

**COLORADO WATER CONSERVATION BOARD  
STATE OF COLORADO**

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

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

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Pursuant to the Hearing Officer’s July 18, 2025 Order Re: Procedures and Deadlines for Prehearing Submissions, the Staff of the Colorado Water Conservation Board (“CWCB Staff”) hereby submits its Rebuttal Prehearing Statement regarding the proposed acquisition of an interest in the Shoshone Power Plant Water Rights from the Colorado River Water Conservation District (“River District”) and Public Service Company of Colorado (“PSCo”) for instream flow (“ISF”) use in the Colorado River.

Forty-one parties filed nineteen Prehearing Statements, raising various issues and arguments. Entities on the west slope support the CWCB acquiring the right to use both Shoshone Water Rights for ISF purposes. Entities on the east slope generally support the acquisition of the senior water right, though raised specific concerns with the project and process. No party raised any concerns with the biological analyses by Colorado Parks and Wildlife (“CPW”) relied on by CWCB Staff for its recommendation of the proposed acquisition and referenced in CWCB Staff’s Prehearing Statement. While CWCB Staff will dedicate some of its presentation to the biological analyses used to determine the flows necessary to preserve and improve the natural environment to a reasonable degree, it will not dedicate a great deal of time on this topic since it is not contested.

The following are responses to the primary issues raised in prehearing statements submitted by the east slope entity opposers. CWCB Staff will address these and other issues raised by the parties at the September hearing.

## **I. Responses to Issues**

### **A. Whether the Board is improperly ceding authority or discretion related to calling for the Shoshone Water Rights for instream flow use.**

ISF Rule 10 specifically allows the CWCB to (a) enter into agreements that limit the Board's discretion in the protection of an instream flow right and (b) delegate limited authority to act on the Board's behalf. The CWCB has entered into agreements and delegated limited authority for ISF use in previous acquisitions of interests in water rights including under the Colorado River Cooperative Agreement ("CRCA") for environmental water from Denver Water for use in Grand County and for acquisition of an interest in the Gross Reservoir environmental pool from the City of Boulder for use in South Boulder Creek.

Some opposers argue that the proposed acquisition agreement for an interest in the Shoshone Water Rights ("ISF Agreement") impermissibly limits the CWCB's statutory authority to manage water rights for ISF purposes to the River District. But those requesting incorporation of the Shoshone Outage Protocol ("ShOP") into the ISF Agreement are essentially asking the CWCB to do the same thing. Instead of asking the CWCB to always call, they are asking the CWCB to agree to not call in times of water shortages based on water supply needs of the front range. There is no distinction from the policy determination that would be required in either instance. CWCB Staff's position is that the water rights should be put to beneficial use and called for as needed when in priority, within the bounds of historical use. Any limitations on future use of the water rights to replicate historical conditions will be worked out during the water court process and any

terms and conditions necessary to prevent injury and to resolve disputes built into the water court decree.

**B. Request to include compact curtailment language in the ISF Agreement**

Colorado Springs Utilities, City of Aurora, and Homestake Partners argue for inclusion of language in the ISF Agreement and eventual water court application that references potential compact administration, one version of which is as follows:

In the event of a curtailment of Colorado water rights, or an imminent threat thereof, resulting from the State of Colorado's obligations under the Colorado River Compact and/or the Upper Colorado River Basin Compact, the Parties will work cooperatively to implement this Agreement consistent with any duly adopted final rules or regulations of the State Engineer adopted for purposes of fulfillment of Colorado's commitments under either or both compacts, and that are in force, any appeal notwithstanding.

This type of language should not be included in the ISF Agreement or any water court application filed to change the Shoshone Water Rights. The State Engineer does not approve of this type of language in water court decrees. Such language risks interference with the State Engineer's exclusive authority to administer and distribute waters of the state under section 37-92-501 C.R.S., including to comply with compact obligations under *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). Every decree is already subject to compact administration, and language that potentially creates carve outs or exceptions to any administration that might need to occur is not needed. *Id.*

Additionally, this type of language opens the door to others wanting this same language or some variation of this language in other decrees and creates the potential for conflict over meaning and intent of the provision. And while there may be differences of opinion about the statutory language related to the State Engineer's compact rulemaking authority, individual decrees are not the place to try to contract or negotiate around those disagreements.

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

The ShOP Agreement, the CRCA, and the Relaxation Agreement are complicated, and some of the parties to those agreements dispute the meaning of certain provisions in the agreements. The CWCB is not a party to these agreements, and incorporation of the agreements will entail some degree of interpretation of the documents. If parties to the agreements are unable to agree as to how to interpret the agreements, it may result in litigation, which would be handled as a contractual matter by the court. The Board cannot alter those agreements, and it is unlikely the Board can resolve this issue by including any interpretation of the agreements in the ISF Agreement, which could effectively result in the Board siding with one party over another. Incorporation of provisions of those agreements into stipulations and the final decree is most appropriately handled in water court which has a structured process for resolving disagreements as to interpretations of legal documents. Current operations at the Shoshone Power Plant are subject to the Relaxation Agreement. During the change case to include ISF use it may be necessary to negotiate related terms and conditions to resolve the case.

**D. Whether the Board should acquire the junior water right.**

Some opposing parties argue that the Board should acquire the senior but not the junior Shoshone Water Right, and the basis for this argument may be that the junior has not been regularly used. Acquisition of both the junior and the senior water rights would preserve and improve the natural environment of the Colorado River from the Shoshone Diversion Dam and Tunnel to the Shoshone Power Plant Discharge Outlets (“Shoshone Reach”) to a reasonable

degree and both water rights are needed to operate under the historical flow regime. See CPW's letter and report, Exhibit CWCBSstaff-5.

At 158 cfs, the junior Shoshone Water Right has historically been diverted since 1929 and is consistently put to beneficial use by PSCo, including in recent years. As nonconsumptive water rights, both the senior and junior Shoshone Water Rights are not curtailed by a senior downstream call. The junior Shoshone Water Right is currently being and has historically been exercised at all times that diversions under the Shoshone Water Rights at the power plant exceed 1,250 cfs. Colorado Decision Support System diversion records indicate that the junior Shoshone Water Right was regularly operated in the last 50 years.

Additionally, if the Board rejects the proposed acquisition of the junior Shoshone Water Right, this will not likely result in an additional 158 cfs in the river for upstream junior water rights to divert. This 158 cfs would likely remain in the ownership of PSCo or the River District and it is unclear how this water right would be operated. The most effective way to ensure the junior Shoshone Water Right will be limited to its historical use is to change it in water court along with the senior right. After the junior Shoshone Water Right is accepted and changed in water court the future use will be limited to its historical use as determined by the water court. Furthermore, not acquiring the junior Shoshone Water Right would likely reduce the effectiveness of the acquisition because less water could be put towards ISF use.

While the Board must keep several factors in mind when considering this proposed acquisition, CPW concluded that the best use of the senior and the junior Shoshone Water Rights is to preserve and improve the natural environment of the Shoshone Reach up to 1,408 cfs. This is based on two different habitat suitability studies conducted by consultants Ecosystem Sciences and Freshwater Consulting that modeled "weighted useable" fish habitat. These studies show

that fish habitat increases in a representative reach within the Shoshone Reach between 50 to 1,400 cfs for fish species of interest. These distinct and corroborating studies indicate that the amount of usable habitat for Rainbow Trout, Brown Trout, Mountain Whitefish, and Flannelmouth Sucker increases substantially up to 1,400 cfs and therefore using the Shoshone water rights of 1,250 and 158 cfs for a total of 1,408 cfs would benefit focal fish species and their unique habitat preferences.

The Board should accept the interest in the junior Shoshone Water Right as well as the senior Shoshone Water Right for instream flow use in the Shoshone Reach consistent with CPW's recommendation. Exhibit CWCBStaff-5, p.18-27.

**E. Whether the addition of ISF use to power generation use is in and of itself an expansion of use of the Shoshone Water Rights.**

Some opposing parties argue that the Shoshone Water Rights should only be used for ISF use when the power plant is not operating, and that both uses should not be allowed to operate at the same time. Such restriction is unnecessary to prevent an expansion of use. It is common for a water right to be decreed for multiple beneficial uses, where just one of the uses can be operated, or uses can be operated simultaneously, without injury so long as it is operated within decreed limitations. While the Shoshone proposal does allow for use for power generation at the same time as ISF use, such simultaneous use would have to be within the limits of historical beneficial use, by splitting the use rate and volume between the two uses. Such simultaneous use would not result in injury if subject to appropriate terms and conditions in a water court decree. Imposition of a restriction that the acquired water rights not be used for instream flow purposes when PSCo

is diverting for power generation is unnecessary to prevent injury and would unnecessarily reduce the efficacy and utilization of the acquisition.

#### **F. Historical use**

Some opposing parties argue that the CWCB should deny the proposed acquisition because they do not agree with a draft historical use assessment offered by the River District.

It is important to note that the reason the River District produced detailed engineering when it did was in an effort to facilitate discussions with the east slope entities in advance of the water court process and to provide information in support of its application for federal funding. The River District has represented that the engineering report is a preliminary draft and subject to change either before or during the change case.

Opposers argue that the River District's draft preliminary historical use assessment would result in injury to their junior transmountain rights. As stated in CWCB Staff's Prehearing Statement, the specifics around a historical use analysis are matters that the water court commonly determines in change cases. The CWCB is not set up to evaluate various expert opinions to determine the proper engineering methodology and details for a change case. The ISF Rules explicitly state that the Board, "shall request the water court to 1) verify the quantification of the historical consumptive use of the acquired water right; 2) verify the identification, quantification, and location of return flows to ensure that no injury will result to vested water rights and decreed conditional water rights" See ISF Rule 6.i. The Board's role is to *consider* injury, not *determine* injury. CWCB Staff is not advocating for a particular historical use study period or methodology but recognizes that the Shoshone Water Rights have historically been used for over one hundred years and that a change case will result in a meaningful amount of water for ISF use. The appropriate study period to use for the water court

quantification of historical use is a point of contention by the parties that will need to be established as part of the water court process and is a typical subject in water court change cases. By accepting the proposed acquisition, the CWCB is not accepting the River District's draft proposed volumetric limit as suggested by some opposers. The Board should consider the competing draft historical uses analyses, and that there would be a sufficient amount of water for ISF use, knowing that the actual amount to not cause injury to the east slope or west slope parties will need to be worked out in water court.

**G. Whether the CWCB should delay the decision on the acquisition and require the parties to negotiate prior to accepting the proposed acquisition.**

Some of the opposers seem to be arguing that as a policy decision, the CWCB should place settlement requirements on the acquisition, e.g., the parties should be required to further negotiate before the CWCB will agree to the proposed acquisition. That is, opposing parties have suggested that the CWCB should delay a decision on the proposed acquisition to allow time for the parties to negotiate as to the proper engineering to present during the change case and reach agreement on proper terms to be included in the ISF Agreement.

This project has been in the works for years, but discussions are routinely stalled and the parties do not seem to have made any progress towards resolution. But, like all other change cases, if an application is filed in water court deadlines for settlement will be set and if necessary, trial. Pretrial deadlines work to motivate parties to negotiate and compromise, to reach a consensus on the engineering methodology and resulting decree terms to avoid trial. Many existing agreements on the Colorado River, including CRCA, ShOP and the Stipulation and Agreement in the Check case, are the result of the structured and deadline driven water court process.



The decision to be made by the CWCB here is whether the acquisition of the interest of water would be appropriate to preserve and improve the natural environment of the Shoshone Reach, and if the CWCB does acquire the interest in the Shoshone Water Rights, how to best utilize the acquired interest in the water rights. While the Board can attach terms and conditions to the acquisition, requiring additional negotiation prior to accepting the acquisition is an unnecessary delay that would not likely be productive. Even if the project proponents were to reach a resolution with the opposers to this administrative action, the resolution may not be acceptable to other parties, whether supporters or opposers, to the water court application. Therefore such an agreement at this stage would improperly and unnecessarily tie the hands of the applicants and may not address concerns of and in fact may contradict the interests of other parties in water court. The Board should decide if the best use of the acquired water rights would be to preserve and improve that natural environment to a reasonable degree as allowed by a future water court decree. If so, the Board should accept the entire amount of both rights and direct staff to proceed with a change application in water court. Given the differences in opinion as to the historical use of the Shoshone Water Rights, it is unlikely a resolution can be reached outside of the water court process.

## **II. CWCB Staff's Requested Relief**


CWCB Staff reiterates its position that the CWCB take the following actions:

- A. Accept a perpetual interest in the junior and senior Shoshone Water Rights for ISF use up to the full decreed amounts and determine that this use will preserve and improve the natural environment to a reasonable degree;
- B. Direct the CWCB Director to sign the ISF Agreement after the hearing. See **Exhibit CWCBStaff-4**;

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

Dated this 29<sup>th</sup> day of August, 2025.

PHIL WEISER  
Attorney General

  
JEN MELE, #30720  
First Assistant Attorney General  
Natural Resources & Environment Section  
Attorneys for the Staff to the Colorado Water  
Conservation Board  
\*Counsel of Record

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Rebuttal Prehearing Statement of the Staff to the Colorado Water Conservation Board** upon all parties herein by email, this 29<sup>th</sup> day of August, 2025, addressed as follows:

<u>Hearing Officer</u>  Jackie Calicchio jackie.calicchio@coag.gov	<u>Office of the Attorney General</u>  John Watson john.watson@coag.gov
<u>American Whitewater (AW)</u>  Hattie Johnson hattie@americanwhitewater.org	<u>Aurora Water (Aurora)</u>  Josh Mann josh@mannwaterlaw.com
<u>Basalt Water Conservancy District (BWCD)</u>  Christopher Geiger chrisg@balcombgreen.com	<u>City of Aspen (Aspen)</u>  Kate Johnson kate.johnson@aspen.gov  Luisa Berne luisa.berne@aspen.gov  Andrea L. Benson alb@alpersteincovell.com  Gilbert Y. Marchand gym@alpersteincovell.com  Stephanie Pierce stephanie@alpersteincovell.com
<u>City of Glenwood Springs (COGS)</u>  Karp N. Hanlon kjh@mountainlawfirm.com  Danielle T. Skinner dts@mountainlawfirm.com  Steve Boyd steve.boyd@cogs.us	<u>City of Rifle (Rifle)</u>  Karp N. Hanlon kjh@mountainlawfirm.com  Danielle T. Skinner dts@mountainlawfirm.com  Patrick Waller pwaller@rifleco.org
<u>Clifton Water District (CWD)</u>	<u>Clinton Ditch &amp; Reservoir Company (CD&amp;RC)</u>

<p>Kirsten M. Kurath kirsten@mcdonoughlawgroup.com</p>	<p>Tom Daugherty tdaugherty@silverthorne.org</p> <p>Glenn Porzak porzaklaw@gmail.com</p>
<p><u>Colorado River District (CRD)</u></p> <p>Peter Fleming pfleming@crwcd.org</p> <p>Jason Turner jturner@crwcd.org</p> <p>Bruce Walters bwalters@crwcd.org</p> <p>Lorra Nichols lnichols@crwcd.org</p>	<p><u>Colorado River Outfitters Association (CROA)</u></p> <p>David Costlow dcostlow@croa.org</p>
<p><u>Colorado Springs Utility (CSU)</u></p> <p>Michael J. Gustafson michael.gustafson@coloradosprings.gov</p> <p>Nathan Endersbee nathan.endersbee@coloradosprings.gov</p>	<p><u>Colorado Water Conservation Board Staff (CWCB Staff)</u></p> <p>Jen Mele jen.mele@coag.gov</p> <p>Sarah Glover sarah.glover@coag.gov</p> <p>Rob Viehl rob.viehl@state.co.us</p>
<p><u>Denver Water (Denver)</u></p> <p>Jessica Brody jessica.brody@denverwater.org</p> <p>Daniel Arnold daniel.arnold@denverwater.org</p> <p>James Wittler james.wittler@denverwater.org</p> <p>Crystal Easom crystal.easom@denverwater.org</p>	<p><u>Eagle County Board of Commissioners (ECBC)</u></p> <p>Sara M. Dunn sarad@balcombgreen.com</p> <p>Beth Oliver beth.oliver@eaglecounty.us</p>

<u>Eagle Park Reservoir Company (EPRCo)</u>  Beth Howard bhoward@vailresorts.com  Fritz Holleman fholleman@bh-lawyers.com  Kristin Moseley kmoseley@somachlaw.com	<u>Eagle River Coalition (Eagle River)</u>  Vicki Flynn flynn@eagleriverco.org
<u>Eagle River Water and Sanitation District &amp; Upper Eagle Regional Water Authority (ERWSD et al)</u>  Kristin H. Moseley kmoseley@somachlaw.com  Michael W. Daugherty mdaugherty@somachlaw.com	<u>Garfield County Board of County Commissioners (Garfield)</u>  Heather K. Beattie hbeattie@garfieldcountyco.gov  Christopher Geiger chrisg@balcombgreen.com  Janette Shute jshute@garfieldcountyco.gov
<u>Grand County, Colorado Board of County Commissioners (Grand)</u>  Edward Moyer emoyer@co.grand.co.us  Barbara Green barbara@sullivangreenseavy.com  David Taussig davet@cjzwaterlaw.com	<u>Grand Valley Water Users Association (GVWUA)</u>  Tina Bergonzini tbergonzini@gvwua.com
<u>Homestake Partners (Homestake)</u>  Michael J. Gustafson michael.gustafson@coloradosprings.gov  Ian Best ibest@auroragov.org  Philip E. Lopez plopez@fwlaw.com	<u>Kobe Water Authority (KWA)</u>  Ryan M. Jarvis ryan@jvamlaw.com  Charles N. Simon simon@jvamlaw.com  Genevieve LaMee genevieve@jvamlaw.com

<u>Mesa County (Mesa)</u>  Todd Starr todd.starr@mesacounty.us  Patrick Barker patrick.barker@mesacounty.us	<u>Middle Park Water Conservancy District (MPWCD)</u>  Katie Randall katie@jvamlaw.com  Kent Whitmer kent@jvamlaw.com  Genevieve LaMee genevieve@jvamlaw.com
<u>Northern Colorado Water Conservancy District and Municipal Subdistrict, Northern Colorado Water Conservancy District (Northern et al)</u>  Bennett W. Raley braley@troutlaw.com  Lisa M. Thompson lthompson@troutlaw.com  William Davis Wert dwert@troutlaw.com	<u>Northwest Colorado Council of Governments (Northwest)</u>  Torie Jarvis torie@sullivangreenseavy.com  Barbara Green barbara@sullivangreenseavy.com
<u>Orchard Mesa Irrigation District (OMID)</u>  Kirsten M. Kurath kirsten@mcdonoughlawgroup.com	<u>Palisade Irrigation District and Mesa County irrigation District (PID/MCID)</u>  Nathan A. Keever keever@dwmk.com
<u>Pitkin County Board of County Commissioners (Pitkin)</u>  Richard Y. Neiley, III richard.neiley@pitkincounty.com  Anne Marie McPhee anne.mcphee@pitkincounty.com  Jennifer M. DiLalla jdilalla@mwhw.com  Molly K. Haug-Rengers	<u>Public Service Company of Colorado (PSCo)</u>  Carolyn F. Burr cburr@wsmtlaw.com  James M. Noble jnoble@wsmtlaw.com  Matthew C. Nadel mnadel@wsmtlaw.com  Frances A. Folin frances.a.folin@xcelenergy.com

mhaug@mwhw.com  Elizabeth “Libby” Truitt etruitt@mwhw.com	
<u>Roaring Fork Conservancy (RFC)</u>  Heather Tattersall Lewin heather@roaringfork.org  Rick Lofaro rick@roaringfork.org	<u>Save The World's Rivers (SWR)</u>  Gary Wockner gary@savetheworldsrivers.org
<u>South Metro WISE Authority (SM WISE)</u>  Lisa Darling lisadarling@southmetrowater.org  Gabe Racz gracz@clarkhill.com	<u>Southwestern Water Conservation District (SWCD)</u>  Beth Van Vurst beth@vanvurst-law.com
<u>Summit County (Summit)</u>  Thomas W. Korver tkorver@hpkwaterlaw.com	<u>Town of Basalt (Basalt)</u>  Ryan M. Jarvis ryan@jvamlaw.com  Charles N. Simon simon@jvamlaw.com  Genevieve LaMee genevieve@jvamlaw.com
<u>Town of Eagle (Eagle)</u>  Mary Elizabeth Geiger megeiger@garfieldhecht.com	<u>Town of Vail (Vail)</u>  Peter Wadden pwadden@vail.gov
<u>Trout Unlimited (TU)</u>  Drew Peternell drew.peternell@tu.org	<u>Ute Water Conservancy (UWC)</u>  Gregory Williams gwilliams@utewater.org  Christopher Geiger chrisg@balcombgreen.com

<u>Western Resource Advocates, Conservation Colorado, American Rivers, and the National Audubon Society (WRA et al)</u>  John Cyran john.cyran@westernresources.org  Bart Miller bart.miller@westernresources.org	
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/s/Sarah Glover

Sarah Glover