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**DEPARTMENT OF  
WATER RESOURCES**

*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

**RESPONSE TO FONNESBECK'S  
PETITION FOR REVIEW AND RESPONSE  
TO AMENDED 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 *Response to Fonnesbeck's Petition for Review and Response to Amended Preliminary Order for Transfer No. 82640* (the "Fonnesbeck Petition"). This petition is the same document that was untimely submitted on September 2, 2019, and asks the Director to review the *Amended Preliminary Order Approving Transfer* dated October 29, 2019 (the "Preliminary Order") issued by the hearing officer, James Cefalo (the "Hearing Officer").

## **I. ARGUMENT**

### **A. The Fonnesebeck Petition should be dismissed under Rule 304 because it was not signed.**

The process to file exceptions with the Director is governed by the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01).<sup>1</sup> Rule 304 provides the Department with the following discretion: “Defective, insufficient, or late pleadings may be returned or dismissed.”

The Fonnesebeck Petition should be dismissed as it was not signed by Fonnesebeck in violation of the Department’s procedural rules. The Fonnesebeck Petition was filed by email and at the end of document it only contains the typed name “Jay Norman Fonnesebeck” with no actual signature.

Rule 300 states that the “Department will accept electronic signatures and electronically signed communications complying with the requirements of Rules 306 through 311 and Sections 67-2351 through 67-2357, Idaho Code, for all communications, filings and transactions with the Department.”<sup>2</sup> Rule 306 goes on to say that “[f]or an electronic signature to be valid for use by the Department, it must be created by a technology that is accepted for use by the Department,” and Rule 307 goes on to describe the criteria for acceptable electronic signature technology. There is no rule that allows a simple typed name to be considered a signature under the Department’s procedural rules. Further, a typed name is easily replicated by others, and therefore, is not unique to the person using it and is not capable of verification. There is no evidence that Fonnesebeck’s typed name has been proposed to the Department or accepted by the Department as an electronic

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<sup>1</sup> Shorthand references to rules in this pleading refer to those rules found at IDAPA 37.01.01.

<sup>2</sup> Reference to Idaho Code §§ 67-2351 through 67-2357 in Rule 300 appears to be an error, as these statutes relate to the “Energy Facility Site Advisory Act.” For that reason, the focus on this motion is on the Department’s procedural rules.

signature as described under Rule 309. The requirement for signed pleadings is not unique to contested cases before the Department—all pleadings submitted in legal actions governed by the Idaho Rules of Civil Procedure must be signed. Idaho Rule of Civil Procedure 11(a) (“Every pleading, written motion, and other paper must be signed at least one attorney of record licensed in the State of Idaho, in the individual attorney’s name, or by a party personally if the party is unrepresented.”).

For these reasons, pursuant to Rule 304, which provides allowance for the dismissal of defective pleadings, the Motion should be dismissed.

**B. If considered on its merits, the Fannesbeck Petition does not provide sufficient bases to reverse the Hearing Officer’s findings of fact and conclusions of law contained in the *Amended Preliminary Order Approving Transfer*.**

The Fannesbeck Petition primarily focuses on matters associated with the ownership of Water Right No. 13-2209 (“13-2209”). 13-2209 is a licensed water right. Additionally, Fannesbeck challenges the Hearing Officer’s findings concerning the (1) the ownership of Water Right No. 13-4120 (“13-4120”); and (2) the validity of 13-4120.

Concerning ownership of 13-2209, Fannesbeck has continually attempted to collaterally attack the license for 13-2209 in an effort to have him declared as the proper owner of the portion of 13-2209 appurtenant to the Aston property. As described by the Hearing Officer:

Idaho Code § 42-220 states that water right licenses “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein.” The Department, therefore, is bound by previously-issued licenses. Except for clerical errors, or licenses that include a term limit or a condition authorizing subsequent review, the Department does not have the authority to reconsider the elements of a license after the appeal period has passed. The Idaho Supreme Court has declared that “finality in water rights is essential.” *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). To allow a water right license to be challenged years after the license is issued creates significant uncertainty for the owner of the water right.

*Preliminary Order* at 14. Based on this correct statement of the law, the Hearing Officer explained

that there is no evidence of a written conveyance of the portion of 13-2209 Fannesbeck claimed he owns. The Hearing Officer also correct analyzed the 2004 agreement Fannesbeck asserts is operative, and, in particular, he correctly found that the 2004 agreement was signed four months **after** the Schvaneveldts conveyed the irrigated farm property to Aston. *Id.* at 15. The Hearing Officer also correctly found that the 2004 agreement was not intended as a conveyance given its plain language, nor did it describe what portion of 13-2209 was to be conveyed. *Id.* at 15-16. The Fannesbeck Petition does not provide any legal basis to reverse the Hearing Officer on this matter.

As to the validity and ownership of the portion of 13-4120 associated with the NWNW of Section 9, Fannesbeck tries to have it both ways and in both cases, to the detriment of Aston. Initially he asserts that Exhibit 300—a recorded letter from the Fredericksens who used to own the NWNW of Section 9—was a valid conveyance of a part of 13-4120: “The Fredericksen letter does constitute a conveyance of water right 13-4120 under the doctrine of part performance and promissory estoppels.” Fannesbeck Petition at \*5. Here is the recorded letter:

276932

Idaho Department of Water Resources  
and/or

Recorded at the request of  
Law Fannesbeck  
Time: 5:00 Amount: \$ 10.00  
FEB 21 2019  
CAMILLE LARSEN, RECORDER  
By [Signature] Deputy  
Franklin County, Idaho

To whom it may concern,

We are the owners of the NW1/4 NW1/4 Sec. 9 T16S R38E in Franklin County and are aware that 40 acres of Claimed Water Right 13 4120 are appurtenant to this piece of land.

It is our desire that this portion of this particular water right be transferred to property owned by ElRay and Janice Balls, as it does represent a part of the proportional amount in which they are entitled, as they do own a 25% interest in the well that is the point of diversion for this water right.

We therefore grant and convey to ElRay and Janice or their assigns our permission to transfer the claimed water right that is appurtenant to this piece of land to their own land or that of their assigns.

[Signature] Zayne Fredrickson      [Signature] Terri Fredrickson

First, the Hearing Officer was correct to conclude that this document was not a valid conveyance of a portion of 13-4120. But more importantly, Fannesbeck is first arguing that there was a valid water right established on the NWNW of Section 9 that should be transferred to El Ray Balls. Then, in a complete reversal of this position, Fannesbeck argues in the next section of his brief that there is “absolutely no evidence” introduced that established a beneficial use water right under 13-4120 for 187 acres, which includes the NWNW of Section 9. *Id.* at \*5. Fannesbeck goes on to argue providing evidence of the manufacture date for the pump at Well #1 as evidence of the installation of the pump at Well #2 “is an act of deception on the part of Aston.” *Id.* These claims, of course, are completely contrary to a statement in Fannesbeck’s Petition just one page prior that “[e]very acre that Aston would consider irrigated on this farm has received water from one and only one source **and that is well #2 since June of 1962.**” *Id.* at 4. Aston did not perform an act of deception—his evidence was consistent with Fannesbeck’s position from the prior page.

As to the culvert and claims that there were water softener tanks on either end of the pipe that was through the culverts, we simply have no idea what Fannesbeck is talking about. As to the culvert itself, El Ray Balls, Gary Cahoon, and Clinton Aston testified about the existence of this culvert (and Aston provided pictures of the culvert and the mainline) through which portable mainline was placed to irrigate the NWNW. There is more than enough evidence in the record supporting a finding that the NWNW of Section 9 was irrigated prior to March 1963.

Finally, it is worth noting that Fannesbeck has not challenged the Hearing Officer’s forfeiture analysis.

## II. CONCLUSION

For the reasons set forth above, the Director should not reverse the portions of the *Preliminary Order* challenged by Fonnesbeck. Rather, the Director should only amend the *Preliminary Order* to allow for the irrigation of a combined 171 acres under 13-4120 and 13-8026 as requested in *Aston's Exceptions to Amended Preliminary Order Approving Transfer*.

DATED this 26<sup>th</sup> day of November, 2019.

A handwritten signature in blue ink, reading "Robert L. Harris", is 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 26<sup>th</sup> day of November, 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:    RESPONSE TO FONNESBECK'S MOTION FOR REVIEW  
AND RESPONSE TO AMENDED PRELIMINARY ORDER  
FOR TRANSFER NO. 82640**

### ORIGINAL VIA EMAIL

**AND FIRST-CLASS MAIL TO:** Gary Spackman, Director  
Rosemary DeMond, Administrative Assistant  
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