

THE COLORADO WATER CONSERVATION BOARD

IN THE MATTER OF PROPOSED INSTREAM FLOW ACQUISITION DIVISION 5: SHOSHONE WATER RIGHTS

PREHEARING STATEMENT OF AURORA WATER

Pursuant to Rule 6m.(5)(f) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level, 2 CCR 408-2 (ISF Rules), the City of Aurora, Colorado, acting by and through its Utility Enterprise (Aurora Water) hereby submits its prehearing statement regarding the Colorado Water Conservation Board's (CWCB) proposed acquisition of the Shoshone Water Rights for instream flow purposes.

I. INTRODUCTION

The CWCB is being asked to make a precedent-setting decision with sweeping implications for water administration on the Colorado River. If done incorrectly, the proposed acquisition and change of use of the Shoshone Water Rights could fundamentally alter the river's flow regime and reduce critical water supplies relied upon by millions of Coloradans east of the Continental Divide.

The Colorado River Water Conservation District (River District) and Public Service Company of Colorado (PSCo) propose to transfer both the Senior Shoshone Water Right (1,250 cfs, adjudicated 1907, appropriation date 1902) and the Junior Shoshone Water Right (158 cfs, adjudicated 1956, appropriation date 1929) to CWCB for instream flow (ISF) use under C.R.S. § 37-92-102(3). Aurora Water supports the concept of protecting the historic stream regime through the addition of ISF as a use of the Senior Shoshone Water Right, subject to its requests set forth below. However, Aurora Water has serious concerns with adding ISF use to the Junior Shoshone 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.

In 2018, as part of the settlement of an Aurora Water right change case, Aurora Water, the River District and other West Slope entities entered into a comprehensive intergovernmental agreement (2018 IGA) that settled a number of disagreements. Under the 2018 IGA, Aurora Water agreed to support changing the Senior Shoshone Water Right to include ISF use, and in return, the River District agreed to several important protections:

1. That the change of the Senior Shoshone Water Right to add ISF uses would maintain the flow regime created by the Senior Water Right (see ¶ 34);
2. That the “Agreement Regarding Shoshone Call Reduction,” between the Denver Water, the River District and PsCO, dated April 30, 2007 (2007 Call Reduction Agreement)¹ is made permanent and applies to any ISF use (¶ 34.4.1); and
3. That in the event of curtailment or the threat of curtailment under the Colorado River Compact or the Upper Colorado River Basin Compact, the CWCB and ISF parties will work cooperatively with all water users, including Aurora, to minimize adverse impacts across the divide (¶ 34.4.2).

The River District’s proposed draft Shoshone Water Rights Dedication and ISF Agreement (Proposed ISF Agreement) fails to meet these requirements of the 2018 IGA.

In the 2018 IGA, Aurora Water specifically reserved the right to agree to the addition of ISF use to the Junior Shoshone Right only upon further good faith negotiation and agreement. However, the River District’s engineering overstates actual historic diversions, and its modeling underestimates the resulting impacts to upstream water users. Compounding this, the River District conflates the Junior and Senior Shoshone Water Right, proposing a regime that would allow administrative calls well in excess of what occurred historically, resulting in material injury.

¹ The 2007 Call Reduction Agreement allows junior water users to refill reservoirs and/or divert water through trans-basin or in-basin diversions during the pre-runoff period in exceedingly dry years when the Shoshone Water Rights would otherwise call on those rights. Reduction of the call occurs in years when the Denver Water predicts that reservoir storage in its system on July 1st will be at or below 80% and forecast for the April - July flow of the Colorado River at the Kremmling gage will be less than or equal to 85% of average. When those conditions are met, the Shoshone Call is reduced to a senior water right call of 704 cfs during the period of March 14th – May 20th.

This concern is reinforced by the terms of the Proposed ISF Agreement, which obligates the CWCB to request full administration of both rights—1,408 cfs—for instream flow purposes whenever the rights are not being used for power generation (see ¶¶ 7–8). By requiring administration at the full combined rate at all times, the agreement strips the CWCB of its discretion to account for broader system conditions—such as drought, compact considerations, or storage operations—enshrining an unlawful expansion of the Shoshone Water Rights and guaranteeing material injury to junior rights, including Aurora’s. This approach constitutes a de facto expansion of the original rights, in direct contravention of Colorado water law. Accordingly, Aurora Water cannot support adding ISF use to the Junior Shoshone Water Right at this time.

II. STATEMENT OF AURORA WATER’S POSITIONS

The CWCB’s decision regarding the proposed acquisition and change of the Shoshone Water Rights must be grounded in accurate data, comply with the requisite legal standards, and employ a statewide perspective. Aurora Water opposes the River District’s current proposal because it relies on flawed assumptions that materially overstate historical use and underestimate injury, threatening the reliability of critical drinking water for almost 400,000 Coloradans in Aurora Water’s service area.

Pursuant to ISF Rule 6(e), the CWCB must evaluate the potential injury and the historical use of water rights proposed for acquisition. Though complex, these evaluations are essential. The Board must safeguard its statutory obligations by acting on behalf of the people of the state of Colorado, not only promoting the policies and purposes of the ISF Program, but also ensuring that any acquisition both preserves the natural environment to a reasonable degree and protects existing water uses. This requires the Board to apply a statewide perspective that balances environmental

goals with the need of existing water users. Colorado Law requires the preservation of the status quo flow regime of the original rights.

A. The River District's Historical Use Analysis Is Flawed and Materially Inflates the Volumetric Limit of the Shoshone Water Rights.

The River District's consultant, BBA Water Consultants (BBA), proposes an annual volumetric limit of 844,644 acre-feet for the Shoshone Water Rights—an estimate that is significantly overstated due to multiple methodological flaws in both the diversion data and analytical approach. First, as analysis by Heather Thompson of Ecological Resource Consultants (ERC) will show, BBA relies on diversion estimates based on administrative flows at the Dotsero gage but fails to properly exclude flows that were not actually diverted for beneficial use at the Shoshone Power Plant. These include releases for downstream contracts, deliveries to others, and periods when the plant was offline or bypassed. The analysis also includes unverified diversions and flows not applied to hydropower generation but released through tunnel adits or lost before reaching the turbines. This approach fails to meet Colorado legal standards, which require historical beneficial use to be based on actual diversion and application to use. Second, BBA's selected study period (1975–2003) is outdated and incomplete. It omits over 20 years of more recent data during which the Shoshone Power Plant experienced more frequent and prolonged outages, reflecting a substantially different operational and administrative regime required by water court cases that changed the River administration in the late 1990's. Specifically, the pre-2003 years reflect historical river operations that predate the Orchard Mesa Check Case, Case No. 91CW247, Water Division No. 5 (Oct. 1, 1996), and no longer represent the actual historic administration, or probable future hydrology, distorting the measure of representative use. Finally, BBA's methodology overstates the water physically and legally available for diversion by underestimating upstream contract deliveries and failing to account for shepherded water. These

omissions artificially inflate the modeled administrative flows and thereby exaggerate the potential diversions.

Analysis by ERC with revised assumptions that incorporate a more accurate diversion dataset, a more representative study period, and appropriate outage adjustments consistent with actual historical use and operational realities yield a much lower volumetric limit—on the order of 538,204 acre-feet annually (a 36% difference). If the River District’s flawed estimate is adopted, the result would be an unlawful expansion of the Shoshone Water Rights and injury to junior users in direct contravention of Colorado Law.

B. The River District’s Modeling Understates Impacts to Transmountain Diversions and Threatens Aurora Water’s Municipal Supply.

Currently, when the Senior Shoshone Water Right is being administered, Aurora Water must curtail its Columbine Ditch water rights. When either of the Senior or the Junior Shoshone Water Right is calling, the Homestake Partners must curtail diversions on the Homestake System. Under the River District’s proposed ISF regime for the Shoshone Water Rights, Aurora Water’s water rights would be curtailed more frequently, leading to increased drawdowns of Homestake Reservoir and more frequent curtailment of the Columbine Ditch. These impacts would reduce the reliability of Aurora Water’s water supply during moderate and severe droughts, disrupt reservoir operations and tunnel deliveries, and could necessitate additional drought restrictions for Aurora Water’s customers.

The River District’s consultant, Hydros Consulting (Hydros), conducted a modeling analysis used to support the proposed change of the Shoshone Water Rights. Hydros incorrectly concluded that the full use of the Shoshone Water Rights would not result in any appreciable reduction in Aurora Water’s water supply. Hydros failed to compare against a baseline condition that reflects the historical use of the Shoshone Water Rights and focused solely on deliveries

through Homestake tunnel, ignoring drawdowns at Homestake Reservoir. Evaluating the impacts to upstream reservoirs and storage accounts—like Homestake—demonstrates that Hydros’ conclusion that Homestake tunnel diversions would experience little change is incorrect, as the impact from full use of the Shoshone Water Rights is primarily experienced at Homestake Reservoir. Modeling conducted by ERC shows significantly reduced storage in upstream reservoirs and accounts when the Shoshone Water Rights are changed to include ISF use and operated under the regime proposed by the River District when compared to a baseline condition that reflects historical use. These drawdowns would impair Aurora Water’s ability to manage its water system and meet the needs of more than 390,000 residents.

C. The CWCB Must Evaluate Historical Beneficial Use and Stream Conditions as Part of Its Statutory and Regulatory Obligations.

Before acquisition, CWCB must first evaluate whether the proposed acquisition is appropriate. Under the CWCB’s ISF Rules, the Board is required to consider several key factors, including any potential material injury to existing decreed water rights, the historical use associated with the water right, and whether the acquisition is administrable by the Division Engineer. These requirements ensure that the CWCB acts as a responsible steward of the public interest and avoids acquisitions that would be unworkable or legally problematic. If the Board decides to proceed, it must file an application in Water Court to change the use of the acquired water right to instream flow use. The Water Court ultimately determines whether the proposed change meets the legal requirements for protecting other water rights, but CWCB must give its staff guidance as to the specific claim to be prosecuted and how injury should be prevented.

Aurora Water understands that the CWCB may have taken the position that it need not evaluate the historical use analyses provided by the River District because the water court will ultimately determine historical use in the change application proceeding. However, that position

would be inconsistent with the CWCB’s obligations under its governing statutes and rules. Rule 6e of the CWCB’s Instream Flow Rules (2 CCR 408-2) requires the CWCB to evaluate the “appropriateness” of any proposed acquisition. This includes express requirements to consider:

- “Any potential material injury to existing decreed water rights” (Rule 6e(3));
- “The historical consumptive use...of the water right proposed for acquisition that may be available for instream flow use” (Rule 6e(4)); and
- “Whether the proposed acquisition is administrable by the Division Engineer” (Rule 6e(5)).

Additionally, Rule 6i 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 decreed 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—not merely to defer to the Water Court. Without evaluating how the rights have actually been used, the CWCB cannot make an informed judgment about whether the acquisition is appropriate, or whether the acquisition as proposed could lead to an unlawful expansion of use or material injury to other decreed water rights.

In sum, the CWCB’s obligation under Rule 6 is to conduct a genuine, good-faith evaluation of the River District’s historical use analysis—including study period, call regimes, flow volumes, return flows, and potential injury—not to simply accept those analyses proffered by the proponent.

D. The CWCB Cannot Accept the River District’s Proposed Volumetric Limit Without Expanding the Shoshone Water Rights in Violation of Colorado Water Law.

The CWCB should not accept the River District’s proposed volumetric limit until the methodology accurately represents the historical use of the Shoshone Water Rights. As long held by the Colorado Supreme Court, “[a] change in point of diversion, place or manner of use is not a

new or increased use of the water right and is limited to the extent of the former actual usage.” *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 634 (Colo. 1954); *Green v. Chaffee Ditch Co.*, 371 P.2d 775, 783 (Colo. 1962). Here, changing an entirely non-consumptive senior water right to an instream flow use for the purpose of “improving” the natural environment—unless strictly confined to the depleted reach between the Shoshone diversion and return points—will necessarily expand the historical use and impose new burdens on junior rights. Further, Colorado law entitles junior rights to maintenance of historical stream conditions. *Williams v. Midway Ranches POA*, 938 P.2d 515, 522 (Colo. 1997); *Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 80 (Colo. 1996). A year-round instream flow call of 1,408 cfs is not duplicative of historical stream conditions. Junior users should not be burdened with a call regime that does not reflect historical seasonal patterns. Finally, the CWCB must evaluate whether the quantification of historical beneficial use is sound and defensible. The fundamental purpose of a change proceeding is to “ensure that the true right—that which has ripened by beneficial use over time—is the one that will prevail in its changed form.” *Santa Fe Trail Ranches POA v. Simpson*, 990 P.2d 46, 55 (Colo. 1999). Only water that was actually diverted and put to beneficial use may be included in a changed right. See also *Midway Ranches*, 938 P.2d at 521; *Farmers High Line Canal & Res. Co. v. City of Golden*, 975 P.2d 189, 198 (Colo. 1999).

The analysis provided by BBA on behalf of the River District assumes diversions occurred at times when the record shows they did not and presumes full beneficial use even when portions of water were returned to the river without use. These flaws result in a material overstatement of historical use, and, if unexamined, would unlawfully expand the Shoshone rights under the guise of instream flow protection.

E. The Proposed ISF Agreement impermissibly delegates the CWCB's exclusive statutory authority to manage water rights for instream flow purposes to the River District.

By dictating future operations, the proposed ISF Use Agreement impermissibly limits the CWCB's statutory discretion to manage and administer instream flow water rights on behalf of the people of Colorado. 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 and expressly prohibits any other entity from obtaining a decree for instream flow use between specific points for any purpose whatsoever. This exclusive authority expressly includes the discretion to determine when and how to operate an instream flow water right considering evolving hydrologic, operational, and policy conditions.

The draft agreement, however, states that the CWCB agrees it will request administration of the Shoshone Water Rights for instream flow purposes "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 a joint written agreement with the River District. This effectively gives the River District veto authority over any decision by the CWCB to adjust the call based on broader public interest considerations, such as interstate compact administration, drought contingency planning, or collaborative operations with other municipal and agricultural users.

By locking the CWCB into a rigid call regime and subordinating its discretion to the concurrence of another party, the agreement abdicates the CWCB's statutory obligation to act independently and in a balanced, statewide manner. The Board must retain the flexibility to manage the Shoshone Water Rights in a manner that promotes the policies and purposes of the ISF Program while protecting present and future uses of water and responding to changing

circumstances on the Colorado River. The current language of the agreement does not allow for that balance.

III. STATEMENT OF OPEN LEGAL QUESTIONS

- Must the CWCB evaluate historical beneficial use and stream conditions as part of its statutory and regulatory obligations?
- Can the CWCB lawfully accept the River District's proposed volumetric limit under Colorado water law and ISF Rules?
- Does the Proposed ISF Agreement impermissibly delegate the CWCB's exclusive statutory authority to manage water rights for instream flow purposes to the River District?

IV. STATEMENT OF RELIEF REQUESTED

Because the River District's Proposed ISF Agreement fails to comply with its existing contractual obligations, Aurora 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 ISF Agreement that complies with its contractual obligations. The River District should be given an opportunity to address significant outstanding concerns related to the historical use analysis and the terms of the Proposed ISF Agreement. Specifically, delay would provide the parties with time to:

- Revise the River District's technical analysis for both the Senior and Junior Shoshone Water Rights to resolve the flaws identified by Aurora Water and other Front Range Water Council (FRWC) parties necessary to prevent an unlawful expansion of use and injury to Aurora's water rights;
- Modify the River District's Proposed ISF Agreement to preserve the CWCB's discretionary authority over enforcement and administration of the changed water rights;
- Incorporate the terms of the 2007 Call Reduction Agreement into the Proposed ISF Agreement; and

- Add a provision in the Proposed ISF Agreement stating specifically that, “in the event of curtailment or the threat of curtailment under the Colorado River Compact or the Upper Colorado River Basin Compact, the CWCB and ISF parties will work cooperatively with all affected water users, including Aurora Water, to minimize adverse impacts across the Continental Divide”.

Alternatively, in the event the River District does not consent to such a delay, the CWCB has no choice but to deny the proposal, perhaps allowing the River District to refile a proposal at a later date that does comply with its contractual commitments with regard to Shoshone Permanence.

While Aurora Water is not seeking or supporting any additional relaxation of the Shoshone Water Rights, it has no objection to the Shoshone Outage Protocol terms in the ISF Acquisition Agreement as proposed by Denver Water and Northern Water. If the River District finds it cannot comply with the many contractual obligations it has made affecting this issue, Aurora is open to discussing a global compromise.

V. AMOUNT OF TIME DESIRED

Aurora Water, in coordination with Denver Water, Northern Water, Colorado Springs and Homestake Partners, requests one hour each or four hours collectively at the hearing. We propose the following order of the five parties’ testimony: 1) Northern Water; 2) Aurora Water; 3) Denver Water; 4) Colorado Springs; and 5) Homestake Partners.

VI. WITNESS LIST

The following witnesses may testify at the hearing as described below, may give rebuttal testimony, and may be available at the hearing to answer questions from the Board.

1. Heather Thompson, P.E., ERC: Will testify to her critique of BBA's and Hydros' analyses and offer her assessment of what a corrected historical use analysis would yield.
2. Alexandra Davis, Assistant General Manager, Aurora Water: Will testify regarding portions of this prehearing statement, impacts to Aurora Water of increased Shoshone Water Rights call frequency and the 2018 IGA.

3. Joshua Mann, Attorney, Aurora Water: Will testify regarding portions of this prehearing statement, the 2018 IGA, the 2007 Call Reduction Agreement and the Proposed ISF Agreement.

VII. EXHIBITS TO BE INTRODUCED AT HEARING

Aurora Water may use the following exhibits:

1.	Aurora 1	Slides with Map of the Upper End Aurora Water's Infrastructure, Graph of Aurora Waters' Supply and Demand Projections, and List of Water Conservation Programs
2.	Aurora 2	Summary of water rights owned by Aurora Water affected by Shoshone Water Rights
3.	Aurora 3	2018 IGA
4.	Aurora 4	Resume of Alexandra Davis
5.	Denver 1	Draft Shoshone Water Rights Dedication and ISF Agreement with Redlines and Comments
6.	Denver 4	2007 Call Reduction Agreement
7.	Denver 5	Technical memorandum by Heather Thompson, Re: Shoshone Power Plant Volumetric Limit
8.	Denver 6	Evaluation of Hydros Consulting's Shoshone Power Plant Water Rights Yield Assessment
9.	Denver 7	Resume of Heather Thompson
10.	Denver 8.a	Thompson Graphs and Tables BBA Memo
11.	Denver 8.b	Thompson Graphs and Tables Hydros Memo

RESPECTFULLY submitted this 4th day of August 2025.

/s/ Joshua Mann

Joshua Mann

Attorney for Aurora Water

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2025, a true and correct copy of Aurora Water's Prehearing Statement was electronically submitted to the Colorado Water Conservation Board via email to Jackie.Calicchio@coag.gov.

/s/ Joshua Mann

Joshua Mann

Attorney for Aurora Water