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Recommended Citation
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). Available at: https://digitalrepository.unm.edu/nrj/vol41/iss3/4

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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**

ABSTRACT

The U.S. Fish and Wildlife Service (FWS) is responsible for implementing one of the most powerful and controversial environmental statutes in the United States today: Section 7 of the Endangered Species Act, which prohibits federal actions likely to further jeopardize a species listed under the Act. Because of a variety of political and institutional constraints, however, the agency has had a difficult time implementing the statute forcefully. After reviewing the Section 7 consultation process and the evolution of the "reasonable and prudent alternative" (RPA) concept, the article takes an in-depth look at the Section 7 consultation process for the proposed Animas-La Plata Project on the San Juan River and at some of the problems surrounding the resulting RPA. Several institutional constraints confronting the FWS are identified, and suggestions are made for strengthening the agency's position during the Section 7 implementation process.

I. INTRODUCTION

The Endangered Species Act (ESA)1 is one of the most powerful and controversial environmental laws in the United States. Implementing the Act has resulted in many conflicts with property rights and development interests and, in a growing number of cases, with tribal sovereignty and/or tribal projects. Thus, there is a need to find ways to integrate the goals of the ESA into society while minimizing conflict, especially with those already at a disadvantage (e.g., Indian tribes). At the same time, the mandate for

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** This article is derived from Dr. Gosnell's dissertation, titled Water, Fish, Tribes, and Choice: A Geographic Evaluation of Endangered Species Act Implementation in the San Juan River Basin, USA. The author would like to thank David Getches for his help and advice in writing the article and Jim Robb for his help with producing the map included in the article.
recovery contained in the Act must not be routinely subordinated to human needs and demands.

This balancing act is to a large extent in the hands of the U.S. Fish and Wildlife Service (FWS), which has been delegated the responsibility of implementing the Act.\textsuperscript{2} This is a significant responsibility because, as historian Samuel Hays has suggested, it is in the administration and implementation of policy and law—more so than in the legislative beginnings—that future interpretations of the law are determined,

for choices are made here that are as fundamental as those made in the legislature. As soon as a law is passed the political actors shift their focus of attention from Congress to the agency. In this new arena they seek to fight through the controversies all over again. Those who sought to achieve a social objective through the law hope that administration will maintain and advance that goal. But their opponents hope that through administration the impact of the law can be reduced. In this way administration becomes the focal point of fierce controversy. To those in contention, decisions here are considered to be more vital because they are more final.\textsuperscript{3}

One of the most important decision-making processes employed by the FWS in the implementation of the ESA occurs during the formulation of Biological Opinions under Section 7 of the Act.\textsuperscript{4} The FWS has broad discretionary authority here, including the authority (indeed, obligation) to issue an Opinion prohibiting any proposed federal action likely to further jeopardize an already endangered species.\textsuperscript{5}

While Biological Opinions are supposed to be immune from considerations other than the welfare of the species in question,\textsuperscript{6} they are, in fact, heavily influenced by politics and other constraints.\textsuperscript{7} As it turns out, the FWS rarely, if ever, uses Section 7 of the ESA to prohibit a federal project outright. More often than not, the agency identifies a "reasonable

\begin{itemize}
\item \textsuperscript{2} See id. § 1532(15). In the case of endangered or threatened marine species, the consultation responsibility falls on the National Marine Fisheries Service (NMFS).
\item \textsuperscript{3} SAMUEL HAYS, BEAUTY, HEALTH, AND PERMANENCE 6 (1987).
\item \textsuperscript{4} 16 U.S.C. § 1536(a)-(c). This balancing act is also evident in the formulation of Habitat Conservation Plans (HCPs) under Section 10 of the ESA, which deals with the granting of "incidental take permits" for private property owners burdened by the "No Take" provision in Section 9 of the Act.
\item \textsuperscript{5} 16 U.S.C. § 1536(a)(2).
\item \textsuperscript{6} id.
\item \textsuperscript{7} See Oliver A. Houck, The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce, 64 U. COLO. L. REV. 278, 280-81 (1993); U.S. GEN. ACCOUNTING OFFICE, LIMITED EFFECT OF CONSERVATION REQUIREMENTS ON WESTERN WATER PROJECTS, PUB. NO. GAO/RCED-87-78, at 2-3 (1987).
\end{itemize}
and prudent alternative” (RPA) in its Biological Opinion, allowing the project to go forward in modified form.8

But what happens when a project is so clearly detrimental to a listed species that the FWS cannot find an alternative? This article looks at the Section 7 process for the Animas-La Plata Project, one of the few cases in ESA implementation history involving a “naked” Jeopardy Opinion (a Biological Opinion citing jeopardy with no alternatives),9 and documents its evolution into an Opinion with an RPA. The Animas-La Plata (A-LP) case study illustrates the difficulties confronted by the FWS in implementing Section 7(a)(2) forcefully, in the face of powerful political and institutional constraints. The Animas-La Plata example also demonstrates that were the FWS truly able to consider a wide range of alternatives to a detrimental project, endangered species might receive the level of protection originally intended by Congress.

Therefore, I argue that the FWS regulatory ability to consider a wider range of alternatives during the Section 7 consultation process, including the alternative of a naked Jeopardy Opinion, should be strengthened. I also argue for the importance of better understanding the nature of the constraints on the decisions made by the FWS during implementation of Section 7. Only by gaining insight into these constraints, many of them potentially unnecessary, will we have the opportunity to improve the decision-making process. The purpose of this article, then, is to use lessons learned from the Animas-La Plata case study to identify ways to improve decision making in the formulation of Biological Opinions, with the underlying goal of strengthening the position of endangered species during the balancing process.10

This article first reviews the requirements of Section 7 and looks at how its implementation has evolved and what legal analysts have said about the use of discretion by the FWS in the implementation of Section 7. Next the article presents the Animas-La Plata case study, focusing on the evolution of the FWS Biological Opinion from a naked Jeopardy Opinion in 1990 to an Opinion with an RPA in 1991. While the RPA for A-LP appears to technically comply with the law, I argue that there may have been better

9. The 1990 Draft Biological Opinion for the Animas-La Plata Project was the only naked Jeopardy Opinion—draft or final—ever issued by Region 6 of the FWS. Interview with Keith Rose, Biologist, U.S. Fish and Wildlife Service, Region 6, in Grand Junction, Colo. (Jan. 12, 2000).
10. While the decisions discussed in this article are nearly ten years old, I argue that they are an important part of ESA implementation history, since the FWS rarely, if ever, issues naked Jeopardy Opinions. The story of how and why the FWS changed its Opinion to allow A-LP to go forward provides a unique insight into the nature and magnitude of the constraints under which the agency must operate.
alternatives that were either not considered or were discounted because of the mechanics of the consultation process and a lack of institutional strength on the part of the FWS. The article concludes that, based on the A-LP experience, strengthening the ability of the FWS to issue naked Jeopardy Opinions where appropriate would stimulate more flexible and creative problem solving on the part of federal action agencies. Specifically, regulatory requirements for broader alternatives analysis, a larger leadership role in the Section 7 process for the FWS, and greater involvement by the concerned public to balance the political scales would strengthen the ability of the FWS to implement the ESA as Congress originally intended.

II. AN OVERVIEW OF SECTION 7 AND ITS IMPLEMENTATION

The driving rationale behind passage of the Endangered Species Act in 1973, as reflected in congressional debate, was the need to conserve our biological heritage. As legal scholar George Cameron Coggins observes,

The dominant theme pervading all Congressional discussion of the proposed [Endangered Species Act of 1973] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources. Much of the testimony at the hearings and much debate was devoted to the biological problem of extinction. Senators and Congressmen uniformly deplored 11

11. See, e.g., Hearings on Endangered Species before the Subcomm. of the House Comm. on Merchant Marine and Fisheries, 93rd Cong. 280 (statement of Rep. Roe); id. at 281 (statement of Rep. Whitehurst); id. at 207 (statement of Assistant Secretary of the Interior). See also H.R. Rep. No. 93-412 (1973) (reporting on H.R. 37, a bill containing essentially the same features as the ESA). See Tenn. Valley Auth. v. Hill, 437 U.S. 153, 172-84 (1978) (comprehensively analyzing the original congressional intent). Congressional intent clearly changed in the wake of this seminal court case, as reflected in the amendments of 1978 and 1982 to the ESA. Section 7 was most affected by the 1978 amendments, when Congress softened some of the language surrounding the No Jeopardy standard, required the FWS to identify reasonable and prudent alternatives to those actions that would otherwise jeopardize a species, and added an exemption process to allow certain projects to go forward in spite of their jeopardy to listed species. For discussions surrounding the 1978 amendments, see, for example, 124 CONG. REC. 19,284, 21,128, 21,131, 21,284, 21,556, 21,599 (1978); H.R. REP. NO. 95-1625 (1978), reprinted in 1978 U.S.C.C.A.N. 9453; S. REP. NO. 95-874, at 10 (1978). For a general overview of the history and evolution of the ESA, see MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 193-276 (3d ed. 1997); Houck, supra note 7, at 281-85.
the irreplaceable loss to aesthetics, science, ecology, and the national heritage should more species disappear.\textsuperscript{12}

The resulting statute represented the most comprehensive legislation for the preservation of endangered species ever passed by any nation and remains today one of the most powerful environmental laws on record, in spite of subsequent amendments that have sought to temper the strength of the law. After briefly reviewing the main components of the Act, this section focuses on Section 7 of the ESA as it stands today.

In Section 2 of the Act, Congress declares that the purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species...."\textsuperscript{13} Required conservation measures include

the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.\textsuperscript{14}

In other words, the central goal of the Endangered Species Act is recovery, not merely protection of the status quo.

Section 7 is comprised of two main parts, 7(a)(1) and 7(a)(2), which deal with affirmative obligations and prohibitory commands respectively. The main purpose of Section 7(a)(1) is to authorize federal agencies—e.g., the Bureau of Reclamation (BOR), the Bureau of Land Management, the National Forest Service, the National Park Service, etc.—to factor endangered species conservation into their planning process, regardless of other statutory directives. Most of the attention surrounding Section 7 implementation has centered on the prohibitions contained in 7(a)(2).

Section 7(a)(2)—"the single most significant provision of the Endangered Species Act"\textsuperscript{15}—further elaborates on the extent to which federal agencies are accountable:


\textsuperscript{14} Id. § 1532(3).

\textsuperscript{15} BEAN & ROWLAND, supra note 11, at 240.
Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary after consultation as appropriate with affected States, to be critical.... 16

The implementing regulations define "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 17

The words "any action" in the passage above are quite wide reaching and refer to all actions directly or indirectly causing modifications of land, water, air, or other elements of a listed species' environment. An "action" can include federal activities or programs, promulgations of regulations, or granting of licenses, contracts, permits, leases, easements, and rights of way, for example. Thus, even the reauthorization of a dam that has existed for 30 years is subject to the consultation process under this portion of the Act.

The consultation process is a critical part of ESA implementation, since this is where prospective developers negotiate with the FWS for permission to go ahead with projects that could affect endangered species. This process was formalized in the 1978 amendments in the wake of Tennessee Valley Authority v. Hill, 18 a pivotal case (discussed below). The 1978 amendments were intended to minimize conflicts between proposed federal actions and listed species or their critical habitats. 19

A later amendment addressed the more specific problem of how to deal with conflicts between Section 7 and federal actions related to water development. 20 The 1982 amendment was made in response to complaints from the water development community during implementation of the ESA in the Upper Colorado River Basin 21 and reads as follows: "It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert

17. 50 C.F.R. § 402.02 (2000)
19. BEAN & ROWLAND, supra note 11, at 243.
with conservation of endangered species." This statute imposes "substantial and continuing obligations on federal agencies" to cooperate with local water entities. These obligations make it difficult for the FWS to distance itself from the water development community during consultation, a fact that becomes even more apparent when we look at the history of ESA implementation in the San Juan River Basin as it relates to the Animas-La Plata Project.

The procedural requirements for complying with Section 7 are comprised of a three step process: (1) federal agencies proposing an action (e.g., the Bureau of Reclamation) must inquire whether any threatened or endangered species may be present in the area of the proposed action; if a protected species may exist in the area, then the agency must prepare a biological assessment to determine whether such species is likely to be affected by the action; and (3) if the assessment determines that a listed species is likely to be affected by the action, then the agency must initiate formal consultation with the Secretary of the Interior. In practice, only a small percentage of federal actions are subjected to a formal consultation.

Formal consultations result in a "Biological Opinion" issued by the FWS. The Biological Opinion analyzes not only the specific federal action, but also the overall context of what is happening to the species. In determining whether the project is likely to jeopardize the species, the FWS looks at three things: (1) The Environmental Baseline—an analysis of the accumulated effect of past and ongoing human and natural impacts that have led to the current state of the species, including ongoing and past actions, actions that have successfully completed Section 7 consultation but are not yet in place, and recurring natural phenomenon such as drought or flooding that may affect the species habitat; (2) The Effect of the Action—a multi-faceted analysis of the direct or immediate impact of the project on the species or its habitat, the indirect impacts anticipated later from the action, and the impacts of actions that are interrelated or interdependent to the federal action; and (3) The Cumulative Effects—an analysis of the reasonably certain future non-federal actions that may affect the species. The FWS looks at these three factors in their totality and determines

22. 16 U.S.C. § 1531(c)(2).
24. § 1536(c)(1).
25. Id.
27. See Houck, supra note 7, for a critical assessment of ESA implementation as practiced by the FWS. According to one study Houck cites, 90 percent of all consultations under the ESA are disposed of informally.
whether the accumulated effect is expected to "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild." This is known as "the jeopardy standard."

There are three possible outcomes from a formal consultation: (1) a No Jeopardy Opinion (the project may go ahead without restrictions); (2) a naked Jeopardy Opinion (the project will jeopardize species and there are no alternatives, thus the project may not go ahead); or (3) a Jeopardy Opinion with "reasonable and prudent alternatives" (the project as presented will jeopardize the species in question, but it can be modified to minimize impact and prevent jeopardy).

The court has characterized the Biological Opinion as a "deliberative tool" that requires careful weighing and consideration. The court has also stated that the purpose of the Biological Opinion is "to attenuate any conflicts between the agency action and the welfare of the endangered species. Reasonable and prudent alternatives must be proposed by the consulting agency so that the action agency can evaluate options that might reconcile any conflict." Reasonable and prudent alternatives (RPAs) have thus been institutionalized as a means to balance the needs of listed species with the human need/desire to develop resources in endangered species habitat. Thus, the RPA is an important concept to examine. Congress articulated the RPA concept as follows: "If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action." The FWS defined "reasonable and prudent alternatives" as alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director [of the FWS] believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Thus, there are four prongs to the definition of an RPA. This definition will be looked at more closely in later sections of the article.

30. Id. § 402.02.
33. Id.
34. 16 U.S.C. § 1536(b)(3).
35. 50 C.F.R. § 402.02 (2000).
The wide-reaching scope and power of Section 7 was not fully appreciated until 1978, with the landmark Supreme Court case *Tennessee Valley Authority v. Hill.* In fact, the case had such ramifications for implementation protocol that some have characterized the political history of the ESA as divided into two eras: before and after *Tennessee Valley Authority v. Hill.* As former Rocky Mountain Regional Solicitor Margot Zallen observed about the reaction to *Tennessee Valley Authority v. Hill,* “people never thought it [the ESA] meant what it said, including half the members of Congress.”

In reaction to the Supreme Court’s findings in *Tennessee Valley Authority v. Hill,* Congress amended the ESA in 1978 to create more “flexibility” in implementation. Among other things, the amendments further developed the notion of “reasonable and prudent alternatives” as a means to resolving conflict in the consultation process and, hinting at ways to mitigate the impact of the Act, even stating that “the consultation process can resolve many if not most of the conflicts that might develop under the Act.”

The Upper Colorado River Basin (see below for map of the Colorado River Basin) provided a good opportunity to try out this new, less adversarial approach to Section 7 implementation. The FWS approach to the consultation process there represents an important turning point in the history of the Act, for it was in the Upper Colorado Basin that the agency

38. Margot Zallen, Rocky Mountain Regional Solicitor, Address at the University of Colorado School of Law (Jan. 25, 2000).
39. The most significant development was the creation of a way to get around a naked Jeopardy Opinion (where there were no identifiable RPAs to mitigate the impact), called the exemption process. Congress authorized the concept of an Endangered Species Committee comprised of seven agency heads and appointees. This committee, sometimes referred to as “the God Squad,” would be empowered to authorize an otherwise prohibited project, essentially allowing a species to risk extinction, provided the project meets certain criteria: (1) it is a federal project of regional or national significance, (2) there are no reasonable and prudent alternatives to the agency action, and (3) the benefits of the action clearly outweigh the benefits of saving the endangered species. 16 U.S.C. § 1536(a).
41. The Colorado River Compact of 1922 divided the river into Upper and Lower basins. The Upper Colorado River Basin includes “those parts of the states of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.” Colorado River Compact of 1922, art. II(f), available at http://www.glencanyon.org/Background/CRC.HTM (last visited June 17, 2001). Since such a small portion of Arizona is included in this definition, Arizona is generally considered a Lower Basin state, along with California and Nevada.
first began experimenting with compromise approaches that used the ESA more as a tool to elicit money for research than as a way to stop harmful development.

**THE COLORADO RIVER BASIN**

Endangered Fish Recovery Programs
A. ESA Implementation in the Upper Colorado River Basin

Soon after implementing regulations for the ESA were finalized in 1978, the FWS began Section 7 consultations with the BOR and other agencies in the Upper Colorado River Basin to determine how existing and proposed water projects would affect the viability and recovery of three endangered native fish species: the Colorado pikeminnow, the humpback chub, and the bonytail chub. Scientific knowledge about the native fishes had grown slowly throughout the 1970s due to a lack of research funding and low motivation within the agency, but nonetheless, between 1977 and 1981 the FWS determined that the operation of every major existing and proposed water project in the Basin jeopardized or would jeopardize the continued existence of the fish.

Not surprisingly, the water development community responded with anger and concern. The first approach taken was to try to change the law to minimize the effect of Section 7 on Colorado River water development. In the early 1980s, states and water users tried to amend the ESA to exclude the Colorado fishes and the Colorado River Basin from the Act, but they were unsuccessful.

The next strategy adopted by water developers was to take the issue to court. In Colorado River Water Conservation District et al. v. Watt, the District filed a lawsuit against the Secretary of the Interior claiming that construction of the mainstem Colorado River dams (Hoover, Glen Canyon, Parker, etc.) had caused the plight of the Colorado River fishes and should, therefore, be dismantled. The District had no intention of seeing the dams removed but rather wished to use the lawsuit to compel the court to rule that the ESA should not be applied to water projects in the Colorado River Basin. In a Stipulation of Settlement, the Department of the Interior agreed, among other things, to include water users in the consultation process.

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42. The Colorado pikeminnow was formerly known as the Colorado squawfish. The American Fisheries Society changed its common name in 1998.
44. Zallen, supra note 21, at 41.
At around the same time, consultation between the FWS and the BOR in the early 1980s regarding the proposed Windy Gap Project set the precedent for a new compromise approach to the conflict between endangered species and water development. In exchange for a No Jeopardy Opinion, the Municipal Subdistrict (the Front Range beneficiaries of the Windy Gap Project) agreed to contribute $100,000 for a habitat manipulation project for the endangered fish and $450,000 over three years for field research and habitat evaluation. This seed money provided the catalyst for more research and the identification of flow needs for the listed fishes. Department of Interior Solicitor Zallen observes that this approach to ESA implementation was widely considered to be "interagency coercion," or even "extortion." The subsequent improved understanding of the fishes' needs (made possible by the seed money) resulted in nearly one hundred Jeopardy Biological Opinions by 1984, effectively shutting down additional water development.

The next approach to resolving the conflict was to try to develop a negotiated agreement between the federal agencies, the states, and relevant interest groups. Realizing their options were limited, water developers took a greater interest in the problem and became more actively involved. The Colorado Water Congress even established a Special Project on Threatened and Endangered Species in 1983 that had as its goal to find an administrative solution to the conflict that would allow water development to continue while complying with the ESA. Meanwhile, the FWS began developing a plan with the BOR; the states of Colorado, Utah, and Wyoming; water developers; and environmentalists. These efforts led to the formation of the Upper Colorado River Coordinating Committee in March 1984.

Early on, participants agreed to exclude the San Juan River from the recovery program, even though it was technically part of the Upper

48. Windy Gap was a proposed supplement to the already constructed Colorado-Big Thompson Project, which diverts water from the headwaters of the Colorado and pipes it underneath the Continental Divide to supply the Front Range with water. See GREGORY M. SILKENSON, WINDY GAP: TRANSMOUNTAIN WATER DIVERSION AND THE ENVIRONMENTAL MOVEMENT (Colo. Water Resources Res. Inst., Technical Rep. No. 61, 1994).

49. Id. at 87.

50. Zallen, supra note 38.


52. See Wydoski & Hamill, supra note 51.

Colorado River Basin. This decision was made in large part because there were no Jeopardy Opinions to deal with in the San Juan River Basin and the state of New Mexico was therefore reluctant to participate when the process began in 1984. Also, Upper Colorado interests knew it would be difficult to negotiate with Steve Reynolds, New Mexico’s state engineer at the time and an avid states’ rights proponent. The San Juan was also thought to have unique issues since there were four tribes with reserved water rights claims in the Basin.

The Upper Colorado Committee met for four years, discussing, negotiating, and analyzing data, and eventually came up with a Recovery Implementation Plan, which was adopted in 1988. The recovery program—which includes instream flow protection, habitat restoration, installation of fish passage facilities, control of non-native fish, and restocking native fish—was formally implemented via a cooperative agreement between the governors of Utah, Colorado, and Wyoming; the administrator for the Western Area Power Administration (WAPA); and the Secretary of the Interior.

The agreement created the ten-member Upper Colorado River Implementation Committee to oversee the FWS recovery efforts. The Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin became the “reasonable and prudent alternative” to preventing the further operation of all the federal projects on the river. Twelve years and $75 million later, none of the fish have been delisted, and it has become obvious that the recovery effort will take much longer than anticipated. The effort to allow water development to continue, however, has fared quite well. In spite of the Jeopardy Opinion for further water development on the Colorado, over 270 projects have been permitted in the three participating states with the recovery program serving as the RPA.

The participants in the program are currently negotiating to secure authorization and funding for an additional $80 million for further research and capital projects and to extend the cooperative agreement that drives the recovery program. Although it is unclear how effective the program has

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55. Zallen, supra note 38.
56. Id.
58. Pontius, supra note 57, at 51.
59. Zallen, supra note 38.
60. Id.
been to date in terms of restoring the fish, the Upper Colorado Program is widely considered a "success," since it satisfies the Section 7 requirement, yet still allows water development to proceed. It is seen as a desirable alternative to traditional models of litigation and confrontation and has thus been touted as a valuable model for implementing the ESA based on principles of watershed management, cooperation, and consensus. It has been used as a model for ESA implementation challenges in other places, like the San Juan River Basin.

B. Perspectives on the FWS Implementation of Section 7

While some observers applaud this "win-win" approach to ESA implementation, some legal analysts have been critical of the FWS (and NMFS) application of Section 7 to potentially harmful federal actions and projects. Legal scholar J.B. Ruhl has noted that even though the court in *Tennessee Valley Authority v. Hill* described the plain meaning of Section 7 as "to require agencies to afford first priority to the declared national policy of saving endangered species," it is just as plain that "that is not how the agencies...historically have applied Section 7(a)(1)." And while the plain language of the ESA indicates that Biological Opinions are supposed to be immune from considerations other than the welfare of the species in question, the fact remains that, in practice, they are heavily influenced by other factors.

As law professor and ESA expert Oliver Houck observes, "given the rolling drumfire of criticism of Section 7 by federal agencies and their commercial beneficiaries, one would expect to find a considerable rate of decisions noting 'jeopardy' and 'adverse modification' of critical habitat, and a steady stream of applications for the exemption process. The facts, however, are otherwise." Houck then goes on to cite two independent studies conducted by the Government Accounting Office and the World

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63. See U.S. FISH & WILDLIFE SERV., supra note 54.

64. See Tenney, supra note 43, at 113.


66. Id. at 317.
Wildlife Fund\textsuperscript{70} in 1992 showing that "the rate of decisions issuing from the consultation process noting even potential jeopardy is low, and the number of projects actually arrested by the ESA is nearly nonexistent."\textsuperscript{71} More specifically, the conclusions reached by both reports (as summarized by Houck) were as follows:

(1) almost ninety percent of all consultations under the ESA are disposed of \textit{informally} and without fanfare; (2) over ninety percent of the consultations concerning activities sufficiently serious to be conducted \textit{formally} resulted in findings of "no jeopardy;" and (3) of those few that were conducted formally and found potential "jeopardy," nearly ninety percent arrived at reasonable and prudent \textit{alternatives} that allowed the project to proceed.\textsuperscript{72}

Houck attributes these facts, in part, to "an extremely discretionary attitude toward jeopardy reflected in Interior's regulations and practice."\textsuperscript{73}

The ability of the FWS to find ways around prohibiting western water development, in particular, is especially impressive, or alarming, depending on one's perspective. Another GAO study, commissioned by Congress out of concern that the ESA was impinging too much on western water development, found just the opposite. Out of 3200 proposed western water projects that had the potential to further jeopardize an already endangered species, none were terminated and only 68 had to be modified at all.\textsuperscript{74} Regarding this report, Houck observes, "On their face, the findings give rise to the suspicion that the biological agencies are bending over backward to identify alternatives....A common theme to all the [Biological] Opinions reviewed was the Service's determination to find an alternative within the economic means, authority, and ability of the applicant."\textsuperscript{75}

Interestingly, the FWS looks at figures like these as a \textit{positive} sign that the Act is being implemented successfully. The following excerpt from a 1999 FWS report titled "The Endangered Species Act at Twenty-Five" characterizes the nature of the agency's pride in and commitment to "improving" its approach to ESA implementation in recent years:

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71. Houck, \textit{supra} note 7, at 317.
72. \textit{Id.} at 318.
73. \textit{Id.} at 317.
74. U.S. GEN. ACCOUNTING OFFICE, \textit{supra} note 7, at 3.
75. Houck, \textit{supra} note 7, at 319-20.
\end{flushright}
Despite some controversy, the incremental knowledge gained through a quarter century of experience with the ESA has enabled the Fish and Wildlife Service to review, validate, fine-tune, and implement creative reforms designed to improve the ESA's effectiveness, while easing regulatory burdens on landowners and businesses, and encouraging the development of partnerships to conserve species. As we look back over the last 25 years of endangered species protection, we can see that the implementation of the ESA has evolved in a very positive way. The approaches of the early days of the ESA—single species management, confrontation, and rigidity—have given way to a multi-species/ecosystem focus, landscape approaches to management, increased regulatory flexibility, and a new sense of partnership.76

Some would argue, however, that the ESA has not evolved in a positive way, and that "innovative" approaches like "regulatory flexibility" and "partnerships" with development interests tend to compromise the original intentions of the Act. The FWS must walk a very fine line between adhering to the letter of the law and being "flexible."

Historically, the FWS has relied on identifying reasonable and prudent alternatives to questionable projects subject to Section 7 consultation as a way of minimizing the impact of the law and appeasing developers. The following passage from the 1999 FWS report reveals two important things: (1) the agency's commitment to finding ways to allow development in endangered species habitat to continue, and (2) its unquestioning faith in the concept of the RPA and its capacity to fulfill the goals of the ESA.

Certainly the ESA's first 25 years have not been without controversy—at times, intense controversy....But in examining the facts, we find that economic development can be compatible with the goals of the ESA. Of more than 145,000 Federal actions reviewed formally and informally between 1979 and 1992, only 69—or less than one-tenth of one percent—resulted in a jeopardy decision where there was no reasonable and prudent alternative for protecting the species. This is an average of 2 of 11,000 projects reviewed annually.77

What is unsettling about this passage is that there seems to be no acknowledgement of the enormous role that agency discretion plays in the formulation of these RPAs. In other words, just because the RPA approach complies with the regulations (created by the FWS itself) for implementing the law, it does not assure compliance with congressional intent—either in

77. Id.
the original statute or thereafter—nor does it by any means guarantee a happy ending for the species in question.

In his own review of 99 Jeopardy Biological Opinions and their RPAs issued between 1988 and 1993, Houck found that, in general, "alternatives strongly favored by the applicant and opposed by the Service were, albeit grudgingly, accepted;" and "alternatives to avoid jeopardy included a mix of measures neither surprising nor in many cases very demanding." Houck finds "recurring evidence that—whatever the law—the alternatives found for controversial projects have been strongly influenced by local and national politics." There are several examples of questionable use of agency discretion in the formulation of Biological Opinions and reasonable and prudent alternatives under Section 7 that illustrate Houck's claims. In *Mount Graham Red Squirrel v. Madigan*, for example, two FWS biologists testified that during the consultation process regarding construction of an observatory in the red squirrel's only habitat, they were instructed to find that the squirrel would not be endangered. The court ultimately concluded that the FWS regional director had mandated the inclusion of the selected alternative in the Final Biological Opinion "partly on non-biological considerations." Similarly, the Denver regional FWS director reportedly stated, before the biological studies were even complete, that he would insist on a "No Jeopardy" ruling for the proposed Two Forks Dam.

In the same vein, a 1992 World Resources Institute report found that "on numerous occasions, decisions to list species or issue jeopardy opinions that were justified on biological grounds have been delayed or reversed (inappropriately) due to political considerations." One of Houck's main conclusions regarding the implementation of Section 7 is that "the Department of Interior has been able to interpret the ESA through regulations in ways that are probably unlawful, contrary to what Congress thought it was enacting, and that have the effect of avoiding jeopardy under Section 7 largely because Section 7 is never applied." Like Houck, legal scholar Michael Bean cites a "disquieting side" to all the statistics showing no conflict between endangered species' needs and development desires, observing that "the political pressures have often 

79. *Id.* at 319.
81. *Id.* at 1449.
82. Bean, *supra* note 37, at 41.
84. Houck, *supra* note 7, at 322.
been too much for the Fish and Wildlife Service to bear." He concludes
that the challenge for the endangered species program in its next fifteen
years will be "to restore the perception that decisions in the program are in
fact being made on the basis of the scientific criteria that the law demands
rather than in response to political pressures."

These various perspectives and GAO findings call for a closer look
at how the ESA has been implemented, whether FWS implementation
strategies are doing justice to the original intent of the Act, and, if not, what
factors are contributing to the potentially questionable use of agency
discretion on the part of the FWS. In the following section I look at how
Section 7 was applied to the Animas-La Plata Project, focusing on methods
for developing an RPA, and then at some of the problems related to the
chosen approach.

III. SECTION 7 APPLIED TO THE ANIMAS-LA PLATA PROJECT

Human modification of the Colorado River Basin ecosystem has led
to the decline of several native fish species and multiple listings under the
Endangered Species Act. Two of the listed species—the Colorado
pikeminnow and the razorback sucker—inhabit the San Juan River, a major
tributary to the Colorado River. At one point, the presence of these fish
threatened to halt further large scale water development in the basin, most
notably the proposed Animas-La Plata Project, which has been slated for
over 30 years to provide water for cities and agriculture and, more recently,
to satisfy the water claims of two Indian tribes in the Basin—the Southern
Utes and Ute Mountain Utes.

Sometimes referred to as "the last big water project in the West," the
Animas-La Plata Project (A-LP) has a long and complicated history,
most of which is beyond the scope of this article. Suffice it to say that the
project, which would move water from the Animas River to the
neighboring La Plata River Basin, was authorized along with several other
Upper Basin projects in the 1968 Colorado River Basin Project Act. While
many other authorized western water projects fell by the wayside in the
1970s and 1980s due to a lack of federal funding and environmental
conscerns, A-LP remains viable today largely because of its ties to the 1988

85. Bean, supra note 37, at 41-42.
86. Id.
87. See generally A REVIEW OF ANIMAS-LA PLATA: THE WEST'S LAST BIG WATER PROJECT
88. For background on the project, see id. and MARC REISNER, CADILLAC DESERT: THE
Colorado Ute Indian Water Rights Settlement Act (CUIWRSA), discussed further in Section III.B.

This article focuses on A-LP's ESA consultation history, since it provides an instructive example of the strengths and limitations of the FWS approach to the Section 7 implementation process, and only delves into the broader history of A-LP to the extent necessary to provide context for ESA implementation.

A. The 1979 Biological Opinion

In 1978, the possible existence of a small population of Colorado pikeminnow in the San Juan River led the BOR to initiate Section 7 consultation with the FWS on the potential effects of the proposed Animas-La Plata project on the fish. The 1979 Final Biological Opinion concluded that A-LP construction would indeed "further degrade the San Juan River to a point that this population will be lost." However, based on the capture of only a single juvenile pikeminnow in the San Juan River near Aneth, Utah, the FWS reasoned that "because of the apparent small size of the San Juan River [pikeminnow] population and its already tenuous hold on survival, its possible loss will have little impact on the successfully reproducing Green and Colorado River [pikeminnow] populations and therefore on the species itself." The FWS thus found no jeopardy for A-LP in 1979.

The Opinion did, however, hold out some hope for the future, recommending that (1) native fish populations of the San Juan River be thoroughly surveyed, (2) the environmental needs of Colorado pikeminnow be determined, (3) an attempt be made to meet the above needs by adjusting projects on the San Juan drainage (Navajo Indian Irrigation Project, Animas-La Plata Project, Gallup-Navajo Project, etc.) to the benefit of the Colorado pikeminnow, and (4) artificial facilities in which to spawn and rear Colorado pikeminnow be provided and funded until such time that suitable habitats in the San Juan River can be developed and maintained.

In spite of these recommendations to the BOR, little or no research was conducted in the San Juan for several years. Meanwhile, perspectives on the importance of the San Juan River to the overall recovery of the pikeminnow were changing as the Upper Colorado Endangered Fish...
Recovery Program got underway. In a June 1985 memo, the FWS informed
the BOR that consultation on Animas-La Plata should be reinitiated based
on the availability of new information. A few months later, in September
1985, the Colorado River Fishes Recovery Team recommended to the FWS that
the San Juan River be considered an integral part of the Upper Colorado River Basin in its recovery efforts
[and]...that the Service encourage participation by the State
of New Mexico and other appropriate entities so that the San Juan can be more fully incorporated into the Recovery Plans,
and subsequently, in Implementation plans.

After discussing the possibility of reinitiating consultation on A-LP with the
BOR, the FWS agreed to delay reconsultation until additional field studies
were completed.

B. A-LP and the Colorado Ute Indian Water Rights Settlement Act

Meanwhile, the Southern Ute and the Ute Mountain Ute Tribes,
who had been looking for a way to realize their federally reserved Winters
water rights since initiating litigation in the early 1970s, entered into
negotiations with A-LP proponents that eventually resulted in A-LP
becoming an "Indian project."

The Utes initiated litigation in 1972 to quantify their water rights in
the San Juan River Basin but decided to abandon the litigation approach in

95. See Memorandum from John Hamill, Colorado River Endangered Species Recovery
Coordinator, Region 6, to John Spinks, Fish and Wildlife Service Assistant Regional Director
96. Id.
97. Working Group on the Endangered Species Act and Indian Water Rights, Case Study
on the Upper Colorado River Basin 13-14 (July 28, 1999) (unpublished draft, on file with
author) [hereinafter Working Group].
98. Memorandum from John Hamill, supra note 95.
99. In Winters v. United States, 207 U.S. 564 (1908), the Supreme Court ruled that tribes are
entitled to enough water to satisfy the purpose of the reservation and to a priority date equal
to the date their reservation was established. Thus, in most cases tribes have priority dates
senior to non-Indians. In terms of quantification, a later case determined that tribes would be
theoretically entitled to the amount of water necessary to irrigate all practicably irrigable
quickly became apparent is that Indian water rights would not always be accorded literal
interpretation. More than anything, it has been the threat of literal interpretation that has led
to creative negotiations and compromise between tribes and non-Indian water users.
100. For a more detailed analysis of the history of Indian water rights in the San Juan River
Basin and the negotiations surrounding CUIW RSA, see Adrian N. Hansen, The Endangered
Species Act and Extinction of Reserved Indian Water Rights on the San Juan River, 37 ARIZ. L. REV.
1984 when the state of Colorado proposed a negotiated settlement. Settlement discussions began in November of 1984 and continued through 1985 in Durango, Colorado, and on both reservations. The sessions often included in excess of 100 people, with representatives from the tribes, the states of Colorado and New Mexico, the Departments of Justice and Interior, local municipalities, and water user entities. Central to the discussions was the potential for the tribes to use water from one or both of two major BOR projects: the Dolores Project, which was nearing completion at the time; and A-LP, which had yet to begin construction. ¹⁰¹

The incorporation of tribal water rights into these formerly non-Indian projects was deemed critical because existing supplies were insufficient to meet the needs of both Indians and non-Indians. Many of the rivers and streams to which the tribes laid claim were already over-appropriated. ¹⁰² If the tribes were not somehow incorporated into existing projects, A-LP proponents argued, providing wet water to them would inevitably displace existing water users, a politically unacceptable prospect. ¹⁰³

In 1986, the negotiations resulted in a proposed Colorado Ute Indian Water Rights Settlement. After a lengthy period of fine-tuning, the agreement was made official in 1988, when the Colorado Ute Indian Water Rights Settlement Act (CUIWRSA) was passed by Congress and signed into law. ¹⁰⁴ In the final agreement, the tribes would give up their water claims on certain streams in exchange for approximately one-third of the water to be diverted annually by A-LP. The Ute Mountain Utes would also be authorized to receive water from the nearby Dolores Project.

The tribal component of A-LP would be realized in Phase II, which, unfortunately, would not be federally funded and would be constructed "when deemed practicable" by one or more of the parties to the 1986 cost-sharing agreement. ¹⁰⁵ The money for Phase II, estimated at over $100 million, would have to come from the tribes themselves, the state of Colorado, and local interests. ¹⁰⁶ The federal government would pay the


¹⁰² Id. at 5.

¹⁰³ Id.


¹⁰⁶ "The nonfederal parties who signed the cost-share agreement are the Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe, the State of Colorado, Montezuma County, the Animas-La Plata Water Conservancy District, the New Mexico Interstate Stream Commission, and the San Juan Water Commission." Id. at 13 n.3.
tribes' share of project costs until water was first used.\textsuperscript{107} The agreement further stated that certain parts of A-LP had to be completed by January 1, 2000, or else the tribes would have the right to reopen litigation of their reserved water rights claims until 2005.\textsuperscript{108}

According to one observer, the settlement was "a model of successful cooperation and preservation of harmonious Indian and non-Indian relations."\textsuperscript{109} It also gave A-LP a new identity as an "Indian project," which made it privy to strong support from state and federal governments in the 1990s, in spite of ongoing fiscal and environmental problems. The prevailing sentiment amongst many politicians has been that A-LP must be built to do justice to the Colorado Ute Tribes.\textsuperscript{110}

It is important to remember that while the FWS had indicated some interest in reinitiating consultation on A-LP and rethinking the 1979 No Jeopardy Opinion before the passage of CUIWRA, the general assumption amongst negotiators seemed to be that the ESA would not be an obstacle to A-LP construction.\textsuperscript{111} This assumption would soon prove to be false.

C. The 1987–1989 San Juan River Fisheries Surveys

In 1987, the BOR finally began surveying the San Juan River, as required by the 1979 Biological Opinion for A-LP and in response to the Fish and Wildlife Service's desire for more data.\textsuperscript{112} The surveys were conducted between 1987 and 1989 and resulted in several surprising discoveries that exceeded most biologists' expectations: (1) Colorado pikeminnow existed in several locations between Shiprock, New Mexico, and Lake Powell; (2) the fish were successfully reproducing, as evidenced by the collection of 18 young-of-year fish in 1987 and 1988; and (3) suitable

\begin{itemize}
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Witte, supra note 101, at 2.
  \item \textsuperscript{110} See, e.g., Ellen Miller, Lujan "sympathetic" to A-LP, DURANGO HERALD, May 10, 1990; Press Release, Governor Bill Owens, Colorado Committed to Building Animas-La Plata (Mar. 12, 1999), available at http://www.state.co.us/owenspress/animas.htm (last visited June 18, 2001).
  \item \textsuperscript{111} I could find no mention of the role a reconsultation on the status of endangered fish in the San Juan might play in the implementation of CUIWRA in documents leading up to CUIWRA.
  \item \textsuperscript{112} Memorandum from John Hamill, supra note 95; Interview with David L. Propst, Endangered Species Biologist, New Mexico Department of Game and Fish, in Albuquerque, N.M. (Jan. 11, 2000).
\end{itemize}
pikeminnow habitat was evident throughout the San Juan River on a year-round basis.\textsuperscript{113}

These findings were received with mixed emotions from the community in the San Juan River Basin. As Colorado River Endangered Species Recovery Coordinator John Hamill wrote after the first survey in 1987, "I believe the findings indicate that the San Juan River may have significant recovery potential for the Colorado [pikeminnow] that needs to be further explored. The States of Utah and New Mexico and Reclamation (reluctantly) agree with this conclusion."\textsuperscript{114}

Obviously, environmentalists were thrilled that viable populations of fish had been found, and on September 15, 1989, Sierra Club Legal Defense Fund attorneys Lori Potter and Federico Cheever wrote to the Bureau of Reclamation\textsuperscript{115} reminding them that the ESA required the reinitiation of consultation when new information regarding a listed species was discovered.\textsuperscript{116} The BOR responded to the SCLDF letter in October of 1989, indicating that it was still reserving judgment on whether the new surveys would qualify as "new information" revealing effects "not previously considered."\textsuperscript{117} Nonetheless, A-LP supporters, in the midst of planning an A-LP groundbreaking ceremony for May 1990, sensed trouble ahead.\textsuperscript{118}

Apparently, the SCLDF letter was threatening enough that the BOR felt compelled to reinitiate consultation, in spite of objections from A-LP proponents like Sam Maynes, legal counsel for the Southern Utes, and the Southwest Water Conservation District. According to Maynes, who would

\textsuperscript{113} See generally Steven P. Platania & Douglas A. Young, A Survey of the Ichthyofauna of the San Juan and Animas River from Archuleta and Cedar Hill, (respectively), to Their Confluence at Farmington, New Mexico (1989); Steven P. Platania, Biological Summary of the 1987 to 1989 New Mexico-Utah Ichthyofauna Study of the San Juan River (1990); Memorandum from John Hamill, supra note 95; Interview with Steven P. Platania, Professor of Biology, Univ. of New Mexico, in Albuquerque, N.M. (Jan. 11, 2000).

\textsuperscript{114} Memorandum from John Hamill, supra note 95.

\textsuperscript{115} Letter from Lori Potter & Federico Cheever, Sierra Club Legal Defense Fund Attorneys, to Reed Harris, U.S. Bureau of Reclamation (Sept. 15, 1989) (on file with author).

\textsuperscript{116} By law, a federal agency must resume consultation with the FWS "if new information reveals that effects of the agency's actions may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16 (2000). See also Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987).

\textsuperscript{117} Letter from Roland Robison, Upper Colorado Regional Office Director, Bureau of Reclamation, to Federico Cheever, Sierra Club Legal Defense Fund Attorney (Oct. 16, 1989) (on file with author).

\textsuperscript{118} Letter from Frank "Sam" Maynes, Southwest Water Conservation District Attorney, to Roland Robison, Upper Colorado Regional Office Director, Bureau of Reclamation (Jan. 2, 1990) (on file with author).
rather have taken his chances in court against SCLDF, the BOR assured him that reconsultation would have little effect on the project. On February 6, 1990, the BOR contacted the FWS, requesting reconsultation on the likely effects of A-LP on the pikeminnow.

D. The 1990 Draft Biological Opinion

During the early phases of the reconsultation, FWS biologist Keith Rose, in charge of preparing the Biological Opinion, looked at the new information about pikeminnow populations in the San Juan and determined that A-LP, as proposed, would indeed jeopardize the fish. He determined that because of already existing projects in the San Juan Basin, flows in the San Juan River were already "at or below the threshold for minimum flows whereby the fish could survive in the river." Of particular concern was A-LP's projected effect on water levels in the mainstem San Juan, especially its effect on spring flows necessary for spawning. He further determined that the population was significant enough that it could not be written off, as the 1979 Opinion had done. This conclusion stemmed at least in part from an April 16, 1990, determination by the Colorado River Fishes Recovery Team that the San Juan River should be included in the Recovery Plan objectives for removing the species from the list of endangered and threatened species. Table 1 contains excerpts from the 1990 Opinion regarding A-LP's projected impact on the fish.

119. Maynes downplayed the significance of the surveys, arguing, "the finding of young-of-year cannot be considered new information, because the Service was aware in 1979 that spawning occurred in the San Juan River." Barry Smith, A-LP Backers, Opponents Plan New Strategies, THE DURANGO HERALD, May 10, 1990, at A1. He then went on to cite the 1980 EIS that had reported that a survey crew had located a "juvenile squawfish" in the San Juan River in 1978. It apparently had spawned in the river in 1975 or 1976. Id.

120. Interview with Frank "Sam" Maynes, Southwest Water Conservation District Attorney, in Durango, Colo. (Jan. 11, 2000).

121. Letter from Acting Regional Director, Upper Colorado Regional Office, Bureau of Reclamation, to Regional Director, Region 6, U.S. Fish and Wildlife Service (Feb. 6, 1990) (on file with author).


123. Id. at 22.
124. Id. at 14-16.
125. Id. at 16.
Table 1: Excerpts from 1990 Draft Biological Opinion (the Naked Jeopardy Opinion) Regarding Projected Impacts of Animas-La Plata

“This Biological Opinion is based on the full project development scenario as requested by the Bureau of Reclamation. The Bureau estimates that the Animas-La Plata Project would result in a net average annual depletion of 154,800 acre-feet of water from the two rivers. The Animas and La Plata Rivers are tributaries to the San Juan River which is inhabited by a reproducing population of Colorado [pikeminnow].” (4)*

“Water depletions in the Upper Colorado River Basin (UCRB) have long been recognized as a major source of impact to endangered fish species. Continued withdrawal of water throughout the Basin has restricted the ability of the Colorado River system to produce flow conditions required by various life stages of the fish. Since 1942 numerous impoundments and diversions have altered the shape of natural hydrographs by reducing peak discharges by as much as 50 percent in some reaches while doubling base flows in other reaches. Significant depletions to flows of the San Juan River of up to 45 percent during the peak runoff period have already occurred as a result of major water development projects, including Navajo Reservoir, San Juan Chama Project and the Navajo Indian Irrigation Project.” (6)

“Depletions, along with a number of other factors, have resulted in such drastic reductions in populations of Colorado [pikeminnow] that the Service has listed this species as endangered throughout its entire range, with the exception of the Salt and Verde River drainages in Arizona where attempted reintroductions of endangered fishes have been classified as non-essential, experimental populations.” (6)

“Recent field studies (Platania et al. 1990) document a greater number of Colorado [pikeminnow] (adults and young-of-year) in the San Juan than were previously known to occur. The San Juan River is one of only three remaining areas where a wild, reproducing population of Colorado [pikeminnow] still persists. As the southernmost tributary in the Upper Colorado River Basin, the San Juan peaks earlier in the year and attains warmer water temperatures than other UCRB streams and is conducive to longer and better growth potential for young Colorado [pikeminnow]. Any additional loss or further degradation of remaining habitats of the San Juan River will exacerbate problems the species is currently experiencing in the San Juan and throughout the Upper Colorado River Basin.” (14)

*Numbers in parentheses indicate page numbers in the Opinion.
Table 1 (Continued)

"Protection and enhancement of the San Juan River could provide additional protection against possible extinction of the Colorado [pikeminnow] while reducing total dependency on the Colorado and Green River systems for survival and recovery. The San Juan sub-basin is geographically isolated from the Colorado and Green River sub-basins, provides a third population of wild fish, and thus, adds an additional buffer against a catastrophic event (such as an oil spill) or future project developments elsewhere in the basin." (14)

"The Animas-La Plata Project will cause discrete, identifiable, additive, adverse impacts to the San Juan River endangered fishes. As shown in the flow analysis, the project will cause flow depletions in addition to existing projects which will further alter historic flow regimes." (20)

"In summary, further flow reductions in the San Juan River are likely to jeopardize the continued existence of the Colorado [pikeminnow]. There are existing data suggesting that wild populations of Colorado [pikeminnow] in the Colorado River sub-basin are continuing to decline and may not be recoverable. The last remaining stronghold for the species is the Green River sub-basin, however, even there they do not appear to be increasing in numbers. Any catastrophic event there could result in severe impacts to Green River sub-basin populations to the point of being lost and unrecoverable. The San Juan River is an essential component of the Colorado River Basin to ensure maintenance of a population of Colorado [pikeminnow] in the event populations are lost in the Green River sub-basin and/or Colorado River sub-basin." (21)

* Numbers in parentheses indicate page numbers in the Opinion.

The FWS thus issued a Draft Biological Opinion on May 4, 1990—two weeks before the scheduled groundbreaking ceremony for A-LP—that concluded that the project was likely, after all, to jeopardize the continued existence of the pikeminnow.126 The Opinion relates how, "in pursuit of attempting to identify reasonable and prudent alternatives to the proposed project," the FWS "queried the Bureau as to existing flexibility within Animas-La Plata Project features" to benefit Colorado pikeminnow in the San Juan.127 The BOR responded that "there was not any project

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126. Id. at 25.
127. Id. at 21-22.
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flexibility." Thus, the FWS looked for alternatives that would allow the full project as initially conceived.

After reviewing several possibilities (see Table 2), the FWS concluded that none were defensible. (See Table 3 for excerpts from the 1990 Opinion regarding consideration of these alternatives.) The agency then recommended that further water depletions in the San Juan River not occur until additional studies were conducted to develop a more complete database, especially on streamflow needs for the fish in the San Juan. This was the first and only "naked" Jeopardy Opinion (a Jeopardy Opinion with no RPAs) ever issued by Region 6.

The 1990 Draft Biological Opinion essentially placed A-LP on hold until further studies could be conducted, which instigated a major outcry from project supporters including the Colorado and New Mexico congressional delegations, the governor of Colorado, and the Southern Ute and Ute Mountain Ute Tribes, who, because of the CUIWRSA, were dependent on A-LP for the realization of their water claims. Secretary of the Interior Manuel Lujan also criticized the FWS opinion and even recommended that Congress amend the ESA to allow consideration of economic factors in the Section 7 consultation process. The Opinion was especially offensive to those who had only two years earlier labored with the Department of the Interior to reach an agreement with the two tribes in the Basin regarding their reserved water rights—an agreement that hinged on the construction of A-LP.

The Department of the Interior was put in a difficult position, since it was obligated to protect, on the one hand, the interests of the Utes (via the Bureau of Indian Affairs) and, on the other hand, the welfare of the fish (via the Fish and Wildlife Service). Interestingly, the Department had historically been in the habit of prioritizing the needs and desires of yet a third agency under its authority, the Bureau of Reclamation, often at the expense of other interests. Endangered fish and Indian water rights were not new concerns for the Department, but to have to manage them in concert and in conflict with each other was indeed a new challenge.

128. Id. at 22.
129. Id. at 25.
130. Interview with Keith Rose, supra note 9.
131. Wydoski & Hamill, supra note 51, at 132.
133. For a history of the Bureau of Reclamation and the Department of Interior's implementation of reclamation law, see generally Reisner, supra note 88.
Table 2: Reasonable and Prudent Alternatives Considered in the 1990 Draft Biological Opinion (The Naked Jeopardy Opinion)*

1) Flexibility in A-LP project features and/or potential design changes that would allow for reoperation of project storage facilities to benefit Colorado [pikeminnow] in the San Juan River.

The Service was interested in this alternative, but “the Bureau responded that there was not any project flexibility and that if they released water from storage, it would necessitate pumping additional water out of the Animas River to refill project reservoirs.”

2) Use of Navajo Dam as a possible means of offsetting project impacts, since it is a BOR facility and is situated on the San Juan River upstream of occupied habitats.

“The Service took the preliminary position that since A-LP would annually deplete 154,800 acre-feet of water from the San Juan sub-basin, the Bureau should provide that same amount of water back to the San Juan River via releases from Navajo Dam.”

“The Bureau proposed an alternative to the Service position that would replace project depletions, totaling 90,800 acre-feet of water in April, May, June, and July only. The remaining eight months of the year (August-March) the Bureau would not release water from Navajo Dam to offset project depletions.” The FWS found this alternative unacceptable.

3) Phasing project depletion replacements consistent with the construction schedule.

“Since A-LP would be constructed in phases (i.e., Phase I: Ridges Basin Dam, Reservoir and associated conveyance facilities; and Phase II: Southern Ute Dam, Reservoir and associated conveyance facilities), an additional option considered was offsetting project depletions associated with Phase I (111,200 to 138,300 acre-feet) which would be completed by the year 2000; and then use the results of continued biological studies which would be done concurrently with construction of Phase I to formulate any additional needs that may accrue as a result of Phase 2.”

The Service considered this option but determined that biological and hydrological ramifications made it indefensible. “The concept of replacing water depleted as a result of the Animas-La Plata Project with water stored in Navajo Reservoir still results in a net depletion in the San Juan sub-basin and would further reduce flows in the San Juan River commensurate with project depletions, and therefore within occupied habitats for Colorado [pikeminnow].”

Table 3: Excerpts from 1990 Draft Biological Opinion (the Naked Jeopardy Opinion) Regarding Reasonable and Prudent Alternatives Considered*

“As the biological and hydrological ramifications of the three options were discussed, it was realized that none were defensible. Since the Service believes that in most years the river is already at or below the threshold for minimum flows whereby the fish could survive in the river, any further depletions to the river system could render the San Juan unusable by the Colorado [pikefish].” (22)

“Additional discussions continued, however, no solutions or additional alternatives were identified.” (22)

“It appears that there are no reasonable and prudent alternatives that can be implemented in a manner consistent with the intended purposes of the Animas-La Plata Project, and within the Bureau's legal authority and jurisdiction that are economically and technically feasible, that the Service believes would avoid the likelihood of jeopardizing the continued existence of the Colorado [pikefish].” (22)

“This opinion was based upon the best scientific and commercial data available as described herein. If new information becomes available (such as results of the proposed studies) or if new species are listed, then formal Section 7 consultation should be reinitiated.” (25)

*Numbers in parentheses indicate page numbers in the Opinion.

The BOR's first response to the 1990 Draft Biological Opinion was that further discussions with the FWS regarding the possibility of a reasonable and prudent alternative to A-LP were pointless. In a handwritten internal memo, BOR employee Wayne Cook related to his colleagues how he responded to the FWS determination during a departmental briefing on the Draft Biological Opinion:

We indicated that they should not expect anything fruitful coming out of additional discussions between the Bureau and the FWS, that we had already suggested prudent alternatives and they were rejected! We need no additional time to discuss. Our opinion should be that the FWS may as well make the opinion final, that it appears to us that we cannot comply with the Service's opinion and meet existing obligations in the San Juan River Drainage (i.e. UIT contract, NIIP
[Navajo Indian Irrigation Project] development, Jicarilla, Ute, and Southern Ute [Indian water right settlements, etc.] and that there may be no other alternative than to seek an exemption as soon as possible under the Endangered Species Act.13

The BOR eventually concluded, however, that the exemption process would be a lengthy ordeal with questionable outcome and that their options were somewhat limited.135 The search for an RPA would thus continue.

E. The Search for a Reasonable and Prudent Alternative

In an effort to avert what many perceived would be a "regional social and economic disaster,"136 the BOR wrote to the FWS, outlining a new approach:

the concept of "no net depletion" on the San Juan River is contrary to the spirit of cooperation we enjoy in the RIP [Upper Colorado Recovery Implementation Program] and is a complete departure from [the 1979 Opinion]....A program which would allow continued use of the San Juan River by residents of Colorado, Utah, and New Mexico while protecting fishes downstream must therefore be developed.137

To that end, the BOR invited various San Juan River Basin water interests (including state and federal representatives, academics, consultants, and environmental groups) to help them determine if an acceptable RPA could be developed during the summer of 1990.138 It is interesting to note here that the FWS was apparently reluctant to participate in the search for an RPA, since it had already gone through the process of trying to identify an RPA with the BOR during the consultation process.139 As a result, the BOR took the lead on searching for an RPA that would be acceptable to the FWS, and the FWS played a relatively passive role throughout negotiations over the next year-and-a-half, in spite of the court's ruling that the consulting agency should take the lead in the identification of RPAs.

135. Bureau of Reclamation, Animas-La Plata ESA Section 7 Consultation (Summer 1990) (unpublished meeting notes, on file with author).
137. Letter from Roland Robison to Galen Buterbaugh, Regional Director, Fish and Wildlife Serv. (July 17, 1990) (on file with author).
138. Memorandum from Wayne Cook, Upper Colorado Regional Office, Bureau of Reclamation, Max Stodolski, Upper Colorado Regional Office, Bureau of Reclamation (June 6, 1990) (on file with author).
139. Interview with David L. Propst, supra note 112.
The BOR eventually established three teams to help it identify an RPA: a Biology Team, a Hydrology Team, and a Legal Team. The Biology Team played the biggest role in the process, since it had to grapple with the issue of whether the fish could tolerate any further depletions, in spite of the FWS findings in the 1990 Draft Biological Opinion.

The first meeting of the Biology Team was held in Las Vegas, Nevada, on June 13, 1990. Two key biologists, David Propst of the New Mexico Department of Game and Fish and Steven Platania of the University of New Mexico (both of whom worked on the 1987–1989 surveys) chose not to attend. The biologists who attended listened to a BOR hydrologist and a BOR biologist describe San Juan River and A-LP hydrology and biology. They then discussed the facts and came to a tentative consensus that (1) protection of the San Juan River population is not only desirable but probably essential to preclude extinction and promote recovery,\textsuperscript{140} and (2) preventing depletion of water from the San Juan Basin was not as critical to survival of the fish as was using operational flexibility at Navajo Dam to provide flows once habitat needs were determined; therefore "some reasonable and prudent alternatives probably exist which would preclude jeopardy to the species."\textsuperscript{141} It was agreed that the principle alternative that needed to be explored was the flexibility of Navajo Dam and whether sufficient water was available to offset the effective depletion of A-LP and enhance runoff flows.\textsuperscript{142} Participants indicated, however, that they wanted to think more about the discussions and then spend some additional time together to come to consensus.\textsuperscript{143}

The Biology Team met again on June 25 and 26, 1990, in Park City, Utah. At this meeting, the biologists came to agreement on several points:

\textsuperscript{140} Richard Valdez, Senior Aquatic Ecologist, Bio/West, and Biological Consultant for the SWWCD, distinguished the relative importance of the San Juan to the pikeminnow and the razorback sucker as follows:

Although losing this small population [of pikeminnow] would probably not impact the existence of the species in other areas, the San Juan River population should be considered important because it may constitute a unique genetic strain and it provides an additional population for the system. The continued existence of the razorback sucker in the San Juan River [however] is essential to the continued existence of the species basinwide. Because this species is not reproducing in the wild in the [Upper B]asin and numbers seem to be declining, maintenance of as many genetic stocks as possible is important until causes for decline are identified.

Richard Valdez, Answers to Animas-La Plata Biological Opinion Questionnaire 1 (June 18, 1990) (unpublished manuscript, on file with author).

\textsuperscript{141} Memorandum from Reed Harris, Biological Support Branch, Upper Colorado Regional Office, Bureau of Reclamation, to Bureau of Reclamation Regional Director Roland Robison (June 20, 1990) (on file with author).

\textsuperscript{142} Id.

\textsuperscript{143} Id.
the Draft Biological Opinion accurately reflected the current status of the two fish species in the San Juan River; the Jeopardy Opinion was warranted; and the San Juan population of fishes were essential to the recovery of the species. The team grappled, however, with the question of whether an RPA could be developed that would offset the impacts of A-LP on the pikeminnow.

Not all of the biologists agreed that an RPA could be identified, a situation that caused great concern for A-LP proponents. Several team members emphasized the need to conduct additional studies on the rivers and look at specific alternatives to the construction of A-LP before any decision could be made. Even Rich Valdez, an independent biologist/consultant who had been hired by the Southwest Water Conservation District (SWWCD) to help find an RPA, admitted the following in a letter to his client's attorney, Sam Maynes:

I thought...that we might be able to formulate some alternatives, but after learning more about the hydrology of the San Juan River, the possible availability of water from Navajo Reservoir, and concerns from the field biologists, I concluded that it would be premature for me to formalize alternatives.

The Biology Team met several times over the course of the summer and fall of 1990 and eventually began to formulate an RPA that was modeled on the one used in the Upper Colorado River, where limited water development was allowed to proceed while a recovery program took place. On September 28, 1990, the BOR wrote to the FWS with a tentative RPA and a plan to finalize the alternative over the next few months. The basic idea was that at least the first part of A-LP could be built while a research and recovery program simultaneously recovered the fish, using Navajo Dam and Reservoir to mimic a more natural hydrograph.

Interestingly, the BOR had significantly modified its stance regarding flexibility in the proposed project, stating that it was now willing to consider an RPA that would initially limit A-LP construction to Ridges

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144. Memorandum from Reed Harris to Roland Robison, Upper Colorado Regional Office Director, Bureau of Reclamation (Summer 1990) (on file with author).
145. See id.; Letter from Richard A. Valdez, Senior Aquatic Ecologist, Bio/West, Inc., to Frank "Sam" Maynes, Southwest Water Conservation District Attorney (July 13, 1990) (on file with author); Interview with David L. Propst, supra note 112.
146. Letter from Richard Valdez, supra note 145.
147. Id.
148. Id.
149. Memorandum from Roland Robison, Regional Director, Bureau of Reclamation, to Galen Buterbaugh, Regional Director, Fish and Wildlife Serv. (Sept. 28, 1990) (on file with author).
150. Id.
Basin Reservoir, the Durango Pumping Plant, and the inlet pipeline, with a net depletion of 50,000 acre-feet, rather than the full project it had insisted on during negotiations leading up to the Draft Biological Opinion. The BOR had also discovered that there was more flexibility in existing San Juan River operations than previously thought. Specifically, the BOR concluded the following:

- New hydrological information suggested that there is additional flexibility in the operations of the Navajo Dam. By reducing late fall and winter releases, water could be made available to increase spring peaks and return the San Juan River to a more natural hydrograph that would mimic historical flow conditions.
- Updated hydrology modeling indicated that approximately 300,000 acre feet of water could be made available from the Navajo reservoir operation to re-create the spring peak flows in the San Juan River.
- The San Juan River population of endangered fish is important to the survival and recovery of the species.
- In addition to flow depletions, other conditions presently occurring in the San Juan River, including proliferation of nonnative species, water quality degradation, the blocking of migration routes, and loss of riparian areas, are extremely detrimental to the survival and recovery of the endangered fish.

Armed with new flexibility and a broader perspective on the possibility for compromise, the BOR expressed confidence that an RPA might still be identified that would allow A-LP to go forward.

To better refine these ideas—with the purpose of developing a viable RPA—the BOR held a series of three general meetings over the course of the next two months. Minutes from the meeting held on October 9, 1990, in Salt Lake City, Utah, indicate how the BOR explicitly reminded the group that the purpose of the meeting was to develop "a potential alternative to the Jeopardy Opinion" for A-LP, not to the project itself. We stressed the fact that we were not here to discuss the pros and cons of the project, the Endangered Species Act, or any other subjects not directly

151. Id.
152. Id.
153. Id.
154. Id.
related to the tasks at hand." The group adjourned, agreeing that each of the three teams would meet independently before October 23, 1990, and then report back to the second general meeting on November 2, 1990, in Albuquerque, New Mexico.

The Biology Team next met on October 22 and 23, 1990, in Denver, Colorado, to discuss the biological basis of the Draft Biological Opinion and to determine if there was any "defensible" biological basis to support an RPA. Bob Williams, the BOR biologist chairing the meeting, again made it clear that the BOR was not seeking advice or recommendations but, rather, simply wanted "expert opinion" on technical issues.

Much of the team's discussion centered on the difficulty of identifying an alternative in the face of the many unknowns and the uncertainty of available water after full depletion. The team then raised its concerns with the direction in which the BOR appeared to be heading with its proposed RPA. The primary concern was that an RPA including or requiring full depletion would be accepted without understanding more about the fish, why they are declining, and what chemical/physical factors have led to their decline. The team spent the better part of the remainder of the meeting discussing research that would be needed to mitigate the scientific uncertainty.

The three teams met again as a group at the second of the three general meetings on November 2, 1990, in Albuquerque to review progress made towards a reasonable and prudent alternative. Again, in its minutes of the meeting, the BOR recounts how "we reiterated that the purpose of the meeting was to find an alternative to the Jeopardy Opinion and not an alternative to the Animas-La Plata project." These continual reminders suggest that some team members still felt that there might be non-A-LP alternatives that might serve the purpose of the project. Indeed, New Mexico Game and Fish biologist David Propst recalls how his suggestions regarding alternatives to A-LP were continually quashed: "They made it very clear that a non-A-LP alternative was not an option." This explains in large part the ongoing absence of any representatives from environmen-

156. Id.
157. Id.
159. Id.
160. Id.
161. Id.
162. Id.
163. Letter from Roland Robison, Upper Colorado Regional Office Director, Bureau of Reclamation, to All Interested Parties (Nov. 8, 1990) (on file with author).
164. Interview with David L. Propst, supra note 112.
tal groups during these meetings. The environmental groups felt that participating in the search for an RPA would be a waste of their time if the full range of alternatives was not going to be considered.

The November 19, 1990, meeting was the last of the three general meetings regarding the formulation of an RPA for A-LP. After agreeing on an RPA, participants then turned to the task of developing the Recovery Implementation Program (RIP) that would serve as the centerpiece of the RPA. On November 27, 1990, the FWS sent out a letter to interested parties requesting comments on and participation in the development of a San Juan River Endangered Fishes Recovery Implementation Program. Several members of the environmental community received the letter, but, for reasons described below, they declined to participate.

In a letter to Robert Jacobsen, Assistant Regional Director of the FWS, Sierra Club Legal Defense Fund attorney Lori Potter (representing several environmental organizations) wrote,

We are not persuaded that it is in the interest of the environmental community to participate in development of a [recovery] program, since it seems driven more by a desire to relieve the Animas-La Plata project from the requirements of the Endangered Species Act than by the need to recover the endangered fish. It appears to us that the alternative of not building the Animas-La Plata project at all or at least deferring construction of one of its principal features, the Ridges Basin Reservoir, until the feasibility of recovering the fish is known, is not on the table.

The letter went on to argue that the approach taken in the Upper Colorado—allowing water development to proceed concurrently with a recovery program—was inappropriate for the San Juan for several reasons. The proposed water depletions in the San Juan were on a much larger scale than those allowed in the Upper Colorado under the RPA. In addition, there were too many uncertainties associated with the proposal to use water from Navajo Reservoir to make up for A-LP depletions.

In spite of opposition from the environmental community, the FWS and BOR continued work on the development of an RIP and a final RPA. On December 6 and 7, 1990, the Biology Team met in Albuquerque to finalize their contributions to the RPA. Each biologist was asked to “sign

165. Interview with Andrew Caputo, former Sierra Club Legal Defense Fund Attorney (Sept. 29, 1999); Letter from Lori Potter et al. to Robert Jacobsen, U.S. Fish and Wildlife Service Assistant Regional Director (Dec. 12, 1990) (on file with author).
166. Memorandum from Rick Gold, for Roland Robison, Upper Colorado Regional Office Director, Bureau of Reclamation, to All Interested Parties (Dec. 5, 1990) (on file with author).
167. Letter from Lori Potter et al., supra note 165.
168. Id.
off" on the alternative they had developed as a group. Some signed off with "qualifications," but all agreed fundamentally that their RPA would offset the impacts of the project and prevent jeopardy.169

On March 4, 1991, the BOR sent the FWS a letter outlining its proposed RPA. The BOR asserted that its alternative "would mitigate all impacts of the proposed construction of A-LP."170 After "independent evaluation" of the BOR's proposal, the FWS issued a Revised Draft Biological Opinion, dated March 21, 1991, that incorporated the Bureau's alternative with a few modifications. The Opinion stated that if all elements of the RPA were fully implemented, the likelihood of jeopardy to the endangered fish would be avoided.171 Again, it must be noted here that it was the action agency, not the consulting agency, that led the search for an acceptable ESA implementation strategy. The FWS limited its involvement to reviewing what the BOR handed them.

F. Problems with the Memorandum of Understanding to Implement the RPA

Since the RPA did end up including implementation of a recovery program, the next challenge was to get all parties involved to sign a Memorandum of Understanding (MOU) regarding the RPA and the proposed San Juan Recovery Implementation Program (SJRIP) before the Final Biological Opinion could be issued. The Navajo Nation, another tribe in the San Juan River Basin, was reluctant to sign the MOU because of concerns about how A-LP and the SJRIP would affect its own federal project, the Navajo Indian Irrigation Project (NIIP), and its San Juan water rights in general. President Peterson Zah even went so far as to announce in Durango that the Navajo were not willing to support the RPA and the construction of A-LP without the prior completion of NIIP and other tribal ventures.172

Without the Navajo's legal commitment to the SJRIP, the FWS was reluctant to issue a Final Biological Opinion for A-LP, since the proposed RPA depended on the protection of releases from Navajo Reservoir through

169. Memorandum from Roland Robison, Upper Colorado Regional Office Director, Bureau of Reclamation, to Regional Director, Region 6, U.S. Fish and Wildlife Service (Mar. 4, 1991) (on file with author).
170. Id.; See also Witte, supra note 101, at 15.
the Navajo Reservation to Lake Powell. Animas-La Plata proponents thus proposed a "Supplemental Agreement" between the Colorado Water Conservation Board and local water users that, when signed, would commit local water users to provide necessary replacement water in the event the Navajo "illegally" diverted water intended for the fish and protect that water to the legal extent of their ability. The Supplemental Agreement would terminate if and when the Navajo signed the MOU.

It is interesting to note here the apparent flexibility in the existing water regime. If existing water rights holders could commit to replacing water that could potentially be diverted by the Navajo, why could they not make that same water available to the Utes, instead of insisting on a complicated, expensive, and environmentally harmful water project?

Regardless, this "guaranteed replacement" approach eventually proved satisfactory to all participating parties, and on October 24, 1991, a Supplemental Agreement was signed. The lengthy Agreement outlined all the ways in which the federal and nonfederal entities in the Basin would be liable to provide replacement water should any Navajo decide to divert water designated for habitat enhancement.

With assurances that the RPA would be implemented properly obtained through the signed MOU and Supplemental Agreement, the FWS was finally able to issue the Final Biological Opinion for A-LP. The Opinion came out on October 25, 1991, one day after the agreements were signed. On October 26, 1991, Assistant Secretary of the Interior John Sayre officially broke ground for the Animas-La Plata Project.

IV. CONFLICT RESOLUTION: A REASONABLE AND PRUDENT ALTERNATIVE

In October of 1991 it seemed that all of the participants' hard work in constructing an RPA acceptable to the FWS had finally paid off. Based on new information including "new hydrological information," "updated hydrology modeling," and renewed consideration of the role other factors

175. Id.
(e.g., non-native fish, water quality) were playing in the fishes' plight, the FWS settled on an RPA that would allow the original A-LP to go forward in modified form while theoretically mitigating jeopardy to the fish.

Project proponents were now free to begin construction on the long-awaited A-LP, although conditions concerning the project and San Juan River operations had certainly changed over the course of the year-and-a-half since the Draft Biological Opinion had been issued. The project had been constrained to a fraction of its original size, at least temporarily, and the San Juan Recovery Implementation Program would affect water users throughout the Basin. The required reoperation of Navajo Dam and the return to a more natural hydrograph would impact irrigators, anglers, tribes, recreationists, and many others. The following is a review of the five components of the RPA, all of which would have to be implemented to avoid jeopardy to the fish, followed by a consideration of the pros and cons of this approach.

A. Components of the RPA

(1) Reduction in Initial A-LP Depletions

After reviewing current hydrological conditions and how the BOR could operate Navajo Dam to mimic the natural hydrograph, the FWS determined that an initial depletion of 57,100 acre-feet of water for the project—instead of full A-LP depletions of 154,800 acre-feet—would not be likely to jeopardize the continued existence of the Colorado pikeminnow, assuming the implementation of all elements of the RPA. The allowed depletion represents that portion of the project available from the construction of Ridges Basin Dam and Reservoir, Durango Pumping Plant, and the inlet pipeline. This restricted depletion was based in part on the fact that in 1991, average annual flows on the San Juan at the gage in Bluff, Utah, had already been depleted by 27 percent. Further depletions associated with the project would raise that figure to 34 percent. By comparison, the Green and Colorado Rivers have been depleted approximately 20 percent (at Green River) and 32 percent (at Cisco), respectively. The Opinion stated that no construction beyond the agreed upon primary elements could be initiated until the completion of the seven-year fish study and a determination that full A-LP development would not jeopardize the fish.

179. Id. at 32.
180. Id. at 2.
181. Id.
182. Id. at 34.
(2) *Seven Years of Research to Determine Endangered Fish Habitat Needs*\(^{183}\)

The Bureau of Reclamation agreed to fund approximately seven years of research effort on the San Juan River and its tributaries with emphasis on observing a biological response in the endangered fish population and habitat conditions. This research would be conducted by knowledgeable endangered species and habitat experts and would allow for testing of hypotheses. The ultimate goal of this research would be to characterize those factors that limit native fish populations in the San Juan River and to provide management options to conserve and restore the endangered fish community. Approval for study design would jointly rest with the FWS and the BOR. During this time, total annual depletions would not be allowed to exceed 3000 acre-feet. Existing projects, *e.g.*, NIIP, San Juan-Chama, etc., could be subjected to additional conservation measures.

(3) *Reoperation of Navajo Dam to Mimic a More Natural Hydrograph*\(^{184}\)

The Bureau of Reclamation would be obligated to operate Navajo Dam under study guidelines developed under element two for the research period so that releases mimic a natural hydrograph. Test flows would be provided to re-create a wide range of flow conditions including high flows similar to 1987, which are hypothesized to benefit reproduction and recruitment in the endangered fish community.

"Since 1963, Navajo Dam has significantly altered the flow of the San Juan River by storing peak flows and releasing water in summer, fall, and winter months. The result is a 45 percent decrease in spring peak flows and doubled winter base flows at the Bluff gage in Utah.\(^{185}\) Similar comparisons can be made at the upstream gages at Shiprock and Farmington (see Table 4).\(^{186}\) Additional depletions associated with the full project would further reduce monthly average flows at Bluff from five percent in a wet year to as much as 70 percent in a dry year.\(^{187}\) The Opinion states that reoperating Navajo Dam to mimic a more natural hydrograph is "the most important feature" of the RPA, both for the research period and for the long term.\(^{188}\)

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183. *Id.* at 32.
184. *Id.* at 33.
185. *Id.* at 15.
186. *Id.*
187. *Id.*
188. *Id.* at 34.
At the end of the approximately seven year research period, Navajo Dam would have to be operated to mimic a natural hydrograph for the life of the A-LP Project based on the findings of the research. Hydrologists had estimated that approximately 300,000 acre-feet of unallocated water per year would be needed to replicate a natural hydrograph with attention to shape, timing, volume, and frequency. Under conditions in 1991, mimicking the natural hydrograph would not be difficult, since each state was nowhere near depleting its full compact allotment and there was plenty of "unallocated" water. Computer simulations predicted that 300,000 acre-feet would be available 96 percent of the time in 1991.

"However," the Opinion warns, "under full depletions (adding in all future proposed projects up to each State's full compact allotment), the 300,000 acre feet of water from Navajo Reservoir would be available only 33 percent of the time, which indicates that the ability to provide all four elements of a natural hydrograph (shape, timing, volume, and frequency) would be severely restricted." Anticipating having to share shortages, the Navajo Nation strongly objected to this aspect of the RPA. The language was eventually changed to require reoperation only for the life of the recovery program, rather than for the life of the project.

189. *Id.* at 33.
190. *Id.* at 35.
191. *Id.*
192. *Id.*

### Table 4: Change in Mean Monthly Flow After Navajo Dam (CFS)

<table>
<thead>
<tr>
<th>Location</th>
<th>Pre-Navajo Low</th>
<th>Pre-Navajo High</th>
<th>Post-Navajo Low</th>
<th>Post-Navajo High</th>
<th>Percent Change Low</th>
<th>Percent Change High</th>
</tr>
</thead>
<tbody>
<tr>
<td>Farmington, NM</td>
<td>170</td>
<td>13,471</td>
<td>418</td>
<td>9,803</td>
<td>+145%</td>
<td>-27%</td>
</tr>
<tr>
<td>Shiprock, NM</td>
<td>44</td>
<td>19,790</td>
<td>213</td>
<td>9,045</td>
<td>+384%</td>
<td>-54%</td>
</tr>
<tr>
<td>Bluff, UT</td>
<td>65</td>
<td>15,380</td>
<td>250</td>
<td>10,334</td>
<td>+284%</td>
<td>-48%</td>
</tr>
</tbody>
</table>
(5) Legal Protection for Reservoir Releases from Navajo Dam

A binding agreement would have to be established within the year to establish protection of reservoir releases through the endangered fish habitat to Lake Powell for both the study period and the life of the project. The Opinion notes that "it is not enough to only release water from Navajo Dam. There also must be guaranteed delivery of the water so that it provides the habitat improvement necessary to maintain and increase the endangered fish population in the San Juan River." The Memorandum of Understanding (MOU) would also have to include a commitment from the appropriate parties to develop and implement a Recovery Implementation Program for the San Juan River.

The San Juan River Recovery Implementation Program (SJRIP), initiated in 1992, was slated to run for 15 years, with the first seven years being a research period. Similar to the Upper Basin Recovery Program, it seeks to allow water development to continue while restoring the two endangered fish species. The goals of the SJRIP are as follows:

(1) To conserve populations of Colorado [pikeminnow] and razorback sucker in the Basin consistent with the recovery goals established under the [ESA]...

(2) To proceed with water development in the Basin in compliance with federal and state laws, interstate compacts, Supreme Court decrees, and federal trust responsibilities to the Southern Utes, Ute Mountain Utes, Jicarillas, and the Navajos.

The SJRIP was originally designed for the Colorado pikeminnow; but when the razorback sucker was listed in 1991, it was included in the Final Biological Opinion for A-LP and is now the beneficiary of the same RPA as the pikeminnow.

195. Id. at 35.
196. Id.
197. The Navajo Nation agreed to participate in discussions, but did not become a voting member of the SJRIP Coordination Committee until 1996. See Working Group, supra note 97, at 18.
199. Memorandum from Regional Director, Region 6, U.S. Fish and Wildlife Service, to Upper Colorado Regional Office Director, Bureau of Reclamation (Dec. 16, 1991) (on file with author); Memorandum from Regional Director, Region 6, U.S. Fish and Wildlife Service, to Upper Colorado Regional Office Director, Bureau of Reclamation (Apr. 24, 1992) (on file with author).
B. How Reasonable and Prudent?

The RPA contained in the 1991 Final Biological Opinion for the Animas-La Plata Project was considered by many a “successful” solution to the conflict between endangered species and water development. Its main achievement was that it allowed water development to proceed while technically complying with statutory and regulatory requirements in the Endangered Species Act. Perhaps most importantly, the SJRIP it required would potentially enable the Department of the Interior to satisfy its trust responsibility to both the Ute Tribes and the Navajo Nation.200

Looked at from a different perspective, however, one could question the wisdom, sincerity, fairness, and practicality of this “win-win” approach, and wonder if it was indeed “reasonable” and “prudent.” One could argue that, in spite of its well-meaning compromise approach, the RPA actually ran contrary to the interests of not only the Navajo Nation (discussed briefly already), but also the Ute Tribes, the endangered fish, and the federal taxpayers. The final part of this section reviews some of the more troubling aspects of the RPA, with the aim of piquing the reader’s curiosity about how and why the FWS agreed to implement Section 7 of the Endangered Species Act in this fashion. The following sections then consider whether this approach was within the bounds of agency discretion and what constraints may have been unduly influencing agency discretion.

The most troubling aspects of this approach to ESA implementation have to do with the RPA’s impact on the Navajo Nation. The Navajo were displeased with the FWS Final Biological Opinion for A-LP because, in their eyes, the RPA posed a direct threat to the realization of their federally reserved water rights. Leonard Haskie, interim president of the Navajo Nation, expressed some of these concerns in a letter to the Secretary of the Interior when he saw in what direction the RPA was heading:

While the Navajo Nation appreciates the importance of the [A-LP] Project to the recent Colorado Ute Indian Water Rights settlement, we cannot allow the [NIIP], nor any other Navajo water, to be sacrificed for the [A-LP] project. We understand that you have trust responsibilities to the other Indian tribes involved. All we ask is that you strenuously represent the interests of all the Indian tribes, including the Navajo Nation.201

200. The RPA alone would not satisfy the trust obligation since it only allowed part of A-LP. The irrigation component of A-LP, critical to both Ute Tribes, would have to undergo another Section 7 consultation in the future. Witte, supra note 101, at 16-17.

Arguably, relying on water from Navajo Dam to offset A-LP’s depletions and recover the fish threatened the completion of the Navajo Indian Irrigation Project (NIIP) and the Navajo’s right to use Navajo Reservoir water. It also threatened their claims to San Juan water above and beyond a completed NIIP. Some facts about NIIP will help illuminate the situation.

NIIP was authorized in 1962 along with the San Juan-Chama Project, which diverts water from the San Juan River into the Rio Grande Basin and on to New Mexico. The project was meant to satisfy at least part of the Navajo’s reserved water rights claims on the San Juan River. NIIP is managed by the Navajo Agricultural Products Industry (NAPI) to provide irrigation on Navajo land in northwest New Mexico, south of Farmington. The water for NIIP is stored in Navajo Reservoir behind Navajo Dam, which was completed in 1963.

NIIP’s authorization includes an annual water supply of 508,000 acre-feet to irrigate 110,630 acres of land on the Navajo Reservation. The project was broken into 11 blocks, each with about 10,000 acres of irrigable land. The BOR initially planned to complete the entire NIIP by 1976, but did not start construction until 1973. Limited operation began in 1976-1977. For a number of reasons, NIIP construction has been continually delayed, while the San Juan-Chama Project was constructed immediately after authorization.

In 1991, NIIP was only depleting 132,980 acre-feet of its allowed 508,000 acre-feet of water each year. Blocks 1 through 6 were complete, but less than 65,000 acres of the project’s 110,630 acres were being irrigated. For these reasons, the authorization of another project in the Basin that would deplete San Juan River water before NIIP was complete

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202. Interview with Stanley Pollack, supra note 193.
203. See generally Working Group, supra note 97.
205. Whether the Navajo have rights to water above and beyond water for NIIP is a point of legal contention. For an exploration of the issue, see Judith E. Jacobsen, The Navajo Indian Irrigation Project and Quantification of Navajo Winters Rights, 32 NAT. RESOURCES J. 825 (1992). Jacobsen concludes that NIIP does not satisfy the Navajo’s entire claim, and they could be legally eligible for more water rights in the San Juan.
206. Id. at 831; Judith E. Jacobsen, A Promise Made: The Navajo Indian Irrigation Project and Water Politics in the American West, (1989) (unpublished Ph.D. dissertation, Univ. of Colo.) (on file with Univ. of N.M. library) [hereinafter Jacobsen, Promise].
207. Working Group, supra note 97, at 4.
208. Id.
209. See Jacobsen, Promise, supra note 206, at 13.
210. For a detailed analysis of the reasons for this apparent inequity, see id.
211. Working Group, supra note 97, at 15.
212. Id. at 4.
was seen as a threat, especially given the constraints created by the endangered fish.213

A second, related reason the Navajo were upset by A-LP's Final Biological Opinion and the RPA contained therein was because it preempted Section 7 consultation on NIIP. Even though NIIP was authorized six years before A-LP, it did not undergo Section 7 consultation regarding the pikeminnow until after the A-LP consultation in 1991.214 A-LP's Final Biological Opinion was issued on October 25, 1991, followed three days later by NIIP's Final Biological Opinion on October 28, 1991.215 NIIP's Final Opinion stated that existing NIIP depletions would be allowed, but additional depletions to complete the project would not. The FWS wrote that additional depletions for NIIP were "beyond the point of jeopardy delineated in the...Animas-La Plata Biological Opinion" and that "any further depletions considered necessary for the operation of NIIP will be evaluated based on the results of the 7-year research program as stipulated in the Animas-La Plata Biological Opinion."216

As the Working Group on the Endangered Species Act and Indian Water Rights observed in 1999, "it is a severe point of contention for the Navajo Nation that 37 years after NIIP authorization and 23 years after the Secretary of the Interior signed a contract for the use of water through NIIP facilities in 1976, construction of NIIP is still not complete."217 Adding insult to injury was A-LP's "jumping ahead" of NIIP.

The FWS ultimately prioritized depletions for A-LP over depletions for the completion of NIIP in 1991 because BOR's consultation on A-LP was begun and completed earlier than the Bureau of Indian Affairs' (BIA) consultation on NIIP. Therefore, because A-LP underwent ESA consultation before NIIP, A-LP was considered part of the environmental baseline when looking at how the completion of NIIP would affect the hydrology of the river and the fish. If the NIIP consultation had been completed before A-


214. NIIP underwent Section 7 consultation in 1979 regarding its impact on terrestrial species like the black-footed ferret, the bald eagle, and the peregrine falcon and received a No Jeopardy opinion. No mention was made at that time of the project's potential impacts on aquatic species in the San Juan River. U.S. Fish & Wildlife Serv., Final Biological Opinion on the Navajo Indian Irrigation Project (Apr. 26, 1979) (on file with author).

215. The Biological Opinion on NIIP was for Blocks 1 through 8 only, because the Navajo believed that consultation on the full project would yield a Jeopardy Opinion, like the Draft Biological Opinion for A-LP. Blocks 1 through 8 could probably be mitigated with an RPA. Consultation on Blocks 9 through 11 was postponed since construction of those Blocks was still several years away. Working Group, supra note 97, at 18.


217. Working Group, supra note 97, at 5.
LP’s consultation, then the full NIIP would have been in the environmental baseline when looking at A-LP’s effect on the river, and A-LP may not have been allowable.

Instead, the environmental baseline in A-LP’s Final Biological Opinion included only those portions of NIIP that had already been constructed and put into operation in 1991. A-LP’s Final Biological Opinion states,

Pursuant to Section 7 regulations, the baseline for the project included: (1) the past and present impacts of Federal, State, and private actions in the basin; (2) the anticipated impacts of all Federal projects having previously undergone formal Section 7 consultation in the area; and (3) the impact of State or private actions contemporaneous with this consultation. There are no Federal projects in the area that have undergone formal Section 7 consultations nor any contemporaneous State or private projects that would affect the baseline....Included in the baseline, along with a number of other smaller water projects, are existing operational portions of the Navajo Indian Irrigation Project....

Blocks 7 through 11 of NIIP were thus excluded from the environmental baseline for A-LP, as were Southern Ute Indian water rights on other tributaries to the San Juan River that had been quantified but had not yet been put to use. Jicarilla Apache water rights, then in the final stages of a negotiated settlement, were also excluded. Existing depletions for the San Juan-Chama Project, as well as the paper rights of several non-Indian water users (which had not yet been put to use), were included in the baseline, as were evaporation losses from Navajo Reservoir. Referring to these apparent inconsistencies, Navajo water attorney Stanley Pollack asks, “Why were the paper rights of non-Indian water rights holders included in the baseline, but the paper rights of the tribes were not?”

Thus, one could argue that the authorization of A-LP in the Final Biological Opinion was ultimately dependent on shifting the burden of providing water for the fish from existing water rights holders on the San Juan River to the Ute, Navajo, and Jicarilla Apache tribes. This has created

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218. Interestingly, the Draft Biological Opinion for A-LP included the entire NIIP in the environmental baseline. Id. at 14-15.
220. Interview with Stanley Pollack, supra note 193. The term “paper” water rights, as opposed to “wet” water rights, refers to water rights that have been granted and recognized but have not yet been put to use.
221. While this may seem like a radical argument, it should be recognized that the part of A-LP authorized in the RPA would benefit only the non-Indian community, which might have been bumped to junior status on the river had the tribes asserted their federally reserved water
tremendous conflict between the tribes. A-LP proponents often claimed that their goal was to satisfy the federal trust responsibility to the tribes, but in the process, the Navajo's rights may have been compromised. A-LP proponents have seemingly relied on the assumption or hope that the 300,000 acre-feet per year required from Navajo Reservoir for the seven years of research will become permanently available, in spite of the Navajo's concerns about their own reserved rights in the San Juan River, which have yet to be quantified. Guaranteed flows from Navajo Reservoir (potentially at the Navajo's expense) would be the only realistic way to offset the eventual completion of A-LP.

Additionally, one could question how "reasonable" or logical the RPA is, given its authorization of only the beginning phases of the original A-LP. The elements authorized would not be functional in a stand-alone fashion, and construction of the remaining elements would be contingent on a later assessment of the endangered species' status. Should the FWS find that the species had not made sufficient progress after the seven years of research and dam reoperation, it could theoretically deny authorization of the rest of A-LP. This would not only be an affront to the Ute tribes, whose water was scheduled to be developed and delivered in a later phase of the project; but also to all federal taxpayers, who may well wonder why the federal government allowed one half of an expensive project to be built when it could not commit to authorizing the second half.

Furthermore, the FWS may have been backing itself into a corner with this approach. If it felt pressure to allow A-LP to begin construction in spite of the fish, one can only imagine the kinds of pressure the agency would be subjected to if it contemplated not allowing an already half-completed project to continue! In a way, by taking the approach outlined in the RPA, the FWS was setting itself up for another Tellico Dam situation, where it would potentially be forced to choose between protecting an endangered species and allowing a half-completed federal project to continue. The conflict would be even more heated in the San Juan River Basin because of the Indian water rights component of the project.

If the fish did not show sufficient progress after seven years of research and reoperation of Navajo Dam and the FWS had the political rights more forcefully and preempted the non-Indian water rights. Meanwhile, in 1991, the reserved rights of the tribes were all being put on hold in one way, shape or form so that the first part of A-LP could go forward. A similar but less radical argument would say that the burden for recovering the fish shifted from the Ute Tribes to the Navajo Nation, since a Jeopardy Opinion for A-LP would mean the Ute Tribes would lose out, but an RPA for A-LP would put the Ute Tribes effectively ahead of the Navajo Nation in line.

222. Pollack, supra note 213, at 33.
courage to prohibit the remainder of A-LP from being constructed with a Jeopardy Opinion, one likely outcome would be the Ute Tribes resorting back to litigation to realize their claims, since they would not be likely to get the water they had been promised in the CUIW RSA via A-LP.\textsuperscript{224} Reopening litigation regarding the tribes' reserved water rights would arguably be a nightmare for existing water users in the basin and time-consuming and expensive for the tribes. In many ways, it seems that the FWS was setting itself up for potential failure later on down the road. It would potentially have to choose between protecting the fish as required under the ESA and meeting the expectations of the tribes, the non-Indian water users in the basin, and the federal taxpayers who might not appreciate seeing a partially completed federal project scrapped.

What is interesting is that there seemed to be a sort of unspoken assumption surrounding negotiations in 1991 that the FWS would ultimately allow the entire project to be built. The MOU attached to the Final Biological Opinion describes the RPA as providing for construction of "an initial portion of the project."\textsuperscript{225} Similarly, one BOR employee characterized the RPA as "a means of starting construction on the full Animas-La Plata project—in other words, it is an incremental step toward completing the full project."\textsuperscript{226}

It is not clear whether these attitudes were indicative of simple arrogance or naive optimism about the recovery program's ability to improve the status of the fish sufficiently to allow the rest of the A-LP Project to go ahead in just seven short years. The leaders of the two tribes, Leonard Burch (Southern Utes) and Judy Knight-Frank (Ute Mountain Utes), seemed to characterize the latter outlook in this 1991 statement: "We view [the RPA] as a painful yet practical solution which will allow the needs of Indian[s] and non-Indians in both states to be met and permit the inevitable effort to recover the squawfish to get underway. It is certainly preferable to long and expensive litigation with an unknown end result."\textsuperscript{227}

In a December 1990 briefing paper, the Solicitor for the Department of the Interior's Southwest Region wrote, "construction of a portion of [the

\textsuperscript{224} Another result may have been congressional reconsideration and weakening of the Endangered Species Act, as occurred after \textit{Tennessee Valley Authority v. Hill}, 437 U.S. 153 (1978). It is reasonable to hypothesize that the potential for this outcome may have influenced the FWS decision-making process.


\textsuperscript{226} U.S. GEN. ACCOUNTING OFFICE, supra note 105, at 21.

\textsuperscript{227} Letter from Leonard C. Burch \& Judy Knight-Frank, supra note 172.
Animas-La Plata Project] represents a gamble that more may be built later. This is important because that is the only way the Ute Tribes will benefit and their water rights claims will finally be settled under the 1988 water rights legislation. This comment raises some interesting questions. Was this "gamble" really "the only way" the Ute Tribes could benefit and settle their claims? The CUIWRSAs was created without the knowledge that A-LP would be competing with endangered fish. A reasonable individual might wonder why the idea of revisiting the assumptions and goals in the CUIWRSAs, and rethinking the approach to the government’s trust responsibility to the tribes, was such anathema to those seeking an RPA for A-LP.

Even the Colorado Water Conservation Board (CWCB) admitted some reservations with the RPA approach to satisfying the CUIWRSAs. In a 1991 letter to Colorado Governor Roy Romer discussing the pros and cons of signing the MOU for the A-LP RPA, CWCB Director David Walker writes the following:

The cost of constructing the second phase is entirely the responsibility of the nonfederal participants. The cost of the Colorado facilities is about $124 million in 1987 dollars. The Board does not foresee that funds of that magnitude will be available to support that irrigation development and therefore concludes that Phase II is unlikely... All of the Indian water would be available in Ridges Basin Reservoir with no delivery systems until phase 2. As noted before, the funding for phase 2 is not likely. The result is that the Indian water will be for uncertain future uses unless the Tribes seek to lease or sell water out of state... The concern for Colorado is that while the settlement agreement may be satisfied, Colorado will be unlikely to benefit from the anticipated beneficial consumptive use in Colorado.

Interestingly, in the last sentence, Walker expresses concerns about Colorado not being able to use its water without Phase II conveyance facilities. He does not express concern about the tribes not being able to use their water.

Walker points out elsewhere in the letter, however, that one advantage to signing the MOU would be that "the commitment to fulfilling Ute Indian reserved rights claims" would be advanced. Thus he seems to be saying that by going along with the RPA, Colorado would be moving
towards fulfillment of its legal obligations, but would be doing so knowing that the Ute Tribes would likely have no real way to actually use their water.

The letter goes on to point out advantages of going along with the RPA besides making a "good faith effort" towards the tribes: "the state will gain a storage facility capable of yielding for Colorado about 122,000 acre feet of water toward utilizing Colorado's compact entitlements, with construction costs largely borne by the federal government." Even if Coloradans could not use the water, developing it and storing it was viewed as a good thing (especially with the federal government picking up the bill), in that it would keep the Lower Basin states from using Colorado's water.

C. Summary of Findings

This review and analysis of the Animas-La Plata Project's ESA consultation history reveals at least two key points worth considering. First, I argue that another "naked" Jeopardy Opinion for A-LP—that is, a Jeopardy Opinion with no RPAs, like the 1990 Draft Biological Opinion—was simply not part of the practical range of choice open to the FWS as it prepared the 1991 Final Biological Opinion. Second, it seems that decision makers involved in the formulation of an RPA for A-LP may have been working with an unnecessarily constrained range of choice. Alternatives to the original Animas-La Plata project were never really considered by the BOR or the FWS during the consultation process. Participants in the search for an RPA were continually reminded that a non-A-LP alternative was not an option.

The ESA requires the FWS to work with the action agency (in this case the BOR) to develop an RPA to the project under consultation in the event of a determination that the project is likely to jeopardize the continued existence of the listed species. An alternative is deemed reasonable and prudent only if:

- It can be implemented by the lead federal agency in a manner consistent with the intended purpose of the project.
- The FWS believes it would avoid the likelihood of jeopardizing the continued existence of listed species.
- 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.

231. Id. at 2.
232. 50 C.F.R. § 402.02 (2000).
So why was a non-A-LP alternative never considered? Could there not have been a less environmentally harmful way for the BOR to satisfy "the intended purpose of the project" that would be "consistent with the scope of its legal authority and jurisdiction" and "economically and technically feasible"? Perhaps, but as already mentioned, the FWS has a significant amount of discretion in its selection of a reasonable and prudent alternative, and the courts have systematically deferred to the implementing agency's judgment. The FWS may have been within the bounds of its discretionary authority in the A-LP case, but it also may have made choices based on an unnecessarily constrained range of alternatives.

According to the Code of Federal Regulations, an RPA must be implementable by the lead federal agency in a manner "consistent with the intended purpose of the project" and "consistent with the scope of its legal authority and jurisdiction." The purpose of the Animas-La Plata Project was "to provide an assured, long-term water supply capable of meeting identified needs in the Project area," including meeting Ute tribal water needs as defined in CUIWRS, and providing "a dependable long-term water supply for neighboring Indian and non-Indian community water needs." Given this project purpose, the range of choices open to the FWS and the BOR in the development of an RPA for A-LP could, in theory, have been much broader than it was, and could have included a non-A-LP alternative.

Why did the FWS not consider other ways to meet the purpose and need of A-LP in its 1990-1991 consideration of RPAs? Given the purpose and need of A-LP, outside consultants were able to come up with an innovative approach that combined structural and non-structural aspects, met the needs of the CUIWRS, was less environmentally harmful, and cost

233. In a separate unpublished study, I sought to define the boundaries of agency discretion in the formulation of Biological Opinions by analyzing the outcomes of cases where the legitimacy of a Biological Opinion had been called into question. The courts have laid out fairly clearly the bounds of agency discretion in the formulation of these opinions. See generally Hannah Gosnell, Water, Fish, Tribes, and Choice: A Geographic Evaluation of Endangered Species Act Implementation in the San Juan River Basin, USA (2000) (unpublished Ph.D. dissertation, Univ. of Colo.) (on file with author).

234. 50 C.F.R. § 402.02 (2000).

a fraction of what A-LP would cost. What kept the FWS from developing such a plan for its RPA in the Final Biological Opinion in 1991?

Although it appears that a non-A-LP alternative could have been legally viable under the statutes and regulations surrounding Section 7, the fact remains that the consultation process has not traditionally been used as a means to generate a wide range of alternatives to a project. Rather, it has typically been used to make slight adjustments to the proposed, jeopardizing project. When this issue was raised with experts involved in ESA implementation, a common response was, "well, that's what NEPA [the National Environmental Policy Act] is for...." The reasoning seemed to be that the consideration of a broad array of alternatives happens at the NEPA stage, and then the preferred alternative is subjected to Section 7 consultation if necessary.

New Mexico Department of Game and Fish biologist David Propst has argued that if a project gets to Section 7 consultation under the ESA and receives a Jeopardy Opinion, then the NEPA process has not done its job in screening out environmentally harmful projects. Propst asserts that while NEPA is set up to facilitate the consideration of a wide range of alternatives, the Section 7 consultation process is not. By the time a project gets to Section 7 consultation, Propst argues, the FWS is somewhat constrained in terms of its ability to rethink the whole approach to the project purpose. Thus, decisions made in the formulation of the EIS under NEPA are critical in that they set a certain path for a given project and potentially preclude certain options later on.

236. Hydrosphere Resource Consultants, Inc., Animas-La Plata Alternatives Study 3-5 (Oct. 8, 1995) (unpublished study, prepared for the Four Corners Action Coalition, Taxpayers for the Animas River, Sierra Club, and SCLDF, on file with author). This study came up with an alternative to A-LP based on structural and non-structural elements. In creating an alternative, the study focused on all types of Indian water uses and on non-Indian municipal and industrial water uses (no irrigation consideration). The alternative would deliver 103,500 acre-feet per year, would meet the requirements of the Ute settlement, and would deplete only 62,000 acre-feet from the San Juan River annually. The total estimated costs for the alternative were $264 million, less than the federal share of Phase I of A-LP. The study concludes that, aside from the example alternative examined in the study, many other practicable alternatives to A-LP do exist.

237. For example, Nancy Gloman, Chief of the Division of Endangered Species, U.S. Fish and Wildlife Service, said this at the American Water Resources Association's 1999 Annual Water Resources Conference on Watershed Management to Protect Declining Species (Dec. 5-9, 1999, Seattle, WA), in response to a question from the audience regarding the need to consider a broad range of alternatives when developing a Reasonable and Prudent Alternative. Also, David L. Propst said this in our interview. See supra note 112.


239. Interview with David L. Propst, supra note 112.
The problem with this system, however, is that NEPA "has no teeth." Thus, "bad" projects can become the "preferred alternative." \(^{240}\) The Section 7 consultation process represents an unused opportunity to rethink and reassess a questionable project. Unlike NEPA, Section 7 of the ESA does have "teeth." As Chief Justice Burger ruled in *Tennessee Valley Authority v. Hill*,

One would be hard-pressed to find a statutory provision whose terms were any plainer than those in Section 7....The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost....The legislative history undergirding Section 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies....The plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable." \(^{241}\)

I assert that this powerful authority has not been used as effectively as it could be used in the FWS approach to the consultation process. To remedy this, there should be a broad consideration of alternatives at all significant junctures, especially ones where the proposed project has been found to be likely to jeopardize the continued existence of a species protected under the Endangered Species Act.

There are several possible explanations for the reluctance of the FWS to use its power in the A-LP case. The FWS was confronted with political constraints (e.g., the mandate to comply with CUIWRSA and to develop the Upper Basin's apportionment of Colorado River water) that manifested themselves as pressure from higher up. Secretary of the Interior

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240. NEPA was enacted in 1969 to "encourage productive and enjoyable harmony between man and his environment" and to "promote efforts which will prevent or eliminate damage to the environment," 42 U.S.C. § 4321, by requiring rigorous analysis of alternatives to any proposed federal action likely to have a significant impact on the environment. NEPA regulations regarding alternatives analysis require, among other things, that "all reasonable alternatives shall be given detailed consideration," that "reasons for eliminating alternatives from detailed consideration shall be given," and that "the 'no action' alternative shall be included." 40 C.F.R. § 1502.14 (1999). However, neither the law nor the regulations command agencies to act in a way that prevents or eliminates damage to the environment. See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 332-62 (3rd ed. 1993) for thoughtful commentary on the strengths and weaknesses of the Act.

Manuel Lujan had been a longtime supporter of A-LP and was not interested in looking at alternatives to the full project. There were also constraints facing the FWS related to scientific uncertainty. Since the FWS could not say for sure that Navajo Dam releases would not serve the same purpose as native flows from the Animas River, the agency probably could not have scientifically justified another naked Jeopardy Opinion. These were all significant constraints on the FWS use of its discretionary authority in the formulation of a final Biological Opinion. Since these constraints are largely due to ideological factors—the politics of the Colorado River and the disregard for the worth of native “trash fish,” which resulted in a paucity of scientific research on and understanding of them—they are more difficult to address and remove.

There were also significant institutional constraints on the Fish and Wildlife Service’s decision making, however, that could be addressed more easily and immediately. These have to do with shortcomings in the mechanics of the consultation process.

V. THE MECHANICS OF THE CONSULTATION PROCESS AS A CONSTRAINT ON THE FWS IMPLEMENTATION OF SECTION 7

Some of the standard operating procedures in Section 7 implementation exacerbate the low prioritization of the native fish species and prevent the FWS from implementing the ESA the way it was originally intended. Many of these constraints on the decision-making process have to do with the relatively passive role played by the FWS during consultation and the corresponding lead role taken by the action agency.

First, Section 7 puts the burden on the action agency to determine if its proposed action will jeopardize the species in the first place. This requires a certain sensitivity to the plight of endangered species and their habitat needs for which the BOR has not historically been known.

Second, the action agency must initiate consultation with the FWS. Normally, the FWS does not review actions under Section 7 until action agencies approach them. For the same reasons mentioned above,

242. Section 7(a)(2) appears to place the FWS in an advisory role, stating that all federal agencies “shall, in consultation with and with the assistance of [FWS or NMFS], insure that any action authorized...is not likely to jeopardize the continued existence of any endangered species.” The Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (1994) (emphasis added).


the BOR historically has not demonstrated an inclination towards being proactive in addressing environmental problems.245 As the Working Group on the ESA and Indian Water Rights observes, "It has taken years to develop agency procedures, sensitize agency officials, and promote the necessary inter-agency communications to persuade and require agencies to consult with the Services when their actions may affect listed species or critical habitat."246

Indeed, in the case of the San Juan River, the FWS had to contact the BOR to encourage the agency to initiate reconsultation on A-LP.247 The BOR did so, but with reluctance, as evidenced by a 1987 letter from Colorado Fisheries Team Leader John Hamill to FWS Assistant Regional Director for Region 6 regarding the possibility of reinitiating consultation on ALP. Hamill wrote,

I should point out that Reclamation is very concerned about the political ramifications of consulting on the Animas-La Plata project. Apparently, the project is in lots of financial and political trouble and they fear that an endangered species issue might be the final blow to kill the project. Reclamation even indicated a willingness to initiate a recovery effort on the San Juan (including the reoperation of the Navajo Project) as an alternative to Section 7 consultation on the project.248

In the A-LP case, the project was significant enough that the FWS took the initiative to prompt the BOR to request reconsultation. But in less prominent cases, because of an increasing workload for the FWS and insufficient funding, "FWS officials do not often seek to urge consultations on more agency actions."249 Thus, this aspect of the Section 7 regulations seems to discourage the initiation of needed consultations.

Third, the responsibility for collecting the best scientific and commercial data for the consultation rests, again, on the action agency.250 In reinitiating consultation on A-LP, for example, the FWS and BOR established a "consultation team" comprised of biologists and hydrologists from

245. Id. at 18. The Working Group states, "Twenty years ago compliance with the mandate of Section 7 was often dependent on FWS officials sending the action agency a letter suggesting that they initiate consultation because an endangered species, perhaps obscure or unknown to agency engineers and contractors, resided in the area of the new water project."

246. Id.

247. Memorandum from John Hamill, supra note 95. The BOR was also pressured into requesting reconsultation by a letter from the Sierra Club Legal Defense Fund. Letter from Lori Potter & Federico Cheever, supra note 115.

248. Memorandum from John Hamill, supra note 95.

249. Working Group, Implementation, supra note 244, at 19.

each agency. The FWS then told the BOR it would need (1) an updated project description, (2) a description of the environmental baseline as defined in the Section 7 regulations (50 CFR 402.02), (3) updated biology and hydrology information for the main stem San Juan and project-affected tributaries, (4) quantification of the flexibility to operate Navajo Reservoir and/or the Animas-La Plata Project to benefit listed species, and (5) water quality (contaminants, temperatures, etc.) for the main stem San Juan and project-affected tributaries. As one FWS biologist observed, the amount of information the BOR hydrologists and biologists decide to submit for the FWS preparation of the Biological Opinion constitutes a major constraint on the range of choice. The "quantification of flexibility" required in (4) above, is particularly subject to interpretation.

This reliance on the BOR's interpretation of "flexibility" in terms of project design and operation and in terms of opportunities for mitigation is probably the most troublesome of the constraints stemming from Section 7 regulations and standard operating procedures, though it is not clear if the statutes and regulations intended this to be the case. In North Slope Borough v. Andrus, the court stated that the purpose of the Biological Opinion is "to attenuate any conflicts between the agency action and the welfare of the endangered species. Reasonable and prudent alternatives must be proposed by [FWS or NMFS] so that the action agency can evaluate options that might reconcile any conflict." This reading of the law makes it sound like the FWS should be playing more of a lead role in the identification and consideration of RPAs than it did in the San Juan. The potentially biased interpretations of flexibility espoused by the action agency can have a constraining effect on the range of choice open to consideration, and ultimately have a significant effect on the outcome of the Opinion and the nature of the RPAs identified to mitigate the jeopardizing effects of the proposed action or project. It simply does not make sense to put such responsibility in the hands of the agency that is promoting the project. One must remember that the action agency is working for its client's interests.

In my case study, for example, the BOR initially told the FWS that it had no flexibility in A-LP design or operations and very little flexibility in reoperating Navajo Dam to mimic a natural hydrograph. Normally, the FWS takes what the action agency says at face value, and as Houck puts it, 

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251. In this case, the team was Errol Jensen, Reed Harris, and Randy Peterson from BOR; and LeRoy Carlson, Jerry Burton, Keith Rose, and George Smith from FWS. Memorandum from Galen L. Buterbaugh to Roland Robison, Regional Director, Bureau of Reclamation (Feb. 15, 1990) (on file with author).

252. Id.


bends over backwards "to find an alternative within the economic means, authority, and ability of the applicant." In this case, FWS field biologist Keith Rose decided to take a rare stand against the action agency and, given the flexibility (or lack thereof) presented by the BOR, determined that no RPA for A-LP existed. As biologist David Propst put it, "the consultation process is like a game of poker, and in this case, Keith forced the BOR's hand." The BOR was forced back to the drawing board and, lo and behold, found that A-LP could indeed be reconfigured and that Navajo Dam could be reoperated to replace all A-LP depletions.

Interestingly, the media portrayed the 1990 impasse between the FWS and the BOR as the fault of the FWS: "No alternatives, including proposed releases of water from Navajo Dam in New Mexico, would satisfy the [S]ervice, the [J]eopardy [O]pinion says." "Supporters of the project contend the Fish and Wildlife Service ignored alternatives that would work, including adjusting releases from existing reservoirs to compensate for the water taken by the yet-to-be-built Animas-La Plata." These sound bites make it sound like the BOR was willing to do anything, and the FWS would not budge. In reality, it was the BOR that was unwilling to consider some of the FWS ideas, like reoperating Navajo Dam to replace all A-LP depletions.

Given these glimpses into FWS-BOR politics, it seems ludicrous that the FWS had to depend on the BOR's research (or lack thereof) on the fish, the BOR's interpretation of its own flexibility regarding A-LP construction and operations, and the BOR's interpretation of its ability to reoperate existing river operations or utilize other already existing projects to (a) meet the purpose and need of the proposed project in an alternative way other than via A-LP and/or (b) mitigate the effects of A-LP if it went ahead.

The 1979 Biological Opinion for A-LP directed the BOR to (1) thoroughly survey the native fish populations of the San Juan River, (2) determine the environmental needs of the Colorado pikeminnow, (3) attempt to meet those needs by adjusting the myriad existing projects on the San Juan River (NIIP, A-LP, Gallup-Navajo, etc.) to the benefit of the species, and (4) provide and fund artificial facilities in which to spawn and rear Colorado pikeminnow. Yet the BOR waited until 1987 to begin its surveys and did nothing in the way of adjusting existing projects in the San Juan Basin until the 1991 Final Biological Opinion required reoperation of Navajo Dam. This is hardly surprising. What incentive did the BOR have

255. Houck, supra note 7, at 319-20.
256. Interview with David L. Propst, supra note 112.
258. Miller, supra note 110.
to spend money on these tasks when they had a No Jeopardy Opinion on A-LP?

As early as 1985, the FWS and the Colorado River Fishes Recovery Team expressed concern about the need to reconsider conclusions in the 1979 Biological Opinion and possibly reconсult with the BOR about A-LP. But there was very little data to justify reinitiating consultation, since the BOR had not yet begun the required research. Thus, the FWS decided to wait until the surveys were completed (which did not happen until 1989). Meanwhile, A-LP proponents were busy negotiating the CUIWRSA with the Ute Tribes. Why did the FWS delay reconsultation? Because they were dependent on the BOR to provide survey data for them and to reinitiate consultation.

It must be remembered that the BOR works very closely with its clients, in this case, the Southwest Water Conservation District (SWWCD), the main sponsor of A-LP. The SWWCD played an important role throughout the entire Section 7 consultation process, via the BOR. Since the SWWCD is an appointed (rather than elected) board, it does not necessarily represent the interests of the general public. Other interest groups did not have access to the consultation process, another problem with the regulations implementing Section 7. What incentive did the SWWCD or the BOR have to find flexibility in the design or operation of the project they spent so long refining? What incentive did they have to develop innovative reasonable and prudent alternatives to the full A-LP construction? The only incentive came when the FWS issued a naked Jeopardy Opinion, a rare event indeed.

Predictably, the BOR's approach to identifying an RPA, even after gathering some of the best regional expertise in the areas of hydrology, biology, and tribal and water law, was to purposely constrain the range of
alternatives considered and to direct the teams to find a way to allow A-LP to go ahead without causing jeopardy to the fish. When participants expressed interest in exploring non-A-LP RPAs, they were rebuffed and reminded that they were there to find an alternative to the Jeopardy Opinion, not to A-LP itself, an approach at variance with the plain language of the ESA's implementing regulations. The definition of an RPA in the ESA regulations specifically includes the possibility of an alternative to the proposed project, as long as it meets the four prongs of the RPA definition. Had the FWS or some other independent, objective entity been in charge of the search for an RPA, the range of choice open to the teams would more likely have been expanded to include such alternatives.

Interestingly, the BOR's approach to developing an RPA—convening a bevy of experts on various aspects of the problem—represents a highly effective approach to expanding the range of choice. The BOR was looking at a naked Jeopardy Opinion with no RPAs and had a lot of incentive to develop some creative alternatives. The approach was successful. The BOR expanded the range of choice by being more open minded and rethinking project flexibility, both in terms of project design and operation and in terms of the BOR's ability to reoperate Navajo Dam to mimic a natural hydrograph. But that expansion of the range of choices was hampered in two crucial ways: a "No Action" alternative (e.g., another naked Jeopardy Opinion) was not on the table, nor were any alternatives that did not include A-LP as the central component. In this sense, the BOR's reaction to the Draft Biological Opinion served to expand the range of choice open to the FWS in some ways, but narrow it in a few critical ways. The FWS was heavily dependent on the BOR for the development of an RPA and essentially adopted the RPA presented to it by BOR in 1991.

In the recent case *Southwest Center for Biological Diversity v. United States Bureau of Reclamation*, the plaintiff environmental group similarly complained about the lead role of the action agency (the BOR) during Section 7 consultation. In that case, the BOR characterized its own "flexibility" in terms of its ability to reoperate Hoover Dam to control lake

263. Interview with David L. Propst, *supra* note 112.
264. 50 C.F.R. § 402.02 (2000).
265. On March 4, 1991, the BOR sent the FWS a letter outlining its proposed RPA. Memorandum from Roland Robison, *supra* note 169. The BOR asserted that its alternative "would mitigate all impacts of the proposed construction of A-LP." After "independent evaluation" of the BOR's proposal, the FWS issued a Revised Draft Biological Opinion, dated March 21, 1991, that incorporated the Bureau's alternative with a few modifications.
266. 6 F. Supp. 2d 1119 (1997).
levels in Lake Mead to benefit the Southwestern willow flycatcher.267 One of the flycatcher’s nesting areas is in the Lake Mead delta, where the second largest continuous patch of native willow habitat in the Southwest exists.268 After consulting with the BOR, the FWS issued a Biological Opinion with an RPA that essentially allowed the flycatcher habitat to be inundated. Plaintiffs contended, among other things, that the FWS based the RPA upon political considerations, and that the FWS should have taken a more active role in determining the BOR’s flexibility. Evidence for the former revolved around the dramatic reduction in RPA requirements from the Draft Biological Opinion to the Final Biological Opinion. Plaintiffs basically argued that the FWS ultimately decided not to require protection of the Lake Mead delta habitat because it was unduly influenced by the BOR.

The allegations in the Southwest Center case are of particular interest, not only because of the claims of politically influenced Biological Opinions, but also because they deal with the FWS formulation of RPAs and the question of how much discretion the Bureau of Reclamation has to reoperate existing federal dams and reservoirs to benefit endangered species. In its Draft Biological Opinion, the FWS required the BOR to use “the full scope of its authority and discretions to immediately protect and maintain the 465 hectares (1148 acres) riparian habitat” of the Lake Mead delta. Under this provision, the BOR was required to provide the FWS with a “detailed account of the type and extent of discretion available to it in the management of Lake Mead.” The BOR responded that it had limited discretion because of the Law of the River,269 and could only reduce the

267. Flycatcher habitat has been dramatically reduced by development and water management projects over the years, and with decreasing numbers, the species was listed as endangered in 1995. The flycatcher is one of over one hundred species that would supposedly be protected by the Lower Colorado River Multi Species Conservation Program.

268. The delta is at the north end of Lake Mead and was created by unusually low water levels in the reservoir throughout the late 1980s and early 1990s. Before that time, this area was usually inundated by normal operations of the Lower Colorado River in accordance with the decree issued in Arizona v. California, 373 U.S. 546 (1963), and the “Law of the River.” In the mid-1990s, water levels began to rise again, inundating what has become flycatcher habitat.

level of Lake Mead for the following specific purposes: (1) river regulation, improvement of navigation, and flood control; (2) irrigation and domestic uses, including the satisfaction of present perfected water rights; and (3) power generation. The FWS accepted these claims of limited discretion and adjusted the RPA accordingly.

Plaintiffs complained that the FWS should have taken it upon itself to investigate the nature and extent of BOR's discretion, instead of leaving the task to the BOR. Given the statutory power of the ESA, and given how it has "turned the prior appropriation system on its ear" in the Upper Colorado,270 it would seem feasible that compliance with the goals of the ESA could possibly supersede other aspects of the Law of the River. After all, it is important to remember that since 1973 the ESA has been a critical part of the Law of the River capable of affecting other aspects of the law, not a separate and inferior law subject to the Law of the River. It is possible that a reconceptualization of BOR agency discretion, the Law of the River, and the relationship between species welfare and Colorado River operations could result in an expanded range of choice for FWS decision makers during the formulation of RPAs.

The main conclusion of the Southwest Center court was that the Biological Opinion was not arbitrary and capricious, since the ESA does not require the protection of every known habitat of a listed species. The BOR could opt not to protect the Lake Mead delta habitat as long as the species in general avoids jeopardy.

The problem with the action agency (and in this case the BOR) playing the lead role in Section 7 consultation is that the agency's ideologies and biases (in this case, against the native fish and against nonstructural approaches to water supply issues) are reproduced, institutionalized, and become part of the law. As Houck observes and illustrates with multiple examples, the Section 7 consultation process has evolved into a "permitting system" where naked Jeopardy Opinions and even innovative alternative solutions to difficult resource problems are generally precluded from consideration.271

Yet another problem with the regulations guiding the Section 7 consultation process has to do with access to the decision-making process during the formulation of Biological Opinions. A central precept in range of choice theory is that inclusion of the public generally serves to expand the range of alternatives considered. In its 1966 report, the National Research Council found that improving the decision-making process will

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270. Tenney, supra note 43.
271. Houck, supra note 7, at 326.
involve (1) generating and evaluating alternatives for consideration by the people, (2) reporting and disseminating such alternatives for the broadest possible discussion in the political arena, and (3) striving to assay the value all segments of society place on specific uses. The report asserts that public discussion helps ameliorate "institutional hardening." In most parts of the ESA, the public is invited to play a role in the implementation of the Act. There are provisions for public participation in the listing process, designation of critical habitat, recovery plans, and habitat conservation planning. But during consultation, for some reason, the public is excluded. This would not be so bad if the project proponents were excluded as well, making the process as scientific and objective as possible, but the regulations allow the FWS to circulate draft opinions to the action agency and the applicants. In practice, this kind of collaboration between the FWS and the action agency and its clients occurs all the time.

In the case of the San Juan River, the FWS did its best to keep the deliberations between the FWS and the BOR. Upon learning that the BOR would reconssult on A-LP with the FWS, however, the SWWCD "secured the services of one of the nation's preeminent experts on Colorado [pikeminnow] in the fall of 1989, and was prepared to consult with the Service. No 'good faith discussions' with the FWS took place, and no SWWCD participation was permitted by the FWS." This enraged the project proponents, who felt unfairly excluded from the process.

In a letter to FWS Director John Turner that was also sent to then President George Bush; the congressional delegations of Colorado, New Mexico, and Utah; the Secretary of the Interior; and others, SWWCD attorney Sam Maynes wrote the following:

In excluding the SWWCD from the consultation process, a USFWS position subsequently confirmed by Regional Director Galen Buterbaugh, your agency is in breach of the Stipulation of Settlement of April 14, 1983. In order to
remedy that breach, we request that you withdraw the Draft Biological Opinion and recommence the consultation process. Further, we request that the SWWCD be included as a participant in that consultation and that the USFWS engage in 'good faith' efforts to develop reasonable and prudent alternatives that would permit the construction of the A-LP in a manner consistent with the Endangered Species Act. Because the Draft Biological Opinion will become a Final Biological Opinion in the absence of your intervention, we request your immediate and prompt attention to this matter. Otherwise, we will have no choice but to seek relief from the federal court to remedy the 'bad faith' disregard and breach of our previous Stipulation of Settlement....Your urgent attention to this matter is genuinely appreciated.277

Directors of the Southwest Water Conservation District and the Animas-La Plata Water Conservancy District, Fred Kroeger and John Murphy, respectively, also expressed their dismay at being excluded from the negotiations leading to the Draft Biological Opinion:

The Districts believe that the Service shirked its duty in searching for reasonable and prudent alternatives by refusing to allow the hydrologist, Ross Bethel, and biologist, Rich Valdez, hired by the SW District and the Tribes to participate in the Section 7 consultation process for the project....The Code of Federal Regulations regarding the Section 7 consultation process does not preclude the Service from entering into consultation with interested project proponents on a voluntary basis. The Service's failure to identify any reasonable and prudent alternatives as a result of this consultation could have been avoided had the Service been willing to work with a broader range of scientific opinion.278

Because of the regulations guiding Section 7 implementation, and because of the standard operating procedure that had been developed in the past, the project proponents felt entitled to participate in the formulation of the

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FWS agreed to work together in good faith with the SWWCD to develop reasonable and prudent alternatives and plans which would permit construction and operation of the [A-LP] in a manner consistent with the ESA.

Maynes, supra note 275. When one actually reads the Stipulation, however, there is no reference to the FWS specifically. Rather the references are to "Interior," which could just as easily, and more likely, refer to the BOR.

277. Letter from Frank "Sam" Maynes, supra note 275.

278. Letter from Frank V. Kroeger, Director, Southwest Water Conservation District, & John E. Murphy, Director, Animas-La Plata Water Conservation District, to Ronald Robinson, Regional Director, Bureau of Reclamation (July 30, 1990) (on file with author).
Biological Opinion. Had it not been for the unusually firm stance taken by FWS biologist Keith Rose throughout the consultation process, it is likely that the A-LP proponents would have been more involved.

As ESA legal scholar Oliver Houck points out, allowing the proponents to participate without creating a mechanism for more general public involvement is patently unfair. The public is completely excluded from the consultation process until the Final Biological Opinion is complete. On this issue Houck writes

[t]hat the ESA operates largely through the benefit of the public's interest in and knowledge of endangered species—from listing petitions through enforcement—is beyond cavil. That Interior would strain so deliberately to exclude the public—while including the development agencies and private applicants—from biological opinions is some measure of just how important it is that the public be involved. Without public participation, findings of "no jeopardy" are far easier to reach.

Houck's observations suggest that more public involvement might work to influence the FWS to use its discretionary authority to benefit species more than it does at present.

VI. CONCLUSIONS

The FWS decision ultimately to allow A-LP to go forward in spite of its predicted impact on the endangered fish is significant because the ESA is one of the few laws with "teeth" strong enough to stop such a well-supported project. Arguably, the ESA was one of the most challenging hurdles for A-LP to negotiate. For many reasons, the FWS forfeited the opportunity to implement the Act as forcefully as it could have, allowing the project to lumber on only partially impeded.

More importantly, there may have been a missed opportunity to develop a more innovative solution to the conflict between endangered species and water demand in the basin. In the same way that forceful implementation of the Clean Air Act led to the development of new technologies for pollution control, strong implementation of the ESA might have resulted in institutional and legal innovations to meet the water needs of the tribes and non-Indian water interests without constructing a new project in the San Juan basin. This missed opportunity may well be attributable to unnecessary constraints on the Fish and Wildlife Service's range of choice.

279. Houck, supra note 7, at 326.
280. Id.
In 1990 and 1991, the FWS made a big effort to comply with the language and intent of Section 7. Keith Rose, the biologist in charge of writing the Biological Opinions for A-LP, and his supervisor, Regional Director Galen Buterbaugh, made a courageous attempt to stop a bad project by issuing a naked Jeopardy Opinion in 1990. As a result, they suffered the wrath of their superiors all the way up to the Secretary of the Interior, as well as senators, congressmen, and other powerful people throughout the region. But by taking such a strong stand in this case, the FWS forced the BOR to rethink its "flexibility" and consider a slightly scaled-down project. The threat of another naked Jeopardy Opinion got the water users to agree to pay for a research and recovery program for the fish. It inspired collaboration and innovation.

The naked Jeopardy Opinion, issued in draft form where appropriate, has been an overlooked tool for eliciting cooperation and creativity from the action agency during the search for a solution to the conflict between endangered species and jeopardizing federal actions. As mentioned earlier, as of January 2000, the 1990 Draft Biological Opinion for A-LP was the only naked Jeopardy Opinion ever issued in the entire history of Region 6 of the FWS. This fact raises serious questions about the applicability of the Section 7 consultation process as conceived by Congress and the Department of the Interior. Should we just eliminate the naked Jeopardy Opinion as an option for the FWS in Section 7 implementation? Or should we seek to make the FWS a stronger entity, able to stand up to political pressure and implement Section 7 the way it was written?

In the experience of Keith Rose, FWS Biologist, there were just too many constraints—mostly political, in his eyes—to allow any honest and thoughtful consideration of alternatives to A-LP, other than the mitigation plan developed in the Final Opinion. The FWS simply did not (and does not today) have the institutional strength to stand up to the BOR and the western water establishment.

By reconfiguring the mechanics of the Section 7 consultation process and refining the regulations surrounding the identification of RPAs, the FWS could be given more leverage. If the regulations required a broader consideration of alternatives, maybe even using NEPA as a model for alternatives analysis, the FWS might, ironically, be able to use its discretion more freely than it can now. Without specific guidelines for the identification and selection of alternatives, the FWS is more susceptible to political pressure from the action agency and other interested parties.

Another possibility would be to combine the NEPA scoping process with Section 7 consultation. The action agency could be prohibited from selecting a "preferred alternative" that did not pass muster with the FWS.

281. Interview with Keith Rose, supra note 9.
and Section 7. This would give NEPA some of the "teeth" it needs and would, theoretically, prevent a "bad" project from making it out of the gates. It might be easier for the FWS to exercise its power under Section 7 on a project at this earlier stage in the process.

Similarly, if the FWS took more of a leadership role in the consultation process, in the research used in the consultation process, and in the identification of RPAs, it would be in a better position to implement the Act as directed. This is not to say that the burden for developing an RPA should be placed exclusively on the FWS, but rather that that agency should be more involved by making suggestions and by ensuring that viable alternatives are not discarded for political reasons.

Also, access to the decision-making process during consultation needs to be rethought. The ESA requires that federal agencies "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."282 Perhaps this statute needs to be clarified. Did Congress intend that project proponents get involved in the formulation of the Biological Opinion? Should the decision-making process be opened up to all interest groups? Or sealed off from all except the biologists? It would seem that justice would demand one or the other.

Perhaps the main lesson from this analysis is that in spite of the language in Section 7 of the ESA, and in spite of Tennessee Valley Authority v. Hill, a naked Jeopardy Opinion, where a project is sacrificed for the welfare of a species, is simply not part of the practical range of choice for the FWS. There are two ways to read this state of affairs. On the one hand, it represents an incredible human optimism about our ingenuity, our ability to think creatively, to think "outside the box." The human imagination seemingly has no limits when it is asked to find a way to have its cake and eat it too. As Colorado Senator Tim Wirth said about his conversation with Interior Secretary Manuel Lujan after the FWS issued its Draft Biological Opinion in 1990, "I said it was imperative for him to send the FWS and the BOR back to find a mitigation plan. There has to be one...." [they just have not found it yet!].283

On the other hand, the practical absence of the ability to draw a line in the sand, to say "No," is representative of a destructive tendency or habit on society's part. Developers and agency officials charged with implementing tough laws tend to think that there is always a way to have it all if they just try hard enough. They cannot take "No" for an answer. But at what cost? The potential loss of species, critical habitat, functioning ecosystems, biodiversity? Chief Justice Burger ruled in Tennessee Valley Authority v. Hill that the ESA was supposed to be enforced as written, and that endangered

283. Miller, supra note 110.
species were to take priority over the primary missions of federal agencies.284

I assert that to realize this superceding authority, the range of choice for the FWS has to be expanded to include the ability to say "No." There may well be many instances where "no action" is the most reasonable and prudent alternative, not only for the species, but also for third parties such as local citizens and federal taxpayers. This is not to say that all development in endangered species habitat must stop. When appropriate, there is nothing so inspirational as a group of creative and determined minds coming together and organizing, collaborating, brainstorming, and developing ways to meet all the needs at hand.

This process is usually at its best and most inspired, however, when confronted with the reality of a "No," or at least the real prospect of a "No." When walls are encountered, institutional innovation often finds a way to flourish. If we are to maintain the integrity of the ESA and achieve its goal of conserving our biological heritage, we must find a way to strengthen the FWS as an institution so that it has the freedom and the ability to consider and choose from all reasonable alternatives in the implementation of the ESA.

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