Colantuono Highsmith & Whatley, PC

CH&W Newsletter

Update on Public Law

Los Angeles • Nevada County

Winter 2015

Looking Below the Surface

By Michael R. Cobden

Water policy wonks sometimes joke that California enacts comprehensive water legislation about every hundred years. Surface water — lakes, rivers, and streams — has been regulated under legislation adopted in 1914. Last year, the Legislature made California the last Western state to regulate groundwater in underground basins or "aquifers." Although the legislation is not comprehensive — it applies only to some aquifers — it is nonetheless significant, and if the model survives implementation, we can expect it eventually to be applied to all groundwater in the state.

The 2014 groundwater legislation is three bills: A.B. 1739 (Dickinson, D-Sacramento), S.B. 1168 (Pavley, D-Agoura Hills) and S.B. 1319 (Pavley). In contrast to centralized regulation of surface water by the State Water Resources Control Board (SWRCB), the Legislation regulates groundwater through local "groundwater sustainability agencies" (GSAs). The Legislation applies to some 400-plus basins identified in the Department of Water Resources Bulletin 118; adjudicated basins are exempt. Fifteen agencies are statutorily designated as "exclusive" GSAs for their basins. Counties, cities and water agencies elsewhere should identify the basins which underlie their jurisdictions or affect their water supplies and identify potential stakeholders. Cities and counties may participate in groundwater management whether or not they operate water utilities.

A GSA is either a single agency designated to regulate a basin or a joint powers agency (JPA) formed by several agencies interested in a basin. There may be more than one GSA for a basin, but their management areas may not overlap. The management area of a GSA is determined in part by the notice a prospective GSA sends to the SWRCB and publishes before formation. If any part of a basin is not regulated by a GSA, the county is the default GSA for that area. Thus a basin may have multiple GSAs, formed by counties, cities, water districts or JPAs of these agencies.

Although the Legislation is not clear, it appears a GSA may claim an entire basin as its management area, whether or not it or its members otherwise have jurisdiction over that whole area. Thus a single local agency could elect to serve as a GSA governing a basin overlaid by others and regulate its neighbors' groundwater production. There is no requirement a proposed GSA admit to a JPA agencies that have a stake in the management of groundwater in the GSA's boundaries. While most basins will likely identify GSAs via collaboration, we expect disputes in at least some cases. These will be resolved in court unless the Legislature responds with further legislation. If no local GSA is formed for a basin by January 2017, the State Department of Water Resources will to regulate that basin.

Once designated, GSAs have substantial authority to regulate or suspend groundwater pumping, limit well-drilling, and impose fees and penalties, among other powers. (A more detailed article on the fee power of cities, counties and GSAs under the Legislation appears on page 3 of this newsletter.) GSAs must develop groundwater sustainability plans to identify basin conditions and safe yields and to plan to manage groundwater extractions through monitoring, regulation, and fines.

Plautus reminds us that "it is wretched business to be digging a well just as thirst is mastering you." (Mostellaria II, 1, 32.) Our fourth year of severe drought brings a "dismally meager" snowpack and many of our aquifers in overdraft, with significant subsidence in some. This will make it challenging to establish a new groundwater management regime without conflict. We recommend that every city and county overlaying an eligible basin and every water provider with an interest in the groundwater resources of those basins begin immediate talks with stakeholders to ensure itself a seat at the GSA table. Further developments are likely, so stay tuned.

♦♦♦

For more information on this topic, contact Michael at 530/798-2416 or mcobden@chwlaw.us.

Tax & Fee Class Actions on the Rise

By Holly O. Whatley

For decades, California courts interpreted California law to bar class action suits for refunds of local taxes. Individual refunds claims, of course, were allowed; as were suits to obtain prospective relief to end or correct an allegedly unlawful tax or fee. But the California Supreme Court's decisions in *Ardon v. City of Los Angeles* (2011) and *McWilliams v. City of Long Beach* (2013) changed that landscape. Together, these decisions make claims for local tax refunds subject to the Government Claims Act, regardless of any contrary local charter provision or ordinance. And the Government Claims Act allows class actions for refunds of local (but not State) taxes, assessments, fees and other revenues.

The class action plaintiffs' bar has responded to this invitation. Since *McWilliams* was decided in 2013, a flurry of class actions have been filed against local agencies around the state seeking tax or fee refunds, including several in the last 12 months seeking telephone tax refunds. Several class actions have also been filed seeking refunds of allegedly unlawful public utility rates — particularly water rates, given the developing case law under Propositions 218 and 26 for retail and wholesale agencies, respectively. Even the Howard Jarvis Taxpayers Assn., which historically pursued its impact litigation agenda through suits for prospective relief and attorneys' fees, has entered the fray — most recently with a class challenge to a city's water rates for extra-territorial customers.

While this trend is ominous news for local agencies and those who depend on them for services, local agencies have options to defend and resolve class actions that are unavailable to private entities. First, class claims remain subject to the Government Claims Act, which means that any refund claims should be limited to one year before a claim is filed. Second, class representative still must submit a written claim to the agency before filing suit. This gives agencies an early opportunity to consider refunds or other actions to reduce exposure and to avoid litigation if possible or, at least, to reduce the scope of any resulting suit. Counsel should carefully review such an approach to determine how it will affect any class suit that may follow. Finally, if a local agency opts to settle and to pay refunds, it is much more likely that a court will approve the return of any unclaimed amounts to the agency for its use to benefit its residents rather than the more typical requirement for private entities to pay such funds to a non-profit entity closely tied to the interests of the class (a so-called "cy pres" payment). This is because the local agency is itself a social benefit organization required to expend its revenue for public benefit.

The broader lesson of these cases is that the risk of challenge to agency rate-making is now markedly higher. Local governments of all sorts are well advised to review their revenues, identify any risks — such as post-1986 taxes not approved by voters and rates not made on the basis of a strong rate-making record reviewed by capable counsel — and find ways to mitigate them. It is no longer wise to keep one's head down and hope that defects in your revenue portfolio go unnoticed.

In short, though the State gives itself statutory immunity from class action tax and fee refund claims, local agencies are at risk. The trend, particularly over the last year, demonstrates that cities, counties and special districts must now expect suits challenging local taxes and fees to include class refund claims and should prepare to deal with the unique, complex, procedural and substantive issues that class treatment raises — at least until the Legislature sees fit to extend to local agencies the same protection from class claims the State enjoys!

♦♦♦

For more information on this topic, contact Holly at 213/542-5704 or hwhatley@chwlaw.us.

Welcome, Pamela Graham!

Pamela Graham joins CH&W as Senior Counsel in our Los Angeles office as a member of our litigation team. Her practice covers a wide range of litigation, including land use, employment law, municipal finance and public revenues, and general contract disputes.

Pamela brings over 12 years' experience litigating complex commercial matters. Prior to joining CH&W, she practiced at Irell & Manella LLP for 7 years and at Drinker, Biddle & Reath LLP for 5. There, Pamela represented clients in entertainment, retail, and other industries in a variety of matters, including business torts, employment disputes, securities fraud, and trademark and copyright litigation. She has broad experience in both state and federal courts, handling all phases of litigation from pleading to appeal. She has successfully defended a number of jury and bench trials.

Pamela earned her law degree *magna cum laude* from Loyola Law School in 2001. She served as the Chief Production Editor of the Loyola of Los Angeles Law Review. She received the Dean's Academic Scholarship from 1999 to 2001, as well as the First Honors Award in legal research and writing, torts, and federal courts. Pamela earned her B.A. in journalism and mass communication and political science from the University of North Carolina at Chapel Hill in 1996.

Immediately following law school, Pamela served as a law clerk to the Honorable Ronald S.W. Lew of the United States District Court, Central District of California.

Welcome, Pamela!

Groundwater Law Allows New Fees

By Michael G. Colantuono

New groundwater legislation gives local government new revenue authority — and new bills to pay. A.B. 1739 (Dickinson, D-Sacramento), S.B. 1168 (Pavley, D-Agoura Hills), and S.B. 1319 (Pavley) establish a new groundwater management regime in California. This legislation is of vital interest to all California local governments — including all cities and counties whether or not they provide water service. It will affect water service, land use, and revenues. A summary of the law appears on the cover of this newsletter; our concern here is with fees.

GSAs will monitor and regulate groundwater use in hundreds of groundwater basins around the State. They will fund their work with service fees on groundwater wells, expressly subject to Proposition 218, and regulatory fees subject to Propositions 13 and 26. Under these measures, GSA fees may not exceed the cost of service and no class of customers may be obliged to subsidize another.

SERVICE FEES. Local agencies engaging in groundwater management before a GSA is designated may impose service fees and they and GSAs may impose such fees until a groundwater sustainability plan (GSP) is adopted. Agencies which are members of multi-agency GSAs may also impose such fees. Service fees may recover all a GSA's costs, including administration, operation, maintenance, property acquisition, supply, treatment, and distribution of water.

REGULATORY FEES "including, but not limited to, permit fees and fees on ground water extraction or other regulated activity, to fund the costs of a groundwater sustainability program, including, but not limited to, preparation, adoption, and amendment of a groundwater sustainability plan, and investigations, inspections, compliance assistance, enforcement, and program administration, including a prudent reserve" are allowed.

GSAs may impose fees to recover the cost to meter wells and fees on a "state or local agency that extracts groundwater".

Regulatory fees may recover a closed list of GSA regulatory costs: preparation, adoption, and amendment of a GSP, as well as investigations and enforcement. GSA regulatory fees may be property related fees subject to Proposition 218, limited to cost. Those not subject to Proposition 218 will be subject to Proposition 26 unless an exception applies. Proposition 26's exception for regulatory fees also limits fees to cost of service.

The Legislature recognized GSAs must gather and analyze information to construct fees that comply with the constitutional cost-of-service limitation and expressly granted them the power to do so. It has also recognized the need for due process in setting fees and for dispute resolution.

STATE FEES. The Legislation also authorizes the State Water Resources Control Board (SWRCB) to impose fees to recover its regulatory costs for groundwater management and dispute resolution and expressly subjects its fees to Proposition 26. SWRCB functions under the Legislation include review of groundwater production reports, preparing GSPs if local governments fail to do so, and resolving groundwater rights disputes.

FINES AND PENALTIES. Both GSAs and the SWRCB can impose fines and penalties, which are not limited to cost of service of service or regulation.

Plainly, the ambitious project to make California the last Western state to regulate groundwater means a substantial expansion of local government and new burdens on the SWRCB. Those efforts will be funded by fees on groundwater use. Thus, local agencies which wish to be GSAs and those which use groundwater will need rate-making expertise. That includes consultants and legal counsel to assist in rate-making, enforcement, and to resolve disputes.

This will be a fast-developing area, as GSAs must be designated by 2017 and plans adopted by 2020 for priority basins and 2022 for other basins. As always, we'll keep you posted!

Fee Cases On the Horizon

Several important rate-making cases will be decided in early 2015. The Sacramento Court of Appeal found Redding's payment in lieu of taxes (PILOT) from its electric utility to its general fund not to be grandfathered by Proposition 26 because it was adopted by budgets, which expire. It remanded the case to the trial court so the City may cost-justify the PILOT. Both parties sought rehearing and the City Council has authorized a petition for review by the California Supreme Court.

A case testing San Juan Capistrano's tiered water rates was argued January 20th. Argument suggested the Orange County Court of Appeal may find the rate-making record insufficient to justify the fees. Decision in this closely watched case is due by April.

Due in March is a decision in Ventura's successful Proposition 218 challenge to groundwater charges of the United Water Conservation District requiring municipal and industrial water users to pay three times what agriculture pays. A decision of the Ventura Court of Appeal is due by early March.

Another groundwater case under Proposition 218 involving the Santa Clara Valley Water District is set for argument this month in the San Jose Court of Appeal. Decision will be due in May.

Plainly, 2015 is starting with a bang in the law of rate-making. For now, rate-makers do well to get good counsel when making rates. Change is coming, so stay tuned!

♦♦♦

For more information on this subject, contact Michael at 530/432-7357 or mcolantuono@chwlaw.us.

Colantuono, Highsmith & Whatley, PC
11364 Pleasant Valley Road
Penn Valley, CA 95946

Are you on our list? To subscribe to our newsletter or to update your information, complete the form below and fax it to 530/432-7356. You can also call Marta Farmer at 530/432-7357 or subscribe via our Web site at **WWW.CHWLAW.US**.

Name: _____ Title: _____

Affiliation: _____

Address: _____

_____

City: _____ State: _____ Zip Code: _____

Phone: _____ Fax: _____

E-mail: _____

Our newsletter is available as a printed document sent by US Mail and as a PDF file sent by e-mail. Please let us know how you would like to receive your copy.

☐Mail ☐E-Mail ☐Both