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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF TUOLUMNE

13 UNLIMITED JURISDICTION

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

15 Petitioner and Plaintiff,

16 vs.

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

20 Respondents and Defendants.

21 **MODESTO IRRIGATION DISTRICT, a**
public agency; **TURLOCK IRRIGATION**
22 **DISTRICT, a public agency; BAY AREA**
23 **WATER SUPPLY AND CONSERVATION**
AGENCY, a public agency, and ROES I-
24 XXX, inclusive,
Real Parties in Interest and Defendants.

Case No. CV 59426

**DEFENDANTS CITY AND COUNTY OF SAN
FRANCISCO, SAN FRANCISCO PUBLIC
UTILITIES COMMISSION, AND BAY AREA
WATER SUPPLY AND CONSERVATION
AGENCY'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION TO STRIKE PETITIONER'S
VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY RELIEF PURSUANT TO
CODE OF CIVIL PROCEDURE §§ 435, 436**

ASSIGNED FOR ALL PURPOSES TO JUDGE
SEIBERT

Hearing Date: January 29, 2016
Hearing Judge: Hon. Kevin M. Seibert
Time: 8:30 a.m.
Place: Dept. # 4

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Trial Date: None set

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TABLE OF AUTHORITIES

Cases

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2 *AIDS Healthcare Foundation v. L.A. County Dept. of Public Health*

3 (2011) 197 Cal.App.4th 6934

4 *Bullis Charter School v. Los Altos School Dist.*

5 (2011) 200 Cal.App.4th 10223

6 *Carrancho v. Cal. Air Res. Bd.*

7 (2003) 111 Cal.App.4th 12553

8 *City of Barstow v. Mojave Water Agency*

9 (2000) 23 Cal.4th 12244

10 *Hudson v. County of L.A.*

11 (2014) 232 Cal. App.4th 3923

12 *Kavanaugh v. West Sonoma County Union High School Dist.*

13 (2003) 29 Cal.4th 9163

14 *L.A. County Professional Peace Officers' Assn. v. County of L.A.*

15 (2004) 115 Cal.App.4th 8663

16 *Miller Fam. Home, Inc. v. Dep't of Social Services*

17 (1997) 57 Cal.App.4th 4883

18 *Mooney v. Garcia*

19 (2012) 207 Cal.App.4th 2294

20 *Peabody v. City of Vallejo*

21 (1935) 2 Cal.2d 3514

22 *Saleeby v. State Bar*

23 (1985) 39 Cal.3d 5472

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21 Code Civ. Proc

22 § 431.10, subd. (b)2

23 § 431.10, subd. (b)(3)1

24 § 436, subd. (a)2

25 § 437, subd. (a)2

26 § 10852

27 § 1085, subd. (a)3, 4

Constitutional Provisions

28 Cal. Const. art. X, § 22, 3

Other References

1 Weil & Brown, Cal. Practice Guide: Civ.
2 Procedure Before Trial (The Rutter Group 2015) ¶ 7:1782

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1 **INTRODUCTION**

2 Petitioner Restore Hetch Hetchy (“Petitioner”) asks the Court to decide the discretionary
3 political question of whether the City and County of San Francisco should prepare a plan to stop using
4 the Hetch Hetchy Reservoir. Petitioner previously put this question to the voters of San Francisco,
5 who overwhelmingly rejected Petitioner’s initiative measure. Having failed at the ballot box,
6 Petitioner now seeks a peremptory writ of mandate ordering San Francisco to develop this plan.

7 This request must be stricken because it is “not supported by the allegations of the complaint or
8 cross-complaint.” (Code Civ. Proc., § 431.10, subd. (b)(3).) Specifically, Petitioner has not alleged a
9 ministerial duty that San Francisco violates by not preparing the requested written plan. Petitioner’s
10 2012 ballot measure might have established such a duty, but it was rejected. There is no other law or
11 regulation that requires San Francisco to prepare the plan described in Petitioner’s prayer for relief. A
12 ministerial duty is an essential element of writ relief under California Code of Civil Procedure section
13 1085, and the failure to allege such a duty is grounds for striking this request for relief.

14 Defendants City and County of San Francisco and the San Francisco Public Utilities
15 Commission (collectively “San Francisco”) and the Bay Area Water Supply and Conservation Agency
16 (“BAWSCA”) make this motion to strike in the alternative to the demurrer, to be considered if
17 Defendants’ pending demurrer is overruled or if the Court sustains the demurrer and grants leave to
18 amend.

19 **BACKGROUND**

20 In 2012, Petitioner proposed a ballot measure it called the Water Sustainability and
21 Environmental Restoration Plan. (*See* Defendants’ Request for Judicial Notice in Support of Demurrer
22 [“RJN”] Ex. H [legal text of proposed measure].) This measure would have required San Francisco to
23 prepare a plan evaluating how to drain the Hetch Hetchy Reservoir so that it could be restored by the
24 National Park Service, as well as identifying replacement water and power sources. (*Id.*) This measure
25 was submitted to the voters on November 6, 2012, and they overwhelmingly rejected it, with 76.9% of
26 the vote against the measure. (*Id.*, Ex. I [Nov. 2012 Election Results].)

27 In the present action, Petitioner once again requests that San Francisco develop a plan to drain
28 Hetch Hetchy. In the Petition’s sole cause of action, Petitioner contends that the operation of

1 O'Shaughnessy Dam and flooding of the Hetch Hetchy Valley is an unreasonable method of
2 diversion, in violation of Article X, Section 2 of the California Constitution. (Verified Petn. for Writ of
3 Mandate and Complaint for Declaratory Relief (Petn.), ¶ 55.) In the prayer for relief, Petitioner
4 requests a declaratory judgment, a peremptory writ of mandate, costs of suit, attorney's fees, and any
5 other relief the Court considers proper. (*Id.*, pp. 21-22.)

6 ARGUMENT

7 I. Legal Standard.

8 A motion to strike is the proper procedure to attack irrelevant matter in a complaint, including
9 a demand for improper relief. (Weil & Brown, Cal. Practice Guide: Civ. Procedure Before Trial (The
10 Rutter Group 2015) ¶ 7:178.) A motion to strike may be based on the complaint itself or on matters
11 that are judicially noticeable. (Code Civ. Proc., § 437, subd. (a).) The court may strike "any irrelevant,
12 false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436, subd. (a).) "Irrelevant
13 matter," also termed "immaterial allegations," includes a "demand for judgment requesting relief not
14 supported by the allegations of the complaint or cross-complaint." (Code Civ. Proc., § 431.10, subd.
15 (b).) Thus, under Sections 436(a) and 431.10(b), the Court may strike a request for relief that is not
16 supported by the allegations of the complaint.

17 II. The Request For A Writ Of Mandate Is Not Supported By The Allegations Of The 18 Complaint, Which Do Not Allege That Any Ministerial Duty Has Been Violated.

19 Petitioner seeks a peremptory writ of mandate under California Code of Civil Procedure
20 section 1085 ordering San Francisco to prepare a detailed written plan for removal of the Hetch
21 Hetchy Reservoir and O'Shaughnessy Dam. (Petn., p. 21:14-23.) This request should be struck
22 because Petitioner does not—and cannot—allege that San Francisco has a ministerial duty to prepare
23 the requested plan.¹

24 ¹ Additionally, the Petition does not allege that San Francisco has violated a legislative or
25 quasi-legislative duty in not preparing the requested plan. Legislative decisions are those "which
26 involve the adoption of a 'broad, generally applicable rule of conduct on the basis of general public
27 policy.'" (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 560.) Even if Petitioner were challenging a
28 legislative action by San Francisco, mandamus would not be available unless Petitioner could show
the action was "so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of
law." (*Carrancho v. Cal. Air Res. Bd.* (2003) 111 Cal.App.4th 1255, 1265.) Mandate "will not lie to
control the discretion of a public official or agency, that is, to force the exercise of discretion in a
particular manner." (*Miller Fam. Home, Inc. v. Dep't of Social Services* (1997) 57 Cal.App.4th 488,

1 A court may issue a writ of mandate “to compel the performance of an act which the law
2 specially enjoins, as a duty resulting from an office, trust, or station....” (Code Civ. Proc., § 1085,
3 subd. (a).) To obtain relief under section 1085, a petitioner must show “that the public agency has a
4 clear, present, and ministerial duty to afford the relief sought, and that the petitioner has a clear,
5 present, and beneficial right to performance of that duty.” (*Hudson v. County of L.A.* (2014) 232 Cal.
6 App.4th 392, 408 citing *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29
7 Cal.4th at p. 916; *Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 1022, 1035.)
8 “An act is ‘ministerial’ when a public officer is required to perform it in a prescribed manner when a
9 given state of facts exists, in obedience to the mandate of legal authority and without regard to his, her,
10 or its own opinion concerning the act's propriety.” (*Id.*) “Mandate will not issue if the duty is not plain
11 or is mixed with discretionary power or the exercise of judgment.” (*L.A. County Professional Peace*
12 *Officers' Assn. v. County of L.A.* (2004) 115 Cal.App.4th 866, 869.)

13 Here, Petitioner seeks a writ ordering a very detailed plan but does not allege any law or facts
14 that would require San Francisco to prepare this plan. Petitioner’s request for writ relief states in full:

15 For a peremptory writ of mandate ordering Respondents to prepare a written
16 plan detailing alternative reasonable methods of diversion of Respondents’
17 Tuolumne River water rights that do not rely upon the continued presence of the
18 Hetch Hetchy Reservoir. The required plan is to propose a reasonable timetable
19 for constructing the facilities necessary to implement the new diversion
20 location(s). The plan shall also include a component for modifying or removing
21 the O’Shaughnessy Dam so that the Tuolumne River may again flow freely
22 through the Hetch Hetchy Valley in order that the beneficial uses that were
23 present in Hetch Hetchy Valley prior to Respondents’ creation of the reservoir
24 may once again be made available to the public and restored to Yosemite
25 National Park. The order should provide for review and approval of the plan by
26 the State Board as well as the Court.

27 (Pet. p. 21:14-23.)

28 There is no law that commands San Francisco to prepare such a plan, under any state of facts.
Petitioner alleges a cause of action arising under Article X, Section 2 of the California Constitution
 (“Article X, Section 2”), but this provision does not “specially enjoin[]” San Francisco to prepare the
 requested plan. (Code Civ. Proc., § 1085, subd. (a).) To the contrary, Article X, Section 2 simply

491.) This is, of course, precisely what Petitioner attempts here, in seeking to persuade the court to
 command San Francisco to investigate draining Hetch Hetchy, in the absence of any legislative action
 or legislative mandate.

1 establishes a rule of reasonableness that applies to all water rights in California. (*Peabody v. City of*
2 *Vallejo* (1935) 2 Cal.2d 351, 367; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224,
3 1241.) Holders of water rights, like San Francisco, must exercise discretion in deciding how to comply
4 with this reasonableness requirement. Article X, Section 2 does not require any water rights holder, let
5 alone any public official, to perform any action in a prescribed manner, so it does not delegate any
6 ministerial duty to San Francisco.

7 Even where statutes more explicitly require a public official to take action, courts have found
8 that “vague and general” duties do not give rise to a clear ministerial duty enforceable by writ of
9 mandate. In *AIDS Healthcare Foundation v. L.A. County Dept. of Public Health* (2011) 197
10 Cal.App.4th 693, for instance, the Court of Appeal found that even when a public official has a
11 mandatory duty, phrases such as “shall take measures as may be necessary” and “all measures
12 reasonably necessary” give the official “discretion to act in a particular manner given the
13 circumstances.” (*Id.* at 701-02.) Such discretion indicates that a duty is not ministerial and is not
14 enforceable by writ of mandate. (*Id.*) The Court of Appeal reached a similar conclusion in *Mooney v.*
15 *Garcia* (2012) 207 Cal.App.4th 229 (*Mooney*), where it held that when the legislature instructs a
16 public entity to adopt “reasonable” regulations and procedures, it intends to provide that entity with
17 discretion. (*Id.* at 199-200.) *Mooney* considered whether a school district had a ministerial duty to
18 place items proposed by members of the public on its agenda for board meetings. Noting that the law
19 “explicitly delegated to school boards the power to adopt ‘reasonable’ regulations and procedures”
20 providing for such an opportunity, the court found that “the Legislature necessarily established that it
21 was providing for the exercise of discretion by school districts, rather than mandating a purely
22 ministerial act.” (*Id.*)

23 Like the statutes in *AIDS Healthcare Foundation* and *Mooney*, Article X, Section 2 gives rights
24 holders and public officials discretion over how to use and divert water. Thus, even if Petitioners were
25 correct that the O’Shaughnessy Dam and Hetch Hetchy Reservoir somehow violate Article X, Section
26 2—which they do not—Respondents would have discretion about how to establish an alternative
27 method of diversion.


1 By contrast, Petitioner's 2012 ballot measure would have imposed on San Francisco a legal
2 duty to prepare the type of plan Petitioners seek. Like the proposed writ relief, the ballot measure
3 would have required San Francisco to prepare a detailed plan identifying alternative water sources,
4 evaluating how to remove the Hetch Hetchy Reservoir, and presenting a timetable for implementing
5 the plan. However, that measure failed and cannot be the basis for writ relief.

6 **CONCLUSION**

7 For the foregoing reasons, Defendants San Francisco and BAWSCA respectfully request that
8 the Court strike Petitioner's request for a writ of mandate. (Petn., p. 21:14-23.)

9
10 Dated: December 21, 2015

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PROOF OF SERVICE

I, Alison Lambert, 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 December 21, 2015, I served the following document(s):

DEFENDANTS CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO PUBLIC UTILITIES COMMISSION, AND BAY AREA WATER SUPPLY AND CONSERVATION AGENCY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE PETITIONER'S VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF PURSUANT TO CODE OF CIVIL PROCEDURE §§ 435, 436

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16 in the manner indicated below:

17 **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic
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23 mail from the electronic address: *alison.lambert@sfgov.org* in portable document format ("PDF") Adobe
24 Acrobat or in Word document format.

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

27 Executed December 21, 2015, at San Francisco, California.

28 

Alison Lambert