

Consent Agenda Item 1.j

March 15-16, 2023 Board Meeting

Case No. 22CW3132 (Water Division 5); Too Well Ranch, LLC

Summary of Water Court Application

Application For Change of Water Rights, Absolute Storage Water Right and Approval of Plan For Augmentation Including Exchange.

Staff Recommendation

Staff recommends that the Board ratify the filing of a Statement of Opposition filed on behalf of the Board in February 2023 to protect CWCB's instream flow water rights.

CWCB Instream Flow Water Rights

The CWCB holds water rights, including the following instream flow water rights in Water Division 5 in the Eagle River Watershed, that could be injured by this application:

Case Number	Stream	Upper Terminus	Lower Terminus	CFS Rate (Dates)	Approp. Date
80CW0124	Eagle River	confl Brush Creek	confl Colorado River	50 (10/1 - 4/30) 130 (5/1 - 9/30)	03/17/1980
80CW0126	Eagle River	confl Lake Creek	confl Brush Creek	45 (10/1 - 4/30) 110 (5/1 - 9/30)	03/17/1980

Potential for Injury

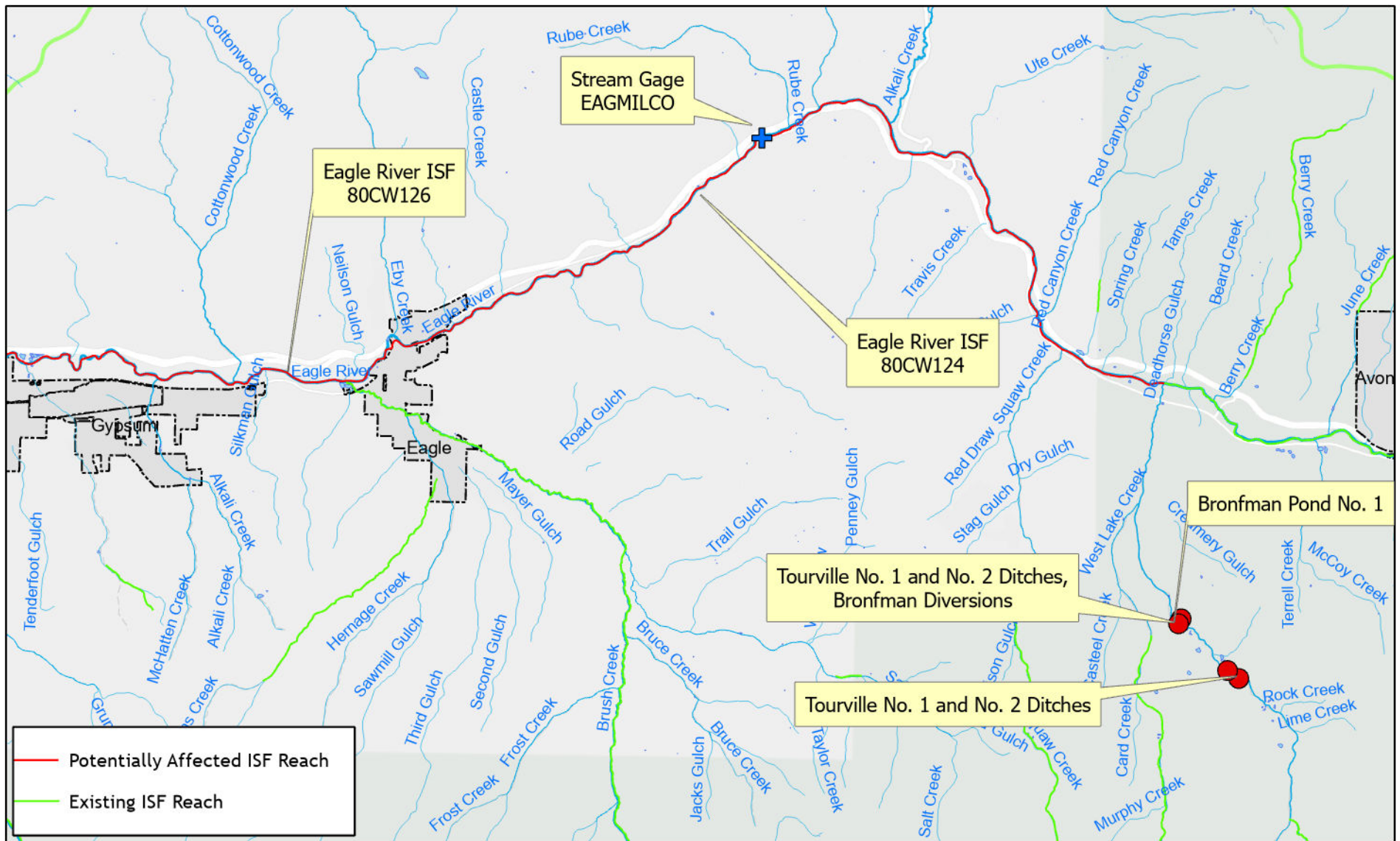
- The proposed plan for augmentation including exchange may not replace depletions in the proper time, place, and amount, which could injure the CWCB's instream flow water rights.
- The alternate points of diversion could cause an expansion of use by increasing the physical availability of water beyond what was historically available, which could injure the CWCB's instream flow water rights.
- Terms and conditions should be included in the decree to ensure that the proposed decree will not injure the CWCB's instream flow water rights.

Other Objectors

No other Statements of Opposition were filed.

Attorney Representing CWCB

Jennifer L. Mele, First Assistant Attorney General, is assigned to this case and can be contacted at jennifer.mele@coag.gov, or 720-508-6282.



COLORADO
Colorado Water Conservation Board

Department of Natural Resources

March 15-16, 2023 CWCB Board Meeting
 Consent Agenda Item 1.j: Statement of Opposition
 Case No. 22CW3132 (Water Division 5)
 Too Well Ranch, LLC

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 Miles



DIVISION 5 WATER COURT- DECEMBER 2022 RESUME

SUBSTITUTE WATER SUPPLY PLAN AND PRODUCED NONTRIBUTARY GROUNDWATER NOTIFICATION LIST

Section 37-92-308(6), C.R.S. directs the State Engineer to establish a notification list for each water division for the purpose of notifying interested parties of requests for the State Engineer's approval of substitute water supply plans ("SWSP") filed in that water division pursuant to section 37-92-308, C.R.S. The SWSP notification list is also used to provide notice of proposed water right loans to the Colorado Water Conservation Board for use as instream flows under section 37-83-105(2)(b)(II), C.R.S., notice of applications for the State Engineer's approval of interruptible water supply agreements under section 37-92-309(3)(a), C.R.S., notice of applications for fallowing-leasing pilot projects under section 37-60-115(8)(e)(II), C.R.S., notice of fire suppression ponds under section 37-80124(10)(a)(II)(E), C.R.S., and notice of storm water detention and infiltration facilities under section 37-92-602(8)(d), C.R.S.

Pursuant to Rule 17.5(B)(2) of the Rules and Regulations for the Determination of the Nontributary Nature of Ground Water Produced Through Wells in Conjunction with the Mining of Minerals, at 2 CCR 402-17 ("Rules"), the State Engineer is publishing this invitation to persons to be included on the Produced Nontributary Ground Water Notification List. According to Rule 17.5(B)(2) of the Rules, the State Engineer must establish a Produced Nontributary Ground Water Notification List for each water division within the State of Colorado for the purposes of ensuring that water users within each water division receive adequate notice of proceedings held pursuant to the Rules. In order to establish such notification list, the State Engineer is directed, in January of each year, to cause to have published in the water court resume for each water division this invitation to be included on the Produced Nontributary Ground Water Notification List for the applicable water division.

This notice is an invitation to be included on the SWSP or Produced Nontributary Groundwater notification lists. Sign up for these or other notification lists maintained by the State Engineer at: <https://dwr.colorado.gov/public-information/notification-lists>. Additional information is available on the Division of Water Resources' website at: <https://dwr.colorado.gov/>.

10. PURSUANT TO C.R.S., §37-92-302, AS AMENDED, YOU ARE NOTIFIED THAT THE FOLLOWING PAGES COMPRISE A RESUME OF THE APPLICATIONS AND AMENDED APPLICATIONS FILED WITH THE WATER CLERK FOR WATER DIVISION 5 DURING THE MONTH OF DECEMBER 2022. *The water right claimed by this application may affect in priority any water right claimed or heretofore adjudicated within this division and owners of affected rights must appear to object and protest within the time provided by statute or be forever barred.*

22CW3132 EAGLE COUNTY, COLORADO, COLORADO RIVER OR ITS TRIBUTARIES, EAST LAKE CREEK. Too Well Ranch, LLC, 3888 Lake Creek Road, Edwards, CO 81632, c/o Scott C. Miller, Esq. and John M. Sittler, Esq., Patrick, Miller & Noto, P.C., 229 Midland Ave, Basalt, CO 81621, (970) 920-1030. First Claim: For Change of Water Right. Name of structure: Tourville No. 1 Ditch, Priority No. 150. Date of original decree: March 5, 1901, Civil Action 385, Garfield County District Court. Legal description: The headgate is situated on the right bank of Lake Creek, from which stream said ditch derives and diverts its supply of water at a point near the center of the north-east quarter of the south west quarter of Sec. 28, T. 5 S. R. 82 west 6th P.M. and about 200 feet west thereof. A map is on file with the court as Exhibit A. 2043 Appropriation date: April 29, 1889. Amount: 3.20 c.f.s. Use: Irrigation. Amount of water Applicant intends to change: Applicant's 1/12 interest, approximately 0.266 c.f.s. Detailed description of proposed change: Applicant owns a 1/12 interest (0.266 c.f.s.) in the Tourville No. 1 Ditch. Applicant requests to change the point of diversion for its interests from the decreed point of diversion at the Tourville No. 1 Ditch to a lower point on its property, the Tourville No. 1 Ditch, Bronfman Diversion. The Tourville No. 1 Ditch, Bronfman Diversion is located approximately 1.5 miles below the decreed point of diversion on East Lake Creek. This change will reduce Applicant's operation and maintenance costs and allow for more efficient use of its Tourville No. 1 Ditch water rights. Applicant will continue to irrigate the same historically irrigated acreage with its Tourville No. 1 Ditch water rights. The irrigated area is on file with the court as Exhibit B. As a result of the proposed change, the reach of East Lake Creek between the Tourville No. 1 Ditch decreed point of diversion and the Tourville No. 1 Ditch, Bronfman Diversion will benefit from increased flows. Because the place of use will not change, all irrigation return flows will accrue to East Lake Creek in accordance with their historical patterns. Applicant will not increase the diversion rate or volume of water diverted by this change. Historic diversion records for the Tourville No. 1 Ditch are on file with the court as Exhibit B1. This downstream change in point of diversion will not injuriously affect the owners of any vested water rights or decreed conditional water rights. Location of new point of diversion: The Tourville No. 1 Ditch, Bronfman Diversion is located in the NE ¼ SW ¼ of Section 20, Township 5 South, Range 82 West of the 6th P.M. (Eagle County). UTM NAD83 Z13: Northing – 4384542, Easting – 362404. A map is on file with the court as Exhibit A. Applicant

owns the land upon which the Tourville No. 1 Ditch, Bronfman Diversion is located and where the water is placed to beneficial use. Molly Webster owns the land upon which the Tourville No. 1 Ditch headgate is located. Second Claim: For Change of Water Right. Name of structure: Tourville No. 2 Ditch, Priority No. 166. Date of original decree: March 5, 1901, Civil Action 385, Garfield County District Court. Legal description: The headgate is situated on the left bank of Lake Creek, from which stream said ditch derives and diverts its supply of water at a point whence the E. 1/4 corner of Section 28, Township 5 S. R. 82 W. lies about 300 feet west, and about 1000 feet below the headgate of the Tourville No. 1. A map is on file with the court as Exhibit A. Source: East Lake Creek, tributary to Lake Creek, tributary to the Eagle River, tributary to the Colorado River. Appropriation date: June 1, 1894. Amount: 3.20 c.f.s. Use: Irrigation. Amount of water Applicant intends to change: Applicant's 1/12 interest, approximately 0.266 c.f.s. Detailed description of proposed change: 166. Applicant requests to change the point of diversion to add an alternate point of diversion lower on its property – the Tourville No. 2 Ditch, Bronfman Diversion. The Tourville No. 2 Ditch, Bronfman Diversion is located approximately 1.25 miles below the decree point of diversion on East Lake Creek. This change will reduce Applicant's operation and maintenance costs and allow more efficient use of its Tourville No. 2 Ditch water rights. However, Applicant requests the Tourville Ditch No. 2, Bronfman Diversion, as an alternate point of diversion to provide Applicant with more flexibility in its water use. Applicant will continue to irrigate the same historically irrigated acreage with its Tourville No. 2 Ditch water rights. The irrigated area is shown on file with the court as Exhibit B. As a result of the proposed change, the reach of East Lake Creek between the Tourville No. 2 Ditch decreed point of diversion and the Tourville No. 2 Ditch, Bronfman Diversion will benefit from increased flows. Because the place of use will not change, all irrigation return flows will accrue to East Lake Creek in accordance with their historical patterns. Applicants will not increase the diversion rate or volume of water diverted by this change. Historic diversion records for the Tourville No. 2 Ditch are on file with the court as Exhibit B2. This downstream change in point of diversion will not injuriously affect the owners of any vested water rights or decreed conditional water rights. Applicant also requests a change in use for the Tourville No. 2 Ditch to add fill and refill of the Bronfman Pond No. 1, applied for below. To prevent any expansion of use, Applicant agrees to limit its diversions at the Tourville No. 2 Ditch or Tourville No. 2 Ditch, Bronfman Diversion to Applicant's 1/12 ownership in the ditch (0.266 c.f.s.), regardless of whether that water is used directly for irrigation as done historically or for fill and refill of the Bronfman Pond No. 1. Applicant will employ accounting measures and install measuring devices as required by the Division Engineer to ensure that this change of water right will not result in an expansion of historical use of the amount of water changed. Location of new alternate point of diversion: The Tourville No. 2 Ditch, Bronfman Diversion is located in the NE ¼ SW ¼ of Section 20, Township 5 South, Range 82 West of the 6th P.M. (Eagle County). UTM NAD83 Z13: Northing – 4384480, Easting – 362409. A map is on file with the court as Exhibit B. Applicant owns the land upon which the Tourville No. 2 Ditch, Bronfman Diversion is located and where the water is placed to beneficial use. Molly Webster owns the land upon which the Tourville No. 2 Ditch headgate is located. Third Claim: For Absolute Storage Water Right. Name of structure: Bronfman Pond No. 1. Legal description: The Bronfman Pond No. 1 is located in the SW ¼ SW ¼ of Section 20, Township 5 South, Range 82 West of the 6th P.M. (Eagle County). UTM NAD83 Z13: Northing – 4384402, Easting – 362339. A map is on file with the court as Exhibit B. Source: East Lake Creek, tributary to Lake Creek, tributary to the Eagle River, tributary to the Colorado River. Name of ditches used to fill and capacity in c.f.s.: Applicant will fill and refill the Bronfman Pond No. 1 through either the Tourville No. 2 Ditch or the Tourville No. 2 Ditch, Bronfman Diversion. The Tourville No. 2 Ditch with a capacity of approximately 3.50 c.f.s. The Tourville No. 2 Ditch, Bronfman Diversion with a capacity of approximately 0.50 c.f.s. Legal description of points of diversion: Tourville No. 2 Ditch as described in paragraph 5.C of the application. Tourville No. 2 Ditch, Bronfman Diversion as described in paragraph 6.B of the application. Appropriation date: June 15, 2013. How appropriation was initiated: Field inspection, formulation of intent to appropriate, construction of pond, and application of water to beneficial use. Date water applied to beneficial use: June 15, 2013. Amount: 0.5388 acre-feet, absolute, with the right to fill and refill in priority or as augmented. Rate of fill: Tourville No. 2 Ditch as 0.266 c.f.s. Tourville No. 2 Ditch, Bronfman Diversion at 0.266 c.f.s. Uses: Aesthetic, recreation, piscatorial, wildlife watering, and fire protection. The Bronfman Pond No. 1 is an aesthetic structure on Applicant's property providing further recreation, piscatorial, wildlife watering, and fire protection benefits. Surface area of highwater line: 0.1796 acre. Vertical height of dam: 6 feet. Length of dam: 60 feet. Total capacity of reservoir: 0.5388 acre-feet. Active capacity: 0.5388 acre-feet. Dead storage: 0.0 acre-feet. Applicant owns the land where the water right is located and where the water is put to beneficial use. Remark: The Bronfman Pond No. 1 may also be used as an irrigation control structure for Applicant's Tourville No. 2 Ditch water rights, with outflows exceeding inflows every 72 hours. Fourth Claim: For Approval of Plan for Augmentation. Name of structure to be augmented: Bronfman Pond No. 1. Legal description: As described in paragraph 9.A of the application. Water rights to be used for augmentation: A Colorado River Water Conservancy District ("River District") contract from the sources described in paragraph 14.A of the application. Complete statement of plan for augmentation: Background: The Bronfman Pond No. 1 was constructed in 2011-12 and provides aesthetic, recreation, piscatorial, wildlife watering, and fire protection benefits to Applicant's property. Applicant will continuously fill and refill the pond under its junior water right, through the Tourville No. 2 Ditch or Tourville No. 2 Ditch, Bronfman Diversion structures. When the Bronfman Pond No. 1 is out-of-priority, Applicant will

continue to fill and refill the pond with its River District contract augmentation and exchange water. If Applicant's River District water is not sufficient, or the exchange is no longer in priority, Applicant will curtail storage diversions into the pond. However, the Bronfman Pond No. 1 may continue to be used as an irrigation control structure for Applicant's senior Tourville No. 2 Ditch water rights. Water requirements: Applicant's consulting engineer calculated the evaporation for the Bronfman Pond No. 1 at 0.476 acre-feet per year. Those calculations are shown on Exhibit C on file with the court. Average annual pond evaporation for 0.1796 acre of pond surface area is 18.09 inches, or 0.476 acre-feet. Evaporation is 100 percent consumptive Applicant's engineer estimated a conservative call period of 100 percent, resulting in total out-of-priority depletions of 0.476 acre-feet per year, as shown on Exhibit C on file with the court. However, Applicant's River District contract will be for the minimum 1.0 acre-feet, which will allow Applicant to completely fill the Bronfman Pond No. 1 (0.5388 acre-feet) even if free river conditions do not exist in a given year. Call operation: Applicant will fill the Bronfman Pond No. 1 under its own junior priority in free river conditions each spring. When a call comes on that would otherwise prevent Applicant from refilling and topping off the Bronfman Pond No. 1, Applicant will continue to fill the pond with River District contract augmentation water. The augmentation will be administered through the Bronfman Exchanges. If Applicant's River District contract water is ever not sufficient to fully replace evaporative depletions, or the contract water cannot be used because the Bronfman Exchanges are out-of-priority, Applicant will curtail all storage diversions in the Bronfman Pond No. 1 and the pond levels will drop commensurate with evaporation. However, Applicant may continue to use the Bronfman Pond No. 1 as a temporary irrigation control structure for its Tourville No. 2 Ditch water rights. Applicant owns the land on which the augmented water right is located and where the water is placed to beneficial use. Remarks: Applicant will limit its diversions from the Tourville No. 2 Ditch, or Tourville No. 2 Ditch, Bronfman Diversion, to its combined 1/12 ownership in the ditch. When Applicant is filling or refilling the Bronfman Pond No. 1, it will reduce the amount diverted directly for irrigation use to prevent expansion of use. Fifth Claim: For Appropriative Right of Exchange. Name of structure: Bronfman Colorado River Exchange. Location of downstream terminus: The confluence of the Colorado and Eagle Rivers, located in the NW ¼ SE ¼ of Section 5, Township 5 South, Range 86 West of the 6th P.M. (Eagle County; UTM NAD83 Z13 coordinates: Northing – 4390469, Easting – 323396). Location of upstream terminus: The point of diversion for the Tourville No. 2 Ditch or Tourville No. 2 Ditch, Bronfman Diversion, as described in the application. A map is on file with the court as Exhibit D. Source: The water rights on the Colorado River owned or controlled by the River District for which Applicant is in the process of applying for an allotment contract for the use of, as described in paragraph 14.A of the application. Appropriation date: December 30, 2022. How appropriation was initiated: Field inspection, formulation of intent to apply water to beneficial use, application to the River District, and filing of this application. Date water applied to beneficial use: N/A. Amount: 0.266 c.f.s., up to 0.5388 acre-feet per year, cumulative between all Bronfman Exchanges. Use: Exchange to implement the plan for augmentation applied for in this case. Remarks: All Bronfman Exchanges utilize the same River District contract, include a portion of the Colorado and Eagle Rivers, and have an upstream terminus at the point of diversion for the Tourville No. 2 Ditch. Operation of an exchange with a lower terminus shall be considered operation of any other exchanges that are wholly contained within the longer exchange reach. For example, operation of the Bronfman Colorado River Exchange shall be considered operation of the Bronfman Eagle River Exchange as well. Sixth Claim: For Appropriative Right of Exchange. Name of structure: Bronfman Eagle River Exchange. Location of downstream terminus: The confluence of the Eagle River and Lake Creek, located in the NE ¼ NE ¼ of Section 6, Township 5 South, Range 82 West of the 6th P.M. (Eagle County; UTM NAD83 Z13 coordinates: Northing – 4390301, Easting – 362007). Location of upstream terminus: The point of diversion for the Tourville No. 2 Ditch or Tourville No. 2 Ditch, Bronfman Diversion, as described in the application. A map is on file with the court as Exhibit D. Source: The water rights on the Eagle River owned or controlled by the River District and for which Applicant is in the process of applying for an allotment contract for the use of, as described in paragraph 14.A of the application. Appropriation date: December 30, 2022. How appropriation was initiated: Field inspection, formulation of intent to apply water to beneficial use, application to the River District, and filing of this application. Date water applied to beneficial use: N/A. Amount: 0.266 c.f.s., up to 0.5388 acre-feet per year, cumulative between all Bronfman Exchanges. Use: Exchange to implement the plan for augmentation applied for in this case. Remarks: All Bronfman Exchanges utilize the same River District contract, include a portion of the Colorado and Eagle Rivers, and have an upstream terminus at the point of diversion for the Tourville No. 2 Ditch. Operation of an exchange with a lower terminus shall be considered operation of any other exchanges that are wholly contained within the longer exchange reach. For example, operation of the Bronfman Colorado River Exchange shall be considered operation of the Bronfman Eagle River Exchange as well.

YOU ARE HEREBY NOTIFIED THAT YOU HAVE until the last day of FEBRUARY 2023 to file with the Water Clerk a verified Statement of Opposition setting forth facts as to why this application should not be granted or why it should be granted in part or on certain conditions. A copy of such statement of opposition must also be served upon the applicant or the applicant's attorney and an affidavit or certificate of such service shall be filed with the Water Clerk, as prescribed by Rule 5, CRCP. (Filing Fee: \$192.00) KATHY POWERS, Water Clerk, Water Division 5; 109 8th Street, Suite 104 Glenwood Springs, CO 81601.