CASE NO. F074107

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

RESTORE HETCH HETCHY
Petitioner and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Respondents and Appellees,

MODESTO IRRIGATION DISTRICT, ET AL.
Real Parties in Interest

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL LAW PROFESSORS IN SUPPORT OF APPELLANTS

On Appeal from the Superior Court of California,
County of Tuolumne, Case No. CV 59426
Honorable Kevin M. Seibert, Presiding

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SUMMARY OF ARGUMENT

The goal of the Raker Act was to solve a regional water crisis by ensuring public control over a new municipal source of water. As the legislative history of the Act demonstrates, Congress had no intention of displacing state regulatory authority. Instead, it followed a fundamental tenet of water law: The federal government must defer to state authority. As such, the Raker Act should not preempt Article X, section 2 of the California Constitution. This cornerstone of state water law imposes reasonable use limits on all appropriations and diversions of the state's non-navigable waters. Courts define reasonable use by balancing competing needs and interests. Because the Raker Act ultimately vested control of state water resources in the people of California, it must allow for this assessment. The Court should, therefore, vacate the trial court's order finding Petitioner's Article X, section 2 claim to be preempted.

ARGUMENT

I. Congress Passed the Raker Act to Protect Against Predatory Monopolies and Return Control of Water to the People of California.

A. The Legislative History of the Raker Act Demonstrates Congress' Goal of Restoring Public Control over State Water Resources.

The Raker Act was never intended to regulate California's resources or federalize water distribution. Rather, it responded to a quickly escalating

municipal crisis caused, in essence, by a lack of public control over state resources. In 1913, San Francisco found itself at the mercy of the Spring Valley Water Company and several private power companies, which were charging the City increasingly high prices for increasingly scarce water and electricity. 51 Cong. Rec. 6 (1913). The water crisis was particularly dire. After the 1906 earthquake, the City began drawing water directly from the ocean for firefighting purposes. H.R. Rep. No. 63-41, at 25 (1913). Residents had to run their spigots all night to have enough water for breakfast, and many homes lacked water even for bathing. *Id*. In addition to being scarce, San Francisco's water was among the most expensive in the United States. *Id.* at 19.

Congress responded to this crisis with the Raker Act, which was crafted to free San Francisco residents from the "thralldom . . . [of] a remorseless private monopoly." 50 Cong. Rec. 4110 (1913). Representative Raker, the Act's sponsor, explained its purpose on the floor of Congress:

> Mr. KAHN. [San Francisco] does not own its own water supply. Its present water supply is furnished by a private company.
>
> […]
>
> Mr. SUMNERS. Is it the purpose of this bill to have San Francisco supply . . . water to its own people?
>
> Mr. RAKER. Yes.

50 Cong. Rec. 3905 (1913).

Indeed, the Supreme Court has interpreted the Raker Act to transfer control of water and electricity from private monopolies to the public. Specifically, the Court found that the Act's legislative history shows "a common understanding . . . that the grant was to be so conditioned as to require . . . supplying Hetch-Hetchy water . . . directly to the ultimate consumers." *United States v. City and County of San Francisco*, 310 U.S. 16, 22 (1940). The Court also pointed to Senator Norris's statement that Congress' purpose was "to harness . . . [hydroelectric] power and . . . put it to public use[,] not to give it to a private corporation. . . . [W]e are going to give it directly to the people." *Id.* at 24 (quoting 51 Cong. Rec. 344 (1913)).

B. The Text of the Raker Act Similarly Shows Congress' Goal of Restoring Public Control over State Water Resources.

The Raker Act solved the water and electric crisis in San Francisco by granting the City an easement to dam the Tuolumne River and ensuring that the City – rather than private corporations – distribute resources directly to the public. Key provisions of the Act clearly serve this anti-monopoly, public-control mission. To the extent that the Act limits state and local authority, it does so only as necessary to ensure that the City operates the dam for public benefit, rather than private gain.

The Raker Act ensures that private monopolies cannot reclaim control of public resources. For instance, section 6 prohibits the City from

"ever selling" the water (or electricity) impounded and delivered as a result of the easement to "any private person, corporation, or association," except a municipality or a municipal water or irrigation district. Raker Act, Pub. L. No. 63-41, § 6, 38 Stat. 242, 245 (1913). Representative Raker explicitly linked this legislative language to the Act's ultimate purpose: "Now, so that there can be no monopoly in regard to the water power that may be generated, the city and county of San Francisco must . . . develop electric power." 50 Cong. Rec. 3904 (1913). The House Report confirms this goal. H.R. Rep. No. 63-41, at 11 (explaining that section 6 of the Raker Act is "designed . . . to prevent any monopoly or private corporation from . . . obtaining control of the water supply of San Francisco").

To the extent that the Raker Act limits state and local authority over distribution, it does so only by imposing certain "beneficial use" requirements. For instance, section 9(h) allows San Francisco to divert only as much water from the Tuolumne River as "necessary for its beneficial use for domestic and other municipal purposes." Raker Act § 9(h); *see also id.* § 9(b) (using "beneficial use" language in reference to preexisting water rights of irrigation districts). The House Report clarifies that this provision was included in the Act to ensure "an economic use of water for the highest purpose of all concerned." H.R. Rep. No. 63-41, at 14. These requirements grew out of a concern that the public might not receive the full benefits intended by Congress unless future monopolies

were avoided. To the Act's drafters, beneficial use and public control were inextricable. As Representative Borah described, the Act could be conceived as a choice between corporations and the people of California: "Defeat this bill and you will receive the plaudits, the acclaim, and the praise of every hydroelectric corporation in the State of California. Pass it and you give into the hands of the people a power that God intended should do some good for man." 51 Cong. Rec. 347 (1913).

Other provisions of the Raker Act protect existing state water rights holders, but do not limit state and local authority. Specifically, section 9 contains conditions on the easement that guarantee minimum water delivery levels to local irrigation districts. The House Report confirms that these conditions were included merely to be "protective of rights already acquired," not as new federal prescriptions. H.R. Rep. No. 63-41 at 12. Put differently, they "relate *only* to the protection of certain rights of the [irrigation districts] – by recognizing, without affecting one way or the other, prior rights of the said districts." *Id.* at 9 (emphasis added). As Representative Raker himself explained, "the irrigationists, under the laws of the state of California, are entitled to 2,350 feet of water . . . and this bill simply recognizes that right." 50 Cong. Rec. 3916 (1913). Indeed, some legislators objected to these conditions as unnecessary surplusage that "should never have been in the bill." 51 Cong. Rec. 368 (1913) (statement of Senator Pittman) (explaining that this language "was placed in the bill

because the [irrigation districts] . . . demanded that it be placed in the bill . . . It was a concession to those demands, and those demands solely, that this extraneous matter was ever placed in the bill.").

Finally, section 11 of the Raker Act expressly provides that the statute does not displace state water law. It states: "[N]othing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use or distribution of water." Raker Act § 11. As Petitioner explains, Congress saw this provision as crucial to the Act's function. Appellant's Opening Br. 33–36. As one Congressman put it, under section 11, "if there be a conflict with the laws of the State of California the laws of the State will control." 63 Cong. Rec. 2917 (statement of Representative Cooper).[1]

These provisions, taken individually or collectively, were clearly intended by Congress to solve a local water crisis while ensuring beneficial use and preserving existing rights. They were not intended to extend the power of the federal government into an unfamiliar realm. The legislative history of these provisions confirms that Congress had no interest in

[1] Indeed, the text of this "savings clause" constitutes clear evidence of Congress' intent to preserve state authority over water allocations even as it granted an easement for construction of the dam. Because the party briefs discuss this provision at length, however, Amici will not duplicate those arguments or further address section 11 here.

exercising federal control over either the operation of the dam or the allocation of state water flowing through the dam.

C. Congress Plainly Believed that the Raker Act Could Not and Did Not Preempt State Water Law.

Congressional debates over the Raker Act show that Congress believed California retained all legal authority over its own water. The extent to which the federal government could and actually did interfere with California water law was a dominant topic during congressional debates over the Act. In summarizing a disagreement between two of his Senate colleagues about whether Congress could legally regulate San Francisco's water, Senator Cummins stated: "We all agree that the United States . . . can not use it[s land] in contravention of the laws of California nor permit anybody else to use it in contravention of the laws of California." 51 Cong. Rec. 70 (1913). Several other members of Congress speaking on the bill expressed the same sentiment. *See id.* at 72 (statement of Senator Stone) ("I am inclined to agree wholly with the Senator from California that this being a nonnavigable stream the United States has an exceedingly limited right, if any right at all, to concern itself with the waters; they are absolutely under the control of the government of California."); 50 Cong. Rec. 3915 (1913) (statement of Representative Mondell) ("[T]his Congress has no power to divide the waters in the sovereign State of California."); 51 Cong. Rec. 313 (1913) (statement of

Senator Pittman) ("[T]his Government has no right to say how the water shall be distributed or controlled."); 51 Cong. Rec. 370 (1913) (statement of Senator Pittman) ("The State owns that water, and the State has a right to grant that water, and the State has a right to grant the power of diverting that water.").

In addition to believing it *could not* interfere with state water rights, Congress believed that the words of the Raker Act actually *did not* do so. In the floor debate, Representative Raker clarified that "there [was] no attempt by Congress to control the waters which belong to the State or to private individuals." 50 Cong. Rec. 3905 (1913); *see also id*. at 3916 (statement of Representative Raker) ("There is no attempt in this bill to divide any waters."). In an exchange about the extent to which Congress, as a landowner, could hypothetically impose conditions on localities, members of Congress were clear that this bill did not do so. 50 Cong. Rec. 3915 (1913) (statement of Representative Ferris). They understood that California was perfectly equipped to manage its own waters:

> [T]he State of California is protected by one of the best water commission[s] which any State ever had, and the law of that State is as strict about the waste of water as . . . any other state. . . . We could not protect them any more in this bill than the people of the State of California [could] protect them by their own laws.

51 Cong. Rec. 313 (1913) (statement of Senator Pittman).

A thorough reading of the Act's legislative history, then, indicates that Congress did not intend to meddle in state water rights. Instead, Congress used the tools at its disposal to confront a complicated water crisis. It issued a conditional grant of a federal easement in order to return control of water resources to the people, through their representative government. In doing so, the federal government in no way altered state water law or existing water rights. The statute employed some binding provisions in service of its goals, but Congress was careful in its drafting and subsequent debate to disavow any effort to federalize or supersede California water law.

II. Congress and the Supreme Court's Contemporaneous Deference to State Control of Water Resources Provides a Revealing Backdrop to the Purpose and Impact of the Raker Act.

The broader history of federal deference to state water law in the western United States also supports Petitioner's position that the Raker Act has no preemptive effect here. When Congress passed the Act, it entered a field with an underlying assumption of federal restraint. As the Supreme Court has explained, the relationship between state and federal authority over water resources in the West reveals a "consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). In part, this deference embodies a basic federalist impulse and "presumption against finding pre-emption of state law in areas traditionally regulated by the States." *California v. ARC*

America Corp., 490 U.S. 93, 101 (1989). The preference for state authority, however, takes on a special significance in the arid West. Eastern states with plentiful water supplies generally have riparian systems, allowing owners of waterfront property to claim water rights appurtenant to their land. *California v. United States*, 438 U.S. at 653–54. This system proved unworkable in the West, where territorial governments in the mid-nineteenth century developed appropriative systems – water rights defined by first-in-time beneficial use. *Id.* These schemes became vital to western industry and agriculture as new states were admitted into the union. *Id.* Because the federal government owned great swathes of western land, the adjudication of state water rights on federal land could have created a jurisdictional morass. *Id.* Instead, Congress decisively resolved this issue in favor of state control. *Id.* In so doing, it allowed state courts and state legislatures to shape the boundaries of beneficial use and deferred to local expertise and self-governance in a region with competing demands and evolving social, economic, and cultural values.

A. Nineteenth-Century Legislation Demonstrates Congress' Commitment to State Control over Water Resources.

Legislation in the second half of the nineteenth century, including the Mining Act of 1866, the Desert Land Act of 1877, and the Right of Way Act of 1891, demonstrates a commitment to state authority over water

rights. These acts of Congress provide a telling prologue to the deference to state control embedded in the Raker Act.

Congress first opened public lands for mineral exploration and extraction with the Mining Act of 1866. Act of July 26, 1866, ch. 262, 14 Stat. 251 (current version at 43 U.S.C. § 661 (2015)); *see California v. United States*, 438 U.S. at 656 (discussing the history of western development). Congress recognized that mining on public lands would impact local water resources and was concerned that the Mining Act "might in some way interfere with the water rights and systems that had grown up under state and local law." *California v. United States*, 438 U.S. at 656. Congress, therefore, crafted the Mining Act to avoid such interference, demanding that "local customs, laws, and the decisions of courts" determine water rights. Act of July 26, 1866 § 9.

Congress made similar calculations in the Desert Land Act of 1877. Ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321–323 (2015)). The statute opened up large tracts of arid federal land to homesteading and specified that, while reclamation and irrigation would create new claims to water rights, all "surplus water . . . shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." *Id.* The Supreme Court interpreted the Desert Land Act to make "all non-navigable waters then a part of the public domain . . . publici juris, subject to the plenary

control of the designated states." *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163–64 (1935). The Court went on to find that this interpretation guaranteed "the right in each [state] to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." *Id.* The Court has consistently reaffirmed the states' authority to define their own system of water rights. *See, e.g.*, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899).

Finally, Congress remained deferential to state law even when granting rights of way to build reservoirs and canals on public land. The Right of Way Act of 1897 reserved state control over water resources that would be distributed through reclamation projects on federal land. Act of Feb. 26, 1897, ch. 335, 29 Stat. 599 (1897) (codified as amended 43 U.S.C § 946 (2015)). "[T]he charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate[d]." *Id.* Discussions in the legislative record make clear that many legislators thought that such language would be redundant given the presumption of state control. *California v. United States*, 438 U.S. at 661–62 (quoting Representative Lacey, who explained, "I think there could be no doubt anyhow, but this amendment takes away the possibility of any question

being raised as to the right of the States and Territories to regulate and control the management and the price of the water").

B. Contemporaneous Supreme Court Decisions Similarly Defer to State Control.

Congress passed the Raker Act at a moment when the Supreme Court understood federal authority over water resources to be strictly limited. In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899), the Court found that the federal government could limit states' plenary authority over water resources in only two ways – neither of which apply to the Raker Act. First, the federal government has authority over navigable streams. *Id.* at 703. Second, the federal government may be entitled to water rights for federal land "so far at least as may be necessary for the beneficial uses of the government property." *Id.* According to *Rio Grande Dam & Irrigation*, however, the state retains plenary authority over water rights unless and until Congress acts pursuant to these two powers. 174 U.S. at 703. When the Raker Act passed, Congress had sweeping power under the Property Clause to make rules governing federal land, but no authority to "override state laws in respect to the general subject of reclamation." *Kansas v. Colorado*, 206 U.S. 46, 92 (1907). As discussed above, this principle clearly guided Congress' crafting of the Raker Act.

C. The Reclamation Act Creates Only a Narrow Exception to the Presumption Against Federal Control.

In the years leading up to the Raker Act, Congress passed legislation introducing federally-funded and federally-managed reclamation projects, but even then continued to defer to state control. The Reclamation Act of 1902 balances federal projects with clear deference to state authority. Pub. L. No. 57-161, 32 Stat. 388 (codified as amended at 43 U.S.C. § 372 (2015)). Undoubtedly, that statute dramatically changed the federal government's role in the West. It authorized the Department of the Interior to fund, construct, and operate reclamation projects across the arid western landscape, creating the infrastructure needed for dramatic development of the region in the twentieth century. Charles F. Wilkinson, *Western Water Law in Transition*, 56 Colo. L. Rev. 317, 320–21 (1985). As the text and history of the law demonstrate, however, Congress still honored the principle of state control. The savings clause in section 8 of the Reclamation Act is explicit: "[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 43 U.S.C. § 383. Similarly, the legislative record shows that Congress intended to conform the bill to "the well-established precedent in national legislation of recognizing local and State laws relative to the

appropriation and distribution of water." 35 Cong. Rec. 6678 (1902) (statement of Representative Mondell). A key proponent of the bill, Representative Mondell, explained that "[e]very act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard." *Id.* at 6679.

While preserving state water law authority in most situations, the Reclamation Act's savings clause does not protect state regulations that undermine its core purpose. In drawing that line, the Supreme Court has hewed to the principle of state deference by cabining the law's preemptive effect. Specifically, the Court has concluded that states retain authority under the Reclamation Act to "impos[e] conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question." *California v. United States*, 438 U.S. at 674. In other words, the Reclamation Act preempts only those state actions that would obstruct federally managed reclamation projects because, as the Court has explained, "[t]he legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *Id.* at 675.

The Raker Act's similar savings clause should be given even broader effect than section 8 of the Reclamation Act given the distinct goals and

functions of the two laws. Congress enacted the Reclamation Act to facilitate the construction, operation, and maintenance of federal dams and reservoirs for the delivery of water. 43 U.S.C. §§ 411, 491, 498. Thus, state requirements that undermine that core objective – for instance, a state requirement that would override federal acreage limitations on water delivery – are not applicable. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958). The Raker Act, by contrast, merely granted San Francisco a conditional easement for a dam and reservoir that the City itself would fund, construct, and operate, if it so chose. In other words, with the Reclamation Act, Congress gave the executive branch narrow authority to enter the field of water distribution; the Raker Act contains no such authorization.

III. Article X, Section 2 Provides a Dynamic State Water Rights System and Is Consistent with the Raker Act.

A challenge to the reasonableness of the diversion at the O'Shaughnessy Dam under Article X, section 2 of the California Constitution ("the Reasonable Use Amendment") does not frustrate the purpose of the Raker Act. As explained above, the goal of the Act was to ensure a locally-controlled and reliable water supply. This local control necessarily demands that water distribution be subject to state law. Just as Congress passed the Raker Act in order to ensure popular control over water resources, the people of California passed the Reasonable Use

Amendment in 1928 as an exercise of that control. The Amendment was a legislative ballot initiative that codified reasonableness limits on all uses and diversions of water within the state. Courts have interpreted the Reasonable Use Amendment to create a flexible and dynamic standard to balance competing demands for water. Because the Raker Act was enacted to ensure local control, the application of the Reasonable Use Amendment does not frustrate the Act's purpose.

A. The Reasonable Use Amendment Demands Beneficial Use of All Water Sources in the State.

A brief overview of the historical and continued importance of the Reasonable Use Amendment may help the Court consider how it interacts with the Raker Act. Ultimately, the Amendment – like the Raker Act – sought to ensure that California's water resources would benefit the general public.

Herminghaus v. Southern California Edison, 200 Cal. 81 (1926), prompted the passage of the Reasonable Use Amendment. The case considered whether riparian water rights could be subject to reasonable use limits. The California Supreme Court determined that such limits could not curtail a riparian user's right to water and that riparian rights were legally superior to appropriative rights; that is, right to the natural flow of a water source was superior to any claim to divert the water for a beneficial

purpose. *Id.* at 99–101. The Court suggested that the legislature, rather than the courts, should decide whether to limit riparian rights. *Id.* at 101.

Following *Herminghaus*, the California Legislature took up the Court's invitation to update the state's antiquated water rights system and placed a constitutional amendment on the ballot. The Reasonable Use Amendment sought to overturn the dual holdings in *Herminghaus* – that reasonable use could not curtail riparian water rights and that riparian rights were superior to appropriative rights. As the drafters of the Amendment wrote, "[The Amendment] will change the present theory of the law that now permits the unused, unrestrained and undiminished flow of our streams to the sea to be interpreted as a beneficial use of the waters in this semi arid state." Clifford W. Schulz & Gregory S. Weber, *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 Pac. L.J. 1031, 1070 n.189 (1988) (quoting the official argument in favor of the Amendment printed on the ballot). Voters ratified the Amendment in 1928, resolving the question of how the people of California intended their water to be used. *Id.* at 1071. Unlike other legislation, the Amendment embodied popular sovereignty. As one historian describes it, "[T]he people changed the constitution . . . Neither the judges nor the rich and the powerful, not even the legislature, finally ruled on this matter; it was the electorate who decided." Harry N.

Scheiber, *Public Rights and the Rule of Law in American History*, 72 Cal. L. Rev. 217, 249 (1984).

The Reasonable Use Amendment demands that *all* water resources of the state "be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof." Cal. Const. art. X, § 2. The Amendment targets both unreasonable uses and unreasonable diversions, noting that water rights "shall not extend to the waste or unreasonable use or unreasonable method of use or *unreasonable method of diversion* of water." *Id.* (emphasis added).

B. The Reasonable Use Amendment Provides an Evolving Standard that Considers the Value of Conservation.

California courts interpret the Reasonable Use Amendment to create a dynamic standard that adapts to changing circumstances and social values. Today, the Amendment allows the State to consider the economic, environmental, aesthetic, and recreational value of conserving California's wild places. This nuanced and flexible standard does not conflict with a federal statute ensuring popular control over the Tuolumne River.

From the outset, the California Supreme Court adopted a dynamic approach to water rights under the Reasonable Use Amendment.[2] First and foremost, it interpreted the Amendment to create a cohesive system in which both riparian and appropriative rights must be subject to reasonable use requirements. *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 706 (1933). In *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 381 (1935), the Court also found that vested riparian rights can *become* unreasonable and then must yield to newer appropriative claims. It clarified that a determination of unreasonable use "depends on the circumstances of each case and the time when waste is required to be prevented." *Id.* at 368. Plaintiffs in *Peabody* challenged a municipal scheme that involved storing and diverting waters from a local stream. *Id.* at 359–61. The Court's decision considered the reasonableness of both the *diversion* of the creek and the *use* of the diverted water. *Id.* at 369. The California Supreme Court has routinely reiterated the significance of an adaptive standard: "[R]easonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes." *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 129–30 (1986) (quoting *Envtl. Def. Fund v. E. Bay Mun. Util. Dist.*, 26 Cal. 3d 183, 194 (1980)).

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[2] See Brian Gray, *In Search of Bigfoot*, 17 Hastings Con. L. Quart. 225, 264–68 (1989). This article provides a detailed explanation and analysis of the reasonable use standard that has emerged out of cases interpreting Article X, section 2.

More recent California Supreme Court cases have clarified that the state can consider a broad range of criteria and shifting circumstances, including the indirect impact of different water uses. The foundation for this approach can be traced to *Joslin v. Marin Municipal Water Dist.*, 67 Cal. 2d 132, 140 (1967). In that case, the Court explained that reasonable use determinations "cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance" like the need to conserve water resources for future users. *Id.* As Professor Brian Gray explains, this language sets the stage for a reasonable use doctrine that "requires all water rights to be exercised in accordance with contemporary economic conditions and social values." Brian Gray, *In Search of Bigfoot*, 17 Hastings Con. L. Quart. 225, 230 (1989).

In conjunction with the public trust doctrine, the Reasonable Use Amendment allows California to adjudicate water rights in a way that considers the environmental, social, and economic value of conserving natural resources. In *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983), a group of environmental organizations challenged Los Angeles' appropriations from streams feeding into Mono Lake. Plaintiffs sought to enjoin these appropriations based on the state's public trust obligations. *Id.* at 425. Diversions by Los Angeles had already significantly lowered water levels in the lake and raised its salinity, threatening the ecological balance of the area. *Id.* at 428–31. The case

required, for the first time, a consideration of how the state's appropriative water rights system interacts with the public trust doctrine. *Id.* at 425. The Court concluded that "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *Id.* at 446. In fulfilling its "sovereign power to allocate water resources in the public interest" the state can reevaluate past allocations "which may be incorrect in light of current knowledge or inconsistent with current needs." *Id.* at 447. The Court directed that the State Water Resource Board reconsider the underlying dispute while taking into account "human and environmental uses of Mono Lake – uses protected by the public trust doctrine." *Id.* at 452.

National Audubon Society clarifies that the Reasonable Use Amendment imposes a balancing test that considers competing uses and interests, including environmental "uses" protected by the public trust doctrine. As Professor Gray explains, the case highlights the state's authority "to ensure that the current apportionment of California's water resources serves contemporary economic, social, and environmental goals in a reasonably efficient manner." Gray, *supra*, at 237. The state applies this standard in all adjudications of water rights, including challenges to the method and nature of diversions. *See People ex rel. State Water Resources Control Bd. v. Forni*, 54 Cal. App. 3d 743, 750–52 (1976) (considering the

reasonableness of winemakers' diversions from the Napa River for frost protection).

C. Applying Reasonable Use Limits on the Diversion and Distribution of State Water Resources Does Not Frustrate the Purpose of the Raker Act.

As Respondents explain, a federal statute authorizing a new project only preempts applications of state law that would be "'inconsistent' with Congress's purpose in enacting the federal authorizing statute." Resp'ts' Br. 29 (quoting *California v. United States*, 438 U.S. at 672). Applying the Reasonable Use Amendment to the diversion and distribution of water resources at Hetch Hetchy Valley is not inconsistent with the purpose of the Raker Act. The core purpose of the Act was to ensure popular control over natural resources. The Raker Act opened up the Tuolumne River to serve as a water source for San Francisco – a practical determination fit for its time. With passage of Article X, section 2, the people of California asserted their constitutional right to reassess that determination – a right consistent with the Raker Act's purpose.

CONCLUSION

A similar "beneficial use" impulse drove the passage of both the Raker Act and the Reasonable Use Amendment. Senator Walsh conceived of the Raker Act as a query to Congress: "It is simply a question as to whether the water . . . shall be allowed to run idly and uselessly to the sea . . . or whether we shall devote it to the use of the city of San Francisco

. . . as is provided by the pending bill." 51 Cong. Rec. 357 (1913). Indeed, Congress explicitly considered factors enshrined in the California Constitution: "The fundamental principle of the whole conservation policy is that of use, to take every part of the land and its resources and put it to that use in which it will best serve the most people." 51 Cong. Rec. 42 (1913). Precisely the same sentiment motivated the Reasonable Use Amendment. Because the state and federal laws served complementary objectives when enacted, they are readily harmonized today. For that reason, the Court should give effect to the purpose of the Raker Act, and honor the will of the people of California, by rejecting the trial court's conclusion that the Act preempts a cornerstone of state water law.

March 17, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.204(c), I certify that the text of this brief consists of 5,652 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

March 17, 2017 By: */s/*
Deborah A. Sivas

DECLARATION OF SERVICE

Alicia Thesing declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On March 17, 2017, I served the foregoing **BRIEF OF *AMICI CURIAE* ENVIRONMENTAL LAW PROFESSORS IN SUPPORT OF APPELLANTS** by uploading the document to the TrueFiling system, which electronically serves counsel for each party, or by placing the document in the United State Mail at Stanford, California or as specified below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed March 17, 2017 at Stanford, California.

/s/
Alicia Thesing