

# **Chapter 7**

## **Permits, Approvals, and Regulatory Requirements**

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### **7.1 INTRODUCTION**

This Final Supplemental Environmental Impact Statement (FSEIS) is intended to provide decision-makers and the public with information regarding the environmental effects of the construction, operation, and maintenance of the proposed Animas-La Plata (ALP) Project, as part of the Bureau of Reclamation's (Reclamation) compliance with the National Environmental Policy Act (NEPA). In addition to NEPA compliance, a number of permits, approvals, and regulatory requirements at the federal, state, and local levels must also be obtained and/or complied with in order to implement the ALP Project.

This chapter discusses the permits, approvals, and regulatory requirements necessary for the construction, operation, and maintenance of the structural components of the Preferred Alternative (Refined Alternative 4). When the non-structural components are implemented, NEPA compliance and similar regulatory requirements will have to be met as well. The development of future water uses will require another set of regulatory requirements. However, the specific regulatory requirements for non-structural and future water uses will vary depending on the developments proposed, and they are not detailed in this chapter.

Reclamation is required to ensure compliance with Section 7(c) of the Endangered Species Act (ESA), with Section 404(r) of the Clean Water Act (CWA), and Section 106 of the National Historic Preservation Act (NHPA). At the federal level, required permits and approval authority outside of Reclamation's jurisdiction also include compliance with the Clean Air Act (CAA). Each of these statutes has been taken into account in the preparation of this document. Each state in which construction would take place may require additional state-level review.

### **7.2 ENDANGERED SPECIES ACT**

Section 7 of the ESA, as amended, states that any project authorized, funded, or conducted by any federal agency should not “. . . *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 . . . to be critical . . .*” [16 USC 1536(a)(2)(1998)]. Reclamation is required to consult with the U.S. Fish and Wildlife Service (Service) to determine whether any federally listed or proposed endangered or threatened species or their designated critical habitat occur in the vicinity of the project. If, upon review of the existing data, Reclamation determines that these species or habitats may be affected by the proposed action, Reclamation is required to prepare a biological assessment to identify the nature and extent of adverse impact, and to recommend mitigation measures that would avoid the habitat and/or species, or that would reduce potential impact to acceptable levels. If, however, Reclamation determines that no federally listed or proposed endangered or threatened species or their designated critical habitat would be affected by the project, no further action is necessary.

Consultation was conducted on previous versions of the ALP Project in 1980 and 1996. A Final Biological Opinion was issued by the Service on October 25, 1991 which included determination of a Reasonable and Prudent Alternative (RPA). The RPA also included a commitment to contribute funding to approximately seven years of research to determine the flow requirements for the endangered Colorado pikeminnow and razorback sucker (a candidate species at that time). Test releases on the San Juan River were conducted and evaluated during the 1992-1998 research period. In exchange for this commitment, a scaled-back version of the ALP Project, with an average depletion of 57,100 acre-

% feet/year (afy) was deemed acceptable as meeting the recommendations contained in the Biological Opinion.

On February 26, 1996, a second Final Biological Opinion was issued on the ALP Project concerning critical habitat of native endangered fish species, which placed further restrictions on the allowable depletion. The opinion concluded that the depletion of 57,100 afy could not be exceeded in any one year until all the elements of the RPA were completed and/or implemented. This limitation was waived in the event that Reclamation lowered releases during various times of the year from Navajo Dam and Reservoir to 300 cubic feet per second (cfs) to provide the extra flexibility in releases described in the hydrology section of the 1991 Biological Opinion. If that condition existed, then the ALP Project could maintain an average depletion of 57,100 afy.

% A new Biological Opinion has been prepared for the Preferred Alternative of the current ALP Project, and is included with this FSEIS in Attachment G. This new opinion concludes that the proposed project may affect the Colorado pikeminnow, razorback sucker, and bald eagle; however, the project is not likely to jeopardize the continued existence of these species and not likely to destroy or adversely modify designated critical habitat. Also, the Service concluded the project may affect, but is not likely to adversely affect, the southwestern willow flycatcher. This new Opinion supercedes previous Opinions. A description of Reclamation's consultation activities with the Service is described in Chapter 6, Consultation and Coordination.

### **7.3 CLEAN WATER ACT**

% Reclamation has prepared an evaluation under Section 404(b)(1) of the CWA to analyze and describe the potential impacts from proposed ALP Project discharges of fill material into the waters of the United States in Colorado and New Mexico. The 404(b)(1) Evaluation is prepared in support of the requirements of Section 404(r) of the CWA (Public Law (P.L.) 92-500, as amended), and the U.S. Environmental Protection Agency (EPA) Guidelines (40 CFR Part 230 *et seq*).

The 404(b)(1) Evaluation followed EPA Guidelines, which were developed in conjunction with the Secretary of the Army acting through the Chief of Engineers, and have the full force and effect of law. The Guidelines are weighted toward restoring and maintaining the chemical, physical, and biological integrity of waters of the United States by controlling discharges. Fill (or dredged) material should not be discharged into such waters unless it is demonstrated that such discharges would not have unacceptable adverse impacts, either individually or in combination with existing and/or probable impacts of other activities affecting the environment. A Section 404(b)(1) Evaluation is intended to demonstrate compliance with the guidelines.

Previous 404(b)(1) Evaluations were prepared to accompany the 1980 Final Environmental Statement (1980 FES) on the Project, the Draft Supplement to the 1980 FES in 1992, and a Final Supplement to the 1980 FES in 1996. The current 404(b)(1) Evaluation reflects proposed changes in the project since 1980, 1992, and 1996. It is part of this FSEIS and is included as Attachment B-1.

## 7.4 NATIONAL REGISTER OF HISTORIC PLACES AND NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

The National Historic Preservation Act (NHPA) of 1966, as amended, requires federal agencies to identify cultural resources within areas of proposed federal undertakings, to assess the eligibility of such resources for inclusion in the National Register of Historic Places (NRHP), and to take steps to mitigate potentially adverse effects to cultural resource sites. Section 106 of the NHPA requires Reclamation to take into account the effects of its undertakings on properties listed on, or eligible for listing on, the NRHP, including prehistoric or historic sites, districts, buildings, structures, objects, or properties of traditional religious or cultural importance, and to afford the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on the undertaking.

The criteria used to evaluate the cultural resource sites that might be affected by construction of the project follow guidelines set forth by NHPA regulations for determining eligibility to the NRHP. The process for determining the eligibility of a property must be evaluated referencing the National Register Criteria for Evaluation (36 CFR Part 60) in order to determine the property's eligibility to the NRHP. The criteria are as follows:

- (a) Association with events that have made a significant contribution to the broad patterns of our history;
- (b) Association with the lives of persons significant in our past;
- (c) Embodiment of the distinctive characteristics of a type, period, or method of construction, or representing the work of a master, or possessing high artistic values, or representing a significant and distinguishable entity whose components may lack individual distinction; and
- (d) Having yielded, or having the likelihood to yield, information important in prehistory or history.

All negative impacts, whether direct or indirect, to cultural resource sites that are eligible, or recommended eligible or potentially eligible for inclusion on the NRHP would be considered significant. %

In accordance with the ACHP procedures, Reclamation, as the lead agency, is required to consult with the appropriate State Historic Preservation Offices (SHPO), Tribal Historic Preservation Offices, and affected Indian tribes regarding the NRHP eligibility of cultural resources and the potential effects of the undertaking on those NRHP-listed or -eligible cultural resources. %  
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A Programmatic Agreement was formulated for earlier versions of the ALP Project in consultation with the ACHP and the State Historic Preservation Officers of Colorado and New Mexico. This Programmatic Agreement set forth the procedures that must be adhered to in order to ensure compliance with historic preservation laws. %

An amended Programmatic Agreement has been prepared for the modified ALP Project and is included in Attachment H in Volume 2 of this FSEIS. A historic preservation management plan, which would %

- % stipulate the procedures for development, review, and implementation of mitigation plans, is a
- % requirement of the Programmatic Agreement. The preservation plan includes measures to minimize and avoid impacts to cultural resources, such as in-place preservation, monitoring, distribution of information, and public and Native American involvement. If cultural resource sites cannot be avoided and protected in place, a program to compensate for losses to sites as a result of project construction would be needed. This program included archaeological excavations and publications and reports detailing the findings of those excavations.
  
- % Under the Native American Graves Protection and Repatriation Act (NAGPRA) and state burial laws,
- % federal agencies must consult with potentially affected Tribes and/or state agencies depending on land
- % status concerning the appropriate treatment and disposition of any human remains (and cultural items)
- % that may be encountered on the project. Pursuant to NAGPRA, a NAGPRA Plan is also included in
- % Attachment H of Volume 2 of this FSEIS.

## 7.5 OTHER REGULATORY REQUIREMENTS

In addition to Reclamation's requirements for a Record of Decision, other federal, state or local regulatory agencies may have permit or approval authority over portions of the proposed project (see **Table 7-1**). In addition, **Table 7-2** lists contracts and agreements that may apply to the structural components of the Preferred Alternative (Refined Alternative 4).

- % Relocation of the 26-inch Northwest Pipeline Corporation natural gas pipeline in Ridges Basin would require a Certificate of Public Convenience and Necessity (CPCN) from the Federal Energy Regulatory Commission (FERC), authorizing abandonment of the present line and construction of the relocated line under Sections 7(b) and 7(c) of the Natural Gas Act, respectively.

Federal requirements of the CWA include compliance under Sections 401 and 402. Water quality certification (Section 401) has been delegated to the jurisdiction of individual state agencies for Colorado and New Mexico. Each state would determine if a National Pollutant Discharge Elimination System (NPDES) Permit (Section 402) would be needed for discharges to state waters.

Ambient air quality is protected by federal regulations under the CAA. These regulations include compliance under the New Source Performance Standards and the requirements for the Prevention of Significant Deterioration. The federal permitting process for the CAA has been delegated to the States of Colorado and New Mexico.

<b>Table 7-1 Federal, State and Local Permit Approval and Consultation Requirements</b>		
<b>Agency</b>	<b>Permit/Action</b>	<b>Agency Action</b>
<b>FEDERAL AND TRIBAL</b>		
Advisory Council on Historic Preservation	Section 106, NHPA of 1966 - Programmatic Agreement	Provide comments on Reclamation's identification of cultural resources within areas of proposed federal undertakings, and consult with recommendations for mitigation of potentially adverse effects to cultural resource sites.
Council on Environmental Quality (CEQ)	NEPA Compliance - SEIS	Provide coordination with CEQ Regulations (40 CFR Parts 1500-1508).
Affected Indian Tribes	Secretarial Order 3175 and Indian Policy (W-6100)	Consult with Indian Tribal Governments on Indian Tribal Assets.
Affected Indian Tribes	American Indian Religious Freedom Act of 1978, Executive Order 13007 of 1997	Identify and avoid impacts to sites sacred to the practice of North American religion. Coordinate with Tribes.
Affected Indian Tribes	Native American Graves Protection and Repatriation Act	In conjunction with tribes, involve project-area affected tribes in developing a plan to treat Native American human remains encountered during project construction.
Affected Minority Groups and Low-Income Populations	Executive Order 12898, Environmental Justice of 1994	Comply with Executive Order.
Department of the Interior, Fish and Wildlife Service	Coordination Act Report	Evaluate impacts, recommend mitigation for fish and wildlife habitat.
Department of the Interior, Fish and Wildlife Service	Section 7, ESA	Provide Biological Opinion on species of wildlife and plants that are federally listed; this Act applies to all project features that may affect federally listed species or their critical habitats.
Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms	Explosive User's Permit	Consider issuance of permits to purchase, store, and use explosives for site preparation during construction.
Environmental Protection Agency	NPDES Permit (Section 402, CWA)	In conjunction with states, review and issue NPDES Permit for discharges to state waters.
Environmental Protection Agency	Storm Water Discharge Permit	In conjunction with states, review and issue Storm Water Discharge Permit for activities associated with construction activities.
Environmental Protection Agency	Section 401, Water Quality Certification	In conjunction with states, consider issuance of water use and crossing permits.

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<b>Table 7-1 (continued)</b>		
<b>Federal, State and Local Permit Approval and Consultation Requirements</b>		
<b>Agency</b>	<b>Permit/Action</b>	<b>Agency Action</b>
<b>FEDERAL AND TRIBAL (continued)</b>		
Environmental Protection Agency	Section 404(r) Certification, CWA	Provide oversight authority on compliance review of 404(b)(1) Evaluation and make recommendation to Congress.
Department of the Interior, Bureau of Reclamation	Archaeological Resource Protection Act	Conduct archeological excavations.
Federal Energy Regulatory Commission	Certificate of Public Convenience and Necessity, Section 7 Natural Gas Act	Consider issuance of a certificate for relocation of the 26-inch Northwest Corporation natural gas pipeline.
Navajo Nation Tribal Council	Right-of-way construction approval	Consider issuing approval for the construction of the Navajo Nation Municipal Pipeline (NNMP).
Navajo Nation Environmental Protection Agency	Water quality certification	Consider issuing certification for the construction of the NNMP.
Navajo Nation Fish and Game Agency	Wildlife coordination	Consult on wildlife impacts involved with the construction of the NNMP.
Southern Ute Tribal Council	Natural gas pipeline relocation concurrence	Consider concurring with FERC and Reclamation on relocation of natural gas pipelines. Land Use concurrence.
Indian Tribal Councils	Indian Self-Determination and Education Assistance Act (P.L. 638)	Consult on level of involvement for design and construction.
Bureau of Indian Affairs (with Tribal approval)	Archaeological Resources Protection Act and NAGPRA	Permits for archaeological excavation on Tribal lands.
<b>COLORADO</b>		
Department of Natural Resources, Division of Wildlife	State sensitive species coordination	Consider approval of activities involving state listed sensitive species.
Department of Natural Resources, Division of Minerals and Geology	Regulation of mining operations and gravel pits	Consider approval of activities involving construction borrow pits.
Department of Natural Resources, Oil and Gas Conservation Commission	Oil and gas well permits	Consider issuance of oil and gas well drilling and abandonment approval.
Department of Public Health and Environment, Water Quality Control Division	Section 401, Water Quality Certification	Consider issuance of water use and crossing permits.
Department of Public Health and Environment, Water Quality Control Division	NPDES Permit (Section 402, CWA)	Review and issue NPDES Permit for discharges to state waters.

<b>Table 7-1 (continued)</b>		
<b>Federal, State and Local Permit Approval and Consultation Requirements</b>		
<b>Agency</b>	<b>Permit/Action</b>	<b>Agency Action</b>
<b>COLORADO (continued)</b>		
Department of Public Health and Environment, Water Quality Control Division	Storm Water Discharge Permit	Review and issue Storm Water Permit for activities associated with aboveground facilities
Department of Public Health and Environment, Water Quality Control Division	River, Stream, and Lake Crossing Permit	Consider issuance of permits for crossing rivers, streams, and lakes in Colorado.
Department of Public Health and Environment, Air Quality Control Division	Air quality permit	Consider issuance of permits or waivers for construction and operation emissions to the air
Office of Archaeology and Historic Preservation (SHPO)	Section 106, NHPA of 1966 Secretarial Order 3175	Provide comments on Reclamation's identification of cultural resources within areas of proposed federal undertakings, assess the eligibility of such resources for inclusion in the National Register of Historic Places, and consult with recommendations for mitigation of potentially adverse effects to cultural resource sites. Coordinate on other Native American issues.
Office of Archaeology and Historic Preservation (SHPO)	Comply with state burial law	Acquire permit to perform excavations on state or private lands where burials are anticipated.
<b>NEW MEXICO</b>		
Bureau of Mines and Mineral Resources	Regulation of mining operations and gravel pits	Consider approval of activities involving construction borrow pits.
Department of Game and Fish	State sensitive species coordination	Consider approval of activities involving state listed sensitive species.
Energy, Minerals, and Natural Resources Department, Oil Conservation Division	Oil and gas well permits	Consider issuance of oil and gas well drilling and abandonment approval.
Environment Department, Air Quality Bureau	Air quality permit	Consider issuance of permits or waivers for construction and operation emissions to the air.
Environment Department, Surface Water Quality Bureau	Section 401, Water Quality Certification	Consider issuance of water use and crossing permits.
Environment Department, Surface Water Quality Bureau	NPDES Permit (Section 402, CWA)	Review and issue NPDES Permit for discharges to state waters.

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<b>Table 7-1 (continued)</b>		
<b>Federal, State and Local Permit Approval and Consultation Requirements</b>		
<b>Agency</b>	<b>Permit/Action</b>	<b>Agency Action</b>
<b>NEW MEXICO (continued)</b>		
Environment Department, Surface Water Quality Bureau	Storm Water Discharge Permit	Review and issue Storm Water Permit for activities associated with aboveground facilities
Environment Department, Surface Water Quality Bureau	River, Stream Crossing Permit	Consider issuance of permits for crossing rivers, streams and lakes in New Mexico
% % % % Office of Cultural Affairs (SHPO)	Section 106, National Historic Preservation Act; Native American Graves and Repatriation Act	Provide comments on Reclamation's identification of cultural resources within areas of proposed federal undertakings, assess the eligibility of such resources for inclusion in the National Register of Historic Places and consult with recommendations for mitigation of potentially adverse effects to cultural resource sites. Coordinate on other Native American issues.
Department of Transportation	Road Crossing Permits	Consider issuance of permits for construction across state roads.
% % Office of State Engineer	Diversion and Water Use Permits	Consider issuance of permits or waivers for water users.
% % % Office of Archaeology and Historic Preservation (SHPO)	Comply with state burial law.	Acquire permit to perform excavations on state or private lands where burials are anticipated.
<b>COUNTY AND LOCAL AGENCIES</b>		
La Plata County Commissioners	Road use and relocation coordination	Coordinate agreement.
New Mexico Counties between Farmington and Shiprock	Impact Fee	Consider impact fee for San Juan River crossings.
County/City Planning Department	Use Permits	Consider approval of activities where use is conditional in a particular zone.
City/County Governments	Local approvals	Develop information sharing process.
La Plata County or City of Durango	Floodplain Development Permit	Governs development activities within the designated 100-year floodplain.

<b>Table 7-2 Contracts, Legislation, and Agreements That May Apply to the Structural Components of the Preferred Alternative (Refined Alternative 4)</b>	
<b>Contract, Legislation, or Agreement</b>	<b>Purpose</b>
Colorado River Compact of 1922, P.L. 84-485	Allocation and management of water between the Upper and Lower Colorado River Basins.
Upper Colorado River Basin Compact of 1948	The Compact apportions waters of the Upper Basin to the States of Arizona, Colorado, New Mexico, Utah, and Wyoming, and establishes certain obligations for the states of the Upper Division.
Colorado River Basin Project Act of 1968, P.L. 90-537	Authorization for construction, operation, and maintenance of the ALP Project.
1986 Colorado Ute Indian Water Rights Final Settlement Agreement*	Quantifies the Colorado Ute Tribes' rights to water in the Animas and La Plata Rivers, allocates water to the Navajo Nation, the San Juan Water Commission and the Animas-La Plata Water Conservancy District (ALPWCD).
1986 Agreement in Principle regarding Colorado Ute Water Rights Settlement Agreement and Binding Agreement for ALP Project Cost Sharing	*Subject to amendment.
Colorado Ute Indian Water Rights Settlement Act of 1988, P.L. 100-585 1988*	
Restricted Use Plan and future Memorandum of Agreement for the Durango Pumping Plant site easement	Allows Colorado Water Conservation Board, ALPWCD (property owner) and Reclamation to set parameters on the easement for the Durango Pumping Plant. Sets limits for how the property may be used in the future. Construction designs require approval of the Colorado Department of Public Health and the Department of Energy.
Brunot Agreement	The 1868 treaty reservation boundaries were modified by the Brunot Agreement (43 Stat. 36), ratified by Congress in 1874.
Treaty of 1868	Navajo Nation lands were specifically set aside in the Treaty of 1868 (15 Stat. 667). An earlier treaty, signed and ratified in 1850 (9 Stat. 974), promised the Navajo people the designation of territories for their benefit.
Navajo Dam and Reservoir	Authorized as part of the Colorado River Storage Project Act of 1956 (70 Stat 105).
Navajo Indian Irrigation Project (NIIP) and San Juan-Chama Project (SJCP), Initial Stage	Public Law 87-483 (76 Stat.96) authorized the Secretary of the Interior to construct, operate and maintain the NIIP and the initial stage of the SJCP as participating projects of the Colorado River Storage Project and for the purposes of furnishing water for the irrigation of irrigable and arable lands and for municipal, domestic, and industrial uses, providing recreation and fish and wildlife benefits, and controlling silt, and other beneficial purposes. The Navajo Nation has an agreement with the United States for the delivery of water to NIIP for the principal purpose of furnishing irrigation water to 100,630 acres of land. The SSCP makes possible the average annual diversion of about 100,000 afy from the upper tributaries of the San Juan River and conveys the water into the Rio Grande Basin in New Mexico.

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