

**BEFORE THE COLORADO WATER CONSERVATION BOARD
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

**IN THE MATTER OF THE HEARING FOR THE PROPOSED ACQUISITION OF AN INTEREST IN THE
SHOSHONE WATER RIGHTS FOR INSTREAM FLOW USE ON THE COLORADO RIVER**

**JOINT REBUTTAL STATEMENT OF WESTERN RESOURCE ADVOCATES, CONSERVATION
COLORADO, AMERICAN RIVERS, THE NATIONAL AUDUBON SOCIETY, AND TROUT UNLIMITED**

Western Resource Advocates, Conservation Colorado, American Rivers, the National Audubon Society, and Trout Unlimited (collectively, “WRA et al”) hereby jointly submit this Rebuttal Statement in the matter of the hearing (“Hearing”) for the Proposed Acquisition of an Interest in the Shoshone Water Rights for Instream Flow Use on the Colorado River (“Shoshone ISF Acquisition”) before the Colorado Water Conservation Board (“Board”).

I. Introduction and Statement of Position

WRA et al support the Board’s acquisition of an interest in the Shoshone Water Rights for instream flow purposes. Through this Rebuttal Statement, WRA et al respond to arguments raised by Denver, Northern et al, CSU, Homestake, and Aurora (collectively, the “Front Range Parties”) where they invite the Board to pre-determine issues properly within the exclusive authority of the water court. The Board should decline their invitation; it has neither the authority nor the expertise to bind the parties to these potentially injurious pre-determinations.

II. Rebuttal Statement of WRA et al to the Front Range Parties' Prehearing Statements

The Record presented to the Board in this Hearing clearly supports, and we strongly recommend, the Board accepting a perpetual interest in the Shoshone Water Rights for instream flow use up to the historical use of the Shoshone Water Rights as determined by the Division 5 water court. There is no serious dispute among the Parties to this Hearing that there is a natural environment that the Board's acquisition and use of the Shoshone Water Rights would protect and improve. The Board has received input from numerous Parties and experts, including pre-filed expert testimony from Jay Skinner and Thomas Chart on behalf of WRA et al, supporting the robust analyses by State agency staff. All these expert opinions conclude the Board's use of the Shoshone Water Rights up to the full decreed amount (subject to terms and conditions approved by the water court) to maintain historical flows in the Colorado River would have significant benefits to the Colorado River environment as well as farms, ranches, recreational businesses, and communities across Colorado.

Notwithstanding these undisputed benefits, the Front Range Parties in their prehearing statements request the Board decide additional issues outside its authority that go beyond the question of whether the Shoshone Water Rights should be acquired for instream flow purposes.

First, the Front Range Parties erroneously argue the Board must evaluate and pre-determine the Parties' conflicting claims regarding historical use of the Shoshone Water Rights, rather than leaving the determination of historical use and injury to the water court, as

required by Colorado statute and the Board's own Rules Concerning the Colorado Instream Flow and Natural Lake Level Program at 2 CCR 408-2 ("ISF Rules", WRA et al-1).

Second, the Front Range Parties ask the Board to interpret and make a legal determination as to the parties' differing opinions regarding application of the 2016 Shoshone Outage Protocol Agreement ("ShOP Agreement", WRA et al-2, Enclosure F, Attachment 3) to the Shoshone Water Rights, an agreement to which the Board is not a party and which the Board has no authority to interpret.

Third, the Front Range Parties argue the Board must limit use of the Shoshone Water Rights to prevent negative impact to the 15-mile reach from impacts to "surplus" from the Historic Users' Pool in Green Mountain Reservoir.

Fourth, the Front Range Parties erroneously suggest the CWCB lacks authority to enter into an agreement clarifying the roles of the Board and other actors with respect to future use of the Shoshone Water Rights.

None of these arguments by Front Range Parties need to, nor should be, determined by the Board in this Hearing, a fact that should greatly simplify the proceeding.

A. The water court has exclusive authority to determine historical use of the Shoshone Water Rights.

The Front Range Parties argue that the Board must limit future use of the Shoshone Water Rights to address alleged defects in the historical use analysis provided by the CRD. Specifically, in their Prehearing Statement, Northern et al argue the Board must perform its

own historical use analysis limiting future use of the rights to less than two-thirds of the 844,644 acre-feet per year demonstrated by the CRD draft preliminary historical use assessment (“CRD Preliminary Assessment”, WRA et al-2, Enclosure F, Attachment 8). Northern et al argue the Board must make such determination because the CRD Preliminary Assessment excludes certain years from the study period and relies upon gauge rather than diversion records. (Northern et al Prehearing Statement at p. 9) Northern et al argue the CRD Preliminary Assessment thus fails to comply with CWCB Instream Flow Rule 6e(4), which lists general factors for the Board to consider in evaluating acquisitions, including “[t]he historical consumptive use and historical return flows of the water right proposed for acquisition.” *Id.*

Northern et al’s argument fails, first, because the CRD presented ample justification for its historical analysis and the study period and records chosen to support such analysis. Colorado law makes clear that historical use analyses need not include all years of record but only a “representative period” of use. *See* C.R.S. 37-92-305(3)(d) (“Quantification of the historical consumptive use of a water right must be based on . . . a representative study period that . . . [n]eed not include every year of the entire history of the subject water right.”)

Second, this argument fails because it would result in the Board quantifying historic use without participation of the many parties who may have avoided this proceeding in favor of participating in the water court change proceeding for the Shoshone Water Rights. The water court proceeding may well have a different cast of players with unique interests and claims of injury not being raised in this Hearing. The Board should not constrain or pre-decide historical use claims or claims of injury for that group of as-yet-to-be-determined persons.

Finally, this argument fails because it is inconsistent with clear law establishing that the Board in making permanent water rights acquisitions should not substitute its own determination of injury and historical use for that of the water court.

The Board's obligation to defer to the water court's historical use analysis is set forth in its own ISF Rules. Specifically, ISF Rule 6e(4) requires the Board when evaluating the appropriateness of an acquisition to include as a "consideration" the historical use of the water right being acquired. Notably this provision does not direct the Board to substitute its own "consideration" of historical use for any subsequent historical use determination by the water court. Further, ISF Rule 6i(1), which governs the Board's acquisition of water rights subject to a water court change proceeding (as is the case here), specifically clarifies that "[t]he water court shall determine matters that are within the scope of section 37-92-305, C.R.S." Matters within the scope of section 37-92-305, C.R.S. include quantification of the historical use of a water right. See C.R.S. 37-92-305(3)(d).

Indeed, citing C.R.S. 37-92-305(3), Northern et al concede they "do not dispute that the water court has exclusive jurisdiction to make a determination quantifying the Shoshone Water Rights' historical use that binds all parties." (Northern et al Prehearing Statement at p. 9) However, immediately after this concession, Northern et al asks the Board to ignore section 37-92-305(3) and make a determination of historical use binding on all parties. Specifically, Northern et al argue the Board's "consideration" of historical use required by Rule 6e(4) requires the Board to "wrestle with those presented facts (and the facts presented by others) before relying on them in water court." *Id.*

This argument fails because it ignores the fact that the Board limiting the water court's quantification as requested by Northern et al, while protective of the Front Range, could result in injury to the West Slope. Just as the Board binding the parties to a determination that overstates the Shoshone Water Rights' historical use could injure the Front Range, a determination *understating* the Shoshone Water Rights' historical use would injure the many West Slope parties to this Hearing that historically have relied upon return flows from the Shoshone Water Rights. The possibility of such injury to either the Front Range or the West Slope is precisely why the Board must not "pre-determine" historical use or injury issues but rather must leave these to the exclusive jurisdiction of the water court.

Indeed, Staff and CRD testimony at the Hearing will establish that, in deference to the water court's exclusive jurisdiction, the Board in past water right acquisition proceedings has limited its role in "pre-determining" historical use by leaving resolution of historical use disagreements to the water court. Consistent with Rule 6i(1) and section 37-92-305, the Board should limit its role to resolution of those issues within its purview and defer to the water court for resolution of questions of injury and historical use.

B. The Board should decline to interpret Third Party agreements.

The Front Range Parties argue that future use of the Shoshone Water Rights must be limited in a manner consistent with the ShOP Agreement. As discussed by the CRD, this Hearing is not the appropriate venue to determine the legal and practical significance of ShOP with respect to the historical or future use of the Shoshone Water Rights. The Board is not a party to ShOP and has no expertise or authority to determine the intent of that agreement. As is the

case with the determination of historical use and injury, the water court is the appropriate venue to determine whether ShOP has any impact on future use of the Shoshone Water Rights.

C. The water court should determine any potential impact of the HUP on the Shoshone Water Rights.

The Front Range Parties also suggest that if the Shoshone Water Rights are enlarged, an increased exercise of the rights to call out junior users upstream could result in less water accruing to the Historic Users' Pool ("HUP") at Green Mountain Reservoir, thus leaving less water available as potentially declared "surplus" for controlled delivery to the 15MR later in the irrigation season. This argument at most points to the importance of a correct determination of the impact of the HUP on the historical use of the Shoshone Water Rights. The argument fails to explain why this Hearing is the appropriate venue for such a determination, rather than the Shoshone Water Rights change proceeding. In short, the technical and legal elements of this issue, like that for historical use, are best resolved by the water court.

D. The Board may enter into use agreements for acquired water rights.

The Front Range Parties also suggest the Board lacks authority to share any future decisions regarding the use of acquired ISF rights with any other party. This is incorrect.

The ISF statute and ISF Rules authorize the CWCB to enter into enforcement agreements with entities which provide water, water rights, or interests in water to the Board. The proposed ISF Agreement for the acquisition of Shoshone Water Rights involves the CRD in decisions about when and how the Board may exercise the Shoshone Water Rights. The proposed ISF Agreement fits squarely inside the broad language of ISF Rule 10, which provides:

The Board may attach conditions to an appropriation, decreased appropriation, or acquisition, and may enter into any enforcement agreements that it determines will preserve or improve the natural environment to a reasonable degree. The Board may enter into enforcement agreements that limit the Board's discretion in the protection, approval of inundation, modification or disposal of ISF right, and/or may delegate limited authority to act on the Board's behalf.

Further, as noted in the CWCB Staff and CRD Prehearing Statements, the proposed ISF Agreement fits squarely within the Board's past practices. See CWCB Staff Prehearing Statement at p. 11; CRD Prehearing Statement at pp. 16-17. Hearing testimony from CRD and CWCB Staff as well as public comment by the Colorado Water Trust will provide multiple examples of water rights acquisitions where the Board has entered into similar agreements governing future use of the rights. These use agreements include the McKinley Ditch Project in Division 4 that, in accordance with ISF Rule 10 can be described as either limiting the CWCB's discretion or delegating limited authority to the Water Trust or others to act on its behalf. See, e.g. Case No. 14CW3108, Water Division 4.

Indeed, the Board has entered into similar use agreements with Front Range water users limiting the Board's discretion in operating instream flow water rights, including agreements with Denver Water in Case No. 05CW316, Water Division 1, which limit the Board's discretion to protect instream flow rights in connection with deliveries of water by Denver Water between Strontia Springs and Chatfield Reservoirs in Water Division 1, and Case No. 11CW152, Water Decision 1, which similarly limits the Board's discretion with respect to protecting deliveries of water made by Denver Water pursuant to the Colorado River

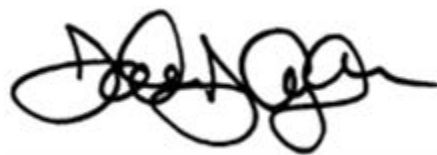
Cooperative Agreement. These examples demonstrate that maintaining the Board's authority under ISF Rule 10 to enter into agreements that limit its discretion in operating ISF water rights is critical to the Board's ability to implement flexible, durable water-sharing arrangements that balance the needs of instream flow protection with the continuing needs of the water rights owners. The flexibility of these and other arrangements provides important incentive for partnerships with the CWCB that help make the agency's programs a success. If such flexibility were limited, it could reduce, perhaps dramatically, the extent of future partnerships. See comment from Colorado Water Trust August 28, 2025, at p. 4.

III. Conclusion

For the reasons stated herein, WRA requests the Board reject the arguments raised by the Front Range Parties asking the Board to pre-determine certain issues properly within the exclusive authority of the water court and that the Board proceed with the acquisition of an interest in the Shoshone Water Rights for instream flow purposes.

Respectfully submitted this 29th day of August 2025.

WESTERN RESOURCE ADVOCATES

A handwritten signature in black ink, appearing to read 'Bart Miller', with a horizontal line underneath.

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On behalf of Western Resource Advocates,
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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing **Joint Rebuttal Statement** upon all parties herein by email, this 29th day of August 2025, addressed as follows:

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**BEFORE THE COLORADO WATER CONSERVATION BOARD
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

**IN THE MATTER OF THE HEARING FOR THE PROPOSED ACQUISITION OF AN INTEREST IN THE
SHOSHONE WATER RIGHTS FOR INSTREAM FLOW USE ON THE COLORADO RIVER**

**SUBMITTAL OF WRITTEN TESTIMONY OF THOMAS CHART ON BEHALF OF WESTERN
RESOURCE ADVOCATES, CONSERVATION COLORADO, AMERICAN RIVERS, THE NATIONAL
AUDUBON SOCIETY, AND TROUT UNLIMITED**

This testimony is based on my professional experiences and opinions. My professional career started with Utah Division of Wildlife Resources where I led the Moab Field Station's efforts to monitor fish populations and research the flow needs of the endangered Colorado River fish. I later worked for U.S. Bureau of Reclamation in their Upper Colorado River Regional office and then for the U.S. Fish and Wildlife Service where I ultimately served as the Director of the Upper Colorado River Endangered Fish Recovery Program (Recovery Program) – a position I held for 12 years.

The 15 Mile Reach (15MR) of the Colorado River is Critical Habitat for two federally listed fish and the Shoshone Water Rights are critically important in sustaining flows there. Maintaining favorable conditions in the 15MR for the survival and recovery of the listed fish helps ensure thousands of water users can continue to operate in compliance with the Endangered Species Act (ESA).

I. Introduction

The proposed acquisition (Shoshone ISF Acquisition) by the Colorado Water Conservation Board (CWCB) would ensure permanency of the Colorado River flow regime historically supported by exercise of the Shoshone Water Rights, protecting a number of

important instream flow benefits both upstream and downstream of the Shoshone Power Plant (refer to testimony of Mr. Jay Skinner). This includes the protection of flows that support the ecology of the 15MR, the roughly 15 miles of the Colorado River from the Grand Valley Irrigation Company's diversion downstream to the confluence with the Gunnison River.

An analysis by Colorado Parks and Wildlife (CPW) concluded that continued exercise of the Shoshone Water Rights benefits hundreds of miles of river habitat for ecosystem health, including several species of threatened and endangered fish found in the Colorado River Basin, and nowhere else in the world, and that are the focus of the Recovery Program.

II. Significance of the 15MR

The 15MR represents a portion of habitat designated critical to the recovery of two federally listed (as per the ESA) fish: the Colorado Pikeminnow (*Ptychocheilus lucius*) and the Razorback Sucker (*Xyrauchen texanus*). These fish were designated as endangered species by the U.S. Fish and Wildlife Service (USFWS) in 1967 and 1991, respectively. The 15MR of the Colorado River provides uniquely valuable habitat for these two species (WRA et al-4).

Among other benefits, the 15MR supplies important spawning habitat for both species, and provides a mix of habitats and robust food base. For adult Colorado Pikeminnow, the 15MR provides an optimum balance between temperature and food availability (WRA et al-4). This contrasts with less-productive reaches of the Colorado River downstream of Westwater, Utah, which provide better rearing habitat for young Colorado Pikeminnow. As Colorado Pikeminnow mature they migrate upstream to re-populate the upper river in the Grand Valley.

Additional native species, including Humpback chub (*Gila cypha*; *Threatened*) and stocked Bonytail (*Gila elegans*; *Endangered*), benefit from flow management in the upper

Colorado and Gunnison rivers, but the 15MR flow targets, developed in the 1990's, focused primarily on providing habitat for Colorado Pikeminnow and Razorback Sucker.

III. Importance to the Water Community throughout Colorado

In 1999 the USFWS issued a programmatic biological opinion (PBO, WRA et al-13) recognizing that the Recovery Program could provide compliance with the ESA for all existing water users reliant on the Colorado River upstream of the Gunnison River confluence, plus up to 120,000 acre-feet/year (AFY) of new depletion uses, provided certain recovery actions were implemented. Among those Recovery Program actions were measures to protect and maintain adequate flows through the 15MR.

Target flows established for the 15MR during the 1990s were incorporated into the PBO as one important element for maintaining and enhancing river habitat. These include spring peak flow targets, and minimum monthly flow targets applicable over the remainder of the year. For example, a minimum mean monthly flow target of 810 cubic feet per second (cfs) is established for the 15MR in August, September, and October of hydrologically dry years. That flow target is higher (1,240 cfs to 1,630 cfs) for hydrologically wetter years.

Failure to maintain and adequately protect flows through the 15MR for the benefit of the federally listed fish has the potential to result in a USFWS determination of non-compliance with the PBO. This would put at risk the ability of thousands of west slope and east slope Colorado water users to operate in compliance with the ESA. Maintenance of the Colorado River flow regime associated with the historical exercise of the Shoshone Water Rights is crucial to 15MR flow maintenance and protection.

In 2022, the USFWS conducted a scheduled review of the PBO and determined that re-initiation of this ESA Section 7 consultation was not necessary at that time. In their review they recognized the cooperation of water managers to improve flow conditions in the 15 MR, but they raised specific concerns over missing the summer / fall endangered fish flow targets, particularly in dry years. Their next review of the PBO is scheduled for 2030. I strongly believe that acquisition of the Shoshone Water Right for ISF use would be viewed favorably by the USFWS in future PBO reviews and thereby reinforce the Recovery Program's approach to implementing the ESA.

III. 15MR Base Flow Augmentation and Shortfalls to Targets

To help maintain desirable flows through the 15MR, a variety of operating agreements, reservoir allocations, water leases, and other mechanisms have been implemented. However, even with these many substantial sources of supplemental flow – which averaged more than 78,000 acre-feet annually from 1998 through 2019 (WRA et al-14) – it has proven problematic to reliably achieve 15MR target flows. Despite substantial Recovery Program flow augmentation efforts and admirable water user collaboration, 15MR flows frequently fall short of PBO recommendations, especially in drier years. For example, flows in the 15MR fell short of the mean monthly minimum flow target of 810 cfs in 21 of the 32 irrigation-season months (July through October) of the eight 'Dry' years identified by the Recovery Program between 1991 and 2019 (see Table 8, page 25, WRA et al-14).

The impacts of very low flows on 15MR habitat in dry years are particularly concerning. Draft guidance provided by the Recovery Program (WRA et al-15) indicates that there is progressive deterioration in 15MR habitat conditions as flows fall below 800 cfs. Flows below

400 cfs result in serious impediments to fish passage, and fish will move to wherever the water is, in many cases likely downstream below the Gunnison River confluence. Fish crowding then becomes a concern. Low, clear water in the 15 MR results in increased vulnerability of the fish to avian predation and sun damage. Dewatering of the river bed severely impacts biological productivity within the 15MR: aquatic insects and other important elements of the food base are severely impacted, and it takes time for that food base to recover after water returns. This is especially concerning when the weather is sunny and hot, as the exposed channel beds can dry quickly. In the 250-400 cfs range, conditions in the 15MR get very concerning: much of the channel goes dry, and because portions of the river are braided, there may be no more than a couple of inches of water in each of the multiple channels. Terrestrial predators then become more of a concern, in addition to avian predators.

Moreover, climate change is increasing the frequency, severity, and duration of dry hydrologic conditions in the Colorado River basin (e.g., WRA et al-12). These hydrologic changes have resulted, and likely will continue to result, in more frequent, more severe, and more extended periods of impaired natural flow through the 15MR.

IV. Importance of Shoshone Water Rights for Sustaining Flows in the 15MR

Exercise of the Shoshone non-consumptive water rights has, historically, played a key role in helping to maintain flows in the 15MR, especially during the summer and fall irrigation season. Without the continued exercise of the Shoshone Water Rights (including the proposed CWCB Shoshone ISF Acquisition), continued growth in both transbasin diversions and in-basin water uses by junior water users upstream is likely to further reduce flows through the 15MR.

Abandonment or disuse of the Shoshone Water Rights would dramatically reduce flows through the 15MR, especially in drier years. Using the State of Colorado's StateMod water

allocation and accounting model, Hydros Consulting (WRA et al-2, Enclosure F, Attachments 11 and 12) concluded that continued exercise of the Shoshone Water Rights would result in an average flow contribution of approximately 78 to 96 cfs through the 15MR across the driest 50% of all simulated monthly flows, compared to flows without the Shoshone Water Rights. Impacts to flows are much more pronounced in the driest years: over their 1988-2013 'stress test' period, and applying current basin water demands, Hydros estimated an average additional 118 cfs of flow in the 15MR during dry months (defined as months with less than 50,000 AF total flow -- essentially, months short of the 810 cfs mean monthly flow target), including effects of both the senior and junior Shoshone Water Rights. On average, this equated to 23% of the total 15MR flow in these months. In short, Shoshone operations benefit 15MR flows the most in drier years, but all years benefit, and the benefits increase from exercising both the senior and junior Shoshone Water Rights.

V. Importance of Shoshone Water Rights for Sustaining Green Mountain Reservoir HUP Surplus Water Supporting 15MR Flows

In 1996, a stipulated agreement known as the Orchard Mesa Check Case (WRA et al-16) was reached among multiple parties including the U.S. Bureau of Reclamation and water users in the Grand Valley. Briefly, this agreement allows the parties to operate their systems as they have historically and reduces the level of the Cameo Call against upstream junior water rights, in exchange for increasing operational flexibility of the "Historic Users Pool" (HUP) at Green Mountain Reservoir by implementing the "Green Mountain Reservoir HUP Operating Criteria".

This agreement also allows for up to 66,000 AF annually from the Green Mountain Reservoir power pool to be used to augment base flows in the 15MR, if a "surplus" is declared in the HUP beyond that needed to meet other historical agricultural and domestic water user

rights on the West Slope perfected as of 1977. A HUP surplus, if declared, typically becomes available in August and September, and in most years it becomes the single largest source of upstream storage available to supplement flows in the 15MR. From 1998 to 2019, HUP surplus releases averaged more than 40,000 AF in years when releases were made (WRA et al-14).

To continue providing these Orchard Mesa Check Case Settlement benefits to the 15MR (i.e., to continue making HUP surplus water deliveries), it is necessary to protect the river flow regime associated with the historical exercise of the Shoshone Water Rights. Specifically, the Check Case settlement expressly sets forth as one of three necessary conditions the continued exercise of the Shoshone Water Rights “in a manner substantially consistent with their historical operations”.

Thus, if the Shoshone Water Rights were to cease operating in a manner consistent with historical practice as described in the Check Case Settlement, failure to meet this condition could trigger the loss of HUP surplus water benefits to the 15MR. Additionally, it’s my understanding that the 1996 Check Case Settlement and the 1999 15MR PBO were based on hydrologic evaluations that predated the extended Shoshone Power Plant outages observed over the last 20 years, as well as the modified river operations associated with the 2016 ShOP Agreement (WRA et al-2, Enclosure F, Attachment 3).

Some Parties have commented on potential negative impacts of the Shoshone Water Rights Acquisition on water accruing to the HUP Pool at Green Mountain Reservoir, leaving less water available as potentially declared “surplus” for controlled delivery to the 15MR later in the irrigation season. However, as the change should not result in any new demands on the river, it shouldn’t have any net impact on the HUP or HUP “surplus.”

VI. Conclusion

Maintenance of the Colorado River flow regime associated with the historical exercise of the Shoshone Water Rights is crucial to 15MR flow maintenance and protection. Without permanent protection of the Shoshone Water Rights, it will become even more challenging to meet Recovery Program flow targets in the 15MR. This creates a greater risk that east and west slope water users may need to reinitiate consultation with the USFWS to determine additional or alternative measures to comply with the ESA. Of course, the Recovery Program would be part of that solution as it has been for more than 30 years, but the Recovery Program has and will always be spread thin dealing with the myriad challenges to recovering the Colorado River fish.

I declare the above to be true and correct to the best of my knowledge.

Thomas E. Chart

Thomas Chart

Respectfully submitted this 29th day of August 2025.

WESTERN RESOURCE ADVOCATES

A handwritten signature in black ink, appearing to read 'Bart Miller', written over a horizontal line.

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On behalf of Western Resource Advocates,
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CERTIFICATE OF SERVICE

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**BEFORE THE COLORADO WATER CONSERVATION BOARD
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

**IN THE MATTER OF THE HEARING FOR THE PROPOSED ACQUISITION OF AN INTEREST IN THE
SHOSHONE WATER RIGHTS FOR INSTREAM FLOW USE ON THE COLORADO RIVER**

**SUBMITTAL OF WRITTEN TESTIMONY OF ORLA BANNAN ON BEHALF OF WESTERN RESOURCE
ADVOCATES, CONSERVATION COLORADO, AMERICAN RIVERS, THE NATIONAL AUDUBON
SOCIETY, AND TROUT UNLIMITED**

Western Resource Advocates, Conservation Colorado, American Rivers, the National Audubon Society, and Trout Unlimited (collectively, “WRA et al”) hereby jointly submit this written testimony of Orla Bannan in the matter of the hearing (“Hearing”) for the Proposed Acquisition of an Interest in the Shoshone Water Rights for Instream Flow Use on the Colorado River (“Shoshone ISF Acquisition”) before the Colorado Water Conservation Board (“Board”).

I, Orla Bannan, depose and state as follows:

I am Policy Manager for State Policy and Engagement for WRA's Healthy Rivers Program. In that role I have worked extensively with Conservation Colorado, American Rivers, The National Audubon Society and Trout Unlimited. WRA et al are all nonprofit conservation organizations with long histories of successfully working with public and private entities to address issues affecting Colorado’s streams and rivers, and I am submitting this testimony on their behalf.

I. Introduction and Statement of Position

WRA et al support the CWCB’s acquisition of an interest in the Shoshone Water Rights for instream flow purposes. This action by the CWCB has broad public support and could be one

of the most significant actions taken by the Board since the Instream Flow Program was created in 1973. We believe consideration of the applicable factors set out in the CWCB Rules (WRA et al-1), the analysis by CPW (WRA et al-2, Enclosures D1 and D2), the 2024 Miller Report (WRA et al-2, Enclosure F, Attachment 5), the 2025 Ecosystem Report (WRA et al-2, Enclosure F, Attachment 6), and the USFS-BLM Report ((WRA et al-2, Enclosure F, Attachment 7), along with WRA et al's Prehearing Statement, Written Testimony of Thomas Chart, Written Testimony of Jay Skinner, and the Rebuttal Statement submitted by WRA et al, which are incorporated by reference as part of my testimony herein, and all the other information submitted in this Hearing, provides overwhelming evidence for the Board to approve the acquisition.

WRA et al's history of working to address issues affecting Colorado's stream and rivers includes actively participating in past CWCB instream flow matters. Our memberships and interests span statewide, including on Colorado's east and west slopes. The acquisition of the Shoshone Water Rights for instream flow purposes is supported by WRA et al and their 70,000 + members, supporters and employees, from all across Colorado, who recognize that maintenance of historical flows in the Colorado River through continued exercise of the Shoshone Water Rights is necessary to protect the health of the Colorado River and all the communities, fish and wildlife, and water users that depend on it.

II. Protecting and Improving the Natural Environment to a Reasonable Degree

As detailed in the expert written testimony submitted by Jay Skinner, the Board has been provided with detailed information regarding the natural environment in and around the Shoshone Reach which is more than sufficient for the Board to conclude that there is a natural

environment that will be preserved and improved by the Shoshone ISF Acquisition. If the Shoshone Water Rights are put to use for ISF purposes the results will be: (1) an improvement to the natural environment and available habitat, (2) lasting positive effects on other ISF water rights and, as a result, the natural environment, both upstream and downstream of the Shoshone Reach, and (3) that interest and will result in basin-wide environmental protection and improvement of aquatic and terrestrial ecosystems.

Additionally, the expert testimony submitted by Thomas Chart discusses how the maintenance of the Colorado River flow regime associated with the historical exercise of the Shoshone Water Rights is crucial to the flow maintenance and protection in the 15 Mile Reach, the roughly 15 miles of the Colorado River from the Grand Valley Irrigation Company's diversion downstream to the confluence with the Gunnison River ("15MR") – ensuring Endangered Species Act compliance for thousands of Colorado water users. Without permanent protection of the Shoshone Water Rights, it will become even more challenging to meet Recovery Program flow targets in the 15MR.

III. Conclusion

For the above reasons, WRA et al support the acquisition of the Shoshone Water Rights for instream flow purposes. The information submitted in this Hearing provides overwhelming evidence for the Board to approve the acquisition.

On behalf of our 70,000+ members, supporters, and employees, WRA et al urge the Board to accept an interest in the Shoshone Water Rights for instream flow use on the Colorado River to preserve and improve the natural environment.

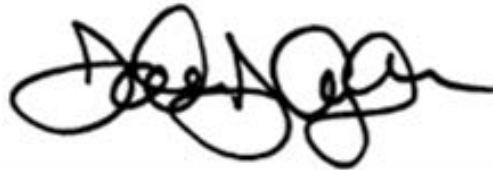
I declare the above to be true and correct to the best of my knowledge.



Orla Bannan

Respectfully submitted this 29th day of August 2025.

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On behalf of Western Resource Advocates,
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CERTIFICATE OF SERVICE

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**BEFORE THE COLORADO WATER CONSERVATION BOARD
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

**IN THE MATTER OF THE HEARING FOR THE PROPOSED ACQUISITION OF AN INTEREST IN THE
SHOSHONE WATER RIGHTS FOR INSTREAM FLOW USE ON THE COLORADO RIVER**

**SUBMITTAL OF WRITTEN TESTIMONY OF JAY SKINNER ON BEHALF OF WESTERN RESOURCE
ADVOCATES, CONSERVATION COLORADO, AMERICAN RIVERS, THE NATIONAL AUDUBON
SOCIETY, AND TROUT UNLIMITED**

I am providing this testimony, which is based on my professional expertise and many years of experience. I am a trained watershed scientist (hydrologist) and aquatic biologist with more than three decades of experience with Colorado's ISF Program. I was formerly employed by the Colorado Water Conservation Board (CWCB), the Colorado Division of Wildlife, and Colorado Parks and Wildlife (CPW) for a combined 33 years, approximately 24 of which were directly related to the state's Instream Flow (ISF) Program. I have personally been involved with more than 500 CWCB ISF water rights, I have experience with wide variety of ISF quantification techniques, and have managed/supervised other CPW ISF specialists, and have participated in many CWCB ISF hearings.

As stated in WRA et al's Prehearing Statement, the following includes my testimony on:

(1) the aquatic and terrestrial ecosystem that will benefit from the Board's acquisition of an interest in the Shoshone Water Rights for instream flow use on the Colorado River, (2) my support of the methods and findings in CPW's Letter of Recommendation and Biological Evaluation Report (WRA et al-2, Enclosure D-1 CPW's Letter of Recommendation and Enclosure D-2 CPW's Biological Evaluation Report) and materials provided by the CRD (WRA et al-2,

Enclosure B River District and PSCo's Offer Letter, Enclosure C Draft ISF Agreement, and Enclosure F River District's Technical Memorandum), and (3) the importance of the Shoshone Water Rights to ISFs above Shoshone (including the Wild and Scenic River segments) and the ISF water right and flow targets for the 15-Mile Reach of the Colorado River (15 MR).

I. Introduction

Glenwood Canyon is probably one of the most picturesque landscapes that Colorado has to offer. On each side of the Colorado River in Glenwood Canyon you have transportation infrastructure; Interstate 70 on one bank, where millions of vehicles travel each year and railroad tracks on the other bank where Amtrak's California Zephyr passenger train has traveled for decades. In the middle of Glenwood Canyon's natural beauty we have the Shoshone Reach: the section of the river between the Shoshone Diversion Dam and Powerplant. PSCo, CRD, and the CWCB have a tremendous opportunity to protect and improve flows in the Shoshone Reach when the powerplant is, for whatever reason, not operating. It remains possible that PSCo may discontinue hydropower operations at Shoshone in the future; if and when that occurs, the proposed acquisition will make it possible for the CWCB to step in and legally protect the Shoshone water as an ISF water right.

In the current proceeding, PSCo and CRD have approached the CWCB with a proposal to add instream flow use to the Shoshone Water Rights and allow water covered by these water rights to remain in the river to, as the Colorado ISF statute states, "preserve or improve the natural environment to a reasonable degree." I believe that, for the reasons summarized below, it is in the state's interest for the CWCB to accept the offered water rights.

II. There is a Natural Environment to be Preserved and Improved

CPW (WRA et al-2, Enclosures D1 and D2), the US Forest Service and Bureau of Land Management (WRA et al-2, Enclosure F, Attachment 7), and GEI Consultants (WRA et al-2, Enclosure G) all have documents in the record for this hearing that discuss in detail the water-dependent natural environment of Glenwood Canyon and the Shoshone Reach. A wide variety of aquatic and terrestrial organisms utilize the Colorado River corridor and the surrounding riparian and upland ecosystem. The canyon is home to bighorn sheep, river otter, beaver, deer, elk, and a variety of raptors, waterfowl, and both canyon-adapted and riparian species of birds. The aquatic community consists of a diverse macroinvertebrate component as well as several native and non-native fish species (bluehead sucker, flannelmouth sucker, roundtail chub, mountain whitefish, and brown, rainbow and cutthroat trout). The aquatic ecosystem within the periodically de-watered reach is obviously stressed by the historic operation of the Shoshone Powerplant, but recent fishery investigations have documented some reproduction in the residual pools that persist even when the streamflow is very low.

Therefore, in my professional opinion, the CWCB has ample evidence to find that a natural environment exists in the subject reach.

III. Acquisition of the Shoshone Water Rights Would Preserve and Improve the Natural Environment

I have reviewed the ISF evaluation reports provided by Freshwater Consulting, LLC (Miller, 2024 or Miller) (WRA et al-2, Enclosure F, Attachment 5) and Ecosystem Sciences, LLC (ES, 2025 or ES) (WRA et al-2, Enclosure F, Attachment 6). I have also reviewed CPW's 2025

Evaluation Report (WRA et al-2, Enclosure D2) that was provided and presented to the CWCB at their May 2025 meeting in Salida, CO. The following discussion represents my evaluation of these documents, their methodology, conclusions and recommendations.

Both Miller, 2024 and ES, 2025 employed the Instream Flow Incremental Methodology (IFIM) to evaluate the relationship between streamflow and physical habitat availability for fish in the Shoshone Reach. IFIM is an appropriate tool to evaluate physical habitat changes between operational alternatives; in the case of the Shoshone Water Rights donation, the consultants analyzed the difference between existing powerplant operations where the reach is frequently de-watered and future operations where the water rights are used for ISF purposes. Miller evaluated habitat conditions between 50 cubic feet per second (cfs) and 3000 cfs at one 1854-foot-long study site. ES evaluated the same range of flow (50 to 3000 cfs) at Miller's site and added a second 1830-foot long study site thus doubling the amount of river directly modeled. ES employed a slightly different evaluation methodology (an additive approach rather than the standard IFIM multiplicative approach) to address the effects of velocity on fish habitat in extremely steep river segments – parts of the Shoshone Reach are extremely steep with very coarse substrate. Both Miller and ES evaluated usable habitat for fish species that are present in Glenwood Canyon and that have published habitat suitability curves, specifically, brown trout, rainbow trout, flannelmouth sucker and mountain whitefish. The ES approach is, in my opinion, an appropriate method to evaluate and quantify habitat availability for fish in this steep and boulder-strewn river in that it sheds light on the effect of usable microhabitat that is present in between and around the boulders. The end result of this analysis shows that usable habitat continues to gradually increase as flows increase.

CPW's evaluation of the Miller and ES reports is correct in my opinion. Essentially, CPW's report states that the two reports should be viewed in conjunction with one another. CPW goes on to state that, in general, for all species evaluated in the IFIM studies, habitat availability continues to increase at flows greater than 1400 cfs up to and beyond 3000 cfs. I agree with this conclusion. The two reports complement each other and, when viewed together, they clearly show that if the 1408 cfs Shoshone Water Rights are put to use for ISF purposes, the result will be an improvement to the natural environment. Further, when the total streamflow in the Shoshone Reach is greater than 1400 cfs (up to 3000 cfs), available habitat either remains stable or continues to gradually increase. In my opinion, there is sufficient evidence in the technical information that has been provided to the CWCB in this proceeding to conclude that the natural environment will be preserved and improved to a reasonable degree with the acquired water rights.

IV. Significance of Shoshone Water Rights to Other CWCB ISF Water Rights, Wild and Scenic Segments and the 15 MR

WRA et al's Prehearing Statement reiterates a point made by the CWCB in their Staff Memo (WRA et al-2) that approximately 300 upstream ISF water rights benefit from the exercise of the Shoshone Water Rights. I reviewed the CWCB tabulation of ISF water rights in Water Division 5 and I found that there are at least 277 ISF water rights above the Shoshone diversion dam: 52 ISF water rights in the Blue River basin; 75 in the Eagle River basin; and another 150 in the middle and upper Colorado River basin. While all of these ISF water rights are junior to the Shoshone Water Rights, it is fair to state that the existence of the Shoshone call played a significant role in the water availability analyses that occurred at the time of the CWCB's

appropriations. Effectively, the Shoshone Water Rights “pull water” down through these upstream ISF reaches. If the Shoshone Water Rights are changed to add ISF uses, that “pulling down” would continue to occur into the future.

Perhaps the most significant effect of the Shoshone Water Rights on upstream CWCB ISF water rights is on the mainstem tributaries (the Blue, Eagle and Fraser Rivers) and the water rights held by the CWCB to support the Colorado River Wild and Scenic River Alternative Management Plan. Without the Shoshone Water Rights calling water down, all of these ISF water rights’ underlying hydrology (water availability) would be compromised.

Exercise of the Shoshone Water Rights for power production or for ISF purposes also has a direct effect on flows in the 15 MR, the roughly 15 miles of the Colorado River from the Grand Valley Irrigation Company’s diversion downstream to the confluence with the Gunnison River. Continued delivery of water to the 15 MR is a critical element to the Upper Colorado River Endangered Fish Recovery Program (Recovery Program) and the sufficient progress determinations made by the USFWS.

Colorado water users on both sides of the Divide have come to rely upon the streamlined Endangered Species Act (ESA) compliance mechanism that the Recovery Program provides and there is broad public and regional political support for the Recovery Program. The Shoshone Water Rights are a key piece of the overall water delivery operations for the 15 MR (see testimony of Thomas Chart); without the water provided by Shoshone operations, meeting the 15 MR flow targets will become increasingly difficult.

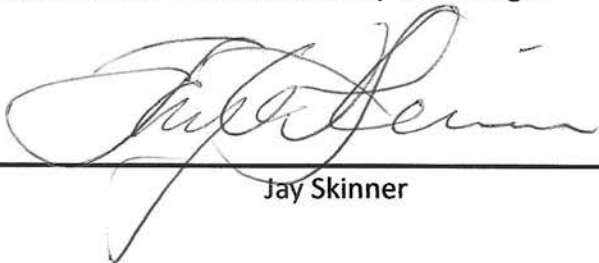
It is important to note that the 15 MR is also important habitat to the “Three Species” of native, non-listed fish species – the bluehead sucker, flannelmouth sucker, and roundtail chub. Colorado is a part of a multi-state agreement to take affirmative steps to protect these species and prevent them from being listed under the ESA; numerous federal agencies and Native American tribes are also party to this agreement.

V. Conclusions

I have the following opinions and recommendations with respect to the Shoshone Water Rights acquisition. First, CPW, the USFS, the BLM, and GEI Consultants have provided the CWCB with detailed information regarding the natural environment in and around the Shoshone Reach. This information is more than sufficient for the CWCB to conclude that there is a natural environment that will be preserved and improved by the water right acquisition. Second, the quantification tools that have been utilized to support and analyze the effects of this acquisition are, in my opinion, appropriate. Miller, ES, and CPW found that if the 1408 cfs Shoshone Water Rights are put to use for ISF purposes the result will be an improvement to the natural environment and that available habitat remains stable or continues to gradually increase when streamflow in the Shoshone Reach is greater than 1400 cfs (up to 3000 cfs). It is my professional opinion that these conclusions and recommendations are scientifically and biologically sound and are well supported by the data. Third, the on-going maintenance of the Shoshone Water Rights’ call (for power production and/or ISF uses) will have lasting positive effects on ISF water rights and, as a result, the natural environment, both upstream and downstream of the Shoshone Reach.

And finally, it is my opinion that the acquisition of the Shoshone Water Rights for future ISF uses is in the State of Colorado's interest and will result in basin-wide environmental protection and improvement of aquatic and terrestrial ecosystems. It is therefore my recommendation that the CWCB accept the offered water rights and move forward to add ISF uses to those rights in the water court.

I declare the above to be true and correct to the best of my knowledge.



Jay Skinner

Respectfully submitted this 29th day of August 2025.

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On behalf of Western Resource Advocates,
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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing **Written Testimony** upon all parties herein by email, this 29th day of August 2025, addressed as follows:

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