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, San Francisco Public Utilities Commission,** Respondents and Appellees, **Modesto Irrigation District, Turlock Irrigation District, Bay Area Water Supply and Conservation Agency**, Real Parties in Interest and Respondents.	Case No. F074107

Tuolumne County Superior Court, Case No. 59426
Honorable Kevin M. Seibert, Judge

STATE WATER RESOURCES CONTROL BOARD'S PROPOSED BRIEF AMICUS CURIAE IN SUPPORT OF NEITHER SIDE

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INTRODUCTION

The State Water Resources Control Board (State Water Board, Board, or SWRCB) submits this proposed brief amicus curiae in support of neither side. The Board submits this brief to provide the Court with relevant historical and legal background and to explain that (1) there is no time bar that prevents the trial court from considering Restore Hetch Hetchy's claim under article X, section 2; and (2) the trial court should not have reached the issue of preemption on demurrer before a determination is made as to whether there is an unreasonable diversion and, if so, what remedy is required by state law.

First, in holding that Restore Hetch Hetchy's claim for unreasonable diversion was time barred, the trial court improperly applied Code of Civil Procedure section 343. The trial court incorrectly held that article X, section 2 embodies an unchanging definition of reasonableness. And it held that continuing diversions from Hetch Hetchy Reservoir amount to neither a continuous accrual nor a continuous violation. This holding is unprecedented and contradicted by Supreme Court and Court of Appeal opinions dating back to 1935.

In incorrectly applying article X, section 2, the trial court gave inadequate attention to the distinction between continuing diversions and construction of the dam. But assuming the truth of all facts asserted in the Petition, every time water is diverted from the Tuolumne River by way of the reservoir, a new alleged violation of article X, section 2 occurs. Since the diversion is continuous, it results in continuous accrual and continuous violation. Accordingly, no statute of limitations bars any allegation of an unreasonable method of diversion, no matter when the diversion first began.

Second, the trial court erred when it ruled that the Raker Act, which granted a conditional right-of-way for operation of the O'Shaughnessy

Dam and Hetch Hetchy Reservoir, preempts Restore Hetch Hetchy's unreasonable diversion claim under article X, section 2.[1] Granted, Restore Hetch Hetchy's petition and briefs have apparently pushed for a particular remedy—removal of the dam and draining of the reservoir—and if that were the only possible remedy allowed under state law, the case would present a much closer preemption question.

However, before addressing conflict preemption, it must be determined what, if anything, California water law actually requires under the facts of this case. The trial court did not address this important question, but rather assumed, based on the Petition's conclusions and prayer for relief, that applying article X, section 2 here could lead only to the specific remedy that Restore Hetch Hetchy seeks. Instead of reaching the preemption issue—and before improperly resolving it by analogizing the Raker Act's saving clause to that of the Reclamation Act—the trial court should have determined what, if anything, California water law requires.

California's water rights system is complicated and has deep historical roots. As the agency charged with administering this system, the State Water Board is uniquely placed to present its understanding of this system to this Court. The State Water Board also occupies a unique position , retaining concurrent jurisdiction with the courts to adjudicate a wide range of disputes involving water rights. (*Nat. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 462 (*National Audubon*).) Through the Board, the state has statutory authority to ensure appropriate water use. (See Wat. Code, § 105 ["the protection of the public interest in the development of the water resources of the State is of vital concern to the people . . . and that the

[1] O'Shaughnessy Dam and Hetch Hetchy Reservoir are sometimes referred to below as "the dam" and "the reservoir."

State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit"]; Wat. Code, § 174 ["to provide for the orderly and efficient administration of the water resources of the state"].)

In recognition of the Board's special expertise, courts can refer water rights questions to the Board for factual development and legal decisions. Water Code section 2000 provides, "In any suit brought in any court of competent jurisdiction in this State for determination of rights to water, the court may order a reference to the board, as referee, of any or all issues involved in the suit."[2] And Water Code section 2001 provides that the court "may refer the suit to the board for investigation of and report upon any or all of the physical facts involved." (See also *National Audubon*, *supra*, 33 Cal.3d at p. 451 [citing these Water Code sections in the context of concurrent jurisdiction].) Thus, faced with an evolving standard and a complicated factual setting, the trial court should have considered referring to the State Water Board the question of the application of California water law to this case. (*Ibid.*)

This Court should reverse the trial court's rulings on statute of limitations and preemption. It should further instruct the trial court to determine the reasonableness of San Francisco's water diversion at Hetch Hetchy.

BACKGROUND FACTS AND LAW

I. STATEMENT OF THE CASE

The State Water Board adopts and incorporates by reference the Statement of the Case set forth in Appellant's Opening Brief.

[2] Water Code section 2040 requires that the State Water Board be paid for its expenses on reference.

II. CALIFORNIA WATER RIGHTS

To aid the Court in understanding the issues in this case, a brief description of the development of California water rights follows. This historical exposition will demonstrate that a reasonable use requirement has always inhered in California water rights, and that the constitutional amendment that enacted article X, section 2 in 1928 confirmed and emphasized this requirement for holders of riparian and appropriative water rights alike.

A. California's Hybrid System

California operates under a hybrid system of water rights that recognizes both riparian rights and appropriative rights. (*People v. Shirokow* (1980) 26 Cal.3d 301, 307.) On statehood, California adopted the common law of England, incorporating the riparian doctrine. (*Lux v. Haggin* (1886) 69 Cal. 255, 361–409.) The riparian doctrine gives the owner of land the right to use on that land a reasonable amount of water flowing by or through the land, without regard to priority in time. (*Miller & Lux, Inc. v. Enterprise Canal & Land Co.* (1915) 169 Cal. 415, 440–441.)

Gold production resulted in the diversion of water from streams to be used on non-riparian lands. The importance of the mining industry and its need to divert water away from streams led to the incorporation of appropriative rights into California water law. (*Irwin v. Phillips* (1855) 5 Cal. 140.) An appropriative right is the right to take water from a watercourse that is not adjacent to the landowner's property. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 428–429.) "The appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by

riparians or earlier appropriators." (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101 (*U.S. v. SWRCB*).)

As between appropriators, the rule of priority is "first in time, first in right." (See *Irwin v. Phillips*, *supra*, 5 Cal. at p. 147.) In other words, appropriators who started diverting water earlier ("senior" appropriators) can divert water up to the amount of their rights before any later ("junior") appropriator is entitled to use any water. (*U.S. v. SWRCB*, *supra*, 182 Cal.App.3d at p. 102.) Until 1914, appropriative rights could be secured simply by diverting and using water beneficially, but since 1914, such rights can be acquired only pursuant to a statutory scheme. (*People v. Shirokow*, *supra*, 26 Cal.3d at p. 308.) Once an appropriative water right permit is issued, the permit holder has the right to take and use the water according to the terms of the permit, which include a defined amount of diversion, place of diversion, and purpose and place of use. (Wat. Code, §§ 1381, 1455.) As discussed below, the permit terms are further constrained by the requirement that any amount used be reasonable, and that the purpose to which the water is put be beneficial.

B. The Requirements of Reasonable and Beneficial Use

The principle that any use of water in California must be both reasonable and beneficial predates passage of the constitutional amendment enacting article X, section 2. As the Supreme Court stated in 1912, "It is the well-settled law of this state that one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose." (*Hufford v. Dye* (1912) 162 Cal. 147, 153 (*Hufford*); see also *Casitas Mun. Water Dist. v. U.S.* (Fed. Cir. 2013) 708 F.3d 1340, 1354 [quoting *Hufford*].) Reviewing pre-1914 decisions, the Supreme Court held, "The effect of the decisions clearly appears to be that one actually diverting water under a claim of appropriation for a useful or beneficial purpose,

cannot by such diversion acquire any right to divert more water than is reasonably necessary for such use or purpose." (*Calif. Pastoral and Agricultural Co. v. Madera Canal and Irrigation Co*. (1914) 167 Cal. 78, 85; see generally Gray, *"In Search of Bigfoot": The Common Law Origins of Article X, Section 2 of the California Constitution* (1989) 17 Hastings Const. L.Q. 225, 250–253.)

After a judicial decision that appeared to violate this principle, Californians enacted article X, section 2 to confirm that the principle of reasonable and beneficial use extends to all water rights, both appropriative and riparian.[3] Article X, section 2 requires that (1) the amount of water; (2) the method of diversion; and (3) the method of use, be reasonable. (Cal. Const., art. X, § 2; see also *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 143 ["the mere fact that a use may be beneficial to a riparian's lands is not sufficient if the use is not also reasonable"]; *Imperial Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548, 570 [rejecting claim that beneficial uses are by definition reasonable]; *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 703 (*Gin S. Chow*) [rejecting argument that a "vested right theory" precludes application of art. X, § 2 to rights that predate the constitutional amendment.].) Article X, section 2 not only imposes a reasonableness requirement on use, method of use, and method of diversion, but also requires all use to be "beneficial." (*Joslin v. Marin Municipal Water District, supra*, 67 Cal.2d at p. 143.)

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[3] In *Herminghaus v. South. California Edison Co.* (1926) 200 Cal. 81, the California Supreme Court held that riparians had a duty to act reasonably only with respect to other riparians. The *Herminghaus* Court held that a riparian owner was entitled to a stream's full flow even though the water was used wastefully and deprived an appropriator of water. In response to *Herminghaus*, California in 1928 passed the constitutional amendment enacting what is now article X, section 2.

The reasonableness and beneficial use requirements in article X, section 2 are self-executing, but the Legislature has also enacted implementing statutes. These statutory provisions give the State Water Board the authority to enforce these requirements. For example, section 275 of the Water Code gives the State Water Board the authority to prevent waste, unreasonable use, unreasonable method of diversion, or unreasonable use under all water rights, including riparian and pre-1914 rights. (See *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 472 fn. 16; *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1986) 186 Cal.App.3d 1160, 1163 fn. 4, 1169–1170, 1171.) In short, the "'*rule of reasonable use*' is now the cardinal principle of California's water law." (*U.S. v. SWRCB, supra*, 182 Cal.App.3d at p. 105.) And the rule of *beneficial* use is likewise made concrete in statute. (See Wat. Code, § 100 [adopting the constitutional language related to beneficial use].) If a permittee or license holder violates any permit or license terms or conditions, or fails to apply the water to a beneficial purpose, the State Water Board can revoke the permit or license. (Wat. Code, §§ 1410, 1611.)

C. San Francisco's Water Rights

As discussed in the Statement of the Case set forth in Restore Hetch Hetchy's opening brief, San Francisco acquired the water rights associated with Hetch Hetchy Reservoir through application of California's appropriative water rights law. San Francisco does not dispute this point, stating rather that the Raker Act "reserved significant power over the [Hetch Hetchy] Reservoir's development to the federal government, which remained fee owner of the lands granted to San Francisco." (San Francisco's Br., p. 18.) While the United States may have remained fee owner of the *lands*, the waters remained the property of the People of California, held in trust by the state. Accordingly, any rights to divert that

water were acquired under state law, and are not controlled by the United States.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT THIS ACTION IS TIME BARRED

The trial court erred in holding that Code of Civil Procedure section 343, the four-year, catch-all statute of limitations, bars Restore Hetch Hetchy's claims of violations of article X, section 2 for ongoing diversions of water.[4] No Court of Appeal decision has ever applied a statute of limitations to such constitutional claims, and neither the trial court's order nor San Francisco's brief cites any. Application of a limitations period to an ongoing unreasonable method of diversion claim is foreclosed by three legal considerations. First, the trial court failed to properly apply the common law interpretation of reasonableness under article X, section 2. Second, the trial court failed to properly apply the doctrine of continuous accrual of a violation. Third, the trial court failed to properly apply the doctrine of continuous violation, which is distinct from continuous accrual.

A. Article X, Section 2's Reasonableness Standard Is Constantly Evolving, and Was Not Fixed upon Its Enactment in 1928

Restore Hetch Hetchy claims that San Francisco's continuing diversions from Hetch Hetchy Reservoir are unreasonable under article X, section 2. The trial court held that the cause of action accrued "at the time of enactment of what is now article X, section 2: in 1928." (Order at p. 14:6–7 [AA 344].) But "reasonableness" as applied to use, method of use, or method of diversion of water under article X, section 2 is a standard that

[4] The State Water Board expresses no opinion about whether the construction of the dam was, or continuing existence of the dam is, constitutionally unreasonable.

evolves with each common law interpretation and application of that standard to new sets of facts. (*National Audubon, supra*, 33 Cal.3d at p. 447 ["the state is not confined by past [water resource] allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs."]; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242; *Joslin v. Marin Mun. Water Dist.*, *supra*, 67 Cal.2d at p. 140; *Gin S. Chow*, *supra*, 217 Cal. at p. 705.)

The trial court's reasoning appears to fix the reasonableness determination at 1928 for *any* challenge to a water right under article X, section 2. This is not the law. The California Supreme Court and the Court of Appeal have both held that reasonableness is not fixed at a determination of what was, or would have been, reasonable in 1928. The California Supreme Court first addressed the question in 1935, stating, "What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567.)

The Court has confirmed this holding, including in application to riparian rights. (*Joslin v. Marin Mun. Water Dist.*, *supra*, 67 Cal.2d at p. 141.) In *Joslin*, the Court applied the changing reasonable use standard to hold that the use of a river to convey rock and gravel down a stream was unreasonable at the time of the decision. (*Ibid*.) *Joslin* did not hesitate to apply the reasonableness requirement of article X, section 2 to a riparian property owner, but without referring to the 1928 standard. (*Ibid.*)[5]

[5] Citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1113, San Francisco argues that no change in the law can revive a time-barred claim. (San Francisco's Br., pp. 51–52.) No change in the law is at issue here, as the law remains that no use, method of use, or method of diversion may be unreasonable. (Cal. Const., art. X, § 2.) Rather, Restore Hetch Hetchy

(continued…)

More recently, the Supreme Court made express the implied holding in *Joslin* that the reasonableness requirement in article X, section 2 extends to water rights outside the permitting authority of the State Water Board. Although the State Water Board has no permitting or licensing authority over riparian rights or appropriative rights acquired before 1914, "[t]he SWRCB does have authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held." (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429, citing Wat. Code, § 275.) And in 2014, the Court of Appeal held, "What constitutes an unreasonable use of water changes with circumstances, including the passage of time." (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1488 (*Light*).) These decisions rest on the principle that the reasonableness requirement inheres in the title of all water rights—a principle which, as described above, predates enactment of article X, section 2—and is an "overriding constitutional limitation" on those rights. (*Gin S. Chow*, *supra*, 217 Cal. at pp. 701–703; *U.S. v. SWRCB*, *supra*, 182 Cal.App.3d at pp. 105–106.)

Thus, since neither San Francisco nor any other water rights holder in California has a vested right to continue diverting water exactly as it has historically, there is nothing to prevent the continuing evolution of the reasonableness standard for use, method of use, and method of diversion under article X, section 2, as explained above. This approach is consistent with the approach taken by the Supreme Court in *Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424 (*Meridian*), which is cited at length by San

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alleges that the factual circumstances determining reasonableness have changed.

Francisco in its Respondent's Brief and which involved (among other claims) the claim that San Francisco's use of water from Hetch Hetchy Reservoir was unreasonable under article X, section 2. In *Meridian*, the plaintiff filed suit on May 31, 1932, more than four years after the January 1, 1928, effective date of the constitutional amendment enacting article X, section 2. (*Ibid*.) *Meridian* addressed the question of a statute of limitations as to both reasonableness and beneficial use, stating, "There need be no apprehension therefore lest rights become vested, by prescription or otherwise, in an excessive use of water or in a use for unauthorized purposes." (*Id*. at p. 450.)

B. Continuing Diversions in Violation of Article X, Section 2 Amount to a Continuing Violation

In analyzing whether Restore Hetch Hetchy's claim is time barred, the trial court (Order at pp. 15:4–16:4 [AA 345-346]), Restore Hetch Hetchy (AOB at pp. 58–59), and San Francisco (San Francisco's. Br., pp. 48–49) all employed an analogy to nuisance, although the trial court did not mention it explicitly. This analogy is entirely appropriate: from the beginning, courts have analyzed water diversions as a continuing nuisance or trespass. For example, in *Moore v. Clear Lake Waterworks* (1885) 68 Cal. 146, 149, the court addressed a dam that diverted water allegedly to the detriment of the plaintiff. The court treated the diversion as a "continuous injury" and entered an injunction to prohibit it. (*Id*. at p. 150.) Likewise, in *Conkling v. Pacific Improvement Co.* (1890) 87 Cal. 296, the court addressed a pipe that diverted water to the alleged detriment of the plaintiff. The court held that "the act of carrying the water away from its natural channel, if wrongful, was a continuous act, against which an injunction might issue." (*Id*. at p. 305.) The court stated, in words quite apropos to the situation now before the court: "The continued diversion of the water was the material thing to be enjoined, and not the putting in of the pipe."

(*Ibid*.) So too, here, the material thing at issue is San Francisco's continued diversion of water, not the putting in of the dam.

The modern approach is to allege, and for the court to consider, an allegedly wrongful diversion as both a nuisance and trespass. This was the approach taken, for example, in *Aspen Grove Condominium Association v. CNL Income Northstar LLC* (2014) 231 Cal.App.4th 53, 56, which involved a retention basin. The court found that the retention basin was "part of a water diversion plan that resulted in irreparable and continuing damage." (*Id.* at p. 64.)

Although Restore Hetch Hetchy alleged only a violation of article X, section 2, both the parties and the court analyzed the allegations in a nuisance context, with the trial court holding that the diversion did not amount to a "pattern of reasonably frequent and similar acts." (Order at p. 15:15–16 [AA 345], citing *Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1198 (*Aryeh*).) But, if assumed to be a violation of article X, section 2, San Francisco's diversions are a continuing violation in the sense that the phrase is used in the nuisance context.

San Francisco argues that, because there is a dam at issue, any nuisance should be considered permanent, requiring a one-time lawsuit within four years of the dam's construction. (San Francisco's Br., pp. 48–49.) San Francisco relies on *Spaulding v. Cameron* (1952) 38 Cal.2d 265, for this argument, noting that *Spaulding* states, "The clearest case of a permanent nuisance or trespass is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility." (San Francisco's Br., p. 49, quoting *Spaulding*, *supra*, 38 Cal.2d at p. 267.) But *Spaulding* based this conclusion on its assumption that "the utility by making compensation is entitled to continue" the nuisance. (*Spaulding*, *supra*, 38 Cal.2d at p. 267.) Here, in contrast, there is no one to compensate, and even if there were, San Francisco would not be entitled to

continue any diversions in violation of article X, section 2, if any such unreasonable diversions are ultimately found. San Francisco's formulistic approach strips article X, section 2 of its vitality to address both the construction and operation of a dam—the initial diversion and the ongoing diversions. Rather, under the authorities above, the proper focus of the limitations inquiry is the continuing nature of the diversion. Thus, the basis for a finding of permanent nuisance does not exist here.

Spaulding also held that "in doubtful cases the plaintiff should have an election to treat the nuisance as either permanent or not." (*Spaulding*, *supra*, 38 Cal.2d 265, 268.) Under a liberal construction of the Petition, San Francisco's continuing diversions constitute an alleged continuing nuisance (and not a permanent one); at minimum, it is at least "doubtful" that this case involves a permanent nuisance. Accordingly, following the nuisance analogy to its logical conclusion, Restore Hetch Hetchy elected to treat San Francisco's diversions as a continuing nuisance rather than a permanent one, and should have been allowed to pursue that theory.

San Francisco's attempt to distinguish *California Trout* should also be rejected. (San Francisco's Br., p. 48–49.) The nuisance-like condition in *California Trout* was not a license, but the dewatering of the stream by Los Angeles's dam and diversion works. (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 598.) Just as dewatering the stream through operation of those dams and diversion works was in the nature of a continuing nuisance, the flooding and other changes in character of the Tuolumne River through the operation of San Francisco's dam and diversion works, if found to be an unreasonable method of diversion, would be in the nature of a continuing nuisance, and no claim seeking remedy for that nuisance would be time barred.

C. Claims Under Article X, Section 2 Regarding Ongoing Diversions Accrue Continuously

The trial court did not adequately consider the theory of continuous accrual. Continuous accrual differs from continuing violation in that, in a continuous accrual case, a plaintiff can recover damages (in a damages case) only for those violations proven to have occurred within the limitations period. Thus, if the limitations period is four years, then a plaintiff can recover damages only for the last four years of injury, even if the injury has occurred regularly for more than four years. In a continuous violation case, on the other hand, a plaintiff can recover for all previous violations as long as suit is filed within the limitations period after the last violation. (*Aryeh, supra*, 55 Cal.4th at p. 1192.)

Continuous accrual applies whenever there is a continuing or recurring obligation. "When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." (*Hogar Dulce Hogar v. Community Development Commission* (2003) 110 Cal.App.4th 1288, 1295.) The Court of Appeal in *Aryeh* put it this way: "Because each new breach of such an obligation provides all the elements of a claim—wrongdoing, harm, and causation—each may be treated as an independently actionable wrong with its own time limit for recovery." (*Aryeh, supra,* (2013) 55 Cal.4th at pp. 1199–2000.)

Reading the Petition liberally, continuous accrual applies here to prevent application of the statute of limitations to San Francisco's continuing diversions. Restore Hetch Hetchy alleges in its Petition and argues in its opening brief that, at some unspecified point in time after construction of the dam, diversions from the reservoir became unreasonable under article X, section 2. If Restore Hetch Hetchy proves that allegation,

then under a continuous accrual theory each diversion after that point is a new independently actionable wrong, with its own time limit for recovery.

The trial court here held that *Aryeh* was distinguishable and determined that continuous accrual did not apply, reasoning that the existence of a permanent dam differs from the type of daily offenses committed in continuous accrual cases. (Order at pp. 16:5–17:2 [AA 346–347].) But on demurrer, the trial court should have accepted as true only the factual allegations in the complaint, and not the proposed remedy sought in the prayer. (See below, pp. 43–46.) Moreover, the complaint's sole cause of action alleges an unreasonable method of diversion in the operation of O'Shaughnessy Dam and the flooding of Hetch Hetchy Valley. (See Petn, ¶¶ 52–55 [AA 29–31].) Therefore, what was at issue before the trial court was only San Francisco's diversion to storage in the reservoir, not the construction—or even the continued existence—of the dam. It is undeniable that those diversions occur regularly. And if the operation of O'Shaughnessy Dam is modified, for example to reduce the flooding of Hetch Hetchy Valley, the alleged unreasonable diversion would be correspondingly reduced, even if the dam or a modified version of dam remains in place.

In this sense, Restore Hetch Hetchy's allegation is similar to the allegation in *Hicks v. Drew* (1897) 117 Cal. 305. In that case, the defendant built a wall on his land in April or May 1890. The wall subsequently caused surface waters to flow onto the plaintiff's land. The plaintiff filed suit in 1893, after expiration of the two-year statute of limitations then applicable to claims of obligation not based on a written instrument, which the court held applicable rather than the three-year statute for trespass claims. (*Id*. at pp. 308–309.) The court held that the plaintiff was entitled to recover all damages suffered in the previous two years because a cause of action accrued as each injury occurred even though the cause of the

injury was the building of the wall more than two years before the action was filed. (*Id*. at p. 310.)

D. The Court Should Make Clear that No Statute of Limitations Bars the State Water Board's Authority to Exercise its Regulatory Authority

The State Water Board asks the Court, in ruling on this appeal, to make clear that it is not addressing potential enforcement actions by the Board, as such actions are not before the Court. Such actions could include actions to enforce the public trust, apply the constitutional reasonableness doctrine, or to enjoin a public nuisance. There is no statute of limitations on the Board's authority and ability to file suit to abate a public nuisance or remove a purpresture.[6] "[A] right to continue a public nuisance cannot be acquired by prescription" or by the passage of time. (Civ. Code, § 3490; *People v. Gold Run Ditch & Mining Co.* (1884) 66 Cal. 138, 152 (*Gold Run*); *City of Turlock v. Bristow* (1930) 103 Cal.App. 750, 756.) No matter how long a public nuisance has continued, the Attorney General has the authority, in the name of the people, "to compel the discontinuance of the acts which constitute the nuisance." (*Gold Run*, *supra*, 66 Cal. at p. 152, citations omitted.)

A nuisance is defined as "[a]nything that is injurious to health," "interfere[s] with the comfortable enjoyment of life or property," or "unlawfully obstructs the free passage or use of any navigable lake, or river, bay." (Civ. Code, § 3479.) A public nuisance is a nuisance that "affects at the same time an entire community or neighborhood, or any considerable number of persons." (Civ. Code, § 3480.)

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[6] A purpresture is an unlawful encroachment, intrusion, or obstruction of a public highway or navigable waterway. (*Gold Run*, *supra*, 66 Cal. at p. 146.)

The passage of time cannot legalize a public nuisance, even if the nuisance is a physical obstruction. (*Nerio v. Maestretti* (1908) 154 Cal. 580, 580–581, citing Civ. Code, § 3490.) In *Nerio*, the plaintiffs had erected houses on part of a public street in San Francisco. The city's board of public works gave notice to the plaintiffs to remove the structures, but the plaintiffs refused to do so, at which point, the board of public works proceeded to remove the obstructions. The trial court found, and the Court of Appeal affirmed, that "[t]he continued occupation by plaintiffs of a portion of the public street was but the continuance of a nuisance. No lapse of time can legalize a public nuisance amounting to an actual obstruction of a public right." (*Ibid.*) No statute of limitations can prevent the State Water Board from bringing an action seeking to have a nuisance or purpresture abated, or to enforce the reasonableness doctrine of article X, section 2. The Board respectfully requests that the Court of Appeal make this clarification in its decision.

II. THE TRIAL COURT SHOULD NOT HAVE REACHED THE ISSUE OF PREEMPTION

Generally speaking, there is no federal preemption of state water law by the Raker Act. In most, if not all, circumstances, application of article X, section 2 would not conflict with the conditions of the Raker Act, and would be protected by the Raker Act's saving clause, Section 11 (the saving clause, or Section 11). The trial court held that there was conflict preemption because it assumed, based on the Petition's conclusions and prayer for relief, that the only remedy under article X, section 2 in the event of an unreasonable diversion would be to bar the operation, and prohibit the existence, of O'Shaughnessy Dam and the Hetch Hetchy Reservoir. (Order at pp. 9–10 [AA 339–340].) This assumption was error. Notwithstanding the parties' positioning of the remedies sought, the trial court should have followed the established judicial preference for determining whether state

law applies, and what it requires, before determining that state law is preempted. Accordingly, before giving the Raker Act preemptive effect, a determination should have been made as to what, if anything, article X, section 2 requires. Reaching preemption was unnecessary at this stage.

A. Under Most, If Not All, Circumstances, Article X, Section 2 Would Not Conflict with the Raker Act

In Section 11, Congress manifested a clear intent to preserve California water law consistent with states' historic police power and authority to allocate intrastate waters. That preservation is broad. Whether that preservation would extend to any state court order requiring the removal of the dam and reservoir contemplated by the Raker Act is a difficult hypothetical question that the trial court need not, and should not, have addressed on demurrer. Article X, section 2, if it requires anything here, could require a wide range of operational or structural adjustments that do not involve removal of the dam, [7] and that almost certainly would not conflict with the Raker Act. Therefore, before the trial court could determine whether the Raker Act preempts California law, it needed to know what, if anything, California law actually requires.

1. Standard for Preemption

"'[T]he purpose of Congress is the ultimate touchstone' in every pre-emption case." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485, quoting

[7] At the same time, dam removal has been considered in other contexts. (See *Wild Fish Conservancy v. National Park Service* (W.D. Wash. 2014) 8 F.Supp.3d 1289, 1292–1294, 1302 [discussing removal of two dams in Olympic National Park]; cf. *City of Tacoma, Washington v. Federal Energy Reg. Com.* (D.C. Cir. 2006) 460 F.3d 53, 72–74 [due to changes in congressional priorities since 1920, including modern environmental laws, Federal Energy Regulatory Commission is not required to relicense hydroelectric projects in perpetuity, but has the authority to order dam removal in connection with relicensing proceedings].)

Retail Clerks v. Schermerhorn (1963) 375 U.S. 96, 103.) Although Congress may preempt state law via express preemptive language, or by regulating a field of law so pervasively that it leaves no room in that field for state law, those forms of preemption are not at issue here. The United States Supreme Court has explained that courts also may infer preemptive intent "if there is an actual conflict between state and federal law," which is what the trial court did here. (*Altria Group, Inc. v. Good* (2008) 555 U.S. 70, 76–77.) But actual conflicts exist only where "compliance with both federal and state [law] is an impossibility" (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955), or where the challenged state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Ibid.*, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 64.) Put another way, "only state law 'inconsistent' with 'congressional directives' is overridden" by conflict preemption. (*United States v. State of Cal., State Water Resources Control Bd.* (1982) 694 F.2d 1171, 1176.)

Preemptive congressional directives are narrowly construed. For example, in *California v. United States*, the U.S. Supreme Court did *not* hold that the Reclamation Act preempts all state law regulating federal dams and reservoirs authorized pursuant to that Act. Instead, examples of preemptive directives were a provision specifically governing charges for water, a provision that "water rights should 'be appurtenant to the land irrigated, and beneficial use . . . the basis, the measure, and the limit of the right,'" and a specific directive that water not be sold to tracts larger than 160 acres. (*California v. United States* (1978) 438 U.S. 645, 678, fn. 31.) So long as state law does not conflict with such specific directives, it is not preempted. (*United States v. State of Cal., State Water Resources Control Bd., supra*, 694 F.2d at p. 1176.)

The Supreme Court has stated that "[o]ur precedents 'establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.'" (*Chamber of Commerce v. Whiting* (2011) 563 U.S. 582, 607 (*Whiting*), quoting *Gade v. Nat. Solid Wastes Management Assn.* (1992) 505 U.S. 88, 110 (conc. opn. of Kennedy, J.)) According to *Whiting*, "[i]mplied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" (*Whiting*, *supra*, 563 U.S. at p. 607, quoting *Gade*, *supra*, 505 U.S. at p. 111.)

Courts begin their preemption analysis "'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (*Altria Group, Inc., supra,* 555 U.S. at p. 77, quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.) The U.S. Supreme Court characterized this presumption against preemption as a "cornerstone" of "pre-emption jurisprudence." (*Wyeth v. Levine* (2009) 555 U.S. 555, 565.) "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." (*Altria Group, Inc., supra,* 555 U.S. at p. 77.) Water law is one such field, as the U.S. Supreme Court has acknowledged a "consistent thread of purposeful and continued deference to state water law by Congress." (*California v. United States*, *supra*, 438 U.S. at p. 653.)

Indeed, the Court noted that "[p]erhaps the most eloquent expression of the need to observe state water law" is that:

> "[i]n the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof. [¶] . . . [I]t is essential

> that each and every owner along a given water course, including the United States, must be amenable to the law of the State . . . ."

(*California v. United States*, *supra*, 438 U.S. at p. 678, quoting Sen. Rep. No. 755, 1st Sess., pp. 3, 6 (1951); see also *United States v. New Mexico* (1978) 438 U.S. 696, 702 [when "address[ing] the question of whether federal entities must abide by state water law, [Congress] has almost invariably deferred to the state law."]; *In re Water of Hallett Creek Stream System*, *supra*, 44 Cal.3d at p. 464 [upon joining the union, "*states* possessed the power to determine the [water] rights that attached to federal lands"].)

2. Congress's Clear and Manifest Intent in the Raker Act Was to Preserve California Water Law

To determine Congress's intent, courts "first examine the words of the statute itself." (*Bodell Construction Co. v. Trustees of California State University* (1998) 62 Cal.App.4th 1508, 1515–1516.) "If the language of the statute is clear and unambiguous, there is no need for construction." (*Id.* at p. 1516.)[8] In the saving clause, Congress expressed its clear and manifest intent to save California water law. In that clause, Congress said:

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

(Raker Act, § 11 [AA 99].)

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[8] Federal courts follow this same "cardinal canon" of statutory construction. (*Connecticut v. Nat'l Bank v. Germain* (1992) 503 U.S. 249, 253, 254.)

In its broad sweep, this clause preserved application of state water law—which includes article X, section 2—to the operation of the dam and reservoir. As explained above, article X section 2 precludes "the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." This state constitutional mandate indisputably "relat[es] to the control, appropriation, use, or distribution of water."[9] Moreover, as discussed above, even though article X, section 2 was enacted after the Raker Act, it reflected longstanding and accepted water law principles. Under well-established California water law at the time the Raker Act was enacted, appropriative water users like San Francisco were required to comply with the doctrine of reasonable use and reasonable method of diversion. (See, e.g., *Basey v. Gallagher* (1874) 87 U.S. 670, 683; *Natoma Water and Mining Co. v. Hancock* (1894) 101 Cal. 42, 51–52.)

The plain text of the saving clause requires considerable deference to California water law, including California's reasonable use doctrine, as that doctrine was and remains the heart of California's law "relating to the control, appropriation, use, or distribution of water." In particular, Section 11 requires the Secretary of the Interior to "proceed in conformity with" California's water law "in carrying out the provisions of" the Raker Act. Given this clear and manifest congressional intent, courts should make all reasonable efforts to harmonize California water law with the Raker Act.[10]

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[9] (See also Wat. Code, § 1050 [declaring that Division 2 of the Water Code, which includes California's statutory water appropriation system, is "in furtherance of the policy contained in Section 2 of Article X of the California Constitution"].)

[10] San Francisco liberally cites *Meridian, Ltd. v. San Francisco, supra*, 13 Cal.2d 424, the key California Supreme Court decision discussing San Francisco's water rights. In *Meridian*, the Court carefully reviewed article X, section 2 before concluding that San Francisco was

(continued…)

3. The Raker Act's Saving Clause Is Broader Than the Reclamation Act's Saving Clause, Preserving Most, If Not All, Applications of Article X, Section 2

Section 11 of the Raker Act broadly preserves California water law. However, the trial court concluded that the section should be interpreted, and limited, in the same way as the saving clause contained in Section 8 of the Reclamation Act of 1902 (Reclamation Act). This was error, because the Raker Act is very different from the Reclamation Act, evincing a very different congressional purpose. Therefore, although the language of Section 11 and Section 8, taken out of context, is nearly identical, the two saving clauses have different effects. The trial court's reliance on Section 8 to interpret Section 11 was mistaken.

In *California v. United States*, the United States Supreme Court held that although Section 8 of the Reclamation Act saves state-imposed conditions on water appropriation permits for federal reclamation projects, it does not save them if the conditions are inconsistent with congressional directives. (*California v. United States*, *supra*, 438 U.S. at pp. 664–679; see also *California v. Federal Energy Regulatory Com.* (1990) 495 U.S. 490, 504; *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 192.) The Court "examined the purpose, structure, and legislative history of the entire statute before it and employed those sources to construe the statute's saving clause." (*California v. Federal Energy Regulatory Com.*, *supra*, at p. 504.) In conducting that

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(…continued)
permitted to engage in diversion to storage of water in excess of the needs of prior right holders for reasonable and beneficial use. (*Id.* at pp. 447–451.) In the course of addressing article X, section 2, the Court held that all water users are prohibited from wasting water. (*Id.* at p. 447.) At no point in *Meridian* did San Francisco argue that the Raker Act preempts article X, section 2.

examination, the Court noted the substantial federal role, and accompanying federal interest, in the projects authorized by the Reclamation Act. For example, in the Reclamation Act, "Congress set forth on a massive program to construct and operate dams, reservoirs, and canals . . . ." (*California v. United States, supra,* at p. 650.) And "Congress specifically directed that the [New Melones] Dam," at issue in *California v. United States*, "be constructed and operated 'pursuant to the Federal reclamation laws,' [citation], the principal one of which is the Reclamation Act of 1902." (*Id*. at p. 651, fn. 6.) "[T]he actual construction and operation of the projects would be in the hands of the Secretary of the Interior." (*Id*. at p. 664.)

By contrast, the federal role and interest in the specific municipal projects authorized by the Raker Act are quite different. Instead of a massive program for the construction and operation of federal dams and related works, the Raker Act authorized a conditional grant to San Francisco of "certain lands and rights-of-way in the public domain in Yosemite National Park and Stanislaus National Forest." (*United States v. San Francisco* (1940) 310 U.S. 16, 18.) San Francisco could either accept the grant and the associated conditions, or reject it. (Raker Act, § 9(s) [AA 99].) Congress intended that, if San Francisco accepted the grant, then San Francisco, not the federal government, would construct "a means of supplying water for the domestic purposes of the City and other public bodies, and . . . a system 'for generation and sale and distribution of electric energy.'" (*United States v. San Francisco*, *supra,* at p. 18.) San Francisco is a political subdivision of the State of California. (*People ex rel. Freitas v. San Francisco* (1979) 92 Cal.App.3d 913, 921.)[11]

[11] No appropriative rights held by the United States are at issue here, as the water rights in question are San Francisco's. San Francisco acquired (continued…)

The distinction between conditions accepted by San Francisco in the Raker Act, and directives mandated to the Secretary of the Interior in the Reclamation Act,[12] is significant. Congress may not commandeer state officers or agencies to administer federal law. (*Printz v. United States* (1997) 521 U.S. 898, 925–930.) Just as Congress may not direct states to take title to radioactive waste generated within their borders (*New York v. United States* (1992) 505 U.S. 144, 175–176), Congress could not, and did not via the Raker Act, direct San Francisco to construct and operate a dam and reservoir.[13] However, as it did in the Raker Act, Congress may impose conditions on grants of federal property, so long as those conditions are not coercive. (*Nat. Federation of Independent Business v. Sebelius* (2012) ___ U.S. ___, 132 S.Ct. 2566, 2665–2666.)[14] Congress's power to mandate

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(…continued)
no appropriative rights from the United States when it built the O'Shaughnessy Dam and Hetch Hetchy Reservoir because the United States had none to give.

[12] And as discussed above at p. 29, even the Reclamation Act's directives to which the High Court gave preemptive effect were narrow and specific. Likewise, as discussed below at pp. 39-41, to the extent that the Raker Act is construed as containing directives, they are exceedingly narrow and may be harmonized with California water law.

[13] San Francisco's assertion that the Raker Act mandates the construction and ongoing operation of Hetch Hetchy Reservoir would mean that San Francisco could not alter its water supply system without Congressional approval. If, for example, the city were to obtain alternate supplies and determine that continued operation of the Hetch Hetchy project was not cost effective, pursuant to San Francisco's theory, the city would be required to seek an amendment of the Raker Act. There is no authority for this interpretation of the Raker Act or its legal effect.

[14] As discussed below at pp. 41, if San Francisco violates those conditions, the Raker Act provides remedies that could and should be harmonized with California water law and that would not unconstitutionally commandeer a political subdivision of California.

federal, but not state, agency action exemplifies the very different federal roles and interests in the Reclamation Act and the Raker Act.

Additionally, the trial court erred in focusing on the similarity between the language of the Raker Act's saving clause and that of the Reclamation Act's saving clause, without considering the larger legal context. The Federal Power Act of 1935 also contains a nearly identical saving clause. (*California v. Federal Energy Regulatory Com.*, *supra*, 495 U.S. at p. 497, citing 16 U.S.C. § 821.) However, despite the nearly identical language, the United States Supreme Court held that the Federal Power Act's clause should be interpreted differently from the Reclamation Act's clause, in light of the different federal roles envisioned in each statute. (*California v. Federal Energy Regulatory Com.*, *supra*, at pp. 503–506.)

Comparing the statutes themselves, rather than just their respective saving clauses viewed in isolation, the High Court noted that the "[Federal Power Act] envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act." (*California v. Federal Energy Regulatory Com.*, *supra*, at p. 504.) The Court noted that, although its prior cases interpreting the two Acts "accord different effect to laws relating to water uses," providing different levels of deference to state law, "this difference stems in part from the different roles assumed by the federal actor in each case . . . ." (*Id.* at pp. 504–505.) The Federal Power Act provided for an even greater federal role than did the Reclamation Act, so the Court interpreted its saving clause more narrowly than Section 8 of the Reclamation Act. (*Id.* at pp. 496–505.)[15]

[15] The Court so held, despite the state's argument—echoed here by San Francisco—that one saving clause served as a model for the other. (*Id.* at p. 503.) San Francisco's citation to *Yosemite Power Co.* (1917) 46 Pub. (continued…)

Similarly, here, the Reclamation Act provides for a much greater federal role in federal reclamation projects than does the Raker Act in the O'Shaughnessy Dam and Hetch Hetchy Reservoir. One could reasonably envision the federal role and interest in the Federal Power Act, the Reclamation Act, and the Raker Act as an inverted pyramid. At the broad top of the inverted pyramid is the Federal Power Act, which created a federal commission for the nationwide licensing of any "dams, water conduits, reservoirs, power houses, transmission lines, or other project works . . . for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any . . . bodies of water over which Congress has jurisdiction . . . ." (16 U.S.C. § 797(e).)[16] Below the Federal Power Act, as the pyramid and the federal role and interest narrows, sits the Reclamation Act and its "massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." (*California v. United*

(…continued)
Lands Dec. 89, 96 (D.O.I.) [1917 WL 1353], to support that argument, is inapposite. (San Francisco's. Br., pp. 32–33.) *Yosemite Power* does not address federal preemption, nor does it involve "state-law licensing schemes" as San Francisco suggests. Instead, it addressed whether a federal license could issue for a power plant that would interfere with San Francisco's plans to develop the water resources of the Tuolumne River pursuant to the Raker Act. (*Id*. at p. 98.)

[16] The dam and reservoir authorized by the Raker Act are not subject to the Federal Power Act's licensing system. (See *Sierra Club v. Federal Energy Reg. Com.* (9th Cir. 1985) 754 F.2d 1506, 1510; see generally *Uncompahgre Valley Water Users Ass'n v. Federal Energy Reg. Com.* (10th Cir. 1986) 785 F.2d 269, 272–275 [Federal Power Act hydropower licensing does not apply to hydroelectric projects specifically authorized by other federal statutes].) Because the Federal Power Act does not apply, and its preemptive effect is even broader than the Reclamation Act, Federal Power Act preemption cases cannot be relied on to support preemption under Raker Act.

States, *supra*, 438 U.S. at p. 650.) Finally, at the narrow bottom tip of the pyramid, we find the Raker Act, which authorized a conditional right-of-way on federal land allowing a single city and county to finance, construct, and operate its own water project. At that narrow tip, the federal role, and the interest in preemption, is at its lowest.

Accordingly, just as the Supreme Court did not even refer to the Federal Power Act or to its own precedent interpreting that Act when interpreting the Reclamation Act's saving clause in *California v. United States*, so too should this Court hold the Reclamation Act and its interpretation in *California v. United States* irrelevant to interpretation of Section 11 of the Raker Act. Consistent with the purpose of the Raker Act, and Congress's intent, Section 11 should be given broader effect than Section 8 of the Reclamation Act. Nothing in logic or the Raker Act supports the opposite conclusion, that Congress intended to prevent California from applying its water law to a project funded, constructed, and operated by one of its own political subdivisions.

4. Other Remedies Exist for Unreasonable Diversion, Which Would Almost Certainly Not Be Preempted

If an unreasonable diversion is present in this case, then article X, section 2 could require a wide range of operational or structural adjustments that do not require removal of the dam and reservoir. Given the broad scope of Section 11, courts' longstanding deference to state water law, and the assumption against preemption of states' historic police powers, those less far-reaching options almost certainly would not be preempted. Therefore, notwithstanding Restore Hetch Hetchy's arguments and prayer, the trial court should not have assumed that article X, section 2 would require removal of the dam, and based its preemption ruling on that assumption.

Restore Hetch Hetchy alleges that San Francisco's operation of O'Shaughnessy Dam constitutes an unreasonable method of diversion. In article X, section 2, "the term 'method of diversion' refers to not only whether water is directly diverted or put into storage, but also the point from which it is diverted, the rate at which the diversion occurs, and other features of the diversion facility and its operation." (*In the Matter of Petition for Reconsideration of Division of Water Rights Refusal to Accept Protest by United States Marine Corps Base, Camp Pendleton Against City of Santa Cruz*, Order No. WR 2009-0061, State of California, State Water Resources Control Board, 2009 WL 6648173, p. 8 (Dec. 1, 2009) (Order WR 2009-0061).) So, for example, a diversion structure that causes fish losses could constitute an unreasonable method of diversion, and, in another case, requiring construction of a temperature control device was "based in part on authority to prevent unreasonable methods of diversion." (*Ibid*.) Accordingly, addressing an unreasonable "method of diversion" may involve changes to a broad range of operational details that do not call into question the structure's existence.[17]

Even assuming the Reclamation Act precedents apply, the Raker Act preempts only state law that is inconsistent with congressional directives contained within that Act. (*United States v. California, State Water Resources Control Bd.*, *supra*, 694 F.2d at p. 1176.) San Francisco contends that the Raker Act's conditions are congressional directives. As discussed above, conditions of a grant to a political subdivision of the state

[17] So, for example, even where Congress directed construction of a federal dam and canal, and the existence of the dam and canal are protected by preemption, article X, section 2 could, without being preempted, preclude diversion of water through the canal to serve a local governmental agency. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.*, *supra*, 26 Cal.3d at pp. 192–193.**)**

should not be equated with congressional directives to a federal agency operating a federal project. But assuming, arguendo, that the conditions in the Raker Act are directives, those directives are limited and leave ample room for operational modification, or even facility modification, if required by state law.

For example, as to the dam creating the Hetch Hetchy Reservoir, section 9(k) of the Raker Act requires only that it be "at least two hundred feet high, with a foundation capable of supporting said dam when built to its greatest economic and safe height." Aside from this minimum height and foundation requirement, and an aesthetic requirement that all non-temporary structures "be sightly" and "harmonize with the surrounding landscape and its use as a park," the Raker Act contains no structural specifications for the dam. (Raker Act, § 4 [AA 93].) As to dam operation, the Raker Act provides only limited guidance as to amounts and costs of water and power to be supplied to certain rights holders. (Raker Act, § 9(b)-(h), (l)-(o) [AA 95–96, 98].) The Act also requires limited protections for the Hetch Hetchy Reservoir, precluding pollutants like excrement, garbage, and sewage, and precluding bathing, washing clothes, and other similar activities in the waters of the reservoir. (Raker Act, § 9(a) [AA 94–95].) None of the foregoing would facially conflict with California's reasonable use requirements as to timing or volume of diversion or storage, or as to facility modifications necessary to protect a wide range of beneficial uses from fisheries to recreation and human health.

Without knowing the specific beneficial use—and the harm to that use—that is being addressed, it is impossible to exhaustively list the potential facility or operational modifications that article X, section 2 might require. However, Order WR 2009-0061, discussed above, provides an idea of the possibilities. That breadth of possibilities, any number of which

could be implemented without interfering with the Raker Act's few specific requirements, highlights the trial court's error here.

Further, the remedies the Raker Act provides to the federal government harmonize well with a determination that California water law may be given full effect without conflicting with the Raker Act. For example, Section 5 of the Raker Act provides for rescission of the grant if San Francisco sells Hetch Hetchy water or electricity in violation of the conditions of the Act. (AA 93–94.) Similarly, Section 9 provides generally for the United States Attorney General to "commence all necessary suits or proceedings in the proper court" to "enforce[e] and carry[] out the provisions of" the Raker Act. (AA 99.) Neither section purports to direct any particular activity by San Francisco, or to require federal enforcement action inconsistent with California water law; instead, these sections authorize the United States to seek available judicial remedies if San Francisco violates a condition of the grant. Given the breadth of potential judicial remedies, in concert with the breadth of potential applications of California water law, courts could and should make all reasonable efforts to give effect to Congress's express intent to preserve California water law in the context of the Raker Act. It would be speculative to conclude that appropriate judicial remedies enforcing the Raker Act must necessarily conflict with application of California water law.

B. The Trial Court Should Not Have Assumed on Demurrer That the Only Possible Remedy Was the Remedy Proposed by Restore Hetch Hetchy

The judicial preference is to determine whether and how a state law applies before reaching the question of preemption, and established standards govern the assumptions courts make in ruling on a demurrer. The trial court did not need to, and should not have, reached the question of preemption without first determining how California law would apply to

this case, and what California law would require. On remand, the court should make the state law determination in the first instance, potentially with assistance from the State Water Board. (*National Audubon, supra*, 33 Cal.3d at p. 426.)

1. Whether State Law Applies, and What It Requires, Should Be Determined Before Considering Conflict Preemption

The Ninth Circuit has noted that "[i]t is preferable to determine whether the state law applies before reaching a determination that state law has been preempted." (*Natural Resources Defense Council v. Houston* (1998) 146 F.3d 1118, 1132 (*NRDC*).) In *NRDC*, the Ninth Circuit considered a claim that the federal Central Valley Project Improvement Act (CVPIA) preempts Fish and Game Code section 5937, and a competing claim that Section 8 of the Reclamation Act requires the federal Bureau of Reclamation to comply with section 5937 in its operation of Friant Dam. (*NRDC*, at pp. 1123, 1131–1132.) Friant Dam is part of the federal Central Valley Project. Section 5937 requires dam owners to allow sufficient water to pass to keep downstream fish in good condition. Noting that "the district court did not determine whether § 5937 is applicable to the Friant dam under state law," and that "it has yet to be determined" whether any requirement of section 5937 "would be consistent with the CVPIA," the Ninth Circuit remanded those issues to the district court rather than jumping straight to conflict preemption analysis.

Similarly, in *United States v. State of Cal., State Water Resources Control Bd., supra*, 694 F.2d 1171, the Ninth Circuit declined to hold there was preemption absent an evidentiary showing that state permit conditions imposed on the federal New Melones Dam conflicted with the federal statute appropriating funds for the dam. (*Id.* at pp. 1178–1179.) Rather than present evidence as to what the state's conditions would actually

require, and how those requirements would affect federal operation of the dam, the United States simply argued that "it need not justify its operational plans so long as those plans are consistent with the scope of the project as envisioned by Congress." (*Id.* at pp. 1174, 1178–1179.) The Ninth Circuit rejected the United States' argument, noting that "[i]f a decision predicated on an evaluation of state interests did not properly implement congressional intent, or if it clashed with significant federal policies, the courts would have a record to judge the question." (*Id.* at p. 1178.) However, because the United States had not presented any such record, the Ninth Circuit declined to "impute extreme positions to a state in an attempt to decide what is in essence a premature question." (*Id*. at p. 1179.)

Here, the trial court should have followed the example the Ninth Circuit set in *NRDC* and *United States v. California, State Water Resources Control Board*. Specifically, the trial court should have determined whether, and how, California law applies, instead of imputing an extreme position to state law and therefore determining that it has been preempted. As discussed, removing O'Shaughnessy Dam and dewatering the Hetch Hetchy Reservoir are not the only possible results of a ruling if San Francisco were found to be in violation of the California Constitution, as Restore Hetch Hetchy has alleged.

2. Restore Hetch Hetchy's Factual and Legal Conclusions and Prayer for Relief Do Not Control the Remedy

The trial court also failed to follow established standards governing demurrers. A demurrer admits "'all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, quoting *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Further, courts are "not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer." (*Barquis v.*

Merchants Collection Assn. (1972) 7 Cal.3d 94, 103.) Instead, courts "must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory." (*Ibid*.) Likewise, "a demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief suggested in the prayer of the complaint." (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1561–1562.)

By assuming that article X, section 2 would "prohibit the dam and reservoir," the trial court's approach conflicted with all of the foregoing rules. (AA 340.) The trial court accurately identified the issue as whether "the Petition fail[s] to state a cause of action under article X, section 2." (AA 333.) However, the court improperly based its ruling on the Petition's "request[] that this Court issue 'a writ of mandate . . . that results in removal of the Hetch Hetchy Reservoir'" (AA 332), apparently accepting the Petition's conclusion that "[o]perating a dam and reservoir in an iconic glacial carved valley within Yosemite National Park is not, in 2015, a reasonable method of diverting water for municipal uses."[18] (AA 29.)[19]

Instead of focusing on the legal conclusion that article X, section 2 requires removal of the dam and reservoir, the trial court should have looked to the Petition's factual allegations. Over several pages, the Petition

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[18] Determining what constitutes a reasonable use, or a reasonable method of diversion, involves "development of a standard of reasonableness on the facts of the case [so] it should be described as a making of law for the particular case." (*Light*, *supra*, 226 Cal.App.4th at p. 1484.) Therefore, allegations that certain uses or methods of diversion are unreasonable are factual or legal conclusions. Because they are mere conclusions, whether factual or legal, courts may not accept them as true on demurrer. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

[19] San Francisco's arguments likewise rely on the premature assumption, expressed in Restore Hetch Hetchy's prayer, that article X, section 2 requires removal of the dam and reservoir. (See, e.g., San Francisco's Br., pp. 14, 22, 28, 32, 37, 38.)

describes San Francisco's Tuolumne River water system, including where San Francisco diverts water, how much it diverts and stores, and how the system could allegedly be operated differently at different times of the year or in different conditions like dry years. (AA 22–25.) The Petition also alleges beneficial uses, designated by the California Regional Water Quality Control Board, Central Valley Region, for the Tuolumne River, and ways in which the operation of the O'Shaughnessy Dam and Hetch Hetchy Reservoir impairs those beneficial uses. (AA 20–21, 29–30.)

Although some of those alleged impairments plainly could only be remedied by restoring the Hetch Hetchy Valley to its original condition, others might, upon evidentiary review not possible at the demurrer stage, be wholly or partially remedied by less severe relief. For example, it is at least conceivable that operational or rules changes could reduce alleged impairment of fishing, hiking, and camping uses, even if those changes do not restore the ideal preferred by Restore Hetch Hetchy in which visitors could hike and camp in an undammed valley and fish in a free-flowing Tuolumne River.[20] Ultimately, the trial court should have asked whether Restore Hetch Hetchy's factual allegations state a cause of action for unreasonable use or method of diversion under article X, section 2, not whether federal law would preempt a state court from awarding Restore Hetch Hetchy its preferred remedy.

The Second District Court of Appeal faced an analogous situation in *Venice Town Council, Inc. v. City of Los Angeles*, *supra*, 47 Cal.App.4th 1547. Los Angeles argued, in part, that a trial court order sustaining Los Angeles' demurrer should be affirmed because relief sought in Venice

[20] As discussed above at pp. 39–41, many such operational or rules changes could be implemented without any apparent conflict with the Raker Act's limited conditions.

Town Council's prayer was precluded by the statute that was the subject of the litigation. (*Id.* at p. 1561.) The Second District agreed that "certain aspects of the prayer of the complaint conflict with" the statute. (*Ibid*.) Nonetheless, because "a demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief suggested in the prayer," that conflict between the statute and the prayer for relief was insufficient to sustain demurrer. (*Id.* at pp. 1561–1562.) So too, here, any potential conflict between the Raker Act and the relief sought by Restore Hetch Hetchy is irrelevant to the issue on demurrer: whether "the Petition fail[s] to state a cause of action under article X, section 2." (AA 333.)

Ultimately, for the foregoing procedural reasons, and because most, if not all, applications of California water law would not conflict with the Raker Act, the trial court should not have reached preemption without first addressing the question of what, if anything, California water law actually requires. If, after addressing that question, conflict preemption remains an issue, that issue should be evaluated in the context of the broad scope of the Raker Act's saving clause and not by analogy to the Reclamation Act.

CONCLUSION

The State Water Board respectfully requests that the Court reverse and remand for further proceedings, with instructions to first consider the reasonableness of San Francisco's method of diversion under article X, section 2 of the California Constitution, before determining any preemptive effect of the Raker Act.

Dated: March 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, as required by California Rules of Court rule 8.204(c)(1) the attached State Water Resources Control Board's Proposed Brief Amicus Curiae in Support of Neither Party, and the Proposed Brief Amicus Curiae, are produced using 13-point Times New Roman type, including footnotes, and contain approximately 11,350 words, which is less than the total words permitted by the rules of court. In making this certification, I am relying on the word count of Microsoft Word, the computer program used to prepare this brief.

Dated: March 17, 2017

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DECLARATION OF ELECTRONIC SERVICE

Case Name: **Restore Hetch Hetchy v. City and County of San Francisco, et al.**
No.: **F074107**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for processing electronic correspondence. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically.

On March 17, 2017, I electronically served the attached **STATE WATER RESOURCES CONTROL BOARD'S PROPOSED BRIEF AMICUS CURIAE IN SUPPORT OF NEITHER SIDE** by transmitting a true copy via this Court's TrueFiling system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 17, 2017, at Sacramento, California.

Kristina Carrasco	/s/
Declarant	Signature

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