

1 Michael R. Lozeau (Bar No. 142893)
Richard T. Drury (Bar No. 163559)
2 Richard M. Franco (Bar No. 170970)
LOZEAU DRURY LLP
3 410 12th Street, Suite 250
Oakland, California 94607
4 Tel: (510) 836-4200
Fax: (510) 836-4205
5 E-mail: michael@lozeaudrury.com
richard@lozeaudrury.com
6 rick@lozeaudrury.com

7 Richard M. Frank (Bar No. 63482)
8 School of Law
University of California
9 Davis, California 95616
Tel: (530) 752-7422
10 Fax: (530) 752-4704
E-mail: rmfrank@ucdavis.edu

11 Attorneys for Petitioner and Plaintiff

12 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

13 IN AND FOR THE COUNTY OF TUOLUMNE

14 RESTORE HETCH HETCHY, a non-profit, public
15 benefit corporation,
16 Petitioner and Plaintiff,

17 vs.

18 CITY AND COUNTY OF SAN FRANCISCO, a
19 municipal corporation; SAN FRANCISCO
PUBLIC UTILITIES COMMISSION, a municipal
20 agency; and DOES I – X, inclusive,
21 Respondents and Defendants.

22 MODESTO IRRIGATION DISTRICT, a public
23 agency; TURLOCK IRRIGATION DISTRICT, a
24 public agency; BAY AREA WATER SUPPLY
AND CONSERVATION AGENCY, a public
25 agency, and ROES I–XXX, inclusive,
26 Real Parties in Interest and Defendants.

Case No.

VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY RELIEF

(Article X, section 2, California Constitution;
Water Code § 100; Code Civ. Pro. § 1060;
Code of Civil Procedure § 1085)

27 THE CITY AND COUNTY OF SAN FRANCISCO and its agency, the SAN FRANCISCO
28 PUBLIC UTILITIES COMMISSION (collectively “CCSF” and “Respondents”) are employing an

1 unreasonable method of diverting municipal water supplies from the Tuolumne River by drowning
2 the Hetch Hetchy Valley of Yosemite National Park with a reservoir. Article X, section 2 of the
3 California Constitution requires that the manner and location of diverting water out of streams and
4 rivers must always be reasonable. Article X, section 2 commands that the conservation and use of
5 waters must implement as many relevant beneficial uses as may be reasonable. Because California's
6 water supply is limited, "the public interest requires that there be the greatest number of beneficial
7 uses which the supply can yield." *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368. Because
8 there are many feasible alternatives for CCSF to divert the same amount of Tuolumne River water to
9 which CCSF is entitled downstream of Yosemite, allowing the Tuolumne River to flow through
10 Hetch Hetchy Valley in a pristine state, the existing reservoir violates Article X, section 2. The
11 reservoir in Yosemite National Park unnecessarily eliminates uses rather than maximizes the greatest
12 number of beneficial uses of the Tuolumne River, including the wonder that would be experienced by
13 millions of visitors over the years journeying to view Hetch Hetchy Valley's sublime landscape and
14 scarce Sierra wetlands and meadow habitat once the reservoir was removed. Petitioner and Plaintiff
15 RESTORE HETCH HETCHY (hereinafter "Petitioner") petitions this Court on its own behalf, on
16 behalf of its members, on behalf of the general public, and in the public interest pursuant to Code of
17 Civil Procedure §§ 1060 and 1085, and Article X, section 2 of the California Constitution for
18 declaratory relief directed to Respondents and by this verified petition, alleges as follows:

20 1. Petitioner brings this action to challenge Respondents' unreasonable method of
21 diversion of the waters of the Tuolumne River by maintaining and operating the O'Shaughnessy Dam
22 and the Hetch Hetchy Reservoir in the Hetch Hetchy Valley of Yosemite National Park. Petitioner
23 seeks declaratory relief and a writ of mandate ordering Respondents to prepare an engineering and
24 financing plan for altering their method of diversion within the Hetch Hetchy Valley that results in
25 removal of the Hetch Hetchy Reservoir, restoration of the natural flow levels of the Tuolumne River
26 through the Hetch Hetchy Valley, and system improvements that will result in no loss of water supply
27 reliability or electric power production. Pursuant to California Constitution, Article X, section 2,
28 every water right in the State of California, including Respondents' rights to the use of Tuolumne

1 River waters, must be procured using a reasonable method of diversion. Operating a dam and
2 reservoir in an iconic valley within Yosemite National Park is not, in 2015, a reasonable method of
3 diverting water for municipal uses.

4 2. Respondents have eliminated or seriously impaired the beneficial uses of the
5 Tuolumne River as the river flows through the Hetch Hetchy Valley. Respondents' method of
6 diverting the Tuolumne River's waters eliminates important aesthetic, scenic, fish & wildlife habitat,
7 fishing, recreational, and preservational beneficial uses in furtherance of water supply storage for
8 remote cities and replaceable electric power production. Petitioner does not dispute the beneficial use
9 of providing municipal water supplies. Nor does Petitioner dispute the beneficial use of hydroelectric
10 power production. Petitioner, however, alleges that Respondents' use of a method of diversion – the
11 O'Shaughnessy Dam and Hetch Hetchy Reservoir – that eliminates or severely impairs the long list
12 of beneficial uses that otherwise would exist within this part of Yosemite National Park and which,
13 prior to the construction of the Hetch Hetchy Reservoir, rivaled in quality the scenic and recreational
14 uses currently revered in Yosemite Valley, is an unreasonable method of diversion that violates
15 Article X, section 2 of the California Constitution.
16

17 3. It is not reasonable for Respondents to monopolize a majestic valley within a world-
18 famous national park as a reservoir that achieves only two beneficial uses – municipal water supply
19 and electrical power production – when feasible engineering design changes, downstream storage,
20 alternative water supplies, and/or yet-to-be applied water conservation measures are available that
21 would obviate the need for the Hetch Hetchy Reservoir and the complete elimination of numerous
22 high quality, world-class beneficial uses. Were the Tuolumne River's Hetch Hetchy Valley uses
23 available today, millions of people from throughout California, the United States and the world
24 would converge on Hetch Hetchy Valley to enjoy its majestic scenery and partake of its unique
25 recreational and aesthetic opportunities, which are similar to those of its popular sister valley –
26 Yosemite Valley.
27
28

1 **PARTIES**

2 4. Petitioner RESTORE HETCH HETCHY is a non-profit organization with a main
3 office in Oakland, California. Restore Hetch Hetchy has more than 4,000 dedicated members
4 residing in California with more than 50 members residing in Tuolumne County. Restore Hetch
5 Hetchy’s mission is to return the Hetch Hetchy Valley in Yosemite National Park to its natural
6 splendor while continuing to meet the water and power needs of all communities that depend on the
7 Tuolumne River. An essential component to achieving this mission is the responsible elimination of
8 the Hetch Hetchy Reservoir and implementation of a reasonable method of diversion that would
9 allow currently lost and inaccessible beneficial uses of the Tuolumne River within the Hetch Hetchy
10 Valley to be accessed and restored to the general public. Restore Hetch Hetchy engages in robust
11 public education programs to remind Californians and other citizens of the magnificence of Hetch
12 Hetchy Valley unaltered by a dam and reservoir.

13
14 5. Restore Hetch Hetchy’s members frequently visit the Hetch Hetchy Area. During
15 these visits, their scenic, aesthetic, and recreational experience is dominated by the presence of Hetch
16 Hetchy Reservoir. These visits are fraught with regret over the presence of the dam and reservoir.
17 The members’ experiences when visiting the Valley are severely diminished because they are
18 precluded from experiencing the untrammelled grandeur of the Valley that existed prior to its being
19 drowned by the Dam and Reservoir. There is only a single principal hiking trail where the dominant
20 scenic view is an unnatural reservoir truncating views of once spectacular cliffs. The presence of the
21 Reservoir precludes Restore Hetch Hetchy’s members from viewing the Tuolumne River meandering
22 through meadows, wetlands, and woodlands along the Hetch Hetchy Valley floor. Restore Hetch
23 Hetchy’s members are forbidden from swimming in the Reservoir. Restore Hetch Hetchy’s members
24 cannot fish in the river but must resort to a diminished fishing experience from the shoreline of the
25 reservoir. Because of the presence of the Reservoir, Restore Hetch Hetchy’s members cannot hike,
26 camp, or bird-watch beside the river and they cannot paddle, canoe, or kayak on the Tuolumne River
27 within the Hetch Hetchy Valley. As members of the public, moreover, Restore Hetch Hetchy’s
28 members possess an ownership interest in public resources present in Hetch Hetchy Valley, including

1 but not limited to aquatic birds, fish and other aquatic animals, and terrestrial species, including black
2 bears, deer, and other species that once thrived in Hetch Hetchy Valley. Restoration would provide
3 access not only to the Hetch Hetchy Valley floor, but also much improved access to adjacent areas,
4 including but not limited to, Hetch Hetchy Dome, the Kolana Rock, Wapama Falls, Rancheria Falls,
5 and the Grand Canyon of the Tuolumne. Many of these areas can only be reached today by visitors
6 who are able to embark on a multiday backpacking trip.

7 6. Petitioner Restore Hetch Hetchy and its members have direct and beneficial interests
8 in assuring Respondents comply with Article X, section 2 of the California Constitution and its
9 prohibition on employing any unreasonable method of diversion to divert waters to which
10 Respondents have a right. These interests have been and are being directly and adversely affected by
11 Respondents' maintenance and operation of the O'Shaughnessy Dam and Hetch Hetchy Reservoir.
12 The presence of the Reservoir is destroying and impairing numerous beneficial uses that are
13 designated for the Tuolumne River within the Hetch Hetchy Valley. These beneficial uses would be
14 present for Petitioner and its members to enjoy but for Respondents' unreasonable method of
15 diversion. The maintenance and prosecution of this action will confer a substantial benefit on the
16 public by declaring Respondents' method of diversion of the Tuolumne River within the Hetch
17 Hetchy Valley an unreasonable method of diversion and setting in motion actions by Respondents to
18 develop plans to replace the unreasonable diversion method with reasonable methods that will restore
19 all of the beneficial uses of the Tuolumne River within Hetch Hetchy Valley while assuring
20 Respondents and Real Parties in Interest uninterrupted access to their water rights in the Tuolumne
21 River.
22

23 7. Respondent and Defendant CITY AND COUNTY OF SAN FRANCISCO ("CCSF")
24 is a municipal corporation and Charter City organized and existing under its charter and state law.

25 8. Respondent and Defendant SAN FRANCISCO PUBLIC UTILITIES COMMISSION
26 ("SFPUC") is a department of CCSF. SFPUC oversees and manages the San Francisco Regional
27 Water System, including the O'Shaughnessy Dam, Hetch Hetchy Reservoir, and other associated
28 features.

1 9. CCSF, through the SFPUC, manages and operates the O'Shaughnessy Dam and Hetch
2 Hetchy Reservoir and other associated infrastructure. CCSF and SFPUC operate the Dam and
3 Reservoir pursuant to a grant issued by the Secretary of the Interior which is conditioned, among
4 other requirements, on CCSF's compliance with all applicable California water right laws, including
5 Article X, section 2 of the California Constitution.

6 10. Petitioner does not know the true names and capacities, whether individual, corporate,
7 associate, or otherwise, of Respondents Doe 1 through Doe 10, inclusive, and therefore sue said
8 Respondents under fictitious names. Petitioner will amend this Petition to show their true names and
9 capacities when the same have been ascertained. Each of these respondents is the agent and/or
10 employee of CCSF or the SFPUC, and each performed acts on which this action is based within the
11 course and scope of such Respondent's agency and/or employment.

12 11. Real Party in Interest MODESTO IRRIGATION DISTRICT ("MID") is a California
13 irrigation district established under the Irrigation District Law, Water Code § 20500 *et seq.* Modesto
14 Irrigation District has a water right to Tuolumne River water that is senior to CCSF. Real Party in
15 Interest TURLOCK IRRIGATION DISTRICT ("TID") is a California irrigation district established
16 under the Irrigation District Law, Water Code § 20500 *et seq.* Turlock Irrigation District has a water
17 right to Tuolumne River water that is senior to CCSF.

18 12. MID and TID are co-owners and operators of the Don Pedro Dam and Reservoir,
19 located on the Tuolumne River downstream of Hetch Hetchy Reservoir and Yosemite National Park..
20 Don Pedro Reservoir stores Tuolumne River water, including a water bank for CCSF that can hold
21 between 570,000 and 740,000 acre-feet of water. The CCSF water bank allows CCSF to withdraw
22 Tuolumne River water upstream consistent with TID's and MID's senior water rights by releasing
23 CCSF's banked water to TID and MID in exchange.

24 13. Real Party in Interest BAY AREA WATER SUPPLY AND CONSERVATION
25 AGENCY ("BASCWA") is a local public agency created in 2003 to represent the interests of 24
26 cities and water districts, and two private utilities, in Alameda, Santa Clara and San Mateo counties
27 that purchase water on a wholesale basis from the San Francisco Regional Water System. Water
28

1 Code § 81300 *et seq.* In addition to representing its members in decisions involving the San
2 Francisco Regional Water System, the agency also has the power, among other examples, to acquire
3 water and water rights within or outside the state; develop, store, and transport water; provide,
4 deliver, and sell water to various cities and public service entities within BASCWA’s boundaries; and
5 acquire, construct, operate, and maintain water facilities. Water Code § 81446.

6 14. Petitioner does not know the true names and capacities, whether individual, corporate,
7 associate, or otherwise, of Real Party in Interests Roe 1 through Roe 30, inclusive, and therefore sue
8 said Real Parties in Interest under fictitious names. Petitioner will amend this Petition to show their
9 true names and capacities when the same have been ascertained.

10 **JURISDICTION AND VENUE**

11 15. Pursuant to California Code of Civil Procedure § 1085 and Article X, section 2 of the
12 California Constitution, this Court has jurisdiction to issue a writ of mandate ordering Respondents to
13 take actions addressing their violations of Cal. Const., Article X, section 2. The Court has
14 jurisdiction to issue declaratory relief pursuant to Code of Civil Procedure § 1060. CCSF is an entity
15 that may be sued. Gov. Code § 23004(a).

16 16. Venue is proper in this court pursuant to Code of Civil Procedure § 392(a)(1) because
17 O’Shaughnessy Dam and the Hetch Hetchy Valley are real property located in Tuolumne County.
18 The injuries to beneficial uses and Petitioner’s interests occur in the Hetch Hetchy Valley within
19 Tuolumne County. Venue also is proper in this court pursuant to Code of Civil Procedure § 393(b)
20 because the cause of action arises in Tuolumne County and involves the duties and actions of a public
21 officer, namely the SFPUC.

22 17. The Superior Court has concurrent jurisdiction, with California’s State Water
23 Resources Control Board, over disputes involving water rights controversies. *Nat’l Audubon Soc’y v.*
24 *Superior Court* (1983) 33 Cal.3d 419, 426. “The doctrine of exhaustion of administrative remedies is
25 inapplicable in water cases.” *Elmore v. Imperial Irrigation Dist.* (1984) 159 Cal.App.3d 185, 192.
26 However, Water Code § 2000 provides that “[i]n any suit brought in any court of competent
27 jurisdiction in this State for determination of rights to water, the court may order a reference to the
28

1 board, as referee, of any or all issues involved in the suit.” Similarly, Water Code § 2001 authorizes
2 a more limited referral option, providing that “the court may refer the suit to the board for
3 investigation of and report upon any or all of the physical facts involved.” Water Code § 2001.
4 Petitioner anticipates requesting the Court to make a referral to the State Board under one of these
5 sections, with appropriate time limits to assure reasonably prompt determinations by the State Board.

6 18. Pursuant to Code of Civil Procedure § 388, Petitioner will provide a copy of this
7 Petition to the Attorney General.

8 **STATEMENT OF FACTS**

9 19. Hetch Hetchy Valley is located in the northwest portion of Yosemite National Park.
10 Formed by the Tuolumne River and glacial scouring, the Valley is about nine miles long, its narrow
11 floor bordered by sheer granite cliffs rising up 1,800 to 3,000 feet above the Valley floor. Prior to the
12 filling of the O’Shaughnessy Dam’s reservoir, the Tuolumne River emerged from the Grand Canyon
13 of the Tuolumne, cascaded over Tuolumne Fall, and meandered along the 1,500 acres of the Valley
14 floor. Prior to flooding, the river flowed past extensive wetlands, meadows and robust stands of
15 trees, including woodland oaks, live oaks, Ponderosa pine and Douglas firs, and, along the river’s
16 edges, alder, poplar, willows and dogwood trees.
17

18 20. The beauty of few natural valleys has garnered more attention than the untrammelled
19 magnificence of the Hetch Hetchy Valley prior to its flooding beginning in 1923. Indeed,
20 contemporaneous accounts invariably compare the valley to Yosemite Valley, the grandeur of which
21 is indisputable. The most well-known commentator is John Muir, who in his book “The Yosemite,”
22 originally published in 1912, made clear the stunning beauty of the Valley:

23 It appears, therefore, that Hetch Hetchy Valley, far from being a plain, common, rock-
24 bound meadow, as many who have not seen it seem to suppose, is a grand landscape
25 garden, one of Nature’s rarest and most precious mountain temples. As in Yosemite, the
26 sublime rocks of its walls seem to glow with life, whether leaning back in repose or
27 standing erect in thoughtful attitudes, giving welcome to storms and calms alike, their
28 brows in the sky, their feet set in the groves and gay flowery meadows, while birds, bees,
and butterflies help the river and waterfalls to stir all the air into music – things frail and
fleeting and types of permanence meeting here and blending, just as they do in Yosemite,
to draw her lovers into close and confiding communion with her.

1 Near the conclusion of his book, Mr. Muir famously declared, “Dam Hetch Hetchy! As well dam
2 for water-tanks the people’s cathedrals and churches, for no holier temple has ever been
3 consecrated by the heart of man.”

4 21. Congress included the Hetch Hetchy Valley when it expanded Yosemite National Park
5 to its current boundaries in 1890. U.S. Stats. at Large, Vol. 26, Chap. 1263, pp. 650-52. *See* Righter,
6 Robert W, “The Battle Over Hetch Hetchy,” p. 22-23 (Oxford University Press 2005) (“Righter”).
7 The statute expanding the Park charged the Secretary of the Interior with adopting regulations to
8 “provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or
9 wonders within said reservation, and their retention in their natural condition.” U.S. Stats. at Large,
10 Vol. 26, Chap. 1263, § 2.

11 22. However, in 1901, Congress enacted a Right-of-Way Act that authorized the Secretary
12 of the Interior “to permit the use of rights of way through the public lands, forest and other
13 reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks,
14 California” for electrical power, telephone and telegraph communication, and irrigation and water
15 supply. U.S. Statutes at Large, Vol. 31, Chap. 372, pp. 790-91. *See* Righter, p. 28.

16 23. CCSF first sought to secure a right-of-way to construct a dam and reservoir in the
17 Valley in 1903. Righter, p. 53. From 1903 through early 1913, one Secretary of the Interior rejected
18 CCSF’s Hetch Hetchy proposal, another Secretary approved the proposal, another issued an order to
19 show cause why that approval should not be vacated, and lastly a Secretary found that the Secretary
20 of the Interior lacked the power to approve or disapprove such a right-of-way and deferred the issue
21 to Congress. *Id.*, pp. 53-54, 70-71, 116.

22 24. With the advent of the administration of President Woodrow Wilson in 1913, the
23 former City Attorney for San Francisco, Franklin L. Lane, was appointed Secretary of the Interior.
24 Righter, p. 118. As a San Francisco attorney, Mr. Lane had assisted San Francisco Mayor James
25 Phelan in quietly securing Tuolumne River water rights within Hetch Hetchy Valley in the beginning
26 years of 1900 to later transfer to the City. *Id.* The new Interior Secretary concurred with the
27 outgoing Secretary’s decision that Congressional action would need to decide the issue. *Id.* But
28

1 Secretary Lane clearly stated that he supported CCSF's request for the Hetch Hetchy grant. CCSF's
2 agents wrote what would become the Raker Act. *Id.*, p. 120. The Raker Act was introduced in 1913,
3 shortly after Secretary Lane was appointed.

4 25. On December 19, 1913, the House of Representatives passed the Raker Act. U.S.
5 Statutes at Large, Vol. 38, Part 1, Chap. 4, pp. 242-51 (H.R. 7207; Public Act No. 41). Despite a then
6 unprecedented outpouring of newspaper editorials and public letters in support of preserving Hetch
7 Hetchy Valley, the Senate followed suit, passing the bill on December 6, 1913 by a vote of 43 yeas,
8 25 nays, and 27 absentees. *See* Righter, p. 131. The Raker Act conditionally granted San Francisco
9 the right to construct a number of dams, powerhouses, pipelines and related facilities in the Tuolumne
10 watershed in order to make use of their water rights in the area. H.R. 7207; Public Act No. 41.
11 These conditional grants included use of the Hetch Hetchy Valley inside Yosemite National Park. *Id.*

12 26. In 1917 and 1918, CCSF clear cut the trees in Hetch Hetchy Valley. Righter, p. 140.
13 The O'Shaughnessy Dam was completed in 1923. *Id.*, p. 151. Tuolumne River water supplies were
14 first delivered to CCSF in 1934. *Id.*, p. 162.

15 27. The O'Shaughnessy Dam and Hetch Hetchy Reservoir have eliminated beneficial uses
16 that would otherwise be available on the stretch of the Tuolumne River within the Hetch Hetchy
17 Valley. The California Regional Water Quality Control Board, Central Valley Region's "Water
18 Quality Control Plan for the Sacramento and San Joaquin River Basins" ("Central Valley Basin
19 Plan") designates beneficial uses for the Tuolumne River from its source to the Don Pedro Reservoir
20 as including, in addition to municipal and domestic water supply, irrigation, and power production,
21 both contact and non-contact recreation, warm and cold freshwater habitat, and wildlife habitat.
22 Central Valley Basin Plan, p. II-8.00 (Table II-1). Contact recreation includes, among other
23 examples, swimming, wading, and fishing. *Id.*, p. II-1.00. Non-contact recreational uses "include,
24 but are not limited to, picnicking, sunbathing, hiking, beachcombing, camping, boating ..., [and]
25 sightseeing or aesthetic enjoyment in conjunction with the above activities." *Id.*, pp. II-1.00 - II-
26 2.00. The California Supreme Court has ruled that scenic views are a beneficial use, indeed an
27
28

1 integral part of the public trust. *Nat'l Audubon Soc'y*, 33 Cal.3d at 435. Wildlife habitat use includes
2 “uses of water that support terrestrial or wetland ecosystems....” Basin Plan, p. II-2.00.

3 28. Within Hetch Hetchy Valley, many of these identified beneficial uses have been
4 eliminated or seriously impaired by the presence of the dam and reservoir. These include contact
5 recreation, especially swimming and wading in the river, which have been eliminated by the reservoir
6 and its access restrictions. Likewise, a number of non-contact recreation uses including boating and
7 camping along this stretch of the Tuolumne have been eliminated. The presence of the reservoir has
8 profound impacts on sightseeing and aesthetic enjoyment of the Hetch Hetchy Valley and adjacent
9 areas. Vast stretches of what is documented to have been as thrilling and majestic a landscape as
10 Yosemite Valley, are now covered in water. None of the valley floor is visible, including its
11 previously thriving meadows, woodlands, wetlands, and meandering channel of the Tuolumne River.
12 Although fishing is allowed in the reservoir, it is only permitted from shore and guides suggest to fish
13 either above or below the reservoir. With the elimination or significant impairment of these many
14 uses, CCSF has monopolized the uses of the Tuolumne River within the Hetch Hetchy Valley for
15 municipal water supply and hydropower production.
16

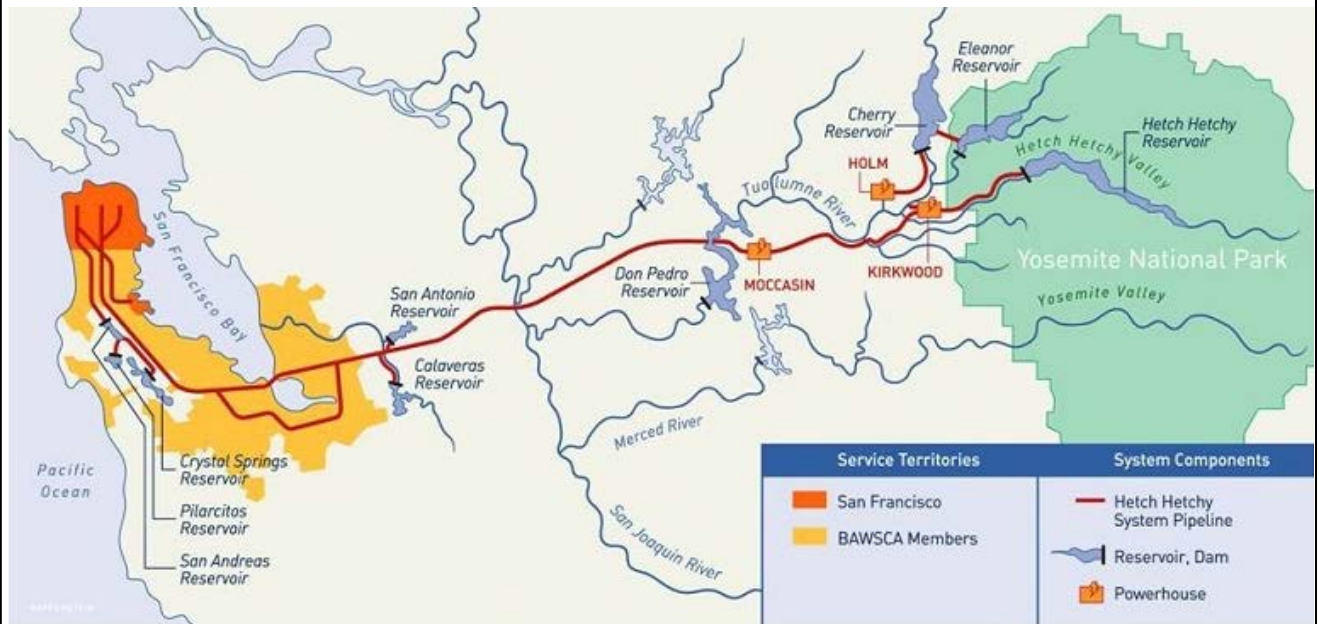
17 29. Currently, Hetch Hetchy Reservoir is one of the least visited parts of Yosemite
18 National Park. On the other hand, Yosemite Valley is struggling to satisfy the growing demands of
19 the estimated 2.5 million annual visitors from all over the world who journey to Yosemite Valley to
20 marvel at its natural wonders. The popularity of Yosemite Valley is a testament to the future
21 popularity of the Hetch Hetchy Valley and the immense value that park visitors would bestow on the
22 valley as its meadows, woodlands, and meandering river are restored to their prior glory. Restoring
23 access to the full beneficial uses of Hetch Hetchy Valley will provide an important alternative for
24 park visitors to experience a sublime natural experience and relieve some of the pressure on Yosemite
25 Valley. The value of recreational benefits to visitors and local businesses over a 50 year period are
26 estimated to be as high as 8.7 billion dollars. The value of creating additional wetland, riparian and
27 meadow habitat, including carbon storage and habitat for the threatened Yosemite Toad and the
28 endangered Sierra Nevada Yellow-Legged Frog would be significant. The existence value of a

1 restored valley would be extremely large. Existence value is a measure of people’s willingness to
2 pay that captures individuals’ strong desires to be able to visit a restored Hetch Hetchy Valley in the
3 future, to realize their ecological ethics, their altruism toward others and the environment, and the
4 desire to benefit future generations. Consistent with peer-reviewed studies of natural resources and
5 dam removal projects most similar in nature to restoring Hetch Hetchy Valley, the existence value of
6 a restored Hetch Hetchy Valley just for the first twenty years of restoration is estimated to be between
7 \$44 billion and \$113 billion dollars. That value continues to expand indefinitely into the future
8 beyond the initial twenty years.

9 30. Although at the time of enactment of the Raker Act, the reasonableness of flooding a
10 uniquely beautiful valley in a national park was debatable, viewed with current sensibilities in mind
11 and the ever-growing popularity of the Nation’s national and state park systems, any such decision
12 today would be unimaginable and patently unreasonable.

13 31. CCSF’s water system includes the following components in the Tuolumne River
14 watershed. CCSF stores water in 3 “upcountry” reservoirs: Hetch Hetchy Reservoir (360,000 acre-
15 feet), Lake Lloyd (also known as Cherry Reservoir) (268,800 acre-feet) and Lake Eleanor (27,000
16 acre-feet). Don Pedro Reservoir, downstream with a capacity of 2,030,000 acre-feet, is owned and
17 operated by the Turlock and Modesto Irrigation Districts but includes a water “bank” for San
18 Francisco supplies that can hold between 570,000 and 740,000 acre-feet, depending on the time of
19 year. Typically, under current operations, releases from Hetch Hetchy Reservoir flow into the
20 Canyon Tunnel which flows to the Kirkwood powerhouse along the Tuolumne River, outside
21 Yosemite National Park. From there, the water is diverted from the Tuolumne River at Early Intake
22 into the Mountain Tunnel, and eventually to the Moccasin powerhouse. From the Moccasin
23 powerhouse, the water enters the Foothill Tunnel and flows across the Central Valley to the Coast
24 Range Tunnel. After crossing the Sunol Valley, the water then passes through the Irvington Tunnel
25 and into CCSF’s Bay Area distribution system. Lake Eleanor (located within Yosemite National
26 Park) and Lake Lloyd (located outside the Park in the Stanislaus National Forest) are linked by a
27 diversion tunnel and are generally operated in tandem. Water from these two reservoirs generally
28

1 produces hydropower at the Holm Powerhouse, before flowing down the Tuolumne River and into
 2 the Don Pedro Reservoir. The portion of water in Don Pedro that is dedicated to San Francisco's
 3 water bank is the result of a series of daily calculations relating to the Tuolumne River's unimpaired
 4 flow and the operations of CCSF's upcountry reservoirs. Currently, CCSF's agreement with TID and
 5 MID precludes CCSF from directly drawing on any of its banked water in the Don Pedro Reservoir
 6 and it lacks the physical infrastructure to do so. Water from Lake Lloyd and Lake Eleanor also can
 7 be diverted through the Lower Cherry Aqueduct and into the Mountain Tunnel and blended with
 8 flows from the Hetch Hetchy Reservoir for the system's municipal water supply. The following
 9 figure depicts CCSF's regional water system:



11 http://www.hetchhetchy.org/hetch_hetchy_today.

12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23 32. In addition to the three reservoirs in the upper Tuolumne River watershed, CCSF
 24 maintains five reservoirs closer to the Bay area, including Pilarcitos, San Andreas, San Antonio,
 25 Crystal Springs, and Calaveras Reservoirs. The Calaveras Dam is currently being rebuilt to restore
 26 the Calaveras Reservoir's storage capacity to 96,850 acre-feet. When Calaveras is completed, the five
 27 dams and reservoirs will be able to store up to 239,000 acre-feet of water.

1 33. On average, CCSF only uses about 12 percent of unimpaired Tuolumne River flows.
2 During dry years, the percentage of Tuolumne River water available to CCSF under its water rights
3 can be substantially less than the 12 percent average. For example, in 1992 CCSF was entitled to
4 only about 68,000 acre-feet of the Tuolumne River’s natural flow – less than 1/3 of its average annual
5 diversion to the Bay Area. MID and TID have senior water rights to those of CCSF and use most of
6 the Tuolumne River’s water. Together, MID and TID are entitled to the base flow of the River.
7 CCSF is only entitled to high flows in excess of the River’s base flow rate. From mid-June through
8 mid-April, MID and TID are entitled to all of the River’s flows below 2,416 cubic feet per second
9 (“cfs”). CCSF may only divert water when the River’s base flow exceeds this flow rate. From mid-
10 April through mid-June, the two months of the year when the River’s base flow is historically at its
11 highest levels, MID and TID are entitled to all water up to a base flow rate of 4,066 cfs.

12 34. The O’Shaughnessy Dam and Hetch Hetchy Reservoir hold about 25 percent of the
13 total water stored in CCSF’s entire water system. Without the Hetch Hetchy Reservoir, CCSF could
14 still divert water supply into its conveyance system at Early Intake during periods of the year when
15 the Tuolumne River has sufficient flow. During dry periods, CCSF could divert stored water from
16 the Tuolumne River into its conveyance system through an intertie to the Cherry Reservoir and/or the
17 Don Pedro Reservoir. CCSF might require cooperation of the Turlock and Modesto Irrigation
18 Districts to install an intertie to Don Pedro. A lesser level of cooperation would be required to build
19 an intertie to Cherry Reservoir. With either intertie, the current level of diversion of Tuolumne River
20 water to CCSF would be unchanged in most years. The construction costs for these alternative
21 methods of diversion are estimated to cost 56 million dollars for a Cherry Intertie and 63 million
22 dollars for a Don Pedro Intertie.

23 35. In dry years, some additional supply would be required to replace that increment of
24 reliability made possible by Hetch Hetchy Reservoir. Such supply could be obtained through
25 investments in groundwater or surface storage and exchanges with or purchases from other water
26 agencies. It is anticipated that CCSF would engage in cooperative agreements with one or more
27 water agencies – in or near the Tuolumne watershed, in the Bay Area, and/or along the State Water
28

1 Project system. Such projects and agreements, implemented over a reasonable period of time, would
2 assure no reduction in water supply from that currently available to CCSF and have the potential to
3 improve water supply reliability for CCSF as well as other parties. The cost of developing
4 infrastructure for a 400,000 acre-foot groundwater bank is estimated to be 244 million dollars.
5 Purchasing dry years supplies from willing sellers at \$1000 per acre-foot is estimated to cost 309
6 million over 50 years. Supply could also be augmented by increased recycling in San Francisco or
7 other Bay Area cities.

8 36. The level of additional investment that would be required to assure an equivalent level
9 of water supply reliability is far less than what other California water agencies have implemented in
10 recent decades to reduce impacts to the Bay-Delta, on the San Joaquin and Trinity Rivers, at Mono
11 Lake or in Central Valley wetlands. Such investments on the part of CCSF are reasonable given the
12 extraordinary value of a restored Hetch Hetchy Valley that they would make possible.

13 37. Eliminating diversions from storage within Hetch Hetchy Valley and replacing it with
14 diversions from stored water in Cherry Reservoir, Don Pedro Reservoir, or other CCSF reservoirs
15 likely would require an increased level of treatment to assure compliance with drinking water
16 standards. Whether or not the Hetch Hetchy Reservoir remains part of the City's Regional Water
17 System, it is possible that CCSF would be required to filter its entire water supply at some point in
18 the future. Presently CCSF filters only water released from reservoirs other than Hetch Hetchy into
19 its water system, and treats supplies released from Hetch Hetchy Reservoir with a combination of
20 chloramine and ultra violet light. Every other large municipality in California relies on filtration of
21 drinking water and reasonably bears the cost of that treatment. With continued diversion of
22 Tuolumne River supplies, additional water treatment costs are estimated to be 387 million dollars
23 over 50 years.

24 38. Restoring Hetch Hetchy Valley will diminish hydropower production at CCSF's
25 Kirkwood Power Plant, located downstream of O'Shaughnessy Dam outside of Yosemite National
26 Park. Changes in patterns for the diversion of water may also have an effect on hydropower
27 production at CCSF's Moccasin and Holm Power plants. This modest reduction in electrical power
28

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

8 Raker Act, Sec. 11. Thus, Congress' right-of-way grant to CCSF is subservient to the State's laws
9 relating to reasonable methods of diversion of water, including Article X, section 2 of the California
10 Constitution.

11 44. After the passage of the Raker Act, in 1928, California enacted Article X, section 2 of
12 the California Constitution. Article X, section 2 provides, in relevant part, that:

13 The right to water or to the use or flow of water in or from any natural stream or water course
14 in this State is and shall be limited to such water as shall be reasonably required for the
15 beneficial use to be served, and such right does not and shall not extend to the waste or
16 unreasonable use or unreasonable method of use or ***unreasonable method of diversion of
17 water.***

18 Cal. Const., Art. X § 2 (emphasis added). *See also* Water Code § 100.

19 45. Section 2 states that “because of the conditions prevailing in this State the general
20 welfare requires that the water resources of the State be put to beneficial use ***to the fullest extent of
21 which they are capable,*** and that the waste or unreasonable use or unreasonable method of use of
22 water be prevented, and that ***the conservation of such waters is to be exercised with a view to the
23 reasonable and beneficial use thereof in the interest of the people and for the public welfare.*** Cal.
24 Const., Art. X § 2 (emphasis added). This Constitutional provision requires that, wherever
25 reasonable, the conservation and use of waters implement as many relevant beneficial uses as may be
26 feasible. “When the supply is limited public interest requires that there be the greatest number of
27 beneficial uses which the supply can yield.” *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368.

28 46. Article X, section 2's limitations and prohibitions “apply to every water right and
every method of diversion.” *Peabody v. Vallejo*, 2 Cal.2d at 367. Section 2's “mandates are plain,
they are positive, and admit of no exception. They apply to the use of all water, under whatever right
the use may be enjoyed.” *Id.* “All uses of water, including public trust uses, must ... conform to the

1 standard of reasonable use.” *Nat’l Audubon Soc’y v. Superior Court* (1983) 33 Cal.3d 419, 443, citing
2 *Peabody v. Vallejo*, 2 Cal.2d at 367; *People ex rel. State Water Resources Control Bd. v. Forni*
3 (1976) 54 Cal.App.3d 743, 749-750.

4 47. “[T]he term ‘method of diversion’ refers not only to whether water is directly diverted
5 or put into storage, but also the point from which it is diverted, the rate at which the diversion occurs,
6 and other features of the diversion facility or its operation.” *In the Matter of Petition for*
7 *Reconsideration of Division of Water Rights Refusal to Accept Protest by United States Marine*
8 *Corps Base, Camp Pendleton Against City Of Santa Cruz*, Order No. WR 2009-0061, State of
9 California, State Water Resources Control Board, 2009 Cal. ENV LEXIS 176, pp. 28-29 (December
10 1, 2009).

11 48. The requirement that all diversion methods be reasonable and seek to further the
12 greatest number of beneficial uses is not static. What may have been reasonable in 1918 or 1930s
13 may not be reasonable in light of current social values. *See Tulare Irrigation Dist. v. Lindsay-*
14 *Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567 (“What is a beneficial use at one time may,
15 because of changed conditions, become a waste of water at a later time”). “What constitutes
16 reasonable water use is dependent upon not only the entire circumstances presented but varies as the
17 current situation changes.” *EDF v. E. Bay Mun. Util. Dist.* (1980) 26 Cal.3d 183, 194.

18 49. “The use of water for recreation and preservation and enhancement of fish and wildlife
19 resources is a beneficial use of water.” Water Code § 1243. “In determining the amount of water
20 available for appropriation for other beneficial uses, the [State Water Resources Control Board] shall
21 take into account, whenever it is in the public interest, the amounts of water required for recreation
22 and the preservation and enhancement of fish and wildlife resources.” *Id.* “In determining the
23 amount of water available for appropriation, the board shall take into account, whenever it is in the
24 public interest, the amounts of water needed to remain in the source for protection of beneficial uses,
25 including any uses specified to be protected in any relevant water quality control plan....” Water
26 Code § 1243.5.
27
28

1 50. Petitioner bears the burden of proving by a preponderance of the evidence that CCSF's
2 method of diversion at O'Shaughnessy Dam and its resulting reservoir is an unreasonable method of
3 diversion of the waters of the Tuolumne River.

4 51. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law
5 within the meaning of Code of Civil Procedure § 1086 unless this Court grants the requested writ of
6 mandate to require Respondent CCSF to prepare a plan and initiate the necessary proceedings for
7 approvals of alternative reasonable methods of diversion to replace the currently illegal Hetch Hetchy
8 Reservoir. In the absence of such remedies, Respondents' unreasonable method of diversion will
9 continue, depriving millions of people of the full value of an iconic valley within Yosemite National
10 Park.

11
12 **FIRST CAUSE OF ACTION**
13 **(Violations of Article X, section 2 of the California Constitution)**

14 52. Petitioners hereby reallege and incorporate all of the above paragraphs as if fully set
15 forth herein.

16 53. Article X, section 2 of the California Constitution prohibits Respondents from
17 employing unreasonable methods of diversion of water.

18 54. Section 10 of the Raker Act provides that the right-of-way granted to Respondents,
19 including the O'Shaughnessy Dam and Hetch Hetchy Reservoir, is subservient to the State of
20 California's regulation of water rights. This includes the prohibition of unreasonable methods of
21 diversion established by Article X, section 2 of the California Constitution.

22 55. The operation of O'Shaughnessy Dam and flooding of the Hetch Hetchy Valley within
23 Yosemite National Park is an unreasonable method of diversion for the following reasons:

- 24 a. It is located within a national park, indeed, Yosemite National Park – one of
25 the crown-jewels of the National Park System. Operating a dam and reservoir
26 in an iconic glacial carved valley within Yosemite National Park is not, in
27 2015, a reasonable method of diverting water for municipal uses;

- 1 b. It is impairing and destroying aesthetic and scenic beneficial uses and public
2 trust values that are comparable to the world-renowned scenic values of
3 Yosemite Valley;
- 4 c. It is precluding recreational beneficial uses including hiking, camping,
5 swimming, and boating that would otherwise be of the highest quality;
- 6 d. It is seriously impairing fishing by the general public within Hetch Hetchy
7 Valley;
- 8 e. It is monopolizing this entire stretch of the Tuolumne River for two beneficial
9 uses – water supply and electrical power generation – both of which could be
10 realized by other more reasonable methods of diverting the waters of the
11 Tuolumne River at other downstream locations.
- 12 f. The existence value combined with the value of future recreational and habitat
13 restoration uses in and related to a restored Hetch Hetchy Valley exceed 47
14 billion dollars and may exceed as much as 122 billion dollars over the next 20
15 years alone.
- 16 g. The cost of replacing water storage in Hetch Hetchy Valley to maintain the
17 current levels of water service and electrical power production by CCSF would
18 be approximately 2 billion dollars, including 199 million dollars for additional
19 interties, 372 million dollars for water supply, 387 million dollars for water
20 treatment, 669 million dollars in for renewable electric power, and 374 million
21 dollars for modifying the O’Shaughnessy Dam.
- 22 h. The economic costs associated with replacing, over the long-term, the two
23 beneficial uses currently served by the Hetch Hetchy Reservoir and existing
24 water diversion at O’Shaughnessy Dam and restoring the numerous other
25 beneficial uses to the Tuolumne River as it flows through the Hetch Hetchy
26 Valley pale in comparison to the immense economic and societal benefits that
27 Valley pale in comparison to the immense economic and societal benefits that
28

1 will result from restoring those beneficial uses and the public's access to the
2 Tuolumne River and priceless public lands.

3 56. There is a present and actual controversy between Petitioner and Respondents as to the
4 constitutionality of the diversion of the Tuolumne River at O'Shaughnessy Dam and the Hetch
5 Hetchy Reservoir. Petitioner desires a judicial determination of the rights and obligations of the
6 respective parties concerning the constitutionality of Respondents' method of diversion at that
7 location.

8 **PRAYER**

9 WHEREFORE, Petitioner prays for the following relief:

10 1. A declaratory judgment that Respondents operation of the O'Shaughnessy Dam and
11 flooding of the Hetch Hetchy Valley is an unreasonable method of diversion pursuant to Article X,
12 section 2 of the California Constitution.

13 2. For a peremptory writ of mandate ordering Respondents to prepare a written plan
14 detailing alternative reasonable methods of diversion of Respondents' Tuolumne River water rights
15 that do not rely upon the continued presence of the Hetch Hetchy Reservoir. The required plan is to
16 propose a reasonable timetable for constructing the facilities necessary to implement the new
17 diversion location(s). The plan shall also include a component for modifying or removing the
18 O'Shaughnessy Dam so that the Tuolumne River may again flow freely through the Hetch Hetchy
19 Valley in order that the beneficial uses that were present in Hetch Hetchy Valley prior to
20 Respondents' creation of the reservoir may once again be made available to the public and restored to
21 Yosemite National Park. The order should provide for review and approval of the plan by the State
22 Board as well as the Court.

23 3. For the costs of suit.

24 4. For an award of attorney fees pursuant to Code of Civil Procedure § 1021.5 and any
25 other applicable provisions of law or equity.
26

27 ///

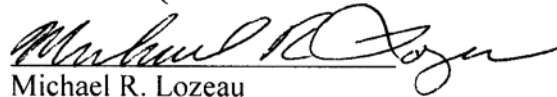
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. For any other equitable or legal relief that the Court considers just and proper.

Dated: April 21, 2015

LOZEAU DRURY LLP



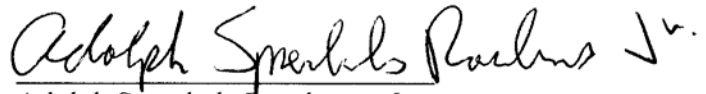
Michael R. Lozeau
Attorney for Petitioner

VERIFICATION

1 I, Adolph Spreckels Rosekrans, Jr., am the Executive Director of Restore Hetch Hetchy, the
2 Petitioner in this action. I am verifying this Petition pursuant to Code of Civil Procedure section 446.
3 My office is located in the County of Alameda. I have read the foregoing petition and complaint. I
4 am informed and believe that the matters in it are true and on that ground allege that the matters
5 stated in the petition and complaint are true.
6

7 I declare under penalty of perjury under the laws of the State of California that the foregoing
8 is true and correct.

9 Date: April 21, 2015


Adolph Spreckels Rosekrans, Jr.