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JAN 28 2010

IN THE WATER COURT OF THE STATE OF MONTANA **Montana Water Court**
LOWER MISSOURI DIVISION
BIG MUDDY CREEK - BASIN 40R

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
FOR THE PRELIMINARY DECREE OF
BIG MUDDY CREEK
- BASIN 40R -**

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

FINDINGS OF FACT

1. DESCRIPTION OF BASIN

Basin 40R encompasses Big Muddy Creek and its tributaries. This Decree affects all sources of water located within the basin. There are a total of 2,028 claims in this Decree. The boundaries of this basin are outlined on the attached map.

2. DECREE ABSTRACTS AND INDEXES

In addition to these Findings and Conclusions, this Decree consists of bound volumes of computer-printed 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 Remarks Index

Bound volumes of the Decree and Index or digital versions are located at the Department of Natural Resources and Conservation (DNRC) Glasgow Water Resources Unit Office, the Sheridan County Clerk of Court office in Plentywood, the Daniels County Clerk of Court office in Scobey, the Culbertson Public Library in Culbertson, and the Montana Water Court in Bozeman. This information is also available on the Internet.

3. SENIOR WATER RIGHTS

Judicial notice is taken of the fact that water rights exist on the Big Muddy Creek main stem, on its tributaries, and in adjoining basins or subbasins 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 a claimant's own source of supply, on the Big Muddy Creek main stem, on any tributaries of Big Muddy Creek, or in adjoining basins or subbasins.

4. SPECIFICS OF EXAMINATION PROCEDURE

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.

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.

If the claim did 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.

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 number. These additional claims are called "implied claims."

5. GUIDELINES

Guidelines were established in the Water Right Claim Examination Rules 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. (1924), 69 Mont. 373, 376-77, 222 P. 451, 452 as cited in *McDonald v. State* (1986), 220 Mont. 519, 536, 722 P.2d 598, 609. There is no exact uniform rule for computing the duty or reasonable quantity of water to be applied for all cases alike.

6. ELEMENTS OF A CLAIM

Ownership. A water right is decreed in the name of the claimant. If a water right transfer certificate or an ownership update form was properly filed and administratively processed prior to July 1, 2008, the Court issued the right in the name of the new owner. If the DNRC processed a water right ownership update form 608 in the DNRC database

between July 1, 2008 and the issuance of this Decree, the Court has issued the right in the name of the new owner. When the DNRC receives new ownership updates from the Department of Revenue, the new owner's name will appear in any subsequent decree.

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 was added to each right noting the conflict.

Flow Rate and Volume. The flow rate and volume is 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 decreed as previously decreed although miner's inches are converted in the manner described below.

Flow rates are 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.

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

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 Findings of Fact Nos. 7 thru 10.

Priority Date. 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 included only a year, the last day of the year is decreed as the priority date. Where a claimed priority date included only a year and a month, the last day of the month is decreed as the priority date.

Priority dates for groundwater rights after 1961 were reviewed for compliance with the 1961 Groundwater Act and are decreed accordingly. If a claim to groundwater after 1961 did not comply with the 1961 Groundwater Act, an issue remark was added noting the problem.

Purpose. 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 Findings of Fact Nos. 7 thru 10.

Lawn and garden and multiple domestic uses are examined in accordance with the Water Right Claim Examination Rules chapter on domestic claims.

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 40R basin decree includes the following other uses claims: agricultural spraying, commercial, fish and wildlife, industrial, institutional, municipal, oil well flooding, and recreation.

Place of Use. The place of use is decreed as claimed unless information in the claim file, aerial photographs, Water Resource Surveys, information obtained via field investigations, or data submitted by the claimant supports clarifying the claimed place of use. The resources actually used are specified on the DNRC's worksheet which is located in the claim file.

Source Name. 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 the USGS maps, the DNRC reviewed Water Resources Survey (WRS) maps, other published maps, or other available information to substantiate the claimed source name including the source name most commonly recognized in the locality.

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

When a water right involves more than one primary source, all sources are listed on the abstracts and indexes. 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. 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. The means of diversion is reviewed and decreed as claimed unless a different means of diversion is apparent.

Period of Use. 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 provides guidelines to aid in the examination of certain claimed periods of use. Specific period of use guidelines are described in Findings of Fact Nos. 7 thru 10.

Period of Diversion. 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, the period of diversion is decreed as the same dates as the period of use.

The period of diversion for reservoir claims, except groundwater pit, 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 was added stating the period of diversion from the source into storage cannot be identified.

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

7. IRRIGATION RIGHTS

Flow Rate. 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 was claimed, but not clearly substantiated, the flow rate is reduced to 17.00 gpm per acre and an information remark noting the reduction was added to the water right claim abstract.

Where the means of diversion is water spreading, natural subirrigation or natural overflow no flow rate is decreed.

A flow rate is 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 was added noting the system is primarily a direct flow irrigation system.

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

Volume is 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 was added noting the system is primarily a direct flow irrigation system.

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

8. DOMESTIC RIGHTS

Flow Rate. The flow rate for direct flow and offstream reservoir domestic right 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 was added noting the problem.

A flow rate is not decreed for onstream reservoirs.

Volume. A volume is decreed for direct flow, 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 was added noting the problem.

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

9. STOCKWATER RIGHTS

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

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.

A flow rate is not decreed for onstream reservoir stockwater claims. Although not quantified by flow rate, such rights are limited to their historical beneficial use.

Volume. 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.

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

Period of Use.

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

10. OTHER USE RIGHTS

Flow Rate. 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.

A flow rate is not decreed for onstream reservoirs.

A flow rate is not decreed for instream or inlake claims. All instream and inlake other use claims in basin 40R not owned by the United States of America have received an issue remark stating that 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 will adjust these claims to reflect the new guidelines.

Volume. A volume is decreed for all direct flow and reservoir claims except for mining and fire protection claims. The volume guideline for all direct flow except for mining and fire protection claims is the capacity of the diversion or the conveyance. Although mining rights and fire protection rights are not decreed a flow rate, mining rights are limited to their historical beneficial use and fire protection rights are limited to the minimum amounts necessary for fire protection.

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 was substantiated by information in the claim file or through the claimant. If a claimed volume above 15.00 acre-feet could not be substantiated, an issue remark was added to the claim.

A volume is not decreed for instream or inlake claims. All instream and inlake other use claims in basin 40R not owned by the United States of America have received an issue remark stating that 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 will adjust these claims to reflect the new guidelines.

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.

Wildlife and Fish and Wildlife claims. All Wildlife and Fish and Wildlife claims that received a factual or legal issue remark also received a remark stating the Court will hold a hearing on the claim. All Wildlife and Fish and Wildlife claims that did not received a factual or legal issue remark received a remark stating the Court will not hold a hearing on the claim.

Period of Use.

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

11. MULTIPLE USES OF A WATER RIGHT

Historically, when a water right was decreed, a single water right may have been used for several purposes or use. In this adjudication, the claimants were required to file separate claims for each use of the 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.

12. SUPPLEMENTAL RIGHTS

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 the flow rate and place of use of that right. The sum total flow rate of these rights shall not exceed the amount historically used for a beneficial purpose.

13. INTERBASIN TRANSFER CLAIMS

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 use basin. Objections to interbasin transfer claims may be filed during the objection periods for either the point of diversion basin or the place of use basin. This decree included one interbasin transfer – claim 40S 142790-00.

14. UNRESOLVED FACTUAL AND LEGAL ISSUES

The objection period provides an opportunity for all the 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.

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

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. This "Notice of Availability" explains the objection process and sets a deadline for filing objections with the Montana Water Court.

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.

15. WITHDRAWN AND DISMISSED CLAIMS

Some water right claims have been withdrawn by the claimants and dismissed in this basin prior to the issuance of this Decree. An abstract of each of these dismissed

claims is found in the bound volumes of the computer-printed abstracts and all dismissed claims are listed in the Decree indexes. These dismissed claims are noted as "WDRN" (Withdrawn) under the Version Status Column of the Decree indexes.

16. LATE CLAIMS

The Montana Supreme Court ordered 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* (1992), 253 Mont. 167, 832 P.2d 1210.

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 will be conditioned upon the claimant meeting the requirements set by the Montana Legislature. *See, generally, Order Setting Uniform Hourly Rate Under Rule 30, W.R.Adj.R.* filed July 2, 2007, *Water Court Order Setting Late Claim Administrative Costs and Expenses* filed September 24, 1997, *Order Establishing Water Court Procedures on Late Claims* filed December 8, 1997, and *Rule 30, W.R.Adj.R.*

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 on the Decree indexes. Objections may be filed on all issues as to these claims.

17. WATER RIGHT CLAIM IDENTIFICATION NUMBERS

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).

In DNRC's new database, letter identification codes are no longer included in water right claim numbers. Each abstract generated by the new 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.

This Decree was produced from DNRC's new 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

I

This is a general adjudication of existing water rights. An existing water right is a right to the use of water which would be 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(10), MCA (2005). 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 those "exempt" water right claims which were not filed.

II

The reserved water rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, and of the United States of America as the trustee for such Tribes, [the Tribal Water Right] are defined in the Fort Peck-Montana Compact and the Compact (codified at § 85-20-201, MCA) is incorporated herein by this reference. The Tribal Water Right was adjudicated in the Special Fort Peck Compact Subbasin Decree spanning several basins, was approved by the Court on August 10, 2001, and Final Judgment was entered on March 22, 2005. *See* the Findings of Fact, Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the Fort Peck-Montana

Compact filed April 6, 1994, the Order Approving and Confirming Fort Peck-Montana Compact filed August 10, 2001, and the Judgment and Decree filed March 22, 2005 in Water Court Cause No. WC-92-1 for more information.

Twenty-two claims for reserved water rights filed by entities other than the Assiniboine and Sioux Tribes are included in this decree. As these reserved claims were not examined by the DNRC, they will be reviewed by the Water Court to determine whether they should be adjudicated as reserved claims, whether they should be included as part of the Tribal Water Right, or whether they should be adjudicated as state law based claims.

The reserved water rights associated with the Turtle Mountain Public Domain Allotments, if any exist, are not included within this decree.

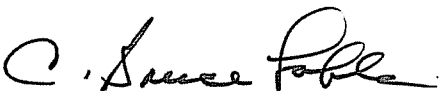
III

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

IV

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

DATED this 28th day of January, 2010.


C. Bruce Loble
Chief Water Judge

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Basin 40R

Big Muddy Creek

! Cities

— Highways

~ NHD Streams

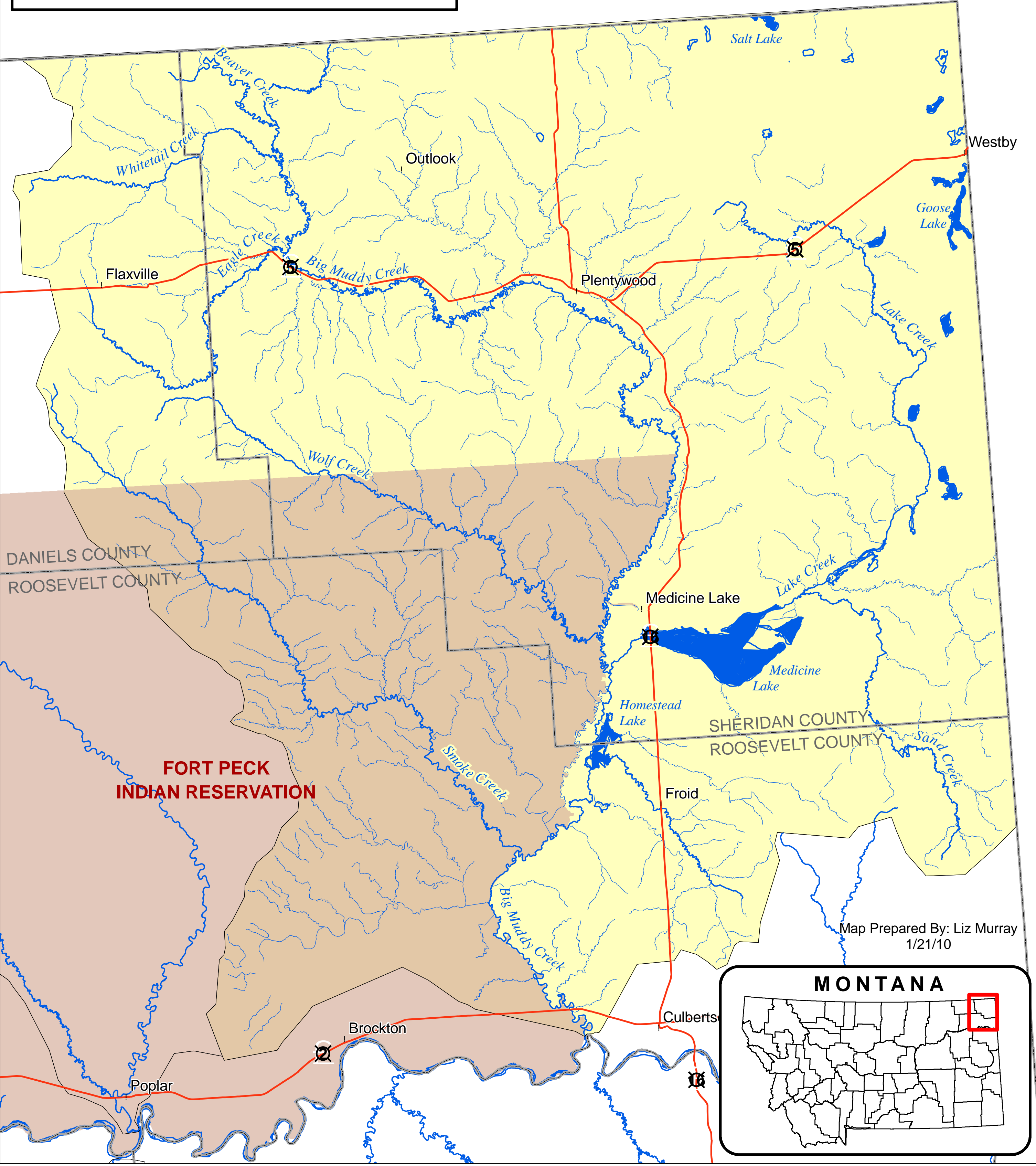
🌊 NHD Waterbodies

🏠 Reservations

🗺️ Counties

🌫️ DNRC Water Management Basins

🟡 Basin 40R



Map Prepared By: Liz Murray
1/21/10

MONTANA

An inset map of the state of Montana with its county boundaries. A red rectangle in the northeast corner indicates the location of Basin 40R.