

**COLORADO WATER CONSERVATION BOARD
STATE OF COLORADO**

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

**REBUTTAL PREHEARING STATEMENT OF PUBLIC SERVICE COMPANY OF
COLORADO**

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

PSCo adopts the positions stated in the Rebuttal Prehearing Statements of the Colorado Water Conservation Board Staff ("Staff") and the River District.

In addition, PSCo submits the following responses to some of the issues raised in other parties' prehearing statements. PSCo may address these and other issues raised by the other parties at the September hearing.

I. Responses to Issues

A. Whether the Board should accept the Junior Shoshone Water Right.

The Junior Shoshone Right was decreed in 1956 for 158 cfs with a 1929 appropriation date. *See* **CRD-2**. It was claimed by PSCo after modifications to the tunnel leading from the diversion dam to the penstocks reduced wave action and allowed PSCo to divert that additional increment of water. The Junior Shoshone Right has historically been diverted since 1929 and is consistently put to beneficial use by PSCo whenever flows in the Colorado River are sufficient,

including pursuant a call of the Junior Shoshone Right, to enable diversions of greater than 1,250 cfs - up to the combined Senior and Junior Shoshone Rights' decreed amount of 1,408 cfs. State Engineer records demonstrate that over a 51-year period of record from 1974-2024, the Junior Shoshone Water Right was diverted almost every year. The diversion records also show that the Junior Shoshone Right has been diverted at its full rate of 158 cfs at least once in every month during the years it was used in the period of record – even in the winter when flows are typically lower than 1,408 cfs. Moreover, PSCo personnel will testify that diverting the combined Senior and Junior Shoshone Rights when available is critical to PSCo's goal of maximizing power generation at Shoshone.

Parties that are opposed to the donation of the Shoshone Rights as proposed imply that use of the Junior Shoshone Right would in some way result in an expansion of use and injury to their trans-basin diversions. They cite to various agreements (none of which PSCo is a party to), including the Shoshone Outage Protocol Agreement (“ShOP”) and the Colorado River Cooperative Agreement (“CRCA”) and even the CB-T authorizing legislation, Senate Document 80, to argue that the Junior Shoshone Right should not be recognized or should even been administered with a 2025 priority date. These arguments quickly fall flat with limited scrutiny. The Junior Shoshone Right is a decreed water right. It is senior to most of the trans-mountain diversion rights, with the exception of Denver's Moffat rights. Not only is the Junior Shoshone Right entitled to operate pursuant to its decree, it has and continues to be used up to its full 158 cfs decreed diversion rate when in priority, and at times, is the calling right on the Colorado River. There is no basis in Colorado water law to impose a junior priority date on the Junior Shoshone Right, *see Empire Lodge Homeowners' Ass'n v. Moyer*, 39 p.3d 1139, 1155 (Colo. 2001) (“A change of water right retains the priority date of the original decree subject to terms and conditions

for the prevention of injury to vested water rights.')} or to abandon it, *see* C.R.S. § 37-92-103 (2) ("Abandonment of a water right" means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder . . .").

To the extent there are disputes between the parties as to the precise scope of the historical use of the Junior Shoshone Right, those issues will be resolved through the water court process. Similarly, to the extent there are disputes among the parties as to whether any of the separately negotiated terms of the ShOP, CRCA, or the 2007 Call Reduction Agreements should be incorporated into the future use of the Shoshone Rights for instream flow purposes, those disputes will be resolved through the water court process and/or separate negotiations. As these issues are properly resolved by the water court, raising the issues here distracts from those matters which are within the Board's statutory purview to decide in this hearing.

What the CWCB Board does have the authority to determine is whether the acquisition of the use of both the Junior and the Senior Rights for ISF purposes would preserve and improve the natural environment of the Shoshone Reach to a reasonable degree. There is undisputed evidence that such is the case. *See* CPW's letter and report, **Exhibit CWCBStaff-5**. CPW concluded that the best use of the Senior and the Junior Shoshone Rights is to preserve and improve the natural environment of the Shoshone Reach up to 1,408 cfs. The Board should accept the interest in the Junior Shoshone Right as well as the Senior Shoshone Right for instream flow use in the Shoshone Reach consistent with CPW's recommendation.

B. The proposed joint use of the Shoshone Water Rights for power and instream flow purposes does not equal an automatic expansion of use.

The proposed Water Dedication and Instream Flow Agreement (**Exhibit CRD-3**) submitted to the Board provides that use of the Shoshone Water Rights will continue for power generation purposes for the foreseeable future, but that if the power plant is not operating, or not operating at full capacity, the portion of the Shoshone Water Rights not being used for power purposes could be used for instream flow purposes. *See Exhibit CRD-3, recitals G and I, ¶7, 8 and 9.* Some opposing parties assert that using the Shoshone Water Rights for ISF purposes and power generation purposes at the same time is an automatic expansion of use. That assertion is incorrect. As CWCB Staff and the River District have stated repeatedly, the water court process is designed to and will thoroughly examine and determine how the Shoshone Water Rights have been historically used, and what terms and conditions need to be placed upon their use going forward to prevent their expansion and injury to other water rights.

Typical terms and conditions in water rights change cases include “volumetric limits.” Volumetric limits impose restrictions on how much water in a given period of time can be used pursuant to the changed water right. For example, if the water court determined that Water Right X was used, on a 10 year basis, an average of 100 acre feet per year, the change decree will contain a term and condition that limits Water Right X to 100 acre feet on a rolling 10 year basis. In some years, the owner of Water Right X may use more than 100 acre feet, which means in subsequent years, they will have to use less than 100 acre feet. The owner of Water Right X must balance total use over the every 10 year period in order to stay within the average annual limit. To expand upon this example, let’s assume that Water Right X can be used for irrigation and commercial purposes. The volumetric limits apply to both uses. The owner of Water Right X can use the water right for one use or both uses, but the net result must be that the water right

is not expanded over the amount that it was used prior to its change to allow new uses. All uses must fall within the long term average annual limit.

These are the types of detailed determinations that the water court will make in the change case. The process through which a water rights owner conveys the right to use a water right for instream flow purposes to the CWCB is not designed to handle these determinations, which are highly technical and follow several rounds of expert disclosures and discussion along with detailed analysis of all of the aspects of the water right's previous use over time. It is, however, important for the CWCB Board to know, that there is a well-established water court process in place that will prevent the expansion of use of the Shoshone Water Rights to protect other water users and allow for simultaneous use for power generation and instream flow purposes within the historical use limitations. Knowing that concerns by parties to this process can and will be addressed in the water court can give the Board confidence to accept the donation, subject to whatever limits, terms and conditions that will be determined in that later process.

C. Historic Use: Consider vs. Determine.

The Board has been presented with a lot of information concerning the historical use of the Shoshone Water Rights – much of it conflicting. The *preliminary* information presented by the River District gives the Board a basis to understand that there has been considerable, consistent use of the Shoshone Water Rights for their decreed purposes for many years. In other words, the Board is being presented with a wet water donation, not a paper water donation. Moreover, the CWCB Staff and the River District have presented detailed scientifically-based information about the positive impact the donation will have in the proposed ISF reach. So, two

facts are undisputed: there's water being offered for ISF use, and that conveyance will help the proposed instream flow reach.

Beyond those two facts, the members of the Front Range Water Council – all trans-mountain diverters serving large populations that would benefit from a reduction of the demand for the Shoshone Water Rights - have tried to create a lot of confusion by insisting that the Board not just **consider** historic use and questions of injury, but **determine** both of those issues before deciding to accept the donation of the Shoshone Water Rights. Their position is legally untenable. The water court has exclusive authority over water matters, which includes changes of water rights. § 37-92-203(1) C.R.S. Moreover, The ISF Rules explicitly state that the board, “shall request the water court to 1) verify the quantification of the historic 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. In other words, it is not the Board's job to weigh in on or decide between competing versions of historic use or potential injury. As is provided for in the proposed Water Dedication and Instream Flow Agreement, the Board can accept the acquisition of the use of the Shoshone Water Rights subject to any terms and conditions imposed by the water court to replicate historic use and prevent injury to other water rights.

The Board's decision to accept the Shoshone Water Rights for instream flow use is the required first step for moving this project - a project that all parties state that they want at some level – forward. Because the CWCB is the only entity entitled to hold water rights for instream flow purposes, the application to file for a change of use to include instream flows as a decreed beneficial use cannot move ahead without the CWCB's participation. PSCo asks the Board to, in good faith, take that step forward knowing that there are many important and unresolved issues,

but also knowing that there is a tried-and-true process that will enable the Shoshone Water Rights to be used as an instream flow in a way that is fair to all interests. PSCo adopts the CWCB Staff's requested relief that the Board:

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 29th day of August, 2025.

WELBORN SULLIVAN MECK & TOOLEY, P.C.

By: 

Carolyn F. Burr (#25978)

James M. Noble (#36716)

Matthew C. Nadel (#57642)

Attorneys for Public Service Company of Colorado,

a Colorado corporation

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 29th day of August, 2025, addressed as follows:

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|---|--|
| <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. Kurat 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 Crystal Easom crystal.easom@denverwater.org | <u>Eagle County Board of Commissioners (ECBC)</u> Sara M. Dunn sarad@balcombgreen.com Beth Oliver beth.oliver@eaglecounty.us |

| | |
|---|---|
| <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 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 |

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|---|---|
| <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 |