

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

**DIVISION OF WATER RIGHTS**

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In the Matter of Permit 21185 (Application 28609)

**June Lake Public Utility District**

**ORDER RENEWING TEMPORARY URGENCY CHANGE**

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SOURCE: Fern Creek tributary to Reversed Creek thence Rush Creek thence Mono Lake

COUNTY: Mono

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BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

**1.0 SUBSTANCE OF TEMPORARY URGENCY CHANGE PETITION**

On November 4, 2015, June Lake Public Utility District (JLPUD or right holder) filed a Temporary Urgency Change Petition (TUCP) for Permit 21185 (Application 28609) pursuant to Water Code sections 1435 and 1441 with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) requesting renewal of the Temporary Urgency Change Order issued on May 26, 2015 (2015 Order). The 2015 Order renewed the Temporary Urgency Change Order issued on August 25, 2014 (2014 Order). The 2014 and 2015 Orders authorized the temporary reduction of the minimum bypass flow requirement for Fern Creek in Permit 21185 from 200 gallons per minute (gpm) to 25 gpm.

JLPUD stated that the water supply made available by the requested change of the temporary relaxation of the minimum bypass requirement would be used to meet potable water demands for JLPUD's Down-Canyon Service Area during both the ongoing drought conditions and if JLPUD's Petersen Water Treatment Plant requires emergency maintenance. JLPUD also stated that an extended water shortage would depressurize its water distribution system and have additional public health and safety implications to JLPUD water users.

JLPUD originally requested that the temporary urgency change renewal period begin on November 28, 2015, and end on May 26, 2016. However, due to favorable hydrologic conditions for Fern Creek in late 2015 and early 2016, on February 8, 2016, JLPUD requested that the renewal take effect on June 1, 2016. On October 10, 2016, JLPUD requested that the renewal period begin on October 10, 2016 and end 180 days later.

Pursuant to Water Code sections 1440 and 1441, a temporary urgency change order automatically expires 180 days from the date of its approval, unless an earlier date is specified or it has been revoked.

**2.0 CALIFORNIA'S ONGOING DROUGHT CONDITIONS**

**2.1 Governor's Proclamations of a Drought State of Emergency**

On January 17, 2014, California Governor Edmund G. Brown Jr., proclaimed a Drought State of Emergency and directed state officials to take actions to make water immediately available. Subsequent to the original emergency proclamation, Governor Brown issued the following orders:

- On April 25, 2014, Governor Brown proclaimed a Continued State of Drought Emergency and issued an executive order to speed up actions necessary to reduce the harmful effects of the drought, and called on all Californians to redouble their efforts to conserve water.
- On September 19, 2014, Governor Brown issued Executive Order B-26-14 streamlining the State's efforts to provide water to families in dire need due to the extreme drought.
- On December 22, 2014, Governor Brown issued Executive Order B-28-14 citing the previous orders and extending the operation of provisions through May 31, 2016.
- On April 1, 2015, Governor Brown issued Executive Order B-29-15, which included key provisions to save water, increase enforcement to prevent wasteful water use, streamline the state's drought response and invest in new technologies that will make California more drought-resilient.
- On November 13, 2015, Governor Brown issued Executive Order B-36-15, which called for additional actions to build on the state's ongoing response to record dry conditions and assist in the recovery efforts from devastating wildfires in 2015.
- On May 9, 2016, Governor Brown issued Executive Order B-37-16 which built on the existing temporary statewide emergency water restrictions to establish longer-term water conservation measures, including permanent monthly water use reporting, new permanent water use standards in California communities and bans on clearly wasteful practices such as hosing off of sidewalks, driveways and other hardscapes.

Pursuant to the Governor's May 9, 2016 Executive Order, the orders and provisions in the January 17, 2014 and April 25, 2014 Emergency Proclamations and Executive Orders B-26-14, B-28-14, B-29-15, and B-36-15 remain in full force and effect except as modified in the May 2016 Executive Order.

## **2.2 State Water Board's Emergency Regulation for Statewide Urban Water Conservation**

The Governor's April 1, 2015 Executive Order directed the State Water Board to impose restrictions on water suppliers to achieve a statewide 25 percent savings in potable urban water usage through February 2016. Consequently, on May 5, 2015, the State Water Board adopted emergency regulations (May 2015 Emergency Conservation Regulations) that implement the Governor's Order, and on May 18, 2015, the Office of Administrative Law approved the conservation emergency regulations effective from May 18, 2015 to February 13, 2016. To prevent waste and unreasonable use of water and to promote water conservation, the regulations required each distributor of a public water supply that is not an urban water supplier<sup>1</sup> to take one or more of the following actions: 1) limit outdoor irrigation of ornamental landscapes or turf with potable water by the persons it serves to not more than two days per week; or 2) reduce by 25 percent its total potable water production relative to the amount produced in 2013. Each distributor of a public water supply that is not an urban water supplier also was required to submit a report by December 15, 2015, that either confirmed compliance with the requirements above or identified total potable water production, by month, from June through November, 2015, and total potable water production by month, for June through November 2013. On February 2, 2016, the State Water Board revised and extended the emergency water conservation regulations.

On May 18, 2016, the State Water Board adopted further revisions to the emergency water conservation regulations (May 2016 Emergency Conservation Regulations). The May 2016 Emergency Conservation Regulations are effective from June 2016 through January 2017 and were revised to require each distributor of a public water supply that is not an urban water supplier to: 1) provide prompt notice to a customer whenever the supplier obtains information that indicates that a leak may exist within the end-user's exclusive control; and 2) submit a report by December 15, 2016, that identifies total potable water production, by month, from December 2015, through November 2016, total potable water production, by month, for the same months in 2013, and any action taken by the supplier to encourage or require its customers to

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<sup>1</sup> An urban water supplier is defined in Water Code section 10617 as a supplier, either publicly or privately owned, providing water for municipal purposes either directly or indirectly to more than 3,000 customers or supplying more than 3,000 acre-feet of water annually. Therefore, JLPUD does not meet the criteria of an urban water supplier.

conserve water. Lack of compliance with the requirements can result in issuance by the Executive Director of the State Water Board of a conservation order requiring additional actions by the supplier to come into compliance with its conservation standard.

### **3.0 BACKGROUND**

#### **3.1 June Lake Public Utility District's Down-Canyon Service Area Water Rights**

JLPUD's Down-Canyon water rights include Permits 7350, 7352, 18199, 21185 and Licenses 2039, 4358, 10837, 10838 (Applications 11892, 12060, 26192, 28609 and 5425, 9432, 17120, 20349, respectively), which authorize year-round direct diversion of water from Fern Creek, an unnamed stream, and three unnamed springs. Water diverted under the Down-Canyon water rights is routed to one of two water treatment plants before being distributed to JLPUD's customers. Fern Creek is typically the sole source of water for the Clark Water Treatment Plant, while water diverted from one of the unnamed springs is the sole source of water for the Peterson Water Treatment Plant. The remaining three water sources named in the Down-Canyon service area water rights are currently inactive. The permits and licenses allow direct diversion of water at a combined rate of up to 0.63 cubic foot per second (cfs) (approximately 280 gpm) for a cumulative total diversion of 297.1 acre-feet per annum (afa) for municipal and domestic use within the Down-Canyon service area. All five water sources identified in the eight water rights listed above are tributary to Reversed Creek thence Rush Creek. Rush Creek flows through Silver Lake and Grant Lake before terminating at Mono Lake on the eastern side of the Sierra Nevada Mountain Range.

Permit 21185 authorizes the year-round direct diversion of 0.30 cfs (approximately 135 gpm) of water from the Fern Creek POD for a total annual diversion limit of 150 acre-feet. The water is used year-round for municipal purposes within JLPUD's Down-Canyon service area.

The Down-Canyon water rights share a common point of diversion on Fern Creek, and include a term requiring the right holder to bypass 200 gpm around the Fern Creek diversion at all times. The bypass term was first added to Permit 18199 in 1998 to resolve a fisheries-based protest filed by the California Sportfishing Protection Alliance (CSPA). The bypass term was accepted by JLPUD and subsequently added to all eight of the Down-Canyon permits and licenses. The minimum bypass flow requirement (Term 9) in Permit 21185 is stated as follows:

*“The Permittee shall maintain a permanent piped bypass around the Fern Creek source sized such that a minimum of 200 gallons per minute will always flow by the diversion regardless of water use by the Permittee, and configured such that it cannot be restricted or plugged.”*

JLPUD stipulated in its May 20, 2014 TUCP that if approval was granted, JLPUD would make all of its Fern Creek diversions under Permit 21185 and would not exercise the other seven Down-Canyon water rights for diversion from Fern Creek during the period of the temporary change.

#### **3.2 June Lake Public Utility District's Long-Term Petition for Change**

On January 30, 2014, JLPUD filed a separate, but related, long-term Petition for Change with the Division pursuant to Water Code section 1701, et seq., and California Code of Regulations section 791(e). The long-term petition requests permanent reduction of the Fern Creek minimum bypass requirement term from 200 gpm to 25 gpm in all eight Down-Canyon water rights. JLPUD asserts that the current bypass requirement is not based on specific instream resource needs, and that this requirement precludes diversion necessary to meet demands in dry years. On February 28, 2014, the Division provided public notice of the long-term petition. Protests were timely filed by the California Department of Fish and Wildlife (CDFW), Inyo National Forest (INF), CSPA, June Lake Advocates (JLA), East Shore Silver Lake Improvement Association (ESSLIA), and three local residents. All eight protests were based on environmental concerns.

### **3.3 2014 Petition for Temporary Urgency Change**

On May 20, 2014, JLPUD filed a TUCP requesting that the State Water Board temporarily reduce the bypass amount required by Permit 21185 from 200 gpm to 25 gpm. On August 25, 2014, the State Water Board issued the 2014 Order approving the temporary urgency change subject to specific terms and conditions effective from August 25, 2014 until February 21, 2015.

On August 27, 2014, the Division provided public notice of the 2014 TUCP and received timely objections from the following parties: (1) CSPA; (2) ESSLIA; (3) JLA; (4) Los Angeles Department of Water and Power (LADWP); and 5) Mr. Larry Hughes (Mr. Hughes). The objections to the 2014 Order and the Division's response to the objections are summarized in Section 3.5 of the 2015 Order.

Section 3.4 of the 2015 Order provided a summary of JLPUD's reporting compliance with the 2014 Order, which was in effect from August 25, 2014 until February 21, 2015.

### **3.4 January 2015 Petition for Temporary Urgency Change and Renewal of the 2014 Order**

On January 12, 2015, JLPUD filed a TUCP requesting renewal of the 2014 Order for an additional 180 days following expiration of the previous order. On March 26, 2015, JLPUD requested that the renewal take effect on June 1, 2015. On May 26, 2015, the State Water Board issued the 2015 Order renewing the temporary urgency change subject to specific terms and conditions effective from June 1, 2015 to November 28, 2015.

The Division provided public notice of the 2015 TUCP renewal on June 3, 2015 with a deadline for submittal of objections by July 3, 2015. The Division received an untimely objection from Mr. Hughes on July 6, 2015. The Division acknowledged receipt of Mr. Hughes' objection by letter, dated July 21, 2015, but because the objection was received after the deadline, it was not accepted by the Division.

The following is a summary of JLPUD's reporting of its compliance with the 2015 Order, which was in effect from June 1, 2015 to November 28, 2015.

#### **Term 2 - Fern Creek Bypass Monitoring**

JLPUD submitted monthly compliance reports for its Fern Creek bypass monitoring to comply with Term 2 of the 2015 Order. In June 2015, JLPUD installed a new gage to automatically and continuously measure and report flows in Fern Creek. Since August 2015, the average daily bypass flows have been reported using the new gage. The monthly reports submitted to the Division include continuous flow measurements throughout the effective period of the temporary urgency change order for the Fern Creek POD.

Based on the Fern Creek bypass monitoring data from June 1, 2015 to November 28, 2015, the minimum average daily bypass flow below the Fern Creek diversion recorded during the 2015 Order period was 30 gpm on September 2, 2015. Therefore, JLPUD complied with the 2015 Order regarding the minimum bypass monitoring requirements for Fern Creek.

#### **Term 3 - Fern Creek Monitoring Plan**

Term 3 of the 2014 Order required monitoring of Fern Creek to ensure that the project does not have an unreasonable effect on fish, wildlife, or instream resources. JLPUD's Fern Creek Monitoring Plan (Plan) was approved by the Division on September 12, 2014. The continued implementation of the Plan was required as a condition (Term 3) in the 2015 Order.

JLPUD submitted monthly reports in compliance with the Plan indicating no unreasonable effects on fish, wildlife, or instream resources. However, the November 2015 monitoring event was not conducted due to the presence of snow and ice which prevented the collection of data. JLPUD's consultant also submitted the Plan to CDFW, requesting review and comment. CDFW did not request any changes to the Plan.

#### **Term 4 - Water Conservation Reporting**

Term 4 of the 2015 Order required JLPUD to comply with the May 2015 Emergency Conservation Regulations. JLPUD submitted a Water Reduction Plan to the Division for approval on September 4, 2014, which was approved by the Deputy Director for Water Rights (Deputy Director) on September 10, 2014. Term 4b of the 2015 Order required JLPUD to submit monthly reports to the Deputy Director documenting compliance with the emergency conservation regulations. JLPUD submitted monthly water conservation reports to the Deputy Director indicating they were in compliance with the May 2015 Emergency Conservation Regulations. JLPUD reported average monthly reduction in water production of 28.85 percent from June through November 2015.

#### **3.5 November 2015 Petition for Temporary Urgency Change and Renewal of the 2015 Order**

On November 4, 2015, JLPUD filed a TUCP requesting renewal of the May 2015 Order for an additional 180 days following expiration of the previous order. JLPUD originally requested that the renewal period begin on November 28, 2015 and end on May 25, 2016. As of October 10, 2016, JLPUD requested that the renewal period instead begin on October 10, 2016 and end 180 days later.

On November 13, 2015, the State Water Board issued public notice of the TUCP pursuant to Water Code section 1438(a). Pursuant to Water Code section 1438(b)(2), JLPUD posted the notice in at least two conspicuous places in the locality to be affected by the change and provided an affidavit, dated November 16, 2015, that the posting was done on November 16, 2015. The State Water Board sent a copy of the notice by registered mail to each person who, in the judgment of the board, could be adversely affected by the temporary change. The State Water Board also distributed the notice through an electronic notification system and posted the notice of the temporary urgency change and a copy of the TUCP (and accompanying materials) on its website.

The Division received timely objections to the TUCP from the following parties who also filed objections to the 2014 TUCP: (1) JLA and (2) Mr. Hughes. The objections are summarized below, followed by the Board's responses:

1. **JLA Objection** – The JLA objection letter is identical to the letter submitted in objection to the 2014 Order, and identifies the following concerns: (a) a comprehensive analysis determining the negative environmental ramifications of reduced flows in Fern Creek has not been completed; and (b) the project does not comply with California Fish and Game Code section 5937<sup>2</sup>.

#### **Response to JLA Objection**

The Division found that, with the terms and conditions of the 2014 and 2015 Orders, there would be no unreasonable effects on fish, wildlife, or other instream beneficial uses from approval of the requested change. The monitoring conducted documented limited fish stranding during the 2014 TUCP approval and no stranding during the 2015 renewal, and no mortality was documented. This renewal Order requires JLPUD to continue implementation of the Fern Creek Monitoring Plan and provide CDFW an opportunity for review and comment. JLPUD will also be required to submit monthly reports to the Deputy Director and include information regarding the consultation with CDFW. Given these monitoring requirements, the results of past monitoring, the temporary and urgent nature of the subject change, and the range of typical dry stream conditions, the reduced bypass condition is not expected to have an unreasonable effect on fish, wildlife, or other instream beneficial uses. Also, refer to Section 5.3 of this Order.

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<sup>2</sup> California Fish and Game Code section 5937 requires the "owner of any dam to allow sufficient water at all times to pass ... over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."

2. **Mr. Hughes' Objection** – Mr. Hughes' objection letter is identical to the letter submitted in objection to the 2014 Order, and identifies the following concerns: (a) there is adequate water available at the Petersen Treatment Plant to provide water to the entire JLPUD service area; therefore, there is no urgency or emergency to justify the TUCP; (b) the 2014 Order should be reconsidered and the decision vacated as there are presently fish and wildlife using the stream; (c) an illegal dam was constructed without plans, permits, an Environmental Impact Report (EIR), or bypass; (d) several hundred fish were observed in the lower portion of Fern Creek in the fall of 2013; therefore, California Fish and Game Code section 5937 is still applicable to Fern Creek; (e) water in the June Lake Loop is currently being mapped; therefore, it would be in the public interest to not modify the water right until the results are made public and a minimum flow is established to preserve the fishery in Fern Creek; and (f) JLPUD should be required to install an accurate and professional weir and recording system.

### **Response to Mr. Hughes' Objection**

During the 2014 – 2015 drought years, JLPUD's water supply to the Down-Canyon service area from the Clark Water Treatment Plant showed late fall (November) through early Spring (April) average daily water demand ranged from 14 to 36 gpm. JLPUD indicated that up to 90 gpm can be supplied by sources other than Fern Creek (i.e., the Peterson Treatment Plant). However, JLPUD has provided water supply and demand projections indicating that temporary relaxation of the bypass requirement the Fern Creek diversion may be necessary to meet the Down-Canyon water demands during ongoing drought periods or if the Peterson Treatment Plant goes offline. JLPUD is required, as a condition of this order, to maximize diversions from all available alternative water sources supplying the Down-Canyon service area prior to initiating diversions from Fern Creek.

As discussed, the reduced bypass condition is not expected to have an unreasonable effect on fish as compared to typical dry stream conditions. If additional information becomes available to the Board through monitoring reports submitted by JLPUD or otherwise, the State Water Board reserves jurisdiction to coordinate or modify terms and conditions of this Order as necessary for the protection of fish, wildlife, instream beneficial uses, and the public interest.

No change to the existing diversion works is proposed by the petition, therefore, the comment regarding the legality of JLPUD's diversion facility is outside of the scope of our consideration of the proposed change.

Further, as indicated above, JLPUD installed a new gage to automatically and continuously measure and report flows in Fern Creek, and the average daily bypass flows have been reported using the new gage since August 2015.

## **4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**

JLPUD filed a Notice of Exemption (NOE) on October 30, 2015. JLPUD determined that the renewal for change is exempt from CEQA based on the following: (1) it is an emergency project; (2) it is consistent with the statutory exemption criteria for an emergency project; and (3) it is consistent with a categorical exemption for existing facilities.

The State Water Board has reviewed the information submitted by the right holder and has made an independent finding that the proposed change is consistent with a Class 1 categorical exemption for existing facilities (Cal. Code Regs., tit. 14, § 15301.) and the Class 4 categorical exemption for minor alterations to land (Cal. Code Regs., tit. 14, § 15304.). The State Water Board will issue an NOE for the proposed change within five days of order issuance.

## 5.0 CRITERIA FOR APPROVING THE RENEWAL OF THE TEMPORARY URGENCY CHANGE

Under Water Code section 1441, a temporary change order issued may be renewed by the State Water Board. Pursuant to Water Code section 1435, a right holder who has an urgent need to change the point of diversion, place of use, or purpose of use from that specified in the permit or license may petition for a conditional temporary change order. The State Water Board's regulations set forth the filing and other procedural requirements applicable to TUCPs. (Cal. Code Regs., tit. 23, §§ 805, 806.) The State Water Board's regulations also clarify that requests for changes to permits or licenses other than changes in POD, place of use, or purpose of use may be filed, subject to the same filing and procedural requirements that apply to changes in POD, place of use, or purpose of use. (*Id.*, § 791, subd. (e).)

Before approving a renewal of the temporary urgency change, the State Water Board must make the following findings:

1. The permittee or licensee has an urgent need to make the proposed change;
2. The proposed change may be made without injury to any other lawful user of water;
3. The proposed change may be made without unreasonable effect upon fish, wildlife, or other instream beneficial uses; and
4. The proposed change is in the public interest. (Wat. Code, § 1435, subd. (b)(1-4).)

### 5.1 Urgency of the Proposed Change

Under Water Code section 1435, subdivision (c), an "urgent need" means "the existence of circumstances from which the board may in its judgment conclude that the proposed temporary change is necessary to further the constitutional policy that the water resources of the state be put to beneficial use to the fullest extent of which they are capable and that waste of water be prevented..." However, the State Water Board shall not find the need urgent if it concludes that the right holder has failed to exercise due diligence in petitioning for a change pursuant to other appropriate provisions of the Water Code. JLPUD filed a petition for permanent change in all eight of its Down-Canyon Service Area water rights on January 30, 2014, pursuant to Chapter 10 of Part 2 of Division 2 of the Water Code, and therefore has exercised due diligence in petitioning for a change.

JLPUD has stated that temporary relaxation of the 200 gpm minimum bypass requirement in Permit 21185 is necessary to meet its potable water demand for its residents during the ongoing drought conditions and a Petersen Water Treatment Plant maintenance emergency. Absent diversions from Fern Creek, JLPUD must rely on the Petersen Water Treatment Plant (which uses a diversion from the unnamed spring) to meet the needs of its Down-Canyon residents. The Petersen Water Treatment Plant has recently had maintenance issues that have resulted in shutdowns. With no other sources of water during a Petersen Water Treatment Plant maintenance emergency, the District states it must divert from Fern Creek to provide for its Down-Canyon residents. In addition, JLPUD has stated that an extended water shortage would depressurize its water distribution system causing additional public health and safety implications to JLPUD water users.

While the drought conditions experienced by the June Lake area appear less severe than in 2014 and 2015, there remains sufficient urgent need for the proposed change due to the continuing drought in 2016. The National Drought Mitigation Center monitors and maps California's drought conditions, and according to their information reported as of September 27, 2016, the June Lake area remains classified as category D3 - Extreme Drought. However, while this drought designation remains, the conditions are improved compared to the previous TUCPs. For example, from March 17, 2016, to August 30, 2016, hydrologic conditions in Fern Creek continued to improve relative to 2014 and 2015, with average daily bypass flows below the Fern Creek diversion in excess of 200 gpm

Precipitation in the June Lake area has been below normal for 2013-2015 water years and the 2016 snow pack, that supplies much of the flow in Fern Creek, is also below normal (Mammoth Lakes Area average was at 80% of normal, and Mammoth Lakes was at 59% of normal on April 1, 2016<sup>3</sup>). Based on JLPUD's summer-fall water demand, recent snow pack surveys, and precipitation shortfalls, JLPUD continues to expect shortages in its water supply for the remainder of 2016.

JLPUD has been taking steps to effectively manage and minimize its customers' water use throughout the prolonged drought period. On January 9, 2008, JLPUD's Board of Directors adopted Water Management Ordinance No. 2008-01 (Ordinance 2008-01) which established a water management program for JLPUD. Pursuant to Ordinance No. 2008-01, on April 22, 2014, JLPUD issued a notice to its customers imposing Stage 2 (Significant Water Shortage) water use restrictions due to the drought. The Stage 2 water use restrictions included a limitation of three (3) days per week for outdoor watering, prohibitions on the construction and irrigation of new landscapes, a prohibition on washing of hard surfaces such as driveways and sidewalks, and prohibitions on irrigation of natural vegetation or undeveloped property. JLPUD's Stage 2 water use restrictions allowed daily hand watering and drip irrigation. The Stage 3 water use restrictions as included in Ordinance 2008-01 stipulated that the use of water for other than domestic and commercial use was prohibited.

On June 10, 2015, JLPUD's Board of Directors adopted Water Management Ordinance No. 2008-02 (Ordinance 2008-02) which amended Ordinance 2008-01 Stage 3 restrictions (Water Emergency). The revised Stage 3 restrictions state that "outdoor watering shall be limited to no more than two days per week," rather than prohibiting the use of water for other than domestic and commercial use. JLPUD initiated Stage 3 water restrictions as of July 2015 and they remain in effect as of the date of this Order.

JLPUD's Stage 2 and Stage 3 water use restrictions were in place during the 2014 and 2015 Orders. JLPUD's reports submitted pursuant to the 2014 and 2015 Orders showed that during late fall (November) through early Spring (April) JLPUD's water supply to the Down-Canyon service area from the Clark Water Treatment Plant had an average daily water demand that ranged from 18 to 36 gpm, respectively. During the remainder of 2014-2015, average daily water demand ranged from 19 gpm in October to 73 gpm in July.

To ensure JLPUD's continued water conservation efforts during the temporary period that relaxation of the minimum bypass is allowed, this Order requires JLPUD to maintain Stage 3 water restrictions in its service area and to report, on a monthly basis, its compliance with the 2016 Emergency Conservation Regulation.

Based on the reduced severity of current drought conditions compared to 2014 and 2015, balancing the needs of municipal water supply with bypass of flows for downstream public trust resources, and consideration of JLPUD's recent stream flow data from Fern Creek, the Division has determined that relaxation of the bypass flow rate to 25 gpm as requested by JLPUD is not necessary. Historic Fern Creek bypass flow data shows that the streamflow below the Fern Creek point of diversion for Permit 21185 typically drops below the 200 gpm bypass threshold in late summer, fall, and winter. Data provided by JLPUD on September 27, 2016 indicated that from March 5, 2016 to September 25, 2016 the average daily bypass flows below the Fern Creek diversion exceeded 200 gpm for 202 of 205 days. The minimum average daily bypass flow data from October 21, 2015 to April 19, 2016 was 133 gpm. Therefore, this Order will reduce the bypass flow to 133 gpm (which was the lowest reported average daily Fern Creek bypass for the same period last year) rather than 25 gpm, as JLPUD has not historically demonstrated an urgent need to reduce the bypass flow requirement as low as 25 gpm to meet JLPUD's demands.

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<sup>3</sup> California Department of Water Resources Eastern Sierra Snow Survey Results, April 1, 2016.

## **5.2 No Injury to Any Other Lawful User of Water**

The INF and LADWP are the only right holders downstream of JLPUD's Fern Creek point of diversion. Any water bypassed under the bypass terms in JLPUD's permits and licenses was for environmental purposes and was not intended to protect downstream right holders from injury. Also, the total volume of additional diversions allowed by this change is a small percentage of water in a stream that lacks year-round hydraulic continuity to Reversed Creek. Based on the information in the record and as discussed in the Division's response to the LADWP objection in Section 3.5 of the 2015 Order, a temporary reduction in bypass flow may be made without injury to any other lawful user of water.

Pursuant to Water Code section 1439, the State Water Board shall supervise diversion and use of water under this Order for the protection of all other lawful users of water and instream beneficial uses and for compliance with the conditions of this Order.

## **5.3 No Unreasonable Effect Upon Fish, Wildlife, or Other Instream Beneficial Uses**

The 2014 Order findings concluded that there would be no unreasonable effects on fish, wildlife, or other instream beneficial uses due to the temporary change. The findings pertaining to fish, wildlife, and other instream beneficial uses are presented in Section 5.3 of the 2014 Order. Section 5.3 includes an explanation of requirements incorporated into the Order (Term 3) to ensure there were no unreasonable impacts on instream resources. These requirements included monitoring the effects of reduced bypass flows on fish and fish habitat. The monitoring conducted documented limited fish stranding during the 2014 TUCP approval and no stranding during the 2015 renewal, and no mortality was documented. Given the nature of these findings, the associated monitoring requirements, the temporary and urgent nature of the subject change, the results of monitoring to date, and the higher bypass amount of 133 gpm, the approval of a reduced bypass condition is not expected to have an unreasonable effect on fish as compared to typical dry stream conditions in the absence of the change in Fern Creek bypass flows.

On June 14, 2016, Division staff emailed CDFW to determine if staff had any concerns with the renewal of JLPUD's 2015 Order. No response was provided by CDFW staff, but since CDFW staff previously had concerns with respect to fish stranding as documented in prior monitoring reports, this Order will require JLPUD to continue the implementation of the Fern Creek Monitoring Plan for the duration of this Order and submittal of findings to CDFW staff for review and comment. This information will be used for the continuing supervision of this Order by the Deputy Director for Water Rights.

In light of the above, and as conditioned in the Order, the State Water Board finds in accordance with Water Code section 1435, subdivision (b)(4) that the proposed changes will not unreasonably affect fish, wildlife, or other instream beneficial uses.

## **5.4 The Proposed Change is in the Public Interest**

Approval of this renewal Order would enable JLPUD to meet water demands and associated public health and safety needs during the continuing drought conditions. Implementation of JLPUD's Stage 2/Stage 3 water use restrictions and the water conservation, monitoring, and reporting requirements of this Order will ensure that additional water supply made available to JLPUD is put to full beneficial use without waste, and that the change may be made without injury to any other lawful user of water or unreasonable effects on fish, wildlife, and other instream beneficial uses.

In light of the above, I find in accordance with Water Code section 1435, subdivision (b)(4) that the proposed change as authorized by this Order is in the public interest.

## 6.0 STATE WATER BOARD AUTHORITY

On June 5, 2012, the State Water Board adopted Resolution 2012-0029, granting the Deputy Director for Water Rights the authority to act on petitions or requests for renewal of a temporary urgency change filed pursuant to Chapter 6.6 of Part 2 of Division 2 of the Water Code.

## 7.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the findings required by Water Code section 1435, subdivision (b).

I conclude that, based on the available evidence:

1. The right holder has an urgent need to make the proposed change;
2. The approved change, as conditioned by this Order, will not operate to the injury of any other lawful user of water;
3. The approved change, as conditioned by this Order, will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses; and
4. The approved change, as conditioned by this Order, is in the public interest.

## ORDER

**NOW, THEREFORE, IT IS ORDERED THAT:** the Petition filed by JLPUD for a temporary urgency change in Permit 21185 is approved subject to the following conditions. All existing terms and conditions of Permit 21185 remain in effect, except as temporarily amended by the following provisions:

1. Term 9 of Permit 21185 is amended as follows:

Right holder shall maintain a piped bypass around the Fern Creek source sized such that a minimum of 133 gallons per minute (gpm), or the entire stream flow if less than 133 gpm, will always flow by the diversion regardless of water use by the right holder, and configured such that it cannot be restricted or plugged.

2. No water shall be diverted from Fern Creek to the Clark Water Treatment Plant pursuant to this Order unless the right holder has maximized diversions from all available alternative water sources for the Down-Canyon service area.
3. No water shall be diverted from Fern Creek to the Clark Water Treatment Plant pursuant to this Order unless the right holder continuously measures and records the instantaneous bypass rate at the Fern Creek point of diversion (POD) and the rate of potable water production at the Clark Water Treatment Plant.
4. The right holder shall submit monthly reports to the Deputy Director for Water Rights, within 15 days of the end of each month, describing the calculated daily Fern Creek streamflow above the Fern Creek POD, the daily volumes of potable water production at the Clark Water Treatment Plant, the daily volumes of potable water production at the Petersen Water Treatment Plant or other available alternative water source(s) serving the Down-Canyon service area, the average daily bypass rates below the Fern Creek POD, and the gage (low or high flow gage) used in measuring the Fern Creek

POD bypass. Production at the Clark Water Treatment Plant will serve as the best estimate of daily diversions from Fern Creek. The average daily Fern Creek bypass rates shall be determined by calculating the arithmetic mean of hourly rates measured from midnight of one day to midnight of the next day. The right holder shall bypass all Fern Creek streamflow if the flow at the Fern Creek POD is less than 133 gpm. If necessary, the right holder shall report hourly water production data to demonstrate that the Fern Creek diversion is inactive when streamflow is less than 133 gpm.

The monthly reports shall also include cumulative monthly diversion volumes (by source) for Permit 21185 and related Down-Canyon Service Area water rights (Permits 7350, 7352, 18199 and Licenses 2039, 4358, 10837, 10838).

5. During the effective period of this Order, the right holder shall continue implementation of the 2014 Fern Creek Monitoring Plan (Plan). Any proposed modifications to the Plan must be provided to CDFW for review and consultation and be approved by the Deputy Director for Water Rights. Subsequent monthly monitoring reports shall be provided to the Deputy Director for Water Rights and CDFW and include a summary of any CDFW-suggested modifications or recommendations regarding the bypass reduction or monitoring parameters. Attachment of CDFW email correspondence in monthly reports will be acceptable in meeting this requirement.
6. To document JLPUD's specific water conservation standards and related shortages, JLPUD is subject to the following conditions:
  - a) JLPUD shall submit monthly reports, within 15 days of the end of each month, to the Deputy Director for Water Rights documenting compliance with the May 18, 2016 State Water Board emergency conservation regulations (2016 Emergency Conservation Regulations) and any subsequent regulations, during the term of this urgency change. JLPUD shall provide a final report no later than 15 days from the expiration date of this Order. This Order does not waive or relieve JLPUD from any duty to comply with applicable requirements under the 2016 Emergency Conservation Regulations;
  - b) JLPUD shall also submit with the monthly reports an update on any proposed and/or completed projects or studies necessary to obtain additional water supplies for the Down-Canyon service area. Projects may include, but are not limited to, the drilling and testing of groundwater wells, or the installation of additional storage tanks. Studies may include, but are not limited to, a comprehensive groundwater study, or a Fern Creek flow study;
  - c) JLPUD shall also include submit with the monthly reports an update on any additional adopted and/or implemented actions taken to meet the conservation standards to reduce the water shortage for the Down-Canyon service area, and identify the date when such additional actions will be fully implemented as part of the monthly report; and
  - d) Failure of JLPUD to continue to institute Stage 3 Water Emergency conditions in its service area during the term of this approval may result in modification or termination of this Order, at the discretion of the Deputy Director for Water Rights.
7. This Order does not authorize any act that results in the taking of a threatened or endangered species, or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this Order, the right holder shall obtain authorization for an incidental take permit prior to construction or operation. The right holder shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary urgency change authorized under this Order.

8. Should the right holder determine that it will not proceed with the changes identified in this Order at any time during the duration of this approval, the right holder may instead operate in accordance with Permit 21185 (Application 28609), and shall notify the Division within 10 days of any such determination.
9. The State Water Board reserves jurisdiction to supervise the temporary urgency change under this Order, and to coordinate or modify terms and conditions, for the protection of vested rights, fish, wildlife, instream beneficial uses, and the public interest as future conditions may warrant.
10. The temporary urgency change authorized under this Order shall not result in creation of a vested right, even of a temporary nature, but shall be subject at all times to modification or revocation in the discretion of the Board. This Order shall automatically expire 180 days after the effective date of this Order unless it has been revoked.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

*Leslie F. Grober, Deputy Director*  
*Division of Water Rights*

Dated: OCT 25 2016