

## San Juan River Workgroup

### Additional answers to questions from the 8/26/10 panel – from Roy Smith, State BLM Office:

#### 1. How are conditional water rights affected by a WSR designation?

Conditional water rights may be developed on federal lands to the extent that such construction does not result in significant degradation to the free-flowing nature, ORVs, classification, and water quality that supports the ORVs. Conditional water rights for storage structures may not be developed on federal lands because designation prohibits dams. Conditional water rights on private lands are not affected, unless the applicant needs any sort of federal permit to construct, such as a Section 404 permit. In that case, the federal permitting agencies could not permit any structure that results in significant degradation to the free-flowing nature, ORVs, classification, and water quality that supports the ORVs.

#### 2. How would the USFS quantify the water necessary for the ORV of geology?

A fluvial geomorphologist would have to answer this question. The basic question that would have to be answered is: what flow is necessary to continue and support the geological processes that formed and that maintain in the river canyon? For example, high flows may or may not be needed to remove inflow of debris from side canyons, depending upon the local geology and vegetation. If the geology was exposed during historical times and the river is now cutting through a new and different layer of geology, then no flows may be required to support the geology ORV. A determination has to be made on a case-by-case basis.

#### 3. How are 404 permits handled under WSR?

The Army Corps of Engineers consults with the administering agency before making a decision on the permit. If a river is designated, then the Army Corps cannot permit any project that results in significant degradation to the free-flowing nature, ORVs, classification, and water quality that supports the ORVs. Many times, potential impacts can be addressed through mitigation and design measures that allow the project to proceed.

#### 4. What if a landowner does something to their land that someone else deems as hurting the ORV and then sues? Who is responsible for the legal costs?

The W&SR Act does not provide a basis for a party to sue a private landowner for actions that are seen as hurting the ORVs. The party who wants to sue would have to find some other legal basis for the suit, such as a violation of county land use zoning or ordinances.

#### 5. What if a head gate needs moved due to erosion?

In general, managing agencies can allow headgates to be moved to allow continued use of an historic headgate. This applies under suitability and under designation. The managing agency may ask the headgate owner to consider other alternatives before permitting the headgate to be moved, such as reconstruction of the headgate, or a different type of diversion structure. If the

segment is classified as wild, construction methods may be restricted to activities that do not require construction of new roads.

6. What if, due to a ditch company's obligations, a stream/river dries up periodically? How does that interplay with WSR?

I assume that the ditch company operates under a senior water right. This would be considered a prior, existing right, and the managing agency could not restrict or stop this practice. The managing agency may suggest cooperative measures that could reduce the impact on the river, such as lining the ditch to enable delivery of the same volume of water with lower diversion rates.