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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 82640 IN THE
NAME OF CLINTON ASTON

**MOTION TO DISMISS FONNESBECK
PETITION FOR REVIEW AND RESPONSE
TO EXCEPTIONS OF PRELIMINARY
ORDER FOR TRANSFER NO. 82640**

Applicant Clinton Aston, (hereinafter "Aston" or the "Applicant"), by and through his attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits this *Motion to Dismiss Fonnesebeck Petition for Review and Response to Exceptions to Exceptions or Preliminary Order For Transfer No. 82640*. The Fonnesebeck pleading was sent by email on Tuesday, September 3, 2019, at 5:24 p.m. This document was not timely served on Aston's counsel, the Department, or the other protestant. This motion is filed pursuant to the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), specifically, Rule 304.¹

¹ Shorthand references to rules in this pleading refer to those rules found at IDAPA 37.01.01.

ARGUMENT

The Fannesbeck document is a combined pleading, seeking to be both (1) a petition for exceptions to the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) and (2) a response to Aston’s exceptions timely submitted on August 19, 2019.

Fannesbeck’s petition for exceptions is not timely. The *Preliminary Order Approving Transfer* issued on August 5, 2019 is a preliminary order as defined in IDAPA 37.01.01.730.01 because it was “issued by a person other than agency head . . .,” which will become a final order of the agency “unless reviewed by the agency head (or the agency’s head’s designee) pursuant to Section 67-5245, Idaho Code.” The Hearing Officer is a person other than the agency head, and therefore, because it is a preliminary order, it is subject to an appeal within the agency to the agency head. The petition must be filed with the Department within fourteen days (14) after the service date of the *Preliminary Order* (Idaho Code § 67-5245(3) and IDAPA 37.01.01.730.01.c), which, in this case, is no later than 5:00 p.m. on August 19, 2019.

Fannesbeck’s petition for exceptions was submitted on September 3, 2019, at 5:24 p.m., and it not timely. Rule 304 provides the Department with the following discretion (with emphasis added): “Defective, insufficient, or **late pleadings** may be returned or **dismissed**.” Because the petition for exceptions was filed two weeks late, it should be dismissed.

As to the response to exceptions component to Fannesbeck’s pleading, it too was not timely submitted. Rule 730.01.d provides that opposing parties in a contested case “shall have fourteen (14) days to respond to any party’s appeal within the agency.” *Id.* The deadline to file a response to Aston’s exceptions was September 3, 2019, by 5:00 p.m. Fannesbeck’s pleading was not filed until 5:24 p.m. on September 3, 2019. For this reason, it should be dismissed.

Furthermore, and in the alternative, the portion of the Fannesbeck pleading relating to

ownership of Water Right Nos. 13-2209 and 13-4120 should be dismissed because it is not responsive to Aston's exceptions. Aston did not challenge in his exceptions any of the hearing officer's findings on these issues. Accordingly, to the extent the Fonnebeck pleading is accepted, it should still be dismissed because it is asserting arguments that are not responsive to Aston's exceptions. Instead, Fonnebeck appears to be using the ability to file a response to exceptions to insert new arguments not timely raised on appeal to the Director.

DATED this 17th day of September, 2019.

A handwritten signature in cursive script, reading "Robert L. Harris", positioned above a horizontal line.

Robert L. Harris, Esq.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2019, I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by the method indicated below.

DOCUMENT SERVED: MOTION TO DISMISS FONNESBECK PETITION FOR REVIEW AND RESPONSE TO EXCEPTIONS OF PRELIMINARY ORDER FOR TRANSFER NO. 82640

ORIGINAL VIA EMAIL

AND FIRST-CLASS MAIL TO: Gary Spackman, Director
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ATTORNEYS AND/OR INDIVIDUALS SERVED:

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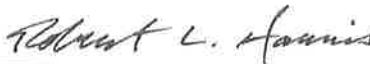
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