Harmonizing Proposition 218, Recent Court Decisions, and Conservation Rates

California State Water Resources Control Board workshop
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Panel Members

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Prop. 218 & Water Rates

• Capistrano Taxpayers Assn v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493 [depublication request pending]

• 4 claims in trial court:
  – Groundwater project was waste
  – “Phantom bond”
  – Funding new purple pipe service from domestic rates
  – Cost justification of tiers
The Holding

• Only recycled water and tiered rates raised on appeal
  – Domestic rate can fund new recycled system b/c definition of “water service” is broad
  – Precise cost justification required for tiered rates
    • Rejects fines arguments
    • Doesn’t discuss argument that upper tiers are not subject to Prop. 218
Court’s Rationale

• Very narrow reading of Article X, § 2
• Much consternation at state & local levels
• Case developments continue; stay tuned
  – City withdrew rehearing petition
  – Requests for depublication pending in California Supreme Court
What happens next?

- City Council voted to withdraw petition for rehearing
- Requests for depublication filed by SWRCB and local government associations
- Time for sua sponte has run, but depublication requests remain pending
Options if *San Juan* is the law

- Use flat rates and fines
- Carefully cost-justify tiers
- 2/3-voter approval as a tax
- IOUs can impose tiered rates
Water Rate Litigation

• Pre-*San Juan*:
  – Glendale
  – Sweetwater Authority
  – San Jose

• Post-*San Juan*
  – Coming soon to a town near you!
Legislative Fix?

- Possible Constitutional Amendment
- Statutory fix to Government Claims Act to eliminate class action suits
- Statutory affirmation that tiered rates can comply with Prop. 218
What the Court Got Wrong

• Court’s analysis of California Constitution article X, section 2
• Court’s analysis of *Brydon v. East Bay Municipal Utility District*
• Court’s analysis of proportionality
Options for Justifying Tiers

- What are the marginal costs of water to justify tiers?
  - Sources of supply
  - Development of alternative supplies
  - Water conservation and efficiency programs
  - Peaking
  - Avoided costs
Other Options

• Use of unrestricted funds
• Supplement an existing administrative record to justify existing tiered rates
• Prepare a new or update an existing rate study
Other Options

• There are at least three other court decisions that analyze the proportionality requirements of Prop. 218 differently than *San Juan Capistrano*
  – *Griffith v. Pajaro Valley Water Management Agency*
  – *Morgan v. Imperial Irrigation District*
  – *Moore v. City of Lemon Grove*
Griffith

• Water service means more than just supplying water; it means ensuring an ongoing supply of water.

• Charges did not exceed the proportionate cost of providing service because all groundwater users benefit from the Agency’s groundwater management activities, not just the coastal well users.
Griffith

- Property-related fees **need not** be established parcel by parcel
- Rate-makers may group similar users together (i.e., calculating fees on a **class by class**)
- “Apportionment is not a determination that lends itself to **precise calculation**”
Morgan

• Ratemaking by customer class is consistent with the proportionality requirement of Article XIII D, § 6(b)
• Different users create different costs
• Ratemaking data does not need to be perfect
Moore

- Fees are not easily correlated to a specific, ascertainable cost
- Apportionment in accordance with the City’s best cost estimates is sufficient
- City presented evidence of informal methods used to apportion costs
- City satisfied its burden to prove compliance with Article XIII D
Unanswered Questions

• Why is it appropriate to allocate more costs of constructing a recycled water project to those who use more water, but it isn’t appropriate to charge more to those who place greater demands on a water system and water supplies?
Unanswered Questions

• Are budget-based rates viable if budgets may not be used to establish tiers?
• What legislative discretion remains for rate-makers?
• If the *San Juan case* is not depublished, will trial courts follow it or *Griffith, Morgan, and Moore*?
Questions?