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19 May 2022

Commission on State Mandates
980 Ninth Street, Suite 300
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Subject: Response of Turlock Irrigation District and Modesto Irrigation District to
Proposed Decision to Dismiss Joint Test Claim 21-TC-02

Dear Commissioners:

Now that staff have explained their thinking behind proposing dismissal of this test claim, it is apparent they have missed the issue. The Proposed Decision rests on the conclusion that Claimants have fee authority but not taxing authority. Even if that were correct (which it is not¹), fees that go too far become taxes—as they would for the Mandate here. Proposition 26 establishes that **all fees start from the presumption they are taxes**, and the party asserting that specific fees are not taxes bears the burden of proving it. (Cal. Const., art. XIII A § 3(d) (“[t]he State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax”); art. XIII C § 1(e) (“[t]he local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax”).) Only if the fee is

¹ Irrigation districts can collect special taxes under Water Code 22078.5, as the Proposed Decision acknowledges (page 27 note 119). The Commission has also found that some irrigation districts also collect property taxes, as the Proposed Decision admits (page 13 note 58). (See also Proposed Decision at 28, quoting *Mitchell v. Patterson* (1898) 190 Cal. 286, 288-289 (describing irrigation district assessments “upon the district” that would likely qualify as a property tax today).) Claimant Turlock Irrigation District has submitted a declaration and receipt from Stanislaus County showing that TID likewise collects property taxes. The Proposed Decision’s speculation, at page 28, that this property tax is “misabeled” is not substantial evidence. (See Evidence Code § 664 (“It is presumed that official duty has been regularly performed”).)

shown to be “no more than necessary to cover the reasonable costs of the governmental activity, and ... the manner in which those costs are allocated to a payor bear a fair and reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity” is the fee not a tax. (Cal. Const., arts. XIII A § 3(d), XIII C § 1(e).) Claimants’ argument is that the Mandate at issue, by its nature, could only be funded by fees that are also taxes—but the Proposed Decision dodges the issue.

The Mandate would require Claimants to construct a multimillion-dollar riparian and floodplain restoration project outside their boundaries that is intended to benefit other areas of the State rather than Claimants’ fee payors. The joint test claim explained: “the Mandate will not provide, and is not intended to provide, benefits tailored to the Districts’ customers (the putative fee payors)”, including because: (i) “the Districts’ legal boundaries exclude riparian parcels” and so “the immediate riparian and floodplain benefits the Mandate is intended to achieve are for the benefit of lands outside the Districts, rather than for the Districts’ customers”, and (ii) the Mandate is intended to benefit the “Bay-Delta Estuary”, which is in “another region of the state entirely”. (Joint Test Claim, section 5 at page 13.) Because the Mandate would not benefit, and is not intended to benefit, the Claimants’ fee payors, the joint test claim concluded Claimants “do not appear to have the authority” to impose fees to pay for the Mandate:

Because fees, charges, or assessments that might be imposed on the Districts’ customers to subsidize significant benefits for riparian lands outside the Districts, or for the Delta Estuary and the rest of the State far downstream, would not bear a “fair or reasonable relationship” (Art. XIII C § 1(e)) to the (non-existent) benefits the Districts’ local customers would receive in return, or would not be “proportionate” to those customers’ (non-existent) specific benefits (Art. XIII D §§ 4(f), 6(b), subparas. (3)-(5)), the Districts do not appear to have the authority to impose them.

(Joint Test Claim, section 5 at page 14.)

To this argument, the 36-page Proposed Decision devotes a total of only three

sentences:

The claimants contend their authority to impose fees are actually taxes under Proposition 218 because the alleged mandate is intended to benefit lands outside district boundaries and does not benefit their customers. Whether or not a fee or charge becomes a tax under Proposition 218 is a question that must be determined by the courts. [*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 873-874; *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 693.] The claimants have submitted no evidence that a court has determined that their fees or charges are, in fact, taxes.

(Proposed Decision at 33-34.) These three sentences are wrong, for four reasons.

First, whether a fee or charge is a tax is *not* a question that must be determined by the courts. Under Proposition 26, all fees and charges are *presumed* to be taxes. (Cal. Const., arts. XIII A § 3(d), XIII C § 1(e).) No court determination is required. Here, this presumption is buttressed by the evidence offered in the joint test claim that the Mandate is not intended to, and would not, benefit the Claimants' fee payors, and thus any fees imposed on them to pay for the Mandate would not bear a "fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity" sufficient to save them from being taxes. (*Id.*) Proposition 26 requires the Commission to presume (as would a court) that Claimants would pay for the Mandate from fees amounting to taxes, even without a court determination.

Second, the two cases cited in the Proposed Decision do not hold that a court determination is required; they simply recite the legal standard of review courts apply: "The cases agree that whether impositions are 'taxes' or 'fees' is a question of law for the appellate courts to decide on independent review of the facts" (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 873-874; *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 693 (same)). A more recent California Supreme Court decision, *California Farm Bureau Federation v. State Water Resources Control Board* (2011), cites this passage from *Sinclair Paint Co.* in the "Standard of

Review” section of the opinion, and says nothing about requiring a court determination. (51 Cal.4th 421, 436 (“Whether [a statute] imposes a tax or a fee is a question of law decided upon an independent review of the record [citing *Sinclair Paint Co.*]”).) Merely because an issue presents a “question of law” that the courts on appeal “decide on independent review of the facts” does not mean the Commission on State Mandates has no jurisdiction to consider the issue when presented in a test claim. No case has held that the Commission lacks jurisdiction in adjudicating a test claim to consider whether a fee is also a tax. The Proposed Decision simply misreads these two cases.

Third, rather, the Legislature has mandated that the Commission shall first “hear and decide upon a claim ... that the local agency ... is entitled to be reimbursed” for a State mandate. (Gov. Code § 17551(a).) The Legislature has also given the Commission jurisdiction, under Government Code section 17556(d), to determine whether a claimant has non-tax fee authority such that reimbursement is unavailable. The Commission has exercised this authority in other cases to decide whether particular fees constitute taxes entitling the local agency to reimbursement. (*E.g.*, *Municipal Storm Water and Urban Runoff Discharges*, Nos. 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 (31 July 2009), Statement of Decision, pages 58-59 (agreeing claimants lack authority to “assess fees on property owners or businesses for the cost of transit trash receptacles because doing so would collect more than the actual cost of the collection and thereby create a special tax”), and page 67 (finding “a local regulatory fee for stormwater would not be a ‘special tax’”).) Similarly here, Claimants argue they are entitled to be reimbursed for the Mandate because it would require them to impose a fee amounting to a tax. The Commission has jurisdiction to hear and decide that argument here, just as it has heard and decided it in the past.

Fourth, the Proposed Decision is wrong to suggest that Claimants have not met their burden. There is no dispute Claimants have authority to levy fees. The real issue is whether parties *opposing* this joint test claim can overcome the presumption that the fees Claimants would have to impose to fund the Mandate would also constitute taxes. (*See* Cal. Const., arts. XIII A § 3(d), XIII C § 1(e).) The Proposed Decision offers no evidence to overcome the presumption the Mandate would have to be funded by fees constituting taxes.

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That question—whether the presumption that funding the Mandate would require fees constituting taxes—is one for the Commission to resolve on the merits, not for the Commission to ignore and then dismiss this test claim at an initial stage. The Proposed Decision should be rejected, and this case should proceed to adjudication on the merits without further delay.

Sincerely,

BRISCOE IVESTER & BAZEL LLP

/s/ Peter Prows

Peter Prows
Claimants' Representative

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento 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 May 20, 2022, I served the:

- **Current Mailing List dated May 13, 2022**
- **Claimant's Late Comments filed May 20, 2022**

Floodplain Restoration Condition (no. 12) of Water Quality Certification for Turlock Irrigation District and Modesto Irrigation District – Don Pedro Hydroelectric Project and La Grange Hydroelectric Project, 21-TC-02

Water Quality Certification for Federal Permit or License, Turlock Irrigation District and Modesto Irrigation District Don Pedro Hydroelectric Project and La Grange Hydroelectric Project, Federal Energy Regulatory Commission Project Nos. 2299 and 14581, Condition 12, Riparian, Spawning, and Floodplain Management, Adopted by the State Water Resources Control Board on January 15, 2021

Turlock Irrigation District and Modesto 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 May 20, 2022 at Sacramento, California.



Lorenzo Duran
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/13/22

Claim Number: 21-TC-02

Matter: Floodplain Restoration Condition (no. 12) of Water Quality Certification for Turlock Irrigation District and Modesto Irrigation District - Don Pedro Hydroelectric Project and La Grange Hydroelectric Project

Claimants: Modesto Irrigation District
Turlock Irrigation District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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