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 REPLY BRIEF

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

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I. INTRODUCTION

When Congress enacted the Raker Act in 1913 and granted the City an option to use federal land within Yosemite National Park, Congress was "not acting in its governmental capacity or exercising governmental powers." (H.R. Rep. No. 41 at 40 (Exhibits to Respondents' Motion For Judicial Notice, p. 82 ["CCSF-RJN:82"]. Congress "[was] acting purely as a landowner disposing of its domain upon such conditions as it sees fit to a grantee who accepts those conditions and is bound by them as a matter of contract, ***not as a matter of statutory regulation***." (*Id.* (emphasis added).) Congress adopted a savings clause that by its express terms preserves the applicability of all California water laws, even if some of those laws would preclude the City from exercising the full scope of the grant authorized by Congress. Congress reiterated this intent consistently throughout the debates on the Raker Act. Although Congress sought to assist San Francisco in addressing its water supply problems present in 1913, Congress had no intention of allowing the City to thereby avoid California water laws applicable to every other municipality and water district in the State.

The City concedes that California water law, including Article X, sec. 2, applies to the amount of water to which the City may be entitled, even water stored within the Hetch Hetchy Valley. (RB:37.) If the Raker Act does not preempt California water law to preclude either the State Water Resources Control Board ("State Board") or California courts from reducing the amount of water stored by the City to make it available for downstream or in-stream uses, there is

no logical reason that federal preemption should restrict the application of Article X, sec. 2 to determine whether the O'Shaughnessy Dam is a reasonable method of diversion. Because the Raker Act explicitly preserves California water law's applicability to San Francisco, Restore Hetch Hetchy's claim should be allowed to be adjudicated by the Superior Court and the State Board. And that claim should not be cut-off by treating a statute of limitations as a de facto amendment of Article X, sec. 2 or by ignoring the Constitution's mandate that all methods of diversion within California be reasonable and the State's water resources "be put to beneficial use to the fullest extent of which they are capable."

II. LEGAL STANDARDS

A. The City Ignores the Heavy Burden It Bears to Establish Congress' Intent to Preempt State Water Law.

The City ignores the overarching standards applicable to a federal preemption analysis that presume the validity of State law and firmly place the burden of establishing Congress' preemptive intent on the party arguing for preemption. (Appellant's Opening Brief ("OB"):27-30; *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 presume "that the states' police powers were not to be superseded 'unless that was the clear and manifest purpose of Congress'"); (*Bronco Wine Co. v. Jolly* (2005) 33 Cal.4th 943, 956) ("The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption").) The City also

incorrectly argues that all of Congress' savings clauses are always subject to conflict preemption. (*See* RB:34-35, 42.) Congress' authority includes the power to adopt a savings clause that ensures an area of state law controls even when it may conflict with the full scope of a right-of-way authorized by Congress.

1. When adopting a savings clause, Congress has the power to preclude conflict or obstacle preemption.

Contrary to the City's argument that conflict preemption always applies to a savings clause, both the California and U.S. Supreme Court have held that Congress has the power to enact a statute that preserves the applicability of a State law even if the State law conflicts with a congressional requirement. (*Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872 (2000).) "Congress has the power to preclude conflict preemption, allowing states to enforce laws even if those laws are in direct conflict with federal law or frustrate the purpose of federal law." (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 924.) In *People v. Edward D. Jones*, the Court of Appeal held that a federal securities law savings clause precluded any finding of a conflict in the first place. (*People v. Edward D. Jones & Co.* (2007) 154 Cal.App.4th 627, 637-39.) Thus, Congress' intent in enacting the Raker Act can (and does) extend to ensuring that California water law applies even if its application precludes the City from exercising all of the right-of-way components otherwise allowed by Congress.

2. The presumption against preemption of California water law applies to the Raker Act.

The City attempts to avoid the presumption against preemption by claiming that the Raker Act does not involve water law, an area traditionally reserved to state control, because Congress acted pursuant to the Property Clause. (Respondents' Brief ("RB"):42.) The Ninth Circuit already has rejected this premise in the context of the Raker Act holding that "the Act's regulation of water and power delivery solely within the State of California ***legislates in an 'area basically the concern of the States***.'" (*Starbuck v. San Francisco*, 556 F.2d 450, 457 (9th Cir. 1977) (emphasis added); *See also California v. United States*, 438 U.S. 645, 669 (1978) (recognizing the "well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water").)

Kleppe v. New Mexico 426 U.S. 529, 543 (1976), does not hold that the presumption against preemption is inapplicable when Congress is acting pursuant to the Property Clause. That case involved a constitutional challenge to the Wild Free-roaming Horses and Burros Act, 16 U.S.C. §§1331-1340. That statute undisputedly overrode a New Mexico state law "insofar as it attempts to regulate federally protected animals" on federal property. (*Id*. at 545.) *Kleppe* did not involve Congress' intent in adopting a broad savings clause.

The City also contends that no presumption against preemption should apply because Appellants' suit does not involve any challenge to the City's water

rights. (RB:42.) The City's attempt to disentangle its method of diversion from its water right is inconsistent with Article X, sec. 2 and long-standing California water rights law. Article X, sec. 2 expressly ties both use and diversion to every water right in California. (Art. X, §2.)[1] The City's appropriative water right to Tuolumne River water by definition includes its diversion. (*See Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967); *People v. Shirokow* (1980) 26 Cal.3d 301, 307, quoting *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925.) "Other means of appropriation include . . . storage of water in a reservoir." (*Fullerton v. State Water Res. Control Bd.* (1979) 90 Cal.App.3d 590, 598.) Because Appellants challenge San Francisco's method of diverting Tuolumne River water, a key component of the City's water right, the presumption against preemption applies.

III. ANALYSIS

A. The Raker Act's Plain Language and Legislative History Demonstrate That Congress Intended to Subject the City's Diversion of Tuolumne River Water to California Water Law.

The City argues that, since Section 9 of the Raker Act authorizes under certain conditions the City to construct a dam in Hetch Hetchy Valley, any California water law that prohibits the diversion of water into a reservoir in the valley conflicts with Section 9. This argument ignores the fundamental condition

[1] Under Article X, sec. 2, the State Board has authority over points of diversion for appropriated water even when the diversion is of a pre-1914 water right. (*See Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1487.)

to the right-of-way grant – the United States subjected the rights conferred on the City in Section 9 to the oversight and regulation of California water law pursuant to Section 11. Congress' complete reliance on California water law is consistent with Congress' recognition that when adopting the Raker Act, it was *acting as a landowner*, *not a regulator*. (HR 41, p. 40 [CCSF-RJN:82].) Given the unambiguous language of section 11, reconfirmed by the Act's legislative history, California water law does not conflict with the Raker Act even if California's mandates no longer allow a diversion within Hetch Hetchy Valley. The grant of the right-of-way was always expressly subject to such potential state water regulations.

Put another way, Section 11 of the Raker Act exemplifies a savings clause in which Congress has expressed its intent to preclude conflict analysis when considering preemption. (*See Geier*, 529 U.S. at 872.) In adopting the Raker Act, Congress sought to preserve all of California's water laws as they might apply to the City notwithstanding any conflicts applying those laws may have with conditions included in the right-of-way grant.

1. Section 11's plain language makes the right-of-way grant conditional on the City's compliance with all California water laws.

The City assumes that Congress intended for the right-of-way conditions set out in section 9 to trump any state laws conflicting with those conditions despite section 11's preservation of all California water laws. Section 11 expressly preserves all California water laws applicable to the City's diversion of water from

the Tuolumne River. Section 11 first acknowledges that other express conditions are "specifically set forth herein." (Raker Act, §11.) Then, it expressly provides 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***." (*Id*.) Accordingly, section 11 by its terms renders all of the prior conditions, including the conditions set forth in section 9, subordinate to State water law. Preempting the application of state law expressly preserved by section 11, especially without allowing California to first determine the scope of state law, defies the plain language of section 11.

2. The Raker Act's legislative history confirms that section 11 subjects the City to California water law despite any potential conflict with right-of-way conditions.

"To better understand the purposes and objectives underlying…[federal] law, [the courts] may consider as well the history preceding and context surrounding their adoption." (*People v. Rinehart* (2016) 1 Cal.5th 652, 664.) Assuming the Raker Act's express terms do not state unambiguously whether, in the face of a conflict, state water law preserved by section 11 or the right-of-way conditions of section 9 control, the Court should resort to the legislative history to clarify Congress' intent.

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a. House Report No. 41 supports Congress' intent to ensure state water law controls in the event of any conflict with the Raker Act's right-of-way conditions.

Prior to discussing the scope of the right-of-way and the various conditions of the Act, House of Representatives Report No. 41's second sentence of its analysis highlights that:

> The 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.

(CCSF-RJN:051.) The prominence that the savings clause plays in the Committee Report supports that Congress placed significant importance on the breadth and applicability of that section. The only other mention of section 11 in H.R. 41 only reinforces Congressional intent that the savings clause preserves state control over water law:

> Section 11 provides that this act shall not 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 or any vested right acquired thereunder, and the Secretary of the Interior is directed to proceed in conformity with the laws of the State of California in carrying out the provisions of this act.

[CCSF-RJN:57-58]. H.R. 41 unequivocally supports the application of California water law to San Francisco's operation of the O'Shaughnessy Dam without exception.

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b. The legislators' statements reinforce the intent that California water law control despite any conflict with other conditions in the Raker Act.

The City claims Appellants only provide "snippets" of the debates by individual legislators. (RB:38.) In fact, Appellant's opening brief comprehensively reviews the relevant discussions regarding Congress' intent behind section 11. The congressional record addressing section 11 is not an example of a lone legislator in the minority attempting to put his/her preferred spin on the intent of the rest of Congress. Every congressman who weighed in on whether section 11 controlled over other provisions of the Raker Act indicated that section 11 would control over any conflict between state law and the other conditions of the Act. (OB:20, 33-34.) Proponents and opponents of the bill alike confirmed time and time again that section 11 preserves a core objective of the Raker Act – that San Francisco remain subject to California water law, whatever those requirements may be going forward. (*See* OB:33-36; 63 Congressional Record ("CR") 3905 (Exhibits to Declaration of Michael R. Lozeau ["RJN"] at 15 ["RJN:15"]) (California water law "shall control ***absolutely***…"") (emphasis added); *Id.* at 3917 (RJN:16) (Mr. Kent) (savings clause "means as a ***condition precedent*** to this grant the Federal Government wants to see the laws of California are obeyed"); 63 CR 185 (RJN:34) (Sen. Clark) ("having made a condition in the bill, [section 11] will waive the condition").) All of these statements preserving the application of state water law are reflected in Section 11's plain language.

Furthermore, the City does not dispute Congress' universal belief at the time it enacted the Raker Act that Congress lacked the authority to adjust water rights, which were the sole jurisdiction of the state. (*See* OB:36 n. 6.) The City cannot reasonably argue that Congress intended to curtail state law in an area it did not even believe it had jurisdiction to do so.

The City also argues that all of the legislators' statements were limited to "concerns about ensuring that state law would govern any disputes about the distribution of water between San Francisco and the Districts[,]" citing H.R. 41 and statements of Mr. French and Senator Works (RB:38.). H.R. 41 does not limit the breadth of section 11. As noted above, ***the second sentence*** of the report's analysis emphasizes that the bill would not "usurp the powers of the State of California in the matter of control of the distribution of water." (CCSF-RJN:51.) Presumably, the City relies on the next sentence which states:

> The conditions imposed – which are acquiesced in by the grantee, relate only to the protection of certain rights of the Turlock-Modesto Irrigation District – by recognizing, without affecting one way or the other, prior rights of the said districts to certain waters in the Tuolumne River, the source of this river being the Hetch Hetchy Valley.

(*Id.*) This sentence however does not refer to section 11 but to section 9. The fact that the conditions set out in section 9 have no effect on the Districts' water rights is entirely consistent with the broad intent of section 11 that the Raker Act not affect any California water rights laws.

The comments of Mr. Raker cited by the City also make clear that ensuring California water law's continued applicability was a key intention of the Act. (63 CR 3900 [RJN:13]; RB:39.) Like H.R. 41, his mention of the conditions of section 9 in the subsequent sentence does nothing to qualify the full scope of section 11's language and intent. (*Id*.)

Mr. French's and Senator Works' statements also do not suggest that the language of section 11's savings clause is limited to disputes about the distribution of water between San Francisco and the Districts. Mr. French was clear that section 11 preserved not just the Districts' rights but every California citizen's rights. (63 CR 3964 [RJN:17] ("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")(emphasis added). Mr. French only reinforces the breadth of the water rights preserved by the Raker Act. (*Id*. at 3967 [RJN:20] ("I have been opposed to the principle of the Government attempting to adjudicate in any way water rights within the several States or to exercise control over water that, in my judgment, is under the control of the several States"); *Id*. (Section 11 "requires that the administration of the act, so far as it has to do with the waters that may be used, shall proceed in conformity with the laws of the State of California").

As for Senator Works, he was adamant that the Raker Act's conditions and California water law would conflict and that section 11 would control. (63 CR 55 (RJN:31).) Indeed, Senator Smith (a Raker Act supporter) agreed with Senator

Works regarding the full power of section 11 as nullifying the Secretary's power in the event of a conflict:

> In the opinion of the Senator, is not the effect of that section largely to nullify the powers granted in the bill to the Secretary of the Interior? … 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.

(*Id*. (emphasis added).) Senator Works agreed. (*Id*.)

Nor does the City succeed in blunting Senator Works' statement directly addressing California's authority to require a different diversion location than Hetch Hetchy Valley (OB:35-36; 63 CR 185 (RJN:34).) Senator Works' statement does not turn on any interpretation of the water commission's authority. Rather, it evidences Congress' intent that California water law be allowed to run its course, whatever that law may require. (*Id*.)

In an effort to bolster its argument, the City isolates Mr. Ferris' statement that "when Congress itself takes action it supersedes and transcends any of the State laws." (63 CR 4110 [RJN:29]. However, Mr. Ferris was not responding to a question about water rights but rather whether section 11 would limit the federal government's authority to fix electricity charges in the future. *(Id.)* Because section 11 does not address electricity charges, Mr. Ferris' statement is irrelevant to the question of Congress' intent to save all California water law.

The cases cited by the City in which references to legislative history amounted to isolated statements of individual legislators, do not preclude the Court from relying on the Raker Act's robust legislative history on section 11.

(*See* RB:37-38.) Indeed, *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) instructs the court to consider a sponsor's individual statement "with the Reports of both Houses and the statements of other Congressmen," which is what Appellant's analysis considers.[2]

3. Congress' main objectives to address San Francisco's water needs at the turn of the 20th century have all been met and would continue to be met should Appellant prevail.

Enforcing the plain meaning of section 11 does not undermine any of the objectives Congress' sought to address in adopting the Raker Act. As the City's brief illustrates, the Raker Act was a response to a number of pressing concerns prevailing in 1913. The concerns resolved by the Raker Act are not in danger of reemerging if San Francisco is required to divert its Tuolumne River water elsewhere, presumably downstream of Hetch Hetchy Valley, as a result of implementation of Article X, sec. 2 by the State Board and California courts.

Foremost among the needs addressed by Congress in enacting the Raker Act was the growing urgency of San Francisco's then tenuous water supply. (H.R. 41 at 17 [CCSF-RJN:59]; RB:26-27.) Restore Hetch Hetchy's claim under Article X, sec. 2 would not result in reducing by even one drop the amount of water to

[2] The other cases the City cites also do not preclude legislative history where an ambiguity exists but noted it was not useful where the statute was unambiguous (*People v. Farell* (2002) 28 Cal.4th 381, 394) or there was a lack of authentication of the purported history (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46) or it consisted of a single legislator's statement (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062.)

which the City is entitled from the Tuolumne River. (*See* AA25 [Complaint, ¶¶41, 55(g).)

The Raker Act also provided for the generation of 60,000 horsepower of municipal power. (§9(m).) Even if removing the O'Shaughnessy Dam resulted in reductions in electrical output from the downstream Kirkwood hydropower plant, the City would still easily meet the 60,000 horsepower goal envisioned by Congress at the two other hydropower plants. The three hydropower plants generate a total of about 400 megawatts ("MW") of energy. (See CCSF-RJN:0034 (in 2015, the plants generated 380.5 MW of electricity).)[3] Although the hydropower output of Kirkwood and Moccasin will be reduced (though not eliminated) by the removal of the Dam, the Holm Plant would not be affected. The Holm Plant by itself generates up to 170 MW of hydropower which is equivalent to over 220,000 horsepower. (Exhibit 2 to Appellant's Second Request for Judicial Notice ("2ndRJN"), pp. 11-12.)[4] Thus, even assuming that relocating the City's diversion point to outside of the Hetch Hetchy Valley would leave only the Holm Plant, that power plant alone generates more than three times the 60,000 horsepower identified by Congress and twice the maximum 115,000 horsepower Congress' understood could be generated. (¶9(m); H.R. 41 at 18 (CCSF-RJN:0060).)

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[3] One megawatt equals 1 million watts.

[4] One electrical horsepower is equal to 746 watts. (http://www.rapidtables.com/convert/power/watt-to-hp.htm. [2ndRJN:Ex. 1]) 170,000,000 watts ÷ 746 = 227,882 horse power.

Congress also wanted to ensure that the two irrigation districts' access to their senior water rights in the Tuolumne River would not be infringed by San Francisco's diversion. Thus, in addition to requiring the City to release specified quantities of water to the Districts, Congress set a parameter of 200-feet for the height of the Dam as "primarily a benefit" for the two water districts. (H.R. 41 at 14 [CCSF-RJN:0056].) The downstream water districts no longer need any storage capacity within Hetch Hetchy Valley, having constructed the 2,030,000 acre-foot Don Pedro Reservoir which dwarfs in size the 360,000-acre foot Hetch Hetchy Reservoir. (*See* AA22 [¶31].) Indeed, depending on the time of year, from 570,000 to 740,000 acre-feet of Don Pedro's capacity is a water bank for San Francisco that the City uses in lieu of storing water in the Reservoir for the Districts. (*Id*.) Thus, any water storage benefitting the two Districts that Congress had in mind in 1913 has been rendered moot by Don Pedro.

Lastly, vast swaths of the right-of-way grant are not affected by Appellant's Article X claim. The Dam and Reservoir are only one component of the right-of-way granted by the Raker Act. Restore Hetch Hetchy does not contend that Cherry Reservoir, Lake Eleanor, any of the power plants, tunnels, pipelines or other components of the right-of-way need be forfeited pursuant to Article X, sec. 2. Assuming Appellant prevails and California determines the Dam and Reservoir are unreasonable methods of diversion, the other right-of-way components will continue to serve San Francisco's water system. And because the Secretary of Interior also has his/her own duty to implement the Raker Act in compliance with

State law, the federal government will be in a position to ensure orderly, long-term adjustments to San Francisco's right-of-way and the eventual reopening of Hetch Hetchy Valley to the general public.

As the California Supreme Court has recently reminded us, "the threshold for establishing obstacle preemption is demanding." (*Rinehart*, 1 Cal.5th at 661.) The Court should not hesitate to give effect to the plain meaning of section 11 and Congress' intent to preserve the application of all California water laws to the City.

4. The Reclamation Act and its savings clause are not probative of Congress' intent under the Raker Act.

Rather than analyze the plain language of Section 11 and its legislative history, the City asks the Court to borrow preemption rulings addressing an entirely different legislative scheme and a different Congress' intent applicable to the Reclamation Act of 1902. (RB:32-33.)[5] The trial court also claimed to have discerned Congress' intent for the Raker Act from the Reclamation Act. (AA337.)

[5] The City points to the 1917 decision of *City and County of San Francisco v. Yosemite Power Co.* (1917) 46 Pub. Lands Dec. 89, 95-96 (1917 WL 1353) by then-Secretary of Interior Franklin L. Lane (previously the San Francisco City Attorney) for the proposition that section 11 of the Raker Act is "modeled on Section 8 of the Reclamation Act" (RB:32; CCSF-RJN:0123.) The Secretary's opinion has no bearing on Congress' intentions in adopting the Raker Act. Nor, as further suggested by the City (RB:33) did Secretary Lane opine about the scope of Section 11. Rather, he applied existing precedent to make the unremarkable determination that even a vested state water right did not, in turn, require the Secretary to grant an application for a right-of-way over federal lands. (CCSF-RJN:122-123.)

The City claims that because section 11 used language from section 8 of the Reclamation Act, the language should be given the same conflict preemptive effect. (RB:32-33.) The actual rule of statutory construction is:

> that similar statutes should be construed in light of one another, and that **when statutes are *in pari materia*** similar phrases appearing in each should be given like meanings. Two [s]tatutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object.

(*People v. Tran* (2015) 61 Cal.4th 1160, 1167-1168 (emphasis added; citations omitted).) The Reclamation Act and the Raker Act do not relate to the same person or thing, do not relate to the same class of persons or things, and they do not have the same purpose or object. (OB:38-47. *See Rinehart*, 1 Cal.5th at 671 (rejecting reviewing other laws to assist the court in determining the preemptive effect of a particular federal statute).) Accordingly, cases that have determined the federal preemptive effect of the Reclamation Act did not inadvertently rule on the Raker Act.[6]

The City's and trial court's effort to broaden this rule of construction also is contrary to the more fundamental rule that the courts "first examine the words of the statute, 'giving them their ordinary and usual meaning and ***viewing them in***

[6] Nor do the non-Reclamation cases cited by the City alter the dramatic differences between the Reclamation Act and the Raker Act. (*See Carpenter v. United States*, 484 U.S. 19, 21 (1987) (comparing the same language for the same classes of fraud offenses sharing the same purpose in almost adjacent sections of the Code); *Musaelian v. Adams* (2009) 45 Cal.4th 512, 516-517 (involving two analogous statutes and absent "evidence the Legislature had a contrary intent….")

their statutory context, because the statutory language is usually the most reliable indicator of legislative intent.'" (*Musaelian*, 45 Cal.4th at 516 (emphasis added).) The City invites the Court to rely on Reclamation Act cases that turn on the entirely different regulatory context of that statute. Rather than the Reclamation Act's comprehensive federal program to have federal agencies construct and operate federal dams, the Raker Act is a single right-of-way grant to a non-federal, local municipality allowing the local entity to build and operate its own dam. The trial court's reliance on Reclamation Act cases thus indirectly incorporated a statutory context that bears no resemblance to the Raker Act.

Appellant's opening brief already distinguishes the Reclamation Act cases. (OB:40-47.) In regard to *EDF v. EBMUD* (1980) 26 Cal.3d 183, the City does not dispute that the canal at issue – the Folsom-South Canal – had already been constructed at the time of the case. (26 Cal.3d at 188 ("The bureau has completed the canal to the point of delivery to EBMUD").) Plaintiffs' claim involved whether EBMUD could use the canal to access its federally contracted water. (*See id*. ("Use of the Folsom-South Canal renders the diverted water unavailable to the lower American River").) Thus, although in the context of the Reclamation Act State law could not remove the Canal, State water law nevertheless could preclude its use as the diversion method. (*See* OB:46-47.) Because, as discussed above, the Raker Act's savings clause is not restrained by any directive found in other sections of the Act, even removal of O'Shaughnessy Dam is not precluded if

necessary to ensure San Francisco's method of diversion is reasonable under Article X, sec. 2.

5. The Federal Power Act also is irrelevant to determining Congress' intent under the Raker Act.

The City also attempts to rely on Federal Power Act ("FPA") preemption rulings as indicative of Congress' intent in enacting the Raker Act. (RB:33-34.) For the same reasons discussed above for the Reclamation Act, the FPA, adopted 22 years after the Raker Act, and the preemption cases decided under that law, have no bearing on determining Congress' intent in drafting the Raker Act. The FPA is a comprehensive federal regulatory scheme that bears no resemblance to a single right-of-way grant to a local municipality that, at the outset, the City could choose not to accept. (*See First Iowa Hydro-Electric Cooperative v. Federal Power Com.*, 328 U.S. 152, 175 (1946).) The two statutes are not *in pari materia* and preemption decisions under the FPA do not inform the analysis of preemption and Congress' intent under the Raker Act.

B. An Article X, Section 2 Claim is Not Barred by Any Statute of Limitations.

1. Article X, Section 2's ongoing mandate that all methods of diversion must be reasonable cannot be extinguished by a statute of limitations.

The City misstates Restore Hetch Hetchy's position as claiming that the courts have discretion to sidestep applicable statutes of limitations. (RB:45-46.)

Restore Hetch Hetchy makes no such argument.[7] It is not the courts' discretion but Article X, sec. 2 itself that precludes applying CCP §343's four-year statute of limitations to Article X, sec. 2. "A constitutional right is always subject to reasonable statutory limitations as to the time within which to enforce it, ***if the constitution itself does not provide otherwise***." (*Muller v. Muller* (1960) 179 Cal.App.2d 815, 819. *See also 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.)

Nor is Restore Hetch Hetchy arguing that no limitations ever apply to any Constitutional provision, as the City suggests. (RB:46.) Appellant is focused only on the inherent conflict between Article X, sec. 2's language and any statute of limitations. Although the City acknowledges the "well-settled rule" a constitutional right will not be subject to a statute of limitations if it "***provides to the contrary***[,]'" the City looks to other unrelated provisions of the Constitution rather than the substantive requirements of Article X, sec. 2 to determine whether CCP §343 applies. (RB:46)[8]

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[7] Hence, the City's citations to *Weinberger v. Weidman* (1901) 134 Cal. 599, 602 (involving a mortgage dispute) and *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395 (wrongful death action) are inapposite. Neither case applied the rule that, where a statute of limitations conflicts with a constitutional provision, the constitutional provision prevails. Norgart did acknowledge that rule though. (21 Cal.4th at 396-97.)

[8] The City cites *Coombes v. Getz* (1933) 217 Cal. 320, 330-331 (involving Article XII, sec. 2 (now repealed) relating to stockholder liability); *Ocean S. R. Co.*, 198 Cal.App.2d at 273 (involving a due process argument under the Fourteenth

The City does not dispute that Article X, sec. 2 establishes a "continually evolving reasonableness standard." (RB:50.) Indeed, this evolving nature of Article X, sec. 2 has been long-settled by the courts. (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567 ("What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."); *See also People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 750; *EBMUD*, 26 Cal.3d at 194; *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140; *EDF*, 20 Cal.3d at 344; *Light,* 226 Cal.App.4th at 1488.) What is reasonable "is determined at the time of use." (*Light,* 226 Cal.App.4th at 1488.)

Nevertheless, the City argues that reasonableness is determined only at the time water is initially diverted. First, the City argues that Appellant does not address the elements that establish an action's accrual date. (RB:50.) However, Article X, sec. 2's continually evolving reasonableness standard supersedes general accrual rules for purposes of determining the reasonableness of a method of diversion of water. Because every water right in the state is subject to an ongoing duty to ensure its method of diversion of water is reasonable, each

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Amendment to the U.S. Constitution); and *Berkeley Unified School Dist. v. State of California* (1995) 33 Cal.App.4th 350, 362-363 (involving Article III B, sec. 6 regarding reimbursement of costs to local governments for costs). None of these cases shed any light on the inconsistency of applying CCP § 343 to Article X, sec. 2.

unreasonable diversion is unlawful. No arbitrary past accrual date may cut off that Constitutional obligation – especially a statute of general applicability.

The City next claims that an evolving standard of reasonableness is akin to a Supreme Court ruling that changes the law, and therefore, does not restart an expired statute of limitations (*Id*. at 51(citing *Jolly v. Eli Lilly & Co*. (1988) 44 Cal.3d 1103, 1113)). No change in law occurs by application of Article X, sec. 2's ongoing mandate of reasonableness. Indeed, the City's "change in law" interpretation would have the statute of limitations run years before a diversion became unreasonable and began violating Article X, sec. 2.

Applying a statute of limitation limiting Article X, sec. 2's reasonableness standard to a fixed date in time many years in the past (in this instance almost 90 years ago) is inconsistent with the plain language of the provision and the undisputed case law that reasonableness under Article X, sec. 2 "changes with circumstances, including the passage of time." (*Light,* 226 Cal.App.4th at 1488.) Such a rule would render Article X, sec. 2, a bedrock provision of the California Constitution, largely superfluous. Instead of applying to every water rights holder as intended (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367–368), it would apply to only a scant few new water diverters.

2. Because Article X, sec. 2 pertains to protecting the public trust, no general statute of limitations applies.

The City argues that Restore Hetchy Hetchy's claim under Article X, sec. 2 does not pertain to the public trust doctrine because it is not itself a public trust

claim. (RB:47-48.) However, plaintiffs in *California Trout v. State Water Res. Control Bd.* (1989) 207 Cal.App.3d 585 also did not bring a public trust claim. California Trout brought a claim under Fish & Game Code §§ 5946 and 5937. (207 Cal.App.3d at 592.) Under *California Trout,* all that is required to trigger the rule barring a statute of limitations is that the requirement being enforced "pertains to" or "concerns" the public trust. (*Id*. at 629, 631.) It cannot be seriously argued that the foundational water law embedded in California's constitution does not pertain to or concern the public trust. (*See Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 443 ("[Article X, sec. 2] establishes state water policy. All uses of water, including public trust uses, must now conform to the standard of reasonable use.").) Indeed, Hetch Hetchy's petition alleges impacts to numerous public trust resources within the Hetchy Hetchy Valley. (AA:20-21 (¶ 27); AA:30 (¶ 55(b)-(d)).)

The City then attempts to distinguish *California Trout* by attempting to craft an exception to the Court of Appeal's analysis based on permanent nuisances. (RB:48-49.) However, the dams at issue in *California Trout* were constructed in 1940 and 1941 and were almost 50 years old when the Court ruled that a claim challenging the amount of water the dams could divert was not subject to CCP §343. (*See* 207 Cal.App.3d at 596.) Despite using a nuisance law analogy, the Court did not rest its decision on nuisance law. Nor did the Court find those claims accrued when in 1973 the State Board issued licenses to the dams omitting

the requisite fish flow requirements. (*See id*. at 626-27.) Fundamental to the Court's ruling was its recognition that:

> [t]he purpose of section 5946 . . . is to maintain fisheries in such streams on an ongoing basis. Hence, the failure to affix to the licenses language conditioning future diversion upon such releases presents a continuing violation of the statute as to which no statute of limitations prevents remediation.

(*Id.* at 628.) The same is true of Article X, sec. 2. The provision's reasonableness mandate applies to all water rights on an ongoing basis regardless of the structure's permanence. Restore Hetch Hetchy has alleged a continuing violation of that constitutional duty. To preclude either private citizens or the State Board from enforcing the provision on the basis of the dam's presumed permanence would conflict with Article X, sec. 2. Like F&G Code §5946, Article X, sec. 2 by its very nature cannot be subjected to a general statute of limitations. (*Id*.)

C. Plaintiff States a Claim Under Article X, Sec. 2 of the California Constitution Upon Which Relief Can Be Granted.

Restore Hetch Hetchy states a claim for relief to enforce the self-executing provision of Article X, sec. 2 requiring that any method of diverting water in the state be reasonable. "The limitations and prohibitions of [Article X, sec. 2] now apply to every water right and every method of diversion." (*Peabody*, 2 Cal.2d at 367-368.) The Court clarified that this provision establishes that:

> Such [water] right does not extend to unreasonable use or unreasonable method of use ***or unreasonable method of diversion of water***…. The foregoing 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. The problem is to apply these rules in the varying circumstances of cases as they arise.

(*Id*. (emphasis added); *See also, Nat'l Audubon Soc'y*, 33 Cal.3d at 443 ("All uses of water, including public trust uses, must now conform to the standard of reasonable use.") "What is a reasonable use or method of use of water is a question of fact to be determined according to the circumstances in each particular case." (*Joslin*, 67 Cal.2d at 139.) Article X, sec. 2 requires the court to examine the particular facts and context to determine whether, by today's standards, the City's method of diversion, which unnecessarily sacrifices access to unique and precious public land, is reasonable.

1. Article X, sec. 2 subjects all water rights and uses to a requirement of reasonable method of diversion, even beneficial uses.

According to the City, Article X, sec. 2's only mandate is to limit water rights holders to diverting and using the *amount* of water reasonably necessary for a beneficial purpose. (RB:54-55.) While there is no doubt that amount of water drawn and nature of the use are central factors to some determinations of reasonableness under Article X, sec. 2, nothing in the text of the provision, its history, or case law suggests that reasonableness is limited *only* to an assessment of the amount of water necessary for a beneficial purpose.

The plain language of the provision establishes that employment of a reasonable method of diversion is a distinct prerequisite for any beneficial use:

> 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.

(Art. X §2 (emphasis added).) The requirement that all methods of diversion be reasonable is additional to the requirement that use of water be "reasonably required for the beneficial use to be served." (*See id*.) The City asks the Court to only give effect to the first half of the sentence, and to render the obligations imposed by the second half of the sentence meaningless.

2. The courts have not confined application of Article X, Sec. 2 to an assessment of amount and nature of use.

The City argues that Appellant cannot challenge its method of diversion because 1) it exercises its rights for the beneficial uses of providing municipal water supply and hydroelectric power production and 2) Appellant does not challenge the amount of water that the City withdraws. (RB:56.) The fact that the cases addressing Article X, sec. 2 have in most instances involved disputes regarding the amount of water does not determine by omission the entire scope of Article X, sec, 2. Just as waste may render a method of diversion unreasonable, so too may a diversion location that unnecessarily eliminates beneficial uses be unreasonable under Article X.

In fact, the Supreme Court permitted such a right of action in *EDF*. Pursuant to Article X, sec. 2, plaintiff EDF did not allege failure to use water for a beneficial use or that the amount of water diverted violated the Constitution. Instead, EDF alleged that the proposed location of diverting water from the American River through the Folsom-South Canal was unreasonable because it

would diminish flows on the lower American River, injuring recreational opportunities including whitewater rafting and stream fishing, among other impacts. (26 Cal.3d at 191.) Reasoning that "[California Constitution, Article X, section 2, and Water Code, section 100] declare that the general welfare requires water resources be put to beneficial use to the fullest extent of which they are capable and that the waste or unreasonable use of water be prevented," the Supreme Court granted EDF leave to allege that diversion of water through the Folsom-South Canal constituted an unreasonable method of diversion. (*Id.* at 193, 200.)

Similar to the upstream point of diversion via the Folsom-South Canal, the City's diversion creates an unnecessary injury to recreational and public trust uses that could be remedied by moving the point of diversion downstream. This deprivation and failure to put the State's finite water resources "to beneficial use to the fullest extent of which they are capable" is the concern Article X, sec. 2 intended to address.

Similarly, diverting water for a "beneficial use" does not exempt a water rights holder from having to ensure that its method of diversion is continually reasonable. (See *Peabody*, 2 Cal.2d at 368 ("The foregoing mandates [of Article X, section 2] . . . admit of no exception") Moreover, Appellant's claim does not seek to deprive the City of access to the waters of the Tuolumne River for domestic use, but to require reasonable diversion of those waters per Article X, sec. 2. (AA:12, 24-25 (¶¶ 1-2, 35).)

3. The case law cited by the City makes clear that reasonableness must be determined on a case-by-case basis.

The cases cited by the City undermine its attempt to create a generic rule that the courts cannot consider the reasonableness of a method of diversion as long as the ultimate use of the water is reasonable. Although the cases cited dealt with a question of amount of water, they do not announce a rule that reasonable efficiency and a beneficial use are all a court reviews to determine whether a method of diversion is reasonable and instead emphasize the case-by-case determination required by Article X, sec. 2. (See e.*g., Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8, 22 ("the question becomes one of fact for the court, in a given case, to determine upon the evidence presented to it"); *Tulare Irrigation*, 3 Cal.2d at 524-25, 573 (determining reasonableness, based on specific facts and circumstances, including local custom); *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242 (emphasizing the fact-specific nature of applying Article X, sec. 2.)

In *Peabody v. Vallejo*, the Supreme Court summed up Article X, sec. 2's "rule of reasonableness" in four mandates:

> (1) The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.
> (2) Such right does not extend to the waste of water.
> (3) Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.
> (4) Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.

(2 Cal.2d at 367-68.) The Court emphasized, "these mandates admit of no exceptions" and apply to all water rights within California. (*Id*.) San Francisco, however, only addresses the first mandate, ignoring the others, including the third mandate which Petitioner invokes. (RB:55-56.) Where the Court explicitly sets out multiple tenets, each of which is without exception, the City's position is baffling. There can be no doubt that reasonable method of diversion is a requirement that is in addition to and distinct from the rule advanced by San Francisco.

4. The ballot materials do not alter Article X, sec. 2's goal of furthering beneficial uses to the fullest extent possible.

Nothing in the ballot materials prepared for Art. X, sec. 2 supports the City's proffered rule that a diversion may only be unreasonable if it exceeds the amount needed to fulfill a beneficial purpose. (RB:54-55.)

First, there is no need to turn to the ballot materials to determine whether maximizing beneficial use is encompassed in the purpose of Article X, sec. 2, because the provision's language is unambiguous. (*See In re Tobacco II Cases* (2009) 46 Cal.4th 298, 315.) The first sentence of Article X, sec. 2 states:

> It is hereby declared 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.

(Art. X, §2 (emphasis added).)

Appellant does not, as the City argues, use the preamble to impose a separate requirement on individual rights holders. (RB:58.) Instead, Appellant relies on this language as guidance in interpreting whether the method of diversion shall be deemed "reasonable" pursuant to the constitutional provision. Indeed, in *Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460, 473, cited by the City, the court relied on this sentence to interpret the scope of Article X, sec. 2, *i.e.* to determine whether lakes were considered waters covered by Article X, sec. 2. The electorate's declaration is equally informative when applying the prohibition on unreasonable methods of diversion

Furthermore, the Supreme Court has explicitly stated that Article X, sec. 2's reasonableness requirements include the purpose of maximizing beneficial uses:

> The waters of our streams are not like land which is static, can be measured and divided and the division remain the same. Water is constantly shifting, and the supply changes to some extent every day. A stream supply may be divided but the product of the division in nowise remains the same. ***When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield***.

(*Peabody,* 2 Cal.2d at 368.) San Francisco's attempt to prevent application of these principles in the current circumstances on the basis that this case does not question the *amount* of water used by the City cuts against this core principal of Article X, sec. 2.

5. The City exaggerates the applicability of Restore Hetch Hetchy's fact-specific claim to other dams throughout the State.

San Francisco argues that allowing Appellant to proceed with its unreasonable method of diversion claim would lead to absurd results because every dam in the state would suddenly be subject to the same claim. (RB:60.) Restore Hetch Hetchy's claim, alleging the unreasonableness of the operation of a private dam in a sublime valley of a beloved national park, will not result in a flood of litigation.

First, Appellant's complaint does not allege, as the City suggests, that any conceivable changes to water diversions are required whenever additional beneficial uses would be achieved. (RB:57, 60.) The Complaint alleges case-specific facts, including but not limited to the Reservoir's location in Yosemite National Park, an estimated recreational value increase of $8.7 billion over 50 years if the Reservoir were drained (Complaint, ¶29), an estimated additional existence use value of between $44 and $113 billion over 20 years (*Id*.), the costs of changing the method diversion (*Id*., ¶¶33-39), the unique nature and historic importance of the Hetch Hetchy Valley (*Id*., ¶20), and the capacity for San Francisco to meet its water needs through alternative methods of diversion and retaining electric power benefits at a cost of approximately $2 billion over 50 years. (*Id*., ¶¶34-39).

This fact-intensive analysis is consistent with the case law applying Article X, section 2. (*See e.g. Trussell v. City of San Diego* (1959) 172 Cal.App.2d 593,

610-11) (considering whether method was reasonable considering costs, the fact that released water ended up in behind another city dam downstream; and the need for the water for consumptive use.) None of the site-specific facts alleged by Restore Hetch Hetchy are applicable anywhere else in the State. No absurd results will result from Appellant's pursuit of its claim under Article X, Sec. 2.

IV. CONCLUSION

The Raker Act expressly preserves California water laws applicable to the City subsequent to the City accepting the government's right-of-way grant. Section 11 provides and Congress' statements emphasize that California's authority to implement all of its water laws pertinent to the City remains unconstrained. Any implication of preemption is at best very ambiguous. Because Congress' intent to preempt must be unambiguous, the Raker Act does not preempt California's water laws. (*Pacific Legal Foundation*, 659 F.2d at 919.) The use and operation of any facility constructed by the City pursuant to the grant are contingent on their compliance with all of California water laws, including the bedrock constitutional mandate of Article X, sec. 2 that all methods of diversion

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be reasonable. Neither a statute of limitations nor piecemealed interpretation of Article X, sec. 2 can thwart its mandates.

Respectfully submitted,

Dated: March 3, 2017

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Date: March 3, 2017 Respectfully submitted,

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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 March 3, 2017, I served a copy of the foregoing document(s) entitled:

APPELLANT'S REPLY BRIEF

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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 March 3, 2017 at Oakland, California.

/s/ Toyer Grear