

DEPT. OF WATER RESOURCES
SOUTHERN REGION

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 §

CERTIFICATE OF SERVICE

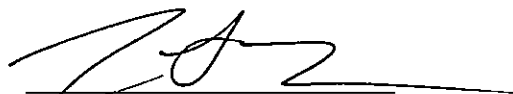
I HEREBY CERTIFY that on this 24th day of July, 2008, I caused to be served a true and correct copy of the foregoing *LISA VIERLING'S PETITION REQUESTING HEARING ON JULY 14, 2008 REINSTATEMENT ORDER / REQUEST FOR INDEPENDENT HEARING OFFICER* by the method indicated:

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

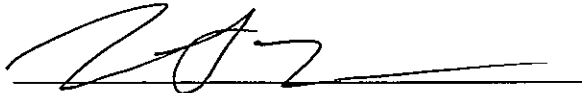

Travis L. Thompson

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

A handwritten signature in black ink, appearing to read 'T. Thompson', is written over a horizontal line.

Travis L. Thompson
Paul L. Arrington

Attorneys for Petitioner Lisa Vierling