5th App. Dist. CIVIL No. F074107

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

RESTORE HETCH HETCHY,
Petitioner and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Respondents and Appellees

MODESTO IRRIGATION DISTRICT, ET AL.
Real Parties in Interest and Respondents.

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court for Tuolumne County,
Case No. CV 59426
Honorable Kevin M. Seibert (Phone no. (209) 533-5563)

Michael R. Lozeau (CBN 142893)
Richard T. Drury (CBN 163559)
Meredith S. Wilensky (CBN 309268)
LOZEAU | DRURY LLP
410 12th Street, Suite 250
Oakland, California 94607
Tel: (510) 836-4200
Fax: (510) 836-4205
E-mail: michael@lozeaudrury.com
richard@lozeaudrury.com
meredith@lozeaudrury.com

Richard M. Frank (CBN 63482)
School of Law
University of California
Davis, California 95616
Tel: (530) 752-7422
Fax: (530) 752-4704
E-mail: rmfrank@ucdavis.edu

Attorneys for Petitioner and Appellant
RESTORE HETCH HETCHY

Certificate of Interested Entities or Persons

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(e)(3)).

Dated: October 17, 2016 Respectfully submitted,

_____

Michael R. Lozeau
Lozeau Drury LLP
Attorneys for Petitioner-Appellant
Restore Hetch Hetchy

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE CASES (cont'd)

FEDERAL CASES

FEDERAL CASES (cont'd)

OTHER STATE CASES

ADMINISTRATIVE DECISIONS

///

///

///

CONSTITUTIONS

California Constitution

U.S. Constitution

CALIFORNIA STATUTES

Code of Civil Procedure

Fish & Game Code

Water Code

FEDERAL STATUTES

Federal Reclamation Act of 1902

Raker Act, Pub. L. No. 41

LEGISLATIVE HISTORY

I. INTRODUCTION

When Congress enacted the Raker Act (Pub. L. No. 41 (Dec. 19, 1913)), granting Respondent/Defendant/Appellee City and County of San Francisco ("City") the option to accept a right-of-way through Yosemite National Park's Hetch Hetchy Valley, as well as Eleanor Creek and parts of the Stanislaus National Forest, Congress conditioned that grant on the City's absolute conformity with the water laws of California. Petitioner/Plaintiff/Appellant Restore Hetch Hetchy brings this action to enforce that clear Congressional intent by ensuring that the City's ongoing operation of one component of the Raker Act grant – the O'Shaughnessy Dam and its associated Hetch Hetchy reservoir – complies with article X, section 2 of the California Constitution, a bed rock provision of California water law. The California Constitution explicitly states that the right to use of water does not extend to unreasonable methods of diversion of water. (Cal. Const., art. X, § 2.) Restore Hetch Hetchy's complaint seeks a declaratory judgment that the City's operation of the O'Shaughnessy Dam and flooding of the Hetch Hetchy Valley is an unreasonable method of diversion in violation of article X, section 2. (Appellant's Appendix ("AA"), pp. 29-32.)[1]

Regardless of whether the City's dam and reservoir in Hetch Hetchy Valley represented a reasonable method for diverting water from the Tuolumne River at the time of enactment of the Raker Act or California's adoption of article X,

[1] Hereinafter, references to Appellant's Appendix shall use the citation format "AA[page number]."

section 2, it certainly is not reasonable now. Viewed with current circumstances and values in mind, including the ever-growing popularity of the Nation's national park system and the incredible recreational and aesthetic value placed on Yosemite National Park, any decision to flood Hetch Hetchy Valley today would be unimaginable and patently unreasonable where San Francisco may access its right to Tuolumne River water downstream of Hetch Hetchy Valley without any loss of supply whatsoever.

This appeal, however, is not about the substantive merits of Restore Hetch Hetchy's unreasonable method of diversion claim. This appeal challenges the Tuolumne County Superior Court's ("trial court") ruling sustaining Defendants' demurrer. The trial court erroneously concluded that the Raker Act preempts article X, section 2 and its application to the O'Shaughnessy Dam and Hetch Hetchy Reservoir. The trial court erred by relying exclusively on precedents under the federal Reclamation Act, and incorrectly assuming that Congress' intent under the Raker Act was precisely the same as its intent in adopting the federal dam building program under the Reclamation Act. The Raker Act, however, is not the Reclamation Act. Nor does the inclusion of similar savings language speak to their respective purposes and intent. In the Raker Act's legislative history, Congress stated time and time again its intention that the City had to fully comply with California water law in its exercise of the grant and, in the event of any conflict between the Raker Act's conditions and California water law, California law prevails.

It is not the courts' role to second-guess that Congressional intent. In adopting the Raker Act, Congress addressed the possibility that California water law would conflict with the conditions of the Raker Act and resolved any future conflict in favor of California law. If applying article X, section 2 of the California Constitution results in a determination that operating the O'Shaughnessy Dam to flood Yosemite National Park's Hetchy Hetchy Valley is an unreasonable method of diversion by the City of its Tuolumne River water rights, Congress mandated that such California water law must be given its full effect upon the City's diversion and must be honored by the Secretary of the Interior. (Raker Act, § 11 (AA99-100).)

The trial court also erred by ruling that the general four-year statute of limitation set forth in Code of Civil Procedure ("CCP") § 343 applies to Restore Hetch Hetchy's claim under article X, section 2, requiring Restore Hetch Hetchy to have challenged the current reasonableness of the dam and reservoir within four years of the 1928 enactment of article X, section 2. However, article X, section 2's mandate that all water uses and methods of diversion be reasonable is an evolving standard that applies equally to new diversions and uses as well as to uses and diversions that began over a century ago. Applying the four-year statute of limitations to a case challenging the current reasonableness of a long-standing method of diversion under article X, section 2 based on current circumstances would frustrate Article X's evolving standard of reasonableness which applies to every water right and every method of diversion, without exception. (*Peabody v.*

Vallejo (1935) 2 Cal.2d 351, 367; *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1486.)

For these reasons, more fully presented below, the Court of Appeal should reverse the trial court's judgment sustaining Defendants' demurrer and remand this action to the Tuolumne County Superior Court to proceed with the merits of Restore Hetch Hetchy's claim.

II. STATEMENT OF THE CASE

A. Statement of Background Facts.

Hetch Hetchy Valley is located in the northwest portion of Yosemite National Park. (AA18.) Formed by the Tuolumne River and glacial scouring, the Valley is about nine miles long, its narrow floor bordered by sheer granite cliffs rising up 1,800 to 3,000 feet above the Valley floor. (*Id*.) Prior to the filling of the O'Shaughnessy Dam's reservoir, the Tuolumne River emerged from the Grand Canyon of the Tuolumne, cascaded over Tuolumne Falls, and meandered through 1,500 acres of wetlands, meadows, and woodlands stretched out along the Hetch Hetchy Valley floor. (*Id*.)

In 1890, Congress created Yosemite National Park, including the Hetch Hetchy Valley. (AA19.) Contemporary accounts compared the grandeur of Hetch Hetchy Valley to that of Yosemite Valley. (*Id*.) The most well-known commentator is John Muir, who in his book "The Yosemite," gave testament to the stunning beauty of Hetch Hetchy Valley: "It appears, therefore, that Hetch Hetchy Valley, far from being a plain, common, rock-bound meadow, as many

who have not seen it seem to suppose, is a grand landscape garden, one of Nature's rarest and most precious mountain temples." (*Id*.) Near the conclusion of his book, Mr. Muir famously declared, "Dam Hetch Hetchy! As well dam for water-tanks the people's cathedrals and churches, for no holier temple has ever been consecrated by the heart of man." (*Id*.)

San Francisco first sought to secure a right-of-way to construct a dam and reservoir in the Hetch Hetchy Valley in 1903. (AA19.) Between 1903 and early 1913, one Secretary of the Interior rejected the City's Hetch Hetchy proposal, another Secretary approved the proposal, another issued an order to show cause why that approval should not be vacated, and lastly a Secretary found that the he lacked the power to approve or disapprove such a right-of-way and deferred the issue to Congress. (*Id*.) In 1913, Congressman John E. Raker sponsored H.R. 7207, which became known as the Raker Act. On September 2, 1913, the bill was passed by the House of Representatives. (63 Cong. Rec. 4112, Exhibit A to Appellant's Request for Judicial Notice ("RJN"), p. 25.)[2] On December 6, 1913, the Senate followed suit. (63 Cong. Rec. 385-86 (RJN36-37).) The bill now known as the Raker Act was signed into law by President Woodrow Wilson on December 19, 1913. (*See* AA100).)

[2] All further references to the congressional debates that are attached as Exhibit A to the Declaration of Michael Lozeau in support of Appellant's Request for Judicial Notice shall use the citation format "63 Cong. Rec. [original congressional record page number] (RJN[PDF page number])."

The right-of-way grant included not only the Hetch Hetchy Valley site but also two other reservoir sites, one in Yosemite National Park on Eleanor Creek and another in the Cherry Valley on the Stanislaus National Forest. (Raker Act, § 1 (AA91).) The Hetch Hetchy Reservoir has a capacity to store 360,000 acre-feet of water. (AA22.) Lake Lloyd or Cherry Reservoir was constructed at the Cherry Valley site and can store 268,800 acre-feet of water from the Tuolumne River and adjacent watershed. (*Id*.) Lake Eleanor, also constructed within the Park, is capable of storing 27,000 acre-feet of water. (*Id*.) Further downstream on the Tuolumne River, the Don Pedro Reservoir has a capacity of 2,030,000 acre-feet. (*Id*.) Don Pedro is owned and operated by the Turlock and Modesto Irrigation Districts but includes a water "bank" for San Francisco supplies that can hold between 570,000 and 740,000 acre-feet of water, depending on the time of year. (*Id*.) San Francisco uses the banked water in the Don Pedro Reservoir to provide water to the Districts pursuant to their senior water rights without having to release water directly from the Hetch Hetchy Reservoir. (AA23.)

Typically, under current operations, San Francisco releases water from the Hetch Hetchy Reservoir into the Canyon Tunnel which flows to the Kirkwood powerhouse along the Tuolumne River, outside of Yosemite National Park. (AA22.) From there, the water is diverted from the Tuolumne River at Early Intake into the Mountain Tunnel, and eventually to the Moccasin powerhouse. (*Id*.) From the Moccasin powerhouse, the water enters the Foothill Tunnel and flows through pipelines across the Central Valley to the Coast Range Tunnel. (*Id*.)

After crossing the Sunol Valley, the water then passes through the Irvington Tunnel and into the City's Bay Area distribution system. (*Id*.)

Lake Eleanor (located within Yosemite National Park) and Lake Lloyd (located outside the Park in the Stanislaus National Forest) are linked by a diversion tunnel and are generally operated in tandem. (AA22.) Water from these two reservoirs generally produces hydropower at the Holm Powerhouse, before flowing down the Tuolumne River and into the Don Pedro Reservoir. (AA22-23.) Water from Lake Lloyd and Lake Eleanor also can be diverted through the Lower Cherry Aqueduct and into the Mountain Tunnel and blended with flows from the Hetch Hetchy Reservoir for the system's municipal water supply. (AA23.)

In addition to the three reservoirs in the upper Tuolumne River watershed, the City maintains five reservoirs closer to the Bay area, including Pilarcitos, San Andreas, San Antonio, Crystal Springs, and Calaveras Reservoirs. (AA23.) The Calaveras Dam is currently being rebuilt to restore the Calaveras Reservoir's storage capacity to 96,850 acre-feet. (*Id*.) When Calaveras is completed, these five dams and reservoirs will be able to store up to 239,000 acre-feet of water. (*Id*.) A map depicting the main components of the City's regional water system is included in Paragraph 31 of the Complaint. (*Id*.)

///

///

///

B. Legal Background.

1. The Raker Act.

Congress, in enacting the Raker Act, did not order the City to construct O'Shaughnessy Dam and the Hetch Hetchy Reservoir. The Act created a permissive grant of a right-of-way, which San Francisco, as the grantee, could choose to accept or not: "We are making a grant of rights in the public lands to the city of San Francisco. . . and San Francisco can take the grant with all those conditions or it can let it alone." (*United States v. San Francisco* (1940) 310 U.S. 16, 29 n.21 (citing 51 Cong. Rec., Part 1, p. 69).) Indeed, the Act gave the City six months after the approval of the Act to accept the terms and conditions. (Raker Act, § 9(s) (AA99).) Only after the City accepted was it subject to the conditions that accompanied the grant. (63 Cong. Rec. 4106 (RJN23) (Mr. Raker) ("I want to say that [in] section 9, it is made the duty of the city and county of San Francisco to file a written acceptance of this grant. Unless it does file a written acceptance of the grant, the grant is inoperative and the city and county of San Francisco get nothing.").)

Congress sought to allay concerns that the Raker Act would interfere with the State of California's right to regulate the use and delivery of the Tuolumne River's waters. Accordingly, Congress included a very broad savings clause making the grant subject to all California law relating to using, controlling and distributing water. Critically, Section 11 of the Act provides:

> That this act is a grant upon certain express conditions specifically set forth herein, and ***nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used*** in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with the laws of said State.

(Raker Act, § 11 (emphasis added) (AA99-100.)

In addition to conditioning the City's right of way grant on complying with all applicable California water rights laws and the City's acceptance of the grant, the Raker Act also established other conditions with which San Francisco was required to comply in order to utilize the right of way. For example, once the City accepted the grant, Section 9 of the grant required that, "[W]hen the said grantee begins the development of the Hetch Hetchy Reservoir site, it shall undertake and vigorously prosecute to completion a dam at least two hundred feet high, with a foundation capable of supporting said dam when built to its greatest economic and safe height." (Raker Act, § 9(k) (AA97).) Congress made efforts to diminish the visual impacts of the various dams and reservoirs included in the right-of way grant on the surrounding park and forest service lands, requiring that the exterior of all reservoirs and dams be designed and finished "so as to harmonize with the surrounding landscape and its use as a park." (*Id*., § 4 (AA93).) Subject to the approval of the Secretary of Interior or, in the case of the relevant national forest lands, the Secretary of Agriculture, the City was required to construct various roads and trails linking the Hetch Hetchy Valley with the other two reservoirs

included in the grant, Lake Eleanor and Cherry Lake. (*Id*., § 9(p) (AA98).) Although not specifying the location or specific design of facilities, Congress did include a condition that the City develop specified amounts of hydroelectric power. (*Id*., § 9(m) (AA97).) Section 9(t) conditions the right-of-way on the City conveying to the United States lands owned by the City within Yosemite Park and adjacent Forest Service lands not necessary to the construction or repair of the various right-of-way components. (*Id*., § 9(t) (AA99).) Other conditions addressed the cutting of timber, the Secretary's approval of plans, designs, and maps, sanitary regulations, and recognition of prior water rights of the Modesto and Turlock Irrigation Districts. (*Id*., § 9 (AA94-99.)

The Raker Act provides that upon the City's acceptance of the grant, it was bound by all of the conditions included throughout the Act: "[T]his grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated." (§ 9 (AA94).) During Congress' deliberations on the proposed Raker Act bill, "the City filed … a brief and argument in support of the Bill. Citing authorities, including this Court's opinions, and legislative precedents, the City submitted to Congress that as grantee it would be bound by and as grantor Congress was empowered to impose 'the conditions set forth in the Hetch-Hetchy bill.'" (*United States v. San Francisco*, 310 U.S. at 29.) "After passage of the Bill the City accepted the grant by formal ordinance, assented to all the conditions contained in the grant, constructed the

required power and water facilities, and up to date has utilized the rights, privileges and benefits granted by Congress." (*Id*.)

Congress specifically expressed its intent that the Section 11 savings clause of the Raker Act supersede the Act's other conditions in the event of a conflict. For example, Congressman Mondell, pointing out potential conflicts between Section 11's incorporation of California water rights laws and conditions set forth in Section 9 stated unequivocally that "I think the provision the gentleman just read [Section 11] will eventually be held to control, …. (63 Cong. Rec. 3917 (RJN11).) Congressman Taylor, an author of Section 11, concurred, explaining that Section 11 serves "to modify and control the entire bill, and if it does, does it not preserve the constitutional rights of the Western States?" (*Id*.) Congressman Cooper left no doubt of Congress intent in making Section 11 paramount over other conditions, stating:

> The gentleman asserts that there is a conflict between some previous sections of the bill and the laws of the State of California, but this last section of the bill, which the gentleman from Colorado claims he is proud of, provides that ***if there be a conflict with the laws of the State of California the laws of the State will control***. Now, what opportunity is there for discussion?

(*Id*. (emphasis added).)

2. California Constitution, Article X, Section 2.

In 1928, California voters by state initiative enacted article X, section 2 of the California Constitution. This provision requires that the manner and location of

diverting water out of streams and rivers must always be reasonable. Article X, section 2 provides that:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use ***or unreasonable method of diversion of water***.

(Cal. Const., art. X, § 2 (emphasis added). *See also* Water Code § 100.) Section 2 also states that "because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use ***to the fullest extent of which they are capable***, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that ***the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare***. (*Id*. (emphasis added).) "When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield." (*Peabody v. Vallejo*, 2 Cal.2d at 368.) Article X, section 2's limitations and prohibitions "apply to every water right and every method of diversion." (*Id*., 2 Cal.2d at 367; *See also Light*, 226 Cal.App.4th at 1486 (explaining that article X, section 2 and other related statutes grant the State Water Resources Control Board ("State Board") "the separate and additional power to take whatever steps are necessary to prevent unreasonable use or methods of diversion").) Article X, section 2's "mandates are plain, they are positive, and admit of no exception. They apply to the use of all

water, under whatever right the use may be enjoyed." (*Id*.) "All uses of water, including public trust uses, must … conform to the standard of reasonable use." (*Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 443, citing *Peabody v. Vallejo*, 2 Cal.2d at 367; *see also People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 749-750.)

"[T]he term 'method of diversion' refers not only to whether water is directly diverted or put into storage, but also the point from which it is diverted, the rate at which the diversion occurs, and other features of the diversion facility or its operation." (*In the Matter of Petition for Reconsideration of Division of Water Rights Refusal to Accept Protest by United States Marine Corps Base, Camp Pendleton Against City Of Santa Cruz,* Order No. WR 2009-0061, State of California, State Water Resources Control Board, 2009 Cal. ENV LEXIS 176, pp. 28-29 (December 1, 2009).)

Whether a particular method of diversion used to procure a specific water right is reasonable evolves over time based on the particular circumstances. "What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes." (*Environmental Defense Fund, Inc. v. East Bay Municipal Utility District* (1980) 26 Cal.3d 183, 194 ("*EBMUD*") (case involved an unreasonable method of diversion based on its location).) "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may,

because of changed conditions, become a waste of water at a later time." (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567. *See also People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal. App. 3d 743, 750.) "What constitutes an unreasonable use of water changes with circumstances, including the passage of time. Thus, the extent of a particular user's vested right to use water similarly may change." (*Light,* 226 Cal.App.4th at 1488 (citation omitted).) What is reasonable "is determined at the time of use."

"The use of all water is subject to the regulation and control of the state, in a manner to be prescribed by law." (Cal. Const. art. X, § 5.) The state constitution declares further that municipal corporations may establish, purchase and operate public works to furnish their inhabitants with water. (Cal. Const. art. XI, § 9(a).) "We read these constitutional provisions to embody the principle that, within constraints imposed by law, municipalities are empowered to furnish themselves and their inhabitants with water, consistent with beneficial and reasonable use and the prohibition against waste. We evaluate the relevant statutory provisions in light of this principle." (*Kern-Tulare Water Dist. v. Bakersfield* (9th Cir. 1987) 828 F.2d 514, 519.)

C. Procedural Background.

On April 21, 2015, Restore Hetch Hetchy filed this action against the City and its Public Utilities Commission in the Tuolumne County Superior Court. (AA11, AA15-16.) The petition names as real parties in interest the Modesto Irrigation District ("MID"), the Turlock Irrigation District ("TID"), and the Bay

Area Water Supply and Conservation Agency ("BAWSCA"). (AA16-17.) The petition alleges that Respondents' operation of the O'Shaughnessy Dam and Hetch Hetchy Reservoir eliminates or severely impairs a long list of beneficial uses within Yosemite National Park that, in the absence of the reservoir, would rival in quality the scenic and recreational uses currently revered in Yosemite Valley, is an unreasonable method of diversion that violates article X, section 2 of the California Constitution. (AA29-31.)

As alleged in the petition, it is not reasonable for San Francisco to monopolize a majestic valley within a world-famous national park as a reservoir. San Francisco's municipal water supply and electrical power production uses can be achieved with feasible engineering design changes, downstream storage, alternative water supplies, and/or yet-to-be applied water conservation measures that obviate the need for the Hetch Hetchy Reservoir. (*See* AA24-26, AA29-31.) Were the Tuolumne River's Hetch Hetchy Valley uses available today, millions of people from throughout California, the United States and the world would converge on Hetch Hetchy Valley to enjoy its majestic scenery and partake of its extraordinary recreational and aesthetic opportunities, which are similar to those of its popular sister valley. (AA29-31.)

The petition alleges that the value of recreational benefits to visitors and local businesses within a restored Hetch Hetchy Valley over a 50-year period are estimated to be as high as 8.7 billion dollars. (AA21.) Likewise, the existence value of a restored valley would be extremely large. (AA22.) Existence value is a

measure of people's willingness to pay that captures individuals' strong desires to be able to visit a restored Hetch Hetchy Valley in the future, to realize their ecological ethics, their altruism toward others and the environment, and the desire to benefit future generations. (*Id*.) The petition alleges that, consistent with peer-reviewed studies of natural resources and dam removal projects most similar in nature to restoring Hetch Hetchy Valley, the existence value of a restored Hetch Hetchy Valley just for the first twenty years of restoration is estimated to be between $44 billion and $113 billion dollars. (*Id*.) By contrast, the cost of making the system improvements necessary to retain all water supply and electric power production benefits is approximately $2 billion, measured over 50 years. (*See* AA24-26.)

The petition alleges that, viewed with current sensibilities in mind and the ever-growing popularity of the Nation's national and state park systems, any such decision to drown Hetch Hetchy Valley today would be unimaginable and patently unreasonable. The petition seeks declaratory relief and a writ of mandate ordering Respondents to prepare an engineering and financing plan for altering their method of diversion within the Hetch Hetchy Valley that results in eventual removal of the Hetch Hetchy Reservoir, restoration of the natural flow levels of the Tuolumne River through the Hetch Hetchy Valley, and system improvements that will result in no loss of water supply reliability or electric power production. (AA31.)

On June 11, 2015, the City filed a motion to change the venue of the case from Tuolumne County to San Francisco. (*See* AA361.) On October 27, 2015, the Court denied the City's motion. (*Id*.)

On December 21, 2015, the City and BAWSCA filed a demurrer to the action. (AA34, AA361.) MID and TID also joined in the demurrer. (AA206.) The demurrer was based on three issues: (1) the federal Raker Act preempts application of article X, section. 2 of the California Constitution; (2) Petitioner's case is time-barred by Code of Civil Procedure ("CCP") § 338's three-year statute of limitations; and (3) Petitioner has failed to state facts sufficient to constitute a cause of action under article X, section 2.[3] On January 29, 2016, trial court held a hearing on the demurrer. (*See* Certified Transcript (Jan. 29, 2016).)

On April 28, 2016, the trial court granted the demurrer on two of the grounds raised by City. The trial court held that article X, section 2 of the California Constitution was preempted by the Raker Act because application of article X, section 2, as interpreted by Petitioner, would conflict with various provisions of the Raker Act. (AA333-341.) The Court's analysis relied on cases interpreting the federal Reclamation Act of 1902. (AA337-340.) The Court also held that preemption was appropriate because the Raker Act's state law savings

[3] The trial court declined to reach the merits of the City's demurrer argument that Petitioner failed to allege facts sufficient to state a claim. (AA347.) The trial court also declined to rule on any of the requests for judicial notice submitted by the parties. (*Id*.) Lastly, the trial court denied as moot the City's motion to strike which accompanied its demurrer. (AA348.) None of these rulings are pursued by Petitioner in this appeal.

clause only applied to state law enacted prior to 1913 and the perceived "inherent unfairness of retroactive application of article X, section 2 to defeat the benefit of the [City and federal government's] bargain." (AA341.)

In regard to the City's statute of limitations arguments, the trial court rejected Defendants' argument that California Code of Civil Procedure ("CCP") section 338 barred suit because the three-year statute of limitations only applied to liability created by statute. (AA342-343.) The Court also rejected Petitioner's contention that article X, section 2's evolving standard of reasonableness precludes application of any statute of limitations. (AA343-345.) Instead, the trial court held that Petitioner's suit was time barred under the four-year statute of limitations established in CCP §343. (AA342-345.) The trial court held that Petitioner's cause of action accrued in 1928, when the constitutional provision was enacted. (AA344.)

III. LEGAL STANDARDS

A. Congress' Intent to Preempt State Law Must Be Unambiguous.

In assessing a challenge under the federal Constitution's Supremacy Clause, article VI, clause 2, this Court must determine "whether Congress intended to prohibit the states from regulating in such a manner." (*Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, (9th Cir. 1981) 659 F.2d 903, 919, *rehearing denied* (1982), *aff'd* 461 U.S. 190 (1983).) Courts start this assessment with a presumption "that the states' police powers were not to be superseded 'unless that was the clear and manifest purpose

of Congress.'" (*Id.* (*citing Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230); *People v. Rinehart* (2016) 1 Cal.5th 652, 661-662 ("Following the United States Supreme Court's lead, we traditionally have applied a strong presumption against preemption in areas where the state has a firmly established regulatory role"); *Quesada v. Herb Thyme Farms* (2015) 62 Cal.4th 298, 312-15.) "The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption." (*Bronco Wine Co. v. Jolly* (2005) 33 Cal.4th 943, 956.)

The federal government has long recognized the states' predominant role in determining water rights, including not only which beneficial uses should be allowed but also the location and methods of water diversion. A review of federal legislation pertaining to water resources reveals a "consistent thread of purposeful and continued deference to state water law by Congress." (*California v. United States* (1978) 438 U.S. 645, 653.) There is a "well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water." (*Id*. (citing 35 Cong. Rec. 6678 (1902). *See Pacific Legal Foundation*, 659 F.2d at 919; *Bronco Wine Co.*, 33 Cal.4th at 956.)

In ascertaining whether preemption applies, "[c]ongressional intent is the touchstone." (*Rinehart*, 1 Cal.5th at 661; *Quesada*, 62 Cal.4th at 318.) "Congressional intent to preempt must . . . be unambiguous." (*Pac. Legal Found.*, 659 F.2d at 919.) Congressional intent to preempt state law can be explicitly stated

by Congress. (*Bronco Wine*, 33 Cal.4th at 955). Congress unambiguous intent may also be implied "(i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law [citations omitted]; (ii) when compliance with both federal and state regulations is an impossibility [citations omitted]; or (iii) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id*.)

The latter two categories of implied preemption are generally referred to as conflict preemption. When considering a conflict preemption claim, the court "may not seek out conflicts between state and federal regulation where none clearly exists." (*United States v. Cal. State Water Res. Control Bd.* (9th Cir. 1982) 694 F.2d 1171, 1176 (citing *Joseph E. Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 45.)) Moreover, the presumption still "operates in favor of the validity of the state law." (*Pacific Legal*, 659 F.2d at 919.) Conflict preemption only acts to invalidate state law "to the extent that it actually conflicts with federal law." (*Id.*)

Obstacle preemption "can … lead to the overzealous displacement of state law to a degree never contemplated by Congress." (*Rinehart*, 1 Cal.5th at 661.) "Accordingly, the threshold for establishing obstacle preemption is demanding: 'It requires proof Congress had particular purposes and objectives in mind, a demonstration that leaving state law in place would compromise those objectives, and reason to discount the possibility the Congress that enacted the legislation was

aware of the background tapestry of state law and content to let that law remain as it was.'" (*Id*., quoting *Quesada*, 62 Cal.4th at 312.)[4]

B. Standard of Review.

This Court reviews *de novo* the trial court's sustaining of a demurrer. (*People ex rel. Harris v. Pac Anchor Transportation, Inc*. (2014) 59 Cal.4th 772, 777.) "All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law … ." (*Id*.) A question of federal preemption raises a pure question of law that is also subject to de novo review. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089 n. 10.). Consideration of a statute of limitations defense on undisputed facts also is a purely legal question. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.) "'A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred." (*Committee for Green Foothills v. Santa Clara*

[4] At the trial court level, the City attempted to rely on Congress' Property Clause authority in its preemption analysis. Although the federal Constitution's property clause vests Congress with the power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," "the property clause has no prohibitive effect when dormant." (*Rinehart*, 1 Cal.5th at 660; U.S. Const., art. IV, § 3, cl. 2.) Instead, "to displace the application of state law on federal land, Congress must act affirmatively." (*Rinehart*, 1 Cal.5th at 660, quoting *Kleppe v. New Mexico* (1976) 426 U.S. 529, 543 ["Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory. …"].) "A state 'is free to enforce its criminal and civil laws' on federal land, unless those laws conflict with federal legislation or regulation; in the event of a conflict, of course, 'state laws must recede.'" (*Rinehart*, 1 Cal.5th at 660, quoting *Kleppe*, 426 U.S. at 543.) "In the absence of any such conflict, state and federal laws governing the same land routinely coexist." (*Rinehart*, 1 Cal.5th at 660.) "Dual sovereignty is the rule, federal exclusivity the exception." (*Id*.)

County Bd. of Supervisors (2010) 48 Cal.4th 32, 42.) "In order for the bar … to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred. (*Id*.)

IV. ARGUMENT

A. The Raker Act Does Not Preempt Any California Law Relating to the Control, Appropriation, Use, or Distribution of Water.

Rather than reflect any intent by Congress to preempt any California laws relating to the control, appropriation, use, or distribution of water, the Raker Act expressly preserves California's authority over where and how water is to be used and diverted. Congress, in enacting the Raker Act, expressly and without exception ensured that state law regarding the diversion of water was the operative law applicable to the O'Shaughnessy Dam. The City and trial court would now write that savings clause out of the Raker Act.

Rather than a federal regulatory scheme, the Raker Act is a right of way grant to a local municipality whose water rights are subject to and conditioned upon California's laws – just like every other municipality and local agency in the State holding a right to divert and use water.

1. The Plain Text of the Raker Act Unambiguously Provides That San Francisco's Right-of-Way is Subject to California Water Law.

To interpret the Raker Act, the Court must first look to the "plain language" of the statute, which is the "one, cardinal canon before all others." (*Connecticut*

Nat'l Bank v. Germain (1992) 503 U.S. 249, 253.) In adopting the Raker Act, Congress expressly stated that nothing in the right-of-way grant affected or intended in any way to interfere with California law relating to the appropriation and distribution of water. Section 11 of the Raker Act provides:

> That this act is a grant upon certain express conditions specifically set forth herein, and ***nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water*** used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with the laws of said State.

(Raker Act, § 11 (emphasis added).) Section 11 is both a savings clause and establishes an important condition of the right-of-way grant. Section 11 expressly and broadly preserves California's water appropriation and distribution laws for all of the features for which Congress granted San Francisco a right-of-way, including the O'Shaughnessy Dam and Hetch Hetchy Reservoir. In addition, it requires that the Secretary's actions conform with the water appropriation and distribution laws of California. Thus, in the Raker Act, rather than expressing any intent that California water rights laws are preempted, Congress specifically provides that both San Francisco and the Secretary of Interior must comply with California's water laws.

The language of Section 11 is so explicit and so broad in preserving California's authority over all decisions controlling, appropriating, using or distributing water – including San Francisco's water rights and diversions from the

Tuolumne River –the trial court's decision not to give effect to that language based on conflict preemption frustrates the plain meaning of Section 11. Although it is true that courts "decline[] to give broad effect to saving clauses where doing so would upset [a] careful regulatory scheme established by federal law," no such regulatory scheme is at stake here, given the Raker Act's conditional right-of-way grant. (*See Geier v. Am. Honda Motor Co.* (2000) 529 U.S. 861, 870.) Unlike, for example, the savings clause, express preemption clause, and broad federal statutory scheme regulating auto safety at issue in *Geier*, the Raker Act contains no express or implied preemption of any California water law.

2. The Congressional Debates on the Raker Act Confirm That Section 11 Controls Over Any Conflicting Conditions Elsewhere in the Act.

Congress' floor debates on the Raker Act consistently emphasize Congress' intent not to interfere with California water law and to make California water rights laws paramount over all other conditions in the right-of-way grant. In particular, when Congressman Mondell expressed concern about preserving the rights of California respecting its authority over water, Congressman Cooper cited and read Section 11. Nevertheless, Mr. Mondell noted:

> It is a question whether the courts will ultimately hold that the provision the gentleman has read is the controlling provision of legislation or whether the pages that precede it and are in direct contradiction of it prevail and control. The two of them cannot stand together. One may say "I do" and "I do not" in the same breath, but I either do or I do not. The provision in regard to the distribution of the water is in direct conflict with the provision the gentleman just read. ***I think the provision the gentleman just read will eventually be held to control***, in which event the gilt on the brick Turlock and

> Modesto is being handed is so thin that a breath of air will brush it off.

(63 Cong. Rec. 3917 (RJN11) (emphasis added).) Mr. Taylor of Colorado was the representative responsible for the language of Section 11. Mr. Taylor responded to Mr. Mondell's concern by emphasizing that Section 11 serves "to modify and control the entire bill:"

> When it is put in as the last section in the bill and winds it up by saying that the act is granted on certain conditions, does not the gentleman think that that will be held by the courts to modify and control the entire bill, and if it does, does it not preserve the constitutional rights of the Western States?

(*Id*.) Congressman Cooper further drove this point home, stating:

> The gentleman asserts that there is a conflict between some previous sections of the bill and the laws of the State of California, but this last section of the bill, which the gentleman from Colorado claims he is proud of, provides that ***if there be a conflict with the laws of the State of California the laws of the State will control***. Now, what opportunity is there for discussion?

(*Id*. (emphasis added). *See also* 63 Cong. Rec. 55 (RJN26) (Mr. Smith) ("this provision says that all of this shall be done in absolute conformity with the laws of the State, and that the State law shall apply to everything the bill contains").) The history could not be more explicit. Section 11 is itself a fundamental condition of the Raker Act that ensures Congress' intent that California water rights laws will prevail to the extent they conflict with any of the conditions established for the right-of-way grant.

Other legislators' statements are consistent with these express statements that Section 11 controls over the remainder of the Raker Act's conditions. Rep.

Raker, the namesake and sponsor of the bill, stated "[t]he bill is not drafted nor designed nor intended to usurp the powers of the State of California in the matter of control of the distribution of water." (63 Cong. Rec. 3900 (RJN8).) He later added, "there is no attempt by Congress to control the waters which belong to the State…. [T]he laws of the State of California shall control absolutely the question of water rights and the interests of those that it may effect…." (*Id.* at 3905 (RJN10).)

This intent not to interfere with California water law was echoed throughout the floor debates by numerous Congressmen.[5] Rep. Kent stated, that the inclusion of the savings clause "simply means as a ***condition precedent*** to this grant the Federal Government wants to see the laws of California are obeyed." (*Id.* at 3917 (RJN11) (emphasis added).) Rep. French also referred to compliance with state water law as "condition precedent" to exercise of the right. (*Id.* at 3967 (RJN15).) Most on point, Sen. Works explicitly stated that California would have

[5] *See e.g.* 63 Cong. Rec. 3964 (RJN12) (statement of Rep. French) ("It is specifically set forth that nothing in the act shall interfere with the rights enjoyed by the citizens of the State under the laws of California"); 63 Cong. Record 4096 (RJN20) (statement of Rep. Ferris) ("I am sure about that as far as that is concerned. This bill leaves the regulation with the State"); 63 Cong. Rec. 185 (RJN29) (statement of Sen. Clark) ("[A]ll I want to do is conform to the laws of California in the use of this water."); 63 Cong. Rec. 3967 (RJN15) (statement of Rep. French) (the savings clause includes language "that could not be said to have the appearance even of adjusting water rights" and "requires that administration of the act, so far as it has to do with the water that may be used, shall proceed in conformity with the laws of that State of California.")

the right to "determine that San Francisco ***should get her water somewhere else***" even after the right-of-way was granted:

> I suggest to the Senator from Wyoming that no Member of this body should, be called, upon to commit himself upon the question as to whether this water should come out of the Hetch Hetchy or should come from some other place. The Government can grant this right of way, but even after that the authorities of California might determine that San Francisco should get her water somewhere else. That is a matter that ought to be left to the authorities of California under the laws of that State, and we should not meddle with it in any way whatever.

(63 Cong. Rec. 185 (RJN29) (emphasis added).) Likewise, Senator Clark expressly pointed out the Senate's undisputed understanding of section 11: "Mr. President, we are told that, if there is an evil in the bill, that [Section 11] will cure the evil; in other words, that, having made a condition in the bill, ***this provision will waive the condition*.**" (*Id*. (emphasis added)) These statements directly contradict the trial courts' ruling that implementation of California water law would frustrate congressional intent to the extent that state law may interfere with the operation of the dam.[6] Certainly, these consistent statements emphasizing the

[6] In fact, the legislative history demonstrates that, at the time, it was the wide-spread belief that Congress lacked the authority to adjust water rights, which were the sole jurisdiction of the state. It was "conceded by everyone that the water and water rights belong to the State." (63 Cong. Rec. 4096 (RJN20) (statement of Rep. Raker); 63 Cong. Rec. 59 (RJN59) (statement of Sen. Works) ("I do not think it will be seriously contended – it has not been so far – that the National Government has any right to interfere with the distribution of water. That is a right that belongs exclusively to the States"); *Id*. at 3968 (RJN16) (statement of Rep. French) ("I believe, of most, if not all, of the members of the committee that the Congress cannot adjudicate water rights within the States"). If Congress was not even operating under the impression that it *could* adjust water rights, it is patently

breadth of Section 11 preclude any discernment of an unambiguous intent of Congress to preempt by implication California's water laws.

The trial court's ruling tacks onto Congress' already generous right-of-way grant a wholesale exemption of the City from the application of State water law to its main diversion of Tuolumne River waters. However, there can be no dispute that the City is subject to the California Constitution and water rights laws. "Cities are subject to the power of the Water Resources Control Board to take action necessary to prevent such unreasonable use or waste[,]" unreasonable method of use, or unreasonable method of diversion of water. (*Kern-Tulare Water Dist.*, 828 F.2d at 519; Water Code §275.) "The limitations and prohibitions of the constitutional amendment [Cal. Const., article X, section 2] now apply to every water right and every method of diversion." (*Peabody v. Vallejo*, 2 Cal.2d at 367.) No water right in the State extends to any unreasonable method of diversion of water. (*Id.*) Rather than suggest that San Francisco's operation of the O'Shaughnessy Dam was exempt from any state law's regulating methods of diversion, Congress in enacting the Raker Act intended the opposite, reinforcing the continued applicability of all California laws "relating to the control, appropriation, use, or distribution of water …." (Raker Act, § 11; *see supra*, pp. 31-37.)

---

unreasonable to interpret the Act to express a manifest intent to supersede those rights.

3. Although Conflict Preemption Still Applies Under the Reclamation Act and its Federal Program, No Such Conflicts Exist Pursuant to the Clear Language and Intent of the Raker Act's Savings Clause.

The lower court primarily relied upon a series of cases decided under the federal Reclamation Act of 1902 to interpret the Raker Act's savings clause. Because the language of Section 11 of the Raker Act is the same as most of the language employed in the Reclamation Act's savings clause, the trial court held cases interpreting the Reclamation Act's savings clause were equally applicable to the Raker Act, citing generally to *Musaelian v. Adams* (2009) 45 Cal.4th 512, 517. (AA337.) However, as the trial court noted, *Musaelian* holds that, "***unless there is evidence the Legislature had a contrary intent***, logic and consistency suggest the same language in analogous statutes should be construed the same way." (45 Cal.4th at 517 (emphasis added).)

The trial court court erred by relying on analyses and Congressional intent inherent to the Reclamation Act to discern Congress' intent under the Raker Act. Congress plainly had different legislative intents in enacting the Reclamation Act and the Raker Act that necessarily affects the breadth of application of their respective savings clauses. The Raker Act involves a single right of way grant as compared to the comprehensive federal dam-building and irrigation program initiated by the Reclamation Act. Likewise, the legislative history for the Raker Act is entirely distinct from the Congressional debates on the Reclamation Act.

Congress' intent in enacting Section 11 of the Raker Act cannot be gleaned from the Reclamation Act's history or debates.

The following review of the key cases demonstrates how the broad savings clause language used in both the Reclamation Act and the Raker Act must be given its full meaning in the context of the Raker Act. Unlike the Reclamation Act, that broad savings clause in the Raker Act is unconstrained either by the federal nature of a comprehensive federal program or any Congressional statements wavering on Congress' intent to make that law paramount over any conflicts with other conditions in the Raker Act.

The Reclamation Act established a massive program for the federal construction and operation of dams, reservoirs and canals in the American West for purposes of reclaiming arid lands. (*California v. United States*, 438 U.S. at 650.) Unlike the Raker Act, the Reclamation Act involved a broad federal interest to reclaim arid lands. All of the dams and other features were to be built and operated by federal agencies. Despite the overwhelming federal control, the Reclamation Act nevertheless included a strong savings clause preserving the states' authority over the control, appropriation, use, or distribution of water. Section 8 of the Reclamation Act provides:

> [Nothing] in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal

> Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

(438 U.S. at 650-51; 43 U.S.C. § 383). As the Supreme Court found, this savings provision made it "abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *Id*. at 675.

The U.S. Supreme Court has focused on the meaning of Section 8 of the Reclamation Act and determined that Congress intended to protect all state water laws from federal preemption except for state imposed conditions that are inconsistent with congressional provisions authorizing a federal reclamation project. (*California v. United States*, 438 U.S. at 674.) Thus, in *Ivanhoe v. Mccracken* (1958) 357 U.S. 275, 293-294, the Supreme Court overturned a California Supreme Court ruling that, pursuant to the Reclamation Act's savings clause, California's water laws that precluded an acreage limit on lands to be supplied water from the project at issue trumped Section 5 of the Reclamation Act, which prohibited the federal projects from providing water to land ownerships of greater than 160-acre in size. (*See The Ivanhoe Irrigation District v. All Parties and Person* (1957) 47 Cal.2d 597, 627-628, *rev'd Ivanhoe v. McCracken*, 357 U.S. 275, (1958).) The California Supreme Court had ruled that California courts need not certify the Bureau of Reclamation contracts including that provision. As the U.S. Supreme Court explained the California Supreme Court's ruling:

> the Supreme Court of California first concluded that the provisions of § 8 of the 1902 Act as to the application of state law were absolute, and controlled all provisions of the Act and other reclamation statutes having to do with "the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . . ."

(*Ivanhoe*, 357 U.S. at 291.) In the specific context of the Reclamation Act Section 5's limitation on providing water to 160-acre parcels, the Supreme Court overturned the California Supreme Court. (*Id*. ("We believe this erroneous insofar as the substantive provisions of § 5 of the 1902 Act are concerned").)[7] The Court's rationale focused on the federal nature of the reclamation program and repeated Congressional actions related to the Reclamation Act confirming the national policy of limiting water from federal reclamation projects to 160-acre tracts. (*Id*. at 291-294.) None of those rationales apply at all to the Raker Act.

In *Fresno v. California* (1963) 372 U.S. 627, 629-630, the petitioner argued "that § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the priority of domestic over irrigation uses." The Supreme Court disagreed that the referenced state laws granted the claimed preferences. (372 U.S. at 630.) The Court thus noted in *dictum* that "§ 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others." (*Id*.) Thus, in no

[7] *See also id*. ("Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5.")

way does *Fresno* stand for the proposition that Section 8 does not otherwise require full compliance with all California water laws when the Secretary of the Interior is implementing the Reclamation Act. Because that decision made no preemption ruling regarding Section 8 of the Reclamation Act, it certainly provides no meaningful preemption analysis of the Raker Act.

Lastly, and most importantly, in *California v. United States*, the Supreme Court addressed the federal Bureau of Reclamation's challenge to California's authority, through the State Water Resources Control Board, to place conditions on the Bureau as part of the permit appropriating water for the federal New Melones Dam project, arguing that California was preempted from conditioning or denying appropriations of water for the Project. (438 U.S. at 647.) The Supreme Court disavowed *dictum* in *Fresno*, clarifying that Reclamation Act "Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights." (*Id.* at 674.) The Court discussed the breadth of Section 8's savings clause language. "That section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.'" (*Id.* at 674-75.) The Court rejected the United States' contention that "§ 8 merely require the Secretary of the Interior to file a notice with the State of his intent to appropriate but to thereafter ignore the substantive provisions of state law." (*Id.* at 675.) "The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the

substance, as well as the form, of state water law. The Government's interpretation would trivialize the broad language and purpose of § 8." (*Id*.)

Nevertheless, in the context of the Reclamation Act's federal program and legislative history, the Court ruled that a "correct reading of § 8 of the Reclamation Act of 1902, [does not] prevent [the State] from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question." (438 U.S. at 674. *See id.* at 668, n. 21 ("In previous cases interpreting § 8 of the 1902 Reclamation Act … this Court has held that state water law does not control in the distribution of reclamation water *if* inconsistent with other congressional directives to the Secretary"); *see also EBMUD*, 26 Cal.3d at 192.) This caveat in the otherwise plain language of Section 8 was based on the Court's review of statements, including dictum, of prior Supreme Court decisions and the Court's extensive analysis of the legislative history unique to the Reclamation Act. (*California v. United States,* 438 U.S. at 665-674.) The caveat also was informed by the entirely federal nature of the dam project requested by Congress. (*Id*. at 651 n. 6 ("Congress specifically directed that the Dam be constructed and operated 'pursuant to the Federal reclamation laws,' …, the principal one of which is the Reclamation Act of 1902").)[8] As the Supreme Court understood, "[t]he projects

[8] Indeed, the statute authorizing the New Melones Dam at issue in *California v. United States* only incorporated the Reclamation Act § 8 savings clause "upon completion of construction of the dam and powerplant…." *United States v.*

would be built on federal land and the actual construction and operation of the projects would be in the hands of the Secretary of the Interior." (*Id.* at 664.) In the context of federal authorization for a federal agency to construct and operate a federal dam as part of a federal reclamation program, Congress' intent required the Court to recognize that, despite Section 8's broad savings provision, a direct conflict between a state law requirement and a Reclamation Act directive tipped the federal supremacy scale in favor of the Reclamation Act directive.

Because of the specific context and legislative history of the Reclamation Act, the Supreme Court's ruling that specific Reclamation Act directives prevail over conflicting state water rights directives does not apply to the Raker Act. The Supreme Court understood that the Reclamation Act did not apply to other statutes with their own unique legislative history. Thus, the Court felt no need to substantively address dictum reiterated in its prior decision in *Arizona v. California* (1963) 373 U.S. 546 (1963) involving a multistate reclamation project: "While the Court [*Arizona v. California*] in rejecting the States' claim repeated the language from *Ivanhoe* and *City of Fresno* as to the scope of § 8, there was no need for it to reaffirm such language except as it related to the singular legislative history of the Boulder Canyon Project Act." (*California v. United States*, 438 U.S. at 674.) The Raker Act's legislative history is likewise unique to that statute and is

---

California, State Water Resources Control Bd. (9th Cir. 1982) 694 F.2d 1171, 1176. No such carve out of completion of construction of the O'Shaughnessy Dam was included by Congress in the Raker Act's savings clause. Therefore, the savings clause applies to both construction and operation of the dam.

not properly accounted for by the trial court's wholesale incorporation of interpretations of the Reclamation Act.

Despite its overarching federal involvement, the Reclamation Act's broad savings clause has nevertheless been interpreted narrowly to allow state water law to preclude waters from being diverted through an already completed federal canal. The California Supreme Court has ruled that Section 8 of the Reclamation Act does not preempt the State's authority to determine whether a water diversion through an already completed federal canal was a reasonable method of diversion and could instead be diverted elsewhere downstream. In *EBMUD*, the California Supreme Court revisited a previous ruling involving another Reclamation Act dam in light of *California v. United States*. *EDF* involved the Folsom-South Canal, a key portion of the Bureau of Reclamation's American River facilities. Congressional legislation authorizing the Auburn Dam also authorized the construction of the Canal and other components. (26 Cal.3d at 193.) The Canal was intended to supply water to the Folsom-South service area, an area south of the American River and east of the Sacramento and San Joaquin Rivers, as well as to deliver water to the East Bay Municipal Utility District ("EBMUD"). (*Id*. at 188-89.) The Bureau already had completed constructed of the Canal "to the point of delivery to EBMUD." (*Id*. at 188.) Use of the Canal to deliver water to EBMUD would "render[] the diverted water unavailable to the lower American River." (*Id*.) EDF brought a constitutional challenge under article X, section 2, alleging that the State Water Resources Control Board's decision to allow the

Bureau to divert water through the Canal to EBMUD was an unreasonable method of diversion of American River water. (*Id*. at 191.)

Prior to *California v. United States*, the California Supreme Court had ruled that "the determination of the diversion point comprises a substantial part of the federal project" and hence could not be challenged under State law. (*Id*. at 192.) In light of *California v. United States*, the Court reversed itself. Despite the completed construction of the Canal and the execution of a contract between the Bureau of Reclamation and EBMUD, the Court held that the question of whether the Canal was a reasonable method of diverting water to EBMUD was not preempted and was subject to the State Board's application of article X, section 2 and its implementing regulations. (*Id*. at 188, 193.) To be sure, given the context of the Reclamation Act and the Bureau's operation of the federal facilities at issue, the Court made clear that:

> To the extent the complaints challenge the contract on the ground that construction of the dam and the Folsom-South Canal constitutes a violation of state law, there is federal preemption. Congress has authorized the construction of the dam and the Folsom-South Canal (*43 U.S.C. ßß 616aaa-616fff*) and a holding that the construction of the dam is contrary to state law is contrary to congressional directive.

(*Id*. at 193.). However, under Section 8 of the Reclamation Act and the statute authorizing construction of the Auburn Dam and the Canal, even the physical presence of the completed Canal did not preempt the State's authority to determine whether that was a reasonable method of diversion and that the EBMUD diversion could occur elsewhere downstream. The Court held:

> However, location of the diversion point downstream on the basis of state law would not be inconsistent with congressional directive. *43 United States Code sections 616aaa -616fff* authorizing the Auburn-Folsom-South unit, American River division, provides in *section 616ddd* for the secretary to locate and design the works and facilities giving due consideration to the California Water Plan and consulting with local interests through public hearings. A section requiring the secretary to seek conformity to local wishes does not make state law inapplicable. [¶] Accordingly, to the extent the complaints challenge the location of the diversion point as being violative of California law there is no federal preemption.

(*Id.*) If the location of a reasonable diversion is not preempted in the context of the Reclamation Act and the Supreme Court rulings governing the scope of the preemptive effect of that statute's savings clause, there is no reason either in logic or precedent to conclude that the local, non-federal interests served by the right-of-way granted in the Raker Act and its broad savings clause would restrict the same state authority over San Francisco's point of diversion from the Tuolumne River. This Court should allow the trial court and, as requested by Petitioner, the State Board to determine the reasonableness of that method of diversion in the first instance. (*See id.* at 200 ("The board has not determined whether diversion of the EBMUD water through the Folsom-South Canal rather than diversion at Hood constitutes an unreasonable method of diversion"); AA17-18 (Plaintiff intends to request the trial court refer the merits of its claim to the State Board pursuant to Water Code § 2000).)

///

///

4. The Raker Act's Savings Clause Applies to Subsequently Enacted State Water Laws and Constitutional Provisions.

The trial court's ruling states that the Raker Act's savings clause could not apply to any California laws relating to water rights that were enacted subsequent to the passage of the Raker Act on December 19, 1913. (AA341.) However, nothing in the language of Section 11 suggests Congress intended to preserve only state law as it existed in 1913. The language is purposefully expansive, providing that "nothing herein contained shall be construed as affecting or intending ***to affect or in any way to interfere with the laws of the State of California relating to*** the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, ***in carrying out the provisions of this act, shall proceed in conformity with the laws of said State***." (Raker Act, § 11 (emphasis added) (AA99-100); *see Natural Resources Defense Council ("NRDC") v. Patterson* (E.D. Cal. 1992) 791 F.Supp. 1425, 1432 (addressing Section 8 of the Reclamation Act, "so long as [the state law] has a connection with or reference to the control, appropriation, use or distribution of water used in irrigation, it is incorporated by Section 8 unless it is found to be remote from Section 8's purposes.")

None of the cases addressing the similar, and even older 1902 savings clause included in the Reclamation Act limit it to state laws enacted prior to 1902. On the contrary, the California Supreme Court in *EBMUD* gives the savings clause effect to numerous state laws and regulations applied after 1902, including

article X, section 2 of the California Constitution (26 Cal.3d at 195) and the modern water rights permitting system managed by the State Board (*Id*. at 194-96.) Many of the statutes identified by the California Supreme Court as operative on the federal New Melones Dam and Folsom South Canal were enacted well after 1902. Many of the Water Code sections that were not preempted by the Reclamation Act – for example, Water Code §§ 100, 1260, 1253, 1255 – were enacted in 1943, 40 years after the passage of the Reclamation Act's savings clause. (*See Id.* at 195-96.) Water Code § 1257 was enacted in 1955. (*See* 26 Cal.3d at 197.) The U.S. Supreme Court likewise addressed many of those same provisions enacted many decades after 1902 in holding that section 8 of the Reclamation Act preserved from preemption California water laws that are not inconsistent with a Congressional directive in the Act. (*California v. United States*, 438 U.S. at 653; *see also id*. at 670 ("For almost half a century, this congressionally mandated division between federal and state authority worked smoothly …. [S]tate laws relating to water rights were observed in accordance with the congressional directive contained in § 8 of the Act of 1902.").)

In *NRDC v. Patterson*, the U.S. District Court for the Eastern District of California, noting the breadth of the Reclamation Act savings clause, determined that Fish & Game Code §5937, a California law enacted in 1957, is one of the California laws that is preserved by the 1902 Reclamation Act's savings clause. (791 F.Supp. at 1435; F&G Code §5937.) That case involved the Friant Dam,

which had been built by the Bureau of Reclamation in the 1940s. (*NRDC v. Houston* (9th Cir. 1998) 146 F.3d 1118, 1123.)

Moreover, the trial court's effort to limit section 11 to California laws in existence as of 1913 is illogical because it would lead inexorably to the near-complete erasure of section 11 from the Act. By the trial court's reasoning, as California has amended its water rights laws or replaced them with updated versions, section 11 has steadily lost its effect. Congress did not place the heightened importance it did on section 11 only implicitly to cede to the State the ability to erase that provision. An interpretation inferring that section 11 only applies to State laws in existence as of 1913 also would run afoul of the strong presumption against preemption in the area of water rights and the rule that Congressional intent to preempt be unambiguous. (*See Pac. Legal Found.*, 659 F.2d at 919; *Rinehart*, 1 Cal.5th at 661-662.) The U.S. Supreme Court, California Supreme Court and other courts have routinely applied the Reclamation Act's savings clause to subsequently enacted state laws. Nothing in Section 11 of the Raker Act or its legislative history suggests it was intended to be limited to California law frozen in time as of 1913.[9]

[9] The trial court also held that preemption was improper because of "the inherent unfairness of retroactive application of article X, section 2 to defeat the benefit of the parties' bargain." (AA341.) However, there is no place in a preemption analysis for a court to evaluate or determine the perceived fairness of Congress' chosen language and intent. (*People v. Nguyen* (2014) 222 Cal.App.4th 1168, 1183 n. 3 (courts are not concerned with considerations of legislative policy or wisdom.) The trial court's concerns would be addressed as part of the trial court's

B. Restore Hetch Hetchy's Claim Pursuant to Article X, Section 2 is Not Barred by Any Statute of Limitations.

1. Applying a Statute of Limitations to Article X, Section 2 Would Truncate and Displace That Provision's Continuing Mandate That a Method of Diversion of Water be Reasonable.

Statutes of limitations may not be applied to constitutional provisions where the effect would undermine the purpose of the provision itself. Article X, section 2's prohibition of unreasonable methods of diversion by its very nature is an evolving standard that must take into account present circumstances. Application of a statute of limitations undermines the provision's ongoing mandate of reasonableness, and therefore, may not be applied to bar suits to enjoin ongoing unreasonable methods of diversion.

"Statutes of limitations, like other statutes, must be viewed in light of their objectives. The purpose of the statute of limitations is certainly not to shield a wrongdoer." (*Peterson v. Owens-Corning Fiberglas Corp.* (1996) 48 Cal.App.4th 118, 129 (citation omitted) Instead, "[t]he fundamental purpose of a statute of limitations is to prevent litigants from asserting stale claims once evidence is no longer fresh and witnesses are no longer available." (*Arcadia Development Co. v. City of Morgan Hill* (2008) 169 Cal.App.4th 253, 267 (citing *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114; *Davies v. Krasna* (1975) 14 Cal.3d 502, 512–513.) Courts have applied statutes of limitations to preserve their

---

or, as requested by Restore Hetch Hetchy, the State Board's assessment of evidence of the reasonableness of O'Shaughnessy Dam and the reservoir as a method of diverting the City's water rights in the Tuolumne River.

purpose without unduly encroaching on the rights of litigants. Consequently, courts will not apply a statute of limitations to a constitutional right if the constitutional provision provides to the contrary or where application of the statute of limitations is "so manifestly inequitable as to amount to a denial of justice." (*Miller v. Board of Medical Quality Assurance* (1987) 193 Cal.App.3d 1371, 1377; *Ocean S. R. Co. v. Santa Cruz* (1961) 198 Cal.App.2d 267, 273.) The trial court's application of the CCP § 343's four-year statute of limitations to article X, section 2 violates the aforementioned principles by effectively amending that constitutional provision to remove its continuing mandate that a method of diversion of water be reasonable.[10]

Article X, section 2's requirement that methods of diversion be reasonable does not establish a static standard that is based on a single point in time. Instead, article X, section 2 establishes an evolving standard:

> What constitutes reasonable water use is dependent upon not only the entire circumstances presented but ***varies as the current situation changes***. As this court noted in *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140, 'what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* from statewide considerations of transcendent importance.'" (20 Cal.3d at p. 344.)

(*EBMUD*, 26 Cal.3d at 194 (emphasis added) (case involved an unreasonable method of diversion based on its location).) "What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."

[10] The lower court rejected the City's argument that CCP section 338 was applicable. (AA342-343.) No party has appealed that ruling.

(*Tulare Irrigation Dist.*, 3 Cal.2d at 567. *See also Forni*, 54 Cal.App.3d at 750.) "What constitutes an unreasonable use of water changes with circumstances, including the passage of time." (*Light*, 226 Cal.App.4th at 1488.) What is reasonable "is determined at the time of use." (*Id.*) In the context of Hetch Hetchy, this means that where the construction of the O'Shaughnessy Dam and flooding of Hetch Hetchy Valley may have at one time been reasonable, considering the needs of San Francisco, prior ethos of public lands, etc., Restore Hetch Hetchy's claim alleges that, as of the date of its petition, that the City's continued method of diversion had become unreasonable.

Applying a static statute of limitations to article X, section 2's continually evolving reasonableness standard conflicts with the constitutional provision, by eliminating article X, section 2's prohibition of methods of diversion that have become unreasonable and therefore unlawful over time. "[I]t is well established that [a] statute cannot trump the Constitution." (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 788.) Courts "will not interpret a statute to suspend the operation of the Constitution *sub silentio*." (*California School Bds. Assn. v. Brown* (2007) 192 Cal.App.4th 1507, 1525 n. 21.) In the context of statute of limitations, courts will not apply a statute of limitations where a constitutional provision provides to the contrary or where application of the statute of limitations is "so manifestly inequitable as to amount to a denial of justice." (*Ocean S. R. Co.*, 198 Cal.App.2d at 273.) To stifle the public's right to challenge a method of diversion that has become unreasonable under the California Constitution is

undoubtedly a denial of justice in direct contradiction to the language and purpose of article X, section 2.

In refusing to acknowledge the ongoing nature of article X, section 2's mandate, the trial court mistook Petitioner's position to mean that no constitutional provision could be subject to any statute of limitations. (AA343 ("…none of the cases cited by Petitioner establish the general proposition that a lawsuit brought pursuant a constitutional mandate cannot be subject to a state of limitations…").) Petitioner makes no such argument. Rather, it is article X, section 2's evolving standard of reasonableness that precludes the application of a fixed statute of limitations. (*See Miller*, 193 Cal.App.3d at 1377.) Given that "[w]hat constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes," (*EBMUD,* 26 Cal.3d at 194) article X, section 2 inherently requires that the right of action challenging the reasonableness of a method of diversion be allowed to continue to account for changed circumstances over time.

The trial court actually recognized that "there is evidence that some constitutional standards, like equal protection and cruel and unusual punishment, do evolve." (AA344, n.4.) The trial court, however, attempted to refute these examples of evolving constitutional standards, claiming there was "no authority to suggest that evolving environmental sentiments can form the constitutional basis for requiring the undoing of massive infrastructure built in the past." (*Id.*) This reasoning inappropriately focuses on the relief requested, not the constitutional

provision that forms the basis of the present action. "The statute of limitations to be applied in a particular case is determined by the nature of the right sued upon or the principal purpose of the action, not by the form of the action or the relief requested." (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207.) The nature of the right sued upon here is whether, at the present time, San Francisco's method of diverting its Tuolumne River water rights within Yosemite National Park and the Hetch Hetchy Valley is reasonable based on modern day circumstances. The scale of relief sought may be considered in the question of whether the diversion is reasonable, but has no place in determining whether the constitutional provision continues to govern or whether Petitioner has a right of action on that basis.

Moreover, applying a static statute of limitations to article X, section 2's continually evolving reasonableness standard creates an unworkable standard requiring the court to determine when the claim first accrued. "As a general rule, a statute of limitations accrues when the act occurs which gives rise to the claim, that is, when 'the plaintiff sustains actual and appreciable harm. Any 'manifest and palpable' injury will commence the statutory period.'" (*Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 879 (citations omitted).) In the context of article X, section 2, an injury does not necessarily occur at first diversion (i.e. construction and first use of the O'Shaughnessy Dam), but rather when the diversion becomes unreasonable based on present circumstances. Thus, application of the four-year statute of limitations would impose on the court the

additional arduous task of determining exactly when the method of diversion became unreasonable. Furthermore, it would create a circular standard whereby the Court must adjudicate the merits (*i.e.* whether the diversion is unreasonable – a determination Petitioner intends to request the Court refer to the expertise of the State Water Resources Control Board) – prior to determining whether it even has jurisdiction to adjudicate the issue.

The trial court engaged in no such inquiry. Instead, that court determined that the construction of the O'Shaughnessy Dam constituted the offending act such that Petitioner's cause of action accrued at the time of enactment of article X, section 2 in 1928. (AA344.) This holding fails to take into account that it is not the construction of the O'Shaughnessy Dam that Petitioner challenges, but the ongoing diversion that has become unreasonable in the present day. If the conduct was reasonable at that time, then Petitioner's claim had not yet accrued. To ignore this fact is to create the untenable circumstance whereby a statute of limitations bans a right of action before those rights may even be exercised. (*See Fullerton v. Lamm* (1945) 177 Ore. 655, 684-685.) ("Nothing could be more unreasonable or more certainly violative of constitutional prohibitions than to bar rights of action because of the lapse of time prior to their accrual, when they could not have been exercised").)

///

///

2. A Statute of Limitations Cannot Be Applied to an Action Seeking to Enforce Rights Pertaining to the Public Trust.

Even if this case were not enforcing a constitutional provision with an ongoing mandate of reasonableness, because the nature of the case is to protect an ongoing public interest and to enforce provisions pertaining to the public trust doctrine, the courts will not interpret a statute of limitations to prevent the adjudication of those claims. Under the judicially created doctrine first enunciated in *Hoadley v. San Francisco* (1875) 50 Cal. 265, "the passage of time does not prevent the state from recovering public-use property that the state has no right to alienate." (*Marin Healthcare Dist.* 103 Cal.App.4th at 884 (citing *California Trout v. State Water Res. Control Bd.* (1989) 207 Cal.App.3d 585, 631.)) In *California Trout*, plaintiffs appealed a superior court decision dismissing petitions for writs of mandate against defendant State Board seeking to rescind two licenses issued to the Los Angeles Department of Water to appropriate water from tributaries of Mono Lake via dams. In reversing the denial, the Court of Appeal refused to apply CCP §343's four-year statute of limitations given "the public nature of the rights at issue, and that prospective relief is sought by petitions." (207 Cal.App.3d at 593.) The Court explained:

> '[Notwithstanding] the positive and comprehensive language of [Code of Civil Procedure] sections 343 and 363, if taken literally, there can be no doubt that they cannot apply to all special proceedings of a civil nature. . . . from the very nature of [certain] proceedings it is obvious that [they could not] be subject to such limitation.' (*Estate of Hume* (1918) 179 Cal. 338, 342-343. . .) The proceeding here is of such a nature that it is outside the ambit of the generic statutes of limitation which the Water Board proffers.

(207 Cal.App.3d at 628.) Because Fish & Game Code §5946 "pertains to a public trust interest[,] no private right in derogation of that rule can be founded upon the running of a statute of limitations…." (*Id*. at 629.) "One may not oust the state from [a public trust] interest by operation of a statute of limitations." (*Id*. at 630.) "The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights.'" (*Id*. (quoting *People v. Kerber* (1980) 152 Cal. 731, 734).)

The present action is analogous to *California Trout.* Article X, section 2, like Fish & Game Code § 5946, pertains to the public trust and represents a critical public right. In this case, the lost scenic views and wildlife habitat resulting from the flooding of Hetch Hetchy Valley constitute compromised public trust interests. (*See Nat'l Audubon Soc'y*, 33 Cal.3d at 435; *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1361. Also as in *California Trout*, the present instance involves an individual entities' rights to operate a dam that has come to interfere with public trust interests. Also analogous, Restore Hetch Hetchy seeks relief that is wholly forward looking. (*See California Trout*, 207 Cal.App.3d at 631.) Restore Hetch Hetchy does not seek to recover water unlawfully diverted through the O'Shaughnessy Dam or request penalties for past violations. (AA31.)

The nature of the damages are also akin to *California Trout*. In support of its holding that the suit was not time barred, the Court of Appeal reasoned:

> The situation is similar to that which arises when a nuisance has been maintained for a protracted period of time. If the nuisance is the sort of ongoing conduct that can be discontinued by an order to stop acts or omissions it is viewed as "continuing" and hence "abatable," despite the fact that the acts or omissions have been conducted for a period beyond that of the pertinent statute of limitations. [citations omitted.] The same principle has been applied to other ongoing wrongs, e.g., failure to pay child support [] and improper exercise of a franchise.

(*California Trout,* 207 Cal.App.3d at 210-11 (citations omitted).) As in *California Trout,* the nature of the operation of the O'Shaughnessy Dam "is the sort of ongoing conduct that can be discontinued by an order to stop acts or omissions" and as such is "continuing or "abatable." (*Id.* at 628.)

Finally, the State Board – the agency to which Restore Hetch Hetchy will request the Court refer this matter (*see* Water Code § 2000) – would not be limited by any statute of limitations to consider the reasonableness of the O'Shaughnessy Dam and Hetch Hetchy Reservoir in Yosemite National Park. (*See id.* at 631.) These same circumstances warranted the rejection of a statute of limitations defense in *California Trout* and warrant the same here. The public should not forfeit its rights to explore and enjoy Hetch Hetchy Valley's majestic scenery because the State has not independently, as yet, sought to enforce the reasonableness standard applicable to San Francisco's method of diversion.

V. CONCLUSION

For the foregoing reasons, this Court should rule that section 11 of the Raker Act preserves all of California water rights laws, including the mandates of article X, section 2 of the state Constitution, notwithstanding any actual or

potential conflict with any of the conditions otherwise established in the Raker Act. The Court should further find that Appellant's claim that the City is employing an unreasonable method of diversion forbidden by article X, section 2 is not precluded by any statute of limitations given the continuing and evolving nature of reasonableness under that constitutional provision which pertains to the public trust. Appellant Restore Hetch Hetchy respectfully requests that this Court reverse the trial court's order and judgment and remand the case to the trial court for further proceedings.

Respectfully submitted,

Dated: October 17, 2016

LOZEAU | DRURY LLP

/s/ *Michael R. Lozeau*
Michael R. Lozeau
Meredith S. Wilensky
Attorneys for Petitioner-Appellant
Restore Hetch Hetchy

Certificate of Word Count
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 13,790 words, as counted by the Microsoft Word word-processing program used to generate this brief.

Date: October 17, 2016

Respectfully submitted,

LOZEAU | DRURY LLP

/s/ *Michael R. Lozeau*
Michael R. Lozeau

Attorneys for Petitioner-Appellant
Restore Hetch Hetchy

PROOF OF SERVICE

I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 410 12th Street, Suite 250, Oakland, CA 94607. On October 17, 2016, I served a copy of the foregoing document(s) entitled:

APPELLANT'S OPENING BRIEF

☒ **BY TRUEFILING, BY ELECTRONIC MAIL, OR BY US FIRST CLASS MAIL**. By uploading the document to the TrueFiling system, by sending the documents as an electronic mail attachment in PDF format to the e-mail addresses below, or by placing the document(s) listed above in a sealed postage pre-paid envelope, and causing the envelope to be delivered to a US Mail receptacle for collection, as specified below:

Fifth District Court of Appeal 2424 Ventura Street Fresno, California, 93721	TrueFiling
Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797	Electronic Submission through the California Supreme Court's e-Submission web portal
Clerk of the Court Tuolumne County Superior Court 41 West Yaney Avenue Sonora, CA 95370	First Class Mail
Dennis J. Herrera, City Attorney Mollie M. Lee, Deputy City Attorney Matthew D. Goldberg, Deputy City Attorney San Francisco City Attorney's Office 1390 Market Street, 6th Floor San Francisco, California 94102 Tel: (415) 554-4290 or (415) 554-4285 Fax: (415) 437-4644 E-mail: Mollie.Lee@sfgov.org Matthew.Goldberg@sfgov.org	TrueFiling and Electronic Mail
Attorneys for Appellees/Respondents City and County of San Francisco and	

San Francisco Public Utilities Commission

Kimon Manolius — TrueFiling and Electronic Mail
Allison C. Schutte
Nathan A. Metcalf
Adam W. Hofmann
Hanson Bridgett LLP
425 Market St 26th Floor
San Francisco, California 94105
Tel: (415) 777-3200
Fax: (415) 541-9366
E-mail: kmanolius@hansonbridgett.com
aschutte@hansonbridgett.com
nmetcalf@hansonbridgett.com
ahofmann@hansonbridgett.com

Attorneys for Appellee/Real Party in Interest
Bay Area Water Supply and Conservation Agency

David L. Hobbs — TrueFiling and Electronic Mail
Griffith & Masuda
517 East Olive Ave
Turlock, California 95380
Tel: (209) 667-5501
Fax: (209) 667-8176
E-mail: dhobbs@calwaterlaw.com

Attorneys for Appellee/Real Party in Interest
Turlock Irrigation District

William C. Paris, III — TrueFiling and Electronic Mail
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

Attorneys for Appellee/Real Party in Interest
Modesto Irrigation District

I declare under penalty of perjury (under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed October 17, 2016 at Oakland, California.

/s/ Toyer Grear