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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Objector The Terteling Company, Inc.

**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
Case 38576	)	
	)	
	)	
	)	MOTION TO STRIKE
	)	
	)	
	)	

MOTION

COMES NOW, Objector The Terteling Company, Inc. (hereinafter "TTCI") by and through its attorneys of record, Ringert Clark, Chartered, and hereby moves this court to strike portions of the *Memorandum of Costs and Attorney Fees and Affidavit of Attorney* filed by Claimant Owyhee Motorcycle Club (hereinafter "OMC") on the grounds that the same contains settlement communications excluded from evidence by I.R.E. 408, and contains hearsay excluded from evidence by I.R.E. 802.¹ This *Motion* is made pursuant to I.R.C.P. 7(b) and/or I.R.C.P. 12(f) and is supported by the record herein.

¹ TTCI contests the substance of the *Memorandum of Costs* and the associated *Owyhee Motorcycle Club's Motion for Attorneys' Fees and Costs* in a separate filing.

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SUMMARY

OMC filed its *Memorandum of Costs and Attorney Fees and Affidavit of Attorney* in the above-referenced subcase on November 27, 2009. The *Affidavit* portion of the document references two separately attached documents: a copy of a June 4, 2008 letter from affiant Julie Klein Fischer to TTCI counsel Charles Honsinger, and a copy of a March 5, 2009 report prepared for Ms. Fischer by Paul E. Drury of ERO Resources Corporation. The June 4, 2008 Klein letter to Honsinger should be stricken from the record because it is an offer to compromise; the March 5, 2009 Drury report should be stricken because it is hearsay.

ARGUMENT

1. **Evidence of Offers of Compromise is not Admissible and Should be Stricken from the Record**

I.R.E. 408 provides in relevant part that “[e]vidence of furnishing, offering, or promising to furnish, . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.”

Here, the June 4, 2008 Klein letter is obviously both a settlement offer and a statement made in negotiations directed towards a compromise - exactly the type of evidence to which I.R.E. 408 is directed. In addition to the letter, OMC makes unsupported assertions as to TTCI’s responses to settlement negotiations. The court should strike from the record all references to settlement negotiations - whether contained in the *Affidavit* or in the *Legal Memorandum*.

OMC states that “the point in referencing the settlement negotiations is that OMC

prevailed on the quantity component of the right” in what is a transparent attempt to mislead the court into finding that the purpose for introducing settlement negotiations into an argument over costs and attorney fees is not to point out the parties’ positions during those negotiations. *Legal Memorandum*, p. 8. This position is self-serving and contrary to the rule, which provides that evidence of settlement negotiations is not to be used to prove “the amount of the claim” - which is exactly the purpose for which OMC is using such evidence in its *Legal Memorandum*. In fact, OMC justifies its attempt to insert settlement discussions into the record to show that it “prevailed” in the litigation by stating that “it agreed there was an error in the original calculation and was successful in obtaining the annual volume it suggested to the Department.” *Legal Memorandum*, p. 8. Any party engaging in the settlement of any litigation could make a similar claim - that they “prevailed” because they were able to settle - but it still would not result in making the settlement negotiations admissible evidence. Moreover, counsel for OMC was well aware of the applicability of I.R.E. 408 because she referenced the rule within the June 4, 2008 Klein letter itself to prevent exactly the situation we have now - where a party is attempting to introduce this offer of compromise into evidence.

The court should see through this charade and simply strike both the June 4, 2008 letter and all references to settlement negotiations in OMC’s *Legal Memorandum*, including any negotiations with IDWR.

2. **Hearsay is Inadmissible and Should be Stricken**

In addition to the settlement negotiations that OMC is attempting to improperly insert into the record, it also attempts to introduce into evidence a technical report authored by Paul E. Drury of ERO Resources Corp. The report is hearsay and should be stricken from the record.

IRE 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

IRE 802 provides that hearsay is not admissible in evidence. There is no question that the Drury report is an out-of-court statement. OMC offers it to show that “ERO concluded an annual volume of 25 acre feet was appropriate based on the facts it had at the time.” *Legal Memorandum*, p. 8. Because no exception applies to the report, it is hearsay and must be excluded from evidence.

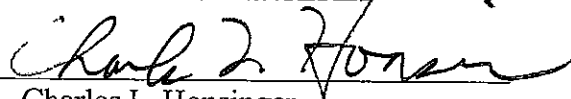
CONCLUSION

The Idaho Rules of Evidence mandate that Exhibits B and C to OMC’s *Legal Memorandum* must be stricken from the record, along with any reference to those Exhibits, and any arguments or statements regarding settlement negotiations. TTCI respectfully requests that the Special Master issue an order requiring the same.

DATED this 9th day of December, 2009.

RINGERT CLARK CHARTERED

By:



Charles L. Honsinger
Attorneys for Plaintiff

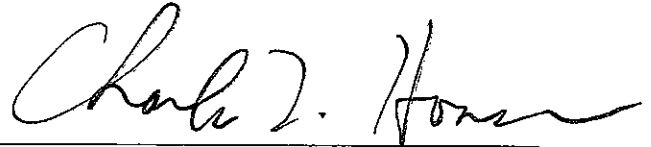
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of December, 2009, I caused to be served a true and correct copy of the foregoing document via U.S.mail and facsimile to the following:

Julie Klein Fischer
Morrow & Fischer
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IDWR Document Depository
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Edward Family LLC
c/o Dana Hofstetter
Hofstetter Law office, LLC
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A handwritten signature in black ink, reading "Charles L. Honsinger", written over a horizontal line.

Charles L. Honsinger