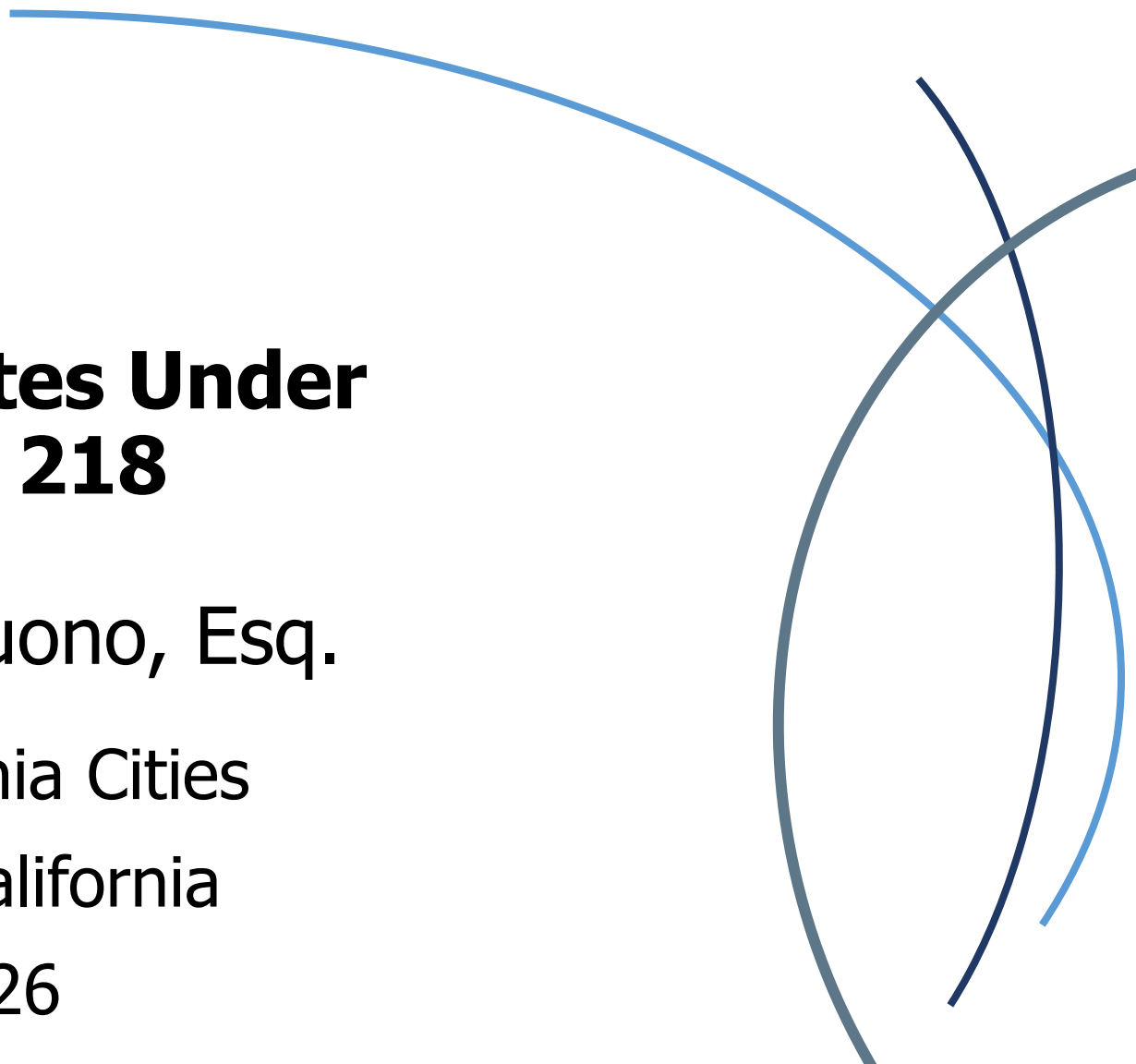




Tiered Water Rates Under Proposition 218

by
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Universal City, California

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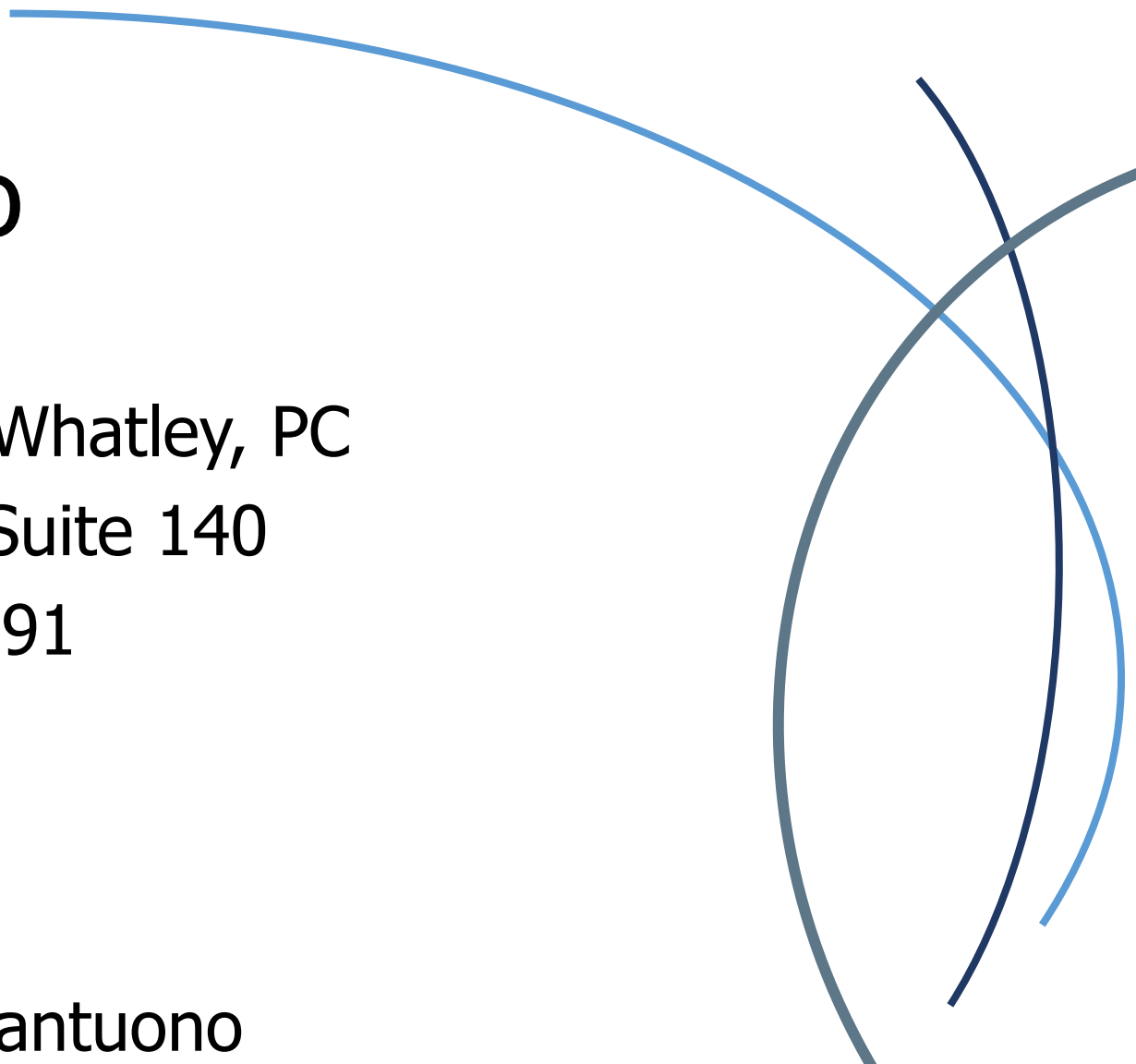
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Our Agenda

- Background: Prop. 218 and Property-Related Fees
- Prologue: *Capistrano* and Tiered Water Rates
- Current Events: *Patz* & *Coziahr*
- Coming Events: *Dreher v. LADWP*
- Other Pending Cases
- Making Rates While Waiting for Godot

Background

- 1996's Prop. 218 had three major impacts
 - Codified earlier rules requiring voter approval of taxes, extending them to charter cities
 - Imposed complex new rules for assessments on real property, requiring property owner approval in a mailed-ballot election, and making standby fees historic relics
 - Imposed complex new rules on a newly defined class of "property related fees"

Prop. 218 and Property-Related Fees

A property-related fee is:

“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).)

“Property-related service” means a public service having a direct relationship to property ownership.” (*Id.*, subd. (h).)

Richmond v. Shasta CSD (2002)

In 2004, the California Supreme Court suggested in dicta that:

"A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' [and therefore a property-related fee under Prop. 218] because it requires nothing other than normal ownership and use of property."

- *Richmond v. Shasta Community Services Dist.* (2002)
32 Cal.4th 409

Bighorn-Desert View Water Dist. v. Verjil

- Made *Richmonds* dicta a holding
- Ordinary water rates now subject to Proposition 218's procedural and substantive requirements.

Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205

Ratemaking Rules: 13D, § 6(b)

- Rates can only fund the service for which they are imposed;
- Rates cannot be used for any other purposes;
- Rates cannot except the proportional cost of serving each parcel (actually, each customer class under *Griffith v. Pajaro*);
- No fee for future service; standby charges approved as assessments;
- No fee for a general governmental service.

Prop. 218's Proportionality Rule

"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."

Cal. Const., art. XIII D, § 6(b)(3).

Palmdale Water Dist. v. Palmdale (2011)

- Tiered rates for irrigation water violated Prop. 218 b/c costs not properly allocated between domestic & irrigation customers.
- District transferred costs from domestic ratepayers to irrigators at the hearing w/o record support.
- Court concluded rate tiers must be cost-justified, too, not just rates in total.

City of Palmdale v. Palmdale Water Dist. (2011) 198 Cal.App.4th 926

Capistrano Raises the Bar (2015)

- Potable water rates could fund recycled water b/c service freed up potable supplies.
- City could not cost-justify its upper tiers.
- Tier-by-tier cost-justification required.
- *Capistrano* contradicted *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 and *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892 🗺️
- *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363
Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493. 🗺️

Two Competing Lines of Authority Persist

Capistrano's demanding approach

VS.

Deference under *Griffith, Morgan, and Moore*

Coziahr continues the losing trend (2024)

- *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785 🗺️
 - Trial court invalidated tiered rates under *Capistrano* and awarded refunds
 - Both parties appealed
 - DCA affirmed the trial court, applying substantial evidence review, and concluded refunds available under Prop. 218
 - Review and depublication denied 10/23/24
 - Remand trial settled

Patz does, too (2025)

Patz v. City of San Diego (2025) 113 Cal.App.5th 225 

- Trial court invalidated tiered rates, adopting statement of decision prepared by plaintiffs' counsel that required time-of-use data to use peaking factors and forbade use of tiered rates for residential class but not other classes
- Court of Appeal affirmed, with a 67-page dissent by Justice Menetrez
- Supreme Court denied review
- Remand trial settled

The *Patz* Dissent is a fun read

- Starting with:

“This is an appeal from a \$79 million judgment that is based on nothing. Plaintiffs’ briefing in the trial court and on appeal relentlessly misrepresents the record and the law, and the trial court’s statement of decision — drafted by plaintiffs’ counsel and adopted virtually without alteration by the court — does as well.”

(*Patz, supra*, 113 Cal.App.5th at p. 311 [Menetrez, J., dissenting].)

More from the *Patz* Dissent

- Ending with:

“Defendant used the only known methodology for constructing a tiered cost calculation and allocation and setting tiered rates, and it applied that methodology to all of the appropriate data and the only data that defendant had, which is the only data that anyone has (with the possible exception of any utilities that use smart meters). Holding defendant liable for that is like holding an accountant liable for using generally accepted accounting principles.”

(*Id.* at p. 346.)

Dreher – A New Hope (2025)

Dreher v. LA DWP (2025) 116 Cal.App.5th 977, *rev. granted* 🗺️

- Prop. 218 challenge to tiered water rates
- City won all but low-income discount; no refunds because plaintiff did not pay under protest
- Court of Appeal affirmed City's trial court victory
- Relatively deferential review of City's record
- No refund of low-income discount because no one paid under protest under HSC 5472

More on *Dreher*

- Review limited to adequacy of record support for tiered rates
- The HSC 5472 holding is not at risk
- Decision not likely until late 2027 at the earliest

Dreher's Best Bits

- “The Constitution does not require the City to trace the flow of water from each source of supply to each parcel, molecule by molecule.”

(116 Cal.App.5th at p. 1028.)

- The Court found City justified its rates by calculating the unit cost of each source, forecasting demand in each tier, and allocating costs proportionally. Record supported the City’s methodology, including allocation of peak pumping and storage costs to higher tiers.

Other Pending Cases

Toy v. City and County of San Francisco, First DCA Case No. A173560

- Fire flow costs properly recovered from domestic rates
- Fully briefed 02/09/26
- Argument likely later this year

Other Pending Cases

Hiller v. Marin Municipal Water District, First DCA Case No. A171271

- Plaintiff appealed District's win in tiered-rates case
- Argued May 1, 2026

Advice on Rate-Making Pending *Dreher*

- Avoid controversy, if possible
- Don't make rates too often; short statutes (e.g., Gov. Code § 53759) protect you only until you make new rates
- Trigger exhaustion of administrative remedies under AB 2257 (Gov. Code, §§ 53758.1, 53758.2)
- Make a good record – have an attorney review your cost of service analysis

More Tips On Rate-Making Pending *Dreher*

- Advise your client of the risk of tiered and other complex rates
 - The law is uncertain
 - You may have to explain to a math-phobic judge
- Argue pro-tiered-rates statutes
 - Gov Code, § 53750.6
 - Water Code, § 366(b)(1)

Still More Tips

Assert these defenses

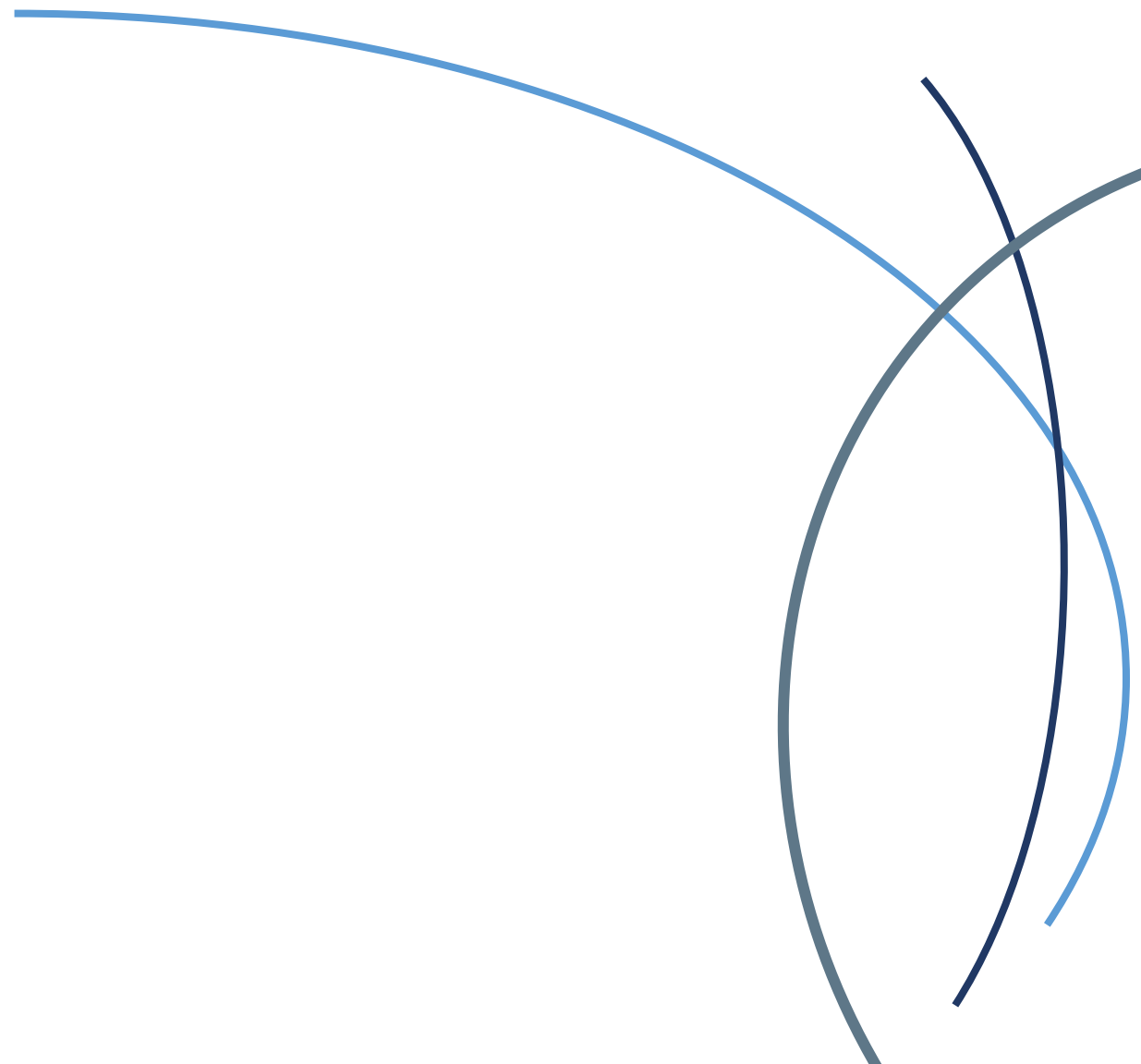
- HSC 5472 and duty to pay under protest
 - *Dreher & Padilla v. San Jose* (2022) 78 Cal.App.5th 1073
- The Government Claims Act
 - *Plata v. San Jose* (2022) 74 Cal.App.5th 736
- The duty to pay first and litigate later
 - Cal. Const., art. XIII, § 32
 - *Mojave Pistachios, LLC v. Superior Court* (2024) 99 Cal.App.5th 605

One Last Tip

Assert Gov. Code, § 53758.8's ban on refunds

- It allows a credit in the next ratemaking
- Applies only to Prop. 218, but can be used in Prop. 26 cases by analogy
- Plaintiffs cite *McKesson Corp. v. Department of Alcoholic Beverages & Tobacco* (1990) 496 U.S. 18 to claim due process demands refunds
- The cases to date are mixed

Questions?



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