

**SHIELDS RIVER PROPOSED FISHING ACCESS
SITE ACQUISITION**

DECISION NOTICE

**Montana Fish, Wildlife & Parks
Region Three, Bozeman
October 6, 2006**

In the Draft Environmental Assessment for the Shields River Proposed Fishing Access Site Acquisition, released on August 24, 2005, Montana Fish, Wildlife & Parks (FWP) proposes to accept the donation of a 23.6 -acre property along the Shields River in Park County, to be managed as a public fishing access site. The primary benefits of this acquisition are to provide formal public access to the high-quality recreational fishery of the Shields River and to secure this access with no capital expenditure of angler dollars.

Seven letters or emails of public comment concerning the Draft Environmental Assessment (also termed the "EA" or the "Environmental Assessment") were received during the comment period of August 24 to September 22, 2005. A public meeting to discuss the issue was held subsequently (October 19, 2005) and a follow up meeting requested by and with adjacent concerned landowners was held on August 15, 2006.

Based on the information in the EA and the comments received from the public, it is my decision to recommend that the Fish, Wildlife & Parks Commission provide approval for FWP to proceed with the proposed action of acquiring by donation a Fishing Access Site on the Shields River. This recommendation to the Commission incorporates two changes to the proposed action described in the EA. First, the Department commits to contracting with a commercial applicator to conduct the weed control effort specified in the proposed action. Second, the Department will prepare and distribute for public comment a separate environmental assessment on a proposed development plan for the site prior to commencing any site development. References to site development activities in the EA are to be considered informational only, and the decision to seek Montana Fish, Wildlife & Parks Commission approval of the Shields River land acquisition will not constitute approval of any site development activities at this time.

The reasons for this decision and FWP's responses to public comments are provided below. Questions regarding this Decision Notice should be directed to Bruce Rich, Region Three Fisheries Manager, Montana Fish, Wildlife & Parks, c/o Shields River FAS – EA, 1400 South 19th Avenue, Bozeman, MT 59718, (406) 994-3155, or at brrich@mt.gov .

This Decision Notice is also available for review from FWP Region Three Headquarters, or online at FWP's Internet website: <http://www.fwp.mt.gov/publicnotices>.

Proposed Action

Montana FWP proposes to accept the donation of a parcel of property from a private donor for inclusion in the Fishing Access Site (FAS) system. The property is 23.6 acres in size and borders the Shields River in Park County, and if accepted would be managed as a Fishing Access Site. This is a good opportunity for FWP to acquire an FAS at minimal cost and in an area with little public access. There are no other FASs on the Shields River, and the next closest FAS is the Highway 89 Bridge FAS on the Yellowstone River, about 17 road miles away. The primary benefits of this site acquisition are providing formal public access to the Shields River with no fee purchase required to obtain the property.

Montana Environmental Policy Act

Montana Fish, Wildlife & Parks assesses impacts of its proposals to the human and natural environments, in compliance with the Montana Environmental Policy Act (MEPA). The details of the Shields River Proposed Fishing Access Site (FAS) Acquisition and its effects were disclosed in the August 24, 2005, Environmental Assessment (EA).

A 30-day comment period was open from August 24 through September 22, 2005. Public notification of the proposed action was facilitated with the distribution of legal notices printed in the Bozeman Daily Chronicle and the Livingston Enterprise. In addition, the EA was posted on the Fish, Wildlife & Parks webpage: <http://www.fwp.state.mt.us>

Summary of Public Comment

Seven separate letters/emails of comment were received on the proposal, consisting of 26 individual comments/issues of concern.

1) The Park County Extension Agent expressed a desire that more specifics be provided on who would conduct weed control activities on the site.

Response: FWP contacted the commenter and agreed to the following change to the EA: on Page 5, last paragraph, after 4th sentence (... to control the weeds on the property.), ADD: "This spraying would be conducted under contract by a commercial applicator to be determined."

2) The Montana State Historical Preservation Office (SHPO) recommended that a cultural resource inventory be conducted before any future ground disturbance would take place.

Response: FWP would have a cultural resource inventory conducted before any ground disturbance would occur. Any site development would be designed to eliminate impacts to all cultural sites the survey reveals, if any. This analysis would be addressed in a subsequent site development EA.

3) "On behalf of the Joe Brooks Chapter of Trout Unlimited of Livingston, Montana I would like to propose that Montana Fish Wildlife & Parks go forward with the Preferred Alternative B: Proposed Action for the Shields River Fishing Access Site Acquisition. It is the view of the Joe Brooks Chapter of Trout Unlimited that the proposed Fishing Access Site would be a benefit to the public. It would allow access to a river that currently does not have any designated public access outside of bridge crossings and right-of-ways. Having such an access would allow the citizens of Montana to continue to benefit from their constitutional right to maintain a tradition of fishing and hunting in this state. A public access on the Shields River would also, in theory, justify further action to protect the native Yellowstone Cutthroat Trout population by validating the river as an active sport fishery that should be preserved for the future benefit of the public. "

Response: We agree on the potential benefits of the proposed action.

4) (This same comment as No. 3 but received from an individual.)

Response: We agree on the potential benefits of the proposed action.

5) "Montana Trout Unlimited supports FWP's preferred alternative in a recent EA to accept a 23.6 acre donation of land for development as a public fishing access site on the Shields River. This proposal is sound because:

1. The land is being donated, making it an exceptional value to Montana's angling community.
2. There are no other public fishing access sites along the entire reach of the Shields, a large river that holds a reasonably attractive wild trout population.
3. Increased access for the public will enhance public commitment for improving habitat quality in the Shields River drainage.
4. The preferred alternative in the EA includes a commitment to dedicate \$10,000 over five years for weed control, thereby obviating the concern of nearby private landowners about the potential negative role the site could have in spread of noxious weeds.

This is a great deal for Montana anglers. It balances the needs of the public with those of nearby private landowners. We support it wholeheartedly. "

Response: FWP agrees that the acquisition of the site and operation as an FAS would strike a good balance between needs of the public and nearby landowners.

6) "As a fisherman who likes to travel around Montana, I would very much support the Preferred Alternative, thus hopefully have an opportunity to fish the Shields. Thank you."

Response: We agree on the potential benefits of the proposed action.

7) Three adjacent landowners to the proposed FAS commented together that the Environmental Assessment inadequately addresses many concerns, and that the Environmental Assessment (EA) violates MEPA and MFWP's implementing regulations as in the following specific ways, and that unless these issues are adequately addressed, that the acquisition should not go forward.

a). Failure to provide for a public scoping process to determine the scope of the environmental review.

Response: FWP is not required by law to conduct a public scoping process prior to writing/conducting an Environmental Analysis. In this case, it was not deemed necessary.

b). Failure to provide for a public meeting on the proposed acquisition and development of the proposed FAS contrary to M.C.A. § 23-1-110(1). DFWP has conducted no public meeting on the proposal in addition to its failure to conduct a public scoping meeting under MEPA.

Response: The Proposed Action (Preferred Alternative B) in the EA describes potential site development, including construction of a six-vehicle gravel parking area, installation of a single vault latrine, boundary fencing, access trails and signs. However, consistent with Section 23-1-110 (1), MCA, the Department withdraws formal consideration of site development activities from the current Proposed Action and, instead, will describe and review the environmental impacts of site development activities in a future environmental assessment. This future site-development EA will be made available for public review and comment, prior to commencement of site development activities. At that time, the specific provisions of MCS §23-1-110(1) will be addressed, consistent with the statute and the Department's rules there under, including those provisions related to the holding of a public meeting (Section 12.8.605, Administrative Rules of Montana). For land acquisitions – the subject of the current EA – FWP decides on a case-by-case basis whether a public meeting is needed based on potential for controversy and whether the public requests a meeting. At the commenters' request, a public meeting was held in Livingston in October 19, 2005, then a followup meeting with concerned parties was held in Livingston on August 15, 2006.

c). Failure to consult with U.S. Fish & Wildlife Service regarding impacts to petitioned, candidate threatened or endangered species such as the westslope cutthroat trout and Yellowstone cutthroat trout as required under the Federal ESA and its implementing regulations. The Shields River in the area of the proposed FAS provides habitat to both westslope and Yellowstone cutthroat. No indication of any consultation with USFS appears from a review of the EA.

Response: At the time of the EA release, Yellowstone cutthroat trout (which are present in the Shields River) were under petition for listing under the Endangered Species Act by the USFWS. Consultation with the USFWS about potential impacts of state actions on a *petitioned* species is not required. The most recent petition was rejected by the USFWS. A resulting court ordered status review by USFWS found an ESA listing of YCT to be not warranted (current official status). Petitioners have filed a

notice of intent to sue USFWS challenging the not warranted classification. The Shields River does not contain westslope cutthroat trout.

d). Failure to obtain review of the proposed action and development of the FAS under the Montana Floodplain and Floodway Management Act. M.C.A. §76-5-101 et seq.

Response:

The site proposed for acquisition is not within a designated floodplain, and thus does not have a land use regulation. However, even if it were designated floodplain, M.C.A. § 76-5-401(3) provides for permissible uses of these areas, including public recreational uses such as boat launching ramps, swimming areas, hiking trails, etc. The Park County Floodplain Administration and Sanitarian have been consulted and have no issue with the proposed acquisition.

e). Failure to review in the EA the secondary impacts of the proposed action. The reason for this deficiency is that DFWP only prepared a checklist EA for the proposed action.

Response: An EA is appropriate when there are no significant impacts to the human environment that cannot be mitigated. Here, the EA found no significant impact, and those minor impacts noted are able to be mitigated. The checklist EA is simply a format, and allows for the recognition and evaluation of all potential environmental impacts by ensuring consideration of a full range of environmental and social issues related to a proposed action. If specific error or lack of analysis in the existing EA can be pointed out and confirmed, FWP will reanalyze those elements.

f). A checklist EA is an inappropriate level of MEPA review of this action. As the EA notes, the Shields is not subject to a high level of recreational use or access. This action will potentially greatly increase access to the River, which will have environmental impacts requiring review in greater detail than allowed by the checklist EA prepared. DFWP cannot proceed until a full and adequate EA or EIS is prepared.

Response:

Although site development plans will be covered in a separate environmental assessment, FWP typically limits the number of vehicle parking spaces at its fishing access sites to a level of use suitable to stream size and conditions. For example, FWP Ruby River fishing access sites accommodate about 4 – 6 cars. The proposed Shields River site constitutes a similar small stream environment and, through the public review process in a future site development environmental assessment, it is likely FWP will seek to maintain a quality recreational experience for the public by limiting the number of parking spaces. FWP has not found adverse environment effects on water quality, stream habitat, wildlife populations or other environmental parameters due to the limited daily and seasonal presence of recreational anglers on Montana waters. The checklist EA is simply a format for reviews that fully assesses all potential impacts.

g.) FWP's regulations state that certain development projects represent a significant change to use patterns. ARM 12.8.602. These include the building of:

a. new trails on undisturbed lands;

- b. excavation of 20 cubic yards or greater of material;
- c. any new construction in a stream;
- d. any significant change in use patterns.

The proposed action appears to trigger all the above which are by rule deemed significant. The EA prepared is insufficient to adequately assess these impacts of the proposed action checklist. In addition the proposed action fails to indemnify mitigation measures to address these significant impacts.

Response: The Administrative Rule of Montana cited applies to “improvement and development projects.” As in comment and response to 7b, this EA does not intend to address development and improvement plans for the site, as they are not yet complete. If the acquisition is completed and the FWP acquires the site, FWP will craft a development and improvement plan that will be analyzed in a separate follow-up EA. That EA will address the points noted in this comment.

h.) The proposed action fails to adequately address the issue of noxious weeds. At page 12 of the EA, noxious weeds are analyzed only at the site. This fails to assess the impacts of recreationists now increasing the spread of noxious weeds up and down the river corridor by the increase in access to the River. This secondary effect is not analyzed in the EA at all and indicates the assessment is inadequate.

Response: FWP recognizes that increasing public access to an area could result in spread of noxious weeds. However, in the course of conducting the EA, FWP felt that given current levels of weed infestation on the site and adjacent properties, the intensive weed control proposed to be implemented on the site, along with educational signing for site users, would result in a net decrease, not increase, in the spread of noxious weeds through the adjacent riparian corridor. This would be especially true if a coordinated weed control effort could be embarked upon with neighboring landowners.

i.) The proposed action fails to adequately analyze the impacts on fish/wildlife resources. By providing public access to a previously infrequently used river, DFWP is taking an action which potentially greatly increases fishing pressure on the River. The EA contains no assessment of these impacts other than the cursory and limited analysis provided at page 13. Without identified baseline data and an articulation of why DFWP reaches its conditions, the EA fails to adequately assess the impacts of the action on fish population or habitat.

Response: Due to the nature of river trout fishing in SW MT (far and away primarily a catch-and-release venture), FWP is confident that there would be no little or no impact to the fish community. See response 7f and 7r for additional consideration of potential impacts on fish and wildlife resources.

j.) The proposed action involving the installation of a latrine on site is inadequately reviewed and analyzed. The potential water quality impacts of providing and encouraging such an activity on site requires specific review, including any potential for upset conditions or spills to surface or groundwater in the area. Such a review is particularly important given the proximity of the site to the river. The checklist EA fails to

analyze or adequately consider both point source and nonpoint source water quality impacts.

Response: The toilet proposed for the site would be a sealed vault set away from the river, subject to permission and siting by the County Sanitarian, and would have no adverse water quality impacts.

k.) The proposed action requires TMDL consideration under both state and federal clean water act considerations including compliance with federal court-ordered requirements for new activities in § 303 (d) related water bodies.

Response: While a TMDL process has been initiated for the Shields River, it is not complete and in any case would not be an issue given the nature of the proposed actions. The proposed acquisition will not affect the water quality of the site or the Shields River.

l.) The EA's treatment of impacts on land use is insufficient and erroneous. Because of the threat of spreading noxious weeds the proposed action will affect land use and productivity. In addition, by providing increased public access to the river, an increase in the likelihood of trespass to private property will occur, in addition to the likelihood of landowner/sportsmen conflicts. The EA totally ignores the impacts of the proposed action on neighboring or adjacent landowners or private property impacts of the action.

Response: For weed concerns, see Response to 7h above. As for increased likelihood of trespass to private property and landowner/sportsmen conflicts, while FWP recognizes some potential here, it also believes that through intensive signing and enforcement efforts, these issues can be kept in check. FWP is willing to commit to these efforts as a cost of providing public access at the site. FWP would be glad to work with adjacent landowners to ameliorate specific concerns and situations.

m.) The proposed action also fails to address impacts from litter, refuse, and general negative impacts associated with FAS site and location. The proposed action fails to assess and provides no proposed mitigation measures associated with increased human use and traffic along a previously little used and pristine section of the river.

Response: FWP recognizes some potential for impact here; it also believes that through intensive signing and enforcement efforts, these issues can be kept in check. FWP is willing to commit to these efforts as a cost of providing public access at the site. FWP would be glad to work with adjacent landowners to ameliorate specific situations and concerns.

n.) The EA fails to provide value or appraisal of the property. Such information should be provided to assess the overall impact of the proposed donation on the public treasury.

Response: The Department is proposing to receive the property as a donation for the purpose of providing a needed public fishing access site. The Department does not know the value of the property. The Department will not commission an appraisal of the property because an appraisal is not necessary for the land acquisition, and because an

appraisal would be a costly expenditure of angler dollars (typically around \$5,000) for no public benefit. The landowner may be eligible to receive a tax deduction for the property donation, but that issue is at the landowner's discretion. The Department does not become involved in the personal financial affairs of private individuals in land transactions. If the landowner seeks a tax deduction and for that purpose provides to the Department IRS Form 8283 to substantiate the property donation, the Department's would complete its portion of the form, acknowledging receipt of the property. The form does not provide for the Department to place a value on the donated property, nor does it require the landowner to provide that value to the Department.

o.) MFWP is required to obtain and discuss SHPO compliance prior to any decision or accepting title to the property or developing a FAS. The EA at page 20 indicates the proposed action is not in compliance with cultural/historic site requirements.

Response: See 2) above.

p.) The EA fails to adequately assess cumulative impacts of the proposed action on fish/wildlife resources, water quality, land use impacts or impacts to the public treasury. The EA must assess cumulative impacts or at least analyze the same in a sufficient manner. The checklist approach is not adequate under MEPA.

Response: The potential impacts in this comment are covered separately under responses to other individual comments. FWP does not foresee any cumulative impacts of the proposed action. The only proposed action is the acquisition of a 23-acre property for a public fishing access site, and FWP is not aware of any other state or private activities in the area that would result in cumulative environmental effects or trigger such an evaluation.

q.) Because a design plan is "pending", DFWP cannot adequately assess the proposed FAS for MEPA compliance. Until a design is proposed and commented upon by the necessary agencies, local government officials and the public, the MEPA analysis is premature and deficient. Without an identified design, DFWP cannot conduct a sufficient MEPA analysis nor can it determine compliance with other laws.

Response: As noted in Response 7b above, the EA is intended to address the impacts of the Department's proposal to acquire the site through a donation, and is not an analysis of impacts of a site development plan. If the acquisition is completed and site development proposed, the Department will conduct that analysis in a separate environmental assessment, which will address the concerns noted here and will be available for public review and comment.

r.) The EA assesses no impact upon the displacement of whitetail deer, black bear and moose of the proposed action even though the EA states the area is used by these wildlife species, and even though this is an important travel corridor for all these species.

Response: FWP wildlife staff was consulted on this issue and provided/agreed with the findings of the analysis as written. The potential for temporary movement of large wildlife species from the property -- as might be caused by limited, nonmotorized day-

use recreation during the fishing season -- has not resulted in significant or even noticeable environmental impacts on wildlife or other resources at other similar dispersed fishing access sites in Montana.

s.) The EA fails to review other reasonable alternatives. The failure is due in large part to no public scoping of the proposed action.

Response: FWP evaluated the alternatives of accepting or not accepting the donation of the fishing access site. This was the only choice posed by the landowner's proposed donation. FWP is not aware of any other real estate opportunities that would meet the identified need public access to the Shields River while providing such an exceptional value for angler dollars.

t.) The EA fails to identify or assess how the proposed transfer of land complies with the subdivision and platting act, surveying requirements, and county planning and zoning requirements. With no discussion of these issues any reader or reviewer of the document cannot tell how the proposed action complies with these legal requirements.

Response: The land proposed to be donated to the Department is already a distinct legal parcel, surveyed and recorded as Park County Certificate of Survey #1934. As such, this 23-acre parcel can be conveyed by the owner to the Department or to any other new owner. The property has legal access from U.S. Highway 89. This area of Park County is not within a zoning district, and use of the property for a fishing access site is not inconsistent with any county planning or zoning.

Decision

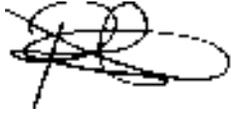
Based on the information in the Environmental Assessment, and in consideration of the comments from the public and the responses provided herein, it is my decision to recommend that the Fish, Wildlife & Parks Commission provide approval for Fish, Wildlife & Parks to accept the donation of a 23.6-acre property for use as a public fishing access site on the Shields River in Park County.

This recommendation to the Commission incorporates two changes to the proposed action described in the EA. First, the Department commits to contracting with a commercial applicator to conduct the weed control effort specified in the proposed action. Second, the Department will prepare and distribute for public comment a separate environmental assessment on a proposed development plan for the site prior to commencing any site development. References to site development activities in the current EA are to be considered informational only, and approval by the Montana Fish, Wildlife & Parks Commission of the Shields River land acquisition will not constitute approval of site development activities at this time.

Based on the analysis in the EA and the applicable laws, regulations, and policies, I have determined that this action will not have a significant effect on the natural or human environment. Therefore, an Environmental Impact Statement will not be prepared. FWP accepts the Draft Environmental Assessment for the Shields River Proposed Fishing Access Site Acquisition, with the corrections and additions of

information provided herein, as the final environmental assessment of the proposed action.

If you have questions regarding this decision notice, please contact Bruce Rich, Region Three Fisheries Manager, (406) 994-4042, 1400 South 19th Avenue, Bozeman, MT 59718, or at brrich@mt.gov.



Patrick J. Flowers
Region Three Supervisor