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FWS Says Condors Can't Be Protected As Cultural Property

By **Sophia Morris**

Law360 (July 10, 2019, 6:40 PM EDT) -- The U.S. government has urged a California federal court to toss a suit from Native American and environmental activists over a development on a ranch property they claim will harm critically endangered California condors, arguing Tuesday that there is no evidence the plan would impact tribal cultural traditions tied to the bird.

The challenged plan authorizes a luxury resort development in a portion of Tejon Ranch, a large area of private land northwest of Los Angeles that is a designated habitat for condors and a culturally significant site for local tribes.

The U.S. Fish and Wildlife Service approved the Tehachapi Uplands Multiple Species Habitat Conservation Plan in 2013, and the agency subsequently issued an incidental take permit to Tejon Ranch that "authorizes the nonlethal take of four condors over 50 years," according to the FWS.

The Wishtoyo Foundation, a nonprofit dedicated to preserving the history and cultural traditions of the Chumash people, and the Center for Biological Diversity **say the plan** violates the National Historic Preservation Act, as the Fish and Wildlife Service failed to take into account the cultural significance of the condor to local Native American tribes.

But the agency said Tuesday that the plaintiffs had not shown they had suffered an actual injury under the National Historic Preservation Act that would give them standing to sue under Article III. There was no evidence provided illustrating how the nonlethal taking of four condors over a 50-year period "presents a risk of real harm to Wishtoyo's interest in the condor's preservation, its cultural significance, or the role that it (or its habitat at the ranch) plays in Wishtoyo's members' lives," the agency said.

The Wishtoyo plaintiffs said the condor holds cultural and religious significance to tribes in the Tejon Ranch region including the Chumash, Kitanemuk and Yowlumne Tejon Indians.

The conservation plan impacts the ability of the Chumash people, who have resided on the land covered by the plan for more than 10,000 years, to carry out ceremonies that involve interaction with the bird, the complaint said.

The agency pushed back on this claim, arguing that the condor population will likely increase over the 50-year period covered by the incidental take permit thanks to its ongoing conservation efforts. As such, the plaintiffs' claim of an imminent threat posed by the taking could not be substantiated.

Additionally, as a wild animal, the condor is not an "object" that can be protected as "traditional cultural property" under the National Historic Preservation Act. Condors fly vast distances in and out of their habitats, and are not necessarily confined to any one area, the agency said.

The FWS noted that the U.S. Department of the Interior has not recognized that animals may be classified as culturally significant objects, despite outlining that nonhuman-made objects, such as trees or rocks, can have this designation.

Given that animals are significant to many cultures, "and the depth of DOI's analysis of traditional

cultural properties, one would expect DOI to have included an animal as an example if animals were, in fact, properly classifiable as objects," the motion said.

Also on Tuesday, Tejon Ranchcorp, the owners of the ranch, moved to intervene in the suit and ask that it be dismissed. Tejon claims that the underlying purpose of the suit is to delay and prevent future development on the ranch, with the plaintiffs aiming to turn the ranch into a national park.

John Buse, senior counsel at the Center for Biological Diversity told Law360 late Wednesday that there is precedent for "animals being considered traditional cultural properties," citing the Okinawa dugong case at the Ninth Circuit.

"That the Fish and Wildlife Service has never classified condors as traditional cultural properties does not excuse their failure to do so here — that is the basis for our lawsuit."

Buse said that Tejon Ranch Co., which accused the Center of mounting a "crusade" against it, has been given "the right to destroy hundreds of acres of condor critical habitat."

"In the current lawsuit, the plaintiffs are attempting to restore the balance in favor of the culturally iconic California condor that Tejon upset years ago," he said.

Representatives for the defendants did not immediately respond to requests for comment Wednesday.

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

Wishtoyo is represented by in-house counsel Jason Weiner.

The government is represented by Brad C. Leneis of the DOJ's Environment and Natural Resources Division.

Tejon Ranchcorp is represented by Charles L. Coleman III of Holland & Knight LLP.

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

--Additional reporting by Darcy Reddan. Editing by Nicole Bleier.