Hetch Hetchy Follow-Up

San Francisco Public Utilities Commission Rebuttal

Editor's Note: The following letter was received from the San Francisco Public Utilities Commission in response to articles in the last issue of ENVIRONS. It is reprinted here exactly as it was received, without alterations or corrections.

PUBLIC UTILITIES COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

April 19, 1988

Editor
Environs
Environmental Law Society
King Hall
University of California, Davis
School of Law
Davis, California 95616

Dear Editor;

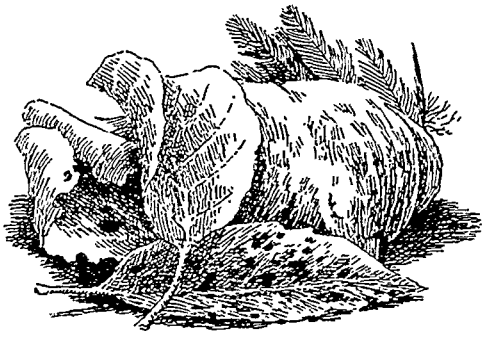
In a recent edition of **ENVIRONS** (12 Environs 1, 1988) several articles appeared regarding the Hetch Hetchy Water and Power Project owned and operated by the City and County of San Francisco's Public Utilities Commission. The articles basically argued that the City was and is violating the Raker Act by and through its power sales to Modesto and Turlock Irrigation Districts, its agreements with Pacific Gas and Electric Company ("PG&E") and its failure to municipalize PG&E or to bring Hetch Hetchy power to San Francisco's residents.

We would like to respond to certain legal and factual inaccuracies contained in those articles. San Francisco sells both its water and its power in compliance with the Raker Act in all respects and Department of the Interior has concurred in that opinion since 1945. Furthermore, we do not consider the Bay Guardian to be a responsible source for a journal published by a respected law school and take serious issue with the use of that newspaper as a foundation for any statements made regarding the Hetch Hetchy system.

The basic grant to the City contained in the Raker Act was for the use of federal lands to develop the facilities required to convey the water San Francisco owned for domestic use in the greater Bay Area and to generate and distribute hydroelectric power. The Act mandated that San Francisco generate specific amounts of hydroelectric power sufficient for its own municipal public purposes and for the benefit of the farmers and municipalities in the Modesto and Turlock Irrigation Districts (Section 9(m)). The Act specifically allows for the sale of surplus power for commercial purposes (Section 9(l)) and, according to previous opinions issued by the Department of the Interior, does not require the City to bring the surplus power into San Francisco. (See, e.g. attached letter dated June 17, 1971 from the Office of the Solicitor of the Department of the Interior to Arthur Brunwasser.)

Two sections of the Raker Act delineate the City's rights, limitations and obligations regarding the sale of power generated by the facilities of the Hetch Hetchy system. Section 6 of the Raker Act specifically prohibits the City from selling or leasing to any private corporation of individual the right to sell or sublet the water or energy sold or given to it or him by the City. The limitation expressly does not apply to municipalities, municipal water districts or irrigation districts. Therefore, the City has the right to wholesale both water and power to those entities for resale but cannot sell power to any private company that resells to end-users. A violation of Section 6 may cause the grant to revert to the federal government.

Section 9 (b-j) of the Raker Act specifically requires that the City recognize the prior rights of the Modesto and Turlock Irrigation Districts to the flow of the Tuolumne River. Section 9(l) requires that the City sell or supply energy it does not need for its own municipal public purposes to the Districts for use by landowners in the Districts for irrigation and pumping and for the municipal public purposes of municipalities within the Districts. Section 9(l) also states that after meeting its own municipal public purposes and the



needs of the irrigation districts, the City "may dispose of any excess electrical energy for commercial purposes".

Pursuant to these requirements, the City utilizes Hetch Hetchy power for its own municipal public purposes first. It then sells power at cost to the Districts for irrigation and municipal public purposes. All remaining excess energy can be sold for commercial purposes at rates that are fair and reasonable in conformance with the laws of the State of California. Under contracts recently approved by the Board of Supervisors and Mayor Art Agnos this excess energy will be sold to Modesto and Turlock Irrigation Districts.

The City also wholesales water to municipalities and municipal utility districts throughout the Bay Area as permitted by Section 6. When the City sells water to private water companies, it must restrict those sales to quantities that can be supplied by water the City collects from local resources. Such sales have been consistently approved by the federal government as in compliance with the Raker Act.

The contention that San Francisco is violating the Raker Act appears to be based in part on a misunderstanding of the current contracts between the City and PG&E. In 1940, the U.S. Supreme Court determined in United States of American v. City and County of San Francisco, 310 U.S. 16, that the City was violating the Raker Act by conveying its power to PG&E in an arrangement by which PG&E took a portion of the Hetch Hetchy power, sold it to PG&E's customers and paid San Francisco the revenues received for the power. Although the arrangement was intended as an agency relationship, the Court found that it violated Section 6 of the Act.

The current arrangements with PG&E are significantly different than those found to violate the Raker Act and do not involve any sale or conveyance of power to PG&E. Rather, the City purchases power and transmission capacity as "wheeling" and "firming" services from PG&E enabling the City to transmit its power to San Francisco for its municipal purposes and to sell its excess power to the Districts and other authorized customers as firm power at a much better price than it could obtain without PG&E's back-up power. The PG&E contract also stipulates that the City has the right to provide energy in place of PG&E to certain of PG&E's industrial customers when the City has power in excess of that which it can sell to the Districts and authorized customers.

The current arrangements with the Districts and PG&E are substantially similar to the arrangements that have been in place since the Supreme Court's decision. In 1945 the Department of the Interior reviewed the City's new power sales contracts and found them to be in compliance with the Raker Act (see telegram dated June 11, 1945 and latter dated June 15, 1945 from former Secretary of the Interior Harold Ickes to Mayor Roger Lapham). Since that review, every PG&E and District contract has been reviewed and accepted by the Department as being in compliance with Section 6 of the Raker Act.

Another argument made regarding violations of the Raker Act is that the Districts resell Hetch Hetchy power for profit in violation of the Raker Act. There is nothing in the Raker Act that prohibits the Districts from reselling for profit the power that is sold to them in excess of their irrigation and municipal needs. That is power sold for commercial purposes and can be used in any way the Districts see fit. However, the District contracts do contain provisions limiting the use of the power sold to the District at cost solely to municipal and agricultural purposes consistent with the Raker Act and prohibiting the Districts from selling Hetch Hetchy power tp private corporation for resale purposes in violation of the Raker Act. If the amount of power used by a District exceeds the amount of Hetch Hetchy power it takes in any month, the District has the right to sell for resale other power it generates or purchases.

Finally, we would like to address more fully the argument that the City is violating the Raker Act because it has neither municipalized PG&E nor constructed the facilities to distribute Hetch Hetchy power on a retail basis to the residents of San Francisco. While it has generally been acknowledged that many of the members of Congress and City officials who were involved in the drafting and passage of the Raker Act intended that the power generated by the Hetch Hetchy facilities would be used by San Francisco's residents, there is nothing in the Act that compels that result.

One of the primary purposes for the development of Hetch Hetchy power that is mentioned repeatedly in the legislative history was to provide cheap energy to the irrigationists of the Modesto and Turlock Districts to enable them to pump the subsurface water in the area. The Raker Act expressly provides for that. In contrast, although the development of public power is mentioned in the legislative history, the Act does not expressly require that public power be developed for residential use.

The voters of San Francisco have consistently since 1925 defeated every ballot measure presented to them that would fund either the municipalization of PG&E or the construction of distribution facilities between Newark, California and San Francisco. As indicated in the previously mentioned letter from the Office of the Solicitor, the Department of the Interior

has recognized that the City has been unable to bring Hetch Hetchy power to the residents of San Francisco and has concluded that this inability does not violate the Raker Act.

Further, dicta in the case of Starbuck v. City and County of San Francisco, (1977) 556 F.2d 450, 456 suggests that there is no obligation to bring Hetchy power to the City. That case held in part that the plaintiffs failed to show that bringing Hetchy power to San Francisco would result in lower rates to consumers. (Id. at 459). Given the cost of constructing or buying such facilities, it is doubtful that the City could recover its costs through rates that would be lower than PG&E's.

While Hetch Hetchy power is not delivered directly to San Francisco residents, the City does use Hetch Hetchy power for all City services. In addition, the revenues generated from the sale of the excess energy for commercial purposes go first to maintain the system and then to support other City services that would not otherwise be funded without an increase in taxes. In that respect, it is clear that the development of the Hetch Hetchy power resource is being used for the benefit of the citizens of San Francisco, perhaps not directly as intended by some, but certainly indirectly by producing much needed revenues.

In summary, San Francisco's current operation of the Hetch Hetchy system is entirely consistent with the Raker Act and all court decisions pursuant to that Act. We hope that any future articles relating to the Raker Act will be based on more careful legal research and analysis and will be happy to provide any assistance we can. We appreciate the opportunity to respond and hope that you will be able to find the space to print this letter in its entirety. Please feel free to call us if you have any further questions.

Very Truly Yours,

Deborah R. Rohrer, Esq.
Director, Claims & Contracts

Thomas M. Berliner
Deputy City Attorney

cc: Harrison C. Dunning

ATTACHMENT 1

United States
Department of the Interior
Office of the Solicitor

Mr. Arthur Brunwasser
Attorney At Law
445 Sutter Street, Suite 501
San Francisco, CA 94108

June 17, 1971

Dear Mr. Brunwasser:

This responds to your letter of June 7 addressed to the Secretary of the Interior and the Attorney General regarding alleged noncompliance by the City and County of San Francisco with the terms of the Raker Act of December 19, 1913.

In your letter you assert that the Raker Act, as a condition to the continued enjoyment of the statutory grant of a right to use Federal lands in Yosemite National Park and Stanislaus National Forest, requires the City "to construct and operate a system for the sale and distribution of electricity for the citizens of San Francisco."

We cannot agree with this proposition. Although some f the sponsors of the legislation may have hoped that the City would take over the distribution system of the Pacific Gas and Electric Company within the City limits and furnish retail electric power service to the citizenry, Congress did not write such a requirement into the Act. It chose, instead, to rely on the legislative sanction of section 6 of the Act forbidding the City to sell Hetch Hetchy power to a private corporation for resale.

Under these circumstances, the question whether the City should acquire PG&E's power distribution system is for the voters to decide, not this Department or the Federal courts.

Sincerely Yours,
(Signature undecipherable)

ATTACHMENT 2
WESTERN UNION

Roger Lapham
Mayor of San Francisco

Retel June 4. Letter on way to you saying that on assumption estimates will be approximately realized the court retains jurisdiction of case. We will not object to approval of plan for disposing of Hetch Hetchy energy through 1949 provided that your contract with irrigation districts is amended to include clause substantially like one agreed upon here by your representatives and Districts' engineers last winter, reading: "The Districts hereby agree that no electric power and energy generated by such facilities, in excess of the amount sold thereform in 1944 to Pacific Gas and Electric Company and no electric power and energy sold to the districts in accordance with this

agreement, shall be sold to any private corporation which is in the business of selling power and energy." Reasons for necessity for including this clause are stated in letter. Plan does not appear to us reasonably to assure substantial technical compliance after 1949.

Harold L. Ickes Secretary of the Interior
1949

ATTACHMENT 3

THE SECRETARY OF THE INTERIOR
WASHINGTON, D.C.
JUNE 11, 1945

My dear Mayor Lapham:

Careful study of the documents which you sent me indicates that, if one change is made in one of the contracts, this Department will be able to advise the Court that it has no objections to the proposed disposition of Hetch Hetchy energy through the year 1949, assuming that the estimates will be approximately realized and that the Court retains jurisdiction over the case. The plan does not appear to assure substantial compliance with the Raker Act beyond 1949, as thereafter large annual amounts of energy will be delivered to the Pacific Gas & Electric Company, as well as a considerable block of power in 1950, and estimated loads so far in the future are highly conjectural. We would therefore oppose present approval of the plan with respect to the years following 1949.

Even with these conditions, the plan would be technical compliance only if an amendment is made to the contract between San Francisco and the Modesto and Turlock Irrigation Districts. That contract, as submitted, does not appear to me to bring about compliance with the Raker Act.

It is clear that under the Raker Act and the decision of the Supreme Court interpreting it, the energy acquired by a private corporation for the purposes of resale must not include any substantial part of the product of the Hetch Hetchy system. Nor may the corporation's supply of energy be increased by any scheme involving a substitution of Hetch Hetchy energy for energy generated elsewhere whereby the latter is made available to the corporation. To use the Irrigation Districts as a mere conduit for Hetch Hetchy energy, the Districts selling their share to the Pacific Gas & Electric Company, would be to violate the conditions of the grant. The same would be true if the Districts were to increase the sale of energy from their own plants to the PG&E because their own needs were being met by Hetch Hetchy energy.

The contract could, and should, contain a clause specifically binding the Districts not to increase their sales of energy to any private utility company for resale. Such a clause was suggested last winter by members of my staff to Mr. Turner and the Engineers of the Districts, Mr. Plummer and Mr. Meikle. It read: "The Districts hereby agree that no electric power and energy sold to the Districts in accordance with this

agreement, shall be sold to any private corporation which is in the business of selling power and energy." At that time, this suggestion was agreeably received, but later the proposed clause was replaced by one which is at best meaningless; and fails to close the loophole which must be closed.

This clause appears in Paragraph 4 of the contract, and reads: "The Districts hereby agree that all electric power and energy received from the City hereunder will be disposed of in accordance with the terms of the Raker Act." The only provisions of the Raker Act which refer to the disposal of energy by the Districts occur in section 9(l) of the Act. That section deals with certain deliveries to the Districts "upon request," and strictly limits the disposal by the Districts. The limitations are, in fact, so strict that it section 9(l) were controlling in the present instance, the whole plan of disposing of Hetch Hetchy energy to the Districts' industrial consumers would obviously violate the law. However, section 9(l) is direct to a situation different from the one here, and therefore is not relevant to our consideration of the contract.

That leaves us with a mere vague promise by the Districts that they will no dispose of the energy in violation of a law which makes no relevant reference to disposition by them. Naturally a contracting party will not readily contract to do an illegal act. The trouble here is that we have a long record of varying opinions as to what is legal and what is not. The City argued that its earlier arrangements with the PG&E was legal. The supreme Court held that it was not. A representative of one of the Districts not long ago indicated his opinion that once the energy was delivered to the Districts they would dispose of it to any customer they desired. I believe that such disposition would be illegal, it if resulted in that Company acquiring additional energy.

Therefore, the contract must include a clause which is not a mere legal conclusion, but which will specifically obligate the Districts to pursue a course which will in fact be in compliance with the law.

In saying that, with certain amendments and conditions, I will not oppose favorable consideration of the proposed plan. I want to make clear that the plan, though technically in compliance, does not carry out the full intent of the Raker Act. Nor is it a plan for the most efficient and economic use of Hetch Hetchy energy for the benefit of the citizens of San Francisco.

The citizens would get the full benefits as intended by the Congress, only if the City brought the energy to San Francisco and distributed it to them. While, as an enforcement officer, I cannot formally oppose technical adherence to the letter of the law, it must be understood that such technical adherence does not result in accomplishing the beneficial purposes of the Act.

The Department of Justice has informally advised my office of its concurrence in the view that, it amended, as suggested above, the contract would be in reasonable compliance with the Raker Act. The Department of Justice also feels, and I concur, that we cannot agree to setting the date of the hearings before July 2. Among other reasons for this decision is the great difficulty of obtaining transportation. In any event, I hope that the desirability of an earlier date from your standpoint will be obviated by your taking action along the lines suggested in this letter.

Sincerely yours,

Harold L. Ickes
Secretary of the Interior

Authors' Reply

In reply to the Letter to the Editor from Deborah Rohrer and Thomas Berliner for the San Francisco Public Utilities Commission and the San Francisco City and County Attorneys, we feel compelled to make the following comments:

1) The Department of the Interior has not informed us that documents exist which show that the Department has found San Francisco in violation of the Raker Act continuously since 1945, but has failed to take any action for reasons that are unclear. The June 11, 1945 letter from Secretary of the Interior Harold L. Ickes (which the PUC attached to their letter) is hardly a ringing endorsement. The letter was written at the end of a seven year struggle to obtain San Francisco's compliance with the Raker Act. It is a reluctant approval, made with obvious displeasure.

2) As to Ms. Rohrer and Mr. Berliner's low opinion of the Bay Guardian, three points need to be addressed. First, the Bay Guardian was one of many sources used by the authors. It was not the foundation for the Hetch Hetchy articles. Next, it must be pointed out that the Bay Guardian holds Ms. Rohrer, Mr. Berliner, and the PUC in equally high esteem. Finally, attacking the source of information is a last resort tactic, employed when all else fails. No specific allegation of error is attributed to our reliance on information provided by the Bay Guardian.

3) The Raker Act allows the sale of surplus power for commercial purposes only after all other Raker Act purposes have been fulfilled -- including the provision of low cost power to San Francisco residents. That purpose has not been accomplished since San Francisco residents pay the fifth highest energy rates in the nation, even though Hetch Hetchy provides virtually free power. Therefore, no surplus power exists for sale.

4) The June 17, 1971 letter from the Solicitor's Office does not state that San Francisco is required to bring surplus power to the City. The letter merely states that the City is not required "to construct and operate a system for the sale and distribution of electricity for the citizens of San Francisco." This is not Secretary Ickes' opinion, nor that of the United States Supreme Court. As Secretary Ickes stated in the attached letter from the PUC:
"The citizens would get the full benefits as intended by Congress, only if the City brought the energy to San Francisco and distributed it to them."

5) The Raker Act, Section 6 limitation does not apply to municipalities, municipal water districts, or irrigation districts which resell power for residential use or pumping irrigation water. The Fifth District Court of Appeals of California has expressly found both the Turlock and Modesto Irrigation Districts to be engaged in a purely proprietary operation (the sale of electricity for profit), outside the bounds of their functions as quasi-governmental bodies.

Such sales are outside the bounds of sections 9(l) and 9(m) as Secretary Ickes emphasized. Section 9(m) specifically requires as a condition of the grant that the "grantee (San Francisco) shall develop and use hydroelectric power for the use of its people...." The intent of the law is clear -- power to and for San Francisco residents.

6) Ms. Rohrer and Mr. Berliner's use of the word "wholesale" may be misleading, considering the $38 million in profits which San Francisco has been receiving annually from its water and power system located in Yosemite National Park.

7) The new PG&E contracts create the "power shuffles" which Secretary Ickes expressly disapproved in his June 11, 1945 letter (paragraph 3). The new contracts also contain provisions which protect PG&E in case future San Francisco administrations should decide to comply with the Raker Act and municipalize the power system. PG&E is now guaranteed its profits even if the City should decide to municipalize

the system. These provisions probably raise the cost of compliance with the Raker Act's intent prohibitively.

8) The intermixing of San Francisco power with PG&E power is still a sales arrangement, regardless of any euphemism, such as "banking," which the PUC wishes to use.

9) The Raker Act's express language quoted by the United States Supreme Court in 1940 makes clear the legislative intent of the Act. Any first year law student knows that legislative intent is an integral part of any piece of legislation and that it will be judicially enforced. Ms. Rohrer and Mr. Berliner argue that since the Raker Act does not explicitly state that San Francisco must develop its public power asset at Hetch Hetchy for residential use, then it may simply ignore the law's intent. This outrageous attitude has already been addressed by the Supreme Court, and Justice Black stated that the law's intent should be followed.

10) It is interesting to note that Mr. Berliner and Ms. Rohrer are willing to dismiss what they term dicta from the 1940 Supreme Court decision, but are quite willing to base arguments on what even they concede is dicta from the 1977 Ninth Circuit case. An interesting sidelight on the matter of dicta: After the authors testified on February 17, 1988 before the San Francisco PUC on the new PG&E contracts, Mayor Agnos asked Mr. Berliner if he had any comments to make. Mr. Berliner stated that most of the language quoted to the PUC from the Supreme Court opinion was dicta. Mayor Agnos stopped Berliner to ask what he considered dicta, "the words of the statute or the statements of Congressman Raker?"

11) The irrigation districts' freedom to resell the power is contested by Secretary Ickes' letter. "Nor may the corporation's supply of energy be increased by any scheme involving a substitution of Hetch Hetchy power for energy generated elsewhere whereby the later is made available to the corporation." (paragraph 3 of Ickes' letter).

12) Mr. Berliner was contacted early in the course of research for the Hetch Hetchy articles, and he was reluctant to make any comment on the record. He did offer, however, to review the articles "for errors" before they were published. The offer was declined.

13) San Francisco's current use of Hetch Hetchy power violates the Raker Act as shown by Secretary Ickes' June 11, 1945 letter (which was enclosed with the PUC letter to ENVIRONS) and by the 1973 San Francisco Grand Jury report. Current investigations by the 1987-88 San Francisco Civil Grand Jury and the Department of the Interior's Washington and San Francisco Solicitor's Offices indicate that ENVIRONS is not alone in questioning San Francisco's compliance.

Rhetoric and ambiguous statements cannot hide the problems San Francisco created for itself.

Boyd Sprehn
Marc Picker

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