

**DOLORES RIVER DIALOGUE
STEERING COMMITTEE
April 5, 2011**

Present: Randy Carver, Montezuma Valley Irrigation Company; David Graf, Division of Wildlife; Vern Harrell, Bureau of Reclamation; Meghan Maloney, San Juan Citizens Alliance; Peter Mueller, The Nature Conservancy; and Don Schwindt, Dolores Water Conservancy District with Jim Fisher as Alternate to Don Schwindt (observing).

Contract staff: Marsha Porter-Norton, facilitator; Ann Oliver, DRD Science Coordinator and Gail Binkly, recorder.

Guests present to discuss MVIC Lease Proposal: Don Magnuson, MVIC manager; Linda Bassi, Colorado Water Conservation Board; Rege Leach, Colorado Division of Water Resources; and Mely Whiting, TU.

Visitors: Dale Smith, and Matthew Clark (Trout Unlimited); Dennis Reich, Colorado Water Institute, Grand Junction; and Mike Preston, DWCD.

Agenda: The agenda was approved with two additions.

Announcements: Meghan said SJCA and American Whitewater have hired Jay Loschert of Dolores as a Dolores River stewardship assistant. He will be working 20 hours a week to organize the boating community and to represent American Whitewater in meetings.

MVIC lease proposal: Marsha introduced the Framework Proposal outline for MVIC's proposal to lease 6,000 acre-feet of water to the CWCB for its instream-flow program. The proposed lease has been discussed at various DRD meetings for some time. She said the proposal is at the stage at which the DRD-SC discusses it and makes a recommendation to the larger DRD. She quickly reviewed the Framework Proposal process steps and relayed that the final phase is to make a recommendation to the larger DRD (which meets 4/28/10).

Randy explained that the lease is for 6,000 acre-feet of non-Dolores Project water to be taken from Groundhog Reservoir and passed through McPhee. It would be targeted toward increasing base flows in the river from McPhee Dam to the confluence with the San Miguel River. Randy said the proposal involves water rights owned by MVIC. He said these are state water rights and would not affect McPhee Reservoir because the water is a pass-through and doesn't require storage.

Randy said MVIC officials would like to make the water available this year. They believe this is a do-able proposal because MVIC is a willing lessor, and they see no reasonable impediments. He said that it is pretty clear there are some desired ecological conditions that are not being met on the Lower Dolores and this water would help achieve those goals. MVIC representatives have been talking to the BOR and DWCD and are working to address questions about injury to other water-rights holders. Randy said the first MVIC board meeting specific to this proposal will be Tuesday, April 12. He said MVIC's goal would be to provide a complete packet about the proposal at the upcoming CWCB meeting in Durango, May 17th and 18th. Randy said two

companies are working on an appraisal of the value of the water. There is potential funding from Xcel Energy, and there are private donors who have expressed interest in helping with costs, including TU and TNC. MVIC is not asking for funding from the DRD-SC or the full DRD but is seeking support.

Randy said this would be a 3-in-10-year lease, meaning the lease could be used three years out of 10. This avoids water court and is the simplest way to get water downstream, and is the way that the CWCB has structured the lease program.

Q & A: David asked what would trigger the decision to designate years two and three after the first year. He also asked how a biological response can be detected so it will be known whether the leased water is making a difference to the downstream ecology.

Linda said the CWCB has been thinking of asking the Biology Committee to provide advice about when and how best to use this water. It is possible that the existing ISF of 78 cfs will fail to be met for more than just three years out of 10, so the CWCB would like to make the best use of the leased water and would welcome advice from the Biology Committee.

Randy said the lease is for only 120 days per year, per state statute. In the winter the water cannot be taken out of Groundhog, so it will be utilized in summer.

Vern said if there is no way to measure the effects of the additional water, he questioned whether or not it will make a difference. He would like to be able to quantify the biological effects of the additional 6,000 acre-feet. Vern said after three years there might be nothing quantifiable because habitat is only as good as the smallest pool. He also said he isn't sure whether the Biology Committee should be charged with identifying when and how the water should be used. Vern said he is a member of the Biology Committee and he doesn't want to be tasked with making such decisions and doesn't believe it is what the committee was set up to do. He said the DOW should make those decisions, and the Biology Committee will follow DOW's recommendations.

David said this is a difficult question, but the DOW's habitat curves do correlate to fish biomass. The DOW recognizes there is a shortage in the Lower Dolores and believes that additional water can help improve ecological conditions. He said a perpetual improvement in supply would be a much more rigorous way to test the effects than a 3-in-10 lease.

Mely said finding a causal relationship between improved flows and fish is very difficult, especially in just three years. She said it is important to monitor conditions, and noted that the DOW conducts fish surveys every year. She said three years is a short time, but this is a first step toward improving downstream ecology. She said it needs to be tried and other things need to be tried as well.

David said the DOW's field biologists are the ones with their finger on the pulse of the river. The DOW is comfortable with the CWCB using the Biology Committee, or with the DOW working directly with the CWCB to decide when the leased water should be used.

Don Schwindt said in terms of this proposal, the concept of adaptive management needs to apply. What has driven the entire DRD as well as "A Way Forward" (the ongoing review of

native-fish science) is awareness of the power of the Endangered Species Act and the potential consequences of an endangered listing for the native fish on the Lower Dolores. He asked whether, if this water is put into the river, it can ever be taken back. He said he fears that if the water is sent down the river and some ecological gain can be shown, certain groups could go to court and demand that it be there permanently. He said there is the potential for such groups to then look at taking federal water rights through Project water instead of MVIC water rights because it is easier to take Project water. He said that question needs to be fully considered when talking about injuries to water rights.

Linda said one of the main purposes of the proposed lease is to bring flows closer to the existing ISF of 78 cfs. She said if the ESA comes into play through a listing, it is possible that someone could mandate a continuance of extra water into the Dolores River, but short of an endangered-species listing, water rights are property rights. When the lease ends, the CWCB cannot compel MVIC to make it continue. She doesn't think environmental groups would have much chance of success if they sued to keep more water in the river because, if MVIC doesn't want to continue leasing, that is its right. She said this will be a public process and a good paper trail can be created to ensure transparency. She said she is comfortable with DOW guiding use of the water.

Ann commented that the CWCB isn't required to monitor the benefits of an ISF, but from a DRD perspective the partners would like to identify the hypotheses about what the extra 6,000 acre-feet would/could accomplish and then measure biomass and any other measurable data. If a change isn't observed it doesn't mean there is no benefit from the additional water, and if there is a change, it doesn't automatically mean it was caused by the lease. She said the ESA is a concern, but by implementing proactive measures, water-managers are actually protecting themselves against some listings because when considering whether to list a species, the US Fish and Wildlife Service looks to see if measures are already happening on the ground to protect that species.

Randy said it is the MVIC shareholders' right to vote to use that water downstream as they want to. He believes if that water is not used downstream, the federal government may eventually come after his water right as a full-service farmer. He believes his shareholders deserve the right to vote on this and the fear that the water will never be "gotten back" is unfounded.

Mely agreed and said this is a private transaction with a public benefit, and that benefit should not be micro-examined. Public money is not even being discussed yet. She said there is a process established to determine if there are potential injuries to other water-rights holders.

David said regarding adaptive management, one thought was to use that 6,000 acre-feet to provide the 78 cfs in the hot part of the summer in order to avoid using the bypass valve at the bottom of the reservoir, which releases undesired nutrients into the river. The DOW would hope to see better year-class survival, better biomass, and better-quality trout from this lease, but those expectations may be unrealistic given other factors. He said adaptive management is a great idea but no one has really shown the ability to exercise it at this point. This is the first part of an experiment and he would like to find a way to quantify some of the benefits from it, perhaps just by measuring the temperature at Bradfield Bridge in the summer months.

Don Schwindt said the assumption he has heard is that more water is better for the ecology, but he and others are skeptical about that assumption. He said a more fundamental question about

this proposal concerns the availability of the water. The proposal relies on Rege Leach to make sure water-rights holders are not damaged. Don said one of his concerns is that MVIC's water rights are encumbered with some contractual obligations to the Dolores Project. He said this is not a state right but a contractual issue; those Project contractual rights are a joint concern of the BOR and DWCD. His second concern is the DWCD's Class B contract with MVIC for the purchase of water. His third concern is the Class A shareholders, and he is one of those. He said communication will be essential to make sure the DWCD doesn't have water rights at risk. Don said more information is needed.

Don Magnusson said this is a private company proposing a private lease with the CWCB. They have chosen to bring it into a public forum to see if the public supports it. He said the proposal is not without some potential risk to the shareholders, but that is their decision alone, once all the information they need is available. Rege doesn't have the authority to determine whether there is an adverse impact to the shareholders – that is their right only.

Rege said this involves 6,000 acre-feet of water that has been stored in Groundhog. The DWCD has some rights in Groundhog and so does the DOW, but this 6,000 acre-feet has been identified as typically unused and left in the reservoir. However, for the three in 10 years, that 6,000 acre-feet will not be available for irrigation purposes, so that is a risk MVIC is taking, and the DWCD is a shareholder of MVIC. He said he needs some assurance from MVIC. This year is an example of where shortages may happen. In January, the water supply in the basin was at 100 percent; now it's at 70 to 80 percent. This is a year where the ISF probably will not be met, so is this a year to start the lease? Who makes that decision? The DOW? The Biology Committee? Rege said those are questions that need to be answered. All that information should be in this agreement.

Don Magnusson said the MVIC board has the authority to do a one-year lease on its own but their by-laws require the board to go to the shareholders for a longer lease. The shareholders then make the decision to approve the lease or not. He said MVIC is open to suggestions about who should be involved in deciding when to use the leased water. MVIC doesn't have the expertise to make that decision and will rely on somebody else once the water is available.

Linda said the CWCB has put together a template for a 3-in-10 lease. In the template they said they would consult with water-rights holders and others before the irrigation season to see whether to exercise that lease or not.

Meghan said she appreciates MVIC's persistence in pursuing multiple options for this proposal. She said SJCA has been supportive of this proposal because it provides an alternative to mandating things from a higher level (i.e., the federal government) for improving the downstream environment. She has a concern about the DOW alone making the decision. She said there are important reasons to have the Biology Committee involved, because it is a diverse committee and provides a public input process.

Marsha said some issues that have been identified are:

- There is not likely going to be an immediate outcome
- Effects on water rights
- Is the water available?
- Making sure nobody would be injured

- Needing more data and information
- The concept of adaptive management – should it continue to be explored?
- If you do a lease can you get the water back?
- Who should administer the lease? The DOW or Biology Committee?

Vern said he also has questions concerning conveyance losses and accounting.

Marsha said the proposal does not have to go to the DRD on April 28, but if MVIC wants to present the idea at that time, perhaps there should be another DRD-SC meeting or conference call before April 28. The other possibility would be scheduling another full DRD meeting before summer. Marsha asked if the group wanted to continue to discuss this issue or address the other agenda items?

Vern said this is the biggest issue the DRD-SC has dealt with and the discussion should not be cut short. The BOR believes this can be done, but he wants to know everything involved.

The group agreed to use the rest of the time continuing to discuss the lease.

David said the DRD-SC will not be able to answer questions about the legal issues -- that is not its role. David said he thinks some kind of benefit can be demonstrated from the lease of water downstream. He said this is a viable alternative after 25 years of discussion about how to find a base-flow increase. The DRD-SC doesn't have to know every detail to say it supports the concept. He thinks it is the job of the DRD-SC is to support some alternatives to help the downstream ecology.

Randy said he wants to move forward because conditions are right for utilizing the lease this year. The appraisal is close to being done. He said he doesn't know how to address the risk issue. Nothing would get done if there couldn't be any risk. He noted how much risk farmers take every year when planting a crop.

Meghan said the proposal must go through other hoops with other agencies before it can be done. She said the DRD-SC's job is not to be an obstacle to a proposal that could have great benefits downstream, but to identify issues. She said the SJCA and Dolores River Coalition support this proposal and would like to see it go to the full DRD and the CWCB. There are implications for some of the partners, but not for the DRD.

Don Schwindt said he could not support the proposal at this point. He said the devil is in the details, especially water availability. When that is known, the DRD-SC's answer to the question may be different.

Mike suggested bringing the proposal to the DRD as information. He said it is probably advantageous to continue to go down the path. Any of the entities around the table can take their own actions. The meeting notes will be put on-line although the proposal won't.

Peter supported taking the proposal to the full DRD and said MVIC can adjust the proposal to address concerns that have been raised. This sets up the DRD to play the role it was meant to play, that of having a dialogue. This is a public process to identify concerns. He said this process

shouldn't empower a big group of diverse interests to harm MVIC's right to exercise their private property rights.

Marsha clarified that DRD support is not mandatory for MVIC. She said this is about presenting information and being transparent and suggesting ideas. She further said that this lease has been controversial and has been "out there" as an issue for a long time, and said she felt it was positive that it was being discussed at the DRD-SC.

Don Schwindt asked who would be the presenters. Marsha said she believes the role of the DRD-SC is to report to the DRD about the process of finding do-able alternatives to meet the DRD purpose statement. The Downstream Temperature Model proposal and "A Way Forward" will be FYIs to the DRD on the 28th because those are the other two active proposals the DRD-SC has discussed to date. Both of those proposals, she informed everyone are "in process" so a decision for support isn't really needed at the present time. With the MVIC lease proposal, this is the first time the DRD-SC is being asked to make a recommendation. She said it is clear the DRD-SC does not have consensus to take the proposal to the full DRD-SC with a recommendation for support. She asked the group how they would like to proceed in light of this fact. She suggested that on the 28th, MVIC could explain the proposal since there is such high interest in it but she said she doesn't think calling for a vote is a good idea. She also noted that there doesn't have to be 100 percent consensus for the DRD-SC to take something forward.

Mely said the role of the DRD is not just to talk about things but to try to improve the downstream environment within existing constraints. MVIC could have skipped this step and gone straight to the CWCB. MVIC is bringing the proposal to the DRD to get some level of support and if there is some support within the DRD, that should be documented. She said the question should at least be asked whether this is something that could be helpful to the downstream environment if the details are worked out.

Don Schwindt said he doesn't want to draw lines in the sand but he is concerned about the lack of information and therefore, he cannot give support at the present time. Randy asked what happens if one person does not give consensus. Marsha said the DRD-SC can recommend that the proposal be discussed and concerns worked through. Don Magnusson said he doesn't expect at this stage for everybody to be in full agreement on all the details, but MVIC wants to keep this in front of the public for their input. He said MVIC wants to continue through the process and let the chips fall where they may.

Rege said he doesn't believe water availability is part of his analysis. That is different from the question of injury. There is 6,000 acre-feet now available for irrigation that won't be available in 3 of 10 years. That's the question the irrigators will have to decide.

David asked how much the CWCB cares about DRD support. Linda said in her experience the CWCB definitely cares what people in the community think.

After discussion, the group agreed that the proposal will be taken to the DRD as information with a summary of the detailed DRD-SC vetting. Marsha will explain the various issues raised today. MVIC will present the outline of the proposal similar to how they did today. It will be stated that there is not consensus among the DRD-SC regarding the proposal but that does not mean a lack of support from five of the six entities around the table. However, there are

questions that have been raised. Don said he was willing to go with this approach as long as his concerns are fairly presented. Meghan and Mely recommended sharing with the DRD where the DRD-SC members stand. Marsha said she can summarize the issues and if the DRD-SC members want to say where they stand on those, that will be part of the dialogue.

DRD goals document: Marsha presented a new draft and said because the flow hypotheses were causing questions, she completely restructured the document. She removed the flow hypotheses from the goals statement because the flows are a means to get to the goals. She added a separate toolkit for framework proposals. Don Schwindt said he hadn't had time to review the revised document and suggested tabling it. Marsha said the goals document was requested by the DRD and if it isn't ready April 28, it would have to wait until the fall meeting. It was decided to set up a conference call among DRD-SC members on the first part of the goals document, and it was also decided to present it in a working draft on the 28th for input.

Public comment: Matt Clark asked about voting to support the *concept* of a lease vs. the lease itself, with all details worked out. He said there seems to be a gray area about what aspects of this the DRD-SC is to make a recommendation on. Is it to be the lease with every detail resolved? He doesn't feel that was addressed adequately and suggested keeping it in mind for future discussions. Meghan said the SC's role may be case-specific to each proposal.

Sno-Tel funding: Marsha said the DOW has committed money to fund the new Sno-Tel site.

Remaining agenda items: The remaining items were tabled because of a lack of time. A conference call will be set up to discuss the goals document before the 28th.

Next meeting: The next meeting will be May 3 at 9 a.m.