

FILED  
YOLO SUPERIOR COURT

JAN 22 2014

BY E. ENDO  
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF YOLO

YOLO RATEPAYERS FOR  
AFFORDABLE PUBLIC UTILITY  
SERVICES and JOHN R. MUNN,

Plaintiffs/Petitioners,

vs.

CITY OF DAVIS, CALIFORNIA

Defendant/Respondent.

) Case No. CV 13 187

) TENTATIVE DECISION<sup>1</sup> AND PROPOSED  
) STATEMENT OF DECISION

In accordance with Code of Civil Procedure section 632 and California Rule of Court 3.1590, the Court issues this Tentative Decision and Proposed Statement of Decision<sup>2</sup> following the bench trial and hearing in this Proposition 218 case.

<sup>1</sup> This *Tentative Decision and Proposed Statement of Decision* is being circulated to the parties for comment and objection, pursuant to Rule of Court 3.1590, subdivision (g). After receiving and considering the parties' responses, the Court will enter a final Statement of Decision and Order.

<sup>2</sup> The purpose of a statement of decision is to provide the Court's "ultimate findings." (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4<sup>th</sup> 1106, 1125.) A statement of decision "need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision." (*Ibid.*)

1 As explained below, the water and sewer rates adopted by the City of Davis meet the  
2 proportionality standards of the California Constitution, and therefore the plaintiffs'<sup>3</sup> claims are  
3 denied.

4  
5 ***1. Factual and Procedural Background***

6 For decades, the City has been drawing its water from a series of wells, but in recent times the  
7 quality and quantity of this water has been declining. In response, the City drilled deeper to reach  
8 better water, but hydrological studies indicate that even with these deeper wells, the City still  
9 may need an alternative source of water to provide its residents with an adequate supply that  
10 meets applicable quality standards.

11  
12 The City looked east, to the Sacramento River, for this alternative supply, and after years of  
13 study and consultation, decided with the City of Woodland to construct a system that would  
14 bring river water to Yolo County's two largest cities. This project is known as the Surface Water  
15 Project.

16  
17 Davis and Woodland formed a joint powers agency, the Woodland-Davis Clean Water Agency  
18 (WDCWA), to implement and oversee the Surface Water Project. The project includes an intake  
19 structure to siphon water from the Sacramento River, pipelines to bring the water to a new  
20 treatment plant, and further pipelines to deliver the treated water to Woodland and Davis. The  
21 City of Davis plans to exclusively use surface water from the project, except in the summer,  
22 when it may be necessary to supplement that supply with groundwater to meet peak demands.

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<sup>3</sup> Because they have filed both a complaint for declaratory relief and a petition for mandamus, the Yolo Ratepayers for Affordable Public Utility Services and John R. Munn are both plaintiffs and petitioners. For simplicity's sake, this decision will refer to them as plaintiffs.

1 The Surface Water Project generated controversy, and the City created a committee, the Water  
2 Advisory Committee, to advise the City on water policy, including water rates. The Committee  
3 recommended that the City proceed with the Surface Water Project, but with less water delivered  
4 to Davis, and with commensurately lower costs. The City also put the Surface Water Project  
5 (but not the rates) to an advisory vote, and it was approved by the voters.  
6

7 The City hired a consulting firm, Bartle Wells Associates, to conduct a water rate study. That  
8 study is the primary factual support for the City's claim that its rates are proportional, and it is  
9 found in the Administrative Record from pages W2027 to W2175. The water rate study notes  
10 that there are two types of costs associated with the operation of a water system. First are the  
11 fixed costs, such as the costs of constructing and maintaining water mains and pipelines, and  
12 certain administrative and billing costs. These costs do not vary with usage, so the water agency  
13 incurs them regardless of how much water its customers use.  
14

15 Second are the variable costs, such as the cost of chemicals to treat the water, and the cost of  
16 electricity to pump it. These costs do vary with usage, so the more water used by customers, the  
17 more the water agency pays for these costs.  
18

19 Like the two types of costs, traditionally there have been two types of charges to water users.  
20 The first type is a fixed charge, which is simply a charge that does not change no matter how  
21 much water a customer uses. The second type is a volumetric (or variable) charge, which does  
22 increase or decrease based on how much water the customer uses. Often, to create an incentive  
23 for conservation, volumetric charges are tiered, with users paying more per unit of water after a  
24 certain level of use.  
25

1 Traditionally, users have paid both a fixed charge and a volumetric charge for their water. Water  
2 agencies traditionally use the revenue they receive from the fixed charges to recover their fixed  
3 costs, and they use the revenue they receive from the volumetric charges to recover their variable  
4 costs. The City has used such a traditional rate structure in the past.

5  
6 At issue in this case are the water rates recently enacted by the City. For the period from May 1,  
7 2013 to December 31, 2014, the City has adopted a traditional water structure, albeit with higher  
8 rates than before, to begin to pay for the Surface Water Project. This rate structure is referred to  
9 as the Bartle Wells rate structure, after the consulting firm that recommended it.

10  
11 For the period beginning January 1, 2015, the City has enacted a new water rate structure dubbed  
12 the Consumption-Based Fixed Rate (CBFR) structure. This rate structure, which was developed  
13 by two members of the Water Advisory Committee, has three components: a fixed distribution  
14 charge,<sup>4</sup> a variable volumetric charge,<sup>5</sup> and a quasi-variable supply charge.

15  
16 The supply charge is unique to the CBFR rate structure. The supply charge is calculated for each  
17 parcel on a yearly basis, and is based on that parcel's water use during the previous six-month  
18 peak period from May to October. This charge is thus quasi-variable because it is fixed for a  
19 period of time, and because it appears that new residents will inherit, for the first year, the supply  
20 rate established by their predecessors. The supply charge is used to pay certain fixed charges  
21 relating to water supply and treatment, including many of the costs of the Surface Water Project.

22 \_\_\_\_\_  
23 <sup>4</sup> The distribution charge is used to recover the costs of the water mains, pipelines, and tanks, fire-flow  
24 devices, meters, and administration. The supply charge is used to recover the costs of the wells, surface  
water supply, and planning and environmental costs.

25 <sup>5</sup> The volumetric charge is used to recover all costs that vary with water usage.

1 Thus, the chief innovation of the CBFR structure is that certain fixed charges are recovered  
2 through a quasi-variable charge, whereas with a traditional rate structure, fixed costs are entirely  
3 recovered through a fixed charge. (In both cases, variable costs, such as the cost of chemicals  
4 and electricity, are recovered through variable charges.) By reducing the fixed component,  
5 CBFR promotes conservation and gives users greater control over their water bill.

6  
7 Both structures impose rates that are significantly higher than the City's rates before May 1,  
8 2013. The primary reason for this increase is simple: the City has decided to implement the  
9 Surface Water Project to meet its water needs, and the funding for this project will come from  
10 the ratepayers. The question for the Court is not whether these rates *in toto* are too high (that is a  
11 policy question for the City's leaders and its voters), but whether they are divided in such a way  
12 that makes them illegal under Proposition 218.

13  
14 The present lawsuit was filed on March 22, 2013, and it includes multiple causes of action, but  
15 the only causes of actions at issue now are the second cause of action (declaratory relief  
16 regarding the Bartle Wells rates), the third cause of action (declaratory relief regarding the CBFR  
17 rates), the fourth case action (mandamus for both water rate structures), the eighth cause of  
18 action (declaratory relief for sewer rates), and the ninth cause of action (mandamus for sewer  
19 rates). The remaining causes of action, dealing with other issues, have been bifurcated by  
20 agreement of the parties and order of the Court, and a pre-trial conference is scheduled for  
21 **March 7, 2014 at 3:30 p.m.** in Department 7 to discuss adjudication of those matters.

22  
23 ***2. The Proportionality Requirement of Proposition 218***

24 The relevant portion of Proposition 218 provides that "[t]he amount of fee or charge imposed  
25 upon any parcel or person as an incident of property ownership shall not exceed the proportional

1 cost of the service attributable to the parcel.” (Cal. Const., art. XIIIID, § 6, subd. (b)(5).) At first  
2 blush, this provision would appear to require the City to show, on a parcel-by-parcel<sup>6</sup> basis, that  
3 its rates are proportional to the costs for that parcel, since the provision refers to the  
4 “proportional cost of the service attributable to the parcel.”

5  
6 But the Court of Appeal, which this Court must follow, has rejected this interpretation, and found  
7 instead that “proportionality is not measured on an individual basis,” but instead is “measured  
8 collectively, considering all rate payers.” (*Griffith v. Pajero Valley Water Management Agency*  
9 (2013) 220 Cal.App.4<sup>th</sup> 586, 601.) Thus, proportionality may be established by “grouping similar  
10 users together” and then charging members of the group according to their usage. (*Ibid.*) So the  
11 Court’s focus is on the categorizations made by the City, and the evidence (if any) supporting  
12 those categorizations.

13  
14 Rates are disproportional if an agency charges groups different amounts for no good reason.  
15 (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal. 926.) In *City of Palmdale*, a water  
16 district charged irrigation users more per unit of water than other users, and the Court of Appeal  
17 struck down the rates because the agency “fail[ed] to identify any support in the record for the  
18 inequality.” (*Id.* at 936.) So the *City of Palmdale* case stands for the proposition that there must  
19 be a record-supported reason for any price discrimination among user groups.

20  
21 It is important to note that Proposition 218 requires rates to be *proportional* to the cost of service,  
22 not *equal* to it, and so the fact that one rate structure is proportional to the cost of service (and  
23 thus legal) does not mean that all other rate structures are disproportional to the cost of service

24  
25 <sup>6</sup> A parcel-by-parcel analysis is not the same as a user-by-user analysis, but they are related, since the  
usage patterns for a parcel are determined by the residents of that parcel.

1 (and thus illegal). This is so because “[a]pportionment is not a determination that lends itself to  
2 precise calculation,” and so agencies still retain discretion to consider policy matters, such as the  
3 need for water conservation,<sup>7</sup> in setting rate structures. (*Griffith v. Pajero Valley Water*  
4 *Management Agency* (2013) 220 Cal.App.4<sup>th</sup> 586, 601.)

5  
6 The Court’s duty is to determine whether the rates are constitutional, and it is for the City’s  
7 elected policymakers to determine if they are fair and promote good public policy. The  
8 increased water rates will undoubtedly burden many Davis residents who are already struggling  
9 to pay their bills, but the elected City Council members, not the Court, must balance that burden  
10 against the need to address the declining quality of the City’s water supply.

11  
12 Also, while the Administrative Record<sup>8</sup> shows that the City has studied the water problem in  
13 great depth, and has solicited public input in excess of the legal requirements, these facts are  
14 legally irrelevant. Illegal rates cannot be saved by study or public participation, and legal rates  
15 do not need them, beyond the procedural requirements of Proposition 218.

16  
17 The City bears the burden of showing that its rates comply with Proposition 218. (Cal. Const.,  
18 art. XIII D, subd. (b)(5) [“[i]n any legal action contesting the validity of a fee or charge, the  
19 burden shall be on the agency to demonstrate compliance with this article”].) The plaintiffs  
20

21  
22 <sup>7</sup> At the hearing on this matter, the plaintiffs agreed that the City may consider the need for water  
23 conservation in setting rates. The California Constitution explicitly recognizes the need for conservation  
of water. (Cal. Const., art. X, § 2.)

24 <sup>8</sup> The Court denied the plaintiffs’ request to submit extra-record evidence, and it likewise hereby exercises  
25 its discretion to deny the City’s request that it take judicial notice of the M-1 Manual, since that Manual  
was not part of the Administrative Record.

1 identify a number of alleged disproportionalities in the City's water and sewer rates, and each  
2 challenge is addressed separately below.

3  
4 **3. Do the City's Water Rates Meet the Proportionality Requirement of Proposition 218?**

5 **3.1. Do Both Rate Structures Impermissibly Fail to Provide a Proportional Special**  
6 **Benefit?**

7 In their opening brief, the plaintiffs argued that the new rates violate a provision of Proposition  
8 218 that prohibits an assessment "on any parcel which exceeds the reasonable cost of the  
9 proportional special benefit conferred on that parcel." (Cal. Const., art. XIII D, § 4, subd. (a).)

10 The plaintiffs claimed that no special benefit has been shown, because the new water rates  
11 assume future growth, but the City may not grow in the future as much as assumed.

12  
13 As the City points out, the plaintiffs have misidentified the applicable portion of Proposition 218,  
14 since water rates are not assessments, but instead are property-related fees, and thus no "special  
15 benefit" need be shown. (Cal. Const., art. XIII D, subd. (b)(5).) The plaintiffs concede this error  
16 and have withdrawn the "special benefit" argument.

17  
18 **3.2. Bartle Wells Rates (Effective from May 1, 2013 to December 31, 2014)**

19 **3.2.1. May the City Charge More Based on Meter Size?**

20 For residential water users, the fixed charge for the Bartle Wells rates is based on the size of the  
21 parcel's water meter, so that users with a one-inch diameter meter pay a higher fixed charge than  
22 those with a 3/4-inch<sup>9</sup> diameter water meter. The plaintiffs argue that there is no valid reason to

23 \_\_\_\_\_  
24 <sup>9</sup> In their opening brief, the plaintiffs argued that the City impermissibly lumped parcels with a 5/8-inch  
25 meter into the same category as those with a 3/4-inch meter. In response, the City cited pages in the  
Administrative Record showing that there are no parcels with a 5/8 inch meter, and plaintiffs do not  
dispute this in their reply brief.



1 set fixed charges based on meter size, because a user with a smaller meter may well end up using  
2 more water than a user with a larger meter, and so all single-family residential users should be  
3 charged the same fixed charge.

4  
5 However, the Administrative Record shows that there are two good reasons to charge a higher  
6 fixed charge to users with a larger meter. First, a user with a larger meter has the capacity to use  
7 more water, and the new system must have the ability to meet potential peak-period demand.

8 (See W2087). The greater the potential demand, the bigger the system, so it is proportional to  
9 charge those parcels with greater capacity a higher *fixed* charge. It would not be proportional to  
10 recover variable costs based on a parcel's potential demand, and the City does not do so. But  
11 because the City incurs fixed costs regardless of usage (that is what makes them fixed, after all),  
12 it is proportional to recover fixed costs based on capacity for use. (*Paland v. Brooktrails*  
13 *Township Community Services District Board of Directors* (2009) 179 Cal.App.4<sup>th</sup> 1358, 1371.)

14  
15 Second, the water rate study shows that parcels with bigger meters do in fact tend to use more  
16 water. (W9392 – 9393). The correlation is not perfect, because some users with smaller meters  
17 use more water than others with larger meters. But as noted above, the Court of Appeal has  
18 interpreted Proposition 218 to eschew individual proportionality analysis and to instead focus on  
19 groups of similar users. (*Griffith v. Pajero Valley Water Management Agency* (2013) 220  
20 Cal.App.4<sup>th</sup> 586, 601; *Paland v. Brooktrails Township Community Services District Board of*  
21 *Directors* (2009) 179 Cal.App.4<sup>th</sup> 1358.)

22 ///

23 ///

24 ///

1 As a group, those with larger meters impose both higher potential and actual costs on the system,  
2 so it is not disproportional to charge them more for the fixed component of the charge.

3  
4 **3.2.2. *Are Low-Volume Water Users Paying More Than Their Proportional Cost of***  
5 ***Service?***

6 The plaintiffs argue that the Bartle Wells rate structure overcharges low-volume water users  
7 because they pay more per unit of water than high-volume users. The plaintiffs rely on *City of*  
8 *Palmdale v. Palmdale Water District* (2011) 198 Cal. 926, where the Court of Appeal struck  
9 down higher rates for irrigation users, because there was no evidence in the record justifying the  
10 price discrimination.

11  
12 Here, unlike in *City of Palmdale*, the City has demonstrated a basis for its allocation of costs to  
13 the ratepayers. In particular, the Rate Study has calculated the costs to provide water, including  
14 the Surface Water Project, and allocates those costs into various categories. The variable costs  
15 are then recovered through the volumetric charge, and the fixed costs are recovered through the  
16 fixed charge. (See W2037, W2039-2040, W2045, W2050, W2070 – 2095).

17  
18 It is true, as plaintiffs note, that low-volume users will pay more per gallon, sometimes much  
19 more, than high-volume users. This phenomenon is not unique to Davis, but is true of any  
20 traditional water rate structure with a fixed fee. Indeed, this phenomenon is not unique to water  
21 rates, but is common in any situation where fixed costs are recovered through a fixed fee.

22  
23 For instance, consider two people who each rent a moving truck for one day for \$50, plus \$.30  
24 per mile. The first person drives 250 miles on that day, and thus pays a total of \$125, which  
25

1 equates to \$.50 per mile. The second person only drives 10 miles, and thus pays a total of \$53,  
2 which equates to \$5.30 per mile.

3  
4 The second driver pays more than 10 times more per mile than the first, and the reason for this  
5 disparity is the fact that many of the costs associated with renting an automobile, such as the  
6 costs of acquisition, insurance, registration, and some maintenance, are not directly variable with  
7 the number of miles driven.

8  
9 Thus, it is not disproportionate to charge a fixed amount to recover fixed costs, even though this  
10 means that low-volume users pay more per unit, because the City incurs “readiness to serve”  
11 costs that arise from potential demand. (*Paland v. Brooktrails Township Community Services*  
12 *District Board of Directors* (2009) 179 Cal.App.4<sup>th</sup> 1358, 1369 – 1371.) To promote  
13 conservation and to ease the burden on low-volume users, the City may recover some fixed costs  
14 through volumetric charges, and it has done so through the new CBFR rate structure. But the law  
15 does not prohibit the City from using a traditional rate structure that recovers all fixed costs  
16 through a fixed charge.

17  
18 **3.2.3. Does the Tiering Structure Violate Proportionality?**

19 The plaintiffs make two<sup>10</sup> arguments against the tiers established through the Bartle Wells rate  
20 structure. First, they note that the City Council did not adopt the cut-off points and rates  
21 recommended by Bartle Wells, but instead set higher cut-off points, thereby allowing residents to  
22 use more water before incurring higher charges. The plaintiffs argue that there is no evidence in  
23 the record to justify this deviation from the consultant’s recommendation.

24  
25 <sup>10</sup> The plaintiffs do not argue, as some others have, that it is impermissible to use a tiering structure that charges higher-volume users more per unit than lower-volume users, so that issue is not before the Court.

1 This argument is based on the fallacious assumption that the elected City Council members are  
2 legally required to follow their consultant's recommendations. A consultant's recommendation is  
3 not the law, and Proposition 218 does not require the City to justify any divergence from that  
4 recommendation.

5  
6 The plaintiffs' second argument is that irrigation users pay more than their proportional cost.  
7 Single-family residential users pay \$1.37 per ccf for the first 18 ccfs, \$1.37 for the next 11 ccfs,  
8 and \$2.33 for any amount above 29 ccf per month. In contrast, irrigation users pay \$2.37 per ccf,  
9 regardless of volume.

10  
11 While irrigation users do impose higher costs on the system because of their higher peak-period  
12 demand, the plaintiffs argue that much of the water in the first residential tier is also used for  
13 irrigation, and almost all of the water in the second and third tiers is used for irrigation. In  
14 particular, the plaintiffs argue that most residential water use after 5 ccf per month is for  
15 irrigation. So, the plaintiffs ask, why do single-family users pay less for their irrigation water  
16 than do those who have an irrigation account?

17  
18 The City answers by denying that irrigation users pay more than the proportional share. In  
19 setting rates, the City proceeded in the manner approved by *Griffith*: it divided the users into  
20 groups of similar uses, and then apportioned to each group its costs. The Administrative Record  
21 supports the City's assertion, and shows that the irrigation users, as a group, are paying their  
22 share of the total costs, based on their high peaking-demand impact. (W2081 – 2082). As a  
23 group, irrigators pay more per unit than single-family users because they place higher peak-  
24 period demands on the system, and peak-period demand is pivotal in determining the City's  
25 water needs and costs.

1 The plaintiffs seem to be arguing that there should parity among *uses*, not just users, so that if a  
2 homeowner is irrigating, he or she should pay the same rate as an irrigator. But this is not what  
3 the law requires: *Griffith* allows the City to place users into groups, and then allocate costs  
4 proportionally among those groups. Plaintiffs' suggestion of instead dividing the costs among  
5 uses may be constitutional too, but the fact "[t]hat there may be other methods favored by  
6 plaintiffs does not render defendant's method unconstitutional." (*Griffith v. Pajaro Valley Water*  
7 *Management Agency* (2013) 220 Cal.App.4<sup>th</sup> 586, 601.)

8  
9 **3.2.4. *Are Multi-Family Residences With a Separate Irrigation Meter Paying More***  
10 ***Than Their Proportional Cost of Service?***

11 The Plaintiffs argue that those multi-family residences that have a separate water meter for  
12 irrigation pay more than their proportionate share, because they are charged at the higher  
13 irrigation rate. This is a variant of the argument addressed above, namely that Proposition 218  
14 requires a justification for price discrimination among uses. But *Griffith* allows the City to  
15 divide the costs among user groups, and then allocate costs to those groups in accordance with  
16 the respective cost each group imposes on the system. No law has been cited that would require  
17 the City to go further and allocate costs *within* each group based on the purpose for which the  
18 water is used.

19  
20 **3.3. *CBFR Rates (Effective Starting January 1, 2015)***

21 **3.3.1. *Are the CBFR Rates Disproportional Because They Differ From the Bartle***  
22 ***Wells Rates?***

23 Plaintiffs argue that because the Bartle Wells rate structure recovers 40% of the system's costs  
24 through fixed charges, and the CBFR rate structure recovers only 13% through fixed charges,  
25 one or both of these rates structures must be unconstitutional. Put another way, the plaintiffs

1 argue that there is a temporal disproportionality, because later users are paying a much higher  
2 percentage through variable or quasi-variable charges than earlier users.

3  
4 This argument is based on the assumption that if one rate structure is proportional, any structure  
5 that significantly deviates from that structure must be disproportional. This assumption might be  
6 warranted if the language of Proposition 218 required that parcels pay an amount *equal* to the  
7 cost of service, but that is not what Proposition 218 says, and no case has interpreted Proposition  
8 218 to mean that only one rate structure is legally permissible.

9  
10 To the contrary, in *Griffith* the Court of Appeal seems to acknowledge that more than one rate  
11 structure may pass constitutional muster. (*Griffith v. Pajaro Valley Water Management Agency*  
12 (2013) 220 Cal.App.4<sup>th</sup> 586, 601.) Thus, the constitutionality of each rate system must be  
13 independently assessed.

14  
15 It is legal to recover all fixed costs from a fixed fee, as the City has done through the Bartle  
16 Wells rate structure, even though that means that low-volume users pay more per unit, because  
17 fixed costs are, by definition, not variable with usage. But it is also legal to recover some fixed  
18 costs on a variable basis, as the City has done through the CBFR rate structure, especially when a  
19 new system is being constructed, and the cost of that system depends on the capacity of water it  
20 must provide.

21  
22 **3.3.2. *May the City Charge More to Users Whose Parcel Contains a Larger Meter?***

23 As explained above, meter size is proportional to costs, because those with larger meters create  
24 both a higher potential demand (which the City must be prepared to accommodate), and because  
25 the data shows that those with larger meters tend to use more water.

1           3.3.3. *Are Steady Users Paying Less Than Their Proportional Cost of Service?*

2 The plaintiffs argue that the CBFR rates are disproportional because steady users (those who use  
3 water at the same clip throughout the year) pay less than typical users (who use more water in the  
4 summer). In particular, the plaintiffs construct a hypothetical situation in which a resident uses  
5 one extra ccf in the summer, which then causes the resident's supply charge to be increased in  
6 the next year, thereby increasing the resident's bill even further.

7  
8 This hypothetical underscores a distinctive feature of the CBFR, which is that the rate is quite  
9 sensitive to changes in summer water use. This sensitivity promotes conservation, as does any  
10 system in which the rates increase with the volume.

11  
12 In setting rates, may a water agency take into account the need to conserve water? The  
13 California Constitution recognizes the importance of water conservation, and at oral argument  
14 the plaintiffs agreed that the City may take into account the need for water conservation. (Cal.  
15 Const., art. X, § 2; Transcript, 58: 22 - 25). So this is not a case, like some others, where the  
16 plaintiffs are arguing that Proposition 218 forbids agencies to encourage water conservation by  
17 establishing tiers that result in higher per-gallon rates for heavy water users.<sup>11</sup>

18  
19 Instead, the plaintiffs argue that the CBFR rates discriminate between users, by penalizing users  
20 who use more water in the summer. But there is a good reason, supported by the Administrative  
21 Record, to charge more for summer water: the system must be built to handle peak capacity, and  
22 that capacity is determined by summer usage.

23  
24  
25 <sup>11</sup> Also, because it is building a new supply system, it is proportional for the City to charge heavy summer  
users more, because the size and cost of the new system is dependent on peak-period demand.

1 As explained in the water rate study, the City is setting rates according to the “Commodity-  
2 Demand Method,” which is one of the two cost-allocation methods recommended by the  
3 American Water Works Association. (W2074). Under this method, costs are allocated to  
4 customers based on peak demand. (*Ibid.*) In particular, costs are divided into four categories,  
5 the most relevant of which here are the “demand costs.” (*Ibid.*) Demand costs “include capital-  
6 related system costs designed to meet peak requirements and the associated operation and  
7 maintenance expenses.” (*Ibid.*)

8  
9 The water rate study includes detailed cost breakdowns showing annual demand costs totaling  
10 \$7,340,593, or 43% of the total costs. (W2076) The study also calculates “peaking costs” for  
11 each customer class. (W2081). The plaintiffs do not identify specific challenges to any of these  
12 calculations or allocations.

13  
14 So “steady” users, who do not increase their use in the summer, do pay less than typical users,  
15 but this variance does not violate proportionality because peak-period demand imposes more  
16 costs on the system than off-season demand.

17  
18 ***4. Do the Sewer Rates Violate Proposition 218 By Using Winter Water Use as a Proxy?***

19 The City’s sewer rates have two components: a flat monthly fee, and a variable charge (subject  
20 to a cap) based on winter water use. The plaintiffs challenge the latter, arguing that winter water  
21 use does not correlate well with sewer use. The plaintiffs rely on a study that analyzed winter  
22 water use in El Macero, near Davis. That study showed that El Macero residents use significant  
23 amounts of water in the winter for irrigation, and the plaintiffs infer that other users must also  
24 irrigate in the winter. Thus, plaintiffs argue, it is disproportional to use winter water use to  
25



1 establish sewer charges, since much of the water used in the winter does not end up in the sewer  
2 system.

3  
4 Winter water use is an imperfect proxy for wastewater discharge rates, especially in dry winters  
5 like the present one where many users are irrigating because nature is not. It is a better proxy  
6 than year-round use, but is it so imperfect that it violates the proportionality requirement of  
7 Proposition 218?

8  
9 Winter water use is a traditional proxy for wastewater discharge, and no case has been cited that  
10 rules it illegal or questions it.<sup>12</sup> This lack of precedent can perhaps be explained by the Court of  
11 Appeal's recognition that "[a]ppportionment is not a determination that lends itself to precise  
12 calculation" and that "proportionality is not measured on an individual basis." (*Griffith v. Pajaro*  
13 *Valley Water Management Agency* (2013) 220 Cal.App.4<sup>th</sup> 586, 601.)

14  
15 Implicit in the plaintiff's argument is the claim that the City should find a better proxy for  
16 wastewater discharge rates, or measure those discharges directly.

17  
18 This leads to the question: to comply with Proposition 218, must the City take steps to acquire  
19 data that it does not currently have, such as by installing wastewater meters in all structures  
20 within the City? Data acquisition has costs, but does Proposition 218 require agencies and their  
21 taxpayers to absorb these costs in the name of proportionality?

22  
23  
24 <sup>12</sup> In *Boynton v. City of Lakeport* (1972) 28 Cal.App.3d 91, 95 the Court of Appeal noted in *dicta* that "the  
25 amount of water consumed would bear a high correlation with the amount of sewage-bearing water  
discharged." This case pre-dates Proposition 218, and the defendant in that case was not using  
consumption as a basis for sewer rates.

1 It would be anomalous if Proposition 218, which was adopted to limit local government's taxing  
2 and spending abilities, were interpreted to require agencies to buy -- and taxpayers to pay for --  
3 new data collection devices or techniques to ensure proportionality. No case has so interpreted  
4 Proposition 218, and the language of Proposition 218 does not contain this requirement.  
5

6 The Court concludes that Proposition 218 may be satisfied if the agency's rate structure and user  
7 categorizations are supported by the available data, so long as that data shows that the parcels  
8 have been divided into groups of similar users, and that there is a sound reason supporting any  
9 disparity in how the groups are charged. (*Griffith v. Pajaro Valley Water Management Agency*  
10 (2013) 220 Cal.App.4<sup>th</sup> 586, 601; *Paland v. Brooktrails Township Community Services District*  
11 *Board of Directors* (2009) 179 Cal.App.4<sup>th</sup> 1358.)  
12

13 Also, the Court interprets Proposition 218 to require agencies to recover variable costs using a  
14 variable charge, at least where the agency has the means to measure usage and therefore to  
15 apportion the variable costs.<sup>13</sup> When an agency lacks the means to directly measure usage, it may  
16 rely on the best-available proxy measurement, even if that measurement is imperfect. Here, the  
17 Court finds that it is not illegal for the City to use winter water usage as the best-available proxy  
18 measurement for wastewater discharge, since the City has not installed meters or other means to  
19 measure sewer use, and since Proposition 218 does not require it to do so.

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25 <sup>13</sup> The Court expresses no opinion on the question of whether Proposition 218 allows an agency that has not installed water meters to charge all users in a given category the same flat fee per month.

1 **5. Conclusion**

2 The City's water and sewer rates are proportional, and thus pass muster under Proposition 218.

3 The Court thus finds in favor of the City on the second, third, fourth, eighth, and ninth causes of  
4 action. This case has not been completed, because there remain other causes of action to  
5 adjudicate, so no costs are awarded at this time.

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9 IT IS SO ORDERED.

10 Dated: 22 January 2014

 DANIEL P. MAGUIRE  
JUDGE OF THE SUPERIOR COURT

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