



WATER AUDIT CALIFORNIA

A PUBLIC BENEFIT CORPORATION

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January 21, 2020

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Minh C. Tran, County Executive Officer

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David Morrison, Planning, Building and Environmental Services Director

Steven Lederer, Public Works Director

BY HAND DELIVERY

To Those That It May Concern:

Re: NOTICE OF INTENDED LITIGATION re:

**AN ORDINANCE OF THE NAPA COUNTY BOARD OF SUPERVISORS,
STATE OF CALIFORNIA, AMENDING SECTION 18.10.020 OF
CHAPTER 18.10 (ZONING ADMINISTRATOR) SECTION 18.124.080
AND SECTION 18.124.130 OF CHAPTER 18.124 (USE PERMITS) AND
SECTION 18.126.030 AND ADDING A NEW SECTION 18.126.065 TO
CHAPTER 18.126 (ADMINISTRATIVE PERMITS) OF TITLE 18
(ZONING) OF THE NAPA COUNTY CODE REGARDING ISSUANCE OF
SMALL WINERY USE PERMITS AND MODIFICATIONS TO WINERY
USE PERMITS (the "Ordinance")**

Water Audit California is an advocate for the public trust. Functioning as a private attorney general, as authorized by California Code of Civil Procedure section 1021.5, we use the judicial process to compel recalcitrant, neglectful and/or unfaithful public entities to comply with their trustee duties to the environment under statutory and common law. Guided by an advisory panel of unquestionable scientific ability and integrity, we have a record of tenacity and unbroken success. We are required by the law and our own policies to give fair notice to any entity that we consider in violation of the law before commencing litigation.

In *National Audubon v. Superior Court* (1983) 33 Cal.3d 419; 189 Cal.Rptr. 346; 658 P.2d 709 California's Supreme Court held that any allocation of water for private purposes, whenever made and for whatever purpose, is subordinate to the evolving needs of the public trust. The Court held that "we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." (*Id.* at 426.) "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources." (*Id.* at 446.)

A county is a legal subdivision of the state and therefore references to the "state" includes subdivisions of the state such as counties. (*Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 175-176) Although the state is primarily responsible for administration of the trust, counties share responsibility for the public trust and "may not approve of destructive activities without giving due regard to the preservation of those resources." (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1370, fn. 19.)

A century ago the Napa River teemed with a population of steelhead trout, salmon and other fish. This was a natural bounty that had existed for millennia. At the turn of the previous century the Napa River was viewed as the foremost fish habitat in the Bay area. But over a decade ago some species were realized to have become extinct, and others were assessed as threatened with extinction. The primary reason was patently obvious to even a casual observer. Since the 1960's not one of the Napa Valley dams had complied with its lawful duty to bypass sufficient water to keep fish downstream in good condition. Through strategic litigation Water Audit and its principals have succeeded in compelling year-round bypass for the length of Napa Valley, from the headwaters near the City of Calistoga to the mouth of the Napa River. For the last two years the downstream reaches below Kimball, Rector and Bell Canyon dams have been continuously wetted for the first time in many decades. Not less than tens of millions of gallons of water annually have been directed to the fish, which because of improved and modernized dam operations has occurred without any impairment to beneficial human uses.

Anticipated environmental benefits from this additional flow of water appear not to have been fully realized. Water Audit has been frustrated by our inability to monitor our water contribution from bypass because of inadequate monitoring and modelling of the Napa River by the County. Frequent wastewater system failures have on occasion turned the Napa River into a sewer; silting of streams and infilling of reservoirs have resulted from uncontrolled erosion; stripping of riparian shade from stream banks has elevated stream temperatures above habitable limits; and unmonitored agricultural runoffs have degraded water quality. Simply put, it appears that the County has largely ignored its duties to protect the public trust in its mono-focused pursuit of economic development. While facilitating the enrichment of wealthy contributors, successive generations of Supervisors have largely failed in their duties as trustees, squandering the natural riches entrusted to them for future generations.

In the interests of comity, we reserve for future communication our very serious reservations about the recent formation of the Groundwater Sustainability Agency. We do note the pertinent point that the County's Alternative Groundwater Plan was rejected by the Department of Water Rights for the reason that there was no "plan" presented that had been recognized and implemented by the County. While data showed that the County was thus far in rough balance in its groundwater, "so far, so good" was found to be inadequate planning for the future, particularly in light of proposed new development and anticipated climate change.

Water Audit cannot, however, remain silent about the proposed Ordinance, as that legislation that appears to pose a direct threat to interests of the public trust. Recent events and research have elevated our concerns to outright alarm. Although the County intentionally elected in 2014 to turn a blind eye to the issue, the County's 2018 water study has at last acknowledged that there is a proven relationship between the surface waters and the groundwater aquifer in Napa Valley. It estimates that over 20% of the County's groundwater is derived from the "losing reaches" in the Napa River. In short, by the County granting well permits for agricultural purposes, it is extracting water from the Napa River that Water Audit obtained for and dedicated to the public trust.

We see no discussion in the Board of Supervisor's record of the impact that these identified new demands will have on the public trust. To the contrary, in its comment on the Ordinance the Center for Biological Diversity set forth an estimation of the water demands of the potential additional winery authorized capacity – a volume that far exceeds the bypass volume that Water Audit has worked so hard to obtain. There has been no objection taken to CBD's assessment, which speaks volumes to its veracity.

In *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 866 (cert. denied) California's Third District Court of Appeal applied the public trust doctrine to the administration of groundwater. It held that counties have a fiduciary duty to consider the public trust before authorizing the drilling of groundwater wells whose extractions *might* have an adverse impact on trust resources. The Court also rejected the argument that the Sustainable Groundwater Management Act preempts or fulfills counties' fiduciary duties to consider the trust. In the Court's own words: "The analysis begins and ends with whether the challenged activity harms a navigable waterway [such as the Napa River] and thereby violates the public trust."

Respectfully, the failure to consider adverse effects on the public trust is a violation of your trustee duties to the public trust, and further appears to be an overt effort to avoid the County's duties under the California Environmental Quality Act.

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Be advised that Water Audit will immediately seek judicial relief, without further notice, should the County adopt the Ordinance without full, transparent, public and thoughtful consideration of the potential impact on the public trust.

Respectfully,
WATER AUDIT CALIFORNIA

Grant Reynolds
Director

Cc by Email:

Calistoga Tribune
Napa Valley Register
St. Helena Star
Weekly Calistogan
Yountville Sun