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12 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF TUOLUMNE

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

16 Petitioner and Plaintiff,

17 vs.

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

21 Respondents and Defendants.

22 MODESTO IRRIGATION DISTRICT, a public
agency; TURLOCK IRRIGATION DISTRICT, a
23 public agency; BAY AREA WATER SUPPLY
AND CONSERVATION AGENCY, a public
24 agency; and ROES I–X, inclusive,

25 Real Parties in Interest and Defendants.
26
27
28

Case No. CV 59426

**PLAINTIFF’S OPPOSITION TO
DEFENDANTS’ MOTION TO STRIKE
PLAINTIFF’S VERIFIED PETITION FOR
WRIT OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF PURSUANT
TO CODE OF CIVIL PROCEDURE § § 435,
436**

1 **INTRODUCTION**

2 Petitioner and Plaintiff Restore Hetch Hetchy brought this action on April 21, 2015 alleging that
3 Defendants City and County of San Francisco and San Francisco Public Utilities Commission current
4 operation of the O’Shaughnessy Dam and Hetch Hetchy Reservoir constitutes an unreasonable method
5 of diversion under Article X, section 2 of the California Constitution. (Petition, ¶ 1.) The
6 Complaint/Petition prays for a declaratory judgment to that effect and a peremptory writ of mandate
7 ordering Defendants to prepare a written plan detailing alternative reasonable methods of diversion of
8 Defendants’ Tuolumne River water rights. (*Id.* at 21:10-16.)

9 On December 21, 2016, Defendants City and County of San Francisco, San Francisco Public
10 Utilities Commission, and Bay Area Water Supply and Conservation Agency (collectively
11 “Defendants”) filed a motion to strike the following portion of Plaintiff’s prayer for relief:

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

23 (Petitioner and Plaintiff Restore Hetch Hetchy’s Verified Petition for Writ of Mandate and Complaint
24 for Declaratory Relief, p.21.) Defendants’ motion is made on the ground that Plaintiff has failed to
25 allege an essential element of writ relief under California Code of Civil Procedure (“CCP”) section
26 1085. Specifically, Defendants contend that Plaintiff has failed to allege a ministerial duty that San
27 Francisco violates that allows the Court to require San Francisco to prepare the plan described in the
28 prayer for relief.

Defendants mistake both the law and the nature of Plaintiff’s request for relief. San Francisco has
a mandatory duty under Article X, Sec. 2 of the California Constitution not to create an unreasonable
diversion of water. That San Francisco has discretion in how it ensures compliance does not preclude
mandamus. Where an agency has a duty to exercise its discretion, mandamus may lie to compel an
official to exercise their discretion under a proper interpretation of the applicable law. Plaintiff does not
seek to guide or limit San Francisco’s discretion in determining how to come into compliance with

1 Article X, Sec. 2. Rather, the report sought is intended to serve only as an enforceable mechanism to
2 ensure that the City exercises its discretion in a manner that complies with the law.

3 **ARGUMENT**

4 **I. THE PETITION PROPERLY ALLEGES A CAUSE OF ACTION THAT SAN FRANCISCO ABUSED ITS
5 DISCRETION IN IMPLEMENTING ITS DUTY UNDER THE RAKER ACT**

6 **A. CCSF Has a Duty to Operate Its Water Systems in Hetch Hetchy Valley in Compliance
7 with Article X, Section 2 of the California Constitution.**

8 A writ of mandate may be issued “to compel the performance of an act which the law specially
9 enjoins, as a duty resulting from an office. . .” (CCP § 1085.) In arguing that Defendants have no duty to
10 create the requested plan, Defendants focus on a proposed ballot measure which, if successful, would
11 have required San Francisco to prepare a plan to create a more sustainable water system and allow for
12 the Hetch Hetchy Valley to be returned to the National Park Service. *See* Defendants City and County of
13 San Francisco et al.’s Memorandum of Points and Authorities in Support of Motion to Strike Petitioner’s
14 Verified Petition for Writ of Mandate and Complaint for Declaratory Relief (“Motion to Strike”), p. 1-
15 2,4; Defendants’ Request for Judicial Notice in Support of Demurrer. EX. H [legal text of proposed
16 measure]. Plaintiff does not refer to this ballot measure in its Petition, let alone rely on this measure as
17 any basis for writ relief.¹ The ballot measure creates no duty on San Francisco and its outcome is
18 irrelevant to the present action.

19 Article X, Section 2 of the California Constitution does, however, create a duty that warrants the
20 relief sought. The relevant part of Article X, sec. 2 provides:

21 [B]ecause of the conditions prevailing in this State the general welfare requires that the
22 water resources of the State be put to beneficial use to the fullest extent of which they are
23 capable, and that the waste or unreasonable use or unreasonable method of use of water
24 be prevented . . . The right to water or to the use or flow of water in or from any natural
25 stream or water course in this State is and shall be limited to such water as shall be
26 reasonably required for the beneficial use to be served, and ***such right does not and shall
27 not extend to the waste or unreasonable use or unreasonable method of use or
28 unreasonable method of diversion of water.***

26 ¹ Petitioner notes that the failure of this ballot measure has no implication on the strength of Petitioner’s
27 suit. The outcome of the measure has no bearing on whether the current diversion of water in the Hetch
28 Hetchy Valley contravenes the California Constitution. Moreover, this citywide vote failed to take into
account the opinions of the citizens of Tuolumne County or California at large who come to Yosemite
National Park to experience its unparalleled natural beauty.

1 Cal. Const., Art. X § 2 (emphasis added). Under this provision, San Francisco has a duty not to divert
2 water in an unreasonable way or location. “The foregoing mandates are plain, they are positive, and
3 admit of no exception.” (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367-368.) “The provisions of Article
4 X, section 2 of the California Constitution being self-executing, the courts have traditionally enforced
5 the proscriptions against unreasonable uses and unreasonable methods of diverting water. (*EDF v. E.*
6 *Bay Mun. Util. Dist.* (1980) 26 Cal. 3d 183, 198.) This action seeks to enforce San Francisco’s failure to
7 comply with its duty under Article X, Sec. 2 because the City is employing an unreasonable method of
8 diverting water from the Tuolumne River by drowning Yosemite National Park’s Hetch Hetchy Valley
9 with a reservoir. (Complaint, p.1-2, ¶¶ 1-2, 6, 50, 55.)

9 **B. Traditional Mandamus is the Appropriate Mechanism to Compel an Agency to Exercise Its
10 Discretion In Accordance with the Applicable Law.**

11 Defendants misrepresent the law by suggesting that a writ of mandate is never appropriate where
12 the agency has discretion in how to carry out a mandatory duty. While San Francisco has considerable
13 discretion in how to comply with Article X, Sec. 2, such discretion does not relieve it of its duty to
14 comply with that constitutional mandate. “The fact that an agency’s decision is subject to its broad
15 discretion does not mean mandate is unavailable to aggrieved parties as a matter of law.” (*California*
16 *Hospital Assn.*, 188 Cal.App.4th at 570.) The Court need look no further than the case law cited by
17 Defendants to see that mandamus may be used to compel an agency to exercise its discretion. In *AIDS*
18 *Healthcare Foundation v. L.A. County Dept. of Public Health*, California Court of Appeals stated that
19 while “[m]andamus does not lie to compel a public agency to exercise discretionary powers in a
20 particular manner” it may “compel it to exercise its discretion in some manner.” (197 Cal. App. 4th 693,
21 700-01; *See also, Common Cause*, 49 Cal.3d 432 at 442.)

21 In fact, Supreme Court of California has permitted a suit seeking a writ of mandate to enforce an
22 agency’s failure to comply with Article X, Sec. 2. In *EDF v. E. Bay Mun. Util. Dist.* plaintiff
23 environmental group sought declaratory judgment requiring the East Bay Municipal Utility District to
24 use its best efforts to rescind a contract which it contended violated Article X, Sec. 2 by setting an
25 unreasonable point of diversion from the American River. In *EDF v. E. Bay Mun. Util. Dist.* (1980) 26
26 Cal. 3d 183, 191. Given the “the self executing provisions of article X, section 2,” the court held that,
27 “[p]rivate parties thus may seek court aid in the first instance to prevent unreasonable water use or
28 unreasonable method of diversion.” *Id.* at 200. The court granted the environmental group leave to
amend to allow its suit seeking a declaratory judgment to proceed. *Id.* As in *EDF v. E. Bay Mun. Util.*

1 *Dist.*, the present action seeks a declaratory judgment and writ of mandate to compel San Francisco to
2 exercise its discretion in furtherance of complying with Article X, Sec. 2.

3 Plaintiff emphasizes that is not asking the court to direct a particular result as to how San
4 Francisco comes into compliance with the law. Plaintiff only requests a writ of mandate requiring San
5 Francisco to exercise its discretion in such a manner that complies with the constitutional mandate.²
6 Courts have consistently held that writ of mandate may be applied to require an agency to exercise its
7 discretion in accordance with the law. (*See, California School Bds. Assn. v. State Bd. of Education*
8 (2010) 186 Cal.App.4th 1298, 1327 (overruling demurrer where petition pled facts showing “virtually
9 complete failure” to comply with charter and allowing mandamus action to proceed). “[A]lthough
10 mandamus is not available to compel the exercise of the discretion in a particular manner or to reach a
11 particular result, it does lie to command the exercise of discretion—to compel some action upon the
12 subject involved under a proper interpretation of the applicable law.” (*Morris v. Harper* (2001) 94 Cal.
13 App. 4th 52, 63; *Sunset Drive Corporation v. City of Redlands* (1999)73 Cal. App. 4th 215, 222). For
14 example, in *Sunset Drive*, the petitioner sought to compel the respondent to complete an environmental
15 review. (*Sunset Drive Corporation*, 73 Cal. App. 4th at 222). The respondent argued that the content of
16 the environmental review was discretionary and thus mandamus was not the appropriate remedy. (*Id.*).
17 Finding in favor of the petitioner, the court reasoned that the respondent had a mandatory duty to
18 complete the environmental review under California law in the first instance. (*Id.*). Because the
19 petitioner was not challenging the content of the review, but rather that it had not occurred, mandamus
20 was the appropriate vehicle to compel agency action. (*Id.*). Like *Sunset Drive*, mandamus is appropriate
21 here because Plaintiff only asks the Court to require San Francisco to exercise its discretion and come
22 into compliance with Article X, Sec. 2.

21 **C. Plaintiff Seeks to Correct an Abuse of Agency Discretion, Not to Force a Particular Action.**

22 Defendants’ argument that Plaintiff seeks a certain result misconstrues the relief sought. Simply
23 because Plaintiff’s prayer for relief asks for a plan detailing alternative reasonable methods of diversion,
24 does not mean Plaintiff seeks to control Defendants “discretion about how to establish an alternative

25 ² Where an agency acts to implement its duties, mandamus review is also available to determine whether
26 the agency implementation occurred under a proper interpretation of the law. (*See California Hospital*
27 *Assn. v. Maxwell-Jolly* (2010) 188 Cal. App.4th 559, 571 (reviewing agency’s implementation of its
28 duties for compliance with statutory mandate).) Thus, should San Francisco argue that it is already
implementing Article X, Sec. 2, writ of mandate is still permitted to require the City to exercise its
discretion under a proper interpretation of the law.

1 method of diversion.” (Motion to Strike, p. 4.) The plan requested was intended to create an enforceable
2 mechanism to ensure compliance, while leaving the discretion with the City to figure out how to achieve
3 that result. Reading the prayer for relief, it is clear that Plaintiff does not seek to control how Defendants
4 implement their statutory duties, but only that they exercise their discretion under the proper
5 interpretation of Article X, Sec. 2. For example, the plan allows San Francisco to propose a reasonable
6 timetable for constructing facilities which it determines are necessary to implement new diversion
7 locations. San Francisco is left with the decision as to what would be a reasonable timeline and what
8 new facilities are necessary.

9 That the plan requires San Francisco to include “a component modifying or removing the
10 O’Shaughnessy Dam so that the Tuolumne River may again flow freely,” does not unlawfully impede
11 on San Francisco’s discretion. “Where only one choice can be a reasonable exercise of discretion, a
12 court may compel an official to make that choice.” (*California School Bd.*, 186 Cal.App.4th at 1327.)
13 Should the Court find that the current diversion is unreasonable, the only reasonable option in
14 addressing this violation will be eventually to modify or remove O’Shaughnessy Dam and drain the
15 Hetch Hetchy Reservoir to remedy that violation. However, Plaintiff’s requested relief does not go that
16 far. For now, the Complaint seeks declaratory relief and the preparation of a plan. The relief sought
17 does not attempt to determine how San Francisco should modify the dam and provide for an alternative
18 diversion location, but only asks that San Francisco explain how it intends to do so. By requiring San
19 Francisco to develop a plan, Restore Hetch Hetchy, a court, or administrative agency could evaluate
20 whether San Francisco’s subsequent actions to address its violation will bring the City into compliance
21 with Article X, Sec. 2.

22 For the foregoing reasons, Defendants Motion to Strike should be denied.

23 Dated: January 14, 2016

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