# San Juan Capistrano Decision and Implications for Sewer Rate Cases

## Introduction

In a recent decision, *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano*, 235 Cal. App. 4th 1493 (4th Dist. App. 2015), a California appellate court held that tiered rates for provision of drinking water service, while permissible, must be based on a calculation of the actual cost of providing water service to the members of the given tier. The holding was based on a California constitutional amendment, Proposition 218, which prohibits the imposition of fees for government services that exceed the actual cost of providing the service to the property. The decision presents a potential hurdle for tiered sewer rates in California, but the weight and reach of its impact is lessened by the existence of a wealth of case law upholding tiered sewer rates.

## Issue

How will the recent *Capistrano* decision impact the ability of NACWA member agencies to impose tiered rates based on various user classifications?

## Short Answer

The decision will likely have little to no impact on the use of tiered sewer rates. Because the decision is based on a constitutional amendment unique to California, and there is a wealth of case law nationwide supporting the use of tiered rates for sewer service, it is unlikely the decision will have any impact outside of California.

## Analysis

### *The Capistrano Decision*

The recent decision in *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano*, 235 Cal. App. 4th 1493 (4th Dist. App. 2015), arose from a challenge of the City of San Juan Capistrano's imposition of a tiered structure for its water rates. The rates were intended to encourage conservation among its users, with the highest rates imposed upon the highest consumers of water. *Id.* at 1498-99. Specifically, the City classified users based on type and size of property, and then within each class developed four budgets based on prior water use: "low, reasonable, excessive, and very excessive." *Id.* Rather than estimate the cost of providing water to each of these tiers, the City simply "allocated its total costs in such a way that the anticipated revenues from all four tiers would equal its total costs." *Id.*

An association of property owners challenged this tiered rate system, as well as the inclusion of capital costs in the calculation of the fees, under California Proposition 218. Proposition 218, enacted in 1996, established five criteria for "property-related service" fees. Specifically, Proposition 218 states:

> A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
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> 1. Revenues derived from the fee or charge shall not exceed the funds required to provide the property-related service.
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> 2. Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

> 3. The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> 4. No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. . . .
>
> 5. No fee or charge may be imposed for general governmental services . . . where the service is available to the public at large in substantially the same manner as it is to property owners.

Cal. Const. art. XIIID § 6(b). Subdivision b(5) also places the burden of proof on agencies in defending actions brought under the section: "In any legal action contesting the validity of a fee or charge contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." Cal. Const. art. XIIID § 6(b). In two prior cases, the California Supreme Court held that water supply is a "property related service" and is therefore subject to Proposition 218. *See Bighorn-Desert View Water Agency v. Verjil*, 138 P.3d 220, 225 (Cal. 2006); *Richmond v. Shasta Comm. Svcs. Dist.*, 83 P.3d 518, 528 (Cal. 2004).

After a hearing, the trial court found in favor of the property owners, holding that the rates were unconstitutional under Proposition 218's mandate that fees must be limited to the "cost of service attributable to the parcel," explaining that it "could not find any specific financial cost data in the [administrative record] to support the substantial rate increases" in the more expensive tiers. *Id.* at 1501. The challenged capital charges were for the recycling and distribution of treated wastewater, which the property owners challenged because it was not used by residential properties, and the court held these to be unconstitutional as well. *Id.*

On appeal, the court reversed in part and affirmed in part, holding that because recycled water freed up water from other sources for residential users it did not violate Proposition 218, but, more relevant to this discussion, that water rates must reflect the "cost of service attributable to a given parcel" and therefore tiered rates must be based on a calculation of the cost to provide service to properties within the tier to pass muster. *Capistrano* at 1505. While the court found, in principal, that tiered rate structures were permissible, "the tiers must still correspond to the actual cost of providing service at a given level of usage." *Id.* at 1498.

With regard to the tiered water rates, the court explained that the City had failed to meet its burden of "showing its 2010 tiered water fees were proportional to the cost of service attributable to each customer's parcel as required by subdivision (b)(3)." *Id.* The court rejected the notion that the City's calculation was entitled to any sort of deference or legislative discretion, along with the idea that the complexity of calculating exact costs attributable to each tier relieved the City of the duty to do so. The court emphasized that the "cost of service to the parcel" language in Proposition 218 required that the City must not only "balance its total costs of service with its total revenues," but "also had to correlate its tiered prices with the *actual cost of providing water at those tiered levels*." *Id.* at 1506 (emphasis added).

The court further rejected the City's argument that the water conservation mandates in article X, section 2 of the California Constitution required it to balance Proposition 218 with its responsibility to ensure continued water supply for future users. Article X, section 2 requires, in pertinent part, that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Cal. Const. art. X § 2. While the court agreed that providing water under drought conditions substantially increases costs, and that passing on these costs to incrementally higher users "would seem like a

good idea," Proposition 218 nonetheless "does require they figure out the true cost of water." *Capistrano* at 1511. Indeed, the court explained, the two constitutional mandates are not at odds "*so long as, for example, conservation is attained in a manner that shall not exceed the proportional cost of the service attributable to the parcel.*" *Id.*

The court also noted that Proposition 218 represents a paradigm shift from the traditional rational basis and equal protection analysis of tiered water rates. Specifically, the court rejected the pre-Proposition 218 decision in *Brydon v. East Bay Municipal Utility District*, 24 Cal. App.4th 178 (1st Dist. App. 1994), which upheld tiered water and sewer rates under a rational basis analysis, explaining that such an analysis "simply has no application to post-Proposition 218 cases." *Capistrano* at 1512.

## *Impact on California Utilities*

The *Capistrano* decision reflects yet another case in a series of cases imposing a hefty burden on water utilities in their ratemaking efforts under Proposition 218. As the 2014 article, *Paying for Water in California: The Legal Framework*,[1] establishes, rate setting for water utilities in California has become increasingly complex based on the interplay between various constitutional amendments and ensuing court decisions, and significant legislative and policy changes are needed to ensure that continued water service is possible in the state.

As discussed more fully below, California is unique in holding its utilities to such strict standards. California is alone in placing the burden of proof on its utilities and in rejecting traditional rational basis analysis for customer classification in rate setting. Courts nationwide acknowledge that rate setting is not an exact mathematical equation, and that some inequities are permissible so long as the rate structure as a whole is equitable and bears a rational relationship to the service provided.

Notably, the *Capistrano* decision does not take Proposition 218 to its fullest literal reading, but instead leaves open the question of whether it is possible to establish tiered rates that are sufficiently connected to a calculation of the cost of service for a given tier. Proposition 218 states that rates cannot exceed the cost of providing service to "*the property*," while the *Capistrano* decision stands for the proposition that the rates must not exceed the cost of providing service to a given *tier*. It is conceivable that a future decision could eliminate tiered rates, and could even extend to the elimination of standard rates, by requiring that rates be *property* specific, but *Capistrano* does not quite go there. Establishing a rate structure based on the cost of providing water to specific parcels seems an impractical, unreasonable, and costly task, but *Capistrano* makes clear that reasonableness is not a part of the rate-making analysis in California.

On the other hand, if the *Capistrano* court can be taken at its word, and rate calculations do not have to be property specific, tiered rate schemes for sewer utilities may be justified with more ease than for water utilities. Water and sewer services, although intricately connected, are inherently different. For water service, developing tiered rates tied to cost of service is more difficult, because the water provided to customers is almost always the same across customer classes, with some exceptions. By contrast, tiered sewer rates based on user classes may be easier to justify, as the cost to treat wastewater increases or decreases based on volumetric contribution, strength, and composition.

Even so, developing a sufficiently accurate calculation of the cost of providing service within a given tier may nonetheless prove too difficult for sewer utilities. Water rates are capable of relatively exact cost calculations through meters installed in most buildings, and tiers could be developed based on conveyance costs, use of recycled water, etc. The ability of sewer utilities to develop similarly accurate calculations reflecting the cost of

[1] Brian Gray, et al., *Paying for Water in California: The Legal Framework*, 65 Hastings L.J. 1603 (2014).

treatment for a given tier may be hampered by the impracticality—both in terms of cost and engineering—of metering actual usage.

## *Impact of the Decision on Sewer Rates Nationwide is Likely to be Minimal*

Across the country, since at least the 1950s, there is strong precedent in support of equity and reasonableness in rate-making for sewer service. Indeed, many cases note that cost need not be the only factor considered by a utility, and that equity among ratepayers is instead paramount. Thus, absent a trend toward unworkable, Proposition 218 style constitutional amendments, it is unlikely that the *Capistrano* decision will have much impact beyond California.

From even some of the earliest rate-setting cases, courts have consistently held that equitable rates and classification among users, so long as it is rational and there is no discrimination within a given class, is completely acceptable in setting sewer rates. For example, in *Antlers Hotel v. Town of City of Newcastle*, 341 P.2d 951 (Wyo. 1959), the Court upheld the utility's division of users into three tiers based on wastewater strength, holding that they were not arbitrary, capricious, or discriminatory. The case arose from a challenge by hotel and laundromat owners, who counter-sued in a sewer system fee collection suit against them, claiming, among other things, that the rates established by the town were "arbitrary, capricious, discriminatory and not uniform." *Id.* at 955. The Court explained that "not every discrimination is condemned but only a discrimination which is arbitrary in view of the fact that ***it is impossible to measure the justness of a rate upon a mathematical basis***," and that the state statute provides that "a rate shall be fixed which shall ***equitably distribute the cost of service between users***." *Id.* (emphasis added).

Similarly, in *Caldwell v. City of Abilene*, 260 S.W.2d 712 (Tex. Ct. App. 1953), the court refused to hold that cost is the only factor to be considered in establishing tiered rates, and rejected an apartment complex owner's request for an injunction against water and sewer rates that imposed higher fees on apartments than other residential users. The court found that the use of "consuming units" as the basis for the fee was not "without reasonable basis and justification." *Id.* at 714. The court explained that "many factors are properly considered in determining the reasonableness of a classification and ***there is no one factor which is of itself controlling*** to the exclusion of all others," rejecting the idea that "any differentiation in water rates must be based upon the economic factor of cost." *Id.* (emphasis added). Instead, the court explained that rate classes and tiers may be "based upon such factors as the cost of service, the purpose for which the service or product is received, the quantity or amount received, the difference character of the service furnished, the time of its use or ***any other matter which presents a substantial difference as a ground of distinction***." *Id.* (Emphasis added). The court also understood the improbability of requiring perfection in ratemaking, noting that "the interest and needs of the numerous water users served by a city are such that it is improbable, if not impossible, that any classification or rate basis could be devised which would not in some way discriminate against some of the users." *Id.* at 715.

The Nebraska Supreme Court in *Rutherford v. City of Omaha*, 160 N.W.2d 223, 228 (Neb. 1968), similarly noted that "perfection is not the standard of municipal duty" in upholding a rate structure providing a flat rate for residential users and scaled rates for commercial and industrial users. In so holding, the Court explained that "rate differences fairly proportionate to differences in cost or difficulty of service are valid," that there were a broad range of factors the municipality could reasonably consider, and that the rate structure was reasonable despite its failure to achieve "perfect equality." *Id.*

The state of New York in particular has a long history of cases upholding tiered water and sewer rates, beginning with the 1978 pronouncement by the Court of Appeals that "exact congruence between the cost of the services provided and the rates charged to particular customers ***is not required***," in *Watergate II Apartments v. Buffalo Sewer Authority*, 385 N.E.2d 560, 564 (New York 1978)(emphasis added). The Court went on to explain

that "where only an approximation of cost or value is possible, discrepancies may have to be endured in the name of administrative flexibility so long as there exists some rational underpinning for the charges levied," and held that an assessed value based rate for apartment buildings combined with the amount of water consumed "though seemingly less exact, may result in a far more accurate allocation of charges" due to urban density and associated higher construction costs.

More recently, the court in *Arcuri v. Village of Remsen*, 202 A.2d 991, 992 (New York App. 1994), cited *Watergate* in upholding "user unit" based tiered sewer rates, noting that utilities have flexibility to develop rate systems that present a reasonable response to community concerns "while ensuring that the sewer charges would bear a rational relationship to the use of the system." The court rejected the notion that mathematical certainty was required, explaining instead that the law requires only a "rational basis for a legislative classification," and that "the relevant inquiry is whether the Village's formulae reflect reasonable and nonarbitrary interpretations of the statute" rather than the precise cost of providing the service. *Id.* at 993(quoting *Watergate*, *supra* at 564). *See also Rezek v. Village of Richmondville*, 806 N.Y.S.2d 772 (New York App. 2005)(upholding tiered water rates based on use of property, stating "a rational basis rather than mathematical certainty is all that is required"); *Frontier Insurance Co. v. Town Bd. of the Town of Thompson*, 728 N.Y.S.2d 311 (New York App. 2001)(finding equitable basis for sewer rate computation and upholding rates despite utility's inability to "calculate precise individual usage"); *Hull v. Town of Warrensburg*, 620 N.Y.S.2d 570 (New York App. 1994)(upholding tiered rates based on user units and noting that "exact congruence between the cost of the services provided and the rates charged to particular customers is not required")(quoting *Watergate*, *supra*).

Indeed, in a well-reasoned opinion in *Phoenix Associates, Inc. v. Edgewater Park Sewerage Authority*, 428 A.2d 508 (N. J. App. 1981), a New Jersey appellate court explained in detail how individual property use makes perfectly equitable rates nearly impossible:

> Plaintiffs contend they are being discriminated against because defendant charges the same sewer service charge for one- and two- bedroom apartments as it charges for dwelling houses containing three or more bedrooms, adding that it is not arguing that there should be a distinction between an apartment as such and a single-family dwelling as such.
>
> From a practical viewpoint, such position could lead to problems and inequities. The classification of a room as a bedroom by a developer or apartment owner *does not* mean that that is the way the room will be utilized by the occupants. A family owning a three-bedroom house could, for example, use one bedroom as a study, a sewing room, utility room or guest room. A family residing in an apartment could similarly do so. Thus, a three-bedroom apartment could become a two-bedroom apartment with one room utilized for some other purpose. ***Thus, classifications based on the number of bedrooms could fluctuate from month to month, depending on the inclination of the occupants.***

*Id.* at 514 (emphasis added). Thus, in upholding the rate structure, the court noted that "by their very nature sewer rates cannot be fixed so that they will apply with exactness," and that the rates were nonetheless reasonable and not arbitrary. *Id.* at 514. *See also Frontier Ins. Co. v. Town Bd. of Town of Thompson*, 285 A.2d 953 (N.Y. App. 2001)(explaining that "the record clearly establishes the inability of the District to calculate precise individual usage in the absence of individual meters and the presence of the inflow and infiltration problems caused by the age of the system which are unrelated to any actual consumption of services," that "when sewer usage is incapable of calculation with exactitude, discrepancy in charges between various properties within the District may be tolerated so long as a rational basis exists with respect to the rents assessed," and upholding tiered rate structure).

In a small number of cases, courts have overturned rate structures as unreasonable or found them to be inequitable as applied to a particular user, but these cases can be limited to their facts, and in all cases the courts applied the flexible standard requiring equity be the guide. For example, in two cases where water usage was used to calculate sewer rates, courts found that because the particular use made by the customer limited the amount discharged into the sewer system, such a charge was unreasonable as applied to them. In *Concord Steam Corp. v. City of Concord*, 519 A.2d 266, 268-70 (N.H. 1986), the court found in favor of a customer challenged the city's use of water consumption as a basis for sewer rate computation, as only fifteen percent of the water used actually reached the sewer. Similarly, in *North East v. A Piece of Land*, 159 A.2d 528, 530 (Pa. 1960), the customer challenged the sewer rate based on his discharge of only five percent of water used, and the court found that imposition of sewer charges based on quantity of water without regard for its use was "arbitrary, improper, inequitable, and unlawful charge."

But compare these cases with the Iowa Supreme Court's decision in *State of Iowa v. City of Iowa City*, 490 N.W.2d 825 (Iowa 1992), in which the Court recognized how incredibly difficult it can be to actually measure the cost of treating a particular customer's wastewater, or to even accurately measure the amount of flow it contributes to the system. In a challenge brought by the state on behalf of the University of Iowa, it was argued that the sewer rate ordinance as applied to the university was unreasonable because the university alleged that "it cost[] the city significantly less to service the university than it costs to service other customers." *Id.* at 832. In evaluating whether the university had met its burden, the Court quoted a lengthy passage from the district court expressing sheer frustration that "cost of service studies when dealing with a waste water treatment plant are at best difficult," noting that both side's experts "would regard a plus or minus 20 percent degree of accuracy as doing well with the type of study undertaken," and expressing despair that the experts could not agree on a reliable method of measuring infiltration and inflow or even the total inflow into the sewer plant. *Id.* at 832-33. The Court concluded that the rate structure was reasonable as a whole, noting that the cost of service was not the only factor to be considered, and that the university had failed to meet is burden of proving that it was unreasonable as applied. *Id.* at 831-33.

Some courts have also held that for properties located within municipal boundaries, utility rate classifications cannot be based purely on location. For example, in *Landy v. Bellmawr Sewerage Authority*, 161 A.2d 111 (N.J. App. 1960), sewer rates were higher in previously unsewered areas to account for construction of new sewers. The court explained that the utility had broad discretion in setting sewer rates, but that such rates must be "uniform throughout the district for the same type, class and amount or use or service of the sewerage system," and held that the higher fees were discriminatory because they did not provide uniform rates within the same class of sewer usage. *Id.* at 113. The court in *Conner v. City of Elmhurst*, 190 N.E.2d 760, 764 (Ill. 1963), reached a similar conclusion in overturning rates that were higher for previously unsewered areas, and declined to hold that "the determination of a city council to impose higher rates upon some property than those imposed upon other property *receiving the same service*, is conclusive and beyond judicial review." (Emphasis added).

On balance, it is the prevailing precedent across the country that sewer utilities have broad discretion in setting rates, and that there is no perfect formula for doing so. Courts evaluate rate structures based on the equity of the system as a whole, with the few exceptions noted above, generally finding that mathematical exactness is nearly impossible, and that cost of service alone is not only difficult to compute, it is also not the only reasonable measure for rates. Without a significant paradigm shift or constitutional mandate nationwide, it is difficult to imagine that the *Capistrano* case would alter decades of precedent allowing for flexibility. What seems more likely is that as California continues to struggle with adequate methods for rate setting and water conservation, the current unworkable legal framework will be abandoned in favor of more reasonable methods.

## Additional Cases

In addition to the cases discussed above, the following precedent throughout the United States supports the proposition that uniform tiered sewer rates with a rational basis are permissible and that the burden is on the challenger to show otherwise:

Illinois:

*McDonald Homes, Inc. v. Village of Swansea*, 371 N.E.2d 1155 (Ill. App. 1977)(upholding tiered rate scheme and explaining that "a legislative classification is never held to be arbitrary or unreasonable where there is any rational basis for the distinction which reasonably relates to the purposes to be accomplished by the enactment").

Indiana:

*CSL Community Ass'n, Inc. v. Jennings Northwest Regional Utilities*, 749 N.E.2d 567 (Ind. Ct. App. 2003)(upholding sewer rate structure and noting that Indiana regional district rates are not required to be based on the cost of service, but may instead "be determined based on a combination of factors that the board determines is necessary to establish just and equitable rates or charges").

Kansas:

*Eudora Development Company of Kansas v. City of Eudora*, 78 P.3d 437 (Kan. 2003)(upholding tiered sewer rate structure as reasonable, noting the presumption of validity in favor of utility and burden of proof on the challenger, and noting that "the law does not prohibit difference lasses of users being charged according to different rate plans. Kansas courts have recognized that discrimination is a relative term and that absolute equality is seldom, if ever, fully realized").

Michigan:

*Brittany Park Apartments v. Harrison Chrter Twp.*, 443 N.W.2d 161 (Mich. 1989)(upholding classification of apartments as residential units and explaining that burden "is upon the party challenging the legislation to show that the classification established is not rationally related to a legitimate state interest").

Minnesota:

*Daryani v. Rich Prairie Sewer and Water Dist.*, Minn. Ct. App. No. A05-1200, 2006 WL 619058 (2006)(explaining that court was "mindful of our deferential standard of review of legislative action," and reasoning that "while services that are directly rendered require a rate as nearly proportionate to the cost of furnishing the service," this does not prohibit a sewer district from basing its rates on water usage or some other equitable measure).

Missouri:

*Mullenix-St. Charles Properties, L.P. v. City of St. Charles*, 983 S.W.2d 550 (Mo. Ct. App. 1998)(upholding tiered user rates, noting that "the cost of service is but one consideration in the determination of the reasonableness of the rate," explaining that "there is a strong presumption that the rates fixed by the municipality are reasonable" and that "the party challenging the rates has the burden of proving the rates has the burden of proving the rates are unreasonable").

New Hampshire:

*McGrath v. Town of Canaan*, 795 A.2d 828 (N.H. 2002)(upholding minimum availability charge for sewer service, explaining that equitable rates are not required to be based on use, and noting that "water rates may be based upon consumption of water on the premises, number of people served on the premises, or upon some other equitable basis").

Pennsylvania:

*Scott Township Sewer and Water Authority v. Ease Simulation, Inc.*, 2 A.3d 1288 (Pa. Ct. App. 2010)(upholding sewer rate structure and explaining that "rates need not be proportioned with exactness to use made or the cost to the individual customer, so long as it is reasonably related to the cost of maintaining the service for all the customers, and the customers challenging the rates receive some benefit from the system").

*Life Services, Inc. v. Chalfont-New Britain Twp. Joint Sewage Authority*, 528 A.2d 1038 (Pa. Ct. App. 1987)(upholding tiered rate structure and noting rates "must have a reasonable relation to the *value* of the service rendered either as actually consumed or as readily available for use" and that rates are not required to be established "*solely* upon the services actually consumed").

*Fairwood Manor Associates v. Borough of Irwin*, 511 A.2d 936 (Pa. Ct. App. 1986)(upholding user classifications).
*White Rock Sewage Corp. v. Monroe Twp.*, 465 A.2d 102 (Pa. Ct. App. 1983)(upholding user classifications and noting that "as long as a charge is uniform within a classification and is reasonably proportional to the service rendered, the court will not interfere with the municipality's discretion in the matter").

*Patton-Ferguson Joint Authority v. Hawbaker*, 322 A.2d 783 (Pa. Ct. App. 1974)(upholding sewer rate classifications and explaining that "where the classification of users has not been proved to be unreasonable and is clearly uniform, flat rate sewer rental which reasonably relates to the value of the service rendered may be applied").

*Gericke v. City of Philadelphia*, 44 A.2d 233 (Pa. 1945)(upholding sewer rate classifications and concluding that the sewer rates were "equitably apportioned" and that "any individual inequities are of such character as not to invalidate the act as a whole").

Texas:

*Bexar County v. City of San Antonio*, 352 S.W.2d 905 (Tex. 1961)(upholding graduated sewer rates based on water use and noting that "it would certainly be very expensive, if not an impossible undertaking, to measure the amount of sewerage discharged by each user. A sewer charge based upon the amount of water used on given premises which goes into the sewer, but the [sic] that it is not mathematically correct does not render such a rate unreasonable, arbitrary, otherwise illegal").

Vermont:

*Vermont North Properties v. The Village of Derby Center*, 102 A.3d 1084 (Vt. 2014)(noting the highly deferential standard of review with the burden on the challenging party, explaining that "in the context of sewer rates that our law requires that rates be fair, equitable and reasonable," rejecting the requirement that rates be based on "actual cost" of service, and holding that tiered rate structure was reasonable).

*Goldman v. Town of Plainfield*, 762 A.2d 854 (Vt. 2000)(upholding classification of sewer users based on nature of use and other factors and noting that under equal protection analysis, rates "may be charged to various classes of customers if the classifications are reasonable, such as based on the quantity used, the time used, the purpose of the use, and other such factors").

Washington:

*Morse v. Wise*, 226 P.2d 214 (Wash. 1951)(upholding user classifications, finding that "we must realize some [users] will require a greater amount of service than others, and therefore it is proper that the users of the sewers be divided into classes or groups according to use as near as it is possible or practicable to do so").