

1 **EXHIBITS**

2 Applicant offered one exhibit for the record. The Objectors offered no exhibits. The
3 Hearing Examiner accepted and admitted into evidence Applicant's Exhibit No. A70.

4 **Applicant's Exhibit A70** is a three-page document entitled "Amended Direct Testimony
5 of Marty Gagnon."
6

7 **PRELIMINARY MATTERS**

8 The February 14, 2006, Order On Motion To Limit Matters In Contested Case
9 Proceeding And Setting Hearing Date [hereinafter Order] limited the factual issues remaining for
10 hearing to: (1) Augmentation: Whether "augmentation" as contemplated by the Applicant's
11 (permit application) plan, is a beneficial use of water within the context of Mont. Code Ann. §85-
12 2-402. Objector Faust Group reserved the right to and Parties may submit evidence on the
13 following issues: (A) Is augmentation a beneficial use; (B) Is the proposed augmentation
14 appropriate for these permits, i.e. should the water just remain in the river instead of changing
15 it's use to "augmentation" as proposed in Applicant's plan. The Order allowed the Parties to brief
16 the following legal issue, due simultaneously at or the before the start of the permit hearing: (1)
17 Is augmentation, as proposed by this Applicant's plan, a beneficial use of water to which an
18 existing irrigation water right can be changed under the closure in the Upper Missouri River
19 basin. See Mont. Code Ann. §§85-2-342, 343.

20 Objector Montana Department of Fish, Wildlife and Parks (FWP); Objector Montana
21 Trout Unlimited; Objectors Kelly, Sales, and Association of Gallatin Agricultural Irrigators
22 indicated at the beginning of the Consolidated Water Use Permit Hearing, held immediately
23 prior to this hearing, that they had entered into a settlement agreement with the Applicant
24 (entitled Consent To Entry Of Administrative Order In the Matter of the Application To Change

1 Water Right No. 41H 30014080), and that they did not intend to participate in the March 2,
2 2006, permit or change hearings. These Parties were allowed the opportunity to present their
3 fundamental legal position in briefs on the allowed legal issue. The Hearing Examiner agreed to
4 place photocopies of the briefs received at the start of the permit hearing into this record.
5 Copies of augmentation briefs from Applicant, Objector Faust Group, Objector FWP, and
6 Objector Montana Trout Unlimited were made for this record.

7 At the conclusion of the hearing in these matters the record was left open until March 10,
8 2006, for receipt of verifications (of the truthfulness of their written testimony) by those
9 submitting written pre-filed testimony. Applicant filed verifications for Marty Gagnon, Pat Eller,
10 and Michael Nicklin. Objector Faust Group filed verifications for Eloise Kendy and Terry
11 Threlkeld along with one copy of their pre-filed testimony (originally filed November 18, 2005 for
12 both the consolidated permit applications and the associated application to change No. 41H
13 30014080), along with attached exhibits. The Hearing Examiner placed a copy of the Objector
14 Faust Group's single submittal for both the permit and change hearings into the record.

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

17

18

FINDINGS OF FACT

General

- 20 1. Application To Change A Water Right No. 41H 30014080 in the name of Utility
21 Solutions, LLC, and Zoot Properties, LLC, and signed by Barbara Campbell and Chris Nelson
22 was filed with the Department on February 9, 2005. (Department file)
- 23 2. Notice of Application No. 41H 30014080 was properly made in the *Bozeman Daily*
24 *Chronicle* on August 14, 2005. (Department file)

1 3. The Environmental Assessment (EA) prepared by the Department for this application
2 was reviewed and is included in the record of this proceeding. (Department file)

3 4. In Application No. 41H 30014080, as noticed, Applicant proposes to change 2.56 cubic
4 feet per second (cfs) up to up to 776.89 acre-feet of water per year under Water Right Claim
5 Nos. 41H 126909-00 and 41H 126910-00 from irrigation to augmentation. This augmentation is
6 proposed to mitigate any loss of water to the West Gallatin River from exercising the 3 proposed
7 Zoot wells in Water Right No. 41H 11546900 and exercising the 8 proposed Utility Solutions
8 wells in Application No. 41H 30012025. The historically consumed irrigation volume of 242.38
9 acre-feet is the total amount that would be used for augmentation. Augmentation use would
10 occur from May 1 to September 30, inclusive. (Department file)

11 Zoot Wells Augmentation: The Zoot Final Order for Permit No. 41H 11546900, requires
12 water to be left in the West Gallatin River from the Beck and Border Ditch point of diversion to a
13 point where the River [West Gallatin] leaves the North side of Sections 10 and 11, Township 2
14 South, Range 4 East, Gallatin County, Montana. To comply with that order, the Applicant
15 proposes to use a flow rate of 0.23 cfs up to 70 acre-feet for augmentation. (Department file,
16 Public Notice)

17 Utility Solutions Wells Augmentation: Applicant proposes that a flow rate of 2.33 cfs
18 would be diverted into the Beck and Border Ditch of which 0.49 cfs up to 146 acre-feet would be
19 diverted to a recharge basin located in the NW¼NE¼NE¼, Section 11, Township 2 South,
20 Range 4 East. The augmentation water would return to ground water and the River [West
21 Gallatin] at the point where the River [West Gallatin] leaves the North side of Sections 3 and 4,
22 Township 2 South, Range 4 East, Gallatin County, Montana. (Department file, Public Notice)

1 The remaining 26.38 acre-feet historically consumed is proposed to be “banked” for
2 future augmentation. No acreage will be irrigated by these water rights in the future under this
3 change request. (Department file, Public Notice)

4 5. The water right to be changed, Claim No. 41H 126910-00, is from the West Gallatin
5 River for 1.88 cfs up to 797.8 acre-feet diverted into the Beck and Border Ditch to irrigate 200
6 acres with a period of appropriation of April 1 to October 31 and a priority date of July 1, 1866.
7 The second water right to be changed, Claim No. 41H 126909-00, is from the West Gallatin
8 River for 305 gallons per minute (0.68 cfs) up to 288.57 acre-feet diverted into the Beck and
9 Border Ditch to irrigate overlapping 200 acres (same 200 acre place of use as Claim No. 41H
10 126910-00) with a period of appropriation of April 1 to October 31 and a priority date of July 1,
11 1883. (Department file)

12 6. The Consent To Entry Of Administrative Order In the Matter of the Application To
13 Change Water Right No. 41H 30014080 [hereafter, Change Consent: copy attached beginning
14 on page 21] document is a settlement document and will be treated as application amendments
15 and conditions where appropriate. The Change Consent places the following limitations on the
16 proposal in Application No. 41H 30014080:

17 Augmentation of Zoot Wells: (A) 0.17 cfs up to 51.8 acre-feet per year out of Water Right
18 Claim No. 41H 126910-00 and 0.06 cfs up to 18.2 acre-feet per year of Water Right Claim No.
19 41H 126909-00, shall not hereafter be diverted from the West Gallatin River, and shall
20 otherwise be left in the West Gallatin River, to augment any depletions to West Gallatin River
21 flows arising out of or related to the exercise of any rights inuring in Water Use Permit No. 41H
22 11546900; (B) The period of use shall be from May 1st through September 30th; (C) The 0.23 cfs
23 up to 70 acre-feet per year shall be administered as if it was being diverted at the present point
24 of diversion of Water Right Claim No. 41H 15825 [the first water right downstream of the point

1 where the West Gallatin River leaves the North side of Sections 10 and 11, Township 2 South,
2 Range 4 East, Gallatin County, Montana]; (D) As conditioned in accordance with subparagraphs
3 A through C, the change of 0.23 cfs up to 70 acre-feet per year complies with Paragraph C of
4 the DNRC's Final Order approving the issuance of Water Use Permit No. 41H 11546900.

5 Augmentation of Utility Solutions' Wells: (A) 0.16 cfs up to 35.1 acre-feet per year out of
6 Water Right Claim No. 41H 126909-00 and 0.44 cfs up to 99 acre-feet per year out of Water
7 Right Claim No. 41H 126910-00, shall be diverted from the date in the spring that the Beck &
8 Border Ditch first carries water through September 30th, or until 134.1 acre-feet has been
9 reached, whichever date is earlier. The diversion point is the Beck & Border Ditch in the
10 NW¼SW¼SE¼ of Section 14, Township 2 South, Range 4 East, Gallatin County. After ditch
11 loss¹, 0.12 cfs up to 33.8 acre-feet per year out of Water Right Claim No. 41H 126909-00, and
12 0.43 cfs thereof up to 90.2 acre-feet per year out of Water Right Claim No. 41H 126910-00 shall
13 thereafter be diverted from the Beck & Border Ditch into a recharge basin located in the NE¼ of
14 Section 11, Township 2 South, Range 4 East, for the purposes of augmenting any depletions to
15 the flows of the West Gallatin River arising from the exercise of any rights inuring in any
16 beneficial water use permit issued by the DNRC under Application For Beneficial Water Use
17 Permit No. 41H 30012025 and Application For Beneficial Water Use Permit No. 41H 30013629;
18 (B) A measuring device capable of recording the rate and volume of water diverted into the
19 infiltration galleries, and records of the volume of water diverted shall be submitted to the DNRC
20 by October 15th of each year; (C) As conditioned in accordance with subparagraph A and
21 subparagraph B, the diversion of and use of those amounts set forth in subparagraph A are
22 sufficient to offset estimated consumptive use arising out of or related to any water use permits

¹ (0.16 + 0.44) – (0.12 + 0.43) = 0.05 cfs = ditch loss

1 that the DNRC may issue under Application For Beneficial Use Permit No. 41H 30012025 and
2 Application For Beneficial Water Use Permit 41H 30013629.

3 Administration of Water Rights: All remaining water and water rights not provided for in
4 Items A above, consisting of 0.46 cfs out of Water Right Claim No. 41H 126909-00, and 1.27 cfs
5 out of Water Right Claim No. 41H 126910-00 shall not hereafter be diverted and shall be left in
6 the West Gallatin River, but shall be administered by calling the designated amounts to the
7 diversion point of the Beck & Border Ditch in the NW¼SW¼SE¼ of Section 14, Township 2
8 South, Range 4 East, Gallatin County. (Department file, Change Consent)

9 7. The stipulated amendments contained in the Change Consent are a subset of the
10 original application. The Parties do not contest the facts set out in the Change Consent. The
11 change of 0.23 cfs up to 70 acre-feet per year complies with Paragraph C of the DNRC's Final
12 Order approving the issuance of Water Use Permit No. 41H 11546900 (Zoot wells). The
13 diversion of and use of those amounts set forth in the Change Consent are sufficient to offset
14 estimated consumptive use arising out of or related to any water use permits (Utility Solutions
15 wells) that the DNRC may issue under Application For Beneficial Use Permit No. 41H 30012025
16 and Application For Beneficial Water Use Permit 41H 30013629. (Department file, Change
17 Consent, Notice of No Contest to Certain Facts and Reservation of Rights)

18 **Adverse Effect**

19 8. Applicant has historically irrigated 200 acres each year by diverting a maximum of 2.56
20 cfs up to 1086.37 acre-feet per year under the two water right claims proposed for change. The
21 maximum amounts historically diverted into the Beck and Border Ditch in any year is 1.88 cfs up
22 to 797.8 acre-feet for Water Right Claim No. 41H 126910-00, and 0.68 cfs up to 288.57 acre-
23 feet for Water Right Claim No. 41H 126909-00 for a combined total of 2.56 cfs up to 1086.37
24 acre-feet. Historically, Water Right Claim No. 41H 126910-00 and Water Right Claim No. 41H

1 126909-00, consumed 242.38 acre-feet per year. These historic maximum amounts include pre-
2 May 1 and post September 30 diversions when water was available. No Party challenged the
3 amount of water historically consumed under these water right claims. (Department file)

4 9. Applicant must not divert and must protect from diversion by others 70 acre-feet of water
5 to cover the consumptive uses for the Zoot Water Use Permit Application No. 41H 11546900 as
6 a condition of the Permit. The 70 acre-feet, when converted to an instantaneous flow rate over a
7 153 day (May 1 through September 30) historic irrigation period equates to 0.23 cfs. Therefore,
8 Water Right Claim No. 41H 126910-00 has a rate of 1.71 cfs remaining of the historical
9 diversion rate of 1.88 cfs, and Water Right Claim No. 41H 126909-00 has a rate of 0.62 cfs
10 remaining of the historical diversion rate of 0.68 cfs. (Department file, Change Consent)

11 10. Under the proposed changes to Water Right Claim No. 41H 126910-00, 0.44 cfs up to
12 99 acre-feet will continue to be diverted into the Beck and Border Ditch (augmentation for Utility
13 Solutions wells), and 0.17 cfs will be left in the West Gallatin River² (augmentation for Zoot
14 wells). Under Water Right Claim No. 41H 126909-00, 0.16 cfs up to 35.1 acre-feet will continue
15 to be diverted into the Beck and Border Ditch (Utility Solutions wells augmentation); and 0.46 cfs
16 will be left in the West Gallatin River³ (Zoot wells augmentation). The amounts proposed for
17 change do not exceed the historically diverted rates or volumes, or the historically consumed
18 volume. (Department file; Change Consent)

19 11. The reason for the changes to these water rights is to mitigate potential adverse effects
20 to downstream West Gallatin River appropriators of water consumed by permitted uses under
21 the Zoot Beneficial Water Use Permit No. 115469-00 and any beneficial water use permits
22 issued under Utility Solutions Application Nos. 41H 30012025 and 41H 30013629. The
23 consumptive volume of the three proposed beneficial water use permits is 216 acre-feet. Thus,

² 0.44 cfs (into B&B Ditch) + 0.17 cfs (into West Gallatin) + 1.27 cfs (Remaining H₂O) = 1.88 cfs
³ 0.16 cfs (into B&B Ditch) + 0.06 cfs (into West Gallatin) + 0.46 cfs (Remaining H₂O) = 0.68 cfs

1 the Applicant intends to divert 0.55 cfs up to 124 acre-feet (after ditch loss) from the Beck and
2 Border Ditch into an infiltration gallery, and intends to not divert 0.23 cfs up to 70 acre-feet into
3 the Beck and Border Ditch to replace the depletions to the West Gallatin River in amount and
4 timing by use of these three proposed beneficial water use permits. No party contests the facts
5 of the augmentation plan, amounts needed to be augmented or amount of augmentation
6 provided under the proposed changes, and that the facts comply with and support a change
7 pursuant to Mont. Code Ann. § 85-2-402. Applicant's change in purpose and place of use will
8 have no adverse affect on prior appropriators. (Department file, testimony of Michael Nicklin,
9 Marty Gagnon, Change Consent)

10 **Adequacy of Appropriation Works**

11 12. To implement the Zoot wells augmentation, the water will be self-executing by not
12 diverting the water into the Beck and Border Ditch from the West Gallatin River. (Department
13 file, testimony of Marty Gagnon)

14 13. To implement the Utility Solutions wells augmentation, the West Gallatin River water will
15 be diverted at the historical headgate on the Beck and Border Ditch, and will be conveyed to
16 Utility Solutions. Water will then be conveyed through use of a headgate on the Beck and
17 Border ditch to a settling basin. The augmentation water will then be pumped to the recharge
18 basin. The current design is adequate to accomplish the intended purpose. Final design of the
19 system will be by a professional engineer licensed in Montana. (Department file, testimony of
20 Marty Gagnon)

21 **Beneficial Use**

22 14. Applicant demonstrated that surface water can be used to recharge ground water during
23 the irrigation season in order to eliminate stream-flow depletions throughout the year. Applicant
24 used a two-dimensional ground-water flow model to simulate the effects of pumping from wells

1 completed in the West Gallatin River alluvium, and recharge to the alluvium through a rapid
2 infiltration basin for waste disposal and a proposed recharge basin. The model was constrained
3 to accomplish two specific objectives: depletion in the reach of the West Gallatin River
4 immediately upstream and downstream of the proposed wells must be eliminated, and the
5 volume of surface water used to recharge ground water must exceed the consumptive use of
6 the new permits. Applicant's methodology provides a reasonable estimate of stream-flow
7 depletion and the mitigation effect of recharge through wastewater disposal and the proposed
8 recharge basin. (Department file; *Nicklin*, June 17, 2005, and June 26, 2005; testimony of
9 Michael Nicklin; *Levens*, August 1, 2005; Change Consent)

10 15. Applicant will benefit from the change of purpose and place of use through its ability to
11 exercise issued beneficial water use permits. Without the ability to implement its augmentation
12 plan as proposed in this change request, the Appropriator could not exercise the beneficial
13 water use permits. Objectors Faust Group offered personal lay opinion that the change of use to
14 augmentation is not beneficial, and that augmentation is not a use of water. (Department file,
15 testimony of Marty Gagnon, Roselee Faust, James Lohmeier)

16 **Possessory Interest**

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

20 **Water Quality Issues**

21 17. Valid objections relative to water quality were filed against this Application by Objectors
22 Shennum and McManus, Faust, Brodie, and Montana River Action Network. There were no
23 objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his
24 permit filed in against this Application. The water quality objections voiced concerns about the

1 return of treated wastewater into the aquifer. This change application does not authorize the
2 injection of treated wastewater into the aquifer. It authorizes the infiltration into the aquifer of
3 irrigation water that was historically applied to local fields. No Objector presented evidence that
4 putting irrigation water into a recharge basin would adversely affect the water quality of a prior
5 appropriator. The water quality of a prior appropriator will not be adversely affected by this
6 proposed change. (Department file)

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

9 **CONCLUSIONS OF LAW**

- 10 1. The Department has jurisdiction to approve a change in appropriation right if the
11 appropriator proves the criteria in Mont. Code Ann. § 85-2-402.
- 12 2. The Department shall approve a change in appropriation right if the appropriator proves
13 by a preponderance of evidence the proposed change in appropriation right will not adversely
14 affect the use of the existing water rights of other persons or other perfected or planned uses or
15 developments for which a permit or certificate has been issued or for which a state water
16 reservation has been issued; except for a lease authorization pursuant to Mont. Code Ann. §
17 85-2-436, a temporary change authorization for instream use to benefit the fishery resource
18 pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439
19 when authorization does not require appropriation works, the proposed means of diversion,
20 construction and operation of the appropriation works are adequate; the proposed use of water
21 is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or
22 a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann.
23 § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory
24 interest, or the written consent of the person with the possessory interest, in the property where

1 the water is to be put to beneficial use; if the change in appropriation right involves salvaged
2 water, the proposed water-saving methods will salvage at least the amount of water asserted by
3 the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not
4 be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of
5 a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

6 3. A public notice containing the facts pertinent to the change application must be
7 published once in a newspaper of general circulation in the area of the source and mailed to
8 certain individuals and entities. Mont. Code Ann. § 85-2-307. (See Finding of Fact No. 2)
9 Modifications to an application may be considered in a proceeding publicly noticed so long as
10 other appropriators are not prejudiced, regardless of whether the other appropriators are parties
11 to the case. If the proposed modification to the application suggests an increase in the burden
12 on the source beyond that identified in the notification of the application as originally proposed,
13 that could cause prejudice. Lack of complete notice means that persons potentially affected by
14 the change could be given insufficient information to determine the likelihood of whether they
15 would be adversely affected. (See In the Matter of the Application for Beneficial Water Use
16 Permit 76161-s76G by Ed Janney, Proposal for Decision (1992); In the Matter of the Application
17 for Beneficial Water Use Permit No. 24591-g41H by Kenyon-Noble Ready Mix Co., Proposal for
18 Decision (1981).)

19 Here, the modified application is a subset of the original application. (See Findings of
20 Fact Nos. 4, 6, 7.) Therefore, parties to the case are not prejudiced. The modification does not
21 increase the burden on the source beyond that identified in the public notice; therefore, other
22 appropriators are not prejudiced.

23 4. The Applicants have proven by a preponderance of the evidence that the water rights of
24 other appropriators under existing water rights, certificates, permits, or state reservations will not
25 be adversely affected when a change authorization is conditioned according to the plan set forth

1 in the Change Consent including installing a measuring device capable of recording the rate and
2 volume of water diverted into the infiltration galleries, and recording the volume of water
3 diverted. Records of the volume of water diverted shall be submitted to DNRC by October 15th
4 of each year. All remaining water and water rights not provided for in Paragraph A of the
5 Change Consent, consisting of 0.46 cfs out of Water Right Claim No. 41H 126909-00, and 1.27
6 cfs out of Water Right Claim No. 41H 126910-00 shall not hereafter be diverted and shall be left
7 in the West Gallatin River, but shall be administered as augmentation water by the applicant
8 making call on the designated amounts to the diversion point of the Beck and Border Ditch in
9 the NW¼SW¼SE¼ of Section 14, Township 2 South, Range 4 East, Gallatin County.

10 Under Applicants' proposed changes, the water rights of prior appropriators will continue
11 to be satisfied, as the rights have historically been used for irrigation. A change to an
12 "augmentation" purpose to recharge ground water during the irrigation season in order to
13 eliminate stream-flow depletions throughout the year by putting the historic irrigation water into a
14 recharge basin is not unlike irrigation itself.

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

20 85-2-402. Changes in appropriation rights. (1) The right to make a change subject to the
21 provisions of this section in an existing water right, a permit, or a state water reservation
22 is recognized and confirmed. In a change proceeding under this section, there is no
23 presumption that an applicant for a change in appropriation right cannot establish lack of
24 adverse effect prior to the adjudication of other rights in the source of supply pursuant to
25 this chapter. An appropriator may not make a change in an appropriation right except, as
26 permitted under this section, by applying for and receiving the approval of the
27 department or, if applicable, of the legislature. An applicant shall submit a correct and
28 complete application.

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

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

8
9 (13) A change in appropriation right contrary to the provisions of this section is
10 invalid. An officer, agent, agency, or employee of the state may not knowingly permit,
11 aid, or assist in any manner an unauthorized change in appropriation right. A person or
12 corporation may not, directly or indirectly, personally or through an agent, officer, or
13 employee, attempt to change an appropriation right except in accordance with this
14 section

15
16 (italics added).

17
18 Montana's change statute simply codifies western water law.⁴ One commentator
19 describes the general requirements in change proceedings as follows:

20 Perhaps the most common issue in a reallocation dispute is whether other appropriators,
21 especially junior appropriators, will be injured because of an increase in the consumptive
22 use of water. Consumptive use may be defined as "diversions less returns, the
23 difference being the amount of water physically removed (depleted) from the stream
24 system through evapotranspiration by irrigated crops or consumed by industrial
25 processes, manufacturing, power generation or municipal use." An appropriator may not
26 increase, through reallocation [changes] or otherwise, the historic *consumptive* use of
27 water to the injury of other appropriators. *In general, any act that increases the quantity*
28 *of water taken from and not returned to the source of supply constitutes an increase in*
29 *historic consumptive use.* As a limitation on the right of reallocation, historic consumptive
30 use is an application of the principle that appropriators have a vested right to the
31 continuation of stream conditions as they existed at the time of their initial
32 appropriations.

33
34 Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78 (italics added).

35 Here, the Applicants have shown the historic diversions and historic consumption and
36 will not increase under the proposed change. Mont. Code Ann. § 85-2-402(2)(a). See Finding of
37 Fact Nos. 8, 9, 10, 11, 14.

⁴ E.g., Wyo. Stat. § 41-3-104.

1 5. The Applicants have proven by a preponderance of evidence that the proposed means
2 of diversion, construction, and operation of the appropriation works are adequate. Mont. Code
3 Ann. § 85-2-402(2)(b). See Finding of Fact Nos. 12, 13.

4 6. The Applicants have proven by a preponderance of evidence that the quantity of water
5 proposed to be used is the minimum amount necessary for the proposed beneficial use and the
6 proposed use is beneficial. This Hearing Examiner is aware that Beneficial Water Use Permit
7 No. 41H 115469-00 issued to Applicant Zoot Properties, LLC, has been remanded to the DNRC
8 to rule on whether augmentation is allowed under the Montana Supreme Court's ruling in
9 Montana Trout Unlimited v. Montana Dept. of Natural Resources and Conservation, No. 05-069,
10 2006 MT 72. That remand does not dictate that the augmentation use proposed here is not
11 beneficial but has to do with allowing augmentation in a permit proceeding in a closed basin.

12 "Augmentation plan" means a plan to provide water to a source of supply and its
13 tributaries to mitigate the depletion effects of a permit or change authorization. The
14 augmentation water right priority date is important to the success of any augmentation plan
15 since a call can be made on that water right. Examples of augmentation include, but are not
16 limited to augmenting the source of supply with water from a nontributary source, or retiring all
17 or a portion of senior water rights in the same source of supply in amounts equal to or greater
18 than the depletion effects of the permit or change application. Mont. Admin. R. 36.12.101(8).The
19 Department's administrative rules (effective January 1, 2005) allow augmentation in closed
20 basins such as the Upper Missouri River basin. See Mont. Admin. R. 36.12.120 (6)-(8). Objector
21 Faust Group argues that the Applicant does not directly benefit from the non-use of its water
22 rights and they are instead abandoning the water rights. Applicants show no intent to abandon
23 their water rights, but rather to have callable water rights for use as herein proposed. Objector
24 Faust Group also argue that augmentation is not such a benefit that fits within the "traditional

1 uses” enumerated in Mont. Code Ann. § 85-2-102(2)(a) which uses in themselves benefit the
2 public, and that the definition does not sanction uses that are designed only to mitigate specific
3 adverse effects that are unnecessary to begin with. The definition of beneficial use found in
4 administrative rule, statute, and case law is “a use of water for the benefit of the appropriator . . .
5 .” See Mont. Admin. R. 36.12.101(8); Mont. Code Ann. § 85-2-102((2)(a)); Sayre v. Johnson, 33
6 Mont. 15, 81 P.389 (1905). Without the changes proposed in this case, Applicant would not be
7 able to exercise beneficial water use permits that may issue pursuant to Application Nos. 41H
8 30012025 and 41H 30013629, and Beneficial Water Use Permit No. 41H 115469-00. The
9 Applicants will clearly benefit from the proposed use of water.

10 It may be necessary for an applicant to make use of new technology or specialized
11 equipment in their water use. If a water use is dependent on special management, technology
12 or measurement to ensure there will be no adverse affect to other water users, DNRC can and
13 routinely does, condition a new permit’s use on use of that special management, technology or
14 measurement. See Mont. Code Ann. § 85-2-312. There is simply no indication in the sections of
15 the Montana Water Use Act that govern the water right change process (Mont. Code Ann. §§
16 85-2-401, *et.seq.*) that a plan of augmentation as a way to preclude adverse affect from
17 exercising a water right, either by replacement of water in a source of supply through a change
18 in use of an existing water right or by other means, is prohibited. Montana case law also
19 provides a history of augmentation, including augmentation by new or untried methods. See
20 Thompson v. Harvey (1974), 154 Mont. 133, 519 P.2d 963; Perkins v. Kramer (1966), 148 Mont.
21 355, 423 P.2d 587. Augmentation is also recognized in other prior appropriation states for
22 various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA
23 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho). Objectors presented no
24 authority for their proposition that augmentation is not allowed for the purpose of meeting the

1 Mont. Code Ann. § 85-2-402 criteria. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact
2 Nos. 14, 15.

3 7. The Applicants have proven by a preponderance of evidence a possessory interest in
4 the property where water is to be put to beneficial use. An applicant or a representative must
5 sign the application affidavit to affirm the following: (a) the statements on the application and all
6 information submitted with the application are true and correct; and (b) except in cases of an
7 instream flow application, or where the application is for sale, rental, distribution, or is a
8 municipal use, or in any other context in which water is being supplied to another and it is clear
9 that the ultimate user will not accept the supply without consenting to the use of water on the
10 user's place of use, the applicant has possessory interest in the property where the water is to
11 be put to beneficial use or has the written consent of the person having the possessory interest.
12 See Mont. Admin. R. 36.12.1802. Mont. Code Ann. § 85-2-402(2)(d). See, Finding of Fact
13 No.16.

14 8. The water quality of a prior appropriator will not be adversely affected. The objections
15 raised were concerns about the injection of treated sewage, and not the injection of the irrigation
16 water in this proposed change. The augmentation proposed here is not for the injection of
17 treated sewage as described in the water quality objections. The water to be injected is the
18 same quality that has been used to irrigate the historic place of use since 1866 and will not
19 change the water quality. No valid objections to the ability of a discharge permit holder to satisfy
20 effluent limitation of a permit was raised. Mont. Code Ann. §§ 85-2-402(2)(f), (g). See, Finding of
21 Fact Nos. 5, 17.

22 9. The Department may approve a change subject to terms, conditions, restrictions, and
23 limitations it considers necessary to satisfy the criteria for authorization to change a water right.

1 The Applicant has agreed to measure and report the water diverted into the recharge basin.
2 Mont. Code Ann. § 85-2-402(8). See Conclusion of Law No. 3.

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

5 **PROPOSED ORDER**

6 Subject to the terms, conditions, restrictions, and limitations specified below,
7 Authorization to Change A Water Right No. 41H 30014080 is hereby **GRANTED** to Zoot
8 Properties, LLC, and Utility Solutions, LLC.

9 Applicant is authorized to change 2.56 cubic feet per second (cfs) under Water Claim
10 Nos. 41H 126910-00 and 41H 126909-00 from irrigation to augmentation as specified below.

11 This augmentation is to mitigate any depletion of water to the West Gallatin River from the three
12 (3) proposed Zoot Properties, LLC, wells and the nine (9) proposed Utility Solutions, LLC, wells.
13 Augmentation use would occur from May 1 to September 30, inclusive. Specifically:

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

18 B. All remaining water and water rights not provided for below, consisting of 1.27 cfs out of
19 Water Right Claim No. 41H 126910-00, and 0.46 cfs out of Water Right Claim No. 41H 126909-
20 00 shall not hereafter be diverted and shall otherwise be left in the West Gallatin River, but shall
21 be administered by the applicant making call on the above designated amounts to the diversion
22 point of the Beck & Border Ditch in the NW¼SW¼SE¼ of Section 14, Township 2 South, Range
23 4 East, Gallatin County.

24 **Augmentation of Zoot Wells:**

1 C. 0.17 cfs up to 51.8 acre-feet per year out of Water Right No. 41H 126910-00 and 0.06
2 cfs up to 18.2 acre-feet per year out of Water Right No. 41H 126909-00, a total of 0.23 cfs up to
3 70 acre-feet, shall not hereafter be diverted from the West Gallatin River, and shall otherwise be
4 left in the West Gallatin River, to augment any depletions to West Gallatin River flows arising
5 out of or related to the exercise of any rights issued for the use of water in or the same as those
6 found in Beneficial Water Use Permit No. 41H 11546900.

7 D. The augmentation purpose for this 0.23 cfs up to 70 acre-feet per year of augmentation
8 water shall be from the location of the Beck and Border Ditch to a point where the West Gallatin
9 River leaves the North side of Sections 10 and 11, Township 2 South, Range 4 East, Gallatin
10 County, Montana.

11 **Utility Solutions Wells Augmentation:**

12 E. Water will be diverted into the Beck and Border Ditch in the amounts of 0.44 cfs up to 99
13 acre-feet per year from Water Right Claim No. 41H 126910-00 and 0.16 cfs up to 35.1 acre-feet
14 per year from Water Right Claim No. 41H 126909-00. After ditch loss, 0.43 cfs up to 90.2 acre-
15 feet per year from Water Right Claim No. 41H 126910-00 and 0.12 cfs up to 33.8 acre-feet per
16 year from Water Right Claim No. 41H 126909-00 will be diverted to settling basins and pumped
17 into recharge basins located in the NE¼, Section 11, Township 2 South, Range 4 East.

18 F. The appropriator shall install a measuring device capable of recording the rate and
19 volume of water diverted into the recharge basins from the Beck and Border Ditch, and must
20 record the volume of water diverted into the recharge basins. Such records shall be submitted to
21 the Bozeman Water Resources Regional Office, by October 15th of each year. Water must not
22 be diverted until the required measuring device is in place and operating properly. The
23 appropriator shall maintain the measuring device so it always operates properly and measures
24 flow rate and volume accurately.

1 **NOTICE**

2 This Proposal for Decision may be adopted as the Department's final decision unless
3 timely exceptions are filed as described below. Any party adversely affected by this Proposal for
4 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral
5 argument. Exceptions and briefs, and requests for oral argument must be filed with the
6 Department by August 3, 2006, or postmarked by the same date, and copies mailed by that
7 same date to all parties.

8 Parties may file responses and response briefs to any exception filed by another party.
9 The responses and response briefs must be filed with the Department by August 13, 2006, or
10 postmarked by the same date, and copies must be mailed by that same date to all parties. No
11 new evidence will be considered.

12 No final decision shall be made until after the expiration of the above time periods, and
13 due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

14 Dated this 14th day of July 2006.

15
16 / Original Signed By Charles F Brasen /

17 Charles F Brasen
18 Hearing Officer
19 Water Resources Division
20 Department of Natural Resources
21 and Conservation
22 PO Box 201601
23 Helena, Montana 59620-1601
24

25 Att: Consent To Administrative Order executed by the Parties in the Matter of Application To
26 Change Water Right No. 41H 30014080

RECEIVED

DEC 13 2005

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
WATER RESOURCES DIVISION
STATE OF MONTANA

MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
HEARINGS UNIT

IN THE MATTER OF THE APPLICATION TO
CHANGE WATER RIGHT NO. 41H 30014080 BY
UTILITY SOLUTIONS, LLC

Consent to Entry of Administrative
Order

Comes now the undersigned parties to the above-entitled matter, by and through their attorneys, and agree that the above-named application fully complies with the requirements set forth in MCA 85-2-402 and all other requirements of the Montana Water Use Act, provided that the approval of the DNRC of the above-named application contains the following material conditions to the exercise of the water rights under the changed conditions, in addition to all other conditions that are usually and customarily appended by the DNRC to any authorization to change an existing water right:

I. Augmentation of Zoot Wells.

A.) 0.17 cfs up to 51.8 acre feet per year out of Water Right No. 41H-126910-00, and 0.06 cfs up to 18.2 acre feet per year out of Water Right No. 41H-126909-00, shall not hereafter be diverted from the Gallatin River, and shall otherwise be left in the Gallatin River, to augment any depletions to Gallatin River flows arising out of or related to the exercise of any rights inuring in Water Use Permit No. 11546900-41H.

B.) The period of use shall be from May 1st through September 30th.

Consent to Entry of Administrative Order 1

Attachment 1 Page 1:
Consent To Administrative Order In the Matter of Application To Change Water Right No.
41H 30014080

1 C.) The 0.23 cfs up to 70 acre feet per year shall be administered as if it was being diverted at
2 the present point of diversion of Water Right No. 41H-15825 or at the first calling right
3 then in priority downstream thereof.

4 D.) As conditioned in accordance with subparagraphs A through C, the change of 0.23 cfs up
5 to 70 acre feet per year complies with Paragraph C of the DNRC's Final Order approving
6 the issuance of Water Use Permit No. 11546900-41H.

7

8 **II. Augmentation of Utility Solutions' Wells.**

9 A.) 0.16 cfs, up to 35.1 acre feet per year, out of Water Right No. 41H-126909-00, and
10 0.44 cfs, up to 99 acre feet per year out of 41H 126910, shall be diverted from the date in
11 the spring that the Beck & Border Ditch first carries water through September 30th, or
12 until 134.1 acre feet has been reached, whichever date is earlier, from the diversion point
13 of the Beck & Border Ditch in the NWSWSE of Section 14, Township 2 South, Range 4
14 East, Gallatin County, and, after ditch loss, 0.12 cfs, up to 33.8 acre feet per year out of
15 Water Right No. 41H-126909-00, and 0.43 cfs thereof up to 90.2 acre feet per year shall
16 thereafter be diverted from the Beck & Border Ditch into infiltration galleries located in
17 the NE¼ of Section 11, T2S, R4E for the purposes of augmenting any depletions to the
18 flows of the Gallatin River arising from the exercise of any rights inuring in any water
19 use permit issued by the DNRC under Application for Beneficial Water Use Permit No.
20 30012025 and Application for Beneficial Water Use Permit No. 30013629.

21 B.) A measuring device capable of recording the rate and volume of water diverted into the
22 infiltration galleries, and records of the volume of water diverted shall be submitted to
23 the DNRC by October 15th of each year.

24 C.) As conditioned in accordance with subparagraph A and subparagraph B, the diversion of
25 and use of those amounts set forth in subparagraph A is sufficient to offset estimated
depletions to the flows of the Gallatin River arising from the exercise of any rights inuring in any water use permit issued by the DNRC under Application for Beneficial Water Use Permit No. 30012025 and Application for Beneficial Water Use Permit No. 30013629.

**Attachment 1 Page 2:
Consent To Administrative Order In the Matter of Application To Change Water Right No.
41H 30014080**

1 consumptive use arising out of or related to any water use permits that the DNRC will
 2 issue under Application for Beneficial Water Use Permit No. 30012025 and Application
 3 for Beneficial Water Use Permit No. 30013629.

4

5 **III. Administration of Water Rights.**

6 A.) All the remaining water and water rights not provided for in Paragraph A hereof,
 7 consisting of 0.46 cfs out of Water Right No. 41H 126909, and 1.27 cfs out of Water
 8 Right No. 41H 126910 shall not hereafter be diverted and shall otherwise be left in the
 9 Gallatin River, but shall be administered by calling the designated amounts to the
 10 diversion point of the Beck & Border Ditch in the NWSWE of Section 14, Township 2
 11 South, Range 4 East, Gallatin County.

12

13 Signed this 12th day of December, 2005

14

15

16

17 

18 Matthew Williams
 19 Attorney for Utility Solutions, LLC

20 Laura Zierner
 21 Attorney for Montana Trout Unlimited

22 Robert Lane
 23 Robert Lane
 24 Attorney for Montana Department of Fish,
 25 Wildlife & Parks

26 David Weaver
 27 Attorney for Francis Kelly, Deloris
 28 Kelly, Walt Sales, Association of
 29 Gallatin Agricultural Irrigators

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Consent to Entry of Administrative Order

**Attachment 1 Page 3:
 Consent To Administrative Order In the Matter of Application To Change Water Right No.
 41H 30014080**

1 consumptive use arising out of or related to any water use permits that the DNRC will
 2 issue under Application for Beneficial Water Use Permit No. 30012025 and Application
 3 for Beneficial Water Use Permit No. 30013629.
 4

5 **III. Administration of Water Rights.**

6 A.) All the remaining water and water rights not provided for in Paragraph A hereof,
 7 consisting of 0.46 cfs out of Water Right No. 41H 126909, and 1.27 cfs out of Water
 8 Right No. 41H 126910 shall not hereafter be diverted and shall otherwise be left in the
 9 Gallatin River, but shall be administered by calling the designated amounts to the
 10 diversion point of the Beck & Border Ditch in the NWSWE of Section 14, Township 2
 11 South, Range 4 East, Gallatin County.
 12

13 Signed this 12th day of December, 2005

14
 15
 16
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 19
 20 Matthew Williams
 Attorney for Utility Solutions, LLC

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 22
 23 Robert Lane
 Attorney for Montana Department of Fish,
 24 Wildlife & Parks

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**Attachment 1 Page 4:
 Consent To Administrative Order In the Matter of Application To Change Water Right No.
 41H 30014080**

1 consumptive use arising out of or related to any water use permits that the DNRC will
2 issue under Application for Beneficial Water Use Permit No. 30012025 and Application
3 for Beneficial Water Use Permit No. 30013629.

4
5 **III. Administration of Water Rights.**

6 A.) All the remaining water and water rights not provided for in Paragraph A hereof,
7 consisting of 0.46 cfs out of Water Right No. 41H 126909, and 1.27 cfs out of Water
8 Right No. 41H 126910 shall not hereafter be diverted and shall otherwise be left in the
9 Gallatin River, but shall be administered by calling the designated amounts to the
10 diversion point of the Beck & Border Ditch in the NWSWSE of Section 14, Township 2
11 South, Range 4 East, Gallatin County.

12
13 Signed this _____ day of December, 2005

14
15
16
17
18 Matthew Williams
19 Attorney for Utility Solutions, LLC

20
21 Robert Lane
22 Attorney for Montana Department of Fish,
23 Wildlife & Parks

18 Laura Ziemer
19 Attorney for Montana Trout
20 Unlimited

21 David Weaver
22 Attorney for Francis Kelly, Deloris
23 Kelly, Walt Sales, Association of
24 Gallatin Agricultural Irrigators
25

Consent to Entry of Administrative Order 3

**Attachment 1 Page 5:
Consent To Administrative Order In the Matter of Application To Change Water Right No.
41H 30014080**

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 14th day of July 2006 by first class United States mail

UTILITY SOLUTIONS LLC
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CC:
WATER RESOURCES REGIONAL OFFICE
2273 BOOT HILL COURT, SUITE 110
BOZEMAN, MT 59715

RUSSELL LEVENS – **Hand Delivered**
PO BOX 201601
HELENA, MT 59620-1601

/ Original Signed By Jamie Scow /

JAMIE SCOW
HEARINGS UNIT, 406-444-6615

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

**IN THE MATTER OF APPLICATION TO CHANGE)
A WATER RIGHT NO. 41H-30014080 BY UTILITY)
SOLUTIONS LLC AND ZOOT PROPERTIES LLC)**

FINAL ORDER

BACKGROUND

The Proposal for Decision (PFD) in this matter was entered on July 14, 2006. Objectors Roselee Faust, James Lohmeir, Charles Brodie, Paul Shennum, Sandra McManus, West Gallatin Canal Company and Montana River Action Network (Faust Group), by and through counsel Arthur V. Wittich and Frederick Landers, filed timely exceptions to the PFD with a request for oral argument on August 3, 2006. The Association of Gallatin Agricultural Irrigators' (AGAI), Montana Trout Unlimited (TU) and the Montana Department of Fish, Wildlife, and Parks (DFWP) filed timely exceptions to the PFD on August 3, 2006. The exceptions filed by AGAI, TU, and DFWP (who all previously signed a "Consent to Administrative Order" in this matter) do not seek to change the outcome recommended by the PFD, but only suggest some minor changes in the PFD's Findings of Fact. AGAI, TU, and DFWP did not request oral argument on their exceptions. Applicant, Utility Solutions, LLC, by and through counsel Mathew W. Williams and Donald D. MacIntyre, filed a response to the exceptions filed by Faust Group and the "comments" of AGAI, TU, and DFWP on August 14, 2006. On September 26, 2006, objectors Faust Group filed with the Department "Supplemental Objections" in this matter. That filing was previously rejected by this Hearing Examiner on October 12, 2006, as being untimely filed.

Oral argument on the exceptions was held on November 13, 2006. At oral argument, objectors Faust Group was represented by Frederick Landers and Utility Solutions LLC was represented by Mathew Williams. AGAI, TU, and DFWP did not participate in the oral argument hearing.

The PFD recommended granting of Application No. 41H-30014080 subject to terms, conditions, restrictions, and limitations as specified.

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order: reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact

unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. *Strom v. Logan*, 304 Mont. 176, 18 P.3d 1024 (2001). Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. ARM 36.12.229(2). The record was closed at the end of the hearing. No evidence presented after the record was closed has been considered in this decision.

I have considered the exceptions and reviewed the record under these standards.

DISCUSSION

Faust Group Exceptions

Objectors Faust Group argue that the Hearing Examiner's PFD is in error because:

- 1) Augmentation is not a beneficial use and is not a proper subject for a change of use under Mont. Code Ann. § 85-2-402.
- 2) The Montana Code does not authorize augmentation for the purpose of mitigating adverse effects to prior appropriators and stream flow depletion within the closed Upper Missouri River Basin.
- 3) The DNRC's administrative rules allowing augmentation is invalid under Montana law.

Exception 1. Augmentation is not a beneficial use of water – Findings of Fact No. 14 and 15 and Conclusion of Law No. 7

Faust Group argues that augmentation is not, nor was it intended to be, considered a beneficial use under the Montana Water Use Act. In support of this proposition, Faust Group relies on the definition of "beneficial use" as provided under Mont. Code Ann. § 85-2-102(2) which does not specifically list "augmentation" as a beneficial use. Faust Group contends that granting Utility Solutions' application would result in the abandonment of their existing surface water rights through non-use. Finally, Faust Group argues that the Montana Legislature provided, through Mont. Code Ann. § 85-2-102(2)(d) (Faust Group cites MCA § 85-2-102(2)(c) but I am assuming that they meant (d)), what "might be considered a beneficial use for

augmentation purposes”, but that the degree of specificity in MCA § 85-2-102(2)(d) is so narrow that the Legislature “clearly did not intend to expand the definition of beneficial use to include a general right of augmentation.” Faust Group relies solely on this statutory argument and presents no other argument or authority that augmentation should not be considered a beneficial use or to contradict the authority set forth in the PFD.

The definition of beneficial use includes “a use of water for the benefit of the appropriator . . . including but not limited to agricultural . . .” (emphasis provided). Mont. Code Ann. § 85-2-102(2). As a general rule, a statute must be interpreted with its plain meaning. E.g., *Ravalli County v. Erickson*, 2004 MT 35, ¶¶ 11 and 12, 320 Mont. 31, 85 P.3d 772 (intention of the legislature determined from the plain meaning of the words used); *Highlands Golf Club v. Ashmore*, 202 MT 8, ¶ 20, 308 Mont. 111, 36 P.3d 697 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither inserts what has been omitted or omits what has been inserted, Mont. Code Ann. § 1-2-101). Effect must be given to all words of the statute. E.g., *State v. Heath*, 2004 MT 126 ¶ 31, 321 Mont. 280, ¶ 31, 90 P.3d 426, ¶ 31 (statutes must be so construed that no word therein is to be considered meaningless, if such a construction can be reasonably found that will give it effect). Clearly the Legislature intended that the words “including but not limited to” have meaning by not limiting beneficial use to only those uses expressly referenced in the statute. To conclude otherwise is to render those words meaningless.

The Hearing Examiner found, and the evidence supports, that Utility Solutions modeling of the West Gallatin River shows that surface water can effectively be used to recharge ground water and that that recharge is beneficial to Utility Solutions by allowing them to exercise other beneficial water use permits. (Findings of Fact No. 14 and 15). Augmentation is clearly a use of water – it is a use of water to offset a depletion caused by a competing use in order to prevent adverse affects upon prior appropriators. Neither does augmentation result in the “non-use” or abandonment of Utility Solutions water right. Abandonment of a water right requires the element of intent and it is clear here that Utility Solutions has no intention of abandoning their water right, but rather to *use* it to offset the effects of depletion by their competing use. E.g. *Axtell v. M.S. Consulting* (1998), 288 Mont. 150, 160, 955 P.2d 1362, 1369 (two elements are necessary for the abandonment of a water right: nonuse of the water associated with the water right and intent to abandon the water right). Moreover, Utility Solutions seeks an enforceable right to use that water for augmentation. The Hearing Examiner, in Conclusion of Law No. 6, thoroughly examined the law, the Department’s rules, and the record before him in this matter

and correctly concluded that Utility Solutions have proven by a preponderance of the evidence that the proposed use is a beneficial use. Faust Group's argument that the augmentation proposed by Utility Solutions "does not fall within any of [the] classifications" provided for under the definition of beneficial use or that it is not one of the "traditional" uses ignores the Legislature's obvious desire to recognize beneficial uses of water not specifically listed in Mont. Code Ann. § 85-2-102(2) and the need for flexibility in administering water resources at times of increasing scarcity. Faust Group's reliance on Mont. Code Ann. § 85-2-102(2)(d) is also not helpful. That section of statute provides for a temporary change in appropriation to *enhance* instream flow for fishery benefits. Utility Solutions is not here attempting to *enhance* the flow of the West Gallatin River for fisheries, but rather to *offset* a depletion to that river which would otherwise occur without their augmentation plan. I find Faust Group's argument unpersuasive.

Faust Group's exception No. 1 cites Conclusion of Law No. 7. This Conclusion of Law relates to the criteria under Mont. Code Ann. § 85-2-402(2)(d) which provides that "the applicant has a possessory interest . . . in the property where the water is to be put to beneficial use." Faust Group provides no argument regarding possessory interest and I can only conclude that they meant to cite Conclusion of Law No. 6. However, to the extent that Faust Group did mean Conclusion of Law No. 7 in their exception, I reject that exception as not being argued. Mont. Admin. R. 36.12.229 (exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript if one was prepared).

Findings of Fact No. 14 and 15 and Conclusion of Law No. 6 will not be modified or rejected based upon this exception.

Exception No. 2 The Montana Code does not authorize augmentation for the purpose of mitigating adverse effects to prior appropriators and stream flow depletion within the closed Upper Missouri River Basin – Conclusion of Law No. 6

Faust Group again argues that their exception is based upon the plain language of the Water Use Act. As explained above, I have rejected that argument. Faust Group then continues their argument by asserting that the Hearing Examiner relied solely on Mont. Code Ann. § 85-2-312 ("[t]he department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 . . ."). Faust Group argues that § 85-2-312 authorizes DNRC to impose "relatively simple" conditions on permits. The Faust Group provides no authority to support an argument as to the allowance of "relatively

simple” conditions versus those they consider not to be “relatively simple,” the difference between the two, or the relevance of this argument to a change proceeding.

I find that this argument is directed towards the wrong proceeding involving Utility Solutions’ overall project, i.e. the Application for Beneficial Use Permit Nos. 41H-30012025 and 41H-30013629. In the PFD, the Hearing Examiner was explaining that Mont. Code Ann. § 85-2-312 could be used to “condition a *new* permit’s use on . . . special management, technology or measurement.” (PFD at p. 16, emphasis provided). In the very next sentence the Hearing Examiner explains that “there is no indication in the sections of the Montana Water Use Act that govern the water right *change* process . . . that a plan of augmentation as a way to preclude adverse affect from exercising a water right . . . is prohibited.” (*Id.*, emphasis provided).

Faust Group also repeats their argument that the Water Use Act allows for temporary change authorization in order to maintain or enhance instream flow for the benefit of fisheries. Faust Group acknowledges that the term “augmentation” is not used in these portions of the Water Use Act, but argues that the Legislature, in providing for this type of change of use, carved out a definition of “augmentation” that is so narrow that no other type of augmentation could be contemplated. Faust Group states that “the absence of a general provision allowing for augmentation to mitigate adverse effects under MCA § 85-2-311 shows that none was intended.” In fact, however, the Legislature did not specify *any* specific provision to mitigate adverse effects under § 85-2-311, but provided that the determination of adverse affect be based on the consideration of the applicant’s *plan* to prevent adverse affects on prior appropriators. Utility Solutions’ *plan* is to augment (i.e. offset) their potential depletions to the West Gallatin River by changing the use of their surface water right. The Hearing Examiner is clearly correct in determining that the proposed use of water is beneficial.

Finally, Faust Group states that “the fact that Utility Solutions’ new permit applications . . . and its suspect augmentation plan are being proposed within a closed basin is, at a minimum, reason for skepticism in this case, as the DNRC has not previously allowed a change of use for augmentation in a closed basin.” Exceptions by Faust Group to PFD at p. 5-6. Apparently in support of this argument Faust Group compares the provisions of the Upper Clark Fork River basin closure law (MCA § 85-2-337) which contains a provision for augmentation with the Upper Missouri River basin closure law (MCA § 85-2-342) which does not contain a provision for augmentation. Faust Group attempts to bolster this argument by citing to previous DNRC decisions. (PFD for Application Nos. 41H-30003523 and 41H30000806 by Montana Golf

Enterprises, LLC). Again, Faust Group attacks the wrong proceeding. The Upper Clark Fork River basin closure provides for augmentation for *new* permits not for *changes* to appropriations. In addition, in the Upper Clark Fork basin closure law (MCA § 85-2-337), an augmentation plan is part of the exception for ground water to the prohibition on processing applications for beneficial water use permits.¹ In the case of the Upper Missouri River basin closure law (MCA § 85-2-342), there is no provision to augment out of the basin closure through an augmentation plan for the ground water exception, and the Department does not hold that there is such an exception to the prohibition on processing applications. The Faust Group appear to confuse augmentation out of a basin closure with the use of augmentation to mitigate adverse effect under a statutory exception to the basin closure.

Faust Group's reliance on *Montana Golf* is also misplaced. *Montana Golf* involved an application for a new appropriation of ground water in the Upper Missouri River closure area and a corollary change application to retire irrigated land in order to offset the depletion caused by the new appropriation. Unlike Utility Solutions' applications for new appropriations, *Montana Golf's* new appropriation did not fall within one of the exceptions provided for under the Missouri River Basin closure. The PFD in *Montana Golf* did not stand for the proposition that "[i]f the Legislature had intended to allow approval conditioned upon augmentation under the Upper Missouri River Basin Closure Law, it would have expressly provided for it." Exceptions by Faust Group to PFD at p. 6. *Montana Golf* simply denied the change application (the augmentation plan) based solely upon a finding that the applicant failed to prove no adverse affect because they did not provide enough information about the amount of land to be retired from irrigation and the historic consumptive use of those irrigated lands. The denial of the new appropriation application in *Montana Golf* was based upon a finding that the applicant failed to prove physical availability, legal availability, and no adverse affect. The PFD only notes that "[t]here are no statutory provisions for or against augmentation in the Upper Missouri River closure, or requirements to provide control of augmentation. The Upper Missouri River Basin closure was amended in 1997, but no augmentation provision was enacted as in the upper Clark Fork basin." All of Faust Groups arguments relate to whether augmentation is allowed to offset a proposed *new* depletion, not whether a *change* in appropriation can be made to provide for augmentation to mitigate adverse effect. Those arguments are better directed towards other proceedings.

¹Notably, the criterion under Mont. Code Ann. § 85-2-337 that applicant prove that the augmentation plan provides sufficient augmentation water in amount, time, and location to replace depletions to senior water rights, is expressly in addition to the criteria of MCA § 85-2-311 (including adverse effect).

Conclusion of Law No. 6 will not be modified or rejected based upon this exception.

Exception No. 3 The DNRC's administrative rules allowing augmentation is invalid under Montana law.

Faust Group asserts that the Hearing Examiner improperly cites to DNRC's rule A.R.M. 26.12.101(8) [sic] and A.R.M. 36.12.120(6)-(8) and that those rules are inconsistent with and go well beyond the plain language of the Water Use Act and are therefore invalid under Montana Law.

An administrative agency's interpretation of a statute under its domain is presumed to be controlling. *Christenot v. State, Dept. of Commerce* (1995), 272 Mont. 396, 901 P.2d 545. An action to determine the validity of a properly adopted and promulgated rule does not lie in a proceeding for an Application to Change a Water Right, but is provided for in the Montana Administrative Procedure Act. The Hearing Examiner and this Final Decision Maker are without jurisdiction to determine the validity of a properly adopted and promulgated rule and are thus bound the that rule. Faust Group's exception simply cannot be addressed in this forum.

AGAI, TU and DFWP Exceptions

AGAI, et. al. provide comments regarding the "Adverse Effect" portion of the Findings of Fact in the PFD. While AGAI, et. al.'s comments may help "square the Proposal for Decision with the objector's (and presumably the applicant's) understanding of the record" I cannot find that the Hearing Examiner's Findings of Fact are "not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." AGAI, TU and DFWP's comments are appreciated and have been preserved in the record.

The Findings of Fact in the PFD will not be modified or rejected based upon this exception.

Based on the record in this matter, the Department makes the following:

ORDER

The Department hereby adopts and incorporates by reference, without modifications, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Application to Change a Water Right No. 41H-30014080 by Utility Solutions LLC and Zoot Properties LLC is **GRANTED** subject to the terms, conditions, restrictions, and limitations specified below.

Applicant is authorized to change 2.56 cubic feet per second (cfs) under Water Claim Nos. 41H 126910-00 and 41H 126909-00 from irrigation to augmentation as specified below.

This augmentation is to mitigate any depletion of water to the West Gallatin River from the three (3) proposed Zoot Properties, LLC, wells and the nine (9) proposed Utility Solutions, LLC, wells.

Augmentation use would occur from May 1 to September 30, inclusive. Specifically:

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

B. All remaining water and water rights not provided for below, consisting of 1.27 cfs out of Water Right Claim No. 41H 126910-00, and 0.46 cfs out of Water Right Claim No. 41H 126909-00 shall not hereafter be diverted and shall otherwise be left in the West Gallatin River, but shall be administered by the applicant making call on the above designated amounts to the diversion point of the Beck & Border Ditch in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, Township 2 South, Range 4 East, Gallatin County.

Augmentation of Zoot Wells:

C. 0.17 cfs up to 51.8 acre-feet per year out of Water Right No. 41H 126910-00 and 0.06 cfs up to 18.2 acre-feet per year out of Water Right No. 41H 126909-00, a total of 0.23 cfs up to 70 acre-feet, shall not hereafter be diverted from the West Gallatin River, and shall otherwise be left in the West Gallatin River, to augment any depletions to West Gallatin River flows arising out of or related to the exercise of any rights issued for the use of water in or the same as those found in Beneficial Water Use Permit No. 41H 11546900.

D. The augmentation purpose for this 0.23 cfs up to 70 acre-feet per year of augmentation water shall be from the location of the Beck and Border Ditch to a point where the West Gallatin River leaves the North side of Sections 10 and 11, Township 2 South, Range 4 East, Gallatin County, Montana.

Utility Solutions Wells Augmentation:

E. Water will be diverted into the Beck and Border Ditch in the amounts of 0.44 cfs up to 99 acre-feet per year from Water Right Claim No. 41H 126910-00 and 0.16 cfs up to 35.1 acre-feet per year from Water Right Claim No. 41H 126909-00. After ditch loss, 0.43 cfs up to 90.2 acre-feet per year from Water Right Claim No. 41H 126910-00 and 0.12 cfs up to 33.8 acre-feet per year from Water Right Claim No. 41H 126909-00 will be diverted to settling basins and pumped into recharge basins located in the NE¼, Section 11, Township 2 South, Range 4 East.

F. The appropriator shall install a measuring device capable of recording the rate and volume of water diverted into the recharge basins from the Beck and Border Ditch, and must record the volume of water diverted into the recharge basins. Such records shall be submitted to the Bozeman Water Resources Regional Office, by October 15th of each year. Water must not be diverted until the required measuring device is in place and operating properly. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

NOTICE

This final order may be appealed by a party 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.

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

Dated this 21st day of December, 2006.

/Original Signed by David A. Vogler/
David A. Vogler
Hearings Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 41H-30014080 BY UTILITY SOLUTIONS LLC AND ZOOT PROPERTIES LLC was served upon all parties listed below on this 21ST day of December, 2006 by first class United States mail.

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RUSSELL LEVENS – **Hand Delivered**
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/Original Signed by David A. Vogler/
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