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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

**MEMORANDUM IN SUPPORT OF
OPPOSITION TO THE IDAHO
DEPARTMENT OF WATER
RESOURCES' MOTION TO
DISMISS**

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

COMES NOW the Petitioner, BOISE RIVER OUTDOOR OPPORTUNITIES, LLC,
through its agent ADAM BASS (collectively "BROO"), by and through its attorney of record, C.

Tom Arkoosh and Jeremy C. Rausch of Arkoosh Law Offices, and hereby requests this Court deny the Idaho Department of Water Resources' ("IDWR" or "Respondent") *Motion to Dismiss*, filed May 16, 2024.

INTRODUCTION

This memorandum is submitted in opposition to the IDWR's Motion to Dismiss the Petition for Judicial Review filed by BROO. The IDWR argues that the court lacks jurisdiction on the grounds that BROO was not a party to the underlying application process and failed to exhaust its administrative remedies. For the reasons set forth below, the motion to dismiss should be denied.

FACTUAL BACKGROUND

On January 24, 2024, IDWR issued Permit No. S63-21092 to the City of Boise, allowing a stream channel alteration at the Boise Whitewater Park. BROO was in receipt of the memorandum and is listed as a recipient alongside the other state agencies and the applicant on the permits cc line. *Declaration of Adam Bass in Support of Opposition to IDWR's Motion to Dismiss, dated May 30, 2024* ("Bass Decl."), ¶ 6.

On February 1, 2024, the IDWR Stream Channel Alteration Secretary Manager, Aaron Golart, and Stream Channel Alteration Specialist, Cass Jones, met with BROO's Designated Agent, Adam Bass, regarding the process after the permit was issued by IDWR. *Bass Decl.*, ¶ 7.

BROO, a limited liability company dedicated to promoting environmental stewardship and outdoor recreational activities along the Boise River, subsequently filed a Motion for Reconsideration with IDWR on February 7, 2024, which the department did not act upon, claiming BROO was not a party to the original proceeding. IDWR's *Brief In Support of Motion to Dismiss*, at 7 (May 16, 2024); *Declaration of Jeremy C. Rausch In Support of Opposition to IDWR's Motion*

to Dismiss, dated May 30, 2024 (Rausch Decl.”), ¶ 3. BROO filed the present Petition for Judicial Review on March 13, 2024. *Rausch Decl.*, ¶¶ 4-5.

LEGAL STANDARDS

The standards for judicial review of agency actions in Idaho are primarily governed by the Idaho Administrative Procedure Act (IDAPA), Idaho Code § 67-5270, and the Idaho Rules of Civil Procedure (I.R.C.P.) Rule 84, and as permitted by statute. These provisions grant jurisdiction to district courts to review final agency actions, provided that certain criteria are met, including the exhaustion of administrative remedies. Under Idaho Code § 67-5273(3) a petition for judicial review must be filed within twenty-eight (28) days of an agency action, the time for filing shall be extended during the pendency of the petitioner’s timely attempts to exhaust administrative remedies. However, Idaho Code § 42-1701A does not require the exhaustion of administrative remedies and allows an aggrieved party to seek judicial review once there is a final decision or order.

ARGUMENT

1. BROO Has Standing as an Aggrieved Person and Properly Sought Judicial Review

IDWR argues that BROO lacks standing under Idaho Code § 67-5270(2) and § 67-5270(3), claiming that BROO was not a party to the contested case and did not exhaust administrative remedies. This argument misinterprets the statutory provisions and the relevant case law.

A. BROO is an Aggrieved Person Under Idaho Code § 67-5270(2) and § 67-5270(3)

Idaho Code § 67-5270(2) allows "a person aggrieved by final agency action other than an order in a contested case" to seek judicial review. Here, the issuance of Permit No. S63-21092 constitutes a final agency action that adversely affects BROO's interests in environmental stewardship and public use of the Boise River. Idaho Code § 67-5201 defines a party as “each

person...properly seeking and entitled as of right to be admitted as a party.” It does not define when a person is required to be a party just that they properly seek to become one in order to be considered a legal “party.” BROO properly filed with IDWR a motion for reconsideration on February 7, 2024, within 15 days of the issuance of the final order by the agency on January 24, 2024. BROO’s status as an aggrieved person is evident from its submitted comments, it’s named on the issued permit as a party receiving a copy of the final permit, and its properly filed Motion for Reconsideration, highlighting significant concerns about environmental impacts and public trust violations. *Rausch Decl.*, ¶ 3; *Bass Decl.*, ¶¶ 6 and 9. IDWR improperly cites *Laughy* and Idaho Code § 67-5243 where they state that BROO could not file a motion for reconsideration because it was not a “party.” However, the definition of party as quoted above does not have a timing requirement that it had been a party to the previous action merely that they are “properly seeking to become a party.” Through the informal process of communications between BROO and IDWR there was no way of knowing what conditions the final permit would contain. BROO’s motion was timely and a proper exhaustion of administrative remedies available to it. The Court should find that BROO is an aggrieved party.

B. The Permit Does Not Constitute an Order in a Contested Case

IDWR’s claim that the permit constitutes an order in a contested case under Idaho Code § 67-5270(3) is incorrect. A contested case involves a proceeding that results in an order following a hearing or similar adjudicative process. In this instance, no such process occurred. The issuance of the permit did not involve a hearing where BROO could participate formally. Thus, the permit should be viewed as a final agency action subject to review under Idaho Code § 67-5270(2). In the February 1, 2024 meeting, IDWR stated that it was not an order and it was a decision. This contradicts the current position of IDWR in its Motion to Dismiss. *Bass Decl.*, ¶ 7(d).

2. BROO SUFFICIENTLY EXHAUSTED ADMINISTRATIVE REMEDIES

IDWR contends that BROO did not exhaust administrative remedies as required by Idaho Code § 67-5271. This argument fails for several reasons. Numerous requests were made for BROO to be included as a party, which included holding multiple meetings and providing information and evidence to IDWR. In its agency record filed in this case, the memorandum in question was included as part of the evidence considered by IDWR. *Rausch Decl.*, ¶ 6. A motion for reconsideration was timely filed with IDWR and was ignored by the agency. In the February 1, 2024 meeting, IDWR stated that it considered BROO as a stakeholder in this process. This contradicts the current position of IDWR in its Motion to Dismiss. *Bass Decl.*, ¶ 7(a).

A. Lack of Opportunity for a Hearing

Under Idaho Code § 42-1701A(3), an aggrieved person is entitled to a hearing to contest agency actions. BROO was not afforded an opportunity for a hearing prior to the issuance of the permit. As the court in *Sun Valley Co. v. Spackman* noted, aggrieved persons must be provided a hearing to contest actions by the Director of IDWR *Sun Valley Co. v. Spackman*, No. CV-WA-2015-14500 (Ada Cnty. Dist. Ct. April 22, 2016). The absence of such an opportunity in this case means that BROO cannot be faulted for not requesting a hearing post-issuance. BROO filed a Memorandum responding to the project on December 28, 2023. Many issues were raised and questions asked of IDWR. These issues and questions were unaddressed with no further communication between IDWR and BROO from the time of the filing of the Memorandum on December 28, 2023, and the issuing of the permit on January 23, 2024. *Bass Decl.*, ¶ 6.

B. Proper Filing of Motion for Reconsideration

BROO filed a Motion for Reconsideration, addressing its substantial concerns about the environmental and legal implications of the permit. This motion should have been considered by IDWR. The rejection of this motion on procedural grounds—claiming BROO was not a party—is

inconsistent with the principles of administrative law that seek to ensure that all affected parties have their concerns heard and addressed. The agency acknowledges receipt and admits it took no action. *Rausch Decl.*, ¶ 3.

C. Administrative Remedies were not required to be exhausted as they would have been futile before a biased agency

If the Court should find that administrative exhaustion was required as IDWR has brought forth, BROO should be excused due to futility before IDWR. BROO has sought inclusion in the decision-making process of IDWR. These attempts for inclusion as a party were either ignored or an afterthought to agency action. “To require a litigant to exhaust his administrative remedies before a biased decisionmaker would also be futile.” *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 136, 106 P.3d 455, 462, (2005). To determine who is a biased decision maker requires a “showing that there is probability that a decisionmaker...will decide unfairly.” *Id.* at 137. In *Owsley* the claimants alleged that the Commission had pre-determined the merits of their case and had therefore denied the claim prior to an administrative process. *Id.* The Court disagreed with claimants and said that a preliminary review of the merits of the underlying claim were required and thus there was no bias decisionmaker. *Id.* Our case is different in that by ignoring BROO’s numerous requests to be included as party and to have a hearing to reconsider the permit, the Agency shows its bias. IDWR was rushed through the process to issue the permit in an attempt to meet the City of Boise’s planned construction timeline for winter 2023/2024. *Bass Decl.*, ¶ 12. Due to the Agency’s perfunctory informal inclusion of BROO and its outright indifference to BROO’s motion for reconsideration the Court should find that any attempts to further exhaust administrative remedies would have been futile and deny the motion to dismiss. In the February 1, 2024 meeting, IDWR stated it coordinated with the applicant about navigation at the whitewater park and then told BROO that IDWR is not responsible for navigation. This shows a clear bias.

Bass Decl., ¶ 7(e).

3. ANY PERSON WHO IS AGGRIEVED BY A FINAL DECISION IS ENTITLED TO JUDICIAL REVIEW

Under Idaho Code 42-1701A(4) “[a]ny person who is aggrieved by a final decision...is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.” Under this section it clearly states that a person who is aggrieved by a final decision is entitled to judicial review. There is no requirement that the aggrieved person was a party. BROO timely filed the judicial review and therefore the motion to dismiss should be denied and the case should be heard on the merits before this court.

Rausch Decl., ¶ 4.

CONCLUSION

BROO has demonstrated its standing as an aggrieved person and has pursued all available administrative remedies in good faith. The issues raised are substantial and warrant judicial review. Consequently, IDWR's motion to dismiss should be denied, allowing the court to fully consider the merits of BROO's petition. IDWR has admitted its failure to act on previous attempts by BROO to resolve the matter through the processes prescribed in regulation, a remand for further proceedings would only further frustrate the process and unduly delay the resolution of this matter.

DATED this 30th day of May 2024.

ARKOOSH LAW OFFICES

/s/ Jeremy C. Rausch
Jeremy C. Rausch
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of May 2024, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

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