No. S226036

Service on Attorney General required by Rule 8.29(c)(1)

Exempt from Filing Fees
Government Code § 6103

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

City of San Buenaventura

Plaintiff, Cross-Defendant and Respondent / Cross-Appellant

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vs.

United Water Conservation District and Board of Directors of United Water Conservation District

Defendants, Cross-Complainants and Appellants / Cross-Respondents

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OPENING BRIEF

Of a Published Decision of the
Second Appellate District, Case No. B251810

Reversing a Judgment of the Superior Court of the State of California
County of Santa Barbara, Case Nos. VENCI 00401714 and 1414739
Honorable Thomas P. Anderle, Judge Presiding

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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?

INTRODUCTION

This case challenges groundwater pumping charges imposed by United Water Conservation District (the District) on the City of San Buenaventura (City) and all others who pump groundwater from eight basins of the Santa Clara River Valley in coastal Ventura County. The trial court determined the District's pumping charges were property related fees subject to article XIII D, section 6 of the California Constitution, adopted by Proposition 218, and were not apportioned according to that provision's cost-of-service requirements. Article XIII D, section 6, subdivision (b)(3)[1] requires such fees be limited to "the proportional cost of the service attributable to the parcel." Proposition 26 limits local government fees not subject to Proposition 218 to "the reasonable costs to the local government of providing the service" and requires "that the manner in which those costs are allocated to a payor bear a fair or

[1] References to articles or sections of articles are to the California Constitution.

reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity," unless they are approved by the voters as taxes. (Cal. Const., art. XIII C, § 1, subd. (e)(2) & final, unnumbered par.)

Under a 1965 statute, the District is required to impose fees on municipal and industrial (M&I) users of groundwater that are three to five times those on agricultural users. That statute was overtaken by the cost-of-service requirements of Propositions 218 and 26.

Also, the District's rate-making records are insufficient to prove its fees are limited to the cost of replenishing groundwater, are spent only to do so and not for "general governmental services ... available to the public at large in substantially the same manner as ... to property owners." (Cal. Const., art. XIII D, § 6, subd. (b)(1), (2) & (5).) Similarly, this record does not allow the District to prove the charges "do[] not exceed the reasonable costs to the [District] of providing the service" or that the allocation of fees satisfies the Proposition 26 standards quoted above.

This is so for three reasons:

- The 3:1 ratio of M&I to agricultural charges cannot be justified on this — or any conceivable — record.
- The District admits its services are not of equal benefit to all eight basins by maintaining its Zone B charge, which requires those who benefit from the Freeman Diversion Dam alone to bear its cost; yet it pools all other charges in a

District-wide Zone A that necessarily overcharges the City for the benefit it receives.

- The record is insufficient to show the District spends the proceeds of the charge only to provide groundwater services and that it has estimated the cost of that service with reasonable accuracy.

Accordingly, whether Proposition 218 provides the rule of decision here, as the trial court and precedent hold, or Proposition 26 does; this Court should affirm the trial court's judgment invalidating the fee. Further, the City urges this Court to provide in its decision the declaratory relief sought by its cross-appeal below.

STATEMENT OF THE CASE

In August 2011 the City filed a Petition for Writ of Traditional Mandate (Code Civ. Proc., § 1085), a Petition for Administrative Mandate (Code Civ. Proc., § 1094.5), a Complaint for Declaratory Relief, and a Complaint for Determination of Invalidity under Code of Civil Procedure section 863. (1JA1:1.)[2] The City alleged the District's 2011–2012 rates violated Propositions 218, 13, and 26; the common law of ratemaking; and Government Code section 54999.7. (1JA1:1.) The City filed in Ventura County and moved for neutral

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[2] Citations to the Joint Appendix are in the form: [Volume]JA[Tab#]:[page#].

venue pursuant to Code of Civil Procedure section 394; the case was transferred to Santa Barbara County. (2JA19:336).

In August 2012, the City similarly challenged the District's 2012–2013 rates. (4JA33:690.) The City related the cases. (4JA39:795; 4JA40:800.) The City again filed in Ventura, but the parties stipulated to Santa Barbara venue.

The District lodged administrative records for the cases, which the Court consolidated for trial. (4JA41:804;[3] 9JA73:1768; 5JA55:980 [Case Mgmt. Order § 7(A)].)

After bench trial on the administrative records, the trial court found:

- The charges are "property related fees" subject to Proposition 218. (10JA88:2123.)
- The District did not prove compliance with the proportional cost requirement of article XIII D, section 6, subdivision (b)(3) because it imposed different rates on farmers than on others without cost justification. (*Ibid.*)
- The administrative records show the District based the charges on Water Code section 75594's mandated 3:1 ratio, not any demonstrated difference in the cost of service. (*Id.* at p. 2157.)

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[3] "AR1" refers to the 2011–2012 administrative record and "AR2" to the 2012–2013 record. Citations are in the form AR[#]:[Tab#]:[page#].

- The District satisfied the other constitutional, statutory and common law standards the City pleaded. (*Id.* at pp. 2140 [Prop. 13], 2150 [Prop. 26], 2151 [common law of utility ratemaking and Gov. Code § 54999.7].)

The trial court ordered a refund of charges in excess of what the City would have paid under uniform rates and pre-judgment interest. (12JA112:2578.)

The City gave notice of entry of judgment September 12, 2013; the District timely appealed October 1, 2013. (12JA114:2590.) The City timely cross-appealed October 21, 2013. (12JA116:2615.)

Following principal and amicus briefing, the Court of Appeal requested supplemental briefing on the 2014 Sustainable Groundwater Management Act (A.B. 1739, S.B. 1168 & S.B. 1319). Its published opinion concluded:

- The District's groundwater extraction charges are subject to Proposition 26 rather than Proposition 218 notwithstanding the contrary conclusions of *Pajaro Valley Water Mgmt. Agency v. AmRhein* (2007) 150 Cal.App.4th 1364 (*Pajaro I*) and *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 (*Pajaro II*); and
- The District's groundwater extraction charges satisfy Proposition 26 because the fees did not exceed the District's service cost in toto and because substantial

evidence in the appellate record supported the trial court's conclusion the rates are fair and reasonable.

The City requested rehearing, noting inter alia the Opinion's failure to apply both prongs of the test stated in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*). The Second District denied rehearing, making minor changes in the Opinion. This Court granted review.

STATEMENT OF FACTS

I. THE DISTRICT CHARGES GROUNDWATER USERS UNIFORMLY IN EIGHT DISTINCT BASINS

The District was formed under the Water Conservation District Law of 1931 (Wat. Code, § 74000 et seq.) to manage groundwater. (AR1:22:36; AR2:106:21 [same].)[4] The District charges all who use groundwater from the eight basins — including municipal and other retailers, agricultural users, and rural residents. (AR1:62:30 [10 largest customers], 38 [nursery and residential customers]; AR2:53:30, 38 [same].)

The City pumps from four basins:

- Mound;
- Santa Paula;
- northern Oxnard Plain; and

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[4] Most of the first administrative record is duplicated in the second. AR2 cites identical to a preceding AR1 cite are marked: "[same]".

- West Las Posas.

(AR1:78:8, 13; AR2:165:21.) The City uses groundwater to serve some 30,000 customers. (AR1:78:1; AR2:165:1.)

The Department of Water Resources defines a "groundwater basin" as "an alluvial aquifer or a stacked series of alluvial aquifers with reasonably well-defined boundaries in a lateral direction and having a definable bottom."(1AR:86:106.) It defines "aquifer" as:

> A body of rock or sediment that is sufficiently porous and permeable to store, transmit, and yield significant or economic quantities of groundwater to wells and springs.

(*Id.*, at p. 103; <http://www.water.ca.gov/groundwater/bulletin118/update_2003.cfm> [as of July 20, 2015] [same].) Thus, a basin is a water-bearing body of rock or sediment bounded laterally by geologic features like faults and bottomed by non-water-bearing rock.

The Department of Water Resources' Groundwater Bulletin[5] describes the geology of the eight basins contested here.

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[5] Groundwater Bulletin 118, update 2003, is in the record at AR1:86. The February 27, 2004 update to its description of the Santa Paula Subbasin, quoted above, is Exhibit A to the February 6, 2014 Motion for Judicial Notice ("MJN"). (See also

(<http://www.water.ca.gov/groundwater/bulletin118/update_2003.cfm> [as of July 20, 2015].)[6] A map of the basins appears at AR2:165:21.

Although all groundwater users share these basins, the District distinguishes municipal and industrial ("M&I") from agricultural users. (See AR1:62:32 [discussing Water Code section 75594]; AR2:53:32 [same].) Agricultural use is that for production of crops, livestock and aquaculture. M&I includes most other uses, including water served by utilities and outdoor irrigation. (*Ibid.*)

Agriculture consistently uses more than 80 percent of District groundwater, while M&I uses less than 20 percent. (AR1:22:59 [2011–2012 budgeted "Groundwater revenue"] [calculated by adding values for agriculture or M & I listed in Acre Feet column and dividing by total, 155,200 AF]; AR2:106:48 [same for FY 2012–2013].) These percentages have remained relatively constant for decades. (See AR1:35:14 [1985 data].) Due to the 3:1 rate ratio, however, M&I users pay more than 42 percent of District fees.[7]

<http://www.water.ca.gov/groundwater/bulletin118/basindescriptions/4-04.04.pdf > [as of July 20, 2015].)

[6] These basins are listed as "South Coast" basins and are numbered 4-4.02 to .07 and 4-8.

[7] For 2011–2012, the District forecast $1,995,000 in agricultural Zone A charges; $1,490,550 in agricultural Zone B charges;

The records, years of scientific data, and the District's own long-standing rate-making practice demonstrate the eight groundwater basins are distinguished by earthquake faults and other geologic features. (See, e.g., AR2:165:21.) Because of these barriers to groundwater flow, the District's recharge efforts benefit some basins more than others. (AR1:16:122 ["The mountains and numerous faults are boundaries to ground water flow"]; AR1:28:62 ["groundwater elevation differences across the boundary between the Mound basin and Santa Paula basin are dramatic"].) The most significant overdraft occurs in agricultural areas of the southeastern Oxnard Plain and Pleasant Valley basins; the City's wells are located elsewhere. (AR1:62:34 ["the majority of the overdraft in the Oxnard [P]lain aquifers has been caused by agricultural pumping in the eastern/southern part of the plain. Most of the M&I wells on the Oxnard Plain are located in the less-impacted north-western portion of the aquifer"]; AR2:53:34 [same]; see also AR2:165:21 [groundwater flow map identifying wells].) Nevertheless, the District imposes

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$1,188,450 in M&I Zone A charges and $1,368,000 in M&I Zone B charges. (AR1:22:59.) Thus, agriculture was to pay $3,485,550 ($1,995,000 + $1,490,550 = $3,485,550) and M&I, $2,556,450 ($1,188,450 + $1,368,000 = $2,556,450). Of 2011–2012 total charges of $6,042,000, then, agricultural customers would pay 57.7% ($3,485,550 / $6,042,000 = 57.7%) and M&I customers, 42.3% ($2,556,450 / $6,042,000 = 42.3%).

uniform rates throughout its territory (AR1:62:30 [citing Water Code section 75592]; AR2:53:30 [same]). Although the City benefits less from the District's services, it and other M&I groundwater users pay three times what agriculture does. (AR1:72:4 [resolution setting rates]; AR2:149:4 [same].) In defense of this litigation, the District resurrects a dated, debunked and implausible theory that all basins act as a "common pool" such that recharge anywhere is recharge everywhere. (AR2:54:4–5.) The trial court properly rejected this fiction.

II. THE DISTRICT RECHARGES WATER AT A FEW LOCATIONS IN ITS GEOLOGICALLY COMPLEX SERVICE AREA

A. The Agricultural Oxnard Plain and Pleasant Valley Basins are Uniquely Affected by Overdraft

The District spends much of its funds to combat seawater intrusion in agricultural areas of the Oxnard Plain and Pleasant Valley Basins. (See AR1:62:69 ["No other part of the District receives so much attention and effort"]; AR2:53:69 [same].) Oxnard Plain overdraft has been a problem for decades; indeed, the District was formed to control it. (AR1:14:1 [1950 resolution "giving precedence to the areas in greatest distress which are presently recognized to be on the Oxnard Plain"]; see also AR1:21:4 ["The overdraft and the

subsequent seawater intrusion of the Oxnard Plain have persisted to varying degrees over the last half century."]; AR2:30:4 [same].)

The southeastern Oxnard Plain and Pleasant Valley Basins alone within the District suffer from long-term overdraft and seawater intrusion. (AR1:60:13; AR2:94:13–14.) However, the District's efforts have only served to shift seawater intrusion from one groundwater stratum to another. (AR1:21:4 [1998 Groundwater Model noting County ordinance requiring pumping shift]; AR2:30:4 [same]; see also AR1:29:8 [saline intrusion continues]; AR2:178:8 [same].)

The District's own reports conclude "the majority of the overdraft in the Oxnard [P]lain aquifers has been caused by agricultural pumping in the eastern/southern part of the plain." (AR1:62:34; AR2:53:34 [same].) The City's Oxnard Plain wells, however, are at its northwestern edge, away from the pumping hole. (*Ibid.*; see also AR1:78:13.) The District acknowledges it spends significant resources addressing agricultural overdraft in these two basins, and its "current operations and long-range planning efforts are focused heavily on that area." (AR1:62:69; AR2:53:69 [same]; see also AR2:54:4.)

B. The City's Basins Benefit Little from the District's Recharge

The District argues recharge in one basin equally benefits groundwater users in every basin, but its administrative records

show otherwise. The City draws its water mostly from the Mound and Santa Paula Basins, which benefit little from recharge elsewhere. (See, e.g., AR1:98:24 ["The Mound Basin in Ventura, which has little connectivity to the other basins managed by United"]; AR2:165:21 [depicting City wells in Mound Basin]; AR2:176:24 [same]; AR1:81:17 ["Santa Paula Basin doesn't respond to recharge at United Water's Saticoy spreading grounds"]; *id.* at p. 22 [map showing Santa Paula Basin and Saticoy spreading grounds separated by Santa Clara River]; AR2:164:6 [District's rebuttal to City essentially concedes limited benefit to Mound and Santa Paula basins].)

The Mound Basin does not suffer from overdraft or seawater intrusion despite its proximity to the coast. (AR1:35:5 ["Overdraft has not been determined to be a problem in the Mound Basin"]; AR1:82:17 [City draws from Mound Basin less than its safe yield].) The District's records do not show meaningful hydraulic connection between Mound and neighboring basins. The District has long known "there is essentially no possibility of water moving from the Oxnard aquifer to the Mound Basin." (AR1:4:5; see also AR2:5:70 [1959 Mann Report: "[T]he underflow from the Santa Paula Basin to the Mound Basin is very small"].)

> Additional aquifer testing, geophysical, water chemistry, and groundwater level data may be necessary to adequately define the subsurface flow

between Santa Paula Basin and the adjacent Mound and Montalvo [i.e., Oxnard Forebay] basins.

(AR1:34:9; see also AR2:66:13 ["Although there is general agreement that there is some hydraulic connection between Santa Paula [B]asin and the Mound Basin, the degree of connection is uncertain"].) In fact, groundwater levels in the Mound and Santa Paula Basins differ by about 60 feet — and at times more than 100 feet — which confirms "[t]he mountains and numerous faults are boundaries to ground water flow" between them. (AR1:16:122; AR1:28:62–63.) If these basins were part of a District-wide common pool, as the District belatedly alleges, groundwater levels and quality should be similar in adjacent basins. As to Mound, however, the evidence shows it is saltier than the River and the basins the River recharges. (*Ibid.*; AR2:169:9–10 [Mound Basin total dissolved solid concentrations up to 6,600 mg/l]; AR2:50:121–123 [Santa Clara River at Freeman Diversion rarely exceeds 150 mg/l].)

Although the Mound Basin may receive some recharge from the Oxnard Forebay Basin (AR1:35:5 [referencing the Oxnard Forebay Basin as the "Montalvo Forebay Basin"]), "[t]he majority of the recharge to the [Mound] basin is likely from precipitation falling on the outcrops of the aquifer in the hills to the northeast of the Mound basin." (AR1:28:17; AR1:29:18.) As a result, the District's groundwater recharge facilities — "[t]he Santa Felicia Dam [which impounds Lake Piru], the Piru Diversion and Spreading Grounds [at

Lake Piru], and the in-river conveyance of Santa Felicia Dam's yield waters," provide "indirect recharge to the Mound Basin" — at best. (AR1:10:19.) The District's own report **excludes** Mound Basin from those benefiting from Lake Piru releases. (AR1:22:144 [listing only Piru, Fillmore, Santa Paula and Freeman Diversion as benefiting from releases].) Indeed, the District acknowledges the Mound Basin "has little connectivity to the other basins" and "receives little benefit from United's recharge operations, in contrast to the other basins ... ." (AR1:98:24; AR2:176:24 [Mound Basin "has little connectivity to the other basins managed by United"]; AR1:62:29; AR2:53:29 [same].)

The City also pumps from the western Santa Paula Basin. (AR2:165:21), which is managed cooperatively under a stipulated judgment. (E.g., AR1:30:3.) The City uses a very small portion of groundwater pumped there, well below its entitlement. (AR1:34:39 [City has a nearly 12,000 acre-foot, cumulative, seven-year surplus of entitlement]; see also AR1:30:11 [in 2000, City pumped 1,621 AF from Santa Paula basin while others pumped 25,169 AF]; AR1:31:12 [in 2003, figures are 316 AF and 21,972 AF]; AR1:32:12 [in 2005, figures are 2,046 AF and 22,626 AF]; AR1:33:38 [City retained 11,000 AF surplus in 2007].)

The District also concedes "Santa Paula Basin doesn't respond to recharge of United Water's Saticoy spreading ground," which

borders the Santa Paula Basin to its southeast.[8] (AR1:81:17, 22; see also AR2:164:6 ["UWCD concurs that the Santa Paula Basin does not respond to spreading operations in the [F]orebay and does not imply that it does"].) Although the Piru and Fillmore Basins — upstream from the Santa Paula Basin — receive groundwater recharge from surface water releases, the Oakridge Fault impedes recharge of the Santa Paula Basin. (AR1:62:50; see also AR1:34:9.) The administrative records indicate the Santa Paula Basin received only about five percent of Lake Piru releases from 2008 to 2010, as compared to approximately 42 and 14 percent for the Piru and Fillmore Basins, respectively. (AR1:22:144; AR2:168:150 [graph in 2011–2012 budget showing minimal recharge of Santa Paula and none of Mound Basin from Lake Piru releases]; see also AR1:24:10 [only 9 percent of lake releases flow to Santa Paula Basin and Freeman Diversion collectively]; AR1:25:14 [failing to quantify benefit to Santa Paula of surface water releases]; AR1:26:3 [same]; AR1:27:10 [same].)

Thus, the administrative records demonstrate that each basin responds to recharge differently and that recharge in one has little or no effect on water supply in another. The basins from which the City draws water are generally unaffected by overdraft and seawater

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[8] This fact confirms the basin delineation; groundwater flow across its boundary would belie the geologic structures that define it.

intrusion unlike the over-pumped southeastern Oxnard Plain and Pleasant Valley Basins.[9]

C. The District's "Common Pool" Theory Is Unsupported by its Administrative Records

After the City filed its first suit, the District sought to justify its 2012–2013 rates based in part on newfound "evidence" suggesting the eight groundwater basins actually function as a "common pool." (AR2:54:4–5.) This so-called evidence dates from the 1950s, but as explained above, has been abandoned for half a century in light of the more accurate and recent studies cited above. (See AR1:10:19.)

The "common pool" theory posits that all eight basins are interconnected such that pumping in one equally affects every groundwater user in every other basin. (*Ibid.*) Although this simplistic theory may be convenient to defense of these suits, it does not account for the hydrology of the eight basins or the District's actual basin management. (See AR1:60:15 ["The balance for each groundwater basin is determined individually"].) For example, as the Water Code requires, the District annually calculates the water balance of each basin separately. (*Ibid.*; AR2:94:17 [same].) It defines

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[9] The parties dispute the existence of agriculture-induced overdraft in the Santa Paula Basin. The point is not well reflected in this record and is not material for this case. However, the City does not wish to mislead.

the basins as did John Mann's 1959 "Plan for Groundwater Management." (AR1:60:16 [areas for groundwater basins (Piru, Fillmore, Santa Paula, Mound, Forebay, and Oxnard Plain) are from John Mann's 1959 report to the District]; AR2:94:18 [same].) Unsurprisingly, conditions in the basins vary and the convenient simplicity the District seeks does not exist.

According to the District's Surface and Groundwater Conditions Report for 1998:

> The groundwater basins within the District vary in their water production and ability to be recharged rapidly. The hydraulic connection between basins also varies across the District.

(AR1:28:16; AR2:177:16 [same].) The District cannot persuasively dispute this, as it acknowledges that long-term overdraft and seawater intrusion plague the Oxnard Plain and Pleasant Valley Basins, but not others. (9JA81:1915–1916.) Its records are replete with evidence the basins do not respond uniformly to recharge, and that their hydrogeology is complex. (See AR2:165:21 [groundwater flow map].) Indeed, were it otherwise, the basins would not have been delineated by the Department of Water Resources' Groundwater Bulletin 118 or accepted by decades of the District's own practice.

III. THE DISTRICT'S CHARGES BELIE ITS NEWFOUND COMMON-POOL THEORY

The District funds its services with:

- property taxes,
- the charges challenged here (identified in the record as "pump charges"),
- fees for its surface water sales (identified as "water delivery fees"), and
- investment earnings.

(AR1:62:10; AR1:22:57.) The District requires all pumpers in its District-wide Zone A to pay a uniform fee per acre-foot of water pumped in any basin, though District requires M&I users to pay three times what agricultural users pay. (AR1:62:30 [uniform fees], 32 [3:1 ratio].)

A. The District-Wide Zone A Charge Funds Its "General Fund"

The District's Board established two rate zones under Water Code sections 75540 and 75591. (See AR1:72:3; AR2:149:3–4.) Zone A includes the whole District. (AR1:72:3; AR2:149:3 [same]; see also AR2:111 [map of zones].) Zone A charges fund the District's "General Fund" and pay for facilities and operations it contends equally benefit all pumpers from Lake Piru in the mountains to Point Mugu on the coast (AR1:62:12; AR1:65:2; AR1:72:4–5); even

while the District acknowledges, as it must, that not all basins benefit equally from its efforts. (AR1:62:29 ["Mound Basin ... receives little benefit from United's recharge operations, in contrast to the other basins"]; *id.* at p. 69 ["No other part of the District receives so much attention and effort" as "the eastern/southern Oxnard Plain"]). As detailed below, however, this charge funds some expenses entirely unrelated to groundwater.

After the City filed its first suit, the District divided its General Fund into three subfunds, introducing a Water Conservation subfund. (AR2:106:42–45 [2012–2013 budget].) The District purports to devote this subfund to groundwater management. (*Id.*, at pp. 42–43.) The City would applaud had this response to suit made substantive change in the District's use of Zone A charges. However, the District continues to treat those charges as discretionary monies to be used for any purpose. All three subfunds benefit from the proceeds of the charge and continue to be used for such expenses as property tax collection fees payable to Ventura County, the District's share of Ventura County Local Agency Formation Commission's (LAFCO) budget, and "[r]ecreational [a]ctivities (including potable water services) at Lake Piru." (*Id.*, at p. 44.). The Water Conservation subfund continues to cover expenses such as chemicals used to treat water delivered to Lake Piru's concessionaire and purchases of imported water piped to agricultural users — neither of which has

meaningful benefit to groundwater pumpers. (*Id.* at p. 49.) The bottles have new labels, but the wine is unchanged.

A uniform, district-wide charge cannot be justified in light of the eight basins' disparate hydrogeology. Moreover, funds paid by pumpers throughout the District are expended to benefit only some. Indeed, there are **no** capital programs in the District's budget to benefit the Mound or Santa Paula Basins serving the City, but many expensive projects to benefit agricultural users in the Oxnard Forebay, Oxnard Plain and Pleasant Valley Basins, including:

- Operation of the recharge projects described above. (AR1:22:21.)
- Studies of potential imports to replace water used for recharge in agricultural areas. (AR1:62:110 [Policy Issue B) 9)]; AR2:53:110 [same].)
- A three-year investigation of seawater intrusion near Port Hueneme and Point Mugu — areas where the City does not pump. (AR1:22:25 [1st whole bullet point].)
- Purchase of land for the Ferro-Rose Recharge Project "essentially an extension of the Freeman Diversion project"[10] to benefit agricultural pumpers in the Oxnard

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[10] The Zone B charge recovers Freeman Diversion expenses from agricultural groundwater users in part of the District. Why, then, ask pumpers District-wide to fund extension of a system which the District admits does not benefit them?

Plain. (AR1:62:46; see also AR1:22:14 ["the Board approved the following budget policies: ... 4) purchase costs for the Ferro property will be paid from the General Fund"]; AR2:106:105–106 [CIP summary of Ferro-Rose Recharge Project].)

- The Environmental Impact Report for the Ferro-Rose Project. (AR1:62:46–47 ["This is also called the 'Ferro-Rose Recharge Project.' It is a General Fund CIP [capital improvement project], with the EIR to be funded from the General Fund. The Board will decide in the future how to fund the actual construction of the project."]; AR2:106:105–106 [CIP summary of Ferro-Rose Recharge Project].)
- A security fence for the Ferro-Rose property. (AR1:22:129 [project funded from 2009 Certificates of Participation]; AR2:106:119—120 [CIP summary of Ferro Rose Security Fencing Project].)
- Certificates of Participation ("COPs") to finance the Noble Basin Reservoir in the Oxnard Forebay[11] and projects for other basins. (AR1:10:15–16 [COPs "will continue to be

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[11] This project will "recharge the aquifers underlying the Oxnard Forebay and Oxnard Plain" — which provide little or no benefit to the City's wells in the Mound and Santa Paula Basins. (AR2:50:16.)

repaid at least in part by groundwater extraction charges"].)

- A pilot seawater barrier well in the Oxnard Plain.[12] (AR1:22:14 ["the Board approved the following budget policies: ... 5) construction of the first pilot seawater barrier well will be paid from the General Fund".)
- New valves at the El Rio Spreading Ground. (AR2:106:139–140 [CIP summary of El Rio Spreading Valve Control Project].)

Furthermore, agriculture uses over four-fifths of groundwater, but pays less than three-fifths of the cost.[13] M&I uses less than one-fifth the groundwater, but pays more than two-fifths the charges.

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[12] District staff believes a temporarily suspended, larger, seawater-barrier-well project should not be funded by Zone A revenues. (AR1:62:47 ["[S]ince seawater intrusion is not an issue in the upstream basins, staff believes that the full-scale project should not be funded by the General Fund."].) Why, then, should those revenues fund preparations for it?

[13] See footnote 7 above.

B. The District Applies its Zone B Charge Only to those Who Benefit from the Freeman Diversion Dam

Zone B is the subarea the District asserts benefits from its Freeman Diversion Dam. (AR1:72:4–5; AR2:149:4–5 [same]; see also AR2:111 [map of zones].) The District's principal act authorizes subzones:

> The ground water charges are authorized to be levied upon the production of ground water from all water-producing facilities, whether public or private, within the district or a zone or zones thereof **for the benefit of all who rely directly or indirectly upon the ground water 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 [emphasis added].)

Thus, the District's establishment of Zone B reflects its conclusion that only groundwater users there benefit from the Freeman Diversion Dam. (AR1:72:3; AR2:149:3 [same].) If the entire District is a "common pool," how can this be? While the District defends its Zone A charge on its new-found "common pool" theory, its maintenance of a smaller Zone B indicts that theory. The District has yet to explain this inconsistency.

The District also applies a 3:1 ratio to its Zone B charge; M&I users pay the same disproportionate share to the Freeman Diversion Fund as to the General Fund. (AR1:22:78 [2011–2012 budget]; AR2:106:67 [2012–2013 budget].) Wells in Zone B — including the City's West Las Posas Basin wells — are subject to both Zone A and Zone B charges. (See AR2:111 [map of zones]; AR2:165:21 [map of City wells].)

IV. THE DISTRICT INCREASED RATES 46 PERCENT IN 2011–2012 AND 39 PERCENT IN 2012–2013

In June 2011, the District adopted 2011–2012 charges, leaving Zone B rates unchanged. (AR1:65; AR1:1; AR1:72:4.) It increased Zone A charges 46 percent from $58.50 to $85.50 per acre-foot for M&I users and from $19.50 to $28.50 for agriculture. (AR1:65:1.)

The District followed Proposition 218's notice and protest procedures for new or increased property related fees under article XIII D, section 6, subdivision (a). (AR1:64; AR1:65:1; see also AR1:73:11–12.) The City timely protested. (AR1:78, 79.) When its protest went unheeded, it sued. (1JA1:1.)

In June 2012, again following Proposition 218's notice and protest procedure, the District increased Zone A charges another 39 percent — more than doubling them in two years. (See AR2:142:1; *id.* at p. 2.) The new rates were $29.75 per acre-foot for farmers and $119.50 for others. (*Ibid.*) It maintained the Zone B charges, including the 3:1 ratio benefiting agriculture. (AR2:149:4.)

As in 2011, the District employed Proposition 218's procedures. (AR2:142:2.) The City again protested unsuccessfully and sought judicial review. (4JA33:690.)

STANDARD OF REVIEW

Whether a charge is a tax or a fee is a question of law decided upon independent review of the rate-making record. (*Sinclair Paint, supra,* 15 Cal.4th at p. 874 [applying Prop. 13]; *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436 (*Farm Bureau*) [same].)

"Constitutional facts" are reviewed de novo to ensure meaningful appellate review of facts on which constitutional rights depend. (See *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842 [independent review "reflects a deeply held conviction that judges — and particularly Members of this Court — must exercise such review in order to preserve the precious liberties established and ordained by the Constitution," quoting *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 510–511].)

Factual findings on conflicting evidence adduced at trial are properly reviewed for substantial evidence. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894.) However, in mandate review of a cold administrative record, the trial and appellate task is the same: "Although an appellate court defers to a trial court's factual determinations if supported by substantial evidence," where, as here, "the trial court's decision did not turn on any disputed facts,"

the trial court's decision "is subject to de novo review." (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916; see also *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032; *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 369 (*Lemon Grove*).)

If, however, a rate-making agency waives the benefit of *Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal.4th 559 (mandate review of agency action limited to administrative record) and offers — or allows a challenger to offer — extra-record evidence, the trial court's findings of facts are reviewed for substantial evidence. Such was the case in *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 915 (*Morgan*) [applying substantial evidence standard to challenger's attack on rate-making using extra-record data].)

The instant cases, however, were appropriately tried on the administrative records alone. No one doubts the completeness or authenticity of the District's records — rather, the parties dispute their legal significance. Accordingly, this Court reviews the administrative records just as the trial court did, and makes its own factual conclusions.

Finally, a trial court sitting in equity has broad remedial discretion, and remedy is reviewed for abuse of discretion. (*In re Estates of Collins* (2012) 205 Cal.App.4th 1238, 1246.)

LEGAL DISCUSSION

I. THE CHARGES ARE GOVERNED BY PROPOSITION 218

A. The Charges are Indistinguishable from those in *Pajaro I*

A "fee or charge" subject to article XIII D, section 6 includes:

> 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).) As the trial court correctly found, the District's charges fall within this definition because they are substantially the same as those considered in *Pajaro I, supra,* 150 Cal.App.4th 1364. (10JA88:2123, 2146 [Phase 2 ruling]; 12JA105:2501 [Phase 3 ruling].)

Relying on *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (*Bighorn*), *Pajaro I* found groundwater charges are:

> 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 I, supra,* 150 Cal.App.4th at p. 1391.) The trial court properly applied this reasoning to the District's charges. (10JA88:2144–2145.)

There is no meaningful difference between a groundwater fee authorized by the Water Conservation District Law of 1931 and that by the Pajaro Valley Water Management Agency Act. (West's Ann. Cal. Wat. Code App., § 124-1 et seq.) Both statutes authorize charges on those who operate groundwater wells to fund recharge and protection of groundwater. The Water Conservation District Law authorizes the District's charges:

> The ground water charges are authorized to be **levied upon the production of ground water from all water-producing facilities**, whether public or private, within the district or a zone or zones thereof **for the benefit of all who rely directly or indirectly upon the ground water 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 [emphasis added]; see also *id.* at § 75521 [charges levied for "protection and augmentation of the water supplies"]; *id.* at § 75523 [charges used "for the district purpose authorized by this division"].)

Pajaro Valley Water Management Agency's authority is stated similarly:

> The agency may, by ordinance, levy groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency.

(West's Ann. Cal. Wat. Code App., § 124-1001.) That statute defines "supplemental water" as:

> "Supplemental water" means surface water or groundwater imported from outside the watershed or watersheds of the groundwater basin, flood waters that are conserved and saved within the watershed or watersheds which would otherwise have been lost or would not have reached the groundwater basin, and recycled water.

(West's Ann. Cal. Wat. Code App., § 124-316.) Thus the Pajaro agency, too, imposes a charge on those who operate wells to fund protection and augmentation of groundwater.

There is no meaningful distinction between the District's and the Pajaro agency's charges — each funds groundwater replenishment to benefit agricultural, rural residential, and M&I users. The District imposes its charges on all groundwater pumpers to fund recharge. (AR1:72:3–5; AR1:62:36–38.) The Pajaro agency does, too. (*Pajaro I, supra,* 150 Cal.App.4th at pp. 1372–1374.)

The Pajaro agency's charges, like those here, are based on pumpage. (See *id.*, at pp. 1385–1386; AR1:62:36–38 [2011 Water Rate Study discusses means to measure pumpage].) Such consumption-based charges are subject to Proposition 218. (*Bighorn, supra,* 39 Cal.4th at p. 217.)

The Court of Appeal attempted to distinguish *Pajaro I* by finding the District has fewer domestic wells than Pajaro. (*City of San Buenaventura v. United Water Conservation District* (2015) 185 Cal.Rptr.3d 207, 221 (*Ventura*).) However, the record here contains no evidence of the number of residential groundwater users in the District. (*Ventura, supra,* 185 Cal.Rptr.3d at p. 221 ["[T]he record does not disclose the exact number of residential customers who pump water in lieu of connecting to an existing water delivery network ..."].) In fact, both the District and the Pajaro agency charge rural residents without alternatives to wells. (See AR1:62:30, 38; 4JA32:683; *Pajaro I, supra,* 150 Cal.App.4th at p. 1374.)

Even if these records could support it, a distinction of urban and rural water users finds no support in Proposition 218 and gives our Constitution less force in urban than in rural areas. How can a charge be lawful as to the City and its customers but unlawful as to rural, residential groundwater users who must pay the same "uniform" rates (Wat. Code, § 75593) and bear the same burden to subsidize agriculture via the 3:1 rate ratio? Rates adopted by the

same resolutions must rise or fall together. Constitutional rights do not depend on how many share them.

The City's customers use the groundwater it delivers for residential purposes and the City is entitled to speak for them. (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 630 [water agency may sue for its customers].) Suit by rural residents, who can less easily pool resources to sue than the City's customers, ought not to be necessary to enforce our Constitution. Finally, statute requires the District to charge the City comparably to "comparable nonpublic users." (Gov. Code, § 54999.7, subd. (b).) No distinction between the City and rural residential groundwater users can take these charges outside Proposition 218.

B. Groundwater Extraction Fees are Property Related

The use of groundwater — for residential or commercial purposes — does not govern whether a groundwater charge imposed uniformly on both customer classes is subject to Proposition 218. *Pajaro I* rejected that distinction:

> A charge may be imposed on a person because he **owns** land, or it may be imposed because he **engages in certain activity** on his land. A charge of the former type is manifestly imposed as an incident of property ownership. A charge of the latter may not be. This

> appears to be the distinction Justice Mosk sought to articulate for the court in *Apartment Association* [*of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830]. **We doubt that it is satisfactorily captured by a distinction between business and domestic uses or purposes.**

(*Pajaro I, supra,* 150 Cal.App.4th at p. 1391, fn. 18, emphasis of final sentence added.)

Pajaro I considered the tension between *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 (*Apartment Ass'n*) and *Bighorn. Apartment Ass'n* found a fee on landlords to fund housing code compliance to be a fee on a particular use of property (i.e., as rental housing) rather than on property ownership per se. *Bighorn* concluded a consumption-based water charge is a fee for a property related service subject to Proposition 218. Election to use property in a particular way is distinguished from election to use any particular amount of water because some water use is "indispensable to most uses of real property." (*Bighorn, supra,* 39 Cal.4th at p. 214.) *Pajaro I* correctly resolved that tension to conclude groundwater charges are also fees for a property related service. (*Pajaro I, supra,* 150 Cal.App.4th at pp. 1389–1391.)

As *Pajaro I* observed, there is no constitutional difference between water served to those who live at such densities that piped

service is feasible and water delivered via groundwater to rural residents:

> 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 13D'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.) *Pajaro I* explained:

> Similarly, assuming *Apartment Association*'s capacity-based analysis retains vitality, we fail to see how it can validate the augmentation charge here. The charge is imposed not only on persons using water in a business capacity but also on those using water for purely domestic purposes. The extension of the charge to domestic wells cannot be attributed to unavoidable regulatory overbreadth. The Agency appears to have a good idea of who is extracting water for residential purposes and who is extracting it for irrigation purposes. Under *Bighorn*, a homeowner or tenant who uses extracted water for bathing, drinking, and other domestic purposes cannot be compared to a

> businessman who, as described in *Apartment Association,* elects to go into the residential landlord business.

(*Id.*, at p. 1390.)

The District's charge cannot be excluded from Proposition 218 as "a charge on the activity of pumping," as the Court of Appeal found. (*Ventura, supra,* 185 Cal.Rptr.3d at p. 222.) Instead, groundwater charges are:

> 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 I, supra,* 150 Cal.App.4th at p. 1391 [original emphasis].) Moreover, long-established law holds the right to use groundwater is itself a property right. (E.g., *Trask v. Moore* (1944) 24 Cal.2d 365, 370; *Garden Water Corp. v. Fambrough* (1966) 245 Cal.App.2d 324, 327 [water system for distribution to subdivision was real property]; *Harper v. Buckles* (1937) 19 Cal.App.2d 481, 484–485.) There is no meaningful distinction between the right to use water on the parcel from which it is drawn (an overlying water right) and the right to distribute it (an appropriative water right); both are appurtenant to the well site. (*Trask, supra,* 24 Cal.2d at p. 370.) Thus, a charge that burdens appropriative water rights is **necessarily** incidental to property ownership.

Nor does characterizing the City's use of groundwater as "commercial" take the District's charges out of Proposition 218. (See *Ventura, supra,* 185 Cal.Rptr.3d at p. 222.) Although the City "sells" water to customers, it is itself bound by Proposition 218 to limit its fees to the cost of service; excessive charges on the City pass through to its customers. (*Lemon Grove, supra,* 237 Cal.App.4th at p. 368.) Further, the District must set "uniform rates." (See Wat. Code, § 75593.) Thus, if its rates are unlawful as to a rural resident due to the 3:1 rate ratio, they are unlawful as to the City, too.

Finally, Proposition 218 — as well as Government Code section 54999.7, subdivision (b) — require rational rate-making distinctions. If a rate-maker wishes to establish rates in separate proceedings for commercial and domestic groundwater pumpers, it may do so; but it may not employ logically inconsistent rationales in one rate-making. (*Morgan, supra,* 223 Cal.App.4th at pp. 909–910.) The District's groundwater charges are therefore property related fees subject to article XIII D, section 6.

C. Settled Expectations Arising from *Pajaro I* Should Not Be Disturbed Now

The District cannot distinguish *Pajaro I,* but asked the lower courts to disagree with it. *Pajaro I* has been law for over eight years, this Court declined to review or depublish it, and groundwater management agencies throughout the state have relied on it. The Sixth District recently reaffirmed *Pajaro I* in *Pajaro II, supra,* 220

Cal.App.4th at p. 595 (augmentation charge subject to Prop. 218 but exempt from election requirement of art. XIII D, § 6, subd. (c) as a fee for "water service"). The Pajaro agency spent years complying with *Pajaro I* and defending its renewed groundwater charge.

Moreover, that agency is not alone in reliance on *Pajaro I*. Trial courts in Santa Clara, Santa Cruz,[14] San Joaquin[15] and Los Angeles Counties have all followed *Pajaro I*, requiring Proposition 218 compliance by groundwater agencies serving millions of Californians. (See *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450 [challenge to groundwater charges imposed in Central and West Basins of Los Angeles County]; see also February 6, 2014 MJN, Exhs. B [Los Angeles] and C [Santa Clara].)[16] This whole portion of the water

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[14] This refers to *Pajaro I*.

[15] See 5JA46:884 (request for judicial notice of *North San Joaquin Water Conservation District v. Howard Jarvis Taxpayers' Association*, 3d DCA Case No. C059758).

[16] The Court of Appeal granted notice of these materials on February 27, 2014. The Sixth District published its decision in the Santa Clara case, but granted rehearing to consider *Ventura* and resubmitted on May 22, 2015. Accordingly, decision there is imminent. (*Great Oaks Water District v. Santa Clara Valley Water District*, 6th DCA Case No. H035885.)

industry has adapted to these new rules at considerable effort and expense. Accordingly, public policy counsels against unsettling these expectations now.

As demonstrated below, failing to apply *Pajaro I* would gain the District nothing; it would be out of the Proposition 218 frying pan into the Proposition 26 fire. As discussed below, Proposition 26 limits local government rates and charges adopted after November 2010[17] to the cost of service. (Cal. Const., art. XIII C, § 1, subd. (e)(2).) Given that the District will be unable to bear its burden to prove its rates do not exceed the cost of serving the City whether or not this Court overrules *Pajaro I*, little is to be gained by undermining settled expectations arising from that decision.

D. The District's Fee Cannot Be Justified as "Regulatory"

The District also claims its charges are "regulatory" in the apparent belief this label defeats the City's claims. However, property related and regulatory fees are not mutually exclusive. As Justice Mosk wrote for a unanimous Court more than a decade ago:

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[17] *Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 205 (local government provisions of Proposition 26 not retroactive, as are its state government provisions).

> The city also misses the mark when it contends (or at least implies) that a regulatory fee or a levy on the operation of a business necessarily falls outside the scope of article XIII D.

(*Apartment Ass'n, supra,* 24 Cal.4th at p. 838.)

The District used revenues from its charges to pay for facilities and services for the same types of activities as the Pajaro agency. *Pajaro I* correctly resolved the tension between *Apartment Ass'n* and *Bighorn* by concluding groundwater charges are property related. (*Pajaro I, supra,* 150 Cal.App.4th at pp. 1389–1391.) Still further, *Apartment Ass'n* is factually distinguishable here, even if *Bighorn* did not supplant it entirely as to most charges for water service. As *Pajaro I* explained:

> [E]ven if a predominantly regulatory purpose would save the charge, it is difficult to see how it might do so here, where the majority of users are charged on the basis not of actual but of estimated or presumptive use. Thus, while the augmentation charge may have some tendency to inhibit consumption and provide an incentive for efficient use **by metered users**, it can have little if any effect on the residential users who make up the majority of persons paying it. Nor is there any attempt to graduate the charge to further discourage the

most intensive uses and encourage conversion to less intensive ones.

(*Pajaro I, supra,* 150 Cal.App.4th at pp. 1389–1390, original emphasis.)

Like the Pajaro agency, the District imposes flat rather than metered fees on small residential wells. (AR1:62:38 [2011 Water Rate Study discusses need to estimate residential use].) Rates are uniform throughout the District, as Water Code section 75593 requires; so the District, too, makes no "attempt to graduate the charge to further discourage the most intensive uses and encourage conversion to less intensive ones." (*Pajaro I, supra,* 150 Cal.App.4th at pp. 1389–1390.) Indeed, the District's charges require M&I users to subsidize agriculture so it is profitable to displace low-water-intensity crops like orchards with water-hungry berry crops over a deep pumping hole. (AR1:22:139 [2011–2012 budget exhibit demonstrating surge in October deliveries for new berry crops].) Subsidizing agriculture does not deter waste. To escape Proposition 218, a fee must itself achieve a regulatory effect, not just raise money. (Cf. *California Taxpayers' Ass'n v. Franchise Tax Bd.* (2013) 190 Cal.App.4th 1139 [penalty for late payment of corporate taxes not tax because intended to deter late payments rather than raise revenue].) If the charges actually had a regulatory purpose to disincentivize inefficient groundwater use, they undermine rather than serve it.

The Legislature has recognized this distinction in the newly adopted Sustainable Groundwater Management Act. (Water Code

§ 10720 et seq.) Water Code section 10730 authorizes a groundwater sustainability agency to levy a purely regulatory fee "to fund the costs of a groundwater sustainability program, including, but not limited to, preparation, adoption, and amendment of a groundwater sustainability plan, and investigations, inspections, compliance assistance, enforcement, and program administration ... ." But, under section 10730.2, if the agency uses the fees to fund such things as "supply, production, treatment, or distribution of water" or "administration, operation, and maintenance," then it must comply with Proposition 218.

II. THE DISTRICT'S CHARGES VIOLATE PROPOSITION 218

The trial court was obliged:

> to make detailed findings focusing on the [District's] evidentiary showing that the associated costs of the regulatory activity were reasonably related to the fees assessed on the payors.

(*Farm Bureau, supra,* 51 Cal.4th at p. 442, citing *Sinclair Paint, supra,* 15 Cal.4th at p. 870 [applying Prop. 13].) Although the trial court properly concluded that neither record provides a reasonable cost justification for charging M&I groundwater users three times what agricultural users pay, it erred in concluding those records show the District uses the charges only to augment groundwater and that the apportionment of the fees met constitutional standards.

Proposition 218 imposes these requirements on property related fees like the District's charges:

> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> ....
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

(Cal. Const., art. XIII D, § 6, subd. (b)(1)–(3) & (5).)

The District's charges violate these requirements because:

1) it cannot cost-justify the 3:1 rate ratio — indeed, it is more costly to serve agricultural users and it admits its services do not equally benefit all basins, though its

rates charge all equally, overcharging the City which relies on less-benefited basins;

2) its two records do not show the charges fund only groundwater services;

3) it charges exceed the proportional cost of serving M&I users; and

4) the charges fund services to the general public.

A. The Charges Exceed the Total Cost to Provide the Service

The District's 2011–2012 ratemaking record demonstrates:

- Agricultural pumping in the southeastern Oxnard Plain Basin and the Pleasant Valley Basin causes the most overdraft and seawater intrusion, and the District spends substantial sums to remediate it (AR1:62:69–70 ["United's current operations and long-range planning efforts are focused heavily on that area" referencing "the eastern/southern Oxnard Plain"]; AR2:53:69–70 [same]);

- Agriculture uses about 80 percent of groundwater, but pays only 57.7 percent of the charges;[18]

- The District devotes a disproportionate share of its attention and budget to agricultural areas of the southeastern Oxnard Plain and Pleasant Valley Basins (See AR1:62:69–70 ["United's current operations and long-range planning efforts are

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[18] See footnote 7 above.

focused heavily on that area" referencing "the eastern/southern Oxnard Plain"]; AR2:53:69–70 [same], AR1:14:1 [1950 resolution "giving precedence to the areas in greatest distress which are presently recognized to be on the Oxnard Plain"]; AR1:21:4 [saltwater intrusion in Oxnard Plain]; AR2:30:4 [same]; AR1:29:8 ["[S]aline intrusion in the Lower Aquifer System [of the Oxnard Plain] north of Mugu Lagoon continues over a broad area. The intrusion is the result of chronically-depressed water levels in over-drafted areas of the southern Oxnard Plain and portions of the Pleasant Valley basin."]; AR2:178:8 [same]; AR1:62:34 ["One reason for maintaining the current [3:1] ratio [rather than increasing it] is that the largest M&I pumpers on the Oxnard Plain are already doing their share to limit overdraft by using costly imported water. In addition, M&I pumpers within the Fox Canyon GMA [Groundwater Management Agency] are subject to more stringent pumping restrictions than agriculture, which can receive the water it needs through the efficiency provisions of GMA ordinances. Increasing the burden on M&I above the present 3:1 ratio under this scenario may not be supportable. [¶] A second reason for maintaining the current ratio is that the majority of the overdraft in the Oxnard [P]lain aquifers has been caused by agricultural pumping in the eastern/southern part of the plain. Most of the M&I wells on the Oxnard Plain are located in the less-impacted north-western portion

of the aquifer."]; AR2:53:34 [same]; see also 9JA75:1804, 1812–1815 [City trial briefing of this evidence].)

- Most of the District's capital program benefits agricultural users in the southeastern Oxnard Plain and Pleasant Valley Basins (AR1:62:46 [Ferro-Rose Recharge Project]; AR2:106:105–106 [same]; AR1:10:15 [Noble Basin Reservoir]; AR1:22:14 [pilot seawater barrier well]; AR2:106:139–140 [El Rio Spreading Valve Control Project]; see also 9JA75:1813–1814 [City trial brief].)

- The District uses labor-intensive methods to estimate groundwater use by unmetered agricultural users, while M&I users provide metered data without charge (AR1:78:5 [City protest letter]; AR1:62:36 ["[T]he Fox Canyon GMA requires meters on all production wells within its management area, with the exception of small domestic wells with minor production."]; see also 9JA75:1814–1815 [City trial brief]); and

- When unfettered by statute, the District's cost accounting distinguishes charges to its recreation concessionaire for potable and irrigation water at a ratio of 1.25:1, which reflects the District's cost to treat drinking water. (AR1:22:15–16;[19] see also 9JA75:1811 [City trial brief].) This demonstrates that the 3:1 rate ratio does not reflect the District's cost of service because it provides the

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[19] Recreation Potable Water Rate of $850.41 per acre-foot is 1.25 times the Recreation Irrigation Water Rate of $680.33. (AR1:22:16.)

City no groundwater services it does not provide agriculture that might justify charging the City for services which do not benefit it. (AR1:22:15–16; see also 9JA75:1814–1815 [City trial brief]). Indeed, the District provides **more** service to agricultural users in the over-drafted southeastern Oxnard Plain and Pleasant Valley Basins than to the City, yet charges them **less**.

The record of the District's 2012–2013 rate-making — conducted after the City first sued — also fails to show M&I users are three times as costly to serve as agriculture. In fact, the District acknowledges it did not even attempt to cost-justify its charges. (AR2:54:2 [Rate Study "not intended ... as an 'evidentiary' or 'cost of service' study in which many retail rate-setting public entities engage during a Proposition 218-type process"]; AR2:164:2 ["The water rate study was never intended to 'provide the rationale' for rate changes"].)[20] The District concedes "a more traditional quantitative cost of service analysis might not fully support such a [3:1] fee differential under the property related fee provisions of Proposition 218." (AOB at p. 38.) As the District concedes its Rate Study is not the basis of its charges, one must ask — what is? This record shows the District has **no** basis to charge M&I three times

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[20] Although its counsel is eager to disavow the 2011 Water Rate Study, the District is not. It updated, rather than repudiated it. (AR2:54.)

what it charges agriculture other than a dated statute which cannot survive Proposition 218.

Additionally, the District bears costs to estimate and monitor agricultural groundwater use that it does not bear as to M&I customers. To pay the groundwater extraction charge, District customers must report their usage, which they measure with "flow meters, electric meters, [or] crop factors." (AR1:62:36.)

Flow meters measure groundwater use most accurately (*ibid.*), and are required of M&I users. Many agricultural users estimate use based on electricity[21] to power wells. (*Ibid.*) Alternatively, some agribusinesses use "crop factors to determine their water usage. A crop factor enables a pumper to calculate the average water demand for a particular crop. Pumpers are usually consistent in their use of a crop factor from year to year." (AR1:30:48 [7th numbered point].) Although the District has considered requiring all non-trivial water users to use meters, its current policy is that "water meters will be encouraged but not required." (AR1:22:14 [6th numbered point in first whole par.].)

The records contain ample evidence that agricultural users are **more** costly to serve than M&I users. As detailed above, the basins which support agriculture receive the lion's share of recharge efforts,

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[21] The electric utility meters agricultural and municipal customers alike, but the District does not.

which have minimal "trickle-down" impact on basins serving M&I users. Judge Anderle therefore properly found that the District's records do not show M&I users are three times as costly to serve as agriculture.

Some agricultural users also buy District water delivered through the Pleasant Valley and the Pumping Trough Pipelines ("PTP"). (See AR2:50:17.) These pipelines deliver Santa Clara River water, supplemented with groundwater, for agricultural use in over-drafted areas of the Oxnard Plain and Pleasant Valley Basins. (*Ibid.*) The District funds these pipelines with fees paid by water buyers and accounted separately from its General Fund. (See AR1:62:16–20 [Rate Study discussion of PTP, Pleasant Valley Pipeline and State Water Import Funds].) In 2009–2010, the Board adopted tiered PTP rates requiring customers to pay more when water deliveries go "above the established baseline limit defined for each customer." (AR1:22:16–17.) The District intended tiered pricing "to minimize higher than normal usage during critical periods as the District has seen with PTP customers switching to growing strawberries and the resulting increased water demands in ... October." (*Id.*, at p. 17; see also AR1:22:139 [2011–2012 budget exhibit demonstrating surge in October deliveries for new berry crops].)

The District sells PTP water at less than cost, as its enterprise funds are consistently in deficit. (AR1:22:85, 87 [shortfalls in Pleasant Valley Pipeline and PTP Funds from 2008–2009 through 2011–2012];

AR2:106:76 [same through 2012–2013].) "In addition, PVCWD,[22] the PTP Customers and the PV Pipeline customers receive more of their share of State Water than would be proportional to the property taxes paid in those areas." (AR1:62:70.) Thus, the District not only favors agriculture over M&I, it favors some farmers over others.

The District's charges accordingly violate Proposition 218 because they must generate more revenues than necessary to provide groundwater services as they also fund subsidies of delivered water. (Cal. Const., art. XIII D, § 6, subd. (b)(1).)

B. The Charges Are Spent for Purposes Unrelated to Groundwater

Proposition 218 prohibits spending "[r]evenues derived from the fee or charge ... for any purpose other than that for which the fee or charge was imposed." (Cal Const., art. XIII D, § 6, subd. (b)(2).) In addition to the subsidy of delivered water noted above, the City identified at trial three expenditures of Zone A groundwater charge revenues unrelated to groundwater management:

- Treating and delivering **surface** water to over-drafted coastal areas. (AR2:106:49 [water treatment chemicals].)
- "State Water Import Costs" to serve delivered water customers. (*Ibid.*; AR2:106:58 [State Water Import Fund].)

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[22] This refers to intervenor Pleasant Valley County Water District, which serves agricultural pumpers in the Pleasant Valley basin.

- "Recreation Activities subfund," which includes potable water delivery to the concessionaire at Lake Piru. (AR2:106:51 [budgeting for "water treatment chemicals" and "water quality services"].)

The District identifies others: expenditures for habitat restoration, public health and safety, and other projects unrelated to groundwater management. (AOB at pp. 3–4, 9.) In fact, the record shows the District comingles its Zone A funds with other revenues, so it cannot show Zone A funds are spent only for groundwater services. (See AR2:106:42–45 ["General / Water Conservation Fund (Zone A)" encompasses "Water Conservation Activities (Zone A)," "General Operating Activities," and "Recreation Activities].)" These costs should be borne by the District's property tax revenues or by fees on those who benefit from these expenditures — such as users of recreational facilities, concessionaires at those facilities, and buyers of piped water.

The District has never meaningfully defended these expenditures. (9JA81:1927–1931 [District's trial brief].) It does not explain why it uses Zone A revenue to pay for treated water at the Lake Piru concession, to subsidize water piped to agricultural customers in Pleasant Valley, or how public health and safety projects relate to groundwater use.

Our Constitution requires the District to account for rate revenues and to show they are spent for the service for which they

are charged. (Cal. Const., art. XIII D, § 6, subd. (b)(2) & (3); cf. *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914, 927 [Prop. 218 forbade general fund transfer from water utility for public safety and street costs because record provided no cost justification]; *Farm Bureau, supra,* 51 Cal.4th at pp. 438, 448 [remanding for more searching trial court review of cost justification of water fee under Prop. 13].) The District's records are opaque on the challenged costs and its briefing nearly conclusory. It has never made a meaningful attempt to justify the costs the City questions, nor identified record evidence to show they relate to serving groundwater to the City.

C. The District's Charges Exceed the Proportional Cost of Service

As shown above, the 3:1 rate ratio violates Proposition 218's requirement that charges be "proportional cost of the service attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b)(3).) The charges violate this cost of service principle in other ways, too. For instance, Zone A / General Fund revenue pays for:

> traditional operations ... includ[ing] the water conservation efforts of operating / maintaining the District's various spreading grounds for groundwater recharge, the Santa Felicia Dam and hydro-electric

plant, engineering services, groundwater management and meet[ing] ESA compliance activities.

(AR1:22:21 [2011–2012 budget].) The City, however, does not benefit from these activities to the same extent as pumpers elsewhere. For instance, the District uses Zone A revenue to operate recharge facilities in Piru, El Rio and Saticoy. (AR1:62:12.) As discussed above, the records demonstrate the City's Mound Basin wells receive little benefit from this recharge. (See AR1:28:17 [majority of recharge to Mound Basin likely from rainfall]; AR1:10:19 [District Engineer states the District's activities provide only "indirect recharge to the Mound Basin"]; AR1:62:29 [2011 Water Rate Study concedes Mound Basin "receives little benefit from United's recharge operations"].)

The District acknowledges its recharge operations do not benefit the City's Santa Paula Basin wells as much as other basins. (E.g., AR1:81:17 ["Santa Paula Basin doesn't respond to recharge at United Water's Saticoy spreading grounds."]; AR1:22:144 [2011–2012 budget chart showing negligible recharge of Santa Paula Basin from Lake Piru releases].)

The District thus acknowledges the City draws water from basins which benefit less than other basins, though it charges the City three times what it charges agricultural users who receive greater benefit.

This failure to allocate costs based on the known hydrology of the basins is highlighted by the District's Zone B. The District

established Zone B to charge only those who benefit from the Freeman Diversion Dam for that facility. (AR1:72:3; AR2:149:3 [same].) By doing so, the District admits the Dam's services do not equally benefit all basins. Moreover, the Freeman Diversion Dam operates in conjunction with the Piru, El Rio, and Saticoy spreading grounds, yet the District imposes the district-wide Zone A charges to cover those costs. (AR1:22:21 [2011–2012 budget].) By pooling all other charges in a District-wide Zone A rather than establishing zones that account for the hydrology of other basins as it did for Zone B, the District necessarily overcharges users in less-benefited basins.

D. The Charges Fund Services Available to the Public Generally on the Same Terms as to Property Owners

Zone A rates fund studies whether the District should import water. (AR1:62:110 [Policy Issue B) 9)]; AR2:53:110 [same].) Yet these imports would augment releases from Lake Piru, which only minimally benefit City wells in the Santa Paula and Mound Basins. In 2010–2011, the Board approved a three-year study of seawater intrusion near Port Hueneme and Point Mugu — areas where the City does not pump. (AR1:22:25 [1st whole bullet point].)

By charging the City for services from which it cannot benefit and for services to the general public such as maintaining Lake

Piru's recreational facilities; the District violates article XIII D, section 6, subdivision (b)(5).

III. THE DISTRICT'S CHARGES ALSO VIOLATE PROPOSITION 26

Proposition 26 defines the "taxes" for which voter approval is required by Propositions 13 (Cal. Const., art. XIII A, § 4) and 218 (Cal. Const., art. XIII C, § 2). It includes seven exceptions, the last for revenues subject to Proposition 218. (Cal. Const., art. XIII C, § 1, subd. (e)(7).)[23] Propositions 218 and 26 dove-tail; one or the other governs every local government revenue measure. Thus, if the charges here are not "property related fees" under Proposition 218 (as *Pajaro I* and *II* conclude), they are necessarily "taxes" under Proposition 26 unless they meet one of its seven exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).)

Two exceptions might apply here:

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[23] Proposition 26 defines "taxes" requiring two-thirds approval by the Legislature (Cal. Const., art. XIII A, § 3, subd. (b)) and those requiring approval of the voters of local governments (Cal. Const., art. XIII C, § 1, subd. (e).) The State definition is subject to five exceptions; the local, to those five and two more. The five common exceptions are stated in substantially (but not entirely) the same terms for the State and local governments. This brief, of course, construes those applicable to local governments like the District.

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(Cal. Const., art. XIII C, § 1, subd. (e)(1) & (2).) To rely on these exceptions, the District:

> bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

(Cal. Const., art. XIII C, § 1, subd. (e) [final, unnumbered par.].)

The District argued below that the exception for "a specific benefit conferred or privileged granted" ought to apply rather than the exception for a "service or product." (AOB, at p. 22.) Judge

Anderle concluded the charges were subject to Proposition 218, and therefore the seventh exception applies. (See 10JA:88:2150.)

Regardless of whether the appropriate exception is for a "government privilege" or a "government service or product" the District bears the burden of demonstrating that the charge "does not exceed the reasonable costs to the [District] of conferring the benefit or granting the privilege." (Cal. Const., art. XIII C, § 1, subd. (e)(1), (2) & final unnumbered par.) Thus, the choice between them is immaterial.

A. The District's Services Are Not Provided Directly to the City

As Judge Anderle acknowledged, much of the District's efforts benefit the City only indirectly. (10JA:88:2147 ["City correctly points out that water is not replaced into the district-wide system uniformly"]; see also *id.* at pp. 2131, 2137–2138.) The District's engineer concluded the spreading operations recharge the Mound Basin only indirectly. (AR1:10:19.) The charges fund some capital projects of no benefit to the City. (See, e.g. AR1:62:46–47 [EIR for Ferro-Rose Recharge Project paid from general fund]; see also AR2:53:46–47.) Thus the records demonstrate the charge funds services which are not directly provided to the City and other pumpers in the Mound Basin.

The District accounts for District-wide Zone A charges in its "General Fund" (AR1:62:12 [2011 Water Rate Study description of

"General Fund"]; AR1:65:2 [rate resolution devotes Zone A charge to General Fund]), and uses that revenue for projects it admits do not benefit all basins. (AR1:62:29 ["Mound Basin ... receives little benefit from United's recharge operations"]; *id.*, at p. 69 ["No other part of the District receives so much attention and effort" as "the eastern/southern Oxnard Plain"].) This practice changed in form, but not substance, after the City first sued. (See AR2:106:42–45 [new labels in 2012–2013 budget].) Specifically, groundwater charges on the City still fund chemicals to treat water delivered to the recreational concessionaire at Lake Piru, as well as "recreational activities" there. (AR2:106:44 [2012–2013 budget].) It is a stretch to argue recreation at Lake Piru is a service to those who pump from the Mound Basin; it is untenable to claim such recreation is a service "provided directly to the payor." (Cal. Const., art. XIII C, § 1, subd. (e)(1) & (2).)

B. The Services Are Provided to Those Not Charged

Recreational activities at Lake Piru are but one example of a use of the District's charge which is not for service only to those charged. The District admits many others. (E.g., AOB at p. 9 [detailing habitat restoration work, dam safety studies, and generally ensuring water availability for "all users (not just pumpers)"].) "Rather, United's services are focused on the long-term district-wide water conservation, management and recharge efforts designed to mitigate the negative and harmful effects of the

collective district-wide groundwater pumping **for the protection of public health and safety**." (AOB at p. 21, emphasis added.) This describes a service that benefits the whole public, not groundwater users alone. The District does not attempt to describe its services as benefitting fee payors — it argues the opposite: "any reasonable examination of the long-term district-wide services provided by United shows that its ground water extraction fee is not intended to provide a service to any particular parcel." (AOB at p. 26, fn. 5.)

The District's commingling of funds and services is fatal. Proposition 26's direct-service requirement requires the District to prove services funded by its charges are provided only to those who pay, and not to others. (Cal. Const., art. XIII C, § 1, subd. (e)(1) & (2).) Because it commingles Zone A charges and other funds — and budgets so opaquely as to conceal how much of those funds are used for particular purposes — it cannot make that showing. The charges fail due to the District's failure to make an adequate record to defend them under Proposition 26. (Cf. *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 238 [invalidating water connection charge under Prop. 13 due to inadequate record]; *Farm Bureau, supra,* 51 Cal.4th at pp. 438, 448 [remanding for more searching trial court review of cost justification of fee under Prop. 13].)

C. The Charges Exceed the Reasonable Cost of Serving the City

As demonstrated above, the District cannot show on either record that its rates do not exceed the total cost of providing groundwater services in part because funds are used for unrelated purposes. (Cal. Const., art. XIII C, § 1, subd. (e)(1) & (2).) This total-cost limit is substantially the same as that under Proposition 218 (Cal. Const., art. XIII D, § 6, subd. (b)(1) & (2).) As the District's records are inadequate to prove compliance with the total cost limit under Proposition 218; so, too, under Proposition 26.

D. Costs Are Not Apportioned as Proposition 26 Requires

Nor can the District show "the manner in which ... costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity" as Proposition 26 demands. (Cal. Const., art. XIII C, § 1, subd. (e) [final, unnumbered par.].) This codifies this Court's pre-Proposition 26 case law testing regulatory and other fees under Proposition 13, on which both Prepositions 26 and 218 build. (*Sinclair Paint, supra,* 15 Cal.4th at p. 879, citing *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1146 ["[T]o show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for

determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity."]; see also, *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1321–1322, 1326 [citing *Sinclair Paint* to construe Prop. 26].)

This Court recently applied *Sinclair Paint*'s test. (*Farm Bureau, supra,* 51 Cal.4th at p. 442, citing *Sinclair Paint, supra,* 15 Cal.4th at p. 870.) There, this Court found insufficient trial court findings on the second, apportionment prong and remanded for further findings whether the "costs of the regulatory activity were reasonably related to the fees assessed on the payors." (51 Cal.4th at p. 442.) Remand, of course, is unnecessary here because the record establishes **no** justification for the 3:1 rate ratio — as the trial court appropriately concluded. (See 10JA:88:2123; see also *California Building Industry Association v. State Water Resources Control Board* (2015) 235 Cal.App.4th 1430, 1455 [applying Prop. 26 to state fees and declining remand as legal character of fee clear as a matter of law].)

The Zone A charges violate Proposition 26's apportionment requirement for two reasons:

- They distribute equally costs for services that benefit groundwater users disparately (i.e., the "common pool" theory fails); and,

- The District commingles Zone A charges with discretionary revenue, and it therefore cannot show the charges do not fund services to non-payors.

Proposition 26 was intended to reduce government's rate-making authority, not to liberalize the *Sinclair Paint* standard it adopted nearly verbatim. Its "Findings and Declaration of Purpose" state:

> This escalation in taxation [since Propositions 13 and 218] does not account for the recent phenomenon whereby the Legislature and local governments have disguised new taxes as "fees" in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. Fees couched as "regulatory" but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes.

(Prop. 26, § 1, subd. (e), reprinted at Historical Notes, 2B West's Ann. Cal. Codes (2013) foll. art. 13A, § 3, pp. 296–297.)

As detailed above, the City pays thrice what agricultural groundwater users do with no cost justification in either rate-making record. Thus if the District must distinguish agricultural from M&I users, it must show its disparate charges are proportionate to each

user class' benefits from, and burdens on, its groundwater services. (Article XIII C, § 1, subd. (e) [final, unnumbered par.]; cf. Gov. Code, § 54999.7, subd. (b).) As Judge Anderle properly concluded, the record entirely lacks evidence to justify the 3:1 ratio and the District's rates therefore fail. (10JA88:2123, 2157.) This Court should affirm that judgment.

IV. WATER CODE SECTION 75594 IS UNCONSTITUTIONAL

As detailed above, Propositions 218 and 26 each limit fees to the cost of providing the services for they are charged. (Cal. Const., art. XIII D, § 6, subd. (b)(1) & (2) [Prop. 218]; Cal. Const., art. XIII C, § 1, subd. (e)(1) & (2) [Prop. 26].) Furthermore, each limits how costs may be allocated among customer classes, either in proportion to the cost of serving each (Cal. Const., art. XIII D, § 6, subd. (b)(3) [Prop. 218]) or to the benefits each receives from or the burdens each imposes on the service. (Cal. Const., art. XIII C, § 1, subd. (e) [final, unnumbered par.] [Prop. 26].)

Water Code section 75594, adopted in 1965, requires the District's M&I charges to be between three and five times its agricultural charges:

> [A]ny 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."

The statute requires a 3:1 to 5:1 ratio of M&I to agricultural charges whether or not an agency's rate-making record demonstrates that M&I is more costly to serve, or receives more benefit, than agriculture. The District itself admits that "[t]his ratio is simply a reflection of a mandate established by the California Legislature as part of the District's principal act." (AR2:54:6.) This 50-year-old statute, however, cannot survive either Proposition 218 or 26.

The District candidly acknowledged below that:

> Any attempt to satisfy **both** the statutory mandate to impose different rates per acre-foot as between agricultural users and non-agricultural users and the requirement under Proposition 218 that such costs to proportional to the cost of service to the parcel is inherently problematic.

(AOB at p. 38.) The evidence here shows agriculture is **more** costly to serve than M&I and suggests a record will rarely — if ever — justify the statutory ratio. Thus Water Code section 75594 demands what the Constitution forbids — that rates be set at a defined ratio without respect to:

- the proportionate cost of serving a customer or customer class (Cal. Const., art. XIII D, § 6, subd. (b)(3)); or

- the allocation of costs among customers or customer classes in proportion to their benefits from, or burdens, on the service (Cal. Const. art. XIII C, § 1, subd. (e) [final unnumbered par].).

It cannot stand.

The trial court erred by failing to recognize this irreconcilable conflict between the Water Code and the Constitution. (10JA88:2158 [refraining from finding section 75594 unconstitutional].) "A statute inconsistent with the California Constitution is, of course, void." (*Hotel Employees and Restaurant Employees Intern. Union v. Davis* (1999) 21 Cal.4th 585, 602; see also *Ventura Group Ventures, Inc. v. Ventura Port Dist.* (2001) 24 Cal.4th 1089, 1098–1099 [Proposition 13 bars supplemental property tax to satisfy judgment]; *Arvin Union School Dist. v. Ross* (1985) 176 Cal.App.3d 189, 199 [Proposition 13 impliedly repealed statute authorizing property-tax override].) No legislative determination — much less one made generations before voters enacted the "Right to Vote on Taxes Act" — can justify ignoring our Constitution.

Furthermore, upholding Water Code section 75594 will produce a result the Legislature could not have intended — that the District has no rate-making power at all. If the District must comply both with the 3:1 to 5:1 mandate of section 75594 and the cost of service mandates of our Constitution, it may set rates only when, by chance or artifice, its costs to serve M&I consumers are at least three times higher and not less than five times higher than its costs to

serve agriculture. The District will have no ratemaking power when its costs do not — as here and in every conceivable year hereafter.

The legislative intent of the 1965 Legislature and that of the voters of 1996 or 2010 are better served by reading Proposition 218 or Proposition 26 to displace Water Code section 75594. (*Ventura Group Ventures, Inc. v. Ventura Port Dist., supra,* 24 Cal.4th at pp. 1098–1099 [resolving conflict between Prop. 13 and statute in favor of Constitution].) That will allow the District to fund its important services by rates proportionate to service cost even when, as these records demonstrate, M&I groundwater users are less costly to serve than agriculture.

Accordingly, the trial court erred to refuse declaratory relief that Water Code section 75594 is unconstitutional. This Court should grant that relief.

CONCLUSION

Accordingly, the City respectfully urges this Court to affirm the trial court's judgments for the City and provide by its decision the declaratory relief sought by the City's cross-appeal:

1. On the present administrative records, the District's charges violate Proposition 218 [or Proposition 26] because they fail to reflect the differing costs to serve users of groundwater in different basins and the differing benefit pumpers in those basins receive from

the District's recharge efforts; the "common pool" theory cannot be sustained on either record here;

2. The District's use of proceeds from the Zone A charge to pay for expenses unrelated to groundwater management violates Proposition 218 [or Proposition 26]; and
3. Water Code section 75594 is facially unconstitutional because the District cannot comply with both its terms and those of the Constitution.

DATED: July 22, 2015

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CERTIFICATE OF COMPLIANCE WITH CAL. R. CT. 8.520(B) & 8.204(C)(1)

Pursuant to California Rules of Court, rules 8.520(b) and 8.204(c)(1), the foregoing Opening Brief on the Merits by Petitioner the City of San Buenaventura contains 13,287 words (including footnotes, but excluding the tables, "Issues Presented for Review" section and this Certificate) and is within the 14,000 word limit set by California Rules of Court, rules 8.520(b) and 8.204(c)(1). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

DATED: July 22, 2015

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CITY OF SAN BUENAVENTURA

PROOF OF SERVICE

City of San Buenaventura v. United Water Conservation District, et al.
Supreme Court Case No. S226036
Court of Appeal, Second Appellate District, Div. 6, Case No. B251810

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 11364 Pleasant Valley Road, Penn Valley, California 94946. On JULY 23, 2015, I served the document described as **REPLY BRIEF** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

X **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Penn Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on JULY 23, 2015, at Penn Valley, California.

Ashley A. Lloyd

SERVICE LIST

City of San Buenaventura v. United Water Conservation District, et al.
Supreme Court Case No. S226036
Court of Appeal, Second Appellate District, Div. 6, Case No. B251810

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