No. S226036

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN BUENAVENTURA,
Plaintiff, Cross-Defendant and Appellant,

v.

UNITED WATER CONSERVATION DISTRICT et al.,
Defendants, Cross-Complainants and Appellants.

After a Decision by the Court of Appeal
Second Appellate District, Division Six, Case No. B251810

Superior Court of Santa Barbara County
Superior Court Case Nos. VENCI 00401714 and VENCI 1414739
Honorable Thomas Pearce Anderle, Judge

APPLICATION OF JACK COHEN (IN HIS CAPACITY AS A PROPOSITION 218 DRAFTER) FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFF CITY OF SAN BUENAVENTURA

JACK COHEN, SBN 123022
Attorney at Law
Post Office Box 6273
Beverly Hills, California 90212
(424) 202-0724

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.520(f) of the California Rules of Court, JACK COHEN (hereafter "Applicant") respectfully requests permission to file an amicus curiae brief in this case (Case No. S226036) in support of Plaintiff, Cross-Defendant and Appellant, City of San Buenaventura. The proposed amicus curiae brief is combined with this application.

Applicant is an attorney and one of the drafters of Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution and was approved by California voters in November 1996. Applicant has a major interest in seeing that Proposition 218 is effectuated consistent with its stated purposes and intent, including the constitutional provisions applicable to property-related fees and charges contained in article XIII D of the California Constitution.

Applicant states there is nothing to identify or disclose under the provisions of Rule 8.520(f)(4) of the California Rules of Court.

Applicant is familiar with the legal issues involved in this case. Applicant believes there is a need for additional briefing because this case involves the interpretation of important constitutional protections under Proposition 218 that will affect millions of property owners in California. Applicant further believes there is a need for additional briefing in this case to help ensure that the interests of private property owners are adequately protected with regard to the Proposition 218 issues presented.

Applicant believes the arguments contained in the proposed amicus curiae brief will assist the Court in resolving this case in a manner that effectuates the purposes and intent of Proposition 218. The proposed amicus curiae brief will focus only on the Proposition 218 issues presented, including the validity of the subject groundwater extraction charges under Proposition 218.

For the foregoing reasons, Applicant respectfully requests leave to file the proposed amicus curiae brief that is combined with this application.

Dated: November 16, 2015

Respectfully submitted,

Jack Cohen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION.

In November 1996, California voters approved Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution. This case (hereafter "*United Water*") concerns issues relating to the validity under Proposition 218 of groundwater extraction charges levied and collected by the United Water Conservation District (hereafter "District") located in Ventura County. The District is organized and operated under the Water Conservation District Law of 1931 (Wat. Code, § 74000 et seq.).

This Court limited review in *United Water* to the following issues: (1) Do the District's groundwater pumping charges violate Proposition 218 or Proposition 26? (2) Does the rate ratio mandated by Water Code section 75594 violate Proposition 218 or Proposition 26? This brief will focus only on the Proposition 218 issues presented.

II. THE COURT OF APPEAL INCORRECTLY CONCLUDED THAT THE SUBJECT GROUNDWATER EXTRACTION CHARGES ARE NOT PROPERTY-RELATED FEES UNDER PROPOSITION 218.

Under article XIII D of the California Constitution, the term "fee" or "charge" (commonly referred to as a "property-related fee") means "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (Cal. Const., art. XIII D, § 2, subd. (e).)

The Court of Appeal in *United Water* concluded that the subject groundwater extraction charges are <u>not</u> property-related fees under

Proposition 218. (Opn. at p. 2.)[1] However, this conclusion conflicts with the decisions in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 ("*Pajaro Valley*") and *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 ("*Griffith*") which both concluded that a local groundwater extraction charge is a property-related fee subject to the requirements of Proposition 218.

The specific conflict involves whether a groundwater extraction charge is imposed "as an incident of property ownership" under the property-related fee constitutional definition (Cal. Const., art. XIII D, § 2, subd. (e)). *United Water* concluded that a groundwater extraction charge is "better characterized as a charge on the activity of pumping than a charge imposed by reason of property ownership" (Opn. at p. 20) while *Pajaro Valley* concluded that a groundwater extraction charge "is not actually predicated upon the *use* of water but on its *extraction*, an activity in some ways more intimately connected with property ownership than is the mere receipt of delivered water." (*Pajaro Valley*, *supra*, 150 Cal.App.4th at p. 1391, italics in original.)[2] *Griffith*, which involved the same groundwater charge as in *Pajaro Valley*, came to the same conclusion (*Griffith*, *supra*, 220 Cal.App.4th at p. 594.)[3] The trial court in *United Water*, relying on *Pajaro Valley*, also concluded that the subject groundwater extraction charges were property-related fees under Proposition 218. (Opn. at p. 2.)

Whether a groundwater extraction charge is a property-related fee under Proposition 218 depends upon whether the charge is more like the business inspection fee found not to be a property-related fee in *Apartment*

---

[1] Opinion references are to the Court of Appeal opinion in *United Water* filed on March 17, 2015.

[2] A Petition for Review in *Pajaro Valley* was denied by this Court on September 12, 2007. (*Pajaro Valley, supra*, 150 Cal.App.4th at p. 1398.)

[3] A Petition for Review in *Griffith* was denied by this Court on January 21, 2014. (*Griffith, supra*, 220 Cal.App.4th at p. 606.)

Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830 ("*Apartment Association*"), or more like the consumption-based water delivery charge found to be a property-related fee in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 ("*Bighorn*"). *Bighorn* held that ongoing water delivery charges are property-related fees imposed "as an incident of property ownership" under Proposition 218, regardless of whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. (*Id.* at pp. 216-217.)

In addition, whether a groundwater extraction charge is a property-related fee under Proposition 218 is a "question of law for the appellate courts to decide on independent review of the facts." (*Apartment Association, supra*, 24 Cal.4th at p. 836.)

Relying on *Orange County Water Dist. v. Farnsworth* (1956) 138 Cal.App.2d 518 ("*Farnsworth*"), a case that predated Proposition 218 by 40 years, *United Water* concluded that a "pump fee" is "better characterized as a charge on the activity of pumping than a charge imposed by reason of property ownership. Given this characterization, the facts here are not materially different from those in *Apartment Association*." (Opn. at p. 20.)[4] Following this Court's decision in *Bighorn*, the foregoing conclusion is not a correct interpretation of the law under Proposition 218.

Farnsworth held that a water replenishment assessment was not an unlawful tax on the ownership and use of property in violation of the California Constitution (Cal. Const., art. XIII, § 1 [uniformity of taxation requirement for property taxes]). (*Farnsworth, supra*, 138 Cal.App.2d at pp. 529-530.) Although the "pump fee" in *Farnsworth* was not an unlawful tax

---

[4] Newspaper articles at the time generally referred to the "pump fee" in *Farnsworth* as a "pump tax," with one article referring to it as a "revolutionary form of tax, first of its kind in California." (*Santa Ana River Pump Tax Ordered*, L.A. Times (Jun. 11, 1954) p. 22.)

on the ownership and use of property under article XIII, section 1 of the California Constitution, this does not mean that a "pump fee" cannot be imposed "as an incident of property ownership" under article XIII D of the California Constitution. Each of the foregoing constitutional provisions must be interpreted in a manner consistent with their language, purpose, and intent.

This Court addressed a similar situation interpreting Proposition 218 in *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 ("*Richmond*") in responding to an argument that since under *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154 ("*San Marcos*") a capacity charge was an "assessment" for purposes of exempting public entities therefrom (Cal. Const., art. XIII, § 3, subd. (b) [local government exemption from property taxation]) it should also be an "assessment" for purposes of article XIII D. (*Richmond, supra,* 32 Cal.4th at pp. 421-422.) In rejecting the foregoing argument, this Court stated that in *San Marcos* it sought to determine and effectuate the constitutional purpose for exempting public entities from property taxes while article XIII D contained its own separate constitutional definition of an "assessment." (*Id.* at pp. 422-423.)

Similarly, article XIII D contains a separate constitutional definition of a property-related fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Cal. Const., art. XIII D, § 2, subd. (e).) The constitutional definition of a property-related fee under Proposition 218 expressly includes levies upon persons, including user fees or charges for property-related services, which is significantly broader than the narrow scope of levies imposed "by reason of property ownership" that are subject

to the restrictions under article XIII, section 1 of the California Constitution (See *City of Oakland v. Digre* (1988) 205 Cal.App.3d 99, 106 [property tax generally triggers no personal liability, but is secured by the property taxed]).

Pajaro Valley also cited *Farnsworth*, but only on the issue of whether the subject groundwater charge was a special tax and not on the issue of whether the charge was a property-related fee under Proposition 218. (*Pajaro Valley*, *supra*, 150 Cal.App.4th at pp. 1380-1381.) Other than *United Water*, no published Proposition 218 case to date has cited *Farnsworth* on the issue of whether a levy is a property-related fee under Proposition 218. Furthermore, *Farnsworth* predated Proposition 218 by 40 years, and pre-Proposition 218 cases are generally not instructive in determining whether a levy is a property-related fee under the constitutional definition contained in article XIII D. (Cf. *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 452 [pre-Proposition 218 cases not instructive in determining whether a benefit justifying an assessment is "special" under Proposition 218 constitutional definition] ("*Silicon Valley*").)

Pajaro Valley did initially conclude, prior to *Bighorn*, that a groundwater extraction charge was not "imposed . . . as an incident of property ownership" under Proposition 218 because it was "imposed not on property owners as such, or even well owners as such, but on persons *extracting groundwater* from the basin." (*Pajaro Valley*, *supra*, 150 Cal.App.4th at p. 1385, italics in original.)[5] In doing so, like in *United Water*, *Pajaro Valley* relied on the decisions in *Richmond* and *Apartment Association*. (*Id.* at pp. 1385-1386.) However, following rehearing the court

[5] On August 25, 2006, the Court of Appeal granted rehearing in *Pajaro Valley* to consider the effect of the *Bighorn* decision. (See Register of Actions, H027817.) This Court filed its decision in *Bighorn* on July 24, 2006. (See Register of Actions, S127535.)

in *Pajaro Valley* reexamined its initial conclusion and abandoned it in light of *Bighorn*. (*Id.* at p. 1386.)

As stated in *Pajaro Valley*: "It would appear that the only question left for us by *Bighorn* is whether the charge on groundwater extraction at issue here differs materially, for purposes of Article XIII D's restrictions on fees and charges, from a charge on *delivered* water. We have failed to identify any distinction sufficient to justify a different result, and the Agency points us to none." (*Id.* at pp. 1388-1389, italics in original.)

United Water attempted to distinguish *Pajaro Valley* by claiming "the vast majority of property owners in the Pajaro Valley obtained their water from wells, and that alternative sources were not practically feasible." (Opn. at p. 18.) In *United Water*, the proportion of residential customers who pump water in lieu of connecting to an existing water delivery network relative to the number of residential customers receiving delivered water was deemed "insubstantial." (Opn. at pp. 18-19.)[6] However, *United Water* didn't explain or otherwise provide a legal basis for how this factual distinction was legally sufficient to bring the subject groundwater extraction charges outside the scope of article XIII D as a property-related fee, especially in light of *Bighorn*.

The analysis in *United Water* also disregarded the fact that the importance of groundwater as a resource varies significantly throughout hydrologic regions in California. (Dept. of Water Resources, California's Groundwater: Bulletin 118 - Update 2003, p. 113 . < http://www.water.ca.gov/pubs/groundwater/bulletin_118/california's_groundwater__bulletin_118_-_update_2003_/bulletin118_entire.pdf > [as of Nov.

[6] This is not surprising inasmuch as within the boundaries of the District are several well developed cities in Ventura County, including Oxnard, with most parcels having service connections to a domestic water delivery system. (See Opn. at p. 3.)

16, 2015] ("Bulletin 118").) *United Water* cited no legal authority in support of the proposition that variability of groundwater resources by geographic location has any legal bearing on whether a groundwater extraction charge is a property-related fee under Proposition 218.

Furthermore, under the reasoning in *United Water*, there would effectively exist an arbitrary "pump-to-delivery ratio" (i.e., number of customers who pump water relative to the number of customers receiving delivered water) that must be exceeded for the property-related fee provisions of Proposition 218 to apply. This would mean that customers engaging in the same activity of extracting groundwater would have Proposition 218 protections in some areas of the state (where the arbitrary "ratio" was exceeded such as in *Pajaro Valley*) but not in other areas of the state (where the arbitrary "ratio" was not exceeded such as in *United Water*). Also, the "ratio" for a local agency could decrease over time whereby customers could lose their Proposition 218 protections in the future due to increased development in their area. (See, e.g., *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 80 [agricultural pumping rapidly declined as agricultural lands were developed commercially and residentially and were served with water by new connections].)

There is nothing in the constitutional language of Proposition 218, or in any expression of voter intent, to support such discordant results. The status of a groundwater extraction charge as a property-related fee under Proposition 218 does not depend upon some arbitrary "pump-to-delivery ratio," as would be the case under the reasoning in *United Water*.[7]

---

[7] The arbitrary "pump-to-delivery ratio" under the reasoning in *United Water* would be somewhere between "vast majority" (*Pajaro Valley* where the groundwater charge was property-related under Proposition 218) and "insubstantial" (*United Water* where the groundwater charge was not property-related under Proposition 218).

A. There Exists No Regulatory Fee or Purpose Exception For Property-Related Fees Under Proposition 218.

United Water also sought to distinguish *Pajaro Valley* by claiming a "regulatory purpose" of "conserving water resources" behind the groundwater extraction charge. (Opn. at p. 19.) In *Pajaro Valley*, the court unnecessarily speculated that a regulatory purpose, such as imposition of a graduated charge to discourage intensive uses and encourage less intensive ones, might possibly bring a groundwater charge outside the scope of article XIII D. (*Pajaro Valley, supra,* 150 Cal.App.4th at p. 1390.) Such speculation was unnecessary because the groundwater charge in *Pajaro Valley* did not serve any "regulatory purpose." (*Ibid.*)

In support of its conclusion that the groundwater extraction charges serve a "regulatory purpose" and are not property-related fees under article XIII D, *United Water* cited the water conservation provisions of article X, section 2 of the California Constitution. (Opn. at p. 19.) However, even if such a "regulatory purpose" exists, recent Proposition 218 cases have harmonized the water conservation "regulatory purpose" provisions of section 2 of article X with the requirements for property-related fees under section 6 of article XIII D to give proper effect to <u>both</u> provisions.

Article X, section 2 is not at odds with article XIII D <u>so long as</u> water conservation is attained in a manner that does not exceed the proportional cost of the service attributable to the parcel. (*City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 936-937 ("*Palmdale Water*").) Furthermore, section 2 of article X and article XIII D work together to promote increased supplies of water. (*Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1511 ("*Capistrano*").) To the extent any "regulatory purpose" may exist under section 2 of article X for a groundwater charge, that is not a legal basis

for excepting that charge as a property-related fee under Proposition 218, as the court improperly did in *United Water*. Rather, section 2 of article X must be harmonized with article XIII D to give proper effect to both constitutional provisions as was done in *Palmdale Water* and *Capistrano*.

Proposition 218 contains no "regulatory fee or purpose" exception for property-related fees. To the extent any exceptions exist for property-related fees under Proposition 218, they are expressly stated in article XIII D such as fees imposed as a condition of property development (Cal. Const., art. XIII D, § 1, subd. (b)) and fees for the provision of electrical or gas service (Cal. Const., art. XIII D, § 3, subd. (b)). Where the language Proposition 218 is clear, and there is no suggestion of any conflicting voter intention, the courts have no authority to engraft an exception onto the constitutional provisions adopted in Proposition 218. (*Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 925.)

Furthermore, the status of a levy as a property-related fee under Proposition 218 is not altered by the fact that the levy could additionally serve a regulatory or police power function. (Cf. *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1424 [landfill user fee that additionally served a regulatory or police power function is still a user fee].) If that weren't the case, a large loophole in article XIII D would be created that it would virtually repeal the property-related fee provisions under Proposition 218. (See *Capistrano, supra*, 235 Cal.App.4th at p. 1515.) For example, many charges for property-related services under Proposition 218 such as water, sewer, or refuse collection services can additionally serve a regulatory or police power function. (See *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, 101-103.) If a charge could avoid the property-related fee provisions of Proposition 218 merely by the fact that the charge could additionally serve a regulatory or police power function, the scope of levies

subject to the article XIII D property related fee provisions would be severely limited. Such a limitation would also be inconsistent with the liberal interpretation provision of Proposition 218 which constitutionally commands that its provisions "be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5, reprinted in *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006, 1022).

Proposition 26 also does not carve out a regulatory exception to, or otherwise weaken, the property-related fee provisions under article XIII D. Proposition 26, approved by California voters in November 2010, amended section 1 of article XIII C (part of Proposition 218) to include a broad constitutional definition of "tax" for purposes of article XIII C, including seven exceptions to the constitutional definition. (Cal. Const., art. XIII C, § 1, subd. (e).) One of those exceptions is for proper regulatory fees imposed by local governments. (Cal. Const., art. XIII C, § 1, subd. (e), par. (3).)

Even if a regulatory fee qualifies under the Proposition 26 regulatory exception, all this means is the fee is not a "tax" under article XIII C. It would not affect the status of the levy as a property-related fee under article XIII D. There is nothing in the language of Proposition 26 to suggest it was intended to create a regulatory exception to (or otherwise weaken) the property-related fee provisions under article XIII D. Rather, Proposition 26 "was an effort to close perceived loopholes in Propositions 13 and 218." (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322.)

Arguments in support of a "regulatory purpose or fee" exception for property-related fees under Proposition 218 are fueled by the erroneous assumption that regulatory fees and property-related fees are mutually exclusive. That if a charge can be categorized as a regulatory fee it cannot legally be a property-related fee under Proposition 218.

The apparent foundation for this argument can be traced to pre-Proposition 218 cases involving the issue of whether a levy is a regulatory fee or a tax subject to the constitutional restrictions under Proposition 13. (See, e.g., *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 ("*Sinclair Paint*").)[8] The legal resolution of such issues under Proposition 13 (i.e., whether or not a levy was a tax subject to the requirements of Proposition 13) was generally mutually exclusive in nature. If a levy were deemed a regulatory fee, it would not be a tax for purposes of Proposition 13. However, the mere fact that a levy is regulatory is not enough, by itself, to remove or otherwise exclude that levy as a property-related fee under article XIII D. (*Apartment Association, supra*, 24 Cal.4th at p. 838.) In other words, regulatory fees and property-related fees are not mutually exclusive under Proposition 218.

B. The Property-Related Fee Provisions Under Proposition 218 Are Not Limited to Residential Uses of Property.

In the wake of *Bighorn, Pajaro Valley* also engaged in unnecessary speculation in offering legal theories under which some water charges, such as those for nonresidential purposes, could possibly fall outside the scope of article XIII D. (*Pajaro Valley, supra*, 150 Cal.App.4th at pp. 1389-1390.) Consideration of such dubious legal theories was not appropriate in *Pajaro Valley* because, as the court stated: "We need not decide the soundness of these theories in the wake of *Bighorn*, because they cannot sustain the charge before us in any event." (*Id.* at p. 1390.)

In *Bighorn*, the Bighorn-Desert View Water Agency ("Agency") provided domestic water service to residents in its service area. (*Bighorn,*

[8] Although *Sinclair Paint* was decided after the passage of Proposition 218 in 1996, the case was not concerned with issues arising under Proposition 218. (*Sinclair Paint, supra*, 15 Cal.4th at p. 873, fn. 2.)

supra, 39 Cal.4th at p. 209.) In fact, residential customers represent nearly 100% of the Agency's customer base. (Bighorn-Desert View Water Agency, Comprehensive Annual Financial Report, Fiscal Year Ended June 30, 2014, p. II <http://www.bdvwa.org/wp-content/uploads/2014/11/Annual-Financial-Report-FY-Ended-June-30-2014.pdf> [as of Nov. 16, 2015].) While the foregoing represented the facts in *Bighorn*, there is no indication whatsoever this Court limited the scope of the property-related fee provisions under Proposition 218 to water charges for residential purposes.[9]

Property-related fee cases following *Bighorn* are consistent with the foregoing conclusion. Examples where property-related fees were involved in the application of article XIII D provisions to nonresidential water users include *Palmdale Water, supra*, 198 Cal.App.4th at p. 928; *Capistrano, supra*, 235 Cal.App.4th at p. 1499; and *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 898. There is also nothing in the language of Proposition 218, especially considering the liberal interpretation provision thereunder (Prop. 218, § 5), to indicate that the property-related fee provisions under article XIII D do not apply to nonresidential users of water.

C. The Sustainable Groundwater Management Act Is Of Little Legal Value For Purposes Of Determining Whether Groundwater Extraction Charges Are Property-Related Fees Under Proposition 218.

United Water also cited the recently enacted Sustainable Groundwater Management Act (Wat. Code, § 10720 et seq.) ("Groundwater Act") in support of its conclusion that the subject groundwater extraction charges are not property-related fees under Proposition 218. (Opn. at p. 23.) *United*

---

[9] In *Richmond*, which was frequently cited in *Bighorn*, the local agency (Shasta Community Services District) operated a water system for residential and commercial users. (*Richmond, supra*, 32 Cal.4th at p. 415.)

Water stated that since "the Legislature required groundwater sustainability agencies to impose some but not all groundwater extraction fees in compliance with article XIII D suggests that, in its view, compliance is not constitutionally required." (*Ibid.*)

As *United Water* noted, the foregoing may represent the "view" of the Legislature, but the "view" that counts in interpreting the constitutional provisions of Proposition 218 is that of the courts. When the Groundwater Act was enacted in 2014 (Stats. 2014, chs. 346, 347, 348), groundwater extraction charges were deemed property-related fees under Proposition 218 both in *Pajaro Valley* and *Griffith*. There was no case law on the books holding that a groundwater extraction charge was not a property-related fee under Proposition 218.

Given the specific language used in the Groundwater Act requiring compliance with certain provisions of article XIII D (Wat. Code, § 10730.2, subd. (c)), the apparent purpose was merely to codify the recent decision in *Griffith*.[10] The foregoing statutory language referenced subdivisions (a) and (b) of Section 6 of Article XIII D of the California Constitution, but not subdivision (c) which contains the voter approval requirement for property-related fees. *Griffith* held that a groundwater extraction charge is exempt from the voter approval requirement for property-related fees because it is for "water service." (*Griffith, supra*, 220 Cal.App.4th at pp. 595-596.)

The practical effect of the court's reasoning in *United Water* in its analysis under the Groundwater Act is to create a regulatory exception for many groundwater extraction charges from the property-related fee

---

[10] An alternative interpretation of the Water Code section requiring compliance with certain provisions of article XIII D is that it creates an independent statutory obligation to comply with the referenced property-related fee provisions under Proposition 218.

provisions under Proposition 218. There is no legal basis, constitutional or otherwise, for such a regulatory exception.

If a levy such as a groundwater extraction charge is a property-related fee under Proposition 218, then it doesn't matter whether the enabling statute authorizing the imposition of that levy includes express language requiring Proposition 218 compliance. The levy nonetheless must comply with applicable statutory and constitutional requirements such as those under Proposition 218. (*Ventura Group Ventures, Inc. v. Ventura Port Dist.* (2001) 24 Cal.4th 1089, 1104 ("*Ventura Group Ventures*").)

In enacting the Groundwater Act, it was the intent of the Legislature to enhance local management of groundwater consistent with section 2 of article X of the California Constitution. (Wat. Code, § 10720.1, subd. (b).) Subsequent to the enactment of the Groundwater Act in 2014, *Capistrano* was decided in 2015. Of particular legal significance in *Capistrano* was harmonization of the water provisions of section 2 of article X with the constitutional requirements for property-related fees under section 6 of article XIII D. (*Capistrano*, *supra*, 235 Cal.App.4th at pp. 1510-1511.) *Capistrano* comprehensively addressed the legal interaction between these important, and potentially conflicting, constitutional provisions.

Capistrano harmonized the water provisions of section 2 of article X with the requirements for property-related fees under section 6 of article XIII D to give effect to both provisions. Under the harmonization analysis in *Capistrano,* section 2 of article X does not serve as a legal basis for a regulatory exception for property-related fees under article XIII D. As a result, the statutory language in the Groundwater Act not expressly requiring Proposition 218 compliance for some groundwater extraction charges (Wat. Code, § 10730, subd. (a)) relied on in *United Water* does not provide a legal

basis for concluding that the subject groundwater extraction charges are not property-related fees under Proposition 218.

Furthermore, this Court stated in *Silicon Valley* that legislation relating to a constitutional provision such as Proposition 218 must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it. (*Silicon Valley, supra*, 44 Cal.4th at p. 448.) The Legislature has no authority to exercise its discretion in a way that violates Proposition 218 or undermines its effect. (*Ibid.*)

III. CONSISTENT WITH THE *PAJARO VALLEY* AND *BIGHORN* CASES, THE SUBJECT GROUNDWATER EXTRACTION CHARGES ARE PROPERTY-RELATED FEES UNDER PROPOSITION 218.

Prior to *United Water*, *Pajaro Valley* was the primary Proposition 218 case interpreting the application of groundwater extraction charges to the property-related fee provisions of Proposition 218. The conclusion in *Pajaro Valley* that groundwater extraction charges are property-related fees under Proposition 218 relied heavily on this Court's decision in *Bighorn*. *Pajaro Valley* concluded that a groundwater extraction charge does not materially differ from a water delivery charge found in *Bighorn* to be a property-related fee subject to Proposition 218. (*Pajaro Valley, supra*, 150 Cal.App.4th at pp. 1388-1389.)

In support of the foregoing conclusion regarding groundwater extraction charges, *Pajaro Valley* noted: "Moreover the charge here is not actually predicated upon the *use* of water but on its *extraction*, an activity in some ways more intimately connected with property ownership than is the mere receipt of delivered water. . . . Thus, even if an overlying landowner does not strictly 'own' the water under his land, his extraction of that water

(or its extraction by his tenant) represents an exercise of rights derived from his ownership of land. In that respect a charge imposed on that activity is at least as closely connected to the ownership of property as is a charge on delivered water." (*Id.* at pp. 1391-1392, italics in original.)

Pajaro Valley even went so far as to question the reach, if not the vitality, of *Apartment Association* in light of the fact that *Bighorn* never cited *Apartment Association* even though it appeared highly relevant to the issues under consideration. (*Id.* at p. 1389.) *Pajaro Valley* also claimed this Court cited *Apartment Association* with apparent approval in *Richmond.* (*Ibid.*) *Richmond* cited *Apartment Association* once, but only in providing historical context in noting that Proposition 218 passed in November 1996 and added articles XIII C and XIII D to the California Constitution. (*Richmond, supra,* 32 Cal.4th at p. 415.) *Apartment Association* was not cited in *Richmond* in its analysis of the property-related fee issues under Proposition 218.

Based on the foregoing, it is reasonable to conclude that *Bighorn*, and not *Apartment Association*, controls whether the groundwater extraction charges in *United Water*, *Pajaro Valley*, and *Griffith* are property-related fees under Proposition 218. Based on subsequent interpretations of Proposition 218 by this Court in *Richmond* and especially *Bighorn*, *Apartment Association* appears to have limited application on the issue of whether a water levy is a property-related fee under article XIII D.[11] Other than *United Water*, only one published Proposition 218 case to date has relied on *Apartment Association* in concluding that a levy was not a property-related fee under article XIII D. That case was *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 995 [upholding various residential rental inspection fees very similar to that in *Apartment Association*].

---

[11] *Apartment Association* is also the only published Proposition 218 case to date with a dissenting opinion.

Applying *Bighorn* in concluding that groundwater extraction charges are property-related fees under Proposition 218 is also consistent with groundwater being a significant resource for domestic water in many areas of the state. Many property owners do not have their water delivered through pipes that are physically connected to their property. Many small to moderate-sized towns and cities are entirely dependent on groundwater for drinking water supplies. (Bulletin 118, *supra*, at p. 2.) In some regions, groundwater provides 60% or more of the supply during dry years. (*Ibid.*) About 40% to 50% of Californians rely on groundwater for part of their water supply. (*Ibid.*) Based on water supply well completion reports submitted to the California Department of Water Resources between 1987 through 2000, 82% were drilled for individual domestic uses. (*Id.* at p. 27.)[12]

As this Court stated in *Bighorn* in support of the conclusion that ongoing water delivery charges are property-related fees under Proposition 218, "water is indispensable to most uses of real property." (*Bighorn, supra*, 39 Cal.4th at p. 214, quoting *Richmond, supra*, 32 Cal.4th. at p. 426.) For purposes of whether a water levy is a property-related fee under Proposition 218, it does not (and should not) legally matter whether the water is delivered to real property through a pipe (as in *Bighorn*) or procured through groundwater extraction (as in *Pajaro Valley*).

Any doubt regarding whether groundwater extraction charges are property-related fees under Proposition 218 should be resolved in favor thereof inasmuch as Proposition 218 constitutionally commands that its provisions be liberally construed to effectuate its purposes. (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1369.)

---

[12] A "domestic well" is defined as a "water well used to supply water for the domestic needs of an individual residence or systems of four or fewer service connections." (Bulletin 118, *supra*, at p. 215.)

A. The Subject Groundwater Extraction Charges Are "User Fees or Charges For A Property-Related Service" Under Proposition 218.

The constitutional definition of a property-related fee includes a "user fee or charge for a property-related service." (Cal. Const., art. XIII D, § 2, subd. (e).) *Bighorn* relied on this expanded component of the constitutional definition in concluding that consumption-based water delivery charges are property-related fees under Proposition 218. (*Bighorn, supra*, 39 Cal.4th at pp. 216-217.) If a groundwater extraction charge is a "user fee or charge for a property-related service" under the constitutional definition, then it is a property-related fee.

Authorized groundwater charges under the Water Conservation District Law of 1931 bear the characteristics of a consumption-based water charge (i.e., "user fees or charges" under the constitutional definition) similar to that in *Bighorn* (See *id.* at p. 217) because the charges are computed by multiplying the production[13] in acre-feet of water for each classification by the groundwater rate charge for each classification of water. (Wat. Code, § 75613.) In other words, a key variable that determines the amount of the groundwater charge is the amount of groundwater extracted.

United Water concluded that in "charging property owners for pumping groundwater, the District is not providing a 'service' to property owners in the same way that the *Bighorn* agency provided a service by delivering water through pipes to residences." (Opn. at pp. 22-23.) The apparent assumption made in *United Water* is that for a groundwater charge to be a property-related fee under Proposition 218 the "services" provided to property owners for pumping groundwater must essentially be the same as

[13] "Production" is defined as the "act of extracting ground water by pumping or otherwise." (Wat. Code, § 75503.)

those "services" associated with the delivery of water through pipes to residences as in *Bighorn*. This is an inappropriately narrow interpretation of what constitutes a property-related fee under Proposition 218.

The key inquiry is whether the "services" provided are "property-related services" as defined in article XIII D. A "property-related service" is defined as "a public service having a direct relationship to property ownership." (Cal. Const., art. XIII D, § 2, subd. (h).) Under Proposition 218, property-related fees may only be levied for "property-related services." (Cal. Const., art. XIII D, § 3, subd. (a), par. (4).) Hence, if a property-related fee is not for a "property-related service," it is constitutionally prohibited under Proposition 218. On the other hand, if a "user fee or charge" is for a "property-related service," it is a property-related fee under Proposition 218. (Cal. Const., art. XIII D, § 2, subd. (e).) Under the "property-related service" constitutional definition, the focus is on whether the public service involved has a direct relationship to property ownership.

Whether a "property-related service" is for "water service" is also significant because it has bearing on whether the election exemptions for property-related fees apply. Property-related fees for "water service" are exempt from voter approval under Proposition 218. (Cal. Const., art. XIII D, § 6, subd. (c).)

The "water service" issue was considered at length in *Griffith* in the context of whether the foregoing election exemption applied to groundwater extraction charges. Relying on the broad definition of "water" contained in the Proposition 218 Omnibus Implementation Act (Gov. Code, § 53750, subd. (m)), *Griffith* concluded that an "entity that produces, stores, supplies, treats, or distributes water necessarily provides water service." (*Griffith*,

supra, 220 Cal.App.4th at p. 595.)[14] As further noted in *Griffith*, "[i]f the charges for water delivery and water extraction are akin, then the services behind the charges are akin." (*Ibid.*) Accordingly, since under *Bighorn* services associated with ongoing water delivery are charges for a "property-related service" (*Bighorn, supra*, 39 Cal.4th at p. 217), then services associated with groundwater extraction would also constitute charges for a "property-related service" under Proposition 218.

More specifically, the groundwater charges in *United Water* are for the benefit of those who rely directly or indirectly upon the groundwater supplies of the District or a zone or zones thereof and water imported into the District or a zone or zones thereof. (Wat. Code, § 75522.) The groundwater extraction charges must be expended in furtherance of District purposes in the replenishment, augmentation, and the protection of water supplies for users within the District or a zone or zones thereof. (Wat. Code, § 75596.) The foregoing would constitute "property-related services" under the reasoning in *Griffith*. The services provided by the District are for the benefit of specific users who rely on the extraction of groundwater as a water supply source in connection with the use of real property.

Accordingly, since the groundwater extraction charges are "user fees or charges for a property-related service," they would be property-related fees under Proposition 218 on that basis. (Cal. Const., art. XIII D, § 2, subd. (e).) Relying on the foregoing component of the enlarged definition of a property-related fee (See *Bighorn, supra*, 39 Cal.4th at p. 217 [use of the term "including" is "ordinarily a term of enlargement" with respect to the

---

[14] Subsequent to the enactment of the Proposition 218 Omnibus Implementation Act in 1997 (Stats. 1997, ch. 38, § 5), in *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358, the court held that the voter approval exemptions for property-related fees (Cal. Const., art. XIII D, § 6, subd. (c)), including what constitutes "water service," must be strictly construed. *Griffith* did not alter that rule.

property-related fee constitutional definition]), it would not matter whether the activity of extracting groundwater technically involves the exercise of a right in real property in all respects under California water law. (See *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240-1241.)

IV. THE SUBJECT GROUNDWATER EXTRACTION CHARGES VIOLATE PROPOSITION 218'S "COST OF SERVICE" REQUIREMENT TO THE EXTENT NON-AGRICULTURAL WATER USERS ARE SUBSIDIZING AGRICULTURAL WATER USERS.

A property-related fee must comply with the various constitutional procedures and requirements under Proposition 218. (Cal. Const., art. XIII D, § 3, subd. (a), par. (4).) These procedures and requirements are primarily contained in section 6 of article XIII D. The property-related fee requirement at issue in *United Water* is the "cost of service" requirement which provides that 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." (Cal. Const., art. XIII D, § 6, subd. (b), par. (3).)

Also of significance is the constitutional requirement that in any legal action contesting the validity of a property-related fee under Proposition 218, the "burden shall be on the agency to demonstrate compliance with this article." (Cal. Const., art. XIII D, § 6, subd. (b).) Furthermore, courts are required to exercise their independent judgment in determining whether the District's groundwater extraction charges violate article XIII D. (*Palmdale Water, supra*, 198 Cal.App.4th at p. 933; *Silicon Valley, supra*, 44 Cal.4th at. p. 448.)

In dictum, *United Water* stated that even if the subject groundwater charges were property-related fees under Proposition 218, there would be no

conflict between Proposition 218's cost of service requirement (Cal. Const., art. XIII D, § 6, subd. (b), par. (3)) and the required rate ratio under Water Code section 75594.[15] (Opn. at p. 23.) Under section 75594 of the Water Code (hereafter "section 75594"), groundwater charges for non-agricultural purposes generally must be fixed at three to five times the rate applicable to agricultural water.[16] (Wat. Code, § 75594) The trial court found the ratio between rates for non-agricultural and agricultural water use required under section 75594 violated Proposition 218. (Opn. at p. 10.)

A. It Is Not Legally Necessary That The Rate Ratio In Water Code Section 75594 Be Facially Unconstitutional In Order For The Subject Groundwater Extraction Charges To Violate Proposition 218.

For the subject groundwater extraction charges to violate the cost of service requirement under Proposition 218, it is not legally necessary that the rate ratio set forth in section 75594 be facially unconstitutional. Instead, the focus is on whether the specific local government levy at issue violates the provisions of Proposition 218. A statute such as section 75594 containing the rate ratio requirement would not be facially invalid on constitutional grounds unless its provisions present a total and fatal conflict with applicable constitutional prohibitions in all of its applications, and not just those limited

---

[15] Section 75594 of the Water Code provides: "Except as provided in Section 75595, any ground water charge in any year shall be established at a fixed and uniform rate for each acre-foot for water other than agricultural water which is not less than three times nor more than five times the fixed and uniform rate established for agricultural water. However, any groundwater charge in any year for water other than agricultural water used for irrigation purposes on parks, golf courses, schools, cemeteries, and publicly owned historical sites may be established at a fixed and uniform rate for each acre-foot which shall not be less than the rate established for agricultural water, nor more than the rate established for all water other than agricultural water." (Wat. Code, § 75594.)

[16] "Agricultural water" means water first used on lands in the production of plant crops or livestock for market. (Wat. Code, § 75508.)

to the groundwater extraction charges at issue in *United Water*. (*Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 817.)

No published case to date could be identified in which a state statute was found unconstitutional under Proposition 218. Rather, it is local government levies that have been invalidated under the constitutional provisions of Proposition 218. For example, in *Silicon Valley* this Court invalidated the local agency assessment but did not invalidate any state statute, including any enabling or other statute relating to the imposition of the assessment. (*Silicon Valley, supra*, 44 Cal.4th at pp. 457-458.) Hence, as illustrated in *Silicon Valley*, the invalidation of a local government levy under the constitutional provisions of Proposition 218 does not legally require any state statute relating to the imposition of that levy, such as a statutory requirement contained in enabling legislation like that in section 75594, be held unconstitutional.

B. The Rate Ratio In Water Code Section 75594 Is Properly Harmonized With Proposition 218 Using The Harmonization Analysis in *Palmdale Water* and *Capistrano*.

Citing *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182 ("*Sunset Beach*"), *United Water* stated that it is "required to try to harmonize constitutional language with that of existing statutes if possible." (Opn. at p. 24.) However, the analysis in *Sunset Beach* focused on an interpretation of Proposition 218 that sought to avoid an implied repeal of several annexation statutes as opposed to a harmonization that gave effect to both the annexation statutes and the constitutional provisions of Proposition 218. (*Sunset Beach, supra*, 209 Cal.App.4th at pp. 1192-1194.) The resulting "harmonization" in *United*

Water effectively gave full force and effect to the section 75594 statutory provision and no effect to the Proposition 218 constitutional provision.

United Water stated that the rate ratio set forth in section 75594 "is a policy decision [predating Proposition 218] made by the Legislature, not the District;" that "[s]ection 6 of article XIII D governs only property-related fees and charges imposed by *local* government agencies," and "does not govern the Legislature's statewide regulatory policy." (Opn. at p. 24, italics in original.)

The foregoing reasoning would be appropriate if the groundwater charges were levied by the state, as opposed to being a requirement on the imposition of a local levy by a local "agency" subject to the constitutional provisions of Proposition 218. (Cal. Const., art. XIII D, § 2, subd. (a) ["agency" definition incorporating broad "local government" definition in subdivision (b) of section 1 of article XIII C].)

Proposition 218 itself does not authorize a local agency to impose a property-related fee. (Cal. Const., art. XIII D, § 1, subd. (a).) The authority must come from an independent legal source such as a state statute. An enabling statute can provide the legal authority to impose a property-related fee, but a property-related fee must still comply with all applicable constitutional requirements under Proposition 218 (Cal. Const., art. XIII D, § 6, subd. (d); Cal. Const., art. XIII D, § 3, subd. (a), par. (4).)

The groundwater extraction charges levied by the District are authorized under the Water Code, but are subject to various statutory procedures and requirements associated with their imposition. (Wat. Code, § 74508.) However, the Legislature's authority in enacting statutes such as section 75594 containing the rate ratio requirement must yield to the constitutional commands of Proposition 218. (Cf. *Bighorn, supra,* 39 Cal.4th at p. 217 [statutes affecting local initiatives under article XIII C].)

The Legislature has no authority to exercise its discretion in a way that violates the constitutional provisions of Proposition 218 or undermine their effect. (Cf. *Silicon Valley, supra,* 44 Cal.4th at p. 448 [local agencies acting in a legislative capacity under Prop. 218].)

Furthermore, concerning the provisions of article XIII D, Proposition 218 provides that "[n]otwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority." (Cal. Const., art. XIII D, § 1.) The foregoing constitutional language makes it clear that, notwithstanding any other provision of law (which "provisions of law" would include section 2 of article X as well as section 75594), the provisions of article XIII D apply to all property-related fees. The reference to a "state statute" makes no distinction whether the statute or statutes in question were enacted before or after the adoption of Proposition 218 in 1996.

Hence, the provisions of article XIII D apply to property-related fees imposed pursuant to state statutes enacted before the passage of Proposition 218, including statutes reflecting "policy decisions made by the Legislature" such as section 75594. Prior to the passage of Proposition 218, groundwater extraction charges subject to section 75594 rate ratio requirements were obviously not subject to a constitutional cost of service requirement such as the one in Proposition 218. However, subsequent to the passage of Proposition 218, groundwater extraction charges subject to section 75594 rate ratio requirements must also comply with the constitutional cost of service requirement contained in article XIII D.

Ventura Group Ventures provides support for the foregoing conclusion. In *Ventura Group Ventures*, this Court held that a port district has the independent statutory authority to impose assessments to raise the

funds needed to satisfy a judgment obtained against it, "*so long as the assessments satisfy the applicable statutory and constitutional requirements.*" (*Ventura Group Ventures, supra*, 24 Cal.4th at p. 1108, italics in original.) *Ventura Group Ventures* involved an enabling statute enacted prior to the passage of Proposition 218 that authorized a local port district to levy property assessments for the "satisfaction of liabilities arising from projects." (Harb. & Nav. Code, § 6365, subd. (d)(2) [added by Stats. 1991, Ch. 978, § 6].) This Court stated that the statutory and constitutional requirements under Proposition 218 for the assessment were not met. In particular, the principal unsatisfied requirement was that the assessment did not "specially benefit" the parcels upon which it would be levied, as constitutionally mandated under Proposition 218. (*Ventura Group Ventures, supra*, 24 Cal.4th at pp. 1104-1108.)

Applying the analysis in *Ventura Group Ventures* to *United Water*, the District can lawfully levy the subject groundwater extraction charges so long as those charges satisfy the applicable statutory and constitutional requirements. Applicable statutory requirements include the required rate ratio in section 75594, and applicable constitutional requirements include the cost of service mandate under section 6 of article XIII D. The foregoing conclusion is also consistent with the Proposition 218 harmonization analysis in *Palmdale Water* and *Capistrano*.

Unlike *United Water*, the two Proposition 218 cases that did harmonize the cost of service requirement under section 6 of article XIII D with the water conservation provisions under section 2 of article X (*Palmdale Water* and *Capistrano*) did not cite *Sunset Beach*.[17] The author of the opinion in *Sunset Beach* (Justice Bedsworth) also authored the opinion in

[17] *United Water* found the subject groundwater extraction fees serve the valid regulatory purpose of conserving water resources under section 2 of article X. (Opn. at p. 19.)

Capistrano, so if the implied repeal analysis in *Sunset Beach* were appropriate for *Capistrano*, one would particularly expect it to have been used. Instead, *Capistrano* relied on the harmonization analysis in *Palmdale Water*. (*Capistrano, supra*, 235 Cal. App. 4th at pp. 1510-1511.)

Consistent with the *Palmdale Water* harmonization analysis, Water Code statutes pertaining to groundwater extraction charges levied by the District would not be at odds with the article XIII D cost of service requirement so long as the applicable water classification rates for the groundwater extraction charges do not exceed the proportional cost of the property-related service attributable to the parcel. (*Palmdale Water*, *supra*, 198 Cal.App.4th at pp. 936-937 [harmonizing article X, section 2 with article XIII D].)

Concerning the specific Water Code statute at issue in *United Water*, section 75594 provides the District with some flexibility in fixing non-agricultural groundwater rates relative to agricultural rates and would not be at odds with article XIII D so long as the fixed rates do not exceed the proportional cost of the service attributable to each parcel. (*Ibid.*) To the extent such water classification rates exceed the proportional cost of service attributable to the parcels, a violation of Proposition 218 occurs, as the trial court concluded. (Opn. at p. 2.)

In enacting section 75594, the Legislature adopted a policy providing for mandatory rate ratios between specified water classifications; but the voters have made it clear they want it done in a particular way. (Cf. *Capistrano, supra*, 235 Cal.App.4th at p. 1511 ["Our courts have made it clear they interpret the Constitution to allow tiered pricing; but the voters have made it clear they want it done in a particular way."].) That "particular way" is set forth in the constitutional language of Proposition 218, including

the cost of service requirement thereunder (Cal. Const., art. XIII D, § 6, subd. (b), par. (3)).

United Water stated that "[s]ection 75594 does not discriminate between persons or parcels," that "[i]t discriminates between types of use, and that "[i]f the City chooses to use its groundwater for agricultural purposes, it too can benefit from the lower rates." (Opn. at p. 24.) However, the foregoing does not provide a legal basis for excluding the water use classification scheme under section 75594 from the constitutional cost of service requirement under Proposition 218.[18] The proper issue is whether the higher rates for non-agricultural use are lawful under the Proposition 218 cost of service requirement.

The courts have already applied the Proposition 218 cost of service requirement in other rate structure contexts. *Palmdale Water* involved a tiered water rate structure where the focus was on inequality between classes of users. In *Capistrano*, the focus was on inequality between classes of water rate tiers, and whether the local agency could justify its price points based on the costs of service for those tiers. (*Capistrano, supra*, 235 Cal.App.4th at p. 1507.) *United Water* involves inequality between water use classifications (agricultural and non-agricultural). The common theme is the rate structures have some form of inequality between water rate classifications which gives rise to cost of service compliance issues under Proposition 218.

In the context of *United Water*, and consistent with the harmonization analysis in *Palmdale Water* and *Capistrano*, non-agricultural water users are not supposed to be subsidizing agricultural water users under the Proposition

---

[18] In a similar context, a water user in *Capistrano* could benefit from lower rates by using less water (i.e., being in a lower water tier with lower rates), but that would not alter the obligation of the local agency under Proposition 218 to justify its price points based on the costs of service for the various water rate tiers.

218 cost of service requirement. (Cf. *Capistrano, supra*, 235 Cal.App.4th at p. 1499 [top tier water rates subsidizing below cost rates for the bottom tier not allowable].) To the extent that is happening in *United Water*, the Proposition 218 constitutional cost of service requirement is violated, as concluded by the trial court (Opn. at p. 2).

C. Conforming Section 75594 To Proposition 218.

The existing rate ratio requirement contained in section 75594 may make it difficult for local water conservation districts to comply with the constitutional cost of service requirement under Proposition 218. To the extent there may exist any difficulties in that regard, the appropriate remedy is for the Legislature to amend section 75594 to better conform to the constitutional provisions of Proposition 218. Very simply, the proper process is to conform the statute to the constitution rather than conforming the constitution to the statute, as was essentially done in *United Water*. Legislation must be subordinate to a Proposition 218 constitutional provision, and must not in any particular attempt to narrow or embarrass it. (*Silicon Valley, supra*, 44 Cal.4th at p. 448.)

There is precedent in the legislative history of section 75594 for easing the rate ratio requirement for water other than agricultural water. In 1984, section 75594 was amended (adding the second sentence to section 75594) to provide relief from the rate ratio requirement for water other than agricultural water used for irrigation purposes on parks, golf courses, schools, cemeteries, and publicly owned historical sites. (Stats. 1984, ch. 718, § 3.)

Section 75594 also incorporates a county population exception from the mandatory rate ratio requirement that was incorporated into the original groundwater extraction charge legislation in 1963 (Stats. 1963, ch. 1414, § 7)

before it was codified as a Water Code section in 1965 (Stats. 1965, ch. 75, § 1). In any county which has a population of 503,000 or more and less than 600,000, the mandatory rate ratio requirement under section 75594 does not apply. (Wat. Code, § 75595.)[19]

The county population numbers currently contained in section 75595 have been unaltered since their original adoption in 1963.[20] This means over time the exception has applied to multiple counties during those time periods when the county population was within the population band exception. In fact, based on historical county population data the exception from the section 75594 rate ratio requirement applied to Ventura County, and thereby the District, during the years 1979 through 1985, inclusive. (See Cal. Dept. of Finance, E-4 Population Estimates for California Cities and Counties, January 1, 1981 to January 1, 1990 < http://www.dof.ca.gov/research/demographic/reports/estimates/e-4/1981-90/documents/90e-4.xls> [as of Nov. 16, 2015] [1981-1985 population]; Cal. Dept. of Finance, Population Estimates for California Counties and Cities, January 1, 1976 through January 1, 1980 < http://www.dof.ca.gov/research/demographic/reports/estimates/e-4/1971-80/counties-cities/#tab76to80> [as of Nov. 16, 2015] [1979-1980 population].)

---

[19] Section 75595 of the Water Code provides: "In any county which has a population of 503,000 or more and less than 600,000, any ground water charge in any year shall be established at a fixed and uniform rate for each acre-foot for water other than agricultural water in such proportion to the fixed and uniform rate established for agricultural water as the board shall determine." (Wat. Code, § 75595.)

[20] Based on a review of historical county population numbers from the California Department of Finance and correlating those numbers with counties having water conservation districts, it appears the county targeted for exception in the 1963 legislation was San Bernardino County. That county is no longer subject to the exception because its population well exceeds 600,000.

It is also questionable whether the groundwater extraction charges are structured to "conserve water resources" as concluded in *United Water*. (Opn. at p. 19.) The use by the Legislature of an unaltered narrow county population band exception adopted in 1963 has resulted in temporal and spatial variations in application of the rate ratio requirement exception that do not appear to serve any valid regulatory purpose in conserving water resources. Furthermore, other statutory restrictions generally require the rates for groundwater extraction charges be uniform. (See, e.g., Wat. Code, § 75592 [fixed and uniform rate per acre-foot requirement].) Such a uniformity restriction appears to preclude water conservation districts from levying tiered rates for groundwater extraction charges that send a significantly stronger water conservation signal. The use of mandated uniform rate restrictions also does not appear to be consistent with current and modern water conservation practices under section 2 of article X. (See, e.g., Wat. Code, § 372, subd. (a), par. (4).)

D. *Capistrano* And *Palmdale Water* Properly Harmonized Section 2 of Article X (Water Conservation) With The Cost Of Service Requirement Under Section 6 of Article XIII D (Proposition 218).

In *Capistrano*, the local city argued that as a result of section 2 of article X of the California Constitution there does not have to be a correlation between water rates and the cost of service attributable to the parcel, as the language of Proposition 218 expressly requires. (*Capistrano, supra*, 235 Cal.App.4th at p. 1508.) In rejecting that argument, *Capistrano* harmonized the two constitutional provisions by stating: "We perceive article X, section 2 and article XIII D, section 6, subdivision (b)(3) to work *together* to promote increased supplies of water--after all, the main reason article X, section 2 was enacted in the first place was to ensure the *capture*

and beneficial use of water and prevent its wasteful draining into the ocean." (*Id.* at p. 1511, italics in original.)

Capistrano also addressed the issue of whether the cost of service requirement under Proposition 218 should be more "flexible." *Capistrano* considered the issue and properly rejected application of *Griffith* to the cost of service requirement under Proposition 218. (*Capistrano*, *supra*, 235 Cal.App.4th at pp. 1513-1514.)

In *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673 ("*Gin Chow*"), this Court stated the following regarding the water conservation constitutional provision (then denoted article XIV, section 3): "The amendment is now the supreme law of the state, which the courts are bound to enforce, and it must be made effectual in all cases and as to all rights *not protected by other constitutional guaranties*." (*Id.* at p. 700, italics added.) The substantive constitutional protections for property-related fees under Proposition 218, including the cost of service requirement, represent "other constitutional guaranties" subject to the foregoing qualification set forth in *Gin Chow*. *Capistrano* properly recognized this in reasonably harmonizing the two constitutional provisions.

The substantive requirements for property-related fees under Proposition 218 are contained in constitutional provisions of dignity at least equal to the constitutional water resources provision (Cal. Const., art. X, § 2). (Cf. *Silicon Valley, supra,* 44 Cal.4th at p. 448 [similar reference to constitutional separation of powers provision].) Furthermore, Proposition 218 constitutionally commands that its provisions be "liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5; see Stats. 1996, p. A-299.) The constitutional amendment adding the water resources provision to the

California Constitution contained no such liberal interpretation provision. (Assem. Const. Amend. No. 27, Stats. 1927, res. ch. 67.)

Hence, section 2 of article X is not superior to and does not trump the constitutional provisions of Proposition 218. Furthermore, based on the preceding points, the harmonization analysis performed in *Palmdale Water* and *Capistrano* regarding the article X, section 2 water constitutional provision and the article XIII D, section 6 cost of service constitutional provision under Proposition 218 strikes and fair and reasonable balance between the two constitutional provisions.[21] Any other interpretation that would alter the balance against Proposition 218 constitutional protections and in favor of the article X, section 2 water constitutional provision would not be legally justified.

V. THE COST OF SERVICE REQUIREMENT UNDER ARTICLE XIII D MUST BE CONSTRUED ACCORDING TO PROPOSITION 218 STANDARDS AND NOT ACCORDING TO PRE-PROPOSITION 218 CASE LAW.

The constitutional cost of service requirement under Proposition 218 provides: "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." (Cal. Const., art. XIII D, § 6, subd. (b), par. (3).) The foregoing constitutional provision must be interpreted in accordance with the standards set forth in Proposition 218 and not be interpreted according to pre-Proposition 218 case law (primarily interpreting Proposition 13) which Proposition 218 was generally intended to modify.

---

[21] While there are numerous cases on the books interpreting the water conservation constitutional provision under section 2 of article X, *Capistrano* and *Palmdale Water* are the only published cases to date addressing the specific interaction between section 2 of article X and the constitutional provisions of Proposition 218.

This Court already addressed this issue at length in *Silicon Valley* with respect to the significantly more stringent assessment provisions under section 4 of article XIII D. (*Silicon Valley, supra*, 44 Cal.4th at pp. 441-458.) *Silicon Valley* further noted that pre-Proposition 218 cases are not instructive in interpreting the plain constitutional language of article XIII D. (*Id.* at p. 452 [interpreting "special benefit" constitutional definition].)

The preceding approach must also be used in the interpretation of the cost of service provision for property-related fees contained in section 6 of article XIII D. For example, *Capistrano* construed article XIII D according to its plain constitutional language in concluding that chargeable costs must be attributable to specific parcels to comply with the cost of service requirement. More specifically, *Capistrano* stated: "If the phrase 'proportional cost of the service attributable to *the* parcel' (italics added) is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really *is* an ascertainable cost of service that can be attributed to a specific -- hence that little word 'the' -- parcel. Otherwise, the cost of the service language would be meaningless. Why use the phrase 'cost of the service to the parcel' if a local agency does not actually have to ascertain a cost of service to that particular parcel?" (*Capistrano, supra*, 235 Cal.App.4th at p. 1505, italics in original.)

Capistrano also noted that "[a]s the *Silicon Valley* court observed, Proposition 218 effected a paradigm shift. Proposition 218 was passed by the voters in order to *curtail* discretionary models of local agency fee determination." (*Id.* at p. 1513, italics in original.) Pre-Proposition 218 cases interpreting the provisions of Proposition 13 are generally not consistent with this curtailment of discretionary models approach and are of little instructive value in interpreting the constitutional language of Proposition 218.

Capistrano further noted that post-Proposition 13 cases decided before the passage of Proposition 218 took a strict constructionist view of Proposition 13 constitutional provisions.[22] Proposition 218 effectively reversed these cases with its liberal construction mandate (Prop. 218, § 5). (*Id.* at p. 1513, fn. 19.) Moreover, pre-Proposition 218 cases such as *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178 [tiered water rates not a special tax under Proposition 13] ("*Brydon*") were decided based on Proposition 13 strict construction cases that Proposition 218 was designed to overturn. (*Capistrano, supra*, 235 Cal.App.4th at p. 1512.)

A. The Cost Of Service Requirement Under Article XIII D Must Be Interpreted To Reflect Technological Advances Enabling More Accurate Cost Apportionments At The Parcel Specific Level.

The cost of service constitutional language states that the amount of a property-related fee "shall not exceed the proportional cost of the service attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b), par. (3).) The plain constitutional language requires the cost of service apportionment be made at the parcel specific level.

The Proposition 218 Ballot Pamphlet confirms the foregoing in stating that "[n]o property owner's fee may be more than the cost to provide service to that property owner's land." (Ballot Pamp., Proposed Amends. to Cal. Const. with analysis of Proposition 218 by the Legislative Analyst and arguments to voters, Gen. Elec. (Nov. 5, 1996) p. 73.) The Ballot Pamphlet also stated that local governments would have to potentially set property-related fees "on a block-by-block or parcel-by-parcel basis." (*Ibid.*) That potential will be more fully realized through future advances in technology.

---

[22] These cases were *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197 and *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47.

The level of specificity required under the cost of service constitutional requirement should not be arbitrarily fixed at some point in time, but must instead be adaptable to changes and advances in technology expected over time that will better realize the plain constitutional language requiring cost of service apportionment be made at the parcel specific level. For example, technological advances in the use of geographic information systems (GIS) can facilitate Proposition 218 cost of service compliance at the parcel specific level. (See *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 162 [discussing capability of GIS in the context of parcels and taxes].)

There have already been instances where the property-related fee provisions under Proposition 218 have been effectively applied at the parcel specific level. For example, in *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353, the City of Salinas imposed a storm drainage fee, but specific developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were only required to pay in proportion to the amount they did contribute runoff or used the City's treatment services. The foregoing provision was not anticipated to apply to a large number of people, but it did reflect special conditions existing at the parcel specific level. (*Id.* at p. 1355, fn. 4.)

This approach is also consistent with the construction of constitutional amendments. "Precedent teaches that the appellate construction of a constitutional amendment must be delivered in a liberal and practical manner so it will 'meet changed conditions and the growing needs of the people.'" (*AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 759 [Proposition 218 case quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245].)

This approach is also consistent with the interpretation of the water conservation provisions under article X, section 2 of the California Constitution. An example is the evolution of water conservation rates in California. Prior to the passage of Proposition 13 in 1978, increasing block rates for water were rarely used in California, even during the severe drought of 1976-1977. (Dept. of Water Resources, The California Drought – 1977 An Update (Feb. 15, 1977), p. 122 <http://www.water.ca.gov/waterconditions/docs/12_drought-1977.pdf> [as of Nov. 16, 2015].) In fact, at that time the most common rate structure in California was the declining block rate where the rate for succeeding water blocks actually decreased with each block.[23] (*Ibid.*)

In 1994, inclining block water rates were generally recognized in *Brydon* as a conservation measure that is part of a Drought Management Program compelled by the mandates of article X, section 2 of the California Constitution. (*Brydon, supra*, 24 Cal.App.4th at pp. 197, 202.)

In order to fully realize the plain constitutional language requiring cost of service apportionment at the parcel specific level, the cost of service requirement under Proposition 218 must be adaptable to technological changes and advances that will occur in the future. Such an interpretation is also consistent with the liberal interpretation constitutional mandate under Proposition 218. (Prop. 218, § 5.)

VI. CONCLUSION.

Following the reasoning and analysis in *Pajaro Valley*, which relied on this Court's decision in *Bighorn*, the groundwater extraction charges in *United Water* are property-related fees subject to the constitutional provisions under Proposition 218.

---

[23] The second most common rate structure was the uniform rate where each unit of water costs the same.

The rate ratio mandated by section 75594 is properly harmonized with the constitutional cost of service requirement under Proposition 218 (contained in section 6 of article XIII D) using the harmonization analysis in *Palmdale Water* and *Capistrano*, and is not at odds with article XIII D so long as the fixed water classification rates under the mandated rate ratio do not exceed the proportional cost of the service attributable to each parcel. To the extent the fixed water classification rates exceed the proportional cost of service attributable to each parcel, a violation of Proposition 218 occurs, as the trial court correctly concluded.

Accordingly, the judgment of the Court of Appeal must be reversed.

Dated: November 16, 2015

Respectfully submitted,

JACK COHEN
Attorney at Law

CERTIFICATE OF WORD COUNT

I certify that the foregoing amicus curiae brief, as measured by the word count of the computer program used to prepare the brief, contains 11,137 words.

Dated: November 16, 2015

JACK COHEN
Attorney at Law

Proof of Service
State of California, County of Los Angeles

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: Post Office Box 6273, Beverly Hills, CA 90212.

On November 16, 2015, I served the foregoing APPLICATION OF JACK COHEN (IN HIS CAPACITY AS A PROPOSITION 218 DRAFTER) FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFF CITY OF SAN BUENAVENTURA by depositing true copies thereof in the United States mail in Beverly Hills (County of Los Angeles), California, enclosed in sealed envelopes with the postage thereon fully prepaid, and addressed as follows:

Michael G. Colantuono, Esq.
Colantuono, Highsmith & Whatley, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, CA 90071
Attorney for Plaintiff, Cross-Defendant and Appellant
City of San Buenaventura

Anthony Hubert Trembley, Esq.
Cheryl A. Orr, Esq.
Musick, Peeler & Garrett LLP
2801 Townsgate Road, Suite 200
Westlake Village, CA 91361
Attorneys for Defendant, Cross-Complainant and Appellant
United Water Conservation District et al.

Jane Ellison Usher, Esq.
Musick, Peeler & Garrett LLP
One Wilshire Boulevard, Suite 2000
Los Angeles, CA 90017
Attorney for Defendant, Cross-Complainant and Appellant
United Water Conservation District et al.

Dennis LaRochelle, Esq.
Arnold, Bleuel, LaRochelle, Mathews et al.
300 Esplanade Drive, Suite 2100
Oxnard, CA 93036
Attorney for Defendant, Cross-Complainant and Appellant
Pleasant Valley County Water District

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 16, 2015, at Beverly Hills, California.

Jack Cohen