

Chapter 1: Purpose and Need, Projects and Scope

1.0 Purpose and Need for Action

The Department of Natural Resources and Conservation (DNRC) has pending before it 9 Applications for Beneficial Water Use Permits and 6 Applications to Change a Water Right in the upper Smith River basin. For the purposes of this document the upper Smith River basin is that portion of the Smith River basin (adjudication basin 41J) upstream of the Cascade – Meagher County line. The Applications for Beneficial Water Use Permits are summarized in Table 1.0-1 and the Applications to Change a Water Right are summarized in Table 1.0-2

This supplemental Environmental Assessment (EA) has been prepared by DNRC to comply with the Montana Environmental Policy Act, which requires that cumulative impacts of proposed actions be analyzed. Cumulative impacts are defined as the collective impacts on the human environment of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type. (Section 75-1-220(3), MCA). It will supplement the individual EAs that DNRC has, or will be preparing for each project.

EA checklists have been completed for 4 of the pending applications. The information contained in this supplemental EA will be used to revise these EA checklists. The information in this supplemental EA also will be used when preparing the individual EA Checklists for each of the remaining 11 applications, after the applications are determined to be correct and complete. In the EA checklists, project-specific impacts and alternatives to the proposed projects will be examined.

Table 1.0-1. Applications for beneficial water-use permit.

| Application Number | Applicant | Water Source | Flow Rate GPM | Volume acre-feet | Purpose | Acres * Irrigated |
|--------------------|--|--------------|---------------|------------------|---------------------------|-------------------|
| 4720800-41J | Galt, Louise | Ground water | 1,650 | 594 | Irrigation | 294 |
| 11366700-41J | Wilhelm, Gary & Margaret | Ground water | 260 | 200 | Irrigation | 95 |
| 11508000-41J | Springdale Colony | Ground water | 1,300 | 344 | Irrigation | 510.5 |
| 11510000-41J | Meagher County (Arrowhead Meadows Golf Course) | Ground water | 95 | 34 | Irrigation/ Commercial | 49 |
| 11778600-41J | Riverside Ranch | Ground water | 850 | 475 | Irrigation | 199.5 |
| 11779100-41J | Galt, Louise | Ground water | 1,200 | 540 | Irrigation | 294 |
| 30000211-41J | Dupea, Helen | Ground water | 600 | 208 | Irrigation | 125 |
| 30001310-41J | Jackson, Ronald | Ground water | 750 | 208 | Irrigation | 125 |
| 11356500-41J | Tom & Anne Burnett Trust (6666 Ranch) | Smith River | 500 | 813 | Fishery** | NA |

*The applications are for ground water to supplement existing surface-water rights. See individual application summaries for details.

**The application is for a non-consumptive use.

Table 1.0-2. Applications to change a water right.

| Application Number | Applicant | Water Source | Change Description |
|--------------------|--|---|---|
| 14610300-41J | Galt, Louise | Geothermal well | Change from flood irrigation to sprinkler irrigation involving a new place of use and an increase in number of acres irrigated. |
| 14609300-41J | Galt, Louise | Catlin Spring Creek, Trib. to Smith River | Partial change from flood irrigation to sprinkler irrigation involving a new place of use. |
| 30002272-41J | Galt, Louise/ Galt, William | Birch Creek & Little Birch Cr. | Partial change from flood irrigation to sprinkler irrigation involving a new place of use. |
| 5353699-41J | Meagher County (Arrowhead Meadows Golf Course) | Ground-water well – same source as permit application | Change in purpose from industrial water use to irrigation. |
| 30003392-41J | Tom & Anne Burnett Trust (6666 Ranch) | Sheep Creek Trib. to Smith River | Change from flood irrigation to sprinkler irrigation involving a new place of use and an increase in the number of acres irrigated. |
| 1767499-41J | Tom & Anne Burnett Trust (6666 Ranch) | Eagle Creek, Trib. to Smith River | Change in the point of diversion for an irrigation water right. |

1.1 Project Locations

Refer to Figure 1.1-1 to locate the projects in the Smith River basin. Project summaries and maps for each application are in Appendix A.

1.2 Scope of Environmental Assessment

Public Involvement

A public scoping meeting was held at the White Sulphur Springs City Hall on October 15, 2002, to discuss the water rights process and to identify potential environmental issues. DNRC representatives from Helena and Lewistown attended the meeting. The public was given until November 15, 2002, to submit written comments regarding the potential impacts to the human environment.

Summary Of The Issues Addressed In This EA

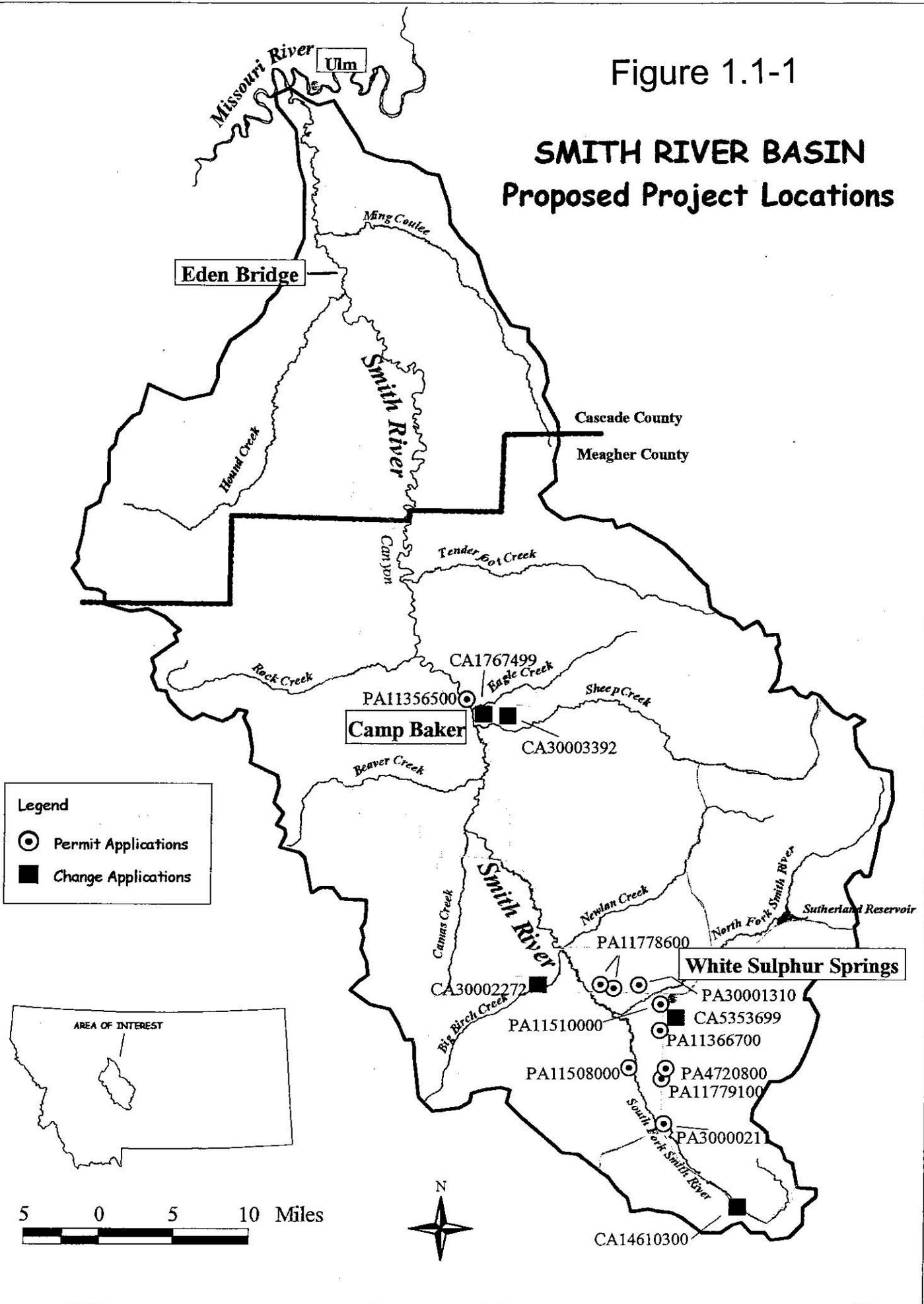
Many issues were brought to DNRC's attention during the public scoping process. Listed below, by category, is a brief summary of the issues that will be evaluated in this EA. More details on many of these issues, especially technical concerns related to ground water, were submitted to DNRC. Although these details have not been restated here, they were considered by DNRC when drafting this EA. Many legal issues were raised during scoping. DNRC has included discussions on water rights and MEPA procedures to better inform the public. However, the EA is not the proper forum for deciding these legal issues. This supplemental EA will not evaluate alternatives to the proposed actions; alternatives will be included in the individual EAs for the applications.

Water Resources

- Cumulative impacts on water quantity and quality associated with changes in irrigation practices.
- Cumulative impacts on surface-water quantity and aquifer conditions due to new ground-water withdrawals.
- Cumulative impacts on water quantity due to the expansion of irrigated acres under existing water rights.

Figure 1.1-1

SMITH RIVER BASIN Proposed Project Locations



Fisheries

- Cumulative impacts on the fisheries due to changes in water quantity and quality.

Economics

- Cumulative impacts on agricultural producers associated with changes in production levels.
- Cumulative impacts on recreational use of the Smith River due to changes in water quantity and quality.
- Cumulative impacts on revenues of recreational based businesses.
- Cumulative impacts on recreational landowners land values.
- Cumulative impacts on revenues from downstream hydroelectric power generation.

1.3 Water Rights and the Decision Process

Background of Water Rights in Montana

Water rights in Montana are guided by the Prior Appropriation Doctrine, that is, first in time is first in right.(Section 85-2-401(1), MCA) A person's right to use a specific quantity of water depends on when the use of water began and the extent of the water use. The first person to use water from a source established the first right, the second person could establish a right to the water that was left, and so on. During dry years, the person with the first right has the first chance to use the available water to fulfill their right. The holder of the second right has the next chance. No preference is given to any particular type of water use.

Montana Water Use Act

The Montana Water Use Act (Title 85, Chapter 2, MCA) of 1973 was the most comprehensive change in Montana's water right laws in the state's history. The act (effective July 1, 1973) changed the way water rights are administered significantly in a number of ways.

1. All water rights existing prior to July 1, 1973, are to be adjudicated through a statewide general adjudication process in state courts.
2. A permit system was established for obtaining water rights for new or additional water developments.
3. An authorization system was established for changing water rights.
4. A centralized records system was established. Prior to 1973, water rights were recorded, but not consistently, in county courthouses throughout the state.
5. A system was provided for public entities to reserve water for future consumptive uses and to maintain minimum instream flows for water quality, and fish and wildlife.

New Appropriations of Water

The Montana Water Use Act of 1973 established a permit system for new uses. Any person planning a new or additional development for a beneficial use of water from surface water or ground water after June 30, 1973, must obtain a Permit to Appropriate Water or file a Notice of Completion of Groundwater Development to get a Certificate of Water Right for smaller wells. The permit system is administered by DNRC. Beneficial uses of water include but are not limited to domestic, stock, irrigation, lawn and garden, mining, municipal, industrial, commercial, agricultural spraying, fisheries, wildlife, and recreation.

Surface Water

A person must apply for and receive a Permit to Appropriate Water before beginning to construct diversion works or diverting water from a surface-water source. The exception to this law is for small livestock reservoirs or pits located on non-perennial flowing streams (streams that do not flow continuously year round).

Ground Water

Anyone anticipating to use more than 35 gallons per minute or 10 acre-feet per year of ground water is required to obtain a Permit to Appropriate Water before any development begins or water is used. However, construction and testing of the well is most often necessary in order to provide the information needed to apply for a Permit.

A person proposing to appropriate more than 3,000 acre-feet of ground water per year must receive legislative approval for the specific appropriation. This law does not apply to appropriations for municipal use, public water supplies, or the irrigation of cropland owned and operated by the applicant.

Upper Missouri Basin Closure

DNRC may not process or grant an application for a permit to appropriate water within the upper Missouri River basin until the final decrees have been issued by the Montana Water Court for all of the subbasins of the upper Missouri River basin (Section 85-2-343(1), MCA). The upper Missouri River Basin is the drainage area of the Missouri River and its tributaries above Morony Dam. Morony Dam is located approximately 10 miles downstream of Great Falls. The Smith River basin (basin 41J) is one of the subbasins within the upper Missouri River basin. At this time no final decrees have been issued for any of the subbasins within the upper Missouri River basin.

This basin closure has several exceptions including "groundwater" and "non-consumptive uses". For the purposes of the closure "groundwater" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water. "Non-consumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

Before processing a Permit applications, DNRC must make a determination if the application meets the closure exceptions. In the case of ground-water wells, DNRC determines if the source is "groundwater" based on whether or not the drawdown from the pumping well induces infiltration of streamflow.

Changes in Water Use

Prior approval from DNRC is required before changing an existing water right, permit, certificate, or water reservation in any of the following ways (Section 85-2-402, MCA):

1. Point of diversion.
2. Place of use.
3. Purpose of use.
4. Place of storage.

To protect all water rights, the water right being changed is subject to a critical and intense review. All elements of the water rights will be reviewed including, but not limited to the historic flow rate, volume, purpose of use and number of acres irrigated (when applicable). The review is used to substantiate the validity of the historic beneficial use which is the limit of the water right.

Application Process for Permits and Authorizations to Change

Once a permit or change application is received it is reviewed by DNRC to determine whether it conforms to the legal standard of being correct and complete. This means, *"the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the*

information have been filled in with the required information”(Section 85-2-102(6), MCA). If DNRC deems the application correct and complete, it does not mean that the permit or authorization to change will be issued. Rather, it insures that the application contains *substantial credible information, which*, as defined by statute, means “*probable believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information*” (Section 85-2-102(18), MCA).

When an application is deemed correct and complete, in most cases it must be published to provide notice to the public. In limited circumstances DNRC may waive the public notice requirement and take final action on the application. If the application is noticed to the public and *no objections are received*, DNRC will document its findings, develop final recommendations and take final action on the application. If *objections are received* and the objectors withdraw their objections, DNRC will then prepare its findings, develop final recommendations, and take action on the application. This action may include approval of the application as submitted, approval with conditions deemed necessary by DNRC, or denial of the application. Note that the application may be approved with conditions or denied even if there are no objections or if all objections are withdrawn. If the application is conditionally approved or is denied, the applicant has an opportunity to show cause in an administrative hearing why the permit or authorization to change should not be conditioned or denied.

If objections cannot be resolved, a contested case hearing is necessary. This is an administrative hearing where a hearings examiner listens to testimony presented by all parties. The examiner will make findings based on the information presented and will propose a decision. Parties will have the opportunity to provide comments on the proposal. Ultimately DNRC will make a final decision. The final decision can be appealed to District Court.

Basis of Decision

Regardless of whether or not an application receives objections or is subject to an administrative hearing, the decision to issue, modify or deny a permit or authorization to change is always based only on the statutory criteria found in Appendix B.

1.3 Other Regulatory Requirements

The state and federal agencies listed in Table 1.3-1 may have jurisdictional authority over certain aspects of the projects.

Table 1.3-1. Other agencies that may have jurisdiction and permitting authority.

| Agency | Permit | Nature of Permit | Authority |
|---|--|--|---|
| U.S. Army Corps of Engineers | Section 404 Permit (Clean Water Act) | Controls discharge of dredged or fill materials in wetlands and other water of the U.S. | Section 404 of the Clean Water Act (33 CFR 323.1) |
| Montana Department of Natural Resources and Conservation – Trust Land Management Division | Montana Land Use License or Easement of Navigable Waters | Requires an easement or license for construction in the beds of State navigable waterways. | Section 77 (77-1-101 – 141, MCA) |
| Local Conservation District | 310 Permit (Montana Natural Streambed and Land Preservation Act) | Requires a permit to perform work in or near a stream. | Section 75 (75-7-101 - 124, MCA) Natural Streambed and Land Preservation Act |