

Consent Agenda Item 1.c

July 17-18, 2019 Board Meeting

Case No. 19CW3037 (Water Division 5); Eagle Valley Clean Energy, LLC

Summary of Water Court Application

This is an application for approval of plan for augmentation and appropriative right of exchange.

Staff Recommendation

Staff recommends that the Board ratify the filing of a Statement of Opposition filed on behalf of the Board in May 2019 to protect CWCB's instream flow water rights.

CWCB Instream Flow Water Rights

The CWCB holds water rights, including the following instream flow water right 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 |

Potential for Injury

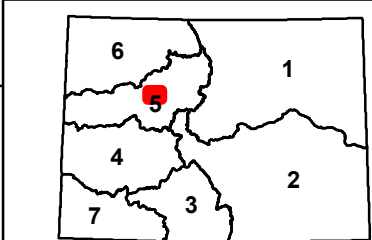
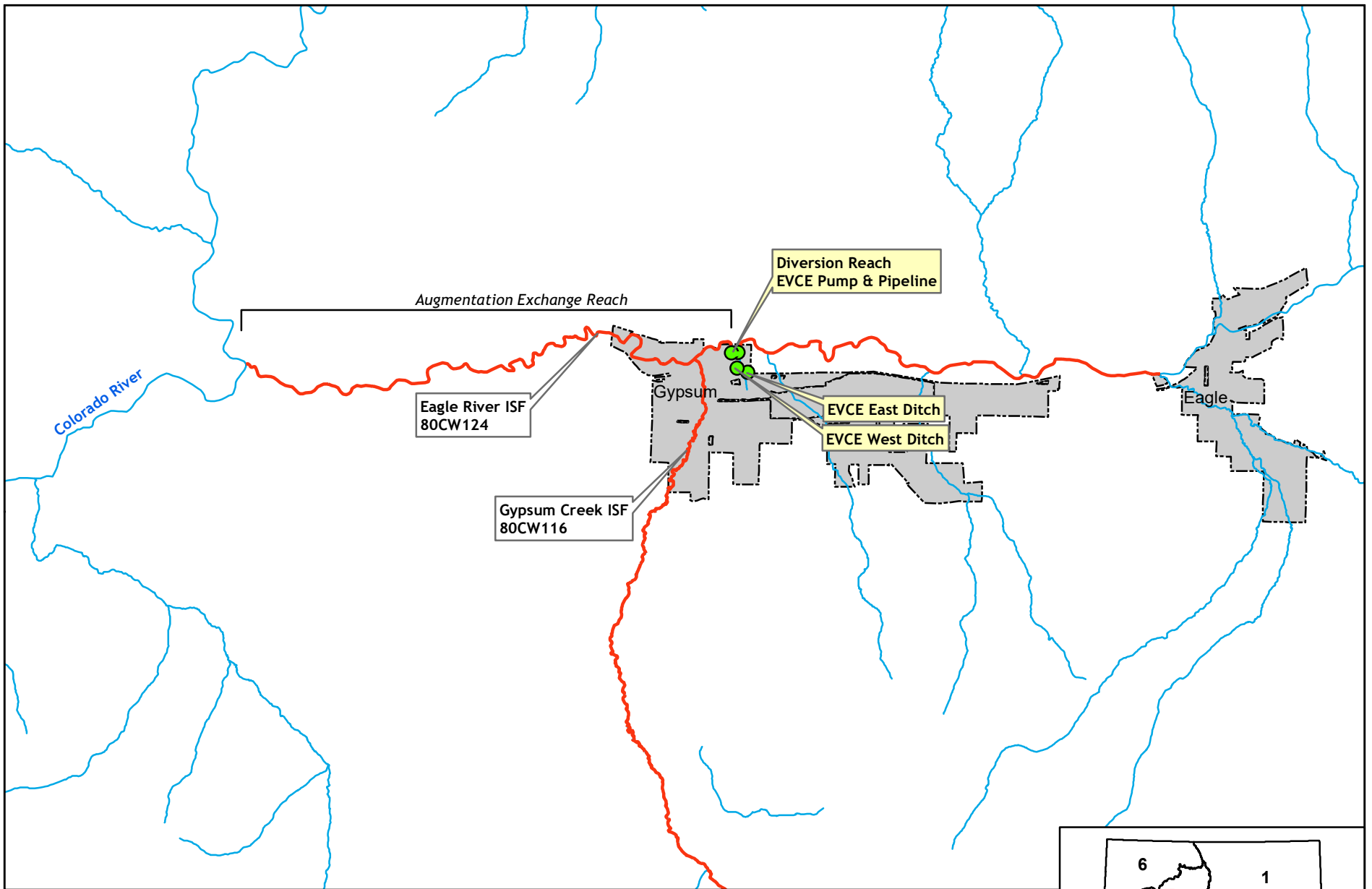
- The proposed plan for augmentation and exchange may not replace depletions in the proper time, place and amount, which could injure the CWCB's instream flow water rights.
- The application does not present sufficient information to fully evaluate the extent to which the Board's instream flow rights may be injured.

Other Objectors

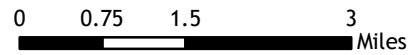
Statements of Opposition were also filed by American Gypsum Company, Town of Gypsum and Eagle County Board of County Commissioners.

Attorney Representing CWCB

Andrew B. Nicewicz, Assistant Attorney General, is assigned to this case and can be contacted at andy.nicewicz@coag.gov, or 720-508-6259.



July 17-18, 2019 CWCB Board Meeting
 Consent Agenda Item 1.c Statement of Opposition
 Case No. 19CW3037 (Water Division 5)
 Eagle Valley Clean Energy, LLC



DIVISION 5 WATER COURT- MARCH 2019 RESUME

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 MARCH 2019. *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.*

19CW3037 EAGLE VALLEY CLEAN ENERGY, LLC (“EVCE”) c/o Kendric B. Wait, 4626 North 300 W., 3rd Floor, Provo, UT 84604, c/o Steven O. Sims and Dulcinea Z. Hanuschak, Brownstein Hyatt Farber Schreck, LLP, 410 17th Street, Suite 2200, Denver, CO 80202, 303.223.1100. **Application for Approval of Plan for Augmentation and Appropriative Right of Exchange. In EAGLE COUNTY.** 2. The structures included in this plan for augmentation and exchange are currently augmented pursuant to the terms of the Town of Gypsum’s augmentation and exchange plan decreed in 14CW3167. This application seeks to decree a supplemental plan for augmentation to replace depletions which exceed the depletions authorized to be replaced in Case No. 14CW3167. EVCE does not seek to amend or modify any term or condition of 14CW3167 as applied to the EVCE augmented structures and exchange. 3. Name of structures to be augmented: All water rights associated with the structures were decreed in 11CW201, Division 5. 3.1. Name of Structure: EVCE East Ditch. 3.1.1. Date of Decree: March 21, 2018. 3.1.2. Type of water right: Surface. 3.1.3. Legal Description of point of diversion--Legal Description of Headgate is: The EVCE East Ditch headgate is located in the SE¼ of the NE¼ Section 5, Township 5 South, Range 85 West 6th P.M. 2040 feet from the north section line and 610 feet from the east section line, Eagle County, Colorado. The headgate is shown on the map attached hereto as Exhibit A. 3.1.4. Source of Water: Unnamed creek in Section 5, Township 5 South, Range 85 West 6th P.M. **tributary to the Eagle River, tributary to the Colorado River.** 3.1.5. Appropriation Date: December 30, 2011, conditional. 3.1.6. Amount: 1.0 cubic feet per second (“c.f.s.”). 3.1.7. Decreed use: Industrial, domestic, and irrigation. 3.1.7.1. Industrial and domestic: Applicant operates a power plant facility on the property depicted in Exhibit A and appropriates this water right for all associated industrial and domestic uses. Applicant is currently using domestic water provided by the Town of Gypsum which is not diverted under the water rights decreed in this case. Applicant will use the water decreed in this case for domestic use only if the Town no longer provides domestic water to the power plant facility and the Town consents or Applicant complies with any existing Town ordinances concerning use of domestic water not provided by the Town municipal water system. The industrial uses also may include the nonconsumptive use of maintaining historical flows and connections between the natural streams and the alluvial aquifer on the power plant site and the adjacent AGC property that may have been disrupted by the construction of the power plant and the EVCE East Ditch and EVCE West Ditch described below. 3.1.7.2. Irrigation: Number of acres historically irrigated: N/A. Total number of acres proposed to be irrigated: 10 acres. Legal description of acreage irrigated or to be irrigated: Lands located in the N1/2 of the SE ¼ of the NE ¼ of Section 5 and the NW ¼ of the SW ¼ of the NW ¼ of Section 4, all in Township 5 South, Range 85 West of the 6th P.M., Eagle County, Colorado, as shown in Exhibit A. 3.2. Name of Structure: EVCE West Ditch, 3.2.1. Date of Decree: March 21, 2018. 3.2.2. Type of water right: Surface. 3.2.3. Legal Description of point of diversion: The EVCE West Ditch is located at the SW¼ of the NE¼, Section 5, Township 5 South, Range 85 West of the 6th P.M. 1750 feet from the north section line and 1350 feet from the east section line, Eagle County, Colorado. The headgate is shown on the map attached hereto as **Exhibit A.** 3.2.4. Source of Water: Unnamed creek in Section 5, Township 5 South, Range 85 West 6th P.M. tributary to the Eagle River, tributary to the Colorado River. 3.2.5. Appropriation Date: December 30, 2011, conditional. 3.2.6. Amount: 2.0 cubic feet per second (“c.f.s.”). 3.2.7. Decreed use: Industrial, domestic, and irrigation. 3.2.7.1. Industrial and domestic: Applicant operates a power plant facility on the property depicted in Exhibit A and appropriates this water right for all associated industrial and domestic uses. Applicant is currently using domestic water provided by the Town of Gypsum which is not diverted under the water rights decreed in this case. Applicant will use the water decreed in this case for domestic use only if the Town no longer provides domestic water to the power plant facility and the Town consents or Applicant complies with any existing Town ordinances concerning use of domestic water not provided by the Town municipal water system. The industrial uses also may include the nonconsumptive use of maintaining historical flows and connections between the natural streams and the alluvial aquifer on the power plant

site and the adjacent AGC property that may have been disrupted by the construction of the power plant and the EVCE East Ditch and EVCE West Ditch described below. 3.2.7.2. Irrigation: Number of acres historically irrigated: N/A. Total number of acres proposed to be irrigated: 10 acres. Legal description of acreage irrigated or to be irrigated: Lands located in the N1/2 of the SE ¼ of the NE ¼ of Section 5 and the NW ¼ of the SW ¼ of the NW ¼ of Section 4, all in Township 5 South, Range 85 West of the 6th P.M., Eagle County, Colorado, as shown in Exhibit A. 3.3. Name of Structure: EVCE Pump and Pipeline. 3.3.1. Date of Decree: March 21, 2018. 3.3.2. Type of water right: Surface. 3.3.3. Legal Description of point of diversion: The diversion reach for the pump and pipeline is located along the southerly bank of the Eagle River from a point located in the NW1/4 of the NE1/4 of Section 5, Township 5 South, Range 85 East of the 6th P.M., approximately 905 feet from the north section line and 1720 feet from the east section line, upstream to a point in the NE1/4 of the NE1/4 of said Section 5, approximately 770 feet from the north section line and 1300 feet from the east section line, as shown on the U.S.G.S. topographic map incorporated herein and attached hereon as Exhibit A. 3.3.4. Source of Water: Eagle River, tributary to the Colorado River. 3.3.5. Appropriation Date: December 31, 2013, conditional. 3.3.6. Amount: 1.0 cubic feet per second ("c.f.s."). 3.3.7. Decreed use: Industrial, domestic, and irrigation. 3.3.7.1. Industrial and domestic: Applicant operates a power plant facility on the property depicted in Exhibit A and appropriates this water right for all associated industrial and domestic uses. Applicant is currently using domestic water provided by the Town of Gypsum which is not diverted under the water rights decreed in this case. Applicant will use the water decreed in this case for domestic use only if the Town no longer provides domestic water to the power plant facility and the Town consents or Applicant complies with any existing Town ordinances concerning use of domestic water not provided by the Town municipal water system. The industrial uses also may include the nonconsumptive use of maintaining historical flows and connections between the natural streams and the alluvial aquifer on the power plant site and the adjacent AGC property that may have been disrupted by the construction of the power plant and the EVCE East Ditch and EVCE West Ditch described below. 3.3.7.2. Irrigation: Number of acres historically irrigated: N/A. Total number of acres proposed to be irrigated: 10 acres. Legal description of acreage irrigated or to be irrigated: Lands located in the N1/2 of the SE ¼ of the NE ¼ of Section 5 and the NW ¼ of the SW ¼ of the NW ¼ of Section 4, all in Township 5 South, Range 85 West of the 6th P.M., Eagle County, Colorado, as shown in Exhibit A. 4. Water right(s) to be used for augmentation: Applicant will use 65.1 AF of River District contracts as the source of augmentation water under this separate plan. Currently Applicant owns a contract for 24 AF of this amount, to wit: Contract CW18004 for 24 AF dated November 27, 2018, said contract is attached as **Exhibit B**. The source of water supply for the River District contract is described as follows: 4.1. Colorado River Water Conservation District Supply. At times when the augmentation sources in 14CW3167 are not available to EVCE, it may use contract water obtained from the River District to augment out-of-priority depletions. The source of the water is from: (1) Wolford Mountain Reservoir, for which storage water right decrees were obtained by the River District in Cases No. 87CW283, 95CW281 and 98CW237 in the District Court for Colorado Water Division No. 5, and for which additional storage water right decrees may be obtained in the future by the River District in other cases; (2) the River District's contractual right to water deliveries from Ruedi Reservoir; and (3) other supplies that the River District may acquire suitable for use in its Water Marketing Program. 4.2. The decree information about the Wolford Mountain Reservoir rights is as follows: The River District owns and operates Wolford Mountain Reservoir (f/k/a Gunsight Pass Reservoir) which diverts under three primary water rights Case No. 87CW283, Case No. 95CW281 and Case No. 98CW237. 4.2.1. Gunsight Pass Reservoir, Case No. 87CW283. Legal description of place of storage: The dam is located in the SW1/4 of the NE1/4 of Section 25, T. 2 N., R. 81 W., 6th P.M. The intersection of the dam axis with the right abutment will occur at a point which bears S. 54°54'20" E. a distance of 3,716.46 feet from the NW Corner of said Section 25; Source: Muddy Creek and its tributaries, all tributary to the Colorado River; Amount: 59,993 acre-feet. 4.2.2. Wolford Mountain Reservoir Enlargement, Case No. 95CW281. Legal description of place of storage: The dam is located in the SW1/4 of the NE1/4 of Section 25, T. 2 N., R. 81 W., 6th P.M. Source: Muddy Creek and its tributaries, all tributary to the Colorado River. Amount: 6,000 acre-feet, conditional. 4.2.3. Wolford Mountain Reservoir Case No. 98CW237. Legal Description of place of storage: Same as for 95CW281. Source: Muddy Creek and its tributaries, all tributary to the Colorado River. Amount: 30,000 acre feet conditional. 4.3. The decree information about the Ruedi Reservoir rights is as follows: The River District holds Contract Nos. 009D6C0111 (500 AF), 009D6C0118 (700 AF), 039F6C0011 (530 AF), 079D6C0106 (5,000 AF), and 139D6C0101 (4,683.5 AF) from the United States Bureau of Reclamation for 11,413.5 acre feet of annual supply from Ruedi Reservoir. This water will be used in addition to and substitution for Wolford Mountain Reservoir water in appropriate

circumstances where Ruedi water is physically equivalent to Wolford water. 4.3.1. Legal description of place of storage: Ruedi Reservoir is located in Sections 7, 8, 9, 11 and 14 through 18, T. 8 S., R. 84 W., 6th P.M., in Eagle and Pitkin Counties. The dam axis intersects the right abutment at a point whence the SW corner of Section 7, T. 8 S., R. 84 W. of the 6th P.M. bears N. 82°10'W. a distance of 1,285 feet. 4.3.1.1. PLSS: Ruedi Reservoir is located in Sections 7, 8, 9, 11 and 14 through 18, T. 8 S., R. 84 W., 6th P.M., in Eagle and Pitkin Counties. The dam axis intersects the right abutment at a point 130 feet South of the North section line and 1,280 feet East of the West section line of Section 7, T. 8 S., R. 84 W. of the 6th P.M. 4.3.2. Source: Fryingpan River. 4.3.3. Previous storage decrees: 4.3.3.1. Decree number: Civil Action No. 4613. 4.3.3.1.1. Decree Date: June 20, 1958. Court: Garfield County District Court. 4.3.3.1.2. Amount: 140,697.3 acre feet, reduced to 102,369 acre feet pursuant to order of the Water Court in Case No. W-789-76. The full amount was made absolute in Case No. 88CW85. 4.3.3.1.3. Appropriation Date: July 29, 1957. 4.3.3.1.4. Use: Domestic, municipal, irrigation, industrial, generation of electrical energy, stock watering and piscatorial. 4.3.3.2. Decree number: 81CW34. 4.3.3.2.1. Decree Date: April 8, 1985; Court: District Court, Water Division No. 5. 4.3.3.2.2. Amount: 101,280 acre feet (refill); of this amount, 44,509 acre feet were made absolute in Case No. 95CW95 and 25,257 acre feet were made absolute in Case No. 01CW269, for a total of 69,766 acre feet absolute. 4.3.3.2.3. Appropriation Date: January 22, 1981. 4.3.3.2.4. Use: Irrigation, domestic, municipal, generation of electrical energy, stock watering, industrial, piscatorial, recreation and maintenance of sufficient storage reserves to fulfill contractual obligations and provide stored water for recreation in times of drought. 5. Complete statement of plan for augmentation. By Agreement between EVCE and Gypsum, Gypsum supplies augmentation water for the benefit of the EVCE Biomass Facility, in the following amounts, pursuant to the decree awarded to the Town of Gypsum in Case No. 14CW3167: 5.1. Up to 115 acre feet to meet Colorado River calls when the EVCE Water Rights are out-of-priority; 5.2. Up to 12 acre feet to meet Eagle River calls during the non-irrigation season, when the EVCE Water Rights are out-of-priority; and 5.3. Up to 55 acre feet to meet Eagle River calls during the irrigation season, when the EVCE Water Rights are out-of-priority. 5.4. Provided however, in any one calendar year, not more than 62 acre feet of water shall be provided to meet Eagle River administration, and not more than 182 acre feet cumulatively shall be made available for replacement water under this plan. 5.5. Gypsum is under no obligation to provide augmentation water above these amounts to EVCE. 5.6. In the event the Gypsum augmentation sources are exhausted and the EVCE Water Rights are out-of-priority, EVCE will use this plan for augmentation and the River District contracts approved by this plan for augmentation to continue out of priority diversions. 6. Exchanges. During times when a Colorado River call is in place downstream of the confluence with the Eagle River (i.e. Shoshone or Cameo) and an Eagle River instream flow call is not active (CWCB's Case No. 80CW124), then out of priority depletions may be offset with releases from Wolford Mountain Reservoir. 6.1. The Upper Termini: The following points will be utilized as the upper termini for the exchange. The locations and sources of each point are described in paragraph 3 above. 6.1.1.1. EVCE East Ditch. 6.1.1.2. EVCE West Ditch. 6.1.1.3. EVCE Pump and Pipeline. 6.2. The Lower Terminus: The confluence of the Colorado and Eagle Rivers. 6.3. Amounts: 2.0 cfs up to 24 acre feet, conditional limited to the amount of the River District Contract described in paragraph 4 above. 6.4. Source: Water Supply Contracts with the River District are described in paragraph 4 above. 6.5. Uses: Augmentation. 6.6. Appropriation date: March 29, 2019. 7. Name(s) and address(es) of owner(s) or reputed owner(s) 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. 7.1. The land on which the structures in paragraph 3 are located is: Eagle Valley Property, LLC, c/o Laura Rostrom, Manager, 259 Stone Brook Lane, Provo, UT 84604. WHEREFORE, Applicant seeks a decree approving the proposed plan for augmentation and exchange as set forth above. (22 pages total including exhibits)

YOU ARE HEREBY NOTIFIED THAT YOU HAVE until the last day of MAY 2019 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.