

San Juan River Workgroup

Meeting 5 Summary

Aug. 26, 2010

draft - 6 pages

NOTE: The Web site for the River Protection Workgroup, including the San Juan River Workgroup and the Vallecito/Pine River Workgroup, is <http://ocs.fortlewis.edu/riverprotection>.

This was a combined meeting of the San Juan River and Vallecito Creek/Pine River workgroups to hear a panel presentation on Wild and Scenic Rivers (WSRs). Panelists were:

- Jackie Dietrich (by telephone) of the U.S. Forest Service national staff for Recreation Heritage and Volunteer Resources, Wild and Scenic Rivers section;
- Kay Zillich, hydrologist with the San Juan Public Lands Center;
- State Sen. Bruce Whitehead of the Southwestern Water Conservation District (SWCD);
- Ted Kowalski of the Colorado Water Conservation Board (CWCB);
- Meghan Maloney, river campaign director with the San Juan Citizens Alliance (SJCA).

Jackie Dietrich: Jackie discussed the WSR Act of 1968 which created the National Wild and Scenic Rivers System. Brochures and handouts were available to participants with information on the WSR Act and the basics of WSR designation.

Jackie said the intent of the WSR Act is to keep designated rivers/streams free-flowing, regardless of the volume of water in the river corridor. It provides for protection of the river and its floodplain. The actual mechanism for protection is described in Section 7(a) of the act. It provides that the federal agency administering the river in question must review any federally assisted water-resources project to make sure there are no adverse effects to the river's values. She said a full standing dam would not be permitted on a designated WSR, and advised the workgroup members to consider whether they anticipate and desire future water-resources projects on the streams in question. If so, WSR designation may not be the best tool for protection of those streams.

Jackie discussed Section 10(a) of the WSR Act, which says there must be a commitment to protect the Outstandingly Remarkable Values (ORVs) of designated rivers. Jackie said that standard has been unambiguously interpreted as a non-degradation and enhancement standard designed to protect the water quality and free-flowing nature of designated rivers. However, the WSR Act provides no regulatory authority for the administering agencies to achieve that. She said the administering agencies have to work through various authorities, including local and tribal governments. The agencies have no authority to tell a private landowner not to do something on his property just because a WSR flows through that property.

She said the framers of the act did not believe a WSR could be managed by a single entity even if that river were entirely on federal land. They intended for management to

be a partnership with users and other agencies. A provision of the act talks about sharing administration with state and local governments. The federal agencies also want to partner with non-profit organizations, landowners, and other interested parties to help protect the rivers' values. There is very broad authority in Section 11(d) that says the administering agencies can partner with anyone to plan and manage river resources.

Jackie said the act deals with two important aspects of water:

- **Water quality.** This is one of the values for which every river is added to the system. However, no special authority is conferred on the administering agencies to allow them to protect the water quality of a WSR. Section 12(c) directs the agencies to work with the U.S. Environmental Protection Agency and state and local agencies regarding water quality.
- **Water quantity.** WSR designation creates a federal reserved water right (FRWR) in the quantity of water necessary to protect the values for which the river was designated. The date of that water right is the date the river is added to the national WSR system. Anyone who has a water right that pre-dates the FRWR continues to have that valid existing right, and it cannot be usurped by the FRWR. However, the FRWR does exist to keep water in the stream to protect wild and scenic values.

Jackie said one of the benefits of the citizens' workgroup process is to consider whether there are sufficient flows in the river to protect its values and whether there might be other tools than WSR designation to protect those values. She said not all grassroots river-workgroup processes lead to an outcome of recommending WSR designation; it is just one tool available.

Jackie said more information is available on the interagency-council web site at www.rivers.gov and at www.nps.gov/rivers/.

Jackie reiterated that WSR designation has no effects on management of private property. The administering agencies receive no regulatory authority over private land. Landowners can continue to use and develop their property and allow hunting or fishing (or not) as they choose. She said WSR designation does not mean that private landowners must allow anyone, including officials with the federal agencies, to trespass on their property. In response to a question, she said if someone wants to build a structure such as a barn, and some people find it "offensive" to visual aesthetics, the agencies cannot tell the landowner where to put it, what size to make it or what color to paint it. She said on rivers that flow through considerable private land, or where zoning offers only limited protection and there is not an interest in trying to "upzone", WSR designation might not be the best protection tool.

Under the WSR Act, any water-resources project planned in a WSR corridor that involves federal assistance through a loan, grant, permit or license is subject to review. However, Jackie said there is no prohibition for a finding of eligible or suitable.

Among the questions Jackie was asked were:

Q: What are the effects on agriculture, and on private property and building projects within the protected area of one-quarter-mile on either side of a WSR?

A: Jackie said there are no impacts to agriculture. She also said whether private property is within or outside of the quarter-mile corridor is irrelevant, because the administering agencies have no ability to regulate what occurs on private land. The corridor defines the area where the agencies will put most of their focus in terms of protection. She said the corridor is not defined a strict quarter-mile on either side of the river; it could be slightly wider or narrower depending on the topography. WSR designation would have no effect on landowners wanting to build a house on their private land within the protected corridor.

Q: What about impacts to other projects, such as a timber sale?

A: Jackie said if a small timber harvest were proposed, the administering agency could offer the services of a landscape architect to ensure the project would be aesthetic and would protect water quality, but the landowner would not have to do follow the architect's recommendations. If a landowner proposes a project that would be adverse to river values, the agency can offer technical assistance and can even offer to buy the property using the WSR Act, but the landowner cannot be forced to accept the assistance or to sell his property.

Q: Would designation affect a federal cost-share or federal permits for an agricultural endeavor?

A: Jackie said the administering agencies have no ability to affect upland activities that might be federally assisted, only in-channel activities that are federally assisted and that could produce adverse effects to values.

Q: Could a bridge be built across the river?

A: Jackie said the agencies have no authority to regulate a bridge that involves no construction activities in the bed or bank and that stretches from private land to private land, though the agencies could offer design advice. However, if the bridge had posts and piers in the river, it would be subject to review. She said the agencies have replaced many existing bridges across WSRs and the bridges are usually larger and better. However, there are not many new bridge proposals on designated rivers.

Q: How would designation affect existing habitat structures that are in-channel?

A: Jackie said an existing in-channel structure can be maintained, but if someone wanted to make it larger or get a federal permit for another activity, that would trigger a review.

Q: If a private landowner has a WSR running through his property and chooses not to partner with the administering agency, would there be any advantage to WSR designation on that property?

A: Jackie said even though a landowner might choose not to partner with the administering agency, that doesn't mean he or she will not be protective of the river values. She said there are WSRs through land with intermingled ownership and some that run entirely through private property. The act helps focus community interest on the river and its values; designation can aid in obtaining grants to enhance the corridor; and there is a management plan to coordinate actions on designated rivers. She said there can be benefits to landowners from a WSR designation, such as the ability to receive technical assistance from the agencies. Some landowners find they like to live within a protected river corridor. However, she said if the community is not interested in focusing on protecting the river values, then WSR designation is probably not a good tool.

Q: What if a project were planned that would have adverse effects on water quality?

A: Jackie said the agency does not receive any special water-quality authority when a WSR is designated. If someone were going to develop a feedlot on a WSR, for example, the administering agency would work through the existing Clean Water Act and any state standards to protect the water quality.

Q: How would the amount of the FRWR be quantified?

A: Jackie said only about 15 of the 230 WSRs in the system have had their FRWRs quantified so far. She said if a basin is adjudicated, the agency would bring its needs to the table after determining the flows necessary to preserve the water-dependent values. If a river is already over-allocated, Jackie said, there is not much to work with for the FRWR. In one such case, she said, the canals in the system were lined to save water. Sometimes the agency will buy some existing water rights from willing sellers.

Q: The Pagosa Area Water and Sanitation District (PAWSD) has a diversion in the West Fork of the San Juan River to collect water. How would that be affected?

A: Jackie said the WSR Act would not affect the existing diversion unless the district wanted to make the diversion structure larger or different in some way. In such cases, the agency can usually work with the new proposal. She said the junior water right of the FRWR would not affect the existing diversion, but if the district wanted a larger water right, the FRWR could affect the district's ability to get it. Also, if a federally assisted in-channel diversion needed to be modified or rebuilt because of a flood event and the new structure were not hugely different from the original, this would probably be allowed.

Q: What new protections would a WSR designation provide for a river in a wilderness area?

A: Jackie said WSR status protects the integrity of the river system. The WSR Act is more restrictive than wilderness designation in terms of water-resources projects. In wilderness areas, the President can authorize a dam, but on a WSR, it would require an act of Congress for a major dam to be built.

Kay Zillich: Kay explained the process by which the ORVs were selected for rivers on San Juan Public Lands. She said the agencies utilized field-level expertise in different disciplines and came up with a long list of ORVs. The group sorted through these and

picked out river-related values that were unique and special. The team selected exemplary values, not all values. Where possible they chose a river that had other ORVs. In the case of the San Juan East and West Forks, geology emerged as the ORV.

Kay was asked what extra protection WSR designation would offer for the value of geology if the land is already protected by a conservation easement or is public land. Kay said where land is private, if there were six landowners and four of them love wildlife and are concerned about what their neighbors are doing, they might be able to get some federal expertise or grant money to encourage wildlife protection. In regard to the specific protections for geology, Kay said rocks are protected by not allowing them to be hauled off.

Ted Kowalski explained that the public-lands agencies' WSR eligibility list is just an inventory. It is in the suitability analysis where people decide whether there are other reasonable ways to protect ORVs. Mark Stiles, San Juan Public Lands Center manager and San Juan National Forest supervisor, explained that federal law requires four agencies (the Forest Service, Park Service, Bureau of Land Management, and Fish and Wildlife Service) to do an inventory of streams on their land in regard to their WSR eligibility. Mark also said that the fact that something is on public land does not mean it's protected from development, except in the case of a wilderness area. Bruce Whitehead said that the protection given by WSR status relates to the FRWR and protects the river against water depletion.

It was asked how much water it takes to protect geology. Kay said it probably doesn't require much.

Bruce Whitehead: Bruce said the SWCD's involvement began with the development of the 2007 revised San Juan Public Lands management plan. The SWCD had concerns about the number of streams that were listed as eligible. The San Juan Citizens Alliance suggested a grassroots effort in partnership with the SWCD to protect the values of the rivers in question while allowing water development. This evolved into the River Protection Workgroup and the various stream-specific workgroups that are operating under it. This process is recognized in the revised forest plan.

Bruce said the FRWR that would come with a WSR designation could affect new water uses in the future or a change in use for existing projects. Someone seeking a Section 404 permit or a change of water right might have to pass a "higher bar". He said such concerns are the reason there is only one WSR in Colorado so far, the Poudre. He said it would be difficult for a designation to be passed by Congress without the support of locals, but if a stream is listed in the forest plan as suitable, the federal government must manage it so as to protect its values until it is designated or taken off the suitability list. However, a suitability finding does not carry an FRWR.

Bruce was asked if there are specific plans for development on these rivers. He said there have been some proposed dams, and there is a conditional water right held by PAWSD and the San Juan Water Conservancy District on the West Fork. He said the federal government may not regard conditional water rights as senior because they have not been developed.

Ted Kowalski: Ted said he works for the Interstate and Federal Section of the CWCB and is charged with protecting Colorado's compact and U.S. Supreme Court entitlements. The CWCB also manages the Instream Flow (ISF) Program. ISFs are water rights intended to protect the natural environment to a reasonable degree. There are thousands across the state. Ted said an ISF is a tool on the table for the water workgroups. ISFs have been successful across the state in protecting flows without involving the federal government. Ted said the legislature provides the CWCB money every year to facilitate such stakeholder processes as the San Juan Workgroup, and there are many different groups statewide. These stakeholder groups can come to consensus on what values a river possesses and what is the best way to protect them.

Mely Whiting of Trout Unlimited said one of the concerns about the ISF Program is it focuses only on the minimum flow necessary. She asked whether the state would be willing to go beyond the minimum. Ted said the board has the authority to accept donations of water and has money to use to preserve and improve the natural environment.

Meghan Maloney: Meghan said the SJCA is a community-based conservation organization that seeks to protect public lands, water, and air quality and work for reasonable development. It focuses on non-consumptive (non-traditional) uses for water such as wildlife, boating, and viewing. She said she advocates for WSRs. They are not appropriate everywhere or without community support, but there are streams that are worth being designated as special and protected from development. She believes there is enough flexibility in the WSR Act to create a designation to fit the needs of this region. She said there are many water users on Colorado's one WSR, the Poudre, as well as five inter-basin diversions. She noted that there are three different classifications in the WSR designation that provide for different levels of development. Meghan said there are benefits to WSR designation because it focuses attention on values of the river system and could bring in federal funding. Also, it provides for the development of a holistic river-management plan. She said the workgroups have an opportunity to create a locally based collaborative decision about what should happen on these local rivers.

Next steps: Facilitator Marsha Porter-Norton said the San Juan Workgroup will start work in more detail in September on ideas for protection. She urged group members to read the information sheet and list of protection tools.

It was agreed that more information is needed on effects of WSR on irrigation and municipal supplies, conditional water rights, and bypass flows.

Next meetings: The next meeting of the San Juan River Workgroup will be Thursday, Sept. 23, from 5:30 to 8:30 p.m. at the Ross Aragon Community Center in Pagosa Springs. The next meeting of the Vallecito Creek/Pine River Workgroup will be Wednesday, Sept. 29, from 5:30 to 8:30 p.m. at the Blue Spruce Campground Event Hall, Vallecito Lake.