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Enviros Slam Developers' Move To End Condor Habitat Suit

By **Adrian Cruz**

Law360 (September 11, 2019, 8:14 PM EDT) -- Two environmental groups pushed back on developers' bid to dismiss the groups' suit over a resort project's alleged threat to endangered California condors, saying the suit was filed on time and that they have standing to pursue their claims.

The Center for Biological Diversity and tribal nonprofit Wishtoyo Foundation in a Monday motion rejected an argument by developers Tejon Ranchcorp and Tejon Mountain Village LLC that the groups violated the six-year statute of limitations to file their suit. The groups argued their suit was filed within the law's time limit based on the date the U.S. Fish and Wildlife Service approved an incidental take permit the groups claim puts the condors' habitat at risk.

The suit was first filed in April 2018 to challenge the agency's decision to grant the developers an incidental take permit to use habitat of an endangered species to build a luxury resort at Tejon Ranch in Kern County, California. The environmental groups said the permit enables construction that would destroy the habitat and put the critically endangered condor at risk of harm.

The developers said in their motion to dismiss that the environmental groups filed their complaint three months after the time limit on their claims expired. They also argued the groups' claims are barred by the doctrine of laches because they waited too long after FWS made its final decision to file their suit.

The environmental groups argued that the developers used the wrong event to mark the FWS' final decision, saying the developers cited a letter sent by the FWS to California's State Historic Preservation Officer in January 2013. The groups argued the final biological opinion actually was released April 26, 2013, and because their suit was filed **April 25, 2019**, they made the cutoff.

"Plaintiffs properly challenged the Service's [National Historic Preservation Act] process in the only way they could — by challenging the only 'final agency action (April 26th opinion)' available to challenge," the groups said.

The groups said the laches defense is uncommon in environmental law because it's a common practice to delay filing in the hopes that government officials would take action, removing the need for litigation.

"Tejon's laches defense is meritless," the groups said. "Laches is 'strongly disfavored' in environmental cases because citizens have a right to assume federal officials will comply with applicable law, thus excusing delay in bringing suit."

The developers also said the groups had no standing to pursue their claims because they weren't able to prove they were directly impacted by the FWS action. The developers argued that while Wishtoyo said it was comprised of area tribe members, it doesn't qualify as a tribe and therefore can't claim it suffered because of the alleged failure by FWS to consult with tribes prior to releasing the final opinion.

Countering that they do have standing, the groups cited a Ninth Circuit decision in [Ctr. for Biological](#)

Diversity v. Mattis concerning a challenge to a military base in Okinawa, Japan, over its potential harm to a protected species. They said the ruling's finding that environmental groups have concrete standing to pursue claims against the government also applies to their claims against the FWS.

"After reviewing Tejon Ranchcorp's motion, we're confident that Tejon's attempt to dismiss our suit on legal technicalities is baseless," said John Buse, general counsel and legal director for the Center for Biological Diversity. "We see this as a continuation of Tejon's long-standing effort to impede condor conservation in Southern California."

The environmental groups said FWS failed to take the condor's habitat into consideration when issuing the permit in violation of the NHPA and that the agency failed to consult with Native American tribes before issuing the permit as the condor has cultural importance to area tribes.

Counsel for the developers did not immediately respond to requests for comment Wednesday.

The Center for Biological Diversity is represented in-house by John T. Buse and Lisa T. Belenky.

The government is represented by Brad C. Leneis of the U.S. Department of Justice's Environment and Natural Resources Division.

Wishtoyo is represented by in-house counsel Jason Weiner.

Tejon Ranchcorp and Tejon Mountain Village are represented by Charles L. Coleman III of Holland & Knight LLP.

The case is Wishtoyo Foundation et al. v. U.S. Fish and Wildlife Service et al., case number 2:19-cv-03322, in the U.S. District Court for the Central District of California.

--Editing by Connor Relyea.

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