

NOTICE OF CLAIM

California Government Code 910

May 19, 2016

By Certified Mail



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TO: CITY OF ST. HELENA
1480 Main Street
St. Helena, CA 94574

CLAIMANT: WATER AUDIT CALIFORNIA
A California Public Benefit Corporation
333 University Drive
Suite 200
Sacramento, CA 95825

The Bell Canyon Creek, also known as Howell Creek, (the "Creek") has drainage of approximately 14 square miles. The Creek flows into the Napa River at a point approximately 2.5 miles north of St. Helena.

The City of St. Helena (the "City") is the owner and operator of Bell Canyon Dam, NID Number CA00149, located at latitude 38.554, longitude 122.483 (the "Dam"). Initially constructed in about 1958, the Dam blocks the natural flow of the Creek to form the Bell Canyon Reservoir.

The City is a trustee for the public trust in its operation of the Dam, subject to the supervision of the courts and trustee agencies of the State. It is the City's duty to preserve and account for the trust

The Claimant alleges that the City is in breach of its duties, and as a result the public trust is suffering an ongoing injury.

History

On or about February 21, 1947, the City filed an Application to Appropriate Unappropriated Water (No.11816) for municipal use with the State Water Rights Board ("Board"). The City proposed building an earthen dam 75 feet in height from the streambed to the overflow level. The Application sought continuous direct diversion of 1.0 cubic feet per second, and from November 15 to April 15 to divert to storage 1,800 acre feet of water per annum.

On or about October 31, 1952, the Board issued Permit 9157 granting the Application with conditions. The conditions included completion of improvements on or

before December 1, 1955, and complete application of water to the proposed use before December 1, 1975. A series of requests to delay completion for Permit 9157 were sought and approved on March 20, 1979; September 7, 1989; and May 4, 2000, the last approving a delay in completion until December 31, 2010.

On or about February 21, 1962, the City filed a second Application to Appropriate Unappropriated Water (No. 20625) for municipal use with the Board. The second Application proposed raising the dam thirty feet, to 105 feet in height from the streambed to overflow. From November 15 to April 15 it sought to divert to storage 2,000 acre-feet per annum.

The California Department of Fish & Game ("DFG") protested the application. After negotiations between the City and DFG, the parties agreed upon interim bypass and that the City would perform hydrological studies. Based upon this agreement, the DFG's Protest was withdrawn.

On or about August 3, 1965, the Board issued Permit 14801 authorizing the second Application with conditions. These included completion of construction before December 1, 1968, and complete application of water to the proposed use before December 1, 1975. Reflecting the changes in environmental conditions, the second Permit expressly stated the Board's authority to include a provision for minimum flows below the reservoir. See below under Bypass. A series of requests to delay completion for Permit 14801 were sought and approved on May 16, 1967; September 25, 1973; July 5, 1979; September 7, 1989; and May 3, 2000, the last approving delay to December 31, 2010.

Permit 9157 was not superseded or revoked, and neither permit was converted into a license.

As of May 11, 2016, the State Water Resources Control Board ("SWRCB") eWRIMS database lists both Permit 14810 and Permit 9157 as "On Hold."

The Fish

The downstream reach has a long historical record of the native population of *Oncorhynchus mykiss*, a species listed as threatened in both the U.S. Endangered Species Act and the California Endangered Species Act. The DFG g=has estimated that estimated that before the dam was built the spawning run was approximately 100 fish. A DFG 1958 stream survey showed that *O. mykiss* were then common in the lower portion of the subject reach, and a large population was observed 5.5 miles upstream from the mouth.

The record further indicates that native fish are not being maintained in good condition by current dam operations. By 1970 the run had been diminished by half. In 1980 DFG reported that natural propagation was not good, and in 1981 that the channel below the reservoir was dry. By 1990 DFG observed no *O. mykiss*.

Bypass

The quantum of bypass required of a dam operator is set forth in *Fish and Game Code section 5937*, which reads in relevant part: "The owner of any dam shall ... allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."

Both of the aforesaid 1989 Orders included terms that required the City to collect hydrological data, and imposed interim minimum bypass during the diversion season:

- (a) From December 1 through January 31 of each year the lesser of the total flow of the stream or 4 cubic feet per second ("cfs");
- (b) From February 1 through February 29 of each year the lesser of the total flow of the stream or 2 cfs; and,
- (c) From March 1 through April 15 the lesser of the total flow of the stream or 1 cfs.
- (d) No diversion was to occur between April 16 and November 14 of any year.

The City remains bound by the 1989 Orders. The City's operating records prove that it is routinely in breach of its commitments.

Monitoring

Nearly forty years ago the City was first directed to install, operate and maintain efficient water measuring devices. In 2001 the SWRCB issued an administrative civil liability against the City for diverting water in excess of the approved rate and outside the diversion season. The SWRCB also found the City "to be in violation of the bypass requirements."

In 2005 the SWRCB recommended that a cease and desist order be considered to address the unauthorized storage of water by the City between April 16 and November 14. At the same time the trustee agency wrote: "Improvements to the monitoring program may have to be implemented to ensure (the City) complies with the bypass flow and diversion season terms of its permits."

In 2012, and again in 2013, SWRCB advised the City that it's monitoring of Dam operations were inadequate and that its diversions were excessive. The SWRCB found that from April 16, 2010 to November 14, 2012 the City exceeded its permissible diversion for 168 days during the study period. The trustee agency wrote: "The City needs to improve its monitoring program to prevent future violations and ensure compliance with the bypass flow terms and the diversion season terms of its permits."

In January 2015 the City undertook to upgrade its monitoring, but to the date of this Notice the Claimant is informed and believes that the upgrades have not been installed and the Dam operations are unchanged.

Although the Claimant has made specific and repeated inquiry, the City has produced no documents that indicate that the City has any present intension to perform

the necessary monitoring improvements, perform a stream and fish study, or reform its dam operations to the needs of the public trust and the 1989 Orders of the trustee agency.

Remedy sought

The Claimant hereby demands that within fifty days of this Notice that the City shall:

1. Instruct staff to immediately comply and remain in compliance with the bypass requirements set forth in the 1989 Orders.
2. Instruct staff to cease all diversion of water from April 16 to November 14 of each year.
3. Instruct staff to immediately post to the Internet the daily operations of the dam, including but not limited to inflow, reservoir level, diversion, and bypass.
4. Pass a binding resolution to install before November 1, 2016, adequate flow monitoring infrastructure. Monitoring shall include both real-time public Internet reporting and permanent records of the measurements taken, and any proposed installation must be accepted as adequate by the SWRCB and Department of Fish and Wildlife ("DFW") before construction starts.
5. Employ qualified professionals to perform a stream and fish study, ("Plan") including determination of interim bypass to keep fish in good condition

during the course of the study, permanent bypass after completion of the study, and a post-Plan monitoring protocol to ensure that fish are being maintained in good condition. Interim bypass shall be no less than that set forth in the 1989 Orders. The Plan shall not be considered acceptable until approval of it is received from the SWRCB and the DFW.

The City is liable to the State in the amount of \$500 for each day that Dam operations were not in compliance.

If within fifty days of the date of this Notice the City has failed to act as set forth above, the Claimant may without further notice commence an action seeking an injunction in the Superior Court, County of Napa, to compel the City to perform its duties to the public trust.

If litigation becomes necessary the Claimant will seek an award of reasonable attorney fees and costs pursuant to *California Code of Civil Procedure section 1021.5*.



Grant Reynolds

Director

Water Audit California, A Public Benefit Corporation

File With:
City Clerk's Office
City of St. Helena
1480 Main Street
St. Helena, CA 94574

**CLAIM FOR MONEY OR
DAMAGES AGAINST
THE CITY OF ST. HELENA**

CLAIM NO. _____

A claim must be presented, as prescribed by the Government Code of the State of California, by the claimant or a person acting on his/her behalf and shall show the following:

If additional space is needed to provide your information, please attach sheets, identifying the paragraph(s) being answered.

1. Name and Post Office address of the Claimant:

Name of Claimant: WATER AUDIT CALIFORNIA

Post Office Address: 333 UNIVERSITY DRIVE, SUITE 200
SACRAMENTO CA 95825

2. Post Office address to which the person presenting the claim desires notices to be sent:

Name of Addressee: AS ABOVE

Telephone: _____

Post Office Address: _____

3. The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.

Date of Occurrence: SEE ATTACHED

Time of Occurrence: _____

Location: _____

Circumstances giving rise to this claim: _____

4. General description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of the presentation of the claim.

SEE ATTACHED

5. The name or names of the public employee or employees causing the injury, damage, or loss, if known.

UNKNOWN

6. **If amount claimed totals less than \$10,000:** The amount claimed if it totals less than ten thousand dollars (\$10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

Amount Claimed and basis for computation:

If amount claimed exceeds \$10,000: If the amount claimed exceeds ten thousand dollars (\$10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case. A limited civil case is one where the recovery sought, exclusive of attorney fees, interest and court costs does not exceed \$25,000. An unlimited civil case is one in which the recovery sought is more than \$25,000. (See CCP § 86.)

☐ Limited Civil Case

☒ Unlimited Civil Case

You are required to provide the information requested above in order to comply with Government Code §910.

7. Claimant(s) Date(s) of Birth:

NOT APPLICABLE

8. Name, address and telephone number of any witnesses to the occurrence or transaction which gave rise to the claim asserted:

9. If the claim involves medical treatment for a claimed injury, please provide the name, address and telephone number of any doctors or hospitals providing treatment:

If applicable, please attach any medical bills or reports or similar documents supporting your claim.

10. If the claim relates to an automobile accident:

Claimant(s) Auto Ins. Co.:

Telephone:

Address:

Insurance Policy No.:

Insurance Broker/Agent:

Telephone:

Address:

Claimant's Veh. Lic. No.:

Vehicle Make/Year:

Claimant's Drivers Lic. No.:

Expiration:

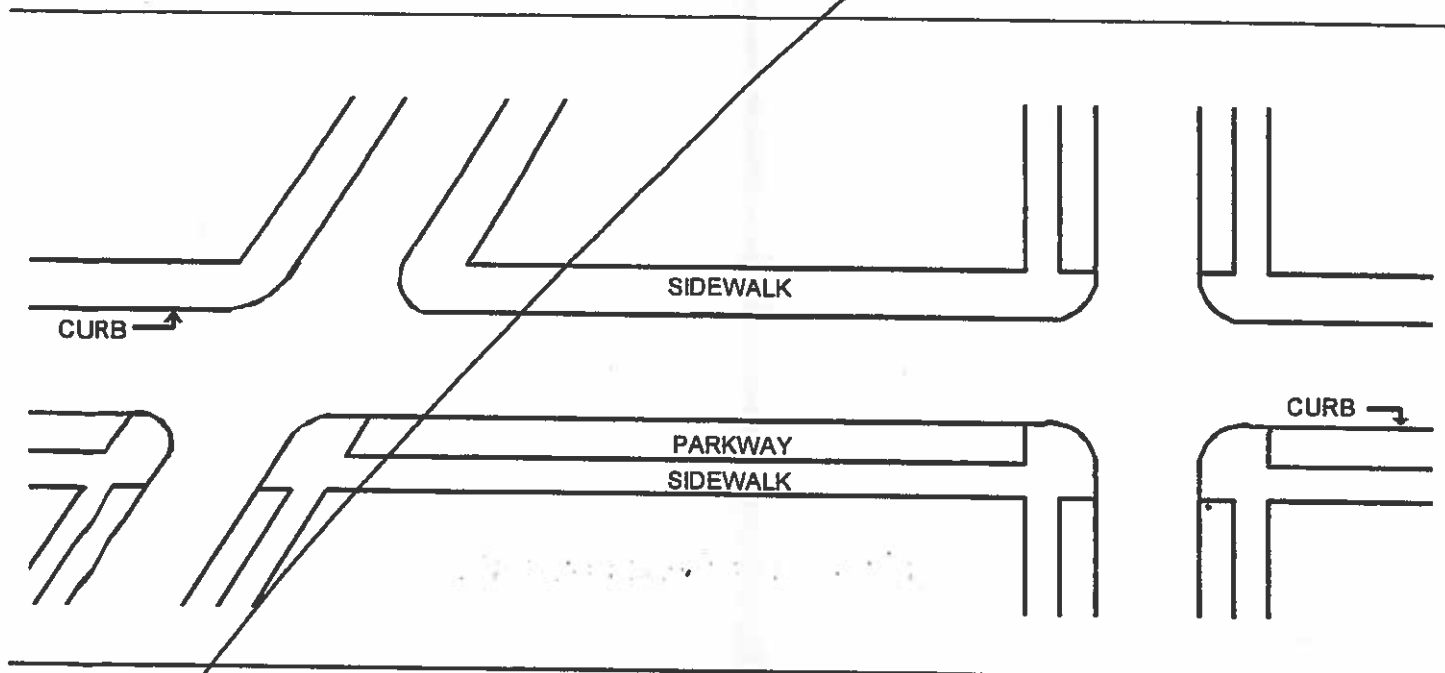
If applicable, please attach any repair bills, estimates or similar documents supporting your claim.

READ CAREFULLY

For all accident claims, place on following diagram name of streets, including North, East, South, and West; indicate place of accident by "X" and by showing house numbers or distances to street corners. If City/Agency Vehicle was involved, designate by letter "A" location of City/Agency Vehicle when you first saw it, and by "B" location of yourself or your vehicle when you first saw

City/Agency Vehicle; location of City/Agency vehicle at time of accident by "A-1" and location of yourself or your vehicle at the time of the accident by "B-1" and the point of impact by "X."

NOTE: If diagrams below do not fit the situation, attach hereto a proper diagram signed by claimant.



Warning: Presentation of a false claim is a felony (Penal Code §72). Pursuant to CCP §1038, the City/Agency may seek to recover all costs of defense in the event an action is filed which is later determined not to have been brought in good faith and with reasonable cause.

Signature: _____

[Handwritten Signature]

Date: 05.19.2016