

Unpacking an Unreasonable Diversion Claim under Article X, Section 2 of the California Constitution

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I. INTRODUCTION

In 1928, Californians voted by a 3-1 margin to approve Article X, Section 2 of the California Constitution prohibiting the unreasonable use, unreasonable diversion, and waste of water.¹ The amendment, drafted by legislators, was partly in response to the California Supreme Court’s decision two years earlier in *Herminghaus v. Southern California Edison Co.*, in which the Court held that riparian water rights could claim the entire flow of a river against a subsequent appropriator, regardless of the reasonableness of the riparian’s proposed use.²

¹ Samuel C. Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 275 (1936); Waste and Unreasonable Use and Diversion, CALIFORNIA WATER IMPACT NETWORK, <https://www.c-win.org/waste-and-unreasonable-use-and-diversion-water.html/> (last visited Mar. 22, 2016).

² CAL. CONST. amend. XVIII, §§ 1, 4 (Section 1 states that the legislature may propose an

Article X, Section 2 represented a significant shift in California water rights by imposing a reasonableness standard on all uses and diversions of water, as well as a prohibition on waste, stating:

The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.³

Under this language, all uses of water had to be reasonable and not wasteful, restricting riparians like *Herminghaus* to “no more than so much of the flow thereof as may be required or used . . . in view of such reasonable and beneficial uses”⁴ The amendment also expressly prohibited unreasonable water diversions.⁵ This dramatic departure from the approach held in *Herminghaus* sent a clear message that California’s waters should be conserved and developed to serve the public welfare when possible.⁶ The amendment quickly impacted water rights jurisprudence before the courts.⁷ However, courts invoking Article X, Section 2 frequently apply the reasonableness test without distinguishing between an unreasonable use and an unreasonable diversion of water.⁸ This tendency presents some unique questions and issues that this Article addresses. First, this Article examines whether courts have approached unreasonable use and unreasonable diversions of water differently. Secondly, upon concluding that there is no difference, I explore why the constitutional amendment

amendment to the constitution, but Section 4 requires that an amendment be approved by a simple majority of California voters in a general election); 200 Cal. 81 (1926); see Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 916-17 (1996); Harry N. Scheiber, *Public Rights and The Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 248-49 (1984); Wiel, *supra* note 1, at 275 (noting that opposition to the *Herminghaus* decision pressed California legislators to draft a constitutional amendment to overturn the court’s decision); B.E. WITKIN AND MEMBERS OF THE WITKIN LEGAL INSTITUTE, Summary of California Law, 2015 Supplement 102 (10th ed. 2015).

³ CAL. CONST. art. X, § 2; Gregory S. Weber, *The Role of Environmental Law in California Water Allocation and Use System: An Overview*, PAC. L.J. 907, 919 (1994) (explaining that the passage of Article X, Section 2 was a paradigm shift away from unfettered common law rights).

⁴ Weber, *supra* note 3, at 919; CAL. CONST. art X, § 2.

⁵ CAL. CONST. art. X, § 2; see *Chow v. City of Santa Barbara*, 217 Cal. 673, 700 (1933) (stating that the purpose of the amendment is to “conserve a great natural resource . . .”).

⁶ Weber, *supra* note 3, at 919.

⁷ See *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 367 (1935); *Chow*, 217 Cal. at 670.

⁸ See, e.g., *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 524 (1935) (pumping of water treated as use of water); *Peabody*, 2 Cal. 2d at 361 (diverting water to overflow riparian lands a use of water); *Chow*, 217 Cal. at 703 (impounding water interpreted as a use of water and not as a diversion); *Erickson v. Queen Valley Ranch Co.*, 22 Cal. App. 3d 578, 585 (1971) (treating diversion through a ditch as a use of water).

specifically mentions diversions of water if all uses of water are subjected to a reasonable and beneficial use test. I argue that the diversion of water has had its own importance separate from the use of water in water law and water rights, and that this importance has carried over into California's present water rights system. Lastly, I argue that though the "reasonableness" standard is the primary test, courts faced with an unreasonable diversion claim should focus on certain factors that are often the reason why the diversion is unreasonable.

Section I of this Article will provide a short case history of Article X, Section 2. Section II will review the history of water diversion and how it has influenced current water law including Article X, Section 2. Section III will show that courts analyze reasonable use and reasonable diversion claims under the same standard of reasonableness, but that there are additional relevant factors worth judicial consideration in an unreasonable diversion case. Section IV will apply these relevant unreasonable diversion factors to examine the merits of an unreasonable diversion claim recently filed against the damming of the Tuolumne River.

II. ARTICLE X, SECTION 2: EARLY CASES

As with any new law or Constitutional amendment, one wonders how courts will interpret the new law and apply it to different factual situations. Here, the California Legislature's intent in drafting Article X, Section 2 as an amendment to the state constitution was to unequivocally depart from the holding in *Herminghaus* and subject all uses of water to a reasonableness standard.⁹ The California Supreme Court's early interpretations of Article X, Section 2 demonstrate that the Court understood the Legislature's intentions.¹⁰

A. *Chow v. City of Santa Barbara*

Chow v. City of Santa Barbara was one of the first cases where the California Supreme Court interpreted Article X, Section 2.¹¹ The plaintiffs in *Chow* sought to enjoin the defendants, the City of Santa Barbara and the Montecito County Water District, from impounding and diverting the Santa Ynez River.¹² As riparians to the land, the plaintiffs asserted that, like in *Herminghaus*, they were entitled to "... have all the waters of the river and its tributaries ... flow through and by their lands as such waters have been wont to flow in the course of nature, without interruption, interception, or interference by the defendants."¹³ The court held that allowing water to pass through the plaintiffs' property

⁹ See *Chow*, 217 Cal. at 703; Weil, *supra* note 1, at 275.

¹⁰ See *Peabody*, 2 Cal. 2d at 361; *Chow*, 217 Cal. at 703.

¹¹ 217 Cal. 673 (1933).

¹² *Id.* at 680.

¹³ *Id.*

unimpeded was clearly contrary to the reasonableness requirement of Article X, Section 2, especially given that the water would wash into the ocean.¹⁴ The court found that the plaintiff riparians would still receive more than enough water to meet their needs even after defendants had diverted and impounded the river.¹⁵ The court also found Article X, Section 2 to be a valid exercise of police power, upholding the amendment and cementing reasonable beneficial use and a prohibition of waste into California water law.¹⁶

B. Peabody v. City of Vallejo

In *Peabody v. City of Vallejo*, the court reinforced the holding in *Chow* that all uses of water are subject to the reasonableness doctrine.¹⁷ The Supreme Court's analysis in the case clarified the reasonableness standard under the constitutional amendment.¹⁸ Owners of riparian land sought to stop the City of Vallejo from impounding and diverting the Gordon Valley Creek, a tributary of the Suisan Creek.¹⁹ Plaintiff, Peabody, diverted creek water into artificial channels that would overflow and consequently deposit valuable silt and wash away unwanted salt and saturation.²⁰ Other plaintiffs riparian to the creek and adjacent to Peabody's property also claimed benefits from Peabody's channel, alleging that the overflow also passed onto their land and deposited silt.²¹ Additional plaintiffs farther up the creek also claimed benefits from the creeks overflow. These plaintiffs alleged that the creek's overflow water maintained the underground water table for wells on their property.²² Thus, impounding and diverting the creek would injure the plaintiffs as it would cause the water table would drop.²³

In clarifying the reasonableness standard as required by Article X, Section 2, the Supreme Court stated:

As to what is waste water depends on the circumstances of each case and the time when waste is required to be prevented. In sections of the state, few in number, where the rivers and streams are plentifully supplied, and there is no need for the conservation of the product thereof, the water flows freely to the sea. When needed for beneficial

¹⁴ *Id.* at 706.

¹⁵ *Id.*

¹⁶ *Id.* at 703-04.

¹⁷ 2 Cal. 2d 351, 367 (1935).

¹⁸ *Id.* at 369-70.

¹⁹ *Id.* at 358-61.

²⁰ *Id.* at 362-63.

²¹ *Id.* at 363.

²² *Id.*

²³ *Id.* at 372-73.

uses it may be stored or restrained by appropriation subject to the rights of those who have a lawful priority in a reasonable beneficial use.²⁴

Here, the plaintiffs' claimed a right to use overflow water because it deposited valuable silt and washed unwanted salt from their land.²⁵ The court held that such a right was an unreasonable use and diversion of water.²⁶ The court also found that the City's diversion would not unreasonably interfere with the water table as plaintiffs had alleged it would.²⁷

Chow and Peabody illustrate the California Supreme Court's early interpretation of Article X, Section 2. In both cases, the benefit of having floodwaters wash over the riparian land conveyed little benefit to the plaintiffs when compared to the vast amounts of water wasted. Both municipalities in *Chow* and *Peabody* sought to construct dam projects to increase water supply for domestic purposes. The courts' finding in favor of the municipality in both cases represented a shift in legal attitudes toward the conservation of water for the beneficial use of others. Under the new amendment, the court had no issue finding the existing uses of the riparians both wasteful and unreasonable.

III. WATER DIVERSIONS IN RIPARIANISM AND PRIOR APPROPRIATION

Though Article X, Section 2 separately prohibits the unreasonable use and unreasonable diversion of water, courts have consistently used the same set of legal criteria to evaluate claims for both.²⁸ An examination of how courts treat diversion in riparianism and prior appropriation will provide some clarity as to why this is the case.²⁹ This section will examine the role of diversions in each system to illuminate how diversion continues to play an important role in the determination of water rights and uses.

A. Diversions in Riparianism and Prior Appropriation

Under riparian water law, a landowner whose property is contiguous with a water body's edge has a right to use the adjacent water.³⁰ Along with the right

²⁴ *Id.* at 368.

²⁵ *Id.* at 362-63.

²⁶ *Id.* at 369.

²⁷ *Id.* at 376.

²⁸ *See e.g., Chow*, 217 Cal. at 706 (using the overflow of a river onto one's property subject to the reasonableness standard); *Peabody*, 2 Cal. 2d at 368-69 (diverting water by riparians assessed under a reasonableness standard); *Erickson*, 22 Cal. App. 3d at 585 (diverting water from a stream assessed under a reasonableness standard).

²⁹ ROBERT H. ABRAMS, JOHN D. LESHY & BARTON H. THOMPSON, JR., *LEGAL CONTROL OF WATER RESOURCES CASES AND MATERIALS* 15 (5th ed. 2013) (California's water rights system is a mix of riparianism and prior appropriation.).

³⁰ *See id.* at 29.

however, traditionally, riparians had to use said water in the tract that it originated.³¹ This requirement can be traced to the pre-industrial English natural flow doctrine.³² The natural flow doctrine views water as a resource to satisfy domestic needs as opposed to a resource for economic activity.³³ Before the industrial revolution, water was used primarily for these domestic purposes and had not achieve the economic significance that it has today.³⁴ With the industrial revolution, and the growth of off-basin development, courts began to chip away at the doctrine while on-tract limitations lingered.³⁵ Part of the reason on-tract limitations remained intact is because courts viewed the on-tract requirement as distinct from natural flow doctrine.³⁶ Thus, even though natural flow doctrine and off-tract restrictions have been replaced by reasonable use, courts have still considered the place of water use when applying the reasonableness standard.³⁷ With the passage of Article X, Section 2 however, all activities by riparians including use and diversion became subject to a reasonableness standard. In California, Article X, Section 2 replaced the traditional riparian requirement of on-tract use with a reasonableness standard, thus carrying forward the aversion of riparian systems towards diversions of water.

Diversions of water under a system of prior appropriation, on the other hand, are important for establishing a right to the water. The prior appropriative water rights system developed in the arid regions of the western United States.³⁸ To obtain an appropriative water right, a water user must put the water to beneficial use, a standard that has changed overtime.³⁹ Moreover, the appropriator must actually divert the water.⁴⁰ The diversion requirement originally existed to provide notice that an appropriation was being made.⁴¹ However, as states shifted to permit-based appropriation systems, as California did in 1914, permits came to replace diversions as the primary form of public notice.⁴² Furthermore, as interest in preserving in-stream flows for recreation and conservation grew, the diversion requirement became an obstacle for those who sought to appropriate water for environmental or recreational purposes.⁴³ Most states

³¹ *Id.* at 30.

³² *Id.*

³³ *See id.*

³⁴ *Id.* 30-31.

³⁵ *Id.* at 36-37.

³⁶ *Id.*

³⁷ *Id.*

³⁸ LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 8:3 (2015).

³⁹ ABRAMS, *supra* note 29, at 169.

⁴⁰ *Id.* at 215.

⁴¹ *Id.*

⁴² *Id.*; WITKIN, *supra* note 2, at 318; *The Water Rights System*, CAL. WATER RES. CONTROL BD., http://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.shtml.

⁴³ ABRAMS, *supra* note 29, at 215-16.

abandoned the diversion requirement after adopting a permit system.⁴⁴ California, however, still requires an actual diversion in order to acquire an appropriative right.⁴⁵

Article X, Section 2 embodies the important features of traditional prior appropriation requirements: it requires that water be put to beneficial use and prohibits both the unreasonable use and diversion of water.⁴⁶ This requirement applies to riparian users as well.⁴⁷ Like the reasonableness standard, beneficial use “depends upon the facts and circumstances of each case.”⁴⁸ The prohibition on unreasonable diversion is made more relevant because California courts still require a water user to divert water in order to claim an appropriation.

B. Article X, Section 2 – A Reflection of California’s Mixed Water Rights System

California’s water laws reflect its mixed riparian and appropriative water rights system. This mixing is well illustrated in Article X, Section 2, where both the reasonableness and beneficial use requirements apply to water users throughout the state. These requirements apply to water uses and diversions alike.

As shown above, the diversion of water has played a unique role in both riparian and prior appropriative water rights systems. Under riparian systems, water diversions were heavily disfavored before uses of water substantially changed with the Industrial Revolution. Within prior appropriative systems, diversion of water has, and continues in California to be, legally important for establishing a water right. Thus, it is sensible that the California legislature specifically included language prohibiting the unreasonable diversion of water in Article X, Section 2.

IV. SAME LEGAL STANDARD, DISTINCT FACTORS

The legal history of water diversions provides context for its continued importance in Article X, Section 2. Recall that Article X, Section 2 specifically prohibits both the unreasonable use and unreasonable diversion of water and that courts have evaluated both claims under the same legal standard.⁴⁹ California courts have stated that an effort should be made to “give effect and significance to every word and phrase of a statute.”⁵⁰ That the California legislature

⁴⁴ *Id.*

⁴⁵ *Id.* at 216.

⁴⁶ CAL. CONST. art. X, § 2.

⁴⁷ *Id.*

⁴⁸ *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 567 (1935).

⁴⁹ *See supra* note 28.

⁵⁰ *Save Our Heritage Organisation v. City of San Diego*, 237 Cal. App. 4th 163, 174 (2015)

specifically inserted language separately prohibiting unreasonable diversions suggests that a diversion is held to a different legal standard than a use. If diversion and use are the same, the legislature would have not have made the distinction in the first place; all water uses for consumption, diversion, or otherwise would be subject to the same reasonable beneficial use standard.⁵¹ In a sense, then, the issue all comes down to semantics: what constitutes a use of water versus a diversion?

One option is to say that a diversion is a type of water use. Samuel C. Wiel predicted this interpretation in 1928 when Article X, Section 2 was first heading to the ballot.⁵² In his article, *The Pending Water Amendment to the California Constitution, and Possible Legislation*, Wiel argued that the amendment would not the change the law for riparians concerning reasonable use.⁵³ History shows that Wiel's argument was incorrect because the California Supreme Court in *Chow* and *Peabody* repudiated riparian rights to command the whole flow of river.⁵⁴ However, in these cases, the Court failed to address whether unreasonable diversion claims are legally distinct from unreasonable use claims, despite the fact that both cases involved water uses and water diversions. In *Chow*, the defendant planned to divert and impound the water, whereas the plaintiffs sought to command the river's entire flow to wash over their property.⁵⁵ In *Peabody*, both the plaintiffs and defendant sought to divert water from the creek.⁵⁶ The fact that the court did not address the difference between impoundments, diversions, and pure uses of water in either case suggests that uses of water and diversions of water are both subject to the reasonableness standard. Later cases also support this conclusion; some cases progeny to *Chow* and *Peabody* also do not make any distinction between use and diversion.⁵⁷

Certain State Water Resources Control Board decisions have made the distinction between water uses and water diversion. In these cases, the Water

(citing *Steinberg v. Amplica, Inc.*, 42 Cal. 3d 1198, 1205 (1986)).

⁵¹ *See id.*

⁵² Samuel C. Wiel, *The Pending Water Amendment to the California Constitution, and Possible Legislation*, 16 CALIF. L. REV. 169, 175 (1928), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3904&context=californialawreview/> (explaining that unreasonable use and diversion claims are "substantially the same") (last visited Mar. 10, 2016).

⁵³ *Id.*

⁵⁴ *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 369 (1935); *Chow v. City of Santa Barbara*, 217 Cal. 673, 699-700 (1933); Wiel, *supra* note 1, at 284.

⁵⁵ *Chow*, 217 Cal. at 679-80.

⁵⁶ *Peabody*, 2 Cal. 2d at 360-61.

⁵⁷ *See Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 502-03 (1935) (directing pumping of water out of watershed); *Erickson v. Queen Valley Ranch Co.*, 22 Cal. App. 3d 578, 584-85 (1971) (diverting water from a creek treated as a use of water). *See also Imperial Irr. Dist.*, No. 1600, 1984 WL 947798, at *2-5 (Cal. St. Wat. Res. Control Bd. June 21, 1984) (order) ("[T]he direct diversion of water for frost protection in the crucial period constitutes an unreasonable use and an unreasonable method of use of water within the purview of the Constitution.").

Board applied a reasonableness standard to the water diversions but considered different factors than those considered in a reasonable use case, such as the time and location of diversion.⁵⁸ Therefore, while the reasonableness standard for use and diversion is the same, it is important for a court to take notice of factors that are exclusive to a diversion of water.

A. Reasonableness and Beneficial Use

Before addressing the particular factors considered in an unreasonable diversion claim, it is helpful to review the legal criteria of reasonableness, waste, and beneficial use. Article X, Section 2 prohibits the unreasonable use, diversion, and waste of water, and requires that users put water to beneficial use.⁵⁹ Courts and the Water Board have treated the waste prohibition and beneficial use requirement as elements of the reasonableness standard.⁶⁰ In *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, the California Supreme Court stated that beneficial use:

depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.⁶¹

The term “beneficial use” is defined statutorily and on a case-by-case basis after a factual inquiry.⁶² Because of its contextual nature, activities that were not deemed beneficial use at one time may be deemed beneficial later under changed circumstances.⁶³ The beneficial use analysis examines not only the current water use but also other possible beneficial uses of that water.⁶⁴

With regard to reasonable use, the California Supreme Court has similarly stated that what is a reasonable use “depends on the circumstance of each case,” and that inquiry cannot occur in a vacuum “from state-wide considerations of

⁵⁸ *Envtl. Def. Fund, Inc. v. E. Bay Mun. Util. Dist.*, 26 Cal. 3d 183, 188 (1980) (describing the activity at issue as a diversion of water); *People ex rel. State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743, 750-51 (1976) (pumping water directly from a river possibly an unreasonable diversion); *Lagunitas Creek*, No. WR 95-17, 1995 WL 694381, at *1 (Cal. St. Wat. Res. Control Bd. Oct. 26, 1995) (order) (analyzing the existing diversions of water in a creek).

⁵⁹ CAL. CONST. art. X, § 2.

⁶⁰ *Imperial Irr. Dist.*, No. 1600, 1984 WL 947798 at *9, 11-12.

⁶¹ *Tulare*, 3 Cal. 2d at 567.

⁶² *Chow v. City of Santa Barbara*, 217 Cal. 673, 695 (1933).

⁶³ See Cal. Water Code § 1257 (2016).

⁶⁴ See *id.*

transcendent importance.”⁶⁵ This language illustrates that the court recognized the increasing importance of state-level water conservation.⁶⁶

Courts and state agencies consider several factors when determining when a particular water use is unreasonable. The Water Board discussed these factors in *In the Matter of Alleged Waste and Unreasonable Use of Water by Imperial Irrigation District*.⁶⁷ There, a farmer asked the Water Board to investigate the Imperial Irrigation District’s (“the District”) alleged unreasonable use of and waste of water.⁶⁸ The farmer alleged that the District kept too much water in its delivery canals, leading to frequent spills, had no reservoirs to manage the delivery of water to the canals, and did not have any recovery system for spilled water.⁶⁹ The farmer also alleged that much of the spilled water ended up wasted and unused in the Salton Sea.⁷⁰ The Water Board considered the following factors in order to determine whether the District’s water use was waste and unreasonable: other potential beneficial uses of the water; the amount of water needed for the current use; the reasonableness and cost of saving the water; whether the water-saving methods are conventional and reasonable; and the possible physical solution to saving the water.⁷¹ The court found that the District was allowing approximately one million acre-feet per year of water to flow into the Salton Sea, where it no longer served a beneficial use.⁷² The court determined that this water could be used for other beneficial uses, including consumption by District customers, groundwater storage, and conserved water transfers.⁷³ The court ordered the District to implement water conservation and physical solution measures to the extent necessary to save water.⁷⁴ The court also found that the proposed solutions were conventional and reasonable solutions for an irrigation district to pursue.⁷⁵

⁶⁵ *Joslin v. Marin Municipal Water Dist.*, 67 Cal. 2d 132, 140 (1967).

⁶⁶ *See id.*

⁶⁷ *Imperial Irrigation District*, No. 1600, 1984 WL 947798, at *11-14 (St. Wat. Res. Control Bd. June 21, 1984) (order).

⁶⁸ *Id.* at *1-2.

⁶⁹ *Id.* at *2-3.

⁷⁰ *Id.*

⁷¹ *Id.* at *11-14. A physical solution serves to eliminate or mitigate damages in lieu of actual damages, and providing the water resource to all users in the dispute. *See Peabody*, 2 Cal. 2d at 379-80.

⁷² *Id.* at *32.

⁷³ *See id.* at *26.

⁷⁴ The State Water Resources Control Board ordered the Imperial Irrigation District to, among other things, submit a conservation plan and evidence that it implemented procedures to monitor tailwater discharge, and make repairs to defective tailwater structures and approach channels. *Id.* at *33.

⁷⁵ *See id.* at *18-24.

B. Unreasonable Diversions

While Article X, Section 2 also requires the diversion of water to be reasonable, courts and the Water Board have considered notably different factors when analyzing an unreasonable diversion claim, factors different than what the Water Board relied on in *Imperial Irrigation District*. These factors include the timing and point of diversion, transmission losses during diversion, the method of diversion, in-stream flows for recreation and wildlife, and physical solutions related to the diversion.⁷⁶ Although the standard ultimately is reasonableness, courts and the Water Board are better equipped to evaluate unreasonable diversion claims by focusing on these diversion-specific factors.⁷⁷

In *People ex rel. State Water Resources Control Board v. Forni* (“*Forni*”), the court applied some of the above factors to reach a solution.⁷⁸ There, a vineyard owner pumped water from the Napa River onto his land on multiple occasions for frost protection.⁷⁹ These diversions resulted in a lack of water for other growers to use during a crucial frost protection period.⁸⁰ The court found this method of diversion to be unreasonable as it caused “great temporary scarcity” that prevented other vineyard owners from protecting their grapes from the frost.⁸¹ The *Forni* court held that the vineyard owner’s diversion was unreasonable due to its poor timing and inappropriate method of diversion.⁸² As a solution, the Water Board proposed constructing reservoirs or winter storage systems to alleviate demand during the crucial frost-protection period.⁸³ By focusing on the factors considered by the court, the Board was able to suggest a possible solution that provided water for the vineyard owner without depriving other owners during the period of high demand.

In *Environmental Defense Fund v. East Bay Municipal Utilities District* (“*EBMUD*”), the East Bay Municipal Utilities District (“the East Bay District”) planned to divert water from the American River to meet growing service needs.⁸⁴ The Easy Bay District considered various diversion options before ultimately settling on the Folsom-South Canal, which would have diverted water away from the lower American River, an area popular for its scenery and recreational opportunities.⁸⁵ At the same time, the County of Sacramento had already invested six million dollars in developing the area around the river into a

⁷⁶ See *supra*, note 79.

⁷⁷ *Id.*

⁷⁸ 54 Cal. App. 3d 743 (1976).

⁷⁹ *Id.* at 747.

⁸⁰ *Id.* at 750.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 26 Cal. 3d 183, 188-89 (1980).

⁸⁵ *Id.*

regional park.⁸⁶ The plaintiffs sought to enjoin the East Bay District from completing the project, alleging that the diversion would reduce recreational opportunities on the river including the loss of whitewater rafting and fishing on the upper American River.⁸⁷ The plaintiffs also alleged that the diversion would hasten wild river destruction and pollute San Francisco Bay while increasing its salination.⁸⁸ The plaintiffs argued that the East Bay District could alternatively divert water at a lower point on the American River, just as economically, while still preserving scenic and recreational opportunities on the lower and upper river.⁸⁹ The court did not decide *EBMUD* on the merits.⁹⁰ However, the court did conclude that Article X, Section 2 requires the courts to consider the “relative benefit to be derived from all beneficial uses of the water concerned, including domestic irrigation, municipal, and industrial use, as well as use for preservation and enhancement of fish, wildlife, and recreational uses.”⁹¹ The court reinforced these requirements by citing to Water Code Section 100, 275, and 1257, which restate Article X, Section 2.⁹² Section 1257, for example, requires the Water Board to use all appropriate means to prevent the activities prohibited in Article X, Section 2, including unreasonable diversion.⁹³

The court’s discussion in *EMBUD* of the history of the canal and dam suggests that a diversion’s reasonableness depends in part on the potential impact to existing recreational uses. The fact that the American River enjoys frequent recreational use seemed to weigh heavily into whether to proceed with the diversion despite public outcry. The diversion would have injured one existing, highly popular use for another use with questionable benefits, when the diversion could have occurred elsewhere with the same economic cost.⁹⁴

The Water Board order in *Matter of Fishery Protection and Water Right Issues of Lagunitas Creek* (“*Lagunitas Creek*”) similarly exemplifies Article X, Section 2’s unreasonable use and diversion prohibition.⁹⁵ In *Lagunitas Creek*, the Water Board assessed diversions by three water users: the Marin Municipal Water District, the North Marin Water District, and Waldo Giacomini.⁹⁶ The

⁸⁶ *Id.* at 188.

⁸⁷ *Id.* at 191.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 200.

⁹¹ *Id.* at 196-200.

⁹² *Id.*

⁹³ Cal. Water Code § 1257.

⁹⁴ See *Env’tl. Def. Fund.*, 26 Cal. 3d at 188-92; Gregory A. Thomas, *The Future of Water Law Reform in California a Quarter Century After the Governor’s Commission*, 36 MCGEORGE L. REV. 495, 516 (2005); Winnie Kam, *History of the Auburn Dam*, <http://are.berkeley.edu/~pberck/winnie/AuburnDam/>.

⁹⁵ *Lagunitas Creek*, No. WR 95-17, 1995 WL 694381, at *2 (St. Wat. Res. Control Bd. Oct. 26, 1995) (order).

⁹⁶ *Id.* at *1.

order reviewed previously established in-stream flow requirements for the protection of certain fish species found in the creek.⁹⁷ The Water Board derived the authority to establish minimum flows from Article X, Section 2; Water Code 100, 275, 1243, and 1253; as well as the public trust doctrine.⁹⁸ In particular, Waldo Giacomini diverted creek water to irrigate his pasture from May to October each year.⁹⁹ Giacomini would construct a seasonal dam to prevent saltwater intrusion on his property in the late spring and summer.¹⁰⁰ Upon review of the data presented, the Water Board concluded that Giacomini's seasonal dam and diversion had harmful effects on migrating salmonoids, neomyxid shrimp, and other fish.¹⁰¹ Specifically, the dam created a barrier to migrating fish and created a temperature difference in the water above and below the dam, which harmed the salmonoids.¹⁰² The dam also interrupted the natural freshwater and saltwater exchange in the creek, harming species in the lower portion of the creek.¹⁰³ The Water Board concluded that Giacomini could avoid these adverse effects by diverting water at a higher point along the creek, but did not discuss the costs or reasonableness of such alternatives.¹⁰⁴ Nonetheless, the Water Board concluded that continued construction of the seasonal dam would violate Article X, Section 2 as an unreasonable diversion. The Water Board allowed Giacomini to build the dam for two more years to give him time to seek alternatives, but required that it be installed after June 15 and removed by November 1.¹⁰⁵ In sum, the Water Board concluded that Giacomini could not use his seasonal dam to divert water because the diversion harmed fish and other species. The Water Board also concluded that Giacomini could, by working with North Marin Water District, find a reasonable alternative to the dam and diversion to irrigate his pasture and prevent saltwater intrusion onto his property.¹⁰⁶

Forni, *EBMUD*, and *Lagunitas Creek* are decisions where the core issue was a proposed or existing diversion. In *Forni*, the challenge was to the timing and method of the diversion which injured others existing use of the water.¹⁰⁷ At issue in *EBMUD* and *Lagunitas Creek* was the location of a diversion that had resulted or would result in injury to other existing uses.¹⁰⁸ *Lagunitas Creek* also

⁹⁷ *Id.*

⁹⁸ *Id.* at *1-3.

⁹⁹ *Id.* at *18.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at *51-52.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *53.

¹⁰⁶ *See id.* at *20-21, 54.

¹⁰⁷ *People ex rel. State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743, 747-48 (1976).

¹⁰⁸ *Envntl. Defense Fund, Inc. v. E. Bay. Mun. Util. Dist.*, 26 Cal. 183, 191, 199-200 (1980);

provided a temporary remedy to the existing diversion by limiting when the seasonal dam could be in place.¹⁰⁹ Notable in all three cases is that the diversion would have harmed important, ongoing, beneficial uses. This factor seems to weigh heavily in determining whether a diversion is reasonable, and what the extent of the other beneficial uses is. The continued pumping in *Forni* deprived other vineyards of using water to prevent their grapes from freezing.¹¹⁰ The Auburn-South Canal and reservoir would have resulted in a loss of recreational opportunities along a very popular stretch of the American River.¹¹¹ Before the order in *Lagunitas Creek*, the Water Board had already set certain requirements to protect the in-stream wildlife including the wildlife harmed by Giacomini's diversion.¹¹² In *Lagunitas Creek*, the Water Board affirmed its commitment to conserving the creek habitat for the affected wildlife over Giacomini's historic method of diversion. It is also important to note that certain portions of Lagunitas Creek flow through Samuel P. Taylor State Park, which is administratively part of the National Park System.¹¹³ The park averages 150,000 visitors a year many who come to enjoy the creek itself.¹¹⁴ This existing and important beneficial use certainly played a factor in the Water Board's decision to require more in-stream protections to preserve the creek for recreational and aesthetic uses.¹¹⁵

These cases help to identify the important factors that courts consider when evaluating unreasonable diversion claims. While the standard of reasonableness is the same for use and diversion, in practice, courts and agencies considering diversions appear to focus on the timing, location, and method of diversion in determining reasonableness. One could imagine a scenario where a diversion of water is unreasonable but the use of the water is reasonable, and vice versa.¹¹⁶ Thus, while the reasonableness standard applies to uses and diversions, courts consider additional, unique factors when evaluating unreasonable diversion claims.

Lagunitas Creek, No. WR 95-17, 1995 WL 694381, at *49-53 (St. Wat. Res. Control Bd. Oct. 26, 1995) (order).

¹⁰⁹ *Lagunitas Creek*, No. WR 95-17, 1995 WL 694381 at *49-53.

¹¹⁰ *Forni*, 54 Cal. App. 3d at 747-48.

¹¹¹ *Env'tl. Def. Fund*, 26 Cal. 3d at 191.

¹¹² *Lagunitas Creek*, No. WR 95-17, 1995 WL 694381 at *1-2.

¹¹³ *Id.* at *46-47.

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ For instance, one could imagine a ditch that is excessively wasteful, but when the water arrives to the place of use it is used reasonably for irrigating crops.

V. UNREASONABLE DIVERSION AND HETCH HETCHY VALLEY

Recently, the prohibition against unreasonable diversion under Article X, Section 2 has re-entered the legal spotlight.¹¹⁷ In 2015, Restore Hetch Hetchy (“RHH”), an environmental non-profit organization, filed a complaint against the City and County of San Francisco (“CCSF”) alleging that CCSF’s continued operation of the O’Shaughnessy Dam, which dams the Tuolumne River in order to flood Hetch Hetchy Valley in Yosemite National Park, is an unreasonable method of diversion.¹¹⁸ The O’Shaughnessy Dam was completed in 1923 by San Francisco to provide water and electricity to the Bay Area.¹¹⁹ Today, the dam provides water to over 2.6 million people in the Bay Area and generates 1.6 billion kilowatt hours of electricity per year.¹²⁰ At the heart of the unreasonable diversion claim is that because Hetch Hetchy Valley is in Yosemite National Park, the diversion and flooding of the valley for electricity and water supply does not maximize beneficial use of the valley given the vast potential for recreational and aesthetic enjoyment.¹²¹ The complaint alleges that there are feasible alternatives to flooding Hetch Hetchy that would provide the necessary water and power needed for San Francisco.¹²² These feasible alternatives would open up the valley to the numerous other beneficial uses.¹²³

In addressing the feasible alternatives, the complaint notes that California agencies have made greater investments to protect other state water resources such as the Bay-Delta, San Joaquin and Trinity Rivers, and Mono Lake.¹²⁴ In light of these other projects, RHH argues that removing the dam and restoring the valley is reasonable because it would cost less than these past projects while providing extraordinary benefits.¹²⁵ RHH also argues that CCSF would still be able to provide enough water to meet the demands of the Bay Area.¹²⁶ Furthermore, the complaint alleges that the loss of hydroelectric power from the dam would not significantly impact California’s Renewable Portfolio Standard because the dam generates less than one percent of California’s renewable

¹¹⁷ See Richard Frank, *The Battle to Restore Hetchy Valley Moves to The Courts*, LEGAL PLANET (Apr. 22, 2015), <http://legal-planet.org/2015/04/22/the-battle-to-restore-hetch-hetchy-valley-moves-to-the-courts/> (last visited Mar. 21, 2016).

¹¹⁸ *Id.*

¹¹⁹ Demurrer at 2-5, *Restore Hetch Hetchy v. City and County of San Francisco*, https://d3n8a8pro7vnm.cloudfront.net/hetchhetchy/pages/105/attachments/original/1453426583/12-22-16_CCSF_demurrer.pdf?1453426583 (hereinafter *Demurrer*).

¹²⁰ *Id.*

¹²¹ Complaint at 19, *Restore Hetch Hetchy v. City and County of San Francisco*, https://d3n8a8pro7vnm.cloudfront.net/hetchhetchy/pages/67/attachments/original/1429569562/2015.04.21_Hetch_Hetchy_Petition_Final.pdf?1429569562/ (hereinafter *Hetch Hetchy*).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 15.

¹²⁵ *Id.*

¹²⁶ *Id.* at 14-15.

power.¹²⁷ According to the complaint, this loss of power could be replaced with alternative power sources like wind or solar for about \$669 million.¹²⁸ This cost, RRH alleges, pales in comparison to the \$8.7 billion that will be brought in over fifty years from recreational activity in and around Hetch Hetchy Valley.¹²⁹ The complaint also relies on the language of *Tulare Irrigation District*, where the court stated what is reasonable at one point in time may not be reasonable later.¹³⁰ In this context, while it may have been reasonable for CCSF to build O'Shaughnessy Dam in the early 1920s and divert the Tuolumne River, given current water shortages, growth of alternative energy sources, and increasing interest in National Parks, the dam and diversion is no longer reasonable.

Public opposition to dams and hydropower has grown in recent years in response to the increased viability of other renewable energy technologies along with increased interest in the restoration of wild rivers.¹³¹ Generally, dams require a consistent flow of water, may cause habitat destruction, and inundate areas that could be used for recreational and aesthetic enjoyment or conservation. If plaintiffs are correct that the benefits of removing O'Shaughnessy Dam outweigh the costs, a court may find that the dam constitutes an unreasonable diversion under Article X, Section 2.

To succeed, the plaintiffs will have to demonstrate that the potential beneficial uses of the valley clearly outweigh its current beneficial use as San Francisco's primary reservoir. The Hetch Hetchy Reservoir stores about twenty-five percent of CCSF's entire water system, so removing the dam would require San Francisco to develop alternative water supplies elsewhere.¹³² The law seems to support the plaintiff's arguments, as evidenced by cases like *Forni*, *EBMUD*, and *Lagunitas Creek*, which focused on the available benefits of other uses if the diversion was modified.¹³³ In the case of Hetch Hetchy Valley, RHH argues that there are numerous other potential beneficial uses of the Tuolumne River, making a diversion that does not allow for these beneficial uses unreasonable.¹³⁴

Restore Hetch Hetchy cannot argue that Californians made substantial recreational or aesthetic use of Hetch Hetchy Valley prior to the construction of O'Shaughnessy Dam.¹³⁵ When Yosemite became a national park in 1890, Hetch

¹²⁷ *Id.* at 15-16.

¹²⁸ *Id.*

¹²⁹ *Id.* at 11.

¹³⁰ *Id.* at 18.

¹³¹ See generally Abrams, *supra* note 29, at 760-65; DAMNATION (Felt Soul Media 2014), <http://damnationfilm.com/>.

¹³² *Hetch Hetchy*, *supra* note 121, at 14.

¹³³ See *supra* Part IV.B.

¹³⁴ *Hetch Hetchy*, *supra* note 121, at 19-21 (listing other beneficial uses, including recreational opportunities in Hetch Hetchy Valley, aesthetic value, and recreational values outside the park).

¹³⁵ See RAY JONES, *IT HAPPENED IN YOSEMITE NATIONAL PARK: REMARKABLE EVENTS THAT SHAPED HISTORY* 75 (2010).

Hetchy Valley was included, but in 1901 plans for flooding the Valley were already in motion.¹³⁶ Thus, plaintiffs will need to demonstrate that although Hetch Hetchy Valley was not widely used before the dam was built, Californians would make significant aesthetic and recreational use of the valley today.

The Hetch Hetchy litigation presents a unique opportunity for California courts to evaluate a large-scale unreasonable diversion claim under Article X, Section 2 of the California Constitution. As this Article has illustrated, unreasonable diversion claims are assessed under a reasonable use standard. This standard has changed over time. Moreover, in unreasonable diversion cases, the focus has increasingly been on in-stream, non-consumption uses as seen in *Forni*, *EBMUD*, and *Lagunitas Creek*. These in-stream uses come into direct conflict with the traditional uses of the O'Shaughnessy Dam. The court will ultimately need to weigh the evidence presented on both sides to determine whether in present times the current use of the Tuolumne River is a reasonable diversion, given other potential beneficial uses. Ideally, the court will conduct its analysis in accordance with the factors emphasized in the discussed diversion cases, while being mindful that what is reasonable has changed since the dam's construction.

VI. CONCLUSION

The act of diverting water is an integral part of water rights, with a role in both riparian and prior appropriation systems. In California, diversions are often the centerpiece of water rights litigation as the state relies on dams and reservoirs to supply water and power to ever-growing municipalities on its coast. Article X, Section 2 signaled the transition away from unreasonable uses of water to a standard of reasonableness for all users in the context of place, manner, time, and competing uses. This standard has come to encompass in-stream uses, recreational uses, and conservation as public attitudes in California have changed along with legislative acts that have affirmed these uses as beneficial. Moreover, as this Article has demonstrated, the protection and concern for in-stream uses has been emphasized in cases alleging an unreasonable diversion. Going forward, as competing interests continue to clash over water in this state, Article X, Section 2 gives advocates of in-stream uses a constitutional foundation to protect their interests. The Hetch Hetchy litigation is a unique opportunity to test the bounds of Article X, Section 2.

¹³⁶ See *Demurrer*, *supra* note 119, at 2; Jason L. Hanson, *The Hetch Hetchy Letters, If a Group of Intellectuals Argues in a Forest, and then that Forest is Submerged Under Water, Does Their Argument Matter?*, Center of the American West Thompson Writing Awards, at 6-7, <http://centerwest.org/wp-content/uploads/2011/01/gradnonhanson.pdf/>.