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**The Impact of Proposition 218 on
California's Water Delivery System:
Should Water Be "Above the Law?"**

by

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THE IMPACT OF PROPOSITION 218 ON CALIFORNIA'S WATER DELIVERY SYSTEM: SHOULD WATER BE "ABOVE THE LAW?"

INTRODUCTION

*"We never know the worth of water til the well runs dry."*¹

California is home to some of the most fertile and productive agricultural land in the nation.² The Central Valley³ alone is responsible for producing enough cotton in one year to make over 827 million cotton t-shirts.⁴ Other important crops produced in the state include lettuce, tomatoes, garlic, almonds, onions, and wheat.⁵ What all these crops have in common is their dependence on an efficient water delivery system. By some estimates, California will be chronically short of water by 2010 unless steps are taken now to improve the water supply system.⁶ In light of this estimate, it is especially discouraging to see Proposition 218, passed by voters in 1996, come between public agencies that build and maintain the state's water delivery system⁷ and the revenue upon which they depend. This revenue is vital to maintain operations at current levels. These public agencies also depend on this revenue to expand operations in order to meet the demands of a rapidly growing state. This comment explores how Proposition 218 can

¹ Bergen Evans, *DICTIONARY OF QUOTATIONS* (1968) (quoting Thomas Fuller).

² 5 *ENCYCLOPEDIA AMERICANA* 204 (Int'l Ed. 1998).

³ The Central Valley of California is situated between the Pacific coastal mountain range to the west and the Sierra Nevada mountains to the east. It stretches as far north as Stockton and as far south as Bakersfield. The greatest source of income for the Central Valley is agriculture.

⁴ WESTLANDS WATER DIST., 1997 CROP REPORT.

⁵ *Id.*

⁶ ASSOCIATION OF CAL. WATER AGENCIES (ACWA) WATER FACTS, Home Page (visited Nov. 3, 1998) <<http://www.acwanet.com>> [hereinafter ACWA Home Page].

⁷ "Water delivery system" herein refers to all components which are necessary for the procurement, treatment, and dispersment of water, as well as water itself.

deprive public water agencies of their revenue and examines several possible solutions to this problem.

I. PROPOSITION 218

Proposition 218 started out as a well-intentioned initiative sponsored by The Howard Jarvis Taxpayers' Association.⁸ Proposition 218, the self-titled "Right to Vote on Taxes Act," was approved by California voters on November 5, 1996.⁹ Proposition 218 amended the California Constitution by creating new landowner approval procedures for benefit assessments on real property and for fees and charges imposed "as an incident of property ownership."¹⁰ These approval procedures were designed "to close loopholes in Proposition 13 which allowed local governments to increase fees, charges, and benefit assessments without a public vote" ¹¹ Proposition 218 is one of the latest of a group of revenue-limiting propositions which began with the passage of Proposition 13 in 1978. These propositions have had the effect of bringing the local government taxing power under the control of California voters.¹²

Proposition 218 gives voters an opportunity to reject certain taxes and fees. For many voters, this opportunity is just too good to pass up, and they have responded by rejecting about one-half of all new taxes.¹³ Much has been said and written regarding the effect of Proposition 218 on such municipal projects as parks, pools, and street

⁸ LEAGUE OF CAL. CITIES, PROPOSITION 218 IMPLEMENTATION GUIDE A-13 (1997).

⁹ *Id.* at iii.

¹⁰ CAL. CONST. art. XIII D, §§ 2(e), 4 (1996).

¹¹ PROPOSITION 218 SUBCOMM., ASSOCIATION OF CAL. WATER AGENCIES, PROPOSITION 218 LOCAL WATER AGENCY GUIDELINES FOR COMPLIANCE (1997)(available at the ACWA Home Page, *supra* note 6 (visited Nov. 4, 1998))[hereinafter GUIDELINES FOR COMPLIANCE]; HOWARD JARVIS TAXPAYERS' ASS'N, PROPOSITION 218 STATEMENT OF DRAFTERS' INTENT § 2, Findings and Declarations [hereinafter STATEMENT OF DRAFTERS' INTENT]:

The People of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself.

¹² John S. Throckmorton, *What Is a Property-Related Fee? An Interpretation of California's Proposition 218*, 48 HASTINGS L.J. 1059, 1065-66 (1997).

¹³ Arleen Jacobius, *Trends in the Region: Californians Have Until November to Decide on Tax Issues*, BOND BUYER, Jan. 9, 1998, at 28.

lighting.¹⁴ In the last year, however, it has become even more apparent that Proposition 218 can affect projects involving California's most important and soon-to-be scarcest resource: *water*.

Revenue-limiting initiatives such as Proposition 218 have both advantages and disadvantages.¹⁵ One advantage is that a revenue-limiting initiative gives the individual voter the power to make a direct impact on the way municipalities and other public agencies conduct their business.¹⁶ A "no" vote on an increased fee or assessment can dictate where revenue is spent and where it is not spent. The spending agencies are then held more accountable to the constituents they serve. Such initiatives can also have a streamlining effect on these public agencies, forcing them, in effect, to be more efficient.¹⁷ The argument is less revenue demands more efficient spending. Another advantage is the immediate economic impact that such an initiative can have. By rejecting higher taxes and fees, voters can keep more money in their own pockets.

A major disadvantage is that the loss of revenue may result in a lower credit rating for an agency, making it more costly to issue debt. Already, the County of San Diego has seen a drop in the rating of its pension obligation bonds, due in part to revenue limitations brought on by Proposition 218.¹⁸ "An issuer rated in the 'BBB' or 'Baa' categories by the major rating agencies may pay interest rates that are 5-10 percent higher than an issuer rated 'A.' This penalty can translate into thousands or even millions of dollars of additional interest expense."¹⁹ Another disadvantage is that the lack of revenue may cause an agency or municipality to postpone needed infrastructure improvements.²⁰ When these infrastructure improvements involve maintaining, extending, or refining the state's water delivery system, California cannot afford to allow short-sighted voters to postpone them.²¹

¹⁴ See generally Stacey Simon, Note, *A Vote of No Confidence: Proposition 218, Local Government, and Quality of Life in California*, 25 *ECOLOGY L.Q.* 519 (1998).

¹⁵ Brian Moore & Jill Greiss, *The Good and the Bad of Voter Initiatives*, *GOV'T FIN. REV.*, Dec. 1, 1997, at 21.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Written testimony of Kole M. Upton, Farmer Vice-President, Chowchilla Water District Chairman, Friant Water Users Authority, given April 15, 1998, at a field hearing in Fresno on the Central Valley Project Improvement Act (CVPIA), *PUB. L. NO. 102-575* (1992):

We have also added a standby charge, essentially compelling our growers

Prior to its passage, the Association of California Water Agencies (ACWA),²² warned that Proposition 218 “would impose burdensome and costly procedures on local public agencies responsible for providing safe drainage water, flood control, drainage, wastewater treatment, recycling and other essential services”²³ Some share the concern that our water delivery system and its components could go the way of California’s public education and highway systems, which in years past were the envy of all the nation.²⁴ Now, due to an ever-declining level of public investment, these systems are suffering.²⁵ According to one survey,²⁶ since Proposition 218 went into effect, only about one-half of all new taxes have been approved.²⁷

A. *How Proposition 218 May Affect Water*

Proposition 218 poses potential threats to the public agencies responsible for providing the state with water. Proposition 218 imposes costly notice requirements²⁸ and approval procedures on these agencies

to use one and one-half acre-feet of water per acre. Now, under Proposition 218 (a state constitutional amendment), if the district were to have further need to raise revenues by increasing assessments, it would have to place such a proposal before its constituents for approval by majority vote. Lacking that approval, the only other way to raise necessary revenue would be to sell some of our water, if we could find a buyer, and that is like a farmer selling his seed corn.

²² ACWA is the largest coalition of public water agencies in the country. Its agencies are responsible for 90% of the water delivered to cities, farms, and businesses in California. ACWA Home Page, *supra* note 6 (visited Oct. 20, 1998).

²³ *California Voters Face Ballot Measures Key to Ground Water Protection*, GROUND WATER MONITOR, Oct. 16, 1996.

²⁴ Jean Ross & Catherine Siciliano, *California's Plummeting Investment in Tomorrow*, SACRAMENTO BEE, Sept. 15, 1998, at F1.

²⁵ *Id.*

²⁶ Kosmont & Associates Inc., a Los Angeles-based financial consulting firm, surveyed 146 ballot measures from both cities and assessment districts. Jacobius, *supra* note 13.

²⁷ *Id.*

²⁸ CAL. CONST. art. XIII D, § 4(c) (1996):

The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the

for any new²⁹ or increased assessment.³⁰ In addition, to be valid, an assessment must be supported by a detailed engineer's report. Furthermore, the assessment cannot exceed the "reasonable cost of the proportional special benefit conferred on [a] parcel."³¹ Proposition 218 allows property owners to *reject* the imposition of a new assessment if a majority of them register their opposition on a ballot³² that is required to accompany the notice of the proposed assessment.³³ One public agency has already attempted to levy a benefit assessment without seeking the required voter approval. In *Consolidated Fire Protection District v. Howard Jarvis Taxpayers Association*,³⁴ the agency argued that a benefit assessment creates a contract between the local agency and the landowners, therefore, Proposition 218 violates the constitutional proscription against the impairment of contracts. The argument failed.³⁵ The court noted that the case might be different where bonds representing the assessment are issued.³⁶ In such a case, a contractual relationship between the property owner and bondholder

completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

²⁹ CAL. CONST. art. XIII D, § 5 (1996) (applies only to new assessments made after July 1, 1997).

³⁰ CAL. GOV'T CODE § 53750(b) (Deering 1999):

"Assessment" means any levy or charge by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, that is imposed to pay the capital cost of the public improvement, the maintenance and operation expenses of the public improvement, or the cost of the service being provided. "Assessment" includes, but is not limited to, "Special Assessment," "Benefit Assessment," "Maintenance Assessment," and "Special Assessment Tax."

³¹ CAL. CONST. art. XIII D, § 4(a) (1996).

³² CAL. CONST. art. XIII D, § 4(d) (1996):

Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

³³ CAL. CONST. art. XIII D, § 4(e) (1996).

³⁴ *Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers Ass'n*, 73 Cal. Rptr. 2d 586, 592 (Ct. App. 1998).

³⁵ *Id.*

³⁶ *Id.*

would be formed.³⁷

Under Proposition 218, when an assessment is challenged as being invalid, the near conclusive presumption in favor of the agency's determinations, formerly espoused by the California Supreme Court,³⁸ is eliminated. Now, the burden of proving that the assessment is valid rests solely on the agency.³⁹ The agency now must show that a valid method was used to identify the special benefit to be received and must identify all of the parcels which would receive the benefit.⁴⁰ They must also show that the cost of the improvement has been reasonably apportioned among the benefitted parcels.⁴¹

Proposition 218 imposes costly, burdensome notice and approval procedures on agencies adopting or raising fees or charges.⁴² Provisions of Proposition 218 also provide that a fee or charge may not be imposed by an agency if written protests are presented by a majority of the affected property owners.⁴³

Proposition 218 places substantive limitations on fees and charges⁴⁴ imposed by a public agency which, in effect, limit the amount of revenue the agency can generate. One limitation is that the revenue generated by the agency's fee cannot exceed the cost of providing the property-related fee.⁴⁵ Another limitation is that the revenue cannot be used for any purpose other than that for which the fee was imposed.⁴⁶ Also, a fee charged on a parcel of land cannot exceed the proportional cost

³⁷ *Id.*

³⁸ CAL. CONST. art. XIII D, § 3(f) (1996); *Dawson v. Town of Los Altos Hills*, 547 P.2d 1377, 1382 (Cal. 1976).

³⁹ LEAGUE OF CAL. CITIES, *supra* note 8, at 23.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² LEAGUE OF CAL. CITIES, *supra* note 8.

⁴³ CAL. CONST. art. XIII D, § 6(a)(2) (1996):

The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

⁴⁴ “ ‘Fee’ or ‘charge’ means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.” CAL. CONST. art. XIII D, § 2(e) (1996).

⁴⁵ CAL. CONST. art. XIII D, § 6(b)(1) (1996).

⁴⁶ CAL. CONST. art. XIII D, § 6(b)(2) (1996).

of service attributable to that parcel.⁴⁷ In addition, fees based on potential or future use of services are not allowed.⁴⁸

Standby charges for water fall under this last category of limitations.⁴⁹ So far, in the only known California case involving standby charges, the judgment of a Merced County judge was firmly in favor of farmers challenging fee assessments by the Chowchilla Water District.⁵⁰ The judge also ordered the district to repeal its water standby charge, ruling that standby charges are not covered by Proposition 218's grandfather clause.⁵¹ This ruling gave the small community of Eastvale a reason to worry. The Jurupa Community Services District which serves Eastvale had been charging the town's property owners a \$10 per acre sewer service standby fee.⁵² This fee brought in \$75,000 annually which was being used to pay for engineering studies for a sewer system to serve the area in the near future.⁵³ Without these revenues, this yet-to-be-built residential sewer line will remain "yet-to-be-built."

There is still much debate centered around how Proposition 218 applies to certain types of water-related fees and charges.⁵⁴ One view is that certain fees, such as consumption-based water fees, are not "an incident of property ownership."⁵⁵ Rather, such fees are an incident of using a service, and hence should fall outside the provisions of Proposition 218.⁵⁶ A competing view holds that Proposition 218 was intended to cover all fees, including those charged for services which are normally provided to real property.⁵⁷ Under either approach, certain

⁴⁷ CAL. CONST. art. XIII D, § 6(b)(3) (1996).

⁴⁸ CAL. CONST. art. XIII D, § 6(b)(4) (1996):

No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

⁴⁹ CAL. CONST. art. XIII D, § 6(b)(4) (1996).

⁵⁰ Sandra Stokley, *Farm Family Resents Fees for Unavailable Services; A Spokesman for the Ortegas of Eastvale Says They Object to Paying a Charge for Sewers That Aren't Built*, PRESS-ENTERPRISE (Riverside, Cal.), June 18, 1998, at B1.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ GUIDELINES FOR COMPLIANCE, *supra* note 11.

⁵⁵ *Id.*

⁵⁶ LEAGUE OF CAL. CITIES, *supra* note 8, at 48.

⁵⁷ *Id.* at 49.

types of acreage-based irrigation charges seem highly susceptible to the requirements of Proposition 218.

In many districts supplying irrigation water, lands within the district are charged for irrigation water based upon the acreage of the property payable without regard to the actual amount of water used. The rationale for an acreage-based charge is that the property owner is entitled to receive a proportionate share of the water provided by the district based upon the acreage owned . . . where the charge is imposed, whether or not any water is actually used, as an incident of owning property within the district, the charge is most likely subject to Article XIII D.⁵⁸

There is a dearth of case law addressing the issue of which fees are covered by Proposition 218 and which fees are exempt from its provisions. Currently, there are only a few California Attorney General Opinions that directly address the issue of water fees. One opinion concludes that “[a] tiered water rate structure based upon the amount of the water used . . . does not have a direct relationship to property ownership, and [thus is not subject to 218’s requirements.]”⁵⁹ Another opinion concludes that a rate structure which charges more than the proportional cost of services attributable to a landowner’s parcel violates the provisions of Proposition 218.⁶⁰ Another opinion holds that “an irrigation district that charges for water on a per-acre basis regardless of usage, the amount of which was established prior to November 6, 1996, may not adopt a surcharge based upon the amount of water used, without complying with [Proposition 218’s] notification and hearing procedures”⁶¹ Yet another opinion concludes:

a municipal water district may not impose a standby charge at an increased rate without providing notice to landowners and obtaining voter approval of the charge even if the rate was specified in a previously adopted engineer’s report covering the year in question and was approved by the district’s board of directors prior to November 6, 1996.⁶²

Despite the guidance these opinions provide, there is still confusion surrounding many of the various water-related service charges. Charges for water-related services may include: charges for water meters, sewers, conservation, acreage-based charges, flood control funding, connection fees, and standby charges.⁶³ Most of these fee-related issues have yet to be conclusively addressed. It is not surprising then,

⁵⁸ GUIDELINES FOR COMPLIANCE, *supra* note 11.

⁵⁹ 80 Op. Cal. Att’y Gen. 183 (1997).

⁶⁰ 81 Op. Cal. Att’y Gen. 104 (1998).

⁶¹ 82 Op. Cal. Att’y Gen. 43 (1999).

⁶² 82 Op. Cal. Att’y Gen. 35 (1999).

⁶³ GUIDELINES FOR COMPLIANCE, *supra* note 11.

that several lawsuits have been filed based on the ambiguities surrounding various water-related fees and rate structures.⁶⁴ These suits are illustrative of another side effect of Proposition 218. Because of 218's ambiguities, public agencies are being forced to expend their resources in either settling or defending these suits.⁶⁵ These resources could and should be put to a far more beneficial use: preserving and expanding water-related services.

B. The Greatest Threat: Too Much Power in the Hands of Too Few

Proposition 218 also changes the number of signatures required to put an initiative petition (including initiatives to reduce taxes, fees, and assessments) on the ballot. It ties the number of signatures needed to the maximum required for statewide statutory initiatives.⁶⁶ This means that the required number of signatures to qualify an initiative for the ballot would be five percent of the total number of votes cast for all candidates for governor at the last gubernatorial election within the local government jurisdiction involved.⁶⁷ This significantly reduces the number of signatures needed to qualify an initiative petition to affect local taxes, assessments, and fees.⁶⁸ By comparison, the number of signatures needed for a normal initiative petition in a city is ten percent of the registered voters.⁶⁹ This reduction makes it easier to put a revenue-limiting initiative on the local ballot.⁷⁰

The significance of the lower signature requirement is best appreciated by considering a real-life example. The Southern California city

⁶⁴ As of November 1, 1998, suits have been filed by the Howard Jarvis Taxpayers' Association against the cities of Modesto, Roseville, and Upland, while other cities and agencies are being threatened with litigation. LEAGUE OF CALIFORNIA CITIES, PROPOSITION 218 LITIGATION SUMMARY (visited Apr. 1, 1998) <<http://www.cacities.org>> [hereinafter LITIGATION SUMMARY].

⁶⁵ *Jarvis Lawsuits Lead Prop 218 Enforcement*, CAL. PUB. FIN., Feb. 9, 1998, at 1.

⁶⁶ CAL. CONST. art. XIII C, § 3 (1996).

⁶⁷ LEAGUE OF CAL. CITIES, *supra* note 8, at 79.

⁶⁸ CAL. CONST. art. XIII C, § 3 (1996):

Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement *higher than that applicable to statewide statutory initiatives*. (Emphasis added.)

⁶⁹ LEAGUE OF CAL. CITIES, *supra* note 8, at 79.

⁷⁰ *Id.*

of Cudahy has 3,500 registered voters, of whom 1,200 voted in 1994.⁷¹ A mere sixty registered voters could put an initiative to lower or even repeal water-related assessments and fees levied by their public water agency on a ballot.⁷² “In all the confusion over fees and assessments, nobody quite fastened on the implications of a full-blown initiative process operating at the local level.”⁷³ Recent developments, however, have caused some public agencies to realize a few of the implications of a more localized initiative process.

II. REALITY CHECK: A TALE OF TWO CITIES

A. Yucca Valley

In Yucca Valley, which sometimes gets only .25 inches of rain per year,⁷⁴ Proposition 218’s initiative process was used against a water district for the first time.⁷⁵ The initiative petition, backed by a local militia leader, needed only 300 signatures to qualify.⁷⁶ The required signatures were all obtained within about one week.⁷⁷ The initiative, dubbed Measure U, would keep the local water district “from charging for everything from maintaining wells to setting up new accounts.”⁷⁸ “ ‘We now have laws made by people standing outside of Wal-Mart with clipboards,’ said Bob Armstrong, president of the Hi-Desert Water District’s board of directors.”⁷⁹ “The typical home water bill in the area is about \$15 more than in other neighboring High Desert districts—but much of that amount is used for debt service on a new pipeline.”⁸⁰ The district predicted that “the initiative would cut its income by 61% percent and bankrupt it within 14 months.”⁸¹ Luckily, it was defeated by a two-to-one margin.⁸²

⁷¹ *The Bottom Line — Commentary*, CAL. J., Mar. 1, 1997.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Diana Marcum, *California and the West; Battle with Water District Could Ripple Across State; Initiatives: Fewer Than 300 Signatures Got Fee-Cutting Measure on Ballot in Mojave Desert Community*, L.A. TIMES, Oct. 30, 1998, at A3.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Diana Marcum, *California and the West; High Desert Water District in Fee Fight; Measure S: Successful Ballot Initiative Reduces or Eliminates Some Customer*

B. Landers

Unfortunately, the neighboring town of Landers was not as lucky. Measure S, an initiative similar to Measure U, was approved by a vote of only 432 to 398.⁸³ Measure S called for reducing or eliminating taxes, fees, and assessments collected by the local water district. The district fears it could go bankrupt.⁸⁴ “ ‘This is curious. It shows people still have this expectation water should be free, or they shouldn’t pay much for water,’ said Larry Rowe, general manager and chief engineer of the Mojave Water Agency . . . ‘I think this is a wake-up call to the water industry to educate our customers.’ ”⁸⁵

If what happened in Landers catches on throughout the state, there could be serious consequences. Voters in smaller towns, such as Landers, could easily use the initiative process to put a measure on their local ballot which would reduce or eliminate fees collected by water districts. This would make it very difficult for the districts to continue operations and would hinder their ability to expand to meet California’s future needs.

III. MORE CITIES MAY YET BE IMPACTED

“Monterey County’s water problems are among the most serious in the state.”⁸⁶ Seawater has contaminated over 120 water wells west of Salinas so far, and experts predict the trend will most likely continue.⁸⁷ One project already in effect consists of the use of recycled water from the urban centers on the Monterey Peninsula to irrigate 12,000 acres of artichokes, broccoli, lettuce, and cauliflower.⁸⁸ There is a concern, however, that this project is not addressing enough of the problem caused by the intrusion of seawater into the water supply.⁸⁹ According to the general manager of the local water district, the project is merely slowing the effects of the invasion of seawater.⁹⁰ This has

Payments to the Agency, Which Now Claims to be Headed for Insolvency, L.A. TIMES, Nov. 12, 1998, at A3.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Michael McCabe, *Slow Assault From the Sea*, S.F. CHRON., Aug. 24, 1998, at A1.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

been accomplished by reducing the need to pump groundwater.⁹¹ More projects have been outlined. One proposed project would modify the spillways at Nacimiento Dam to store rainwater more efficiently.⁹² In addition, the plan calls for the injection of some winter water back into aquifers for storage and for rejuvenation of aquifers.⁹³ The costs have been projected at approximately \$40 million, and it is hoped that it will be enough to correct the problem.⁹⁴ The most difficult hurdle now will be convincing those who would benefit from these water projects to pay for them. With Proposition 218's provisions in effect, the voters may be able to reject any assessment or fee levied to pay for these projects.

During the summer of 1998, Camarillo residents received ballots asking them to approve the continuation of a water subsidy for local farms at a rate of eighty-four cents per one hundred cubic feet.⁹⁵ Why would 10,000 Camarillo residents be willing to pay more for water so that only 18 farmers could pay less? The answer is, they were not.⁹⁶ Without the subsidy, many local farmers feared that the cost of raising crops would increase by several hundred dollars per acre, making the venture unprofitable.⁹⁷ City officials believed that the higher water rates would make the farmers more receptive to proposals to sell their land to developers.⁹⁸ The farmers will see their water rates jump from 83 cents per 100 cubic feet to \$1.14 per 100 cubic feet.⁹⁹ The non-farming residents of Camarillo will be "rewarded" with a reduction in their water rates equal to about forty-five cents per month.¹⁰⁰

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Farmers' Subsidy Makes Good Sense*, VENTURA COUNTY STAR (Ventura County, Cal.), June 24, 1998, at D8.

⁹⁶ Gregg Mansfield, *Residents Vote to End Farm Water Subsidy 42 to 48 percent: Water Bills Will No Longer Include Extra 45 Cents Per Month*, VENTURA COUNTY STAR (Ventura County, Cal.), Sept. 24, 1998, at B1.

⁹⁷ *Farmers' Subsidy Makes Good Sense*, *supra* note 95.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Mansfield, *supra* note 96.

IV. OPTIONS

A. Privatization

In the wake of Proposition 218-related lawsuits, at least one city has considered the option of privatizing the service portion of its water system.¹⁰¹ The city would allow a private company to handle the operation and maintenance of the system.¹⁰² This can be accomplished by either long-term leases or operating contracts with private water companies.¹⁰³ Although the intent of Proposition 218 may have been to increase the public's control over governmental services, it may end up having the opposite effect.¹⁰⁴ The loss of revenue by agencies providing services such as water could very well drive them to privatize.¹⁰⁵ This would ultimately give the voter even less control.¹⁰⁶

A 1996 report reviewed "over 45 studies, papers, and books on the topic of public utility privatization . . . [concluding] that many services, [such as water,] are not suitable for privatization"¹⁰⁷ Specific conclusions of the report include:

¹⁰¹ *Stockton Takes Safe Path on Water Privatization*, CAL. PUB. FIN., Mar. 16, 1998, at 1.

¹⁰² *Id.*

¹⁰³ Leslie Berkman & Michael B. Marois, *California's Anti-Tax Wave May Drive Water Systems to Privatize*, BOND BUYER, Mar. 14, 1997, at 2.

¹⁰⁴ *Id.*

¹⁰⁵ The point is illustrated by the following comments made by the California Public Utilities Commission in a preface to an order instituting rulemaking on the Commission's own motion. CALIFORNIA PUB. UTILITIES COMM'N., 1997 Cal. No. R.97-10-048, 3-4 (filed Oct. 22, 1997) available in LEXIS, States library, CAPUC file No. 1063:

Most of the 200 or so water companies that the Commission regulates are Class C and D, with less than 1,000 customers. Many of these are not earning an adequate return nor providing the best service. The policy of the Commission has always been to support the acquisition of smaller, troubled water companies by municipal water companies, water districts, or by our larger, more efficient investor-owned water companies. We note that Proposition 218 may dampen the "public" water sector's incentives to purchase the small, troubled companies. That leaves the investor-owned companies and regionalized management companies as the market for helping resolve this issue.

¹⁰⁶ Berkman & Marois, *supra* note 103.

¹⁰⁷ Stephen P. Morgan & Jeffrey I. Chapman, *Issues Surrounding the Privatization of Public Water Service* (1995) (summary available in a briefing paper at the ACWA Home Page, *supra* note 6).

[1] Private sector companies work well in competitive environments, but do not perform as well when competition is absent, such as in industries where natural monopolies occur.

[2] Utility functions, such as water service, are natural monopolies, where it is expensive and inefficient to have more than one service provider in a given geographic area.

[3] The regulation of private sector companies operating in a natural monopoly can lead to inefficiencies.

[4] The public sector is often more sensitive to public needs such as quality of life and equity of service.¹⁰⁸

The report concludes that the water supply can be considered a "natural monopoly" because:

[1] it is capital intensive (having significant fixed costs);

[2] it is . . . a necessity (essential to the community);

[3] it is non-storable (yet subject to fluctuating demands).¹⁰⁹

"A natural monopoly such as water does not support efficiency in the private sector because there is no market to impose price and quality sensitivity on a product."¹¹⁰ Based on these findings, privatizing water service could create even more problems for the state's water delivery system than Proposition 218.

B. Legislative Clarification

Steps were taken to clarify Proposition 218 through the "Proposition 218 Omnibus Implementation Act"¹¹¹ which took effect on July 1, 1997. The stated purpose of the Act was to "clarify the law so that local governments can adopt budgets for the 1997-98 fiscal year to provide essential local services in compliance with Proposition 218 without needless confusion, duplication of effort, and uncertainty."¹¹² The Act passed on the Senate floor by a vote of thirty-six to zero and had the support of both ACWA and the Howard Jarvis Taxpayers' Association.¹¹³ Sections of the Act clarify that assessments for water are exempt from the provisions of Proposition 218 until they are "increased."¹¹⁴ "Increased" does *not* include "renewed annually."¹¹⁵

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ CAL. GOV'T CODE § 53750 (Deering 1999).

¹¹² See historical and statutory notes, CAL. GOV'T CODE § 53750, added by 1997 Cal. Stats. ch. 38, § 5 (eff. July 1, 1997) (Deering 1999).

¹¹³ SENATE RULES COMM., SENATE BILL ANALYSIS, S.B. 919-90, 2d Sess. (Cal. 1997).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Therefore, assessments and fees validly imposed prior to Proposition 218 may continue to be imposed as long as they are not increased. *McBrearty v. City of Brawley* upheld continued collection of local taxes and property-related fees at *preexisting* rates without voter approval.¹¹⁶ This does help public agencies who impose annual assessments by exempting them from the provisions of 218, but only to the extent that they do not *increase* the amount of such assessment. Once the need arises to increase the assessment, agencies are left in essentially the same position as before the adoption of the Act. Most of the lawsuits and difficulties currently facing public agencies post-date the adoption of the Act.¹¹⁷ It is clear that more legislation is needed when it comes to water.

Legislation is needed to exempt water-related fees, charges, and assessments from having to comply with Proposition 218 altogether. For example, Proposition 218 excludes fees for gas and electrical services from the category of fees and charges which are deemed "imposed as an incident of property ownership."¹¹⁸ Therefore, they are exempted from having to comply with substantive limitations as well as costly notice requirements. The reason for the exemption, according to the drafters, is that gas and electrical services are usually metered and therefore, the charges for both are based primarily on usage and not on property ownership.¹¹⁹ Water fees are sometimes based on metered use, but oftentimes they are not. Water should be exempted simply because it is too valuable a resource. The imposition of costly notice and approval procedures, coupled with the ability of the voters to control fees, can have a potentially devastating effect on California's water supply.

C. Alternative Sources of Revenue

Now may be the time for public agencies to pursue alternative means of raising revenue. One possibility is for public agencies to consider offering nonessential services. The City of Alameda, for example, has considered owning and operating its own cable television service, using subscriber fees to supplement the city's general fund to offset the loss of revenue caused by Proposition 218.¹²⁰ For municipal-

¹¹⁶ *McBrearty v. City of Brawley*, 69 Cal. Rptr. 2d 862, 868 (Ct. App. 1997).

¹¹⁷ LITIGATION SUMMARY, *supra* note 64.

¹¹⁸ CAL. CONST. art. XIII D, § 3(b) (1996).

¹¹⁹ STATEMENT OF DRAFTERS' INTENT, *supra* note 11, at 6.

¹²⁰ Suzanne Espinosa Solis, *Alameda Eyes Cable Service; City Sees Passing Measure A as Way to Create Revenue*, S.F. CHRON., Oct. 20, 1998, at A15.

ities that provide water services or are currently pursuing water projects, revenue from nonessential services could be used to help finance these essential services and projects. This may be especially helpful where a water project receives no financial support from the voters. This option may not be practical for some public agencies, such as the smaller water districts whose *sole* purpose is to provide water services. These smaller water districts have fewer resources and are generally unable to provide the wide array of services that a typical municipality can. The prohibitive costs associated with the pursuit of providing nonessential services coupled with the districts' lack of resources may make it impractical to pursue such alternatives.

D. Education and the Public Relations Approach

Public agencies must take steps now to ensure that voters have all of the necessary information regarding the costs borne by the agencies.¹²¹ Voters need to understand why it is sometimes necessary to raise fees or impose new assessments. Voters should have information which includes the costs of labor, equipment, maintenance, administration, utilities, and the water itself. Voters must gain an understanding of the challenges agencies currently face in providing water. More importantly, voters must be aware of the obstacles the agencies will have to overcome in the future as both California and its demand for water continue to grow. Providing this information will surely result in an immediate and appreciable cost; however, the short term investment in educating the voter has the potential to produce valuable returns in the long run.

There are some simple things public agencies can do now to influence voters in a positive manner. First, public water agencies need to be more accessible to the public they serve. The public's questions and concerns must be effectively and thoroughly resolved. Second, public agencies must learn from mistakes made by other agencies and strenuously seek to avoid repeating them. Most importantly, public water agencies need to provide excellent customer service to the public they serve. When the public is satisfied with the service provided, they are less inclined to combat any necessary fee increase for that service.

CONCLUSION

Public water agencies have seen just the tip of the iceberg when it comes to potential problems that may be caused by Proposition 218.

¹²¹ Simon, *supra* note 14, at 545.

Costly approval procedures, notice requirements, and substantive limitations on fees all put an unnecessary burden on agencies responsible for supplying the state with its most valuable resource. Agency resources would be put to better use improving California's water delivery system. Costs borne by these agencies to defend lawsuits, coupled with the disturbing statewide trend of voter repeal of water fees and subsidies, should serve as a wake-up call for all public agencies, as well as their voting constituents.

With all of the problems that Proposition 218 has caused in other areas of raising revenue, little attention has been given to the threat posed to water. Now is the time to review all of the available options and map out a strategy. Privatization seems too extreme a remedy and could ultimately hurt the water supply even more. Generating new revenue through providing nonessential services may be impractical for most affected agencies. The most viable option is to push for legislation that is either more favorable to water under Proposition 218 or exempts water from its provisions altogether. Agencies should also put forth a greater effort to educate all classes of water users. When the water users *truly* understand the benefits of certain fees and assessments, they will be more willing to pay for them.

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