State high court rejects bid to depublish appellate water ruling

By America Hernandez

The state's highest court on Wednesday stood behind a 4th District Court of Appeal decision striking down arbitrary tiered water rates as unconstitutional, denying requests from Gov. Jerry Brown and Attorney General Kamala Harris to depublish the opinion.

Benjamin T. Benumof, special counsel to Krause Kalfayan Benink & Slavens LLP in San Diego and plaintiff's counsel at the trial level, said he was not surprised that the state Supreme Court rejected the request to depublish, which was filed in June.

"The request acknowledges that the court got it right, and that really they just don't like the opinion," Benumof said.

Brown and Harris had argued that the city of San Juan Capistrano's punitive water rates encouraged compliance with the state's emergency drought regulations and aided conservation efforts. *Capistrano Taxpayers Association Inc v. City of San Juan Capistrano*, S226906.

"With all due respect, they're wrong," Benumof added. "There are millions of ways to conserve water like education, low flow faucets, artificial turf, rationing, and the municipal ordinances penalizing water waste, which most cities including San Juan Capistrano already have."

The Court of Appeal decision does not actually prohibit tiered water rates, but rather arbitrary ones.

In the case brought by taxpayers in San Juan Capistrano, plaintiffs had successfully shown that the city had reverse engineered its water rate tiers based on budget goals rather than the actual cost of delivering water to residents.

The decision echoes a 2nd District Court of Appeal decision holding that the incremental increases between rate tiers need to be justified on a cost basis. *City of Palmdale v. Palmdale Water District*, B224869 (Cal. App. 2nd Dist. Aug. 9, 2011).

A spokesperson for the attorney general's office declined to comment.

Calls late Wednesday to the office of the governor were not returned by time of publication.

The decision comes days after attorneys and brothers Michael K. and Kenneth J. Schmier, who call themselves the Committee for the Rule of Law, sent the court a letter denouncing its practice of depublishing opinions previously certified for publication, a practice which is unique to California.

"The high court's decision puts the water matter temporarily to rest, but doesn't change the fact that they're still routinely depublishing decisions and more importantly, the fact that attorneys are prohibited by the Rules of Court from even mentioning the 93 percent of cases not certified for publication at the risk of being disciplined," said Michael Schmier.

"You can't even tell a three-judge panel on Tuesday what the same panel did on Monday? That's the order against enlightenment."

The city of San Juan Capistrano can still appeal the decision not to depublish the case, Schmier said.

In a four-page letter, the Schmiers called depublication a "breach of the separation of powers, bringing the practice of lobbying to judicial decision-making."

Rather than jumpstart the legislative process to correct unpopular decisions, they argue, the practice serves special interests by circumventing voters and clouding the law.

"Depublished and unpublished decisions hide bad law and sedate the concern of those who would otherwise be affected by such decisions...'because they do not count,'" the letter reads.

america_hernandez@dailyjournal.com