

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE )  
APPLICATION FOR CHANGE OF ) FINAL  
APPROPRIATION WATER RIGHT ) ORDER  
42J-G(D)00002343-00 BY )  
JOHN AND DELORES MOBLEY )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation accepts and adopts the Findings of Fact and Conclusions of Law as contained the March 9, 1998, Proposal for Decision, and incorporates them by reference.

WHEREFORE, based upon the record, the Department makes the following:

**ORDER**

Application to Change Appropriation Water Right 42J-G(D)002343 by John and Delores Mobley is denied.

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as

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part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 22<sup>nd</sup> day of April, 1998.



Jack Stults, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
P.O. Box 201601  
Helena, MT 59620-1601  
(406) 444-6605

#### CERTIFICATE OF SERVICE

This is to certify a true and correct copy of the Final Order was served upon all parties of record at their address or addresses this 24<sup>th</sup> day of April, 1998, as follows:

John & Delores Mobley  
HC 88 Box 110  
Olive, MT 59343

Alvin J & Helen L Irion  
HC 88 Box 165  
Olive, MT 59343

Bonita Jo Quade  
HC 88 Box 165  
Olive, MT 59343

James P. Lucas  
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Keith Kerbel, Manager  
Billings Regional Office  
Department of natural  
Resources & Conservation  
1537 Avenue D, Suite 121  
Billings, MT 59102  
(Via electronic mail)

Nancy Andersen, Chief  
Water Rights Bureau  
Department of Natural  
Resources & Conservation  
P O Box 201601  
Helena MT 59620  
(hand delivered)

Vivian A. Lighthizer  
Hearing Examiner  
Water Resources Division  
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P.O. Box 201601  
Helena, MT 59620-1601  
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Mandi Shulund  
Hearings Assistant

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE )  
APPLICATION FOR CHANGE OF ) PROPOSAL  
APPROPRIATION WATER RIGHT ) FOR  
42J-G(D)00002343-00 BY ) DECISION  
JOHN AND DELORES MOBLEY )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on December 9, 1997, in Miles City, Montana, to determine whether an authorization to change a water right should be granted to John and Delores Mobley for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1995).

APPEARANCES

John and Delores Mobley (Applicants) appeared at the hearing in person.

Alvin J. and Helen L. Irion (Objectors) appeared at the hearing by and through Helen L. Irion and counsel, Jim Lucas.

Bonita Quade, daughter of Mrs. Irion, and Barry Emmons, owner of property immediately upstream from Applicant, appeared at the hearing as witnesses for Objectors.

Marty Van Cleave, Water Resource Specialist with the Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing and was called to testify by Objectors.

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## EXHIBITS

Applicants offered five exhibits for the record. All were accepted without objection except Applicants' Exhibit 5.

Applicants' Exhibit 1 is a copy of a page from a water rights declaration form which contains a hand-drawn map of Applicants' water spreading system. This map shows, in red, the acreage in each part of the system. The dikes are shown in green. The existing ditch is shown in blue as is the natural watercourse which returns the excess water to Mizpah Creek. Also in red pencil, are the designations of a proposed pump site and the proposed location of the dam across Mizpah Creek.

Applicants' Exhibit 2 is a hand-drawn suggested means of diversion, a top view and a front view. A statement on this exhibit indicates the NRCS would design the diversion works.

Applicants' Exhibit 3 is entitled "Errors and Inaccuracies in Objection" and makes three statements to that effect.

Applicants' Exhibit 4 is a summary of Applicants' case.

Applicants' Exhibit 5 contains calculations to estimate the amount of water available in Mizpah Creek for Objectors' use. Objectors objected to this exhibit on the basis that it is inaccurate because it is based on unmeasured calculations and is speculative. The Hearing Examiner reserved a ruling on the objection to be addressed during this Proposal. The objection is sustained. Although the calculations appear to be correct,

Applicant admitted he had not taken measurements and was relying on observations made during the last 22 years. Also, it is not known whether Applicants actually measured or estimated the drop in the pipe, which if inaccurate, could skew the calculations.

#### **PRELIMINARY MATTERS**

During the hearing, it became evident the public notice did not describe the proposed project as Applicants presented it at the hearing. In addition to the proposed dam across Mizpah Creek in the ~~NW~~~~NW~~~~NW~~ Section 8, Applicants also propose to place a pump in Mizpah Creek at a point in the ~~SW~~~~SE~~~~NE~~ of Section 7, both in Township 03 South, Range 51 East, Powder River County, Montana.<sup>1</sup> Since the omission of the additional point of diversion could not have prejudiced any person because the proposed pump site is upstream from the proposed dam, it is harmless error.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

#### **FINDINGS OF FACT**

1. Application for Change of Appropriation Water Right 42J-G(D)002343 in the name of and signed by John and Delores Mobley was received in the Department's Billings Water Resources Regional Office on July 1, 1996 at 12:55 p.m. (Department file.)

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<sup>1</sup> Unless otherwise stated, all land descriptions in this Proposal are located in Township 03 South, Range 51 East, Powder River County, Montana.

2. Pertinent portions of the application were published in the *Powder River Examiner*, a newspaper of general circulation in the area of the source on May 1, 1997. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed change. One objection to the proposed change was received by the Department. Applicant was notified of the objections by a letter from the Department dated May 30, 1997. (Department file.)

3. Applicants seek to change the point of diversion of water rights 42J-D002343-01 and 42J-D002343-02 from the NW~~SE~~SW~~SW~~, Section 18, to a point in Mizpah Creek in the NW~~NW~~NW~~NW~~ Section 8 and add a point of diversion also in Mizpah Creek in the SW~~SE~~NE~~NE~~ of Section 7. Applicants also seek to change the point of diversion of water rights 42J-D002343-00 and 42J-D002343-03 from the SE~~SW~~SW~~SW~~ of Section 7 to the aforementioned points in Mizpah Creek in Section 8 and Section 7. (Department file and testimony of John Mobley.)

The water rights Applicants seek to change are waste water rights. Applicants' water has never been taken directly out of Mizpah Creek. The water from Lay Creek flows from the west, into Emmons' dike system in Section 12, Township 03 South, Range 50 East, continues to Section 7 where the excess is routed to Applicants' point of diversion in the SE~~SW~~SW~~SW~~ of said Section 7 at the end of Emmons Ranch property and the beginning of Applicants' property. Mr. Emmons testified this has happened once in the

past 20 years. When there is insufficient water from Lay Creek to irrigate Emmons' dike system in Section 7, Emmons Ranch diverts water from Mizpah Creek by a dam located in NW¼SE¼SW¼ of Section 18, south of Applicants dike system. Water is released into a ditch where it flows into Emmons' water spreading system directly up stream from Applicants' dike system. After the system is flooded, the excess water is released through a tube into Mizpah Creek. (To pond the water so that Applicants can use it, risks drowning Emmons' hay.) According to Barry Emmons, this occurs four or five times in ten years. There is no method to measure the amount of water discharged from Emmons Ranch into Mizpah Creek. (Department records, Department file, and testimony of Barry Emmons.)

4. Applicants have not proven by a preponderance of evidence there would be no adverse effect to the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3. There are no other planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued in the proposed source. There are, however, senior water rights further downstream.

Objectors irrigate approximately 104 acres in Section 9 and 244 acres in Section 21, both in Township 2 South, Range 51 East. The property in said Section 9 is approximately four miles downstream and the property in Section 21 is approximately six miles

down stream, as the crow flies, from Applicants' proposed point of diversion. The means of diversion for each system is a diversion dam across Mizpah Creek. In the last 20 years, Objectors have received sufficient water to irrigate all their acreage in 1978, 1994, and 1997. A "couple other years" the acreage was partially flooded. To allow another dam across Mizpah Creek and another pump site in the Mizpah would reduce the amount of water available to Objector further, especially since there is no method to measure the amount of water released from Emmons' property. (Department records and testimony of Bonita Quade.)

5. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicants stated the actual design of the system would be completed by the Natural Resources Conservation Service (NRCS). (Applicants' Exhibit 4 and testimony of John Mobley.)

6. Applicants have proven by a preponderance of evidence the proposed use of water is beneficial. Irrigation is a beneficial use as set forth in Mont. Code Ann. § 85-2-102(2)(a) (1995).

7. Applicants have proven by a preponderance of evidence they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicants own the

property where the water would be put to beneficial use.  
(Department file.)

8. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

#### CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. § 85-2-402 (1995).

2. Applicants have not met the criteria for issuance of an authorization to change appropriation water right. See Findings of Fact 3, and 4.

Based upon the forgoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

#### PROPOSED ORDER

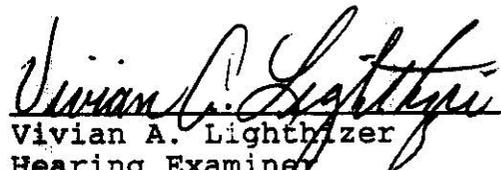
Application to Change Appropriation Water Right  
42J-G(D)002343 by John and Delores Mobley is denied.

#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may

file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

Dated this 9<sup>th</sup> day of March, 1998.

  
Vivian A. Lighthizer  
Hearing Examiner  
Water Resources Division  
Department of Natural Resources  
and Conservation  
P.O. Box 201601  
Helena, MT 59620-1601

#### CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 9<sup>th</sup> day of March, 1998, as follows:

Proposal for Decision  
App. 42J-G(D)002343 by Mobley

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**CASE # 2343**

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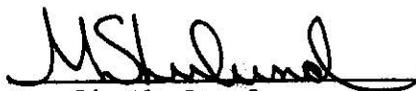
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