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CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**BEAUDRY MOTORS, INC.,** )  
 )  
 *“Protestant”/appellant,* )  
 vs. )  
 )  
 **KAWASAKI MOTORS CORP., U.S.A.,** )  
 )  
 *Respondent/appellee.* )  
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Case No. **CV 2011 7190**

**MEMORANDUM DECISION AND  
ORDER DENYING “PROTESTANT  
BEAUDRY MOTORS, INC.’S  
MOTION TO STAY PURSUANT TO  
I.C. § 67-5274” and GRANTING  
IDAHO TRANSPORTATION  
DEPARTMENT’S MOTION FOR  
CORRECTIVE ACTION**

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.**

This matter is before the Court on plaintiff Beaudry Motors, Inc.’s (Beaudry) Motion to Stay Pursuant to I.C. § 67-5274, (which is opposed by defendant Kawasaki Motors Corp., U.S.A. (Kawasaki)), and Idaho Transportation Department’s (ITD) Motion for Corrective Action.

On September 6, 2011, Beaudry filed its pleading captioned “Protestant Beaudry Motors, Inc.’s Notice of Appeal to Kootenai County District Court”. Two problems with this pleading are readily apparent. First, Idaho does not have “County District Courts”, Idaho has State of Idaho District Courts located in its forty-four county seats. Idaho Code §§ 1-101, 1-701, IDAHO CONSTITUTION Article 5 §§ 2, 11, 12, 24. Any other type of court was abolished in Idaho in 1971. Idaho Code § 1-103. Second, the Notice of Appeal should be filed with the court or agency appealed from, in this case the Idaho

Transportation Department (ITD), and not the District Court Clerk. I.R.C.P. 84(r), I.A.R. 14. Beaudry mailed a copy of its “Protestant Beaudry Motors, Inc.’s Notice of Appeal to Kootenai County District Court”, to the Director and the Dealer Operations Program Supervisor of the ITD, but that pleading fails to satisfy most of the requirements of I.R.C.P. 84(d). A latent problem with Beaudry’s “Protestant Beaudry Motors, Inc.’s Notice of Appeal to Kootenai County District Court” filed on September 6, 2011, is it was premature, given the fact that Beaudry’s motion for reconsideration before the ITD was denied by ITD on September 7, 2011. This may create a failure of Beaudry to have exhausted its administrative remedies, and certainly seems to run afoul of the requirement under I.C. § 67-5273 that the Petition for Judicial Review be from a “final order.”

On September 13, 2011, Beaudry filed “Protestant Beaudry Motors, Inc.’s Motion for Stay Pursuant to I.C. § 67-5274”, an “Affidavit of Steve Beaudry in Support of Motion for Stay”, an “Affidavit of Michael H. Church in Support of Protestant Beaudry Motors, Inc.’s Motion for Stay Pursuant to I.C. § 67-5274”, “Protestant Beaudry Motors, Inc.’s Memorandum in Support of its Motion for Stay Pursuant to I.C. § 67-5274”, and a Notice of Hearing which noticed its “Protestant Beaudry Motors, Inc.’s Motion for Stay Pursuant to I.C. § 67-5274” for hearing on October 11, 2011.

On October 4, 2011, Kawasaki filed its “Respondent’s Opposition to Protestant’s Motion for Stay”.

On October 6, 2011, ITD filed “Idaho Transportation Department’s Motion and Memorandum for Corrective Action” and “Idaho Transportation Department’s Motion and Memorandum to Shorten Time.”

On October 7, 2011, Beaudry filed a “Supplemental Affidavit of Steve Beaudry in Support of Motion for Stay” and a “Reply Memorandum in Support of Protestant’s Motion for Stay Pursuant to I.C. § 67-5274.”

On the morning of the October 11, 2011, hearing, Beaudry filed “Protestant Beaudry Motors, Inc.’s Memorandum in Response to Idaho Transportation Department’s Motion and Memorandum for Corrective Action”, an “Affidavit of Matthew T. Ries in Support of Motion for Stay”, and Kawasaki filed “Respondent’s Response to the Idaho Transportation Department’s Motion for Corrective Action.”

Oral argument was held on October 11, 2011. At the beginning of oral argument, counsel for Beaudry and counsel for Kawasaki had no objection to ITD’s Motion to Shorten Time, and ITD’s Motion to Shorten time was granted. Due to the extensive pleadings filed immediately before the hearing, the Court had to take the remaining motions under advisement.

Beaudry builds motorcycles for law enforcement agencies. Beaudry does not purchase these motorcycles in a traditional retail setting, but rather pursuant to contracts obtained via a bidding process. Protestant Beaudry Motors, Inc.’s Memorandum in Support of Its Motion for Stay Pursuant to I.C. § 67-5274, p. 6. Beaudry’s relationship with Kawasaki was governed by the Kawasaki Authorized Dealer Sales and Service Agreement (Agreement), pursuant to which Beaudry was able to purchase motorcycles at a “government sales program” set price, ten percent lower than the reduced dealer price, which is in turn lower than the retail price. *Id.*, p. 11. The Agreement required Beaudry to seek Kawasaki’s prior written approval before moving its place of business, and violation of this provision constituted cause for immediate termination of the Agreement. Respondent’s Opposition to Protestant’s Motion for Stay, p. 2, citing Exhibit A to Respondent’s Opposition at p.p. 11-14.

Beaudry's place of business had been in Post Falls. In January of 2011, Beaudry sought Kawasaki's approval to change its business location, but to remain in Post Falls. Protestant Beaudry Motors, Inc.'s Memorandum in Support of Its Motion for Stay Pursuant to I.C. § 67-5274, p. 6. Beaudry and Kawasaki entered into a Relocation and No-Protest Agreement with "...the exact location of each such dealership to be determined by [Kawasaki] in its sole discretion." *Id.*, p. 7, quoting Exhibit A to the Affidavit of Michael H. Church. Beaudry encountered problems with its proposed new location in Post Falls and moved to a location in Hayden Lake. Beaudry sought permission from Kawasaki, but Kawasaki objected to the Hayden Lake location and found Beaudry's move constituted good cause for termination of the Agreement because Beaudry would create competition for Edge Performance, a Hayden Lake Kawasaki powersports dealer. *Id.*, pp. 7-8. On March 1, 2011, Kawasaki provided Beaudry with a Notice of Termination letter. Respondent's Opposition to Protestant's Motion for Stay, p. 3.

Idaho Code Title 49 Chapter 16 governs dealer and salesman licensing. The relocation provision in the Agreement is necessary for Kawasaki to comply with Idaho law, as existing dealers within ten miles of a proposed new dealership have a right to protest under I.C. § 49-1616. *Id.* A hearing before ITD was scheduled for August 4, 2011, to determine the propriety of termination of Beaudry's license. Protestant Beaudry Motors, Inc.'s Memorandum in Support of Its Motion for Stay Pursuant to I.C. § 67-5274, p. 4. During a telephonic hearing with the ITD Hearing Officer on July 18, 2011, Beaudry had sought and received a continuance of the termination hearing to November 3 and 4, 2011, with summary judgment rescheduled to August 25, 2011. *Id.* However, on July 29, 2011, the Hearing Officer notified both Beaudry and Kawasaki via fax and ordered the parties to proceed with the termination hearing on August 4, 2011.

*Id.*, pp. 4-5. Beaudry's motion argues, "[t]his severely prejudiced Beaudry Motors' ability to prepare for and submit evidence at the termination hearing." *Id.*, p. 5. At the hearing, the Hearing Officer issued a Recommended Order, determining Kawasaki had good cause for termination. The Director of ITD adopted the Hearing Officer's findings of fact, conclusions of law and recommendation, issuing a Final Order on August 8, 2011. Respondent's Opposition to Protestant's Motion for Stay, pp. 3-4.

Beaudry appealed to this Court, filing a Notice of Appeal on September 6, 2011. Beaudry's appeal was not filed pursuant to I.C. § 49-1621, and therefore, ITD was not a named party to the instant action before the Court. On October 6, 2011, ITD filed its Motion and Memorandum for Corrective Action and a motion to shorten time on the hearing thereon. Beaudry's Motion for Stay and ITD's motion for corrective action are now before the Court. Oral argument was held on October 11, 2011.

## **II. STANDARD OF REVIEW.**

Decisions of the District Court acting in its appellate capacity under the Idaho Administrative Procedure Act (IDAPA) are reviewed directly by appellate courts. *Taylor v. Canyon County Board of Commissioners*, 147 Idaho 424, 430-31, 210 P.3d 532, 538-39 (2009). When factual issues are raised for review, appellate courts conduct an independent review of the agency record. *Wohrle v. Kootenai County*, 147 Idaho 267, 273, 207 P.3d 998, 1004 (2009). Issues of statutory construction are subject to free review. *City of Sun Valley v. Sun Valley, Co.*, 128 Idaho 219, 221, 912 P.2d 106, 108 (1996).

A decision to stay proceedings under the Idaho Administrative Procedure Act is one committed to the Court's discretion; the Idaho Code permits a reviewing Court to stay the effectiveness or enforcement of an agency's action upon appropriate terms.

I.C. § 67-5274. “The word ‘may’ is permissive and denotes an exercise of discretion.” *State v. Hanson*, 150 Idaho 729, \_\_\_, 249 p.3d 1184, 1187 (Ct.App. 2011) (citing *State v. Harbaugh*, 123 Idaho 835, 837, 853 P.2d 580, 582 (1993)).

### **III. ANALYSIS.**

#### **A. Motions to Appear *Pro Hac Vice*.**

As a preliminary matter, both Beaudry and Kawasaki have filed motions for attorneys not licensed in the State of Idaho to appear *pro hac vice*, pursuant to I.B.C.R. 227. As of the October 11, 2011, hearing, verification of proof of the fee to the Idaho State Bar Association had not been received by the Clerk of the Court for the First District Court. As of the date of this opinion, such verification still has not been received. Accordingly, the proposed orders submitted by both Beaudry and Kawasaki have not been signed by this Court.

#### **B. Beaudry Motor’s Motion to Stay.**

In addition to filing the instant action as an appeal, Beaudry seeks an order of this Court staying the effectiveness or enforcement of an agency’s action pursuant to Idaho Code § 67-5274 “to maintain the status quo in the business relationship between Beaudry Motors and Kawasaki throughout the pendency of this appeal.” Protestant Beaudry Motor, Inc.’s Memorandum in Support of Its Motion for Stay Pursuant to I.C. § 67-5274, p. 1. Beaudry’s Memorandum in Support of Its Motion for Stay sets forth its support for the contention that the Hearing Officer committed legal error, including: permitting the owner of Edge Performance to testify despite not having been previously disclosed; finding that I.C. § 49-1613(6) (on unlawful site control) is inapplicable; and finding Kawasaki met its burden of proving the Agreement was appropriately and timely terminated. Protestant Beaudry Motors, Inc.’s Memorandum in Support of Its Motion for Stay Pursuant to I.C. § 67-5274, pp. 8-11.

Specific to its motion for a stay, Beaudry argues a stay is necessary to prevent “immediate and catastrophic damage” to the Beaudrys. *Id.*, p. 12. Beaudry argues an Order of this Court staying the effectiveness or enforcement of ITD’s Order is necessary because, “[w]ithout [the] government sales pricing, Beaudry Motors would not have been able to win bids for agency contracts”, and Mr. Beaudry signed various contracts as personal guarantor in reliance on Kawasaki’s representations that it tested and approved Beaudry’s motorcycles and it was partnering with Beaudry to supply motorcycles. *Id.* Beaudry asks this Court to “require Kawasaki to continue to sell the Kawasaki Concours at the government sales price to Mr. Beaudry.” *Id.*, p. 13. Absent such an Order from this Court, Beaudry claims it would be faced with either making no profit or facing lawsuits and fines while terminating employee and business relationships. *Id.*, pp. 13-14. Beaudry argues a stay is necessary to prevent the plethora of government agencies with whom it does business from being detrimentally affected. *Id.*, p. 15. Finally, Beaudry argues the termination affects its twelve employees and numerous small business who provide Beaudry with parts, and places a possible contract with the California Highway Patrol to develop a new radio in jeopardy. *Id.*, pp. 15-16.

In response, Kawasaki correctly notes that Beaudry is *de facto* requesting injunctive relief, not a stay pursuant to I.C. § 67-5274. Respondent’s Opposition to Protestant’s Motion for Stay, p. 4. Kawasaki argues Beaudry’s status as a terminated dealer would remain unchanged if the Court were to grant the relief sought and maintain the status quo as to the parties’ business relationship because, at the time Beaudry sought a stay from this Court, its status was already terminated by ITD. *Id.*, p. 5. Further, Kawasaki states Beaudry is seeking artificial price supports and guarantees,

in effect asking the Court to require Kawasaki to sell Beaudry motorcycles at a lower price than if Beaudry had succeeded in the agency action below. *Id.*, p. 4. Kawasaki argues the price Beaudry demands, \$12,479 per motorcycle, is the 2011 model price and dealer net cost has increased to \$13,037 per motorcycle; further, “[a]s to the discount, known as [Kawasaki’s] Government Sales Assistance and Retail Incentive Program, it ended September 30, 2011.” *Id.*, p. 14. (emphasis in original).

Although Beaudry has not requested injunctive relief, and is therefore precluded from a grant of such equitable relief (see *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct.App. 1997) (Issues not supported by either argument or authority on appeal will not be addressed); *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (A party waives issue on appeal if lacking either argument or authority)), Kawasaki has addressed Beaudry’s entitlement to such relief, or lack thereof, in detail. Kawasaki states Beaudry is unlikely to succeed on the merits because “the Hearing Officer weighed the appropriate evidence and reached a conclusion that was reviewed and affirmed by the Department on two separate occasions, [Beaudry] will likely not succeed on the merits in an appeal to the court, where it would be required to overcome the substantial burden that the findings of the Hearing Officer were clearly erroneous.” Respondent’s Opposition to Protestant’s Motion for Stay, p. 8 (emphasis in original). Additionally, Kawasaki contends no substantial right of Beaudry’s was affected as the privilege of operating a Kawasaki dealership is arguably not a fundamental right. *Id.*, citing *Kawasaki Motors Corp. v. Superior Court*, 85 Cal. App.4<sup>th</sup> 200, 204-05 (Cal.Ct.App. 2000).

Kawasaki goes on to argue the procedural issues surrounding the August 4, 2011, termination hearing date were misstated by Beaudry. “[O]n July 29, 2011, the

Hearing Officer denied [Beaudry's] Motion to Continue and left the hearing date unchanged from August 4, 2011, a date which had been previously agreed to by the parties..." *Id.*, p. 9. The Hearing Officer also explained no legal authority to grant the continuance existed as such a continuance would have constituted an automatic finding of good cause for the termination; and Kawasaki notes both parties received the same amount of notice regarding the August 4, 2011, hearing, resulting in equal prejudice to both. *Id.* Kawasaki then briefly addresses the propriety of calling the owner of Edge Performance as a rebuttal witness, noting the Agreement's language giving Kawasaki sole discretion to determine dealer locations, the inapplicability of I.C. § 49-1613(6) to "unauthorized" relocations, and Kawasaki notes the self-serving nature of Mr. Beaudry's affidavit that Beaudry conducted business throughout the month of February 2011, (where the Hearing Officer had previously found substantial evidence that Beaudry had no physical location for at least seven consecutive days in that month, thereby rendering Kawasaki's fifteen-days' notice of its intention to terminate proper under I.C. § 49-1614(2)(c)). *Id.*, pp. 9-11.

Finally, Kawasaki argues Beaudry cannot demonstrate irreparable injury to itself, and a stay would, in fact, substantially harm Kawasaki and its authorized dealers. *Id.*, pp. 12-13. Kawasaki cites to non-binding precedent in its brief to support its argument that, because any harm sustained by Beaudry could be properly compensated by monetary damages, Beaudry's harm is not irreparable. *Id.*, p. 12. Further, Beaudry's having to pay a greater price for motorcycles likewise does not rise to the level of irreparable harm. *Id.* Kawasaki also notes the grant of a stay would result in harm to Kawasaki and Edge Performance (and possibly other dealers), and the statutory right of dealers to file a protest under I.C. § 49-1616 would be rendered ineffectual were this

Court to grant Beaudry the relief it seeks. *Id.*, p. 13. Kawasaki argues Beaudry's claim of harm to its suppliers and employees is nothing more than speculation in light of Beaudry's failure to support its argument with affidavits from customers or employees claiming harm. *Id.*, p. 12.

The Court's decision to grant or deny equitable relief is a matter committed to its discretion. *Rowe v. Burrup*, 95 Idaho 747, 750, 518 P.2d 1386, 1389 (1974) ("As a general principle, the trial court is to be granted broad discretion in fashioning equitable relief. See generally: 27 Am.Jur.2d *Equity* § 102, et seq."). Here, Beaudry has presented the Court with a *de facto* request for equitable relief, one framed as a motion for stay under IDAPA provisions. Due to the absence of either argument or authority, Beaudry is not entitled to such relief. *Powell*, 130 Idaho 122, 128, 937 P.2d 434; *Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970. Beaudry posits the requirements for injunctive relief do not apply to its instant motion for a stay. Reply Memorandum in Support of Protestant's Motion for Stay Pursuant to I.C. § 67-5274, pp. 2-4. And Beaudry goes on to state its support and authority for its contention that it is likely to succeed on the merits of its claim and that irreparable injury would result if the Court did not grant relief (requirements of injunctive relief). *Id.*, pp. 4-6.

The instant motion before the Court is one for a stay under I.C. § 67-5274. A stay pursuant to I.C. § 67-5274 is a matter committed to the Court's discretion and is applicable to petitions for review. In the instant matter, Beaudry's putative petition for review has not been filed following the procedure set forth in the applicable Idaho Rules of Civil Procedure.

In *Cobbley v. City of Challis*, 143 Idaho 130, 139, 139 P.3d 732, 735 (2006), the Idaho Supreme Court wrote, "[j]udicial review of an administrative decision is wholly

statutory; there is no right of judicial review absent the statutory grant.” See I.R.C.P.

84(a)(1). Idaho Code § 49-1621 states in its entirety:

JUDICIAL REVIEW. Any party to a hearing before the department, or any party to a hearing has the right to judicial review in the district court. Appeals shall be as provided in chapter 52, title 67, Idaho Code.

Thus, Beaudry’s right to appeal is pursuant to Title 49, Chapter 16 of the Idaho Code and the appeal procedure is set forth in Idaho Rule of Civil Procedure 84(a)(1), *et seq.*

The text of Rule 84(b)(1) sets forth the procedure for filing a petition for judicial review “unless a different time or procedure is prescribed by statute”:

...a petition for judicial review from an agency to district court must be filed with the appropriate district court within twenty-eight (28) days after the agency action is ripe for judicial review under the statute authorizing judicial review, but the time for filing a petition for judicial review is extended as provided in the next sentence. When the decision to be reviewed is issued by an agency with authority to reconsider its decision, the running of the time for petition for judicial review is suspended by a timely motion for reconsideration, and the full time for petition for judicial review commences to run and is computed from the date of any decision on reconsideration, the date of any decision denying reconsideration, or the date that reconsideration is deemed to be denied by statute by inaction on a petition for reconsideration. Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding). Proof of service on the agency and all parties shall be filed with the court in the form required by Rule 5(f).

I.R.C.P. 84(b)(1). Here, ITD’s denial of Beaudry’s motion for reconsideration was issued on September 7, 2011. Because Title 49, Chapter 16 of the Idaho Code, specifically, I.C. § 49-1621, does not specifically provide a procedure or standard for judicial review, I.R.C.P. 84(e) sets forth the method and scope of review:

When judicial review is authorized by statute, and statute or law does not provide the procedure or standard, judicial review of an agency action shall be based upon the record created before the agency.

I.R.C.P. 84(e)(1).

In its Motion and Memorandum for Corrective Action, ITD notes Beaudry completely failed to follow the requirements of I.R.C.P. 84. Idaho Transportation Department's Motion and Memorandum for Corrective Action, p. 2. ITD argues Beaudry has failed to pay the fee for preparation of the agency record and agency transcript pursuant to I.R.C.P. 84(f)(4) and 84(g)(A). *Id.* Because of Beaudry's failure, ITD cannot comply with the fourteen-day objection deadline in I.R.C.P. 84(j), should any objections to the record and/or transcript arise, and the forty-two day deadline for preparation of the record under I.R.C.P. 84(k) likewise cannot likely be met. *Id.* Beaudry appears to have attempted to frame the instant appeal as one falling outside IDAPA for purposes of its Notice of Appeal, but as falling within IDAPA for purposes of the stay Beaudry seeks.

The argument made by Kawasaki during the October 11, 2011, hearing on the motion for a stay is well-taken. In the instant motion, Beaudry seeks not only reinstatement of the contract between itself and Kawasaki, but also that the Court impose a pricing structure pursuant to the previous contract between the parties. Such a pricing structure, as argued by Kawasaki, is no longer available to even dealers currently in the relationship Beaudry had been in with Kawasaki. The earlier price for motorcycles paid by Beaudry was also subject to a now-expired incentive program. A stay would not be appropriate if analyzed under injunctive relief guidelines, nor is a stay appropriate as analyzed under I.C. § 67-5274. There are no Idaho appellate cases analyzing I.C. § 67-5274, and that statute, rather obliquely, simply reads:

**Stay.**—The filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

Use of the word “may” causes this issue to be committed to this Court's discretion.

It is appropriate for this Court to exercise its discretion and deny Beaudry the relief it seeks in the form of a stay. Such relief would go well beyond staying the effectiveness or enforcement of ITD's action as contemplated in I.C. § 67-5274.

The parties and ITD all agreed that ITD was not a necessary party during the hearing on the motion for a stay on October 11, 2011. Beaudry stated on the record it is willing to provide ITD with additional time within which to complete preparation of the record and transcript. This issue is not specifically before the Court. In any event, the Court would be reluctant to rule on any request for additional time had such been brought by ITD, due to the unique procedural posture of the case before the Court. Nonetheless, Idaho Rule of Civil Procedure 84(a) specifically states:

When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review.

I.R.C.P. 84(a). Further, the Rule goes on to state that in situations such as the present where no statute provides the procedure or standard, "...judicial review of the agency action shall be based upon the record created before the agency." I.R.C.P. 84(e)(1). Due to the manner in which the instant appeal has been brought by Beaudry, no such procedure could have been followed.

Ultimately, the "[r]equirements for timely filing and serving of a petition for review are jurisdictional. Absent compliance with this statutory requirement, a district court has no jurisdiction to review a final determination..." *Johnson v. Blaine County*, 146 Idaho 916, 926, 204 P.3d 1127, 1137 (2009) (quoting *Floyd v. Board of Commissioners of Bonneville County*, 137 Idaho 718, 723, 52 P.3d 863, 868 (2002) (holding failure of petitioner to seek judicial review of Board of Commissioner's finding regarding conditional use permit precluded appeal).

Beaudry's failure to file a Petition for Judicial Review in the instant matter as required by I.C. § 67-5273 (choosing instead to file a "Protestant Beaudry Motors, Inc.'s Notice of Appeal to Kootenai County District Court"), and Beaudry's failure to follow the requirements of I.R.C.P. 84 (specifically I.R.C.P. 84(f)(4), 84(g)(1)(A), 84(j)), combine to preclude Beaudry from the relief it seeks in the form of a stay, and may result in this Court's lacking subject-matter jurisdiction to hear Beaudry's appeal.

**C. ITD's Motion for Corrective Action.**

On October 4, 2011, this Court received a two-page letter to the Court from J. Tim Thomas, Deputy Attorney General for ITD, dated September 29, 2011. Later in the morning of October 4, 2011, Stephanie Wright of ITD's Legal Section faxed the same letter (and the enclosure, which was Beaudry's "Protestant Beaudry Motors, Inc.'s Notice of Appeal to Kootenai County District Court"), to this Court's law clerk. In addition to the Court, this letter was also addressed to counsel for Beaudry, and a copy is shown being sent to Kawasaki's attorneys. The letter outlined the procedural history before ITD and the procedural difficulties ITD perceived with "Protestant Beaudry Motors, Inc.'s Notice of Appeal to Kootenai County District Court", and concludes:

Pursuant to I.R.C.P. 84(k), the Department's 42 day deadline for lodging the agency record and transcript is fast approaching (October 13, 2011). Due to the approaching deadlines for settling the transcript, it is problematic for the Department to comply based upon the facts stated above. The Department is thus seeking guidance on how to proceed in light of the procedural posture of this appeal.

Tim Thomas Letter, p. 2. This Court refused to respond to this letter as to do so would be inappropriate for a variety of reasons. First, and foremost, no motion was before this Court. Second, even though copies went to the attorneys from both sides involved, the letter is still *ex parte* communication. Idaho Code of Judicial Conduct, Canon 3(B)(7).

Third, ITD was not a party, even though it was the reviewing agency appealed from. Fourth, any action requested would amount to an advisory opinion.

On October 6, 2011, ITD filed “Idaho Transportation Department’s Motion and Memorandum for Corrective Action”, and “Idaho Transportation Department’s Motion and Memorandum to Shorten Time”, such that ITD’s Motion for Corrective Action could be heard at the October 11, 2011, hearing. In ITD’s Motion and Memorandum for Corrective Action, ITD reiterates the procedural problems created by the decisions Beaudry made in choosing to file “Protestant Beaudry Motors, Inc.’s Notice of Appeal to Kootenai County District Court”. Those problems were discussed immediately above.

Additionally, ITD argues ITD should have been made a party to Beaudry’s appeal (which should have been a Petition for Judicial Review), because I.R.C.P. 84(a)(2)(E), states, “Respondent” means any person responding to the petitioner’s request for judicial review of the agency’s actions before the district court, *including the agency itself* (italics added), and because *Sagewillow, Inc. v. Idaho Department of Water Resources*, 138 Idaho 831, 845-46, 70 P.3d 669, 683-83 (2003), according to ITD, “...makes it clear that the Department may be a party.” ITD’s Motion and Memorandum for Corrective Action, pp. 2-3. In *Sagewillow*, the Idaho Supreme Court held the Idaho Department of Water Resources was properly a party to Sagewillow’s petition for judicial review of the agency’s (Idaho Department of Water Resources) decision, analyzing the statutory IDAPA definitions of “party” (“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(13)) and “person” (“any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character”, I.C. § 67-5201(15)). ITD’s Motion and Memorandum for Corrective Action, p. 3.

ITD then claims “Without being named a party, the Department cannot participate in the judicial review of its final agency action.” *Id.* This Court agrees. This Court specifically finds that ITD is, as defined by I.C. § 67-5201(13), a “party” in that ITD is “properly seeking and entitled as a right to be admitted as a party.”

ITD finally claims it “...asks the Court for its Order allowing the parties to cure the procedural defects.” ITD’s Motion and Memorandum for Corrective Action, p. 4.

Beaudry argues: “Beaudry Motors joins in the Department’s request [ITD’s Motion for Corrective Action] to the extent that any procedural errors exist.” Protestant Beaudry Motors, Inc.’s Response Memorandum Re: Idaho Transportation Department Memorandum, p. 2. This Court has found several procedural errors were committed by Beaudry in its “Protestant Beaudry Motors, Inc.’s Notice of Appeal to Kootenai County District Court”. Beaudry argues that since I.R.C.P. 84(a) requires “When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court’s judicial review”, and since I.C. § 67-5720 “...governs this issue of judicial review”, I.R.C.P. 84 does not apply in this case.

Beaudry Motors, Inc.’s Response Memorandum Re: Idaho Transportation Department Memorandum, p. 2. Beaudry argues it complied with I.C. §§ 67-5721 to 5729.

Specifically, Beaudry argues I.C. § 67-5273 requires Beaudry to “file for review within 28 days”. Beaudry Motors, Inc.’s Response Memorandum Re: Idaho Transportation Department Memorandum, p. 4. This “file for review” is a not so subtle sleight of hand by Beaudry, as Idaho Code § 67-5273 required Beaudry to file its “petition for judicial review” within 28 days. Beaudry did not file any “petition for review”, and that failure by Beaudry is the essence and genesis of its legal bungling of this case. So Beaudry argues the statute (I.C. § 67-5273) does apply when Beaudry does not want I.R.C.P. 84

to apply, but then glosses over the fact that it never complied with the statute (I.C. § 67-5273) in the first place! Most importantly, nothing in I.C. §§ 67-5270 et. seq., makes any provision for the transcript or the record. Since those statutes are silent on those issues, I.R.C.P. 84(a) becomes applicable because: “When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court’s judicial review.” I.R.C.P. 84(a). There is no procedure for payment in the statute, and Beaudry failed to comply with I.R.C.P. 84 because Beaudry failed to pay the fee to prepare the agency transcript and agency record pursuant to I.R.C.P. 84(f)(4) and 84(g)(A). *Id.* Because of Beaudry’s failures, ITD cannot comply with the fourteen-day objection deadline in I.R.C.P. 84(j).

Kawasaki agrees with ITD that Beaudry’s “notice of appeal” is procedurally defective, but argues allowing Beaudry to cure its defective notice is not the correct remedy, that dismissal of Beaudry’s “notice of appeal” is what is required.

Respondent’s Response to the Idaho Transportation Department’s Motion for Corrective Action, pp. 1-3. However, at the time the motions were taken under advisement on October 11, 2011, no motion to dismiss was before the Court (on October 24, 2011, Kawasaki filed “Respondent’s Motion to Dismiss Protestant’s Notice of Appeal”, which is not yet at issue before the Court). Kawasaki argues I.R.C.P. 84(d) “...unequivocally provides that failure to file a timely petition for judicial review ‘shall be jurisdictional and shall cause **automatic dismissal** of the petition for judicial review upon motion of any party.’” Respondent’s Response to the Idaho Transportation Department’s Motion for Corrective Action, pp. 3-4. (underlining and bold in original). While “automatic”, I.R.C.P. 84(d) requires a “motion [to dismiss] of any party”, and no motion to dismiss is *presently* before this Court, although one has been filed.

Oddly enough, Beaudry writes: “If the Department is contending that Beaudry Motors appeal is incorrectly titled and should instead be titled a ‘Petition for Judicial Review,’ Beaudry Motors has already agreed to file a motion requesting to amend the name.” Beaudry Motors, Inc.’s Response Memorandum Re: Idaho Transportation Department Memorandum, p. 4. That statement begs the question: “Why has Beaudry up to the present chosen NOT to amend?” This only compounds Beaudry’s other procedural miscalculations.

No party has discussed the doctrine of “relation back”, if the parties wer allowed to attempt to “correct” any procedural defects. Because there is not presently a motion to dismiss at issue before this Court, and because the effect of any future attempt to “correct” the procedural defects this Court finds exist, ITD’s Motion for Corrective Action should be granted, with the Court left to determine at a later date the effectiveness of any subsequent correction.

#### **IV. CONCLUSION AND ORDER.**

For the reasons set forth above, Beaudry’s Motion for Stay Pursuant to I.C. § 67-5274 must be denied.

IT IS HEREBY ORDERED Beaudry’s Motion for Stay Pursuant to I.C. § 67-5274 is DENIED.

IT IS FURTHER ORDERED ITD’s Motion for Corrective Action is GRANTED, and 1) ITD is now made a party to this action, and 2) any party is allowed the opportunity to attempt to correct any procedural defect; the effect of any attempt to cure is to be determined. Any party has 20 days from the date of this Memorandum Decision and Order to file any amended pleadings.

Entered this 2<sup>nd</sup> day of November, 2011.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of November, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Matthew Ries	1-509-326-4891	J. Tim Thomas/Jerry D. Reynolds	1-208-334-4498
Nancy J. Garrett	1-208-938-2277	Stephen M. Bledsoe	1-816-561-1888

\_\_\_\_\_  
Jeanne Clausen, Deputy Clerk