

BEFORE THE COLORADO WATER CONSERVATION BOARD

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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

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

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Northern Colorado Water Conservancy District and its Municipal Subdistrict  
(collectively, “Northern Water”) hereby submit this Rebuttal Prehearing Statement.

**I. Introduction**

The consistent thread in the prehearing statements is that the Shoshone Water Rights are extraordinarily consequential throughout the state, including to Northern Water and other Front Range parties that together supply water to a majority (over 3.4 million) of the state’s residents and hundreds of thousands of acres of agricultural lands. The CWCB, with its roots in the promotion of water development, its history of fostering statewide collaboration (the Colorado Water Plan chief among the examples), and its current charge to “correlate the activities of mankind with some reasonable preservation of the natural environment” through the instream flow (ISF) program, C.R.S. § 37-92-102(3), is tailor-made to moderate the varying interests and conduct its consideration of acquiring an interest in the Shoshone Water Rights for ISF use in a manner that benefits the entire state. Northern Water’s description of the rights’ complicated context and its opposition to the River District’s proffered historical use assessment and acquisition agreement are meant to equip the CWCB with the information it needs to critically assess the evidence and have an informed statewide perspective on the proposal and on how the acquisition can be accomplished in a manner that maintains status quo.

As we have stated, Northern Water supports the concept of the CWCB acquiring an interest in the Shoshone Water Rights for ISF use, but it has objections to certain details of the

present proposal (which is the product of “careful negotiations” only among the River District, Xcel, and CWCB Staff, to the exclusion of Front Range parties, River District et al. Prehearing Statement (“PHS”) at 2). Northern Water requests that the CWCB delay acceptance of the acquisition offer, either through extension of the statutory 120-day decision period or denial of the present offer, to encourage the parties to negotiate a revised proposal that avoids the need for the CWCB to weigh in on the complicated factual disputes that currently exist. If the CWCB instead chooses to accept the acquisition, then it must justify its decision in light of the conflicting evidence before it and must incorporate other terms into the acquisition agreement to maintain and protect the status quo, as intended.

## **II. Legal Background**

The CWCB was created in 1937, the same year as both Northern Water and the River District. Thomas V. Cech & J. William McDonald, *Defend and Develop: A Brief History of the Colorado Water Conservation Board's First 75 Years* at 51 (2012). That is not coincidence. The General Assembly's enactments in that year sought to encourage the development of the state's water on a statewide and regional basis, as well as to defend the state's rights to interstate streams. *See id.* at 44, 52–57. The CWCB's organic act described the agency's purpose as “aiding in the protection and development of the waters of the state for the benefit of the present and future inhabitants of the state” and empowered the agency to, among other things, “foster and encourage” the newly created districts and other entities in the “conservation, development and utilization of the waters of Colorado.” 1937 Colo. Sess. Laws, ch. 265, §§ 1, 11(a) (codified at C.R.S. §§ 37-60-102, -106(1)(a)). Since enactment of the ISF law in 1973, the CWCB's charge has been a “balancing act” between these water-development objectives and “reasonable preservation of the natural environment” through the appropriation (and later acquisition) of water rights for ISF use. 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); Cech & McDonald at 154.

When considering an offer to acquire an interest in water for ISF use, the CWCB's discretion is fairly broad, giving it room to consider the offer holistically and in view of all of its statewide interests and duties. The CWCB "may," but is not required to, acquire interests in water for ISF purposes "in such amount as the board determines is appropriate . . . to preserve or improve the natural environment to a reasonable degree." C.R.S. § 37-92-102(3). Part of the CWCB's role in the acquisition process also is to determine "what terms and conditions it will accept in a contract or agreement for such acquisition." *Id.*

This discretion does not, however, allow the CWCB to make its decision without reasoning. Contrary to argument from both CWCB Staff and the River District that the CWCB does not need to make specific findings on the ISF Rule 6e factors (River District et al. PHS at 6; CWCB Staff PHS at 4), the Colorado Administrative Procedure Act, to which the CWCB is subject, requires that the CWCB's decision be supported by "substantial evidence." C.R.S. § 24-4-106(7)(b)(VIII). Concluding that an acquisition is "appropriate" without explaining the Board's evaluation of conflicting evidence presented in relation to the ISF Rule 6e "appropriateness" criteria (which the CWCB adopted at statutory direction, C.R.S. § 37-92-102(3)) would not accord with this legal requirement because it would not enable a reviewing court to determine whether the Board's action is supported by substantial evidence. *See Chase v. Colo. Oil and Gas Conservation Comm'n*, 2012 COA 94, ¶¶ 55–59, 284 P.3d 161, 170–72. If the CWCB feels it is not presently equipped to make findings or weigh the credibility of the evidence presented, then the solution is to delay decision or decline the offer so that the

parties can negotiate a revised proposal that could avert the need for the CWCB to make those difficult determinations.

### **III. Rebuttal**

#### ***A. Northern Water’s objective, like all other parties, is preservation of status quo.***

The Colorado–Big Thompson (C-BT) Project was (though Senate Document No. 80) formulated with Shoshone operations baked in, and both it and the Windy Gap Project exist within a lengthy history of collaboration and agreement on important issues surrounding the Shoshone Water Rights. *See* Northern et al. Ex. 5 at 3, 14–16. This background explains why Northern Water agrees with other parties in this proceeding, including CWCB Staff and the River District, that the goal should be to maintain that status quo.<sup>1</sup> *See, e.g.*, CWCB Staff PHS at 6 (“replicate the historical use regime.”); 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) (“maintaining river operations”); River District et al. PHS at 9 (“replicate[] the historical exercise”); River District et al. Ex. 8 at 15 (“mimic the historical non-consumptive operation”); Headwaters Parties PHS at 2 (“maintaining the historical flow regime and administration”). The sticking issue is accurately reflecting what “status quo” is.

Northern Water is participating in these proceedings because it disagrees with the River District’s portrayal of “status quo” in its offering documents and believes the CWCB should take an active role in the search for consensus on what “status quo” truly means for the Shoshone Water Rights before accepting an interest in those rights. *See* Denver Exs. 5 & 6. From Northern

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<sup>1</sup> The Grand Valley Entities’ baseless accusation that Northern Water and others are seeking to “eliminate[]” the Shoshone Water Rights to realize a “windfall” (Joint PHS of Clifton Water District et al. at 9) is plainly refuted by this background and Northern Water’s prior Request For Hearing, Notice of Party Status, and Prehearing Statement.

Water’s perspective, “status quo” consists of the conditions on the river as they have existed post-Check Case settlement and in light of subsequent agreements, including those that implement the Shoshone Outage Protocol (ShOP).

***B. The CWCB cannot uncritically rely on the River District’s proffered historical use assessment to support its ISF acquisition decision.***

Northern Water’s Prehearing Statement explains why the CWCB cannot base its “appropriateness” decision on the inaccurate historical use facts relied upon by the River District. *See* River District et al. Ex. 8. Simply put, what Northern Water seeks is maintenance of the flow regime generated by the current administrative framework that water users are accustomed to and that strikes the legally necessary balance of preventing injury to *all* water rights, upstream and downstream. *See* CWCB Staff PHS at 5; *United States v. City of Golden.*, 2024 CO 43M, ¶ 50, 551 P.3d 634, 648–49.

The River District would prefer its presented historical use assessment go unchallenged, and in an attempt to do so conflates the CWCB’s administrative process with the Water Court’s jurisdiction to make binding determinations as to historical use. River District et al. PHS at 11. The River District is positing that the CWCB has no agency, and no ability to have its own views of the facts, in either the ISF acquisition process itself or in the Water Court change case that follows (in which the CWCB will be a co-applicant). But the very purpose of a Hearing before the CWCB is for it to take evidence on factual issues, assess the credibility of that evidence, and decide whether and how it affects its decision, including the terms it will accept in the acquisition agreement and how it intends to direct its staff to prosecute the subsequent change case in Water Court. The Water Court cannot make that decision, or the factual findings upon which it is based, for the CWCB. Put differently, the CWCB cannot passively “rely on the water court process” (CWCB Staff PHS at 6) when its active participation in that process is essential—

and when its failure to weigh in on the historical use issue in this Hearing will be taken as an implicit endorsement of the River District's analysis absent an express statement otherwise.

In Northern Water's view, the enormous magnitude of difference between the River District's and the Front Range entities' analyses is reason for the CWCB to delay acceptance of the acquisition to give the parties more time to discuss these issues and negotiate a compromise that at least obviates the need for the CWCB to make those credibility determinations. By seeking to shut down criticism of its historical use assessment, the River District is effectively preventing collaborative discussions that could resolve the technical disagreement and fashion a negotiated ISF acquisition. The current compressed schedule also is artificial—it could be extended to provide room for those discussions if the River District is willing.

The River District's appeal to the Water Court's exclusive jurisdiction also ignores the fact that the CWCB can condition its acquisition for reasons not strictly related to injury to water rights. Consistent with ISF Rule 6e, the CWCB has many other policy questions to consider regardless of how the Water Court will subsequently address and rule upon historical use and injury. The stated goal of maintaining the status quo also involves issues beyond simple quantification of historical use that could be addressed in the CWCB's acquisition agreement. For example, some of the existing agreements surrounding the Shoshone Water Rights (discussed below) implement operations outside of the priority system of administration. Non-injury is the legal floor to be determined in Water Court, but maintaining the status quo could additionally involve the imposition of other terms in the acquisition agreement, whether through a negotiated and revised proposal or through terms imposed by the CWCB in its discretion.

***C. Existing agreements relating to operation of the Shoshone Water Rights make up a part of the status quo.***

If the intent is that the CWCB's use of the Shoshone Water Rights for ISF purposes will maintain status quo, *supra* Section III.A, then ISF use should be implemented consistent with the contractual arrangements that Colorado River users have painstakingly negotiated and implemented over the last 30 years.<sup>2</sup> Users on the river have planned around both the Shoshone Water Rights' historical operation and the existence of these contractual arrangements. *See* Denver Ex. 3, Recital C (intent of 2016 ShOP Agreement included keeping "the flow regime of the Colorado River as it has been historically influenced by the Senior Shoshone Call").

Regardless of the fact that the CWCB is not party to many of those agreements, it has been offered an interest in water rights that are subject to numerous agreements to which the River District and Xcel are party. Throwing those contractual limitations to the wayside would effectively allow those parties to escape their contractual obligations using the CWCB's ISF program as cover. The CWCB should determine that, in order to maintain the status quo, the Shoshone Water Rights must be used for instream flow in a manner consistent with existing agreements.<sup>3</sup> Or, as Northern Water requests, the CWCB could delay accepting the offer so that the parties can negotiate a revised proposal that collaboratively addresses these issues upfront.

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<sup>2</sup> The Headwaters Parties present an example from 2006 to illustrate the alleged effects of a Shoshone non-call, but the Shoshone Water Rights were in fact calling during the timeframe in question. A better example of the effects of a Shoshone non-call would be 2007, when a penstock rupture shut the plant down for over a year. In response, parties worked collaboratively to voluntarily modify their operations to avoid the effects of the Check Case settlement becoming temporarily inoperative, which set the stage for how the flow regime upstream and downstream would be maintained at times when the power plant was not operational moving forward. These are the roots from which ShOP grew.

<sup>3</sup> The redlines in Denver Exhibit 1 could be used as a model for terms aimed at maintaining the status quo (and addressing other needed revisions). If, however, the CWCB accepts the current offer and existing contractual provisions are not directly incorporated, then language similar to the following should be added to the acquisition agreement: "In prosecuting the Water

***D. The ISF acquisition as proposed could negatively affect the Upper Colorado River Endangered Fish Recovery Program.***

Northern Water agrees with both CWCB Staff and Western Slope parties that continued viability of the Upper Colorado River Endangered Fish Recovery Program is essential. *See* CWCB Staff Ex. 9 at 1; River District PHS at 14; Grand Valley Entities PHS at 7–9. The importance of the Recovery Program is a primary reason Northern Water has expressed concerns about an inflated historical use quantification of the Shoshone Water Rights or changes in use of those rights that affect existing contractual arrangements. An enlargement of those rights could diminish the ability of surplus HUP water (the largest contributor of water to the Recovery Program, CWCB Staff Ex. 9) and Woford Mountain Reservoir to provide releases that enhance flows in the 15-Mile Reach.

***E. Even if it may legally do so, given the statewide importance of the Shoshone Water Rights, the CWCB should not delegate ISF use authority to the River District.***

CWCB Staff notes that ISF Rule 10 contemplates the CWCB attaching conditions to an acquisition to “limit the Board’s discretion” or “delegate limited authority [to others] to act on the Board’s behalf.” CWCB Staff PHS at 11. But conspicuously absent from CWCB Staff’s Prehearing Statement is an explanation for why the Board *should* delegate some of its powers to the River District in this particular case. It should not open that door.<sup>4</sup> The CWCB, as a statewide agency, is best equipped to consider the interests of all Colorado River water users in the state and operate the Shoshone Water Rights for ISF use in a balanced manner. Bringing only the

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Court application, the CWCB will give due regard to existing contractual arrangements affecting current operation and use of the Shoshone Water Rights and will advocate for the incorporation of terms similar to those agreements into the decree to be entered to the extent they are consistent with the existing water rights administration regime.”

<sup>4</sup> The past examples the River District provides where the CWCB allegedly ceded authority to other parties, River District et al. PHS at 17, are distinguishable and have little relevance here given the magnitude of the Shoshone Water Rights. Many of those other examples also, unlike here, involved controllable releases from reservoirs.



River District into that decision-making sends the inaccurate message that the Shoshone Water Rights and Colorado River administration are purely Western Slope concerns and risks the rights being used in a way that harms other parties' critical water supplies. Southwestern Water Conservation District contends that the River District should be granted a role because it will "facilitate[] and encourage[] ongoing collaboration between the CWCB and the River District in an area of shared concern." SWCD PHS at 7. But this argument fails to acknowledge that there are numerous parties throughout the state interested in this "area of shared concern." If any parties are brought into the CWCB's decision-making process, then it should be a broad-based advisory committee that includes Northern Water.

#### **IV. Conclusion**

Rather than push all legal and policy issues off to Water Court, the CWCB should take the present proposal for it to acquire an interest in the Shoshone Water Rights for ISF use as an opportunity for it to work collaboratively with all interested parties to search for a workable arrangement that maintains the status quo and benefits the entire state. The most consequential ISF acquisition the CWCB may ever consider deserves no less. But it will take time to fashion an acquisition agreement that accomplishes those objectives. Accordingly, Northern Water requests that the CWCB delay acceptance of the acquisition offer, either through extension of the statutory 120-day decision period or denial of the present offer, to encourage the parties to negotiate a revised proposal that avoids the need for the CWCB to weigh in on the complicated factual disputes that currently exist. If the CWCB instead chooses to accept the acquisition, then it must justify its decision in light of the conflicting evidence before it and must incorporate other terms into the acquisition agreement to maintain and protect the status quo, as intended.

Respectfully submitted: August 29, 2025.

TROUT RALEY

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## CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2025, a true and correct copy of this **Rebuttal 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](mailto:Jackie.Calicchio@coag.gov) and to the following parties:

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s/ William Davis Wert  
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BEFORE THE COLORADO WATER CONSERVATION BOARD

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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

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**PRE-FILED WRITTEN TESTIMONY OF KYLE WHITAKER, P.E., NORTHERN  
COLORADO WATER CONSERVANCY DISTRICT<sup>1</sup>**

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One of the foundational documents for the Colorado-Big Thompson (C-BT) Project, which the Northern Colorado Water Conservancy District (Northern Water) operates jointly with the U.S. Bureau of Reclamation, is Senate Document 80 (SD 80). That document describes the manner of operation of the C-BT Project's Green Mountain Reservoir explicitly in relation to the senior Shoshone Water Right. The way the Colorado River is administered, particularly in relation to these two major structures, has changed in the intervening 88 years, but the general importance of the senior Shoshone Water Right's exercise to C-BT Project operations has not. In addition, in the last 30 years, an intricate system of priority administration and contractual arrangements has emerged around the Shoshone Water Rights that, at least from Northern Water's perspective, by and large serves Colorado River water users in Colorado very well.

It is for these reasons that Northern Water has participated extensively in these proceedings, in two ways. First, we support the CWCB acquiring an interest in the Shoshone Water Rights for instream flow (ISF) use because the rights are integral to the current administrative regime and to how Green Mountain Reservoir is operated. Second, we are invested in ensuring the CWCB is fully informed about the Shoshone Water Rights' context and impacts to other water users in the Colorado River Basin in Colorado. This is all to ensure that the CWCB's acceptance

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<sup>1</sup> The content of this submission comprises Mr. Whitaker's anticipated testimony as of the date of submission. Mr. Whitaker's actual testimony at the Hearing may vary from this written testimony, and he and Northern Water reserve the right for it to do so.

is “done right”—in other words, the conditions of its acquisition maintain the carefully constructed status quo surrounding the Shoshone Water Rights.

My August 4 memorandum attached to Northern Water’s Prehearing Statement as **Northern et al. Exhibit 5** goes into great detail about historical administration of the Colorado River, issues with the River District’s proposed historical use study period, our concerns about injury to the C-BT Project and to the Municipal Subdistrict’s Windy Gap Project, and the numerous governing documents that today comprise the administrative regime surrounding the Shoshone Water Rights. I will not rehash all that is discussed in that memo (although I encourage the Board to review it in detail). Instead, I want to focus on a few major points about the importance of Green Mountain Reservoir and its unique role in benefitting both West Slope and East Slope water users and other users of the Colorado River. I then want to spend much of my time explaining why Northern Water is requesting an outcome that allows interested parties the time and ability to negotiate a revised proposal for the CWCB to consider in lieu of the present one.

Green Mountain Reservoir is a 154,645 acre-foot reservoir on the Blue River and was the first constructed feature of the C-BT Project, completed in 1943. Green Mountain Reservoir is a keystone feature of the project under SD 80 and was specifically intended to be built upstream of the Shoshone Power Plant to provide 52,000 acre-feet of replacement water to western Colorado uses, as well as 100,000 acre-feet of additional water in a “Power Pool.” Under SD 80, the Power Pool is designed principally to make releases between April 15 and October 15 of each year “as required to supply a sufficient quantity [of water] to maintain the specified flow of 1,250 cubic feet per second of water at the present site of said Shoshone diversion dam, provided this amount is not supplied from the 52,000 acre-feet” of Replacement Pool water. These Power Pool releases also helped to supplement water supplies in the Grand Valley, including the suite of water rights

commonly known as the “Cameo Call.” In other words, the Power Pool was conceived to keep the senior Shoshone Water Right whole, avoid the basin-wide adverse effects of that right placing a formal call on the river, and supply water users in the Grand Valley.

Later developments refined Green Mountain Reservoir’s role on the Colorado River, all within the context of SD 80. First, in 1984, the U.S. Bureau of Reclamation adopted a Green Mountain Reservoir Operating Policy that quantified the then presently perfected uses of water dependent on the Power Pool and set out a means for future uses to benefit from the remaining amount of water in the pool. As for the then “presently perfected uses,” the Operating Policy established what is now known as the “Historic User Pool” or “HUP,” which totals 66,000 acre-feet and consists of releases to satisfy all irrigation and domestic uses in place as of October 15, 1977. In effect, the HUP serves as a blanket augmentation plan for beneficiary water rights and allows those rights to continue diverting regardless of any Shoshone, Cameo, or other senior call. The remaining portion of the Power Pool was primarily doled out to a 20,000 acre-foot “Contract Pool” to supply other users by contract, as well as a 5,000 acre-foot “Silt Pool” to benefit the federal Silt Project. In terms of Green Mountain Reservoir’s fill, the Replacement Pool is first to fill, followed by the Silt Pool, HUP, and then the Contract Pool.

A second major factor in Green Mountain Reservoir’s modern operation is the “Orchard Mesa Check Case Settlement” in 1997, which refers to a Water Court case that centered around a “check” structure and the complicated web of water rights and operations in the Grand Valley related to it. Several issues and disputes converged in the Check Case. It is not necessary here to get into all of the “nitty gritty” details, but one important factor is that the case unfolded at about the same time that the Upper Colorado River Endangered Fish Recovery Program (Recovery Program) was being stood up to (a) recover four fish species listed (at that time) as endangered

under the federal Endangered Species Act (ESA) and (b) provide ESA compliance to water development projects that have depletive effects on the species' habitat. Among other things, the Check Case Settlement promulgated new HUP Operating Criteria and a process by which a group of HUP managing entities<sup>2</sup> manages HUP supplies throughout the year and has the option to declare an HUP "surplus" in years when the full amount of the HUP is not needed to meet the needs of the irrigation and domestic beneficiaries. The surplus HUP water can then be released to contract users in a manner that results in enhanced flows in the "15-Mile Reach" that benefit endangered fish and their habitat. Since the Check Case Settlement, surplus HUP water has been the largest source of water to the Recovery Program, averaging about 46% (35,000 acre-feet annually) of the Program's controllable water supplies between 1998 and 2024. **CWCB Staff Ex. 9** at 3.

Importantly, for the suite of water rights to be administered per the agreed upon framework, and for the Recovery Program to utilize surplus HUP water, three conditions must be met under the terms of the Check Case Settlement:

- (1) The Orchard Mesa Check is physically operable;
- (2) There is at least 66,000 acre-feet of water in the HUP when Green Mountain Reservoir is no longer in priority for its initial fill; and
- (3) The Shoshone Water Rights continue to be exercised "in a manner substantially consistent with their historical operations for hydropower production at their currently decreed point of diversion."

The interplay between these conditions illustrates why maintenance of the status quo is so important. While a number of other parties have focused on term (3) above, term (2) is equally

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<sup>2</sup> The 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.

important. Changing how the Shoshone Water Rights are exercised could result in both of these conditions no longer being met: the Shoshone Water Rights may no longer be operating consistent with historical operations, and any increased calls under those rights would diminish Green Mountain Reservoir's opportunity to fill and have 66,000 acre-feet of HUP water in storage.

Finally, in recent years, Colorado River water users have taken notable steps to address the desire to provide consistent flows and avoid the undesirable effects of outages at the Shoshone Power Plant outside of the priority system of water rights administration. In particular, the "Shoshone Outage Protocol," or "ShOP," has been enacted through a few different agreements, including the 2016 Shoshone Outage Protocol Agreement and the Windy Gap Firming Project Intergovernmental Agreement. The Windy Gap Firming Project IGA is a perpetual agreement. While the 2016 ShOP Agreement has a 40-year term (ending in 2056) with the option of renewal, parties entered into it as a means to keep the flow regime on the Colorado River as it has been historically influenced by the senior Shoshone Water Right's call even if the Shoshone Power Plant is not operational and able to exercise its water rights.

In basic terms, ShOP functions as a "virtual call," meaning water users operate their systems during a Shoshone Outage as if a (senior) Shoshone call were in place. The 2016 ShOP Agreement includes important terms and conditions that define the scope of parties' participation in ShOP in ways that also protect their critical water supplies. From Northern Water's (and the Municipal Subdistrict's) perspective, ShOP has served Colorado water users very well and approximates the Shoshone Water Rights' historical operations in a manner that is generally satisfactory to users upstream and downstream of the Plant. The CWCB's acquisition of an interest in the Shoshone Water Rights for ISF use represents an opportunity to continue that collaborative arrangement into the future, perhaps with refinements.

To summarize, Green Mountain Reservoir has significantly changed the flows in the Colorado River and is important to many different groups for different reasons:

- It is important to **Northern Water** because it can replace out-of-priority C-BT Project diversions to the East Slope.
- It is important to the **Shoshone Power Plant** because its releases supplement natural flows and improve the plant's hydropower production.
- It is important to **West Slope HUP beneficiaries** because it allows their diversions to continue at times when they would otherwise be curtailed by a Shoshone or Grand Valley call.
- It is important to the **Grand Valley** and the **Silt Project** because it provides controllable water supplies that supplement their irrigation supplies.
- It is important to **post-1977 West Slope users for irrigation, domestic, and industrial uses, including snowmaking**, because it provides for continued diversions at times when they would otherwise be curtailed through releases from the Contract Pool.
- It is important to the **threatened and endangered fish** in the 15-Mile Reach as a substantial source of controllable releases to enhance flows in the 15-Mile Reach during critical times of year.
- It is important to **water users throughout the Colorado River Basin that rely on the Recovery Program for ESA compliance** for the same reason.

Given this multi-faceted importance, we have been vocal about the need for the CWCB to take its consideration of an interest in the Shoshone Water Rights for ISF use as an opportunity to carefully explore the possible effects of its acquisition and condition it in a way that protects the status quo. In particular, we believe the CWCB should address, in the acquisition agreement, the potential adverse effects of the acquisition on Green Mountain Reservoir. If exercise of the Shoshone Water Rights is modified or expanded, there would be a corresponding decrease in the amount and frequency of Green Mountain Reservoir diversions into storage, leading to reduced

availability of water for replacement purposes, West Slope HUP beneficiaries, Contract Pool users, and the Recovery Program. The CWCB can address these potential effects by either prompting the parties to come up with a negotiated revised proposal or conditioning its acceptance in a manner that avoids those potential effects.

Yes, we recognize that legal issues like historical use quantification and non-injury will be worked out in Water Court, but that is not a reason for the CWCB to not delve into the details of what its acquisition means for the state's water users. Its administrative acquisition process is a separate step. There are many policy questions and other aspects of the "status quo" that the CWCB should take interest in and seek to address upfront regardless of how the legal questions subject to the Water Court's jurisdiction will play out. We believe that not taking the time to explore and address those issues now, before the CWCB accepts an interest in the Shoshone Water Rights and before parties assume their litigation stances in Water Court, would be a lost opportunity to more holistically engineer the CWCB's acquisition and use of an interest in the Shoshone Water Rights for instream flow to benefit the entire state. The most consequential ISF acquisition the CWCB may ever consider deserves no less.

There is nothing requiring the CWCB to rush this process. Public Service Company of Colorado informed the Board in May that there are no future plans to decommission the Shoshone Power Plant. While PSCo continues to operate the Plant, the status quo will remain in place and the rights will not be available to the CWCB for ISF use anyways. Even if the Shoshone Power Plant is subject to an unanticipated shutdown in the near term, operation of the Shoshone Water Rights generally will remain unchanged because the ShOP agreements serve as a backstop to minimize the effects of a short-term shutdown or prolonged periods of non-calls of the Shoshone Water Rights. What the CWCB is being asked to do is decide for all time how the Shoshone Water

Rights will be exercised at times when in the past the Shoshone Water Rights could not be exercised. The Water Court and the legal standards it applies certainly will play a role in determining that future. But the CWCB's authority to acquire an interest in the rights for ISF use also provides it the opportunity to bring all interested parties together in advance of Water Court litigation and to mold the acquisition to benefit the entire state.

It is for these reasons that Northern Water requests that the CWCB delay acceptance of the acquisition offer, either through extension of the statutory 120-day decision period (if the River District consents) or denial of the present offer, to encourage the parties to negotiate a revised proposal. Doing so aligns with the CWCB's long-time commitment to finding collaborative solutions to major issues that Colorado water users face. We would look forward to working with the CWCB, the River District, and others in this process to implement ISF use of the Shoshone Water Rights in a way that best serves the State of Colorado.

Respectfully submitted: August 29, 2025.

*s/ Kyle Whitaker*  
Kyle Whitaker, P.E.  
Water Rights Department Manager  
Northern Colorado Water Conservancy District



## CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2025, a true and correct copy of this **Pre-Filed Written Testimony of Kyle Whitaker, P.E., Northern Colorado Water Conservancy District** was electronically submitted to the Hearing Officer via email to [Jackie.Calicchio@coag.gov](mailto:Jackie.Calicchio@coag.gov) and to the following parties:

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