

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

**IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 78-12447 IN THE NAME OF)
JAMES L. AND SANDRA J. HENLEY)**

**PRELIMINARY ORDER
DENYING PERMIT**

PROCEDURAL HISTORY

On July 12, 2016, James L. and Sandra J. Henley ("Henley") filed Application for Permit No. 78-12447 with the Idaho Department of Water Resources ("Department"). Henley amended Application 78-12447 on August 9, 2016, adding points of diversion and reducing the proposed diversion rate. The Department published notice of the amended application on August 17 and 24, 2016. A protest was filed by Michael and Eulla Wallace ("Wallace").

The parties requested that a 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 an administrative hearing on June 14, 2017 in Boise, Idaho. Henley was represented by attorney Shelley Davis. Wallace represented themselves.

Exhibits 1 – 8, 10 – 17, 19, 20 and 22 offered by Wallace and Exhibits 101 – 110 offered by Henley 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 78-12447 (as amended) proposes to divert 0.11 cfs from three springs tributary to Threemile Creek for stockwater use and for the irrigation of three acres. Henley proposes to divert water for irrigation during the irrigation season (4/1 – 10/31) and to divert water for stock year round (1/1 – 12/31).
2. The proposed points of diversion and proposed place of use are on property owned by Henley.
3. The proposed spring sources, if left undiverted, would connect to Threemile Creek. Testimony of James Henley; Testimony of Eulla Wallace. Natural stream channels exist which could convey water from the springs to Threemile Creek. Testimony of James Henley.

4. 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

5. In addition to irrigation use, water right 78-4066 authorizes the diversion of 0.02 cfs from Threemile Creek for stockwater use throughout the entire year.

6. Henley did not provide any evidence about the quantity of water emanating from the springs or the flow of Threemile Creek. Henley did not provide any evidence about the amount of water diverted by existing water users on Threemile Creek.

EVALUATION CRITERIA / ANALYSIS

Idaho Code § 42-203A(5) 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 . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5). *See* IDAPA 37.03.08.40.04.

Reduction to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules sets forth the criteria used for determining whether a proposed use of water will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

IDAPA 37.03.08.45.01.a

Henley did not provide sufficient evidence to evaluate whether their proposed diversion from the springs tributary to Threemile Creek will reduce the quantity of water under existing water rights. Henley confirmed that water from the three springs would reach Threemile Creek if they were left undiverted. Multiple senior water rights exist downstream of the location where water from the springs would flow into Threemile Creek. It is not clear whether these downstream water rights are ever fully satisfied by the flows in Threemile Creek. Without evidence about flow rates and existing diversions on Threemile Creek, it is not possible to determine whether the proposed project will reduce the quantity of water under existing water rights.

Sufficiency of Water Supply

Rule 45.01.b of the Department's Water Appropriation Rules sets forth the criteria for determining whether the water supply is sufficient for a proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible" IDAPA 37.03.08.45.01.b.

Henley proposes a diversion rate of 0.11 cfs from the three spring sources. Kalinowski did not provide sufficient evidence to evaluate whether the water supply from the springs is adequate to accomplish the proposed beneficial uses. There is no evidence in the record about the actual flow rate from the spring sources. Without such evidence, it is not possible to determine whether there is sufficient water emanating from the springs to make the proposed project economically feasible.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria for determining whether an application is filed in good faith and not for speculative purposes. An applicant must have "legal access to the property necessary to construct and operate the proposed project." IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that it is "in the process of obtaining other permits needed to construct and operate the project" and that there are no obvious legal impediments to prevent successful completion of the project. IDAPA 37.03.08.45.01.c.ii-iii.

Prior to the hearing, Wallace stipulated that this element is not at issue in this contested case. Henley owns the property at the proposed points of diversion and place of use and would not need to cross any other property to complete the proposed project. No other permits are needed to complete the project. There are no obvious legal impediments to completing the proposed project.

Henley has demonstrated that Application 78-12447 was filed in good faith and not for delay or speculative purposes.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria for determining whether an applicant has sufficient financial resources to complete a project. "An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director." IDAPA 37.03.08.45.01.d.ii.

Prior to the hearing, Wallace stipulated that this element is not at issue in this contested case. There is no evidence in the record suggesting that Henley lacks sufficient financial resources to complete the proposed project.

Conservation of Water Resources

Prior to the hearing, Wallace stipulated that this element is not at issue in this contested case. There is no evidence in the record that the proposed permit 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).

Prior to the hearing, Wallace stipulated that this element is not at issue in this contested case. There is no evidence in the record that the proposed permit will conflict with the local public interest.

CONCLUSIONS OF LAW

Henley did not satisfy their burden of proof for Application 78-12447 for two of the elements of review set forth in Idaho Code § 42-203A(5). They did not demonstrate that Application 78-12447 will not reduce the quantity of water under existing water rights. They did not demonstrate that the water supply is sufficient for the proposed beneficial uses. Therefore, Application 78-12447 should be denied.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 78-12447 in the name of James L. and/or Sandra J. Henley is DENIED.

Dated this 16th day of August, 2017.

A handwritten signature in black ink, appearing to read 'J. Cefalo', written over a horizontal line.

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August 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, certified with return receipt requested, postage prepaid and properly addressed, to the following:

Document Served: Preliminary Order Denying Permit (78-12447)

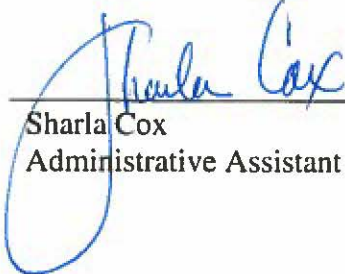
Shelley M. Davis
Barker Rosholt & Simpson LLP
1010 W Jefferson St, Suite 102
PO Box 2139
Boise, ID 83701-2139

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

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.