

Questions Regarding Wild & Scenic Rivers Analysis – Water Rights/Water Projects

Does BLM obtain a federal water right if the agency determines that stream segments are suitable for wild & scenic river designation?

No. A BLM determination in a planning document is not sufficient to establish a water right. BLM does not obtain a federal water right unless the United States Congress officially designates a stream segment as Wild & Scenic.

If Congress does designate a stream segment as wild & scenic, what type of water right does BLM obtain?

BLM would obtain a water right that carries a priority date that is equal to the date Congress officially designated the stream. This means that the new water right would be junior to all existing water rights. BLM would then conduct studies to determine the minimum amount of water needed to support the outstandingly remarkable values. BLM's water right claim would be adjudicated through the state's water court system, and BLM would be required to prove the timing and amount of water sought is the minimum necessary to support the outstandingly remarkable values.

Since the water right would be a federal water right, would it automatically be able to take water away from other water rights?

No. The water right would be administered just like any other junior water right. The primary circumstance in which the federal right could impact senior water rights is if the owners sought to change those water rights. Just like any other junior water right, BLM would be entitled to stream conditions that existed at the time the water right was established. BLM could file an objection in water court to protect those conditions.

Would a suitability determination in a planning document allow BLM to become involved in water rights processes in order to protect the outstandingly remarkable values?

Until the U.S. Congress officially designates a stream segment as a Wild and Scenic River, the Wild and Scenic Rivers Act does not provide any additional authority or requirements for BLM to participate in water rights processes. This occurs because no water right is created for BLM until Congress actually designates the suitable segment. Agency actions to protect outstandingly remarkable values in the suitable segment are restricted to authorities the agency already possesses under other federal laws, including the Federal Land Policy and Management Act.

BLM involvement would be triggered only if the proposed water right would injure an existing BLM water right decreed for other purposes, and that would be highly unlikely. BLM would not be able to object to the proposed water right based upon injury to

outstandingly remarkable values. BLM would not yet have a water right, because the segment would not have yet been designated by Congress. Once a segment is designated, BLM would then need to quantify, via analytical studies, the precise amount of flow needed to support the outstandingly remarkable values.

Would BLM be forced to become involved in future water rights applications to export water from basins, even if those exports are upstream from the suitable segments?

Same answer as above.

Would BLM be forced to protest or recommend against land use authorizations by other federal agencies (especially Forest Service), if those authorizations are required to export water from upstream locations?

Whenever another federal agency is writing an environmental impact statement for a proposed project, the agency is required to seek comments from other federal agencies whose management responsibilities could be affected. If BLM were to comment, BLM would likely note the existence of any downstream stream segments that had been determined to be suitable. However, if Congress had not yet designated the segment, BLM would not have conducted any quantification studies that would allow the BLM to comment about exact amount of water required to support outstandingly remarkable values. Since future water export and storage projects are likely to capture a small percentage of peak snowmelt runoff flows, it is likely that these proposed projects would not significantly affect outstandingly remarkable values. Even if the proposed project was certain to affect outstandingly remarkable values, the decision making agency would not be obligated to make a decision to protect those values. NEPA processes require only that the decision-making agency is aware of the impact, but does not require that impacts be avoided.

If a proposed water project were located within a suitable segment, would BLM be forced to deny land use authorization for the proposed project?

BLM would refer to the land use plan currently in effect for guidance in how to respond to the proposal. If the current land use plan determined that the stream segment is “suitable,” BLM is obligated to not impair the free-flowing conditions of the segment by allowing dams, major diversions, rip-rap and other major water control infrastructure to be constructed in the river channel. BLM would likely deny a land use application to build the project. However, if stakeholders believed that construction of the project was absolutely essential for future water supplies, the stakeholders could request that BLM amend its land use plan. At that time, stakeholders could offer additional facts and rationale for BLM to change its determination from suitable to “non-suitable.”

Would a determination of suitability affect operations of currently existing water infrastructure in the segment?

A determination of suitability is based upon existing conditions in the stream corridor, including current ditches and diversions. Those facilities would continue to operate under the authorities and permits that allowed those structures to be constructed and operated. Many facilities were constructed prior to the passage of the Federal Land Policy and Management Act of 1976. These facilities would continue to operate under “grandfathered” rights-of-way. For these rights-of-way, historic operation and maintenance practices would be allowed to continue, because they are valid, existing rights.

- Does a determination of suitability create permanent protection for the stream segment, analogous to a wilderness study area?

No. A suitability determination remains in effect only as long as the land use plan that made that determination is in effect. BLM has the authority to change the determination via a land use plan amendment or during its next revision of the plan. In contrast, Wilderness Study Areas can be removed only with Congressional authorization.

- Isn't BLM required to make its wild & scenic river plans consistent with state and local land use plans that have identified these segments for future water supply projects?

BLM is required to make its land use plans as consistent as possible with local and state planning documents. However, any land use planning decisions must be also be consistent with federal laws, regulations, policies, and objectives. In the absence of specific land use proposals for water projects that are backed up by funding and feasibility studies, BLM is required to maintain and enhance water-related and multiple use values, including wildlife, recreation, and scenery.

- Why can't BLM protect water-related values using its other authorities, rather than relying upon the Wild & Scenic Rivers Act?

BLM is required by law to consider protection under the Wild & Scenic Rivers Act as part of its land use planning process. Determination of a river segment as suitable simply means that BLM will continue to use its administrative authorities to protect those values. So yes, BLM can protect water related values on an interim basis using existing authorities. The decision as to whether or not those values are worthy of permanent and enduring protection is left to the U.S. Congress. Congress can also consider other means of protection, including designation of national recreation areas, national conservation areas, or tailored legislation designed specifically for the stream in question.