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COMMENTARY

DAVID J. HAYES*

Integrating ESA Goals into a Larger Context: The Lesson of Animas-La Plata

ABSTRACT

The process by which the U.S. Fish & Wildlife Service examines whether proposed federal projects satisfy the Endangered Species Act gives the Service considerable power to influence proposed projects. Using the Animas La Plata water project as a case study, however, Hannah Gosnell has suggested that the Fish & Wildlife Service's institutional limitations reduce its ability to shape federal projects to conform with species protection needs. This author disagrees. The Fish and Wildlife Service can have a profound impact on federal projects through the Section 7 consultation process by identifying issues and species needs that can trigger a serious review of project alternatives. In the case of Animas-La Plata, the Service's 1991 biological review led to a complete reexamination of the proposed project and a fundamental alteration of the nature and scope of the project in a way that satisfied the Endangered Species Act and other policy imperatives.

I. INTRODUCTION

Hannah Gosnell's excellent article questions whether the U.S. Fish & Wildlife Service (FWS or the Service) undertook a broad enough examination of alternatives when it was evaluating the compatibility of an early version of the Animas-La Plata (A-LP) water project with the Endangered Species Act (ESA). She suggests that in 1991 the Service missed an opportunity to change the direction of the project, in part because of her proposition that the FWS cannot compete against a more powerful "action" agency (here, the U.S. Bureau of Reclamation) during the ESA consultation process. Gosnell relies on the FWS draft 1991 Biological Opinion in the

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2. Specifically, Gosnell states in her article that "it seems ludicrous that the FWS had to depend upon the Bureau of Reclamation" in the consultation process.
Animas-La Plata Project to conclude that the Service too rarely says "no" to projects—particularly western water projects—infering that the Service is a paper tiger having little ability to influence the nature or scope of Animas-La Plata or other proposed water projects.

In developing her argument, Gosnell makes a number of good points. Her conclusion, however, misses the mark. As the Animas-La Plata Project itself demonstrated, the Fish & Wildlife Service's biological conclusions often define the playing field for action agencies and other interested parties. Ms. Gosnell feared that the draft 1991 Biological Opinion would provide the basis for a flawed A-LP project to go forward. It did not. Instead, the Service's strong statement that far less water could be taken out of the Animas River than had previously been assumed had the practical effect of halting the project in its tracks, just as effectively as if the Service had issued a "jeopardy" opinion in 1990.

As explained at length below, the Service-induced stalemate triggered reconsideration of the fundamental architecture of the original A-LP project. With the FWS significantly limiting water withdrawals from the Animas River to protect endangered fish species, the prospect of building a massive reservoir near the Animas River to feed a large new irrigation project no longer seemed realistic. Colorado Governor Roy Romer entered the breach and tried, unsuccessfully, to broker a solution between project proponents and opponents.

Ultimately, Secretary of the Interior Bruce Babbitt concluded that the original A-LP Project was a dead letter. He offered a fundamentally new approach that proposed to revamp and scale back the project by cutting out all irrigation use of water from the Animas side of the project and to downsize the off-stream water storage of the project to match up with the Fish and Wildlife Service's views of acceptable depletion levels on the Animas River. The result was a proposed project that could meet the federal trust responsibility by addressing the water rights of the Ute Mountain Ute and Southern Ute Tribes, but that otherwise bore little resemblance to the original Animas-La Plata Project. Following completion of a public process, including the preparation of a supplemental environmental impact statement pursuant to the National Environmental Policy Act (NEPA), Congress essentially agreed with the Babbitt plan and changed the law accordingly.

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3. As explained in more detail in Gosnell's article, the 1990 jeopardy opinion concluded that the original A-LP project would create too much demand on Animas River water (154,800 acre-feet per year in depletions). The 1991 draft biological opinion proposed to significantly limit depletions by nearly one-third—to 57,100 acre-feet for the project.

Thus, despite Gosnell's thesis that the FWS issues too few "jeopardy" opinions and that the Service's institutional limitations make it a mostly-ineffective player among federal agencies, the Animas-La Plata case study tells a different story. In the case of A-LP, the 1991 draft Biological Opinion had the practical effect of a jeopardy decision. Although the Service identified "reasonable and prudent alternatives" (RPAs), the significant constraints that such RPAs proposed to put on the project raised questions about the viability of the project and alerted project opponents to weak points in the project's design.

The project was stopped, and a long process of reexamination of various project alternatives began. While it is true that the FWS did not drive the formulation of potential alternatives to the design of the A-LP project, Congress never intended the FWS to use the consultation process to play a dominant role in that regard. In the case of A-LP, a full range of project alternatives emerged from administrative and legislative processes and were analyzed in a public NEPA process. The process was full, robust, and public, and it generated a new proposal that satisfied federal trust responsibilities to the Ute Tribes, while fully complying with all environmental requirements.

II. DEVELOPING REASONABLE AND PRUDENT ALTERNATIVES AS PART OF THE ESA CONSULTATION PROCESS

The Endangered Species Act is dedicated to species protection, first and foremost. When drafting the ESA, Congress also sought to avoid ESA confrontations between proposed federal actions and listed species where it could. As a result, the ESA incorporates a process-related goal of seeking to find ways to protect species in a manner that accommodates other public policy needs. Accordingly, when it appears that a proposed federal action may jeopardize the continued existence of an endangered species, Congress requires the FWS to identify "reasonable and prudent alternatives" to the proposed project that may allow a modified project to go forward without harming the species in question.5

Gosnell's article questions the theory and application of this aspect of the ESA, using the A-LP project as an example in point. On the theory side, she asks whether the FWS has the institutional capability to identify reasonable and prudent alternatives to proposed projects when the Service

5. Gosnell reviews the role of RPAs, noting that RPAs were developed, in part, to avoid the type of irreconcilable conflict that triggered the snail darter conflict in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). The FWS also has developed habitat conservation plans under the authority of Section 10 of the Act as another technique for ensuring species protection in the context of development pressures.
must rely on the federal agency that is backing the proposed project for information and analysis regarding potential alternatives, despite the lack of interest that the agency may have in vigorously exploring alternatives. She states that the “problem with an action agency taking the lead is that the agency’s ideologies and biases are reproduced and institutionalized and become part of the law.”

On the application side, Gosnell questions how it can be that the FWS finds that so few federal projects trigger “jeopardy” opinions, and how it is that so many other projects can be rejiggered through the imposition of RPAs to pass the ESA test. Gosnell notes that the law provides the Service with broad discretion in formulating reasonable and prudent alternatives, and she concludes that RPAs are likely influenced by politics as much as science. She speculates that “[h]istorically, the Fish and Wildlife Service relied on identifying reasonable and prudent alternatives to questionable projects subject to a Section 7 consultation as a way of minimizing the impact of the law and appeasing developers.”

It is my turn to make a sweeping proposition or two on these subjects, before turning to the A-LP case example for a more rigorous discussion. My observations flow primarily from my experience, particularly from my tenure as Deputy Secretary of the Department of the Interior, where I had authority over the Fish & Wildlife Service.

With regard to the institutional role played by the FWS in developing RPAs, there is no question that the Service must rely primarily on the agency that is proposing the project in question to help identify potential alternatives. The ESA’s Section 7 consultation process puts the FWS in a reactive role. The Service does not shape projects; it responds to projects that have been proposed by other federal agencies.

This dynamic is essential, in my view, to the successful implementation of the ESA. The consultation process should not present the FWS with an opportunity to become a land management agency, or a water agency, by empowering it to make decisions on whether and how to deliver government services under implementing statutes as diverse as the Federal Land Policy and Management Act and the Reclamation Act. The Service does not have these statutory responsibilities, and it clearly does not have the institutional capability to take over these responsibilities and revamp proposed projects.

Rather, the Service’s core expertise is evaluating how a proposed project may affect a listed species. If there is a potential impact on the species, the FWS has a right to push the proposing agency to come up with alternative ways of implementing the project that will mitigate or eliminate such impacts. But the Service’s biologists, who are experts on the species and not the project, should be asking the questions, not imposing their worldview on the underlying merits of the project itself.
For those who would prefer that the FWS both ask and answer questions regarding a proposed project and impose their will more aggressively in redesigning projects presented to them, I offer two relevant observations. First, the National Environmental Policy Act—and not the ESA—is the federal law that is intended to fully explore a range of basic alternatives to a proposed action. NEPA establishes a public process that includes substantial procedural safeguards. It is a far better, and more appropriate, context to evaluate fundamentally different approaches to meeting project purposes than, say, a Fish & Wildlife Service biologist's review of the ESA impacts of a specific proposed project.6

Second, I disagree with the suggestion that because the FWS is not in a position to force adoption of fundamentally different project ideas by a consulting agency, its role under the ESA becomes trivialized, with RPAs becoming tools of appeasement. Because the ESA gives the FWS both a "nuclear" weapon (the jeopardy opinion) and access to "conventional" weapons (the no jeopardy decision, conditioned on the satisfaction of reasonable and prudent actions that are defined by the Service), agencies that are seeking ESA approval for a project must and do listen to the Service. Indeed, it is my experience that agencies would rather take a proposed project back to the drawing board than trigger a "jeopardy" opinion from FWS.7 And many agencies are willing to go the extra mile in agreeing to expensive and difficult-to-implement conditions of going forward, if such "reasonable and prudent alternatives" are needed by the Service to give an ESA green light.8

I will admit that these observations lack empirical proof.9 But they are at least as relevant as the statistical information regarding the number of times that the FWS exercises its nuclear power and issues a "jeopardy" biological opinion. And in the absence of compelling empirical evidence, we are thrown back to the case example at hand—the Animas-La Plata project—which, I believe, illustrates these points rather effectively.

6. Gosnell acknowledges that NEPA could play such a role, but she suggests that because the ESA has more "teeth," alternatives should be more rigorously explored by the Fish & Wildlife Service as part of the reasonable and prudent alternatives review. My concern is that the ESA may have its teeth knocked out if the Service uses the RPA review as a vehicle to engage in the type of project scoping process that NEPA is far better equipped to handle.

7. This phenomenon may explain why so few "naked" jeopardy opinions are issued by the Service as part of the Section 7 consultation process.

8. Ironically, Gosnell makes this very point early in her article, when she quotes a regional solicitor of the Department of the Interior as characterizing the Fish & Wildlife Service's role in working with other agencies as "interagency coercion."

9. I do not believe that it would be difficult to obtain such proof. Interviews of project managers whose projects implicate ESA issues would provide a fertile source of such information.
III. ANIMAS-LA PLATA—THE POST 1991 STORY

A. Overview

Gosnell’s article points to the FWS 1991 draft Biological Opinion as an example of the ESA’s institutional shortcomings. The article suggests that the Service caved in to the water interests that were pushing for the large A-LP project by issuing a no jeopardy biological opinion that allowed the project to go forward, albeit with certain restrictions. Gosnell also asserts that because of the Service’s institutional limitations on defining “reasonable and prudent alternatives,” the Service failed to identify and request consideration of a completely different approach to satisfying local needs than that proposed by the consulting agency, the U.S. Bureau of Reclamation.

If the clock stopped on the A-LP project in 1991, there might be considerable merit to some of Ms. Gosnell’s claims. The story that follows issuance of the draft 1991 biological opinion, however, argues for a much different conclusion. Specifically, the FWS draft Biological Opinion was the most significant factor in halting the project and triggering a public discussion about whether the project should go forward at all and, if so, whether it should be fundamentally redesigned before it did.10 As discussed below, the net effect of the subsequent activity was the enactment of new legislation that cut out significant aspects of the original project and allowed for a scaled down project that was sized to fit the Service’s determination of the depletions that were allowable under the ESA.

The A-LP story line indicates that the FWS draft 1991 Biological Opinion, rather than being a sop to water interests, played a critical role in stopping and reshaping the project. The FWS did not take the lead role in identifying the outlines of a new project (appropriately, in my view), but there can be no question that a broad public debate occurred on alternatives, through both the administrative and legislative processes. And NEPA—not the ESA—provided the appropriate legal and analytical framework for this analysis.

10. The draft biological opinion was not the only factor that slowed down the project. Serious issues were raised by project opponents regarding the adequacy of the project’s compliance with NEPA and compliance with cultural resources survey requirements.
B. Post-1991 Highlights

By severely limiting Animas River depletions by nearly two-thirds—from the proposed 154,800 acre-feet per year to 57,100 acre-feet per year—the FWS draft 1991 Biological Opinion provided the grist for project opponents to question the wisdom of the project. The opinion raised fundamental questions about the viability of building a massive off-stream reservoir that was designed to hold 280,000 acre-feet of Animas River water, and subsequently designing and constructing large new irrigation works that potentially could irrigate nearly 66,000 acres of land, when these projects would require much larger draws on the Animas River than the FWS would approve. Wasn’t this folly?

The debate shook the region, prompting Governor Romer to institute a public process to seek out a compromise solution that would be acceptable to both project proponents and opponents. Over the course of several years, then-Governor Roy Romer and then-Lieutenant Governor Gail Schoettler urged the factions to come toward the middle. They did not succeed in their quest, but the mediation nonetheless was valuable because it presented two new alternatives for consideration: (1) so-called “A-LP Lite,” which called for the construction of a large, off-stream reservoir, but which put a temporary hold on the balance of the project; and (2) the so-called “non-structural alternative,” which recommended that the area’s water needs be satisfied primarily by existing reservoir assets and new water purchases, rather than by the construction of an off-stream reservoir.

The “A-LP Lite” proposal was incorporated into legislation (S. 1771) that Senator Ben Nighthorse Campbell introduced during the 105th Congress. Congressional hearings were held on June 24, 1998. The Clinton Administration opposed the proposal, primarily on environmental grounds. The project was oversized and did not match the depletions allowed by the FWS. The EPA raised serious concerns about the impacts that the proposed new irrigation works would have on water quality. Also, adequate environmental reviews on the project had not been undertaken and the Campbell legislation proposed to override the potential need for additional NEPA compliance.11

A firestorm of more controversy followed. The loudest objections came from the Ute Mountain Ute and Southern Ute Tribes, who were counting on the A-LP project to satisfy their water rights claims.12 The Ute

11. See generally Joint Oversight Hearing of the Comm. on Indian Affairs with the Subcomm. on Water and Power of the Comm. on Energy and Natural Res. on S. 1771 and S. 1899, 105th Cong. (testimony of Eluid Martinez, Commissioner of Reclamation).

12. The reserved water right doctrine is a well-established feature of federal law. Some parties questioned whether the Ute Mountain Ute and the Southern Ute Tribes had valid federal reserved water rights, despite Congress’s affirmation of such rights in 1988. The
Tribes had been willing to compromise their substantial water rights claims in the context of the Colorado Ute Indian Water Rights Settlement Act of 1988, so long as they could develop “wet” water through the A-LP project. The rejection of A-LP Lite appeared to end that plan, potentially leaving the tribes back at square one.

Driven by concern of satisfying the government’s trust responsibility to the tribes, Secretary Babbitt proposed a new plan in August of 1998 that focused on satisfying the needs of the tribes by providing access to water supplies in a smaller off-stream reservoir, supplemented by water purchases in the marketplace, a concept derived from the “non-structural” alternative. A limited amount of municipal water also would be available from the reservoir for the local jurisdictions on a non-subsidized basis, but no irrigation water would be allowed, and none of the proposed irrigation works would be constructed.

Secretary Babbitt also insisted that the Department of the Interior’s proposal be subject to a full NEPA analysis, along with the two major alternatives that surfaced during the Romer/Schoettler process: A-LP Lite and the non-structural alternative. This would ensure that if an A-LP project were built, there would be no environmental shortcuts. All environmental issues would be fully evaluated.

Over the next two years, a supplemental environmental impact statement was prepared to evaluate the Administration’s proposal against a number of potential alternatives, including the non-structural alternative and the “no action” alternative. During the course of the process, refinements were made to the Administration’s proposal, but the essential project remained the same: a smaller, off-stream reservoir, sized to the Fish & Wildlife Service’s depletion analysis,13 and dedicated primarily to satisfying the tribes’ water rights.14

Solicitor of the Interior, John Leshy, transmitted a memorandum addressing that subject dated September 9, 1999. The Leshy memorandum concluded that the tribes have valid water rights that were recognized by the United States and that needed to be addressed as part of any Animas-La Plata settlement.

13. The reservoir that was analyzed in the supplemental EIS was enlarged from 90,000 acre-feet to 120,000 acre-feet, in order to ensure that the reservoir would not need to be drained in order to access the active storage pool. The larger reservoir would produce better water quality, as well as provide potential recreational opportunities. It would not, however, rely on larger depletions from the Animas River than the Fish & Wildlife Service had identified in its draft 1991 biological opinion.

14. As part of the review of the revised project, the interests of downstream tribes also were fully evaluated. The proposed project included a set-aside of water for the Navajo Nation, and it authorized the construction of a new Navajo drinking water pipeline from Farmington to Shiprock. In addition, resolution of the Ute Tribes water rights ended the uncertainty about depletions in the Animas River, thereby clearing the way for the implementation of tribal water rights in the San Juan Basin. Accordingly, the Navajo Nation and the Jicarilla Apache
The public EIS process provided an opportunity for all voices to be heard on this important subject. Large public meetings were held in Durango and Denver, Colorado, and Farmington, New Mexico. Hundreds of comments were filed and Congress held several hearings on the subject. By the end of the process, there was little doubt that a full range of potential alternatives was on the table for consideration. No one was relying on the FWS to flesh out a new approach to the project as part of its consideration of "reasonable and prudent alternatives." The Service's draft Biological Opinion had helped to catalyze attention to the issue, but a variety of policy interests—particularly the trust-related responsibilities—was now driving the issue.

After the NEPA process was completed, the Administration signed a Record of Decision that selected its modified proposal as the preferred path for the Animas-La Plata project. The modified proposal was judged to provide the best means to satisfy the government's trust responsibility and to implement the 1998 settlement with the tribes, particularly in light of the potential environmental benefits of the proposal.

Despite the radical departure of the proposal from the original plan and the resulting disappointment of many of the water users in the area, the FWS had helped bring a needed dose of reality to the region by scaling back expectations. The Clinton Administration reinforced those diminished expectations and made it clear that the only hope for a bipartisan end to the long-running A-LP controversy was to build a smaller project that conformed to the NEPA analysis and focused primarily on tribal water rights. A February 15, 2000, letter from Bruce Babbitt to environmental leaders (see table 1) made the point eloquently. In the end, a bipartisan Congress united around the revised project, with the Senate passing the legislation by an 85-to-5 vote.

### IV. CONCLUSION

The ESA's Section 7 consultation process is not perfect, but it provides the FWS with the leverage needed to ensure that projects proposed by federal agencies will not adversely affect listed species. Although the FWS does not have the institutional capability to redesign projects proposed by other agencies, the A-LP project illustrates the power

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Tribe explicitly endorsed the revised project in a letter to Secretary Babbitt dated August 24, 2000.

15. The Record of Decision was signed on September 25, 2000.

16. The non-structural proposal, which would have required the purchase and transfer of a large percentage of the water rights in the basin, raised potentially serious wetlands issues, as explained more fully in the supplemental environmental impact statement that was prepared for the project.
of the Service's conditioning authority to force a reconsideration of project assumptions. The Service's draft opinion helped to trigger a complete examination of the merits of the project. The evaluation proceeded in the public arena, under NEPA's watchful eye. It generated a new and different project that better addresses environmental and other public policy concerns, while remaining true to the project's need to resolve the long-standing tribal claims to Animas basin water.
Table 1: February 15, 2000, Letter from Bruce Babbitt to Environmental Leaders

Mr. Vawter Parker  
Executive Director  
Earthjustice Legal Defense Fund  
180 Montgomery St., Suite 1400  
San Francisco, CA 94104

Dear Mr. Parker:

I am writing in response to your recent letter expressing opposition to the Administration's proposals for implementation of the Colorado Ute Water Rights Settlement.

As you are aware, in 1988, Congress enacted the Colorado Ute Water Rights Settlement Act which secured for the Ute Tribes a specific quantity of water from Animas-La Plata (ALP) to settle their water rights claims in the Animas and La Plata River basins. Implementation of this settlement has been long-delayed, thus denying the Tribes the benefit of the agreement they reached with their non-Indian neighbors, the State of Colorado, and the United States in the mid-1980s. The delay has triggered a clause in the settlement agreement which now necessitates a decision – whether to honor the fundamental tenets of the settlement or force the Tribes to litigate their water right claims.

In August 1988, I presented an Administration proposal to finalize implementation of the 1988 Colorado Ute Water Rights Settlement Act. At that time, I made it clear that we would not take environmental short-cuts in resolving this issue. Accordingly, our proposal was downsized to satisfy our responsibilities under the Endangered Species Act. In addition, we committed to submit our proposal, as well as competing proposals to settle the Tribes' water rights claims, to an environmental review process under the National Environmental Policy Act (NEPA). The preliminary results of the NEPA analysis were made available on January 14 with the release of a draft Supplemental Environmental Impact Statement (SEIS). The draft SEIS recommended a modified version of the Administration Proposal as the best alternative to resolve the Tribes' water rights with the least environmental impacts.
Our proposal bears no resemblance to the massive ALP project that has been opposed by the environmental community for many decades. Gone is the irrigation component of the project, which called for much more water than the Animas River could support, and which would have brought with it serious water quality concerns. Gone is an oversized reservoir that would create a continuing incentive to divert more water from the Animas River than the river system can tolerate. What is left is a down-sized off-stream reservoir that satisfies the bulk of the Tribes’ water rights, and which stores a limited amount of unsubsidized municipal water for the growing communities in the Durango and Farmington areas. The balance of the Tribes’ water rights would be secured through market purchases of water rights, an approach that many environmental groups have advocated.

I particularly want to emphasize my concern that we honor our obligation to the Ute Tribes by carrying through on commitments that were made in the 1988 settlement. In order to get this matter settled, the Tribes have made significant concessions in response to environmental concerns and it is now time for us to reciprocate.

Justice Black once admonished, “Great Nations, like great men, should keep their word.” The time has come to fulfill our trust responsibility to the Tribes. I am committed to follow through on this responsibility by working with the Congress to enact legislation in this session.

An identical letter has been sent to all the signatories of the February 2, 2000, letter.

Sincerely,

(Signed) Bruce Babbitt

The Secretary of the Interior
U.S. Department of the Interior
Washington