



June 9, 2025

The Colorado Water Conservation Board  
C/O Lauren Ris, Director  
1313 Sherman St., Room 718  
Denver, Colorado 80203

Via Certified U.S. Mail and Email

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

Dear Lauren and CWCB Board Members,

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 ("Rules"), on behalf of Colorado Springs Utilities (Utilities) and to provide you with Utilities' comments on the proposed acquisition agreement attached as Exhibit 4 to the Colorado River District's (River District) proposal.

Utilities, the River District, and several other West Slope entities entered into a Memorandum of Agreement (MOA) in which Utilities agreed not to oppose an agreement between the River District, the CWCB and other parties for the purposes of adding instream flow (ISF) as a decreed use of the senior Shoshone water right when the Shoshone Power Plant is not in operation, and agreed to negotiate in good faith with the River District, the CWCB and other West Slope parties about adding ISF uses to the junior Shoshone water right. Utilities does not oppose the acquisition and subsequent change of the senior Shoshone water right by the CWCB to provide for permanency of the historic Shoshone call and preservation of the historical Colorado River flow regime based on the actual historic use of the senior water right for power generation.

However, Utilities is concerned that the River District's proposed methodology for determining the historic use of the senior and junior Shoshone water rights will result in the expansion of Shoshone water rights, especially the junior right, that could materially injure Utilities' decreed water rights including its water rights on the Blue River and its interest in the water rights for the Homestake Project by reducing the volume of water available for diversion under those rights. Any reduction in water supplies currently available for a growing community like Colorado Springs results in increased reliance on water derived by changing agricultural water rights in other basins to meet their customers' demands and limits our ability to fully develop our currently decreed Colorado River basin supplies. This consequence seems contrary to the outcome intended by the Colorado Water Plan.

The Rules require the CWCB to consider: (a) the natural flow regime of the river; (b) any potential material injury to existing decreed water rights; (c) the historical use of the water right

proposed for acquisition that may be available for ISF when evaluating the appropriateness of any acquisition of water for ISF purposes; and (d) the effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting compact obligations or result in the delivery of more water than is required. *See* Rule sections 6e (2), (3), (4), and (8). Therefore, it is critical for the change of use of the Shoshone water rights for ISF purposes to be supported by a quantification of the actual historic beneficial use of the right that is based on diversions of native water available in priority and that was put to beneficial use for the specific beneficial use of power generation. Utilities is concerned that the River District's proposed methodology for quantifying the historic use of the Shoshone water rights does not meet this standard and could have significant and consequential effects on the administration of the mainstem of the Colorado River and its tributaries above the Shoshone power plant. Utilities' detailed concerns about the River District's proposed methodology are set forth in its letter to the CWCB dated May 8, 2025.

Utilities is requesting a hearing because it believes that it is important for the CWCB to be fully informed about the impacts of the proposed acquisition, through understanding how the River District's proposed methodology implicates the factors identified above which impacts all Colorado River water users, when making the decision to accept the River District's proposal or to place limits on the acquisition.

I have also attached a document outlining Utilities' initial comments on the proposed acquisition agreement that it believes are consistent with Utilities' MOA and ensures that the decree contemplated in the acquisition agreement facilitates the CWCB fulfilling its mission to conserve, develop, protect, and manage Colorado's water for present and future generations. Utilities reserves the right to provide additional comments on the acquisition agreement and any application for change of water rights in general in the future.

Despite its concerns with the River District's proposed methodology and this request for a hearing, Utilities is prepared to participate in good faith negotiations with the CWCB and the River District to address its concerns with the River District's proposed methodology and the CWCB's contemplated acquisition and subsequent change of the Shoshone water rights.

Thank you for considering Utilities' request for a hearing.

Sincerely,



Michael J. Gustafson  
Senior Attorney

CC by email: Colorado River Water Conservation District, Colorado Attorney General, Colorado State Engineer, Executive Director – Colorado Department of Natural Resources

Enclosure: Attachment 1 - Utilities' Written Comments on Acquisition Agreement

**Attachment 1**  
**Colorado Springs Utilities' Initial Comments on Proposed Acquisition Agreement for the Shoshone Water Rights**

1. In its MOA with the River District and others, dated March 1, 2024 (“Utilities MOA”), Utilities agreed to not oppose an agreement between the River District and the CWCB for the purpose of adding instream flow as a permitted use of the Senior Shoshone water right for the purpose of ensuring that flows of up to 1,250 cfs (to the extent the senior right is in priority) are available in the Shoshone Reach. Utilities also agreed that it would participate in good faith discussions with the River District and the CWCB regarding adding ISF use to the junior Shoshone water right. As stated in Utilities May 8, 2025 letter to the CWCB, Utilities believes that the River District’s historic use analysis significantly over inflates the actual historic use of the Shoshone water rights and may not support the River District’s assertion that the Shoshone water rights were regularly diverted at 1,408 cfs and that the call occurred every time the “Natural Flow” dropped below that amount. Utilities believes that Recital E to the Acquisition Agreement should be revised to reflect that the curtailment of junior water rights upstream of the Shoshone Power Plant only occurred to the extent the Shoshone water rights were historically in priority and were actually placing a formal call for water.
2. Recital F provides that all water diverted by PSCo for hydropower uses was returned to the Colorado River after being run through the SPPs penstocks and turbines. However, a portion of the water diverted was returned to the Colorado River via adits without being used to generate hydropower. As such, Recital F should be revised to reflect that only a portion of the water diverted at the diversion dam was actually put to a decreed beneficial use while the remaining amount was returned to the stream without generating power. The operation of “sand-outs” or other conveyance actions that occur before the decreed beneficial use are not appropriate for inclusion in a historical use calculation.
3. Recitals I and J and Paragraphs 2, 4, and 7 to the Acquisition Agreement provide that the River District desires to dedicate the Shoshone water rights to the CWCB for ISF use to the extent the water rights are not being used for hydropower production (i.e., anytime the SPP is diverting water at less than 1,408 cfs). Utilities’ understanding at the time it entered into its MOU was that the River District and CWCB only intended to change the Shoshone water rights to allow ISF use when the SPP was not in operation. Allowing the Shoshone water rights to be used for ISF use to the extent necessary to make up the gap between what is being diverted for hydropower use and the amount of Natural Flow available in priority, does not reflect the historic use of the right and may result in an expansion of use of the water rights to the detriment of all other upstream water rights. Utilities requests that the Acquisition Agreement be revised to reflect that the Shoshone water rights will only be used for ISF use when the SPP is not operating.

4. The CWCB has taken the position that it will rely on the Water Court to determine the volume of water available under the Shoshone water rights that can be used for ISF purposes based on the historic use of the rights. However, the Acquisition agreement provides, in several instances, that up to the full amount of 1,408 cfs under both the senior and junior water rights can be used for ISF purposes. To remain consistent with the CWCB's position referenced above, the Acquisition Agreement should be revised to provide that the maximum volume of water that the CWCB may use for ISF purposes is the volume determined by the water court or 1,408 cfs, whichever is less. The only volume of water that can be changed to ISF purposes is the amount that would be called under the original beneficial use for power generation purposes. When power generation is occurring there is no additional water that should be available to be called for ISF purposes, especially if it is water that would otherwise be diverted and used by upstream water rights.
5. Paragraph 6 of the Agreement should be revised to reflect that the parties will work together to accommodate the construction of any infrastructure associated with the change of water rights that is required by the Water Court in addition to the Division Engineer as already provided.
6. The second sentence of paragraph 7 of the Acquisition Agreement requires the CWCB to place a call under the Shoshone water rights at any time the Natural Flow of the Colorado River at the Dotsero Gauge is less than 1,408 cfs. This language impermissibly limits the required discretion of the CWCB to decide not to place a call or place a call at less than 1,408 cfs under the Shoshone water rights, to the extent necessary to ensure maximum utilization of the State's water supply under the Colorado River Compact, such as during drought. Paragraph 7 should be revised to make it clear that the CWCB maintains its discretion on how to manage an ISF water right, including a decision to not place a call for water or limit the extent of its calls, in its sole discretion.
7. Paragraph 7.c of the Acquisition Agreement provides that the CWCB and River District have to agree on any reduction of the Shoshone water rights call. Utilities position is that this concept does not comply with the law because only the CWCB has exclusive authority to use water for instream flow purposes and all references to the River District should be removed from that section.
8. Adding the following term and condition to the Acquisition Agreement will also make it clear that the CWCB is maintaining its sole discretion to manage its ISF rights:

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 consumptive 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.

9. Utilities requests that the Acquisition Agreement be revised to provide that the CWCB cannot place a call under the Shoshone water rights when the conditions for relaxation of the Shoshone call set forth in the 2007 Agreement between Denver Water and PSCo and the Colorado River Cooperative agreement occur. This language is necessary to ensure that municipalities are not unduly impacted by a Shoshone call during drought and gives proper respect for prior agreements that were entered into in good faith.
10. The Utilities MOA provides that the River District will negotiate with Utilities in good faith to include an additional uniform exception that prohibits the CWCB from making a call in excess of 1,250 cfs when drought conditions exist. Utilities intends to work with the CWCB, River District and other stakeholders to come up with a uniform drought exception that prohibits a call in excess of 1,250 cfs, or historic levels of use, when water users that rely on Colorado River water are facing shortages as a result of drought, before the Acquisition Agreement is finalized.
11. The Utilities MOA provides, in part, that Utilities will not oppose the ISF use of the senior Shoshone water right, provided the Acquisition Agreement and the Change of Water Right Decree approved by the Water Court include language similar to the following language, referenced in footnote 5 of the Technical Memorandum submitted by the Colorado River District and Xcel Energy, that confirms the ISF use of the senior Shoshone water right will be exercised in compliance with any potential rules on compact administration issued by the State Engineer that may be in effect:

In the event of a curtailment of Colorado water rights, or an imminent threat or expectation thereof, resulting from the State of Colorado's obligations under the Colorado River Compact and/or the Upper Colorado River Basin Compact, the CWCB's exercise of the Shoshone Water Rights for instream flow purposes will be consistent with any duly adopted final rules or regulations of the State Engineer adopted for purposes of fulfillment of Colorado's commitments under either or both compacts, and that are in force, any pending appeal notwithstanding.

Language to that effect is not currently included in the Acquisition Agreement but must be. Utilities pledges to work in good faith with the State Engineer, CWCB staff, the Attorney General's Office, and the River District, to develop language agreeable to all parties prior to the CWCB's formal decision on whether to approve the Acquisition Agreement. The requirement that language to this effect be included in the Acquisition Agreement is an existing contractual obligation between Utilities and the River District and others and Utilities intends to fully pursue its contractual remedies if the required language is not included in the Acquisition Agreement.