

To: Napa County Measure A Financial Oversight Committee

From: Genji Schmeder, chair,
Adhoc Committee to Investigate Calistoga Project #7 Kimball Dam

Date: 24 Apr 2013

Subject: Report and finding for Financial Oversight Committee action

Table of Contents

- A. Conclusion
- B. Finding
- C. The Main Issue in Project #7
- D. History
- E. The City of Calistoga's Defenses against the Public-Trust Cause-of-Action
- F. Napa County's Responsibility for the Living Napa River
- G. Interpretation of Measure A
- H. Adhoc Committee History

A. Conclusion

The adhoc committee of the Financial Oversight Committee ("FOC") agrees with the 2012 Grand Jury report that reimbursement by the Flood Authority of approximately \$525,000 for legal expenses of the City of Calistoga ("City") in defense against a public-trust cause-of-action intended to enforce wildlife protection law and allow restoration of the fish population downstream from Kimball Dam was inconsistent with the purpose and intent of the Measure A Ordinance. The Flood Authority used Flood Protection Sales Tax revenues to reimburse an attempt to defeat an ultimate goal of the Flood Project, restoration of the Napa River's living environment.

City had operated Kimball Dam for decades in violation of its water diversion licenses and of state wildlife protection law by failing to install flow meters and failing to bypass water in scheduled amounts adequate to sustain downstream fish in good condition. The lack of data on flows into and from Kimball Reservoir made it impossible to determine whether or how much water was being taken by City in excess of permitted amounts. After years of accusations, threats and fines by state water and wildlife agencies, and repeated promises by City to comply, a private party sued City in 2009 primarily for private water rights causes-of-action but also for public rights under the public-trust doctrine, bringing the controversy into court. Because new conflict between City and the state Department of Fish and Game ("DFG") had broken out in 2008 and was unresolved when the lawsuit was already in court, there is no reason to believe City had any intention of voluntary compliance.

The private causes-of-action of the lawsuit were dismissed in Jan 2011. Trial of the public cause-of-action was scheduled for an Oct 2011 trial, but was declared moot in Aug 2011 on the ground that the purposes of the cause-of-action had been fulfilled by City's adoption that month of an interim bypass plan. Though the plan had been rejected by DFG as inadequate, it did commit City to building bypass infrastructure to be ready by Mar 2012. The eventual plan is still being worked out between City and the two state agencies DFG and State Water Resources Control Board ("SWRCB"). At any moment in its long history of conflict with state agencies, City could have decided to comply by installing flow meters and implementing a schedule for bypassing water, each to DFG's satisfaction.

B. Finding

Acceptance of this report by FOC implies the following finding as official statement of FOC to the public of Napa County:

The Financial Oversight Committee finds that reimbursement by the Flood Authority of approximately \$525,000 for legal costs of the City of Calistoga in its defense against a valid public-trust cause-of-action intended to enforce wildlife protection law and allow restoration of the fish population downstream from Kimball Dam was inconsistent with the purpose and intent of the Measure A Ordinance.

C. The Main Issue in Project #7

Amendment project #7 lists these activities: Kimball Dam intake tower, drain valve, bypass structure, and water rights protection. The Flood Authority allocated \$1,100,000 for the project. The last-listed activity has actually received most of the allocation. It comprises legal fees and consultant expenses incurred defending against the lawsuit Reynolds vs Calistoga (Napa Superior Court case 26-46826). That lawsuit can be partitioned into five private and one public-trust water rights causes-of-action. The public-trust cause-of-action alleges failure of Calistoga to meter water flows at Kimball Dam and to bypass water adequate to keep below-dam fish in good condition. The adhoc committee decided to investigate only legal fees for the public water rights cause-of-action. City representatives have written that all legal fees reimbursed by Measure A were for the public-trust defense, and we have no reason to doubt this. The amount at issue is therefore about \$525,000 of Measure A tax revenue.

The Grand Jury considered this reimbursement improper because Calistoga was defending practices which it well knew violated its water diversion licenses and wildlife protection law. Success of its legal defense would have allowed continuation of practices denying adequate water for fish in the upper Napa River. Since the goals of Measure A and of the Napa River Flood Project include restoration of a living Napa River environment, reimbursing Calistoga's legal defense amounts to funding an attempt to defeat a goal of the Flood Project and a use of Measure revenues against itself. That is the main issue in Project #7.

We decided to focus our investigation on one item, the public-trust cause-of-action of the Reynolds lawsuit. We have no opinion on appropriateness of reimbursing other items listed under Project #7. Nor do we have an opinion on appropriateness of reimbursing City's defense from the private rights causes-of-action, if ever a request for such reimbursement may be made. We also decided not to contest reimbursements for consultants, expert studies and expert testimony since these are a minor portion (\$92,000) of the reimbursements, and the studies may provide knowledge about the fishery and advice for operating the bypass, and thereby be valuable for River restoration regardless of validity of City's legal defense.

D. History

Around 1939, City negotiated for water rights and permission to divert and store water from Kimball Creek, the primary headwater stream forming the Napa River. Water rights were bought from Alfred Tubbs who owned the water rights of the land proposed for a reservoir. The permit for diversion, storage and use of water came from the state of California. There was conflict between Tubbs and City from the earliest years of the new reservoir. However, private conflicts will be addressed here only when it helps explain issues of public-trust water rights.

In applications to the state, engineering plans and correspondence with Tubbs and others, the proposed dam height at spillway and the reservoir capacity vary from 44-ft height and 138-acre-feet ("af") capacity to 60 ft and 315 af. DFG required a fishway for the higher dam proposal, but withdrew its protest when the application was changed to the 44-ft height. State approval granted in 1944 was for the 44-ft height and 138-af capacity, but mentions appropriation right of 315 af per year. The dam height was increased in 1947 and 1954, in the later year with application to the state to add flashboards to retain more water during maximum flow. Applications for increased capacity and new permits were made also in 1970 and 1981.

In 1982 DFG protested the 1981 application to raise the dam to 105 ft because reduction of flow during critical low-flow periods would adversely affect survival of steelhead trout and other fish and wildlife. DFG withdrew the protest after City agreed to bypass sufficient water to maintain fish below the dam in good condition. So the new water diversion permit number 20395 tied a specific bypass schedule to the increased reservoir capacity. City never raised the dam so the corresponding bypass schedule and amounts never became mandatory.

Before existence of Kimball Dam, the upper Napa River had a large steelhead trout population as attested by accounts of old residents and photos of them showing off catches of large fish. The dam didn't seriously impair the downstream fishery until addition of the flashboards which retained all of the creek's flow for days during spawning and hatching. Though a 1963 report states that the Napa River is the most important steelhead stream bordering San Francisco Bay, in 1966 DFG field notes gave the opinion that the two-mile section between the dam and Tubbs Lane could be managed easily as a catchable trout stream if the needed releases were made from

Kimball Canyon Reservoir. In 1993 and 1994 fish sampling found no steelhead, and in 1997 only a few were found. In 2002, the steelhead trout was federally listed as an endangered species.

In 2001 SWRCB served an administrative liability complaint alleging City had diverted water in excess of its licenses, failed to install a required measuring device, failed to comply with bypass requirements and expanded its service to deliver water from Kimball Reservoir to about 60 customers outside the authorized area. City's water system superintendent Steve Anderson admitted that City had never bypassed water for the fish and needed a plan to monitor inflow, use and release of water. City paid a \$5,000 fine and promised to bring dam operations into compliance. Only rudimentary, partial flow metering was installed.

Around 2002 when City applied for a license amendment to legalize expansion of the area of service to the 60 customers, both DFG and National Marine Fisheries Service ("NMFS") protested, but SWRCB effectively dismissed their protests on the ground that they could address only the changes in the license, not the entire effect of Kimball Dam operations. The two agencies had noted lack of previous environmental review, lack of data on effects of the Kimball diversion and need for a regular bypass plan. City was copied on these four letters, and must thereby have become acutely aware in 2002 of wildlife agencies dissatisfaction with Kimball Dam operation and the narrowness of SWRCB's scope of environmental certification.

During the following years DFG repeatedly demanded that City institute a bypass plan, citing violation of state Fish and Game Code ("FGC") 5937, which requires a dam owner to allow sufficient water to pass to keep in good condition any fish below the dam. Don Richardson, retired DFG officer who was a principal in DFG protests to Calistoga during 2008, stated most definitely that DFG's demands were not based on the bypass requirements in permit 20395, rather on his personal observations of the dry streambed below Kimball Dam, that is objective evidence that not enough water was being released to comply with FGC 5937. He also said that the DFG demand for Calistoga to apply for a stream alteration permit under FGC 1602 was not conditioned on any changes that Calistoga was intending, rather had become standard practice of DFG since the 1990s, to require all water diverters to renew every five years in order to apply current DFG standards. In a sworn declaration, Richardson stated that he had advised Calistoga representatives on several occasions, most recently in 2008, that they were in violation of FGC 5937, and stated further that the issues could not be resolved before his retirement at end of 2008 due to the City of Calistoga's reluctance to cooperate and delaying tactics. In Oct 2008 DFG wrote to City, "The fact is the resources have been and are continuing to be negatively impacted by the dam and its operation. Given the fact that two federally listed species are downstream of this dam (freshwater shrimp, steelhead trout) the City is likely to be in violation of federal laws also."

Grant Reynolds was a friend of descendants of Alfred Tubbs who had originally sold water rights to and exchanged easements with City. One descendant disputed City over a water bill and began to learn the history of the ancestral agreement. The expectation was that water would be supplied at nominal price to the Tubbs land near Kimball Dam. The dispute progressed from discussion to

administrative complaint to lawsuit. Reynolds by then had bought from the Tubbs descendant the water rights plus any retroactive revenue from City's alleged theft of water over the decades.

The original five causes-of-action of the lawsuit were private, and the public-trust cause-of-action, that City had deprived wildlife of necessary water, was added in Aug 2009 in a second amended complaint. Though new to the lawsuit, the public-trust cause-of-action was not new to the controversy since it had been stated in the final administrative complaint by the Tubbs descendent against City in Dec 2008. Reynolds has also stated that he wrote to the Calistoga water superintendent around late summer 2008 that "the City should allow water to flow through the creek as required to satisfy the Public Trust in order to protect the riparian habitat of the creek."

City contested all causes-of-action and said that a lawsuit over operation of a dam could be brought only against permitting agency SWRCB. The Napa Superior Court judge agreed and dismissed the public-trust cause-of-action. Reynolds then sued SWRCB and DFG for the same cause-of-action, prompting the state attorney-general ("SAG") in Mar 2010 to intervene as amicus curiae in the original lawsuit to advise that the courts and SWRCB have concurrent rights to adjudicate public-trust water issues, and that private parties have a right to sue dam operators in the courts for violations of FGC 5937. In May 2010 the judge reinstated the public-trust cause-of-action. In Jan 2011 the judge dismissed all the private causes-of-action, on the ground that the private water rights had expired with the life of the original holder. The parties could not agree on the remaining issue, so the lawsuit continued with trial set for Oct 2011. In summer 2011 City announced a bypass plan, prompting the judge to declare the lawsuit moot, despite that DFG considered the plan inadequate.

E. The City of Calistoga's Defenses against the Public-Trust Cause-of-Action

1. City Has Always Operated Kimball Reservoir in Compliance with Licenses and Laws

The history of City's relations with state and federal agencies belies this assertion.

2. City Was Unaware of its Public-Trust Duty until Informed by State Attorney General

The Grand Jury report stated, "The City has taken the position in public documents that it was not until that intervention by the Attorney General that it realized it might have a public trust duty with regards to the diversion of the water of Kimball Creek. The Grand Jury finds this legal stance disingenuous. On September 7, 2007, nineteen months before the commencement of litigation, and over two years before the Attorney General's intervention, the City of Calistoga received official notice from the SWRCB that the City's Amended License for Diversion and Use of Water at Kimball Creek contained a public trust provision controlling, among other things, "unreasonable method of diversion of said water."

Correspondence in 2002 between wildlife agencies and SWRCB which was copied to City also clearly states this public-trust duty.

3. Water Bypassed for Fish May Have Critically Depleted the Municipal Supply

City wrote that the absence of specific quantities of water demanded for bypass in the Reynolds public-trust cause-of-action meant that adjudicated amounts might be large enough to jeopardize Kimball Reservoir as a municipal water supply. Also, City has stated that DFG and SWRCB were in mutual conflict about City's public-trust obligations, and that DFG's demands were based on the inapplicable bypass schedule in unused permit 20395. In the opinion of City, these factors required it to prolong the disputes while it did its own research on environmental needs and bypass methods.

But California water law has specific provisions for resolving water disputes in the courts whereby SWRCB may be called in as referee, the expert advisor who can take into account not only the needs and rights of the parties to a lawsuit but also of every water user in the affected area. Since Fish and Game Code 5937 is enforced by the Department of Fish and Game, SWRCB would have relied mainly on DFG opinions for decisions on amounts and schedule of water to be bypassed to satisfy that law.

In 2010 Reynolds retained the Center for Ecosystem Management and Restoration ("CEMAR") to analyze watershed hydrology and fishery. In Aug 2010 CEMAR gave a presentation of its findings to both parties to the lawsuit, stating that the Kimball watershed provides an ample volume of water for both public-trust and municipal uses.

When the public-trust cause-of-action was added to the Reynolds lawsuit in Aug 2009, City could have requested the issue be stayed while it worked out bypass and flow metering plans with the state agencies. It was already engaged in contentious dialog with DFG over the same issue, and might have recognized the futility of fighting on two fronts when one opponent (the state agencies) was likely to be ultimate arbitrator on both fronts. The ease of this path is suggested by the readiness of the superior court to dismiss the public-trust cause-of-action as moot as soon as City in Aug 2011 published an interim bypass plan, even without acceptance of the plan by DFG or SWRCB. Even if City would have gained a more favorable solution through prolonged negotiation with DFG aided by expert studies, prolonging the same struggle in court was unnecessary and very expensive.

In fact, a stay of public-trust litigation for six months during which a bypass plan and stream rehabilitation plan would be developed by CEMAR under contract with City was jointly proposed by the attorneys for City and Reynolds in Sep 2010. The proposal was accepted by the court but not implemented because City failed to approve it before a deadline.

4. City's Lawsuit Defense Was in Accord with Living River Guidelines

City wrote to the Flood Authority on 30 Nov 2011 that all the lawsuit defense expenses to be reimbursed are in accord with the Living River Guidelines, and that the services and improvements contributed to the rehabilitation of the Napa River as a living river and healthy ecosystem. But City's legal defense fought the very improvement that it cites to justify reimbursing that defense. In simple logic, if the bypass demanded by the Reynolds lawsuit is an improvement to the Napa River environment, then the fight against the requirement to install the bypass is not.

5. City was Defending its Rights against the Public-Trust Cause-of-Action

Calistoga Project #7 lists among its tasks "water rights protection". That term may be accurate in defense against the private causes-of-action, but not against the public-trust cause-of-action. In the latter case it would be more accurately termed "water wrongs protection", since City was defending not a right but rather its knowing violation of licenses and violation of a right of the people of California through injury to wildlife. This may seem a mere turn of phrase, but it should disqualify reimbursement since City had no water rights to be protected against the public-trust cause-of-action.

6. Calistoga is Not a Subdivision of the State of California

SAG's amicus curiae argued that the 1983 Audubon supreme court decision controlled environmental water issues, not the 2008 Biodiversity appellate decision. But SAG argued that even the Biodiversity decision implied that Calistoga could be sued directly over dam operations. City responded that Biodiversity applies to counties but not to cities, because cities are not subdivisions of the state of California.

City based this astonishing assertion on a decision (County of San Mateo vs Coburn) by the state supreme court in 1900 (one hundred ten years in the past) which has been superseded in recent decades by high court decisions and statute law definition. SAG wrote, "Until the 1960's, courts relied on San Mateo to find that cities were not political subdivisions, but later cases have held the opposite." SAG cited several state appellate and supreme court decisions from 1973 to 1998 which stated, "Municipal corporations are political subdivisions of the state"; "general law cities are simply creatures of the state and as such are parts of the machinery by which the state conducts its governmental affairs"; "charter cities in California generally are defined as political subdivisions".

Current California government code section 8557(b) provides this definition: "Political subdivision" includes any city, city and county, county, district, or other local governmental agency or public agency authorized by law.

City's use of a judicial opinion obsolete for nearly 40 years to deny an obvious fact about its status only more deeply erodes its credibility.

F. Napa County's Responsibility for the Living Napa River

During the years of open conflict between City and the state water and wildlife agencies over operation of Kimball Dam, our county government was uninvolved. Whatever responsibility it had to the life of the Napa River before the 1990s was made more explicit by the flood project. The flood project had been debated for years by a citizens advisory committee which eventually agreed that environmental restoration must become an essential component along with flood protection. The Napa River flood project has been an inspiration to similar projects around the USA for this combination of goals. Our project was an historic improvement over traditional flood projects which treated rivers as mere conveyances for water and ignored their broad life-giving role. When the flood project and Measure A were adopted, they committed county government, primarily through the Flood District and the Flood Authority, to increased responsibility as a protector of the Napa River.

When conflicts over Kimball Dam's damage to the fishery of the upper Napa River broke out in the years after Measure A was passed, county government could have closely monitored each incident and weighed in on the side of the River whenever state agencies were not acting strongly or persistently enough. When the Reynolds lawsuit public-trust cause-of-action was filed, county government could have recognized it as key to compelling City to reform its practices and might therefore have intervened. Instead, county government took no side in a battle for the life of the upper Napa River, and then rewarded the party in the wrong with funds raised for the Napa River flood project.

G. Interpretation of Measure A

The principal task of Calistoga's statutory project #1 was complete dredging of Kimball Reservoir. The FOC annual report for Jun 2005 listed this as "Kimball Water Treatment Plant Maintenance Dredging Project". At the 6 Feb 2013 FOC meeting, Calistoga City Engineer Takasugi said, "We did a feasibility study for dredging Kimball Reservoir back in 2003. We got back a report from Harrison Engineering that showed us that dredging the reservoir is pretty much economically and environmentally infeasible." Similar conclusions have been stated by City officials at least since 2008. Though the task has never been dropped from the Flood Authority's agenda, it's generally agreed that it will not be implemented.

Effectively dropping this task left a large amount of Measure A funds without specific destination. Calistoga had several alternatives, including devoting all the money to drainage improvements under statutory project #2. In spring 2012 the City Engineer stated that drainage improvements in the City could have absorbed at least \$11 million.

Another alternative was to declare statutory project #1 infeasible and then submit a replacement to the chain of approvals defined in Measure A. The minor tasks of statutory project #1 (like repair of the reservoir intake valve) could have been included in the replacement project, and the replacement could also have included the engineering study which provided evidence of

infeasibility. There was no certainty of approval at any link in the chain, but the replacement definition could have been composed in consultation with Flood District staff and even refined if not entirely acceptable to the other links. Objection to reimbursing the engineering study would be seen as unreasonable since it would imply that only feasibility studies producing a positive answer can be reimbursed. The replacement process would have brought any controversies repeatedly into public view and enhanced the legitimacy of the final result by the approvals of two additional review bodies (FOC and Technical Review Committee).

But that was the road not taken. Instead City worked with Flood District and Flood Authority staff to include in statutory project #1 certain tasks not mentioned in Measure A or the Flood Project in the years when Measure A was composed and presented to the voters. The rationale for incorporating these novelties as components of statutory projects was the supposed need for broad interpretation of Measure A Ordinance. Such interpretation is considered necessary when literal language or lack of specifics in a voter-approved statute will lead to deadlock or absurd results. But Measure A already provides a replacement process to handle project infeasibility, so broad interpretation seems unwarranted in this case. Controversies about the new tasks were resolved at the staff level and not mentioned in agenda packets presented to the Flood Authority Board. The Board approved the tasks unanimously on consent agendas without discussion.

The inclusion of legal defense against an allegation of damage to fish from illegal operation of Kimball Dam, so called "water rights protection", in Calistoga statutory project #1 required several extremely broad and probably invalid interpretations of Measure A. As stated above, there is no right to do something illegal, and City's operation of the reservoir violated wildlife protection law. Also as stated above, whereas we don't object to spending Measure A funds for enhancements to the reservoir for bypass technology to maintain fish in good condition or studies to learn effective ways to do that, we do not believe that the struggle against a demand to implement an adequate bypass for fish constitutes enhancement or stabilization of the reservoir.

One extremely broad interpretation of Measure A would include a task as part of a statutory project simply because it accords with the project's purposes. Since the purposes are typically stated in more general language than the action clause of the project description, this seriously lowers the bar to qualification. This kind of interpretation would assert that "water rights protection" is a legitimate part of Calistoga statutory project #1 because it was for the purpose of "water supply reliability". Since water supply reliability must be prudently conceived as broadly as the range of practical threats to reliability (structural, geological, climatic, legal, financial, etc.), numerous tasks could be included therein without relevance to Kimball Dam enhancement and stability. It seems more reasonable that a task must accord with both action and purpose clauses of a project definition.

Measure A is was passed by the voters to fund the Napa County Flood Protection and Watershed Improvement Expenditure Plan which would, among other goals, "safeguard the environment" (Section 3.D). Among the ultimate goals of the Plan are to "restore the Napa River, Napa Creek,

and other tributaries ... and enhance riparian environments" (Section 2.I). The long and expensive struggle of City against the public-trust cause-of-action was an attempt to perpetuate practices detrimental to the Napa River and a tributary and their riparian environments.

Measure A Ordinance Section 5 states, "The distribution of the Flood Protection Sales Tax revenues to fund the projects described in this Ordinance ... shall occur in a manner which is proportional to the Flood Protection Sales Tax revenues generated by each of the incorporated and unincorporated areas in Napa County." This does not imply that each incorporated area has complete liberty in spending the Measure A tax revenues collected within its borders. The revenues are available only "to fund the projects described in this Ordinance".

Measure A Ordinance Section 9.A.2 lists the responsibilities of the Financial Oversight Committee. Section 9.A.2.c requires FOC to advise the public whether projects using Flood Protection Sales Tax proceeds are consistent with the purpose, spirit, intent and language of the Ordinance. Section 9.A.2.d requires FOC to inform the public of an expenditure of proceeds inconsistent with the purpose and intent of the Ordinance. In any specific finding of inconsistency, the FOC has neither responsibility nor power beyond advising and informing the public, so it seems prudent to refrain from advising how the Flood Authority should remedy the incident at hand.

H. Adhoc Committee History

Seven amendment projects for the City of Calistoga were approved by the Flood Authority, which considered them included within the two approved projects for Calistoga specifically written into Measure A. An adhoc FOC committee investigated these seven for appropriateness of funding with Measure A tax revenues, and reported to the FOC meeting of 6 Jun 2012. Because of new information in the Napa County Grand Jury report appearing around the same time, the FOC dropped conclusions about two amendment projects, including #7, with option to investigate them later.

The adhoc committee to investigate Calistoga Project #7 Kimball Dam was formed at the FOC meeting of 7 Nov 2012. Members appointed were Peter Murphy, Genji Schmeder and David Smith. The adhoc committee met on 9 Nov 2012 and unanimously chose Genji for chair and David for secretary. Through 23 Jan 2013 we met eight times. Our main source of information has been the file of civil complaint Reynolds vs City of Calistoga, Napa Superior Court case 26-46826, and also documents from the County Auditor and the Flood District. The case file contains numerous historical documents. We also had individual discussions with Richard Spitler, city manager of Calistoga, and Dan Takasugi, public works director of Calistoga. On 20 Mar 2013 Genji interviewed retired DFG officer Don Richardson. On 16 Apr 2013 Genji and Peter met with FOC counsel Rob Paul to discuss legal aspects of this report.

This report expresses the opinion of majority members Schmeder and Smith, whereas member Murphy dissents.