

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

HOMESTAKE PARTNERS' REBUTTAL PRE-HEARING STATEMENT

The City of Colorado Springs, acting through Colorado Springs Utilities (“Springs Utilities”), and the City of Aurora, acting by and through its Utility Enterprise (“Aurora”), both acting by and through the Homestake Steering Committee (collectively, “Homestake Partners”), by and through its undersigned attorneys, files its Rebuttal Pre-Hearing Statement pursuant to paragraph I. of the July 18, 2025 Order Re: Procedures and Deadlines for Prehearing Submissions:

INTRODUCTION

In its Pre-Hearing Statement filed on August 4, Homestake Partners demonstrated the flaws in BBA’s historical use analysis of the Shoshone Water Rights and how adoption or endorsement of that analysis would lead to injury of Homestake Partners’ water rights. Thus, Homestake Partners urged CWCB to evaluate the appropriateness of the proposed acquisition by considering such injury and the historical beneficial use associated with the Shoshone Water Rights, rather than accepting the acquisition under the auspices of a flawed analysis. Homestake Partners also demonstrated the shortcomings of the Proposed Acquisition Agreement between the River District and CWCB, namely that it failed to include terms and conditions that the River District had previously agreed to with Aurora and Colorado Springs.

In this rebuttal statement, Homestake Partners respond to the statements and arguments made by CWCB Staff and the River District in their respective prehearing statements. As set forth below, those parties’ positions indicate that they have not fully accounted for the magnitude of the

proposed acquisition of the Shoshone Water Rights. As described below, those parties advocate for CWCB to take action that is inconsistent with its legislative directive to secure the greatest utilization of the state's water. This includes their request that CWCB delegate management and administration of the Shoshone Water Rights to the River District, which unlike CWCB, does not represent nor answer to the citizens of the state as a whole.

The River District and CWCB Staff urge CWCB to take a position that may send the various stakeholders in this process to a divisive water court proceeding. But that is not the only path forward, and CWCB can delay or deny the acquisition with direction to the parties to reach a compromise before any acquisition will occur, which should result in a subsequent, non-controversial, expedient water court proceeding. To the extent CWCB's acquisition now may potentially send the parties to a disputed water court proceeding, it should send them on equal footing by CWCB agreeing to not support or oppose any particular party or parties' position.

ARGUMENT

I. The positions of the River District and CWCB Staff are contrary to the General Assembly's policy directives to CWCB.

While CWCB's instream flow program is a vital program to preserve the natural environment, it is but one duty delegated by the General Assembly to CWCB as the water policy arm of the State of Colorado. The General Assembly has tasked CWCB to "promote the conservation of the waters of the state of Colorado *in order to secure the greatest utilization of such waters.*" § 37-60-106(1), C.R.S. (emphasis added). To secure the greatest utilization of the state's public water resource, CWCB must also "foster and encourage" all the various water entities in the state "for the conservation, development, and utilization of the waters of Colorado" and "to devise and formulate methods, means, and plans for bringing about the greater utilization of the waters of the state." § 37-60-106(1)(a) and (c).

Thus, while the potential acquisition of the Shoshone Water Rights for instream use is an unmatched opportunity for CWCBC and the people of the state of Colorado to preserve and protect a one-of-a-kind water right, CWCBC's ability to acquire the Shoshone Water Rights does not override or negate CWCBC's broader statutory duty to secure "the greatest utilization of such waters." This directive is also demonstrated in the instream flow statutes, which only require that CWCBC utilize instream flows so that "the natural environment will be reserved to a *reasonable* degree" in order to "correlate the activities of mankind with some reasonable preservation of the natural environment." § 37-92-102(3), C.R.S. But the River District's current proposed Acquisition Agreement, and CWCBC Staff's position on such agreement, appears to place the greatest utilization of the state's water in the back seat by instead seeking to maximize the use of the Shoshone Water Rights for instream use beyond their historical use to the potential detriment and injury of other water users.

CWCBC will not achieve its policy directive if it actively or passively supports an acquisition of the Shoshone Water Rights that leads to division, litigation, and potential injury to other water rights, rather than requiring an acquisition of this magnitude to be subject to terms and conditions that allow for both the maximum utilization of water without injury to other water users. Those two requirements are the foundation of Colorado's prior appropriation doctrine and water policy. *Fellhauer v. People*, 167 Colo. 320, 336, 447 P.2d 986, 994 (1968) ("It is implicit in these constitutional provisions that, along with Vested rights, there shall be Maximum utilization of the water of this state.").

II. CWCBC should reject any proposed acquisition delegating its authority over the Shoshone Water Rights.

The Proposed Acquisition Agreement between the River District and CWCBC explicitly requires CWCBC to request full administration of both rights—1,408 cfs—for instream flow

purposes whenever the rights are not being used for power generation. Ex. CRD-03, ¶¶ 7–8. By requiring administration at the full combined rate at all times, the agreement strips CWCB of its discretion to account for broader system conditions—such as drought, compact considerations, or storage operations.

The River District and CWCB both argue that ISF Rule 10 specifically allows CWCB “(a) to enter into agreements that limit the Board’s discretion in the protection of an instream flow right and (b) to delegate limited authority to act on the Board’s behalf.” CWCB Staff Pre-Hearing Statement, p 11. *See also* River District’s Pre-Hearing Statement, pp 16-17. Even assuming CWCB Staff and River District’s interpretation of ISF Rule 10 is correct, which Homestake Partners do not concede, that position suggests that neither party has fully accounted for the significance of the proposed transaction CWCB is considering.

Simply because CWCB *can* delegate its authority to operate an instream flow right does not mean that CWCB *should* delegate its authority to operate the most important water right ever to be utilized for instream flow purposes. The Shoshone Water Right is essentially the controlling water right on the entire Colorado River and has the potential to affect water supplies for millions of Colorado citizens. This situation differs dramatically from other prior CWCB acquisitions of small amounts of water rights to which CWCB may have delegated its operational authority to another party.

CWCB and its board members represent the collective interest of the people of the state of Colorado, and the party who represents that collective interest should maintain control of the operation of the Shoshone Water Rights for instream flow purposes to ensure the maximum utilization of the public’s limited resource. CWCB discretion and control is necessary as the state is facing an unknown future that involves drought, further issues regarding the Colorado River

Compact, and increased population growth, among other things. CWCB control allows future flexibility to operate the Shoshone Water Rights for instream flow use in a way that most benefits the citizens of Colorado. The water policy arm of the state should not delegate such an important fiduciary duty to an entity whose duties are not to represent the state as a whole. “[T]he Conservation Board, unlike other water users, acts on behalf of the people of the state of Colorado and is thereby burdened with a fiduciary duty arising out of its unique statutory responsibilities.” *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd.*, 901 P.2d 1251, 1259 (Colo. 1995). CWCB should reject any proposed acquisition delegating its authority over the Shoshone Water Rights.

III. CWCB should reject any proposed acquisition that will force the parties into protracted litigation.

CWCB Staff appears to recognize there are legitimate disputes regarding a change of the Shoshone Water Rights: “An assessment of the potential for material injury will necessarily involve a complex analysis of historical use of the Shoshone Water Rights by the water court. These rights are senior to many transbasin and reservoir storage water rights that serve front range water users. If adding ISF use results in an expansion of use, the acquisition has potential to cause material injury to those transbasin and other water rights upstream.” CWCB Staff Pre-Hearing Statement, p 5. But CWCB Staff and River District’s solution could result in protracted litigation in water court. *See* CWCB Staff Pre-Hearing Statement, pp 5-6; River District Pre-Hearing Statement, p 11. While it may be true that “the 120-day administrative process before the Board is not designed to provide structure for such a multi-party approach to derive the historical use or return flows of water rights” as argued by CWCB Staff, CWCB has the discretion to deny any acquisition that may lead to protracted litigation due to parties being forced to protect their water rights from injury in the judicial forum.

As a matter of policy, CWCB should only acquire the Shoshone Water Rights in an amount and with terms and conditions that have been agreed upon by the parties, especially since the River District has already agreed to various terms and conditions with various Front Range Entities but has declined to include those previously-agreed to terms in the Proposed Acquisition Agreement. CWCB's decision to deny a disputed acquisition will force the parties to the negotiating table to resolve outstanding issues in an "efficient alternative to litigation by allowing the parties to agree upon an alternate nonjudicial forum to resolve disputes which is simpler and more expedient than normally encountered in our judicial system." *See Coors Brewing Co. v. Cabo*, 114 P.3d 60, 65 (Colo. App. 2004) (discussing the policy benefits of alternate dispute resolutions). An agreed-upon acquisition would more likely proceed through the water court process with far less transaction costs to the parties and the public and result in a decree for instream flow use in a far more expedient manner.

IV. To the extent CWCB's acquisition sends the parties into water court litigation, it should send them on equal footing by agreeing to take no position on the historical use analysis for the Shoshone Water Rights or the terms and conditions necessary to prevent injury to other water rights.

As discussed above, there are ample policy reasons why CWCB should delay accepting Proposed Acquisition Agreement at this time to allow the parties to reach a compromise. To the extent CWCB decides to accept a Proposed Acquisition Agreement that does not resolve the issues between the River District and Front Range entities including Homestake Partners and instead send the parties to a disputed water court proceeding, CWCB should not take a position on those matters in dispute between the parties.

As discussed above, CWCB represents the interests of the entire state, including the millions of citizens whose water is supplied by the Front Range entities that include Homestake Partners. CWCB's role is to represent the interests of all Coloradans, rather than favoring one

group of constituents or one region of the state over another. Accordingly, CWCB should exercise its authority with care and avoid taking positions that could be perceived as influencing disputed issues involving the historical use analysis of the Shoshone Water Rights or the terms and conditions needed to protect other water users.

This is especially true where the River District takes positions on these issues that are contrary to well-established Colorado law. The River District incorrectly states that the no-injury rule only applies to those water rights within a proposed instream flow reach. River District Pre-Hearing Statement, p 8. The River District goes on to imply that upstream junior water rights can never be injured by a change of the Shoshone Water Right because “the stream conditions that existed at the time of their appropriations included the downstream operations of the Shoshone Power Plant.” *Id.*, pp 8-9.

The River District’s proposal does not reflect that Colorado law requires that a water right not be expanded beyond its historical use, *and* that no injury to other water rights occur. *See, e.g. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Res.*, 91 P.3d 1058, 1063 (Colo. 2004) (“Even when it seems clear that no other rights could be affected solely by a particular change [of water right], it is essential that the change also not enlarge an existing right. Because an absolute decree is itself not an adjudication of actual historic use but is implicitly further limited to actual historic use, in order to insure that a change of water right does not enlarge an existing appropriation, its ‘historic beneficial [] use,’ must be quantified and established before a change can be approved.”).

Even assuming no other water rights are injured, the Shoshone Water Rights must be limited to the scope of their historical use, even if less than its decreed rates. *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1224 (Colo. 1988) (“Thus, a senior appropriator is not entitled to enlarge the historical use of a water right by changing the point of diversion and then

diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion.”).

Moreover, as Homestake Partners’ Pre-Hearing demonstrates, injury *will* occur to its water rights under BBA’s flawed historical use analysis that overinflates the historical use of the Shoshone Water Rights. “[T]he actual beneficial use of the appropriation becomes the basis, measure, and limit of the water right. Over an extended period of time, the pattern of historical diversions and use matures, becoming the true measure of the water right . . . Thus, an absolute decree, whether expressed in terms of a flow rate or a volumetric measurement, is not a final adjudication of actual historical use, but implicitly, is further limited to actual historical use over a representative period.” *Wolfe v. Sedalia Water & Sanitation Dist.*, 343 P.3d 16, 23 (Colo. 2015).

Thus, water erroneously attributed to historical use of the Shoshone Water Rights that was never diverted under the Shoshone Water Rights was in fact diverted by junior water rights, including Homestake Partners, and injury will occur to junior users due to an unlawful expansion of the Shoshone Water Rights. “Injury involves diminution of the available water supply that a water right holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder’s decreed water right operating in priority.” *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661 (Colo. 2011). CWCB should not throw its weight behind a flawed analysis and flawed arguments that will injure other water rights.

CONCLUSION

To the extent CWCB decides to accept a Proposed Acquisition Agreement that does not resolve the issues between the River District and Front Range entities including Homestake

Partners and instead accepts an agreement that may potentially send the parties to a disputed water court proceeding, CWCB should not take a position on those matters in dispute between the parties.

Respectfully submitted this 29th day of August 2025.

FAIRFIELD AND WOODS, P.C.



Philip E. Lopez, Reg. No. 40484

Attorneys for Homestake Partners

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2025, a true and correct copy of **HOMESTAKE PARTNERS' REBUTTAL PRE-HEARING STATEMENT** was electronically submitted to the following parties via email:

<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 & Reservoir Company (CD&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@croat.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 & 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

mhaug@mwhw.com Elizabeth “Libby” Truitt etruitt@mwhw.com	frances.a.folin@xcelenergy.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

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

/s/ Philip E. Lopez

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

WRITTEN TESTIMONY OF RICHARD KIENITZ ON BEHALF OF HOMESTAKE PARTNERS

As provided for in the July 18, 2025 order of the hearing officer, I, Richard Kienitz, have prepared my pre-filed written testimony on behalf of Homestake Partners, as set forth in this document, for the Shoshone Water Rights Acquisition Hearing currently scheduled for September 16-18, 2025 before the Colorado Water Conservation Board ("CWCB").

I. Qualifications.

I am Aurora's Water Resources Basin Manager for the Arkansas and Colorado River Basins. In this position I and my team are responsible for managing all of Aurora's diversions, storage, exchange and carriage of water to optimize the yield of Aurora's water portfolio in these basins, water accounting, planning and forecasting, water rights protection, as well as acquisitions, IGA compliance, and managing Aurora's interactions with public and private sector partners on water issues and related land issues. I have a Bachelor of Science degree in Industrial Engineering from Colorado State University Pueblo which has served me well with the efficiency, optimization and planning aspects of my work for Aurora.

II. Introduction.

Aurora Water and Colorado Springs Utilities, the third and second largest municipal water providers (respectively) in the state, together represent one of the largest municipal water partnerships in the state. The Homestake Project is vital to these two communities, and an

expanded Shoshone call would jeopardize our collective ability to deliver reliable water supplies. Homestake Partners support CWCB's acquisition of the Shoshone Water Rights in principle, as preserving flows through Glenwood Canyon provides significant environmental benefits and helps maintain the historical flow regime that has shaped water administration on the Colorado River for over a century. However, Homestake Partners' support is conditioned on ensuring that the acquisition does not unlawfully enlarge the Shoshone Water Rights or cause material injury to junior users.

III. The Homestake Project and Its Importance

Colorado Springs Utilities and Aurora Water, both acting by and through the Homestake Steering Committee (collectively, "Homestake Partners") own and operate a number of direct flow and storage water rights in the Eagle River basin that collectively comprise the Homestake Project, which is a transmountain diversion system decreed in 1962 with an appropriation date of 1952. *See* Ex. Homestake-1, CA1193 Decree; Ex. Homestake 2, Map of Homestake Project. The Homestake Project diverts water from tributaries in the headwaters of the Eagle River Basin, part of the Colorado River system, and stores that water in Homestake Reservoir. From Homestake Reservoir, water is conveyed through the Homestake Tunnel beneath the Continental Divide to Turquoise Lake near Leadville. Releases from Turquoise Lake then flow into the Arkansas River system, where they are delivered to Aurora and Colorado Springs' service areas. Together, these supplies provide water to more than a million Coloradans and indirectly support communities such as Pueblo through supplemental deliveries.

The Homestake water rights are junior to both the Senior Shoshone Water Right (1,250 cfs, 1902) and the Junior Shoshone Water Right (158 cfs, 1929). That means whenever Shoshone is calling, Homestake must curtail its diversions. Despite this junior status, Homestake has reliably

operated for decades because Shoshone's calls have reflected actual historic use patterns, including outages at the power plant and negotiated call relaxations. This balance has allowed Homestake Reservoir to fill in most years, providing a secure foundation for Aurora's and Colorado Springs' municipal supplies.

IV. Homestake Partners' Concerns Regarding the Proposed Shoshone Acquisition

While the Shoshone Water Rights are vital to the health of the Colorado River, the CWCB's decisions in this matter carry broad and significant implications. As currently proposed, the acquisition and change of use would unlawfully enlarge the Shoshone rights, reduce Homestake's water supply, and cause material injury to Aurora and Colorado Springs. If mishandled, the acquisition could disrupt the river's natural flow regime and jeopardize the water supplies for millions of people residing east of the Continental Divide, impacting communities far beyond the immediate stakeholders.

Our foremost concern is the flawed historical use analysis prepared by Bishop Brogden Associates (BBA) for the River District. This analysis inflates Shoshone's historical diversions by approximately 36 percent. Aurora's expert, Environmental Resource Consultants (ERC), has identified the flaws in BBA's methodology and provided corrected results. Hydros Consulting, retained by the River District to conduct a yield assessment, compounded these errors by relying on incorrect assumptions. When ERC corrected those assumptions, the results showed substantial injury to Homestake's water rights if BBA's inflated analysis were adopted.

ERC demonstrated that adopting the overstated quantification would lead to a maximum annual decrease of 6,869 acre-feet in Homestake Reservoir storage, resulting in up to 6,047 acre-feet fewer deliveries through the Homestake Tunnel. ERC further showed that, during the study

period, there are 168 months (54 percent of the model period) when Homestake Reservoir contents would decline by more than 500 acre-feet—losses not reflected under Hydros’ analysis.

If the Shoshone Water Rights are expanded beyond their true historical use, Homestake would face earlier and more frequent curtailments. This would reduce inflows to Homestake Reservoir, lower overall storage reliability, and decrease deliveries through the Homestake Tunnel. In practical terms, an unlawful enlargement of Shoshone would reduce Aurora’s and Colorado Springs’ ability to provide water to hundreds of thousands of people. This outcome would destabilize municipal water supplies east of the Continental Divide and create significant risks in times of drought.

A second concern is that the draft acquisition agreement requires CWCB to expand the historical use of Shoshone water rights for instream flow purposes unless it obtains the River District’s permission not to do so. This effectively transfers CWCB’s discretion to another party. The exclusive authority to hold, and decide how to operate, instream flow rights was given to a governmental entity with state-wide authority – and responsibilities to all the people of the state – to ensure the ISF program would strike a balance between preservation of the natural environment and use of water by the State’s residents. Homestake Partners urge the Board not to compromise its ability to meet that responsibility.

Finally, CWCB staff has endorsed the River District’s flawed analysis, effectively placing the Board’s institutional weight behind one party in the anticipated water court change case. If the Board does not believe it has the expertise to form a conclusion about the correct quantification of the historical use of the Shoshone Water Rights, it should not take an action that effectively adopts the analysis of one party without a thorough understanding of the details of the other parties’

analyses. And it should not give the impression – to the Water Court or the general public – that it has examined the details of historical use and potential injury to an extent that warrants its endorsement of the future operations *required* by the currently proposed acquisition agreement.

V. Conclusion and Request.

In conclusion, Homestake Partners support the acquisition of the Shoshone Water Rights in principle, recognizing the environmental and statewide benefits of protecting flows through Glenwood Canyon. However, we cannot support the agreement in its current form. The flawed historical use analysis, improper delegation of CWCB's discretion, and premature endorsement by staff create substantial risks of unlawful enlargement and injury to junior rights.

Homestake Partners request that CWCB should modify the draft acquisition agreement to ensure accurate quantification of Shoshone's historical use, preserve CWCB's independent statutory authority, and maintain a statewide perspective that balances environmental goals with the protection of existing water uses. Done correctly, this acquisition can be a win for the river, for the environment, and for all Coloradans. Done incorrectly, it risks undermining critical municipal supplies, destabilizing river administration, and triggering protracted litigation.

DATED this 29th day of August 2025.

By: 

Richard Kienitz
Water Resources Basin Manager
City of Aurora

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2025, a true and correct copy of **WRITTEN TESTIMONY OF RICHARD KIENITZ ON BEHALF OF HOMESTAKE PARTNERS** was electronically submitted to the following parties via email:

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

Crystal Easom crystal.easom@denverwater.org	
<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 & 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	<u>Kobe Water Authority (KWA)</u> Ryan M. Jarvis ryan@jvamlaw.com Charles N. Simon simon@jvamlaw.com

Philip E. Lopez plopez@fwlaw.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	<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

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

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

/s/ Philip E. Lopez