

BEFORE THE COLORADO WATER CONSERVATION BOARD

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

**PREHEARING STATEMENT OF NORTHERN COLORADO WATER
CONSERVANCY DISTRICT AND ITS MUNICIPAL SUBDISTRICT**

In accordance with the Hearing Officer’s July 18, 2025 Order and Instream Flow (ISF) Rule 6m(5)(f), 2 CCR 408-2, Northern Colorado Water Conservancy District and its Municipal Subdistrict (collectively, “Northern Water”) hereby submit this Prehearing Statement.

Unless the Colorado River Water Conservation District (River District) and Public Service Company of Colorado (Xcel) were to agree to extend the statutory 120-day period for a CWCB decision, Northern Water requests that the Colorado Water Conservation Board (CWCB) decline to accept the proposed acquisition of the Shoshone Water Rights for ISF purposes, with clear direction to the project partners that it will re-consider a revised proposal after further negotiations with Northern Water and the other parties that incorporates protective terms (previously agreed upon by the River District) related to the Shoshone Outage Protocol and upstream reservoir operations that “maintain river operations upon which water users statewide have historically relied and planned.”¹

In the alternative, if the CWCB accepts the proposed acquisition, Northern Water requests that it only do so if the acquisition agreement is significantly modified as described herein, including to limit CWCB’s ability to place a call for instream flow purposes based on existing Shoshone Outage Protocol limitations.

¹ Memo, Rob Viehl & Kaylea White to CWCB Members, “10.d Proposed Acquisition of an Interest in the Shoshone Water Rights for Instream Flow Use on the Colorado River” at 1 (May 21-22, 2025) (“CWCB Staff Memo”).

I. Factual Background

Northern Water expects the CWCB will receive additional background specific to the Shoshone Water Rights from CWCB staff, the River District, Xcel, and other parties and presentations. The facts below seek to provide additional context to the rights and their administration, particularly as they relate to the interests of Northern Water.

A. C-BT Project: Green Mountain Reservoir

Northern Water is a water conservancy district established in 1937 to partner with the federal government for the construction and operation of the Colorado-Big Thompson (C-BT) Project, a transmountain diversion project that delivers an average of over 200,000 acre-feet of water from the Colorado River Basin to the Eastern Slope of the Continental Divide for supplemental use within Northern Water's boundaries, which encompass about 615,000 acres of irrigated land and a population of over one million people. A key component of the C-BT Project is Green Mountain Reservoir, a 154,645 acre-foot reservoir located on the Blue River in Summit County operated by the U.S. Bureau of Reclamation with a priority date between the senior and junior Shoshone Water Rights. *See* Northern et al. Ex. 7 (map). Green Mountain Reservoir contains storage accounts for different purposes pursuant to "Senate Document 80" ("SD-80") and the Operating Policy for Green Mountain Reservoir (1983), the foundational governing documents for the reservoir. Northern et al. Ex. 1. The 52,000 acre-foot "Replacement Pool" is used, when flows at the Shoshone diversion dam are less than 1,250 cfs, to fulfill Western Slope water rights in the same amount concurrently being diverted by the C-BT Project for Eastern Slope use. Any change in the ability to fill the Replacement Pool impacts C-BT. The 100,000 acre-foot "Power Pool" is used for hydroelectric power generation and is primarily available, without charge, to supply irrigation and domestic water in western Colorado. Under current administration, the Power Pool is subdivided into sub-pools, including a 66,000 acre-foot

“Historic User Pool” (“HUP”) to supply irrigation and domestic appropriations perfected before October 15, 1977, a 5,000 acre-foot “Silt Pool” to benefit the Silt Project, and a 20,000 acre-foot “Contract Pool” (20,000 acre-feet) for other uses authorized by contract to be supplied from controllable releases from the reservoir. Northern et al. Ex. 2 at 56658. Reducing the ability to fill Green Mountain reservoir reduces the HUP water and Contract Pool water used to benefit west slope water users.

Operation and use of the 66,000 acre-foot HUP is governed in large part by operating criteria included in a 1996 stipulation incorporated into the decree entered in the “Orchard Mesa Check Case.” Northern et al. Ex. 3. In drier years, nearly all of the HUP is released to provide water for replacement of depletions by HUP beneficiaries and for direct delivery to supplement the irrigation supplies in the Grand Valley.² However, in wetter years when it is not needed by the HUP beneficiaries, a HUP “surplus” is declared by the HUP managing entities³, the surplus water is an essential tool under the Upper Colorado River Endangered Fish Recovery Program (“Recovery Program”) to provide water to support recovery of fish species listed as threatened or endangered under the federal Endangered Species Act (ESA) found in the “15-Mile Reach” extending upstream from the confluence with the Gunnison River. Surplus HUP water is delivered under contracts, thus resulting in enhanced flows within the reach to the benefit of endangered fish and their habitat. Northern et al. Ex. 3, Attachment 1, ¶ 5.a. These releases are additive to water appearing in the 15-Mile Reach through the Shoshone Water Rights’ non-consumptive use or from other sources. The continued success of the Recovery Program is

² U.S. Bureau of Reclamation, *Seventy-First Annual Report: Colorado-Big Thompson Project and Western Division Systems Power Operations*, at 13 (May 2023).

³ CWCB, the Colorado State Engineer, Orchard Mesa Irrigation District (OMID), Grand Valley Irrigation Company (GVIC), Grand Valley Water Users Association (GVWUA), U.S. Fish and Wildlife Service (USFWS), and U.S. Bureau of Reclamation (Reclamation).

crucial statewide because it provides streamlined ESA coverage for numerous projects' depletions.⁴ Reduction in the ability to fill Green Mountain Reservoir, effects the availability of HUP surplus. And without releases from upstream reservoirs like Green Mountain Reservoir, the existing Recovery Program operations and benefits could unravel, putting numerous projects that rely on the Recovery Program for ESA compliance at risk.

Surplus HUP water is, as the River District acknowledges (ISF Offer Letter, Attachment 9), commonly the largest source of upstream storage available for supplementing flows in the 15-Mile Reach. Of course, the ability of Green Mountain Reservoir to contribute controllable releases to the 15-Mile Reach is dependent upon the existence of an HUP "surplus." Operation of Green Mountain Reservoir and its ability to fill each year depends in part on hydrologic conditions; calls by downstream senior water rights, including the Shoshone Water Rights; and the volume of water needed to refill the reservoir based on the previous year's release of stored water. If conditions change on the Colorado River, including through an inflated quantification of the Shoshone Water Rights' historical use and a corresponding enlargement of their use and call frequency moving forward, then the amount and frequency of Green Mountain Reservoir diversions into storage will be diminish, the amount and frequency of Replacement Pool releases would increase because C-BT Project diversions would be out of priority more frequently, and the ability of the reservoir to meet all Replacement Pool needs, satisfy all HUP beneficiary uses, meet the needs of the Contract Pool agreements, and provide controllable surplus HUP water to the 15-Mile Reach would be compromised.

In 2016, after years of negotiation, numerous parties entered into the Shoshone Outage

⁴ U.S. Fish and Wildlife Service, *2023 Assessment of Sufficient Progress for the Upper Colorado River Endangered Fish Recovery Program in the upper Colorado River basin*, at 2 (Nov. 14, 2024); see also Consultation List, Recovery Program Website: <https://coloradoriverrecovery.org/uc/documents/section-7-consultations/consultation-list/>.

Protocol Agreement (“2016 ShOP Agreement”) to implement operational procedures and provide greater certainty for the flow regime of the Colorado River when the Shoshone Power Plant is not operating and calling. Denver Ex. 3.⁵ The 2016 ShOP Agreement stemmed from a “desire to keep the flow regime of the Colorado River as it has been historically influenced by the Senior Shoshone Call.” Denver Ex. 3, Recital C. In basic terms, the 2016 ShOP Agreement employs a “virtual call” during plant outages under which certain parties would, subject to water shortage exceptions, operate and exercise their water rights “as if” a full or partial senior Shoshone call were in place. Under the agreement, Green Mountain Reservoir would participate in the protocol under certain circumstances tied to its probable or actual fill, but only up to a virtual Shoshone call of 900 cfs in the winter or 1,250 in the summer, and then only to a certain extent of the Power Pool. Denver Ex. 3, ¶ IV.D. The 2016 ShOP Agreement was an agreed upon balancing of the need for Colorado River flows and upstream storage and diversion. The ShOP parties’ (including the River District) agreed-upon flow regime in the 2016 ShOP Agreement is strikingly different from the regime portrayed by the River District’s proposed year-round continuous 1,408 cfs call, discussed below.

B. Windy Gap Project

The Municipal Subdistrict was created in 1970 as a subdistrict of Northern Water to construct and operate the Windy Gap Project, a transmountain diversion project that diverts water from the Colorado River near the Town of Granby for delivery through C-BT Project facilities to municipalities and other water users on the Eastern Slope. The Windy Gap Project was constructed in the 1980s to provide Colorado River water to municipalities on the Eastern Slope. Through construction of the 90,000 acre-feet Chimney Hollow Reservoir, which will be

⁵ The parties are the U.S. Bureau of Reclamation, the Colorado Division of Water Resources, Denver Water, the River District, Middle Park Water Conservancy District, Northern Water, the Municipal Subdistrict, GVVUA, OMID, and GVIC.

completed this year, the project will provide a firm annual yield of approximately 30,000 acre-feet to Eastern Slope project participants (as well as 3,000 acre-feet to the Middle Park Water Conservancy District on the Western Slope). The CWCB recognized the project as an “identified project and process” in the initial Water Plan and has loaned over \$150 million for project construction.⁶ Because the Windy Gap Project is junior to the Shoshone Water Rights, its diversions are directly affected by the frequency and amount of Shoshone calls, in addition to general hydrologic conditions. The project also is subject to the 2016 ShOP Agreement, under which it would operate during a Shoshone Plant outage as if a call of 1,250 cfs is in place, subject to certain volumetric and other limitations. Denver Ex. 3, ¶ IV.B; Northern et al. Ex. 4.

C. Administration of the Colorado River

The Shoshone Water Rights are an integral part of a complicated system of water rights administration on the Colorado River. It is important for the CWCB to understand those complexities and the water rights’ history in order to appreciate the effects quantification of the Shoshone Water Rights, and the future exercise that the ISF use will have on other water rights and critical interests of the CWCB (including flows for Recovery Program, water supply for the State, prior use of tax dollars to support construction of supply projects). In other words, the stakes of the proposed acquisition and the importance of the acquisition agreement cannot be understated. The CWCB must maintain and respect the critical balance of existing contractual commitments. It is of critical Statewide importance.

Based on his specialized knowledge and experience as a water resources engineer, Northern Water’s Kyle Whitaker will explain how the basic principles of administration on the Colorado River underwent a few discrete and substantial changes between the 1970s and 1998. Northern et al. Ex. 5. This explanation will provide needed context and demonstrate why a

⁶ See HB 24-1435, § 12 (2024 Projects Bill).

historical use analysis that relies on years before 1998 is not accurate and reliable. The eras of Colorado River water rights administration are summarized as follows:

- **1943–1983 (Senate Document 80):** SD-80 operated to supplement irrigation and domestic uses on the Western Slope with releases from the Green Mountain Reservoir Power Pool in a way that kept flows at the Shoshone Plant at 1,250 cfs, thereby satisfying the senior Shoshone Water Right and avoiding curtailment of West Slope irrigation and domestic water rights junior to the senior Shoshone Water Right.

- **1984–1997 (Green Mountain Reservoir Operating Policy):** Green Mountain Reservoir Power Pool is subdivided and HUP releases allow beneficiary rights upstream and junior of the Shoshone Water Rights to continue diverting even when Shoshone or the “Cameo Call” in the Grand Valley are calling. Shoshone begins to regularly place calls. Uncertainty exists surrounding implementation of Policy, including use of Contract Pool and exhausting HUP.

- **1998–present (Orchard Mesa Check Case Settlement and HUP Operating Criteria):** Settlement generally reduces the Cameo Call’s impact on the HUP and allows more water to flow through the 15-Mile Reach to enhance habitat for listed fish species covered by the Recovery Program through use of “surplus” HUP water. The ShOP Agreement, as well as a 2007 Call Relaxation Agreement between Denver Water and Xcel (Denver Ex. 4), are also integral features of this current era of Colorado River water rights administration.

II. Statement of Positions

Without waiving or limiting any rights or arguments they intend to make in Water Court, Northern Water expects to take the following positions during the CWCB’s Hearing.

A. The River District's proposed historical use analysis is not accurate and reliable and will result in injury to other vested water rights, moreover the River District's proposal tries to evade decades of prior negotiated agreements.

The Offer Letter submitted by the River District and Xcel correctly notes that the CWCB's consideration of the factors set out in ISF Rule 6e is "mandatory." In relation to ISF Rule 6e(4) regarding historical use, the River District offers a technical memorandum (Attachment 8) and characterizes it as a "reasonable and well-supported" analysis of the Shoshone Water Rights' historical use. Northern Water disputes the accuracy of the River District's historical use analysis, and the CWCB cannot rely upon it to satisfy ISF Rule 6e(4). Any cursory review of the River District's proposal shows that it is not credible, and should not be relied upon. The primary flaws in the BBA Water Consultants Analysis include (1) an inappropriate and non-representative study period that excludes the last two decades of use; (2) reliance on calculations using the upstream Dotsero gage, and an unexplained rejection of official diversion records received and kept by the State Engineer; and (3) selective exclusion of records of no diversions.⁷

To illustrate the extent to which the River District's analysis inflates the Shoshone Water Rights' historical use (to the injury to other water rights), Northern Water and other parties will jointly offer a simple alternative analysis for demonstrative purposes through testimony from Heather Thompson, P.E. Denver Exs. 5 & 6.⁸ This demonstrative example will show that if a proper study period is adopted, and reliable (and available) diversion records are used, average annual use of the Shoshone Water Rights is less than two-thirds of the River District's flawed

⁷ Other issues exist and Northern Water reserves the right to raise them in future proceedings.

⁸ By providing this simple example for demonstrative purposes, Northern Water and the Municipal Subdistrict are not necessarily asserting that this analysis and its study period and data is the most appropriate analysis for purposes of the Water Court's eventual determination of historical use. The example is provided in this administrative context only to illustrate the magnitude of difference between different historical use analyses.

conclusion of 844,644 acre-feet per year. The River District's vast overstatement will cause injury to other water rights, as Northern Water will explain at the Hearing with respect to their projects. It would also have negative effects on the Recovery Program, including by reducing the availability and frequency of controllable releases of surplus HUP to enhance flows in the 15-Mile Reach. And reduce the ability to store water in upstream reservoirs which provide a vital water supply for the State.

We do not dispute that the Water Court has exclusive jurisdiction to make a determination quantifying the Shoshone Water Rights' historical use that binds all parties. *See* C.R.S. § 37-92-305(3). But the River District has intentionally placed a proposed historical use analysis before the CWCB for purposes of ISF Rule 6e(4) that is unsupported and should not be accepted. The CWCB can neither condone nor ignore it. As a prospective applicant in Water Court with burdens of proof and persuasion, it must wrestle with those presented facts (and the facts presented by others) and make its own assessments about their legitimacy before relying upon them in Water Court. *See* ISF Rule 6i. Failing to do so and seeking to remain "neutral" on these factual issues would preclude the CWCB from fulfilling its various statutory duties and promoting its policy interests, which include *but are not limited to* its interest in preserving or improving stream flows.⁹

Northern Water is fully prepared to litigate these issues in Water Court. At the same time, Northern Water is committed to working with the CWCB and the River District to find a creative

⁹ C.R.S. § 37-92-102(3) ("Nothing in this article shall be construed as authorizing any state agency to . . . deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact."); *see also* Linda J. Bassi, Susan J. Schneider & Kaylea M. White, *ISF Law—Stories About the Origin and Evolution of Colorado's Instream Flow Law in this Prior Appropriation State*, 22 U. Denv. Water L. Rev. 389, 391 (2019) (quoting C.R.S. § 37-92-102(3) and recognizing the CWCB's legal "balancing act" in appropriating and acquiring water rights for ISF use).

solution that avoids a protracted dispute about the Shoshone Water Rights’ true historical use, and ongoing applicability of prior agreements signed by the River District. As noted above, Northern Water’s first request is the CWCB create the opportunity for the parties to have more time to discuss these pivotal issues and negotiate a modified ISF acquisition proposal that they all can agree upon. (The last three decades show that these parties are capable of reaching negotiated agreements on complex issues—some of which the River District’s proposal and accompanying historical use analysis bluntly try to eschew.) The CWCB can do so by declining to accept the present offer but making clear that it is doing so in the interest of receiving a modified proposal that could obviate the need for litigation about the Shoshone Water Rights’ historical use. If the CWCB does not take that action, then Northern Water requests that CWCB only accept the acquisition at this time with incorporation of the ShOP limitations and conditions included in the redlined Acquisition Agreement (Denver Water Ex. 1). Northern Water reserves the right to revise and update the proposed redlines in the acquisition agreement based on the prehearing statements of other parties and any additional negotiations with the Applicants.

B. The CWCB must revise the Draft ISF Acquisition Agreement.

The draft ISF acquisition agreement proposed by the River District (Attachment 4 to the offer letter) (“Acquisition Agreement”) does not accord with the statutes and rules relevant to the CWCB’s authority to acquire interests in water for instream flow purposes, does not accomplish the stated intent to maintain “river operations upon which water users statewide have historically relied and planned,” CWCB Staff Memo at 1, and must be revised in the event the CWCB accepts the acquisition. In particular:

- a. The CWCB must retain discretion in exercising the Shoshone Water Rights for ISF purposes in a manner that serves its policy goals and legal duties and considers impacts to health and safety, endangered fish species, or Colorado’s obligations under interstate compacts.

- b. The Acquisition Agreement cannot legally grant the River District a role in exercising the Shoshone Water Rights for ISF uses.
- c. The Acquisition Agreement must incorporate existing contractual terms to limit the Shoshone Water Rights when used for instream flow purposes. This includes the 2016 ShOP Agreement (and including the WGFP IGA referenced therein), which is addressed in the redline version marked as Denver Ex. 1, but also other agreements and governing documents that define present water rights administration in the Colorado River Basin.
- d. The Acquisition Agreement must prevent curtailment of C-BT diversions if the 52,000 acre-foot Replacement Pool is fully depleted.
- e. The CWCBC must retain the ability to take an active role in any litigation to quantify and carry its burden of proof on historical use of the Shoshone Water Rights (See Section III.A above).

These and other requested edits are included in the redlines in Denver Exhibit 1.

III. Statement of Open Legal Questions

All legal issues identified in this Prehearing Statement, including the issues identified in Section II.B above, remain as open questions. The remaining open legal questions also include whether the Proposed Acquisition Agreement meets the requirements of ISF Rule 6.

IV. List and Summary of Witnesses Expected to Testify

1. **Kyle Whitaker**, *Water Rights Department Manager, Northern Water. Resume identified as Northern et al. Exhibit 6.* Mr. Whitaker will provide testimony based on his personal and specialized knowledge and experience as a water resources engineer about the administrative and operational context of the Shoshone Water Rights on the Colorado River, the C-BT Project, Green Mountain Reservoir and its Historical User Pool, the Recovery Program, and the injury and other negative adverse effects of an enlargement of the Shoshone Water Rights under the River District's proposed historical use quantification.

2. **Heather Thompson, P.E.**, *Ecological Resource Consultants, LLC. Resume identified as Denver Exhibit 7.* Jointly with Aurora Water, Denver Water, Colorado Springs Utilities, and Homestake Partners, Northern Water intends to present engineering testimony from

Ms. Thompson regarding errors and flaws in the historical use analysis prepared by BBA Water Consultants (Attachment 8). Ms. Thompson also will present testimony on her assessment of the Hydros Consulting analysis (Attachments 11 and 12) and impacts on upstream reservoirs.

3. ***William Davis Wert, Esq.***, will provide argument relating to Northern Water's water rights and interests affected by the proposed acquisition and its requested relief.

V. Amount of Time Desired for Presentation

Northern Water requests 1 hour at the hearing, or in the alternative 4 hours to be shared jointly between Northern Water, Denver Water, Aurora Water, Colorado Springs Utilities, and Homestake Partners.

VI. Statement of Relief Requested

Unless the Colorado River Water Conservation District (River District) and Public Service Company of Colorado (Xcel) were to agree to extend the statutory 120-day period for a CWCB decision, Northern Water requests that the CWCB decline to accept the proposed acquisition of the Shoshone Water Rights for ISF purposes, with clear direction to the project partners that it will re-consider a revised proposal after further negotiations with Northern Water and the other parties that incorporates protective terms (previously agreed upon by the River District) related to the Shoshone Outage Protocol and upstream reservoir operations that "maintain river operations upon which water users statewide have historically relied and planned." CWCB Staff Memo at 1.

In the alternative, if the CWCB accepts the proposed acquisition, Northern Water requests that it only do so if the acquisition agreement is significantly modified as described herein to limit CWCB's ability to place a call for instream flow purposes based on existing Shoshone Outage Protocol limitations, and the acquisition agreement includes the other redlines proposed by Northern Water.

Respectfully submitted: August 4, 2025.

TROUT RALEY

s/ William Davis Wert

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***Attorneys for Northern Colorado Water
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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2025, a true and correct copy of this **Joint Prehearing Statement of Northern Colorado Water Conservancy District and Municipal Subdistrict, Northern Colorado Water Conservancy District** was electronically submitted to the Hearing Officer via email to Jackie.Calicchio@coag.gov and to the following parties:

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s/ William Davis Wert
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APPENDIX A – LIST OF EXHIBITS

Note: Northern Water intends to rely on exhibits listed by Denver Water as well, but to avoid repetition is not separately listing those exhibits here. Below are additional exhibits Northern Water intends to rely on at the Hearing.

- Northern et al.-1 -** Senate Document No. 80, Synopsis of Report on Colorado-Big Thompson Project, 75th Congress, 1st Session (Jun. 15, 1937)
- Northern et al.-2 -** Operating Policy for Green Mountain Reservoir, 48 Fed. Reg. 56657 (Dec. 22, 1983)
- Northern et al.-3 -** Decree, Case No. 91CW247, Water Division No. 5 (Oct. 1, 1996)
- Northern et al.-4 -** Intergovernmental Agreement between the Municipal Subdistrict, Northern Colorado Water Conservancy District and its Windy Gap Firming Project Water Activity Enterprise, Board of County Commissioners of Grand County, Colorado, Middle Park Water Conservancy District, Colorado River Water Conservation District, and Northwest Colorado Council of Governments (fully executed July 12, 2016) (“WGFP IGA”)
- Northern et al.-5 -** Memorandum Prepared by Kyle Whitaker (August 4, 2025)
- Northern et al.-6 -** Resume of Kyle Whitaker
- Northern et al.-7 -** Map of Northern Water System
- Northern et al.-8 -** Lists of Water Rights Associated with Colorado-Big Thompson Project and Windy Gap Project