

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

RESTORE HETCH HETCHY,
Petitioner and Appellant,

v.

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

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

**PROPOSED AMICUS CURIAE BRIEF OF BARBARA GRIFFIN AND
ROBERT BINNEWIES IN SUPPORT OF
RESTORE HETCH HETCHY**

Appeal from the Superior Court for Tuolumne County
Case No. CV 59426
Honorable Kevin M. Seibert (Phone: 209.533.5563)

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BACKGROUND

In this case, Petitioner/Appellant Restore Hetch Hetchy seeks a determination that the continuing use of the O’Shaughnessy Dam and the associated Hetch Hetchy Reservoir is unreasonable under article X, section 2 of the California Constitution, which confers broad authority on the State to regulate all manner of water use and diversion. The trial court did not determine that the continued use of the dam and reservoir was “reasonable” – rather, it concluded that the question could not be examined at all. Amicus Curiae believe that this determination was erroneous and that the citizens of California are entitled to an examination of the reasonableness of this use under article X, section 2.

ARGUMENT

I. THE UNIQUE QUALITIES OF HETCH HETCHY VALLEY MAKE AN EXAMINATION OF ITS USE AS A RESERVOIR APPROPRIATE

The Respondents suggest that this case is simply about second-guessing the placement of a dam. We disagree. More than a century ago, a decision was made to allow the destruction of one of America’s unique natural resource treasures; this case asks whether that decision continues to be reasonable when viewed against current values and current alternatives.

Hetch Hetchy Valley is marked by steep, glacier-carved cliffs, similar to Yosemite Valley. Both valleys are several miles long. Yosemite Valley averages a mile wide, while Hetch Hetchy Valley averages a half mile wide.

Prior to the onset of construction of the O’Shaughnessy Dam in 1919, Hetch Hetchy was marked by open grassy meadows and was somewhat less densely wooded than Yosemite Valley. It was included within the boundaries of Yosemite National Park as authorized by the United States Congress and established in 1890 by the signature of President Benjamin Harrison. The noted preservationist John Muir referred to the area as the “Tuolumne Yosemite” and described Hetch Hetchy Valley as a “wonderfully exact counterpart” to Yosemite Valley.¹ Muir wrote that “next to Yosemite in beauty, grandeur, and importance, is the floor of Hetch Hetchy, which, like that of Yosemite, is a beautiful landscape park, diversified by magnificent groves, gardens, and flowery meadows in charming combinations.”²

In an article published in the *Century Illustrated Monthly Magazine* in 1909, Muir describes the floor of the Hetch Hetchy valley in great detail:

The floor of the valley is about 3 miles long, half a mile wide, and is partly separated by a bar of glacier-polished granite across which the river breaks in rapids. The lower part is mostly a grassy, flowery meadow, with the trees confined to the sides and the river banks. The upper forested part is charmingly diversified with groves of the large and picturesque California live oak and the noble yellow pine, which here attains a height of more than 200 feet, growing well apart in small groves or singly, allowing each tree to be seen in all its beauty and grandeur. Beneath them the common pteris spreads a sumptuous carpet, tufted here and there with ceanothus and

¹ John Muir. *The Yosemite* (1912).

² Hearing held before the committee on the Public Lands of the House of Representatives, December 16, 1908, on House Joint Resolution 184 - Part VIII. (<http://www.sfmuseum.org/hetch/hetchy8.html>.)

manzanita bushes, azalea and brier rose, and brightened with mariposa tulips, golden-rod, tall mints, larkspurs, geraniums, etc., amid which butterflies, bees, and humming birds find rich pasturage. Near the walls, especially on the earthquake tali that occur in many places, the pines and California oak give place to the mountain live oak, which forms the shadiest and most extensive groves. The glossy foliage, densely crowded, makes a beautiful ceiling, with only a few irregular openings for the admission of sunbeams, while the pale-gray trunks and the branches, snarled and outspread in wide interlacing arches, are most impressively beautiful and picturesque. The sugar pine, sabine pine, incense cedar, silver fir, and tumion occur here and there among the oaks and yellow pines, or in cool side canyons, or scattered on the rifted wall rocks and benches. The river-bank trees are chiefly libocedrus, poplar, willow, alder, and flowering dogwood.³

The Valley served as more than just a nature reserve. Aside from the serene landscape, the floor of Hetch Hetchy Valley had been home to Native Americans for thousands of years.

The battle over whether to flood Hetch Hetchy Valley and create the dam was pitched. Almost 100 newspapers published editorials at the time opposing the plan. Congressmen reported receiving thousands of letters opposing the project. The controversy and debate over the use of Hetch Hetchy Valley raised the nation's awareness of the need to protect and care

³ John Muir "The Endangered Valley: The Hetch Hetchy Valley in the Yosemite National Park" Century Illustrated Monthly Magazine. (<http://www.sfmuseum.org/hetch/hetchy8.html>; <http://www.worldcat.org/title/endangered-valley-the-hetch-hetchy-valley-in-the-yosemite-national-park/oclc/54452688>.)

for our natural wonders.⁴ The O’Shaughnessy Dam was authorized by Congress in 1913. But three years later, in 1916, and years before construction on the dam began, Congress passed the Organic Act, which established the National Park Service as an agency within the U. S. Department of the Interior and legislatively directed it to “conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” Many historians argue that the fight over Hetch Hetchy was the origin of the movement to protect the environment.⁵

Despite the “beauty, grandeur, and importance” of the Hetch Hetchy Valley and the mandate to “conserve” and “leave unimpaired,” the valley disappeared when the O’Shaughnessy Dam was constructed in 1923. With the completion of the dam, the right of all Yosemite National Park visitors to enjoy the natural splendor of Hetch Hetchy Valley was taken away. No longer are park visitors able to enjoy the spacious, picturesque meadows that the Valley once offered as those meadows are under water. Access is now

⁴ National Parks Conservation Association “The 'Outrageous Evil' That Led to the Birth of the National Park Service” (Aug. 25, 2015). (<https://www.npca.org/articles/470-the-outrageous-evil-that-led-to-the-birth-of-the-national-park-service#sm.0001drial4b3ce7ir632qidqw3tzx.>)

⁵Robert W. Righter. *The Battle Over Hetch Hetchy, America’s Most Controversial Dam and the Birth of Modern Environmentalism* (2005).

restricted by gates. Overnight camping is not allowed, and swimming and boating in the reservoir are prohibited. There is no public transportation access and limited parking. The substantial loss of a natural resource area and concomitant loss of public access is completely at odds with what Congress envisioned when it designated the Yosemite National Park in the first instance.

II. THE POTENTIAL SIGNIFICANCE OF HETCH HETCHY VALLEY TO THE CURRENT USE AND ENJOYMENT OF YOSEMITE NATIONAL PARK

Yosemite National Park was named a UNESCO World Heritage site in 1984 for its exceptional natural beauty and distinctive reflections of geologic history. Over the last century, the number of people visiting Yosemite National Park has increased drastically, from approximately 33,000 visitors annually in 1916 to over 5 million visitors in 2016, an all-time high.⁶ Yosemite Valley – the most visited area of the Park – is itself a limited resource that has become increasingly crowded and congested, leading to increased pressure and efforts to limit use during peak periods.⁷ Of course, for those seeking a wilderness experience or access to places of tranquility,

⁶[https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20\(1904%20-%20Last%20Calendar%20Year](https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20(1904%20-%20Last%20Calendar%20Year)

⁷ The Wall Street Journal “Yosemite Slammed: Record Crowds Make America’s National Parks Hard to Bear” (Aug. 3, 2016).

these problems represent particular challenges – challenges that the National Park Service has been grappling with for some time.

Restoring Hetch Hetchy Valley would add approximately 1,200 acres that share many of the characteristics of Yosemite Valley – the most popular destination for park visitors. Restoring Hetch Hetchy would increase access to similar meadowlands and wilderness areas, increase available recreational options, and reclaim for future generations a scenic treasure of national and international significance. Amicus curiae also believe that adding an area with the unique qualities of Hetch Hetchy Valley would increase the level of enjoyment for those persons seeking to maximize the wilderness experience as the focus of their visit to the Park. The over-all increase in opportunities and availability of recreational activities in the Park would clearly have positive benefits for the region as a whole. There are currently numerous restrictions on use and access in the Hetch Hetchy Valley; restoration of the Valley – even for less intensive uses – would substantially increase the opportunities for persons to enjoy the Yosemite National Park and the level of satisfaction of all visitors.

The Petition in this case alleges (an allegation that must be accepted for purposes of these proceedings) that the value of recreational benefits to visitors and local businesses of a restored Hetch Hetchy Valley over time would be \$8.7 billion over 50 years – more than 4 times the cost of the water system improvements necessary to assure a continuing undiminished supply

of water to the Central Valley and the San Francisco Bay Area. In addition, the value of simply having this additional resource available to the public would reach tens of billions of dollars, possibly more than \$100 billion. (AA 21-22.) The Respondents suggest that only the members of Restore Hetch Hetchy want to use Hetch Hetchy Valley, but this suggestion is belied by the experience of amicus curiae with the Yosemite Valley. The potential users are not limited to those who actively support the Park or even those who affirmatively use it for camping, fishing, rock climbing, photography and art, sheer scenic pleasure, and the educational and recreational benefits inherent in the thoughtful conservation of flora, fauna, and cultural values. There are many who may only visit once or twice and even more who may never visit but believe there is a value in having the resource available. Indeed, amicus curiae believe there is a growing national awareness of the importance and value of preserving significant natural resource areas such as Hetch Hetchy Valley.

III. IT'S NECESSARY FOR CALIFORNIA TO BE ABLE TO APPLY THE CONSTITUTIONAL STANDARDS OF ARTICLE X, SECTION 2 TO HETCH HETCHY VALLEY

The plain language of the Raker Act states that nothing in the Act shall be construed as “affecting or intending to affect or in any way to interfere with the laws of California relating to the control, appropriation, use or distribution of water...” The most fundamental of these laws is article X, section 2, which allows for the regulation of water use and diversion in the

public interest and prevents the unreasonable use or diversion of water. (Cal. Const., art. X, § 2.) “All uses of water, including public trust uses, must now conform to the standard of reasonable use.” (*Nat’l Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443, citing *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367.)

At the time the Raker Act was debated and enacted, San Francisco was recovering from a devastating earthquake and fire and faced with a significant threat of water shortages. While the need to assist the City’s recovery may have reasonably engendered support and the options available at that time may have been limited, it does not mean that the exigencies of that time should forever preclude the evaluation of the continuing reasonableness of a decision made over a century ago – particularly if it can be demonstrated that there are alternatives available and practical which will both serve the needs of the City and allow the natural beauty and resources of Hetch Hetchy to once again be available to the citizens of California.

A. Applying a Four-Year Statute of Limitation to a Constitutional Requirement That Water Uses Be Reasonable Makes No Sense

The California Constitution commits the authority to regulate and control the use of water to the State. (Cal. Const., art. X, § 5 [“The use of all water is subject to the regulation and control of the state, in a manner to be prescribed by law.”].) And it makes the reasonableness of use and diversions the touchstone. (Cal. Const., art. X, § 2.) By its very nature, what is

“reasonable” is likely to evolve and change over time. While a relatively short statute of limitations makes a great deal of sense for typical civil actions, limiting the State’s ability to review the reasonableness of water use to a short time-frame would undermine the authority of the state to ensure compliance with the constitutional requirements on an ongoing basis. “What constitutes an unreasonable use of water changes with time, including the passage of time.” (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1488.)

There is no way that Congress in 1913 could have anticipated the explosive growth and increased popularity of Yosemite and other national parks. Nor could it have anticipated the numerous water storage developments and options now in place that make use of Hetch Hetchy Reservoir unnecessary. Under the California Constitution, the weighing and balancing that Congress undertook in 1913 that resulted in the reservoir option being made available must remain subject to modern day realities and environmental sensibilities that would undoubtedly lead to a different conclusion. While we believe that the highest and best use serving the most people will be restoration of Hetch Hetchy Valley as a significant natural resource rather than water storage, that case is one to be made to the officials charged by the State of California with making these evaluations. The alternative would be to render outdated decisions unreviewable and lock in

potentially unreasonable and even dangerous uses and diversions of water despite the broad constitutional language prohibiting that.

B. Changes in Water Delivery, Storage and Management Must Be Considered In Evaluating Reasonableness of a Diversion.

We acknowledge that the need to ensure an adequate and reliable supply of high-quality water to the San Francisco Bay Area and to protect the Turlock and Modesto Irrigation Districts are critical aspects of any calculation involving the continuing use of the Hetch Hetchy Reservoir. However, in looking at the water storage issues broadly, it is apparent that Hetch Hetchy's actual storage capacity is relatively small and therefore more easily addressed. Since 1990, more than 5 million acre-feet of new water storage has been developed – without new dams. A review of current storage options (as opposed to those available in 1913) demonstrates several developments that should be considered.

First, as Petitioner/Appellant has pointed out, San Francisco's water system includes many other storage facilities, including Lake Lloyd or Cherry Reservoir, Lake Eleanor, and a portion of Don Pedro Reservoir. (AOB, pp. 15-16.) The combined storage capacity of these facilities dwarfs Hetch Hetchy Reservoir. In addition to these reservoirs in the Tuolumne watershed, San Francisco maintains five reservoirs closer to the Bay Area. (*Id.*) Many of these storage options were unavailable at the time of the Raker Act (the first two were part of the Raker Act right-of-way grant and would be

unaffected by restoration of the valley) and their combined storage capacity likewise far exceeds Hetch Hetchy Reservoir. (*Id.*)⁸

Second, water supply solutions today look very different than they did in 1913, when dams and reservoirs were more common. “Off-stream” surface reservoirs have been developed (*e.g.*, Los Vaqueros and Diamond Valley Reservoirs), as well as groundwater aquifers (*e.g.*, Kern and Semitropic Water Storage District). Underground storage in particular has dramatically expanded. Each of these examples (except Los Vaqueros) currently stores more water than the storage capacity of Hetch Hetchy (360,000 acre-feet).

In short, water storage options have changed considerably since 1913 and there is no question that San Francisco could expand its surface and groundwater storage outside Yosemite and access its right to Tuolumne River water downstream of Hetch Hetchy Valley without any loss of supply.⁹ (See ARB, pp. 20-23.) These developments must be weighed against the continuing loss of a magnificent portion of Yosemite National Park to water storage.

⁸ Petitioner/Appellant’s Reply Brief also details the options for replacing any lost hydropower. (ARB, p. 21.)

⁹ San Francisco could also take the same steps that many cities have taken to filter, recycle and conserve water.

CONCLUSION

The Hetch Hetchy Valley is a unique natural resource. New water storage facilities and modern water storage alternatives now provide San Francisco with possibilities and alternatives unknown when the decision was made to flood the Valley more than a century ago. There is little question that the same decision would not be made today. The California constitutional requirements for continued oversight and evaluation of water use not only afford an opportunity to re-examine the decision to use Hetch Hetchy Valley as a reservoir, they compel it. Amicus Curiae urge the Court to reverse the decision of the trial court and allow the constitutional requirements to be properly implemented in this case.

Respectfully submitted,

Dated: March 17, 2017

OLSON HAGEL & FISHBURN LLP

By: /s/ Deborah H. Caplan
DEBORAH B. CAPLAN

**CERTIFICATE OF COMPLIANCE
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Pursuant to Rule 8.204 of the California Rules of Court, I certify that this attached brief is proportionately spaced, has a typeface of 13 points or more, and contains 3,277 words as counted by the Microsoft Office Word 2003 word processing program used to generate this brief, excepting the caption, tables, verification, and this certificate.

Dated: March 17, 2017

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PROOF OF SERVICE

Case Name : Restore Hetch Hetchy v. City and County of San Francisco, et al.
Case No.: : F074107
Court : Court of Appeal, Fifth Appellate District

I am a citizen of the United States, over the age of 18, and not a party to the within action. My business address is 555 Capitol Mall, Suite 1425, Sacramento, California, 95814. On March 17, 2017, I served a true and correct copy of the following entitled documents:

BRIEF OF AMICUS CURIAE

I certify that I caused a copy to be transmitted electronically by filing the foregoing with the clerk of the California 5th District Court of Appeal by using its True Filing system, which electronically serves counsel for each party.

I further certify that some of the participants in this case are not registered with the True Filing system. On March 17, 2017, I have served those participants by placing the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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