

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 – (Applications)**

**BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS**

**APPLICATION: 31807**

**We, the California Sportfishing Protection Alliance; Chris Shutes, 1608 Francisco St., Berkeley, CA 94703; Bill Jennings, 3536 Rainier Ave, Stockton, CA 95204; and Michael Jackson, P.O. Box 207, 429 West Main St., Quincy, CA 95971,** have read carefully the application of Donald Ryan to appropriate water from North Shirttail Canyon Creek, tributary to Shirttail Canyon Creek, thence North Fork American River. The proposed point of diversion is Sugar Pine Reservoir: NE ¼ of SW ¼ of Section 24, T15N, R10E, MDB&M. The proposed point of rediversion is within the NE ¼ of NW ¼ of Section 24, T14N, R10E, MDB&M. The proposed amount is 6.0 cubic feet per second by direct diversion, 450 acre-feet annual limit, and 450 acre-feet annually to storage, with a combined direct diversion and storage limit of 450 acre-feet annually. The proposed season of diversion is November 1 through July 1 of the succeeding year. The proposed purpose of use is domestic, with a place of use within Sections 23, 24, 25, 26, 27, and 34, T14N, R10E, MDB&M. The application was noticed by the Division of Water Rights on March 4, 2010.

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:

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|---|----------|
| <b>(1) not be within the State Water Resources Control Board’s (SWRCB) jurisdiction</b> | <b>x</b> |
| <b>(2) not best serve the public interest</b>   | <b>x</b> |
| <b>(3) be contrary to law</b>   | <b>x</b> |
| <b>(4) have an adverse environmental impact</b>   | <b>x</b> |

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

*Background*

North Shirttail Canyon Creek is a fully appropriated stream. The Foresthill Public Utility District (FPUD) holds diversion rights on the stream under Permit 15375, and stores water in Sugar Pine Reservoir, an onstream reservoir for domestic use in the Foresthill area. Applicant proposes to “temporarily” use water currently permitted under Permit 15375, but not yet put to use by FPUD; as authority, applicant cites to Water Code sections 106.5, 1203, and 1462, and 1810. However, applicant, on page 3 of a letter to the Division of Water Rights received by the Division on October 28, 2009, states in a postscript: “Although this application is sought under the authority of the temporary appropriation statutes, it is expected that the water will be available to the applicant’s project on a permanent basis as the Foresthill Public Utility District 2008 Master Plan report assumes 100% build out of potential customers within its District boundaries.”

Applicant identifies, under item 6d of his application, “percolating + ground + riparian water” as alternate sources of water if a requested diversion season must be excluded. However, the alternate amounts of water available are not quantified, and the reliability of any such water to serve municipal use is not discussed.

Applicant proposes to use the water so to service Forest Ranch, a subdivision of 2250 residential units, serving a total of 4405 people that he proposes to build. A “tenants in common” ownership of the property to be served is stated, and water use of 60 gallons per person per day is projected. Applicant states that a portion of the proposed subdivision is within the FPUD service area, but that most of the proposed development is not.

An Environmental Impact Report for the Foresthill Divide Community Plan was completed in late 2008. Embedded within that EIR was an analysis that incorporated the Forest Ranch development as an option within the overall community plan. Appendix H of the Draft EIR, (which appears to have been incorporated into the final EIR), contains an SB610 (Water Code sections 10910-10915) compliance study. Page 3 of this study (Appendix H pdf pagination page 8) shows that there is sufficient reliable water for the 524 planned Forest Ranch units that are already within the FPUD service area (and also included in the 1981 Placer County General Plan), with between sufficient additional reliable water for between 571 and 745 additional Forest Ranch units, once other planned development in Foresthill is supplied. An alternative analysis (Appendix H pdf pagination pages 9-10) suggests that little more of the proposed Forest Ranch development could be reliably served than the 524 units at Forest Ranch that are already within the FPUD service area.

The draft EIR states on page 3-67 that water to supply that portion of Forest Ranch outside the FPUD service area would “require approximately 845 acre feet of water per year.” It continues: “The District has indicated that approximately 65 percent of the Forest Ranch Concept Plan project site is not within current District boundaries. Although the project site is within the District’s Sphere of Influence, District Policy #6030.10 states: ‘Property must be annexed to the District prior to receiving District services. Furthermore, unconditional commitments to provide water service to property and/or proposed developments will not be granted until said property is annexed to the District.’”

### *Discussion*

The current, highly unusual request for “temporary” service by FPUD water and facilities appears to be an outgrowth of both a land use dispute and an effort by Forest Ranch to leverage an unwilling FPUD into supplying it with more water than FPUD is otherwise prepared to supply.

What is unusual about the applicant’s invocation of sections 106.5, 1203, 1462, and 1810, of the Water Code is first, that the effort is made against the manifest wishes of the established water district, and second, that the “temporary” use will create hardened, domestic demand for water, unlike many cases in the past where agricultural use of water included in a municipal water right permit was made while development took place. It is also striking, and contrary to law, that applicant’s citation of the Water Code does not address Sections 10910 and 10911 of the Water Code, which require that an applicant for municipal water identify additional sources of water available if an EIR shows that proposed or existing supplies are inadequate for the proposed project.

The State Water Resources Control Board should not allow this selective and extremist use of the Water Code to stand. Sections 106.5, 1203 and 1462 of the Water Code were intended to promote orderly and thoughtful planning of water supply for municipal development, and to allow for reasonable beneficial use of water in the interim as development takes place. These sections were not intended to allow a developer to leverage his vision of development in opposition to established planning, or to oppose in a different venue development decisions when he has been unable to prevail in normal and established land use planning forums. It is not in the public

interest to have water allocations under an existing permit driven by a single developer whose accelerated plans for growth disrupt orderly and cautious water planning on the part of an established water purveyor and water permit holder. It is not in the public interest that water and municipal planning be driven by a party who is simply able to first complete construction. It is also not in the public interest that land use decisions be driven by application of provisions for temporary use of water under the Water Code.

Applicant's statement that water use will be by a "Tenants-in-Common" entity is unexplained; apparently, there would be no single responsible party if actual water use were to exceed projected use.

Except for the 524 planned units of the proposed Forest Ranch development that are within the FPUD district boundary, the proposed development appears not to be in conformity with the Placer County general plan that is currently in effect.

Applicant states that water use under his project will be 60 gallons per person per day. This is substantially less than amounts assumed in Section 3 and Appendix H of the EIR. No justification for applicant's figure is provided, nor is there any explanation of the large discrepancy.

Applicant's reliance on the Foresthill Divide Community Plan EIR also appears to be deficient in that it does not meet the requirements for CEQA review of long term water supply as defined by the California Supreme Court in S132972, *Vineyard Area Citizens for Responsible Growth v City of Rancho Cordova*, (2007) 40 Cal. 4<sup>th</sup> 412. The general standard is summarized on page 2 of that ruling: "While the EIR identifies the intended water sources in general terms, it does not clearly and coherently explain, using material properly stated or incorporated in the EIR, how the long-term demand is likely to be met with those sources, the environmental impacts of exploiting those sources, and how those impacts are to be mitigated." Further: "CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project." (Ibid, p. 16). Continuing: "Future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decisionmaking under CEQA." (Ibid, p 17).

Applicant states in section 4a of his application that "diversion does NOT impact any stream or stream system identified as fully appropriated." However, the over-allocation of water resources to service hardened municipal demand contemplated in this application creates systemic pressure on water devoted to environmental purposes. There is ample history of "emergency" requests of both the State Board and the Governor for instream flow reductions in drier water years that directly result from the systemic pressure of heavily allocated watersheds. Further, a public trust analysis that will be conducted when permit 15375 goes to license may demonstrate that existing flow requirements have not been adequately protective of instream beneficial uses. The licensing process would be a more appropriate venue to consider the effects of permit 15375 on instream beneficial uses of the fully appropriated North Shirttail Canyon Creek than would be the current highly unusual request for "temporary" use of water and its speculation about its effects on instream uses.

Finally, we must return to the applicant's statement that was quoted near the beginning of this protest: "Although this application is sought under the authority of the temporary appropriation statutes, it is expected that the water will be available to the applicant's project on a permanent basis as the Foresthill Public Utility District 2008 Master Plan report assumes 100% build out of potential customers within its District boundaries." While the logic of this sentence is opaque, the meaning is clear: applicant is not looking for a "temporary appropriation." There being no other identified water supply available to service his subdivision, applicant wants to get "temporary" water now that will become permanent later on. He will leverage "temporary"

hardened municipal demand to get all the water that is not licensed to FPUD, or else seek to be serviced by FPUD under the terms of its eventual license.

This temporary-but-not-temporary scheme is a transparent attempt to circumvent the laws regarding fully appropriated streams. Those laws were instituted to prevent the over-allocation of the state's waters. It is contrary to law for the applicant to misrepresent his application as being for a "temporary appropriation." It is not in the public interest for fully appropriated streams to be subject to the hostile appropriation of water from an existing permit against the wishes of an established permit holder. Acceptance of this application will lead not only to systemic pressure on the immediate fully appropriated stream in question, but will create a precedent that will allow systemic pressure on instream beneficial uses in every fully appropriated stream in the state. Such precedent would eviscerate the laws regarding fully appropriated streams, contrary to the very intent of those laws.

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


This application should be dismissed. The Board should direct the applicant to proceed with that portion of his project within the FPUD service area for which there is demonstrated water available, which would not require a permit separate from Permit 15375. The Board should further direct the applicant to pursue his land use issues in the appropriate land use venues, including a general plan amendment or new general plan that brings his proposed development into conformity with a current and valid general plan as required following the court's direction in *Amador v El Dorado* (1999) 76 Cal.App.4th 931.

Should the Board not simply deny the application, it should then begin by requiring a supplemental project-specific EIR that meets the requirements set forth in Water Code sections 10910-10915, and also the requirements set forth in S132972, *Vineyard Area Citizens for Responsible Growth v City of Rancho Cordova*, (2007). Any such supplemental EIR should also address the substantive issues presented above, including but not limited to water use projections and responsibility for enforcement of projected use, and discrepancies between applicant's projects and projections in the Foresthill Divide Community Plan EIR. CSPA must be informed immediately upon release of any such supplemental draft EIR in order that CSPA be afforded the opportunity to comment. CSPA reserves the right to set further conditions upon review of any supplemental EIR for this proposed project (including any proposed modifications of this project).

A true copy of this protest has been served upon the petitioner by mail.  
(Personally or by mail)

Date: May 17, 2010

Chris Shutes, FERC Projects Director,  
Bill Jennings, Executive Director  
Michael Jackson  
California Sportfishing Protection Alliance

  
Chris Shutes  
(signed on his own behalf and for  
Bill Jennings and Michael Jackson)

Protestant(s) Authorized Representative sign here

cc: Douglas Ryan  
1735 Crockett Lane  
Burlingame, CA 94010