

## Securing a long term McElmo water supply

AGENDA 10-18-17 Discussion of water rights of the four agricultural users in the San Juan Basin

### A) Quick overview of tonight's plan

- 1) Driven by two questions after our first meeting.
  - a) What is an adjudicated water right?
  - b) Can MVIC's creation of class B stock serve as a template for a way to move forward with solving a developing shortage to McElmo water supply?
  
- 2) Quick review of a few points from the 9-27-17 presentation.
  - a) Colorado's prior appropriation water rights principles are straight forward and understandable, but more complicated when it comes to individual rights application.
  
  - b) Federal laws are much more indirect in the way they are overlaid and interact with state law.
  
  - c) "Gift" of self-government as opposed to Byzantine, court decision, case law is critical to "rule of law" application. It is complicated by use of both federal and state law and courts as well as by contracts and politics.
  
  - d) We must remember how absolutely vital the transbasin Dolores River water supply has been to the history of our community's development in the San Juan River drainage.
  
  - e) Review the "addendum" we provided on 9-27-17, which frames local issues from a comprehensive, local water use perspective of strengths, rather than from a competitive focus among the four users, that will result in a better local outcome to these complicated problems.
  
- 3) We plan to spend the majority of our presentation time tonight describing the water rights underlying the water use of the four agricultural users in the San Juan Basin. We will touch on the contracts that drive the use of Dolores Project water, move to the MVIC class B stock story, and go to questions & answers.
  
- 4) Colorado administers the rights that it adjudicates through the Division of Water Resources (DWR). The DWR administration does not include delivering water to MVIC shareholders or reach into the administration of Dolores Project contracts and allocations.

### B) MVIC's water rights

- 1) Most important are the direct flow rights that the company inherited from its predecessors - direct flow rights from the Dolores River of 707cfs absolute and 592cfs conditional with an 1885 appropriation date and some reservoir storage rights that are all administered by the state of Colorado.

Terms we will cover include: Diversion rights, consumptive use, and also touch on carrier water. (See Glossary of Water Terms)

We also need to understand that water rights administration attitudes change over time.

2) All of the other rights we will discuss tie directly back to the use of these early MVIC decrees, and their administration by the state, as well as the way they were utilized in later contracts and agreements.

3) MVIC is a mutual ditch company which holds title to the adjudicated water rights that are used by its shareholders.

4) The company has a contract with DWCD that adjusts (limits) the use of these rights; this contract also provides MVIC with a Dolores Project water allocation and describes repayment, operation and maintenance, and other details related to the new Dolores Project situation. The company has several more contracts that further define how MVIC's non-project water supply and Project water supply will be administered.

### **C) Dolores Project full service water users**

1) The project is owned by the federal government through the Bureau of Reclamation (BOR). DWCD is the local quasi-governmental body formed to "partner" with BOR to develop and administer the project, according to specific contractual obligations. DWCD owns the water rights that are administered by the state to fill McPhee Reservoir. Storage rights and project allocations are measured in acre feet.

2) As the owner of the project, BOR has contracted with various users to provide them with a project allocation of water supply, including DWCD, who then provides water to the full service users through a water petition, that makes that allocation a part of the land ownership, through a petitioned process. Federal law and contracts describe what kinds of lands can be served, in addition to other limitations on the use and payment for this project allocation. In addition to MVIC and the full service users, DWCD also provides project water allocations to Cortez, Dove Creek, and various other individual municipal and industrial users within its service area.

3) The methodology utilized to provide an adequate water supply to all project allocations was described in the Project Definite Plan Report (DPR). The DPR identified various "buckets" of water as unavailable for project supply for allocation: a. Existing Dolores River water uses. b. Dolores River water rights that would be expected to expand their current use. c. The amount of MVIC water rights that were contractually described as "non-Project" and were to be retained by MVIC for their use. The Dolores River water that was left was used to fill McPhee and define the amount of water available for Project allocations. This water supply methodology for both non-Project use and Project supply allocations was incorporated into later contracts that added to and refined operational responsibilities. The way these contracts adjust/limit the utilization of MVIC's Colorado adjudicated water rights is quite complicated and difficult to understand.

4) A significant component of project water allocation was retained by BOR, to be released downstream of McPhee for the benefit of that downstream river environment. The federal ownership of the project and its water supply bring additional responsibilities and political interests to the use of the project supply that are not carried by other adjudicated water rights administered through Colorado's priority system.

**D) Ute Mountain Ute Tribe (UMUT) Farm and Ranch Project allocation**

1) The Tribe has a special “reserved” water right, that originated with tribal reservations, which provides an excellent introduction to learning how federal law and state law have developed ways to integrate both legal systems into the use of water under our nation’s “rule of law” system. The UMUT “reserved water rights” carry a date of 1868, within Colorado’s prior appropriation system.

2) The UMUT negotiated to receive their Dolores Project “wet” water allocation in lieu of their “paper” reserved right. This took special legislation in both the federal and state arena to accomplish. The UMUT has its own repayment contract with the BOR, so their water rights under the project are not directly part of DWCD’s contractual responsibility. DWCD does have O&M and other responsibilities described by the various contracts for all of the project users.

**E) McElmo water rights**

1) They are administered by the state of Colorado, just as are all of the other users we have already described. However, there is no direct connection to the Dolores Project, as there are for MVIC, the full service users, and the UMUT Farm and Ranch. McElmo users have an indirect connection through their historical reliance on MVIC water for their supply, and the interpretation of MVIC’s non-project water supply, described by MVIC’s various contracts associated with the Project. McElmo water rights are more complicated than the other water uses in our basin because the administration of those rights is based on indirect and possibly imperfect case law applied to our unique location and water uses.

2) “Use to extinction” administration is based on specific court cases, but the history in our community was different from the front range where this law developed.

3) A significant portion of the adjudicated water rights in McElmo Creek were appropriated prior to the Colorado River Compact. Early pre-compact water uses in Colorado are not subject to any potential compact curtailment. How this Colorado Compact provision will be implemented is the subject of a multiple decade, seven state negotiation, that is at the forefront of policy and legislative discussions today, at both a state and federal level. Protecting the continued use of pre-compact water is not only important to our community, but also to the state.

4) The history of DWCD and a community sense of fairness for administration of the Dolores Project water supply resulted in unwritten policy: maximize already established water rights, and do not damage already existing water uses from the Dolores River that were not utilized in the DPR for determining water available for Project allocation. This policy has resulted in past discussion of the need to explore ways to protect McElmo’s adjudicated water use. MVIC is the current lead in these types of discussions.

5) The foundation of this educational outreach, and the way we are framing issues during the outreach sessions, was not utilized by the task force that developed the DWCD drought mitigation plan.

**F) Transbasin riparian/environmental water use, the “stepchild” water “bucket” for any protection of McElmo’s water rights**

- 1) The Colorado Water Conservation Board has an instream flow appropriation on Yellowjacket Creek in the Canyons of the Ancients National Monument. Because of the “use to extinction” administration of MVIC’s water rights, that decree has protective language to assure compliance with this part of Colorado law. The instream flow statute has an “acquisition” tool in addition to their “appropriation” tool.
- 2) Various federal laws with their ability to use courts or politics could come into play as tools to provide some more explicit protection. These usually require dollars and are very difficult to keep from bringing negative consequences to water use from the local perspective, (similar to the use of a sledge hammer when a small ball peen hammer would be appropriate for the job.)
- 3) The very strong feelings associated with these kinds of issues in our community make even a discussion of utilization of either of these tools for protection potentially counterproductive.
- 4) The Towaoc Highline Canal (THC) contract includes language for MVIC to use any water saved “for any use, including, but not limited to, fish and wildlife enhancement and maintenance of cottonwood habitat.”

**G) Contracts that govern project administration**

- 1) BOR responsibilities:
  - a) Repayment contracts with DWCD and UMUT.
  - b) NEPA resulted in specific direction for management of spills from McPhee for rafting and other purposes, and in direction for how to manage the storage water retained for downstream release.
  - c) Assure compliance with multiple federal laws that explicitly and indirectly govern Dolores Project operations (sometimes with conflicting guidance.)
- 2) DWCD responsibilities:
  - a) Repayment contracts with full service users (through the petitions for water tied to the land), MVIC, cities of Cortez, Dove Creek, and contracts with other individual users for M&I water allocations.
  - b) Project O&M directed by both its repayment contract and the THC contract.
  - c) Other important contracts that have been locally negotiated: The THC contract, the Class B contract with MVIC, the BOR carriage contract and the Project lawsuit settlement contract (these were all negotiated utilizing the unwritten policy described in the McElmo water rights section.)
  - d) Operate within the guidelines set by Colorado legislative authorities in 1937, along with additional revisions, and DWCD board policies. Who are constituents; where are district boundaries

**H) Class B stock as template**

- 1) The process and players
- 2) Water availability

**I) Q&A**

**J) MVIC-McELMO water use discussion update**

## **Glossary of Terms for the October 18<sup>th</sup> Session**

### **Absolute Water Right**

A water right with a specified priority date that has been put to beneficial use.

### **Acre Foot**

The volume of water required to cover one acre of land to the depth of one foot. Equals 43,560 cubic feet or 325,851 gallons.

### **Adjudication**

The judicial process through which the existence of a water right is confirmed by court decree.

### **Beneficial Use**

The application of water necessary to accomplish the purpose of the appropriation.

### **Carriage Water**

The difference between the consumptive use of water and what is being diverted in an a water decree.

### **Consumptive Use**

Any use of water that that permanently removes water from the natural stream system.

### **Conditional Water Right**

A right obtained through the water court, which fixes the priority of the water right with a certain date, even though the appropriation has yet to be completed. It gives the holder time to complete the appropriation, as long as they diligently pursue completion of the project.

### **Cubic Feet Per Second (cfs)**

A rate of water flow at a given point, amounting to the a volume of one cubic foot of water per second of time. Equal to 7.48 gallons per second, 448.8 gallons per minute, and 1.984 acre feet per day.

### **Direct Flow Water Rights**

The flow of water diverted from a river or stream.

### **Federal Reserved Rights**

An implied water right that occurs when the federal government withdraws its land from the public domain and reserves it for a federal purpose. The government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.

### **Transbasin Diversion**

The conveyance of water from its natural drainage basin into another basin for beneficial use.

### **Transmountain Diversion**

The conveyance of water from one drainage basin to another across the Continental Divide.