COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RESTORE HETCH HETCHY, a non-profit, public benefit corporation, Petitioner/Appellant vs. CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; SAN FRANCISCO PUBLIC UTILITIES COMMISSION, a municipal agency, and DOES I–X, inclusive, Respondents/Appellees	Case No. F074107 (Tuolumne County Superior Court No. CV 59426)
MODESTO IRRIGATION DISTRICT, a public agency; TURLOCK IRRIGATION DISTRICT, a public agency; BAY AREA WATER SUPPLY AND CONSERVATION AGENCY, a public agency, and ROES I-XXX, inclusive, Real Parties in Interest/ Respondents	

AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES AND NORTHERN CALIFORNIA WATER ASSOCIATION IN SUPPORT OF RESPONDENTS

Superior Court of California, County of Tuolumne
The Honorable Kevin M. Seibert (Telephone no. (209) 533-5563)

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I.

INTRODUCTION

In concept, the claim of Appellant Restore Hetch Hetchy is simple. Restore Hetch Hetchy alleges that the continued operation of O'Shaughnessy Dam and Hetch Hetchy Reservoir on the upper Tuolumne River by Respondent City and County of San Francisco ("San Francisco") is an "unreasonable method of diversion" of water that violates Article X, section two, of the California Constitution. Restore Hetch Hetchy alleges this to be true because it claims that San Francisco could obtain the same water supply by arranging to use other facilities and that San Francisco's reservoir precludes recreational use of the Hetch Hetchy Valley. Restore Hetch Hetchy therefore seeks the following:

> [A] peremptory writ of mandate ordering Respondents to prepare a written plan detailing alternative reasonable methods of diversion of Respondents' Tuolumne River water rights that do not rely upon the continued presence of Hetch Hetchy Reservoir . . . The plan shall also include a component for modifying or removing the O'Shaughnessy Dam . . . .

(Appellant's Appendix ("AA") p. 31.)

According to Restore Hetch Hetchy, the alternate facilities and operations that San Francisco would need to implement would require $2,000,000,000 in new investments in addition to the investments that it has made in its water system. (AA 24-26, 30 (complaint's allegations).)

The Legislature and California's voters, however, enacted Article X, section two, to enable the investments in water storage necessary to ensure that Californians will have consistent and adequate water supplies even though precipitation in our state is highly variable. This purpose was aligned with the purpose of the Raker Act, which predated Article X,

section two, by 15 years. The Raker Act's terms, under which San Francisco was required to cooperate with downstream prior water-right holders, are aligned with the way that California courts have implemented Article X, section two, namely by using water storage to reconcile the demands of senior and junior water users through flexible physical solutions.

While Article X, section two's application has expanded since its 1928 enactment, its original purpose has never been reversed, as Restore Hetch Hetchy now proposes. In fact, in recent years, the people of California and the Legislature have enacted new laws that – like Article X, section two – seek and support further investments in not only surface-water storage, but also in groundwater storage and other related facilities.

This Brief's review of Article X, section two's enactment, its history in the courts, its alignment with the Raker Act and today's need for water-storage investments demonstrates that Restore Hetch Hetchy's theory is not only preempted by the Raker Act` as the Superior Court held, but also is not supported by the constitutional provision on which Restore Hetch Hetchy relies.

II.

THE PEOPLE OF CALIFORNIA ENACTED THE CALIFORNIA CONSTITUTION'S ARTICLE X, SECTION TWO, TO SUPPORT WATER-STORAGE INVESTMENTS, WHICH IT HAS

A. Article X, Section Two's 1928 Enactment Culminated The Initial Reconciliation Of California Water Law With Our State's Unique Climate

On August 9, 1922, the California Supreme Court's Chief Justice Lucien Shaw presented an address to a joint session of the American Bar Association and the California Bar Association. He entitled the address *The Development Of The Law Of Waters In The West.* The Supreme Court included the address in its official reports. (*See* Shaw, *The Development Of*

The Law Of Waters In The West (1922) 189 Cal. 779 ("Shaw").) After limiting his address to California law, Chief Justice Shaw described his discussion's scope as follows:

> The subjects of the decisions on water law may be classified as follows: 1. The use of water for mining purposes on government land, giving rise to a peculiar phase of the development of the law, which terminated at the close of the Civil War and with the passage of the act of Congress in 1866, presently to be described. 2. The use of water for the irrigation of land, and its diversion from streams on land in private ownership. 3. The extraction and use of the subterranean supplies of water. Another use has recently begun; the impoundment of water in reservoirs for the double purpose of producing electrical energy, and conserving the run-off during the rainy season and while the mountain snows are melting, for use in irrigation after it has passed through the power plants. The law with regard to this use, in so far as it may require any modification of settled rules, is now in process of development and it does not come within the scope of a paper devoted to the past.

(Shaw, *supra*, 189 Cal., at p. 780.)

While his address does not say it, Chief Justice Shaw himself was instrumental in the third development of California law he described namely that concerning "subterranean supplies of water." As an associate Justice, he had written the Supreme Court's 1903 decision in *Katz v. Walkinshaw* (1903) 141 Cal. 116, which departed from the common law rule that a landowner owned all of the water beneath his or her property and instead adopted the rule that, as to percolating groundwater basins, all landowners must share the supply correlatively. (*Id.* at pp. 121-137.)

Chief Justice Shaw's 1922 address also did not identify the fact that he already also had foreseen, in his concurring opinion in *Miller v. Bay Cities Water Co.* (1910) 157 Cal. 256, the reconciliation of California law concerning surface water with the need to have sufficient water to serve people and industries during our state's dry periods. *Miller* concerned a

proposal to dam the Coyote River near San Jose, divert water from the river's surface flow and underflow and to deliver that water "by gravity pressure . . . to the southern limits of the city and county of San Francisco." (*Id.* at pp. 262-265, 271.) The Court affirmed an injunction against the proposal on the grounds that the water at issue, even "flood or storm waters," were not surplus to the needs of the plaintiff landowner, who relied on those waters to recharge the river's underflow to support the landowner's extraction and use of groundwater. (*Id.* at pp. 260-262, 265, 284-285.) In his concurring opinion, Chief Justice Shaw described how, in other water cases, an injunction could be flexible enough to allow a junior water user to store water that otherwise would not be used and why such injunctions could be crucial to California's progress:

> In many parts of the state, especially in the large interior valleys, practically all the flood waters are waste waters. They contribute little or nothing to the saturation of any subterranean gravel beds which are resorted to for a supply of water for useful purposes. They rush in great volume to the sea, carrying destruction in their path and overflowing the low lands to the great damage of the owners, serving no useful purpose whatever. If they were stored in reservoirs they might be made to serve a triple purpose. The extreme floods and consequent overflow and destruction would be prevented; the stored water could be used to irrigate large areas of valley land, now left unproductive for lack of water; if distributed upon the plains, for irrigation, a large portion of these waters would in due course of time find their way by seepage and percolation to the channels of the streams, giving an increased and more regular flow in the summer months, increasing the amount available for irrigation in the smaller streams and bettering the navigation of the large rivers; all of which would add tremendously to the growth, prosperity and wealth of the state and to its ability to support the large population which its climate and productions attract. The question of the right to store such flood waters and the terms upon which it can be obtained or exercised is of the greatest importance to the future welfare of the state.

(*Miller, supra*, 157 Cal., at p. 287.)

The issue of how California water law would apply to proposed reservoirs came to a head after Chief Justice Shaw had left the Court, namely in the December 24, 1926 decision in *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81. While Chief Justice Shaw had left the Court, he appeared as a Special Assistant to the Attorney-General of the United States on the United States' *amicus curiae* brief supporting the appellant, Southern California Edison ("Edison"). (*Id.* at p. 85.) The Court ruled against Edison, which had proposed to store water for later hydroelectric use in the San Joaquin River's upper reaches. (*Id.* at pp. 109-111.) The Court held that Edison's project would violate the rights of Amelia Herminghaus and the other plaintiffs who, as riparian landowners, owned lands adjacent to the river's lower reaches in the San Joaquin Valley and who had relied on the river's annual floods to overflow and water those lands. (*Id.* at pp. 86-87, 90-91, 122-123.) The Court held that riparian landowners' reliance on the annual flood flows was a reasonable use of water and that they had no duty to implement any diversions or other artificial measures that might be available to meet their needs with less water. (*Id.* at pp. 103-105.) The Court quoted Chief Justice Shaw's 1922 address for the proposition that, if there were objections to riparian rights, those objections were too late and should have been directed to the Legislature in 1850, before it adopted English common law as a general rule for California and implicitly vested riparian rights. (*Id.* at pp. 111-112.)

The reaction to *Herminghaus* was swift. On March 9, 1927, Assembly Members Crittenden, Bernard, Adams and Mixter introduced Assembly Constitutional Amendment ("ACA") 27, which, after amendments, would propose to the people of California what is now known as Article X, section two. (Assem. J. (1927 Reg. Sess.) pp. 635, 2374,

2656; Assem. Const. Amend. No. 27, Stats. 1927 (1927 Reg. Sess.) res. ch. 67, pp. 2373-2374.)[1] ACA 27 was filed with the Secretary of State, as approved by two-thirds votes of both the Assembly and the Senate, on April 29, 1927. (Stats. 1927, *supra*, pp. 2373-2374.)

The people considered ACA 27 as Proposition 7 at the November 6, 1928 general election. (*See* Voter Information Guide for 1928 General Election (Nov. 6, 1928), pp. 29-30, at http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1250&context=ca_ballot_props (as of Feb. 21, 2017) ("1928 Voter Guide").) Assembly Members Crittenden and Easley wrote the ballot argument in favor of Proposition 7, arguing:

> California has practically no rain in the summer. The state's future development requires that its water shall be stored in order that it may be used in summer and fall for domestic use for great cities, irrigation of lands, development of power, navigation, and for the purpose of flood control . . .
>
> [¶] While this amendment protects all water rights to the full extent to which they can be put to reasonable beneficial use in some reasonable way, and this includes the riparian owner as well as others, nevertheless it is an effort on the part of the state, in the interest of the all of the people of the state, to conserve our waters . . .
>
> [¶] Under present interpretations the riparian owner is not bound by any rule of reasonableness in the use of water.
>
> For example, in the Herminghaus case it was held that approximately 97 per cent of the water of the streams should flow by the land, in order that 3 per cent might be used for irrigation.

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[1]Article X, section two, was enacted as Article XIV, section three, and was renumbered in 1976. (*People v. Shirokow* (1980) 26 Cal.3d 301, 309 fn. 10.) For simplicity, this brief refers to both as Article X, section two.

> The development of California requires that a different rule from this be adopted . . .

(1928 Voter Guide, p. 14.)[2]

There were no ballot arguments opposing Proposition 7, which passed by a vote of 913,125 to 270,163 and carried 57 of the 58 counties. (Statement of Vote at General Election held on November 6, 1928 (Cal. Sec'y of State 1928) p. 33.) Only Humboldt County voted "no," with 4,317 "yes" votes and 5,162 "no" votes. (*Id.*)

By their vote, the people resolved the key issue that Chief Justice Shaw had identified in 1922 as the next step in reconciling our state's water law with our climate. They had voted resoundingly to amend the Constitution to support water storage.

B. The Courts Have Consistently Interpreted Article X, Section Two, To Support Investments In Water Storage

1. In The 1930s, The California Supreme Court Repeatedly Confirmed That Article X, Section Two, Supports Water Storage

In an extraordinary line of eight decisions issued between 1933 and 1939, the California Supreme Court interpreted Article X, section two, with four of those decisions explicitly holding that it was intended to and did support increased water storage to meet the state's needs. (*See Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 353; *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316; *Meridian, Ltd., v. City and County of San Francisco* (1939) 13 Cal.2d 424; *see also Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489 (interpreting Art. X, § 2, but not in relation to a storage project); *Corona Foothill Lemon Co. v. Lillibridge* (1937) 8 Cal.2d 522;

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[2]The Respondents' Brief states that this ballot argument is attached to their request for judicial notice as Exhibit J. (Respondents' Brief, p. 54.)

Hillside Water Co. v. City of Los Angeles (1938) 10 Cal.2d 677 (same); *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501 (same).)

In *Gin S. Chow*, *Peabody*, *City of Lodi* and *Meridian*, the Court considered the claims of downstream water users that the construction and operation of upstream storage reservoirs interfered with their enjoyment of the various benefits of high streamflows. (*Gin S. Chow*, *supra*, 217 Cal., at pp. 677-680; *Peabody*, *supra*, 2 Cal.2d, at pp. 358-360, 369-370, 375-376; *City of Lodi*, *supra*, 7 Cal.2d, at pp. 320-323; *Meridian*, *supra*, 13 Cal.2d, at pp. 429-430, 435-438.) In *Gin S. Chow*, *Peabody* and *Meridian*, the facts closely resembled *Herminghaus*'s facts, with riparian landowners asserting that they were injured by the storage of high streamflows that otherwise would have flowed to and benefited their properties along the relevant streams. (*Gin S. Chow*, *supra*, 217 Cal., at pp. 677-680, 699-706; *Peabody*, *supra*, 2 Cal.2d, at pp. 358-360, 369-370, 375-376; *Meridian*, *supra*, 13 Cal.2d, at pp. 429-430, 435-436.) *City of Lodi* was similar, with the plaintiff city arguing against upstream storage, claiming that high streamflows were necessary to press water into the downstream groundwater from which it pumped its municipal supplies. (*City of Lodi*, *supra*, 7 Cal.2d, at pp. 321, 326, 330-331, 335-336.)

In each of these decisions, the California Supreme Court ruled that Article X, section two, supported the storage project's implementation. (*Gin S. Chow*, *supra*, 217 Cal., at pp. 699-706; *Peabody*, *supra*, 2 Cal.2d, at pp. 358-360, 369-370, 375-376; *City of Lodi*, *supra*, 7 Cal.2d, at pp. 337-340, 343-345; *Meridian*, *supra*, 13 Cal.2d, at pp. 444-451.) Because *Meridian* concerned the exact storage project that is at issue here, the Court's discussion in that case of water storage is particularly relevant. In *Meridian*, the Court modified an injunction favoring the riparian landowners and stated:

> In truth, the program of the state in developing and conserving its water resources has progressed to the stage where it should be said that the restraint and storage of water in the upper reaches of our rivers and streams as a means of protection against damage by flood and of equalizing and stabilizing the flow are beneficial uses. If this be not so the efforts of the state and the federal government check in providing primarily for storage, flood protection and stabilization of the water supply of the Sacramento and San Joaquin Rivers by means of the Central Valley Project (Stats. 1933, p. 2643), are beyond the pale of lawful enterprise and, according to the theory of the judgment of injunction herein, subject to the right of those farther down the stream to prohibit, even though such storage cause the lower owner no damage and be in fact of great benefit to him . . .
>
> [¶] These great projects are further confirmation of the fact that the storage of fresh water is deemed essential to the growth and progress of the state. *It was undoubtedly the purpose of the proponents of the amendment of 1928 to make it possible to marshal the water resources of the state and make them available for the constantly increasing needs of all of its people. In according to that great purpose its proper significance it is necessary and appropriate to declare, an inherent in the plan, that the storage of water for the purposes of flood control, equalization and stabilization of the flow and future, is included within the beneficial uses to which the waters of the rivers and streams of the state may be put within the intent of the constitutional amendment . . .*
>
> [¶] We conclude that the waters of the Tuolumne River and its tributaries in excess of the needs of lower riparian owners and prior appropriators for all reasonably useful and beneficial purposes have been released by the constitutional amendment of 1928 for storage and other beneficial uses incident thereto . . . .

(*Meridian, supra,* 13 Cal.2d, at pp. 449, 451 (emphasis added); *see also id.* at p. 459.)

2. In Later Decisions, The California Supreme Court Reaffirmed Article X, Section Two's Initial Purpose And Interpreted It As A Tool To Limit Uncertainty That Could Discourage Investment

The Court has never overruled its 1930s decisions or reversed the course of the law they set. In 1967, the Court considered a case similar to its 1930s' water-storage decisions, namely *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132. In *Joslin*, a landowner sought damages against the district because its dam interfered with the deposition of sand and gravel on the landowner's property. (*Id.* at pp. 134-135.) The Supreme Court affirmed a judgment in favor of the district and, citing the above 1930s decisions extensively, reiterated the interests that the people enacted Article X, section two, to advance:

> Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment. [Footnote 9 omitted] On the other hand, unlike the unanimous policy pronouncements relative to the use and conservation of natural waters, we are aware of none relative to the supply and availability of sand, gravel and rock in commercial quantities. Plaintiffs do not urge that the general welfare or public interest requires that particular or exceptional measures be employed to insure that such natural resources be made generally available and should therefore be carefully conserved.

(*Joslin, supra*, 67 Cal.2d, at p. 140 (emphasis in original).)

It is noteworthy that the Court inserted, in this middle of this discussion, its footnote nine as describing "statewide considerations of transcendent importance" and that the footnote contains an extensive quote from Chief Justice Shaw's concurrence in *Miller v. Bay Cities Water Co., supra*, 157 Cal. 256, including his statement that:

> If [high streamflows] were stored in reservoirs they might be made to serve a triple purpose. The extreme floods and consequent overflow and destruction would be prevented; the stored water could be used to irrigate large areas of valley land, now left unproductive for lack of water; if distributed upon the plains, for irrigation, a large portion of these waters would in due course of time find their way by seepage and percolation to the channels of the streams . . . .

(*Joslin, supra*, 67 Cal.2d, at p. 140 fn. 9 (quoting *Miller, supra*, 157 Cal., at pp. 701-702 (Shaw, concurring).)

In other words, the "statewide considerations of transcendent importance" that the California Supreme Court explicitly identified in *Joslin* are those associated with supporting water storage that Chief Justice Shaw identified in 1910.

Since *Joslin*, the California Supreme Court has not interpreted Article X, section two, in relation to a water storage project, but two of its post-*Joslin* decisions demonstrate that the concerns underlying its application of that provision in the 1930s cases and *Joslin* remain valid.[3]

In *In Re Waters Of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, the Court held that a statute authorizing the State Water Resources Control Board (the "SWRCB") to conduct an adjudication of all rights in a surface stream authorized the deprioritization of unexercised

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[3]Since *Joslin*, the Supreme Court has applied Article X, section two, in other types of cases. For example, it applied that provision in two decisions concerning East Bay Municipal Utility District's proposal to divert water, under a Central Valley Project ("CVP") contract with the federal Bureau of Reclamation, from the lower American River. (*Environ. Defense Fund v. East Bay Mun. Utility Dist.* (1977) 20 Cal.3d 327, 331-332, 341-344; *Environ. Defense Fund v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 188-190, 193, 198-200 ("*EDF II*").) Unlike *City of Lodi, supra*, those decisions did not involve that district's own storage reservoirs. In *Shirokow*, *supra*, the Court cited Article X, section two, as stating state policy that supported its interpretation of the Water Code as precluding prescriptive surface-water rights from being established against the State. (*Shirokow*, *supra*, 26 Cal.3d, at pp. 308-309.)

riparian rights. (*Id.* at pp. 344, 351-352, 358-359.) The Court relied on Article X, section two, and quoted *Gin S. Chow* in stating:

> [W]e have observed that the purpose of the amendment [Article X, section two] was "to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea" . . . .

(*Long Valley*, *supra*, 25 Cal.3d, at p. 353 (quoting *Gin S. Chow*, *supra*, 217 Cal., at p. 700).)

The Court went on to identify that "the policies of the amendment" include reducing uncertainty, relying on the 1978 report of the Governor's Commission to Review California Water Rights Law, which, according to the Court, "identifies uncertainty as one of the major problems in contemporary California water rights law . . . ." (*Long Valley*, *supra*, 25 Cal.3d, at pp. 354-355.) The Court stated:

> Uncertainty concerning the rights of water users has pernicious effects. Initially, it inhibits long range planning and investment for the development and use of waters in a stream system . . .
>
> [¶] Uncertainty also fosters recurrent, costly and piecemeal litigation. In the present case, for example, there has been incessant litigation between the claimants to the waters of the stream system since about 1883 . . .
>
> [¶] Finally, uncertainty impairs the state's administration of water rights.

(*Long Valley*, *supra*, 25 Cal.3d, at pp. 354-356.)[4]

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[4]In 1980, the Legislature enacted Water Code section 109, subdivision (a) of which states, in its current form and in pertinent part, "The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights."

Similarly, the Supreme Court's most recent application of Article X, section two, emphasized the importance of applying it to affirm and reconcile water rights if possible. In *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 ("*Mojave*"), the Court considered a Superior Court judgment in a groundwater adjudication involving hundreds of parties, in which the Superior Court had adopted, as its global judgment, a negotiated "physical solution" that it had imposed on non-stipulating parties after prohibiting parties from presenting evidence of their water-right priorities. (*Id.* at pp. 1235-1238.) The Court held that a physical solution under Article X, section two, cannot simply ignore water rights and their priorities. (*Id.* at pp. 1249-1251.)[5]

Similarly, in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 ("*National Audubon*"), the Supreme Court briefly discussed the application of Article X, section two, to environmental uses of water. *National Audubon* concerned the City of Los Angeles' diversions from non-navigable tributaries to Mono Lake that the state had permitted without considering their effect on the lake's resources. (*Id.* at pp. 424-428, 447.) The Supreme Court held that the common law public trust doctrine applied to those tributaries and authorized reconsideration of Los Angeles' water rights that the State had issued without considering the associated diversions' impacts on public trust resources. (*National Audubon*, *supra*, 33 Cal.3d, at p. 447 ("[T]he salient fact is that no responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct").)

Before reaching that conclusion, the Court declined to decide what the full scope of Article X, section two's application is, but discussed the

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[5]The Court stated that its decision did not affect the SWRCB's administrative authority or its authority over surface waters. (*Mojave*, *supra*, 23 Cal.4th, at p. 1233 fn. 2.)

development of California water-right law, including Article X, section two's enactment and declared:

> This amendment does more than merely overturn *Herminghaus* – it establishes state water policy. *All uses of water, including public trust uses, must now conform to the standard of reasonable use.*

(*National Audubon*, *supra*, 33 Cal.3d, at p. 443 (second emphasis added); *see also id.* at p. 447 fn. 28 (concerning Article X, section two).)

By applying the common law public trust doctrine to water rights, *National Audubon* is considered to have introduced uncertainty in those rights' use. (*See, e.g.*, Littleworth, *The Public Trust vs. The Public Interest*, 19 Pacific L. J. 1201 (1988).)[6] *National Audubon*, however, also indicates how Article X, section two, also can be used to control any such uncertainty, just as it was enacted to control the uncertainty resulting from *Herminghaus*'s expansive interpretation of riparian rights.

3. Court Of Appeal Decisions Have Expanded Article X, Section Two's Scope, Including To Groundwater Storage

As one would expect for an almost 90-year-old and generally worded constitutional provision, Article X, section two's application has broadened beyond its original purpose through numerous Court of Appeal decisions. It has been applied to determine, for example: whether particular losses through water conveyances are acceptable (*Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 584-586; *Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 146-147; *Imperial Irr. Dist. v. State Water Resources Control Bd.* (1986) 186 Cal.App.3d 1160, 1163-1170; *Imperial Irr. Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 553-554, 557-564); whether instantaneous effects of

[6]The Court of Appeal, however, has interpreted *National Audubon* as not applying to water stored in a reservoir. (*Golden Feather Community Assn. v. Thermalito Irr. Dist.* (1989) 209 Cal.App.3d 1276, 1285-1287.)

multiple simultaneous diversions on streamflows can be regulated (*People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 748-752**;** *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1472-1473, 1479-1480); whether physical solutions that resolved multi-party groundwater cases were valid (*Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1726-1728, 1736-1737; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287-290 ("*Santa Maria*")); what the relationship between a court-approved physical solution and later local-agency actions is (*Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363, 376-379; *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480-482); and whether water suppliers' rates are legal (*Brydon v. East Bay Mun. Utility Dist* (1994) 24 Cal.App.4th 178, 192-196; *Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1508-1512). Importantly for this case, the Courts of Appeal not only continued to protect storage investments under Article X, section two, but also have extended that logic to groundwater storage.

a. The Court of Appeal Has Applied Article X, Section Two, To Protect Storage Investments In Several Cases

Three decisions show how the Court of Appeal protected water agencies' investments in both surface storage and groundwater storage.

First, in relation to surface water, in *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, the Court of Appeal held that the storage and use of Santa Ynez River water by the City of Santa Barbara and others was not only consistent with the judgment concerning that river in *Gin S. Chow*, but also was a reasonable use under Article X, section two. (*Jordan*, *supra*, 46 Cal.App.4th, at pp. 1263-1275.) The Court relied on not only *Gin S.*

Chow, but also the Supreme Court's *Meridian*, *Peabody* and *Long Valley* decisions. (*See id.* at pp. 1266-1268.) It quoted *Meridian* as follows:

> In *Meridian. Ltd. v. San Francisco* (1939) 13 Cal.2d, 424, 449, [90 P.2d 537], the Supreme Court recognized that ". . . the storage of water for the purposes of flood control, equalization and stabilization of the flow and future use, is included within the beneficial uses to which the waters of the rivers and streams of the state may be put within the intent of the constitutional amendment [Article X, section two]."

(*Jordan, supra*, 46 Cal.App.4th, at p 1267.)

Second, in relation to groundwater, in *Niles Sand & Gravel Co. v. Alameda County Water Dist.* (1974) 37 Cal.App.3d 924, the Court of Appeal held that, under Article X, section two, the operator of sand and gravel pits had not suffered a compensable taking where water accumulated in those pits as a result of a water district's program of recharging the relevant groundwater basin to prevent saltwater intrusion from the Bay. (*Id.* at pp. 928-932, 935-937.) The Court further held that the sand and gravel operation's correlative right to pump groundwater from the basin had not authorized it to pump that water into San Francisco Bay. (*Id.* at pp. 932-935.) In *Niles Sand & Gravel, supra*, the Court of Appeal thus applied Article X, section two, to protect the water district's investment in surface-water supplies and its recharge program as essentially a trustee for all of the groundwater users in the basin. (*Id.* at pp. 930-931 (describing district's program), 934, 937.)

Third, in *Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.* (2003) 109 Cal.App.4th 891, the court considered whether a motion that proposed an amendment to a groundwater case's judgment that would have allocated rights in the relevant basin's subsurface storage space was, among other things, consistent with Article X, section two. (*Id.* at pp. 898-900, 902, 912-914.) The proposed amendment would have allocated rights in that storage space consistent with the parties' right

to pump groundwater under the judgment. (*Id.* at p. 900.) The Court of Appeal affirmed the motion's denial, based largely on the fact that the judgment did not address storage space, but also finding that Article X, section two, did not require any particular allocation of the space. (*Id.* at pp. 912-914.) The Court stated:

> Appellants recognize the constitutional mandate [of Article X, section two] and argue that granting the Motion is consistent with the constitutional mandate because the proportional allocation [of storage space] would result in public accountability and would lead to greater efficiency . . .
>
> [¶] [T]he Motion permits the Pumpers to sell their storage rights to "those entities that value it most" without any guarantee that the "entities that value it most" also are accountable to the public . . .
>
> [¶] Embedded within appellants' efficiency claim is a request for clearly defined water rights, a prerequisite for an efficient market. The request for definition is understandable in light of the deleterious effects of uncertainty . . . The need for clear definition, however, supports no particular allocation [of the basin's storage space] including that proposed by appellants.

(*Id.* at pp. 913-914.)

Instead of adopting the proposed allocation of storage space, the Court instead held that a preexisting water replenishment district with jurisdiction over the basin had authority to manage that space, subject to some restrictions. (*Id.* at pp. 915-916.) That district's replenishment program involved spreading water imported into the basin, or reclaimed water, so that it would percolate into the groundwater. (*Id.* at pp. 897-898, 915.) The district asserted that it already had recharged 250,000 acre-feet of water into the basin. (*Id.* at p. 898.)

In both *Niles Sand & Gravel, supra*, and *Central and West Basin Water Replenishment Dist., supra*, the Court of Appeal applied Article X, section two, to support a local district's investment in the water that it

recharged into groundwater storage. By protecting those investments, both Court of Appeal decisions are consistent with Article X, section two's original intent of encouraging water storage.

b. Court of Appeal Decisions Under Article X, Section Two, Involving Storage Impacts Concerned Sovereign Governments' Prioritization Of Their Own Assets Or Emphasize Water-Right Priority

The Court of Appeal decisions that have suggested that Article X, section two, can be applied to potentially invade storage assets either have addressed unique circumstances involving the state and federal governments' decisions about their own projects or ultimately have reinforced the key legal principle supporting initial water investments in California, namely the rule of priority.

Two of these decisions involved the operations of the United States' Central Valley Project (the "CVP") and the State of California's State Water Project (the "SWP") and the water quality of the Sacramento-San Joaquin Bay-Delta, which those operations affect. (*See United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 97-100, 106-111 ("*Racanelli*");[7] *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 690-695 ("*SWRCB Cases*").)

In *Racanelli*, the Court discussed Article X, section two, in the context of the SWRCB's authority to require the CVP to operate to meet certain Delta water quality standards. In issuing the CVP's initial water-right permits in 1958 and 1961, the SWRCB's predecessor agency, the State Water Rights Board, had reserved jurisdiction to later determine what terms to apply to address the CVP's effect on the Delta's water quality. (*Racanelli, supra*, 182 Cal.App.3d, at pp. 106, 127-130 (citing Wat. Code,

[7]This decision often is called *Racanelli* after its author, Justice John T. Racanelli. (*SWRCB Cases*, *supra*, 136 Cal.App.4th, at p. 690.)

§ 1394).) In its Decision 1485 in 1978, the SWRCB had required the CVP to meet certain water quality requirements in the Delta. (*Racanelli, supra*, 182 Cal.App.3d, at pp. 98, 110-111.) In the years between 1961 and 1978, both the United States and the State of California had enacted comprehensive statutes to manage and protect water quality. (*See id.* at pp. 107-111.)[8] One way in which the CVP might meet the resulting water quality requirements was by releasing stored water from its reservoirs. (*Id.* at p. 125 fn. 18, 130.) The Court held that the SWRCB had authority to require the CVP to meet those requirements both as an exercise of reserved jurisdiction over the CVP's permits and because the CVP's impacts on Delta water quality could make its operations an unreasonable use under Article X, section two. (*Id.* at pp. 127-130.)

In *SWRCB Cases*, the Article X, section two, issue was whether the SWRCB's requirement that the CVP ensure that certain San Joaquin River water quality standards were met was an unreasonable use of water because it could require the CVP to release stored water to dilute salinity. (*SWRCB Cases, supra*, 136 Cal.App.4th, at pp. 760-762.) Prior decisions including *Racanelli* had held that prohibiting upstream water uses to ensure salinity dilution in the Delta was unreasonable in their particular circumstances. (*City of Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451, 460, 465; *Racanelli*, *supra*, 182 Cal.App.3d, at pp. 143-144.) In *SWRCB Cases*, however, the Court of Appeal held that Article X, section two, did not *prohibit* the requirements even if they might require storage releases, which the Court noted they did not expressly do. (136 Cal.App.4th, at pp. 761-762.) In other words, the Article X, section two, issue presented in *SWRCB Cases* was whether that provision precluded a specific regulatory

[8]*See* 33 U.S.C. §§ 1251-1388 (federal Clean Water Act); Wat. Code, §§ 13000-16104 (Porter-Cologne); s*ee also* Wat. Code, § 13160 (SWRCB implements federal water quality laws).)

requirement, not whether Article X, section two, itself could require that a water user be divested of the water-storage assets its own investments had created.

Racanelli and *SWRCB Cases* are unique decisions because of the nature of the CVP and the SWP, for at least two reasons.

First, unlike cases such *Gin S. Chow*, *Peabody*, *City of Lodi*, *Meridian*, this case and the other cases discussed in this Brief in which a local agency or other actor created water storage through its investments, *Racanelli* and *SWRCB Cases* involve CVP and SWP facilities that the United States and the State of California created themselves as sovereigns and, after building the projects, impacted by enacting water quality laws. Such actions by a sovereign government create complicated questions about what liability it may have to contractors and others who depended on the sovereign's initial investments before it enacted the later laws. (*See Casitas Mun. Water Dist. v. United States* (Fed. Cir. 2008) 543 F.3d 1276, 1286-1288, (contracts), 1288-1292 (takings); *Stockton East Water Dist. et al. v. United States* (Fed.Cir. 2009) 583 F.3d 1344, 1354-1359, 1365-1368.) While such contractors' and others' options for preventing the sovereign's actions may be limited, the sovereign can be liable for contract damages or takings compensation when the actions it takes to comply with its own laws leave it unable to meet its contractual commitments or devalue investments it encouraged a third party to make. (*Stockton East*, *supra*, 583 F.3d, at pp. 1354-1359, 1365-1369.) In addition, where such a sovereign government accepts permit terms that benefit particular water users, it must abide by them. (*See Racanelli*, *supra*, 182 Cal.App.3d, at p. 102 (discussing water-right permitting); *see also*, *e.g.*, *SWRCB Cases*, *supra*, 136 Cal.App.4th, at pp. 808-818 (discussing certain CVP permit terms).)

Second, the CVP and the SWP are such large projects with such an extensive effect on the hydrology and water quality of not only the Delta,

but also the Central Valley generally, that it was apparent from their initiation that it would require many years to determine exactly how they were affecting, and would affect, relevant resources. (*See Racanelli*, *supra*, 182 Cal.App.3d, at pp. 107, 128-129 (discussing project's scope and reservations of jurisdiction to determine permit terms).) Moreover, salinity control is one of the CVP's and the SWP's authorized purposes. (*See id.* at pp. 128-129, 134-137.) Initial water-supply investments in the CVP and the SWP were made with these uncertainties in mind.[9]

The importance of a project's initial permitted terms is key in the third Court of Appeal decision that suggests Article X, section two, could affect storage. (*El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937 ("*El Dorado*").) *El Dorado* concerned the SWRCB's attempt to impose, on a local agency's new water-right permit within the Delta's watershed that had priority over the CVP and the SWP, a prohibition on diversions at times when the CVP and the SWP were releasing their stored water in order to meet Delta water quality requirements. (*Id.* at pp. 942-943.) The new permit had priority over the older CVP and SWP permits because the local agency obtained its permit based on an even older water-right application that the State had filed in 1927 and that had been assigned to the local agency. (*Id.* at pp. 946-947, 952-957.)

The Court of Appeal held that the SWRCB had erred because it had not limited diversions by water users whose rights held priorities between that permit's 1927 priority date and the CVP's and the SWP's priority dates. (*Id.* at pp. 961-965.) Relying on *Meridian* and *Mojave*, the court

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[9]While *Racanelli* SWRCB could have ordered water users besides the CVP and the SWP to contribute to Delta water quality requirements (182 Cal.App.3d, at pp. 120, 126), the case did not involve any such orders and therefore is not authority on that point. (*See, e.g., People v. Jennings* (2010) 50 Cal.4th 616, 684.)

emphasized the importance of priority in California's water-right system. (*El Dorado*, *supra*, 142 Cal.App.4th, at pp. 961-965.) The court stated that priority must yield if its effect would cause water use inconsistent with Article X, section two, but held that the SWRCB had not shown its permit term was necessary to prevent that result. (*Id.* at pp. 965-971.) The court stated:

> The Board's [SWRCB's] role was not simply to determine which choice it thought was the most "fair," untethered from any guiding principles. On the contrary, in making that choice the Board's "*first* concern" should have been to recognize and protect El Dorado's prior appropriative right, if possible. (*Meridian. Ltd., v. San Francisco, supra*, 13 Cal.2d at p. 450, italics added.) If it could not impose term No. 91 without contravening El Dorado's 1927 priority, then it should not have imposed that term at all, because no competing principle or interest justified that result.

(*El Dorado*, *supra*, 142 Cal.App.4th, at pp. 970-971.)

El Dorado thus emphasized the protection of the key condition under California law that determines whether it makes sense to pursue a water project, namely whether its priority would make enough water available for use to support the investment. (*See id*. at p. 962 (discussing priority's "utmost importance" in determining the water available to an applicant).)[10] The fact that the Court in *El Dorado* was clear on this point in a case involving the initial terms for a storage project demonstrates the California courts continue to implement the public policy that Article X, section two, was enacted to implement, namely to clarify the law to make water available to support the significant investments necessary for

[10]Because *Trussell v. City of San Diego* (1959) 172 Cal.App.2d 593 emphasizes the water-right priority of a reasonable use (*id.* at pp. 609-612), Restore Hetch Hetchy's reliance on *Trussell* to support its theory that Article X, section two, can support a court ordering wholesale changes to San Francisco's facilities and operations is misplaced.

Californians to have consistent and adequate water supplies even in our variable climate.

III.

ACCEPTING RESTORE HETCH HETCHY'S THEORY WOULD IMPERIL FUTURE INVESTMENTS IN WATER STORAGE CONTEMPLATED BY THE PEOPLE AND THE LEGISLATURE

The potential effect of Restore Hetch Hetchy's case is that the operation – and even the existence – of any water-storage asset would be subject to repeated reconsideration as a potentially unreasonable method of diversion. Even aside from the impact that such a declaration of law would have on existing water-storage assets, it would discourage future investments in water storage. "Uncertainty concerning the rights of water users has pernicious effects. Initially, it inhibits long range planning and investment for the development and use of waters in a stream system." (*Long Valley*, *supra*, 25 Cal.3d, at p. 355.) Discouraging such investments would contradict the people of California's overwhelming approval of such investments under 2014's Proposition 1, (Wat. Code, §§ 79700-79798), as well as the investments necessary to implement the Legislature's intent in enacting the landmark statewide Sustainable Groundwater Management Act (Wat. Code, §§ 10720-10737.8) and the Bay Area Water Supply and Conservation Agency Act that concerns many of the agencies involved in this case (Wat. Code, §§ 81300-81461).

A. In Approving Proposition 1, The People Not Only Approved New Storage Investments, But Required Coordinated Investments By Others

The people considered Proposition 1 – formally entitled the Water Quality, Supply and Infrastructure Improvement Act of 2014 – in the November 4, 2014 general election and overwhelmingly approved it by a count of 4,771,350 (67.13%) to 2,336,676 (32.87%). (Statement of Vote, November 4, 2014, General Election (Cal. Sec'y of State) pp. 88-90; *see*

also Wat. Code, § 79700.) Proposition 1 is a $7,120,000,000 general obligation bond, the largest single portion of which is the $2,700,000,000 contained in its Chapter 8. (Wat. Code, §§ 79750-79760, 79785.) The purpose of the people's commitment of those funds is stated as follows:

> Notwithstanding Section 13340 of the Government Code, the sum of two billion seven hundred million dollars ($2,700,000,000) is hereby continuously appropriated from the fund, without regard to fiscal years, to the commission [California Water Commission] for *public benefits associated with water storage projects* that improve the operation of the state water system, are cost effective, and provide a net improvement in ecosystem and water quality conditions, in accordance with this chapter.

(Wat. Code, § 79750, subd. (b) (emphasis added).)

Proposition 1's Chapter 9 then defines the types of water storage projects that are eligible for bond funding:

> Projects for which the public benefits are eligible for funding under this chapter consist of only the following:
>
> (a) Surface storage projects identified in the CALFED Bay-Delta Program Record of Decision, dated August 28, 2000, except for projects prohibited by Chapter 1.4 (commencing with Section 5093.50) of Division 5 of the Public Resources Code [the California Wild & Scenic River Act].
>
> (b) Groundwater storage projects and groundwater contamination prevention or remediation projects that provide water storage benefits.
>
> (c) Conjunctive use and reservoir reoperation projects.
>
> (d) Local and regional surface storage projects that improve the operation of water systems in the state and provide public benefits.

(Wat. Code, § 79751.)[11]

Proposition 1, however, does not fully fund the construction of new water-storage assets, but instead, in most cases, requires that the state's investment in those projects be at least equally matched by others. Proposition 1 limits the state's investment in a storage project under its Chapter 8 to certain defined public benefits. (Wat. Code, § 79753, subd. (a).) It then further limits the state's investment in most such projects to one-half of their cost:

> *The public benefit cost share of a project funded pursuant to this chapter, other than a project described in subdivision (c) of Section 79751, shall not exceed 50 percent of the total costs of any project funded under this chapter.*

(Wat. Code, § 79756, subd. (a) (emphasis added).)

By approving Proposition 1, the people of California sent twin messages about water storage, namely that the state should be investing in them and that others should be as well. This approach for encouraging future water-storage investments is aligned with Article X, section two's history, as discussed above. The people of California enacted that constitutional provision to support the investments in storage that have been necessary to provide adequate water supplies in our unique climate, with the State sometimes making those investments, but often with others making them in reliance on state law. In particular, many local agencies like San Francisco and the other respondents have made those investments to serve their particular communities. Proposition 1 demonstrates that the people of California expect to maintain this course. Restore Hetch Hetchy's claims, in contrast, would discourage any investments in water storage by making the benefits of those investments continuously subject to

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[11]For information concerning the CALFED program, *see In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1156-1160.

potential forfeitures through undefined reconsideration of their reasonableness.

B. Restore Hetch Hetchy's Theory Could Undermine The Legislature's New Effort To Make California's Groundwater Use Sustainable

The effect that accepting Restore Hetch Hetchy's theory could have on investments in water storage could extend to measures implementing the Sustainable Groundwater Management Act, also enacted in 2014. (Wat. Code, §§ 10720-10737.8. ("SGMA").) SGMA is California's first law that comprehensively regulates groundwater use. It requires that:

- Groundwater basins "that are subject to critical conditions of overdraft" be managed under a groundwater sustainability plan, or coordinated plans, by January 31, 2020 (Wat. Code, § 10720.7, subd. (a)(1);
- Other "high- or medium-priority basins" shall be managed under such plans by January 31, 2022 (Wat. Code, § 10720.7, subd. (a)(2); and
- Those plans must contain "[m]easurable objectives . . . to achieve the sustainability goal in the basin within 20 years of the implementation of the plan," with the sustainability goal including the implementation of measures "targeted to ensure that the applicable basin is operated within its sustainable yield." (Wat. Code, § 10721, subd. (u); 10727.2, subd. (b)(1).)

In SGMA, the Legislature recognized that it might be necessary for local agencies to invest in water-storage projects to achieve SGMA's goals. It explicitly empowered the "groundwater sustainability agencies" – which may be single agencies or joint efforts – that will implement SGMA to

appropriate and store both surface water and groundwater, both within the agency's boundaries and outside of them:

> A groundwater sustainability agency may . . .
>
> (b) Appropriate and acquire surface water or groundwater and surface water or groundwater rights, import surface water or groundwater into the agency, and conserve and store within or outside the agency that water for any purpose necessary or proper to carry out the provisions of this part, including, but not limited to, the spreading, storing, retaining, or percolating into the soil of the waters for subsequent use . . . .

(Wat. Code, § 10726.2, subd. (b); *see also* Wat. Code, §§ 10723, 10723.6 (defining possible agency members).)

To the extent that storage projects may be necessary to bring the operation of groundwater basins within their sustainable yields under SGMA, significant investments necessarily will be required. The recharge program that the Court of Appeal upheld under Article X, section two, in *Niles Sand & Gravel*, *supra*, is an example of the type of project that presumably will become more prevalent under SGMA. (*See Niles Sand & Gravel, supra*, 37 Cal.App.3d, at pp. 935-937.) Contrary to *Niles Sand & Gravel, supra*, Restore Hetch Hetchy's theory of Article X, section two, if accepted, would interfere with investments in such programs by subjecting them to potentially repeated and indefinite reconsideration.

C. Accepting Restore Hetch Hetchy's Theory Would Undermine The Legislature's Intent To Encourage Investments By Agencies Involved In This Case

In 2002, the Legislature authorized the Bay Area Water Supply and Conservation Agency ("BAWSCA") as a new public agency consisting of San Francisco's Hetch Hetchy contractors specifically to support further investments related to that system. (*See* Wat. Code, §§ 81300-81461.) In doing so, the Legislature stated:

> (a) Many separate cities, districts, and public utilities are responsible for distribution of water in portions of the Bay Area served by the regional system operated by the City and County of San Francisco . . .
>
> (b) The San Francisco regional system is vulnerable to catastrophic damage in a severe earthquake, which could result in San Francisco and neighboring communities being without potable water for up to 60 days. The San Francisco regional system is also susceptible to severe water shortages during periods of below average precipitation because of insufficient storage and the absence of contractual arrangements for alternative dry year supplies . . .
>
> (d) *It is the intent of the Legislature to enable local governments responsible for water distribution in the three counties [Alameda, San Mateo and Santa Clara Counties] to establish a multicounty agency authorized to plan for and acquire supplemental water supplies, to encourage water conservation and use of recycled water on a regional basis, and to assist in the financing of essential repairs and improvements to the San Francisco regional water system, including seismic strengthening.*

(Wat. Code, § 81301 (emphasis added).)

Restore Hetch Hetchy's legal theory would put all of these arrangements at risk based on lengthy, very expensive and highly technical litigation in a Superior Court governed by the standard of whether San Francisco's facilities, some undefined portion of them or some undefined operation of them would be a "reasonable method of diversion." Such litigation in itself could discourage needed investments in San Francisco's Hetch Hetchy system, which serves 24 public entities. (*See* Wat. Code, § 81305.)

Restore Hetch Hetchy's theory also would undermine the investments in *other water supplies* that the Legislature intended to foster in creating BAWSCA. Requiring San Francisco and BAWSCA's members to invest $2,000,000,000 only to receive the same water supply that they

already receive, as Restore Hetch Hetchy proposes (AA 24-26, 30 (complaint's allegations)), necessarily would discourage new investments in supplemental water supplies, conservation and recycled water that the Legislature explicitly intended to encourage in creating BAWSCA. (*See* Wat. Code, § 81301, subd. (d).) Just as the people intended to encourage water-supply investments statewide in enacting Article X, section two, so did the Legislature in creating BAWSCA. Restore Hetch Hetchy's theory is inconsistent with the intent underlying both of those acts.

IV.

THE COURT SHOULD HOLD THAT RESTORE HETCH HETCHY'S CLAIMS ARE BOTH INCONSISTENT WITH ARTICLE X, SECTION TWO, AND PREEMPTED BY THE RAKER ACT BECAUSE THOSE AUTHORITIES ARE ALIGNED IN BOTH THEIR INTENT AND EFFECT

Restore Hetch Hetchy's case rests on broad statements by the California Supreme Court that Article X, section two, must be interpreted in light of current facts and statewide considerations, but Restore Hetch Hetchy does not account for actual facts and considerations identified in the relevant decisions. Its complaint quotes a statement in *Peabody*, *supra*, about the public interest requiring that "there be the greatest number of beneficial uses which the supply can yield." (AA 17.) *Peabody*, however, was one of the California Supreme Court's several decisions in the 1930s that confirmed that Article X, section two, in fact would support storage investments. (*See* § II.B.1 *supra*.) While that Court stated in *Joslin* that "what is a reasonable use of water depends on the circumstances of each case [and] cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance," (67 Cal.2d, *supra*, at p. 140), in doing so, it quoted Chief Justice Shaw's statement about the importance of storage to identify those considerations. (*Id.* at p. 140 fn. 9.)

Restore Hetch Hetchy's claim that Article X, section two, authorizes the courts to compel San Francisco to forfeit the storage assets that its investments have created is the opposite of what that constitutional provision was enacted to achieve and has achieved, as discussed in detail above. Moreover, Restore Hetch Hetchy asserts that, under Article X, section two, the Court can compel San Francisco to make an *additional* investment of at least $2,000,000,000 in order to receive its current existing water supply. (AA 24-26, 30.) The Court therefore can affirm the Superior Court's judgment sustaining San Francisco's demurrer because Restore Hetch Hetchy's claim is contrary to Article X, section two. Such a decision would not only affirm that provision's intent and history, but also would reflect the State's most recent statements of water policy as reflected in 2014's Proposition 1 and SGMA.

The Court also can affirm the Superior Court's judgment on the grounds that Restore Hetch Hetchy's Article X, section two, theory is preempted by the Raker Act. San Francisco's brief persuasively argues that the Raker Act preempts Restore Hetch Hetchy's theory because Congress enacted that Act explicitly to enable San Francisco's project. *Amicus curiae* will not repeat San Francisco's arguments, but, as discussed below, emphasizes that, contrary to Restore Hetch Hetchy's arguments, there is no inconsistency between a proper understanding of Article X, section two – as it may apply under the Raker Act's section 11 – and that Act's general purpose.

Simply reviewing the Raker Act's terms demonstrates that Congress intended the Act to enable San Francisco to invest in water storage. The Act's section one states, in relevant part:

> [T]here is hereby granted to the city and county of San Francisco, a municipal corporation in the State of California . . . such lands in the Hetch Hetchy Valley and Lake Eleanor Basin within the Yosemite National Park, and the Cherry

> Valley within the Stanislaus National Forest, irrespective of the width and extent of such lands, as may be determined by the Secretary of the Interior *to be actually necessary for surface or underground reservoirs, diverting and storage dams . . . .*

(38 Stats. 242 (1913).)

The Act's section four states, in relevant part:

> That the said grantee shall conform to all regulations adopted and prescribed by the Secretary of the Interior governing the Yosemite National Park and by the Secretary of Agriculture governing the Stanislaus National Forest, and shall not take, cut, or destroy any timber within [those areas], except such as may be actually necessary *in order to construct, repair, and operate its said reservoirs [and] dams . . . And provided further,* That *all reservoirs [and] dams . . .* shall be sightly and of suitable exterior design and finish so as to harmonize with the surrounding landscape and its use as a park.

(38 Stats. 243-244 (1913) (first and third emphasis added, second emphasis in original).)

The Act's section nine, subdivision (a), states, in relevant part:

> [U]pon *the completion of the Hetch Hetchy Dam or the Lake Eleanor Dam,* in the Yosemite National Park, by the grantee, as herein specified, and upon *the commencement of the use of any reservoirs thereby created by said grantee as a source of water supply* for said grantee, the following sanitary regulations shall be made effective with the watershed above and around *said reservoir sites . . . .*

(38 Stats. 245 (emphases added).)

Congress's enactment of these specific terms to govern San Francisco's facilities is perfectly aligned with the argument that Assembly Members Crittenden and Easley made in favor of 1928's Proposition 7, by which the people enacted Article X, section two:

> California has practically no rain in the summer. *The state's future development requires that its water shall be stored in*

> *order that it may be used in summer and fall for domestic use for great cities*, irrigation of lands, development of power, navigation, and for the purpose of flood control . . . .

(1928 Voter Guide, p. 14 (emphasis added).)

The similarities between the Raker Act and the law under Article X, section two, also extend to their more particular applications. The California Supreme Court has interpreted Article X, section two, as requiring that practical physical solutions be assessed to potentially resolve conflicts between senior and junior rightholders. (*City of Lodi*, *supra*, 7 Cal.2d, at pp. 341, 344 (possible deliveries from EBMUD to Lodi); *Rancho Santa Margarita*, *supra*, 11 Cal.2d, at pp. 559-562.) Physical solutions allow senior rightholders to be satisfied, while making water available for the junior rightholders, by physically changing facilities or operations, often largely through the use of new storage. (*City of Lodi*, *supra*, 7 Cal.2d, at pp. 341, 344 (possible deliveries from EBMUD to Lodi); *Rancho Santa Margarita*, *supra*, 11 Cal.2d, at pp. 559-562.) Physical solutions continue to be critical for resolving complex water disputes, such as the Santa Maria groundwater adjudication addressed in the Court of Appeal's most recent decision involving such a solution. (*See Santa Maria*, *supra*, 211 Cal.App.4th, at pp. 287-290.)

While the Raker Act predated Article X, section two, by 15 years, that Act contains its own physical solution. The Act's section nine, subdivisions (b) and (c) require that San Francisco "recognize" and "never interfere with" certain defined water rights of the Modesto and Turlock Irrigation Districts. (38 Stats. 246 (1913).) The Act's section nine, subdivisions (d) through (g), then go a step further and require San Francisco to sell those districts water that San Francisco stores in its reservoir under certain terms. Subject to a number of conditions stated later in the Act, subdivision (d) of its section nine states:

> That the said grantee [San Francisco] whenever the said irrigation districts desire water in excess of that to which they are entitled under the foregoing [subdivisions (b) and (c)], shall on written demand of the said irrigation districts sell to the said irrigation districts *from the reservoir or reservoirs of said grantee such amounts of stored water as may be needed for the beneficial use of the said irrigation districts* at such a price as will return to the grantee the actual total costs of providing such stored water . . . however, that the said grantee may require the said irrigation districts to purchase and pay for a minimum quantity of such stored water . . . .

(38 Stats. 246-247 (emphasis added).)[12]

Restore Hetch Hetchy's argument is that the Raker Act allows Congress's express intent favoring San Francisco's proposed investments in water storage, and its careful use of that storage as a physical solution, to be upset because the Act's section 11 recognizes and preserves California law "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 . . . ." (*See* 38 Stats. 250-251.) As this Court considers that argument, and San Francisco's persuasive response, it is important to recognize that there is only an argument about section 11 because Restore Hetch Hetchy asserts an interpretation of Article X, section two, that would bring that provision and the Raker Act into conflict. A comparison of the established law under Article X, section two, and the Raker Act demonstrates that they actually are consistent in supporting investments in water storage and the careful use of the resulting water assets to reconcile otherwise competing water uses.

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[12]The fact that the Raker Act explicitly relied on the storage that San Francisco would create to address possible water-right conflicts also refutes Restore Hetch Hetchy's argument that *EDF II, supra,* supports its claim. *EDF II* relied on specific congressional authorization of certain facilities to find federal preemption of an Article X, section two claim. (*EDF II, supra,* 26 Cal.3d, at pp. 192-193.)

The Court therefore should affirm the Superior Court's judgment because Restore Hetch Hetchy's theory is both inconsistent with Article X, section two, and preempted by the Raker Act.

V.

THE COURT SHOULD AFFIRM THE SUPERIOR COURT BECAUSE DOING OTHERWISE WOULD RAISE A SERIOUS CONSTITUTIONAL ISSUE ABOUT AN UNCOMPENSATED TAKING OF SAN FRANCISCO'S WATER-STORAGE ASSETS

"It has long been a cardinal rule, of course, that if a provision of the California Constitution is capable of two constructions, one of which would cause a conflict with the federal Constitution, the other must be adopted." (*Otsuka v. Hite* (1966) 64 Cal.2d 596, 607.) Here, the relevant term of the United States Constitution is the Fifth Amendment's Takings Clause, which applies to actions by the State of California through that Constitution's Fourteenth Amendment. (*Lingle v. Chevron, Inc.* (2005) 544 U.S. 528, 536.) The Takings Clause applies to property held by local government agencies. (*See, e.g., Casitas, supra*, 543 F.3d, at pp. 1288-1292 (federal taking of local California district's water right through order requiring particular operation of the district facilities); cf. *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 671-677 (local governments can raise federal constitutional claims against the state in some cases).) The Takings Clause can apply to actions by courts, as well as those of legislative and executive branches. (*Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 164 (courts cannot take property for public use by "judicial decree"); *see also Stop The Beach Renourishment v. Florida Dep't of Environmental Protection* (2012) 560 U.S. 702, 713-715 (Scalia, J., plurality).)

The forfeiture of San Francisco's water-storage assets that Restore Hetch Hetchy proposes be accomplished by a California court's interpretation of Article X, section two, would raise a serious question

about whether an unconstitutional uncompensated taking would occur. A governmental order requiring that a water facility be operated in the government's preferred manner is a "physical" taking of the facility owner's water right. (*See Casitas*, *supra*, 543 F.3d, at pp. 1288-1292.) Such a taking can go well beyond a taking of the facility owner's underlying water right. The facilities, and their use, each have their own value. For example, California law establishes terms under which the owner of a "water conveyance facility" must allow unused capacity in the facility to be used by another upon the payment of "fair compensation." (*See* Wat. Code, §§ 1810-1811; *San Luis Coastal Unified School Dist. v. City of Morro Bay* (2000) 81 Cal.App.4th 1044.) As Chief Justice Shaw's concurrence in *Miller*, *supra,* explained, storage itself is an even more valuable asset. (*Miller*, *supra,* 157 Cal., at p. 287.)

Accepting Restore Hetch Hetchy's attempt to divest San Francisco of its water-storage assets would implicate one of the key considerations in takings law, namely whether a governmental action would interfere with "reasonable investment backed expectations." (*Kaiser Aetna v. United States* (1979) 444 U.S. 164, 175; *see also Lingle*, *supra*, 544 U.S., at p. 539 (surveying recent takings decisions).) *Kaiser Aetna* is instructive. In that case, the U.S. Army Corps of Engineers acquiesced in the creation of a private marina adjacent to navigable waters and, later, sought to compel the opening of that marina to public use under the federal navigational servitude. (*Id.* at pp. 166-169.) In *Kaiser Aetna*, the Supreme Court held that such a result would be "an actual physical invasion" of the facility that the owner had created by investing in reliance on the government's authorization and therefore was a taking. (*Id.* at pp. 166-169, 175-180.)

If Restore Hetch Hetchy's case were to succeed, San Francisco would be in a position similar to – and, in fact, much stronger than – that of the plaintiff in *Kaiser Aetna* in seeking compensation for an

unconstitutional taking. San Francisco has relied on Congress's express 1913 authorization – not merely the acquiescence of a federal agency – in making the investments necessary to create its water-storage facilities and then would have those facilities invaded, and its reasonable investment backed expectations frustrated, through an interpretation of a state constitutional provision that was not only enacted later, but was enacted for a purpose consistent with those facilities' construction and operation. In fact, in 1939, the California Supreme Court confirmed that Article X, section two, was consistent with San Francisco's operation of its facilities. (*Meridian*, *supra*, 13 Cal.2d, at pp. 444-451, 457-459.)

If Restore Hetch Hetchy were to prevail in this case, that result would create a difficult issue about whether San Francisco would be owed significant takings damages. The fact that Article X, section two, is a longstanding state constitutional provision would not resolve the matter. The federal navigational servitude at issue in *Kaiser Aetna* was of long standing and was not sufficient to preclude the United States Supreme Court from finding a taking in that case. (*Kaiser Aetna*, *supra*, 444 U.S., at pp. 170-174, 179-180.) Where state and federal law have encouraged the investments necessary to create valuable water assets and a government forfeits or invades those assets, a taking occurs.

Consistent with "a cardinal rule" of interpretation of the California Constitution (*Otsuka, supra,* 64 Cal.2d, at p. 607), this Court should navigate around this problem by interpreting both Article X, section two, and the Raker Act as not supporting Restore Hetch Hetchy's claims and therefore should affirm the Superior Court's judgment.

VI.

CONCLUSION

For the reasons stated above, amicus curiae Association of California Water Agencies and Northern California Water Association

respectfully request that the Court affirm the judgment of the Superior Court.

Dated: March 16, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c))

I hereby certify that this brief, and the above application to file an *amicus curiae* brief, has been prepared using Microsoft Word for Windows software and that software's "Word Count" function states that this brief contains 11,196 words, not including the tables of contents and authorities, the cover information and this certificate.

Dated: March 16, 2017

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PROOF OF SERVICE

I, Terry M. Olson, declare as follows:

I am a resident of the State of California, and employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1011 22nd Street, Sacramento, California 95816. On March 16, 2017, I served a copy of the foregoing document(s) entitled:

***AMICUS CURIAE* BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES AND NORTHERN CALIFORNIA WATER ASSOCIATION IN SUPPORT OF RESPONDENTS**

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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 16, 2017 at Sacramento, California.

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