

USDA Forest Service Water Rights in Montana



Western States Water Council Workshop

Adjudication of Federal Non-Tribal Water Rights

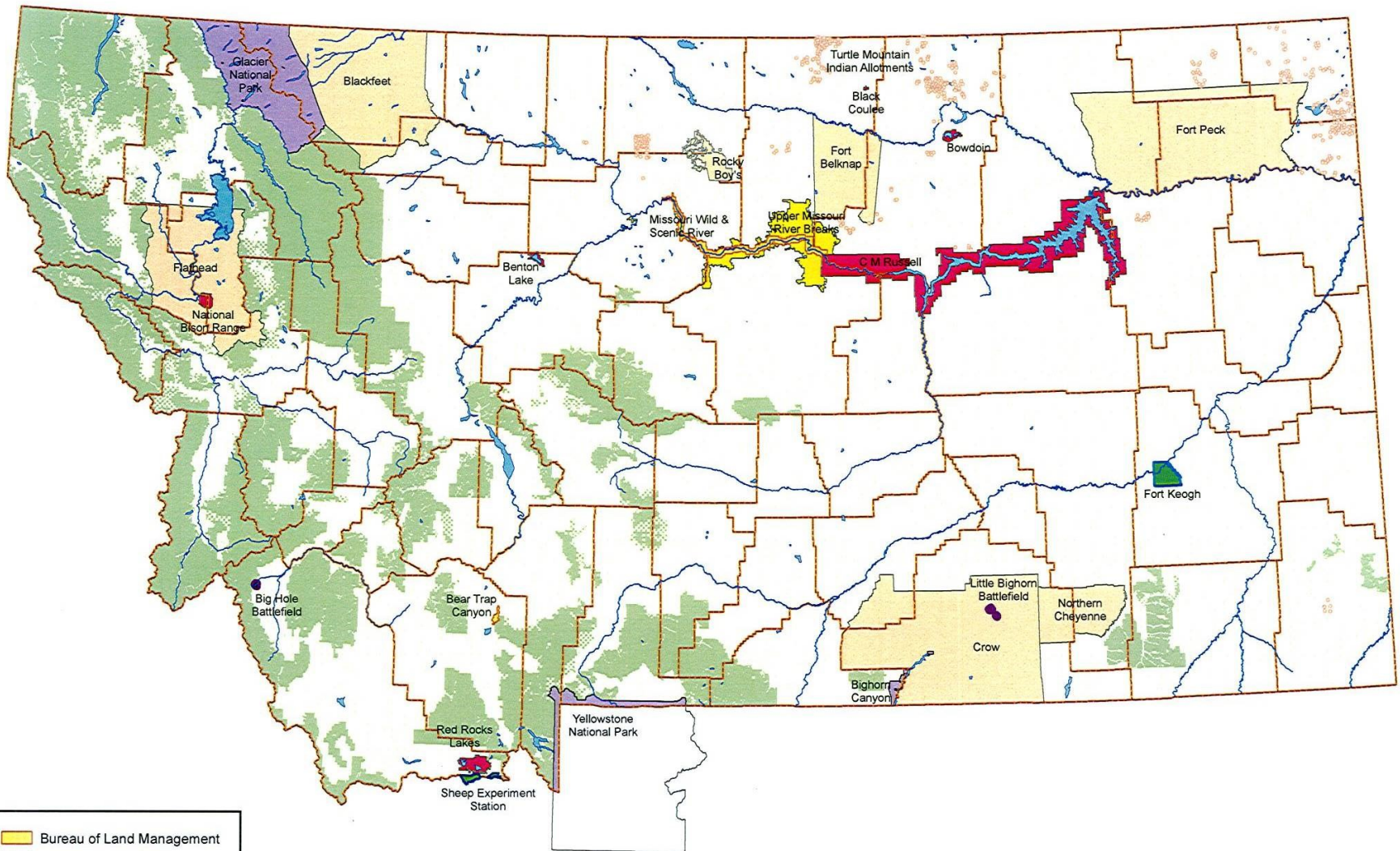
**Helena, Montana
July 15, 2014**

Prepared by Smith Wells and Faye Bergan

Federal Reserved Water Rights

- **A federal reserved water right is created under federal law when land is withdrawn from the public domain and reserved for a specific purpose by an act of Congress, a treaty, or an executive order.**
- **The minimum amount of appurtenant water then unappropriated is reserved to accomplish the purpose of the reservation.**

Federal and Indian Lands in Montana Claiming Reserved Water Rights



- Bureau of Land Management
- National Park Service
- National Wildlife Refuge
- Indian Reservation
- US Department of Agriculture



Montana Reserved Water Right Compact Commission

- **The Compact Commission was established by the Montana Legislature in 1979 as part of the state-wide general stream adjudication process.**

Negotiation of Settlements

- The Compact Commission negotiates settlements with Indian tribes and federal agencies claiming federal reserved water rights in Montana.
- The Compact Commission negotiates on behalf of the Governor.

Statutory Mandate

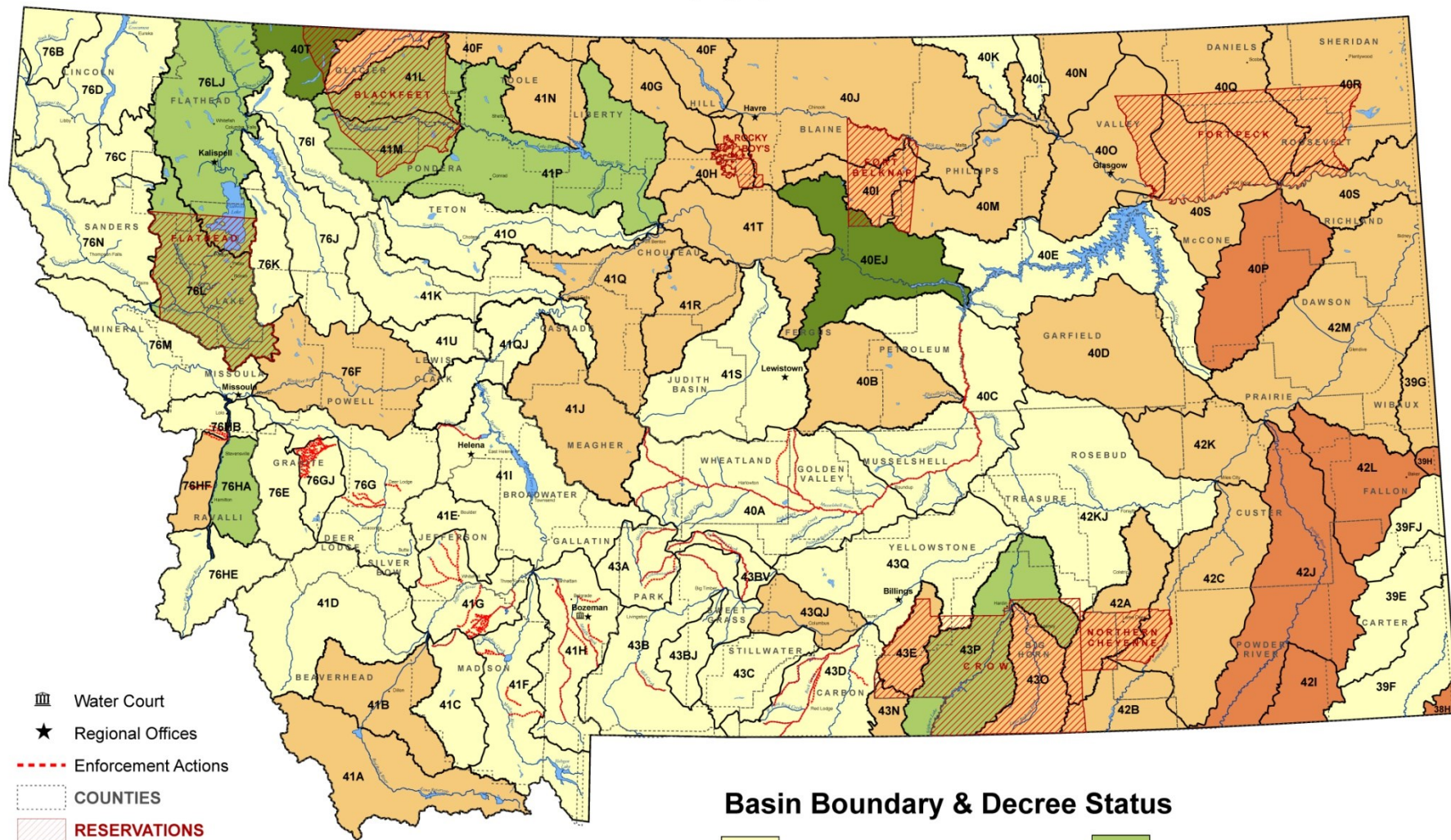
- **The statutory mission of the Compact Commission is to conclude “compacts concerning the equitable division and apportionment of water between the state and its people and the federal government claiming non-Indian reserved waters within the state.” (MCA 85-2-703.)**

Compact Commission

- **The Compact Commission is made up of nine members who serve four-year terms. One member is appointed by the Attorney General's office, two by the Governor's Office, two by the Montana Senate and two by the Montana House of Representatives.**

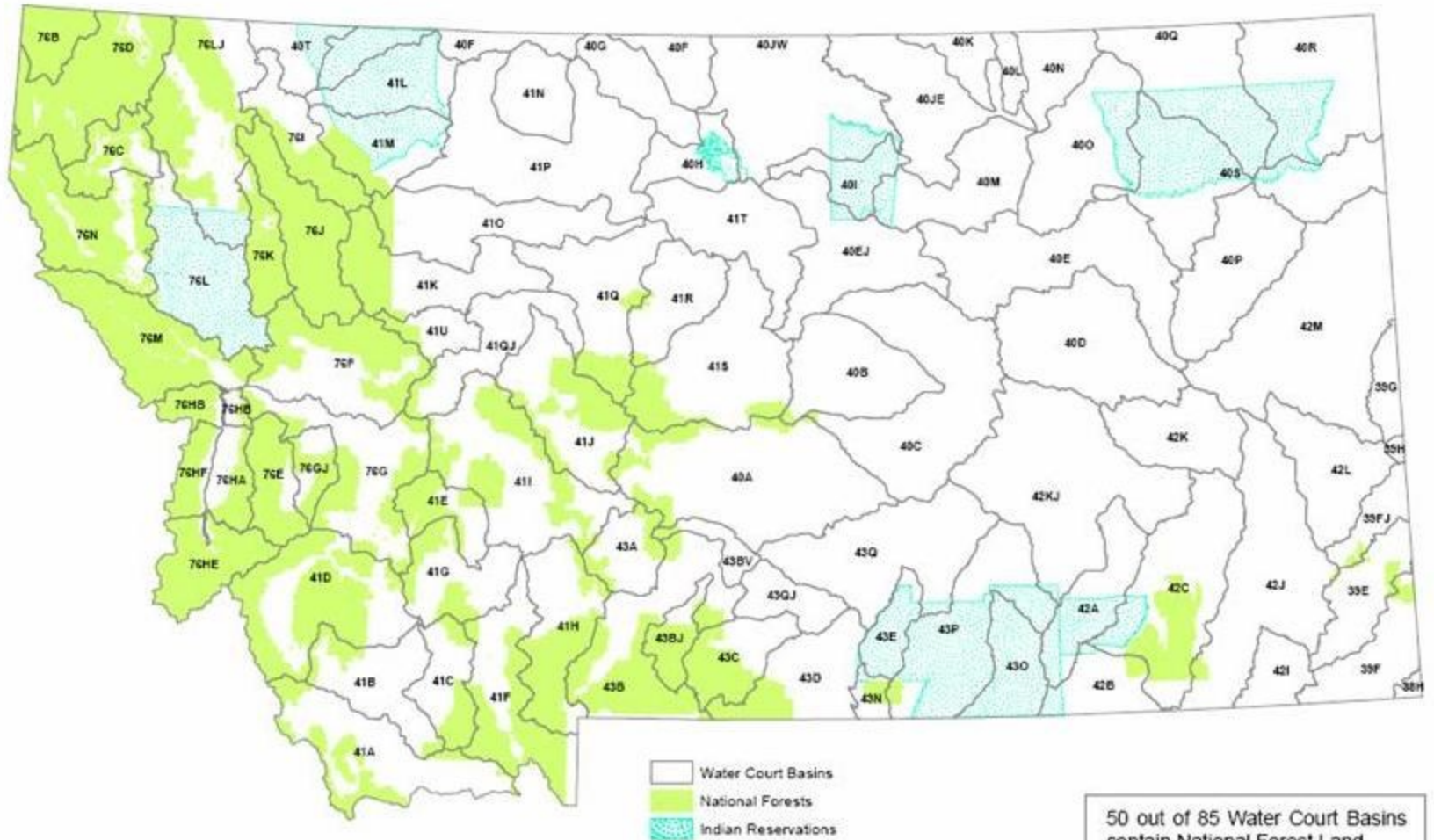
Basin Location and Adjudication Status

2/10/2014



Water Resources Division
Feb 2014
NAD 1983 StatePlane Montana FIPS 2500

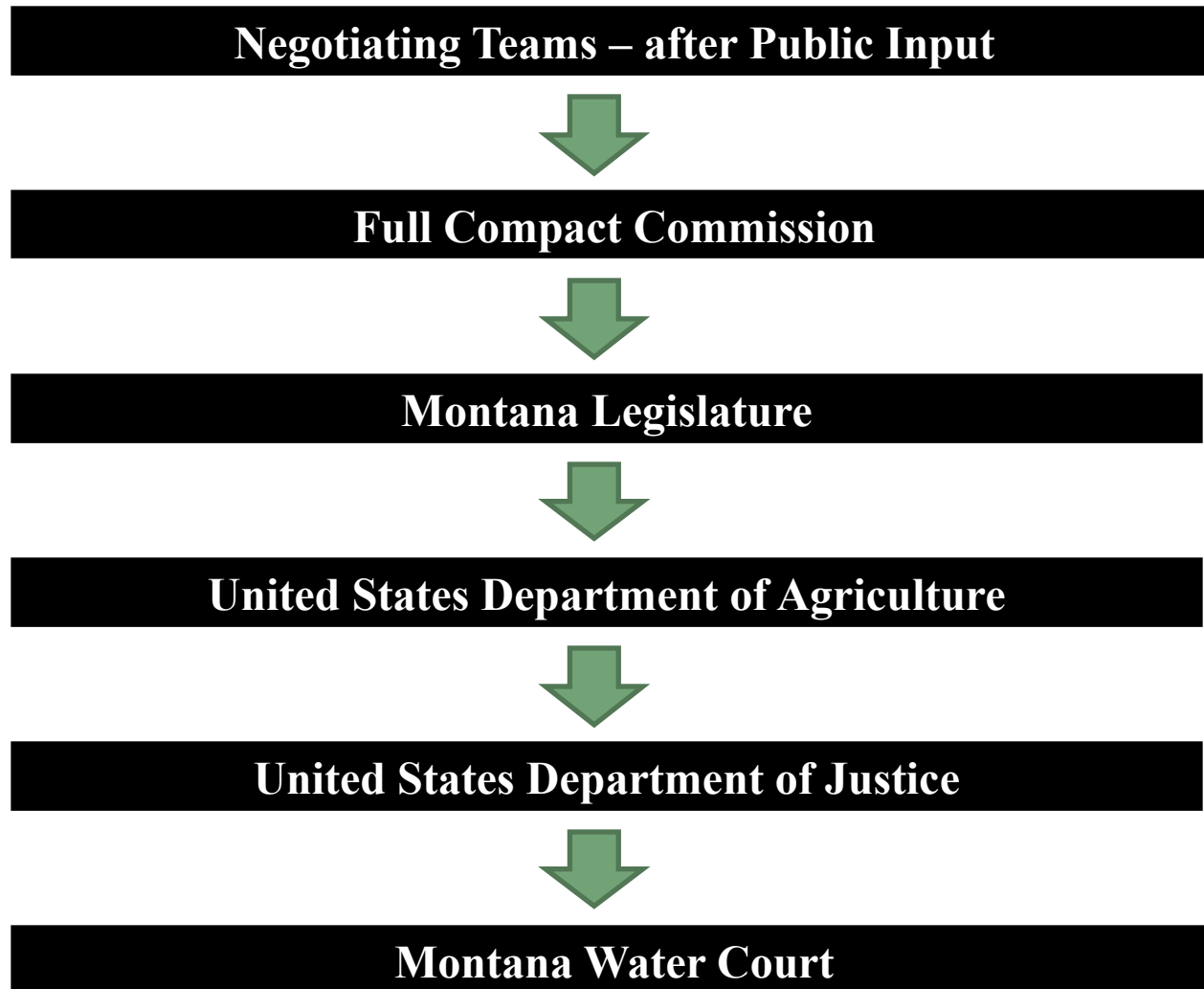
Water Court Basins with Forest Service Lands



50 out of 85 Water Court Basins
contain National Forest Land

43 of these basins have no other
reserved land

Compact Approval Process - USDA Forest Service



USDA FOREST SERVICE – MONTANA COMPACT

- **Recognizes federal reserved water rights**
- **Creates 78 state water rights in Compact**
- **Provide process for acquiring state instream flow water rights**
- **Changes to state law for sequencing**
- **Confirms standing to object in adjudication**
- **New state law for permanent change of diversionary use to instream flow**

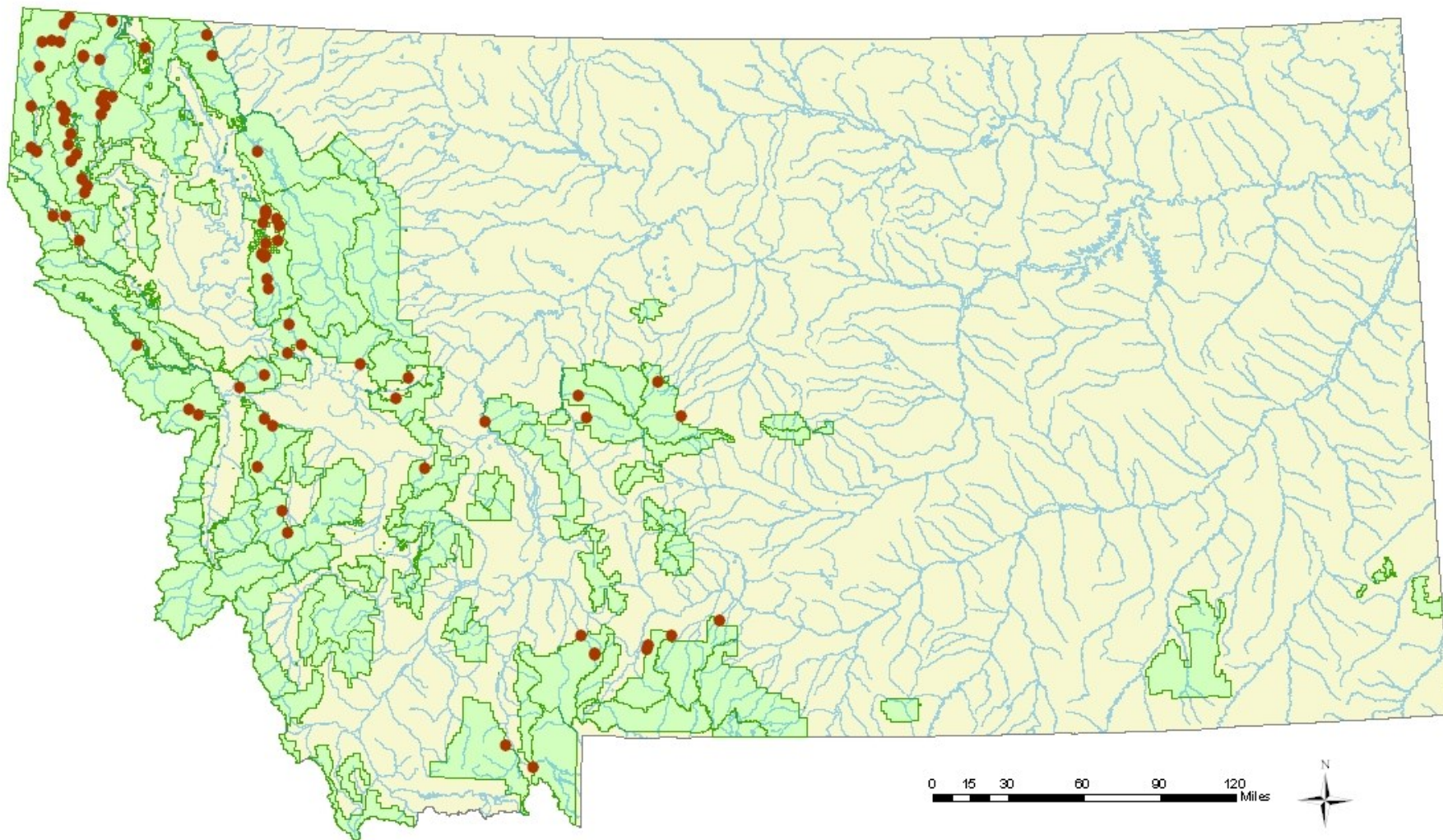
USDA Forest Service's Federal Reserved Water Rights

- Discrete Administrative Uses, both current and future, such as:
 - Water for pack animals
 - Housing units
 - Tree nurseries
- Dispersed Administrative Uses, such as:
 - Dust abatement
 - Reclamation
- Emergency Fire Suppression
- South Fork Flathead Wild and Scenic River

State Water Rights Created

- 77 streams with quantified instream flow under state law based on Wetted Perimeter Methodology
- 1 in situ non-consumptive (Fen) based on volume
- Water Right created in Compact (akin to Murphy Rights)
- Subject to senior stock water rights

USDA Forest Service Instream Flow Water Rights Created in the Compact



Process for Acquiring State Water Rights – State Water Reservations

- **Modifications to the Montana Water Reservation Statute. (MCA 85-2-316.)**
- **Article VI of the Compact:**
 - **Authorizes Forest Service to proceed under state law in all basins notwithstanding basin closure.**
 - **Authorizes Forest Service to apply for any authorized federal purpose.**
 - **Sets time frames.**

State Water Reservations (Cont.)

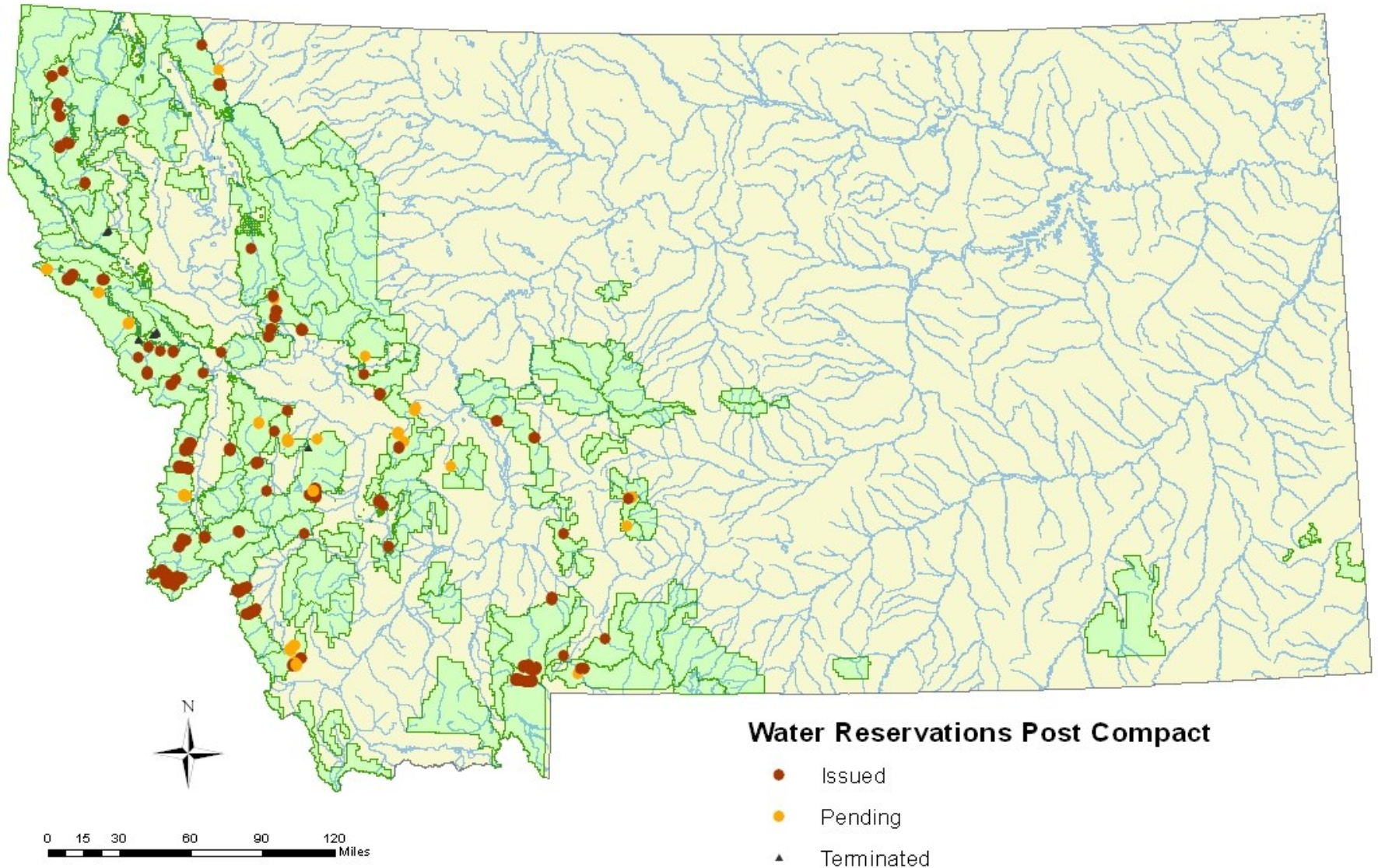
- **Specific procedure in limited circumstances**
 - Where purpose is **fish**; and
 - Where amount requested is based on the **Wetted Perimeter Methodology**
 - Lower inflection point
 - Upper inflection point for an existing population of certain fish species; or
 - Where amount is based on methodology approved through rulemaking.



State Water Reservations - Specific procedure in limited circumstances (cont.)

- **Forest Service must submit a correct and complete application.**
- **Correct and complete application constitutes:**
 - Conclusive evidence of purpose and need
 - Prima facie evidence of amount and public interest.
- **DNRC has no discretion to deny correct and complete application unless there is an objector.**
- **Objector has the burden to show:**
 - The amount was not properly calculated or there is no existing population of fish species applied for; or
 - Proof of a proposed water development project that conflicts with the application.

USDA Forest Service Water Reservations Post Compact



Standing

- **Forest Service has right to object in ongoing statewide adjudication to any water right claim for water use or storage on or water conveyed across National Forest System Lands.**
- **Compact recognizes that the Forest Service has an ownership interest in water and its use for water sources within National Forest System Lands based on Administrative Uses and Emergency Fire Suppression. Meets criteria for “good cause” to object to water rights in general adjudication. (MCA 85-2-233.)**

Sequencing

- **Permit applicant for a new water right or a change in use must have special use permit (if one is required) in order to have correct and complete application.**
- **All appropriations must have special use permit (if one is required) in order to get certificate of water right.**
- **New permits are subject to terms and conditions of special use permit, if required.**

New state law for permanent change of diversionary use to instream flow

- **Ability to change diversionary (consumptive) use to instream flow on permanent basis within or immediately adjacent to the exterior boundaries of the National Forest.**
- **Must go through change process with notice and opportunity to object. (MCA 85-2-402.)**
- **10 year window for objections based on adverse affect.**

Changes in state law

- Principles in Article IV
 - Article VIII Process – Time Limit
 - Standing
 - State Water Reservation Process
 - Condition Precedent
 - Sequencing
 - Change of diversionary use to instream flow

Web sites:

- RWRCC – Authorizing Statutes and Legislatively Approved Compacts.
<http://www.dnrc.mt.gov/rwrcc/Default.asp>
- Water Court Order, U.S.D.A Forest Service-Montana Compact – Case WC-2007-03 (October 31, 2012).
<http://watercases.mt.gov/view/null?id={8963F8EC-9484-4E7C-9217-CB61EEFF9EFA}>
- Montana Legislature Water Policy Committee, Summary of instream flow water reservations (form 638) pursuant the US Forest Service-Montana Water Rights Compact, MCA 85-20-1401 (January 7, 2014).
http://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/Jan-2014/2013_USFS_Instream_Summary_Report.pdf
- Montana Legislature Water Policy Committee, Wetted Perimeter descriptions (September 10, 2013).
<http://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/September-2013/FWP-wetted-perimeter.pdf>
<http://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/September-2013/Exhibits/September-10-2013/Exhibit13.pdf>
- Montana Codes Annotated. http://leg.mt.gov/bills/mca_toc/85.htm
- Montana basin closure map. http://www.dnrc.mt.gov/wrd/water_rts/appro_info/basinclose-cgw_map.pdf
- Form 638 – Objection Form.
http://www.dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/611.pdf