

Hermosa Creek Workgroup

Meeting #2 Summary

May 6, 2008

Facilitator Marsha Porter-Norton reviewed the meeting agenda and presented the meeting summary for Meeting 1 on April 8, 2008. Both were approved with no changes.

Process principles: Marsha reviewed the process principles for the Hermosa Creek Workgroup (“Hermosa Workgroup”) as follows:

- Anyone with an interest is a stakeholder and has a seat at the table.
- Dialogue must be respectful to ensure that the whole range of opinions is heard and understood and that a future recommendation will meet as many concerns as possible.
- Facts and information must be accurate. This is a complicated topic and a complex watershed so all attendees need to operate from the same set of facts and information.
- There will be lots of interaction, collaboration, and possible negotiations to reach a consensus.
- The process will be fair, open and transparent.
- Stream Value Protection tools will be fully discussed when appropriate.

Consensus: Marsha reviewed the meaning of “consensus” as it applies to the Hermosa Workgroup. All views will be heard and considered. Differences of opinion are natural and expected. The workgroup will make a good-faith effort to reach a decision that everyone can support. Consensus does not mean everyone agrees, but only that they can support the ultimate decision.

The process will not involve taking votes because that would mean there are winners and losers. In this process, the goal is to hear as many concerns, solutions, and ways forward as possible. If someone doesn’t support a particular idea, the group will talk through the reasons. If it is not possible to reach consensus, the Hermosa Workgroup will determine what to do then.

A process such as this is messy and requires a lot of time, but if a recommendation is going to move forward that requires action on the state or federal level, its support needs to be as broad-based as possible. The group wants to find a way forward that has the support of as many at the table as possible, without voting.

In response to Marsha's introduction, Hermosa Workgroup members commented that the process seems to be modeled after that of the Animas River Stakeholders' Group ("ARSG"), which has been long and complicated but has had a satisfactory outcome. Two things helped with that process: All the stakeholders were presented with the same set of facts, rather than each party hearing from a different consultant; and the participants felt they had a stake in the process and were, therefore, willing to watch over it. Such a process is focused on ideas rather than people, institutions or organizations.

ARSG probably could not have been more divided when it began, but came together for the purpose of improving water quality in the upper Animas River basin. That was something all participants could agree on. The process has lasted 14 years, which is longer than many marriages!

One of the most important features of such a consensus-based process is that every position is valid. No one is put down for an opinion. Patience is needed.

Therefore, Hermosa Workgroup members have established the following ground rules for their process:

- Show respect.
- One person talks at a time.
- Everyone's opinion is important.
- Focus on figuring out accurate data about each issue.
- Speak up; don't hold back.

"Water 101": Bruce Whitehead, Executive Director of the Southwestern Water Conservation District ("SWCD"), and the Animas-La Plata Water Conservancy District, passed out a newspaper column by John Porter, former General Manager of the Dolores Water Conservancy District, explaining water rights. Bruce then gave a "Water 101" talk on the basics of water law in Colorado.

The State of Colorado has seven water divisions, one for each major river system. Southwest Colorado is in Water Division 7, the San Juan-Dolores system, which encompasses waters from Wolf Creek Pass to the Utah line and from Lizard Head Pass to the New Mexico state line.

Divisions are divided into water districts. The Hermosa Creek Watershed is in Division 7, Water District 30, which encompasses the Animas River mainstem and its tributaries, including the Florida River and Hermosa Creek. Information on particular water districts is available at the Division of Water Resources Web site, <http://water.state.co.us/>.

Bruce explained some of the terminology basic to understanding water rights and water law included in the Glossary of Water Terms distributed to the Hermosa

Workgroup and available on the Web site for the River Protection Workgroup at ocs.fortlewis.edu/riverprotection.

“Flow” is a measure of volume/time and is generally given in cubic feet per second (“cfs”). One cfs is about 450 gallons per minute, a large amount of water, roughly two acre-feet per day. The flow on Hermosa Creek varies. The average minimum is around 30 cfs and the average maximum is approximately 665 cfs.

With regard to water volumes, there are about 7.48 gallons in each cubic foot of water and about 326,000 gallons in one acre-foot, which is the amount of water it would take to cover one acre of land one foot deep.

“Water rights” are private property rights, which can be bought, sold, and traded.

Water rights in Colorado date back before statehood to early mining laws. The water of the State belongs to the people of the State. The right to appropriate and use the unappropriated water of the State shall never be denied under the Colorado Constitution.

Anyone can obtain a water right as long as it does not injure someone else’s water right.

Section 7 of the State Constitution, which covers rights-of-way for ditches, gives people a right to place a ditch across the property of another in order to put their water to use, with payment of “just compensation” to the owner of the property.

The “doctrine of prior appropriation” is key to determining water-rights claims. Under this system, earlier uses have priority over later uses. This concept of “first in time, first in right” dates to before statehood. In many river systems in Southwest Colorado, this may not be an issue because there is plenty of water. A number of rivers do have water shortages, at least some time during the year. When there are water shortages, the doctrine of prior appropriation determines who receives the available water. Diversions by a 2008 water right, for instance, can be curtailed (shut off) to provide water for an earlier water right.

“Adjudication” means a court process for decreeing water rights. “Appropriation” is putting water to use through some action taken on the ground. Both adjudication and appropriation dates are important in deciding water-rights priorities.

The first, original, adjudication on the Animas River occurred in 1923. Adjudications that take place after an original adjudication are “supplemental”. The second adjudication on the Animas was in 1965. No water rights were adjudicated between the two decree dates.

An adjudication date is as important as the appropriation date in establishing the priority of a water right. If a water-user put water to use in 1920 but has only recently filed in court for a water right, the right would be junior to rights adjudicated before the recent filing.

Proving when water was appropriated is not always easy. Neighbors can testify about water use, or photos can show water being used. Sometimes a sign in the ground with a date can evidence an appropriation.

Decisions about water rights are made by water courts. In Division 7, Judge Greg Lyman is the Water Judge. Appeals of water-court decisions go directly to the State supreme court, bypassing the Colorado Court of Appeals.

Water rights are decreed only for “beneficial uses”. Over time, the list of such uses has expanded. Originally, the primary uses were mining, livestock and irrigation. Now there are many more. The Water Rights Determination and Administration Act of 1969 recognized augmentation as a use. Recreation and instream flow (“ISF”) are more recent beneficial uses.

The Colorado Division of Water Resources designates certain areas as “water-critical” when such areas routinely have water shortages at some time during the year. This designation relates primarily to well-permitting. To obtain a well permit in a water-critical area, requires at least 35 acres or a land subdivision prior to 1972.

Hermosa Creek is a tributary of the Animas River. The Animas has never had a sustained call, though there have been occasional shortages. A call occurs when water demanded by senior water rights which are not receiving their entitlement and for their specific decreed uses. Hermosa Creek is considered “non-critical”, although there was a call for a short period in 2002, a year of severe drought. There has rarely been a call on Hermosa Creek.

There was a new water right decreed recently in Southwest Colorado for a recreational in-channel diversion (“RICD”) for the City of Durango for recreational boating. The right is for a significant year-round flow. Because of the adjudication of that right, it is possible that the Animas in the future may be considered over-appropriated and, therefore, designated could be designated as “water critical” for the purposes of well permitting.

The decree for the Durango RICD was arrived at through negotiations, which allow for some future consumptive development within La Plata and San Juan Counties under rights held by SWCD and La Plata County. Durango’s RICD was adjudicated in 2006 and is a junior water right to these designated future uses. A, RICD can be held only by a municipality or other designated public entity, not by an individual.

There are a number of Colorado Water Conservation Board ("CWCB") instream-flow ("ISF") rights on the Animas River and its tributaries. ISF was recognized by the legislature in 1973 as a beneficial use of water to provide protection for the natural environment to a reasonable degree. ISF rights tend to be junior rights, but the CWCB can buy senior water rights to change to ISF purposes, for improving or enhancing the natural environment. The CWCB can also accept donations of water rights for ISF purposes.

In Hermosa Creek, an ISF right adjudicated in 1973 is a good, i.e. "senior" right. ISF rights have a decreed amount, the minimum amount necessary to protect the natural environment, which varies by stream. ISF rights are non-consumptive; i.e. ISF flows are not diverted. Many of the Hermosa Creek tributaries already have an ISF right. More information about specific ISF rights can be found on the Initial Hermosa Creek Information Sheet, available on the Web site.

CWCB is the only entity in Colorado that may hold an ISF right. Trout Unlimited, the Bureau of Land Management and others have worked with the CWCB to suggest filings for some ISF rights.

In answer to questions, Bruce said that building a reservoir in a stream reach with an ISF reach would present a major conflict, unless the reservoir right was senior. There may be ways to mitigate the effect of the dam on the ISF, such as a bypass flow or a conservation easement, but the CWCB would have to approve such a measure.

The SWCD was able to acquire an irrigation water right in the Carbon Lake Ditch, with an Environmental Protection Agency grant, under the auspices of the ARSG, which was donated to the CWCB for change to an ISF to improve water quality on the upper Animas River.

HB 1280, passed this year, allows longer-term leases for consumptive use water rights with the CWCB for CWCB ISF purposes, while still protecting the right's historic consumptive use even though the water is not being used by the CWCB for its original consumptive purposes. A change of water right would be necessary to change the use of the water to ISF purposes.

"Interstate compacts" are interstate agreements to provide equitable apportionment of the water in a stream between/among states. The Colorado River Compact is one example. Water rights may be curtailed in Colorado and other upstream states (Utah, Wyoming and New Mexico) in order to provide water to downstream states (California, Arizona and Nevada) under the Compact.

Most uses of water are not 100 percent consumptive. Return flows that aren't consumed by one water user become available to downstream users. Water leaving a basin, as a transbasin or trans-mountain diversion, is 100%

consumptive to the exporting basin. Colorado's Front Range relies on a significant amount of trans-mountain water from the Western Slope. "Imported" water may be used and re-used to extinction in its new location, provided it is in the receiving basin. The recipient does not have to maintain historic return flows and the imported water is not subject to call of a compact in the receiving basin.

"Reserved water rights" are federal water rights, dating from the date of a specific reservation of federal land. A Wild and Scenic River ("WSR") designation usually comes with a reserved water right, to be held by the federal government. The two Ute Tribes have historic reserved rights dating from the formation of their reservations.

The question of a U.S. Forest Service ("USFS") federal reserved water rights has been controversial. For the USFS, the date of a reserved water right is the date a National Forest was established. In Southwest Colorado, USFS reserved rights are still under litigation. Hermosa Creek and most of the streams in the San Juan National Forest are involved in the reserved water rights litigation. Quantification of these claims is just one of the unresolved issues in the litigation.

In answer to another question, Bruce responded that municipalities and certain other water providers have the right of eminent domain to condemn water supplies, but these are rarely exercised.

One recent issue is whether the production of water produced in conjunction with drilling for coalbed methane is a beneficial use of water that requires a water well permit. The District 7 Water Court has found that this was the case. That decision was appealed to the Colorado supreme court. Historically the State administered the produced water as a byproduct in the coalbed-methane extraction process, which was not considered a beneficial use and, therefore, was , under the jurisdiction of the Colorado Oil and Gas Conservation Commission. If produced water had been being used beneficially it would have come under the jurisdiction of the State Engineer.

When a water-user has a ditch or other water facility on National Forest land, the user needs an easement under the 1986 Ditch Bill, an amendment to the Federal Land Policy and Management Act ("FLPMA"), or a special-use permit from the USFS. The USFS may require the user to bypass a portion of his water right as a condition of the permit or the Ditch Bill easement. This is a very contentious issue. There is disagreement on the USFS authority to impose a bypass-flow requirement. This is not a major issue on Hermosa Creek since there are few, if any, diversions of water that originate or cross federal lands.

Discussion of map: Because time was running out, the group skipped the scheduled review of the Hermosa Creek Initial Information Sheet and moved to discussion of the maps of the Hermosa Creek Watershed. Scott Brinton, Division of Water Resources, had prepared new maps adding some areas outside the

boundaries of the Hermosa Creek Watershed and showing trails, water rights, roads, and mining claims based on requests at the first Hermosa Creek meeting.

There was a request for the USFS to provide a map showing uses in the Hermosa Creek area, but the San Juan Public Lands Center has not yet finalized its Draft Resource Management Plan or chosen the final alternative under the Plan, so future uses are still undecided. A map showing the current uses will be provided.

Hermosa Workgroup members asked for maps showing only the CWCB ISF rights; the current inventoried roadless area; and the proposed management themes and uses under the San Juan Public Lands Center's Draft Plan preferred alternative.

Next meeting: The next meeting of the Hermosa Creek workgroup will be Tuesday, June 3, from 6:30 to 8:30 p.m., at a location to be announced.