

RESOLUTION 2021-061

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CALISTOGA, COUNTY OF NAPA, STATE OF CALIFORNIA, AUTHORIZING THE 2021 DROUGHT YEAR WATER SUPPLY AGREEMENT BETWEEN THE CITY OF NAPA (NAPA) AND THE CITY OF CALISTOGA (CALISTOGA) AND AUTHORIZING THE INTERIM CITY MANAGER TO SIGN THE 2021 AGREEMENT TERMS

WHEREAS, 2021 is characterized as a critically dry year and state and local reservoirs are below normal across the state; and

WHEREAS, Kimball Reservoir received rainfall well below normal and was 16.3", which is about 40% of normal that is typically 38", and the reservoir is about 55% full; and

WHEREAS, the City's other water supply is contracted through the Napa County Flood Control and Water Conservation District (NCFCWCD) for water supply from the Department of Water Resources (DWR) State Water Project (SWP); and

WHEREAS, the State Department of Water Resources has allocated 5% of State Water Project supplies to all contractors; and

WHEREAS, In December 2013, the Napa County Flood Control and Water Conservation District (NCFCWCD) on behalf of the three participating SWP subcontractors: Cities of American Canyon, Calistoga and Napa, entered into an Area of Origin Settlement (AOO) Agreement with the Department of Water Resources, Amendment No. 24 to Agreement No 1573 (City Agreement No. 6496); and

WHEREAS, pursuant to the terms and conditions set forth in the Area of Origin Settlement Agreement, additional water is available known as "Advanced Table A Water" (ATAW) making another 5,000af available in years when Table A and carryover water has been consumed amongst all three subcontractors; and

WHEREAS, on July 20, 2021, the Napa City Council declared a water shortage and required mandatory outdoor irrigation restrictions, prohibiting the use of City water for outdoor irrigation in excess of two days per week; and

WHEREAS, Napa projects using its 2021 allocations of Table A and Carryover, as well as Yuba Accord water, by early July and needs to use ATA to meet demands through the end of the year; and

WHEREAS, American Canyon has 260af of Table A and 696af of Carryover and plans to use all allocations in the next couple of months; and

WHEREAS, Calistoga has 96af of Table A and 1,053af of Carryover and does not intend to use all available allocations; and

WHEREAS, in order for NCFCWCD to access ATA for the sub-contractors, all available 2021 Table A and Carryover allocated to Calistoga will need to be consumed; and

WHEREAS, the agreement with Napa will allow them to use Calistoga's unused water to get to Advanced Table A Water (ATAW); and

WHEREAS, in return Napa will provide return water equivalent to the amount of Calistoga's unused water; and

WHEREAS, additionally, Napa will pay Calistoga \$148,404 for their use of Calistoga's Advanced Table A allotment of 332af with proceeds going to Account No.02-3289; and

WHEREAS, Napa will be responsible to pay back the SWP, the 332af volume per the Area of Origin Settlement Agreement terms; and

WHEREAS, Calistoga will have up to 5 years to use the return water; and

WHEREAS, in addition, Calistoga has an option to sell the unused water, or have Napa return a portion and pay the remainder of the return water owed back to Calistoga; and

WHEREAS, Napa is requesting adoption of the attached 2021 Drought Year Water Supply Agreement between Napa and Calistoga to be able to access this additional water shown on **EXHIBIT A**; and

WHEREAS, the cost of Advanced Table A water and the return water (Table A and Carryover water we transfer to Napa) are priced the same and has been budgeted in FY21/22 under Account No. 02-4132-4503.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CALISTOGA DOES HEREBY find the following:

1. Adopt the 2021 drought year water supply agreement between the Napa and Calistoga.
2. Authorize the Interim City Manager to sign the 2021 agreement terms between Napa and Calistoga.
3. Approve that the 2021 Drought Year Water Supply Agreement between Napa and Calistoga is general policy and procedure and is not a Project under CEQA as defined under Section 15378(b) (2) of CEQA and therefore exempt from CEQA review.

PASSED, APPROVED AND ADOPTED this 3rd day of **August 2021**. I, **MARNI RITTBURG, CITY CLERK OF THE CITY OF CALISTOGA, HEREBY CERTIFY** the foregoing resolution was introduced and passed at a regular meeting of the Calistoga City Council by the following roll call vote:

AYES: Councilmembers Gift, Kraus, and Williams, Vice Mayor Lopez-Ortega, and Mayor Canning
NOES: None
ABSENT: None
ABSTAIN: None

ATTEST:



Marni Rittburg, CMC, City Clerk

APPROVED:



Chris Canning, Mayor

City of Napa Agreement No. _____

City of Calistoga Agreement No. _____

**2021 DROUGHT YEAR WATER SUPPLY AGREEMENT BETWEEN
THE CITY OF NAPA AND THE CITY OF CALISTOGA**

This Agreement for 2021 Drought Year Water Supply (this "Agreement") by and between the City of Napa, a California charter city ("NAPA"), and the City of Calistoga, a California City ("CALISTOGA") is effective as of the effective date identified on the signature page. NAPA and CALISTOGA may be identified as "a Party," or collectively, as "the Parties".

RECITALS

A. NAPA owns entitlements to State Water Project ("SWP") water pursuant to *Agreement No. 1482, Contract for Water Supply from North Bay Aqueduct between Napa County Flood Control and Water Conservation District and City of Napa*, dated April 5, 1966. Agreement No. 1482 has been amended over the years, through Amendment No. 16, dated March 19, 2019 ("Napa Water Supply Agreements").

B. CALISTOGA owns entitlements to SWP water pursuant to *Agreement No.1926, Contract for Water Supply from North Bay Aqueduct between Napa County Flood Control and Water Conservation District and CALISTOGA*, dated June 15, 1982. Agreement No. 1926 has been amended over the years, through Amendment No. 14, dated December 01, 2020 ("Calistoga Water Supply Agreements").

C. The City of American Canyon ("American Canyon") owns entitlements to SWP water pursuant to *Agreement No.423, Contract for Water Supply from North Bay Aqueduct between Napa County Flood Control and Water Conservation District and American Canyon*, dated November 15, 1966. Agreement No. 423 has been amended over the years, through Amendment No. 17 dated December 15, 2022 ("American Canyon Water Supply Agreements").

D. SWP water is delivered to Napa County Flood Control and Water Conservation District ("NCFCWCD") by the Department of Water Resources ("DWR") via the North Bay Aqueduct ("NBA") system, and the SWP water is delivered to NAPA and CALISTOGA at the SWP terminal raw water tanks located at the Edward I. Barwick Jamieson Canyon Water Treatment Plant.

E. CALISTOGA's SWP water is treated by NAPA and wheeled through NAPA's system to a meter on Silverado Trail south of Sage Canyon Road wherein it is delivered for use by CALISTOGA.

F. On March 23, 2021, DWR announced SWP Table A ("Table A") allocations for 2021 are 5% of the maximum contracted amount for NAPA, CALISTOGA and American Canyon.

G. Notwithstanding the 2021 Table A allocations, DWR and NCFCWCD have determined Table A Carryover (“Carryover”) water (unused allocations from previous years) are available for NAPA, CALISTOGA and American Canyon throughout 2021 under the terms of the Water Supply Contract, dated December 19, 1963, between DWR and NCFCWCD for SWP water, as amended over the years through Amendment No. 26, dated February 26, 2021 (“State Water Project Contract”).

H. Pursuant to the terms and conditions set forth in the *2014 Area of Origin Settlement Agreement* between DWR and NCFCWCD, Advance Table A (“ATA”) water in the amount of 5,000 acre-feet (“AF”) is available to NCFCWCD, provided that all Napa County SWP sub-contractors have exhausted their 2021 Table A and Carryover water allocations.

I. Based on projected use of SWP in 2021, all Table A and Carryover allocations are projected to be used by NCFCWCD and therefore in April 2021, the State Water Project Analysis Office scheduled 5,000 AF of ATA for delivery to NCFCWCD.

J. In 2021, CALISTOGA has 96 AF of Table A, 1,053 AF of Carryover, and 332 AF of ATA available through the SWP and will not be able to consume all available allocations.

K. In 2021, NAPA has 1,095 AF of Table A, 3,104 AF of Carryover, and 3,772 AF of ATA available through the SWP and desires to acquire unused water available from CALISTOGA.

L. In 2021, American Canyon has 260 AF of Table A, 696 AF of Carryover, and 896 AF of ATA and may not use all available allocations and does not desire to acquire unused water available from CALISTOGA.

M. On May 4, 2021, the NAPA City Council declared a Moderate Water Shortage and called for a 15% reduction in demand from all customers and has implemented vital conservation programs city-wide.

N. On May 10, 2021, the Governor of the State of California issued a Proclamation of a State of Emergency as a result of on-going drought conditions in 41 counties, including Napa County.

O. On July 20, 2021, the NAPA City Council updated the declaration of a Moderate Water Shortage implementing mandatory outdoor irrigation restrictions including prohibition of using City water for outdoor irrigation in excess of two days per week.

P. NAPA intends to purchase Yuba Accord Program water that is available through the SWP.

Q. NAPA’s Lake Hennessey is at 62% capacity which is a historically low level following two winters with significantly below average precipitation.

R. NAPA intends to limit the use of Lake Hennessey in order to preserve supplies in the event the drought continues into 2022.

S. NAPA projects using all of their 2021 allocations of Table A and Carryover, as well as Yuba Accord water, and needs to use ATA to meet demands through the end of the year.

T. In order for NAPA to access ATA, all available 2021 Table A and Carryover allocated to CALISTOGA and the City of American Canyon will need to be used.

U. CALISTOGA is willing to allow NAPA beneficial use of CALISTOGA'S unused 2021 Table A, Carryover, and ATA water under the terms of this Agreement.

NOW, THEREFORE, NAPA and CALISTOGA for the mutual consideration described herein, agree as follows:

1. **TERM.** This Agreement is effective on the date it is signed by the NAPA City Clerk, below, attesting to full execution of the Agreement by both parties ("Effective Date").

2. **DEFINITIONS.** The following terms are defined for the purpose of this Agreement:

- (a) **Available Water.** The total SWP allocation of Table A, Carryover, ATA, Yuba Accord, Dry Year Transfer and any other water made available for beneficial use to NCFWCWD by DWR and subsequently made available by NCFWCWD to NAPA and CALISTOGA for use in 2021.
- (b) **Delivered Water.** Amount CALISTOGA consumes of their 2021 Table A, Carryover, and ATA allocations through December 31, 2021.
- (c) **Unused Water.** Amount NAPA consumes of the remaining CALISTOGA 2021 allocations of Table A, Carryover, and ATA after all Delivered Water is accounted for through December 31, 2021.
- (d) **Return Water.** The amount of CALISTOGA's Table A and Carryover (Unused Water) that NAPA consumes and returns to CALISTOGA in accordance with Agreement Section 6.
- (e) **CALISTOGA'S Table A Water.** State Water Project water that CALISTOGA is entitled to delivery from NCFWCWD, under the terms of the CALISTOGA Water Supply Agreements, where allocation of Table A water between the Parties is determined in light of the NAPA Water Supply Agreements and American Canyon Water Supply Agreements.
- (f) **Carryover Water.** Unused Table A water as allocated to American Canyon, NAPA, or CALISTOGA by NCFWCWD under the terms of

the CALISTOGA Water Supply Agreements, NAPA Water Supply Agreements and American Canyon Water Supply Agreements, and thereafter, carried over by NCFWCWD for the benefit of each party, as permitted under the terms of the State Water Project Contract.

3. STIPULATIONS.

- (a) It is hereby stipulated that in the absence of this Agreement, the 2021 allocations of Table A water are: for CALISTOGA 96af; and for NAPA 1,095af; and for American Canyon 260af.
- (b) It is hereby stipulated that in the absence of this Agreement, the 2021 allocations of Carryover water are: for CALISTOGA 1,053af; and for NAPA 3,104af; and for American Canyon 696af.
- (c) It is further stipulated that ATA water is available to NAPA, CALISTOGA, and American Canyon from NCFWCWD based on the principles of allocation set forth in the CALISTOGA Water Supply Agreements, NAPA Water Supply Agreements and American Canyon Agreements, and that in the absence of this Agreement, the 2021 allocations for Advance Table A water are: for CALISTOGA 332af; and for NAPA 3,772af; and for American Canyon 896af.

4. TABLE A AND CARRYOVER WATER. CALISTOGA hereby authorizes NAPA to take beneficial use of CALISTOGA'S Table A and Carryover Unused Water, under the terms of this Agreement. Based on projections, CALISTOGA estimates 500-600AF of Table A and Carryover Unused Water to be available to NAPA, however, no guarantee of Unused Water is made hereunder, and nothing in this contract obligates CALISTOGA to provide any Table A and Carryover water in the event that CALISTOGA requires or uses such water for its own use.

5. ADVANCE TABLE A WATER. CALISTOGA agrees to sell and hereby authorizes NAPA to take beneficial use of 332 AF of CALISTOGA'S ATA. Such ATA as used by NAPA shall be recorded as NAPA ATA water and CALISTOGA shall have no obligations thereof for repayment under the terms of the *2014 Area of Origin Settlement Agreement* between DWR and NCFWCWD.

6. PAYMENT.

(a) Table A and Carryover Water. By no later than December 31, 2021, CALISTOGA shall notify NAPA whether it shall require delivery of any amount of Return Water for CALISTOGA'S use during the period between January 2022 and April 2022, and provide an estimated schedule of Return Water needed.

On or before April 30, 2022, CALISTOGA shall provide written notice to NAPA if CALISTOGA desires Return Water, monetary payment, or a combination of Return Water and monetary payment for the actual amount of Table A and Carryover Unused Water that NAPA used in 2021 and for which Return Water has not already been provided prior to April 30, 2022. If CALISTOGA does not provide NAPA with such written notice on or

before April 30, 2022, NAPA will provide CALISTOGA with Return Water for all of the Unused Water.

i. Return Water. NAPA shall repay CALISTOGA for all the Unused Water provided by CALISTOGA and used by NAPA. Return Water shall be available beginning January 2022. By no later than December 31, 2021, CALISTOGA shall notify NAPA as to an estimated schedule of Return Water CALISTOGA desires to be delivered between January 2022 and April 2022. By no later than December 31st in each subsequent year, CALISTOGA shall provide NAPA an estimated schedule of Return Water CALISTOGA desires to be delivered in the following year. The return water shall be recorded as "Napa Return Water" to CALISTOGA and be accounted for on CALISTOGA'S 2022 SWP Water Delivery Accounting Spreadsheet, as maintained by NCFCWCD. NAPA shall determine the source of Return Water and notify NCFCWCD accordingly for recording. CALISTOGA shall accept all Return Water by no later than December 31, 2026.

ii. Monetary Payment. For water used by NAPA for which return water is not provided, NAPA shall pay CALISTOGA \$447/AF for the requested amount of CALISTOGA'S Table A and Carryover water that NAPA used in 2021. Payment shall be made within 45 days of notice.

(b) Advance Table A Water. NAPA shall pay CALISTOGA \$447 per AF for the 332 AF of CALISTOGA'S ATA provided under this Agreement. Payment shall be made by February 15, 2022.

(c) Any monetary payment required under this Section shall be delivered to 1232 Washington Street, Calistoga, CA 94515.

(d) NAPA shall be responsible for the variable component of SWP charges due to NCFCWCD incurred under the SWP Contract for Unused Water and ATA water. In the event that NCFCWCD does not bill NAPA directly, NAPA shall reimburse CALISTOGA for payment of such charges within 30 days of presentment.

7. POINT OF DELIVERY.

(a) Unused Water. Point of delivery shall be the SWP terminal raw water tanks.

(b) Return Water. Point of delivery shall be at CALISTOGA meter used for normal deliveries of CALISTOGA'S SWP water that is treated and wheeled by NAPA. The normal treat and wheel costs at the time of delivery shall apply.

8. MEASUREMENT OF WATER.

(a) Unused CALISTOGA Water to NAPA. The quantity of Unused CALISTOGA Water delivered to NAPA shall be pursuant to metering and recording mechanisms normally used to account for SWP used by the Parties.

(b) Return/Exchange Water to CALISTOGA. The quantity of Return Water shall be measured at the point of delivery in the same manner SWP deliveries are recorded.

9. QUALITY OF WATER.

(a) SWP Water to NAPA. CALISTOGA makes no representation regarding the quality of water delivered. The source of water is SWP water delivered by DWR.

(b) Return Water to CALISTOGA. The quality shall be of suitable quality for human consumption and of the same quality that NAPA delivers to its retail customers.

10. BENEFICIAL USE. Water delivered pursuant to this Agreement shall be for beneficial use only as prescribed by the California Water Code, Article X of the California Constitution, and applicable decisional law.

11. INDEMNIFICATION.

(a) By NAPA. NAPA shall indemnify, hold harmless, release, and defend CALISTOGA (including its officers, elected or appointed officials, employees, volunteers, and agents) from and against any and all liability or claims (including actions, demands, damages, injuries, settlements, losses or costs [including legal costs and attorney's fees]) (collectively "Liability") of any nature, arising out of, pertaining to, or relating to NAPA's acts or omissions under this Agreement. NAPA will not be obligated to indemnify CALISTOGA for the proportionate share of the Liability caused by the CALISTOGA's active negligence, sole negligence, or willful misconduct. NAPA's indemnification obligations under this Agreement are not limited by any limitations of any insurance held by NAPA, including, but not limited to, workers' compensation insurance.

(b) By CALISTOGA. CALISTOGA shall indemnify, hold harmless, release, and defend NAPA (including its officers, elected or appointed officials, employees, volunteers, and agents) from and against any and all liability or claims (including actions, demands, damages, injuries, settlements, losses or costs [including legal costs and attorney's fees]) (collectively "Liability") of any nature, arising out of, pertaining to, or relating to CALISTOGA's acts or omissions under this Agreement. CALISTOGA will not be obligated to indemnify NAPA for the proportionate share of the Liability caused by the NAPA's active negligence, sole negligence, or willful misconduct. CALISTOGA's indemnification obligations under this Agreement are not limited by any limitations of any insurance held by CALISTOGA, including, but not limited to, workers' compensation insurance.

12. NOTICES. All notices or requests required or contemplated by this Agreement will be in writing and delivered to the other party's Authorized Representative by personal delivery, U.S. Mail, nationwide overnight delivery service, email, or as otherwise specified herein. Delivery is deemed effective upon the first to occur of: (a) actual receipt by a party's Authorized Representative, (b) actual receipt at the address identified below, or (c) three business days following deposit in the U.S. Mail of registered or certified mail

sent to the address identified below. A party's contact information, below, may be changed by providing written notice to the other party.

NAPA's Authorized Representative:

UTILITIES DIRECTOR
CITY OF NAPA
P.O. Box 660
NAPA, CA 94559-0660
pbrun@cityofnapa.org

CALISTOGA'S Authorized Representative:

Derek Rayner, Director of Public Works
414 Washington Street
Calistoga, CA
drayner@ci.calistoga.ca.us

13. INDEPENDENT ENTITIES. This Agreement shall not be considered a Joint Powers Agreement. NAPA and CALISTOGA are independent entities, and NAPA and CALISTOGA and the respective officers, agents and employees of NAPA and CALISTOGA are not, and shall not be deemed, employees or agents of the other agency for any purpose. Each agency shall be responsible for its worker's compensation and employee benefits.

14. THIRD PARTY BENEFICIARIES. Except to the extent expressly stated herein, this Agreement will not be construed to create any rights in third parties.

15. GENERAL PROVISIONS.

15.1. Headings. The heading titles for each section of this Agreement are included only as a guide to the contents and are not to be considered as controlling, enlarging, or restricting the interpretation of the Agreement.

15.2. Severability. If any term of this Agreement (including any phrase, provision, covenant, or condition) is held by a court of competent jurisdiction to be invalid or unenforceable, the Agreement will be construed as not containing that term, and the remainder of this Agreement will remain in full force and effect; provided, however, this section will not be applied to the extent that it would result in a frustration of the parties' intent under this Agreement.

15.3. Governing Law, Jurisdiction, and Venue. The interpretation, validity, and enforcement of this Agreement will be governed and interpreted in accordance with the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement will be filed and heard in a court of competent jurisdiction in the County of Napa.

15.4. Attorney's Fees. If any litigation is commenced to enforce or interpret this Agreement, the prevailing party is entitled to reasonable attorney's fees, costs, and expenses incurred.

15.5. Assignment and Delegation. This Agreement will not be assigned or transferred in whole or in part, nor will any of CALISTOGA'S duties be delegated without NAPA'S prior written consent. Any attempt to assign, transfer, or delegate this Agreement, in whole or any part, without NAPA'S prior written consent will be void and of no force or effect. Any consent by NAPA to one assignment, transfer, or delegation will not be deemed to be consent to any subsequent assignment, transfer, or delegation.

15.6. Modifications. This Agreement may not be amended or modified orally. No amendment or modification of this Agreement is binding unless it is in a writing signed by both parties.

15.7. Waivers. No waiver of a breach, default, or duty under this Agreement will be effective unless it is in writing and signed by the party waiving the breach, default, or duty. Waiver of a breach, default, or duty under this Agreement will not constitute a continuing waiver or a waiver of any subsequent breach, default, or duty under this Agreement.

15.8. Entire Agreement. This Agreement, including all documents incorporated herein by reference, comprises the entire integrated understanding between the parties regarding the terms of sale of Unused CALISTOGA Water to NAPA. This Agreement supersedes all prior negotiations, agreements, and understandings regarding this matter, whether written or oral. The documents incorporated by reference into this Agreement are complementary; what is called for in one is binding as if called for in all. If any provision in any document attached or incorporated into this Agreement conflicts or is inconsistent with a provision in the body of this Agreement, the provisions in the body of this Agreement will control over any such conflicting or inconsistent provisions.

15.9. Interpretation. Each party to this Agreement has had an opportunity to review the Agreement, and to consult with its respective legal counsel regarding the meaning of the Agreement. Accordingly, Civil Code Section 1654 will not apply to interpret any uncertainty in the meaning of the Agreement.

[SIGNATURES ON FOLLOWING PAGE]

16. SIGNATURES.

16.1. Counterparts. This Agreement may be executed in counterparts, each one of which is deemed an original, but all of which together constitute a single instrument.

16.2. Signatures. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of NAPA and CALISTOGA.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective on the Effective Date set forth below.

CITY OF NAPA, a California Charter City:

CITY OF CALISTOGA, a California City:

Phil Brun, Utilities Director

Brad Kilger, Interim City Manager

ATTEST:

ATTEST:

Tiffany Carranza, City Clerk

Marni Rittburg, CMC, City Clerk

Date: _____
("Effective Date")

APPROVED AS TO FORM:

COUNTERSIGNED:

Michelle Marchetta Kenyon,
City Attorney

Joy Riesenber, City Auditor

APPROVED AS TO FORM:

Michael W. Barrett, City Attorney