

Julie Klein Fischer
 MORROW DINTUS
 5680 East Franklin Road, Suite 220
 Nampa, Idaho 83687
 Telephone: (208) 475-2200
 Facsimile: (208) 475-2201
 ISB No.: 4601
jfischer@morrowdintus.com

Attorneys for Owyhee Motorcycle Club

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

In Re SRBA	)	SUBCASE NO. 63-18957
	)	
	)	OBJECTION TO MOTION TO
Case 38576	)	ENTER UPON LAND FOR
	)	INSPECTOIN OF WATER
	)	DIVERSOIN ANDDISTRUBITON
	)	SYSTEM/MOTION TO COMPEL
	)	

COMES NOW, Owyhee Motorcycle Club, Inc. ("OMC") through its attorney of record, Julie Klein Fischer, and objects to Terteling Company, Inc's ("Terteling") Motion for access to the OMC property as follows:

BACKGROUND AND STATEMENT OF THE CASE

Owyhee Motorcycle Club, Inc. is a non-profit corporation that has operated a motorcycle park in Ada County since the 1940s. OMC is governed by a volunteer board.

OBJECTION TO MOTION TO ENTER UPON LAND FOR INSPECTOIN OF WATER DIVERSOIN
 ANDDISTRUBITON SYSTEM/MOTION TO COMPEL - 1

The OMC property contains a care-taker's residence, a club house, and one well out of which the subject water right is diverted. The water is both domestic and commercial (for dust control on the race tracks).

The OMC property is adjacent to property owned by Terteling who would like to see the park moved. See pps. 87-89 of Exhibit A attached to the Affidavit of Julie Fischer ("Fischer Aff.") containing excerpts from the deposition of Joe Terteling wherein he explains his dislike for the proximity of the park to his property, irritation with dust and noise, and that he would like to see it moved.

OMC timely filed a beneficial use claim in the adjudication for its water right. The Department then recommended the right as follows:

Source:	Groundwater
Quantity:	0.160 CFS; 142.40 AFY
Priority Date:	3/01/1963
Point of Diversion:	T04N R02E S15 SWSE within Ada County
Purpose:	Domestic .040; Commercial .16

Two objections were filed to the OMC right. One by Edwards Family, LLC (which was settled on an agreement that OMC's water was not geothermal) and one by Terteling.

Terteling's objection, filed in April 2006, raised objections to OMC's quantity, priority, and point of diversion.

The initial hearing was held on December 6, 2006. Thereafter, status conferences were held on May 1, 2007, July 31, 2007 and October 2, 2007. As a result of the October 2007 status conference the Court entered a Trial Scheduling Order (dated October 4, 2007) setting the matter for hearing on April 15, 2008. Pursuant to the same Order, discovery was to be completed by March 14, 2008, and witnesses were to be disclosed by February 14, 2008. The only discovery

conducted in this matter was two Rule 30(b)(6) depositions: One of William Henning on behalf of OMC, and one of Joe Terteling on behalf of The Terteling Company on April 4, 2008.

At the pretrial conference, the parties notified the Special Master that settlement negotiations continued and that they would like to reset the trial to provide more time for settlement talks. The Court agreed, and the matter was re-set for trial on May 28, 2008.

On Tuesday, May 27, 2008 the parties held a status conference with the Court, and the trial was again vacated due to a death in the family of OMC's counsel (the funeral being scheduled for the same day as trial). At that time, the hearing was reset for July 17, 2008 and the parties agreed to a new witness disclosure deadline (at the request of attorney Nick Spencer). Significantly, there was no request for additional discovery or any indication the parties were not prepared for trial which would have commenced the following day.

In early June, settlement discussions broke down, and the pending motion was filed.

ARGUMENT

1. Discovery is Closed and Terteling has No Good Cause to Reopen the Same.

While it is not the intention of OMC to be uncooperative, this case has been pending for over two years, and the discovery deadlines are long passed. Terteling has had more than sufficient time to visit the OMC property and conduct the discovery it now seeks.

Additionally, any claim that Terteling needs access (at this late date) to prepare for trial is disingenuous *because Terteling already has had access to the Property*. In the deposition of Joe Terteling (taken as a Rule 30(b)(6) deposition) Mr. Terteling testified he had been to the OMC property the prior day with his son Andy (albeit without permission). *See Exhibit A to Fischer Aff. p. 42, ll. 10-24.* Mr. Terteling testified during his site visit that he had observed an eight-inch well casing; the size of the connected pipes; and two water storage tanks (red and black in

color) placed about one hundred feet in above ground, *Id.* p. 49, ll. 15-23; p. 69, ll. 14-17. Additionally, Mr. Terteling's inspection was detailed enough to discover the name "Hiddleston" on the top of the well (*Id.* p. 55, ll. 24-25) and from his site visit and observations, Mr. Terteling was able to calculate what he believes to be OMC's current rate of diversion. *Id.* p. 50-51.

Mr. Terteling (an engineer) also testified (after the expert disclosure deadline) that he had not retained an expert. Accordingly, there is no reason to open discovery since Mr. Terteling has already been to the property and the time to disclose experts (to the extent that is the purpose for the site visit) is long past.

Further, Terteling has not ever, at any status or other conference, requested the court modify its scheduling order, or requested additional discovery. In fact, at his deposition it was confirmed Terteling had not requested any opportunity to test or examine the OMC well or property through formal discovery. *See Exhibit A to Fischer Aff.*, p. 81. Rather, Terteling conducted his own site visit and now that it has been unable to settle with OMC seeks to reopen discovery in an attempt to support its objections.

Had Terteling needed additional information or discovery to support its objections, the issue should have been raised sooner. The trial is scheduled to begin in just over one month and to reopen discovery at this time would be expensive, cause delay and prejudice OMC.

2. The Site Visit is an Attempt to Obtain Support for Terteling's Objections.

Terteling objected to the OMC water right on three bases: priority date, point of diversion and quantity. It was not until Mr. Terteling was deposed that Terteling conceded it had no basis or evidence for two of its objections, and could offer no substantive support for the third.

Regarding the point of diversion objection, the following questions concluded a lengthy discussion about the same:

Q. So you don't have any dispute that the point of diversion, to the extent that means the well –

A. Okay. If you specify well, I agree with you.

Q. –that's properly recommended in the Exhibit No. 3, the Department's recommendation; correct?

A. I believe the well to be correct.

See Exhibit A to Fischer Aff., p. 18, ll. 3-11.

Similarly, after a considerable amount of testimony, Mr. Terteling also conceded that he had no evidence to contradict OMC's evidence of priority:

MR. HONSINGER: Counsel, now that we're back on the record, we'll stipulate to the fact that we don't have any evidence to contradict Guy James' claim that the priority date of a well that was drilled in 1958. We will continue to dispute the quantity, though.

Id., p. 35, ll. 21-25, p. 36, l. 1. (See also pps. 22-25 inquiring about evidence to support the priority date objection).

Next, Terteling ultimately stipulated that it had no objection to OMC's domestic right with a 1958 priority date:

Q. Okay, We had a discussion off the record where you had a chance to visit with Counsel. And it's my understanding that The Terteling Company will stipulate to a domestic water right with the priority date of 1958. "Domestic" being as defined by law. The term "domestic" being how ever the law or Department denies a domestic water right; is that fair?"

A. That's fair.

Terteling also agreed it did not dispute there is some commercial use by OMC. *Id.*, p. 74.

At one point during the deposition, Mr. Terteling challenged the place of use for the OMC right (*Id.*, p. 85) but upon further examination, it was agreed that the only unresolved objection after the deposition was to the commercial component of Water Right No. 63-18957:

Q. Okay. Aside from the objection to the commercial component of Owyhee Motorcycle Club's water right, have we resolved all of the other issues?

MS. KLEIN FISCHER: And jump in, Charlie, if you thing I'm misstating what our agreement is. I want to make sure I understand what our agreement is when we finish this deposition.

MR HONSINGER: The Terteling Company objection is to the commercial component of the Water Right No. 63-18957.

Id., p. 86, ll. 1-12.

While there is considerable more discussion in the record regarding Terteling's objections to the commercial component of the water right, the support therefore is meager, and based on speculation.

In sum, Terteling has abandoned two of its three claims, and, on the eve of trial is hoping to visit the property to discover facts to support objections it filed, and forced OMC to defend.

It is too late, not to mention prejudicial, to launch into a fact finding mission a month before trial. As mentioned above, this matter has been pending for over two years and OMC has spent considerable time and money simply getting Terteling to concede it had no evidence for at least two of its objections. If Terteling is now allowed to reopen discovery, OMC will be required to spend even more time and money participating in site visits, deposing experts and further employing its own experts to counter any arguments or opinions expressed by Terteling.

//

//

//

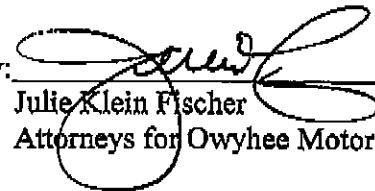
//

CONCLUSION

For the reasons set forth herein, OMC respectfully requests the Court deny Terteling's motion, and honor the existing deadlines the parties have agreed upon, and relied upon.

DATED this 13 day of June, 2008.

MORROW DINIUS

By: 

Julie Klein Fischer

Attorneys for Owyhee Motorcycle Club

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 13 day of June, 2008, a true and correct copy of the above and foregoing document was served upon the following by:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

X

US Mail
Overnight Mail
Hand Delivery
Facsimile X to 287-6700

Chief, Natural Resources Division
Office of the Attorney general
State of Idaho
PO Box 44449
Boise, ID 83711-4449

X

US Mail
Overnight Mail
Hand Delivery
Facsimile X to 854-8072

Edwards Family LLC
c/o Dana Hofstetter
HOFSTETTER LAW OFFICE, LLC
608 West Franklin Street
Boise, ID 83702

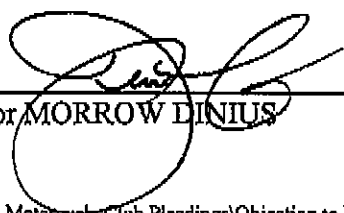
X

US Mail
Overnight Mail
Hand Delivery
Facsimile X to 424-8774

The Terteling Co. Inc.
c/o Charles L. Honsinger
RINGERT CLARK, Chtd.
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

X

US Mail
Overnight Mail
Hand Delivery
Facsimile X to 342-4657


for MORROW DINIUS

T:\Clients\O\Owyhee Motorcycle Club 22151.000\Pleadings\Owyhee Motorcycle Club Pleadings\Objection to Motion for Site Visit.doc