Are Groundwater Extraction Fees Property Related or Regulatory Fees? It Depends.

Two new Proposition 218-related cases published in March come to opposite conclusions in determining whether groundwater extraction and replenishment fees are "property-related" fees subject to Article XIII D of the California Constitution (Proposition 218). Given the conflicting appellate decisions and the tremendous concern over groundwater overdraft statewide, this issue is ripe for California Supreme Court review. The need for certainty over how to classify groundwater extraction fees is particularly acute given the financing authority groundwater sustainability agencies (GSA) now have under the new groundwater management legislation. (See Wat. Code §§ 10730 et. seq.)

On March 26, 2015, the Sixth Appellate District affirmed its prior precedent, opining that the Santa Clara Valley Water District's (SCVWD) groundwater extraction fee is a property-related fee under Art. XIII D, and is a fee imposed for water service and thus exempt from voter ratification. (*Great Oaks Water Co. v. Santa Clara Valley Water District*, No. H035260, 2015 WL 1403340 (Ca. Ct. App. Mar. 26, 2015)) The court's reasoning is consistent with its prior decisions in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 and *Griffith v. Pajaro Valley Water Management District* (2013) 220 Cal.App.4th 586. A multimillion-dollar judgment against SCVWD was reversed because the appellate court found that SCVWD had met its burden under Proposition 218 in justifying its groundwater extraction fees.

In contrast, in an opinion issued on March 17, 2015, the Second Appellate District opined that groundwater extraction charges are not property-related fees. (*City of San Buenaventura v. United Water Conservation District*, 2d. Civil No. B251810, 2015 WL 1212205 (Cal. Ct. App. March 17, 2015)) The court expressly distinguished (elected not to follow) the *Pajaro* cases. Instead, the Second District reasoned that United Water Conservation District's (UWCD) pump charges were regulatory in nature. Remarkably, prior to issuing its ruling, the Second District asked the parties to provide additional briefing on the applicability of the Sustainable Groundwater Management Act (SGMA), and cited the SGMA in its opinion.

Reasonable minds may differ on the fundamental issue—whether or not groundwater pump charges are subject to Art. XIII D —but it is very difficult to reconcile these two opinions. Both SCVWD and UWCD use pumping charges to fund groundwater replenishment and management-related activities—including capital infrastructure, water purchases and water management expenses. And both entities are authorized to impose different pump charges on agricultural versus municipal pumpers (another important issue discussed in these cases). Given the likelihood that groundwater sustainability agencies will be using groundwater pump charges to fund their "management" activities, it would be quite helpful to have a consistent legal passage through (or around) Proposition 218. Can we order up California Supreme Court review, please?

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