



## California Sportfishing Protection Alliance

*"An Advocate for Fisheries, Habitat and Water Quality"*

Chris Shutes, Water Rights Advocate

1608 Francisco St., Berkeley, CA 94703

Tel: (510) 421-2405 E-mail: [blancapaloma@msn.com](mailto:blancapaloma@msn.com)

Web: [www.calsport.org](http://www.calsport.org)

September 19, 2014

Mr. Scott Frazier  
Division of Water Rights  
State Water Resources Control Board  
Sacramento, CA  
[Scott.Frazier@waterboards.ca.gov](mailto:Scott.Frazier@waterboards.ca.gov)  
Via e-mail

Re: Comments on and Objections to temporary urgency change petition and order, June Lakes Public Utilities District, Licenses 2039, 4358, 10837 AND 10838 and Permits 7350, 7352, 18199 and 21185 (Applications 5425, 4358, 17120, 20349, 11892, 12060, 26192 and 28609, respectively)

Dear Mr. Frazier:

The California Sportfishing Protection Alliance (CSPA) has read carefully a notice dated August 27, 2014 relative to a temporary urgency change petition (TUCP) for June Lake Public Utility District for change in required minimum flows past its Fern Creek diversion facility from 200 gallons per minute (gpm) to 25 gpm, and an Order signed by the Deputy Director, Division of Water Rights dated August 25, 2014, granting this change. The TUCP applies to the above-referenced permits. CSPA objects to the petition and the Order, as described below, and recommends that additional conditions be required of permittee in a revised Order.

The TUCP filed on May 14, 2014 is identical in many respects to the petition for a permanent change in the instream flow requirement for Fern Creek that was noticed on February 28, 2014, and that CSPA protested on March 31, 2014. Indeed, many of the documents and language submitted in support of the TUCP are identical to the word to materials submitted in support of the petition to permanently change the flow requirement. CSPA incorporates by reference all of its objections and grounds for protest of the petition for permanent change into the present comments on the TUCP. For your convenience, a copy of CSPA's March 31, 2014 protest is attached as an appendix to this letter.

CSPA objects to and protests the TUCP on most of the same grounds that CSPA protested the early petition for permanent change. The petitioner has made no showing that the proposed minimum flow is protective of fishery resources in Fern Creek, but continues to rely on the same bad faith argument that it is justified in reducing the flow it agreed to in 1998: it can't

define a reason for the existing minimum flow, so it asserts that it can unilaterally, with no supporting evidence, cut it to one eighth of that flow.

Equally, the Order by the Deputy Director does not require and makes no effort to define an evidentiary basis for the interim flow that the Order grants. Of additional concern, the Order suggests on page 6 that because instream flow in Fern Creek is designed in part to protect of “nonnative Brook Trout” that this somehow diminishes the importance of the flow requirement. CSPA reminds the division that the application of Fish and Game Code 5937 in the 1980’s to nearby Rush Creek dealt with “nonnative” rainbow trout and brown trout, and that this law by no means applies exclusively to native species. Brook trout have long been and continue to be, in many Sierra streams, an important and valued fisheries resource. CSPA recommends that the term “nonnative” be stricken from the order.

The Order treats the Petitioner like any other petitioner that finds itself short of water in the present drought conditions. This too is inappropriate. This Petitioner set itself up for failure by allowing development without a reliable water supply to serve that development. This likelihood was anticipated and called out in CSPA’s protest of the permittee’s water right petitions in 1992. Accordingly, this Petitioner should be required to institute more stringent water conservation measures than a more responsible water purveyor might otherwise be. Currently, the Stage 2 restrictions imposed by JLPUD limit watering to three days a week. CSPA recommends that this initially be revised by the Board to limit outdoor watering to one day a week. The Order also requires a standard 20% reduction of water use in the District’s service area, similar to the general statewide initiative requested by the Governor. Given the particulars of this situation, CSPA suggests that the Order apply a more stringent standard, such as a 40% reduction from baseline, and that the Order identify the precise conditions under which JLPUD would be required to institute Stage 3 restrictions. CSPA also recommends that JLPUD be forbidden from serving any new water meters while the Order is in effect.

As a condition of the Order, Petitioner was required to provide the Division of Water Rights with a plan for compliance, and with results of monitoring efforts. CSPA requests that the Division post this plan and these results on its website, as well as all other documents required pursuant to the Order, or in the alternative that CSPA be provided with electronic copies as they are submitted to the Division.

As an additional condition of the Order, Petitioner should be required to submit to the Board by December 31, 2014 a study plan to determine a scientific basis for its proposed flow. If drought persists into 2015, this will be germane to the Order or to successive temporary orders; if the drought breaks, Petitioner will have a leg up on work it must perform anyway to support its petition for permanent change. Similarly, the Petitioner should be required as a condition of the Order to report immediately, and again once every three months so long as this Order or subsequent Orders are in effect, on the state of investigation and negotiation for supplemental supplies from U.S. Forest Service land, as referenced in its petition for permanent change.

Thank you for considering these comments and objections.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Chris Shutes", with a long horizontal line extending to the right.

Chris Shutes  
Water Rights Advocate  
California Sportfishing Protection Alliance

cc: June Lakes Public Utilities District  
c/o Vince Maples  
Wagner & Bonsignore  
2151 River Plaza Drive, Suite 100  
Sacramento, CA 95833  
vmaples@wbecorp.com  
(via e-mail and surface mail)

APPENDIX

CSPA Protest

JLPUD Petition for Change

March 31, 2014

State of California  
State Water Resources Control Board  
**DIVISION OF WATER RIGHTS**  
**P.O. BOX 2000, Sacramento, Ca. 95812-2000**  
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterrihts.ca.gov>

**PROTEST – (Petitions)**

**BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS**

**LICENSES 2039, 4358, 10837 AND 10838 AND PERMITS 7350, 7352, 18199 AND 21185  
(APPLICATIONS 5425, 4358, 17120, 20349, 11892, 12060, 26192 AND 28609,  
RESPECTIVELY)**

**I, Chris Shutes, Water Rights Advocate, California Sportfishing Protection Alliance, 1608  
Francisco St., Berkeley, CA 94703, [blancapaloma@msn.com](mailto:blancapaloma@msn.com), (510) 421-2405**

have read carefully a notice dated February 28, 2014 relative to a petition for June Lake Public Utility District for change in required minimum flows past its Fern Creek diversion facility from 200 gallons per minute (gpm) to 25 gpm.

As stated in the Notice, the sources, points of diversion, amounts, season and purposes of use are as follows:

Sources:

- Unnamed Spring (a) – A5425, A9432, A11892, A12060, A17120, A20349, A26192
- Unnamed Spring(b) – A11892
- Unnamed Spring (c) – A11892, A12060
- Fern Creek – A5425, A9432, A11892, A12060, A17120, A20349, A26192, A28609
- Unnamed Stream – A11892, A12060

Points of  
Diversion:

- Unnamed Spring (a) – SW ¼ of NW ¼ of Section 22, T2S, R26E, MDB&M
- Unnamed Spring (b) – NW ¼ of NW ¼ of Section 22, T2S, R26E, MDB&M
- Unnamed Spring (c) - NW ¼ of NW ¼ of Section 22, T2S, R26E, MDB&M
- Fern Creek – NW ¼ of SE ¼ of Section 21, T2S, R26E, MDB&M
- Unnamed Stream – NW ¼ of NW ¼ of Section 22, T2S, R26E, MDB&M

Amount:

- A5425 - 3,000 gallons per day (gpd), with 3.4 acre-foot per annum (afa) limit
- A9432 – 0.025 cubic foot per second (cfs), with 17.9 afa limit
- A11892 - 0.1cfs, with 40 afa limit
- A12060 – 0.13 cfs, with 55 afa limit
- A17120 – 13,000 gpd, with 4.2 afa limit
- A20349 – 15,000 gpd, with 4.9 afa limit
- A26192 – 0.03 cfs, with 21.7 afa limit
- A28609 – 0.3 cfs, with 150 afa limit

Season: January 1 to December 31 of each year

Purposes of Use: Domestic and Municipal (varies by water right)

Place of Use: Within the service area boundary of June Lake Public Utility District being SE ¼ of Section 8, within SE ¼ of NW ¼ and SW ¼ of Section 15, within SW ¼ of NW ¼ of S ½ of Section 16, within E ½ of Section 17, within NE ¼ of NE ¼ of Section 20, within N ½ of Section 21, within N ½ of NW ¼ of Section 22; all being within T2S, R26E, MDB&M

It is desired to protest against the approval thereof because to the best of our information and belief:

The proposed application/petition for water will:

- |                                                 |          |
|-------------------------------------------------|----------|
| <b>(1) not best serve the public interest</b>   | <b>x</b> |
| <b>(2) be contrary to law</b>                   | <b>x</b> |
| <b>(3) have an adverse environmental impact</b> | <b>x</b> |

**State Facts, which support the foregoing allegations:**

***Background:***

The existing minimum instream flow for Fern Creek, as set forth in the above-referenced licenses and permits is reported by the petitioner in to have been

... included in the JLPUD Licenses and Permits in 1998 pursuant to an accommodation for dismissal of a protest by California Sportfishing Protection Alliance (CSPA). The protest expressed concerns regarding the adequacy of water ‘to protect the ecosystems of *Rush Creek and Mono Lake, including the environment of Reversed Creek.*’ There is no indication in the State Water Board files that demonstrates how the 200 gallons per minute (GPM) bypass amount was determined, or precisely what resources it was intended to protect.

(Attachment I to the petition, pp. 1-2). Attachment I further states that the existing instream flow requirement “was not based on specific identified needs for these [fish and wildlife] resources, and is not required to protect them.”

Attachment I reports that the petitioner is exploring new groundwater sources on National Forest land, but that this exploration is incomplete and that Forest Service approval of a production well, should the source prove sufficient, is uncertain.

Attachment I concludes: “The proposed change is in the public interest, because absent this change, during below normal years JLPUD would be precluded from diverting sufficient water under its water right Licenses and Permits to provide treated municipal water to the residents of the Down-Canyon service area. Lack of a continuing supply of potable water would be a threat to public health and safety.” (p. 4).

Attachment I describes the fact that the petitioner believes that altering the required instream flow in Fern Creek would be subject to CEQA compliance, but that the change would qualify for a:

... categorical exemption under Class 1: The operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the of the lead agency’s determination;

(i) Maintenance of fish screens, fish ladders, wildlife habitat areas, artificial wildlife waterway devices, streamflows, spring, and waterholes, and stream channels (clearing of debris) to protect fish and wildlife resources.

(Attachment I, pp. 4-5)

***Discussion:***

Petitioner agreed to a minimum instream flow of 200 gpm in 1998 in order to resolve CSPA’s protest. At the time of this protest resolution, petitioner had every opportunity to be aware of a 1992 letter that had been written to CSPA by Edward Anton, Chief of the Division of Water Rights (appended to Attachment I as “Exhibit 3”) in which the Mr. Anton suggested the adequacy of a non-numeric instream flow requirement for Fern Creek. Nonetheless, JLPUD agreed to a 200 gpd flow requirement for Fern Creek below the JLPUD diversion, and this became a condition of the affected permits and licenses. Now, sixteen years later, following added development in its “Down Canyon” area and anticipating more, JLPUD seeks to renege on its agreement. Attachment I appears to suggest that, rather than a showing by JLPUD that its proposed flow requirement of 1/8 the current flow is protective of fish and wildlife, the burden of proof should again fall on a protestant to show that cutting the flow requirement to 1/8 the current requirement is not protective on fish and wildlife.

In addition to demonstrating unusually bad faith in its proposal to simply withdraw from its agreement, JLPUD is noticeably selective in its review of Mr. Anton’s letter. Mr. Anton cites to

“Mr. Leonard Ainsworth, the June Lake General Manager,” who is reported to claim “the place of use is surrounded by U.S. Forest Service land. There is very little private property left to develop in this area.” (Attachment I, Exhibit 3, p. 1). Nonetheless, growth has occurred, and more is forecast. See June Lakes Master Water Plan, 2007, available at: [http://inyo-monowater.org/wp-content/uploads/2011/09/JLPUD\\_Master-Water-Plan-Final-2007.pdf](http://inyo-monowater.org/wp-content/uploads/2011/09/JLPUD_Master-Water-Plan-Final-2007.pdf).

When the petitioner suggests, as cited above, that maintaining its required bypass flows would be a “threat to health and safety,” it simply denies its own history and its reported disavowal of future growth. The evident threat to health and safety was development of year-round and seasonal housing beyond the capacity of the known water supply to adequately serve it and protect it in case of fire. Still worse, JLPUD reproduces its water conservation literature in which it suggests that somewhat less water should be devoted to landscaping.

It is contrary to law for petitioner not to complete CEQA in order to disclose the impacts of the proposed project. The petitioner notes that CEQA is required, but just as quickly engages in creative interpretation of CEQA exemption in order to avoid the requirement. The cited language describes a situation in which an entity seeks to maintain an environmental benefit in the course of its business. It does not apply to a situation in which an entity seeks to abolish an environmental benefit by cutting a flow requirement to 1/8 the existing amount. In place of CEQA analysis, petitioner relies on an e-mail from one biologist from the Department of Fish and Wildlife. This not only fails to meet the requirements of CEQA, it fails to meet the requirement for substantial evidence.

It would not serve the public interest to allow JLPUD to perfunctorily withdraw from its agreement because it irresponsibly allowed more development than it could reliably serve. Such action should be discouraged, not valorized by allowing reduction of agreed-upon environmental protections after the fact.

### **Under what conditions may this protest be disregarded and dismissed?**

1. Petitioner must complete a CEQA analysis of the proposed flow reduction.
2. Petitioner must complete its stated ongoing investigation of groundwater opportunities on National Forest land and report on these opportunities to the Board and to protestants of the petition. Before any action is taken on the present petition, petitioner must first exhaust its opportunities to meet its needs through groundwater or other alternative sources.
3. Petitioner must demonstrate that the proposed flow reduction will not have a negative impact on the environment and in particular on fish and wildlife.
4. Petitioner must provide a scientific basis for its proposed flow reduction, including hydrogeological analysis of the contribution if any of the flow of Fern Creek into downstream streams and aquifers.
5. Petitioner must adopt and publish a policy that it will serve no new development in its Down Canyon service area until such time as it develops sufficient alternative supplies



to reliably serve such development while at the same time maintaining its present 200 gpm flow requirement at the Fern Creek diversion.

A true copy of this protest has been served upon the petitioner by e-mail, c/o Paula Whealan, [pwhealen@wbecorp.com](mailto:pwhealen@wbecorp.com).

Date March 31, 2014

A handwritten signature in black ink, appearing to read "Chris Shutes", with a long horizontal flourish extending to the right.

Chris Shutes, Water Rights Advocate  
California Sportfishing Protection Alliance