

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR)	ORDER ON EXCEPTIONS;
TRANSFER NO. 81039 IN THE NAME OF)	ORDER APPROVING
<u>MICHAEL AND/OR EULLA WALLACE)</u>	TRANSFER

BACKGROUND

On July 12, 2016, Michael and Eulla Wallace ("Wallace") filed Application for Transfer No. 81039 ("Application 81039") with the Idaho Department of Water Resources ("Department"). The Department published notice of the application on August 3 and 10, 2016. Protests were filed by James L. and Sandra J. Henley ("Henley") and Edward Kalinowski ("Kalinowski").

On March 28, 2017, Henley and Kalinowski filed a *Motion for Summary Judgment* ("Motion") and *Memorandum in Support of Motion for Summary Judgment* pursuant to Rule 260 of the Department's Rules of Procedure (IDAPA 37.01.01). The hearing officer issued an *Order Denying Motion for Summary Judgment* on April 13, 2017.

The parties requested a hearing be held to decide the contested matter. The Department conducted a hearing on June 14, 2017, in Boise, Idaho. During the hearing, the parties asked for the opportunity to file post-hearing briefs. The request was granted and the parties filed post-hearing briefs on June 30, 2017.

On August 16, 2017, the hearing officer issued a *Preliminary Order Approving Transfer* ("Transfer Order"). On August 30, 2017, the Department timely received *Kalinowski and Henleys' Exceptions to Preliminary Orders for Transfer Application 81039, and Water Right Application Nos. 78-12439 and 78-12447* ("Exceptions")¹ pursuant to the Department's Rule of Procedure 730. See IDAPA 37.01.01.730.02.b. Henley and Kalinowski assert the hearing officer's decision to approve Application 81039 "must be reversed." *Exceptions* at 1.

¹ This order addresses arguments raised in the Exceptions specific to the Transfer Order. The Director addresses arguments raised in the Exceptions specific to the hearing officer's preliminary orders denying water right application nos. 78-12439 and 78-12447 in the *Order on Exceptions; Order Denying Permits* issued in those matters.

ANALYSIS

- A. The Director will correct statements of fact regarding the points of diversion authorized by the partial decree for water right no. 78-10067 and remove findings of fact that are irrelevant to the outcome of Application 81039.**

Henley and Kalinowski assert the hearing officer erred in his factual description of the two authorized points of diversion for water right no. 78-10067 in the Transfer Order. *Exceptions* at 1-2. Water right no. 78-10067 is the right Wallace seeks to change the points of diversion for pursuant to Application 81039.

The hearing officer correctly stated in finding of fact no. 4 that “[w]ater right 78-10067 authorizes the diversion of water from two springs for domestic use at two homes and the irrigation of 4.0 acres.” *Transfer Order* at 2. However, the hearing officer erred by stating stating “[t]he two springs diverted by Wallace and Leonard Wallace under water right 78-10067 are physically located . . . on properties now owned by Henley and Kalinowski.” *Id.* As the hearing officer recognized, the Snake River Basin Adjudication Court “issued a partial decree for water right 78-10067 on November 6, 2007, describing” two points of diversion in Government Lot 3 (SENWSW), Section 9, T19N, R02E. *Id.* Henley and Kalinowski’s properties are located in Government Lot 3 (NWNWSW), Section 9, T19N, R02E. *Id.* The Director will correct statements of fact regarding the points of diversion authorized by the partial decree for water right 78-10067.

The Director will also remove finding of fact 12 and references to the historic use and delivery of water from springs located on Henley and Kalinowski’s properties to Wallace’s property because the finding of fact and references are irrelevant to the outcome of Application 81039.

- B. The hearing officer’s determination that easements are in place that would allow Wallace to access the springs on Henley and Kalinowski’s properties is supported by substantial evidence.**

Henley and Kalinowski assert the hearing officer erred by determining that “[s]ubstantial evidence in the record indicates that the necessary easements are already in place, which would allow Wallace to divert water from the springs” located on Henley and Kalinowski’s properties as proposed in Application 81039. *Exceptions* at 5-9.

In rejecting Henley and Kalinowski’s argument that “Wallace lacks the easement necessary to access the proposed points of diversion,” the hearing officer stated that, in their protests to Application 81039, “Henley and Kalinowski acknowledge that there are recorded easements running from the proposed spring points of diversion to the Wallace property.” *Transfer Order* at 3. Henley and Kalinowski assert the hearing officer’s statement “is a gross misstatement of the testimony and evidence.” *Exceptions* at 7. The Director disagrees. Kalinowski stated in his protest that, when he purchased his property, he was given “documents from the realtors and mortgage company which described the property.” Ex. 16. Kalinowski attached one such document to his protest which depicts a waterline easement running from the

Wallace property to a spring on Kalinowski's property. *Id.* Similarly, Henley stated in his protest that, prior to the purchase of his property, he discovered "two platted waterline easements and one irrigation (ditch) easement did exist but were acceptable to me in terms of purchase." *Id.* Henley attached the same document to his protest as Kalinowski, depicting a waterline easement running from the Wallace property to a spring on Henley's property. *Id.*

Moreover, Henley acknowledged in his protest that the waterline easements "provide access, but do not provide rights to the springs themselves." *Id.* Kalinowski stated in his protest that "[t]he Wallace's have the right as does any person to use the 2 public easements designated on Sheet 3 of 7-TIMBER RIDGE SUBDIVISION, Toothman-Orton Engineering Company located in Adams County Planning Office. *Id.* The hearing officer cited the "Plat of Timber Ridge Subdivision (recorded with Adams County in August 1995)" in support of his determination "that the necessary easements are already in place, which would allow Wallace to divert water from the springs" located on Henley and Kalinowski's properties as proposed in Application 81039. *Transfer Order* at 4. Sheet 3 of the Plat shows two "10' wide water line" easements running from the Wallace property to a spring on Kalinowski's property and to a spring on Henley's property. Ex. 17.² The hearing officer did not misstate the evidence in the record by determining that Henley and Kalinowski acknowledge that there are recorded easements running from the proposed spring points of diversion to the Wallace property.

Exhibit 8 also supports the hearing officer's determination "that the necessary easements are already in place, which would allow Wallace to divert water from the springs" located on Henley and Kalinowski's properties as proposed in Application 81039. Exhibit 8 is the March 21, 1994, meeting minutes from Adams County Joint Planning Commission describing a public hearing on the Timber Ridge Subdivision preliminary plat. The minutes state that Wallace's "conveyance systems will be marked on plat when the snow leaves and the areas can be identified for protection." Ex. 8 at 2.

Relying upon the Declaration of Protective Covenants, Conditions and Restrictions for Timber Ridge Subdivision, Henley and Kalinowski assert "[t]he platted irrigation easements do not benefit the Wallaces, as they are not Lot owners of the Timber Ridge Subdivision." *Exceptions* at 8. Whether the platted irrigation easements benefit Wallace is irrelevant. The Plat of Timber Ridge Subdivision describes and depicts the relevant easements in this matter as "10' wide water line" easements that run from the Wallace property to springs on the Henley and Kalinowski properties, not "irrigation easements," which the plat separately describes and depicts.

The hearing officer's determination "that the necessary easements are already in place, which would allow Wallace to divert water from the springs" located on Henley and Kalinowski's properties as proposed in Application 81039 is supported by substantial evidence in the record and will not be reversed.³

² Exhibit 105 is the same Plat of Timber Ridge Subdivision (recorded with Adams County in August 1995).

³ Henley and Kalinowski also assert the hearing officer's approval of Application 81039 "injures the[ir] prior filed water right" application nos. 78-12439 and 78-12447 because it "ignores the relative priorities of the three

Consistent with the foregoing, and after carefully considering the evidence in the record, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 81039 proposes to change the legal description of the points of diversion for water right 78-10067.

2. Wallace own a portion of the place of use described in water right 78-10067. The remainder of the place of use is owned by Leonard Wallace, Michael Wallace's father. Wallace acquired their portion of the place of use for water right 78-10067 from Leonard Wallace in 2001. Ex. 17, Aff. of Eulla Wallace.

3. Wallace signed Application 81039. Leonard Wallace was present when Application 81039 was filed and was present at the hearing with Wallace.

4. Water right 78-10067 authorizes the diversion of water from two springs for domestic use at two homes and the irrigation of 4.0 acres.

5. On May 3, 1988, Leonard M. and Sheryl K. Wallace filed Claim No. 78-10067 in the Snake River Basin Adjudication ("SRBA"). Claim 78-10067 described the diversion from two springs (in the SENWSW, Section 9, T19N, R02E and the SWNWSW, Section 9, T19N, R02E) for domestic use and the irrigation of four acres. The claim was based on historical beneficial use and did not rely on or refer to any prior decrees, licenses, or claims. Ex. 7.

6. Claim 78-10067 was reviewed by the Department. On December 19, 2006, the Department sent a recommendation of water right 78-10067 to the SRBA Court, describing two spring points of diversion, both in the SENWSW, Lot 3, Section 9, T19N, R02E.

7. The SRBA Court issued a partial decree for water right 78-10067 on November 6, 2007, describing the following points of diversion:

T19N R02E S09 Lot 3	(SENWSW)	Within Adams County
T19N R02E S09 Lot 3	(SENWSW)	

8. Government Lot 3 in Section 9, T19N, R02E is generally located in the NW 1/4 of the SW 1/4 of Section 9.

9. Application 81039 proposes to change the legal description for both points of diversion for water right 78-10067 to be in Lot 3 (NWNWSW), Section 9, T19N, R02E. If left undiverted,

applications." *Exceptions* at 8-9. As determined in the *Order on Exceptions; Order Denying Permits* issued in the matters of water right application nos. 78-12439 and 78-12447, the hearing officer properly denied those applications because neither Henley nor Kalinowski satisfied their burden of proof to demonstrate that the water supply is sufficient for their proposed beneficial uses. Accordingly, approval of Application 81039 does not injure water right application nos. 78-12439 and 78-12447.

water from the springs at the proposed points of diversion would connect to Threemile Creek. Testimony of James Henley; Testimony of Kalinowski; Testimony of Eulla Wallace

10. The following water rights were decreed in the SRBA and authorize diversion from Threemile Creek for irrigation use:

Water Right No.	Priority Date	Period of Use	Diversion Rate (cfs)
78-263	11/26/1919	4/1 – 10/31	2.00
78-264	11/27/1919	4/1 – 10/31	0.20
78-265	11/28/1919	4/1 – 10/31	1.20
78-4066	11/30/1919	4/1 – 10/31	5.24
78-4130	9/26/1922	4/1 – 10/31	3.48
78-12443	9/26/1922	4/1 – 10/31	0.19
Total:			12.31

RELEVANT LEGAL PROVISION

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not 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, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

ANALYSIS

Wallace's Access to the Springs

In Idaho, a person cannot develop a water right in trespass. *See Lemmon v. Hardy*, 95 Idaho 778, 779; 519 P.2d 1168, 1170 (1974). One of the primary arguments raised by Henley and Kalinowski is that Wallace lacks the easement necessary to access the proposed points of diversion. But Henley and Kalinowski acknowledge there are recorded easements running from the proposed spring points of diversion to the Wallace property. Kalinowski stated in his protest that, when he purchased his property, he was given “documents from the realtors and mortgage company which described the property.” Ex. 16. Kalinowski attached one such document to his protest which depicts a waterline easement running from the Wallace property to a spring on

Kalinowski's property. *Id.* Henley stated in his protest that, prior to the purchase of his property, he discovered "two platted waterline easements and one irrigation (ditch) easement did exist but were acceptable to me in terms of purchase." *Id.* Henley attached the same document to his protest as Kalinowski, depicting a waterline easement running from the Wallace property to a spring on Henley's property. *Id.*

Moreover, Henley acknowledged in his protest that the waterline easements "provide access, but do not provide rights to the springs themselves." *Id.* Kalinowski stated in his protest that "[t]he Wallace's have the right as does any person to use the 2 public easements designated on Sheet 3 of 7-TIMBER RIDGE SUBDIVISION, Toothman-Orton Engineering Company located in Adams County Planning Office. *Id.* The Plat of Timber Ridge Subdivision (recorded with Adams County in August 1995) supports a determination that the necessary easements are already in place which would allow Wallace to divert water from the springs located on Henley and Kalinowski's properties as proposed in Application 81039. Sheet 3 of the Plat shows two "10' wide water line" easements running from the Wallace property to a spring on Kalinowski's property and to a spring on Henley's property. Ex. 17.

Exhibit 8 also supports a determination that the necessary easements are already in place which would allow Wallace to divert water from the springs located on Henley and Kalinowski's properties as proposed in Application 81039. Exhibit 8 is the March 21, 1994, meeting minutes from Adams County Joint Planning Commission describing a public hearing on the Timber Ridge Subdivision preliminary plat. The minutes state that Wallace's "conveyance systems will be marked on plat when the snow leaves and the areas can be identified for protection." Ex. 8 at 2. Wallace has sufficiently demonstrated legal access to the proposed points of diversion.

Injury to Existing Water Rights

Wallace proposes to change the legal description of the two points of diversion for water right 78-10067. At the time of this order, there are no existing licensed or decreed water rights on the proposed springs. If left undiverted, water from the springs at the proposed points of diversion would connect to Threemile Creek. There are multiple water rights on Threemile Creek senior to water right 78-10067. The change proposed in Application 81039 will not injure existing water rights, but water right 78-10067 is subject to the senior water rights on Threemile Creek. To prevent injury to existing water rights, the transfer approval should include a condition noting that water right 78-10067 can only be diverted when all downstream senior rights on Threemile Creek are satisfied.

Enlargement

There is no evidence in the record that the change proposed in Application 81039 will enlarge the use under water right 78-10067. According to Wallace, water will continue to be diverted and used for those purposes.

Conservation of Water Resources

There is no evidence in the record that the change proposed in Application 81039 is inconsistent with the conservation of water resources within the state of Idaho.

Local Public Interest

The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3).

There is no evidence in the record that the changes proposed in Application 81039 are not in the local public interest.

CONCLUSIONS OF LAW

Wallace has satisfied all of the elements of review under Idaho Code § 42-222(1). To prevent injury to existing water rights, water right 78-10067 should be conditioned as subject to downstream senior water rights on Threemile Creek.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 81039 in the name of Michael and/or Eulla Wallace is APPROVED as set forth in the attached approval document.

Dated this 25th day of October 2017.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October 2017, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order on Exceptions; Order Approving Transfer

Michael and Eulla Wallace
3288 Wallace Lane
New Meadows, ID 83654

Shelley M. Davis
Barker Rosholt & Simpson, LLP
1010 W Jefferson St. Suite 102
PO Box 2139
Boise, ID 83701-2139



Kimi White

**STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES**

**TRANSFER OF WATER RIGHT
TRANSFER NO. 81039**

This is to certify that: EULLA WALLACE AND/OR
MICHAEL WALLACE
3288 WALLACE LN
NEW MEADOWS, ID 83654

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

<u>Water Right</u>	<u>Origin/Basis</u>	<u>Priority Date</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
78-10067	WR/DECREED	9/1/1970	0.160 cfs	N/A	N/A	4.0	SPRINGS

Purpose of Transfer (Changes Proposed)

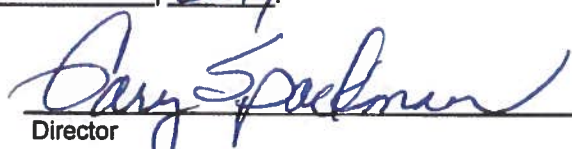
<u>Current Number</u>	<u>Split</u>	<u>POD</u>	<u>POU</u>	<u>Add POD</u>	<u>Period of Use</u>	<u>Nature of Use</u>
78-10067	NO	YES	NO	NO	NO	NO

Summary Of Water Rights After the Approved Change

<u>Existing Right</u>	<u>New No. (Changed Portion)</u>	<u>Transfer Rate</u>	<u>Transfer Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>New No. (remaining portion)</u>	<u>Remaining Rate</u>	<u>Remaining Volume</u>	<u>Remaining Acre Limit</u>	<u>Remaining Total Acres</u>
78-10067	78-10067	0.160 cfs	N/A	N/A	4.0	N/A	N/A	N/A	N/A	N/A
COMBINED TOTALS		0.160 cfs	N/A	N/A	4.0		N/A	N/A	N/A	N/A

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 25th day of October, 2017.


Director

Transfer No. 81039

WATER RIGHT NO. 78-10067**As Modified by Transfer No. 81039**

In accordance with the approval of Transfer No. 81039, Water Right No. 78-10067 is now described as follows:

Right Holder: MICHAEL WALLACE AND/OR
EULLA WALLACE
3288 WALLACE LN
NEW MEADOWS, ID 83654

Priority Date: 9/1/1970

Source: SPRINGS

Tributary: THREEMILE CREEK

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>
DOMESTIC	01/01	to 12/31	0.080 cfs
IRRIGATION	04/01	to 10/31	0.080 cfs
			0.160 cfs

LOCATION OF POINT(S) OF DIVERSION

SPRINGS	L3 (NWNWSW)	Sec 9	Twp 19N Rge 02E	ADAMS County
SPRINGS	L3 (NWNWSW)	Sec 9	Twp 19N Rge 02E	ADAMS County

PLACE OF USE: DOMESTIC

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
19N	02E	8													X				

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
19N	02E	8													4.0				4.0

POU Total Acres: 4.0

CONDITIONS OF APPROVAL

1. This right is subject to all downstream senior water rights on Threemile Creek. Water may only be diverted under this right when all downstream senior water rights on Threemile Creek are satisfied.
2. Domestic use is for 2 homes.
3. The quantity of water decreed for this water right for domestic use is not a determination of historical beneficial use.
4. The quantity of water under this right for domestic use shall not exceed 13,000 gallons per day.

Transfer No. 81039

WATER RIGHT NO. 78-10067
As Modified by Transfer No. 81039

CONDITIONS OF APPROVAL

5. This right does not grant any right-of-way or easement across the land of another.
6. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
7. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
8. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.