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R SUPPLY, CITY OF SAN FRANCISCO.

TION FOR LAKE ELEANOR AND HETCH HETCHY VALLEY  
RESERVOIR SITES, ACT OF FEBRUARY 15, 1901.

DEPARTMENT OF THE INTERIOR,  
*March 1, 1913.*

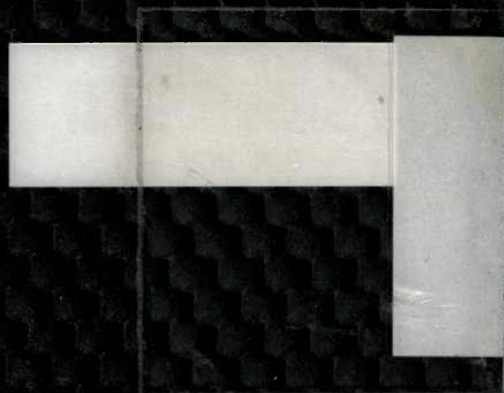
*Mayor and board of supervisors of the city and county of San Francisco, California.*

MEMEN: In the matter of the permit issued on May 11, 1908, Hon. James R. Garfield, Secretary of the Interior, to the city of San Francisco, for certain reservoir and other rights of way within Yosemite National Park, upon what are known as the Lake Eleanor and Hetch Hetchy Valley reservoir sites, there are two disallowances pending before the Department of the Interior. The rule issued on February 25, 1910, by the Hon. R. A. Ballou, Secretary of the Interior, to the mayor and board of supervisors of the city and county of San Francisco, to show why the Hetch Hetchy Valley reservoir site should not be eliminated from said permit. The application of the city and county of San Francisco for the continuation of the said permit, so as to allow the immediate use of Hetch Hetchy Valley for reservoir purposes.

Yosemite National Park was originally created as a forest reservation (not as a national park) by the act of Congress of October 3, 1890 (26 Stats., 650), which provided:

Reservation shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition. \* \* \*

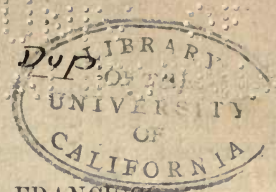
in view of the fact that the provisions of law and the rules and regulations adopted by the Secretary were, in substance, the same as provided for the Sequoia National Park, and because the reservation surrounded the tract of land known as Yosemite Valley, which was granted to the State of California for a public park by the act of Congress approved June 30, 1864, Secretary John W. Noble, in his annual report for 1890, called the reservation the "Yosemite National Park," and in subsequent acts of Congress this title appears to have been used without being specifically adopted. In 1905 the





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WATER SUPPLY, CITY OF SAN FRANCISCO.

APPLICATION FOR LAKE ELEANOR AND HETCH HETCHY VALLEY RESERVOIR SITES, ACT OF FEBRUARY 15, 1901.

DEPARTMENT OF THE INTERIOR,  
March 1, 1913.

*The mayor and board of supervisors of the city and county of San Francisco, California.*

GENTLEMEN: In the matter of the permit issued on May 11, 1908, by the Hon. James R. Garfield, Secretary of the Interior, to the city of San Francisco, for certain reservoir and other rights of way within the Yosemite National Park, upon what are known as the Lake Eleanor and Hetch Hetchy Valley reservoir sites, there are two distinct proceedings pending before the Department of the Interior. One is the rule issued on February 25, 1910, by the Hon. B. A. Ballinger, Secretary of the Interior, to the mayor and supervisors of the city and county of San Francisco, to show why the Hetch Hetchy Valley reservoir site should not be eliminated from said permit. The other is the application of the city and county of San Francisco for a modification of the said permit, so as to allow the immediate use of the Hetch Hetchy Valley for reservoir purposes.

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In view of the fact that the provisions of law and the rules and regulations adopted by the Secretary were, in substance, the same as those provided for the Sequoia National Park, and because the reservation surrounded the tract of land known as Yosemite Valley, which had been granted to the State of California for a public park by act of Congress approved June 30, 1864, Secretary John W. Noble, in his annual report for 1890, called the reservation the "Yosemite National Park," and in subsequent acts of Congress this title appears to have been used without being specifically adopted. In 1905 the

State of California ceded the Yosemite Valley to the United States upon the condition that it should be held and maintained as a national park, and on June 11, 1906, this recession was accepted by joint resolution of Congress, which specifically referred to the act of October 1, 1890, and established certain boundaries between the "Sierra Forest Reserve" and the "Yosemite National Park."

Within the exterior boundaries of the park there was a considerable number of tracts of land the title to which had passed from the Government to private parties. These private lands included a large part of the shores of Lake Eleanor and the greater portion of the floor of the Hetch Hetchy Valley, as well as other tracts of considerable area located in other portions of the park. The Department of the Interior and many citizens and groups or associations of citizens have repeatedly urged upon Congress that these private holdings should be purchased by the Government, but Congress has refused to appropriate money for this purpose. The private lands at Lake Eleanor and Hetch Hetchy have been purchased by the city of San Francisco, which has also acquired other valuable lands and rights within the exterior boundaries of the park. Its holdings, however, do not include the dam site. On February 15, 1901, Congress passed an act (31 Stats., 790) entitled "An act relating to rights of way through certain parks, reservations, and other public lands." That act reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of the said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph com-



panies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

This is the so-called "revocable permit" act, under which rights of way for electrical plants, transmission lines, canals, ditches, and reservoirs are permitted through the public lands and forest reservations of the United States. The only national parks to which it applies are the Yosemite, Sequoia, and General Grant National Parks, in the State of California. The act was passed on February 15, 1901. On October 15, 1901, the city of San Francisco, through the Hon. James D. Phelan, then mayor, filed an application for reservoir rights of way at Lake Eleanor and Hetch Hetchy. After consideration of this application, Hon. E. A. Hitchcock, then Secretary of the Interior, on December 22, 1903, refused the permit on the principal ground that he did not have the necessary statutory authority. He discussed the existing and available water supplies of the city of San Francisco, and upon the information then before him, held that there were other adequate sources of supply available; but the controlling consideration for his refusal of the permit was the construction placed by him upon the two acts of Congress above mentioned.

The city continued its efforts to obtain the permit, but on February 5, 1905, Secretary Hitchcock again reached the conclusion that the permit "could not be granted without further legislation by Congress." The application was again renewed by the city before Secretary Hitchcock's successor, Hon. James R. Garfield, and on May 11, 1908, Secretary Garfield granted the permit which is now in force. This permit provided that the city might develop the Lake Eleanor reservoir site and that if this site when developed to its full capacity should not prove adequate for the needs of the city the Hetch Hetchy Valley could then be used as a reservoir. The permit is set out in full in the report of the Advisory Board of Army Engineers made on February 19, 1913, and contains other important provisions, which need not be referred to at this time.

In October, 1909, Hon. R. A. Ballinger, then Secretary of the Interior, instructed the Director of the Geological Survey and certain engineers of the Reclamation Service to investigate and report upon the sources of water supply involved in the permit and upon the necessity for the retention of the Hetch Hetchy Valley within the terms thereof. On February 25, 1910, in view of the report made of the results of this investigation, especially "as to the sufficiency of the Lake Eleanor reservoir site when fully developed, and in view of the importance of the public interests involved in this matter and the Government's obligation in connection therewith," Secretary

Ballinger required the city and county of San Francisco "to show why the Hetch Hetchy Valley and reservoir site should not be eliminated from said permit."

At the request of the Secretary of the Interior the War Department, by direction of the President, appointed an Advisory Board of three Army Engineers to assist the Secretary of the Interior in passing upon the matters submitted to the Interior Department under the order to show cause, and Congress subsequently appropriated \$12,000 to pay the expenses of this Advisory Board. A hearing was held on May 25 and 26, 1910, and upon application of the city a postponement was granted until June 1, 1911, for the purpose of enabling the city to furnish the necessary information for a proper determination of the important questions involved, and the city undertook to furnish this information at its own expense and with due diligence. The Advisory Board of Army Engineers was also authorized to procure such independent data and information as it deemed proper. It has conducted an extensive investigation on its own account and has made personal inspections of many of the proposed sources of water supply and reservoir sites, including visits to the Hetch Hetchy and Lake Eleanor. The order of continuance is set out in full in the report of the Advisory Board.

This was the situation when I became Secretary of the Interior in March, 1911. Shortly thereafter the city applied for a continuance, which was granted until December 1, 1911. Upon a further application of the city the time was extended until March 1, 1912, and again until June 10, 1912. These later applications were all granted by me with the greatest reluctance and only after pointing out to the representatives of the city the importance of an early hearing, so that the many difficult and intricate questions could be thoroughly considered and ample time might be available for procuring such additional information and permitting such additional discussion as would in all probability be found essential as a result of the formal hearing. Nevertheless, on May 28, 1912, the city again presented a request for a further extension of time in which to secure and present its evidence. It was demonstrated that the city would not be able to present its case without a substantial extension of time, and I appreciate quite fully the adverse conditions with which the present representatives of the city have had to contend and many of which were practically unavoidable. A detailed schedule was prepared fixing various dates on or before which the city would be able to make documentary showing upon the different matters under investigation, and it was required to make this showing in accordance with this schedule. Appropriate periods were fixed within which the objectors should have an opportunity to examine the matters presented by the city and to answer them and a further period within which



the city was to reply. The formal hearing was set for November 20, 1912, and later postponed until November 25, 1912. In September, 1911, I personally visited Lake Eleanor and Hetch Hetchy.

The oral hearing before me began on November 25, 1912, and continued until and including November 30. The reports and other documents filed on and prior to this hearing included thousands of printed or typewritten pages with financial and statistical tables, diagrams, and maps. They are enumerated in the report of the Advisory Board of Army Engineers. Nevertheless, as had been apparent, the information was incomplete in important particulars and it was found necessary or desirable to call for additional reports and statements. Dates were fixed within which these matters were to be supplied, but it was not until the middle of January, 1913, that the city completed its showing, including a draft of the permit which it requested the department to issue as a modification of the permit issued by Secretary Garfield. The modifications proposed were of great importance and included a particular treatment of the interests of the Turlock-Modesto irrigation district, which had not previously been discussed. On February 1, 1913, the city authorities requested that this new provision be further modified. To these modifications the representatives of the Turlock-Modesto district have objected and presented a substitute. The answer of the city to the proposed substitute was not received until February 15. Meanwhile, however, the Advisory Board of Army Engineers was giving to the various engineering questions submitted to it such consideration as was practicable in the uncompleted state of the record. The board was not able to make its report to me until February 19, 1913. Since that date the pressure of official business inevitable during the closing weeks of an administration has prevented me from giving to this report and to the entire matter to which it relates that time and consideration which the nature and importance of the questions at issue demand.

If it were clear that I should issue to the city of San Francisco a permit of the general character it requests, it would have been and would now be absolutely impossible within the time available to embody the details of such a permit in a properly considered document. This is a matter of the greatest regret to me as I had hoped to be able at least to draft a permit embodying the provisions which, in my judgment, should be contained in any permit for the use of the Hetch Hetchy Valley as a reservoir site by the city of San Francisco and the communities around San Francisco Bay. The importance of doing this, however, is much reduced by the fact that I have reached the conclusion that a permit for this purpose should not be issued by the Secretary of the Interior under the existing law. This conclusion is not based at all upon questions of detail connected with

the permit, but is based upon the fact that the only statutory authority under which such a permit could be issued is the act of February 15, 1901.

The first and main conclusion reached by the Advisory Board of Army Engineers is as follows:

The board is of the opinion that there are several sources of water supply that could be obtained and used by the city of San Francisco and adjacent communities to supplement the near-by supplies as the necessity develops. From any one of these sources the water is sufficient in quantity and is, or can be made, suitable in quality, while the engineering difficulties are not insurmountable. The determining factor is principally one of cost; in some cases, however, such as the Sacramento, sentiment must be taken into consideration.

The project proposed by the city of San Francisco, known as the Hetch Hetchy project, is about \$20,000,000 cheaper than any other feasible project for furnishing an adequate supply. The only exception is the filtered Sacramento project, which in actual cost is about \$30,000,000 greater than the Hetch Hetchy project, but by discounting to 1914 becomes only \$13,000,000 greater.

The Hetch Hetchy project has the additional advantage of permitting the development of a greater amount of water power than any other.

I do not believe that the Secretary of the Interior should grant, under the act of February 15, 1901, a permit in this case based upon the principal determining factor of the difference in cost between available alternative sources of water supply, whether that difference be \$13,000,000 or \$20,000,000, or even more than \$20,000,000. If the Secretary were to do this, he would, in a certain important sense, be placing a monetary value upon the preservation of the Hetch Hetchy Valley in its present natural condition. He would be determining that in order to save the expenditure of a certain sum of money by the people of San Francisco the people of the whole country should consent to change the present natural condition of the Hetch Hetchy Valley. It may well be that such consent would be justified. It depends upon the effect of the use permitted and upon the amount of money saved, as well as upon other considerations. Such action, however, should not be taken by the Secretary without a clearer authorization by Congress than I am able to believe was consciously intended when the act of 1901 was passed. In any event, such action with respect to so important a feature of a national park as is the Hetch Hetchy Valley would constitute a precedent which should be most carefully and effectively guarded before it is established.

This conclusion is not based upon the opinion that the conversion of the Hetch Hetchy Valley into a reservoir or lake would so seriously mar the scenic beauty of the valley as is contended by many of the objectors to the city's application. I have been convinced that the proposed use of the Hetch Hetchy as a reservoir will not require undesirable sanitary restrictions upon the use of its watershed by the public, if the permit contains the provisions recommended by the Advisory Board. If the use of the Hetch Hetchy Valley was



clearly necessary for the city of San Francisco and its adjacent communities, I believe that such change in its condition and such loss or impairment of scenic beauty as might possibly occur would be amply justified and would not be a matter of such serious moment as to be at all controlling. It is indeed an open question about which real differences of disinterested and intelligent opinion exist whether the valley would not be as beautiful if it contained the lake created by the dam as it is with its present natural floor. Nevertheless, the valley should be retained in its natural condition unless ample justification exists for changing it. The act of October 1, 1890, creating the reservation which is now the Yosemite National Park, provides "for the preservation from injury of all \* \* \* natural curiosities or wonders within such reservation and their retention in their natural condition," and this provision should be followed unless there is clearly some adequate justification for a different course.

I am unable to agree with the conclusion reached by Secretary Hitchcock that the act of February 15, 1901, does not confer upon the Secretary of the Interior technical legal authority for permitting the use of the Hetch Hetchy as a reservoir site. The act of 1901 expressly mentions the Yosemite National Park as one of the reservations to which it is applicable, and in express language the Secretary of the Interior is authorized and empowered to permit the use of rights of way therein "for water plants, dams, and reservoirs" for "the supplying of water for domestic, public, or any beneficial uses." I can not find in the act of 1901 any limitation which makes it subject by a process of construction or otherwise to the general provisions of the act of 1890 with respect to the Yosemite National Park. I do find in the act of 1901 the provision that the permits which it authorizes the Secretary of the Interior to grant shall be issued only "upon a finding by him that the same is not incompatible with the public interest"; and in view of the language of the Yosemite reservation act of 1890 I believe that as a matter of broad public policy, and not at all as a matter of necessary statutory construction, the natural condition of so important a natural curiosity or wonder as the Hetch Hetchy Valley should not be radically changed without the express authority of Congress embodied either in a statute granting a permit and fixing its terms and conditions or by an act conferring upon the Secretary of the Interior the power to issue such a permit upon terms and conditions to be fixed by him within broad general limitations. I have repeatedly urged that the act of 1901 should be amended in this very way.

It is clear and it is conceded by the applicants for this permit that it should not be granted except upon terms and conditions which the city of San Francisco can be legally and effectively compelled to observe. The act of February 15, 1901, does not in words author-

ize the Secretary of the Interior to impose "terms and conditions" upon the permits issued by him, and it is vigorously contended by other applicants under it for permits throughout the public domain that the act is not susceptible of the construction that it does authorize the Secretary to impose terms and conditions in the permits for which they apply. The act provides that the permits shall be issued "under general regulations" to be fixed by the Secretary of the Interior, and it expressly provides that these permits "may be revoked by him or his successor, in his discretion, and shall not be held to confer any right or easement or interest in, to, or over any public land, reservation, or park." General regulations have been fixed by the Secretary which contain provisions which might be held to impose certain general terms and conditions applicable to all permits or to all permits of a particular class or kind.

I have repeatedly pointed out as vigorously as I am able that this statute as it now reads is unsound in principle and injurious in practice with respect to both the public and the private interest affected. It is most unsatisfactory as a basis for the important administrative actions that can be taken only under it. I have been willing to issue permits under it only because these permits are by the express terms of the statute made revocable in the discretion of the Secretary. Were it not for this power of revocation the validity of some of the general regulations and of some of the conditions imposed in or under them might be contested by the permittees. The existence of the power of revocation makes it possible to ignore this question of statutory construction in the case of permits to individuals or private corporations. The power of revocation, however, is an ineffectual weapon with which to enforce the terms and conditions of a permit issued to a municipal corporation such as the city of San Francisco. If that city and its adjacent communities should invest the money of the tax payer in creating a municipal water supply dependent on a reservoir in the Hetch Hetchy Valley, no Secretary of the Interior would or should revoke the permit in order to enforce terms and conditions which might otherwise not be legally binding upon the city. If these terms and conditions could not be enforced in and of themselves by direct action under the permit, they could not practicably be enforced at all. I believe that certain kinds of "terms and conditions" can properly be provided by or under "general regulations" as this expression is used in the existing statutes. I have been unable, however, to see how the special "terms and conditions" which clearly should be attached to any permit to use the Hetch Hetchy could be included within any "general regulations" which could be fixed by the Secretary under the language of the act of 1901. These terms and conditions are in



their very nature special and peculiar to this particular permit, as a reading of the report of the Advisory Board will clearly show.

The foregoing considerations seem to me controlling upon the pending application of the city. I therefore continue both this application and the rule to show cause until application can be made by the city to Congress for such action as Congress may deem proper in the premises. I prefer not to express any conclusion based upon the report of the Advisory Board of Army Engineers and upon my own investigation and consideration as to whether Congress should or should not expressly authorize the use of the Hetch Hetchy Valley by the city of San Francisco and its adjacent communities, because I have decided not to base any official action upon such a conclusion now and because if I were now properly authorized to take official action I would prefer to secure some additional information and to give some further consideration to certain features of the matter before taking such action. Among these features are the bases and consequences of the conclusions reached by the Advisory Board that—

the use of the Hetch Hetchy Valley as a reservoir site is necessary if the full flow of the upper Tuolumne is to be conserved

and that—

the San Joaquin Valley is relatively less well provided with water than the Sacramento Valley both as to rainfall and as to run-off of rivers. The demands of the valley for complete irrigation are in excess of the water available.

Many of the conditions which should be attached to any permit are discussed in the report of the Advisory Board of Army Engineers. I do not agree with all of the suggestions there made, and I believe that other equally important terms and conditions should be imposed.

The precise manner under which the work of constructing a dam at the Hetch Hetchy Valley would be carried on under any permit is of the greatest importance if serious risk of injuring the scenic beauty is to be avoided. I believe that a dam and a scenic road and other works proposed by the city can be constructed in such a way as to mar the beauty of the valley little, if at all, and even in some respects to enhance the possibilities of enjoying this beauty. This, however, can result only from conducting the work with the greatest skill and without regard to those considerations of expense which quite uniformly control work of this character. I have no doubt that the city would carry on its operations with a considerable degree of care, but I believe that extraordinary measures of precaution should be taken and that the work should be carried on not merely under plans and specifications approved by the Secretary of the Interior, but that the manner in which the work itself upon the ground is conducted should be subject to supervision by competent representatives selected and employed by him.

The questions connected with the use of water by the Turlock-Modesto district and other irrigation interests, with the development and disposition of the water power, and with many other conflicting interests are so difficult and complicated that suggestions are made either by the city or by the Advisory Board that they be left largely to future disposition by the Secretary of the Interior. The functions thus devolved upon the Secretary and the duties imposed upon him will require the occasional or regular employment of experts, engineers, and other assistants, whose compensation should not be made a charge upon the General Government, but should be paid by the beneficiaries of any permit that may be granted. In fact, in view of the conclusion of the Advisory Board that the saving to the city is the principal determining factor as to any permit, the whole question of the payments which the city should make to the Government as the custodian of the park requires more consideration than has been given to it.

It is conceded that it would be unsound economics for the city of San Francisco to duplicate the existing distributing system and that it should acquire most if not all of the present sources of supply of the Spring Valley Water Company; and the Advisory Board bases its report on this theory. It is the declared intention of the city to purchase these properties as the beginning of its proposed municipal water system and active negotiations have been carried on to this end. These negotiations, however, have thus far proved unsuccessful. I do not wish any action of mine to be open to the construction of expressing any opinion whatever as to the merits of the controversy between the city and the company as to the value of the latter's property, nor as to which portions of the property it would be appropriate for the city to acquire. If they are unable to agree, both parties should be compelled to submit to some impartial tribunal the questions at issue between them, so that the company may receive that to which it is fairly entitled and the city may not be required to pay one dollar more than the real value of the property it should acquire.

These questions, however, are merely illustrations of the large number of important, although relatively minor, provisions of the proposed permit which call for greater consideration, both as to substance and as to the precise manner in which they should be worded, than I have been able to give to them under the existing conditions in the Secretary's office.

Respectfully,

WALTER L. FISHER, *Secretary.*

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Fisher, Walter Lowrie, 1862-1935





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