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October 16, 2014

Heather Halsey, Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Re: Comments on Draft Proposed Decision Re: Test Claim No. 10-TC-12 (*Water Conservation*), consolidated with Test Claim No. 12-TC-01 (*Agricultural Water Measurement*)

Dear Ms. Halsey:

Claimants Biggs-West Gridley Water District, Glenn-Colusa Irrigation District, Oakdale Irrigation District, Paradise Irrigation District, Richvale Irrigation District and South Feather Water & Power Agency hereby submit their comments on the Draft Proposed Decision issued by the executive director of the Commission on State Mandates in this matter dated July 31, 2014.

Respectfully submitted,

MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP

By: _____
DUSTIN C. COOPER

By: _____
PETER C. HARMAN

Attorneys for Claimants Paradise Irrigation District, Richvale Irrigation District, Oakdale Irrigation District, and South Feather Water & Power Agency

Heather Halsey, Executive Director

Re: Comments on Draft Proposed Decision Re: Test Claim No. 10-TC-12 (*Water Conservation*), consolidated with Test Claim No. 12-TC-01 (*Agricultural Water Measurement*)

October 16, 2014

SOMACH SIMMONS & DUNN

By: _____

ANDREW M. HITCHINGS, Attorney for
Claimants Biggs-West Gridley Water District and
Glenn-Colusa Irrigation District

Heather Halsey, Executive Director
Re: Comments on Draft Proposed Decision Re: Test Claim No. 10-TC-12 (*Water Conservation*), consolidated with Test Claim No. 12-TC-01 (*Agricultural Water Measurement*)
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INTRODUCTION

The Draft Proposed Decision correctly finds that the Water Conservation Act and related regulations impose new mandates on Claimants and other affected public agencies, but denies reimbursement for two fundamentally flawed reasons. First, it asserts that, due to a supposed exemption from Proposition 218's majority protest and formal election requirements, Claimants have the right and power to pass the costs of the newly mandated activities onto their customers by imposing new or increased fees and charges for water service. The cited exclusion, however, is limited to the formal election requirement and does not excuse the Claimants from complying with Proposition 218's majority protest procedures. The Commission held in a recent test claim decision that the majority protest procedures imposed a Constitutional barrier to Claimants' former (pre-Proposition 218) authority to impose new fees and charges. As the Commission has already recognized, these Claimants lack legal authority to simply pass the newly mandated costs onto their customers.

Second, the Draft Proposed Decision denies reimbursement as to Claimants Richvale Irrigation District and Biggs-West Gridley Water District because they do not receive a share of ad valorem property taxes. Relying on case law superseded by Constitutional amendment and on other inapposite cases that apply only to redevelopment agencies, the Draft Proposed Decision proposes an interpretation of articles XIII A and XIII B of the California Constitution that ignores articles XIII C and XIII D (i.e., Proposition 218), leading to absurd results. The purpose of subvention is to provide funding for implementing state mandates to agencies that are hamstrung by Constitutional limitations on generating revenue. Articles XIII A, XIII B, XIII C, and XIII D each impose similar and interrelated limitations on local agencies' revenue; there is no rational basis for the Draft Proposed Decision's distinguishing between the limitations imposed by each article.

Claimants South Feather Water and Power Agency, Oakdale Irrigation District, Paradise Irrigation District, Glenn-Colusa Irrigation District, Richvale Irrigation District, and Biggs-West Gridley Water District respectfully ask the Commission to amend the Draft Proposed Decision to provide reimbursement for the reasons explained below.

I. The Draft Proposed Decision Incorrectly Determines That the Claimants Have Sufficient Authority to Establish or Increase Fees to Pay for the Newly Mandated Activities.

The Draft Proposed Decision concludes that the increased costs caused by these new state mandates are not reimbursable because the Claimants have sufficient fee authority to pass on the increased costs to customers. However, the Draft Proposed Decision misreads the California

Constitution in reaching its determination that Proposition 218 does not impose a legal barrier to Claimants establishing or increasing water fees to pay for the mandates.[1] The Commission has already decided this exact issue, determining that article XIII D, section 6(a)(2) of the California Constitution is a legal and Constitutional barrier to establishing or increasing fees, and there are no exemptions to the 6(a)(2) process. Because of this legal barrier, Government Code section 17556(d) does not apply, and the new mandates are reimbursable for all Claimants.

A. Claimants Do Not Have Sufficient Authority to Unilaterally Establish or Increase Water Service Fees.

The Draft Proposed Decision determines that the newly mandated costs are not reimbursable under section 17556(d) because, it asserts, the Claimants have fee authority sufficient to pay for the newly mandated activities. The Draft Proposed Decision is in error. As the Commission has previously determined, Proposition 218—specifically, article XIII D, section 6(a)(2) of the California Constitution—creates a barrier to Claimants' fee authority by divesting them of the unilateral "authority" (defined as a "right" or "power"[2]) to levy fees sufficient to cover the costs.

1. Proposition 218 Deprived Claimants of The Authority to Unilaterally Impose New or Increased Fees or Charges.

The Draft Proposed Decision argues that Proposition 218 did not create a legal barrier, or divest the Claimants of authority, to establish or increase property-related fees or charges.[3] However, its analysis is faulty either because it ignores article XIII D, section 6(a)(2), or because it conflates section 6(a)(2) with section 6(c), resulting in the erroneous conclusion that the Claimants are exempt from Proposition 218.[4]

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1 The Draft Proposed Decision confusingly uses the phrase "fees or assessments" in its discussion of article XIII D, section 6. Section 6 relates to "fees or *charges*," while sections 4 and 5 of article XIII D deal with "assessments." At issue in this test claim is the effect of section 6; there is no question that sections 4 and 5 constitute a legal barrier and divest the claimants of authority to establish or increase "assessments," and the Draft Proposed Decision does not contend otherwise. Sections 4 and 5 of article XIII D are not addressed in the Draft Proposed Decision. If the Commission's staff also contends that Proposition 218 does not constitute a legal barrier or divest claimants of authority to establish or increase assessments, Claimants reserve the right to address such a position, as it was not raised in the Draft Proposed Decision.

2 *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 399.

3 Draft Proposed Decision at pp. 77-78.

4 See Draft Proposed Decision at 80 ["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."].

Proposition 218 (1996) added articles XIII C and XIII D to the California Constitution. Article XIII D requires that local governments follow specific processes before they may establish new or increased fees or charges for property-related services.[5] An agency that wishes to impose a new or increased property-related fee or charge must notify affected landowners of the proposal and of the hearing on the proposal.[6] "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."[7] If there is no majority protest, then a formal election is held in which the fee or charge must be approved by either a majority of affected property owners or by two-thirds of the electorate.[8] Fees and charges for sewer, water, or refuse collection services are excused from the formal election process, but not from the majority protest process.[9] There is no question that the section 6(a)(2) majority protest and section 6(c) formal election are two distinct and separate processes; that there are no exemptions from the section 6(a)(2) process; and that section 6(a)(2), standing alone, imposes a legal and Constitutional barrier to Claimants' authority to fix new fees for water service.

The Proposition 218 Omnibus Implementation Act[10] clearly distinguishes between section 6(a)(2) majority protests and the section 6(c) formal elections. There are separate procedures for section 6(a)(2) majority protests (Gov. Code § 53755(b)) and for section 6(c) formal elections (Gov. Code § 53755.5). The California Supreme Court acknowledges that sections 6(a)(2) and 6(c) comprise two separate and distinct procedural requirements:

> [I]f a majority of owners of the identified parcels protests, the fee will not be imposed. (Art. XIII D, § 6, subd. (a).) [¶] If, however, there is no majority protest, the proposed fee is put before the voters for approval. Subdivision (c) sets forth the manner of conducting such an election . . . .[11]

The courts of appeal also recognize that subdivisions (a)(2) and (c) constitute two separate and distinct barriers to establishing or increasing fees or charges.[12]

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5 Cal. Const. art. XIII D §§ 2(b), 3(a)(4).

6 *Id.* § 6.

7 *Id.* § 6(a)(2).

8 *Id.* § 6(c).

9 *Ibid.*

10 Gov. Code §§ 53750-53758.

11 *Greene v. Marin County Flood Control and Water Conservation District* (2010) 49 Cal.4th 277, 286. See also *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427.

12 E.g., *Paland v. Brooktrails Township Community Services District* (2009) 179 Cal.App.4th 1358, 1366.

The Draft Proposed Decision erroneously concludes that the limited exclusion from the formal election process for fees for water, sewer, and refuse collection services in section 6(c) constitutes a complete exemption from Proposition 218. In fact, the section 6(c) exclusion applies only to the voter approval requirements in section 6(c), and not to the majority protest requirements in section 6(a)(2), to which there is no exemption.[13] Agencies 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.

2. Cases That Predate or Fail to Consider Proposition 218 Have No Bearing On This Claim.

The cases that the Draft Proposed Decision relies upon in its fee authority analysis, *County of Fresno v. State of California*, *Connell v. Superior Court*, and *Clovis USD v. Chiang*, do not in any way address Proposition 218's constraints on fee authority,[14] so they do not support the Draft Proposed Decision's conclusion that Proposition 218 does not divest Claimants of sufficient fee authority.[15] *Connell* does, however, frame the basic inquiry for evaluating Claimants' fee authority: The question is "whether the Districts have authority, *i.e.*, the right or power, to levy fees sufficient to cover the costs."[16]

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.[17] But Proposition 218's effect—as this Commission has already recognized—was that it created a legal barrier to establishing or increasing fees and charges and divested the Claimants of any authority (defined as a "right" or "power")[18] to levy fees sufficient to cover the new state-mandated costs. 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 the proposed fee increase. As a result, Claimants and other public agencies may be subject to new mandates but be incapable of funding them if the customers reject the proposed fees.

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[13] E.g., *Richmond, supra,* 32 Cal.4th at p. 427; *Paland, supra*, 179 Cal.App.4th at p. 1366.

[14] Draft Proposed Decision at pp. 75-80. See also, e.g., *id.* at p. 78 ["*Connell* did not address the possible impact of Proposition 218 on the districts' fee authority."].

[15] *Loeffler v. Target Corp.* (2014) 58 Cal. 4th 1081, 1134 ["cases are not authority for propositions not considered"].

[16] Draft Proposed Decision at p. 76, quoting *Connell, supra,* 59 Cal.App.4th at p. 399 [emphasis added].

[17] See Draft Proposed Decision at p. 77. We note, however, that the Proposed Decision's reference to Water Code section 10608.32 as a source of fee authority is, at best, misleading, because that provision only applies to utilities regulated by the California Public Utilities Commission (CPUC) and none of the Claimants here are subject to CPUC regulation.

[18] *Connell, supra,* 59 Cal.App.4th at p. 399.

The Draft Proposed Decision erroneously determined that the section 6(c) exclusion for water, sewer, and refuse collection fees from the formal election requirement exempts Claimants from compliance with section 6(a)(2). This is incorrect and, as the Commission has recognized in the past, section 6(a)(2) divests claimants of fee authority and renders Government Code section 17556(d) inapplicable.

B. The Commission Has Already Decided the *Exact Issue* Presented in this Claim: Article XIII D, Section 6(a)(2), Divests Public Agencies of Sufficient Fee Authority Even if They Are Not Subject to the Additional Section 6(c) Procedure.

The Commission's correct analysis of Proposition 218's impact in a recent test claim decision is directly applicable here. The Draft Proposed Decision misreads some parts of that prior decision, totally ignores other sections, and urges the Commission to undermine its credibility by departing from its established holdings.

The Draft Proposed Decision states that test claim 07-TC-09 (*Discharge of Stormwater Runoff*) is distinguishable from the current test claim because the fees and charges in the current test claim qualify for the section 6(c) exclusion, while the fees and charges in 07-TC-09 did not qualify for the exclusion.[19] This is incorrect—the very opposite is true. Some of the fees and charges at issue in 07-TC-09 *were* subject to the section 6(c) exclusion (as refuse collection services) and the Commission's consideration of those fees turned on the barrier imposed by the section 6(a)(2) majority protest procedure, as it must here.[20] This misunderstanding of Proposition 218's effects, and of the facts and reasoning in 07-TC-09, resulted in the Draft Proposed Decision's erroneous determination that the Claimants here 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."[21]

The street sweeping fees in 07-TC-09, like the fees at issue here, qualified for the section 6(c) exclusion (though as "refuse collection services" rather than "water"). After determining that street sweeping is "refuse collection" for purposes of section 6(c), the Commission held:

> Under Proposition 218, "refuse collection" is expressly exempted from the voter-approval requirement (article XIII D, § 6, subd. (c).). . . .

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[19] Draft Proposed Decision at p. 80 ["Unlike the test claimants in [07-TC-09], the services for which fees or charges would be increased [in the current test claim] are expressly exempt from the voter approval requirements in article XIII D, section 6(c), and [thus] the decision and reasoning of the Commission in [07-TC-09] is not relevant."].

[20] *Discharge of Stormwater Runoff*, Case No. 07-TC-09, at pp. 114-116.

[21] Draft Proposed Decision at p. 80.

> To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. **If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)).** . . . .
>
> **Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners.** The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] **Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.**
>
> Additionally, **it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate.** This would violate the purpose of article XIII B, section 6, which is to "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."[]
>
> Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.
>
> **Any proposed fees that are not blocked by a majority of parcel owners for street sweeping must be identified as offsetting revenue in the parameters and guidelines.**[22]

The Commission's analysis from 07-TC-09 is exactly on point here. Although Claimants' fees and charges for water service are excused from the formal election requirement under article XIII D section 6(c), the majority protest provision in subdivision (a)(2) still applies and constitutes a legal barrier to Claimants' fee authority. Any new or increased fees or charges

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[22] 07-TC-09, *supra,* at pp. 115-116 [bolding added, footnote removed].

are contingent on the outcome of a written protest by a majority of the parcel owners. Claimants 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. The subvention requirement was adopted to prevent this scenario and to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies that are "ill equipped" to assume increased financial responsibility in light of their Constitutionally limited abilities to increase revenue.[23]

In this test claim, as in the earlier *Stormwater Runoff* test claim, "Government Code, section 17556, subdivision (d), does not apply" because the Claimants have "no authority to impose the fee if it is protested by a majority of parcel owners."[24] And if it comes to pass that new or increased fees to implement the new mandates are not blocked by a majority protest, that would *not* establish that the agency had "authority" to impose fees, but only means that those new or increased fees "must be identified as offsetting revenue in the parameters and guidelines."[25] The Commission should apply the sound reasoning from its past, on-point precedent to find that section 17556(d) does not prohibit reimbursement here.

C. An Abrupt Reversal of the Commission's Established Position on Proposition 218 Would Have Serious Consequences Extending Beyond this Claim to All Past and Future Claims Involving Enterprise Districts that Provide Property-Related Services.

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.[26] 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.

The Draft Proposed Decision, in its current form, would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218. These districts are California public agencies that provide for the most basic of human needs: water, sanitation, and other utility services (e.g., Community Services Districts, Water Districts, Irrigation Districts, Water Agencies, Sanitary Districts, Public Utility Districts, and Sewer Districts, to name a few). If this Draft Proposed Decision were adopted, the State would be able to mandate new programs or new or higher levels of service and pass the costs on to these Claimants and all other similarly situated public agencies, with no assurance that the agencies would be permitted, in light of

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[23] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[24] 07-TC-09, *supra,* at p. 115.

[25] *Id.* at p. 116.

[26] See Draft Proposed Decision at p. 78.

Proposition 218, to raise the funds necessary to comply. This Draft Proposed Decision 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. By no longer recognizing the Proposition 218 barrier and deeming uncertain, contingent fee authority to be "sufficient," the Draft Proposed Decision, if adopted, would assure that no enterprise district will ever be eligible for reimbursement for any state mandate. No previous test claim decision has ever endeavored to carve out a large swath of local agencies from the Commission's jurisdiction, as this Draft Proposed Decision now does.

Many past test claims would also be called into question. These Claimants and other enterprise districts were found in past test claims to be eligible for subvention for activities newly mandated by the state.[27] This sea change in Constitutional interpretation suggested by the Draft Proposed Decision would call all of these prior claims into question. The Commission should not disrupt settled Constitutional law and should instead apply the clear reasoning from its *Stormwater Runoff* decision to the test claim here.

II. The Draft Proposed Decision Erroneously Determined That Two Claimants Are Ineligible for Reimbursement Based on a Determination That They Do Not Collect or Expend Tax Revenue.

The Draft Proposed Decision wrongly determined that two of the Claimants, Richvale Irrigation District and Biggs-West Gridley Water District (Excluded Claimants) are not eligible for subvention because they do not currently collect or expend tax revenues.[28] The faulty analysis relies on one case that was superseded by later Constitutional amendments and three other cases that only apply to redevelopment agencies and thus are inapplicable to these Claimants. The Draft Proposed Decision's determination that the Excluded Claimants are not eligible for reimbursement is incorrect as a matter of law.

A. Background of the Subvention Requirement.

Articles XIII A and XIII B were added to the California Constitution as ballot propositions in 1978 and 1979, respectively.[29] Proposition 13 limited local governments' abilities to collect ad valorem property taxes and made it more difficult to establish or increase special taxes, and Proposition 4 limited local governments' abilities to appropriate and expend "proceeds of taxes." By 1996, many believed that local governments were attempting to

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[27] E.g., CSM-4257 (Open Meetings Act); 02-TC-10 & 02-TC-51 (Public Records Act); 07-TC-04 (Local Agency Ethics Training).

[28] Draft Proposed Decision at pp. 8, 31-41.

[29] Proposition 13 (1978) [adding art. XIII A]; Proposition 4 (1979) [adding art. XIII B].

circumvent the article XIII A and B limitations by passing new "assessments," "fees," and "charges," which were not subject to the limitations because they were not called "taxes."[30] In order to close these perceived loopholes, the people passed Proposition 218, which added articles XIII C and XIII D to the California Constitution. These new Constitutional provisions added strict new limitations on local governments' abilities to levy taxes (art. XIII C) and to establish or increase assessments and property-related fees and charges (art. XIII D). Taken together, these four new Constitutional articles severely constrained local governments' abilities to generate revenue: Proposition 218 alone eliminated $100 million of annual revenue for affected agencies, as measured in 1996.[31]

Recognizing that local governments were in the midst of a series of substantial revenue cuts, Proposition 4 also included a separate provision requiring that the state reimburse local governments for the costs of complying with new, unfunded state mandates. The voters that passed Proposition 4 were told that the subvention requirement would "require[] that the state provide funds to reimburse local agencies for the cost of complying with state mandates."[32] The California Supreme Court stated that the subvention 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."[33] The Draft Proposed Decision, however, incorrectly argues that local governments whose revenue was severely constrained by Proposition 218 are not eligible for subvention unless they fit precisely into the revenue and appropriations limitations found in Propositions 13 and 4.

B. The Draft Proposed Decision Adds a New Eligibility Requirement for Subvention Based on Inapplicable or Misconstrued Case Law.

The Draft Proposed Decision reads into article XIII B section 6 a new requirement that has no basis in the Constitution or applicable case law: It argues that the subvention requirement only applies to local agencies that collect and expend tax revenue.[34] The Draft Proposed Decision creates this additional "requirement" 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.

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30 California Ballot Pamphlet, General Election, November 5, 1996, at p. 76 [included as Exhibit E to Claimants' Response to Request for Additional Information 10-TC-12 and12-TC-01, filed September 23, 2013].

31 See *id.* at p. 75.

32 California Ballot Pamphlet, Special Statewide Election, November 6, 1979, at pp. 20-21 [included as Exhibit D to Claimants' Response to Request for Additional Information 10-TC-12 and12-TC-01, filed September 23, 2013].

33 *Fresno, supra,* 53 Cal.3d at p. 487.

34 Draft Proposed Decision at pp. 32-34.

1. *Fresno* (1991) Does Not Govern Cases Where Proposition 218 (1996) Applies.

The Draft Proposed Decision relies on *Fresno*[35] for the notion that local governments are only eligible for subvention when the costs would otherwise only be recoverable from tax revenue.[36] That interpretation does not control this test claim because *Fresno* predates Proposition 218, the Draft Proposed Decision relies on *Fresno* for a notion not considered therein, and *Fresno* is factually distinguishable from the test claim here.

The Supreme Court in *Fresno* stressed that the subvention provision must be "read in its textual and historical context."[37] Articles XIII C and XIII D were absent from the "textual and historical context" when *Fresno* was decided in 1991, so *Fresno* itself mandates a fresh look at the subvention provision in light of the major Constitutional changes brought about by the addition of articles XIII C and XIII D in 1996. *Fresno*'s discussion of the reasoning behind the subvention requirement was based on the Supreme Court's earlier decisions on the matter, *Lucia Mar*[38] and *County of Los Angeles*[39]. The subvention provision was included "to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources."[40] In 1991—prior to Proposition 218—the *Fresno* Court equated "increasingly limited revenue resources" with "tax" revenues, because articles XIII A and XIII B only addressed "taxes" and at that time there were no legal or Constitutional barriers to raising "fees," "charges," or "assessments." However, with the passage of article XIII D five years later, assessments and property-related fees and charges have joined tax revenues as among local entities' "increasingly limited revenue resources."

Given the major Constitutional amendments passed just five years after *Fresno* was decided, *Fresno*'s discussion of the subvention provision cannot be read in a vacuum and must, as it admonishes, be read in context. The subvention provision was intended to assure local agencies that state mandates would not place additional burdens on local agencies' "increasingly limited revenue resources"—a category which, after 1996, includes assessments and property-related fees and charges, in addition to taxes. That Proposition 4 was passed before Proposition 218 should be of no import; the "evil to be prevented" by the subvention requirement is equally

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35 *Fresno, supra,* 53 Cal.3d 482.

36 Draft Proposed Decision at p. 75.

37 *Fresno, supra,* 53 Cal.3d at p. 487.

38 *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830.

39 *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

40 *Lucia Mar, supra,* 44 Cal.3d at p. 836 n. 6.

present whenever local agencies are ill-equipped to assume increased financial responsibilities.[41] *Fresno* cannot be cited as authority for the notion that the subvention provision does not protect the revenue streams limited by Proposition 218 because *Fresno* neither discussed Proposition 218, nor considered the subvention requirement in light of Proposition 218.[42]

In addition, the current test claim is factually distinguishable from *Fresno* because the test claim statute in *Fresno* specifically authorized affected local governments to establish user fees to pay for increased costs caused by the newly mandated activities.[43] There is no such authorization in the statutes and regulations at issue in this test claim. Here, the Draft Proposed Decision suggests that the Claimants recoup the costs through property-related fees and charges, which—unlike the user fees authorized by the test claim statute at issue in *Fresno*—are limited by Proposition 218. The Draft Proposed Decision purposely confuses these and other user fees that are not subject to Proposition 218 with the water service fees at issue here, which are limited by Proposition 218.[44] For these reasons, *Fresno* is inapplicable here.

2. The Redevelopment Agency Cases Do Not Apply Here.

Bell Community Redevelopment Agency (Bell), *Redevelopment Agency of San Marcos (San Marcos)*, and *City of El Monte (El Monte)*, the three other cases upon which the Draft Proposed Decision's reasoning rests, only apply to redevelopment agencies and do not apply to any of the Claimants here.[45] The analysis in each of those cases is specific to redevelopment agencies because in each case the reasoning is based at the outset upon Health and Safety Code section 33678, which specifically limits article XIII B's application to redevelopment agencies.[46] No similar statute or any other exemption from the article XIII B limitations applies to the Excluded Claimants here. The Draft Proposed Decision itself acknowledges that redevelopment

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41 It is "fundamental" that the "prime consideration" in interpreting a Constitutional provision is the "objective sought to be achieved . . . as well as the evil to be prevented." *Rock Creek Water Dist. v. County of Calaveras* (1946) 29 Cal.2d 7, 9.

42 *Loeffler, supra,* 58 Cal.4th at p. 1134 ["It is well-established that cases are not authority for propositions not considered"].

43 *Fresno, supra,* 53 Cal.3d at p. 485 citing Health and Safety Code Section 25513.

44 E.g., Draft Proposed Decision at p. 76, citing *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812.

45 See Draft Proposed Decision at pp. 33-34 citing *Bell Community Redevelopment Agency v. Woolsey* (1985) 169 Cal.App.3d 24; *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.

46 *Bell, supra,* 169 Cal.App.3d at p. 29; *San Marcos, supra,* 55 Cal.App.4th at p. 979; *El Monte, supra,* 83 Cal.App.4th at p. 271. See also, e.g., Draft Proposed Decision at p. 33 ["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*" (emphasis added)].

agencies' financing structures are unlike other local agencies.[47] Just because some local agencies do not *currently* collect and expend the proceeds of taxes does not mean that they are somehow "exempt" from the Constitutional limitations, as the Draft Proposed Decision posits.[48] Were the Excluded Claimants to begin collecting special taxes, they would undoubtedly be subject to the appropriations limitations. Agencies that do not currently collect taxes are not permanently "exempt" from article XIII B, as redevelopment agencies are under Health and Safety Code section 33678. *Bell*, *San Marcos*, and *El Monte* are not applicable to local agencies such as Excluded Claimants that do not enjoy a statutory exemption from the article XIII B appropriations limitations.

C. The Draft Proposed Decision's Interpretation of *Fresno* Leaves the Excluded Claimants Without Any Means of Paying for New Mandates Aside from Subvention.

Fresno says only that "read in its textual and historical context [as it existed in 1991] section 6 of article XIII B requires subvention only when the costs in question can be recovered solely from tax revenues."[49] The Draft Proposed Decision then takes a step beyond *Fresno* to conclude that agencies are *ineligible* for subvention unless they currently collect and expend the proceeds of taxes. Even if *Fresno* was not superseded by Proposition 218, if new fees were defeated by a majority protest, then the Excluded Claimants would have no option but to recover the costs imposed by the new mandates through subvention.[50]

Local agencies, in light of articles XIII A through XIII D, have very limited sources of revenue to fund their operations: Ad valorem property taxes, special taxes, assessments, and fees and charges.[51] The Excluded Claimants do not collect general ad valorem property taxes. They are, however, able to propose new or increased fees, charges, special taxes, and assessments, but they do not have the unilateral "authority" to impose them on unwilling customers.[52] If the Excluded Claimants were able to reallocate some of their existing water service fee revenue to pay for the newly mandated activities without cutting existing services, then that excess fee revenue would be "proceeds of taxes,"[53] qualifying them for subvention. However, as the Draft

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47 Draft Proposed Decision at p. 34, quoting *San Marcos*, *supra,* 55 Cal.App.4th at p. 987 [redevelopment agencies' "tax increment financing scheme[ ] is one step removed from other local agencies' collection of tax revenues"].

48 Draft Proposed Decision at pp. 33, 41.

49 *Fresno, supra,* 53 Cal. 3d at p. 487 [italics removed].

50 See Cal. Const., art. XIII B, § 8 [defining "proceeds of taxes"].

51 *Id.*, art. XIII D, § 3.

52 *Id.*, §§ 4, 6.

53 See *id.*, art. XIII B, § 8(c)(1).

Proposed Decision recognizes,[54] such a reallocation of existing fee revenue would be a violation of Proposition 218.

This Catch-22 is exactly why subvention is necessary. 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. Option (a) carries repercussions associated with failing to implement a state mandate. In this case, Richvale and Biggs would be subject to potential civil liability from third parties and ineligibility for state grants and loans. Option (b) would demonstrate that the agency was expending the "proceeds of taxes", making them eligible for subvention, yet would also violate Proposition 218 because it shows that fees were being imposed in excess of the pre-mandate cost of service. And, as discussed above, agencies are unable to unilaterally implement Option (c), because Proposition 218 divested the agencies of the necessary authority to pass the costs of mandates onto customers. An agency may do no more than propose increases in fees, charges, or assessments for consideration and approval that is solely in the discretion of the customers/voters.

Richvale and Biggs 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. All public agencies that are ill-equipped to fund and implement new state mandates should be eligible for reimbursement. This includes agencies subject to Propositions 13 and 4 and agencies, like Richvale and Biggs, subject to Proposition 218.

D. The Draft Proposed Decision's Flawed Analysis Leads to Absurd Results.

If the Commission were to adopt the Draft Proposed Decision's flawed analysis, absurd results would follow. As the Draft Proposed Decision would have it, the subvention requirement protects local agencies from the effects of Constitutional limitations on one category of revenue ("taxes"), but not from nearly identical Constitutional limitations on other categories ("assessments" and "fees and charges"). A local agency that collects only assessments, fees, and charges would, under this interpretation, be ineligible for subvention, but if the same agency had an *additional* revenue source (taxes), then it would also be eligible for *yet other* source of revenue, state subvention.

It makes no sense to only allow reimbursement to entities that have more sources of revenue while prohibiting reimbursement for those entities that are the *least* equipped to handle

[54] Draft Proposed Decision at pp. 37-39.

the increased costs because they have fewer sources of revenue. Articles XIII A though XIII D impose strict constraints on all forms of local agency revenue. Subvention was intended to protect local agencies' "increasingly limited revenue resources." Therefore, 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.[55]

This problem is not simply theoretical. The Draft Proposed Decision distinguishes between Claimants where there is no difference. Claimants Glenn-Colusa Irrigation District and Richvale Irrigation District are both irrigation districts organized under the California Irrigation District law. They are both subject to the same mandates (the agricultural water conservation mandates of the Water Conservation Act and related Regulations). Both districts suffer from the same Constitutional inability to unilaterally raise revenue to comply with new mandates. However, the Draft Proposed Decision deems Richvale ineligible for subvention, but would find Glenn-Colusa eligible, because Glenn-Colusa collects tax revenue and Richvale does not. The absurdity is obvious: Same mandate, same enabling legislation, same type of public agency, yet one is deemed eligible for subvention and the other is not. There is no difference between the two districts' inability to fund the unfunded mandates and there is no rational basis for distinguishing between them based on how their insufficient revenue resources are categorized. The reason Proposition 218 was passed in the first place was because assessments, fees, and charges were perceived as being taxes by another name.

In yet another illustration of the Draft Proposed Decision's absurdity, consider how easily an agency could game the proposed interpretation. Although Richvale Irrigation District does not *currently* collect tax revenue, it has the authority to do so (with customer approval) under article XIII A, section 4. If Richvale passed a nominal special tax of $0.01 per acre, it would then, according to the Draft Proposed Decision, be eligible for subvention. Including as eligible for subvention only those entities that *currently* collect "taxes," and excluding all others, does nothing 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."[56] Instead, the "prime consideration" in interpreting the subvention provision should be "the objective sought to be achieved" and "the evil to be prevented."[57] Here, the objective is to prevent unfair shifting of financial responsibility for state mandates onto local agencies that are not equipped to absorb the costs. Creating this irrational, artificial distinction between entities

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[55] "Where the language of a statute is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." *Oakdale Irrigation District v. County of Calaveras* (1955) 133 Cal.App.2d 133, 138.

[56] *Fresno, supra,* 53 Cal. 3d at p. 487.

[57] *Rock Creek Water Dist., supra,* 29 Cal.2d at p. 9.

that do and do not receive revenue categorized as "taxes" does nothing to advance the express purpose underlying the subvention requirement.

III. Analysis of Existence of New Mandates

The Draft Proposed Decision correctly determines that the Act and related regulations impose new requirements on Claimants and other urban and agricultural water suppliers.[58] As described in previous filings, the costs to these Claimants of implementing the newly mandated activities would be extraordinary. Glenn-Colusa estimated that it would spend approximately $46 Million, plus $2.1 Million in annual compliance costs, to implement the new mandates.[59] South Feather estimated its implementation costs to exceed $9 Million by 2020.[60] Biggs estimated that its costs would amount to over $8 Million by 2020 and Richvale, $3 Million in the same time period.[61] Paradise Irrigation District expects that its costs by 2020 will amount to between $1.7 Million and $4 Million.[62] Oakdale determined that its implementation of the new mandates will cost at least $1 Million, and potentially up to $20 Million, by 2020.[63]

The findings of the existence of new mandates, however, contain a number of exceptions. For instance, section 10608.48(b)(1) was determined to be a new mandate for agricultural water suppliers, but not for those that already measure water with sufficient accuracy under Water Code section 531.10.[64] Similarly, a number of the test claim statutes were found to be new mandates, but not for entities that are parties to Quantitative Settlement Agreements[65] or for those that participate in regional water management planning[66]. None of the Claimants here are subject to any of these exemptions.

Some of the test claim statutes and regulations were deemed not to be new mandates for certain Federal contractors by operation of Water Code section 10828.[67] However, the Draft Proposed Decision did not fully analyze the reach of this exception as it pertains many of the test claim statutes,[68] so it is difficult to determine how this exception would be applied. To the extent

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58 See Draft Proposed Decision at pp. 42-75.

59 Glenn-Colusa Irrigation District's Notice of Substitution of Parties, Jan. 13, 2014, Bettner Decl. at p. 4, ¶ 17.

60 10-TC-12, Claimants' Written Narrative at p. 11.

61 *Id.*

62 *Id.* at p. 12.

63 Oakdale Irrigation District's Notice of Substitution of Parties, Jan. 13, 2014, Knell Decl. at p. 3 (unnumbered) [second] ¶ 9.

64 Draft Proposed Decision at p. 52.

65 See, e.g., Draft Proposed Decision at pp. 52-53.

66 *Id.* at pp. 58

67 E.g., Draft Proposed Decision at pp. 57-58.

68 E.g., Water Code §§ 10821 & 10841-10844.

that the applicability of such an exception depends on individual review of each Federal contractor Claimant's water conservation plan, that analysis is best left to the Parameters and Guidelines stage of this proceeding. And even if a Federal contractor claimant were subject to these exceptions, the provisions to which the exceptions apply do not include the most onerous and expensive water measurement portions of the newly mandated programs.

Although the Claimants do not here lodge specific objections to the findings on the existence of new mandates in the Draft Proposed Decision, the Department of Water Resources, the State Controller's Office, and the Department of Finance each raised a number of unsound arguments against finding that new mandates exist. Their positions are without merit and Claimants reserve all arguments and rights to defend against those objections as necessary.

CONCLUSION

The Commission should modify the Draft Proposed Decision to account for Proposition 218's constraints on local agencies' revenue sources, as have been recognized in past Commission test claim decisions. These recognized limitations restrict Claimants' ability to unilaterally impose new fees and charges such that Government Code section 17556(d) is not a ground for prohibiting subvention.

The Draft Proposed Decision should also be amended to recognize that articles XIII A through XIII D limit all of Claimants' revenue resources equally, so that there is no rational basis for distinguishing between reimbursing the costs of state mandates that must be paid from a local agency's "fee" revenue, as opposed to its "tax" revenue. The California Constitution limits all of those revenue sources and subvention was intended to protect agencies' limited revenues, so agencies should be eligible for subvention regardless of how the revenue resources subject to limitation are classified.

Respectfully submitted,

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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On October 17, 2014, I served the:

CSDA Comments and Claimant Comments
Water Conservation, 10-TC-12 and 12-TC-01
Water Conservation Act of 2009 et al.
South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District, Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 17, 2014 at Sacramento, California.

Heidi J. Palchik
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/25/14

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

Matter: Water Conservation

Claimants: Glenn-Colusa Irrigation District
Oakdale Irrigation District
Paradise Irrigation District
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