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9TH CIRCUIT UPHOLDS CORPS PERMIT AND BIOLOGICAL OPINION

Butte Environmental Council v. United States Army Corps of Engineers, No. 09-15363 (9th Cir. June 1, 2010)

By Robert Uram, Keith Garner & Brenna Moorhead

In *Butte Environmental Council v. United States Army Corps of Engineers*, No. 09-15363 (9th Cir. June 1, 2010), the Ninth Circuit Court of Appeals affirmed that it is appropriate for the Corps to consider an applicant's project purpose, and that an area of a species' critical habitat can be destroyed without appreciably diminishing the value of the species' critical habitat overall.

The City of Redding proposed to build an industrial park and conducted an environmental review analyzing the effects of the proposed project, including examining a dozen alternative sites. Both the Corps of Engineers and the EPA commented on the draft environmental review documents. The Corps initially stated that the project did not appear to be the least environmentally damaging practicable alternative ("LEDPA") as required for compliance with Section 404(b)(1) Guidelines because the screening criteria were too restrictive. The EPA made similar comments, urging the City to consider several smaller, disaggregated parcels instead of a single large parcel as a way to minimize impacts. In its supplemental and final environmental review documents, the City clarified the project purpose as the development of a medium to large parcel business park to address the manufacturing and distribution needs of several potential users. It also reduced the project's potential impacts to sensitive natural resources, incorporated on-site preservation, and prepared an off-site compensatory mitigation plan. The Corps accepted the revised statement of project purpose and issued a permit for the revised proposal, concluding that the City had clearly demonstrated that there was no practicable alternative having fewer environmental impacts.

The Butte Environmental Council raised a number of objections centered on the Corps' compliance with the Section 404(b)(1) Guidelines. The district court held that the Corps rationally concluded that the proposed project was the LEDPA. The Ninth Circuit agreed. First, the court held that the Corps had applied the presumption that alternatives with fewer impacts were available and properly concluded that this presumption had been overcome. Second, the court concluded that the Corps' initial comments on the project did not render its final decision arbitrary and capricious, but rather indicated that the process worked just as it should have. Third, the Council's contention that the Corps failed to make an independent determination on the project purpose was rejected. While the Corps initially voiced skepticism over the need for a single large parcel, the City explained that such a parcel was needed to create synergy among the

park's users. And relying on well-established Ninth Circuit case law, the court observed that the Corps has a duty to consider an applicant's legitimate and genuine purpose. Fourth, the court rejected the Council's argument, based on First Circuit case law, that the Corps erred in evaluating an alternative based on the cost of acquisition at the time the permit application was filed, rather than the time the City "entered the market," because the court concluded that the Corps' decision to reject the alternative was based on other factors. And finally, the court found nothing in the record to suggest that the Corps allowed the City to adopt off-site mitigation measures to relieve it from having to adopt the LEDPA.

The Council also objected to the Fish & Wildlife Service's conclusion in the biological opinion that the proposed project would not result in adverse modification of critical habitat. The project would destroy 234.5 acres of critical habitat for vernal pool crustaceans and 242.2 acres of slender Orcutt grass. The Ninth Circuit rejected the Council's argument that the Service applied the regulatory definition of "adverse modification" invalidated by the Ninth Circuit's decision in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*. The court noted that the Service expressly stated that it did not rely on the regulatory definition of 50 C.F.R. § 402.02, and there was nothing in the record to suggest otherwise. The Council then argued that the project's acknowledged destruction of critical habitat conflicted with the Service's no adverse modification determination, essentially asserting that any destruction of critical habitat would result in adverse modification. The Ninth Circuit rejected this argument, too, finding that "[a]n area of a species' critical habitat can be destroyed without appreciably diminishing the value of the species' critical habitat overall."

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