

Office of Administrative Hearings  
Department of Natural Resources and Conservation  
1539 Eleventh Avenue  
P.O. Box 201601  
Helena, MT 59620-1601  
Phone: (406) 444-6615  
DNRCOAH@mt.gov

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\*\*\*\*\*

IN THE MATTER OF CHANGE APPLICATION )  
NO. 76G-30106785 BY CLARK FORK ) FINDINGS OF FACT AND CONCLUSIONS  
COALITION ) OF LAW AND FINAL ORDER

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**INTRODUCTION**

On November 5, 2021, I issued an order granting in part and denying in part the summary judgment motion filed by Clark Fork Coalition (Applicant) against Pamela B. and Rick A. Hirsch (Hirsch Objectors) and Dan J. and Deborah D. Kelley (Kelley Objectors), the two sets of objectors in this case who had not reached settlement agreements with Applicant. That Order left open a single issue in this case, namely whether Applicant could meet its burden to prove by a preponderance of the evidence that granting change application No. 76G-30106785 (Change Application) would not cause adverse effect to the Hirsch Objectors' or the Kelley Objectors' water rights due to asserted deficiencies in the measurement plan Applicant submitted to the Department of Natural Resources and Conservation (DNRC) in connection with the Change Application.<sup>1</sup>

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1. A group of 10 objectors, Objectors 2-Bar Ranch Limited Partnership, 5 Rockin' MS Angus Ranch, Inc., Melvin R. Beck Ranch, LLC, Brad Anderson Farm Limited Partnership, Ted R. Beck, Western Montana Land and Livestock, LLC, Daniel T. Bersanti, Laurie J. Bersanti, Vanisko Ranches, Inc., James P. Berg, Charla J. Berg, and Kaehl P. Berg (collectively Racetrack Objectors) also have valid objections related to the adverse effect criterion. Applicant's summary judgment motion is not directed at those objectors because they have collectively entered into a settlement agreement that has been submitted to me for approval. The same is true for Objectors Martin J. Dippold, Marla A. Hanson, and Roger L. Hanson. While Objector Modesty Creek Ranch was originally included in the ambit of Applicant's summary judgment motion, it too has now entered into a settlement agreement with Applicant. I will address these settlement agreements below, a discussion which will make clear why I find it unnecessary to address the gravamen of these settling objectors' underlying objections in this Final Order.

On September 15, 2021, prior to ruling on Applicant's summary judgment motion, I conducted an evidentiary hearing in order to afford the Hirsch Objectors and the Kelley Objectors, who are proceeding *pro se*, every opportunity to introduce evidence into the record capable of defeating Applicant's motion. At a status conference I convened on December 8, 2021, each party to this case confirmed that there was no additional evidence any of them wished to introduce into the record and that the case was ripe for resolution on the record as it stood at the conclusion of the Evidentiary Hearing. I afforded the parties an opportunity for post-hearing briefing and I now hereby GRANT the Change Application for the reasons set forth below. <sup>2</sup>

### **PROCEDURAL HISTORY**

The bulk of the procedural history of this case, in which Applicant seeks to change water right number 76G 91008-00, is ably set out in DNRC's Preliminary Determination to Grant the Change Application of July 22, 2019 (2019 PDG). 2019 PDG at 1-4. Upon the issuance of the PDG, DNRC issued timely public notice of the Change Application pursuant to § 85-2-307, MCA, and multiple parties filed objections to the 2019 PDG. DNRC ultimately determined that 16 parties' objections were valid. Each objector validly objected on the ground of adverse effect. The Hirsch Objectors, the Kelley Objectors, as well as objectors Martin J. Dippold, and Modesty Creek Ranch Stock Ranch, LLC (Modesty Creek Ranch), also filed valid objections on the ground of beneficial use.<sup>3</sup> On November 26, 2019, DNRC appointed me as the Hearing Examiner for this case. Since that time, objector Perkins Ranch withdrew its objection, and settlement agreements between or among Applicant and Racetrack Objectors, Martin J. Dippold, Marla A. Hanson and Roger L. Hanson, and Modesty Creek Ranch have been lodged with me for approval.<sup>4</sup>

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2. Applicant has properly preserved an objection to the validity of DNRC's policy related to its assessment of the effects of the change on return flows (Return Flow Policy). Applicant's Motion for Summary Judgment at 8, n.4; Evidentiary Hearing Video ("EHV") at 10:16:25-10:17:07. I also note that, at least in this case, there appears to be some tension between DNRC's implementation of the Return Flow Policy and Judge McElyea's ruling of April 10, 2019, vacating DNRC's initial preliminary determination to grant CFC's application with modifications and remanding this matter to the Department. WC-MAPA-2018-01 at 8. Because I am granting the Application, I hereby DENY Applicant's objection as moot and will not otherwise attempt to resolve the tension in regard to DNRC's Return Flow Policy here.

3. DNRC determined that objectors Marla A. Hanson and Roger L. Hanson had failed to assert a valid beneficial use objection to accompany their valid adverse effect one.

4. The Dippold and Hansons settlement agreements with Applicant each recites that the terms of the settlement agreement between Applicant and Racetrack Objectors are sufficient to resolve the Dippold and Hansons objection as well.

## LEGAL STANDARD

Under Montana law, an applicant for a change in use authorization always retains the burden of proof to show by a preponderance of the evidence that the applicable criteria of § 85-2-402(2), MCA, are satisfied before DNRC may issue the applicant a change authorization. *In re Royston*, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991).<sup>5</sup> Consequently, in connection with the Change Application, Applicant must show that:

- 1) the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued;
- 2) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- 3) the proposed use of water is a beneficial use; and
- 4) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

Section 85-2-402(2)(a)-(d), MCA. As the Application is for an instream flow purpose, the adverse effect criterion is also mandated by § 85-2-408(3)(a).<sup>6</sup> Pursuant to § 85-2-307(2)(a)(ii), MCA, the 2019 PDG DNRC's preliminary determination that Applicant has proven those criteria by the requisite standard.

The issuance of the 2019 PDG proposing to grant the Application, however, does not relieve Applicant of its obligation to prove that the applicable criteria are satisfied. But it does, have the effect of shifting the burden of production to Objector to demonstrate that Applicant failed to satisfy its burden on the criteria at issue in the valid objections.<sup>7</sup> Because Applicant retains the

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5. A change applicant need only demonstrate that the criteria of § 85-2-402(2)(f)-(g), MCA, are satisfied if a valid objection raising those grounds is filed. Section 85-2-402(3), MCA. No such valid objections were filed in connection with the Change Application.

6. It does not appear to me, and no party has argued, that the adverse effect requirements of § 85-2-402(2)(a) and § 85-2-408(3)(a), MCA, are anything other than functionally co-extensive, at least where, as here, an Applicant has proposed a plan that requires measurement of the instream flow use at one or more specific points. Therefore, I find no need to separately consider the operation of those sections in this Final Order.

7. Because no valid objections were filed challenging the adequacy of the means of diversion or Applicant's possessory interest in the intended place of use, and because no evidence in the record causes me to question Applicant's satisfaction of those criteria as determined by DNRC in the 2019 PDG, I will not address those criteria further in this Order. Too, in my Order of November 5, 2021, I granted

burden of proof as to the criteria, Applicant may adduce evidence to rebut relevant evidence pertaining to the objection that an objector proffers during the course of resolving the objection. See generally, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT 96, 112 P.3d 964 (2005).<sup>8</sup>

### **APPEARANCES, WITNESSES, AND RECORD**

As noted above, the parties waived their rights to a full hearing in this case, but I did hold an evidentiary hearing on September 15, 2021. At that evidentiary hearing, Applicant was represented by counsel Andrew Gorder. The Racetrack Objectors were represented by Callie Michaels. The Hirsch Objectors and the Kelley Objectors appeared *pro se*, and Objectors Marla A. Hanson, Roger L. Hanson, and Modesty Creek Ranch declined to attend or be represented at the evidentiary hearing. At the evidentiary hearing, the Kelley Objectors called eight witnesses: Jim Berg, Melissa Brickl, Rick Cline, Andy Fischer, Dan Kelley, Scott Perkins, William Pauley, and Joe Shafford. The Hirsch Objectors questioned those witnesses and also testified on their own behalf. Applicant called no witnesses at that hearing but did cross-examine the Hirsch Objectors' and Kelley Objectors' witnesses.

No party introduced any exhibits at the evidentiary hearing, and I have not otherwise admitted additional materials into the record. Consequently, the record in this case consists of the testimony received at the evidentiary hearing and the DNRC file for the Change Application, which includes the settlement agreements among Applicant and the Racetrack Objectors, between

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Applicant's summary judgment motion on the question of beneficial use, finding that they had successfully proven that criterion was satisfied. *Id.* at 2. In that Order, I also granted summary judgment to Applicant on the question of adverse effect as it related to an asserted loss of return flows. *Id.* at 3-5. So I will not discuss the beneficial use criterion further in this Order, and the discussion of adverse effect is limited to that assertedly caused by deficiencies in the measurement plan Applicant submitted to DNRC, pursuant to § 85-2-408(1)(b), MCA, as part of the Application.

8. In that case, MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and -401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim." *Id.* ¶ 2 (see § 26-1-401, MCA ("[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."); § 26-1-402, MCA ("[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.")).

Applicant and Martin J. Dippold, among Applicant and the Hansons, and between Applicant and Modesty Creek Ranch.

### **ADVERSE EFFECT**

As I explained in my November 5 Order, the sum total of objectors' evidence on the question of adverse effect caused by deficiencies in the measurement plan Applicant submitted to the DNRC as part of the Application, is what was adduced at the evidentiary hearing through the testimony of current Racetrack Creek water commissioner Joe Shafford, former Racetrack Creek water commissioner William Pauley, and DNRC Staff Expert Melissa Brickl. Specifically, these witnesses' testimony raised questions about the potential adverse effects to the Hirsch Objectors' and the Kelley Objectors' water rights by virtue of the way in which the protectable volume of Applicant's proposed change might be enforced and accounted for along the four distinct reaches of Racetrack Creek identified in CFC's application. This testimony, however, is all based on the sort of speculation about hypothetical future injury that the Montana Supreme Court, and the Water Court in prior proceedings in this very case, have warned the Department against relying on because it imposes a higher burden on an applicant than required by § 85-2-402, MCA. See *Hohenlohe v. DNRC*, 2010 MT 203, ¶ 64, 357 Mont. 438 (2010); *Clark Fork Coalition v. DNRC*, WC-MAPA-2018-01 (April 10, 2019) at 10.

### **Findings of Fact**

1. Joe Shafford, whose tenure as Racetrack Creek water commissioner ran from 1999 - 2006 and resumed in 2016, EHV at 11:07:17-33, testified that if there were to be a shortfall in the volume of Applicant's changed right that was supposed to be present at a particular measurement point, he would have to shut off Racetrack Creek water users until the protectable volume of Applicant's changed right was met. EHV 11:36:15-50. These shutoffs would be made in order of priority, Mr. Shafford testified, but because Applicant's right is sourced from stored water, rights with priority dates senior to Applicant's could nonetheless be curtailed if that became necessary to provide the protectable volume at the measuring point. EHV 11:36:52-11:37:22.<sup>9</sup>

2. But Mr. Shafford also testified to his complete lack of familiarity with the Application or Applicant's proposed measurement plan. EVH at 11:27:10-24; 11:28:10-41. Even so, he averred

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9. The vast majority of the water rights which the Kelley Objectors and the Hirsch Objectors assert will be adversely affected by a grant of the Change Application are senior to the right Applicant seeks to change, and thus would normally be legally unaffected by an attempt to exercise a junior right.

that he would be able to distribute water properly in priority, including to protected instream flows, so long as natural losses of water through the protected stream reach were measured and deducted, EVH at 11:30:30-56, and that doing so would be no more challenging for him than distributing water through the protected reach to an irrigation user. See 11:45:30-11:46:07.

3. William Pauley, who served as Racetrack Creek water commissioner from 2009 - 2015, EHV at 9:23:34-40 and 9:37:10-13, testified that he, too, understood that Racetrack Creek water users would need to be regulated off if there were to be a shortfall in the volume of Applicant's changed right that was supposed to be present at a particular measurement point. EHV at 10:00:30-10:02:50. Mr. Pauley also stated that, depending on the specific hydrologic conditions, curtailments could reach up into Cement Creek or the Morrison Ditch, where several of the Kelley Objectors' water rights are located, and not just the mainstem of Racetrack Creek. EHV 9:24:45-9:25:30.

4. Mr. Pauley also testified that there could be adverse effects to water rights due to the difficulty in disaggregating between Applicant's Racetrack Lake water and accretions from the gaining reach of Racetrack Creek between Cement Ditch and Branch Ditch. These could occur if Applicant's water right measurements are not accurate, and Applicant would essentially be able to capture within the ambit of its protectable volume accretions that otherwise would be available to satisfy other water rights. See EHV at 9:52:05-52.

5. Yet Mr. Pauley also testified that he had "briefly" reviewed the Application, EVH at 9:42:57-9:43:06, but that he did not understand the specifics of Applicant's proposed measurement plan. EVH at 9:54:40-59.

6. DNRC Staff Expert Melissa Brickl mentioned that she could understand how shortfalls in the protected volume at issue in the Application could, in theory, lead to the curtailment of other water rights irrespective of relative priority dates and geography as well. EHV 10:54:55-10:55:58. But Ms. Brickl also testified that she was unfamiliar with water management practices on Racetrack Creek and that she would defer to Mr. Pauley and Mr. Shafford on this issue. EVH at 11:04:44-11:05:30.

7. Andy Fischer testified about how Applicant's measurement plan is calculated to account for transmission losses and to ensure that the protectable volume of Applicant's changed right is not inflated by natural accretions as it passes through a gaining reach of Racetrack Creek. See *generally* EVH at 13:29-11:34. Mr. Fischer has extensive experience working on streamflow

restoration and has taken or supervised the collection of myriad streamflow measurements over the course of a decade or more along multiple reaches of Racetrack Creek. EVH at 13:26:32-13:27:41; 13:28:38-13:29:59. I find his detailed testimony credible.

### **Conclusions of Law**

8. Sections 85-2-402 and 85-2-408, MCA, require (among other things) an applicant for a new change in use authorization for instream flow purposes to prove by a preponderance of the evidence that the proposed change will not adversely affect “the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3 [of Title 85, Chapter 2].” Section 85-2-402(2)(a), MCA; *see also* § 85-2-408(3)(a) (change applicant for an instream flow for fisheries purposes must prove by a preponderance of the evidence that “the temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons”). DNRC has also promulgated a rule to guide its administration of that statute. ARM § 36.12.1903. That rule explains that “[l]ack of adverse effect for change applications is generally based on the applicant’s plan showing the diversion and use of water and operation of the proposed project will not exceed historic[a] use, and can be implemented and properly regulated.” *Id.* at § 36.12.1903(1).

9. In the 2019 PDG, DNRC determined that Applicant had satisfied its burden to prove by a preponderance of the evidence that a grant of the Application would not cause adverse effects so long as a mandated measurement and reporting condition was in effect. 2019 PDG at 6-7.

10. Even if I dismiss their pending objections, the Hirsch Objectors and the Kelley Objectors retain the right under Montana law to bring renewed objections to the Application once during the duration of the 10-year term of the proposed change should events on the ground belie Applicant’s good faith belief and DNRC’s determination that Applicant’s measurement plan is sufficient to ensure a lack of adverse effect to their water rights. Section 85-2-407(4)(b)(iii), MCA.

11. Because I do not find the testimony adduced by the Hirsch Objectors and the Kelley Objectors sufficient to meet their burden of production as to the adverse effect criterion of the Application, I have no basis to disturb the conclusion in the 2019 PDG that Applicant has met its burden as to this criterion. I therefore conclude that Applicant has met its burden of proof in regard

to the criterion of adverse effect, and that the outstanding objections should therefore be DISMISSED.

### **The Settlement Agreements**

As I noted in my Order of April 16, 2021, there are conditions in the settlement agreement among Applicant and the Racetrack Objectors (which are incorporated by reference into the settlement agreements between Applicant and Mr. Dippold and among Applicant and the Hansons) that exceed my jurisdiction to impose. But the parties subsequently indicated their intent to have Applicant's exercise of the changed water right be subject to the terms of this settlement as a private party agreement, and their agreement that such a condition on exercise is sufficient to resolve the Racetrack Objectors' adverse effect objections. See Order of May 18, 2021; Racetrack Objectors' Closing Brief at 8-9. The settlement agreement between Applicant and Modesty Creek Ranch lacks these provisions, which purport to bind the Racetrack Creek water commissioner to performing certain actions in furtherance of the implementation of the terms of the agreement. But on the record before me, I do not find that the terms of the Modesty Creek Ranch settlement agreement are *necessary* to my finding that Applicant has proven its satisfaction of the applicable criteria by a preponderance of the evidence. See ARM 36.12.207(2). Consequently, I will construe that agreement as a private party agreement as well.

### **Findings of Fact**

12. Applicant and the Racetrack Objectors entered into a settlement agreement built on a Water Management Plan (WMP), binding as among those parties, which was filed with DNRC on September 8, 2020. The parties to this settlement agreement have represented to me that implementation of the Water Management Plan resolves the Racetrack Objectors' objections to the Application.

13. Applicant and Objector Martin J. Dippold entered into a settlement agreement, binding as between those parties, built on the WMP. The parties to this settlement agreement have represented to me that DNRC's adoption by reference of the WMP is sufficient for me to construe Mr. Dippold's objection as withdrawn. The settlement agreement entered into among Applicant and Objectors Marla A. Hanson and Roger L. Hanson is materially identical to the settlement between Applicant and Mr. Dippold and makes a similar representation.

14. Applicant and Objector Modesty Creek Ranch entered into a settlement, binding as between those parties, that contains a set of terms and conditions related to the relationship



between Applicant's exercise of the right proposed to be changed and Modesty Creek Ranch's exercise of its own water rights. The parties to this settlement agreement have represented to me that "[u]pon execution of this Agreement, Modesty Creek's objection to CFC's Change Application will be deemed withdrawn." Settlement Agreement Between Clark Fork Coalition and Modesty Creek Stock Ranch LLC at 2.

### **Conclusions of Law**

15. Because the WMP contains terms beyond my jurisdiction to impose, I cannot conclude – as requested by the Racetrack Objectors in their Closing Brief – that the WMP is necessary to Applicant's ability to prove a lack of adverse effect. Nonetheless, I conclude that it is appropriate to add the following remark to this change authorization: "This change authorization is subject to a private party agreement entered into by Applicant and Objectors 2-Bar Ranch Limited Partnership, 5 Rockin' MS Angus Ranch, Inc., Melvin R. Beck Ranch, LLC, Brad Anderson Farm Limited Partnership, Ted R. Beck, Western Montana Land and Livestock, LLC, Daniel T. Bersanti, Laurie J. Bersanti, Vanisko Ranches, Inc., James P. Berg, Charla J. Berg, and Kaehl P. Berg, and filed with DNRC on September 8, 2020. This private party agreement is attached as Exhibit A of this final order. DNRC is directed to include a copy of Exhibit A in Statement of Claim file no. 76F 91008-00."

16. Because I have now adopted by reference the WMP, pursuant to the terms of the settlement agreement between Applicant and Objector Martin J. Dippold, I conclude the objection is hereby WITHDRAWN.

17. Because I have now adopted by reference the WMP, pursuant to the terms of the settlement agreement among Applicant and Objectors Marla A. Hanson and Roger L. Hanson, I conclude the objection is hereby WITHDRAWN.

18. The settlement agreement between Applicant and Modesty Creek Ranch recites the objection shall be deemed withdrawn upon the execution of that agreement, an event which occurred no later than August 30, 2021, and which agreement was filed with DNRC on September 14, 2021. I therefore conclude that objection is hereby WITHDRAWN. I also conclude that for purposes of public notice, the following remark shall be added to this change authorization: "This change authorization is subject to a private party agreement entered into by Applicant and Modesty Creek Stock Ranch, LLC and filed with DNRC on September 14, 2021. This private party

agreement is attached as Exhibit B of this final order. DNRC is directed to include a copy of Exhibit B in Statement of Claim file no. 76F 91008-00.”

**CONCLUSION**

Applicant has met its burden of proof to show by a preponderance of the evidence that it has satisfied all applicable criteria necessary to warrant a grant of the Change Application.

**FINAL ORDER**

Change Application No. 76G-30106785 is GRANTED as proposed in the Change Application PDG with the following additional remarks:

1. “THIS CHANGE AUTHORIZATION IS SUBJECT TO A PRIVATE PARTY AGREEMENT ENTERED INTO BY APPLICANT AND OBJECTORS 2-BAR RANCH LIMITED PARTNERSHIP, 5 ROCKIN’ MS ANGUS RANCH, INC., MELVIN R. BECK RANCH, LLC, BRAD ANDERSON FARM LIMITED PARTNERSHIP, TED R. BECK, WESTERN MONTANA LAND AND LIVESTOCK, LLC, DANIEL T. BERSANTI, LAURIE J. BERSANTI, VANISKO RANCHES, INC., JAMES P. BERG, CHARLA J. BERG, AND KAEHL P. BERG, AND FILED WITH DNRC ON SEPTEMBER 8, 2020. THIS PRIVATE PARTY AGREEMENT IS ATTACHED AS EXHIBIT A OF THIS FINAL ORDER. DNRC IS DIRECTED TO INCLUDE A COPY OF EXHIBIT A IN STATEMENT OF CLAIM FILE NO. 76F 91008-00.”
2. “THIS CHANGE AUTHORIZATION IS SUBJECT TO A PRIVATE PARTY AGREEMENT ENTERED INTO BY APPLICANT AND MODESTY CREEK STOCK RANCH, LLC AND FILED WITH DNRC ON SEPTEMBER 14, 2021. THIS PRIVATE PARTY AGREEMENT IS ATTACHED AS EXHIBIT B OF THIS FINAL ORDER. DNRC IS DIRECTED TO INCLUDE A COPY OF EXHIBIT B IN STATEMENT OF CLAIM FILE NO. 76F 91008-00.”

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**NOTICE**

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

IT IS SO ORDERED.

Dated this 3<sup>rd</sup> day of May 2022.

/Original signed by Jay D. Weiner/  
Jay D. Weiner, Hearing Examiner  
Department of Natural Resources  
and Conservation  
Office of Administrative Hearings  
P.O. Box 201601  
Helena, Montana 59620-1601  
(406) 444-1510

## **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER was served upon all parties listed below on this 3<sup>rd</sup> day of May 2022 by first class United States mail and/or by electronic mail (e-mail).

ANDREW GORDER - ATTORNEY  
CLARK FORK COALITION  
PO BOX 7593  
MISSOULA, MT 59807  
[andrew@clarkfork.org](mailto:andrew@clarkfork.org)

PAMELA B HIRSCH  
RICK A HIRSCH  
3257 YELLOWSTONE TRAIL  
DEER LODGE, MT 59722 9794  
[thehirschs35@hotmail.com](mailto:thehirschs35@hotmail.com)

DAN & DEBORAH KELLEY  
1869 WILLOW RD  
DEER LODGE, MT 59722  
[kelleyranch@hotmail.com](mailto:kelleyranch@hotmail.com)

MARTIN J DIPPOLD  
301 RANCHVIEW LN  
DEER LODGE, MT 59722 9457  
[joedippold@hotmail.com](mailto:joedippold@hotmail.com)

**DNRC Staff Expert:**

MELISSA BRICKL  
[melissa.brickl@gmail.com](mailto:melissa.brickl@gmail.com)

JOHN J. FERGUSON - ATTORNEY  
GRAHAM J. COPPES - ATTORNEY  
EMILY F. WILMOTT - ATTORNEY  
FERGUSON LAW OFFICE PLLC  
PO BOX 8359  
MISSOULA, MT 59807-8359  
[johnf@fergusonlawmt.com](mailto:johnf@fergusonlawmt.com)  
[grahamc@fergusonlawmt.com](mailto:grahamc@fergusonlawmt.com)  
[emilyw@fergusonlawmt.com](mailto:emilyw@fergusonlawmt.com)

CALLI J MICHAELS - ATTORNEY  
BLOOMQUIST LAW FIRM PC  
PO BOX 1418  
DILLON, MT 59725 1418  
[cmichaels@helenalaw.com](mailto:cmichaels@helenalaw.com)  
[blf@helenalaw.com](mailto:blf@helenalaw.com)

MARLA A HANSON  
ROGER L HANSON  
1296 WILLOW RD  
DEER LODGE, MT 59722 9742  
[marly828@yahoo.com](mailto:marly828@yahoo.com)

/Original signed by Jamie Price/  
Jamie Price, Hearings Assistant  
Hearings Unit, (406) 444-6615

1 Andrew Gorder  
140 S. 4th Street West, Unit 1  
2 Missoula, Montana 59801  
406.542-0539 ext. 202  
3 [andrew@clarkfork.org](mailto:andrew@clarkfork.org)  
4 *Attorney for Applicant, Clark Fork Coalition*

5 BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND  
6 CONSERVATION OF THE STATE OF MONTANA

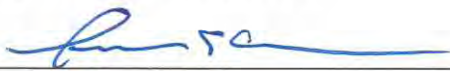
7 In the Matter of Change Application  
8 No. 76G 30106785,

**Notice of Settlement**

9 Clark Fork Coalition, Applicant,  
10

11 Pursuant to A.R.M. 36.12.207, the following Parties: Clark Fork Coalition, 2-Bar  
12 Ranch Limited Partnership, Melvin R. Beck Ranch, LLC, Brad Anderson Farm Limited  
13 Partnership, Ted Beck, Western Montana Land and Livestock, LLC, Dan Bersanti, Laurie  
14 Bersanti, Vanisko Ranches, Inc., Jim Berg, Charla Berg, and Kaehl Berg (for the  
15 purposes of this Notice, the “Parties”), hereby give notice that they reached a settlement  
16 to resolve the objections of the above-named Objectors. The Parties request inclusion of  
17 the attached Water Management Plan as a condition of the Clark Fork Coalition’s Change  
18 Authorization.  
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20 Respectfully submitted this 8th day of September, 2020.

21 By:   
22 Andrew Gorder  
23 *Attorney for Applicant*

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**CERTIFICATE OF MAILING**

This is to certify that the foregoing was duly served upon the following at the email address and postal address below, by first-class mail postage-prepaid, the \_\_ day of September, 2020 as follows:

JAMIE PRICE, HEARINGS ASSISTANT  
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
1424 9TH AVE.  
HELENA, MT 59620-1601

CALLI J MICHAELS  
BLOOMQUIST LAW FIRM PC  
PO BOX 1418  
DILLON, MT 59725 1418

GRAHAM COPPES  
FERGUSON LAW OFFICE PLLC  
PO BOX 8359  
MISSOULA, MT 59807

MARTIN J DIPPOLD  
301 RANCHVIEW LN  
DEER LODGE, MT 59722 9457

MARLA A HANSON  
ROGER L HANSON  
1296 WILLOW RD  
DEER LODGE, MT 59722 9742

PAMELA B HIRSCH  
RICK A HIRSCH  
3257 YELLOWSTONE TRAIL  
DEER LODGE, MT 59722 9794

DAN J KELLEY  
DEBORAH D KELLEY  
1869 WILLOW RD  
DEER LODGE, MT 59722 9726

  
By: Andrew Gorder

## Water Management Plan

On November 4, 2016, the Clark Fork Coalition (CFC) submitted Application to Change Water Right No. 76G 30106785 to temporarily change Statement of Claim No. 76G 91008 00 from irrigation to instream flow. The DNRC issued a Preliminary Determination to Grant CFC's Application on July 19, 2019. The DNRC provided public notice.

2-Bar Ranch Limited Partnership, 5 Rockin' MS Angus Ranch, Inc., Melvin R. Beck Ranch, LLC, Brad Anderson Farm Limited Partnership, Ted Beck, Western Montana Land and Livestock, LLC, Dan Bersanti, Laurie Bersanti, Vanisko Ranches, Inc., Jim Berg, Charla Berg, and Kaehl Berg (collectively, "Objectors") filed objections to CFC's Change Application and the Preliminary Determination to Grant. The DNRC found the objections valid and set a hearing track.

Objectors and CFC (the "Parties") have agreed to the following Water Management Plan to resolve the objections without the expense, time, and resources of a contested case hearing.

### **A. Background**

Racetrack Creek is an adjudicated creek in Basin 76G. Water distribution is, and has historically been, managed by a water commissioner paid by the Racetrack Creek water users. The water commissioner visits each diversion on Racetrack Creek daily to ensure proper water distribution.

Objectors rely on Racetrack Creek for direct flow irrigation and stockwater. Objectors Brad Anderson Farm Limited Partnership and Ted Beck also rely on Racetrack Creek to convey their storage water (76G 214587 00 and 76G 214588 00) from Racetrack Lake to their secondary points of diversion.

CFC purchased an irrigation right (76G 91008 00) for storage water from Racetrack Lake in 2011 and seeks to temporarily change that right to instream flow.

CFC seeks to use its storage right to provide instream flow on the lower reaches of Racetrack Creek during the period of the irrigation season when portions of the creek would otherwise be dewatered.

The lower reaches of Racetrack Creek are believed to contain losing reaches and gaining reaches. While some data has been gathered, the hydrology of Racetrack Creek is complex and would require an extensive water balance study to fully understand how water is distributed throughout the system. Moreover, it is unknown how losing or gaining reaches will change or respond in Racetrack Creek when subjected to CFC's proposed storage release for instream flow.

To avoid the need for an expensive and time-consuming water balance study, the Parties agree to the following terms to resolve the objections to CFC's Change Application and for the purposes of water distribution and administration upon the DNRC's approval of CFC's Application to Change Water Right No. 76G 30106785.

**B. Objectives.** The intent of this Water Management Plan is to ensure, to the extent practicable, the following objectives are met:

Objector's water rights—which allow them to divert all available water naturally occurring in Racetrack Creek, whether from the natural flow of the creek, tributaries, springs, seeps, return flows, or other sources (i.e., all non-stored water)—will not be adversely affected by CFC's efforts to release storage water for instream use;

CFC's storage water release will not adversely affect the stored water rights currently held by Brad Anderson Farm Limited Partnership and Ted Beck;

CFC will not claim or protect as instream flow water to which Objectors are entitled; and

Except as otherwise contemplated by this Water Management Plan, CFC's stored water will not be used to fill Objectors' direct flow water rights during CFC's period of release.

**C. Agreement.** In consideration of the mutual promises contained in this Water Management Plan, the Parties agree as follows:

1. Objectors agree this Water Management Plan, when fully implemented, will resolve their objections concerning adverse effects caused by CFC's change application. Objectors agree to withdraw their objections upon (a) the Parties' execution of this Water Management Plan and (b) the DNRC's adoption of this Water Management Plan by reference as a condition of approval of Change Application No. 76G 30106785.

2. The Parties agree to resolve the objections and protect Objectors' direct flow irrigation rights in the following manner.

2.1. Before the 2021 irrigation season, Objectors' expert shall identify and establish monitoring points at or near each of Objectors' points of diversion on Racetrack Creek that are located downstream from a point in the SESWSE of Section 16, Township 6 North, Range 10 West known locally as the "Cement Ditch" (the "Monitoring Points"). For purposes of water administration under this Water Management Plan, the Monitoring Points shall supplant the points identified in the DNRC's Preliminary Determination to Grant.

2.1.1. The precise type, location, and nature of the Monitoring Points shall be determined by Objectors' expert with input from CFC and Objectors.



2.1.2. The type, location, and nature of the Monitoring Points may change as the Parties learn more about the Racetrack Creek system. Changes to the type, location, and nature of the Monitoring Points must be approved by the Objectors and shall not negate this Water Management Plan.

2.1.3. The Monitoring Points shall be established in a manner that allows the Parties to accurately record the stage (i.e., height of water) and flow rates in Racetrack Creek, even during periods of low flow.

2.1.4. The Monitoring Points shall be established in a manner that allows the Parties to record measurements at least one time per day.

2.2. Each year, the water commissioner on Racetrack Creek shall distribute Racetrack Creek water according to priority, as historically done. No changes from historical practice shall occur until the Trigger Date, as defined below.

2.2.1. The “Trigger Date” is the date on which Racetrack Creek, according to historical practice, is boarded off at the Cement Ditch in an effort to divert all available Racetrack Creek water at or upstream from the Cement Ditch.

2.2.2. The Trigger Date will take effect even if small quantities of water seep through or around the boarded off section at the Cement Ditch and continue down the channel of Racetrack Creek.

2.2.3. If, due to natural conditions beyond the control of Objectors or CFC, the Trigger Date has not occurred by July 25th, CFC may release its storage water before the Trigger Date occurs, so long as the release is otherwise consistent with the terms of this Water Management Plan.

2.3. Within two days of the Trigger Date (or before the Trigger Date if CFC elects to release its storage water after July 25th in accord with Subsection 2.2.3) and prior to the release of CFC’s storage water, the Parties shall measure and record the quantity of water at each Monitoring Point (the “Measurement Date”).

2.3.1. The Parties shall record the stage and quantity of water available at each Monitoring Point on the Measurement Date and retain a record of those measurements in an electronic file format. The electronic file shall be available to and accessible by Objectors and CFC.

2.3.2. If, on the Measurement Date, the flow rate in any reach of Racetrack Creek downstream from the Cement Ditch is artificially high due to a temporary condition (including, but not limited to, a precipitation event or an irrigator not diverting water), the Parties agree to delay measurements at each affected Monitoring Point until stream conditions revert to the levels measured prior to the temporary condition or until the Parties agree upon an

estimated flow rate for each affected Monitoring Point to be applied in lieu of actual measurements for that irrigation season.

2.4. After the Parties have recorded measurements at each Monitoring Point, CFC may release its storage water from Racetrack Lake. The water must be released in a manner consistent with Section 3 of this Water Management Plan.

2.5. To ensure Objectors' water rights are not adversely impacted by CFC's use of water for instream flow, the following conditions shall apply throughout the period of CFC's stored water release:

2.5.1. At points of diversion at or upstream from the Cement Ditch, Objectors may continue their historical practice of diverting Racetrack Creek water according to priority.

2.5.2. At points of diversion downstream from the Cement Ditch, Objectors may continue to divert water at the same flow rate as was recorded at their respective Monitoring Points on the Measurement Date, as limited by their water rights and subject to the rules of priority.

2.5.2.1. The quantity of water each Objector may divert under Section 2.5.2 shall, therefore, be limited to the lesser of: (a) the maximum flow rate authorized by the Objector's Water Right for each point of diversion (subject to the rules of priority), or (b) the maximum flow rate recorded on the Measurement Date at the Monitoring Point for each point of diversion.

2.5.2.2. CFC may protect as instream flow that quantity of water remaining instream after Objectors have filled their direct flow rights in accordance with Section 2.5.2, as clarified by Subsection 2.5.2.1.

2.5.3. At least once per day, the Parties shall measure and record the quantity of water available at each Monitoring Point. The Parties agree the data may be recorded using continuous data loggers and may be uploaded to and stored in an online central database.

2.5.4. At least once per week, the water commissioner shall measure and record the flow rate at each Monitoring Point to cross-reference the water commissioner's observed measurements with those recorded by the data loggers.

2.5.5. At least once per day, the water commissioner shall measure and record the quantity of water diverted at each Objector's point of diversion. The water measurement records shall be labeled with sufficient specificity to track the stage and flow rate of water diverted each day at each point of diversion.

2.5.6. The water commissioner shall adjust as necessary each Objector's diversion to divert the quantity of water to which the Objector is entitled, as determined in Sections 2.5.1 and 2.5.2 of this Water Management Plan.

2.6. Any increase in the flow of Racetrack Creek not attributable to CFC's stored water release shall be available to Objectors and not to CFC. The Parties shall distinguish CFC's storage water from increases in direct flow as follows:

2.6.1. For each Monitoring Point, the Parties shall calculate the average flow rate in Racetrack Creek over the two days preceding the date with the increase in flow using the data recorded daily at that Monitoring Point.

2.6.2. Any quantity of water exceeding the average flow rate at each Monitoring Point, as calculated in Section 2.6.1, shall be distributed to the Objectors according to priority.

2.7. After CFC has released the full quantity of its stored water right (433.33 acre-feet as measured at the primary point of diversion and 390 acre-feet as measured at the Cement Ditch), CFC shall not be entitled to any water in Racetrack Creek or Racetrack Lake. When CFC has exhausted its storage release, water management on Racetrack Creek shall revert to the status quo and this Water Management Plan shall cease to apply until the following irrigation season in which CFC may again release storage water for instream use.

3. CFC together with its successors and assigns agrees to cooperate with the other storage water right holders (Ted Beck and Brad Anderson Farm Limited Partnership) and their heirs, successors, and assigns in determining when to release storage water.

3.1. CFC shall measure the volume and flow of storage water released into Racetrack Creek at the Cement Ditch. The total volume of storage water released by CFC at the Cement Ditch shall not exceed 390 acre-feet.

3.2. Unless the conditions in Subsection 3.3 are met, CFC must release its water in conjunction with the other storage water right holders and their heirs, successors, and assigns according to the following terms.

3.2.1. The storage water right holders shall agree upon a release date that is suitable for all Parties and release their storage water simultaneously and for the same period of time.

3.2.2. If the storage water right holders cannot agree on a release date and period of time that is suitable for all Parties, the storage water right holders using the storage water for its historical purpose of irrigation shall decide when and for how long the water is released or CFC may release its stored water independently, in accordance with Section 3.3.

3.3. CFC may release its stored water at a different time from that chosen by the remaining storage water right holders only if the following conditions are met.

3.3.1. CFC may not release its water at a rate greater than 8.33 cubic feet per second (CFS) at the primary point of diversion and 7.5 CFS at the secondary point of diversion (the Cement Ditch). Whatever quantity of water CFC releases at the primary point of diversion shall be decreased by 10% at the secondary point of diversion to account for shrinkage, according to historical practice.

3.3.2. CFC must, at its own expense, measure and monitor the volumes in Racetrack Lake to ensure sufficient water remains in the lake to satisfy the remaining storage water right holders' rights. CFC's methods shall include quantifying the stored volume of each storage water right before and during the release and quantifying outflow associated with any individual or coordinated release such that an electronic record of daily releases attributable to each storage water right holder is available.

3.3.3. If it becomes apparent the volume of water available in Racetrack Lake after CFC has begun its release will not be sufficient to satisfy the volume to which the remaining two storage water rights are entitled, CFC must *immediately* cease its release of storage water or reduce its rate of release to compensate for the difference in available volume to ensure the remaining storage water right holders are able to fill their storage rights.

3.3.4. If the volume of water available in Racetrack Lake after CFC begins an independent release is insufficient to satisfy all three stored water rights, CFC shall accept any losses and the remaining stored water right holders shall be entitled to the full amount of their stored water rights. (If CFC releases in conjunction with the other stored water rights, losses shall be allocated in proportion to each storage water right holder's interest in the total amount of the stored water.)

3.3.5. CFC alone shall be responsible for any increase in expense as a result of CFC's decision to release its stored water independently from the other stored water users. The parties' respective obligations for ongoing permitting, maintenance, and upkeep of Racetrack Lake that are not created, increased, or otherwise affected by CFC's changes in use of the stored water shall not be affected by this Water Management Plan.

3.3.6. Before initiating its first independent release, CFC must produce a written plan explaining how it will comply with Section 3.3 of this Water Management Plan and obtain written approval from all remaining storage water right holders. Any plan prepared under this subsection shall remain in

effect for subsequent irrigation seasons unless revoked in writing by all storage water right holders. Any changes to CFC's plan must also be approved in writing by all storage water right holders.

4. From the Trigger Date until CFC ends its storage water release, the water commissioner shall maintain (a) a detailed, daily record of the quantity of water diverted at each Objector's point of diversion according to Section 2.5.5 and (b) a record of the measurements taken each week at the Monitoring Points according to Section 2.5.4. If CFC elects an independent release, CFC shall collect, maintain, and make immediately available to Objectors, a daily record of storage volumes in, and releases from, Racetrack Lake, as explained in Subsection 3.3.2.

5. CFC shall pay all reasonable capital expenditures, maintenance costs, and operation costs associated with monitoring water in Racetrack Creek under the terms of this Water Management Plan, including, but not limited to, the cost of installing on or off-stream measurement devices, installing continuous data loggers, transmitting data, recording data, and maintaining a central database for electronic data. CFC shall pay any increases in the expense of hiring a water commissioner to distribute water on Racetrack Creek that are attributable to the added duty of distinguishing CFC's storage water from the remaining water rights on Racetrack Creek, including all costs associated with the water commissioner visiting points of diversion that were not previously administered by the water commissioner.

6. If CFC, at any time and for any reason, fails to pay all expenses and costs contemplated under Section 5 of this Water Management Plan, CFC's storage water shall be released from Racetrack Lake in conjunction with the remaining storage water right holders' storage water and shall be diverted into the lower reaches of Racetrack Creek at the Cement Ditch. After the storage water has been released into the lower reaches of Racetrack Creek at the Cement Ditch, the storage water shall not be distinguished or measured to separate CFC's stored water from the direct flow in Racetrack Creek. CFC agrees that, if the provisions of this section (Section 6) are implemented, CFC will not object to senior users downstream from the Cement Ditch diverting CFC's stored water where it is intermingled with the direct flow of Racetrack Creek.

7. The Parties shall divide the cost associated with the work performed by Objectors' expert in developing the methods for implementing this Water Management Plan as follows: CFC 50%; Objectors 50%. If the Parties engage Objectors' expert to adjust the methods in the future, the Parties agree to divide all future costs according to this Section.

8. CFC agrees not to challenge Objectors' use of Racetrack Creek for instream livestock water in accordance with historical practices, even if the water consumed by Objectors' livestock may be attributed to CFC's storage water release.

9. The Parties agree the data collected at the Monitoring Points may be recorded electronically and stored in a central database. Objectors and CFC shall each have unrestricted access to all data collected on Racetrack Creek pursuant to this Water Management Plan.

10. Upon execution of this Water Management Plan, CFC shall provide Objectors and Objectors' expert all available raw data within CFC's possession or of which CFC is aware that describe the hydrology of Racetrack Creek and the watershed. Specifically, CFC agrees to provide all flow measurements, gage installation data, or gage rating activities in the watershed, and any inflow-outflow water balance modeling done for Racetrack Creek. CFC also agrees to provide any discharge measurements in the watershed, stage-discharge relationship for any prior monitoring sites, raw stage data used in hydrograph development, calculated hydrographs, or any other related information or reports that may be useful in leveraging existing information or historical monitoring sites. CFC agrees to collaborate with Objector's expert and to provide any other information, data, or data analysis about the hydrology of Racetrack Creek that may be relevant to this Water Management Plan.

11. The terms of this Water Management Plan will be submitted to the DNRC as settlement of the objections before the Hearing Examiner in the present contested case proceeding. The Parties agree the terms of this Water Management Plan will be a condition of the withdrawal of Objectors' objections and a condition of the DNRC's approval of Application to Change Water Right No. 76G 30106785. The Parties agree this provision may be met by the DNRC adopting the Water Management Plan in whole rather than specifically identifying each term of this Water Management Plan as a condition of approval.

12. This Water Management Plan shall be provided to any water commissioner appointed to distribute water on Racetrack Creek.

13. This Water Management Plan shall remain in effect so long as CFC's temporary change to instream use, and any renewals thereof, remain in effect and authorized by the DNRC. This provision notwithstanding, CFC reserves the right to seek amendment or termination of the Water Management Plan if actions or challenges by other water users (not party to this Water Management Plan) materially impact CFC's ability to use its water for instream flow purposes. Any amendment or termination must comply with Sections 21 and 22 of this Water Management Plan.

14. The Parties agree, in any action to enforce this Water Management Plan, the remedy of specific performance shall be a preferred, but not exclusive, remedy.

15. The Parties shall pay their own attorney's fees incurred in the preparation of this Water Management Plan.

16. In the event of an action to enforce or dispute arising under, or relating to, this Water Management Plan, the prevailing party shall be entitled to recover all reasonable attorney and paralegal fees, costs, and expenses incurred as a result of the underlying dispute or action.

17. This Water Management Plan embodies the entire agreement between the Parties and supersedes all prior negotiations, understandings, and agreements, if any, relating to Application to Change Water Right No. 76G 30106785.


18. The Parties agree this Water Management Plan does not create any new legal rights to water or otherwise alter or diminish any existing rights to water.

19. The terms and conditions of this Water Management Plan shall inure to the benefit of, and be binding upon, the heirs, legal representatives, successors, and assigns of the Parties.

20. This Water Management Plan may be executed in one or more counterparts, which taken together shall constitute one and the same document.

21. This Water Management Plan may be amended, modified, supplemented, or terminated only by an instrument in writing executed by CFC and each Objector.

22. CFC and Objectors agree to all of the above until such time that a superseding agreement is executed by the Parties.

  
\_\_\_\_\_  
Karen Knudsen, Executive Director  
Clark Fork Coalition

Date: 8/17/2020

\_\_\_\_\_  
Evan Johnston, General Partner  
2-Bar Ranch Limited Partnership

Date: \_\_\_\_\_

\_\_\_\_\_  
Michael Simpson, President  
5 Rockin' MS Angus Ranch, Inc.

Date: \_\_\_\_\_

\_\_\_\_\_  
Dorothy Beck Peterson, Managing Member  
Melvin R. Beck Ranch, LLC

Date: \_\_\_\_\_

16. In the event of an action to enforce or dispute arising under, or relating to, this Water Management Plan, the prevailing party shall be entitled to recover all reasonable attorney and paralegal fees, costs, and expenses incurred as a result of the underlying dispute or action.

17. This Water Management Plan embodies the entire agreement between the Parties and supersedes all prior negotiations, understandings, and agreements, if any, relating to Application to Change Water Right No. 76G 30106785.

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\_\_\_\_\_  
Karen Knudsen, Executive Director  
Clark Fork Coalition

Date: \_\_\_\_\_

  
Evan Johnston, General Partner  
2-Bar Ranch Limited Partnership

Date: 8/18/2020

\_\_\_\_\_  
Michael Simpson, President  
5 Rockin' MS Angus Ranch, Inc.

Date: \_\_\_\_\_

\_\_\_\_\_  
Dorothy Beck Peterson, Managing Member  
Melvin R. Beck Ranch, LLC

Date: \_\_\_\_\_



16. In the event of an action to enforce or dispute arising under, or relating to, this Water Management Plan, the prevailing party shall be entitled to recover all reasonable attorney and paralegal fees, costs, and expenses incurred as a result of the underlying dispute or action.

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\_\_\_\_\_  
Karen Knudsen, Executive Director  
Clark Fork Coalition

Date: \_\_\_\_\_

\_\_\_\_\_  
Evan Johnston, General Partner  
2-Bar Ranch Limited Partnership

Date: \_\_\_\_\_

  
\_\_\_\_\_  
Michael Simpson, President  
5 Rockin' MS Angus Ranch, Inc.

Date: 9/29/2020

\_\_\_\_\_  
Dorothy Beck Peterson, Managing Member  
Melvin R. Beck Ranch, LLC

Date: \_\_\_\_\_

16. In the event of an action to enforce or dispute arising under, or relating to, this Water Management Plan, the prevailing party shall be entitled to recover all reasonable attorney and paralegal fees, costs, and expenses incurred as a result of the underlying dispute or action.

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\_\_\_\_\_  
Karen Knudsen, Executive Director  
Clark Fork Coalition


Date: \_\_\_\_\_

\_\_\_\_\_  
Evan Johnston, General Partner  
2-Bar Ranch Limited Partnership

Date: \_\_\_\_\_

\_\_\_\_\_  
Michael Simpson, President  
5 Rockin' MS Angus Ranch, Inc.

Date: \_\_\_\_\_

  
\_\_\_\_\_  
Dorothy Beck Peterson, Managing Member  
Melvin R. Beck Ranch, LLC

Date: 8-25-20

Monica Anderson

Monica Anderson, General Partner  
Brad Anderson Farm Limited Partnership

Date: 8/18/2020

Ted R. Beck  
Ted R. Beck

Date: 8/19/20

Daniel T. Bersanti

Daniel T. Bersanti, Managing Member  
Western Montana Land and Livestock, LLC

Date: 8/18/2020

Daniel T. Bersanti

Daniel T. Bersanti

Date: 8/18/2020

Laurie J. Bersanti

Laurie J. Bersanti

Date: 8/18/2020

Vanisko Ranches Inc.  
James P. Berg Pres  
James P. Berg, President  
Vanisko Ranches, Inc.

Date: 8-18-2020

James P. Berg  
James P. Berg

Date: 8-18-2020

Charla J. Berg  
Charla J. Berg

Date: 8-18-2020

Kaehl P. Berg  
Kaehl P. Berg

Date: 8-18-2020

**RECEIVED**

SEP 14 2021

MONTANA DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION  
HEARINGS UNIT

1 Andrew Gorder  
140 S. 4th Street West, Unit 1  
2 Missoula, Montana 59801  
406.542-0539 ext. 202  
3 andrew@clarkfork.org  
4 *Attorney for Applicant, Clark Fork Coalition*

5 **BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND**  
6 **CONSERVATION OF THE STATE OF MONTANA**

7 In the Matter of Change Application  
8 No. 76G 30106785,

**Notice of Settlement**

9 Clark Fork Coalition, Applicant,  
10

11 Pursuant to A.R.M. 36.12.207, the following Parties: Clark Fork Coalition and  
12 Modesty Creek Stock Ranch, LLC, hereby give notice that they reached a settlement to  
13 resolve the objections of Modesty Creek Stock Ranch. A copy of the executed  
14 Settlement Agreement has been provided to the Hearings Examiner.

15  
16 Respectfully submitted this 14<sup>th</sup> day of September, 2021.

17 By: \_\_\_\_\_

Andrew Gorder  
*Attorney for Applicant*

1 **CERTIFICATE OF MAILING**

2 This is to certify that the foregoing was duly served upon the following at the  
3 email and postal addresses below, by first-class mail postage-prepaid, the 17<sup>th</sup> day of  
September, 2021 as follows:

4 JAMIE PRICE, HEARINGS ASSISTANT [EMAIL AND MAIL]  
5 DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
6 1424 9TH AVE.  
HELENA, MT 59620-1601

7 CALLI J MICHAELS [EMAIL]  
8 BLOOMQUIST LAW FIRM PC  
PO BOX 1418  
9 DILLON, MT 59725 1418

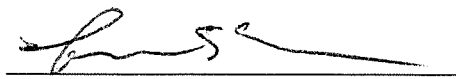
10 GRAHAM COPPES [EMAIL]  
11 FERGUSON LAW OFFICE PLLC  
PO BOX 8359  
MISSOULA, MT 59807

12 MARTIN J DIPPOLD [EMAIL]  
13 301 RANCHVIEW LN  
DEER LODGE, MT 59722 9457

14 DAN KELLEY [EMAIL]  
15 DEBORAH KELLEY  
1869 WILLOW RD  
DEER LODGE, MT 59722 9726

16 MARLA A HANSON [MAIL]  
17 ROGER L HANSON  
1296 WILLOW RD  
18 DEER LODGE, MT 59722 9742

19 PAMELA B HIRSCH [MAIL]  
20 RICK A HIRSCH  
3257 YELLOWSTONE TRAIL  
DEER LODGE, MT 59722 9794

21  
22   
23 By: Andrew Gorder

**Settlement Agreement Between  
Clark Fork Coalition and Modesty Creek Stock Ranch LLC**

On November 4, 2016, the Clark Fork Coalition (CFC) submitted Application to Change Water Right No. 76G 30106785 to temporarily change Water Right No. 76G 91008-00 from irrigation to instream flow. The Montana Department of Natural Resources and Conservation (DNRC) issued a Preliminary Determination to Grant CFC's application on July 19, 2019. The DNRC provided public notice to interested parties. Modesty Creek Stock Ranch LLC (Modesty Creek) objected to CFC's application. The DNRC found the objection valid.

CFC and Modesty Creek (the Parties) have agreed to the following terms to resolve Modesty's objections without the expending the time, money and resources required for a contested case hearing. Therefore, in consideration for the mutual promises made in this Agreement, the Parties agree as follows:

- 1) CFC owns water right 76G 91008-00, which represents the right to store a volume of 433.33 Acre-Feet of water in Racetrack Lake;
- 2) Modesty Creek owns certain water rights, including water rights 76G 90446, 76G 90447, and 76G 90483 (which represent the right to divert water from Racetrack Creek), and 76G 90448 (which represents the right to store water in Thornton Lake and convey it down Racetrack Creek).
- 3) Both CFC and Modesty Creek's storage rights are released into the natural channel of Racetrack Creek as needed during the irrigation season and conveyed to secondary points of diversion downstream.
- 4) Historically, the water commissioner on Racetrack Creek has managed these storage releases to ensure that overflow from is made available to downstream users with rights to the natural flow of Racetrack Creek. The storage rights have also historically been subject to a 10% conveyance loss to reflect natural losses that accrue during the period of release.
- 5) CFC's Change Application seeks to temporarily change the use of its water right from irrigation to instream flow for the benefit of the fishery in Racetrack Creek.
- 6) To avoid adverse impacts from CFC's change, Modesty Creek seek to ensure that the status quo is maintained with respect to the application of conveyance losses to CFC's storage right.
- 7) The Parties agree that the DNRC's Preliminary Determination to Grant CFC's change limits CFC's useable volume of water right 76G 91008-00 to 390 Acre-Feet at or below its historical point of diversion (i.e. the Cement Ditch). See *Preliminary Determination to Grant, Order Following Remand* at 6 (July 19, 2019). Thus, the DNRC's Determination incorporates and is contingent upon the 10% conveyance loss applicable to CFC's water right.

- 8) CFC further agrees that the 10% conveyance loss will continue to be applied to its releases of stored water from Racetrack Lake in accordance with historical practices. CFC agrees that its useable is limited to no more than 390 Acre-Feet below the Cement Ditch on Racetrack Creek.
- 9) CFC further agrees that it will not make call on Modesty Creek's water rights, or otherwise seek to enjoin its diversions.
- 10) The Parties agree that after CFC has released the full quantity of its stored water right (433.33 acre-feet as measured at the primary point of diversions and 390 acre-feet as measured at the Cement Ditch), CFC shall not be entitled to any water in Racetrack Creek or Racetrack Lake.
- 11) CFC agrees that Modesty Creek shall have a right to be involved in the design of a new independent control/measuring device at the Cement Ditch for the delivery of CFC's water right, such that Modesty Creek's existing headgate (at the Cement Ditch) will not be the control device for the delivery of CFC's water downstream.
- 12) CFC agrees that it shall install and operate its own independent control device and measuring device for delivery of its water right downstream. Any such device described both in ¶11 and 12, shall be approved by DNRC (or another competent body) as sufficient for this purpose.
- 13) While CFC intends to maximize its usable volume (390 Acre-Feet) for instream use below the Cement Ditch, CFC recognizes and agrees that the amount of water it will be able to realize at the confluence of Racetrack Creek and the Clark Fork River is unknown.
- 14) Upon execution of this Agreement, Modesty Creek's objection to CFC's Change Application will be deemed withdrawn.
- 15) The terms of the executed Agreement will be submitted to the DNRC as settlement of the objections before the Hearing Examiner in the present contested case proceeding.
- 16) This Agreement shall be provided to any water commissioner appointed to distribute water on Racetrack Creek.
- 17) This Agreement shall remain in effect so long as CFC's temporary change to instream use, and any renewals thereof, remain in effect and authorized by the DNRC.
- 18) The Parties agree, in any action to enforce this Agreement, the remedy of specific performance shall be a preferred, but not exclusive, remedy.
- 19) The Parties shall pay their own attorney's fees incurred in the preparation of this Agreement.

- 20) In the event of an action to enforce or dispute arising under, or relating to, this Agreement, the prevailing party shall be entitled to recover all reasonable attorney and paralegal fees, costs, and expenses incurred as a result of the underlying dispute or action.
- 21) This Agreement embodies the entire agreement between the Parties and supersedes all prior negotiations, understandings, and agreements, if any, relating to CFC's Change Application.
- 22) The terms and conditions of this Agreement shall inure to the benefit of, and be binding upon, the heirs, legal representatives, successors, and assigns of the Parties.
- 23) This Agreement may be amended, modified, or supplemented only by an instrument in writing executed by CFC and Modesty Creek.
- 24) The Parties agree to all of the above until such time that a superseding agreement is executed by the Parties.

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**SIGNATURES**

*Karen Knudsen*

Clark Fork Coalition  
By: Karen Knudsen

Date: 8/30/21

Its:

*Dave Beck*  
Modesty Creek Stock Ranch, LLC  
By: Dave Beck

Date: 8/24/21

*Managers*

Its: