

**San Juan National Forest/Public Land
Management Plan Revisions
Governmental Water Roundtable
Meeting 12– May 3, 2006
Summary**

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

Seated at the Roundtable:

Robin Schiro, Archuleta County
Scott Brinton (alt), Colo. Div. Water Res.
Bruce Whitehead, Colo. Div. Water Res.
David Graf, Colo. Division of Wildlife
Dan Merriman (alt), Colo. Water Cons. Board
Al Heaton, Dolores County
John Taylor, Hinsdale County
Gerald Koppenhafer, Montezuma County
Steve Fearn, San Juan County
Mark Stiles, San Juan Public Lands Center
Brian Davis, SJPLC
Kelly Palmer, SJPLC
Chuck Lawler, Southern Ute Indian Tribe
Janice Sheftel, SW Water Cons. District
Tom Rice (alt), Ute Mountain Ute Tribe
Mark Braly, Rio Grande County

Interested Audience Participants:

Dave Gerhardt, SJPLC
Chuck Wanner, San Juan Cit. Alliance
Kay Zillich, SJPLC
Ann McCoy Harold, for U.S. Sen. Allard
John Whitney, for U.S. Rep. Salazar
Cindy Hockelberg, SJPLC
Jim Siscoe, Montezuma Valley Irrigation
Mely Whiting, Trout Unlimited
Mark Pearson, San Juan Citizens Alliance
Amber Clark, San Juan Citizens Alliance

BASELINE FOR PERMIT RENEWALS AND DITCH BILL EASEMENTS:

Mark Stiles, Manager of the San Juan Public Lands Center, said the SJPLC had received approximately 219 applications for easements under the Colorado Ditch Bill, a 1986 amendment to the Federal Land Policy and Management Act (FLPMA) of 1976. He hopes to be able to have almost all of those applications processed before the Plan Revisions are final, but he is not sure whether this will happen. The San Juan National Forest (SJNF) has about 10 percent of all the Ditch Bill applications in the nation. An Interim Directive from the U.S. Forest Service, providing guidance about how to evaluate applications for Ditch Bill easements, came out in 2004.

Dave Gerhardt, fishery biologist for the SJNF, said field work has been completed on about 40 of the Ditch Bill applications. Approximately 20 easements are ready to be sent to the applicants for their signatures. All the work done at this point is for the purpose of evaluating impacts to threatened and endangered species under Section 7 of the Endangered Species Act.

Dave said a high percentage — more than half — of the applicants have not submitted all their required application information. The most critical piece of information that is commonly missing is ownership of water rights. The Southwestern Water Conservation District (SWCD) has offered to work with the SJPLC to help sort out that issue. The SJPLC is sending out a letter with information to Ditch Bill applicants which mentions the SWCD's offer of help . SWCD will coordinate providing any information it receives with the SJPLC.

Dave said a high percentage of the Ditch Bill applicants are also asserting outstanding rights under the Mining Act of 1866 ("1866 Act"). The Act sets forth criteria for road and water facility easements on public lands. If a water use was established prior to the reservation of the San Juan National Forest, it may be governed by the 1866 Act. The SJNF will give its administrative opinion on whether these applications would qualify for 1866 Act easements, based on the information it has, but only a court may decide the issue finally.

Mark said that if the use of the water changed after the creation of the SJNF, then an 1866 Act easement is no longer applicable, to the extent the use has changed post-reservation of the land from the public domain. Mark said if people are really concerned about giving up rights under the 1866 Act in order to acquire a Ditch Bill easement for such pre-reservation uses, the SJPLC could put language into the Ditch Bill easement stating nothing in the easement takes away rights to an 1866 easement for the earlier uses. The agency's thinking was that Ditch Bill applicants would give up any 1866 Act rights in filing a Ditch Bill easement claim. The joint applications put the SJPLC in an awkward position. It can't give information that would be interpreted as legal advice.

Dan Merriman, Administrator of the Colorado Water Conservation Board's Stream and Lake Protection Program, said he knows of a Power Point presentation on the Ditch Bill vs. the 1866 Act. Perhaps a link to that information could be put on the Roundtable web site.

Dave said many of the ditches for which Ditch Bill easements have been requested have been totally realigned. If the realignment occurred post-Forest reservation, any portion of the Ditch that was modified or added to has lost its entitlement to an 1866 Act easement.

John Taylor, representing Hinsdale County, said whereas realignments may invalidate the 1866 Act claims, enlargements are another story, depending on the size of the enlargement. If a ditch was originally constructed to carry 3 cubic feet per second and now carries 30 cfs, that probably would not qualify for an 1866 Act easement, but courts have decided that if it was originally built to carry 30 cfs and just 3 cfs were added, it might still qualify. The courts have to decide case by case.

Dan said a Ditch Bill easement brings closure to the right-of-way issue, but for the 1866 Act claims, until there is a court adjudication, an 1866 Act easement claim represents just an assertion, not an actual easement.

Dave added that for the applicants to have an established 1866 Act easement, there must be a court decree typically from a federal court. If someone appears to have a valid 1866 Act claim, the SJNF will continue to treat it as a valid claim unless a court says not to.

Mark Braly, representing Rio Grande County, asked what would happen to an 1866 Act claim if a ditch were abandoned. **Cindy Hockelberg of the SJPLC** said the easement usually requires that there be continuous use. In the case of a ditch abandonment, no one would retain the easement. It would revert to the public domain.

Janice Sheftel, Attorney for the SWCD, asked whether people must come back to the SJPLC every year once a Ditch Bill easement Operations and Maintenance ("O&M") Plan is approved. Dave said it depends on the O&M plan. Some maintenance work can be performed without consulting the SJPLC. On the other hand, noxious-weed control requires prior approval.

John Whitney, representing U.S. Rep. John Salazar, handed out copies of Congressman Salazar's letter of Feb. 28, 2006, to Supervisors of National Forests in Colorado, regarding the U.S. Forest Service's processing of Ditch Bill easements. John also handed out a copy of the reply from Regional Forester Rick Cables, dated March 10, 2006.

The Roundtable members then discussed baseline conditions for Ditch Bill easements. Janice expressed concern that the baseline condition for Ditch Bill easements appears to be a hypothetical "pristine" condition. Ditch Bill easements are special because an applicant has to have had a pre-1976 ditch to be eligible for a Ditch Bill easement. Many ditches for which Ditch Bill easements were requested, although they don't predate the Forest reservation, were created in the 1910s and 1920s. To use as the baseline condition a pristine, pre-ditch state is of great concern.

Dave said people need to be very careful when using the term "baseline". It's treated differently under NEPA, the Ditch Bill, and Section 7 (ESA) consultations. "Pristine" can be considered the baseline, pursuant to specific Forest Plan guidelines. This standard looks at 100 percent of the capability of the un-impacted habitat so that incremental uses of water over time can be judged for their affects on habitat capability. Terms and conditions for Ditch Bill easements are discretionary. The Ditch Bill is not an exception to FLPMA, it is an amendment. It's part of FLPMA. So except for what's in the Ditch Bill amendment, all other aspects of FLPMA apply.

John Taylor said he worked on obtaining support for the passage of the Ditch Bill. The intent was to take away all the questions about an easement and how to deal with it.

Dave said that's why there was a five-year hiatus in processing of Ditch Bill easements. The issue was kicked back to Washington for an interpretation. Many people had John's idea, but it doesn't fit with how FLPMA was actually amended. Ultimately the Forest Service received guidance on how to treat Ditch Bill easement terms and conditions, which are discretionary.

Dan said many folks believe issuance of a Ditch Bill easement was to be non-discretionary, just like a claim under the 1866 Act, but a legal opinion out of Washington turned that around. Water-users eventually decided to see if they could work with the new interpretation in order to get the Ditch Bill easements processed and implemented.

Dan said “baseline” means different things to different people at different times. It is not a term defined in a hard and fast way. Reasonable discretion should be used in making decisions.

Mark said he knows there is anxiety about the Ditch Bill issue and wants to keep working on it. He said that the SJNF’s easier Ditch Bill applications will be processed first.

PERMIT RENEWALS, OUTSIDE THE DITCH BILL:

Janice asked whether the Forest Service has either a rule or guidelines for habitat protection in the Plan Revisions. Mark said not yet.

Cindy noted that an easement is different from a Special Use Permit (SUP). An SUP has a termination date, whereas an easement is permanent. Technically there is no such thing as a “permit renewal”. When a permit expires, the applicant may seek a new permit. SUPs usually last for 20 to 30 years. Typically, easements are not time-limited. Dave said usually an old SUP terminates before a new one is issued, with the applicant bringing that use into compliance with any new laws.

Facilitator Mike Preston said a question remains about whether the current USFS Management Plan standard requiring that habitat be kept at 40 percent of capability will continue in the Plan Revisions or be changed.

Mark said he does not think the Plan Revisions will use the same words. New Forest Service regulations change the approach and allow the Plan to be less prescriptive.

Dave said the old planning regulations talk about population viability, not species viability. The new rule discusses “ecosystem sustainability” and “species sustainability”. How those new terms will affect Plan guidance and on-the-ground management is yet to be determined.

Mark said there were benefits to having a specific number for sustainability or viability to allow objective measurement, although lack of flexibility is a problem. He said it would be good to have a criterion that is measurable and can be tracked, but at the same time would provide flexibility. The SJPLC is struggling with this issue.

Janice asked whether 100 percent of habitat capability is the base against which ecosystem sustainability is measured. Mark said no. For the Plan Revisions, the answer is not yet known.

Dave said 40 percent of habitat capability was a bare minimum for a particular species. The flexibility was supposed to be with regard to levels above the minimum. Forty percent is not a goal to be managed toward.

Bruce Whitehead of the Colorado Division of Water Resources asked whether guidelines for ecosystem sustainability will be contained in the Plan Revisions or written afterward.

Mark said the Plan Revisions will talk about desired conditions for systems on a broad scale. Guidelines will also be written into the Plan Revisions. Whether the language talks specifically about a 40 percent or similar standard has not yet been decided. The Plan Revisions will generally have guidelines instead of standards.

Mike said the current Plan concerns population viability and 40 percent of habitat potential is a standard aimed at trying to ensure such viability. In the Plan Revisions, the emphasis will be on ecosystem and species sustainability, but the question still remains as to what standards will be applied.

Dan asked whether ecosystem sustainability will be evaluated in-house or through public efforts. Mark said the SJPLC has performed internal assessments. The Nature Conservancy and others have been looking at landscape-scale assessments. Mark said, for example, that rangelands should be functional, meaning that plants are green when they should be green — instead of green just one time a year, as with cheatgrass. That is the general type of information that will be used to evaluate ecosystem function in a rangeland setting. A specific guideline could state that there will always be stubble at least 6 inches high or that grazing will be deferred once every three years, but the USFS is looking for a broader view.

Al Heaton, representing Dolores County, said individuals are important in the process of implementing standards and guidelines. Every range con has a slightly different view on how to perform the job. In the last 15 years, Al said, he has worked with seven different range cons.

Dan raised the issue of whether a 20-30 year SUP is suited to something like pipelines or a reservoir, which may have a 100-year life expectancy. He suggested that perhaps the easement concept needs to be extended.

Cindy said sometimes facilities become abandoned, even large ones, and the Forest Service has to be able to address that situation. Extending the easement concept would have to be addressed nationally, not just in the local Plan Revisions.

Janice asked how the April 2004 MOU between the USFS and the State of Colorado, with its principle of cooperation, will be incorporated into the Plan Revisions. Mark said a lot will be put into the guidelines, but he isn't sure how the water section will be structured.

Janice asked whether members of the Government Water Roundtable will have a chance to review some of these concepts in writing before the entire Plan Revisions go public.

Mark said the SJPLC is rapidly running out of time on the Plan Revisions. Funding for the Revisions will be gone at the end of this year. Therefore, any future work will have to be funded from the regular budget. The Roundtable needs to move quickly to provide the SJPLC with its review, preferably within the next two months.

From the audience: Mely Whiting, an attorney with Trout Unlimited, said the environmental community wants to be able to review whatever draft comes out of the Roundtable. The community would like to focus on specific issues instead of having to look at the whole Plan Revisions at once and having a deadline to react to everything in the Plan Revisions. The environmental community would like a place at the table. She asked when the public will have an opportunity to provide input.

Mark said public meetings are scheduled in May, but he is not sure if any will focus on water. [NOTE: Wild and Scenic River eligibility was a major topic (along with travel suitability, oil and gas, and management themes) at community meetings in Cortez, Pagosa Springs, Durango and Silverton in May.]

CRITERIA FOR TRIGGERING BYPASS FLOW ANALYSES AND ALLOCATIONS:

Janice said there are situations in which no bypass flow should be required — for example, for facilities that have been in place a long time. A range of alternatives needs to be reviewed for facilities on the Forest, from no bypass to considering a bypass. The issue of a bypass should not come up for every permit or Ditch Bill issuance.

Dan added that a bypass flow is just one tool. All the tools in the box should be considered. The goal of the MOU was to lay out this approach on a regional basis.

David Graf, water specialist with the Colorado Division of Wildlife, said the term “bypass flow” means something like an instream flow to support the environment to a minimum degree to keep the system viable. He asked what other tools in the box are available if a piece of creek or river will be sacrificed? While using a hatchery to restock fish is one suggestion, he looks at a bypass flow as a minimum life-support system to keep certain species viable. He also questioned what other tools are available when there is going to be a trade-off.

Janice said other actions to help the ecosystem could be habitat improvements, such as pools and tree shading. She reiterated that it goes back to the baseline issue, especially when some facilities have been in place for 80 years.

Mark asked if there were a request for a use that dried up a stream at a certain time every year, whether an agreement could be worked out to ensure pool maintenance.

Janice said that such an agreement could be accomplished. She said it seems wrong to expect a stream with a ditch that's been in place for 50 to 80 years to be required to return to an Eden-like condition. The baseline question is, the ecosystem at what time.

Mark said the Interim Ditch Bill Directive does not rule out Ditch Bill easements requiring some level of ecosystem restoration. Janice said she doesn't believe this requirement should apply to Ditch Bill easements for uses that have been going on for many years.

Bruce questioned whether a ditch that has been in place for 80 years and has had an SUP for 30 years wasn't part of the ecosystem. If a ditch hasn't changed its diversion practices or return flow patterns, the ecosystem to be sustained already exists.

Dave said species and ecosystem sustainability means reproductivity, and connectivity vs. fragmentation of habitat. He said all native species are already in trouble locally. Considerable damage has already been done to ecosystems. When people talk about giving a "free pass" to existing facilities, those are the very facilities that resulted in the conditions that have put native species at risk.

Dave also said he is concerned because the Plan Revisions process encompasses a land base of more than 2 million acres, containing many stream miles and species. A strategic plan vs. a prescriptive plan means dealing in generalities and that puts specific decisions back at the project level. Water is a scarce and valuable commodity and its use is tied in with history and politics. That means there is a considerable amount of pressure on the District Supervisor at a project level to make a decision that is politically correct. It's easy to say that a particular stream doesn't affect the whole forest, but it's like "being nibbled to death by ducks". At what point, Dave asked, is there no longer a sustainable ecosystem and sustainable species? That's when species are put on the Endangered Species list.

Jim Siscoe, Manager of the Montezuma Valley Irrigation Co. ("MVIC"), said MVIC has created a new ecosystem where there once was nothing but sagebrush. MVIC canals make habitat for bald eagles and other valuable species. A bypass flow doesn't create water, it reallocates it. If water is taken from one viable place to another, one system may be dried up in favor of another.

Dave said objectives and the trade-offs must be considered. Humans are part of the ecosystem, too. If a Plan does not set reasonable and definitive guidelines and allows the deferral of decisions to a project level, the whole concept of ecosystem sustainability goes down the drain.

Mark said he understands the concerns about the SJPLC unilaterally imposing a bypass flow. If the agency is negotiating with a permit applicant concerning a stream about which the agency has issues, the agency might be accused of "extortion" if it asks the applicant to consider a donation to the CWCB's Instream Flow program.

Janice said it's important to define the ecosystem that needs to be sustained. Maybe if a water-user were to take water through a different headgate, the ecosystem could be sustained. The process should be a matter of choices and collaboration. Requiring someone to give up a property right through a USFS demand for a bypass flow should be a last resort.

Mark drafted a list compiling the messages he was receiving from the water-users. Those notes are below:

Mark Stiles' Flip Charts May 3, 2006

BYPASS FLOWS

- Start with a bigger toolbox.
- Keep in mind that there may be other ways to mitigate reduced flow.
 - a. shading
 - b. pool maintenance
- Options range from no bypass in certain situations, all the way to imposition of bypass flows, but a bypass flow should be the last resort.
- The key is to cooperatively explore workable solutions.
- There should be some way to deal with historic uses differently from proposed uses.
- Strive for options that are based in existing administrative structures.
- Recognize the complexity of Colorado water law and the potential for conflicts between State and Federal statutes and a potential solution or practical inconsistencies.

Mely Whiting said that a 10th Circuit Court of Appeals decision held that the Federal Government does have the right to impose reasonable conditions on water-users. She said the criteria for triggering bypass flows, drafted by Steve Harris of the SWCD, on the Roundtable web site was of concern. She said that while a bypass flow is not always the best solution and Trout Unlimited believes in cooperation, taking anything out of the toolbox and restricting the USFS is a bad idea.

Kelly Palmer, a hydrologist with the SJNF, said one of the biggest complaints from SUP applicants isn't the outcome of the permitting process but the time it takes to complete the process. She said a collaborative process could take even longer and reminded the Roundtable that it is all a public process.

PLAN EFFECT ON FACILITY O&M ISSUES:

Bruce asked whether O&M plans apply to claims under the 1866 Mining Act. Cindy said the SJNF would sit down with easement applicants to understand the scope of their actions. Granting an 1866 easement is non-discretionary, but access to the water facilities might have to be worked out. An O&M plan is required for any SUP, even for grazing, and for Ditch Bill easements.

WILD AND SCENIC RIVER INVENTORY:

Kay Zillich, a hydrologist with the SJNF, handed out a detailed, resource-by-resource write-up on the different Outstandingly Remarkable Values (ORVs) used to determine the eligibility of stream and river segments on San Juan Public Lands for WSR designation.

She said the SJPLC has met with the BLM Montrose Office to sort out which office will handle the tributaries and segments of the Dolores River that lie outside the SJPLC boundary, but share watersheds and ecosystems with the SJPLC. SJPLC will handle the analysis for the main stem of the Dolores down to Bedrock. The BLM Montrose office will prepare the analysis for the Dolores tributaries of La Sal Creek, Naturita Creek and Wild Steer Canyon.

Mark said the BLM Montrose Office is conducting a WSR inventory because of a significant increase in oil and gas development in the Paradox Basin. Recently, when an area on the San Miguel River was to be leased, the lease was successfully appealed because a WSR inventory had never been completed on that river segment.

Janice asked whether the SJPLC had winnowed down the list of Eligible stream segments, as water-users had requested. Kay said two or four stream segments listed for scenery or ecology might drop off, but that was it.

Members of the Roundtable continued to question the criteria by which stream segments were determined to be eligible for WSR status. Mark said that the Eligibility list is just an inventory and does not speak to how best to manage these streams to maintain their ORVs. On the SJNF, five streams were found Suitable in analyses decades ago, which constitute 18 to 19 of the 56 segments on the current Eligibility list. The San Juan Public Lands have much more water and longer stream reaches than almost any other National Forest around.

Mark listed the four issues raised by the Roundtable related to WSRs as:

Mark Stiles' Flip Charts
May 3, 2006

CONCERNS ON WILD & SCENIC RIVERS

1. "New" policy? First eligibility inventory on the San Juan.
2. Surprised at how many.
3. Once eligible, will the designation ever "go away".
4. Suitability process [in plan revision timelines] too simple [given the ramifications].

Janice questioned the difference between protecting a value for a stream that has been designated eligible for WSR status and protecting it in other ways. Mark responded that in the latter case, the ORVs aren't called ORVs, but, for example, a black swift nest is a black swift nest. Because there are a finite number of such nests in Colorado, a nest would still be protected. However, instead of focusing on the entire stream segment, the agency would try to mitigate damage to a specific nest.

Mark stated that if the agency does not proceed to a Suitability analysis, there will not be a shorter, winnowed-down list.

Chuck Wanner of the San Juan Citizens Alliance said there does not seem to be time to complete a thorough Suitability analysis before the Plan Revisions are completed. Mark said a Suitability analysis could take longer, but it could be made clear in the ongoing Plan Revisions process. The discussion will begin with the draft Plan Revisions and carry on through the final document. The draft Plan Revisions will delineate what will happen to stream segments found Eligible but not Suitable.

Mark Braly asked how finding a stream or stream segment Suitable would affect recreation and public access. Kay said it should not affect recreation at the current level, but if a stream were designated a Wild River, the agency probably would not put in a new campground, for example.

Mark said the Dolores River and four others have been considered Suitable for WSR status for 27 years and the agencies have not shut off public access.

John Taylor said Hinsdale County has a strong land-use plan and asked how that would be taken into consideration by the agencies when managing any Suitable streams. Mark said it should be.

Mark discussed Options for Mitigating Concerns of the Roundtable Members. Those are:

Mark Stiles' Flip Charts
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OPTIONS?

- a. Fully disclose policy and interpretation that eligible streams fall out w/suitability.
- b. Explain how former ORVs would be managed in the future.
- c. Fully disclose concerns raised during the Suitability review so legislators must consider them.
- d. Make it very clear which segments are viewed as the best.

Members of the Roundtable continued to protest the length of the Eligibility list. Al asked why some stream segments in canyon country that have not had water for years were listed for the presence of the Naturita milk vetch or how a rare plant in a dry canyon is related to WSR designation. Mark said the plant is on the agency's list of sensitive species.

Roundtable members said they did not see why the agencies could not make cuts now to the Eligible list for such inappropriate streams.

Mark said his guidance on the decisions came from the State, Regional and Federal levels. He said one reason the inventory is raising concern is that a full WSR inventory has never before been conducted on San Juan Public Lands.

MEETING PLAN:

Mike Preston suggested putting into writing the concepts the Roundtable has been working on where some agreement has been reached. Janice said she would like a draft of this information before the next Roundtable meeting. Janice would like a specific document to respond to, at least for the parts that relate to water. Mike suggested putting the Roundtable comments and concerns in writing on the ORVs for streams that are listed on the eligibility inventory as well as responses to Mark's list of concerns and options. Dan asked whether the Roundtable will prepare a document and make a recommendation to the Forest Supervisor. Mark said there probably wouldn't be time before the Draft Plan Revisions are prepared, but there may be time between the draft and final EIS.

Next Meeting: The next meeting will be Wednesday, June 14, 10:00 to 3:00 at the San Juan Public Lands Center, after the USFS has some draft Plans Revisions available. The agenda will include preliminary drafts of some of the water related content that will be addressed by Plan Revisions, follow-up discussions on the baseline for permit issuances, by-pass flows, ditch bill easements, facility O&M issues and discussion of the WSR inventory.