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June 10, 2025

Via e-mail (lauren.ris@state.co.us)

Colorado Water Conservation Board
Board of Directors
1313 Sherman St., Room 718
Denver, CO 80203

Attention: Lauren Ris, Director

Re: Request for Hearing – Proposed Acquisition for and Interest in the Shoshone Water Rights for Instream Flow Use on the Colorado River, Water Division No. 5

Directors:

We represent Northern Colorado Water Conservancy District (Northern Water), a quasi-municipal entity and political subdivision of the State of Colorado formed under the Water Conservancy Act, C.R.S. §§ 37-45-101 to -153. We also represent the Municipal Subdistrict of Northern Water (Subdistrict), a quasi-municipal entity, political subdivision of the State of Colorado, and subdistrict of Northern Water formed under C.R.S. § 37-45-120.

Pursuant to Rule 6m(4) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 508-2 (“ISF Rules”), Northern Water and the Subdistrict hereby jointly request the Board hold a hearing on its proposed acquisition for an interest in the Shoshone Water Rights for instream flow use on the Colorado River, Water Division No. 5, which was initially considered by the Colorado Water Conservation Board (CWCB) as Agenda Item 10.d at its May 21–22, 2025, Board meeting in Steamboat Springs, Colorado. Northern Water and the Subdistrict support the CWCB’s acquisition of an interest in the Shoshone Water Rights for instream flow use, but a hearing is required to ensure the acquisition occurs in a manner that complies with the ISF Rules, is consistent with the CWCB’s statutory responsibilities, and prevents injury or other adverse effects to other water users in Colorado.

Identity of Requesting Parties

Northern Water was established in 1937 principally to contract with the federal government for the construction, operation, and maintenance of the Colorado–Big Thompson (C-BT) Project, a transmountain diversion project that delivers an average of over 200,000 acre-feet of water from the Colorado River Basin to the Eastern Slope of the Continental Divide for supplemental use

within Northern Water's boundaries, which encompass about 615,000 acres of irrigated land and a population of over one million people. One key component of the C-BT Project is Green Mountain Reservoir, a 154,645 acre-foot reservoir located on the Blue River in Summit County, which provides replacement water for out-of-priority diversions of the C-BT Project collection system, supplements and enhances existing domestic/municipal and irrigation uses on the Western Slope, and provides controllable water supplies via contracts with the U.S. Bureau of Reclamation for many other Western Slope water users, in addition to generating hydroelectric power. Releases from Green Mountain Reservoir also contribute to enhancing flows in the "15-Mile Reach" downstream of the Shoshone Plant to improve habitat for endangered fish species covered by the Upper Colorado River Endangered Fish Recovery Program. Operation of Green Mountain Reservoir and its ability to fill each year depends in part on hydrologic conditions; calls by downstream senior water rights, including the Shoshone Water Rights; and the volume of water needed to refill the reservoir based on the previous year's release and use of stored water.

The Municipal Subdistrict was created in 1970 as a subdistrict of Northern Water to construct and operate the Windy Gap Project, a transmountain diversion project that diverts water from the Colorado River near the Town of Granby for delivery through C-BT Project and other conveyance and storage facilities to municipalities and other water users on the Eastern Slope. The Windy Gap Firming Project, also known as the Chimney Hollow Reservoir Project, is nearing completion this year and will improve the reliable yield of the Windy Gap Project water rights for its users by providing 90,000 acre-feet of storage on the Eastern Slope; in recognition of this fact, the CWCB endorsed the project as aligning with the key elements of the Colorado Water Plan in 2016. Windy Gap Project diversions and operations also are affected by hydrologic conditions and downstream senior calls, including by the Shoshone Water Rights.

Reasons For Hearing Request

In accordance with ISF Rule 6m(4), Northern Water and the Subdistrict jointly provide the following brief statement, with as much specificity as possible, of their reasons for requesting a hearing in this matter. Additional details about Northern Water's and the Municipal Subdistrict's concerns are set forth in our May 19, 2025, letter sent to the CWCB on their behalf, a copy of which is attached.

Northern Water and the Subdistrict support the CWCB's acquisition of an interest in the Shoshone Water Rights for instream flow use when the rights are not being used for hydroelectric power generation, but a hearing is required to ensure the acquisition occurs in a manner that complies with the ISF Rules, is consistent with the CWCB's statutory responsibilities, and prevents injury or other adverse effects to other water users in Colorado. The information submitted by the offering parties, the Colorado River Water Conservation District (River District) and Public Service Company of Colorado (Xcel Energy), recognizes that exercise of the Shoshone Water Rights plays a pivotal role in the administration of the Colorado River within the State, including by directly affecting determinations for the use of water stored in the various accounts in Green Mountain Reservoir. *See* River District and Xcel ISF Offer Letter (May 6, 2025), Attachment 9,

page 1. Operations at Green Mountain Reservoir, in turn, have a cascading effect on the operations of many other water users in Colorado on both sides of the Continental Divide. In short, the importance of changing the Shoshone Water Rights in Water Court to add instream flow uses in a manner that is protective of the historical flow and administrative regime cannot easily be overstated.

The CWCB's ISF Rule 6e requires the Board to consider several factors to determine the "appropriateness" of a given acquisition of water, water rights, or interests in water to preserve or improve the environment to a reasonable degree, including the natural flow regime, the potential for material injury to existing decreed water rights, the historical use of the water right proposed for acquisition, and the effect of the proposed acquisition on interstate compact issues and maximum utilization of the waters of the state. These regulatory factors are a reflection of the multiple statutory responsibilities that the Board is charged with balancing. As the CWCB's organic statute provides, its purpose is "aiding in the protection and development of the waters of the state . . . for the benefit of the present and future inhabitants of the state." C.R.S. § 37-60-102. The CWCB's duties in carrying out this purpose include "secur[ing] the greatest utilization" of waters of the state, C.R.S. § 37-60-106(1), protecting the State's "allocation of interstate waters for current and future beneficial purposes," and achieving "optimum development of such waters under significant constraints imposed by federal law and policy," C.R.S. § 37-60-115(1)(b).

These statutory duties must be considered when the CWCB exercises its discretionary authority to acquire an interest in the Shoshone Water Rights for instream flows and sets the terms and conditions of that acquisition. Failure to meaningfully consider any of the factors in ISF Rule 6e that are relevant to the proposed acquisition, or failure to assess the accuracy of the facts presented by the offering parties that relate to those factors, would be contrary to the ISF Rules, an abuse of discretion, and arbitrary and capricious.

Northern Water and the Subdistrict assert that the information submitted by the offering parties includes a flawed historical use quantification of the Shoshone Water Rights upon which the CWCB cannot reasonably base its determinations of the "appropriateness" factors under ISF Rule 6e. The offering parties' proposed historical use analysis would expand the use of the Shoshone Water Rights in a manner that would be injurious to Northern Water, the Subdistrict, and others. While a final determination of the Shoshone Water Rights' historical use will be made by the Water Court, the CWCB relying upon the offering parties' analysis for purposes of ISF Rule 6e would be arbitrary and capricious.

Without waiving any rights to present evidence or argument on other issues, Northern Water and the Subdistrict identify the following issues relevant to a hearing on the CWCB's proposed acquisition of an interest in the Shoshone Water Rights for instream flow use:

1. **Natural Flow Regime (ISF Rule 6e(2))** – The CWCB must base its assessment of the acquisition on an accurate characterization of the natural flow regime. The flows historically available to and diverted by the Shoshone Water Rights include water other than natural flow that is released from upstream reservoirs to supplement uses and flows

downstream of the Shoshone Hydroelectric Power Plant; this released water is not subject to a senior call.

2. **Historical Use and Non-Injury (ISF Rules 6e(3), (4) & (5))** – To guard against material injury to existing decreed water rights (and to properly assess the acquisition’s ability to preserve or improve the natural environment to a reasonable degree), the CWCB must base its determination and condition its acceptance on a reasonably accurate depiction of the Shoshone Water Rights’ historical use. (ISF Rule 6e(3), (4), (5))
3. **Interstate Compact Effects (ISF Rule 6e(7))** – The CWCB must be mindful of the potential effects an expansion beyond true historical use could have on interstate compact issues and Colorado’s ability to use its interstate water allocation, and must take affirmative steps to condition the acquisition in a manner that guards against those possible effects.
4. **Maximum Utilization of the Waters of the State (ISF Rule 6e(8))** – The CWCB must appreciate the potential effects an expansion beyond true historical use could have on the continued functions of the Upper Colorado River Endangered Fish Recovery Program, including the amount and timing of water available in upstream reservoirs (including Green Mountain Reservoir) for release to enhance flows in the 15-Mile Reach under the Program. The CWCB must take affirmative steps to condition the acquisition in a manner that protects against those possible effects, which could hinder uses of water in Colorado that rely on the Program for Endangered Species Act compliance.
5. **Acquisition Agreement Terms and Conditions** – The acquisition agreement into which the CWCB will enter if it accepts the proposed acquisition must:
 - a. Reserve to CWCB staff the discretion to independently verify, and if necessary to disagree with and take positions contrary to, facts and evidence presented by its co-applicants in Water Court, the River District and Xcel Energy, including with respect to the proper data, methods, and analysis for the Water Court to determine the Shoshone Water Rights’ historical use and potential injury to other water users;
 - b. Grant to the CWCB full and sole discretion in the exercise or non-exercise of the Shoshone Water Rights for instream flow use at times when they are not being used for hydroelectric power generation;
 - c. Include limitations on instream flow use that are consistent with existing contractual limitations on the Shoshone Water Rights (including the 2016 Shoshone Outage Protocol Agreement); and
 - d. Recognize the CWCB’s authority to cease exercise of the Shoshone Water Rights for instream flow use if it deems it necessary to protect the maximum utilization of waters of the state consistent with relevant interstate compact obligations and other considerations.

We appreciate the opportunity to participate in the CWCB's administrative process regarding this proposed acquisition. Thank you for your consideration of this hearing request pursuant to the ISF Rules.

Sincerely yours,

TROUT RALEY



Bennett W. Raley, Esq.
Lisa M. Thompson, Esq.
William Davis Wert, Esq.

***Attorneys for Northern Colorado Water
Conservancy District and
Municipal Subdistrict, Northern Colorado Water
Conservancy District***

Enclosure

cc/enc via e-mail: Bradley D. Wind, Northern Water
Kyle Whitaker, Northern Water



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May 19, 2025

Via E-mail

Colorado Water Conservation Board
Board of Directors
1313 Sherman St., Room 718
Denver, CO 80203

**Re: Pending Colorado River Water Conservation District Request for CWCB
Acquisition of Interest in Shoshone Water Rights for Instream Flow (ISF) Purposes**

Dear Board Members,

Please accept these comments on behalf of our clients, the Northern Colorado Water Conservancy District (Northern Water) and its Municipal Subdistrict, regarding the request submitted by the Colorado River Water Conservation District (River District) for the Colorado Water Conservation Board (CWCB) to acquire an interest in the water rights decreed to the Shoshone Hydroelectric Power Plant (“Shoshone Rights”) for instream flow (ISF) purposes. Northern Water and the Municipal Subdistrict are supportive of the CWCB’s acquisition of an interest in, and the judicial change of, the Shoshone Rights for ISF purposes if the acquisition is done in a manner that perpetuates the historical flow regime on the Colorado River, to which the Shoshone Rights have contributed. As detailed below, however, we have serious concerns about the River District’s proposal and its analysis of historical conditions. We wish to emphasize the importance of the CWCB closely analyzing the historical operations of the Shoshone Rights and conditioning its acquisition appropriately to ensure any resulting water right change maintains the status quo, a goal we believe accords with the CWCB’s duty to “promote the conservation of the waters of the state of Colorado in order to secure the greatest utilization of such waters.” C.R.S. § 37-60-106(1).

Northern Water was established in 1937 pursuant to the Water Conservancy Act principally to contract with the federal government for the construction, operation, and maintenance of the Colorado–Big Thompson (C-BT) Project, which diverts and conveys water from the Colorado River Basin to the Eastern Slope of the Continental Divide for use within Northern Water’s boundaries. A key component of the C-BT Project is Green Mountain Reservoir, located on the Blue River, which provides replacement water for out-of-priority diversions of the C-BT Project collection system, supplements and enhances existing domestic/municipal and irrigation uses on the Western Slope, and provides controllable water supplies via contracts with the U.S. Bureau of Reclamation for many other West Slope water users, in addition to generating hydroelectric power.

Releases from Green Mountain Reservoir also contribute to enhancing flows in the “15-Mile Reach” downstream of the Shoshone Plant to improve habitat for endangered fish species covered by the Upper Colorado River Endangered Fish Recovery Program. Operation of Green Mountain Reservoir and its ability to fill each year depends in part on hydrologic conditions; calls by downstream senior water rights, including the Shoshone Rights; and the volume of water needed to refill the reservoir based on the previous year’s use of stored water.

The Municipal Subdistrict was created in 1970 as a subdistrict of Northern Water to construct and operate the Windy Gap Project, which diverts water from the Colorado River Basin for delivery through C-BT and other conveyance and storage facilities to municipalities and other water users on the Eastern Slope. The Windy Gap Firming Project, also known as the Chimney Hollow Reservoir Project, is nearing completion this year and will improve the reliability of the Windy Gap Project water rights for its users; in recognition of this fact, the CWCB endorsed the project as aligning with the key elements of the Colorado Water Plan in 2016. Windy Gap Project diversions and operations also are affected by downstream senior calls, including the Shoshone Rights.

Pursuant to the CWCB’s ISF Rules, the Board must consider several factors when determining the “appropriateness” of an ISF acquisition and what terms and conditions it will require in the acquisition contract. Among those factors are the natural flow regime of the river, the historical use and return flows of the water right proposed for acquisition, the ability of the water right to preserve or improve the natural environment to a reasonable degree, and any potential material injury to existing decreed water rights. The River District’s submitted information inaccurately reflects the historical flows and exaggerates the Shoshone Rights’ in-priority historical use. In so doing, the River District’s proposal, if adopted, would injure other water rights by expanding the use of the Shoshone Rights beyond historical measures. As a consequence, the proposal overstates the extent to which the added instream flow use can preserve or improve the natural environment to a reasonable degree.

The River District’s proposed methodology for quantifying the historical use of the Shoshone Rights is flawed in several respects. In particular, the quantification fails to exclude from the analysis all water released from upstream reservoirs, including Green Mountain Reservoir, to supplement the flows at the Shoshone Plant and for conveyance to uses downstream of the Shoshone Plant. This error — in addition to others, such as a flawed study period — results in a historical use quantification that overstates the Shoshone Rights’ historical use.

While a final determination of the Shoshone Rights’ historical use will be made by the Water Court, the CWCB must use a reasonably accurate depiction of the Rights’ historical use to assess the extent to which the amount of water made available by the Rights can preserve or improve the natural environment to a reasonable degree. Accurately understanding the Shoshone Rights’ historical use is a key component of the CWCB’s ability to craft appropriate terms and conditions in the acquisition contract to guard against material injury to other water rights. Junior water rights, including those for Green Mountain Reservoir and the Windy Gap Project, will be injured if their ability to divert and store water in the future is reduced by an inflated quantification

of the Shoshone Rights. We therefore urge the CWCB to assess the River District's methodology with a critical eye and not bind itself in the acquisition agreement to the River District's flawed historical use analysis in the subsequent change case in Water Court.

Another central component towards status quo of Colorado River mainstem administration is the existing Shoshone Outage Protocol Agreement (a/k/a ShOP Agreement), executed in 2016 among several parties, including the River District, the U.S. Bureau of Reclamation, Northern Water, the Municipal Subdistrict, and the CWCB's sister agency, the Colorado Division of Water Resources. The ShOP Agreement is in effect until 2056 and represents a carefully negotiated compromise to, under certain specific circumstances when the Shoshone power plant is not operational, operate particular water rights and projects to maintain flows in the Colorado River as if the senior Shoshone call is in effect. The CWCB's acquisition of an interest in the Shoshone Rights must occur in a manner that does not adversely affect the ongoing intent of the ShOP Agreement's terms.

As noted above, Northern Water and the Municipal Subdistrict have additional concerns with the River District's proposal and reserve the right to raise other issues in subsequent comments or proceedings.

Northern Water and the Municipal Subdistrict have expressed these (and other) concerns to the River District and are committed to continuing dialogue with the River District, Public Service Company of Colorado (Xcel), and the CWCB in order to ensure that the CWCB's ISF acquisition maintains the Shoshone Rights' historical role on the Colorado River and does not adversely affect Green Mountain Reservoir and the rest of the C-BT Project, or the Windy Gap Project. We believe the CWCB and the River District share in this goal. We and our clients look forward to participating in the CWCB's upcoming ISF acquisition process towards that end and are available to meet with the CWCB to discuss these comments further.

Sincerely,



William Davis Wert

for

TROUT RALEY

cc: Lauren Ris, Director (lauren.ris@state.co.us)