

SHIELDS RIVER WATER RIGHT ACQUISITION

DECISION NOTICE

Montana Fish, Wildlife & Parks
Region Three, Bozeman
April 2008

Proposed Action

Montana Fish, Wildlife and Parks (FWP) proposes to acquire by gift irrigation water right number 43A 1874 00 owned by the Edward O & Donna L Hillman Revocable Trust for the future use in benefiting in-stream flow and/or other uses to benefit the fishery of the Shields River.

Montana Environmental Policy Act

Montana Fish, Wildlife & Parks is required by the Montana Environmental Policy Act (MEPA) to assess significant potential impacts of a proposed action to the human and physical environment. In compliance with MEPA, an Environmental Assessment (EA) was completed for the proposed project by FWP and released for public comment on February 15, 2008.

Public comments on the proposed project were taken for 30 days (through March 18, 2008). The EA was mailed to 48 individuals and groups; a legal notice was printed in the *Livingston Enterprise* and *Helena Independent Record*; and the Draft EA was posted on the FWP webpage: <http://fwp.mt.gov/publicnotices/>.

Summary of Public Comment

Public comments or inquiries were received during the 30-day review period. The comments and responses are categorized following.

General Comment in Support

Comment: "This is to inform you that the Anaconda Sportsmen Club is in favor of the Shields River Water Right Acquisition by Gift."

Response: Thank you for your comment in support.

Water Right and Related Comments

Comment: "On page 4, it is explained that the change in water right is only temporary, even though it can be renewed every 10 years indefinitely. I'm wondering what else might happen. Could that person or somebody else request to have that water right back? Could FWP lose the water right if they are late in reapplying?"

Response: If FWP were to acquire the water right, it could not revert to another party. If FWP were to fail to renew the temporary change to instream flow on time, the temporary change would expire. The water right would remain intact but would have no effective use. FWP would need to re-apply to DNRC for a temporary change in use.

Comment: “On page 5, Alternative B, I'm not sure I fully understand the last sentence. Is there another step in the process to actually changing this water right to instream flow, or is the change to instream flow automatic? In other words, could this process get hung up in court after FWP makes its decision? Also, what are the "other uses for the benefit of the fishery?”

Response: In order to change the water right to instream flow or any other use, application would need to be made to DNRC and authorization received prior to making the change in place of use and purpose.

Other uses refers to a project still early in its planning stages to capture all fish trying to move upstream of the Chadbourne diversion and allow only native species to continue upstream. If ultimately implemented, this project could require some diversion of water for holding tanks for the fish. This potential use is somewhat speculative at this time. This possibility for other uses was mentioned in order to provide full disclosure that the water right may be used for other purposes to benefit the fishery.

Comment: “Water right attaches to the land and not to the persons who own the land.”

Response: Water rights are property that can be bought and sold. While they are attached to the place where they are used, they can be severed and sold. This is not common but has occurred across the state, particularly on decreed streams where water users have purchased more senior water rights to assure that they would have water in times of shortage. As water rights are property, they are severed and transferred to a new owner via a deed just like land.

Comment: “Diverting water to the river constitutes a change in point of use of the water which requires approval of DNRC.”

Response: In order to change the water right to instream flow or any other use, application would need to be made to DNRC and authorization received prior to making the change in place of use and purpose. The EA does not assert that this action would not be taken without DNRC approval.

Comment: “The proposed action adversely affects the rights of all the water users of the water of the McNiven Ditch.”

Response: In order approve the change in place of use and purpose of the water right, the DNRC would need to make a finding that other water right(s) would not be adversely affected. However, the acquisition of the water right is the action being evaluated, not the change in place of use and purpose of the water right which would be subject to a separate DNRC proceeding.

Comment: “The proposed action constitutes a taking of property rights without exercise of Eminent Domain.”

Response: The proposed action is not to acquire water rights or other property owned by any party other than the Edward O & Donna L Hillman Revocable Trust. No other party has asserted an ownership interest in water right number 43A 1874 00. Any potential injury to other water rights would be addressed in the DNRC water right change process.

Comment: “The purchase of the land by the present owners was based on the value of the water rights attached. The proposed action would devalue the property now owned.”

Response: Any potential injury to other water rights would be addressed in the DNRC water right change process. As this process protects against injury to water rights, it results in no impacts to the value of the property associated with those water rights.

Comment: “The ditch now carries only about half of the water allowed under the original water right.”

Response: The abstracts of the water rights using the McNiven Ditch provide no indication that the McNiven Ditch is capable of carrying only half of the water allowed under the original water right. This is clearly a limiting factor for all of the water rights using the McNiven Ditch.

It also presents a potential that other water users could be adversely affected by removing water right number 43A 1874 00 from the McNiven Ditch and ultimately changing to uses in the Shields River. To exercise water right 43A 1874 00 other than in the McNiven Ditch could increase the total appropriation under all of the McNiven Ditch rights including 43A 1874 00 and thus adversely affect other water users in the Shields River basin.

It must be noted that other water right holders do not have a right to use water under water right 43A 1874 00 owned by the Edward O & Donna L Hillman Revocable Trust.

Comment: “The undersigned users hereby file a protest and demand a hearing.”

Response: The Montana Environmental Policy Act provides for public involvement but does not provide for a right to a formal hearing. Hearings are sometimes held to gather additional public comment and gather information, but given the decision in this matter a hearing is not warranted.

Final Environmental Assessment for the Shields River Water Right Acquisition

Section 3.i. of Part II of the Draft Environmental Assessment is modified to reflect a potentially significant impact. Because the McNiven Ditch carries only half of the water allowed under the original right, to exercise water right 43A 1874 00 other than in the McNiven Ditch could increase the total appropriation under all of the McNiven Ditch rights including 43A 1874 00. This potentially could adversely affect other water users in the Shields River basin by increasing the water demand under this relatively senior priority date. While this impact could be potentially mitigated, the mitigation measures would likely be quite complex and difficult to implement. In addition, the mitigation measures would likely limit benefits to the fishery of the Shields River.

The Draft Environmental Assessment as modified by the preceding, together with this Decision Notice, will serve as the final document for this proposal.

Decision

Based on the Environmental Assessment and public comment, it is my decision to select *Alternative A: No Action* to not proceed with the acquisition of water right 43A 1874 00 owned by the Edward O & Donna L Hillman Revocable Trust.

I find there are potentially significant impacts on the human and physical environments associated with this project in that water rights of other water users in the Shields River basin could be negatively impacted.

Patrick J. Flowers
Region Three Supervisor



***Montana Fish,
Wildlife & Parks***

Environmental Assessment

Shields River Water Right Acquisition

February 2008



***Montana Fish,
Wildlife & Parks***

Environmental Assessment

PART I. PROPOSED ACTION DESCRIPTION

- 1. Type of proposed state action:**
Montana Fish, Wildlife and Parks (FWP) proposes to acquire, by gift, irrigation water right number 43A 1874 00 owned by the Edward O. & Donna L. Hillman Revocable Trust for the future use in benefiting in-stream flow and/or other uses to benefit the fishery of the Shields River.

- 2. Agency authority for the proposed action:**
§87-1-209, MCA authorizes FWP to acquire water rights for water suitable for fish restoration, propagation or protection.

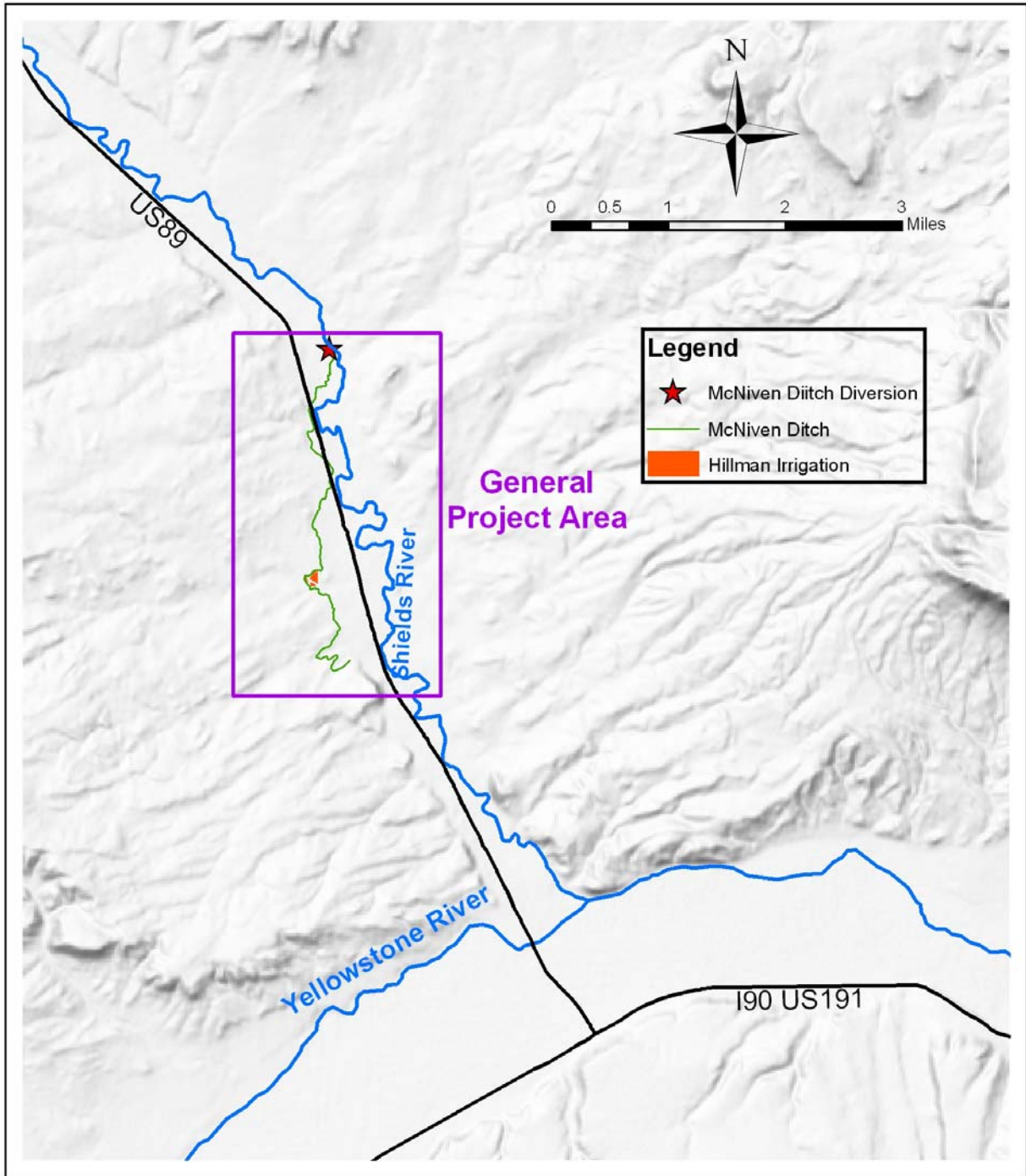
§85-2-436, MCA authorizes FWP to temporarily or permanently change water rights to in-stream flow purposes to benefit the fishery.

- 3. Name of project:** Shields River Water Right Acquisition by Gift

- 4. Name, address and phone number of project sponsor:**
Andy Brummond
Water Resources Specialist
Montana Fish, Wildlife & Parks
PO Box 938
Lewistown, MT 59457
406-538-4658 x224

- 5. Anticipated Schedule:**
Complete Transfer of Water Right Ownership: Spring 2008

- 6. Location affected by proposed action:**
Park County: Sections 4, 9 & 16, Township 1 South, Range 10 East, Park County
Section 32, Township 1 North Range 10 East, Park County



General Location Map

7. Estimate the number of acres that would be directly affected:

	<u>Acres</u>		<u>Acres</u>
(a) Developed:		(d) Floodplain	<u>0</u>
Residential	<u>0</u>		
Industrial	<u>0</u>	(e) Productive:	
		Irrigated cropland	<u>7</u>
(b) Open Space/ Woodlands/Recreation	<u>0</u>	Dry cropland	<u>0</u>
(c) Wetlands/Riparian Areas	<u>0</u>	Forestry	<u>0</u>
		Rangeland	<u>0</u>
		Other	<u>0</u>

8. Other Local, State or Federal agency that has overlapping or additional jurisdiction.

(a) Permits:

<u>Agency Name</u>	<u>Permits</u>
None	

(b) Funding:

<u>Agency Name</u>	<u>Funding Amount</u>
Montana Fish, Wildlife and Parks	Incidental costs associated with water right transfer in ownership.

(c) Other Overlapping or Additional Jurisdictional Responsibilities:

<u>Agency Name</u>	<u>Type of Responsibility</u>
MT Dept. of Natural Resources and Conservation	Water Right Ownership Update

9. Summary of the proposed action:

Edward O. & Donna L. Hillman Revocable Trust, the owner of a small irrigation water right from the Shields River, tributary to the Yellowstone River near Livingston, has offered to give the water right to Montana Fish, Wildlife and Parks (FWP). The water right, Statement of Claim 43A 1874 00, reflects a decreed right for diversion of 0.58 cubic feet per second (cfs) for irrigation of 7 acres. The water right is diverted through the McNiven Ditch, which is shared by several other water users. The diversion of water occurs approximately 8 river miles upstream from the confluence of the Shields

River with the Yellowstone River. The owner of the water right no longer desires to irrigate and participate in the maintenance of the ditch.

Once owned by FWP, this water right could be temporarily changed to instream flow to benefit the fishery in the lower Shields River. The term of the temporary change would be 10 years and under present law could be renewed an unlimited number of times. The right could be permanently changed to instream, but under present law FWP is limited to only 12 stream reaches for permanent changes to instream flow and would not likely designate the lower Shields River as one of these reaches at this point in time.

FWP staff classifies the Shields River as periodically dewatered. During August and September, stream flow drops to critical low levels and water temperature rises above levels desirable for trout. In recent years, flow at the mouth of the Shields River has dropped regularly below 40 cfs and was as low as 23 cfs in 2001 and 29 cfs in both 2006 and 2007. While 0.58 cfs constitutes a relatively small water right, it does represent 2% of the total flow of the Shields River when it is flowing 29 cfs, making this water right meaningful in terms of the hydrology of the Shields River, particularly during times of low flows.

FWP is also working with the owners of the Chadbourne irrigation diversion in the same area of the Shields River to rehabilitate their diversion to allow for fish passage. This project may eventually include the capture and genetic testing of trout migrating upstream. Only pure Yellowstone Cutthroat trout would be allowed to migrate upstream. The captured trout would be held for a short period while genetic testing occurs. If this project ultimately needs a diversion of water (i.e. water right) for the purposes of holding the trout, the 0.58 cfs water right could fill this need in addition to improving stream flow.

The scope of this Environmental Assessment is limited to the acquisition of the water right and the impacts of it no longer being diverted from the Shields River. Any changes to how and where the water right is used are under the jurisdiction of the Department of Natural Resources and Conservation which conducts an environmental review as part of the water right change process. Any impacts associated with the legal changes to the water right will be addressed in that process.

10. Description and analysis of reasonable alternatives

Alternative A: No Action

If no action is taken, FWP would not accept the gift of the water right from the Hillman Trust. The use of the water right would remain unchanged, and no change in impacts to the environment would be expected. The Hillman Trust could exercise other options such as selling or giving the water right to another party, likely resulting in a continued depletion of water from the Shields River. The Hillman Trust could also withdraw the water right from the General Adjudication, effectively retiring the water right for perpetuity. The potential actions of the Hillman Trust if FWP does not accept the gift of

the water right are speculative and therefore are not evaluated under this alternative.

Alternative B: Acquire the Water Right (preferred alternative)

Under this preferred alternative, FWP would accept the gift of the water from the Hillman Trust. The water right would no longer irrigate the Hillman Trust property previously irrigated, and the 0.58 cfs of water would not be diverted from the Shields River. While the water right represents a small portion of the flow in the Shields River, this acquisition represents a starting point in an ongoing process to restore stream flow in the Shields River basin. Until changed to instream flow or other uses for the benefit of the fishery, the water right could not be enforced against other water users.

PART II. ENVIRONMENTAL REVIEW CHECKLIST

The analysis of the physical and human environments discussed on the following pages is limited to Alternative B, the preferred action. This is because under Alternative A, the No Action Alternative, FWP would not pursue the acquisition of the water right thus preserving the status quo which has existed for over a century.

1. Evaluation of the impacts of the Proposed Action including secondary and cumulative impacts on the Physical and Human Environment.

A. PHYSICAL ENVIRONMENT

1. <u>LAND RESOURCES</u> Will the proposed action result in:	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
a. **Soil instability or changes in geologic substructure?		X				
b. Disruption, displacement, erosion, compaction, moisture loss, or over-covering of soil, which would reduce productivity or fertility?			X			1b
c. **Destruction, covering or modification of any unique geologic or physical features?		X				
d. Changes in siltation, deposition or erosion patterns that may modify the channel of a river or stream or the bed or shore of a lake?		X				
e. Exposure of people or property to earthquakes, landslides, ground failure, or other natural hazard?		X				
f. Other:		X				

- 1b. The removal of the parcel of land from irrigated production would reduce, to some degree, the productivity of the land. In recent years, the land has not been irrigated and therefore no change from present conditions would occur. Additionally, this land, located within a subdivided area, has not been part of an agricultural business since the present owners acquired the land and built a home in the late 1970s. The Department of Revenue further classifies the land as "non-qualified ag land" meaning land under one ownership which falls into the acreage range of 20-160 acres for which no agricultural application has been approved.

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

2. <u>AIR</u> Will the proposed action result in:	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
a. **Emission of air pollutants or deterioration of ambient air quality? (Also see 13 (c).)		X				
b. Creation of objectionable odors?		X				
c. Alteration of air movement, moisture, or temperature patterns or any change in climate, either locally or regionally?		X				
d. Adverse effects on vegetation, including crops, due to increased emissions of pollutants?		X				
e. ***For P-R/D-J projects, will the project result in any discharge, which will conflict with federal or state air quality regs? (Also see 2a.)		X				
f. Other:		X				

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

3. <u>WATER</u> Will the proposed action result in:	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
a. *Discharge into surface water or any alteration of surface water quality including but not limited to temperature, dissolved oxygen or turbidity?		X				
b. Changes in drainage patterns or the rate and amount of surface runoff?			X			3b
c. Alteration of the course or magnitude of floodwater or other flows?		X				
d. Changes in the amount of surface water in any water body or creation of a new water body?			X			3d
e. Exposure of people or property to water related hazards such as flooding?		X				
f. Changes in the quality of groundwater?		X				
g. Changes in the quantity of groundwater?			X			3g.
h. Increase in risk of contamination of surface or groundwater?		X				
i. Effects on any existing water right or reservation?			X			3i.
j. Effects on other water users as a result of any alteration in surface or groundwater quality?		X				
k. Effects on other users as a result of any alteration in surface or groundwater quantity?		X				3k.
l. ****For P-R/D-J, will the project affect a designated floodplain? (Also see 3c.)		X				
m. ***For P-R/D-J, will the project result in any discharge that will affect federal or state water quality regulations? (Also see 3a.)		X				
n. Other:		X				

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

3b & 3d. Because irrigation would no longer be occurring on the Hillman property in the vicinity of Crazyhead Creek, both irrigation surface water return flow and ground-water return flow to Crazyhead Creek would diminish slightly. These flows would remain in the Shields River where they naturally occurred, mitigating the impacts to the river basin as a whole.

3g. Ground water in and near the irrigated area on the Hillman Property may diminish slightly. However, this reduction may be welcome as the high water table is not wanted on a residential property. As the McNiven Ditch will still carry water through the Hillman property and will continue to seep water, the reduction in ground water in the area would be limited.

3i & 3k. The reduction of diversions from the Shields River would benefit FWP's instream flow reservation for the Shields River which is often not met during the summer. As the water not diverted would remain in the Shields River, it would mitigate any potential impacts to downstream water users.

The Hillman water right for 0.58 cfs represents only 2% of the 23.68 total diversion rate claimed for all water rights using the McNiven Ditch. Even at lower flows, the impact of removing the 0.58 cfs from the McNiven ditch would be negligible. While the ditch varies in size and shape, a trapezoidal shape with a 3-foot bottom and 1.5:1 sides and a longitudinal slope of 0.002 is a reasonable representation of the average ditch geometry. This geometry at a depth of 1.5 ft. would carry about 12.5 cfs. This flow rate may be more representative of the flow normally carried by the ditch than the maximum diversion claimed under all of the water rights. Reducing the flow rate by 0.58 cfs would decrease the water depth by less than 3% and reduce the wetted cross-section of the ditch by about 2%. As the wetted cross-section of the ditch largely controls the rate of seepage from the ditch, the removal of 0.58 cfs would have little if any impact on the delivery of water to the remaining water users.

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

4. <u>VEGETATION</u> Will the proposed action result in?	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
a. Changes in the diversity, productivity or abundance of plant species (including trees, shrubs, grass, crops, and aquatic plants)?			X			4a
b. Alteration of a plant community?			X			4b
c. Adverse effects on any unique, rare, threatened, or endangered species?		X				
d. Reduction in acreage or productivity of any agricultural land?		X				4d
e. Establishment or spread of noxious weeds?		X				
f. ****For P-R/D-J, will the project affect wetlands, or prime and unique farmland?		X				
g. Other:		X				

4a & 4b. Water loving plants may decrease slightly in the area due to decreases in the artificially elevated ground-water table. However, any decreases in productivity or changes in the plant community are expected to be minor and represent a shift back toward more natural conditions. Deeper-rooted plants such as trees and shrubs are not expected to be impacted.

4d. While productivity would decrease, the land presently irrigated is not considered agricultural land. (see comment 1b also)

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

** 5. <u>FISH/WILDLIFE</u> Will the proposed action result in:	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
a. Deterioration of critical fish or wildlife habitat?		X				
b. Changes in the diversity or abundance of game animals or bird species?		X				
c. Changes in the diversity or abundance of nongame species?		X				
d. Introduction of new species into an area?		X				
e. Creation of a barrier to the migration or movement of animals?		X				
f. Adverse effects on any unique, rare, threatened, or endangered species?		X				
g. Increase in conditions that stress wildlife populations or limit abundance (including harassment, legal or illegal harvest or other human activity)?		X				
h. ****For P-R/D-J, will the project be performed in any area in which T&E species are present, and will the project affect any T&E species or their habitat? (Also see 5f.)		X				
i. ***For P-R/D-J, will the project introduce or export any species not presently or historically occurring in the receiving location? (Also see 5d.)		X				
j. Other:		X				

A search of the Montana Natural Heritage database revealed one threatened species, the Bald Eagle, and one sensitive species, the Cutthroat Trout, in the vicinity of the Hillman property. As this project would not involve construction or disturbance of the land, it is highly unlikely the Bald Eagle would be impacted. It is expected that the Cutthroat Trout would benefit to a small degree from increased flow in the Shields River.

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

B. HUMAN ENVIRONMENT

6. <u>NOISE/ELECTRICAL EFFECTS</u> Will the proposed action result in:	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
a. Increases in existing noise levels?		X				
b. Exposure of people to serve or nuisance noise levels?		X				
c. Creation of electrostatic or electromagnetic effects that could be detrimental to human health or property?		X				
d. Interference with radio or television reception and operation?		X				
e. Other:		X				

7. <u>LAND USE</u> Will the proposed action result in:	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
a. Alteration of or interference with the productivity or profitability of the existing land use of an area?		X				
b. Conflicted with a designated natural area or area of unusual scientific or educational importance?		X				
c. Conflict with any existing land use whose presence would constrain or potentially prohibit the proposed action?		X				
d. Adverse effects on or relocation of residences?		X				
e. Other:		X				

The proposed project would be consistent with the rural residential nature of the area and would have no impact on existing land uses except for removal of irrigation from the Hillman property.

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

8. <u>RISK/HEALTH HAZARDS</u>	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
Will the proposed action result in:						
a. Risk of an explosion or release of hazardous substances (including, but not limited to oil, pesticides, chemicals, or radiation) in the event of an accident or other forms of disruption?		X				
b. Affect an existing emergency response or emergency evacuation plan, or create a need for a new plan?		X				
c. Creation of any human health hazard or potential hazard?		X				
d. ***For P-R/D-J, will any chemical toxicants be used? (Also see 8a)		X				
e. Other:		X				

9. <u>COMMUNITY IMPACT</u>	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
Will the proposed action result in:						
a. Alteration of the location, distribution, density, or growth rate of the human population of an area?		X				
b. Alteration of the social structure of a community?		X				
c. Alteration of the level or distribution of employment or community or personal income?		X				
d. Changes in industrial or commercial activity?		X				
e. Increased traffic hazards or effects on existing transportation facilities or patterns of movement of people and goods?		X				
f. Other:		X				

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

10. <u>PUBLIC SERVICES/TAXES/UTILITIES</u> Will the proposed action result in:	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
a. Will the proposed action have an effect upon or result in a need for new or altered governmental services in any of the following areas: fire or police protection, schools, parks/recreational facilities, roads or other public maintenance, water supply, sewer or septic systems, solid waste disposal, health, or other governmental services? If any, specify:		X				
b. Will the proposed action have an effect upon the local or state tax base and revenues?		X				
c. Will the proposed action result in a need for new facilities or substantial alterations of any of the following utilities: electric power, natural gas, other fuel supply or distribution systems, or communications?		X				
d. Will the proposed action result in increased use of any energy source?		X				
e. **Define projected revenue sources						
f. **Define projected maintenance costs.						
g. Other:		X				

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

** 11. <u>AESTHETICS/RECREATION</u>	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
Will the proposed action result in:						
a. Alteration of any scenic vista or creation of an aesthetically offensive site or effect that is open to public view?		X				
b. Alteration of the aesthetic character of a community or neighborhood?		X				
c. **Alteration of the quality or quantity of recreational/tourism opportunities and settings? (Attach Tourism Report.)		X				
d. ***For P-R/D-J, will any designated or proposed wild or scenic rivers, trails or wilderness areas be impacted? (Also see 11a, 11c.)		X				
e. Other:		X				

12. <u>CULTURAL/HISTORICAL RESOURCES</u>	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
Will the proposed action result in:						
a. **Destruction or alteration of any site, structure or object of prehistoric historic, or paleontological importance?		X				
b. Physical change that would affect unique cultural values?		X				
c. Effects on existing religious or sacred uses of a site or area?		X				
d. ****For P-R/D-J, will the project affect historic or cultural resources? Attach SHPO letter of clearance. (Also see 12.a.)		X				12d
e. Other:		X				

12d. As this project involves no physical changes to any structures and no physical disturbance of the land no cultural or historic resources would be impacted.

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

SIGNIFICANCE CRITERIA

13. SUMMARY EVALUATION OF SIGNIFICANCE	IMPACT *					
	Unknown	None	Minor	Potentially Significant	Can Impact Be Mitigated	Comment Index
Will the proposed action, considered as a whole:						
a. Have impacts that are individually limited, but cumulatively considerable? (A project or program may result in impacts on two or more separate resources that create a significant effect when considered together or in total.)		X				
b. Involve potential risks or adverse effects, which are uncertain but extremely hazardous if they were to occur?		X				
c. Potentially conflict with the substantive requirements of any local, state, or federal law, regulation, standard or formal plan?		X				
d. Establish a precedent or likelihood that future actions with significant environmental impacts will be proposed?		X				
e. Generate substantial debate or controversy about the nature of the impacts that would be created?		X				
f. ***For P-R/D-J, is the project expected to have organized opposition or generate substantial public controversy? (Also see 13e.)		X				
g. ****For P-R/D-J, list any federal or state permits required.		X				

* Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.

** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).

*** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.

**** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

2. Other control measures, mitigation, stipulations enforceable by the agency or another government agency:

This section provides an analysis of impacts to private property by proposed restrictions or stipulations in this EA as required under 75-1-201, MCA, and the Private Property Assessment Act, Chapter 462, Laws of Montana (1995). The analysis provided in this EA is conducted in accordance with implementation guidance issued by the Montana Legislative Services Division (EQC, 1996). A completed checklist designed to assist state agencies in identifying and evaluating proposed agency actions, such as imposed stipulations, that may result in the taking or damaging of private property, is included in Appendix A.)

While the project does impact private property, this impact is limited to only the property of the Hillman Trust, which has voluntarily offered the Shields River water right to FWP as a gift.

- * Include a narrative explanation under Part III describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or cannot be evaluated.
- ** Include a narrative description addressing the items identified in 12.8.604-1a (ARM).
- *** Determine whether the described impact may result and respond on the checklist. Describe any minor or potentially significant impacts.
- **** Include a discussion about the issue in the EA narrative and include documentation if it will be useful.

PART III. NARRATIVE EVALUATION AND COMMENT

No significant adverse impacts to the human and physical environment are expected. The minor impacts identified are so subtle in nature it is unlikely that they would even be obvious without detailed study. The minor impacts also represent a move back toward natural environmental conditions from the present manipulated landscape.

The acquisition of the Hillman Trust water right represents a small but important step in maintaining water in the Shields River and helping to promote restoration of native species such as the Yellowstone Cutthroat Trout.

PART IV. PUBLIC PARTICIPATION

1. Description of the level of public involvement:

The public will be notified in the following manners and informed of the opportunity to comment on this draft EA, the proposed action and alternatives:

- A direct mailing to interested parties;
- Public notice on the Fish, Wildlife & Parks web page: <http://fwp.mt.gov>.

Copies of this Environmental Assessment will be distributed to the neighboring landowners and interested parties to ensure their knowledge of the proposed project.

This level of public notice and participation is appropriate for a project of this scope, having limited impacts.

2. Duration of comment period.

The public comment period will extend for (30) thirty days beginning February 15, 2008. Written comments will be accepted until 5:00 p.m., March 18, 2008, and can be mailed to the address below:

Scott Opitz, Fisheries Biologist
Montana Fish, Wildlife and Parks Region 3
1354 Highway 10 West
Livingston, MT 59718

Or email comments to: sopitz@mt.gov

PART V. EA PREPARATION

- 1. Explanation of why or why not an EIS is required, explain why the EA is the appropriate level of analysis for this proposed action.**

Based on the criteria provided by MEPA Model Rule III to assess if an EIS is required, this environmental review revealed no significant long-term, negative impacts would be created from the proposed action. Therefore, an EIS is not necessary and an EA is the appropriate level of analysis.

- 2. Individuals responsible for the preparation of this document:**

Andy Brummond
Water Resources Specialist
Montana Fish, Wildlife and Parks
PO Box 938
Lewistown MT 59457
406-538-4658 x224

- 3. List of agencies consulted during preparation of the EA:**

Montana Fish, Wildlife & Parks
Fisheries Division
Legal Unit

APPENDICES

APPENDIX A

PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

The 54th Legislature enacted the Private Property Assessment Act, Chapter 462, Laws of Montana (1995). The intent of the legislation is to establish an orderly and consistent process by which state agencies evaluate their proposed actions under the "Takings Clauses" of the United States and Montana Constitutions. The Takings Clause of the Fifth Amendment of the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." Similarly, Article II, Section 29 of the Montana Constitution provides: "Private property shall not be taken or damaged for public use without just compensation..."

The Private Property Assessment Act applies to proposed agency actions pertaining to land or water management or to some other environmental matter that, if adopted and enforced without compensation, would constitute a deprivation of private property in violation of the United States or Montana Constitutions.

The Montana State Attorney General's Office has developed guidelines for use by state agency to assess the impact of a proposed agency action on private property. The assessment process includes a careful review of all issues identified in the Attorney General's guidance document (Montana Department of Justice 1997). If the use of the guidelines and checklist indicates that a proposed agency action has taking or damaging implications, the agency must prepare an impact assessment in accordance with Section 5 of the Private Property Assessment Act. For the purposes of this EA, the questions on the following checklist refer to the following required stipulation(s):

(LIST ANY MITIGATION OR STIPALTIONS REQUIRED, OR NOTE "NONE")

DOES THE PROPOSED AGENCY ACTION HAVE TAKINGS IMPLICATIONS UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?

YES	NO	
	<input checked="" type="checkbox"/>	1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?
	<input checked="" type="checkbox"/>	2. Does the action result in either a permanent or indefinite physical occupation of private property?
_____	<input checked="" type="checkbox"/>	3. Does the action deprive the owner of all economically viable uses of the property?
_____	<input checked="" type="checkbox"/>	4. Does the action deny a fundamental attribute of ownership?

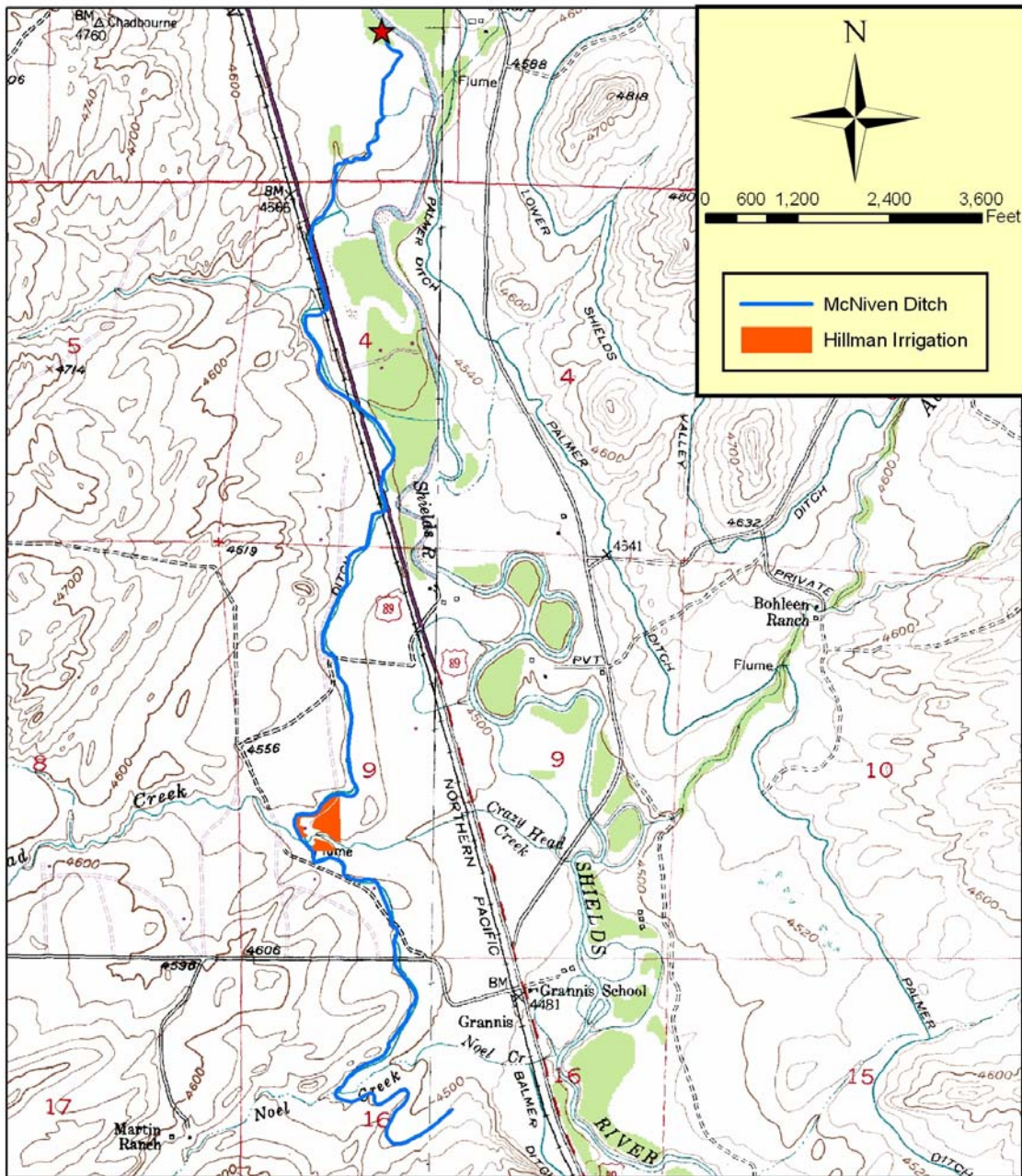
- | | | | |
|-------|---------------|----------|--|
| _____ | <u> </u> | 5. | Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO , skip questions 5a and 5b and continue with question 6.] |
| _____ | <u> </u> | 5a. | Is there a reasonable, specific connection between the government requirement and legitimate state interests? |
| _____ | <u> </u> | 5b. | Is the government requirement roughly proportional to the impact of the proposed use of the property? |
| _____ | <u> </u> | X | 6. |
| _____ | <u> </u> | X | 7. |
| _____ | <u> </u> | 7a. | Is the impact of government action direct, peculiar, and significant? |
| _____ | <u> </u> | 7b. | Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded? |
| _____ | <u> </u> | 7c. | Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question? |

Taking or damaging implications exist if **YES** is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 4, 6, 7a, 7b, 7c; or if **NO** is checked in response to questions 5a or 5b.

If taking or damaging implications exist, the agency must comply with Section 5 of the Private Property Assessment Act to include the preparation of a taking or damaging impact assessment. Normally, the preparation of an impact assessment will require consultation with agency legal staff.

APPENDIX B

Project Area



Project Area in Detail

