

**COLORADO WATER CONSERVATION BOARD  
STATE OF COLORADO**

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**IN THE MATTER OF THE PROPOSED ACQUISITION OF AN INTEREST IN THE  
SHOSHONE POWER PLANT WATER RIGHTS**

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**PREHEARING STATEMENT OF STAFF OF COLORADO WATER CONSERVATION  
BOARD**

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Pursuant to the Hearing Officer’s July 18, 2025 Order Re: Procedures and Deadlines for Prehearing Submissions, and pursuant to Rule 6.m(5)(e) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level, 2 CCR 408-2 (“ISF Rules”) at **CWCBStaff-1**, the Staff of the Colorado Water Conservation Board (“CWCB Staff”) hereby submits its Prehearing Statement regarding the proposed acquisition of an interest in the Shoshone Power Plant Water Rights from the Colorado River Water Conservation District (“River District”) and Public Service Company of Colorado (“PSCo”) for instream flow (“ISF”) use in the Colorado River. CWCB Staff’s May 2025 board memo, at **CWCBStaff-2**, provides a more complete description of the project proposal. This Prehearing Statement provides a brief background, summary of the required factors, as well as Staff’s position and relief requested. Staff will respond to issues and legal questions presented by other parties in its rebuttal statement, as appropriate.

**I. CWCB Staff’s Position**

CWCB Staff recommends the CWCB take the following actions:

- A. Accept a perpetual interest in the junior and senior Shoshone Water Rights for ISF use up to the full decreed amounts and determine that this use will preserve and improve the natural environment to a reasonable degree;

- B. Direct the CWCB Director to sign the ISF Agreement after the hearing. See current draft ISF Agreement attached to the May 2025 Board Memo, **CWCBStaff-4**;
- C. Determine that protecting the Shoshone Water Rights in the Shoshone Reach, subject to the terms and conditions in the final water court decree, in amounts up to the stream flow rates recommended by CPW to preserve and improve the natural environment, is the best utilization of the acquired water to preserve and improve the natural environment to a reasonable degree; and
- D. Direct Staff to work with the Attorney General's Office and the River District and PSCo as Co-Applicants to file a water court application requesting to add an instream flow use to the Shoshone Water Rights in accordance with section 37-92-102(3), C.R.S.

## **II. Witness List**

CWCB witnesses include Staff and representatives from CPW. CWCB Staff is submitting a motion to request additional witnesses beyond the three witness limit and to seek clarification regarding a potential presentation by the Division of Water Resources at the hearing. A description of anticipated testimony for each witness is provided at **CWCBStaff-8**, and their resumes at **CWCBStaff-10-14**. The witnesses include: (A) CWCB witnesses: Rob Viehl, and/or Kaylea White, and Colin Watson if allowed, of the CWCB Stream and Lake Protection Section; and Kara Scheel of the CWCB Interstate Federal and Water Information Section; (B) CPW witnesses: Katie Birch ISF Coordinator, and/or Kendall Bakich, if allowed; (C) if needed: Counsel for CWCB Staff, Jen Mele. Division Engineer for Water Division 5 James Heath may provide information regarding administrability and administration.

### **III. Background and Board Factors**

The River District and PSCo have offered to the CWCB an interest in the Shoshone Water Rights for ISF purposes on the mainstem of the Colorado River in Glenwood Canyon. See the maps at **CWCBStaff-3**. The Shoshone Water Rights are decreed for non-consumptive hydropower generation use at the Shoshone Hydroelectric Power Plant, currently owned by PSCo, a subsidiary of Xcel Energy. 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”), which are more fully described in the May 2025 Board Memo, at **CWCBStaff-2**.

Pursuant to the Purchase and Sale Agreement (“PSA”) between the River District and PSCo, with an effective date of January 1, 2024, the River District is the contract purchaser of the Shoshone Water Rights. The PSA provides that PSCo, or its successors and assigns, is entitled to continued use of the Shoshone Water Rights for hydropower generation at the Shoshone Power Plant. The draft ISF Agreement, at **CWCBStaff-4**, details the CWCB’s interest and ability to use the Shoshone Water Rights for instream flow use. If the Board decides to acquire the interest in the water rights, the CWCB, pursuant to section 37-92-102(3) C.R.S., along with the River District and PSCo, will need to file an application in water court to change the rights to allow for ISF use. See draft water court application at **CWCBStaff-6**.

The Board must decide (1) the appropriateness of the acquisition of the interest in water to preserve and improve the natural environment and (2) how to best utilize the acquired interest in water to preserve or improve the natural environment (ISF Rule 6.e). The Board must also determine the biological need of the subject reach of stream, that is, the flows necessary to preserve and improve the environment to a reasonable degree (ISF Rule 6.a). The ISF Rules also

contemplate that the Board consider whether the ISF acquisition agreement should include terms and conditions on the acquisition (ISF Rule 6.b).

Rule 6.e contains eleven factors for the Board to consider when determining the appropriateness of the acquisition. These factors are relevant to the Board's actions and the Board must consider each factor. However, a specific finding is not required for each of the factors.

**Rule 6.e (1).** **The proposed reach of stream** for instream flow use of the Shoshone Water Rights is the approximately 2.4 mile stretch of the Colorado River in Glenwood Canyon between the Shoshone Power Diversion Dam and Tunnel and the Shoshone Power Plant Discharge Outlets ("Shoshone Reach") historically dewatered by use at the Shoshone Power Plant. CWCB does not hold any ISF water rights in this reach.

**Rule 6.e (2).** **The flow regime** is characterized as a natural snowmelt runoff regime with significant alterations due to upstream diversions and reservoir releases. The USGS measures streamflow at the Colorado River near Dotsero Colorado gage (the "Dotsero gage," USGS 09070500), which is approximately 8.5 miles upstream from the Shoshone Reach. Records for the Dotsero gage, which includes effects from upstream water uses, indicate that for the full gage period of record from 1940 to 2024, monthly mean flows are between 4,600 and 6,100 cfs during runoff and between 850 cfs and 1,200 cfs during winter months. Peak streamflow during snowmelt runoff can be as low as 2,000 cfs in drought years such as 2002 and over 22,000 cfs in extreme runoff years like 1984. There are many sources of flow alteration in the upper basin including multiple transmountain diversions, in-basin diversions, diversions into reservoirs, and releases to the 15-Mile Reach.

**Rule 6.e (3).** An assessment of the potential for material injury will necessarily involve a complex analysis of historical use of the Shoshone Water Rights by the water court. These rights are senior to many transbasin and reservoir storage water rights that serve front range water users. If adding ISF use results in an expansion of use, the acquisition has potential to cause material injury to those transbasin and other water rights upstream. However, if adding ISF use results in limitations that reduce use below historical amounts, then return flows may not be sufficient to prevent injury to downstream water rights. When changing a water right, the measure of the right is based on its historical use, not its full decreed amount. While the proposed change of water rights is for the entire amount of the Shoshone Water Rights, 1,408 cfs, the measure of the water rights will need to reflect the historical use as determined in the water court process. The court's objective in a change of water rights case is to avoid an expansion of use to protect other water rights from injury. *Widefield Water & Sanitation Dist v. Witte*, 340 P.3d 1118, 1120 (Colo. 2014). This will be accomplished by analysis of the historical diversions and use of the right. *See Grand Valley Water Users Association v. Busk-Ivanhoe, Inc.*, 386 P.3d 452, 463, (Colo. 2016).

The parties interested or affected by the injury analysis can participate in the water court case. The water court process is designed to allow ample opportunity in a structured time frame for all parties, with their attorneys and engineers, to discuss and work toward amicable compromise solutions, which can involve stipulated terms, or pre-trial motions to the court to resolve any outstanding questions of law, and ultimately a trial if necessary. In comparison, the 120-day administrative process before the Board is not designed to provide structure for such a multi-party approach to derive the historical use or return flows of water rights. As with all

acquisitions and consistent with Rule 6.i, this Board will need to rely on the water court process to prevent injury from an expansion of use of the acquired water rights.

**Rule 6.e (4).** **Historical use and return flows** began over one hundred years ago, and both of the Shoshone Water Rights have been used throughout most of the 20th century and are still in operation today. This long period of hydropower plant operation shows robust historical use which will likely result in a meaningful amount of water from the acquisition for ISF use. The exact amount and timing of water that can be put to ISF use will be determined during the water court change case. CWCB Staff intends that ISF use of this acquisition will replicate the historical use regime. The historical use is for non-consumptive power generation and therefore the measure of this water right is its historical use, rather than an historical consumptive use.

While PSCo has diverted 1,408 cfs at times historically, it did not divert 1,408 cfs all the time. CWCB Staff anticipates that as a result of the change case, any ISF use may be up to 1,408 cfs at times, but not all the time. For example, 1,408 cfs was not often diverted in the winter and would not often be available for future instream flow use in the winter.

**Rule 6.e (5).** **The natural environment** of the Shoshone Reach supports a quality fishery consisting of both native and sport fishes, including Brown Trout, Rainbow Trout, dace, sculpin, Mountain Whitefish, and Bluehead Sucker recently sampled by CPW. However, at times when flows are less than 1,408 cfs, the Shoshone Water Rights can legally divert the entirety of the Colorado River leaving the Shoshone Reach dewatered. Under seasonally low flows with diminished condition, aquatic habitat persists, specifically in deep pools and glides isolated by steep boulder drops or shallow riffles. More consistent streamflow would provide major benefits to the fishery in the Shoshone Reach by supporting aquatic food webs, sediment transport, dampening of temperature extremes, and increased availability of aquatic habitat, among others.

See **CWCBStaff-5**.

Under section 37-92-102(3), C.R.S., the Board must request a biological analysis from CPW. CPW analyzed the ecological and biological benefits of the proposed Shoshone Water Rights acquisition, which included conducting fish surveys and reviewing reports prepared by consultants which analyzed hydraulic fish habitat in the Shoshone Reach. CPW's analysis considered the potential aquatic benefits of the proposed acquisition in the Shoshone Reach, as well as benefits upstream and downstream of the Shoshone Reach in the Colorado River Basin. Based on the data, CPW concluded there is a flow-dependent natural environment that can be preserved and improved by the proposed acquisition.

Given the anticipated biological benefits within the Shoshone Reach, CPW Staff recommends the Board accept the interest in the Shoshone Water Right. CPW's analysis indicates that the best use of the acquired water rights is to preserve and improve the natural environment in the Shoshone Reach of the Colorado River at any rate up to the full decreed amount of 1,408 cfs, and CPW Staff's analysis further showed that fish habitat will also be improved in the Shoshone Reach at streamflows up to at least 3,000 cfs. See CPW's recommendation letter and report, at **CWCBStaff-5**. CPW evaluated the higher flow rates because at times there has been, and will continue to be, other water in the stream including shepherded reservoir releases flowing through this stream reach for delivery to downstream uses. These higher flow rates occur when the natural flow available to the Shoshone Water Rights is present with other water such as water delivered through this reach to other downstream uses.

**Rule 6.e (6).** Other water rights are located both upstream and downstream of the Shoshone Reach and include water rights that are junior and senior to the Shoshone Water Rights. There are no diversions within the Shoshone Reach; however, a number of augmentation

plans and exchanges extend through this reach. The change case in water court to add ISF use will result in a decree containing terms and conditions to prevent injury to other water rights.

**Rule 6.e (7). Interstate compacts.** Colorado and the Upper Division States have never failed to meet obligations pursuant to the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact. CWCB will ensure that the change of the Shoshone Water Rights to allow ISF uses will not expand the historical use of the water right and will not reduce the return flows that were maintained by the historical diversions. Use of the Shoshone Water Rights for ISF and hydropower purposes shall be subject to terms and conditions imposed by the change of water right decree to be entered by the water court, which will restrict the future use. Downstream of the Shoshone Reach, the return flows from use of the Shoshone Water Rights will become part of the natural stream flow in the Colorado River and will be available for other uses as it was historically.

**Rule 6.e (8). Maximum utilization of waters of the state** will be accomplished by continuing the beneficial uses of the Shoshone Water Rights for hydropower use and adding the ISF use in the Shoshone Reach. Through the water court process, the change of these water rights to include ISF use should allow the same level of utilization as the historical use of the non-consumptive Shoshone Water Rights, which will not alter water available for other uses. There is no clear standard for what constitutes maximum utilization, but there is authority for the proposition that maximum utilization of waters of the state does not simply mean diversion and consumption. The Colorado Supreme Court has held that the doctrine of maximum utilization is intended to “spread the benefits of the public’s water resources to as many as uses possible,” and that “optimum use can be achieved only through proper regard for all significant factors,



including environmental and economic concerns.” *Pagosa Area Water and Sanitation Dist. v, Trout Unlimited*, 170 P.3d 307, 314 (Colo.2007)

**Rule 6.e (9).** **Water will be available for uses downstream** because the historical return flows will be maintained at the lower terminus of the Shoshone Reach and will become part of the natural stream flow available for consumptive and nonconsumptive downstream water uses. There are several large diversions downstream of the Shoshone Reach that rely on, and will continue to use, the historical return flows. Furthermore, return flows downstream from the Shoshone Reach may continue to be used by the ISF water rights held by CWCB in the 15-Mile Reach. Consequently, by not expanding the historical use, and by continuing the utilization of the Shoshone Water Rights, CWCB will ensure that this acquisition will not have a negative effect on downstream uses. This will be determined in the water court process.

**Rule 6.e (10).** **The cost to complete the transaction** will consist mainly of costs associated with the change case and normal operating costs. Previously, the Board conditionally approved a non-reimbursable project fund of \$20 million to aid the River District’s purchase of the Shoshone water rights from PSCo. River District committed \$20 million, other supporters committed \$17.1 million, and USBR B2E funds were conditionally approved for \$40 million, subject to the satisfaction of conditions identified by the Bureau of Reclamation. These funds are currently frozen. Potential costs to the CWCB to complete this transaction include costs associated with preparing, filing, and prosecuting a change of water right application to add instream flow use, including any necessary engineering analyses. Other potential costs to CWCB are associated with installing, operating, and maintaining any measuring device required by the Division Engineer to administer the changed water right. It should be noted however, that much of these costs will be borne by the River District. The CWCB already holds and protects existing

appropriated instream flow rights on the Colorado River and Staff does not expect to incur significant additional costs to protect the acquired interest in the rights.

**Rule 6.e (11). Administrability of the acquired water right when used for instream flow purpose.** The Division Engineer has advised Staff that the Shoshone Water Rights would be administrable if changed to add instream flow use with proper terms and conditions in a water court decree.

#### **IV. Staff Relief Requested**

The proposed acquisition of the Shoshone Water rights is appropriate and will be best utilized by protection of flows up to 1,408 cfs to the extent historically diverted and put to beneficial use by PSCo, as determined through the water court process.

As enumerated above in Section I above as “CWCB Staff’s Position,” CWCB Staff recommends that the CWCB acquire an interest in the full amount of the Shoshone Water Rights, direct the CWCB Director to sign the ISF Agreement, and direct CWCB Staff to work with the Attorney General’s Office to file an application in water court to change those rights, where the court will determine the best representation of historical use to allow for future instream flow use. CWCB Staff further recommends that the Board direct CWCB Staff to work through the water court process, which will result in a decree with terms and conditions providing guidelines for future instream flow use, with limitations to the extent necessary to prevent injury.

#### **V. Legal and Policy Questions**

The following issues are some of the issues raised in requests for hearing and communications from a few of the various parties, which issues are not necessarily addressed by the factors discussed above. Staff will more fully address these or other issues that may be raised in other parties’ Prehearing Statements through CWCB Staff’s Rebuttal Statement.

**1. Whether the Board is improperly ceding authority or discretion related to calling for the Shoshone Water Rights for ISF use.**

The CWCB has the discretion to work with other entities to administer ISF water rights and has done so in the past. It is sometimes the case that when the CWCB acquires an interest in a water right, for example a water storage right, the owner of the water right retains control and discretion over when to release and use the water right for instream flow purposes, so long as the stream needs the water to meet the ISF rates. ISF Rule 10 specifically allows the CWCB (a) to enter into agreements that limit the Board's discretion in the protection of an instream flow right and (b) to delegate limited authority to act on the Board's behalf.

**2. Whether the Recovery Program will be affected by this acquisition.**

The Upper Colorado River Endangered Fish Recovery Program has dual goals of equal importance: (1) allow water users to continue to develop water supplies apportioned under the Colorado River Compact and Upper Colorado River Basin Compact, and (2) recover the four species of endangered fish in the Colorado River and its tributaries. Administration of the Shoshone Water Rights may implicate water availability for the Recovery Program. CWCB is including a memo regarding water supplies that support target flows in the 15-Mile Reach as a component of the Recovery Program, at **CWCBStaff-9**. There are two decreed ISF water rights within the 15-Mile Reach. A significant portion of supplies relied upon by the Recovery Program in the 15-Mile Reach are provided through HUP surplus, as summarized in the memo at **CWCBStaff-9**. The CWCB is interested in ensuring that the 15-Mile Reach, including CWCB's instream flow water rights within the 15-Mile Reach, will not be affected by the proposed acquisition as a result of the change to include ISF use.

**3. Whether existing agreements such as the Relaxation Agreement, ShOP, or part of the CRCA should be included in the ISF Agreement.**

The CWCB is not a party to these agreements, and incorporation of the agreements may entail some degree of interpretation of the documents. Incorporation of any of the agreements into the ISF Agreement is a difficult and complicated proposition for various reasons, including the degree of disagreement between the parties as to what the agreements mean. CWCB is a party to the stipulation in the related “OMID Check Case” No. 91CW247, filed by OMID, GVVUA, and Bureau of Reclamation. Here in the Shoshone acquisition hearing process, CWCB Staff recommends to the Board that incorporation of any provisions of these agreements including any drought provisions should occur during the water court process among all parties in the case, and not during the administrative acquisition process.

#### **4. Whether the Board should acquire the full decreed amounts of the Shoshone Water Rights**

Some of the interested parties have asserted that the acquisition of 1,408 cfs is not appropriate because 1,408 cfs is not representative of the historical use of the water rights. The CWCB always acquires the entire amount of a water right or an interest in a water right offered, with the understanding that the amount of water available for instream flow use will be limited in the water court process to the historical use, which is less than the entire amount offered. If the full amount is not acquired, a portion would remain unchanged and not subject to the change case limitations. In this type of scenario, an owner could increase the use of any unchanged portion up to the decreed amount or change it to a different beneficial use.

## **VI. Desired Time**

CWCB Staff requests 90 minutes to present testimony and any rebuttal information.

## I. Exhibit List

<u>Exhibit Number</u>	<u>Exhibit Name</u>
CWCBStaff-1	Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (Effective 9/14/2025)
CWCBStaff-2	May 2025 Staff's Board Memo (with hyperlink to Enclosures) <a href="https://cwcb.colorado.gov/2025-shoshone-isf-acquisition">https://cwcb.colorado.gov/2025-shoshone-isf-acquisition</a> (or) <a href="https://dnrweblink.state.co.us/cwcbsearch/0/edoc/227319/10d%20Shoshone%20Bd%20Memo-ISF%20Acquisition%20w%20Encl%20and%20all%20Public%20Comment%20submitted.pdf?searchid=c75290c4-8d9a-4eef-8f6a-360bc0a92343">https://dnrweblink.state.co.us/cwcbsearch/0/edoc/227319/10d%20Shoshone%20Bd%20Memo-ISF%20Acquisition%20w%20Encl%20and%20all%20Public%20Comment%20submitted.pdf?searchid=c75290c4-8d9a-4eef-8f6a-360bc0a92343</a>
CWCBStaff-3	May 2025 Board Memo Enclosure A - Maps
CWCBStaff-4	May 2025 Board Memo Enclosure C - Draft ISF Agreement, dated May 2025
CWCBStaff-5	May 2025 Board Memo Enclosure D - CPW's Recommendation Letter Report (dated May 6, 2025)
CWCBStaff-6	May Board Memo Enclosure E - Draft Water Court Application
CWCBStaff-7	May Board Memo Enclosure G - GEI Report - GEI Consultants, Inc., April 2025 "Review of the Effects of Flow on Biology and Stream Processes, Glenwood Canyon".
CWCBStaff-8	Witness List
CWCBStaff-9	Memo Re: Recovery Program Storage Supplies on the Colorado River
CWCBStaff-10	Resume of Rob Viehl
CWCBStaff-11	Resume of Kaylea White
CWCBStaff-12	Resume of Colin Watson
CWCBStaff-13	Resume of Katie Birch
CWCBstaff-14	Resume of Kara Scheel

	The CWCB reserves the right to use as an exhibit any exhibit introduced by any other party and any exhibit necessary for rebuttal purposes.

Dated this 4th day of August, 2025.

PHIL WEISER  
Attorney General

/s/Jennifer Mele

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## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement of the Staff to the Colorado Water Conservation Board** upon all parties herein by email, this 4th day of August, 2025, addressed as follows:

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/s/Sarah Glover

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