



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

1313 Sherman Street, Room 718  
Denver, CO 80203

P (303) 866-3441  
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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Lauren Ris, CWCB Director

**TO:** Colorado Water Conservation Board Members

**FROM:** Rob Viehl, Chief  
Kaylea White, Senior Water Resource Specialist  
Stream and Lake Protection Section

**DATE:** July 1, 2025

**SUBJECT:** 1. Proposed Acquisition of an Interest in the Shoshone Water Rights for  
Instream Flow Use on the Colorado River

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## **I. Staff Recommendation**

Staff recommends that the Board: (1) grant the requests for a hearing for the proposed acquisition of an interest in the Shoshone Water Rights for instream flow use on the Colorado River; (2) schedule the hearing to be held in conjunction with the September 16-18, 2025, CWCB meeting; and (3) appoint Senior Assistant Attorney General Jackie Calicchio as Hearing Officer.

## **II. Background**

At the May 21, 2025, CWCB meeting, staff presented an offer to the Board from the Colorado River Water Conservation District (“River District”), and Public Service Company of Colorado (“PSCo”) for an interest in the Shoshone Water rights for instream flow (“ISF”) purposes on the mainstem of the Colorado River. Under this proposal, the River District would purchase and maintain ownership of the water rights, while CWCB would hold perpetual ISF use rights, and PSCo would hold a lease for hydropower use. The Shoshone water rights offered to CWCB total 1,408 cfs, comprised of the senior Shoshone water right in the amount of 1,250 cfs, and the junior Shoshone water right in the amount of 158 cfs, (together, the “Shoshone Water Rights”). The CWCB would use these water rights, pursuant to their individual priorities, in the combined amount of up to 1,408 cfs, as recommended by Colorado Parks and Wildlife to preserve and improve the natural environment to a reasonable degree in a 2.4-mile reach of the Colorado River between the Shoshone Power Diversion Dam and Tunnel and the Shoshone Power Plant discharge outlets.

## **III. Discussion**

ISF rule 6m (4) provides that any person may request the Board hold a hearing on a proposed ISF acquisition. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed acquisition. Four



notices to contest were received within the twenty-day deadline in this matter: Aurora Water, Colorado Springs Utilities, Denver Water, and Northern Colorado Water Conservancy District. See the notices to contest in Enclosure A. ISF rule 6m (5) states at its next regularly scheduled meeting after the receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. If a hearing is granted by the Board under ISF rule 6m (5)(a) a hearing on a proposed acquisition, except for renewable loans, must be held within the 120-day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time. The end of the 120-day period in this matter is September 18, 2025.

If a hearing on this matter is granted on July 1, 2025, then staff will provide the required notice identified in ISF rule 6m (5) (c) on July 2, 2025. Any person who desires party status must provide a submission of a written Notice of Party Status to the Board office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive any Notice of Party Status within seven days of the hearing notice, which would be by the end of the day on July 9, 2025.

**Enclosures:**

- A. Requests for Hearing
- B. Rules Concerning the Colorado Instream flow and Natural Lake Level Program



June 9, 2025

Colorado Water Conservation Board  
ATTN: Director Lauren Ris  
1313 Sherman Street, Room 718  
Denver, CO 80203  
CC (via e-mail): CWCB Board Members

**RE: Request for Hearing Regarding Proposed Acquisition of Shoshone Water Rights for Instream Flow Use**

Dear Director Ris:

Pursuant to Rule 6m(4) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("ISF Rules"), Aurora Water respectfully requests that the Colorado Water Conservation Board (CWCB) hold a hearing on the proposed acquisition of the Shoshone Water Rights for instream-flow use.

Aurora Water continues to support changing the Shoshone rights to include instream-flow use so long as the change accurately reflects the historic flow regime and does not expand the existing rights in a way that materially injures junior water users. If, as the River District asserts, the status quo will be maintained, this acquisition can be a win-win for both the Front Range and the West Slope. However, as noted in our May 9, 2025, letter, we have significant concerns that the methodology used to quantify historic use for both the senior and junior Shoshone rights overstates those amounts, effectively expanding the rights and altering the historic flow regime. If the River District's assertion that their quantifications maintain the status quo is wrong and the Shoshone water rights are erroneously expanded, Aurora's existing Colorado River water rights, which are essential for providing clean drinking water to over 400,000 people, would be injured.

The current ISF Agreement requires the CWCB to file and "diligently pursue" a decree based on the River District's analysis—implicitly endorsing those technical conclusions. Front Range Water Council members have shown, and shared with the River District, how this methodology may overstate historic use by up to 300,000 acre-feet (~36 percent). The State binding itself to a potentially flawed position, before a full technical review is done, would neither serve the public interest nor comply with the ISF Rules. In addition, the draft ISF agreement removes significant CWCB authority, hampering the Board's ability to exercise its authority and address unforeseen issues. Aurora Water believes it is essential that the State remain neutral regarding the methodology and not agree to such constraints.

Aurora Water supports Denver Water's redline of the ISF Agreement to the extent it maintains CWCB's appropriate authority, prevents implicit endorsement of any party's technical analysis and addresses potential injury to existing water rights or expansion of the Shoshone water rights. Aurora Water also supports inclusion of references to the 2007 Call Relaxation Agreement.

These proposed targeted revisions to the draft ISF Agreement honor Aurora Water's commitments in the 2018 Intergovernmental Agreement and will (i) allow the acquisition process to move forward without

unnecessary delay, (ii) preserve the Board's neutrality, and (iii) safeguard the CWCB's discretionary authority regarding administration.

Thank you for your consideration. Aurora Water remains committed to a good-faith, collaborative resolution. We look forward to discussing these issues at a hearing and to working toward an agreement that preserves the Colorado River's historic flow regime while protecting existing water users.

Sincerely,



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Marshall Brown,  
General Manager  
Aurora Water

CC:  
Colorado River Water Conservation District



## OFFICE OF THE CITY ATTORNEY

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.



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Denver, CO 80204-3412  
303.628.6000  
denverwater.org

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 21<sup>st</sup>, 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

Attachment 4

[\[Denver Water Comments – 6/09/2005\]](#)**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 6<sup>th</sup> 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 6<sup>th</sup> Principal Meridian bears South 29° 24' 14" East, 1,771 feet, in Garfield County, Colorado.<sup>1</sup>

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.

<sup>1</sup> 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](mailto:DNR_CWCBISF@state.co.us)

and

Jen Mele  
 First Assistant Attorney General

Natural Resources and Environment Section  
1300 Broadway, 7<sup>th</sup> Floor  
Denver, CO 80203  
[jen.mele@coag.gov](mailto: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](mailto: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](mailto:cburr@wsmtlaw.com)  
[jnoble@wsmtlaw.com](mailto: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](mailto:edinfo@crwcd.org)

and

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



1120 Lincoln Street • Suite 1600  
Denver, Colorado 80203-2141  
303.861.1963  
[www.troutlaw.com](http://www.troutlaw.com)

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

Colorado Water Conservation Board  
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June 10, 2025  
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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,

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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.

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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

A handwritten signature in blue ink, reading "William Davis Wert", is written over a horizontal line.

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.

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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



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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)

**DEPARTMENT OF NATURAL RESOURCES****Colorado Water Conservation Board****RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM****2 CCR 408-2**

*[Editor's Notes follow the text of the rules at the end of this CCR Document.]*

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**1. TITLE.**

Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, hereafter referred to as the Instream Flow ("ISF") Program as established in §37-92-102 (3) C.R.S., shall be hereinafter referred to as the "ISF Rules."

**2. PURPOSE OF RULES.**

The purpose of the ISF Rules is to set forth the procedures to be followed by the Board and Staff when implementing and administering the ISF Program. By this reference, the Board incorporates the Basis and Purpose statement prepared and adopted at the time of rulemaking. A copy of this document is on file at the Board office.

**3. STATUTORY AUTHORITY.**

The statutory authority for the ISF Rules is found at §37-60-108, C.R.S. and §37-92-102 (3), C.R.S. Nothing in these rules shall be construed as authorizing the Board to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

**4. DEFINITIONS.****4a. Agenda Mailing List.**

The agenda mailing list consists of all Persons who have sent a notice to the Board Office that they wish to be included on such list. These Persons will be mailed a Board meeting agenda prior to each scheduled Board meeting.

**4b. Board.**

Means the Colorado Water Conservation Board as defined in §§37-60-101, 103 and 104, C.R.S.

**4c. Board Office.**

The Colorado Water Conservation Board's office is located at 1313 Sherman Street, 7th Floor, Denver, CO 80203. The phone number is (303) 866-3441. The facsimile number is (303) 866-4474. The Board's website is <https://cwcb.colorado.gov>.

**4d. Contested Hearing Mailing List.**

The Contested Hearing Mailing List shall consist of all Persons who have received Party status or Contested Hearing Participant status pursuant to Rules 5l. or 5m. This mailing list is specific to a contested appropriation.

**4e. Contested Hearing Participant.**

Any Person who desires to participate in the contested ISF process, but not as a Party, may obtain Contested Hearing Participant status pursuant to Rule 5m. A Person with such status will receive all Party documents. Contested Hearing Participants may comment on their own behalf, but may not submit for the record technical evidence, technical witnesses or legal memoranda.

**4f. CWCB Hearing Officer.**

The Hearing Officer is appointed by the Board and is responsible for managing and coordinating proceedings related to contested ISF appropriations, acquisitions or modifications, such as setting prehearing conferences and adjusting deadlines and schedules to further the Parties' settlement efforts or for other good cause shown. The Hearing Officer does not have the authority to rule on substantive issues.

**4g. Final Action.**

For purposes of Rule 5, final action means a Board decision to (1) file a water right application, (2) not file a water right application or (3) table action on an ISF appropriation; however, tabling an action shall not be construed as abandonment of its intent to appropriate.

**4h. Final Staff ISF Recommendation.**

Staff's ISF recommendation to the Board is based on Staff's data and report, and public comments and data contained in the official record.

**4i. ISF.**

Means any water, or water rights appropriated by the Board for preservation of the natural environment to a reasonable degree, or any water, water rights or interests in water acquired by the Board for preservation or improvement of the natural environment to a reasonable degree. "ISF" includes both instream flows between specific points on a stream and natural surface water levels or volumes for natural lakes.

**4j. ISF Subscription Mailing List(s).**

The ISF Subscription Mailing List(s) are specific to each water division. The ISF Subscription Mailing List(s) shall consist of all Persons who have subscribed to the list(s) by sending notice(s) to the Board Office that they wish to be included on such list for a particular water division. The Staff shall, at such times as it deems appropriate, mail to all Persons on the water court resume mailing list in each water division an invitation to be included on the ISF Subscription Mailing List for that water division. Persons on the list are responsible for keeping Staff apprised of address changes. Persons on the ISF Subscription Mailing List(s) shall receive agendas and other notices describing activities related to ISF recommendations, appropriations and acquisitions in the particular water division. Persons may be required to pay a fee in order to be on the ISF Subscription Mailing List(s).

**4k. Mail.**

For the purposes of the ISF Rules, mail refers to regular or special delivery by the U.S. Postal Service or other such services, electronic delivery (e-mail), or delivery by FAX transmission.

**4l. Party.**

Any Person may obtain Party status pursuant to Rule 5l. Only a Person who has obtained Party status may submit, for the record, technical evidence, technical witnesses or legal memoranda. Each Party is responsible for mailing copies of all documents to all other Parties and Contested Hearing Participants.

**4m. Person.**

Means any human being, partnership, association, corporation, special district, water conservancy district, water conservation district, municipal entity, county government, state government or agency thereof, and federal government or agency thereof.

**4n. Proper Notice.**

Means the customary public notice procedure that is provided each year by the Board in the preamble to the Board's January Board meeting agenda. This customary public notice procedure may include posting of the agenda at the Board office, filing legal notices when required, mailing to Persons on the Board mailing lists and posting notices on the Board's website.

**4o. Stacking.**

As used in Rule 6, the terms "stack" or "stacking" refer to an instance in which the Board holds more than one water right for the same lake or reach of stream and exercises the rights independently according to their decrees.

**4p. Staff.**

Means the Director of the Colorado Water Conservation Board ("CWCB Director" ) and other personnel employed by the Board.

**5. ORIGINAL APPROPRIATION PROCEDURE.****5a. Recommendation of Streams and Lakes for Protection.**

All Persons interested in recommending certain stream reaches or natural lakes for inclusion in the ISF Program may make recommendations to the Board or Staff at any time. Staff will provide a preliminary response to any Person making such a recommendation within 30 working days after receipt of the recommendation at the Board Office. Staff will collaborate with State and Federal agencies and other interested Persons to plan and coordinate collection of field data necessary for development of ISF recommendations. The Staff shall advise the Board, at least annually, of all new recommendations received and of streams and lakes being studied for inclusion in the ISF Program.

**5b. Method of Making Recommendations.**

All recommendations transmitted to the Board or Staff for water to be retained in streams or lakes to preserve the natural environment to a reasonable degree must be made with specificity and in writing.

**5c. Board Approval Process.**

Periodically, after studying streams and lakes for inclusion in the ISF Program, Staff will recommend that the Board appropriate ISF rights. The Board and Staff will use the following annual schedule for initiating, processing and appropriating ISF water rights:

**January**

- The January Board meeting agenda will list proposed ISF appropriations to be appropriated that year.
- Staff will provide data, engineering and other information supporting each proposed ISF appropriation to the Board prior to or at the January Board meeting.
- Staff will present its information and recommendation for each proposed ISF appropriation at the January Board meeting.
- The Board will take public comment on the proposed ISF appropriations at the January Board meeting.
- The Board may declare its intent to appropriate for each proposed ISF appropriation at the January Board meeting, provided that the particular ISF appropriation has been listed as being under consideration in a notice, mailed at least 60 days prior to the January Board meeting, to the ISF Subscription Mailing List for the relevant water division(s).
- Notice of the Board having declared its intent to appropriate will be distributed through the ISF Subscription Mailing List for the relevant water division(s).

**March**

- The Board will take public comment on all ISF appropriations at the March Board meeting.
- Notice to Contest an ISF appropriation, pursuant to Rule 5k, must be submitted to the Board Office by March 31st, or the first business day thereafter.

**April**

- Staff will notify all Persons on the ISF Subscription Mailing List(s) of contested ISF appropriations by April 10th, or the first business day thereafter.
- Notice of Party status or Contested Hearing Participant status, pursuant to Rules 5l. or 5m., must be submitted to the Board Office by April 30th, or the first business day thereafter.

**May**

- Staff will report to the Board which ISF appropriations are being contested.
- The Board may set hearing dates for contested ISF appropriations.
- At the May Board meeting, the Board may take final action on all uncontested ISF appropriations.

**July**

- A prehearing conference will be held prior to the July Board meeting for all contested ISF appropriations (Date specific to be determined by the Hearing Officer).

- Five working days before the prehearing conference, all Parties shall file at the Board office, for the record, any and all legal memoranda, engineering data, biological data and reports or other information upon which the Party will rely.

**August**

- All Parties must submit written rebuttal statements, including testimony and exhibits, by August 15th, or the first business day thereafter. Except for such rebuttal and testimony provided at the hearing pursuant to Rule 5p.(2), the Board will not accept any statements, related documentation or exhibits submitted by any Party after the prehearing conference, except for good cause shown or as agreed upon by the Parties.

**September**

- Staff will make its final recommendations to the Board, based upon its original report, all public comments, documents submitted by the Parties and all data contained in the official record, at the September Board meeting.
- Notice of the Final Staff ISF Recommendations will be sent to all Persons on the Contested Hearing Mailing List prior to the September Board meeting.
- Parties may choose to continue or withdraw their Notice to Contest an ISF appropriation at or before the September Board Meeting.
- The Board will hold hearings on all contested ISF appropriations.

**November**

- The Board shall update the public on the results of any hearings through its agenda and may take final action on contested ISF appropriations.

When necessary, the Board may modify or delay this schedule or any part thereof as it deems appropriate.

**5d. Board's Intent to Appropriate.**

Notice of the Board's potential action to declare its intent to appropriate shall be given in the January Board meeting agenda and the Board will take public comment regarding its intent to appropriate at the January meeting.

- (1) After reviewing Staff's recommendations for proposed ISF appropriations, the Board may declare its intent to appropriate specific ISF water rights. At that time, the Board shall direct the Staff to publicly notice the Board's declaration of its intent to appropriate.
- (2) After the Board declares its intent to appropriate, notice shall be published in a mailing to the ISF Subscription Mailing Lists for the relevant water divisions and shall include:
  - (a) A description of the appropriation (e.g. stream reach, lake location, amounts, etc.);
  - (b) Availability (time and place) for review of Summary Reports and Investigations Files for each appropriation; and,
  - (c) Summary identification of any data, exhibits, testimony or other information in addition to the Summary Reports and Investigations Files supporting the appropriation.

- (3) Published notice shall also contain the following information:
- (a) The Board may change flow amounts of contested ISF appropriations based on information received during the public notice and comment period.
  - (b) Staff will maintain, pursuant to Rule 5e.(3), an ISF Subscription Mailing List for each water division composed of the names of all Persons who have sent notice to the Board Office that they wish to be included on such list for a particular water division. Any Person desiring to be on the ISF Subscription Mailing List(s) must send notice to the Board Office.
  - (c) Any meetings held between Staff and members of the public will be open to the public. Staff may provide Proper Notice prior to any such meetings and may provide notice to Persons on the ISF Subscription Mailing List(s).
  - (d) Any Notice to Contest must be received at the Board office no later than March 31st, or the first business day thereafter. All Notices of Party status and Contested Hearing Participant status must be received at the Board office no later than April 30th, or the first business day thereafter.
  - (e) Staff will announce its Final Staff ISF Recommendation concerning contested appropriations at the September Board meeting and will send notice of the Final Staff ISF Recommendations to all Persons on the Contested Hearing Mailing List.
  - (f) The Board may take final action on any uncontested ISF appropriations at the May Board meeting.
- (4) After the Board declares its intent to appropriate, notice of the Board's action shall be mailed within five working days to the County Commissioners of the county(ies) in which the proposed reach or lake is located.
- (5) Final action by the Board on ISF appropriations will occur no earlier than the May Board meeting.

**5e. Public Comment.**

- (1) The Board will hear comment on the recommended action to declare its intent to appropriate at the January Board Meeting.
- (2) ISF appropriations will be noticed in the Board agenda for each regularly scheduled subsequent meeting until the Board takes final action. Prior to March 31st, at each regularly scheduled Board meeting, time will be allocated for public comment. Subsequent to March 31st, the Board will accept public comment on any contested ISF appropriations or lake levels only at the hearings held on those appropriations pursuant to Rule 5j.
- (3) Staff will maintain an ISF Subscription Mailing List for each water division. Any Person desiring to receive information concerning proposed ISF appropriations for that water division must contact the Board Office to request inclusion on that ISF Subscription Mailing List.

**5f. Date of Appropriation.**

The Board may select an appropriation date that may be no earlier than the date the Board declares its intent to appropriate. The Board may declare its intent to appropriate when it concludes that it has received sufficient information that reasonably supports the findings required in Rule 5i.

**5g. Notice.**

Agenda and ISF Subscription Mailing List(s) notice shall be given pursuant to Rule 5d. and the public shall be afforded an opportunity to comment pursuant to Rule 5e. Notice of the date of final action on uncontested ISF appropriations shall be mailed to Persons on the ISF Subscription Mailing Lists for the relevant water divisions, maintained pursuant to Rule 5e.(3).

**5h. Final Board Action on an ISF Appropriation.**

The Board may take final action on any uncontested ISF appropriation(s) at the May Board meeting or any Board meeting thereafter. If a Notice to Contest has been filed, the Board shall proceed under Rules 5j. - 5q.

**5i. Required Findings.**

Before initiating a water right filing to confirm its appropriation, the Board must make the following determinations:

**(1) Natural Environment.**

That there is a natural environment that can be preserved to a reasonable degree with the Board's water right if granted.

**(2) Water Availability.**

That the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made.

**(3) Material Injury.**

That such environment can exist without material injury to water rights.

These determinations shall be subject to judicial review in the water court application and decree proceedings initiated by the Board, based on the Board's administrative record and utilizing the criteria of §§24-4-106(6) and (7), C.R.S.

**5j. Procedural Rules for Contested ISF Appropriations.**

- (1) Whenever an ISF appropriation is contested, the Board shall hold a hearing at which any Party may present evidence, witnesses and arguments for or against the appropriation and any Contested Hearing Participant or member of the public may comment. The hearing shall be a notice and comment hearing as authorized in §37-92-102(4)(a), C.R.S., and shall not be a formal agency adjudication under §24-4-105, C.R.S.
- (2) These rules are intended to assure that information is received by the Board in a timely manner. Where these rules do not address a procedure or issue, the Board shall determine the procedures to be followed on a case-by-case basis. The Board may waive the requirements of these rules whenever the Board determines that strict adherence to the rules is not in the best interests of fairness, unless such waiver would violate applicable statutes. For any such waiver, the Board shall provide appropriate justification, in writing, to Persons who have Party or Contested Hearing Participant status.
- (3) In a hearing on a contested ISF appropriation, a Party may raise only those issues relevant to the statutory determinations required by §37-92-102(3)(c), C.R.S. and the required findings in Rule 5i.



**5k. Notice to Contest.**

- (1) To contest an ISF appropriation, a Person must comply with the provisions of this section. The Board must receive a Notice to Contest the ISF appropriation by March 31st, or the first business day thereafter.
- (2) A Notice to Contest an ISF appropriation shall be made in writing and contain the following information:
  - (a) Identification of the Person(s) requesting the hearing;
  - (b) Identification of the ISF appropriation(s) at issue; and,
  - (c) The contested facts and a general description of the data upon which the Person will rely to the extent known at that time.
- (3) After a Party has filed a Notice to Contest an ISF appropriation, any other Person may participate as a Party or a Contested Hearing Participant pursuant to Rules 5l. or 5m.
- (4) Staff will notify all Persons on the relevant ISF Subscription Mailing List(s) of contested ISF appropriations by April 10th, or the first business day thereafter.

**5l. Party Status.**

- (1) Party status will be granted to any Person who timely files a Notice of Party Status with the Staff. Any Person filing a Notice to Contest shall be granted Party status and need not also file a Notice of Party Status. A Notice of Party status must be received by April 30th, or the first business day thereafter. A Notice of Party status shall set forth a brief and plain statement of the reasons for obtaining Party status, the contested facts, the matters that the Person claims should be decided and a general description of the data to be presented to the Board. The Board will have discretion to grant or deny Party status to any Person who files a Notice of Party Status after April 30th or the first business day thereafter, for good cause shown.
- (2) Only a Party may submit for the record technical evidence, technical witnesses or file legal memoranda. Each Party is responsible for mailing copies of all documents submitted for Board consideration to all other Parties and Contested Hearing Participants.
- (3) The Staff shall automatically be a Party in all proceedings concerning contested ISF appropriations.
- (4) Where a contested ISF appropriation is based fully or in part on another agency's recommendation pursuant to Rule 5a., that agency shall automatically be a Party in any proceeding.
- (5) All Parties, whether they achieved such status by filing a Notice to Contest or a Notice of Party Status, shall be afforded the same rights in the contested ISF appropriation proceedings. Specifically, but without limiting the generality of the foregoing sentence, any Person who filed a Notice of Party Status is entitled to raise issues not raised by any Person who filed a Notice to Contest.

**5m. Contested Hearing Participant Status.**

- (1) Any Person who desires to participate in the process, but not as a Party, may obtain Contested Hearing Participant status by filing a notice thereof at the Board Office prior to April 30th. A Person with such status will receive all Party documents specific to the contested appropriation. Contested Hearing Participants may comment on their own behalf, but may not submit for the record technical evidence, technical witnesses or legal memoranda. The Board will have discretion to grant or deny Contested Hearing Participant status to any Person who filed a Notice of Contested Hearing Participant Status after April 30th or the first business day thereafter, for good cause shown.
- (2) The request for Contested Hearing Participant status must be received by April 30th, or the first business day thereafter.
- (3) Staff shall notify all Parties and Contested Hearing Participants of the list of Contested Hearing Participants prior to May 31st. Thereafter, Parties shall also mail their prehearing statements and any other documents to Contested Hearing Participants.

**5n. Prehearing Conference.**

- (1) The Board will designate a Hearing Officer, who shall schedule and preside over prehearing conferences and assist the Parties with procedural matters, such as setting prehearing conferences and adjusting deadlines and schedules to further the Parties' settlement efforts or for other good cause shown. All prehearing conferences will be scheduled and held prior to the July Board meeting.
- (2) On or before five working days before the prehearing conference, each Party shall file 25 copies of its prehearing statement with the Board, and provide an electronic version when possible. The prehearing statement shall identify all exhibits, engineering data, biological data and reports or other information that the Party will rely upon at the hearing and shall contain:
  - (a) A specific statement of the factual and legal claims asserted (issues to be resolved) and the legal basis upon which the Party will rely;
  - (b) Copies of all exhibits to be introduced at the hearing;
  - (c) A list of witnesses to be called and a brief description of their testimony;
  - (d) Any alternative proposal to the proposed ISF appropriation;
  - (e) All written testimony to be offered into evidence at the hearing;and
  - (f) Any legal memoranda.

Each Party shall deliver a copy of its prehearing statement to all other Parties, Contested Hearing Participants, the Hearing Officer and directly to the Assistant Attorneys General representing Staff and the Board five working days before the prehearing conference. The Board will not consider information, other than rebuttal statements and testimony provided at the hearing pursuant to Rule 5p.(2), submitted by the Parties after this deadline except for good cause shown or as agreed upon by the Parties.

- (3) Any Contested Hearing Participant may also submit written comments 5 working days prior to the prehearing conference. Contested Hearing Participants who submit written comments for the Board's consideration shall provide 25 copies to the Board, and a copy to all other Contested Hearing Participants, Parties, the Hearing Officer and the Assistant Attorneys General representing Staff and Board, and provide an electronic version when possible.
- (4) The prehearing conference will afford the Parties the opportunity to address such issues as time available for each Party at the hearing, avoiding presentation of duplicative information, consolidation of concerns, etc. The Parties may formulate stipulations respecting the issues to be raised, witnesses and exhibits to be presented, and/or any other matters which may be agreed to or admitted by the Parties. At the prehearing conference, the Parties shall make known any objections to the procedures or evidence that they may raise at the hearing unless such objections could not have been reasonably determined at that time.
- (5) August 15th, or the first business day thereafter, is the last day for submission of written rebuttal statements, including testimony, legal memoranda, and exhibits. Twenty-five copies of such materials must be provided to the Board, and an electronic version also provided, when possible. Except for such rebuttal and testimony provided at the hearing pursuant to Rule 5p.(2), the Board will not accept any statements, related documentation or exhibits submitted by any Party after the deadline set forth in Rules 5n.(2) and 5n.(3), except for good cause shown or as agreed upon by the Parties. The scope of rebuttal is limited to issues and evidence presented in the prehearing statements. Any documentation to be submitted pursuant to this subsection (5) shall be delivered to the Board and mailed to all Parties and Contested Hearing Participants by August 15th, or the first business day thereafter, unless the Parties agree otherwise.

**5o. Notice of Hearings on Contested ISF Appropriations.**

- (1) Staff shall mail notice of prehearing conference(s) on contested ISF appropriations to all Persons on the Contested Hearing Mailing List for the particular ISF appropriation. The notice shall specify the time and place of the prehearing conference and any procedural requirements that the Board deems appropriate.
- (2) The Board may postpone a hearing to another date by issuing written notice of the postponement no later than 7 calendar days prior to the original hearing date.

**5p. Conduct of Hearings.**

- (1) In conducting any hearing, the Board shall have authority to: administer oaths and affirmations; regulate the course of the hearing; set the time and place for continued hearing; limit the number of technical witnesses; issue appropriate orders controlling the subsequent course of the proceedings; and take any other action authorized by these Rules.
- (2) At the hearing, the Board shall hear arguments, concerns or rebuttals from Parties, Contested Hearing Participants and interested members of the public. The Board may limit testimony at the hearing. Without good cause, the Board will not permit Parties or Contested Hearing Participants to introduce written material at the hearing not previously submitted pursuant to these Rules. The Board, in making its determinations, need not consider any written material not timely presented.
- (3) Only the Board may question witnesses at the hearing except where the Board determines that, for good cause shown, allowing the parties to question witnesses may materially aid the Board in reaching its decision, or where such questioning by the Parties relates to the statutory findings required by §37-92-102(3)(c), C.R.S. The Board may terminate questioning where the Board determines that such questioning is irrelevant or redundant or may terminate such questioning for other good cause.

- (4) The hearing shall be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing shall be responsible for the cost of the transcription.

**5q. Final Board Action.**

The Board may take final action at the hearing or at a later date.

**5r. Statement of Opposition.**

In the event that any Person files a Statement of Opposition to an ISF water right application in Water Court, the Staff may agree to terms and conditions that would prevent injury. Where the resolution of the Statement of Opposition does not involve a change regarding the Board's determinations under Rule 5i. (including but not limited to the amount, reach, and season), the Board is not required to review and ratify the resolution. Staff may authorize its counsel to sign any court documents necessary to finalize this type of pretrial resolution without Board ratification.

**5s. Withdrawal of Filing.**

If the Board elects to withdraw a Water Court filing, notice shall be given in the agenda of the Board meeting at which the action is expected to occur.

**6. ACQUISITION OF WATER, WATER RIGHTS OR INTERESTS IN WATER FOR INSTREAM FLOW PURPOSES.**

The Board may acquire water, water rights, or interests in water for ISF purposes by the following procedures:

**6a. Means of Acquisition.**

The Board may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any Person, including any governmental entity, such water, water rights, or interests in water that are not on the Division Engineer's abandonment list in such amounts as the Board determines are appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.

**6b. 120 Day Rule.**

At the request of any Person, including any governmental entity, the Board shall determine in a timely manner, not to exceed one hundred twenty days, unless further time is granted by the requesting Person, what terms and conditions the Board will accept in a contract or agreement for the acquisition. The 120-day period begins on the day the Board first considers the proposed contract or agreement at a regularly scheduled or special Board meeting.

**6c. Stacking Evaluation.**

The Board shall evaluate whether to combine or stack the acquired water right with any other ISF appropriation or acquisition, based upon the extent to which the acquired water will provide flows or lake levels to preserve or improve the natural environment to a reasonable degree.

If the Board elects to combine or stack the acquired water right, the details of how the water rights are to be combined or stacked with other existing ISF appropriations or acquisitions must be set forth in the application for a decree to use the acquired right for instream flow purposes.

**6d. Enforcement of Acquisition Agreement.**

Pursuant to section 37-92-102(3), C.R.S., any contract or agreement executed between the Board and any Person which provides water, water rights, or interests in water to the Board shall be enforceable by either party thereto as a water matter in the water court having jurisdiction over the water right according to the terms of the contract or agreement.

**6e. Appropriateness of an Acquisition.**

The Board shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment. Such evaluation shall include, but need not be limited to consideration of the following factors:

- (1) The reach of stream or lake level for which the use of the acquired water is proposed, which may be based upon any one or a combination of the following: the historical location of return flow; the length of the existing instream flow reach, where applicable; whether an existing instream flow water right relies on return flows from the water right proposed for acquisition; the environment to be preserved or improved by the proposed acquisition; or such other factors the Board may identify;
- (2) The natural flow regime;
- (3) Any potential material injury to existing decreed water rights;
- (4) The historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use;
- (5) The natural environment that may be preserved or improved by the proposed acquisition, and whether the natural environment will be preserved or improved to a reasonable degree by the water available from the proposed acquisition;
- (6) The location of other water rights on the subject stream(s);
- (7) The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the delivery of more water than required under compact obligations;
- (8) The effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (9) Whether the water acquired will be available for subsequent use or reuse downstream;
- (10) The cost to complete the transaction or any other associated costs; and
- (11) The administrability of the acquired water right when used for instream flow purposes.

The Board shall determine how to best utilize the acquired water, water rights or interest in water to preserve or improve the natural environment.

**6f. Factors Related to Loans and Leases.**

In addition to considering the factors listed above, for loans and leases of water, water rights and interests in water for ISF purposes under section 37-92-102(3),

- (1) The Board shall consider the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, including but not limited to:

- (a) Whether the amount of water available for acquisition is needed to provide flows to meet a decreed ISF amount in below average years; and
  - (b) Whether the amount of water available for acquisition could be used to and would improve the natural environment to a reasonable degree, either alone or in combination with existing decreed ISF water rights.
- (2) In considering the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, the Board will request and review a biological analysis from Colorado Parks and Wildlife (CPW), and will review any other biological or scientific evidence presented to the Board.
- (3) If other sources of water are available for acquisition on the subject stream reach(es) by purchase or donation, the Board shall fully consider each proposed acquisition and give preference first to the donation and then to a reasonable acquisition by purchase.
- (4) The Board shall obtain confirmation from the Division Engineer that the proposed lease or loan is administrable and is capable of meeting all applicable statutory requirements.
- (5) The Board shall determine, through negotiation and discussion with the lessor, the amount of compensation to be paid to the lessor of the water based, in part, upon the anticipated use of the water during and after the term of the lease.
- (6) The Board shall consider evidence of water availability based upon the historical record(s) of diversion, the beneficial use of the subject water right, the location and timing of where return flows have historically returned to the stream, and the reason(s) the water is available for lease or loan.

**6g. Recording Requirements.**

- (1) All contracts or agreements for leases or loans of water, water rights or interests in water under section 37-92-102(3) shall require the Board to:
  - (a) Maintain records of how much water the Board uses under the contract or agreement each year it is in effect; and
  - (b) Install any measuring device(s) deemed necessary by the Division Engineer (1) to administer the lease or loan of water, (2) to measure and record how much water flows out of the reach after use by the Board under the lease or loan; and (3) to meet any other applicable statutory requirements.
- (2) All contracts or agreements for leases or loans of water shall provide for the recording of the actual amount of water legally available and capable of being diverted under the leased or loaned water right during the term of the lease or loan, with such records provided to the Division of Water Resources for review and publication.

**6h. Water Reuse.**

All contracts or agreements for the acquisition of water, water rights or interests in water under section 37-92-102(3) shall provide that the Board or the seller, lessor, lender or donor of the water may bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, pursuant to the water court decree authorizing the Board to use the acquired water.

- (1) The bringing about of beneficial use of the historical consumptive use of the water may be achieved by direct use, sale, lease, loan or other contractual arrangement by the Board or the seller, lessor, lender or donor.
- (2) The contract or agreement also shall provide that the Division Engineer must be notified of any agreement for such beneficial use downstream of the ISF reach prior to the use.
- (3) Prior to any beneficial use by the Board of the historical consumptive use of the acquired water right downstream of the ISF reach, the Board shall find that such use:
  - (a) Will be consistent with the Board's statutory authority and with duly adopted Board policies and objectives; and
  - (b) Will not injure vested water rights or decreed conditional water rights.

**6i. Applications for a Decreed Right to Use Water for ISF Purposes.**

The Board shall file a change of water right application or other applications as needed or required with the water court to obtain a decreed right to use water for ISF purposes under all contracts or agreements for acquisitions of water, water rights or interests in water under section 37-92-102(3), including leases and loans of water. The Board shall file a joint application with the Person from whom the Board has acquired the water or a Person who has facilitated the acquisition, if requested by such Person. The Water Court shall determine matters that are within the scope of section 37-92-305, C.R.S. In a change of water right proceeding, the Board shall request the Water Court to:

- (1) Verify the quantification of the historical consumptive use of the acquired water right;
- (2) Verify the identification, quantification and location of return flows to ensure that no injury will result to vested water rights and decreed conditional water rights;
- (3) Include terms and conditions providing that:
  - (a) The Board or the seller, lessor, lender, or donor of the water may bring about the beneficial use of the historical consumptive use of the changed water right downstream of the ISF reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights and decreed conditional water rights; and
  - (b) When the Board has not identified such downstream beneficial use at the time of the change of water right, the Board may amend the subject change decree, if required by the Division Engineer, to add such beneficial use(s) of the historical consumptive use downstream of the ISF reach at the time the Board is able to bring about such use or reuse, without requiring requantification of the original historical consumptive use calculation; and
- (4) Decree the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right pursuant to section 37-92-102(3), C.R.S.

**6j. Limitation on Acquisitions.**

The Board may not accept a donation of water rights that were acquired by condemnation, or that would require the removal of existing infrastructure without approval of the current owner of such infrastructure.

**6k. Temporary (Expedited and Renewable) Loans of Water to the Board.**

Section 37-83-105, C.R.S., authorizes the Board to accept and exercise two types of temporary loans of water for ISF use: (1) expedited loans; and (2) renewable loans. Expedited loans have a term of up to one year and may be used to preserve the natural environment to a reasonable degree on a decreed instream flow reach. Renewable loans, which can be used to preserve or improve the natural environment on a decreed instream flow reach, may be exercised for up to five years in a ten-year period and for no more than three consecutive years, and may be renewed for up to two additional ten-year periods. The Board may exercise both expedited and renewable temporary loans of water for instream flow use for a period not to exceed 120 days in a single calendar year, in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S. The owner of a decreed water right who has offered water to the Board for an expedited or renewable loan is referred to herein as an "applicant."

**(1) Expedited Loans.**

- (a) An expedited loan approved to preserve the natural environment to a reasonable degree has a term of up to one year, with instream flow use not to exceed 120 days in a single calendar year. The loan period begins when the State Engineer approves the expedited loan. If an expedited loan is approved, the applicant may not reapply for an additional expedited loan of the subject water right.
- (b) Within five working days after receiving an offer of an expedited loan of water to the Board for temporary instream flow use, the Director will provide a response to the applicant. If the proposed loan appears to be appropriate for instream flow use, staff will coordinate with the applicant to:
  - i. prepare and submit the necessary documentation to the State Engineer required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S.;
  - ii. provide the written notice required by section 37-83-105(2)(b)(II), C.R.S., and access to all documentation provided to the State Engineer under Rule 6k.(1)(b)i, to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6), C.R.S., for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall; and
  - iii. provide notice to all Persons on the ISF Subscription Mailing List for the relevant water division.
- (c) Provided that the State Engineer has made a determination of no injury pursuant to section 37-83-105(2)(a)(III), C.R.S., the Board hereby delegates authority to the CWCB Director to accept expedited loans of water for instream flow use in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S., to execute an agreement for the loan of the water, and to take any administrative action necessary to put the loaned water to instream flow use. The purpose of this delegation is to expedite the Board's exercise of a temporary loan of water for instream flow use under this Rule 6k.(1).
- (d) The CWCB's use of loaned water for instream flows shall not exceed the CWCB's decreed instream flow rate(s), time period(s), and reach(es) at any time during the expedited loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury.



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- (e) At the first regular or special Board meeting after the Director accepts, or rejects over applicant's objection, an offer of an expedited loan of water to the Board for temporary instream flow use under (b) and (c) above, the Board shall vote either to ratify or overturn the Director's decision.
  - (f) The Board, Director and staff will expedite all actions necessary to implement Rule 6k.(1).
- (2) Renewable Loans.
- (a) A renewable loan approved to preserve or improve the natural environment must not be exercised for more than five years in a ten-year period and for no more than three consecutive years, for which only a single approval by the State Engineer is required. Instream flow use may not exceed 120 days in a single calendar year. The ten-year period begins when the State Engineer approves the loan. If an applicant for a renewable loan has previously been approved for and has exercised an expedited loan using the same water right(s) that are the subject of the pending application, the one-year loan period of the expedited loan counts as the first year of the five-year allowance for the subsequent renewable loan.
  - (b) The Board will use a two-Board meeting process to review, consider public comment, and direct Staff whether to move forward with proposed renewable loans of water for instream flow use to preserve or improve the natural environment to a reasonable degree.
  - (c) Any Person may request the Board to hold a hearing on a proposed renewable loan. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed renewable loan, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested. The Board shall conduct all hearings on renewable loans pursuant to Rule 6m.(5).
  - (d) For renewable loans to improve the natural environment to a reasonable degree, the Board will:
    - i. request and review a biological analysis from CPW concerning the extent to which the proposed loan will improve the natural environment to a reasonable degree, and review any other biological or scientific evidence presented to the Board;
    - ii. make findings on flow rates appropriate to improve the natural environment to a reasonable degree with the loaned water; and
    - iii. give preference to loans of stored water, when made available, over loans of direct flow water.
  - (e) When evaluating a proposed renewable loan, the Board shall consider any potential injury to decreed water rights, decreed exchanges of water, or other water users' undeclared existing exchanges of water to the extent that the undeclared existing exchanges have been administratively approved before the date of the Board's consideration.
  - (f) If the Board directs Staff to move forward with a proposed renewable loan, staff will coordinate with the applicant to:
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- i. prepare and submit the necessary documentation to the State Engineer required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S.;
  - ii. provide the written notice required by section 37-83-105(2)(b)(II), C.R.S., and access to all documentation provided to the State Engineer under Rule 6k.(2)(f)i, to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6), C.R.S., for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall;
  - iii. provide notice to all Persons on the ISF Subscription Mailing List for the relevant water division; and
  - iv. make best efforts to publish notice of the proposed plan in an appropriate legal newspaper of general circulation in each county in which the loan will be implemented and from which the loaned water has been historically used.
- (g) Board direction to Staff to move forward with a proposed renewable loan will include authorizing Staff to execute an agreement for the loan of water and to take any administrative action necessary to put the loaned water to instream flow use, provided that the State Engineer determines that no injury will result from the proposed loan.
  - (h) The CWCB's instream flow use of loaned water shall not extend beyond the CWCB's decreed instream flow reach(es) at any time during the renewable loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury.
  - (i) In each year that a renewable loan is exercised, the applicant, coordinating with Staff if necessary, shall provide the written notice described in section 37-83-105(2)(b)(II), C.R.S.
  - (j) The applicant may reapply for a renewable loan, and the State Engineer may approve such loan for up to two additional ten-year periods. Prior to any such reapplication, at a properly noticed public meeting, Staff will inform the Board about the exercise of the loan during the previous ten-year period and request approval for the loan to continue for the additional ten-year period. The Board shall consider any public comment and objections to the renewal provided at the public meeting. If the Board authorizes renewal of the loan, staff will coordinate with the applicant to: (1) prepare and submit the necessary documentation to the State Engineer required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S.; and (2) provide the written notice required by section 37-83-105(2)(b)(II), C.R.S.
- (3) Water rights loaned to the Board pursuant to expedited or renewable loans are not precluded from concurrent or subsequent inclusion in other programs, such as water conservation, demand management, compact compliance, or water banking programs or plans, as are or may be subsequently defined or described in statute. The applicant will inform the Board of inclusion of the loaned water right in any such program during the loan period.

#### **6I. Funds for Water Right Acquisitions.**

The Board may use any funds available to it for costs of the acquisition of water rights and their conversion to ISF use. The Board shall spend available funds for such costs in accordance with section 37-60-123.7, C.R.S. and any other applicable statutory authority, and with applicable Board policies and procedures.

**6m. Public Input on Proposed Acquisitions.**

The Board shall follow the public review process in Rules 11a. - 11c. when acquiring water, water rights or interests in water, except for expedited and renewable temporary loans or leases as provided in Rule 6k. above and except as provided below.

- (1) Prior to Board consideration of any proposed acquisition, Staff shall mail notice of the proposed acquisition to all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division, and shall provide Proper Notice. Such notice shall include:
  - (a) The case number adjudicating the water right proposed to be acquired, and the appropriation date, adjudication date, priority, decreed use(s), and flow amount of the water right proposed to be acquired, and approximately how much of the water right the Board will consider acquiring;
  - (b) The location of the stream reach or lake that is the subject of the proposal, including, when available, the specific length of stream reach to benefit from the proposed acquisition;
  - (c) Any available information on the purpose of the acquisition, including the degree of preservation or improvement of the natural environment to be achieved;
  - (d) Any available scientific data specifically supporting the position that the acquisition will achieve the goal of preserving or improving the natural environment to a reasonable degree; and
  - (e) In addition to (a) - (d) above, for leases and loans of water, water rights or interests in water under section 37-92-102(3), C.R.S., such notice shall include the proposed term of the lease or loan and the proposed season of use of the water under the lease or loan.
- (2) At every regularly scheduled Board meeting subsequent to the mailing of notice, and prior to final Board action, Staff will report on the status of the proposed acquisition and time will be reserved for public comment.
- (3) Any Person may address the Board regarding the proposed acquisition prior to final Board action. Staff shall provide any written comments it receives regarding the proposed acquisition directly to the Board.
- (4) Any Person may request the Board to hold a hearing on a proposed acquisition. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed acquisition, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested.
- (5) At its next regularly scheduled meeting after receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. All hearings scheduled by the Board shall be governed by the following procedures:
  - (a) A hearing on a proposed acquisition, except for renewable loans, must be held within the 120 day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time.
  - (b) The Board shall appoint a Hearing Officer to establish the procedures by which evidence will be offered.

- (c) For hearings on acquisitions other than renewable loans, at least thirty days prior to the hearing date(s), the Board shall provide written notice of the hearing(s) to the Person proposing the acquisition, all interested parties known to the Board, and all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division. The Board also shall provide Proper Notice, as defined in ISF Rule 4n.
- (d) For hearings on renewable loans, at least thirty days prior to the hearing date, the Board shall provide written notice of the hearing to the owner of the water right to be loaned and to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6), C.R.S., for the water division in which the proposed loan is located; (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall; and (3) provide notice to all Persons on the ISF Subscription Mailing List for the relevant water division. Such notice shall include the process and deadlines for participating in the hearing.
- (e) Any Person who desires party status shall become a Party upon submission of a written Notice of Party Status to the Board Office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive Notice of Party Status within seven days after notice of the hearing is issued.
- (f) The Hearing Officer shall set timelines and deadlines for all written submissions. Prehearing statements will be required, and shall include, but not be limited to, the following: 1) a list of all disputed factual and legal issues; 2) the position of the Party regarding the factual and legal issues; 3) a list identifying all of the witnesses that will testify for the Party, and a summary of the testimony that those witnesses will provide; and 4) copies of all exhibits that the Party will introduce at the hearing(s).
- (g) Any Party may present testimony or offer evidence identified in its prehearing statement regarding the proposed acquisition.
- (h) The Hearing Officer shall determine the order of testimony for the hearing(s), and shall decide other procedural matters related to the hearing(s). The Hearing Officer does not have authority to rule on substantive issues, which authority rests solely with the Board.
- (i) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
- (j) The Board may permit general comments from any Person who is not a Party; however, the Board may limit these public comments to five minutes per Person.
- (k) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.
- (l) Board hearings may be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing(s) shall be responsible for the cost of the transcription.
- (m) When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

**6n. Board Action to Acquire Water, Water Rights or Interests in Water.**

The Board shall consider the acquisition during any regular or special meeting of the Board. At the Board meeting, the Board shall consider all presentations or comments of Staff or any other Person. After such consideration, the Board may acquire, acquire with limitations, or reject the proposed acquisition.

**7. INUNDATION OF ISF RIGHTS.**

Inundation of all or a portion of an ISF stream reach or lake may be an interference with the Board's usufructuary rights that have been acquired by Board action. "Inundation" as used in this section is the artificial impoundment of water within an ISF or natural lake; "inundation" does not refer to the use of a natural stream as a conveyance channel as long as such use does not raise the waters of the stream above the ordinary high watermark as defined in §37-87-102 (1)(e), C.R.S.

**7a. Small Inundations.**

Staff may file a Statement of Opposition to inundations described in this section if it determines that the ISF right or natural environment will be adversely affected by the inundation. The Staff shall not be required to file a Statement of Opposition to applications proposing small inundations. Small inundations are those in which the impoundment is 100 acre-feet or less, or the surface acreage of the impoundment is 20 acres or less, or the dam height of the structure is 10 feet or less. The dam height shall be measured vertically from the elevation of the lowest point of the natural surface of the ground, where that point occurs along the longitudinal centerline of the dam up to the flowline crest of the spillway of the dam.

- (1) All structures proposed by any applicant on a stream reach shall be accumulated for the purpose of determining whether the inundations proposed by the applicant are small inundations. In the event the cumulative surface acreage, volume impounded, or dam height of all impoundments exceed the definition of a small inundation, Staff may file a Statement of Opposition to that application.
- (2) In the event that no Statement of Opposition is filed pursuant to the terms of this section, the Board shall be deemed to have approved the inundation proposed without a request by the applicant.

**7b. Application of Rule 7.**

The provisions of this rule will not be applied to the following water rights:

- (1) any absolute or conditional water right that is senior to an ISF right;
- (2) any senior conditional water right that seeks a finding of reasonable diligence;
- (3) any junior absolute or conditional water right which was decreed prior to July 10, 1990, or had an application for decree pending prior to July 10, 1990, unless the Board had filed a Statement of Opposition to the absolute or conditional water right application prior to July 10, 1990; or
- (4) any inundation of an ISF reach by water that does not have an absolute or conditional water right if the inundation occurred prior to July 10, 1990.

**7c. Request to Inundate.**

Any Person seeking permission to inundate shall timely submit a written request for permission to inundate to the Board Office. No requests for inundation will be considered or approved until the Person seeking permission to inundate files a water court application outlining their storage plans or files plans and specifications with the State Engineer for a jurisdictional dam pursuant to §37-87-105, C.R.S. The Board will consider the request to inundate in a timely manner.

**7d. Staff Investigation.**

After receiving the request to inundate, the Staff may seek the recommendations from Colorado Parks and Wildlife, Division of Water Resources, United States Department of Agriculture and United States Department of Interior.

**7e. Required Information.**

In any written request to inundate, the requesting Person shall at a minimum include information on the following factors: the location of the inundation, the size of the inundation, impact of the inundation on the natural environment, any unique or rare characteristics of the ISF water right to be inundated, any regulatory requirements or conditions imposed upon the applicant by federal, state and/or local governments, all terms and conditions included in applicant's water court decree, and any compensation or mitigation offered by the Person proposing the inundation.

**7f. Determination of Interference.**

In response to the request to inundate, the Board shall determine whether the proposed inundation interferes with an ISF right. When making this determination, the Board shall consider, without limitation, the extent of inundation proposed and the impact of the proposed inundation on the natural environment existing prior to the inundation.

**7g. Consideration of Request to Inundate.**

If the Board determines that a proposed inundation interferes with an ISF right, the Board may then approve, approve with conditions, defer, or deny the request to inundate. In making this decision, the Board shall consider all relevant factors, including, but not limited to (1) the extent of inundation proposed; (2) the impact of the proposed inundation on the natural environment existing prior to the inundation; (3) the degree to which the beds and banks adjacent to the ISF right subject to the inundation are publicly or privately owned; (4) the economic benefits arising from the inundation; (5) the benefits to recreation and downstream ISF segments arising from the inundation; (6) the degree to which the proposed inundation will allow development of Colorado's allotment of interstate waters as determined by compact or adjudication; and, (7) any mitigation or compensation offered to offset adverse impacts on the ISF right. After considering all relevant factors, the Board shall take one of the actions set forth in Rules 7h. - 7k. below.

**7h. Approval.**

If the Board approves the request to inundate, any Statement of Opposition filed by the Board shall be withdrawn.

**7i. Conditional Approval.**

The Board may require certain conditions to be performed prior to approval. Failure to perform any condition will be a reason for denial.

**7j. Deferral.**

When it appears that other governmental agencies may impose terms and conditions upon the issuance of a permit to construct a facility which will cause an inundation, the Board may defer consideration of the request to inundate until all other governmental bodies have finalized the permit or approval conditions.

**7k. Denial of Request to Inundate.**

Requests for permission to inundate may be denied if in the discretion of the Board the request is inconsistent with the goals of the ISF Program. The Board may decide to deny a request for permission to inundate if it finds:

- (1) No compensation or mitigation would be adequate for the injury caused by the inundation; or
- (2) No compensation or mitigation acceptable to the Board has been proposed by applicant; or
- (3) The proposed inundation is inconsistent with the goals of the ISF Program.

**7l. Remedies.**

The Board may seek any administrative, legal or equitable remedy through state courts (including water courts), federal courts, city, county, state or federal administrative proceedings to resolve actual or proposed inundation of its ISF rights.

**7m. Board Has Sole Right to Protect ISF Rights from Interference.**

Only the Board may seek to prevent interference with an ISF right by inundation and only the Board may seek compensation or mitigation for such interference.

**7n. Public Review Process.**

The Board shall follow the public review process in Rules 11a. - 11c. prior to any Board decision on a request to inundate an ISF right.

**8. PROTECTION OF ISF APPROPRIATIONS.**

The Board delegates the day-to-day management and administration of the ISF Program to Staff. Staff shall seek ratification of its decisions as set forth in Rules 8c., 8e.(2), 8i., and 8j.

**8a. Resume Review.**

Staff shall review the monthly resumes of all water divisions. The Staff shall evaluate each resume entry for the possibility of injury or interference to an ISF right.

**8b. Statement of Opposition.**

In the event Staff identifies a water right application in the resume that may injure an ISF right, Staff shall file a Statement of Opposition to that application. In the event Staff identifies a water right application in the resume that may interfere with an ISF right as contemplated in Rule 7, Staff may file a Statement of Opposition to that application.

**8c. Ratification of Statements of Opposition.**

At a Board meeting following the filing of the Statement of Opposition, Staff shall apprise the Board of the filing of a Statement of Opposition and the factual basis for the Staff action. At that time, the Board shall ratify the filing, disapprove the filing, or table the decision to a future meeting if more information is needed prior to making a decision.

**8d. Notice.**

Prior to ratification of a Statement of Opposition, the Staff shall mail the applicant a copy of the Board memorandum concerning the ratification and a copy of the agenda of the meeting in which the ratification will be considered. Following a Board action considering a Statement of Opposition, the Staff shall notify the applicant and/or its attorney in writing of the Board's action.

**8e. De Minimis Rule.**

In the event that Staff determines a water court application would result in a 1 percent depletive effect or less on the stream reach or lake subject of the ISF right, and the stream reach or lake has not been excluded from this rule pursuant to Rules 8f. or 8h., Staff shall determine whether to file a Statement of Opposition. Staff's decision not to file a Statement of Opposition does not constitute: (1) acceptance by the Board of injury to any potentially affected ISF water right; or (2) a waiver of the Board's right to place an administrative call for any ISF water right.

- (1) If Staff does not file a Statement of Opposition, Staff shall notify the Division Engineer for the relevant water division that it has not filed a Statement of Opposition, but that it may place an administrative call for the potentially affected ISF water right(s). Such a call could be enforced against the water right(s) subject of the application by the Division Engineer in his or her enforcement discretion. Staff also shall mail a letter to the applicant at the address provided on the application notifying the applicant: (a) of Staff's decision not to file a Statement of Opposition pursuant to this Rule; (b) that the CWCB may place a call for its ISF water rights to be administered within the prior appropriation system; and (c) that the Division Engineer's enforcement of the call could result in curtailment or other administration of the subject water right(s).
- (2) If Staff files a Statement of Opposition, Staff shall seek Board ratification by identifying and summarizing the Statement of Opposition on the Board meeting consent agenda pursuant to Rule 8c.

**8f. Cumulative Impact.**

In determining existence of a de minimis impact, Staff shall consider the existence of all previous de minimis impacts on the same stream reach or lake. If the combined total of all such impacts exceeds 1 percent, then Staff will file a Statement of Opposition regardless of the individual depletive effect of an application.

**8g. Notification of Staff Action.**

At a Board meeting following a Staff determination to apply the De Minimis rule, the Staff shall notify the Board about the factual basis leading to its application of the De Minimis rule.

**8h. Exclusion from De Minimis Rule.**

The Board may at any time exclude any stream reach or lake, or any portion thereof, from application of the De Minimis rule.



**8i. Pretrial Resolution.**

Staff may negotiate a pretrial resolution of any injury or interference issue that is the subject of a Statement of Opposition. The Board shall review the pretrial resolution pursuant to the following procedures:

**(1) No Injury.**

In the event the pretrial resolution includes terms and conditions preventing injury or interference and does not involve a modification, or acceptance of injury or interference with mitigation, the Board is not required to review and ratify the pretrial resolution. Staff may authorize its counsel to sign any court documents necessary to finalize this type of pretrial resolution without Board ratification.

**(2) No Injury/Modification.**

In the event the pretrial resolution addresses injury or interference through modification of the existing ISF decree, the process set forth in Rule 9 shall be followed prior to any Board decision to ratify the pretrial resolution.

**(3) Injury Accepted with Mitigation.**

In the event a proposed pretrial resolution will allow injury to or interference with an ISF or natural lake level (NLL) water right, but mitigation offered by the applicant could enable the Board to accept the injury or interference while continuing to preserve or improve the natural environment to a reasonable degree, and if the proposed pretrial resolution does not include a modification under ISF Rule 9, the Board shall:

- (a) Conduct a preliminary review of the proposed pretrial resolution during any regular or special meeting to determine whether the natural environment could be preserved or improved to a reasonable degree with the proposed injury or interference if applicant provided mitigation; and
- (b) At a later regular or special meeting, take final action to ratify, refuse to ratify or ratify with additional conditions.
- (c) No proposed pretrial resolution considered pursuant to this Rule 8i.(3) may receive preliminary review and final ratification at the same Board meeting.
- (d) The Board shall not enter into any stipulation or agree to any decretal terms and conditions under this Rule that would result in the Division of Water Resources being unable to administer the affected ISF or NLL water right(s) in accordance with the priority system or with Colorado water law.
- (e) To initiate CWCB staff review of an Injury with Mitigation proposal, the proponent must provide the following information in writing:
  - i. Location of injury to ISF or NLL water right(s) (stream(s) or lake(s) affected, and length of affected reach(es));
  - ii. Quantification of injury (amount, timing and frequency);
  - iii. Type of water use that would cause the injury;
  - iv. Analysis showing why full ISF or NLL protection is not possible;

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- v. Detailed description of the proposed mitigation, including all measures taken to reduce or minimize the injury;
  - vi. Detailed description of how the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake to a reasonable degree despite the injury;
  - vii. Identification and feasibility analysis of: (1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. This information shall address the environmental and economic benefits and consequences of each alternative; and
  - viii. A discussion of the reasonableness of each alternative considered.
- (f) After receipt and review of the required information, staff will consult with CPW and with the entity that originally recommended the affected ISF or NLL water rights(s) (if other than CPW) to determine whether additional field work is necessary and to identify any scheduling concerns. Staff will request a recommendation from CPW as to whether the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake to a reasonable degree despite the injury, including a discussion of the reasonableness of the alternatives considered. CWCB staff will use best efforts to consult with affected land owners and managers regarding the proposal.
  - (g) Prior to bringing the proposal to the Board for preliminary consideration, staff will consult with the Division of Water Resources on whether the proposal would result in the Division of Water Resources being unable to administer the affected ISF or NLL water right(s) in accordance with the priority system or with Colorado water law.
  - (h) At the first meeting of the two-meeting process required by this Rule, staff will bring the proposal to the Board for preliminary consideration after completing its review of the proposal and its consultation with CPW. Staff will work with the proponent and interested parties to address any preliminary concerns prior to bringing a proposal to the Board. Preliminary consideration by the Board may result in requests for more information or for changes to the proposal. Staff will work with the proponent and interested parties to finalize the proposal and bring it back to the Board for final action at a subsequent Board meeting.
  - (i) The Board will consider the following factors when evaluating Injury with Mitigation proposals. Because Injury with Mitigation proposals may involve unique factual situations, the Board may consider additional factors in specific cases. Further, evaluation of each Injury with Mitigation proposal will require the exercise of professional judgment regarding the specific facts of the proposal.
    - i. Extent of the proposed injury:
      - 1. Location of injury – affected stream(s) or lake and length of affected reach(es);
      - 2. Amount, timing and frequency of shortage(s) or impacts to the affected ISF or NLL water right(s); and

3. Potential impact to the natural environment of the affected stream reach(es) or lake from the proposed injury.
- ii. Benefits of the mitigation to the natural environment:
  1. The nature and extent of the benefits the mitigation will provide to the existing natural environment of the affected stream or lake;
  2. The scientific justification for accepting the mitigation; and
  3. Whether the mitigation will enable the Board to continue to preserve or improve the natural environment of the subject stream or lake to a reasonable degree.
- (j) Evaluation of proposed alternatives. The Board shall evaluate: (1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. In its evaluation, the Board shall consider the following factors:
  - i. Availability of on-site mitigation alternatives;
  - ii. Technical feasibility of each alternative;
  - iii. Environmental benefits and consequences of each alternative;
  - iv. Economic benefits and consequences of each alternative;
  - v. Reasonableness of alternatives;
  - vi. Administrability of proposed alternatives by the Board and the Division Engineer; and
  - vi. For mitigation alternatives, whether the mitigation was or will be put in place to satisfy a requirement or need unrelated to the Injury with Mitigation proposal.
- (k) The Board will consider mitigation on a different reach of stream or another stream ("off-site mitigation") as a last resort and will only consider mitigation in an area other than the affected stream reach if no reasonable alternative exists for mitigation on the affected stream reach. The Board only will consider off-site mitigation on stream(s) located in the same drainage as the affected stream. Factors that the Board may consider in looking at such a proposal include, but are not limited to, the degree and frequency of impact to the affected stream; the environmental benefits provided to the off-site stream by the mitigation; whether the proposal could, in effect, constitute a modification of the ISF water right on the affected stream; or whether the proposal could result in the Division of Water Resources being unable to administer the affected ISF water right(s) in accordance with the priority system or with Colorado water law.
- (l) Stipulations and water court decrees that incorporate Injury with Mitigation shall include, but not be limited to inclusion of, the following terms and conditions:

- i. A provision that the proponent will not divert water or take any other action that would reduce flows in the affected stream or levels in the affected lake below the decreed ISF or NLL amount until the agreed-upon mitigation measures are in place and fully operational;
- ii. A requirement that the structural components of the mitigation be maintained permanently;
- iii. A provision allowing CWCB or CPW staff access to the property on which structural components of the mitigation are located to inspect the structures at certain time intervals, and, if necessary, to perform biological stream or lake monitoring. This provision shall clearly define the reasonable nature, extent and timing of such access (i.e, advance notice, dates, times or season of access, coordination with proponent, and location and routes of access);
- iv. A term providing that if the proponent ceases to provide the agreed upon mitigation (such as removing structural components or failing to maintain them to a specified level, or ceasing to implement non-structural components), that the proponent will not divert water or take any other action that would reduce flows in the affected stream or levels in the affected lake below the decreed ISF or NLL amount because the Board will no longer accept the injury based upon the mitigation no longer being in effect -- in such case, if the Board places a call for the affected ISF or NLL water right, the Board will notify the Division Engineer that this provision of the decree now is in effect and that the Board is not accepting the injury;
- v. A requirement that the proponent install and pay operation and maintenance costs of (or commit to pay operation and maintenance costs if the CWCB installs) any measuring devices deemed necessary by the Division Engineer to administer the terms of the stipulation and decree implementing the Injury with Mitigation pretrial resolution; and
- vi. A term providing that the water court will retain jurisdiction to enforce the terms and conditions set forth above in subsections (i) - (vi), and any other terms and conditions specific to the Injury with Mitigation pretrial resolution, as a water matter.

#### **8j. Authorization to Proceed to Trial.**

In the event that a Statement of Opposition filed by the Board is not settled prior to the last regularly scheduled Board meeting prior to the trial date, Staff shall seek Board authorization to proceed to trial. In the event that Staff is authorized to proceed to trial, the Board may adjourn to executive session to discuss settlement parameters with its counsel. Staff is authorized to settle any litigation without Board ratification if the settlement terms are consistent with instructions given by the Board to its counsel.

#### **8k. Public Review Process.**

The Board shall follow the public review process in Rules 11a. - 11c. prior to consideration of a request to ratify a pretrial resolution pursuant to Rule 8i.(3).

#### **8l. Notice.**

At any time Staff verifies that an ISF water right is not being fulfilled as a result of water use against which the ISF water right is entitled to protection, the Staff shall provide Proper Notice, including a description of what the Board is doing in response to the situation.

**9. MODIFICATION OF ISF RIGHTS.**

The Board may modify any existing decreed ISF right according to the procedures set forth in this Rule. "Modification" of an ISF right within the meaning of this Rule includes a decrease in the rate of flow described in the existing ISF decree, segmenting an existing ISF reach into shorter reaches with the result of decreasing the rate of flow in any portion of an ISF reach, or subtracting water from an ISF right during any particular time period or season.

**9a. Need for Modification.**

Modification may be requested by the Staff or by any Person who has filed a water right application on an ISF reach or who has applied for any governmental permit for facilities located in or near an ISF reach and who complies with Rules 9b. and 9c. Any request for modification, except by staff, shall be made in writing, submitted to Staff and such writing shall contain the following information:

- (1) name, address and telephone number of the Person seeking modification;
- (2) stream or lake subject of request;
- (3) modification requested;
- (4) reason for modification; and
- (5) the scientific data supporting the request.

**9b. Need for Water.**

Any Person who requests a modification of an ISF right must, as a precondition to the Board's consideration of the request, establish a need for the water made available by the modification. Staff does not have to comply with this rule and any governmental entity seeking to implement the terms of an agreement specified in Rule 9f. does not have to comply with this section.

**9c. Grounds for Modification.**

No request for modification may be considered until the applicant establishes that one of the following reasons for modification exists:

**(1) Mistake.**

An ISF right may be considered for modification if the requesting Person establishes that an error was made in the calculations upon which the original or supplemental appropriation or enlargement to an original appropriation was made.

**(2) Excessive Flow.**

An ISF right may be considered for modification if the requesting Person establishes that the ISF flow rate is in excess of the amount of water necessary to accomplish the purpose of the original, supplemental or enlarged ISF right when that right was appropriated.

**9d. Recovery Implementation or Other Intergovernmental Agreement.**

An ISF right may be modified if such modification was agreed upon by the Board as part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin or any other agreement between the Board and another governmental entity. Modifications made as a part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin need not be subject to the public review process in Rule 9e. Criteria for modifications made in the ISF rights decreed as part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin will be established in the decrees governing such appropriations.

**9e. Public Review Process of Requests for Modification.**

The Board shall adhere to the following public review process when considering requests for modification:

**(1) Notice.**

Notice of the proposed modification and the date of the public meeting at which it will first be considered shall be printed in the resume in the Water Court having jurisdiction over the decree that is the subject of the modification. The first public meeting of the Board at which the modification is to be considered shall occur at least sixty days after the month in which the resume is published. Notice shall also be published in a newspaper of statewide distribution within thirty to forty-five days prior to such first public meeting.

**(2) Public Meeting.**

If the Board decides at such first public meeting to give further consideration to the proposed modification, the Board shall announce publicly the date of a subsequent public meeting for such purpose. If the Board decides that it will not give further consideration to the proposed modification, it shall state, in writing, the basis for its decision.

**(3) Request for Delay.**

On the written request of any Person made within thirty days after the date of the first public meeting, the Board shall delay the subsequent public meeting for up to one year to allow such Person the opportunity for the collection of scientific data material to the proposed modification. The Board need not grant the request if it determines that the request is made solely to delay the proceedings.

**(4) Procedures.**

On the written request of any Person made within thirty days after the date of the first public meeting, the Board shall, within sixty days after such request, establish fair and formal procedures for the subsequent public meeting, including the opportunity for reasonable disclosure, discovery, subpoenas, direct examination, and cross examination. Subject to these rights and requirements, where a meeting will be expedited and the interests of the participants will not be substantially prejudiced thereby, the Board may choose to receive all or part of the evidence in written form.

**(5) Final Determination.**

The Board shall issue a final written determination regarding the modification that shall state its effective date, be mailed promptly to the Persons who appeared by written or oral comment at the Board's proceeding, and be filed promptly with the water court.

**10. ENFORCEMENT AGREEMENTS.**

The Board may attach conditions to an appropriation, decreased appropriation, or acquisition, and may enter into any enforcement agreements that it determines will preserve or improve the natural environment to a reasonable degree. The Board may enter into enforcement agreements that limit the Board's discretion in the protection, approval of inundation, modification or disposal of ISF right, and/or may delegate limited authority to act on the Board's behalf.

**10a. Ratification of Enforcement Agreements.**

No enforcement agreement shall be effective to limit the discretion of the Board until that agreement and all of its terms are reviewed and ratified by the Board. Upon ratification, the Director may execute the agreement and the agreement shall be binding upon the Board for the term set forth in the enforcement agreement.

**10b. Public Review Process.**

The Board shall follow the public review process set forth in Rules 11a. - 11c. prior to any Board decision to ratify an Enforcement Agreement.

**11. PUBLIC REVIEW PROCESS.**

Except as otherwise provided in the ISF Rules, the Board shall follow the public review process set forth below prior to any Board decision requiring public review.

**11a. Public Notice.**

Public notice of all Board actions under these Rules shall be provided through the agenda of each regular or special Board meeting.

**11b. Public Comment.**

Except as otherwise provided in Rules 5k. and 6m., at a regular or special meeting, the Board shall consider public comment on the recommended ISF action prior to the Board action on the recommendation in any or all of the following manners:

- (1) Oral and/or written comments may be directed to Staff. When such comments are made, Staff may summarize these comments to the Board.
- (2) Oral and/or written comments, subject to reasonable limitations established by the Board, may be made directly to the Board during the public meeting.

**11c. Public Agency Recommendations.**

Prior to taking an ISF action pursuant to Rules 5 or 6, the Board shall request recommendations from Colorado Parks and Wildlife. The Board shall also request recommendations from the United States Department of Agriculture and the United States Department of Interior. The Board may also request comments from other interested Persons or agencies as it deems appropriate.

Prior to taking an ISF action pursuant to Rules 7, 8, 9, or 10, the Board may request recommendations from Colorado Parks and Wildlife, the Division of Water Resources, the United States Department of Agriculture, the United States Department of Interior or other Persons as it deems appropriate.

**11d. Board Procedures.**

At a regular or special Board meeting, the Board may, as necessary, adopt or amend procedures to supplement these rules.

**12. SEVERABILITY.**

In the event that any section or subsection of these Rules are judged to be invalid by a court of law or are allowed to expire by the General Assembly, the remaining Rules shall remain in full force and effect.

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**Editor's Notes****History**

Entire rule eff. 03/02/2009.

Rules 4c, 6f.(2), 6k, 6m, 7d, 8i(3), 11c eff. 03/17/2021.