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BRIAN A. ELLISON\*

# Bureaucratic Politics, the Bureau of Reclamation, and the Animas-La Plata Project

## ABSTRACT

*At the end of the 1990s the Bureau of Reclamation's Animas-La Plata Project in southwestern Colorado—after 30 years of planning—stood on the edge of oblivion. Though the Bureau had successfully negotiated a series of complex environmental impact negotiations, its construction of a reasonable and prudent alternative—designed to protect the endangered Colorado pikeminnow—was a patchwork of arrangements that violated the spirit of the Endangered Species Act, several of the Bureau's longstanding policies regarding water rights, and congressional authorization of the project. Since then the Bureau has addressed each of the fundamental flaws of the reasonable and prudent alternative, even securing a reauthorization for the project, and the construction of the Animas-La Plata Project is nearly complete. The purpose of this article is to reflect on the conduct of distributive politics and explore how the Bureau used its prowess in administrative process to save the project.*

## I. INTRODUCTION

The U.S. Bureau of Reclamation (Bureau) is constructing the Animas-La Plata Project (ALP) in southwest Colorado, near Durango and the Four Corners area.<sup>1</sup> ALP was first authorized for construction as

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1. The W.C. Kenney Watershed Protection Foundation, Denver, Colo., and the University Research Council, Appalachian State University, Boone, N.C., funded the research conducted for this article. Testimonial data used for this article were collected through 13 personal interviews conducted with project proponents and opponents—representing local, state and federal agencies, elected officials, and environmental activists—on two research trips to Denver and Durango, Colo., and Albuquerque, N.M., in May 2006 and March 2008. Documentary and archival data on the Animas-La Plata Project were collected at numerous local, state and federal agencies, and on-line. Different types of evidence were used to support substantive points in the ALP narrative and to shore-up internal validity in the case study. See generally ROBERT K. YIN, *CASE STUDY RESEARCH, DESIGN AND METHODS* (3rd ed. 2002); Randy Stoecker, *Evaluating and Rethinking the Case Study*, 39 *THE SOC. REV.* 88 (1991). This essay is also an update of earlier articles on the Animas-La Plata Project. See generally Brian A. Ellison, *Environmental Management and the New Politics of Western Water: The Animas-La Plata Project and Implementation of the Endangered Species Act*, 23 *ENVTL. MGMT.* 429 (1999) [hereinafter Ellison, *Environmental Management*]; Brian A. Ellison, *The Ad-*

a participating project in the Colorado River Basin Project Act of 1968,<sup>2</sup> which also approved construction of the Central Arizona Project and four other projects in Colorado. ALP was a traditional reclamation project between 1968 and 1999, and would have provided a variety of irrigation, municipal and industrial, fish and wildlife, and recreation benefits to people along the Animas River and La Plata River watersheds if constructed according to the Bureau's plans. The purpose of the project was to move water from the abundant Animas River to the drier La Plata River, where the land is flatter and more suitable for irrigated farming.<sup>3</sup> Like many other Bureau irrigation projects, ALP was never able to pass any tests of economic feasibility mostly because the scale of the project—calling for the irrigation of hundreds of thousands of acres with water being lifted hundreds of feet above the Animas River—made it too expensive for area farmers to reimburse the Bureau with the sale of alfalfa and surplus crops.<sup>4</sup>

Today, a different Animas-La Plata Project is being constructed. It is no longer designed to move water from the Animas River to the La Plata River, nor does it have an irrigation component. Instead, ALP is

*vocacy Coalition Framework and Implementation of the Endangered Species Act: A Case Study in Western Water Politics*, 26 POL'Y STUD. J. 11 (1998); Hannah Gosnell, *Section 7 of the Endangered Species Act and the Art of Compromise: The Evolution of a Reasonable and Prudent Alternative for the Animas-La Plata Project*, 41 NAT. RESOURCES J. 561 (2001).

2. The Animas-La Plata Project has been authorized for construction three times. First in the Colorado River Basin Project Act of 1968, 43 U.S.C. 620 (1968), second in the Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973 (1988), and third in the Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

3. U.S. BUREAU OF RECLAMATION, DENVER, COLORADO, DEFINITE PLAN REPORT: ANIMAS-LA PLATA PROJECT—COLORADO AND NEW MEXICO (1979).

4. On April 18, 1977, President Jimmy Carter issued a statement on water resource projects, referred to as Carter's "hit list," in which he announced the deletion of funds for 18 federal water projects. Jimmy Carter, Water Resource Projects, Statement Announcing Administration Decisions (Apr. 18, 1977). The Animas-La Plata Project was not on that list because the Senate had already eliminated it for financial considerations. Letter from Albert Nason to author, Archivist, Jimmy Carter Library, (Apr. 17, 2008) (on file with author). Additionally, at least two independent benefit-cost analyses have been conducted on the project, concluding that the project does not meet Bureau tests for economic feasibility. Letter from Dale E. Lehman, Professor of Economics, Fort Lewis College, to the Regional Director of the U.S. Bureau of Reclamation, Salt Lake City, Utah (Nov. 29, 1992) (on file with author); Memorandum from Charles W. Hope, Professor of Economics, University of Colorado Boulder, to Regional Director, U.S. Bureau of Reclamation, Salt Lake City, UT (Dec. 2, 1992) (on file with author). The project was split into two phases in 1986 in order to enhance its economic feasibility through cost sharing by project participants. See generally U.S. BUREAU OF RECLAMATION, AGREEMENT IN PRINCIPLE CONCERNING THE COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT AND BINDING AGREEMENT FOR ANIMAS-LA PLATA COST SHARING (1986).

being constructed to resolve federal reserve water rights claims<sup>5</sup> by the Ute Mountain Ute and Southern Ute Indians on the rivers that transect their reservations—reservations that lie in 15 by 110 mile horizontal strips along the Colorado-New Mexico border in southwestern Colorado and that include the Animas, La Plata, Piedra, and Florida Rivers.<sup>6</sup> According to the Bureau and other project proponents, such as the Colorado Water Conservation Board, the adjudication of Native American federal reserve water rights claims on these reservations would give the Ute Mountain Ute and Southern Ute Tribes all of the water that is currently on the reservations.<sup>7</sup> This adjudication could displace Anglo farmers on the reservations and cause a water war.<sup>8</sup> Hence, the Bureau will spend at least a half-billion dollars to construct a pumping station, inlet conduit, the Ridges Basin Dam, and the Nighthorse Reservoir to store 57,090 acre-feet of water to be used by the Ute Mountain Ute Tribe, the Southern Ute Tribe, the State of Colorado, the Navajo Nation, and three water districts.<sup>9</sup> The Colorado Water Court has designated the water in

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5. In *Winters v. United States*, 207 U.S. 564, 575-77 (1908), the U.S. Supreme Court ruled that the water rights needed for the intended use of a federal reserve were established when Congress set aside the land. These water rights, known as federal reserve water rights, “date from the year Congress created a reservation and exist whether or not [they] have [been] put to beneficial use.” Judith E. Jacobsen, *The Navajo Indian Irrigation Project and Quantification of Navajo Winters Rights*, 32 NAT. RESOURCES J. 825, 826 (1992). A methodology for quantifying federal reserve water rights on Indian reservations was established in *Arizona v. California*, 373 U.S. 546, 601 (1963). The Supreme Court ruled that a tribe is entitled to water needed for its practicable irrigable acreage. This quantification system often leads to claims for water rights that exceed the amount of water in entire river basins. Some in the Navajo Nation claim, for example, that they have title to more water than is currently used by the states of “New Mexico, Arizona, California, Nevada, Utah, Colorado, and Wyoming.” See Matt Jenkins, *Seeking the Water Jackpot*, HIGH COUNTRY NEWS (Mar. 17, 2008). See also DANIEL C. MCCOOL, *NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA* (2002); Ellison, *Environmental Management*, *supra* note 1.

6. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973; Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763.

7. Interview with D. Randolph Seaholm, Chief, Water Supply Protection, Colorado Water Conservation Board, in Denver, Colo. (May 10, 2008).

8. This is the position of the U.S. government, the States of Colorado and New Mexico, the Tribes, Tribal attorneys, and a host of others.

9. The table of project beneficiaries with storage in Nighthorse Reservoir include (in acre-feet):

the reservoir for municipal and industrial use,<sup>10</sup> though none of the project participants presently have the capacity to use the water.<sup>11</sup>

The Bureau has a longstanding and proud tradition of constructing projects—indeed some of the world’s largest dams and reservoirs—to provide the nation with reclamation benefits.<sup>12</sup> For the most part, reclamation has meant irrigation but real benefits also include municipal and industrial use, power generation, flood control, and recreation. Another mainstay of the reclamation program has been that reclamation beneficiaries pay the government for the public goods they receive from projects, even if those repayments are heavily subsidized through the agency’s “cash register” dams.<sup>13</sup> The revenues from these large dams and reservoirs—constructed on the Colorado, Columbia and other rivers—are used to help pay for irrigation projects that would not be affordable otherwise. Therefore, a balance of payments is theoretically maintained for the reclamation program—a practice known as river-basin accounting. ALP, however, goes beyond the old system of river basin accounting because most project costs will not be repaid. ALP will also require enormous operational subsidies in the form of the electricity needed to pump water uphill to fill Nighthorse Reservoir.<sup>14</sup> Still, many critical questions

Southern Ute Tribe: 16,525  
 Ute Mountain Ute Tribe: 16,525  
 ALP Water Conservancy District: 2,600  
 State of Colorado: 5,320  
 Navajo Nation: 2,340  
 San Juan Water Commission: 10,400  
 La Plata Water Conservancy Dist.: 780  
 TOTAL: 54,490

Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763.

10. Colorado District Court, Water Division 7, Case Nos. W-1603-76F, W-1603-76J, 02 CW 85, and 02 CW 86 (2006).

11. Interview with Phillip T. Doe, Chair, Citizens Progressive Alliance and Alison Maynard, Attorney, Citizens Progressive Alliance, Denver, Colo. (Mar. 10, 2008). Interview with D. Randolph Seaholm, *supra* note 7.

12. Even Marc Reisner’s classic critique of the Bureau of Reclamation pays tribute to the agency’s accomplishments. See generally MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* (Rev. ed. 1993).

13. Cash register dams, generally a derogatory term, were primarily constructed to generate hydropower revenues that could be used to pay for projects that were not economically feasible; usually irrigation projects like the original ALP. River-basin accounting allowed the Bureau to demonstrate the economic feasibility of its system, rather than a single project, and gave the agency the argument it needed to build more water projects—even water projects that were completely lacking in economic, environmental, or reclamation logic. See Reisner, *supra* note 12 at 135–136.

14. The Animas-La Plata Project that is currently under construction has three main features: a pumping plant on the Animas River, an inlet conduit, and Nighthorse Reservoir and Ridges Basin Dam. Water will be drawn from the Animas River and pumped 552 feet

about the Animas-La Plata Project remain unanswered: (1) how and when will any of the project beneficiaries use the water stored in Nighthorse Reservoir?; and, (2) why construct the project when it has been demonstrated that non-structural solutions to Native American water rights claims are effective and acceptable?<sup>15</sup>

Perhaps the most interesting development in the face of these questions is that 18 years ago ALP was at a virtual standstill over a series of issues related to the protection of endangered species in the San Juan River Basin. The fundamental issue was that in 1990 the U.S. Fish and Wildlife Service (Service) determined ALP posed a threat to the endangered Colorado pikeminnow in the San Juan River Basin and released a draft “jeopardy” biological opinion that did not include a reasonable and prudent alternative.<sup>16</sup> Though the Service released a final biological opinion that included a reasonable and prudent alternative in 1991,<sup>17</sup> several of its features were clearly illegal and violated the congressional intent of both the Endangered Species Act and the Animas-La Plata Project.<sup>18</sup> Yet today, 18 years later, ALP is near completion.

The purpose of this article is to describe how officials in the Bureau and project proponents used their prowess in administrative process to secure funding for the construction of ALP in the face of enormous obstacles. This description is difficult because sorting through the administrative morass that surrounds the project is deliberately

uphill for delivery into the reservoir. The Bureau estimates that the project will require 67,100,100 kWh of electricity, but notes this power is being delivered cheaply under the obligations of the Colorado River Storage Project Act. Interview with Barry Longwell, Deputy Construction Engineer, Four Corners Construction Office, U.S. Bureau of Reclamation, Durango, Colo. (Mar. 14, 2008).

15. The Ute Mountain Ute and Southern Ute Tribes received \$40 million dollars in the Colorado Ute Settlement Act of 2000 to purchase 13,000 acre-feet of water rights on the Pine, Florida, Animas, La Plata and Mancos Rivers, and McElmo Creek because ALP does not meet the Tribes’ allocation under the Colorado Ute Indian Final Settlement Agreement of 1986 as ratified in the Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973.

16. U.S. FISH & WILDLIFE SERVICE, DRAFT BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO (1990). According to the regulations that govern implementation of the Endangered Species Act, an agency is required to consult with the Service if its actions will affect an endangered species or its habitat. 50 C.F.R. § 402 (June 3, 1986) (implementing regulations for the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543). This is called a Section 7 consultation and the result is either a “no jeopardy” or “jeopardy” biological opinion on the project. *Id.* If the Service issues a jeopardy biological opinion, the action agency and the Service may develop a “reasonable and prudent alternative” designed to mitigate the impacts of an action. *Id.*

17. U.S. FISH & WILDLIFE SERVICE, FINAL BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO (1991).

18. See generally Ellison, *Environmental Management*, *supra* note 1.

daunting. It not only reflects the complexity associated with natural resources development but, more fundamentally, the demise of federalism and constitutional politics, and the rise of the administrative state. Today, agencies and the administrative process—rather than Congress and the democratic process—dominate politics in distributive policy arenas.<sup>19</sup> One effect of this decision-making transition—from constitutional politics to administrative process—has been to distract and desensitize the public to a variety of political issues that should be front-and-center, such as discussions about natural resources development. The Animas-La Plata Project makes a good case to illuminate this point because the project is fraught with issues, which range from the protection of endangered species and the environment, to reasonable concern for taxpayer money, to the settlement of Native American water rights claims and the re-regulation of the San Juan River, that have largely been settled administratively.

The discussion in the following section will examine the relationship between bureaucratic politics and natural resources management. Next, the resolution of a variety of problems in water resources management in the San Juan River Basin will be illuminated through an updated case study of Endangered Species Act compliance for the Animas-La Plata Project. Finally, lessons from this system of distributive politics through bureaucratic government will be discussed along with a qualitative analysis of the costs and benefits associated with this type of governing.

## II. BUREAUCRATIC POLITICS AND THE ADMINISTRATIVE STATE

Gary Lawson declared in the *Harvard Law Review* that “[t]he post-New Deal administrative state is unconstitutional.”<sup>20</sup> By unconstitutional, Lawson contends that the administrative state is at a “variance with the Constitution’s original public meaning.”<sup>21</sup> His argument rests on the assertion that not only does the administrative state have legislative, executive, and judicial powers, but that the formal political institutions—Congress, the Presidency, and the Supreme Court—have abandoned the sacred precepts of American government, such as the nondelegation doctrine, the unitary executive, and the independent judi-

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19. *Id.*

20. Gary Lawson, *The Rise and the Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1993–1994). For a similar argument, see generally DOUGLAS YATES, BUREAUCRATIC DEMOCRACY: THE SEARCH FOR DEMOCRACY AND EFFICIENCY IN AMERICAN GOVERNMENT (1982).

21. Lawson, *supra* note 20.

ciary. Even more dramatically, Lawson argues that the administrative state is made powerful because we have abandoned the concept of a limited national government, as enshrined in the enumerated powers of Article I of the U.S. Constitution. Hence, actors in the national government feel little compunction when they meddle in education, health care, elections, local public administration, and other areas of governing that are reserved to the states.<sup>22</sup>

Lawson's argument is dramatic but understated. The United States of America is largely governed by the administrative state, which includes national, state, and local agencies that share jurisdiction over substantive policy arenas. It should not be inferred that legislatures, elected executives, and judiciaries do not have significant powers, because they do. Each of these institutions still checks administrative power here and there, especially when the constituency of a significant politician is affected. But most administrative activities go unnoticed and most arenas of governing have become so complex that it is extraordinarily difficult for citizens to participate.

This complexity is prevalent in natural resources management and, especially so, in water resources development. In order to secure the start of construction on the Animas-La Plata Project, for example, Bureau officials wrote an environmental impact statement, conducted a "Section 7" consultation on the protection of endangered species, applied for a dredge and fill permit, applied for the adjudication of water rights, managed cultural resources, and wrote contracts under the Indian Self Determination and Education Assistance Act, all while negotiating with groups and governments as diverse as tribal governments, states, municipalities, special districts, interested parties, and other state and federal agencies. Yet, this is just the tip of the administrative iceberg.

At the heart of all this activity are concerns about who wins and who loses in governing. Politics is often defined as the "authoritative allocation of values for a society"<sup>23</sup> and should be ideally conducted by our political institutions—legislatures, elected executives, and high courts—at the appropriate level of government. Meanwhile, the purpose of the administrative state is to deliver public goods and services.<sup>24</sup> Thus, agencies should respond once Congress decides that action is necessary. Unfortunately, this assertion is democratic wishful thinking because it does not describe how governing in America is conducted. In distributive pol-

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22. *See id.*

23. DAVID EASTON, *THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICAL SCIENCE* 134 (1953).

24. Brian A. Ellison, *Public Administration Reform in Eastern Europe: A Research Note and a Look at Bulgaria*, 39 *ADMIN. & SOC'Y* 221, 222 (2007).



icy arenas<sup>25</sup> in particular, administrative agencies and their clientele provide politicians with the justification for action. This is nothing new. What is different, however, is that the platform for the conduct of distributive politics is not Congress and the appropriations process, but agencies and administrative process. For example, those who control the flow of information that goes into writing a successful environmental impact statement decide the winners and losers in natural resource management.

### A. Bureaucratic Politics

The administrative state in the United States is a collection of public organizations—referred to as departments, agencies, bureaus, commissions, and public corporations—all created through the political process to deliver public goods and services. Though ostensibly considered the managers of governments, scholars know that administrators are political actors themselves, and that they have a stake in how policy should be constructed and how public goods and services should be delivered.<sup>26</sup> A good deal of political and scholarly attention has been devoted to the role of administrators in the policy process because the U.S. Constitution provides us with little guidance regarding the construction of the administrative state—save the reference to the President's ability to choose a cabinet in Article II. The role of the administrative state was not a concern when government in the United States was relatively sim-

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25. Theories of distributive policy formulation have typically dominated discussions about the construction of western water projects. The argument is that spending on western water projects reflects a political calculus designed to ensure particularistic benefits for farmers, municipalities, and power users and continuing reelection for congresspersons, while the costs are broadly dispersed across the country. The strength of this system, often called an "iron triangle" or a sub-government, lay in the ability of a few key western congresspersons to control the flow of authorizations and appropriations for western water projects. See DANIEL C. MCCOOL, *COMMAND OF THE WATERS: IRON TRIANGLES AND FEDERAL WATER DEVELOPMENT* 5–12 (1994). See generally T.R. Miller, *Recent Trends in Federal Water Resource Management: Are "Iron Triangles" in Retreat?*, 5 *POL'Y STUD. REV.* 395 (1985); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (1979); Dean E. Mann, *Political Incentives in U.S. Water Policy: Relationships Between Distributive and Regulatory Politics*, in *WHAT GOVERNMENT DOES* (Mathew Holden, Jr. & D.L. Dresang, eds., 1975); EMMETT S. REDFORD, *DEMOCRACY AND THE ADMINISTRATIVE STATE* (1969); ARTHUR MAASS, *MUDDY WATERS* (1951).

26. See generally DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* (2001); Larry B. Hill, *Who Governs the Administrative State? A Bureaucratic-Centered Image of Governance*, 1 *J. OF PUB. ADMIN. RES. & THEORY* 261 (1991); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989); HAROLD SEIDMAN & R. GILMOUR, *POLITICS, POSITION AND POWER: FROM THE POSITIVE TO THE REGULATORY STATE* (1986); FRANCIS E. ROURKE, *BUREAUCRACY, POLITICS, AND PUBLIC POLICY* (3rd. ed. 1984).

ple. We began with an administrative state that was organized and managed by gentlemen between 1789 and the 1820s. Then Democratic reformers in the late 1820s, lead by President Andrew Jackson, argued that political partisans should manage government and that gave rise to the spoils system.<sup>27</sup>

These systems of public administration were developed when the United States was in its infancy, which did not last long. By the late 1800s, the United States had the world's largest and most productive economy, and reformers sought to construct a government that could manage it.<sup>28</sup> During the progressive era, roughly 1883 to 1921, the foundation for the modern administrative state was constructed on the "gospel of efficiency,"<sup>29</sup> the scientific management movement,<sup>30</sup> and political neutrality in public administration.<sup>31</sup> Although the scholarship on these fundamental tenets of administration is vast and a good deal of debate continues regarding the influence of these various movements, these ideas formed the foundation for administrative statecraft during the progressive era and continue to influence administrative activity today.<sup>32</sup> Indeed, the influence of science and efficiency was so significant that most major administrative reforms since the progressive era have sought to protect democratic accountability on the one hand and promote administrative rationality on the other.<sup>33</sup> By 1946, the country recognized the need to check administrative power—specifically, to draw some line between the exercise of executive, legislative, and judicial powers by agen-

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27. See FREDERICK C. MOSHER, *DEMOCRACY AND THE PUBLIC SERVICE* 64–66 (2nd ed. 1982).

28. See HERBERT DAVID CROLY, *THE PROMISE OF AMERICAN LIFE* 157–194 (2007).

29. See SAMUEL P. HAYES, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890–1920* (1959).

30. See FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (Norton Library 1967) (1911).

31. See Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197 (1887).

32. This is especially true in natural resources management because the developmental agencies—the U.S. Forest Service, Bureau of Reclamation, Bureau of Land Management (BLM), U.S. Fish & Wildlife Service, and the National Park Service—were largely constructed on the ideas of the conservationists and conservationism, which was a fundamental feature of progressive thinking. Reform in these organizations—some created with different names, like the Grazing Service (now BLM)—followed a management reform process through the introduction of concepts such as dominant use, multiple use, and ecosystems management. Water resource managers now talk about adaptive management and conjunctive management. The bottom line of all these reforms is seeking the proper balance between science and democracy.

33. Brian A. Ellison, *Bureaucratic Politics as Agency Competition: A Comparative Perspective*, 29 *INT'L. J. OF PUB. ADMIN.* 1259, 1262 (2006).

cies—and did so through the Administrative Procedure Act.<sup>34</sup> The plethora of legislation passed during the environmental movement—with cross-cutting requirements and standing for citizens to sue agencies that failed to comply with them—was an effort to check science with science and bring some democratic practice to administrative decision-making.<sup>35</sup> Recent management movements in public administration, including the concerns about representative bureaucracy,<sup>36</sup> Total Quality Management,<sup>37</sup> and the New Public Management,<sup>38</sup> fit these same themes of reform.<sup>39</sup>

## B. Bureaucratic Competition in the Policy Process

Competition is the essence of bureaucratic politics and power.<sup>40</sup> Administrators compete in the policy process to maintain their interests

34. See Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440–441 (1989).

35. One reason the environmental movement—a label we use to describe creation of the U.S. Environmental Protection Agency (EPA) in 1970 and passage of a host of environmental protection legislation, such as the National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1970), Clean Water Act (Federal Water Pollution Control Act Amendments of 1972), 33 U.S.C. §§ 1251–1387 (1972), Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (1973)—is important in that it changed the way Congress charged agencies with responsibility to protect the environment. Rather than create an agency to implement the National Environmental Policy Act (NEPA), Congress made all agencies responsible for assessing environmental impacts and writing environmental impact statements. Hence, the regulations crossed agencies and are called cross-cutting requirements. These statutes also gave citizens standing to sue federal agencies that failed to implement them. Another reform is that the EPA Administrator was to be held politically accountable for the implementation of technical responsibilities—such as the establishment of standards for point sources of pollution as required by the Clean Water Act. These provisions were designed to force administrators to protect the environment. An empirical assessment of the struggle between elected officials and bureaucratic power is provided in B. Dan Wood, *Principles, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213 (1988). Wood demonstrates that these statutes gave agencies formidable power in bureaucratic politics.

36. See MOSHER *supra* note 27, at 98–102.

37. See generally W. EDWARDS DEMING, *THE NEW ECONOMICS: FOR INDUSTRY, GOVERNMENT, EDUCATION* (2nd ed. 2000).

38. See generally DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1993).

39. See generally JACK H. KNOTT & GARY J. MILLER, *REFORMING BUREAUCRACY: THE POLITICS OF INSTITUTIONAL CHOICE* (1987); JOHN P. BURKE, *BUREAUCRATIC RESPONSIBILITY* (1986).

40. Todd Kunioka & Lawrence S. Rothenberg, *The Politics of Bureaucratic Competition: The Case of Natural Resource Policy*, 12 J. OF POL'Y ANALYSIS & MGMT. 700 (1993); Jonathan Bender & Terry M. Moe, *An Adaptive Model of Bureaucratic Politics*, 79 AM. POL. SCI. REV. 755 (1985).

and achieve their goals.<sup>41</sup> The critical question is what are those administrative interests and goals, and are they in the public interest? Early scholars of bureaucratic politics contended that agencies struggle for more resources—more money, employees, and responsibilities.<sup>42</sup> Thus, like any corporation in the private sector, administrators compete for an ever-greater share of the public market. Though this struggle for more resources is not necessarily insidious—indeed the New Public Management is constructed on this idea—William A. Niskanen argues that administrative interest is fundamentally at odds with the public interest because we lack a theory of administrative statecraft that relates the “preferences of constituencies” to the activities of agencies.<sup>43</sup> The distance between democratic accountability and administrative rationality is structural and inevitable, and a feature of human nature and a weakness of political science.

A second set of scholars argue that administrators and agencies are more interested in the maintenance of agency autonomy than expanding their reach and resources. James Q. Wilson defines autonomy as relatively undisputed jurisdiction over specific policy arenas.<sup>44</sup> Thus, administrators avoid new responsibilities because they rarely come with expanded resources. Instead, new responsibilities carry the burden of new clients, more oversight, and new opportunities for failure. This is especially true when new responsibilities are in conflict with the agency’s basic operational objectives, or “core tasks.”<sup>45</sup> In recent work, Daniel P. Carpenter defined autonomy in terms of the agency’s independent policymaking power.<sup>46</sup> He argues that administrators in successfully autonomous agencies offer unique services and understand how to protect themselves through multiple and diverse political affiliations.<sup>47</sup> Thus, organizational autonomy is a function of an agency’s ability to protect the legal, technical, and fiscal mechanisms that structure its jurisdiction.<sup>48</sup>

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41. See Brian A. Ellison, *Autonomy in Action: Bureaucratic Competition Among Functional Rivals in Denver Water Politics*, 14.5 POL’Y STUD. REV. 25–48 (1995). See generally FRANCIS E. ROURKE, *BUREAUCRACY, POLITICS, AND PUBLIC POLICY* (3rd ed. 1984).

42. See Ellison, *supra* note 41. See generally WILLIAM A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

43. Niskanen, *supra* note 42, at 27, 128.

44. Wilson, *supra* note 31, at 183.

45. *Id.* at 223–224.

46. CARPENTER, *supra* note 26, at 18.

47. *Id.* at 31.

48. Stephen P. Mumme & Scott T. Moore, *Agency Autonomy in Transboundary Resource Management: The United States Section of the International Boundary and Water Commission, United States and Mexico*, 30 NAT. RESOURCES J. 661, 664 (1990).

Whether administrators struggle in the policy process for more resources and responsibilities or agency autonomy, many scholars of bureaucratic politics point to two fundamental sources of power—expertise and constituency support<sup>49</sup>—that administrators use to compete in the policy process. Though all agencies possess some aspects of these sources of power, some are better suited to demonstrate them than others. Agencies that provide the public with tangible benefits, such as the construction of a dam and reservoir, tend to be more successful in the eyes of the public than regulatory agencies that often have the unwanted task of controlling behavior.<sup>50</sup> For the purposes of this study, these two sources of bureaucratic power will be described in the context of managing and controlling administrative process.

Expertise is the essence of administrative statecraft in the United States.<sup>51</sup> In general, we put our engineers in one agency, our biologists in another, and our social workers in yet another in order to, theoretically, protect the public interest and produce efficiency. The public interest is protected because administrative discretion in agencies is checked with professionalism rather than politics, and efficiency is produced through specialization. Expertise is a critical source of power for administrators because it allows them to control the flow of information and advice. In a related vein, agencies that are structured around a dominant profession tend to have more power in the policy process than those that do not.<sup>52</sup> Constituency support can be understood as the management of internal and external groups, both private and public, in the policy process.<sup>53</sup>

In summary, administrators use these sources of bureaucratic power to compete in the policy process—which involves the collection of resources and the protection of autonomy. Ideally, administrators struggle to protect their ability to make public policy and deliver public goods and services; they want to define what needs to be done and do it. Administrators protect their autonomy through competition, by controlling

49. ROURKE, *supra* note 41, at 15, 48. See also Wood, *supra* note 35; HAROLD SEIDMAN & R. GILMOUR, *POLITICS, POSITION AND POWER: FROM THE POSITIVE TO THE REGULATORY STATE* (1986); JEANNE NIENABER CLARKE & DANIEL C. MCCOOL, *STAKING OUT THE TERRAIN: POWER DIFFERENTIALS AMONG NATURAL RESOURCE MANAGEMENT AGENCIES* (1985).

50. CLARKE & MCCOOL, *supra* note 49, at 7.

51. ROURKE, *supra* note 41, at 108.

52. BRIAN J. COOK, *BUREAUCRATIC POLITICS AND REGULATORY REFORM: THE EPA AND EMISSIONS TRADING* 59–60 (1988). Cook provides an interesting study on competition among professions in the U.S. Environmental Protection Agency (EPA) and the development of solutions to air pollution. Lawyers in the EPA advocated a regulatory scheme, scientists advocated a technical solution, and economists urged the development of a market solution. The economists won because they made a better case to the public for their solution. *Id.* at 124. See also CLARKE & MCCOOL, *supra* note 49.

53. ROURKE, *supra* note 41, at 125.

decision-making, and fending off their rivals in the policy process. Finally, it is important to note that the purpose of this article is not to provide a normative argument regarding the ability of agencies to protect the environment through the implementation of cross-cutting regulations. The purpose of the article is to describe how administrators get what they want from the policy process, which is often in contradiction to sound environmental management. Indeed, Robert Paehlke and Douglas Torgerson contend that environmental protection tends to be of secondary consideration in these processes.<sup>54</sup> Instead, the fundamental objective of governance in these policy arenas is maintaining development rather than protecting the environment.<sup>55</sup>

### III. THE ANIMAS-LA PLATA PROJECT AND IMPLEMENTATION OF THE ENDANGERED SPECIES ACT

Starting construction on the Animas-La Plata Project took a good deal of time because, for many years, it was a project looking for a purpose rather than a purpose looking for project. As noted earlier, the initial idea—proposed as early as 1904—was to move water for irrigation from the Animas River to the La Plata River watershed. In 1956, Congress called for a feasibility report for the project—delivered in 1966—which described the project as a dam and reservoir high on the Animas River with a gravity flow diversion to the La Plata River.<sup>56</sup> When ALP was authorized for construction in 1968, it was the product of simple pork-barrel politicking, Colorado's western versus eastern slope conflict over water and development, and the struggle to store state allocations under the Colorado River Compact of 1922.<sup>57</sup> Congressman Wayne Aspinall, a Democrat from Colorado's 3rd District and chairman of the House Committee on Interior and Insular Affairs, brokered a deal in which he exchanged his support for the Central Arizona Project for broader congressional support of ALP and four other Colorado water projects.<sup>58</sup>

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54. Douglas Torgerson & Robert Paehlke, *Environmental Administration: Revising the Agenda of Inquiry and Practice*, in *MANAGING LEVIATHAN: ENVIRONMENTAL POLITICS AND THE ADMINISTRATIVE STATE* (Douglas Torgerson & Robert Paehlke, eds., 2005).

55. Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 306–320 (John E. Chubb & Paul E. Peterson, eds., 1989). Moe contends that agencies were not constructed to be effective. Instead, their structure, and therefore behavior, is a reflection of interest group politics. *Id.* at 267.

56. U.S. DEP'T OF THE INTERIOR, REPORT TO CONGRESS ON THE ANIMAS-LA PLATA PROJECT, COLORADO-NEW MEXICO: PURSUANT TO THE PROVISIONS OF 53 STAT. 1187 (1967).

57. REISNER, *supra* note 12, at 290–293. See also HELEN INGRAM, *WATER POLITICS: CONTINUITY AND CHANGE* (1990).

58. REISNER, *supra* note 12, at 290–293.

ALP has always had some features that would serve Native Americans. Water was made available to Native Americans for cattle in the 1966 feasibility report, and the 1979 Definite Plan Report listed Native Americans among the project's beneficiaries.<sup>59</sup> But these were secondary aspects because ALP was designed to be an irrigation project for Anglo farmers.<sup>60</sup> ALP became a Native American water project after the Ute Mountain Ute Indians sued for adjudication and quantification of their water rights on the Ute Mountain Ute Reservation in 1972.<sup>61</sup> This action, taken up by the U.S. Department of Justice and subsequent calls by the Carter and Reagan administrations for cost sharing by project proponents, forced them into a somewhat unusual process designed to resolve these problems. The result was two agreements that would resolve Native American water rights claims<sup>62</sup> and to provide cost-sharing by project beneficiaries—especially the states.<sup>63</sup> Taken together, the agreements split the Animas-La Plata Project into two phases. Phase one

59. There is some confusion with regard to ALP and the "hit list." See discussion *supra* note 4. James Decker contends that the project survived because it was deemed beneficial to Native Americans. James C. Decker, *Conflicts in the Department of the Interior: Water Project, Indian Trust Responsibility, and Squawfish*, COMMON GROUND, THE THIRD ANNUAL NATIONAL STUDENT ENVIRONMENTAL CONFERENCE 26 (1991). We could also conclude by inference that Carter did not veto the project because the Definite Plan Report for the project had not been completed and, hence, was not ripe for consideration.

60. Land ownership on the Southern Ute Reservation is complex. The Southern Ute Tribe accepted the federal government's allotment plan for the reservation in 1894–1895, meaning that members of the Southern Ute Tribe accepted individual parcels of land. Meanwhile, the Weeminuche Band, now Ute Mountain Ute Tribe, moved to the western part of the Southern Ute Reservation to protest the allotment program. The reservation was open to homesteading in 1899. The subsequent sale of allotments to non-Indians created a checkerboard pattern of land ownership on the Southern Ute Reservation in which the most productive lands are in the hands of non-Indians. This is an extremely complicated story that has mostly been pieced together through the Supreme Court's decision in *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159 (1971).

The map on page 2-32 of the Final Supplemental Environmental Impact Statement (2000) provides a picture of land available for sale on the Southern Ute and Ute Mountain Ute Reservations. No land is available for sale on the Ute Mountain Ute Reservation, while non-Indians own most of the acreage along the La Plata, Animas, Florida and Pine Rivers on the Southern Ute Reservation. U.S. BUREAU OF RECLAMATION, ANIMAS-LA PLATA PROJECT, COLORADO-NEW MEXICO: FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (2000) [hereinafter U.S. BUREAU OF RECLAMATION, FSEIS], available at [www.usbr.gov/uc/envdocs/eis/animas/fseis/index](http://www.usbr.gov/uc/envdocs/eis/animas/fseis/index).

61. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973. In 2007 there were 9,500 non-Indians living on the Southern Ute Reservation along with only 1,000 members of the Southern Ute Tribe. Susan Moran, *Indian Tribe Becomes Force in West's Energy Boom*, N.Y. TIMES, July 24, 2007.

62. U.S. BUREAU OF RECLAMATION, COLORADO UTE INDIAN WATER RIGHTS FINAL SETTLEMENT AGREEMENT (1986).

63. U.S. BUREAU OF RECLAMATION, *supra* note 4.

would be constructed and financed by the Bureau, and phase two would be financed by the states and built on an indeterminate schedule. In exchange for quantification of their water rights on the reservations, the water rights in the Animas-La Plata and Dolores projects, as well as a \$60.5 million Tribal Development Fund, the Ute Mountain Ute and Southern Ute Indians agreed to relinquish their claims to federal reserve water rights on the reservations if phase one of the Animas-La Plata Project was constructed by the year 2000. Congress ratified these agreements in the Colorado Ute Indian Water Rights Settlement Act of 1988.<sup>64</sup>

### A. Implementing the Endangered Species Act

The U.S. Fish and Wildlife Service issued a draft jeopardy biological opinion just when the stage was set for construction to begin on the project in May 1990.<sup>65</sup> In the draft opinion, the Service contended that ALP would harm critical habitat for the Colorado pikeminnow but offered no reasonable and prudent alternative (RPA). In response, the Bureau assembled three committees—biological, hydrological, and legal—to form a response to the draft biological opinion and develop an RPA.<sup>66</sup> In 1991, the Service issued a final biological opinion that did include an RPA for ALP. Though complex, the Service acquiesced to a Bureau proposal for an RPA that included these elements:

1. Limit construction of the Animas-La Plata Project to three features—Ridges Basin Reservoir, Durango Pumping Plant, and the inlet conduit—and to limit depletions to 57,100 acre-feet;
2. Fund a seven-year research effort on the San Juan River and its tributaries;
3. Operate Navajo Dam for the duration of the research project to mimic the natural hydrograph of the San Juan River;
4. Operate Navajo Dam for the benefit of the Colorado [pikeminnow] for the life of the Animas-La Plata Project;
5. Develop a recovery implementation program for the Colorado [pikeminnow] on the San Juan River.<sup>67</sup>

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64. U.S. BUREAU OF RECLAMATION, *supra* note 3.

65. U.S. FISH & WILDLIFE SERV., DRAFT BIOLOGICAL OPINION FOR THE ANIMAS LA PLATA PROJECT, COLORADO AND NEW MEXICO (1990). For a full description of the proceedings leading to the development of the reasonable and prudent alternative for ALP, see Ellison, *Environmental Management*, *supra* note 1.

66. Ellison, *Environmental Management*, *supra* note 1.

67. U.S. FISH & WILDLIFE SERV., FINAL BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO 32–33 (1991).



According to the implementing regulations of the Endangered Species Act, an alternative is considered reasonable and prudent if:

1. It can be implemented by the lead federal agency in a manner consistent with the intended purposes of the project;
2. The Service believes it would avoid the likelihood of jeopardizing the continued existence of the listed species;
3. It can be formulated in such a way that it can be implemented by the lead federal agency consistent with the scope of its legal authority and jurisdiction;
4. It is economically and technically feasible.<sup>68</sup>

These criteria can be used to assess the degree to which the RPA is in compliance with the implementing regulations of the Endangered Species Act. In 1991, the RPA violated each of these criteria. A brief summary of how the RPA violated these criteria, along with a description of the Bureau's subsequent activities, is provided in the following sections.

1. *"It can be implemented by the lead federal agency in a manner consistent with the intended purpose of the project."*<sup>69</sup>

As noted earlier, in 1991 the Animas-La Plata Project was one of the Bureau's last and largest reclamation projects. It included pumping stations, two storage reservoirs, conduits, laterals, canals, etc., all designed to transfer irrigation water from the Animas River to the La Plata River. Construction of the three initial features, as contemplated in the 1991 RPA, clearly violated the law and the spirit of ALP with regard to this first criterion since the three initial features would not provide irrigation benefits or transfer water from the Animas to the La Plata.

Several factors came together to force the Bureau to redesign ALP and to seek a new authorization for it. The most important of these factors was the Colorado Ute Water Rights Settlement Act of 1988, which required construction of phase one of ALP by the year 2000 in order to avoid costly litigation by the Tribes for their water rights. In 1996, Secretary of the Interior Bruce Babbitt and Colorado Governor Roy Romer created a process designed to resolve the ALP impasse as the pace of administrative, scientific, and fiscal processes made it clear that this deadline would not be met.<sup>70</sup> The "Romer/Schoettler process"<sup>71</sup> brought

68. ESA Final Rule, 50 C.F.R. § 402.02 (1986).

69. *Id.*

70. For a broad description of the ALP problem and the Romer/Schoettler process, see Ed Marston, *Cease-fire Called on the Animas-La Plata Front*, HIGH COUNTRY NEWS, Nov. 11, 1996.

71. The process was also named after Colorado Lt. Governor Gail Schoettler.

a variety of groups to the negotiating table—including several project opponents such as Earth Justice—and produced a justification for a scaled down ALP, containing both structural and non-structural components that could be used to meet the needs of the Ute Tribes. These components included, for example, the expansion of existing federal water storage facilities in the San Juan River Basin, water conservation proposals, and a fund for the acquisition of water rights. Though a catalyst for change, Secretary Babbitt rejected the Romer/Schoettler proposal and instead entered into a series of secret negotiations with the Ute Tribes and project proponents. The Animas-La Plata Project that emerged from these negotiations did not have an irrigation component but did include a municipal and industrial reservoir for the Ute Tribes, the Navajo Nation, and several special districts, and it provided a \$40 million fund for the Tribes to purchase water rights; it also included the Navajo Nation Municipal Pipeline. The proposal also came with a promise to subject the project to “full environmental review, including a review of competing non-structural proposals to settle the Tribes’ water rights claims.”<sup>72</sup>

The Bureau successfully sought and attained reauthorization of ALP based on this proposal. The Colorado Ute Settlement Act Amendments of 2000 authorized the Bureau to construct, operate, and maintain “a reservoir, a pumping plant, a reservoir inlet conduit, and appurtenant facilities with sufficient capacity to divert and store water from the Animas River to provide for an average annual depletion of 57,100 acre-feet of water to be used for a municipal and industrial water supply.”<sup>73</sup> Thus, the Animas-La Plata Project was changed from a large, trans-basin diversion and irrigation project to a smaller municipal and industrial water supply project.

2. “*The Service believes it would avoid the likelihood of jeopardizing the continued existence of the listed species.*”<sup>74</sup>

The Service concluded three times that construction of ALP would jeopardize the Colorado pikeminnow and its habitat.<sup>75</sup> In 1979, the Ser-

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72. *Colorado Ute Indian Water Rights: Testimony on S. 2508, The Colorado Ute Settlement Act Amendments of 2000*, 106th Cong. 3 (2000) (statement of David J. Hayes, Deputy Sec’y of the Interior before the Senate Commission on Indian Affairs).

73. Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114. Stat. 2763.

74. ESA Final Rule, 50 C.F.R. § 402.02 (1986).

75. U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO (1979); U.S. FISH & WILDLIFE SERVICE, DRAFT BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO (1990); U.S. FISH & WILDLIFE SERVICE, FINAL BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO (1991).

vice noted that while the Animas-La Plata Project would “further degrade the San Juan River to a point that this population would be lost,” the species would continue to survive in the Green and Colorado Rivers.<sup>76</sup> In 1990, the Service changed its position on the expendability of the San Juan River pikeminnow population and issued a jeopardy biological opinion on ALP. In 1991, the Service concluded that it could not support construction of the full ALP and acquiesced on construction of the three initial features because it could not determine—in the context of mitigation strategies and hydrological modeling—what affect these features would have on the pikeminnow. In the end, the RPA was built on the odd logic that a study of the pikeminnow should continue along with construction of a project that threatens them.<sup>77</sup>

At the heart of this conflict are the needs of the Colorado pikeminnow. The pikeminnow survived in western river systems that have historically had great seasonable variations in flow; melting winter snow packs brought spring deluges, with lesser flows in the summer. It has been documented that pikeminnow reproduction occurs in response to the combination of silt, seasonal pulses of water, and access to flooded areas. Service biologists believed in 1990 that the free flowing Animas River, the only substantial unregulated river in the San Juan River Basin, had helped the pikeminnow survive. Thus, the key to the RPA in the 1991 final biological opinion was agreement that the Bureau would spill approximately 300,000 acre-feet of water from Navajo Reservoir to mimic the natural hydrograph of the San Juan River.<sup>78</sup>

While the Service biologists considered this a “biologically indefensible” solution in 1991, the program seems to be working today. The research effort, in combination with a sophisticated spill regime,<sup>79</sup> have produced conditions on the San Juan River that are positively affecting the pikeminnow and the razorback sucker, another endangered species.<sup>80</sup> These improved ecological conditions are reflected in water quality, energy sources, physical habitat, and biotic interactions—in

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76. U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO 5 (1979).

77. See *id.* See also Brian A. Ellison, *The Advocacy Coalition Framework and Implementation of the Endangered Species Act: A Case Study in Western Water Politics*, 26.1 POL’Y STUD. J. 11–29 (1998).

78. U.S. FISH & WILDLIFE SERV., FINAL BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO 32–35 (1991).

79. PAUL B. HOLDEN, FLOW RECOMMENDATIONS FOR THE SAN JUAN RIVER. SAN JUAN RIVER RECOVERY IMPLEMENTATION PROGRAM, U.S. FISH & WILDLIFE SERV. (1999).

80. Interview with James E. Brooks, Project Leader, U.S. Fish & Wildlife Serv., in Albuquerque, N.M. (Mar. 12, 2008). Interview with David L. Propst, Ichthyologist Conservation Services Div., N.M. Dep’t of Game & Fish, in Albuquerque, N.M. (Mar. 11, 2008).

short, the fundamental variables that help define a functional environment.<sup>81</sup> Thus, where skepticism prevailed, Service biologists today have noted that the San Juan River Basin Recovery Implementation Program (SJRRIP)—tied to both ALP and the Navajo Indian Irrigation Project—has protected both developmental and environmental interests. Most importantly, the program has: (1) brought otherwise disparate interests together; (2) provided real water to work with for the protection of the fish and other species; (3) given legitimacy to the concept that fish and other species deserve water for survival; and (4) has provided a steady source of funding for environmental protection.<sup>82</sup> In the end, biologists contend that it was the Bureau's agreement to spill water from Navajo Reservoir to mimic the natural hydrograph that produced the necessary conditions for program success.<sup>83</sup>

The 2000 Final Biological Opinion<sup>84</sup> on the Animas-La Plata Project is a product of the updated environmental impact statement and notes the success of the SJRRIP. In the 2000 biological opinion, the Service found no grounds to challenge the Bureau's call for the construction of Ridges Basin Dam and Reservoir, Durango Pumping Plant, the inlet conduit—or "Refined Alternative 4" as described in the 2000 Draft Supplemental Environmental Impact Statement—or the Navajo Nation Municipal Pipeline, as long as the Bureau guaranteed maintenance of the flow regimes at Navajo Reservoir.<sup>85</sup>

3. "It can be formulated in such a way that it can be implemented by the lead federal agency consistent with the scope of its legal authority and jurisdiction."<sup>86</sup>

Both the Navajo Indian Irrigation Project (NIIP) and ALP lie in the San Juan River Basin, both affect the same population of endangered fish, both are Native American water rights projects, and both are irrigation projects. In 1991, both the Bureau and the Service stated that the key to the ALP RPA was the use of water from Navajo Reservoir to mimic the natural hydrograph for the benefit of the Colorado pikeminnow and to offset depletions from the Animas River. In 1991, it was also clear that the Bureau was not considerate of Navajo claims in the basin. Officials in

81. See N. Leroy Poff et al., *The Natural Flow Regime: A Paradigm for River Conservation and Restoration*, 47 *BIOSCIENCE* 11 (1997); David L. Propst & Keith B. Gido, *Responses of Native and Nonnative Fishes to Natural Flow Regime Mimicry in the San Juan River*, *TRANSACTIONS OF THE AM. FISHERIES SOC'Y* 922 (2004).

82. Brooks, *supra* note 80.

83. *Id.*

84. U.S. FISH & WILDLIFE SERV., *FINAL BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO* 4 (2000).

85. *Id.* at 5–6.

86. ESA Final Rule, 50 C.F.R. § 402.02 (1986).

the Bureau committed to the re-operation of Navajo Reservoir to mimic the natural hydrograph, committed to a 300,000 acre-foot spill, and ignored Bureau policy regarding prior non-project water rights.<sup>87</sup> These violations occurred despite objections from the solicitor for the U.S. Department of the Interior's Southwest Region, the Assistant Secretary for Indian Affairs, and the President of the Navajo Nation.<sup>88</sup>

Furthermore, NIIP did not benefit from favorable administrative decisions at that time. Since completion of NIIP in 1990 would have impacted the same population of endangered Colorado pikeminnow on the San Juan River, the Service conducted its consultation with the Bureau of Indian Affairs on NIIP and simultaneously developed a biological opinion on ALP. While the result of the Bureau's consultation on ALP was an RPA that allowed construction to begin by offsetting Animas River depletions with water from Navajo Reservoir, the biological opinion on NIIP—released just two days after the final opinion on ALP—did not offer the possibility of construction until the end of the seven-year research effort. In this case, the Service decided that construction of NIIP should not continue until the needs of the pikeminnow were known.<sup>89</sup>

Today the Navajo Nation is essentially a partner in the Animas-La Plata Project. The Navajo Nation retains a small amount of municipal and industrial water storage in Nighthorse Reservoir (2,340 acre-feet), and also received authorization for the Navajo Nation Municipal Pipeline in the Colorado Ute Settlement Act Amendments of 2000. The purpose of the pipeline is to replace and expand an existing pipeline that runs 28.9 miles along the San Juan River and delivers treated water from Farmington to Shiprock, New Mexico.<sup>90</sup> Additionally, in 1999, the Bureau of Indian Affairs hired a private engineering firm to conduct a biological assessment on the construction of blocks 9 through 11 of the Navajo In-

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87. The Bureau failed to consider the Navajo Nation's superior claims for water rights in the basin and for completion of NIIP in particular. NIIP was authorized six years before ALP in 1962, giving it a prior project water right in the San Juan River Basin—a fundamental criterion in the doctrine of prior appropriation that the Bureau has defended since 1902. Next, in 1962, Congress made a deal with the Navajo Nation in which it promised to construct NIIP in exchange for the Tribe's acquiescence on construction of the San Juan-Chama Project. The primary beneficiary of the San Juan-Chama Project, which the Bureau completed in 1967, is the city of Albuquerque and farmers in the Rio Grande River Basin. See Jacobsen, *supra* note 5; ELIZABETH CHECCHIO & BONNIE G. COLBY, *INDIAN WATER RIGHTS: NEGOTIATING THE FUTURE* (1992).

88. U.S. GEN. ACCOUNTING OFFICE, *ANIMAS-LA PLATA PROJECT: STATUS AND LEGISLATIVE FRAMEWORK*, GAO/RCED-96-1 26 (1996), available at [www.gao.gov/archive/1996/rc96001.pdf](http://www.gao.gov/archive/1996/rc96001.pdf). See also Ellison, *Environmental Management*, *supra* note 1.

89. U.S. FISH & WILDLIFE SERV., *FINAL BIOLOGICAL OPINION FOR THE NAVAJO INDIAN IRRIGATION PROJECT, NEW MEXICO* (1991).

90. U.S. BUREAU OF RECLAMATION, *FSEIS*, *supra* note 60, at 1.4.3.

dian Irrigation Project.<sup>91</sup> The engineers concluded that the completion of blocks 9 through 11, with a total average annual depletion of 270,000 acre-feet for all blocks per year, was not likely to “adversely affect” or “adversely modify or destroy designated critical habitat” for the Colorado pikeminnow and razorback sucker in the San Juan River Basin.<sup>92</sup> This decision has two remarkable features. First, it essentially restores the depletion allowed for NIIP to the levels considered in the 1991 biological opinion. And, second, it is remarkable for the informality with which the decision was handled. The Bureau of Indian Affairs presented the engineers’ findings to biologists in the Service, who accepted them in light of the success of the SJRRIP.<sup>93</sup> The expansion of NIIP will require an additional depletion of 120,580 acre-feet of water from the San Juan River per year. This level of depletion would have clearly required a formal Section 7 consultation just a short time ago.

Perhaps most importantly, the Navajo Nation is poised to settle its water rights claims with New Mexico in the San Juan River Basin. In the agreement that was signed between the two parties, the Navajo Nation’s water rights claims will be adjudicated and quantified by 2015 through a series of decrees in New Mexico’s courts. The Navajo Nation also received various rights, including the right to use *de minimus* water for domestic use and livestock and the right to develop small amounts of groundwater. The agreement additionally calls for final settlement contracts between the Navajo Nation and the Bureau of Reclamation (Bureau) for water delivered through the Navajo-Gallup Water Supply Project, NIIP, and ALP. Of course the agreement is dependent on a host of federal funding for the Navajo-Gallup Water Supply Project (\$695 million), irrigation project development (\$23.4 million), conjunctive use ground water wells (\$77.6 million), the Navajo Nation Water Development Trust Fund (\$50 million), and the Navajo Nation Municipal Pipeline (with \$47 million already authorized).<sup>94</sup>

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91. KELLER-BLIESNER ENGINEERING, U.S. BUREAU OF INDIAN AFFAIRS, NAVAJO INDIAN IRRIGATION PROJECT BIOLOGICAL ASSESSMENT (1999).

92. *Id.*

93. Interview with James E. Brooks, *supra* note 80. Interview with David L. Propst, *supra* note 80. See also U.S. FISH & WILDLIFE SERV., FINAL BIOLOGICAL OPINION FOR THE ANIMAS-LA PLATA PROJECT, COLORADO AND NEW MEXICO 4 (2000).

94. San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement, State of New Mexico–Navajo Nation (Apr. 19, 2005), available at [www.ose.state.nm.us/water-info/NavajoSettlement/NavajoSettlement.pdf](http://www.ose.state.nm.us/water-info/NavajoSettlement/NavajoSettlement.pdf). The implementing legislation for the settlement was the Northwestern New Mexico Rural Water Projects Act, senate bill 1171 of the 110th Congress, was introduced in the U.S. Senate by Senator Jeff Bingaman on April 19, 2007.

4. “It is economically and technically feasible.”<sup>95</sup>

In 1991, the situation regarding economic and technical feasibility was vastly different than it is today. Though the Bureau clearly has the technical prowess to construct the three features contemplated in the 1991 RPA, the 2000 Final Supplemental Environmental Impact Statement (FSEIS), and the Colorado Ute Settlement Act Amendments of 2000—indeed these features are nearly complete—it did not do an economic feasibility study on these features because they would not produce any economic benefits.<sup>96</sup> The Bureau’s 1991 RPA, as noted elsewhere, violated both the authorizing legislation for ALP and the implementing regulations of the Endangered Species Act, which prohibits an action agency from piecemealing a project toward an “irreversible or irretrievable commitment of resources.”<sup>97</sup> These problems were corrected through the Colorado Ute Settlement Act Amendments of 2000, which redefined ALP in terms of the three features contemplated by the RPA and specifically stated that the purpose of the project is to settle Southern Ute and Ute Mountain Ute water rights claims.

Another economic feasibility problem emerged, however, because reclamation law generally requires repayment of construction and operational costs for its projects through direct payment by water users or through subsidy by power revenues. Under the Leavitt Act of 1932, Native Americans do not have to reimburse the government when irrigation projects are constructed for them<sup>98</sup> but municipal and industrial costs are reimbursable. Thus, since ALP was redefined as a municipal and industrial water project, a specific provision had to be written into the Colorado Ute Settlement Act Amendments of 2000 to relieve Native Americans from the obligations of reimbursement for construction. The Ute Tribes are, however, required to pay the federal government for operations, maintenance, and replacement costs once the water is used.<sup>99</sup>

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95. ESA Final Rule, 50 C.F.R. § 402.02 (1986).

96. Ellison, *Environmental Management*, *supra* note 1, at 434.

97. The Endangered Species Act specifically prohibits federal agencies from making an “irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any [future] reasonable and prudent alternative.” 16 U.S.C. § 1536(d) (2006). In other words, any action must be reversible unless it can be demonstrated that it will not harm the species. This provision was put in place to prevent an action agency from building pieces of a project until Congress had no choice but to complete a project despite its ecological harm. DONALD C. BAUR & WILLIAM ROBERT IRVIN, *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 103 (2002).

98. Leavitt Act, 25 U.S.C. § 386(a) (2006).

99. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973. *See* Tribal Construction Costs, 25 U.S.C. § 302(C)(2).

Finally, the Bureau of Reclamation did not conduct a cost-benefit analysis of the project and was relieved of its traditional economic feasibility obligations under the Colorado Ute Settlement Act Amendments of 2000—this was justified by the outcomes of a variety of administrative processes, such as the FSEIS and the associated Record of Decision. According to the Bureau:

In addition, because [an administrative proposal to implement the Colorado Ute Indian Water Rights Settlement Act of 1988] is intended to resolve Indian reserved water rights claims, traditional cost-benefit analyses do not apply because it would not account for the primary benefits of an Indian water rights settlement which include avoiding direct and indirect litigation costs and resolving claims which might be associated with failure to protect tribal trust resources.<sup>100</sup>

#### IV. BUREAUCRATIC POLITICS AND THE ANIMAS-LA PLATA PROJECT

To a certain extent it is impossible to summarize the Bureau's position, which is stated in the preceding paragraph, without inducing sarcasm. Such a summary sentence might read: Thus, without the need to prove the project's technical or economic feasibility and with taxpayer funds behind it, the Bureau was free and clear to build ALP. While bureaucratic politics is concerned with the distribution of values by administrative agencies, in this case officials in the Bureau wanted to construct the Animas-La Plata Project and they did so by eliminating entire categories of public concern through administrative processes that were subsequently ratified by Congress. Broadly speaking, in the name of settling Indian water rights claims and avoiding costly litigation, the public's right to know about the costs and functionality of their investment were ignored through administrative process. How Bureau officials did this will be described in the following sections.

##### A. Expertise

One fundamental problem officials in the Bureau confronted was undoing decades of work that supported the argument that the purpose of the Animas-La Plata Project was irrigation. Indeed, the Bureau argued in the 1966 Feasibility Study, the 1979 Definite Plan Report, the 1980 Fi-

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100. U.S. BUREAU OF RECLAMATION, RECORD OF DECISION: ANIMAS-LA PLATA PROJECT/COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT 3 (2000) [hereinafter U.S. BUREAU OF RECLAMATION, ROD], available at <http://www.usbr.gov/uc/envdocs/eis/animas/fseis/pdf/rod.pdf>.



nal Environmental Impact Statement, the 1991 Biological Opinion, and in the 1996 Final Supplement to the Final Environmental Impact Statement, and other administrative documents, that the purpose of ALP was to bring irrigation water to the “dry side,” or the La Plata River watershed. There were three things that needed to be done in order to provide a new justification for the project. First, the Bureau had to eliminate the irrigation component without losing the project outright. Second, the Bureau needed to appease rival water users in the San Juan River Basin. And, third, all of this needed to be sanctioned by Congress. At the heart of all these activities was also the need to develop a new environmental impact statement for the project that provided an administrative justification for a scaled down Animas-La Plata Project and addressed the competing interests in the San Juan River Basin.

After the turmoil surrounding the project in the 1990s, the Bureau was able to redefine the Animas-La Plata Project as a municipal and industrial project for Native Americans.<sup>101</sup> This redefinition of the project came in two parts. First, the Bureau noted that despite all the administrative activity and studies on ALP, it was never able to prove that the project made sense from an environmental perspective. Indeed, in its 2000 Record of Decision the Bureau stated:

[T]he original project was not constructed because this Department, and many other parties, raised serious concerns regarding the environmental consequences of building the project. These consequences included a large diversion from the Animas River which would violate Endangered Species Act (ESA) requirements and water quality impacts associated with a major new non-Indian project in the Four Corners region.<sup>102</sup>

Second, through the Record of Decision and related administrative documents, Bureau officials maintained that they were motivated by their obligation to Native American trust responsibilities and the constant threat of “extensive litigation” if Ute Mountain Ute and Southern Ute water rights claims were not redressed.<sup>103</sup> These contentions, along with the 2000 construction deadline established by the Colorado Ute Water Rights Settlement Act of 1988, provided the “purpose and need” for the new

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101. It might be a bit unfair to say that the Bureau redefined the project, since the Record of Decision and the Final Supplemental Environmental Impact Statement ascribe the redefined ALP to the administration. Still, the administration proposal was developed in secret and looks more like the project the Bureau wanted to build in 1991 than a project constructed according to the recommendations of the Romer/Schoettler process—sans its conversion to a municipal and industrial project.

102. U.S. BUREAU OF RECLAMATION, ROD, *supra* note 100, at 1.

103. *Id.* at 1, 3.

Animas-La Plata Project, which was the fundamental concept that drove the analysis for the environmental impact statement. The purpose and need of the Animas-La Plata Project was to “implement the Settlement Act by providing the Ute Tribes an assured long-term water supply and water acquisition fund in order to satisfy the Tribes’ senior water rights claims as quantified in the Settlement Act, and to provide for identified [municipal and industrial] water needs in the project area.”<sup>104</sup>

The analysis in the new environmental impact statement focused on the assessment of various alternatives designed to address the Colorado Ute Tribes’ water rights claims. These included the administration proposal for various reservoir levels, increasing the size of federal water facilities in the area, and non-structural alternatives such as water leasing and the establishment of a fund to purchase water rights. These alternatives would be compared to the purpose and need, and assessed along four dimensions: yield, reliability, location, and practicality.<sup>105</sup> Most importantly, ALP was subject to the rules of the Indian Self Determination and Education Assistance Act (ISDEAA)<sup>106</sup> because it was redefined as a Native American water rights project in this administrative process. Generally, the ISDEAA gives Native Americans a substantive stake in the nature of the public goods and services they receive from the United States. However, in this case, the effect of tribal participation in the administrative process was to give the Colorado Ute Tribes a veto over any alternative that did not meet their needs. Since the Tribes would not accept non-structural alternatives—the expansion of existing facilities or water leasing—the only acceptable alternative that remained was the construction of ALP.<sup>107</sup>

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104. U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60, at 19.

105. These criteria are defined in volume 1, chapter 5, section 5-2, page 21 of the Animas-La Plata Final Supplemental Environmental Impact Statement: yield refers to whether the project will provide “wet water” in the amount desired to the Tribes; reliability refers to whether the alternative will be renewed by the hydrologic cycle; location refers to whether water from the alternative will be “reasonably available” to the Tribes; and practicability refers to whether the alternative is technically feasible. *Id.* The only way to meet these criteria would be to construct the three features contemplated in the administration proposal and, before that, the 1991 RPA. *Id.* § 5-8.

106. Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. (2006).

107. The alternatives are analyzed in the 2000 FSEIS and are dismissed if they do not support a structural alternative. U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60. Also, as noted in the 2000 Record of Decision, “Refined Alternative 4” is the alternative supported by the Colorado Ute Tribes and, by default, is the only acceptable alternative. U.S. BUREAU OF RECLAMATION, ROD, *supra* note 100, at 2. Finally, according to Earth Justice, the Deputy Secretary of the Interior in the Clinton Administration, David J. Hayes, stated that the NEPA process for ALP would be used “defensively” as he promoted the administration proposal. Hence, Earth Justice concluded, “the Bureau set out to find that a non-structural

There were two additional problems that went to the Bureau's assessment of ALP as a municipal and industrial water supply for Native Americans, both of which were analyzed in the ALP Final Environmental Impact Statement: (1) finding demand for municipal and industrial water, and (2) addressing the risks associated with changing water rights from irrigation to municipal and industrial uses. The Bureau conducted an analysis of non-binding water use scenarios in order to assess demand issues. These scenarios, which included new municipal water use for housing, construction of an industrial park, and recreation and tourism development, were purely speculative.<sup>108</sup> The Bureau, for example, used data from the U.S. Census Bureau to calculate that the Native American population on the reservations would increase from 3,287 in 1998 to 15,000 in the year 2100. The result of this increase would be a housing shortage and a need for new municipal water on the reservation. Though serving as the basis for ALP, the Bureau noted that each of these scenarios was non-binding and would require the construction of new structural components that would be subject to future National Environmental Policy Act (NEPA) review. The benefit of this non-binding scenario approach, the Bureau contended, is that it "respects the Colorado Ute Tribes' sovereignty and protects their ability to allocate water in accordance with future needs consistent with federal law."<sup>109</sup>

The second problem arose with respect to the non-structural component of ALP, as envisioned in the administration proposal alternative. Under the 1988 Settlement Act, the Colorado Ute Tribes were entitled to

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alternative would not work, [and] that is what it found." Letter from Robert B. Wiygul, Earth Justice, to Pat Schumacher, Bureau of Reclamation (Apr. 20, 2000).

108. These non-binding water use scenarios were speculative in both the practical and legal sense of the word. The Bureau's population projections are simple linear estimates that account for no intervening events or practical analysis. U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60, at 2-4. Similarly, Colorado water law prohibits speculative uses of water. The Bureau responded in the General Comments and Responses section of the 2000 FSEIS:

As stated in the purpose and need for the project, the ALP Project is intended to settle the federal water rights claims of the Colorado Ute Tribes. The settlement itself is embodied in federal law. Because the doctrine of *Winters* rights evolved to ensure the Indian reservations and public lands set aside by the federal government will have sufficient water to fulfill the purposes for which they were established, certain principles embodied in state water law, including the requirement of beneficial use to perfect and maintain a water right, are inapplicable.

U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60, at GC-7.

109. U.S. BUREAU OF RECLAMATION, ROD, *supra* note 100, at 3.

over 79,000 acre-feet of water.<sup>110</sup> But since this figure includes water for irrigation—which has a smaller return flow than municipal and industrial water—the entitlement was reduced to approximately 52,960 acre-feet, 39,960 acre-feet of which would be stored in Nighthorse Reservoir. The remaining 13,000 acre-feet<sup>111</sup> will be acquired through the purchase of land and water rights on or near the reservations through the \$40 million water acquisition fund established by the 2000 Colorado Ute Settlement Act Amendments. The problem, however, is that the purchase of land and water rights on a willing-seller/willing-buyer basis—and the conversion of those water rights—is no simple matter and may take 10 to 30 years to complete. The Bureau notes that the risks associated with this approach include, but are not limited to: the “risk of availability of lands with senior water rights”; the “risk associated with estimating rate of inflation of land prices”; the “risk associated with the assumption there would be no disruption to market prices of land”; and the “risk of encountering higher costs resulting from a longer procurement period for land purchases.”<sup>112</sup> These risks are in addition to the problems of converting fee simple farmland to Indian trust land, which will reduce local tax bases,<sup>113</sup> and the problem of converting these water rights from irrigation to municipal and industrial uses in the Colorado water courts. Bureau officials warn, “[S]everal legal considerations and constraints that may affect the change of irrigation water rights to M&I [municipal and industrial] use, include but are not limited to . . . the need for court approval . . . the need to deal with numerous objectors . . . [the] time required for change [which] can be substantial . . . [and the] uncertainty of outcome.”<sup>114</sup>

Hence, the administrative processes used to justify reauthorization of ALP in 2000 were constructed on the argument that the Ute Mountain Ute and Southern Ute Tribes should settle their claims for a municipal and industrial project that develops water for which no market or water right exists and, secondarily, the improbable purchase of

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110. U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60, at 2-100, Table 2-52. See also U.S. BUREAU OF RECLAMATION, COLORADO UTE INDIAN WATER RIGHTS FINAL SETTLEMENT AGREEMENT (1986).

111. These numbers are generated from the Bureau’s discussion of Refined Alternative 4 in the FSEIS. U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60. In the Record of Decision, the Bureau advocates implementation of Refined Alternative 4. U.S. BUREAU OF RECLAMATION, ROD, *supra* note 100.

112. U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60, at D-10 to D-12, available at <http://www.usbr.gov/uc/envdocs/eis/animas/fseis/index.html> (capitalization changed).

113. *Id.* at D-24.

114. *Id.* at 2-15 (capitalization changed).

water rights and their conversion to municipal and industrial uses in the Colorado water courts. This administrative accomplishment goes hand-in-hand with the agency's ability to manage its constituents.

## B. Constituency Support

One of the most striking aspects of the Animas-La Plata Project is how we might categorize the project's proponents and opponents. In general, proponents of ALP are elites: members of Congress with direct ties to the project, Secretaries of the Interior, managers in the Bureau of Reclamation, the water conservancy and conservation districts that were created by the Colorado General Assembly to lobby for water projects with public funds, elected officials in Colorado, the Colorado Water Conservation Board, tribal attorneys, and some tribal leaders. Project opponents include members of the general public, concerned taxpayers, environmentalists, and independent analysts with expertise in economics or engineering. Though certainly not a scientific measure of public opinion, the testimony and written comments on the 2000 FSEIS, reported in Volume 3a, support the categorization of proponents and opponents as elite advocates for Native American water rights versus citizens worried about environmental and fiscal issues.<sup>115</sup> What is missing from these comments—and from the administrative processes that supported reauthorization of the Animas-La Plata Project in the 2000 Colorado Ute Settlement Act Amendments—is any concern for the Anglo farmers who were set to receive the tens of thousands of acre-feet of water for irrigation under previous conceptions of ALP. This process replaced the interests of the “dry side” farmers of the La Plata River watershed with municipal and industrial interests,<sup>116</sup> and Native American interests.

Certainly Native Americans have struggled throughout American history for support from the U.S. government. This is the truism under which the Animas-La Plata Project will be constructed. But while the Bureau and its allies had been making this argument for some time, it was the Romer/Schoettler process that brought broader legitimacy to the idea that a water war in southwestern Colorado would be a disaster. Moreover, the process produced a justification for a scaled down, municipal and industrial water project.<sup>117</sup> The justification, essentially, was that

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115. *Id.* at vol. 3a.

116. *Id.* at 2-117 to 2-123.

117. The Romer/Schoettler process was innovative—according to supporters and even the *High Country News*—because it brought a variety of groups to the negotiation table. See generally Marston, *supra* note 70 (describing the politics of the process). And though the Romer/Schoettler process produced alternatives that were collectively known as ALP-Lite,

settlement of the Ute Tribes' water rights was so critical that all interests in the project were required to give up or reduce their claims as ALP went from a diversion of 191,230 to 57,100 acre-feet.

Moreover, as the size and scope of the project was reduced, the effect was to remove claimants and resolve problems by default, hence eliminating effective opposition. When the irrigation component was removed from the project, the U.S. Environmental Protection Agency's concerns regarding selenium contamination of the water were also eliminated. The Navajo Nation became a supporter when it was given the Navajo Nation Municipal pipeline. And once the Native Americans in the San Juan River Basin—including the Jicarilla Apache—came together to support the project, Earth Justice (formerly the Sierra Club Legal Defense Fund), a longtime ALP foe, dropped its active opposition to the project because it did not want to be perceived as "anti-Indian."<sup>118</sup> The success of the SJRRIP and the commitment to spill water from Navajo Reservoir to benefit endangered fish placated the U.S. Fish and Wildlife Service.<sup>119</sup> Furthermore, Bureau and government lawyers from the Departments of the Interior and Justice simply outspent any local opponents that challenged them in court, such as the Citizens Progressive Alliance.<sup>120</sup>

The primary results of the 2000 FSEIS and the 2000 Colorado Ute Settlement Act Amendments are that the Bureau has been authorized to construct the features it wanted to construct under the 1991 RPA—Ridges Basin Dam and Reservoir, the Durango pumping plant, and the inlet conduit. Through these processes, the Bureau has also protected the resources of key constituencies and ensured the political viability of a larger ALP in the future. This contention is supported by legislative action on the project. The Romer/Schoettler process, for example, produced a piece of legislation that was introduced in the House of Representatives. The Colorado Ute Settlement Act Amendments of 1998<sup>121</sup> is very similar to the act of 2000 since it would have authorized construction of the three initial features. But the 1998 act did not include a \$40 million fund for the Tribes and also maintained the cost-share ar-

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the administration proposal that was ultimately adopted was crafted in secret. For a description of the Romer/Schoettler process, see DALE PONTIUS, *COLORADO RIVER BASIN STUDY, FINAL REPORT* (Report to the Western Water Policy Review Advisory Commission 1997); *Colorado Ute Settlement Act Amendments of 2000: Hearing on S. 2508 Before the S. Indian Affairs Comm.*, 106th Cong. (June 7, 2000) (statement of David J. Hayes, Deputy Sec'y of the Interior).

118. Interview with Phillip T. Doe & Alison Maynard, *supra* note 11.

119. Interview with James E. Brooks, *supra* note 80.

120. Interview with Phillip T. Doe & Alison Maynard, *supra* note 11.

121. Colorado Ute Settlement Act Amendments of 1998, H.R. 3478, 105th Cong. (1998).

rangements envisioned in the 1988 Colorado Ute Indian Water Rights Settlement Act. Hence, the 1998 bill would have required the San Juan Water Commission, the Animas-La Plata Water Conservancy District, and the State of Colorado to put up \$8.6 million, \$4.4 million, and \$16 million, respectively, for the project. Project proponents in the House and Senate seem to have let the 1998 bill die without much of a fight.<sup>122</sup>

In 2000, the primary sponsors of the new Colorado Ute Settlement Act Amendments—Representative Scott McInnis and Senator Ben Nighthorse Campbell—addressed the flaws of the 1998 legislation: the Colorado Ute Tribes were given a \$40 million fund to purchase water rights on the reservations; no cost-share was required by non-Indian participants; and the Navajo Nation Municipal Pipeline was authorized for construction. Thus, ALP would be complete with construction of the three components.

The only legislative stumbling block that emerged was an amendment by Senator Feingold, No. 4326, which would have de-authorized all other project components as envisioned under previous legislation, such as the 1979 Definite Plan Report. Amendment 4326 would have also required repayment of construction, fish and wildlife mitigation, and recreation costs by all non-Indian project participants.<sup>123</sup> Senator Feingold's amendment was, however, tabled by a roll call vote of 56 to 34.<sup>124</sup>

The 2000 Colorado Ute Settlement Act Amendments and the 2000 FSEIS are a unique combination of legislative and administrative activity that hands the Bureau and its allies carte blanche to construct a large storage reservoir near Durango, Colorado. The most interesting question

122. Another bill on Animas-La Plata was also introduced in the 105th Congress. H.R. 745, introduced by Representative Peter DeFazio, sought to "deauthorize the Animas-La Plata Federal reclamation project, and to direct the Secretary of the Interior to enter into negotiations to satisfy, in a manner consistent with all Federal laws, the water rights interests of the Ute Mountain Ute Indian Tribe and the Southern Ute Indian Tribe." This legislation failed to make it out of the House Subcommittee on Water and Power.

123. See S. Amendment 4326 to S. 2508, 106th Cong. (2000).

124. *Id.* One consistent aspect of this debate, however, that pits Native Americans against fiscal concerns and environmental protection, is the platitudes taken by these members of Congress. See H.R. Rep. No. 106-1001 (2000); S. Rep. 106-513 (2000). Though there is no question that the U.S. government has injured Native Americans, it is also the case that the United States provided remuneration for past injustices. The United States paid the Ute Tribes \$31 million in the 1950s in order to settle land claims stemming from the Jurisdiction Act of 1938, 52 Stat. 1209. The Ute Tribes received a \$49.5 tribal development fund from the federal government in the 1988 Colorado Ute Settlement Act and \$40 million as a non-structural water rights settlement in the 2000 Colorado Ute Settlement Act Amendments. It is also the case that the Southern Ute Tribe is worth approximately \$4 billion dollars. "Each of its 1,400 members is a millionaire many times over, on paper anyway." Moran, *supra* note 61. See generally Ianthe Jeanne Dugan, *Business Empire Transforms Life for Colorado Ute Tribe*, WALL STREET J., June 13, 2003.

is, of course, why did the Bureau of Reclamation commit to the Animas-La Plata Project? The answer, based on thousands of pages of administrative documentation, is to settle the water rights claims of the Ute Mountain Ute and Southern Ute Indian Tribes. Critics, of course, contend that there are cheaper and simpler solutions to the water rights problem, such as allowing the Tribes to market their water downstream, giving the Tribes water in Navajo Reservoir, or giving the Tribes money to invest in the stock market. Others contend that ALP will provide energy developers with a source of water in an area with vast amounts of coal and natural gas, which is one of the non-binding water use scenarios explored in the FSEIS. What is clear from these legislative and administrative documents is that the Bureau will have to go back to Congress for more funding before any of this water can be put to use on or near the reservations.

## V. CONCLUSION: THE ANIMAS-LA PLATA PROJECT AND BUREAUCRATIC POLITICS

The Bureau touted in the Record of Decision that the cost of Refined Alternative 4 at \$278 million was “less than half the cost [of the \$700 million] associated with the ALP concept incorporated into the original settlement.”<sup>125</sup> The Bureau updated its cost estimate in 2003 to \$540 million<sup>126</sup> and has maintained that figure as the project nears completion.<sup>127</sup> There are, however, a host of additional costs associated with the project that the Bureau does not systematically assess.<sup>128</sup> For example, Bureau officials describe a variety of non-binding water use scenarios that will require the construction of additional facilities before the water can be delivered<sup>129</sup> but they do not estimate the costs of those facilities. As noted earlier, the Bureau contends that these scenarios are for analytical purposes only and are left open in order to protect the Ute Tribes’ sovereignty and to make decisions in the future.<sup>130</sup> But these facilities will

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125. U.S. BUREAU OF RECLAMATION, ROD, *supra* note 100, at 3.

126. U.S. BUREAU OF RECLAMATION, ANIMAS-LA PLATA PROJECT CONSTRUCTION COST ESTIMATES, REPORT TO THE SECRETARY (2003). The Bureau estimates that the project will cost \$500 million, but does not include the \$40 million dollar tribal development fund in its analysis because those costs were not indexed.

127. Interview with Barry Longwell, *supra* note 14.

128. In the 2000 FSEIS a variety of organizations call for a more thorough economic analysis of ALP. U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60.

129. *Id.* at 2-119 (showing potential conveyance routes).

130. U.S. BUREAU OF RECLAMATION, ROD, *supra* note 100, at 3.



be part of the Animas-La Plata Project and must be constructed before the Colorado Ute Tribes' water can be put to beneficial use.<sup>131</sup>

Most interestingly, while the project is being constructed in order to avoid the extensive litigation that will occur if the Ute Tribes sue for adjudication of their federal reserve water rights, the costs of this litigation are never estimated.<sup>132</sup> Once again, as noted before, the Bureau contends that it is not possible to estimate these costs and that it is not required to do so under the Council of Environmental Quality guidelines that govern implementation of NEPA.<sup>133</sup> The Bureau defends its position most eloquently in the General Comments & Responses section of the 2000 FSEIS. The Bureau notes that while the intention of cost-benefit guidelines is to ensure that reclamation projects provide a "net benefit to national economic development," the "primary benefits of Indian water rights settlements" and, thus, the purpose of ALP is:

1. Avoiding the direct and indirect *costs* of continued litigation.
2. Resolving potential *damage claims* that Tribes may bring against the United States for failure to protect trust resources or against other parties for interference with the Tribes' use of those resources.
3. Acting in concert with the United States trust responsibility to Indian tribes.
4. Avoiding the *costs* associated with widespread displacement of non-Indian water users.<sup>134</sup>

Once again, the Bureau maintains that the purpose of ALP is not to make a national investment but to avoid the "costs of litigation" and settle Indian trust responsibilities. Yet, the authorities the Bureau cites do not support this position. The Water Resource Council's Economic and Environmental Principles and Guidelines<sup>135</sup>—the fundamental criteria the Bureau uses to conduct cost-benefit analysis—does not include a concept that can be used to draw a distinction between Indian and non-Indian water projects. A second authority the Bureau uses to justify its

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131. Water marketing is one non-binding scenario that is considered, though it is called "San Juan and Animas-River Diversions" in the analysis. Under this scenario, the Tribes would leave their water in the Animas and San Juan River for diversion by downstream municipalities. The Tribes in the earlier analysis vetoed water marketing because it would not require the construction of the Animas-La Plata Project. See U.S. BUREAU OF RECLAMATION, ROD, *supra* note 100.

132. U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60, at GC-1.

133. *Id.* at OR-2-1.

134. *Id.* at GC-1 (emphasis added).

135. U.S. WATER RES. COUNCIL, ECONOMIC AND ENVIRONMENTAL PRINCIPLES AND GUIDELINES FOR WATER AND RELATED LAND RESOURCES IMPLEMENTATION STUDIES (1983).

position that ALP is exempt from cost-benefit analysis, Secretarial Order No. 3215, is a policy of the Secretary of the Interior regarding the discharge of trust responsibilities. For the most part, it calls on Bureau officials to maintain sound management practices and does not relieve them of their financial responsibilities under reclamation law.<sup>136</sup>

More specifically, Bureau officials cite President George H.W. Bush's policy regarding Indian water rights settlements, which urges agencies to avoid litigation when it comes to the settlement of Native American Water rights claims.<sup>137</sup> But this policy, like those previously cited, does not relieve the Bureau of its responsibilities in analyzing costs. Indeed, the policy requires the Bureau to estimate the value of litigation in order to calculate legal exposure, to ensure that the value of the settlement does not exceed the costs of litigation, to guarantee that non-federal parties to the settlement engage in appropriate cost-sharing, and to make certain that settlements "promote economic efficiency on reservations and tribal self-sufficiency."<sup>138</sup> Yet, such cost analyses were not performed.

These problems bring us back to the questions asked at the beginning of this article. In particular, if the Animas-La Plata Project fails to stand up to even minimal scrutiny, why did Congress approve it and why did the Bureau want to build it in the first place?<sup>139</sup> In order to answer these questions it is important to stress that ALP is a political project. Rather than building a water project to store municipal and industrial water, for example, the Colorado Ute Tribes could be given the water rights of their entire settlement allocation in the free-flowing Animas River or their rights in Navajo Reservoir.<sup>140</sup> But these solutions

136. U.S. DEP'T OF THE INTERIOR, ORDER 3215, PRINCIPLES FOR THE DISCHARGE OF THE SECRETARY'S TRUST RESPONSIBILITY (2000), available at <http://www.usbr.gov/native/naao/policies/3215.html>.

137. U.S. DEP'T OF THE INTERIOR, WORKING GROUP IN INDIAN WATER SETTLEMENTS; CRITERIA AND PROCEDURES FOR THE PARTICIPATION OF THE FEDERAL GOVERNMENT IN NEGOTIATIONS FOR THE SETTLEMENT OF INDIAN WATER RIGHTS CLAIMS, 55 FED. REG. 9223 (1990) (policy statement).

138. *Id.* See also interview with Steve Cone, Member, Citizens Progressive Alliance, in Farmington, N.M. (Mar. 13, 2008).

139. Stanley M. Pollack and Scott B. McElroy, attorneys for the Navajo Nation and Southern Ute Tribe respectively, took umbrage when Hannah Gosnell implied that ALP was a bad project. Stanley M. Pollack & Scott B. McElroy, *ALP Lite: A Compromise Project that Fulfills the Untied States' Trust Responsibility in an Environmentally Responsible Manner*, 41 NAT. RESOURCES J. 639 (2001). It is important to note that Pollack, McElroy and Gosnell are looking at the project from different perspectives. Pollack and McElroy contend that ALP makes good political sense. *Id.* Gosnell contends that the process used to develop the 1991 ALP RPA was flawed. See Gosnell, *supra* note 1.

140. Water leasing and storage in Navajo Reservoir was proposed by the Citizens Progressive Alliance and assessed as an alternative in the 2000 FSEIS. The legal morass that

would require critical changes in the Law of the River that institutions like the Colorado Water Conservation Board, the Bureau of Reclamation, and state legislatures in the Colorado River Basin currently oppose. Instead, the purpose of this project is to protect traditional water users—such as Anglo farmers residing on the reservations—and the legal institutions that are used to distribute water in the western United States.<sup>141</sup>

The Bureau of Reclamation will complete the Animas-La Plata Project because it controls the administrative processes that are essential to natural resources management decision-making. The Bureau has spent at least \$68 million over the past several decades on administrative and technical argumentation in support of the project, and Congress has continued to ratify those reports and analyses in successive legislative acts on ALP.<sup>142</sup> The Bureau was also able to use its expertise to control its agency rivals. By placating the U.S. Fish and Wildlife Service and the U.S. Environmental Protection Agency in the NEPA process, for example, the Bureau effectively eliminated administrative static and was able to speak to Congress more effectively. In the end, consistent with many theories of policy formulation, it took only a few key people—such as sponsoring members of Congress, key Colorado politicians, Bureau officials, and local supporters—to push for reauthorization and construction of the project. Indeed, project proponents have become so brazen that U.S. Justice Department attorneys have naively—though effectively—maintained that ALP must be constructed because “Congress has spoken.”<sup>143</sup> These attorneys do not point out that the Colorado Ute Settle-

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constrains interstate water marketing is complex. Out-of-state water marketing is not presently allowed under Colorado water law unless New Mexico treats “that water as a New Mexico depletion.” U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60, at 2-15. See also Steven J. Shupe et al., *Western Water Rights: The Era of Reallocation*, 29 NAT. RESOURCES J. 413 (1989). See generally U.S. BUREAU OF RECLAMATION, FSEIS, *supra* note 60, at GC-7 (explaining that Native Americans do not have to show beneficial use to perfect their water rights in order to maintain them), available at <http://www.usbr.gov/uc/envdocs/eis/animas/fseis/index.html>.

141. Interview with D. Randolph Seaholm, *supra* note 7. In this interview, Seaholm, the Chief of Water Supply Protection for the Colorado Water Conservation Board, stated that his agency’s goals in ALP water rights settlement were to: (1) protect the Compact; (2) protect the water rights system; (3) protect Indian settlements; (4) be environmentally conscious; and (5) be economical. These sentiments were mirrored in an impromptu conversation at the Department of the Interior with the Commissioner of the Bureau of Reclamation, Robert W. Johnson, on May 21, 2008 in Washington, D.C.

142. U.S. BUREAU OF RECLAMATION, REPORT TO THE SECRETARY, *supra* note 126.

143. Interview with Phillip T. Doe & Alison Maynard, *supra* note 11. Mr. Doe and Ms. Maynard told the author that, during legal proceedings in District Court, Water Division 7, Case nos. W-1603-76F, W-1603-76J, 02 CW 85, and 02 CW 86, the Justice Department attorney pursued this line of questioning. The author was also asked these same questions during a deposition on these water rights cases.

ment Act Amendments of 2000 appear on pages 258 through 266 of a 710-page omnibus appropriations statute, and are sandwiched between the Vietnam Education Foundation Act of 2000 and the designation of the American Museum of Science and Energy in Oak Ridge, Tennessee. It is unlikely that any member of Congress who voted in favor of Public Law 106-554 knew the details of the bill.

For nearly a century the Bureau of Reclamation has demonstrated its prowess as a political institution and its ability to adapt to extraordinary change. This adaptability is a feature of its autonomy, as exemplified by its ability to maintain its jurisdiction and reliably deliver public goods and services to its clientele. Today, the Bureau achieves its objectives by outsmarting its rivals in administrative process. But there are three problems associated with the type of hyper-administrative activity that surrounds these types of development and natural resource management issues. First, it is impossible for members of the public to negotiate the maze of administrative actions that dominate the formulation and implementation of natural resource development policy. It is a bewildering experience—and must have been for both members of the public and members of Congress—to even attempt to read the administrative documents that were used to support the 2000 Colorado Ute Settlement Act Amendments. The Bureau, for example, published a plethora of testimonial and written comments in the 2000 FSEIS that posed common sense challenges to ALP that were never discussed in Congress—a clear indication that few if any members of Congress (or members of their staffs) read the document. Second, this type of administrative activity leaves our most important public decisions in the hands of those who are most astute at bureaucratic politics. While this is a good thing for those who unreservedly support the theory of administrative expertise, it is a bad thing from a democratic point of view because citizens rarely have the expertise to challenge administrators in these processes. Third, following the previous point, it eliminates the possibility of public debate on issues that are critical to entire regions of the United States, such as water allocation issues in the Colorado River Basin. The decisions that resulted from the administrative processes that were used to justify the Animas-La Plata Project are rational only in the context of management and legal institutions—like the Law of the River—that have become anachronistic in the western United States and the Colorado River Basin in particular.

