

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 323 (Caballero)
Version: March 17, 2021
Hearing Date: April 20, 2021
Fiscal: No
Urgency: No
JT

SUBJECT

Local government: water or sewer service: legal actions

DIGEST

This bill establishes a 120-day limitations period for, and applies existing validation action procedures to, judicial challenges to water and sewer fees and charges.

EXECUTIVE SUMMARY

Code of Civil Procedure sections 860 through 870.5, known as the “validation statutes,” establish an expedited procedure for challenging certain government acts. Under these procedures, once a public agency takes an action, a complaint must be filed within 60 days. Notice of the claim must be served on all interested parties by publication, and a challenge under these provisions receives calendar preference. If no challenge is brought within 60 days, the action is deemed valid and becomes immune from attack. The validation statutes were originally devised in order to speedily validate local government bonds and provide certainty to prospective bondholders, but these statutes have since been applied in a variety of contexts, including certain types of fees and charges, in order to support the fiscal stability of public agencies.

This bill establishes a 120-day limitations period for judicial challenges to fees or charges for water or sewer services that have been adopted, modified, or amended after January 1, 2022. The bill applies the validation statutes to such challenges, subject to the 120-day limitations period. The bill also provides that it does not apply to any statutes that establish specific timeframes and procedures for judicial challenges to water or sewer service fees. The bill is sponsored by the Association of California Water Agencies (ACWA) and is supported by numerous water agencies. The bill is opposed by the Consumer Attorneys of California (CAOC) and the Howard Jarvis Taxpayers Association. The bill passed the Senate Governance and Finance Committee by a vote of 4 to 1.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes procedural and substantive requirements for the imposition of property-related fees and charges, including requirements for notice, a public hearing, the calculation of the fee or charge and the use of revenue; subjects such fees and charges to voter approval, but specifically excludes water and sewer fees and charges from this requirement. (Cal. Const. art. XIII § 6; Gov. Code § 53750 et seq.)
- 2) Provides a procedure for seeking a tax refund, which must be commenced not later than one year after the accrual of the cause of action. (Cal. Const. art. XIII, § 32, Gov. Code §§ 945.4, 911.2.) Establishes a three-year limitations period for any action upon liability created by statute, which is applicable to challenges against fees and charges. (Code Civ. Proc. 338(a).)
- 3) Establishes procedures governing validation actions that provide a 60-day period in which a public entity or any interested person may sue to determine the validity of a governmental act. (Code Civ. Proc. 860 et seq.)

This bill:

- 1) Establishes a 120-day limitations period for any lawsuit that challenges an ordinance, resolution, or motion adopting a fee or charge for water or sewer service, starting from the effective date of the fee or charge.
- 2) Requires challenges to be brought under the existing statutes for validation suits, except that the 120-day period applies to any action initiated under the bill.
- 3) Specifies that the above provisions do not apply to fees or charges for water or sewer service for which another statute establishes a specific time and procedure for bringing a judicial action or proceeding to attack, review, set aside, void, or annul a fee or charge of that type.
- 4) Specifies that its provisions do not apply to a fee or charge for water or sewer service that has been adopted, modified, or amended after January 1, 2022.

COMMENTS

1. Author's statement

The author writes:

The COVID-19 pandemic has put strain on many essential businesses, including ones that the public depends on for basic needs. Public utilities, such as water and sewer service providers have experienced a reduction in the number of consumers who are able to pay for their services. Yet because of Governor Newsom's Executive Order prohibiting water shutoffs, water agencies have continued to service every customer regardless of their ability to pay, which has made water districts' revenue and financial planning more unpredictable. In light of this new financial strain, another long standing issue comes into focus that needs to be addressed- the lack of a time line for rate challenges. Other utility agencies, such as electricity, have a 120-day statute of limitations for challenges to rates or charges that have been in effect for decades. This is because lawsuits arising years after rates were adopted create unstable funding for the agency. This statute of limitations has not been extended to water agencies yet, and the inability to plan for such claims effects funding necessary to supply safe drinking water, upgrade and improve aging infrastructure, and operate effectively. That is why I have introduced SB 323, which would require an interested party to bring an action within 120 days after the local water agency adopts the new rate. By allowing customers to bring challenges within a reasonable - but limited - period of time, this proposal would balance the interests of ratepayers with those of public water and sewer agencies and end the current piecemeal character of existing law.

2. Proposition 218

Proposition 218 provides for, among other things, procedural and substantive requirements for the imposition of property-related fees. (Cal. Const. art. XIID § 6(a), (b).) To impose a new fee, a local agency must identify parcels subject to the fee, calculate the amount, and provide notice by mail to affected property owners of the proposed fee. (*Id.* at § 6(a)(1).) The local agency must conduct a public hearing and consider all written protests filed by the affected property owners. (*Id.* at § 6(a)(2).) If a majority of the property owners present written protests against the fee, the fee may not be imposed. (*Id.*) The fee is subject to various requirements related to the amount charged and the purposes for which the money may be used. (*Id.* at (b).) The agency has the burden to demonstrate the lawfulness of the fee, if challenged. (§ 6(b)(5).) As a general matter, a fee must also receive voter approval; however, this requirement does not apply to sewer and water fees. (*Id.* at (c).) The Proposition 218 Omnibus Implementation Act (Gov. Code § 53750 et seq) further delineates the procedural

requirements for notice and hearing applicable to changes in property-related fees and charges (Gov. Code § 53755).

3. Validation actions

The validation statutes provide for an expedited procedure for challenging certain government actions in order to promptly settle the validity of a public agency's actions. (*McLeod v. Vista United School Dist.* (2008) 158 Cal.App.4th 1156, 1166; Code Civ. Proc. § 860 et seq.) When made applicable by another substantive statute, the validation statutes provide a 60-day period in which the public entity or any interested person may sue to determine the validity of a governmental act. (*Golden Gate Hill Development Company, Inc. v. County of Alameda* (2015) 242 Cal.App.4th 760, 765–767.) Lawsuits brought by the public entity are called “validation actions,” and lawsuits by the public are called “reverse validation actions.” (*Id.*)

Validations actions were traditionally used to enable public agencies to establish the validity of their bonds and assessments. (*City of Ontario v. Superior Court* (1970) 2 Cal. 3d 335, 340.) “[I]n its most common and practical application, the validation proceeding is used to secure a judicial determination that proceedings by a local government entity, such as the issuance of municipal bonds and the resolution or ordinance authorizing the bonds, are valid, legal, and binding. Assurance as to the legality of the proceedings surrounding the issuance of municipal bonds is essential before underwriters will purchase bonds for resale to the public.” (*Friedland v. City of Long Beach* (1998) 62 Cal. App.4th 835, 842, citations omitted [*Friedland*]) However, the governing statutes apply to “any matter which under any other law is authorized to be determined pursuant to this chapter” (Code Civ. Proc. § 860) and a variety of statutes authorize actions under these procedures, including various types of charges that use 120-day limitations period akin to the one established under this bill (*see e.g.* Gov. Code § 66022 [capacity fees]; Pub. Util. Code § 10004.5 [electric rates]; Wat. Code § 30066 [county water district property assessments]).

Under these procedures, once a public agency takes an action, a complaint must be filed within 60 days of the act to be challenged. (Code Civ. Proc. § 860.) Notice of the claim must be served on all interested parties by publication. (*Id.* § 861.) The claim or action must be given preference over other civil actions. (*Id.* § 867). Appeal of the trial court's ruling must be noticed within 30 days of the notice of entry of judgment. (*Id.* § 870(b).) If not appealed or overturned, the judgment is “forever binding and conclusive ... against the agency and against all other persons.” (*Santa Clarity Organization for Planning & the Environment v. Abercrombie* (2015) 240 Cal.App.4th 300, 308, citing section 870(a).)

If no challenge is brought within 60 days, the action is deemed valid and “become[s] immune from attack.” (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th at 30.) As a result, all matters “which have been or which could have been adjudicated in a validation

action, ... including constitutional challenges,” must be “raised within the statutory limitations period in section 860 et seq. or they are waived.” (*Friedland, supra*, 62 Cal.App.4th at 846–847.) Courts have concluded the 60-day period is reasonable given the important purposes of the validation statutes, which include “the need to limit the extent to which delay due to litigation may impair a public agency’s ability to operate financially.” (*California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1420.) “We recognize the statutory period of limitation for commencing a validation action is extremely short but it is not unique in its brevity. ‘What constitutes a reasonable time is a question ordinarily left to the Legislature, whose decision a court will not overrule except where palpable error has been committed.’” (*Id.*, citations omitted.)

4. Water agencies argue the bill is crucial to their fiscal stability

Water rates have been a fount of litigation since the passage of Proposition 218 in 1996,¹ including a recent class action lawsuit filed against 81 water suppliers in California,² challenging their ability to defray the cost of supplying water for fire hydrants. For some of the agencies sued, the challenged rates were adopted five years before the lawsuit.

The bill is sponsored by ACWA and supported by scores of water agencies, who argue that the threat of lawsuits to long-established rates undermines their ability to manage their operations and invest in infrastructure. They jointly write:

Reliable long-term financial planning is paramount in providing essential government services, like water and sewer. Public water and sewer utility budgets are largely funded by revenue collected through service rates. These rates provide the funding necessary to supply safe drinking water, upgrade and improve aging infrastructure, and operate effectively. While public water and sewer service providers require financial stability to meet these demands, existing law does not prevent lawsuits that seek refunds or seek to invalidate existing rate structures years after rates have been adopted and collected.

The California State Legislature has recognized the need to minimize fiscal uncertainty for public agencies providing essential government services by creating statutes of limitation for legal challenges to certain fees and charges, such as municipal electric rates and connection and capacity fees assessed by water and sewer agencies. However, existing law offers a piecemeal statutory landscape where statutes of limitation are afforded to fees and charges that fund some essential government services but not others. SB 323 would close this gap

¹ This case prompted legislative action to clarify that fire hydrants and the water provided by them are a component of water service in SB 1386 (Moorlach, Ch. 240, Stats. 2020).

² *Kessner et al v. City of Santa Clara et al. Santa Clara County Superior Court Case No. 20CV364054*. This bill applies prospectively and would not interfere with pending litigation.

in existing law by allowing customers to bring legal challenges to water and sewer rates within a reasonable – but limited – period of time. By following precedent established in existing law, this bill strikes a balance between the interests of ratepayers and the need for public agencies to maintain reliable sources of revenue.

(Emphasis in original; footnotes omitted.)

5. Opposition claims are not supported by judicial precedents involving short limitations periods and Proposition 218

The Howard Jarvis Taxpayers Association opposes the bill, arguing, among other things, that validation statutes are an unfair denial of due process. Likewise, CAOC, asserts that the bill is likely unconstitutional, writing:

Article XIII D, section 6, subdivision (b) of the California Constitution mandates apply to all existing fees or charges. In other words, this constitutional provision clearly states the intent to leave open constitutional challenges regardless of when the fee itself was originally enacted. This is likely the case because although the fee may have been set in place 10 years ago, the injury is suffered each month the illegal fee is charged and collected.

CAOC cites to *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809 (*Jarvis*), in which the Supreme Court held that “where the three-year limitations period for actions on a liability created by statute (Code Civ. Proc., § 338, subd. (a)) applies, and no other statute or constitutional rule provides differently, the validity of a tax measure may be challenged within the statutory period after any collection of the tax, regardless of whether more than three years have passed since the tax measure was adopted.” (*Id.* at 825.) Thus, a new violation occurred, and a separate limitations period ran, every time the city collected a tax that had not been approved by the requisite majority vote of the electorate. (*Id.* at 821–822.) The renewal of the limitations period by the repeated misfeasance of collecting an invalid tax, as opposed to the act of adopting it, falls under the doctrine of “continuous accrual,” in which “a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period.” [Citation.]” (*Luke v. Sonoma County* (2019) 43 Cal. App. 5th 301, 306.) However, the Supreme Court in *Jarvis* expressly limited the holding, stating: “We are not concerned in this case with bond issues or other governmental actions that, by state law, are made subject to the accelerated validation procedures of Code of Civil Procedure sections 860-870.5.” (*Id.*)

Pointing to this caveat, subsequent cases have held that the continuous accrual doctrine is inapplicable when validation statutes govern. (See e.g., *Utility Cost Management v. Indian Wells Valley Water District* (2001) 26 Cal.4th 1185, 1195 [rejecting the continuous

accrual doctrine; distinguishing the 120-day limitations period applicable to capital facilities fees under Government Code section 66022, which runs from the “effective date” of fee legislation]; *Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 819-820 [same; distinguishing the 30-day limitations period under section 329.5 applicable to an action contesting the validity of an assessment against real property for public improvements]; *Coachella Valley Water Dist. v. Superior Court* (Mar. 9, 2021) 61 Cal.App.5th 755, 773-774 [same; distinguishing 60-day limitations period for a property assessment under Water Code section 30066, which incorporates the validation statutes].)

Nor do short limitations periods conflict with Article XIII D. *Barratt American, Inc. v. City of San Diego, supra*, 117 Cal.App.4th 809 rejected the contention that Proposition 218 impliedly repealed the 30-day limitations period under section 329.5 applicable to an action contesting the validity of an assessment against real property for public improvements. “There is no basis to conclude Proposition 218 expressly or impliedly repealed section 329.5.” (*Id.* at 818.) Likewise, the Fourth District Court of Appeal rejected an argument that the 120-day limitations period under Government Code section 66022 violated due process, stating:

Finally, appellant argues it was denied due process because it was not afforded an opportunity to challenge the fee assessed against it. This argument was impliedly rejected in *Utility Cost Management v. Indian Wells Valley Water Dist., supra*, 26 Cal.4th at page 1196. There, the court held that adoption by the local agency of an improper fee ordinance constitutes the wrong and that the objector has the right at that time to challenge the ordinance. Inherent in the Supreme Court’s analysis is the idea the 120-day limitations period, beginning when the wrong occurs, is adequate to satisfy due process concerns. [Citation.]

(*California Psychiatric Transitions, Inc. v. Delhi County Water Dist.* (2003) 111 Cal.App.4th 1156, 1164.)

While courts have upheld various statutes that are similar to the one proposed by this bill, they have found that fees and rates enacted under validation statutes may again be subject to challenge when reenacted, even if they are essentially the same as previous ones for which the limitations period has expired. (*Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 702-703.) Were “all subsequent reenactments ... immune to judicial challenge or review,” then “there would be no effective enforcement mechanism to ensure that local agencies” base rates on the cost of service. (*Id.* at 703.) “[I]mmunity from judicial review” would create “an incentive for local agencies to overvalue the estimated costs of services and then continually readopt that fee.” (*Id.*) This has been held to be applicable to rate structures that provide for automatic adjustments and that were duly enacted under validations statutes, where the rate structure was not itself pledged for the payment of bonds. (*San Diego County Water Authority v. Metropolitan Water Dist. Of Southern California* (2017) 12 Cal. App. 5th

1124, 1142-1143.) Some related statutes expressly provide that an automatic adjustment re-triggers the limitations period while others, like this bill, do not. (*Compare* Gov. Code § 66022 with Pub. Util. Code § 10004.5.) In any event, an agency providing water or sewer service may not adopt a schedule of fees for property-related service that exceeds five years. (Gov. Code § 53756(a).)³

SUPPORT

Alameda County Water District
Amador Water Agency
Aromas Water District
Association of California Water Agencies
Bella Vista Water District
Bodega Bay Public Utility District
Brooktrails Township Community Services District
California Association of Sanitation Agencies
California Municipal Utilities Association
California Special Districts Association
Calleguas Municipal Water District
City of Fountain Valley
City of Garden Grove
City of La Habra
City of Oceanside
City of Riverside
City of Roseville
City of Sacramento
City of Santa Ana
City of Santa Monica
City of Santa Rosa
City of Shasta Lake
City of Torrance
City of Watsonville
Coachella Valley Water District
Corcoran Irrigation District
Cucamonga Valley Water District
Desert Water Agency
Diablo Water District

³ A coalition of organizations that includes Mesa Water District, CalMutuals, Tuolumne Utilities District, and Yorba Linda Water District takes a support-if-amended position. They argue that the bill should be amended to require certain mailings and require the agency's website and social media to include information relating to the limitations period under the bill. They also argue that additional public notice should be provided by an agency if it seeks to obtain the benefits of the validation procedures. The author and sponsor respond that such requirements would be out of step with similar provisions in existing law. They also note that nothing prevents a water agency from voluntarily providing additional notice.

East Orange County Water District
Eastern Municipal Water District
El Dorado Irrigation District
El Toro Water District
Elk Grove Water District
Elsinore Valley Municipal Water District
Foothill Municipal Water District
Fresno Metropolitan Flood Control District
Helix Water District
Hidden Valley Lake Community Services District
Humboldt Bay Municipal Water District
Humboldt Community Services District
Indian Wells Valley Water District
Inland Empire Utilities Agency
Irvine Ranch Water District
Kings River Conservation District
Las Virgenes Municipal Water District
League of California Cities
Los Angeles County Sanitation Districts
Mariana Ranchos County Water District
Marin Water
McKinleyville Community Services District
Mercy Springs Water District
Mid-peninsula Water District
Modesto Irrigation District
Monte Vista Water District
Monterey Peninsula Water Management District
Municipal Water District of Orange County
North Coast County Water District
North Marin Water District
Olivenhain Municipal Water District
Otay Water District
Panoche Water District
Pine Grove Community Services District
Princeton Codora Glenn Irrigation District
Provident Irrigation District
Public Water Agencies Group
Rainbow Municipal Water District
Rancho California Water District
Reclamation District #1500
Regional Water Authority
Root Creek Water District
Sacramento Suburban Water District
San Bernardino Municipal Water Department

San Diego County Water Authority
San Francisco Public Utilities Commission
San Juan Water District
Sanitation Districts of Los Angeles County
Santa Clara Valley Water District
Santa Clarita Valley Water Agency
Santa Margarita Water District
Scotts Valley Water District
Sonoma County Water Agency
South San Joaquin Irrigation District
South Tahoe Public Utility District
Southern California Water Coalition
Stege Sanitary District
Tahoe City Public Utility District
Tehama-Colusa Canal Authority
Trabuco Canyon Water District
Tuolumne Utilities District
United Water Conservation District
Valley Center Municipal Water District
Vista Irrigation District
Walnut Valley Water District
West County Wastewater District
Western Municipal Water District
Westlands Water District

OPPOSITION

Consumer Attorneys of California
Howard Jarvis Taxpayers Association

RELATED LEGISLATION

Pending Legislation: SBs 810, 811, and 812 (Committee on Governance and Finance, 2021) collectively comprise the annual Validating Acts that validate the organization, boundaries, acts, proceedings, and bonds of the state and counties, cities, and specified districts, agencies, and entities. The bills are pending in the Assembly.

Prior Legislation: SB 1386 (Moorlach, Ch. 240, Stats. 2020) provided that fire hydrants are a part of water service for the purposes of Proposition 218.

PRIOR VOTES:

Senate Governance and Finance Committee (Ayes 4, Noes 1)
