

On March 22, 2013, Rangen filed a *Response in Opposition to City of Pocatello's Motion for Declaratory Order Regarding Rangen's Legal Obligation to Interconnect* ("Rangen Response"). At the outset, Rangen states there is no express basis in the Department's administrative rules for the filing of a motion for declaratory order; moreover, there is no stated legal standard by which to address the motion. Rangen then argues against Pocatello's assertion that there are undisputed facts. Rangen states that it uses all water available to it under its water rights and that interconnection would not solve its shortages: "All water is used multiple times before leaving the facility whether or not it is used first in the upper portion of the facility or the lower portion of the facility." *Rangen Response* at 3. "Rangen is short of water throughout its facility. There is no portion of the facility with excess water that could be moved to another portion of the facility." *Id.* at 4. Rangen also contends that Pocatello misapplies the *A&B* decision. There, the Director required A&B to demonstrate interconnection because of the way in which its water right was decreed and the fact that A&B had over- and under-performing wells. By interconnecting its well system, A&B would be able to resolve water shortages at under-performing wells. Rangen states, unlike A&B, "Rangen does not have, and has never had, a portion of its facility with too much water that could benefit another portion with too little by being interconnected." *Rangen Response* at 9. "The bottom line is that the concept of 'interconnection' is unique to A&B and should not be applied to Rangen." *Id.* at 10.

On March 29, 2013, Pocatello filed a *Reply in Support of Motion for Declaratory Order Regarding Rangen's Legal Obligation to Interconnect* ("Reply"). In its Reply, Pocatello points out Rangen "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." *Reply* at 1. Concerning Rangen's argument that the Department's administrative rules do not provide for motions for declaratory relief, Pocatello points to the *A&B* delivery call, in which the hearing officer heard and decided A&B's motion for declaratory judgment concerning the Ground Water Act. Pocatello then argues that Rangen, like A&B, must have a reasonable means of diversion in order to sustain a delivery call: "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." *Reply* at 6-7.

CONCLUSIONS OF LAW

Pocatello correctly points out that, in *A&B*, the Department and Idaho Supreme Court took no issue with the hearing officer's resolution of the applicability of the Ground Water Act via a motion for declaratory order. While the Department's administrative rules do not expressly provide for this type of motion, neither do the rules exclude them. Moreover, Pocatello's attempt to narrow and focus issues for hearing is consistent with Rule 50: "The rules in this chapter will be liberally construed to secure just, speed and economical determinations of all issues presented

to the agency.” IDAPA 37.01.01.050. Therefore, the Director will entertain Pocatello’s motion for declaratory order.

Regarding the merits of the Interconnection Brief, the narrow question posed is whether “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.” While Pocatello may ultimately be correct that Rangen is legally required to interconnect some or all of its system, there are sufficient factual differences between the facts in *A&B* and the developing record in this case as to preclude a declaratory order at this point. In *A&B*, the Idaho Supreme Court affirmed the Director's discretion to require reasonable methods of diversion by a senior right holder, but the reasonableness of *A&B*'s diversions was tied directly to the way *A&B*'s senior water right was licensed and subsequently decreed by the SRBA district court. All 177 individual points of diversion for *A&B*'s senior water right were described in the single water right, authorizing the diversion of 1,100 cfs for irrigation of 62,604.3 acres. *A & B Irr. Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, ___, 284 P.3d 225, 228 (2012). The Bureau of Reclamation, when developing the *A&B* project, intentionally described the water right as an interconnected system so that *A&B* would have flexibility to move water throughout its entire system. As the Court recognized, the Bureau of Reclamation in developing the *A&B* project viewed the project as “as one integrated system, physically, operationally, and financially....” *A&B* at ___ n.2, 284 P.3d at 228 n.2. The Bureau of Reclamation stated that “it is impractical and undesirable to designate precise land areas within the project served by each of the specific wells on the list.” *Id.* The way the water right in *A&B* was licensed and decreed is unique for ground water rights and it is the unique nature of the right that led the Director to require *A&B* to interconnect the system. In this case, Pocatello may be able to make a case for interconnectedness, but only upon a fully developed factual record will the Director be able to draw a legal conclusion that Rangen is required to interconnect its system.

Moreover, the Director recently issued an order related to Rangen’s use of what Pocatello describes in its motion as the Lower Talus Slope point of diversion. The order recognizes that the Lower Talus Slope point of diversion is outside the authorized point of diversion described in Rangen’s water rights. *Order Granting In Part and Denying In Part Rangen, Inc.’s Motion for Partial Summary Judgment Re: Source* at 6 (April 22, 2013). Because the partial decree for Rangen’s water right does not include a point of diversion for the Lower Talus Slope point of diversion, Rangen is effectively prevented from interconnecting the Lower Talus Slope point of diversion with the Hatch House, Green House, and Small Raceways. Given the April 22, 2013 order, the issue of interconnectedness is moot.

ORDER

Based upon the foregoing, the Director DENIES Pocatello’s *Motion for Declaratory Order Regarding Rangen’s Legal Obligation to Interconnect*.

Dated this 23rd day of April, 2013.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of April, 2013, the above and foregoing document was served on the following by providing a copy in the manner selected:

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