

## Lower Dolores Working Group Meeting 12 Feb. 16, 2010

**Note:** Presentations, documents, meeting summaries, agendas and other information related to the Lower Dolores Working Group process are posted at <http://ocs.fortlewis.edu/drd>. There is a button on the left on the home page for the Lower Dolores Working Group.

**Review of timetable:** Facilitator Marsha Porter-Norton said the intention is for the Working Group to complete its work by June and to have a report prepared for the Dolores Public Lands Office ("DPLO"). The group's next meetings will be focusing on the most complex issues, such as landscape and water protection tools.

**Review of meeting summary:** The December meeting summary was approved with no changes.

**Public comment:** none.

**Wilderness legislation:** Dolores County Commissioner Ernie Williams said U.S. Rep. Diana DeGette's wilderness bill, which includes acreage in the Dolores River corridor, will receive a hearing. He noted that the Working Group has sent a letter expressing opposition to moving ahead with wilderness legislation while the group is still evaluating alternatives for management of the Lower Dolores.

Jim Siscoe, manager of the Montezuma Valley Irrigation Company, commented that some 2 1/2 years ago when the full Dolores River Dialogue ("DRD") was meeting after the release of the 2007 *San Juan Public Lands Draft Revised Resource Management Plan*, there was great concern about the Wild and Scenic Rivers ("WSR") suitability evaluation and the finding that the Lower Dolores was preliminarily suitable for WSR status. The full DRD put together a letter signed by 23 groups, including area county commissioners, that was sent to Mark Stiles, San Juan National Forest supervisor and manager of the San Juan Public Lands Center ("SJPLC"). The purpose of the Working Group and of the process Mark allowed to begin through the DRD was to find alternatives to WSR designation.

### Panelists on Protection Tools

Panelists with expertise in different types of landscape and water protection tools provided information and answered questions for the group.

**Linda Bassi** of the Colorado Water Conservation Board ("CWCB"), who works with the state's Instream Flow ("ISF") Program, gave a PowerPoint presentation about the program. The presentation is available on the web site listed above.

Linda said the ISF Program could provide an alternative to WSR designation. An ISF is an in-channel or in-lake appropriation of water. The ISF program was established in 1973 by legislation that recognized “the need to correlate the activities of mankind with some reasonable preservation of the natural environment”. The program gave the CWCB the authority to appropriate or acquire water for ISFs or natural lake levels.

There are two ways the board can acquire ISF protection: a new ISF appropriation or an acquisition for ISF use.

The CWCB appropriates the minimum amount required to preserve the natural environment to a reasonable degree. Per state law, the CWCB staff must make the following determinations before applying for a new ISF water right:

- A natural environment exists (this is usually identified by the presence of a coldwater fishery);
- Water is available for appropriation;
- No material injury to other water rights will occur.

In the case of water acquisitions, the CWCB can acquire water, water rights or an interest in water (not a full water right) in amounts it determines are appropriate to preserve or *improve* the natural environment to a reasonable degree. Linda said water acquisitions might be the most effective ISF tool to serve as an alternative to WSR designation on the Dolores.

For acquisitions, the CWCB works with willing sellers, donors, and lessors. An acquisition changes an existing water right to ISF use and maintains the priority date. The CWCB has done about 25 water acquisitions.

In 2008, the Legislature for the first time appropriated funds, approximately \$1 million, to the CWCB for water acquisition. Because of the state’s tight budget, appropriations are being scaled back now, but Linda hopes the CWCB will receive such funding again in the future.

The donor/seller of a water right can retain the right to use that water under certain circumstances. For example, the City of Boulder can take back the water it has provided for an ISF and use it for municipal purposes in drought years.

Linda said loans/leases can be temporary and these can be short-term or long-term.

Potential sources of leased water include farmers and ranchers who don’t want to irrigate a crop; landowners who want to maintain flows; municipalities and water districts that are not using their water right at present but may need it in the future; and government agencies that own water.

The 2008 legislation gave protection to water-rights owners who lease water to the CWCB for ISF use so they will not suffer a reduction in historic consumptive use. Linda said a stringent process is followed for both permanent acquisitions and leases, so that water-rights owners are not either excessively compensated or punished for leasing to the CWCB.

Linda said there is a decreed ISF on the Dolores River of 78 cubic feet per second. An acquisition program could be used to maintain or increase the water right and could be used to help to protect the river's Outstandingly Remarkable Value ("ORV") of fish.

Four working groups are taking place right now in Colorado: the Upper Colorado River Stakeholders Group; Lower Gunnison; River Protection Workgroup and the Lower Dolores Working Group. The Upper Colorado River group has the goal of creating a river-management alternative for the BLM and Forest Service and is looking at developing an ISF on the main stem of the Colorado River to provide base flows.

The River Protection Workgroup is addressing five sub-basins in Southwest Colorado. Its goal is to develop measures to protect values while allowing water development to continue. This group is interested in creating federal legislation addressing land use to protect the watershed and address multiple-use needs. It wants to address water-protection issues from a basin-wide perspective.

The Lower Gunnison River Group, based in Grand Junction, was started in December 2009 and encompasses five different workgroups. One is studying the Dolores River from Bedrock to San Miguel County and from the San Miguel River downstream 10.5 miles.

David Vackar of Trout Unlimited asked if an ISF senior right can be changed. Linda said this is difficult. Once the board has a decreed ISF water right, it has a fiduciary duty to protect that water right. It is unlikely to be changed and the CWCB would probably be sued if it did seek to change such a right.

Linda was asked whether an ISF would create a future threat to other water-rights holders who want to change a use in the future. She said an ISF appropriation is a new junior water right. The effect on future changes is that if someone wants to change a point of diversion upstream from the original point through an ISF water right, the CWCB would ask that they not be allowed to do so if the ISF would not be met. The ISF is entitled to the conditions that were on the stream when the water right was appropriated.

Jim Siscoe asked how it was decided to set the ISF on the Dolores at 78 cfs. Linda said the number is a bit of a mystery, but it had to do with historic operations of the Dolores. Jim said the DRD talked long ago about providing additional drops of water for native fish and for trout. Rarely is the 78 cfs met year-round. This is a tool to consider. Linda said having an ISF of more than 78 cfs wouldn't require a new water right, but an increase in the decree.

She was asked about ISFs for flushing flows. She said this is a hot-button issue with the CWCB. The board has never appropriated an ISF for that purpose but it comes up in discussions.

**Mark Stiles:** Mark discussed the joint planning effort for San Juan Public Lands, which involves both the Forest Service and the Bureau of Land Management. This is the first such joint planning effort in the nation. The land-use plan provides a general framework for management of public lands. The most recent plan was adopted in 1983 for the San Juan National Forest and 1985 for the BLM , so the plan revision is overdue.

The 2007 *San Juan Public Lands Draft Revised Resource Management Plan* did two major things regarding the Dolores River corridor. First, there was an evaluation of WSR eligibility and then suitability for streams in the area. The Dolores River was found preliminarily suitable, with some wording added to recognize the efforts of the Working Group. Second, the plan establishes general management direction for the corridor. The Dolores River corridor from Bradfield Bridge down to the Dolores River Canyon Wilderness Study Area would be a Management Area 2 under the plan, a special management area. MA 2 is a catch-all category that says there will be special management for a specific area because of its unique qualities. The Alpine Loop above Silverton is also an MA 2.

In MA 2s, the agency looks at desired conditions for the area's special features. In the Dolores corridor, the desired conditions were that cultural resources, scenery, wildlife and fisheries would be protected and preserved. That is the SJPLC's vision of the future.

Mark said a land-use plan, once adopted, can be amended under certain situations but the process is laborious and requires public input.

Mark discussed national conservation areas ("NCAs"), which at present are exclusively a BLM-managed designation. There are three NCAs in Colorado: Gunnison Gorge (1999), McInnis Canyons (2000) and Dominguez-Escalante (2009). Management of NCAs is very flexible. The management plans are more focused and more intensive than most general land-use plans for public lands. In Colorado and elsewhere, NCAs have been chosen because they allow customized management; they fill a gap between land-use plans and other, more stringent options such as wilderness areas; and they can include a smaller wilderness area within their boundaries, though this is not required.

Common components of NCAs are usually management restrictions, mineral withdrawal, and identifying what resources should be protected. An NCA is established through federal legislation. There is no over-riding NCA act such as the Wilderness Act or WSR Act. The biggest different between land-use plans and NCAs is the permanence of the latter.

Jim Siscoe asked how NCAs protect private landowners and water-rights owners. Mark said NCA language will talk about respecting valid existing rights. Having these documented in statute can be an advantage. He said he believes there have been no cases where an NCA

included a federal reserved water right; however, Roy Smith of the state BLM office said there is one such case, outside Colorado.

Ernie Williams asked, if the Working Group comes to consensus on an alternative to a WSR, whether a special-interest group could file a protest and have the group's recommendations thrown out. Mark said, in the case of an NCA or other special management area, since the establishing language is passed by Congress, this is unlikely. A protest would have to be considered by the U.S. Supreme Court. On the other hand, a mere land-use plan can be protested and overturned more easily, and it is possible that parts of the group's recommendations in the land-use plan could be challenged. But he said it is unlikely that everything the group decided would be thrown out.

**Roy Smith**, statewide coordinator for BLM on water rights, ISF protection and WSRs, gave a PowerPoint presentation about WSRs. He said he was not promoting or discouraging the idea of a WSR designation, only providing information. His PowerPoint is available on the web site mentioned above.

Roy said the 1976 *Dolores River Wild and Scenic River Study Report* found the Dolores River suitable. The assumption is that the recommendations of the group as adopted by the Forest Service will supersede the 1976 recommendation. He added that a finding of suitability does not mean the agency will act on the recommendation by going to Congress seeking a formal WSR designation. Having a suitability designation can be a protection tool in itself even if legislation never moves forward. Suitability carries no federal reserved water right but it does protect ORVs and the free-flowing characteristics of the stream.

Roy said the BLM's Grand Junction Field Office and Uncompahgre Field Office have found stream segments downstream from the Lower Dolores eligible for WSR status, and the BLM office in Moab has found the Dolores River from the state line to the confluence with the Colorado River to be suitable. Downstream from the confluence with the Colorado, there are also segments of the Colorado that have been found suitable.

Roy said, if a river is granted WSR status, no new impoundments are allowed. Protecting the free-flowing nature of the river is the whole purpose of creating a WSR. Impoundments are considered to be structures that hold water in place for an extended period, not lesser structures such as a low dam to move water to a ditch. Maintenance of an existing structure on a WSR is allowed. WSRs can be and have been created just below dams; this is not uncommon. If a WSR is designated, all federal agencies are then obligated to protect the WSR's values.

When a WSR is established, a special management plan is created, generally with input from stakeholders. Valid prior existing rights may be exercised. However, if you have a conditional right to build a dam in a WSR you would not be allowed to do so. A state water right does not provide access to the federal land that would be needed to build the dam. A conditional

diversion right might be a different story because it could be compatible with the WSR designation.

WSR designation has historically included a federal reserved water right (“FRWR”), the amount of which is quantified by the federal agencies. The language of the WSR Act creates a FRWR so it would be difficult to create a WSR without that right.

Landowner Rowdy Suckla asked about the effect on property values for private landowners along a WSR. Roy said there is not much data on this. The WSR Act does not dictate what can happen on private land. However, a designation could either increase or decrease the values. Protected riverfront property might be worth more, or it might be worth less if someone wanted to build a dam, for instance, and could not. Roy said there are numerous WSRs in the East where there is little public land, and there the federal agencies and local landowners cooperate on decisions about projects on private land.

Cole said he still doesn’t understand the criteria for deciding a river is suitable. Roy said there is a list of factors but it is basically a subjective management call.

Dolores County Commissioner Doug Stowe asked whether it is necessary to make a change in current management on the Lower Dolores. Is the condition of the river and corridor degrading? Is one of the ORVs suffering?

Marsha said one of the tools on the list to be discussed at coming meetings is retaining existing management. However, the status quo includes the SJPLC’s finding of preliminary suitability.

Mark Stiles said a management plan that maintains current uses and restrictions is an option, but maintaining the status quo in *management* may not be sufficient to maintain the status quo in *values*. The system is not static. The Dolores River was found suitable in 1976 and it has been found suitable again. That doesn’t indicate that anything is “broken”.

Mark was asked whether the suitability finding will be eliminated if the group can protect the ORVs another way. He said the draft plan doesn’t state that suitability might be pulled off the table, only that there are options that might be preferable to a WSR.

**David Robbins**, attorney and president of Hill and Robbins, P.C., said he has been practicing law for 40 years in the area of natural resources. David said the first thing the Working Group probably wants to do is to minimize conflicts with the federal land agencies. He said if you establish a WSR below an impoundment you create great conflict. He also said WSRs designated near to and upstream from a state line often don’t work well. He doesn’t believe that WSRs along state lines are advisable in Colorado because the state’s rivers are at the limit in terms of consumption. Colorado needs to protect its water use and rights. It may be a different situation in states with more water.

David said he wrote a law, passed in 2005, that created Colorado's Rio Grande Outstanding Natural Area, which follows the Rio Grande River from the southern boundary of the Alamosa National Wildlife Refuge to the New Mexico state border. The natural area was created as a solution to a conundrum on the Rio Grande River. The Rio Grande has a WSR designation in New Mexico downstream from the state line. This does not create a problem for Colorado, David said, because WSRs can't interfere with states' entitlements. The water going down the Rio Grande has to be in the amount that Colorado owes New Mexico, not more.

But the reach of the Rio Grande above the state line up to Alamosa sits below 600,000 acres of irrigated land. It was never designated as a WSR. That produced a conflict that required a new approach. David finally learned the BLM had designated an "outstanding natural area" in another state that provided river protection but had no FRWR. So he wrote a statute and it was passed. In the bill, Congress said the federal agencies should no longer study this reach of the Rio Grande for WSR suitability when land-use planning occurs. The benefit of this approach is that it achieved the same goals and benefits as WSR designation without the same conflicts. The BLM was able to see that a different management technique was needed for this reach below a huge irrigated area.

David said he supports the concept of WSRs but it is inappropriate to designate a WSR and try to write out of the law the very purposes for which the WSR Act was created. An NCA or other special management area might serve the group's purposes better; providing a flexible alternative with no water right required.

David said the legislation designating the Rio Grande Natural Area defines it as the corridor lying one-quarter mile from each side of the river. The legislation also sets up a management plan. The river corridor is half in private ownership, and the private landowners were encouraged but not required to participate in the development of the plan. Congress withdrew the area from mineral use, abandoned dam sites, and designated some roadless area within the corridor but did not designate a WSR. It was a real give-and-take but avoided the fight about a FRWR. David emphasized that when you make a deal, nobody gets everything he wants.

In response to questions, David said the natural-area legislation was written so as not to tighten water-quality standards upstream. But he said it's possible that New Mexico could demand higher water quality from Colorado for the WSR reach downstream.

Jim Siscoe asked if it is possible to maintain a consumptive-use right and still use the excess water for beneficial purposes such as recreation or a fishery. David said yes but it is not easy or cheap.

David Vackar asked if it is better for the Working Group to push for a permanent solution now or wait till there are more people and more conflicts on the Lower Dolores. David Robbins said if you reach consensus with a significant majority and the federal agencies are OK with the plan, you are better off with the long-term certainty provided by legislation

Roy Smith recommended that the group look at the language that created the Dominguez-Escalante NCA because it was very customized.

Cole asked whether establishing an NCA would mean dropping the possibility of a WSR. David said that would have to be written into the legislation.

**Jeff Widen** of the Wilderness Society was scheduled to give a presentation but it was postponed until the next meeting.

**Next meeting:** This will be Monday, March 8, at 5:30 p.m. (dinner at 5) at the Dolores Water Conservancy District office, 60 S. Cactus, Cortez.