

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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
17,123-s41-0 BY EDWIN A. AND) FINAL ORDER
ROY GEBHART)

The Proposed Findings of Fact, Conclusions of Law, and Order,
as entered by the Hearing Examiner on April 14, 1980, are hereby
adopted as the Findings of Fact, Conclusions of Law and Order.

FINAL ORDER

Application for Beneficial Water Use Permit No. 17,123-s41-0 by
Edwin A. and Roy Gebhart is hereby denied.

NOTICE

The Hearing Examiner's Final Order may be appealed in accordance
with the Montana Administrative Procedures Act, by filing a petition
in the appropriate court within thirty (30) days after service of the
Final Order.

DATED this 28th day of April, 1980.



DAVID L. PENGELLY, D.N.R. & C.
HEARING EXAMINER

1 Objectors' Exhibit:

2 O-1 Findings of Fact, Conclusions of Law, Judgment and Decree,
3 Case No. 6536, May 2, 1969, Ninth Judicial District Court,
4 Teton County, Montana.

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6 The Objectors' Exhibit was marked accordingly and received into the
7 record without objections.

8 Observers present at the hearing were: Don Rice, Donald Zimbelman,
9 Gordon Schlepp, Ken Johnson, Barney Maltby, and Jesse Malone, Sr.

10 Montana Department of Natural Resources and Conservation personnel
11 present and testifying on behalf of the Department were: Bob Larson,
12 Havre Water Rights Bureau Field Office Manager and Arlin Krogstad,
13 Hearing Representative. Also present was Vicki Woodrow, Hearing Recorder.
14 The Department was not represented by legal counsel. Three exhibits
15 were introduced by the Department, to wit:

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17 Department's Exhibits:

18 D-1 U. S. G. S. Gauging Station No. 06108000, Teton River near
19 Dutton, Montana, discharge records from October 1953 to
20 September 1978

21 D-2 U. S. G. S. Gauging Station No. 06106500, Muddy Creek near
22 Bynum, Montana, discharge records from October 1912 to
23 September 1924

24 D-3 U. S. G. S. Gauging Station No. 06107000, North Fork of Muddy
25 Creek near Bynum, Montana, discharge records from October
26 1912 to September 1924.

27 The Department's Exhibits were marked accordingly and received into the
28 record without objections.

SUMMARY OF RECORD

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2 1. On January 27, 1978, the Department received Application for
3 Beneficial Water Use No. 17,123-s41-0 by Edwin A. and Roy Gebhart to
4 appropriate 3 cubic feet per second or 1,346 gallons per minute of
5 water, not to exceed 245 acre-feet per annum from Muddy Creek, a tributary
6 of the Teton River in Teton County, Montana, to be diverted by means of
7 a pump into an existing sprinkler irrigation system at a point in the
8 NW1/4 NW1/4 NW1/4 of Section 25, Township 26 North, Range 6 West, M.P.M.,
9 and used for new sprinkler irrigation on 60 acres in the SW1/4 and
10 supplemental sprinkler irrigation on 65 acres in the SW1/4 and 14.3
11 acres in the SE1/4 of said Section 25, and containing a total of 139.3
12 acres, more or less, from March 15 to July 15, inclusive, of each year.

13 2. On November 9, 16, and 23, 1978, the Department caused to be
14 duly published in the Choteau Acantha, Choteau, Montana, notice of
15 Application for Beneficial Water Use Permit No. 17,123-s41-0.

16 3. On December 7, 1978, the Department received an objection to
17 the above Application from the Teton Water Users Association.

18 4. On December 21, 1978, the Department received an objection to
19 the above Application from Charles and Janet Danreuther.

20 5. On December 26, 1978, the Department received objections to the
21 above Application filed on behalf of the Bynum Irrigation District and
22 the Teton CoOperative Reservoir Company by Ira Perkins. On January 2,
23 1979, the Department received objections to the above Application filed
24 on behalf of the Bynum Irrigation District and the Teton CoOperative
25 Reservoir Company by Charles Joslyn.

26 6. On January 2, 1979, the Department received a letter from the
27 Ninth District Judge R. D. McPhillips concerning potential problems in
28 the use of Muddy Creek water.

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1 7. On November 14, 1979, at the Pre-hearing Conference held in
2 Choteau, Montana, the Brady Irrigation District was admitted as an
3 untimely objector to the above Application. The Brady Irrigation District
4 had not been notified by individual Public Notice of the above Application
5 at the time of its publication. The Brady Irrigation District was
6 included in the December 26, 1978, objection of the Teton Co-Operative
7 Reservoir Company.

8 8. Mr. Edwin A. Gebhart testified for the Applicants that they
9 were seeking a use of high water in the spring. According to Mr. Gebhart,
10 the July cutoff date in the Application was recommended by the Water
11 Rights Bureau of the Department of Natural Resources and Conservation in Helena.
12 Mr. Gebhart stated that the Applicants would accept a May 15 cutoff date
13 so as not to conflict with the Bynum Irrigation District. Mr. Gebhart
14 stated that he did not believe the withdrawal of 3 cubic feet per second
15 would adversely affect prior appropriators when there is in excess of
16 four (4) feet of water in Muddy Creek. The water would be withdrawn
17 with a pump which could be shut off at the request of downstream users;
18 also the water could be measured with a flow meter. Under cross-examination
19 by Mr. Charles Joslyn, the Applicant stated that the 65 acres listed
20 under supplemental irrigation are acreages that are already irrigated
21 with the Applicants' Bynum share water. The Applicants would differentiate
22 between the Bynum share water and water applied for under this Application
23 by having different points of diversion and different periods of use.
24 The Applicants stated that they intend to purchase a pump to use for
25 appropriating water under this Application. The Applicants intent is to
26 build up the subsoil moisture as soon as the frost is gone in the spring.
27 The Applicants testified that they have 30 acre-feet per year from Bynum
28 Reservoir delivered in Muddy Creek and feel that if they can appropriate
another 30 acre-feet per year it would be economically feasible to pump

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due to restrictions on their power supply, they would only be able to operate a 30 horsepower pump capable of pumping 750 gallons per minute out of Muddy Creek. The Applicants expect to get one (1) irrigation of 2 to 2 1/2 inches every spring with the water being applied for. Mr. Gebhart feels that excess water is usually available on April 1 and that high water usually lasts for one (1) week, but sometimes as long as a month. The Applicants feel that unappropriated water is even available in May and even into June in some years.

9. Harvey Weikum testified on behalf of the Brady Irrigation District. The Brady Irrigation District uses its flood rights in dry years as early as April 1, if its ditches are open. The District puts as much water as possible into storage. The Brady Irrigation District is concerned primarily with the policing policy on Muddy Creek, and also how unappropriated water in Muddy Creek would be determined. Under cross-examination Mr. Weikum testified that water does pass the Brady Irrigation District's point of diversion during floods and fast run-off in normal years. Mr. Weikum further testified that when the Brady Irrigation ditches are plugged, generally the ground is frozen at this time also. Mr. Weikum further testified that based on a period of ten years: in approximately two (2) out of 10 years, floods occur after May 15, and in three (3) out of 10 years flooding would occur before May 15; in the remaining five (5) years there would be no flood water available for appropriation. Mr. Weikum further testified that the Brady Irrigation District needs a certain head of water in Muddy Creek to be able to divert water down their ditch, but he does not know the exact figures necessary for this diversion. Under cross-examination Mr. Weikum testified that a May 15 cutoff date on the above Permit Application would still

1 adversely affect the Brady Irrigation District's right.

2 10. Bill Reichelt testified on behalf of the Teton Water Users
3 Association that there may be high water on Muddy Creek yet the Teton
4 River may be low; therefore, he feels that the availability of excess
5 water is hard to determine. Mr. Reichelt also testified that there is a
6 time lag of approximately one (1) week from the time water passes the
7 Applicants' proposed point of diversion until it reaches prior appro-
8 priators on the Teton River. He feels a communications agreement will
9 not solve the potential problems involved. Mr. Reichelt further testified
10 that the Teton Water Users Association has not had sufficient water in
11 recent years and feels that any new permits issued, no matter how small,
12 will adversely affect the Teton Water Users Association. Mr. Reichelt
13 testified that the Teton Water Users Association is often short of water
14 early in June. Mr. Reichelt stated that a May 15 cutoff date on this
15 Application would adversely affect the Teton Water Users Association.

16 11. Charles Danreuther testified that a May 15 cutoff date could
17 adversely affect him in a dry year.

18 12. Ira Perkins testified on behalf of the Bynum Irrigation District
19 and the Teton Co-operative Reservoir Company and himself. Mr. Perkins
20 testified that he has lived in Bynum, Montana for 45 years, that he is
21 an officer of the two (2) organizations he represents. He presented a
22 brief history of each of the organizations. Mr. Perkins testified that
23 the present capacity of the Teton Co-operative Reservoir is about 75,000
24 acre-feet. Mr. Perkins testified that there is a Water Commissioner who
25 delivers water out of the Teton Co-operative Reservoir, and that the
26 channel of Muddy Creek is used to deliver this District water beginning
27 on May 15th. The District irrigation season is from May 15 to September

28 15. Mr. Perkins stated his belief that excess water is only available

1 in years when it is not needed for irrigation, in other words, when
2 excess water is available, the ground is already saturated and doesn't
3 need to be irrigated. Under cross-examination by Roy Gebhart, Mr.
4 Perkins testified that the May 15 cutoff date proposed by the Applicant
5 would alleviate the conflict with the Bynum Irrigation District, however,
6 it would conflict with the Perkins Ranch Company, other older rights on
7 Muddy Creek and the Brady Irrigation District (NOTE: The Perkins
8 Ranch Company did not file an objection to this Application). Mr.
9 Perkins further stated that at present there are no problems on Muddy
10 Creek among the various users regarding illegal appropriations, although
11 he did state that during low water years upstream users do divert the
12 water and the downstream users let them.

13 13. Bob Larson testified for the Department that a May 15 cutoff
14 date would not alleviate all the problems regarding adverse affects on
15 downstream rights on Muddy Creek. Mr. Larson listed the Brady Irrigation
16 District as having a storage right of 3,300 acre-feet and a filed right
17 of 400 cubic feet per second. Mr. Larson stated that based on 12 years
18 of record, (Exhibits D-1, D-2 and D-3) there was only one (1) day in 12
19 years in which the flow in Muddy Creek exceeded 400 cubic feet per
20 second during the March 1st to May 15th period in which the Applicants
21 seek to divert water. Mr. Larson further stated that if the 400 cubic
22 foot per second diversion rate is not considered, there were only five
23 (5) years in twelve in which there was sufficient water to meet the
24 Brady Irrigation District's storage requirement. Mr. Larson also stated
25 that some of the flow of Muddy Creek may be diverted into the "C" Canal
26 above the Applicants' point of diversion prior to May 15. Mr. Larson
27 further stated his concern whether or not a permit could be conditioned
28 to protect prior rights below the proposed point of diversion.

1 other planned uses or developments for which a permit
2 has been issued or for which water has been reserved;"

3 2. It is concluded that there are unappropriated waters in the
4 source of supply at times when the water can be put to the use proposed
5 by the Applicants.

6 3. It is concluded that there are no unappropriated waters in the
7 source of supply in the amount the Applicants seek to appropriate.

8 4. It is concluded that there are no unappropriated waters in the
9 amount requested throughout the period during which the Applicants seek
10 to appropriate water.

11 5. It is concluded that the rights of prior appropriators would be
12 adversely affected if this permit is issued.

13 6. It is concluded that the proposed means of diversion or construction
14 are not adequate.

15 7. It is concluded that the proposed use is a beneficial use.

16 8. It is concluded that the proposed use will not interfere unreasonably
17 with other planned uses or developments for which permits have been
18 issued or for which water has been reserved.

19 Based on the above Proposed Findings of Fact and the Proposed
20 Conclusions of Law the following Proposed Order is hereby made:

21 PROPOSED ORDER

22 Application for Beneficial Water Use Permit No. 17,123-s410 by
23 Edwin A. and Roy Gebhart is hereby denied.

24 NOTICE

25 This Proposed Order is offered for the review and comment of all
26 parties of record. The review and comment period shall commence with
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1 the receipt of this Proposed Order and shall end ten (10) days thereafter.
2 No extensions of time for comment will be granted.

3 The Final Order in this matter will be sent to all parties by
4 certified mail.

5 The Hearing Examiner's Final Order may be appealed in accordance
6 with the Montana Administrative Procedures Act, by filing a petition in
7 the appropriate court within thirty (30) days after service of the Final
8 Order.

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10 DATED this 14th day of April, 1980.

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13 DAVID L. PENGELLY, D.N.R.&C.
14 HEARING EXAMINER
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