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To: Spreck Rosekrans, Restore Hetch Hetchy
From: Michael Lozeau, Esq., Lozeau Drury LLP
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Re: Legal Analysis of Raker Act, Section 9(a)(5) and the Park Service’s Lack
of Authority to Restrict Boating on the Hetch Hetchy Reservoir

The following analyzes the language of Section 9 of the Raker Act that excludes restrictions by the National Park Service on visitors’ use of the Hetch Hetchy watershed in furtherance of assisting the City and County of San Francisco in avoiding having to filter the water and whether the Park Service’s sanitary regulations for the Hetch Hetchy watershed are consistent with the Act.

The Raker Act’s Sanitary Regulation Provisions.

Section 9 includes a list of conditions to the Hetch Hetchy grant to the City. Raker Act, § 9 (“That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:…”). Section 9 sets forth three specific restrictions on visitors’ use of the “watershed above and around said reservoir sites”:

(a) That upon the completion of the Hetch Hetchy Dam or the Lake Eleanor Dam, in the Yosemite National Park, by the grantee, as herein specified, and upon the commencement of the use of any reservoirs thereby created by said grantee as a source of water supply for said grantee, the following sanitary regulations shall be made effective within the watershed above and around said reservoir sites so used by said grantee:

First. No human excrement, garbage, or other refuse shall be placed in the waters of any reservoir or stream or within three hundred feet thereof.

Second. All sewage from permanent camps and hotels within the watershed shall be filtered by natural percolation through porous earth or otherwise adequately purified or destroyed.

Third. No person shall bathe, wash clothes or cooking utensils, or water stock in, or in any way pollute, the water within the limits of the Hetch Hetchy Reservoir or any reservoir constructed by the said grantee under the provisions of this grant, or in the streams leading thereto, within one mile of said reservoir; ...

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Raker Act, § 9(a)(1)-(3).

The fourth paragraph requires the City to pay for the Park Service’s investigation and enforcement of those restrictions. *Id.*, § 9(a)(4).

Paragraph 5 addresses the circumstance where the three specified restrictions turn out to be insufficient to protect the reservoir’s “purity”:

Fifth. If at any time the sanitary regulations provided for herein shall be deemed by said grantee insufficient to protect the purity of the water supply, then the said grantee shall install a filtration plant or provide other means to guard the purity of the water. ***No other sanitary rules or restrictions shall be demanded by or granted to the said grantee as to the use of the watershed by campers, tourists, or the occupants of hotels and cottages.***

Raker Act, § 9(a)(5) (emphasis added). The first sentence makes clear that the City is solely responsible for installing filtration or “other means to guard the purity of the water” should the three specified sanitary regulations prove deficient. The second sentence then constrains the “potential other means” by expressly prohibiting the Department of the Interior and Park Service from enacting or implementing any other rules or restrictions regulating the use of the Hetch Hetchy watershed by visitors.

Although other more general language within the Raker Act suggests that the Secretary of the Interior may ascribe certain conditions and regulations to the City, those general provisions would not prevail over the specific limit identified in Section 9(a)(5) regarding sanitary regulations and visitor uses. See *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016) (“a ‘narrow, precise, and specific’ statutory provision is not overridden by another provision ‘covering a more generalized spectrum’ of issues”) (this canon goes by the Latin name of *generalia specialibus non derogant*). In particular, section 4 of the Raker Act states “[t]hat the said grantee shall conform to all regulations adopted and prescribed by the Secretary of the Interior governing the Yosemite National Park and by the Secretary of Agriculture governing the Stanislaus National Forest, and shall not take, cut, or destroy any timber.....¹ Assuming this broad directive is not limited to cutting timber, it would not prevail over Section 9’s specific language prohibiting sanitary regulations restricting visitors’ use of the Hetch Hetchy watershed beyond the three prescribed measures.

¹ in the preamble to the Raker Act, the statute provides for San Francisco to take “stone, earth, gravel, sand, tufa and other materials” to construct the project “under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture, within their respective jurisdictions, for the protection of the public lands, the Yosemite National Park, and the Stanislaus National Forest...” Raker Act, Preamble. The conditions and regulations referenced there are limited to those regulating the taking of those construction materials.

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The specific list of activities prohibited by Section 9(a)(3) cannot be expanded to prohibit non-polluting uses of the reservoirs and surrounding areas. The doctrine of *expressio unius est exclusio alterius* “as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.” *Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d 881, 885 (9th Cir. 2005). “This canon only applies, however, if ‘it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.’” *Washington v. United States Dep’t of State*, 996 F.3d 552, 562 (9th Cir. 2021). Given Congress’ specific sanitary measures and its express statement that the list not be expanded to include any further restrictions on visitor use, the maxim is readily applicable here.

The intent of Congress to forbid the Secretary and Park Service from further restricting visitor use of the Hetch Hetchy watershed for purposes of assisting the City in keeping the reservoir water clean is confirmed by the legislative history for the Raker Act, i.e. the Congressional debates.

“In the task of statutory interpretation, ‘our purpose is always to discern the intent of Congress.’” *U.S. Aviation Underwriters Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1096 (9th Cir. 2012) (citations omitted). “To determine the plain meaning of a statutory provision, we examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy. If ambiguity exists, we may use legislative history as an aid to interpretation.” *Id.*, quoting *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158, 1171 (9th Cir. 2011). See *United States v. City & Cnty. of San Francisco*, 23 F. Supp. 40, 44 (N.D. Cal. 1938), *decree rev’d*, 106 F.2d 569 (9th Cir. 1939), *rev’d*, 310 U.S. 16, 60 S. Ct. 749, 84 L. Ed. 1050 (1940) (looking to Raker Act’s legislative history to discern Congress’ intent – “The aims of the Raker Act were made apparent by both the Senators and the Representatives who discussed the bill during the months preceding its passage in 1913.”).

Congress expressly discussed and confirmed that the sanitary rules to be required by the Secretary would be limited to what was listed. After summarizing the sanitary regulations included in Section 9, the analysis of the Raker Act, H.R. 7207, introduced by Congressman J.R. Knowland, states, “Should these regulations prove insufficient to the grantee, then the grantee shall install a filtration plant, and no other sanitary rules or restrictions shall be granted.” 63 Cong. Rec. 3922. The analysis continues, stating:

It is intended that the use of the watershed shall be free to campers and visitors, and that **no onerous or prohibitive sanitary regulations shall ever be imposed**. The sanitary experts assert that the storage of water in the Hetch Hetchy Reservoir will insure adequate purity, and the Government officials assert that the regulations herein are only those required by common decency and for the protection of campers themselves.

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Id. (emphasis added). Likewise, Senator Gronna introduced a report from the Army Engineers which quotes the report of San Francisco's consulting engineer Mr. Allen Hazen, an integral part of the report prepared for the City by John R. Freeman entitled "The Hetch Hetchy Water Supply For San Francisco, 1912" (the "Freeman Report") which was circulated to Congressional members. The excerpt highlighted by Senator Gronna states that, in regard to sanitary restrictions, "No modification of or addition to the rules-now in effect-need be made." 63 Cong. Rec. 258. The Raker Act conditions reflected the rules in place at the time. 63 Cong. Rec. 3922 ("[the Raker Act sanitary] regulations are practically identical with the rules now in force in the Yosemite National Park").

The legislative history also indicates that the uses which Congress intended the grant to expand or not adversely affect included boating on the authorized reservoir. As Congressman Church explained,

and so I say to you, as I said before, I believe a lake covering part of the Hetch Hetchy Valley will add new charm to this already beautiful place, for around about this lake campers and nature lovers will pitch their tents, and instead of a valley, in which the mountains are already rich, will appear a beautiful mountain lake, blue, deep, and clear, in which fishes swim and **on the surface of which rowboats and sailboats glide**; and nature lovers and natural lovers and rheumatic members of the Sierra Club will sit on the rocks along the shore in the morning time, and just before sunrise will look upward at the great cliffs, rising perpendicular, thousands of feet on every side, and then down into the clear waters where the great shadows fall and into the waters as if into a looking-glass all the outlines and beauties of the mountains will again appear; and as the sun sinks in the evening behind the mountains to the west the same picture will greet the eye, and at bedtime, just as the nature lover spreads his blankets upon the pine boughs, the real lovers, hand in hand and arm in arm, will wander among the rocks along the shore, and there will be a sky above and a sky below, for the moon and the stars will shine in the waters even as they do overhead, and the moonlight wanderers, looney and mooney as they are, will see beauty everywhere.

63 Cong. Rec. 3923-24 (emphasis added). Congressman Church's comment reflected the understanding of the bill's proponents that the reservoir would be accessible to park visitors for boating and unfettered access to its shoreline. This understanding was reiterated by Senator Thomas, responding to Senator Smoot's statement that the bill contained a "provision, as I remember, that no one is allowed within 300 feet of the lake," stated, "Oh, no. There are regulations for sanitary purposes that extend for 800 feet from the lake, **but that does not prevent people from going on the lake.**" 63 Cong. Rec. 131-132 (emphasis added). Senator Thomas further emphasized this intent by insisting that it would be similar to those reservoirs around the country that allowed boating, responding to Senator Martine's suggestion that no boating would be allowed:

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Mr. MARTINE of New Jersey. You can not sail on the reservoir of the city of Washington, neither can that be done in that of the city of New York.

Mr. THOMAS. There are a great many cities in which, it is done, especially when the reservoirs are far distant from the place of distribution.

Mr. MARTINE of New Jersey. The cases, are very rare.

Mr. THOMAS. I do not think, so. I think it is quite frequently the case.

63 Cong. Rec. 131-132 (Sen. Thomas supported the Raker Act, while Sen. Martine was in opposition). Senator Thomas further emphasized that only activities that would cause pollution are prohibited by the Raker Act: “They can not camp in this zone or utilize it for any purpose that would render the water itself insanitary or expose it to any sort of pollution, which, is a perfectly proper and necessary safeguard.” *Id.* at 132. It also is clear from his and Mr. Church’s statements that boating was not considered by Congress as a polluting activity.

Lastly, Senator Gronna also introduced correspondence from the then-manager of the Modesto and Turlock irrigation districts which cited the City’s Freeman Report with approval, especially the illustrations of the reservoir included in the report, noting “the beautiful pictures of the future Hetch Hetchy as drawn in Mr. Freeman’s report....” 63 Cong. Rec. 264. The Freeman Report illustrations include a good-sized steamboat loaded with passengers plying the waters of the Hetch Hetchy reservoir. See Keeping Promises, Providing Public Access to Hetch Hetch Valley, p. 11 (Restore Hetch Hetchy 2021).

The Park Service’s Current Sanitary Regulations for the Hetch Hetchy Watershed.

With the Raker Act’s provisions and legislative history in mind, the current regulations applicable to the Hetch Hetchy watershed exceed the authority granted by Congress in the Raker Act.

The following discusses each of the closures and restrictions pertinent to Hetch Hetchy as of the August 18, 2022 Superintendents Compendium of Designations, Closures, Permit Requirements and Other Restrictions Imposed Under Discretionary Authority.

1. *Public access is prohibited below the high water mark of Hetch Hetchy reservoir (see the High Water Mark map in the appendix). [the referenced map is not attached to the 2021 Compendium]*

This restriction is necessary to maintain the high quality of water found in the Hetchy and Lake Eleanor Reservoirs as a clean municipal drinking water source free from microbial pathogens and other contaminants.

Comment: This regulation is not included in the three Raker Act sanitary conditions and is not authorized. The only condition it would arguably fit within is the “[n]o person shall ... in any way pollute....” There is no prohibition included in the Raker

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Act of people walking down to the waterline of the reservoir, even if the reservoir is below its high water mark.

2. *Hetch Hetchy Reservoir is closed to all vessels.
Lake Eleanor is closed to all motorized vessels.*

These restrictions are in direct support of the Raker Act, Water Quality Provisions, and the Filtration Avoidance Regulation, and it is necessary to maintain the high quality of water found in the Hetchy and Lake Eleanor Reservoirs as a clean municipal drinking water source free from microbial pathogens and other contaminants.

Comment: This restriction to protect the purity of the reservoir is not listed in the Raker Act. It limits the use of the watershed by campers and tourists in direct contravention of Section 9(a)(5). There is no other reason for the restriction beyond maintaining the purity of the water. No other waters in the Park have a similar blanket restriction for all vessels. See <https://www.nps.gov/yose/planyourvisit/boating.htm> (“All lakes other than Hetch Hetchy Reservoir and some rivers (described below) are open to non-motorized vessels”) Moreover, the fact that nonmotorized boats are allowed on Lake Eleanor despite the same goal as for the Hetch Hetchy Reservoir to maintain its high quality is inconsistent.

Section 9(a)(1)-(3)’s restrictions do not extend to prohibiting any boating. Indeed, the City itself operates as many as three motorboats on the reservoir. The three boats are all trailered, outboards and may include a 15-ft Boston Whaler with a 60 h.p. motor; a 13-ft Boston Whaler with a 30 h.p. motor and an 11-ft inflatable with a hard bottom and a 9.9 h.p. motor. The City has an inspection program to make sure the boats are all well-maintained before going into the water. Thus, a limited number of inspected motorboats are not harmful to the purity of the water. The Freeman Report, prepared for the City and relied upon by Congress in support of adopting the Raker Act, includes an illustration depicting a large steam-powered vessel on the reservoir. Thus, neither the plain language of Section 9 nor Congress’ intent can justify restricting visitors’ boating use on the Hetch Hetchy Reservoir in order to protect the purity of the reservoir’s water quality.

3. *Motorized boats are prohibited in all lakes and free flowing rivers, creeks, and streams within Yosemite.*

These restrictions are necessary to preserve the natural characteristics of the lakes for public enjoyment and safety, and to ensure that the management of the park’s lakes meets the needs of all park users, including but not limited to photographers, fishermen, and those wishing to see undisturbed sections of lakes. This restriction is in direct support of the Raker Act, water quality provisions and the Filtration Avoidance Regulation, and is necessary to maintain the high quality of water found in the Hetchy and Lake Eleanor Reservoirs as a clean municipal drinking water source free from microbial pathogens and other contaminants.

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Comment: A boating restriction for the Hetch Hetchy Reservoir is not authorized by the Raker Act. The Raker Act controls for this portion of Yosemite Park. Even if one assumes that the Park Service retains some discretion on whether or not motorized boats should be allowed, the reasons used for banning motorized boats in other locations in the Park would not apply. There are no natural characteristics of the unnatural Hetch Hetchy Reservoir to preserve. The valley is already disturbed and the presence of some boats on the reservoir would not adversely affect the needs of park users. It would enhance them for this severely altered landscape within the Park.

The Park Service and San Francisco 2019 Memorandum of Agreement.

In addition to these specific rules, the Park Service has entered into a *Memorandum of Agreement Between City and County of San Francisco San Francisco Public Utilities Commission and National Park Service Yosemite National Park for Comprehensive Management of Watersheds within Yosemite National Park Supplying the San Francisco Regional Water System* (July 30, 2019) (“2019 MOA”). The 2019 MOA includes an objective that appears to extend the City’s desire to maintain its filtration avoidance status pursuant to 40 C.F.R. Part 141, Subpart H and 22 Cal. Code of Regulations § 64652.5 to a shared responsibility with the Park Service. Thus, the 2019 MOA states:

This Agreement serves as the mechanism for:

1. **SOURCE WATER PROTECTION (SWP) PROGRAM:** Watershed controls to preserve the SFR WS watersheds within YNP as high-quality drinking water sources and to maintain the filtration avoidance status of the Hetch Hetchy Supply. This includes watershed management for source water protection and reimbursement for implementation of the Raker Act water quality provisions, along with other source water protection initiatives.

2019 MOA, pp. 2-3. Likewise, the 2019 MOA provides:

The NPS develops and implements additional watershed protection policies and regulations, which are coordinated with the SFPUC. These **additional policies and regulations constitute, in combination with the Raker Act’s water quality provisions**, a watershed control program that meets the filtration avoidance requirements of 40 CFR § 141. 71 and 22 CCR § 64652.5 for the Hetch Hetchy Supply and protects water quality for the SFR WS UNHHS. The watershed control program ensures that high water quality of the SFR WS sources is maintained.

2019 MOA, p. 3 (emphasis added). The 2019 MOA also binds the Park Service to a distinct goal of preserving the City’s filtration avoidance above and beyond the water quality and sanitary controls specified in the Raker Act:

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2. SOURCE WATER PROTECTION A goal of the Source Water Protection Program is to maintain filtration avoidance designation (or unfiltered status) for the Hetch Hetchy Supply. Another goal is to manage the affected watersheds (Hetch Hetchy Supply and UNHHS) within YNP to protect water quality and mitigate potential sanitary concerns. This includes the following SFPUC and NPS activities: ... 111. NPS Facilities - Facilities within the Hetch Hetchy watershed, including trails, are constructed, operated and maintained to mitigate and/or prevent water contamination.

2019 MOA, p. 9.

The Park Service's commitment to maintaining the City's filtration avoidance objective is contrary to the express limitations set forth in the Raker Act, § 9. In particular, any operational controls of access to and use of trails, roads, or campsites that restrict the use of the watershed by visitors beyond those specified in section 9 is forbidden by the Raker Act. For example, to the extent night-time closures of the Hetch Hetchy Entrance Station is intended to protect the reservoir's water quality, that restriction violates Section 9. Disallowing people to access this area of the Park in the evening goes beyond prohibiting people from polluting the reservoir. Raker Act, § 9(a)(3). Similarly, prohibiting boating on the reservoir to protect water quality is contrary to the Raker Act's mandate that the Park Service's efforts to protect the reservoir's water quality through limits on Park users are limited to the specified sanitary restrictions.

The Park Service should be asked to justify any user restrictions in the Hetch Hetchy Reservoir watershed, including the entrance closure, any camping or boating restrictions, or closure of roads to the public, and eliminate those restrictions that go beyond prohibiting people from polluting the reservoir or are intended to assist San Francisco with maintaining its filtration avoidance status.

Conclusion

For the above reasons, the Park Service has acted outside of its legal authority by expanding the use restrictions in the Hetch Hetchy watershed beyond those specified in the Raker Act in contravention of the Act's prohibition on any further use restrictions to protect the reservoir's water quality. As a result, the 2022 Compendium rules identified above are prohibited by the Raker Act and are null and void:

The proposition need not be labored that power to release or otherwise dispose of the property of the United States is lodged in the Congress by Article IV, Section 3 of the Constitution. Nor can defendant seriously assert that subordinate officials of the United States have that power, unless it has been conferred upon them expressly or impliedly, by Act of Congress. And where a government official purports to bind the United States to an agreement which such official had no statutory authority to

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execute, his act is of course nugatory and void.

United States v. City & Cnty. of San Francisco, 112 F. Supp. 451, 453 (N.D. Cal. 1953), *aff'd*, 223 F.2d 737 (9th Cir. 1955). *See also City & Cnty. of San Francisco v. United States*, 223 F.2d 737, 737–38 (9th Cir. 1955) (“Nor is there any merit to the contention that the administrative interpretation of a statute which is contrary to its clear meaning controls the construction of the Act.”); *id.* at 739 (“We cannot accept the contention that administrative rulings— such as those here relied on— can thwart the plain purpose of a valid law.”)

The Superintendent of Yosemite National Park is authorized to establish restrictions and closures for the Park “[c]onsistent with applicable legislation....” 36 C.F.R. § 1.5(a). The Superintendent also “may ... Terminate a restriction, limit, closure, designation, condition, or visiting hour restriction.... 36 C.F.R. § 1.5(a)(3). The Superintendent should use this authority to bring the Compendium requirements into compliance with the Raker Act.