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## Funding a Right to Clean Water: The Financial Challenges of AB 685

By John J. Schatz\*

Philanthropy is commendable, but it must not cause the philanthropist to overlook the circumstances of economic injustice which makes philanthropy necessary.

- *Strength to Love*, Martin Luther King, Jr.

### Background

Assembly Bill 685 declared California's policy that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.<sup>1</sup> AB 685 further stated that "implementation of this section shall not infringe on the right or responsibilities of any public water system."<sup>2</sup> The human right to water has been recognized by the state in one form or another for many years.<sup>3</sup> In 2015, the "Resilient, Affordable, Safe Drinking Water for Disadvantaged Communities Framework" was created.<sup>4</sup> The Framework identified three Legislative Bills as part of a series of measures necessary to ensure that all communities have access to safe and affordable water.<sup>5</sup> The recent flurry of proposed remedial actions is attributed to the drought.<sup>6</sup> Yet, the AB 685 declaration of state policy is only a *brutum fulmen* absent accompanying funding measures that not only invest implementing capital funding, but also establish perpetual operational and maintenance subsidies for the extraordinary costs of water quality treatment systems.<sup>7</sup> A right is meaningless if

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1. AB 685, ch. 524, 2012 Cal. Stat. 91 (Codified at CAL. WATER CODE § 106.3 (West 2012)).

2. *Id.*

3. S. Rules Comm., Off. of S. Floor Analyses of AB 685, dated Aug. 23, 2012.

4. CAL. WATER BOARDS, AFFORDABLE & SAFE DRINKING WATER INITIATIVE FACT SHEET, updated Feb. 7, 2017, [https://www.waterboards.ca.gov/water\\_issues/programs/hr2w/docs/data/fs020817\\_asdw\\_act.pdf](https://www.waterboards.ca.gov/water_issues/programs/hr2w/docs/data/fs020817_asdw_act.pdf) [<https://perma.cc/M PK4-RHAC>].

5. *Id.*

6. Brett Walton, *Deep Drought Stirred Action California's Right to Water*, CIRCLE OF BLUE, (Sept. 12, 2017), <http://www.circleofblue.org/2017/world/deep-drought-stirs-action-californias-right-water/> [<https://perma.cc/GC88-A5AZ>].

7. STATE WATER RESOURCES CONTROL BOARD REPORT TO THE LEGISLATURE, COMMUNITIES THAT RELY ON A CONTAMINATED GROUNDWATER SOURCE FOR DRINKING

there is no means to exercise the right. Can payment for the means to effectuate the rights of some usurp the rights of others? Whose rights are paramount? Where in other contexts the process of balancing rights transcends from a health issue to a moral imperative, rationalization of rights arises.<sup>8</sup>

To what extent would water agencies be forced to comply with the law? The background section of the AB 685 Senate Floor Analysis traces the evolution of water use priority and what that means today in the context of the state's declared policy of the human right to safe and affordable water.<sup>9</sup> The arguments in opposition included in the Analysis foretell the advent of Senate Bill 623 in 2017.<sup>10</sup> The opposition, consisting mostly of water suppliers throughout the state, warily and presciently focused on the requirement that water be "affordable."

### Challenges

AB 685 begged the question of how the extensive implementation costs of underwriting the human right to water will be paid. While there is no credible argument against the right, there is a legitimate debate as to whether the state should accompany its human right declaration with its existing funding sources or if a new revenue stream is required to be generated from California's water users via the water fee that would have been imposed by SB 623.

The expressed concerns of water agencies with SB 623 include:<sup>11</sup> 1) it is highly problematic and not the appropriate response to the problem to require water agencies and cities to impose a tax on water for the state;<sup>12</sup> 2) it is not sound policy to tax something that is a human right;<sup>13</sup> 3) adding the fee works against keeping

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WATER (Jan. 2013) *available at* <https://www.waterboards.ca.gov/gama/ab2222/docs/ab2222.pdf> [<https://perma.cc/RG4L-3QJH>].

8. Frank Zappa: "Well, I'm not here to impinge on anybody else's lifestyle. If I'm in a place where I know I'm going to harm somebody's health or somebody asks me to please not smoke, I just go outside and smoke. But I do resent the way the nonsmoking mentality has been imposed on the smoking minority. Because, first of all, in a democracy, minorities do have rights. And, second, the whole pitch about smoking has gone from being a health issue to a moral issue, and when they reduce something to a moral issue, it has no place in any kind of legislation, as far as I'm concerned."

9. S. Rules Comm., Off. of S. Floor Analyses of AB 685, dated Aug. 23, 2012.

10. S.B. 623 Water quality: Safe and Affordable Drinking Water Fund (Cal. Aug. 21, 2017).

11. See Association of California Water Agencies letter to the Assembly Appropriations Committee (Mar. 7, 2018), [https://www.acwa.com/wp-content/uploads/2017/08/BTB-Coalition-Letter-Budget\\_4\\_13\\_18.pdf](https://www.acwa.com/wp-content/uploads/2017/08/BTB-Coalition-Letter-Budget_4_13_18.pdf) [<https://perma.cc/6QTT-ZHZZ>].

12. While water agencies may be required to impose the tax for the state, it is highly controversial because it has not been done before. Water agencies say the appropriate response is to use other sources of revenue.

13. This is an interesting riposte considering the purpose of the water fee; their real underlying point is whether the human right to water is to be funded from existing state funds or via the creation of a new revenue stream.

water affordable for all Californians;<sup>14</sup> and 4) it is inefficient for local water agencies across the state to collect the tax and send it to Sacramento.<sup>15</sup>

Perhaps water agencies and their customers, with up to one-inch water meters, would willingly pay a nominal amount, such as the \$0.95 per month water fee imposed by SB 623. After all, many of the communities that rely on contaminated groundwater sources are located in agricultural areas that produce the food they eat.<sup>16</sup> But water agencies understand that the establishment of a water fee would be novel and open the door for increased fees for a plethora of water-related projects and programs. Further, once retail agency wallets are opened to create a new revenue source for a state program, the state may reduce funding from its existing revenue sources so that water fees essentially become a means for the state to fund other state programs.

As is often the case with legislation, the concern is the slippery slope precedent and what it may herald rather than opposition to the initial purpose and amount of funding. Can water agencies trust the state to limit the amount of a new water fee as provided in SB 623 or is it an ante for increased fees?<sup>17</sup>

Retail water agencies reside within a heavily regulated environment with myriad competing and constricted funding demands that require adroit public policy and prioritization decisions. Among these funding demands are: meeting stringent water quality requirements for their own customers,<sup>18</sup> water conservation

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14. Imposition of the water tax will increase everyone's water rates, but any source of funding (i.e., bonds) means ratepayers/taxpayers will have to pay. The form of payment in this case (water rates) is the source of controversy.

15. This includes the point that water agencies have to take the heat from their ratepayers for increased rates, charges, and fees rather than the state for collecting money that will not be used for local purposes.

16. STATE WATER RESOURCES CONTROL BOARD REPORT TO THE LEGISLATURE, *supra* note 7.

17. Reports and studies find American customers pay some of the lowest water rates among developed nations. See, G. T. Mehan III & Ian Kline, *Pricing as a demand side management tool: Implications for water policy and governance*, 104 J. AWWA, 61, 62. This may suggest to the state that there is plenty of room for increased rates that would also help effectuate the state's conservation goals and mandates via the economic tool of higher rates.

18. The funding for the implementation of the state drinking water regulatory program is tenuous. Federal funds have either been reduced or can fluctuate by millions of dollars. Safe Drinking Water Account fees on Public Water Systems are structured such that larger Public Water Systems receive the majority of oversight activities even though the greatest oversight need is associated with small Public Water Systems, particularly those that are disadvantaged. STATE WATER RESOURCES CONTROL BOARD REPORT TO THE LEGISLATURE, SAFE DRINKING WATER PLAN FOR CALIFORNIA (June 2015).

mandates,<sup>19</sup> labor costs,<sup>20</sup> and compliance with Proposition 218 concerning water rate increases.<sup>21</sup>

In 2015, the State Water Resources Control Board (“SWRCB”) adopted an emergency regulation implementing Governor Brown’s Executive Order that mandated a 25% statewide reduction in potable urban water use.<sup>22</sup> The regulation effectively required water agencies to increase fixed monthly meter charges and enact higher-tiered water rates in order to pay fixed costs regardless of the amount of water sold.<sup>23</sup> The SWRCB is presently conducting a rulemaking process to create permanent specified water uses regardless of hydrological conditions.<sup>24</sup> It considers the proposed prohibitions on water use for things such as hosing off sidewalks and driveways as supporting the goal of “Making Conservation a California Water of Life.”<sup>25</sup> Water agencies will continue to be in the business of spending their ratepayers’ money to convince customers to use less water—consequently rewarding their efforts with higher water rates. Water agencies must not only spend their ratepayers’ money to persuade them to use less water, but if they are successful in their efforts, the agencies will need to increase water rates to offset the loss of water sales revenue.<sup>26</sup>

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19. Selling less water means there is less revenue to pay water suppliers’ costs. Many of these costs are fixed and must be paid regardless of the volume of water that is sold. PACIFIC INSTITUTE, WATER RATES: CONSERVATION AND REVENUE STABILITY (Jan. 1, 2013).

20. Attracting and retaining qualified employees is essential to water suppliers. Labor costs are typically a major part of water suppliers’ costs. Eric Tsai, *Alameda County Water Rate Increase Driven by Labor Costs, Not Drought*, CALIFORNIA POLICY CENTER (Mar. 13, 2015) <https://californiapolicycenter.org/alameda-water-district-rate-increases-fun-d-pay-increases-not-water-purchases/> [<https://perma.cc/6LLD-P8G8>].

21. Proposition 218 requires water agencies to develop justification for water rate increases that are subject to due process procedures prior to enacting increased rates. LEGISLATIVE ANALYST’S OFFICE, *Understanding Proposition 218* (Dec. 1996), [http://www.lao.ca.gov/1996/120196\\_prop\\_218/understanding\\_prop218\\_1296.html](http://www.lao.ca.gov/1996/120196_prop_218/understanding_prop218_1296.html) [<https://perma.cc/7GT4-NFGK>].

22. The mandates are expected to recur during cyclical droughts; permanent reductions in water usage even in wetter water years can be expected by customers who have substantially changed indoor and outdoor water demands; Cal. Exec. Order No. B-29-15 (Apr. 1, 2015) *available at* [https://www.gov.ca.gov/docs/4.1.1\\_5\\_Executive\\_Order.pdf](https://www.gov.ca.gov/docs/4.1.1_5_Executive_Order.pdf) [<https://perma.cc/EN4Q-CAHL>].

23. PACIFIC INSTITUTE, WATER RATES: CONSERVATION AND REVENUE STABILITY (Jan. 1, 2013) [https://pacinst.org/wp-content/uploads/2013/01/water-rates-conservation\\_and\\_revenue\\_stability.pdf](https://pacinst.org/wp-content/uploads/2013/01/water-rates-conservation_and_revenue_stability.pdf)

24. CAL. WATER BOARDS, MEDIA RELEASE: STATE WATER BOARD ADOPTS REGULATIONS FOR AUGMENTING RESERVOIRS WITH TREATED RECYCLED WATER (Mar. 6, 2018) [https://www.waterboards.ca.gov/press\\_room/press\\_releases/2018/pr\\_recycledwater\\_3\\_6.pdf](https://www.waterboards.ca.gov/press_room/press_releases/2018/pr_recycledwater_3_6.pdf) [<https://perma.cc/BX3U-254A>].

25. CAL. DEP’T OF WATER RESOURCES, MAKING WATER CONSERVATION A CALIFORNIA WATER OF LIFE: IMPLEMENTING EXECUTIVE ORDER B-37-16 FINAL REPORT (Apr. 7, 2017) [http://www.water.ca.gov/LegacyFiles/wateruseefficiency/conservation/doc/s/20170407\\_EO\\_B-37-16\\_Final\\_Report.pdf](http://www.water.ca.gov/LegacyFiles/wateruseefficiency/conservation/doc/s/20170407_EO_B-37-16_Final_Report.pdf) [<https://perma.cc/RP6B-YVTZ>].

26. PACIFIC INSTITUTE, *supra* note 23.

So what does this have to do with SB 623? While local agencies are not required to include the state's water fee as part of their Proposition 218 rate increase processes, higher water bills that include the water fee reduce the amount of a local agency's political headroom with its ratepayers. Depending on the process and means that SB 623 may become law, the state legislative process may independently stand on its own constitutional footing—meaning that the water fee will not be subject to local agencies' Proposition 218 process in order for the local agency to collect the state fee. If the state water fee is not part of a local agency's Proposition 218 process, then the state can effectuate water conservation from Sacramento with the demand-management tool of water fees while generating money for the human right to water and perhaps for other purposes—not to mention the convenience of using local water agencies to collect the water fee. Crowding the water bill with the state water fee further exacerbates the conservation impact on water suppliers that have raised rates to offset reduced water sales. Will this have a chilling effect on the political will of water agencies to raise rates for local purposes, including needed infrastructure replacement? Will this be reflected in a local agency's bond ratings when it attempts to access the market to issue debt?<sup>27</sup>

### What To Do?

In its September 8, 2017 letter to the Assembly Appropriations Committee, the Association of California Water Agencies ("ACWA") suggested several solutions short of the SB 623 water fee that gives water agencies the collywobblers.<sup>28</sup> The solutions included using the federally funded Safe Drinking Water State Revolving Fund to finance capital costs and using General Obligation Bonds to fund drinking water for disadvantaged communities.<sup>29</sup> Senate Bill 5 proposes \$175 million for safe drinking water and two new bond initiatives have been filed with the Attorney General.<sup>30</sup> Both bond initiatives propose \$500 million to prioritize disadvantaged communities. ACWA also suggested agricultural funding by including a nitrate fee in SB 623 and using the state's General Fund to pay the cost of non-nitrate operation and maintenance needs of public water systems in certain disadvantaged communities.<sup>31</sup> Agricultural funding would link the proximate cause of groundwater contamination to funding the water treatment fix for the affected disadvantaged community.

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27. While an initial \$0.95/month water fee appears insignificant, depending on the size of the water supplier, political climate, and potential for the amount of the water fee to increase in the future, these factors must be considered substantial concerns.

28. See letter to the Assembly Appropriations Committee (Aug. 18, 2017) [https://www.acwa.com/wp-content/uploads/2017/08/SB-623-APPROPRIATIONS-Coalition-Letter\\_09\\_08\\_17.pdf](https://www.acwa.com/wp-content/uploads/2017/08/SB-623-APPROPRIATIONS-Coalition-Letter_09_08_17.pdf) [<https://perma.cc/9VR5-N2FE>].

29. *Id.* at 2.

30. *Id.*

31. *Id.*

The January 2013 report to the legislature regarding communities that rely on a contaminated groundwater source for drinking water included the most common types of solutions associated with providing safe drinking water:<sup>32</sup> regional consolidation with a nearby larger public water system;<sup>33</sup> alternative sources of supplies; short-term mitigation measures (i.e., bottled water); new wells; and, water quality treatment. The report mentions treatment systems, including point-of-use/point-of-entry (“POU/POE”) as typically the most cost-effective method of addressing groundwater contamination for small water systems and private well owners.<sup>34</sup> POU/POE treatment systems are the most expeditious way to readily bring local supplies up to drinking water standards and may be the most realistic long-term solution given the time and expense associated with constructing centralized treatment systems.<sup>35</sup> However, POU treatment systems present private property access challenges to the extent the system will require ongoing official inspection, monitoring, and maintenance.

On August 17, 2017, the California Public Utilities Commission (“CPUC”) and the SWRCB conducted a joint public workshop on providing safe drinking water through the consolidation of water systems.<sup>36</sup> The role of the CPUC is notable because it regulates investor-owned water utilities across the state. The majority of these water systems are small with fewer than 500 service connections.<sup>37</sup> The nine largest investor-owned utilities regulated by the CPUC constitute 95% of state residents served by investor-owned utilities, each serving more than 10,000 connections.<sup>38</sup> Small water systems simply do not have a sufficient number of customers to spread the substantial cost of water treatment. With increasingly stringent water testing and quality requirements combined with the need for infrastructure investment, smaller water systems do not possess the

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32. STATE WATER RESOURCES CONTROL BOARD REPORT TO THE LEGISLATURE, *supra* note 7.

33. We may see specific legislative suggestions from water agencies addressing consolidation as a means to facilitate resolution of providing the human right to water.

34. On February 6, 2018, the SWRCB adopted POU and POE permanent regulations in connection with Assembly Bill 434 (2015). See STATE WATER RESOURCES CONTROL BOARD, Resolution No 2018-0008 (Feb. 6, 2018) [https://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2018/rs2018\\_0008\\_with\\_regs.pdf&sa=U&ved=0ahKEwi5s-344L\\_ZAhVr6oMKHfIrD8cQFggFMAA&client=internal-udscse&cx=001779225245372747843:6ygtx6llvco&usg=AOvVaw2xZV1IVKsyxyKyd395vSXt](https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2018/rs2018_0008_with_regs.pdf&sa=U&ved=0ahKEwi5s-344L_ZAhVr6oMKHfIrD8cQFggFMAA&client=internal-udscse&cx=001779225245372747843:6ygtx6llvco&usg=AOvVaw2xZV1IVKsyxyKyd395vSXt) [https://perma.cc/LF2L-C9JU].

35. STATE WATER RESOURCES CONTROL BOARD REPORT TO THE LEGISLATURE, *supra* note 7, at 19.

36. STATE WATER RESOURCES CONTROL BOARD, NOTICE OF WORKSHOP AND OPPORTUNITY FOR PUBLIC COMMENT: PROVIDING SAFE DRINKING WATER THROUGH CONSOLIDATION OF WATER SYSTEMS, [https://www.waterboards.ca.gov/drinking\\_water/programs/documents/joint\\_wkshop\\_swrcb\\_cpuc\\_081717.pdf](https://www.waterboards.ca.gov/drinking_water/programs/documents/joint_wkshop_swrcb_cpuc_081717.pdf) [https://perma.cc/VGQ6-KTPK].

37. *Id.* at 2.

38. CALIFORNIA PUBLIC UTILITIES COMMISSION, Water Division, [www.cpuc.ca.gov/water](http://www.cpuc.ca.gov/water) [https://perma.cc/NPF6-E2HS].

technical, managerial, or financial capabilities to operate viable utilities.<sup>39</sup> What this means is that smaller systems cannot afford to pay these costs. The CPUC adopted a policy in 1997 to encourage the consolidation of smaller water systems with larger water systems.<sup>40</sup> Likewise, Senate Bill 88 authorizes the SWRCB to require certain water systems that consistently fail to provide safe drinking water to consolidate with or receive an extension of service from another public water system.<sup>41</sup> SB 88 includes liability relief for the receiving water system, whether the consolidation is mandatory or voluntary.<sup>42</sup>

While consolidations make sense if larger water systems are proximate to disadvantaged communities with human right to water challenges,<sup>43</sup> this is obviously not physically possible for isolated, small water systems or communities with unconnected clusters of wells.

The SWRCB Affordable & Safe Drinking Water Initiative Fact Sheet (“Fact Sheet”) characterizes “lifeline” rates as a critical need.<sup>44</sup> The Fact Sheet references Assembly Bill 401, pursuant to which the SWRCB is developing a plan for a statewide low-income rate assistance (“LIRA”) program. The SWRCB is required to submit a report to the legislature with its recommendations by February 1, 2018, but has not yet done so. The Fact Sheet mentions Proposition 1 and the Drinking Water State Revolving Fund as potential sources to fund the construction cost of treatment systems,<sup>45</sup> but cryptically states that there are no funding sources available to provide funding for long-term operations and maintenance costs, which public water systems must provide in order to gain access to available capital improvement funding.<sup>46</sup> The Fact Sheet further states that disadvantaged communities often lack the rate base, as well as the technical, managerial, and financial capacity to show they can afford and effectively manage operations and maintenance costs related to water treatment.<sup>47</sup> Without the ability to pay for maintenance, “these communities are effectively barred from accessing capital improvement funding.”<sup>48</sup> As stated above, this de facto restriction exists because the state will not invest funds to construct treatment systems if the means do not exist to operate and maintain them. Consequentially, developing and maintaining ongoing operational and maintenance funding assistance is as critical as funding

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39. CAL. DEP’T OF WATER RESOURCES *supra* note 25.

40. *Id.* at 2.

41. S.B. 88, § 3, (Cal. 2015).

42. CAL. DEP’T OF WATER RESOURCES *supra* note 25, at 3.

43. This assumes state funding will be available to pay the cost of bringing the smaller water system into compliance. *See* STATE WATER RESOURCES CONTROL BOARD, WATER SYSTEM PARTNERSHIPS AND VOLUNTARY CONSOLIDATION, [https://www.waterboard.s.ca.gov/drinking\\_water/certlic/drinkingwater/waterpartnership.shtml](https://www.waterboard.s.ca.gov/drinking_water/certlic/drinkingwater/waterpartnership.shtml) [<https://perma.cc/4N XR-7CKR>].

44. CAL. WATER BOARDS, *supra* note 4.

45. *Id.* at 1-2.

46. *Id.*

47. CAL. WATER BOARDS, *supra* note 4, at 2.

48. *Id.*

the construction of the water treatment systems—otherwise it is like a car without any fuel.

### **Conclusion**

The SB 623 water fee opens a new funding frontier for the legislature under the juggernaut of the human right to water. However, it must be recognized that the water fee precedent is the primary basis of concern and opposition by most water suppliers, more than the purpose or initial amount of the fee. What the water fee precedent portends for future state projects and programs funded by water fees is of great concern to water agencies. How state-imposed water fees may eventually impact the financial stability of local water agencies facing substantial costs in their own backyards should receive equal consideration by the legislature. Local costs include infrastructure replacement, revenue loss from water conservation, and increasing operating and maintenance demands. If imposed, incremental rate impacts will eventually erode ratepayer support for needed local facilities that fund and maintain the water system. This may have the unintended consequence of flipping locally funded infrastructure projects to state bond funding and erode or erase the benefit of water fees for state programs or projects.