# WATER AUDIT CALIFORNIA

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County of Napa
Planning Commission

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RE: Hearing – June 21, 2023, Agenda # 7
Notice of Intent to Adopt a Negative Declaration (ND) for the Rutherford Ranch Winery Major Modification #P19-00126-MOD and Use Permit Exception to the Conservation Regulations #P23-00145 (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.

Water Audit California ("Water Audit") is an advocate for the public trust.

The Applicant, variously identified as Rutherford Ranch Winery and Round Hill vinery, ("Applicant") is a bottling plant located at 1680 Silverado Trail in the County of Napa. The "Application" is as captioned above.

The California Department of Fish & Wildlife ("CDFW") in its comment to the Application has stated: "The Project, as proposed, would have an impact on fish and/or wildlife." It concludes: "a Mitigated Negative Declaration is more appropriate for the Project and the below recommended mitigation measures should be implemented." (Agenda PDF 417) Water Audit concurs.

Given the short time allowed for public review, this hurried comment will limit itself to three objections:

(a) **The Application does not consider the implications of the proposed conduct on the public trust;**
(b) **The Application is incomplete and inadequately supported by fact;**
(c) **The recommended mitigations of a trustee agency have not been included in the terms of the proposed approval.**

Through Government Code § 65800 et seq. the Legislature conveyed to the county the authority to adopt regulations and ordinances to promote the general welfare of the State's residents, while providing that the county's may exercise the maximum degree of control over zoning matters. Government Code § 65101 states in part: "The legislative body [i.e. the Board of

Supervisors] may create one or more planning commissions each of which shall report directly to the legislative body."

The Napa County Planning Commission performs the function of a planning agency. Its five members are each appointed by the supervisor representing one of the counties' five districts for a term that expires one month after the appointing supervisor is no longer in office.

Notwithstanding the State's sweeping assignment of powers, the County remains subordinate to the control and direction of the senior levels of government. Napa Ordinances Title 16 and Title 18 were required to conform the County to state law. The state endows the highest priority on fish and wildlife protection and conservation. "The Legislature finds and declares that the protection and conservation of the fish and wildlife resources of the state are of utmost public interest.

Fish and wildlife are the property of the people, and provide a major contribution to the property of the state …" (*Fish and Game Code* § 1600) This statement is one of the foundations of Water Audit's mission, both generally and herein.

Ordinance § 16.04.040 declares the County's intent to, *inter alia,* control the alteration of stream channels.

A 'riparian way" is proximate to the stream flowing through the subject property. Ordinance § 16.04.010 states a County finding that riparian vegetation "is a valuable natural resource … [many] wildlife species, particularly birds, live only in riparian cover."

Ordinance § 16.04.050 lists five County riparian objectives:

- Preserving fish and game habitats;
- Preventing or reducing erosion;
- Maintaining cool water temperature;
- Preventing or reducing siltation;
- Promoting wise uses and conservation of woodland and wildlife resources of the county.

Ordinance § 16.04.060 provides that the methods "of preserving riparian cover include regulating by permit all development activities within riparian zones."

Ordinance § 16.04.750 (B) prohibits any facility or structure within ten feet from the top of a stream bank.

Ordinance § 16.04.770 states: "No structure or facility shall be constructed, located, extended, converted *or altered* without full compliance with the provision of this chapter … "

Ordinance § 18.108.050 states that that no permit shall be issued "for uses, buildings

or purposes which would be in conflict with the provisions of this title." In further emphasis of the preeminence of the subject chapter.

Ordinance § 16.04.780 states in relevant part:

> "Neither the issuance of a permit nor compliance with the conditions thereof … shall act to relieve any person from any responsibility otherwise imposed by law. … A permit issued pursuant to this chapter shall not relieve the permittee of the responsibility of securing and complying with all other permit requirements and procedures which may be required by any other rule or regulation. "

Ordinance § 18.108.050 sets forth categorial exemptions to the chapter. Review of the provisions disclose that none apply to the instant matter.

Ordinance § 18.108.040 sets forth the requirements in order to qualify for use permit that would allow a discretionary exception to environmental compliance. It provides that "the encroachment, if any, is the minimum necessary to implement the project."

There are three exemptions to the rule that would permit the approval of a use permit. None avail the Applicants. The first exemption, Ordinance § 18.108.050, is factually inapplicable. The application did not concern land clearing, fire safety, or any other of the designated exceptions set forth in that provision.

Second, the Applicants are ineligible for an exemption because their proposal does not contain the necessary precondition of maintaining legal setbacks from the stream bank. See Ordinance § 16.04.750 (B) and Ordinance § 18.108.025 (B)(3). The Planning Commission is without authority to grant an exemption if the applicant does not meet that fundamental requirement. Other provisions of building and zoning it may waive, but this minimum protection of environmental interests is mandatory.

Ordinance § 18.108.025(E) is unavailing because it requires "appropriate permits from other state, federal and local use permit requirements," and that the director determine "that the least damaging alternative has been selected as part of an approved project." There is no state or federal permit, or evidence that the encroaching buildings are the least damaging alternative.

Ordinance § 18.112.160 provides for mandatory abatement in situations where an encroachment has occurred:

> Any building set up, erected, built, moved or maintained, and any use of property contrary to the provisions of this title, shall be and the same is hereby declared to be unlawful and a public nuisance and the county may immediately commence action or actions, proceeding or proceedings, for the abatement, removal and enjoinment thereof in the manner provided by law, and shall take such other steps

> and shall apply to such court or courts as may have jurisdiction to grant such relief as will abate and remove such building or use and restrain and enjoin any persons, firm or corporation from setting up, erecting, building, moving or maintaining any such building or using any property contrary to provisions of this title.

Ordinance § 18.144.030 provides it "*shall* be the duty of the director, and other county officials herein or otherwise charged by law with the enforcement of this title, to enforce this title and all of its provisions." (Emphasis added)

Amongst the most venerable of California's laws are the Maxims of Equity, otherwise known as the Maxims of Jurisprudence. Intended to integrate the concept of "what is fair and just" with statutory law, the Maxims import moral values into "legal" decisions. The Maxims include "He who seeks equity must do equity." Applied herein, it is submitted that the Maxims mean that if the Applicant wishes to receive relief from the legal constraints that prohibit their conduct, they must be completely and unreservedly truthful to this Commission. As is detailed below, the Applicant has repeatedly failed this test.

**(1) The Public Trust**

By simply stating that no impacts exist, Applicant has arbitrarily and wholly failed to discuss the substantial potential off-site impacts of the project.

The subject parcel is served by a well located approximately seven hundred feet from Conn Creek. The presence of this watercourse is not properly represented in the Application, at the best represented in fine type. It would be possible on normal review to not note the close proximity between extraction and creek. The project is in an area that is well recognized as a losing reach, i.e. a section of watercourse that tends to lose surface flow to groundwater. A second well is shown, but not discussed in the Application. Conn Creek has a proven population of steelhead, a federally protected fish.

Pursuant to Fish & Gamed Code section 5937 the City of Napa bypasses by Conn Dam from 0.4 to 0.5 cubic feet per second (CFS) into Conn Creek for approximately 6 months a year, (approximately 140 to 160 AF per year). This water is dedicated for the purpose of sustaining fish in Conn Creek downstream of the dam to the confluence with the Napa River.

Extraction by the Applicant lowers the groundwater level, contributing to the drying of Conn Creek. To the extent the extractions of the Applicant diminish surface water flow they cannot be allowed to continue. Staff avoids this consideration altogether by accepting at face value the assertion that the proposed substantial changes in bottling and visitation operations do not change water consumption. Based upon this improbable assertion, staff then concludes that a Tier 3 Water Availability Analysis is unnecessary. Water Audit challenges both the factual and the legal foundations of this proposition.

(a) **The assertion of no increase in water consumption should be viewed skeptically.**

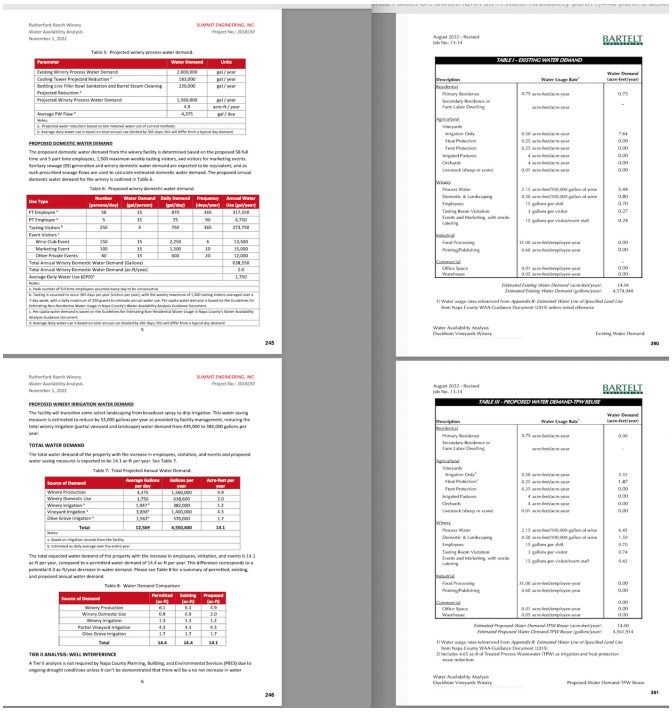
The Application is not based on tangible empirical operating evidence. In the absence of data, the public must wholly rely on the integrity of consultants. However, one need not put one's common sense into storage when considering this Application.

Compare the recent application by Duckhorn Winery at its Agenda Packet pages 390 and 391 with the subject Application at Agenda Packet 246. (See following page.)

The difference in form is obvious on first glance; it is impossible to do a line by line comparison. A cynical person would suggest this is an intentional officiation, as each of these applications is based on similar data. Consistency in form and content would facilitate review.

Nevertheless, it is possible to compare one fundamental metric found in different formats in the two applications: the volume of water alleged to be required for wine production. Duckhorn represented that it takes 2.15 acre-feet (AF) of water per 100,000 gallons of wine production, or 0.0000215 AF (approximately 7 gallons of water per gallon of wine.) This is the industry standard, published and utilized by the County, and in the absence of contradictory empirical information is apparently deemed reasonable.

The Applicant represents that it proposes to extract 4.9 AF of groundwater to produce 1,560,000 gallons of wine, or 0.00000341 AF (approximately 1.1 gallons of water per gallon of wine), utilizing only 15% of the water used by Duckhorn. This is not credible. A decision to accept such a remarkable assertion demands supporting facts and explanation that are not present in the Application.



(b) **Injuries to the public trust cannot be vested.**

In any event, whether the water utilization is greater or not, the County must consider potential injury to the public trust from the activities sought to be authorized by the Application. A common law doctrine, the public trust is continuously evolving to protect the public's use and needs in California's waterways. In *Environmental Law Foundation v. State Water Resources Control Board* (2018) 16 Cal.App.5th 844, 858 (*ELF*) the court held that groundwater extractions that diminish public trust surface water flows can be enjoined as injuries to the public trust.

The essential idea of the public trust doctrine is that the government holds and protects certain natural resources in trust for the public benefit. (See *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 452, 456; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441; *Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521.)

Public trust theory has its roots in the Roman and common law. (*United States v. 11.037 Acres of Land* (N.D. Cal. 1988) 685 F. Supp. 214, 215.) Its principles underlie the entirety of the State of California. Upon its admission to the United States in 1850, California received the title to its tidelands, submerged lands, and lands underlying inland navigable waters as trustee for the benefit of the public. (*People v. California Fish Co.* (*California Fish*) (1913) 166 Cal. 576, 584; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 288.) The People of California did not surrender their public trust rights; the state holds land in its sovereign capacity in trust for public purposes. (*California Fish, Ibid*.)

The courts have ruled that the public trust doctrine requires the state to administer *as a trustee* all public trust resources for current and future generations, precluding the state from alienating those resources into private ownership and requiring the state to protect the long-term preservation of those resources for the public benefit. (*National Audubon, supra.* 33 Cal.3d 419, 440-441; *Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 249-251.)

The public trust fulfills the basic elements of a trust: intent, purpose, and subject matter. (*Estate of Gaines* (1940) 15 Cal.2d 255, 266.) It has both beneficiaries, the people of the state, and trustees, the agencies of the state entrusted with public trust duties.

The beneficiaries of the public trust are the people of California, and it is to them that the trustee owes fiduciary duties. As Napa County is a legal subdivision of the state, it must deal with the trust property for the beneficiary's benefit. No trustee can properly act for only some of the beneficiaries – the trustee must represent them all, taking into account any differing interests of the beneficiaries, or the trustee cannot properly represent any of them. (*Bowles v. Superior Court* (1955) 44 C2d 574.) This principle is in accord with the equal protection provisions of the Fourteenth Amendment to the US Constitution.

A public trust trustee "**may not approve of destructive activities without giving due regard to the preservation of those [public trust] resources.**" (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* ("*Bio Diversity*") (2008) 166 Cal.App.4th 1349, 1370, fn. 19, 83 Cal.Rptr.3d 588.) [Emphasis added]

Common law imposes public trust considerations upon County's decisions and actions. (*Biological Diversity, supra.* 166 Cal.App.4th 1349; *Environmental Law Foundation v. State Water Resources Control Board* ("ELF") (Cal. Ct. App. 2018) 26 Cal.App.5th 844.) The courts have recognized the State's responsibility to protect public trust uses whenever feasible. (*See*, e.g., *National Audubon, supra.* 33 Cal.3d 419, 435; *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 631; *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 289.) Napa County, under Public Resources Code, section 6009.1, has an affirmative duty to administer the natural resources held by public trust solely in the interest of the people of California.

The public trust doctrine requires the State (i.e. Napa County), as a trustee, to manage its public trust resources (including water) so as to derive the maximum benefit for its citizenry. Even if the water at issue has been put to beneficial use, it can be taken from one user in favor of another need or use. The public trust

doctrine therefore means that no water rights in California are truly "vested" in the traditional sense of property rights.

Furthermore, there can be no vested rights in water use that harm the public trust. Regardless of the nature of the water right in question, no water user in the State "owns" any water. Instead, a right to water grants the holder thereof only the right to use water, a "usufructuary right". The owner of "legal title" to all water is the State in its capacity as a trustee for the benefit of the public. Both riparian and appropriative rights are usufructuary only and confer no right of private ownership in the watercourse, which belongs to the State. (*People v. Shirokow* (1980) 26 Cal.3d 301 at 307.)

The Application asserts that it is impossible to know whether the Applicant's operations have an adverse effect on groundwater levels as there are no monitoring records. That is not a true assertion. The City of Napa has for more than two decades monitored groundwater levels proximate to the Applicant, and that data is readily available on request.

Further, even if the assertion of no increase in consumption were true, the County's hydrological consultants, Luhdorff & Scalamanini Consulting Engineering offer a flat rate service through the Planning Department to perform a Tier 3 analysis for no more than $1,250, with no groundwater monitoring required. Water Audit has concluded that the only reason for not including the Tier 3 analysis is because it would reveal that the Applicant is injuring the public trust. Responsible planning staff should be embarrassed.

**(2) The Application is incomplete and inadequately supported by fact**

The Exception for Conservation Regulation Application page 5 has no date or permit number. It was signed by the Applicant in 2022, but the County parcel report states the request was applied for in May 2023 and is not identified as a "Con Regs" application. Further, P18-00452 (a *very* minor modification) is the supporting application for the subject hearing of P19-00126-MOD (a major modification). Technical Information and Reports are reported to have been submitted with P18-00452 but are not available on the public record under either file number.

Agenda PDF 172 represents itself to be a policy memorandum signed by the Director of Planning David Morrison. Both the form and the contents are fraudulent. The 2005 date of the "memorandum" predates Mr. Morrison's employment in 2014 by nearly a decade. Further, the content of the form misrepresents the current standards adopted in 2018, prior to the subject Application.

There is no storm water plan, although photographs submitted with the application show a parking lot immediately adjacent to the drainage flowing into Conn Creek, and show an unpermitted bridge constructed across the watercourse, with the creek flowing under parking structure. (Agenda PDF 250)

Although the County planning process requires designation of environmental risk by state or federal agencies, the Applicant makes no such showing, relying solely on a summary dismissal of the risk in the Kjeldsen biological report. (Agenda PDF 183)

The entirety of Attachment C.1 is in support of the argument that offending improvements should be allowed to remain, alleging that many of the improvements were permitted. No evidence is shown of any such permits. It has been the law in California since 1872 "That which does not appear to exist is to be regarded as if it did not exist." *Ca. Civ. Code § 353*

There is no statement of grape source, although the Applicant was formally asked through its counsel to provide a certified statement and was advised that the use permit would not be granted without both documents being provided.

By reference to the Applicant's website (https://rutherfordranch.com/round-hill) it can easily be seen that only a small portion of the Applicant's production is derived from Napa grapes. The Applicant acknowledges that "Round Hill offers California's most popular varietals sourced from premium Monterey Coast and Central Valley vineyards." One million gallons of juice, the source of two-thirds of the total proposed production, is brought to the site from hundreds of miles away by over two hundred 6,500 tanker trucks. Despite the cache of the Napa address, the greatest value of this facility to the Applicant is the copious amounts of free water. Napa is not so richly endowed with water that consideration must be given to whether this is a good bargain for the public.

The exchange of correspondence between Applicant and staff of the planning department is not fully presented in the agenda packet.

The application for a conservation regulation exception was apparently made long after the program of forgiveness had ended. The Applicant has apparently not corrected issues raised in a code enforcement action that was not disclosed or discussed in the Application.

This site is 17 acres, and under current Water Availability Analysis standards of 0.3 AF per acre of land, the Applicant is entitled to 5.1 AF per year. By applying industry norms to wine production and hospitality estimation of the likely extraction is closer to 55 AF per year. Monitoring is proposed for only one year and reporting only required on demand.

In Attachment F*, Biological Report and Restoration Plan,* at PDF page 225, *Plate 1, Location and Site Map* ("Map") is represented by the Applicant to be "USGS Rutherford Quadrangle." This is a misrepresentation. While the diagram might have some origin history with a USGS map, the Map presented is a distant shadow of the original.

The Map shows a pink dashed line at the base of the slope, identified as the location of the "Project Site" and "Location of Creek." There is no recognized USGS designation for a pink dashed line. The pink dashed

line appears to be representing not a creek, but the Applicant's unpermitted redirection of the natural watercourse.

Ordinance § 18.108.030 states in part: "'stream' means any of the following: 1. A watercourse designated by a solid line of dash and three dots symbol on the largest scale of the United States Geological Survey maps most recently published …" Blue dashed lines on the USGS map that indicate ephemeral streams in the hills between the hills have been carefully overdrawn in a black line, evidently to erase the existence of nature.

Compare to Application Attachment I, Summit Engineering *Wastewater Feasibility Study,* (Agenda PDF page 287), which shows a blue dashed line at a markedly different location from the aforesaid pink dashed line. A blue dotted line is found in the same location as the Summit drawing as in Attachment I in the County GIS publication of the actual USGS map. Web hosted County Community map terrain data indicates two watercourses running through the center of the property that appear to to have been filled and redirected, and the original water courses no longer exist.

Concerns for flood plains and wetlands considered in the original use permit have disappeared from consideration.

**(3) The recommended mitigations of a trustee agency have not been included in the terms of the proposed approval.**

In Attachment C, *Previous Project Conditions*, sub-Attachment 1, *Mitigation Measures for Ortman & Rogers Winery,* it is reported that in 1983 the Applicant obtained a use permit from the County of Napa that was foundational to the present operations. Term 17 of the use permit provided that the owner "obtain an approved streambed alteration agreement (Fish and Game Code 1603 from the California Department of Fish and Game."

There is no record of such an agreement being sought or made. The Applicant ignored an express term of mitigation of the use permit, constructed an unlawful drainage, filled other drainages, and have taken commercial advantage of their malfeasance to this date.

The Applicant protests that the previous injuries were caused by prior owners, but the plain fact is that the equity of the shareholders of the Applicant is responsible for the sins of the corporation. A new shareholder at GM or Ford cannot deny responsibility for a factory recall because they were not a shareholder at the time of the manufacturing error. Neither may the current owners of the Applicant deny their responsibility for remediation. "He who takes the benefit must bear the burden." *Ca. Civ. Code § 3521*

Attached as Exhibit N, mistakenly categorized as part of *Public Comments,* CDFW the trustee agency for fish and wildlife makes request for inclusion of mitigation terms. Staff has failed to heed these

recommendations. CDFW has requested the removal of all encroachments in the riparian way. Staff does not fully support recognition and approval and continued use of structures in the stream setback. (Agenda PDF 21)

Water Audit notes the presence of piping, both pressure and drainage, in the "creek" drainage.

Water Audit has found no State Clearing House listing for this project. Department of Drinking Water has no reports for this facility for three of the last five years, and no certification of any report. There has been no comment or waiver of comment from the Regional Water Quality Resource Board, State Water Resources Control Board, there is no hazardous materials management plan, there is no water quality analysis, and there is no Public Works groundwater memorandum. Land use maps are inconsistent with the norm.

**(4) Conclusion**

For the foregoing reasons Water Audit respectfully requests that the Planning Commission deny the Negative Declaration, and if the Applicant should wish to continue, that subsequent applications address the comments made.

Respectfully,

William McKinnon
General Counsel
Water Audit California