SUPERIOR COURT OF CALIFORNIA

COUNTY OF TUOLUMNE

RESTORE HETCH HETCHY, a non-profit, public benefit corporation,

Petitioner and Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; SAN FRANCISCO PUBLIC UTILITIES COMMISSION, a municipal agency; and DOES I through X, inclusive,

Respondents and Defendants.

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

Real Parties in Interest and Defendants.

Case No.: CV59426

ORDER ON DEMURRER TO VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF; ORDER ON DEFENDANTS' MOTION TO STRIKE

Date: January 29, 2016
Dept.: 4
Judge: Hon. Kevin M. Seibert

This matter came on regularly for hearing on January 29, 2016, before the Honorable Kevin M. Seibert, Judge, presiding. Petitioner and Plaintiff, RESTORE HETCH HETCHY (hereafter Petitioner),

was not present but appeared through its counsel Michael Lozeau of Lozeau Drury, LLP. Respondents and Defendants CITY AND COUNTY OF SAN FRANCISCO and SAN FRANCISCO PUBLIC UTILITIES COMMISSION (hereafter Respondents) were not present but appeared through their counsel Mollie M. Lee, Matthew D. Goldberg, and Joshua D. Milstein of the San Francisco Office of City Attorney. Real Party in Interest and Defendant MODESTO IRRIGATION DISTRICT (MID) was not present but appeared telephonically through its counsel William C. Paris, III, of O'Laughlin & Paris, LLP. Real Party in Interest and Defendant TURLOCK IRRIGATION DISTRICT (TID) was not present but appeared telephonically through its counsel David Hobbs of Griffith & Masuda. Real Party in Interest and Defendant BAY AREA WATER SUPPLY AND CONSERVATION AGENCY (BAWSCA) was not present but appeared through its counsel Nathan Metcalf of Hanson Bridgett, LLP. Oral argument was received, and the Court took the matter under submission.

PROCEDURAL BACKGROUND

On April 21, 2015, Petitioner filed its Verified Petition for Writ of Mandate and Complaint for Declaratory Relief (hereafter Petition). The Petition alleges a single cause of action: violation of article X, section 2 of the California Constitution. Petitioner requests that this Court issue "a writ of mandate ordering Respondents to prepare an engineering and financing plan for altering their method of diversion [of water] within the Hetch Hetchy Valley that results in removal of the Hetch Hetchy Reservoir, restoration of the natural flow levels of the Tuolumne River through the Hetch Hetchy Valley, and system improvements that will result in no loss of water supply reliability or electric power production." (Petition at p. 2, lines 23-27.) Petitioner alleges that when the admitted beneficial uses of providing municipal water supplies and hydroelectric power are measured against the fact that the Hetch Hetchy Reservoir eliminates or severely impairs a list of other beneficial uses in the Hetch Hetchy Valley, the method of diversion of water by means of the O'Shaughnessy Dam is an unreasonable method of diversion that violates article X, section 2 of the California Constitution.[1]

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[1] Article X, section 2 also prohibits the waste, unreasonable use, or unreasonable method of use of water. The Petition does not allege that the dam or reservoir comes within any of these prohibited activities.

On November 17, 2015, the Court granted in part and denied in part Respondents' ex parte application for an order authorizing an expanded briefing schedule and oversized briefs on demurrer. On December 22, 2015, Respondents and BAWSCA (collectively hereafter Defendants) filed both a demurrer to and, in the alternative, a motion to strike the Petition. MID and TID joined in the demurrer. Opposition and reply papers were filed. The Court heard oral argument on January 29, 2016, and took the matter under submission.

ISSUES PRESENTED

1. Does the Petition fail to state a cause of action under article X, section 2 of the California Constitution because federal law preempts California law?
2. Does the Petition fail to state a cause of action because the action is barred by the applicable statute of limitations?
3. Does the Petition fail to state a cause of action because the facts alleged in the Petition, even if accepted as true, do not establish that damming and flooding the Hetch Hetchy Valley of Yosemite National Park is an unreasonable method of diverting municipal water supplies from the Tuolumne River?

ANALYSIS

1. **Federal Preemption**

Petitioner's entire case is premised on the argument that Respondents' operation of O'Shaughnessy Dam and flooding of the Hetch Hetchy Valley are an unreasonable method of diversion of water in violation of article X, section 2 of the California Constitution. Defendants argue, as their first ground for demurrer, that Petitioner's interpretation of article X, section 2 is preempted by federal law—specifically, the Raker Act of 1913, which authorized the dam and reservoir at Hetch Hetchy and established the conditions under which Respondents were to exercise their rights under the grant. The United States Supreme Court has articulated the following standard for preemption: "'If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with

both state and federal law [citation] or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress [citation].'" (*Cal. Coastal Com. v. Granite Rock Co.* (1987) 480 U.S. 572, 581.) In enacting the Raker Act, Congress clearly did not intend to displace state regulation entirely, as evidenced by the inclusion of a savings clause. Section 11 of the Raker Act provides:

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

Thus, the first question to be addressed by the Court in analyzing preemption is whether there is an actual conflict between the federal Raker Act and article X, section 2 of the California Constitution as interpreted by Petitioner. Stated another way, if section 11 of this federal law is interpreted as incorporating a later-enacted California constitutional prohibition on the dam and reservoir at Hetch Hetchy, would it be impossible for Respondents to comply with both state and federal law? The answer is yes.

Through the Raker Act, Congress granted to the City and County of San Francisco (hereafter City or Respondents), "subject to express conditions, certain lands and rights-of-way in the public domain in Yosemite National Park and Stanislaus National Forest. The Act in terms declared that this, known as the 'Hetch-Hetchy' grant, was intended for use by the City both in constructing and maintaining a means of supplying water for the domestic purposes of the City and other public bodies, and in establishing a system 'for generation and sale and distribution of electric energy.'" (*United States v. City and County of San Francisco* (1940) 310 U.S. 16, 18.) The grant explicitly included "such lands in the Hetch Hetchy Valley . . . within the Yosemite National Park . . . irrespective of the width or extent of said lands, as may be determined by the Secretary of the Interior to be actually necessary for surface or underground reservoirs, diverting and storage dams." (Raker Act, § 1.)

The Raker Act set forth precise requirements about the dam and reservoir to be constructed and operated at Hetch Hetchy. The Raker Act specifies the height of the dam: "[W]hen the said grantee

begins the development of the Hetch Hetchy Reservoir site, it shall undertake and vigorously prosecute to completion a dam at least two hundred feet high, with a foundation capable of supporting said dam when built to its greatest economic and safe height." (§ 9, subd. (k).) It also contains requirements about the appearance of the reservoir and dam given their location in a national park: "[A]ll reservoirs, dams, . . . and other structures not of a temporary character shall be sightly and of suitable exterior design and finish so as to harmonize with the surrounding landscape and its use as a park." (§ 4.) Roads and trails were required to be built at specific places in relation to the "Hetch Hetchy Reservoir site" and other landmarks. (§ 9, subd. (p).) The taking, cutting, and destruction of timber within Yosemite National Park, which otherwise would have been prohibited, was allowed to the extent "actually necessary in order to construct, repair, and operate its said reservoirs, dams," and other works and structures mentioned in the grant, including from "land to be submerged." (§ 4.) The City was required to enact specific "sanitary regulations" for the watershed above and around any reservoir sites, to be effective "upon the completion of the Hetch Hetchy Dam" and "upon the commencement of the use of any reservoirs thereby created." (§ 9, subd. (a).)

Before the City could begin work on this project and at designated points along the way, federal approval was required. The City was required to "file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant." (§ 9, subd. (s).) The City was required to file maps showing the lands required for the purposes of the grant and was prohibited from starting any "permanent construction work" until receiving the Secretary's approval. (§ 2.) The Secretary retained authority to determine the extent of the lands in the Hetch Hetchy Valley that were "actually necessary for surface or underground reservoirs, diverting and storage dams." (§ 1.) "[A]ll plans and designs" for the "structures not of a temporary character," including any reservoirs and dams, were required to be submitted to the Secretary for approval. (§ 4.) The building and maintenance of roads and trails also was subject to federal determination and approval. (§ 9, subd. (p).)

The Raker Act is clear on its face that if the City accepted the grant it was bound by all of the conditions set forth therein, including those enumerated above: "[T]his grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and

hereinafter enumerated." (§ 9.) Furthermore, the City risked being subject to legal action brought by the federal government if it did not comply with any of the conditions: "[I]n the exercise of the rights granted by this act, the grantee shall at all times comply with the regulations herein authorized, and in the event of any material departure therefrom the Secretary of the Interior or the Secretary of Agriculture, respectively, may take such action as may be necessary in the courts or otherwise to enforce such regulation." (§ 5.) Even the savings clause established that the Raker Act was "a grant upon certain express conditions specifically set forth herein." (§ 11.)

After passage of the Raker Act, "the City accepted the grant by formal ordinance, assented to all the conditions contained in the grant, [and] constructed the required power and water facilities." (*United States v. City and County of San Francisco*, *supra*, 310 U.S. 16, 29.) In the 1940 case of *United States v. City and County of San Francisco*, the United States Supreme Court analyzed the mandatory nature of the conditions in the Raker Act following the City's acceptance of the grant, echoing what is obvious from the face of the statute: that the City was required to comply with the "conditions upon which those benefits were granted." (*Id.* at p. 30.) Although the Supreme Court there considered—and ultimately found a violation of—section 6 of the Raker Act, relating to the sale and distribution of power originating at Hetch Hetchy, neither the language of the Raker Act nor the court's analysis in that case suggests that the conditions imposed on the construction and operation of the dam and reservoir at Hetch Hetchy should be understood differently here. "Congress clearly intended to require" the conditions set forth in the grant. (*Id.* at p. 26.) Accordingly, reading article X, section 2 of the California Constitution to prohibit the very dam and reservoir that were not only authorized by the Raker Act and subsequent federal approvals but also subject to specific federal statutory conditions creates a conflict between state and federal law and requires a conclusion that federal law preempts Petitioner's proposed interpretation. Petitioner's arguments that Respondents could have chosen not to accept the grant or that they can abandon their rights under it (see, e.g., Raker Act, § 5 [providing for forfeiture if construction was not "prosecuted diligently" or if construction ceased for three consecutive years]) are beside the point. It is uncontroverted that Respondents did accept the grant and are bound by its terms, and there are no allegations that Respondents have abandoned or forfeited their rights or obligations under the Raker Act or plan to do so.

Further support for preemption of Petitioner's proposed interpretation of article X, section 2 is found in the California Supreme Court's decision in *Environmental Defense Fund v. East Bay Municipal Utility District* (1980) 26 Cal.3d 183. In that case, the plaintiffs challenged a water contract under article X, section 2 of the California Constitution and under the California Water Code, alleging that it would diminish flows and harm the environment and recreational opportunities on the American River. (*Id.* at p. 191.) As relevant here, the court held that, "[t]o the extent the complaints challenge the contract on the ground that construction of the dam and the Folsom-South Canal constitutes a violation of state law, there is federal preemption. Congress has authorized the construction of the dam and the Folsom-South Canal (43 U.S.C. §§ 616aaa-616fff) and a holding that the construction of the dam is contrary to state law is contrary to congressional directive."[2] (*Id.* at p. 193.) In other words, where Congress had authorized the dam and canal at issue, state law—including article X, section 2—could not be read to prohibit them without giving rise to a conflict with federal law that resulted in preemption. Petitioner fails to persuasively distinguish the operative facts of *Environmental Defense Fund* from those of the instant case for purposes of preemption.

In the absence of case law interpreting section 11 of the Raker Act, the Court may be guided in its preemption analysis by interpretations of the nearly identical language of section 8 of the federal Reclamation Act of 1902, which is codified at section 383 of title 43 of the United States Code:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

(See *Musaelian v. Adams* (2009) 45 Cal.4th 512, 517 ["[U]nless there is evidence the Legislature had a contrary intent, logic and consistency suggest the same language in analogous statutes should be construed the same way."])

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[2] The court applied the formulation of the preemption standard from *California v. United States* (1978) 438 U.S. 645, which will be discussed below.

In *California v. United States* (1978) 438 U.S. 645, 671-674, the United States Supreme Court, after an extensive examination of the legislative history of the Reclamation Act and the legislative intent behind its savings clause, held that a state may impose a condition on control, appropriation, use, or distribution of water only if the condition is not inconsistent with clear congressional directives as to the project authorized by Congress. The Supreme Court remanded the case for consideration of whether conditions imposed by the state on the United States' water appropriation permit were "inconsistent with congressional directives" as to the dam at issue there.[3] (*Id.* at p. 679.) On remand, applying the "inconsistent with congressional directives" standard, the United States Court of Appeals for the Ninth Circuit did not find any of the conditions imposed by the state on the United States' water appropriation permit to be preempted. (*United States v. California* (9th Cir. 1982) 694 F.2d 1171.) Petitioner argues that the holdings in the Ninth Circuit's opinion support a finding of no preemption in the instant case. However, this Court views that case as distinguishable with respect to both the underlying facts and the status of the dispute at the time of litigation. The Court also finds support for preemption here in a portion of the Ninth Circuit's analysis.

Petitioner argued at the hearing on the instant demurrer that *United States v. California* demonstrates how difficult it is to establish a conflict between federal and state law, because none of the conditions imposed by the state on the United States' water appropriation permit were found to be preempted. (Transcript of January 29, 2016, hearing at p. 18; see also Petitioner's Opposition to Defendants' Demurrer (hereafter Opposition) at p. 12, lines 2-12.) While it is true that all of the conditions in that case were upheld, the reasons that most of them were upheld do not find parallels in the instant case. The Ninth Circuit repeatedly emphasized that its holdings were based on the limited record before the court, which was less robust than it could have been because of the United States' litigation strategy. The court concluded, "We find nothing in California's conditions that cannot be in harmony with the letter and spirit of the 1962 statute *given the failure of the United States to introduce evidence* to show the existence of facts that might dictate a contrary result. We are satisfied that the

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[3] On remand, the United States District Court for the Eastern District of California, in considering this preemption standard, observed that the high court used the concepts of congressional intent, directives, and objectives interchangeably in part of its opinion. (*United States v. California* (E.D.Cal. 1981) 509 F.Supp. 867, 880.)

United States is not entitled at this time and *on this record* to invalidate any of the conditions placed by the California Water Board on the New Melones project." (*United States v. California, supra*, 694 F.2d 1171, 1174, italics added.) For example, a restriction on the appropriation of water for power generation was upheld because the United States did not present evidence that water appropriated for other purposes would not fill the project to capacity or that there was a need to impound water for power purposes only (*id.* at pp. 1179-80), and conditions requiring that the project serve California's water-quality goals and abide by its county-of-origin preferences were upheld as "lead[ing] to results anticipated, and apparently encouraged, by Congress," especially in the absence of any evidence or argument from the United States that implementation of these conditions would "frustrate the attainment of any federal goal" (*id.* at pp. 1180-81). The court declined to hold other conditions invalid because either it was premature to determine the validity of them, the challenges were moot, or the effects were too remote to identify. (*Id.* at pp. 1181-82.) This Court finds the instant case distinguishable. Preemption is clear from the face of the Raker Act, without requiring any evidentiary showing by Defendants. Moreover, the dam and reservoir challenged by Petitioner have been in place for close to a century, which avoids concerns about a "premature" preemption determination, and the effects of the declaratory judgment sought by Petitioner are not too remote to identify, despite Petitioner's protests to the contrary.

Furthermore, the Ninth Circuit's analysis of one condition that could have been construed to "never allow the full use of the dam contemplated by Congress" is instructive in the instant case. (*Id.* at p. 1177.) The court observed that "[s]uch a reading would raise serious questions of inconsistency with the federal statute," and the state conceded during litigation that it could not "'*permanently* prevent full impoundment of water in the New Melones Project, since this result would be directly inconsistent with the congressional mandate that the project shall eventually achieve full storage capacity.'" (*Ibid.*) Preemption there ultimately was avoided through a narrow interpretation of the condition at issue. By contrast, in the instant case, Petitioner's proposed interpretation of article X, section 2, is that the operation of the dam and reservoir at Hetch Hetchy is unconstitutional, and that interpretation is not subject to narrowing that can save it from preemption. This is not a case of "seek[ing] out conflicts between state and federal regulation where none clearly exists." (*Id.* at p. 1176.) Construing section 11

of the Raker Act to incorporate a California constitutional prohibition on the dam and reservoir authorized by that same act presents an obvious conflict between federal and state law.

Applying the preemption standard of *California v. United States*, *supra*, 438 U.S. 645 to the instant case, this Court finds Petitioner's proposed interpretation of article X, section 2 of the California Constitution preempted by the Raker Act. As detailed above, Congress specifically directed construction of the dam and reservoir at Hetch Hetchy, including the minimum height of the dam, the appearance of the reservoir, dam, and other structures, the building of roads and trails around the reservoir site, and the enactment of sanitary regulations above and around the reservoir site. Thus, reading article X, section 2 to prohibit the dam and reservoir would be inconsistent with these congressional directives. The Court disagrees with Petitioner's assertion that "the issue for the court must be not whether the Raker Act directed the construction of O'Shaughnessy Dam and the Hetch Hetchy Reservoir, but whether the Act mandates its continued existence and use in perpetuity." (Opposition at p. 9, lines 9-11.) Petitioner offers no legal authority for the proposition that the Raker Act must have included such a mandate in order for the federal law to preempt conflicting state law. Moreover, Petitioner's observations that dams "have a lifespan" and that "O'Shaughnessy Dam is already 93 years old" (*id.* at p. 9, lines 23-24) are irrelevant to the Court's analysis here.

Petitioner expends considerable efforts toward trying to distinguish the Reclamation Act and Federal Power Act cases cited by Defendants—including but not limited to *California v. United States*, *supra*, 438 U.S. 645; *United States v. California*, *supra*, 694 F.2d 1171; *Ivanhoe Irrigation Dist. v. McCracken* (1958) 357 U.S. 275; *City of Fresno v. California* (1963) 372 U.S. 627; and *Environmental Defense Fund v. East Bay Mun. Utility Dist.*, *supra*, 26 Cal.3d 183—primarily on the ground that those cases are about expansive federal programs or federal regulatory schemes, whereas the instant case is about a "*local* issue." (See Opposition at pp. 12-16.) However, the Court need not address those arguments to the extent it has not already done so above, as there can be no dispute the federal government has an interest in and authority over the use of Yosemite National Park, and those cases are useful and relevant for their presentation and analysis of general preemption principles, even if their facts may lead to different results.

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Petitioner's reliance on the Raker Act's savings clause to try to avoid preemption also ignores the problems created by retroactive application of its interpretation of article X, section 2. Section 11, enacted with the rest of the Raker Act in 1913 (Petition, ¶ 25), requires that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State." The language that is now article X, section 2 of the California Constitution was not enacted until 1928 (Petition, ¶ 44), five years after completion of O'Shaughnessy Dam in 1923 (*id.*, ¶ 26). Petitioner fails to articulate how the Secretary of the Interior could have been expected to see into the future and predict what laws might be enacted. Surely the savings clause could not have been intended to require the Secretary to comply with laws that did not yet exist. Petitioner also completely ignores the inherent unfairness of retroactive application of article X, section 2 to defeat the benefit of the parties' bargain. While the City clearly received bargained-for benefits, it also gave bargained-for consideration in exchange. Among other things, the Raker Act required the City to convey to the federal government all land it owned in 1913 within and adjacent to Yosemite National Park that was not needed for reservoir and water-system purposes. (§ 9, subd. (t).) The Raker Act also requires the City to make portions of the national park accessible to the public by building and maintaining access roads and trails and to comply with various sanitary and aesthetic requirements. (§§ 4, 7, 9.) Petitioner's retroactive application of article X, section 2, taken to its logical extreme, would mean that, within days after the City had spent huge sums of money to build the dam and other infrastructure and had completed the transfer of the City's land to the federal government, the State of California could have enacted article X, section 2, and the City would have been required to tear down the dam and restore the Hetch Hetchy Valley. This Court rejects such a retroactive application.

This Court finds that Petitioner's proposed interpretation of article X, section 2 is preempted by federal law.

The Petition contains only one cause of action: "Violations of Article X, section 2 of the California Constitution." (Petition at p. 19.) However, in its opposition to the demurrer, Petitioner refers obliquely to the public trust doctrine. Since Petitioner did not assert a cause of action for violations of the public trust, did not plead facts to establish any violation of the public trust, and only in passing referred to the public trust doctrine in its opposition brief, the Court is not sure whether

Petitioner believes there is a basis for a claim of violation of the public trust. Petitioner also did not, in its opposition brief, request leave to amend the Petition to state a claim under the public trust doctrine. The Petition, at paragraph 46, cites to *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443. The court in *Audubon*, referring to article X, section 2, stated, "This amendment does more than merely overturn *Herminghaus*—it establishes state water policy. All uses of water, *including public trust uses*, must now conform to the standard of reasonable use." (*Id.* at p. 443, italics added.) The issues of (1) whether the public trust doctrine applies to the method of diversion of water and (2) whether the public trust doctrine, even if it does apply to the method by which water is being diverted here, is subsumed under article X, section 2's requirements for water diversion are not currently before the Court. However, even if they were, Petitioner has not provided the Court with any authority to suggest that the preemption analysis applied to Petitioner's interpretation of article X, section 2 would not apply equally to a public trust claim, if one had been presented or if the Petition were amended to assert such a claim.

2. **Statute of Limitations**

A. **Applicable Statute of Limitations**

If any statute of limitations applies to Petitioner's claims, it is the four-year statute of limitations established by California Code of Civil Procedure section 343. Section 343 provides that "[a]n action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Defendants assert that the three-year statute of limitations established by California Code of Civil Procedure section 338, subdivision (a) is the applicable limitations period. This section applies only to "[a]n action upon a liability created by statute." (*Ibid.*) Petitioner has asserted purely constitutional claims under article X, section 2 of the California Constitution. Neither party argues that the claims are grounded in any statute. Constitutional provisions are not themselves statutes. Statutes are enacted by the legislature. The California Constitution prescribes that amendments to it must be approved by a majority of votes of electors. (Cal. Const., art. XVIII.)

The main case cited by Defendants for the proposition that the three-year statute of limitations of section 338, subdivision (a) applies to constitutional claims—*Peles v. LaBounty* (1979) 90

Cal.App.3d 431—is not on point. In discussing *Peles* in their reply brief, Defendants failed to mention that the action there was founded upon *both* constitutional rights *and state regulations enacted pursuant to state statute*. The *Peles* court's holding that the three-year statute of limitations for actions upon a liability created by statute applied was founded upon a finding that the claim arose from a statute, not the California Constitution.

Petitioner, on the other hand, argues that no statute of limitations applies because, among other things, "[a]pplying a statute of limitations to Article X, Sec. 2 would truncate and displace that provision's continuing mandate that a method of diversion of water be reasonable" (Opposition at p. 19, line 3) and "[a] generic statute of limitations cannot operate to stifle the Court's authority to enforce a use or—in this case—method of diversion that has become unreasonable under the California Constitution 'at a later time'" (*id.* at p. 19, lines 17-19). However, putting aside for the moment Petitioner's arguments about how the continuing violation doctrine and the theory of continuous accrual affect any statute of limitations (which arguments are addressed below), none of the cases cited by Petitioner establish the general proposition that a lawsuit brought pursuant a constitutional mandate cannot be subject to a statute of limitations, nor has the Court found any such authority. Furthermore, the California Court of Appeal has observed on more than one occasion that "it is well settled that the assertion of a constitutional right is subject to a reasonable statute of limitations unless a constitutional provision provides to the contrary." (*Miller v. Bd. of Medical Quality Assurance* (1987) 193 Cal.App.3d 1371, 1377.) While no statute has been identified setting a limitations period on the specific type of constitutional claim Petitioner makes—which distinguishes the instant case from *Miller* and cases cited by the *Miller* court—it also is true that article X, section 2 does not provide for any shortening or extension of the so-called "catch-all" statute of limitations at Code of Civil Procedure section 343. Accordingly, the Court will apply section 343's four-year statute of limitations.

B. **Accrual of Cause of Action**

As discussed above, the language of the constitutional amendment that presently appears at article X, section 2 was enacted in 1928. Nearly all of the specific events that give rise to this lawsuit occurred years before the enactment of the constitutional provision Petitioner's entire claim is based upon. Actions that pre-date the enactment of article X, section 2 include the clear-cutting of the trees in

the Hetch Hetchy Valley in 1917 and 1918 (Petition, ¶ 26), the completion of the O'Shaughnessy Dam in 1923 (*ibid.*), and the commencement of flooding of the Hetch Hetchy Valley in 1923 (*id.*, ¶ 20). Respondents' method of diversion of water using the Hetch Hetchy Reservoir—what lies at the heart of Petitioner's claims—was already in place, by means of massive infrastructure built and maintained pursuant to the terms of the Raker Act, when the amendment that Petitioner claims makes such operations unreasonable and unconstitutional was enacted. Accordingly, Petitioner's cause of action accrued at the time of enactment of what is now article X, section 2: in 1928.

Petitioner appears to argue that its cause of action accrued at some later date because "Article X, Sec. 2's mandate that methods of diversion be reasonable does not establish a static standard that is based on a single point in time many years in the past. Instead, Article X, Sec. 2 establishes an evolving standard." (Opposition at p. 19, lines 5-7.) By this reasoning, it would appear that accrual of a cause of action is not traceable to any fixed or predictable action or knowledge but rather depends on the ability of a litigant to convince a court that standards have evolved, and it is difficult to believe that any litigant would acknowledge in its pleadings that standards evolved prior the applicable limitations period. The evolving standard espoused by Petitioner would make every complaint alleging a constitutional violation immune from demurrers based on the statute of limitations.[4] Petitioner's citations to cases suggesting that what constitutes a reasonable *use* of water at one time may constitute *waste* at another time do not assist in resolving the instant case, as evaluating how a given quantity of water is used in one month, season, or year versus another is not analogous to determining whether construction of a dam and reservoir nearly a century ago is reasonable under "modern day circumstances and current evidence." (*Id.* at p. 19, lines 25-26.) Moreover, one of those cases—*Environmental Defense Fund v. East Bay Mun. Utility Dist.*, *supra*, 26 Cal.3d 183—which Petitioner cited as a case that "involved an unreasonable method of diversion based on its location" (Opposition at p. 19, lines 9-10), contains no discussion of statutes of limitations and merely held, relevant to the instant motions, that there was no federal preemption of the complaints, under the facts presented, to

[4] The Court acknowledges that there is evidence that some constitutional standards, like equal protection and what constitutes cruel and unusual punishment, for example, do evolve. However, Petitioner has provided no authority to suggest that evolving environmental sentiments can form the constitutional basis for requiring the undoing of massive infrastructure built in the distant past.

the extent they challenged the location of the diversion point as violating California law. The opinion granted leave to amend the complaints to allege unreasonable method of diversion, and there was no discussion of the merits of the challenge to the location of the diversion point.

C. **Continuing Violation Doctrine**

Petitioner's arguments in support of extending the statute of limitations based on a theory that Respondents' actions fall within the continuing violation doctrine fail for a number of reasons. First, Petitioner is not persuasive in analogizing Respondents' actions to the misconduct in cases in which the "'injuries are the product of a serious of small harms, any one of which may not be actionable on its own,'" such that those injured are "'handicapped by the inability to identify with certainty when harm has occurred or has risen to a level sufficient to warrant action.'" (Opposition at p. 21, lines 6-8 [quoting *Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197].) It is clear from the Petition that the alleged wrongs here stem from some rather large actions that occurred nearly a century ago and that the results of those actions were not only immediately evident but also debated extensively prior to the passage of the federal law authorizing the actions. (See, e.g., Petition, ¶¶ 23-28.) Furthermore, the instant case is unlike the cases cited by Petitioner as examples of continuing violations, where the alleged "pattern[s] of reasonably frequent and similar acts" (*Aryeh*, *supra*, at p. 1198) were a company's imposing excessive fees for photocopies during 17 service visits over a two-and-a-half-year period (*id.* at pp. 1197-98 [holding that the continuing violation doctrine, in fact, did not apply, as the complaint identified "a series of discrete, independently actionable alleged wrongs" and the plaintiff conceded that he was aware of and recognized as wrongful the allegedly unlawful acts approximately six years before he filed the complaint]), failure to pay child support (*Cal. Trout, Inc. v. State Wat. Resources Control Bd.* (1989) 207 Cal.App.3d 585, 628 [citing another case]), and improper exercise of a franchise (*ibid.*).

Second, Petitioner cites no authority for application of the continuing violation doctrine to extend the limitations period for purposes of investigation of suspected harms or pursuit of political solutions. (See Opposition at p. 21, lines 14-17.) Being unaware of harm is different from making deliberate and strategic decisions about how to address the harm. Third, to the extent that the rationale for the continuing violation doctrine is to allow later misconduct that falls outside of the limitations

period to be linked to misconduct that falls within the limitations period so that the entire course of conduct is actionable, Petitioner seems to imply, through its arguments about evolving standards, that Respondents' earlier conduct was not necessarily unreasonable or unconstitutional—which means that there is no misconduct within the limitations period to which later conduct can be linked.

D. **Theory of Continuous Accrual**

Petitioner's alternative argument that it asserts timely claims under the theory of continuous accrual also fails. Petitioner asks the Court to find that a new limitations period is triggered every day because Respondents divert the waters of the Tuolumne River at O'Shaughnessy Dam every day in violation of article X, section 2. While the theory of continuous accrual generally provides that a new cause of action accrues each time a wrongful act occurs in the context of an obligation that arises on a recurring basis (see *Aryeh v. Canon Bus. Solutions, Inc.*, *supra*, 55 Cal.4th 1185, 1199), Petitioner fails to demonstrate how the daily diversion of water by means of infrastructure "not of a temporary character" (Raker Act, § 4), including a dam that was built nearly a century ago, is analogous to the breaches of recurring obligations in cases where this theory has been found to apply.

Petitioner cites only three cases in its argument for the application of the theory of continuous accrual. *Aryeh*, discussed above, involved a continuing duty by a lessor of photocopy machines not to impose unfair charges in *monthly* bills to the lessee. (55 Cal.4th at p. 1200.) *Hogar Dulce Hogar v. Community Development Commission of City of Escondido* (2003) 110 Cal.App.4th 1288 addressed the recurring *annual* obligation of the defendant agency to place twenty percent of its tax-increment receipts into a low-and-moderate-income housing fund. (*Id.* at p. 1296.) Finally, *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809 involved a city's collection of an allegedly invalid *monthly* utility tax. (*Id.* at pp. 819, 821.) Other examples of the application of the theory of continuous accrual described in the leading case of *Aryeh* are as follows: an employer's ongoing obligation not to discriminate in setting wages, which are paid on a recurring basis; a tenant's recurring obligation to pay periodic rent to a commercial landlord; and a lessee's obligation to make monthly payments pursuant to a gas and oil lease. (See *Aryeh*, *supra*, 55 Cal.App.4th at pp. 1199-1200.) Respondents' diversion of water today via a dam, reservoir, and other infrastructure it constructed nearly a century ago does not resemble the recurring unlawful acts in the above cases, nor

are the contexts remotely similar, and Petitioner advances no basis for expanding the theory of continuous accrual to the instant situation.

3. **Reasonableness of the Method of Diversion**

While reasonable minds, acting in good faith, have come to different conclusions on the issue of whether the construction of a dam in a national park that floods a scenic valley is an unreasonable method of diversion (as apparently many, including the famous naturalist John Muir, did during the decade-long debate before enactment of the Raker Act [see Petition, ¶¶ 20-25] and as undoubtedly many will in the future), there is no reason for this Court to either engage in the debate or decide that issue here. Given the Court's findings that Petitioner's state-based claim is preempted by federal law and also is untimely, the Court need not and will not inject its judgment on the issue of whether Petitioner has alleged sufficient facts to establish that Respondents' method of diversion of water is unreasonable under article X, section 2 of the California Constitution.

RULINGS

1. For the foregoing reasons, the Court SUSTAINS the demurrer. In the case of an original complaint or petition, a plaintiff or petitioner is not required to request leave to amend. "Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not." (*McDonald v. Super. Ct.* (1986) 180 Cal.App.3d 297, 303-304; see also *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747.) While this Court is unable at this juncture to see how the Petition is capable of being amended to avoid preemption or the statute of limitations, the Court, in an abundance of fairness and caution, sustains the demurrer with 20 days' LEAVE TO AMEND.

2. The Court did not rely on any matters that would have required it to take judicial notice. Therefore, the Court is not ruling on the requests for judicial notice or any objections thereto.

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3. Based on its sustaining of the demurrer, the Court DENIES Defendants' motion to strike as moot.

IT IS SO ORDERED.

Dated: 4/29/16

KEVIN M. SEIBERT
JUDGE OF THE SUPERIOR COURT