

Funding Groundwater Plans

Sacramento Central
Groundwater Authority

Budget Subcommittee

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Types of Fees

- Prop. 26 defines everything as a tax, except:
 - Fees for benefit or privilege (e.g., utility connection)
 - Fees for service or product (e.g., utility services, AB 1600 development impact fees)
 - Regulatory fees
 - Use of government property
 - Fines and Penalties

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More Types of Fees

- More Prop. 26 Exceptions
 - Development Fees (permitting, CEQA mitigation, development impact)
 - Assessments and property related fees subject to Prop. 218

Authority for Fees

- Every fee must be authorized by some legislation, such as:
 - the Constitution (utility fees)
 - Statutes like the SGMA legislation
 - Local ordinances (like utility fees, permit fees)

SGMA Fee Authorities

- Service fees subject to Prop. 218
 - Full range of services can be funded, including water supply
- Permitting and other regulatory fees subject to Prop. 26
 - Limited to developing plan, metering wells, and other regulatory costs
 - Cannot fund water supply

Services Fees Under Prop. 218

- GSA service fees - WC 10730.2(c)
- Local agency pre-plan fees - WC 10730.2(b)
- Members of multi-agenda GSA pre-plan fees – WC 10721(j)

Regulatory Fees Under Prop. 26

- Permit fees and fees to fund plan development – WC 10730(a)
- Meter installation cost recovery fee – WC 10725.8(b)

More SGMA Details on Fees

- Can impose fees on other state and local governments – WC 10726.8(d)
- Fees can be validated, which may help with issuance of debt backed by fees – WC 10726.6

Prop. 218 in a Nutshell

- Prepare justification for fee (13D, 6(b))
- Give notice of majority protest hearing by mail (13D, 6(a)(1))
- Conduct Majority protest hearing (13D, 6(a)(2))
- If no majority protest, impose fee (13D, 6(a)(2)+
- Can set fees with annual CPI adjustment for up to five years (GC 53756)

Prop. 218 in a Nutshell

- Fees cannot
 - Exceed cost of service in total
 - Be used for other purposes
 - Exceed proportional cost of service to customer or customer class
 - Fund services not immediately available
 - Fund General Government Services

Prop. 26 in a Nutshell

- No procedural requirements
- Rules for regulatory fees
 - Limited to reasonable costs of regulation
 - Costs allocated in “fair or reasonable relationship to payor’s burdens on, or benefits ... from” government regulation

Tips on Rate-making

- Use a rate-making consultant
- Have the cost-of-service analysis (COSA) reviewed by an attorney
- Allow for the possibility Board will reject consultants' recommendation
- Make a good record
- Don't adopt fees not supported by the record
- Consider validation

Fines are not Taxes

- *Cal. Taxpayers Ass'n v. FTB* (3rd DCA 2010)
 - 20% penalty on late corporate taxes raising \$1.4b not a tax requiring 2/3 vote of Legislature
 - Distinguishing characteristics: label, revenues diminish over time, triggered by violation
 - No need for findings or good faith defense; post-payment remedy sufficient
 - Relevant to Prop. 26 analysis

Groundwater Extraction Charges

- *Pajaro Valley Water Mgmt. Agency v. AmRhein* (2007) 150 CA4th 1364
 - Groundwater augmentation / extraction charges are property related fees subject to Prop. 218

Groundwater Extraction Charges

- *Griffith v. Pajaro Water Mgmt. Agency* (2013)
220 CA4th 586
 - Charge is a fee for “water service” exempt from 13D, 6(c) election requirement
 - Omnibus Act’s definitions are good authority notwithstanding *HJTA v. Salinas*
 - Notice of protest hearing can be given to property owners alone

Groundwater Extraction Charges

- *Griffith* (continued)
 - Debt service, GA&O, service planning all permissible uses of fee
 - AWWA M-1 Manual's cost-accounting process complies w/ Prop. 218
 - Parcel-by-parcel cost analysis is not required; class-by-class is okay provided the classes are rationally drawn

Groundwater Extraction Charges

Ventura v. UWCD (CA S Ct Case No. S226036)

- Groundwater charges subject to Prop. 26 or Prop. 218?
- Does 3:1 ratio of ag. to non-ag. rates mandated by Water Code section 75594 violate 218 or 26?
- Fully briefed 10/19/15 and awaiting argument

Groundwater Extraction Charges

Great Oaks Water Co. v. Sta. Clara Valley WD
(grant & hold behind *Ventura*)

- Groundwater charges subject to Prop. 218?
- “Water” charges exempt from election requirements?
- DCA remanded substantive challenges to 10:1 ratio of ag. to non-ag. fees

Groundwater Extraction Charges

- *Water Replenishment District of So. Cal. v. Cerritos* (2013) 220 CA4th 1450 (2nd DCA)
 - “Pay first, litigate later” rule applies to local government
 - Dicta suggests remedy for illegal revenue measure is not full refund, but refund of difference between lawful charge and what was paid

Stormwater Recapture

- AB 2403 (Rendon, D-So. Gate)
 - Codifies *Griffith v. Pajaro*
 - Amends GC 53750(m) to add “from any source” to definition of “water” in Prop. 218 Omnibus Implementation Act
 - Chaptered 6/28/14

Prop. 218 & Water Rates

- *City of Palmdale v. Palmdale Water District* (2nd DCA 2011)
 - City challenged conservation water rates, claiming Prop. 218 disallows them
 - DCA found 218 and Constitutional provision against wasting water (art. X, section 2) could be harmonized, but struck down PWD rates as insufficiently justified
 - Caution required when constructing conservation rates

Prop. 218 & Water Rates

- *Capistrano Taxpayers Assn v. City of San Juan Capistrano* (4th DCA 2015)
 - Must satisfy water conservation mandate of article X, section 2 and Prop. 218
 - Domestic rates can fund recycled water as supply program
 - Tiered rates require precise cost-justification
 - Disagrees with other cases and therefore trial courts need not follow it.

Prop. 218 & Water Rates

- *Morgan v. Imperial Irrigation* (4th DCA 2014)
 - No separate protest vote on water rates on domestic, municipal, industrial and agricultural water customers
 - Full cost recovery
 - Data need not be perfect

Prop. 218 & Water Rates

- *Green Valley Landowners Assn v. City of Vallejo* (1st DCA 2016)
 - Restates pay first, litigate later rule
 - Urban water rates need not subsidize higher cost of service via exurban system

Low-Income Rates

- AB 401 (Dodd, D-Napa)
 - Water Code section 189.5 requires SWRCB to develop a plan to fund and implement a Low-Income Water Rate Assistance Program by 1/1/18
 - Prop. 218 will not allow this to be funded by rates

Drinking Water Fees

- 2015's SB 83 modified SWRCB authority to impose fees on public water systems to fund State's Drinking Water Program
- SWRCB proposes to charge less to smaller systems with fewer resources
- Does Prop. 26 permit this approach?
- Adoption slated for 9/6/15; rates effective in FY 16-17.

Prop. 218 Legislation

- AB 2801 (Gallagher, R-Sutter Co.)
 - Amends Prop. 218 Omnibus Implementation Act to require protests to be treated as public records and retained for two years
 - Earlier proposal to limit validation died in Assembly Committee
 - Chaptered Aug. 30, 2016

Referenda on Fees

- Prop. 218 allows initiatives to repeal or reduce fees
- Can a fee also be referended?
 - *Monterey Peninsula Water Mgmt. Dist. v. Monterey Peninsula Taxpayers Assn* (6th DCA)
 - *HJTA v. Amador Water Agency* (3rd DCA)
 - *Ebinger v. Yorba Linda Water Dist.* (O.C. SC)
 - Shasta County Case

Prop. 218 Litigation

- *City of Azusa v. Cohen* (3rd DCA 2015)
 - State could prevent RDA successor agency from repaying loan to water and power utilities without offending Proposition 218
 - Court reasoned that funds ceased to be utility revenues when loaned to the RDA
 - Would allow government to “lend around” all legal restrictions on use of fees; later cases likely to limit this to its post-RDA facts

Prop. 26 Litigation

- *Schmeer v. County of Los Angeles* (2nd DCA 2013)
 - Challenge to provision of plastic bag ban requiring retailers to charge \$0.10 for paper bags
 - Because fee doesn't fund government, 26 doesn't apply

Prop. 26 Litigation

- *Newhall County Water Dist. v. Castaic Lake Water Agency* (2d DCA 2016)
 - Wholesaler w/ 4 customers could not make rates by class
 - Wholesaler w/o groundwater services or regulatory authority could not tie rates to groundwater use (free-rider violation)
 - Conservation rates must conserve rate-maker's own water supplies

Regulatory Fees

- *CBIA v. SWRCB* (CA S Ct Case No. S226753)
 - Applies *Sinclair Paint* under Prop. 13 to SWRCB fees for water quality programs
 - DCA found it sufficient that fee did not exceed cost of 8 related regulatory programs; not required that each program be self-funded
 - Fully briefed 12/20/15 and awaiting argument

Prop. 26

Griffith v. City of Santa Cruz (2012) 207 CA4th 982

- Challenge to fee on landlords for housing code enforcement
 - No violation of equal protection, 218 or 13
 - Helpful discussion of burden of proof under 26, practical application of licensing exception, applies pre-26 regulatory fee case law

Prop. 26 Litigation

- *Citizens for Fair REU Rates v. City of Redding* (Cal. S. Ct. No. S224779)
 - Challenge to electric utility PILOT
 - Trial court found grandfathered
 - DCA found PILOT subject to Prop. 26 b/c adopted w/ biennial budget & remanded for cost justification
 - Fully briefed 7/21/15 and awaiting argument

Prop. 26 Litigation

- *Cal. Chamber of Commerce v. CARB*, 3rd DCA Case No. C075930
 - Challenges AB 32 implementation under Prop. 13
 - Court ruled for State; fully briefed and awaiting argument as of 9/15/16
- *Morning Star Packing Co. v. CARB*, 3rd DCA Case No. C075954
 - Related to the Chamber case; same result & status, appeals consolidated

Prop. 26 & State Fire Fee

- State imposed \$150 / structure fee on State Responsibility Areas
- HJTA challenged under Prop. 26 b/c not approved by 2/3 of each house
- *HJTA v. CDF*, Sacto Superior Case No. 34-2012-00133197
- Class certification & notice approved 1/22/16

Questions?

