LAWRENCE G. WASDEN
Attorney General

DARRELL EARLY
Chief Deputy Natural Resources

GARRICK BAXTER #6301
MICHAEL C. ORR #6720
MEGHAN CARTER #8863
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
michael.orr@ag.idaho.gov
meghan.carter@idwr.idaho.gov

Attorneys for Respondents

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SOUTH VALLEY GROUND WATER DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources, Respondents.	**Case No. CV07-2021-00243** **THIRD DECLARATION OF MICHAEL C. ORR**

I, MICHAEL C. ORR, certify and declare under penalty of perjury pursuant to the laws of the State of Idaho, that the following is true and correct:

1. I am over the age of eighteen (18) and am an attorney of record for Respondents the Idaho Department of Water Resources and its Director Gary Spackman, in his official capacity as Director of the Idaho Department of Water Resources, in the above-captioned matter. I make this declaration pursuant to Idaho Code Section 9-1406, and based on my own personal knowledge.
2. Attached hereto as "**Exhibit H**" is a true and correct copy of the *Order Denying Application for Peremptory Writ of Mandate* issued on October 29, 2010 in *Blue Lakes Trout Farm, Inc. v. Spackman*, Ada County Case No. CV WA 2010-19823;
3. Attached hereto as "**Exhibit I**" is a true and correct copy of the *Order Dismissing Petition for Judicial Review* issued on June 4, 2018 in *City of Pocatello v. Spackman*, Ada County Case No. CV-01-17-23146).

DATED this 9th day of July, 2021.

/s/ MICHAEL C. ORR
MICHAEL C. ORR
Deputy Attorney General
Idaho Department of Natural Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of July, 2021, I caused to be served a true and correct copy of the foregoing document by ICourts e-filing delivery to each party listed as following:

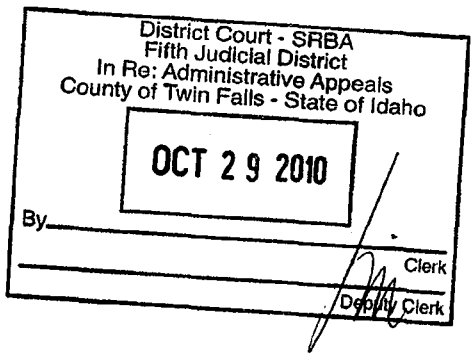
Albert P. Barker Travis L. Thompson Michael A. Short Barker Rosholt & Simpson LLP 1010 W. Jefferson St., Ste. 102 P.O. Box 2139 Boise, ID 83701-2139 apb@idahowaters.com tlt@idahowaters.com mas@idahowaters.com	James R. Laski Heather E. O'Leary Lawson Laski Clark, PLLC 675 Sun Valley Rd., Ste. A P.O. Box 3310 jrl@lawsonlaski.com heo@lawsonlaski.com efiling@lawsonlaski.com
Jerry R. Rigby Chase Hendricks Rigby, Andrus & Rigby Law, PLLC 25 North Second East Rexburg, ID 83440 jrigbv@.rex-law.com	W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org
Joseph F. James James Law Office, PLLC 125 5th Ave. West Gooding, ID 83330 joe@jamesmvlaw.com	Candice M. McHugh Christopher M. Bromley McHugh Bromley, PLLC 380 S. 4th Street, Suite 103 Boise, ID 83702 cmchugh@mchugbromley.com cbromley@mchughbromley.com
Sarah A. Klahn Somach Simmons & Dunn 2033 11th Street, #5 Boulder, CO 80302 sklahn@somachlaw.com	

/s/ MICHAEL C. ORR
MICHAEL C. ORR

EXHIBIT H

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

BLUE LAKES TROUT FARM, INC., **Petitioner / Plaintiff,** **vs.** **GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES,** **Respondents / Defendants,** **and** **CLEAR SPRINGS FOODS, INC., and THE IDAHO GROUND WATER APPROPRIATORS, INC.,** **Intervenors,**	**CASE NO.: CV WA 2010-19823** **ORDER DENYING PETITION FOR PEREMPTORY WRIT OF MANDATE**



I.

FACTS AND PROCEDURAL BACKGROUND

The facts and procedural background set forth in this Court's *Order Denying Petition for Alternative Writ of Mandate* issued in the above-captioned matter on October 8, 2010, are expressly incorporated herein by reference. In addition, on October 12, 2010, Petitioner Blue Lakes Trout Farms, Inc. ("Blue Lakes") filed an *Application for Peremptory Writ of Mandate*, requesting that this Court compel the Respondents "to consider updated, improved and/or new data, analysis and methods for determining the

impact of junior ground water diversions on Plaintiff's water rights, and to allow Plaintiff to present such evidence in any proceeding before IDWR related to Plaintiff's water delivery call." Clear Springs Foods, Inc. ("Clear Springs") subsequently intervened in support of the *Application* and the Idaho Ground Water Appropriators, Inc. ("IGWA") intervened in opposition to the *Application.*

On October 28, 2010, Respondents filed their *Answer* to Petitioner's *Verified Complaint, Declaratory Judgment Action and Petition for Writ of Mandate* ("*Complaint*"), along with a *Memorandum in Opposition to Application for Peremptory Writ of Mandate*. A hearing on Petitioner's *Application* was held before this Court on October 28, 2010. In its *Application* Petitioner requested immediate and expedited consideration of this matter by the Court as the parties have a November 5, 2010 deadline in the underlying proceeding which may be affected by the decision of this Court. As such, at oral argument this Court instructed the parties that a written ruling would be released in short order.

II.
DISCUSSION

A. Standard of Review.

A decision to issue a writ of mandate is committed to the discretion of the court. I.R.C.P. 74(b). Whether a party is seeking an alternative writ or a peremptory writ the standard is the same: "[T]he party seeking a writ of mandate must establish a 'clear legal right' to the relief sought. Additionally, the writ of mandate will not issue where the petitioner has 'a plain, speedy and adequate remedy in the ordinary course of law." *Ackerman v. Bonneville County*, 140 Idaho 307, 311, 92 P.3d 557, 561 (Ct. App. 2004) (citing *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (1997)).

B. Peremptory Writ of Mandate.

Blue Lakes assigns error to the Director's decision, contained in his *Order Limiting Scope of Hearing*, that Blue Lakes is precluded from addressing issues in the underlying proceeding related to the 10% model uncertainty, the trim-line, or other issues related to the use or application of the ground water model. Blue Lakes argues that the

Director's ruling in this regard wrongfully prohibits it from presenting evidence that provides a better technical basis for determining the extent of injury and mitigation obligations than the "trimline" and "spring allocation" determinations of the Director.[1] In support of its argument, Blue Lakes asserts that certain of the district court's previous orders in Gooding County Case No. 2008-444 authorize and/or require the Director to entertain the presentation of such evidence. For the following reasons, this Court denies Blue Lakes' *Application.*

i. Blue Lakes has a plain, speedy and adequate remedy at law.

The issuance of a peremptory writ of mandate in this matter would be improper under the above-mentioned standard of review because Blue Lakes has a plain, speedy and adequate remedy at law. In *State v. District Court,* 143 Idaho 695, 698, 152 P.3d 566, 569 (2007), the Idaho Supreme Court directed that "A right of appeal is regarded as a plain, speedy and adequate remedy at law in the absence of a showing of exceptional circumstances or of the inadequacy of an appeal to protect existing rights."

In this case, the ability of Blue Lakes to seek judicial review of decisions made by the Director in the underlying proceeding is provided for by Idaho's Administrative Procedure Act ("IDAPA"). I.C. §§ 67-5201, *et seq.*; *See also*, I.C. § 42-1701A. The Court has made clear that it never was the intention or meaning either of the common law or the statute that issuance of writs should take the place of appeals. *Smith v. Young*, 71 Idaho 31, 34, 225 P.2d 446, 468 (1950). Supplanting the judicial review process provided for in IDAPA by issuing a peremptory writ of mandate in this matter to overrule an interlocutory determination by the Director would therefore be improper.

As such, the Court finds Blue Lakes' argument that it has no remedy at law unpersuasive. Once a final decision of the Director is issued in the underlying proceeding, Blue Lakes will be entitled to take advantage of those rights afforded to aggrieved parties under IDAPA, including the right to seek judicial review. Although Blue Lakes presumably contends that its rights under IDAPA are not adequate because it must wait for a final determination of the Director, this Court is precluded from testing

[1] Specifically, Blue Lakes seeks to present evidence by way of an expert report prepared by its expert John S. Koreny that the Eastern Snake Plain Aquifer Model ("ESPAM") has been calibrated to Blue Lakes' individual spring flow as opposed to river reaches.

the adequacy of a remedy on inconvenience grounds alone. *See e.g., Rufener v. Shaud,* 98 Idaho 823, 825, 573 P.2d 142, 144 (holding, "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").

Furthermore, the Idaho Supreme Court has instructed that a writ of mandate "will not lie to control discretionary acts of courts acting within their jurisdiction." *State v. District Court,* 143 Idaho 695, 698, 152 P.3d 566, 569 (2007). The determination by the Director to limit the scope of the hearing pending before him on remand after taking into account the limited issue remanded to him in Gooding County Case No. 2008-444, and the issues presently pending before the Idaho Supreme Court on appeal, was discretionary in nature as opposed to ministerial. The remedy sought in this matter does not result from the Director refusing to perform his statutory duty of administering water rights. Rather, the dispute results from a disagreement over how the Director is performing his duty. In *Musser v.* Higginson, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994), the Idaho Supreme Court held "the director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water." As such, utilizing a writ of mandate to overrule the Director's determination in this matter would be an inappropriate attempt to control a discretionary action of the Director.

ii. This Court lacks jurisdiction to issue the requested writ of mandate.

The Court finds that the subject matter of the peremptory writ of mandate, namely evidence relating to the use of the trimline, the margin of error in the ground water model and other issues related to the application of the ground water model are intertwined with, or are the same issues raised in Gooding County Case 2008-444, which is currently on appeal to the Idaho Supreme Court. This Court is unable to parse the issues as narrowly as argued by Blue Lakes. As to the remanded portion of Gooding County Case 2008-444, the case was remanded by Judge Melanson for a limited purpose only – to apply the appropriate burdens of proof and evidentiary standards when considering seasonal variation as part of a material injury determination.

Following remand in Gooding County Case 2008-444, Blue Lakes filed a *Motion to Enforce Order* in that matter before then district court Judge John Melanson. Blue Lakes' *Motion* sought, among other things, to have the district court order the Director to permit Blue Lakes to present the same evidence which it now seeks this Court to order the Director to consider. Judge Melanson concluded that he did not have jurisdiction to modify his order under Idaho Appellate Rule 13:

> Upon remand, this Court did not contemplate that the Director would hold a hearing or take new evidence when applying the proper burdens of proof and evidentiary standards. Rather, the scope of the Court's *Orders* on remand is narrow – the Director must consider the evidence presented below and apply the correct burdens and standards when considering seasonable variations as part of a material injury analysis.
>
> ...
>
> However, the Director is not obligated to take additional evidence in order to apply the correct burdens of proof and evidentiary standards on remand. The evidence Blue Lakes seeks to introduce at the mitigation plan hearing is outside the scope of this Court's previous *Orders* on remand. This Court's *Orders* are currently on appeal to the Idaho Supreme Court and under Idaho Appellate Rule 13(b)(13), this Court has jurisdiction to "take any action or enter any order required for the enforcement of any judgment, order or decree." While this Court has jurisdiction to enforce its *Orders* on remand, this Court does not have jurisdiction to order action be taken outside the scope of the prior *Orders*. The prior *Orders* affirmed the Director's use of the trimline and the spring allocation determinations. Accordingly, neither is within the scope of the prior *Orders* on remand. The Determination of what evidence the director may or may not consider in conjunction with a mitigation plan hearing is also beyond the scope of this Court's prior *Orders*.

Gooding County Case No. 2008-444, *Order Granting in Part Motion to Enforce Orders*, pp.3–4 (May 12, 2010).

The filing of a separate action seeking the exact same relief which Judge Melanson concluded that he did not have jurisdiction over does not resolve the jurisdictional problems. In essence, Blue Lakes is asking this Court to modify Judge Melanson's Orders. Judge Melanson's ruling is not only the law of the case, but this Court concurs with the ruling. According, this Court concludes consistent with Judge Melanson that Idaho Appellate Rule 13 does not provide an exception to this Court which would allow it to issue the writ of mandate ordering the Department to address issues which are the same, or intertwined with, those presently pending on appeal.

III.

Therefore, IT IS HEREBY ORDERED that Blue Lakes' Application for Peremptory Writ of Mandate **is denied.**

Dated October 29, 2010.

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING PETITION FOR PEREMPTORY WRIT OF MANDATE was mailed on October 29, 2010, with sufficient first-class postage to the following:

GARY SPACKMAN
Represented by:
BAXTER, GARRICK L
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

GARY SPACKMAN
Represented by:
BROMLEY, CHRIS M
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720
Phone: 208-287-4800

IDAHO GROUND WATER
Represented by:
BUDGE, THOMAS J
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

IDAHO GROUND WATER
Represented by:
CANDICE M MC HUGH
101 S CAPITOL BLVD, STE 208
BOISE, ID 83702
Phone: 208-395-0011

BLUE LAKES TROUT FARM INC
Represented by:
CHARLES L. HONSINGER
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

BLUE LAKES TROUT FARM INC
Represented by:
DANIEL V. STEENSON
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

IDAHO GROUND WATER
Represented by:
RANDALL C BUDGE
201 E CENTER, STE A2
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

BLUE LAKES TROUT FARM INC
Represented by:
S. BRYCE FARRIS
RINGERT LAW CHARTERED
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

CLEAR SPRINGS FOODS INC
Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 208-733-0700

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Julie Murphy
Deputy Clerk

EXHIBIT I

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

---

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:

GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

JAMES BROWITT
SCHROEDER LAW OFFICES PC
1915 NE CESAR E CHAVEZ BLVD
PORTLAND, OR 97212
Phone: 503-281-4100

LAURA A SCHROEDER
SCHROEDER LAW OFFICES PC
1915 NE CESAR E CHAVEZ BLVD
PORTLAND, OR 97212
Phone: 503-281-4100

SARAH A KLAHN
WHITE & JANKOWSKI LLP
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

/S/ JULIE MURPHY
Deputy Clerk