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

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

The City of Pocatello ("Pocatello") hereby submits its Reply in Support of its Motion for Declaratory Order Regarding Rangen's Legal Obligation to Interconnect.

INTRODUCTION

Rangen, Inc.'s ("Rangen") Response In Opposition to Pocatello's Motion does not dispute that two-thirds of the water supply available to the hatchery is *not* made available to its Small Raceways, a structure Rangen has asserted it would use more frequently for research and for raising more fish but for alleged water shortages. See Response ¶ 4, at 4. As a precondition to demanding curtailment of juniors, Rangen must show the Director that it has taken reasonable

steps to interconnect, or that it is technically or financially infeasible to install a pipe and pump¹ to deliver water from the Lower Talus Slope to the Small Raceways. *A&B Irrigation District v. Spackman*, as well as *Schodde v. Twin Falls Land and Water Company* require implementation of a reasonable means of diversion (which in this case requires interconnection) before Rangen may demand curtailment of junior ground water users. Department orders have done so as well. See Order ¶¶ 90–99, In the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B and 36-07148; and to Water Rights Nos. 36-07083 and 36-07568, July 8, 2005, attached as Ex. G to Aff. of J. Ryland Hutchins, Mar. 28, 2013.

Rangen’s Response, finally, on page 10, acknowledges Idaho law in this regard when it notes: “the CM Rules allow the Director to consider reasonable diversion in his determinations.” Response at 10 (quotation marks and citation omitted). However, Rangen suggests that in this case, making its entire water supply available to the entire facility is not “useful” because it will not provide Rangen its entire decreed water quantity. Response at 12–13. Admittedly, providing water from the Lower Talus Slope to its Small Raceways by means of a pipe and pump will not allow Rangen to divert its full decreed quantity; however, until it is established that Rangen has a reasonable means of diversion, it is not even possible to establish whether it has a shortage of water.²

I. PRELIMINARY MATTERS

Rangen argues that there is no legal basis to file a motion for declaratory order, therefore, before responding to the substance of Rangen’s arguments, Pocatello will first address this procedural argument. Pocatello’s Motion is not intended to resolve the delivery call, or to obtain

¹ This assumes a pump is even necessary. The talus slope supply is collected upstream of the Small Raceways and depending on relative elevation, it may in fact be possible to convey Lower Talus Slope water to the Small Raceways gravity alone.

² It is Pocatello’s contention (and one that will be shown at trial) that Rangen never received, never used, and does not require its full decreed quantity.

a finding of no injury; Pocatello acknowledges that regardless of the ruling on its Motion, the Director is likely to require a trial. Instead, Pocatello's Motion is a preliminary request for a ruling on a question of law regarding Rangen's obligation to demonstrate its delivery system is reasonable.³

II. RANGEN IS LEGALLY OBLIGATED TO MAINTAIN A REASONABLE MEANS OF DIVERSION.

A. Legal argument regarding reasonable means of diversion.

1. *A&B Irrigation District v. Idaho Department of Water Resources* applies to this case.

The holding in *A&B Irrigation District v. Idaho Department of Water Resources* ("*A&B*"), is binding Supreme Court precedent which applies to this delivery call. 153 Idaho 500, 284 P.3d 225 (2012). Rangen's attempts to distinguish the application of *A&B* from the facts in this case because *A&B* was an appropriator using water for irrigation and Rangen uses its water for aquaculture are without basis. The application of *A&B* to a delivery call arises not from the use prior appropriators make of the water; rather the application arises because a reasonable means of diversion is a limitation on the operation of a prior appropriative right, and particularly on a senior's ability to exercise his priority to demand curtailment of juniors. *Schodde v. Twin Falls Land & Water Co.* 224 U.S. 107, 118, 126, 32 S.Ct. 470, 471-72, 475 (1912). In addition, like *A&B*, Rangen's decrees contain no terms restricting the place of use of Rangen's adjudicated water supplies to particular structures. *See A&B*, 284 P.3d at 228 ("Water right 36-2080 did not identify a specific place of use with each diversion point"); Partial Decrees for Water Rights 36-02551 and 36-07694, *attached* as Ex. A to Aff. of Fritz X. Haemmerle In Support of Rangen, Inc.'s Motion for Partial Summary Judgment Re: Material Injury, Jan. 8,

³ As for precedent, *A&B* filed a Motion for Declaratory Order in 2008 seeking rulings as a matter of law regarding its ability to demand curtailment to achieve historic water levels. *See A&B's Motion for Declaratory Ruling, In the Matter of the Petition for Delivery Call of A&B Irrigation District, Docket No. 37-03-11-1, Mar. 21, 2008.*

2013. The non-restrictive nature of Rangen’s decrees obligates Rangen to interconnect to deliver water to any areas of the hatchery in which it is short prior to demanding water from juniors.⁴

Furthermore, the holding in the *A&B* decision was based on the Director’s obligation to interpret a senior’s decree in answering a delivery call, as well as the Director’s discretion to assess the reasonableness of a senior’s means of diversion as set forth in the Conjunctive Management Rules. *See A&B*, 284 P.3d at 240–41 (“The Director did not impose a new condition, but rather he used his discretion to analyze A&B’s delivery call using his statutory authority in the manner governed by the CM Rules.”). As noted with approval by the Supreme Court, the Hearing Officer in *A&B* cast the interconnection issue as one of maximization of use: “[T]here is an obligation of A&B to take reasonable steps to maximize the use of [interconnection] to move water within the system before it can seek curtailment or compensation from juniors.” *Id.* at 239 (quoting the Hearing Officer’s Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations, Mar. 27, 2009). This is as far as the Director needs go in his Order in response to this Motion: to find that Rangen, as a matter of law, must establish that it has made reasonable efforts to interconnect its first-use water supplies, or that it is technically or financially infeasible to do so.

III. HAVING NO PERSUASIVE LEGAL ARGUMENTS TO SUPPORT ITS CONTENTION THAT IT IS NOT REQUIRED TO DEMONSTRATE A REASONABLE MEANS OF DIVERSION, RANGEN ATTEMPTS TO DISTINGUISH *A&B* FROM THE FACTS OF THIS CASE.

Although Rangen has an obligation to show that it has taken reasonable steps to interconnect (and thus that its means of diversion are reasonable), Rangen’s Response attempts to avoid its legal obligations by highlighting factual distinctions between itself and A&B.

⁴ Pocatello acknowledges the problems for Rangen from the failure of its partial decrees to specify the Lower Talus Slope supply as a part of the “Martin-Curren Tunnel” supply; however for purposes of this Motion, Pocatello assumes it is appropriate for Rangen to deliver the Lower Talus Slope supply to satisfy its hatchery water needs regardless of whether the water at this location is subject to Rangen’s partial decrees.

However, the factual distinctions Rangen draws are either incorrect or not material—in fact, to the extent Rangen argues about the technical feasibility of interconnection (for example, its arguments about oxygen depletion or ammonia levels), Rangen concedes the very substance of the Motion.⁵

- Like A&B, Rangen’s decrees do not limit the place of use of its water supplies to particular structures. *See A&B*, 284 P.3d at 228 (“Water right 36-2080 did not identify a specific place of use with each diversion point”); Partial Decrees for Water Rights 36-02551 and 36-07694, *attached* as Ex. A to Aff. of Fritz X. Haemmerle.
- Like A&B’s complaints about its ability to deliver water to its southwest area, Rangen asserts that it has “limiting factors” on its ability to deliver water to its Small Raceways because of facility design and inadequate water supplies from the Curren Tunnel. Ramsey Dep. vol. I, 24:19–23, 25:3–6, Sept. 12, 2012, *attached* as Ex. A to Aff. of J. Ryland Hutchins; Kinyon Dep. vol. I, 18:19–19:6, Sept. 10, 2012, *attached* as Ex. B to Aff. of J. Ryland Hutchins.
- By the same token (and again, like A&B which had both water long and water short well systems that were not interconnected) Rangen has additional water supplies from a diversion of water from the Lower Talus Slope which it uses only for its Large Raceways and CTR Raceways. Colvin Dep. vol. I, 63:18–23, Mar. 4, 2013, *attached* as Ex. C to Aff. of J. Ryland Hutchins; Brockway Dep.

⁵ Rangen has additional problems insofar as it implies that there are disclosed technical feasibility problems with interconnecting: its expert’s reports are devoid of opinions related to interconnection and its lay witnesses have testified to facts contrary to those asserted in Rangen’s Response. But the result of these complications for Rangen can be vetted at trial.

198:22–25, Mar. 6, 2013, *attached* as Ex. D to Aff. of J. Ryland Hutchins; Smith Dep. 130:1–11, Mar. 7, 2013, *attached* as Ex. E to Aff. of J. Ryland Hutchins.

- Rangen argues, much like A&B in the context of its water short southwestern area of the unit, that the fact that its Lower Talus Slope delivery system is not interconnected to serve its upper facilities is irrelevant, because it “is short of water throughout its facility.” Response ¶ 5, at 4.
 - This is the same argument A&B made—that all of its farmers could use more water, not just the ones receiving less than A&B’s demanded-for 0.88 miner’s inches/acre, and that taking water away from the water-long wells would only create hardships for those farmers.
 - However, Rangen has specifically asserted that it is water short in its Small Raceways (*id.*), and cannot seek curtailment of juniors unless and until it takes steps to utilize all first-use water available to it. In this case, that requires it to interconnect its Lower Talus Slope water supply with its Small Raceways.

In all of these factual distinctions, Rangen misses the point that requiring a senior to maintain a reasonable means of diversion is not about rectifying or avoiding injury to the senior’s water right as a whole; instead, it is to ensure that the senior is beneficially using the water it has, that it needs more water, and that it is not wasting water. The logical conclusion is that if a senior does not have a reasonable means of diversion and is failing to fully utilize the supply it has, it must not actually need more water. Here, Rangen could plainly increase its supply at a critical point in the hatchery (the Small Raceways) through a simple pipe and pump

mechanism. To demand curtailment when it could as much as double the water available to key structures is indeed to demand water in excess of that appropriated for beneficial uses.

But Rangen's Response—and Pocatello's arguments above—get ahead of the script. To reiterate, the point of this Motion is simply to ask for a ruling as a matter of law that Rangen must demonstrate that its means of diversion are reasonable in advance of demanding or obtaining curtailment of juniors.

IV. OPERATIONALLY, INTERCONNECTING THE LOWER TALUS SLOPE WITH THE SMALL RACEWAYS WOULD INCREASE RANGEN'S ABILITY TO BENEFICIALLY USE WATER IN THE SMALL RACEWAYS WITHOUT IMPACTING USE OF THE WATER IN THE LOWER FACILITIES.

Rangen argues on pages 10 through 14 of its Response that its means of diversion are reasonable and that moving water around within the hatchery would not be “useful.” The testimony and opinions of Rangen's expert, as well as those of Pocatello and Idaho Ground Water Appropriators, Inc.'s (“IGWA”) experts, demonstrate that these arguments are without basis. Rangen has an apparently unique (i.e., not consistent with industry standards) raceway/water supply arrangement, which prevents it from using more than one-third of its water in the Small Raceways, Hatch House and Greenhouse. Even Rangen's own fish expert cannot recall a hatchery with this limitation on its ability to deliver water throughout its facility.⁶ Given that Rangen has requested the Director to interpret its decree to answer its delivery call, and the fact that it requests delivery of 18 cfs through curtailment of over 1700 cfs of pumping across the Snake River Plain, it is crucial that Rangen first show that it has taken appropriate steps to interconnect its water supply. Simply put, it has not.

⁶ Rangen's expert Charlie Smith testified that he was unaware of another hatchery in which the entire quantity of first use water was unavailable at the top of the hatchery (e.g., here, at the Small Raceways). Smith Dep. 130:1–11, Mar. 7, 2013, *attached* as Ex. E to Aff. of J. Ryland Hutchins.

To wit:

- Rangen erroneously argues that because all of the water it diverts is used in *some* part of their facility, their means of diversion are reasonable. Response at 2, 11. However, reasonable use in the aquaculture context requires that the water be used through the whole facility and, unlike agriculture, re-use is integral to efficient hatchery operations.
- For purposes of water re-use, the limiting factors in fish production are oxygen and ammonia levels. *Charlie Smith Expert Report In the Matter of Distribution of Water to Rangen, Inc's Water Right Nos. 36-02551 and 36-07694* (“Smith Report”) at 7, Dec. 21, 2012, *attached* to Aff. of Charlie E. Smith in Support of Rangen Inc.’s motion for Partial Summary Judgment, (Jan. 8, 2013). Interconnecting the Lower Talus Slope with the Small Raceways would increase the available supply to its Small Raceways, which Rangen’s witnesses have testified are water short for purposes of its research interests, and which are the first location to experience oxygen shortages within the hatchery. Kinyon Dep. vol. I, 18:19–19:6, *attached* as Ex. B to Aff. of J. Ryland Hutchins (testifying that the Small Raceways are “where we tend to run into our oxygen – we run into our oxygen levels or low oxygen levels first.”).
- Despite Rangen’s suggestions in its brief (Response at 12), it has produced no records to indicate that the Lower Talus Slope water reaches the point of oxygen or ammonia “exhaustion” at the end of the CTR raceways.⁷ Thomas Rogers

⁷ Pocatello and IGWA specifically requested water quality data related to these constituents, and only sporadic sampling was provided. *See* Pocatello’s First Set of Discovery Requests to Rangen, Request for Production No. 8, Aug. 10, 2012, *attached* as Ex. H to Aff. of J. Ryland Hutchins; IGWA’s First Set of Discovery Requests, Request for Production No. 12, May 23, 2012, *attached* as Ex. I to Aff. of J. Ryland Hutchins; Modified Subpoena Duces

Rebuttal Report at 7, Feb. 8, 2013 (“I have not found records from Rangen that show regularly scheduled monitoring of ammonia or oxygen and find no indication that these factors have been a limiting factor at the Rangen Hatchery.”).

- Hatcheries re-use production water multiple times. For example, Mr. Smith describes the use of water in hatcheries as “flow-through systems in which water is used down through a series of raceways and perhaps as many as 4 or 5 times.”

Smith Report at 8.

- The majority of the supply for the Large Raceways comes from first-use Lower Talus Slope water. Lower Talus Slope water flows out of the Large Raceways and into the CTRs—meaning reuse of the Lower Talus Slope water a maximum of two times.
- Rangen’s current reuse practices for Lower Talus Slope water fall below the standards practiced in aquaculture industry.

CONCLUSION

Pocatello’s Motion requested, as a matter of law, that the Director order Rangen to show that it had taken reasonable means to interconnect its water supplies, or that it was technically and financially infeasible to do so. Rangen’s Response argues erroneously that it has no obligation to show that it has interconnected (or that its means of diversion are reasonable) because *A&B* is inapplicable to this case. By the same token, Rangen argues that as a matter of fact it *is* reasonable for Rangen to demand curtailment of juniors to supply additional water to the Small Raceways even though it has failed to interconnect its Lower Talus Slope supply to serve

Tecum for Doug Ramsey ¶ 5, Aug. 31, 2012, *attached* as Ex. J to Aff. of J. Ryland Hutchins. Mr. Ramsey testified that neither oxygen nor ammonia was routinely sampled. Ramsey Dep. vol. I, 36:19–22, 37:8–10, *attached* as Ex. A to Aff. of J. Ryland Hutchins. When he was presented with an example of Rangen’s sporadic water quality sampling data, Mr. Ramsey testified that he was “comfortable” with the oxygen levels at the end of the CTR raceways. *Id.* at 88:13–24. Mr. Tate also testified that he did not measure for ammonia or other contaminants. Tate Dep. 91:1–92:21, Sept. 11, 2012, *attached* as Ex. F to Aff. of J. Ryland Hutchins.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2013, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Reply in Support of Pocatello's 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:


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