environs

UCD School of Law
Environmental Law Society

Vol. 12, No. 1
January 1988

The Raker Act -- Is San Francisco violating federal law?

By Marc Picker
and Boyd Sprain

When Interior Secretary Donald Hodel announced his proposal to tear down O'Shaughnessy Dam, drain Hetch Hetchy Lake and restore the valley to its former natural state, there was some predictably bitter reaction.

San Francisco Mayor Dianne Feinstein followed in the ideological footsteps of her predecessors in lambasting the idea as "foolish" and touted the Bay area's "birthright" to water rights obtained by city leaders at the turn of the century.

But, what birthright does an illegitimate child possess? And, if the Raker Act of 1913 which authorized O'Shaughnessy Dam wasn't a political bastard, then what was it?

San Francisco gets its rights under the 1913 bill introduced by California Congressman Raker and passed by Congress in one of the most bitter environmental battles in history.

But, one factor left out of the reaction to Hodel's proposal is the Interior Secretary's legal ability to carry out the plan. The same congressional act which allowed San Francisco to use the valley gave the Interior Secretary discretion to regulate that use and enforce its provisions, or even seek reversion of the entire project to the federal government if the Act is violated.

CONGRESSIONAL BATTLES

A seemingly innocuous bill termed the Right of Way Act of 1901 set the stage for the damming of Hetch Hetchy Valley. The bill, offered by California Congress-

man Marion De Vries of Stockton, allowed rights of way across national parks and forests for water lines, aqueducts, tunnels and dams.

At the same time, Hetch Hetchy's abundance of clear water came to the attention of a financier named James Phelan, the mayor of San Francisco. Phelan filed privately for water rights to serve San Francisco but was turned down by the then Interior Secretary. Phelan turned the rights over to San Francisco when he left office, but the City was also turned down.

Mayor Phelan's and San Francisco's permit requests for the rights to Hetch Hetchy's water were denied twice in 1903, and again in 1905. In 1906, a different mayoral administration convinced the San Francisco Board of Supervisors to pass a resolution abandoning the pursuit of Hetch Hetchy's resources, but then the earthquake intervened.

But, in 1907, the San Francisco supervisors reversed themselves and voted to again fight for the Tuolumne watershed supply. The appointment of a new Interior Secretary led to a reconsideration of the City's requests and the permit was granted in 1908. It carried the limitation that San Francisco had to develop the resources of Lake Eleanor and its sub-watershed before damming Hetch Hetchy Valley. And, that damming could not occur until San Francisco proved,conclusively,that it could not obtain sufficient water of the necessary purity from other sources.

In 1908, the fledgling Sierra Club's fight to preserve Hetch Hetchy and protect Yosemite National Park hit a low point as voters in San Francisco voted by a six to one margin to go ahead with the Hetch Hetchy project and sell $600,000.00 in municipal bonds to pay for developing the water supply.

In 1909, a new administration took over in Washington, D.C., with President Taft. That same year, Taft spent a day in Yosemite with Muir as his guide.

Soon thereafter, the Interior Secretary wrote to the mayor and supervisors of San Francisco asking them to show cause why the Hetch Hetchy reservoir site should not be eliminated from the water rights permit. The environmentalists rejoiced, sure that the battle had finally fallen in their favor. But, the hearings ended with San Francisco told only to gather more information.

While the permit fight raged, the battle moved to a new site. Rep. Raker introduced the first of a number of bills that would eventually cost the preservationists their entire fight.

In 1913, a new administration again took over with the newly appointed Interior Secretary a former San Francisco city attorney under Mayor Phelan.

Congressman Raker also filed the first of five bills which would ultimately award the valley to San Francisco. Although a suppressed San Francisco engineering report was

uncovered that showed water sources other than Hetch Hetchy were adequate and available, the fight remained even. Then, just before Congress' fall recess, it was announced the Raker bill would not be considered until December. However, as soon as congressmen began leaving town, the bill suddenly appeared on the floor of the House of Representatives and was passed by a vote of 183 to 43, with 205 not voting due to absence. The bill passed, with barely half the House in attendance.

The Senate later passed the bill, and although environmentalists held hope that President Woodrow Wilson would veto the Act, the President succumbed to great political pressure from within his own political party and signed the bill a few weeks later.

Although the fight over construction of the dam and reservoir were finished, the legal confrontations continued.

THE RAKER ACT

The first water from Hetch Hetchy Lake flowed into San Francisco in 1934, and within four years San Francisco was in court defending itself against charges of violating the provisions of the Raker Act.

The Act grants San Francisco rights of way, "together with such lands in Hetch Hetchy Valley and Lake Eleanor Basin within the Yosemite National Park ... as may be determined by the Secretary of the Interior to be actually necessary."

Section 6 of the Raker Act has stirred most of the litigation over San Francisco's management of Hetch Hetchy's power generation. Section 6 prohibited San Francisco "from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or an irrigation district, the right to sell or sublet the water or electric energy sold or given to it or him by the said grantee: PROVIDED, that the rights hereby granted shall not be sold, assigned or transferred to any private person, corporation or association, and in case of any attempt to so sell, assign, transfer or convey, this grant shall revert to the government of the United States."

San Francisco was authorized by the Act to sell water and electric energy from Hetch Hetchy to any municipality or municipal corporation, with specific provisions preserving the claimed water rights of Turlock and Modesto Irrigation Districts.

Section 9, the enforcement provision of the Act, states in subsection (m) that "the grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use ..." In subsection (l), the Act provided that the

"grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for drainage or irrigation, for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated ..."

In subsection (u), it is provided that the Attorney General, at the request of the Secretary of the Interior, may commence suit to enforce the Act if the grantee violates any of the conditions to the grant.

In Section 5, Congress required that, "in 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 therefore 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 regulations."

The final part of the Act required San Francisco to specifically accept all of the regulations before it could utilize the legislation.

HETCH HETCHY GOES TO COURT

"After passage of the Bill the City accepted the grant by formal ordinance, assented to all the conditions contained in the grant, constructed the required power and water facilities, and up to date has utilized the rights, privileges and benefits granted by Congress. Now, the City seeks to retain the benefits of the Act while attacking the constitutionality of one of its important conditions." So stated Justice Hugo Black in his majority opinion in United States v. San Francisco, 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050 (1940).

In that case, the United States Supreme Court reversed the Ninth Circuit Court of Appeals and ordered reinstatement of an injunction compelling compliance with Raker Act provisions, and forbidding San Francisco from disposing of Hetch Hetchy-generated energy over transmission lines owned and operated by Pacific Gas & Electric Company, which San Francisco had been doing since the O'Shaughnessy Dam was completed in 1925. United States v. City and County of San Francisco, 23 F.Supp. 40, 53 (1938).

In the federal district court, San Francisco argued that PG&E was not buying power and reselling it, which would violate the Raker Act, but was merely acting as its agent. Power from Hetch Hetchy was entering the PG&E system at Newark and being "wheeled" into San Francisco. In other words, San Francisco was getting credit for all the energy feeding into the system, and was getting a commensurate price decrease on energy it consumed in San Francisco — even though it wasn't

the "same" power.

The district court ruled that the "wheeling" system did not meet the intent and clear language of the Raker Act, and instead San Francisco was selling the Hetch Hetchy power to PG&E and was then getting a lower price on energy it was buying from the private company. So, the district court enjoined San Francisco from continuing the arrangement.

The Ninth Circuit reversed the district court, holding that the contract between San Francisco and PG&E was for an agency relationship. The court held that the Raker Act did not prohibit the City from contracting with the private company for distribution of Hetch Hetchy energy, it merely prohibited outright sale to a company intent on reselling the power. City and County of San Francisco v. United States, 106 F.2d 569 (1939)

The following year, the United States Supreme Court overruled the Ninth Circuit and sent the case back to the district court for reimposition of the injunction. The high court, in a lengthy opinion, cited a number of debates from the Congressional Record from when the Raker Act was being debated.

The Supreme Court quoted one exchange between Rep. Raker and Rep. Sumner:

"Mr. Sumner: Is it the purpose of this bill to have San Francisco supply electric power and water to its own people?"

"Mr. Raker: Yes."

"Mr. Sumner: Or to supply these corporations, which will in turn supply the people?"

"Mr. Raker: Under this bill it is to supply its own inhabitants first ..."

310 U.S. at 22.

As Justice Black explained in the majority opinion, "From the statement of the Congressman responsible for the application of the prohibitions of section 6 specifically to electric energy, it is clear that as enacted section 6 was understood to prohibit the City from transferring to a private utility the right to sell Hetch Hetchy power and not merely to forbid sale of power as a commodity for resale ..." 310 U.S. at 21-22.

Justice Black also quoted Rep. Kent, another member of the California delegation and supporter of the bill, who stated that "there is no possibility of selfish gain, and ... no corporation or individual can obtain any benefit whatsoever from this bill. It is for the benefit of the people of California." 310 U.S. at 23.

Sen. Thomas, another proponent of the measure, explained on the Senate floor that the Raker Act would put San Francisco in competition with the single corporation that held a monopoly on hydroelectric power generation in northern California. He said one of the greatest values of the bill would be thecompetition between San Francisco and PG&E.

As Sen. Norris was quoted in support of the bill stating, "The people who ride

on street cars, the people who use electric lights, the people who are now using gas, those who eventually will use coal for purposes of heat, and those who use water for washing purposes will all receive all the benefit there is in this legislation without any rake-off by any corporation of monopoly." 310 U.S. at 25-26, footnote 17.

As Justice Black concluded, "Congress clearly intended to require — as a condition of its grant — sale and distribution of Hetch Hetchy power exclusively by San Francisco and municipal agencies directly to consumers in the belief that consumers would thus be afforded power at cheap rates in competition with private power companies, particularly Pacific Gas & Electric Company." 310 U.S. at 26.

Justice Black held that "Terminology of consignment of power rather than of transfer by sale, and verbal description of the power Company as the City's agent or consignee, are not sufficient to take the actions of the

parties under the contract out of section 6." 310 U.S. at 28.

Those conditions were a valid and central part of the grant of rights to San Francisco, Justice Black held. He quoted Sen. Walsh of Montana, who stated, "We are making a grant of rights in the public lands to the City of San Francisco, and we may impose just exactly such conditions as we see fit, and San Francisco can take the grant with all those conditions or it can let it alone." 310 U.S. at 29, footnote 21.

With the beginning of World War II, the battle over San Francisco's dealings with PG&E was put on hold as Hetch Hetchy power was utilized for defense plants in the Bay area.

In 1944, the plants were closed and the United States gave San Francisco six months to comply with provisions of the Raker Act and the prior court decisions. San Francisco and PG&E immediately signed a new "wheeling" contract, and the City signed new sales agreements with Modesto and Turlock Irrigation Districts.

In 1973, the grand jury for the City and County of San Francisco released a 21-page investigation of the Hetch Hetchy project and the Raker Act, and found that San Francisco was in violation of it, which would risk having the federal government demand reversion of the entire system.

The grand jury stated, "Since the City has declined to distribute power to its citizens despite the provisions of the Raker Act, it has chose to dispose of this power to other users." Grand Jury Report 1973, Page 33.

The grand jury examined the City's agreements with PG&E and concluded that San Francisco was still doing just what the Supreme Court had ruled was illegal.

"... the City has — contrary to the terms of section 6 — abdicated its control over the sale and ultimate distribution of Hetch Hetchy power." Grand Jury Report 1973, Page 35.

The report accused San Francisco of "dumping" the bulk of its power on the Modesto and Turlock Irrigation Districts rather than abiding by the Raker Act and using the power "for the use of its people ... It is the people of Turlock and Modesto who have the use of the City's power." Grand Jury Report 1973, Page 35.

The conclusion and recommendation of the grand jury was "BRING OUR POWER HOME!" It recommended initially leasing and later buying the distribution system used by PG&E to "wheel" the Hetch Hetchy power into the City. The grand jury stated, "The acquisitions by the City of its own electric distribution system is the only way San Francisco can fully utilize for its own purposes the electrical power produced by its great Hetch Hetchy system. This is NOT a case of the City acquiring power rights. We have had them for two generations. It is time that the citizens should realize the full benefits of this enormous resource of energy which we own." Grand Jury Report 1973, Page 42.

Reactions to the 1973 Grand Jury's surprising conclusions were contained in the Investigatory Grand Jury Report and Civil Grand Jury Report for 1974-1975.

The Investigatory Grand Jury was succinct in its criticism. "Last year, there was a suggestion that the City acquire the PG&E distribution system in San Franscisco. Many reasons were given as to why it should be, and several suggestions were made as to how it could be taken over. While it would be nice if it could be done, the suggestion is idealistic and impractical. P.U.C. General Manager Crowley's letter of August 16, 1974, amply rebutted why it should be taken over and PG&E Division Manager John H. Black's letter of August 21, 1974, definitely answered the several suggestions of how it could be taken over with a flat refusal of any takeover." Investigatory Grand Jury Report 1974-1975, Page 94.

No effort was made in either of the 1974-75 reports to explain just why providing the power to San Francisco residents was idealistic and impractical beyond the fact that PG&E would refuse to go along with a buyout.

In the 1977-1978 Civil Grand Jury Report, there was a recounting of a number of lawsuits pending against the City by the San Francisco International Airport, Modesto and Turlock Irrigation Districts over attempts to sell Hetch Hetchy power at rates equal to those charged by PG&E, even though the City's generating costs were much lower. The suits found the irrigation district attempting to invoke the language of the Raker Act to control the rates to "cost plus a small rate of return, not at the prevailing

market ..."

After the grand jury recommendations and attempted repudiations, San Francisco's compliance with the Raker Act reached the Ninth Circuit again in 1977. Starbuck v. City and County of San Francisco, 556 F.2d 450, was a "suit by residents, taxpayers and consumers of electricity alleging that San Francisco's present wheeling arrangement with the utility company (PG&E) violated Raker Act provisions establishing the Hetch Hetchy Valley as a resource of water and electric power."

The court dismissed the suit because the Raker Act made no provision for private enforcement and the plaintiffs lacked standing to invoke the Administrative Procedures Act. But, the Ninth Circuit spent a lot of time discussing what San Francisco was doing wrong and how much discretion the Secretary of the Interior would have to revoke the City's grant and force a reversion of the entire system back to the federal government.

The Ninth Circuit examined the legislative history of the Raker Act paralleling the 1940 findings of the United States Supreme Court. The Ninth Circuit noted there had been a suggestion to include an automatic forfeiture provision in the bill in 1913 in case of any violations by San Francisco but that amendment was rejected as too harsh. A compromise finally reached was offered by Rep. Raker himself, and it was adopted as section 9(u), which provides that the Attorney General, at the request of the Interior Secretary, may commence suit to enforce the act if the City violates any provisions of the grant. 556 F.2d at 455.

The Ninth Circuit recounted a number of violations by San Francisco, including those in the 1940 decision. The court discussed the claims in the case before it sympathetically, but felt itself forced to dismiss the suit for lack of standing.

The court also examined the Interior Secretary's latitude to enforce the Raker Act, and his right to demand revocation of the grant because of continued violations. While the circuit judges didn't directly examine the taxpayers' claimed injuries, they did reflect on them positively.

The same Ninth Circuit panel which heard Starbuck, had three months earlier upheld an injunction against San Francisco in a suit filed by seven Bay area cities and eight governmental districts which had accused the City of increasing water rates in a discriminatory manner and in a way not related to San Francisco's cost in providing them service. City of Palo Alto v. City and County of San Francisco, 548 F.2d 1374 (1977)

The district court had enjoined San Francisco from raising its rates, and from transferring surplus water department funds into the City's general fund. The Ninth Circuit affirmed the injunction against the rate increases but re-

manded the question of transfer of excess funds. The court held that the cities and districts were intended to be direct beneficiaries of the Raker Act and so had standing, and as direct beneficiaries they were entitled to enforce its provisions.

As well, in 1953, the federal government had to take the City to court to enforce another provision of the Raker Act. In United States v. City and County of San Francisco, 112 F.Supp. 451 (1953), the federal district court ordered the City to reimburse the federal government for maintenance of roads which San Francisco was obligated to maintain under the act.

The amount involved was $27,313.82, and San Francisco was only paying $30,000.00 a year for the grant.

CONCLUSION

Looking at the language of the Raker Act, the legislative history behind it and the way the courts

have interpreted it, Secretary Hodel has the legal authority to force San Francisco to make major changes in its Hetch Hetchy water and power system.

San Francisco may claim it is entitled to compensation for its investment in the system, but given the fact San Francisco is paying $30,000 per year to the federal government for the system and has recently made almost $40 million a year in revenues from water and power sales, it will be hard to prove the City hasn't recouped its expenditures.

The U.S. Bureau of Reclamation issued a preliminary analysis of Hodel's proposal in a November 1987 report, Hetch Hetchy: Water and Power Replacement Concepts. In the report, the bureau noted that the Raker Act "established priority for use of Hetch Hetchy power. The first priority is for the municipal needs of San Francisco; the second is for the municipal and pumping needs in the irrigation district areas; and the third is for public entities. Generation surplus to these priority uses is sold to industry." Hetch Hetchy:, page 5.

The report explained that of the "total power generated from the Hetch Hetchy system, about 25 percent goes to the City of San Francisco, 65 percent to the Modesto and Turlock Irrigation Districts, and 10 percent to industries in the San Francisco bay area." Hetch Hetchy:, page 28.

It also noted, "During the fiscal year which ended on June 30, 1987, the Hetch Hetchy system generated water revenues of approximately $7.8 million and $89.6 million in power sales. Corresponding operation and maintenance expenses totaled $70.5

million. Consequently, the Hetch Hetchy system was responsible for generating $26.9 million in net operation-related revenues. During the 6-year period between fiscal years 1982-1987, average water and power revenues totaled $87.7 million; average operation expenses totaled $49.1 million; and average net revenues generated totaled $38.7 million." Hetch Hetchy:, page 15.

These revenue figures might have been much higher if seven cities and eight governmental districts hadn't been successful in their 1977 lawsuit to keep San Francisco from raising water rates equal to market levels because the City was not incurring market-type costs.

The 65 percent of Hetch Hetchy's power which is sold to Turlock and Modesto Irrigation Districts each year was attacked by the 1973 San Francisco Grand Jury. The districts are entitled to electrical energy, according to the Raker Act, but only for pumping of subsurface waters and actual municipal public purposes.

In City of Modesto v. Modesto Irrigation District, 34 Cal.App.3d 504. 110 Cal.Rptr. 111 (5th District, 1973), the City of Modesto sued to tax sales of that electricity within the City by the irrigation district. The court found that the sale of power by the district was merely "ancillary" and the district is "engaged in a purely proprietary enterprise additional to and not necessary for irrigation purposes." 34 Cal.App.3d at 507.

In other words, the court found that the districts are reselling Hetch Hetchy power for profit — after San Francisco sells it to them at a profit.

There may be no clearer violation of the spirit, if not the letter, of the Raker Act which wanted cheap, competitive power provided to the residents of San Francisco.

Now, the people of Modesto and Turlock are paying their irrigation districts enough for electricity to subsidize their agricultural water systems, and San Francisco is making almost $40 million a year selling the power to the districts — all from power generated in a national park.

All of this is probably more than enough to convince a judge there is legal basis to force reversion of the Hetch Hetchy Valley to the federal government — something that San Francisco officials and Secretary Hodel are no doubt very aware of.

Marc Picker is a third-year student at the U.C. Davis School of Law and will graduate in May 1988. He is the editor of ENVIRONS. He is a former award-winning newspaper reporter and editor at newspapers throughout the West, and will be returning to Reno, Nevada, after graduating from King Hall.

Boyd Sprain is a second-year student at the U.C. Davis School of Law. He is the chairman of the Environmental Law Society.