

**BEFORE THE COLORADO WATER CONSERVATION BOARD**

---

**COLORADO SPRINGS UTILITIES' PREHEARING STATEMENT**

---

**IN THE MATTER OF THE PROPOSED ACQUISITION OF AN INTEREST IN THE  
SHOSHONE WATER RIGHTS FOR INSTREAM FLOW USE ON THE COLORADO  
RIVER**

---

Pursuant to Rule 6(m)(5)(f) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level, 2 CCR 408-2 (ISF Rules) and paragraph I. of the July 18, 2025 Order Re: Procedures and Deadlines for Prehearing Submissions, the City of Colorado Springs, acting by and through its enterprise, Colorado Springs Utilities (Springs Utilities) hereby submits this Prehearing Statement.

**A. Statement of Springs Utilities' Position**

**1. Introduction**

Pursuant to the Charter of the City of Colorado Springs, Springs Utilities supplies water to approximately 500,000 customers within the City of Colorado Springs and the surrounding area supporting families, specialized healthcare services, higher education institutions, retail centers and five military installations that serve our region, our state and our nation. Approximately 37 percent of the potable water Springs Utilities uses to supply its customers is derived from the first use and reuse of water diverted from the tributaries of the Colorado River under its water rights for the Continental Hoosier System (CHS) and the Homestake System which it owns 50/50 with the City of Aurora. This water is combined with Springs Utilities' other water supplies to satisfy its customers' demands.

On May 6, 2025 the Colorado River Water Conservation District (River District) and Public Service Company of Colorado (PSCo) submitted a formal proposal under which the River District would acquire the senior (1,250 cfs with a with an 1902 appropriation date) and the junior (158 cfs with an 1929 appropriation date) water rights decreed to the Shoshone Hydroelectric Power Plant (SPP) ("Shoshone

Water Rights”) and then dedicate the Shoshone Water Rights to the Colorado Water Conservation Board (CWCB) for instream flow (ISF) purposes at a combined flow rate of 1,408 cfs under C.R.S. § 37-92-102(3) pursuant to a proposed agreement providing the terms and conditions under which the River District would dedicate the Shoshone Water Rights to the CWCB for ISF purposes (Proposed Acquisition Agreement). Under the proposal the CWCB would have the ability to place a call for 1,408 cfs, as limited by the annual volumetric limit of 844,644 acre-feet proposed by BBA Water Consultants, Inc.’s (BBA). This limitation would effectively allow a call of 1,408 cfs 6 months of the year and 1,250 cfs the other 6 months.

Springs Utilities, the River District, and several other West Slope entities entered into a 2024 Blue River Memorandum of Agreement (2024 Blue River MOA) in which Springs Utilities agreed not to oppose the River District and the CWCB adding ISF purposes as a decreed use of the senior Shoshone Water Right, limited to its historic use, and agreed to participate in good faith discussions and negotiations regarding the addition of ISF uses to the junior Shoshone right. In the 2024 Blue River MOA, Springs Utilities conditions its non-opposition to the change of the senior Shoshone Water Right on inclusion of (1) the call relaxation provisions contained in the 2007 Agreement between PSCo and Denver Water Concerning the Shoshone Call (2007 Call Reduction Agreement) and Article VI.E.2 of the 2012 Colorado River Cooperative Agreement (CRCA); and 2) a term and condition related to operation of the Shoshone Water Rights to prevent injury in the event of a curtailment under the Colorado River Compact and the Upper Colorado River Basin Compact in the Proposed Acquisition Agreement and change decree entered by the water court. Provisions to that effect have not been included in the Proposed Acquisition Agreement.

Springs Utilities supports the River District and CWCB’s acquisition of an interest in, and the judicial change of only the senior Shoshone Water Right for ISF purposes to provide for permanency of the historic Shoshone call and maintenance of the historical Colorado River flow regime. Springs Utilities has

not agreed to a change of the junior Shoshone Water Right for ISF purposes and has concerns with adding ISF use to the junior Shoshone Water Right, given that the River District's historical use analysis overstates actual historic diversions and its modeling underestimates the resulting impacts to upstream water users.

Both the 1,250 cfs and 158 cfs Shoshone Water Rights are senior in priority to Springs Utilities' Homestake Project water rights and the portion of its CHS water rights with a 1948 priority (1948 CHS Water Rights). An expansion of use, relative to historical operations by the Shoshone Water Rights, would cause injury to these important Springs Utilities' water supplies. As detailed below, the historic use analysis conducted by BBA and the yield assessment of the Shoshone Water Rights conducted by Hydros Consulting, Inc. ("Hydros") were conducted using flawed methods and therefore Springs Utilities believes if adopted will result in an unlawful enlargement of the Shoshone Water Rights that will reduce the volume of water available to Springs Utilities under its 1948 CHS Water Rights and Homestake Water Rights. To avoid these impacts, it is important for the CWCB to base its acceptance and acquisition of the Shoshone Water Rights for ISF uses on an accurate analysis of the historical operations of the Shoshone Water Rights.

The Proposed Acquisition Agreement currently requires that the CWCB request administration of Shoshone Water Rights at any time the natural flow of the Colorado River at the Dotsero Gage is less than 1,408 unless the River District and CWCB jointly agree to a lower flow rate for administration. That provision usurps the CWCB's exclusive discretion to operate the Shoshone Water Rights for ISF uses in accordance with the statutory authority granted to it under C.R.S. § 37-92-102 and is inconsistent 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 under C.R.S. § 37-60-106(1)." The Proposed Acquisition Agreement must be modified to maintain the CWCB's lawful discretion consistent with proposed language in section A.4 below and to include the provisions required under the 2024 Blue River MOA related to call

relaxation. Finally, the Proposed Acquisition Agreement should be revised to include the term and condition referenced in section A.5 below related to consistency between the CWCB's exercise of the Shoshone Water Rights and rules adopted for the purposes of fulfillment of Colorado's commitments under either or both the Colorado River Compact and the Upper Colorado River Basin Compact.

## **2. Flaws with the River District's Historic Use Analysis**

*The Rules Concerning the Colorado Instream Flow and Natural Lake Levels Program* (2 CCR 408-2) (the "Rules") require the CWCB to consider: (a) any potential material injury to existing decreed water rights; (b) 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. Rule 6(e)(3) and (4). Rule 6(i) requires that in the subsequent change proceeding, the CWCB must request that the Water Court verify the quantification of historical consumptive use, and the identification, quantification, and location of return flows to ensure no injury will result to other absolute or conditional water rights. Together, these provisions obligate the CWCB to conduct a meaningful and fact-based review of the River District's historical use analysis to ensure there is no unlawful expansion of use or injury and provide the Water Court with information regarding the historical use of the Shoshone Water Rights that it can verify.

Without evaluating how the Shoshone Water Rights have actually been used, the CWCB cannot make an informed judgment about whether the acquisition is appropriate, or whether it could lead to an unlawful expansion of use that results in material injury to other decreed water rights. Therefore, it is critical for the CWCB's acquisition and change of use of the Shoshone Water Rights for ISF purposes be supported by a quantification of the historic beneficial use of the right that is based on documented diversions of native water available in priority and put to beneficial use over a representative study period and that is consistent with Colorado law. The River District's proposed methodology for quantifying the historic use of the Shoshone Water Rights as described in BBA's November 8, 2024 Memorandum – Preliminary Shoshone Historical Use Assessment, does not meet this standard and would have significant and consequential

effects on the administration of the mainstem of the Colorado River and its tributaries. Springs Utilities has the following concerns with the River District's proposed methodology that are more specifically described in Ecological Resource Consultants, LLC's (ERC) August 4, 2025 Memorandum Re: Shoshone Power Plant Volumetric Limit.

- a. Unrepresentative Study Period. The River District's proposed methodology defines the study period as 1975-2003 which excludes the most recent 21 years of beneficial use of the Shoshone Water Rights for hydroelectric power generation. In addition, that period is not reflective of the current administration of the Colorado River because the administration of the Grand Valley irrigation (Cameo Call) rights changed in 1998 after the Orchard Mesa Check Case. Therefore, it is important to reflect a study period that is inclusive of 2004-2024.
- b. Use of the Dotsero Gage. BBA inappropriately used records of streamflow at the Dotsero Gage limited to 1,408 cfs as the record of diversions of the Shoshone Water Rights for years in the study period prior to 1998. An appropriate methodology is to limit Shoshone Water Rights historic use to the lesser of available (a) natural Colorado River streamflow unenhanced by upstream reservoir releases, and (b) diversions that were demonstrated to have been put to beneficial use as recorded in Colorado's Decision Support System (CDSS). CDSS stands as the official public record of water diverted through the SPP generating turbines and were provided annually to Colorado Division of Water Resources by the owner of the Shoshone Water Rights.
- c. SPP Outages. The River District's proposed methodology does not appropriately factor in SPP outages. The diversion record period should include zeros by default when the SPP was not operating. In other applications the non-use of a water right is carried as a zero when historic use is determined. If non-maintenance outages occurred, then appropriate evidence must be provided to support using a non-zero record. This will prevent inflating the average annual volumetric.

ERC's analysis indicates that, due to these discrepancies, the River District's preliminary historic use analysis inflates the historical use of the Shoshone Water Rights by approximately 36%, resulting in an expansion of use of the senior and junior Shoshone Water Rights. Specifically, BBA proposed an annual volumetric limit of 844,644 acre-feet. On the contrary, the 1998-2022 period analyzed by ERC appropriately addresses times of power plant outage and appropriately factors water user supplied diversion records. These assumptions would result in an annual use volume of about 538,204 acre-feet which is 36% less than the yield determined by BBA. As discussed in ERC's Memo, BBA's flawed historic use analysis would unlawfully enlarge the use of the Shoshone Water Rights and negatively impact vested water rights above the SPP, and potentially negatively impact timing of flows through the 15-Mile Reach that supports the Upper Colorado River Endangered Fish Recovery Program. *See, e.g. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Res.*, 91 P.3d 1058, 1063 (Colo. 2004) ("Even when it seems clear that no other rights could be affected solely by a particular change [of water right], it is essential that the change also does not enlarge an existing right.")

### **3. The River District's Modeling Understates Impacts to Transmountain Diversions**

The River District's consultant, Hydros, conducted modeling analysis used to support the River District's proposed change of the Shoshone Water Rights. Hydros incorrectly concluded that full use of the Shoshone Water Rights would not result in any appreciable reduction in yield from the 1948 CHS Water Rights. These rights are decreed to divert from tributaries at the headwaters of the Blue River and convey water supplies through the Hoosier Tunnel for delivery to Colorado Springs Metropolitan Area. Diversions under the 1948 CHS Water Rights make up the majority of yield from this project and are junior in priority to the Shoshone Water Rights. An expansion of the Shoshone Water Rights would injure Springs Utilities' water rights by changing the historical Colorado River call regime by lengthening the time a call is placed by the Shoshone Water Rights.

As reflected in ERC's Memo: Evaluation of Hydros Consulting's Shoshone Power Plant Water Rights Yield Assessment (Denver Water Exhibit 7), Hydros' analysis and conclusions are flawed because Hydros did not compare against a baseline condition that reflects the historical use of the Shoshone Water Rights, while ignoring drawdowns at West Slope reservoirs Springs Utilities' operations are dependent on, specifically Green Mountain Reservoir and Homestake Reservoir. Hydros should have also evaluated impacts to reservoirs and storage accounts. Its conclusion that Hoosier Tunnel diversions would experience little change is false. Modeling conducted by ERC shows a conservative estimate of max annual supply reductions through the Hoosier Tunnel of more than 800 acre feet to the existing collection system. Moreover, Springs Utilities is in pre-permitting for enlargement of Montgomery Reservoir to provide resiliency of CHS and in the future, fully utilize absolute decreed 1948 Blue River water rights. In consideration of this, Springs Utilities has agreed to the Shoshone Outage Protocol Agreement, which obligates Springs Utilities to honor a Shoshone Water Right call of 1,250 cfs, with some exceptions outlined in the 2024 Blue River MOA. An expansion of Shoshone Water rights for ISF use calling up to 1,408 cfs causes injury to diversions under planned enlargement of Montgomery Reservoir. This reduction in yield would materially impair Springs Utilities' vested water rights and the ability to manage its water system to meet the needs of its 500,000 customers. Springs Utilities joins in the Homestake Partner's position on the Hydros analysis as it relates to the Homestake Water Rights.

#### **4. The Proposed Acquisition Agreement Impermissibly Limits the CWCB's Statutory Discretion**

Section 37-92-102(3), C.R.S., grants the CWCB exclusive authority to appropriate and acquire water rights to preserve the natural environment to a reasonable degree, which includes the discretion to determine when and how to operate an instream flow water right. The second sentence of paragraph 7 of the Proposed 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 Guage is less than 1,408 cfs unless it enters into a separate agreement with the River District allowing for reduced calls. This language impermissibly limits the CWCB's sole discretion to decide not to place a call or place an ISF 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 and essentially allows the River District to overrule a decision by the CWCB to adjust the call. As such the Proposed Acquisition Agreement must 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. Adding the following term and condition to the Proposed 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.

## **5. The Proposed Acquisition's Effect on Colorado's Interstate Compacts**

It is important that the ISF use not reduce the amount of Colorado River water available for existing users and future water supply development within the State under Colorado's Compact apportionments. If the change of the Shoshone Water Rights for ISF purposes results in an expansion of historical use under



the Shoshone Water Rights, then more water may be delivered than required under Colorado's compact obligations thereby reducing the amount of water available for use in Colorado.

The 2024 Blue River MOA provides, in part, that Springs Utilities will not oppose the ISF use of the senior Shoshone Water Right, limited to historic use, provided the Proposed 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 instream flow 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.

#### **B. Witnesses**

At the September 16, 2025 hearing, Springs Utilities may call the following witnesses to present evidence on the issues discussed above and a brief description of such testimony is provided below:

1. Heather Thompson, PE. Ms. Thompson will testify about her critiques of the BBA and Hydros Analysis and offer her assessment of what a corrected historical use analysis would yield.

Ms. Thompson is only available to provide testimony on the afternoon of September 16 and all day September 17, 2025.

2. Tyler Benton, PE – Mr. Benton will testify as to some of Springs Utilities’ positions taken in this Prehearing Statement, the impacts to Springs Utilities water system resulting from expansion of the Shoshone Water Rights, and the 2024 Blue River MOA.

3. Michael J. Gustafson, Esq – Mr. Gustafson will testify as to some of Springs Utilities’ positions taken in this Prehearing Statement, the impacts to Springs Utilities water system resulting from expansion of the Shoshone Water Rights, and the 2024 Blue River MOA.

#### **C. Utilities’ Statement of Any Open Legal Questions**

1. Does the Proposed Acquisition Agreement improperly surrender the CWCB’s exclusive authority to operate water rights for ISF purposes to the River District?

2. Must the CWCB evaluate historical beneficial use and stream conditions as part of its statutory and regulatory obligations?

#### **D. Utilities’ Statement of Relief Requested**

Because the River District’s proposed Acquisition Agreement fails to comply with its existing contractual obligations regarding Shoshone permanence, Springs Utilities respectfully requests that the CWCB seek the River District’s consent to delay the CWCB’s action on the proposed acquisition until the River District presents a proposed Acquisition Agreement that does comply with its contractual obligations. The River District should be given an opportunity to address significant outstanding concerns related to the historical use analysis and to add the terms previously agreed to in the 2024 Blue River MOA in the ISF Acquisition Agreement. Specifically, delay would provide the parties time to:

1. Revise the River District's historic analysis for both the senior<sup>1</sup> and junior Shoshone Water Rights to resolve the technical flaws identified by Springs Utilities and other Front Range Water Council parties necessary to prevent an unlawful expansion of use and injury to Springs' Utilities water rights;
2. Modify the ISF Acquisition Agreement to preserve the CWCB's discretionary authority over enforcement and administration of the changed water rights, similar to that proposed in section A.4;
3. Incorporate the terms of the 2007 Call Reduction Agreement into the ISF Acquisition Agreement as permitted by the 2024 Blue River MOA; and
4. Modify the Proposed Acquisition Agreement to include the language provided at the end of section A.5 above regarding exercise of the Shoshone Water Rights in the event of Colorado River compact call.<sup>2</sup>

Alternatively, in the event the River District does not consent to such a delay, the CWCB has no choice but to deny the proposal, which would allow the River District to refile a proposal at a later date that does comply with its contractual commitments with regard to Shoshone permanence. At present, the CWCB can approve an acquisition only if it is limited to the actual historical use of the senior Shoshone Water Right and other limitations to which the River District expressly agreed with Springs Utilities (due to the injurious effect of operation of the junior Shoshone Right on Springs Utilities' Water Rights) and includes the terms requested in the last three bullets above. While Springs Utilities is not seeking or

---

<sup>1</sup> At this time, while Springs Utilities is not opposed to CWCB *acquiring* the junior Shoshone Right it is opposed to CWCB seeking to change the junior Shoshone Right to ISF uses absent further negotiation and agreement, due to the unacceptable risk that, when combined with the Senior Right, it could lead to administrative calls well in excess of what which occurred historically, resulting in an unlawful expansion of use and material injury to Springs' Utilities water rights.

<sup>2</sup> If the provisions requested in items 3 and 4 are not included in the Proposed Acquisition Agreement, consistent with the 2024 Blue River MOA, Utilities reserves its right to object to a change of the senior Shoshone Water Right and seek additional drought protections, including those referenced in the 2024 Blue River MOA or the ShoP related provisions included in Denver Water's Exhibit 1 to ensure its water rights are protected.

supporting any additional relaxation of the Shoshone Water Rights, it has no objection to the drought protections in the ISF Acquisition Agreement as proposed by Denver Water or any other recommended provisions that may be more protective of water users against an expansion of use of the Shoshone Water Rights. However, Springs Utilities does not concede or agree that Denver Water's proposed revisions, in and of themselves, prevent injury to Springs Utilities' water rights.

Springs Utilities supports the CWCB's goal of protecting the natural environment through its Instream Flow Program but emphasizes that any acquisition must be narrowly tailored to avoid unlawful expansion of use and ensure continued reliability of water supplies for Coloradans on both sides of the Divide.

**E. Amount of Time Desired for the Party's Presentation at the Hearing.**

Springs Utilities requests 1 hour at the hearing or in the alternative 4 hours to be shared jointly with Northern Water, Aurora Water, Denver Water, and Homestake Partners. If Colorado Springs is granted 1 hour it intends to allocate a portion of its time for Ms. Thompson's testimony.

**F. Utilities' Exhibit List:**

A list of the Exhibits Utilities intends to introduce at the hearing is below and copies of the exhibits are provided herewith.

1. Springs Utilities 1 - Map of Springs Utilities' West Slope Collection System
2. Springs Utilities 2 - Map of Springs Utilities' Water service area
3. Spring Utilities 3 – Description of Springs Utilities' of CHS Water Rights
4. Spring Utilities 4 – Description of Homestake Water Rights
5. Springs Utilities 5 – 2024 Blue River MOA
6. Springs Utilities 6 – Resume of Tyler Benton
7. Denver 1 – Draft Shoshone Water Rights Dedication and ISF Agreement with Redlines and Comments

8. Denver 2 - 2013 Colorado River Cooperative Agreement
9. Denver 4 - 2007 Call Reduction Agreement
10. Denver 5 - Technical memorandum by Heather Thompson, Re: Shoshone Power Plant Volumetric Limit
11. Denver 6 - Technical memorandum by Heather Thompson, Re: Evaluation of Hydros Consulting's Shoshone Power Plant Water Rights Yield Assessment
12. Denver-7: Resume of Heather Thompson
13. Denver 8.a - Thompson Graphs and Tables BBA Memo
14. Denver 8.b - Thompson Graphs and Tables Hydros Memo

Respectfully submitted this 4th day of August, 2025,

**Office of the City Attorney**

By: \_\_\_\_\_

Michael J. Gustafson, Reg No. 37364  
**Attorney for Colorado Springs Utilities**

#### **CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of August 2025, a true and correct copy of **Colorado Springs Utilities' Prehearing Statement** was electronically submitted to the Colorado Water Conservation Board via email to [Jackie.Calicchio@coag.gov](mailto:Jackie.Calicchio@coag.gov).

\_\_\_\_\_  
Michael J. Gustafson