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MITSUBISHI COURT ORDER

IN THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

Judge James A. Edwards
Case #: SCV 43289

NOTICE OF DECISION ON PETITION FOR WRIT OF MANDATE

SPIRIT OF THE SAGE COUNCIL,
An unicorporated association,

Petitioner,

vs.

COUNTY OF SAN BERNARDINO,

Respondent.

MITSUBISHI CEMENT CORPORATION,

Real Party in Interest.

The above matter came on for hearing on June 15, 1998, the Honerable James A. Edwards, judge presiding. Petitioner appeared through counsel, Thomas D. Mauriello. Respondent appeared through Paul F. Mordy, Deputy County Counsel. Real Party in Interest appeared through counsel Jocelyn Niebur Thompson and Nicki Carlsen. The court having taken the matter under submission makes the following findings and orders.

BACKGROUND

Real Party in Interest (Mitsubishi) presently owns and operates a limestone mine and cement plant, called the Cushenbury Mine, located on 191 acres on the north slope of the San Bernardino Mountain range and bordering on the San Bernardino National Forest. The present mine and plant site is part of 750 acres owned by Mitsubishi, plus an additional 40 acres of federal land, on which Mitsubishi owns mining claims.

Limestone is excavated from the site by drilling and blasting a series of benches each 25 feet wide and 45 feet high. The mined limestone is then processed at the adjacent cement plant. Obviously, any plants and wildlife located in the area mined are lost or displaced in the process.In August 1996, Mitsubishi submitted to respondent County a proposed project that would expand the mining operations by 35 acres. The 35 acres involved are located entirely on land owned by Mitsubishi. The County Planning Department reviewed the project and an Initial Study was prepared to determine whether the project would have a significant impact on the environment.

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Planning Department staff found that there were four carbonate endemic species of plants located on the project site that were federally listed as endangered or threatened. The identified plants were the Parish's Daisy, Cushenbury milkvetch, Cushenbury buckwheat, and Cushenbury oxytheca.

Staff recognized that under the Guidelines of the California Environmental Quality Act (CEQA) a mandatory finding of significance triggering the preparation of an Environmental Impact Report (EIR) was called for because the project "...has the potential to...[r]educe the number or restrict the range of a rare or endangered plant..." (CEQA Guidelines, Section 15065(a)). However, not wanting to put Mitsubishi to the expense of preparing an EIR, it was suggested if a onservation/revegetation component were added to the impact could be reduced to a level of less than significant, thus obviating the need for an EIR. Consequently, a Mitigated Negative Declaration (MND) was prepared that incorporated a conservation/revegetation plan.

Mitsubishi proposed a plan that called for 105 acres (3 times the number involved in the proposed project) to be placed in a conservation bank. It would then attempt to revegetate each of the 35 acres after mining was completed. For each acre that was at least 50% successfully revegetated with the protected plants, a corresponding acre would be released from the conservation bank up to a maximum of 35 acres. For each acre that was 100% successfully revegetated an additional acre could be released. The maximum acreage that could be released upon 100% successful revegetation was 70 acres, leaving 35 acres in the bank in perpetuity. This was referred to as the 1:1 ratio meaning, under the best case scenario, one acre would remain in conservation for each of the 35 acres mined.

The County Board of Supervisors (Board) had approved the 1:1 ratio a few years earlier when Mitsubishi applied for a larger expansion known as the Specialty Minerals Project. However, that project involved the preparation of an EIR which permitted the Board to adopt a statement of overriding considerations and allowed the project to move forward even though there would be a significant impact to the protected vegetation notwithstanding the 1:1 conservation ratio.

Staff recognized that option was not available to this project if it were to proceed without an EIR. To proceed by way of MND, a measure would have to be incorporated that would reduce the impact to a level below significance. A proposed MND was circulated for public comment on January 21, 1997. The MND listed as the only potentially significant impact on the environment the loss or displacement of the four carbonate species described above. To reduce the impact to below a level of significance the MND contained the 1:1 conservation proposal. The two "trustee" agencies for the protection of plant and wildlife — California Department of Fish and Game (DFG) and the U.S. Fish and Wildlife Service (USFWS) — initially objected to allowing the project to proceed without an EIR.

Their objections were much the same as those made to the Specialty Minerals Project. In a letter dated February 21, 1997, USFWS wrote "the mitigation for impacts to biological resources described in the document would not be adequate to reduce project related impacts to below a level of significance." (Administrative Record (AR) II:607). DFG concurred with USFWS that the proposed mitigation in the MND would not be sufficient. Both agencies suggested that, without an EIR, a conservation ratio of 3:1 would be needed to reduce the impact to a level below significance. In other words, three acres would remain in the conservation bank in perpetuity for every acre mined.

Both DFG and USFWS expressed concerns with the proposed revegetation aspect of the measure. US Department of Agriculture Botanist, Deveree Volgarino, wrote the following in a memorandum dated April 25, 1997:

> "Mitsubishi's mitigation bank proposal is vague and lacks key information

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necessary to analyze the effects or predict the success rate of the plan." [and]

"2. Establishment of carbonate species' may be deceiving in the long term. Like most substrate endemic plants, the carbonate species can be grown in a controlled setting on the other substrates besides carbonate. However, in a natural setting the plants occur in areas of carbonate soils characterized by high calcuim, high pH, and generally lower cover. This suggests that while the carbonate endemics may be physiologically adapted to harsh sites, they are poor competetors (sic) in non-carbonate soil or areas of relatively high cover. The San Bernardino National Forest has conducted studies at over 600 randomly chosen vegetation plots in the northeastern part of the range which have clearly demonstrated this...Just because carbonate endemics have been established on a reclaimed area does not mean they will be there in 20, 50, or 200 years, ... A reclaimed mine landscape is not suitable habitat for carbonate endemics unless species diversity, cover, age class, and drainage patterns are similar to unmined land in a natural state." [and]

"Furthermore, the pollination requirements of the carbonate endemics have not been studied in detail nor has the identity and habitat requirements of pollinating insects. The genetic variability within populations on disturbed versus undisturbed habitats is not known. This sort of "mitigation bank" actually provides a less than 1:1 conservation ratio. The San Bernardino National Forest recommends a 3:1 mitigation ratio of lands containing similar densities of carbonate endemic plants to any lands being impacted by expansion. This land must be preserved in perpetuity in order to guarantee long-term protection of the carbonate endemics." (AR, II:601-602).

Following the filing of these objections, Staff met with representatives of USFWS and Mitsubishi on April 30, 1997. A "revised mitigation strategy" was agreed upon that would "marginally" mitigate the impacts of the project on the carbonate and endemic plants to below a level of significance. (See USFWS letter dated October 17, 1997, AR, II:578). Then in June 1997, Staff, USFWS and Mitsubishi representatives met with officials of DFG. As a result of that meeting, DFG agreed not to object to certification of the MND provided a permanent conservation ratio of 2:1 be implemented. The remaining 35 acres could only be withdrawn upon future successful restoration of the carbonate habitat and rare plants. Performance standards for determining the success of restoration were to be approved by both agencies. (See DFG letter dated August 11, 1997, AR, I:129).

On September 11, 1997, a public hearing was held before the County Planning Commission. At that time Staff presented to the Commission the proposed mitigation measure that called for the a 2:1 ratio. Representatives of Mitsubishi argued that the 1:1 ratio was more appropriate because it provided an incentive to successfully restore the vegetation 100%. Staff pointed out that USFWS and DFG objected to the 1:1 ratio as not reducing the impact below a level of significance. Since these were trustee agencies, their findings would be given great weight, and the project probably would not be allowed to proceed without an EIR if challenged in court. (AR, I:15-16). The Commission adopted the MND with the 2:1 mitigation provision recommended by Staff. This was designated "Condition 43."

Up to this point, petitioner herein made no appearances, or filed any objection to the project. However, Mitsubishi decided to appeal Condition 43 to the Board. It was then that the petitioner filed its objection, not only to the appeal of Condition 43, but to the adequacy of the MND as to the potential impact of the project on the bighorn sheep in the area. In addition, USFWS directed a letter to the Chairman of the Board, Jerry Eaves, advising him that failure to uphold Condition 43 in its adopted form would result in the project not being mitigated to a level below significance. (AR, II:578-579).

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On October 21, 1997, the Board heard the appeal. Planning Director, Valerie Pilmer, explained the history of the project and the rationale behind the adoption of Condition 43. She further explained to the Board that, unlike the Specialty Minerals Project that had an EIR and allowed a 1:1 mitigation ratio, this project would not have an EIR thereby precluding the use of a statement of overriding consideration. (AR, I:154). Notwithstanding her recommendation, the Board modified Condition 43 to provide for the 1:1 ratio. The petition followed.

CONTENTIONS

Although petitioner makes several arguments as to why the MND is insufficient and an EIR is required, they essentially boil down to two:

1. There is substantial evidence in the record to support a "fair argument" that the proposed expansion project would have a significant impact on the endangered and threatened plants identified in the Initial Study, and the bighorn sheep that inhabit the area; and

2. There is no substantial evidence to support the findings in the MND that the mitigation measures provided will reduce the impact to below a level of significance.

The County and Mitsubishi argue that Condition 43, as modified by the Board, is more than sufficient to reduce the level of impact. As for the impact on the bighorn sheep, they argue that the variety of bighorn sheep found at the project site is not a protected species, and, in any event, petitioner failed to exhaust its administrative remedies on this issue.

ISSUE

Did the Board abuse its discretion by adopting the MND rather than requiring an EIR?

DISCUSSION

Ordinarily in answering such a question, a reviewing court looks to the record to see if there is substantial evidence to support the Board's findings. If so, no abuse of discretion is found even though there may also be substantial evidence contradicting those findings. However, when the lead agency's decision is not to require an EIR because it finds a project's impact on the environment is below a level of significance, a different standard of review is employed. In that case, if it can be *fairly argued* based on substantial evidence that the project may have a significant environmental impact, then the agency's action is not to be upheld merely because substantial evidence was presented that the project would not have such. (*Friends of "B" Street v. City of Hayward* (1980), 106 CA3 988, 1002). In that situation the reviewing court must order the agency's action vacated and an EIR prepared.

Using this standard it is clear that the Board's adoption of the MND with the modified 1:1 conservation ratio was an abuse of discretion. This action was taken not only against the advise of Planning Department Staff, but with the explicit opinion of USFWS and DFG that such a ratio would not reduce the impact to below a level of significance. Certainly, such evidence would be substantial and would raise a fair argument that the project may have a significant impact. Planning Staff acknowledged that these agencies were recognized as having biological expertise in terms of revegetation, and that the likely success of such efforts was, as yet, unproven. (AR I:358).

If Mitsubishi chooses to proceed with the project in the form adopted by the Board, CEQA requires the preparation of an EIR. However, if Condition 43 is modified to include the 2:1 ratio adopted by the Planning Commission, would an EIR be required? This court thinks not.Granted, both USFWS

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and DFG initially expressed doubts about any conservation measures that called for less than a 3:1 ratio of permanent conservation. They were fearful then (and presumably still are now) that the plant life inevitably destroyed on the 35 acres would not be successfully restored and, therefore, would be permanently lost. To adequately compensate for this loss, a permanent preserve of 105 acres would be sufficient to reduce the impact to a level below significance.

As discussed above, later in the process, both agencies were persuaded that even partial restoration was better than nothing. They conceded that if Mitsubishi could restore at least 50% of the vegetation to their satisfaction, a release of one acre for each acre restored, up to a maximum of 35 acres, would be sufficient to reduce the impact to below a level of significance when coupled with the permanent reserve of 70 acres. Since there is nothing in the record to show that either agency's opinion is wrong, or that there is other substantial evidence to refute it, the court must conclude that there is no substantial evidence to support a fair argument that the project could have a significant impact on the environment if it is allowed to proceed under the MND as adopted by the Planning Commission.

As for the bighorn sheep, the Initial Study found that "potential effects to the desert bighorn are considered to be non-significant due to the large range of the animal and lack of specialized habitat on site." (AR I:46). Section 15065 of the CEQA Guidelines requires a finding of significant effect on the environment where the project has "...the potential to ...substantially reduce the habitat of a fish or wildlife species, ...[or] reduce the number or restrict the range of a rare or endangered plant or animal..."

The species of bighorn found in the area of the project is not one of those listed as threatened or endangered. (AR II:646). Therefore, there would have to be substantial evidence that the project may substantially reduce the habitat of the bighorn sheep. As Mitsubishi points out in its opposition, all the evidence in the record is that these sheep have a large range and the project area does not include any specialized habitat for the sheep. Based on the mining history in the area over the past 40 to 50 years, there has been no substantial impact on the population. Those that are displaced move to adjacent habitat without significant detriment. Based on its review of the record, the court does not find any substantial evidence to support petitioner's argument that there may be a significant impact on the bighorn sheep or their habitat.

CONCLUSION

For the foregoing reasons, the court will grant the petition directing the Board to vacate its adoption of the MND with the revised Condition 43. If Mitsubishi wishes to proceed with the project as approved by the Board, an EIR will be required. If the project is to proceed in the form approved by the Planning Commission, no EIR will be required. ///