

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT TO APPROPRIATE)	
WATER NO. 23-11387 IN THE NAME OF)	
JEFFREY AND MICHELLE ALEIXO)	ORDER GRANTING PETITION
_____)	FOR RECONSIDERATION

This matter having come before the Department of Water Resources (Department) as a petition to reconsider the issuance of a permit to appropriate water, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. On December 18, 2008, the Department issued Permit to Appropriate Water No. 23-11387 (permit) to Jeffrey and Michelle Aleixo (right holders) for the diversion and use of 0.03 cfs and the storage and use of 3.0 af of water from Palisades Creek in the SW¼NW¼ of Section 25, Township 1 North, Range 44 East, B. M. Bonneville County, for irrigation, aesthetic, and recreational purposes.
2. The *Comprehensive State Water Plan-South Fork Snake River Basin* designates Palisades Creek a protected recreational river pursuant to Idaho Code §42-1734A and B.
3. The *Comprehensive State Water Plan-South Fork Snake River Basin* states that for recreational streams the construction of diversion works is prohibited within the stream channel or below the high water mark.
4. The permit was issued as a preliminary order (order) of the Department pursuant to §67-5243, *Idaho Code*, and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730).
5. Rule 730.02.a. of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.) provides in pertinent part as follows:

Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order.

6. On January 2, 2009, 15 days after issuing the permit, the Department received a petition for reconsideration of the order (petition) from the right holder's attorney (attorney). In the petition the attorney asks IDWR to change approval condition no. 6 listed on the permit. Approval condition no. 6 states:

The right holder shall use a pump installed outside the high water mark of Palisades Creek to divert water in connection with this right. Only a flexible pipe may extend from the pump to the water below the high water mark. The intake for the pipe shall be screened with ¼ inch or smaller mesh to protect fish and wildlife.

7. January 1, 2009, was a legal holiday for the State of Idaho.
8. Rule 56 of the Department's Rules of Procedure (IDAPA 37.01.01.056) states that:

Whenever statute, these or other rules, order, or notice requires an act to be done within a certain number of days of a given day, the given day is not included in the count, but the last day of the period so computed is included in the count. If the day the act must be done is Saturday, Sunday or a legal holiday, the act may be done on the first day following that is not Saturday, Sunday or a legal holiday.

9. In the petition, the attorney asserts that condition of approval no. 6 “appears to set forth the only authorized method of diverting water from Palisades Creek (a pump with a screen).” The attorney explains in the petition that the permit holder would like the option of installing a sandpoint well away from the creek channel to divert water in connection with the authorized beneficial use.
10. Neither the applicant nor the applicant’s attorney have submitted information to show that the diversion of water from a sandpoint well will allow the diversion of water in direct hydraulic connection with Palisades Creek and not some other source of water.
11. Idaho Code § 42-203A states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

CONCLUSIONS OF LAW

1. The petition was filed timely.
2. The Department shall take into consideration the local public interest when evaluating the approval of an application to appropriate water.
3. The *Comprehensive State Water Plan-South Fork Snake River Basin* is a statement of the local public interest in Palisades Creek.

4. It is in the public interest to limit the type of diversion that can be employed in connection with the proposed diversion to remain consistent with the protected stream designation for Palisades Creek. However, for this permit, installing a pump outside the high water mark may not be the only method of diversion consistent with the local public interest.
5. The Department should grant the petition and modify approval condition no.6 consistent with the applicant's request, subject the Department's confirmation that the diversion works constructed by the permit holder allow the diversion of water from Palisades Creek and not from some other source of water.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order issuing Permit to Appropriate Water No. 23-11387 is **GRANTED** pursuant to §67-5243, *Idaho Code*.

IT IS FURTHER HEREBY ORDERED that approval condition no. 6 on the permit is **MODIFIED** as follows:

To divert water in connection with this right, the right holder shall use a pump that is installed outside the high water mark of Palisades Creek or installed in a shallow well or sump constructed or excavated outside the high water mark but near enough to Palisades Creek that diversions of water from it cause the flow of Palisades Creek to be diminished by at least 50% of the diversion rate within a 24 hour period. If the right holder elects to install a well or sump, prior to its construction or excavation, the right holder shall submit a report prepared by a licensed professional engineer or geologist that demonstrates the depletion requirement of this condition and shall receive written approval from the Department. If the permit holder does not employ a shallow well or sump, only a flexible pipe may extend from the pump to the water below the high water mark, and the intake for the flexible pipe shall be screened with ¼-inch or smaller mesh to protect fish and wildlife.

IT IS FURTHER HEREBY ORDERED that permit no. 23-11387 issued by the Department on December 18, 2008, is **SUPERSEDED** by the amended permit approval issued in conjunction with this order.

Dated this 25th day of January, 2009.


SHELLEY W. KEEN
Manager, Water Rights Section