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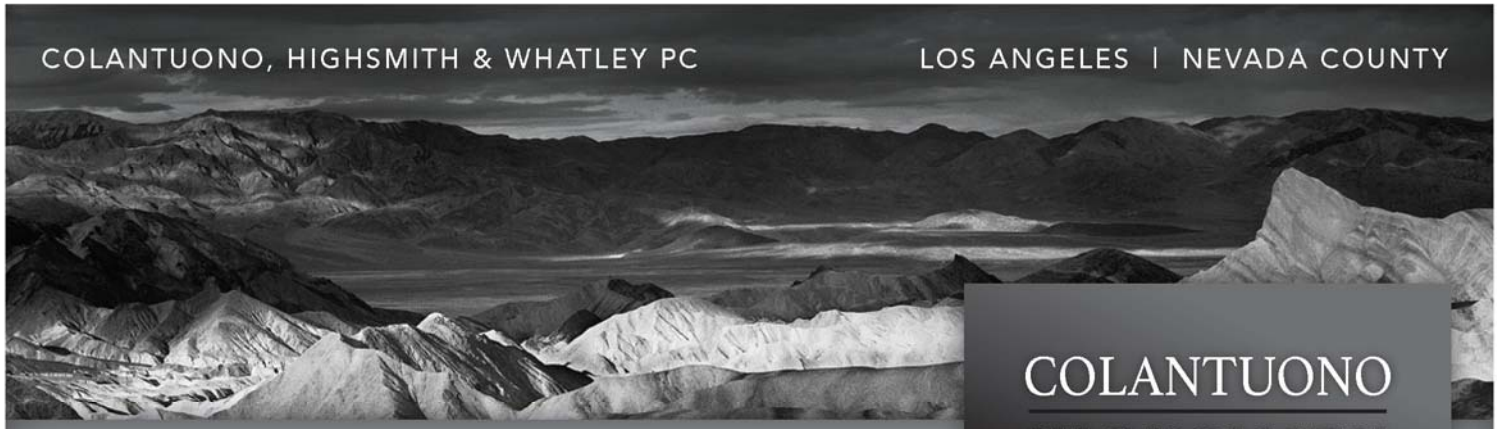

Newsletter | Spring 2016

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

400 New Water Rate-making Agencies!

By Michael G. Colantuono

California is becoming the last Western State to regulate groundwater in 2015 with the adoption of the Sustainable Groundwater Management Act (SGMA). It requires formation by mid-2017 of local groundwater management agencies (GMAs) to regulate some 400+ groundwater basins the State Department of Water Resources (DWR) has identified as high- or medium-priority basins. SGMA designates 15 such agencies; the rest will be designated by local agencies proposing to fill that role or forming coalitions by joint powers agreement or memorandum of understanding. Counties get the job by default if no other agency steps forward. If a county declines the role, DWR must fill it. Single-agency GMAs or participants in collective GMA may be counties, cities, or special districts with "water supply, water management, or land use responsibilities within a groundwater basin."

GMAs must develop and enforce management plans to reduce groundwater pumping to each basin's safe yield. Plans are due by January 31, 2020 for basins in "critical overdraft" and by January 31, 2022 for other high- and medium-priority basins. Plans must seek to reduce production to sustainable yield within 20 years of plan adoption. Thus, all high- and medium-priority groundwater basins are expected to achieve water balance by 2042. Whether this means groundwater recharge, pumping reductions, or both, it is plain a substantial new regulatory regime must be funded.

This means new fees on those who use groundwater — including municipal utilities, farmers, private well operators and others. These may be collected on the property tax roll, on water bills and/or as new charges on pumping. Legally, these can be understood as service fees under Proposition 218 or regulatory fees under Proposition 26.

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COBDEN & DUNN: RISING STARS

Super Lawyers has named Michael R. Cobden and Ryan Thomas Dunn to its roster of 2016 "Rising Stars" —the top 2.5% of younger attorneys evaluated by their peers.

Mike chairs our Municipal Practice Group. He is Town Attorney of Yountville, Assistant City Attorney of Auburn, and General Counsel to North Yuba Water District and Garden Valley Fire Protection District (El Dorado County). He is our leader on police and law enforcement.

Ryan chairs our Litigation Practice Group. He handles a wide range of litigation; current cases include a CERCLA matter for a Fortune 500 company, appellate defense of a lawyer-client dispute, and disputes involving water rates, assessments, franchise fees, airport funding, and land use.

Congratulations, Mike and Ryan!

New Rate-making Agencies (cont.)

Pump charges and other service fees will be subject to the notice, hearing and majority protest requirements of 1996's Proposition 218. These can fund preparation of plans; investigations and monitoring; enforcement; and, water supply. Such fees are limited to the proportional cost of serving each parcel. Therefore, statutes requiring rate preferences for agriculture arguably violate Proposition 218 — that question is pending in the California Supreme Court.

Regulatory fees can fund preparation of plans and regulation and must bear a fair or reasonable relationship to pumpers' benefits from or burdens on a GMA's services and programs. These require noticed hearings under SGMA, but Proposition 26 has no procedures like those of Proposition 218. Such fees may fund plan development, meter installation and inspection, and the like. An augmentation charge may be more useful to implement groundwater plans, especially if recharge is to be funded.

Rate-making is legally complex due to Propositions 218 and 26. Each of these 400+ new agencies will need rate-making consultants, will need to engage groundwater users and other local agencies to achieve consensus and to establish and implement their plans. Legal counsel will be needed, too, for rate-making and for the inevitable disputes that rate-making and regulation will produce.

Communities should soon identify their GMAs and start the process of building consensus. This ambitious new regulatory program will affect every community that overlies a high- or medium-priority groundwater basin — affecting water availability and cost, land use, economics, and the environment. Communities which start soon may find that the necessary consulting serves are more readily available and at lower cost than those who wait for the coming rush.

For more information on this subject, contact Michael at MColantuono@chwlaw.us or (530) 432-7359.

MMBA Factfinding Applies to All Bargaining

By Pamela K. Graham

The San Diego Court of Appeal recently ruled in *San Diego Housing Commission v. Public Employment Relations Board* that Meyers Milias Brown Act (MMBA) factfinding applies to all bargaining disputes, not just impasses in bargaining memoranda of understanding (MOUs). This is unwelcome news for local government management.

Implemented by 2011's AB 646, MMBA factfinding obligates public employers to submit labor disputes to an advisory factfinding panel at a union's request before they impose a last, best and final offer. The process is overseen by the Public Employment Relations Board (PERB), the agency that administers public sector labor laws.

San Diego Housing Commission involved an impasse in negotiations over the effects of layoffs. The Commission persuaded the trial court that AB 646 only applies to impasses on MOUs, not other bargained issues. PERB argued factfinding applies broadly to any bargaining dispute. PERB compared the MMBA impasse provisions to those of the Educational Employment Relations Act (EERA) and the Higher Education Employer-Employee Relations Act (HEERA).

The appellate court unanimously agreed with PERB. The court relied heavily on the rationales of two 2014 PERB decisions that found AB 646 factfinding to apply not only to MOU impasses but also to any negotiations in the scope of representation. The court gave great deference to PERB's interpretation of labor relations statutes, writing its "findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."

The court applied the same reasoning in reaching its similar holding in *County of Riverside v. PERB*, involving an impasse in effects bargaining over a

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One Person, One Vote; Not One Voter, One Vote

By Holly O. Whatley

In *Evenwel v. Abbot*, the U.S. Supreme Court recently resolved whether the one-person-one-vote principle established in the 1960s requires state and local governments to equalize voting districts based on voter-eligible population as opposed to total population (i.e., including children, non-citizens, felons, etc.). The 8-member Court (due to the Scalia vacancy) answered with a resounding "no," but left unresolved whether districting on the basis of registered voters offends the Constitution.

The *Evenwel* plaintiff challenged the practice of drawing Texas Senate districts based on total population. She argued this resulted in unequal districts measured by those eligible to register to vote, which devalued her vote compared to those in other districts and therefore violated Equal Protection. The Court recognized that different standards apply to congressional districts and to state or local districts. For congressional districts, the maps must be drawn "with populations as close to perfect equality as possible." But state and local districts may deviate from this standard to a limited extent to accommodate a variety of interests. Where the largest and smallest districts deviate by less than 10 percent, the districting is presumptively valid; greater than 10 percent deviation, however, and districts are presumed invalid.

The Court noted the Framers of the Constitution and of the post-Civil War Fourteenth Amendment understood that representatives serve all residents, not just those eligible or registered to vote. For example, non-voters, such as children, have an interest in public schools. And "ensuring that each representative is subject to requests and suggestions from the same number of constituents" promotes equitable representation. Thus, drawing districts based on total population complies with the one-person one-vote principle and the Constitution.

Though Texas opposed Plaintiff's contention its use of total population was unconstitutional, it urged the Court to find that a state could equalize districts based on voter-eligible population. The Court declined to decide that issue. Thus, it could return to the Court's docket in the future, perhaps after Justice Scalia's successor is seated.

In the meantime, local districts can use total population to equalize their districts without running afoul of the one-person one-vote principle and likely should do so to avoid becoming a test case. California's Constitution could easily be interpreted to require more than does the federal Constitution and any standard other than one-person-one-vote involves risk of suit.

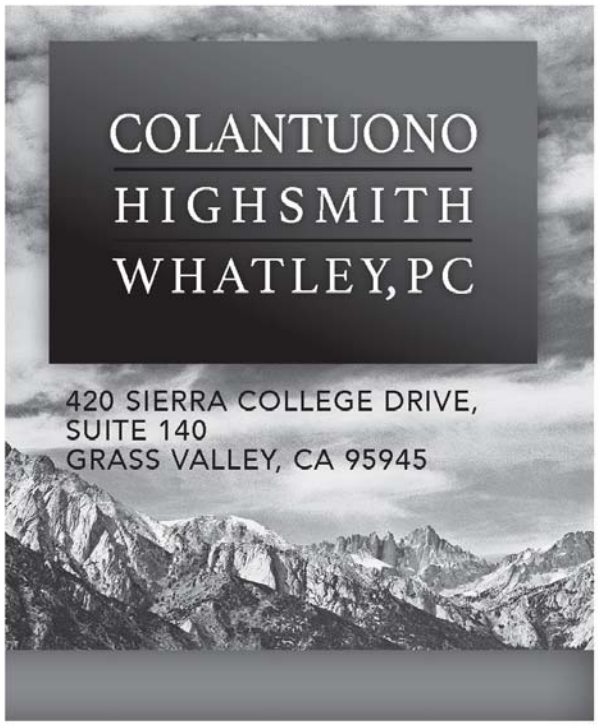
For more information on this subject, contact Holly at HWhatley@chwlaw.us or (213) 542-5704.

MMBA Factfinding (cont.)

new background check policy for information technology employees.

Local governments must now be prepared to participate in factfinding hearings on all bargaining disputes if impasse procedures are invoked. This affects how employers prepare to bargain; how they document bargaining; how they frame last, best and final offers; and how long it takes and how costly it will be to impose a last, best and final offer. The results of fact finding are legally advisory only, but they can be politically potent and they can affect the strength of an employer's position in litigation. The bottom line for employers: proceed with caution.

For more information on this subject, contact Pamela at PGraham@chwlaw.us or (213) 542-5702.



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