



SAN JUAN BASIN FARM BUREAU

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The San Juan Basin Farm Bureau Board of Directors takes the following position on the proposed National Conservation Area (NCA) legislation:

INTRODUCTION The Dolores River Dialogue is an effort that was jointly conceived by environmentalist groups and the Dolores Water Conservancy District to discuss competing demands for water use below McPhee Reservoir. A collaborative working group that evolved out of the DRD has been exploring a federal legislative solution to those conflicting demands. In September of 2014 they released a National Conservation Area (NCA) proposal supposedly designed to support the goals of those conflicting desires. It is hard to conceive of any NCA legislation, based on this NCA proposal, which will not harm our community's present transbasin use and future water needs.

This community has always had a strong sense of the value of their transbasin diverted water rights and the need to protect them. An often repeated sentiment is, "If we ever let any water return to the lower Dolores River, we will never get it back." This reasoning is based on some knowledge of the state prior appropriation system, and a sense of risks to those rights from potential federal actions. There have been a number of votes by MVIC shareholders over the years, which have strongly supported the above sentiment. The DWCD public also voted, in a Tabor election, to tax itself to retain Dolores Project water supply for transbasin water use instead of allowing other interests to find a way to return those rights to the lower Dolores.

At a joint MVIC and DWCD board meeting in October, the boards were told that the environmental interests, working to create the NCA, will absolutely refuse to support a proposal that does not protect their right to describe water that would have to come from our present transbasin use. That is exactly the same water that this community is so dependent on and determined to protect. This community needs to represent the will expressed by those votes from the landowners who actually own the water and put it to use. The environmental community's goal is to protect all of the flow presently flowing through McPhee Reservoir, as well as finding additional water to enhance the Dolores River downstream from McPhee. What our community envisions as potential risks to our water rights are viewed by the environmental community as "tools in their tool box" to potentially use to move water to the lower Dolores. The strongest of those risks, or tools, are legislative acts passed by congress.

FEDERAL ACTIONS THAT IMPACT STATE WATER RIGHTS Colorado's prior appropriation system began with the first settlers in our territory, which established the "common law" that caused it to be enshrined in the Colorado constitution. There is a strong and significant body of state legislation and case law built on the words in the constitution that is now called Colorado's "prior appropriation" system. That long history has brought a strong common understanding in our state as to how challenges to an individual state water right can unfold.

Reserved rights by federal action began in the early 1900's with "Winters Doctrine" federal reserved rights for Indian reservations. Following that precedent, some case law has established accepted ways that federal legislation can establish water rights that have their place within the state's prior appropriation system. Wild and Scenic River (WSR) designation, which can be done through federal legislation, falls within this "reserved rights" way of doing business. A very important part of this body of law is the principle established by the US Supreme Court that federal water rights can only be established by congress, and those rights require specificity, defined by the purpose of the federal law.

Other federal legislation with the ability to impact water rights, such as the Endangered Species Act (ESA) that was passed by congress in the 1970's, has less case law to bring a common understanding and agreement as to how it may impact the state system. The negative impacts of the Endangered Species Act that we hear about from places like Klamath Falls and the Central Valley of California, have usually been driven by specific court actions directed toward a federal water project. Those court actions have focused on the BOR's need to respond to the conflicting responsibilities of the federal government, both to meet the requirements of ESA needs, as well as their federal water project authorities. Since water may be an ESA need, the federal project can be the water supply, if a court case can be framed in such a way as to gain the agreement of a judge.

Since the interplay of federal water law and our state system is not clearly settled, the courts are still actively engaged in deciding final outcomes. This is why words matter so much, and why we need to carefully evaluate any potential commitment that we may be seen as making with respect to a water need. We must carefully try and understand that actions we take today may have unintended consequences. Those unintended consequences are often driven by political or judicial actions initiated by folks with interests different than our interests. We must ask ourselves, "are we supporting actions that may expand the ability of those interests to use the legal process to acquire water we did not intend to be available for acquisition?" We do not want to negotiate water away in our proactive response that we would not expect to lose if we just remain defensive. We need to see any action that we may take through realistic potential interpretations of a judge. This is why specialized legal guidance is so critical as actions are formulated.

FATAL FLAWS OF THE NCA PROPOSAL What are the risks associated with the NCA Proposal? The proposal has been shaped by the faulty conclusion that MVIC is wasting water and can productively move some back to the Dolores River in exchange for money to improve its system. The majority of the company's shareholders have always known that they have never had enough water to meet the requirements of the land that MVIC has served in its transbasin acreage.

1) The proposal has conflicting requirements with respect to its description of water rights which could set the stage for serious litigation. It states that there will be no water rights associated with the proposal, but those protections are couched in the broad language of protecting Colorado water rights and Dolores Project uses without enough specificity to avoid strong future disagreements.

2) It creates a new legislatively directed requirement for the Bureau of Reclamation to increase the base flow to 36500af. Yet it prohibits new dams and large-scale water developments, which could severely restrict both DWCD and MVIC conditional rights and will limit opportunities to address future water needs. Those future needs could also include new storage to create the water supply for this 36500af demand. This prohibition also forces the BOR to acquire the 4701af needed to increase the base

flow pool to 36500af to come from existing users and their already utilized transbasin water supply. Except for new storage, the only place there is enough water supply available from the Dolores River is from either MVIC or DWCD. This legislative path would set up a community fight between MVIC shareholders and DWCD full service farmers. (The Ute farm and ranch supply may have adequate protection, but it may take serious effort to prove it.)

3) It only provides WSR protection within the proposed NCA boundaries. That narrow protection description will leave us with significant WSR potential risk. We may still face legal challenges to our water supply from down river efforts to address WSR concerns below the confluence of the San Miguel, or other stream segment "suitability" above McPhee. Silence on specific ORVs seems to leave us vulnerable to future risks.

4) It significantly increases our vulnerability to ESA risks. It specifically has a protection commitment to enhance the "native fish resources." The present listed native species under ESA are the pikeminnow, razorback sucker, and humpback chub. The additional three native species have been discussed in the development of the NCA proposal are the roundtail chub, bluehead sucker, and flannel mouth sucker that are not yet listed. There are probably other native fish that have water needs as well. These additional legislative commitments for these other native species potentially go far beyond our potential ESA water requirements of today.

5) The reality is that an NCA is a new, potentially powerful, "tool in the tool box/risk" because it is federal legislation. It will add significant uncertainty to our community desire for water use protection.

We need to acknowledge the unacceptable risks associated with pursuing potential NCA legislation, and begin considering more realistic strategies for protection of our community's water supplies.