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DATE: March 31, 2010

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Charles Honsinger – 342-4657

FROM: Julie Klein Fischer / Valerie

PAGES: 12
(Incl. Cover Page)

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

COMMENTS: Please see the attached:

1. Owyhee Motor Cycle Club's Reply Memorandum in Support of Motion for Attorneys' Fees and Costs (Re: Terteling Co., Inc.); and
2. Affidavit of Julie Klein Fischer.

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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	)	SUBCASE NO. 63-18957
	)	
	)	
Case 39576	)	OWYHEE MOTOR CYCLE
	)	CLUB'S REPLY MEMORANDUM
	)	IN SUPPORT OF MOTION FOR
	)	ATTORNEYS' FEES AND COSTS
	)	(Re: Terteling Co., Inc.)
	)	

This Reply Memorandum is filed in support of Owyhee Motorcycle Club, Inc.'s ("OMC")
 Motion for Attorney Fees and Costs.

REVIEW

OMC moved for attorneys' fees and costs in this matter pursuant to Idaho Code 12-121. Pursuant to that rule, the Court should award the requested fees if it finds that: 1) OMC prevailed; and 2) The Terteling Company, Inc. ("TCI") brought, pursued or defended this matter, frivolously, unreasonably or without foundation. In determining whether the matter was pursued unreasonably,

frivolously or without foundation, the Court also may consider whether the non-moving party's conduct was malicious. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

In all cases, an award of attorneys' fees is committed to the sound discretion of the Court. IRC 54(d)(1)(B) and (C), and 54(e)(1); *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

ARGUMENTS

In response to OMC's motion for attorneys' fees, TCI argues: 1) that OMC is not the prevailing party and; and 2) that OMC has failed to show TCI acted frivolously, without foundation or in an unreasonable manner. Although OMC's position is already stated in its' moving papers, the following discussion replies to issues raised by TCI in its *Objection to Owyhee Motorcycle Club's Motion for Attorneys Fees and Costs* ("Objection").

1. OMC Prevailed in this Matter

In determining which party prevailed in litigation, IRCP 54 requires the trial court to consider the result of the action in relation to the relief sought by the respective parties. In this matter, TCI challenged the quantity, priority and point of diversion recommended for OMC's water right no. 63-18957. As previously argued, TCI's objection did not result in a single change to the elements of OMC's claim. Instead, OMC successfully established an earlier priority date; the point of diversion was unchanged; and while the annual volume was adjusted – it was done so in a manner more favorable to OMC.¹ The fact that OMC also objected to certain elements of the water right claim, as recommended by the Director/Department is inconsequential.

¹ As the Court knows, the original Recommendation was erroneous in that a mathematical error occurred in calculating the annual volume. Specifically, it was calculated and recommended at the rate of 142.40 afy, but should

The following chart summarizes the results of this litigation and illustrates OMC prevailed on every single issue in this matter:

	.160 cfs 142.40 afy	Should be domestic only. Advocated 12 afy based on report submitted by Ed Squires	Acknowledged mathematical error in recommendation and sought greater annual volume than 19 afy	.16 cfs 27.93 afy
	03/01/1963	Should be domestic priority	Priority should be 1958	12/31/1958
	SW ¼ SE ¼ of Sec. 15, T4N R2E, Ada County	Point of Diversion is recommended in wrong ¼ ¼ Section	No objection	SW ¼ SE ¼ of Sec. 15, T4N R2E, Ada County

Thus, in considering the result, as compared to the relief sought, it is clear that OMC prevailed.

As an aside, TCI attempts to argue that it prevailed because its objection ensured that the erroneous recommendation of 142.40 afy was not decreed. As set forth above (and in footnote 1) that simply is not the case.

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

In response to OMC's motion for attorneys fees and costs, TCI claims that its' objections were well founded. In support thereof, TCI argues that Joe Terteling made specific observations which formed the basis for TCI to object to OMC's recommended right. However, a close review of the record suggests otherwise. For example, TCI argues that Joe Terteling "spoke with the son of

have been 19 afy. *See Supplemental Director's Report Regarding Subcase 63-18957* (April 30, 2009), p. 7. To OMC's knowledge, no party ever disputed there was an error. OMC objected to the recommended quantity seeking to establish an annual volume greater than 19 afy, and to correct the mathematical error.

the man who drilled the OMC well.” *Objection* p. 11. This statement is offered to show TCI’s objection regarding quantity and priority was well founded. The truth, however, is that Mr. Terteling’s testimony on the point is circular. *See* pps 22-28 of Exhibit A to *Honsinger Affidavit* in support of *Objection*. Indeed, the recorded testimony shows that Mr. Terteling *never* answers the question of “why” he believed the OMC well was low volume or poor quantity, and thus was originally only a domestic well (as is claimed by TCI).

In addition, TCI argues that because Mr. Terteling observed a drilling rig on the OMC property in approximately 1998, TCI’s objection to quantity was reasonable. Again, this is not the case. In fact, at the outset of this litigation, OMC voluntarily agreed, absent formal discovery, to provide TCI with any information about drilling or changes to the OMC well. Attached to the Affidavit of Julie Fischer (filed herewith) is a July 30, 2007 letter advising TCI of OMC’s findings. Despite the information provided, and that TCI had no evidence to the contrary, TCI continued to pursue its objection *searching* for any information to support its objections. The search reached a level of absurdity when TCI made the extraordinary demand that it be allowed to pull OMC’s pump and conduct invasive testing of the well. *See* June 11, 2008 *Motion to Enter upon Land for Inspection of Water Diversion and Distribution System/Motion to Compel*. All this was done on Mr. Terteling’s “suspicion” that the well had been modified.

These are just two examples to show TCI’s objections were made without any evidentiary or factual support. As established in OMC’s *Motion for Attorneys’ Fees and Costs*, TCI’s objections were speculative, based on conjecture and lacked any reasonable foundation. TCI’s actions do not appear reasonably calculated to accomplish anything other than to cost OMC money in defending its’

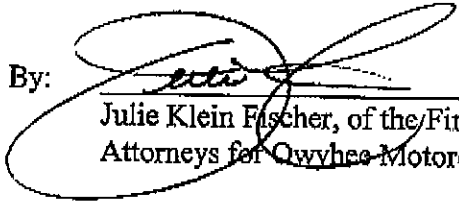
very modest water right. For these reason, TCI's actions give the impression of being malicious.

CONCLUSION

OMC incurred significant expenses defending against the TCI objections. A party filing an objection should have a legitimate and reasonable basis for making an objection and 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 30 day of March, 2010.

MORROW & FISCHER, PLLC

By: 

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

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 21th day of March, 2010, a true and correct copy of the above and foregoing document was served upon the following by:

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State of Idaho
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c/o Dana Hofstetter
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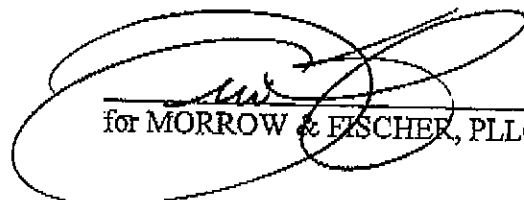
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Attorneys for Owyhee Motorcycle Club

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	)	SUBCASE NO. 63-18957
	)	
Case 39576	)	AFFIDAVIT OF JULIE KLEIN
	)	FISCHER
	)	

STATE OF IDAHO)
 : ss
 County of Canyon)

JULIE KLEIN FISCHER, being first duly sworn, deposes and says:

1. I am the attorney of record for Owyhee Motorcycle Club in this matter.
2. This affidavit is made based on my own personal knowledge of the facts herein.
3. Attached hereto as Exhibit A, is a true and correct copy of a letter dated June 30, 2007 addressed to Charles Honsinger from Julie Klein Fischer.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 31 day of March, 2010.


 JULIE KLEIN FISCHER

SUBSCRIBED AND SWORN to before me this 3rd day of March, 2010.

(SEAL)

Notary Public for Idaho
My commission expires: _____

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c/o Charles L. Honsinger
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P.O. Box 2773
Boise, ID 83701-2773

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for MORROWFISCHER

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EXHIBIT A

WHITE PETERSON

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** Also admitted in WA

July 30, 2007

Via Facsimile and Email

Charles Honsinger
Ringert Clark
455 South Third Street
Boise, Idaho 83701

Re: *Owyhee Motor Cycle Club Right No. 63-18957*
I.R.E. 408 Communication

Dear Charlie:

As agreed during our recent settlement conference, my clients attempted to obtain information related to their ground water well. Specifically, your client, Mr. Terteling, suspected the well had been enlarged or deepened sometime after the claimed priority date which formed the basis of the Terteling objection, at least in part. We agreed to try and obtain this information for your clients without formal discovery in an effort to resolve the objections as expeditiously as possible.

We have inquired of past club members, as well as Hiddleston Drilling, to obtain information about work performed on the subject well, if any. We have learned the following:

1. The well casing was raised from its below grade location to above grade sometime within the last 10 – 15 years. Approximately five feet of casing was added. This apparently was done to avoid well contamination.
2. Hiddleston has repaired and replaced the pump located in the well on several occasions: In June 1998, the pump was replaced then

July 27, 2007

Page Two

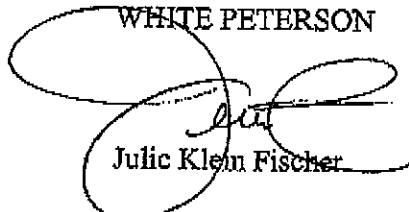
was repaired under warranty in September 1998. A new pump was installed again in 2004. The pump size has remained the same.

3. There is no information the well was ever deepened or enlarged.

I trust this information will satisfy your clients that the water right has not been expanded. However if you have any information to the contrary, please let me know. Otherwise, I am hopeful that with this information the objections can be resolved.

Sincerely,

WHITE PETERSON



Julie Klein Fischer

Cc: William Henning, President OMC

10/1/07