

THE COLORADO WATER CONSERVATION BOARD

DENVER WATER’S PREHEARING STATEMENT

CONCERNING THE PROPOSED ACQUISITION OF AN INTEREST IN THE SHOSHONE WATER RIGHTS FOR INSTREAM FLOW USE, COLORADO RIVER, WATER DIVISION NO. 5

Pursuant to Rule 6(m)(5)(e) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, the City and County of Denver, acting by and through its Board of Water Commissioners (Denver Water) hereby submits its prehearing statement. As grounds for its prehearing statement, Denver Water states as follows:

I. Introduction and Request For Relief:

Denver Water supports the CWCB’s acquisition of the Shoshone Water Rights and change to instream flow (ISF) use as a mechanism that will permanently preserve the current flow regime of the Colorado River, as protected by the Shoshone Outage Protocol (ShOP). Denver Water believes the CWCB’s acquisition would be a win for the State of Colorado if done in a thoughtful manner that protects existing water rights from material injury. This balance can best be struck by modifying the Shoshone Water Rights Dedication and ISF Agreement (“Use Agreement”) to incorporate the terms of ShOP, which helps to preserve the flows created by the Senior Shoshone Water Right while also protecting essential water supplies for the millions of Coloradoans who rely on these supplies during extreme water shortages.

ShOP was conceived in Article VI of the Colorado River Cooperative Agreement (CRCA) among Denver Water and several West Slope Parties in 2013 and applies to Denver Water and the River District on a permanent basis. A few years later, a separate ShOP agreement (“2016 ShOP”) became effective among Denver Water, various West Slope Parties, Northern Water, the U.S. Bureau of Reclamation (Reclamation), and the Colorado Division of Water

Resources. This broader agreement operates in parallel to the CRCA ShOP agreement, until June 27, 2056 (unless extended), and it includes several additional provisions specific to Northern Water and Reclamation. Since then, Aurora Water and Colorado Springs Utilities have joined the 2016 ShOP under separate agreements. This prehearing statement refers to the CRCA ShOP provisions that relate specifically to Denver Water since they apply on a permanent basis.

Similar to an ISF, ShOP preserves the flow in the Colorado River whenever the Shoshone Power Plant is unable to operate for any reason by protecting the “Shoshone Call Flows,” which means the flow regime created by the Senior Shoshone Call. ShOP did not quantify the Shoshone Call Flows, but rather, through a compromise, requires that the parties bypass water when the Shoshone Power Plant is not operating and flows at the Dotsero gage are at or less than 1,250 cfs in the irrigation season and at or less than 900 cfs in the winter season, subject to exceptions for water shortages and 17 days in the winter, reflecting a maintenance period that historically occurred at the Shoshone Power Plant. ShOP also provides relief to junior water rights during water shortages, which help Denver Water and others replenish reservoirs during droughts. These terms operate together in a balanced compromise to protect flows in the river while not jeopardizing critical water supplies required for essential needs.

If the CWCB disregards ShOP, it will adversely impact the water supply upon which Denver Water’s 1.5 million customers rely. As a consequence, Denver Water will need to insist on a strict quantification of the Shoshone Water Rights to prevent injury to its system because it will be at risk of a 1,408 cfs call that, as proposed by the Proponent, would apply without any reduction, unlike the current Shoshone Water Rights that may not call due to maintenance, planned and unplanned outages, and agreements for relaxation of the call.

Absent a consensus-based approach that maintains the status quo in the form of ShOP's terms, there is a risk that the Shoshone Water Rights will be diminished through the change case. A change of water right proceeding is not designed to protect and preserve the flow regime in the river, but rather, to quantify the actual historical beneficial use of a water right to prevent enlargement and injury to other water rights. Based on an analysis of the available records, a contested change of the Shoshone Water Rights is unlikely to yield the Proponent's anticipated volume of water for ISF purposes.

For these reasons, Denver Water requests that the CWCB incorporate the ShOP terms into the proposed Use Agreement as reflected in **Denver Exhibit 1**. This will help maintain the status quo and resolve Denver Water's objections in the change of water right case. Alternatively, if the CWCB declines to include the ShOP terms in its acquisition and change of the Shoshone Water Rights, the CWCB should delay its acquisition until the proponent corrects the significant deficiencies in its historical use analysis so that the CWCB can accurately assess whether the proposed ISF acquisition will materially injure existing water rights.

II. Statement of Denver Water's Position:

1. Impact of the Shoshone Water Rights on Denver Water's System.

Denver Water is the oldest and largest municipal water provider in Colorado, serving 1.5 million customers in the City and County of Denver and surrounding communities. Approximately half of Denver Water's water supply originates on Colorado's Western Slope.

When the Senior Shoshone call is being administered, Denver Water must curtail its entire West Slope system which is comprised of the Blue River (Roberts Tunnel) and Moffat Tunnel Collection Systems, Williams Fork Reservoir, and Welford Mountain Reservoir. (**Denver Ex. 9.**) The Junior Shoshone Call does not curtail Denver Water's Moffat Tunnel Collection

System, but it does curtail the rest of its West Slope system. (**Denver Ex. 9.**) When Denver Water is curtailed, it may continue to divert via the Blue River and Moffat Collection Systems (Roberts and Moffat Tunnels), but only by exchanges from Williams Fork Reservoir, primarily.

Denver Water's system is also sensitive to whether Reclamation's Green Mountain Reservoir (GMR) fills. Under the Blue River Decree, Denver Water may divert under its junior priorities while GMR is filling. If GMR does not fill, Denver Water must release a replacement source in substitution of Reclamation's obligations to Western Slope water users under Senate Document 80 or release water from Dillon Reservoir to GMR.

If, as proposed by the River District, the Shoshone Water Rights are able to call 24 hours per day, 7 days per week for ISF use, under a right not prone to outages for maintenance or other reasons as the plant historically has been, Denver Water's water rights would be curtailed more frequently. This will result in (1) draw down of Denver's West Slope Reservoirs used for exchange operations, and release of more water from storage for substitution payments than has historically occurred; and (2) larger diversions during the spring runoff to refill these reservoirs. This will reduce the reliability of Denver Water's water supply during severe droughts, alter the current hydrograph, change reservoir operations, and could result in more severe drought restrictions for its customers.

2. The Shoshone Outage Protocol.

a. The CWCB should incorporate the CRCA ShOP terms and conditions into the Use Agreement and Application for a Change of the Water Right.

To preserve the status quo, the CWCB should incorporate the terms of ShOP into the Use Agreement and application to change the water right. ShOP is a carefully negotiated set of conditions intended to preserve the Shoshone Call Flows created by the Senior Shoshone Water Right while at the same time providing relief in times of severe water shortages. Since taking

effect in 2013, ShOP has gained participation and operated reasonably well to preserve the Shoshone Call Flows. The Proponent's proposed Use Agreement without ShOP terms will upset this balanced approach to protecting the Shoshone Call Flows that has been administered by the Division Engineer for nearly a decade.

ShOP protects “. . . the flow regime created by the Senior Shoshone Call,” i.e., the Shoshone Call Flows, (**Denver Ex. 2**, Art. VI.A.2.), when a Shoshone Power Plant Outage occurs due to a “shutdown for repair, maintenance, *or other reasons*. . . .” (**Denver Ex. 2**, Art. VI.A.3.) (emphasis added).

When a Shoshone Outage occurs in the irrigation season (March 25-November 10) and results in a flow of the Colorado River at the Dotsero gage at or below 1,250 cfs (not including releases for endangered fish species purposes), then the parties to ShOP must operate their systems as if the Senior Shoshone Call were on the River to increase flows up to 1,250 cfs at the Dotsero gage (plus water released for endangered fish species purposes). (**Denver Ex. 2**, Art. VI.B.1.) ShOP does not require the parties ensure a flow of 1,250 cfs, but rather, operate their systems by bypassing water if their water rights are junior to the Senior Shoshone Water Right.

CRCA Article VI.B.3 separately addresses Shoshone Call flows during the winter season. It provides that from November 11 through March 24: (1) as a result of conditions other than scheduled maintenance on the Shoshone power plant facilities, and (2) if flows at the Dotsero gage are at or below 900 cfs, the parties must operate their system as if the Senior Shoshone Call were on the river. The parties are not required to create a flow of 900 cfs, but instead bypass water they are otherwise legally entitled to take under their junior water rights.

ShOP also includes “water shortage provisions” that apply during very dry irrigation seasons and winter seasons. (**Denver Ex. 2**, Art. VI.B.1, B.3.) These provisions, which have not

been triggered since the CRCA became effective in September 2013, allow Denver Water and other ShOP parties to exercise their water rights to meet critical municipal needs, such as protection of public health, welfare and safety.

The determination of whether ShOP parties may exercise their water rights during water shortages in the irrigation season depends on monthly projections of water shortages in the spring. A water shortage occurs when the following two conditions are met:

- a. Using Denver Water's regular methodology and based on the "normal" scenario, Denver Water predicts that reservoir storage in its system [including Antero, Eleven Mile, Cheesman, Marston, Chatfield, Gross, Ralston, Dillon, Williams Fork, and Wolford Mountain] on July 1 will be at or below 80% full; and
- b. The Most Probable forecast of streamflow prepared by the Natural Resources Conservation Service (NRCS) or jointly by NRCS and the Colorado Basin River Forecast Center indicates that the April - July flow of the Colorado River at the Kremmling gage will be less than or equal to 85% of average. If no forecast for the Kremmling gage is available, then the Dotsero gage will be used.

To determine whether a water shortage occurs during the irrigation season, Denver Water will make three monthly projections – in March prior to March 25, and again in early May and late June. (**Denver Ex. 2**, Art. VI.B.3.a.) If a projection made in March or May meets the conditions for a water shortage, then a party is not required to operate their system as if there is a Senior Shoshone Call until the next projection. Conversely, if a projection made in March or May does not meet the conditions for a water shortage, they must operate as if there is a call until the next projection; provided that a party is relieved from operating as if there is a call during any period when the Shoshone call is relaxed under the 2007 Call Reduction Agreement between Denver Water and Xcel Energy Company. (**Denver Ex. 2**, Art. VI.B.3.b.) If the June projection meets the condition for a water shortage, then the party is relieved from operating as if there is a call for the remainder of the irrigation season. (**Denver Ex. 2**, Art. VI.B.3.c.)

In the winter, a water shortage is defined by the storage level on November 1. If Denver Water storage is less than 79%, the parties are only obligated to partially operate as if there is Call depending on the percentage of storage contents, (**Denver Ex. 2**, Art. VI.B.3.a.-c.), provided that if Denver Water’s storage is less than or equal to 49% the parties are not required to operate as if there a Call:

Percentage Range of Storage Contents	Required operation
less than 79% and greater than 63%	Half of normal obligation
Equal to or less than 63% and greater than 49%	One fourth of normal obligation
equal to or less than 49%	No obligation

The CRCA also provides that regardless of whether a water shortage occurs, the obligation to forego water diversions will “not apply for 17 cumulative days during the Winter Season, to duplicate the effect of the current scheduled outages for maintenance.” (**Denver Ex. 2**, Art. VI.C.2.b.)

To give effect to ShOP’s terms in the Use Agreement, the call of the Shoshone Water Rights for ISF purposes must be limited to no more than 1,250 cfs in the irrigation season (Mar. 25 – Nov. 10) and no more than 900 cfs in the winter season (Nov. 11- March 24) as measured at the Dotsero gage. Denver Water would not object to use of the Junior Shoshone Water Right for ISF purposes provided its call is subordinated to a date of September 18, 2025. The water shortage provisions and the 17 cumulative days of outage for maintenance in the winter can be incorporated into the Use Agreement through general no-call provisions (or in the winter, through reduced calls depending on the percentage of Denver Water’s storage contents).

b. ShOP provides reasonable terms that should be applied to the CWCBC’s use of the Shoshone Water Rights.

Under § 37-92-102(3), C.R.S., the CWCB can accept a proposed acquisition, subject to terms and conditions it deems appropriate: “. . . the board shall determine in a timely manner, not to exceed one hundred twenty days unless further time is granted by the requesting person or entity, *what terms and conditions it will accept in a contract or agreement for such acquisition.*” (Emphasis added). *See also* ISF Rule 6b.

ShOP provides a reasonable compromise for acceptance of the acquisition. The ShOP terms will resolve Denver Water’s concerns in this matter. They will also protect critical water supplies during water shortages, not just for Denver Water but also for other water users who may benefit based on the priority system. This will help satisfy the doctrine of the maximum utilization of waters by committing the Senior Shoshone Water Right to ISF uses most of the time, while providing relief to other water users during water shortages to protect public safety and critical municipal functions. ShOP water shortage provisions are also narrowly tailored as they have yet to be triggered since becoming effective in September 2013. For these reasons, the CWCB should accept the acquisition with modifications to incorporate the ShOP terms on a permanent and perpetual basis.

3. A change of the Shoshone Water Rights based on the BBA Consultants historical use analysis would impair Denver Water’s water rights.

If the ShOP terms are not incorporated into the proposed Use Agreement, it will then become essential for Denver Water to insist on an accurate quantification of the Shoshone Water Rights because it will no longer have the protections of ShOP’s terms. Without the bargained for benefits of ShOP, the Shoshone Water Rights will need to be limited to their actual historical beneficial use. This is critical given that a change of the Shoshone Water Rights to ISF uses will likely be operated in perpetuity without interruption, contrary to historical operations which included planned and unplanned outages (e.g., routine maintenance, repairs).

a. The BBA Analysis of the historical use contains significant flaws.

The BBA Analysis contravenes existing law. An applicant seeking a change of use of a water right bears the burden of proving that the change will not injure other water users. C.R.S. § 37–92–305(3)(a); *Cnty. of Boulder v. Boulder & Weld Cnty. Ditch Co.*, 2016 CO 17, ¶ 35.

An absolute decree is implicitly limited to actual historical use, notwithstanding its decreed flow rate. *Division Engineer v. Bradley*, 53 P.3d 1165, 1170 (Colo. 2002). Under C.R.S. § 37-92-305(3)(d), the “quantification of the historical consumptive use of a water right must be based on an analysis of the actual historical use of the water right for its decreed purposes during a representative study period that includes wet years, dry years, and average years.” Further, “[d]iversion of water by itself cannot ripen into a water right if the water is not used beneficially.” *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 53-54 (Colo. 1999). “A change in the ‘manner of use’ must be . . . ‘strictly limited to the extent of former actual usage.’” *Santa Fe Trail Ranches*, 990 P.2d at 54.

Because injury can result from an unlawful enlargement of a changed water right, it is necessary to determine the actual historical beneficial use lawfully made. C.R.S. § 37–92–305(3)(a); *Cnty. of Boulder v. Boulder & Weld Cnty. Ditch Co.*, 2016 CO 17, ¶ 33. Additionally, “[w]hile the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible ‘change’ of an existing right.” *Division of Water Resources v. Bradley*, 53 P.3d 1165, 1170 (Colo. 2002).

The BBA historical use analysis includes several significant flaws that do not conform to existing law. (See **Denver Ex. 5**.) First, the study period must be adjusted. The BBA study period of 1975-2003 is not representative, as it omits the most recent period of current administration, and variable hydrology. Second, the BBA analysis must be revised to base its quantification on a

representative measure of the beneficial use of the Shoshone Water Rights. The Dotsero gage, which is approximately 8.5 miles upstream is not representative of actual beneficial use, but rather, of the river at Dotsero. The best measure of beneficial use is the flow at the plant correlated to power production as documented in the State's diversion records. Third, the omission of periods of non-use during the study period must be corrected. The Proponent argues the periods of non-use are justified, but it can point to no statutory exemption for excluding days that it omitted from its analysis or other valid legal basis to support this assertion. Rather, cases where justified nonuse has been raised as an issue arise within the context of abandonment. The one change case that discusses justified nonuse holds that prolonged unjustified nonuse calls for examination of the period of nonuse when determining the annual average historical use amount. *Wolfe v. Sedalia Water & Sanitation Dist. in Douglas Cnty.*, 2015 CO 8, ¶ 34 (declining to find that a 24-year period of nonuse was justified where there were no findings in the record to support such a conclusion). Finally, the BBA analysis includes water releases from GMR in its analysis that is not part of the natural flow. The inclusion inflates the historical flow available to the Shoshone Water Rights used for power production, resulting in enlargement.

Because the significant flaws in the historical use analysis will result in unlawful enlargement and injury, the CWCB should delay acquisition and request that the River District correct the deficiencies. If the BBA Analysis is corrected to conform to what the law requires, the Shoshone Water Rights are at risk of a substantial reduction. Denver Water does not believe this outcome would be desirable, which is why it encourages the CWCB to condition its acceptance of the Shoshone Water Rights on a modified Use Agreement that incorporates the ShOP terms.

4. The CWCB must retain its exclusive discretion to operate instream flow rights.

The Proponent's Use Agreement usurps the CWCB's exclusive authority by requiring it to operate the Shoshone Water Rights in a specific manner at all times.

Section 37-92-102(3), C.R.S., vests the CWCB "with the exclusive authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, such waters of natural streams . . . as the board determines may be required for minimum streamflows or for natural surface water levels . . . to preserve the natural environment to a reasonable degree." Under § 102(3), "no other person or entity shall be granted a decree adjudicating a right to water or interests in water for instream flows in a stream channel between specific points . . . for any purpose whatsoever."

Paragraph 7 of the Proponent's Use Agreement states that "[t]he CWCB agrees that it will request administration of the Shoshone Water Rights for instream flow use in the Shoshone Reach of the Colorado River to preserve and improve the natural environment to a reasonable degree *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 the limitations set forth below." (Emphasis added). The limitations only allow a reduction: "During any period wherein the CWCB and the River District *jointly agree in writing to reduce the flow rate requested for administration* of the Shoshone Water Rights for instream flow purposes." (Emphasis added). Paragraph 7 of the Use Agreement gives the Proponent a veto over operations. By putting the Proponent in a coequal role with the CWCB, the proposed Use Agreement violates the CWCB's exclusive authority under C.R.S. § 37-92-102(3) to appropriate and acquire water rights for ISF purposes.

5. Dual Use of Shoshone Water Rights for Power and ISF Uses.

Denver Water requests that the CWCB accept the Shoshone Water Rights for use only when the power plant is not operating. Partial use for ISF purposes when the power plant is

operating could conflict with Denver Water's 2007 Call Reduction Agreement with Xcel. Additionally, dual simultaneous use may result in enlargement of the right, and would require new measurement structures and devices and extensive real time coordination to simultaneously track the separate and dual uses to prevent injury.

III. List of Legal Questions:

Does the proposed Use Agreement improperly surrender the CWCB's exclusive authority to operate water rights for ISF purposes to the River District?

IV. Conclusion and Relief Requested:

Denver Water requests relief as set forth in Section I above. Denver Water is also requesting the revisions to the Use Agreement set forth in **Denver Exhibit 1**. Denver Water requests 1 hour at the hearing or in the alternative 4 hours to be shared jointly with Northern Water, Aurora Water, Colorado Springs Utilities, and Homestake Partners.

V. Witnesses:

At the September 16, 2025, hearing, Denver Water may call the following witnesses:

1. Heather Thompson, PE. Ms. Thompson may testify about her critiques of the Hydros and BBA analyses, and her assessment of what a corrected historical use analysis yields.
2. Jeffrey Bandy, PE. Mr. Bandy may testify about ShOP operations, including water shortage provisions, ShOP's benefits to the river, and injury to Denver Water in the absence of ShOP, as well as portions of this prehearing statement.
3. Daniel Arnold, Attorney. Mr. Arnold may testify as to Denver Water's position and request for relief, and terms of CRCA and ShOP.

VI. Exhibits to be Introduced at Hearing:

At the September 16, 2025 hearing, Denver Water may use the following exhibits:

1.	Denver Ex. 1	Draft Shoshone Water Rights Dedication and ISF Agreement with Redlines and Comments
2.	Denver Ex. 2	2013 Colorado River Cooperative Agreement (CRCA)
3.	Denver Ex. 3	2016 Multi-Party ShOP Agreement
4.	Denver Ex. 4	2007 Call Reduction Agreement
5.	Denver Ex. 5	Technical memorandum by Heather Thompson, Re: Shoshone Power Plant Volumetric Limit
6.	Denver Ex. 6	Evaluation of Hydros Consulting's Shoshone Power Plant Water Rights Yield Assessment
7.	Denver Ex. 7	Resume of Heather Thompson
8.	Denver Ex. 8.a	Thompson Graphs and Tables BBA Memo
9.	Denver Ex. 8.b	Thompson Graphs and Tables Hydros Memo
10.	Denver Ex. 9	List of Denver Water water rights currently used for water supply affected by the call placed by the Senior and Junior Shoshone water rights
11.	Denver Ex. 10	Resume of Jeffrey Bandy
12.	Denver Ex. 11	Map of Denver Water Collection System
13.	Denver Ex. 12	Straight Line Diagram of Denver Water's Major Water Supply Infrastructure and Other Major Infrastructure in the Upper Colorado River Basin Relative to the Shoshone Power Plant
14.	Denver Ex. 13	DW ShOP Contributions
15.	Denver Ex. 14	DW ShOP Substitution Table
16.	Denver Ex. 15	1408vShOP CurrentClimate and Demands
17.	Denver Ex. 16	1408vShOP_5FWarmingFutureDem

Respectfully submitted this 4th day of August, 2025

JESSICA R. BRODY, General Counsel

By: /s/ **Daniel J. Arnold**

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2025, a true and correct copy of **Denver Water's Prehearing Statement and Denver Exhibits 1-16** were electronically submitted to the Colorado Water Conservation Board via email to Jackie.Calicchio@coag.gov and the following additional recipients set forth in the Table below.

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