



MEMORANDUM

Date: August 17, 2022

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: Jan Leshner 
County Administrator

Re: **City of Tucson Differential Water Rate Lawsuit Update**

On [July 5, 2022](#), I informed you that all filings related to the City of Tucson's Motion to Dismiss the equal protection claims in the County Complaint had been completed. The equal protection claims, comprising Counts III and IV of the County Complaint, assert that the City of Tucson differential water rate denies equal protection under the United States and Arizona Constitutions based on both similarly situated customers and race-based discrimination.

The County requested an opportunity for oral arguments prior to the Court ruling on the motion, which was granted, as communicated to you on [July 18](#).

The hearing on the Motion to Dismiss the equal protection claims was held August 12 in Maricopa Superior Court. Judge Warner asked questions of both parties regarding the constitutional issue of standing and issued a Minute Entry on August 16 ruling the County has no standing to bring the discrimination claim and that a privileges and immunities type claim is precluded by prior Arizona Supreme Court precedent (attached). We will not be pursuing the privileges and immunities claim further at this time, but the Court's ruling on this issue may be the subject of a post-trial appeal. I am working with our attorneys to address the discrimination claim.

This ruling does not affect other Counts in the County Complaint seeking injunctive and declaratory relief based on violation of Arizona Revised Statutes requiring that rates be "just and reasonable"; common law rate discrimination by not treating similarly situated customers equally; and violation of Article IV, Part 2, Section 19 of the Arizona Constitution prohibiting governments from enacting "special laws".

Please let me know if you have any questions.

JKL/dym

Attachment

c: Carmine DeBonis, Jr., Deputy County Administrator
Yves Khawam, PhD, Senior Advisor, County Administrator's Office

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-001141

08/16/2022

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
A. Meza
Deputy

PIMA COUNTY

JEFFREY WILLIS

v.

CITY OF TUCSON, et al.

CHARLES W WIRKEN

BRETT W JOHNSON
CHRISTOPHER E AVERY
JUDGE WARNER

MINUTE ENTRY

The City of Tucson's Motion To Dismiss Plaintiff's Equal Protection Claims (Counts III and IV) is under advisement after argument. For reasons that follow, the Motion is granted.

1. Background.

This case involves water rates the City of Tucson charges Pima County and water users outside Tucson city limits. Pima County claims, among other things, that Tucson violates equal protection and Arizona's equal privileges and immunities clause by charging customers outside city limits more than customers within city limits. The Motion to Dismiss—which the Court treats as a motion for judgment on the pleadings, since an answer has been filed—seeks dismissal of the equal protection and equal privileges and immunities claims.

2. Jung v. City of Phoenix Precludes Equal Protection And Equal Privileges And Immunities Claims Based On Different Rates Between Residents And Non-Residents.

Tucson argues that *Jung v. City of Phoenix*, 160 Ariz. 38, 770 P.2d 342 (1989), precludes equal protection and equal privileges and immunities claims based on rate discrimination. Like this case, the plaintiff in *Jung* alleged that the City of Phoenix charged customers outside city

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limits more for water service than it charged customers within city limits. The Supreme Court held that this allegation could state a claim under Arizona statute, but not a constitutional claim. “The plaintiffs,” the Court reasoned, “have no constitutional right to receive water at a particular rate.” 160 Ariz. at 39, 770 P.2d 343.

Jung is controlling here. It holds that different water rates for those within and outside city limits does not violate equal protection. Although Pima County argues that *Jung* is inconsistent with modern equal protection precedents, the case has not been overruled so the Court must follow it.

Jung does not, however, address suspect class discrimination in ratemaking. One of Pima County’s claims is that Tucson discriminates between Native Americans and Non-Native Americans by providing more favorable rates to Native American tribes. Nothing in *Jung* precludes a claim that water rates unconstitutionally discriminate based on a suspect class like race.

3. Pima County Cannot Assert An Equal Protection Or Equal Privileges And Immunities Claim On Its Own Behalf.

Yet Pima County cannot claim suspect class discrimination on its own behalf. That is because it is not a “citizen” or a “person” with rights under the equal protection or equal privileges and immunities clauses. *See Braden Trust v. County of Yuma*, 205 Ariz. 272, 277, 69 P.3d 510, 515 (App. 2003) (“Being neither a ‘citizen’ under Article 2, Section 13 of the Arizona Constitution nor a ‘person’ within the meaning of the Fourteenth Amendment to the United States Constitution, the County may not assert an equal protection claim.”). Pima County concedes this point, but claims it can represent the rights of its residents under the doctrine of “*jus tertii*.”

4. Pima County Does Not Have Third-Party Standing To Assert A Race Discrimination Claim.

The U.S. Supreme Court described the doctrine of *jus tertii* as follows:

Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of *jus tertii* standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected

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properly to frame the issues and present them with the necessary adversarial zeal.

Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984). The Arizona Supreme Court similarly described third-party standing in a footnote:

In some instances, a party may have standing to protect a constitutional right possessed solely by a third person and not by the party. To have such standing, the party must have a substantial relationship to the third person, the third person must be unable to assert the constitutional right on his or her own behalf, and the failure to grant the party standing must result in a dilution of the third person's constitutional rights.

State v. B Bar Enterprises, Inc., 133 Ariz. 99, 101 n.2, 649 P.2d 978, 980 (1982).

This doctrine does not apply here because there is no obstacle to Pima County residents asserting a race discrimination claim on their own behalf. Either as individuals or in a class action, if Pima County residents wish to challenge Tucson's water rates on the ground that they unconstitutionally favor Native American tribes, they can do so.

Pima County further argues that the standing requirement is prudential and the Court should waive it. The Supreme Court has made clear that courts should waive standing only in exceptional cases. *Bennett v. Brownlow*, 211 Ariz. 193, 196, 119 P.3d 460, 463 (2005). Because Pima County residents can assert a race discrimination claim on their own behalf, policy considerations do not justify waiving standing here.

5. **Order.**

IT IS ORDERED granting the Motion.