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

*Bik/MCP  
Augmentation*

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IN THE MATTER OF APPLICATION NO. 41H )  
30021139 TO CHANGE WATER RIGHT NOS. )  
41H 12231-00 AND 41H-12232-00 BY UTILITY )  
SOLUTIONS LLC )

FINAL ORDER

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6 Pursuant to the Montana Water Use Act and to the contested case provisions of the  
7 Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-  
8 307, a hearing was held on December 6, 2007, in Bozeman, Montana, to determine whether an  
9 authorization to change a water right should be issued to Utility Solutions, LLC, [hereinafter  
10 referred to as "Applicant"] for the above applications under the criteria set forth in Mont. Code  
11 Ann. § 85-2-402(2). All water right claims involved in the change application were listed in the  
12 required public notice. The Water Right Claims proposed for change are Claim Nos. 41H 12231-  
13 00 and 41H 12232-00.

14 **APPEARANCES**

15 Applicant Utility Solutions, LLC, appeared at the hearing by and through counsel, Matt  
16 Williams and Don MacIntyre. Marty Gagnon, P.E., Morrison-Maierle, Inc.; Dr. Gerald Westesen;  
17 Dr. Michael Nicklin, P.E., Nicklin Earth & Water, Inc.; David Pruitt; Milo Todd; and Gerald  
18 Pacovsky, were called to testify on behalf of the Applicant. In addition, Dr. Gerald Westesen;  
19 Scott Compton, Manager, DNRC Bozeman Water Resources Regional Office; and Barbara  
20 Campbell, part owner of Utility Solutions, LLC were called to provide rebuttal testimony for the  
21 Applicant.

22 Objector Roselee Faust, Objectors Craig and Angela Airhart, Objector Jerry Ritter,  
23 Objector Charles Brodie, Objectors Debra Walberg and George Metcalfe, Objectors Paul  
24 Shennum and Sandra McManus, Objector James Lohmeier, Objector West Gallatin Canal Co.,  
25 and Objector Montana River Action Network [hereafter Objector Group] appeared at the hearing  
26 by and through counsel, Art Wittich. Larry Cawfield, P.E., Senior Engineer; Tetra Tech, Inc.;  
27 James Maus, Hydrologist/Hydrogeologist, Tetra Tech, Inc.; Roselee Faust; Paul Shennum; Dick  
28 DeBernardis, West Gallatin Canal Co.; and Joe Gutkoski, President, Montana River Action  
29 Network, testified for the Objector Group. In addition, Larry Cawfield, Senior Engineer, Tetra

1 Tech, Inc., provided rebuttal testimony for the Objector Group. Objector Clinton Cain appeared  
2 in his own behalf.

3 Russell Levens, Department of Natural Resources and Conservation (DNRC)  
4 Hydrogeologist and Staff Expert, was called to testify by the Objector Group.

### 5 EXHIBITS

6 Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted  
7 into the record to the extent noted below. Except when evidentiary objections are sustained,  
8 prefiled exhibits (filed with prefiled direct testimony) will be part of the record. Exhibit numbers  
9 containing an "H" are exhibits offered at hearing as opposed to those submitted with pre-filed  
10 testimony. (e.g., A1 or AH1). Applicant offered seven exhibits for the record. The Objectors  
11 offered four exhibits. The Hearing Examiner accepted and admitted into evidence Applicant's  
12 Exhibit Nos. A1, A2, A7, A8; and AH1-AH3. Exhibit Nos. A3-A6 were not offered.

13 **Applicant's Exhibit A1** is an 8½" x 11" page containing two maps. The page is entitled  
14 Project features/Simulation Model Domain, Utility Solutions, prepared by Nicklin Earth & Water,  
15 dated November 8, 2005. (Nicklin Pre-filed testimony)

16 **Applicant's Exhibit A2** is an undated 11" x 17" document entitled Simulated Gain For  
17 Reach With Recharge Basin Augmentation, Combined Pumping, Rapid Infiltration Basin, And  
18 Infiltration Basin – Recharge Change No. 41H 30021139 – Last Year Of 16 Year Simulation,  
19 prepared by Nicklin Earth & Water. (Nicklin Pre-filed testimony)

20 **Applicant's Exhibit A7** is a one-page 11" x 17" map entitled Wastewater System  
21 Improvements Service Area 4, prepared by Morrison Maierle, Inc., and dated July 2006.  
22 (Gagnon Pre-filed testimony)

23 **Applicant's Exhibit A8** is an 11" x 17" one-page map entitled Historic Place of Use  
24 Exhibit dated January 27, 2006, prepared by Morrison & Maierle, Inc. (Gagnon Pre-filed  
25 testimony)

26 **Applicant's Exhibit AH1** is an 11" x 17" one-page map entitled Historic Place of Use  
27 Exhibit dated January 27, 2006, prepared by Morrison & Maierle, Inc.

28 **Applicant's Exhibit AH2** is a six-page copy of two documents regarding the Gallatin  
29 River, Stream Reach #2 and #3, 11" x 17" one-page map entitled Utility Solutions Infrastructure  
30 2006 prepared by Morrison & Maierle, Inc., dated August 2006.

31 **Applicant's Exhibit AH3** is one-page containing 3 photographs of the disposal bed  
32 covers.



1 clarified that the withdrawal was for her only and not Objector Paul Shennum whose name also  
2 appears on the objection filed with the Department of Natural Resources and Conservation  
3 (Department or DNRC). James Lohmeier and Sandra McManus are no longer parties in this  
4 matter.

5 The record was left open following the hearing for filing of simultaneous written  
6 responses to the prehearing memorandums filed by the Parties, and written closing statements.  
7 The record was left open for briefs filed by postmark of December 13, 2006. Briefs were  
8 received from the Applicant and the Objector Group.

9 Applicant requested that his cross-examination of Mr. James Maus in the hearing on  
10 Application for Water Use Permit No. 41H 30019215 be included in the record of this  
11 proceeding by reference and incorporation. Without objection, Mr. Williams' cross-examination  
12 of witness James Maus is so incorporated into the record for this proceeding.

13 Applicant's counsel objected that Larry Cawfield's rebuttal testimony of Dr. Nicklin's pre-  
14 filed testimony regarding monitoring was surrebuttal testimony and beyond the scope of  
15 Applicant's rebuttal witness' testimony. Objector Group's counsel responded that there is no  
16 other opportunity to "rebut" Dr. Nicklin's pre-filed testimony, so it must come as rebuttal. The  
17 Hearing Examiner took the objection under advisement and allowed the witness to continue.  
18 The Hearing Examiner **SUSTAINS** the objection. Objector Group had the opportunity to counter,  
19 or rebut, Dr. Nicklin's (deadline of October 11, 2006) pre-filed testimony when they submitted  
20 their pre-filed testimony (deadline of October 20, 2006) in the pre-filed testimony, which was the  
21 purpose of the staggered deadlines.

22 Objector Clinton Cain, after a sustained objection to his cross-examination of Applicant's  
23 last witness, informed the Hearing Examiner that he was leaving the hearing. After a previous  
24 objection to his cross-examination of the witness, the Hearing Examiner offered an explanation  
25 of the objection and his ruling, to assist him in future cross-examination. When Objector Cain  
26 was not allowed to examine the witness as he wanted without objection, he left the hearing.  
27 Objector Cain did not return prior to the close of the hearing to present his case in chief. The  
28 Hearing Examiner notes that Objector Cain did not attend the First Prehearing Conference  
29 where procedural questions regarding the hearing process are discussed to prevent just this  
30 type of situation. Had Objector Cain attended the prehearing conference, the Hearing Examiner  
31 would have informed him that if he doesn't feel comfortable with the hearing procedure, and that  
32 he understands and can follow the requirements of the hearing, he might consider retaining an  
33 attorney to help him in this matter. The Hearing Examiner would have also informed Objector

1 Cain that this does not mean that he cannot represent himself in this hearing, but that not  
2 having counsel will not grant him any favors over those with counsel. The Hearing Examiner  
3 hereby finds Objector Cain in default and his interest in this proceeding is dismissed. Mont.  
4 Admin. R. 36.12.208(1). Objector Cain is no longer a Party in this matter.

5 The Hearing Examiner, having reviewed the record in this matter and being fully advised  
6 in the premises, does hereby make the following:

7 **FINDINGS OF FACT**

8 **General**

9 1. Application To Change A Water Right No. 41H 30021139 in the name of Utility  
10 Solutions, LLC, and signed by Barbara Campbell was filed with the Department on March 28,  
11 2006. (Department file)

12 2. A public notice describing facts pertinent to this application was published in the  
13 *Bozeman Daily Chronicle*, a newspaper of general circulation on July 8 and 11, 2006, and was  
14 mailed to persons listed in the Department file on July 6, 2006. (Department file)

15 3. The Environmental Assessment (EA) prepared by the Department for this application,  
16 dated June 22, 2006, was reviewed and is included in the record of this proceeding.  
17 (Department file)

18 4. Applicant intends to remove 22 acres from irrigation and change the water consumed by  
19 the 22 acres of irrigated alfalfa to an augmentation purpose to offset any depletions to the West  
20 Gallatin River from exercising the use of Water Use Permit No. 41H 30019215. (Department file,  
21 testimony of Marty Gagnon)

22 5. The Water Rights proposed for change by Applicant as described in Mr. Gagnon's pre-  
23 filed direct testimony and his testimony at hearing conflict with the water right numbers and  
24 corresponding flow rates found in the water right abstracts in the Department file. The pre-filed  
25 testimony, hearing testimony, and Exhibit No. OH2 indicate that Water Right Claim No. 41H  
26 12231-00 has a flow rate of 1.25 cubic feet per second (cfs) and Water Right Claim No. 41H  
27 12232-00 has a flow rate of 1.18 cfs. However, the water right abstracts in the Department file  
28 indicate Water Right Claim No. 41H 12231-00 has a flow rate of 1.18 cfs and Water Right Claim  
29 No. 41H 12232-00 has a flow rate of 1.25 cfs. Further, Objectors Exhibit OH2 suggests that  
30 20% of 1.18 cfs is 0.034 cfs (consumed) + 0.266 cfs (remainder). It is not. Twenty percent of  
31 1.18 is 0.236. The Hearing Examiner understands from testimony in the record that the numbers

1 derived by the witness for testimony were derived from the ratio of the 22 acres to be removed  
 2 from irrigation to the 110 acres historically irrigated, and the ratio to each of the two water rights  
 3 to the total flow<sup>1</sup> of the rights – 41H 12231 ≈ 49% and 41H 12232 ≈ 51%. The Hearing Examiner  
 4 sees that the witness has made arithmetic and scrivener's errors in his testimony. The Hearing  
 5 Examiner sees that Mr. Gagnon's Pre-filed Testimony and Objector's Exhibit OH2 should read  
 6 as follows:

<b>Objector's Exhibit OH2 – [ ‡ = Revised by Hearing Examiner]</b>			
<b>Rt #</b>	<b><del>231</del> <u>232</u> ‡</b>	<b><del>232</del> <u>231</u> ‡</b>	<b>[total]</b>
<b>Total</b>	1.25	1.18	[2.43]
<b>- 20% aug</b>	$1.25 * .2 = .25$	$1.18 * .2 = 0.236 ‡$ [not 0.266]	$0.236 + 0.25 = .486$
<b>Aug flow<sup>2</sup></b>	$(1.25 / 2.43) * 0.07 ≈$ .036 cfs	$(1.18 / 2.43) * 0.07 ≈$ 0.034 cfs	.07
<b>Remaining in River</b>	$0.25 - .036 = 0.214$	$0.236 - .034 = 0.202 ‡$	$0.486 - 0.07 = 0.416 ‡$
<b>Remalnder [for remaining 88 acres]</b>	$1.25 - 0.25 = 1.00$	$1.18 - 0.236 = 0.944 ‡$ [not 0.885]	$1.944 ‡$ [not 1.88]

7  
 8 The Hearing Examiner also sees that the 7% (0.005 cfs) "ditch loss" to get the  
 9 augmentation water through the Beck and Border Ditch is not included in Mr. Gagnon's Pre-filed  
 10 Testimony, Paragraph 19; Objector's Exhibit OH2; or in the above tabulation. The Department  
 11 file and the non-numeric hearing testimony clearly describes Applicant's intent – to divert 0.07  
 12 cfs into and from the Beck and Border Ditch, and to divert 0.005 cfs into the Beck and Border  
 13 Ditch to cover the ditch loss between the headgate at the West Gallatin River, and the headgate  
 14 from the Beck and Border Ditch into the augmentation gallery. Thus, the above tabulation must  
 15 include and apportion between the two rights the 0.005 cfs ditch loss as well as the  
 16 augmentation flow. This Hearing Examiner calculates and finds that Water Right Claim No. 41H

<sup>1</sup> Total = 1.18 cfs + 1.25 cfs = 2.43 cfs; Ratios = 1.18 / 2.43 = 0.486, ≈49% and 1.25 / 2.43 = 0.514, ≈ 51%

<sup>2</sup> The augmentation flow does not include the 7% ditch loss of .005 cfs mentioned in the application.

1 12231-00 shall be charged 0.00243 cfs for ditch loss, and Water Right Claim No. 41H 12232-00  
 2 shall be charged 0.00257 cfs for ditch loss in accord with the intent expressed in the Application.  
 3 (See Footnote 1 on page 6) The following tabulation summarizes the Hearing Examiner's  
 4 findings:

Hearing Examiner [OH2] Tabulation Including Ditch Loss			
Rt #	<del>234</del> <u>232</u>	<del>232</del> <u>231</u>	[total]
<b>Total</b>	1.25	1.18	[2.43]
<b>- 20% aug</b>	$1.25 * .2 = 0.25$	$1.18 * .2 = 0.236$ [not 0.266]	$0.236 + 0.25 = 0.486$
<b>Aug flow<sup>3</sup></b>	$(1.25 / 2.43) * 0.075 \approx$ 0.0386 cfs	$(1.18 / 2.43) * 0.075 \approx$ 0.0364 cfs	<u>.075</u>
<b>Remaining In River</b>	$0.25 - .0386 = 0.214$ <u>0.2114</u>	$0.236 - .0364 = 0.202$ <u>0.1996</u>	$0.486 - 0.075 = 0.416$ <u>0.411</u>
<b>Remalnder [80% for remaining 88 acres]</b>	$1.25 - 0.25 = 1.00$	$1.18 - 0.236 = 0.944$ [not 0.885]	1.944 [not 1.88]

5  
 6 (Department file, testimony of Marty Gagnon)

7 6. The water rights to be changed are: 1) Water Right Claim No. 41H 12231-00 from the  
 8 West Gallatin River for 1.18 cfs up to 220 acre-feet diverted into the Beck and Border Ditch to  
 9 irrigate 110 acres with a period of appropriation of April 1 to October 31 and a priority date of  
 10 July 1, 1890, and 2) Water Right Claim No. 41H 12232-00 from the West Gallatin River for 1.25  
 11 cfs up to 220 acre-feet diverted into the Beck and Border Ditch to irrigate overlapping 110 acres  
 12 (same 110 acre place of use as Water Right Claim No. 41H 12231-00) with a period of  
 13 appropriation of April 1 to October 31 and a priority date of July 1, 1890. (Department file)

14 7. In Application No. 41H 30021139, Applicant proposes to change 20% each of Water  
 15 Right Claim Nos. 41H 12231-00 and 41H 12232-00 up to 9.73 acre-feet of water per year from  
 16 irrigation to augmentation. Twenty-two acres of the 110 historically irrigated located in the

<sup>3</sup> The augmentation flow includes the 7% ditch loss of .005 cfs mentioned in the application.

1 E½NE¼ of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana will be  
2 removed from irrigation. These water rights were historically diverted through the Beck and  
3 Border Ditch. 9.73 acre-feet is the amount of water Applicant calculated to not return to the  
4 West Gallatin River when exercising Water Use Permit No. 41H 30019215. This augmentation  
5 is proposed to offset these depletions of water to the West Gallatin River from exercising the 9  
6 wells for the use proposed in Water Right No. 41H 30019215. Of the historically consumed  
7 irrigation volume from irrigation of 22 acres which is 11.6 acre-feet, 9.73 acre-feet is the total  
8 amount that would be diverted into the augmentation gallery. A flow rate of .075 cfs (See table  
9 on page 7) must be diverted at Beck and Border Ditch to get 9.73 acre-feet to the gallery  
10 diversion from the Beck and Border Ditch. Diversion to augmentation use would occur from May  
11 1 to July 10, inclusive. The remainder of the water that was historically diverted to, but not  
12 consumed by, the 22 acres (0.411 cfs: See table on page 7), would be left in the West Gallatin  
13 River to augment the reach between the headgate at the Beck and Border Ditch and the point  
14 where the West Gallatin River leaves Section 2 and Section 3, Township 2 North, Range 4 East.  
15 This River reach is located downstream of the Beck and Border Ditch in the NW¼ SW¼ SE¼  
16 Section 14 within Section 14, NE¼ NE¼ Section 15, E½ Section 10, W½ NW¼ Section 11, E½  
17 Section 3, W½ Section 2, all in Township 2 North, Range 4 East, Gallatin County, Montana.  
18 (Department file including General Abstract filed in accord with Mont. Admin. R. 36.12.1901(7),  
19 testimony of Marty Gagnon, Dr. Gerald Westesen)

#### 20 Adverse Effect

21 8. Applicant intends to change the water consumed by 22 acres of irrigated alfalfa to an  
22 augmentation purpose to offset any depletions to the West Gallatin River from exercising the  
23 use of Water Use Permit No. 41H 30019215. (See Hearing Examiner Tabulation Including Ditch  
24 Loss on page 7) The augmentation water (0.075 cfs) will continue to be diverted into the Beck  
25 and Border Ditch. This flow rate includes an amount to cover the 7% ditch loss (0.005 cfs) and  
26 the 0.07 cfs determined necessary to mound a sufficient amount of water in the aquifer between  
27 May 1 and July 10 to cause flows from the aquifer that will offset year-long depletions to the  
28 West Gallatin River from exercising the year-long use proposed under Water Use Permit  
29 Application No. 41H 30019215. The amount of the depletions, 9.73 acre-feet, was determined *In*  
30 *the Matter of Beneficial Water Use Permit Application No. 41H 30019215*. At a new headgate in  
31 the Beck and Border Ditch, 0.07 cfs up to 9.73 acre-feet will be diverted from the Ditch into an  
32 augmentation gallery specifically designed for that purpose. The remaining portion, 0.4111 cfs,

1 of the water historically consumed by the 22 acres removed from irrigation<sup>4</sup> will no longer be  
2 diverted and will be left in the West Gallatin River. (Department file, testimony of Marty Gagnon,  
3 Dr. Nicklin)

4 9. Mr. Gagnon and Mr. Compton testified at hearing that the place of use of that portion of  
5 the water rights being left in the river is not being changed or abandoned by the Applicant. This  
6 contradicts information found in the Department file (General Abstracts filed in accord with Mont.  
7 Admin. R. 36.12.1901(7)) as described in Finding of Fact No. 7 above. For the portion of the  
8 water left in the West Gallatin River to be returned to the reach where it historically returned, it  
9 must be protected through the reach described in Finding of Fact No. 7 above. The place of use  
10 of the portion of the water rights historically diverted but not consumed must be protected to  
11 return to (i.e., changed to augment) the river reach where it was historically tributary as  
12 described in the water right abstracts provided with the Application. To protect this water the  
13 Hearing Examiner finds the place of use for this water historically diverted but not consumed is  
14 being changed as shown on the Application No. 41H 30021139 To Change Water Right Nos.  
15 41H 12231-00 And 41H-12232-00 By Utility Solutions LLC. (Department file, testimony of Marty  
16 Gagnon, Scott Compton)

17 10. Objectors argue that because there is little proof of actual use of the water rights being  
18 changed after they were sold by Mr. Pacovsky (previous owner) about 1993, they are  
19 abandoned. Ms. Barbara Campbell for the Applicant did not testify that the water rights were  
20 used to irrigate the 22 acres after 2003 when Applicant became a successor to the water rights.  
21 No party provided evidence of what happened to the water under these water rights during the  
22 period 1993 to 2003. (Department file, testimony of Gerald Pacovsky, Barbara Campbell, Joe  
23 Gutkoski, Richard DeBernardis)

24 11. Retiring 22 acres of the 110 historically irrigated acres retires 20% ( $22 / 110 = 0.2 =$   
25 20%) of the claimed water rights, and leaves the balance of the rights to irrigation use (80%) as  
26 they now exist. Only a portion of the water applied to the 22 acres was consumed. The volume  
27 consumed by the historic irrigation of the 22 acres is 11.6 acre-feet, which exceeds the 9.73  
28 acre-feet consumed by Water Use Permit Application No. 41H 30019215. Applicant chose the  
29 time frame of May 1 through July 10, inclusive, a period of 71 days, to divert water into the  
30 augmentation gallery. A flow rate of 0.07 cfs for 71 days equates to a volume of at least 9.73  
31 acre-feet. (Department file, testimony of Marty Gagnon, Dr. Westesen)

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<sup>4</sup>0.2114 cfs (#12231) + 0.1996 cfs (#12232) for a total from both rights of 0.4111 cfs.

1 12. The ditch loss between the Beck and Border Ditch headgate, on the West Gallatin River,  
2 and the new headgate, from the Beck and Border Ditch to the augmentation gallery, is 7% of the  
3 flow rate. Here, that amount is 0.005 cfs. Thus, future diversions into the Beck and Border Ditch  
4 for the augmentation purpose must include the 0.005 cfs for a total augmentation diversion of  
5 0.075 cfs (for 71 days the Hearing Examiner calculates this to be 10.56 acre feet). Applicant  
6 states they will confine their diversions to this volumetric measure (i.e., augmentation plus ditch  
7 loss) within this period of use. The augmentation flow diverted from the Beck and Border Ditch,  
8 0.07 cfs up to 9.73 acre-feet, would be diverted for augmentation purposes into an  
9 augmentation gallery (or, recharge basin) located in the NW¼NE¼NE¼, Section 11, Township  
10 2 South, Range 4 East. Of the augmentation water diverted into the Beck and Border Ditch,  
11 Water Right Claim No. 41H 12231-00 would contribute 0.0364 cfs (49%), and Water Right  
12 Claim No. 41H 12232-00 would contribute 0.0386 cfs (51%) of this 0.075 cfs, including ditch  
13 loss. The augmentation water diverted into the augmentation gallery will return to ground water  
14 and eventually to the West Gallatin River in the reach of the River 3 miles south and 4 miles  
15 north of Norris Road. The remainder of the historic diversion to the 22 acres but not consumed  
16 on the 22 acres removed from irrigation, will not be diverted into the Beck and Border Ditch, but  
17 instead remain in the West Gallatin River to flow to the reach of the West Gallatin River below  
18 the Beck and Border Ditch headgate. (Department file, testimony of Marty Gagnon, Dr. Nicklin,  
19 Exhibit A2, OH2, Table on page 7)

20 13. The change will be implemented to its full extent immediately following the issuance of  
21 an authorization to change. Objector Shennum argued that more water needs to be augmented  
22 in the early years of an augmentation plan to account for delay before equilibrium is established.  
23 Dr. Nicklin estimates that the impacts of implementing the augmentation plan in May will reach  
24 the West Gallatin River by July and August. Dr. Nicklin testified that the aquifer system will  
25 achieve 90% equilibrium in the first year, and after eight (8) years of use of the augmentation  
26 gallery, equilibrium between depletion and augmentation will be achieved. Applicant estimates it  
27 will take ten years to fully appropriate the water applied for under Beneficial Water Use Permit  
28 Application No. 41H 30019215. Thus, the effect of the augmentation will be fully felt at the West  
29 Gallatin River prior to the full impacts of the permitted use. (Department file, testimony of Dr.  
30 Nicklin, Paul Shennum)

31 14. Applicant, or its predecessor, has historically irrigated 110 acres each year by diverting a  
32 maximum of 2.43 cfs under the two water right claims proposed for change starting as early as

1 April 1 and continuing through October 31 when water was available. Irrigation generally started  
2 in May, but these water rights were often out of priority<sup>5</sup> by July 10. Mr. Todd (lessee of place of  
3 use for the rights being changed [from Pacovsky] between 1961 to 1991) recalled planting in  
4 April or May and starting irrigation the middle to the end of May. Both Mr. Todd and Mr.  
5 Pacovsky recalled using the rights fully or to the best of their ability, and that these two rights  
6 were generally cut off by the water commissioner about July 10<sup>th</sup> to July 20<sup>th</sup>, or the middle of  
7 July. The 22 acres Applicant proposes to not irrigate have historically been in the acreage used  
8 to grow alfalfa and in priority through July 10 of each year. The drought of the 1930's was the  
9 only exception. Using the Montana Irrigation Guide, Applicant determined the net irrigation  
10 requirement for these 22 acres of alfalfa between May 1 and July 10 to be 11.6 acre-feet. Net  
11 irrigation requirement is the amount of water in excess of effective precipitation that is required  
12 to meet the consumptive use requirements of alfalfa. Said another way, it is that portion of the  
13 crop consumptive use supplied by irrigation, not precipitation. Objectors question whether  
14 Applicant's procedure properly accounted for the non-typical years in determining the amount of  
15 water consumed. Dr. Westesen, Applicant's expert, determined the consumptive use of the  
16 historic alfalfa crop using the Montana Irrigation Guide, then subtracted the amount of water  
17 typically provided by precipitation to estimate the amount of consumptive use provided by  
18 irrigation water on 22 acres of alfalfa. Dr. Westesen estimated that amount to be 11.6 acre-feet.  
19 This amount for optimum irrigation is supported by the personal testimony of Mr. Todd and Mr.  
20 Pacovsky. This calculation is reasonable given the testimony that the water rights were used to  
21 their fullest to provide water to the crops. Applicant determined in the Beneficial Water Use  
22 Permit Application No. 41H 30019215 proceeding that they need to place 9.73 acre-feet in their  
23 augmentation gallery to offset projected depletions of the West Gallatin River by use of water  
24 under that Application. The amount consumed between May 1 and July 10 by these 22 acres  
25 exceeds the projected depletions. (Department file, testimony of Dr. Gerald Westesen, David  
26 Pruitt; Milo Todd; and Gerald Pacovsky)

27 15. Under the proposed changes to Water Right Claim No. 41H 12231-00 (0.0364 cfs) and  
28 Water Right Claim No. 41H 12232-00 (0.0386 cfs), a total of .075 cfs will continue to be diverted  
29 into the Beck and Border Ditch (augmentation for Black Bull Run and Middle Creek Parklands  
30 uses), and 0.411 cfs will be left in the West Gallatin River<sup>6</sup> (water previously diverted to the 22

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<sup>5</sup> "out of priority" means a downstream senior appropriator has called an upstream junior appropriator to shut down because there is insufficient water for the senior's needs.

<sup>6</sup> 0.075 cfs (into Beck & Border Ditch) + 0.411 cfs (left in West Gallatin) + 1.944 cfs (irrigation of remaining irrigated

1 acres, but not consumed). The amounts proposed for change do not exceed the historically  
2 diverted rates or volumes, or increase the historically consumed volume. (Department file,  
3 testimony of Marty Gagnon,)

4 16. Objector Montana River Action Network, Roselee Faust, Paul Shennum, and West  
5 Gallatin Canal Company are concerned that the proposed augmentation plan will not return  
6 sufficient water to the West Gallatin River, has no backup if the plan fails, and more information  
7 is needed. Objector West Gallatin Canal Co. argues that the water commissioner sets headgate  
8 flows based on downstream river gages, so if Applicant's augmentation plan does not return the  
9 water to the West Gallatin River as projected, they will be prematurely cut off. Objector  
10 Shennum argues that a concept called aquifer storage and recovery (ASR) should be used  
11 instead of Applicant's plan. However, ASR is not the plan presented for consideration in this  
12 proceeding. Objectors offered no technical evidence or analysis to support their allegations that  
13 the proposed augmentation will not work, or counter Applicant's model and analysis that the  
14 augmentation plan will work. Instead, Objector Group argues that augmentation is not legally  
15 available in a closed basin, and that the project should be phased into existence so it can be  
16 determined if the proposed augmentation plan is actually working. Applicant points out that it  
17 may be futile to attempt to measure flows in the West Gallatin River to determine that the  
18 augmentation gallery water has actually impacted the River – the augmentation flows are too  
19 small to measure in the West Gallatin River. Again, no objector came forward with evidence of  
20 adverse effect beyond the question of whether Applicant's augmentation plan will work.  
21 Applicant's change in purpose and place of use will have no adverse affect on prior  
22 appropriators. (Department file, testimony of Michael Nicklin, Marty Gagnon, Joe Gutkoski,  
23 Roselee Faust, Paul Shennum)

#### 24 **Adequacy of Appropriation Works**

25 17. To implement the Utility Solutions Application No. 41H 30021139 the West Gallatin River  
26 water will be diverted from the River as it historically has been at the headgate on the Beck and  
27 Border Ditch, and will be conveyed to Utility Solutions' new headgate on the Beck and Border  
28 Ditch to the augmentation gallery. Water will then be conveyed to a settling basin and then be  
29 pumped to the augmentation gallery (recharge basin). Final design of the system will be by a  
30 professional engineer licensed in Montana. The current design is adequate to accomplish the  
31 intended purpose. (Department file, testimony of Marty Gagnon)

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acreage) = 2.43 cfs

1 **Beneficial Use**

2 18. Applicant demonstrated that without the ability to offset depletions of surface water  
3 caused by exercising Water Use Permit No. 41H 30019215, the permit would not issue.  
4 Applicant demonstrated that surface water can be used to recharge ground water during the  
5 irrigation season in order to eliminate stream-flow depletions throughout the year. Applicant  
6 used a two-dimensional ground-water flow model to simulate the effects of pumping from wells  
7 completed in the West Gallatin River alluvium, and recharge to the alluvium through a rapid  
8 infiltration basin for waste disposal and a proposed recharge basin or augmentation gallery. The  
9 model was constrained to accomplish two specific objectives: 1) depletion in the reach of the  
10 West Gallatin River immediately upstream and downstream of the proposed wells must be  
11 offset, and 2) the volume of surface water used to recharge ground water must equal or exceed  
12 the consumptive use of Application No. 41H 30019215. Applicant's methodology provides a  
13 reasonable estimate of stream-flow depletion and the mitigation effect of recharge through  
14 wastewater disposal and the proposed recharge basin. (Department file, Applicant's Exhibit  
15 AH11, testimony of Michael Nicklin)

16 19. Applicant identified the amount of water required to eliminate any claim that depletions to  
17 the [West] Gallatin River that may arise under the use proposed under Application For  
18 Beneficial Water Use Permit No. 41H 30019215 will adversely affect any rights to those West  
19 Gallatin River flows. Applicant will benefit from the change of purpose and place of use through  
20 its ability to exercise any permit issued in Application For Beneficial Water Use Permit No. 41H  
21 30019215. Without the ability to implement its augmentation plan as proposed in this change  
22 request, the Appropriator could not exercise the beneficial water use permits. Objector Group  
23 offered personal lay opinion that the change of use to augmentation is not beneficial, and that  
24 augmentation is not a use of water. The proposed use of water will benefit the Applicant and is a  
25 beneficial use of water. (Department file, testimony of Marty Gagnon, Roselee Faust)

26 **Possessory Interest**

27 20. Applicant has affirmed that it has the possessory interest, or the written consent of the  
28 person with the possessory interest in the property where the water is to be put to beneficial  
29 use. No party contested this issue. (Department file)

30 **Water Quality Issues**

31 21. Valid objections relative to water quality were filed against this Application by Objectors  
32 Shennum and McManus, and Clinton Cain. There were no objections relative to the ability of a

1 discharge permit holder to satisfy effluent limitations of his permit filed in this Application. The  
2 water quality objections voiced concerns about the return of treated wastewater into the aquifer.  
3 This change application does not request the injection of treated wastewater into the aquifer. It  
4 requests authorization to allow the infiltration into the aquifer of the same irrigation water that  
5 was historically applied to local fields. No Objector presented evidence that putting irrigation  
6 water into a recharge basin would adversely affect the water quality of a prior appropriator. The  
7 water quality of a prior appropriator will not be adversely affected by this proposed change.  
8 (Department file, testimony of Paul Shennum)

9 Based upon the foregoing Findings of Fact and upon the record in this matter, the  
10 Hearing Examiner makes the following:

### 11 CONCLUSIONS OF LAW

- 12 1. The Department has jurisdiction to approve a change in appropriation right if the  
13 appropriator proves the criteria in Mont. Code Ann. § 85-2-402.
- 14 2. The Department shall approve a change in appropriation right if the appropriator proves  
15 by a preponderance of evidence the proposed change in appropriation right will not adversely  
16 affect the use of the existing water rights of other persons or other perfected or planned uses or  
17 developments for which a permit or certificate has been issued or for which a state water  
18 reservation has been issued; except for a lease authorization pursuant to Mont. Code Ann. §  
19 85-2-436, a temporary change authorization for instream use to benefit the fishery resource  
20 pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439  
21 when authorization does not require appropriation works, the proposed means of diversion,  
22 construction and operation of the appropriation works are adequate; the proposed use of water  
23 is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or  
24 a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann.  
25 § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory  
26 interest, or the written consent of the person with the possessory interest, in the property where  
27 the water is to be put to beneficial use; if the change in appropriation right involves salvaged  
28 water, the proposed water-saving methods will salvage at least the amount of water asserted by  
29 the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not  
30 be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of  
31 a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

1 3. A public notice containing the facts pertinent to the change application was published  
2 once in a newspaper of general circulation in the area of the source and mailed to the  
3 appropriate individuals and entities. Mont. Code Ann. § 85-2-307. See Finding of Fact No. 2

4 4. The Applicant has proven by a preponderance of the evidence that the water rights of  
5 other appropriators under existing water rights, certificates, permits, or state reservations will not  
6 be adversely affected when a change authorization is conditioned as set forth herein including:  
7 1) 22 acres of historically irrigated land will be retired from irrigation under the water rights being  
8 changed; 2) installing a measuring device capable of recording the rate and volume of water  
9 diverted into the augmentation (infiltration) gallery; 3) recording the volume of water diverted into  
10 the augmentation gallery. (Records of the volume of water diverted shall be submitted to DNRC  
11 by October 15<sup>th</sup> of each year.); 4) all remaining water not consumed by the 22 acres removed  
12 from irrigation, consisting of 0.1996 cfs out of Water Right Claim No. 41H 12231-00, and 0.2114  
13 cfs out of Water Right Claim No. 41H 12232-00 shall not hereafter be diverted and shall be left  
14 in the West Gallatin River, but shall be administered as augmentation water by the applicant  
15 making call on the designated amounts to the diversion point of the Beck and Border Ditch in  
16 the NW¼SW¼SE¼ of Section 14, Township 2 South, Range 4 East, Gallatin County.

17 Objectors post-hearing brief argues that Mont. Code Ann. § 85-2-404(2) creates a  
18 statutory presumption that these water rights are presumed abandoned because they have not  
19 been used since 1991. This statute states: "If an appropriator ceases to use all or part of an  
20 appropriation right . . . for a period of 10 successive years and there was water available for  
21 use, there is a prima facie presumption that the appropriator has abandoned the right for the  
22 part not used." Objectors overlook Mont. Code Ann. § 85-2-404(5) which states: "Subsections  
23 (1) and (2) do not apply to existing rights until they have been finally determined in accordance  
24 with part 2 of this chapter." The Hearing Examiner does not find from the record in this matter  
25 that these two water rights being changed have been "finally determined" as required by Mont.  
26 Code Ann. § 85-2-404(5). Therefore, there is no *prima facie* presumption of abandonment by  
27 the terms of the statute. It is true that the Department will consider the issue of abandonment in  
28 a change proceeding under adverse effect and the Department in administrative rulings has  
29 held that a water right in a change proceeding is defined by actual beneficial use, not the  
30 amount claimed or even decreed. In the Matter of Application for Change Authorization No.  
31 G(W)028708-411 by Hedrich/Straugh/Ringer, December 13, 1991, Final Order; In the Matter of  
32 Application for Change Authorization No. G (W)008323-g76L by Starkel/Koester, April 1, 1992,  
33 Final Order. However, the Objectors presented no evidence of an intent of the Applicant to

1 abandon the water rights at issue other than the statute discussed above. Without the statutory  
2 presumption, abandonment requires proof by the person claiming abandonment of intent to  
3 abandon the right by the water right holder, and nonuse. E.g., Best v. Rodda (1923), 68 Mont.  
4 205, 217 P. 669; Thomas v. Ball (1923), 66 Mont. 161, 213 P. 597 (abandonment of an  
5 appropriation of water requires a concurrence of act and intent, the relinquishment of  
6 possession, and the intent not to resume it for a beneficial use; burden of proof on one claiming  
7 abandonment; nonuse alone is insufficient); 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426, 666  
8 P.2d 215.

9 Under Applicant's proposed changes, the water rights of prior appropriators will continue  
10 to be satisfied, as the rights have historically been used for irrigation. Objectors appear to argue  
11 that exact historic conditions such as return flow must be matched or maintained. However, the  
12 statutory criterion only requires that an appropriator not be adversely affected by this proposed  
13 change – not that the historic practice must be maintained or matched. See Mont. Code Ann. §  
14 85-2-402(2)(a). A change to an "augmentation" purpose to recharge ground water during the  
15 May 1 to July 10, inclusive, portion of the irrigation season in order to eliminate stream-flow  
16 depletions throughout the year will not adversely affect water rights of prior appropriators  
17 according to the record in this matter. The historic consumed irrigation water was not historically  
18 available to prior appropriators; thus, it can be treated as if it were "new" water added to the  
19 system to offset depletions caused by Applicant exercising their permit. The historic return  
20 flows, irrigation water that returns as ground water to the West Gallatin River, are now being left  
21 in the West Gallatin River and protected to the river reach where they historically returned.  
22 Thus, they remain available to other appropriators. No objector came forward with evidence of  
23 adverse effect beyond question of whether Applicant's augmentation plan will work.

24 There was cross-examination testimony of Applicant's witnesses regarding the "day of  
25 first use" for irrigation purposes which could imply that irrigation had not taken place as of May  
26 1, but instead starting mid-May. There was no testimony by an Objector witness that irrigation  
27 did not start until mid-May. However, there is testimony by prior owners of the water rights that  
28 irrigation occurred as early as April 1 and the water rights were used to their fullest. The Hearing  
29 Examiner also notes that it is highly questionable that an irrigator with the right to divert as of  
30 April 1 when water was available would not divert water during that time, if needed. An  
31 appropriator would be diligent in using water when it was needed especially on streams with  
32 water commissioners and a water right whose priority date is frequently shut off before season  
33 end.

1           Objector's Response To Utility Solutions, LLC's Hearing Memorandum further argues  
2 that Applicant's plan is to leave non-consumed water in the River and reserve it to use to  
3 augment depletion and adverse effects of additional new water rights for which it will apply for in  
4 the future. Thus, they are, or the possibility exists, for "double dipping". The record does not  
5 show this to be Applicant's plan. As previously explained the water historically used on the 22  
6 acres consisted of consumed and non-consumed water. The historically consumed portion is  
7 being changed to augmentation (.075 cfs, See table on page 7). The historically non-consumed  
8 water applied to the 22 acres, formerly seepage or return flows tributary to the West Gallatin  
9 River, (0.0411 cfs, See table on page 7) are called to the Beck and Border Ditch, but not  
10 diverted into the Ditch, and left in the West Gallatin River where they historically returned. There  
11 is no "double dipping."

12           Objector Shennum argues there is not an augmentation plan in the state of Montana.  
13 Objector Faust argues that augmentation is not allowed by statute in a closed basin.  
14 Augmentation is not foreign to the laws of Montana. See Mont. Code Ann. § 85-2-337(3). See  
15 e.g., In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by  
16 Peterson and MT Department of Transportation, Proposed Terms And Conditions, Final Order  
17 (2001). Augmentation is a water use tool in Montana. This Hearing Examiner disagrees with  
18 argument of Objector Faust that augmentation is not allowed in this closed basin (i.e., changes  
19 are not allowed in a basin which has been closed to protect existing appropriators). The statutes  
20 closing the basin, Mont. Code Ann. §§ 85-2-342 and -343, address only the permitting of new  
21 water rights and allow exceptions to the closure. These statutes do not in anyway address  
22 changes pursuant to Mont. Code Ann. §85-2-402. Likewise, there is nothing in Mont. Code Ann.  
23 §85-2-402 which prohibits changes in closed basins. Moreover, if changes are not allowed (as  
24 Objectors suggest), I fail to see how **any** permit application for an exempt use such as domestic  
25 or stock (for example) could be allowed through an exemption. If there is no water for new uses  
26 (i.e., the reason the basin was closed), and changes of existing rights are not allowed in a  
27 closed basin, then all water right activity except for the process allowed in Mont. Code Ann. §  
28 85-2-306, would presumably stop under this argument. The Legislature apparently  
29 contemplated that new uses could be allowed, and in fact foresaw that changes to existing  
30 water rights would need to occur to allow flexibility including for a new appropriator to offset  
31 effects of the new use – the Legislature did not prohibit changes to existing rights in the closure  
32 legislation. Mont. Code Ann. § 85-2-343(1).

1 In a change proceeding, it must be emphasized that other appropriators have a vested  
2 right to have the stream conditions maintained substantially as they existed at the time of their  
3 appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert  
4 E. Beck, 2 Waters and Water Rights § 16.02(b) (1991 edition); W. Hutchins, Selected Problems  
5 in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in relevant  
6 part:

7 85-2-402. Changes in appropriation rights. (1) The right to make a change subject to the  
8 provisions of this section in an existing water right, a permit, or a state water reservation  
9 is recognized and confirmed. In a change proceeding under this section, there is no  
10 presumption that an applicant for a change in appropriation right cannot establish lack of  
11 adverse effect prior to the adjudication of other rights in the source of supply pursuant to  
12 this chapter. An appropriator may not make a change in an appropriation right except, as  
13 permitted under this section, by applying for and receiving the approval of the  
14 department or, if applicable, of the legislature. An applicant shall submit a correct and  
15 complete application.

16 (2) Except as provided in subsections (4) through (6), the department shall  
17 approve a change in appropriation right if the appropriator proves by a preponderance of  
18 evidence that the following criteria are met:

19 (a) *The proposed change in appropriation right will not adversely affect the use of*  
20 *the existing water rights of other persons* or other perfected or planned uses or  
21 developments for which a permit or certificate has been issued or for which a state water  
22 reservation has been issued under part 3.

23 ....  
24 (13) A change in appropriation right contrary to the provisions of this section is  
25 invalid. An officer, agent, agency, or employee of the state may not knowingly permit,  
26 aid, or assist in any manner an unauthorized change in appropriation right. A person or  
27 corporation may not, directly or indirectly, personally or through an agent, officer, or  
28 employee, attempt to change an appropriation right except in accordance with this  
29 section

30 (Italics added).

31  
32 Montana's change statute simply codifies western water law.<sup>7</sup> One commentator  
33 describes the general requirements in change proceedings as follows:

34 Perhaps the most common issue in a reallocation dispute is whether other appropriators,  
35 especially junior appropriators, will be injured because of an increase in the consumptive  
36 use of water. Consumptive use may be defined as "diversions less returns, the  
37 difference being the amount of water physically removed (depleted) from the stream  
38 system through evapotranspiration by irrigated crops or consumed by industrial  
39 processes, manufacturing, power generation or municipal use." An appropriator may not  
40 increase, through reallocation [changes] or otherwise, the historic *consumptive* use of  
41 water to the injury of other appropriators. *In general, any act that increases the quantity*  
42 *of water taken from and not returned to the source of supply constitutes an increase in*  
43

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<sup>7</sup> E.g., Wyo. Stat. § 41-3-104.

1 *historic consumptive use.* As a limitation on the right of reallocation, historic consumptive  
2 use is an application of the principle that appropriators have a vested right to the  
3 continuation of stream conditions as they existed at the time of their initial  
4 appropriations.  
5

6 Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78 (italics added).

7 No objector came forward with evidence of adverse effect beyond the general question of  
8 whether Applicant's augmentation plan will work. Here, the Applicant has shown an intent to use  
9 the water rights being changed (lack of intent to abandon), and the historic diversions and  
10 historic consumption will not increase under the proposed change. Because there is no increase  
11 in the historic consumption under the proposed change or, indeed, any change that can be  
12 authorized pursuant to the Mont. Code Ann. §85-2-402 criteria, changes are perfectly consistent  
13 with a basin closure because the use of water cannot be expanded. Mont. Code Ann. § 85-2-  
14 402(2)(a). See Finding of Fact Nos. 0, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.

15 5. The Applicant has proven by a preponderance of evidence that the proposed means of  
16 diversion, construction, and operation of the appropriation works are adequate. Mont. Code  
17 Ann. § 85-2-402(2)(b). See Finding of Fact No. 17.

18 6. The Applicant has proven by a preponderance of evidence that the quantity of water  
19 proposed to be used is the amount necessary for the proposed beneficial use and the proposed  
20 use is beneficial. Objector Group argues that the Applicant does not directly benefit from the  
21 non-use of its water rights and they are instead abandoning the water rights. Applicant shows  
22 no intent to abandon their water rights, but rather to have callable water rights for use as herein  
23 proposed. (See Conclusion of Law No. 4 above) Objector Group also argues that augmentation  
24 is not such a benefit that fits within the "traditional uses" enumerated in Mont. Code Ann. § 85-2-  
25 102(2)(a) which uses in themselves benefit the public, and that the definition does not sanction  
26 uses that are designed only to mitigate specific adverse effects that are unnecessary to begin  
27 with. The definition of beneficial use found in administrative rule, statute, and case law is "a use  
28 of water for the benefit of the appropriator . . ." See Mont. Code Ann. § 85-2-102((2)(a)); Sayre  
29 v. Johnson, 33 Mont. 15, 81 P.389 (1905). Without the changes proposed in this case, Applicant  
30 would not be able to exercise beneficial water use permits that may issue pursuant to  
31 Application No. 41H 30019215. The Applicant will clearly benefit from the proposed use of  
32 water. In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311  
33 Mont. 327, 55 P.3d 396 (recognizing the prior appropriation doctrine's history of flexibility and  
34 practicality).

1 It may be necessary for an applicant to make use of new technology or specialized  
2 equipment in their water use. If a water use is dependent on special management, technology  
3 or measurement to ensure there will be no adverse affect to other water users, DNRC can and  
4 routinely does, condition a new permit's use on use of that special management, technology or  
5 measurement. See Mont. Code Ann. § 85-2-312. There is simply no indication in the sections of  
6 the Montana Water Use Act that govern the water right change process (Mont. Code Ann. §§  
7 85-2-401, *et seq.*) that a plan of augmentation as a way to preclude adverse affect on others  
8 caused by exercising a water right, either by replacement of water in a source of supply through  
9 a change in use of an existing water right or by other means, is prohibited. Montana case law  
10 also provides a history of augmentation, including augmentation by new or untried methods.  
11 See *Thompson v. Harvey* (1974), 154 Mont. 133, 519 P.2d 963; *Perkins v. Kramer* (1966), 148  
12 Mont. 355, 423 P.2d 587. Augmentation is also recognized in other prior appropriation states for  
13 various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA  
14 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho). Objectors argue they are  
15 only asking the Department to strictly construe and apply the plain language terms of the Water  
16 Use Act and abide by the Legislature's intent to protect the over-appropriated water resource;  
17 yet, they presented no authority for their proposition that augmentation is not allowed for the  
18 purpose of meeting the Mont. Code Ann. § 85-2-402 criteria, which is not subject to the basin  
19 closure. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 18, 19.

20 During the pendency of this case, the Montana Legislature has passed HB 831, which,  
21 provides in part for "aquifer recharge." Although HB 831 is not applicable to this case by its  
22 terms<sup>8</sup>, it is important to note that the new law statutorily authorizes, as a beneficial use what  
23 the Department has previously characterized as "augmentation" under the term "aquifer  
24 recharge." Aquifer recharge is defined to mean, "either the controlled subsurface addition of  
25 water directly to the aquifer or controlled application of water to the ground surface for the  
26 purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of  
27 surface water." Mont. Code Ann. §85-2-102(2)(2007). Even though not statutorily authorized  
28 outside the Clark Fork River basin prior to HB 831, augmentation or aquifer recharge was not  
29 prevented by statute prior to HB 831.

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<sup>8</sup> Section 30. Effective date. [This act] is effective on passage and approval. Section 31. Applicability. [This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]. This bill was signed by the Governor May 3, 2007.

1 7. The Applicant has proven by a preponderance of evidence a possessory interest in the  
2 property where water is to be put to beneficial use. An applicant or a representative must sign  
3 the application affidavit to affirm the following: (a) the statements on the application and all  
4 information submitted with the application are true and correct; and (b) except in cases of an  
5 instream flow application, or where the application is for sale, rental, distribution, or is a  
6 municipal use, or in any other context in which water is being supplied to another and it is clear  
7 that the ultimate user will not accept the supply without consenting to the use of water on the  
8 user's place of use, the applicant has possessory interest in the property where the water is to  
9 be put to beneficial use or has the written consent of the person having the possessory interest.  
10 See Mont. Admin. R. 36.12.1802. Mont. Code Ann. § 85-2-402(2)(d). See Finding of Fact No.  
11 20.

12 8. The water quality of a prior appropriator will not be adversely affected. The objections  
13 raised were concerns about the injection of treated sewage. The augmentation proposed here is  
14 not for the injection of treated sewage as described in the water quality objections. The water to  
15 be injected is the same quality that has been used to irrigate the historic place of use since 1890  
16 and will not change the water quality. No valid objections to the ability of a discharge permit  
17 holder to satisfy effluent limitation of a permit was raised. Mont. Code Ann. §§ 85-2-402(2)(f),  
18 (g). See Finding of Fact Nos. 6, 7, 21.

19 9. The Department may approve a change subject to terms, conditions, restrictions, and  
20 limitations it considers necessary to satisfy the criteria for authorization to change a water right.  
21 The Applicant has agreed to cumulatively measure and report the water diverted into the  
22 augmentation basin. Mont. Code Ann. § 85-2-402(8). See Conclusion of Law No. 4.

23 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the  
24 Hearing Examiner makes the following:

25 **FINAL ORDER**

26 Subject to the terms, conditions, restrictions, and limitations specified below,  
27 Authorization to Change A Water Right No. 41H 30021139 is hereby **GRANTED** to Utility  
28 Solutions, LLC.

29 Applicant may change 20% each of Water Right Claim No. 41H 12231-00 (0.0364 cfs)  
30 and 41H 12232-00 (0.0386 cfs) up to 10.56 acre-feet total of water per year from irrigation to  
31 augmentation in an infiltration gallery. Twenty-two acres historically irrigated located in the  
32 E½NE¼ of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana, must be

1 retired from irrigation under these water rights. The amount of water Applicant calculated to not  
2 return to the West Gallatin River when exercising Water Use Permit No. 41H 30019215 is 9.73  
3 acre-feet. This augmentation is to offset these depletions of water to the West Gallatin River  
4 from exercising the 9 wells for the use proposed in Water Right No. 41H 30019215. Of the  
5 historically consumed irrigation volume from irrigation of 22 acres, 9.73 acre-feet is the total  
6 amount that must be diverted into the augmentation gallery from the Beck and Border Ditch,  
7 with 10.56 acre-feet to be diverted at the headgate of the Beck and Border Ditch. Diversion to  
8 augmentation use would occur from May 1 to July 10, inclusive. The remainder of the water  
9 historically diverted to, but not consumed by, the 22 acres (Water Right Claim No. 41H 12231-  
10 00 [0.1996 cfs] and 41H 12232-00 [0.2114 cfs]), is to be left in the West Gallatin River to  
11 augment the reach between the headgate at the Beck and Border Ditch and the point where the  
12 West Gallatin River leaves Section 2 and Section 3, Township 2 North, Range 4 East. This  
13 River reach is located downstream of the Beck and Border Ditch in the NW¼ SW¼ SE¼  
14 Section 14 within Section 14, NE¼NE¼ Section 15, E½ Section 10, W½ NW¼ Section 11, E½  
15 Section 3, W½ Section 2, all in Township 2 North, Range 4 East, Gallatin County, Montana.

16 A. This authorization is limited to the amount of the historic consumptive use recognized by  
17 the DNRC in this proceeding as subject to change, and will thereafter not exceed that amount. If  
18 the historic use is reduced under adjudication proceedings pursuant to Title 85, Chapter 2, Part  
19 2, MCA, this authorization will be limited to that lesser amount.

20 B. Applicant shall not hereafter divert 0.1996 cfs out of Water Right Claim No. 41H 12231-  
21 00, and 0.2114 cfs out of Water Right Claim No. 41H 12232-00 and shall otherwise leave this  
22 amount of water in the West Gallatin River. This water shall be administered by the Applicant by  
23 making call on the above designated amounts to the diversion point of the Beck & Border Ditch  
24 in the NW¼SW¼SE¼ of Section 14, Township 2 South, Range 4 East, Gallatin County, for  
25 augmentation use within the reach between the headgate at the Beck and Border Ditch and the  
26 point where the West Gallatin River leaves Section 2 and Section 3, Township 2 North, Range 4  
27 East. The period of augmentation use is May 1 to July 10, inclusive.

28 C. Augmentation water will be diverted into the Beck and Border Ditch in the amounts of  
29 0.0364 cfs from Water Right Claim No. 41H 12231-00 and 0.0386 cfs from Water Right Claim  
30 No. 41H 12232-00. After ditch loss, 0.034 cfs from Water Right Claim No. 41H 12231-00 and  
31 0.036 cfs from Water Right Claim No. 41H 12232-00 will be diverted to settling basins and

1 pumped into augmentation (recharge) basins located in the NE¼, Section 11, Township 2  
2 South, Range 4 East. The period of augmentation use is from May 1 to July 10, inclusive.

3 D. The appropriator shall install a measuring device capable of recording the rate and  
4 volume of water diverted into the recharge basins from the Beck and Border Ditch, and must  
5 record the volume of water diverted into the augmentation (recharge) basins. Such records shall  
6 be submitted to the DNRC Bozeman Water Resources Regional Office, by October 15<sup>th</sup> of each  
7 year. Water must not be diverted until the required measuring device is in place and operating  
8 properly. The appropriator shall maintain the measuring device so it always operates properly  
9 and measures flow rate and volume accurately. The appropriator shall also properly maintain  
10 the settling basins and pump(s) for return of the augmentation water to aquifer.

11 **NOTICE**

12 This final order may be appealed by a party in accordance with the Montana  
13 Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the  
14 appropriate court within 30 days after service of the order.

15 If a petition for judicial review is filed and a party to the proceeding elects to have a  
16 written transcript prepared as part of the record of the administrative hearing for certification to  
17 the reviewing district court, the requesting party must make arrangements for preparation of the  
18 written transcript. If no request is made, the Department will transmit only a copy of the audio  
19 recording of the oral proceedings to the district court.

20 Dated this 24<sup>th</sup> day of July 2007.

21 

22 Charles F Brasen  
23 Hearing Officer  
24 Water Resources Division  
25 Department of Natural Resources  
26 and Conservation  
27 PO Box 201601  
28 Helena, Montana 59620-1601

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 24<sup>th</sup> day of July 2007 by first-class United States mail

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