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## Public Agency & Natural Resources News

New Supreme Court Decision

### Utility Service Rates and Charges and Proposition 218

The California Supreme Court has now held that metered water rates charged by public agencies are property-related charges subject to Proposition 218. See our Legal Alert entitled “[Metered Water Rates Are Subject to Proposition 218](#)”, August 14, 2006, for more details on *Bighorn-Desert View Water Agency v. Verjil (Kelley)*, (— Cal. Rptr. 3d —, 2006 WL 2042597, Cal., July 24, 2006).

This decision upsets what had been thought to be a settled issue. The Court disapproved the holding in a prior appellate court opinion (*Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79) that charges for water service that are “primarily based on the amount consumed” (i.e., metered water rates) are not subject to Proposition 218.

The logic of the Court’s decision can also be extended to public agency charges for other utility services (such as sanitary sewer and trash collection) that are based on the amount of service delivered.

### Consequences

Procedures for Setting Rates and Charges. To establish or increase rates and charges for its utility services, whether they are calculated on the basis of consumption or are imposed as a fixed monthly amount, an agency must follow these procedures required by Proposition 218:

- Notice: The agency must provide written notice by mail of the proposed rate or charge to the record owner of each parcel subject to the charge.
- Hearing: The agency must conduct a public hearing on the proposed rate or charge not less than 45 days after mailing the notice.
- Protest: If written protests against the rate or charge are presented by a majority of the owners of the parcels subject to it, the agency may not implement the new or increased rate or charge.

Metered service is not exempt from Proposition 218.

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- **Election:** Except for rates and charges for “sewer, water, and refuse collection services,” no rate or charge may be imposed or increased until it is approved either by a majority vote of the owners of the property subject to the rate or charge or, at the agency’s option, by a two-thirds vote of the registered voters. The election must be held within 45 days after the public hearing. The election may be conducted by mailed ballot.

*Record Owners versus Ratepayers.* Proposition 218 requires that the hearing notices be mailed to the “record owner” of each parcel on which the rate or charge is proposed to be levied. Government Code Section 53750(j) defines “record owner” as the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll. In some cases, the ratepayer on agency’s billing list will not be the record owner. So, sending hearing notices only to ratepayers does not appear to satisfy the requirements of Proposition 218. The League of California Cities has said that it and ACWA, CASA, CSAC and CSDA are discussing legislation that would amend the law to allow notice by mail *either* to ratepayers or to the property owners rather than both.

*Scope of Exemption from Election.* Sewer, water, and refuse collection rates and charges do not require approval by the voters. Storm drainage has been determined by an appellate court to be neither a water service nor a sewer service.

*Charges Not Subject to Proposition 218.* Connection or capacity charges for new customers are not subject to the rules of Proposition 218, as decided in *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409. Some other agency charges related to utility services may also be exempt, if they are additional or optional services requested by a customer (such as charges for hazardous waste removal, temporary construction water service, or meter repair).

**Refunds.** Some agencies have increased their metered water service rates since the July 1, 1997, effective date of Proposition 218’s requirements for increasing property-related charges without following those procedures. Because the general rule in California is that judicial decisions are applied retroactively (they state what the law has been), those increased charges are subject to the risk of claims for refund.

Considerations of fairness and public policy, including the extent of reliance on prior decisions, may lead a court to make an exception to the general rule and apply a new decision only prospectively. However, the fact that a Supreme Court decision overrules a prior appellate court decision does not by itself necessarily justify prospective application. The Legislature also has the power to enact a statute that would make the court’s decision in *Bighorn* apply only prospectively.

**Repeal or Reduction by Initiative.** The Supreme Court also held in *Bighorn* that voters may use the initiative power to reduce or repeal any existing property-related fee or charge, and possibly other types of fees and charges as well. The Court did not decide whether the initiative power was limited by statutes that require public agencies to set their utility rates at a level sufficient to pay their operations, maintenance and debt service costs.

Rates are subject to reduction by initiative.