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DEPARTMENT OF
WATER RESOURCES

CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 455
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

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	)	
	)	
	)	OBJECTION TO OWYHEE MOTORCYCLE
	)	CLUB'S MOTION FOR ATTORNEYS' FEES
	)	AND COSTS
	)	
	)	

COMES NOW, Objector The Terteling Company, Inc. (hereinafter "TTCI") by and through its attorneys of record, Ringert Clark, Chartered, and hereby asserts its Objection to Claimant Owyhee Motorcycle Club, Inc.'s (hereinafter "OMC") request for an award of attorney fees and costs. Such request is asserted through OMC's *Motion for Attorneys' Fees and Costs*, and through its *Memorandum of Costs and Attorney Fees*, both of which were filed on November 27, 2009. This Objection is timely as it is filed within 14 days of the filing of the *Memorandum of Costs and Attorney Fees* pursuant to I.R.C.P. 54(d)(6). This Objection is supported by the record herein.

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AND COSTS - Page 1

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SUMMARY

OMC filed a motion alleging entitlement to costs on the basis that it is the “prevailing party” in subcase no. 63-18957, and alleging entitlement to attorney fees on the basis that TTCI conducted the litigation over its objection frivolously, unreasonably and without foundation pursuant to I.C. §12-121. OMC’s argument is contained in its *Legal Memorandum in Support of Motion for Attorneys’ Fees and Costs*. TTCI contests OMC’s argument that it is the “prevailing party” in the litigation and therefore entitled to costs, and OMC’s assertion that it is entitled to attorney’s fees under I.C. §12-121.

FACTS

IDWR originally recommended OMC’s water right no. 63-18957 with the following relevant elements:

Source:	Groundwater
Quantity:	0.16 CFS; 142.40 AFY
Priority Date:	03/01/1963
Point of Diversion:	T04N R02E S15 SWSE
Purpose:	Domestic .040 CFS; Commercial .16 CFS

TTCI filed its Objection to the recommendation of water right no. 63-18957 on April 21, 2006. TTCI objected to: (1) the point of diversion, explaining that it was merely recommended in the wrong ¼¼ section; (2) the quantity, stating that it should be “[o]nly a domestic quantity; and (3) the priority date, stating that it should be “[o]nly a domestic priority.” On June 22, 2006, OMC responded to TTCI’s objection, and the normal course of litigation in the SRBA ensued. Initial hearings and status conferences occurred, punctuated by OMC’s Motion to File Late Objection on February 6, 2007 which was granted on February 8, 2007. In its Late Objection,

OMC objected to the priority date recommended by IDWR, instead asserting a 1958 priority date, and objected to the .160 cfs quantity recommended by IDWR, asserting .270 cfs instead. The parties maintained contact with each other throughout the litigation through their counsel and various settlement proposals floated back and forth. In June, 2008, after hearing TTCI's Motion to Compel OMC to permit an inspection of its diversion and distribution system, the court granted the same. After the inspection occurred, TTCI proposed additional testing and work to determine the capacity of OMC's well so that the quantity produced by the well could be properly determined. The court denied TTCI's Motion to Compel the same, and ordered IDWR to issue a 706 Report setting forth the basis of its recommendation of the water right, and ordered the issuance of an Amended Director's Report. IDWR issued its Amended Director's Report on April 30, 2009, changing the recommended priority date from 03/01/1963 to 12/31/1958, and the recommended volume from 142.40 AFY to 27.930 AFY. The recommended flow rate, however, remained 0.16 cfs, despite OMC's objection. No party, including TTCI objected to the Amended Director's Report. Shortly thereafter, the Court issued its Special Master's Report and Partial Decree, and OMC filed its request for attorney fees and costs.

ARGUMENT

OMC is not the prevailing party in this case as is required by I.R.C.P. 54(d) for an award of costs and attorney fees, and therefore, the same cannot be awarded. Moreover, OMC's *Legal Memorandum* fails to discuss salient facts that lead to the conclusions that TTCI conducted the litigation in this case reasonably, and that it had a foundation for its objection. Accordingly, OMC's Motion must be denied.

I. OMC is Not the Prevailing Party

I.R.C.P. 54(d)(1)(B) directs trial courts to consider the following in “determining which party to an action is a prevailing party”:

“[T]he final judgment or result of the action in relation to the relief sought by the respective parties”

The “final judgment or result of the action” in this case is represented by the Partial Decree issued by the court, whereas the “relief” sought by the parties is indicated by OMC’s original claim, and by both parties’ objections to IDWR’s recommendation of the claim. When the case is looked at under this measure, it is obvious that OMC did not “prevail.”

OMC claimed a quantity of .270 CFS: .04 CFS for Domestic purposes and .23 CFS , but did not claim any volumetric limitation. When IDWR recommended a quantity of .16 CFS (.04 CFS for Domestic and .16 CFS for Commercial purposes), both OMC and TTCI objected: OMC on grounds that it should have been .27 CFS as claimed (see OMC Objection), and TTCI on grounds that only the quantity for domestic purposes could be recommended under the priority recommended. Eventually, the recommended quantity of .16 CFS was decreed. Accordingly, neither party prevailed on this particular issue.

TTCI also objected to the 142.40 AFY volumetric limitation recommended by IDWR, while OMC did not object to the recommended volume. It is worth noting that if TTCI had not objected, the volume decreed to OMC would have been more than five times greater than the 27.93 AFY eventually decreed. Thus, as to volume, there can be no dispute that TTCI prevailed. OMC did prevail on the priority date issue and the location of the point of diversion (which TTCI

did not contest once it determined that the point of diversion was properly located), but at best, it can only be determined that OMC prevailed only in part, and that without TTCI's objection to the volumetric limitation, an enormous volume would have been decreed for OMC's water right. OMC's argument that it somehow prevailed because its volumetric quantity was reduced based only upon occurrences during settlement negotiations should be completely disregarded as violative of IRE 408 as further discussed in TTCI's Motion to Strike. Instead, the Court should determine that each party prevailed in part, and that costs should not be assessed against either party.

II. TTCI had a Legitimate Foundation for its Objection, and Litigated the Case Reasonably

OMC has requested attorney fees pursuant to I.C. §12-121. That statute provides in relevant part that “[i]n any civil action, the judge may award reasonable attorney’s fees to the prevailing party.” I.C. §12-121. The court must find that the nonprevailing party brought or pursued the case frivolously, unreasonably or without foundation. I.R.C.P. 54(e)(1); *Turner v. Willis*, 116 Idaho 682, 684, 778 P.2d 804 (1989). The entire course of litigation is to be examined in determining whether a case was brought or pursued frivolously or unreasonably. *Turner v. Willis*, at 685. “ Thus, if there is a legitimate, triable issue of fact, attorney fees **may not** be awarded under I.C. §12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation.” *Nampa & Meridian Irrigation District v. Washington Federal Savings*, 135 Idaho 518, 20 P.3d 702 (2001) (emphasis added).

In other words, the “total defense of a party’s proceedings must be unreasonable or frivolous” to award attorney fees under I.C. §12-121 and “it is not appropriate to segregate those

claims and defenses to determine which were or were not frivolously defended or pursued.”

Turner v. Willis at 739 (quoting *Magic Valley Radiology Associates, P.A. v. Professional Business Services, Inc.*, 119 Idaho 558, 563, 808 P.2d 1303, 1308 (1990)). Recently in *Seiniger Law Office, P.A. v. North Pacific Insurance Company*, 2008 Ida. LEXIS 10, 178 P.3d 606 (2008), the Court held that “I.C. §12-121 applies to the case as a whole. Where there are multiple claims and defenses, it is not appropriate to segregate those claims and defenses for purposes of awarding attorney fees under I.C. § 12-121.” *Id.* at 21, 178 P.3d at 615.

TTCI’s filed its objection based upon a legitimate foundation, and conducted the litigation over the claim to water right no. 63-18957 in a manner that was reasonable. As discussed above, there were three aspects to TTCI’s objection: location of the point of diversion, and that the quantity and priority should relate only to a “domestic” water right.

A. Point of Diversion

TTCI objected to the point of diversion element of OMC’s claim because it suspected there were other points of diversion for the water right. OMC quotes a small portion of Joe Terteling’s (TTCI’s president) testimony in support of its argument that TTCI should not have objected to the point of diversion element - suggesting that the only basis for the object was the location of OMC’s well. OMC conveniently omits discussing the part of the deposition relevant to other reasons for the objection. In the full portion of the testimony quoted by OMC, Joe Terteling explained that, in fact, TTCI was concerned that springs and tanks on the OMC property might be points of diversion in *addition* to the well:

Q. (BY MS. KLEIN FISCHER) All right. I want to talk about the three Xs that are checked on page 2 of your objection. It’s on Exhibit No. 2. I want to start

with the point of diversion. Do you see that, No. 5?

A. Yes.

Q. The comment there is, is recommended in the incorrect quarter quarter section. According to the Terteling Company, what is the correct quarter quarter section for Owyhee Motorcycle Club's point of diversion?

A. Do you have a map?

Q. I do not.

A. I think it's fairly close to the property line. And I have a question. Is there only one well? Are there no springs? Are there any booster pumps? Are there tanks in storage? So those are just four or five of my questions that I would like answered before I really know the answer to that.

Q. So is your answer, you don't know what the correct quarter quarter section is for the Terteling well? I mean, I'm sorry -- the Owyhee Motorcycle Club well?

A. If you had a map, I would show you where the well is. But there are other storage tanks. Are there springs? There are other booster pumps. I would kind of like to have you define for me what the point of diversion is.

Q. Do you know what quarter quarter section the Owyhee Motorcycle Club well is located in?

A. The well. So there is no springs?

Q. Yeah, and I don't want to be difficult, but I get to ask the questions today. All right?

A. Okay. If it's the well only, I think the way you have it specified could be correct.

Q. Okay. Do you have any information to support that it is not correct?

A. If it's the well, I think it's probably in the correct 40-acre area as you specified.

Q. Because that's how -- if you look at the recommendation, which is Exhibit No. 3. I believe you have that there in front of you. It says the point of diversion is in Township 4 North, Range 2 East, Section 15, Southwest quarter of the southeast

quarter in Ada County. Do you see that? It's right here (indicating).

A. I believe the well is in the 40 acres.

Q. That I just read?

A. Yes.

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.

Q. Okay. You were posing some questions to me that you had concerns about where tanks are, and some other things that would help you answer my original question, why did you object to the point of diversion. Can you explain to me what your concerns are with respect to tanks or springs that you believe may be located on the Owyhee Motorcycle Club property?

A. Well, I've been told by members that there are springs up there, and I'm not aware of those springs. But I've been told that's why the tank was overflowing. So I don't believe that's correct, but I've been told that.

Q. What members told you that there are springs?

A. I don't know the guy's name. I just said, here's water running down. You ought to turn off your pump. You are wasting water. He said, that's a spring.

Q. When did that occur?

A. Five years ago.

Q. Five years ago. How many people have told you there are springs on --

A. The one fellow.

Q. Just the one guy?

A. One fellow.

Q. Do you know if he's a member of the Club?

A. I assume so.

Q. Were there any other members around when you had that conversation with him?

A. There was a little kid around, but I don't know who he was either.

Q. Okay. Probably some motorcycles, too. If you look at the recommendation which is Exhibit No. 3, it says the source of Owyhee Motorcycle Club's water right is ground water. Do you have a belief that the Club is claiming some other source of -- any other sources of water --

A. No.

Q. -- than ground water?

A. No.

Q. That was a bad question, but I think you understood what I meant. Okay. The spring issue, you explained that. Someone told you there might be springs. But you don't think there are springs, though; is that right?

A. No, I don't think so.

Q. All right. How would that show you the point of diversion -- where the springs are springing from?

A. Is that what they do? What was the question?

Q. I'm just going back to -- you made some comments when I asked you why Terteling had objected to the point of diversion. And then you raised some concerns that you weren't able to answer that, because you had some concerns about tanks, and springs, and things like that. I'm just trying to understand why your concerns about tanks and springs would affect your -- well, how that would play into your objection to the point of diversion?

A. They wouldn't have been the same point of diversion.

Q. A spring would be a different point of diversion --

A. Yes.

Q. -- than the well?

A. Yes.

Affidavit of Charles L. Honsinger in Support of Objection to Owyhee Motorcycle Club's Motion for Attorney's Fees and Costs (hereinafter "Honsinger Affidavit"), Exhibit A, pp. 16 - 21. Despite OMC's attempt to "cherry-pick" pieces of testimony that allegedly support a fallacious argument, TTCI had a legitimate concern regarding possible additional points of diversion based upon a reading of all of Mr. Terteling's relevant testimony, particularly his testimony regarding his discussion with an OMC member. Accordingly, TTCI's objection to the point of diversion was reasonable.

B. "Domestic" Quantity and Priority

In a similar argument to that it made regarding the point of diversion argument, OMC quotes small pieces of Mr. Terteling's deposition in an attempt to show that TTCI's objection to the quantity and priority elements of OMC's claim were unreasonable. This argument also fails, as the record clearly establishes reasonable grounds for TTCI's objection to these elements.

The simple fact is that TTCI objected to the quantity and priority elements of the claim, specifying that those elements should be "domestic" because, based upon TTCI's observations and knowledge (gained by Joe Terteling over many years), the original well had been a "domestic" well, and that it had been re-drilled long after initial construction to provide sufficient water for the claimed "commercial" purposes.

Mr. Terteling testified that he had spoken with the son of the man who drilled the OMC well, and knew that it was drilled as a “domestic” quantity well. Honsinger Affidavit, Ex. A, p. 23, ln.4 - p. 24, ln. 22. Mr. Terteling also testified that when he was younger, he observed that water from the original well wasn’t used to wet down the track on the hillsides, and observed that it would take up to half of a day to fill a one thousand gallon water truck from that original well. *Id*, p. 28, ln. 11-14; p. 30, ln. 9 - 17. He observed that it was originally a poor quality well with minimum flow. *Id*, p. 32, ln. 3- 11. Mr. Terteling also extrapolates from a statement regarding the use of the well water to mix with concrete that the original well’s production was approximately one-half gallon a minute. *Id*, p. 37, ln. 11- p. 38, ln. 16.

He observed that OMC started putting sprinkler lines in to water its track in approximately 1998. *Id*, p. 41, lns. 9 - 22. He observed that a well driller’s rig was sitting over the well in approximately 1998, and that at that point in time, OMC began using the commercial component of its claim. *Id*, p. 52, ln. 2 - p. 54, ln. 16. Mr. Terteling recognizes the difference between a drill rig and a work over rig. *Id*, p. 59, ln. 21 - p. 60, ln. 16. Mr. Terteling observed that after the drill rig had been over the well, the quantity of water from the well increased. *Id*., p. 59, lns. 10 -1 2. He also testified that he observed a smaller casing for the original well than the eight inch casing currently in place. *Id*, p. 66, ln. 17 - p. 67, ln. 7. He observed that sprinklers and tanks were installed to water more and more ground after the well rig had been over the OMC well in approximately 1998. *Id*, p. 67, lns. 15 - 24. Based upon all of his observations, Mr. Terteling made the logical conclusion that the well was improved and enlarged, resulting in additional quantities being used at OMC’s facilities. *Id*, p. 72, ln. 13 - p.

73, ln. 9.

The simple fact is that OMC's claim to this water right was a beneficial use claim, necessitating the proof of both priority and quantity. Accordingly, TTCI assumed that OMC should have to establish the use of the quantity claimed on the *date of priority claimed* in order to receive a water right for that quantity and that priority date. Mr. Terteling's observations led to the logical conclusion that the quantity of the water produced from the well increased in approximately 1998 to the quantity claimed, and that therefore, *the quantity claimed could not have been produced in 1958* - the priority date claimed. Therefore, TTCI's objection was not to the "domestic" quantity of the water right - which was diverted on the priority date claimed - but to additional quantities diverted for commercial purposes at a later date - because those quantities could not be claimed with a 1958 priority date. TTCI's objection to these elements was entirely reasonable, and based upon factual observations by Joe Terteling. Additionally, TTCI objected to the quantity element because, as explained above, the volumetric quantity was simply too high, an element of the water right that was corrected in the Amended Director's Report. In this regard, TTCI's objection was entirely reasonable, *and was successful*. In fact, if TTCI had not objected, OMC would likely have been decreed an absurdly high volumetric quantity in its water right. Just because TTCI did not pursue the remaining portions of its objection (those upon which it did not succeed) after the Amended Director's Report was issued does not make its objection somehow "unreasonable" and "without foundation." In fact, TTCI has conclusively established that it had a reasonable foundation for its objection.

Even assuming that OMC's argument that portions of TTCI's objection were without

foundation (an assertion TTCI strenuously contends) is correct, the court must view the litigation “as a whole” without segregation, and must simply dismiss OMC’s request for attorney fees.

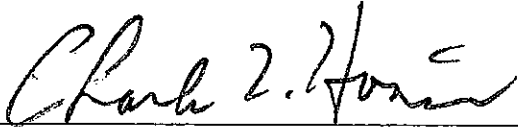
The fact is, that there were legitimate and reasonable grounds for TTCI’s objection, whether any one of the four grounds for the objection (point of diversion, flow rate, volumetric quantity and priority date) were “unreasonable” or not. Finally, any assertion by OMC that TTCI’s conduct in settlement negotiations was “unreasonable” must be completely disregarded as violating IRE 408 as further discussed in TTCI’s Motion to Strike.

CONCLUSION

OMC requests costs and attorney fees, arguing that it was the prevailing party in this litigation and that TTCI’s objection and litigation were unreasonable and frivolous. However, the fact of the matter is that without TTCI’s objection, OMC would have been decreed an enormous volumetric quantity - more than five times that quantity eventually decreed. Accordingly, TTCI’s objection was successful, and OMC is not the “prevailing party.” Even if OMC were the “prevailing party,” TTCI’s objections in this litigation were neither “unreasonable” nor frivolous. Its objections were based upon observed facts and made in good faith. One of its objections was, in fact successful. Accordingly, the Special Master must deny entirely OMC’s request for costs and attorney fees.

DATED this 9th day of December, 2009.

RINGERT CLARK CHARTERED

By: 

Charles L. Honsinger
Attorneys for Objector The Terteling
Company, Inc.

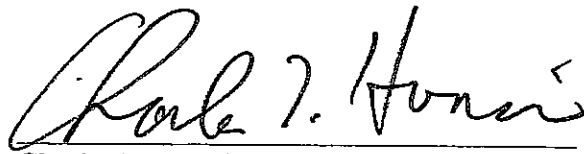
CERTIFICATE OF SERVICE

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
332 N. Broadmore Way, Ste. 102
Nampa, Idaho 83687
Fax: (208)475-2201

IDWR Document Depository
P.O. Box 83720
Boise, Idaho 83720
Fax: (208) 287-6700

Edward Family LLC
c/o Dana Hofstetter
Hofstetter Law office, LLC
608 West Franklin Street
Boise, Idaho 83702
Fax: (208)424-8774


Charles L. Honsinger