

Case law on funding:

Sierra Club v. Babbitt, 15 F. Supp. 2d 1274 (S.D. Ala. 1998) Two HCPs developed to allow take of the Alabama beach mouse required the developers to provide money - \$60,000 and \$150,000 respectively, to acquire property offsite “of quantity and quality sufficient to compensate for and minimize unavoidable impacts.” Plaintiffs contended that the mitigation funding was inadequate and not supported by the A.R., and that FWS had relied on speculative unnamed sources to contribute additional funds to make up for the deficiency in offsite mitigation funding required under the plans.

Held: The Service’s findings of adequate funding were arbitrary and capricious where evidence in the record indicated that the levels of funding provided under the two plans were lower than the Service had required for similar projects in the past, and the Service had failed to justify in the record why the level of funding provided was adequate. In particular, the court found that the Service’s acknowledgment in the A.R. that the offsite mitigation funding would have to be pooled with additional funds from an unnamed non-profit organization in order to purchase mitigation lands amounted to “speculative reliance on unnamed sources” to make up for the inadequacy of funding in violation of the Act. In this case, as in NWF v. Babbitt, plaintiffs’ challenges to the Service’s “maximum extent practicable” and funding findings were inextricably linked.

Loggerhead Turtle et al. v. County Council of Volusia County, 120 F. Supp. 2d 1005 (M.D. Fla. 2000) Challenge to HCP for three listed sea turtle species. Plaintiffs challenged as arbitrary and capricious the Service’s finding that the county had ensured funding to implement the plan. Under the HCP the county committed to fund the plan through annual appropriations. Plaintiffs argued that FWS lacks the discretion to condition the ITP on future appropriations.

Held: The ESA requires “adequate funding” for permit approval. “The statute speaks in terms a future action: the Secretary must be satisfied the applicant *will* ensure that adequate funding for the plan *will* be provided.” 15 F. Supp. 2d at 1021 (emphasis in original). The finding was based in part on the Service’s ability during the HCP development process to “observe the County’s commitment to funding the HCP’s contemplated programs.” *Id.* In addition, the permit was conditioned on FWS’s approval of the County’s annual budget allocations. The Service’s decision to accept the annual budgeting and appropriation as “adequate funding” was reasonable.

Here, the nature of the HCP rendered the annual appropriation approach reasonable. This was a short term HCP, which consisted largely of developing and enforcing beach management plans to restrict access and control lighting of certain portions of the beach at certain times. Although monitoring, research and outreach obligations were included in the HCP, mitigation did not include a requirement to acquire and manage offsite habitat which would require a large outlay of money, so there was little risk of a mitigation deficit. It was logical to fund the HCP from ongoing beach management appropriations.

National Wildlife Federation v. Babbitt, 128 F.Supp.2d 1274 (E.D. Cal. 2000) Regional HCP covering the Natomas Basin in the City of Sacramento and the Counties of Sacramento and

Sutter. Under the plan, each development project was required to pay a mitigation fee sufficient to acquire and manage .5 acres of habitat for each acre of land developed. The acquisition portion of the mitigation fee was not capped and could be adjusted over time. The only identified source of funding for the plan was the mitigation fee, and the IA expressly provided that the permittee would not be required to provide general funds to implement the plan. Under the HCP, mitigation lands are purchased after fees are collected and retroactive fee increases are not allowed.

Held: The Service's finding that funding for the plan was ensured was arbitrary and capricious. The court rejected plaintiffs' claim that the initial mitigation fees were too low, concluding that the record contained an adequate analysis to support the fee amount. However the court upheld plaintiffs' inadequate funding claim based on the city's explicit refusal to "ensure" funding beyond the mitigation fees. The city argued that it could not legally bind future city supervisors to commit funding which was subject to future appropriations. The court stated that even if that were true, "Section 10(a)(2)(iii) makes no exception for applicants who are legally incapacitated from meeting the requirements of the ESA." The court characterized the plan's funding mechanism as requiring "continual infusions of new developable lands to provide funding necessitated by previous development." The court was concerned that the need for additional mitigation funds might not become apparent until virtually all the city's land had been developed and given that the city was the only participant in the regional plan, there would be no future development subject to the plan to shoulder the outstanding mitigation obligation.

Key to the court's decision was the express prohibition in the plan on using general funds to make up any funding deficiency should the mitigation fees fail to generate sufficient mitigation funds and the plan's failure to identify any other backup funding source. These facts combined with the fact that acquisition of mitigation lands under the plan would trail the collection of fees, convinced the court that the Service's finding that adequate funding had been ensured was arbitrary and capricious.

Southwest Center for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118 (S.D. Cal. 2006)
Challenged the Service's finding of assured funding in the City of San Diego's MSCP/HCP. City committed to join with other MSCP jurisdictions to establish a regional funding mechanism, and noted a bond requiring voter approval or a sales tax as potential funding mechanisms. The regional funding mechanism had not been created at the time of the lawsuit in 2001, but the City had funded the HCP through appropriated funds for several years.

Held: The Service's finding that funding for the City's plan was ensured was arbitrary and capricious because the sources cited by the City to fund the plan were "speculative" and "undependable." The administrative record "does not demonstrate a rational connection between the facts – the City's shaky pledge to make an effort to find funding – and FWS's conclusion that the ESA funding requirement was satisfied." Rather the City promised to use its best efforts to implement the plan's financing and land acquisition components but could not guarantee funds ... will be available beyond those obtained through the mitigation process." The court considered the City's funding commitment similar to that rejected by the Natomas I court and contrasted that with the more robust funding commitment upheld in NWF v. Norton (Metro

Air Park). Interestingly, though this flaw could have brought the entire City plan down (along with County's HCP, plaintiffs and the court chose only to apply the decision to the 7 vernal pool species that were the focus of the lawsuit.