

Summary

This application (attached) seeks to make the Town of Avon's Recreational In-Channel Diversion (RICD) water right absolute, or in the alternative, seeks a finding of reasonable diligence. The RICD was originally decreed in Case No. 5-05CW258 and is located on the Eagle River near the intersection of Avon Road and Hurd Lane in Avon, CO. The reach of the white water course is shown on the map attached and includes 3 decreed control structures. The RICD is decreed for the following flows:

Time Period	Flow Rate (in cfs)
Apr. 20-Aug. 7	200
May 1- July 20	350
May 25-July 7 (eight 12-hr days: "high flow dates")	1400

CWCB Appropriations

The CWCB holds the following instream flow (ISF) water rights that could be injured by this application:

CWCB Case No.	Stream/Lake	Amount (cfs)	Approp. Date
5-80CW134	Eagle River	35 cfs (10/1 - 4/30) 85 cfs (5/1 - 9/30)	3/17/1980

Basis for Statement of Opposition

The CWCB would like to ensure that the Applicant has provided proper evidence to support its claim for an absolute water right, or in the alternative, a finding of reasonable diligence for the RICD water right. Improper diligence or perfection of this RICD may affect Colorado's ability to promote maximum utilization of the waters of the State.

Other Objectors

At this time, Brent Gardner-Smith is the only other objector in this case.

Staff Recommendation

The Staff requests that the Board ratify the attached SOP that was filed by Staff and the Attorney General's Office in this case.

Attachments:

Application and Map
SOP

<p>DISTRICT COURT, WATER DIVISION NO. 5, COLORADO</p> <p>109 Eighth Street, Suite 104 Glenwood Springs, Colorado 81601</p> <hr/> <p>CONCERNING THE APPLICATION FOR WATER RIGHTS OF TOWN OF AVON</p> <hr/> <p>IN EAGLE COUNTY</p> <hr/> <p>James R. Montgomery, #10989 Richard Mehren, #32231 Anne D. Bensard, #45316 Moses, Wittemyer, Harrison and Woodruff, P.C. P. O. Box 1440 Boulder, Colorado 80306-1440 Telephone: (303) 443-8782 Facsimile: (303) 443-8796 jmontgomery@mwhw.com; rmehren@mwhw.com; abensard@mwhw.com</p>	<p>DATE FILED: June 27, 2014 3:02 PM FILING ID: 7C7669E745E83 CASE NUMBER: 2014CW3079</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case No.: 14CW____ (05CW258)</p>
<p align="center">APPLICATION FOR FINDING OF REASONABLE DILIGENCE AND TO MAKE ABSOLUTE</p>	

1. Name, address, and telephone number of applicant:

Town of Avon ("Avon")
c/o Virginia Egger, Town Manager
P. O. Box 975
Avon, CO 81620
Telephone: (970) 748-4010

2. Name of structure: Avon Whitewater Course.

3. Description of conditional water right:

- A. General Description of Recreational In-Channel Diversion: The Avon Whitewater Course ("Course"), the approximate location of which is depicted in the map attached hereto as **Exhibit A**, contains three control structures known as Bob, Sr., Bob, Jr., and Baby Bob. The Course is approximately 348 feet in length from the Baby Bob invert (the upstream control structure) to the Bob, Sr. invert (the downstream control structure). The recreational in-channel diversion water right ("RICD") is defined by the specific points between the control structures and not for the entire 348-foot reach. The Course is located in the channel of the

Eagle River near the intersection of Avon Road and Hurd Lane where Avon Road crosses the Eagle River at the bridge named Bob (“the Bridge”). The approximate locations of the three control structures are depicted on the map attached hereto as **Exhibit A**. Each of the three control structures controls the entire flow within the river channel. The control structures are designed to perform at different rates of flow. Baby Bob has been constructed as a pour-over hole and is located the farthest upstream of the Bridge. Bob, Jr. has been constructed as a wave hole and is located 75 feet upstream of the upstream face of the Bridge. Bob, Sr. has been constructed as a constriction wave and is located 20 feet downstream of the downstream face of the Bridge. The three control structures are designed to divert, capture, control, and concentrate the flow of water in the Course between the specific points to create water features that allow the minimum stream flows for three distinct recreational experiences for different skill levels to be placed to beneficial use.

- B. Original Decree: Case No. 05CW258, District Court, Water Division No. 5, State of Colorado, entered on June 28, 2008.
- C. Legal description of each control structure:
 - i. Baby Bob: Located in the NE 1/4 of the SE 1/4, Sec. 12, Township 5 S., R. 82 W., 6th P.M., 2,450 feet west of east section line and 2,400 feet north of south section line.
 - ii. Bob, Jr.: Located in the SW 1/4 of the NE 1/4, Sec. 12, Township 5 S., R. 82 W., 6th P.M., 2,600 feet west of the east section line and 2,350 feet south of the north section line.
 - iii. Bob, Sr.: Located in the SE 1/4 of the NW 1/4, Sec. 12, Township 5 S., R. 82 W., 6th P.M., 2,550 feet east of west section line and 2,300 feet south of north section line.
- D. Source: Eagle River, tributary to the Colorado River.
- E. Appropriation date: December 31, 2005.
- F. Rates of flow: The rates of flow for different levels of recreational use are as follows:

Level One Flows, for beginner freestyle kayaking

Calendar Period	Flow (cfs)
April 20 - August 7	200 cfs, CONDITIONAL

Level Two Flows, for intermediate freestyle kayaking

Calendar Period	Flow (cfs)
May 1 - July 20	350 cfs, CONDITIONAL

Level Three Flows, for advanced freestyle and competitive kayaking

Calendar Period	Flow (cfs)
Eight Specified 12-hour Days between May 25-July 7 ("High Flow Dates")	1,400 cfs, CONDITIONAL

- G. Use: Recreational in-channel boating purposes, including recreational boating, kayaking, and rafting. The use of the RICD for navigation by kayaks and rafts in and through the Course is a beneficial use.
4. Outline of work and expenditures during the diligence period towards completion of the appropriation and application of the water to beneficial use: During the period from June, 2008 until June, 2014 ("Diligence Period"), Avon has worked diligently to develop the RICD, as demonstrated by the following activities:
- A. In summer 2008, Avon partnered with the Westin Riverfront Resort and the Vail Daily to hold a "Big Air Shootout Competition" at the Course, as part of its recreation center special events program, to promote the Course and RICD. Participants uploaded videos of themselves doing tricks in the Course to the Vail Daily. The Big Air Contest ran from May 15, 2008 to July 15, 2008. The prize for first place was \$2,500, which was paid by the Westin Riverfront Resort. Avon staff and volunteers judged the event.
- B. The Avon Parks Department regularly maintains the Course during the summer kayaking and rafting season. Maintenance occurs in two primary areas: (1) the boat launch on the south shore, and (2) the north shore pedestrian access and overlook. Maintenance includes trash collection, noxious weed removal, fence repair, and graffiti removal. At the end of the season, the Parks Department and Engineering Department inspect the shoreline and control structures in the Course

to determine if the shoreline or control structures require repairs after the spring runoff. They also schedule any necessary repair work. In 2010, the north shore experienced damage and the pedestrian overlook and shoreline were reconstructed. Avon spent approximately \$10,690 on this work. Over the diligence period, Avon has expended approximately \$10,000 in staff labor costs for maintenance of the Course.

- C. Avon has posted signs notifying users of the start and end of the Course.
- D. Avon expended approximately \$141,500 in legal fees related to development and protection of its water rights, such as filing statements of opposition to Water Court cases for protection of its water rights, including the RICD that is the subject of this application.
- E. Avon has expended approximately \$3,600 in legal fees related to the diligence activities related to the RICD that is the subject of this application.

5. Claim to make absolute:

A. Date of diversion in priority and application to beneficial use:

- i. Level One Flows: July 1, 2008.
- ii. Level Two Flows: July 15, 2008.
- iii. Level Three Flows: June 7, 2014.

B. Amount:

- i. Level One Flows: 200 cfs
- ii. Level Two Flows: 350 cfs
- iii. Level Three Flows: 1,400 cfs

- C. Use: Recreational in-channel boating purposes, including recreational boating, kayaking, and rafting. The use of the RICD for navigation by kayaks and rafts in and through the Course is a beneficial use.
- D. Place of beneficial use: The Course, as described above in paragraph 3.C.
- E. Evidence that diversion was made in priority: Since its opening, the Course has been consistently used by both individual and commercial boaters, including

kayakers and rafters, for recreational boating purposes. There is a consistent pattern of use of the Course for boating purposes. Based on measurements at USGS Gage No. 09067020, Avon requests to make Level One, Level Two, and Level Three Flows absolute as described below. The RICD is adequately measured by USGS Gage No. 09067020, which is located 3,200 feet downstream of the Course.

- i. Individual boaters used the Course from 2008 through the date of filing. During the high runoff in May and June of each year, several rafting companies float the Course, including Saga and Nova Guides. Documentation of such use by individual and commercial boaters may include magazine and news publications, photographs, videos, blog posts, and statements by boating users of the Course.
- ii. In 2008, Avon held the Big Air Shootout, discussed above in paragraph 4.A. This event ran from May 15, 2008 until July 15, 2008. Both individual and commercial boaters used the Course during this period to make both the Level One and Level Two Flows absolute.
 - (i) Level One Flows were put to beneficial use at various times during the diligence period. As an example, the minimum flow rate necessary for a reasonable recreational experience at Level One Flows (200 cfs) was met and exceeded on July 1, 2008 on this date. Between the RICD's hours of 8:00 am and 8:00 pm, USGS Gage No. 09067020 measured a peak flow of 2,980 cfs at 8:15 am and a minimum flow rate of 2,430 cfs at 6:45 pm. At these flow rates, Baby Bob controlled, concentrated, and diverted, without waste, water to create waves, hydraulic holes, large changes in current direction, and whitewater features that were used by kayakers and other boaters for the intended recreational experiences.
 - (ii) Level Two Flows were put to beneficial use at various times during the diligence period. As an example, the minimum flow rate necessary for a reasonable recreational experience at Level Two Flows (350 cfs) was met and exceeded on July 15, 2008. Between the RICD's hours of 8:00 am and 8:00 pm, USGS Gage No. 09067020 measured a peak flow of 1,040 cfs at 8:00 am and a minimum flow of 871 cfs at 7:30 pm. At these flow rates, Baby Bob and Bob Jr. controlled, concentrated, and diverted, without waste, water to create waves, hydraulic holes, large changes in

current direction, and whitewater features that were used by kayakers and other boaters for the intended recreational experiences.

- iii. Level Three Flows were put to beneficial use at various times during the diligence period. As an example, the minimum flow rate necessary for a reasonable recreational experience at Level Three Flows (1,400 cfs) was met and exceeded on June 7, 2014. Between the RICD's hours of 8:00 am and 8:00 pm, USGS Gage No. 09067020 measured a peak flow of 3,160 cfs at 8:00 pm and a minimum flow of 2,670 cfs at 4:15 pm. At this flow rate, Baby Bob, Bob Jr., and Bob Sr. controlled, concentrated, and diverted, without waste, water to create waves, hydraulic holes, large changes in current direction, and whitewater features that were used by kayakers and other boaters for the intended recreational experiences. As required by the decree entered in Case No. 02CW258, on June 5, 2014, Avon provided notice to the Division Engineer and Water Commissioner of its intent to designate its eight high flow dates for the purpose of putting Level Three Flows to beneficial use. These eight high flow dates were June 7, 2014 - June 14, 2014.

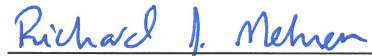
6. Names and addresses of owners or reputed owners of the land upon which any new diversion or storage structure, or modification to any existing diversion or storage structure is or will be constructed or upon which water is or will be stored, including any modification to the existing storage pool.

N/A. Avon owns the land upon which the control structures are located. Avon controls access to the Course through a River Improvements Easement Agreement (Tract O), dated August 14, 2006, and Operating Agreement, Tract O, Beaver Creek Subdivision as Part of Town of Avon Water Park Activities, dated May 1, 2007, between Avon and The Vail Corporation d/b/a Vail Associates, Inc.

WHEREFORE, Avon requests that the Court enter a decree making the RICD absolute for recreational in-channel boating purposes, as described above, and/or finding that Avon has exercised reasonable diligence with respect to the RICD, and continuing in full force and effect, for an additional diligence period, any portion of the RICD that the Court finds remains conditional.

Respectfully submitted this 27th day of June, 2014.

MOSES, WITTEMYER, HARRISON AND
WOODRUFF, P.C.



James R. Montgomery, #10989

Richard J. Mehren, #32231

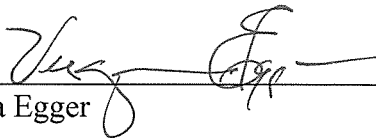
Anne D. Bensard, #45316

ATTORNEYS FOR APPLICANT,
TOWN OF AVON

*E-FILED PURSUANT TO C.R.C.P. 121. Duly signed original on file at the law offices of
Moses, Wittemyer, Harrison and Woodruff, P.C.*

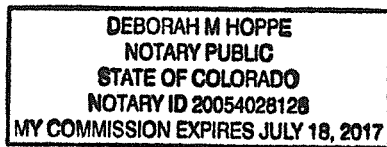
**VERIFICATION AND ACKNOWLEDGMENT OF APPLICANT OR OTHER
PERSON HAVING KNOWLEDGE OF THE FACTS STATED IN THIS
APPLICATION FOR FINDING OF REASONABLE DILIGENCE AND TO
MAKE ABSOLUTE**


Being first duly sworn, I hereby state that I have read this **APPLICATION FOR FINDING OF REASONABLE DILIGENCE AND TO MAKE ABSOLUTE**, that I have personal knowledge of the facts stated, and that I verify its contents to the best of my knowledge, information, and belief.



Virginia Egger

The foregoing instrument was acknowledged before me in the County of Eagle, State of Colorado, this 25th day of June, 2014, by the person whose signature appears above.





Notary Public

My commission expires: July 18, 2017

The person signing this verification is **Town Manager for the Town of Avon.**

<p>DISTRICT COURT, WATER DIVISION 5 GARFIELD COUNTY, COLORADO 109 Eighth Street, Suite 104 Glenwood Springs, CO 81601 (970) 945-5075</p> <hr/> <p>CONCERNING THE APPLICATION FOR WATER RIGHTS OF:</p> <p>TOWN OF AVON,</p> <p>IN EAGLE COUNTY, COLORADO</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for the Colorado Water Conservation Board: JOHN W. SUTHERS, Attorney General SUSAN J. SCHNEIDER, Attorney Reg. # 19961* First Assistant Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 Phone Number: (720) 508-6311 Email Address: susan.schneider@state.co.us *Counsel of Record</p>	<p>Case No. 2014CW3079</p> <p>Water Div. 5</p>
<p style="text-align: center;">STATEMENT OF OPPOSITION OF THE COLORADO WATER CONSERVATION BOARD</p>	

1. Name of objector: Colorado Water Conservation Board ("CWCB").

Mailing address: 1313 Sherman Street, Room 718, Denver, CO 80203.
2. Name of ditch or structure: As more fully described in the application.
3. State facts why this application for water rights should not be granted or why it should be granted only on certain conditions:

a. The CWCB would like to ensure that the Applicant has provided proper evidence to support its claim for an absolute water right, or in the alternative, a finding of reasonable diligence in Case No. 2014CW3079.

b. Improper diligence or perfection of this Recreational In-Channel Diversion ("RICD") may affect Colorado's ability to promote maximum utilization of the waters of the State.

c. The application alone does not present sufficient information to support its claim for an absolute water right.

4. This statement of opposition is continuing in nature and shall apply to any and all future amendments to the original application.

Dated this 25th day of August, 2014.

JOHN W. SUTHERS

Attorney General

*E-filed pursuant to C.R.C.P. 121. Duly signed original
on file at the Office of the Attorney General.*

/s/Susan J. Schneider

SUSAN J. SCHNEIDER, #19961*

First Assistant Attorney General

Natural Resources and Environment Section

Attorney for the Colorado Water

Conservation Board

*Counsel of Record

Nov 8 2016

CERTIFICATE OF SERVICE

This is to certify that on this 25th day of August, 2014, I caused a true and correct copy of the foregoing **STATEMENT OF OPPOSITION OF THE COLORADO WATER CONSERVATION BOARD** to be served electronically via ICCES File & Serve to each of the following:

Name	Type	Attorney	Organization
Avon, Town Of	Applicant	James R Montgomery	Moses, Wittemyer, Harrison and Woodruff, P.C.
Avon, Town Of	Applicant	Richard John Mehren	Moses, Wittemyer, Harrison and Woodruff, P.C.
Avon, Town Of	Applicant	Anne D. Bensard	Moses, Wittemyer, Harrison and Woodruff, P.C.
Division 5 Engineer	Division Engineer	Division 5 Water Engineer	State of Colorado DWR Division 5
State Engineer	State Engineer	Colorado Division Of Water Resources	State of Colorado - Division of Water Resources

E-filed pursuant to C.R.C.P. 121. Duly signed original on file at the Office of the Attorney General.

/s/ Constance L. Rust

CONSTANCE L. RUST