Are Groundwater Pumping Fees or Charges Subject to Proposition 218? California Supreme Court to Resolve Conflicting Precedent

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In 2015 California's Sixth and Second District Courts of Appeal issued conflicting opinions regarding whether groundwater extraction fees or charges are subject to Article 13D of the California Constitution (Proposition 218). The California Supreme Court is likely to resolve the conflict in the coming year. This issue is especially urgent in light of the forthcoming regulation of groundwater extractions under the Sustainable Groundwater Management Act (SGMA). The issue also is important because of newly articulated substantive limitations on tiered pricing under Proposition 218. (See *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal. App. 4th 1493, decided April 20, 2015, as modified May 19, 2015.)

Sixth District Court of Appeal – Proposition 218 Applies

In December 2015, the Sixth District Court of Appeal issued a revised opinion after rehearing the Great Oaks case. (*Great Oaks Water Company v. Santa Clara Valley Water District* (2015) 242 Cal. App. 4th 1187). The court held, among other things, that a groundwater extraction fee imposed by the water district is a property-related fee or charge subject to Proposition 218. (*Id*. at 1197.) The court reasoned that

[A]ny charge on the extraction of groundwater will typically place a direct burden on an interest in real property and is thus incidental to property ownership. This is because any extraction of groundwater by a longtime extractor like Great Oaks is almost certain to involve the exercise of a right in real property. Since a charge on that activity directly burdens the exercise of that right, it must be deemed incidental to it, and thus to ownership of real property.

(242 Cal. App. 4th at 1207.) *Great Oaks* comports with prior opinions of the Sixth District, including *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal. App. 4th 1364 (*Amrhein*) and *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal. App. 4th 586, 590 (*Griffith*).

In *Amrhein*, the Sixth District considered as a matter of first impression whether a groundwater augmentation fee was subject to Proposition 218. The court initially held that the augmentation fee at issue need not comply with Proposition 218 because it was imposed on the activity of extracting groundwater – not as an incident of property ownership within the meaning of Proposition 218. *(See Amrhein, supra*, 150 Cal. App. 4th at 1385.) But the court subsequently revised its opinion in light of *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (*Bighorn*), in which the California Supreme Court held that charges for domestic water service are imposed as an incident of property ownership and thus subject to Proposition 218. (*Amrhein, supra,* 150 Cal. App. 4th at 1370.) Following *Bighorn*, the Sixth District reasoned that a groundwater augmentation fee is at least as closely connected to the ownership of property as is a charge on delivered water (*id*. at 1392) and conceptually indistinguishable from water service charges for purposes of Proposition 218. (See *id.* at 1388-1392.)

In *Griffith*, the Sixth District once again held that a groundwater augmentation charge was subject to Proposition 218. The court rejected a proposed distinction from *Bighorn* and *Amrhein*, that the augmentation charge was for groundwater management as opposed to water service. (*Griffith, supra*, 220 Cal. App. 4th at 595.) The court reasoned that the augmentation charge did not differ materially from a charge on delivered water, and the water agency's statutory mandate to purchase, capture, store, and distribute supplemental water . . . describes water service. (*Id*. at 595.)

Second District Court of Appeal – Proposition 218 Does Not Apply

The Second District Court of Appeal reached the opposite conclusion – that groundwater pumping fees imposed by a water conservation district are not property-related and thus are not subject to Proposition 218. (*City of San Buenaventura v. United Water Conservation Dist.* (2015) 235 Cal. App. 4th 228, 248 (*San Buenaventura*), superseded by grant of review on June 24, 2015, S226036.) The court reasoned that a pump fee is better characterized as a charge on the activity of pumping than a charge imposed by reason of property ownership, and that the controlling Supreme Court precedent is not *Bighorn*, but rather Apartment *Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal. 4th 830, 839 (*Apartment Association*).[1] (*San Buenaventura, supra*, 235 Cal. App. 4th at 249-250.) In *Apartment Association* the Supreme Court held that an annual fee imposed on residential rental properties to cover the costs of inspection and enforcement was not subject to Proposition 218. (24 Cal. 4th at 840.) According to the Court, the fee was imposed on landlords not in their capacity as landowners, but in their capacity as business owners, and was more in the nature of a fee for a business license than a charge against property. (*Ibid*.)

The Second District distinguished *Amrhein* on two grounds. First, *Amrhein* rests upon a factual finding that the vast majority of property owners in the Pajaro Valley obtained their water from wells, and that alternative sources were not practically feasible, which suggests a strong relationship between property ownership and pumping charges. (*San Buenaventura, supra*, 235 Cal. App. 4th at 248, citing *Amrhein, supra*, 150 Cal. App. 4th at 1389-1390.) In contrast, the Second District noted that in *San Buenaventura* the number of parcels with wells is insubstantial compared to the number of residential customers receiving delivered water. (235 Cal. App. 4th at 248.) Second, the court in *San Buenaventura* reasoned that, unlike *Amrhein*, the groundwater extraction fees serve a regulatory purpose of conserving water resources. (*Id*. at 249.)

The court also found it instructive that under SGMA, fees to fund costs of groundwater management are expressly subject to Proposition 218. (See *San Buenaventura, supra*, 235 Cal. App. 4th 228 at 252, citing Water Code § 10730.2.) In contrast, fees authorized to fund the costs of a groundwater sustainability program have no such requirement. (Water Code §10730, subd. (a).) The court reasoned that the fact the Legislature required groundwater sustainability agencies to impose some, but not all, groundwater extraction fees in compliance with Proposition 218 suggests that, in the Legislature's view, compliance with Proposition 218 is not constitutionally required for groundwater extraction charges. (*San Buenaventura, supra*, 235 Cal. App. 4th at 252.)

California Supreme Court Likely to Resolve Conflict

In June 2015, the California Supreme Court granted review of *San Buenaventura*. (351 P.3d 328.) The case has been fully briefed, with submissions from numerous amici curiae. (*See* California Courts, Appellate Courts Case Information, .) Oral argument has not been scheduled, but it may be held within the year.

The Supreme Court is likely to address the issue of whether all, or some, groundwater extraction charges are governed by Proposition 218. Assuming the Court holds that the groundwater extraction fees at issue in *San Buenaventura* are subject to Proposition 218, then the Court also likely will address whether the statutory three-to-one ratio between rates for nonagricultural and agricultural water use is unconstitutional because, absent adequate evidence to justify the rate differential, it violates Proposition 218's substantive requirements. In addition, the Court might provide guidance as to whether SGMA correctly distinguishes between fees to fund costs of groundwater management and fees authorized to fund the costs of a groundwater sustainability program for purposes of Proposition 218. Stay tuned.

[1.] *Amrhein* dismissed *Apartment Association*, in large part because the case is not mentioned in *Bighorn*. (See *Amrhein, supra*, 150 Cal. App. 4th at 1389-1390.)