



A Tradition of Stewardship  
A Commitment to Service

**Board of Supervisors**

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**Keith Caldwell**  
Chairman

August 14, 2012

The Honorable Diane Price  
Presiding Judge  
Superior Court of California, County of Napa  
825 Brown Street  
Napa, CA 94559

**FILED**

**SEP - 4 2012**

Clerk of the Napa Superior Court  
By: *C. Brennan*  
Deputy

Dear Judge Price:

As required by Penal Code Section 933(c), enclosed is the response to the 2011-2012 Final Reports on Measure A.

The Flood Protection and Water Improvement Authority, the Board of Supervisors, Napa County Counsel, and the Director of Public Works acknowledge the members of the 2011-2012 Grand Jury for the time they have devoted in preparing their report.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith Caldwell".

Keith Caldwell  
Chairman, Napa County Board of Supervisors  
Chairman, Board of the Flood Protection and Water  
Improvement Authority

Enclosure

cc: Foreman, 2012-2013 Grand Jury  
The Honorable Mark Boessenecker

**RECEIVED**

**SEP - 4 2012**

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District 5

NAPA COUNTY  
RESPONSE TO THE GRAND JURY FINAL REPORT ON  
MEASURE A  
FISCAL YEAR 2011-2012

**Finding 1:** Construction of the Mt. Washington water storage tank is a build out of the City's water infrastructure. It supports growth and will store NBA water, both of which are counter to the letter and spirit of Measure A.

***Response, County Counsel:*** County Counsel disagrees with this finding. Under Section 8 of Measure A, one of the approved projects for the City of Calistoga is the "stabilization and enhancement of Kimball Reservoir which shall be for the purpose of flood protection and water supply reliability." The Mt. Washington storage tank constitutes an infrastructure improvement which increases the reliability of Kimball Reservoir as a continued source of municipal water supply for the City's residents. The improvements enhance the operational abilities of Kimball Reservoir and allow for increased bypass flows from the Reservoir during certain key times of the year to improve the downstream habitat of Kimball Creek, with water retained in the storage tank remaining available for use by City residents. Measure A does not include any spatial or locational limitations on approved projects' measures to enhance water supply reliability, only that the project actually enhances reliability.

The water storage tank project was reviewed by City, Flood Authority, and County engineers and found to be a qualified approved project, a project which in fact enhanced the water supply reliability of Kimball Reservoir as required by Measure A. Only after those expert determinations were made by qualified staff did the Flood Authority Board approve the project at a publicly noticed meeting.

The mere fact that the water storage tank may incidentally represent a build out of the City's water infrastructure does not mean the improvement in any way is a violation of the letter and spirit of Measure A. Under the prefatory clause of Section 8 of Measure A, it is stated with respect to approved projects for jurisdictions other than the City of Napa "...are designed to protect against flooding, improve water quality, preserve the integrity of ground water resources and/or stabilize water supply reliability for the existing Napa County population as of the effective date of this Ordinance. None of these projects are intended or designed to expand water capacity for growth and new development." The water storage tank fits within the parameters of stabilizing water supply reliability of Kimball Reservoir. The additional storage of Kimball Reservoir water provided by the water storage tank allows the City the ability to perform necessary maintenance and repairs on the Reservoir and still provide Kimball Reservoir water to the City's citizens. That the water storage tank may provide incidental benefits to the City's water supply infrastructure as a whole is not prohibitory of its qualification as an explicitly approved project for the City of Calistoga.

Measure A's prohibition on projects storing North Bay Aqueduct ("NBA") water are found later in Section 8 and apply only to projects which jurisdictions put forth as "replacement" projects. As the water storage tank falls within the express provisions of "approved" projects for the City of Calistoga, the "replacement" project's prohibitory requirements are not applicable.

**Response, Flood Protection and Water Improvement Authority (Board of Supervisors):** The Flood Protection and Water Improvement Authority (FPWIA) disagree with this finding and incorporates by reference the response and explanation of County Counsel.

**Finding 2:** Construction of the Mt. Washington water storage tank should have been listed in the 1998 Ordinance as an “approved project” or should have gone through the “replacement project” process.

**Response, County Counsel:** Although no Response was requested or is required, County Counsel notes the following:

Respondents disagree with this finding. As noted in Response to Finding 1, the water storage tank falls within the approved project parameter of “[s]tabilization and enhancement of Kimball Reservoir which shall be for the purpose of flood protection and water supply reliability.” As a project fitting within the specific approved projects for the City of Calistoga, there was no need to invoke the “replacement” project procedures and requirements. A brief review of the approved projects for the various jurisdictions of Napa County show that generic descriptions of approved projects was intentional on the part of the drafters of Measure A, as well it should be to take into account unknown circumstances or technologies that might affect flood protection or water supply reliability. This purposeful generic categorization is notable for approved projects in, e.g.,: St. Helena (“[S]tabilization and enhancement of Bell Canyon Reservoir, or other existing reservoirs...); City of American Canyon (“[R]estore wetlands by replacing the existing wastewater treatment facility.”); Community of Angwin/Deer Park (“[S]tabilization and enhancement of existing water reservoirs . . .”). While it is debatable whether Measure A as passed by the voters should have included more restrictive language with respect to approved projects requirements, the measure as written and approved by the voters did not do so, and the water storage tank was properly treated as an approved project.

**Finding 3:** Solage Resort Drainage Project should not have been paid with Measure A funds as the City of Calistoga had no duty to pay that \$600,000 cost.

**Response, County Counsel:** County Counsel disagrees with this finding to the extent it implies the so-called “Solage Resort Drainage Project” was not an approved project entitled to reimbursement with Measure A funds. The improvements being questioned are more accurately referred to as “Drainage Improvements in Southeastern Calistoga,” which is the project approved by the Flood Authority. This project qualifies as a Measure A, Section 8(C)(2) approved project for the City of Calistoga as “[F]lood protection and drainage improvements in the Grant Street area and *other critical areas* to protect residents and businesses from flooding” (emphasis added). Three specific drainage improvements were constructed as part of this project: 1) Installation of a bypass culvert to reduce flooding in a mobile home park, 2) widening and stabilizing the slopes of a drainage ditch, and 3) replacement of two 48-inch diameter culverts with a wider bridge. The construction of these improvements was performed as part of the Solage Resort development project under an agreement between the City and the developer but Measure A funding was only sought for the drainage improvements.

The Grand Jury claims that the City of Calistoga had no duty to pay Solage for the drainage improvements that Solage had constructed. Neither Measure A or the Joint Powers Agreement Regarding the Use and Equitable Distribution of Flood Protection Sales Tax Revenues contain any "duty to pay" requirement for a qualifying jurisdiction to receive Measure A funds, and the Grand Jury report correctly does not state the documents so require. In fact, Measure A, Section 5, providing for distribution of funds, is silent on any such requirement. It simply provides the tax revenues are to be used for qualifying flood protection projects. That section provides: "The portion of the distributions representing the share of the revenues allocated to the unincorporated area *may be used to assist in paying for the flood protection projects* involving incorporated areas that are described in this Ordinance" (emphasis added). The language does not require the City itself to have either constructed or paid for the improvements, as long as the improvements are made and they qualify as approved projects.

The payment also does not violate applicable provisions of the Joint Powers Agreement. Section (9)(c) of that Agreement simply requires a jurisdiction requesting access to Measure A funds "submit to the Authority a request for disbursement in a form acceptable to the Authority, which, at a minimum, shall state the amount of funds requested, describe the project for which the funds are sought and specify how the proposed project is a permissible use of Flood Protection Sales Tax revenues". Calistoga's request for funds was in compliance with those requirements.

However, the agreement between the City of Calistoga and Solage is clear that there was a "duty to pay" obligation to Solage by the City of Calistoga. The clear intent from of the language in the City of Calistoga and Solage agreement is that the City was to make "good faith efforts to obtain funds for the reimbursement of the Drainage Improvements" from its share of Measure A funds and, only after the City has made such efforts and did not receive Measure A fund was it relieved of reimbursing Solage for the cost of the drainage improvements. The City made such a request, and, because the project fit within Section 8(C)(2) of Measure A, the Authority approved the request. Once the request was approved, the City had a duty to reimburse Solage for the drainage improvements.

***Response, Director of Public Works:*** The Director of Public Works disagrees with this finding and incorporates by reference the responses and explanations of County Counsel.

***Response, FPWIA/Board of Supervisors:*** The FPWIA disagrees with this finding and incorporates by reference the responses and explanations of County Counsel and the Director of Public Works.

**Finding 4:** As the defense of a lawsuit by a municipality is a general governmental function, the legal fees paid by the City of Calistoga for the Kimball Creek Bypass litigation was an improper use of Measure A funds.

***Response, FPWIA/Board of Supervisors:*** The FPWIA disagrees with this finding. The blanket assertion, without any supporting authority, that defense of lawsuits always constitute a general governmental function is incorrect. The nature of the distinction actually lies in the difference between a "special" tax and a "general" tax. A special tax is one levied to fund a specific governmental project or program, such as the Measure A tax. Expenditures from that tax are specifically limited to those areas of flood protection and water reliability as authorized by the

measure. This is in contradistinction to a "general" tax, which is levied for general governmental purposes, i.e., ordinary day to day governmental activities. Measure A funds clearly could not be used to fund City litigation associated with slip and fall tort actions, district attorney criminal prosecutions, or welfare fraud prosecutions, because the basic nature of those actions flow from general tax fund, or general governmental function, activities. It is not the mere fact of litigation that is determinative, but rather whether the underlying basis of the lawsuit impacts the specific governmental project or program which is the subject of the special tax.

Defense of the lawsuit was necessary to insure the continued availability of Kimball Reservoir water as a water supply for the City, as it was when Measure A was enacted. If the plaintiff in that lawsuit had prevailed, the continued viability of Kimball Reservoir water as source of supply for city residents could have been severely jeopardized. The legal expenditures were made in furtherance of Measure A objectives, that is ensuring the water supply reliability of Kimball Reservoir. As such, the legal expenditures were proper.

**Finding 5:** The invoices for the fees paid by the City of Calistoga for the Kimball Creek Bypass litigation provided inadequate information to allow the FPWIA to make an informed determination as whether the billings were reasonable and appropriate.

***See Response of the County Auditor-Controller previously submitted to the Grand Jury and set forth herein for convenience:*** The Auditor-Controller disagrees with this finding. The invoices submitted by the City of Calistoga for the Kimball Creek Bypass project followed all required procedures and had all the appropriate and required approvals to allow for payment. Billing records between the City of Calistoga and its attorneys identifying the specific legal tasks performed are subject to the attorney client privilege, and such specific identifying information is appropriately redacted. The Auditor-Controller and FPWIA are entitled to rely on the representations of City that the attorney fees were an appropriate reimbursable expense.

***Response, FPWIA/Board of Supervisors:*** The FPWIA disagrees with this finding and incorporates by reference the response and explanation of the Auditor-Controller.

**Finding 6:** The City of Calistoga should have acknowledged its breach of public trust much earlier in the bypass litigation.

***Response:*** No response is required.

**Finding 7:** The Measure A Ordinance did not explicitly describe how the approval process should operate and as a result the Organizational Chart was arbitrarily drawn. To the degree the chart is used as a schematic model for Measure A projects, its flaws are transferred into the approval process.

***Response:*** No Response is required.

**Finding 8:** The County Public Works Director improperly certified the legality of several Calistoga Measure A projects.

**Response, Director of Public Works:** The Director of Public Works disagrees with this finding and incorporates by reference the responses and explanations of County Counsel to Findings 1, 2 and 3.

**Finding 9:** County Counsel is on the Flood Protection Funding Flow Chart to put agreements into proper form, but has no formal role reviewing proposals for compliance with Measure A. In practice County Counsel sometimes reviews proposals but does not review all proposals, and even as to reviewed proposals, County Counsel renders no formal opinion as to compliance with Measure A.

**Response, County Counsel:** County Counsel disagrees partially with this finding. County Counsel agrees that under the referenced flowchart County Counsel has no formal project approval review role, other than to prepare the necessary funding agreement between the requesting entity and the FPWIA. However, County Counsel review is available upon request throughout the process to provide legal review if requested, and a review is performed at the time each funding agreement is approved. Respondents do not believe any more formal review role for County Counsel is necessary.

**Response, FPWIA/Board of Supervisors:** The FPWIA disagrees partially with this finding and incorporates by reference the response and explanation of County Counsel.

**Finding 10:** The approval process is ineffective since the Flood Protection Water Improvement Authority (Board of Supervisors) has approved projects that lack compliance to Measure A requirements. Greater care should be taken to examine in reasonable detail the compliance of projects and their expenses.

**Response, FPWIA/Board of Supervisors:** The FPWIA disagrees with this finding. Respondents believe the approval process in place is appropriate and effective, and no projects have been approved in violation of Measure A's requirements. The approval process in place contains sufficient safeguards to insure compliance with Measure A. Requesting jurisdictions on their own first determine a proposed project's eligibility under Measure A. That determination and request are then reviewed by Flood District personnel and the County Director of Public Works to make an independent determination of eligibility. Finally, the request is presented to the Flood Authority Board, which in approving or denying the request makes its own determination of eligibility. Also see Responses to Findings 1, 2, 3 and 9.

**Finding 11:** The Financial Oversight Committee exemplifies the disability of the system by being placed at the end of the approval process. The Ordinance intended the Financial Oversight Committee to "Ensure **ongoing community input** in the finalization of **all projects**..." (Emphasis added.)

**Response, FPWIA/Board of Supervisors:** The FPWIA disagrees with this finding. There is no disability of the system with respect to Measure A project approval process. All projects are subject to review and oversight by qualified engineers, including the Flood Authority and County Public Works Department. As set forth in Measure A itself, the role of the FOC with respect to approving projects is limited to making a recommendation on proposed replacement projects.

See Measure A, Section 8, concluding paragraph. Section 9(A)(2) of Measure A sets forth the responsibilities of the FOC, and, other than its role in replacement projects, the FOC has no listed responsibility for approving projects. The Grand Jury's quote with respect to the intent of the FOC is misplaced. That quotation is from Section 3, entitled Purpose and Intent, was drafted with respect to the Napa County Flood Protection and Watershed Improvement Expenditure Plan as a whole, not the specific role of the FOC.

**Finding 12:** The Financial Oversight Committee is the community “watchdog” for Measure A projects and should constantly monitor the projects in all stages, instead of only after the termination of those projects.

***Response, FPWIA/Board of Supervisors:*** The FPWIA disagrees partially with this finding. The FPWIA agrees that the FOC’s role could be construed as a community “watchdog” with respect to the expenditure of Measure A tax funds, as Section 9 states the FOC's "purpose and charge is to inform the public regarding the expenditure of the Flood Protection Sales Tax proceeds that will be generated as a result of the approval of this Ordinance by the Authority and the electorate." The FPWIA disagrees the FOC should constantly monitor projects in all stages. FOC members have neither time nor expertise to fulfill roles currently performed by qualified engineers of the Flood Authority and County Public Works Department. Note that under Section 9 of Measure, there is no mention of engineering expertise as a qualification for FOC members. Such technical expertise is assigned to the Technical Advisory Panel. FOC members are community volunteers and serve without compensation. The FOC's role is to monitor the expenditures tax proceeds, not monitor actual project design and construction.

**Finding 13:** The Financial Oversight Committee is improperly constituted and has passively performed its role.

***Response, FPWIA/Board of Supervisors:*** The FPWIA disagrees with this finding. The FOC is properly constituted in accordance with the membership requirements of Measure A, Section 9(A)(3). The fact that there are vacant Committee positions does not mean the Committee is improperly constituted. The FPWIA also disagrees the FOC has performed its role passively. The FOC has complied with its financial oversight duties as set forth in Section 9 of Measure A.

**Recommendation 1:** Flood Protection and Water Improvement Authority (Board of Supervisors) more carefully evaluate Measure A proposals and take steps to ensure that all proposals for the expenditure of Measure A tax revenue meet Measure A requirements from a legal standpoint as well as from a technical standpoint.

***Response, FPWIA/Board of Supervisors:*** This recommendation will not be implemented because it is not warranted. The Authority already carefully evaluates proposals and takes steps to insure expenditures meet Measure A requirements both legally and technically. See Response to Findings F9 and 10.

**Recommendation 2:** Flood Protection and Water Improvement Authority redefine the approval process and the corresponding County flow chart, so that after “the Auditor-Controller ensures adequate Measure A funds exist to meet request” and before “County Counsel prepares funding agreement,” both the Director of Public Works and County Counsel certify that the requested expenditure meets Measure A requirements, rather than just the Director of Public Works so certifying.

***Response, Public Works Director:*** The Director of Public Works will not implement this recommendation as it is not warranted. County Counsel relies on the professional engineering analysis provided by the Department of Public Works as to whether a proposed project qualifies for Measure A funding. Such a determination is a factual engineering question, not a legal question, of whether the proposed project "protects against flooding, improves water quality, preserve the integrity of ground water resources and/or stabilize water supply reliability." If the project qualifies under those standards as determined by engineers and the Authority Board itself, a "certification" by County Counsel would be superfluous. See Response to Findings 9 and 10.

***Response, FPWIA/Board of Supervisors:*** This recommendation will not be implemented because it is not warranted. The FPWIA concurs with the response and explanation of the Director of Public Works.

**Recommendation 3:** Flood Protection and Water Improvement Authority redefine the approval process and the corresponding County flow chart, so that after “the Auditor-Controller ensures adequate Measure A funds exist to meet request” and before the proposal is “presented at meeting of Flood Protection and Water Improvement Authority,” the Financial Oversight Committee be given a copy of the proposal to, pursuant to their charge, review and “advise the public whether it is consistent with the purpose, spirit, intent, and language of Measure A.”

***Response, FPWIA/Board of Supervisors:*** This recommendation will not be implemented because it is not warranted. The present approval process is fully compliant with Measure A requirements.

**Recommendation 4:** County Counsel certify every proposed expenditure as in compliance with Measure A.

***Response, County Counsel:*** County Counsel will not implement this recommendation as it is not warranted. County Counsel relies on the professional engineering analysis provided by the Department of Public Works as to whether a proposed project qualifies for Measure A funding. Such a determination is a factual engineering question, not a legal question, of whether the proposed project "protects against flooding, improves water quality, preserve the integrity of ground water resources and/or stabilize water supply reliability". If the project qualifies under those standards as determined by engineers and the Authority Board itself, a "certification" by County Counsel would be superfluous. See Response to Findings 9 and 10.



***Response, FPWIA/Board of Supervisors:*** This recommendation will not be implemented because it is not warranted. The FPWIA concurs with the response and explanation of County Counsel.

**Recommendation 5:** Financial Oversight Committee receives the information on proposed expenditures prior to approval by the Flood Protection and Water Improvement Authority.

***Response, FPWIA/Board of Supervisors:*** With respect to the FOC as a whole actually conducting a meeting to receive information on proposed expenditures prior to Authority approval, the recommendation will not be implemented because it is neither warranted or reasonable. Under Measure A, the FOC has no role in the approval of projects, other than providing recommendations on proposed replacement projects. However, the Authority Auditor-Controller has agreed to notify Committee members by email of Flood Authority Board meetings where proposed expenditures are an agenda item, which will allow individual Committee members to access the information from the Authority website. If warranted, a Committee member can then request the item be placed on the FOC agenda for further consideration consistent with the responsibilities of the FOC. An interested FOC member could attend the publically noticed Flood Authority Board meeting where the item is agenda item to request further information if deemed warranted. Note that such information is already available publically when it is posted on Flood Authority Board agenda pursuant to Brown Act requirements prior to any approval action being taken.

**Recommendation 6** Immediate, concerted and ongoing effort to fill Financial Oversight Committee vacancies by Financial Oversight Committee and Board of Supervisors; specifically, the vacancies for representatives from:

- Board of Supervisors
- Business Community
- Local Media
- Napa County Taxpayers
- Environmental Community
- Agricultural Industry
- Health and Human Services

***Response, FPWIA/Board of Supervisors:*** The recommendation has been implemented. At least once a year, recruitment letters are sent to those organizations responsible for nominating an FOC member, and twice a year posting and advertising of Committee vacancies takes place in compliance with the Maddy Local Appointive List Act of 1975 (Government Code Sections 54970 et seq.).

**Recommendation 7:** Auditor-Controller prepare an annual audit as per Section 23 of Ordinance in addition to the annual Financial Oversight Committee audit.

***See Response of the County Auditor-Controller previously submitted to the Grand Jury and set forth herein for convenience:*** The recommendation will not be implemented because it is not warranted.

Section 9 (A)(2)(b) of the ordinance states the Financial Oversight Committee shall cause an annual audit to be prepared. Section 23 of the ordinance states the in addition to that audit, the Napa County Auditor-Controller shall annually conduct an audit of how Measure A revenues are spent by the County of Napa.

Currently, the Auditor-Controller contracts with an independent certified public accounting firm to issue three annual financial audits with regards to the Measure A funds: 1) for the Napa County Flood Protection and Watershed Improvement Authority, which receives the original sales tax collections and allocates the revenues to each jurisdiction (compliance with Section 9(A)(2)(b)), 2) for the County's financials, which includes how the County of Napa spends Measure A funds within the unincorporated areas of the County (compliance with Section 23), and 3) for the Napa County Flood Control and Water Conservation District, which receives Measure A funds for the Napa City and vicinity project. Each audit involves extensive testing of receipts and claims issued regarding Measure A funds. Bound within each report, there are additional, separate opinions given by the external auditors regarding internal controls over financial reporting and on compliance and other matters in each of the audits. These opinions result from additional testing of both internal controls and compliance regarding the reporting and use of the funds. In addition, the County contracts with The HDL Companies to provide quarterly updates and continuous auditing of the sales tax revenue, ensuring maximum collections and appropriate allocations to the jurisdictions pursuant to Measure A. Furthermore, the Auditor-Controller presents detailed quarterly reports to the Financial Oversight Committee which involves a review of all revenues and expenditures to ensure proper recording and accurate reporting. It is the opinion of the Auditor-Controller that both sections of the ordinance are being complied with, there are adequate checks and balances in place and inserting an additional audit would be an inefficient and unnecessary use of Measure A funds.

***Response, FPWIA/Board of Supervisors:*** The recommendation will not be implemented because it is not warranted. The FPWIA concurs with the response and explanation of the Auditor-Controller.

**Recommendation 8:** Financial Oversight Committee be granted authority to require jurisdictions requesting Measure A funds to present proposed expenditures to that Committee prior to final approval by Flood Authority.

***Response, FPWIA/Board of Supervisors:*** This recommendation will not be implemented because it is unwarranted and unnecessary. As noted in Measure A, the FOC has no formal approval role in the approval process of "approved" projects. The FOC has adequate means to carry out its Measure A oversight duties under existing procedures. See Responses to Recommendations 1, 2, and 5.

**Recommendation 9:** Financial Oversight Committee receive and examine itemized invoices billed to Measure A projects in addition to the summarized data currently provided it.

***See Response of the County Auditor-Controller previously submitted to the Grand Jury and set forth herein for convenience:*** The recommendation has been implemented as all the invoices are a matter of public record and can be viewed at any time. However, to assist the Committee in their role, the Auditor-Controller will make available the invoices paid during the quarter at each quarterly meeting for review by the Committee.

***Response, FPWIA/Board of Supervisors:*** This recommendation has been implemented. The FOC is already able to receive and examine itemized invoices upon request to the Auditor-Controller if the FOC deems necessary. Such itemized invoices are also readily available to inspection by interested FOC members under the Public Records Act.

**Recommendation 10:** Financial Oversight Committee establish subcommittees in order to more effectively fulfill its responsibilities under the Ordinance, namely:

- a. Provide the public with information regarding the manner in which Measure A tax proceeds have been spent;
- b. Prepare an annual audit regarding the use of Measure A proceeds;
- c. Review the financial impact of each project and advise the public whether it is consistent with the purpose, spirit, intent and language of Measure A;
- d. Inform the public of any expenditure which is inconsistent with the purpose and intent of Measure A;
- e. Make recommendations to the Napa County Flood Control and Water Conservation District regarding proposed replacement projects if a project identified in Measure A is determined not feasible.

**No Response required.**

**Recommendation 11:** Any further requests by the City of Calistoga for Measure A funds for the Mt. Washington tank and Solage projects be denied and the City be required to return any unspent Measure A tax revenue forwarded to it for these matters.

***Response, FPWIA/Board of Supervisors:*** This recommendation will not be implemented because it is not warranted. As both referenced projects as presented to the Authority up to this time qualify as approved projects for the City of Calistoga under Measure A, there is no basis to require any return of funds. Future requests for funding related to the identified projects will be evaluated on their merits for compliance with Measure A.