

June 9, 2025

The Colorado Water Conservation Board
1313 Sherman St., Room 718
Denver, Colorado 80203

Re: Request for Hearing Regarding Proposed Acquisition of Shoshone Water Rights

Dear CWCB Board Members,

On behalf of Denver Water, I am writing to request a hearing on the proposed acquisition of the Shoshone Water Rights for instream flow use pursuant to Rule 6m(4) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2, and to also provide you with Denver Water's comments on the proposed acquisition agreement attached as Exhibit 4 to the Colorado River District's (River District) proposal.

Denver Water supports a mechanism or combination of mechanisms that will permanently preserve the historical flow regime created by the Senior Shoshone Call for instream flow use and, as the Colorado River District contends, to do so without harm to others, preserving the "status quo." Based upon Denver Water's review of the River District's proposed acquisition letter dated May 6, 2025 and attachments, the proposal will change, rather than maintain, the status quo in ways that would harm Denver Water's ability to provide water to the 1.5 million people we serve during severe or prolonged drought.

Denver Water's concerns regarding the proposed acquisition are set forth in greater detail in its May 14, 2025 letter to the CWCB. In brief, as part of the River District's proposed change of the Shoshone Water Rights to instream flow use, the River District is proposing to expand the exercise of the right, which has the potential to result in significant impacts to the operation and administration of the Colorado River and its tributaries, and material injury to Denver Water's water rights and the water rights of others. In addition, the River District's proposed acquisition fails to honor the River District's contractual obligations under the Colorado River Cooperative Agreement (CRCA) and the Shoshone Outage Protocol (SHOP) that apply to the Shoshone Water Rights. For these reasons, Denver Water is requesting a hearing so that the Board may further consider whether the Shoshone Water Rights should be acquired with limitations, which the Board may include under ISF Rule 6n.

Under its ISF Rules, the Board "shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment." ISF Rule 6e. Such evaluation shall consider at least eleven factors, including any potential material injury to existing decreed water rights, the historical use and historical return flows of the water right, and the effect of the proposed acquisition on the maximum utilization of the water of the state. See ISF Rule 6e.(3), (4), (8). It is important that the Board give consideration to these factors in determining whether to accept the proposal as made or, alternatively, to place limitations on the acquisition. Equally important is that Denver Water and other affected water right holders have an opportunity to participate and present testimony and evidence of the potential impacts so that the Board may make a fully informed determination whether to acquire the Shoshone Water Rights, with or without limitations.

Additionally, we are enclosing comments on, and suggested modifications to, the River District's proposed Acquisition Agreement that would help address some of Denver Water's concerns, for your consideration.

As noted in our public comment on May 21st, we make this request for a contested hearing with the hope that stakeholders will come together before the September hearing and coalesce around a modified proposal that achieves the River District's important goal of Shoshone permanency while avoiding the potential harms that Denver Water and others have raised. While cleareyed about the challenges to reaching such an agreement, we think it is important to make every effort to come together as a state to maximize the benefit of this critical resource for the river as well all Colorado water users who depend on it. Thank you for considering our request.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Brody', is positioned above the printed name.

Jessica Brody
General Counsel
Denver Water

Enclosure: Proposed Acquisition Agreement with Denver Water Comments

[\[Denver Water Comments – 6/09/2005\]](#)

DRAFT

SHOSHONE WATER RIGHTS DEDICATION AND ISF AGREEMENT

(Shoshone Water Rights)

This WATER RIGHT DEDICATION and ISF AGREEMENT (“Agreement”), is made as of this ____ day of _____, 2025, by and between the Colorado Water Conservation Board (“CWCB”), an agency of the State of Colorado, the Colorado River Water Conservation District (“River District”), a political subdivision of the State of Colorado, and Public Service Company of Colorado, a Colorado corporation (“PSCo”). The CWCB, the River District, and PSCo may be hereinafter referred to individually as a “party,” and together as the “parties.”

RECITALS

- A. The CWCB is an agency of the State of Colorado created to aid in the protection and development of the waters of the state for the benefit of its present and future inhabitants. In 1973, the General Assembly vested the CWCB with the exclusive authority to appropriate waters of the natural stream for minimum stream flows between specific points on a stream to preserve the natural environment to a reasonable degree.
- B. Pursuant to section 37-92-102(3), C.R.S., the General Assembly has also vested the CWCB with the ability to acquire, by grant, purchase, donation, lease, or other contractual agreement, such water, water rights, and interests in water that are not on the division engineer’s abandonment list in such amount as the CWCB determines is appropriate for stream flows to preserve and/or improve the natural environment to a reasonable degree.
- C. The River District was created by the provisions of sections 37-46-101, C.R.S., *et seq.*, to promote the health and general welfare of the State of Colorado by the conservation, use, and development of the water resources of the Colorado River and its principal tributaries. The River District constituents include West Slope governmental entities and water interests that desire to maintain in perpetuity the flow regime within Water Division 5 created by the historical exercise of the water rights that are the subject of this Agreement.
- D. PSCo is a Colorado corporation and is the owner and operator of the hydroelectric power plant (the “Shoshone Power Plant”) located on the mainstem of the Colorado River in Glenwood Canyon, approximately six miles upstream of Glenwood Springs, Colorado. The Shoshone Power Plant produces hydroelectric energy by means of PSCo’s diversion of the following water rights:

- (i) The Glenwood Power Canal and Pipeline water right, decreed on December

9, 1907, in Civil Action No. 466, Eagle County District Court, in the amount of 1,250 cubic feet per second of time (“c.f.s.”) with an appropriation date of January 7, 1902, for power, mining, milling, manufacturing, lighting and heating and traction purposes, and as decreed absolute by the Eagle County District Court on February 27, 1911, in Civil Action No. 553 (the “Senior Shoshone Water Right”); and

- (ii) The Shoshone Hydro Plant Diversion No. 2 water right, decreed absolute on February 7, 1956, in Civil Action No. 1123, Eagle County District Court, in the amount of 158 c.f.s. with an appropriation date of May 15, 1929, for manufacturing and generation of electrical energy (the “Junior Shoshone Water Right”).

Together, these two water rights are referred-to as the “Shoshone Water Rights”.

E. The Senior Shoshone Water Right is one of the most senior water rights on the Colorado River. During significant periods of the year, there is not sufficient water to satisfy all water rights decreed on the Colorado River and its tributaries within the State of Colorado. At such times, when the measurable Natural Flow of the Colorado River drops below 1,408 c.f.s. (the sum of 1,250 c.f.s. attributable to the Senior Shoshone Water Right and 158 c.f.s. attributable to the Junior Shoshone Water Right) at the streamflow gauge (USGS 09070500) located on the Colorado River near Dotsero, Colorado (“Dotsero Gage”), to the extent in priority, the Colorado Division of Water Resources (“DWR”) administers a call for the Shoshone Water Rights which results in the curtailment of junior water rights upstream of the Shoshone Power Plant. The Dotsero Gage is the location where the administration and measurement of the Shoshone Water Rights has historically occurred. The “Natural Flow” is the amount of water in the Colorado River measured at the Dotsero Gage, including the amount of water usable by the Shoshone Water Rights when those water rights are in priority, except that the “Natural Flow” does not include any water released from storage and conducted into the Colorado River upstream of the Dotsero Gage (accounting for evaporation and transit loss), which water is intended for delivery for use downstream of the discharge outlets for the Shoshone Power Plant.

Commented [A1]: The parties to the CRCA ShOP intended to only preserve the Shoshone Call Flows created by the Senior, not the Junior.

Commented [A2]: The phrase “and measurement” should be stricken. This is not accurate.

Commented [A3]: Does limiting to natural flow potentially result in more water than the ISF might need when other non-natural flows are in the river?

F. The Shoshone Water Rights are decreed for non-consumptive hydropower generation use at the Shoshone Power Plant. A portion of All of the water diverted by PSCo for hydropower generation use is returned to the Colorado River after such water is being conveyed through the Shoshone Power Plant’s penstocks and turbines, to a point of return at the plant’s discharge outlets that is approximately 2.4 miles downstream of the point of diversion at the Shoshone Diversion Dam and Tunnel, as depicted on the map attached as **Exhibit A**. The approximate locations of the “Shoshone Diversion Dam and Tunnel” and the outfall for the “Shoshone Power Plant Discharge Outlets” are as follows:

Commented [A4]: Without modifications, this statement represents that all water diverted returns to the Colorado River after being used to generate power, whereas in reality, a portion of the water diverted is discharged as conveyance loss back to the Colorado River via adits.

- i. **Shoshone Power Plant Diversion Dam and Tunnel:** on the right bank, being the northerly bank, of the Colorado River whence the North quarter corner of Section Thirty (30), Township Five (5) South, Range Eighty-Seven (87) West of the 6th Principal Meridian bears North 23° 48’20” East 2,414.64 feet, in Garfield County, Colorado.

- ii. **Shoshone Power Plant Discharge Outlets:** on the right bank, being the northerly bank, of the Colorado River whence the Southeast corner of Section Thirty-five (35), Township Five (5) South, Range Eighty-Eight (88) West of the 6th Principal Meridian bears South 29° 24' 14" East, 1,771 feet, in Garfield County, Colorado.¹

The reach of stream between the Shoshone Power Diversion Dam and Tunnel and the Shoshone Power Plant Discharge Outlets is referred to herein as the "Shoshone Reach." Through this Agreement, the parties seek to preserve and improve the natural environment of the Colorado River within the Shoshone Reach to a reasonable degree.

- G. Pursuant to the Purchase and Sale Agreement between the River District and PSCo, with an effective date of January 1, 2024 (the "PSA"), the River District is the contract purchaser of the Shoshone Water Rights. The PSA provides that PSCo, and its successors and assigns, is entitled to a perpetual leasehold interest in the Shoshone Water Rights for continued use of the Shoshone Water Rights for hydropower generation at the Shoshone Power Plant (the "Lease," the form of which is attached to the PSA as "Exhibit D"). The PSA (including all its Exhibits and Attachments) is attached and incorporated hereto as **Exhibit B**.
- H. PSCo's historical exercise of the Shoshone Water Rights has resulted in a streamflow regime that has benefitted the natural environment of the Colorado River basin both upstream and downstream of the Shoshone Power Plant. In addition, the historical exercise of the Shoshone Water Rights has provided benefits to water users throughout the Colorado River basin by providing a relatively predictable water rights administration regime both upstream and downstream of the Shoshone Power Plant.
- I. The parties wish to continue the general historical call operations and maintain the flow regime of the Colorado River, both upstream and downstream of the Shoshone Power Plant. In furtherance of that effort, and subject to the terms of this Agreement, the River District wishes to dedicate to the CWCB, at no additional cost to the CWCB, the exclusive right to use the Shoshone Water Rights for instream flow purposes within the proposed Shoshone Reach ~~to the extent~~ when the water rights are not being used for hydropower generation purposes at the Shoshone Power Plant, subject to the requirements of this Agreement. To that end, and subject to the terms set forth herein, the River District, PSCo, and the CWCB agree to jointly file an application to adjudicate a change of the Shoshone Water Rights in Garfield County District Court, Water Division No. 5, (the "Water Court") to add instream flow use to preserve and improve the natural environment of the Shoshone Reach of the Colorado River to a reasonable degree as an additional beneficial use of the Shoshone Water Rights. Use of the Shoshone Water Rights for instream flow and hydropower purposes shall be subject to any terms and conditions imposed by the change of water right decree to be entered by the Water Court, further described in Paragraphs XX and XX below (the "Decree").

Commented [A5]: Denver Water's view per the CRCA ShOP is that it committed to preserving the Shoshone Call Flows only when the power plant is not operating (either/or power use or operation of ShOP to preserve Shoshone Call Flows), not that ShOP would apply while the power plant is operating to make up any gap in the decreed flow rate being beneficially used.

¹ The legal description set forth above for the Downstream Terminus (Shoshone Power Plant Discharge Outlets) is an approximate location developed by River District staff and may be supplemented or modified at the time a water court application is filed in Water Division No. 5.

J. At two regularly scheduled public meetings of the CWCB held on [date], and [date], the CWCB considered the River District's proposed dedication of the exclusive right to use the Shoshone Water Rights for instream flow purposes to the CWCB in accordance with section 37-92-102(3), C.R.S., and the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rule(s)"), 2 CCR 408-2. At its regularly scheduled meeting on [date], the CWCB determined that it is appropriate to enter this Agreement and that the best use of the acquired interest in the Shoshone Water Rights is use up to the full decreed amount of 1,408 c.f.s., for instream flow use to preserve and improve the natural environment to a reasonable degree within the Shoshone Reach. ~~Such use of the Shoshone Water Rights for instream flow purposes can occur within the Shoshone Reach to the extent when the Shoshone Water Rights are not being exercised for hydropower generation purposes at the Shoshone Power Plant, up to the full amount of 1,408 c.f.s. of Natural Flow (hereinafter, the "ISF Rate"), subject to the limitations described in Paragraphs 7 and 9 below.~~

Commented [A6]: This sentence should be subject to the new paragraph 7.e Denver Water proposes below to maintain the purpose and intent of the 2007 Relaxation Agreement between Denver Water and Xcel.

K. The CWCB, the River District, and PSCo wish to cooperate to implement such legal mechanisms and to obtain such court decree and approvals as are necessary to change the Shoshone Water Rights to include instream flow use for the purpose of preserving and improving the natural environment ~~to a reasonable degree within the Shoshone Reach, and to protect the Natural Flow ISF Rate through the Shoshone Reach to the extent it is not being exercised for hydropower generation purposes at the Shoshone Power Plant.~~

Commented [A7]: "To a reasonable degree" should be included consistent with statutory requirements.

Commented [A8]: This does not appear to be a legitimate or lawful purpose.

~~K.L.~~ Nothing in this Agreement, the Water Court application, or any future decree shall be construed as an admission by the CWCB regarding the natural flow regime, historical use, historical return flows or the absence of material injury to existing decreed water rights. The CWCB retains exclusive discretion, consistent with C.R.S. § 37-92-102(3) and its Instream-Flow Rules, to decide whether, when, and to what extent to request administration. Any such decision shall not constitute a breach of this Agreement."

AGREEMENT

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

DEDICATION

1. The Recitals to this Agreement are incorporated by this reference and shall constitute part of this Agreement.
2. The River District hereby dedicates to the CWCB in perpetuity, effective as of the date of closing of the PSA, at no additional cost to the CWCB, the exclusive right to use the Shoshone Water Rights for instream flow use within the Shoshone Reach, ~~when to the extent~~, such water rights are not being used for hydropower generation purposes at the Shoshone Power Plant pursuant to the Lease, and subject to the requirements of Paragraph 9 below. The River District shall retain title to the Shoshone Water Rights.

3. This Agreement acknowledges the CWCB's consideration of the Colorado Parks and Wildlife analysis showing a biological need to preserve and improve the natural environment of the Shoshone Reach of the Colorado River to a reasonable degree.
4. The parties intend that the Decree, as further described in Paragraphs XX and XX below, shall confirm that the water attributable to the Shoshone Water Rights up to the available ISF Rate will remain in the stream to preserve and improve the environment to a reasonable degree within the Shoshone Reach where the CWCB does not presently have a decreed instream flow right, ~~when to the extent~~ the Shoshone Water Rights are not being used for hydropower generation purposes.
5. The parties intend that the Decree shall confirm that the Shoshone Water Rights shall be administered by the State Engineer and the Division Engineer for Water Division No. 5 ("Engineers") based on the Natural Flow at the Dotsero Gage. Instream flow use of the Shoshone Water Rights will be administered through the Shoshone Reach where the intended instream flow use will occur with the goal of utilizing the Shoshone Water Rights up to the available ISF Rate without diversion or exchange by intervening water users. The parties intend that the Decree shall also contain an affirmative finding which confirms that the change of the Shoshone Water Rights for the additional instream flow use is administrable by the Engineers and is capable of meeting all applicable statutory requirements.
6. In the event any new infrastructure or stream gaging stations are either necessary or desirable for the implementation of this Agreement, or in the event that any new infrastructure—including measuring devices—are deemed necessary by the Engineers with respect to the Shoshone Water Rights, the parties agree to work cooperatively with each other in good faith to accommodate the installation of any such infrastructure or gaging stations, which are necessary to make water available for use under this Agreement, in an efficient and economical manner.

CONDITIONS ON THE ADMINISTRATION AND EXERCISE OF
THE SHOSHONE WATER RIGHTS FOR INSTREAM FLOW USE

7. It is the intent of the parties that the Shoshone Water Rights will be ~~protected-used~~ for instream flow use ~~to the maximum extent possible~~ as allowed under the Water Court Decree, ~~when to the extent~~ the Shoshone Water Rights are not being used for power generation. ~~To implement this mutual intent, the CWCB agrees that it will request administration of the Shoshone Water Rights for instream flow use in the Shoshone Reach of the Colorado River to preserve and improve the natural environment to a reasonable degree at all times when the Natural Flow of the Colorado River as measured at the Dotsero Gage is less than 1,408 c.f.s., subject only to the limitations set forth below:~~
 - a. Any terms, conditions, and limits set forth in the Decree;
 - b. Any reduction in instream flow use made pursuant to the terms and conditions of Paragraph 9, below, due to use or planned use of the Shoshone Water Right for power

Commented [A9]: First sentence should be subject to new term proposed at paragraph 7.e below that serves to preserve the purpose and intent of the 2007 Relaxation Agreement with Xcel.

Commented [A10]: If the CWCB were to agree to this second sentence it would impermissibly be contracting away the policy discretion of future Boards. For this reason, the sentence should be deleted.

The CWCB should also retain discretion to place calls under the Shoshone Water Rights so as to provide for the maximum utilization of water particularly during drought conditions when water supplies are required for municipal purposes for the purposes of public safety.

Commented [A11]: Revise to state 1,408 c.f.s. or the amount determined by the final Water Court decree, whichever is less.

generation; and

c. During any period wherein the CWCB ~~and the River District jointly agree in writing to requests to~~ reduce the flow rate requested for administration of the Shoshone Water Rights for instream flow purposes.

d. The Shoshone Water Rights may not place a call for instream flow purposes during very dry Irrigation and Winter Seasons when the following conditions are met:

i. The Shoshone Water Rights will not call for instream flow purposes during the Irrigation Season (extending from March 25 through November 10) when a Water Shortage occurs. A "Water Shortage" occurs when the following two conditions are met: Using Denver Water's regular methodology and based on the "normal" scenario, Denver Water predicts that reservoir storage in its system on July 1 will be at or below 80% full; and the Most Probable forecast of streamflow prepared by the Natural Resources Conservation Service (NRCS) or jointly by NRCS and the Colorado Basin River Forecast Center indicates that the April - July flow of the Colorado River at the Kremmling gage will be less than or equal to 85% of average. If no forecast for the Kremmling gage is available, then the Dotsero gage will be used.

ii. Very dry Irrigation Seasons occur when the two conditions for a Water Shortage are met. Denver Water will make projections in March prior to March 25, and again in early May and late June to determine whether a Water Shortage is occurring. If a Denver Water projection in March or May meets the conditions for a Water Shortage, then the Shoshone Water Rights may not place a call for instream flow purposes during the period from that projection to the next projection. If a Denver Water projection made in March or May does not meet the conditions for a Water Shortage, then the Shoshone Water Rights may call for instream flow purposes during the period from that projection to the next projection; provided, however, that the Shoshone Water Rights may not place a call for instream flow purposes during any period when the Shoshone Call is relaxed under the 2007 Shoshone Agreement.

ii. If a Denver Water projection made in June meets the conditions for a Water Shortage, then the Shoshone Water Rights may not place a call for instream flow purposes during the remainder of the Irrigation Season that year. If the projection made in June does not meet the conditions for a Water Shortage, then the Shoshone Water Rights may place a call for instream flow purposes during the remainder of the Irrigation Season that year.

iii. During the period from November 11 to March 24 (Winter Season), the Shoshone Water Rights may not call fully for instream flow purposes when the overall storage in Denver Water's system is less than 79% of capacity on November 1. For purposes of this paragraph, the reservoirs that will be considered in determining overall storage are Antero, Eleven Mile, Cheesman, Marston, Chatfield, Gross, Ralston, Dillon, Williams Fork, and Wolford Mountain, but excluding any reservoirs under storage restrictions due to maintenance, repairs or

Commented [A12]: It's unclear what legal authority exists for the River District to have a joint say in the operation of the Shoshone Water Rights for instream flow purposes given the CWCB's exclusive authority to appropriate and use water for instream flow use. This phrase also usurps the CWCB's discretion to operate for instream flow purposes as needed.

Commented [A13]: These terms are consistent with current agreements that Denver Water and the River District are parties to.

Commented [A14]: Denver Water requests that the CWCB incorporate the SHOP/CRCA drought exception terms as additional limitations on the use of the Shoshone Water Rights for instream flow use and a provision clarifying that the Shoshone Water Rights will not be used for instream flow purposes when the terms of the 2007 Call Reduction Agreement would preclude the power plant from calling for more than 704 cfs.

orders from the Colorado State Engineer. If Denver Water storage is less than 79%, but more than 63%, then the Shoshone Water Rights may call for no more than 704 c.f.s. during that Winter Season. If Denver Water storage is equal to or less than 63%, but more than 49%, then the Shoshone Water Rights may all for no more than 352 c.f.s. during that Winter Season. If the storage is equal to or less than 49%, then the Shoshone Water Rights may not call during that Winter Season.

e. If the Shoshone Power Plant is operating and calling for water, and a Water Shortage occurs as defined above, to the extent PSCo is required to reduce its call to a one-turbine 704 c.f.s. call under the terms of the 2007 Agreement Concerning Reduction of Shoshone Call ("Call Reduction Agreement"), as may be amended in the future, no call may be placed from the Shoshone Water Rights for instream flow purposes until such time that there is no longer a Water Shortage under the terms of the Call Reduction Agreement.

e.f. The CWCB shall not place a call under the Shoshone Water Rights for 17 cumulative days during the Winter Season to duplicate the effect of scheduled outages for maintenance at the power plant that historically occurred.

8. Pursuant to ISF Rule 10, 2 CCR 408-2, the parties shall cooperate in the administration and monitoring of the instream flow use of the Shoshone Water Rights dedicated to the CWCB under this Agreement so that, subject to the terms of this Agreement and the Decree, the CWCB will maximize the use of the Shoshone Water Rights for instream flow purposes ~~when to the extent~~ the rights are not being used for hydropower generation purposes at the Shoshone Power Plant. ~~PSCo, the CWCB and the River District shall~~ will coordinate with DWR to monitor the flow and calculate the Natural Flow of the Colorado River at the Dotsero Gage as the point of administration for the Shoshone Water Rights for hydropower generation and instream flow use.

9. The CWCB and the River District shall notify PSCo of any request for administration required by the provisions of this Agreement. PSCo shall provide advance written notice to the River District and the CWCB at least thirty (30) days prior to any scheduled operations or maintenance activities that result in a full or partial shutdown of the Shoshone Power Plant, and shall provide notice as soon as reasonably possible of any unscheduled shutdown or reduction of Shoshone Power Plant operations. During the term of the Lease, the parties will coordinate on at least an annual basis to determine how the Shoshone Water Rights will be allocated between hydropower generation and instream flow use in a manner consistent with the terms and conditions of the Decree that (1) maximizes PSCo's ability to exercise the Shoshone Water Rights for hydropower generation purposes; and (2) maximizes the ability to use the Shoshone Water Rights for instream flow purposes ~~when to the extent~~ the water rights are not being used for hydropower generation purposes at the Shoshone Power Plant, in a manner that does not reduce the availability of the Shoshone Water Rights for subsequent hydropower use. Upon termination of the Lease, this paragraph, and any other restrictions on the Shoshone Water Rights throughout this Agreement due to hydropower use, shall no longer be in effect, and, subsequent to any

Commented [A15]: It is unclear why PSCo and the River District need to coordinate with DWR to monitor the flow and calculate the natural flow when used for instream flow purposes. This raises questions whether the CWCB is using the water rights for instream flow purposes or if non-CWCB entities are operating the water rights for instream flow purposes contrary to state law.

permanent decommissioning of the Shoshone Power Plant, instream flow shall be the only use of the Shoshone Water Rights.

10. Each party to this Agreement shall also immediately report, in writing, to the other parties the nature of any communications with the Engineers concerning the administration of the Shoshone Water Rights as contemplated by this Agreement. Following the closing of the PSA, the parties shall identify those persons and provide such contact information (including email and telephone number) to the other parties necessary to effectuate the purposes hereof.
11. Any rights created by this Agreement are contractual rights. Use by the CWCB for instream flow purposes in accordance with this Agreement does not provide the CWCB an ownership right in the Shoshone Water Rights or in any of the River District or PSCo's facilities or water rights as they exist now or may exist in the future.
12. The CWCB's contractual rights to and interest in the Shoshone Water Rights dedicated to the CWCB for use in the Shoshone Reach under this Agreement extends to and terminates at the downstream termination point of the Shoshone Reach, which is the stream accrual point for the current Shoshone Power Plant Discharge Outlets.

NO CREATION OF RIGHT OF SUCCESSIVE USE OF THE SHOSHONE WATER RIGHTS DOWNSTREAM OF THE SHOSHONE REACH

13. This Agreement does not recognize any use or create any right of use by the River District of the Shoshone Water Rights downstream of the Shoshone Reach. Notwithstanding the foregoing, this Paragraph 13 does not prevent any use by the River District, ~~or its~~ constituents, or any water user of the natural stream flow downstream of the Shoshone Reach within the priority system and in accordance with Colorado law and the Decree.

Commented [A16]: This term should more broadly refer to any water user.

WATER COURT PROCEEDINGS

14. The parties shall file and diligently pursue a Water Court application and any necessary appeals to obtain the Decree in a final, unappealable form confirming a change of water right for the Shoshone Water Rights to include the additional use for instream flow purposes by the CWCB and confirming that the water attributable to the Shoshone Water Rights will be used for instream flow to preserve and improve the natural environment in the Shoshone Reach of the Colorado River to a reasonable degree up to the full amount of the ISF Rate, subject to the terms and conditions of the Decree and this Agreement. In such water court application, the CWCB, the River District, and PSCo shall be co- applicants for the purpose of advancing and protecting their contractual rights under this Agreement, including adjudicating a decreed right to use of the Shoshone Water Rights by the CWCB to preserve and improve the natural environment to a reasonable degree within the Shoshone Reach. Except as otherwise provided in the PSA, to which the CWCB is not subject, each party shall bear its own attorney fees and costs related to its participation in any water court adjudication contemplated under this Paragraph 14. Except for its own

attorney fees and court filing fees, the CWCB is not responsible for paying costs of prosecuting the water court application, including the costs of hiring a consulting engineer or other witnesses in furtherance of such application, or attorney fees of any other party incurred in relation thereto.

15. The parties intend that the Decree shall confirm that ~~when to the extent~~ the water dedicated under this Agreement is not being used for hydropower generation at the Shoshone Power Plant, such water shall be beneficially used by the CWCB for instream flow purposes to preserve and improve the natural environment of the Colorado River within the Shoshone Reach to a reasonable degree, subject to the terms and conditions of the Decree and this Agreement.
16. The parties agree that the Decree shall not confirm any new appropriation of water. Nor shall any claim be included in the Water Court application except as expressly described in this Agreement. The parties further agree that, upon the successful prosecution of the Water Court application described in Paragraph 14, above, and upon the issuance of the Decree by the Water Court, no further claim for approval of any change of water right with respect to the Shoshone Water Rights shall be sought by any of the parties to this Agreement in the future without first obtaining the prior written consent of all the parties hereto. The River District agrees it will not transfer or otherwise encumber the rights to any other person or entity without the express written consent of the CWCB, with the exception of the right to enter into a promissory note and deed of trust to the benefit of PSCo as provided by paragraph 3.1.d.2 of the PSA. The parties agree to request that the Water Court include an express statement in the Decree setting forth the limitations described in this Paragraph 16, to wit:
 - a. the decree does not confirm any new appropriation or change except to add instream flow;
 - b. no further claim for approval of any change of the Shoshone Water Rights will be sought by any of the applicants without written consent of the other applicants hereto; and
 - c. the River District will not transfer or otherwise encumber the Shoshone Water Rights to any other person or entity without the express written consent of the CWCB.

RECORDS AND ACCOUNTING

17. The River District shall be responsible for maintaining all records and accounting necessary for the implementation of this Agreement, using forms mutually agreeable to the parties, and all records required by the Engineers for the administration of the changed Shoshone Water Rights.
18. The River District will provide accounting related to the operation of this Agreement to the CWCB and PSCo.

MISCELLANEOUS PROVISIONS

19. The term of this Agreement is perpetual unless terminated in accordance with the terms of this Agreement, [including paragraph 20 below](#).

20. This Agreement will automatically terminate and be of no further effect in the event that (i) the sale of the Shoshone Water Rights from PSCo to the River District does not close or occur, or (ii) the PSA is terminated or otherwise expires. Except as otherwise provided in the immediately preceding sentence in this Paragraph 20, this Agreement may be amended or terminated by the written agreement of the parties, and any such termination or amendment shall take effect only when signed by all of the parties to this Agreement or their successors in interest.
21. Neither the CWCB nor PSCo is responsible for construction or modification of any structures that may be necessary for use of the Shoshone Water Rights for instream flow purposes.
22. This Agreement shall not be assignable by any party without the written consent of all the parties hereto. Notwithstanding the foregoing, an assignment by PSCo of this Agreement to any successor or assign of its rights under the Lease is approved by the CWCB and River District without separate written consent, however thirty (30) days advanced written notice of the assignment to the River District and the CWCB is required, and PSCo may assign the Lease only to a successive owner or operator of the Shoshone Power Plant for power generation purposes. Notice and contact information shall be provided to all parties concurrent with any assignment. In the event of the termination of the Lease by PSCo or its successors or assigns pursuant to Paragraph 26, below, the River District and CWCB will not be required to obtain the written consent of PSCo or its successors or assigns to assign this Agreement.
23. Pursuant to section 37-92-102(3), C.R.S., this Agreement shall be enforceable by each of the parties hereto as a water matter according to the terms and conditions of this Agreement. The parties further agree that the exclusive venue for and jurisdiction of any dispute pertaining to the interpretation or enforcement of this Agreement shall be the Water Court (as defined herein); *provided, however*, that before commencing any action for enforcement of this Agreement, the party alleging the violation shall notify the other parties in writing of the alleged violation and the parties shall make a good faith effort to resolve their differences through informal consultation.
24. The parties hereto acknowledge and agree that specific performance of this Agreement shall be the exclusive remedy for failure of any party to comply with any provision of this Agreement. The parties hereby waive any right to seek or collect damages for any breach or violation of this Agreement.
25. Enforcement of this Agreement and all rights and obligations hereunder are reserved solely to the CWCB, the River District, and PSCo, and not to any third party. Any services or benefits which third parties may receive or provide as a result of this Agreement are incidental to the Agreement and do not create any rights for such third parties.
26. The parties anticipate that at some point in the future, PSCo may permanently decommission the Shoshone Power Plant, and the Lease will terminate. In the event that the Lease terminates, then PSCo shall provide written notice to the parties of the termination of the Lease and PSCo's rights and obligations under this Agreement will also be deemed to be terminated; however, all rights and responsibilities between the CWCB

Commented [A17]: What would happen if the parties terminate after the water right is changed? Does that mean the CWCB would be unable to exercise the ISF after it contributed \$20 million of state funds to this project? Would the CWCB get an ownership interest?

and the River District will remain in effect. Upon termination of the Lease, all restrictions on the Shoshone Water Rights throughout this Agreement due to hydropower use shall no longer be in effect, and, subsequent to any permanent decommissioning of the Shoshone Power Plant, instream flow shall be the only use of the Shoshone Water Rights.

Commented [A18]: Does this preclude any changes of the right in the future to allow another use? If so, should the agreement or decree be more explicit about the existing hydropower and ISF being the exclusive uses of the right in perpetuity?

27. The provisions of §§37-92-102(3) and 305(3)(b), C.R.S. that require that all contracts or agreements for interests in water, and the water court decree implementing the contracts or agreements, to state the board or the lessor, lender, or donor may bring about beneficial use of the historical consumptive use of the leased, loaned, or donated water right downstream of the instream flow reach as fully consumable water are not relevant and do not apply to this acquisition.
28. In the event the Decree and this Agreement are inconsistent, the Decree shall control.
29. This Agreement shall be construed in accordance with the laws of the State of Colorado and shall be interpreted broadly to give effect to its purposes.
30. Any failure or delay by a party in exercising any of its rights, power, and remedies hereunder or in accordance with laws shall not lead to a waiver of such rights, and the waiver of any single or partial exercise of a party's rights shall not preclude such party from exercising such rights in any other way and exercising the remaining part of the party's rights.
31. Any notice, consent, waiver, request or other communication required or provided to be given under this Agreement shall be in writing and shall be sufficiently given and shall be deemed delivered when: (a) delivered personally; (b) transmitted by email to the then-designated address of the party, provided that a delivery receipt sent by the recipient is received by the sender, provided if the delivery receipt is sent on a non-business day, or after 5:00 p.m. local time at the physical address of the recipient, then the notice will be deemed received on the next business day; (c) two (2) business days after deposit with the United States Postal Service by certified or registered mail, return receipt requested, postage prepaid; or (d) one (1) business day following deposit with a nationally recognized overnight delivery service, in any event, addressed to the applicable party as set forth below, or at such address as either party may from time-to-time specify in writing to the other:

If to the CWCB: Section Chief
 Colorado Water Conservation Board
 Stream and Lake Protection Section
 1313 Sherman Street, Room 721
 Denver, CO 80203
 DNR_CWCBISF@state.co.us

and

Jen Mele
First Assistant Attorney General

Natural Resources and Environment Section
1300 Broadway, 7th Floor
Denver, CO 80203
jen.mele@coag.gov

If to PSCo:

Public Service Company of Colorado
Attn: Environmental Services
1800 Larimer Street, Suite 1300
Denver, CO 80202

and

Public Service Company of Colorado
Attn: Legal Dept. – Real Estate
1800 Larimer Street, Suite 1400
Denver, CO 80202
(303) 294-2222
Frances.A.Folin@xcelenergy.com

and

Welborn Sullivan Meck & Tooley, P.C.
Carolyn F. Burr, Esq.
James M. Noble, Esq.
1401 Lawrence Street, Suite 1800
Denver, CO 80202
(303) 830-2500
cburr@wsmtlaw.com
jnoble@wsmtlaw.com

If to the River District:

Colorado River Water Conservation District General Manager
Andrew Mueller
201 Centennial St., Suite 200
Glenwood Springs, CO
81601 edinfo@crwcd.org

and

General Counsel,
Peter Fleming, Esq.
201 Centennial St., Suite 200
Glenwood Springs, CO 81601
(970) 945-8522
pffleming@crwcd.org

32. Each provision contained herein shall be severable and independent from each of the other provisions such that if at any time any one or more provisions herein are found to be invalid, illegal, or unenforceable, the validity, legality, or enforceability of the remaining provisions herein shall not be affected as a result thereof.
33. The effective date of this Agreement shall be the last date shown on the signature page or pages of this Agreement, provided however that parties' rights and obligations under this Agreement with specific regard to the exercise of the Shoshone Water Rights for instream flow purposes shall not commence until the closing date of the PSA. If the PSA is terminated according to its terms, then this Agreement shall also automatically terminate. This Agreement may be executed in two or more counterparts, each of which when so executed shall be deemed to be an original and all of which when taken together shall constitute one and the same instrument. The counterparts of this Agreement may be executed and delivered by electronic means (including portable document format) by either of the parties and the receiving party may rely on the receipt of such document so executed and delivered electronically as if the original had been received.

[remainder of page intentionally blank]

[signature page(s) follow]

IN WITNESS WHEREOF, the CWCB, the River District, and PSCo have executed this Agreement as of the last date of execution.

COLORADO WATER CONSERVATION BOARD

By: _____
Lauren Ris, Director

Date: _____

[signatures continue on next page]

[signature page to Water Right Dedication Agreement (Shoshone Water Rights)]

**COLORADO RIVER WATER CONSERVATION
DISTRICT**

ATTEST:

By: _____
Andy Mueller, General Manager

BY: _____

Date: _____

[signatures continue on next page]

[signature page to Water Right Dedication Agreement (Shoshone Water Rights)]

PUBLIC SERVICE COMPANY OF COLORADO

By: _____
Robert Kenney, President

Date: _____

[signature page to Water Right Dedication Agreement (Shoshone Water Rights)]

Exhibit A
(Shoshone Diversion Dam and Tunnel)

Exhibit B
(Purchase and Sale Agreement)

