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**FILED**  
DEC 12 2013

**Montana Water Court**

MONTANA WATER COURT, LOWER MISSOURI DIVISION  
MILK RIVER ABOVE FRESNO RESERVOIR  
BASIN 40F

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE PRELIMINARY  
DECREE OF THE MILK RIVER ABOVE FRESNO RESERVOIR  
- BASIN 40F -**

These Findings of Fact and Conclusions of Law are issued by the Chief Water Judge for inclusion in the Preliminary Decree for the Milk River, Above Fresno Reservoir (Basin 40F) as authorized by §§ 3-7-224(2) and 85-2-231, MCA.

**FINDINGS OF FACT**

**DESCRIPTION OF BASIN**

1. Basin 40F encompasses the Milk River above Fresno Reservoir. This Decree affects all sources of water located within the basin. There are a total of 2,339 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) Havre Regional Office, the DNRC Water Rights Adjudication Office in Helena, the 9<sup>th</sup> Judicial Clerk of District Court in Shelby, the 12<sup>th</sup> Judicial Clerk of District Court in Havre, and the Montana Water Court in Bozeman. This information is also available on the DNRC's Water Rights Adjudication webpage.

#### **SENIOR WATER RIGHTS**

4. Water rights exist on the water sources within this Basin and in adjoining basins and subbasins that may be senior to some of the rights decreed in this Basin. Rights decreed herein may be cut off or reduced during times of water shortage to satisfy senior rights within this Basin or in adjoining 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 many abstracts noting 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. The guidelines are merely estimates of reasonable water use. The guidelines are subject to modification to accurately reflect a claimant’s historical use of a water right. “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 rule for computing the duty or reasonable quantity of water to be applied for all situations.

### **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 of the claims in this Decree, the ownership information used to update the DNRC centralized record system is current through December 2, 2013 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.

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 1.00 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. Claims identified as groundwater rights with priority dates 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 govern examination of 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 on domestic claims.

20. Other use claims include 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 Basin 40F Decree may include the following other uses claims: commercial, erosion control, fish and wildlife, flood control, industrial, institutional, lawn and garden, mining, municipal, sediment control, and wildlife.

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.

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 have been 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.

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 but the claimant has identified a period of diversion during claim examination, 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 with 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. Volume is usually not decreed for direct flow irrigation rights except where the means of diversion is water spreading. If 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 feet 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 and conveyance system. If the capacity of the diversion and conveyance system cannot be determined an issue remark will be added and the flow rate will remain as claimed if not objected to.

47. A flow rate is not decreed for onstream reservoirs, inlake claims or pothole lakes.

48. A flow rate is decreed for all instream claims. The guideline is the minimum amount necessary to sustain a specific purpose. An issue remark will be added if a guideline cannot be determined by the DNRC and the flow rate will remain as claimed if not objected to.

49. Instream fish and wildlife claims filed by the Montana Department of Fish, Wildlife, and Parks on Murphy Right streams identified by § 89-801(2), RCM (1969) are decreed with the claimed flow rate.

Volume.

50. A quantified volume is decreed for all other use claims with the exceptions of mining rights and fire protection rights. 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.

51. The volume guidelines for direct flow claims is that which appears reasonable and customary for the purpose, with the exception of municipalities and agricultural spraying. The volume guideline for municipal rights is 250.00 gallons per capita per day.

The volume guideline for agriculture spraying is 2.00 acre-feet per year or 4.00 acre-feet per year if a reservoir is involved.

52. Reservoir claims and inflake claims for less than 15.00 acre-feet are decreed as claimed, and no issue remarks are added. For reservoir claims and inflake claims greater than 15.00 acre-feet, the guideline is maximum storage capacity of the reservoir plus the estimate of evaporation. If the volume is less than or equal to the guideline, the volume is decreed as claimed. If a claimed volume is above 15.00 acre-feet, exceeds the guideline, and cannot be substantiated by information in the claim file or through contact with the claimant, an issue remark will be added to the claim and the volume will remain as claimed if not objected to.

53. Instream fish and wildlife claims filed by the Montana Department of Fish, Wildlife, and Parks on Murphy Right streams identified by § 89-801(2), RCM (1969) are decreed with the claimed volume.

54. A volume is decreed for instream claims. The guideline is the minimum amount necessary to sustain a specific purpose. An issue remark will be added if a guideline cannot be determined by the DNRC and the volume will remain as claimed if not objected to.

55. The claimed volume is decreed for all fish and wildlife, wildlife, and recreation claims which involve pothole lakes pursuant to the April 17, 2013 Supplemental Order Regarding Fish & Wildlife, Wildlife, & Recreation Claims.

#### Fish and Wildlife Claims.

56. 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.

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

**MULTIPLE USES OF A WATER RIGHT**

58. 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 the specific filings, 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**

59. 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**

60. 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**

61. 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.

62. Many unresolved factual and legal issues have been noted by issue remarks on the individual claim abstracts. The Issue Remark Index combines all the issue 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.

63. 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.

64. 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**

65. The abstract of a terminated claim contains a reference to its terminated, withdrawn, or dismissed status. Terminated claims are listed in the Decree index. Water right claims which have been withdrawn by the claimants and terminated in this Basin prior to the issuance of this Decree are noted as "WDRN" (Withdrawn) under the Version Status column of the Decree index.

#### **LATE CLAIMS**

66. 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).

67. The 1993 Montana Legislature subsequently 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 August 5, 2013; 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.

68. Late claim abstracts contain the term “Late Claim:” followed by the letter “A” or “B.” “A” claims identify a claim mailed or executed on or before April 30, 1982 and received by the DNRC after April 30, 1982, but on or before May 7, 1982. “B” Claims identify claims which were executed after April 30, 1982 and mailed or submitted to the DNRC on or before July 1, 1996. Late claim status is also identified in the Decree index. Objections may be filed to these claims.

#### **WATER RIGHT CLAIM IDENTIFICATION NUMBERS**

69. 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).

70. 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.

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

2. Certain claims were exempt from the filing process, but could be voluntarily filed. Section 85-2-222, MCA (1979). These exempt rights were for stock or domestic uses from instream or groundwater sources. This Decree includes those “exempt” water right claims that were voluntarily filed, but does not include “exempt” water rights that were not filed. In 2013, the Montana Legislature passed Senate Bill 355, creating a petition process to file and judicially determine as yet unfiled claims for existing water rights that were exempt from filing in the statewide water right adjudication. Senate Bill 355 requires that any water user who files an exempt right after the issuance of this Decree have it examined by the DNRC and pay to publicly notice the newly filed water right claim.

3. 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, 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.

4. In 2009, the Blackfeet Tribe of the Blackfeet Indian Reservation, the United States of America, and the State of Montana entered into the Blackfeet-Montana Compact settling any and all existing water right claims of or on behalf of the Blackfeet Tribe. Section 85-20-1501, et. seq., MCA.

Currently, the Compact is involved in proceedings before the United States Congress. If the Congressional action is successful, the Compact will eventually be filed with the Water Court. When that occurs the Compact will be incorporated into a separate decree and a separate objection period will take place. Until the conclusion of the Compact proceedings, and approval of the Compact by the Court, the Court will take no action on Blackfeet Tribe claims.

Meanwhile, the Water Court must continue with the adjudication of water right claims in the Milk River drainage. Some Basin 40F claims are within the Blackfeet Indian Reservation. Some of the claims assert reserved water right claims. Any non-Blackfeet Tribe water right claim will be reviewed by the Water Court to determine whether it is part of the Tribal Water Right identified in the Compact or whether it is a state law based claim.

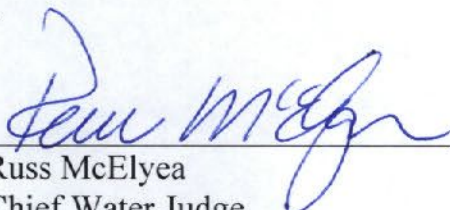
5. The State of Montana and the United States of America concluded a Compact settling the reserved water right claims of the National Park Service to water in the Park Service units located in Montana, including Glacier Park. The Compact is codified at § 85-20-401, MCA. The Water Court issued its National Park Service-Montana Compact Decree in 1996 and provided notice throughout this basin of the right to object to the reserved water rights recognized in the Compact. The Compact Decree was captioned as Case WC-94-1. Objections to the Compact were filed and resolved. The Court approved and confirmed the Compact in its April 11, 2005 Findings of Fact and Conclusions of Law Approving and Confirming the United States Park Service - Montana Compact. The Compact recognizes specific United States reserved water rights in Glacier Park and these rights are included in this Basin 40F Preliminary Decree. Because the reserved rights recognized in the United States Park Service-Montana Compact were the subject of a prior proceeding in Case WC-94-1, no objections may be filed against those reserved rights in this current Milk River, Above Fresno Reservoir (Basin 40F) Preliminary Decree.

6. The Montana Water Court has jurisdiction to enter a Preliminary Decree for the Milk River, Above Fresno Reservoir (Basin 40F) pursuant to Title 85, Chapter 2,

Montana Code Annotated. *Arizona v. San Carlos Apache 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).

7. 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 40F and comprise a Preliminary Decree in accordance with § 85-2-231, MCA, and Rule 4, W.R.Adj.R.

DATED this 12<sup>th</sup> day of December 2013.

  
Russ McElyea  
Chief Water Judge

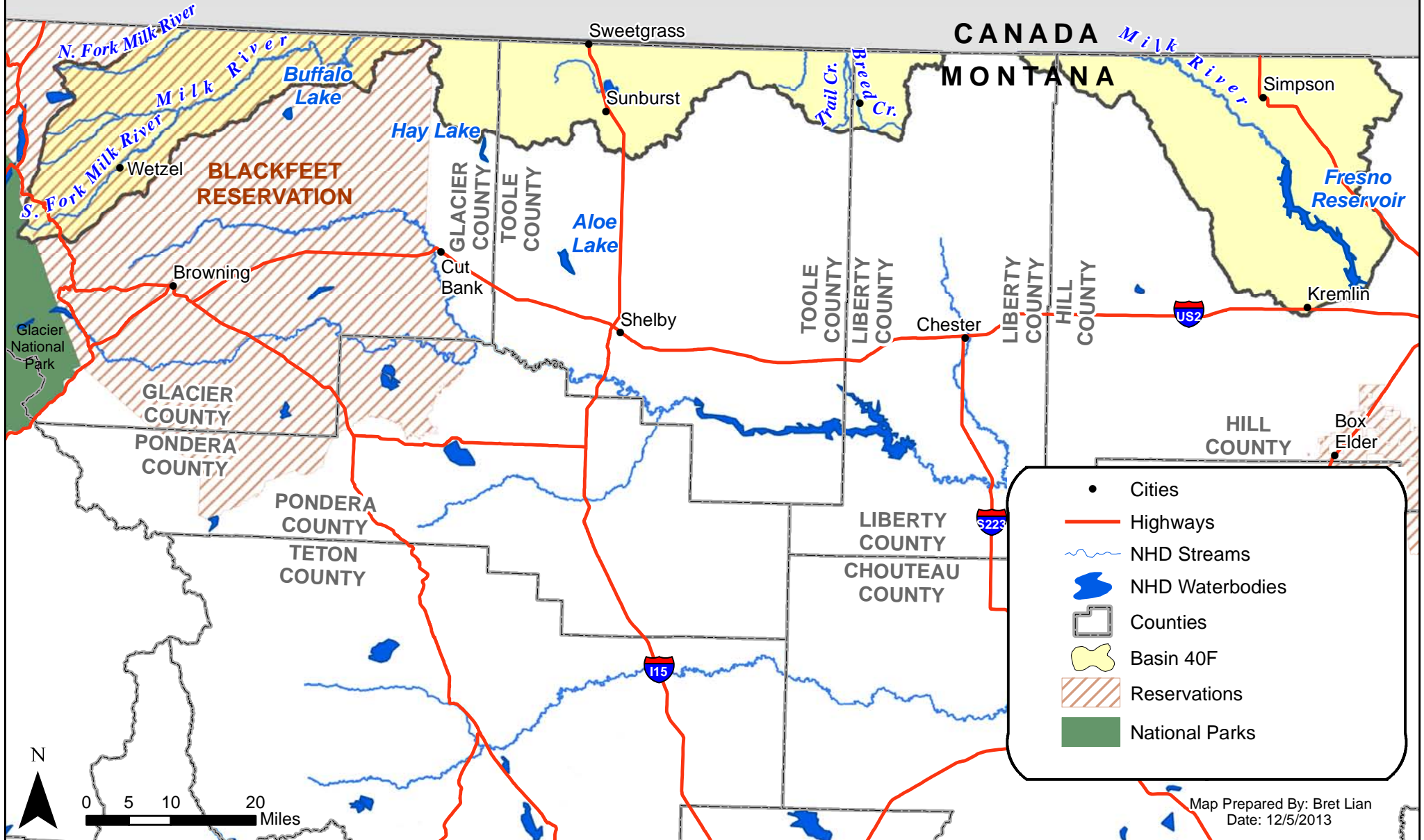
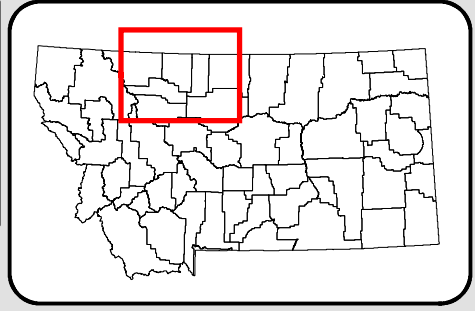
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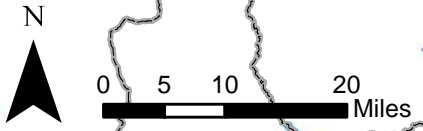


# Basin 40F

## Milk River Above Fresno Reservoir



- Cities
- Highways
- ~ NHD Streams
- NHD Waterbodies
- Counties
- Basin 40F
- ▨ Reservations
- National Parks



Map Prepared By: Bret Lian  
Date: 12/5/2013