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From: Julie Klein Fischer/Laura

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RE: ***SRBA***
Case No. 39576
Subcase no. 63-18957

Please see the attached:

1. Response to Motion to Compel.

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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

Case 39576

) **SUBCASE NO. 63-18957**

) **RESPONSE TO 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 to Compel as
 follows:

Background

1. On June 11, 2008, Terteling filed a *Motion to Enter Upon Land For Inspection of Water Diversion and Distribution System/Motion to Compel*.

2. On June 13, 2008, OMC objected to Terteling's motion on the basis that, i) discovery deadlines had long passed and the request was untimely; ii) Mr. Terteling already had made his own site inspection (albeit unauthorized); and iii) the motion was an obvious, last minute, attempt to try and find support for Terteling's objection to OMC's water right.¹

3. The Court granted Terteling's Motion on June 16, 2008 reasoning that because the Director's Report erroneously recommended an incorrect annual volume, it is appropriate for the parties to use experts to establish the correct amount of water being used by OMC. Accordingly, Terteling would be allowed to "inspect" the diversion and distribution works. Notably, the order does not comment on the scope of the "inspection" to be allowed, and is absent any permission to "test" the well or pump. *See Order Granting Motion To Enter Upon Land For Inspection of Water Diversion and Distribution System. Motion to Compel*, p. 2.

4. Following a reconnaissance inspection of the OMC diversion works and well (in August 2008), Terteling proposed additional extensive testing and work on site, including removal of the OMC pump; inspection of the well without the pump in place; installation of a monitoring tube; and draw down testing. *See Exhibit A to Honsinger Affidavit in Support of Motion to Compel ("Honsinger Aff.")*.

5. In response to OMC's refusal to allow the extensive and potentially risky testing, Terteling submitted a revised proposal. After consultation with OMC's retained experts, ERO Resources, the revised proposal also was rejected as is noted in the November 4, 2008 letter from

¹ Recall that Mr. Terteling admitted in his deposition that he had no evidence to support Terteling's objections to OMC's priority date and point of diversion; and no substantive proof for the objection related to purpose of use (i.e. commercial component of the OMC right). *See Objection to Motion to Enter Upon Land*, p. 4 -5.

Julie Fischer to Charlie Honsinger. *See Exhibit D to Honsinger Aff.* At that time, OMC made it clear that there are less intrusive ways to obtain accurate and reliable data, and that reasonable, less invasive testing might be allowed. However, OMC also made it clear that absent further direction from the Special Master, regarding the scope of the “inspection,” Terteling was not allowed to remove OMC’s pump or perform the other extensive and disruptive testing.

6. The pending motion to compel requests nothing other than permission to enter the OMC property “for the purpose of inspecting the water diversion and distribution system located on said property as ordered by this Court...” *Motion to Compel*, p. 1. Unfortunately, that already has been done. What is at issue, is the scope of work Terteling should be allowed to conduct on the OMC property.

Arguments

The testing requested by Terteling far exceeds what the IDWR typically relies upon in connection with a claim review and is unnecessary. As this Court knows, the purpose of an IDWR claim review is to verify the elements of the water right including the rate of flow. The recommendations found in Terteling’s Draft Technical Memorandum are not required as part of a water right claim review. Details regarding construction, pump installation, and pump tests are irrelevant to the claim review. In addition, the installation of a flow meter, monitoring tube, or second pressure gage is extraneous to determining the discharge capacity of the OMC water system.

OMC’s expert, Paul Drury with ERO Resources, conducted two flow measurement tests on July 17, 2008. The first test utilized an ultra-sonic flow meter to measure the flow rate in a closed pipe. The second test, used to confirm the results of the first test, utilized the time to fill a container of known volume. Both tests (the descriptions of which are over simplified in this

legal brief) allowed ERO to determine a rate of flow using methods generally relied upon in the industry, all without over extensive, invasive testing.²

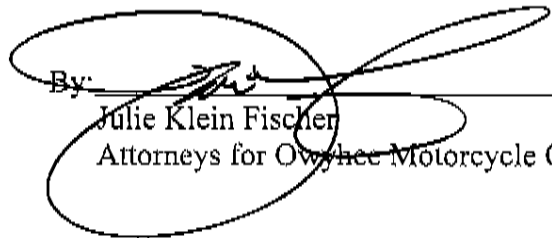
Accordingly, OMC objects to the scope of work proposed by Terteling. However, should further testing (not just inspecting) be permitted, OMC requests the Court define the scope the permissible testing, and include the following conditions in any ensuing Order:

1. Any further investigation of the OMC well and diversion works, including pump testing, shall be conducted during a period when adjacent wells on the Terteling property are not being pumped and after aquifer levels have stabilized.

2. Terteling shall be required to indemnify OMC with a performance bond valued at 150 % of the cost to replace the OMC well and water system. The cost to replace the OMC well and water system shall be determined by a registered professional engineer selected by Paul Drury and Ed Squires (experts for each OMC and Terteling).

Respectfully submitted this 20th day of January, 2009.

MORROW DINIUS & FISCHER, PLLC

By: 
Julie Klein Fischer
Attorneys for Owyhee Motorcycle Club

² In an effort to control the costs of this matter, ERO has not prepared a final report in connection with this litigation. However, based on the pending motion, counsel for OMC will attempt to obtain a final report from ERO, for the benefit of the Special Master, prior to the hearing on Terteling's Motion to Compel.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 20th day of January, 2009, a true and correct copy of the above and foregoing document was served upon the following by:

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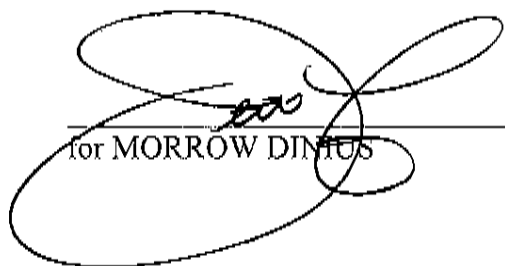
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