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RECEIVED
APR 23 2019
Department of Water Resources
Eastern Region

Attorneys for Clinton Aston

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
FONNESPECK PETITION FOR
RECONSIDERATION**

Applicant Clinton Aston, (hereinafter "Aston" or the "Applicant"), by and through his attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., herby moves to dismiss the *Petition for Reconsideration Jay Norman Fonneseck Protestant*¹ sent by email to the hearing officer in this matter by protestant Jay Fonneseck at 4:55 p.m. on Monday, April 15, 2019. This document was not timely served on Aston's counsel or the other protestants as described below.

This motion is filed pursuant to the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), specifically, rules 301, 302, 303, and 304.²

¹ This title is what was contained in the title portion of the case caption submitted by Fonneseck.

² Shorthand references to rules in this pleading refer to those rules found at IDAPA 37.01.01.

ARGUMENT

A petition for reconsideration is a “pleading” in a contested case before the Idaho Department of Water Resources (“IDWR” or “Department”). Rule 201. The Department’s Rules of Procedure describe how pleadings should be formatted and served. Rule 301 sets forth the form of the pleadings; Rule 302 mandates that “all documents intended to be part of the agency record for decision must be served upon the representative of each party of record” when the document is filed with the hearing officer; and Rule 303 mandates that the document must be “attached to or accompanied by proof of service . . .” If any of these rules are not followed, Rule 304 provides the hearing officer with the following discretion (with emphasis added): “Defective, insufficient, or late pleadings may be returned **or dismissed**.”

Fonnespeck was emailed directly concerning the above-described rules when the hearing officer emailed two of the other protestants in this matter pointing out these deficiencies—the Spradlins—on Friday, April 12, 2019 at 11:27 a.m. in response to the Spradlins letter (which letter appeared to be a petition for reconsideration). A copy of this email is attached hereto as **Exhibit 1**. Fonnespeck was copied on this email. The email placed the Spradlins—as well as any other remaining protestants—on notice of the following (bolding and underline in the original):

I am notifying you of these issues as soon as possible to allow you time to remedy the problems. By rule, petitions for reconsideration must be filed within 14 days of the service date of the preliminary order. In this case, the Preliminary Order Approving Transfer was issued on April 1, 2019, meaning that petitions for reconsideration are due on or before **April 15, 2019 at 5:00 pm**.

Importantly, from this email, the hearing officer already exercised his discretion to not accept deficient pleadings. Otherwise there would have been no need for the email to the Spradlins if he was going to accept the pleading with its deficiencies. Additionally, the email explained that the hearing officer sent the email “as soon as possible to allow you time to remedy the problems.”

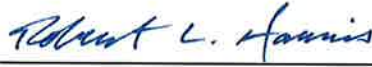
This notice to “remedy the problems” would not have been necessary if the hearing officer intended to accept the deficient pleading. As instructed in the hearing officer’s email, the Spradlins did remedy the deficiencies by timely emailing a corrected version of their petition for reconsideration to the parties and the hearing officer on April 15, 2019, at 3:45 p.m.

Despite the hearing officer’s clear description of what is required under the Department’s procedural rules provided by email to Fonnespeck, Fonnespeck emailed his petition for reconsideration to only the hearing officer on April 15, 2019, at 4:55 p.m. It is evident that Fonnespeck received the hearing officer’s prior email because he replied to the email to serve the pleading on the hearing officer. Fonnespeck did not properly serve his petition on the other parties, including the Applicant’s counsel, despite indicating that the pleading had been served by email on the certificate of service attached to Fonnespeck’s petition. It was not until April 18, 2019 that Applicant’s counsel learned that a petition for reconsideration from Fonnespeck had been filed. A copy of the email from Fonnespeck to the hearing officer that was forwarded to Applicant’s counsel is attached hereto at **Exhibit 2**. The email address for Applicant’s counsel (rharris@holdenlegal.com) is not on the **Exhibit 2** email.

Based on the hearing officer’s previous exercise of discretion in this contested case to inform the parties that he was “notifying [Spradlins] of these issues as soon as possible to allow [the Spradlins] time to remedy the problems,” the hearing officer should be consistent in his treatment of Fonnespeck’s petition for reconsideration. As Fonnespeck’s petition was not timely emailed to the other parties by 5:00 p.m. on April 15, 2019, it did not comply with the Department’s procedural rules described herein, and more importantly, was not in accord with the hearing officer’s clear instructions to the parties. For that reason, Fonnespeck’s petition for reconsideration should be dismissed and not considered by the hearing officer. There is no justifiable reason for

the hearing officer to vary from the instructions he provided to the Spradlins relative to Fonneseck's petition for reconsideration as all parties should be held to the same standard.

DATED this 23rd day of April, 2019.



Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 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 FONNESPECK PETITION
FOR RECONSIDERATION**

**ORIGINAL VIA
EMAIL TO:**

James Cefalo
Hearing Officer
Idaho Department of Water Resources
900 N. Skyline Dr., Suite A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov

ATTORNEYS AND/OR INDIVIDUALS SERVED:

J&F King Farms Inc.
Geraldine K. Gunnell
8169 W. Hwy 36
Weston, ID 83286

- ☒ Mail
- ☐ Hand Delivery
- ☐ Facsimile
- ☐ Courthouse Box
- ☐ Email

Shelly and William Spradlin
6995 W. 2200 S.
Weston, ID 83286

- ☒ Mail
- ☐ Hand Delivery
- ☐ Facsimile
- ☐ Courthouse Box
- ☒ Email

Courtesy Copy:
Bob White
7026 W. 2200 S.
Weston, ID 83286

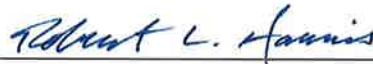
- ☒ Mail
- ☐ Hand Delivery
- ☐ Facsimile
- ☐ Courthouse Box
- ☐ Email

Courtesy Copy:
Kevin L. Olson
7806 W. 300 S.
Weston, ID 83286

- ☒ Mail
- ☐ Hand Delivery
- ☐ Facsimile
- ☐ Courthouse Box
- ☐ Email

Jay Norman Fannesbeck
6022 W. Hwy 36
Weston, ID 83286

- ☒ Mail
- ☐ Hand Delivery
- ☐ Facsimile
- ☐ Courthouse Box
- ☒ Email



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

Rob Harris

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Friday, April 12, 2019 11:27 AM
To: Shelly Spradlin
Cc: J Foncesbeck; Rob Harris
Subject: Petition for Reconsideration

Ms. Spradlin,

I just received your letter dated April 10, 2019. The document does not include a caption or a title. I assume you intended it to be a Petition for Reconsideration because it was mailed to me. A Petition for Reconsideration is a “pleading” in a contested case. The Department’s Rules of Procedure describe how pleadings should be formatted and served:

301. FORM OF PLEADINGS (RULE 301).

01. Pleadings. All pleadings, except those on agency forms, submitted by a party and intended to be part of an agency record should:

- a. Be submitted on white eight and one-half inch (8 1/2") by eleven inch (11") paper copied on one (1) side only;
- b. State the case caption, case number, if applicable, and title of the document;
- c. Include on the upper left corner of the first page the name(s), mailing and street address(es), and telephone and FAX number(s) of the person(s) filing the document or the person(s) to whom questions about the document can be directed; and
- d. Have at least one inch (1") left and top margins.

02. Form. Documents complying with this rule will be in the following form:

Name of Representative
Mailing Address of Representative
Street Address of Representative (if different)
Telephone Number of Representative
FAX Number of Representative (if there is one)
Attorney/Representative for (Name of Party)

BEFORE THE AGENCY
(Title of Proceeding)) CASE NO.)
)
) (TITLE OF DOCUMENT)

302. SERVICE ON PARTIES AND OTHER PERSONS (RULE 302).

All documents intended to be part of the agency record for decision must be served upon the representatives of each party of record concurrently with filing the original with the officer designated by the agency to receive filings in the case.

303. PROOF OF SERVICE (RULE 303).

Every document filed with and intended to be part of the agency record must be attached to or accompanied by proof of service by the following or similar certificate

304. DEFECTIVE, INSUFFICIENT OR LATE PLEADINGS (RULE 304).

Defective, insufficient or late pleadings may be returned or dismissed.

In its current form, your letter is insufficient. Please revise the document as needed to meet the requirements of Rules 301-303. Most importantly, I don't know whether Mr. Harris or Mr. Fannesbeck were served a copy of your letter. All pleadings must be served upon representatives for all other parties of record. **In this case, email service to the hearing officer and the other parties will be sufficient.** I am notifying you of these issues as soon as possible to allow you time to remedy the problems. By rule, petitions for reconsideration must be filed within 14 days of the service date of the preliminary order. In this case, the Preliminary Order Approving Transfer was issued on April 1, 2019, meaning that petitions for reconsideration are due on or before **April 15, 2019 at 5:00 pm.**

James Cefalo
Water Resources Program Manager
IDWR Eastern Region
(208) 525-7161

Rob Harris

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Thursday, April 18, 2019 1:21 PM
To: Rob Harris
Subject: FW: Petition for Reconsideration
Attachments: Reconsideration.docx

From: J Fonnesebeck [mailto:jfonnes@gmail.com]
Sent: Monday, April 15, 2019 4:55 PM
To: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Subject: Re: Petition for Reconsideration

On Fri, Apr 12, 2019 at 11:27 AM Cefalo, James <James.Cefalo@idwr.idaho.gov> wrote:

Ms. Spradlin,

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Telephone Number of Representative

FAX Number of Representative (if there is one)

Attorney/Representative for (Name of Party)

BEFORE THE AGENCY

(Title of Proceeding)

)

CASE NO.

)

) (TITLE OF DOCUMENT)

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James Cefalo

Water Resources Program Manager

IDWR Eastern Region

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