

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

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<b>IN THE MATTER OF APPLICATION FOR</b>	)	
<b>BENEFICIAL WATER USE PERMIT NO. 41H</b>	)	<b>FINAL ORDER</b>
<b>30019215 BY UTILITY SOLUTIONS LLC</b>	)	

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on December 5, 2006, in Bozeman, Montana, to determine whether a beneficial water use permit should be issued to Utility Solutions, LLC, hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

**APPEARANCES**

Applicant appeared at the hearing by and through counsel, Matt Williams and Don MacIntyre. Marty Gagnon, P.E., Morrison-Maierle, Inc.; Michael Kaczmarek, Morrison-Maierle, Inc.; Dr. Michael Nicklin, P.E., Nicklin Earth & Water, Inc.; Richard Stenzel, P.E., Applegate Group, Inc.; and Barbara Campbell, part owner of Utility Solutions, LLC, testified for the Applicant. In addition, Michael Kaczmarek, Dr. Michael Nicklin, and Marty Gagnon, P.E., provided rebuttal testimony for the Applicant.

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

**EXHIBITS**

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below. Except when evidentiary objections are sustained,

prefiled exhibits (filed with prefiled direct testimony) will be part of the record. Exhibit numbers containing an “H” are exhibits offered at hearing as opposed to those submitted with pre-filed testimony, or they are copies of documents offered in accord with the December 1, 2006, Minute Order regarding official notice. (e.g., A1 or AH1).

Applicant offered twenty-eight exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit Nos. A1 - A5, A7 - A13, A13(2) - A17, and AH1 – AH2, AH7-AH11. No Exhibit A6 was submitted. Documents Nos. AH4, AH5, AH6, are matters officially noticed at hearing.

**Applicant's Exhibit A1** is a five-page copy (consisting of Sheets 1-5, each 11” x 17”) of the Preliminary Plat of Black Bull Subdivision prepared by Allied Engineering Services, Inc., prepared August 22, 2006. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A2** is a two-page copy (each 11” x 17”) of the Preliminary Plat of Middle Creek Parklands, prepared by Gateway Engineering and Surveying, Inc., dated February 22, 2006. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A3** consists of seven pages: 1) a four-page copy entitled Utility Solutions, LLC, Water Distribution System, Black Bull Run Water Service, November 2005; and 2) a three-page copy entitled Utility Solutions, LLC, Water Distribution System, Middle Creek Parklands Water Service, December 2005, prepared by Marty Gagnon. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A4** consists of an 11” x 17” map entitled Place of Use Exhibit. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A5** consists of a sixteen-page document entitled Technical Memorandum to Kenneth R. Wright, P.E. Chief Engineer, from Dwight W Kimsey and Patricia K Flood, P.E., dated December, 31, 1987. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A7** is a one-page document containing two sections entitled Evaporative Loss From WWTP Surface and Water Loss Due to Sludge Removal. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A8** is a one-page document entitled Summary of Estimated Water Consumption, prepared by Marty Gagnon. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A9** is a one-page 11” x 17” map entitled Water System Improvements Service Area 4, prepared by Morrison Maierle, Inc., and dated July 2006. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A10 (Replacement A-10)** is a one-page 11" x 17" map entitled Wastewater System Improvements Service Area 4, prepared by Morrison Maierle, Inc., and dated July 2006. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A11** is a two-page copy of a letter to Martin Gagnon, P.E., Morrison-Maierle, Inc., from the Department of Environmental Quality dated January 6, 2005. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A12** is a two-page copy of a letter to Martin Gagnon, P.E., Morrison-Maierle, Inc., from the Department of Environmental Quality dated November 23, 2004. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A13** is a nineteen-page copy of Domestic Wastewater Permit No. MT-X000106 issued to Dennis Simpson by the Montana Department of Environmental Quality on April 15, 2002. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A13(2)** is an 11" x 17" one-page map entitled Locations with Transmissivity Data, Vicinity of Four Corners, prepared by Nicklin Earth & Water, Inc., dated September 18, 2005. (Nicklin Pre-filed testimony).

**Applicant's Exhibit A14** is an 8½" x 11" one-page map entitled Geologic Map And Conceptual Cross-Section, Vicinity of Utility Solutions LLC Project, prepared by Nicklin Earth & Water, dated September 16, 2005. (Nicklin Pre-filed testimony)

**Applicant's Exhibit A15** is an 8½" x 11" one-page map entitled Model Domain and Boundary Conditions, Two Dimensional Simulation Model, Utility Solutions LLC, prepared by Nicklin Earth & Water, dated September 18, 2005. (Nicklin Pre-filed testimony)

**Applicant's Exhibit A16** is an undated one-page document entitled Model Input Assumptions, Black Bull Run and Middle Creek – Domestic/Commercial Pumping prepared by Nicklin Earth & Water. (Nicklin Pre-filed testimony)

**Applicant's Exhibit A17** is an undated 11" x 17" document entitled Stream Depletion of Ground-water – Simulated Reach – Including Black Bull Run and Middle Creek, Combined Pumping and Rapid Infiltration Basin Recharge 41H 30012025 & 41H 30019215 – Last Year of 16 Year Simulation prepared by Nicklin Earth & Water. (Nicklin Pre-filed testimony)

**Applicant's Exhibit AH1** is an 11" x 17" one page map entitled Alluvial Well Location Map dated April 2006 prepared by Morrison & Maierle, Inc.

**Applicant's Exhibit AH2** is an 11" x 17" one page map entitled Utility Solutions Infrastructure 2006 prepared by Morrison & Maierle, Inc., dated August 2006.

**Applicant's Exhibit AH3** was offered but not accepted.

**Applicant's Document AH4** is a copy of a document for which official notice was taken without objection. The copy was presented in accord with the Hearing Examiner's December 1, 2006, Minute Order and consists of a twelve-page copy of Mike Kaczmarek's August 13, 2004, Memo to Chris Wasia/Pat Eller regarding: Cone of Depression Calculation for Zoot Well, and an unsigned four-page copy of a document captioned as "Utility Solutions LLC's First Supplement to Objector Faust Group's First Set of Discovery Request To Applicant," dated November 2006.

**Applicant's Document AH5** is a copy of a document for which official notice was taken without objection. The copy was presented in accord with the Hearing Examiner's December 1, 2006, Minute Order and consists of an eighteen-page copy of Mike Kaczmarek's July 10, 2004, Memo to Barbara Campbell, Marty Gagnon, Pat Eller regarding: Four Corners Area Tertiary Aquifer Pumping Tests Interpretation.

**Applicant's Document AH6** is a copy of a four-page affidavit of Kim Overcast (regarding water rights issued by the Department of Natural Resources and Conservation) dated September 6, 2006, and its eleven-page Exhibit A. Official notice was taken of the document without objection; this document is not an exhibit.

**Applicant's Exhibit AH7** consists of a fifteen-page copy of the Department of Environmental Quality's response to comments regarding Utility Solutions, LLC's, MGWPCS Permit MTX000110, dated June 8, 2005.

**Applicant's Exhibit AH8** is a one-page copy of USGS data from the Gallatin River Basin, 06043500 Gallatin River Near Gallatin Gateway, MT, Discharge, Cubic Feet Per Second, Water Year October 2002 to September 2003.

**Applicant's Exhibit AH9** consists of a copy of pages 7-24 of *Water Resources Data, Montana, Water Year 2004, Volume 1. Hudson Bay and Upper Missouri River Basins*.

**Applicant's Exhibit AH10** is a one-page hydrograph entitled Daily Mean Discharge as recorded from 1889 through 2006, by the USGS at Station 06043500.

**Applicant's Exhibit AH11** is a twenty-one page copy entitled WATER RESOURCES RESEARCH, VOL. 42, W08415, doi:10.1029/2005WR00792, 2006, Transient effects of groundwater pumping and surface-water-irrigation returns on streamflow, by Eloise Kendy and John D. Bredehoeft, and published August 10, 2006. This exhibit was offered according to the Federal Rule of Evidence No. 702, not only for impeachment purposes, but for the truth of what it asserts. Objector Group objected that the testimony of Mr. Maus was being mischaracterized. Argument was heard from both sides and the Hearing Examiner then took the objection under advisement. Objection to Exhibit AH11 is **OVERRULED**, however, the Exhibit is only allowed to

impeach any testimony suggesting that modeling, as used by the Applicant, is not used by the scientific community to project or calculate what cannot be measured or computed by other means.

Objector Group offered two exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector Group's Maus and Cawlfeld Exhibits A.

**Objector's Maus Exhibit A** is a copy James Maus's Curriculum Vitae (Maus Pre-filed testimony).

**Objector's Maus Exhibit A** is a copy Larry Cawlfeld's Curriculum Vitae (Cawlfeld Pre-filed testimony).

### **PRELIMINARY MATTERS**

Immediately prior to the hearing, Objector James Lohmeier, and Objector Sandra McManus submitted letters to the Hearing Examiner withdrawing their objections. The Hearing Examiner provided copies to counsel for Applicant and Objector Group. Sandra McManus clarified that the withdrawal was for herself only and not Objector Paul Shennum whose name also appears on the objection filed with the Department of Natural Resources and Conservation (Department or DNRC). James Lohmeier and Sandra McManus are no longer parties in this matter.

The record was left open following the hearing for filing of simultaneous written responses to the prehearing memorandums filed by the Parties, and written closing statements. The record was left open for briefs filed by postmark of December 12, 2006. Briefs were received from the Applicant and the Objector Group.

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

### **FINDINGS OF FACT**

#### **General**

1. Application for Beneficial Water Use Permit 41H 30019215 in the name of Utility Solutions, LLC, and signed by Barbara Campbell, was filed with the Department on January 18, 2006. (Department file)

2. A public notice describing facts pertinent to this application was published in the *Bozeman Daily Chronicle*, a newspaper of general circulation on July 8, 2006, and was mailed to persons listed in the Department file on July 6, 2006. (Department file)
3. At hearing, Applicant clarified that pre-public notice the number of wells in the Northstar Subdivision well field anticipated to provide the water requested had been reduced from nine to six, plus the three wells located in the Galactic Park Subdivision. Applicant clarified that the place of use is limited to only the Black Bull Run Subdivision and the Middle Creek Parklands Subdivision. (Testimony of Marty Gagnon, Barb Campbell)
4. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding. In the EA at Part II, No. 2, on Page 6 of 7, Secondary and Cumulative impacts on the physical environment and human population have been addressed. Therein it states that cumulative impact of additional wells could impact water users on the river, unless potential water loss is mitigated, and the cumulative impact on human population will be an increase in people living in the Four Corners area. (Department file)
5. Applicant seeks to appropriate 373 gallons per minute (gpm) up to 194.6 acre-feet of ground water per year. The ground water is to be diverted from one or more of nine wells<sup>1</sup> located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , and NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , all in Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The proposed use is municipal use. It does not include any irrigation. The proposed place of use is the Black Bull Run and Middle Creek Parklands Subdivisions located in the E $\frac{1}{2}$  and SW $\frac{1}{4}$  of Section 6, and N $\frac{1}{2}$  and W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 7, all in Township 2 South, Range 5 East; and in the E $\frac{1}{2}$ E $\frac{1}{2}$  of Section 12, Township 2 South, Range 4 East, all in Gallatin County, Montana. The proposed water system will incorporate a 500,000 gallon water storage tank located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The proposed period of diversion and period of use is January 1 through December 31, inclusive, of each year. (Department file)

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<sup>1</sup> Utility Solutions originally proposed 12 wells to divert ground water to their service area, but determined that only 9 are needed. The 9 wells include 3 located in Galactic Park Subdivision, and 6 (not 9) in the Northstar Subdivision; they are the 9 wells listed in the public notice of the application.

6. The Hearing Examiner hereby takes official notice of documents received at hearing and labeled as: 1) AH4, 2) AH5, and 3) AH6. No Party contested the materials so noticed at hearing. Mont. Admin. R. 36.12.221.

7. After the hearing as a result of the March 26, 2007 Decision and Order in Lohmeier et.al v. DNRC, Cause No. ADV-2006-454, the Hearing Examiner solicited briefs on the retroactivity and meaning of the definition of “municipal use,” Mont. Admin. R. 36.12.101(39 reinstated by the Lohmeier decision. Official notice is hereby taken of the Lohmeier decision.

8. After receipt of the Lohmeier briefs, the Hearing Examiner notified the Parties that he proposed to take official notice of the following documents: 1) Department’s Memorandum to File Nos. 30017376, 30023457, 30024735, and 30026244 by Utility Solutions, LLC, dated June 15, 2007: specifically the decision and facts regarding Application No. 41H 30026244 which involves the same applicant and includes both the Black Bull Run and Middle Creek Parklands subdivisions; 2) *Comments on Evidence and Record* by Utility Solutions, LLC, Attachment No. B: Table DP-1. Profile of General Demographic Characteristics: 2000. Geographic Area: Four Corners CDP, Montana, Source: U.S. Census Bureau, Census 2000; 3) *Brief On Applicability Of Decision And Definition Of Municipal Use* By Utility Solutions, LLC: a) Exhibit No. A: 2005 Dex Media, Area Maps and Street Guide, Bozeman Area Street Map 4, Page 14; b) Exhibit No. B-1: (consisting of 8 pages) [http://factfinder.census.gov/servlet/GCTTTable?-geo\\_id=04000US30&-mt\\_name=DEC\\_20...](http://factfinder.census.gov/servlet/GCTTTable?-geo_id=04000US30&-mt_name=DEC_20...): Montana – Place: GCT-PH1-R. Population, Housing Units, Area, and Density (geographies ranked by total population): 2000; Data Set: Census 2000 Summary File 1 (SF 1) 100 percent Data; c) Exhibit B-2: (consisting of 1 page) [http://ask.census.gov/cgi-bin/askcensus.cfg/php/enduser/std\\_adp.php?p\\_faqid=1377&p\\_cr...](http://ask.census.gov/cgi-bin/askcensus.cfg/php/enduser/std_adp.php?p_faqid=1377&p_cr...); d) Exhibit No. H: (consisting of 4 pages): In The Matter Of The Application By Big Sky Western Bank Of Big Sky Montana To Establish A Branch Bank In Four Corners, Montana, Approval and Order of State Banking Board, August 17, 1995. The Hearing Examiner notified the Parties that they may contest the materials so noticed. Objector Group contested the noticed materials arguing that it was too late to take additional evidence. See Mont. Admin. R. 36.12.221(4).

### **Physical Availability**

9. Applicant intends to appropriate water from the Quaternary alluvial aquifer system by the proposed wells at depths of less than 70 feet. Applicant’s expert used aquifer tests of wells in the source aquifer and Tertiary aquifer to measure the hydraulic properties of the aquifer that control the rate of flow through the aquifer and the yield of the aquifer to the wells, and digital

modeling simulations of the aquifer response to diversions through well fields to opine that an additional 373 gpm up to 194.6 acre-feet/year is physically available for the proposed use from the Quaternary alluvium at depths less than 70 feet below ground surface. Applicant's expert evaluated eight aquifer tests conducted in the alluvial aquifer at the sites of Applicant's proposed wells, including tests of 410 gpm for 72 hours, 560 gpm for 24 hours, 425 gpm for 24 hours, another 425 gpm for 24 hours, 500 gpm for 72 hours, 450 gpm for 24 hours, 375 gpm for 48 hours, and another 500 gpm for 24 hours; and two wells in the Tertiary aquifer at depths greater than 70 feet, including tests from wells 475 and 520 feet deep. (Department file, testimony of Mike Kaczmarek, Application Exhibit No. 3 [Ground water Availability For Alluvial Wells, Four Corners Area, Gallatin County, Montana, December 2003], Application Exhibit No. 4 [Mike Kaczmarek Memorandum to Marty Gagnon regarding information requested in Russell Levens' 12/29/04 letter, January 25, 2005 {revised February 8, 2005}], Applicant's Document No. AH4 [Mike Kaczmarek's August 13, 2004, Memo to Chris Wasia/Pat Eller regarding: Cone of Depression Calculation for Zoot Well], Applicant's Document No. AH5 [Mike Kaczmarek's July 10, 2004, Memo to Barbara Campbell, Marty Gagnon, Pat Eller regarding: Four Corners Area Tertiary Aquifer Pumping Tests Interpretation])

10. Applicant estimated the area of potential impact and estimated the amount of water flowing through that area. Applicant's expert used sound hydrologic principles and aquifer pumping test results to determine aquifer characteristics and estimate that 8748 acre-feet per year is available in the Quaternary alluvial aquifer in the area affected by Applicant's wells. Applicant is seeking an additional 194.6 acre-feet per year of water. No evidence was presented to contradict that water is physically available. The requested amount of water is physically available. (Department file, testimony of Mike Kaczmarek, Application Exhibit No. 3 [Ground water Availability For Alluvial Wells, Four Corners Area, Gallatin County, Montana, December 2003], Application Exhibit No. 4 [Mike Kaczmarek Memorandum to Marty Gagnon regarding information requested in Russell Levens' 12/29/04 letter, January 25, 2005 {revised February 8, 2005}], Applicant's Document No. AH4 [Mike Kaczmarek's August 13, 2004, Memo to Chris Wasia/Pat Eller regarding: Cone of Depression Calculation for Zoot Well], Applicant's Document No. AH5 [Mike Kaczmarek's July 10, 2004, Memo to Barbara Campbell, Marty Gagnon, Pat Eller regarding: Four Corners Area Tertiary Aquifer Pumping Tests Interpretation])

### **Legal Availability**

11. Applicant has provided an analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed points of diversion with the existing legal demands on the supply of water. Applicant's expert determined the area of potential impact from the proposed pumping by this Application and Applicant's previous applications. Applicant's expert used sound hydrologic principles and aquifer pumping test results to determine aquifer characteristics and estimate that 8748 acre-feet per year is available in the Quaternary alluvial aquifer in the 1.78 mile width of the zone of influence of the Applicant's wells. Applicant's expert then estimated the legal demands within that area to be 2976.71 acre-feet per year, including the water requested under this Application based on a review of the Department's records in the area of influence. Objector Shennum argues that a larger margin of safety is needed when determining water availability because well interaction has not been considered. However, Applicant's expert has calculated drawdowns for annual operation of the proposed well fields at a collective rate of 1500 gpm up to 763.7 acre-feet per year, and provided his professional opinion that the predicted drawdown was not large enough to adversely affect any of the existing wells or prevent their use under the rights claimed. Other than testimony by Objector Shennum, no evidence or analysis was presented to contradict that the requested water is legally available. The amount of water physically available exceeds the existing legal demands within the area of potential impact by approximately 5771 acre-feet per year. Water in the requested amount for the period of diversion is legally available. (Department file, testimony of Mike Kaczmarek)

### **Adverse Effect**

12. Applicant's multifaceted plan for the exercise of the proposed permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied includes: 1) to treat and return water diverted but not consumed to the aquifer through a Rapid Infiltration (RI) basin located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 2 South, Range 4 East, Gallatin County, Montana, and 2) to meter flows from each well into the tank and all releases from the storage tank, and water delivered to each user. In addition, Applicant plans to retire irrigated acres of land and put the water historically consumed under those (two) water rights into an augmentation gallery located in the NE $\frac{1}{4}$  of Section 14, Township 2 South, Range 4 East, Gallatin County, Montana, to offset the 9.73 acre-feet of water consumed by this use. To assure Applicant's plan accomplishes its goals, Applicant must: 1) meter all water diverted from

ground water at each well, meter flows from each well into the tank and all releases from the storage tank, all water delivered to each user, all treated water diverted to the RI Basin, and all water diverted to the augmentation gallery; and 2) treat and return non-consumed water to the aquifer. (Department file, testimony of Marty Gagnon, Document No. AH1)

13. Under Applicant's plan, the amount of water consumed equals the depletion to the ground water aquifer (and the West Gallatin River). Here, consumption is defined to mean the amount of depletion, i.e., the difference between the water pumped and the water that is subsequently returned to the aquifer after water has been delivered to meet the proposed use. Applicant's experts estimate the amount of water consumed by the Applicant's proposed use (i.e., no irrigation) would be no more than 2%. Two percent is a conservative estimate for this purpose. However, to avoid any issue that may otherwise arise under this Application attendant to this consumption, Applicant elected to assign a 5% loss instead of 2%. (Testimony of Richard Stenzel, Marty Gagnon)

14. Applicant's projected depletion of the West Gallatin River, that is, what will be consumed, by this Application is 6 gpm up to 9.73 acre-feet over the course of a year at full build out. These amounts are not measurable in the flow of the West Gallatin River, however, using a ground water model, they are calculable. These amounts were calculated by Dr. Nicklin using a ground water model. Model inputs were transmissivity (16,283 ft<sup>2</sup>/d) from data collected and analyzed by Applicant's consultant Morrison & Maierle, specific yield value (0.20) which is more indicative of an alluvial aquifer's porosity when dealing with long-term pumping as is the case here, boundary conditions, and Rapid Infiltration basin recharge rates assuming a 5% rate of consumption. Applicant's expert projected depletions to the West Gallatin River for Applicant's present and previous applications<sup>2</sup> to be 59.6 gpm up to 96.15 acre-feet (i.e., including the 6 gpm up to 9.73 acre-feet for this Application) over a year's time at full build out. The modeled depletions would occur in the reach of the [West Gallatin] River generally 3 miles south and 4 miles north of Norris Road. Objector Shennum argues that the model input specific yield variable should be a lower number than that used by Dr. Nicklin. Dr. Nicklin explained that it is best to use values more indicative of an alluvial aquifer's porosity when dealing with long-term pumping as would be the case in this project, than the lower number argued by Objector

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<sup>2</sup> Because the difference between the pumping rates and the recharge at the RI basin is only 6 gpm, Dr. Nicklin had to combine the flow from the current Application with that of beneficial water use permits issued pursuant to Application Nos. 41H 30012025 and 41H 30013629 to obtain enough discharge to provide a meaningful solution in his model.

Shennum. Ranges of porosity for alluvial aquifers typically range between 0.25 to 0.40. Dr. Nicklin used 0.2 so that he did not under-predict the potential consequences of the well field on the West Gallatin River. Dr. Nicklin's model input, as explained, will be given greater weight. (Department file, testimony of Dr. Nicklin, Marty Gagnon, James Maus, Paul Shennum)

15. Based upon Dr. Nicklin's model, Applicant plans additional augmentation to area ground water by retiring additional West Gallatin River irrigation water rights via a change of use for those water rights. Applicant's augmentation plan uses an infiltration gallery to place the irrigation water into the aquifer during its historic period of diversion to offset projected depletions, in amount, timing, and location to the West Gallatin River. The West Gallatin River is connected to the area ground water. Applicant's augmentation plan will offset any depletions from the West Gallatin River made over the course of a year at the time and in the location the depletions will occur. Applicant's proposed use must be conditioned on receipt of an approved augmentation plan to offset the 6 gpm up to 9.73 acre-feet per year impact to the West Gallatin River to prevent adverse effect to surface water users. Changes to the approved augmentation plan can only be allowed if the aquifer recharge amount and location is not altered, and must be approved by DNRC in a change proceeding prior to any change taking place. (Department file, testimony of Dr. Nicklin)

16. Applicant used average values of aquifer characteristics to predict aquifer drawdown in the vicinity of the Northstar well field. The specific yield values used in this drawdown analysis range between 0.0304 to 0.0981. In addition, Mr. Kaczmarek states that the drawdown predicted on the basis of averaged aquifer parameters does not fit the early data, but tends to converge with the late data on two of the tests and underestimates the late data on two other tests. This indicates that the averaged values will predict excessive drawdown near the pumped wells, and will predict drawdown accurately at large distances from the pumped wells. The greatest amount of drawdown interference that is predicted by the new appropriation on neighboring wells is less than 0.6 feet. The ground water wells within the potential area of impact will not be adversely affected because there is an adequate water column above the bottom of the saturated thickness of the alluvial aquifer to accommodate drawdown interference caused by the Applicant's pumping. (Department file, testimony of Mike Kaczmarek, Paul Shennum)

17. Upstream Objector West Gallatin Canal Company believes any depletion to the West Gallatin River during the irrigation season will prompt an earlier call on this appropriator, thus

decreasing the time water is available to them. However, this Objector had not read Applicant's Nicklin report regarding offsetting any depletions to the River. Objector Faust objected because she believes there have been cumulative effects to the West Gallatin River that have resulted in her West Gallatin River ditch being cut back by the water commissioner "to help with flows in the River." Objector Faust also alleged that wells in the area have gone dry. However, no facts supporting those problems were offered into the record. Here, the evidence is that any depletions to the River by this Application must be offset (by Applicant's augmentation plan) such that there are no depletions above what have historically occurred. Without facts to support the allegations, they can be afforded little weight. (Department file, testimony of Dick DeBernardis, Rosie Faust, Dr. Nicklin)

18. Applicant will require the subdivisions construct a water distribution system and institute subdivision covenants that do not allow cross-connection with this proposed system and the water system to be used for irrigation within the proposed place of use. (Testimony of Marty Gagnon, Barb Campbell)

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

19. Water will be diverted from the aquifer via nine wells which will pump to a water storage tank. Under this Application the wells will be operated one or more wells at a time, but collectively no more than 373 gpm. From the water storage tank, water is pumped through the booster station into a water distribution system constructed throughout the Black Bull Run and Middle Creek Parklands subdivisions. This water distribution system supplies water to each individual homeowner, the golf course clubhouse and restaurant, and fire suppression. The intended purposes are designed and constructed as a single integrated system for the pumping and delivery of water to homes and businesses. The pumps, wells, pipelines, distribution and treatment system for the public water supply system, and the operation are extensively regulated by the Montana Department of Environmental Quality (Montana DEQ). The water system and wastewater system have been designed by professional engineers. Montana DEQ has approved the public water supply system, wastewater system, and all of their components. Applicant will install a storage tank to receive water from the wells and allow pumping from the wells during times of off-peak demand. The proposed wells, pumps, distribution and treatments system are reasonable and customary for their intended purposes. No evidence was submitted to contradict the propriety of Applicant's proposed construction. The means of diversion,

construction, and operation of the appropriation works are adequate. The appropriation works are adequate. (Department file, testimony of Marty Gagnon)

### **Beneficial Use**

20. Applicant has provided persuasive evidence that the proposed use is a beneficial use of water. Applicant intends to use the water to supply water within the identified place of use for municipal uses including: (1) domestic water requirements of two subdivisions; (2) fire suppression and fire fighting for the structures located in or near the place of use; and (3) golf course clubhouse, restaurant, and commercial within the place of use. In the event the developers of Black Bull Run and Middle Creek Parklands Subdivisions are successful in their attempt to be annexed into the Four Corners County Water and Sewer District, Applicant has an agreement to provide bulk water to the Water and Sewer District for these subdivisions for these uses. Otherwise, Applicant has signed letters addressed to Montana DEQ confirming Applicant will serve Black Bull Run and Middle Creek Parklands Subdivisions by connection to Applicant's water system. The proposed use will benefit the homeowners who purchase homes within the Subdivisions, the patrons of the golf course on Black Bull, other commercial patrons, Utility Solutions, and the public, as the system include a fire-suppression component. The proposed use is a municipal use and beneficial use of water. (Department file, testimony of Marty Gagnon, Finding of Fact No. 27 below)

21. Applicant proposes to use water for a municipal purpose to provide water to residential lots in the Black Bull Run and Middle Creek Parklands Subdivisions, and for the golf course clubhouse and restaurant, other commercial, and fire suppression water. No water has been requested for irrigation purposes. The irrigation component of the water supply will come from the subdivision developers, and not from this Applicant. Montana DEQ Circulars (design standards used by DEQ to regulate the design of public water and sewer facilities) were used to estimate the amount of water needed for the proposed uses within the two subdivisions. The Black Bull Run Subdivision will have 378 residential lots, a golf course clubhouse and restaurant using up to 122.8 acre-feet; Middle Creek Parklands will have 250 residential lots, minor commercial use, and require 71.8 acre-feet for a total of 194.6 acre-feet per year. Estimates do not include water for fire suppression. Water demands were based on the uses within the Subdivisions' boundaries as estimated by Applicant's engineer using DEQ Circulars, assumptions generally used by the engineering community, and conversations with the Subdivision engineers. If someone outside the Subdivisions requests water from the Applicant,

the Applicant will seek additional amounts through appropriate applications to the Department as needed for these requirements as they become necessary. No evidence was submitted to contradict Applicant's estimated requirements. The volume of water requested is the amount necessary for the proposed purpose. (Department file, testimony of Marty Gagnon)

22. The flow rate requested is higher than the estimated average day demand of 235 gpm to provide a rest period for the pumps at the point of diversion. The proposed water system will incorporate a 500,000 gallon water storage tank which will provide water during times of peak demand when water is being used at rates higher than the average day demand. During the peak demands, water will be removed from storage and when the peak demand subsides the tank will be refilled at the flow rate requested under this Application. The flow rate requested is the amount necessary for the proposed use as designed by Applicant's professional engineer. (Department file, testimony of Marty Gagnon )

### **Possessory Interest**

23. Applicant has the possessory interest, or the written consent of the owners of Black Bull Run and Middle Creek Parklands Subdivisions. Ultimately, Applicant will have consent prior to supplying water to a landowner, because Applicant will not supply water to any landowner without the landowner subscribing to the service, which is by its nature, consent. Applicant has possessory interest in the proposed place of use. (Department file, testimony of Marty Gagnon)

### **Water Quality Issues**

24. One objection relative to water quality was filed against this application. No objections were filed relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. There is no evidence in the record that the Objector has surface water rights whose water quality will be adversely affected, and no evidence from a prior appropriator was presented showing their surface water quality will be adversely affected. (Department file)

25. Objector Montana River Action Network alleges that prestream capture of tributary ground water will diminish flows in the West Gallatin River and result in thermal pollution where trout cannot survive in warm water. However, Objector provided no facts that the water quality of a prior appropriator will be adversely affected. Here, Applicant plans to treat and replace the diverted water not consumed via a Rapid Infiltration basin, and to augment the West Gallatin River by retiring West Gallatin River irrigation water uses by diverting the water into an augmentation gallery. The water that the Objector alleges will be removed and cause thermal

pollution must be replaced in the West Gallatin River by the Applicant. (Department file, testimony of Joe Gutkoski, Marty Gagnon, Dr. Nicklin)

26. One appropriator (not an objector) has property and a well within 100' of the Rapid Infiltration basin and contacted Montana DEQ regarding his concerns. Montana DEQ's response was that the existing residential wells will not be impacted by the wastewater discharged from the system outfall. Montana DEQ has reviewed and approved the wastewater treatment process to ensure that the ground water and surface water quality outside the mixing zone will not be affected by the permitted RI basin discharge. The discharge permit requires that the Applicant show the Applicant can achieve effluent limitations and meet nondegradation standards at the mixing zone boundary. Applicant through their engineer's analysis, and as confirmed by Montana DEQ, has shown that the water quality at the end of the mixing zone meets the Montana DEQ water quality standards. The water quality of a prior appropriator will not be adversely affected. (Department file, testimony of Marty Gagnon, Clinton Cain)

### **Basin Closure Issues**

27. The definition reinstated by the Court in Lohmeier provides that "Municipal use" means water appropriated by and provided for those in and around a municipality or an unincorporated town." Admin. R. M. 36.12.101(39). Applicant admits that it is not a municipality. The proposed use, however, is for high density domestic use, golf course clubhouse and restaurant, and fire suppression which are of the type normally found in a municipal use. After the Lohmeier decision and after the hearing held in this matter, DNRC made a determination that ". . . Utility Solutions applications propose to provide water to subdivisions that will be completely or partially within or adjacent to the unincorporated town of Four Corners. Additionally, these applications can also be considered to be in and around a municipality (the City of Bozeman). For these reasons, the Department finds that Utility Solutions, LLC's applications for municipal use appropriations to supply water under 30017376 for Service Area #2, 30023457 for Galactic Park, 30024735 for Elk Grove and 30026244 for Gallatin Heights, Galactic Park, North Star, Gallatin River Hideaway, **Black Bull Run and Middle Creek Parklands** may go forward under the definition of municipal use reinstated by Judge McCarter's March 26, 2007 decision." (emphasis added) These similar applications are in the same area by the same applicant for much the same purposes are for a permit to appropriate water by and for those in and around a municipality or an unincorporated town and qualify under the reinstated rule defining a municipal use. That determination cannot be distinguished factually from this matter other than the

subdivisions include additional names and the application numbers are different. Black Bull Run and Middle Creek Parklands are clearly adjacent to the unincorporated town of Four Corners. I find no evidence in this record which was not available to the Department when it made its June 15, 2007 determination regarding this Applicant and water use in Black Bull Run and Middle Creek Parklands subdivisions. The Department's proposed determination and the documents upon which it is based were officially noticed and is hereby adopted. The use proposed in this Application qualifies under the reinstated Mont. Admin. Rule 36.12.102(39) (Department file, testimony of Marty Gagnon, Official Notice: Document AH6, Department's Memorandum to File Nos. 30017376, 30023457, 30024735, and 30026244 by Utility Solutions, LLC, dated June 15, 2007)

28. The DNRC cannot process or grant an application for a permit to appropriate water within the Upper Missouri River basin until the final decrees have been issued in accordance with Mont. Code Ann. Title 85, Chapter 2, Part 2 for all of the subbasins of the Upper Missouri River basin. The "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony Dam. Mont. Code Ann. §85-2-342(4). The proposed wells are located in the Gallatin Valley which is within the Upper Missouri River basin closure area. There are exceptions to this closure for applications for permits to appropriate water for domestic, municipal, or stock use. This appropriation is by and for those in and around a municipality or an unincorporated town, and qualifies as a municipal use. Mont. Code Ann. §85-2-343(2)(c) and §85-2-342. This Application is for municipal use. (Department file, testimony of Marty Gagnon, Official Notice: Department's Memorandum to File Nos. 30017376, 30023457, 30024735, and 30026244 by Utility Solutions, LLC, dated June 15, 2007)

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

### **CONCLUSIONS OF LAW**

1. Objector Group and Applicant each filed Prehearing Memorandums and a post-hearing brief. Objector Group lists three issues of law: 1) Is the Applicant entitled to a municipal use exemption from the Basin Closure Law? 2) Has the Applicant met its burden in proving the statutory criteria under Mont. Code Ann. § 85-2-311? and 3) Should DNRC have included a cumulative impact analysis in its environmental assessment that compares this project with prior Utility Solutions, LLC, projects and potential future Utility Solutions, LLC, projects?

**2. Is Applicant entitled to a municipal use exemption from the Basin Closure Law?**

Objector Group argues that Applicant is not a municipality or any other quasi-public body, and its claim that it is entitled to a “municipal use” exemption is contrary to the Legislature’s intent for a plain language construction and is not supported by Montana law. Objector Group argues that municipal use is not defined in the Basin Closure Law; the Applicant is a private entity engaged in the subdivision and development of land for profit in the Four Corners area of Gallatin County; and that Mont. Code Ann. § 85-2-227(4) cannot be relied upon to support the conclusion that municipal use can include a private entity that operates a public water system because Mont. Code Ann. § 85-2-227(4) only addresses the abandonment of municipal water rights and not new appropriations; and application of arguments offered with earlier applications do not work here because this place of use is outside the Four Corners Water and Sewer District boundary (unlike the earlier places of use in Applicant’s previous permit). In addition, Objector Group points out that this Application was filed when DNRC’s administrative rule in ARM 36.12.101(39) definition of the term “municipal use” was in effect. That rule was later repealed by DNRC, but the validity of that action has been challenged by some of the Objectors in a Declaratory Judgment action which reinstated the rule . See, Lohmeier et.al v. DNRC, Cause No. ADV-2006-454. Objector Group’s arguments lead them to conclude that calling this type of use a municipal use has created a gaping hole in the Basin Closure Law [Mont. Code Ann. §§ 85-2-342, -343]. Objector Group concludes that these applications are not exempt from the Basin Closure Law and should not have been processed by DNRC.

Prior to reinstatement of the rule in Lohmeier, Applicant argued that DNRC must follow its own adjudications in which DNRC determined that municipal uses are simply not confined to cities and towns, and it is arbitrary and capricious to do otherwise. See In the Matter of Beneficial Water Use Application Nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC., Final Order November 9, 2006. Applicant argued that the focus of municipal use should be on the character of the use itself. DNRC has consistently confirmed municipal uses where the appropriator is neither a city or a town. In addition, Applicant argued that the Subdivisions that are the subject of this Application have petitioned to be annexed into the Four Corners Water and Sewer District. However, if they are not annexed, Utility Solutions, LLC, intends to supply the homeowners and businesses within the place of use under tariffs approved by the Public Service Commission. Applicant acknowledged that it has dedicated part of its system to public use; the PSC has accepted jurisdiction and authority over so much of the Utility Solutions, LLC, service that includes Elk Grove Subdivision. After the reinstatement of the rule, Applicant

argues its use is a municipal use because the proposed use will be appropriated and used by those around the municipality of Bozeman; it will be appropriated and used by those in and around the unincorporated town of Four Corners; and it will be appropriated by and provided for those within a place of use exhibiting all the criteria of an unincorporated town. Applicant cites Pollard v. Montana Liquor Control Board (1942), 114 Mont. 44, 131 P.974 as judicial support for its argument that the US service area is an unincorporated town.

The DNRC cannot process or grant an application for a permit to appropriate water within the Upper Missouri River basin until the final decrees have been issued in accordance with Mont. Code Ann. Title 85, Chapter 2, Part 2 for all of the subbasins of the Upper Missouri River basin. The “Upper Missouri River basin” means the drainage area of the Missouri River and its tributaries above Morony Dam. Mont. Code Ann. §85-2-342(4). However, applications for beneficial water use permits to appropriate water for domestic, municipal, or stock use, i.e., exceptions to the closure, can be processed prior to issuance of final decrees for all the subbasins of the Upper Missouri River basin. See Mont. Code Ann. §§85-2-342, 343(2)(c). See Finding of Fact No. 28. Objector Group argues that this Applicant cannot appropriate water for a municipal use because it is not a municipality or unincorporated town and the place of use is not within the Four Corners Water and Sewer District (distinguishing it from earlier DNRC Orders). The Objector Group relies on Mont. Admin. R. 36.12.101(39), reinstated March 26, 2007, which defines municipal use. They further argue that DNRC has not issued permits to a non municipality or unincorporated town within a basin closure area in the past. They cite Lohmeier regarding the meaning of “municipal use” as used in the basin closure Mont. Code Ann. §85-2-343(2)(c). However, Lohmeier does not define the terms within the reinstated definition as Objector Group argues – it merely reinstates the rule and says it is an accurate expression of the legislative intent behind the Upper Missouri River basin closure. The Department has found there is little if any controversy as to what comprises a municipality. However, it is not possible to expressly delineate what is an “unincorporated town” and what is “around it” with the same precision possible with municipalities.

The intended purposes of this Application are designed and constructed as a single integrated system for the pumping and delivery of water to homes and businesses in and about the unincorporated Four Corners area and for fire protection within the Utility Solutions, LLC, service area. A person may not appropriate water except as provided in the Montana Water Use Act, and may appropriate water only for a beneficial use. See Mont. Code Ann. § 85-2-301. A

“person” means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or **any other entity**. (emphasis added) Mont. Code Ann. § 85-2-102(14) (emphasis added). By this definition and the finding of the Department in its June 15, 2007, Memorandum, the Applicant is a person who can appropriate water for a beneficial use. The proposed use is a municipal use according to applicable law, past DNRC permitting decisions and according to the description of the use. See Finding of Fact Nos. 20, 21, 27, 28.

No evidence was presented to contradict the Department’s June 15, 2007, determination that the proposed uses for Black Bull Run and Middle Creek Parklands are a municipal use. Objector Group contested the Hearing Examiner’s officially noticed materials stating it is improper to take notice at this stage in the proceeding. Objector Group did not argue that the documents in question were not a proper subject for official notice. Objector Group did specifically voice exception to the notice of the 1995 State Banking Board decision and finds it notable that the attorney for the requesting bank in that proceeding (Big Sky Western Bank) is a partial owner of one of the developments seeking water through this current proceeding. Official notice of the document was taken because of the determination made in 1995 regarding the standing of the Four Corners area and not because counsel of one of those parties has apparently invested in the Four Corners area. I do not find the exception to notice of this document sufficient to exclude it. DNRC’s determination that these Applications are for municipal use allows processing of the beneficial water use permit applications. Mont. Code Ann. §§§ 85-2-102(14); 85-2-301; 85-2-342, 343.

3. **Has the Applicant met its burden in proving the statutory criteria under Mont. Code Ann. § 85-2-311?** Objectors argue that augmentation is not a beneficial use of water within a closed basin, or otherwise, except in the Upper Clark Fork River Basin. Augmentation is not a proposed use under this Application. See Finding of Fact No. 5 above. The Hearing Examiner addresses proof of the statutory criteria in Conclusions of Law Nos. 9, 10, 11, 12, 13, 14, and 15 below.

4. **Should the DNRC have included a cumulative impact analysis into its environmental assessment that compares this project with prior Utility Solutions, LLC, projects and potential future Utility Solutions, LLC, projects?** Objectors argue that allowing the Applicant to apply for multiple water use permits instead of one that scrutiny of the cumulative impacts of these applications has been evaded.

Applicant argues the proof in this proceeding is that 98% of the water pumped for this use will be returned to the upper aquifer<sup>3</sup>. As a consequence, the record is clear that the large majority of the water moving through this aquifer is unappropriated. Augmentation is required to offset the remaining 2% depletions to the West Gallatin River. The Hearing Examiner finds that the Applicant's plan and the augmentation required to exercise this permit mitigate any adverse effect. Thus, there is no cumulative impact by the exercise of the rights for this projected use. By definition a permit cannot issue if there is adverse effect, cumulative or otherwise. Mont. Code Ann. §85-2-311(1)(b).

The Department file contains an environmental assessment which addresses cumulative impacts, in the absence of the Applicant's proposed augmentation plan to mitigate impacts. The adequacy of the Department EA is an issue outside the scope of this Hearing Examiner's authority. The issues for which he was appointed are "whether the appropriation for which the Applicant has applied meets the required statutory criteria of Mont. Code Ann. §85-2-311, and whether one of the exceptions in Mont. Code Ann. §85-2-343(2) applies." See Mont. Admin. R. 36.12.204(1)(e), September, 18, 2006, Notice of Hearing and Appointment of Hearing Examiner, and Finding of Fact No. 4.

5. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 by a preponderance of the evidence. Mont. Code Ann. §85-2-311(1).

6. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **analysis** of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's **plan** for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed

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<sup>3</sup> However, Applicant used 95% to be conservative and assure that West Gallatin River depletions will be offset in the reach affected by the diversions

use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).

7. A public notice containing the facts pertinent to the permit application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. Proper notice has been made. Mont. Code Ann. §85-2-307. See Finding of Fact Nos. 2, 3.

8. The Hearing Examiner may take notice of judicially cognizable or generally recognized technical or scientific facts within the Department's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in the proposal for decision of the material noticed. Here, Parties were notified during the hearing and no objection was made. The Parties were also notified in the Hearing Examiner's June 26, 2007 Notice Of Material Noticed and Opportunity To Contest Materials Noticed. Objector Group files Objectors' Contest To Additional Materials. ARM 36.12.221(4); ARM 36.12.229. See Finding of Fact Nos. 6, 8 and Conclusion of Law No. 2 above.

9. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. §85-2-311(1)(a)(i). See Finding of Fact Nos. 9, 10.

10. The Applicant has proven that water can reasonably be considered legally available in the amount and during the period of requested appropriation. Objectors presented little evidence to show water is not legally available. An Objector stated that wells in the area had gone dry, but offered no evidence to support the statement, including causation or identification of specific wells. Applicant has shown that sufficient unappropriated water will be physically available at the points of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made on it by a senior appropriator. Mont. Code Ann. §85-2-311(1)(a)(ii). See Finding of Fact No. 11.

11. The Applicant has proven that the water rights of prior (ground or surface water) appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected when conditioned to assure Applicant's plan accomplishes its goals.

Applicant must: 1) require a water distribution system and/or subdivision covenants that do not allow cross-connection with the irrigation water system used to irrigate within the proposed place of use, 2) treat and return non-consumed water to the aquifer; 3) assure that water treated at the waste water treatment plant and discharged into the RI basin disposal beds is not used further; 4) meter all water diverted from ground water at each well, all water diverted from each well into the tank and all releases from the storage tank to this place of use, all water delivered to each user, all treated water diverted to the RI Basin, and all water diverted to the augmentation gallery; and 5) obtain a DNRC approved change authorization or otherwise find a reliable source of water to implement their augmentation plan to offset the 6 gpm up to 9.73 acre-feet per year impact to the West Gallatin River in the reach of the West Gallatin River generally 3 miles south and 4 miles north of Norris Road over the course of a year. Diversion under these Applications may not commence until the augmentation is implemented. Diversion under this Application must stop if augmentation as herein required in amount, location and duration ceases. Nothing in this decision approves, by implication or otherwise, the granting of any applications for permits or changes other than those in the caption to this proceeding.

Applicant's plan to assure the water rights of prior appropriators will not be adversely affected is to change water rights that have been historically used for irrigation to an "augmentation" purpose in order to make up for the consumptive portion of the proposed new use.

Mont. Code Ann. §85-2-311 states that DNRC shall issue a permit if an applicant for beneficial water use permit proves by a preponderance of evidence that certain criteria, here adverse affect, are met. It may be necessary for an applicant to make use of new technology or specialized equipment to meet one or more of the criteria. If an application is dependent on special management, technology or measurement to ensure there will be no adverse affect to other water users DNRC can and routinely does, condition a new permit's use on use of that special management, technology or measurement. See Mont. Code Ann. § 85-2-312. There is no indication in the sections of the Montana Water Use Act that govern the new water use permitting process (Mont. Code Ann. § 85-2-301, *et.seq.*) that a plan of augmentation, either by replacement of water in a source of supply through a change in use of an existing water right or by other means, is prohibited as a way to preclude adverse affect. See, e.g., In the Matter of Beneficial Water Use Permit Application No. 41H 30012025 by Utility Solutions, LLC, Final Order (2006); In the Matter of Beneficial Water Use Permit Application No. 41I-104667 by

Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods, Final Order (2000) (augmentation Upper Missouri River Basin); Mont. Code Ann. §85-2-413. Montana case law also provides a history of augmentation, including augmentation by new or untried methods. See Thompson v. Harvey (1974), 154 Mont. 133, 519 P.2d 963; Perkins v. Kramer (1966), 148 Mont. 355, 423 P.2d 587. Augmentation is also recognized in other prior appropriation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho). Here, Applicant's plan is to augment flows in the West Gallatin River to mitigate any impacts that would have an effect on a prior appropriator, and not to "augment" out of the basin closure statute. Mont. Code Ann. §85-2-311(1)(b). See Finding of Fact Nos. 12, 13, 14, 15, 16, 17, 18.

12. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. §85-2-311(1)(c). See Finding of Fact No. 19.

13. The Applicant has proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. The flow rate and volume of water requested is the amount necessary for the proposed purpose. Mont. Code Ann. §85-2-311(1)(d). See Finding of Fact Nos. 20, 21, 22.

14. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Applicant has met the requirements of Mont. Admin. R. 36.12.1802(1)(b) because the proposal is for municipal use. Mont. Code Ann. §85-2-311(1)(e). See Finding of Fact No. 23.

15. The Applicant has proven that the water quality of a prior appropriator will not be adversely affected. Objections were raised as to the issue of water quality of a prior appropriator being adversely affected. Here, the water that the Objector alleges will be removed and cause thermal pollution must be replaced in the West Gallatin River by the Applicant. Applicant's plan to show there will be no adverse affect to prior appropriators replaces the water removed from the River under this appropriation. Mont. Code Ann. §85-2-311(1)(f), (g), (h). See Finding of Fact No. 24, 25, 26 and Conclusion of Law No. 11 above.

16. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use

permit. Applicant has met the criteria for issuance of a permit when conditions are applied. Mont. Code Ann. §85-2-312. See Conclusions of Law Nos. 9, 10, 11, 12, 13, 14, 15 above.

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

### **ORDER**

Subject to the terms, conditions, restrictions, and limitations listed below, Application for Beneficial Water Use Permit 41H 30019215 is **GRANTED** to Utility Solutions, LLC, to appropriate 373 gallons per minute (gpm) up to 194.6 acre-feet of ground water per year. The ground water is diverted from nine wells located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , and NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , all in Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The purpose is municipal use. The place of use is the Black Bull Run and Middle Creek Parklands Subdivisions located in the E $\frac{1}{2}$  and SW $\frac{1}{4}$  of Section 6, and N $\frac{1}{2}$  and W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 7, all in Township 2 South, Range 5 East; and in the E $\frac{1}{2}$ E $\frac{1}{2}$  of Section 12, Township 2 South, Range 4 East, all in Gallatin County, Montana. The water system incorporates a 500,000 gallon water storage tank located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The period of diversion and period of use is January 1 through December 31, inclusive, of each year.

- A. Permittee shall require a water distribution system and/or subdivision covenants that do not allow cross-connection with the irrigation water system used to irrigate within the proposed place of use.
- B. All water not consumed by the proposed use must be treated at the waste water treatment plant and discharged to the Rapid Infiltration basin disposal beds after the use provided for herein, and the Permittee shall not further divert or use such return flows under the rights provided for in the Permit.
- C. Permittee shall obtain DNRC's approval for any change in the method of disposal of non-consumed water. Any change in disposal method must return at a minimum the amount of water approved to be returned to the aquifer through the RI basin(s) under this Application.
- D. Permittee shall install or cause to be installed meters to record the flow rates and volumetric amounts of all water diverted from ground water at each well, all water diverted from each well into the tank and all releases from the storage tank to this place of use, all water

delivered to each user, all treated water diverted to the RI Basin, and all water diverted to the augmentation gallery. Water must not be diverted until the required measuring devices are in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted at each measuring device including the period of time, and shall submit the record by October 15<sup>th</sup> of each year and upon request at other times during the year. Failure to submit records may be cause for revocation of a permit. The records must be submitted to the Bozeman DNRC Water Resources Regional Office. The appropriator shall maintain the measuring devices so they always operate properly and measure flow rate and volume accurately.

E. Permittee's use of water under this Permit is conditioned upon augmentation to offset the 6 gpm up to 9.73 acre-feet per year impact to the West Gallatin River generally in the reach 3 miles south and 4 miles north of Norris Road over the course of a year. Diversion under this Permit may not commence until the augmentation as specifically described in this decision is implemented. Diversion under this Application must stop if augmentation as herein required in amount, location and duration ceases. Diversion under this Permit must stop if any part of the required augmentation ceases.

#### **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 24<sup>th</sup> day of July 2007.

/Original signed by Charles F Brasen/

Charles F Brasen  
Hearing Examiner  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
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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**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 Price/

Jamie Price  
Hearings Unit, 406-444-6615