

**BEFORE THE COLORADO WATER CONSERVATION BOARD
STATE OF COLORADO**

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

**JOINT PREHEARING STATEMENT OF THE COLORADO RIVER WATER
CONSERVATION DISTRICT, ET AL.**

Pursuant to the Hearing Officer’s July 18, 2025, Order re: Procedures and Deadlines for Prehearing Submissions and Rule 6m.(5)(f) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“ISF Rules”), the Colorado River Water Conservation District (the “River District”), the Mesa County Board of County Commissioners, the Clinton Ditch & Reservoir Company, and the Basalt Water Conservancy District (collectively, “River District et al.”) hereby submit this joint prehearing statement in support of the proposed dedication to the Colorado Water Conservation Board (the “Board”) of the exclusive right to use the Shoshone Water Rights for instream flow purposes.

I. INTRODUCTION

The importance of the Shoshone Water Rights to the Colorado River cannot be overstated. The longstanding exercise of the Shoshone Water Rights has led to the creation of a historical flow regime that provides vital ecosystem, habitat, agricultural, recreational, municipal, and other economic benefits up and down the Colorado River’s mainstem. The proposed “Shoshone Water Rights Dedication and ISF Agreement” (the “ISF Agreement,” **CRD-3**) is the culmination of more than a decade of collaboration between the River District, Public Service Company of Colorado (“PSCo”), and a coalition of Colorado’s local governments, major water entities, and regional

partners to secure the permanent protection of the river flow regime created by the historical exercise of the Shoshone Water Rights. This acquisition is a benefit to every Coloradan.

The rich and unique history of the Shoshone Power Plant is important for evaluating the appropriateness of the ISF Agreement. For over a century and continuing through to the present, PSCo has exercised the Shoshone Water Rights¹ via the Shoshone Diversion Dam to generate hydroelectricity at the Shoshone Power Plant by diverting up to 1,408 cubic feet per second (“cfs”) of Colorado River water. The Senior Shoshone Water Right was originally decreed in Civil Action No. 466 in the amount of 1,250 cfs, with a priority date of 1905. *See* **CRD-1**. The Junior Shoshone Water Right was originally decreed in Civil Action No. 1123 in the amount of 158 cfs, with a priority date of 1940. *See* **CRD-2**. Like instream flow use, the decreed hydropower generation use of the Shoshone Water Rights is non-consumptive, meaning that water diverted from the Colorado River at the Shoshone Diversion Dam is returned to the river without any net stream depletion.

Through the “ISF Agreement (**CRD-3**), the River District and PSCo propose to dedicate to the Board the exclusive right to use the Shoshone Water Rights up to the total decreed amount of 1,408 cfs for instream flow purposes. The contractual arrangement contemplated by the ISF Agreement is the product of nearly two years’ worth of extensive and careful negotiations between the River District, PSCo, and Staff of the Colorado Water Conservation Board (“CWCB Staff”), and is consistent with the January 1, 2024, Purchase and Sale Agreement between the River District and PSCo (the “PSA”). *See* **CRD-4**. Under the PSA, the River District is the contract purchaser of the Shoshone Water Rights and PSCo is entitled to a perpetual leasehold interest in

¹ For purposes of this prehearing statement, the 1905 Shoshone water right shall be referred to as the “Senior Shoshone Water Right,” the 1940 Shoshone water right shall be referred to as the “Junior Shoshone Water Right,” and the two priorities shall collectively be referred to as the “Shoshone Water Rights.”

the Shoshone Water Rights for continued hydropower use at the Shoshone Power Plant. *Id.* The PSA also explicitly contemplates the execution of a separate agreement that will assign to the Board an interest in the exclusive right to use the Shoshone Water Rights for instream flow purposes following the completion of certain conditions specified in the PSA, including the prosecution of a change decree in water court for Water Division No. 5. *See* **CRD-4** at ¶ 4.4(a).

As proposed, the Shoshone Water Rights will be used for instream flow purposes within the “Shoshone Reach,” a stretch of the river extending 2.4 river miles from the Shoshone Diversion Dam on the Colorado River downstream to the point where the water diverted returns to the river at the Shoshone Power Plant. *See* **CRD-3** at ¶ 2; *see also* **CRD-30**. The ISF Agreement provides that such instream flow use shall occur whenever water is not diverted (or is diverted at a reduced rate) by PSCo for hydropower production pursuant to PSCo’s leasehold interest under the PSA. *See* **CRD-3**. While the River District shall be the title owner of the Shoshone Water Rights, the ISF Agreement provides that the Board shall be exclusively entitled to use the water rights for instream flow purposes. *Id.*

II. POSITION STATEMENT

The Board is required to make two determinations with respect to the proposed acquisition. First, the Board must determine that the acquisition is appropriate to preserve and improve the natural environment to a reasonable degree. *See* § 37-92-102(3), C.R.S. (**CRD-10**). And second, the Board must determine how to best utilize the Shoshone Water Rights to preserve and improve the natural environment. *See* ISF Rule 6e. These two determinations are informed by the recommendation of Colorado Parks and Wildlife (“CPW”). *See* ISF Rule 11c. Pursuant to section

37-92-102(3), C.R.S., the Board relies on CPW's biological analysis to determine the appropriateness of such acquired water to support an ecological need.

Given the demonstrated biological benefits within the Shoshone Reach, to the Colorado River headwaters and tributaries, and to the mainstem downstream of the Shoshone Power Plant, the River District, PSCo, and the CWCB Staff agree that the Board's acquisition of the Shoshone Water Rights for instream flow purposes up to the full decreed amounts is appropriate and will preserve and improve the natural environment to a reasonable degree in accordance with section 37-92-102(3), C.R.S., and the factors listed in ISF Rule 6e. This position is confirmed by CPW's analysis and professional recommendation, which concluded that the Shoshone Water Rights would preserve and improve the natural environment to a reasonable degree up to a flow rate of 1,408 cfs, and that fish habitat within the Shoshone Reach will also be improved at streamflows up to at least 3,000 cfs. *See CRD-7*, p 2; *see also CRD-6*.² The River District et al. therefore requests that the Board direct the CWCB's Director to sign the ISF Agreement as proposed (**CRD-3**).

The River District and PSCo's May 2025 Technical Memorandum (**CRD-8**) and CWCB Staff's May 2025 Board Memo (**CRD-9**) provide additional analysis addressing each of the ISF Rule 6e. factors. The contents of the two memorandums are incorporated hereto by this reference.

² CPW's recommendation is supported by the findings and conclusions of Freshwater Consulting, LLC (*see CRD-27*) and Ecosystem Sciences, LLC (*see CRD-28*).

III. STATEMENT OF FACTUAL AND LEGAL CLAIMS

All Parties support the Board’s acquisition of an interest in the right to use the Shoshone Water Rights for instream flow purposes, and a significant majority of those Parties unconditionally support the proposed acquisition.³

Aurora, Denver, CSU, and Northern et al. (the “Objectors”)⁴ have all indicated support for the Board’s acquisition of an interest in the Shoshone Water Rights for instream flow purposes. However, the Objectors have raised questions concerning the following ISF Rule 6e. factors: (a) the natural flow regime (ISF Rule 6e.(2)); (b) any potential material injury to existing decreed water rights (ISF Rule 6e.(3)); (c) the historical consumptive use and historical return flows of the water right proposed for acquisition that “may” be available for instream flow use (ISF Rule 6e.(4)); (d) the effect of the proposal on any “relevant” interstate compact issue, including whether the acquisition would assist in meeting or result in delivery of more water than required under the compact obligations (ISF Rule 6e.(7)); and (e) the effect of the proposed acquisition on the maximum utilization of the waters of the state (ISF Rule 6e.(8)). In addition, some of the Objectors allege that the proposed ISF Agreement improperly limits the Board’s discretion in a manner that is contrary to the Board’s statutory authority. This allegation is not an ISF Rule 6.e. factor *per se* but does go directly to the legal authority the Board possesses with respect to acquisition agreements of this type. Lastly, a few of the Objectors oppose the proposed ISF Agreement based

³ As of July 17, 2025, all public comments regarding the acquisition are unanimously supportive of the Board’s acquisition of the right to use the Shoshone Water Rights for instream flow purposes. These comments represent voices from across the state on both sides of the Continental Divide.

⁴ Two other Parties—Homestake and SM WISE—assert objections regarding the acquisition in their respective Notices of Party Status. SM WISE details no specific objections and instead references the Requests for Hearing submitted by Aurora and Denver. Homestake is comprised of Aurora and CSU and, for purposes of this prehearing statement, is presumed to hold the same position as those entities.

on certain provisions in third party agreements to which the River District is a signatory, but not the Board nor PSCo.

While the Board is required to consider the factors enumerated in ISF Rule 6e., the ISF Rules do not require the Board to make any findings on these factors. Instead, the Board considers the ISF Rule 6e. factors to determine whether the acquisition is appropriate to preserve and improve the natural environment to a reasonable degree, in concert with CPW's recommendations, and how best to utilize the Shoshone Water Rights to preserve and improve the natural environment.

A. The natural flow regime (ISF Rule 6e.(2)).

To date, no Party has contested CPW's recommendation and analysis confirming the ecological need for the acquisition. However, at least one of the Objectors references the "natural flow regime" factor (ISF Rule 6e.(2)) to argue that the Board must base its acquisition on an "accurate characterization of the natural flow regime."⁵ The River District et al. agree that the Board must consider the natural flow regime but disagree that the Board must condition its acceptance of the ISF Agreement on the Objectors' mischaracterization of what the natural flow regime is.

The Board's consideration of the natural flow regime is important because this factor speaks to the degree to which an acquisition will preserve and improve the natural environment (e.g., whether acquired water will restore flows to a dewatered stream reach). The "natural flow regime" in the mainstem of the Colorado River and within the Shoshone Reach is addressed in the

⁵ See July 9, 2025, Notice of Party Status of Northern Colorado Water Conservancy District and Municipal Subdistrict, Northern Colorado Water Conservancy District – Proposed Acquisition of an Interest in the Shoshone Water Rights for Instream Flow Use on the Colorado River ("Northern's Notice of Party Status").

River District and PSCo's Technical Memorandum (**CRD-8**, p 7, ¶ 2), and in the CWCB Staff Memo (**CRD-9**, p 9, ¶ 2). The Objectors misinterpret the "natural flow regime" factor to mean flows "historically available to and diverted by the Shoshone Water Rights." *See* Northern's Notice of Party Status.

In evaluating the natural flow regime, the Board should consider the historical river flow measured at the USGS gage on the Colorado River near Dotsero, Colorado (the "Dotsero Gage," USFS 0907500). *See* **CRD-9**, p 9. The Shoshone Water Rights have historically been and continue to be administered at the Dotsero Gage by the State Engineer's Office. Records for the Dotsero Gage indicate highly variable streamflows in the Colorado River on an annualized basis due to several factors including the uncertainty of snowpack and precipitation, in addition to flow alterations attributable to large junior upstream diversions including those of the transmountain diversion projects. These conditions have a variety of effects ranging from reduced total flow to changing the magnitude or timing of water that ultimately reaches the Shoshone Reach. The River District et al. have identified witnesses to answer questions regarding ISF Rule 6e.(2).

B. Any potential material injury to existing decreed water rights (ISF Rule 6e.(3)).

Pursuant to ISF Rule 6e.(3), the Board shall "consider . . . [a]ny potential material injury to existing decreed water rights" when evaluating the appropriateness of an acquisition of water.

This factor typically arises when there are intervening water diversions in a proposed reach that may be injured by the change in use. Here, there are no intervening diversions within the Shoshone Reach. And for those water rights that are upstream and junior to the Shoshone Water Rights,⁶ the stream conditions that existed at the time of their appropriations included the

⁶ All the Objectors' water rights in the Colorado River basin are junior to the Senior Shoshone Water Right. Some of the Objectors' in-basin water rights are junior to the Junior Shoshone Water Right.

downstream operations of the Shoshone Power Plant. Consistent with ISF Rule 6i., “[t]he Water Court *shall* determine matters that are within the scope of section 37-92-305, C.R.S.” (emphasis added); *see also* § 37-92-102(3), C.R.S. (“[t]he board may file applications for changes of water rights . . . and the water court *shall* determine matters that are within the scope of section 37-92-305.” (emphasis added)) (**CRD-10**). The application of the no-injury rule is a water matter that is within the exclusive jurisdiction of the water court under section 37-92-305, C.R.S. (**CRD-11**).

The Objectors argue that the Board must predetermine historical use of the Shoshone Water Rights to prevent injury before the Board can accept the ISF Agreement. This argument is misplaced, not least of all because the Objectors, to date, have failed to identify any existing water rights—including their own—that might be *materially* injured by the acquisition let alone how that injury might occur. Regardless of whether the Objectors can introduce any evidence to support their argument, the water court has exclusive jurisdiction, as recognized by the Board’s own rules (*see* ISF Rule 6i.), to determine whether injury exists and what terms and conditions are necessary to prevent it. *See* § 37-92-203(1), C.R.S.; *see also* § 37-92-305(3)(a), C.R.S. (**CRD-11**).

More importantly, the Board’s approval of the ISF Agreement alone cannot result in any injury (material or otherwise) because the agreement specifically requires that a change decree that meets all applicable statutory requirements be approved by the water court before the Board may use the Shoshone Water Rights for instream flow purposes. *See* **CRD-3**, p 4, ¶ K; p 5 ¶ 7.a. A change decree can only be approved if the decree contains terms and conditions that will not result in injury to vested water rights. Furthermore, consistent with section 37-92-102(3), C.R.S., the Division Engineer for Water Division No. 5 has advised the River District that the Shoshone Water Rights would be administrable if changed in water court to add instream flow use.

The River District et al. will have witnesses available to provide testimony should the Board have any questions on topics pertaining to ISF Rule 6e.(3).

C. **The historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use (ISF Rule 6e.(4)).**

The Shoshone Water Rights have been exercised for their decreed purposes and at their decreed rates for most of the 20th century and the rights remain in operation today. Notably, because the historical use of the Shoshone Water Rights has been for non-consumptive power generation, the measure of these rights is based on their historical use and not their “historical *consumptive* use” within the meaning of ISF Rule 6e.(4). The long period of hydropower operations at the Shoshone Power Plant provides a robust historical use period. Accordingly, the River District, PSCo, and CWCB Staff (upon the Board’s approval) intend to seek a change of water rights decree that replicates the historical exercise of the Shoshone Water Rights over a representative study period while maintaining historical stream conditions and return flows in accordance with applicable law. *See generally* **CRD-5**.⁷

The Objectors disagree with the River District’s preliminary draft historical use assessment prepared by BBA Water Consultants, Inc. (“Preliminary Assessment,” **CRD-12**). The Preliminary Assessment is, as the title implies, a “preliminary” assessment of the historical yield of the Shoshone Water Rights that may be available for changed use and the assessment is designed to be modified as additional details become known. The Objectors also assert that the study period examined in the Preliminary Assessment is not representative and must include more recent years

⁷ Importantly, the ISF Agreement includes an express condition requiring the successful prosecution of a change of water rights decree with adequate terms and conditions to prevent enlarged use and injury before the water rights may be used for instream flow purposes. *See* **CRD-3**, p 5, ¶ 7.a.

of plant outages,⁸ and that the Board must base its determination on a reasonably accurate depiction of historical use (i.e., the Board must determine historical use). The Objectors also contend that it is not appropriate for the Board to acquire 1,408 cfs because the Shoshone Water Rights have not always been exercised at their combined decreed rate. The River District et al. disagree.

The need to reallocate the historical use of a water right from an original use to a new or additional use through a change proceeding in water court is nothing new. *See, e.g., Strickler v. Colo. Springs*, 26 P. 313 (Colo. 1891). The determination of a representative study period under section 37-92-305(3)(d), C.R.S., is not subject to any formulaic or mechanical application that requires the inclusion or exclusion of certain years. *See, e.g., City & Cty. of Broomfield v. FRICO*, 235 P.3d 296, 301 (Colo. 2010). Instead, a study period must only include wet, dry, and average years; and need not include every year of the entire history of a water right. *See* § 37-92-305(3)(d), C.R.S. The preliminary assessment and study period selected by BBA is consistent with these well-established legal standards. And the River District is unaware of any legal authority that supports the Objectors' theory that only the most recent years of use of a century-old water right must be considered in evaluating historical use—because no such authority exists.

In addition, the Objectors' position on historical use focuses only on nebulous impacts to junior water users located upstream of the Shoshone Power Plant and ignores the need to maintain historical return flows downstream of the Shoshone Diversion Dam, which is a fundamental feature to any change of water right. *See City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 80 (Colo. 1996). Because the historical use of water at the Shoshone Power Plant has been wholly non-consumptive, any reduction in historical use of the Shoshone Water Rights would result in injury

⁸ Most of these outages were caused by natural disasters or mechanical issues beyond PSCo's control.

to downstream water rights. This is because downstream junior appropriators have vested rights to the continuation of stream conditions that existed at the time of their respective appropriations, including the maintenance of historical return flows whenever the senior changed right is exercised. *Id.* During the hearing, the Board will hear testimony from the Grand Valley Entities, Kobe Water Authority, and potentially others about the need to maintain historical return flows when changing the Shoshone Water Rights to prevent injury to downstream water users.

To conclude, all Parties interested in issues regarding historical use and historical return flows will have the right to participate in the change of use proceedings in water court where these issues will be resolved. The water court process is statutorily designed to allow ample opportunity for parties to attempt to resolve complicated issues involving quantification and the methodologies relied on to calculate historical use with the assistance of counsel and expert consultants. *See* § 37-92-305(3)(a), C.R.S. Colorado has a unique and well-regarded water court system. Colorado's water laws clearly define the role of the water court and that of the Board. It is important for the Board to acknowledge the unique role played by Colorado's water courts and not be swayed by political pressure to ignore the rule of law. The Objectors' disagreement with the Preliminary Assessment offered by the River District does not (and legally cannot) mean that the Board must endorse any methodology for quantification of historical use. The Objectors indicate that they agree with this limitation, but the Objectors also ask the Board to condition this acquisition on "a reasonably accurate depiction of historical use." The Objectors cannot enjoy the benefits of two incompatible options simultaneously, especially when one of those options requires the Board to exceed the bounds of its own rules and statutory limits with respect to acquisitions of water under section 37-92-102(3), C.R.S. *See* **CRD-10** and **CRD-11**.

D. The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or resulting in the delivery of more water than required under compact obligations (ISF Rule 6e.(7)).

The Board must also evaluate the effect of the ISF Agreement on any relevant interstate compact issue. *See* ISF Rule 6e.(7). The Objectors speculate that the potential enlarged use of the Shoshone Water Rights would impact Colorado’s ability to use its interstate allocation. One fact that the Objectors fail to acknowledge is that the Shoshone Water Rights have been in place for more than 100 years and are still in operation today. Another fact that the Objectors overlook is that the instream flow use of these water rights through a change decree will ensure there is no impact on any of Colorado’s interstate compact obligations.

To the extent that Colorado has remaining water to develop under the Colorado River Compact, there is ample opportunity to develop that water for consumptive uses both upstream and downstream of the Shoshone Reach. Upstream of the Shoshone Reach, water continues to be available for appropriation during average and wet periods. The 2024 Upper Colorado River Basin Model (“UCRM”) in StateMod demonstrates that development of new water rights can still occur within Water Division No. 5 upstream of the Shoshone Reach. *See generally* **CRD-13** and **CRD-14**. For example, even in this relatively dry year of 2025, there was approximately 125,000 acre-feet of water available for appropriation prior to the imposition of an administrative call by the Junior Shoshone Water Right between April 11 and June 30.⁹ Additionally, there are 145 miles of Colorado River downstream of the Shoshone Reach within Colorado in which consumptive water rights (for use on both sides of the divide) can be developed with no impact on the Shoshone

⁹ Supportive data was queried using the USGS gage on the Colorado River near Dotsero, Colorado (09070500) and average daily streamflow data in StateMod, at <https://cdss.colorado.gov/modeling-data/surface-water-statemod>.

Reach, not to mention the many river miles in Water Division Nos. 4, 6, and 7 that are subject to the Colorado River Compact.

The Shoshone Water Rights will have no impact on the development of Colorado's remaining compact entitlement from sources within Colorado's Water Division Nos. 4, 5, 6, or 7. The River District et al. have identified a witness who is available to provide testimony should the Board have any questions on topics pertaining to ISF Rule 6e.(7).

E. The effect of the proposed acquisition on the maximum utilization of the waters of the state (ISF Rule 6e.(8)).

Because the original use of the Shoshone Water Rights is non-consumptive, any additional use of this water right must also be non-consumptive, which includes very few other water uses but does include instream flow use. The River District, PSCo, and CWCB Staff will ensure that the change of the Shoshone Water Rights for instream flow purposes will continue the same historical level of optimum use for hydropower generation, thereby resulting in no alteration of water available for other downstream water uses. What is more, any return flows that remain in the river and are not diverted and consumed between the Shoshone Power Plant and the 15-Mile Reach may continue to be used for instream flow purposes by the Board in the 15-Mile Reach. By not expanding the historical use, the River District, PSCo, and CWCB Staff will ensure that this acquisition will not have a negative effect on the maximum utilization of the waters of the state.

Some of the Objectors argue that the Board must retain exclusive discretionary authority over the exercise of the Shoshone Water Rights to provide for the maximum utilization of water for municipal purposes when supplies are needed to benefit growing cities on Colorado's front range. This position is premised on an incorrect interpretation of the doctrine of maximum utilization. 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 uses as possible,” and that maximum utilization does not mean that every ounce of Colorado’s water ought to be appropriated; rather, “[maximum] 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) (emphasis added). Contrary to the Objectors’ argument concerning ISF Rule 6e.(8), there is no authority for the proposition that maximum utilization always means diversion and consumption for municipal purposes.

In evaluating the acquisition under ISF Rule 6e.(8), the River District et al. encourage the Board to consider that the continued exercise of the Shoshone Water Rights in their historical manner will promote maximum utilization by facilitating continued compliance with the 15-Mile Reach Programmatic Biological Opinion (“PBO”) and the broader Upper Colorado River Endangered Fish Species Recovery Program (the “Recovery Program”). Moreover, the continued exercise of the Shoshone Water Rights in “a manner substantially consistent with their historical operations” also ensures the continuation of surplus releases from Green Mountain Reservoir’s Historic Users Pool (“HUP Surplus”) pursuant to the decree and stipulation entered by the Division 5 Water Court in Case No. 91CW247 (the “OMID Check Case”). *See* **CRD-15**. If the Shoshone Water Rights are no longer exercised consistently with historical practice, then the HUP Surplus may not be available as the single largest source of stored water to supplement flows in the 15-Mile Reach. *See id.*; *see also* **CRD-34** and **CRD-35**. Thus, achieving the permanent protection of the Shoshone Water Rights would ease the historical reliance on temporary and/or voluntary water contributions towards permanent protection.¹⁰

¹⁰ In 2022, in response to the Recovery Program’s review of the 15-Mile Reach PBO, the U.S. Fish and Wildlife Service (“FWS”) commended the Recovery Program’s “commitment to developing partnerships to augment flows”

F. The Colorado River Cooperative Agreement and the Shoshone Outage Protocol Agreement.

The Objectors variously argue that existing, third-party agreements, namely the Colorado River Cooperative Agreement (“CRCA,” **CRD-16**) and the Shoshone Outage Protocol Agreement (“ShOP Agreement,” **CRD-17**), require the Board to place additional limitations on this acquisition before it may accept the ISF Agreement. The Objectors are mistaken.

Any discussion of the incorporation of any provisions found in the CRCA or in the ShOP Agreement should occur during the water court process and not during the Board’s 120-day acquisition process. Furthermore, there’s nothing in either agreement that would prevent the Board from acquiring the Shoshone Water Rights pursuant to the ISF Agreement. In fact, the CRCA and the ShOP Agreement do not bind the Board in any respect regarding this acquisition, nor could they because the Board is not a signatory to either agreement. Simply put, there is no need to condition or limit the proposed ISF Agreement based on one Party’s incorrect interpretation of its agreements with the River District and other West Slope entities.

With respect to the CRCA, Objector Denver is one of eighteen signatories (including the River District and numerous Parties to this acquisition process) to a complex and lengthy settlement agreement with numerous interlocking provisions. *See* **CRD-16**. Critically, all other CRCA signatories disagree with Denver’s *current* interpretation and agree that the CRCA contemplates the implementation of a permanent solution to ensure the preservation of the historical call regime created by the Senior Shoshone Water Right, and that the ISF Agreement would fulfill that contractual commitment.

but expressed concern “with the reliance on voluntary water contributions because of the uncertainty that these augmentations will be available in the future.” *See* **CRD-18**.

G. The Board has authority under the plain language of section 37-92-102(3), C.R.S., to acquire an exclusive interest in the right to use the Shoshone Water Rights for instream flow purposes as set forth in the ISF Agreement.

The Objectors argue that the ISF Agreement improperly cedes the Board's discretionary authority to the River District and PSCo. More particularly, the Objectors insist that the ISF Agreement is inappropriate because the agreement: (1) requires the Board to exercise a call (*see* **CRD-3**, ¶ 7); and (2) provides that the Board and the River District must jointly agree in writing to reduce the flow rate requested for administration of the Shoshone Water Rights (*see id.* at ¶ 7.c.). As discussed below, the Objectors' argument regarding the scope of the Board's authority vis-à-vis acquisition agreements is unsupported by the plain language of section 37-92-102(3), C.R.S., and is contradicted by prior instream flow acquisitions by the Board.

The Board has broad authority to acquire water. The Board may acquire water rights, including interests in water rights, in such amount(s) as the Board determines is appropriate to preserve or improve the natural environment to a reasonable degree. *See* § 37-92-102(3), C.R.S. (**CRD-10**). Pursuant to statute, the Board may exercise discretion in determining whether to acquire an interest in water rights and "what terms and conditions it will accept in a contract or agreement for such acquisition[,]" so long as the acquisition will preserve and improve the natural environment to a reasonable degree. *Id.* Furthermore, ISF Rule 10 provides that the Board may enter into acquisition agreements "that limit the Board's discretion in the protection . . . of [an] ISF right, *and/or may delegate limited authority to act on the Board's behalf.*" *See* ISF Rule 10, 2 CCR 408-2 (emphasis added).¹¹ So, contrary to the Objectors' position on this point, the Board

¹¹ The ISF Rules are legally presumed to be valid; thus, to the extent that the Objectors insist that the ISF Agreement unlawfully limits the Board's discretion in exercising the Shoshone Water Rights, the Objectors would need to prove that the ISF Rules are invalid by demonstrating that the rulemaking body acted in a manner inconsistent with statutory requirements. *See Amax, Inc. v. Colo. Water Quality Control Comm'n*, 790 P.2d 879, 883 (Colo. App. 1989).

may lawfully exercise its discretion to limit or delegate its authorities to act in precisely the manner proposed by the ISF Agreement—i.e., through coordination with a donating entity regarding the exercise of an acquired water right or by assigning the right to request an administrative call for such acquired right. In fact, the Board has entered into numerous permanent acquisition agreements wherein the Board has limited or delegated its discretionary authority to another party (including agreements with Denver) to act on the Board’s behalf. Specific examples of contractual arrangements where the Board has exercised its discretion in this manner include the agreements identified as exhibits and attached hereto as **CRD-19** through **CRD-24**.

To conclude, the Objectors’ demand for new contractual conditions regarding the Board’s authority to delegate is premised on an incorrect legal position and should be rejected accordingly.

IV. STATEMENT OF RELIEF REQUESTED

The River District et al. requests that the Board determine that: (1) the acquisition is appropriate to preserve and improve the natural environment to a reasonable degree; (2) the best use of the acquired interest in the Shoshone Water Rights is to preserve and improve the natural environment of the Shoshone Reach to a reasonable degree; and (3) the Board accept the ISF Agreement as tendered by the River District and PSCo.

V. AMOUNT OF TIME DESIRED FOR PRESENTATION

The River District et al. respectfully requests 120 minutes for presentation at the hearing, including witness testimonies and rebuttal. The River District et al. reserves its right to request more or less time for its presentation in response to the August 12, 2025, prehearing conference.

VI. WITNESS LIST AND DESCRIPTION OF TESTIMONY

1. Amy Moyer, Chief of Strategy, Colorado River Water Conservation District, or in the alternative, Andy Mueller, General Manager, Colorado River Water Conservation District.

a. Ms. Moyer may provide pre-hearing witness testimony and may be available for in-person testimony during the hearing to address any questions from the Board relating to the contents of the River District et al.'s prehearing statement.

b. In the alternative, if Ms. Moyer is unavailable or unable to provide testimony, Andy Mueller, General Manager of the Colorado River Water Conservation District, may provide pre-hearing witness testimony and may be available for in-person testimony during the hearing to address any questions from the Board relating to the contents of the River District et al.'s prehearing statement.

2. Brendon Langenhuizen, P.E., Director of Technical Advocacy, Colorado River Water Conservation District.

a. Mr. Langenhuizen may provide pre-hearing witness testimony and may be available for in-person testimony during the hearing to address any questions from the Board relating to the contents of the River District et al.'s prehearing statement.

b. Mr. Langenhuizen's resume is included hereto as **CRD-25**.

3. John Carron, Ph.D., Hydros Consulting, Inc.

a. Mr. Carron may testify regarding the information set forth in sections III.D. and III.E., above. Mr. Carron may also testify as needed for rebuttal purposes.

b. Mr. Carron's resume is included hereto as **CRD-26**.

4. Counsel for the Colorado River Water Conservation District.

a. One of the following individuals will be available for presentation and for rebuttal purposes during the hearing; to respond to any questions from the Board; and to address any issues raised by another Party: Peter Fleming, Jason Turner, or Bruce Walters.

5. The River District et al. reserves its right to call any witness declared by any other party or any witness necessary for rebuttal purposes as may be permitted by the Hearing Officer pursuant to the July 18, 2025, procedural order.

VII. EXHIBIT LIST

The River District et al. identifies the following exhibits that the River District et al. may rely upon at the hearing. The River District et al. reserves the right to use as an exhibit any exhibit introduced by any other party and any exhibit necessary for rebuttal purposes.

<u>Exhibit Number</u>	<u>Exhibit Name</u>
CRD-1	Civil Action No. 466, Senior Shoshone Water Right Decree
CRD-2	Civil Action No. 1123, Junior Shoshone Water Right Decree
CRD-3	Proposed Shoshone Water Rights Dedication and ISF Agreement
CRD-4	January 1, 2024, Purchase and Sale Agreement
CRD-5	Draft Application for Change of Water Rights
CRD-6	May 6, 2025, CPW Recommendation on the Proposed Acquisition of an Interest in the Shoshone Hydroelectric Power Plant Water Rights

CRD-7	May 6, 2025, CPW Biological Evaluation of the Shoshone Water Rights Instream Flow Acquisition
CRD-8	River District and PSCo May 2025 Technical Memorandum
CRD-9	CWCB Staff's Board Memo for May 2025 Board Meeting
CRD-10	Section 37-92-102, C.R.S.
CRD-11	Section 37-92-305, C.R.S.
CRD-12	November 8, 2024, Preliminary Historical Use Assessment – DRAFT
CRD-13	September 11, 2024, Hydros Consulting, Inc., Shoshone Power Plant Water Rights Yield Assessment
CRD-14	November 7, 2024, Hydros Consulting, Inc., Addendum to September 11, 2024, Shoshone Power Plant Water Rights Yield Assessment
CRD-15	Joint Memorandum – The Shoshone Water Rights, the Orchard Mesa Check Case, and Green Mountain Reservoir's Historic Users Pool "Surplus" Releases to the 15-Mile Reach
CRD-16	Colorado River Cooperative Agreement [reduced]
CRD-17	Shoshone Outage Protocol Agreement
CRD-18	October 30, 2024, United States Department of Interior, Fish and Wildlife Service, Letter of Support Re: Shoshone Permanency Project
CRD-19	November 23, 2011, Water Delivery and Stream Flow Improvement Agreement

	between the CWCB, Denver Water, and Grand County
CRD-20	September 9, 2019, Water Delivery Agreement between the CWCB and the City of Boulder
CRD-21	December 23, 2009, Declaration of a Revocable Trust (The Pitkin County Water Rights Revocable Trust) between the Board of County Commissioners of Pitkin County and the CWCB
CRD-22	July 20, 1990, Agreement between the CWCB and the City of Boulder
CRD-23	February 15, 2013, Delivery Agreement between the CWCB and Denver Water
CRD-24	April 13, 2015, Grant of Flow Restoration Use between the Colorado Water Trust and the CWCB
CRD-25	Brendon Langenhuizen – Resume
CRD-26	John Carron – Resume
CRD-27	September 30, 2024, Final Report (CA23044) – Shoshone Reach Instream Habitat Data Analysis, Habitat Simulations and Habitat Evaluation of Colorado River from the Shoshone Diversion to the Shoshone Power Plant Outfall
CRD-28	April 22, 2025, Shoshone Reach Instream Flow Beneficial Use and Hydraulic Habitat Suitability Assessment
CRD-29	September 2024, USFS-BLM Biological and Recreational Resources Dependent on Colorado River Flows Through Glenwood Canyon

CRD-30	Colorado River District – Shoshone Maps
CRD-31	April 30, 2025, Colorado River District, Shoshone Water Rights Analysis on Decreed Instream Flow Reaches in the Colorado River Watershed
CRD-32	House Bill 24-1435 (Concerning the Funding of Colorado Water Conservation Board Projects, And in Connection Therewith, Making an Appropriation)
CRD-33	Summary of Shoshone Permanency Funding Commitments
CRD-34	Table – Total Annual Reservoir Releases for the 15-Mile Reach
CRD-35	Chart – Median % of Total Annual Releases for 15-Mile Reach
CRD-36	November 13, 2024, Shoshone Water Rights Preservation Project B2E Application
CRD-37	January 17, 2025, Press Release – Governor Polis Celebrates Historic Investments in Colorado’s Water Future, Including \$40M for Shoshone Water Rights

Respectfully submitted this 4th day of August, 2025.

COLORADO RIVER WATER CONSERVATION DISTRICT

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