

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, (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:

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

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 on 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.

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.

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