

Thompson. 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, 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*. That petition is the subject of this matter pending before the Department.

LEGAL STANDARD

Pursuant to Rule 353 of the Department's Rules of Procedure (IDAPA 37.01.01. *et seq.*), the Department will grant intervention if: (1) the petition to intervene is timely, (2) the petitioner shows a direct and substantial interest in any part of the subject matter of the proceeding, (3) the issues will not be unduly broadened, and (4) the petitioner's interests are not adequately represented by existing parties.

REASONS SUPPORTING INTERVENTION

I. Vierling's Petition is Timely.

Vierling's petition is timely. A petition is timely if it is filed at least fourteen days before the date set for the formal contested case hearing or before the prehearing conference. Robbins filed his *Petition to Reinstate* just last week on May 15, 2008. No hearings have been set and the proceeding is barely a week old at this point.

II. Vierling Has a Direct and Substantial Interest in the Subject Matter.

The Department's Rules provide for intervention of persons with a "direct and substantial interest" in the proceeding. Rule 351. As stated above, Vierling holds two water rights that have been injured by Robbins' illegal water use and activities surrounding Vierling's diversion structure. Vierling's water rights and the fact her diversion structure is located on Robbins'

property provide the “direct and substantial interest” required under the Department’s Rules. Moreover, Vierling’s water rights are to the same source (Warfield Hot Springs) to which Robbins seeks to resurrect his lapsed permit. Again, this fact provides Vierling with a “direct and substantial interest” in this proceeding, particularly since the water flow and temperature in the source have been detrimentally affected in recent years thereby injuring Vierling’s water rights.

III. Vierling’s Intervention Will Not Broaden the Issues / No Other Party Adequately Represents Vierling’s Interests.

The scope of this proceeding and the issues involved are identified in Robbins’ *Petition to Reinstate*. The issues include when and to the extent Robbins’ water system was completed, the actions of Mr. Reuther in failing to submit timely beneficial use, and the lack of reasonable cause for filing a late proof of beneficial use now. Moreover, it’s apparent there was no unappropriated water available at the time Robbins completed his beneficial use given the injury it caused to Vierling’s water rights. Finally, Robbins cannot show any error or mistake on behalf of the Department in deciding the permit lapsed pursuant to Idaho law. Vierling’s participation will not unduly broaden the issues and it’s clear that no other party to the proceeding can adequately represent her direct and substantial interest. For theses reasons the Department should grant Vierling’s petition to intervene in this matter.

PROTEST TO REINSTATE LAPSED PERMIT

Vierling protests Robbins’ *Petition to Reinstate Lapsed Water Right Permit No. 37-8388*. Vierling submits that the petition and accompanying materials filed 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 protest to

Robbins' petition as discovered through this proceeding.

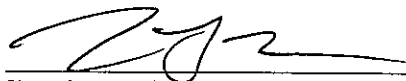
REQUESTS FOR RELIEF

WHEREFORE, Vierling requests the following:

1. That Robbins' *Petition to Reinstate Lapsed Water Right Permit No. 37-8388* be **Denied.**
2. 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.
3. 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 Cod § 42-1701A(4).
4. That the Department order such other relief deemed necessary.

DATED this 23rd day of May, 2008.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson
Paul L. Arrington

Attorneys for Intervenor Lisa Vierling

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 2008, I caused to be served a true and correct copy of the foregoing *LISA VIERLING'S PETITION TO INTERVENE / PROTEST TO PETITION TO RESINSTATE LAPSED WATER RIGHT PERMIT NO. 37-8388* by the method indicated:

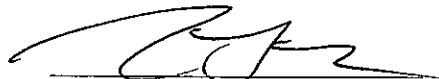
By Hand Delivery:

Allen Merritt
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Idaho Department of Water Resources
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By U.S. Mail, postage prepaid:

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