to apply for two and one-half years, pursuant to the 2002 TMDL adopted by the Regional Board. That period was expanded to 13 years after appeal and remand from the SWRCB, and the revised schedule was approved by the SWRCB, OAL, and the Administrator of the U.S. EPA.[146] Resolution R4-2006-016 shortened the interim WLA period by two years, as follows:

> The interim effluent limits for chloride shall remain in effect for *no more than 11 years after the effective date of the TMDL*. Water Quality Objective for chloride in the Upper Santa Clara River shall be achieved. The Regional Board may consider extending the completion date of this task as necessary to account for events beyond the control of the [District].[147]

Resolution R4-2008-012 shortened the implementation schedule again, providing that the interim WLAs "shall remain in effect for no more than 10 years after the effective date of the TMDL."[148]

Based on applicable case law there is no new program inherent in shortening the time frame for the interim WLAs. Pursuant to the test claim Resolution, the requirements of the interim WLAs remain the same, only the schedule is accelerated, and the final WLAs attach one year sooner. It may be argued that it costs more to implement the final WLAs one year sooner, but this change does not of itself constitute a new program or higher level of service.[149]

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[144] The 2002 Resolution was approved by U.S. EPA, after appeal, remand, and revision, on April 28, 2005. (See Exhibit A, Test Claim, at p. 45 [Attachment B to Resolution R4-2008-012].)

[145] Exhibit B, LA Regional Board Comments, at p. 543 [Resolution R4-04-004].

[146] Exhibit B, LA Regional Board Comments, at pp. 533 [Resolution R4-03-008]; 605 [Resolution R4-2008-012].

[147] Exhibit A, Test Claim, at p. 228; Exhibit B, LA Regional Board Comments, at p. 566 [emphasis added].

[148] Exhibit B, LA Regional Board Comments, at pp. 623-624.

[149] In comments submitted on the draft staff analysis, the District argues that the cases cited herein are distinguishable, and that no case "addresses the issue of accelerated timetables for the completion of a project." While true that no case directly addresses the issue of an accelerated project, two of the three cited cases also ultimately conclude that the local government claimant has experienced a mandate, based on the facts of those cases. More importantly, however, the cases cited show that costs alone do not constitute a reimbursable mandate, unless those costs are

The court of appeal in *Long Beach Unified School District* declared that "[a] mere increase in the cost of providing a service which is the result of a requirement mandated by the state is *not tantamount to a higher level of service*."[150] The Supreme Court has also spoken on the requirement of a new program in *Lucia Mar Unified School District*, *supra*, in terms often repeated in later decisions: "We recognize that, as its made indisputably clear from the language of the constitutional provision, *local entities are not entitled to reimbursement for all increased costs mandated by state law*, but only those costs resulting from a new program or an increased level of service imposed upon them by the state."[151] Accordingly, in *City of San Jose v. State of California*,[152] the court held that "withdrawal of funds to reimburse [for a program] was not a 'new program' under section 6,"[153] and that "there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[154] Finally, not only is an increase in costs not tantamount to a higher level of service, there is no evidence in the record of the incremental cost increase which might be alleged based on accelerating the implementation of the final WLAs by one year.

Based on the foregoing, the Commission finds that Implementation Task 20 does not impose any new state mandated activities and does not result in a new program or higher level of service.

3. <u>The Alternative Water Resources Management program is not a new program or higher level of service.</u>

The California Supreme Court, in *County of Los Angeles I*,[155] addressed the phrase "new program or higher level of service" as follows:

> Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning…We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – programs that carry out 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.[156]

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shifted *from* the state *to* the local entity. (Exhibit J, Claimant Comments on Draft Staff Analysis, at p. 5.)

[150] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, at p. 173 [citing *County of Los Angeles*, *supra*, 43 Cal.3d at pp. 54-56] [emphasis added].

[151] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, at p. 835 [emphasis added].

[152] (1996) 45 Cal.App.4th 1802, at pp. 1811-1813.

[153] *City of San Jose, supra*, 45 Cal.App.4th at p. 1817.

[154] 45 Cal.App.4th at p. 1813 [citing *County of Los Angeles v. Commission on State Mandates, supra* (1995) 32 Cal.App.4th 805, at p. 817].

[155] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, at p. 56.

[156] *Ibid*.

Thus the Supreme Court articulated a multi-faceted test for "new program or higher level of service:" reimbursement requires (1) a new task or activity; (2) which constitutes an increase in service as compared to prior law; (3) and which either provides a service to the public, or imposes requirements uniquely upon government, rather than upon all persons and entities equally.

The Regional Board has argued that the Resolution cannot impose a new program or higher level of service because water quality objectives and TMDLs apply to a water body as a whole, and all dischargers are subject to them, "both public agencies and private industry alike." The Commission need not address this argument,[157] since the AWRM program is an optional alternative to complying with the more stringent TMDL imposed by prior law, which claimant may choose to reject. Moreover, the requirements of the AWRM provide a lower level of service when compared to the law in effect immediately prior to the adoption of R4-2008-012. Therefore, based on the analysis below, the Commission finds that the AWRM does not impose a state mandated new program or higher level of service.

The Regional Board argues that Resolution R4-2008-12 cannot impose a new program or higher level of service because it "amended the Basin Plan to, among other things, adopt site-specific objectives for chloride in the Santa Clara River that are *less stringent* than the generally applicable water quality objectives that apply to other major dischargers to the Santa Clara River…"[158] The Regional Board argues: "thus, if anything, the 2008 Resolution imposes a *lower level of service* in order to make it less expensive for the Claimant to implement" the TMDL.[159] The Commission agrees.

The first water quality objectives for the Santa Clara River were established in 1975, in which chloride objectives were set at 90 mg/L for Reach 5 and 80 mg/L for Reach 6.[160] In 1978, the Regional Board modified the chloride objectives to 100 mg/L for both Reaches 5 and 6. In 2002, the 100 mg/L objective was incorporated into a TMDL, pursuant to the impairment listing under

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[157] In comments submitted on the draft staff analysis, the Regional Board entreats the Commission to consider this argument anyway: "The Board…respectfully requests that the Commission address this argument in the context of the Resolution as a whole and determine that the Resolution does not impose requirements unique to the government." However, the Second District Court of Appeal has previously called this theory into question, when ruling on the constitutionality of the State Water Resources Control Board's (and the Regional Boards' by extension) categorical exemption from the definition of a reimbursable executive order, under prior section 17516. The court stated "the applicability of permits to public and private discharges does not inform us about whether *a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate* necessitating subvention under article XIII B, section 6. (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, at p. 919.) In any event, the Commission need not address this issue because the AWRM program is voluntary, and constitutes a lower level of service than that required under prior law.

[158] Exhibit B, LA Regional Board Comments, at p. 2 [emphasis in original].

[159] Exhibit B, LA Regional Board Comments, at p. 26 [emphasis in original].

[160] Exhibit A, Test Claim, at p. 7; Exhibit B, LA Regional Board Comments, at p. 9.

section 303(d) of the Clean Water Act of certain reaches of the Santa Clara River, and the threat to salt-sensitive agriculture uses both within Reaches 5 and 6 and downstream.[161] Aside from variances and temporary relaxation of the objectives due to drought conditions in the 1990s, the 100 mg/L objective has remained the underlying standard from 1978 to the present.[162] Resolution R4-2008-012 plainly states that the TMDL then in effect is being amended, conditionally, to include the elements of the AWRM.[163] Therefore, the underlying water quality objectives and TMDL in effect are outside the subvention requirement, because any activities or requirements to meet the 100 mg/L objectives, or the TMDL, are not new, and are not pled in this test claim.

Both the District and the Regional Board agree that the AWRM contains "relaxed" requirements, as compared with the prior water quality objectives. The District describes the Resolution as follows:

> The December 11, 2008 amendment to the Basin Plan also modified the chloride requirements. This amendment included the enactment of *relaxed site specific objectives ("SSOs")* for chloride in the Santa Clara River conditioned upon the completion of activities set forth in the revised TMDL that contained new final WLAs and a detailed implementation plan.[164]

The Regional Board states:

> In addition, the 2008 Resolution reduces the compliance costs the Claimant would otherwise incur. As detailed above, the 2008 Resolution was specifically adopted to incorporate relaxed site-specific objectives into the Basin Plan in order to implement the Claimant's proposed AWRM program.[165]

In addition, "implementation actions to attain [the prior TMDL] would require advanced treatment – that is, reverse osmosis – of the full effluent from the Saugus *and* Valencia plants with discharge into the ocean through a 43-mile brine line."[166] Under the AWRM, reverse osmosis desalination is only required at the Valencia WRP, and the waste is permitted to be disposed of through deep well injection.[167] The District estimates that implementing the advanced treatment upgrades at only one of the two facilities, along with other tasks, will cost only approximately $250 million, as opposed to $500 million under the prior TMDL.[168]

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[161] Exhibit A, Test Claim, at pp. 9-10; Exhibit B, LA Regional Board Comments, at pp. 10-11.

[162] Exhibit A, Test Claim, at pp. 7-11; Exhibit B, LA Regional Board Comments, at pp. 9-11.

[163] Exhibit A, Test Claim, at p. 36. See also, Exhibit B, LA Regional Board Comments, at p. 705 [transcript of December 11, 2008 hearing].

[164] Exhibit A, Test Claim, at p. 11 [emphasis added].

[165] Exhibit B, LA Regional Board Comments, at p. 29.

[166] Exhibit B, LA Regional Board Comments, at p. 719 [transcript of December 11, 2008 meeting] [emphasis added]. See also, Exhibit A, Test Claim, at p. 10 [TMDL estimated to cost $500 million].

[167] Exhibit A, Test Claim, at p. 12; Exhibit B, LA Regional Board Comments, at p. 778-779.

[168] Exhibit A, Test Claim, at pp. 10; 12.

However, in comments submitted on the draft staff analysis, the District argues that "both the AWRM and the compliance plan adopted by the District on October 28, 2013 are designed to comply with Regional Board requirements that are far more stringent than the pre-TMDL standard," and that, as argued above, "the comparison must be between the pre-TMDL conditions and the present TMDL conditions – not comparisons between the various TMDL standards adopted during the appeals process spanning form 2002 to 2008."[169] As explained above, there is no support in mandates law for this position, and the requirements of the test claim Resolution are, as in all mandates cases, evaluated with reference to the law in effect immediately prior to the alleged test claim statute or executive order.[170]

There is nothing in the AWRM that imposes a higher level of service on this claimant. Resolution R4-2008-012 calls for the implementation of less-stringent requirements than under prior law, which the District has acknowledged will be less-expensive to implement. In addition, those requirements are conditional, and the default requirements, should the AWRM not continue to be fully implemented, are not new.

Based on the foregoing, the Commission finds that the AWRM program is not a new program or higher level of service, and the costs and activities alleged thereunder are denied.

C. Even if the Resolution Constitutes a State-Mandated New Program or Higher Level of Service, it Would not Impose Costs Mandated by the State Under Section 17556(d) Because the Claimant Has Sufficient Fee Authority, as a Sanitation District providing Sewer Services, to Cover the Costs of the Program.

Government Code section 17556(d) provides that the Commission "shall not find costs mandated by the state, as defined in Section 17514" if the Commission finds that "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." The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[171] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B

[169] Exhibit J, Claimant Comments on Draft Staff Analysis, at p. 5.

[170] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[171] *County of Fresno v. State of California, supra*, 53 Cal.3d 482.

> requires subvention only when the costs in question can be recovered *solely from tax revenues.*[172]

Accordingly, in *Connell v. Superior Court of Sacramento County,*[173] the Santa Margarita Water District, among others, was denied reimbursement on the basis of its authority to impose fees on water users. The water districts submitted evidence "that rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water."[174] The court concluded that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs." Water Code section 35470 authorized the levy of fees to "correspond to the cost and value of the service," and "to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose."[175] The court held that the Districts had not demonstrated "that anything in Water Code section 35470 limits the authority of the Districts to levy fees "sufficient" to cover their costs," and that therefore "the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry."[176]

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the Controller's office was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts' authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court noted that the concept underlying the state mandates process that Government Code sections 17514 and 17556(d) embody is that "[t]o the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost."[177] The court further noted that, "this basic principle flows from common sense as well. As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[178]

Here, Health and Safety Code section 5471 permits a sanitation district, "by ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees tolls, rates, rentals, or territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system."[179] This section provides "authority," within the meaning of section 17556(d), based on the plain language of both Health and Safety Code section 5471 and Government Code section 17556.

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[172] Id, at p. 487.

[173] (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382

[174] *Id*, at p. 399.

[175] Ibid.

[176] *Connell*, *supra*, (1997) 59 Cal.App.4th at p. 401.

[177] *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

[178] *Ibid.*

[179] Health and Safety Code section 5471(a) (Stats. 2007, ch. 27 (SB 444)).

Proposition 218, adopted by the voters in 1996, also known as the "Right to Vote on Taxes Act," declared its purpose to protect taxpayers "by limiting the methods by which local governments exact revenue from taxpayers without their consent." Proposition 218 added articles XIII C and XIII D to the Constitution;[180] article XIII D, section 6 lays out the procedures and requirements for "new or existing increased fees and charges:"

> (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:
>
> (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.
>
> (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. *If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*
>
> (b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the

[180] Exhibit X, Text of Proposition 218.

service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. *Except for fees or charges for sewer, water, and refuse collection services*, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision…

Section 6 of article XIII D thus provides that an agency seeking to impose or increase fees must identify the parcels and the amount proposed, and must provide written notice by mail to the record owners of the identified parcels, including notice of a public hearing, at which the agency is required to "consider all protests." Written protests by a majority of owners of the affected parcels are sufficient to defeat a fee increase. In addition, the section provides that new or increased fees are required to "not exceed the funds required to provide the property related service;" "not be used for any purpose other than that for which the fee or charge was imposed;" "not exceed the proportional cost of the service attributable to the parcel;" and be "actually used by, or immediately available to, the owner of the property in question." The section provides specifically that new fees or charges may not be imposed for general services such as police and fire protection. Finally, voter approval is required "[e]xcept for fees or charges for sewer, water, and refuse collection services."[181]

The District asserts that the fee authority case law discussed above is no longer on point "because the most significant cases predate the passage of [Proposition 218]." The District contends that "[t]his potential conflict is significant where a local agency is unable to obtain the requisite approval to implement a proposed fee increase." The District asserts that it "attempted to implement the Proposition 218 process, but the elected public officials could not support the proposed rate increase in the face of fierce public opposition." The District states that "[i]n 2010, the District's board declined to adopt the proposed rate increases based on the expectation that any substantive rate increase would be overturned by way of referendum due to fierce opposition from the District's ratepayers."[182]

In addition, the District argues in comments on the draft staff analysis that it "has no legal authority to obtain reimbursement from the parties responsible for the majority of the chloride concentration, nor does it have the legal authority to obtain reimbursement from the beneficiaries of the treatment." The District also argues that *Clovis Unified, supra*, "is distinguishable from

[181] California Constitution, article XIII D, section 6 (adopted November 5, 1996).

[182] Exhibit A, Test Claim, at p. 26.

this Test Claim," in that the community college districts were "authorized under the Education Code to collect a specified sum of money from each student for health fees," while the District, "in contrast, has no authority to raise sewer fees by a sum certain." In addition, the District argues that it is "subject to Prop. 218 protests and referenda on the rates necessary to support the TMDL facilities," while the community colleges in *Clovis Unified* were "not subject to Prop. 218 or referenda on the health fee because it was directly established by law."[183]

However, based on the plain language of article XIII D, section 6, above, voter approval is not required for increases to water and sewer rates, and the absence of a statute providing for a specific dollar-amount fee increase is not relevant to the authority of sewer districts to raise fees.[184] All remaining limitations of article XIII D, must be satisfied (e.g., parcels must be identified, and amounts proposed must be calculated; fees shall not exceed the funds required to provide service; revenues may not be used for any other purpose; amount of a fee must be proportional to the cost of the service attributable to a parcel; a public hearing must be held and *if written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge*), but the parties' comments only identify "written protests" as a limitation at issue here, and state that "elected public officials could not support the proposed rate increase."

The Regional Board argues that "assuming that Proposition 218 does apply to Claimant's proposals for rate increases…the number of written protests necessary to preclude the Board of Directors from passing rate increases under Proposition 218 was noticeably lacking." Section 6(a)(2), states that "[i]f *written protests* against the proposed fee or charge are *presented by a majority of owners of the identified parcels*, the agency shall not impose the fee or charge." The Regional Board argues that there are nearly 69,000 parcels connected to the District's sewerage system, and therefore "at least 34,449 written protests" would be a majority of the owners required to defeat a rate increase. At the May 26, 2009 and July 27, 2010 hearings the District received "203 written protests and 7, 732 written protests, respectively."[185]

The District does not dispute the number of written protests needed, or the number received (the Regional Board's mathematical reasoning presumes that each of the 69,000 parcels represents an individual voting property owner, but the District fails to argue the point); rather the District argues that the District's Board "quite reasonably believed that this large rate increase would be rejected if challenged by initiative."[186] Section 3 of Proposition 218 provides that the initiative power to overturn a tax, fee, or assessment "shall not be prohibited or otherwise limited," and the District maintains that an initiative to overturn the fee increase would qualify for the ballot with approximately 6,500 votes, based on the estimated number of voters in the last gubernatorial election who would be affected by the increase.[187] Therefore, the District concludes that the

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[183] Exhibit J, Claimant Comments on Draft Staff Analysis, at p. 6.

[184] California Constitution, article XIII D, section 6(c) (adopted November 5, 1996).

[185] Exhibit B, LA Regional Board Comments, at p. 20 [citing "Letter from Stephen R. Maguin…to Council members" regarding responses to comments made during the public hearing on proposed rate increases].

[186] Exhibit D, Rebuttal Comments, at p. 11.

[187] Exhibit D, Rebuttal Comments, at p. 11, Fn. 8. See also article XIII C, section 3.

7,732 written protests "exceeded the number of signatures needed to qualify an initiative that would overturn the rate increase."[188]

But written protests are not tantamount to an initiative petition, and an initiative petition is not a successful referendum. The District acknowledges that its own board "declined to adopt the proposed rate increases based on the expectation that any substantive rate increase would be overturned by way of referendum."[189] The Commission agrees with the Regional Board, in that "[t]he Claimant cannot rely on mere speculation as to what could happen as a defense to the fee increase exception" of section 17556(d).[190]

The District argues that the Commission's decision on *Discharge of Stormwater Runoff* (07-TC-09) reflects the tension between Proposition 218 and the precedent of *Connell*,[191] discussed above, because the Commission found in that earlier test claim decision that Proposition 218 limited the authority of the local government to raise the necessary fees. *Connell* did not address Proposition 218, because the water districts did not allege that their authority to raise fees was impacted by Proposition 218.[192] The water districts in *Connell* instead urged an interpretation of "authority" under section 17556(d) that would necessarily include economic feasibility as a test of "sufficiency," and the court rejected that interpretation. Moreover, the Commission's decision in *Discharge of Stormwater Runoff* concluded that Proposition 218 was a barrier to raising assessments or fees only because stormwater management charges were not "water" or "sewer" services provided directly to users, and thus exempt from the voter approval requirement of Proposition 218. The Commission concluded that without the exemption from voter approval under section 6(c), "it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate." [193]

Therefore the Commission's earlier decision, though it would not in any event be precedential, is distinguishable on the very same ground that renders *Connell* significantly poignant. The District cannot rely on the unwillingness of voters to raise fees, because the fees in question fall, based on the plain language of the Constitution, outside voter-approval requirement of article XIII D, section 6(c). The District would have the Commission recognize "political realities" as a test of the District's "authority" under Health and Safety Code section 5471 to raise fees, but here, as in *Connell*, "the plain language of the statute defeats the Districts' position." The District asserts that "political realities…[made] it *impossible*" for the District to raise fees, but

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[188] Exhibit D, Rebuttal Comments, at p. 11.

[189] Exhibit A, Test Claim, at p. 26.

[190] Exhibit B, LA Regional Board Comments, at p. 31.

[191] (1997) 59 Cal.App.4th 382.

[192] *Id*, at p. 402.

[193] *Discharge of Stormwater Runoff* (07-TC-09) at p. 106 [citing *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, at pp. 1358-1359 (concluding that city's charges on developed parcels to fund stormwater management were property-related fees, but not covered by the exemption for water and sewer fees, and thus required voter approval)].

ultimately "the District's board *declined to adopt the proposed rate increases*…"[194] In the same way that the court in *Connell* declined to find that an inability to market reclaimed water would undermine the "sufficiency" of the districts' authority to raise fees, the Commission here declines to make a finding that political opposition undermines the authority of a sanitation district to raise fees.

Furthermore, the ground upon which the District seeks to distinguish *Clovis Unified*, that the District does not have statutory authority to raise rates by "a sum certain," only serves to demonstrate why the Health Fee Elimination mandate was held to constitute a reimbursable new program offset by the authorized revenues, while this test claim Resolution does not impose costs mandated by the state under section 17556(d). The Health Fee Elimination mandate underlying *Clovis Unified* was approved for ongoing reimbursement in the test claim decision only *because* the fee authority of the community colleges was limited to a certain dollar amount, indexed to inflation, and that amount was held, as a matter of law, to be insufficient to cover the entire mandated cost of the program.[195] Had the community colleges held fee authority as broad as is provided to the District under Health and Safety Code section 5471, the result of the analysis under section 17556(d) in *Clovis Unified* would have been the same as discussed herein: where fee authority is sufficient to cover the costs of the mandated activities, there can be no reimbursable costs mandated by the state.

Based on the foregoing, the Commission finds that the District has not incurred increased costs mandated by the state, pursuant to section 17556(d).

V. Conclusion

Based on the foregoing discussion and analysis, the Commission denies this test claim and concludes that Resolution No. R4-2008-012, adopted December 11, 2008, by the Los Angeles Regional Water Quality Control Board does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

[194] Exhibit A, Test Claim, at p. 26 [emphasis added].

[195] See Education Code section 76355 (Stats. 2005, ch. 320); Test Claim Decision, Health Fee Elimination (CSM-4206).

Glossary of Frequently Used Water Quality Related Terms and Acronyms:

Alternative Water Resources Management program (AWRM)	An alternative to meeting the prior TMDL and WLA requirements of the former basin plan. The requirements for the AWRM were included in a MOU entered into by the stakeholders which was then included in the revised Upper Santa Clara River TMDL and SSOs by Resolution R4-2008-012.
California Antidegradation Policy	A 1968 State Board policy that precludes water quality degradation in the state unless specific conditions are satisfied.
Clean Water Act (CWA)	The primary federal law governing water pollution. The CWA was enacted in 1972, to restore and maintain the chemical, physical, and biological integrity of the nation's waters and includes a goal to eliminate the discharge of pollutants into the navigable waters by 1985.
Effluent	Wastewater - treated or untreated - that flows out of a treatment plant, sewer, or industrial outfall; generally refers to wastes discharged into surface waters.
Environmental Impact Report (EIR)	A detailed statement prepared in accordance with California Environmental Quality Act (CEQA) whenever it is established that a project may have a potentially significant effect on the environment. The EIR describes a proposed project, analyzes potentially significant environmental effects of the proposed project, identifies a reasonable range of alternatives, and discusses possible ways to mitigate or avoid the significant environmental effects. (Pub. Resources Code §§ 21061, 21100 and 21151; Cal. Code Regs., tit. 14, § 15362.)
Federal Antidegradation Policy	The CWA's antidegradation policy is found in section 303(d) (and further detailed in federal regulations). Its goals are to 1) ensure that no activity will lower water quality to support existing uses, and 2) to maintain and protect high quality waters.

Porter-Cologne Water Quality Control Act	California's Porter-Cologne Water Quality Control Act was enacted in 1969 to allocate and to protect the waters of California. Through it, the State Board and regional boards were established. Many of its provisions mirror those of the CWA which was modeled, in part, on Porter-Cologne.
Reclaimed Water	Treated effluent that is considered to be of appropriate quality for an intended reuse application.
Regional Water Quality Control Boards (RWQCBs or Regional Boards)	The nine RWQCBs develop and enforce water quality objectives and implementation plans to protect the State's waters, recognizing local differences in climate, topography, geology and hydrology.
Site Specific Objective (SSO)	Water Quality Objectives (WQOs) adjusted to reflect localized site specific conditions. Usually initiated by a discharger to allow discharge of pollutants at greater than background levels.
State Water Resources Control Board(SWRCB or State Board)	The state board charged with protecting the waters of California. The SWRCB has joint authority of water allocation and water quality protection. It also oversees and supports the work of the regional boards (RWQCBs).
Total Maximum Daily Load (TMDL)	A calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.
Waste Load Allocation (WLA)	The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution (e.g., permitted waste treatment facilities).
Water Quality Objectives (WQOs)	Define the level of water quality that shall be maintained in a water body or portion thereof.
Water Reclamation Plant (WRP)	A plant which treats sewage and produces reclaimed water.

STATE OF CALIFORNIA
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RE: **Adopted Statement of Decision**

Upper Santa Clara River Chloride Requirements, 10-TC-09
Los Angeles Regional Water Quality Control Board Resolution No. R4-2008-012, Effective December 11, 2008
Santa Clarita Valley Sanitation District of Los Angeles County, Claimant

On January 24, 2014, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Heather Halsey, Executive Director

Dated: January 31, 2014

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: January 2010 Compliance Report from the California Department of Education; November 2009 Decision by the Office of Administrative Hearings; Education Code Section 56041, as enacted by Statutes 1992, Chapter 1360 (AB 2773)[1] Filed on November 3, 2010 By Los Angeles Unified School District, Claimant.	Case No.: 10-TC-04 *Special Education Services for Adult Students in County Jail* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted March 28, 2014*) (*Served April 4, 2014*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on March 28, 2014. Mr. Barrett Green represented claimant, Los Angeles Unified School District. Ms. Kathleen Lynch and Ms. Lisa Mierczynski appeared on behalf of the Department of Finance (Finance).

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the proposed statement of decision to deny the test claim at the hearing by a vote of 7-0.

[1] Although only the January 2010 Compliance Report from the California Department of Education was listed in box 4 of the test claim form, the Commission also accepted jurisdiction over Education Code section 56041 and the November 16, 2009 decision by the Office of Administrative Hearings because Education Code section 56041 and the OAH Decision were clearly identified and alleged to contain a mandate in the written narrative of the test claim.

Summary of the Findings

This test claim addresses a compliance report issued by the California Department of Education (CDE) and a decision by the Office of Administrative Hearings (OAH) interpreting and applying Education Code section 56041. For those students ages 18 to 22 that are eligible for special education services pursuant to federal and state law, Education Code section 56041 provides a means for determining the district responsible for providing special education and related services beyond the pupil's 18th birthday. In December 2008, the Disability Rights Legal Center filed both a special education complaint with the CDE and a due process hearing complaint with the OAH on behalf of two students who were allegedly denied special education services that they were allegedly entitled to under federal and state law while incarcerated in Los Angeles County Jail. On November 19, 2009, the OAH interpreted and applied Education Code section 56041 and issued a decision (OAH Decision) finding that claimant was responsible for providing special education to students incarcerated in Los Angeles County Jail. In 2010, the CDE also interpreted and applied Education Code section 56041 and issued a decision (2010 CDE Compliance Report) finding that claimant was responsible for providing special education to students incarcerated in Los Angeles County Jail. Claimant requests reimbursement for complying with the OAH Decision, 2010 CDE Compliance Report, and Education Code section 56041. Claimant alleges that before the OAH Decision and 2010 CDE Compliance Report, it did not have to provide special education services to eligible students in county jail.

The Commission denies this test claim. The Commission finds that Education Code section 56041 is not new and that the 2010 Compliance Report and OAH Decision do not alter existing law. Rather the 2010 Compliance Report and the OAH Decision applied section 56041 and required claimant to comply with the law as it has existed since section 56041 was enacted in 1992. In addition, the Commission finds that Education Code section 56041, the 2010 CDE Compliance Report, and the OAH Decision do not result in any increased costs mandated by the state within the meaning of article XIII B, section 6. Accordingly, the Commission finds that Education Code section 56041, the 2010 CDE Compliance Report, and the OAH Decision do not impose a reimbursable state-mandated program on school districts.

COMMISSION FINDINGS

I. Chronology

11/03/2010	Claimant, Los Angeles Unified School District (LAUSD), filed the test claim with the Commission.
02/07/2011	Commission staff deemed the filing complete and issued a notice of complete test claim filing and schedule for comments.
11/27/2013	Commission staff issued the draft staff analysis and proposed statement of decision.

12/10/2013	Claimant requested an extension of time to file comments on the draft staff analysis and postponement of the hearing, which were granted for good cause.
01/17/2014	Claimant comments on the draft staff analysis and proposed statement of decision.

II. Background

This test claim seeks reimbursement for costs incurred to provide special education services to adult students, between the ages of 18 and 22, incarcerated in county jail. The costs incurred by the claimant are alleged to result from a compliance report issued by the California Department of Education (CDE) and a decision by the Office of Administrative Hearings (OAH). The report and decision both interpreted and applied Education Code section 56041 to find, as a matter of law, that LAUSD, rather than the county jail or another school district providing adult education services to incarcerated adults, was required to provide special education services to 18-22 year old students in county jail. To better understand this test claim, existing state and federal law on special education is summarized below.

A. Federal and State Special Education Requirements

Under federal law, the Individuals with Disabilities Education Act (IDEA) requires that a free and appropriate public education (FAPE) be provided to children with disabilities.[2] Pursuant to the IDEA and section 56026 of the California Education Code, children who are eligible for special education services are entitled to continue receiving those services until they turn 22 or receive a high school diploma.[3] IDEA requires that if a child between the ages 18 and 22 received special education services in the child's last educational placement prior to being incarcerated in an adult correctional facility, that child is entitled to services while incarcerated.[4]

Each state is responsible for ensuring compliance with the IDEA and is required to specify which state education agency (SEA) or local educational agency (LEA) is responsible for providing special education services to certain students, including students who are incarcerated.[5] States are generally responsible for ensuring IDEA's requirements are met.[6]

[2] Title 20 United States Codes section 1400 et seq.

[3] Title 20 United States Codes section 1412(a)(1)(A). As discussed further below, the Commission addressed reimbursement for activities required by Education Code section 56026 in a prior test claim, *Special Education,* CSM-3986, and the state and certain interested parties later entered into a settlement agreement to resolve all claims regarding the Special Education test claim, including claims for reimbursement incurred to provide special education as required by Education Code section 56026.

[4] Title 20 United States Codes section 1412(a)(1)(B)(ii); Title 34 Code of Federal Regulations section 300.102(a)(2)(ii).

[5] See Title 20 United States Codes section 1412(a).

Thus, although federal law imposes a mandate to provide special education services, the question of which agency is responsible for providing a student with a FAPE pursuant to this federal mandate is determined under state law.[7] Apart from a state's supervisory responsibilities, a state can be required to provide direct services to a child if the responsible LEA is unable or unwilling to provide those services.[8] States are also responsible for providing services when there is no state law or regulation that delegates the state's responsibility to another educational agency.[9] In most circumstances, however, a state will assign responsibility for providing special education services to an LEA, such as a school district. In California, the responsible LEA is usually the school district where the child would otherwise be assigned.[10] California's compulsory school attendance law requires that children between the ages of six and eighteen attend school in "the school district in which the residency of either the parent or legal guardian is located."[11] Section 48200 "embodies the general rule that parental residence dictates a pupil's proper school district."[12] There are exceptions to this rule,[13] mostly for students who do not reside with their parents, but generally students ages six to eighteen receive special education services from the school district in which their parents reside.

B. Education Code Section 56041

Education Code sections 56000 through 56865 *et. seq*. set forth state requirements for the provision of special education programs within California. Education Code sections 56000 through 56001 state the Legislature's intent to provide special education instruction and services to "individuals with exceptional needs."[14] An "individual with exceptional needs" is defined by Education Code section 56026 in order to determine which pupils are eligible for

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[6] *Id*.; Title 20 United States Codes section 1412(a)(11)(C) (responsibility for meeting requirements for incarcerated children may be assigned to any public agency in the state).

[7] See *Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525–27.

[8] Title 20 United States Codes section 1413(g).

[9] *Orange County Department of Education v. California Department of Education* (9th Cir. 2011) 668 F.3d 1052, 1052-53.

[10] *See Orange County Department of Education. v. A.S.* (C.D.Cal.2008) 567 F.Supp.2d 1165, 1167.

[11] Education Code section 48200.

[12] *Katz v. Los Gatos–Saratoga Joint Union High School District* (2004) 117 Cal.App.4th 47, 53.

[13] Education Code section 48204.

[14] Education Code section 56000, as last amended by Statutes 2007, chapter 454; Education Code section 56000.5, as last amended by Statutes 1994, chapter 1126; and Education Code section 56001, as last amended by Statutes 2005, chapter 653.

special education services.[15] Section 56026 also requires the provision of special education services for qualifying pupils with exceptional needs up to 22 years of age if the pupil has not yet completed the prescribed course of study, has not met proficiency standards, or has not graduated from high school with a regular high school diploma.[16] Education Code section 56026, as last amended in 2007, provides in full that:

> "Individuals with exceptional needs" means those persons who satisfy all the following:
>
> (a) Identified by an individualized education program team as a child with a disability, as that phrase is defined in Section 1401(3)(A) of Title 20 of the United States Code.
>
> (b) Their impairment, as described by subdivision (a), requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a free appropriate public education pursuant to Section 1401(9) of Title 20 of the United States Code.
>
> (c) Come within one of the following age categories:
>
> (1) Younger than three years of age and identified by the local educational agency as requiring intensive special education and services, as defined by the board.
>
> (2) Between the ages of three to five years, inclusive, and identified by the local educational agency pursuant to Section 56441.11.
>
> (3) Between the ages of five and 18 years, inclusive.
>
> (4) Between the ages of 19 and 21 years, inclusive; enrolled in or eligible for a program under this part or other special education program prior to his or her 19th birthday; and has not yet completed his or her prescribed course of study or who has not met proficiency standards or has not graduated from high school with a regular high school diploma.
>
> (A) Any person who becomes 22 years of age during the months of January to June, inclusive, while participating in a program under this part may continue his or her participation in the program for the remainder of the current fiscal year, including any extended school year program for individuals with exceptional needs established pursuant to Section 3043 of Title 5 of the California Code of Regulations and Section 300.106 of Title 34 of the Code of Federal Regulations.

[15] Education Code section 56026, as last amended by Statutes 2007, chapter 56.

[16] Education Code section 56026(c).

(B) Any person otherwise eligible to participate in a program under this part shall not be allowed to begin a new fiscal year in a program if he or she becomes 22 years of age in July, August, or September of that new fiscal year. However, if a person is in a year-round school program and is completing his or her individualized education program in a term that extends into the new fiscal year, then the person may complete that term.

(C) Any person who becomes 22 years of age during the months of October, November, or December while participating in a program under this act shall be terminated from the program on December 31 of the current fiscal year, unless the person would otherwise complete his or her individualized education program at the end of the current fiscal year.

(D) No local educational agency may develop an individualized education program that extends these eligibility dates, and in no event may a pupil be required or allowed to attend school under the provisions of this part beyond these eligibility dates solely on the basis that the individual has not met his or her goals or objectives.

(d) Meet eligibility criteria set forth in regulations adopted by the board, including, but not limited to, those adopted pursuant to Article 2.5 (commencing with Section 56333) of Chapter 4.

(e) Unless disabled within the meaning of subdivisions (a) to (d), inclusive, pupils whose educational needs are due primarily to limited English proficiency; a lack of instruction in reading or mathematics; temporary physical disabilities; social maladjustment; or environmental, cultural, or economic factors are not individuals with exceptional needs.

For those pupils ages 18 to 22 that are eligible for special education services pursuant to Education Code section 56026, Education Code section 56041 identifies the district responsible for providing special education and related services beyond the pupil's 18th birthday as the district of residence of the parent or conservator. Education Code section 56061, which was adopted in 1992, provides in full that:

> Except for those pupils meeting residency requirements for school attendance specified in subdivision (a) of Section 48204, and notwithstanding any other provision of law, if it is determined by the individualized education program team that special education services are required beyond the pupil's 18th birthday, the district of residence responsible for providing special education and related services to pupils between the ages of 18 to 22 years, inclusive, shall be assigned, as follows:
>
> (a) For nonconserved pupils, the last district of residence in effect prior to the pupil's attaining the age of majority shall become and remain as the

responsible local educational agency, as long as and until the parent or parents relocate to a new district of residence. At that time, the new district of residence shall become the responsible local educational agency.

(b) For conserved pupils, the district of residence of the conservator shall attach and remain the responsible local educational agency, as long as and until the conservator relocates or a new one is appointed. At that time, the new district of residence shall attach and become the responsible local educational agency.[17]

C. 2010 Department of Education Compliance Report and OAH Decision

i. Office of Administrative Hearing Decisions and Department of Education Compliance Reports Regarding Education Code Section 56041

The CDE has established a formal process for submitting and reviewing complaints regarding noncompliance with federal and state special education laws, such as failure to implement an individualized education program (IEP) for a student eligible for special education.[18] Once the CDE receives a special education complaint that meets certain procedural requirements, the CDE will conduct an investigation regarding the allegations, prepare an investigation report, and, where appropriate, suggest corrective action by the school district or other public agency providing special education services.[19] The CDE may apply sanctions if corrective actions are not taken by the responsible school district or other public agency providing special education services.[20]

In addition to the CDE's investigation process, parents, guardians, or surrogates of children with disabilities have the right to request an impartial due process hearing regarding the identification, assessment, and educational placement of their child or the provision of FAPE.[21]

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[17] Added by Statutes. 1992, chapter. 1360, section 8. Effective January 1, 1993. [Former section 56041, added by Statutes 1977, chapter 1247, operative July 1, 1978, relating to certification of private school, was repealed by Statutes 1980, chapter 797, effective September 28, 1980. Section 56041 was also derived from former section 56037, enacted by Statutes 1976, chapter 1010 (relating to creation of minimum education standards for "exceptional children") and Education Code section 6874.5, added by Statutes 1968, chapter 472 (relating to creation of minimum education standards for "exceptional children"), amended by Statutes 1969, chapter 1524, section 4.]

[18] Title 34 Code of Federal Regulations sections 300.151, 300.152, 300.153; Education Code sections 56043(p) and 56500.2; California Code of Regulations, Title 5, sections 4660-4670.

[19] *Ibid*.

[20] *Ibid*.

[21] Title 20 United States Code sections 1415(f)(1)(A), 1415[f][3][A]-[D]; Title 34 Code of Federal Regulations section 300.511; Education Code section 56501[b][4].

These due process hearings are provided by the Special Education Division of the OAH.[22] Due process complaints are filed when there is disagreement about what should be included in an IEP or where the IEP should be implemented. In contrast, CDE complaints are filed when a school district is alleged to have failed to abide by federal or state special education laws or comply with a previously established IEP.

In December 2008, the Disability Rights Legal Center filed both a special education complaint with the CDE and a due process hearing complaint with the OAH on behalf of Michael Garcia and another unidentified student alleging that Mr. Garcia and the other student were denied FAPE while incarcerated in Los Angeles County Jail.[23] Mr. Garcia's complaints alleged a systemic failure of various public agencies to identify and serve eligible adults while incarcerated in the Los Angeles County Jail. Mr. Garcia's OAH due process complaint named a variety of education and correctional agencies, but not the claimant. OAH dismissed the allegations regarding a systematic failure to provide special education services for lack of jurisdiction and dismissed various named agencies on the grounds that each dismissed agency was not responsible for providing FAPE for Mr. Garcia.[24]

Following the dismissal of Mr. Garcia's due process complaint, CDE continued its investigation and during this process the claimant asserted that LAUSD was not the LEA responsible for providing Mr. Garcia with special education services. Instead, claimant argued that the LEA responsible for providing special education services was either: (1) the Los Angeles County Jail pursuant to statutory law which requires counties to provide juvenile and adult education to inmates; or (2) the Hacienda La Puente Unified School District, which contracted with the Los Angeles Sheriff's Department to provide adult education services to inmates of county jails.[25] On June 10, 2009, CDE issued a compliance report (2009 CDE Compliance Report) which required that LAUSD provide special education services to Mr. Garcia, the other unidentified complainant, and other eligible students between the ages of 18 and 22 incarcerated in Los Angeles County Jail. The 2009 CDE Compliance Report specifically found the following:

> Eligibility: State and federal laws state that individuals with disabilities who are identified as needing special education instruction and related services continue to be eligible for those services from age 3 until they reach the age of 22 (*EC*

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[22] Department of General Services, Office of Administrative Hearings, Understanding Special Education Due Process Hearings Provided By The Office of Administrative Hearings (2009), p. VI.

[23] Exhibit A, test claim, dated November 3, 2010, section 7 (DOCUMENTATION), Exhibit 1, June 10, 2009 Compliance Report issued by the California Department of Education, p. 5, "Background Information."

[24] *Ibid*.

[25] *Id*. at p. 91-10, citing Government Code sections 26600 and 26605 and California Code of Regulations, Title 15, section 1061.

Section 56026)(c); 34 *CFR* Section 300.101(a).) There is a specific exception for individuals incarcerated in adult correctional facilities who were not identified for special education before the age of 18. However, the exception for CDEs does not apply in this case. There is no other exception that would make incarcerated adults ineligible for special education if they were identified before age 18. Therefore Students 1 and 2 in this case are still eligible to receive the services required by the IEPs.

Residence: As a general rule, the local education agency (LEA) of a student's parents' residence is required to provide the procedural safeguards and special education services necessary for FAPE as described in the student's IEP. *(EC* Section 48200) Education Code Section 56041 states that, if the IEP team determines that a student needs special education after turning 18, responsibility for providing special education and related services between the ages of 18 and 22 shall be assigned to the "last district of residence in effect prior to the pupil's attaining the age of majority." When a student turns 18, the last LEA of the parents' residence is required to notify the student and the parents that all of the parents' procedural rights have transferred to the student *(EC* Section 56041.5). Although the parents' rights regarding participation in the IEP process transfer to the student at age 18, it appears that an adult student's responsible LEA continues to be the district of the residence of the parents under section 56041. In the instant case, since the parents of Student 1 and 2 are residents of LAUSD, that district is responsible for providing FAPE.

No statute indicates how an LEA is supposed to locate and serve a student over 18 who has left public school. It seems reasonable to imply that such individuals have the duty to inform the appropriate LEA of their location and their continued desire to receive instruction and services after age 18. Once on notice, the responsible LEA has the duty to provide the required instruction and related services or to pay for the provision of services. (*EC* Section 56041(a)[26]

The 2009 CDE Compliance Report also imposed the following corrective actions upon claimant:

1. By December 30, 2009, the LAUSD will adopt written policies and procedures to ensure that inmates (aged 18-22) of the LACJ who are eligible to receive special education through LAUSD and who request special education services will be provided services while incarcerated in the LACJ. Acceptable evidence would include a copy of policies and procedures and evidence that such policies have been provided to appropriate LAUSD personnel.

[26] *Id*. at pp. 15-16, "Conclusion."

2. By August 30, 2009, the LAUSD will request an agreement with the LACJ indicating the circumstances under which special education services will be provided to eligible individuals while incarcerated in the LACJ. If such agreement is reached, a copy shall be provided to CDE. LAUSD and LACJ may contract with and LEA or SELPA to provide those services. Acceptable evidence will include written evidence of any agreed upon contract.
3. By April 30, 2009, LAUSD will revise their SELPA policies and procedures to include language that provides for the procedural guarantees and services for incarcerated detainees, 18 to 22, eligible for special education services detained in the LACJ. Acceptable evidence would include a copy of the section of the SELPA that reflects this revision.
4. By June 30, 2009, LAUSD will conduct an IEP team meeting for Student 2, perform any necessary assessments, and determine if student still qualifies for and is available to receive special education services, and determine, if any, compensatory services are owed to student since LAUSD acknowledged the existence of the student on February 20, 2009.
5. Beginning June 30, 2009, the CDE will monitor the required corrective actions in this compliance complaint for a period not to exceed on year. The period for monitoring will include quarterly reports beginning September 30, 2009, and subsequently each quarter following. Acceptable evidence would include a list of incarcerated inmates who are eligible to receive special education services and are receiving services on a monthly basis in the LACJ. The quarterly report will reflect the number of inmates begin served.[27]

On June 5, 2009, Mr. Garcia filed an amended due process complaint with the OAH naming only the claimant as a respondent. On July 15, 2009, the CDE set aside its June 2009 Compliance Report because the issues presented in Mr. Garcia's complaint to the CDE were also subject to an ongoing OAH due process hearing. On November 16, 2009, the OAH issued its decision (OAH Decision) regarding Mr. Garcia's complaint. The OAH Decision found that that Mr. Garcia was eligible to receive special education services.[28] After applying Education Code section 56041, OAH concluded that the claimant, LAUSD, was responsible for the student's education while he was incarcerated in Los Angeles County Jail because Mr. Garcia's mother resided within the claimant's jurisdictional boundaries at all time relevant

[27] *Id*. at pp. 18-19, "Required Corrective Actions."

[28] *Id*. at pp. 7-8.

to Mr. Garcia's complaint.[29] The OAH Decision ordered the claimant to begin providing special education services to Mr. Garcia within 60 days of the date of the OAH Decision.[30]

Following the issuance of the OAH Decision, on January 15, 2010, the CDE issued an amended compliance report (2010 CDE Compliance Report). The 2010 CDE Compliance Report included the same findings as the 2009 CDE Compliance Report, but extended the corrective action deadlines imposed upon claimant by six months. [31]

ii. Claimant Litigated the Interpretation of Education Code Section 56041

Claimant appealed the OAH decision and, on May 4, 2010, the U.S. District Court for the Central District of California issued an order affirming the OAH decision. The District Court found that the OAH decision correctly determined that Education Code section 56041 "applies to make LAUSD responsible for providing special education services to Garcia…" and that "Garcia's right to special education services did not end upon his eighteenth birthday…"[32] The claimant then appealed to the U.S. Court of Appeal for the Ninth Circuit. The Ninth Circuit found that section 56041 was controlling, but also found that no controlling California precedent had addressed whether section 56041 requires school districts to provide special education to eligible students incarnated in county jails. Thus, rather than decide this novel issue of California law itself, the Ninth Circuit requested that the California Supreme Court address this issue and decide the question of state law pending before the Ninth Circuit.[33] On March 28, 2012, the California Supreme Court granted the Ninth Circuit's request. This matter was argued and submitted to the California Supreme Court on October 10, 2013. On December 12, 2013, the California Supreme Court ruled that where eligible individuals between the ages of 18 and 22 are incarcerated in county jail, "the entity responsible for providing special education services to an eligible young adult pupil while he or she is incarcerated in county jail is properly determined by the terms of section 56041."[34]

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[29] *Id*. at pp. 8-12.

[30] *Id*. at p. 17.

[31] *Id*., Exhibit 3, January 15, 2010 Compliance Report issued by the California Department of Education, pp. 18-19, "Required Corrective Actions." Although claimant did not include all portions of the 2010 CDE Compliance Report in the test claim, it appears that the 2009 CDE Compliance Report and 2010 CDE Compliance Report are identical except for the corrective action deadlines.

[32] Exhibit A, test claim, dated November 3, 2010, section 7 (DOCUMENTATION), Exhibit 4, *Los Angeles Unified School District v. Garcia* (C.D. Cal. 2010, Case No. CV 09-9289-VBF(RCx).

[33] *Los Angeles Unified School District v. Garcia* (9th Cir. 2012) 669 F.3d 956, 963.

[34] *Los Angeles Unified School District v. Garcia* (2013) 58 Cal 4th 175, 188-189.

D. Prior Related Special Education Test Claims and Settlement Agreement

In the *Special Education* test claims (Board of Control SB90-3453, CSM-3986, and 3986A) the Commission considered the question of whether costs incurred to provide various special education services as required by the Education Code were reimbursable.[35] After years of litigation, the state and the parties to the *Special Education* test claims entered to a settlement agreement which resulted in legislation settling all disputes regarding the *Special Education* test claims, including claims seeking reimbursement for costs incurred for providing special education services pursuant to Education Code section 56026.

The state and the parties to the *Special Education* test claims entered into a settlement agreement to resolve all outstanding issues and any potential litigation regarding the *Special Education* test claims. Every LEA in the state, including claimant, agreed to be bound by the terms of the settlement agreement. Pursuant to the settlement agreement, on August 12, 2001, the Governor approved Senate Bill 982 (Stats 2001,Ch. 203) as urgency legislation resolving and providing funding to each district based on the total average daily attendance of students in the district.[36] Senate Bill 982 added Education Code section 56836.156 (f), which provides funding, in the amount of $100 million, to be used for special education services established pursuant to Sections 56000 to 56885, inclusive, and Sections 3000 to 4671, inclusive, of Title 5 of the California Code of Regulations, "as those sections read on or before July 1, 2000." The statute further clarifies in subdivision (f)(6) and (10) that the funding shall be applied to special education services established pursuant to Education Code section 56026 as that section read on July 1, 2000, that are provided to pupils ages 18 to 21. The statute states that the services "shall be deemed to be fully funded within the meaning of subdivision (e) of Section 17556 of the Government Code."

III. Position of the Parties

Claimant's Position

Claimant asserts that the 2010 CDE Compliance Report, OAH Decision, and Education Code section 56041 impose a reimbursable state-mandated program or higher level of service within an existing program. Claimant requests reimbursement for complying with the 2010 CDE Compliance Report and OAH Decision, which both found that Education Code section 56041 requires claimant to provide special education services for eligible students in county jail for students whose parents reside within claimant's district at the time the student reached the age of 18. Claimant alleges the 2010 CDE Compliance Report, OAH Decision, and Education Code section 56041:

[35] The original test claim filed in 1980, which was ultimately consolidated with several other test claims, alleged, among other things, that Education Code section 56026 imposed a new program or higher level of service within an existing program upon school districts by requiring the provision of special education services beyond age 21 under certain circumstances.

[36] Senate Bill 982, approved by Governor August 12, 2001 (2001-2002 Regular Session).

> …result in new activities and costs by virtue of LAUSD paying for special education services for adult inmates in county jail. The funding for such services will come from dedicated state and federal funds that currently support other programs and services. Some of the financing for these programs and services will be redirected toward special education services for adult inmates. Thus, the funding for special education services for adult inmates results in a reduction in other programs and services.[37]

Claimant alleges that the 2010 CDE Compliance Report, OAH Decision, and Education Code section 56041 have caused claimant to incur $33,750.17 in costs during the 2009-2010 fiscal year.[38] Claimant estimates that it will incur approximately $100,000 in costs during fiscal year 2010-2011 and in each year going forward.[39] Claimant estimates that the statewide cost for school districts to comply with the 2010 CDE Compliance Report, OAH Decision, and Education Code section 56041 will exceed $1,000,000 per year.[40]

In comments submitted in response to the draft staff analysis, claimant disagreed with the conclusion that the 2010 CDE Compliance Report, OAH Decision, and Education Code section 56041 do not impose any state-mandated activities upon school districts. Claimant's comments argue that federal law leaves it to the states to decide which state entity must provide special education services to inmates in county jails and that the legislature assigned this requirement to school districts by enacting Education Code section 56041.[41] Claimant further argues that the special education funding provided pursuant to section 56836.156 could not have been specifically intended to fund special education for inmates because claimant had never received a request by an inmate for special education services prior to February 2009 and, therefore, the Legislature could not have intended that section 56836.156 would fund special education for inmates. As such, claimant contends that the draft staff analysis incorrectly concludes that Government Code section 17556(e) is applicable in this matter

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[37] Exhibit A, test claim, dated November 3, 2010, section 5 (WRITTEN NARRATIVE), p. 2.

[38] *Id*. at section 6 (DECLARATION OF SHARON JARRETT), p. 3. Ms. Jarrett's declaration states that the total cost of the special education services for Mr. Garcia in the 2010-2011 fiscal year will be lower than in the 2009-2010 fiscal since Mr. Garcia was transferred out of jail and to a prison facility in September 2010.

[39] *Id*. Ms. Jarrett's declaration indicates that "it is difficult to specify the cost of special education services for other adult inmates in Fiscal Year 2011" because such costs is subject to unknown variables and estimates that special education services will be provided for more that 5 inmates per year going forward.

[40] *Id*. Claimant's statewide cost estimate is "based on the number of total students statewide in contrast to the number of LAUSD students." Claimant did not present any other evidence, such as surveys or declarations from other school districts, to support its statewide cost estimate.

[41] Exhibit C, Claimant comments on draft proposed statement of decision, pp. 2-4.

because there is no evidence that section 56836.156 was intended to fund the provision of special education services to inmates.[42]

State Agency Position

No state agency filed written comments on this test claim. At the hearing, the Department of Finance agreed with the proposed statement of decision.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever 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 programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 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."[43] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[44]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[45]
2. The mandated activity either:

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[42] *Id*. at pp. 4-6.

[43] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

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

[45] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

a. Carries out the governmental function of providing a service to the public; or

b. Imposes unique requirements on local agencies or school districts and CDEs not apply generally to all residents and entities in the state.[46]

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[47]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[48]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[49] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[50] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[51]

A. Education Code section 56041, the 2010 CDE Compliance Report, and the OAH Decision do not mandate a new program or higher level of service on school districts.

Claimant contends that the findings of the 2010 CDE Compliance Report and OAH decision, holding that Education Code section 56041 requires claimant to provide special education services for students' while incarcerated in Los Angeles County Jail, mandates a new program or higher level of service within an existing program. Claimant further argues that federal law leaves it to the states to decide which state entity must provide special education services to

[46] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.)

[47] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[48] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[49] *County of San Diego*, *supra*, 15 Cal.4th 68, 109.

[50] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[51] *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose*, *supra*].

inmates in county jails and that the legislature assigned this requirement to school districts by enacting Education Code section 56041.[52] The Commission disagrees.

Education Code section 56041 was originally enacted in 1992 and provides that the district responsible for providing special education services for students beyond the age of 18 is based on the residence of the parent or conservator. The statute currently states the following:

> Except for those pupils meeting residency requirements for school attendance specified in subdivision (a) of Section 48204, and notwithstanding any other provision of law, if it is determined by the individualized education program team that special education services are required beyond the pupil's 18th birthday, the district of residence responsible for providing special education and related services to pupils between the ages of 18 to 22 years, inclusive, shall be assigned, as follows:
>
> (a) For nonconserved pupils, the last district of residence in effect prior to the pupil's attaining the age of majority shall become and remain as the responsible local educational agency, as long as and until the parent or parents relocate to a new district of residence. At that time, the new district of residence shall become the responsible local educational agency.
>
> (b) For conserved pupils, the district of residence of the conservator shall attach and remain the responsible local educational agency, as long as and until the conservator relocates or a new one is appointed. At that time, the new district of residence shall attach and become the responsible local educational agency.

The plain language of section 56041 does not require school districts to perform any activities. Instead, section 56041 identifies which school district is responsible for providing special education and related services for students eligible to receive services after their 18th birthday.

In addition, the 2010 CDE Compliance Report and OAH decision do not impose any new mandated duties on claimant. These decisions interpret *existing* state and federal law and conclude that the claimant is required to provide special education services to incarcerated students in county jail since the district was the "last district of residence in effect prior to the pupil's attaining the age of majority."

The duty to provide special education services to students between the ages of 18 and 22 who are incarcerated in county jail was imposed by prior federal law[53] and Education Code section 56026, a state statute originally enacted in 1980 and last amended in 2007. The enactment of section 56041 in 1992 did nothing to change these requirements and simply provided a means to determine which entity must provide special education services to inmates between the ages of 18 and 22 who are incarcerated in county jail. No new mandated duties are required of the claimant.

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[52] Exhibit C, Claimant comments on draft proposed statement of decision, pp. 2-4.

[53] Title 20 United States Code section 1400 et seq.

Accordingly, the Commission finds that Education Code section 56041, the 2010 CDE Compliance Report, and the OAH decision do not mandate a new program or higher level of service.

B. Additional revenue specifically intended to fund the cost of special education services to students between the ages of 18 and 22 has been appropriated in an amount sufficient to cover the costs of any activities required by prior law and, thus, there are no costs mandated by the state.

The claimant, in this case, asserts that it incurred direct and indirect costs in the amount of $33,750.17 for providing special education services to Mr. Garcia from July 1, 2009 through June 30, 2010. The claimant further argues that it will incur future costs in excess of $100,000 per year, based on an estimate that it will provide services for five inmates per year. The claimant acknowledges there is existing funding, including funding from the special education settlement agreement, but argues that the funding was not intended to fund the provision of services to adult inmates in county jails.

The Commission disagrees and finds, as a matter of law, that school districts have been fully funded for the provision of special education services required to be provided to *any* student between the ages of 18 and 22.

Government Code section 17556(e) states that the Commission shall not find costs mandates by the state, as defined in Section 17514, if the Commission finds that "the statute, executive order, or an appropriation in a Budget Act or other bill … includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate."

As indicated in section II. Background of this analysis, Education Code section 56836.156(f) was enacted to fund the Special Education settlement agreement and expressly provides that the funds appropriated shall be "used for costs of *any state-mandated special education services established pursuant to Sections 56000 to 56885, inclusive, and Sections 3000 to 4671, inclusive, of Title 5 of the California Code of Regulations,* as those sections read on or before July 1, 2000." (Emphasis added.) In addition, Education Code section 56836.156 (f)(6) and (f)(10) state that the settlement funds shall be deemed to fully fund, within the meaning of Government Code section 17556(e), the services provided to the following students: "[m]aximum age limit established pursuant to paragraph (4) of subdivision (c), as this section read on July 1, 2000," and (2) [s]pecial education for pupils ages 3 to 5, inclusive, and 18 to 21, inclusive, established pursuant to Education Code section 56026, as this section read on July 1, 2000."

Although the settlement agreement does not specifically include students who are 22, Education Code section 56026 provides that certain eligible students who become 22 while participating in a special education program continue to be eligible to participate in special

education program for a set period of time.[54] As indicated above, the requirement to provide special education services to students between the ages of 18 and 22, and the identity of the responsible district have been contained in Education Code sections 56026 and 56041 since before July 1, 2000 and therefore is not new.

In addition, the funding pursuant to section 56836.156 is appropriated to each district based on the district's average daily attendance of pupils and, in this case, the claimant did not count county jail inmates as part of their ADA before the CDE Compliance Report and OAH decision were issued. However, the plain language of section 56836.156(f) provides funding in an amount sufficient to pay for *any* state-mandated special education services required by California law that became effective on or before July 1, 2000. Thus, as a matter of law, the Commission finds that Education Code section 56836.156(f) includes additional revenue that was specifically intended to fund the costs of any state mandated activity required by the Education Code in an amount sufficient to fund the cost of the state mandate and, thus, there are no increased costs mandated by the state.

Claimant, in comments on the draft proposed statement of decision, argues that the special education funding provided pursuant to section 56836.156 could not have been specifically intended to fund special education for inmates because claimant had never received a request by an inmate for special education services prior to February 2009. Therefore the Legislature could not have intended that section 56836.156 would fund special education for inmates. However, although claimant may not have received a request by an inmate for special education services prior to February 2009, the plain language of section 56836.156(f) provides funding in an amount sufficient to pay for "*…any state-mandated special education services established pursuant to Sections 56000 to 56885, inclusive, and Sections 3000 to 4671, inclusive, of Title 5 of the California Code of Regulations*, as those sections read on or before July 1, 2000." (Emphasis added.) Thus, regardless of whether section 56836.156(f) refers to special education services for "inmates" or any other specific group of eligible individuals, it is clear from the plain language of section 56836.156(f) that it was intended to fund special

[54] Education Code section 56026(c)(4)(A) states that "Any person who becomes 22 years of age during the months of January to June, inclusive, while participating in a program under this part may continue his or her participation in the program for the remainder of the current fiscal year…" Education Code section 56026(c)(4)(B) states that "Any person otherwise eligible to participate in a program under this part shall not be allowed to begin a new fiscal year in a program if he or she becomes 22 years of age in July, August, or September of that new fiscal year. However, if a person is in a year-round school program and is completing his or her individualized education program in a term that extends into the new fiscal year, then the person may complete that term." Education Code section 56026(c)(4)(C) states that: "Any person who becomes 22 years of age during the months of October, November, or December while participating in a program under this act shall be terminated from the program on December 31 of the current fiscal year, unless the person would otherwise complete his or her individualized education program at the end of the current fiscal year."

education services provide to all eligible individuals between the ages of 3 and 22, including eligible inmates.

As the courts have determined, "Section 6 was not intended to entitle local entities to reimbursement for all increased costs resulting from legislative enactments, but only those costs mandated by a new program or an increased level of service imposed upon them by the State."[55] In this case, these elements have not been met and reimbursement is not required.

V. Conclusion

Based on the foregoing, the Commission concludes that the Education Code section 56041, the 2010 CDE Compliance Report, and the OAH Decision do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission therefore denies this test claim.

[55] *City of San Jose v. State of California (1996)* 45 Cal.App.4th 1802, 1816; see also, *Lucia Mar Unified School District v. State of California* (1988) 44 Cal.3d 830, 835; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876.

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RE: **Adopted Statement of Decision**

Special Education Services for Adult Students in County Jail, 10-TC-04
January 2010 Compliance Report from the California Department of Education
Los Angeles Unified School District, Claimant

On March 28, 2014, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Heather Halsey, Executive Director

Dated: April 4, 2014

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Health and Safety Code section 34176 Statutes 2011, First Extraordinary Session, Chapter 5 (ABX1 26); Statutes 2012, Chapter 26 (AB 1484) Filed on June 28, 2013 By, Stanton Housing Authority, Claimant.	Case No.: 12-TC-03 *Housing Successor Agency* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted May 30, 2014*) (*Served June 3, 2014)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 30, 2014. Sigrid Asmundson appeared on behalf of the Stanton Housing Authority. Lee Scott, Michael Byrne, and Kathleen Lynch appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed statement of decision to deny the test claim at the hearing by a vote of 5-0, with two members abstaining.

Summary of the Findings

This test claim alleges reimbursable state-mandated activities arising from the dissolution of the former Stanton Redevelopment Agency and the transfer of that agency's assets and obligations to the Stanton Housing Authority (Authority), pursuant to Health and Safety Code section 34176. The Commission finds that housing authorities are not claimants eligible to seek reimbursement pursuant to article XIII B, section 6, because they are not subject to the taxing and spending limitations of article XIII A and B of the California Constitution.[1]

COMMISSION FINDINGS

[1] In its filings on the test claim, the Authority failed to establish that it is a claimant eligible to seek reimbursement pursuant to article XIII B, section 6 of the California Constitution. However, because it is not possible to determine conclusively whether the Authority is an eligible claimant without a full analysis of the issue of whether it is subject to the taxing and spending limitations of article XIII A and B, the Commission takes jurisdiction to decide that issue.

I. Chronology

06/28/2013	The Authority filed this test claim.[2]
07/08/2013	Commission staff issued notice that the test claim filing was incomplete.[3]
07/22/2013	The Authority filed a rebuttal to Commission staff's notice.[4]
07/31/2013	Commission staff issued a notice of complete test claim filing and schedule for comments, including a request for additional information regarding the Authority's status as an eligible claimant.[5]
08/30/2013	The State Controller's Office (Controller) notified the Commission that it had no comments on the test claim.[6]
08/30/2013	The Department of Finance (Finance) submitted comments on the test claim, and responded to Commission staff's request for additional information.[7]
01/31/2014	Commission staff issued the draft staff analysis and proposed statement of decision.[8]
02/18/2014	Finance submitted comments on the draft staff analysis.[9]
02/19/2014	The Authority requested an extension of time to file comments and postponement of the hearing, which was granted for good cause.
04/07/2014	The Authority submitted comments on the draft staff analysis.[10]
04/07/2014	The Sacramento Housing and Redevelopment Agency (SHRA) submitted comments on the draft staff analysis.[11]

II. Introduction

Background and History of Redevelopment

After World War II, beginning in 1945, the Legislature authorized local agencies to create redevelopment agencies (RDAs) "in order to remediate urban decay."[12] These agencies were

[2] Exhibit A, Stanton Housing Authority Test Claim.

[3] Exhibit B, Notice of Incomplete Filing and Request for Additional Information.

[4] Exhibit C, Claimant Response to Notice of Incomplete Filing.

[5] Exhibit D, Notice of Complete Test Claim Filing and Request for Additional Information.

[6] Exhibit E, Controller's Comments on Test Claim Filing.

[7] Exhibit F, Finance Comments on Test Claim Filing.

[8] Exhibit G, Draft Staff Analysis.

[9] Exhibit H, Finance Comments on Draft Staff Analysis.

[10] Exhibit I, Claimant Comments on Draft Staff Analysis.

[11] Exhibit J, SHRA Comments on Draft Staff Analysis.

intended "to help local governments revitalize blighted communities," but have "since become a principal instrument of economic development, mostly for cities, with nearly 400 redevelopment agencies…active in California."[13] A redevelopment agency usually was "governed by the sponsoring community's own legislative body," and was authorized to improve, rehabilitate, and redevelop blighted areas.[14] The first step in doing so was to "declare an area to be blighted and in need of urban renewal." In the early years of redevelopment "few communities established redevelopment areas and most project areas were small – typically 10 acres (about six square city blocks) to 100 acres (an area about one-fifth of a square mile)."[15]

Within a project area, redevelopment agencies had power to acquire and dispose of real property, including by eminent domain, to clear land and construct infrastructure, and make other improvements to public facilities. Redevelopment agencies did not, however, have the power to levy taxes; instead, such agencies relied largely on tax increment financing, a scheme authorized by article XVI, section 16 of the California Constitution, and outlined in Health and Safety Code section 33670 et seq.[16] In a tax increment scheme, "those public entities entitled to receive property tax revenue in a redevelopment project area…are allocated a portion based on the assessed value of the property prior to the effective date of the redevelopment plan." Then, all remaining revenue "in excess of that amount – the *tax increment* created by the increased value of project area property – goes to the redevelopment agency for repayment of debt incurred to finance the project." In other words, "property taxes for entities other than the redevelopment agency are frozen, while revenue from any increase in value is awarded to the redevelopment agency on the theory that the increase is the result of redevelopment."[17] Tax increment revenues were permitted to be used "only to address urban blight in the community that established the RDA."[18]

Tax increment financing, though "a powerful and flexible tool for community economic development…has sometimes been misused to subsidize a city's economic development through the diversion of property tax revenues from other taxing entities." Such misuse "became more common in the era of constricted local tax revenue that followed the passage of Proposition 13."[19] The passage of Chapter 1406, Statutes of 1972 (SB 90, Dills) "created a system of school 'revenue limits,' whereby the state guarantees each school district an overall level of funding from local property taxes and state resources combined." Thus, the state committed itself to

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[12] *California Redevelopment Association v. Matosantos*, (*CRA v. Matosantos*) (2011) 53. Cal.4th 231, at p. 245 [citing Stats. 1945, ch. 1326, p. 2478; Stats. 1951, ch. 710, p. 1922]. See also, LAO Report: Unwinding Redevelopment, at p. 5.

[13] *CRA v. Matosantos*, at p. 246 [internal citations omitted].

[14] *Ibid*.

[15] Exhibit K, LAO Report: Unwinding Redevelopment, at p. 5.

[16] California Constitution, article XVI, section 16 (Adopted Nov. 4, 1974; amended Nov. 8, 1988); Health and Safety Code section 33670 et seq.

[17] *CRA v. Matosantos, supra*, at pp. 246-247.

[18] Exhibit K, LAO Report: Unwinding Redevelopment, at p. 8.

[19] *CRA v. Matosantos, supra*, at p. 247.

providing additional funds when school districts' local property taxes were redirected for redevelopment, and the local community could capture more property tax revenue while ensuring its schools were supported. Then, Proposition 13 in 1978 "significantly constrained local authority over the property tax and most other local revenue sources," but did not affect local authority over redevelopment revenues.[20]

As a result of restricted revenue authority and state guarantees of school funding, "cities (joined by a small number of counties) no longer limited their project areas to small sections of communities, but often adopted projects spanning hundreds or thousands of acres and frequently including large tracts of vacant land." As an extreme example, "[a]t least two cities placed all privately owned land in the city under redevelopment."[21] By fiscal year 2009-2010, "RDAs were receiving over $5 billion in property taxes annually – a redirection of 12 percent of property tax revenues from general purpose local government use for redevelopment purposes." This increasing diversion of property taxes over time placed a greater burden on the state's general fund to backfill K-14 school districts to meet minimum funding requirements.[22] In response to the unforgiving "shell game among local agencies" caused by restricted local revenues, the Legislature has at times required redevelopment agencies to transfer some of their tax increment revenue for other local government needs, including schools.[23] Such transfers have been, in the past, temporary, but even these temporary shifts were made more difficult by limitations placed on the Legislature's power to shift funds among local agencies by Proposition 1A (2004) and Proposition 22(2010).[24]

Background and History of Housing Authorities

The national program of public housing originated with the United States Housing Act of 1937,[25] which established a federal mechanism for funding "the development, acquisition, or administration of low-rent-housing or slum-clearance projects" by local housing agencies.[26] One year after passage of the federal Act, the California Legislature enacted the Housing Authorities

[20] Exhibit K, LAO Report: Unwinding Redevelopment, at pp. 5-7.

[21] *Ibid*.

[22] Exhibit K, LAO Report: Unwinding Redevelopment, at p. 8.

[23] *CRA v. Matosantos*, *supra*, 53 Cal.4th, at p. 247. See also, *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266.

[24] *Id*, at p. 249.

[25] Former Title 42 United States Code section 1401 et seq., now Title 42 United States Code section 1437 et seq.

[26] Former Title 42 United States Code section 1409. See generally Note, The New Leased Housing Program: How Tenantable a Proposition? (1975) 26 Hastings L.J. 1145, 1148–1157.

Law[27] establishing procedures for the development of public housing in the state and creating local housing authorities to receive and administer the newly available federal funds.[28]

Housing authorities are authorized, under the Health and Safety Code, to file suit and be sued; to make and execute contracts; to acquire, lease and operate housing projects for persons of low income; to provide for construction, reconstruction, improvement, alteration, or repair of all or any part of a housing project; to provide leased housing to persons of low income; to provide financing for acquisition, construction, rehabilitation, refinancing, or development of dwelling accommodations for persons of low income; to issue revenue bonds; to make or undertake commitments to make construction loans and mortgage loans; to lease or rent any dwellings, houses, accommodations, lands, buildings, structures, or facilities embraced in any housing project; to own, hold and improve real or personal property; to purchase, lease, or acquire by gift, grant, bequest, or devise, any real or personal property; to acquire property by eminent domain; and to sell or dispose of any real or personal property.[29] In addition, a housing authority may issue bonds "for any of its corporate purposes"; it may sell or otherwise dispose of mortgage loans; pledge revenues and receipts; mortgage, pledge, assign, or grant security interests in any mortgage loans, notes, loans made to lending institutions, or other property in favor of the holder or holders of bonds; pledge all or any part of its gross or net rents, fees, or revenues; mortgage all or any part of its real or personal property then owned or thereafter acquired; covenant against pledging all or part of its rents or other revenues; and covenant as to the use or maintenance of its real or personal property.[30] A housing authority does not have the power to levy taxes.[31]

Winding Down and Dissolution of Redevelopment

On December 6, 2010, and again on January 20, 2011, outgoing Governor Schwarzenegger, followed by incoming Governor Brown, recognized and declared a state fiscal emergency.[32] On June 29, 2011, the Legislature enacted amendments to the Community Redevelopment Law (Health and Safety Code section 33000, et seq.), that were "intended to stabilize school funding by *reducing or eliminating the diversion of property tax revenues* from school districts to the state's community redevelopment agencies."[33] Section 1 of Statutes 2011-2012, First Extraordinary Session, chapter 5 (ABX1 26) states, in pertinent part:

> (j) It is the intent of the Legislature to do all of the following in this act:
>
> (1) Bar existing redevelopment agencies from incurring new obligations, prior to their dissolution.

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[27] Statutes 1938, Extra Session, chapter 4, p. 9.

[28] Health and Safety Code sections 34200–34402; see also *Davis v. City of Berkeley* (1988) 47 Cal.3d 512.

[29] Health and Safety Code sections 34311-34315.

[30] Health and Safety Code sections 34350; 34359; 34360; 34363.

[31] Health and Safety Code sections 34200-34380.

[32] *Id*, at p. 250; Legislative Counsel's Digest, paragraph 7 (Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26)).

[33] *CRA v. Matosantos, supra*, at p. 241 [emphasis added].

(2) Allocate property tax revenues to successor agencies for making payments on indebtedness incurred by the redevelopment agency prior to its dissolution and *allocate remaining balances in accordance with applicable constitutional and statutory provisions*.

(3) Beginning October 1, 2011, allocate these funds according to the existing property tax allocation within each county to make the funds available for cities, counties, special districts, and school and community college districts.

(4) Require successor agencies to *expeditiously wind down the affairs of the dissolved redevelopment agencies* and to provide the successor agencies with limited authority that extends only to the extent needed to implement a winddown of redevelopment agency affairs.[34]

Accordingly, Part 1.8 of the amended Community Redevelopment Law freezes the operations of redevelopment agencies, prohibiting RDAs from incurring new bonds or other indebtedness, and from entering into new plans or partnerships, effective June 29, 2011. Part 1.85 then provides for the dissolution of the RDAs and transfer of their operations and functions to successor entities, in order to implement the winding down of redevelopment activities and the return of the tax increment to the taxing agencies (cities, counties, and school districts) from which the funds had been diverted previously.

Sections 34162 through 34165 state that as of the effective date of ABX1 26 (June 29, 2011), RDAs shall *not have authority* to, and *shall not*, among other things: issue or sell bonds; refund, restructure, or refinance indebtedness; make loans or advances; enter into contracts with or make commitments to any entity; dispose of assets by sale, lease, gift, grant, exchange, transfer, assignment, or otherwise; acquire real property by any means for any purpose; prepare, approve, adopt, amend, or merge a redevelopment plan; create, designate, merge, expand, or otherwise change the boundaries of a project area; enter into new partnerships; impose new assessments; provide optional or discretionary bonuses to any officers or employees; or begin any condemnation proceeding or begin the process to acquire real property by eminent domain.[35] Section 34167 expressly provides that "[n]othing in this part shall be construed to interfere with a redevelopment agency's authority, pursuant to enforceable obligations as defined in this chapter, to (1) make payments due, (2) enforce existing covenants and obligations, or (3) perform its obligations."[36] RDAs are permitted to continue making payments and performing existing obligations relating to projects or properties existing prior to the amendments "[u]ntil successor agencies are authorized pursuant to Part 1.85,"[37] but "Part 1.8's purpose is to preserve

[34] Statutes 2011-2012, 1st Extraordinary Session, chapter 5 (ABX1 26), section 1 [emphasis added].

[35] Health and Safety Code sections 34162-34165 (as added or amended by Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26); Stats. 2012, ch. 26 (AB 1484)).

[36] Health and Safety Code section 34167 (Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26))].

[37] Health and Safety Code section 34169 (Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26)).

redevelopment agency assets and revenues for use by 'local governments to fund core governmental services' such as fire protection, police, and schools."[38]

The dissolution of redevelopment agencies and the winding down of their operations is governed by Part 1.85, commencing with section 34170, which provides that unless otherwise specified, "all provisions of this part shall become operative on February 1, 2012."[39] Section 34172 provides that "[a]ll redevelopment agencies and redevelopment agency components of community development agencies…in existence on the effective date of this part are hereby dissolved and shall no longer exist as a public body, corporate or politic."[40] Sections 34173 and 34176 provide for two new entities that are charged with assuming the assets and responsibilities, and winding down the affairs of the former RDA: a successor agency, and a successor *housing* agency.

Section 34173 provides that "all *authority, rights, powers, duties, and obligations previously vested*" with the former RDA "are hereby vested in the successor agencies." The default successor agency is the city, county, city and county, or one or more of the entities forming a joint powers authority that created the RDA.[41] A city, county, or city and county, or the entities forming the joint powers authority that authorized the creation of each redevelopment agency, *may elect not to serve* as a successor agency, pursuant to section 34173, and if no local agency elects to serve as a successor agency, a public body, referred to as a "'designated local authority' shall be immediately formed…and shall be vested with all the powers and duties of a successor agency as described in this part."[42]

Among other duties, a successor agency is required, pursuant to section 34177, to continue to make payments due for and perform obligations required by enforceable obligations; remit unencumbered balances of RDA funds to the county for distribution to the taxing entities; dispose of assets and properties as directed by the oversight board; enforce all rights of the former RDA for the benefit of the taxing entities; expeditiously wind down the affairs of the former RDA; continue to oversee development of properties until the contracted work has been completed or the obligations of the former RDA can be transferred to other parties; and prepare a Recognized Obligation Payment Schedule projecting the dates and amounts of scheduled payments for each enforceable obligation "for the remainder of the time period during which the redevelopment agency would have been authorized to obligate property tax increment had the redevelopment agency not been dissolved."[43] Enforceable obligations are defined in section 34167 to include bonds and debt service; loans borrowed by the former RDA; payments required

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[38] *CRA v. Matosantos, supra*, at p. 251 [citing Health and Safety Code section 34167 (Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26))].

[39] Health and Safety Code section 34170 (Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26)) [operative date amended per *CRA v. Matosantos, supra* (2011) 53 Cal.4th 231].

[40] Health and Safety Code section 34172 (Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26)).

[41] Health and Safety Code section 34171 (as added by Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26)). See also, Exhibit K, Senate Floor Analysis, ABX1 26, dated June 14, 2011, at p. 3.

[42] Health and Safety Code section 34173 (as amended, Stats. 2012, ch. 26 (AB 1484)).

[43] Health and Safety Code section 34177 (as amended, Stats. 2012, ch. 26 (AB 1484)).

by the federal government, and preexisting obligations to the state or payments required to RDA employees; judgments or settlements; and any legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy.[44]

Section 34176 provides for what the Legislative Analyst's Office calls a "successor *housing* agency."[45] Pursuant to section 34176, a city, county, or city and county "*may elect* to retain the *housing assets and functions previously performed* by the redevelopment agency," and in such case "all rights, powers, duties, obligations, *and housing assets*, as defined in [section 34176(e)], *excluding any amounts on deposit in the Low and Moderate Income Housing Fund* and *enforceable obligations retained by the successor agency*, shall be transferred to the city, county, or city and county."[46] However, section 34176 further provides that if the city or county "*does not elect* to retain the responsibility for performing housing functions previously performed by a redevelopment agency, all rights, powers, assets, duties, and *obligations associated with the housing activities* of the agency," as specified, shall be transferred to a local housing authority. If there is only one housing authority within the territorial jurisdiction of the former RDA, the transfer of responsibilities and assets is to that housing authority; if there is more than one, the city or county must select one; and if there is no local housing authority, the transfer is to the Department of Housing and Community Development.[47] Section 34176 further provides that the entity assuming the housing functions of the former RDA "shall submit to the Department of Finance by August 1, 2012, a list of all housing assets that contains an explanation of how the assets meet the criteria specified in subdivision (e)." "Housing assets" are defined in subdivision (e) to include any interest in real property; any funds encumbered by an enforceable obligation to build low or moderate income housing; any loans or grants receivable, any funds derived from rents or operation of housing properties; and repayments of loans or deferrals owed to the Low and Moderate Income Housing Fund.[48]

On January 10, 2012, the City Council of Stanton adopted Resolution 2012-03, which stated, in pertinent part, that the City Council "hereby affirmatively elects…to serve as the Successor Agency to the Stanton Redevelopment Agency," and that the City Council "hereby elects to have the City of Stanton and/or the Stanton Housing Authority assume all rights, powers, assets, liabilities, duties, and obligations associated with the housing activities of the Stanton Redevelopment Agency in accordance with Health and Safety Code Section 34176." The dissolution of the former RDAs and the transfer of assets and housing functions of former RDAs to the housing authorities is the subject of this test claim.

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[44] Health and Safety Code section 34167 (Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26)).

[45] Exhibit K, LAO Report: Unwinding Redevelopment, at p. 15.

[46] Health and Safety Code section 34176(a)(1) (added, Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26); amended, Stats. 2012, ch. 26 (AB 1484)).

[47] Health and Safety Code section 34176 (added, Stats. 2011-2012, 1st Ex. Sess., ch. 5 (ABX1 26); amended, Stats. 2012, ch. 26 (AB 1484)).

[48] *Ibid*.

III. Positions of the Parties[49]

A. Stanton Housing Authority Position

The Authority alleges that on January 10, 2012, "in accordance with Section 34176(b), the City of Stanton adopted Resolution No. 2012-03 requiring all 'rights, powers, assets, liabilities, duties and obligations' of the former Stanton Redevelopment Agency ('RDA') to be transferred to the Stanton Housing Authority." The Authority alleges that several properties were transferred and that the "obligations for completion of planned/ongoing projects and/or maintenance of these properties…far exceed any fee authority, or governmental funding, provided to the Authority." The Authority asserts that prior to the addition of Health and Safety Code section 34176, the Authority "did not have any responsibilities or obligations associated with former RDA properties," and that "[a]ll obligations of the Authority related to former RDA properties…are a new program or higher level of service imposed by ABX1 26 and AB 1484."

Specifically, the Authority alleges that the largest expense "consists of a low and moderate income housing project created by the former RDA and known as the 'Tina/Pacific project,'" and that the obligations and expenses associated with the Tina/Pacific Project total approximately $17 million.[50] The Authority alleges that the following activities and costs were transferred from the former Stanton RDA to the Authority:

a. Staff and consultant fees and costs associated with the completion of the Housing Asset Transfer Form ("HAT"), including costs related to the completion, submission and meet & confer with DOF, and implementation of the HAT.

b. $6,500,000 in replacement housing costs for 12 properties that were demolished by the former Stanton Redevelopment Agency.

c. $7,041,684 in replacement housing costs for the 13 properties to be demolished.

d. $519,600 for demolition [$390,000 for demolition of the 13 properties ($30,000 per property), +$129,600 for fencing ($21,600 per 6 month period).]

e. $1,629,000 in relocation expenses [$24,000 for relocation plan plus $1,605,000 in relocation costs] for the 13 properties previously purchased by the former Stanton Redevelopment Agency, in which the tenants have not yet been paid relocation costs.

f. $105,000 in consultant fees to assist with relocation of Tina/Pacific Project existing tenants.

g. Estimated $612,000 in staff time related to Tina/Pacific Project.

h. Estimated $596,400 in maintenance/utilities/miscellaneous expenses for all 25 Tina/Pacific Project properties.

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[49] The State Controller's Office submitted to the Commission a single page notice that it has no comment on this test claim. (Exhibit E, SCO Comments).

[50] Exhibit A, Test Claim, at pp. 4-5.

> Additionally, the HAT lists additional properties there were transferred from the former RDA to the Housing Authority, which will require costs associated with maintenance, utilities and staff time.[51]

The Authority alleges that these activities and costs are imposed by section 34176(b), which provides that if the city or county that created the RDA elects not to "retain the responsibility for performing housing functions previously performed by a redevelopment agency, all rights, powers, assets, duties, and obligations associated with the housing activities of the agency, *excluding enforceable obligations retained by the successor agency and any amounts in the Low and Moderate Income Housing Fund, shall be transferred*" to the local housing authority. The Authority submitted letters from Finance, which rejected enforceable obligations claimed by the city-as-successor-agency, as evidence that the obligations above are mandated on the Authority as housing successor, because the costs and activities are not "enforceable obligations retained by the successor agency."[52]

The Authority alleges that it receives approximately $48,000 per month in rent from the Tina/Pacific Project, and that no other state, federal, or nonlocal funds are available for this program.[53]

In response to Commission staff's initial notice of incomplete filing, the claimant responded that "[t]he Stanton Housing Authority is an independent public entity created by statute," and an eligible local government claimant pursuant to the definitions of "local agency" and "local government" found in Government Code section 17518 and article XIII B, section 8(d), respectively.[54]

The Authority continues, in its comments on the draft staff analysis, to stress its status as an eligible "local agency" under section 17518, and the inclusion of an "authority, or other political subdivision of or within the state" in the definition of "local government" in article XIII B, section 8(d).[55] In addition, the Authority maintains that "the Authority receives property taxes and is therefore subject to Article XIII A and XIII B," and that its revenue qualifies as "proceeds of taxes," and therefore reimbursement is required.[56] The Authority argues that the redevelopment dissolution statutes, and especially the most recent amendments to those statutes,[57] "converted" the tax increment revenues of the former Stanton Redevelopment Agency to "general property taxes, therefore falling outside the scope of Section 33678 and within the

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[51] Exhibit A, Test Claim, at p. 5.

[52] Exhibit A, Test Claim, at pp. 22-30.

[53] Exhibit A, Test Claim, at pp. 4-6.

[54] Exhibit C, Claimant Rebuttal Comments, at p. 1.

[55] Exhibit I, Claimant Comments on Draft Staff Analysis, at p. 2.

[56] *Id*, at pp. 2-3.

[57] Exhibit I, Claimant Comments on Draft Staff Analysis, at p. 3 [citing Health and Safety Code section 34171 (as amended, Stats. 2014, ch. 1 (AB 471)).

scope of article XIII B." [58] Finally, the Authority argues that section 34176(b) constitutes a new program or higher level of service "requiring state reimbursement."[59]

B. Sacramento Housing and Redevelopment Agency Position

SHRA asserts that pursuant to Health and Safety Code section 34176 it "was statutorily mandated to assume all rights, powers, assets, duties, and obligations associated with the housing activities of the former Redevelopment Agency of the City of Sacramento." (Emphasis added.) Similarly, SHRA asserts that pursuant to Health and Safety Code section 34176, it "was statutorily mandated to assume all rights, powers, assets, duties, and obligations associated with the housing activities of the former Redevelopment Agency of the *County* of Sacramento." (Emphasis added.)[60] The SHRA therefore concludes that it "qualifies as a claimant under the above referenced claim." The SHRA states that it "would like to state our concurrence with the comments submitted by the Stanton Housing Authority to the Commission on State Mandates on the above referenced claim."[61]

C. Department of Finance Position

Finance argues, in its comments on the test claim, that the claimant's eligibility to claim reimbursement has not been established, and that the resolution of the Stanton City Council "uses language making it unclear to whom the City of Stanton is assigning responsibility for housing functions formerly performed by the redevelopment agency." Finance argues, in addition, that the test claim should be denied regardless of "the claimant's nature." Finance argues that if the Stanton Housing Authority "is part of the City of Stanton, the claimant is not eligible for reimbursement of any possible costs mandated by the state because the City elected to retain the responsibility." Alternatively, Finance argues that "[i]f the Stanton Housing Authority is a joint powers authority, that too negates a reimbursable state mandate because joint powers authorities are not eligible for mandate reimbursement." And, Finance argues that "[i]f the claimant is some other form of local government generally eligible for mandate reimbursement, the costs of any alleged requirements are imposed on them by another local government, not the state," and "[s]uch a shift between local governments of any responsibilities and costs is not subject to mandate reimbursement." In addition, Finance argues that some of the activities alleged are optional, and some of the costs alleged are not tied to state-mandated activities, but represent a shift of costs from one local entity to another. Finally, Finance argues that "the claimant has at its disposal any revenue generated by the housing assets transferred to the claimant, the right and power to choose to dispose of those assets, and the right and power to

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[58] *Id*, at p. 4. Note that section 33678 specifies that tax increment revenues are not proceeds of taxes.

[59] *Id*, at pp. 4-5.

[60] Note that SHRA is the joint powers housing and redevelopment authority for the City and County of Sacramento and was established on April 20, 1982. It is unclear whether the City and County actually have their own independent housing authorities (aside from the SHRA JPA). Nonetheless, two separate comments were submitted together in the same electronic submission on SHRA letterhead purporting to be from the Housing Authority of the *City* of Sacramento and the Housing Authority of the *County* of Sacramento, respectively.

[61] Exhibit J, SHRA Comments on Draft Staff Analysis.

use any revenue generated from the sale of any assets to carry on the functions of the Housing Successor."[62]

Finance's comments on the draft staff analysis concur with the recommendation that the claim be denied because the claimant is not eligible to claim reimbursement under article XIII B, section 6 of the California Constitution.[63]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever 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 programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 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."[64] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[65]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[66]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[67]

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[62] Exhibit F, Department of Finance Comments on Test Claim, at pp. 1-2.

[63] Exhibit H, Finance Comments on Draft Staff Analysis.

[64] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

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

[66] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[67] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.)

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[68]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[69]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[70] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[71] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[72]

Article XIII B, section 6 requires reimbursement to local governments for increased costs mandated by the state. "Costs mandated by the state" is defined to mean "any increased costs which a local agency or school district is required to incur…as a result of any statute…or any executive order implementing any statute…which mandates a new program or higher level of service of an existing program."[73] "Local agency," in turn, is defined to include "any city, county, special district, authority, or other political subdivision of the state."[74] However, not every "local agency," as defined, is eligible to claim reimbursement pursuant to article XIII B, section 6. In addition to an entity fitting the description above, the entity must also be subject to the tax and spend limitations of articles XIII A and XIII B. As explained in the following analysis, an agency that does not collect or expend the proceeds of taxes, as defined in the Constitution and interpreted by the courts, is not eligible to claim reimbursement under article XIII B, section 6. Therefore, because housing authorities do not collect or expend the proceeds of taxes, such agencies are not eligible claimants before the Commission. Specifically, because the Stanton Housing Authority does not collect or expend the proceeds of taxes, it is not an eligible claimant within the meaning of article XIII B, section 6. Nothing in the redevelopment dissolution statutes, or in any other code section or constitutional provision, alters this analysis.

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[68] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[69] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[70] *County of San Diego*, *supra*, 15 Cal.4th 68, 109.

[71] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[72] *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose*, *supra*].

[73] Government Code section 17514 (Stats. 1984, ch. 1459).

[74] Government Code secton 17518 (Stats. 1984, ch. 1459).

A. Article XIII B, section 6 requires reimbursement only when the local government is subject to the tax and spend provisions of Articles XIII A and XIII B of the California Constitution.

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. "Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend taxes for public purposes."[75]

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value" and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…"[76] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by voters.[77]

Article XIII B was adopted by the voters less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[78] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[79]

Article XIII B established "an appropriations limit," or spending limit for each "local government" beginning in fiscal year 1980-1981.[80] Specifically, the appropriations limit provides as follows:

> The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.[81]

No "appropriations subject to limitation" may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.[82] Article XIII B does not limit the ability to expend government funds collected from *all sources*; the appropriations limit is based on "appropriations

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[75] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 (*County of Fresno*).

[76] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[77] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[78] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 (*County of Placer*).

[79] *Ibid.*

[80] California Constitution, article XIII B, section 8(h) (effective Nov. 7, 1979).

[81] California Constitution, article XIII B, section 1 (effective Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[82] California Constitution, article XIII B, section 2 (effective Nov. 7, 1979).

subject to limitation," which means, pursuant to article XIII B, section 8, "any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity."[83] Appropriations subject to limitation do not include "local agency loan funds or indebtedness funds,"[84] "investment (or authorizations to invest) funds…of an entity of local government in accounts at banks…or in liquid securities,"[85] "[a]ppropriations for debt service," "[a]ppropriations required to comply with mandates of the courts or the federal government," and "[a]ppropriations of any special district which existed on January 1, 1978 and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 [and one half] cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."[86]

Article XIII B, section 6 was added also as a part of Proposition 4, to provide reimbursement to local governments for any additional revenue-limited expenditures that might be required. The California Supreme Court, in *County of Fresno v. State of California*,[87] explained:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.[88]

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, in particular, have been identified by the courts as being exempt from the restrictions of article XIII B. As discussed above, redevelopment agencies relied primarily, prior to their dissolution, on a funding scheme described as tax increment financing. In a tax increment scheme, property values that normally provide the tax base for school districts, cities, and counties within a redevelopment project area

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[83] California Constitution, article XIII B, section 8 (effective Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[84] California Constitution, article XIII B, section 8(i) (effective Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[85] *Ibid*.

[86] California Constitution, article XIII B, section 9 (effective Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[87] *County of Fresno*, *supra*, (1991) 53 Cal.3d 482.

[88] *Id*, at p. 487. Emphasis in original.

are "frozen" at the time the redevelopment plan is adopted. Thereafter, the tax due on any increase in property values, theoretically attributable to the efforts of the redevelopment agency, is collected by the county and passed on to the agency to repay bonds issued for redevelopment activities. This financing scheme is laid out in Health and Safety Code section 33670 et seq., and section 33678 expressly provides that tax increment financing shall not be considered proceed of taxes for purposes of article XIII B. Specifically, section 33678 provides, in pertinent part:

> This section implements and fulfills the intent of this article and of Article XIII B and Section 16 of Article XVI of the California Constitution. The allocation and payment to an agency of the portion of taxes specified in subdivision (b) of Section 33670 for the purpose of paying principal of, or interest on, loans, advances, or indebtedness incurred for redevelopment activity, as defined in subdivision (b) of this section, shall not be deemed the receipt by an agency of proceeds of taxes levied by or on behalf of the agency within the meaning or for the purposes of Article XIII B of the California Constitution, nor shall such portion of taxes be deemed receipt of proceeds of taxes by, or an appropriation subject to limitation of, any other public body within the meaning or for purposes of Article XIII B of the California Constitution or any statutory provision enacted in implementation of Article XIII B. [89]

In *Bell Community Redevelopment Agency v. Woolsey*, the Second District Court of Appeal concluded that section 33678 is consistent with the Constitution, and that bonds issued by a redevelopment agency and repaid with tax increment revenues are not appropriations subject to limitation.[90] *Bell Community Redevelopment Agency* was not a mandate reimbursement case, but dealt more generally with the applicability of the appropriations limit. In that case, the agency had previously adopted a redevelopment plan for a given project area, and "concluded all necessary steps to issue [$3 million in] allocation bonds" to fund the project. Woolsey, the agency secretary, refused to publish notice inviting bids on the bonds to be issued, reasoning that section 33678 was unconstitutional, and that "the Agency and the City Council had acted beyond their powers because the debt service on the proposed bond issue constituted an appropriation in excess of that allowed by article XIII B." Woolsey concluded that "this proposed notice committed him to appropriate and expend 'proceeds of taxes' without regard to the appropriations limitations imposed by article XIII B."[91] The agency's petition to compel Woolsey to publish the notice was denied in the superior court. On appeal, the Second District concluded that a redevelopment agency's power to issue bonds, and to repay those bonds with its tax increment, was not subject to the spending limit of article XIII B. The court reasoned that to construe tax increment payments as appropriations subject to limitation "would be directly contrary to the mandate of section 7," which provides that "Nothing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with respect to existing or future bonded indebtedness."[92] In addition, the court found that other

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[89] Health and Safety Code section 33678 (Stats. 1980, ch. 1342, p. 4750; Stats. 1993, ch. 942 (AB 1290)).

[90] (Cal. Ct. App. 2d Dist. 1985) 169 Cal.App.3d 24.

[91] *Id*., at p. 29.

[92] *Id*., at p. 31 [quoting article XIII B, section 7].

provisions of the article XIII B weighed against treating tax increment revenues as appropriations subject to limitation:

> Upon a reading of the complete text of article XIIIB we find further support for this holding. Article XIIIB governs "appropriations subject to limitation;" a redevelopment agency has no appropriation limit. Section 2 provides that revenues in excess of the appropriations limit be returned to the taxpayers; article XVI, section 16 and case law require that tax increments be returned to the taxing entity upon elimination of the debt. Section 4 calls for a vote of the "electors" of an entity to change an appropriations limit; dependence on such periodic approval for repayment would effectively negate the viability of a bond issuance. Section 9(a) expressly excludes debt service from "appropriations subject to limitations"; tax increments are exactly that.[93]

In addition, the court found that article XVI, section 16, addressing the funding of redevelopment agencies, was inconsistent with the limitations of article XIII B:

> Article XVI, section 16, provides that tax increment revenues "may be irrevocably pledged" to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit, it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds.[94]

The court therefore concluded that redevelopment agencies could not reasonably be subject to article XIII B, and therefore upheld Health and Safety Code section 33678, and ordered that the writ issue to compel Woolsey to publish the notice.

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,[95] the court held that redevelopment agencies were not eligible to claim reimbursement, because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B.

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity." The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level,

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[93] *Id*., at p. 32 [citing *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, at p. 108].

[94] *Id*, at p. 31.

[95] (Cal. Ct. App. 4th Dist. 1997) 55 Cal.App.4th 976.

> is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...
>
> For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limit also support denying reimbursement under section 6 … [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues.[96]

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates*, affirmed the reasoning of the *San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[97]

Therefore, pursuant to *County of Fresno*, *supra*, *Redevelopment Agency of San Marcos*, *supra*, and *City of El Monte*, *supra*, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, does not enjoy the protection of article XIII B, *section 6,* and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

B. Housing Authorities do not have statutory authority to levy taxes, and their sources of revenue are not subject to the appropriations limit.

The Authority argues that it is an eligible claimant before the Commission, as follows:

> The Stanton Housing Authority is an independent public entity created by statute. (See Health & Saf. Code §§ 34203, 34240 [a housing authority is a public body, corporate and politic].) Pursuant to California Constitution, Article XIIIB, Section 8(d), "local government" for purposes of Article XIIIB of the California Constitution means "any city, county, city and county, school district, special district, authority, or other political subdivision of or within the state." (Emphasis added.) Government Code Section 17518 reiterates this definition by providing that a "local agency means any city, county, special district, authority, or other political subdivision of the state." (Emphasis added.) Under the definitions set forth in the California Constitution and Government Code Section 17518, the Authority is an eligible claimant.[98]

Finance has asserted in its comments on the test claim, citing *Redevelopment Agency of San Marcos*, that the Authority is not an eligible claimant because "joint powers authorities are not eligible for mandate reimbursement."[99] While local housing authorities may be created as a joint powers authority, as discussed below (SHRA was formed on April 20, 1982 under a joint powers

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[96] *Redevelopment Agency of San Marcos*, *supra*, 55 Cal.App.4th at p. 986-987 [internal citations omitted].

[97] (2000) 83 Cal.App.4th 266, 281-282 (*El Monte*).

[98] Exhibit C, Claimant Response to Notice of Incomplete Test Claim Filing.

[99] Exhibit F, Department of Finance Comments on Test Claim, at p. 2.

agreement[100]), it is not clear that the Stanton Housing Authority is a joint powers authority; its area of operation appears to be limited to the City of Stanton, and its governing body is made up of the members of the City Council of Stanton only, and not representatives from any other city or county.[101] Nevertheless, the reasoning of *Redevelopment Agency of San Marcos* still holds, because like a joint powers authority, the Authority has no authority to levy taxes. In addition, like a redevelopment agency, the Authority has the power to issue bonds or finance its activities by other means: a housing authority, pursuant to Health and Safety Code sections discussed herein, funds its operations through bonds or other long-term financing mechanisms; sources of revenue that are not subject to the spending limit of article XIII B.

Statutory authorization for the creation and powers of local housing authorities is found in Part 2 of Division 24 of the Health and Safety Code, commencing at section 34200, which provides that "[t]his chapter [sections 34200 to 34380, inclusive] may be cited as the Housing Authorities Law." Section 34240 of the Housing Authorities Law provides as follows:

> In each county and city there is a public body corporate and politic known as the housing authority of the county or city. The authority shall not transact any business or exercise its powers unless, by resolution, the governing body of the county or city declares that there is a need for an authority to function in it.[102]

Section 34240.1 provides that the governing body of any city or county may enter into an agreement with any other city or county whose governing body has declared by resolution the need for a housing authority, and may form an area housing authority empowered by section 34247 to operate within all cities or counties joining in the agreement; in such case two commissioners may be appointed by the governing body of each member city or county pursuant to section 34246.[103] Sections 34310 to 34334, inclusive, describe the powers and duties of local housing authorities, which include the power to sue and be sued, to make and execute contracts, and to make and amend by-laws and regulations consistent with the Health and Safety Code.[104] In addition, within its area of operation, a housing authority has the power to "acquire, lease, and operate housing projects for persons of low income," to "[p]rovide for the construction, reconstruction, improvement, alteration, or repair of all or any part of any housing project," and to "[p]rovide leased housing to persons of low income."[105] These activities overlap the powers and duties of redevelopment agencies to some extent: Section 33391 provides for a redevelopment agency's power to acquire property within a project area,[106] and section 33400 permits a redevelopment agency to "[r]ent, maintain, manage, operate, repair and clear such property."[107]

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[100] See http://www.shra.org/AboutUs.aspx (accessed April 28, 2014).

[101] See, e.g., Exhibit K, Stanton Housing Authority Meeting Minutes, January 14, 2014.

[102] Health and Safety Code section 34240 (Stats. 1951, ch. 710).

[103] Health and Safety Code section 34240.1; 34246; 34247 (Stats. 1951, ch. 710).

[104] Health and Safety Code section 343110 (Stats. 1951, ch. 710).

[105] Health and Safety Code section 34312 (As amended, Stats. 2006, ch. 890).

[106] Health and Safety Code section 33391 (As amended, Stats. 1988, ch. 1599).

[107] Health and Safety Code section 33400 (As amended, Stats. 1965, ch. 1665).

More importantly, both redevelopment agencies and housing authorities have the power to issue bonds to finance their activities. Section 33640 provides that a redevelopment agency may issue bonds "for any of its corporate purposes," which may be repaid from any, or a combination of, the following: the income and revenues of the redevelopment projects financed with those bonds; tax increment financing; "transient occupancy tax" revenues pursuant to a duly adopted ordinance; or any contributions or financial assistance from the state or federal government.[108] A housing authority, pursuant to section 34312.3, may "[i]ssue revenue bonds for the purpose of financing the acquisition, construction, rehabilitation, refinancing, or development of multifamily rental housing and for the provision of capital improvements in connection with and determined necessary to the multifamily rental housing." A housing authority is also authorized to make or purchase construction loans and mortgage loans "to finance the acquisition, construction, rehabilitation, refinancing, or development of multifamily rental housing."[109]

Therefore, while a housing authority is a local entity with a local sphere of influence and responsibility, the relevant code sections provide that its authority to raise revenues for its funding is restricted to the issuance of bonds or other non-tax financing mechanisms. These funding sources are not proceeds of taxes, and therefore are not subject to the appropriations limit. In *County of Placer v. Corin*, *supra*, the Court of Appeal discussed the applicability of article XIII B as being based on "appropriations subject to limitation," which consists of the authorization to expend during a fiscal year the "proceeds of taxes."[110] "As to local governments, limits are placed only on the authorization to expend the proceeds of taxes *levied by that entity* …"[111] In addition, "'proceeds of taxes' generally contemplates only those impositions which raise general tax revenues for the entity."[112] "Proceeds of taxes" do not include "the proceeds from the sale of bonds, notes, warrants or other obligations required for the purpose of financing or refinancing the acquisition, construction, or completion of public improvements or projects or any rents, charges, assessments, or levies, other than tax levies, made pursuant to law, the proceeds of which are required for the payment of principal and interest, or to otherwise secure such obligations, and to pay the costs and expenses associated therewith."[113] A housing authority's funding mechanisms consist of "bonds, notes, warrants or other obligations required for the purpose of financing or refinancing the acquisition, construction, or completion of public improvements or projects or any rents…the proceeds of which are required for the payment of principal and interest…"[114]

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[108] Health and Safety Code section 33641 (As amended, Stats. 1993, ch. 942). See also Revenue and Taxation Code section 7280.5 (Added, Stats. 1987, ch. 665).

[109] Health and Safety Code section 34312.3 (As amended, Stats. 2001, ch. 745).

[110] 113 Cal.App.3d at p. 447.

[111] *Ibid.* [emphasis added].

[112] *Id*., at p. 451.

[113] *Id*., at p. 453, fn. 8, quoting Government Code section 53715, which implemented article XIII B. See also, *County of Fresno*, *supra*, 53 Cal.3d 482, 487.

[114] *County of Placer v. Corin*, *supra*, 113 Cal.App.3d at p. 453, fn. 8, quoting Government Code section 53715, which implemented article XIII B.

Moreover, for the same reasons that a redevelopment agency's financing tools were held in *Bell Community Redevelopment Agency v. Woolsey*, *supra*, to fall outside the appropriations limit of article XIII B, a housing authority's power to issue bonds or engage in other types of financing to acquire, construct, rehabilitate, refinance, or develop multifamily rental housing for low-income persons is not limited by the restrictions in article XIII B. In particular, the court in *Bell Community Redevelopment Agency* noted that "Section 9(a) expressly excludes debt service from "appropriations subject to limitations," and that section 7 expressly provides that "[n]othing in this Article shall be construed to impair the ability of the State or of any local government to meet its obligations with respect to existing or future bonded indebtedness." In addition, the court explained that "[article XIII B, s]ection 4 calls for a vote of the 'electors' of an entity to change an appropriations limit; dependence on such periodic approval for repayment would effectively negate the viability of a bond issuance."[115] Likewise, "dependence on such period approval for repayment would effectively negate the viability" of any long-term mortgage solutions or other financing scheme that a housing authority is authorized to undertake. The court thus concluded: "If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit…[t]he untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds."[116]

Accordingly, housing authorities do not have statutory authority to levy taxes, and their sources of revenue are not subject to the appropriations limit. Thus, housing authorities are not subject to the tax and spend limitations of articles XIII A and B.

C. Nothing in the redevelopment dissolution statutes, or in any other statute or constitutional provision, alters the above analysis.

The Authority has alleged costs relating to the Tina-Pacific Project, which consists of some 25 properties acquired by the former Stanton RDA and intended for demolition and redevelopment. Pursuant to the enactment of the test claim statutes, the "obligations associated with the housing activities" of a former RDA are transferred to a successor housing agency, which is, pursuant to the statute, either the city or county that created the RDA, or, if no city or county elects to serve as the successor housing agency, the local housing authority. As the foregoing analysis explains, a housing authority is not eligible to claim reimbursement pursuant to article XIII B, section 6, because a housing authority does not collect or expend proceeds of taxes and its revenues are not subject to the spending limit. Nothing in the dissolution statutes alters the above analysis with respect to the activities of a housing authority. The activities and statutes pled in this test claim are not and will not be funded with "appropriations subject to limitation," but rather must be funded, if at all, by the revenues of the housing authority which consist of "bonds, notes, warrants or other obligations required for the purpose of financing or refinancing the acquisition,

[115] *Bell Community Redevelopment Agency*, *supra*, 169 Cal.App.3d, at pp. 31-32 [quoting California Constitution, article XIII B, sections 4, 7, 9, as added or amended by Proposition 4, November 6, 1979, Proposition 111, June 5, 1990].

[116] *Id.*, at p. 31.

construction, or completion of public improvements or projects or any rents…the proceeds of which are required for the payment of principal and interest…"[117]

However, the Authority argues, in its comments on the draft staff analysis, that it does receive property taxes "and is therefore subject to Article XIII A and XIII B."[118] The Authority's arguments have surface appeal, but are not supported by the law or facts.

The Authority first relies on article XIII B, section 8(b-c),[119] as follows:

> Article XIII B, Section 8(b) of the California Constitution defines "appropriations subject to limitation" of a local government to mean "any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity and the proceeds of state subventions to that entity (other than subventions made pursuant to Section 6) exclusive of refunds of taxes."
>
> The "proceeds of taxes" is thereinafter defined to "include, but not be restricted to, all tax revenues and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues. With respect to any local government, 'proceeds of taxes' shall include subventions received from the state ..." (Cal. Const. Art. XIII B, §8(c).)
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> The Staff Analysis provides that "because housing authorities do not collect or expend the proceeds of taxes, such agencies are not eligible claimants before the [CSM]. Specifically, because the Stanton Housing Authority does not collect or expend the proceeds of taxes, it is not an eligible claimant within the meaning of Article XIII B, Section 6." (Staff Analysis, p.17 .) We believe this is incorrect.[120]

The Authority asserts that Health and Safety Code section 34171(p) "allocates the proceeds of taxes to the Authority,"[121] implying that the allocation constitutes "proceeds of taxes levied *by or for* [the] entity."[122] The Authority further maintains that section 34171(p) "clearly recognizes that if a local housing authority assumed the housing functions of the former redevelopment agency, these activities should be paid for with property taxes, and require [*sic*] the Authority to expend the proceeds of taxes."[123] The Authority also cites the uncodified language of ABX1 26, which "provides that '[t]he Legislature finds and declares all of the following…(i) Upon [the redevelopment agency's] dissolution, any property taxes that would have been allocated to redevelopment agencies will no longer be deemed tax increment. Instead those taxes will be

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[117] *County of Placer v. Corin* (1980) 113 Cal.App.3d at p. 453, fn. 8, quoting Government Code section 53715, which implemented article XIII B.

[118] Exhibit I, Claimant Comments on Draft Staff Analysis, at pp. 2-5.

[119] Exhibit I, Claimant Comments on Draft Staff Analysis, at p. 3.

[120] *Ibid*.

[121] Exhibit I, Claimant Comments on Draft Staff Analysis, at p. 3.

[122] California Constitution, article XIII B, section 8(b) [emphasis added].

[123] Exhibit I, Claimant Comments on Draft Staff Analysis, at p. 3.

deemed property tax revenues…" The Authority concludes that "[t]he legislative intent is clear," and that "the Authority receives property taxes under Section 34171(p), not tax increments, to pay for its costs as a housing successor under Section 34176."[124]

However, in *Bell Community Redevelopment Agency*, *supra*, the court explained that to levy taxes "for an entity" has special meaning in the law, which still requires the entity itself to have taxing power:

> The phrase "to levy taxes by or for an entity" has a special meaning of long-standing. The concept of one entity levying taxes for another dates back to at least 1895 (Stats. 1895, p. 219) and the adoption of an act providing for the levy of taxes "by or for" municipal corporations. This act allowed general law and charter cities to continue to exercise their taxing power directly or, if they so desired, to have the county levy and collect their taxes for them. (*Griggs v. Hartzoke* (1910) 13 Cal.App. 429, 430-432; *County of Los Angeles v. Superior Court* (1941) 17 Cal.2d 707, 710-711.) The legal effect of this arrangement, as explained by case law, was that the taxing power exercised was that of the city, and it remained in the city. The county officers in levying taxes for the city became ex-officio officers of the city and exercised the city's taxing power. (*Madary v. City of Fresno* (1912) 20 Cal.App. 91, 93-94.) In levying taxes for the city the county was levying "municipal taxes" through the ordinary county machinery. (*Griggs*, *supra.*, at p. 432.)
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> Thus, the salient characteristics of one entity levying taxes "for" another entity are: (1) the entity for whom the taxes are levied has the taxing power; (2) the levying officers of the county exercise the taxing power of the entity for whom they are levying; (3) they exercise such power as ex-officio officers of that entity, and (4) the taxes collected are those of the "levied for" entity. It is obvious that none of these characteristics has any applicability to the redevelopment process as set forth in article XVI, section 16.[125]

Therefore, even if the revenues that the Authority alleges are considered "proceeds of taxes," whether by virtue of being deemed property taxes, or being "converted" by way of fees or charges in excess of the reasonable costs of providing services, those revenues are not collected "by or for" the Authority, because the Authority has no statutory authority to collect or expend property taxes, as discussed above.

Moreover, nothing in the redevelopment dissolution statutes, either as added or as subsequently amended, establishes that the Authority receives *proceeds of taxes* which are subject to the taxing and spending limitations of articles XIII A and XIII B. The Authority implies that the use of the words "property tax" in the redevelopment dissolution statutes renders the Authority subject to the tax and spend limitations of articles XIII A and XIII B, and therefore an eligible claimant under article XIII B, section 6. But each example that the Authority cites is expressly limited to certain purposes, and not "general revenues for the local entity."[126] Section 34171(p),

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[124] Exhibit I, Claimant Comments on Draft Staff Analysis, at p. 4.

[125] 169 Cal.App.3d at p. 32.

[126] *Placer v. Corin*, *supra*, 113 Cal.App.3d at p. 451.

on which the Authority relies, describes a limited amount of "property taxes" otherwise allocated to the Redevelopment Obligation Retirement Fund, which are now required to be allocated to the housing successor entity for "administrative costs."[127] "Administrative costs" are not specifically defined in section 34171(p), but with respect to the "[a]dministrative cost allowance" provided to a successor agency (as opposed to a successor housing agency), section 34171(b) provides that "[a]dministrative cost allowances *shall exclude* any litigation expenses related to assets or obligations, settlements and judgments, and the costs of maintaining assets prior to disposition…" and "[e]mployee costs associated with work on specific project implementation activities, including, but not limited to, construction inspection, project management, or actual construction, shall be considered project-specific costs and *shall not constitute administrative costs*."[128] Therefore the "property taxes" allocated by section 34171(p) are limited in scope and purpose.

In addition, subdivision (p) was added by Statutes 2014, chapter 1 (AB 471), effective February 18, 2014, and is therefore not inherently instructive as to legislative intent with respect to the dissolution of redevelopment agencies enacted nearly three years prior.[129] Indeed the Legislative Counsel's Digest preceding Statutes 2014, chapter 1 (AB 471) describes the existing law requiring counties to allocate funds in the Redevelopment Property Tax Trust Fund for passthrough payment obligations, enforceable obligations of a former RDA, and administrative costs, and states that "[t]his bill would require that, under specified conditions, on July 1, 2014, and twice yearly thereafter until July 1, 2018, funds be allocated to cover the housing entity administrative cost allowance of a local housing authority that has assumed the housing duties of the former [RDA]..."[130] Therefore the amendment to section 34171 is envisioned as a change to existing law, and should not be interpreted as clarifying or relied upon as evidence of the intent of the Legislature with respect to the earlier dissolution statutes.

Furthermore, the "property tax" revenues that are allocated to the Redevelopment Obligation Retirement Fund, from which a housing entity administrative cost allowance is drawn, are similarly circumscribed in their permissible uses: the purpose of these funds is to retire the obligations of the former RDA, after which the revenues will be reallocated to the counties, cites, and school districts from which the tax increment had been diverted. In other words, even though these revenues are termed "property taxes," the moneys in the Redevelopment Obligation Retirement Fund are not "general revenues for the local entity."[131] Health and Safety Code section 34182 provides, in pertinent part:

> (c)(1) The county auditor-controller shall determine the amount *of property taxes that would have been allocated to each redevelopment agency* in the county had the redevelopment agency not been dissolved pursuant to the operation of the act adding this part. These amounts are *deemed property tax revenues within the*

[127] Health and Safety Code section 34171(p) (as amended Stats. 2014, ch. 1 (AB 471)).

[128] Health and Safety Code section 34171(b) (as amended Stats. 2012, ch. 3 (AB 1413)).

[129] See *Union League Club v. Johnson* (1941) 18 Cal.2d 275 [presumption that when there is a new enactment, the Legislature intended to change the existing law].

[130] Statutes 2014, chapter 1 (AB 471).

[131] *Placer v. Corin, supra*, 113 Cal.App 3d 443, at p. 451.

meaning of subdivision (a) of Section 1 of Article XIII A of the California Constitution and are available for allocation and distribution in accordance with the provisions of the act adding this part. The county auditor-controller shall calculate the property tax revenues using current assessed values on the last equalized roll on August 20, pursuant to Section 2052 of the Revenue and Taxation Code, and pursuant to statutory formulas or contractual agreements with other taxing entities, as of the effective date of this section, and shall deposit that amount in the Redevelopment Property Tax Trust Fund.

(2) Each county auditor-controller shall administer the Redevelopment Property Tax Trust Fund *for the benefit of the holders of former redevelopment agency enforceable obligations and the taxing entities that receive passthrough payments and distributions of property taxes pursuant to this part*.

(3) In connection with the allocation and distribution by the county auditor-controller of property tax revenues deposited in the Redevelopment Property Tax Trust Fund, in compliance with this part, the county auditor-controller shall prepare estimates of amounts of property tax to be allocated and distributed and the amounts of passthrough payments to be made in the upcoming six-month period, and provide those estimates to both the entities receiving the distributions and the Department of Finance, no later than October 1 and April 1 of each year.

(4) Each county auditor-controller shall *disburse proceeds of asset sales or reserve balances*, which have been received from the successor entities pursuant to Sections 34177 and 34187, *to the taxing entities*. In making such a distribution, the county auditor-controller shall utilize the same methodology for allocation and distribution of property tax revenues provided in Section 34188.[132]

And, Health and Safety Code section 34172 provides for a former RDA's tax increment to be allocated for payments of principal and interest on indebtedness, with the remainder to be returned to the taxing entities, as follows:

> Revenues equivalent to those that would have been allocated pursuant to subdivision (b) of Section 16 of Article XVI of the California Constitution shall be allocated to the Redevelopment Property Tax Trust Fund of each successor agency for making payments on the principal of and interest on loans, and moneys advanced to or indebtedness incurred by the dissolved redevelopment agencies. Amounts in excess of those necessary to pay obligations of the former redevelopment agency *shall be deemed to be property tax revenues within the meaning of subdivision (a) of Section 1 of Article XIII A* of the California Constitution.[133]

The California Supreme Court, in *CRA v. Matosantos*, *supra*, interprets the requirements of the dissolution statutes similarly:

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[132] Health and Safety Code section 34182 (as amended Stats. 2012, ch. 26 (AB 1484)).

[133] Health and Safety Code section 34172 (as added, Stats. 2010-2011, 1st Ex. Sess., ch. 5 (ABX1 26)) [emphasis added].

> Finally, tax increment revenues that would have gone to redevelopment agencies must be deposited in a local trust fund each county is required to create and administer. All amounts necessary to satisfy administrative costs, pass-through payments, and enforceable obligations will be allocated for those purposes, while *any excess will be deemed property tax revenue* and distributed in the same fashion as balances and assets.[134]

Therefore, although the Health and Safety Code employs the phrase "deemed property tax revenues," it is clear that all revenues of the former RDA are intended to be allocated to specific purposes, and in a specified order of priority, with remainder to be distributed as property taxes to the cities, counties, and school districts encompassing the former RDA, and not provided as "general revenues for the [housing] entity"[135] or other successor agency.

Accordingly, the uncodified portion of ABX1 26 upon which the Authority relies, when read in its full context, clearly provides that the tax increment that is "…deemed property tax revenues" upon dissolution of an RDA "will be *allocated first to successor agencies to make payments on the indebtedness incurred by the dissolved redevelopment agencies*, with remaining balances allocated in accordance with applicable constitutional and statutory provisions."[136] Section 34182 gives effect to this uncodified text, as noted above. The Authority's quotation of this language, repeated above, ends with "deemed property tax revenues," and therefore fails to acknowledge that the Legislature's intent was to provide an order of priority for the use of those funds for the sole purpose of winding-down the former RDAs, and not to provide "general revenues for the local entity."[137]

The Authority further argues the rent that it charges to "its users (tenants of affordable housing projects)" constitutes a user fee or charge, and "[b]ecause the only viable option for raising revenue to pay Section 34176 expenses is to increase user charges and fees, thereby exceeding the Authority's cost of providing the service (i.e., housing), this source of revenue also falls within the definition of 'proceeds of taxes.'"[138] This theory of eligibility relies on a particular interpretation of article XIII B, section 8(c), which states that proceeds of taxes include "the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds *exceed* the costs reasonably borne by that entity in providing the regulation, product, or service…"[139] However, this ignores the plain language of article XIII C, section 1(e)(4) of the California Constitution which provides:

> (e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following: …

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[134] 53 Cal.4th at p. 251 [emphasis added] [citing Health and Safety Code sections 34170.5; 35182; 34172; 34183].

[135] *Placer v. Corin*, *supra*, 113 Cal.App.3d at p. 451.

[136] Statutes 2011-2012, 1st Extraordinary Session, chapter 5 (ABX1 26), section 1(i)

[137] See *Placer v. Corin*, *supra*, 113 Cal.App.3d at p. 451.

[138] Exhibit I, Claimant Comments on Draft Staff Analysis, at p. 4.

[139] California Constitution, article XIII B, section 8(c) (as amended by Proposition 111, June 5, 1990).

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

Additionally, there is reason to question the extent of the Authority's power to increase rents. Rent charges imposed by a housing authority, at least for that percentage of rental units that are reserved for low and moderate income tenants, are limited by the Housing Authorities Law.[140] Moreover, the entire purpose of allowing housing authorities, and formerly redevelopment agencies, to acquire property, or to finance or refinance the acquisition of property, is so that it can be rehabilitated and safe and sanitary dwelling accommodations can be made available "at rents which persons of low income can afford…"[141] The Legislature's intent in authorizing housing authorities and redevelopment agencies was to promote safe and affordable housing;[142] not to guarantee a stream of revenue for the agencies themselves (or for the counties or cities encompassing them).

Furthermore, Proposition 218 expressly forbids raising fees or charges beyond that necessary to provide the service in question. The Authority alleges, as noted above, that if it is compelled to raise rents (which it characterizes as a user charge or fee), those increased proceeds will exceed the costs reasonably borne to provide the service, and thus constitute proceeds of taxes under section 8. However, article XIII D, section 6 states that a fee or charge "*shall not be extended, imposed, or increased by any agency*…" if the revenues derived from the fee or charge exceed the funds required to provide the property related service.[143] In addition, article XIII C requires that "[N]o local government may impose, extend, or increase *any general tax* unless and until that tax is submitted to the electorate and approved by a majority vote."[144] For these purposes, article XIII C defines a tax broadly to include "any levy, charge, or exaction of any kind imposed by local government, except…" a charge imposed for a specific benefit or specific government service "which does not exceed the reasonable costs to the local government" of providing the service or conferring the benefit; or "[a]ssessments and property-related fees imposed in accordance with the provisions of Article XIII D."[145] Therefore, if user fees or charges were increased to the point that they "exceed the costs reasonably borne by that entity in providing the regulation, produce or service," thereby falling within the definition of "proceeds of taxes" pursuant to article XIII B, section 8, such increases would be prohibited by articles XIII C and XIII D. In other words, user fees and charges cannot be raised, pursuant to Proposition 218, in a manner that would constitute proceeds of taxes, because any increase in taxes would require voter approval.

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[140] Health and Safety Code sections 34312; 34312.3 (as amended by, Stats. 2001, ch. 745; Stats. 2006, ch. 890).

[141] See Health and Safety Code section 34201 (Stats. 1951, ch. 710).

[142] *Ibid*.

[143] California Constitution, article XIII D, section 6 (added by Proposition 218, November 5, 1996).

[144] California Constitution, article XIII C, section 2 (added by Proposition 218, November 5, 1996).

[145] California Constitution, article XIII C, section 1 (added by Proposition 218, November 5, 1996).

Based on the foregoing, the Commission finds that nothing in the dissolution statutes, or any other statutory or constitutional provision, renders the revenues of the former redevelopment agency "proceeds of taxes," for purposes of article XIII B. Therefore, the Authority is not subject to the taxing and spending limitations of articles XIII A and XIII B, and is not eligible for reimbursement.

V. Conclusion

Based on the foregoing discussion and analysis, the Commission denies this test claim, finding that the claimant is not eligible to claim reimbursement under article XIII B, section 6.

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
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SACRAMENTO, CA 95814
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RE: **Adopted Statement of Decision**

Housing Successor Agency, 12-TC-03
Health and Safety Code Sections 34176
Statutes 2011-12, First Extraordinary Session, Chapter 5 (ABX1 26);
Statutes 2012, Chapter 26, (AB 1484)
Stanton Housing Authority, Claimant

On May 30, 2014, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: June 3, 2014

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Statutes 2009, Chapter 2 (SCA 4), adopted June 8, 2010 (Proposition 14); Elections Code Sections 13, 300.5, 325, 332.5, 334, 337, 359.5, 9083.5, 13102, 13105, 13110, 13206, 13230, 13302, 14105.1, as added or amended by Statutes 2009, Chapter 1 (SB 6); Elections Code Sections 8002.5, 8040, 8062, 9083.5, 13105, 13206, 13206.5, 13302, as added or amended by Statute 2012, Chapter 3 (AB 1413); Secretary of State County Clerk/Registrar of Voters Memoranda Nos. 11005, effective 1/26/11; 11125, effective 11/23/11; 11126, effective 11/23/11; 12059, effective 2/10/12. Filed on June 11, 2013 By County of Sacramento, Claimant.	Case No.: 12-TC-02 *Top Two Candidates Open Primary Act* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 26, 2014*) (*Served October 1, 2014*)

DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 26, 2014. Alice Jarboe appeared on behalf of the claimant, the County of Sacramento; Donna Ferebee and Lee Scott appeared on behalf of the Department of Finance; and Geoffrey Neill appeared for the California State Association of Counties.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed decision to deny the test claim at the hearing by a vote of six to zero, with one member absent.

Summary of the Findings

This test claim alleges reimbursable state-mandated activities arising from amendments to the California Constitution and the Elections Code and the executive orders issued to implement those amendments to provide for a "top-two" primary election system for all statewide and congressional offices. The Commission finds in each case that either the test claim statutes pled

do not impose any new mandated activities; or that the duties imposed by the test claim statutes do not result in costs mandated by the state because they either are expressly included in or necessary to implement the voter-approved ballot measure, Proposition 14 (June 8, 2010, Statewide Primary Election), or are incidental to the ballot measure mandate and produce at most de minimis added costs, pursuant to Government Code section 17556(f). Thus, the test claim statutes and alleged executive orders do not result in a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

I. Chronology

06/11/2013	The County of Sacramento (claimant) filed this test claim.[1]
07/03/2013	Commission staff issued a Notice of Complete Test Claim Filing and Schedule for Comments.
08/02/2013	The Department of Finance (Finance) requested an extension of time to file comments, which was approved for good cause.
08/30/2013	Finance submitted comments on the test claim.[2]
09/26/2013	Claimant requested an extension of time to file rebuttal comments, which was approved for good cause.
10/28/2013	Claimant submitted rebuttal comments,[3] along with a proposed amendment to the test claim filing.[4]
11/04/2013	Commission staff informed claimant that the proposed amendment was not timely, and therefore must be rejected.[5]
01/21/2014	Claimant submitted a challenge to the executive director's rejection of the proposed test claim amendment.[6]
05/19/2014	Commission staff issued a draft proposed statement of decision on the test claim.[7]

[1] Exhibit A, Test Claim.

[2] Exhibit B, Finance Comments on Test Claim, filed August 30, 2013.

[3] Exhibit C, Claimant Rebuttal Comments, filed October 28, 2013.

[4] Exhibit F, Proposed Test Claim Amendment Filing, filed October 28, 2013.

[5] Exhibit F, Notice of Rejected Proposed Test Claim Amendment, issued November 4, 2013.

[6] Exhibit F, Claimant's Challenge to Rejection of Test Claim Amendment, filed January 21, 2014. This "challenge" to the executive director's decision was not timely, in accordance with Code of Regulations section 1181 (now renumbered at section 1181.1, Register 2014, No. 21), which requires a written appeal submitted "within ten (10) days of first being served written notice of the executive director's action or decision." Therefore, the submission is received and treated as party comments, rather than an appeal of the executive director's decision.

[7] Exhibit D, Draft Proposed Decision, issued May 19, 2014.

06/04/2014	Claimant requested an extension of time to file comments on the draft decision, and postponement of the hearing, both of which were granted for good cause.
07/11/2014	Claimant submitted written comments on the draft decision.[8]
09/10/2014	The California State Association of Counties (CSAC) submitted late comments.

II. Background

The Secretary of State of California is the chief elections officer of the state,[9] and has the authority and the duty to ensure that the election laws are enforced, and that elections are conducted in an orderly manner.[10] Each county or city elections official, usually the county or city clerk or a local registrar,[11] is responsible for overseeing elections within the jurisdiction, and at the direction of the Secretary.[12] Article II of the California Constitution addresses voting, initiatives, and elections. Prior to the adoption of Proposition 14, and the enactment of the test claim statutes, Article II required the Legislature to provide for partisan primary elections for most elective offices.[13] All "expenses authorized and necessarily incurred in the preparation for, and conduct of, elections," are and were required to be paid from county treasuries.[14]

Under prior law, during each primary election cycle, including special primary elections, counties prepared ballots and sample ballots for each qualified party, including the names of *all candidates* affiliated with *each qualified political party* for whom nomination papers had been duly filed.[15] The partisan primary election process required the preparation of as many as seven partisan ballots for each primary election,[16] and a nonpartisan ballot. Each partisan primary ballot was intended to be printed together with the nonpartisan ballot as a single ballot.[17]

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[8] Exhibit E, Claimant's Comments on Draft Proposed Decision, filed July 11, 2014.

[9] Elections Code section 10 (Stats. 1994, ch. 920 (SB 1547)).

[10] Government Code section 12172.5 (Stats. 1975, ch. 1119; Stats. 1977, ch. 1205; Stats. 1978, ch. 847; Stats. 1994, ch. 923 (SB 1546); Stats. 2006, ch. 588 (AB 3059); Stats. 2011, ch. 118 (AB 1412); Stats. 2012, ch. 162 (SB 1171)).

[11] Elections Code section 320 (Stats. 2007, ch. 125).

[12] Elections Code section 11 (Stats. 1994, ch. 920).

[13] California Constitution, article II, section 5 (as amended by Stats. 2004, Res. C. 103 (SCA 18) (Proposition 60, approved November 2, 2004)). See also, article II, section 6 (as amended, June 3, 1986).

[14] Elections Code section 13001 (Stats. 2007, ch. 487 (AB 119); Stats. 2008, ch. 179 (SB 1498)). See also, former Elections Code section 13001 (Stats. 1994, ch. 920 (SB 1547)).

[15] Elections Code sections 13000 (Stats. 1994, ch. 920 (SB 1547); 13102 (Stats. 2007, ch. 515 (AB 1734)); 13300 (Stats. 2003, ch. 425 (AB 177)).

[16] See Exhibit A, Test Claim, at p. 73 ["seven qualified state political parties" participating in 2012 presidential primary election].

[17] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

However, if the county elections official determined that the ballot would be too large to be conveniently handled, the county was permitted to provide for the nonpartisan ballot to be printed separately and provided alongside the partisan ballot to each party-affiliated voter.[18] A voter not registered as intending to affiliate with any of the participating political parties would receive only a nonpartisan sample ballot.[19] The sample ballot materials were mailed to each voter, as appropriate to their registered party affiliation, or lack of party affiliation, between 10 and 40 days prior to the election.[20] On the day of the primary election, voters registered as affiliated with a participating political party received the ballot prepared by the county for their party, which could be printed together with the nonpartisan ballot, or separately from the nonpartisan ballot, if the county elections official determined that a single ballot booklet would be too large to be conveniently handled.[21] Voters with no registered party affiliation would receive only a ballot for nonpartisan offices and ballot measures put before the voters, except that parties could adopt a rule allowing voters with no party affiliation to receive their party's ballot, and thus be treated as partisan voters.[22]

For general elections, including general special elections, only one form of ballot and sample ballot was provided.[23] That ballot contained the title of all offices to be voted for, the names of all candidates, as specified, and the titles and summaries of measures to be voted on.[24] The ballot also included, "immediately to the right of and on the same line as the name of the candidate, or immediately below the name, if there is not sufficient space to the right of the name…the name of the qualified political party with which the candidate is affiliated." In addition, the ballots and sample ballots would include the names of any parties that nominated a candidate, in addition to the candidate's own party.[25] Counties were required to mail sample ballots to registered voters 29 to 40 days prior to a general election, including notice to voters of their polling place.[26] Each political party that participated in the partisan primary had the right,

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[18] Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[19] *Ibid*.

[20] Elections Code section 13300 (Stats. 2003, ch. 425 (AB 177)).

[21] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)); Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[22] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[23] Elections Code section 13102(Stats. 2007, ch. 515 (AB 1734)) ["There shall be provided, at each polling place, at each election at which public officers are to be voted for, but one form of ballot for all candidates for public office, except that, for partisan primary elections, one form of ballot shall be provided for each qualified political party as well as one form of nonpartisan ballot…"]. Elections Code section 13303 (Stats. 2000, ch. 899 (AB 1094)) [sample ballot shall be identical to the official ballots used in the election].

[24] Elections Code section 13103 (Stats. 1994, ch. 920 (SB 1547)).

[25] Elections Code section 13105 (Stats. 1994, ch. 920 (SB 1547)).

[26] Elections Code section 13303(Stats. 2000, ch. 899 (AB 1094)).

under prior law, to place its successful primary candidate on the ballot as its nominee for the ensuing general election.[27]

Prior law also required county elections officials to furnish precinct supplies to each polling place, including, but not limited to, lists of voters, envelopes, instruction cards, a digest of election laws, an American flag "of sufficient size to adequately assist the voter in identifying the polling place," ballot containers, badges for members of the precinct board, and printed copies of the Voter Bill of Rights.[28]

As amended by Proposition 14 and the test claim statutes and executive orders discussed below, counties now provide for a voter-nominated primary process for all congressional and state elective offices.[29] In primary elections, candidates are placed on the ballot by gathering sufficient signatures to satisfy a nomination petition, but those signatures no longer need to be provided by voters of the same party as the candidate.[30] In a general election, the candidates on the ballot are only those that were the top two "vote-getters" at the primary election.[31] Political parties no longer have any right or entitlement to place their favored candidate on the general election ballot,[32] and party designations on both the primary and general election ballots are chosen by the candidates, and do not reflect the endorsement or support of the party named.[33] The voters are to be made aware of these changes by inclusion of certain instructions and explanatory text in the ballots and sample ballots, and by the posting at polling places of appropriate explanatory signage. Specifically, voters are informed that they may vote for the candidate of their choosing regardless of party preference, except in presidential primary contests, but that the party preference, if any, designated by a candidate is chosen by the candidate, and does not constitute or imply support or endorsement of that political party (again, except in presidential primary contests).[34] The voter-nominated primary process does not require printing as many as seven separate partisan ballots for each qualified political party (as was required under prior law), except in presidential election years,[35] and permits, with the exception of presidential candidates and political party offices in a primary election only, any

[27] California Constitution, article II, section 5 (as amended by Proposition 60, November 2, 2004).

[28] Elections Code section 14105 (Stats. 1994, ch. 920 (SB 1547); Stats. 2003, ch. 425 (AB 177); Stats. 2003, ch. 810 (AB 1679)).

[29] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[30] Elections Code sections 8062; 8068 (Stats. 2009, ch. 1 (SB 6)).

[31] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[32] California Constitution, article II, section 5(b) (as amended by Proposition 14, June 8, 2010).

[33] Elections Code section 9083.5 (Stats. 2009, ch. 1 (SB 6); Stats. 2012, ch. 3 (AB 1413)).

[34] Elections Code sections 13206 (Stats. 2009, ch. 1 (SB 6); Stats. 2012, ch. 3 (AB 1413)); 13206.5 (added, Stats. 2012, ch. 3 (AB 1413)); 9083.5; 14105.1 (added, Stats. 2009, ch. 1 (SB 6)).

[35] Elections Code section 13102 (as amended by Stats. 2009, ch. 1 (SB 6)).

voter to vote for the candidate of his or her choice regardless of the party preference of the candidate or the voter.[36]

Test Claim Statutes and Alleged Executive Orders

Proposition 14/Statutes 2009, Chapter 2

Senate Constitutional Amendment 4 (Stats. 2009, ch. 2) was filed with the Secretary of State on February 19, 2009, and put before the voters as Proposition 14 at the June 8, 2010 Statewide Primary Election.[37] Because SCA 4 had no legal effect until adopted by the voters, the analysis below will refer hereafter to SCA 4, also called Statutes 2009, chapter 2, as Proposition 14.

The text of Proposition 14, section (a) of the findings and declarations, states that "[t]his act, along with legislation already enacted by the Legislature to implement this act, are intended to implement an open primary system in California as set forth below."[38] The "legislation already enacted…to implement" the act was Statutes 2009, chapter 1, discussed below.[39] Proposition 14 amended article II, section 5 of the California Constitution, providing, in pertinent part:

> (a) A voter-nomination primary election shall be conducted to select the candidates for congressional and state elective offices in California. All voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.
>
> (b) Except as otherwise provided by Section 6, a candidate for a congressional or state elective office may have his or her political party preference, or lack of political party preference, indicated upon the ballot for the office in the manner provided by statute. A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary. This subdivision shall not be interpreted to prohibit a political party or party central committee from endorsing, supporting, or opposing any candidate for a congressional or state elective office. A political party or party central committee shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election, as provided in subdivision (a).

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[36] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[37] See Exhibit A, Test Claim, at p. 10. See also, Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[38] Exhibit F, Text of Proposition 14.

[39] Statutes 2009, chapter 1 (SB 6) states that it will not become operative unless SCA 4 (Proposition 14) is adopted.

> (c) The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees, including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy.
>
> (d) A political party that participated in a primary election for a partisan office pursuant to subdivision (c) has the right to participate in the general election for that office and shall not be denied the ability to place on the general election ballot the candidate who received, at the primary election, the highest vote among that party's candidates.[40]

Proposition 14 also amended article II, section 6 to add the Superintendent of Public Instruction to the list of nonpartisan offices. Judicial, school, county, and city offices were already designated nonpartisan under prior law. The amendments to article II, section 6 also provide that a political party shall not nominate a candidate for *nonpartisan* office, and for *nonpartisan offices* a candidate's party preference shall not be included on the ballot.[41] Proposition 14 was adopted by the voters June 8, 2010, with an operative date of January 1, 2011.[42]

Statutes 2009, Chapter 1

Statutes 2009, chapter 1 effects a number of amendments to the Elections Code to conform to the Top Two Primaries Act, but explicitly states that its provisions "shall become operative only if SCA 4 is approved."[43] The Legislative Counsel's Digest preceding Statutes 2009, chapter 1, states that in addition to the changes proposed in Proposition 14: "[t]his measure would permit a voter, at the time of registration, to choose whether or not to disclose a party preference…[and] provide that a voter may vote for the candidate of his or her choosing in the primary election, regardless of his or her disclosure or non-disclosure of party preference." In addition, the Digest states that the measure would provide for a "voter-nominated primary election" for each state and congressional office, in which a voter may vote for any candidate regardless of the party preference disclosed by either the candidate or the voter. The two candidates receiving the highest vote totals would then compete for the office at the general election. The Digest further states that the measure would not change existing law relating to presidential primaries.[44]

The amendments made to the Elections Code by Statutes 2009, chapter 1 address, among other things, the form of ballots, the registration of voters, and the declaration of candidacy filed by each eligible candidate. The designation of all state and congressional offices as voter-

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[40] California Constitution, article II, section 5 (as amended by Proposition 14, effective June 9, 2010).

[41] Compare California Constitution, article II, section 6 (Amended June 3, 1986) with California Constitution, article II, section 6 (amended by Proposition 14, effective June 9, 2010).

[42] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[43] Statutes 2009, chapter 1 (SB 6), section 67.

[44] Statutes 2009, chapter 1 (SB 6), Legislative Counsel's Digest.

nominated offices pursuant to Proposition 14 required adding the words "voter-nominated office" to a number of Elections Code sections pertaining to qualification of candidates,[45] designation of party preference,[46] and the form of ballots.[47] In addition, the Code was amended in several relevant places to provide for "party preference" in lieu of "party affiliation."[48] Finally, Statutes 2009, chapter 1 required instructions to be added to the ballot and posted at polling places, to explain to voters the changes that had been made.[49]

Secretary of State's Memorandum CC/ROV #11005 (January 26, 2011)

This memorandum from the Secretary of State provides specific direction to county elections officials for special elections conducted during 2011. Most of the memorandum is explanatory of the changes made by Proposition 14 and Statutes 2009, chapter 1, including changes to the declaration of candidacy and nomination forms, additions to the voter information contained in the ballot, and the limitations imposed on write-in and independent nomination processes. The memorandum restates the language required by section 13105(a) to indicate a candidate's party preference, and provides for that information to appear on the ballot in three lines, with the name of the candidate, followed by the party preference designation sentence, followed by a "Ballot Designation."[50] Lastly, the memorandum provides that for special elections, a list of endorsements by qualified political parties shall be considered timely received, and therefore must be printed in the sample ballot booklets, if provided 43 days prior to the special primary election.[51]

Secretary of State's Memorandum CC/ROV #11125 (November, 23, 2011)

Memorandum #11125 addresses the changes made by Proposition 14 and Statutes 2009, chapter 1 as applied to the first full primary election cycle to begin in 2012. To reduce costs, the memorandum provides for shortening the party designation phrase from a complete sentence to "Party Preference: _____." In addition, the memorandum provides that there may be cases in which the shorter party preference designation phrases will not solve "ballot printing and cost challenges," and therefore the memorandum provides party abbreviations that may be used where necessary.[52]

Secretary of State's Memorandum CC/ROV #11126 (November 23, 2011)

Many of the directives of CC/ROV #11126 are similar to those stated in CC/ROV #11005, which applied only to special primary and special general elections, and most of CC/ROV #11126

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[45] Elections Code section 13 (Stats. 2009, ch. 1 (SB 6)).

[46] Elections Code section 8002.5 (Stats. 2009, ch. 1 (SB 6)).

[47] Elections Code sections 13102; 13105; 13110; 13206; 13230; 13302 (Stats. 2009, ch. 1 (SB 6)).

[48] See, e.g., section 13102 (Stats. 2009, ch. 1 (SB 6)).

[49] Elections Code section 9083.5; 14105.1 (Stats. 2009, ch. 1 (SB 6)).

[50] Exhibit A, Test Claim, at p. 54 [CC/ROV #11005].

[51] Exhibit A, Test Claim, at p. 55 [CC/ROV #11005].

[52] Exhibit A, Test Claim, at pp. 56-58.

restates the requirements of the Elections Code, pertaining to the reclassification of most offices to "voter-nominated" offices, the changes to candidate filing and nomination documents, and the instructions to voters to be included in the ballot and furnished to the voting precincts. The memorandum also notes that the June 5, 2012 primary election will not include any nonpartisan offices, and therefore the explanatory text for such offices is not necessary. The memorandum restates the shortened party designation phrases provided in CC/ROV #11125, and adopts for the regular primary election cycle the same "three-line format" called for in CC/ROV #11005 regarding special elections.[53]

Statutes 2012, chapter 3

The Legislative Counsel's Digest for Statutes 2012, chapter 3 states that "[t]his bill would make technical revisions to provisions of the Elections Code to reflect the 'voter-nominated primary election' process."[54] Those technical revisions include a provision *requiring* a candidate's party preference to appear on the primary ballot, and stating that the candidate's preference "shall not be changed between the primary and general election."[55] The amendments include changing the words "party affiliation" to "party preference" on the Declaration of Candidacy form, and changing the words "less than" to "fewer than," with respect to the number of signatures required to nominate a candidate for office.[56] In addition, the amendments require candidates for voter-nominated offices to disclose their voter registration and party preference history for the previous ten years.[57] With respect to the form of ballots, the amendments of Statutes 2012, chapter 3 *eliminated* the requirement that party preference information be printed in "eight point roman lowercase type," and the Code now provides for party preference identification "as specified by the Secretary of State." Amendments to the form of ballots also reflect the change described above, in that if a candidate indicates a party preference on his or her voter registration and declaration of candidacy, that preference shall be printed on the ballot.[58] And, the amendments reflect the fact that presidential primaries are unaffected by Proposition 14 or Statutes 2009, chapter 1, and therefore information relating to party-nominated offices must appear on the ballot in every presidential election year; in all other election years, only voter-nominated and nonpartisan offices will be on the ballot, and therefore the voter information pertaining to party-nominated offices may be omitted.[59]

Secretary of State's Memorandum CC/ROV #12059 (February 10, 2012)

This memorandum addresses the amendments made by Statutes 2012, chapter 3. The memorandum notes that Statutes 2012, chapter 3 now requires a candidate to provide a party preference or lack of party preference "consistent with the preference stated on their voter registration card," and thus the Declaration of Candidacy form has been updated to remove "the

[53] Exhibit A, Test Claim, at pp. 59-64.

[54] Legislative Counsel's Digest, Statutes 2012, chapter 3 (AB 1413).

[55] Elections Code section 8002.5 (as amended, Stats. 2012, ch. 3 (SB 1413)).

[56] Elections Code sections 8040; 8062 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[57] Elections Code sections 8040 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[58] Elections Code sections 13105; 13206 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[59] Elections Code section 13206.5 (as added, Stats. 2012, ch. 3 (AB 1413)).

option for a candidate who disclosed a party preference on their voter registration card to withhold that information from the ballot."[60] As before, "[t]he forms, along with the qualifications and requirements for running for voter-nominated office, were forwarded to all county elections offices."[61] The memorandum further provides that on the sample ballot there are only two options for a candidate's party preference: either the name of a party, or the word "None." And, the memorandum states that "[t]he above-described designations made by the candidates shall appear on both the primary and general election ballots and shall not be changed between the primary and general elections." Finally, the memorandum restates the political party abbreviations that may be used on the ballots, where necessary, and clarifies that no further changes were made by AB 1413 to the requirements of printing a list of endorsements or furnishing voter information to the precincts.[62]

III. Positions of the Parties

A. Position of the Claimant

Claimant has pled Statutes 2009, chapter 2, which was put before the voters by the Legislature and approved in the June 2010 primary election as Proposition 14. Claimant has also pled specific code sections added or amended by Statutes 2009, chapter 1, and Statutes 2012, chapter 3, both of which purport to implement Proposition 14, and four specific memoranda from the Secretary of State's office, which provide for the implementation of the test claim statutes and Proposition 14.[63] Claimant alleges that it first incurred costs in fiscal year 2011-2012 to perform the following activities required by the test claim statutes and executive orders alleged:

i. Reproduce and provide to each polling place the Secretary of State's explanation of electoral procedures for party-nominated, voter-nominated and nonpartisan offices, in all required languages.

ii. Post at each polling place the Secretary of State's explanation of electoral procedures for party-nominated, voter-nominated and non partisan offices.

iii. Include in each ballot and sample ballot the wording "Party Preference" for all voter-nominated candidates.

iv. List all candidates for each voter-nominated office, regardless of party preference or lack thereof.

v. Follow the formatting rules promulgated by the Secretary of State.

vi. Include in each ballot and sample ballot new information regarding partisan offices, and voter-nominated and nonpartisan offices.

vii. Include in each sample booklet authorized party endorsement lists, without cost to the party or central committee.

[60] Exhibit A, Test Claim, at p. 66.

[61] Exhibit A, Test Claim, at p. 67.

[62] Exhibit A, Test Claim, at pp. 70-72.

[63] Exhibit A, Test Claim, at p. 1.

viii. Include in each sample booklet new information regarding partisan offices, and voter-nominated and non partisan offices.

ix. Include in each presidential general election ballot new specified language.

x. Include in each election ballot new specified language.

xi. Include in each ballot, sample ballot, and voter information pamphlet specified party abbreviations; those abbreviations will be posted at each polling place and mailed to vote-by-mail voters.

xii. Collect and report additional specified information from candidates for voter-nominated office.

xiii. Attend meetings and trainings to ensure uniform implementation of the Top Two Candidates Open Primary Act.

xiv. Perform additional In-Lieu of Filing Fee petition signature verification to comply with elimination of lower signature thresholds for minor party candidates to voter-nominated offices.

xv. Perform more complex testing of Voting System Logic and Accuracy to verify vote counting machines programming correctly tabulates lengthy voter-nominated contests.

xvi. Increase the length of the ballot and sample ballot to accommodate lengthy voter-nominated contests.

xvii. Increase the length of the ballot and sample ballot to accommodate lengthy instructions.

xviii. Modify precinct officer training classes and on-line training programs to include changes implementing the Top Two Candidates Open Primary Act, including:

a. Instructions on what documents to post, and where the documents to be posted; and

b. Information on the new contest designations and who is allowed to vote on the contests.

xix. Revise polling place operations manual to include changes resulting from Top Two Candidates Open Primary Act, including:

a. Written instructions on what is to be posted and where it is to be posted; and

b. Written definition and lists of Party Nominated, Voter Nominated, and Nonpartisan contests, including who is eligible to vote on these contests.[64]

Claimant estimated increased costs in fiscal year 2011-2012 in the amount of $33,000, and estimated increased costs in fiscal year 2012-2013 in the amount of $15,000. In addition,

[64] Exhibit A, Test Claim, at pp. 3-4.

claimant alleges that no offsetting non-local funds or fee authority are available to cover the costs of this mandate.[65]

In response to Finance's comments, which assert that the entirety of the test claim should be denied because the statutes and executive orders are necessary to implement a voter-enacted ballot measure, claimant argues:

> Proposition 14 established the minimum requirements for the conduct of certain election activities to be performed by counties. The Legislature enacted statutes and the Secretary of State promulgated executive orders that impose new and higher levels of service related to election activities which are neither contained in, nor required to implement, Proposition 14.[66]

Then, in response to the draft proposed decision issued May 19, 2014, claimant argues that "Proposition 14 contained very clear ballot measure language..." which was "altered and in some cases even superseded by legislative statutes and executive orders that were not necessary to implement or incidental to SCA 4/Proposition 14." Claimant argues that because the Secretary of State "has no ability to conduct an election; issue, process or validate candidate nomination paperwork; prepare official ballots; present voter specific sample ballot pamphlets; or even process affidavits of registration…[a]s such, the Top Two test claim is very much a mandate to Counties who bear the burden of the activities identified in the test claim."[67] Claimant addresses the analysis of each amended code section in turn, and argues that each imposes plain language requirements, and that those requirements are not necessary to implement Proposition 14, and impose more than de minimis costs.[68] Specifically, claimant argues that some of the activities' costs "exceed $1,000 which meets the threshold for mandate claiming and therefore are not de minimus [*sic*]."[69] And, claimant argues, "[e]ven should the Commission find [the alleged activities and costs] are necessary, these methods are not the least burdensome method for providing the information to the voters."[70] Finally, claimant states that it "respectfully requests the Commission find that the activities and costs pled in the test claim and amended test claim are not due to language contained in, incidental to or required to implement SCA 4/Proposition 14." Claimant asks that the Commission "find the test claim statutes and executive orders cited in the test claim and amended test claim do impose new mandated activities and results in costs mandated by the State…"[71]

B. Department of Finance Position

Finance argues that the test claim statutes "were necessary to either put the ballot measure before the voters or to implement the ballot measure once it was approved by the voters." In addition,

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[65] Exhibit A, Test Claim, at p. 5.

[66] Exhibit C, Claimant Rebuttal Comments, at p. 1.

[67] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 1.

[68] Exhibit E, Claimant Comments on Draft Staff Analysis, at pp. 2-7.

[69] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 6.

[70] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 7.

[71] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 7.

Finance argues that the four memoranda from the Secretary of State's office were necessary to implement the ballot measure approved by the voters. Therefore, "Finance is of the opinion that the Commission on State Mandates (Commission) should deny the test claim, in its entirety, based upon Government Code section 17556(f) which finds that no state mandate exists if 'The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election.'"[72]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever 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 programs or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:
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> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 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."[73] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[74]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[75]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[76]

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[72] Exhibit B, Finance Comments on Test Claim, at pp. 1-2.

[73] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, at p. 81.

[74] *County of Los Angeles v. State of California* (*County of Los Angeles I*) (1987) 43 Cal.3d 46, at p. 56.

[75] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, at p. 874.

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[77]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[78]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[79] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[80] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[81]

A. Statutes 2009, chapter 2 was adopted by the voters as Proposition 14 in a statewide election, and therefore does not impose a state-mandated local program.

Senate Constitutional Amendment 4 (Stats. 2009, ch. 2) was filed with the Secretary of State on February 19, 2009, and put before the voters as Proposition 14 at the June 8, 2010 Statewide Primary Election.[82] The text of Proposition 14 states that "[t]his act, along with legislation already enacted by the Legislature to implement this act, are intended to implement an open primary system in California as set forth below."[83] The "legislation already enacted…to implement" the Act was Statutes 2009, chapter 1 (SB 6), discussed below. Proposition 14 amended article II, sections 5 and 6 of the California Constitution to provide for voter-nominated primary elections for congressional and state offices, and a "top-two" general election.

Government Code section 17556(f) provides that the Commission "shall not find" costs mandated by the state if:

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[76] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, at p. 56.)

[77] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, at pp. 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, at p. 835.

[78] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, at p. 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, at p. 1284; Government Code sections 17514 and 17556.

[79] *County of San Diego*, *supra*, 15 Cal.4th 68, at p. 109.

[80] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, at pp. 333-334.

[81] *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, at p. 1281 [citing *City of San Jose v. State of California* (1996) 45 Cal.app.4th 1802, at p. 1817].

[82] See Exhibit A, Test Claim, at p. 10; Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[83] Exhibit F, Text of Ballot Measure, Proposition 14, at p. 1.

> The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.[84]

California School Boards Association v. State of California (*CSBA I*) makes clear that this statutory exclusion from reimbursement is consistent with the subvention requirements of article XIII B, section 6.[85] The court in *CSBA I* reasoned that the subvention requirement applies to mandates imposed by the Legislature, not by the voters; the voters' powers of initiative and referendum are reserved powers, not vested in the Legislature, and are therefore not limited by article XIII B, section 6. *CSBA I* holds that the reimbursement requirement applies only to state-mandated costs, not costs incurred by way of "the people acting pursuant to the power of initiative."[86]

Proposition 14 was put before the voters at the June 8, 2010 primary election, and adopted the exact language as Statutes 2009, chapter 2. Therefore, all requirements of Statutes 2009, chapter 2 are expressly included in a ballot measure approved by the voters in a statewide election, and the Commission shall not find costs mandated by the state, within the meaning of article XIII B, section 6, pursuant to Government Code section 17556(f).

In its response to the draft proposed decision, claimant concedes that "Proposition 14 does not impose the mandate." Rather, claimant argues "[i]t is SB 6 [Stats. 2009, ch. 1] and AB 1413 [Stats. 2012, ch. 3] together that defined a complex and party-centric implementation of the Top Two Candidates Open Primary Act which exceeded the plain language and in some instances changed the intention of SCA 4/Proposition 14 that has produced the mandate."[87]

Based on the foregoing, the Commission finds that Statutes 2009, chapter 2 does not result in a reimbursable state-mandated program and is denied.

B. Many of the code sections, as amended by the test claim statutes, and the executive orders pled, do not impose any new state-mandated activities on local government.

The first element of a reimbursable mandate, as stated above, is that the statute or executive order alleged must require or mandate local agencies to perform an activity. The following code sections and executive orders alleged in this test claim do not impose any new required activities on county election officials, as explained herein, and thus do not constitute state-mandated programs within the meaning of article XIII B, section 6: Elections Code sections 13, 300.5, 325, 332.5, 334, 337, 359.5, and 13230, as amended by Stats. 2009, ch. 1; sections 8002.5, 8040, 8062, as amended by Stats. 2012, ch. 3; and that portion of the Secretary of State's Memorandum CC/ROV #11126 pertaining to nomination papers.

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[84] As amended by Statutes 2010, chapter 719 (SB 856).

[85] *California School Boards Association v. State of California* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, 1206-1207; 1210.

[86] *Ibid.*

[87] Exhibit E, Claimant's Comments on Draft Proposed Decision, at p. 2.

1. Elections Code section 13, as amended by Statutes 2009, chapter 1, does not impose any new state-mandated activities on local government.

Section 13, prior to amendment by the test claim statutes, provided that no person shall be considered a legally qualified candidate for office or party nomination *for a partisan office* unless that person has filed a declaration of candidacy with the proper official for the particular election or primary, or is entitled to have his or her name placed on the general election ballot by reason of having been nominated at a primary election, or having been selected to fill a vacancy on the general election ballot as provided in Section 8806, or having been selected as an independent candidate pursuant to section 8304. Prior section 13 further provided that nothing in this section prevents or prohibits a voter from casting a ballot by writing in the name of the person, or from having that ballot counted or tabulated.[88]

As amended, section 13 refers to a person being selected to fill a vacancy on the ballot pursuant to section 8807, rather than section 8806, and now clarifies that a person shall not be legally qualified for nomination or to participate in the general election for a *voter-nominated office* unless that person has filed a declaration of candidacy, or was nominated at a primary election. The amendment to section 13 is technical in nature, and is required to conform to the change from a party-nomination to a voter-nomination for congressional and state offices.[89] Moreover, the plain language does not mandate any activities or tasks; it is definitional in nature.

Although the plain language of section 13 does not mandate any activities on counties, claimant alleges more specifically, in response to the draft proposed decision, that "Election Code [*sic*] Section 13 previously allowed write-in candidates for any election." Claimant continues: "With the enactment of SB 6 and AB 1413, write-in candidacy for voter-nominated offices were limited to primary elections only, eliminating this opportunity for write-in candidates in voter-nominated contests in the general election."[90] Claimant, however, does not address how that change to the availability of write-in candidacies constitutes a state-mandated increase in the level of service provided to the public.

Based on the foregoing, the Commission finds that Elections Code section 13, as amended by Statutes 2009, chapter 1, does not impose any state-mandated activities on counties.

2. Elections Code sections 300.5, 325, 332.5, 334, 337, and 359.5, as added or amended by Statutes 2009, chapter 1, do not impose any new state-mandated activities on local government.

Section 300.5, as added, defines the phrase "affiliated with a political party," as used in the code, to mean "the party preference that the voter or candidate has disclosed on his or her affidavit of registration."[91] Claimant alleges that this definition "is contrary to how SCA 4/Proposition 14

[88] Statutes 2003, chapter 810 (AB 1679).

[89] Statutes 2009, chapter 1 (SB 6).

[90] Exhibit E, Claimant's Comments on Draft Proposed Decision, at p. 2.

[91] Elections Code section 300.5 (Stats. 2009, ch. 1 (SB 6)).

defined the word…"[92] However, the Commission is required to presume that statutes are constitutional.[93] The proper place to challenge the constitutionality of a statute is in the courts.

Section 325, as added, defines "independent status" to mean "a voter's indication of 'No Party Preference.'"[94] Section 325 was repealed by Statutes 2012, chapter 3.[95]

Section 332.5, as added, defines the term "nominate" to mean "the selection, at a state-conducted primary election, of candidates who are entitled by law to participate in the general election for that office, but does not mean any other lawful mechanism that a political party may adopt for purposes of choosing the candidate who is preferred by the party for a nonpartisan or voter nominated office."[96]

Section 334, as amended, clarifies that a "nonpartisan office" is one for which no party may nominate a candidate, but does not include a "voter-nominated office," which is defined in section 359.5, discussed below.[97]

Section 337, as amended, defines a "partisan office" to include President and Vice President of the United States, and "the delegates therefor," and an "[e]lected member of a party committee."[98] Prior section 337 provided only that a partisan office "means an office for which a party may nominate a candidate."[99]

Section 359.5, as added by Statutes 2009, chapter 1, defines a voter-nominated office under the open primary provided for by Proposition 14. Section 359.5 provides that a voter-nominated office "means a congressional or state elective office for which any candidate may choose to have his or her party preference or lack of party preference indicated upon the ballot." Section 359.5 further provides that a party "shall not nominate a candidate at a state-conducted primary election for a voter-nominated office," and that "[t]he primary conducted for a voter-nominated office does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." Section 359.5 goes on to list a number of state and federal offices that shall be voter-nominated, and finally states that the section does not prohibit a political party from endorsing, supporting, or opposing a candidate for a voter-nominated office.[100]

Claimant argues that section 359.5 necessitates additional training and publications "for poll workers, voters, candidates…" and that "transferring the training and information duties to the

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[92] Exhibit E, Claimant's Comments on Draft Proposed Decision, at p. 2.

[93] California Constitution, article III, section 3.5 ["An administrative agency…has no power…[t]o declare a statute unconstitutional…"].

[94] Former Elections Code section 325 (Stats. 2009, ch. 1 (SB 6)).

[95] Statutes 2012, chapter 3 (AB 1413), § 2.

[96] Elections Code section 332.5 (Stats. 2009, ch. 1 (SB 6)).

[97] Elections Code section 334 (Stats. 2009, ch. 1 (SB 6)).

[98] Elections Code section 337 (Stats. 2009, ch. 1 (SB 6)).

[99] Statutes 1994, chapter 920 (SB 1547).

[100] Elections Code section 359.5 (Stats. 2009, ch. 1 (SB 6)).

County is a practical mandate."[101] The plain language of section 359.5 does not impose any requirements on counties. Nor does the plain language of section 359.5 support any inference of training or informational requirements. The duty to educate voters, and to train poll workers, if any such duty is found in law, is altered in scope and extent by the changes to the primary election system effected by Proposition 14, but not by the addition of a definition of "voter-nominated" to the Elections Code.

Nothing in the plain language of sections 300.5, 325, 332.5, 334, 337, or 359.5 imposes any activities or costs on local government. The additions and amendments to the Elections Code effected by Statutes 2009, chapter 1 are definitional in nature.

Based on the foregoing, the Commission finds that Elections Code sections 300.5, 325, 332.5, 334, 337, and 359.5, as added or amended by Statutes 2009, chapter 1 do not impose any state-mandated activities on counties.

3. Elections Code section 13230, as amended by Statutes 2009, chapter 1, does not impose any new state-mandated activities on local government.

Pre-existing law, section 13230, added by Statutes 2000, chapter 898, provided that "[i]f the county elections official determines that, due to the number of candidates and measures that must be printed on the ballot, the ballot will be larger than may be conveniently handled, the county elections official may provide that a nonpartisan ballot shall be given to each partisan voter, together with his or her partisan ballot, and that the material appearing under the heading 'Nonpartisan Offices' on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots." In addition, prior section 13230 provided that "'[p]artisan voters,' for purposes of this section, includes persons who have declined to state a party affiliation, but who have chosen to vote the ballot of a political party as authorized by that party's rules duly noticed to the Secretary of State."[102]

As amended by Statutes 2009, chapter 1,[103] section 13230 provides that if the county elections official determines that a ballot will be larger than may be conveniently handled, "the county elections official may provide that a nonpartisan ballot shall be given to each partisan voter, together with his or her partisan ballot, and that the material appearing under the heading 'Voter Nominated and Nonpartisan Offices' on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots."[104] And, amended section 13230 provides that "partisan voters" includes "both persons who have disclosed a party preference pursuant to Section 2151 or 2152 and persons who have declined to disclose a party preference, but who have chosen to vote the ballot of a political party as authorized by that party's rules duly noticed to the Secretary of State."[105]

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[101] Exhibit E, Claimant's Comments on Draft Proposed Decision, at p. 3.

[102] Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[103] The amendment to section 13230 made by Statutes 2012, chapter 3 (AB 1413) was not properly pled, and the Commission does not have jurisdiction over that amendment.

[104] Elections Code section 13230(a) (Stats. 2009, ch. 1 (SB 6)) [emphasis added].

[105] Elections Code section 13230(c) (Stats. 2009, ch. 1 (SB 6)) [emphasis added].

None of the amendments to section 13230 impose new state-mandated activities on counties. The amended definition of "partisan voter" is merely clarifying of the law as approved by the voters in Proposition 14, and does not impose any activities or tasks on counties. More importantly, the county elections official is not *mandated* to provide separate ballots, but *may* provide separate ballots if he or she determines that a single ballot would be "larger than may be conveniently handled."[106] That determination is a local discretionary decision, and there is no requirement that the county elections official provide for separate ballots even if such a determination is made.[107] Moreover, the provision that a county elections official may provide for separate partisan and nonpartisan ballots is found also in prior law,[108] and is therefore not new.

In response to the draft proposed decision, claimant argues that "giving voters a ballot 'larger than may be conveniently handled' disenfranchises voters and candidates to the extent that down-ballot contests are avoided." Claimant asserts that because most previously partisan offices are now voter-nominated "the ballot is still 'larger than can be conveniently handled,'" and "in reality continues the voter disenfranchisement."[109]

Claimant's concerns are not relevant to the question of whether a test claim statute imposes a reimbursable state mandate, and asserted voter disenfranchisement is not within the Commission's purview. The plain language of amended section 13230 does not impose any mandated activities on county elections officials, and the option to provide a separate partisan ballot is not new, with respect to prior law.

Based on the foregoing, the Commission finds that Elections Code section 13230, as amended by Statutes 2009, chapter 1, does not impose any new state-mandated activities on counties.

4. Elections Code sections 8002.5 and 8040, as amended by Statutes 2012, chapter 3, do not impose any new state-mandated activities on local government.

Prior to the enactment of the test claim statute, section 8002.5 provided that a candidate "may indicate his or her party preference, or a lack of party preference, as disclosed upon the candidate's most recent statement of registration," and if a candidate indicates a party preference, "it shall appear on the primary and general election ballot."[110] The prior version of section 8002.5 also required that all references to party preference or affiliation "shall be omitted from all forms required to be filed by a voter-nominated candidate…except that the declaration of candidacy required by Section 8040 shall include space for the candidate to list the party preference disclosed upon the candidate's most recent affidavit of registration."[111]

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[106] Elections Code section 13230(a) (Stats. 2009, ch. 1 (SB 6)).

[107] See Government Code section 14 ["'Shall' is mandatory and 'may' is permissive."].

[108] See Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[109] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 3.

[110] Elections Code section 8002.5 (as added, Stats. 2009, ch. 1). Note that this section as amended by Statutes 2009, chapter 1 was not pled in this test claim. See Exhibit A.

[111] Elections Code section 8002.5 (as added, Stats. 2009, ch. 1 (SB 6)).

As amended by Statutes 2012, chapter 3, section 8002.5 now requires a candidate to indicate either a party preference or no party preference in the candidate's declaration of candidacy, "which shall be consistent with what appears on the candidate's most recent affidavit of registration." The candidate's party preference "shall appear on the primary and general election ballot in conjunction with his or her name, and shall not be changed between the primary and general election."[112]

Section 8040 was also amended by Statutes 2012, chapter 3 to eliminate the reference to party affiliation, in accordance with the implementation of a voter-nominated primary election system. Prior section 8040 provided for the Declaration of Candidacy form which stated "I hereby declare myself a _____ Party candidate for nomination to the office of _____ District Number ____ to be voted for at the primary election…"[113] The amended section omits any reference to party, and instead provides that the form shall state: "I hereby declare myself a candidate for nomination to the office of _____ District Number ____ to be voted for at the primary election…"[114] In addition, amended section 8040 now provides that on the Declaration of Candidacy form a candidate shall certify his or her political party preference as indicated on his or her current affidavit of registration, and certify his or her "party affiliation/preference history" for 10 years prior to the year in which the document is executed.[115]

The 2012 amendments to sections 8002.5 and 8040 therefore consist of (1) a requirement that candidates indicate a party preference or no party preference, and that the statement of party preference be consistent with the candidate's most recent affidavit of registration; (2) a directive that a candidate's party preference shall not be changed between the primary and general election; and (3) an amendment to the language of the Declaration of Candidacy form.

Claimant argues that these amendments require county elections officials to verify that a candidate's indication of party preference or no party preference is consistent with the most recent affidavit of registration. Claimant also argues that if the candidate's designation of party preference does not match the most recent affidavit of registration, county elections officials would be required "to explain the requirement to the candidate and give the candidate the opportunity to change their filing or their affidavit of registration."[116] And finally, Claimant argues that "AB 1413 amended Elections Code [section] 8040 to include new candidate certifications in the candidate's declaration of candidacy." Claimant maintains that "[t]his additional certification is not contained in Proposition 14 and is not required for its implementation." Therefore, claimant reasons, "[t]hese requirements increase costs related to redesigning and reprinting those forms and instructions as well as staff training on these new requirements."[117]

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[112] Elections Code section 8002.5 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[113] Elections Code section 8040 (Stats. 2003, ch. 277 (AB 277)).

[114] Elections Code section 8040 (Stats. 2012, ch. 3 (AB 1413)).

[115] *Ibid.*

[116] See Exhibit C, Claimant Rebuttal Comments, at pp. 1-2.

[117] Exhibit C, Claimant Rebuttal Comments, at p. 2.

The plain language of section 8002.5 does not impose any requirement on counties to verify that the candidate's party preference matches his or her affidavit of registration; nor does the code provide any consequence for the situation in which the candidate's declaration and most recent registration do not match. The requirement is directed to the candidate; the plain language does not require anything of local government. Furthermore, the provision that a stated party preference "shall not be changed" between the primary election and the general election does not impose any affirmative duty on local government officials; this, too, is directed to the candidate.

Similarly, the plain language of amended section 8040 does not impose any state-mandated activities on local government. The plain language of section 8040 does not require training, and does not require counties to update the form, as alleged.[118] Indeed, the test claim executive order CC/ROV #12059, entitled: "Top Two Candidates Open Primary Act of 2010: UPDATED Implementation Guidelines" provides expressly that updated forms that "comply with AB 1413, have been forwarded to all county elections offices."[119] Therefore, any changes required to the Declaration of Candidacy form have been implemented by the Secretary of State and provided to the counties, and no "redesigning and reprinting" is necessary.

In response to the draft proposed decision, claimant argues that section 8040, as amended, "is clearly a mandate put forth by the [L]egislature in AB 1413." And with respect to section 8002.5, claimant argues that "[t]he [L]egislature, by implementing AB 1413, changed the intention of SCA 4/Proposition 14 from a candidate's political party *preference* to a candidate's political party *registration*."[120] Claimant continues: "The change is significant as it voids the candidates 'choice' to declare their party preference and requires the candidate to use only the political party with which they are registered at the time they file for office [*sic*]." Claimant argues that the new form provided for by amended section 8040 "requires information not previously mandated." Claimant asserts that "it is the County election official that is responsible for interacting with the candidates, requesting the newly required information, and ensuring filing paperwork is completed as required by this new law." Claimant argues that if a county fails to "gather this information, the candidate will not be qualified to run for office; the burden is on the County to accept and timely file candidate's paperwork [*sic*]."[121] Claimant concludes: "This legislation is not necessary to implement nor incidental to [Proposition 14]," and that "[t]he cost is not de minimus [*sic*]."[122]

Claimant's argument is not persuasive. The plain language of section 8002.5 does not impose an activity or task on counties. The language, as explained above, is directed toward candidates, and counties are not made responsible for ensuring compliance. Finally, the Commission is

[118] Exhibit C, Claimant Rebuttal Comments, at pp. 1-2.

[119] Exhibit A, Test Claim, at p. 67.

[120] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 4 [Emphasis in orginial].

[121] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 4.

[122] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 4.

required to presume that statutes are constitutional.[123] If the claimant wishes to challenge the constitutionality of section 8002.5, it must do so in the courts.

With respect to section 8040, claimant argues, without basis, that the form, to be filled out and certified by a candidate, imposes new mandated activities or costs on counties. The plain language of section 8040 does not impose any burden on claimant to ensure that the form is completed correctly, accurately, or truthfully; the plain language of amended section 8040 *only* describes the content of the form, and no other provision of the Elections Code requires a county to verify any of the information on the form. If any new burden exists, it is on candidates. Finally, the claimant continues to focus on whether section 8040 is necessary to implement or incidental to Proposition 14, while the analysis above is confined to whether the plain language of section 8040 imposes any requirements at all on counties.

Based on the foregoing, the Commission finds that Elections Code sections 8002.5 and 8040, as amended by Statutes 2012, chapter 3 (AB 1413) do not impose any state-mandated activities on counties.

5. Elections Code section 8062, as amended by Statutes 2012, chapter 3; and the portion of the Secretary of State Memorandum CC/ROV #11126 relating to signatures on nomination papers, do not impose any new state-mandated activities on local government.

Section 8062 provides the number of registered voters required to sign a nomination paper for a candidate for a primary election for specified offices. Statutes 2012, chapter 3 amended section 8062 as follows in underline and strikeout:

> (a) The number of registered voters required to sign a nomination paper for the respective offices are as follows:
>
> (1) State office or United States Senate, not ~~less~~fewer than 65 nor more than 100.
>
> (2) House of Representatives in Congress, State Senate or Assembly, State Board of Equalization, or any office voted for in more than one county, and not statewide, not ~~less~~fewer than 40 nor more than 60.
>
> (3) Candidacy in a single county or any political subdivision of a county, other than State Senate or Assembly, not ~~less~~fewer than 20 nor more than 40.
>
> (4) With respect to a candidate for a political party committee, if any political party has ~~less~~fewer than 50 voters in the state or in the county or district in which the election is to be held, one-tenth the number of voters of the party.
>
> (5) ~~When~~If there are fewer than 150 voters in the county or district in which the election is to be held, not ~~less~~fewer than 10 nor more than 20.
>
> (b) The provisions of this section are mandatory, not directory, and no nomination paper shall be deemed sufficient that does not comply with this section. However, this subdivision shall not be construed to prohibit withdrawal of signatures pursuant to Section 8067. This subdivision also shall not be

[123] California Constitution, article III, section 3.5 ["An administrative agency…has no power…[t]o declare a statute unconstitutional…"].

> construed to prohibit a court from validating a signature which was previously rejected upon showing of proof that the voter whose signature is in question is otherwise qualified to sign the nomination paper.[124]

The 2012 amendments are technical and clarifying in nature and do not impose any new state-mandated activities or costs on local government.[125]

Nevertheless, claimant alleges that "SB 6 [Stats 2009, ch. 1] and AB 1413 [Stats 2012, ch. 3] amended Election Code 8062 [*sic*] changing the number of nomination signatures required for certain political parties and candidates for political party committees." Claimant further alleges that section 8068, which was not pled, results in increased costs related to nomination petitions:

> SB 6 [Stats 2009, ch. 1] amended Elections Code Section 8068 to allow voters of any party affiliation to sign a candidate's nomination forms. While this makes sense to do in the wake of Proposition 14, it is not necessary for its implementation. This change resulted in changes to counties' Election Management Systems (EMS). Any change to the EMS results in costs for training staff.[126]

The changes to sections 8062 and 8068 to which claimant refers were not pled in this test claim.[127] Sections 8062 and 8068, as amended by Statutes 2009, chapter 1 were included in the claimant's proposed amendment to the test claim, which was rejected based on untimely filing.[128] It may be true that sections 8062 and 8068, as amended by Statutes 2009, chapter 1, together require counties to review a greater number of nomination petitions, but the only amendment to section 8062 properly pled in this test claim is that made by Statutes 2012, chapter 3, which changed the words "less than" to "fewer than," with respect to signatures needed to file nomination papers, added the word "State" before "Board of Equalization," and changed "when" to "if," in paragraph (a)(5). These technical changes do not impose any mandated activities on counties.

Claimant also alleges that CC/ROV #11126 imposed new activities related to review of nomination petitions. The Memorandum states:

> Signatures in-lieu - Prior to the Top Two Candidates Open Primary Act, only a voter of the same political party as a candidate could sign the candidate's nomination paper. Additionally, any voter could sign an in-lieu petition, but only the signature of a voter who was of the same political party could be counted toward the number of voters required to sign a nomination paper. Now any registered voter, regardless of party preference, can sign a nomination paper. As a result, all signatures on an in lieu petition can be counted toward the number of

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[124] Elections Code section 8062 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[125] Compare Elections Code section 8062, as amended by Statutes 2009, chapter 1 (SB 6) with section 8062 as amended by Statutes 2012, chapter 3 (AB 1413).

[126] Exhibit C, Claimant Rebuttal Comments, at p. 2.

[127] Exhibit A, Test Claim, at p. 1.

[128] See Exhibit F, Proposed Test Claim Amendment, October 28, 2013; Rejection of Proposed Test Claim Amendment, November 4, 2013.

voters required to sign a candidate's nomination paper. (Elec. Code§§ 8061, 8068.)[129]

The plain language of this paragraph of the memorandum does not impose any new mandated activities on counties; it merely clarifies that all signatures of registered voters may be counted on a nomination paper or an "in-lieu petition" pursuant to the amendments made by the Top Two Candidates Open Primary Act. The memorandum is explanatory in this respect, not mandatory.

In response to the draft proposed decision, claimant argues that "the amendment put forth by Claimant references Section 8106 in place of Section 8062." Claimant states that "AB 1413 changed the number of signatures required from minor party candidates…" which "significantly increases the amount of work County election officials must do to validate these minor party candidate filings."[130] However, claimant's proposed amendment to the test claim was not timely, in accordance with Government Code section 17551 and section 1183 of the Commission's regulations, and section 8106 is therefore not before the Commission.[131]

Based on the foregoing, Elections Code section 8062, as amended by Statutes 2012, chapter 3, and CC/ROV #11126 do not impose any state-mandated activities on counties.

C. Some of the code sections, as amended, and the executive orders alleged require counties to perform some new activities, but the required activities do not impose costs mandated by the state because they are necessary to implement Proposition 14 or are intended to implement and incidental to Proposition 14 and impose at most de minimis added costs in the context of the Top Two Primary program.

The remaining code sections and executive orders pled (Elec. Code §§ 9083.5, 13102, 13105, 13110, 13206, 13206.5, and 14105.1 as added or amended by Stats. 2009, ch. 1, and Stats. 2012, ch. 3; Secretary of State's Memoranda CC/ROV# 11005, 11125, 11126, and 12059), as explained below, require counties to perform some new activities. However, the costs of these activities are not mandated by the state pursuant to Government Code section 17556(f).

1. The courts have interpreted the "necessary to implement" clause of Government Code section 17556(f) to preclude a finding of cost mandated by the state if the activities or costs are required "even in the absence of" the test claim statute; and when the state has no "true choice" as to the manner of implementation; and, if duties imposed by the statute or executive order are *incidental to the ballot measure* and produce at most *de minimis added costs*.

Section 17556(f) states that the Commission "shall not find costs mandated by the state" if, after a hearing, the Commission finds that "[t]he statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election."[132] The plain language of the statute provides that when the state imposes requirements that are not expressly contained in a ballot measure approved by the

[129] Exhibit A, Test Claim, at p. 60.

[130] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 5.

[131] See Exhibit F, Proposed Test Claim Amendment, October 28, 2013; Rejection of Proposed Test Claim Amendment, November 4, 2013.

[132] Government Code section 17556(f) (Stats. 2010, ch. 719 (SB 856)).

voters, but are necessary to implement the ballot measure, the excess activities required by the state do not impose costs mandated by the state and are not reimbursable within the meaning of article XIII B, section 6.

The courts have analyzed the "necessary to implement" language of section 17556(f), pertaining to ballot measure mandates, in the same manner as section 17556(c),[133] which proscribes a finding of costs mandated by the state if the state statute or executive order "imposes a requirement that is mandated by a *federal* law or regulation."[134]

Two early court of appeal decisions in which underlying *federal* law was at issue in a test claim analysis are *Hayes v. Commission on State Mandates*[135] *and County of Los Angeles v. Commission on State Mandates* (*County of Los Angeles II*).[136] In *Hayes*, the test claim statute addressed special education services required of school districts, and the court considered whether federal special education law on point constituted a federal mandate. The court found, in this respect, that "[t]he alternatives were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event." The court concluded that the federal Education of the Handicapped Act did indeed constitute a federal mandate, relevant to the test claim statutes, and therefore held:

> When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate *so long as the state had no "true choice" in the manner of implementation of the federal mandate*.[137]

In *County of Los Angeles II*, the test claim statute at issue required counties to provide for indigent defendants "investigators, experts, and others for the preparation or presentation of the defense."[138] The court found that these requirements were not state mandated, but were required by the Sixth Amendment to the United States Constitution, and therefore "even in the absence of [the test claim statute], appellant and other counties would be responsible for providing ancillary services under the constitutional guarantees of due process."[139]

Then, the California Supreme Court, relying in part on *County of Los Angeles II*, analyzed Government Code section 17556(c) in *San Diego Unified School District v. Commission on State*

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[133] *California School Boards Association v. State of California* (*CSBA I*) (2009) 171 Cal.App.4th 1183, at p. 1214 ["[T]here is no difference in the effect" of sections 17556(c) and 17556(f).].

[134] Government Code section 17556(c) (Stats. 2010, ch. 719 (SB 856)).

[135] (1992) 11 Cal.App.4th 1564.

[136] (1995) 32 Cal.App.4th 805.

[137] *Hayes*, *supra*, 11 Cal.App.4th, at pp. 1592-1594 (Emphasis added.).

[138] 32 Cal.App.4th at p. 812, fn. 3 [quoting Penal Code section 987.9].

[139] *Id*, at p. 815.

Mandates, (*San Diego Unified*),[140] and the Third District Court of Appeal later applied that analysis to section 17556(f) in *California School Boards Association v. State of California* (*CSBA I*) with respect to activities required by the state that exceed the requirements of a ballot measure mandate.[141] In *San Diego Unified*, the Court considered whether due process procedures which were required to be provided to a public school student facing possible expulsion constituted a reimbursable state-mandated program. Specifically, the Court considered whether certain notice and recordkeeping requirements, and requirements pertaining to an expulsion hearing required by the statute, were sufficiently tied to a student's due process rights as to render the state-specified requirements a non-reimbursable federal mandate. The Court noted that "[t]he District recognizes, of course, that…it is not entitled to reimbursement to the extent Education Code section 48918 *merely implements federal due process law*."[142] The requirements of the Education Code that "merely implement[ed]" federal due process requirements were considered *adopted to implement* a federal mandate, and nonreimbursable pursuant to Government Code section 17556(c). However, with respect to those requirements "attributable to hearing procedures that *exceed* federal due process requirements,"[143] the Court reasoned that "challenged state rules or procedures that are *intended to implement* an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate."[144] The activities that "exceeded" the plain language of federal law, but that the Court found to be "incidental" to the federal mandate were listed in a footnote, and included adopting rules and regulations, preparing and sending notices to parents, and maintaining records, as follows:

> …(i) adoption of rules and regulations pertaining to pupil expulsions; (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing; (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing; (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion; (v) maintenance of a record of each expulsion, including the cause thereof; and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls).[145]

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[140] (2004) 33 Cal.4th 859.

[141] (2009) 171 Cal.App.4th 1183.

[142] 33 Cal.4th at p. 885 [emphasis added].

[143] *Ibid* [emphasis in original].

[144] *Id*, at p. 890.

[145] *Id*, at p. 873, fn. 11 [citing Education Code section 48918]; 890.

The Court found that these "assertedly 'excessive due process' aspects of Education Code section 48918 for which the District seeks reimbursement…fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost."[146]

The Third District Court of Appeal reasoned in *CSBA I* that "there is no difference in the effect" of sections 17556(c) and 17556(f).[147] The court determined that "the 'necessary to implement' language of [section 17556(f)] is consistent with article XIII B, section 6 because it denies reimbursement only to the extent that costs imposed by a statute are necessary to implement the ballot measure."[148] In addition, the court in *CSBA I* stated: "We also conclude that statutes imposing duties on local governments do not give rise to reimbursable costs if the duties are incidental to the ballot measure mandate and produce at most de minimis added costs."[149] The court explained:

> In *San Diego Unified*, the court considered whether costs resulting from statutes that were not adopted to implement federal due process requirements were reimbursable under article XIII B, section 6, and Government Code section 17556, subdivision (c). The court determined that "the Legislature, in adopting *specific statutory procedures* to comply with the general federal mandate, *reasonably articulated various incidental procedural protections*." It also determined that the statutes, "viewed singly or cumulatively, [ ] did not significantly increase the cost of compliance with the federal mandate." The court concluded that, "for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate."
>
> There is no reason not to apply this practical holding similarly to ballot measure mandates. Thus, the Commission must consider the holding of *San Diego Unified* in determining whether costs are reimbursable for ballot measure mandates.[150]

Therefore, based on the holdings of *Hayes*,[151] *County of Los Angeles II*,[152] *San Diego Unified*,[153] and *CSBA I*,[154] two possible tests for the exception to reimbursable costs under section 17556(f)

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[146] *Ibid*.

[147] *California School Boards Association v. State of California* (*CSBA I*) (2009) 171 Cal.App.4th 1183, at p. 1214.

[148] *Id*, at p. 1213.

[149] *Id*., at p. 1216.

[150] *CSBA*, *supra*, at p. 1217 [citing *San Diego Unified*, *supra*, 33 Cal.4th at pp. 889-890] [emphasis added].

[151] (1992) 11 Cal.App.4th 1564.

[152] (1995) 32 Cal.App.4th 805.

[153] (2004) 33 Cal.4th 859, at pp. 889-890.

arise, either of which will proscribe a finding of costs mandated by the state within the meaning of section 17514. Section 17556(f) proscribes reimbursement if:

- The activities and costs required by a statute are *necessary to implement* a relevant ballot measure mandate, meaning they would be required or compelled "even in the absence of" the test claim statute, or the state has no "true choice" as to the manner of implementation; or
- The duties imposed by the statute or executive order are *incidental to the ballot measure mandate* and produce at most *de minimis added costs*. This includes "specific statutory procedures to comply with the general federal [or ballot measure] mandate, [which] reasonably articulated various incidental [additional requirements]," so long as those specific procedures or incidental requirements "viewed singly or cumulatively, [ ] did not significantly increase the cost of compliance with the federal [or ballot measure] mandate."[155]

2. Government Code section 17556(f) applies here.

Here, as discussed in more detail below, the activities required by the remaining test claim statutes and alleged executive orders address the amendments to the form and content of ballots and sample ballots, and require additional information be provided to educate voters about the new top two primary system and voter-nominated offices. Although the activities required to be performed may exceed the plain language of Proposition 14, they are necessary to implement Proposition 14, or are incidental to the implementation of Proposition 14, and produce at most de minimis added costs, and are, therefore, not eligible for reimbursement within the meaning of article XIII B, section 6 and Government Code section 17556(f).

a) Prior court decisions and the Proposition 14 findings and declarations approved by the voters support the finding that the required activities imposed by the test claim statutes and executive orders are necessary to implement Proposition 14 or are incidental to the ballot measure mandate, and produce at most de minimis added costs in the context of the Top Two Primary program.

Before the adoption of Proposition 14, existing statutes and case law made clear that ballots must be written and prepared in a way that avoids confusing the voters, or providing inaccurate or misleading information. One of the cases described below, *Washington State Grange,*[156] specifically addressed a similar top-two primary system in another state, and that case was expressly acknowledged and identified in the voter materials for Proposition 14.

Under existing California law, avoidance of electoral confusion is an expected feature of the ballots to be prepared by counties. The Government Code requires the Attorney General to prepare a title and summary of every ballot measure,[157] which the Elections Code states "must be

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[154] (2009) 171 Cal.App.4th 1183, at pp. 1212-1217.

[155] *CSBA, supra,* at p. 1217 [citing *San Diego Unified, supra,* 33 Cal.4th at pp. 889-890].

[156] *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442.

[157] Government Code section 88002; Elections Code section 9002; 9050; 9051 (Stats. 1994, ch. 920 (SB 1547)).

true and impartial, and not argumentative or likely to create prejudice for or against the measure."[158] In addition, the courts have held that the title and summary prepared by the Attorney General "must reasonably inform the voter of the character and real purpose of the proposed measure."[159] The goal "is to avoid misleading the public with inaccurate information."[160]

In 2008, the United States Supreme Court heard a challenge to a top-two primary system in the State of Washington, and the Court acknowledged that the top-two primary, which had not yet been implemented and for which ballots had not yet been printed, could mislead the public with inaccurate information, in that candidates' party preference designations could be viewed as an endorsement by the party named, which could result in a First Amendment violation. As described in the *Washington State Grange* case, the voters in the State of Washington enacted a top-two primary system, similar to that enacted by Proposition 14 in California, wherein party preferences on the primary election ballots are chosen by the candidates, and do not reflect the endorsement or support of the party named. The voter initiative was brought in response to the Ninth Circuit Court of Appeal having invalidated the prior *blanket primary* system, based on impairment of the political parties' associational rights under the First Amendment.[161] A facial constitutional challenge was immediately brought by the Washington State Republican Party based on a perceived impairment of the political parties' associational rights resulting from the top-two primary. The Washington State Republican Party argued that the replacement primary system continued to violate its associational rights by usurping its right to nominate its own candidates and forcing it to associate with candidates it did not endorse.[162]

The Court characterized the early facial challenge as "sheer speculation," stating that "[i]t depends upon the belief that voters can be 'misled' by party labels." However, the Court further held that "[o]f course, it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties…" but "because I–872 has never been implemented, we do not even have ballots indicating how party preference will be displayed."[163] The Court held that "[i]t stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot," and that the inquiry must turn on "whether the ballot could conceivably be printed in such a way as to

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[158] Elections Code section 9051 (Stats. 1994, ch. 920 (SB 1547)).

[159] *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, at p. 440 [citing *Tinsley v. Superior Court* (1980) 150 Cal.App.3d 90.

[160] *Lungren*, *supra*, 48 Cal.App.4th at p. 440 [citing *Amador Valley Joint Union High School District v. State Board of Equalization*, (1978) 22 Cal.3d 208].

[161] See *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, at pp. 445-446; *Democratic Party of Washington State v. Reed* (2003) 343 F.3d 1198; *California Democratic Party v. Jones* (2000) 530 U.S. 567

[162] *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, at p. 448.

[163] *Id*, at p. 455.

eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment."[164] Specifically, the Court suggested:

> [T]he ballots might note preference in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as "my party preference is the Republican Party." Additionally, the State could decide to educate the public about the new primary ballots through advertising or explanatory materials mailed to voters along with their ballots.[165]

The Court concluded that "there are a variety of ways in which the State could implement [its top-two primary] that would eliminate any real threat of voter confusion," and thus upheld the law against the facial challenge alleging impairment of the parties' associational rights.[166]

The provisions of Proposition 14 are intended to avoid the potential constitutional pitfalls identified in *Washington State Grange*. Section (b) of the findings and declarations in Proposition 14 states in part that "[a]ll registered voters otherwise qualified to vote shall be guaranteed the unrestricted right to vote for the candidate of their choice in all state and congressional elections." Section (b) of the findings and declarations also states that "[a]ll candidates for a given state or congressional office shall be listed on a *single primary ballot*." And, section (c) of the findings and declarations states that "[a]t the time they register, all voters shall have the freedom to choose whether or not to disclose their party preference," and "[a]t the time they file to run for public office, all candidates shall have the choice to declare a party preference." Section (d) of the findings and declarations adopted by the voters explains, in accordance with *Washington State Grange*, that each candidate's party preference "shall accompany the candidate's name on both the primary and general election ballots," and "shall not constitute or imply endorsement of the candidate by the party designated, and no candidate for that office shall be deemed the official candidate of any party by virtue of his or her selection in the primary." Finally, section (f) of the findings and declarations adopted for Proposition 14 states that "[t]his act conforms to the ruling of the United States Supreme Court in *Washington State Grange v. Washington State Republican Party* (2008) 128 S.Ct. 1184."[167]

Accordingly, Proposition 14 eliminated partisan primary elections for all congressional and state offices (preserving partisan primaries for presidential candidates and party committee offices), and provided that any voter, regardless of party preference, could vote for any candidate for congressional or state office. The adoption of Proposition 14 by the voters amended article II, section 5 of the California Constitution, which provides, in pertinent part:

> (a) A voter-nomination primary election shall be conducted to select the candidates for congressional and state elective offices in California. All voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office *without regard to the political party*

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[164] *Id*, at p. 456.

[165] *Ibid*.

[166] *Ibid*.

[167] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.

(b) Except as otherwise provided by Section 6, a candidate for a congressional or state elective office may have his or her *political party preference*, or lack of political party preference, indicated upon the ballot for the office in the manner provided by statute. A political party or party central committee *shall not nominate* a candidate for any congressional or state elective office at the voter-nominated primary. This subdivision shall not be interpreted to prohibit a political party or party central committee from endorsing, supporting, or opposing any candidate for a congressional or state elective office. A political party or party central committee *shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office* other than a candidate who is one of the two highest vote-getters at the primary election, as provided in subdivision (a).

(c) The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees…[168]

Proposition 14 also amended article II, section 6 to provide that for nonpartisan candidates, including the Superintendent of Public Instruction, no party may nominate a candidate, and the candidate's party preference shall not be included on the ballot for nonpartisan office.[169]

Therefore, based on the plain language of the constitutional provisions amended by Proposition 14, as well as the findings and declarations approved by the voters in Proposition 14, a voter-nominated top two primary election system requires that

- All candidates for a particular office be listed on a unified *primary* election or *special primary* election ballot;[170]
- Voters of any party preference be permitted to vote for any candidate and have that vote counted; that candidates be permitted to select their party preference at the time they file their candidacy;
- Each candidate's designated party preference be included in the ballot for both primary and general election ballots;
- Parties be permitted to informally nominate candidates for voter-nominated office, but no longer have an automatic right to have their chosen candidate appear on the ballot for the general election; and

[168] California Constitution, article II, section 5 (as amended by Proposition 14, adopted June 8, 2010) [emphasis added].

[169] California Constitution, article II, section 6 (as amended by Proposition 14, adopted June 8, 2010).

[170] All candidates are already required be listed on a *general* election ballot under prior law.

- Only the top two "vote-getters" for any voter-nominated office advance to the general election, irrespective of those two candidates' stated party preferences.

Finally, Proposition 14 makes no changes to presidential primary elections, and retains party committee offices as partisan-nominated, and thus requires the Legislature to continue to provide for separate ballots for those offices.

b) Activities Pertaining to the Reorganization of Ballots: Elections Code sections 13102 and 13110, as amended by Statutes 2009, chapter 1 (SB 6) are necessary to implement a Proposition 14.

The activities required by sections 13102 and 13110, as amended, pertain to the consolidation and reorganization of primary election ballots in order to implement a top two candidates open primary consistently with Proposition14.

Before the adoption of Proposition 14, existing law required the county elections official or county clerk to "provide ballots for any elections within his or her jurisdiction, and…cause to be printed on them the name of every candidate whose name has been certified to or filed with the proper officer pursuant to law, and who, therefore, is entitled to a place on the appropriate ballot."[171] Prior section 13110 required that the group of names appearing on the ballot shall be the same for all voters entitled to vote for candidates for that office.[172] Prior section 13102 required separate ballots for *partisan* primary elections for each qualified political party, to be printed together with the nonpartisan ballot, if possible,[173] and provided that voters would receive a partisan ballot only if registered with the particular political party whose ballot they requested, or if the party whose ballot was requested adopted a rule permitting nonparty voters to vote that ballot.[174] The names of candidates appearing on each of the separate partisan primary ballots were those that were duly nominated by registered party voters.[175]

Prior to Proposition 14, all congressional and state offices were elected by this partisan nominating process.[176] However, Proposition 14 removed all congressional and state offices from the *partisan* nominating process, and reclassified those offices as "voter-nominated." Proposition 14 provided that all voters would have the opportunity to vote for any candidate, and that candidates would have the opportunity to self-select their party preferences. Proposition 14 also provided that the "Legislature shall provide for partisan elections" for presidential and party committee candidates. As noted above, the Proposition 14 findings and declarations section (b) states expressly that "[a]ll candidates for a given state or congressional office shall be listed on a single primary ballot." Accordingly, separate partisan ballots are still provided for in the Elections Code and the Constitution, but only for presidential and party committee offices; and voter-nominated offices are included in the nonpartisan primary ballot, along with the

[171] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[172] Elections Code section 13110 (Stats. 1994, ch. 920 (SB 1547)).

[173] Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[174] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[175] Elections Code sections 8062; 13000 (Stats. 1994, ch. 920 (SB 1547)).

[176] California Constitution, article II, section 5 (as amended by Stats. 2004, Res. C. 103 (SCA 18) (Proposition 60, approved November 2, 2004)).

candidate's self-ascribed party preference designation, which previously would only have been printed in the general election ballot.

In conjunction with placing Proposition 14 before the voters, the Legislature enacted Statutes 2009, chapter 1, which expressly stated that it would become operative only if Proposition 14 were adopted by the voters.[177] Statutes 2009, chapter 1 amended Elections Code section 13102 to change all "party affiliation" language to "party preference,"[178] and sections 13102 and13110 to provide for a unified nonpartisan primary ballot, containing the names of all candidates for voter-nominated offices and nonpartisan offices.[179] These amendments do not of themselves impose any new activities on counties; the requirement to print ballots is found in section 13000, which is not new.[180] Moreover, the scope and extent of the counties' duties under sections 13102 and 13110 are not clearly expanded by the test claim statutes; counties were always required to include in the ballot the names of all candidates duly nominated, and both sections 13102 and 13110 were amended only to ensure that voter-nominated offices would be included in the nonpartisan ballot, and party committee offices would remain partisan, consistent with the requirements of Proposition 14.

Claimant alleges increased costs, asserting that "[e]ach ballot and sample ballot will [now] list all candidates for each voter-nominated contest, regardless of party preference or lack of party preference," resulting in "[i]ncreased length of ballot and sample ballot to accommodate lengthy voter-nominated contests."[181]

However, claimant's allegations do not describe a new activity or task imposed on counties, and no new activity is found in the plain language of sections 13102 and 13110, as amended; the same offices and candidates previously included in primary election ballots are now required to be included in the nonpartisan ballot provided to all voters. Even if the reorganization of ballots imposes additional costs on counties, increased costs alone do not amount to a new program or higher level of service.[182]

Moreover, any costs resulting from the "increased length of ballot [*sic*]" are imposed by the voter-enacted ballot measure, Proposition 14, and are not mandated by the state. As noted above, the Proposition 14 findings and declarations expressly call for a "single primary ballot,"[183] and the plain language of article II, section 5, as amended, provides that "[a]ll voters may vote at a voter-nominated primary election for any candidate for congressional and state

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[177] Statutes 2009, chapter 1 (SB 6) section 67.

[178] Elections Code sections 13102; 13105 (as amended by Stats. 2009, ch. 1 (SB 6)).

[179] Elections Code sections 13102; 13110 (as amended by Stats. 2009, ch. 1 (SB 6)).

[180] See Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[181] Exhibit A, Test Claim, at pp. 6-7.

[182] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830.

[183] Exhibit F, Text of Ballot Measure, Proposition 14.

elective office without regard to the political party preference disclosed by the candidate or the voter."[184]

Therefore, the tests described above to determine when duties imposed by a test claim statute are "necessary to implement" a ballot measure both apply to this situation. Because the California Constitution, as amended by Proposition 14, calls for all voters to be permitted to vote for any candidate (except presidential or party committee candidates), counties would be required, "even in the absence of"[185] the test claim statutes, to provide the list of candidates for voter-nominated office to *all voters* (i.e., to include voter-nominated offices in the nonpartisan ballot). In addition, the amendments made to sections 13102 and 13110 were a matter of "no true choice"[186] for the Legislature; the Proposition 14 findings and declarations call for a "single primary ballot," as noted above, but also state that "[t]his act makes no change in current law as it relates to presidential primaries…" and "[p]olitical parties may also adopt such rules as they see fit for the selection of party officials…"[187] Therefore, the amendments to sections 13102 (adding "voter-nominated" offices to the nonpartisan ballot provided to all voters) and 13110 (providing for political party committee and presidential candidates to remain on a separate partisan ballot) implemented Proposition 14 as a matter of "no true choice."

In comments submitted in response to the draft proposed decision, claimant disputes this conclusion. Claimant argues that the language of Proposition 14 "is plain and clear in its directive that presidential primary elections be open." Claimant reasons that an open presidential primary means "there is no need to prepare a partisan ballot in any primary election." Therefore, claimant concludes that "[t]he partisan ballot rules found in the codes changed by SB 6 set out specific rules for political party ballots in primary elections, rules that were not contemplated in the SCA 4/Proposition 14." Therefore, "[t]his is not needed to implement, nor incidental to SCA 4/Proposition 14."[188]

Claimant's comments do not address the analysis above, in that the changes to the ballot effected by SB 6 were made to implement a voter-nominated primary for all offices *except* presidential and political party candidates. No change was intended to the party-centered nominating process for presidential candidates,[189] and yet the provision for partisan primary ballots for presidential elections is the apparent focus of claimant's comments. In addition, it is unclear on what basis claimant believes that an "open presidential primary" would not require partisan ballots. In *Washington State Grange, supra*, the Court described an open primary as follows:

> The term "blanket primary" refers to a system in which "any person, regardless of party affiliation, may vote for a party's nominee." A blanket primary is distinct from an "open primary," in which a person may vote for any party's nominees,

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[184] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[185] *County of Los Angeles II*, *supra*, (1995) 32 Cal.App.4th 805.

[186] *Hayes*, *supra*, 11 Cal.App.4th, at pp. 1592-1594.

[187] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[188] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 5.

[189] See Exhibit F, Text of Ballot Measure, Findings and Declarations, section (f) ["This act makes no change in current law as it relates to presidential primaries."].

> but must choose among that party's nominees for all offices, and the more traditional "closed primary," in which "only persons who are members of the political party ... can vote on its nominee."[190]

Therefore, an "open presidential primary," as required by Proposition 14, is one in which voters may request the ballot of any party, "but must choose among that party's nominees for all offices…" Claimant's suggestion that partisan ballots are not necessary at all under Proposition 14 is more akin to a "blanket primary," which the Court in *California Democratic Party v. Jones* held an unconstitutional violation of the First Amendment rights of political parties.[191] The Commission finds that claimant's comments do not alter the above analysis.

Based on the foregoing, the requirements of sections 13102 and 13110 to include all candidates for voter-nominated offices in the nonpartisan ballot provided to all voters, and to include political party candidates only in the partisan ballots provided to voters registered as disclosing a preference for that party, are necessary to implement the plain language requirements of Proposition 14, and therefore do not impose costs mandated by the state.

c) *Activities Pertaining to the Form and Content of Candidates' Ballot Entries: Elections Code section 13105, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3; and portions of Secretary of State's Memoranda CC/ROV #11005, CC/ROV #11125, and CC/ROV #12059 are either necessary to implement Proposition 14 or are incidental to the implementation of Proposition 14 and produce at most de minimis costs in the context of the Top Two Primary.*

The activities required by section 13105, as amended, and by portions of the Secretary of State's Memoranda CC/ROV #11005, CC/ROV #11125, and CC/ROV #12059, pertain to the form and content of each candidate's entry on the primary, general, and special election ballots.

Before the adoption of Proposition 14, existing law required the county elections official or county clerk to "provide ballots for any elections within his or her jurisdiction, and…cause to be printed on them the name of every candidate whose name has been certified to or filed with the proper officer pursuant to law, and who, therefore, is entitled to a place on the appropriate ballot."[192] Existing law requires separate ballots for *partisan* primary elections for each qualified political party, to be printed together with the nonpartisan ballot, if possible,[193] and voters receive a partisan ballot only if registered with the particular political party, or if the party whose ballot was requested has adopted a rule permitting nonparty voters to vote that ballot.[194] The names of candidates appearing on each of the separate partisan primary ballots are those that are duly nominated by registered party voters.[195] In a *general* election for partisan office, the nominee of each qualified political party that participated in the partisan primary election is

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[190] *Washington State Grange, supra* 552 U.S. 442, at p. 445, Fn. 1 [citing *California Democratic Party v. Jones* (2000) 530 U.S. 567, at pp. 570; 576, n. 6].

[191] 530 U.S. 567, at p. 577.

[192] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[193] Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[194] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[195] Elections Code sections 8062; 13000 (Stats. 1994, ch. 920 (SB 1547)).

printed on the ballot, along with the nominee's political party affiliation,[196] or the word "independent."[197] Seven qualified political parties participated in the 2012 presidential election, requiring seven separate partisan ballots, and requiring county elections officials to print the names of as many as seven party nominees for the general election.[198]

Absent Proposition 14, all congressional and state offices would have been elected by this partisan nominating process.[199] What has changed is the definition and scope of "partisan" offices, and the addition of a new category, called "voter-nominated" offices: Proposition 14 removed all congressional and state offices from the partisan nominating process, and reclassified those offices as "voter-nominated." Proposition 14 also provided that all voters would have the opportunity to vote for any candidate, and that candidates would have the opportunity to self-select their party preferences. In so doing, Proposition 14 significantly limited the importance of party affiliation in primary elections, and provided that only the top two candidates for any office would advance to the general election, regardless of their stated party preferences. Accordingly, separate partisan ballots are still provided for in the Elections Code and the Constitution, but only for presidential and party committee offices; and *all candidates* for voter-nominated offices are included in the nonpartisan primary ballot, along with each candidate's self-ascribed party preference designation, which previously would only have been printed in the general election ballot.

In conjunction with placing Proposition 14 before the voters, the Legislature enacted Statutes 2009, chapter 1, which expressly stated that it would become operative only if Proposition 14 were adopted by the voters.[200] Statutes 2009, chapter 1 amended Elections Code section 13105 to provide that in *both the primary and general election ballots,* each candidate for voter-nominated office would have his or her party *preference* indicated in the ballot, with the words "My party preference is the _____ Party," or the words "No Party Preference." If a candidate chose not to have his or her party preference listed in the ballot, the space for party preference would be left blank.[201] Secretary of State's Memorandum CC/ROV #11005, issued January 26, 2011, restated and clarified the requirements of amended sections 13105 and 13107[202] as applied to *special elections,* and required that counties print the name, party preference, and ballot designation of each candidate on three lines in the ballot.[203] CC/ROV #11125, issued November

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[196] Elections Code section 13105 (Stats. 1994, ch. 920 (SB 1547)).

[197] See Elections Code section 8300 et seq. (Stats. 1994, ch. 920 (SB 1547)).

[198] Exhibit A, Test Claim, at p. 72.

[199] California Constitution, article II, section 5 (as amended by Stats. 2004, Res. C. 103 (SCA 18) (Proposition 60, approved November 2, 2004)).

[200] Statutes 2009, chapter 1 (SB 6) section 67.

[201] Elections Code section 13105 (as amended by Stats. 2009, ch. 1 (SB 6)).

[202] Section 13107 was not pled in the test claim filing, and the Commission therefore does not have jurisdiction to analyze this section. However, the plain language of section 13107 addresses the form and content of the candidate's ballot designation, usually a few words describing the candidate's current occupation, vocation, or office.

[203] Exhibit A, Test Claim, at pp. 52-55.

23, 2011, provided for shortening the party preference designation phrases required to be printed in the ballot, from a full sentence ("My party preference is the…") to "Party Preference: _____." CC/ROV #11125 also provided for party name abbreviations to be used to aid in solving "ballot printing and cost challenges."[204] On February 10, 2012, the Legislature enacted Statutes 2012, chapter 3 as an urgency measure, which amended section 13105 to adopt the shortened party preference designation phrases called for by CC/ROV #11125, and to eliminate the option for a candidate for voter-nominated office to withhold a registered party preference (section 8002.5, discussed above, was similarly amended).[205] CC/ROV #12059, issued on the same day that Statutes 2012, chapter 3 took effect, restated the shortened party preference designation phrases, this time omitting the option "Party Preference: Not Given," in accordance with the amendment to section 13105, and restated the requirements of the earlier orders to print the required candidate information on three consecutive lines and to utilize the party name abbreviations.[206]

Claimant alleges that the amendments to section 13105, as well as the requirements imposed by the alleged executive orders, impose state-mandated increased costs for the preparation and printing of ballots by requiring a certain font size and lengthy wording, and using a three line format on the ballots to reflect the candidates' party preference.

Claimant's allegations are not persuasive. The courts have made clear that increased costs alone do not constitute a state mandated new program or higher level of service.[207] Although counties may experience additional costs to comply with the statutes and executive orders that implement Proposition 14, those costs are not mandated by the state, but result from the voters adoption of Proposition 14. Counties were always required to print ballots, and to provide the names of all candidates eligible for nomination or election.[208] Under prior law, counties would provide separate partisan ballots for each qualified political party for a primary election, and then print each party's nominee in a single ballot for a general election. Now, pursuant to Proposition 14 and the test claim statutes, ballots have been reorganized, and the group of candidates appearing on the single unified primary ballot has increased, and thus the length of the nonpartisan ballot will be increased, in the usual case; but the added length itself does not constitute a new activity.

Nevertheless, the addition of a party preference designation to primary election ballots is a new activity, and the use of specific wording, which claimant describes as "lengthy," also constitutes an additional or new activity.

Thus, the plain language of the above-described statutes and executive orders requires counties to perform the following new activities:

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[204] Exhibit A, Test Claim, at p. 57.

[205] Elections Code section 13105 (Stats. 2012, ch. 3 (AB 1413)).

[206] Exhibit A, Test Claim, at pp. 70-71.

[207] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830.

[208] See Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

- Identify in the ballot, for voter-nominated offices in a *primary election*, including a *special primary election*, the political party designated by the candidate pursuant to section 8002.5;[209]
- Identify each candidate's name, party preference, and ballot designation on three consecutive lines in the ballot.[210]
- Beginning November 23, 2011, utilize approved party name abbreviations, as necessary.[211]
- With regard to a candidate's party preference designation:
    - For the period between July 1, 2011 and November 23, 2011,[212] identify each candidate's party preference in *both the primary and general election ballots, including special elections*, with the words "My party preference is the _____ Party," "No Party Preference," or "My party preference is the _____ Party," with the space left blank;"[213]
    - For the period between November 23, 2011 and February 10, 2012,[214] identify each candidate's party preference in *both the primary and general election ballots* with the words "Party Preference:_____," "Party Preference: None," or "Party Preference: Not Given;"[215] And,
    - Beginning February 10, 2012, identify each candidate's party preference in *both the primary and general election ballots* with the words "Party Preference:_____," or "Party Preference: None;"[216]

However, while the plain language imposes the above new activities, the Commission finds that these activities are necessary to implement Proposition 14 or are incidental to the ballot measure

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[209] Elections Code section 13105 (Stats. 2009, ch. 1 (SB 6)).

[210] Secretary of State's Memorandum CC/ROV #11005, issued January 26, 2011.

[211] Secretary of State's Memorandum CC/ROV #11125, issued November 23, 2011.

[212] The potential period of reimbursement begins July 1, 2011, based on the filing date of the test claim. As of November 23, 2011, CC/ROV #11125 required counties to use the shortened "Party Preference: _____." The Commission takes official notice that at least one special election was held within between July 1, 2011 and November 23, 2011 in which candidates for a voter-nominated office appeared on the ballot. (See Exhibit F, Special Election, Congressional District 36, July 12, 2011.).

[213] Elections Code section 13105 (Stats. 2009, ch. 1 (SB 6)); CC/ROV #11005, issued January 26, 2011.

[214] The Commission is unaware of any special elections between November 23, 2011 and February 10, 2012 in which a voter-nominated candidate appeared on the ballot.

[215] Secretary of State's Memorandum CC/ROV #11125, issued November 23, 2011.

[216] Elections Code section 13105 (as amended by Stats. 2012, ch. 3 (AB 1413) effective February 10, 2012).

mandate and produce at most de minimis added costs, and are, therefore, not reimbursable pursuant to Government Code section 17556(f).

i) The requirement to identify each candidate's party preference designation in primary and special primary ballots is necessary to implement Proposition 14.

The requirements of section 13105 to add each candidate's party preference designation to the *primary election* ballot,[217] and of CC/ROV #11005 to include each candidate's party preference in a *special primary election* ballot,[218] are necessary to implement the plain language requirements of Proposition 14. Prior to Proposition 14, as noted above, counties were required to prepare separate primary ballots for each qualified political party for any election containing "partisan offices."[219] This could include any or every primary or special primary election: all congressional and state offices were then party-nominated.[220] As discussed above, pursuant to Proposition 14, all candidates for congressional and state offices are now included in the nonpartisan ballot given to all voters, irrespective of their party preference or affiliation. Therefore some indication on the ballot of party preference attributed to each candidate is required, both to inform the voters, and to avoid impairment of the parties' First Amendment associational rights, as discussed above.[221] Moreover, article II, section 5 expressly provides, as amended, that "a candidate for a congressional or state elective office *may have his or her political party preference, or lack of political party preference, indicated upon the ballot* for the office in the manner provided by statute."[222] Accordingly, section 13105 (requiring party preference to be included in both primary and general election ballots) gives effect to the express requirements of the California Constitution, as amended by Proposition 14, and the express language of the Proposition 14 findings and declarations adopted by the voters. And likewise that portion of CC/ROV #11005 that requires each candidate's party preference to be indicated in a special primary ballot also gives effect to the express requirements of Proposition 14 and the express language of the findings and declarations.

As discussed above, the court found in *Hayes v. Commission on State Mandates* that a test claim statute could not impose a state-mandated cost if the state had no "true choice" in the manner of implementation of the federal mandate.[223] And, in *County of Los Angeles II*, the court held that an activity or requirement of a test claim statute was not "state-mandated" if the local government would be required by federal law [or in this case, a ballot measure] to perform the activity or incur the cost "even in the absence of" the test claim statute.[224] Here, the

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[217] Elections Code section 13105 (Stats. 2009, ch. 1 (SB 6)).

[218] CC/ROV #11005, found at Exhibit A, Test Claim, at p. 54.

[219] Former Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[220] California Constitution, article II, section 5 (as amended by Stats. 2004, ch. 103 (Proposition 60, November 2, 2004)).

[221] See *Washington State Grange, supra*, (2008) 552 U.S. 442, at pp. 445-446.

[222] California Constitution, article II, section 5 (as amended by Stats. 2009, ch. 2 (Proposition 14)).

[223] 11 Cal.App.4th, at pp. 1592-1594.

[224] 32 Cal.App.4th at p. 815.

requirements to include each candidate's party preference designation in primary and special primary ballots is both a matter of "no true choice," and would be required "even in the absence of" the test claim statute (section 13105) and executive order (CC/ROV#11005).

Based on the foregoing, the portion of section 13105, as amended by Statutes 2009, chapter 1, and Statutes 2012, chapter 3,and that portion of CC/ROV #11005, which require party preferences to be indicated in a *primary* or *special primary* election ballot, do not impose costs mandated by the state pursuant to Government Code section 17556(f).

ii) The requirement to identify each candidate's party preference in primary and general election ballots with specified party preference language is incidental to the implementation of Proposition 14 and produces at most de minimis added costs in the context of the Top Two Primary.

The remaining requirements of section 13105, as amended by Statutes 2009, chapter 1; interpreted by CC/ROV #11005 and CC/ROV #11125; and as subsequently amended by Statutes 2012, chapter 3 and restated by CC/ROV #12059; to identify each candidate's party preference in *both the primary and general election ballots* with *specified party preference language* (the language varies with subsequent amendments and based on interpretation in the Secretary of State's Memoranda, as noted above) are incidental to the ballot measure mandate and produce at most de minimis added costs, pursuant to *San Diego Unified*, *supra*, and *CSBA I*, *supra*.[225] In addition, the requirement of the alleged executive orders to print each candidate's name, party preference designation, and ballot designation in a "three-line format" is incidental to the ballot measure mandate and produces at most de minimis added costs.

Under prior law, candidates' party *affiliations* were only included in the *general* election ballot, at which time each candidate appearing on the ballot would be the official nominee of a qualified political party,[226] and therefore only the *name* of the candidate's affiliated party was needed to identify that nomination.[227] Similarly, with respect to primary election ballots under prior law, each candidate appearing on the *separate partisan* ballot of his or her political party would be a duly-nominated candidate affiliated with that party, and therefore no indication of party affiliation was needed.[228] And, under prior law, a candidate's party affiliation could be placed to the right of the name, or below the name if necessary,[229] and a ballot designation (usually the candidate's current or previous occupation or office), was required to be placed beneath the candidate's name.[230] However, pursuant to Proposition 14, the concept of "party *affiliation*," with respect to voter-nominated offices has been replaced by the concept of a candidate's "party *preference*," which the Proposition 14 findings and declarations make clear is chosen *by the*

[225] *San Diego Unified*, 33 Cal.4th at p. 873, fn. 11; *CSBA I*, 171 Cal.App.4th 1183, at p. 1214.

[226] See former California Constitution, article II, section 5 (as amended by Stats. 2004, ch. 103 (Proposition 60, November 2, 2004)).

[227] Elections Code section 13105 (Stats. 1994, ch. 920 (SB 1547)).

[228] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[229] Elections Code section 13105 (Stats. 1994, ch. 920 (SB 1547)).

[230] Elections Code section 13107 (Stats. 1994, ch. 920 (SB 1547)).

candidate and does not reflect the endorsement or support of the party named.[231] A candidate appearing in either a primary or general election ballot need not be *affiliated* with any particular party, or any party, and may declare a party preference at the time he or she files a declaration of candidacy.[232] Furthermore, the *general* election ballot no longer consists of the official party *nominees* for each office: article II, section 5 states that "[a] political party *shall not have the right* to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election."[233] Thus, not only is it inaccurate to suggest that the party named in conjunction with each candidate is that candidate's party affiliation, it also is inaccurate and misleading to fail to indicate in the text of the ballot itself that the party preference of the candidate is chosen by the candidate, and not necessarily reflective of the party's endorsement or approval of the candidate. Accordingly, the *party preference designation* required by section 13105 (which replaced party *affiliation* previously required only for general election ballots) was expanded to provide some context, and resulted in more often being placed on the line below the candidate's name.[234]

In *Washington State Grange*, *supra*, the United States Supreme Court recognized that a top-two primary system imposed by direct voter enactment may lead to voter confusion, and may give rise to a constitutional challenge on the basis of an impairment of the political parties' associational rights under the First Amendment.[235] Helpfully, the Court suggested remedial measures that might be implemented to avoid such challenge: "the ballots might note preference in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as 'my party preference is the Republican Party.'"[236] Accordingly, the state has implemented the Court's suggestions in Elections Code section 13105, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, and as interpreted by the Secretary of State in CC/ROV #11005, CC/ROV #11125, and CC/ROV #12059. Section 13105, as noted above, requires counties to include in both the primary and general election ballots a party preference designation "in substantially the following form: 'My party preference is the _____ Party.'"[237] Later interpretations of that section, pursuant to CC/ROV #11125,[238] followed by a statutory amendment effected by Statutes 2012, chapter 3, shortened the party preference designation, as described above, to simply "Party

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[231] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[232] However, note that sections 8002.5 and 8040, discussed above, require a candidate to certify 10 years of party affiliation/party preference history at the time he or she files a declaration of candidacy.

[233] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[234] See Exhibit A, Test Claim, at p. 54 [CC/ROV #11005, stating that the need to place party preference below candidate's name "will be more likely to occur now, given the new political party identification sentences required by the Top Two Candidates Open Primary Act"].

[235] *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442.

[236] *Id*, at p. 456.

[237] Elections Code section 13105 (as amended, Stats. 2009, ch. 1 (SB 6)).

[238] See Exhibit A, Test Claim, at p. 57.

Preference: _____."[239] But the requirement to print in the ballot something more than merely the name of a party preferred by the candidate remains. As noted above, section (a) of the Proposition 14 findings and declarations expressly invokes Statutes 2009, chapter 1,[240] and findings and declarations section (f) expressly states that the "act conforms to the ruling in *Washington State Grange*. . ."[241] The amendments to section 13105, and the later interpretations of that section, along with the statutory "clean-up" of Statutes 2012, chapter 3,[242] are therefore intended to implement Proposition14 in a manner that does not lead to a confusing or misleading ballot, which could give rise to a constitutional challenge, as was the case in the State of Washington.

Moreover, as discussed above, the Court in *San Diego Unified* found that where a test claim statute provides "specific statutory procedures," designed to "set forth…details that were not expressly articulated" in prior law or in the ballot measure, and which do not "significantly increase the cost of compliance," those activities should be viewed as "part and parcel" of the underlying [ballot measure] mandate, and thus non-reimbursable.[243] The activities that the Court in *San Diego Unified* found were "incidental and de minimis" included a number of notice and recordkeeping requirements related to providing due process to students under threat of expulsion from public school, but which the Court presumed to be "excessive due process" aspects of the statute:

> …(i) adoption of rules and regulations pertaining to pupil expulsions; (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing; (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing; (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion; (v) maintenance of a record of each expulsion, including the cause thereof; and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls).[244]

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[239] Elections Code section 13105 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[240] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[241] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[242] See Statutes 2012, chapter 3 (AB 1413) ["This bill would make technical revisions to provisions of the Elections Code to reflect the 'voter-nominated primary election process.'"].

[243] 33 Cal.4th at p. 889.

[244] *Id,* at p. 873, fn. 11 [citing Education Code section 48918]; 890.

The Court found these "excessive" activities to be part and parcel of the existing federal mandate, and denied reimbursement under article XIII B, section 6 of the California Constitution.[245]

Here, the requirements of section 13105 to include a short party preference designation sentence[246] (later reduced to only a few words[247]) in the primary and general election ballots, and to print each candidate's entry, including name, party preference, and ballot designation, on three consecutive lines, when viewed in context of the existing and other new requirements, impose at most de minimis added costs. As shown above, existing law required that counties produce ballots for every election; and the plain language of Proposition 14 and Elections Code sections 13102 and 13110 require including all voter-nominated offices in a single nonpartisan primary ballot. The plain language of amended section 13105, requiring including each candidate's party preference in the primary ballot (in addition to the general election ballot, which was already required), is also shown above to be required by the plain language of Proposition 14 (i.e., required even in the absence of the test claim statutes, and the state had "no true choice"). Moreover, because a general election now includes only two candidates for each office, rather than a candidate from each participating qualified political party, there may often be a cost savings inherent in the Top Two Candidates Open Primary Act, related to the form and content of general election ballots. In that context, the asserted new requirement to print a short phrase or sentence identifying each candidate's party preference, and to do so on three lines, is significantly less costly and burdensome than the notice and recordkeeping activities denied by the California Supreme Court in *San Diego Unified*, and therefore the activities are incidental to the ballot measure mandate and produce at most de minimis added costs.

In comments submitted on the draft proposed decision, claimant states specifically that "[t]he wording 'party preference' is not required ballot wording in SCA 4/Proposition 14 and is not necessary to implement the plain language requirements of SCA 4/Proposition 14." In addition, claimant argues that "[f]or counties that are required to provide materials in alternate languages, this 'party preference' wording after each voter-nominated candidate makes the official ballot longer by one line for each candidate on the ballot, in some cases several inches longer." Finally, claimant alleges that all of this results in increased costs, as follows:

> The ballot is the most costly part of any election and the legislation and CCROVs could have directed the counties to provide a definition of the party preference in the sample ballot pamphlet at a much reduced, and even de minimus, cost. They did not. Adding the words 'party preference' after each voter-nominated candidate on the ballot results in longer ballots cards and even additional ballot cards. The resulting costs are not de minimus. [*Sic*].[248]

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[245] 33 Cal.4th at p. 873, fn. 11; 889-890.

[246] Elections Code section 13105 (as amended, Stats. 2009, ch. 1 (SB 6)).

[247] See Exhibit A Test Claim, at p. 57 [CC/ROV #11125].

[248] Exhibit E, Claimant Comments on Draft Proposed Decision, at pp. 5-6.

As explained above, increased costs alone do not constitute a state mandate,[249] and counties were already required under prior law to print ballots.[250] Moreover, as the analysis above demonstrates, some additional identifying information for each candidate *is* required, in order to satisfy state law requirements that ballots may not be misleading[251] and the United States Supreme Court's ruling with respect to the First Amendment associational rights of political parties.[252] And, Proposition 14 itself expressly states that candidates must be allowed to indicate their party preference on the ballot for voter-nominated offices.[253] Finally, as shown above, Proposition 14 itself provides that: "a candidate for a congressional or state elective office may have his or her political party preference, or lack of political party preference, indicated upon the ballot…" And finally, given that some additional information and context (beyond merely a party name) is required, the additional requirement to identify the party with a short phrase, and to utilize three lines for each candidate's entry, are incidental to the ballot measure mandate and produce at most de minimis added costs, in context. Claimant's comments do not alter the above analysis.

Based on the foregoing, the Commission finds that the requirements of section 13105, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, as well as those portions of CC/ROV #11005, CC/ROV #11125, and CC/ROV #12059 which pertain to the party preference designation phrases required for each candidate's entry on the ballot do not impose costs mandated by the state pursuant to Government Code section 17556(f).

d) Activities Pertaining to the Receipt and Printing of Party Endorsements in the Sample Ballot: Elections Code section 13302, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3; and portions of Secretary of State's Memoranda CC/ROV #11005, CC/ROV #12059 are intended to implement and are incidental to Proposition 14 and produce at most de minimis additional costs in the context of the Top Two Primary.

Elections Code section 13302, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, as well as portions of CC/ROV #11005 and CC/ROV #12059, require counties to receive and print in the voter information portion of the sample ballot, for any election, including a special election, a list of party endorsements timely submitted by a qualified political party. In addition, CC/ROV #11005 interprets section 13302 to require counties to treat as timely, for purposes of special elections, a list of endorsements received from a qualified political party not

[249] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830.

[250] Former Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[251] *Lungren, supra*, 48 Cal.App.4th at p. 440 [citing *Amador Valley Joint Union High School District v. State Board of Equalization*, (1978) 22 Cal.3d 208].

[252] *Washington State Grange, supra*, (2008) 552 U.S. 442, at pp. 445-446.

[253] California Constitution, article II, section 5 (as amended by Stats. 2009, ch. 2 (Proposition 14)).

later than *43 days* prior to a *special primary* election, and to "work with any interested qualified political parties who wish to submit lists" of endorsements for a *special general* election.[254]

Under existing law, each county elections official is required to "provide ballots for any election within his or her jurisdiction."[255] Separate ballots are required for *partisan* primary elections[256] for each qualified political party, and for partisan offices each party participating in the primary election has the right to participate in the general election.[257]

Pursuant to and after Proposition 14, all candidates for voter-nominated office are included on a single primary ballot, and the general election ballot contains the names only of the two candidates for each office who received the highest vote totals in the primary election, regardless of those candidates' party preference. Partisan elections are still provided for presidential and party committee candidates, but political parties no longer have the right to nominate a candidate for voter-nominated office, and the candidates appearing on the ballot for voter-nominated office need not be nominated only by members of the party for which the candidate states a preference.[258] However, the findings and declarations section (e) in Proposition 14 states, in pertinent part, as follows:

> Nothing in this measure shall restrict the parties' right to contribute to, endorse, or otherwise support a candidate for state elective or congressional office. Political parties may establish such procedures as they see fit to endorse or support candidates or otherwise participate in all elections, and they may informally "nominate" candidates for election to voter-nominated offices at a party convention or by whatever lawful mechanism they so choose, other than at state-conducted primary elections.[259]

Accordingly, in conjunction with the adoption of Proposition 14, the Legislature amended Elections Code section 13302 to require counties to receive and print in the sample ballot a list of party endorsements timely submitted by a qualified political party.[260] CC/ROV #11005 interpreted section 13302 to apply also to a special election, and directed counties to treat as

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[254] Exhibit A, Test Claim, at pp. 52-5 [emphasis added].

[255] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[256] Note, however, that the category of partisan offices has been significantly narrowed by Proposition 14.

[257] See Elections Code section 13102 (Stats. 2007 ch. 515 (AB 1734); Stats. 2009, ch. 1) [new category of "voter-nominated" offices added to the nonpartisan ballot, but separate ballot still required for partisan offices]. See also, California Constitution, article II, section 5 (as amended, Stats. 2004, ch. 103 (Proposition 60, November 2, 2004); Stats. 2009, ch. 2 (SCA 4) (Proposition 14, June 8, 2010)) [political party participating in partisan primary election has the right to participate in general election for partisan office, but all congressional and state offices now designated voter-nominated].

[258] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[259] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[260] Elections Code section 13302(b) (as amended, Stats. 2009, ch. 1 (SB 6)).

timely a list of endorsements received not later than 43 days prior to the election,[261] and Statutes 2012, chapter 3 made minor technical changes to section 13302, which clarified that counties were only required to print the list of endorsements if timely submitted.[262]

Claimant argues that printing a list of party endorsements is not necessary to implement Proposition 14, and "makes printing sample ballot booklets much more expensive by increasing the number of pages that must be included." Claimant also alleges that printing party endorsements "increases staff costs because counties must verify the information submitted to ensure it complies with all requirements."[263]

Claimant's focus on costs is not persuasive, and the existing requirement to print the ballot was not added or amended by the test claim statutes.[264] However, to the extent claimant alleges increased staff time and additional information being included in the ballots and sample ballots pursuant to amended section 13302, the following new activities are identified for analysis:

- In connection with any election at which a candidate for voter-nominated office will appear on the ballot, receive from a qualified political party a list of endorsements for candidates for voter nominated office, and print the list, if provided not later than 43 days prior to a *special primary* election, or 83 days prior to a primary or general election, in the voter information section of the sample ballot.[265]

The Commission finds that these activities, as explained herein, are incidental to the ballot measure mandate and produce at most de minimis added costs, and therefore do not impose costs mandated by the state pursuant to Government Code section 17556(f).

As discussed above, the United States Supreme Court in *Washington State Grange* recognized that a top two candidates primary election system could give rise to a constitutional challenge based on a perceived threat to the associational rights of the political parties, (i.e., a threat to their right to exclude unwanted candidates, or disassociate themselves from such persons). The Court held that in order to mitigate that threat and defuse potential legal challenges, "the State could decide to educate the public about the new primary ballots through advertising or explanatory materials mailed to voters along with their ballots."[266]

Here, the requirements of section 13302, to receive from a qualified political party and print in the ballot, if timely received, a list of party endorsements for congressional and state elective offices, constitute a form of "explanatory materials" in the ballot, which are intended to vindicate the parties' rights to "informally 'nominate' candidates," (or to abstain from endorsing or

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[261] See Exhibit A, Test Claim, at p. 55.

[262] Elections Code section 13302(b) (as amended, Stats. 2012, ch. 3 (AB 1413)).

[263] Exhibit C, Claimant Rebuttal Comments, at p. 4.

[264] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[265] Elections Code section 13302 (Stats. 2009, ch. 1; Stats. 2012, ch. 3) Secretary of State's Memorandum CC/ROV #11005 [See Exhibit A, Test Claim, at p. 55.].

[266] *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, at p. 456.

nominating such candidates) and to avoid a constitutional challenge to the Top Two Candidates Open Primary Act on the basis of the parties' First Amendment associational rights. As discussed above, the legal standard for "necessary to implement" under section 17556(f) is whether the duties imposed would be required "even in the absence of" the test claim statute or executive order,[267] or the Legislature had no "true choice" but to enact the statute or order implementing the ballot measure, and choice may include the compulsion of likely litigation.[268] Here, *some* mechanism or procedure to allow political parties to express their "informal" endorsements (both at primary and general elections) is required to effectuate the provisions of Proposition 14 even in the absence of the test claim statute.[269] And, because the top two primary system imposed by Proposition 14 results in a potential threat to the parties' First Amendment associational rights, a "barrage of litigation"[270] on constitutional grounds is sufficiently likely, and the Legislature is compelled to act to provide the parties with some means to distinguish their favored candidates from those less favored.

However, while some new requirements are implicated by the plain language requirements of Proposition 14, and by the compulsion to avoid a First Amendment challenge to the law,[271] the state may have exercised some discretion as to the manner of implementation of the ballot measure in this case. Nevertheless, any excess requirements of section 13302 and CC/ROV #11005 to receive and print a list of party endorsements, if timely, are not reimbursable. In *San Diego Unified School Dist*., the California Supreme court considered whether statutory procedures designed to make the underlying federal due process rights enforceable and to set forth procedural details not expressly articulated in the case law establishing the due process rights could constitute a reimbursable state mandate. Some of the alleged due process protections and procedures were considered adopted to implement federal due process law, while the excess activities were determined to be *incidental to the federal mandate* and did not significantly increase the cost of compliance with the underlying federal mandate. The Court identified the following "excess" due process requirements, but concluded that they were incidental to federal due process requirements and impose de minimis added costs, in context:

> …(i) adoption of rules and regulations pertaining to pupil expulsions; (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing; (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing; (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon

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[267] *County of Los Angeles II* (1995) 32 Cal.App.4th 805.

[268] *Hayes, supra*, (1992) 11 Cal.App.4th 1564, at pp. 1592-1594.

[269] *County of Los Angeles II, supra*.

[270] *Hayes, supra*, at p. 1592.

[271] *Washington State Grange, supra*, 552 U.S. 442.

> enrollment, of the pupil's expulsion; (v) maintenance of a record of each expulsion, including the cause thereof; and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls).[272]

Thus, for purposes of article XIII B, section 6, the excess activities were considered not reimbursable under Government Code section 17556(c).[273] The court of appeal in *CSBA* later applied that same analysis to Government Code section 17556(f) and statutes that implement underlying ballot measure mandates.[274]

Applying that analysis here, section 13302, as amended, and that portion of CC/ROV #11005 pertaining to printing a list of endorsements in the ballot for special elections,[275] constitute "specific statutory procedures" which are "designed to…set forth procedural details that were not expressly articulated"[276] in the ballot measure, in order to provide for political parties to continue to express their endorsements and to "informally nominate" candidates.

And, as compared with the prior law requirements to print separate ballots for each qualified political party (as many as seven separate ballots required for the 2012 presidential election [See Exhibit A, Test Claim, at p. 72.]), and to include the names of each party's winning candidates (i.e., each party's nominees) in the general election ballot,[277] preparing a *single* primary ballot for all voter-nominated offices, and printing *only the names of the top two* "vote getters" in the general election ballot likely presents a cost savings to the counties. In that context, the additional requirement to receive and print a list of endorsements from qualified political parties, instead of printing separate primary ballots and including the names of all nominees in the general election ballot, is incidental to Proposition 14 and produces at most de minimis added costs. Moreover, the requirement imposed by CC/ROV #11005, to treat a list of endorsements as timely received if provided by a qualified political party not later than 43 days prior to a *special* election, is also incidental to Proposition 14 and produces at most de minimis added costs, in context of the larger program.

In comments submitted on the draft proposed decision, claimant argues that Proposition 14 "does not provide for, nor in any manner of interpretation, require counties to provide, at the counties' costs, sample ballot pamphlet endorsement pages for the California's qualified political parties [*sic*]." Claimant argues that Proposition 14 "clearly states that 'Political Parties may establish such procedures as they see fit to endorse or support candidates or otherwise participate in all

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[272] *San Diego Unified*, *supra*, 33 Cal.4th at p. 873, fn. 11 [citing Education Code section 48918]; 890.

[273] *San Diego Unified*, *supra*, 33 Cal.4th at p. 889.

[274] *CSBA*, *supra*, 171 Cal.App.4th at p. 1216.

[275] Exhibit A, Test Claim, at p. 55.

[276] *San Diego Unified*, *supra*, 33 Cal.4th, at p. 889.

[277] See former California Constitution, article II, section 5 (as amended by Stats. 2004, Res. C. 103 (SCA 18) (Proposition 60, approved November 2, 2004)) [providing that a qualified political party participating in the primary election has the right to participate in the general election].

elections…'" But, claimant asserts, "[n]othing in this wording requires the county to receive and print a list of party endorsements at the County's cost in order to implement SCA 4/Proposition 14." Finally, the claimant concludes that "[c]osts to comply with the mandate language in both SB6 [Stats. 2009, ch. 1] and AB 1413 [Stats. 2012, ch. 3] exceed $1,000 which meets the threshold for mandate claiming and therefore are not de minimus [*sic*]."[278]

However, as the analysis above shows, Statutes 2009, chapter 1 and Statutes 2012, chapter 3 both expressly state that they are intended to implement Proposition 14,[279] and the requirements of section 13302 give effect to the provisions of Proposition 14 that state that parties shall continue to have the right to informally nominate candidates, and to express their preferences. The provision for parties to endorse candidates for voter-nominated offices is merely a mechanism to allow parties to express their "informal" nominations, as provided for in the findings and declarations section of Proposition 14. Specifically, subdivision (e) of the Proposition 14 Findings and Declarations states that "[p]olitical parties may establish such procedures as they see fit to endorse or support candidates or otherwise participate in all elections, and they may informally 'nominate' candidates for election to voter-nominated offices at a party convention or by whatever lawful mechanism they so choose, other than at state-conducted primary elections."[280]

Moreover, prior to Proposition 14, party nominations would indeed control the appearance or absence of a candidate on the ballot (with the exception of write-in candidates), and the party chair would provide the list of nominations to the county officials, who would reproduce that list in the form of a partisan ballot.[281] Now, pursuant to the voter-nominated primary, the party no longer nominates a candidate,[282] and the list of endorsements authorized by section 13302 allows the parties to continue to express their preferences. Finally, the finding that this activity is

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[278] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 6.

[279] The Proposition 14 findings and declarations approved by the voters expressly state that "[t]his act, along with legislation already enacted by the Legislature to implement this act, are intended to implement an open primary system in California as set forth below." Accordingly, Statutes 2009, chapter 1states that "[t]his measure shall become operative only if SCA 4 [Proposition 14] is approved by the voters." In addition, the Legislative Counsel's Digest preceding Statutes 2012, chapter 3 (AB 1413) states that "[t]his bill would make technical revisions to provisions of the Elections Code to reflect the 'voter-nominated primary election' process."

[280] Exhibit F, Text of Ballot Measure, Proposition 14, Findings and Declarations (e).

[281] See Former Elections Code section 13000 (Stats. 1994, ch. 920) ["The person in charge of elections for any county, city and county, city, or district shall provide ballots for any elections within his or her jurisdiction, and shall cause to be printed on them the name of every candidate whose name has been certified to or filed with the proper officer pursuant to law and who, therefore, is entitled to a place on the appropriate ballot."]. See also Former Elections Code section 8300 et seq., pertaining to write-in nominations (Stats. 1994, ch. 920).

[282] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010) ["A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary."].

incidental to the ballot measure mandate and results in de minimis added costs follows the analysis of the California Supreme Court in *San Diego Unified*. The Court held that the activities that "exceeded" the federal mandate, which were listed in a footnote and included a number of notice and recordkeeping requirements triggered by a process to expel a student from public school, "fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost."[283] Here, a comparison must be drawn between the alleged state required activities to implement the ballot measure mandate of Proposition 14 and the entire Top Two Primary Act. Actual yearly costs of the excess activities were not considered by the Supreme Court in *San Diego Unified* and are not relevant to those questions, except in context of the entire program. Nor, as the County suggests, is the Commission's threshold $1,000 for reimbursement pursuant to section 17564 a viable test for whether an activity is de minimis.

Therefore, based on the foregoing, the requirements of section 13302, as amended, and of CC/ROV #11005, to receive and print in the ballot, if timely, a list of endorsements from a qualified political party, do not impose costs mandated by the state pursuant to Government Code section 17556(f).

e) Activities to Educate Voters About Proposition 14 with Instructions and Voter Information Provided in the Ballot and Posted at Polling Places: Elections Code sections 9083.5, 14105.1, 13206, and 13206.5, as added or amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3; and portions of Secretary of State's Memoranda CC/ROV #11005, CC/ROV #11126, CC/ROV #12059 are intended to implement and are incidental to Proposition 14 and produce at most de minimis costs.

Elections Code sections 9083.5, 14105.1, 13206, and 13206.5, as added or amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, as well as portions of CC/ROV #11005, CC/ROV #11126, and CC/ROV #12059, require counties to include certain instructions and explanatory text in the ballots and sample ballots for primary elections, general elections and special primary and general elections, respectively, and to furnish to precincts and post at polling places a poster informing voters of the changes to the election laws.

Under pre-existing law, each county elections official is required to "provide ballots for any election within his or her jurisdiction."[284] Those ballots are required to contain instructions to voters, with respect to how to mark their ballots for particular candidates, how to vote for a qualified write-in candidate, how to vote for a ballot measure, and what to do if the voter makes a mistake or wrongly tears or defaces their ballot. These instructions also include the procedures for confirmation of justices of the Supreme Court or the Court of Appeal.[285] In addition, county elections officials are required to include in the ballot, as appropriate to the election cycle, instructions for voting for delegates to a national convention, and for voting for the electors for a

[283] 33 Cal.4th 890.

[284] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[285] Elections Code sections 13204; 9083 (Stats. 1994, ch. 920 (SB 1547)).

presidential candidate.[286] And finally, under pre-existing law, county elections officials are required to provide to each precinct a list of "precinct supplies," as specified by statute.[287]

Proposition 14 eliminated partisan primary elections for all congressional and state offices, and created a new category of elective office, called "voter-nominated." Proposition 14 required that all voters would be permitted to vote for any candidate for voter-nominated office, regardless of the party preference of the voter or the candidate, and accordingly called for a unified ballot for all voter-nominated and nonpartisan offices. In addition, Proposition 14 provided that a candidate for voter-nominated office could have his or her party preference indicated in the ballot, but a candidate for nonpartisan office would not be permitted to do so. Proposition 14 also provided that only the top two "vote getters" in any voter-nominated primary contest would advance to the general election for that office, regardless of party preference, but that no party shall have the right to have its preferred candidate appear on the ballot unless that candidate is one of the two highest "vote getters" in the primary election.[288] And finally, Proposition 14 findings and declarations section (d), approved by the voters, also cautioned that a candidate's self-selected party preference "shall not constitute or imply endorsement of the candidate by the party designated, and no candidate for that office shall be deemed the official candidate of any party by virtue of his or her selection in the primary."[289]

In conjunction with placing Proposition 14 before the voters, the Legislature enacted Statutes 2009, chapter 1, which expressly stated that it would become operative only if Proposition 14 were adopted by the voters.[290] Statutes 2009, chapter 1 provided for posters available at polling places[291] and additional instructions to be added to the ballot[292] containing information for voters regarding the changes to the primary election system, including the ability of voters to vote for any candidate regardless of party preference. Secretary of State's Memorandum CC/ROV #11005, issued January 26, 2011, restates and clarifies the requirements of the amended and added sections of the Elections Code as applied to *special elections*. CC/ROV #11005 notes specifically that while section 9083.5 *requires the Secretary of State* to include in the statewide Voter Information Guide (VIG) certain information pertaining to the new voter-nominated primary system and top two candidates open primaries, "there is no VIG for special elections to fill vacancies," and therefore "county elections officials should provide…the language (taken from Elections Code section 9083.5), *on the sample ballot* in order to educate voters about the changes in the law."[293] CC/ROV #11126, issued November 23, 2011, directs counties to *omit from the primary ballots* some of the language provided by section 13206, because the June 5,

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[286] Elections Code section 13205 (Stats. 1994, ch. 920 (SB 1547)).

[287] Elections Code section 14105 (Stats. 1994, ch. 920 (SB 1547); Stats. 2003, ch. 425 (AB 177); Stats. 2003, ch. 810 (AB 1679)).

[288] California Constitution, article II, sections 5, 6 (as amended by Proposition 14, June 8, 2010).

[289] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[290] Statutes 2009, chapter 1 (SB 6) section 67.

[291] Elections Code sections 9083.5; 14105.1 (added, Stats. 2009, ch. 1 (SB 6)).

[292] Elections Code section 13206 (as amended, Stats. 2009, ch. 1 (SB 6)).

[293] See Exhibit A, Test Claim, at pp. 52-53 [CC/ROV #11005].

2012 Presidential Primary election did not contain any nonpartisan offices, and thus explanation of the procedures and significance of nonpartisan offices was not necessary.[294] On February 10, 2012, the Legislature enacted Statutes 2012, chapter 3 as an urgency measure, amending section 13206 to make the explanatory text in the ballot describing voter-nominated and nonpartisan offices slightly shorter than that provided in Statutes 2009, chapter 1,[295] and also adding section 13206.5, which provides for similar explanatory text to appear in the statewide *general* election ballot.[296] CC/ROV #12059, issued on the same day that Statutes 2012, chapter 3 took effect, restated the language of amended section 13206, including the language pertaining to nonpartisan offices that counties had been directed to exclude pursuant to CC/ROV #11126. The order also restated the language added by section 13206.5.[297] Because CC/ROV #12059 superseded CC/ROV #11126 before the June 5, 2012 primary election occurred, the omission required pursuant to CC/ROV #11126 is no longer required.

Claimant alleges that sections 13206 and 13206.5 require each ballot and sample ballot to "include new specified information regarding partisan offices, and voter-nominated and nonpartisan offices," and "contain specified language, per election type."[298] In rebuttal, claimant explains that "[n]othing in Proposition 14 requires voter education," and that "[u]sing space on official ballots for voter education is particularly expensive due to the extraordinarily strict requirements related to official ballot paper quality, type, thickness, and ink quality..."[299] In addition, claimant alleges that "AB 1413 added Elections Code Section 13206.5, which requires certain information to be printed at the top of the ballot used in a statewide general election in years evenly divisible by four" and that "[t]hese requirements are entirely new and involve considerable ballot space to print."[300] And, claimant alleges that sections 9083.5 and 14105.1 require counties to "[r]eproduce and provide to each polling place the Secretary of State created explanation of electoral procedures," to "[p]ost at each polling place, in specified locations and quantities, the Secretary of State created explanation of electoral procedures," and to post at each polling place and mail to vote-by-mail voters "[s]pecified party abbreviations."[301] Claimant alleges that "[t]his requirement results in increased costs to change poll worker training materials and training procedures," and that "[v]oter education is not required by Proposition 14."

Claimant's allegations are not persuasive. To begin, claimant's assertion that "nothing in Proposition 14 requires voter education" is not accurate, because, as discussed below, the findings and declarations approved by the voters in Proposition 14 expressly state that the Top Two Candidates Open Primary Act "conforms to the ruling in *Washington State Grange v. Washington State Republican Party*," which centers on the potential for voter confusion giving

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[294] Exhibit A, Test Claim, at p. 62 [CC/ROV #11126].

[295] Elections Code section 13206 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[296] Elections Code section 13206.5 (added, Stats. 2012, ch. 3 (AB 1413)).

[297] Exhibit A, Test Claim, at p. 70.

[298] Exhibit A, Test Claim, at p. 6.

[299] Exhibit C, Claimant Rebuttal Comments, at p. 3.

[300] Exhibit C, Claimant Rebuttal Comments, at p. 3.

[301] Exhibit A, Test Claim, at pp. 6-7.

rise to a constitutional challenge to a top two primary system. The Court in *Washington State Grange* held that a constitutional challenge to Washington's top two primary system could be avoided by the institution of certain voter information and education procedures, as discussed below. By expressly invoking that case, the Proposition 14 findings and declarations demonstrate the voters' intent that Proposition 14 must be implemented in a manner that would avoid a similar constitutional challenge. Secondly, the plain language of sections 9083.5 and 14105.1 does not require counties to "reproduce" the notices specified in section 9083.5;[302] section 14105.1 expressly states that the notices will be "supplied by the Secretary of State," and therefore only the activity of "furnishing" the notices is required.[303] Moreover, claimant's comments and allegations focus heavily on the increased *costs* of preparing ballots resulting from Proposition 14 and the implementing test claim statutes, but increased costs alone do not result in a reimbursable state-mandated program.[304]

Therefore, based on the foregoing, the following new activities pertaining to voter information and instructions provided in the ballot and posted at polling places are required:

- Furnish to precinct officers printed copies of the notices specified in section 9083.5, as supplied by the Secretary of State.[305]
- Conspicuously post the notices inside and outside every polling place.[306]
- Add to a *partisan primary ballot*, below the box labeled "Party-Nominated Offices," the following:

  > "Only voters who disclosed a preference upon registering to vote for the same party as the candidate seeking the nomination of any party for the Presidency or election to a party committee may vote for that candidate at the primary election, unless the party has adopted a rule to permit non-party voters to vote in its primary elections."[307]

- Add to a *special primary election ballot* a box and label for "Voter-Nominated Offices," and below that box the following:

  > "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office.

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[302] Exhibit A, Test Claim, at p. 6.

[303] Elections Code section 14105.1 (added, Stats. 2009, ch. 1 (SB 6)).

[304] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830.

[305] Elections Code section 14105.1 (as added, Stats. 2009, ch. 1 (SB 6)).

[306] *Ibid.*

[307] Elections Code section 13206(a) (as amended, Stats. 2009, ch. 1 (SB 6); Stats. 2012, ch. 3 (AB 1413)).

Voter-Nominated Offices. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only.

It does not constitute or imply an endorsement of the candidate by the party indicated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party.[308]

- From July 1, 2011 to February 10, 2012,[309] add to the nonpartisan part of the *primary election ballot*, below the box labeled "Voter-Nominated and Nonpartisan Offices," the following:

  "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office.

  Voter-Nominated Offices. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only.

  It does not constitute or imply an endorsement of the candidate by the party indicated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party.

  "Nonpartisan Offices. A candidate for a nonpartisan office may not designate a party reference on the ballot."[310]

- Beginning February 10, 2012, add to the nonpartisan part of the *primary election ballot*, below the box labeled "Voter-Nominated and Nonpartisan Offices," the following:

  "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only. It does not imply that the candidate

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[308] Secretary of State's Memorandum CC/ROV #11005 [See Exhibit A, Test Claim, at pp. 53-54.].

[309] The potential period of reimbursement begins July 1, 2011, based on the filing date of the test claim. As of February 10, 2012, Elections Code section 13206 was amended to shorten the required text for inclusion in the ballot. The Commission takes official notice that at least one special election was held within between July 1, 2011 and November 23, 2011 in which candidates for a voter-nominated office appeared on the ballot. (See Exhibit F, Special Election, Congressional District 36, July 12, 2011.).

[310] Elections Code section 13206(b) (as amended, Stats. 2009, ch. 1 (SB 6)).

is nominated or endorsed by the party or that the party approves of the candidate. The party preference, if any, of a candidate for a nonpartisan office does not appear on the ballot."[311]

- Add to the *general election ballot, in an election year evenly divisible by the number four*, below the box and label for "Party Nominated Offices," the following:

  "The party label accompanying the name of a candidate for party-nominated office on the general election ballot means that the candidate is the official nominee of the party shown."[312]

- Add to the *general election ballot*, in *all election years*, below the box and label for "Voter-Nominated and Nonpartisan Offices," the following:

  "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only. It does not imply that the candidate is nominated or endorsed by the party or that the party approves of the candidate. The party preference, if any, of a candidate for a nonpartisan office does not appear on the ballot."[313]

- Add to a *special election ballot*, the following:

  "VOTER-NOMINATED OFFICES

  Under the California Constitution, political parties are not entitled to formally nominate candidates for voter-nominated offices at the primary election, and a candidate nominated for a voter-nominated office at the primary election is not the official nominee of any party for the office in question at the ensuing general election. A candidate for nomination or election to a voter-nominated office may, however, designate his or her party preference, or lack of party preference, and have that designation reflected on the primary and general election ballot, but the party designation so indicated is selected solely by the candidate and is shown for the information of the voters only. It does not constitute or imply an endorsement of the candidate by the party designated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party. The parties may have a list of

[311] Elections Code section 13206(b) (as amended, Stats. 2012, ch. 3 (AB 1413)).

[312] Elections Code section 13206.5(a)(1) (Stats. 2012, ch. 3).

[313] Elections Code section 13206.5(a)(2) (Stats. 2012, ch. 3).

> candidates for voter-nominated offices, who have received the official endorsement of the party, printed in the sample ballot.
>
> All voters, regardless of the party for which they have expressed a preference upon registering, or of their refusal to disclose a party preference, may vote for any candidate for a voter-nominated office, provided they meet the other qualifications required to vote for that office. The top two vote-getters at the primary election advance to the general election for the voter-nominated office, and both candidates may have specified the same party preference designation. No party is entitled to have a candidate with its party preference designation participate in the general election unless such candidate is one of the two highest vote-getters at the primary election."[314]

The Commission finds that these activities are incidental to the ballot measure mandate and produce at most de minimis added costs, and therefore do not impose costs mandated by the state pursuant to Government Code section 17556(f).

In *Hayes, supra*, court held that "[r]eimbursement is required when the state 'freely chooses to impose on local agencies any peculiarly "governmental" cost which they were not previously required to absorb,'"[315] but "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention."[316] Ultimately the threat of "a barrage of litigation" was seen as sufficient compulsion against the state to act to implement an applicable federal mandate.[317] Accordingly, here, a significant potential for constitutional challenge (and the significant potential that such challenge could succeed) is sufficiently compelling as against the state to require certain voter education measures, as discussed herein.

In *Washington State Grange, supra,* the Court recognized that a top two candidates open primary could give rise to widespread voter confusion, especially with respect to the diminished role of the political parties, and thus lead to a successful constitutional challenge to the law, asserting impairment of the political parties' associational rights under the First Amendment. The Court held that "[i]t stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot,"[318] but because the State of Washington had yet to implement its voter-enacted top two primary system, a facial constitutional challenge based on possible voter confusion was premature. Specifically, the Court suggested:

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[314] Secretary of State's Memorandum CC/ROV #11005 [See Exhibit A, Test Claim, at pp. 52-53.].

[315] (1992) 11 Cal.App.4th 1564, at p. 1578 [quoting *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, at p. 70].

[316] *Id,* at p. 1593.

[317] *Hayes, supra,* 11 Cal.App.4th at p. 1592.

[318] *Id,* at p. 456.

> [T]he ballots might note preference in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as "my party preference is the Republican Party." Additionally, the State could decide to educate the public about the new primary ballots through advertising or explanatory materials mailed to voters along with their ballots.[319]

Here, the Top Two Candidates Open Primary Act has been implemented in a manner that includes both of the innovations that the Court suggested would help weather any challenge asserting impairment of the parties' First Amendment associational rights. Specifically, the requirements of sections 9083.5 and 14105.1 to furnish the notices and post the notices inside and outside each polling place, and of sections 13206 and 13206.5 and CC/ROV #11005 to include additional explanation in primary, general, and special election ballots, involve notice and information to the voters which operate to "educate the public about the new primary ballots."[320] The explanatory text specified in amended section 13206 and added section 13206.5, and in CC/ROV #11005 (all of which are substantially similar), whether posted at polling places or printed in the ballot, draws heavily from the text of Proposition 14 itself,[321] and the information is provided to voters in order to avoid misleading or confusing the voters. Based on the state law requirement to "avoid misleading the public with inaccurate information,"[322] and the statement in the text of Proposition 14 that the act conforms to the ruling of *Washington State Grange*, additional instructions and voter information as required by sections 9083.5, 14105.1, 13206, and 13206.5 provide helpful information to voters regarding the changes to the primary system.

However, the Court in *Washington State Grange* suggested some options for the State of Washington to implement its top-two primary in a manner that avoided further litigation; the Court did not demand all of the stated measures. Moreover, the Court was not specific as to exactly what extent and scope of "advertising or explanatory materials" would be necessary to vindicate the First Amendment rights of the political parties.

Therefore, the activities required by added sections 9083.5 and 14105.1, to furnish to precinct officers the notices specified in section 9083.5, and to conspicuously post the notices at each polling place; as well as those required by added and amended sections 13206.5 and 13206, and by CC/ROV #11005, to include additional instructions and explanatory text in primary, general, and special election ballots, are adopted to implement Proposition 14. Even if they are not "necessary" to implement a top two candidates open primary consistently with Proposition 14, Government Code section 17556(f) still applies; these requirements are incidental to the ballot measure mandate and produce at most de minimis added costs. As discussed above, the California Supreme Court in *San Diego Unified*, found that statutory notice and recordkeeping requirements associated with public school expulsion proceedings were not reimbursable under

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[319] Ibid.

[320] *Washington State Grange*, *supra*, (2008) 552 U.S. 442, at p. 456.

[321] See Exhibit F, Text of Ballot Measure, Proposition 14.

[322] *Lungren*, *supra*, 48 Cal.App.4th at p. 440 [citing *Amador Valley Joint Union High School District v. State Board of Equalization*, (1978) 22 Cal.3d 208].

Government Code section 17556(c) because they represented "specific statutory procedures to comply with the general federal mandate," which are "designed to…set forth procedural details that were not expressly articulated in the case law establishing the respective rights [of the parties]." The Court held that if the excess procedural activities, "viewed singly or cumulatively, [do] not significantly increase the cost of compliance," then they "should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable" under Government Code section 17556(c).[323] The activities which the Court in *San Diego Unified* held were "incidental to" the federal due process requirements are as follows:

> …(i) adoption of rules and regulations pertaining to pupil expulsions; (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing; (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing; (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion; (v) maintenance of a record of each expulsion, including the cause thereof; and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls).[324]

The court of appeal in *CSBA* applied the same reasoning to a voter-enacted ballot measure under section 17556(f), and concluded that "statutes imposing duties on local governments do not give rise to reimbursable costs if the duties are incidental to the ballot measure mandate and produce at most de minimis costs." The court directed the Commission, on remand, to consider its interpretation of section 17556(f) when determining whether "the State is obligated to provide reimbursement with respect to the *Mandate Reimbursment Process II* test claim."[325]

Here, the requirements of sections 9083.5 and 14105.1 to furnish the notice specified in section 9083.5 to precinct officers along with the precinct supplies identified in section 14105,[326] and to conspicuously post the notice inside and outside each polling place; and the requirements of sections 13206 and 13206.5,[327] and a portion of CC/ROV #11005,[328] to include similar explanatory information in the ballots for primary, general, and special elections, constitute

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[323] *San Diego Unified, supra*, 33 Cal.4th at p. 889.

[324] *Id*, at p. 873, fn. 11 [citing Education Code section 48918]; 890.

[325] *CSBA, supra* (2009) 171 Cal.App.4th 1183, at p. 1216-1217.

[326] Elections Code section 14105.1 (added, Stats. 2009, ch. 1 (SB 6)).

[327] Elections Code section 13206 (amended, Stats. 2009, ch. 1 (SB 6); Stats. 2012, ch. 3 (AB 1413)); Elections Code section 13206.5 (added, Stats. 2012, ch. 3 (AB 1413)).

[328] Exhibit A, Test Claim, at pp. 52-53.

"specific statutory procedures" which are "designed to…set forth…details that were not expressly articulated"[329] in Proposition 14, or in *Washington State Grange*, *supra*. And when "viewed singly or cumulatively, [those activities] did not significantly increase the cost of compliance…"[330] This conclusion is reached by examining the extent of voter instructions printed in the ballot under prior and existing law, and the preexisting duties of county elections officials with respect to precinct supplies.

Under prior law, section 14105, as amended by Statutes 2003, chapter 810, provides for a long list of precinct supplies that a county elections official must already furnish, as follows:

> (a) Printed copies of the indexes.
>
> (b) Necessary printed blanks for the roster, tally sheets, lists of voters, declarations, and returns.
>
> (c) Envelopes in which to enclose returns.
>
> (d) Not less than six nor more than 12 instruction cards to each precinct for the guidance of voters in obtaining and marking their ballots. On each card shall be printed necessary instructions and the provisions of Sections 14225, 14279, 14280,14287, 14291, 14295, 15271, 15272, 15273, 15276, 15277, 15278, 18370, 18380,18403, 18563, and 18569.
>
> (e) A digest of the election laws with any further instructions the county elections official may desire to make.
>
> (f) An American flag of sufficient size to adequately assist the voter in identifying the polling place. The flag is to be erected at or near the polling place on election day.
>
> (g) A ballot container, properly marked on the outside indicating its contents.
>
> (h) When it is necessary to supply additional ballot containers, these additional containers shall also be marked on the outside, indicating their contents.
>
> (i) Sufficient ink pads and stamps for each booth. The stamps shall be one solid piece and shall be made so that a cross (+) may be made with either end. If ballots are to be counted by vote tabulating equipment, an adequate supply of other approved voting devices shall be furnished. All voting stamps or voting devices shall be maintained in good usable condition.
>
> (j) When a candidate or candidates have qualified to have his or her or their names counted pursuant to Article 3 (commencing with Section 15340) of Chapter 4 of Division 15, a sufficient number of ink pens or pencils in the voting booths for the purpose of writing in on the ballot the name of the candidate or candidates.
>
> (k) A sufficient number of cards to each polling place containing the telephone number of the office to which a voter may call to obtain information about his or

[329] *San Diego Unified*, *supra*, 33 Cal.4th at p. 889.

[330] *Ibid.*

her precinct location. The card shall state that the voter may call collect during polling hours.

(l) An identifying badge or insignia for each member of the precinct board. The member shall print his or her name and the precinct number thereon and shall wear the badge or insignia at all times in the performance of duties, so as to be readily identified as a member of the precinct board by all persons entering the polling place.

(m) Facsimile copies of the ballot containing ballot measures and ballot instructions printed in Spanish or other languages as provided in Section 14201.

(n) Sufficient copies of the notices to be *posted* on the indexes used at the polls. The notice shall read as follows: "This index shall not be marked in any manner except by a member of the precinct board acting pursuant to Section 14297 of the Elections Code. Any person who removes, tears, marks, or otherwise defaces this index with the intent to falsify or prevent others from readily ascertaining the name, address, or political affiliation of any voter, or the fact that a voter has or has not voted, is guilty of a misdemeanor."

(o) A roster of voters for each precinct in the form prescribed in Section 14107.

(p) In addition, the elections official may, with the approval of the board of supervisors, furnish the original books of affidavits of registration or other material necessary to verify signatures to the precinct officers.

(q) Printed copies of the Voter Bill of Rights, as supplied by the Secretary of State. The Voter Bill of Rights shall be conspicuously *posted* both inside and outside every polling place.[331]

The new requirements to *furnish* to precinct officers printed copies of the notices specified in section 9083.5, as supplied by the Secretary of State, and to ensure that those notices are *conspicuously posted* inside and outside each polling place, do not significantly increase the cost of compliance with Proposition 14 and the costs of conducting elections pursuant to the Elections Code. In other words, these activities are "incidental" to Proposition 14 and "produce at most de minimis added costs."[332] As noted above, these are the only requirements of the plain language of sections 908.5 and 14105.1.

Similarly, prior to enactment of the test claim statutes, section 13204 provided for the following instructions in the ballots of all voters:

> "To vote for a candidate for Chief Justice of California; Associate Justice of the Supreme Court; Presiding Justice, Court of Appeal; or Associate Justice, Court of Appeal, stamp a cross (+) in the voting square after the word "Yes," to the right of the name of the candidate. To vote against that candidate, stamp a cross (+) in the voting square after the word "No," to the right of the name of that candidate."

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[331] Elections Code section 14105 (Stats. 1994, ch. 920 (SB 1547); Stats. 2003, ch. 425 (AB 177); Stats. 2003, ch. 810 (AB 1679)) [emphasis added].

[332] *CSBA*, *supra*, 171 Cal.App.4th 1183, at p. 1216.

"To vote for any other candidate of your selection, stamp a cross (+) in the voting square to the right of the candidate's name. [When justices of the Supreme Court or Court of Appeal do not appear on the ballot, the instructions referring to voting after the word "Yes" or the word "No" will be deleted and the above sentence shall read: "To vote for a candidate whose name appears on the ballot, stamp a cross (+) in the voting square to the right of the candidate's name."] Where two or more candidates for the same office are to be elected, stamp a cross (+) after the names of all candidates for the office for whom you desire to vote, not to exceed, however, the number of candidates to be elected."

"To vote for a qualified write-in candidate, write the person's name in the blank space provided for that purpose after the names of the other candidates for the same office."

"To vote on any measure, stamp a cross (+) in the voting square after the word "Yes" or after the word "No."

"All distinguishing marks or erasures are forbidden and make the ballot void."

"If you wrongly stamp, tear, or deface this ballot, return it to the precinct board member and obtain another."

"On vote by mail ballots mark a cross (+) with pen or pencil."[333]

The pre-existing requirements of section 13205 also provide for four paragraphs of *additional* instructions to be included in the ballot during presidential election cycles.[334]

Section 13206, as amended by Statutes 2009, chapter 1, requires counties to add the following, to primary election ballots, below the box and label for "Voter-Nominated and Nonpartisan Offices":

"All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office.

Voter-Nominated Offices. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only.

It does not constitute or imply an endorsement of the candidate by the party indicated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party.

"Nonpartisan Offices. A candidate for a nonpartisan office may not designate a party reference on the ballot."[335]

The required language was shortened by Statutes 2012, chapter 3, as follows:

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[333] Elections Code section 13204 (Stats. 2007, ch. 508 (AB 1243)).

[334] Elections Code section 13205 (Stats. 1994, ch. 920 (SB 1547)).

[335] Elections Code section 13206(b) (as amended, Stats. 2009, ch. 1 (SB 6)).

> "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only. It does not imply that the candidate is nominated or endorsed by the party or that the party approves of the candidate. The party preference, if any, of a candidate for a nonpartisan office does not appear on the ballot."[336]

In addition, CC/ROV #11005 directed counties to omit the last sentence of section 13206(b), as amended by Statutes 2009, chapter 1, pertaining to nonpartisan offices for special election ballots, and to add two paragraphs explaining the procedure and significance of voter-nominated offices, derived from section 9083.5, to a special election ballot, to take the place of the statewide Voter Information Guide.[337] Then, section 13206.5, added by Statutes 2012, chapter 3 required two additional sentences to be included in the general election ballot during presidential election cycles, and one additional sentence to be included the general election ballot during all other election cycles. In context of the instructions already required pursuant to sections 13204 and 13205, the additional text required pursuant to sections 13206 and 13206.5, and CC/ROV #11005 (for special elections) produces at most de minimis added costs, and these sections do not impose costs mandated by the state within the meaning of article XIII B, section 6.

In comments submitted on the draft proposed decision, claimant argues that "Proposition 14 does not provide for any type of additional instructions or ballot text in the absence of voter information guides." In addition, claimant argues that "additional instructions or ballot text is not required to implement nor incidental to SCA 4/Proposition 14." Claimant asserts that "Government Code section 17556(f) does not apply here as these activities are not expressly included in the ballot measure and are not necessary to implement SCA 4/Proposition 14." Claimant further asserts that "[e]ven should the Commission find they are necessary, these methods are not the least burdensome method for providing the information to the voters." And finally, claimant argues that "[t]he costs related to these activities are not de minimus for the Claimant, exceeding the $1000 threshold required for mandate claiming [*sic*]."[338]

Although Proposition 14 does not expressly state that additional instructions and ballot text must be provided, the instructions and text are derived from the ballot measure mandate and the findings and declarations approved by the voters, and are intended to implement a Top Two Primary system in accordance with the California Constitution, and in a manner that does not violate the First Amendment associational rights of the political parties, in accordance with *Washington State Grange*, *supra*.[339] Moreover, the changes made by Statutes 2009, chapter 1 and Statutes 2012, chapter 3 are expressly intended to implement the Top Two Candidates Open

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[336] Elections Code section 13206(b) (as amended, Stats. 2012, ch. 3 (AB 1413)).

[337] Secretary of State's Memorandum CC/ROV #11005 [See Exhibit A, Test Claim, at pp. 52-54.].

[338] Exhibit E, Claimant Comments, at pp. 6-7.

[339] 552 U.S. 442.

Primary Act.[340] For these reasons, the requirements of sections 9083.5, 14105.1, 13206, and 13206.5 are incidental to Proposition 14, and produce at most de minimis added costs. And finally, the "$1000 threshold required for mandate claiming" is not dispositive of the issue whether costs claimed are de minimis; the analysis turns on a comparison of the claimed costs and activities to the scope of the entire program, as discussed in *San Diego Unified, supra*.[341]

Based on the foregoing, the requirements of Elections Code sections 9083.5, 14105.1, 13206, and 13206.5, as added or amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, and portions of Secretary of State's Memoranda CC/ROV #11005, CC/ROV #11126, CC/ROV #12059 related to the instructions and explanatory information for the voters do not impose costs mandated by the state pursuant to Government Code section 17556(f).

V. Conclusion

Based on the foregoing, the Commission finds that the test claim statutes and executive orders alleged either do not require any new activities of local government, or impose duties that are necessary to implement the ballot measure, and are incidental to the ballot measure and produce at most de minimis added costs within the meaning of Government Code section 17556(f). Therefore all alleged statutes and executive orders are denied.

[340] Statutes 2009, chapter 1 (SB 6) expressly states that it "would become operative only if SCA 4 [Proposition 14] is approved by the voters. Proposition 14, in turn, refers to "legislation already enacted by the Legislature to implement this act…" And, Statutes 2012, chapter 3 (AB 1413) states that "[t]his bill would make technical revisions to provisions of the Elections Code to reflect the 'voter-nominated primary election' process."

[341] 33 Cal.4th 859.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

COMMISSION ON STATE MANDATES
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RE: **Adopted Decision**

Top Two Candidates Open Primary Act, 12-TC-02
Statutes 2009, Chapter 2 (SCA 4); Elections Code Sections 13, 300.5, 325, 332.5, 334, 337, 359.5, 9083.5, 13102, 13105, 13110, 13206, 13230, 13302, 14105.1, as added or amended by Statutes 2009, Chapter 1 (SB 6); Elections Code Sections 8002.5, 8040, 8062, 9083.5, 13105, 13206, 13206.5, 13302, as added or amended by Statutes 2012, Chapter 3 (AB 1413)
Secretary of State's CC/ROV Memorandums #11005, #11125, #11126, and #12059
County of Sacramento, Claimant

On September 26, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.

Heather Halsey, Executive Director

Dated: October 1, 2014

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: 10-TC-12 Water Code Division 6, Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4; Filed on June 30, 2011; By, South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, Biggs-West Gridley Water District, Claimants; *Consolidated with* 12-TC-01 Filed on February 28, 2013; California Code of Regulations, title 23, sections 597, 597.1 597.2, 597.3, and 597.4, Register 2012, No. 28; By, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, Glenn-Colusa Irrigation District, Claimants.	Case Nos.: 10-TC-12 and 12-TC-01 *Water Conservation* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 5, 2014*) (*Served December 12, 2014*)

DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 5, 2014. Dustin Cooper, Peter Harman, and Alexis Stevens appeared on behalf of the claimants. Donna Ferebee and Lee Scott appeared on behalf of the Department of Finance. Spencer Kenner appeared on behalf of the Department of Water Resources. Dorothy Holzem of the California Special Districts Association and Geoffrey Neill of the California State Association of Counties also appeared on behalf of interested persons and parties.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed decision to deny the test claim by a vote of six to zero.

Summary of the Findings

The Commission finds that the two original agricultural water supplier claimants named in each test claim, Richvale Irrigation District and Biggs-West Gridley Water District, are not eligible to claim reimbursement under article XIII B, section 6, because they do not collect or expend tax revenue, and are therefore not subject to the limitations of articles XIII A and XIII B. However, two substitute agricultural water supplier claimants, Oakdale Irrigation District and Glenn-Colusa Irrigation District, are subject to articles XIII A and XIII B and are therefore claimants eligible to seek reimbursement under article XIII B, section 6. As a result, the Commission has jurisdiction to hear and determine test claims 10-TC-12 and 12-TC-01.

The Commission finds that the Water Conservation Act of 2009 (Act), and the Agricultural Water Measurement regulations promulgated by the Department of Water Resources (DWR) to implement the Act, impose some new required activities on urban water suppliers and agricultural water suppliers, including measurement requirements, conservation and efficient water management requirements, notice and hearing requirements, and documentation requirements, with specified exceptions and limitations.

However, the Commission finds that several agricultural water suppliers are either exempted from the requirements of the test claim statutes and regulations or are subject to alternative and less expensive compliance alternatives because the activities were already required by a regime of federal statutes and regulations, which apply to most agricultural water suppliers within the state.[1]

Additionally, to the extent that the test claim statute and regulations impose any new state-mandated activities, they do not impose costs mandated by the state because the Commission finds that urban water suppliers and agricultural water suppliers possess fee authority, sufficient as a matter of law to cover the costs of any new required activities. Therefore, the test claim statute and regulations do not impose costs mandated by the state pursuant to Government Code section 17556(d), and are not reimbursable under article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

I. Chronology

06/30/2011	Co-claimants, South Feather Water and Power Agency (South Feather), Paradise Irrigation District (Paradise), Biggs-West Gridley Water District (Biggs), and Richvale Irrigation District (Richvale) filed test claim 10-TC-12 with the Commission.[2]
10/07/2011	Department of Finance (Finance) requested an extension of time to file comments, which was approved.

[1] See Public Law 102-565 and the Reclamation Reform Act of 1982 and the specific exceptions and alternate compliance provisions in the test claim statutes for those subject to these federal requirements, as discussed in greater detail in the analysis below.

[2] Exhibit A, *Water Conservation Act* Test Claim, 10-TC-12.

12/06/2011	Department of Water Resources (DWR) requested an extension of time to file comments, which was approved.
02/01/2012	DWR requested an extension of time to file comments, which was approved.
03/30/2012	DWR requested an extension of time to file comments, which was approved.
05/30/2012	DWR requested an extension of time to file comments, which was approved.
08/02/2012	DWR requested an extension of time to file comments, which was approved.
10/02/2012	DWR requested an extension of time to file comments, which was approved.
12/03/2012	DWR requested an extension of time to file comments, which was approved.
12/07/2012	Finance requested an extension of time to file comments, which was approved.
02/04/2013	DWR requested an extension of time to file comments, which was approved.
02/06/2013	Finance requested an extension of time to file comments, which was approved.
02/28/2013	Richvale and Biggs filed test claim 12-TC-01 with the Commission.[3]
03/06/2013	The executive director consolidated the test claims for analysis and hearing, and renamed them *Water Conservation*.
03/29/2013	DWR requested an extension of time to file comments, which was approved.
06/07/2013	Finance submitted written comments on the consolidated test claims.[4]
06/07/2013	DWR submitted written comments on the consolidated test claims.[5]
07/09/2013	Claimants requested an extension of time to file rebuttal comments, which was approved.
08/07/2013	Claimants filed rebuttal comments.[6]
08/22/2013	Commission staff issued a request for additional information regarding the eligibility status of the claimants.[7]
09/19/2013	Finance submitted comments in response to staff's request.[8]
09/20/2013	The State Controller's Office (SCO) submitted a request for extension of time to comments, which was approved for good cause.
09/23/2013	DWR submitted comments in response to staff's request.[9]

[3] Exhibit B, *Agricultural Water Measurement* Test Claim, 12-TC-01.

[4] Exhibit C, Finance Comments on Consolidated Test Claims.

[5] Exhibit D, DWR Comments on Consolidated Test Claims.

[6] Exhibit E, Claimant Rebuttal Comments.

[7] Exhibit F, Request for Additional Information.

[8] Exhibit G, Finance Response to Commission Request for Comments.

09/23/2013	The claimants submitted comments in response to staff's request.[10]
10/07/2013	SCO submitted comments in response to staff's request.[11]
11/12/2013	Commission staff issued a Notice of Pending Dismissal of 12-TC-01, and a Notice of Opportunity for a Local Agency, Subject to the Tax and Spend Limitations of Articles 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.[12]
11/22/2013	Co-claimants Richvale and Biggs filed an appeal of the executive director's decision to dismiss test claim 12-TC-01.[13]
11/25/2013	The executive director issued notice that the appeal would be heard on March 28, 2014.[14]
01/13/2014	Oakdale Irrigation District (Oakdale) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Dustin C. Cooper, of Minasian, Meith, Soares, Sexton & Cooper, LLP, as its representative.[15]
01/13/2014	Glenn-Colusa Irrigation District (Glenn-Colusa) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Andrew M. Hitchings and Alexis K. Stevens of Somach, Simmons & Dunn as its representative.[16]
01/15/2014	Commission staff issued a Notice of Substitution of Parties and Notice of Hearing which mooted the appeal.[17]
07/31/2014	Commission staff issued a draft proposed statement of decision.[18]
08/13/2014	South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, and Biggs West Gridley Water District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.

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[9] Exhibit H, DWR Response to Commission Request for Comments.

[10] Exhibit I, Claimant Response to Commission Request for Comments.

[11] Exhibit J, SCO Response to Commission Request for Comments.

[12] Exhibit K, Notice of Pending Dismissal.

[13] Exhibit L, Appeal of Executive Director's Decision.

[14] Exhibit M, Appeal of Executive Director Decision and Notice of Hearing.

[15] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District.

[16] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[17] Exhibit P, Notice of Substitution of Parties and Notice of Hearing. Note that matters are only tentatively set for hearing until the draft staff analysis is issued which actually sets the matter for hearing pursuant to section 1187(b) of the Commission's regulations. Staff inadvertently omitted the word "tentative" in this notice.

[18] Exhibit Q, Draft Proposed Decision.

08/14/2014	Glenn Colusa Irrigation District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.
10/16/2014	Claimant filed comments on the draft proposed decision.[19]
10/17/2014	California Special Districts Association (CSDA) filed comments on the draft proposed decision.[20]
10/17/2014	Environmental Law Foundation (ELF)filed comments on the draft proposed decision.[21]
10/17/2014	DWR filed comments on the draft proposed decision.[22]
10/22/2014	Northern California Water Association (NCWA) filed late comments on the draft proposed decision.[23]
11/07/2014	Claimants filed late comments.[24]

II. Background

These consolidated test claims allege that Water Code Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] enacted by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) (10-TC-12) impose reimbursable state-mandated increased costs resulting from activities required of urban water suppliers and agricultural water suppliers. The claimants also allege that the Agricultural Water Measurement regulations issued by DWR (12-TC-01), codified at California Code of Regulations, title 23, sections 597-597.4, impose additional reimbursable state-mandated increased costs on agricultural water suppliers only.

The Water Conservation Act of 2009, pled in test claim 10-TC-12, calls for a 20 percent reduction in urban per capita water use on or before December 31, 2020, and an interim reduction of at least 10 percent on or before December 31, 2015.[25] In order to achieve these reductions, the Act requires urban retail water suppliers, both publicly and privately owned, to develop urban water use targets and interim targets that cumulatively result in the desired 20 percent reduction by December 31, 2020.[26] Prior to adopting its urban water use targets, each supplier is required to conduct at least one public hearing to allow community input regarding the supplier's implementation plan to meet the desired reductions, and to consider the economic

[19] Exhibit R, Claimant Comments on Draft Proposed Decision.

[20] Exhibit S, CSDA Comments on Draft Proposed Decision.

[21] Exhibit T, Environmental Law Foundation Comments on Draft Proposed Decision.

[22] Exhibit U, DWR Comments on Draft Proposed Decision.

[23] Exhibit V, NCWA Comments on Draft Proposed Decision.

[24] Exhibit W, Claimants Late Rebuttal Comments.

[25] Water Code section 10608.16 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[26] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

impacts of the implementation plan.[27] This hearing may be combined with the hearing required under prior law (Water Code 10631) for adoption of the urban water management plan (UWMP).[28] An urban retail water supplier is also required to include in its UWMP, which is required to be updated every five years in accordance with pre-existing Water Code section 10621, information describing the baseline per capita water use; interim and final urban water use targets;[29] and a report on the supplier's progress in meeting urban water use targets.[30]

With respect to agricultural water suppliers, the Act requires implementation of specified critical efficient water management practices, including measuring the volume of water delivered to customers and adopting a volume-based pricing structure; and additional efficient water management practices that are locally cost effective and technically feasible.[31] In addition, the Act requires agricultural water suppliers (with specified exceptions)[32] to prepare and adopt, and every five years update, an agricultural water management plan (AWMP),[33] describing the service area, water sources and supplies, water uses within the service area, previous water management activities; and including a report on which efficient water management practices have been implemented or are planned to be implemented, and information documenting any determination that a specified efficient water management practice was not locally cost effective or technically feasible.[34]

Prior to preparing and adopting or updating an AWMP, the Act requires an agricultural water supplier to notify the city or county within which the supplier provides water that it will be preparing or considering changes to the AWMP;[35] and to make the proposed plan available for

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[27] Water Code section 10608.26 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[28] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[29] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[30] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[31] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[32] See Water Code sections 10608.8(d) (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [agricultural water suppliers that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617 are exempt from the requirements of Part 2.55 (Water Code sections 10608-10608.64)]; 10608.48(f); 10828 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [an agricultural water supplier may meet requirements of AWMPs by submitting its water conservation plan approved by United States Bureau of Reclamation]; 10827 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [members of Agricultural Water Management Council and submit water management plans to council pursuant to the Memorandum of Understanding may rely on those plans to satisfy AWMP requirements]; 10829 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [adoption of an urban water management plan or participation in an areawide, regional, watershed, or basinwide water management plan will satisfy the AWMP requirements].

[33] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[34] Water Code sections 10608.48; 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[35] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

public inspection and hold a noticed public hearing.[36] An agricultural water supplier is then required to implement the AWMP in accordance with the schedule set forth in the AWMP;[37] and to submit a copy of the AWMP to DWR and a number of specified local entities, and make the plan available on the internet, within 30 days of adoption.[38]

Finally, to aid agricultural water suppliers in complying with their measurement requirements and developing a volume-based pricing structure as required by section 10608.48, DWR adopted in 2012 the Agricultural Water Measurement Regulations,[39] which are the subject of test claim 12-TC-01. These regulations provide a range of options for agricultural water suppliers to implement accurate measurement of the volume of water delivered to customers. The regulations provide for measurement at the delivery point or farm gate of an individual customer, or at a point upstream of the delivery point where necessary, and provide for specified accuracy standards for measurement devices employed by the supplier, whether existing or new, as well as field testing protocols and recordkeeping requirements, to ensure ongoing accuracy of volume measurements.

To provide some context for how the the test claim statute and implementing regulations fit into the state's water conservation planning efforts, a brief discussion of the history of water conservation law in California follows.

A. Prior California Conservation and Water Supply Planning Requirements.

1. Constitutional and Statutory Framework of Water Conservation.

Article X, section 2 of the California Constitution prohibits the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. It also declares that the conditions in the state require "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." Moreover, article X, section 2 provides that "[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and *such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water*."[40] Although article X, section 2 provides that it is self-executing; it also provides that the Legislature may enact statutes to advance its policy.

The Legislature has implemented these constitutional provisions in a number of enactments over the course of many years, which authorize water conservation programs by water suppliers, including metered pricing. For example:

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[36] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[37] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[38] Water Code sections 10843; 10844 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[39] Code of Regulations, title 23, sections 597-597.4 (Register 2012, No. 28).

[40] Adopted June 8, 1976. Derivation, former article 14, section 3, added November 6, 1928 and amended November 5, 1974 [emphasis added].

- Water Code section 1009 provides that water conservation programs are an authorized water supply function for all municipal water providers in the state.[41]
- Water Code section 1011 furthers the water conservation policies of the state by providing that a water appropriator does not lose an appropriative water right because of water conservation programs. [42]
- Water Code sections 520 -529.7 require water meters and recognize that metered water rates are an important conservation tool.[43]
- Water Code section 375(b) provides that public water suppliers may encourage conservation through "rate structure design." The bill amending the Water Code to add this authority was adopted during the height of a statewide drought. In an uncodified portion of the bill, the Legislature specifically acknowledged that conservation is an important part of the state's water policy and that water conservation pricing is a best management practice.[44]
- Water Code sections 370-374 provide additional, alternate authority (in addition to a water supplier's general authority to set rates) for public entities to encourage conservation rate structure design consistent with the proportionality requirements of Proposition 218.[45]
- Water Code section 10631(f)(1)(K) establishes water conservation pricing as a recognized water demand management measure for purposes of UWMPs, and other conservation measures including metering, leak detection and retrofits for pipes and plumbing fixtures.[46]

In addition, the Legislature has long vested water districts with broad authority to manage water to furnish a sustained, reliable supply. For example:

[41] Statutes 1976, chapter 709, p. 1725, section 1.

[42] Added by statutes 1979, chapter 1112, p. 4047, section 2, amended by Statutes, 1982, chapter 876, p. 3223, section 4, Statutes 1996, chapter 408, section 1, and Statutes 1999, chapter 938, section 2.

[43] Added by Statutes 1991, chapter 407 and amended by Statutes 2004, chapter 884, section 3 and Statutes 2005, chapter 22. See especially, Water Code section 521 (b) and (c)).

[44] Statutes 1993, chapter 313, section 1.

[45] Statutes 2008, chapter 610 (AB 2882). See Exhibit X, Senate Floor Analysis AB 2882; Assembly Floor Analysis AB 2882.

[46] Water Code section 10631(f)(1)(K) (Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 712 (SB 553); Stats. 2001, ch. 643 (SB 610); Stats. 2001, ch. 644 (AB 901); Stats. 2002, ch. 664 (AB 3034); Stats. 2002, ch. 969 (SB 1384); Stats. 2004, ch. 688 (SB 318); Stats. 2006, ch. 538 (SB 1852)).

- Irrigation Districts have the power to take any act necessary to furnish sufficient water for beneficial uses and to control water.[47] They have general authority to fix and collect charges for any service of the district.[48]
- County Water Districts have similar power to take any act necessary to furnish sufficient water and express authority to conserve.[49]
- Municipal Water Districts also have broad power to control water for beneficial uses and express power to conserve.[50]

2. Existing Requirements to Prepare, Adopt, and Update Urban Water Management Plans.

The Urban Water Management Act of 1983 required urban water suppliers to prepare and update an UWMP every five years.[51] This Act has been amended numerous times between its original enactment in 1983 and the enactment of the test claim statute in 2009.[52] The law pertaining to UWMPs in effect immediately prior to the enactment of the test claim statute consisted of sections 10610 through 10657 of the California Water Code, which detail the information that must be included in UWMPs, as well as who must file them.

According to the Act, as amended prior to the test claim statute, "[t]he conservation and efficient use of urban water supplies are of statewide concern; however, the planning for that use and the implementation of those plans can best be accomplished at the local level."[53] The Legislature declared as state policy that:

> (a) The management of urban water demands and efficient use of water shall be actively pursued to protect both the people of the state and their water resources.
>
> (b) The management of urban water demands and efficient use of urban water supplies shall be a guiding criterion in public decisions.

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[47] Water Code section 22075 added by Statutes 1943, chapter 372 and section 22078 added by Statutes 1953, chapter 719, p. 187, section 1.

[48] Water Code section 22280, as amended by statutes 2007, chapter 27, section 19.

[49] Water Code sections 31020 and 31021 added by Statutes 1949, chapter 274, p. 509, section 1.

[50] Water Code sections 71610 as amended by Statutes 1995, chapter 28 and 71610.5 as added by Statutes 1975, chapter 893, p. 1976, section 1.

[51] Statutes 1983, chapter 1009 added Part 2.6 to Division 6 of the Water Code, commencing at section 10610.

[52] Enacted, Statutes 1983, chapter 1009; Amended, Statutes 1990, chapter 355 (AB 2661); Statutes 1991-92, 1st Extraordinary Session, chapter 13 (AB 11); Statutes 1991, chapter 938 (AB 1869) Statutes 1993, chapter 589 (AB 2211); Statutes 1993, chapter 720 (AB 892); Statutes 1994, chapter 366 (AB 2853); Statutes 1995, chapter 28 (AB 1247); Statutes 1995, chapter 854 (SB 1011); Statutes 2000, chapter 712 (SB 553); Statutes 2001, chapter 643 (SB 610); Statutes 2001, chapter 644 (AB 901); Statutes 2002, chapter 664 (AB 3034); Statutes 2002, chapter 969 (SB 1384); Statutes 2004, chapter 688 (SB 318); Statutes 2006, chapter 538 (SB 1852); Statutes 2009, chapter 534 (AB 1465).

[53] Water Code section 10610.2 (Stats. 2002, ch. 664 (AB 3034)).

(c) Urban water suppliers shall be required to develop water management plans to actively pursue the efficient use of available supplies.[54]

The Act specified that each urban water supplier that provides water for municipal purposes either directly or indirectly to more than 3,000 customers or supplies more than 3,000 acre feet of water annually shall prepare, update, and adopt its urban water management plan at least once every five years on or before December 31, in years ending in five and zero.[55]

a. Contents of Plans

The required contents of an UWMP are provided in sections 10631 through 10635. These statutes are prior law and have not been pled in this test claim. As last amended by Statutes 2009, chapter 534 (AB 1465), section 10631 requires that an adopted UWMP contain information describing the service area of the supplier, reliability of supply, water uses over five year increments, water demand management measures currently being implemented or being considered or scheduled for implementation, and opportunities for development of desalinated water.[56] Section 10631 further provides that urban water suppliers that are members of the California Urban Water Conservation Council and submit annual reports in accordance with the "Memorandum of Understanding Regarding Urban Water Conservation in California," may submit those annual reports to satisfy the requirements of section 10631(f) and (g), pertaining to current, proposed, and future demand management measures.[57]

Section 10632 requires that an UWMP provide an urban water shortage contingency analysis, which includes actions to be taken in response to a supply shortage; an estimate of minimum supply available during the next three years; actions to be taken in the event of a "catastrophic interruption of water supplies," such as a natural disaster; additional prohibitions employed during water shortages; penalties or charges for excessive use; an analysis of impacts on revenues and expenditures; a draft water shortage contingency resolution or ordinance; and a mechanism for determining actual reductions in water use.[58]

Section 10633, as amended by Statutes 2002, chapter 261, specifies that the plan shall provide, to the extent available, information on recycled water and its potential for use as a water source in the service area of the urban water supplier. The preparation of the plan shall be coordinated with local water, wastewater, groundwater, and planning agencies that operate within the supplier's service area, and shall include: a description of wastewater collection and treatment systems; a description of the quantity of treated wastewater that meets recycled water standards; a description of recycled water currently used in the supplier's service area; a description and quantification of the potential uses of recycled water; projected use of recycled water over five year increments for the next 20 years; a description of actions that may be taken to encourage the

[54] Water Code section 10610.4 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[55] Water Code sections 10617 (Stats. 1996, ch. 1023(SB 1497)); 10621(a) (Stats. 2007, ch. 64 (AB 1376)).

[56] Water Code section 10631 (Statutes 2009, chapter 534 (AB 1465)).

[57] Water Code section 10631(i) (Statutes 2009, chapter 534 (AB 1465)).

[58] Water Code section 10632 (Stats. 1995, ch. 854 (SB 1011)).

use of recycled water; and a plan for optimizing the use of recycled water in the supplier's service area.[59]

As added by Statutes 2001, chapter 644, and continuously in law up to the adoption of the test claim statute, section 10634 requires the UWMP to include, to the extent practicable, information relating to the quality of existing sources of water available to the supplier over the same five-year increments as described in Section 10631(a); and to describe the manner in which water quality affects water management strategies and supply reliability.[60]

And finally, section 10635, added by Statutes 1995, chapter 330, requires an urban water supplier to include in its UWMP an assessment of the reliability of its water service to customers during normal and dry years, projected over the next 20 years, in five year increments.[61]

b. Adoption and Implementation of Plans

Sections 10640 through 10645, as added by Statutes 1983, chapter 1009 and Statutes 1990, chapter 355, provide the requirements for adoption and implementation of UWMPs, including public notice and recordkeeping requirements associated with the adoption of each update of the UWMP.

Section 10640 provides that every urban water supplier required to prepare an UWMP pursuant to this part shall prepare its UWMP pursuant to Article 2 (commencing with Section 10630), and shall "periodically review the plan … and any amendments or changes required as a result of that review shall be adopted pursuant to this article."[62] Section 10641 provides that an urban water supplier required to prepare an UWMP may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water demand management methods and techniques.[63]

Section 10642 provides that each urban water supplier shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the service area prior to and during the preparation of its UWMP. Prior to adopting an UWMP, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to section 6066 of the Government Code. A privately owned water supplier is required to provide a similar degree of notice, and the plan shall be adopted after the hearing either "as prepared or as modified…"[64]

Section 10643 provides that an UWMP shall be implemented "in accordance with the schedule set forth in [the] plan."[65] As amended by Statutes 2007, chapter 628, section 10644 requires an

[59] Water Code section 10633 (Stats. 2002, ch. 261 (SB 1518)).

[60] Water Code section 10634 (Stats. 2001, ch. 644 (AB 901)).

[61] Water Code section 10635 (Stats. 1995, ch. 330 (AB 1845)).

[62] Water Code section 10640 (Stats. 1983, ch. 1009).

[63] Water Code section 10640 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[64] Water Code section 10642 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552)).

[65] Water Code section 10643 (Stats. 1983, ch. 1009).

urban water supplier to submit to DWR, the State Library, and any city or county within which the supplier provides water supplies, a copy of its plan and copies of any changes or amendments to the plans no later than 30 days after adoption. Section 10644 also requires DWR to prepare and submit to the Legislature, on or before December 31, in the years ending in six and one, a report summarizing the status of the UWMPs adopted pursuant to this part. The report is required to identify the outstanding elements of the individual UWMPs. DWR is also required to provide a copy of the report to each urban water supplier that has submitted its UWMP to DWR.[66] And lastly, in accordance with section 10645, not later than 30 days after filing a copy of its UWMP with DWR, the urban water supplier and DWR shall make the plan available for public review during normal business hours.[67]

c. Miscellaneous Provisions Pertaining to the UWMP Requirement

While sections 10631 through 10635 provide for the lengthy and technical content requirements of UWMPs, and sections 10640 through 10645 provide the requirements of a valid adoption of a UWMP, several remaining provisions of the Urban Water Management Planning Act provide for the satisfaction of the UWMP requirements by other means, and provide for the easing of certain other regulatory requirements and the recovery of costs.

- Section 10631, as amended by Statutes 2009, chapter 534 (AB 1465), provides that urban water suppliers that are members of the California Urban Water Conservation Council shall be deemed in compliance with the demand management provisions of the UWMP "by complying with all the provisions of the 'Memorandum of Understanding Regarding Urban Water Conservation in California'…and by submitting the annual reports required by Section 6.2 of that memorandum."[68] These suppliers, then, are not separately required to comply with sections 10631(f) and (g), which require a description and evaluation of the supplier's "demand management measures" that are currently or could be implemented.[69]
- Section 10652 streamlines the adoption of UWMPs by exempting plans from the California Environmental Quality Act (CEQA). However, section 10652 does not exempt any project (that might be contained in the plan) that would significantly affect water supplies for fish and wildlife.[70]
- Section 10653 provides that the adoption of a plan shall satisfy any requirements of state law, regulation, or order, including those of the State Water Resources Control Board and the Public Utilities Commission, for the preparation of water

[66] Water Code section 10644 (Stats. 1983, ch. 1009; Stats. 1990, ch. 355 (AB 2661); Stats. 1992, ch. 711 (AB 2874); Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552); Stats. 2004, ch. 497 (AB 105); Stats. 2007, ch. 628 (AB 1420)).

[67] Water Code section 10645 (Stats. 1990, ch. 355 (AB 2661)).

[68] Water Code section 10631 (as amended, Stats. 2009, ch. 534 (AB 1465)).

[69] Water Code section 10631(f-g) (as amended, Stats. 2009, ch. 534 (AB 1465)).

[70] Water Code section 10652 (Stats. 1983, ch. 1009; Stats. 1991-1992, 1st Ex. Sess., ch. 13 (AB 11); Stats. 1995, ch. 854 (SB 1011)).

management plans or conservation plans; provided, that if the State Water Resources Control Board or the Public Utilities Commission requires additional information concerning water conservation to implement its existing authority, nothing in this part shall be deemed to limit the board or the commission in obtaining that information. In addition, section 10653 provides that "[t]he requirements of this part *shall be satisfied by any urban water demand management plan prepared to meet federal laws or regulations after the effective date of this part*, and which substantially meets the requirements of this part, or by any existing urban water management plan which includes the contents of a plan required under this part."[71] The plain language of section 10653 therefore exempts an urban retail water supplier that is already required to prepare a water demand management plan from any requirements of an UWMP added by the test claim statutes.

- Section 10654 provides expressly that 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." Any best water management practice that is included in the plan that is identified in the "Memorandum of Understanding Regarding Urban Water Conservation in California" (discussed below) is deemed to be reasonable for the purposes of this section.[72] Therefore, suppliers are expressly authorized to recover the costs of implementing "reasonable water conservation measures" or any "best water management practice…identified in [the MOU for Urban Water Conservation]."

3. Prior Requirements to Prepare, Adopt, and Update Agricultural Water Management Plans, Which Became Inoperative by their own Terms in 1993.

The Agricultural Water Management Planning Act was enacted in 1986 and became inoperative, by its own terms, in 1993.[73] The 1986 Act stated in its legislative findings and declarations that "[t]he Constitution requires that water in the state be used in a reasonable and beneficial way…" and that "[t]he conservation of agricultural water supplies are of great concern." The findings and declarations further stated that "[a]gricultural water suppliers that receive water from the federal Central Valley Water Project are required by federal law to develop and implement water conservation plans," as are "[a]gricultural water suppliers applying for a permit to appropriate water from the State Water Resources Control Board…" Therefore, the act stated that "it is the policy of the state as follows:"

(a) The conservation of water shall be pursued actively to protect both the people of the state and their water resources.

(b) The conservation of agricultural water supplies shall be an important criterion in public decisions on water.

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[71] Water Code section 10653 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)) [emphasis added].

[72] Water Code section 10654 (Stats. 1983, ch. 1009; Stats. 1994, ch. 609 (SB 1017)).

[73] Statutes 1986, chapter 954 (AB1658). See Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

(c) Agricultural water suppliers, who determine that a significant opportunity exists to conserve water or reduce the quantity of highly saline or toxic drainage water, shall be required to develop water management plans to achieve conservation of water.[74]

Specifically, the 1986 Act provided that every agricultural water supplier serving water directly to customers "shall prepare an informational report based on information from the last three irrigation seasons on its water management and conservation practices…" That report "shall include a determination of whether the supplier has a significant opportunity to conserve water or reduce the quantity of highly saline or toxic drainage water through improved irrigation water management…" If a "significant opportunity exists" to conserve water or improve the quality of drainage water, the supplier "shall prepare and adopt an agricultural water management plan…" (AWMP).[75] The Act provided, however, that an agricultural water supplier "may satisfy the requirements of this part by participation in areawide, regional, watershed, or basinwide agricultural water management planning where those plans will reduce preparation costs and contribute to the achievement of conservation and efficient water use and where those plans satisfy the requirements of this part." The requirements of an AWMP or an informational report, where required, included quantity and sources of water delivered to and by the supplier; other sources of water used within the service area, including groundwater; a general description of the delivery system and service area; total irrigated acreage within the service area; acreage of trees and vines within the service area; an identification of current water conservation practices being used, plans for implementation of water conservation practices, and conservation educational practices being used; and a determination of whether the supplier has a significant opportunity to save water by means of reduced evapotranspiration, evaporation, or reduction of flows to unusable water bodies, or to reduce the quantity of highly saline or toxic drainage water.[76] In addition, an AWMP "shall address all of the following:" quantity and source of surface and groundwater delivered to and by the supplier; a description of the water delivery system, the beneficial uses of the water supplied, conjunctive use programs, incidental and planned groundwater recharge, and the amounts of delivered water that are lost to evapotranspiration, evaporation, or surface flow or percolation; an identification of cost-effective and economically feasible measures for water conservation; an evaluation of other significant impacts; and a schedule to implement those water management practices that the supplier determines to be cost-effective and economically feasible.[77]

The Act further provided that an agricultural water supplier required to prepare an AWMP "may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water conservation and management methods and techniques."[78] And, "[p]rior to adopting a plan, the agricultural water supplier shall make the plan available for public inspection and shall hold a public hearing thereon." This requirement

[74] Former Water Code section 10802 (Stats. 1986, ch. 954 (AB 1658)).

[75] Former Water Code section 10821 (as added, Stats. 1986, ch. 954 (AB 1658)).

[76] Former Water Code section 10825 (as added, Stats. 1986, ch. 954 (AB 1658)).

[77] Former Water Code section 10826 (as added, Stats. 1986, ch. 954 (AB 1658)).

[78] Former Water Code section 10841(as added, Stats. 1986, ch. 954 (AB 1658)).

applies also to privately owned water suppliers.[79] In addition, the Act states that an agricultural water supplier shall implement its AWMP in accordance with the schedule set forth in the plan, and "shall file with [DWR] a copy of its plan no later than 30 days after adoption."[80] Finally, the 1986 Act provided for funds to be appropriated to prepare the informational reports and agricultural water management plans, as required, and provided that "[t]his part shall remain operative only until January 1, 1993, except that, if an agricultural water supplier fails to submit its information report or agricultural water management plan prior to January 1, 1993, this part shall remain operative with respect to that supplier until it has submitted its report or plan, or both."[81]

As noted above, the AWMP requirements provided by the Agricultural Water Management Planning Act became inoperative as of January 1, 1993,[82] and therefore do not constitute the law in effect immediately prior to the test claim statute, even though, as shown below, the test claim statute reenacted substantially similar plan requirements. However, the federal requirement to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the federal Central Valley Project Improvement Act (Public Law 102-565) or the federal Reclamation Reform Act of 1982, remained the law throughout and does constitute the law in effect immediately prior to the test claim statute, with respect to those suppliers subject to one or both federal requirements.[83]

4. The Water Measurement Law, Statutes 1991, chapter 407, applicable to Urban and Agricultural Water Suppliers.

The Water Measurement Law (Water Code sections 510-535) requires standardized water management practices and water measurement, and is applicable to Urban and Agricultural Water Suppliers, as follows:[84]

- Every water purveyor that provides potable water to 15 or more service connections or 25 or more yearlong residents must require meters as a condition of *new* water service.[85]
- Urban water suppliers, except those that receive water from the federal Central Valley Project, must install meters on all municipal (i.e., residential and governmental) and industrial (i.e., commercial) service connections on or before January 1, 2025 and shall charge each customer that has a service connection for which a meter has been installed based on the actual volume of deliveries beginning on or before January 1, 2010 service. A water purveyor, including an

[79] Former Water Code section 10842(as added, Stats. 1986, ch. 954 (AB 1658)).

[80] Former Water Code sections 10843 and 10844 (as added, Stats. 1986, ch. 954 (AB 1658)).

[81] Former Water Code sections 10853; 10854; 10855 (as added, Stats. 1986, ch. 954 (AB 1658)).

[82] Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

[83] See Water Code section 10828 (added, Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[84] The Water Measurement Law was added by Statutes 1991, chapter 407.

[85] Section 525 as amended by statutes 2005, chapter 22.

urban water supplier, may recover the cost of the purchase, installation, and operation of a water meter from rates, fees, or charges.[86]

- Urban water suppliers receiving water from the federal Central Valley Project (CVP) shall install water meters on all residential and non-agricultural commercial service connections constructed prior to 1992 on or before January 1, 2013 and charge customers for water based on the actual volume of deliveries, as measured by a water meter, beginning March 1, 2013, or according to the CVP water contract. Urban water suppliers that receive water from the CVP are also specifically authorized to "recover the cost of providing services related to the purchase, installation, and operation and maintenance of water meters from rates, fees or charges.[87]
- Agricultural water providers shall report annually to DWR summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis. However, the Water Measurement Law does not require implementation of water measurement programs or practices that are not locally cost effective.[88]

The test claim statute, as noted above, requires agricultural water suppliers to measure the volume of water delivered to customers and to adopt a volume-based pricing structure. However, the test claim statute also contemplates a water supplier that is both an agricultural and an urban water supplier, by definition: section 10829 provides that an agricultural water supplier may satisfy the AWMP requirements by adopting an UWMP pursuant to Part 2.6 of Division 6 of the Water Code; and the definitions of "agricultural" and "urban retail" water suppliers in section 10608.12 are not, based on their plain language, mutually exclusive. The record on this test claim is not sufficient to determine how many, if any, agricultural water suppliers are also urban retail water suppliers,[89] and consequently would be required to install water meters on new and existing service connections in accordance with Water Code sections 525-527, and to charge customers based on the volume of water delivered. In addition, the record is not sufficient to determine whether and to what extent some agricultural water suppliers may already have implemented water measurement programs which were locally cost effective, in accordance with section 531.10. However, to the extent that an agricultural water supplier is also an urban water supplier, sections 525-527 may constitute a prior law requirement to accurately measure water delivered and charge customers based on volume, and the test claim statute may not impose new requirements or costs on some entities. And, to the extent that water measurement programs or practices were previously implemented pursuant to section 531.10, some of the activities required by the test claim statute and regulations may not be newly required, with respect to certain agricultural suppliers. These caveats and limitations are noted where relevant in the analysis below.

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[86] Section 527 as amended by statutes 2005, chapter 22.

[87] Section 526 as amended by Statutes 2004, chapter 884.

[88] Section 531.10 as added by Statutes 2007, chapter 675.

[89] See Water Code section 10608.12, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) for definitions of "agricultural water supplier" and "urban retail water supplier."

III. Positions of the Parties

A. Claimants' Positions:

The four original claimants together alleged a total of $72,194.48 in mandated costs for fiscal year 2009-2010 (although Paradise maintains a different fiscal year than the remaining claimants). In addition, claimants project that program costs for fiscal year 2010-2011, and for 2011-2012, will be "higher," but claimants allege that they are unable to reasonably estimate the amount.

South Feather Water and Power Agency and Paradise Irrigation District

South Feather and Paradise allege that they are urban retail water suppliers, as defined in Water Code section 10608.12. As such, they allege that they are required to establish urban water use targets "by July 1, 2011 by selecting one of four methods to achieve the mandated water conservation." South Feather and Paradise further allege that they are "mandated to adopt expanded and more detailed urban water management plans in 2010 that include the baseline daily per capita water use, urban water use target, interim urban water use target, compliance daily per capita water use, along with the bases for determining estimates, including supporting data."[90] South Feather and Paradise allege that thereafter, UWMPs are to be updated "in every year ending in 5 and 0," and the 2015 plan "must describe the urban retail water supplier's progress towards [*sic*] achieving the 20% reduction by 2020."[91] Finally, South Feather and Paradise allege that they are required to conduct at least one noticed public hearing to allow community input, consider economic impacts, and adopt a method for determining a water use baseline "from which to measure the 20% reduction."[92]

Prior to the Act, South Feather and Paradise allege that there was no requirement to achieve a 20 percent per capita reduction in water use by 2020. They allege that they were required to adopt UWMPs prior to the Act, but not to include 'the baseline per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with bases for determining those estimates, including supporting data."[93] And they allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts…or to adopt a method for determining an urban water use target."[94]

Biggs-West Gridley Water District and Richvale Irrigation District

Richvale and Biggs allege that they are required to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate," in accordance with regulations adopted by DWR pursuant to the Act.[95] They further allege that they are required to adopt a pricing structure for water customers

[90] Exhibit A, 10-TC-12, page 3.

[91] *Ibid*.

[92] Exhibit A, 10-TC-12, page 4.

[93] Exhibit A, 10-TC-12, pages 7-8.

[94] Exhibit A, 10-TC-12, page 8.

[95] Exhibit A, 10-TC-12, page 4.

based on the quantity of water delivered, and that "[b]ecause Richvale and Biggs are local public agencies, the change in pricing structure would have to be authorized and approved by its [*sic*] customers through the Proposition 218 process."[96]

In addition, Richvale and Biggs allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices," as specified. They additionally allege that on or before December 31, 2012, they are required to prepare AWMPs that include a report on the implementation and planned implementation of efficient water management practices, and documentation supporting any determination made that certain conservation measures were held to be not locally cost effective or technically feasible.[97] Finally, Richvale and Biggs allege that prior to adoption of an AWMP, they are required to notice and hold a public hearing; and that after adoption the plan must be distributed to "various entities" and posted on the internet for public review.[98]

Prior to the Act, Richvale and Biggs assert, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered." In addition, prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible." And, Richvale and Biggs allege that prior to the Act the number of agricultural water suppliers subject to the requirement to develop an AWMP was significantly fewer, and now the "contents of the plans" are "more encompassing than plans required under the former law."[99] Richvale and Biggs allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing prior to adopting the plan, make copies of it available for public inspection, or to publish the time and place of the hearing once per week for two successive weeks in a newspaper of general circulation."[100]

As discussed below, in the early stages of Commission staff's review and analysis of these consolidated test claims, it became apparent that Richvale and Biggs, the two claimants representing agricultural water suppliers, are not subject to the revenue limits of article XIII B, and do not collect or expend "proceeds of taxes," within the meaning of articles XIII A and XIII B.[101] After additional briefing and further review, it was concluded that Richvale and Biggs are indeed not eligible for reimbursement under article XIII B, section 6. The Commission's executive director therefore issued a notice of pending dismissal and offered an opportunity for another eligible local claimant, subject to the tax and spend limitations of articles XIII A and XIII B, to take over the test claim.[102] Richvale and Biggs filed an appeal of that decision, and maintain that they are eligible local government claimants pursuant to Government Code section 17518, and that the fees or assessments that the districts would be required to establish or increase to comply with the requirements of the test claim statute and regulations would be

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[96] *Ibid*.

[97] Exhibit A, 10-TC-12, pages 4-6.

[98] Exhibit A, 10-TC-12, page 6.

[99] Exhibit A, 10-TC-12, page 8.

[100] Exhibit A, 10-TC-12, page 9.

[101] Exhibit F, Commission Request for Additional Information, page 1.

[102] Exhibit K, Notice of Pending Dismissal.

characterized as taxes under article XIII B, section 8, because such fees or assessments would exceed the reasonable costs of providing water services.[103] This decision addresses these issues.

Glenn-Colusa Irrigation District and Oakdale Irrigation District

Glenn-Colusa and Oakdale requested to be substituted in as parties to these consolidated test claims, in place of Richvale and Biggs.[104] Both Glenn-Colusa and Oakdale submitted declarations asserting that they receive an annual share of property tax revenue, and therefore are subject to articles XIII A and XIII B of the California Constitution. Both additionally allege that they incur at least $1000 in increased costs as a result of the test claim statute and regulations, and that they are subject to the requirements of the test claim statutes and regulations as described in the test claim narrative.[105]

Claimants' Collective Response to the Draft Proposed Decision

In comments on the draft proposed decision, the claimants focus primarily on the findings regarding the ineligibility of Richvale and Biggs to claim reimbursement based on the evidence in the record indicating that neither agency collects or expends tax revenues subject to the limitations of articles XIII A and XIII B. The claimants also address the related findings that all claimants have sufficient fee authority under law to cover the costs of the mandate, and thus the Commission cannot find costs mandated by the state, pursuant to section 17556(d).

Specifically, the claimants argue that "[f]ees and charges for sewer, water, or refuse collection services are excused from the formal election process, but not from the majority protest process."[106] Therefore, claimants conclude that "[a]gencies that provide water, sewer, or refuse collection services, including Claimants, lack sufficient authority to unilaterally impose new or increased fees or charges in light of Proposition 218's majority protest procedure."[107]

In addition, claimants note the Commission's analysis in 07-TC-09, *Discharge of Stormwater Runoff*, and argue that the Commission should not "ignore a prior Commission decision that is directly on point…" The claimants assert that "as this Commission has already recognized…" Proposition 218 "created a legal barrier to establishing or increasing fees or charges…" and as a result claimants "can do no more than merely propose new or increased fees for customer approval and the customers have the authority to then accept or reject…" a fee increase.[108]

The claimants assert that the reasoning of the draft proposed decision "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218..."[109] and "would create a class of local agencies that are per se ineligible for reimbursement under this test

[103] Exhibit L, Appeal of Executive Director's Decision.

[104] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[105] *Ibid.*

[106] Exhibit R, Claimant Comments on Draft Proposed Decision, page 10.

[107] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[108] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[109] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[110] The claimant calls this a "sea change in Constitutional interpretation…"[111]

The claimants argue, based on this interpretation of the effect of Proposition 218, that the draft proposed decision inappropriately excluded Richvale and Biggs from subvention, "because they do not currently collect or expend tax revenues."[112] The claimants argue that "this additional 'requirement' [is] based on an outdated case that predates Proposition 218 and on an inapplicable line of cases that apply only to redevelopment agencies, while ignoring the strong policy underlying the voters' approval of the subvention requirement."[113] The claimants argue that after articles XIII C and XIII D, "assessments and property-related fees and charges have joined tax revenues as among local entities' 'increasingly limited revenue sources…'"[114]

The claimants further argue that: "Agencies like Richvale and Biggs that need additional revenue to pay for new mandates but are subject to the limitations of Proposition 218 are faced with three problematic options: (a) do not implement the mandates in light of revenue limitations; (b) implement the mandates with existing revenue; or (c) propose a new or increased fee or charge, assessment, or special tax to implement the mandates."[115] The claimants argue for the Commission to take action to expand the scope of reimbursement: "the subvention provision should be read in harmony with later Constitutional enactments and protect not just tax revenue, but assessment and fee revenue as well."[116]

Finally, in late comments, the claimants challenge DWR's reasoning, including the figures cited by the department, that due to the existence of a substantial number of private water suppliers, the test claim statutes do not impose a "program" within the meaning of article XIII B, section 6.[117]

B. State Agency Positions:

Department of Finance

Finance maintains that "the Act and Regulations do not impose a reimbursable mandate on local agencies within the meaning of Article XIII B, section 6."[118] Finance asserts that each of the claimants is a special district authorized to charge a fee for delivery of water to its users, and therefore has the ability to cover the costs of any new required activities.[119] Finance further

[110] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[111] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[112] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[113] Exhibit R, Claimant Comments on Draft Proposed Decision, page 16.

[114] Exhibit R, Claimant Comments on Draft Proposed Decision, page 17.

[115] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[116] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21.

[117] Exhibit W, Claimant Late Comments, pages 1-4.

[118] Exhibit C, Finance Comments, page 1.

[119] Exhibit C, Finance Comments, page 1.

asserts that the conservation efforts required by the test claim statute and regulations will result in surplus water accruing to the claimant districts, which are authorized to sell water. Finance concludes that "each district will likely have the opportunity to cover all or a portion of costs related to implementation of the Act or Regulations with revenue from surplus water sales."[120] Moreover, Finance argues that "special districts are only entitled to reimbursement if they are subject to the tax and spend limitations under articles XIII A and XIII B…*and only when the mandated costs in question can be recovered solely from the proceeds of taxes*."[121] Finance argues that the claimants "should be directed to provide information that will enable the Commission on State Mandates to determine if they are subject to tax and spending limitations."[122] Finance did not submit comments on the draft proposed decision.

State Controller's Office

In response to Commission staff's request for additional information regarding the uncertain eligibility of the test claimants, the SCO submitted written comments confirming that the "Butte County Auditor-Controller has confirmed for fiscal years 2010-2011, 2011-2012, and 2012-2013," that South Feather and Paradise both received proceeds of taxes, but Richvale and Biggs did not.[123] However, the SCO also noted that none of the four claimants reported an appropriations limit for fiscal years 2010-2011, 2011-2012, and 2012-2013. The SCO stated that "Government Code section 7910 requires each local government entity to annually establish its appropriations limit by resolution of its governing board," and that "Government Code section 12463 requires the annual appropriations limit to be reported in the financial transactions report submitted to the SCO." However, the SCO noted that it "has the responsibility to review each report for reasonableness, yet we are not required to audit any of the data reported." The SCO concluded, therefore, that "we are unable to determine which special district is subject to report an annual appropriations limit." The SCO did not comment on the draft proposed decision.

Department of Water Resources

DWR argues, in comments on the consolidated test claims, first, that the Water Conservation Act of 2009 applies to public and private entities alike, and is therefore not a "program" within the meaning of article XIII B, section 6. In addition, DWR argues that the Act is not a "new program," because it is "a refinement of urban and agricultural water conservation requirements that have been part of the law for years." DWR further asserts that even if the Act "were an unfunded state mandate, it would not be reimbursable since the water suppliers have sufficient non-tax sources to offset any implementation costs." And, DWR asserts that the test claim regulations on agricultural water measurement do not impose any requirements on water suppliers because "they are free to choose alternative measurement methods." And finally, DWR argues that the Act does not impose any new programs or higher levels of service "because what is required is compliance with general and evolving water conservation standards based on

[120] Exhibit C, Finance Comments, page 2.

[121] Exhibit C, Finance Comments, page 2 [emphasis in original].

[122] Exhibit C, Finance Comments, page 2.

[123] Exhibit J, SCO Comments, pages 1-2.

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."[124]

In comments on the draft proposed decision, DWR "concurs with and fully supports the ultimate conclusion reached…", but reiterates and expands upon its earlier comments with respect to whether the alleged test claim requirements constitute a new program or higher level of service that is uniquely imposed upon local government.[125] DWR argues that "a law that governs private and public entities alike is not a 'program' for purposes of article XIII B…"[126] DWR continues:

> Claimants, in their Rebuttal Comments, ignore DWR's reference to the language of the Water Conservation Act, which by its plain terms is made applicable to both public and private entities. Instead, Claimants seek to shift attention away from the nature of the activity and focus instead on the number of entities engaged in that activity. Claimants concede that the law and regulations adopted pursuant to that law do in fact apply to both private and public entities, but argue that because (according to their calculation) "only 7.67%" of urban retail water suppliers are private, the requirements of the Water Conservation Act ought to be treated as reimbursable "programs" because those requirements "fall overwhelmingly on local governmental agencies."[127]

DWR maintains that "there are, in fact, 72 private wholesale and retail suppliers out of a total of 369…so the proportion of private water suppliers is actually 16.3 percent." And, "based on data submitted in the 2010 urban water management plans, it turns out that private retail water suppliers serve 19.7 percent of the population and account for 17.3 percent of water delivered."[128]

DWR acknowledges that there are more public than private water suppliers, but asserts that "[u]nder the Supreme Court's test in *County of Los Angeles v. State of California* the question is not whether an activity is more likely to be undertaken by a governmental entity, but whether the activity implements a state policy and imposes unique requirements on local governments, but is one that does not apply generally to all residents and entities in the state."[129] DWR explains that "generally," in this context, is not synonymous with "commonly," and therefore the prevalence of public water suppliers as to private is not relevant to the issue; rather, "generally" refers to

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[124] Exhibit D, DWR Comments, page 2.

[125] Exhibit U, DWR Comments on Draft Proposed Decision, page 1.

[126] Exhibit U, DWR Comments on Draft Proposed Decision, page 2 [citing Exhibit D, DWR Comments, filed June 7, 2013; *Carmel Valley Fire Protection District v. State* (1987) 190 Cal.App.3d 521, 537].

[127] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [quoting Exhibit E, Claimant's Rebuttal Comments, pages 3-4].

[128] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[129] Exhibit U, DWR Comments on Draft Proposed Decision, page 3. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

laws of general application, meaning "those that apply to all persons or entities of a particular class."[130] The Water Conservation Act, DWR maintains, "does just that."[131]

In addition, DWR disputes that the provision of water services is a "classic governmental function," as asserted by the claimants.[132] The California Supreme Court has held that reimbursement should be limited to new "programs" that carry out the governmental function of providing services to the public.[133] DWR maintains that there is an important distinction between public purposes, and private or corporate purposes, and that that distinction should control in the analysis of a new program or higher level of service. In particular, DWR identifies the provision of utilities to municipal customers as a corporate activity, rather than a governmental purpose:

> Of the myriad services provided by government, although some may be difficult to categorize, at either end of the spectrum the categories are fairly clear. At one end, such things as police and fire protection have long been recognized as true governmental functions, those that implicate the notion of the "government as sovereign." At the other end, however, are public utilities such as power generation, and, of particular significance to this claim, municipal water districts.[134]

DWR argues that "California law thus draws a distinction between the many utilitarian services that could as easily be (and often are) undertaken by the private sector, and those that implicate the unique authority vested in the state and its political subdivisions." DWR continues: "Maintaining a police force, for instance, is easily understood as something fundamental to the government *as government*." "On the other hand," DWR reasons, "there is nothing intrinsically governmental about a government entity operating a utility and providing services such as electricity, natural gas, sewer, garbage collection, or water delivery."[135]

DWR thus "urges the Commission to give full consideration to the fact that the Water Conservation Act is a law of general application that applies to private as well as public water

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[130] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [citing *McDonald v. Conniff* (1893) 99 Cal.386, 391.

[131] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[132] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing Exhibit E, Claimant Rebuttal Comments, page 4].

[133] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 50].

[134] Exhibit U, DWR Comments on Draft Proposed Decision, page 5 [citing *Chappelle v. City of Concord* (1956) 144 Cal.App.2d 822, 825; *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Davoust v. City of Alameda* (1906) 149 Cal. 69, 72; *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 593; *Nourse v. City of Los Angeles* (1914) 25 Cal.App. 384, 385; *Mann Water & Power Co. v. Town of Sausalito* (1920) 49 Cal.App. 78, 79; *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 58; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

[135] Exhibit U, DWR Comments on Draft Proposed Decision, page 6.

suppliers alike." And, DWR reiterates: "contrary to Claimants' suggestion, water delivery, while clearly an important service, is not a classic "governmental function" in the constitutional sense."[136]

C. Interested Person Positions:[137]

California Special Districts Association

CSDA asserts that "the Proposed Decision fails to appropriately analyze the provisions of Article XIII B Section 6…as amended by Proposition 1A in 2004…"[138] CSDA argues that the draft proposed decision "rather analyzes the original language of Article XIII B Section 6 adopted as Proposition 4 in 1978, before the adoption of Proposition 218 adding articles XIII C and XIII D to the Constitution and before the adoption of Proposition 1A amending Article XIII B Section 6."[139]

CSDA argues that the plain language of article XIII B, section 6, as amended by Proposition 1A, "indicates that the mandate provisions are applicable to all cities, counties, cities and counties, and special districts without restriction."[140] CSDA further asserts that "[t]he plain language also mandates the state to appropriate the 'full payment amount' of costs incurred by local government in complying with state mandated programs, without any qualification as to the types of revenues utilized by local governments in paying the costs of such compliance."[141] CSDA reasons that "there are no words of limitation indicating that suspension of mandates is only applicable to those local government agencies which receive proceeds of taxes and expend those proceeds of taxes in complying with state mandated programs." Therefore, absent "such limiting language, the holding of the Proposed Decision which limits eligibility for claiming reimbursement…to those local agencies receiving proceeds of taxes is contradicted by the mandate provisions of Proposition 1A, and is therefore incorrect as a matter of law."[142]

CSDA also argues that the voters' intent and understanding in adopting Proposition 1A is controlling, and can be determined by examining the LAO analysis in the ballot pamphlet.[143] CSDA argues that "[t]he LAO analysis of Proposition 1A in the ballot pamphlet fails to mention any restriction or limitation on state mandates to be reimbursed or suspended, and such analysis is totally silent as to any requirement that reimbursable mandates be limited to those mandates imposed on local governments which receive and expend proceeds of taxes…" In fact, CSDA argues, the LAO analysis indicates that Proposition 1A "expand(s) the circumstances under

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[136] Exhibit U, DWR Comments on Draft Proposed Decision, page 7.

[137] "Interested person" is defined in the Commission's regulations to mean "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (Cal. Code Regs., tit. 2, § 1181.2(j).)

[138] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[139] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[140] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[141] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[142] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[143] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

which the state is responsible for reimbursing cities, counties and special districts for complying with state mandated programs by including all programs for which the state even had partial financial responsibility before such transfer."[144] CSDA maintains that "[t]herefore the voters who approved Proposition 1A by 82% of the popular vote had no understanding of this limitation on reimbursement of state mandates to local governments which is the basic holding of the Proposed Decision."[145] CSDA relies on the language of the ballot pamphlet, which states: "if the state does not fund a mandate within any year, the state must eliminate local government's duty to implement it for that same time period."[146] CSDA concludes that "[t]he plain words of Proposition 1A support this voter intent to require the state to fully reimburse the costs incurred by all cities, counties, cities and counties and special districts in implementing any state program in which the complete or partial financial responsibility for that program has been transferred from the state to local government, not just those cities, counties, cities and counties, and special districts which receive proceeds of taxes."[147]

In addition, CSDA argues that the Commission's analysis must read together and harmonize articles XIII A, XIII B, XIII C, and XIII D.[148] Specifically, CSDA argues that pursuant to article XIII C, added by Proposition 218, property-related fees are subject to "majority protest procedures" and "may not be expended for general governmental services…which are available to the public at large in substantially the same manner as they are to property owners..." [149] And, revenues from property-related fees "may not be used for any purpose other than that for which the fee was imposed;" and "may not exceed the costs required to provide the property related service."[150] In addition, CSDA asserts that the amount of a property-related fee must not exceed the proportional cost of providing the service to each individual parcel subject to the fee.[151] CSDA also notes that "Article XIII D includes similar provisions restricting the ability of local governments to raise and expend assessment revenue."[152] CSDA argues that "[a]nalyzed together, all of these restrictions on the raising and expenditure of property related fees and charges by local government agencies specified in Articles XIII C and D of the Constitution severely limit the ability of local government agencies to utilize revenue for property related fees and charges to fund the costs of state mandated programs."[153] CSDA goes on to argue that "[t]hose restrictions are more onerous and stringent than the restrictions imposed on local government agencies in expending proceeds of taxes by virtue of the appropriations limit in

[144] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[145] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[146] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[147] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[148] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[149] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[150] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[151] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[152] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[153] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

Article XIII B."[154] CSDA concludes that "[t]he Proposed Decision should be modified to recognize these restrictions imposed by Articles XIII C and D."[155]

Environmental Law Foundation Position

ELF states, in its comments, that it agrees with the draft proposed decision, however, "[t]o 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…"[156] ELF asserts that "the Commission should find that charges for irrigation water are not 'property-related fees' for the purposes of Article XIII D of the California Constitution."[157] Specifically, ELF agrees that the test claim statutes are exempt from the voter-approval requirements of article XIII D, section 6(c);[158] however, ELF also argues that "charges for irrigation water are not 'property-related fees' at all." ELF reasons: "As a result, raising them does not trigger the substantive or procedural requirements contained in Article XIII D, and the claimant districts may increase them free of any constitutional obstacle."[159]

ELF continues: "Article XIII D, § 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)." However, ELF asserts that "Section 2 of Article XIII D makes Proposition 218's relatively limited reach abundantly clear."[160] ELF notes that section 2 defines a fee or charge as "any levy other than an ad valorem tax, a special tax, or an assessment, 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."[161] ELF therefore reasons that "[f]ees 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."[162] ELF notes that in *Apartment Association of Los Angeles County v. City of Los Angeles*[163] the court held that an inspection fee imposed upon landlords was not imposed upon them as property owners, but as business owners and, therefore the fee was not subject to article XIII D.[164] The court, ELF

[154] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[155] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[156] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[157] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[158] Exhibit T, ELF Comments on Draft Proposed Decision, page 3 [citing Exhibit Q, Draft Proposed Decision, page 80].

[159] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[160] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[161] California Constitution, article XIII D, section 2; Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[162] Exhibit T, ELF Comments on Draft Proposed Decision, pages 3-4.

[163] (2001) 24 Cal.4th 830.

[164] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

explains, found that this type of 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."[165]

ELF goes on to note that "no case has squarely addressed the issue…" but the courts have recognized that not all water service charges are necessarily subject to article XIII D. In *Pajaro Valley Water Management Agency v. Amrheim*,[166] the court held that a groundwater augmentation charge was a property-related fee, but "it rested that conclusion on the fact that the majority of users were residential users, not large-scale irrigators."[167] And, ELF notes, other cases have found that domestic water use is "necessary for 'normal ownership and use of property.'"[168] ELF concludes that these cases, and others, "present no obstacle to the conclusion that irrigation water is not a property-related service."[169] ELF concludes that fees for irrigation water are not "property-related" but a business-related fee, and that therefore the Commission should deny this test claim.[170]

Northern California Water Association Position

In late comments on the draft proposed decision, NCWA seeks to "highlight and emphasize how onerous and expensive these new state mandates are in the Sacramento Valley."[171] NCWA argues that "[t]hese statewide benefits, achieved through implementation of incredibly expensive mandates, ought to be funded by the state and not borne exclusively by the impacted local agencies' landowners."[172] NCWA continues: "The draft proposed decision, in an effort to circumvent the clear requirements to reimburse for these types of state mandates, has attempted to avoid reimbursement by exerting exclusions that are not appropriate for the facts before the Commission."[173] NCWA denies that any "exemptions" apply to the test claim statutes, and "urge[s] the Commission to modify the draft proposed decision to reimburse these and other similarly affected water suppliers."[174]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

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[165] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

[166] (2007) 150 Cal.App.4th 1364.

[167] Exhibit T, ELF Comments on Draft Proposed Decision, pages 4-5.

[168] Exhibit T, ELF Comments on Draft Proposed Decision, page 5 [citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427; *Bighorn Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205].

[169] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[170] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[171] Exhibit V, NCWA Comments on Draft Proposed Decision, page 1.

[172] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[173] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[174] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

> Whenever 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 programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 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."[175] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[176]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[177]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[178]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[179]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not

[175] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

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

[177] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[178] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56).

[179] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

reimbursable if an exception identified in Government Code section 17556 applies to the activity.[180]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[181] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[182] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[183]

The parties raise the following issues in their comments:

- The test claim statute and executive order do not impose a new program or higher level of service that is subject to article XIII B, section 6 because the Water Conservation Law and implementing regulations apply to both public and private water suppliers alike, and do not impose requirements uniquely upon local government.
- The test claim statute and executive order do not impose a new program or higher level of service because the provision of water and other utilities is an activity that could be, and often is, undertaken by private enterprise, and is therefore not a quintessentially governmental service in the manner that police and fire protection are generally accepted to be.
- The test claim does not result in costs mandated by the state for agricultural water suppliers because fees or charges for the provision of irrigation water are not "property-related" fees or charges subject to the limitations of articles XIII C and XIII D.

As described below, the Commission denies this claim on the grounds that most of the code sections and regulations pled do not impose new mandated activities, and all affected claimants have sufficient fee authority as a matter of law to cover the costs of any new requirements. Therefore, this decision does not make findings on the additional potential grounds for denial raised in comments on the draft proposed decision summarized above.

A. South Feather Water and Power Agency, Paradise Irrigation District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District are Subject to the Revenue Limitations of Article XIII B, and are Therefore Eligible for Reimbursement Pursuant to Article XIII B, Section 6.

1. To be eligible for reimbursement, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B.

[180] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[181] *County of San Diego, supra*, 15 Cal.4th 68, 109.

[182] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.

[183] *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. "Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend taxes for public purposes."[184]

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…"[185] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by voters.[186]

Article XIII B was adopted by the voters as Proposition 4 less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[187] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[188]

Article XIII B established an "appropriations limit," or spending limit for each "entity of local government" beginning in fiscal year 1980-1981.[189] Specifically, the appropriations limit provides as follows:

> The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.[190]

No "appropriations subject to limitation" may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.[191] Article XIII B does not limit the ability to expend government funds collected from *all sources*; the appropriations limit is based on "appropriations subject to limitation," which means, pursuant to article XIII B, section 8, "any authorization to

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[184] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 (*County of Fresno*).

[185] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[186] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[187] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 (*County of Placer*).

[188] *Ibid*.

[189] California Constitution, article XIII B, section 8(h) (added, Nov. 7, 1979).

[190] California Constitution, article XIII B, section 1 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[191] California Constitution, article XIII B, section 2 (added, Nov. 7, 1979).

expend during a fiscal year the *proceeds of taxes* levied by or for that entity."[192] Appropriations subject to limitation do not include "local agency loan funds or indebtedness funds"; "investment (or authorizations to invest) funds…of an entity of local government in accounts at banks…or in liquid securities";[193] "[a]ppropriations for debt service"; "[a]ppropriations required to comply with mandates of the courts or the federal government"; and "[a]ppropriations of any special district which existed on January 1, 1978 and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 [and one half] cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."[194]

Proposition 4 also added article XIII B, section 6 to require the state to reimburse local governments for any additional expenditures that might be mandated by the state, and which would rely solely on revenues subject to the appropriations limit. The California Supreme Court, in *County of Fresno v. State of California*,[195] explained:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.[196]

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Bell Community Redevelopment Agency v. Woolsey*, the Second District Court of Appeal concluded that a redevelopment agency's power to issue bonds, and to repay those bonds with its tax increment, was not subject to the spending limit of article XIII B. The court reasoned that to construe tax increment payments as appropriations subject to limitation "would be directly contrary to the mandate of section 7," which provides that "[n]othing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with

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[192] California Constitution, article XIII B, section 8 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990) [emphasis added].

[193] California Constitution, article XIII B, section 8.

[194] California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[195] *County of Fresno, supra*, (1991) 53 Cal.3d 482.

[196] *Id*, at p. 487. Emphasis in original.

respect to existing or future bonded indebtedness."[197] In addition, the court found that article XVI, section 16, addressing the funding of redevelopment agencies, was inconsistent with the limitations of article XIII B:

> Article XVI, section 16, provides that tax increment revenues "may be irrevocably pledged" to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit [*sic*], it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds.[198]

The court therefore concluded that redevelopment agencies could not reasonably be subject to article XIII B, and therefore upheld Health and Safety Code section 33678, and ordered that the writ issue to compel Woolsey to publish the notice.

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,[199] the court held that redevelopment agencies were not eligible to claim reimbursement because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B.

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity." The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...
>
> For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6… [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues.[200]

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[197] (1985) 169 Cal.App.3d 24, at p. 31 [quoting article XIII B, section 7].

[198] *Id*, at p. 31.

[199] (1997) 55 Cal.App.4th 976.

[200] *Redevelopment Agency of San Marcos*, *supra*, 55 Cal.App.4th at pp. 986-987 [internal citations omitted].

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates*, affirmed the reasoning of the *San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[201]

Therefore, pursuant to the plain language of article XIII B, section 9 and the decisions in *County of Fresno*, *supra*, *Redevelopment Agency of San Marcos*, *supra*, and *City of El Monte*, *supra*, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

Nevertheless, claimants argue that *County of Fresno* and the redevelopment agency cases do not apply in this case. Specifically, claimants argue that *County of Fresno*, *supra*, predates Proposition 218, which added articles XIII C and XIII D to the California Constitution, and is factually distinguishable from this test claim because the test claim statute at issue in *County of Fresno* specifically authorized user fees to pay for the mandated activities. With respect to the redevelopment cases (*Bell Community Redevelopment Agency*, *Redevelopment Agency of San Marcos*, and *City of El Monte*), the claimants argue that the courts' findings rely on Health and Safety Code section 33678, which specifically excepts the revenues of redevelopment agencies from the scope of revenue-limited appropriations under article XIII B.[202] In addition, the claimants argue that the above reasoning "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218…" and "would create a class of local agencies that are per se ineligible for reimbursement under this test claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[203] In addition, both the claimants and CSDA suggest that the Commission broaden the scope of reimbursement eligibility under article XIII B, section 6, beyond that articulated by the courts, and beyond the plain language of articles XIII A and XIII B.[204] The claimants and CSDA urge the Commission to consider the restrictions placed on special districts' authority to impose assessments, fees, or charges by articles XIII C and XIII D to be part of the "increasingly limited revenues sources" that subvention under section 6 was intended to protect. The claimants and CSDA would have the Commission broadly interpret and extend the subvention requirement and treat fee authority subject to proposition 218 as proceeds of taxes, "to advance the goal of 'preclud[ing] the state from shifting financial responsibility for carrying out governmental functions onto local entities that [are] ill equipped to handle the task."[205]

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[201] (2000) 83 Cal.App.4th 266, 281-282 (*El Monte*).

[202] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18.

[203] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 14-15.

[204] See Exhibit R, Claimant Comments on Draft Proposed Decision, page 21; Exhibit S, CSDA Comments on Draft Proposed Decision, pages 10-12 [Arguing that the restrictions of articles XIII C and XIII D are more onerous than the revenue limits of article XIII B, and the Commission should "recognize these restrictions…" and "Articles XIII A, B, C, and D should be read together and harmonized…"].

[205] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21 [quoting *County of Fresno*, *supra* 53 Cal.3d, at p. 487.].

The claimant's comments do not alter the above analysis. The factual distinction that claimants allege between this test claim and *County of Fresno* is not dispositive.[206] Specific fee authority provided by the test claim statute is not necessary: so long as a local government's statutory fee authority can be legally applied to alleged activities mandated by the test claim statute, there are no *costs mandated by the state* within the meaning of Government Code section 17514 and article XIII B, section 6, to the extent of that fee authority.[207] If the local entity is not compelled to rely on *appropriations subject to limitation* to comply with the alleged mandate, no reimbursement is required.[208]

The claimant's comments addressing the redevelopment cases are similarly unpersuasive. Those cases are discussed above not as analogues for the types of special districts represented in this test claim, but only to demonstrate that *not all local government entities* are subject to articles XIII A and XIII B, and that an agency that is not bound by article XIII B cannot assert an entitlement to reimbursement under section 6.[209]

Moreover, enterprise districts, and indeed any local government entity funded exclusively through user fees, charges, or assessments, *are* per se ineligible for mandate reimbursement. This is so because only a mandate to expend revenues that are subject to the appropriations limit, as defined and expounded upon by the courts,[210] can entitle a local government entity to mandate reimbursement. In other words, a local agency that is funded solely by user fees or charges, (or tax increment revenues, as discussed above), or appropriations for debt service, or any combination of revenues "other than the proceeds of taxes" is an agency that is not subject to the appropriations limit, and therefore not entitled to subvention.[211]

This interpretation is supported by decades of mandates precedent and is consistent with the purpose of article XIII B. As discussed above, "Section 6 was included in article XIII B in recognition that article XIII A…severely restricted the *taxing* powers of local governments."[212] Article XIII B "was not intended to reach beyond taxation…" and "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue…"[213] The issue, then, is

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[206] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18. *County of Fresno*, *supra*, 53 Cal.3d at p. 485.

[207] See also, *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 812 ["Claimants can choose not to required these fees, but not at the state's expense."

[208] See *Redevelopment Agency of San Marcos*, *supra*, 55 Cal.App.4th at p. 987 ["No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes."].

[209] *City of El Monte*, *supra*, (2000) 83 Cal.App.4th 266, 281-282 [citing *Redevelopment Agency of San Marcos*, *supra*, (1997) 55 Cal.App.4th 976].

[210] See *Placer v. Corin* (1980) 113 Cal.App.3d 443; *Bell Community Redevelopment Agency*, *supra* (1985) 169 Cal.App.3d 24; *County of Fresno*, *supra* (1991) 53 Cal.3d 482; *Redevelopment Agency of San Marcos*, *supra*, (1997) 55 Cal.App.4th 976.

[211] California Constitution, article XIII B, section 9 (Adopted Nov. 6, 1979; Amended June 5, 1990).

[212] See *County of Fresno*, *supra*, 53 Cal.3d at p. 487 [emphasis added].

[213] *Ibid*.

not *how many* different sources of revenue a local entity has at its disposal, as suggested by claimants;[214] it is whether and to what extent those sources of revenue (and the appropriations to be made) are *limited* by articles XIII A and XIII B. Based on the foregoing, nothing in claimants' comments alters the above analysis.

The Commission also disagrees with the interpretation offered by CSDA. CSDA argues in its comments that Proposition 1A, adopted in 2004, made changes to article XIII B, section 6, which must be considered by the Commission, and that the voters' intent and understanding when adopting Proposition 1A should weigh heavily on the Commission's interpretation of the amended text.[215] However, the amendments made by Proposition 1A require the Legislature to either pay or suspend a mandate for local agencies, and expand the definition of a new program or higher level of service. The plain language of Proposition 1A does not address which entities are eligible to claim reimbursement, and does not require reimbursement for all special districts, including those that do not receive property tax revenue and are not subject to the appropriations limitation of article XIII B.[216] CSDA's comments do not alter the above analysis.

Based on the foregoing, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

2. Biggs-West Gridley Water District and Richvale Irrigation District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, Oakdale Irrigation District and Glenn-Colusa Irrigation District are subject to the taxing and spending limitations, have been substituted in as claimants for both of the consolidated test claims, and are eligible for reimbursement under article XIII B, section 6 of the California Constitution.

10-TC-12 was originally filed by four co-claimants: South Feather, Paradise, Biggs, and Richvale.[217] 12-TC-01 was filed by Richvale and Biggs only,[218] and the two test claims were consolidated for analysis and hearing and renamed *Water Conservation*. Based on the analysis herein, the Commission finds that Richvale and Biggs are ineligible to claim reimbursement under article XIII B, section 6, and test claim 12-TC-01 would have to be dismissed for want of an eligible claimant.[219] However, Oakdale and Glenn-Colusa have requested to be substituted in on both test claims in the place of the ineligible claimants.[220] The analysis below will therefore address the eligibility of each of the six co-claimants, and will show that South Feather, Paradise,

[214] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 20-21.

[215] See, e.g., Exhibit S, CSDA Comments on Draft Proposed Decision, page 7.

[216] See California Constitution, article XIII B, section 6 (b-c).

[217] Exhibit A, Test Claim 10-TC-12.

[218] Exhibit B, Test Claim 12-TC-01.

[219] See Exhibit K, Notice of Pending Dismissal.

[220] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

Oakdale, and Glenn-Colusa are all eligible to claim reimbursement under article XIII B, section 6, and therefore the Commission maintains jurisdiction over both of the consolidated test claims.

a. Biggs-West Gridley Water District and Richvale Irrigation District are not eligible to claim reimbursement under article XIII B, section 6.

The Districts have acknowledged that "Richvale and Biggs do not receive property tax revenue."[221] With respect to Richvale, that statement is consistent with the original test claim filing, in which Richvale stated that it "does not receive an annual share of property tax revenue."[222] However, Biggs had earlier stated in a declaration by Karen Peters, the District's Executive Administrator, that "Biggs receives an annual share of property tax revenue," and for "Fiscal Year 2011 the amount of property tax revenue is expected to be approximately $64,000."[223] Biggs has since determined that the Peters declaration was in error, and a more recent declaration from Eugene Massa, the District's General Manager, states that "[t]hat revenue estimate actually reflects Biggs' *assessment*, equating to $2 per acre within Biggs' boundaries." Mr. Massa goes on to state that "Biggs does not currently receive any share of ad valorem *property tax* revenue."[224,225]

Even though Richvale and Biggs acknowledge that they receive no property tax revenue, they argue that they and "other similarly situated public agencies should not be deemed ineligible for subvention due to a historical quirk that resulted in those agencies not receiving a share of ad valorem property taxes."[226] The "historical quirk" to which Richvale and Biggs refer, it is assumed, is the fact that Richvale and Biggs either did not exist or did not share in ad valorem property tax revenue as of the 1977-78 fiscal year, which would render at least some portion of

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[221] Exhibit I, Claimant Response to Request for Additional Information, page 1.

[222] Exhibit A, South Feather Water and Power Test Claim, page 22.

[223] Exhibit A, 10-TC-12, page 30.

[224] Exhibit I, Claimant Response to Request for Additional Information, page 393 [emphasis added].

[225] See also Exhibit X, Special Districts Annual Report 2010-2011, pages 184; 389; 1051 [The Special Districts Annual Report for 2010-2011 is consistent with Richvale's statement that it does not receive property tax revenue. Table 8 indicates no property tax receipts, and Table 1 does not indicate an appropriations limit. Biggs did not submit the necessary information to the SCO, and therefore does not appear in Tables 1 or 8 of the 2010-2011 Special Districts Annual Report. Based on that report, and the admissions of the Districts, a notice of dismissal was issued on November 12, 2013 for test claim 12-TC-01, for which Richvale and Biggs were the only named claimants. In response to the Notice of Pending Dismissal, the Districts submitted an Appeal of Dismissal, in which they argue that Proposition 218 undermines a local agency's fee authority, and that the Districts are eligible for reimbursement "for the reasons already explained in the Districts' 'Claimants' Response to Request for Additional Information 10-TC-12 and 12-TC-01.'" (Exhibit K, Notice of Pending Dismissal; Exhibit L, Appeal of Executive Director's Decision)].

[226] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

their revenues subject to the appropriations limit, in accordance with article XIII B, section 9.[227] They argue that all public agencies are ill-equipped to cover the costs of new mandates, whether they are subject to the tax and spend limits of articles XIII A and XIII B, or the fee and assessment restrictions of articles XIII C and XIII D.[228] In addition, Richvale and Biggs assert that to the extent they do have authority to raise revenues other than taxes, any increased fees or assessments necessary to cover the costs of the required activities would, by definition, be classified as proceeds of taxes under article XIII B, section 8.[229]

The Districts' reasoning is both circular and fundamentally unsound. Article XIII B, section 8 provides that "proceeds of taxes" includes "all tax revenues and the proceeds to an entity of government from (1) regulatory licenses, user charges, and user fees *to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service*, and (2) the investment of tax revenues."[230] The districts argue, therefore, that "proceeds of taxes" includes not only revenues directly derived from taxes, "but also revenues exceeding the costs to fund the services provided by the agency." The Districts argue that Richvale and Biggs are unable, under Proposition 218, to impose new fees as a matter of law, and must reallocate existing fees, which constitute "proceeds of taxes" under article XIII B, section 8. But Proposition 218 added article XIII D to expressly provide that fees or charges "*shall not be extended, imposed, or increased*" if revenues derived from the fee or charge exceed the funds needed to provide the property-related service; and "shall not be used for any purpose other than that for which the fee or charge was imposed."[231] Therefore, Proposition 218 imposes an absolute bar to raising fees beyond those necessary to provide the property-related service, or "reallocating" fees for a purpose other than that for which the fee or charge was imposed.

Moreover, Richvale and Biggs' reasoning that such fees *would automatically and by definition* constitute proceeds of taxes under article XIII B, section 8, rests on the initial presumption that such fees or charges would "exceed" those necessary to provide the service. In other words, the Districts presume that the costs of the mandate are unrelated to, or exceed, the costs of providing water service to the districts' users.[232] On the contrary, any fees or charges, whether *new or existing*, imposed by Richvale and Biggs are imposed for the purpose of providing irrigation water. The alleged mandated activities imposed upon irrigation districts by the test claim statute and regulations are required for those districts to *continue* providing irrigation water. Therefore, utilizing revenues from fees or charges to comply with the alleged new requirements is not

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[227] Section 9 states that appropriations subject to limitation do not include: "Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977–78 fiscal year levy an ad valorem tax on property in excess of 12 1/2 cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."

[228] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[229] Exhibit I, Claimant Response to Request for Additional Information, page 3.

[230] Exhibit I, Claimant Response to Request for Additional Information, page 3 [citing California Constitution, article XIII B, section 8 (emphasis added)].

[231] Article XIII D, section 6(b) (added November 5, 1996, by Proposition 218).

[232] Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

"divert[ing] existing revenues from their authorized purposes…"[233] Rather, the increased or reallocated fees are merely being used to ensure that claimants can continue to provide water service consistently with all applicable legal requirements. Claimants' assertion that an increase or reallocation of fees alters the legal significance of such fees pursuant to article XIII B, section 8 is not supported by the law or the record.

Simply put, Richvale and Biggs do not impose or collect taxes[234] and the Commission cannot say, as a matter of law, that fees increased or imposed to comply with the alleged mandate would constitute proceeds of taxes, within the meaning of article XIII B, section 8. Unless or until a court determines that article XIII B, section 8 can be applied in this manner, the Commission must presume that only those local government entities that collect and expend proceeds of taxes, within the meaning of article XIII A, are subject to the spending limits of article XIII B, including section 6.

Based on the foregoing, the Commission finds that Richvale Irrigation District and Biggs-West Gridley Water District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible to claim reimbursement under article XIII B, section 6.

b. South Feather Water and Power Agency and Paradise Irrigation District are eligible to claim reimbursement under article XIII B, section 6.

Claimants state that "South Feather and Paradise receive property tax revenue," and "are in the process of establishing their appropriations limits for their current fiscal years."[235]

Declarations attached to claimants' response state that both South Feather and Paradise are in the process of determining and adopting an appropriations limit. Kevin Phillips, Finance Manager of Paradise, stated that during his tenure, "I have not calculated or otherwise established Paradise's appropriation limit as set forth in Proposition 4." Mr. Phillips further states that "[a]t the request of Paradise's legal counsel, I have begun working to establish Paradise's appropriation limit and intend…to ask Paradise's Board of Directors to adopt a resolution…for its current fiscal year."[236] Similarly, Steve Wong, Finance Division Manager of South Feather, states that he has not "calculated or otherwise established South Feather's appropriation limit" during his employment with South Feather. Mr. Wong further states that "[a]t the request of South Feather's legal counsel, I have begun working to establish South Feather's appropriation limit and intend, after the requisite public review period, to ask South Feather's Board of Directors to adopt a resolution establishing South Feather's appropriation limit for its current fiscal year."[237]

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[233] See Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

[234] Note that special districts generally have statutory authorization to impose special taxes, but only with two-thirds voter approval (See article XIII A, section 4). However, there is no evidence in the record indicating that Richvale or Biggs currently collects or expends special taxes.

[235] Exhibit I, Claimant Response to Request for Additional Information, pages 1-2.

[236] See Exhibit I, Claimant Response to Request for Additional Information, page 394.

[237] See Exhibit I, Claimant Response to Request for Additional Information, page 427.

Based on the foregoing, the Commission finds that both South Feather and Paradise are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

3. Oakdale Irrigation District and Glenn-Colusa Irrigation District are eligible to claim reimbursement under article XIII B, section 6 and are thus substituted in as claimants in the consolidated test claims in place of Biggs-West Gridley Water District and Richvale Irrigation District.

Pursuant to the Notice of Pending Dismissal, Oakdale submitted a request to be substituted in as a party on 10-TC-12 and 12-TC-01 on January 13, 2014. Oakdale states that it is subject to the tax and spend limitations of articles XIII A and XIII B, and that it is an agricultural water supplier "subject to the mandates imposed by the Agricultural Water Measurement Regulations…and the Water Conservation Act of 2009."[238] The declaration of Steve Knell, Oakdale's General Manager, attached to the Request for Substitution, states that Oakdale "receives an annual share of ad valorem property tax revenue from Stanislaus and San Joaquin counties." The declaration further states that the District "received $5,701,730 in property taxes for 2011-2013 and expects to receive approximately $1.9 million in 2014."

The Special Districts Annual Reports for 2010-2011 and 2011-2012 do not indicate an appropriations limit for Oakdale in Table 1,[239] but they do indicate that Oakdale received property tax revenue in Table 8 for 2010-2011 and 2011-2012.[240]

Similarly, Glenn-Colusa submitted a request to be substituted in as a party on both test claims. Glenn-Colusa asserted in its request that it "is subject to the tax and spend limitations of Articles XIII A and XIII B of the California Constitution," and is an agricultural water supplier, subject to "the mandates imposed by the Water Conservation Act of 2009…and the Agricultural Water Measurement Regulations."[241] In declarations attached to the Request for Substitution, Thaddeus Bettner, General Manager of Glenn-Colusa, asserts that the District "received $520,420 in property taxes in 2013 and expects to receive $528,300 in 2014."[242]

Table 8 of the Special Districts Annual Report indicates that Glenn-Colusa collected property taxes in 2010-2011 and 2011-2012,[243] but Table 1 does not indicate an appropriations limit for the district.[244]

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[238] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District, page 2.

[239] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 159 and 157, respectively.

[240] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 381 and 379, respectively.

[241] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, pages 1-2.

[242] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, page 7.

[243] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 357 and 355, respectively.

[244] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 104 and 101, respectively.

Based on the evidence in the record, including the declarations of the General Managers of Oakdale and Glenn-Colusa, as well as the information reported to the SCO in the Special Districts Annual Reports for fiscal years 2010-2011 and 2011-2012, both the substitute claimants collect some amount of property tax revenue. In turn, because property tax revenue is subject to the appropriations limit, both claimants also expend revenues subject to the appropriations limit, in accordance with article XIII B. A local government entity that is subject to both articles XIII A and XIII B is eligible for subvention under article XIII B, section 6, and is an eligible claimant before the Commission.

The Commission concludes that both Oakdale and Glenn-Colusa are subject to article XIII B as a matter of law, because they have authority to collect and expend property tax revenue.

Based on the foregoing, the Commission finds that Oakdale and Glenn-Colusa are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

B. Some of the Test Claim Statutes and Regulations Impose New Requirements on Urban Retail Water Suppliers.

Test claim 10-TC-12 alleged all of Part 2.55 of Division 6 of the Water Code, which consists of sections 10608 through 10608.64. The following analysis addresses only those sections of Part 2.55 containing mandatory language, and those sections specifically alleged in the test claim narrative. Sections 10608.22, 10608.28, 10608.36, 10608.43, 10608.44, 10608.50, 10608.56, 10608.60, and 10608.64 are not analyzed below, because those sections were not specifically alleged to impose increased costs mandated by the state, and because they do not impose new requirements on local government.

1. Water Code sections 10608, 10608.4(d), 10608.12(a; p), and 10608.16(a), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Water Code section 10608 states the Legislature's findings and declarations, including: "Water is a public resource that the California Constitution protects against waste and unreasonable use..." and "Reduced water use through conservation provides significant energy and environmental benefits, and can help protect water quality, improve streamflows, and reduce greenhouse gas emissions." Subdivision (g), specifically invoked by the claimants,[245] states that "[t]he Governor has called for a 20 percent per capita reduction in urban water use statewide by 2020."[246] The plain language of this section establishes a goal, but does not, itself, impose any new requirements on local government.

Water Code section 10608.4 as added, states the "intent of the legislature," including, as highlighted by the claimants,[247] to "[e]stablish a method or methods for urban retail water suppliers to determine targets for achieving increased water use efficiency by the year 2020, in

[245] Exhibit A, Test Claim 10-TC-12, page 3.

[246] Water Code section 10608(a; d; g) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[247] Exhibit A, Test Claim 10-TC-12, page 3.

accordance with the Governor's goal of a 20 percent reduction."[248] The plain language of this section expresses legislative intent, and does not impose any new activities on local government

Water Code section 10608.16(a), as added, states that "[t]he state shall achieve a 20 percent reduction in urban per capita water use in California on or before December 31, 2020." In addition, section 10608.16(b) provides that the state "shall make incremental progress towards the state target specified in subdivision (a) by reducing urban per capita water use by at least 10 percent on or before December 31, 2015."[249] The plain language of this section is directed to the State generally, and does not impose any new mandated activities on local government.

Water Code section 10608.12 provides that "the following definitions govern the construction of this part:" An "urban retail water supplier " is defined as "a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes."[250] The claimants allege that the Water Conservation Act imposes unfunded state mandates on urban retail water suppliers, and that South Feather and Paradise "are 'urban retail water suppliers,' as defined."[251] Likewise, under section 10608.12, an "agricultural water supplier" is defined as "a water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water."[252] The claimants allege that this definition "expanded the definition of what constitutes an agricultural water supplier," and thus required a greater number of entities to adopt AWMPs and perform other activities under the Water Code.[253] However, whatever new activities may be required by the test claim statutes, the plain language of amended section 10608.12 does not impose any new requirements on urban retail water suppliers or agricultural water suppliers; section 10608.12 merely prescribes the applicability and scope of the other requirements of the test claim statutes.

Based on the foregoing, the Commission finds that sections 10608, 10608.4 10608.12, and 10608.16, pled as added, do not impose any new requirements on local government, and are therefore denied.

2. Water Code sections 10608.20(a; b; e; and j), 10608.24, and 10608.40, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) impose new required activities on urban water suppliers.

Prior law required the preparation of an urban water management plan, and required urban water suppliers to update the plan every five years. The test claim statutes add additional information related to conservation goals to that required to be included in a supplier's UWMP, and authorize an extension of time from December 31, 2010 to July 1, 2011 for the adoption of the next UWMP. As added by the test claim statute, section 10608.20 provides, in pertinent part:

[248] Water Code section 10608.4 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[249] Water Code section 10608.16(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[250] Water Code section 10608.12(p) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[251] Exhibit A, 10-TC-12, page 2.

[252] Water Code section 10608.12(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[253] Exhibit A, 10-TC-12, page 8.

(a)(1) Each urban retail water supplier shall develop urban water use targets and an interim urban water use target by July 1, 2011. Urban retail water suppliers may elect to determine and report progress toward achieving these targets on an individual or regional basis, as provided in subdivision (a) of Section 10608.28, and may determine the targets on a fiscal year or calendar year basis.

(2) It is the intent of the Legislature that the urban water use targets described in subdivision (a) cumulatively result in a 20-percent reduction from the baseline daily per capita water use by December 31, 2020.

(b) An urban retail water supplier shall adopt one of the following methods for determining its urban water use target pursuant to subdivision (a):

(1) Eighty percent of the urban retail water supplier's baseline per capita daily water use.

(2) The per capita daily water use that is estimated using the sum of the following performance standards:

(A) For indoor residential water use, 55 gallons per capita daily water use as a provisional standard. Upon completion of the department's 2016 report to the Legislature pursuant to Section 10608.42, this standard may be adjusted by the Legislature by statute.

(B) For landscape irrigated through dedicated or residential meters or connections, water efficiency equivalent to the standards of the Model Water Efficient Landscape Ordinance set forth in Chapter 2.7 (commencing with Section 490) of Division 2 of Title 23 of the California Code of Regulations, as in effect the later of the year of the landscape's installation or 1992. An urban retail water supplier using the approach specified in this subparagraph shall use satellite imagery, site visits, or other best available technology to develop an accurate estimate of landscaped areas.

(C) For commercial, industrial, and institutional uses, a 10-percent reduction in water use from the baseline commercial, industrial, and institutional water use by 2020.

(3) Ninety-five percent of the applicable state hydrologic region target, as set forth in the state's draft 20x2020 Water Conservation Plan (dated April 30, 2009). If the service area of an urban water supplier includes more than one hydrologic region, the supplier shall apportion its service area to each region based on population or area.

(4) A method that shall be identified and developed by the department, through a public process, and reported to the Legislature no later than December 31, 2010…[254]

In addition, section 10608.20(e) provides that an urban retail water supplier "shall include in its urban water management plan due in 2010…the baseline daily per capita water use, urban water

[254] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining estimates, including references to supporting data."[255]

And, section 10608.20(j) provides that an urban retail water supplier "shall be granted an extension to July 1, 2011…" to adopt a complying water management plan, and that an urban retail water supplier that adopts an urban water management plan due in 2010 "that does not use the methodologies developed by the department pursuant to subdivision (h) shall amend the plan by July 1, 2011 to comply with this part."[256]

Section 10608.40 provides that an urban retail water supplier shall also "report to [DWR] on their progress in meeting their urban water use targets as part of their [UWMPs] submitted pursuant to Section 10631."[257]

Section 10608.24 provides that each urban retail water supplier "shall meet its interim urban water use target by December 31, 2015," and "shall meet its [final] urban water use target by December 31, 2020."[258]

As discussed above, prior law required the adoption of an UWMP, which, pursuant to section 10631, included a detailed description and analysis of water supplies within the service area, including reliability of supply in normal, dry, and multiple dry years, and a description and evaluation of water demand management measures currently being implemented and scheduled for implementation.[259] Pursuant to existing section 10621, that plan was required to be updated "once every five years…in years ending in five and zero."[260] And, existing section 10631(e) also required identification and quantification of past, current and projected water use over a five-year period including, but not necessarily limited to, all of the following uses:

> (A) Single-family residential.
>
> (B) Multifamily.
>
> (C) Commercial.
>
> (D) Industrial.
>
> (E) Institutional and governmental.
>
> (F) Landscape.
>
> (G) Sales to other agencies.
>
> (H) Saline water intrusion barriers, groundwater recharge, or conjunctive use, or any combination thereof.

[255] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[256] Water Code section 10608.20(j) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[257] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[258] Water Code section 10608.24(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[259] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[260] Water Code section 10621 (Stats. 2007, ch. 64 (AB 1376)).

(I) Agricultural.[261]

However, nothing in prior law required the adoption of urban water use targets, baseline information on a per capita basis (as opposed to on a type of use basis), interim and final water use targets, assessment of present and proposed measures to achieve the targeted reductions, or a report on the supplier's progress toward meeting the reductions.

Based on the foregoing, the Commission finds that Water Code sections 10608.20, 10608.24, and 10608.40, as added by the test claim statute, impose new requirements on urban retail water suppliers, as follows:

- Develop urban water use targets and an interim urban water use targets by July 1, 2011.[262]
- Adopt one of the methods specified in section 10608.20(b) for determining an urban water use target.[263]
- Include in its urban water management plan due in 2010 the baseline daily per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining those estimates, including references to supporting data.[264]
- Report to DWR on their progress in meeting urban water use targets as part of their UWMPs.[265]
- Amend its urban water management plan, by July 1, 2011, to allow use of technical methodologies developed by the department pursuant to subdivisions (b) and (h) of section 10608.20.[266]
- Meet interim urban water use target by December 31, 2015.[267]
- Meet final urban water use target by December 31, 2020.[268]

The activities required to meet the interim and final urban water use targets are intended to vary significantly among local governments based upon differences in climate, population density, levels of per capita water use according to plant water needs, levels of commercial, industrial, and institutional water use, and the amount of hardening that has occurred as a result of prior conservation measures implemented in different regions

[261] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[262] Water Code section 10608.20(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[263] Water Code section 10608.20(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[264] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[265] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[266] Water Code section 10608.20(i) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[267] Water Code section 10608.24(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[268] Water Code section 10608.24(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

throughout the state. Local variations, therefore, are not expressly stated in the test claim statutes.

3. Water Code section 10608.26, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), requires urban water suppliers to conduct at least one public hearing to allow community input regarding an urban retail water supplier's implementation plan.

Section 10608.26 provides that "[i]n complying with this part," an urban retail water supplier shall conduct at least one public hearing "to accomplish all of the following:" (1) allow community input regarding the urban retail water supplier's implementation plan; (2) consider the economic impacts of the urban retail water supplier's implementation plan; and (3) adopt one of the four methods provided in section 10608.20(b) for determining its urban water use target.[269]

The claimants assert that "prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts of the implementing the 20% reduction [*sic*], or to adopt a method for determining an urban water use target."[270]

Section 10642, added by Statutes 1983, chapter 1009, required a public hearing prior to *adopting an UWMP*, as follows:

> Prior to adopting a plan, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to Section 6066 of the Government Code…[271]

However, section 10608.26 requires a public hearing for purposes of allowing public input regarding an implementation plan, considering the economic impacts of an implementation plan, or adopting a method for determining the urban water supplier's water use targets, as required by section 10608.20(b). DWR, the agency with responsibility for implementing the Water Conservation Act, has interpreted these two requirements as only requiring one hearing.[272] As the implementing agency, DWRs interpretation of the Act is entitled to great weight.[273]

Based on the foregoing, the Commission finds that section 10608.26 imposes a new and additional requirement on urban retail water suppliers, as follows:

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[269] Water Code section 10608.26(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[270] Exhibit A, 10-TC-12, page 8 [citing Water Code section 10608.26(a)(1-3)].

[271] Water Code section 10642 (Stats. 1983, ch. 1009) [citing Government Code section 6066 (Stats. 1959, ch. 954), which provides for publication once per week for two successive weeks in a newspaper of general circulation].

[272] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[273] *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11.

Include in the public hearing on the adoption of the UWMP an opportunity for community input regarding the urban retail water supplier's implementation plan; consideration of the economic impacts of the implementation plan; and the adoption of a method, pursuant to section 10608.20(b), for determining urban water use targets.[274]

4. Water Code section 10608.42, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new requirements on local government.

Section 10608.42 provides:

> The department shall review the 2015 urban water management plans and report to the Legislature by December 31, 2016, on progress towards achieving a 20-percent reduction in urban water use by December 31, 2020. The report shall include recommendations on changes to water efficiency standards or urban water use targets in order to achieve the 20-percent reduction and to reflect updated efficiency information and technology changes.[275]

The claimants allege that section 10608.42 requires an UWMP, adopted by an urban retail water supplier, to "describe the urban retail water supplier's progress toward achieving the 20% reduction by 2020."[276] However, the plain language of this section is directed to DWR, and does not, itself, impose any new activities or requirements on local government.

Based on the foregoing, the Commission finds that section 10608.42 does not impose any new requirements on local government, and is therefore denied.

5. Water Code sections 10608.56 and 10608.8, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Section 10806.56 provides that "[o]n and after July 1, 2016, an urban retail water supplier is not eligible for a water grant or loan awarded or administered by the state unless the supplier complies with this part."[277] The plain language of this section does not impose any new requirements on local government; the section only states the consequence of failing to comply with all other requirements of the Act.

Section 10608.8 provides that "[b]ecause an urban agency is not required to meet its urban water use target until 2020 pursuant to subdivision (b) of Section 10608.24, an urban retail water supplier's failure to meet those targets shall not establish a violation of law for purposes of any state administrative or judicial proceeding prior to January 1, 2021."[278] The plain language of

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[274] Water Code section 10608.26 ((Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)). See also Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[275] Water Code section 10608.42 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[276] Exhibit A, 10-TC-12, page 3.

[277] Water Code section 10608.56 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[278] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

this section does not impose any new requirements on local government; rather, the section states that no violation of law shall occur until after the date that urban water use targets are supposed to be met.

The claimants allege that Water Code section 10608.56 imposes reimbursable state-mandated costs, alleging that "[f]ailure to comply with the aforementioned mandates by South Feather and Paradise will result, on and after July 1, 2016, in ineligibility for water grants or loans awarded or administered by the State of California." In addition, the claimants allege that "a failure to meet the 20% target shall be a violation of law on and after January 1, 2021," citing Water Code section 10608.8.[279] The plain language of sections 10608.8 and 10608.56, as described above, do not impose any new activities or tasks on local government; the provisions that the claimants allege only state the consequences of failing to comply with all other requirements of the Act.

Based on the foregoing, the Commission finds that sections 10806.56 and 10806.8 do not impose any new requirements on local government, and are therefore denied.

C. Some of the Test Claim Statutes and Regulations Impose New Requirements on Non-exempt Agricultural Water Suppliers.

Chapter 4 of Part 2.55 of Division 6 of the Water Code consists of a single code section that addresses water conservation requirements for agricultural water suppliers: section 10608.48. The remaining provisions of the test claim statute addressing agricultural water suppliers were added in Part 2.8 of Division 6 of the Water Code, consisting of sections 10800-10853, and address agricultural water management planning requirements. Sections 10608.8 and 10828 provide for exemptions from the requirements of Part 2.55 and Part 2.8, respectively, under certain circumstances, which are addressed where relevant below.

1. Water Code section 10608.48(a-c), as amended by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), imposes new requirements on some agricultural water suppliers to implement efficient water management practices, including measurement and a pricing structure based in part on quantity of water delivered; and to implement up to fourteen other efficient water management practices, if locally cost effective and technically feasible.

Section 10608.48 provides for the implementation by agricultural water suppliers of specified critical efficient water management practices, including measurement and volume-based pricing; and *additional* efficient water management practices, where locally cost effective and technically feasible, as follows:

> (a) On or before July 31, 2012, an agricultural water supplier shall implement efficient water management practices pursuant to subdivisions (b) and (c).
>
> (b) Agricultural water suppliers shall implement *all of the following critical efficient management practices*:
>
> (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).

[279] Exhibit A, 10-TC-12, page 4.

(2) Adopt a pricing structure for water customers based at least in part on quantity delivered.

(c) Agricultural water suppliers shall implement *additional efficient management practices*, including, but not limited to, practices to accomplish all of the following, *if the measures are locally cost effective and technically feasible*:

(1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

(2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

(3) Facilitate the financing of capital improvements for on-farm irrigation systems.

(4) Implement an incentive pricing structure that promotes one or more of the following goals:

(A) More efficient water use at the farm level.

(B) Conjunctive use of groundwater.

(C) Appropriate increase of groundwater recharge.

(D) Reduction in problem drainage.

(E) Improved management of environmental resources.

(F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

(5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

(6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[280]

The claimants allege that section 10608.48 requires agricultural water suppliers (Oakdale and Glenn-Colusa) to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate." In addition, they allege, agricultural water suppliers are required to "adopt a pricing structure for water customers based on the quantity of water delivered." The claimants further allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices" specified in section 10608.48(c).[281]

The claimants argue that prior to the test claim statute, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered," and were not required to measure the volume of water delivered if it was not locally cost effective to do so. The claimants assert that "[w]hile subdivision (a) of Water Code section 531.10 was a preexisting obligation, subdivision (b) of that same section gave an exception to the farm-gate measurement requirement if the measurement devices were not locally cost effective." The claimants conclude that now "[t]he Act requires compliance with subdivision (a) regardless of whether it is locally cost effective."[282] In addition, the claimants assert that prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible."[283]

Section 531.10 of the Water Measurement Law, as added by Statutes 2007, chapter 675 provides, in its entirety:

(a) An agricultural water supplier shall submit an annual report to the department that summarizes aggregated farm-gate delivery data, on a monthly or bimonthly basis, using best professional practices.

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

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[280] Water Code section 10608.48(a-c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)) [emphasis added].

[281] Exhibit A, Test Claim 10-TC-12, page 4.

[282] Exhibit A, 10-TC-12, page 8.

[283] Exhibit A, 10-TC-12, page 8.

(c) It is the intent of the Legislature that the requirements of this section shall complement and not affect the scope of authority granted to the department or the board by provisions of law other than this article.

The plain language of section 531.10 required agricultural water suppliers to submit an annual report to DWR summarizing aggregated data on water delivered to individual agricultural customers using best professional practices, but only if water measurement programs or practices were locally cost effective.[284] Therefore, to the extent that water measurement programs or practices *were* locally cost effective, such activities were required to comply with prior law. Section 10608.48(b), in turn, does not impose a *new* requirement to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with [section 531.10(a),]" if such water measurement activities were already performed. However, section 10608.48(b) also requires an agricultural water supplier, *regardless of local cost-effectiveness*, to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 *and to implement paragraph (2),*" which requires suppliers to implement a pricing structure based at least in part on volume of water delivered. Therefore, section 10608.48(b) imposes a new requirement to the extent that prior law activities were not sufficient to also implement a pricing structure based at least in part on quantity of water delivered.

Moreover, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1, for as long as the QSA remains in effect.[285] The local agency parties to the QSA include the San Diego County Water Authority, Coachella Valley Water District, Imperial Irrigation District, and Metropolitan Water District of Southern California.[286] As a result, by the plain language of Water Code section 10608.8 those entities are exempt and are not mandated by the state to comply with the requirements of Part 2.55 of Division 6 of the Water Code, including section 10608.48.

Based on the foregoing, the Commission finds that section 10608.48 imposes new requirements on agricultural water suppliers, except those that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617, section 1, for as long as QSA remains in effect, as follows:

- Measure the volume of water delivered to customers with sufficient accuracy to (1) comply with subdivision (a) of Water Code section 531.10, which previously imposed the requirement, with specified exceptions, for agricultural water suppliers to submit an annual report summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis, using best professional practices; and (2) implement a pricing structure for water customers based at least in part on quantity of water delivered.[287]

[284] Water Code section 531.10 (Stats. 2007, Ch. 675 (AB 1404)).

[285] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[286] Exhibit X, Quantification Settlement Agreement, dated October 10, 2003.

[287] Water Code section 10608.48(b)(1) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

This activity is only newly required if measurement of farm-gate delivery data was not previously performed by the agricultural water supplier pursuant to a determination under section 531.10(b) that such measurement programs or practices were not locally cost effective, or if measurement data was not sufficient to implement a pricing structure based at least in part on quantity of water delivered.[288]

- Implement a pricing structure for water customers based at least in part on quantity of water delivered.[289]
- *If the measures are locally cost effective and technically feasible,* implement additional efficient management practices, including, but not limited to, practices to accomplish all of the following:

  (1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

  (2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

  (3) Facilitate the financing of capital improvements for on-farm irrigation systems.

  (4) Implement an incentive pricing structure that promotes one or more of the following goals:

  (A) More efficient water use at the farm level.

  (B) Conjunctive use of groundwater.

  (C) Appropriate increase of groundwater recharge.

  (D) Reduction in problem drainage.

  (E) Improved management of environmental resources.

  (F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

  (5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

  (6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

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[288] Water Code section 531.10(a-b) previously required reporting annually to the Department of Water Resources aggregated farm-gate delivery data, summarized on a monthly or bi-monthly basis, unless such measurement programs or practices were not locally cost effective. If an agricultural water supplier had not determined that such practices were not locally cost effective, then the prior law, Section 531.10(a) would have required measurement, and the activity is not therefore new.

[289] Water Code section 10608.48(b)(2) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[290]

2. Water Code sections 10608.48(d-f) and 10820-10829, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers, as defined pursuant to section 10608.12, to prepare and adopt on or before December 31, 2012, and to update on or before December 31, 2015, and every five years thereafter, an agricultural water management plan, as specified. However, many agricultural water suppliers, including all participants in the Central Valley Project and United States Bureau of Reclamation water contracts, are exempt from the requirement to *prepare and adopt* an agricultural water management plan pursuant to 10826, because they were already required by existing federal law to prepare a water conservation plan, which they may submit to satisfy this requirement.

As noted above, the test claim statute repealed and added Part 2.8 of Division 6 of the Water Code, commencing with section 10800. While a number of the activities alleged in these consolidated test claims were required by the prior provisions of the Water Code that were repealed and replaced by the test claim statute, those provisions were by their own terms no longer operative immediately prior to the effective date of the test claim statute. Former Water Code section 10855, as added by Statutes 1986, chapter 954, provided that "[t]his part shall

[290] Water Code section 10608.48(c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

remain operative only until January 1, 1993..." Therefore, the provisions added by the test claim statute, which became effective on February 3, 2010, impose new requirements or activities.[291]

Section 10820, as added, provides that all agricultural water suppliers *shall prepare and adopt* an AWMP on or before December 31, 2012, and shall update that plan on December 31, 2015, and on or before December 31 every five years thereafter.[292]

Section 10826, as added, provides that the plan "shall do all of the following:"

> (a) Describe the agricultural water supplier and the service area, including all of the following:
>
> (1) Size of the service area.
>
> (2) Location of the service area and its water management facilities.
>
> (3) Terrain and soils.
>
> (4) Climate.
>
> (5) Operating rules and regulations.
>
> (6) Water delivery measurements or calculations.
>
> (7) Water rate schedules and billing.
>
> (8) Water shortage allocation policies.
>
> (b) Describe the quantity and quality of water resources of the agricultural water supplier, including all of the following:
>
> (1) Surface water supply.
>
> (2) Groundwater supply.
>
> (3) Other water supplies.
>
> (4) Source water quality monitoring practices.
>
> (5) Water uses within the agricultural water supplier's service area, including all of the following:
>
> (A) Agricultural.
>
> (B) Environmental.
>
> (C) Recreational.
>
> (D) Municipal and industrial.
>
> (E) Groundwater recharge.
>
> (F) Transfers and exchanges.

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[291] Bills introduced in an extraordinary session take effect 91 days after the final adjournment of that extraordinary session. (Cal. Const. Art. IV, Sec. 8(c)(1).) The 7th Extraordinary Session concluded on November 4, 2009. Thus, the effective date of SB X7 7 is February 3, 2010.

[292] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(G) Other water uses.

(6) Drainage from the water supplier's service area.

(7) Water accounting, including all of the following:

(A) Quantifying the water supplier's water supplies.

(B) Tabulating water uses.

(C) Overall water budget.

(8) Water supply reliability.

(c) Include an analysis, based on available information, of the effect of climate change on future water supplies.

(d) Describe previous water management activities.

(e) Include in the plan the water use efficiency information required pursuant to Section 10608.48.[293]

Meanwhile, section 10608.48(d) provides that agricultural water suppliers "shall include in the agricultural water management plans required pursuant to [section 10820] a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report, and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future."[294]

Furthermore, section 10608.48 provides that if a supplier "determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination."[295] And, the section further provides that "[t]he data shall be reported using a standardized form developed pursuant to Section 10608.52."[296]

In addition, section 10828 provides that:

> (a) Agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, *may submit those water conservation plans to satisfy the requirements of Section 10826, if both of the following apply*:
>
> (1) The agricultural water supplier has adopted and submitted the water conservation plan to the United States Bureau of Reclamation within the previous four years.
>
> (2) The United States Bureau of Reclamation has accepted the water conservation plan as adequate.

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[293] Water Code section 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[294] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[295] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[296] *Ibid*.

> (b) This part does not require agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, to prepare and adopt water conservation plans according to a schedule that is different from that required by the United States Bureau of Reclamation.[297]

And, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[298]

Based on the plain language of section 10828, those local agencies who are CVP or USBR contractors may submit a copy of their water conservation plan already submitted to USBR in satisfaction of the requirements of section 10826 (which provides for the contents of an AWMP). In addition, section 10828(b) provides that CVP or USBR contractors are not required to adhere to the "schedule" for preparing and adopting AWMPs, as provided in section 10820, above. Therefore, the requirements of section 10820, to prepare and adopt an AWMP on or before December 31, 2012, and to update the AWMP on or before December 31, 2015 and every five years thereafter, do not apply to CVP or USBR contractors, who may instead rely on the schedule for updating and readopting their water conservation plans.

Both Glenn-Colusa and Oakdale are contractors with the United States Bureau of Reclamation (USBR) and as a result are required by federal law to prepare water conservation plans. Glenn-Colusa and Oakdale are also CVP contractors, as are dozens of other local agencies.[299]

As noted above, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1 for as long as QSA remains in effect.[300] Therefore, a supplier that is a party to the QSA is not mandated by the state to include the water use efficiency reporting requirements in the plan pursuant to section 10680.48.

Additionally, section 10608.48(f) provides that an agricultural water supplier "may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to the United States Bureau of Reclamation that meets the requirements described in Section 10828."[301] Therefore, the requirements to include in a supplier's AWMP a report on efficient water management practices and documentation on those practices determined not to be cost effective or technically feasible, pursuant to section 10608.48(d-e), do not apply to CVP or

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[297] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[298] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[299] Exhibit X, Bureau of Reclamation, Mid-Pacific Region, Central Valley Project (CVP) Water Contractors, dated March 4, 2014.

[300] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[301] Water Code section 10608.48(e; f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

USBR contractors that prepare and submit water conservation plans to USBR.[302] The *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, issued by DWR, "encourages" suppliers to file certain "documentation as an attachment with the USBR-accepted water management/conservation plan."[303] However, the plain language of section 10608.48(f) states that a supplier may satisfy the requirements of section 10608.48(d) and (e) by submitting to DWR its water conservation plan prepared for USBR. And, section 10828, as shown above, exempts CVP and USBR contractors from the requirement to prepare an AWMP in the first instance. Finally, pursuant to section 10829, the requirement to adopt an AWMP in the first instance does not apply if the supplier adopts a UWMP, or participates in regional water management planning.

Based on the foregoing, the Commission finds that newly added sections 10820 and 10826, and 10608.48(d-f), impose the following new requirements on agricultural water suppliers, except for suppliers that adopt a UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and CVP and USBR contractors:

- On or before December 31, 2012, prepare and adopt an agricultural water management plan in accordance with section 10826.[304]
- On or before December 31, 2015, and every five years thereafter, update the agricultural water management plan, in accordance with section 10820 et seq.[305]
- If a supplier becomes an agricultural water supplier, as defined, after December 31, 2012, that agricultural water supplier shall prepare and adopt an agricultural water management plan within one year after the date that it has become an agricultural water supplier.[306]
- Include in the agricultural water management plans required pursuant to Water Code section 10800 et seq. a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report,

[302] Water Code section 10608.48(f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[303] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 11, "The agricultural water suppliers that submit a plan to USBR may meet the requirements of section 10608.48 (d) and (e) [report of EWMPs implemented, planned for implementation, and estimate of efficiency improvements, as well as documentation for not locally cost effective EWMPs] by submitting the USBR-accepted plan to DWR. "DWR *encourages* CVPIA/RRA water suppliers to also provide a report on water use efficiency information (required by section 10608.48(d);see Section 3.7 of this Guidebook)." Emphasis added.

[304] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[305] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[306] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future.[307]

In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[308]

- If an agricultural water supplier determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination.[309]

  In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[310]

- Report the data using a standardized form developed pursuant to Water Code section 10608.52.[311]

  An agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[312]

3. Section 10608.48(g-i), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new activities on local government.

Section 10608.48(g) provides that on or before December 31, 2013, DWR shall submit to the Legislature a report on agricultural efficient water management practices that have been implemented or are planned to be implemented, and an assessment of those practices and their effects on agricultural operations. Section 10608.48(h) states that DWR "may update the efficient water management practices required pursuant to [section 10608.48(c)]," but only after conducting public hearings. Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement" of section 10608.48(b).

The plain language of these sections section 10608.48(g-i) is directed to DWR, and does not impose any activities or requirements on local government.

4. Sections 10821, 10841, 10842, 10843, and 10844, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers.

[307] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[308] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[309] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[310] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[311] Water Code section 10608.48(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[312] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

Water Code section 10821, as added, provides that an agricultural water supplier required to prepare an AWMP pursuant to this part, "shall notify each city or county within which the supplier provides water supplies that the agricultural water supplier will be preparing the plan or reviewing the plan and considering amendments or changes to the plan."[313]

In addition, newly added section 10841 requires that the plan be made available for public inspection and that a public hearing shall be held as follows:

> Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned agricultural water supplier pursuant to Section 6066 of the Government Code. A privately owned agricultural water supplier shall provide an equivalent notice within its service area and shall provide a reasonably equivalent opportunity that would otherwise be afforded through a public hearing process for interested parties to provide input on the plan...[314]

Section 10842 provides that an agricultural water supplier shall implement its AWMP "in accordance with the schedule set forth in its plan."[315]

Following adoption of an AWMP, section 10843 requires an agricultural water supplier to submit a copy of its AWMP, no later than 30 days after adoption, to DWR and to the following affected or interested entities:

> (2) Any city, county, or city and county within which the agricultural water supplier provides water supplies.
>
> (3) Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.
>
> (4) Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
>
> (5) Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
>
> (6) The California State Library.
>
> (7) Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[316]

Finally, newly added section 10844 requires an agricultural water supplier to make its water management plan available for public review via the internet, as follows:

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[313] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[314] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[315] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[316] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(a) Not later than 30 days after the date of adopting its plan, the agricultural water supplier shall make the plan available for public review on the agricultural water supplier's Internet Web site.

(b) An agricultural water supplier that does not have an Internet Web site shall submit to [DWR], not later than 30 days after the date of adopting its plan, a copy of the adopted plan in an electronic format. [DWR] shall make the plan available for public review on [its] Internet Web site.[317]

The prior provisions of the Water Code pertaining to the adoption and implementation of AWMPs, as explained above, were inoperative by their own terms as of January 1, 1993.[318] Therefore, the requirements to hold a public hearing, to implement the plan in accordance with the schedule, to submit copies to DWR and other specified local entities, and to make the plan available by either posting the plan on the supplier's web site, or by sending an electronic copy to DWR for posting on its web site, are new activities with respect to prior law.

However, section 10828, as discussed above, provides that USBR or CVP contractors may satisfy the requirements of section 10826 by submitting their water conservation plans adopted within the previous four years pursuant to the Central Valley Improvement Act or the Reclamation Reform Act of 1982.[319] This section does not expressly exempt CVP or USBR contractors from all requirements of Part 2.8, but only from the content requirements of the plan itself, and the requirement to adopt according to the "schedule" set forth in section 10820, as discussed above. Accordingly, DWR's *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 [AWMP]* provides:

> All agricultural water suppliers required to prepare new agricultural water management/conservation plans must prepare and complete their plan in accordance with Water Code Part 2.8, Article 1 and Article 3 requirements for notification, public participation, adoption, and submittal (refer to Section 3.1 for details). *The federal review process may incorporate many requirements specified in Part 2.8, Articles 1 and 3; as such the federal process may meet the requirements of Part 2.8, otherwise, the agricultural water supplier would have to complete those requirements in Part 2.8, Articles 1 and 3 that are not already a part of the federal review pro*cess.[320]

Article 1 of Part 2.8 includes section 10821, which requires an agricultural water supplier to notify the city or county that it will be preparing an AWMP. Therefore, to the extent that the "federal process" of adopting a water conservation plan for USBR or CVP also requires notice to the city or county, this activity is not newly required. Article 3 of Part 2.8 includes sections 10840-10845, pertaining to the adoption and implementation of AWMPs. Those requirements include, as discussed above, noticing and holding a public hearing; implementing the plan in

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[317] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[318] See former Water Code sections 10840-10845; 10855 (Stats. 1986, ch. 954).

[319] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[320] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 94 [emphasis added].

accordance with the schedule set forth in the plan; submitting a copy of the AWMP to specified state and local entities within 30 days after adoption; and making the AWMP available on the supplier's website, or submitting the AWMP for posting on DWR's website. To the extent that the "federal process" satisfies those requirements, they are not newly required by the test claim statutes.

In addition, as noted above, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[321] That exception would include all of the notice and hearing requirements identified below.

Based on the foregoing, the Commission finds that Water Code sections 10821, 10841, 10842, 10843, and 10844 impose new requirements on agricultural water suppliers, except those that adopt an UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and except to the extent that suppliers that are USBR or CVP contractors have water conservation plans that satisfy the AWMP adoption requirements, as follows:

- Notify the city or county within which the agricultural supplier provides water supplies that it will be preparing the AWMP or reviewing the AWMP and considering amendments or changes.[322]
- Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan.[323]
- Prior to the hearing, notice of the time and place of hearing shall be published in a newspaper within the jurisdiction of the publicly owned agricultural water supplier once a week for two successive weeks, as specified in Government Code 6066.[324]
- Implement the AWMP in accordance with the schedule set forth in the AWMP.[325]
- An agricultural water supplier shall submit to the following entities a copy of its plan no later than 30 days after the adoption of the plan. Copies of amendments or changes to the plans shall be submitted to the entities identified within 30 days after the adoption of the amendments or changes.
    - DWR.
    - Any city, county, or city and county within which the agricultural water supplier provides water supplies.
    - Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.

[321] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[322] Water Code section 10821(Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[323] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[324] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[325] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
- Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
- The California State Library.
- Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[326]

- An agricultural water supplier shall make its agricultural water management plan available for public review on its web site not later than 30 days after adopting the plan, or for an agricultural water supplier that does not have a web site, submit an electronic copy to the Department of Water Resources not later than 30 days after adoption, and the Department shall make the plan available for public review on its web site.[327]

5. Agricultural Water Measurement Regulations, California Code of Regulations, Title 23, Division 6, sections 597 through 597.4, Register 2012, Number 28.

California Code of Regulations, title 23, section 597 provides that under authority included in Water Code section 10608.48(i), DWR is required to adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirements of section 10609.48(b).[328] The plain language of this section does not impose any new activities or requirements on local government.

Section 597.1 provides that an agricultural water supplier providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article, and a supplier providing water to 10,000 or more irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article unless sufficient funding is provided pursuant to Water Code section 10853. A supplier providing water to 25,000 irrigated acres or more, excluding acres that receive only recycled water, is subject to this article. A supplier providing water to wildlife refuges or habitat lands, as specified, is subject to this article. A *wholesale* agricultural water supplier is subject to this article at the location at which control of the water is transferred to the receiving water supplier, but the wholesale supplier is not required to measure the ultimate deliveries to customers. A canal authority or other entity that conveys water through facilities owned by a federal agency is not subject to this article. An agricultural water supplier that is a party to the QSA, as defined in Statutes 2002, chapter 617, section 1, is not subject to this article. And finally, DWR is not subject to this article.[329] None of the above-described provisions of section 597.1 impose any new requirements or activities on local government.

[326] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[327] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[328] Code of Regulations, title 23, section 597 (Register 2012, No. 28).

[329] Code of Regulations, title 23, section 597.1 (Register 2012, No. 28).

Section 597.2 provides definitions of "accuracy," "agricultural water supplier," "approved by an engineer," "best professional practices," "customer," "delivery point," "existing measurement device," "farm-gate," "irrigated acres," "manufactured device," "measurement device," "new or replacement measurement device," "recycled water," and "type of device."[330] Based on the plain language of 597.2, the definitions provided in section 597.2 do not impose any new requirements or activities on local government.

Section 597.3 requires an agricultural water supplier to measure surface water and groundwater that it delivers to its customers and provides a range of options to comply with section 10608.48(i), as follows:

> An agricultural water supplier subject to this article shall measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards in this section. The supplier may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section. Measurement device accuracy and operation shall be certified, tested, inspected and/or analyzed as described in §597.4 of this article.
>
> **(a) Measurement Options at the Delivery Point or Farm-gate of a Single Customer**
>
> An agricultural water supplier shall measure water delivered at the delivery point or farm-gate of a single customer using one of the following measurement options. The stated numerical accuracy for each measurement option is for the volume delivered. If a device measures a value other than volume, for example, flow rate, velocity or water elevation, the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume as described in §597.4(e).
>
> (1) An existing measurement device shall be certified to be accurate to within +12% by volume,
>
> and,
>
> (2) A new or replacement measurement device shall be certified to be accurate to within:
>
> (A) ±5% by volume in the laboratory if using a laboratory certification;
>
> (B) ±10% by volume in the field if using a non-laboratory certification.
>
> **(b) Measurement Options at a Location Upstream of the Delivery Points or Farm-gates of Multiple Customers**
>
> (1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer's delivery points meet either of the following conditions:

[330] Code of Regulations, title 23, section 597.2 (Register 2012, No. 28).

(A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device.

(B) An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at a single farm-gate, accuracy standards of measurement options in §597.3(a) cannot be met by installing a measurement device or devices (manufactured or on-site built or in-house built devices with or without additional components such as gauging rod, water level control structure at the farm-gate, etc.). If conditions change such that the accuracy standards of measurement options in §597.3(a) at the farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, a schedule, budget and finance plan to demonstrate progress to measure water at the farm-gate in compliance with §597.3(a) of this article.

(2) An agricultural water supplier choosing an option under paragraph (b)(l) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:

(A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those points.

(B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the water level or flow conditions described in §597.3(b)(l)(B) exist at individual customer's delivery points downstream of the point of measurement as approved by an engineer.

(C) The agricultural water supplier shall document all of the following criteria about the methodology it uses to apportion the volume of water delivered to the individual downstream customers:

(i) How it accounts for differences in water use among the individual customers based on but not limited to the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system, and;

(ii) That it is sufficient for establishing a pricing structure based at least in part on the volume delivered, and;

(iii) That it was approved by the agricultural water supplier's governing board or body.[331]

Thus, one option under these regulations, in order to measure the volume of water delivered, as required by section 10608.48, is measurement "at the delivery point or farm-gate of a single customer" using an existing measurement device certified to be accurate to within 12 percent by volume, or a new measurement device certified to be accurate within 5 percent if certified in a laboratory or within 10 percent if certified in the field. Another option is to measure upstream of a delivery point or farm gate if the supplier does not have legal access to the delivery point for an individual customer, or if the standards of measurement cannot be met due to large fluctuations in flow rate or velocity during the delivery season. If this option is chosen, appropriate documentation explaining the option must be provided, as described above.

The claimants allege that section 597.3 requires agricultural water suppliers to measure at a delivery point or farm gate "by either (1) using an existing measurement device, certified to be accurate within ±12% by volume or (2) a new or replacement measurement device, certified to be accurate within ±5% by volume in the laboratory if using a laboratory certification or ±10% by volume in the field if using a non-laboratory certification." In addition, the claimants allege that the regulations provide for "limited exceptions" if the supplier is unable to measure at the farm-gate, which allow, in certain circumstances, for upstream measurement.[332] The claimants assert that prior to these regulations, "there was no requirement to measure water delivered to the farm-gate of *each* single customer, with limited exception."[333]

DWR argues that these regulations merely provide options, and are not therefore a mandate. Specifically, DWR asserts that "[n]o local government is required to comply with those regulations." DWR asserts that "the regulations exist as a resource for agricultural water suppliers who wish to comply with certain requirements…described in the 2009 Water Law." DWR concludes that "[the regulations] are optional, and the suppliers are free to comply with the law in other ways."[334]

Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement" to comply with the measurement requirements of subdivision (b).[335] The phrase "may use or implement" suggests that the regulations provide a choice for agricultural water suppliers, rather than a mandate.

However, Section 10608.48(b) states that agricultural water suppliers "shall implement all of the following critical efficient management practices…(1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to [adopt a pricing structure based in part on quantity of water delivered]."[336] Moreover, the plain language of section 597.3 of the regulations, as cited above, states that an agricultural water

[331] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[332] Exhibit B, 12-TC-01, page 4.

[333] Exhibit B, 12-TC-01, page 6.

[334] Exhibit D, DWR Comments, page 11.

[335] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[336] *Ibid*.

supplier "shall measure surface water and groundwater that it delivers to customers pursuant to the accuracy standards in this section." The language states that the supplier "may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section."[337] There is no express provision for choosing a measurement option or combination of options not listed in section 597.3. Although an agricultural water supplier may pick which one of the regulatory options to comply with, it "shall" pick one of them based on the plain language of section 597.3. As a result, most agricultural water suppliers are required to implement one of the measurement options provided by 597.3. As discussed above though, there are several water suppliers exempt from this requirement, including parties to the QSA, suppliers providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, and suppliers providing water to more than 10,000 irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, unless sufficient funding is provided pursuant to Water Code section 10853. Thus, section 597.3 requires the following for those agencies which are not exempt:

- Measure water delivered at the delivery point or farm-gate of a single customer using one of the following options.
  - An existing measurement device certified to be accurate to within ±12% by volume.
  - A new or replacement measurement device certified to be accurate to within:
    - ±5% by volume in the laboratory if using a laboratory certification;
    - ±10% by volume in the field if using a non-laboratory certification.

    If a device measures a value other than volume (e.g., flow rate, velocity or water elevation) the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume.[338]
- Measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers if:
  - The supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device; or
  - An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season, accuracy standards of measurement cannot be met by installing a measurement device or devices.[339]
- And, when a supplier chooses to measure water delivered at an upstream location:

[337] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[338] Code of Regulations, title 23, section 597.3(a) (Register 2012, No. 28).

[339] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

- Provide, where applicable, documentation to demonstrate the lack of legal access at delivery points of individual or groups of customers downstream of the point of measurement; or documentation of the water measurement device unavailability and that water level or flow conditions exist that prohibit meeting accuracy standards, as approved by an engineer.
- Document the following about its apportionment of water delivered to individual customers:
  - How the supplier accounts for differences in water use among individual customers based on the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system;
  - That it is sufficient for establishing a pricing structure based at least in part on the volume of water delivered; and
  - That it was approved by the agricultural water supplier's governing board or body.[340]

Section 597.4, also alleged in this consolidated test claim, requires that measurement devices be certified and documented as follows:

(a) Initial Certification of Device Accuracy

The accuracy of an existing, new or replacement measurement device or type of device, as required in §597.3, shall be initially certified and documented as follows:

(1) For existing measurement devices, the device accuracy required in section 597.3(a) shall be initially certified and documented by either:

(A) Field-testing that is completed on a random and statistically representative sample of the existing measurement devices as described in §597.4(b)(1) and §597.4(b)(2). Field-testing shall be performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer.

Or,

(B) Field-inspections and analysis completed for every existing measurement device as described in §597.4(b)(3). Field-inspections and analysis shall be performed by trained individuals in the use of field inspection and analysis, and documented in a report approved by an engineer.

(2) For new or replacement measurement devices, the device accuracy required in sections 597.3 (a)(2) shall be initially certified and documented by either:

[340] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

(A) Laboratory Certification prior to installation of a measurement device as documented by the manufacturer or an entity, institution or individual that tested the device following industry-established protocols such as the National Institute for Standards and Testing (NIST) traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device.

Or,

(B) Non-Laboratory Certification after the installation of a measurement device in the field, as documented by either:

(i) An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devices for each type of device installed at specified locations.

Or,

(ii) A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.

(b) Protocols for Field-Testing and Field-Inspection and Analysis of Existing Devices

(1) Field-testing shall be performed for a sample of existing measurement devices according to manufacturer's recommendations or design specifications and following best professional practices. It is recommended that the sample size be no less than 10% of existing devices, with a minimum of 5, and not to exceed 100 individual devices for any particular device type. Alternatively, the supplier may develop its own sampling plan using an accepted statistical methodology.

(2) If during the field-testing of existing measurement devices, more than one quarter of the samples for any particular device type do not meet the criteria pursuant to §597.3(a), the agricultural water supplier shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed an additional 100 individual devices for the particular device type. This second round of field-testing and corrective actions shall be completed within three years of the initial field-testing.

(3) Field-inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards

of §597.3(a) and operation and maintenance protocols meet best professional practices.

(c) Records Retention

Records documenting compliance with the requirements in §597.3 and §597.4 shall be maintained by the agricultural water supplier for ten years or two Agricultural Water Management Plan cycles.

(d) Performance Requirements

(1) All measurement devices shall be correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.

(2) If an installed measurement device no longer meets the accuracy requirements of §597.3(a) based on either field-testing or field-inspections and analysis as defined in sections 597.4 (a) and (b) for either the initial accuracy certification or during operations and maintenance, then the agricultural water supplier shall take appropriate corrective action, including but not limited to, repair or replacement to achieve the requirements of this article.

(e) Reporting in Agricultural Water Management Plans

Agricultural water suppliers shall report the following information in their Agricultural Water Management Plan(s):

(1) Documentation as required to demonstrate compliance with §597.3 (b), as outlined in section §597.3(b)(2), and §597.4(b)(2).

(2) A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.

(3) If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:

(A) For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.

(B) For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is

derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.

(C) For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).

(4) If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.

Thus, the plain language of section 597.4 requires agricultural water suppliers to certify and document the initial accuracy of "existing, new or replacement measurement device[s]," as specified.[341] In addition, section 597.4 provides that field-testing "shall be performed" following "best professional practices," and either sampling "no less than 10% of existing devices," as recommended by the department, or developing a "sampling plan using an accepted statistical methodology." Then, if field testing results in more than a quarter of any particular devices failing the accuracy criteria described in section 597.3(a), above, the supplier "shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices…"[342] In addition, section 597.4 provides that records documenting compliance "shall be maintained…for ten years or two Agricultural Water Management Plan cycles."[343] Section 597.4 further provides that "all measurement devices shall be correctly installed, maintained, operated, inspected, and monitored," and if a device no longer meets the accuracy requirements of section 597.3, the supplier "shall take appropriate corrective action," including repair or replacement, if necessary.[344] And finally, section 597.4 requires agricultural water suppliers to report additional information regarding their compliance and "best professional practices" for water measurement in their agricultural water measurement plan.[345]

As noted above, some agricultural water suppliers may have been required pursuant to section 531.10 to measure farm-gate water deliveries.[346] To the extent that those measurement programs or practices satisfy the requirements of these regulations, the regulations do not impose new activities.[347] In addition, for any agricultural water supplier that is also an urban water supplier,

[341] Code of Regulations, title 23, section 597.4(a) (Register 2012, No. 28).

[342] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[343] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[344] Code of Regulations, title 23, section 597.4(d) (Register 2012, No. 28).

[345] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

[346] Water Code section 531.10 (Stats. 2007, ch. 675 (AB 1404)).

[347] See discussion above addressing section 10608.48(a-c).

existing sections 525 through 527 required those entities to install water meters on new and existing service connections, as specified.[348] To the extent that any such water meter on an agricultural service connection satisfies the measurement requirements of these regulations, the regulations do not impose any new activities or requirements.

Based on the foregoing, the Commission finds that section 597.4 imposes new requirements on agricultural water suppliers not exempt from the water measurement requirements, and not already required by existing law to take part in the programs or practices of water measurement, discussed above, that would satisfy the accuracy standards of these regulations, as follows:

- Certify the initial accuracy of existing measurement devices by either:
    - Field-testing that is completed on a random and statistically representative sample of the existing measurement devices, performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer; or
    - Field inspections and analysis for every existing measurement device, performed by individuals trained in the use of field inspection and analysis, and documented in a report approved by an engineer.[349]
- Certify the initial accuracy of new or replacement measurement devices by either:
    - Laboratory certification prior to installation of the device as documented by the manufacturer or an entity, institution, or individual that tested the device following industry-established protocols such as the National Institute of Standards and Testing traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device; or
    - Non-laboratory certification after installation of a measurement device in the field, documented by either:
        - An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devises for each type of device installed at specified locations; or
        - A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.[350]
- Ensure that field-testing is performed as follows:

[348] Section 525 as amended by statutes 2005, chapter 22; Section 527 as amended by statutes 2005, chapter 22; Section 526 as amended by Statutes 2004, chapter 884.

[349] Code of Regulations, title 23, section 597.4(a)(1) (Register 2012, No. 28).

[350] Code of Regulations, title 23, section 597.4(a)(2) (Register 2012, No. 28).

- Field-testing shall be performed for a sample of existing measurement devices according to the manufacturer's recommendations or design specifications and following best professional practices.
- If more than one quarter of the samples for any particular device type do not meet the accuracy criteria specified in section 597.3(a), the supplier shall provide in its Agricultural Water Management Plan a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed 100 additional devices for the particular device type, and shall complete the second round of field-testing and corrective actions within three years of the initial field-testing.
- Field inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards specified in section 597.3(a) and that operation and maintenance protocols meet best professional practices.[351]

- Maintain records documenting compliance with the requirements of sections 597.3 and 597.4 for ten years or two Agricultural Water Management Plan cycles.[352]
- Ensure that all measurement devices are correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.[353]
- If an installed measurement device no longer meets the accuracy requirements of section 597.3(a) based on either field-testing or field-inspections and analysis for either the initial accuracy certification or during operations and maintenance, take appropriate corrective action, including but not limited to, repair or replacement of the device.[354]
- Report the information listed below in its Agricultural Water Management Plan(s). :
    - Documentation, as required, to demonstrate that an agricultural water supplier that chooses to measure upstream of a delivery point or farm-gate for a customer or group of customers has complied justified the reason to do so, and has taken appropriate steps to ensure that measurements can be allocated to the customer or group of customers sufficiently to support a pricing structure based at least in part on quantity of water delivered.

[351] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[352] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[353] Code of Regulations, title 23, section 597.4(d)(1) (Register 2012, No. 28).

[354] Code of Regulations, title 23, section 597.4(d)(2) (Register 2012, No. 28).

- A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.
- If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:
    - For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.
    - For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.
    - For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).
- If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.[355]

D. The Test Claim Statutes and Regulations do not Result in Increased Costs Mandated by the State, Because the Claimants Possess Fee Authority Sufficient as a Matter of Law to Cover the Costs of any New Mandated Activities.

As the preceding analysis indicates, many of the requirements of the test claim statutes are not new, at least with respect to *some* urban or agricultural water suppliers, because suppliers were previously required to perform substantially the same activities under prior law. Additionally, many of the alleged test claim statutes do not impose any requirements at all, based on the plain language. However, even if the new requirements identified above could be argued to mandate a new program or higher level of service, the Commission finds that the costs incurred to comply

[355] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

with those requirements are not costs mandated by the state, within the meaning of article XIII B, section 6 and Government Code section 17514, because all affected entities have fee authority, sufficient as a matter of law to cover the costs of any mandated activities.

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state, as defined in section 17514, if the local government claimant "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[356] The Court, in holding that the term "costs" in article XIII B, section 6 excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*[357]

Accordingly, in *Connell v. Superior Court of Sacramento County,*[358] the Santa Margarita Water District, among others, was denied reimbursement based on its authority to impose fees on water users. The water districts submitted evidence that funding the mandated costs with fees was not practical: "rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water."[359] The court concluded that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs." Water Code section 35470 authorized the levy of fees to "correspond to the cost and value of the service," and "to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose."[360] The court held that the Districts had not demonstrated "that anything in Water Code section 35470 limits the authority of the Districts to levy fees 'sufficient' to cover their costs,"

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[356] *County of Fresno v. State of California, supra*, 53 Cal.3d 482.

[357] *Id*, at p. 487 [emphasis added].

[358] (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382.

[359] *Id*, at p. 399.

[360] *Ibid*.

and that therefore "the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry."[361]

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the SCO was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts' authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court noted that the concept underlying Government Code sections 17514 and 17556(d) is that "[t]o the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost."[362] The court further noted that, "this basic principle flows from common sense as well." The court reasoned: "As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[363]

1. The claimants have statutory authority to levy fees or charges for the provision of water.

Both Finance and DWR asserted, in comments on the test claim, that the test claim statutes are not reimbursable pursuant to section 17556(d). Finance argued that the claimants are "statutorily authorized to charge a fee for the delivery of water," and thus "each of these water agencies has the ability to cover any potential initial and ongoing costs related to the Act and Regulations with fee revenue."[364] DWR asserted that "Senate Bill 1017, which amended the [Urban Water Management Act] in 1994," provides authority for an urban water supplier "to recover the costs of preparing its [urban water management plan] and implementing the reasonable water conservation measures included in the plan in its water rates."[365]

For the following reasons, the Commission finds that the claimants have statutory authority to establish and increase fees or assessments for the provision of water services.

Water Code section 35470 provides generally that "[a]ny [water] district formed on or after July 30, 1917, may, in lieu in whole or in part of raising money for district purposes by assessment, make water available to the holders of title to land or the occupants thereon, and may fix and collect charges therefor." Section 35470 further provides that "[t]he charges may vary in different months and in different localities of the district to correspond to the cost and value of the service, and the district *may use so much of the proceeds of the charges as may be necessary to defray the ordinary operation or maintenance expenses of the district and for any other lawful purpose*."[366] In addition, section 50911 provides that an irrigation district may "[a]dopt a schedule of rates to be charged by the district for furnishing water for the irrigation of district lands."[367]

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[361] *Connell*, *supra*, (1997) 59 Cal.App.4th at p. 401.

[362] *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

[363] *Ibid.*

[364] Exhibit C, Finance Comments on Test Claim, page 1.

[365] Exhibit D, DWR Comments on Test Claim, pages 8-9 [citing Water Code section 10654].

[366] Water Code section 35470 (Stats. 2007, ch. 27 (SB 444)) [emphasis added].

[367] Water Code section 50911 (Stats. 2007, ch. 27 (SB 444)).

More specifically, and pertaining to the requirements of the test claim statutes, Water Code section 10654 permits an urban water supplier to "recover in its rates" for the costs incurred in preparing and implementing water conservation measures.[368] And, section 10608.48 expressly requires agricultural water suppliers to "[a]dopt a pricing structure for water customers based at least in part on quantity delivered."[369] This provision indicates that the Legislature intended user fees to be an essential component of the water conservation practices called for by the Act. And finally, Water Code section 10608.32, as added *within the test claim statute*, provides that all costs incurred pursuant to this part may be recoverable in rates subject to review and approval by the Public Utilities Commission.[370]

Based on the foregoing, the Commission finds that both agricultural and urban water suppliers have statutory authority to impose or increase fees to cover the costs of new state-mandated activities.

2. Nothing in Proposition 218, case law, or any prior Commission Decision, alters the analysis of the claimants' statutory fee authority.

The claimants argue that both Finance and DWR cite *Connell v. Superior Court* and "ignore the most recent rulings on the subject of Proposition 218 where their exact arguments were considered and overruled by the Commission in *Discharge of Stormwater Runoff*, 07-TC-09." The claimants argue that "under Proposition 218, Claimants' customers could reject the Board's action to establish or increase fees or assessments, yet Claimants would still be obligated to implement the mandates."[371] In comments on the draft proposed decision, the claimants reiterate, more urgently:

> The Commission should not accept its staff's invitation to ignore a prior Commission decision that is directly on point, and which was based on a plain reading of the California Constitution, all in order to reject the test claim here. To do so would undermine the Commission' s credibility, eviscerate the Commission's Constitutional duty to reimburse agencies for new state mandates, and have far-reaching negative effects.[372]

For the following reasons, the claimant's argument is unsound. In *Connell v. Superior Court, supra* the court held that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs," and that the economic viability of the necessary rate increases "was irrelevant and injected improper factual questions into the inquiry."[373] *Connell* did not address the possible impact of Proposition 218 on the districts' fee authority, because the districts did not "contend that the services at issue…are among the 'many services'

[368] Water Code section 10654 (Stats. 1994, ch. 609 (SB 1017)).

[369] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[370] Water Code section 10608.32 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[371] Exhibit E, Claimant Rebuttal Comments, pages 11-12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[372] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[373] *Connell*, *supra*, (1997) 59 Cal.App.4th at p. 401.

impacted by Proposition 218."[374] The claimants here argue that *Connell* is no longer good authority, because Proposition 218 has changed the landscape of special districts' legal authority to impose fees or charges.

Proposition 218, adopted by the voters in 1996, also known as the "Right to Vote on Taxes Act," declared its purpose to protect taxpayers "by limiting the methods by which local governments exact revenue from taxpayers without their consent." Proposition 218 added articles XIII C and XIII D to the Constitution;[375] article XIII C addresses assessments, while article XIII D addresses user fees and charges. The claimants allege that article XIII D, section 6, specifically, imposes a legal or constitutional hurdle to imposing or increasing fees, which undermines any analysis of statutory fee authority under Government Code section 17556(d).

The requirements of article XIII D, section 6 to which claimants refer provide as follows:

> Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:
>
> (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.
>
> (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. *If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*
>
> [¶…¶]
>
> (c) Voter Approval for New or Increased Fees and Charges. *Except for fees or charges for sewer, water, and refuse collection services*, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures

[374] 59 Cal.App.4th at p. 403.

[375] Exhibit X, Text of Proposition 218.

similar to those for increases in assessments in the conduct of elections under this subdivision.[376]

The claimants have acknowledged that they have fee authority, absent the restrictions of articles XIII C and XIII D: "Claimants do not deny that, before the passage Proposition 218, the Water Code would have provided Claimants sufficient authority, pursuant to their governing bodies' discretion, to unilaterally establish or increase fees or charges for the provision of water services."[377] After Proposition 218, the claimants argue they are now "authorized to do no more than *propose* a fee increase that can be rejected" by majority protest.[378] Furthermore, the claimants maintain that the Commission's decision in *Discharge of Stormwater Runoff* recognized the limitations imposed by article XIII D, section 6, and the effect on local governments' fee authority: "[f]inding *Connell* inapposite, the Commission observed that 'The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one.'"[379]

However, claimants' reliance on the Commission's prior action is misplaced, and claimants' assertions about the effect of Proposition 218 on the law of *Connell* are overstated. Commission decisions are not precedential, and in any event the current test claim is distinguishable from the analysis in *Discharge of Stormwater Runoff*. The Commission, in *Discharge of Stormwater Runoff*, deviated from the rule of *Connell*, and found that Proposition 218, as *applied to the claimants* and *the mandated activities in that test claim*, constituted a legal and constitutional barrier to increasing fees. The test claim was brought by the County of San Diego and a number of cities, and alleged various mandated activities and costs related to reducing stormwater pollution.[380] The Commission found that although the County and the Cities had a generalized fee authority based on regulatory and police powers,[381] "[w]ith some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996."[382] The Commission reasoned that "it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate,"[383] and that "[a]bsent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d)."[384] Thus, the

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[376] California Constitution, article XIII D, section 6 (added, November 5, 1996, by Proposition 218) [emphasis added].

[377] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[378] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[379] Exhibit E, Claimant Rebuttal Comments, page 12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[380] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 1.

[381] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 103.

[382] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 105.

[383] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 106.

[384] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107.

Commission concluded that "[t]he voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one."[385]

Here, Proposition 218 does not impose a legal and constitutional hurdle, because fees for the provision of water services are expressly exempt from the voter approval requirements of Proposition 218.[386] The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water."[387] Thus, an urban or agricultural water supplier that undertakes measures to ensure the conservation of water, to produce more water, and enhance the quality and reliability of its supply, is providing water service, within the meaning of the Omnibus Act. The statutory and regulatory metering and other conservation practices required of the claimants therefore describe "water service." Unlike the test claimants in *Discharge of Stormwater Runoff* (cities and counties), the services for which fees or charges would be increased are expressly exempt from the voter approval requirements in article XIII D, section 6(c), and the decision and reasoning of the Commission in *Discharge of Stormwater Runoff* is not relevant. Therefore, the Commission's earlier decision is distinguishable on the very same ground that renders *Connell* significantly poignant. The claimants cannot rely on the unwillingness of voters to raise fees, because the fees in question fall, based on the plain language of the Constitution, outside voter-approval requirement of article XIII D, section 6(c).

Claimants acknowledge that fees for water service "are excused from the formal election requirement under article XIII D section 6(c), [but] the majority protest provision in subdivision (a)(2) still applies and constitutes a legal barrier to Claimants' fee authority."[388] Claimants therefore argue that they "find themselves required to implement and pay for the newly mandated activities, yet are authorized to do no more than *propose* a fee increase that can be rejected by a simple majority of affected customers."[389]

However, the so-called "majority protest provision," which claimants allege constitutes a legal barrier to claimants' fee authority, presents either a mixed question of fact and law, which has not been demonstrated based on the evidence in the record, or a legal issue that is incumbent on the courts first to resolve. In order for the Commission to make findings that the claimants' fee authority has been diminished, or negated, pursuant to article XIII D, section 6(a), the claimants would have to provide evidence that they tried and failed to impose or increase the necessary fees,[390] or provide evidence that a court determined that Proposition 218 represents a

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[385] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107 [citing *Connell v. Superior Court*, *supra*, 59 Cal.App.4th 382, at p. 401].

[386] See California Constitution, article XIII D, section 6(c).

[387] Government Code section 53750(m) (Stats. 2002, ch. 395).

[388] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[389] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[390] If a claimant were to provide evidence that it had tried and failed to impose or increase fees, that evidence could constitute costs "first incurred," within the meaning of Government Code section 17551, and a claimant otherwise barred from reimbursement under section 17556(d) could thus potentially demonstrate that it had incurred costs mandated by the state, as defined in

constitutional hurdle to fee authority as a matter of law. The Commission cannot now say, as a matter of law, that the claimants' fee authority is insufficient based on the speculative and uncertain threat of a "written protests against the proposed fee or charge [being] presented by a majority of owners of the identified parcels…"[391]

Based on the foregoing analysis, the Commission cannot find costs mandated by the state, within the meaning of Government Code section 17514, because the claimants have sufficient fee authority, as a matter of law, to establish or increase fees or charges to cover the costs of any new required activities.

V. Conclusion

Based on the foregoing analysis, the Commission finds that the Water Conservation Act of 2009, enacted as Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), and the Agricultural Water Measurement Regulations issued by the Department of Water Resources, found at Code of Regulations, title 23, section 597 et seq., do not impose a reimbursable state-mandated program on urban retail water suppliers or agricultural water suppliers within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission therefore denies this test claim.

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section 17514. The Commission does not make findings on this issue, but merely observes the potentiality.

[391] See article XIII D, section 6(a)(2).

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RE: **Decision**

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,
Oakdale Irrigation District, and Glenn-Colusa Irrigation District, Claimants

On December 5, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: December 12, 2014

Heather Halsey, Executive Director