

Hermosa Creek Workgroup Meeting #11 Summary Feb. 3, 2009

Meeting summaries: The December and January meeting summaries were approved with no changes.

Presentation on Wild and Scenic Rivers: Roy Smith, water-rights specialist with the Colorado office of the Bureau of Land Management (“BLM”) in Denver, gave a PowerPoint presentation about the Wild and Scenic Rivers Act of 1968 and the process by which a river or stream segment can be designated a Wild and Scenic River (“WSR”). The PowerPoint is available on the Web site, ocs.fortlewis.edu/riverprotection.

Roy emphasized that the WSR process is not a monolithic approach. It has been customized to fit different rivers in different parts of the country.

Whenever federal land-management agencies develop or revise a resource management plan (“RMP”), they are required to do a WSR evaluation for the streams within the boundaries of their management area. The process has four steps:

- **Eligibility.** To be eligible to be a WSR, a stream must be generally free-flowing and possess at least one Outstandingly Remarkable Value (“ORV”). Free-flowing means free of dams, riprap, and similar artificial constructions, but it does not require natural hydrology. A WSR could be designated right at the foot of a dam.

An ORV is a quality or attribute that is extraordinary (among the best of the best) or a superior example of a more widespread value. “Outstanding” can mean in a statewide, regional or national context. ORVs must be stream-related. For Hermosa Creek, the ORVs are native Colorado cutthroat trout habitat and recreation. There is an unlimited list of potential ORVs a stream can possess, a few of which are scenery, geology, wildlife and cultural resources.

- **Tentative classification.** When a stream is judged eligible, it is tentatively classified as wild, scenic, or recreational, based on the type and degree of human development associated with the stream and stream corridor at the time of the evaluation. This step is very important because it determines what activities can occur in the river or stream corridor. “Wild” rivers have the least amount of development, “scenic” rivers may have some development, and a “recreational” river may have more extensive development along its shoreline, including roads and major diversions.

- **Suitability.** Suitability is the next step in the process and involves deciding whether WSR designation is a viable management approach for a stream segment. Federal agencies are not required to conduct a suitability analysis when writing or revising an RMP but they may choose to do so; the San Juan Public Lands Center (“SJPLC”) has done one for its most recent plan revision. Factors involved in deciding whether a stream is suitable for WSR designation include potential management conflicts, prior existing rights, and the availability of alternatives for protecting the ORVs.

Streams identified as suitable in a final RMP must then be managed to protect their ORVs, their free-flowing character, and their water quality.

- **Designation.** A stream segment can be added to the WSR system through congressional legislation or by an executive order of the Secretary of the Interior. The former method is much more common.

Effects of WSR designation: Typically, a management plan for the newly designated WSR is then written locally in cooperation with stakeholders and partners over three or four years. It addresses what uses are allowed. Valid prior existing rights along the river segment remain in place but there may be some restrictions on those rights. New projects that would take place in the river corridor are restricted or banned, depending partly on whether the WSR is classified as wild, scenic, or recreational.

If there is a prior development in place along the WSR and it is a valid right, the owner continues to be able to exercise that water right and to maintain the structure. But if someone wants to build a new diversion, whether it will be allowed depends on the stream’s classification (wild, scenic or recreational) and whether the diversion can be built without harming the ORVs. The project might be allowed but might have terms and conditions to protect the ORVs (e.g., a structure might have to blend into the landscape where scenery is an ORV). For a river classified as wild, new developments would probably be banned.

Roy said there is a long list of rules delineating what is and isn’t allowed under the three different classifications.

Mark Stiles, manager of the SJPLC, said the Forest Service in its draft plan revision and its WSR suitability analysis, looked at slightly more than 62 miles, including tributaries, of Hermosa Creek. Twenty-eight miles of the mainstem creek were found suitable and classified as scenic; 22 miles of tributaries were classified as wild; and the East Fork of the Hermosa was classified recreational.

Roy said grazing permits along a WSR are usually considered valid existing rights. If a grazing allotment was within the corridor and was up for renewal there might be a review of management practices to make sure they were compatible with protection of ORVs, but it would be unusual for the permit to be canceled

unless livestock was harming water quality. Hunting and fishing generally should not be affected by a WSR designation.

Mark added that activities that are permitted, such as grazing, are not considered as “pure” rights but would be managed according to the management plan for the WSR. So long as they didn’t impair the values they would be allowed.

Whether an agency doing a WSR analysis stops at the eligibility level or continues on to a suitability analysis, the stream segments found to be eligible or suitable (whichever is the higher level of analysis done) must be managed so as to protect their ORVs.

Roy said WSR designation usually includes one-quarter mile on either side of the river, but the language in the legislation can change that. A WSR designation could be written to go to the tops of canyon walls, for instance.

Federal reserved water right: Typically and historically, a WSR designation brings with it a federal reserved water right. In every case so far, WSR designation has included a federal reserved water right. A mere finding of suitability, however, does not include such a water right. However, the language in the 1968 WSR act does not mandate a federal reserved water right, and theoretically, Congress can do what it wants. There could be a WSR without a water right but it would likely create controversy.

A federal reserved water right says that Congress has set aside part of the federal land estate for a purpose, and water is needed to fulfill that specific purpose. State have primacy over water allocation, but a federal reserved water right requires that the state work with the federal agencies to create a water right to fulfill their purposes even if the purposes are not recognized under state law. Examples of places where such a water right might exist are wilderness areas, national monuments, national forests, and Indian reservations.

The WSR act contains no guidance or restrictions on how federal reserved water rights are to be quantified or adjudicated. State water courts decide the amount. Some state courts have ruled that a federal reserved water right is for the minimum amount of water needed to support the federal purposes, while others say it is the amount “reasonably necessary”. It could be all the flow or just a fraction. The federal water right usually has no effect downstream. Its priority date is whenever Congress or the Interior Secretary acts to designate the WSR.

Wilderness areas don’t have to have a federal reserved water right, although they certainly can. In Colorado, there has never been a wilderness area with a federal reserved water right.

Mark Stiles said there are many instream flows (“ISFs”) on Hermosa Creek and asked whether those could substitute for a federal right. Roy said the WSR act

was passed before ISFs existed so it does not address them. Usually a federal reserved water right is considered necessary.

Roy said if a WSR is designated in a midstream area, a federal reserved water right could affect upstream water-rights changes. If someone is asking for a special use permit to divert half the streamflow and build a reservoir, the federal agency would deny that project if it would diminish the ORVs

Mark Stiles said there is one adjudicated water right of 1.7 cfs upstream on the Hermosa and there are a few, very small amounts for wells, plus the state's ISF rights, but there should not be many conflicts.

It was asked whether the federal reserved water right could be quantified prior to a WSR designation being sought. Roy said he had never heard of that being done. Mark Pearson, executive director of the San Juan Citizens Alliance, said the 2009 Omnibus Public Lands Management Act, which includes provisions designating 315 miles of WSRs in Idaho, states that on Idaho's Owyhee River, 10 percent of the streamflow will be reserved for development, and this provision was written prior to the WSR bill being passed.

Roy said the trend is to figure things out in advance and to customize the approach for each WSR.

He said concerns about federal reserved water rights are threefold:

- The possible future impact on changing senior water rights.
- A sentiment of not wanting the federal government to be a significant player in the water-rights system.
- The feeling that because states have been given primacy over water they should keep it.

A question was raised again about the potential effect of a WSR designation on use. Would it draw more attention to Hermosa Creek and bring more visitors, thus degrading the resource? Roy said the BLM's observation has been that a federal designation will bring more visitors when the area in question is near a major population center, but it does not necessarily do so when the area is far from population centers.

There was a general discussion about whether state protection of water resources in Hermosa Creek would be adequate, or whether a federal designation such as a WSR or wilderness area would be preferable.

Ted Kowalski of the Colorado Water Conservation Board ("CWCB") said the state has not said it is opposed to WSR status for Hermosa Creek, and this is not the only river where the issue is being debated. But all approaches need to be considered.

Mely Whiting of Trout Unlimited said she would be comfortable with state protection instead of federal if it conveyed the same level of permanency and if the CWCB were willing to appropriate flows to adequately protect the stream and values, rather than the absolute minimum flows. However, she said, a federal designation might bring more funding for resource protection.

Ted said an ISF gives permanency and there could be a dialogue with the CWCB on whether the ISF water amounts are enough to protect other values. However, it is difficult to change an ISF once it's set.

Roy addressed the funding question, saying that for the BLM, it has proven true that a federal designation brings more funding, including monies for a management plan and then for any projects needed. Mark Stiles said a designation helps to "out-compete" other national forests.

One person commented that we live in a dynamic world and shouldn't tie up options and opportunities to meet the needs of communities by making a designation that fits today but may not in 50 or 75 years.

Other people said the most important values in Hermosa might be the ecological value of the watershed, not just the water rights. We don't know what future threats might be. Twenty years ago, no one realized what a problem ATVs would become. This is a opportunity to protect the river for the future.

Other comments included that it is time to put aside prejudices and focus on the problem. It doesn't matter whether protection is state or federal so long as there is protection. Also, there will be more workgroups talking about other streams and areas in the future. Maybe this stream is special enough to protect with a federal designation, while the others are different.

Marsha said, to succeed, the Hermosa Workgroup's solution will have to protect as many interests as possible. It will have to address threats, meet future water needs, protect the ecology, and provide local control.

Next meeting: The next meeting of the Hermosa Workgroup will be Tuesday, March 3, from 6:30 to 8:30 p.m., at the Durango Recreation Center. Come with ideas about tools and plans for the future.