

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

IN THE MATTER OF APPLICATION FOR) TRANSFER NO. 81039 IN THE NAME OF) <u>MICHAEL AND/OR EULLA WALLACE</u>)	PRELIMINARY ORDER APPROVING TRANSFER
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PROCEDURAL HISTORY

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, Protestants 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 an administrative hearing be held to decide the contested matter. On April 13, 2017, the Department issued an *Order Consolidating Proceedings and Notice of Hearing*. Contested transfer application 81039 and applications for permit 78-12439, 78-12445 and 78-12447 were consolidated for purposes of conducting an administrative hearing.

The Department conducted a hearing on June 14, 2017, in Boise, Idaho. Wallace represented themselves. Henley and Kalinowski were represented by attorney Shelley Davis.

Exhibits 1 – 8, 10 – 17, 19, 20 and 22 offered by Wallace and Exhibits 101 – 110 offered by Henley and Kalinowski were admitted into the administrative record. Exhibits 9, 18 and 21 offered by Wallace were not admitted into the record.

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. After carefully considering the evidence in the record, the Department 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. Spring #1 arises on Kalinowski's property and is diverted for use at the home owned by Wallace. Spring #2 arises on Henley's property and is diverted for use at the home owned by Leonard Wallace.

6. 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.

7. 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.

8. 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)	

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

10. The two springs diverted by Wallace and Leonard Wallace under water right 78-10067 are physically located in the NW 1/4 of Lot 3, Section 9, T19N, R02E, on properties now owned by Henley and Kalinowski. Ex. 7 (SRBA Claim for water right 78-10067, filed in May 1988, describes "two developed springs with pipeline to place of use" and "2 domestics with lawn irrigation."); Ex. 8 (Meeting minutes from Adams County Joint Planning Commission (dated March 21, 1994) describe a public hearing on the Timber Ridge Subdivision preliminary plat: "Mr. Wallace's water rights, spring and conveyance systems will be marked on plat when the snow leaves and the areas can be identified for protection."); Ex. 17, Affidavit of Leonard Wallace, Exhibit A, Sheet No. 3 of 7 (Timber Ridge Subdivision plat shows two water line easements - one running from the spring on Kalinowski's property to the Wallace property and one running from the spring on the Henley property to the Wallace property); Testimony of Eulla Wallace; Ex. 17, Aff. of Leonard Wallace at ¶¶ 2-3. The two springs are generally located in the NW 1/4 of the NW 1/4 of the SW 1/4 of Section 9, T19N, R02E.

11. 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.

12. Spring boxes or cisterns are currently used to capture the water emanating from the springs. Water is piped from the springs to the Wallace property. Unused water is piped away from the springs and is released into a nearby irrigation ditch. If left undiverted, both springs would connect to Threemile Creek. Testimony of Eulla Wallace, James Henley and Kalinowski.

13. 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 PROVISIONS

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. Henley and Kalinowski acknowledge that there are recorded easements running from the proposed spring points of diversion to the Wallace property. *See Henley Protest and Kalinowski Protest*. They argue, however, that the easements were of little concern when they purchased their respective properties because there were no valid water rights associated with the springs at that time. *Id.*

Substantial evidence in the record indicates that the necessary easements are already in place, which would allow Wallace to divert water from the springs. Ex. 17, Plat of Timber Ridge Subdivision (recorded with Adams County in August 1995). Underground pipelines are already in place, which can convey water from the springs to the Wallace property. Testimony of Eulla Wallace, James Henley and Kalinowski. The easements have been actively used to deliver water from the springs to the Wallace property since at least 1988. Ex. 7; Ex. 8; Testimony of Eulla Wallace; Ex. 17, Aff. of Leonard Wallace at ¶¶ 2-3. 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 springs.¹ The source for water right 78-10067 is springs tributary to Threemile Creek. 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. Evidence in the record demonstrates that water has been diverted for domestic and irrigation use under water right 78-10067 since at least 1988. 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.²

¹ In June 2016, Kalinowski filed Application for Permit 78-12439, seeking to appropriate water from Spring #1 for irrigation and stockwater use. In August 2016, Henley filed Application for Permit 78-12447, seeking to appropriate water from Spring #2 for stockwater and irrigation use. These applications will be addressed by the Department in separate orders.

² Based on the testimony offered at hearing, it appears that most of the water from the springs is continuously diverted through underground pipelines regardless of demand. Water is piped away from the springs and unused water is discharged into a local irrigation ditch. Currently, there are no water rights authorizing the diversion of water from the springs for discharge into the ditch. This transfer approval will authorize Wallace to divert water from the springs pursuant to water right 78-10067. Diverting water from the springs to simply be discharged, unused, into a nearby ditch is a wasteful practice and is not consistent with the conservation of water resources within the state of Idaho. Water which cannot be beneficially used by Wallace under water right 78-10067 or which is required to flow to downstream senior water rights should remain undiverted at the spring source. Wallace may need to reconstruct the spring boxes to release unused water at the spring (instead of diverting it through the pipeline system) in order to avoid an enforcement action for unauthorized diversion of water.

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 to make the right 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 approval document issued in conjunction with this order.

Dated this 16th day of August 2017.



James Cefalo
Water Resource Program Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August 2017, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

Document Served: Preliminary Order Approving Transfer (81039)

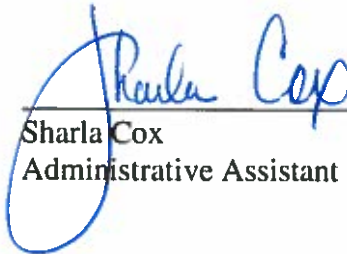
**Michael and Eulla Wallace
3288 Wallace Lane
New Meadows, ID 83654**

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

Courtesy Copy sent via standard US Mail:

**Edward Kalinowski
PO Box 127
New Meadows, ID 83654**

**James and Sandra Henley
PO Box 396
New Meadows, ID 83654**



Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

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.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.