

A. Dean Tranmer (ISB # 2793)
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 239-6986 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn (ISB # 7928)
Mitra M. Pemberton
J. Ryland Hutchins
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

ATTORNEYS FOR CITY OF POCATELLO

**BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHT NOS.) Docket No. CM-DC-2011-004
36-02551 AND 36-07694)
) **CITY OF POCATELLO'S MEMORANDUM**
(RANGEN, INC.)) **IN SUPPORT OF ITS MOTION FOR**
_____) **DECLARATORY ORDER REGARDING**
RANGEN'S LEGAL OBLIGATION TO
INTERCONNECT

COMES NOW, City of Pocatello ("Pocatello"), by and through its attorneys, and moves the Director pursuant to Rules 260 and 565 of the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*), for an Order establishing as a matter of law that under C.M.R. 42, Rangen must take reasonable steps to interconnect its existing water supplies prior to seeking curtailment of junior ground water users. There are no disputes of material fact and, as discussed within, judgment is correct as a matter of law.

UNDISPUTED FACTS

1. Rangen’s hatchery cannot use all of the first-use water that is captured by its diversion structures.
 - a. The highest location from which Rangen has diverted water is the Curren Tunnel (“Curren Tunnel Supply”). *See*, Affidavit of C. Brockway dated January 9, 2013, attaching *Expert Report in the Matter of Rangen Inc. – Availability of Spring Flow and Injury to Water Rights*, Brockway, Colvin, Brannon (“Rangen’s Water Rights Report”), at Figure 5; Affidavit of Greg Sullivan dated February 7, 2013, referring to *Spronk Water Engineers, Inc. Expert Report* dated December 21, 2012 Prepared for the City of Pocatello (“Pocatello’s Opening Expert Report”) at Figure 2-4.¹
 - b. In addition, Rangen has diverted water from a spring emanating below the Curren Tunnel on the so-called “talus slope” (“Lower Talus Slope Supply”). *See*, Affidavit of C. Brockway dated January 9, 2013, attaching *Expert Report in the Matter of Rangen Inc. – Availability of Spring Flow and Injury to Water Rights*, Brockway, Colvin, Brannon (“Rangen’s Water Rights Report”), at Figure 5; Affidavit of Greg Sullivan dated February 7, 2013, referring to *Spronk Water Engineers, Inc. Expert Report* dated December 21, 2012 Prepared for the City of Pocatello (“Pocatello’s Opening Expert Report”) at Figure 2-4.
2. The Hatch House, Greenhouse and Small Raceways are served only by Curren Tunnel Supplies. Pocatello’s Opening Expert Report, Figure 2-4 (showing location of Hatch House, Greenhouse and Small Raceways).
3. Currently, the range of flows associated with the Curren Tunnel Supply is 1.0 – 12.0 cfs annually. Pocatello’s Opening Expert Report, Figure 2-7.
4. The Lower Talus Slope Supply serves only the large raceways and the CTR Raceways. Pocatello’s Opening Expert Report, Figure 2-4 (showing location of Large Raceways and CTR Raceways).
5. Currently, the range of flows associated with the Lower Talus Slope Supply is 9-12 cfs annually. Pocatello’s Opening Expert Report, Figure 2-7.
6. Rangen is unable to deliver water from the Lower Talus Slope Supply to the Hatch House, Greenhouse or Small Raceways. Affidavit of Greg Sullivan dated February 7, 2013, referring to *City of Pocatello’s Disclosure of Expert Rebuttal Reports and Supporting Information* (“Pocatello’s Rebuttal Report”), page 15.
7. Rangen has identified water shortages at the Small Raceways as a primary concern. March 8, 2013, Affidavit of Sarah Klahn (“Klahn Affidavit”), Exhibits A, B, and C:

¹ Experts for both Rangen and Pocatello have sworn in the above-referenced affidavits that the contents of the expert reports contain their true and correct opinions; thus, references to information contained in these reports amounts to both undisputed fact and sworn testimony.

Kinyon Deposition at 18:19-20:13 (stating that Rangen’s use of the Greenhouse “severely curtails” water available to the small raceways); Ramsey I Dep. at 24:11-25:18; Ramsey Second Deposition at 216:12 -20 (testifying that he could not remember a time that the small raceways, Greenhouse, and Hatch House had been fully utilized simultaneously).

8. According to Rangen’s expert David Colvin, about two-thirds of the water currently available at the Rangen Facility comes from the Talus Slope while only about one-third comes from the Curren Tunnel. Klahn Affidavit, Exhibit D: Colvin Deposition 62:25-63:18. (Rough).
9. Therefore, at times two-thirds or more of Rangen’s water is unavailable for use at its upper facilities due to lack of interconnection in the system.
10. Interconnection of Lower Talus Slope Supply with the Small Raceways, for example, would provide a total of 10-24 cfs annually for use in this structure. Pocatello’s Opening Expert Report, Figure 2-7.
11. Rangen’s partial decrees do not contain terms restricting delivery of the Lower Talus Slope Supply to the Large Raceways and CTR Raceways. Klahn Affidavit, Exhibits E, F.

ARGUMENT

A. Idaho law requires that the calling senior take reasonable steps to interconnect its existing water supplies in advance of demanding curtailment of juniors.

Rangen has an obligation under Idaho law to interconnect its available water supplies.

Under the Conjunctive Management Rules (“CMR”), one of the factors for consideration by the Director is:

The extent to which the requirements of the holder of a senior-priority water right could be met with the user’s existing facilities and water supplies by employing reasonable means of diversion and conveyance efficiency and conservation practices.

CMR 37.03.11.42.g.

IDWR employed this provision of CMR 42 in the A&B Delivery Call to require A&B to interconnect its system before it could demand curtailment of juniors. CMR 42 applies in the captioned matter, with the same result: because Rangen has no decree terms limiting the structures to be served by its physical water supply, Rangen must interconnect its system to make

available all of its first use water throughout its facility before curtailment of juniors is a possibility.

The SRBA District Court and Idaho Supreme Court have confirmed that, in the absence of decree terms restricting a senior's ability to utilize its entire physical water supply to serve its entire facility, pursuant to the CMR the Director may require a senior to take reasonable steps to interconnect its physical water supplies prior to acting on a request for curtailment of the ESPA to satisfy an alleged shortage. To wit:

[T]he extent to which the Director may require A&B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director.

Memorandum Decision and Order on Petition for Judicial Review at 39 (May 4, 2010). The District Court also affirmed the Department's finding "that A&B must make reasonable efforts to maximize interconnection of the system and placed the burden on A&B to demonstrate where interconnection is not physically or financially practical." *Id.* The Idaho Supreme Court affirmed:

[T]here is an obligation of A&B [sic] to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from junior users.... Given the language of the CM Rules, we find that the Director did not act arbitrarily or violate Idaho law when he found that A&B must work to reasonably interconnect some individual wells or well systems before a delivery call can be filed, and we affirm the district court's finding in this regard.

A&B Irrigation Dist. v. Spackman, 153 Idaho 500, 284 P.3d 225, 241 (2012) (emphasis added).

Therefore, as a matter of law, Rangen has a legal duty to show the Director it has made reasonable efforts to maximize interconnection of its diversion and conveyance system or show that interconnection is financially or technically infeasible before it can request curtailment of junior water users.

B. Rangen's partial decrees do not limit its ability to interconnect its diversion and delivery system so as to fully utilize its existing water supply.

Without terms and conditions limiting Rangen's place of use within the Rangen facility, the Director must interpret the Rangen decrees to require Rangen to take reasonable steps to interconnect its water supplies to improve water supply conditions throughout the hatchery. See A&B Hearing Officer's Memorandum and Decision at 17-20, March 27, 2009.

At the present time, Rangen's system as-built is not able to physically deliver the water supplies it uses from the Curren Tunnel *and* the Lower Talus Slope to all of the structures in the facility. Specifically, Rangen cannot use water diverted at the Lower Talus Slope Supply at the Hatch House, Greenhouse or Small Raceways. Rangen's SRBA decrees generally describe the place of use of its water rights to be the Rangen Hatchery and contain no restrictions as to which structures at the Hatchery are to be served by which water supplies. See Exhibits E, F to Klahn Affidavit. Accordingly, Rangen is not foreclosed by its decree terms from using its Lower Talus Slope Supply at any of the hatchery structures.

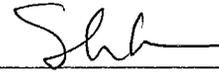
Based on the currently available flows, an interconnection that delivered the Lower Talus Slope Supply to the Small Raceways would increase available first use water supplies to that structure by an additional 9-12 cfs of water annually². Pocatello's Opening Expert Report at Figure 2-7. Mr. Rogers's sworn expert report establishes that interconnection is routine in hatcheries in Idaho, and that it is feasible at the Rangen facility. Rogers' Initial Report at pp. 10, 13; Rogers' Rebuttal Report at pp. 9-10. Rangen's witnesses, for their part, provide only general objections to interconnection³. See e.g. Brockway/Colvin/Brannon-Rangen's Expert Rebuttal

² Rangen could also pump Talus Slope water up for use at the Hatch House and Greenhouse if desired, but according to Doug Ramsey those facilities have sufficient water in all months except for June. Ramsey Dep. II, 212: 17-213:14.

³ Charlie Smith's rebuttal report objects to *re-circulation* of water, but does not address the feasibility of interconnection. Recirculation entails pumping used water from the bottom of the CTR raceways back to the top of the facility to be used a second time; interconnection entails pumping first use water from where it is available below the Talus Slope up to the top of the Small Raceways. See Rogers' Initial Report at pp. 10, 13, Rogers' Rebuttal Report at pp. 9-10.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2013, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Memorandum in Support of Its Motion for Declaratory Order regarding Rangen's Legal Obligation to Interconnect** for Docket No. **CM-DC-2011-004** upon the following by the method indicated:



Sarah Klahn, White & Jankowski, LLP

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|---|---|
| <p>Gary Spackman, Director State of Idaho, Dept of Water Resources 322 E Front St PO Box 83720 Boise ID 83720-0098 deborah.gibson@idwr.idaho.gov</p> | <p><input checked="" type="checkbox"/> Original sent via U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile – 208-287-6700 = Phone – 208-287-4803 <input checked="" type="checkbox"/> Email</p> |
| <p>J. Justin May May Browning 1419 W Washington Boise ID 83702 jmay@maybrowning.com</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-342-7278 <input checked="" type="checkbox"/> Email</p> |
| <p>Robyn Brody Brody Law Office PO Box 554 Rupert ID 83350 robynbrody@hotmail.com</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile - 208-434-2780 = Phone 208-434-2778 <input checked="" type="checkbox"/> Email</p> |
| <p>Fritz Haemmerle Haemmerle Haemmerle PO Box 1800 Hailey ID 83333 fxh@haemlaw.com</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-578-0564 <input checked="" type="checkbox"/> Email</p> |
| <p>Garrick L. Baxter Chris M. Bromley Deputy Attorneys General – IDWR PO Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov kimi.white@idwr.idaho.gov</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile - 208-287-6700 <input checked="" type="checkbox"/> Email</p> |
| <p>Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey 101 S Capitol Blvd Ste 300 Boise ID 83702 rcb@racinelaw.net cmm@racinelaw.net bjh@racinelaw.net</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-433-0167 <input checked="" type="checkbox"/> Email</p> |
| <p>Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 dtranmer@pocatello.us</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile – 208-234-6297 <input checked="" type="checkbox"/> Email</p> |

| | |
|--|---|
| <p>C. Thomas Arkoosh Arkoosh Eiguren LLC PO Box 2900 Boise ID 83701 tom.arkoosh@aelawlobby.com erin.cecil@aelawlobby.com</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-343-5456 <input checked="" type="checkbox"/> Email</p> |
| <p>John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 195 River Vista Place Ste 204 Twin Falls ID 83301-3029 flt@idahowaters.com jks@idahowaters.com pla@idahowaters.com jf@idahowaters.com</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-735-2444 <input checked="" type="checkbox"/> Email</p> |
| <p>W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-878-2548 <input checked="" type="checkbox"/> Email</p> |
| <p>Jerry R. Rigby Hyrum Erickson Robert H Wood Rigby Andrus & Rigby PO Box 250 Rexburg ID 83440-0250 jrigby@rex-law.com herickson@rex-law.com rwood@rex-law.com</p> | <p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-356-0768 <input checked="" type="checkbox"/> Email</p> |