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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,

and

CITY OF BOISE,
Intervenor.

Case No. CV01-24-04576

**DEPARTMENT'S BRIEF IN SUPPORT
OF MOTION TO DISMISS**

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

Respondent, the Idaho Department of Water Resources (the “Department”), files this brief pursuant to Idaho Rule of Civil Procedure (“I.R.C.P.”) 84(o) in support of the Department’s concurrently filed *Motion to Dismiss*. The motion is brought pursuant to I.R.C.P. 12(b)(1) and other applicable law discussed below. This Court should dismiss Boise River Outdoor Opportunity, LLC’s (“BROO”) *Petition for Judicial Review* (“*Petition*”) for lack of jurisdiction because BROO was not a party to the underlying application process and failed to exhaust its available administrative remedies.

BACKGROUND

On October 23, 2023, the City of Boise (“City”) filed its *Joint Application for Permits* (“*Application*”) with the Department to conduct a stream channel alteration to the City of Boise’s Whitewater Park on the Boise River. R. 34–52. On December 28, 2023, BROO sent a memorandum providing comments concerning the proposed project to the City and the Department. R. 64–67.

On January 24, 2024, the Department issued *Permit No. S63-21092 Boise River – WWP Maintenance* (“*Permit*”) to the City approving the City’s *Application* pursuant to its statutory authority under Idaho Code § 42-3805 and the Department’s Stream Channel Alteration Rules (IDAPA 37.03.07). R. 68–125.

On February 7, 2024, BROO filed a *Motion for Reconsideration* (“*Motion*”) with the Department regarding the *Permit*. R. 129–217. Because Idaho Code § 67-5243(3) only authorizes a “party” to file a motion for reconsideration and because BROO was not a party to the action, the Department did not act on the *Motion*.

On March 13, 2024, BROO filed its *Petition* with the Ada County Fourth Judicial District Court. On March 14, 2024, the *Petition* was subsequently reassigned “to the presiding judge of

the Snake River Basin Adjudication [(“SRBA”)] District Court of the Fifth Judicial District.”

Notice of Reassignment SRBA. The *Petition* was reassigned pursuant to an Idaho Supreme Court *Administrative Order* dated December 9, 2009, declaring that all petitions for judicial review of any decisions of the Department must be assigned to the SRBA District Court.

On April 15, 2024, BROO served the Department with notice of its *Petition*.

LEGAL STANDARDS

Generally, “[a]ctions by state agencies are not subject to judicial review unless expressly authorized by statute.” *Laughy v. Idaho Dep’t of Transp.*, 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010) (citing I.R.C.P. 84(a)(1)). District courts have subject matter jurisdiction over petitions for judicial review brought under the Idaho Administrative Procedures Act (“APA”), which “governs judicial review of agency actions.” *Id.* The APA offers two circumstances in which a petition for judicial review of an agency action may be permitted. I.C. § 67-5270(1). First, “[a] person aggrieved by final agency action other than an order in a contested case is entitled to judicial review” I.C. § 67-5270(2). Second, “[a] party aggrieved by a final order in a contested case decided by an agency . . . is entitled to judicial review” I.C. § 67-5270(3). However, a petition for judicial review may not be filed until “that person has exhausted all administrative remedies available with the agency” I.C. § 67-5271(1). If the court lacks jurisdiction to consider a petition for judicial review pursuant to the APA, the court must dismiss the case for lack of jurisdiction. *Laughy*, 149 Idaho at 876–77, 243 P.3d at 1064–65.

ARGUMENT

This Court should dismiss the *Petition* because (1) Idaho Code § 67-5270(2) does not apply; (2) the Court lacks jurisdiction under Idaho Code § 67-5270(3) since BROO was not a party to the application process; and (3) BROO failed to exhaust its administrative remedies with the Department as an aggrieved person under Idaho Code § 42-1701A(3). Because this Court lacks jurisdiction, the *Petition* must be dismissed.

I. **Section 67-5270(2) does not apply because the *Permit* constitutes an “order in a contested case.”**

The APA entitles “[a] person aggrieved by final agency action *other than an order in a contested case*” to judicial review. I.C. § 67-5270(2) (emphasis added). If an aggrieved person files a petition for judicial review under this subsection, the person “must be challenging a final agency action that is *not* an order in a contested case” *Laughy*, 149 Idaho at 870, 243 P.3d at 1058 (emphasis in original). The *Petition* filed by BROO is not reviewable under subsection (2) because, as explained below, the *Permit* is an “order in a contested case.”

A contested case exists when there is “[a] proceeding by an agency . . . which may result in the issuance of an order.” I.C. § 67-5240. An agency action constitutes a contested case when two elements are present: “(1) the agency must be empowered to determine the particular issue, and (2) the action must fit the statutory definition of an ‘order.’” *Laughy*, 149 Idaho at 872, 243 P.3d at 1060 (citations omitted). By establishing that the underlying matter was a contested case, the Department will show that the issued *Permit* constitutes an order of the agency. Therefore, Idaho Code § 67-5270(2) does not apply.

A. The Department is the State agency empowered to determine the particular issue in this case.

An “agency” is statutorily defined as a “state board, commission, department or officer authorized by law to make rules or to determine contested cases” I.C. § 67-5201(3). The Legislature created the Department to “be an executive department of the state government.” I.C. § 42-1701(1). The Legislature also established the Idaho Water Resource Board (“Board”) “within the department of water resources.” I.C. § 42-1732. Throughout the many chapters of Title 42, Idaho Code, the Legislature repeatedly authorized the Department and the Board to make rules and determine contested cases. *See, e.g.*, I.C. §§ 42-1805, 42-3803(c), 42-1720(4), 42-3805; *see generally* IDAPA 37.01.01. Therefore, the Department is unquestionably a State “agency.”

The Legislature empowered the Department with the authority to issue permits for stream channel alterations under Title 42, Chapter 38, Idaho Code. Specifically, the Legislature requires that any person interested in a stream channel alteration project must apply for a permit with the Department. I.C. § 42-3803. Once the Department receives an application for a stream channel alteration permit, the Department processes and considers the application in accordance with the Stream Channel Alteration Rules promulgated by the Board—IDAPA 37.03.07. *See* I.C. § 42-3803(c) (authorizing the Board to “adopt, revise and rescind” rules for stream channel alternation). As prescribed by the Legislature, the Director of the Department will investigate and “prepare and forward to the applicant his decision approving the application in whole or in part or upon conditions, or rejecting the application.” I.C. § 42-3805.

Therefore, the first element of a contested case is met because the Department is the State agency empowered by the Legislature to issue stream channel alteration permits.

B. The stream channel alteration *Permit* at issue fits the statutory definition of an “order.”

An “order” is statutorily defined as “an agency action of particular applicability that determines the legal rights . . . or other legal interests of one (1) or more specific persons.” I.C. § 67-5201(15). Similar to the process for determining whether an agency proceeding constitutes a contested case, the Idaho Supreme Court implemented a two-step analysis to determine whether the definition of an order applies: (1) “the Legislature must have empowered the agency to determine the particular issue”; and (2) “the decision must determine ‘the legal rights . . . or other legal interests’ of one or more persons.” *Laughy*, 149 Idaho at 871, 243 P.3d at 1059 (quoting *Westway Constr., Inc. v. Idaho Transp. Dep’t*, 139 Idaho 107, 112, 73 P.3d 721, 726 (2003)).

The first element must be met prior to the second element because if an agency does not have authority over a particular issue, then the agency cannot issue an order regarding a person’s legal rights. *Westway Const., Inc.*, 139 Idaho at 112, 73 P.3d at 726. The first step for determining whether an agency action is an order is substantively identical to the first step for determining whether an agency proceeding is a contested case. For the reasons outlined in Section I.A. above, the first element of an order is met in this case because the Department is a State agency authorized by the Legislature to issue stream channel alteration permits.

Under the second element, an agency’s decision to conditionally approve or deny requested permits impacts a person’s legal rights or interests. *Laughy*, 149 Idaho at 871, 243 P.3d at 1059. In *Laughy*, the Court concluded that the second element of an order was met because issuing the overlegal permit would specifically impact the applicant’s legal right to transport its cargo on the state highway. *Id.* Because the overlegal permit constituted an “order in a contested

case,” the Court lacked jurisdiction over the petition for judicial review under Idaho Code § 67-5270(2).

Similar to *Laughy*, the Department’s decision to approve, conditionally approve, or reject a stream channel alteration application impacts a potential permittee’s legal rights and interests. *See* I.C. § 42-3805. Specifically, the Department’s decision to issue the conditional *Permit* to the City directly impacted the City’s legal rights and interests in making modifications to the Whitewater Park for its citizens and users.¹ Because the *Permit* impacted the City’s legal rights and interests and the Legislature empowered the Department to issue the stream channel alteration permit, the *Permit* constitutes an “order in a contested case.” Therefore, because the *Permit* is an order in a contested case, Idaho Code § 67-5270(2) does not apply.

II. This Court lacks jurisdiction under Idaho Code § 67-5270(3) because BROO was not a party to the application process.

This Court lacks jurisdiction under Idaho Code § 67-5270(3) because BROO was not a party to the application process that resulted in the conditional *Permit* being issued to the City. Section 67-5270(3) states that “[a] party aggrieved by a final order in a contested case decided by an agency . . . is entitled to judicial review.” (emphasis added). The APA defines “party” as “each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.” I.C. § 67-5201(16). The Department’s procedural rules define “parties” as “applicants, petitioners, respondents, protestants, or intervenors.” IDAPA

¹ Without the *Permit*, the City would have been estopped from pursuing its goals of altering the Boise River to provide for “a reliable recreational experience for all users.” City of Boise, *Phase 2 Wave Modifications Update – February 2024*, <https://www.cityofboise.org/departments/parks-and-recreation/parks/ja-and-kathryn-albertson-family-foundation-boise-whitewater-park/phase-2-wave-modifications-update-february-2024/> (last visited Mar. 29, 2024).

37.01.01.150. BROO was not named or admitted as a party at any time nor did BROO seek admission as a party. Consequently, BROO is not entitled to judicial review.

Providing public comment on the permit application process is insufficient to become admitted, or to seek admission, as a party to a contested case. *Laughy*, 149 Idaho at 874, 243 P.3d at 1062. In *Laughy*, the Idaho Supreme Court held that the respondents failed to become parties to the contested case because they never established a “substantial interest in the proceeding” and never petitioned to become intervenors. *Id.* at 874–75, 243 P.3d at 1062–63. The Court reasoned that the respondents’ comments and objections submitted to the Idaho Transportation Department were insufficient for them to become intervenors. *Id.* at 874, 243 P.3d at 1062. If the respondents had petitioned to intervene, they could have become parties and been afforded an opportunity to provide expertise or evidence to support their interest in the matter. *Id.* However, because the respondents failed to become parties to the contested case, the Court concluded that the respondents violated the exhaustion doctrine by circumventing the administrative process through filing a petition for judicial review. *Id.*

BROO was not a party to the *Permit* issued to the City because BROO failed to file a petition to intervene during the application process. BROO claims that it “provided public comment to the record for consideration by the hearing official,” notifying the Department of several concerns. R. 130. However, the memorandum BROO sent to the Department merely constituted comments to the Department during the application process, comparable to the comments provided by the respondents in the *Laughy* case. *See* R. 64–67. And as the Court reasoned in *Laughy*, the submission of written comments is insufficient to become an intervenor. BROO’s only option to become a party to the application process was to file a petition to

intervene establishing a “direct and substantial interest in the proceeding.” IDAPA 37.01.01.350; *see* I.C. § 67-5201(16).

If BROO had formally petitioned to become an intervenor and shown a “direct and substantial interest in the proceeding,” BROO could have been afforded the opportunity to provide expertise and evidence supporting its interest in the matter as a party, but BROO failed to do so. Instead of formally petitioning to intervene, BROO filed a motion for reconsideration after the *Permit* was issued. But Idaho Code § 67-5243(3) only authorizes a party to file a motion for reconsideration, and BROO was not a party to the contested case when it filed its *Motion*. Accordingly, the Department did not act on the *Motion*. Therefore, this Court lacks jurisdiction under Idaho Code § 67-5270(3) because at no point was BROO a named or admitted party to the application process.

III. BROO should have exhausted its administrative remedies by requesting a hearing under Idaho Code § 42-1701A(3) as an aggrieved person prior to filing a petition for judicial review.

Generally, a petition for judicial review may only be filed once a “person has exhausted all administrative remedies” I.C. § 67-5271.² The purpose of exhausting administrative remedies is to “mitigat[e] or cur[e] errors without judicial intervention [and] defer[] to the administrative process established by the Legislature and the administrative body” *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 239, 207 P.3d 963, 970 (2009) (quoting *Park v. Banbury*, 143 Idaho 576, 579, 149 P.3d 851, 853–54 (2006)). Although an aggrieved person is not a party to an administrative proceeding, the aggrieved person still must exhaust their administrative remedies prior to filing a petition for judicial review.

² BROO fits within the definition of “person” as a limited liability company. *See* I.C. § 67-5201(20).

This Court has already established that an aggrieved person must exhaust its administrative remedies available to them by requesting a hearing before the Director under Idaho Code § 42-1701A(3) prior to filing a 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) [hereinafter *Jurisdiction Order*]. Idaho Code § 42-1701A(3) states:

[A]ny person aggrieved by any action of the director, . . . including action upon any application for a permit, . . . who is aggrieved by the action of the Director, and 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. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing.

In *Sun Valley*, this Court determined that the Director erred when he advised an aggrieved person to file a petition for reconsideration under Idaho Code § 67-5246(4) despite that person not being a party to the contested case. *Jurisdiction Order*, at 6. Moreover, this Court determined that the Director erred when he advised the aggrieved person to file a petition for judicial review without exhausting their administrative remedies. *Id.* at 7.

Section 42-1701A(3) allows any person aggrieved by the Director's determination on an application for permit the option to request a hearing before the Department to contest the issued permit. BROO failed to exhaust its administrative remedies because it did not request a hearing pursuant to Idaho Code § 42-1701A(3) as a person aggrieved by the issued *Permit*. Instead, BROO filed its *Motion* pursuant to Idaho Code § 67-5246(4) which states that "any party may file a motion for reconsideration of any final order." (emphasis added). As established above, because BROO never formally intervened in the application process, BROO never became a

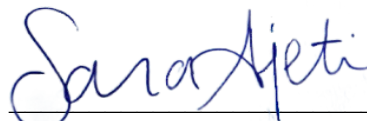
party that could file a motion for reconsideration under Section 67-5246(4).³ Instead, BROO would be considered an aggrieved person and could have requested a hearing under Idaho Code § 42-1701A(3) as a means to exhaust its administrative remedies. However, BROO failed to request a hearing with the Department within fifteen days after the *Permit* was issued as an aggrieved person. Therefore, BROO failed to exhaust its administrative remedies made available to it and is not entitled to judicial review.

CONCLUSION

For the reasons set forth above, the Department respectfully requests this Court grant its motion to dismiss in its entirety.

DATED this 16th day of May 2024.

STATE OF IDAHO
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³ Even if BROO was authorized to file its *Petition* as a party to the contested case, BROO failed to timely provide service of process to the Department. I.R.C.P. 84(d) states: “When the petition for judicial review is filed, the petitioner must serve copies of the notice of petition for judicial review upon the agency” Although the *Petition* was filed on March 13, 2024, BROO failed to timely serve notice to the Department until over one month later when it served the Department notice on April 15, 2024. Instead, the Department became aware of the *Petition* when it appeared on the SRBA website after the *Petition* was transferred to the SRBA District Court. In addition, Rule 84(n) states: “Failure of a party to timely take any other step in the process for judicial review will not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.” I.R.C.P. 84(n). Because BROO failed to timely serve notice to the Department, Rule 84(n) authorizes this Court to dismiss the *Petition*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May 2024, I caused to be served a true and correct copy of the foregoing *Department's Brief in Support of Motion to Dismiss* via iCourt E-File and Serve, upon the following:

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