

**BEFORE THE COLORADO WATER CONSERVATION BOARD
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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

**JOINT PREHEARING STATEMENT OF WESTERN RESOURCE ADVOCATES, CONSERVATION
COLORADO, AMERICAN RIVERS, THE NATIONAL AUDUBON SOCIETY, AND TROUT UNLIMITED**

Western Resource Advocates, Conservation Colorado, American Rivers, the National Audubon Society, and Trout Unlimited (collectively, “WRA et al”) hereby jointly submit this Prehearing Statement in the matter of the hearing (“Hearing”) for the Proposed Acquisition of an Interest in the Shoshone Water Rights for Instream Flow Use on the Colorado River (“Shoshone ISF Acquisition”) before the Colorado Water Conservation Board (“CWCB”).

I. Introduction and Statement of Position

WRA et al support the CWCB’s acquisition of an interest in the Shoshone Water Rights¹. We echo submittals by CWCB staff and the Colorado River Water Conservation District (“CRD”) and provide additional information, below, to assist the CWCB Board (the “Board”) in reaching this determination.

WRA et al was recently joined by Trout Unlimited to decrease the volume of Hearing materials being provided to the CWCB. Collectively, the five nonprofit conservation organizations have long histories of successfully working with public and private entities to

¹ As defined in WRA et al-2, CWCB Staff Memo, p. 5

address issues affecting Colorado's streams and rivers, including actively participating in past CWCB instream flow matters. Our memberships and interests span statewide, including on Colorado's east and west slopes.

Western Resource Advocates ("WRA") is a nonprofit conservation organization dedicated to fighting climate change and its impacts on the Interior West's land, air, and water. WRA engages with water providers, districts, and utilities, state and federal government agencies, and Colorado irrigators to find solutions to promote river restoration and water conservation, while protecting stream flows for fish, wildlife, and recreation. WRA has experience helping western communities meet their legitimate water needs, as well as extensive knowledge of the water delivery systems in the Colorado River Basin.

Conservation Colorado ("CoCO") works to protect our state's climate, air, land, water, and communities through organizing, and advocacy. CoCO has a long and successful history in Colorado of collaborating on key environmental issues, working collectively at the State Capitol, and establishing strategic partnerships.

For more than 50 years, American Rivers ("AR") has worked to safeguard the 3.5 million miles of rivers and streams essential to our nation's clean drinking water, extraordinary wildlife, and the strength of our communities. AR advocates for local, state, and federal protection for our nation's healthiest waterways — including rivers that flow across our public lands and through our communities, as well as restoration work to improve river health. In Colorado, AR works to find holistic, common-sense solutions to the many needs of rivers, including the Colorado River, and all who depend on them.

The National Audubon Society (“NAS”) is an inclusive, nonpartisan bird conservation organization that collaborates with diverse stakeholders to further its mission of protecting birds and the places they need, including Colorado rivers and streams, today and tomorrow. Twenty-three state/regional programs, 41 nature centers, 450+ local chapters, and a broad array of partners give NAS an unparalleled wingspan that reaches millions of people each year to inform, inspire, and unite diverse communities in conservation action. Audubon Rockies is a regional office of NAS representing Colorado, Utah, and Wyoming. Audubon Rockies’ Western Rivers Initiative aims to create healthier rivers throughout Colorado, for birds, wildlife, and people.

Trout Unlimited (“TU”) is a nationwide, nonprofit fisheries conservation organization. TU’s mission is to conserve and restore cold water fisheries and the rivers and creeks on which they depend. In Colorado, TU has 10,000 members, 22 chapters, and nearly 40 staff all working to safeguard and improve Colorado’s waterways so that they support healthy trout populations.

WRA et al support the CWCB’s acquisition of an interest in the Shoshone Water Rights. This action by the CWCB has broad public support and could be one of the most significant actions taken by the Board since the Instream Flow Program was created in 1973. We believe consideration of the applicable factors set out in CWCB Rules 2 CCR 408-2 (“CWCB Rules” WRA et al-1), as well as additional considerations and the sheer volume of support, provide overwhelming evidence for the Board to approve the acquisition.

Over the past twenty-plus years, the Colorado River has been compromised by drought and noticeable changes in temperature and precipitation. Over this time, the average flow in the Colorado River, across the basin, has declined approximately 20 percent, largely due to climate change, which is causing warming temperatures, diminished rainfall, increased evaporation, and a snowpack that's shrinking and melting earlier. Models show that climate change and historic drought will continue to affect the Colorado River and the State of Colorado in the foreseeable future.

The proposed instream flow ("ISF") acquisition would preserve and improve the environment to a reasonable degree throughout the 2.4-mile instream flow reach of the Colorado River between the Shoshone Power Diversion Dam and the Shoshone Power Plant Outlets.

Maintenance of historical flows in the Colorado River through continued exercise of the Shoshone Water Rights is also necessary to protect the health of the Colorado River and all the communities, fish and wildlife, and water users that depend on it. For example, CWCB holds over 300 instream flow water rights upstream of the Shoshone Power Plant that benefit from the seniority of the Shoshone Water Rights and their ability to maintain flows in the Colorado River.

An analysis by Colorado Parks and Wildlife ("CPW") concluded that continued exercise of the Shoshone Water Rights benefits hundreds of miles of critical river habitat for ecosystem health, including several species of threatened and endangered fish found in the Colorado River Basin, and nowhere else in the world, and that are the focus of the Upper Colorado River

Endangered Fish Recovery Program, where WRA joins the State of Colorado, water users, and many other stakeholders as a partner. Maintenance of a healthy Colorado River is also critical to a wide range of wildlife including river otters, beavers, mule deer, elk, peregrine falcon and bighorn sheep, and to preserving the unique geology in Glenwood Canyon that includes caves, springs, and geothermal outputs.

Continuation of flows provided by the Shoshone Water Rights is also essential to advancing water security and reliability in the Colorado River Basin for Colorado's water users. These flows help buffer the uncertainty of water supply variability within the State, providing water stability for all who depend on the Colorado River, including the State's critical agriculture and recreation-based economies on the Western Slope.

II. Recommendations Regarding Board Findings

WRA et al support by reference the comprehensive conclusions reached on the relevant factors by the experienced staff at the CWCB and CPW. (CWCB Staff Memo, May 2025, Item 10d. Shoshone ISF Acquisition w/ Encl., WRA et al-2, See Enclosure D-1 CPW's Letter of Recommendation and Enclosure D-2 CPW's Biological Evaluation Report) WRA et al and our experts weigh in on three factors set out in Rule 6e:

Factor 6e(4): *The historical consumptive use and historical return flows of the water rights proposed for acquisition that may be available for the instream flow use.*

The proposed acquisition is for non-consumptive water rights, so there is no associated consumptive use. However, use of the Shoshone Water Rights for ISF purposes clearly will benefit flows further downstream, including in the Colorado River's 15-Mile Reach ("15MR").

Several parties have raised issues as to the actual historical use of the Shoshone Water Rights and its interplay with other existing agreements. Those are questions that will be raised and resolved in the water court process. The question in front of the CWCB is whether the acquisition of the Shoshone Water Rights would preserve and improve the natural environment. The answer is clear that the acquisition of the Shoshone Water Rights would preserve and improve the natural environment. As noted by CWCB staff, the CWCB would "accept the proposed interest in the full decreed amount of the Shoshone Water Rights, which ISF use will then be subsequently limited by any terms and conditions imposed by the change of water right final water court decree." (WRA et al-2, see CWCB Staff Memo, page 7)

Factor 6e(5): *The natural environment that may be preserved or improved by the proposed acquisition, and whether the natural environment will be preserved or improved to a reasonable degree by the water available from the proposed acquisition.*

The natural environment clearly will be preserved and improved to a reasonable degree by the proposed acquisition over time, as the frequency of use of the rights for hydropower production decreases – the Shoshone Reach of the Colorado River has been ecologically impaired for decades. The flow in this reach has been frequently reduced to nearly zero due to hydropower diversions at the Shoshone Dam. This dry "bypass" reach of the Colorado River is highly visible from Interstate 70 and the Amtrak Railroad; many travelers have undoubtedly wondered how or why the river nearly disappears. The CWCB has a tremendous opportunity to

restore the Colorado River's flow in this de-watered reach through the acquisition of the Shoshone Water Rights for ISF uses both in the short term, when hydropower temporarily goes off-line, and over the long-term, as generation eventually stops at the Plant. The Colorado River downstream of the Shoshone Power Plant supports a robust aquatic and terrestrial ecosystem that is supported by the river itself. Restoring flow to the bypass reach will allow fish and other aquatic life to re-colonize this section of the river.

Information provided by CPW and CRD (WRA et al-2, see Enclosure D-1 CPW's Letter of Recommendation, Enclosure D-2 CPW's Biological Evaluation Report, and Enclosure F River District's Technical Memorandum, including Attachment 5, 2024 Miller Report, and Attachment 6, 2025 Ecosystem Report) clearly shows the biological benefit of the Shoshone Water Rights' use for instream flow purposes. The water rights could potentially add up to 1,408 cubic feet per second ("cfs") to the river and the data presented show that aquatic conditions for fish in the river continue to improve up to the 3,000 cfs flow level.

Factor 6e(8): *The effect of the proposed acquisition on the maximum utilization of the waters of the state.*

We work from the understanding 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 "optimum use can be achieved only through proper regard for all significant factors, including environmental and economic concerns." (WRA et al-3 *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307, 314 (Colo.2007)) In this light, we wish to highlight that the proposed acquisition will assist with the maximum utilization of the waters of the state for important non-consumptive needs:

(1) 15MR and Recovery Program - The 15MR is designated critical habitat for two federally listed fish: the Colorado Pikeminnow (*Ptychocheilus lucius*) and the Razorback Sucker (*Xyrauchen texanus*). These fish were designated as endangered species by the U.S. Fish and Wildlife Service in 1967 and 1991, respectively. The 15MR of the Colorado River provides uniquely valuable habitat for these two species and is considered critical to the recovery of both fish populations (WRA et al-4, Osmundson, D.B. 2000. Importance of the 15-Mile Reach to Colorado River Populations of Endangered Colorado Pikeminnow and Razorback Sucker. Final Report to the Upper Colorado River Endangered Fish Recovery Program). For Colorado's water user community, efforts to maintain favorable flow conditions in the 15MR for the survival and recovery of these listed fish is crucial to ensuring that thousands of water uses relying on the Colorado River upstream of Grand Junction can continue to operate in compliance with the Endangered Species Act ("ESA"). Exercise of the Shoshone non-consumptive water rights has, historically, played a key role in helping to maintain flows in the 15MR, especially during the summer and fall irrigation season. Without the continued exercise of the Shoshone Water Rights (including the proposed CWCB instream flow right), continued growth in both transbasin diversions and in-basin water uses by junior water users upstream is likely to further reduce flows through the 15MR.

Maintenance of the Colorado River flow regime associated with the historical exercise of the Shoshone Water Rights is crucial to 15MR flow maintenance and protection. Without permanent protection of the Shoshone Water Rights, it will become much more challenging to meet Recovery Program flow targets in the 15MR, casting

doubt on meeting the standard of making “sufficient progress” toward fish recovery.

This creates a greater risk water users will have to meet other mitigation requirements outside of a Program that has provided ESA coverage for more than 30 years.

- (2) CWCB ISFs - Maintaining the historical use of the Shoshone Water Rights is also critical to the more than 300 CWCB decreed ISFs that protect nearly 1,500 miles of rivers and streams as they are critical to pulling water down through these reaches (as discussed in more detail in WRA et al-2, CWCB Staff Memo, Section VIII. Factors to Consider. p.8).
- (3) Upper Colorado River Outstandingly Remarkable Values - By pulling water downstream to lower Glenwood Canyon, the Shoshone Water Rights also help protect the Outstandingly Remarkable Values of the Colorado River from Kremmling to Glenwood Springs, which include fishing, water temperatures that support cold water fisheries and thus the protection and maintenance of fisheries and fish habitat, and boating (WRA et al-2, CWCB Staff Memo, Enclosure F, Attachment 7). In accordance with the [Amended and Restated Upper Colorado River Wild and Scenic Stakeholder Group Management Plan](#) (WRA et al-5) “The Shoshone and Cameo groups of senior water rights generally control the administrative call within the Colorado River Basin. These water rights are located downstream of the subject stream reaches; therefore, an administrative call during dry or average conditions by these water rights can curtail diversions from upstream junior water rights or require the release of water from storage to replace those junior diversions. This administrative call generally results in stream flow through the subject stream segments in amounts greater than would exist in the absence of the administrative call.” (WRA et al-5, p.30)

WRA et al firmly support CWCB Staff's recommendation from the May 2025 board meeting, and the supporting materials provided by CPW (see WRA et al-2). We find they completely satisfy the Board's statutory requirements and support a decision that the acquisition of the Shoshone Water Rights for ISF purposes will benefit the environment. Other technical and legal questions should be left to the purview of water court.

III. Witness List

- a. **Jay Skinner**, Consultant – Jay Skinner was formerly employed by the CWCB, the Colorado Division of Wildlife, and CPW for 33 years; approximately 24 of which were directly related to the state's ISF Program. Mr. Skinner will testify on the aquatic and terrestrial ecosystem that will benefit from the Board's acquisition of an interest in the Shoshone Water Rights for instream flow use on the Colorado River. He will testify to his support of the methods and findings in CPW's Letter of Recommendation and Biological Evaluation Report (WRA et al-2, Enclosure D-1 CPW's Letter of Recommendation and Enclosure D-2 CPW's Biological Evaluation Report) and materials provided by the CRD (WRA et al-2, Enclosure B River District and PSCo's Offer Letter, Enclosure C Draft ISF Agreement, and Enclosure F River District's Technical Memorandum). Mr. Skinner will also address the importance of the Shoshone Water Rights to ISFs above Shoshone and potential benefits to the ISF water right for the Upper Colorado Recovery Program's 15MR. Mr. Skinner's resume is attached as WRA et al-6.
- b. **Tom Chart**, Principal, Grand River Consulting, LLC – Tom Chart is the past Director of the Recovery Program – a position he held for 12 years. Prior to that he served as the

Instream Flow Coordinator and the Nonnative Fish Coordinator for the Recovery Program. Mr. Chart will testify to the importance of the 15MR as critical habitat for two federally listed fish and the importance of Shoshone Water Rights in sustaining flows in the 15MR. Additionally, he will discuss how maintaining favorable conditions in the 15MR for the survival and recovery of the listed fish ensures thousands of water users can continue to operate in compliance with the ESA. Mr. Chart's resume is attached as WRA et al-7.

- c. **Drew Peterzell**, Colorado State Director, Rockies Region, Trout Unlimited. Drew Peterzell has extensive experience overseeing conservation projects and working closely with farmers and ranchers, state and federal agencies, water rights holders, landowners, and TU staff and volunteers to advance trout habitat, recreation, agriculture and water policy initiatives. A well-respected attorney, Mr. Peterzell has handled significant cases benefiting Colorado's trout populations and the broader Colorado River Basin. Mr. Peterzell's resume is attached as WRA et al-8.
- d. **Orla Bannan**, Policy Manager for State Policy and Engagement, Western Resource Advocates. As part of the Healthy Rivers Program at WRA, Orla Bannan develops and implements key conservation strategies at the state and local level. Ms. Bannan advocates for policy and programs that will protect and improve Western rivers, including working on the Colorado River Basin and advocating for the economic and environmental benefits of water conservation, stream protection, and funding for conservation. Ms. Bannan's resume is attached as WRA et al-9.

Ms. Bannan and Mr. Peternell represent organizations that have long histories of successfully working with public and private entities across Colorado to address issues affecting Colorado's streams and rivers, including actively participating in past CWCB instream flow matters and the Recovery Program. Ms. Bannan and Mr. Peternell may provide testimony related to the acquisition of the Shoshone Water Rights for instream flow use in the Colorado River, specifically related to environmental benefits and ecosystem health, and how the Shoshone Water Rights preserve and improve the natural environment.

IV. Statement of Open Legal Questions

WRA et al have not identified any open legal questions relevant to this Hearing. The water court will resolve contested legal issues in the water rights change case.

V. Statement of Relief Requested

WRA et al request that the Board accept the Shoshone Water Rights for instream flow use on the Colorado River to preserve and improve the natural environment by restoring flows in the depleted reach of stream and improving river connectivity and habitat.

VI. Time Requested at Hearing

WRA et al request 60 minutes total for the testimony of Jay Skinner, Tom Chart, Drew Peternell and Orla Bannan. WRA et al will appropriately combine testimony to eliminate redundancy.

VII. Exhibit List

WRA et al identifies the following exhibits that WRA et al may rely on at the Hearing. WRA et al reserves the right to use as an exhibit any exhibit introduced by any other party and any exhibit necessary for rebuttal purposes.

1. 2 CCR 408-2, Rules Concerning the Colorado Instream Flow Program and Natural Lake Level Program (WRA et al-1)
2. CWCB Staff Memo, May 2025, Item 10d. Shoshone ISF Acquisition w/ Encl. (WRA et al-2)
3. Pagosa Area Water and Sanitation Dist. v. Trout Unlimited, 170 P.3d 307, 314 (Colo.2007) (WRA et al-3)
4. Osmundson, D.B. 2000. Importance of the 15-Mile Reach to Colorado River Populations of Endangered Colorado Pikeminnow and Razorback Sucker. Final Report to the Upper Colorado River Endangered Fish Recovery Program (WRA et al-4)
5. [Amended and Restated Upper Colorado River Wild and Scenic Stakeholder Group Management Plan](#) (WRA et al-5)
6. Mr. Skinner Resume (WRA et al-6)
7. Mr. Chart Resume (WRA et al-7)

8. Mr. Peterneil Resume (WRA et al-8)
9. Ms. Bannan Resume (WRA et al-9)
10. 15-Mile Reach “Dry” Year Monthly Mean Flows 1991 – 2019 (July – Oct of 8 Dry years, 32 Months Total) (WRA et al-10)
11. Irrigation Season 2018 Flows in the 15-Mile Reach of the Colorado River (Palisade Gage) With and Without Augmentation (WRA et al-11)
12. Udall, B. and J. Overpeck. 2017. The twenty-first century Colorado river hot drought and implications for the future *Water Resources Research*, 53(3), 2404-2418 (WRA et al-12)
13. U.S. Fish and Wildlife Service (USFWS). 1999. Final Programmatic Biological Opinion for Bureau of Reclamation's Operations and Depletions, Other Depletions, and Funding and Implementation of Recovery Program Actions in the Upper Colorado River Above the Confluence with the Gunnison River (WRA et al-13)
14. Upper Colorado River Endangered Fish Recovery Program (Recovery Program). 2021a. A Review of the Upper Colorado River Endangered Fish Recovery Program’s Recovery Actions and Endangered Species Response in the Colorado River (WRA et al-14)
15. Upper Colorado River Endangered Fish Recovery Program (Recovery Program). 2021b. Discussion Draft guidance for managing short-duration, low-flow conditions in the 15-Mile Reach during the ‘April Hole’ period (WRA et al-15)
16. Stipulation and Agreement Case No. 91CW247, District Court, Water Division No. 5 (Orchard Mesa Check Case) (WRA et al-16)

VIII. Contact Person.

For this hearing only, Bart Miller, Healthy Rivers Program Director, Western Resource Advocates and John Cyran, Senior Staff Attorney, Western Resource Advocates, are the contacts for WRA et al. Mr. Miller's and Mr. Cyran's mailing addresses, phone numbers, and email addresses are listed below.

Respectively submitted this 4th day of August 2025.

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On behalf of Western Resource Advocates,
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CERTIFICATE OF SERVICE

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

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