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## Pricing the Way Through a Water Shortage

**Dealing *in* Drought: Development, Legislation *and* Litigation**

**Kelly J. Salt**  
**Partner**

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## Article X, section 2 (1928)



“The general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use of water be prevented”

## Water Code section 375 (1977)

- Agencies may adopt and enforce a water conservation program
- 1993 Amendment – water conservation ordinance or resolution may encourage conservation through rate structure design
- Violation of ordinance or resolution may be prosecuted as a misdemeanor and subject to fines

## *Brydon v. E. Bay MUD (1994)*

Shifting the costs of environmental degradation from the general public to those most responsible is consistent with the objectives of Prop 13



## Proposition 218 (1996)

- California Constitution, article XIII D, section 6(b) substantive limitations:
  - Fees shall not exceed the **reasonable cost** of providing the service
  - Fees shall not exceed the **proportional cost** of providing the service attributable to the parcel on which it is imposed

## Proposition 218

- Fees may only be used for the purposes for which they were imposed
- Fees may not be imposed for a service that is not actually used by or ***immediately available*** to the owner of the property in question
- Fees may not be imposed for general governmental services – i.e. police and fire services
- Article XIII D, section 6(b)(5) – ***Burden is on the public agency*** to show compliance

## Independent Judgment

- Validity of property-related fees is a constitutional question
- Courts are responsible for enforcing the Constitution
- Courts must exercise their independent judgment

## Water Code sections 370-374 (2008)



- Agency's Billing must be based on metered use
- Establish volumetric allotments of water
- Establish "basic charge"
- Establish "conservation charge"

## Water Code sections 370-374

- Establish proportionality and cost-revenue nexus requirements through tiers and allocations
- Determine and support conservation costs
- Determine and support water resource management costs



*City of Palmdale v.  
Palmdale Water District (2011)*

- District adopted budget-based rates to promote water conservation
- City, an irrigation customer, challenged the fees for failing to meet the proportionality requirements of Article XIII D, section 6

*City of Palmdale v.  
Palmdale Water District*

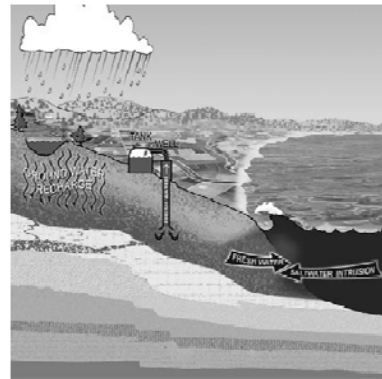
- Budget-based water rates and tiered rate structures do not violate Proposition 218
- The District failed to demonstrate that the proposed budget-based rates for one customer class were proportionate to the cost of providing water service
- Lesson: **SHOW YOUR WORK!**

### *Capistrano Taxpayers Ass'n v. City of San Juan Capistrano (2013)*

- Trial Court Decision:
  - Tiered water rates were not proportionate to the cost of providing service
  - Upper tiers were not penalties
  - Lack of data
  - Collection of fees for CIP, even without issuance of bonds, is valid
  - Recycled water service is not “immediately available” to potable water customers

### *Griffith v. Pajaro Valley Water Management Agency (2013)*

- Groundwater augmentation fee is a charge for water service and is not subject to Section 6(c) election requirement
- Omnibus Act definitions are good authority (see *HJTA v. Salinas*)
- Use of AWWA M-1 Manual’s cost accounting process complies with Prop 218



## *Griffith v. Pajaro Valley Water Management Agency (2013)*



- Charges may be used to fund recycled water service

## *Griffith v. Pajaro Valley Water Management Agency*



- Groundwater augmentation 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 users receiving the supplemental water



## *Griffith v. Pajaro Valley Water Management Agency*



- Using the Agency's revenue requirements to determine the rates for groundwater augmentation charges does not violate the proportionality requirements of Section 6(b)

## *Griffith v. Pajaro Valley Water Management Agency*

- Property-related fees do not have to be established on a parcel-by-parcel basis
- It is appropriate to group similar users together (i.e. calculating fees on a class-by-class basis)
- Apportionment is not a determination that lends itself to precise calculation



## *Morgan v. IID (2014)*

- Establishing customer classes is consistent with the proportionality requirements of Article XIII D, section 6(b)

## *Morgan v. IID*



- Data used for determining rates does not have to be perfect
- The appellate court's review is limited to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact by the trial court

## Assembly Bill 2403

- Government Code section 53750(m):

“Water” means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from ***any source***.

## Assembly Bill 2403



- Stormwater improvements that:
  - Produce,
  - Store,
  - Supply,
  - Treat, or
  - Distribute water

## Drought Surcharges and Penalties

- Drought Surcharges or Drought Rates – revenue recovery
- Penalties – punish for violations of water conservation ordinance or resolution



## What does the Future hold?



- The drought is most likely to continue
- Public Agencies have the burden of demonstrating compliance
- Agencies must fairly allocate the costs of service

## What does the future hold?

- Agencies must DOCUMENT the methodology used and justify the allocation of costs
- Courts will exercise their independent judgment, *but* courts are moving in the right direction
- Consider alternative rate methodologies to achieve conservation *and* manage your water resources

## Preparing for Rate Changes

- Consider approving multi-year rates and automatic adjustments, *including* advance approval for drought rates and surcharges
- Do a new rate study – old rate studies may not provide sufficient detail to be upheld against a challenge
- Critically review the rate study – look for unsupported/unexplained conclusions

## Questions?

### **Kelly J. Salt**

Partner

Best Best & Krieger LLP

Office 655 W. Broadway, San Diego, CA 92103

Phone: (619) 525-1375

Email: [kelly.salt@bbklaw.com](mailto:kelly.salt@bbklaw.com)

[www.bbklaw.com](http://www.bbklaw.com)