DENNIS J. HERRERA, State Bar #139669
City Attorney
RONALD P. FLYNN, State Bar #184186
Chief Deputy City Attorney
NOREEN AMBROSE, State Bar # 109114
General Counsel, S.F. Public Utilities Commission
JOSHUA D. MILSTEIN, State Bar # 120906
MATTHEW D. GOLDBERG, State Bar #240776
MOLLIE LEE, State Bar #251404
Deputy City Attorneys
1390 Market Street, 6th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3800
Facsimile: (415) 437-4644
E-Mail: matthew.goldberg@sfgov.org
E-Mail: mollie.lee@sfgov.org

Attorneys for Respondents and Defendants
CITY AND COUNTY OF SAN FRANCISCO and
SAN FRANCISCO PUBLIC UTILITIES COMMISSION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF TUOLUMNE

UNLIMITED JURISDICTION

RESTORE HETCH HETCHY, a non-profit, public benefit corporation,

Petitioner and Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; SAN FRANCISCO PUBLIC UTILITIES COMMISSION, a municipal agency; and DOES I – X, inclusive,

Respondents and Defendants.

MODESTO IRRIGATION DISTRICT, a public agency; TURLOCK IRRIGATION DISTRICT, a public agency; BAY AREA WATER SUPPLY AND CONSERVATION AGENCY, a public agency, and ROES I-XXX, inclusive,

Real Parties in Interest and Defendants.

Case No. CV 59426

ASSIGNED FOR ALL PURPOSES TO JUDGE KATE POWELL SEGERSTROM

RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENTS' NOTICE OF MOTION AND MOTION TO CHANGE VENUE TO SAN FRANCISCO SUPERIOR COURT

Hearing Date:	July 30, 2015
Hearing Judge:	Hon. Kate Powell Segerstrom
Time:	9:30 a.m.
Place:	Dept. # 3
Date Action Filed:	April 21, 2015
Trial Date:	not set

Attached Document: Respondents' Notice of Motion and Motion to Change Venue to San Francisco Superior Court

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondents City and County of San Francisco ("CCSF") and San Francisco Public Utilities Commission ("SFPUC") respectfully request that this action be transferred to the county in which it should have been brought: San Francisco. An action brought against Respondents must be litigated in the San Francisco Superior Court in accordance with Code of Civil Procedure section 395(a)[1] because Respondents reside in San Francisco. Neither of the statutory exceptions to this general rule identified by Petitioner Restore Hetch Hetchy ("RHH" or "petitioner") is applicable: section 392(a)(1) does not confer venue in Tuolumne County because this is not an action for injuries to real property, and section 393(b) does not confer venue in Tuolumne County because this is not an action based on acts done by public officers, but rather seeks prospective declaratory and injunctive relief. Since this action has been brought in the wrong court, it must be transferred to San Francisco under section 396b.

II. FACTUAL BACKGROUND

Petitioner RHH filed this Petition for Writ of Mandate and Complaint for Declaratory Relief ("writ petition")[2] in Tuolumne County on April 21, 2015. The writ petition names CCSF and the SFPUC as Respondents and Defendants (collectively, "respondents"), and names Modesto Irrigation District, Turlock Irrigation District, and Bay Area Water Supply and Conservation Agency as Real Parties in Interest and Defendants. Petitioner RHH served this writ petition on the San Francisco Mayor's Office on April 29, 2015. On May 26, 2015, pursuant to California Rules of Court, Rule 3.110, the parties stipulated to a 15-day extension of the time period prescribed for respondents' responsive pleading to the extent necessary to extend the deadline for a responsive pleading to and including June 15, 2015.

Petitioner RHH is a nonprofit organization with its sole office in the city of Oakland, located in Alameda County. (Pet., ¶ 4.) Respondent CCSF is a municipal corporation and Charter City organized and existing under its charter and state law. (Pet., ¶ 7.) Respondent SFPUC is a department of CCSF. (Pet., ¶ 8.)

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[1] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

[2] Citations to the writ petition are designated "Pet."

RHH's writ petition includes a single cause of action, alleging "[v]iolations of Article X, section 2 of the California Constitution." (Pet., ¶¶ 52-56.) RHH contends that, for various reasons, "[t]he operation of O'Shaughnessy Dam and flooding of the Hetch Hetchy Valley within Yosemite National Park is an unreasonable method of diversion [of water]." (Pet., ¶ 55.) RHH prays for relief in the form of: 1) a declaratory judgment that Respondents' operation of the O'Shaughnessy Dam and flooding of the Hetch Hetchy Valley is an unreasonable method of diversion of water pursuant to Article X, section 2 of the California Constitution, and 2) a peremptory writ of mandate ordering Respondents to prepare a written plan detailing alternative reasonable methods of diversion of Respondents' Tuolumne River water rights that do not rely upon the continued presence of the Hetch Hetchy Reservoir. (Pet., p. 21:10-16.)

Respondents now bring this timely motion under section 396b to have this action transferred to San Francisco Superior Court. A change of venue under this section is mandatory when a proper showing is made: "the court *shall*, if it appears that the action or proceeding was not commenced in the proper court, order the action or proceeding transferred to the proper court." (Code Civ. Proc., § 396(b), emphasis added.)

III. ARGUMENT

A. Under Code of Civil Procedure Section 395(a), San Francisco Superior Court is the Proper Court For This Action Because Respondents Reside In San Francisco.

The statutory provisions governing proper venue of civil actions are found in section 392 *et seq.* Section 395(a) sets forth the general rule, subject to exceptions and transfers: "the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action." (Code Civ. Proc., § 395(a).) The statute creates a preference for trial in the county of a defendant's residence. (*Mosby v. Superior Court* (1974) 43 Cal.App.3d 219, 224.)

"The right of a defendant to have an action brought against him tried in the county of his residence is an ancient and valuable right, safeguarded by statute and supported by a long line of decisions." (*Kaluzok v. Brisson* (1946) 27 Cal.2d 760, 763; *Brown v. Happy Val. Fruit Growers* (1929) 206 Cal. 515, 521.)

Here, Respondent CCSF, a municipal corporation, and Respondent SFPUC, a municipal agency, reside in the City and County of San Francisco. There is no contention that respondents or any real party in interest reside in Tuolumne County. Thus, the proper venue for this action is San Francisco Superior Court.

B. There Is No Statutory Basis To Support Venue in Tuolumne County.

Petitioner RHH alleges venue is proper in Tuolumne County based upon two exceptions to the general rule set forth in section 395:

1) O'Shaughnessy Dam and the Hetch Hetchy Valley—and Petitioner's injuries and interests—are located in Tuolumne County (section 392(a)(1)); and

2) The cause of action arises in Tuolumne County, and involves the duties and actions of a public officer (section 393(b)). (Pet., ¶16.)

Courts have consistently held that plaintiffs carry a heavy burden in seeking venue in a county other than defendant's residence. "Where a defendant has made a proper showing of nonresidence, the burden is on the plaintiff to show that the case comes clearly within one of the statutory exceptions to the general rule that actions are triable in the place of the defendant's residence." (*Archer v. Superior Court In and For Humboldt County* (1962) 202 Cal.App.2d 417, 420; see also *Postin v. Griggs* (1944) 66 Cal.App.2d 147, 149 ("before it will be found that a case falls within an exception, the conditions under which the exception is claimed must be *clearly and distinctly shown*" (emphasis added)); *Kaluzok v. Brisson*, *supra*, 27 Cal.2d at p. 763 ("[t]he right of a plaintiff to have an action tried in a county other than that of the defendant's residence is exceptional").)

Furthermore, uncertainties are strictly construed against plaintiffs making such arguments. "All ambiguities will be construed against the pleader to the end that a defendant shall not be deprived improperly of his fundamental right to have the cause tried in the county of his residence." (*Haurat v. Superior Court for Los Angeles County* (1966) 241 Cal.App.2d 330, 334.) "Because the law favors the right of trial at the defendant's residence, the complaint will be strictly construed against a plaintiff seeking to lay venue elsewhere. (*Gallin v. Superior Court* (1991) 230 Cal.App.3d 541, 544; see also *Ah Fong v. Sternes* (1889) 79 Cal. 30, 33.)

As discussed below, Petitioner RHH has not met its heavy burden to clearly and distinctly show that venue is proper in a county other than respondents' county of residence. Both proffered exceptions are unavailing.

1. Code Of Civil Procedure Section 392(a)(1) Does Not Confer Venue In Tuolumne County Because This Is Not An Action For Injuries To Real Property.

"Property" is the thing of which there may be ownership. (Civil Code, § 654.) The sub-class of "real property" includes land, that which is affixed to land, that which is incidental or appurtenant to land, and that which is immovable by law. (Civil Code, § 658.)

Under section 392(a)(1), venue is proper in the superior court in the "county where the real property that is the subject of the action" is situated in three specific types of real property actions:

- "recovery of real property, or of an estate or interest therein";
- "determination in any form, of that right or interest" in real property; and
- "injuries to real property."

The venue allegation in paragraph sixteen of RHH's writ petition identifies "injuries" to "real property located in Tuolumne County" and thus rests upon the third type of action identified in section 392(a)(1).[3] (Pet., ¶ 16.) However, the other fifty-five paragraphs of the writ petition, along with the prayer for relief, do not comport with this venue allegation.

As a threshold matter, this is not a case about "injuries *to* real property" at all—petitioner alleges neither injuries nor ownership in real property. Rather, the writ petition sets forth a single cause of action alleging an unreasonable method of diverting water, in violation of Article X, section 2 of the California Constitution. (Pet., ¶¶ 52-56.) RHH admits that respondents' uses of its Tuolumne River water rights—for a municipal water supply and for hydropower production—are beneficial. (Pet., ¶¶ 2, 28.) So it is left to narrowly allege that the operation of O'Shaugnessy Dam and the flooding of Hetch Hetchy Valley constitute an "unreasonable method of diversion" of water because they have eliminated various "beneficial uses" of that water. (Pet., ¶ 55.) If RHH alleges any injuries

[3] RHH does not raise or rely upon the other types of real property actions identified in section 392(a)(1). Nor does RHH rely upon section 392(a)(2) or 392(b), which, respectively, establish venue in actions for "foreclosure of all liens or mortgages on real property" and "unlawful detainer" proceedings. None of these provisions is applicable here.

or harm at all, it is this elimination of beneficial uses, which RHH describes at various points in the writ petition as consisting of: "fishing, recreational, and preservational beneficial uses" (Pet., ¶ 2); experiencing, viewing, swimming, fishing, hiking, camping, bird-watching, paddling, canoeing, kayaking (Pet., ¶5); swimming, wading, fishing, picnicking, sunbathing, hiking, beachcombing, camping, boating, and sightseeing (Pet., ¶¶ 27, 28); "scenic, recreational, and aesthetic beneficial uses" (Pet., ¶ 41); "aesthetic and scenic beneficial uses" (Pet., ¶ 55(b)); hiking, camping, swimming, and boating (Pet., ¶ 55(c)); and fishing. (Pet., ¶ 55(d).)[4]

These alleged harms identified in the writ petition do not constitute *injuries to real property.* At most, they are limitations on RHH members' ability to engage in various activities in and around Hetch Hetchy Valley—no more, no less.

Even if "injuries to real property" were identified in the writ petition in some fashion, they are most definitely not the "subject of the action" as required by section 392(a)(1). For venue purposes, the *subject* of the action must be determined from the nature or character of the *judgment* which could be rendered. (*Thielen v. Superior Court of Los Angeles County* (1963) 219 Cal.App.2d 217, 218; see also *Eckstrand v. Wilshusen* (1933) 217 Cal. 380, 381; *Neet v. Holmes* (1942) 19 Cal.2d 605, 607; *Work v. Associated Almond Growers of Paso Robles* (1926) 76 Cal. App. 708, 710-711; *Perkins v. Winder* (1932) 123 Cal.App. 467, 470.) "It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated." (*Howe v. Tucker* (1933) 219 Cal. 193, 195; *Weygandt v. Larson* (1933) 130 Cal.App. 304, 308 ("it is only when land or an interest therein is the *exclusive* subject matter of the action that...section 392 controls"); *Smith v. Smith* (1891) 88 Cal. 572, 576.) Where only one cause of action is alleged in the complaint, but more than one type of remedy or relief is sought, the venue of the action will be determined by the "main relief" sought or the "primary object" of the action. (*Turlock Theatre Co. v. Laws* (1939) 12 Cal.2d 573, 577; *Kaluzok v. Brisson, supra*, 27 Cal.2d at p. 762; *Fletcher v. Nordesta Homes, Inc.* (1961) 192 Cal.App.2d 33, 35.)

[4] "In passing upon a motion for a change of venue the court must take the pleading as it is written." (*Johnson v. Superior Court of Fresno County* (1965) 232 Cal.App.2d 212, 217-18; see also *Sheeley v. Jones* (1923) 192 Cal. 256, 257; *Eckstrand v. Wilshusen* (1933) 217 Cal. 380, 380-81.)

Here, neither the exclusive nor the primary object of the action is one for relief stemming from injuries to real property located in Tuolumne County. Rather, the relief sought—and thus the subject of the action for venue purposes—is entirely prospective and unrelated to any such injuries. Petitioner prays for a peremptory writ of mandate ordering respondents to prepare a written plan detailing alternative methods of diversion of water.[5] (Pet., p. 21:14-23.) A written plan is not a form of relief that redresses injuries to real property, and that is certainly true of the written plan sought by petitioner here. In fact, even the preparation and contents of the plan would have little connection to Tuolumne County. It would be prepared by respondents in their county of residence, San Francisco. Further, the nature of the plan sought—detailing *alternative* methods of diverting water that do not rely upon Hetch Hetchy reservoir—would, by definition, focus on other downstream locations and would consider respondents' entire water system, including reservoirs, dams, pipelines, and other facilities located in disparate counties, including San Francisco, San Mateo, and Alameda. (See Pet., ¶¶ 31, 32.) Further, the plan would necessarily consider impacts on the real parties in interest and their respective customers and facilities, located in, *inter alia,* Stanislaus, Alameda, Santa Clara and San Mateo counties. (See Pet., ¶¶ 11-13.)

In *Neet v. Holmes*, *supra*, 19 Cal.2d 605, plaintiffs were owners of a fractional interest in a mine. They joined causes of action for money received, for an accounting of the operations of leased and adjoining mines and damages for injuries to mines, for the establishment of a trust in adjacent mining claims, and for an accounting of ores removed therefrom. (*Id.* at 611.) The Court determined that the action turned principally on the personal obligations arising from fraud; title to the properties and injury to the property were merely incidental to the action. (*Id.* at 612.) Thus, venue was proper in the county of defendants' residence rather than the county where those mining operations were located. (*Id.* at 613.) "[I]t has been declared to be the policy of the law jealously to guard the right of

[5] Petitioner also seeks a declaratory judgment regarding Article X, section 2 of the California Constitution, costs of suit, an award of attorneys' fees, and any other relief. (Pet., pp. 21:9-13, 21:24-25:1.) These forms of relief have even *less* connection to injuries to real properties in Tuolumne County than the preparation of a written plan. They provide no support for petitioner's venue contentions here.

the defendant to have a trial in the county where he resides and that the allegations of a complaint will be strictly construed against the pleader." (*Id.* at 612.)

The more recent case of *County of Siskiyou v. Superior Court* (2013) 217 Cal.App.4th 83, as modified (July 12, 2013) (*County of Siskiyou*), is also instructive. There, real parties in interest filed a writ petition in Sacrament County, asserting that respondent public agencies' failure to act caused injury to the Scott River and its populations of fish and wildlife located in Siskiyou County. (*Id.* at 87.) They sought mandate and injunctive relief to cease the issuance of well-drilling permits for groundwater until respondents complied with their public trust duties. (*Ibid.*) Respondent Siskiyou County sought venue where the land was located (per section 392), in part, because real parties in interest alleged the unregulated drilling of wells constituted an injury to the Scott River as well as to the fish and wildlife habitat. (*Id.* at 94.) These injury-to-real-property contentions were much stronger and more central in *County of Siskiyou* than any such contentions made by RHH here, but the Court still held section 392(a) did not confer venue in the county where the property was located because "the primary thrust" of the action was the state Board's regulatory authority over the application of the public trust doctrine to interconnected ground and surface water. (*Id.* at 95.)

More generally, there is simply no precedent for invoking section 392(a)(1) in an action like the one presented by RHH here. Venue has been found pursuant to this provision only in actions brought by *owners of real property* clearly seeking damages or other relief stemming from injuries to *their* real property.[6] (See, e.g., *Las Animas & San Joaquin Land Co. v. Fatjo* (1908) 9 Cal.App. 318 (action to recover damages to plaintiff's land caused by fire negligently started by defendant); *Williams v. Merced Irr. Dist.* (1935) 4 Cal.2d 238 (action by landowner for injuries to land caused by flooding); *San Jose Ice & Cold Storage Co. v. San Jose* (1937) 19 Cal.App.2d 62 (action by landowner

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[6] In contrast, RHH's writ petition does not contend any *ownership interest* in any real property whatsoever. For example, RHH does not contend that it owns the Tuolumne River waters. Nor does Petitioner purport to own the Hetch Hetchy valley itself. The only ownership interest identified by RHH in the writ petition is "in public resources present in Hetch Hetchy Valley, including but not limited to aquatic birds, fish and other aquatic animals, and terrestrial species, including black bears, deer, and other species that once thrived in Hetch Hetchy Valley." (Pet., ¶ 5.) But these fish and animals simply do not constitute real property owned by RHH nor are they the subject matter of this action.

for impairment of access to real property by construction of grade crossings); *Strosnider v. Pomin* (1939) 32 Cal.App.2d 103 (action by landowner for damages stemming from defendant's obstruction of landowner's easements and right of way); *Wolfe v. Wallace* (1957) 154 Cal.App.2d 523 (private landowner action to recover damages for value of trees cut down and for diminution in value of land); *Wick v. Mattison* (1962) 207 Cal.App.2d 608 (action for damages stemming from depreciation in value of plaintiff's real estate); *Stauffer Chem. Co. v. Superior Court* (1968) 265 Cal.App.2d 1 (actions by landowners and lessees to recover damages for injuries to soil and growing crops); and *Foundation Engineers, Inc. v. Superior Court* (1993) 19 Cal. App. 4th 104 (property owner action for negligent design and construction of buildings affixed to real property).)

The writ petition here alleges a violation of the California Constitution regarding the reasonable diversion of water, and prays for a declaratory judgment and a peremptory writ of mandate ordering preparation of a written report. (Pet., ¶¶ 52-56, p. 21:10-16.) Petitioner does not own real property in Tuolumne nor allege injuries to any such property. At most, any references that could be construed as such injuries are tangential and ambiguous, and do not constitute the "subject of the action." (Code Civ. Proc., § 392(a)(1).) Petitioner RHH has not met its heavy burden under section 392(a)(1) to clearly establish venue in Tuolumne County and thus overcome respondents' fundamental right to a trial in their resident county of San Francisco.

2. Code Of Civil Procedure Section 393(b) Does Not Confer Venue In Tuolumne County Because This Is Not An Action Based On "Acts Done" By Public Officers, But Rather Seeks Prospective Declaratory And Injunctive Relief.

Code of Civil Procedure section 393(b) sets forth an exception to the general venue rule established in section 395:

> the county in which the cause, or some part of the cause, arose, is the proper county for the trial of the following actions: [¶] ... [¶] (b) Against a public officer or person especially appointed to execute the duties of a public officer, for *an act done by the officer* or person in virtue of the office, or against a person who, by the officer's command or in the officer's aid, does anything touching the duties of the officer.

(emphasis added.)

This section has been narrowly construed for over one-hundred and fifty years, dating back to the seminal venue case of *McMillan v. Richards* (1858) 9 Cal. 365 (*McMillan*), which held the predecessor to section 393(b)[7] inapplicable when petitioner sought to compel the Sherriff to execute a deed. The provision "applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty (citations omitted)." (*Id.* at 420-21.)

In *Bonestell, Richardson & Co. v. Curry* (1908) 153 Cal. 418, 419 (*Bonestell*), plaintiff sought to "enjoin further action" regarding a printing contract upon the ground that the contract "was illegal and void." The Court followed and further narrowed the *McMillan* interpretation of this venue provision.

> This construction contemplates only such affirmative acts of an officer as directly interfere with the personal rights or property of the person complaining, such as wrongful arrest, trespass, conversion, etc. The complaint in the case at bar shows no such case. Moreover, the action is not one against public officers for an *act done by them, but is an action against them and certain other persons solely to prevent the doing of certain acts by such officers and by the other defendants in the future.*

(*Id.* at 420, emphasis added; see also *Harris v. Alcoholic Beverage Control Appeals Bd.* (1961) 197 Cal.App.2d 759, 768 (*Harris*) (section 393(b) inapplicable to writ seeking to restrain further action because it "has been narrowly construed to apply only to affirmative acts which directly interfere with the personal rights or property of the person complaining, to acts done as distinguished from acts threatened [citation omitted]").)

In *State Commission in Lunacy v. Welch* (1908) 154 Cal. 775, 778 (*Lunacy*), decided shortly after *Bonestell,* the Court re-affirmed its narrow interpretation of section 393(b) by holding it inapplicable where a State commission sought a writ of mandate to compel a county treasurer to pay public monies to the State treasurer.

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[7] Section 393(b) was originally enacted as section 19(2), in the California Statutes of 1850, and it was re-enacted as section 19(2), in the 1851 Civil Practice Act; as section 393(2), in the 1872 Code of Civil Procedure; as section 393(1)(b), in amendments in 1933 and 1998; and as section 393(b), in 2003 amendments. The legislature carried forward this venue statute throughout its legislative history "without substantive change." (*Cal. State Parks Foundation v. Superior Court* (2007) 150 Cal.App.4th 826, 845.)

Collectively, these controlling venue cases establish that the applicability of section 393(b) can be determined by looking to the nature of the relief sought. Actions that do not seek to redress injuries caused by official acts—but rather seek to compel or prohibit future conduct, and thus to forestall future harms—do not fall within the ambit of section 393(b).

Petitioner RHH's contention that venue is proper in Tuolumne County under section 393(b) fails for at least two reasons. First, as a threshold matter, RHH does not identify or predicate its action on any specific "acts done" by respondents. For example, it does not identify any decisions, orders, or regulatory actions taken by CCSF or SFPUC, whether adjudicatory or legislative in nature. Nor does it identify any acts performed by any specific CCSF or SFPUC officials. In fact, RHH claims that the purportedly unreasonable diversion that is the basis of its lawsuit is not due to any actions taken by respondents, but rather is a function of changing social values: "The requirement that all diversion methods be reasonable and seek to further the greatest number of beneficial uses is not static. What may have been reasonable in 1918 or 1930s may not be reasonable in light of current social values." (Pet., ¶48.) From there, RHH ambiguously concludes that "operating a dam and reservoir"—which have been in operation for nearly one hundred years—is now, in 2015, no longer reasonable. (Pet., ¶¶ 1, 55(a).) This artful pleading is fatal to petitioner's venue contention here. Absent an official act as predicate, venue in Tuolumne County cannot rest on section 393(b).

Second, even if an official act were identified, this action would nonetheless fall outside the scope of section 393(b). Petitioner RHH does not pray here for damages or any other relief for injuries sustained, but rather seeks prospective relief—in the form of a declaratory judgment and a writ of mandate ordering preparation of a written plan—regarding potential, *future* constitutional violations. (Pet., p. 21:10-23.) In this respect, RHH's action is identical to those actions considered in *McMillan* (action to compel the sheriff to issue a deed), *Bonestell* (action to enjoin officials from entering into and carrying out a contract), *Lunacy* (action to compel payment to state treasury), and *Harris* (action to restrain appeals board from taking further action). In each of those cases, the Court expressly held section 393(b) inapplicable (and thus venue outside of defendant's county of residence improper) because, like RHH here, the actions did not seek to redress the harms caused by acts done, but rather sought prospective relief.

In a related series of cases, culminating in *Cal. State Parks Foundation v. Superior Court* (2007) 150 Cal.App.4th 826, courts have established that section 393(b) is not limited to actions seeking to vindicate private rights, but also encompasses actions seeking to vindicate public rights. But this distinction does not bear on the issue raised here. In fact, these cases further highlight that section 393(b) establishes venue for actions seeking to redress "acts done" by public officers, not action for prospective relief such as the one brought by RHH here. In each case, the action identifies and seeks redress for a specific act performed by a public officer. (See, e.g., *Cecil v. Superior Court in and for L.A. County* (1943) 59 Cal.App.2d 793 (action to annul Department of Agriculture order revoking plaintiff's license as a milk distributor); *Regents of Unv. of Cal. v. Superior Court* (1970) 3 Cal.3d 529, 537 (action to declare invalid the prior resolutions of Board of Regents); *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729 (action to halt implementation of classification system developed in violation of Administrative Procedures Act); *Colusa Air Pollution Control Dist. v. Superior Court* (1991) 226 Cal.App.3d 880, 884 (action to invalidate regulations as unlawfully promulgated); and *Cal. State Parks Foundation v. Superior Court*, *supra*, 150 Cal.App.4th 826 (action to challenge agency's certification of environmental impact report (EIR) for construction of toll road).)

For all the foregoing reasons, section 393(b) does not support venue in Tuolumne County in this action.

C. This Court Must Transfer This Action To the Proper Court, San Francisco.

"The court may, on motion, change the place of trial … [w]hen the court designated in the complaint is not the proper court." (Code Civ. Proc., § 397(a).) Upon hearing a motion to transfer an action to the proper court, "the court *shall*, if it appears that the action or proceeding was not commenced in the proper court, order the action or proceeding transferred to the proper court." (Code Civ. Proc., § 396b(a), emphasis added.) "[W]hen it appears that the action has been commenced in the wrong court a transfer to the 'proper' court is mandatory." (*San Jose I. & C. Storage Co. v. San Jose*, *supra*, 19 Cal.App.2d at pp. 64-65.) The court is divested of jurisdiction to do anything other than transfer the action. (*Bernson v. Eveleth* (1962) 203 Cal.App.2d 41, 45.)

Here, strictly construing its complaint, petitioner's venue contentions fail. RHH has not clearly and distinctly established that the action meets either of the statutory exceptions to overcome

respondents' fundamental right to have the cause tried in their county of residence. The proper venue is San Francisco, where respondents reside. The case should be transferred.

IV. CONCLUSION

For the reasons stated above, respondents respectfully request that this Court grant the motion for change of venue and transfer this case to San Francisco Superior Court.

Dated: June 11, 2015

DENNIS J. HERRERA
City Attorney
RONALD P. FLYNN
Chief Deputy City Attorney
NOREEN AMBROSE
General Counsel, S.F. Public Utilities Commission
JOSHUA D. MILSTEIN
MATTHEW D. GOLDBERG
MOLLIE LEE
Deputy City Attorneys

By: _____
MATTHEW D. GOLDBERG

Attorneys for Respondents and Defendants
City And County Of San Francisco and
San Francisco Public Utilities Commission

PROOF OF SERVICE

I, Catheryn M. Daly, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On June 11, 2015, I served the following document(s):

RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENTS' NOTICE OF MOTION AND MOTION TO CHANGE VENUE TO SAN FRANCISCO SUPERIOR COURT

on the following persons at the locations specified:

Michael R. Lozeau Richard T. Drury Richard M. Franco LOZEAU DRURY LLP 410 12th Street, Suite 250 Oakland, CA 94607 Tel: (510) 836-4200 Fax: (510) 836-4205 E-mail: michael@lozeaudrury.com richard@lozeaudrury.com rick@lozeaudrury.com	Attorneys for Petitioner and Plaintiff Restore Hetch Hetchy
Richard M. Frank School of Law, University of California Davis, CA 95616 Tel: (530) 752-7422 Fax: (530) 752-4704 E-mail: rmfrank@ucdavis.edu	Attorney for Petitioner and Plaintiff Restore Hetch Hetchy
William C. Paris III O'LAUGHLIN & PARIS LLP 117 Meyers Street, Suite 110 Chico, California 95928 Tel: (530) 899-9755 Fax: (530) 899-1367 E-mail: bparis@olaughlinparis.com	Attorney for Real Party in Interest Modesto Irrigation District
Allison C. Schutte HANSON BRIDGETT LLP 425 Market Street, 26th Floor San Francisco, CA 94105 Tel: (415) 777-3200 Fax: (415) 541-9366 E-mail: aschutte@hansonbridgett.com	Attorney for Real Party in Interest Bay Area Water Supply and Conservation Agency

David L. Hobbs GRIFFITH & MASUDA 517 E. Olive Avenue Turlock, CA 95380 Tel: (209) 667-5501 Fax: (209) 667-8176 Email: dhobbs@calwaterlaw.com	Attorney for Real Party in Interest Turlock Irrigation District

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY OVERNIGHT DELIVERY**: I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☐ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through File & ServeXpress in portable document format ("PDF") Adobe Acrobat.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed June 11, 2015, at San Francisco, California.

Catheryn M. Daly

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