

**LAW SEMINARS INTERNATIONAL**

*An Advanced One-Day Seminar on Issues for*

**Municipal Water Utility  
Ratemaking in California**

*Designing rates to recover your costs and encourage  
conservation under Propositions 218 and 26*

July 20, 2015  
Sacramento, CA

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- Best Best & Krieger LLP
- California Public Utilities Commission
- City of Signal Hill
- Colantuono, Highsmith & Whatley PC
- Hanson Bridgett LLP
- LitiNomics
- University of California Berkeley

**Who Should Attend:**

*Attorneys, water agency managers, consultants, real estate developers, agricultural water users, Tribal representatives and anyone else involved in water issues in California*

*An Advanced One-Day Seminar on Issues for*

# Municipal Water Utility Ratemaking in California

Designing rates to recover your costs and encourage conservation under Propositions 218 and 26



**July 20, 2015**  
 Sacramento, California  
 Courtyard Marriott Sacramento Midtown

**Credits:** CA 7.25 MCLE (call about others)  
**Quick when/where:** 8:30 a.m., 4422 Y Street

**Municipal Water Utility Ratemaking Seminar**

July 20, 2015 | Sacramento, California  
 Courtyard Marriott Sacramento Midtown

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8:00 Registration Opens

8:30 Introduction and Overview

**Benjamin T. Benumof, Esq., Program Co-Chair**  
AlvaradoSmith, APC ~ Santa Ana, CA

**Padmanabhan Srinagesh, Ph.D., Program Co-Chair, Director**  
LitiNomics ~ Mountain View, CA

8:45 **The Law: When do the Substantive and Procedural Provisions of Proposition 218 and Proposition 26 Apply?**

City of San Buenaventura v. United Water Conservation District (2nd District Court of Appeal) compared with Great Oaks Water Company v. Santa Clara Valley Water District (6th District Court of Appeal): Property-relatedness under 218 and exclusions from 26

**Patricia J. Quilizapa, Esq.**  
Aleshire & Wynder, LLP ~ Irvine, CA

Practical tips for dealing with remands from the litigants' perspective (and what to do differently the first time around)

**Adam W. Hofmann, Esq., Senior Counsel**  
Hanson Bridgett LLP ~ San Francisco, CA

A review of recent cases on Proposition 218

**W. Michael Hensley, Esq.**  
AlvaradoSmith, APC ~ Santa Ana, CA

10:45 Break

11:00 **The Economics: Lessons from Recent Cases on Conducting a Valid Cost of Service Analysis (COSA)**

Analytical approaches to determining the revenue requirement; analysis of compliant rate structures

**Padmanabhan Srinagesh, Ph.D., Program Co-Chair**

A view from the trenches on the engineering economics and COSAs: How Mesa Water District develops rates

**Michael Hanemann, Ph.D., Chancellor's Professor Emeritus**  
University of California Berkeley ~ Berkeley, CA

12:15 Lunch (on your own)

1:30 Tiered Rates: San Juan Capistrano

**Benjamin Benumof, Esq., Program Co-Chair**

**Michael G. Colantuono, Esq.**  
Colantuono, Highsmith & Whatley PC ~ Los Angeles, CA

2:30 Break

2:45 **Dealing With the Drought: State Water Resources Control Board (WRCB) Mandatory Water Consumption Reduction Measures**

Update on the Governor's executive order requiring 25 percent reductions and WRCB's implementation efforts; how the rate structuring/pricing/penalty provisions for encouraging conservation mesh with Proposition 218

**Kelly J. Salt, Esq.**  
Best Best & Krieger LLP ~ San Diego, CA

3:30 **Dealing With the Drought (con't): Compliance Options**

Capturing Stormwater and Recycling Wastewater: When does a capture/treat for reuse component enable a local government to avoid Proposition 26's requirement of a two-thirds vote? To what extent can local government transfer funds between enterprises?

**Kenneth C. Farfsing, City Manager**  
City of Signal Hill ~ Signal Hill, CA

How the California Public Utility Commission designs rates for private utilities to encourage conservation by recovering a greater proportion of total costs through consumption charges; the options for publicly-owned water utilities

**Raminder S. Kahlon, Water Director**  
California Public Utilities Commission ~ San Francisco, CA

5:00 Evaluations and Adjourn



About the Seminar



What previous attendees have said:

"Very timely issues and good discussions."

"The content of the conference was, overall, excellent."

"You put on an excellent conference. I learned a lot from the presentations, and also took advantage of the opportunity to network and learn from my fellow attendees."

California is in the midst of a historic drought. Surface water deliveries are at an all-time low and many groundwater basins are being significantly drawn down. The economic effects of actual or foreseeable shortages can be mitigated by increasing the price end users pay for each gallon of water used. However, the rates municipal utilities charge for water are restricted by Proposition 218, and must be justified by a Cost of Service Analysis (COSA). Proposition 218 may limit the ability of municipal water utilities to encourage conservation by raising volumetric charges for water. Recently, the City of Capistrano's implementation of one widely used mechanism for reducing demand, tiered rates, was found to violate Proposition 218 by the Fourth Appellate District because the rates were not justified by a COSA. The decision highlights the need to develop COSA methodologies that are compliant with Proposition 218.

This one-day seminar will explain recent decisions by California courts on the limitations Propositions 218 and 26 place on municipal water rates, and describe the economic principles used by COSA to develop municipal water rates. In particular, leading experts in the law and economics of water pricing will examine the legal and economic challenges that are likely to emerge as municipal water utilities cope with the ongoing drought.

This advanced seminar will help practitioners in both fields improve their overall understanding of these interrelated fields just as water issues are front-page news. We hope to see you there.

Register soon for in person or live webcast attendance.

**Program Co-Chairs: Benjamin Benumof, Esq., AlvaradoSmith, APC and Padmanabhan Srinagesh, Ph.D., LitiNomics**



**Benjamin T. Benumof**, *Program Co-Chair*, shareholder, Alvarado-Smith, APC, has extensive experience in bench and jury trials, complex binding and non-binding arbitrations, mediations and appellate work in state and federal courts, with an emphasis in land use, water law, real estate, construction, business law and litigation.

**Padmanabhan Srinagesh, Ph.D.**, *Program Co-Chair*, Director, LitiNomics, specializes in litigation consulting and telecommunications research. He has experience as a consulting expert in antitrust litigation and patent infringement cases.

**Michael G. Colantuono**, partner, Colantuono, Highsmith & Whatley PC, a certified Specialist in Appellate Law, focuses on areas of local California government, including constitutional law, land use regulation, public utilities, LAFCO issues, conflicts of interest and municipal litigation.

**Kenneth C. Farfsing**, City Manager, City of Signal Hill, is experienced in community development, redevelopment, economic development and city management. He is past president of the Gateway Cities City Manager's Group and former member of the Water Quality Task Force of the League of California Cities.

**Michael Hanemann, Ph.D.**, is Professor and Julie A. Wrigley Chair in Sustainability in the Department of Economics at Arizona State University, and Chancellor's Professor Emeritus in the Department of Agricultural & Resource Economics at UC Berkeley. He is Director of the Center for Environmental Economics and Sustainability Policy at ASU,

and has worked on the economics of water with California's water rights agency and designed the water rates used by LADWP since 1993.

**W. Michael Hensley**, shareholder, AlvaradoSmith, APC, is a litigator and an appellate attorney involved in a wide variety of commercial and civil disputes. He specializes in law and motion proceedings, trials, arbitrations, mediations, and appeals as well as specialty writ proceedings.

**Adam W. Hofmann**, senior counsel, Hanson Bridgett LLP, represents public and private clients in civil writs and appeals, traditional litigation, administrative proceedings, arbitration, and mediation. His experience includes representing cities, counties, special districts, and transit districts in land use, eminent domain, finance, election law, code enforcement and civil rights disputes.

**Rami Kahlon**, Water Director, California Public Utilities Commission, investigates water and sewer system service quality issues and analyzes and processes utility rate change requests.

**Patricia J. Quilizapa**, partner, Aleshire & Wynder, LLP, focuses on litigation and water law. She has litigated matters involving issues of ground-water extraction, water rights, storage rights, public finance and water rate disputes.

**Kelly J. Salt**, partner in the Public Finance practice group, Best Best & Krieger LLP, works with public agencies on bond and municipal finance matters, rate setting and compliance with Propositions 218 and 26, and drought management and water conservation programs.



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 conservation under Propositions 218 and 26

**July 20, 2015**  
 Sacramento, California

Courtyard Marriott Sacramento Midtown  
 4422 Y Street  
 (916) 455-6800

## You Will Learn About:

- *The law: When do the substantive and procedural provisions of Proposition 218 and Proposition 26 apply?*
- *The economics: Lessons from recent cases on conducting a valid cost of service analysis*
- *Tiered rates: San Juan Capistrano*
- *Dealing with the drought: State Water Resources Control Board's mandatory water consumption reduction measures*
- *Compliance options*

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California Environmental Quality Act (CEQA)	October 5, 2015	Santa Monica, CA
Hydrology and the Law	October 21, 2015	Los Angeles, CA

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Municipal Water Ratemaking in California	January 7, 2015	Long Beach, CA
Deployment of Local Wireless Facilities	February 19-20, 2015	Los Angeles, CA
Groundwater Regulation & Management in California	March 2-3, 2015	Sacramento, CA

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## **Municipal Water Utility Ratemaking in California**

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*July 20, 2015, in Sacramento, CA*

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## Faculty

### Municipal Water Utility Ratemaking in California

July 20, 2015  
Sacramento, CA

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**The Law: When do the Substantive and  
Procedural Provisions of Proposition 218 and  
Proposition 26 Apply?**

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## **Practical Tips for Dealing with Remands from the Litigants' Perspective and What to Do Differently the First Time Around - Setting Water Rates Under Proposition 218 and Curing Past Violations**

- I. Municipal Water Rates for Retail Customers Are Generally Governed by Proposition 218, Article XIII D, § 6 of the California Constitution
  - A. Domestic water delivery through a pipeline is a property-related charge. *Bighorn-Desert View Water Agency v. Virgil* (2006) 39 Cal.4th 205.
  - B. Groundwater production charges can also be considered property-related fees for water services, subject to Proposition 218. *Griffith v. Pajaro Valley Water Management District* (2013) 220 Cal.App.4th 586
  - C. But watch *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2015) 235 Cal.App.4th 523 (holding groundwater charges are property-related fees governed by Proposition 218) and *City of San Buenaventura v. United Water Conservation Dist.* (2015) 235 Cal.App.4th 228 (holding groundwater charges are for a government benefit governed by Proposition 26, Article XIII C, § 1(e)(1)).<sup>1</sup>
- II. Proposition 218 Sets Procedural and Substantive Limits on Municipal Water Rates
  - A. Procedural Requirements, Article XIII D, § 6, subd. (a)
    1. Identify parcels subject to the charge.
    2. Calculate the amount of the charge to be imposed.
    3. Provide written notice to all record owners of parcels upon which the charge will be imposed, including:
      - a. The amount,
      - b. The basis upon which the amount was calculated,
      - c. The reason for the charge,
      - d. The date, time, and location of a public hearing on the charge.
    4. Hold a public hearing no less than 45 days from mailing the notice.

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<sup>1</sup> Though originally published both *Great Oaks* and *City of San Buenaventura* are no longer citable. The Sixth District Court of Appeal granted rehearing in *Great Oaks* on April 24, 2015, depublishing its original opinion, and has not issued a new opinion as of the time of publication—a final decision should issue no later than August 19, 2015. The California Supreme Court granted review in *City of San Buenaventura* on June 24, 2015.

5. Consider all protests to the charge.
  6. If a majority of owners protest the charge, the agency shall not adopt it.
  7. No vote required. Article XIII D, § 6, subd. (c).
- B. Substantive Requirements, Article XIII D, § 6, subd. (b)
1. Revenues cannot exceed the funds required to provide the related service.
  2. Revenues cannot be used for any purpose other than to pay for the service for which it was charged.
  3. The amount of the fee charged any individual parcel cannot exceed the proportional cost of providing service to that parcel.
  4. The charge cannot be imposed unless the service is used by or immediately available to the payer.

### III. Procedural Requirements Applied

- A. Notice only to record owners, not tenants or customers. *Griffith v. Pajaro Valley Water Management District* (2013) 220 Cal.App.4th 586.
- B. Agencies may hold hearings on proposed rates less than 45 days from notice, so long as the rates are not adopted until after a public hearing at least 45 days from notice. *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2015) 235 Cal.App.4th 523.<sup>2</sup>
- C. No requirement for separate protest procedures for different classes of customers, and proportional balloting is not required. *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.892.
- D. Agencies are not required to provide rate payers notice of their option to protest a proposed rate, nor does the Constitution prescribe any specific procedures for collecting and tallying rate protests; the detailed procedures Article XIII D, § 4 requires for assessments do not apply to water rates, so long as protests are actually accepted and tallied. *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2015) 235 Cal.App.4th 523.<sup>3</sup>

### IV. Substantive Requirements Applied

- A. Agencies Must Set Cost-Proportional Water Rates – Dos and Don'ts
1. **Do:** Set rates proportional to the cost of providing all services, as defined by enabling legislation, allocated reasonably amongst grouped rate payers, based on a cost-of-service study utilizing reliable data.
    - a. Agencies may set rates using a "revenue requirements model," starting with the costs of operating its water service as defined by its enabling legislation, subtracting other revenue sources, and

<sup>2</sup> Note publication status above.

<sup>3</sup> Note publication status above.

- developing a charge that would cover the remainder. *Griffith v. Pajaro Valley Water Management District* (2013) 220 Cal.App.4th 586.
- b. An agency's cost to provide "water service" to all rate payers may include conservation activities that preserve existing supplies for all customers, such as adopting a recycled-water program, so long as rates do not result in some rate payers disproportionately subsidizing the water use of others. *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493.
  - c. Proposition 218 "prescribes no particular method for apportioning a fee or charge," and it is "reasonable" for an agency to apportion its actual costs of service amongst ratepayers, grouping similar users together into rate tiers. Rates need not be calculated on a parcel-by-parcel basis. *Griffith v. Pajaro Valley Water Management District* (2013) 220 Cal.App.4th 586.
  - d. A cost of services study that utilizes "reliable" data is a sufficient basis to establish that the rates adopted were proportional to costs of providing service to each of the rate classes. Perfect data is not required, and data will generally be considered reliable if it satisfies AWWA standards. *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892.
  - e. Agencies may adopt rates that are lower than actual costs of service and lower than rates identified in a Proposition 218 notice so long as no group of ratepayers is made to subsidize those lower rates. *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892.
2. **Don't:** Set rates that ignore cost of service principles, allocate costs to rates arbitrarily, or unreasonably cause some payers to subsidize service for others.
- a. If a cost of service study identifies more than one option for setting rates and rate structures, agencies should not choose structures that emphasize considerations such as rate stability or water conservation at the expense of ensuring cost proportionality. *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926; *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493.
  - b. Tiered rates cannot be set without justifying the cost proportionality of each tier; it is not sufficient that tiered rates are tailored to recover an agency's aggregate costs from total payments across the tiers. *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493.
  - c. When utilizing tiered rates, higher tiers cannot be saved by identifying them as penalty rates—governed by Proposition 26—in


response to a rate challenge. *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493.

- d. **Note:** The State Water Control Resources Board and the Association of California Water Agencies have both asked the California Supreme Court to depublish *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493. A final decision on these requests should issue by September 3, 2015.
- B. Service must be used by or "immediately available" to rate payers
1. Water service is "immediately available," even if not actually in use, as long as the agency has provided all necessary connections and it is only the unilateral act of the property owner that causes the service not to be used. *Paland v. Brooktrails Township Community Services Dist.* (2009) 179 Cal.App.4th 1358.
  2. Provision of recycled water to customers who can use it is part of the "water service" provided to all rate payers. That holistic service is, therefore, used by or immediately available to all rate payers, even those that receive no recycled water, so long as the inclusion of those costs do not create cross subsidies. *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493.
- C. Revenues must be used to pay only for the provision of water service
1. Rates can be used to reimburse a general fund to pay for local-government overhead to the extent actually used by the municipal utility as reasonably calculated by the agency. *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363.
  2. Paying debts incurred for past projects and investigating future water sources can both be parts of an agency's present service to ratepayers, if included in the definition of service found in the agency's enabling legislation. *Griffith v. Pajaro Valley Water Management District* (2013) 220 Cal.App.4th 586.
- D. Take Aways
1. Proposition 218 was enacted to make it more difficult for agencies to set fees and charges, including water rates. See Ballot Pamp., Gen. Elec. (Nov. 5, 1996) analysis of Prop. 218 by the Legis. Analyst, p. 74.
  2. This is part of a national trend that seeks to treat government like a private provider of goods and service, charging only for those goods and services that citizens want and are willing to purchase at rates they are willing to pay.
  3. Still, courts have shown a clear tendency to defer to rate-setting agencies so long as those agencies can show they made a reasonable, good-faith attempt to justify their rates both in the aggregate and as allocated amongst groups of rate payers.

4. Thus, agencies will not be required to adopt perfectly calibrated rates, nor will they be required to prove that their rates are the most reasonable or the rates that challengers or judges would adopt. Nonetheless, agencies should bear in mind Proposition 218's goals and seek to tailor rates as closely as possible to the costs of providing services to rate payers.\
5. Above all, obtain a professional cost of service study and build a robust administrative record to support rates.

V. Conservation Rates and Penalties – Creative Problem Solving in a Small Box


- A. Water conservation and supply management are often part of water agencies' services as defined by their enabling legislation, and related costs can be recovered from rates. Correlating those costs to the benefits received by rate payers, however, may prove complex. *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493
- B. Tiered Rates
  1. Agencies can set tiered water rates, so long as the tiers are cost justified at each level and reflect the costs of providing water at each level.
  2. For example, if an agency can show that certain, heavy water users require the agency to obtain more expensive water supplies or to spend more money constructing, maintaining, and operating water infrastructure, they can and probably should allocate those increased costs to higher tiers.
- C. Incentives
  1. Agencies can incentivize conservation by charging some rate payers less than their proportional cost of service.
  2. But, incentive pricing cannot result in disproportionately higher costs for other users.
  3. As a result, incentive rates must generally be subsidized with revenues wholly separate from water rates.
- D. Penalties
  1. Penalties are governed by Proposition 26 and *should* not require evidence of cost proportionality or a notice-and-protest process.
  2. A true penalty regulates conduct, rather than seeking to raise revenue. *Cal. Taxpayers Assn. v. Franchise Tax Bd.* (2010) 190 Cal. App. 4th 1139. And Prop 26 requires that a penalty remedy a violation of law.
  3. *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 calls into question whether agencies can charge purely volumetric penalty rates without satisfying Proposition 218.
- E. The State Water Resources Control Board will be providing some guidance for setting conservation consistent with Propositions 218 shortly before the seminar, and this presentation will be supplemented with a summary of that guidance and any written materials the Board issues will be made available upon request.




Practical Tips for Dealing with Prop 218

Municipal Water Rate Setting

July 20, 2015



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**Proposition 218**  
**California Constitution, Article XIII D, Section 6**

**Establishes Procedural and Substantive Restrictions on  
Local Government Fees and Charges Imposed as an  
Incident Of Property Ownership**



## Proposition 218 Governs Most Retail Water Rates Set by Public Agencies

*Bighorn-Desert View Water Agency v. Virgil*

(2006) 39 Cal.4th 205

- Domestic water delivery through a pipeline is a property-related charge subject to Proposition 218

*Griffith v. Pajaro Valley Water Management District*

(2013) 220 Cal.App.4th 586

- Certain charges imposed on the production of groundwater have been held subject to Proposition 218

## Procedural Requirements

- Identify parcels subject to the charge
- Calculate the amount of the charge to be imposed
- Provide written notice to all record owners of parcels upon which the charge will be imposed, including:
  - The amount
  - The basis upon which the amount was calculated
  - The reason for the charge
  - The date, time, and location of a public hearing on the charge
- Hold a public hearing no less than 45 days from mailing the notice
- Consider all protests to the charge
- If a majority of owners protest, the agency shall not adopt it

Cal. Const., art. XIII D, § 6, subd. (a)

## Tips for Applying Procedural Requirements

- Prop 218 Notice to property owners, not tenants or customers
- Prop 218 notice can identify a volumetric rate or range of possible rates, so long as the ultimate rate is not greater than the maximum rate identified in the range
- Agencies can hold hearings on proposed rates earlier than 45 days from notice, so long as rates are not adopted until close of hearing at least 45 days from notice
- Agencies are not required to hold separate protest procedures for different customer classes or proportional protests
- Agencies are probably not required to provide notice of right to protest or to publicize protest procedures

## Substantive Requirements

- Revenues cannot exceed the funds required to provide the related service
- Revenues cannot be used for any purpose other than to pay for the service for which it was charged
- The amount of the fee charged any individual parcel cannot exceed the proportional cost of providing service to that parcel
- The charge cannot be imposed unless the service is used by or immediately available to the payor

Cal. Const., art. XIII D, § 6, subd. (b)

## Tips for Applying Substantive Requirements:

### Proportional Rates, *Do*

- Set rates proportional to the cost of providing all services
- Allocate rates reasonably amongst grouped rate payers, based on a cost-of-service study
- Define services consistent with enabling legislation
- Use reasonably reliable data

## Tips for Applying Substantive Requirements:

### Proportional Rates, *Don't*

- Ignore cost-of-service analysis
- Assign costs to rates arbitrarily or based primarily on considerations other than the costs of providing service and benefits conferred
- Unreasonably cause some groups of ratepayers to subsidize service for others

## Tips for Applying Substantive Requirements:

### Immediately Available Service

- Service is “immediately available” when agency has provided all necessary connections such that ratepayer may access service unilaterally
- Water service, as defined by enabling legislation, may include the holistic provision of water within the agency’s jurisdiction, and that holistic service is “immediately available” to all ratepayers even if some components or supplies are only provided to a subset of ratepayers

## Tips for Applying Substantive Requirements:

### Revenues Used Only for Service

- Revenue from water rates can be used to reimburse municipal general fund for overhead used by enterprise utility
- The cost of servicing debts for past water projects and the cost of investigating new water supplies may be part of an agency’s current, holistic water service as defined by enabling legislation

## Take Aways

- Proposition 218 is designed to make rate setting difficult
- Agencies are not required to set perfectly calibrated rates, nor are they required to set the *most* reasonable rates or the rates that ratepayers or judges would prefer
- Courts generally defer to agencies that make a good faith attempt to establish rates that are reasonably justified by costs of service and proportional to those costs based on reliable data
- Obtain a professional cost-of-service study and follow its recommendations
- Take a close look at your enabling legislation and tailor your cost-of-service study to the services it describes

## Conservation Rates, Incentives, and Penalties

- Water conservation and supply management are often part of water agencies' holistic water service as defined by their enabling legislation
- Article X, section 2 of the California Constitution sets a policy favoring conservation
- Conservation and supply management do not alone trump constitutional limits on local government fees and charges
- The tension between these policies remains fairly unsettled

## Tiered Rates

- Tiered water rates *are* permitted by Proposition 218
- As it stands, each tier must reflect the costs of providing water at each level of use
- It may be possible to set penalty tiers, but it is in doubt

## Incentives

- Agencies may incentivize conservation by charging efficient users less than their proportional cost of service
- Incentive pricing cannot result in cross subsidies
- Incentives must generally be funded with revenues wholly separate from water rates

## Penalty Rates

- Penalties are not subject to Proposition 218
- They are governed by Proposition 26, California Constitution Article XIII C, Section 1, subdivision (e):

All charges or levies imposed by local government are "taxes," except . . . "(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law."

## What Constitutes a Penalty?

- *Cal. Taxpayers Assn. v. Franchise Tax Bd.* (2010) 190 Cal. App. 4th 1139, 1148, a penalty regulates conduct, rather than seeking to raise revenue, though revenue is raised by penalties
- Traditional fines for conduct, *i.e.* watering lawns in daylight or hosing down a driveway
- *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* calls into question whether agencies can charge purely volumetric penalty rates



What, me worry?

