

**MONTANA WATER COURT
LOWER MISSOURI RIVER DIVISION - BASIN 40B
Flatwillow Creek, Including Box Elder Creek**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
FOR THE PRELIMINARY DECREE OF FLATWILLOW CREEK,
INCLUDING BOX ELDER CREEK
- BASIN 40B -**

These Findings of Fact and Conclusions of Law are issued by the Chief Water Judge for inclusion in the Preliminary Decree for Flatwillow Creek, including Box Elder Creek (Basin 40B) as authorized by § 3-7-224(2) and § 85-2-231, MCA.

FINDINGS OF FACT

DESCRIPTION OF BASIN

1. Basin 40B encompasses Flatwillow Creek and Box Elder Creek drainages. This Decree affects all sources of water located within the Basin. There are a total of 3,677 claims in this Decree. The boundaries of this Basin are outlined on the attached map.

DECREE ABSTRACTS AND INDEX

2. In addition to these Findings and Conclusions, this Decree consists of a computer CD of the volumes of abstracts of each individual water right claim decreed in this basin. Accompanying the Decree is an Index designed to help people research and find water rights included in the Decree. The Index is composed of the following six sections:

- Water Right Claim Identification Number Index
- Owner Name Index
- Priority Date Index
- Point of Diversion Index
- Source Name Index
- Issue Remark Index

3. CD copies of the Decree and Index are located at the Department of Natural Resources and Conservation (DNRC) Lewistown Water Resources Unit Office, the Montana DNRC Water Rights Adjudication Office in Helena, the Clerk of the District Court's office in the Petroleum County Courthouse in Winnett, and the Montana Water Court in Bozeman. This information is also available on the Internet.

SENIOR WATER RIGHTS

4. Water rights exist on the Flatwillow Creek main stem and in adjoining basins or sub-basins which may be senior to some of the rights decreed in this basin. Rights decreed herein may be subject to curtailment or cessation during times of water shortage in order to satisfy senior rights on the Flatwillow Creek main stem, on any tributaries of the Flatwillow Creek, or in adjoining basins or sub-basins.

SPECIFICS OF EXAMINATION PROCEDURE

5. The DNRC examined each claim for incomplete or inaccurate information in accordance with the Water Right Claim Examination Rules originally adopted by the Montana Supreme Court on July 7, 1987. The Supreme Court has amended these rules from time to time, most recently by its Order of March 21, 2008.

6. The extent of each water right claim in this Decree is further defined by these Findings of Fact and Conclusions of Law. The specifics of each claim appear in the abstract of the water right. Each abstract of the claimed right includes (when the information was available):

- (a) The name and mailing address of the owner of the right;
- (b) The flow rate and volume;
- (c) The priority date of the right;
- (d) The purpose for which the right is used;
- (e) The place of use;
- (f) The source of water included in the right;
- (g) The point of diversion;
- (h) The means of diversion;
- (i) The period of use;
- (j) The period of diversion;
- (k) Any other information necessary to define the nature and extent of the right.

7. If the claim does not include all the information required by § 85-2-224, MCA, and the information was not provided to the DNRC prior to issuance of this Decree, the right is decreed within the limits of the information submitted. Issue remarks were added to the abstracts flagging any unresolved issues.

8. Where the DNRC determined a claimant filed two or more water rights on the same claim form, each right was separated and assigned an individual water right claim number. These additional claims are called “implied claims.”

GUIDELINES

9. The Water Right Claim Examination Rules establish guidelines to aid in the examination of certain elements. These guidelines are merely estimates of reasonable water use. These guidelines are subject to modification to accurately reflect a claimant’s water right in its true and historical sense. “The quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use . . . the principle of beneficial use [being of] paramount importance.” *Allen v. Petrick, et al.*, 69 Mont. 373, 376-77, 222 P. 451, 452 (1924), as cited in *McDonald v. State*, 220 Mont. 519, 536, 722 P.2d 598, 609 (1986). There is no exact uniform rule for computing the duty or reasonable quantity of water to be applied for all cases alike.

ELEMENTS OF A CLAIM

Ownership.

10. A water right is decreed in the name of the entity or entities identified as the current owner in the DNRC centralized record system. Since July 1, 2008, in accordance with § 85-2-424, MCA, the Department of Revenue has been required to provide information to the DNRC to update the state’s water right ownership records. For all the claims in this Decree, the ownership information updating the DNRC centralized record system is current through April 27, 2011 and that ownership record will be reflected on all of the water right abstracts contained in this Decree.

11. Some previously decreed water rights are claimed by more than one person. When the combined flow rate of such claims exceeds the previously decreed flow rate,

each claimant is decreed the claimed flow rate, but a “decree exceeded” issue remark is added to each right noting the conflict.

Flow Rate and Volume.

12. The flow rate and volume are measured at the point of diversion unless otherwise noted on the abstract. Where the flow rate or the volume was established in a previous decree, the flow rate or volume is as previously decreed although miner’s inches are converted in the manner described below.

13. Flow rate is decreed in gallons per minute (gpm) or in cubic feet per second (cfs) instead of the traditional miner’s inches. One miner’s inch is equivalent to 11.22 gpm. Forty miner’s inches are equivalent to one cfs.

14. Volume is decreed in acre-feet per year. An acre-foot of water will cover one level acre to a depth of one foot.

15. The Water Right Claim Examination Rules provide guidelines to aid in the examination of certain claimed flow rates and volumes. Specific flow rate and volume guidelines are described in the applicable Findings of Fact.

Priority Date.

16. The priority date is decreed as claimed except where it is incomplete or it contradicts the claim’s supporting documentation. Where a claimed priority date includes only a year, the last day of the year is decreed as the priority date. Where a claimed priority date includes only a year and a month, the last day of the month is decreed as the priority date.

17. Priority dates for groundwater rights after 1961 were reviewed for compliance with the 1961 Ground Water Act and are decreed accordingly.

Purpose.

18. For examination, every claim is classified into one of four purposes: irrigation, domestic, stockwater, or other uses. The Water Right Claim Examination Rules provide the rules for examining each claim based on its purpose as described in the applicable Findings of Fact.

19. Multiple domestic and lawn and garden uses are examined in accordance with the Water Right Claim Examination Rules chapter on domestic claims.

20. Other use claims are all uses of water for purposes other than irrigation, domestic, and stockwater. The claim abstract lists the specific purpose for which the claim is used. The 40B Decree may include the following other uses claims: agricultural spraying, commercial, fish and wildlife, industrial, institutional, mining, municipal, and recreation.

Place of Use.

21. The place of use is decreed as claimed unless information in the claim file, aerial photographs, Water Resource Surveys, information obtained from field investigations, or data submitted by the claimant supports or clarifies the claimed place of use. The DNRC identifies resources actually used to examine the place of use on a worksheet kept in the claim file.

Source Name.

22. The source is generally designated by the name listed in the most recent United States Geological Survey (USGS) quadrangle maps. If the source or source name cannot be substantiated on USGS maps, the DNRC reviewed Water Resources Survey maps, other published maps, or other available information to substantiate the claimed source name including the source name most commonly recognized in the locality.

23. The source for claims associated with lakes and reservoirs is generally decreed under the name of the inflowing stream.

24. When a water right involves more than one primary source, all sources are listed on the abstract and index. Secondary sources and points of diversions may be identified in an information remark. Implied claims may be generated for multiple sources which represent separate water rights.

Point of Diversion.

25. The point of diversion is decreed as claimed unless a different point of diversion is apparent. The point of diversion is specifically designated by legal land description. Secondary points of diversion are noted in an information remark when possible or necessary.

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Means of Diversion.

26. The means of diversion is reviewed and decreed as claimed unless a different means of diversion is apparent.

Period of Use.

27. The claimed period of use is decreed if it is reasonable unless it contradicts a previously decreed or documented period of use. The Water Right Claim Examination Rules provide guidelines to aid in the examination of certain claimed periods of use. Specific period of use guidelines are described in the applicable Findings of Fact.

Period of Diversion.

28. The period of diversion for direct flow claims is decreed as claimed when documentation in the claim file supports the claimed period of diversion. If there is no documentation in the claim file indicating a period of diversion, the period of diversion is decreed as identified by the claimant. If the claimant does not identify the period of diversion for a direct flow claim, the period of diversion is decreed the same dates as the period of use.

29. The period of diversion for reservoir claims, except groundwater pits, is decreed as identified by the claimant. If the period of diversion date is not identified by the claimant, the period of diversion is not decreed and an issue remark is added stating the period of diversion from the source into storage cannot be identified.

30. For reservoir claims involving groundwater pits, the period of diversion is decreed as year round.

IRRIGATION RIGHTS

Flow Rate.

31. A flow rate is decreed for direct flow and offstream reservoir irrigation claims except where the means of diversion is water spreading, natural subirrigation, or natural overflow. If a flow rate in excess of 17.00 gallons per minute (gpm) per acre was claimed and clearly substantiated, it is decreed as claimed. If a flow rate in excess of 17.00 gpm per acre is claimed, but not clearly substantiated, the flow rate is reduced to 17.00 gpm per acre and an information remark noting the reduction is added to the water right claim abstract.

32. No flow rate is decreed when the means of diversion is water spreading, natural subirrigation, or natural overflow.

33. A flow rate is usually not decreed for onstream reservoirs. However, if it is determined that the onstream reservoir is not a significant part of the irrigation system, a flow rate is decreed and an information remark is added noting the system is primarily a direct flow irrigation system.

Volume.

34. No volume is decreed for direct flow irrigation rights except where the means of diversion is water spreading. Although not quantified by a decreed volume, direct flow rights are limited to their historical beneficial use.

35. Volume is usually decreed for rights which involve a reservoir. However, if it is determined that a reservoir is not a significant part of an irrigation system, volume is not decreed and an information remark is added noting the system is primarily a direct flow irrigation system.

Period of Use.

36. The period of use is decreed on all claims. Except where the means of diversion is water spreading, if a period of use is not claimed or not within the appropriate climatic zone guideline, an issue remark is added noting the problem. Where the means of diversion is water spreading, the period of use is decreed as year round unless the claimant specifies different dates.

DOMESTIC RIGHTS

Flow Rate.

37. The flow rate for direct flow and offstream reservoir domestic claims is decreed as claimed. If the claimed flow rate exceeds 35.00 gpm and the accompanying documentation or other data does not substantiate the flow rate, an issue remark is added noting the problem.

38. A flow rate is not decreed for onstream reservoirs.

Volume.

39. A volume is decreed for direct flow and onstream and offstream reservoirs. The volume guideline for domestic use is 1.50 acre foot per year per household and 2.50

acre feet per year per acre of lawn and garden. If the claimed volume exceeds these guidelines, an issue remark is added noting the problem.

Period of Use.

40. The period of use is decreed on all claims. The period of use guideline for domestic and multiple domestic claims is year round. For lawn and garden claims, the period of use guidelines are the same as the irrigation guidelines.

STOCKWATER RIGHTS

Flow Rate.

41. A flow rate is decreed for direct flow and offstream reservoir stockwater claims. If the claimed flow rate for stockwater rights from wells, developed springs, pumps, and gravity flow pipelines exceeds 35.00 gpm and the accompanying documentation or other data does not substantiate the flow rate, the flow rate is decreed as claimed and an issue remark is added noting the problem. A flow rate for stockwater rights from wells, developed springs, pumps and gravity flow pipelines which does not exceed 35.00 gpm is generally decreed as claimed.

42. A flow rate is not decreed for claims involving stock drinking directly from surface water sources or onstream reservoirs. Although not quantified by flow rate, such rights are limited to their historical beneficial use.

Volume.

43. Unless otherwise directed by the Water Court, stockwater claims are not decreed a specific volume. Although not quantified by a decreed volume, the limit of the right is based on a consumptive use of 30.00 gallons per day per animal unit. An animal unit is described as a cow/calf pair or equivalent. The number of animal units is limited to the reasonable carrying capacity of the area historically serviced by the water source.

44. The claimed volume is decreed for all stockwater claims filed by the United States of America which involve pothole lakes and reservoirs pursuant to the August 7, 1987 Order of the late Chief Water Judge W. W. Lessley.

Period of Use.

45. For stockwater claims, the period of use guideline is year round.

OTHER USE RIGHTS

Flow Rate.

46. A flow rate is decreed for all direct flow and offstream reservoir claims. The flow rate guideline for these claims is the capacity of the diversion or the conveyance facility.

47. A flow rate is not decreed for onstream reservoirs.

48. A flow rate is not decreed for instream or inlake claims with the exception of instream fish and wildlife claims filed by the Montana Department of Fish, Wildlife, and Parks on Murphy Right streams identified by § 85-801, RCM (1969). Murphy Rights are decreed with the claimed flow rate. With the exception of Murphy Rights, all instream and inlake claims receive an issue remark stating the claimed flow rate was not examined as no flow rate guidelines for this purpose have been established. Once the DNRC has established guidelines for examining the flow rate for other use instream and inlake claims, the Water Court may adjust these claims to reflect the new guidelines.

Volume.

49. A volume is decreed for most direct flow and onstream and offstream reservoir claims. The volume guideline for most direct flow claims is what is reasonable and customary for the purpose. Mining rights and fire protection rights are not decreed a volume. The volume of a mining right is limited to its historical beneficial use and the volume of a fire protection right is limited to the minimum amount necessary for the purpose of fire protection.

50. Reservoir claims for less than 15.00 acre-feet are decreed as claimed. Reservoir claims greater than 15.00 acre-feet are decreed if the volume is substantiated by information in the claim file or through the claimant. If a claimed volume above 15.00 acre-feet cannot be substantiated, an issue remark is added to the claim.

51. A volume is not decreed for instream or inlake claims with the exception of instream fish and wildlife claims filed by the Montana Department of Fish, Wildlife, and Parks on Murphy Right streams identified by § 85-801, RCM (1969). Murphy Rights are decreed with their claimed volume. With the exception of Murphy Rights, all instream and inlake claims receive an issue remark stating the claimed volume was not examined

as no volume guidelines for this purpose have been established. Once the DNRC has established guidelines for examining the volume for other use instream and inlake claims, the Water Court may adjust these claims to reflect the new guidelines.

52. The claimed volume is decreed for all other uses claims filed by the United States of America which involve pothole lakes and reservoirs pursuant to the August 7, 1987 Order of the late Chief Water Judge W. W. Lessley.

Fish and Wildlife Claims.

53. All fish and wildlife, wildlife, and recreation claims, with the exception of Murphy Rights, that receive a factual or legal issue remark receive an issue remark stating the Water Court will hold a hearing on the claim. All fish and wildlife, wildlife, and recreation claims, with the exception of Murphy Rights, that do not receive a factual or legal issue remark receive an issue remark stating the Water Court will not hold a hearing on the claim.

Period of Use.

54. For other use claims, the claimed period of use is decreed if reasonable for the claimed purpose.

MULTIPLE USES OF A WATER RIGHT

55. Historically, when a water right was decreed, a single water right may have been used for several purposes or uses. In this adjudication, claimants were required to file separate claims for each use of a water right. Special claim forms were used for irrigation, stockwater, domestic, and other uses. As a result of this specific filing, each use of a water right will be decreed separately. Therefore, a water right might be represented by two or more claims for these multiple uses. An information remark noting the multiple use of a water right appears whenever irrigation, stockwater, domestic, and other use claims are for the same right. The use of the right for several purposes does not increase the extent of the right. Rather it decrees the right to alternate and interchange the use or purpose of the water in accordance with historical practices.

SUPPLEMENTAL RIGHTS

56. For irrigation claims, several water rights with different priority dates or different sources may be combined to supplement the irrigation requirements of all or part

of the same acreage. Each right is limited to its own flow rate and place of use. The sum total flow rate of supplemental rights shall not exceed the amount historically used for a beneficial purpose.

INTERBASIN TRANSFER CLAIMS

57. Claims having a point of diversion in one basin and place of use in another basin are called interbasin transfers. Interbasin transfer claims are decreed in both the point of diversion basin and the place of use basin. Objections to interbasin transfer claims may be filed during the objection period for either basin.

UNRESOLVED FACTUAL AND LEGAL ISSUES

58. The objection period provides an opportunity for all parties in this Decree to raise any issue which needs to be resolved. All such issues may also be reviewed by the Water Court on its own initiative (“on its own motion”). *See* Rule 8, W.R.Adj.R.

59. Unresolved factual and legal issues have been noted by issue remarks on the individual claim abstracts. The Issue Remark Index combines all these remarks into one index arranged numerically by water right claim number. Searching the Issue Remark Index by water right claim number will identify all issue remarks that are noted on individual claim abstracts. Issue remarks not resolved through the objection process will be resolved by the Water Court as directed by § 85-2-248, MCA.

60. Water users within this basin and other interested persons will be mailed a Notice of Entry of Preliminary Decree and Notice of Availability contemporaneously with the filing of these Findings and Conclusions. The Notice of Availability explains the objection process and sets a deadline for filing objections with the Water Court.

61. If a water right claim receives no objection and is not reviewed by the Water Court on its own initiative or as directed by § 85-2-248, MCA, the claim will likely be entered into the Final Decree without change. After all the objections and hearings on a source have been resolved and completed, the claims may be enforced and administered by the district court as authorized in § 85-2-406, MCA.

WITHDRAWN AND DISMISSED CLAIMS

62. Some water right claims have been withdrawn by the claimants and terminated in this basin prior to the issuance of this Decree. Terminated claims are listed in the

Decree index. These terminated claims are noted as “WDRN” (Withdrawn) under the Version Status column of the Decree index. The abstract of a terminated claim also contains a reference to its terminated, withdrawn, or dismissed status.

LATE CLAIMS

63. The Montana Supreme Court set the deadline for filing claims of existing water rights as 5:00 PM on April 30, 1982. Claims filed after this time and date were forfeited. *See Matter of the Adjudication of Yellowstone River Water Rights*, 253 Mont. 167, 832 P.2d 1210 (1992).

64. The 1993 Montana Legislature provided for the conditional remission of the forfeiture of late claims. *See* § 85-2-221(3), MCA. Any remission of forfeiture is conditioned upon the claimant meeting the requirements set by the Montana Legislature. *See*, generally, Water Court Order Setting Uniform Hourly Rate Under Rule 30, W.R.Adj.R. filed July 2, 2007, Water Court Order Establishing Water Court Procedures on Late Claims filed December 8, 1997, Water Court Order Setting Late Claim Administrative Costs and Expenses filed September 24, 1997, and Rule 30, W.R.Adj.R.

65. Late claims are included in this Decree. Late claim abstracts contain the term “Late Claim:” followed by the letter “A” or “B.” Late claim status is also identified in the Decree index. Objections may be filed to these claims.

WATER RIGHT CLAIM IDENTIFICATION NUMBERS

66. The computer system containing the state’s centralized water right database has undergone a major modification by the DNRC. In DNRC’s former database system, water right claim numbers contained a letter identification code, such as W, A, B, U, or O. The letter identification code identified the claim as an “existing right” (W), a “late claim” (A or B), a “reserved” right (U), or a “terminated” claim (O).

67. In DNRC’s current database, letter identification codes are no longer included in water right claim numbers. Each abstract generated by the current database identifies the type or the status of the right by a word or phrase. The term “Statement of Claim” replaces the “W” letter code. The term “Late Claim” followed by the designation of “A” or “B” identifies the existence and type of late claim. The term “Reserved” replaces the

“U” letter code. The terms “Withdrawn” or “Dismissed” replace the “O” letter identification code.

68. This Decree was produced from DNRC's current database. Therefore, the water right claim numbers do not contain water right identification codes.

Based on these Findings of Fact, the Chief Water Judge makes the following:

CONCLUSIONS OF LAW

1. This is a general adjudication of existing water rights. An existing water right is a right to the use of water which is protected under the law as it existed prior to July 1, 1973. Existing water rights include federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law. Section 85-2-102(12), MCA. This action for the adjudication of existing water rights commenced on June 8, 1979 when the Montana Supreme Court issued its Order requiring the filing of statements of claim of existing rights. Certain claims for existing rights were exempt from the filing process, but could be voluntarily filed. Section 85-2-222, MCA (1979). This Decree includes those “exempt” water right claims which were voluntarily filed, but does not include “exempt” water right claims which were not filed.

2. Claims for water rights reserved under the laws of the United States of America are included in the Montana general adjudication of water rights. The State of Montana through the Reserved Water Rights Compact Commission, is now and has been engaged in the negotiation of reserved water right compacts with Indian Tribes and the federal government. Sections 85-2-701 through 85-2-708, MCA.

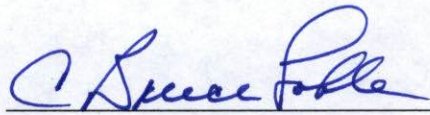
3. The federal reserved water rights for the National Forest System Lands administered by the Forest Service, an agency of the United States Department of Agriculture, were negotiated and included in a Compact, codified in Section 85-20-1401, MCA. This Compact was filed with the Water Court and consolidated into Water Court Case No. WC-2007-03. Objections to the Compact were filed and resolution of those objections and the Water Court's review of the Compact is taking place in Case WC-2007-03. Several United States Forest Service non-reserved water right claims are included in this Decree.

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4. The Montana Water Court has jurisdiction to enter a Preliminary Decree for the Flatwillow Creek, including Box Elder Creek (Basin 40B) pursuant to Title 85, Chapter 2, Montana Code Annotated. *San Carlos Apache Tribe v. Arizona and Montana v. Northern Cheyenne Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983); *State ex Rel. Greely v. Conf. Salish & Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985).

5. These Findings of Fact, Conclusions of Law and Abstracts define the nature and extent of each claimed existing water right under Montana law in Basin 40B and comprise a Preliminary Decree in accordance with § 85-2-231, MCA, and Rule 4, W.R.Adj.R.

DATED this 5 day of May 2011.



C. Bruce Loble
Chief Water Judge

John Peterson
Adjudication Bureau Chief
Montana DNRC
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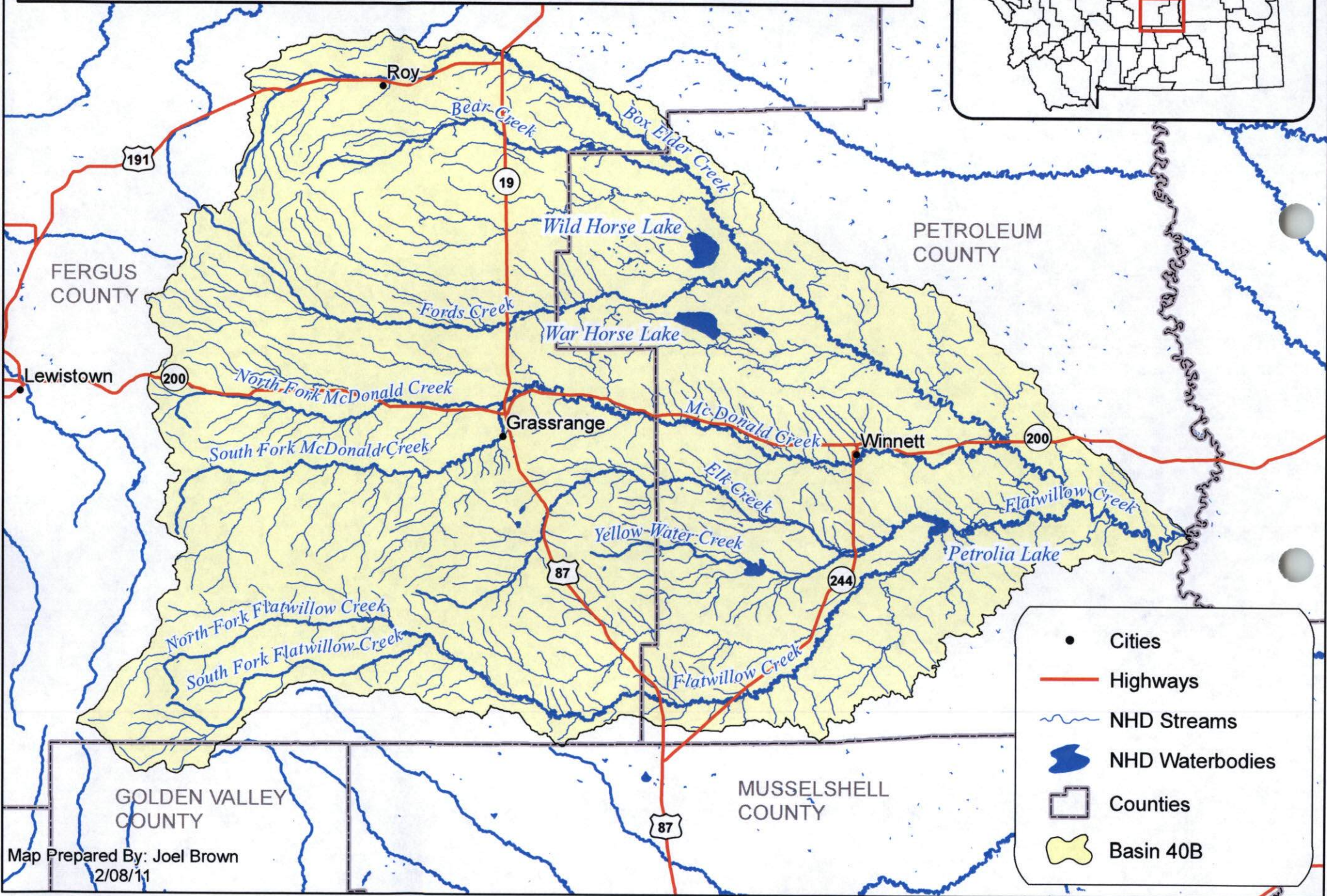
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Basin 40B

FLATWILLOW CREEK INCLUDING BOX ELDER CREEK

MONTANA



Map Prepared By: Joel Brown
2/08/11