

# Restore Hetch Hetchy *in* Yosemite National Park

## LEGAL CAMPAIGN UPDATE:

### “Friends” endorse Restore Hetch Hetchy’s right to trial in California courts

As the period for submitting legal analysis to the appellate court draws to a close, several “friends” have submitted “**amicus curiae**” briefs that support Restore Hetch Hetchy’s legal position. While Restore Hetch Hetchy has never doubted the legal (or technical) merits of our approach, it is exceptionally pleasing to have the formal support of this diverse group.



*Like so many others, retired Ranger Philip Swartz supports restoration.*

#### California State Water Resources Control Board

**amicus brief**

The **California State Water Resources Control Board** has weighed in with the appellate court, supporting Restore Hetch Hetchy’s legal arguments. While the Board’s amicus brief was filed on behalf of “neither side”, it clearly supports the view that Hetch Hetchy Reservoir is not exempt from California law.

**In its brief, the State Board takes the trial court sharply to task for its erroneous rulings.** The State Board points out that the trial court’s holding that “reasonableness” does not change over time is “unprecedented and contradicted by Supreme Court and Court of Appeal opinions dating back to 1935.” Further, the Board asserts that “no statute of limitations bars any allegation of an unreasonable method of diversion, no matter when the diversion first began.”

The State Board knows this issue well, since it is the institution principally charged with enforcing California water law.

The State Board goes on to note “the trial court erred when it ruled that the Raker Act, which granted a conditional right-of-way for operation of the O’Shaughnessy Dam and Hetch Hetchy Reservoir, preempts Restore Hetch Hetchy’s unreasonable diversion claim” and that “Nothing in logic or the Raker Act supports the opposite conclusion, that Congress intended to prevent California from applying its water law to a project.”

The concluding sentence in the State Board’s summary is perfectly clear: **“This Court should reverse the trial court’s rulings on statute of limitations and preemption. It should further instruct the trial court to determine the reasonableness of San Francisco’s water diversion at Hetch Hetchy.”**

#### Yosemite Superintendents

**amicus brief**

Employees of the National Park Service do not publicly express opinions, one way or the other, about whether a reservoir should occupy a magnificent glacier-carved valley in Yosemite National Park. Retirees, however, are not so reticent. **Attorney Deborah Caplan of Olson, Hagel and Fishburn LLP** submitted an amicus brief on behalf of former **Superintendents Barbara (B.J.) Griffin and Robert Binnewies**. See page 3 for Bob’s and B.J.’s personal thoughts about the opportunity for restoration.

#### Law Professors

**amicus brief**

Similar to Restore Hetch Hetchy’s filings, the law professors’ brief, which was drafted primarily by law students at the **Stanford Environmental Law Clinic**, includes pertinent elements of legislative history which clearly demonstrate that Congress always intended that the Raker Act be subordinate to State water law. The law professors also describe how the Raker Act was intended to serve a public purpose—the imminent water supply problem in San Francisco—an objective not dissimilar to the reasonable use requirements of the California Constitution.

“This was a great project for us. Our students, **Aaron Forbath and Will Horowitz**, got to work with legal experts at other law schools and really dig into the deep background of what Congress intended in passing the Raker Act,” said **Deborah Sivas, Luke W. Cole Professor of Environmental Law at Stanford Law School and Director of its Environmental Law Clinic**. “What they discovered is that the animating sentiment in the early 20th Century was that states should retain ultimate authority over how their waters are used and allocated. In 1913, that meant helping the City of San Francisco secure drinking water for the public in the face of various obstacles. But technology and public needs change, and the law evolves along with those changes. Today, California water law requires that we consider all competing public needs, including the need for recreational opportunities and a robust environment. The amicus brief we prepared argues that nobody, not even the City of San Francisco, is immune from such considerations.”

## The Four Officials, Joined by Earth Island Institute

amicus brief

Four former statewide officials, **Attorney Generals Dan Lungren and John Van de Kamp**, and **Resource Secretaries Huey Johnson and Doug Wheeler**, have also submitted an amicus brief in support of Restore Hetch Hetchy. The brief was joined by **Earth Island Institute**.

**Attorneys Antonio Rossmann and Roger Moore** describe the Four Officials as "... former public servants of the State of California who have occupied, short of the Governorship, the highest offices in the state that govern California's natural resources and enforce legal mandates for their protection."

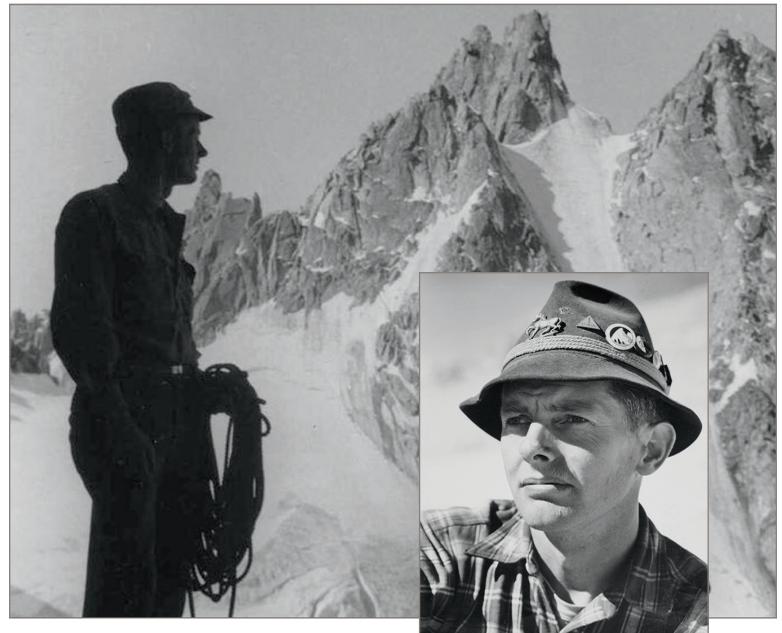
In their reply to the trial court's ruling that Hetch Hetchy Reservoir was authorized by federal law and thus exempt from state law, the Four Officials are careful to note that Hetch Hetchy is very different from Shasta or Folsom Reservoirs, which were constructed by federal officials and are operated by them as part of a nationwide program. The brief reads "... in contrast, Hetch Hetchy is not a federal project, does not demand compliance with a uniform nationwide 'system of regulation,' and **its operation to comply with article X, section 2 of the California Constitution will not offend national policy.**"

### Rossmann and Moore

**Rossmann and Moore**, one of California's leading water law firms, represents government, private, and non-profit clients. Antonio Rossmann and Roger Moore have provided leadership and advocacy addressing several prominent water resource disputes in the western United States, including controversies in the Sacramento/San Joaquin Bay-Delta, along the Colorado River and at Mono Lake.



**John Van de Kamp** passed away March 14, one day after reviewing the amicus brief with Roger Moore. He was dedicated to environmental protection throughout his career and delivered a personal and passionate keynote speech about restoring Hetch Hetchy Valley at UCLA's "A Century beyond Muir" symposium in 2014. We will miss him.



Legendary environmentalist, mountaineer and World War II veteran **David R. Brower** founded **Earth Island Institute** in 1982 and later encouraged the creation of **Restore Hetch Hetchy**.

### Resource Secretaries

**Doug Wheeler and Huey Johnson** are longtime friends of Restore Hetch Hetchy who share our passion for Yosemite and our practicality for keeping San Francisco and others whole with respect to water supply. In the foreword to the Environmental Defense Fund's *Paradise Regained* (2004), Wheeler and Johnson explained "restoration advocates bear the burden of proving that alternatives can be made to work" before concluding with the poignant words of ecologist E.O. Wilson "**That it is time to begin reweaving the wondrous diversity of life that still survives around us.**"

### Attorney Generals

"Yosemite Valley is one of the great natural wonders of the world and yet accessible to so many. I will admit that it has additional personal meaning to me—as a 19 year-old college student, I met my wife Bobbi there and subsequently enjoyed its refreshing and contemplative beauty on our honeymoon three years later. We thought there was nothing like it in the world until I learned of the submerged Hetch Hetchy Valley. While **John Van de Kamp** and I disagreed on many political positions over many years, we, each in our own way, worked for what we thought was best for our state and nation. And there was one thing for which we shared a conviction and a passion—the unmistakable majesty of Yosemite Valley and the unique opportunity to return Hetch Hetchy Valley, its twin, to the American people. It was an honor to join him in our amicus curiae brief as our last collaborative effort."

— **Dan Lungren**,  
former California Attorney General  
and U.S. Congressman

# RESTORE HETCH HETCHY *in* Yosemite National Park

## **The (legal) case for restoration in a nutshell**

Restore Hetch Hetchy has sued San Francisco, arguing that the ongoing operation of Hetch Hetchy Reservoir violates the California Constitution's mandate prohibiting any "unreasonable method of diversion". Our petition argues that the value of a restored valley far outweighs the cost of improving San Francisco's water system so that it can divert the flow of the Tuolumne River outside of Yosemite National Park **without losing a drop of water supply**.

Last spring, however, the trial court in Tuolumne County ruled that San Francisco need not comply with the California Constitution for two reasons. First it ruled that O'Shaughnessy Dam and its Hetch Hetchy Reservoir were authorized by Congress, "preempting" any State law that would challenge the facility. Secondly, the court ruled that the statute of limitations for making any such claim passed long ago.

Restore Hetch Hetchy has responded that the "plain language of the Raker Act" as well as its Congressional history are clear that **"nothing 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"**. Also "reasonableness" is an evolving standard and thus cannot be subject to a statute of limitations. What might have been reasonable 100 years ago may be unreasonable today.

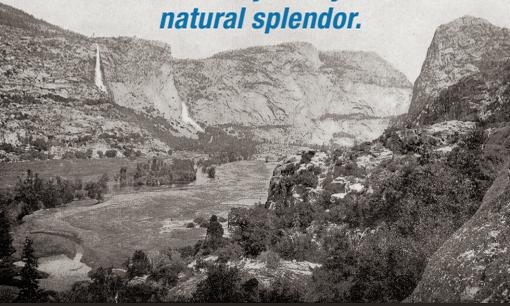
The amicus briefs described in this newsletter provide important support for Restore Hetch Hetchy's legal positions, as developed by attorneys **Michael Lozeau, Meredith Wilensky and Richard Frank**. They make for some pretty interesting reading and are posted at [hetchhetchy.org](http://hetchhetchy.org).

## **Yosemite Superintendents** (continued from page 1)

*"Remove the O'Shaughnessy Dam? Some 1,384 dams have been removed from our nation's rivers in past decades, 72 of them in 2016 alone. The purposes have been to restore fisheries, natural habitat, outdoor recreational opportunities, and aesthetics and to eliminate obsolete, unsafe, and degrading facilities. Sound familiar? Downriver from O'Shaughnessy Dam lies a modern water system opportunity that will best serve the San Francisco Bay Area and California's great Central Valley as water conservation becomes ever more essential. Upriver is world renowned natural beauty, flooded, but waiting. We are right to ask for a careful, present-day review of the options. To simply say, oh, the old dam is there, so forget it, is like saying, oh, the air already is polluted or pesticides already are in our food chain or that our nation's infrastructure already is crumbling, so why try to do better? We can, and we should."* — Bob Binnewies

*"Yosemite is a revered treasure of the American people and the world. For over 100 years, a spectacular part of this World Heritage Site has been closed to natural processes and public enjoyment. Restoration of Hetch Hetchy valley to its natural state would allow its wildlife to return home, its waters to flow freely, and its visitors to wander and be enriched by its beauty."* — B.J. Griffin

**Please Contribute Today!**  
*It's time to restore Yosemite's Hetch Hetchy Valley to its natural splendor.*



**No donation is too small or too large!**  
Use attached envelope, go to [www.hetchhetchy.org](http://www.hetchhetchy.org) or contact our office—we now accept contributions of appreciated stocks and other securities.

**JOIN RESTORE HETCH HETCHY BOARD AND STAFF ON MAY 7**  
**9:30 HIKE TO WAPAMA FALLS (and back)**  
**1:00 PICNIC LUNCH**  
Call **510-893-3400** or email **Julene@hetchhetchy.org**

**On March 11, more than 170 supporters of Restore Hetch Hetchy gathered at the Berkeley City Club to listen to world champion climber Hans Florine and to celebrate progress toward our common goal of making Yosemite National Park whole.**



# Restore Hetch Hetchy

PO Box 71502  
Oakland, CA 94612



Albert Bierstadt Oil on canvas ca. 1890



Isaiah West Taber photographer 1908

*“We no longer consider the natural environment merely as a grand resource to be exploited for agricultural and urban uses. The natural environment, as such, has great value.”*

**Carl Boronkay**, former general manager of the Metropolitan Water District of Southern California

## We get by with a little help from our amici

(with apologies to Lennon and McCartney)

Amicus was one of the first words I learned in Latin class at Willard Jr. High. An amicus is your friend, if it is a boy or a man. A girl or woman friend is an amica. Several friends are amici.

Restore Hetch Hetchy has amici. We think of them as our own friends although technically they are amici curiae (“friends of the court”).

**These amici—law professors and students, former Yosemite Superintendents, the Earth Island Institute, former statewide officials and the State Water Board—agree: It’s time to evaluate the merits of restoration and that evaluation should take place in the California courts.**

San Francisco has amici as well, including the Association of California Water Agencies (ACWA), the Northern California Water Association, and the Santa Clara Valley Water District. It’s not surprising to see water agencies sticking together.

Still, I’ll confess that I was particularly disappointed to see ACWA’s amicus. I have many friends at its member agencies, who, at least privately, support restoration of Hetch Hetchy Valley.

Retirement, however, often allows folks to speak their mind publicly. **Tom Clark and Carl Boronkay**, former General Managers of, respectively, the Kern County Water Agency and the Metropolitan Water District of Southern California, joined Restore Hetch Hetchy’s Advisory Board shortly after leaving those positions. Support from people like Tom and Carl is important to us because they understand that water system reform is eminently achievable and that Yosemite National Park can be made whole again.



Executive Director  
**Spreck Rosekrans**



PO Box 71502, Oakland, CA 94612 • 510-893-3400 • [admin@hetchhetchy.org](mailto:admin@hetchhetchy.org) • [www.hetchhetchy.org](http://www.hetchhetchy.org)

