



Summer 2001

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Recommended Citation

Stanley M. Pollack & Scott B. McElroy, *A-LP Lite: A Compromise Project that Fulfills the United States Trust Responsibility in an Environmentally Responsible Manner*, 41 NAT. RES. J. 639 (2001).

Available at: <https://digitalrepository.unm.edu/nrj/vol41/iss3/6>

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COMMENTARY

STANLEY M. POLLACK* & SCOTT B. McELROY**

A-LP Lite: A Compromise Project that Fulfills the United States' Trust Responsibility in an Environmentally Responsible Manner

ABSTRACT

The development of a "reasonable and prudent" alternative Animas-La Plata project in the Four Corners area represents an appropriate Fish and Wildlife Service consultation under the Endangered Species Act. The process followed by the Service resulted in a smaller project than originally planned. A simple Fish and Wildlife Service opinion that the project jeopardized an endangered species would not have satisfied the Service's obligation to help find reasonable and prudent alternatives. The scaled-down alternative project was consistent with the federal responsibility to endangered species, other environmental laws, and native tribes.

INTRODUCTION

Recent events demonstrate that the efforts over the last decade to construct the Animas-La Plata Project (A-LP or project) in a reduced format in order to settle the long standing claims of the Ute Mountain Ute and Southern Ute Indian Tribes (referred to collectively as the Ute Tribes) on the Animas and La Plata Rivers have at the same time significantly increased the likelihood of recovery of the endangered fish in the San Juan basin. Settlement of the Ute Tribes' claims through the construction of a much smaller project (A-LP Lite) than originally contemplated in the Colorado Ute Indian Water Rights Settlement Act of 1988¹ will also make it considerably easier for the Jicarilla Apache Nation and the Navajo Nation, the other two tribes with water rights in the San Juan basin, to develop the water supplies required for the needs of tribal members. Hannah Gosnell overlooks those substantial benefits in her article *Section 7 of the Endangered*

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1. Pub.L.No. 100-585, 102 Stat. 2973.

Species Act and the Art of Compromise: The Evolution of a Reasonable and Prudent Alternative for the Animas-La Plata Project (Gosnell Article) criticizing the development of the reasonable and prudent alternative (RPA) for A-LP under the Endangered Species Act² over a decade ago. She also fails to give sufficient consideration to the Department of the Interior's continued deference to the position of the two Ute Tribes that the storage of water from the Animas River is needed to provide the Tribes with the water required to meet their present and future needs. Finally, she never mentions that last year the Navajo Nation and the Jicarilla Apache Nation both strongly urged the Department of the Interior to proceed with the reduced project and the Department ultimately found that it would facilitate the protection of the interests of those Tribes if the reduced project were built, as opposed to the non-structural alternative pressed by project opponents.

To be sure, the development and implementation of the recovery program for the endangered fish and the evolution of the current configuration of A-LP, as pointed out in the Gosnell article, has been a tedious and time-consuming process. But the same factors that made it difficult to find an acceptable solution to the complex problem of settling tribal water rights while complying with federal environmental laws ultimately have contributed to the underlying strength of the recovery program. The strength of that program is derived from the belated realization by the development and conservation interests in the San Juan basin that they must work together to recover the endangered fish while allowing the four Tribes in the basin to obtain the water supplies that were first promised to them by the United States so long ago. The political consensus that the population of endangered fish in the San Juan River should be recovered and the accompanying awareness that it would take substantial resources to do so required time to emerge. But in the absence of such a cooperative effort, there is no reason to believe that it would be possible to halt the environmental degradation on the San Juan River that has been so devastating to the Colorado pikeminnow and the razorback sucker.

In short, stopping A-LP would not have helped to recover the endangered fish since the factors leading to their "extirpation" were already firmly in place. In contrast, the RPA so heavily criticized in the Gosnell article provided the catalyst for the recovery effort, both in terms of political and financial capital. In addition, it has now resulted in a revised Ute water rights settlement that depends on a greatly reduced project to meet the water needs of the two Ute Tribes and thereby facilitated the ability of the Jicarilla Apache Nation and the Navajo Nation to meet their needs in the basin.

2. The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1994).

**I. THE PROCESS TO DEVELOP A REASONABLE AND PRUDENT
ALTERNATIVE RESULTED IN AN OUTCOME THAT WILL
BENEFIT THE ENDANGERED FISH WHILE PERMITTING THE
RIGHTS OF THE UTE TRIBES TO BE SETTLED**

In the fall of 2000, the Department of the Interior concluded that a modified and smaller A-LP, "A-LP Lite," is the "most environmentally responsible" way to meet the obligations on the part of the United States to the two Ute Tribes.³ Almost ten years earlier, the Fish and Wildlife Service approved a reasonable and prudent alternative for A-LP that would allow a project to be built with an annual depletion from the San Juan River basin of 57,100 acre-feet. That RPA resulted in the modification of the hydrologic regime of the San Juan River through the altered operation of Navajo Dam to "mimic the natural hydrograph." Also included in the RPA was the requirement for a San Juan River Basin Recovery Implementation Program (SJRBRIP) dedicated to recovery of the endangered fish and the development of the water supplies in the San Juan basin in accordance with state and federal laws, including those protecting the environment. The contrast is stark and overwhelming between the virtually non-existent efforts to restore the habitat for the endangered fish before adoption of the RPA and the remarkable changes that occurred after the adoption of the RPA.

The unspoken and underlying assumption of the Gosnell article is that A-LP is a "bad project" that should not be built and the Department of the Interior should have taken a different course of action on the San Juan River that did not include A-LP as part of the settlement of the water rights of the Ute Tribes. That has not been the view of the two Ute Tribes who have steadfastly viewed the storage of water from the Animas River as the best way to meet their present and future needs for water without depriving non-Indian farmers, ranchers, and cities in the area of the water rights that they have used for generations.⁴ The conclusion of the two Ute

3. U.S. Dep't. of the Interior, Record of Decision, Animas-La Plata Project (Sept. 25, 2000) (on file with authors).

4. See, e.g., *Hearing on H.R. 3112, To Amend the Colorado Ute Indian Water Rights Settlement Act to Provide for a Final Settlement of the Claims of the Colorado Ute Indian Tribes, and for Other Purposes before the Comm. on Resources 105th Cong. 23 (2000)* (Testimony of John Baker, Jr., Chairman, Southern Ute Indian Tribe):

Last fall, I was elected Chairman of the Tribe on a platform that included a new approach to tribal government. A lot has changed since I took office but one thing has not—the strong tribal support for the Animas-La Plata Project. I know that even in its reduced form, [Animas-La Plata] is the best and only way to provide the Tribe with a water supply to meet its present and future

Tribes that a reliable water supply should be set aside for their benefit can hardly be faulted.

The four states surrounding the two Ute Reservations are each engaged in a massive effort to ensure that a firm water supply is available for their citizens. In the lower basin of the Colorado River, an even more intense battle is underway among California, Nevada, and Arizona to secure a stable water supply for the future. At the center of many of these activities are federally funded facilities that were frequently criticized at their inception but that now are viewed as critical components in supplying water for major non-Indian communities. The Central Arizona Project, for example, was originally justified as an agricultural project but now delivers water from the Colorado River to the cities of Tucson and Phoenix. Closer to home, the San Juan-Chama Project diverts water from the San Juan River for use along the Rio Grande in New Mexico. Both Santa Fe and Albuquerque are anxious to put water from the project to use in their cities. The obvious lesson is that in order to have a reliable water supply in the future, responsible governments must take the necessary steps now to secure and protect that supply.

For the Ute Tribes, litigation was not an attractive method to secure the water that they need for the future. Although the *Winters* doctrine promises Indian Tribes the water they need to meet their present and future needs, success in the litigation by the Ute Tribes would not result in the construction of the storage facility required to store water from the Animas River for long-term community uses in the area. Moreover, litigation over tribal rights to scarce natural resources has frequently resulted in bitter resistance by non-Indians, who have previously relied on the resources to which the Tribes have a superior right.⁵ The Tribes, therefore, found A-LP to be an appealing solution to their claims on the Animas and La Plata Rivers since it would not require their non-Indian neighbors to relinquish their use of water from those streams while actually providing the Tribes

needs. The Tribal Council continues to support that approach, just as the prior Tribal Council did when my father, John Baker, was Chairman, just as the Council did when my uncle, Chris Baker, was Chairman and the Colorado Ute Indian Water Rights Final Settlement Agreement (Dec. 10, 1986) was signed, just as the Council did when my predecessor, Clement Frost, was Chairman, and just as the Council did during the many years of Leonard Burch's leadership.

5. See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979). "Except for some desegregation cases...the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." (quoting *Puget Sound Gillnetters' Ass'n v. United States Dist. Court*, 573 F. 2d 1123, 1126 (9th Cir. 1978)).

with a more reliable water supply than could be achieved through reliance on the direct flow of the two streams.⁶

The Gosnell article disapproves of the Department of the Interior's failure in the RPA process to consider alternatives that did not include A-LP. In advocating for the consideration of different alternatives, the Gosnell article fails to account for the fact that the principal reason that the Department sought so strenuously to proceed with A-LP was to carry out the terms of the 1986 Settlement Agreement and the 1988 Settlement Act. The Ute Tribes were at the forefront of the effort to convince the Department that it must find a way to implement the settlement that had been so difficult to assemble. The arguments advanced in the Gosnell article against the course of action followed by the Department never come to grips with the fundamental point that it was the Tribes who urged the Department to go forward with the project and to find a way to overcome the obstacles in the way of implementation of their water rights settlement.

II. THE FISH AND WILDLIFE SERVICE CANNOT USE A "NAKED" JEOPARDY OPINION TO LEVERAGE CONSIDERATION OF ADDITIONAL ALTERNATIVES WHEN THE ACTION AGENCY DEVELOPS A REASONABLE AND PRUDENT ALTERNATIVE THAT AVOIDS JEOPARDY

Gosnell's conclusion that a "Naked" Jeopardy Opinion for the Animas-La Plata Project would have forced the project sponsors to develop alternatives that would have better served the native fish community in the San Juan River is wrong on both counts. The Endangered Species Act does not mandate that the environmentally preferred alternative be selected; nevertheless, the environmentally preferred alternative was selected in the end.

The Section 7 process is intended to ensure that federal actions do not cause jeopardy to or adversely modify critical habit of endangered species. Unlike the NEPA process, the Section 7 process does not require the Fish and Wildlife Service to find the most environmentally preferred alternative or even the alternative that best serves the purpose of protecting endangered species. So long as jeopardy to the species or adverse modification to the species' habitat is avoided, the requirements of Section 7 are fulfilled.⁷ Thus, the Service cannot impose a "naked" jeopardy opinion as a means of leveraging the most environmentally benign result. Indeed,

6. Gosnell concedes that existing water supplies were insufficient to meet the needs of both the Indians and non-Indians.

7. Southwest Ctr. For Biological Diversity v. United States Bureau of Reclamation, 6 F.Supp.2d 1119, 1129 (1997).

the Service has an affirmative obligation to propose a reasonable and prudent alternative, if one exists.⁸

In the case of A-LP, the Service determined that a project that depleted 57,100 acre-feet per year could be built without jeopardizing the endangered fish or adversely modifying their habitat so long as Navajo Dam, which regulates the flow of the San Juan River throughout the habitat of the fish, is operated to replicate a more natural hydrograph. The Service also believed that the development of a recovery implementation program could foster the recovery of the fish, thereby offsetting the impacts from the project. Gosnell faults the Service for not forcing the Bureau of Reclamation and the project sponsors to work with the environmental community to find an alternative to the project. Ironically, such a dialog occurred in 1996 when Colorado Governor Roy Romer and Lt. Governor Gail Schoettler convened meetings between the project supporters and opponents to consider alternatives to A-LP. Although the Romer-Schoettler process did not result in consensus as to a preferred alternative, two alternatives emerged. The "structural" alternative, supported by the A-LP proponents, was premised on the construction of an off-stream reservoir to provide a water supply to the Ute Tribes and to the non-Indian communities. This alternative was known as "A-LP Lite" and later became the basis for the project that was authorized by Congress in late 2000. The "non-structural" alternative,⁹ supported by A-LP opponents, was premised on developing a water supply through the acquisition of water rights, water rights transfers, and the use of available storage at Navajo Reservoir.

The "non-structural" alternative was something of a misnomer. Although it did not include the construction of a storage reservoir at Ridges Basin, it would have required constructing additional storage at existing facilities that would result in the loss of wetland and riparian wildlife habitat.¹⁰ Moreover, the non-structural alternative utilized all of the available capacity remaining in Navajo Reservoir to provide the water supply to the Navajo Nation and to the San Juan Water Commission. This reduction in capacity would leave the Navajo Nation and the Jicarilla Apache Nation without any ability to develop future water supplies and would not provide sufficient water supplies to meet the requirements of the endangered fish.¹¹

The Department of the Interior evaluated both alternatives and variations of these alternatives in its Final Supplemental Environmental

8. 50 C.F.R. § 402.14(g)(5) (2000).

9. A/k/a Animas River Citizens Coalition Conceptual Alternative.

10. U.S. DEP'T OF THE INTERIOR, ANIMAS-LA PLATA PROJECT, COLORADO-NEW MEXICO, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, at 3-76 to 3-79, available at <http://www.uc.usbr.gov/special/alp/fseis/index.html> (last updated July 13, 2000).

11. *Id.* at 3-31.

Impact Statement and confirmed what the Tribes had previously intuited, that the modified Animas-La Plata Project would best fulfill the trust obligations owed to the Ute Tribes *and* was the most environmentally benign alternative.¹²

III. A "NAKED" JEOPARDY OPINION WOULD NOT HAVE BENEFITTED NATIVE FISH

Contrary to Gosnell's thesis, a "naked" jeopardy opinion would not have benefited the native fish. A "naked" jeopardy opinion would not have contained the two most beneficial elements of the A-LP RPA with respect to the recovery of endangered fish: the reoperation of Navajo Dam and the formulation of a recovery implementation program. What critics of A-LP fail to take into account is that the endangered fish are on the verge of extirpation from the San Juan River basin. The May 1990 Draft Biological Opinion for A-LP prepared by the Fish and Wildlife Service characterized the critical condition of the Colorado squawfish, now known as the Colorado pikeminnow:

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 unuseable by the Colorado squawfish.¹³

In other words, whether or not A-LP were constructed, given the conditions confronting the Colorado pikeminnow, it would be unable to survive in the San Juan River if no further action were taken to recover the fish.

The process utilized to develop the reasonable and prudent alternative brought together federal, state, tribal, and private interests with a stake in the future of the San Juan River. It was unfortunate that the environmental community chose not to participate in this process, apparently believing that no alternative could be developed that provided water to the Ute Tribes while avoiding jeopardy to the endangered fish. The reasonable and prudent alternative that arose out of the process criticized by Gosnell ensured the implementation of the following powerful tools for protecting and recovering the native fish community:

12. *Id.* at ES-9 to ES-10.

13. U.S. Fish & Wildlife Serv., Draft Biological Opinion for the Animas-La Plata Project, Colorado and New Mexico 22 (May 4, 1990) (on file with authors).

A. Limitation on Depletions

The first element of the RPA limited A-LP depletions to 57,100 acre-feet per year.¹⁴ This reduced the total depletions for the project by almost two-thirds. A-LP, as originally configured, would have utilized an average depletion of 154,800 acre-feet per year.¹⁵ A project of that magnitude would actually deplete less than various alternative projects that had previously been supported by the environmental community.¹⁶

B. Seven Year Research Effort

The second element of the RPA was a commitment by Reclamation to fund approximately seven years of research on the San Juan River endangered fish community. The research was to be conducted by "knowledgeable endangered species and habitat experts and [would] allow for testing of hypotheses."¹⁷ Gosnell concedes that little research had been conducted on the San Juan River for several years leading up to the RPA. A "naked" jeopardy opinion would not have secured much needed research of the native fish community.

C. Reoperation of Navajo Dam for Research and Consultation on Dam Operations

The third element of the RPA required the Bureau of Reclamation to operate Navajo Dam for the seven-year research period in accordance with guidelines developed by the biologists investigating the native fish. The Bureau was to reoperate Navajo Dam in such a way as to create a variety of flow conditions that would provide much needed information concerning the habitat requirements for the native fish and the environmental impacts that could result from various flow regimes. Even more importantly, Reclamation committed to initiate Section 7 consultation on Navajo Dam operations with a "commitment to operate the dam for the conservation of the endangered fish."¹⁸ At the time of the RPA, the Bureau of Reclamation was not engaged in any other Section 7 consultations on the San Juan River. The consultation on the Animas-La Plata Project provided

14. U.S. Fish & Wildlife Serv., Final Biological Opinion for the Animas-La Plata Project, Colorado and New Mexico 32 (Oct. 25, 1991) (on file with authors).

15. *Id.*

16. Hydrosphere Resource Consultants, Inc., Animas-La Plata Alternatives Study 62 (Oct. 8, 1995) (unpublished study, prepared for the Four Corners Action Coalition, Taxpayers for the Animas River, Sierra Club, and SCLDF, on file with authors).

17. U.S. Fish & Wildlife Serv., *supra* note 14, at 33.

18. *Id.* at 4.

the Service with the best opportunity for Reclamation to operate Navajo Dam in a manner necessary to avoid extirpation of the native fish species.

D. Reoperation of Navajo Dam to Mimic a Natural Hydrograph for the Life of the Project

Reoperation of dams to more closely resemble or "mimic" the natural hydrograph has proven to be a powerful tool in the recovery of fish in the Colorado River basin,¹⁹ and the San Juan River basin is no exception in that regard.²⁰ Thus, as a major component of the RPA for the Animas-La Plata Project, the U.S. Fish and Wildlife Service required the Bureau of Reclamation to operate Navajo Dam to "mimic a natural hydrograph for the life of the Project based on the Research."²¹ The scientists engaged in research activities on the San Juan River developed a set of flow recommendations for Navajo Dam based on seven years of research that identified the habitat needs of the endangered fish.²² At the heart of the flow recommendations is the reoperation of Navajo Dam to provide a more natural hydrograph that mimics the variability in flows that existed prior to the construction of dams and water projects in the basin.²³ The reoperation of Navajo Dam will have profound ramifications for the entire San Juan basin. A draft Environmental Impact Statement concerning such operations is scheduled to be released by the end of 2001.

E. Protection of Flows and a Commitment to Implement a Recovery Implementation Program for the San Juan River

The final element of the RPA required Reclamation to obtain commitments from all governmental entities along the San Juan River to protect the flow releases made from Navajo Dam for the benefit of endangered species. This commitment is particularly significant in that New Mexico water law does not recognize instream flow protection as a beneficial use of water.²⁴ Moreover, Reclamation committed to the formulation of a recovery implementation program for the San Juan River within one year.

19. See generally, U.S. DEP'T OF THE INTERIOR, OPERATION OF GLEN CANYON DAM—FINAL ENVIRONMENTAL IMPACT STATEMENT (1995).

20. U.S. Fish & Wildlife Serv., *supra* note 14, at 7.

21. U.S. Fish & Wildlife Serv., *supra* note 15, at 33.

22. SAN JUAN RIVER BASIN RECOVERY IMPLEMENTATION PROGRAM BIOLOGY COMMITTEE, FLOW RECOMMENDATIONS FOR THE SAN JUAN RIVER, at S-2 (Paul B. Holden ed., 1999).

23. *Id.* at S-1.

24. See N.M. STAT. ANN. § 75-1-2 (Michie 1997).

The SJRBRIP is a collaborative effort of various agencies and interests within the San Juan River basin to recover endangered fish while developing water resources in a manner consistent with the Endangered Species Act.²⁵ The SJRBRIP is comprised of various federal, state, tribal, and private interests.²⁶ Conservation groups have been invited to participate in this effort but have repeatedly declined. It appears that the environmental community prefers to devote its resources to opposing water development in the basin rather than assisting in the recovery of the basin's endangered fish.

In the words of the biologists working for the SJRBRIP, the program "accomplished most of the objectives it set during the [seven] year research period."²⁷ In addition to extensive research, the program initiated augmentation of the fish species that resulted in the establishment of a razorback sucker population that is reproducing in the river and an increase in the population of the Colorado pikeminnow.²⁸ At the time the RPA was formulated, most biologists believed that research was necessary to determine *if* recovery could be achieved. The biologists now believe that significant progress has been made and that recovery *will* occur in the future.²⁹

Gosnell and other critics of the Animas-La Plata Project blame the Project for its alleged adverse impact on native fish species. Such blame overlooks and ignores the fact that the native fish were in dire straits prior to the development of the RPA for the Project. The RPA represents the best opportunity for the survival of the native fish community in the San Juan River basin. It is unfortunate that the critics of A-LP have chosen not to be part of this effort.

25. See San Juan River Basin Recovery Implementation Program, Program Document § 1.1 (n.d.) (unpublished document, on file with authors).

26. The SJRBRIP is made up of federal agencies: Fish and Wildlife Service, Bureau of Reclamation, Bureau of Indian Affairs, and Bureau of Land Management; state governments: Colorado and New Mexico; four Indian Tribes: Navajo Nation, Jicarilla Apache Nation, Southern Ute Indian Tribe, and Ute Mountain Ute Indian Tribe; water development interests; and conservation interests (vacant).

27. See SAN JUAN RIVER BASIN RECOVERY IMPLEMENTATION PROGRAM BIOLOGY COMMITTEE, *supra* note 24, at S-2.

28. *Id.*

29. *Id.*

IV. THE NAVAJO NATION AND JICARILLA APACHE NATION ARE BETTER OFF WITH A SMALLER ANIMAS-LA PLATA PROJECT THAN WITH NO A-LP OR WITH THE NON- STRUCTURAL ALTERNATIVE

At section IV.B of her article, Gosnell argues that the Reasonable and Prudent Alternative was neither reasonable nor prudent for the Navajo Nation. While it is true that the Navajo Nation was initially troubled by the RPA, the Navajo Nation later became an active proponent of the Animas-La Plata Project. During the RPA process, the Navajos had reason to be suspicious of A-LP. The Navajo's experience with their own water development project, the Navajo Indian Irrigation Project (NIIP), counseled that the federal commitment made in 1962³⁰ was ambivalent at best.³¹ Gosnell correctly recognized that the Navajo Nation believed that the reoperation of Navajo Dam as part of the RPA might limit the Navajo's ability to complete NIIP or to develop other water in the San Juan River basin.

What Gosnell fails to grasp, and what the Navajos have realized, is that the components of the A-LP RPA, including the recovery implementation program and the reoperation of Navajo Dam, were absolutely necessary if water development on the San Juan River were to proceed in an environmentally responsible manner. As discussed in the preceding section, without the recovery program, which was brought about by the development of A-LP, the endangered fish could have been extirpated from the San Juan River. It is conceivable that in the absence of A-LP, *existing* water development, including NIIP, would be in jeopardy without the elements of the RPA. Even projects that have already undergone consultation under Section 7 of the ESA are subject to reconsultation under a variety of circumstances, including the development of new information that reveals that effects of the action may be of an extent not previously considered.³² Although the Service was silent about the need for dam reoperation and a recovery implementation program in its final biological opinion for the first eight blocks of NIIP,³³ the opinion, issued three days after the A-LP opinion, implicitly relied on the elements of the A-LP RPA to give its approval for additional NIIP development. While it

30. Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96.

31. 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).

32. 50 C.F.R. § 402.16 (2000).

33. U.S. Fish & Wildlife Serv., *Formal Section 7 Consultation: Biological Opinion and Conference Report for the Navajo Indian Irrigation Project, Blocks 1 through 8* (Oct. 28, 1991) (on file with authors).

can be argued that A-LP was not a necessary condition for the development of a recovery implementation program or the reoperation of Navajo Dam, there is little doubt that the recovery efforts in the San Juan River basin have been enhanced by the broad-based coalition of interests in support of the program, including the A-LP beneficiaries. One indicia of the success of the program was the recent Section 7 consultation on the remaining blocks of the Navajo Indian Irrigation Project. In that consultation, the Service agreed that the flow recommendations developed by the SJRBRIP identified sufficient water to protect the endangered fish as well as water sufficient for the development of the remainder of NIIP.³⁴

Both the Navajo Nation and the Jicarilla Apache Nation have expressed frustration over the lack of tribal water development in the San Juan River basin.³⁵ The major impediment to water development by the Navajos and the Apaches is not the water rights of the Ute Tribes or A-LP, but the presence of endangered fish.³⁶ With or without A-LP, the endangered fish in the San Juan River will be a significant impediment to tribal water development. The "non-structural" alternative developed in the Romer-Schoettler process and analyzed as part of the A-LP EIS would greatly constrain the Navajos' and the Apaches' ability to utilize Navajo Reservoir for their own tribal water development. Clearly these Tribes are better off with A-LP than without the project.

The Navajo Nation is also a direct beneficiary of the Animas-La Plata Project. Under the original configuration for A-LP, the Navajo Nation was to receive 7600 acre-feet of the project water supply. Under the modified A-LP, each of the participants agreed to reduce their water supply so that the overall project depletion would not exceed 57,100 acre-feet per year. As a result, the Navajo water supply was reduced to 4680 acre-feet, with an annual depletion of 2340 acre-feet. This is a small quantity of water compared with the enormity of the potential rights of the Navajo Nation to the San Juan River.³⁷ The Navajo Nation would not have put its water rights at risk in return for such a small allocation of water unless it believed that

34. U.S. Fish & Wildlife Serv., Biological Assessment for Completion of Navajo Indian Irrigation Project (July 14, 1999) (on file with authors). 120,580 acre-feet of additional depletions allowed to complete project with total depletion of 270,000 acre-feet.

35. U.S. Dep't. of the Interior, Report of the Working Group on the Endangered Species Act and Indian Water Right—Implementation of Section 7 of the ESA in Relation to Indian Water Resources Development (July 2000) (on file with authors).

36. *Id.*; Adrian N. Hansen, *The Endangered Species Act and Extinction of Reserved Indian Water Rights on the San Juan River*, 37 ARIZ. L. REV. 1305 (1995); Tim Vollmar, *The Endangered Species Act and Indian Water Rights*, NAT. RESOURCES & ENV'T., Fall 1996, at 39.

37. Judith E. Jacobsen, *The Navajo Indian Irrigation Project and Quantification of Navajo Winters Rights*, 32 NAT. RESOURCES J. 825, 828 (1992); Stanley M. Pollack, *Integrated Water Resources Management in the San Juan River Basin—The Navajo Perspective*, in PROCEEDINGS OF THE 41ST ANNUAL NEW MEXICO WATER CONFERENCE 31 (N.M. Water Resources Inst. ed., 1997).

settling the Ute claims through A-LP would benefit Navajo interests in the long run. Development of the Ute water rights with or without A-LP would reduce the amount of water that could be developed by the Navajo Nation. Ultimately, the Navajo Nation concluded that it made sense for the Navajo to support their Ute neighbors and to do so in a manner that brought water development to a portion of the Navajo reservation in need of additional municipal water supplies. Thus, the Navajo Nation conditioned its support for A-LP³⁸ on the authorization of a waterline that could be used to deliver its 4680 acre-feet of A-LP water to Shiprock, the largest community on the Navajo Reservation.³⁹

The supposed conflict between the Tribes in the San Juan River basin is overstated by Gosnell. The Navajo Nation has a special understanding of how the federal government can create conflicts between tribes in lieu of finding reasonable solutions to the use of common resources by Indian people.⁴⁰ The Navajos were determined not to create a conflict over the San Juan River with the Ute Tribes. The Navajo Nation joined its Jicarilla Apache and Colorado Ute neighbors in the San Juan River Basin Recovery Implementation Program in 1996 and has been an active participant in the recovery efforts since that time. The four Tribes in the San Juan River basin have collaborated on numerous matters impacting their water resources, including the Working Group on the Endangered Species Act and Indian Water Rights and as cooperators on the development of the Environmental Impact Statement for Navajo Dam Operations.

Opponents of A-LP sought to "divide and conquer" the four Tribes, and the U.S. Environmental Protection Agency (EPA) took up their cause. EPA argued to Interior that A-LP would reduce the water supply available to honor the water rights settlement of the Jicarilla Apache Nation⁴¹ and for the proposed Navajo-Gallup Water Supply Project.⁴² In response, the four Tribes countered that what was best for the Tribes could better be

38. Resolution of the Intergovernmental Relations Committee of the Navajo Nation Council, *Expressing Support for the Modified Animas-La Plata Project Subject to Certain Conditions*, IGRMY-91-98 (May 18, 1998).

39. The waterline would replace an existing line from Farmington, New Mexico, to Shiprock. The community of Shiprock has an acute need for additional municipal water. See Navajo Nation Dep't of Water Resources, *An Appraisal Level Study of the Proposed Farmington to Shiprock Municipal Water Line* (June 19, 1998) (unpublished technical memorandum, on file with authors).

40. See e.g. 25 U.S.C. §§ 640d to 640d-19 (1994) ("Navajo and Hopi Tribes: Settlement of Rights and Interests"); *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963).

41. Jicarilla Apache Water Rights Settlement Act of Oct. 23, 1992, 106 Stat. 2237.

42. Letter from Rebecca W. Hammer, Action Regional Administrator, U.S.E.P.A. Region 8 to David Hayes, Deputy Secretary, Department of the Interior (June 23, 2000) (on file with authors).

determined by the Tribes themselves, and the four Tribes had determined that support of A-LP was in their best interests:

In short, we urge the Department to continue its actions to advance the interests of the four basin Tribes by the construction of the reduced [Animas-La Plata]. The Tribes face many challenging issues in the basin that will require a great deal of effort if all of the tribal needs are to be met. The four Tribes intend to continue to work together and with the Department to accomplish that goal. We hope that you will encourage EPA, apart from its interests relative to [Animas-La Plata], to work closely with the Tribes and the Department to better understand the interests of the four Tribes and to provide financial and other assistance to meet the tribal needs in the basin.⁴³

The Tribes believed what the A-LP EIS confirmed, that the modified Animas-La Plata Project would best fulfill the trust obligation owed to all of the Tribes.

CONCLUSION

The process employed by the Fish and Wildlife Service to develop the reasonable and prudent alternative for the Animas-La Plata Project resulted in the formulation of "A-LP Lite," a smaller, more environmentally sound water development project that honors commitments made to the Colorado Ute Tribes and to their tribal partners, the Navajo Nation and the Jicarilla Apache Nation. This process was consistent with federal environmental laws and the federal trust responsibility owed to Indian Tribes. While a "naked" jeopardy opinion might appear to offer a facile alternative to the process, such an alternative would not have generated the broad base of support currently enjoyed by the San Juan River Basin Recovery Implementation Program. Nor would a "naked" jeopardy opinion have benefited the endangered fish. In short, a "naked" jeopardy opinion would have been neither prudent nor reasonable.

43. Joint Letter from John E. Baker, Chairman, Southern Ute Indian Tribe; Ernest House, Sr., Chairman, Ute Mountain Ute Indian Tribe; Kelsey A. Begaye, President, Navajo Nation; and Rodger Vicenti, President, Jicarilla Apache Tribe (n/k/a Jicarilla Apache Nation) to David Hayes, Deputy Secretary, Dep't of the Interior (Aug. 24, 2000) (on file with authors).