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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 THE CITY OF BOISE	Case No. CV01-24-04576 **REPLY 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 REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS pursuant to Idaho Rule of Civil Procedure 84(o).

INTRODUCTION

BROO's Opposition Memos[1] collectively make four arguments.

1. The IDWR Stream Channel Alteration Permit is not an "order" in a contested case under Idaho Code § 67-5201(40) because there was no "adjudicative procedure" and thus, review is governed by Idaho Code § 67-4270(2) rather than § 67-4270(3).
2. BROO is entitled to review as a "party" to the proceeding because it submitted comments, met with IDWR and filed "Motion for Reconsideration."
3. Idaho Code § 42-1701A(4) allows for judicial review by "any person aggrieved" by a decision of the director and therefore neither the exhaustion requirement of Idaho Code § 67-5271, nor the requirement to be a "party" to a contested case under § 67-5270(3) are applicable to this proceeding.
4. That exhaustion of administrative remedies is not required because it would be futile.

Each of these arguments reflect a misunderstanding of Idaho law and should be rejected.

ARGUMENT

A. A STREAM CHANNEL ALTERATION PERMIT IS AN ORDER RESULTING FROM A CONTESTED CASE.

BROO argues that a stream channel alteration permit is not an order in a contested case and thus, Idaho Code § 67-5270(3) and *Laughy* are not applicable because a "contested case involves a proceeding that results in an order following a hearing or similar adjudicative process." *IDWR Opposition at 4*. This argument was plainly rejected in *Laughy.*

The Dissent asserts that only formally adjudicated cases are contested cases under

[1] The City and IDWR filed largely similar motions to dismiss but due to timing, BROO has filed separate responses to each. For purposes of judicial economy this Memorandum will address arguments raised in both BROO's Memorandum in Support of Opposition to Boise City's Motion to Dismiss dated June 5, 2024 ("*City Opposition Memo*") and BROO's Memorandum In Support of Opposition to the Idaho Department of Water Resources Motion to Dismiss, dated May 31, 2024 ("*IDWR Opposition Memo*").

> the IAPA. To the contrary, no statute or rule makes formal proceedings a prerequisite to a contested case. A contested case is defined both by statute and by the Rules as a "proceeding by an agency ... that may result in the issuance of an order." *Id.* § 67–5240; *see also* IDAPA 04.11.01.005.06 (stating that a contested case is a "proceeding which results in the issuance of an order"). Moreover, Rule 50 states that the rules governing both informal and formal proceedings apply to agencies in contested cases. IDAPA 04.11.01.050.
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> This Court has never otherwise suggested that only formally adjudicated cases are contested cases. *See Barron v. Idaho Dep't of Water Res.,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001) (stating that "*all proceedings* by an agency ... that may result in the issuance of an 'order' " are governed by the IAPA (emphasis added)); *Dupont v. Idaho State Bd. of Land Comm'rs,* 134 Idaho 618, 622, 7 P.3d 1095, 1099 (2000) ("I.C. § 67–5240 defines *any proceeding* that may result in an order as a contested case, unless otherwise provided." (emphasis added)). Whether formal procedures were followed is irrelevant to the definition of a contested case.
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> * * *
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> "Proceedings that result in the issuance of an order are contested cases. Idaho Code § 67–5240."

Laughy, 149 Idaho at 872, 243 P.3d at 1060.

A stream channel alteration permit is very much an "order" because it affects the legal interest of the applicant, the City of Boise. *See* Idaho Code § 67-5201(40). It is irrelevant what process is used for the issuance of the permit.

B. <u>BROO WAS NEVER A PARTY TO THE PROCEEDINGS BEFORE IDWR.</u>

BROO asserts that it was a "party" to the proceedings before IDWR because it submitted comments to IDWR, met with IDWR employees, was provided a copy of the Permit and, after the permit was issued, filed a Motion for Reconsideration. *IDWR Opposition Memo at 4*. Like the actions taken by the petitioners in *Laughy v. Idaho Department of Transportation*, 149 Idaho 867, 243 P.3d 1055 (2010), these acts fail to make BROO a "party to a contested case" as required by Idaho Code § 67-5270(3).

Idaho Code § 67-5201(16) defines "Party" as: "each person or agency named or admitted as a party <u>or properly seeking and entitled as of right to be admitted as a party</u>." (emphasis

added). BROO extrapolates from this that because they "sought to be a party" they are a "party*." IDWR Opposition Memo at 4.* BROO ignores, however, the plain language of this section that it must "properly seek" and be "entitled as of right to be admitted as a party." BROO did not "properly seek" to be admitted as a party. The proper process for seeking such status is to file a motion to intervene under IDAPA 37.01.01.200 during the course of the proceeding leading to the issuance of the permit. Or, in the case of IDWR proceedings where a hearing was not previously available, to file a request for hearing as specified in Idaho Code § 42-1701A. BROO did neither of these things and thus did not "properly" seek to be admitted as a "party." As illustrated by *Laughy*, submitting written comments, even comments opposing an action, does not make a person a "party." Attending meetings does not make a person a party. Conversing and corresponding with staff does not make one a party. The fact that IDWR sent a courtesy copy of the permit to BROO is irrelevant to whether it "properly" sought and was entitled to be admitted as a party.[2]

BROO asserts that filing something styled as a Motion for Reconsideration makes it a "party." As explained by IDWR in its Brief in Support of Motion to Dismiss, Idaho Code § 67-5243(3) only allows motions for reconsideration to be filed by a "party" to the proceeding. As explained above, BROO was not a "party" at the time it filed the motion because it had not properly sought to be admitted as a party. The motion was properly ignored by IDWR. It is likewise telling that even in filing the motion for reconsideration, BROO did not serve the City of Boise (R. at 000133), evidencing that even in filing this document, BROO did not treat the matter as a contested

[2] Relying upon the Declaration of Adam Bass, BROO argues that during a February 1, 2024, meeting, IDWR staff referred to BROO as a "stakeholder" as an admission that it was a "party." IDWR Opposition Memo at 5. Consideration of this Declaration in response to a Motion to Dismiss on a Petition for Judicial Review where the facts are limited to the record compiled by the agency is inappropriate. Regardless, being considered a "stakeholder" is not the same as being a "party."

case proceeding or act like a party. *See* IDAPA 37.01.01.053.02.a..

In *Vickers v. Idaho Board of Veterinary Medicine*, 167 Idaho 306, 469 P.3d 634 (2020) the Idaho Supreme Court rejected arguments by the Petitioner that filing a document styled as a "complaint" initiated a contested case. BROO makes a similar failing argument. Styling something as a Motion for Reconsideration which is only available to a "party" in the first instance under Idaho Code § 67-5243, is not the way to "properly" seek to be admitted as a party. Because BROO was not a "party," in the first instance it cannot use a "Motion for Reconsideration" to bootstrap itself into such status.

Finally, BROO did not show and cannot show that it was "entitled as of right to admitted as a party." Being interested in a permit or even having an interest affected by a permit does not make it "entitled as of right to be admitted as a party." The petitioners in *Laughy* consisted in part of businesses that operated along Highway 12 and would be impacted by the overlength permits. Despite having an interest that was potentially adversely impacted the Court still concluded that their failure to follow the proper process for intervention barred review under Idaho Code § 67-5270(3). *Laughy*, 149 Idaho at 875, 243 P.3d at 1063.

In sum, BROO could have made itself a party by either moving to intervene or by filing a request for a hearing under Idaho Code § 42-1701A. Having failed to do so, it should not be considered a party for purposes of Idaho Code § 67-5270(3).

C. BROO MUST EXHAUST ADMINISTRATIVE REMEDIES BY REQUESTING A HEARING UNDER IDAHO CODE § 42-1701A.

Idaho Code § 67-5271 requires that BROO exhaust its administrative remedies before seeking judicial review.

> 1) A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.

Idaho Code § 67-5271(1). As explained in *Park v. Banbury,* 143 Idaho 576, 149 P.3d 851 (2006),

> 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.

Id. At 579, 149 P.3d at 853-54.

BROO argues that it is not required to exhaust its remedies because Idaho Code § 42-1701A allows "any person aggrieved by a final decision or order of the director" to seek judicial review. *City Opposition Memo at 3.* BROO is mistaken.

Idaho Code § 42-1701A(4) specifically states that judicial review will be conducted in accord with Title 67, Chapter 52, Idaho Code. This language therefore specifically incorporates the requirement of exhaustion of administrative remedies found in Idaho Code § 67-5271. Idaho Code § 42-1701A provided an administrative process by which BROO could have sought further consideration by the Director of the issues it wished to raise. Failing to seek this recourse bars consideration of this Petition for Judicial Review. *Order on Motion to Determine Jurisdiction, at 5, Sun Valley Co. v. Spackman,* No. CV01-16-23185 (Ada Cnty. Dist. Ct. Feb. 16, (2017).

D. BROO IS NOT ENTITLED TO JUDICIAL REVIEW BECAUSE IT DID NOT SEEK A HEARING UNDER IDAHO CODE § 42- 1701A.

BROO also argues that because Idaho Code § 42-1701A(4) allows any "person aggrieved" by a decision of the director to have judicial review, being a "party" is not required and that *Laughy* is inapplicable. *See City Opposition Memo at 3; IDWR Opposition Memo at 4*. But once again this argument ignores the incorporation of Title 67, Chapter 52 into section 1701A(4) and just as importantly ignores the language of Idaho Code § 42-1701A(3) and Idaho

Code § 42-3805.

Idaho Code § 42-1701A(3) clearly states: "Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section." This language requires that a hearing be held before judicial review is available. Confirming this in the context of stream channel alteration permits, Idaho Code § 42-3805 limits judicial review of stream channel alteration permits to the "applicant" and "any person appearing at a hearing." It is thus apparent that judicial review of a stream channel alteration permit must follow a hearing and when no such hearing is sought, it must be denied.

E. EXHAUSTION OF ADMINISTRATIVE REMEDIES WOULD NOT HAVE BEEN FUTILE.

Finally, BROO suggests that Idaho Code § 67-5271 should not apply because holding a hearing before a biased agency would have been futile. *See IDWR Opposition Memo at 6.* This conclusory allegation undermines "the opportunity for mitigating or curing errors without judicial intervention," *Laughy*, 149 Idaho at 874, 243 P.3d at 1062, and deprives the Court of the concomitant benefit of developing an adequate record for judicial review. Because BROO failed to request a hearing or otherwise make itself a proper party, its allegations were never adjudicated by the Director of IDWR. Had BROO availed itself of the administrative process available under IDWR's contested case rules, and Idaho Code § 42-1701A, the City would have seen the Motion, briefing would have been submitted, and the decision of the Department (whatever it may have turned out to be) would have been made on a complete record where both the legal and factual assertions of BROO were subject to response and legal analysis. As it stands, this Court has only a minimal and one-sided record regarding the issues raised by BROO in its comments. *See Laughy*, 149 Idaho at 874, 243 P.3d at 1062 ("If Respondents had formally intervened, the agency could have brought its expertise to bear in considering the parties' competing interests, heard

Respondents' evidence and testimony, and corrected substantive mistakes.").

BROO's reliance on the decision in *Owsley v. Idaho Industrial Comm'n*, 141 Idaho 129, 106 P.3d 455 (2005) is misplaced. While recognizing that exhaustion is not required if the proceeding would be before a biased decisionmaker, the Court held that conclusory allegations of bias were not sufficient and that specific facts must be plead in the complaint. Importantly, the Court rejected statements contained in affidavits that were filed after the fact and looked solely to the pleadings. *Owsley,* 141 Idaho at 137, 106 P.3d at 463. BROO has attempted to support its allegations of bias with the Declaration of Adam Bass. Like the Court in *Owsley*, this Court cannot and should not consider these extra record statements. *See* footnote 2 supra. Focusing on the allegations of bias contained in the pleadings (that the Commission had stated it didn't think there was liability), the Court in *Owsley* rejected the claim of bias, finding that even if true it did not support a claim of bias sufficient to avoid the exhaustion doctrine. *Id.* BROO's evidence contained in the record of this proceeding is even more tenuous than that in *Owsley.* BROO asks this Court to find that statements allegedly made by staff members at IDWR concerning his legal arguments show evidence of bias by the Director of IDWR. No such inference should be made. In fact, the very purpose of Idaho Code § 42-1701A is to provide the Director an opportunity to review staff decisions and either affirm or correct such. Similar to *Laughy*, this Court should reject any claims of futility and dismiss this Petition.

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 12th day of June, 2024.

OFFICE OF THE CITY ATTORNEY

/s/ Darrell G. Early
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Attorney for City of Boise

CERTIFICATE OF SERVICE

I hereby certify that I have on this 20th 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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