

**San Juan National Forest/Public Land
Management Plan Revisions
Governmental Water Roundtable
Meeting 8– Dec. 7, 2005
Summary**

<http://ocs.fortlewis.edu/forestplan/>,
click on Governmental Water Roundtable

Seated at the Roundtable:

Bruce Smart, City of Cortez
Bruce Whitehead, Colo. Div. Water Res.
David Graf, Colo. Division of Wildlife
Don Schwindt, Colo. Water Conserv. Board
Dan Merriman, Colo. Water Conserv. Board
Al Heaton, Dolores County
Gerald Koppenhafer, Montezuma County
Mark Stiles, San Juan Public Lands Center
Brian Davis, SJPLC
Kelly Palmer, SJPLC
Thurman Wilson, SJPLC
Chuck Lawler, Southern Ute Indian Tribe
Peter Ortego, Ute Mt. Ute Tribe
Janice Sheftel, SW Water Cons. Dist.
Steve Harris (Alt), SW Water Cons. Dist.

Interested Audience Participants:

Dave Gerhardt, SJPLC
Chuck Wanner, San Juan Cit. Alliance
Kay Zillich, SJPLC
Eric Janes, for Colo. Sen. Jim Isgar
Ann McCoy Harold, for U.S. Sen. Allard
John Whitney, for U.S. Rep. Salazar
Jamie Krezelok, San Juan National Forest

Dan Merriman, Director of the Colorado Water Conservation Board's Colorado Stream & Lake Protection Program, announced that the Colorado Supreme Court issued a ruling in Central City v. CWCB, which strengthened and reaffirmed the CWCB's ability to protect its ISF water rights, holding that ISF rights deserve the same level of protection as other water rights.

Ditch Bill: Dave Gerhardt, fishery biologist for the San Juan National Forest, gave a Power Point presentation on the Colorado Ditch Bill, Public Law 99-545, which amended the Federal Land Policy and Management Act of 1976 (FLPMA). To see the complete power point presentation, go to the Roundtable website and click Ditch Bill under the Slide Show Header. In order to share the details of Dave's presentation, only the text from the power point presentation is shown on pages 2 and 3 :

[Begin Power Point Text]
**Colorado Ditch Bill:
An amendment to the
Federal Land Policy
and Management Act of 1976
Public Law 99-545**

PURPOSE

“To authorize the Secretary of Agriculture to issue permanent easements for water conveyance systems in order to resolve title claims arising under Acts repealed by the Federal Land Policy Management Act of 1976, and for other purposes.”
(emphasis added)

“Other Purposes”

Conversion of term-limited fee permits to non-fee perpetual easements.

Resolve outstanding issues of trespass.

Qualifying Criteria

1. Must have been in place prior to October 21, 1976.
2. Located in an appropriation doctrine State.
3. Used “solely for agricultural irrigation or livestock watering purposes.”
4. Use served is not located solely on Federal lands.
5. Has been in “substantially continuous operation without abandonment.” (five year limit)
6. Applicant has a valid existing right to the water.
7. Has provided a recordable survey documenting location.
8. Application submitted on or before December 31, 1996.

AND.....

“Except as otherwise provided in this subsection, all rights-of-way issued pursuant to this subsection are subject to all conditions and requirements of this Act.” (i.e. FLPMA)

Minimum Operation and Maintenance Requirements

Notify, consult, and obtain concurrence of Grantor for operation and maintenance.

- Install and maintain an operable headgate capable of controlling the amount of water entering the system.
- No use of fire or herbicides except as permitted in writing by Grantor.
- Operate and maintain in accordance with Federal, State, and local laws, regulations, and standards.

A Few Important Examples

- National Environmental Policy Act (NEPA)
- Multiple Use Sustained Yield Act (MUSYA)
- National Forest Management Act (NFMA)
- Federal Land Policy and Management Act (FLPMA)
- Clean Water Act (CWA)
- National Historic Preservation Act (NHPA)
- Endangered Species Act (ESA)

Status of SJNF Applications

The Forest received **225** applications that appear to meet the minimum qualifications.

- These applications include **168** facilities.
- Applicants asserting outstanding rights under the Act of 1866 = **107**
- Assertions that appear to be valid = **64**
- Number of “non-1866” applicants with no authorization to occupy Federal lands = **97**

Applications that provide the minimum required information = **57**

- Applications known to be incomplete = **168**
- Applicants who have not adequately documented ownership of water rights = **145**
- Letters sent requesting additional information = **146** (some sent 2 or more letters)
- Responses from Applicants for additional information = **66**

NEPA Analysis for O&M Plans

Facilities having field work completed = **39**

Draft permits and O&M plans completed = **12**

Awaiting ESA Section 7 clearance from USFWS

ESA Section 7 Requirements?

Razorback Sucker, Colorado Pikeminnow, Humpback Chub, Bonytail Chub

A Question of Federal Discretion

- Scope of discretion includes the development of any terms and conditions that meet the purposes set forth in the FLPMA, including Section 505.
- Section 505 requires mandatory terms and conditions to protect the environment, including aquatic resources.

i.e. The FS has statutory obligations to bring facilities into compliance with current law. It has discretion over water diversions and flows that maintain aquatic habitats on Federal lands. The diversions are known to adversely affect listed species. Therefore, adverse findings under Section 7 of the ESA are warranted.

[End Power Point Text]

Dave said some have questioned whether this issuance of Ditch Bill Easements needs review under Se



Colorado Pikeminnow



has a statutory obligation to bring facilities into compliance with current law and diversions constitute a potential affect on listed species, ESA Section 7 consultation is necessary.

A Biological assessment has been submitted to the FWS, including 166 “Ditch Bill” facilities in the San Juan River Basin. Government-to-government consultation is ongoing with tribal entities. The issuance of a Biological Assessment is pending for the remaining facilities in the Dolores River Basin for which a Ditch Bill has been applied.

As additional Ditch Bill issues and concerns, Dave said many Ditch Bill applicants do not have an operable headgates, as is required. The USFS defined an operable headgate as a permanent structure with the ability to adjust the amount of the diversion. He added that in its field work, the SJNF saw a lot of ditches that aren’t very stable and a lot of ditch failures, which could result in significant damage to Forest land.

Discussion: Janice Sheftel, Attorney for the Southwestern Water Conservation District, said there should be leniency on the question of ownership because many deeds contain the language “all appurtenant water rights” without specifying these rights. Since the facilities had to be in place before 1976 to qualify for Ditch Bill easements, most applicants have been using the water for over 18 years. She said cooperating with the state Division of Water Resources offers an easy way to find out which people have been using their ditches, even if their deeds are not specific, because the water commissioners have been administering the water use.. Janice said that being very strict about the language in the deeds would be counter-productive. Preparing a legal title opinion for water rights could cost \$15,000 to \$20,000 for each right.

Dave agreed. He said the applications he was talking about were ones where the only thing submitted was the Division 7 tabulation. These applicants have not provided anything like what Janice described. The SJNF has sent letters requesting additional information but has received very few replies.

Janice said the SWCD might be able to help if the SJNF would provide a list of the applicants in question. She will recommend to the SWCD board that SWCD staff assist the USFS and work with DWR.

Bruce Whitehead of the Colorado Division of Water Resources said the DWR does not track ownership but does have a good idea who is using water and can document that a ditch is being used.

Dave said it is common to see a large ditch with many users where every application sets out the entire cfs being carried by the ditch, not just the owner’s share. Janice said she believes the Ditch Bill application deadline of Dec. 1, 1996, caught up with people and they were just trying to ensure that all water rights in a ditch were covered. Sorting it out may require being creative. She said she sees ownership as one of the least daunting of the issues that Dave raised.

Dave said he would welcome any help the SWCD can provide and that water claims need to total no more than what has been decreed. SJNF has received requests from some people wanting to convert their irrigation water to domestic use, but water under the Ditch Bill is supposed to be utilized for agricultural purposes. Domestic uses require a Special Use Permit. Dave stated that it is, therefore, important then to know who owns what, because part will be authorized under the Ditch Bill, and part under a special use permit. It will be to everybody's benefit to document water rights as accurately as possible in case uses start to change.

Steve Harris of the Southwestern Water Conservation District asked what will happen if wildlife habitat below a ditch does not meet the minimum standard of 40 percent of potential habitat and whether Dave would require a bypass flow.

Dave said habitat which is not in compliance will be documented and in cases where it is reasonable to require mitigation, that will be documented as well, but a bypass flow is not his decision. He said he will make that recommendation on a case-by-case basis.

Mark Stiles, Manager of the San Juan Public Lands Center, said the process is taken step by step. The bypass flow is one option, but working with the CWCB is another option.

Janice noted that the 40 percent standard may be changed in the Forest Plan Revision and may become a more lenient standard.

Dave said decisions about the issuance of Ditch Bill easements are project-level decisions, and will be made under the current Plan, not the new one. He said the new Plan won't allow streams to dry. However, the new Plan will focus on species sustainability, rather than species viability, as in the current Plan. He said the practical difference between those terms is not clear.

Thurman Wilson of the SJPLC said which Plan applies is a timing matter for Ditch Bill issuance. Some of the applications are on a faster track than the Plan Revision. He said staff must consider how to word the new standard in the revised plan, whether to continue to use the 40 percent standard or something else. There is an underlying reason to have a habitat standard in the Forest Plan, but how it will be worded will require thought.

Dan Merriman stated the issuance of a Ditch Bill easement is non-discretionary. If an applicant qualifies, the SJNF must issue the easement. He said it was the water users understanding that the baseline condition of the stream was to be the condition when the easement is issued.

Dave said the USFS is required to bring users into compliance with current laws and policies. Dan asked when the compliance requirement came into effect, because in discussions he had been part of, the baseline condition was the standard.

Mark Stiles said figuring out the baseline will be critical and is something with which the SJNF is struggling. The Ditch Bill easement directive makes it clear that the USFS retains the responsibility for bringing users into compliance but it also states the USFS should minimize the conditions put on the use of facilities.

Brian Davis of the SJPLC said the USFS could not issue an O&M plan that would violate its laws.

Janice said there shouldn't be any question regarding the effect of the Ditch Bill ditches on Endangered Species because the ditches are already in either the San Juan River or Upper Colorado River RIP baseline.

Dave said the position of FWS is that the fact that a depletion is considered in the baseline doesn't mean this use has met Section 7 consultation requirements. Every time there is a water-depleting activity that hasn't specifically gone through Section 7 consultation under the ESA, the USFS has to consult with FWS.

Janice asked whether FWS consultation applies to "small depletions" as defined in the SJRRIP of under 100 acre-feet. Dave said the fact that a depletion is small streamlines the consultation process, but minor depletions still have to undergo consultation. He said the size of the depletion does not affect whether a user goes through the process, just how onerous it is.

Janice presented a number of other Ditch Bill issues, including O&M plan administration. She said if a ditch owner has a plan to maintain a ditch, the owner shouldn't have to come back year after year for approval to do the same thing. She said she has a major issue with how O&M plans will be administered. Another issue is the USFS interpretation of headgate requirements, because most irrigators don't have headgates that would meet the standard. Dave said about 50 percent of them have operable headgates.

Dan asked whether there is latitude in the definition of an "operable headgate." Rocks in a stream may be sufficient in some cases. Dave said his reading of the law is that the headgate needs to be a permanent, constructed device capable of making incremental adjustments in flow.

David Graf of the Colorado Division of Wildlife said the DOW would have concerns about major concrete structures being put in streams. He said sometimes there is a disconnect between engineers and biologists.

Dave Gerhardt said if a headgate is fixed in place and anchored, that works for him.

Bruce Whitehead asked whether it wouldn't cause more environmental damage to install a structure on a stream where there had not been one before. Dave said if there is just a line of rocks in the water, the USFS does not believe that constitutes an operable headgate as required under FLPMA.

Facilitator Mike Preston said collaborative opportunities, other than for Forest Plan Revision issues, can move forward to help Ditch Bill implementation. The Government Water Roundtable is trying to focus on the Plan, but opportunities for other collaborations can proceed on their own track.

Mark Stiles stated that SJNF welcomes support and encouragement of the Ditch Bill applicants. Many may not have all the information needed to support their applications. Janice and Steve can help the SJNF explain to water users on the National Forest that they need to complete their applications and provide the necessary information. He said the SJNF would like to have half the applications issued by the end of the Fiscal Year, Sept. 30, 2006.

Livestock Ponds and Facilities: Mark Tucker, range management specialist with the SJNF, gave a Power Point presentation on regulations regarding Livestock Ponds and Facilities on public lands. The Power Point discussion is available on the Roundtable website under the slide shows header, labeled range water uses.

Mark responded to written questions prepared by Janice in cooperation with Al Heaton of Dolores County and Gerald Koppenhafer, of Montezuma County, as follows.

Question 1. What rights to use of stock tanks, ponds or springs on USFS or BLM land is available to a grazing permittee/allottee?

Mark said those within their allotment and authorized under grazing decisions are available.

2. How many stock tanks, ponds or springs are within grazing allotments on BLM land? On USFS land? Is a map available?

Mark said there are approximately 767 on BLM land and 1,644 on SJNF land. Range management specialists with the agencies can give information for specific places. He said a single map is not readily available.

3. How many of these water features for stock watering on BLM or USFS land have water rights that are privately owned? That are owned by either BLM or the USFS?

Mark said on BLM lands some water features, generally built before the Taylor Grazing Act was passed, are privately owned. He said there aren't likely to be any on USFS lands. On BLM land in 1926 all range springs and waterholes not already reserved were withdrawn, along with 40 acres surrounding each one, and designated as public water reserves. There are approximately 10 to 12 of these in Southwest Colorado, six of which are still considered eligible as reserved water rights, which are being adjudicated by the BLM.

4. What restrictions can the USFS/BLM impose on use of such water features by the permittees'/allottees' cattle? What is the authority for such restrictions?

Mark said the current Forest Plan requires improvements to benefit both livestock and wildlife. The CFR (Code of Federal Regulations) provides this authority and guidance, together with Forest Plans. The SJNF does not have maintenance items under its

agreements. When a user builds an improvement, the agency doesn't specify that the user can maintain the dam to its initial height, etc. Water facilities are considered range improvements, like fences or corrals.

Mark said the agencies need to do a better job providing specific guidance for O&M. There are three inter-agency documents for technical improvements that provide a good starting point, and the SJNF wants to use those more frequently.

Mark Stiles said it would be good to have such guidance in the initial agreements to help with what to analyze when reconstruction or other work is done.

Janice asked whether grazing permits discuss livestock watering and the use of stock tanks. Mark Tucker said on the USFS side there is language addressing the use of those improvements, and maintenance responsibilities are listed or referenced.

5. Can the USFS or the BLM fence off areas/features/ponds designed originally for stock watering? What if they were constructed or improved with private funds?

Mark Tucker said the answer is yes. Agency improvements are owned by the U.S. government. However, they generally aren't fenced because they are used for both wildlife and livestock watering. Permittees can be compensated for their share of the value of a range improvement if the agency fences something off. In most cases, the agency is performing the maintenance, unless the agreement says otherwise.

6. We understand these livestock ponds create an amenity for wildlife and in some cases aesthetics. Ranchers would like their contribution with regard to these facilities to be recognized, but without penalizing or unduly restricting the livestock use of the facilities and the user who created the amenity in the first place.

Mark said the contributions are recognized in the BLM cooperative agreement or the USFS permit modification.

Al Heaton said ranchers would like the public, not just agency personnel, to recognize that ranchers are making contributions instead of damaging the land, as some people believe.

Mark said more can be done by the agency to improve PR for the ranchers. He said when people see a downed fence, or a broken spring or a trough, they may get a negative impression of cattle. He said the NEPA analysis will show in the public record when things have improved. He also suggested permittees act as ambassadors and talk to people whom they see on public lands.

6A. What if stock water features create artificial wetlands? Can the wetlands be fenced off? Under what authority?

Mark said the answer is yes under the authority of the CFR. Wetlands are sediment filters and can extend the life of a reservoir by reducing sediment.

7. Change from cow-calf operation to steer operations. How does the USFS review and condition a change in operations such that there will not be damage to water facilities on USFS land?

The intent of this question was how a ditch user can protect his ditch if a permittee changes to a steer operation, because steers can tear things up. Mark Tucker said they might have to fence the ditch off. Mark Stiles said the NEPA analysis should help address this issue.

8. Maintenance of structures. Whose responsibility is it to maintain a stock pond? Is this issue defined in a permit for a grazing allotment? How may the pond be maintained?

It is the grazing permittee's responsibility to maintain improvements to the standards shown in the grazing permit or cooperative range improvement agreement.

If the USFS acknowledges that the review of O&M Plans could cause serious delays in the availability of water for livestock, which could cause monetary damage to permittees, and if a permittee proposes to conduct O&M for the current season in a manner similar to that described under the O&M plan, the permittee should be allowed simply to proceed with the O&M of the facilities.

If the permittee will be changing O&M operations significantly, in a way that could seriously impact USFS land, e.g., using significantly different motorized equipment or motorized equipment when none was used previously, the USFS will consult with the party and issue a revised O&M plan in consultation within 30 days of the permittee's request to undertake ground disturbing maintenance.

Mark Tucker said it is the user/permittee's responsibility to maintain a pond, as set forth in a USFS grazing-permit modification or a BLM cooperative maintenance agreement. The question may be whether an action is solely maintenance or structure modification instead. Several factors can cause delays in O&M. The National Historic Preservation Act requires the evaluation of ground-disturbing actions for effects on cultural resources. If some activity is planned outside the original structure footprint, an archeological survey may need to be conducted. If a T or E species is present, the agency must consult with biologists/ botanists. Older projects may never have had an engineering or an archeological survey prepared and may need such surveys when a change in a structure is proposed.

Mark Stiles said the San Juan Public Lands are working on an agreement with the State Historic Preservation Office (SHPO) to provide that the agencies don't have to consult with SHPO on as many cases and, when they do, the process will be streamlined. Maintenance of 2,700 miles of roads is the biggest problem for the SJPLC. Using a road grader on some of the lower-elevation roads where there may be a high concentration of cultural resources means first preparing an archeological survey.

In response to a question, Mark Tucker said the money for improvements comes from the Public Rangelands Improvement Act of 1978 (PRIA), which provides funds to both

agencies through revenues raised from grazing fees. Funding comes back to the local office to pay for range improvements, such as reseeding, prescribed burns, fences and weed control. Usually the agency tries to arrange a 50-50 cost-share between the user and the government. Labor can count as part of the cost-share. However, the agency is not obligated to help pay for improvements it does not believe will benefit public lands.

AI asked whether users/permittees with existing ponds built by ranchers should be filing for water rights to use them.

Kelly Palmer, hydrologist with the San Juan Public Lands Center, said that on USFS lands there is a recognition that there are many water uses and few water rights to support those uses. The agency is ready to make a big filing mostly for stock-related water rights because it is never going to be easier to file for a water right than it is now.

AI asked whether the filing should be done jointly with the allotment holder. Eric Janes, representing Colorado Sen. Jim Isgar, said that that is not currently an option on BLM lands, but under the current administration's new grazing regulations, which aren't final yet, co-ownership of water rights may become an option in states such as Colorado.

Kelly said for BLM lands in this corner of the state, water rights for more than 95 percent of the water features have been filed for already.

Mark Tucker said it might be worth filing for the water right if grazing is going to be a long-term use that is passed on to another permittee. Kelly said it might also be worthwhile on a spring where there may be other users, but grazing has been the historic use. The value of the improvements should also be considered.

Kelly said the water features she is filing on are for livestock, as the primary use, and wildlife as a secondary purpose.

Mark Tucker said in other states, grazing permits are based on ownership of water rights, so filing for the water rights may be more important than in Colorado. Here, the permit is based on ownership of land.

David Graf said this has put the brakes on the DOW's filings for water features because if somebody dams a stream and files for the water right, DWR could make the party construct a structure to allow administration of the right. Janice said even if an entity doesn't file, if there is a dam the DWR might make the party put in an administrative structure.

Mark Tucker reiterated that, for now, the BLM's regulations will not allow joint filings. Therefore, ownership will be in the name of the United States. Permittees must figure out if filing for their own water rights is a good idea.

Forest Plan: Thurman exhibited draft planning maps based on input from the Community Study Group Meetings for the SJNF Forest Plan Revision. The maps show management emphasis themes for different areas of the Forest. The themes range from

No Action (meaning retain current management themes) to an Option E. Forest planners are working to refine the ideas they have heard and coordinate with available data. They hope to have more maps ready by the meeting in February. The SJNF will have a preferred alternative in the draft revised Plan that also will analyze alternatives. There will then be a formal public comment period of at least 90 days, before the SJNF comes out with a final Plan.

In response to a question, Mark Stiles said forest management standards could possibly be different in different management themes.

Plan Revision Concepts: Guiding Concepts. Mike Preston reviewed the suggestions from the November meeting and asked for further suggestions. These were:

1. Encourage the collaborative stakeholder process
2. Get more bang for the buck (by using the collaborative process to comprehensively evaluate priorities and approaches for the efficient use of resources (e.g. Animas River Stakeholders' process))
3. Investigate how the reintroduction of species could impact water management, including any restrictions on diversions.
4. Put more specific direction into the Plan regarding implementation of USFS/BLM-CDNR/CWCB MOUs with regard to issues such as stream protection, fisheries and WSR.
5. Continue the collaborative theme throughout all levels of the Plan: Vision, Strategy and Design Criteria
6. Develop criteria to determine when a by-pass flow analysis is triggered.
7. Respect and protect private rights under Colorado's Water Rights system, and specifically recognize pre-forest diversion rights.

The Roundtable added four additional planning concepts for discussion, as follows:

1. Plan should support trade-offs allowing for higher levels of protection in undeveloped areas and more flexibility in areas of opportunity for resource utilization (e.g. the Arapahoe-Roosevelt Plan Revision).
2. Flexibility for collaborative problem solving and innovation vs. a rigid regulatory approach (e.g. Carbon Lakes)
3. Guidelines rather than standards: define what language means in functional rather than quantitative terms.
4. Plan should create a climate of mutual advocacy with regard to water to make the system work (similar to the mutual, agreed upon approaches presented concerning livestock facilities)

Kelly commented that if everything is written as guidelines rather than standards there could be too much flexibility in decision-making and people might not know what is going to happen.

Mark Stiles said the Plan standards can be worded in different ways. For example, it doesn't have to say 40 percent for the habitat standard. There may be a better approach to the species viability requirement.

January meeting: The January meeting will be moved to Jan. 11, instead of Jan. 4 because of the holidays and vacations.

Topics will be:

- Thurman will bring some maps showing oil and gas leasing potential on San Juan Public Lands as well as examples of the effect of themes along river corridors.
- A third cut discussion of Wild and Scenic River eligibility and suitability
- Chuck Wanner of the San Juan Citizens Alliance will discuss a collaborative process for Wild and Scenic Rivers that is called "Secretary designates" or the 2a11 process. He also commented that it may seem that there is an unfair burden to protect lands in our locale, but these lands are of national interest as well as local interest.
- Federal Reserved Water Rights, a preliminary discussion.