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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BOISE RIVER OUTDOOR
OPPORTUNITIES, LLC, an Idaho limited
liability company,

Petitioner

v.

THE IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

IN THE MATTER OF APPLICATION FOR
PERMIT NO. S63-21092 IN THE NAME OF
BOISE RIVER OUTDOOR
OPPORTUNITIES

Case No. CV01-24-04576

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

The city of Boise City (the City) by and through its counsel of record, hereby respectfully submits this MEMORANDUM IN SUPPORT OF MOTION TO DISMISS pursuant to Idaho Rule of Civil Procedure 84(o).¹

¹ The City joins in the Motion to Dismiss filed by the Idaho Department of Water Resources on May 16, 2024, and incorporates by reference the arguments advanced by the Department in its Memorandum in Support of Motion To Dismiss as if fully set forth herein.

BACKGROUND

Pursuant to Idaho’s Stream Channel Alteration Act, Idaho Code 42-3801 *et. seq.*, and IDAPA 38.07.07, the City filed a “Joint Application for Permit No. S63-21092 Boise River – WWP Maintenance” (“Application”) with the Department of Water Resources (“Department”) on October 23, 2023, seeking to authorize repairs and alterations to the City’s Boise River Whitewater Park Phase II. R. 32-52.² The proposed repairs and alterations intend to resolve design and construction issues with Whitewater Park Phase II. Between November 8, 2023, and December 28, 2023, Boise River Outdoor Opportunity, LLC (“BROO”) requested public records from the Department and emailed written questions and comments concerning the proposed project to the Department. R. 53-67. On January 24, 2024, the Department issued *Permit No. S63-21092* (“Permit”) to the City approving the City’s Application. R. 68-125. At no time prior to issuance of the Permit did BROO file a Motion to Intervene with the Department pursuant to IDAPA 37.07.01.350 or otherwise seek to become a “party” to the proceedings before IDWR.

On February 7, 2024, BROO filed a *Motion for Reconsideration* with the Department regarding the Permit. R. 129-217. The Motion for Reconsideration does not ask for nor seek a hearing before the Director of the Idaho Department of Water Resources (“Director”). The Department did not respond to the Motion.

On March 13, 2024, BROO filed its *Petition for Judicial Review*.³ Over a month later, on

² The Whitewater Park Phase II was originally constructed in 2019 pursuant to Stream Channel Alteration Permit No. S63-20701. R. at 77; 94. This phase of the Park is constructed in conjunction with the diversion works for the Farmer’s Union Canal on the Boise River and consists, among other features, of an adjustable wave and a tuber by-pass. R. at 94-96.

³ The Petition is captioned “IN THE MATTER OF APPLICATION FOR PERMIT NO. S63-21092 IN THE NAME OF BOISE RIVER OUTDOOR OPPORTUNITIES” however, the Permit is issued in the name of the City of Boise not BROO. The Department has moved to correct this error.

April 15, 2024, BROO served the Department with notice of its *Petition*. At no time has BROO served the City with a copy of the *Petition*. The City only became aware of the *Petition* when IDWR advised the City to check the SRBA Court’s docket.⁴

LEGAL STANDARDS

In *Laughy v. Idaho Dep’t of Transp.*, 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010) the Court reiterated the longstanding rule that unless expressly authorized by statute, state agency action is not subject to judicial review. *See also*, Id. R. Civ. P. 84. For a right to judicial review to exist, it must be found in either the substantive statutes of the agency itself (in this case Title 42) or more generally in the Idaho Administrative Procedures Act (hereinafter “the APA”), Idaho Code § 67-5270. The right to review is limited, and any person seeking such relief must show first that they are entitled to review, that prior to seeking review they have exhausted their administrative remedies, Idaho Code § 67-5271, and that they have complied with any procedural requirements for seeking such relief. In this case the Petitioner has failed on all three items, and Rules 84(o) and 12(b)(1) of the Idaho Rules of Civil Procedure require this Court to dismiss this *Petition*.

ARGUMENT

I. BROO IS NOT ENTITLED TO JUDICIAL REVIEW UNDER IDAHO CODE § 42-3805.

Idaho’s Stream Channel Alteration Act, Idaho Code § 42-3801 *et. seq.* governs the process for issuance of a Stream Channel Alteration Permit and the right of judicial review. Per Idaho Code § 42-3805, the Director of IDWR is first charged with evaluation and issuance of the permit. If the

⁴ Idaho Rule of Civil Procedure 84(d) requires a petition for judicial review of an agency action to be served on all parties to the agency action. The City, as the properly named applicant, was entitled to service in this matter and while the failure to serve is not jurisdictional, it may be subject to sanction. *See* Id. R. Civ. P. 84(n). In addition to the reasons for dismissal set forth herein, dismissal is also an appropriate sanction for the Petitioner’s failure to follow the Idaho Rules of Civil Procedure.

“applicant” is not satisfied with the Director’s determination regarding its application, the “applicant” may request a hearing before the Idaho Water Resources Board. Judicial review is only available at the conclusion of Board’s decision regarding the permit.

Any applicant or other person appearing at a hearing shall have the right to have the proceedings of the board and the decision of the director reviewed by the district court in the county where the stream channel alteration is proposed. With the exception that the matter may be reviewed by the district court in the county where the stream channel alteration is proposed, judicial review shall be had pursuant to chapter 52, title 67, Idaho Code.

Idaho Code § 42-3805. Review under this section is thus limited to two classes of persons. The “applicant” and “other person[s] appearing at a hearing” before the Board. BROO is not the “applicant.” *See* IDAPA 37.01.01.151. No hearing before the Board was requested by the Applicant and none was held. Since BROO is neither the “applicant” nor a person appearing at a hearing before the Board, Idaho Code § 42-3805 does not provide an avenue for judicial review.

II. BROO IS NOT ENTITLED TO JUDICIAL REVIEW UNDER IDAHO CODE § 42-1701A.

Actions of the Director are also subject to review pursuant to Idaho Code § 42-1701A. Generally it states: “[u]nless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director... including action upon any application for a permit,... who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.” 42 Idaho Code § 42-1701A(3). It goes on to require that in order to seek such a hearing, the person “shall file... a written petition stating the grounds for contesting the action by the director and requesting a hearing.” *Id.* (emphasis added). It instructs that after providing notice, the Director shall conduct a hearing in accordance with the APA. *Id.* “Judicial review of any final order of the director issued following the hearing shall be had pursuant to

subsection (4) of this section.” *Id.* (emphasis added).

Under the circumstances of this case, this provision provided BROO the opportunity to participate in the process for issuance of the permit and then to seek judicial review. BROO was not provided a hearing before the Board prior to the issuance of the permit, because only an applicant can request such under Idaho Code § 42-3805. Thus, BROO was a person “who ha[d] not previously been afforded an opportunity for a hearing.” But BROO never requested a hearing in conformity with the statute and thus is not entitled to judicial review.⁵ Because no hearing was requested and none was held, judicial review is not available under Idaho Code § 42-1701A.

III. BROO IS NOT ENTITLED TO JUDICIAL REVIEW UNDER IDAHO CODE § 67-5270(3).

More generally the APA allows for judicial review for any person aggrieved by a final agency action other than an order in a contested case, Idaho Code § 67-5270(2), or for a “party aggrieved by a final order in a contested case.” Idaho Code § 67-5270(3). A “contested case” is defined as: “a proceeding that results in the issuance of an order.” Idaho Code § 67-5201(8). *See also* Idaho Code § 67-5240. An “order” is in turn defined as: “an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” Idaho Code § 67-5201(15). It is beyond question that a stream channel alteration permit is an “order”⁶ and the process for issuance of the permit is a “contested

⁵ BROO may argue that its “Petition for Reconsideration” met the requirements of Idaho Code § 42-1701A but an exhaustive reading of the Petition reveals that at no point does it “request a hearing” in any form or manner. *See* R. 129-217.

⁶ An agency action is an “order” where the agency is charged by statute with authority to determine the issue, and the action meets the definition of an “order.” *See Lochsa Falls L.L.C. v. State*, 147 Idaho 232, 237, 207 P.3d 963, 968 (2008). IDWR is statutorily charged with issuing stream channel alteration permits by Idaho Code § 42-3805 and the permit otherwise meets the definition of an “order” because it determines the legal rights, duties and privileges of the City of Boise to engage in alteration of a stream channel.

case.” Thus, review of this action is governed by Idaho Code § 67-5270(3) and only available to a “party” to such a case.

In *Laughy v. Idaho Department of Transportation*, 149 Idaho 867, 243 P.3d 1055, the Court found that a person submitting comments and objections to an agency about a proposed action was not entitled to petition for judicial review because they were not a “party” to the contested case. There, individuals who had submitted comments and lodged objections to the issuance of overlength permits sought judicial review. The Court reasoned that Idaho Code § 67-5270(3) was applicable because the permits were an “order” and the result of a contested case. Petitioners had never intervened in the case or otherwise endeavored to become “parties” and the court ruled that merely submitting comments and objections did not initiate a contested case or otherwise make them “parties.” *See also, Vickers v. Idaho State Board of Veterinary Medicine*, 167 Idaho 306, 469 P.3d 634 (2020) (letter to agency labeled as a “complaint” did not initiate a contested case).

In the present case, BROO is much like the petitioners in *Laughy*. The email correspondence and written comments it submitted to the Department did not meet the requirements of the Department’s Rules for intervention and did not request a hearing as required by Idaho Code § 42-1701A. Since it was not a “party” to the contested case, BROO cannot seek judicial review pursuant to Idaho Code § 67-5270(3).

IV. BROO HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES AND THIS CASE IS BARRED BY IDAHO CODE § 67-5271

Having failed to make itself a party to the process, BROO has likewise failed to exhaust its administrative remedies as required by Idaho Code § 67-5271.

The doctrine of exhaustion serves important policy considerations, including “providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative process established by the Legislature and the administrative body, and

the sense of comity for the quasi-judicial functions of the administrative body.” Consistent with these principles, courts infer that statutory administrative remedies implemented by the Legislature are intended to be exclusive.

Park v. Banbury, 143 Idaho 576, 579, 149 P.3d 851, 853–854 (2006) (quoting *Regan*, 140 Idaho at 724, 100 P.3d at 618, internal citations omitted).

Under both Idaho Code § 42-3805 and § 42-1701A, a person wishing to ultimately obtain judicial review of a stream channel alteration permit must seek some form of hearing before either the Board or the Director and only after such hearing, is review available. As noted by this Court, failing to seek a hearing under Idaho Code § 42-1701A and avail oneself of the potential administrative remedy found therein bars review by the Court. *Order on Motion to Determine Jurisdiction, at 5, Sun Valley Co. v. Spackman*, No. CV01-16-23185 (Ada Cnty. Dist. Ct. Feb. 16, 2017).

CONCLUSION

BROO has failed to meet the requirements for judicial review set forth in both Title 42 and Title 67 of Idaho Code. The City respectfully requests this Court to dismiss this matter in its entirety.

DATED this 21st day of May, 2024.

OFFICE OF THE CITY ATTORNEY

/s/ *Darrell G. Early*

DARRELL G. EARLY
Deputy City Attorney
Attorney for City of Boise

CERTIFICATE OF SERVICE

I hereby certify that I have on this 21st day of May 2024, I electronically filed the foregoing with the Clerk of Court using the iCourt system which sent a Notice of Electronic Filing to the following persons:

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/s/ Darrell G. Early

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