

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 COUTY OF SAN FRANCISCO, a municipal corporation; SAN FRANCISCO PUBLIC UTILITIES COMMISSION, a municipal agency; and DOES I – X, inclusive,

Respondents/Appellees

MODESTO IRRIGATION DISTRICT, a public agency; TURLOCK IRRIGATION DISTRICT, a public agency; BAY AREA WATER SUPPLY AND CONSERVATION AGENCY, a public agency, and DOES I – XXX, inclusive,

Real Parties in Interest/
Respondents

Case No. F074107

(Tuolumne County Superior Court No. CV 59426)

***AMICUS CURIAE* BRIEF OF SANTA CLARA VALLEY WATER DISTRICT 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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**AMICUS CURIAE BRIEF OF SANTA CLARA VALLEY WATER
DISTRICT IN SUPPORT OF RESPONDENTS**

I.

INTRODUCTION

Amicus Curiae Santa Clara Valley Water District (“SCVWD”) files this amicus brief in support of Defendants and Respondents, City and County of San Francisco, et al. (“Respondents”). This brief addresses one issue presented for review:

Whether the trial court erred by ruling that the general four-year statute of limitation set forth in Code of Civil Procedure § 343 applies to Restore Hetch Hetchy’s claim under Article X, section 2.

(See Restore Hetch Hetchy Opening Brief, p. 12.)

The Santa Clara Valley Water District (SCVWD) is an independent special district and is the primary wholesale water supply agency for Santa Clara County, serving close to two million residents and the vital high-tech economy of “Silicon Valley.” The SCVWD is interested in this case for two reasons. First, the Hetch Hetchy system is an important component of the Santa Clara County’s water system and supply. On average, water from the Hetch Hetchy system supplies 15 percent of the County’s water supply demand. The SCVWD does not control or administer Hetch Hetchy deliveries to the county; however, it is expected that many of the SFPUC retailers within Santa Clara County would pump additional groundwater if there were a shortfall in SFPUC deliveries. A reduction in Hetch Hetchy

supplies, which is a reasonably foreseeable result if the SFPUC is no longer able to utilize the Hetch Hetchy reservoir, would increase the strain on Santa Clara County's groundwater supplies – supplies that are already strained due to population growth, drought conditions and increasing regulatory restrictions. If carried forward, Petitioner and Appellant's claim poses a real risk to Santa Clara County's current water system.

Second, the SCVWD is concerned by Appellant's argument that applying the four-year statute of limitations would undermine the purpose of Article X, section 2. Appellant's argument unnecessarily and erroneously allows claims based on Article X, section 2 to be brought at any time, regardless of when the underlying facts occurred. For this reason and others, adopting Appellant's argument has the potential to create undue uncertainty for entities, such as the SCVWD, that own, operate and depend on dams and other water infrastructure to meet the current and future water supply demands of the areas they serve.

II.

ARGUMENT

Amicus Curiae agrees with the arguments made by Respondents in their Response Brief as to the applicability of the statute of limitations to Appellant's claim. In furtherance of those arguments with a specific focus on practical and policy implications, the SCVWD argues that the Appellant's cause of action accrued decades ago and, as such, application of the statute

of limitations is proper and does not contravene Article X, section 2. To hold otherwise, would create significant uncertainty for public agencies that own and operate water infrastructure projects.

A. Application of the Statute of Limitations is Proper as Appellant's Cause of Action Accrued Decades Ago.

The Appellant urges this court to reverse the trial court's ruling sustaining the demurrer on the ground that, in part, its claim is not time barred. The Appellant contends that the statute of limitations should not bar its suit since a once acceptable method of diversion may later become "unreasonable" as a consequence of evolving contemporary standards. Appellant argues that Article X, section 2 inherently requires that the right of action challenging the reasonableness of a method of diversion be allowed to continue to account for changed circumstances over time.

Appellant, however, fails to allege any actual changed circumstances. The dam is not new. The reservoir and any associated impacts are not new. In fact, Appellant does not allege any new or affirmative actions; nor any new decisions made by the Respondents that created, changed or expanded the Respondents' method of water diversion. Appellant has not identified any relevant fact that would trigger its claim to have arisen within the four-year statute of limitations.

It is this very type of claim that the statute of limitations is intended to prevent. The California Supreme Court summarized the purposes of limitation of actions as follows:

“The fundamental purpose of the statute [of limitations] is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims.”

(*Jolly v. Eli Lilly & Co.* (1988) 44 Cal. 3d 1103, 1112 (citing *Davies v. Krasna* (1975) 14 Cal. 3d 502, 512)). “Limitations statutes afford repose by giving security and stability to human affairs.” (*Gutierrez v. Mofid* (1985) 39 Cal. 3d 892, 899.) Similarly, avoiding “surprise” has been mentioned as one of the reasons why old claims should be barred (See *Wood v. Elling Corp.* (1977) 20 Cal. 3d 353, 362), and has expressed the notion that “the right to be free of stale claims in time comes to prevail over the right to prosecute them.” (*Ibid.*)

In the absence of any new or different conduct that could re-trigger or re-initiate a new accrual date for Appellant’s cause of action, Respondents should be afforded repose. The Appellant’s controversy arises from decisions and actions that were taken in the early part of the last century. As such, the claim is stale; and, while the Appellant may believe that the decision to dam and flood Hetch Hetchy valley was a wrong and unreasonable decision, the time to prosecute that belief has passed.

B. Application of the Statute of Limitations Does Not Conflict With Article X, Section 2.

Contrary to the Appellant's arguments, applying the statute of limitations to this claim does not conflict with the language and purpose of Article X, section 2. Importantly, Article X, section 2 contains no limitations period within its language. "[A]ssertion of a constitutional right is subject to a reasonable statute of limitations unless a constitutional provision provides to the contrary." (*Miller v. Board of Medical Quality Assurance* (1987) 193 Cal.App.3d 1371, 1377.) Article X, section 2 is silent with regard to a limitation period and, thus, a reasonable limitation period is applicable. Appellant attempts to avoid the statute of limitations application by arguing that the substantive requirements of Article X, section 2 supersede general accrual rules. (Appellant's Reply Brief at 28.) "Because every water right in the state is subject to an ongoing duty to ensure its method of diversion of water is reasonable," Appellant argues, "[n]o arbitrary past accrual date may cut off that Constitutional obligation" (*Id.* at 28-29.)

While it may indeed be the case that every water right has an ongoing duty to ensure its method of diversion is reasonable, it does not remove Appellant's obligation to assert its claim of injury within the limitations period. Attempting to avoid this obligation, Appellant argues that general accrual rules do not apply to an Article X, section 2 claim. (*Ibid.*) This

argument defies logic. The Constitutional requirement that a method of diversion be reasonable does not modify the obligation to diligently pursue a claim. An unreasonable use or method of diversion may result in an injury, but the right to assert the claim of injury must still be done within the limitations period. To hold otherwise would allow potential claimants to “sit” on their claims until the most opportune time to pursue the particular claim. This is exactly the type of situation the statute of limitations is intended to prevent. Article X, section 2 does not provide for the contrary and neither should this court.

Likewise, even if the Appellant’s assertion regarding the principle that reasonableness can evolve over time is correct, it still does not remove the Appellant’s burden to demonstrate that the changed circumstances that caused a method of diversion to now be unreasonable and, thus, caused its injury have occurred within the limitations period. Requiring the Appellant to demonstrate when its claim accrued and that it diligently prosecuted that claim does not stifle the public’s right to challenge a particular method of diversion; it simply encourages the diligent prosecution of claims – a worthy objective.

From a policy perspective, there must be some nexus between a claim attempting to redefine a beneficial use as unreasonable and an actual change in circumstances, i.e., a link to when an injury occurred. Without such a nexus, “surprise” claims could be brought at any time, regardless of when

the underlying facts occurred. If this were the case, entities such as the SCVWD, that own, operate and depend on dams, reservoirs and other water supply infrastructure would always have to be at the ready to defend their historical investments and operations. This would be more than just a mere inconvenience. It would add an additional level of insecurity to SCVWD's water supply system, which could result in adverse impacts to district's operations, financing, and planning.

For example, allowing such claims to be brought at any time would create instability for public entities seeking financing for the restoration and repair of such infrastructure. Financing institutions would be wary of providing long-term funding if they knew certain infrastructure and related operations might, at any time, be deemed violative of law. This wariness could translate into significantly increased costs associated with financing infrastructure and operations. Increased costs would, in turn, impact planning and operational decisions, directly affecting a public entity's ability to provide a safe, clean and reliable water supply.

Lastly, Appellant attempts to overcome the application of the statute of limitations by referencing the public trust. (See *Restore Hetch Hetchy* Opening Brief, p. 57-59.) As amply argued by the Respondents, this is not a public trust case. It is a controversy between two entities on the use of the Hetch Hetchy valley. Appellant argues that it is injured by Respondents use of the valley as a reservoir. If that be the case, proof of the injury should have

been shown four years from the time of the alleged injury. Absent such a timely showing, the Respondents' method of diversion is lawful and the claim is time barred.

III.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be affirmed.

Dated: March 17, 2017

Respectfully submitted,

SANTA CLARA VALLEY WATER
DISTRICT

By: /s/ Erick D. Soderlund
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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 2,298 words, not including the tables of contents and authorities, the cover information and this certificate.

Dated: March 17, 2017

Respectfully submitted,

SANTA CLARA VALLEY WATER
DISTRICT

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PROOF OF SERVICE

I, Michael Rosado, declare as follows:

I am a resident of the State of California, and am employed in San Jose, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 5750 Almaden Expressway, San Jose, California 95118. On March 17, 2017, I served a copy of the foregoing document(s) entitled:

APPLICATION BY SANTA CLARA VALLEY WATER DISTRICT FOR PERMISSION TO FILE AMICUS CURIAE BRIEF 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 17, 2017, at San Jose, California.

/s/ Michael Rosado
Michael Rosado