



## CITY OF CALISTOGA

### STAFF REPORT

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**TO:** Honorable Mayor and City Council  
**FROM:** Derek Rayner, Acting Public Works Director/City Engineer  
**DATE:** August 20, 2019  
**SUBJECT:** Consideration of a Resolution Approving Filing an Interpleader Action in the Napa County Superior Court Regarding \$244,112.89 In Disputed Spring Street Utility Replacement Project Contract Funds and Delivering the Funds to the Clerk of That Court and Authorizing the City Manager to Take All Required Actions in Connection with the Action.

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**Approved by**

A handwritten signature in blue ink that reads 'Michael Kirn'. The signature is written in a cursive style.

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**Michael Kirn, City Manager**

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**DESCRIPTION:**

Consideration of a Resolution Approving Filing an Interpleader Action in the Napa County Superior Court Regarding \$244,112.89 In Disputed Spring Street Utility Replacement Project Contract Funds and Delivering the Funds to the Clerk of That Court and Authorizing the City Manager to Take All Required Actions in Connection with the Action.

**RECOMMENDATION:**

Consider a resolution approving filing an Interpleader Action in the Napa County Superior Court.

**SUMMARY:**

Consideration of a Resolution that:

1. Approves filing an interpleader action in the Napa County Superior Court regarding \$244,112.89 in disputed Spring Street Utility Replacement Project Contract funds.
2. Approves the delivery of the funds to the Clerk of that Court.
3. Authorizes the City Manager to take all actions and execute all documents as necessary or appropriate to carry out the intent of the Resolution.

**BACKGROUND:**

Northern Pacific Corporation (NPC) was the contractor on the City's Spring Street Utility Replacement and Paving Rehabilitation Project - Cedar Street to End Project (Project), pursuant to a Contract for Construction (Contract) dated September 18, 2018. The Project was substantially completed on June 18, 2019, and the City recorded a Notice of Completion on June 21, 2019.

Within 45 days of Project completion, six purported NPC subcontractors, suppliers, consultants and workers filed Stop Payment Notices (Stop Notices) in accordance with procedures set forth in the California Civil Code requesting that the City withhold \$195,290.31 in unpaid compensation otherwise due to NPC. In response, and also in accordance with the California Civil Code, the City withheld 125% of the aggregate face value of the Stop Notices, or \$244,112.89, from the amounts otherwise payable to NPC. While the exact remaining Contract balance is still being determined, as of August 9, 2019, this \$244,112.89 Stop Notice withholding amount represents all but approximately \$4,333.64 of the remaining Contract balance.

The City long ago tendered the Stop Notices to the Project's payment bond surety, Fidelity and Deposit Company of Maryland (Surety). In response, the Surety indicated it expected to seek an Assignment from NPC and resolve the Stop Notice claims. However, to date, the City has not received confirmation the Surety has done so.

On July 31, 2019, the City received a "Notice of Assignment" from California Bank of Commerce (Bank), NPC's lender. The Bank's Notice of Assignment, consistent with customary Uniform Commercial Code (UCC) procedures, stated that (i) NPC was in default to the Bank, (ii) the Bank had exercised its right to have all accounts and accounts receivable the City owed to NPC be paid instead to the Bank, and (iii) directed the City to pay all such amounts only to the Bank. The Notice of Assignment was accompanied by a UCC-1 Financing Statement.

While City staff is in the process of determining exactly how much of the approximately \$4,333.64 of the remaining Contract balance must be paid to the Bank pursuant to the Notice of Assignment, the City is legally prohibited from paying the \$244,112.89 Stop Notice withholding amount to the Bank because the Stop Notices had the legal effect of imposing a lien on those funds.

At this time, the City does not know whether the Bank, the Stop Notice claimants, the Surety, or anyone else, will ultimately be found to be entitled to the \$244,112.89 in withheld funds. What the City does know, however, is the City is entitled to none of those amounts. To permit City staff and the City Attorney's office to stop dealing with the funds, the City Attorney's office is recommending the City file an action in interpleader (Interpleader) with the Napa County Superior Court (Court), and deposit the funds with the clerk of that Court (Clerk). Following the commencement of the Interpleader action, the City will file a motion seeking the City's discharge from the Interpleader action and leaving it to the Court and the various Stop Notice fund claimants to ascertain which party

is entitled to the funds. In light of the large amount of the required payment, City Council approval is required.

A further advantage to the Interpleader action is that while in the absence of an Interpleader action, the City is unlikely to be able to recover its attorney's fees in connection with the holding and (ultimate) distribution of the withheld funds, the City should be entitled to collect its Interpleader action attorney's fees as part of that action. Therefore, City staff believes that filing an Interpleader action will ultimately save the City some amount of money.

**ANALYSIS:**

Not applicable.

**FINANCIAL IMPACT:**

Except for some modest expected savings in attorney's fees and the freeing up of some City staff time, none, as the City is already obligated by the Spring Street Contract to pay the funds at issue to the party(ies) entitled to them.

**CEQA REVIEW:**

Not applicable.

**CONSISTENCY WITH CITY COUNCIL GOALS AND OBJECTIVES:**

The proposed Resolution is consistent with Goal No. Goal 1: Maintain and enhance the economic vitality of the community and the financial stability of the City.

**ALTERNATIVES:**

The City Council could disapprove the Resolution to approve filing an Interpleader action and paying the withheld funds to the Clerk of the Court. In that case, the City would continue to hold the funds and monitor and respond to all associated correspondence, until all disputes regarding the proper party(ies) entitled to them are resolved, and the funds are paid to the appropriate parties.

**ATTACHMENTS:**

1. Resolution
2. Summary of Outstanding Stop Notices
3. Notice of Assignment

RESOLUTION 2019 - XXX

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CALISTOGA, COUNTY OF NAPA, STATE OF CALIFORNIA, APPROVING FILING AN INTERPLEADER ACTION REGARDING \$244,112.89 IN DISPUTED SPRING STREET UTILITY REPLACEMENT PROJECT CONTRACT FUNDS WITH THE NAPA COUNTY SUPERIOR COURT AND DELIVERING THE FUNDS TO THE CLERK OF THAT COURT, AND AUTHORIZING THE CITY MANAGER TO TAKE ALL REQUIRED ACTIONS IN CONNECTION WITH THE ACTION**

**WHEREAS**, following receipt of Stop Payment Notices from six purported Northern Pacific Corporation subcontractors, suppliers, consultants and workers on the City's Spring Street Utility Replacement and Paving Rehabilitation Project - Cedar Street to End (**Project**), the City is withholding \$244,112.89 from the amounts otherwise payable to NPC; and

**WHEREAS**, the City has received conflicting demands for the withheld funds, including from the Project's payment bond surety, Fidelity and Deposit Company of Maryland, and NPC's lender, California Bank of Commerce; and

**WHEREAS**, while the City does not know which party(ies) ultimately is entitled to the withheld funds, the City knows the City is not entitled to the funds; and

**WHEREAS**, the most cost effective way to resolve the matter from the City's perspective is to file an action in interpleader with the Napa County Superior Court, deposit the funds, less the City's attorney's fees and any other amounts which may be deducted pursuant to applicable laws, with the Clerk of that Court, and seek a Court Order directing the proper disposition of the funds.

**NOW, THEREFORE, BE IT RESOLVED** that the City Council of the City of Calistoga hereby approves filing an interpleader action with the Napa County Superior Court regarding the \$244,112.89 in disputed funds held by the City under the City's Spring Street Utility Replacement and Paving Rehabilitation Project - Cedar Street to End.

**BE IT FURTHER RESOLVED** that the in connection with the interpleader action, the City shall deposit the disputed funds with the Clerk of the Napa County Superior Court.

**BE IT FURTHER RESOLVED** that the City Council hereby authorizes and directs the City Manager to take all actions and execute all documents as necessary or appropriate to carry out the intent of the foregoing resolution on behalf of the City.

**PASSED, APPROVED, AND ADOPTED** by the City Council of the City of Calistoga at a Meeting held this **20<sup>th</sup> day of August 2019**, by the following vote:

**AYES:**  
**NOES:**  
**ABSTAIN;**  
**ABSENT:**

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**CHRIS CANNING, Mayor**

**ATTEST:**

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**IRENE CAMACHO-WERBY, City Clerk**

<b><i>Stop Notice Calculations—Spring Street Project</i></b>					
	<b><u>Claimant</u></b>	<b><u>Original Stop Notice</u></b>	<b><u>Reduction</u></b>	<b><u>Total Stop Notice Amount</u></b>	<b><u>Withholding Amount (125%)</u></b>
<b>1</b>	R.E. Maher, Inc.	\$71,825.00	\$(5,630.00)	\$66,195.00	\$ 82,743.75
<b>2</b>	Hi-Way Safety, Inc.	\$4,900.00		\$ 4,900.00	\$ 6,125.00
<b>3</b>	HD Supply Construction & Industrial White Cap	\$6,252.61		\$ 6,252.61	\$ 7,815.76
<b>4</b>	Josh Patterson (worker)	\$29,653.01		\$29,653.01	\$ 37,066.26
<b>5</b>	R&B Company	\$21,984.60		\$21,984.60	\$ 27,480.75
<b>6</b>	BoDean Company	\$41,313.50		\$41,313.50	\$ 51,641.88
<b>7</b>	Benito Garcia	\$21,081.59		\$21,081.59	\$ 26,351.99
<b>8</b>	Cinquini & Passarino	\$3,910.00		\$ 3,910.00	\$ 4,887.50
<b><i>Totals</i></b>				\$195,290.31	\$ 244,112.89



July 25, 2019

NOTICE OF ASSIGNMENT

City of Calistoga
Planning & Building Department
1232 Washington Street
Calistoga, CA 94515

Re: NORTHERN PACIFIC CORPORATION

NORTHERN PACIFIC CORPORATION. ("Northern Pacific") previously collaterally assigned to CALIFORNIA BANK OF COMMERCE ("Lender") all of Northern Pacific's right, title and interest in and to all presently existing and hereinafter arising accounts, accounts receivable and other amounts owing from your company (the "Company") to Northern Pacific (collectively the "Accounts"). A copy of the Financing Statement giving notice of this assignment and perfecting Lender's lien in and to same is enclosed for your convenience.

Northern Pacific is presently in default in its obligations to Lender. As a result of such defaults, and as authorized by its loan documents and applicable law. Lender has elected (among other things) to exercise its rights under its agreement with Northern Pacific and under the California Commercial Code to collect the Accounts directly from the account debtors, including your Company. Accordingly, all amounts owing by Company to Northern Pacific on any presently existing or hereinafter arising Accounts are now and shall hereafter be payable directly and only to Lender.

In accordance with California Commercial Code and continuing until Company is further notified in writing by Lender that Lender no longer holds any right, title or interest in or to any Accounts, please be advised that from and after the date of such notice of assignment (1) Company has no right to assert any claims, defenses, offsets, deductions, or counterclaims of any kind against Lender that it would or could assert against Northern Pacific; and (2) Company is obligated to pay the amount of the Accounts (together with any late fees, interest or other charges otherwise payable in connection with any Account) directly and only to Lender. Consequently, demand is hereby made that Company pay directly and solely to Lender any and all presently existing or hereinafter arising Accounts, which sums should be paid to Lender at the addresses below:



160 West Santa Clara Street, Suite 700
San Jose, CA 95113

408.380.8631
CaliforniaBankofCommerce.com



**Mail**

**California Bank of Commerce  
P.O. Box 946  
San Jose, Ca 95108**

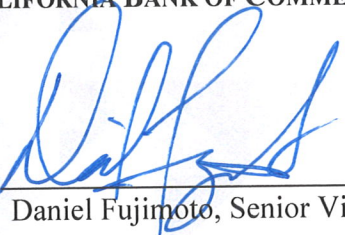
**Wire Transfer:**

**Account Name: California Bank of Commerce/  
FBO NORTHERN PACIFIC CORPORATION  
ABA# 121144696  
Account #1094416**

Company is obligated to pay the foregoing sums to Lender notwithstanding any claim by Northern Pacific that they are not in default in their obligations owing to Lender. Payment by Company to anyone other than Lender (including, without limitation Northern Pacific or any other person or entity that Northern Pacific may direct you to pay) shall not discharge Company's obligations.

If Company chooses to pay the Accounts to the Northern Pacific or any party other than Lender, Company will be liable for the double payment of such amount and can be compelled to pay such amount to Lender. Thus, Company's obligations respecting the Accounts can only be satisfied and discharged by payment only to Lender.

**CALIFORNIA BANK OF COMMERCE**

By:   
Daniel Fujimoto, Senior Vice President

Enclosures: CBC UCC-1

160 West Santa Clara Street, Suite 700  
San Jose, CA 95113

408.380.8631  
CaliforniaBankofCommerce.com



# UCC FINANCING STATEMENT

**FOLLOW INSTRUCTIONS**

<b>A. NAME &amp; PHONE OF CONTACT AT FILER (optional)</b> Gisela Melendez 800-331-3282
<b>B. E-MAIL CONTACT AT FILER (optional)</b>
<b>C. SEND ACKNOWLEDGMENT TO: (Name and Address)</b> CT LIEN SOLUTIONS 2727 ALLEN PARKWAY HOUSTON, TX 77019 USA

**DOCUMENT NUMBER:** 61263390002  
**FILING NUMBER:** 17-7584589468  
**FILING DATE:** 05/09/2017 16:39

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**1. DEBTOR'S NAME:** Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here  and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

OR	1a. ORGANIZATION'S NAME Northern Pacific Corporation				
	1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX	
1c. MAILING ADDRESS 331 Perkins Street		CITY Sonoma	STATE CA	POSTAL CODE 95476	COUNTRY USA

**2. DEBTOR'S NAME:** Provide only one Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 2b, leave all of item 2 blank, check here  and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

OR	2a. ORGANIZATION'S NAME				
	2b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX	
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE	COUNTRY

**3. SECURED PARTY'S NAME (or NAME of ASSIGNEE of ASSIGNOR SECURED PARTY):** Provide only one Secured Party name (3a or 3b)

OR	3a. ORGANIZATION'S NAME California Bank of Commerce				
	3b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX	
3c. MAILING ADDRESS 3595 Mt. Diablo Blvd		CITY Lafayette	STATE CA	POSTAL CODE 94549	COUNTRY USA

**4. COLLATERAL:** This financing statement covers the following collateral:  
 All Inventory, Chattel Paper, Accounts, Deposit Accounts, Equipment and General Intangibles; whether any of the foregoing is owned now or acquired later; all accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles and other account proceeds).

**5. Check only if applicable and check only one box:** Collateral is  held in a Trust (see UCC1Ad, item 17 and instructions)  being administered by a Decedent's Personal Representative

**6a. Check only if applicable and check only one box:**  Public-Finance Transaction  Manufactured-Home Transaction  A Debtor is a Transmitting Utility

**6b. Check only if applicable and check only one box:**  Agricultural Lien  Non-UCC Filing

**7. ALTERNATIVE DESIGNATION (if applicable):**  Lessee/Lessor  Consignee/Consignor  Seller/Buyer  Bailee/Bailor  Licensee/Licenser

**8. OPTIONAL FILER REFERENCE DATA:**  
 CA-0-58830772-53279990

**FILING OFFICE COPY**