

## **BEFORE THE COLORADO WATER CONSERVATION BOARD**

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

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#### **HOMESTAKE PARTNERS' PRE-HEARING STATEMENT**

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The City of Colorado Springs, acting through Colorado Springs Utilities (“Springs Utilities”), and the City of Aurora, acting by and through its Utility Enterprise (“Aurora”), both acting by and through the Homestake Steering Committee (collectively, “Homestake Partners”), by and through its undersigned attorneys, files its Pre-Hearing Statement pursuant to Rule 6m.(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:

#### **I. Statement of Homestake Partners' Position.**

Homestake Partners own and operate a number of water rights in the Eagle River basin that collectively comprise the Homestake Project, originally decreed in Civil Action No. 1193, Eagle County District Court on June 8, 1962, with an appropriation date of September 22, 1952. Under the Homestake Project, water rights from various tributaries in the headwaters of the Eagle River basin are diverted into Homestake Reservoir, and then through the Homestake Tunnel underneath the Continental Divide into Turquoise Lake near Leadville. From Turquoise Lake, water can be released for delivery to Aurora and Colorado Springs' respective service areas. The water rights comprising the Homestake Project are junior in priority to both the senior and junior water rights

decreed to the Shoshone Power Plant (“Shoshone Water Rights”), and thus are subject to a valid call of the Shoshone Water Rights.<sup>1</sup>

While Homestake Partners generally supports the Colorado Water Conservation Board’s (“CWCB”) acquisition of the senior Shoshone Water Right<sup>2</sup> from Public Service Company and the Colorado River Water Conservation District (“River District”), Homestake Partners assert:

- (1) terms and conditions agreed to by the River District in its prior agreements with Aurora and Springs Utilities must be included in the Acquisition Agreement and incorporated in any final decree issued by the Division 5 Water Court; and
- (2) CWCB’s acquisition must be accomplished pursuant to the requirements of § 37-92-102(3) and the ISF Rules, including but not limited to the requirement that CWCB evaluate the appropriateness of the proposed acquisition by considering “[a]ny potential material injury to existing decreed water rights” and “[t]he historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use.” ISF Rules, ¶ 6(e)(3)-
- (4).

Homestake Partners hereby incorporate the statements made by Aurora and Springs Utilities in their prehearing statements regarding those necessary terms and conditions previously agreed to by the River District. Additionally, Homestake Partners further incorporate Aurora’s and

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<sup>1</sup> The senior Shoshone right was decreed for 1,250 cfs in 1907 with a 1902 appropriation date, and the junior Shoshone right was decreed for 158 cfs in 1956 with a 1929 appropriation date.

<sup>2</sup> At this time, while Homestake Partners is not opposed to CWCB *acquiring* the junior Shoshone Right, Homestake Partners is opposed to CWCB seeking to change the junior Shoshone Right to instream flow 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 occurred historically, resulting in an unlawful expansion of use and material injury.

Springs Utilities' statements regarding the flaws with the River District's historical use analysis provided by Bishop Brogden Associates ("BBA Analysis").

As further described by Aurora and Springs Utilities, their expert, Environmental Resource Consultants ("ERC") has provided a technical memorandum that demonstrates BBA's analysis overstates the historical use of the Shoshone Water Rights that is appropriate to change to instream flow use by 36%, a clear unlawful expansion of historical use. *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 not enlarge an existing right. Because an absolute decree is itself not an adjudication of actual historic use but is implicitly further limited to actual historic use, in order to insure that a change of water right does not enlarge an existing appropriation, its 'historic beneficial [ ] use,' must be quantified and established before a change can be approved.").

In addition, Hydros Consulting, Inc. has provided a yield assessment of the Shoshone Water Rights on behalf of the River District. ERC's additional technical memorandum in response to Hydros' analysis demonstrates that the overstatement in historical use will cause injury to Homestake Partners' water rights. Adoption of the annual volumetric as proposed by BBA will lead to a maximum annual decrease of 6,869 acre-feet of water in storage at Homestake Reservoir. Decreases in storage at Homestake Reservoir contribute to a maximum decrease in 6,047 acre feet of deliveries through Homestake Tunnel. Additionally, ERC's analysis - using correct assumptions - shows that during the study period there are 168 months (54% of the model period) that Homestake Reservoir contents decrease by more than 500 acre-feet, which content decreases were not shown under Hydros' flawed analysis. "Under the no injury rule, water users may change, among other things, the type, place, or time of use associated with a water right only if they

demonstrate that the change will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.” *United States v. City of Golden*, 551 P.3d 634, 648 (Colo. 2024) (citing § 37-92-305(3)(a), C.R.S.).

## **II. Statement of Open Legal Questions.**

Homestake Partners hereby incorporates the open legal questions set forth in Aurora and Springs Utilities’s prehearing statements.

## **III. Statement of Relief Requested.**

As further set forth by Aurora and Springs Utilities, Homestake respectfully requests that CWCB seek the River District’s consent to delay CWCB’s action on the proposed acquisition, or deny the proposed acquisition at this time. Delay or denial will allow the River District and other interested parties the opportunity to address significant outstanding concerns related to the Proposed Acquisition Agreement, which currently lacks terms previously agreed to between the River District and other parties, including Aurora and Springs Utilities, and to address significant outstanding concerns related to the River District’s proposed historical use analysis. Specifically, delay or denial would provide the parties time to:

1. Work cooperatively on the River District’s proposed historical use analysis for both the Senior and Junior Shoshone Water Rights to resolve the technical flaws in such analysis identified by ERC that currently allow for an unlawful expansion of use of the Shoshone Water Rights and cause injury to the Homestake Project. Allowing the parties to work together to reach a consensus on the historical use analysis before it is considered by CWCB would allow CWCB the opportunity to consider a potential solution that benefits users on both the East Slope and West Slope and the state of Colorado as a whole, rather than forcing the parties into potential litigation in water court that may lead to further division and increased transaction costs for all parties.

2. Modify the Proposed Acquisition Agreement to include language that preserves CWCB's discretionary authority over enforcement and administration over the Shoshone Water Rights after they are changed for instream flow use;

3. Modify the Proposed Acquisition Agreement to incorporate the terms of Aurora's and Springs Utilities' prior agreements with the River District.

#### **IV. Time Requested**

Homestake Partners requests one hour at the hearing; or alternatively, four hours in combination and coordination with Denver Water, Northern Water, Aurora and Springs Utilities.

#### **V. Homestake Partners' Witness List.**

1. Heather Thompson, P.E. Ms. Thompson will testify to her critique of BBA's and Hydros' analyses, as well as the injury to Homestake Partners' water rights if those analyses are adopted.
2. Richard Kienitz, Water Resources Basin Manager, Aurora Water. Mr. Kienitz will testify as to some of Homestake's positions taken in this pre-hearing statement, and the impacts and injury to the Homestake Project resulting from expansion of the Shoshone Water Rights.
3. Tyler Benton, P.E., Senior Water Resource Engineer, Colorado Springs Utilities. Mr. Benton will testify as to some of Homestake's positions taken in this pre-hearing statement, and the impacts and injury to the Homestake Project resulting from expansion of the Shoshone Water Rights.


#### **VI. Homestake Partners' Exhibit List**

1. Homestake-1: Applicable portions of Decree entered in CA 1193, Eagle County District Court (provided herewith)

2. Homestake-2: Map of Homestake Project (provided herewith)
3. Denver-1: Draft Shoshone Water Rights Dedication and ISF Agreement with Redlines and Comments (being provided by Denver Water)
4. Denver-4: 2007 Call Reduction Agreement (being provided by Denver Water)
5. Denver-5: ERC Technical memorandum by Re: Shoshone Power Plant Volumetric Limit (being provided by Denver Water)
6. Denver-6: ERC Evaluation of Hydros Consulting's Shoshone Power Plant Water Rights Yield Assessment (being provided by Denver Water)
7. Denver-7: Resume of Heather Thompson (being provided by Denver Water)
8. Denver-8.a: H. Thompson Graphs and Tables re BBA Memo (being provided by Denver Water)
9. Denver-8.b: Thompson Graphs and Tables re Hydros Memo
10. Springs Utilities-4: List of Homestake water rights (being provided by Springs Utilities)
11. Springs Utilities-5: 2024 Blue River MOA (being provided by Springs Utilities)
12. Springs Utilities-6: Resume of Tyler Benton, P.E. (being provided by Springs Utilities)
13. Aurora-2: 2018 IGA (being provided by Aurora)
14. Any other exhibits listed by any other parties.

Respectfully submitted this 4th day of August 2025.

FAIRFIELD AND WOODS, P.C.



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Philip E. Lopez, Reg. No. 40484

Attorneys for Homestake Partners

## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2025, a true and correct copy of **Homestake Partners' Prehearing Statement** was electronically submitted to the Colorado Water Conservation Board via email to [Jackie.Calicchio@coag.gov](mailto:Jackie.Calicchio@coag.gov) and [john.watson@coag.gov](mailto:john.watson@coag.gov), and to those parties listed in the Certificate of Service attached to the Hearing Officer's July 18, 2025 Prehearing Order via email to the email addresses listed for those parties therein.

/s/ Philip E. Lopez