

9TH CIRCUIT UPHOLDS BIOLOGICAL OPINIONS FOR PROPOSED MINE

Rock Creek Alliance v. U.S. Fish and Wildlife Service, No. 10-35596 (9th Circuit Court of Appeal; November 16, 2011)

November 22, 2011 by Keith Garner and Alex Merritt

This month the 9th Circuit upheld the Fish and Wildlife Service's biological opinions finding that a proposed silver and copper mine in northwestern Montana would not result in "adverse modification" to critical habitat of the bull trout or "jeopardy" to the grizzly bear, both of which are federally listed as threatened species.

Rock Creek Alliance, an environmental plaintiff, had challenged the two biological opinions, alleging that the FWS had violated the Endangered Species Act and acted arbitrarily and capriciously in making the "no jeopardy" and "no adverse modification" findings. The district court upheld the FWS's determinations, and Rock Creek Alliance appealed raising four alleged defects. In a brief opinion that gave "deference due to the agency," the court rejected each of the four claims.

Use of Large-Scale Analysis

To determine the mine's impact on critical habitat for the bull trout, FWS conducted a "large-scale analysis" in which it compared the relatively small area of affected critical habitat to the total area of critical habitat. Rock Creek Alliance argued that this was improper. But the court upheld FWS's approach because it did not focus solely on the scale of the impact, but also on other features such as duration of the impact and effects on the habitat's functionality. FWS acted reasonably because it did not use large-scale analysis in an "attempt to hide the local impacts of the action."

Failure to Consider Recovery in a Separate Section of Biological Opinion

Rock Creek Alliance argued that FWS failed to adequately analyze the mine's impact on bull trout recovery. The court disagreed. Even though FWS did not address recovery in a "separate, distinct section" of the biological opinion, as contemplated by an FWS guidance memorandum, it did explicitly address the issue of recovery elsewhere. Thus, giving a fair reading to the biological opinion and appropriate deference to the agency, the court found that FWS had adequately considered bull trout recovery.

Improper Method of Calculating Mitigation Habitat

Rock Creek Alliance alleged that in calculating mitigation habitat requirements for the grizzly bear, FWS failed to account for the effect of existing development on proposed mitigation habitat. The court disagreed, noting that FWS had expressly acknowledged the effects of existing development on mitigation habitat. In addition, the court found that FWS was not required to replace affected habitat on an acre-for-acre for basis. More importantly, the court found that the mitigation plan was "multi-faceted," including activities beyond Revett's required acquisition of mitigation land parcels, and that "collectively, the measures would reduce, remove or more than offset the potential adverse effects of the proposed action."

Speculative Habitat Mitigation Plan

Rock Creek Alliance argued that the grizzly bear habitat mitigation plan was unreasonably speculative. The court rejected this argument, noting that the mine could not open until it had satisfied mitigation requirements, that the mine had already purchased 273 acres of mitigation land, and that the mine was required to post a bond or establish a trust fund to ensure its compliance. Thus, FWS had satisfied the requirement of having "binding and specific plans," "solid guarantees," and a "clear, definite commitment of resources."