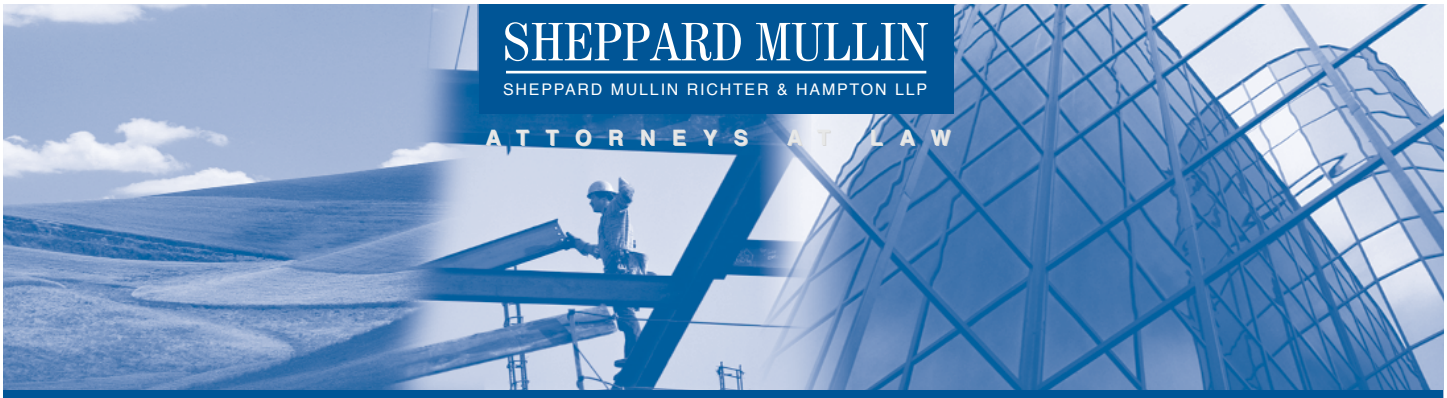

Real Estate and Environmental Client Update

July 2004

Major New ESA Decision Limits Mitigation the Services May Require

In *Westlands Water District v. Hoopa Valley Tribe*, filed July 14th, 2004, the Ninth Circuit Court of Appeals affirmed a district court ruling that set aside two conditions included in non-jeopardy biological opinions as non-discretionary "reasonable and prudent measures." The biological opinions were issued by the Fish and Wildlife Service and the National Marine Fisheries Service for tribal and federal agency plans to redirect Trinity River water to revive three listed fish species. The Ninth Circuit held that the conditions were invalid because they altered the agency action in a way that was more than "minor" in violation of 50 CFR section 402.14(i)(2). That section of the Services' Endangered Species Act regulations limits reasonable and prudent measures in non-jeopardy opinions to actions that do not alter the location, scope, duration or timing of an action and may involve only minor changes. By contrast, if the Service issues a draft jeopardy opinion, it may then identify reasonable and prudent alternatives which can involve major changes to a project so long as they are consistent with the intended purpose of a project, are economically and technically feasible and can be implemented consistent with the action agency's authority.

ABOUT THIS UPDATE

This case has very broad implications and could lead to major changes in the administration of the ESA.

One condition that was invalidated required reallocating water flows in the Sacramento River. The Ninth Circuit held that this change would likely result in broad system-wide effects to the agency action and could not be considered "minor" under section 402.14(i)(2). The other condition required flow regime changes to be "implement[ed] immediately." The Court of Appeals held that

this action "alters the timing of the action" and violated section 402.14(i)(2).

This case has very broad implications and could lead to major changes in the administration of the ESA. It confirms that unless the Service can make a jeopardy determination, it cannot ask for major project changes. It undermines whatever legal basis there may have been for the common practice of the Service insisting on 2:1 or 3:1 offsite mitigation in non-jeopardy situations.

It is also likely to lead the Service to routinely issue draft jeopardy opinions so as to be able to require project changes where the applicant does not volunteer "adequate" mitigation. This will in turn lead to a testing of what it means to jeopardize the continued existence of a species.

ABOUT THE AUTHOR

Robert Uram specializes in wetlands, endangered species and water quality issues. He has obtained permits from the Army Corps of Engineers, Fish and Wildlife Service, California Department of Fish and Game and various Regional Water Quality Control Boards for over 25 master planned communities and other residential and commercial projects of all sizes throughout California. He is working on a number of Habitat Conservation Plans and is counsel for the Homebuilders Association of Northern California in their challenge to the Fish and Wildlife Service's designation of four million acres of critical habitat for the California red-legged frog. For more information, please contact Robert at (415) 774-3285 or ruram@sheppardmullin.com.

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