Supreme Court Rules Referendum Process Cannot Be Used to Challenge Water Rates

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Key Points

- Adoption of Water Rates not subject to challenge by referendum; challenges are limited to those provided for by Proposition 218.
- California Supreme Court overrules Court of Appeal decision that found that water rates are not a "tax" under Article II, Section 9.
- Supreme Court disagrees, finding municipal water rates fall within the broad understanding of the term "tax," and referendum cannot be used to disrupt essential government services.

On August 3, 2020, the California Supreme Court published its decision in *Wilde v. City of Dunsmuir* (Case No. S252915). The case presented the issue of whether the electorate can use the referendum power (Cal. Const., art. II, §9) to challenge a city's resolution increasing water fees, or whether voters who wish to change water rates must do so by initiative (Cal. Const. arts. XIII C & XIII D, §6) (Proposition 218).

Resolution Increasing Water Rates Not Subject to Challenge by Referendum

The Court unanimously overruled the Court of Appeal's decision and found that a local public entity's resolution increasing water rates is not subject to challenge by referendum.

In *Wilde*, respondent Leslie Wilde sought to challenge a resolution increasing water rates by referendum. The City refused to place the referendum on the ballot even though the opponents of the resolution obtained enough signatures to qualify for placement on the ballot. The Court of Appeal held that no law prohibited ratepayers from challenging the resolution using the referendum.

The referendum "is the power of electors to approve or reject statutes or parts of statutes **except** urgency statutes, statutes calling elections, and **statutes providing for tax levies or appropriations for usual current expenses** of the State." (Cal. Const., art. II, §9 (a), emphasis added). The Court of Appeal interpreted this section in the context of Proposition 218, an

initiative restricting governments' ability to raise revenue, and found that water rates are "fees or charges," pursuant to Article XIIID, Sections 3 and 6, rather than "taxes". Therefore, the Court of Appeal held that the City's resolution was subject to challenge by referendum.

The Supreme Court disagreed, holding that for the purposes of the constitutional provisions establishing the referendum, water-rate increases were "tax levies" and therefore exempt from being challenged by referendum. The Court conducted a lengthy analysis of the shifting meaning of the term "tax" in various contexts, quoting a decision from the early 20th Century (*City of Madera v. Black* (1919) 181 Cal. 306, 310) that defined a "tax" as "every charge upon persons or property imposed by or under the authority of the legislature for public purposes." Water rates and municipal utility charges fell within this capacious definition for the purposes of Article II. The Court acknowledged that the definition of "tax" used in Article XIII C did not apply to water rates, but rejected Wilde's assertion that the definition of "tax" across the two articles must be harmonized, and found that Proposition 218's definitions relate only to matters described within its terms.

The Court also focused on the purpose for prohibiting referenda to challenge taxes. As it explained, that prohibition is designed to prevent disruption of essential government services provided by local governments due to lack of funding. Once a referendum qualifies for the ballot, the local agency must stop implementation of the challenged resolution until after the vote. (Election Code § 9141). By contrast, an initiative to undo local legislation requires no such suspension. The temporary suspension of revenue measures necessarily threatens the orderly provision of the public services funded by those revenue measures. That analysis applies with the same force to water rates as with traditional “taxes.” And a delay of 30 days or more for water revenues could have significant consequences for the provision of water service.

Implications for Water Providers

This is a critical decision for California public agencies that provide water service. In the most obvious sense, it prevents the very service disruptions that the Court feared would arise if water rates could be challenged by referendum. In addition, it is worth noting that fewer signatures are required to place a referendum on the ballot than an initiative. A referendum relating to legislation enacted by a district will be placed on the ballot if the proponents present a petition protesting the enactment prior to its effective date that contains the signatures of at least 10 percent of the number of voters who cast ballots within the district in the last gubernatorial general election. (Elections Code §§ 9340 and 9144.) By contrast, the proponents of an initiative must obtain a number of signatures equal to 10 percent of all eligible voters in districts with less than 500,000 eligible voters or 5 percent of all eligible voters in districts with more than 500,000 eligible voters. (Elections Code § 9310(a).) As a result, mounting a direct, voter attack on water rates will be more difficult.

This decision will give water providers more certainty in adopting and enforcing rate increases and will eliminate a potential source of "low participation" challenges to those rates.

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