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California attorney general goes to bat for water-hog penalties

By Kurtis Alexander

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California Attorney General Kamala Harris is going to battle over water conservation, seeking to ensure water agencies hold the power to sock big users with higher prices.

In a recent letter sent to the state Supreme Court, the attorney general's office asked the high court to limit the scope of a lower court decision that struck down tiered water rates designed to penalize waste. The appellate court in April ruled that prices must be a reflection of the cost of water — not a tool to entice savings.

The attorney general's office is requesting that the Supreme Court “depublish” that decision, meaning the ruling would apply only to San Juan Capistrano — the subject of the court case — and couldn't be used as precedent to challenge water bills elsewhere. State attorneys warned of a “chilling effect” on the conservation efforts of agencies using tiered rates as California grapples with a fourth year of drought.

But it may be too late. Already, water rates in other places are being targeted in the wake of the ruling — with the latest protest emerging in Marin County.

“What we had with the Capistrano case is something that's very similar to what's going on in Marin,” said attorney Beau Burbidge, who is representing a Mill Valley woman who filed suit against the Marin Municipal Water District over its four price tiers for water. “That (case) gives us some indication of how our case will be treated in the courts and gives us some precedential value.”

The suit in Marin County, like the Southern California case, rests on Proposition 218. The voter-approved measure doesn't allow public agencies to charge more for a service than what it costs to provide it.

The Fourth District Court of Appeal deemed San Juan Capistrano's higher rates unconstitutional because the city didn't incur additional expenses delivering extra water. The city is in the process of reimbursing residents for charging too much.

According to Burbidge, Marin County's tiered rates similarly don't reflect higher operating costs, only large and arbitrary price increases.

The water agency bills single-family households \$3.74 for each 748 gallons of water used — about a two-day supply — if usage every two months in the summer is below 19,500 gallons. If a household's consumption spikes to more than 75,000 gallons, it faces the top-tier rate of \$22.45 for every 748 gallons.

“It's purely a penalty or tax for excess water use,” Burbidge said. “We're absolutely for any measure of conservation, including tiered rates. But there's a method in which the water district has to go about doing that.”

The agency, Burbidge said, must prove that its divergent charges are based on different costs — or go to voters to get approval for higher rates.

The lawsuit against the Marin Municipal Water District was filed in Marin County Superior Court on May 26 by Anne Walker. Burbidge, however, said he plans to turn the case into a class action on behalf of the agency's customers. The potential financial damages haven't been determined.

Marin County water officials declined to discuss the litigation, as a matter of policy, but said they're reviewing their water prices to ensure they're in line with expenses.

"Our understanding is that our current rate structure meets cost-of-service requirements, is legally defensible and follows Prop. 218 protocol," spokeswoman Libby Pischel wrote in an e-mail to The Chronicle.

Statewide, more than half of all water agencies embrace some form of tiered pricing, which has been shown to dampen consumption.

Most water providers, as of this month, are under state orders to cut back water use. Gov. Jerry Brown has urged the agencies to use pricing to help ensure the reductions, but the San Juan Capistrano case called the tactic into question.

"The court's sweeping statement couldn't come at a worse time with the state trying to manage this drought," said Michael Lauffer, chief counsel for the State Water Resources Control Board, which asked the attorney general's office to come to its aid and petition the Supreme Court for depublishing of the court decision.

Lauffer said tiered water rates remain legal if agencies show that prices correlate with the cost of providing service.

"In many respects, the decision is really a show-your-math exercise," he said.

The Association of California Water Agencies, the California State Association of Counties and the League of California Cities also wrote a letter to the high court requesting that the appellate court opinion be depublished.

Lauffer said he expects the Supreme Court to make a decision on the matter within two months.

Kurtis Alexander is a San Francisco Chronicle staff writer. E-mail: kalexander@sfchronicle.com Twitter: @kurtisalexander

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