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November 30, 2009

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DEPARTMENT OF
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Re: *Owyhee Motorcycle Club*

03-18957

Copies enclosed:

- ☐ For you to fill out. Please complete form and return to my office.
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- ☐ For filing. Please file the original document and return the conformed copy in the envelope which we have provided.

REMARKS:

Enclosed please find a copy of the following documents:

1. Owyhee Motor Cycle Club's Legal Memorandum in Support of Motion for Attorneys' Fees and Costs (Re: Terteling Co., Inc.)
2. Amended Certificate of Service.

Please call if you have any questions.



Debbie R. Howard
Legal Assistant

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

SUBCASE NO. 63-18957

**OWYHEE MOTOR CYCLE
CLUB'S LEGAL MEMORANDUM
IN SUPPORT OF MOTION FOR
ATTORNEYS' FEES AND COSTS
(Re: Terteling Co., Inc.)**

BACKGROUND AND HISTORY OF CASE

The OMC property contains a care-taker's residence, a club house, and one well out of which the water right 63-18957 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 the Terteling Co., Inc. ("Terteling") which entity and its principals would like to see the park moved. See pps. 87-89 of Exhibit A attached to the Affidavit of Julie Fischer filed on June 13, 2008 in support of OMC's objection to Mitton to Enter land ("Fischer Aff. 1") 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 promptly 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.

On March 21, 2008, OMC conducted a Rule 30(b)(6) deposition of Joe Terteling in order to understand the basis for the Terteling Co., Inc's objections. Significantly, Mr. Terteling conceded during his deposition that his company 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.1, 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 however 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 considerably 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. Nonetheless, and despite Terteling's lack of evidence to support the remaining objection, the matter continued and was scheduled to be heard on April 15, 2008.¹

At the pretrial conference (just before the April trial date), the parties notified the Special Master that settlement negotiations were underway 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

¹ Prior to the April 2008 hearing date, the only discovery that had been conducted was the 30(b)(6) deposition of Joe

have commenced the following day.

In early June, settlement discussions broke down, and despite that discovery had not been “re-opened” Terteling filed a *Motion to Enter upon Land for Inspection of Water Diversion and Distribution System/Motion to Compel* (dated June 11, 2008). OMC objected to the Motion on June 13, 2008 on the basis that, i) discovery deadlines had long passed and the request was untimely; ii) Terteling already had made a site inspection; and iii) the motion was an obvious, last minute attempt, to try and find support for Terteling’s objection to OMC’s water right. *See Response to Motion to Compel*, p.2. Despite the objection, the Court granted Terteling’s Motion on June 16, 2008 allowing an inspection of the diversion and distribution works at the OMC site. The Court also vacated the hearing (then scheduled for July 17 2008). *See June 16, 2008 Order Granting Motion to Enter Upon Land for Inspection of Water Diversion and Distribution System/Motion to Compel; Order Vacating Trial and Requested Proposed Trial Schedule.*

Terteling proceeded with a site inspection, as allowed, and subsequently proposed additional extensive testing and site work, 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* on file herein.

For obvious reasons, and after consultation with its own experts, OMC declined to allow further testing. As a result, Terteling filed another *Motion to Compel* on December 30, 2009. Again, OMC objected and on January 30, 2009, after hearing the matter, the Court denied Terteling’s motion to compel. In the same Order, the Court requested a 706 Report and Amended Director’s Report from the Department. The deadline for filing the Amended Director’s report was

April 30, 2009. Objections to the amended report were required to be filed by May 28, 2009. *See* January 30, 2009 *Order Denying Motion to Compel; Order Requesting 706 Report / Amended Directors' Report from IDWR; Order Setting Scheduling Conference.*

On April 30, 2009 the Department filed its Amended Director's Report recommending the OMC water right as follows.

Source:	Groundwater
Quantity:	0.160 CFS; 27.93 AFY
Priority Date:	12/31/1958
Point of Diversion:	T04N R02E S15 SWSE within Ada County
Purpose:	Domestic .040; Commercial .16

The amended recommendation appropriately references the agreement between Edwards Family LLC and OMC regarding the diversion of low temperature geothermal water. In addition, the priority date was changed to reflect evidence presented by OMC, and the annual volume was adjusted to correct the previous error made in calculating the same.

No objections were filed to the amended recommendation and a partial decree for the water right was entered on November 12, 2009.

ARGUMENTS & AUTHORITY

1. Attorneys Fees under Idaho Code § 12-121

OMC timely moved this Court for an award of attorneys' fees pursuant to Idaho Code § 12-121 which provides in part, "In any civil action, the judge may award reasonable attorney's fees to the prevailing party." *Id.* The Idaho Supreme Court has interpreted § 12-121 to allow attorneys fees to the prevailing party when the action or defense is frivolous, unreasonable, or without foundation. *See Elec. Wholesale Supply Co. v. Nielson*, 41 P.3d 242

(2001); *United States Nat'l Bank v. Cox*, 126 Idaho 733, 889 P.2d 1123 (Ct. App. 1995); *Simonovich v. Simonovich*, 110 Idaho 9, 713 P.2d 445 (Ct. App. 1985). If legitimate issues of fact are raised in a defense, that defense will not be considered frivolous for the purposes of § 12-121. *Rockefeller v. Grabow*, 29 P.3d 577 (2001). However, where the action or defense hinges on a question of law that has been settled, and there is no argument that the law has been misapplied, an award of fees under § 12-121 is proper. *Hutchinson v. Sate*, 134 Idaho 18, 995 P.2d 363 (Ct. App. 1999).

In this case, OMC contends that it is the prevailing party and that Terteling's position in the litigation was frivolous and unreasonable, and without foundation.

2. OMC Prevailed in this Matter.

After more than two years of litigation regarding the components of OMC's water right, the outcome was OMC improved its' priority date and a mathematical error in the annual volume calculation was corrected.

More importantly, however, is that Terteling did not accomplish anything through its objection. As stated above, Terteling objected to OMC's priority date, quantity and point of diversion without any evidence to support its position. OMC prevailed on the priority issue by gaining an earlier priority for its water right, and the point of diversion was not ever changed. Additionally, in June 2008 OMC offered to resolve the matter with Terteling on terms less desirable than those ultimately recommended and decreed. Specifically, OMC agreed to an annual volume of 25.4 AFY (the only issue then in contention).² See June 4, 2008 letter from Julie Fischer to Charlie

² Obviously, OMC's offer was based on a desire to compromise and settle a claim for economic reasons, and should

Honsinger attached to the *Memorandum of Costs and Fees and Affidavit of Attorney* as Exhibit "B." Terteling rejected that proposed settlement and insisted it would not agree to the suggested annual volume without OMC's agreement to never make a call on the Terteling well. As a result, the matter was not settled. However, the point in referencing the settlement negotiations is that OMC prevailed on the quantity component of the right. That is, it agreed there was an error in the original calculation and was successful in obtaining the annual volume it suggested to the Department. In fact, OMC provided a report from ERO Resources to the Department containing what ERO believed would be an appropriate quantity recommendation. In the report, which is attached to the *Memorandum of Costs and Fees and Affidavit of Attorney* as Exhibit "C," ERO concluded an annual volume of 25 acre feet was appropriate based on the facts it had at the time. Thus, OMC prevailed by defeating Terteling's objection in its entirety.

2. This Action was Defended Frivolously, Unreasonably and without Foundation

As discussed above, Terteling raised objections to OMC's water right without having any basis in law or fact to support its position. In fact, Terteling conceded to having no evidence on which to base its objection to the recommended point of diversion *and* priority date for OMC's right. Unfortunately, Terteling did not concede its position until after causing OMC to incur costs and fees defending the objection. Additionally, the record is clear from Terteling's conduct that it did not have any reasonable basis on which to object to the quantity element of OMC's water right. Rather, Terteling made a late attempt to find evidence for its position and when none could be found it sought to perform additional and extensive work to the OMC system. Still, Terteling's efforts failed and it accomplished nothing by launching the above-captioned litigation.

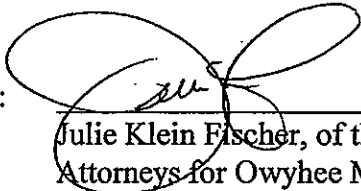
Further, there is evidence in the record that Terteling was motivated by a strong dislike for OMC and the existence of a motorcycle park on the border of its property. As discussed above, Joe Terteling admitted the same in his deposition stating he would like to see the park moved and complaining about the use of land as a motorcycle park. See Fischer Aff. 1, Exhibit A. Thus, there can be no question, when considering the lack of evidence and support for its position, that Terteling's actions were motivated by a desire to hassle OMC. Its objection was not pursued in good faith and was not based on any fact or evidence. Rather Terteling caused OMC to spend considerable sums defending the matter, only to concede in the end.

CONCLUSION

Although OMC ultimately prevailed in this matter, the means to the end was expensive and the process was unnecessary. Terteling did not have a basis for raising its objections and did so only to hassle and trouble OMC. Thus, for the reasons stated herein, OMC respectfully requests it be awarded attorneys fees and costs pursuant to Idaho Code § 12-121, and Idaho Rules of Civil Procedure 54(d) and 54(e).

DATED this 28 day of November, 2009.

MORROW & FISCHER, PLLC

By: 

Julie Klein Fischer, of the Firm
Attorneys for Owyhee Motorcycle Club

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 25th day of November, 2009, a true and correct copy of the above and foregoing document was served upon the following by:

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

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

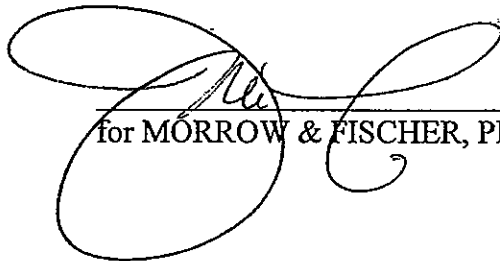
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The Terteling Co. Inc.
c/o Charles L. Honsinger
RINGERT CLARK, Chtd.
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

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for MORROW & FISCHER, PLLC

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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

AMENDED CERTIFICATE OF SERVICE

COMES NOW, the law firm of Morrow & Fischer, PLLC and provides the Court with the following Amended Certificate of Service:

1. That on the 30th day of November, 2009, the undersigned served upon IDWR Document Depository, Chief, Natural Resources Division, Office of the Attorney General, State of Idaho, Dana Hofstetter of the law firm Hofstetter Law Office, LLC the following documents by electronic mail and Charles L. Honsinger of the law firm The Tertelling Co., Inc. by Facsimile to 342-4657:

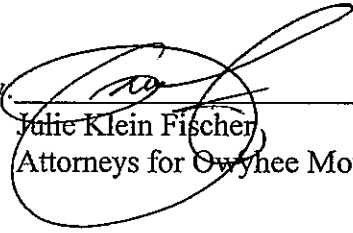
a. Owyhee Motor Cycle Clubs' Legal Memorandum in Support of Motion

COPY

for Attorneys' Fees and Costs (Re: Terteling Co., Inc.)

DATED this 30 day of November 2009.

MORROW & FISCHER, PLLC

By: 

Julie Klein Fischer
Attorneys for Owyhee Motorcycle Club

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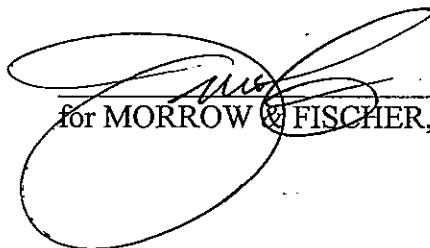
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for MORROW & FISCHER, PLLC