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MAR 16 2009

DEPARTMENT OF
WATER RESOURCES

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March 12, 2009

Mr. David Tuthill
Idaho Department of Water Resources
322 E. Front Street
P. O. Box 83720
Boise ID 83720-0098

RE: Permit No. 37-8388 / SDRTR, LLC / Lisa Vierling

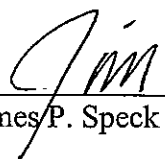
Dear Dave:

I represent SDRTR, LLC, the owner of Permit No. 37-8388. A Reinstatement Order (copy enclosed) for the permit was issued by the Department on July 14, 2008. Lisa Vierling then filed the enclosed Petition Requesting Hearing on the Reinstatement Order and related matters. It now appears that efforts to resolve this matter without the requested hearing have been unsuccessful. Therefore, my client requests that the hearing be set as soon as possible. My client also objects to the appointment of an independent hearing officer on the basis of Idaho Code § 42-1701A(4) as such statute does not provide the authority to make that appointment. I am available for a conference call with Mr. Thompson and you to discuss this matter and scheduling for the hearing at your earliest possible convenience.

Thank you.

Sincerely yours,

SPECK & AANESTAD
A Professional Corporation

By: 

James P. Speck

Enclosures

cc: Travis Thompson
Sam Georges (via email)

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LAPSED PERMIT)
NO. 37-8388 IN THE NAME OF THE)
SDRTR, LLC.)
_____)

REINSTATEMENT ORDER

This matter having come before the Idaho Department of Water Resources ("Department") as a Petition to Reinstate Lapsed Water Right Permit No. 37-8388, the Department makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On February 3, 1989, the Department approved Permit No. 37-8388 ("permit") to Bruce Gilbert ("Gilbert") authorizing the diversion of 2.00 cubic feet per second ("cfs") of water from Warfield Hot Springs within the SWNWNW, Sec. 31, Township 04 North, Range 17 East, Blaine County, B.M., to be used for heating, recreational, and domestic uses with priority date of August 25, 1988. A condition of permit approval required the permit holder to submit proof of beneficial use of water ("proof") to the Department on or before March 1, 1992.
2. On December 31, 1991, by certified mail, the Department notified Gilbert that proof was due and provided instruction for the steps to be taken to submit the proof or an extension of time ("extension") request.
3. On February 18, 1992, Gilbert requested an extension for the permit. The extension was granted and the proof deadline was extended to March 1, 1997 based on governmental delay.
4. On December 31, 1996, by certified mail, the Department notified Gilbert that proof was due and provided instruction for the steps to be taken to submit the proof or an extension request.
5. On February 28, 1997, Gilbert requested an extension for the permit. An attachment to the extension request indicated that "...excavation and construction of the diversion works was commenced and a device for the purpose of measuring flow and temperature of the water has been set in place." The extension was granted and the proof deadline was extended to March 1, 2001 based on governmental delay.
6. On May 25, 2000, James P. Speck, attorney, filed an Assignment of Permit with the Department on behalf of his client, Steven D. Reuther ("Reuther"). The permit was assigned from

Bruce and Ellen Gilbert to Reuther.

7. On December 31, 2000, the Department sent, by certified mail, a notice to Reuther that proof was due and provided instruction for the steps to be taken to submit the proof or an extension request.

8. On February 12, 2001, James P. Speck requested an extension for the permit on behalf of Reuther. An attachment to the extension request indicated that "[o]nce the plans were approved by Blaine County and the building permit issued in October, 2000, construction commenced immediately and has continued through the winter. The use of geothermal surface water for heating purposes has significantly expedited the construction process during these winter months." The extension was granted and the proof deadline was extended to March 1, 2006 based on due diligence.

9. On December 31, 2005, the Department sent, by certified mail, a notice to Reuther that proof was due and provided instruction of the steps to be taken to submit the proof or an extension request. The notice was returned to the Department as undeliverable. The Department did not provide notice to Reuther's attorney.

10. On March 10, 2006, the Department sent Reuther a lapse notice since the Department had not received an acceptable proof statement or extension request. The notice was returned to the Department as undeliverable. The Department did not provide notice to Reuther's attorney.

11. On May 16, 2008, James P. Speck filed an Assignment of Permit with the Department on behalf of his client, SDRTR, LLC. The permit was assigned from Reuther to SDRTR, LLC ("permit holder").

12. On May 16, 2008, James P. Speck filed a Petition to Reinstate Lapsed Water Right Permit No. 37-8388 ("petition") on behalf of the permit holder. The petition seeks reinstatement of the permit with no advancement in the priority date because the Department failed to properly notify Reuther or his attorney that proof was due and that the permit had lapsed. The petition included information demonstrating that water was used as authorized by the permit prior to the date that proof was due in 2006. The information included 1) a copy of correspondence in 2005 from Travis L. Thompson, attorney, regarding concerns arising from the installation and operation of Reuther's hot water system and, 2) an Affidavit of David Rosser, a building contractor, indicating that, "[a]mong the residential improvements is a hot water system using water from Warfield Hot Springs to heat the home, melt snow from the driveway and fill a hot tub. That system was fully constructed and in operation by June, 2004."

13. On July 7, 2008, James P. Speck filed a proof statement and a Beneficial Use Field Report ("field report") on behalf of the permit holder. The field report indicated that 0.45 cfs was developed under the permit for heating and recreation use.

CONCLUSIONS OF LAW

1. Section 42-218a.2, Idaho Code, provides as follows:

That upon receipt of proof of beneficial use after sixty (60) days after such notice of lapsing, the director shall require sufficient evidence to be submitted by the permit holder to clearly establish the extent of beneficial use made during the time authorized by the permit and any extensions of time previously approved. Upon finding that beneficial use had occurred during the authorized period and upon a showing of reasonable cause for filing a late proof of beneficial use, the director may reinstate the permit with the priority date advanced to the day that proof of beneficial use was received;

2. Section 42-218a(3), Idaho Code, provides that the Department may reinstate a permit without advancing the permit's original priority date upon a showing of error or mistake of the Department.

3. The Department failed to adequately notify Reuther that proof was due and that the permit had lapsed because the Department did not provide copies of the notices to Reuther's attorney.

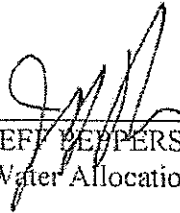
4. The permit holder has provided sufficient information and reasonable cause for the Department to reinstate the permit.

5. The Department should reinstate the permit without advancing the priority date.

ORDER

IT IS HEREBY ORDERED that Permit No. 37-8388 in the name of SDRTR, LLC is **REINSTATED** with no advance of the August 25, 1988 priority date.

Dated this 14th day of July, 2008.


JEFF PEPPERSACK, Chief
Water Allocation Bureau

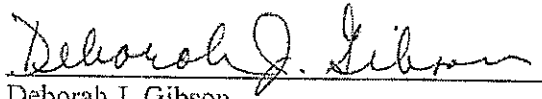
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2008, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Reinstatement Order and Explanatory Information sheet for a Preliminary Order when a hearing was not held.

JAMES P SPECK
SPECK & AANESTAD
PO BOX 987
KETCHUM ID 83340

TRAVIS L THOMPSON
PAUL L ARRINGTON
BARKER RSHOLT & SIMPSON LLP
PO BOX 485
TWIN FALLS ID 83303-0485


Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Petitioner Lisa Vierling

RECEIVED
JUL 25 2008
SPECK & AANESTAD

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LAPSED PERMIT	)	LISA VIERLING'S PETITION
NO. 37-8388 IN THE NAME OF SDRTR,	)	REQUESTING HEARING ON JULY
LLC.	)	14, 2008 REINSTATEMENT ORDER /
	)	PETITION REQUESTING HEARING
	)	ON JULY 7, 2008 STATEMENT OF
	)	COMPLETION FOR SUBMITTING
	)	PROOF OF BENEFICIAL USE /
	)	REQUEST FOR INDEPENDENT
	)	HEARING OFFICER

COMES NOW, LISA VIERLING ("Vierling"), by and through counsel of record, Barker Rosholt & Simpson LLP, and hereby files this *Petition Requesting Hearing on July 14, 2008 Reinstatement Order / Petition Requesting Hearing on July 3, 2008 Statement of Completion for Submitting Proof of Beneficial Use / Request for Independent Hearing Officer* ("Petition") in the above-captioned matter. The Department's July 14, 2008 *Reinstatement Order* reinstated lapsed permit no. 37-8388 in the name of SDRTR, LLC (hereinafter referred to as "Robbins"). Robbins filed a statement of completion for submitting proof of beneficial use on July 7, 2008 Vierling requests a hearing on both the Department's *Reinstatement Order* and Robbins' *Statement of*

Completion pursuant to Idaho Code § 42-1701A(3). Vierling further requests the appointment of an independent hearing officer (not an employee of the Department) to preside over this matter pursuant to Idaho Code § 42-1701A(4). The initial bases for this Petition are set forth below.

BACKGROUND

Vierling is the owner of two water rights (#37-13054 and #37-20894) from Warfield Hot Springs. Vierling diverts her water through a collection box and gravity fed pipeline that begins on Robbins' property. Ever since construction began on Mr. Tony Robbins' hot water system in 2001, Vierling has been concerned about the interference with her water right and the ability to access her diversion structure on Robbins' property. See **Exhibit A** to *Affidavit of Travis L. Thompson*.¹ In 2002, upon the complaint of Jay Pace, a downstream user on the pipeline, the Department issued an *Order to Show Cause* directing both Vierling and Pace to demonstrate when their water uses were first established and to provide a detailed description of their delivery systems. See **Exhibit B** to *Thompson Aff.* In that *Order* the Department recognized that the "diversion of the public waters of the state of Idaho not in compliance with existing water rights must be stopped to prevent injury to other water rights, to protect the water resources of the state and to assure that the allocation and use of available water supplies take place in an orderly manner." See *id.* at 2. The Department made a site visit to the area on March 13, 2003, a time when the flows and temperature had decreased from levels prior to the initial work on Robbins' hot water system. The flow levels increased temporarily after the Department's field visit and this concern was relayed to the Department. See **Exhibit C** to *Thompson Aff.* Although the Department reviewed the "head of the pipeline" and the "accessible stub outs along the pipeline", no review, investigation, or measurements were taken of Robbins' system. See **Exhibit D** to *Thompson Aff.* However, despite the failure to investigate Robbins' system,

¹ The referenced *Affidavit of Travis L. Thompson* and attached exhibits were filed on May 23, 2008 in this matter.

Department staff recommended “closer monitoring of the spring source should be implemented by users to ascertain if [Robbins’] collection drain affects the pipeline spring. (Installing a staff gauge in spring box and recording levels during a pump test of [Robbins’] system may resolve this issue).” *See id.* (Merritt April 29, 2003 email). Unfortunately no test was ever completed to determine the effect of Robbins’ system on the pipeline diversion and the Department has yet to monitor the spring source flows.

On August 28, 2003 the Department sent Mr. Pace’s attorney (Jim Speck) a letter informing him that a notice of violation would not be sent to Vierling. *See Exhibit D to Thompson Aff.* Thereafter, water flows and temperatures in the spring source continued to plummet throughout 2003 and 2004, affecting Vierling’s ability to heat and use hot water in her home. The reduction in flow and temperature also apparently affected Mr. Pace’s use since concerns were voiced to Vierling that she was causing the problem. In January 2005 the flows and temperature dropped even further to approximately half of what was flowing when the Department conducted its measurements in the spring of 2003. *See Exhibit E to Thompson Aff.*

Consequently, counsel for Vierling sent a letter to the Department requesting investigation into Robbins’ use and the interference with Vierling’s water rights. *See id.* The Department replied on January 24, 2005, refusing to take any action alleging that the resolution of this matter “has been stalled until the SRBA process is finalized”. *See Exhibit F to Thompson Aff.* On February 20, 2007 the Department finally issued its Director’s Report for water right claims in Basin 37, Part 3, which included Vierling’s water rights. In the meantime, water flows and temperatures continued to decline, injuring Vierling’s water rights and preventing her from heating and using hot water in her home.

The situation turned for the worse in the winter of 2007-2008. Vierling attempted to

resolve the matter directly with Mr. Robbins for approximately a year, who was apparently represented by Ed Lawson at the time. In the end, Mr. Robbins refused to work with Vierling or acknowledge the injury to her water rights. During that time Vierling recognized that Robbins' prior permit 37-8388 had lapsed and that Robbins was using water illegally to the detriment of Vierling and others like Mr. Pace. On May 9, 2008 Vierling requested the Department and/or the Watermaster to investigate the illegal water use by Robbins and his apparent interference with Vierling's diversion structure. *See Exhibit G to Thompson Aff.* The Department responded on May 16, 2008, once again refusing to investigate Robbins' illegal water use or the damage and interference with Vierling's diversion structure. *See Exhibit H to Thompson Aff.* Again, the Department used the fact that Vierling's water rights were pending in the SRBA as a basis for not taking any action. *See id.* ("Essentially little has changed since the January 24, 2005 letter to you (Copy enclosed) about these same matters.") (emphasis in original).

On May 15, 2008 Robbins (under the name of SDRTR, LLC, an entity represented by Jim Speck) filed a *Petition to Reinstate Lapsed Water Right Permit No. 37-8388*. On May 23, 2008 Vierling filed a *Petition to Intervene / Protest to Petition to Reinstate Lapsed Permit No. 37-8388*. On June 11, 2008 the Department issued an *Order Denying Petition to Intervene/Protest* in this matter.

On July 3, 2008 Robbins' agent (Brockway Engineering) completed a beneficial use exam and signed a *Statement of Completion*. The *Statement* was later filed with the Department on July 7, 2008. The day before the exam, July 2, 2008, Robbins, or his agents, cut and damaged the gravity pipeline that serves Vierling's water rights, depriving Vierling of water which resulted in damages to Vierling's property. The unlawful interference with the pipeline may have affected the water source and raises questions about the validity of the *Statement of*

Completion. On July 14, 2008 the Department issued the *Reinstatement Order* which reinstated lapsed permit no. 37-8388.

**PETITION CHALLENGING ORDER TO REINSTATE LAPSED PERMIT /
STATEMENT OF COMPLETION**

Vierling challenges the legal and factual basis underlying the Department's *Reinstatement Order* and the *Statement of Completion*. Specifically, Vierling challenges the validity of the *Statement* and the Department's decision to reinstate the permit and the conclusion to not advance the priority date on the basis that the Department "erred" or made a "mistake" in not sending copies of the lapsed notice to Reuther's attorney. Vierling submits that the petition and accompanying materials filed by Robbins to reinstate the lapsed permit do not meet the standard for reinstatement as prescribed by Idaho Code § 42-218a. Vierling further challenges the affidavits submitted by Steven D. Reuther and David Rosser and she is entitled to discover the basis for the statements made therein. Additional issues may be identified regarding Vierling's petition as discovered through this proceeding.

REQUESTS FOR RELIEF

WHEREFORE, Vierling requests the following:

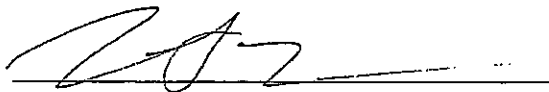
1. That Robbins' *Statement of Completion* be **Rejected**.
2. That the Department's *Reinstatement Order* be **Reversed** and Robbins' *Petition for Reinstatement* be **Denied**.
3. That the Department issue a notice of violation for Robbins' illegal water use and order Robbins to cease and desist any diversions from Warfield Hot Springs immediately.
4. That the Department provide for a hearing in this matter pursuant to Idaho Code §

42-1701A(3) and appoint an independent hearing officer pursuant to Idaho Code
§ 42-1701A(4).

5. That the Department order such other relief deemed necessary.

DATED this 24th day of July, 2008.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson
Paul L. Arrington

Attorneys for Petitioner Lisa Vierling

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of July, 2008, I caused to be served a true and correct copy of the foregoing *LISA VIERLING'S PETITION REQUESTING HEARING ON JULY 14, 2008 REINSTATEMENT ORDER / REQUEST FOR INDEPENDENT HEARING OFFICER* by the method indicated:

By U.S. Mail, postage prepaid:

Allen Merritt
Regional Manager
Southern Region
Idaho Department of Water Resources
1341 Fillmore St., Suite 200
Twin Falls, ID 83301-3380

James P. Speck
Speck & Aanestad
120 East Avenue
P.O. Box 987
Ketchum, Idaho 83340

Attorneys for SDRTR, LLC


Travis L. Thompson