

JUN 26 2024

TRENT TRIPPLE, Clerk
By ERICA WEEKLEY
DEPUTY

**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,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent,

and

CITY OF BOISE,

Intervenor.

IN THE MATTER OF APPLICATION FOR
PERMIT NO. S63-21092 IN THE NAME OF
CITY OF BOISE

) Case No. CV01-24-4576

) **ORDER GRANTING MOTION
TO DISMISS**

I.

BACKGROUND

The City of Boise filed joint application for permit no. S63-21092 with the Idaho Department of Water Resources on October 23, 2023. R., 34. The application seeks approval to alter the Boise River in conjunction the City's Whitewater Park. R., 34. During the fall of 2023, Boise River Outdoor Opportunity, LLC ("BROO") sent the Department various email correspondences concerning the application. R., 53-63. Then, on December 28, 2023, it

submitted a written memorandum to the Department for its consideration. R., 64. In the memorandum, BROO sets forth various issues and concerns it has with the application and concludes it “cannot support the modifications proposed” therein. R., 64.

On January 24, 2024, the Department issued permit no. S63-21092, approving the application. R., 68. On February 7, 2024, BROO filed a motion for reconsideration of the permit with the Department under Idaho Code § 67-5246(4). R., 129. The Department did not act on the motion. BROO subsequently filed a petition seeking judicial review of the permit. Motions to dismiss the petition for lack of subject-matter jurisdiction were filed by the Department and the City of Boise. BROO opposes the motions. A hearing on the motions was held before the Court on June 14, 2024.

II. ANALYSIS

The issue presented is whether the Court has jurisdiction over the petition for judicial review. The Court holds it lacks jurisdiction under Idaho Code § 42-1701A(3) and the doctrine of exhaustion.

A. **The Court lacks jurisdiction under the plain language of Idaho Code § 42-1701A(3).**

The application to alter the Boise River was filed pursuant to Idaho’s Stream Channel Alteration Act. That Act directs that “[n]o person shall engage in any project or activity which will alter a stream channel without first applying to and receiving a permit therefor from the director.” I.C. § 42-3803(a). When such an application is filed “it shall be the duty of the director to examine same” I.C. § 42-3804. “Based upon his own investigation and the recommendations and alternate plans of other state agencies, the director shall 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. The Act contains no requirement that an administrative hearing be held prior to the Director’s issuance of a decision on an application to alter a stream channel.

That said, the Act provides an avenue for a hearing and judicial review that, for reasons set forth herein, do not apply under the facts of this case. It provides:

Within fifteen (15) days of the date of mailing of the decision, the applicant shall notify the director if . . . it requests a hearing before the board thereon. If requested, such hearing shall be held in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules adopted by the board. . . . Upon the conclusion of the hearing and completion of any investigation conducted by the director the board shall enter its findings in writing approving the decision of the director on the application and plans in whole or in part, or upon conditions, or rejecting the decision of the director on said application and plans for such proposed stream channel alteration.

A copy of the board's findings on the director's decision shall be mailed to the applicant and to each person or organization who appeared at the hearing and gave testimony in support of or in opposition to the proposed stream channel alteration. 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.

I.C. § 42-3805 (emphasis added).¹ The City of Boise is the applicant in this case. It did not request a hearing before the board within fifteen days of the Director's issuance of its decision. Therefore, no hearing was held and the avenue to judicial review set forth in Idaho Code § 42-3805 was not triggered.

This does not mean an avenue for a hearing and judicial review was unavailable to BROO. To the contrary, Idaho Code § 42-1701A provided any person aggrieved by the Director's decision, including BROO, the right to a hearing before the Director as well as a subsequent avenue to judicial review. Subsection 3 of that provision provides:

(3) Unless 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 any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, 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. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to

¹ The term "board" as used in Idaho Code § 42-3805 means the Idaho Water Resource Board. I.C. § 42-3802(c).

participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

I.C. § 42-1701A(3). Subsection 4 provides that any person who is aggrieved by a final decision or order of the Director issued following an Idaho Code § 42-1701A(3) hearing is entitled to judicial review and that “judicial review shall be had in accordance with the provisions and standards set forth in chapter 42, title 67, Idaho Code.”

Thus, Idaho Code § 42-3805 and Idaho Code § 42-1701A(3) work in tandem. The former provides an avenue to an applicant for a hearing followed by subsequent judicial review. The latter provides an avenue for hearing and judicial review to any other person aggrieved by the Director’s decision. Either way, written notice requesting a hearing was required to be given to the Director within fifteen days of the issuance of his decision.

The Director acted in this case when the decision was issued approving the application. That action was done without a hearing, and Title 42 of the Idaho Code contains no statutory right to a pre-action hearing under these circumstances. Therefore, under Idaho Code § 42-1701A(3), any person aggrieved, including BROO, was entitled to a hearing before the Director to contest the action upon the filing of a timely written petition “stating the grounds for contesting the action . . . and requesting a hearing.” This is the administrative remedy available to an aggrieved person under the facts of this case. The record establishes that BROO did not make a written request for a hearing under Idaho Code § 42-1701A(3).² As a result, an Idaho Code § 42-1701A(3) hearing was not conducted. Since no such hearing was conducted, and since the Director has not issued a subsequent written decision, no person aggrieved by the Director’s action is entitled to judicial review under the plain language of Idaho Code § 42-1701A(3). It follows the petition for judicial review must be dismissed.

Notwithstanding the foregoing analysis, BROO argues Idaho Code § 42-1701A(4) permits judicial review. This despite the fact it failed to request an Idaho Code § 42-1701A(3)

² BROO did file a motion for reconsideration of the permit with the Department under Idaho Code § 67-5246(4). However, IDAPA and its remedies have not been implemented in this matter. IDAPA “controls agency decision-making procedures only in the absence of more specific statutory requirements.” *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1994). The Legislature has enacted a specific statutory scheme to provide aggrieved persons an administrative remedy where the Director takes an action without a hearing. That scheme is found in Idaho Code § 42-1701A. Since the provisions of that statute apply to the specific facts and circumstances of this case they control the remedies available to aggrieved persons, not IDAPA. Further, the Court notes the motion for reconsideration did not contain a request for a hearing.

hearing and the Director has yet to consider the issues it now raises on judicial review. BROO unjustifiably reads Idaho Code § 42-1701A(4) in a vacuum. *Cf., McCall v. Martin*, 74 Idaho 277, 280, 262 P.2d 787, 788 (1953) (stating statutes in pari materia must be construed together). In reading Idaho Code § 42-1701A, it is clear the avenue to judicial review in subsection 4 is informed by the statute's preceding subsections. This includes subsection 3, which provides that "[j]udicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section." I.C. § 42-1701A(3) (emphasis added). Therefore, the Court finds the avenue to judicial review in subsection 4 becomes available only after the conditions in subsection 3 have been met. Those conditions have not been met here. Additionally, for reasons set forth below, the Court finds BROO's argument offends the policy considerations underlying the doctrine of exhaustion that require the Director be given the opportunity to address the issues raised by BROO prior to this Court. The Court therefore finds BROO's argument to be unavailing.

BROO also argues it is entitled to judicial review under Idaho Code § 67-5270 of the Idaho Administrative Procedure Act ("IDAPA"). The Court disagrees. The provisions of IDAPA govern agency proceedings "except as provided by other provisions of law." I.C. § 67-5240. Likewise, Idaho Code § 67-5270 governs judicial review of agency actions "unless other provision of law is applicable. . . ." These sections make clear IDAPA "controls agency decision-making procedures only in the absence of more specific statutory requirements." *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1994). Here, a more specific statutory provision exists. As stated above, Idaho Code § 42-1701A sets forth specific hearing and judicial review procedures for an aggrieved person where the Director acts without a hearing. Such is the situation here. Therefore, the hearing and judicial review procedures set forth in Idaho Code § 42-1701A control.³

³ Notwithstanding the requirements of Idaho Code § 42-1701A, BROO would not be entitled to seek judicial review under Idaho Code § 67-5270 as it was not a party to the contested case. Idaho Code § 67-5270(3) limits judicial review to "a party aggrieved by a final order in a contested case decided by an agency." Party is defined as "each person or agency named or admitted as a party, properly seeking and entitled as a matter of right to be admitted as a party." I.C. § 67-5270(3). The Department's rules of procedure define parties as "applicants, petitioners, respondents, protestants or intervenors." IDAPA 37.01.01.150. BROO neither filed a protest nor sought leave to intervene in the proceeding. Although BROO submitted public comment in conjunction with the application process, such comment alone was insufficient to confer party status. See *Laughy v. Idaho Dept. of Transportation*, 149 Idaho 867, 243 P.3d 1055 (2010) (comments submitted to agency were insufficient to confer party status).

B. The Court lacks jurisdiction under the doctrine of exhaustion.

Under Idaho law, the pursuit of statutory remedies is a condition precedent to judicial review. *Park v. Banbury*, 143 Idaho 576, 578, 149 P.3d 851, 853 (2006). The doctrine of exhaustion requires a case “run the full gamut of administrative proceedings before an application for judicial relief may be considered.” *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004). Important policy considerations underlie this requirement. It protects agency autonomy by allowing the agency to develop the record and mitigate or cure errors without judicial intervention. *See e.g., Park*, 143 Idaho at 578-579, 149 P.3d at 853-854. It also defers “to the administrative process established by the Legislature.” *Id.* Consistent with these principles, “courts infer that statutory administrative remedies implemented by the Legislature are intended to be exclusive.” *Id.*

As established in the preceding section, BROO had an administrative remedy available to it under Idaho Code § 42-1701A(3). It was required to file a petition and request for hearing before the Director challenging his action. This remedy has not been exhausted. The policy considerations underlying the doctrine of exhaustion require that the Director be given the opportunity to address the issues raised by BROO prior to this Court. As an initial matter, it is the Director and his agency that must develop the factual and evidentiary record in this matter. Both the Idaho Supreme Court and the U.S. Supreme Court have instructed that “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” *See e.g., Regan*, 140 Idaho at 725, 100 P.3d at 619 (citing *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106, 111 (1973)). Since there has been no administrative hearing or proceeding before the Director at this time pertaining to his decision, there is no factual or evidentiary record for the Court to review. There is certainly no record pertaining to the issues raised by BROO, as the Director has yet to consider those issues. As a reviewing body, this Court is not in the position to create a new record on the issues raised by BROO.

Moreover, it is the Director’s prerogative to consider and address issues pertaining to an application to alter the Boise River. The Legislature has vested this responsibility in the Director because he has the specialized knowledge and expertise necessary to make such a decision. It follows that the Director should be given the opportunity to apply his knowledge and expertise to the issues raised by BROO prior to this Court’s review of those issues. The sense of comity the

judiciary has for the quasi-judicial functions of the Director requires this courtesy to allow him the first opportunity to detect and correct any errors that may pertain to his decision. *See e.g., White v. Bannock County Commissioners*, 139 Idaho 396, 401-402, 80 P.3d 332, 337-338 (2003) (one policy consideration underlying the doctrine of exhaustion is “the sense of comity for the quasi-judicial functions of the administrative body”).

Since BROO had an adequate administrative remedy available to it which has not been exhausted its petition for judicial review must be dismissed. *See e.g., Regan*, 140 Idaho at 724, 100 P.3d at 618 (“if a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted”).

III.
ORDER

THEREFORE, BASED ON THE FOREGOING THE FOLLOWING ARE HEREBY
ORDERED:

1. The motions to dismiss filed by the Department and the City of Boise are hereby granted.

2. The petition for judicial review is hereby dismissed with prejudice.

Dated 6/26/24



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to: 01/26/2024

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