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

CITY OF POCATELLO, Petitioner, vs. GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents, and SPARTAN PORTNEUF, LLC, Intervenor.	)	Case No. CV-01-17-23146 **ORDER DISMISSING PETITION FOR JUDICIAL REVIEW**

I.
BACKGROUND

This matter concerns an application for transfer filed by the City of Pocatello with respect to water rights 29-2274, 29-2338, and 29-7375. R., 1. The subject water rights were decreed in the Snake River Basin Adjudication. They cumulatively authorize the City to divert 21.45 cfs of ground water for municipal purposes pursuant to 13 shared points of diversion. *Id.* Under the rights, the entire authorized diversion rate can be diverted from any one of the shared diversion points. *Id.* The City's application seeks to change the location of one diversion point – well 39 – approximately 1/2 mile to the north. *Id.* In addition, the City's application seeks 11 shared points of diversion as opposed to 13.[1] *Id.*

[1] The City asserts its omission of two decreed points of diversion in its transfer application was inadvertent. That said, it admits the two omitted points of diversion "are not (and have not been) among the City's active points of

On September 26, 2016, Spartan Portneuf, LLC ("Spartan") protested the proposed transfer. *Id.* at 21. Spartan owns water right 29-13425, which authorizes it to divert .676 cfs of ground water for irrigation and stock water purposes. The well Spartan uses is located approximately 300 feet north of one of the points of diversion authorized under the City's rights – well 44. Spartan alleges the City's operation of well 44 has been and continues to be injurious to its senior use. *Id.* at 21. It alleges further that the proposed transfer will exacerbate the injury. *Id.*

On June 27, 2017, the City moved to dismiss Spartan's protest, arguing that it is not related to the changes being proposed. *Id.* The hearing officer agreed:

> Spartan's protest does not identify any issues related to the proposed change for Well 39. The protest does not even refer to Well 39 or the existing or proposed points of diversion for Well 39. Spartan's protest focuses entirely on Well 44, which is located over 12 miles away from Well 39. Application 81155 does not propose to change the diversion rate authorized at Well 44 in any way. Pocatello is already authorized to divert the full quantity listed on water right 29-2274, 29-2338 and 29-7375 from Well 44. If Application 81155 were approved, the authorized diversion rate from Well 44 will not increase.

Id. at 114-115. Asserting that Idaho Code § 42-222(1) only provides for protest against "the proposed change," the hearing officer issued a *Preliminary Order* dismissing Spartan's protest as defective and approving the transfer.[2] *Id.* at 116. In so doing, he noted that "[i]f Pocatello's operation of Well 44 is causing injury to Spartan's water rights, the proper forum to address such injury is within a delivery call proceeding." *Id.* at 114.

Spartan subsequently filed exceptions to the *Preliminary Order*, asserting that the hearing officer erred in dismissing its protest. *Id* at 145. The Director agreed:

> The Director disagrees with the hearing officer's conclusion that "Spartan's protest does not identify any issues related to the proposed change for Well 39." As the hearing officer explained, Spartan argues "that eliminating points of diversion or changing the location of Well 39 may possibly increase the demand in Well 44" and "exacerbate the alleged injury to the Spartan Well." In other words, Spartan asserts the changes proposed . . . will cause Pocatello to alter the way it operates its system to "shift more demand to Well 44 and exacerbate the alleged injury to the Spartan Well resulting from operation of Well 44." While

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diversion" under the water rights, and does not challenge "the abandonment of these points of diversion." *Opening Br.*, 10-11.

[2] The protest was dismissed pursuant to IDAPA 37.01.01.304, which provides that "[d]effective, insufficient or late pleadings may be returned or dismissed."

> the hearing officer is correct that "Pocatello is already authorized to divert the full quantity listed on water rights 29-2274, 29-2338 and 29-7375 from Well 44" that does not necessarily mean "the expected operation of the system is of little consequence in an injury analysis." It is conceivable that Spartan could present evidence at a hearing regarding Pocatello's current operation of its system and evidence that the changes proposed . . . will cause Pocatello to shift operation of its system to demand more water from Well 44 and injure the Spartan Well.

Id. at 217-218 (internal citations omitted). The Director issued an *Order* remanding the matter to the hearing officer to conduct "a hearing including Spartan as a protestant." ("*Remand Order*"). *Id.* at 219. In the *Remand Order* the Director also denied the City's request that all evidence regarding well 44 be excluded from the hearing. *Id.*

On December 15, 2017, the City filed a *Petition* seeking judicial review of the *Remand Order*. It asserts the *Remand Order* is contrary to law and requests that the Court set it aside. A hearing on the *Petition* was held before the Court on May 10, 2018.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

A. Jurisdiction.

A threshold issue is whether the Court has jurisdiction over the City's *Petition*. The legislature has vested the Department with jurisdiction over Idaho Code § 42-222 water right transfers. It is a basic tenet of administrative law that where an agency has exclusive jurisdiction over a matter, the parties to a contested case must ordinarily await a final order before resorting to the courts. I.C. § 67-5270(3). A final order is one "that resolves all issues, or the last unresolved issue, presented in the contested case so that it constitutes a final determination of the rights of the parties." *Williams v. State Bd. of Real Estate Appraisers*, 149 Idaho 675, 678, 239 P.3d 780,783 (2010). "If issues necessary for a final determination of the parties' rights remain unresolved, there is no final order." *Id.* In addition, the doctrine of exhaustion generally requires that a matter "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); I.C. § 67-5271(1). The doctrines of finality and exhaustion stand for the general proposition that if there is no final order in a contested case there is no exhaustion of the administrative remedy or right to judicial review.

The legislature has provided a limited exception to the doctrines of finality and exhaustion. Idaho Code § 67-5271(2) provides that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." In this case, it is undisputed that neither the doctrine of finality nor the doctrine of exhaustion has been satisfied. The administrative proceeding on the City's application has not run its course. The Director has not issued a final order and the City's application is pending unresolved. Notwithstanding, the City asserts that judicial review is proper under Idaho Code § 67-5271(2). The Court disagrees.

Examination of the case establishes that judicial review of the final order to be ultimately issued by the Director in the administrative proceeding provides the City with an adequate remedy. The City complains that the Director erred in denying its motion to dismiss Spartan's protest. Additionally, it complains that he further erred in denying its request to exclude all evidence regarding well 44 from the administrative hearing. Each of these issues can properly be raised and addressed on judicial review following issuance of a final order. That there is no

impediment to raising these issues on review of a final order is telling proof that judicial review of the final order is an adequate remedy.

The Court notes that expenses and delay incident to an administrative hearing do not justify immediate review of an interlocutory order under Idaho Code § 67-5271(2). All parties seeking review of an interlocutory order could qualify if expenditure of time and resources in the administrative proceeding rendered judicial review of a final order an inadequate remedy. However, such considerations do not warrant the premature interference with the agency process. The Idaho Supreme Court "long ago recognized that 'the adequacy of a remedy is not to be tested by the convenience or inconvenience of the parties to a particular case. If such a rule were to obtain, the law of appeals might as well be abrogated at once.'" *Rufener v. Shaud*, 98 Idaho 823, 825, 573 P.2d 142, 144 (1977). The City has not shown that waiting for a final order would work any hardship on it aside from the expense and delay associated with the administrative hearing. It has not established that any penalties will accrue, or that it will be required by the Department to take any detrimental action in the interim.[3] Therefore, the fact that the Director remanded the matter to the hearing officer does not entitle the City to review under Idaho Code § 67-5271(2).

The City argues that "if the agency decision is adverse to Pocatello, the City must appeal that decision under a deferential standard of review—even if the basis for the adverse decision was beyond the proper scope of the transfer proceeding in the first place." *Reply Br.*, 3. This Court disagrees with the City's position. If the basis for an adverse final order is beyond the proper scope of the proceeding, then the City will be able to raise that argument on judicial review of the final order. The same standard of review will be applicable whether the issue is raised now or following a final order. Either way, the City will have to establish that the Director acted in a manner that violates I.C. § 67-5279(3) and that one of its substantial rights was prejudiced. Furthermore, the same relief will be available to the City under either scenario. I.C. § 67-5279. That said, it is clear that review of a final order following hearing will provide a more complete remedy than a premature review, as all issues regarding the transfer application

[3] The Supreme Court has allowed judicial review of an interlocutory order where the agency's "decision to continue the case was the functional equivalent of a stay order of undetermined duration, and while not an express denial of the Hospital's application, leaves the Hospital unremunerated for its substantial expenditures . . . for an indefinite and potentially lengthy period of time." *Univ. of Utah Hosp. v. Twin Falls County*, 122 Idaho 1010, 1013, 842 P.2d 689, 692 (1992). Such circumstances do not exist here.

may then be raised and determined. Moreover, the issues the City now raises may ultimately be mooted by the Director's final decision.

In summary, the Court finds that judicial review of a final order will provide the City with an adequate remedy. All issues now raised can be adequately raised and considered at that time if they are not ultimately mooted by the Director's final decision. Therefore, this suit is premature and must be dismissed.

B. The Court does not reach the remaining issues.

The City raises a variety of additional issues in its *Petition*. The Court expresses no opinion on those issues as it lacks jurisdiction over the City's *Petition* for the reasons set forth in this decision.

C. Attorney fees.

The Respondents and Intervenor seek an award of attorney fees under Idaho Code §12-117. The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The Idaho Supreme Court has instructed that attorney fees under Idaho Code §12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 159, 1165 (2012). The Court holds that the City has presented legitimate issues pertaining to this Court's jurisdiction over its petition. The Court does not find the City's arguments on this issue to be frivolous or unreasonable. Therefore, the Court in an exercise of its discretion denies the Respondents' and Intervenor's requests for attorney fees.

IV.
ORDER

Therefore, based on the foregoing, IT IS ORDERED that the City of Pocatello's *Petition for Judicial Review* **is hereby dismissed with prejudice.**

Dated June 4, 2018

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DISMISSING PETITION FOR JUDICIAL REVIEW was mailed on June 04, 2018, with sufficient first-class postage to the following:

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