5th App. Dist. CIVIL No. F074107

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

RESTORE HETCH HETCHY,
Petitioner and Appellant,

v.

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

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

APPELLANT'S ANSWER TO THE *AMICUS CURIAE* BRIEFS OF ASSOCIATION OF CALIFORNIA WATER AGENCIES, NORTHERN CALIFORNIA WATER ASSOCIATION, AND SANTA CLARA VALLEY WATER DISTRICT

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

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I. INTRODUCTION.

Appellant Restore Hetch Hetchy files this answer responding to the *amicus curiae* brief filed on behalf of the Association of California Water Agencies and Northern California Water Association (collectively "ACWA") as well as the separate *amicus curiae* brief filed on behalf of the Santa Clara Valley Water District ("SCVWD"). ACWA attempts to marshal an argument that Article X, section 2 favors storage to the point that implicitly no storage scheme could be considered unreasonable. ACWA further argues that the Raker Act is consistent with Article X, section 2 but nevertheless preempts Appellant Restore Hetch Hetchy's interpretation of the Act. *Amicus curiae* SCVWD writes in support of applying a four-year statute of limitations to Article X, section 2. Rather than assist the Court, these *amici curiae* briefs merely distract the Court of Appeal in addressing the issues raised in the appeal.

II. ARGUMENT.

A. ACWA's Analysis Does Not Demonstrate That in Enacting Article X, Section 2 the Citizens of California Sought to Relieve All Water Storage Projects from any Challenge to Their Reasonableness.

ACWA's brief largely focuses on a theory – not raised before the trial court – that Article X, section 2 can be read to preserve any and all water storage facilities existing or perhaps even contemplated within the State. As ACWA perceives it, "[t]he Legislature and California's voters … enacted Article X, section two[] to enable the investments in water storage necessary to ensure that Californians will have consistent and adequate water supplies even though

precipitation in our state is highly variable." (ACWA Brief, p. 11.) However, as ACWA's summary of water law decisions throughout the decades underscores, Article X, section 2, at its core, precludes the total certainty of past investments desired by ACWA. Indeed, ACWA's brief agrees that Article X, section 2 made every riparian water right in the State contingent on remaining reasonable. The same evolving standard of reasonableness applies not only to riparian water rights, but to every appropriative water right in the State, including those held by Respondent City and County of San Francisco ("City"). Moreover, Article X, section 2 makes clear that the reasonableness standard applies to every method of water diversion employed in California, including dams and reservoirs. Thus, factors contributing to the reasonableness of a particular water diversion or use may change over time as society's values and ecological understanding evolve or as unique landscapes grow ever rarer. But there is nothing in Article X, section 2 or its relevant legislative history that suggests any large investment made by any water user anywhere in the State guarantees the continued use of that method or use indefinitely.

Although ACWA's brief goes far afield in its quest for purported legislative history, the only actual legislative history it cites undermines its thesis that all storage is protected by Article X, section 2. As the ballot argument in favor of the amendment states, "this amendment protects all water rights to the full extent they can be put to reasonable beneficial use ***in some reasonable way***…." (ACWA Brief, p. 16 (quoting 1928 Voter Guide, p. 14 [Respondents RJN, p. 0128, Exhibit

J] (emphasis added).) Restore Hetch Hetchy's petition for writ of mandate states a claim that the City's method of diversion in Hetch Hetchy Valley is an unreasonable way of diverting the City's water appropriation from the Tuolumne River contrary to Article X, section 2's duty. The California Supreme Court has confirmed the validity of a private non-profit group enforcing the reasonableness requirements of Article X, section 2 by way of a mandamus proceeding. (*EDF v. EBMUD* (1980) 26 Cal.3d 183, 198 ("The provisions of article X, section 2 of the California Constitution being self-executing…, the courts have traditionally enforced the proscriptions against unreasonable uses and unreasonable methods of diverting water").) Where a diversion method has become unreasonable by the increased value of, for example, an enormously popular national park, the growing scarcity of the landscape and beneficial uses being drowned, and the availability of other diversion and storage alternatives, the ballot argument states that such a diversion is not protected by Article X, section 2.

Although ACWA goes to great length to reference many California water rights cases mentioning Article X, section 2, none of those cases undermines the established rule, acknowledged as well by ACWA, that what is a reasonable use or method of diversion "depends on the circumstances of each case" and "such an inquiry cannot be resolved *in vacuo*." (ACWA Brief, p. 20 (quoting *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140.) Failing to heed this directive, ACWA asks the Court to do just that – refuse to consider the circumstances of the City's continued flooding of a unique valley in a cherished national park despite

the presence of feasible alternatives, the cost of which pale in comparison to the value of the beneficial uses currently being drowned by the City's diversion method. (Petition for Writ of Mandate, ¶ 19-4, 55 [Appellant's Appendix ("AA"):18-26, 29-31].) Nor does ACWA contest the long-accepted principle that the reasonableness of a particular diversion or use may change over time and is judged from current social values and available diversion options. (*See, e.g. Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 456 (Fed. Cl. 2011) ("The public trust and reasonable use doctrines are self-executing, as well as evolving, and do not therefore lend themselves to such a static interpretation"); Appellant's Opening Brief ("AOB"), pp. 52-53.) This Court should give little credence to ACWA's notion that all water storage in California is by definition a reasonable diversion.

Six years after the enactment of Article X, section 2, when issuing its ruling in *Peabody v. Vallejo* (1935) 2 Cal.2d 351, the California Supreme Court acknowledged the uncertainty that is manifest in Article X, section 2's reasonableness standards, noting that only by adjudicating a claim under that provision could a court resolve the uncertainty for the foreseeable future:

> It is suggested that the application of the doctrine of reasonable use of water lays the matter open to too much uncertainty. Conceding that the ascertainment of reasonable use is difficult it does not follow that it cannot be done. The requirements of public welfare demand that it be done, and ***the uncertainty ends when a definite application of the rule has been made to the facts in each case***.

(2 Cal.2d at 375 (emphasis added).) And, after epitomizing Article X, section 2 as mandating, without exception, that any users right to water "does not extend to … unreasonable method of diversion of water," the Court further emphasized that "[t]he problem is to apply these rules in the varying circumstances of cases as they arise." (*Id*. at 367-68.) The Court did not single out reservoirs or other storage diversions as exempt from this rule. ACWA's numerous case citations fail to substantiate any notion that Article X, section 2, on its face, can be read to insulate any method of diversion – even a 94-year old dam or reservoir – from a well-pled unreasonable method of diversion claim. As alleged by Appellant, the Court should allow the trial court and the State Water Resources Control Board ("State Board") to apply Article X, section 2's rule of reasonableness to the Hetch Hetchy Reservoir and O'Shaughnessy Dam based on their inappropriate location, their continuing adverse effect on other beneficial uses highly valued by all Californians, and the availability of alternative diversion locations that would provide equal access to the City's Tuolumne River water rights.

B. ACWA Fails to Substantiate Any Claim That Allowing Restore Hetch Hetchy's Case to Proceed Would Discourage Investments in Water Storage.

Ignoring Restore Hetch Hetchy's petition, ACWA exaggerates the impacts of Restore Hetch Hetchy's claim should the group be allowed to litigate its claim. ACWA suggests that if allowed to proceed, Restore Hetch Hetchy's case could subject any water storage asset to repeated claims of constituting an unreasonable

method of diversion. ACWA then proceeds to argue that this would lead to fewer investments in surface and groundwater storage around the State.

ACWA's speculation is not consistent with the facts underlying Restore Hetch Hetchy's claim. Restore Hetch Hetchy's claim will not lead to repeated challenges to other diversions around the State for a simple reason: the facts specific to the City's dam in Hetch Hetchy Valley are unique and not replicated anywhere else in the State.

First, few other reservoirs in California are located in a national park. Perhaps the only exception is the City's dam creating Lake Eleanor, also in Yosemite National Park and subject to the Raker Act's right-of-way grant.[1]

Second, no other reservoirs in California, including Lake Eleanor, drown a glacial valley comparable to Hetch Hetchy Valley that rivals the beauty and sublimity of Yosemite Valley.

Third, no other diversion frustrates beneficial uses with recreational and habitat values estimated to exceed 47 billion dollars and which may exceed as much as 122 billion dollars over the next 20 years alone, were Hetch Hetchy Valley restored. (*See* Petition, ¶ 55(f) [AA:30].) Those costs dwarf the estimated

[1] Notably, Restore Hetch Hetchy does not claim that any other of the City's facilities is an unreasonable method of diversion under Article X, section 2. Indeed, the petition alleges that removing the Hetch Hetchy Reservoir is feasible, in part, because the City will be able to rely on other facilities included in the Raker Act's right-of-way, including both Lake Eleanor and Cherry Reservoir (also known as Lake Lloyd). (*See* Petition, ¶¶ 31, 34 [AA:22-24].)

costs to alter and move the City's diversion location to an extent unmatched anywhere else in California.

It is untenable that Restore Hetch Hetchy's claim seeking to address the unique affront to the Hetch Hetchy Valley will encourage other would-be litigants to mount the wave of challenges predicted by ACWA. ACWA's resulting assertion that this non-existent wave of Article X, section 2 litigation would discourage investments in water storage projects throughout the State is nothing more than pure conjecture. As the petition alleges, "[a]lthough at the time of enactment of the Raker Act, the reasonableness of flooding a uniquely beautiful valley in a national park was debatable, viewed with current sensibilities in mind and the ever-growing popularity of the Nation's national and state park systems, any such decision today would be unimaginable and patently unreasonable." (Petition, ¶ 30 [AA:22].) Short of a water rights holder proposing to build a dam in Yosemite Valley or a massive dam and reservoir in one of the national parks located in California, it cannot reasonably be said that Restore Hetch Hetchy's claim will unleash a flood of pent-up challenges to dams and reservoirs in California.

ACWA's fear that Restore Hetch Hetchy's claim will create new uncertainty for water storage projects is further unwarranted based on the limited scope of the relief prayed for by appellant. Restore Hetch Hetchy's appeal seeks to restore its right to present its case to the Superior Court and, pursuant to Water Code § 2000, the State Board. The petition only seeks declaratory relief finding

that the City's O'Shaughnessy Dam and Hetch Hetchy Reservoir constitute an unreasonable method of diversion and a writ of mandate ordering the creation of a plan by the City to cure that violation of Article X, section 2. (AA:31.) Should Restore Hetch Hetchy prevail, it anticipates an orderly administrative process conducted over time that would continue after this litigation concludes. That future process would result in an ultimate remedy that would be devised by the City and State Board – and subsequently the Secretary of the Interior pursuant to his duty under Section 11 of the Raker Act – and would implement changes to the City's system incrementally over a reasonable period of time. If Restore Hetch Hetchy's long-term goal is accepted by the State Board and included in those future plans, the ultimate remedy would empty the reservoir and result in modifications or removal of O'Shaughnessy Dam so the value of a restored valley could be realized. However, none of those on-the-ground changes would be ordered by the trial court in the current case.

ACWA claims that this case will undermine the City's and the Bay Area Water Supply and Conservation Agency's ("BAWSCA") efforts to plan for and acquire supplemental water supplies. This claim is without merit. As the petition alleges, the costs identified for modifying the City's diversion in Hetch Hetchy Valley include investments in expanding other existing water supply options. "Such supply could be obtained through investments in groundwater or surface storage and exchanges with or purchases from other water agencies." (Petition, ¶ 35 [AA:24-25].) Cost estimates are alleged for specific storage methods. For

example, the Petition alleges that "[t]he cost of developing infrastructure for a 400,000 acre-foot groundwater bank is estimated to be 244 million dollars." (*Id*. [AA:35].) The Petition also includes other alternative water supply costs. (*Id*.) These are the very investments that ACWA claims will be discouraged. Of course, in the context of a demurrer, ACWA is not at liberty to assume that any factual allegations in the Petition are incorrect. (*See People ex rel. Harris v. Pac Anchor Transportation, Inc*. (2014) 59 Cal.4th 772, 777.)

C. If, as ACWA Claims, Article X, section 2 and the Raker Act Are Consistent, No Federal Preemption can be Claimed.

ACWA argues that Article X, section 2 and the Raker Act are entirely consistent. (ACWA Brief, pp. 39-44.) Restore Hetch Hetchy also believes the two statutes are consistent, though for different reasons. In either case, if they are consistent, no federal preemption applies. This entire argument only underscores why the Court should vacate the trial court's preemption ruling to allow the Superior Court and State Board to apply California law prior to any holding that either a conflict or federal preemption is present. (*See* State Board Brief *Amici Curiae*; Brief of *Amici Curiae* Huey Johnson, Daniel Lungren, John Van de Kamp, and Douglas Wheeler; and Joinder by Earth Island Institute.)

D. ACWA's Takings Argument Is Not Relevant to the Issues on Appeal and Meritless.

ACWA's effort to invoke the Fifth Amendment's Takings Clause as a risk to the State of California warranting the Court of Appeal's concern is premature.

Additionally, it raises a speculative issue not addressed by the lower court and is replete with incorrect statements of applicable law.

Contrary to ACWA's argument, there is nothing in Appellant's prayer that would come close to taking any property interest the City could claim relating to O'Shaughnessy Dam. There is certainly no taking of any water right held by the City, the petition on its face making clear that any alternative diversion would, as a pre-condition, ensure the City access to whatever amount of Tuolumne River water it may be entitled pursuant to its existing water rights. (*See* Petition, ¶¶ 1, 35, 36, 41 [AA:12, 24, 25, 26].)

The petition requests a declaration that the dam and reservoir constitute an unreasonable method of diversion and further requests a writ of mandate ordering the City to develop a plan to cure the violation of Article X, section 2. At the conclusion of this action, no changes or alteration to the dam will have occurred even if Restore Hetch Hetchy prevails completely. Presumably, the plan and compliance questions would be subject to extensive proceedings before the State Board as well as, perhaps, a reviewing court. But any remedy in favor of Restore Hetch Hetchy in this action would not give rise to any potential taking of any property interest the City may have in O'Shaughnessy Dam.

The Court should not consider such a speculative and premature argument that is not encompassed by the petition for writ of mandate and which was not addressed to the trial court. (*Casitas Mun. Water Dist.*, 102 Fed. Cl. at 471 ("Because the relevant property interest is plaintiff's right to beneficial use, that

right cannot be taken until defendant's action encroaches on plaintiff's ability to deliver water to its customers. Since that condition has not occurred, plaintiff's cause of action is not ripe.").)

In addition, ACWA's taking argument is incorrect as a matter of law. Whether the courts or the State Board declare the Hetch Hetchy reservoir to be an unreasonable method of diversion, and even assuming that means O'Shaughnessy Dam would be modified or even removed as a result of this action, the City would lack standing to prosecute a takings claim under the federal or State constitutions against the State of California because the City is a creature of the state. (*See California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 255, quoting *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 914 ("In our federal system the states are sovereign but cities and counties are not; in California as elsewhere they are mere creatures of the state and exist only at the state's sufferance").) ACWA's constitutional argument ignores the well-settled law that "subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution." (*Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6.) "The same reasoning applies to the due process protections afforded under the California Constitution." (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296.) "[A] public entity, being a creature of the state,

is not a 'person' within the meaning of the due process clause, and is not entitled to due process from the state." (*Id.* at p. 297.)

ACWA appears to suggest that the City could side-step its lack of standing to pursue a takings claim, citing obliquely to *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660. The Court of Appeal in *Sanchez* determined that Modesto had third-party standing to assert the individual rights of its citizens to challenge the constitutionality of a state voting rights statute because it allegedly discriminated against Latino voters. (145 Cal.App.4th at 665-66, 671-77.) Unlike the claims in *Sanchez*, there are no individual rights of any particular San Francisco citizen at issue via Restore Hetch Hetchy's petition. No individual San Francisco citizens have any property interest in the O'Shaughnessy Dam. Nor do any citizens of San Francisco exercise any of the City's water rights.

This situation is analogous to the facts underlying *City of Azusa v. Cohen* (2015) 238 Cal.App.4th 619. In *City of Azusa*, the Court of Appeal held that the City lacked third-party standing on behalf of the ratepayers of the City's local municipal utility to challenge a State statute dissolving redevelopment agencies in California or to mount a takings claim seeking to be reimbursed for funds loaned to the local redevelopment agency. (*Id*. at 631.) ACWA's proffered facts are comparable. Because, as alleged in the Petition, Restore Hetch Hetchy's action will not affect the amount of water flowing to the City's faucets, all of the City's ratepayers will continue to receive their portion of all of the water to which the City is entitled, even after Restore Hetch Hetchy prevails. There is virtually no

chance that a future order of the court or State Board mandating changes to the O'Shaughnessy Dam and the City's diversion of Tuolumne River water would lead to a good faith takings claim by the City. Obviously, given the speculative nature of ACWA's contention, the Court of Appeal should not accept ACWA's premature invitation to provide an advisory opinion concerning any likely meritless future taking disputes.

E. SCVWD's Amicus Curiae Brief Repeats the City's Incorrect Statute of Limitations Arguments.

SCVWD reiterates the City's statute of limitations arguments, adding nothing worthy of the Court's substantive consideration. SCVWD's forecasts of negative outcomes from allowing Restore Hetch Hetchy's claim to proceed are inconsistent with the facts pled by Restore Hetch Hetchy and not credible.

SCVWD's forecast that Restore Hetch Hetchy's claim would reduce the City's supply from the Tuolumne River is inconsistent with the petition's allegations as well as its requested relief. (Petition, ¶¶ 1, 35, 36, 41, Prayer for Relief [AA12, 24-26, 31].) The Petition's allegations incorporate a condition that any reasonable alternative to the City's current diversion in Hetch Hetchy Valley "will result in no loss of water supply reliability." (*Id*., ¶ 1 [AA:12.) Like ACWA, SCVWD's effort to create an outcome that is contrary to the allegations in the petition ignores the basic rule that, in the context of a demurrer, the courts must accept as true each of petitioner's factual allegations. (*People ex rel. Harris,* 59 Cal.4th at 777.)

SCVWD claims that unless this Court cuts off any right to enforce Article X, section 2 after only four years would lead to uncertainty by allowing a swarm of challenges to the reasonableness of SCVWD's dams. (SCVWD Brief, p. 11.) Again, like ACWA, this argument ignores the unique facts alleged by Restore Hetch Hetchy regarding the City's dam in Hetch Hetchy Valley. (*See supra*, pp. 10-11.) SCVWD does not maintain any dam or reservoir within a national park. Nor would the facts necessary for the Superior Court and State Board to determine the merits of Restore Hetch Hetchy's claim be transferable to any other dam or reservoir in the State, including those operated by SCVWD. (*See* Petition, ¶¶ 27-41, 55 [AA:20-26, 29-31].) SCVWD's attempt to paint Restore Hetch Hetchy's challenge to the Hetch Hetchy reservoir as a challenge to all storage projects is not consistent with the Petition's very specific allegations.

Turning to SCVWD's legal arguments, SCVWD reiterates the City's statute of limitations arguments, all of which have been fully addressed by Restore Hetch Hetchy in its opening and reply briefs. Although purporting to address the consistency of Article X, section 2 with CCP § 343, SCVWD's brief is remarkable for the fact that it does not cite to a single court decision addressing the mandates of Article X, section 2.

SCVWD argues that a physical change to the dam or reservoir must occur in order for a claim under Article X, section 2 to accrue. (SCVWD Brief, p. 7.) However, the California Supreme Court and other courts have long made clear that, even if a use does not change, it may become unreasonable as a result of

"changed conditions." (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567 ("What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time"); *See also Casitas Mun. Water Dist.*, 102 Fed. Cl. at 456 (reasonable use doctrine is self-executing and "evolving"); AOB, pp. 52-53; Appellant's Reply Br., p. 28.) Nothing in the "self-executing" language of Article X, section 2 or in the numerous court decisions considering the constitutional provision suggests that the reasonableness of a method of diversion or use can only be questioned when the operator opts to make a substantial change to their facilities or operations. Nor does SCVWD identify any.

III. CONCLUSION

For the above reasons, the Court should give little weight to the arguments presented in briefs *amici curiae* filed by ACWA and SCVWD. Appellant Restore Hetch Hetchy respectfully requests, along with *amici curiae* State Water Resources Control Board, highly-respected water law professors, past California Attorneys General and cabinet secretaries, and former superintendents of Yosemite National Park, that the Court reverse the trial court's erroneous rulings. Restore Hetch Hetchy's claim under the California Constitution is not preempted by federal law. Nor is it foreclosed by any statute of limitation. Accordingly, this

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Court should allow Restore Hetch Hetchy to pursue its unreasonable method of diversion claim before the lower court and State Board.

Respectfully submitted,

Dated: May 2, 2017

LOZEAU | DRURY LLP

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Certificate of Word Count
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 3,913 words, as counted by the Microsoft Word word-processing program used to generate this brief.

Date: May 2, 2017

Respectfully submitted,

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I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 410 12th Street, Suite 250, Oakland, CA 94607. On May 2, 2017, I served a copy of the foregoing document(s) entitled:

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I declare under penalty of perjury (under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed May 2, 2017 at Oakland, California.

/s/ Toyer Grear