

Consent Agenda Item 1.u

March 20-21, 2019 Board Meeting

Case No. 18CW3052 (Water Division 7); Montezuma Valley Irrigation Company

Summary of Water Court Application

This is an Application for change of water rights and for confirmation of relocated points of diversion.

Staff Recommendation

Staff recommends that the Board ratify the filing of a Statement of Opposition filed on behalf of the Board in February 2019 to protect CWCB's instream flow water rights.

CWCB Instream Flow Water Rights

The CWCB holds instream flow water rights, including the following water right in Water Division 7 in the Dolores River Watershed, that could be injured by this application:

Case Number	Stream	Upper Terminus	Lower Terminus	CFS Rate (Dates)	Approp. Date
75W1346	Dolores River	McPhee Res Dam	confl San Miguel River	78 (1/1 - 12/31)	05/01/1975

Potential for Injury

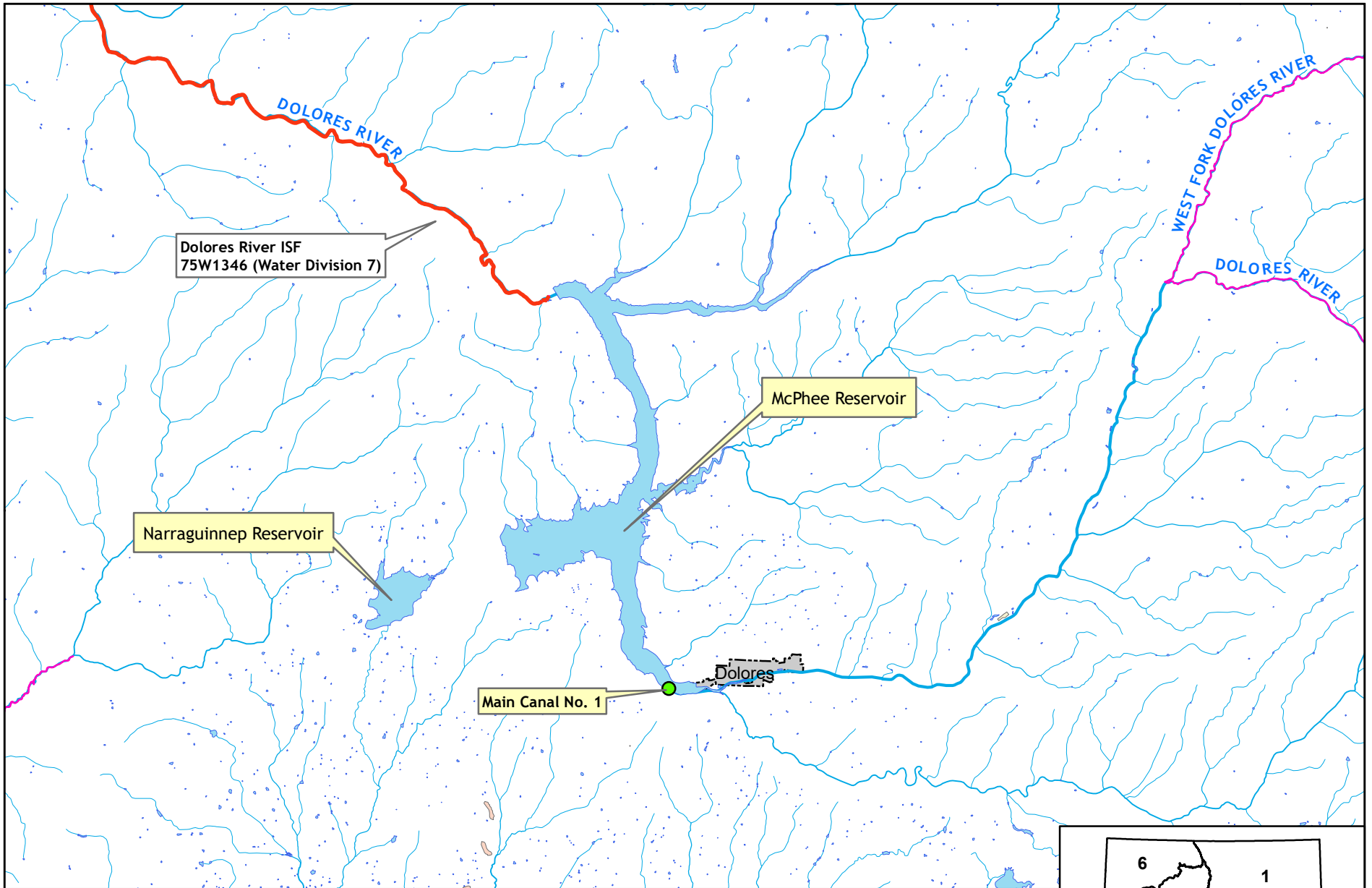
- The proposed change of water rights could cause an expansion of use of the originally decreed conditional right, which could injure the CWCB's instream flow water right.
- It is not clear that Applicant is entitled to the alternative request for confirmation of relocated points of diversion under § 37-86-111 C.R.S. To the extent the Applicant is so entitled, the Applicant must demonstrate that the relocated points of diversion will not injure the CWCB's instream flow right, and protective terms and conditions should be included in any decree to ensure against the same. *Harvey v. Davis*, 655 P.2d 418, 422 (Colo. 1982).
- The proposed change of direct flow to storage could change the reservoir operations and availability of various pools in the reservoir.

Other Objectors

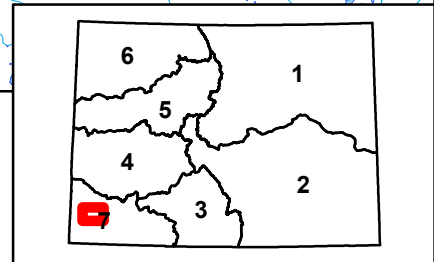
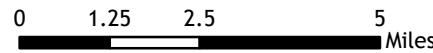
Statements of Opposition were also filed by Colorado Division of Parks and Wildlife and Parks and Wildlife Commission, Dolores Water Conservancy District, Montezuma Water Company, Southwestern Water Conservation District, State and Division Engineers Office, and Summit Reservoir & Irrigation Company.

Attorney Representing CWCB

Jennifer L. Mele, First Assistant Attorney General, is assigned to this case and can be contacted at jennifer.mele@coag.gov, or 720-508-6282.



March 20-21, 2019 CWCB Board Meeting
 Consent Agenda Item 1.u: Statement of Opposition
 Case No. 18CW3052 (Water Division 7)
 Montezuma Valley Irrigation Company



DISTRICT COURT, WATER DIVISION 7, COLORADO
AMENDED WATER RESUME

TO: ALL PERSONS INTERESTED IN WATER APPLICATIONS IN SAID WATER DIVISION NO. 7
Pursuant to C.R.S. 37-92-302, you are notified that the following is a resume of all water right
applications filed in the Office of the Water Clerk during the month of December, 2018, for each county
affected.

**18CW3052 APPLICATION FOR CHANGE OF WATER RIGHT AND FOR CONFIRMATION OF
RELOCATED POINTS OF DIVERSION. 1. Applicant.** MONTEZUMA VALLEY IRRIGATION
COMPANY (“MVIC”), Post Office Box 1056, Cortez, Colorado 81321, Email Address:
bjohnson@mvic.info, Telephone Number: (970) 565-3332. Attorneys: John P. Justus, Karoline M.
Henning, HOSKIN FARINA & KAMPF, Professional Corporation, 200 Grand Avenue, Suite 400, Post
Office Box 40, Grand Junction, Colorado 81502. **2. Background:** MVIC is the owner of a certain
conditional direct flow water right, described in paragraph 3 below, presently decreed for diversion from
the Dolores River at the common diversion dam for the Main No. 1 Canal and the Main No. 2 Canal for
irrigation and domestic use (the “87.3 cfs Conditional Right”). As its principal claim, MVIC seeks a
change of water rights for the 87.3 cfs Conditional Right, consistent with the principles for change of a
conditional water right articulated in *Twin Lakes Reservoir & Canal Co. v. City of Aspen*, 193 Colo. 478,
483, 568 P.2d 45, 49 (1977), from a direct flow right, to a storage right that may be stored in either
McPhee Reservoir and/or Narraguinnep Reservoir, for subsequent irrigation and domestic use by MVIC
shareholders. No change in place of use is sought, and the end uses to be made by MVIC shareholders are
to remain unchanged. As an alternative claim, MVIC seeks judicial confirmation that relocation of the
point(s) of diversion of the 87.3 cfs Conditional Right to the Great Cut Dike and the Dolores Tunnel Inlet,
which are described in paragraphs 4.c and 4.d below, is consistent with C.R.S. § 37-86-111. This claim is
derived from the construction of the Dolores Reclamation Project in 1986 by the United States Bureau of
Reclamation. The decreed diversion structure for the 87.3 cfs Conditional Right, and for other water
rights decreed thereto, was inundated by MCPhee Reservoir, the central feature of the Dolores
Reclamation Project. As a result, the 87.3 cfs Conditional Right cannot receive, at the decreed point of
diversion, the inflow of water from the Dolores River to which MVIC is entitled. If the Court denies
MVIC’s application for change of water right described in Paragraphs 3 through 6 below, the 87.3 cfs
Conditional Right’s point of diversion must now be relocated to the Great Cut Dike and Dolores Tunnel.
3. Decreed Water Right for Which Change is Sought: a. Structure: Main No. 1 Canal and the Main
No. 2 Canal. i. Amount: 87.3 cfs Conditional Right. ii. Original and all relevant subsequent decrees:
Decretal Order entered in CA473 on February 1, 1892 by the District Court for the Seventh Judicial
District of the State of Colorado, sitting in and for the County of Montrose (the “CA473 Decree”); Decree
of Adjudication entered in CA0967 on December 18, 1933 by the District Court in and for the County of
Montezuma, and Decree of Adjudication entered in CA0967 on March 22, 1963 by the District Court in
and for the County of Montezuma (the “1963 CA0967 Decree”). The Court has determined that the
Conditional 1885 Priority has been diligently preserved in the Decree entered on October 20, 1970 by the
Division No. 7 Water Court (the “Water Court”) in Case No. W-27; Decree entered on May 23, 1973 by
the Water Court in Case No. W-597; Decree entered by the Water Court in Case No. 80CW79; Decree

entered on March 25, 1985 by the Water Court in Case No. 84CW89; Decree entered on April 13, 1989 by the Water Court in Case No. 88CW38; Decree entered on June 17, 1997 by the Water Court in Case No. 94CW35; Decree entered on December 21, 2005 by the Water Court in Case No. 03CW45; and the Decree entered on February 25, 2013 by the Water Court in Case No. 11CW77. iii. Decreed point of diversion: The headgate of the Main No. 1 Canal was located at a point in Montezuma County, Colorado, on the south bank of the Dolores River, in the NW¹/₄ of the NE¹/₄ of Section 17, Township 37 North, Range 15 West of the N.M.P.M. The headgate of the Main No. 2 Canal was located at a point in said county on the south bank of said river, in said quarter section, said Township and Range, near the west line of said above mentioned tract of land. The Main No. 1 Canal and Main No. 2 Canal have been determined by the Water Court to constitute a single ditch or canal. iv. Decreed source of water: Dolores River. v. Appropriation date: November 25, 1885. vi. Decreed uses: Irrigation and domestic. vii. Contemplated Draft: The diversion of water from the Dolores River into Montezuma Valley is 100% consumptive with respect to the Dolores River Basin. The Decree entered on February 1, 1892, in CA473 defined the duty of water for irrigation purposes within the Montezuma Valley as 1 cfs per 65 acres of irrigated land. Accordingly, the 87.3 cfs Conditional Right was originally contemplated to provide irrigation water for 5,675 acres of land within Montezuma Valley. A full supply of water for irrigation of land within Montezuma Valley requires the diversion, on average, of 4.01 acre-feet per irrigated acre. Therefore, the contemplated draft of the 87.3 cfs Conditional Right on the Dolores River was approximately 22,755 acre-feet per year. However, a study of Dolores River flows historically available to satisfy the 87.3 cfs Conditional Right, taking into account actual diversions by all senior absolute water rights diverting from the Dolores River, determined that the average annual volume available for diversion pursuant to the 87.3 cfs Conditional Right averaged 20,678 acre-feet in the April 1 through October 30 period of each year. The following are the Average Monthly Diversions, in acre-feet, that

would have been available to the 87.3 Conditional Right over the study period: April: 4,573; May: 5,092; June: 3,832; July: 1,764; Aug.: 1,798; Sep.: 1,548; Oct.: 2,070; Total: 20,678. The following are the Maximum Monthly Diversions, in acre-feet, that would have been available to the 87.3 cfs Conditional Right over the study period: April: 5,195; May: 5,368; June: 5,195; July: 5,368; Aug.: 5,368; Sept.: 5,368; Oct.: 5,195; Total: 22,755. **4. Changes Sought by Applicant:** MVIC seeks to change the 87.3 cfs Conditional Right from a direct flow right to a storage right that may be diverted and stored: (1) in McPhee Reservoir, for subsequent release from McPhee Reservoir via the Great Cut Dike and the Dolores Inlet Tunnel for irrigation and domestic use by MVIC shareholders within the MVIC service area; or (2) in Naraguinnep Reservoir, either by diversion from the Dolores River through the Great Cut Dike or after prior storage in McPhee Reservoir, for later release and use by MVIC shareholders for irrigation and domestic purposes. This includes a change in point of diversion from the Main No. 1 Canal and the Main No. 2 Canal to the McPhee Reservoir structures, which include McPhee Dam, the Great Cut Dike, and the Dolores Tunnel Inlet. Those structures, described below, are illustrated in the figures attached as Exhibit A and Exhibit B to the Application. **a.** McPhee Reservoir is an on-stream reservoir located on the Dolores River and is the principal feature of the Dolores Project. The total capacity of McPhee Reservoir is 381,000 acre-feet, with 229,000 acre-feet of active capacity, 152,000 acre-feet of inactive capacity, and 100 acre-feet of dead storage. McPhee Reservoir is formed by McPhee Dam and the Great Cut Dike, which are located on the Dolores River about 10 miles below the Town of Dolores. The reservoir is located on portions of Sections 5, 6, 7, 8, 9, 16, 17, and 18, Township 37 North, Range 15 West, and Sections 1 and 2, Township 37 North, Range 16 West, and Sections 2, 3, 4, 5, 6, 7, 17, 18, 20, 21, 28, 29, 30, 31, and 32, Township 38 North, Range 15 West, and Sections 12, 25, 35 and 36, Township 38 North, Range 16 West, and Sections 27, 34 and 35, Township 39 North, Range 15 West, N.M.P.M. The surface area of McPhee Reservoir at the active capacity high water line is approximately 4,470 acres. **b.** McPhee Dam is approximately 270 feet in height from the streambed to the crest of the dam. The axis of McPhee Dam is described as follows: The Northwest corner of Section 1, Township 38 North, Range 16 West, N.M.P.M., bears North 8°50' West, a distance of 3,540 feet from a point on the North end of the axis of the dam from whence the axis of the dam bears South 33°04' East. The Crest is about 40 feet wide and approximately 1,300 feet long. **c.** The Great Cut Dike is located about five miles upstream from McPhee Dam. The axis of the Great Cut Dike is described as follows: The Northwest corner of Section 35, Township 38 North, Range 16 West, N.M.P.M. bears North 40°26' West a distance of 2,280 feet from a point on the North end of the axis of the dike from whence the axis bears South 18°26' West. The crest of the dike is about 30 feet wide and approximately 1,900 feet long, with the height above the lowest point of the ground surface about 62 feet. **d.** The Dolores Tunnel Inlet is located in the NE1/4, SE1/4, Section 7, Township 37 N, Range 15 W, N.M.P.M., being 1,580 feet from the South section line and 985 feet from the East section line of said Section 7. GPS location: Northing 4153597; Easting 186811; NAD83; Zone 13N. **e.** Naraguinnep Reservoir is an approximately 20,800 acre-foot off-stream reservoir owned by MVIC and situated in Sections 4, 8, and 9, Township 37 North, Range 16 West, N.M.P.M., Montezuma County, Colorado, and historically diverted its supply of water from the Dolores River through Main No. 2 Canal, but now receives water through the Great Cut Dike described above. **5. Ownership and Operation of McPhee Dam and Reservoir:** The McPhee Dam, McPhee Reservoir, the Dolores Tunnel and the Great Cut Dike are located on land owned by the United States Department of Interior, Bureau of Reclamation ("BuRec"), as part of the Dolores Project. The Dolores Project and water rights are operated by the Dolores Water Conservancy District ("DWCD"). **a.** The United States Congress approved the planning and investigation of the Dolores Project as a participating project of the Colorado River Storage Project on April 11, 1956 (70 Stat. 105). The Colorado River Basin Project Act of September 30, 1968 (82 Stat. 896) authorized the construction, operation and maintenance of the Dolores Project. **b.** The Dolores Project was constructed for the purpose, among others, of providing a supplemental supply of irrigation water for the MVIC service area, particularly during the late season. **c.** Prior to the development of the Dolores Project, MVIC possessed a senior water rights portfolio that includes various direct flow and storage water rights. Because the MVIC water rights are senior to the Project's water rights, it was necessary for MVIC and DWCD, the entity that operates the Dolores Project, to reach an accommodation.

In return for conveying that portion of MVIC's conditional water rights determined to be "excess," water available pursuant to the MVIC water rights would be delivered to MVIC from McPhee Reservoir through the Dolores Inlet Tunnel and the Great Cut Dike, rather than from the historical Canal No. 1 and Canal No. 2, and Project water would be delivered in a pattern that would address late-season shortages. MVIC would not use its senior water rights to call out the Project's water rights so long as MVIC was supplied as contemplated. The existing tunnel from the Dolores River to the MVIC service area would be plugged and abandoned. It would be replaced by a new Dolores Inlet Tunnel, which would be bored through the Dolores-San Juan Divide and would serve the southern portion of the MVIC service area and facilities at the new Great Cut Dike, which would allow service of the northern part of the MVIC service area as well as additional Dolores Project lands. **d.** On September 23, 1977, the United States entered into a repayment contract for the Dolores Project with the DWCD. MVIC's water rights were described as "Nonproject water," which "would be delivered to the Company under its own senior water rights in the same amounts and at the same time as it would have diverted under preproject conditions." It was anticipated that MVIC "would receive its ideal requirement of about 150,400 acre-feet solely from non-project water in years of relatively good water supply" and that it would need supplemental Project water in other years. "During the life of the project, the Company should receive an average of about 130,600 acre-feet of non-project water annually" Reaching an agreement between MVIC and DWCD was a condition precedent to construction of the Project. **e.** Also on September 23, 1977, MVIC entered into a contract with DWCD (the "1977 DWCD Contract"), which, among other things, recognized MVIC's water rights and provided how these would be utilized through the Dolores Project facilities. The 1977 DWCD Contract provided certain limits on MVIC's use of water, provided that MVIC would transfer to DWCD water rights in excess of those needed to accomplish the purposes of the agreement and provided that MVIC would apply to this Court "for a change in the point of diversion of its Dolores River water as may be necessitated by the construction of the facilities for the Project." **f.** On April 21, 1989, the United States DWCD, MVIC and the Ute Mountain Ute Tribe entered into an agreement (the "1989 Contract"), which, among other things, provided further how the MVIC water rights would be exercised utilizing the Dolores Project facilities. The 1989 Contract specifies the excess water rights be transferred by MVIC to DWCD. Of the water rights retained, MVIC retained the 1885 Conditional Water Right, which is recognized as senior to the remainder of the conditional water right decreed for diversion at the Main No. 1 and Main No. 2 Canals under the November 25, 1885 priority confirmed in CA473. Retention of this right together with "the Company's current absolute right of 707.7 cfs, with a November 25, 1885 priority as decreed in the CA473 Decree and the 1963 CA0967 Decree, in the Main Canal Nos. 1 & 2 (the "1885 Absolute Water Right") will bring the Company's total diversion right to 795.0 cfs, which is the Dolores Project's designed diversion capacity for the Company." Further, subject to limits in the 1977 DWCD Contract, MVIC may store in McPhee Reservoir MVIC owned non-project adjudicated water during the period April 1 – June 30 of each year. **6. Terms and Conditions Proposed by Applicant for Proposed Change of Water Right:** **a.** Subject to the terms and conditions proposed in this Paragraph 6, the 87.3 cfs Conditional Right owned by MVIC will be changed from direct flow to storage in either McPhee Reservoir or Narraguinnep Reservoir, for subsequent release for beneficial use. No water rights will be injured by this change because it was originally contemplated that the 87.3 cfs Conditional Right would be exported from the Dolores River basin and the proposed use is within the originally contemplated draft of the 87.3 cfs Conditional Right. **b.** The changes in water rights described in Paragraphs 3 and 4 will be subject to the following limitations: i. MVIC will not place a call under the 87.3 cfs Conditional Right so long as MVIC is able to receive the amount of water contemplated by the 1977 DWCD Contract. ii. Diversions under the 87.3 cfs Conditional Right into McPhee Reservoir or through the Great Cut Dike for delivery to Narraguinnep Reservoir will not exceed a maximum combined rate of 87.3 cfs. iii. Diversions under the 87.3 cfs Conditional Right into or through McPhee Reservoir to the Great Cut Dike will not exceed the flow at the originally decreed point of diversion. Because the point of diversion for the Main No. 1 and Main No. 2 Canals has been inundated, that amount will be determined based on the physical flow of the Dolores River at the USGS Dolores gauge located at Latitude 37°28'21", Longitude 108°29'49" NAD27, less amounts (if any) that must be bypassed at the original point of diversion for the

Main No. 1 and Main No. 2 Canals to satisfy any calls placed by downstream water rights that are senior to the 87.3 cfs Conditional Right. iv. MVIC will not divert water to storage in McPhee Reservoir pursuant to the 87.3 cfs Conditional Right after the month of June unless and until the terms of the 1989 Contract are amended to permit storage of such water in the Months of July, August, September, and October. Furthermore, any water stored pursuant to the 87.3 cfs Conditional Water Right that remains in McPhee Reservoir after October 15 of each calendar year will become and accounted for as Project Water. However, MVIC will not be precluded from transferring such water to storage Narraguinnep Reservoir prior to October 15th of each year. v. The maximum amount of water stored under the 87.3 cfs Conditional Right will not exceed 22,755 acre feet in any single calendar year. vi. Subject to the maximum annual volume described in the immediately preceding paragraph, MVIC's diversions of water pursuant to the 87.3 cfs Conditional Right will be limited to the following maximum monthly volumetric diversion limitations, in acre-feet: April: 5,195; May: 5,368; June: 5,195; July: 5,368; Aug.: 5,368; Sep.: 5,195; Oct.: 5,368. No diversion to storage of the 87.3 cfs Conditional Right will occur from the period of November 1 through March 31 of the following year. vii. MVIC's diversions to storage pursuant to the 87.3 cfs Conditional Right will be limited over a running ten-year period to a total volume of 206,776 acre-feet, for an average annual volume of 20,678 acre-feet per year. viii. Deliveries of water diverted and stored water under the 87.3 cfs Conditional Right will be limited, if necessary, to assure that MVIC receives no more than 150,400 acre-feet in any calendar year for irrigation purposes from its privately held water rights and Project water provided to MVIC by DWCD.

7. Confirmation of Relocation of the Point(s) of Diversion of the 87.3 cfs Conditional Right in Conformance with C.R.S. § 37-86-111: In addition to the change of water right set forth in Paragraphs 3 and 6 above, as an additional and alternative claim, MVIC seeks a determination that relocation of the diversion facilities for the 87.3 cfs Conditional Right to the Great Cut Dike and the Dolores Inlet Tunnel, described in subparagraphs 4.c and 4.d above, is consistent with the requirements of C.R.S. 37-86-111, as follows: **a.** C.R.S. § 37-86-111(1) provides in pertinent part: In case the channel of any natural stream becomes so cut out, lowered, turned aside, or otherwise changed from any cause as to prevent any ditch, canal, or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled . . . the owners of the ditch, canal, or feeder have the right to relocate the head of such ditch, canal, or feeder . . . as may be necessary for securing a sufficient flow of water into the same ditch, canal or feeder . . . The priority of right to take water from a stream through such ditch, canal, or feeder as to any such ditch, canal, or feeder remains unaffected in any respect by reason of such extension; but the relocation must not physically interfere with the complete use or enjoyment of any absolute or decreed conditional water right. **b.** Further, C.R.S. § 37-86-111(2) provides “[i]f an owner of a water right relocates a surface diversion structure to a new surface point of diversion in compliance with subsection (1) of this section, the owner does not need to file a change of water right application for the new surface point of diversion.” Relocation of the point of diversion for the 87.3 cfs Conditional Right to the Great Cut Dike and the Dolores Inlet Tunnel, described in subparagraphs 4.c and 4.d does not physically interfere, and has not interfered, with the complete use and enjoyment of any absolute or decreed conditional water right diverting from the Dolores River or its tributaries. **c.** MVIC seeks confirmation that relocation of the diversion facilities for the 87.3 cfs Conditional Right to the Great Cut Dike and the Dolores Inlet Tunnel is consistent with the requirements of C.R.S. 37-86-111 and accordingly will be administered by the State and Division Engineers in all respects otherwise consistent with Colorado Law at the relocated points of diversion.

8. Proposed Terms and Conditions on Confirmation of Relocation Pursuant to C.R.S. § 37-86-111(1): In order to avoid any potential for physical interference with the complete use or enjoyment of any absolute or decreed conditional water right and for the administration of the diversion of the 87.3 cfs Conditional Right at the Dolores Project Facilities MVIC proposes the following terms and conditions, consistent with the Court's prior decree in Case No. 16CW3016, as part of the Court's confirmation of the relocation pursuant to C.R.S. § 37-86-111(1): **a.** MVIC will comply with the orders of the Division Engineer to install necessary measuring and recording devices and administrative structures, and will keep records and make reports of diversions pursuant to the 87.3 cfs Conditional Right as reasonably requested by the Division Engineer. **b.** The total amount of water diverted at any point or combination of points will not exceed the amount of

water legally and physically available at the original point of diversion. The amount of water physically and legally available at the original point of diversion will be determined by the flow rate at the USGS gage "Dolores River at Dolores, CO," plus the flow rate at the USGS gage "Lost Canyon Creek near Dolores, CO," or suitable substitutions approved by the Division Engineer, less any transit loss, as determined by the Division Engineer. **9. Names and Addresses of Owners on Which Structures Will Be Located:** Applicant is the owner of Narraguinnep Reservoir; United States of America (managed by the Bureau of Reclamation), Western Colorado Area Office, 445 West Gunnison Avenue, Suite 221, Grand Junction, Colorado 81501-5711. United States of America (managed by the Bureau of Reclamation), Cortez Field Office, 60 Cactus St., Cortez, Colorado 81321. Application is 10 pages in length. (12 pages)