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9
10 **BEFORE THE**
STATE WATER RESOURCES CONTROL BOARD
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12 _____)
13)
14 In The Matter Of:)

15 CALIFORNIA STATE WATER)
RESOURCES CONTROL BOARD)
16 INVESTIGATION ORDER WR 2011-0003-)
EXEC)

) **RESPONSE TO PETITION FOR**
) **RECONSIDERATION OF**
) **INVESTIGATION ORDER [WATER**
) **CODE SECTIONS, 1058, 1122, and 1123;**
) **CALIFORNIA CODE OF**
) **REGULATIONS, TITLE 23 SECTION**
) **769(a)]; REQUEST FOR STAY (WATER**
) **CODE SECTION 13321; CALIFORNIA**
) **CODE OF REGULATIONS, TITLE 23,**
) **SECTION 2053)**
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RESPONSE TO PETITION FOR RECONSIDERATION OF INVESTIGATION ORDER [WATER CODE SECTIONS, 1058, 1122, and 1123; CALIFORNIA CODE OF REGULATIONS, TITLE 23 SECTION 769(a)]; REQUEST FOR STAY [WATER CODE SECTION 13321; CALIFORNIA CODE OF REGULATIONS, TITLE 23, SECTION 2053]

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1 **I. INTRODUCTION**

2 The Modesto Irrigation District (“Modesto ID”) has riparian water rights for the
3 Tuolumne River and also shares pre-1914 rights of appropriation dating back to 1855 and post-
4 1914 rights of appropriations with the Turlock Irrigation District (“TID”). Hydropower is but one
5 beneficial use to which Modesto ID applies its water rights. It generates hydropower at New Don
6 Pedro, where it holds a 31.54 percent share of the project with TID. It uses the power generated
7 to directly serve approximately 275,000 people in the cities of Escalon, Modesto, Oakdale,
8 Ripon, Riverbank and Waterford, and the communities of Empire and Salida. New Don Pedro’s
9 relicensing process started in 2011 to renew the current license, which expires in 2016.

10 The State Water Resources Control Board (“State Water Board”) Division of Water
11 Rights (“Division”) issued Investigative Order WR 2011-0003 (“Order”), purportedly to collect
12 additional information for Merced Irrigation District’s (“Merced ID”) eventual application for
13 Clean Water Act section 401 water quality certification for its Merced River Hydroelectric
14 Power Project (“Project”). The Modesto ID concurs with Merced ID’s Points and Authorities in
15 Support of its Petition for Reconsideration (“Petition”). The Division’s Order is overbroad,
16 premature, and preempted by the Federal Power Act. Assuming the Division could order the
17 studies and do so now, the Division would be imposing a state-mandated cost for which it would
18 be required to reimburse the Merced ID. As the Merced ID stated in its Points and Authorities,
19 the studies could cost almost \$8 million. This is no small sum, and the State Water Board should
20 weigh whether the studies it is mandating are (1) timely, (2) truly germane to the proper scope of
21 water quality certification for the Project, and (3) needed at all. This is especially true as the
22 State’s finances grow increasingly challenging.

23 **II. ARGUMENT**

24 **A. The Order is Improper and Premature, Overbroad, and Preempted by the Federal**
25 **Power Act.**

26
27 The Project is a non-federal hydropower project applying for relicensing to the Federal
28 Energy Regulatory Commission (“FERC”), pursuant to the Federal Power Act (“FPA”). The

1 FPA has occupied the field in the realm of hydropower with respect to the regulation of
2 discharges and minimum flow requirements. [Sayles Hydro Associates v. Maughan, 985 F.2d
3 451, 455 (1993).] The FPA preempts state authority to deny, impose additional conditions of
4 operation, or even request additional information of FERC licensees based on water quality or
5 other environmental concerns. (Karuk Tribe of N. Cal. v. Cal. Reg'l Water Quality Control Bd.
6 (2010) 183 Cal.App.4th 330, 339-340 n6.) The FPA and Clean Water Act allow substantial
7 opportunity for the State to implement its water quality law, but only in the context of federal
8 licensing procedures. (Id. at 339-340.) State water quality certification authority over FERC
9 licensed hydroelectric projects is broad, but subject to relatively narrow procedural limitations
10 governing how and when that authority may be exercised. (Id. at 339-340 n6.)

11 Since the State Water Board water quality certification must operate within the FERC
12 relicensing process, so too must a dispute it has with FERC's study determination. If the State
13 Water Board disagreed with FERC's determination, it was required to file a petition for review
14 with FERC within 60 days. (18 C.F.R. § 8251(a).) If FERC denied the petition in a final order,
15 the State Water Board could have then appealed to the District Court of Appeal. [18 U.S.C. §
16 8251(b); Ind. & Mich. Elec. Co. v. Fed. Power Commn., 224 F.Supp. 166, 170 (N.D. Ind. 1963);
17 Cal. Dept. of Water Resources v. F.E.R.C., 341 F.3d 906, 909 (9th Cir. 2003).] This is the
18 specific, complete and exclusive mode for judicial review of FERC orders. (City of Tacoma v.
19 Taxpayers of Tacoma (1958) 357 U.S. 320, 336.) The State Water Board did not petition FERC
20 to review the study dispute determination. Since FERC issued its determination on December 22,
21 2009, more than 60 days have passed. Even if the State Water Board disagrees with FERC's
22 determination, it has waived its sole and exclusive remedy for challenging that determination.

23 Furthermore, water right certification authority begins when a hydropower project applies
24 for water quality certification. In *PUD No. 1 of Jefferson County*, the State of Washington had
25 the authority to set minimum flows through its water quality certification process, but until the
26 hydropower project sought FERC licensing, such requirements were premature, as it was
27 possible FERC would eventually deny the hydropower project's application or, based on

1 recommendations made by the State of Washington in other aspects of the licensing process,
2 impose the same conditions sought by the state. [PUD No. 1 of Jefferson County v. Washington
3 Dept. of Ecology, 511 U.S. 700, 722 (1994).] The Order similarly is premature. Anything could
4 happen between now and when Merced ID applies for water quality certification. FERC could
5 order the studies the Order seeks, information the studies would provide could otherwise become
6 available, or Merced ID’s application, when submitted, could show that some or all of the studies
7 required in the Order are unnecessary or that others are necessary.

8 Unless and until it does, studies required by the Order that were denied by FERC are
9 improper and premature.

10 **B. Assuming the Order is Proper, a Subvention of Funds Would be Required.**

11 Under Article XIII B, Section 6 of the California Constitution, whenever a state agency
12 mandates a new program or increases the level of service on any local government, the State
13 shall provide a subvention of funds. [Cal. Const., Art. XIII B, §6(a).] Essentially, the State must
14 pay for any new governmental programs, or for higher levels of service under existing programs,
15 that it imposes upon local governmental agencies. (Hayes v. Commission on State Mandates
16 (1992) 11 Cal.App.4th 1564, 1577; County of Los Angeles v. St. of Cal. (1987) 43 Cal.3d 46,
17 56.) The subvention requirement is intended to prevent the State from transferring the costs of
18 government from itself to local agencies. (Hayes, *supra* 11 Cal.App.4th at 1578.)

19 The Government Code defines “costs mandated by the state” as any increased costs a
20 local agency is required to incur as a result of any statute enacted or executive order
21 implementing any statute mandating a new program or higher level of service of an existing
22 program within the meaning of Section 6 of Article XIII B of the California Constitution.¹ (Govt.
23 Code §17514.) Merced ID estimates the costs of studies required by the Order to be between
24 \$3,480,000 and \$7,315,000 over the next two or three years. (Merced ID Petition for
25 Reconsideration, p. 4.) The Government Code further defines “executive order” as an order,

26 _____
27 ¹ “Costs mandated by the state” more specifically include statutes enacted on or after January 1, 1975 and executive
28 orders issued on or after January 1, 1975 initially implementing statutes, but since the Order was issued in January
2011, this distinction is irrelevant.

1 plan, requirement, rule, or regulation issued by the Governor, an officer or official serving at the
2 pleasure of the Governor, or an agency, department, board, or commission of state government.
3 (Govt. Code §17516.) The State Water Board is a state agency. Therefore, the Order is an
4 “executive order” that may mandate state costs.

5 The studies are not discretionary, because they are commanded by the Order. Granted
6 Merced ID has discretion whether to seek relicensing, but in seeking relicensing it must
7 eventually, pursuant to Section 401 of the Clean Water Act, apply for and obtain the water
8 quality certification that is purportedly the Order’s basis. (33 U.S.C. §1341.) Merced ID has not
9 yet applied for state water quality certification for the Project.

10 A “program” can mean either programs that carry out the governmental function of
11 providing services to the public or laws which, to implement a state policy, impose unique
12 requirements on local governments and do not apply generally to all residents and entities in the
13 state.” (Carmel Valley Fire Protection Dist. v. St. of Cal. (1987) 190 Cal.App.3d 521, 537.) Only
14 one of these findings is necessary to trigger reimbursement. (Id.) The Order imposes unique
15 requirements on Merced ID and applies to no other residents or entities in the State.

16 A “new program” is required if the mandate requires the local agency to do something
17 that was not required before, while a “higher level of service” is required if, compared to the
18 legal requirements in effect before the order, the mandate requires an increase in the actual level
19 or quality of governmental services provided. (San Diego Unified School Dist. v. Commn. on St.
20 Mandates (2004) 33 Cal.4th 859, 875, 877.)

21 Subvention is not required when mandated costs are imposed by federal law and do not
22 exceed state requirements. [Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th
23 1564, 1581; Cal. Govt. Code § 17556(c).] However, the studies are not required by federal law.
24 To the contrary, FERC ruled that the studies were *not* required.

25 Costs are not mandated if the local agency has the authority to levy service charges, fees,
26 or assessments sufficient to pay for the mandated program or increased level of service. (Cal.

1 Govt. Code § 17556(d).) However, every charge is a “tax,” unless, among other exceptions not
2 presently relevant, the charge is imposed for –

- 3 • A specific benefit conferred or privilege granted directly to the payor, is not provided to
4 those not charged, and does not exceed the reasonable cost of conferring the benefit;
- 5 • A specific government service or product provided directly to the payor, not provided to
6 those not charged, and does not exceed the reasonable cost of conferring the benefit; and
- 7 • Reasonable regulatory costs incident to issuing licenses and permits, performing
8 investigations, inspections, and audits, enforcing agricultural marketing orders, and the
9 administrative enforcement and adjudication thereof.

10 (Cal. Const. Art. 13C, §1.)

11 Regardless of the exception, the local government entity bears the burden of proving by a
12 preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount
13 is no more than necessary to cover the reasonable costs of the governmental activity, and that the
14 manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the
15 payor's burdens on, or benefits received from, the governmental activity. (Cal. Const. Art. 13C,
16 §1.)

17 Many of the studies required by the Order would benefit others, while only marginally
18 benefitting Merced ID’s electrical ratepayers, if at all. The Order even admits that, in addition to
19 Merced ID’s Section 401 certification, the studies would also be used for unspecified future total
20 maximum daily loads and for water quality control planning for the Bay-Delta. Other studies
21 exceed the project bounds established by FERC, evaluating factors all the way downstream into
22 the Delta. Again, if the State Water Board disagrees with FERC’s determination of the
23 boundaries of the Project’s impacts, it should address the matter with FERC; not through the
24 Order.

25 Merced ID lacks the authority to levy service charges, fees, or assessments sufficient to
26 pay for the studies under either of the first two exceptions. Many of the studies apply to water
27 quality issues not specific to the Project, such as pesticides and San Joaquin River flows, because

1 the service and benefit of the studies would be provided to others. For the studies of factors
2 unrelated to the Project, the Project's rate payers would receive no benefit at all.

3 Merced ID similarly lacks the authority to levy regulatory charges, fees, or assessments
4 sufficient to pay for the studies. Merced ID's rate payers, through their use of Merced ID's
5 hydropower, do not create the burdens evaluated by studies of factors, such as pesticides and San
6 Joaquin River flows, which are unrelated to the Project. Neither do Merced ID's rate payers
7 receive any benefit from the regulation of factors unrelated to the Project. Many of these
8 burdens, such as pesticide and pollutant discharges and altered and diminished flows, are caused
9 by other factors.

10 In short, most of the studies mandated by the Order appear to pursue the very goal
11 Section 6, Article XIII B of the Constitution is intended to deter – allowing state government to
12 force programs on local governments without the state paying for them. (Cal. Const. Art. XIII B,
13 §6; San Diego Unified School Dist. v. Commn. on St. Mandates (2004) 33 Cal.4th 859, 875.) If
14 the State Water Board wants more information for the San Joaquin River and Bay-Delta for its
15 total maximum daily loads and water quality control planning, it should figure out how to fund
16 the studies itself. If this Order stands, the State Water Board may well find itself paying for some
17 or all of the studies in the end upon a claim to the Commission on State Mandates for
18 reimbursement.

19 **III. CONCLUSION**

20 As Merced ID states in its Points and Authorities, citing *Jefferson P.U.D.*, water quality
21 certification authority is not unbounded. [Merced ID Petition, p. 5 (*citing PUD No. 1 of Jefferson*
22 *County, etc. v. Washington Dept. of Ecology* (1994) 511 U.S. 700).] FERC denied the State Water
23 Board's study dispute and the State Water Board did not petition for review. FERC's determination
24 is now final and the State Water Board waived any remedy it could have pursued. No matter how
25 much the State Water Board disagrees with FERC's determination, it must now live with it. Even
26 assuming the FPA has not occupied the field to a degree that would allow the State Water Board to
27 nonetheless order the studies, the Order is premature, because Merced ID has not yet applied for
28 water quality certification. Furthermore, even if the State Water Board could order the studies, now

1 or when Merced ID applied for water quality certification, many of the studies impose state-
2 mandated costs. The Order reeks of an attempt by the State Water Board to leverage Merced ID
3 in an attempt to make Merced ID pay for studies for information the State Water Board wants for
4 other unrelated projects, such as total maximum daily loads and Bay-Delta planning. As a result,
5 even if the State Water Board could order the studies, it would be required to reimburse Merced ID
6 for the costs of conducting them. Given the State Water Board's current and prospective future
7 funding limitations, it should think twice about ordering such studies.

8 Dated: March 23, 2011

Respectfully submitted,

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10 **O'LAUGHLIN & PARIS LLP**

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12 By: KENNETH PETRUZZELLI, Attorneys for
13 MODESTO IRRIGATION DISTRICT
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PROOF OF SERVICE BY MAIL

(Government Code §11440.20)

I, TERRI L. BROOKS, declare that:

I am employed in the County of Butte, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is P.O. Box 9259, Chico, California 95927-9259. On the date indicated below, in the following manner, I served the foregoing document(s) identified as: **RESPONSE TO PETITION FOR RECONSIDERATION OF INVESTIGATION ORDER [WATER CODE SECTIONS 1058, 1122, AND 1123; CALIFORNIA CODE OF REGULATIONS, TITLE 23, SECTION 769(a)]; REQUEST FOR STAY [WATER CODE SECTION 13321; CALIFORNIA CODE OF REGULATIONS, TITLE 23, SECTION 2053]**

UNITED STATES MAIL [CCP §1013]: I enclosed the documents in a sealed envelope addressed to the following persons and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with our practice for collection and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage thereon fully prepaid at Chico, California addressed as set for below.

FACSIMILE: Based on prior consent, I caused the documents to be sent to the following persons via telecopier/facsimile machine a true copy thereof to the parties indicated below.

OVERNIGHT DELIVERY [CCP §1013(c)]: I enclosed the documents in a sealed envelope provided by an overnight delivery carrier and addressed it to the persons identified below. I placed said envelope for collection at a regularly utilized drop box of the overnight carrier.

E-MAIL [CCP §1010.6]: Based on a court order or an agreement of the parties to accept service by e-mail, I caused the documents to be sent to the following persons at the following e-mail address, and did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

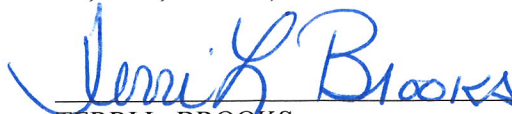
PERSONAL DELIVERY [CCP §415.10]: I personally delivered the documents to the persons identified below.

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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 MARCH 23, 2011, at Chico, California.


TERRI L. BROOKS