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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

SEVEN HIGH RANCH, INC, a general  
business corporation,

Petitioner,

v.

IDAHO DEPARTMENT OF WATER  
RESOURCES,

Respondent(s).

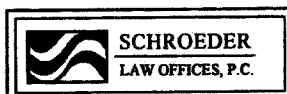
CASE NO. CV-2017-1536

PETITION FOR JUDICIAL REVIEW

L(3): \$221.00

COMES NOW petitioner, Seven High Ranch, Inc., a general business corporation  
(hereinafter “Seven High Ranch”), by and through its attorneys of record, Schroeder Law  
Offices, P.C., files this Petition for Judicial Review (“Petition”) seeking judicial review of the  
Respondent, Idaho Department of Water Resources (“IDWR”) August 10, 2017 approval of  
Transfer No. 81188 that became a final order on August 24, 2017 (“Final Order”<sup>1</sup>). This petition

<sup>1</sup> See attached Exhibit 1: August 10, 2017 IDWR Transfer Approval Notice.



1 is filed in accordance with Idaho Code § 67-5270(2), as Petitioner is aggrieved by a “final  
2 agency action other than an order in a contested case”. See Idaho Code § 67-5270(2).

### 3 JURISDICTION AND PARTIES

4 1. Petitioner, Seven High Ranch, Inc., owns real property in Owyhee County Idaho,  
5 described as SE1/4 SW1/4 and SW1/4 SE1/4 of Section 25, NE1/4 NW1/4, NW1/4 NW1/4 and  
6 SW1/4 NW1/4 of Section 36, all in Township 2 South, Range 4 West, Boise Meridian, together  
7 with Water Right Nos. 57-253, 57-268, 57-1064 and 57-1065. See Exhibits 2-5.

8 2. On September 1, 2016, Seven High Ranch Inc., c/o Jerry Hoagland, the corporation’s  
9 president, filed with IDWR an Application for Transfer of Water Right – Points of Diversion to  
10 add a point of diversion for Water Right Nos. 57-253, 57-268, 57-1064 and 57-1065. The  
11 Transfer Application was assigned Transfer No. 81188. See Exhibit 6.

12 3. Respondent Idaho Department of Water Resources is tasked with enforcing rules and  
13 regulations pertaining to its duty to conserve and develop the use of waters of the State. IDWR  
14 issued its approval of Transfer No. 81188 on August 10, 2017. See Exhibit 1.

15 4. On August 10, 2017, IDWR also issued a Transfer Approval Notice, identifying the  
16 Transfer of Water Right as a Preliminary Order that became a final order without further action  
17 by IDWR, within fourteen days unless the applicant petitions for reconsideration for files an  
18 exception and/or brief. See Exhibit 1. Petitioner Seven High Ranch, Inc., did not request  
19 reconsideration, and the Preliminary Order became final on August 24, 2017.

20 5. This Court has jurisdiction to address this Petition under Idaho Code § 67-5270(2).

### 21 VENUE

22 6. Venue is proper under Idaho Administrative Procedure Act § 67-5272(1)(d). Transfer No.  
23 81188 and underlying Water Right Nos. 57-253, 57-268, 57-1064 and 57-1065, the subject of the  
24 agency decision, are appurtenant to real property located in Owyhee County, Idaho.

25 ///

26 ///



1 **DECISION**

2 7. On August 10, 2017, IDWR approved Transfer of Water Right No. 81188, omitting a  
3 condition ("Early and Late Use Condition") provided in the decreed underlying Water Right  
4 Nos. 57-253, 57-268, 57-1064 and 57-1065. The omitted condition provides:

5 Diverting water before or after the period of use under this right is  
6 allowed provided:

- 7 A. the waters so diverted are applied to a beneficial use, and  
8 B. the existing rights and future appropriations are first satisfied.<sup>2</sup>

9 8. The Transfer Approval is identified as a Preliminary Order issued by IDWR. *See Exhibit*  
10 1. Pursuant to Idaho Code § 67-5243, a Preliminary Order becomes a final order without further  
11 action by IDWR unless the applicant petitions for reconsideration or files an exception and/or  
12 brief within fourteen days of the service date of the Preliminary Order. Petitioner Seven High  
13 Ranch, Inc. did not petition for reconsideration. The Preliminary Order became a Final Order on  
14 August 24, 2017.

15 9. This petition for judicial review is filed with this Court under the authority of Idaho Code  
16 § 67-5270(2) on the grounds that Petitioner is aggrieved by IDWR's cancellation of the Early  
17 and Late Use Condition decreed with the underlying Water Right Nos. 57-253, 57-268, 57-1064  
18 and 57-1065, by the District Court of the Fifth Judicial District of Idaho, in the County of Twin  
19 Falls *In Re SRBA, Case No. 39576* when IDWR issued its August 24, 2017 Final Order.

20 **GENERAL ALLEGATIONS**

21 10. The Reynolds Creek Adjudication was initiated by order of the Owyhee County district  
22 court on April 14, 1978, as a McCarran Amendment general adjudication. It was a general  
23 adjudication pursuant to Idaho Code title 42, chapter 14, and thus determined all rights to the use  
24 of water from the Reynolds Creek water system. Pursuant to Idaho statute, actual service was  
25 made on all known and unknown water users by publication on June 19, 1979.

26 <sup>2</sup> See Exhibits 7-10.



1 11. IDWR investigated all water right claims and the Director of IDWR filed his proposed  
2 findings outlining the water rights in the Reynolds Creek water system with the Reynolds Creek  
3 District Court on June 28, 1985.

4 12. The findings were amended by stipulation of the parties of the Reynolds Creek  
5 Adjudication and were decreed by the Reynolds Creek District Court on March 23, 1988. The  
6 Decree determined the water rights by providing a list of water rights describing each individual  
7 right, including all elements of a water right as required by statute at that time and made certain  
8 provisions for the administration of those rights.

9 13. Partial Decrees pursuant to IRCP 54(b) for Water Right Nos. 57-253, 57-268, 57-1064  
10 and 57-1065 were filed with the District Court of the Fifth Judicial District of Idaho, in the  
11 County of Twin Falls *In Re SRBA, Case No. 39576* on December 15, 1997. The 1997 Partial  
12 Decrees describe the period of use as "Irrigation Season". See Exhibits 11-14.

13 14. On April 22, 1998, the Supreme Court of Idaho issued a ruling that concluded water  
14 rights should include specific periods of use to determine the necessity of general provisions. See  
15 *A & B Irrigation Dist. V. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

16 15. Following this ruling, the Snake River Basin Adjudication ("SRBA") Court presiding  
17 Judge, Judge Daniel C. Hurlbutt, Jr. ordered IDWR to file Supplemental Director's Reports with  
18 recommendations as to specific dates for the beginning and ending of the irrigation season and as  
19 to conductive management. On July 26, 1999, IDWR filed a *Supplemental Director's Report,*  
20 *Reporting Area 2, IDWR Basin 57, Regarding Revision of Period of Use (For Irrigation Uses)*  
21 *and Conjunctive Management General Provisions* that contained a recommended season of use  
22 and recommended inclusion of the following condition to be used on rights to allow the use of  
23 "excess water":

24 Diverting water before or after the period of use under this right is  
25 allowed provided:

- 26 A. the waters so diverted are applied to a beneficial use, and  
B. the existing rights and future appropriations are first satisfied



1 16. On October 28, 2002, SRBA Special Master Thomas Cushman filed *Special Master's*  
2 *Report and Recommendations; Findings of Fact and Conclusions of Law* with the District Court  
3 of the Fifth Judicial District of Idaho, in the County of Twin Falls *In Re SRBA, Case No. 39576*  
4 for Water Right Nos. 57-253, 57-268, 57-1064 and 57-1065. *See Exhibits 15-18.* In his report,  
5 the Special Master cites to the 1999 Supplemental Director's Report, noting the Director's  
6 recommendation that an irrigation period of use be identified for Water Right Nos. 57-253, 57-  
7 268, 57-1064 and 57-1065 and that the following "subordination language" be included:

8 Diverting water before or after the period of use under this right is  
9 allowed provided:

- 10 A. the waters so diverted are applied to a beneficial use, and  
11 B. the existing rights and future appropriations are first satisfied

12 *See Exhibits 15-18.* In contrast to the Director's recommendations, in his own 2002 report,  
13 Special Master Cushman recommended that the subordinate language not be included in the  
14 Amended Partial Decree issued for Water Right Nos. 57-253, 57-268, 57-1064 and 57-1065, as  
15 he considered the language no longer necessary.

16 17. Having reviewed the IDWR Director's recommendations to specify a specific irrigation  
17 period and to include the subordination language (Early and Late Use Condition) and having  
18 reviewed the Special Master's recommendation to specify a specific irrigation period and to omit  
19 the subordination language (Early and Late Use Condition), Presiding Judge Roger S. Burdick of  
20 the District Court of the Fifth Judicial District of Idaho, in the County of Twin Falls *In Re SRBA,*  
21 *Case No. 39576* issued Orders of Amended Partial Decrees on December 23, 2002 relating to  
22 each of the Water Right Nos. 57-253, 57-268, 57-1064 and 57-1065. *See Exhibits 19-22.*

23 18. Enclosed with the Orders the court endorsed Amended Partial Decrees relating to  
24 underlying Water Right Nos. 57-253, 57-268, 57-1064 and 57-1065, also filed on December 23,  
25 2002. *See Exhibits 7-10.* Each of the Amended Partial Decrees for Water Right Nos. 57-253, 57-  
26 268, 57-1064 and 57-1065 specifically includes the following subordination language (Early and  
Late Use Condition):

1 Diverting water before or after the period of use under this right is  
2 allowed provided:

3 A. the waters so diverted are applied to a beneficial use, and

4 B. the existing rights and future appropriations are first satisfied

5 *See Exhibits 7-10.*

6 19. On September 1, 2016, Seven High Ranch, Inc. c/o Jerry Hoagland, filed with IDWR an  
7 Application for Transfer of Water Right – Point(s) of Diversion. *See Exhibit 6.* The Transfer  
8 Application was assigned Transfer No. 81188 by IDWR. Transfer Application 81188 relates to  
9 Water Right Nos. 57-253, 57-268, 57-1064 and 57-1065 seeking to add one point of diversion at  
10 High Ditch, an existing ditch for other water rights that were currently regulated by the  
11 Watermaster. Transfer No. 81188 states “[t]he rights on this transfer inadvertently omitted the  
12 Section 24 POD at the time the rights were claimed in the SRBA”. *See Exhibit 6.*

13 20. On January 11, 2017, IDWR Water Resource Agent Phill Hummer sent correspondence  
14 to Watermaster 57R, Connie Brandau, providing copies of Application for Transfer of Water  
15 Rights Nos. 57-253, 57-268, 57-1064 and 57-1065, requesting the Watermaster’s  
16 recommendations. *See Exhibit 23.*

17 21. On January 30, 2017, Watermaster Connie Brandau provided IDWR with the  
18 Watermaster Recommendation Form noting the Watermaster did not oppose approval of the  
19 application. The Watermaster’s recommendation was received by IDWR on January 31, 2017.  
20 *See Exhibit 24.*

21 22. On August 9, 2017, Phill Hummer prepared a Memorandum regarding the evaluation of  
22 Transfer Application 81188. In his evaluation, Mr. Hummer noted that the transfer application  
23 would not change the amount of water diverted annually, did not propose a change that will  
24 create an enlargement of use and specifically stated that the proposed point of diversion “is  
25 currently in use and this transfer will change the records to match the actual use. No change to  
26 the source will occur if the application is approved”. *See Exhibit 25*

1 23. In the "Conditions" section of Mr. Hummer's evaluation memo, he stated "[t]he text  
2 condition regarding use out of season needs to remain since it was on the decree". *See Exhibit*

3 25. However, later in the memo his evaluation contradicts this statement when he noted:

4 Since the Special Master's Report recommends this condition be  
5 removed as the use of "excess water" is no longer department  
6 policy it is likely the amended partial decrees issued on 12/23/02  
7 that still contain that condition were done in error. Whether it was  
8 an error or not, the department can remove the condition as part of  
9 the transfer approval process because this does not enlarge the  
right. This condition should be removed from these water rights to  
make these rights consistent with the others from the same source  
that had the condition removed by the SRBA and to promote  
conservation of water resources by limiting diversion to the  
standard irrigation season when plants can use the water.

10 *See Exhibit 25 at 3.*

11 24. On August 10, 2017, IDWR issued a Transfer Approval Notice regarding Transfer No.  
12 81188, enclosing the approved Transfer of Water Right for Transfer No. 81188. *See Exhibit 1.*  
13 The Transfer of Water Right effectively cancelled a portion of the Petitioner Seven High Ranch,  
14 Inc.'s decreed rights of use by omitting the Early and Late Use Condition decreed to Water Right  
15 Nos. 57-253, 57-268, 57-1064 and 57-1065. *See Exhibit 1.*

16 25. On August 28, 2017, Dave Shaw, the water consultant for Seven High Ranch, discovered  
17 that the condition had been omitted. Mr. Shaw emailed IDWR Regional Manager Nick Miller to  
18 determine if the omission was done in error. Mr. Miller informed Mr. Shaw that the condition  
19 was intentionally removed "so the use under the right is consistent with the standard season of  
20 use and therefore consistent with the conservation of water resources and the local public  
21 interest". *See Exhibit 26.*

## 22 PETITION FOR JUDICIAL REVIEW

23 26. Petitioner re-alleges paragraphs 1-25 and incorporates same herein by reference.

24 27. The approval of Transfer No. 81188, that became a Final Order on August 24, 2017,  
25 cancelled Petitioner Seven High Ranch's decreed rights of use by omitting the Early and Late  
26 Use Condition decreed to underlying Water Right Nos. 57-253, 57-268, 57-1064 and 57-1065.



1 28. Petitioner is aggrieved by the approval of Transfer No. 81188, to the extent it removed  
2 the Early and Late Use Condition, in one or more of the following ways:

3 **EXCEPTION #1: STATUTORY VIOLATION**

4 29. In violation of Idaho Code §§ 42-222, 42-1418 and 42-1424(5) that provide a procedure  
5 to forfeit a right of use that does not include omitting an allowed use upon processing an  
6 application to transfer;

7 **EXCEPTION #2: STATUTORY AUTHORITY OF DECREED CONDITIONS**

8 30. Is in excess of IDWR's delegated authority as IDWR holds no authority to overturn a  
9 right of use established by a decree of the District Court;

10 **EXCEPTION #3: PERIOD OF USE**

11 31. Is in excess of IDWR's delegated authority as IDWR holds no authority to change the  
12 period of use established by the District Court;

13 **EXCEPTION #4: UNLAWFUL PROCEDURE**

14 32. In violation of Idaho Code § 42-1420 as it is unlawful for IDWR to overturn a right of  
15 use conclusively decreed in a general adjudication;

16 **EXCEPTION #5: ARBITRARY, CAPRICIOUS AND/OR ABUSE OF DISCRETION**

17 33. Removal of decreed right of use established as a condition by the District Court upon  
18 IDWR's later transfer approval is arbitrary, capricious and/or an abuse of discretion, as is the  
19 Department's failure to cite a basis for removal of the condition before the action was taken.  
20 That IDWR's rationale was offered after the Transfer Approval Notice was issued and only then  
21 in response to an inquiry made on behalf of the Petitioner, *see* Exhibit 26, that demonstrates this  
22 arbitrary action; and/or

23 **EXCEPTION #6: IDWR POLICY**

24 34. Action is inconsistent with IDWR policy, as specified in *Transfer Processing*  
25 *Memorandum No. 24*, dated December 21, 2009 (p. 3, ¶ 4): "For decrees, conditions that are no  
26 longer applicable should be noted in comments on the department's electronic record for the



1 right. However, a change to any element of a decreed water right requires filing an application  
2 for transfer, unless the appropriate court makes the change by amending the decree" (see Exhibit  
3 27) and consequently is arbitrary, capricious, and/or an abuse of discretion.

4 **REQUEST FOR RELIEF**

5 WHEREFORE, Seven High Ranch requests the Court to:

- 6 1. Vacate IDWR's approval of Transfer No. 81188, omitting the Early and Late Use  
7 Condition decreed to underlying Water Right Nos. 57-253, 57-268, 57-1064 and  
8 57-1065;
- 9 2. Remand that matter back to IDWR with orders to issue Transfer No. 81188 with  
10 the decreed Early and Late Use Condition decreed to underlying Water Right  
11 Nos. 57-253, 57-268, 57-1064 and 57-1065; and
- 12 3. For such other and further relief that this Court deems proper and just.

13  
14 DATED this 21 day of September, 2017.

15 SCHROEDER LAW OFFICES, P.C.

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