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# *Salix v. USFS*: Why Can't the Agencies Just Talk to Each Other?

Michelle Tafoya
*Alexander Blewett III School of Law*

# *SALIX V. USFS*; WHY CAN'T THE AGENCIES JUST TALK TO EACH OTHER?

**Michelle Tafoya**

No. 13-35624
Ninth Circuit Court of Appeals

Oral Argument: Monday, July 7, 2014, 9:00 a.m. in the Portland Pioneer Courtroom, Portland, Oregon.

Case Panel: PREGERSON, PAEZ, WATFORD

## I. ORAL ARGUMENT SUMMARY

Given the complexity and breadth of this case, the summary below only includes the main oral arguments of Mr. Brabender and Mr. Kenna and the key questions of Judges Pregerson, Paez, and Watford.[1]

### *A. Federal Defendants-Appellants USFS*

Within seconds after Mr. Brabender began his argument, Judge Paez interjected to ask why USFS did not reinitiate consultation when FWS designated lynx critical habitat. Mr. Brabender claimed that USFS did not take any affirmative action which required consultation because it did not promulgate the designation. He then introduced USFS's main § 7 argument: in this case, the agency is not required to reinitiate consultation on the Amendment because it is sufficient that consultation occurs when specific projects are considered. Judge Paez asked if USFS refers to the broader Amendment when engaged in project level consultation and whether the Amendment would be stronger if it included critical habitat. In response, Mr. Brabender equated the Amendment's identification of occupied habitat with the ESA's critical habitat designation and argued that project consultation would reveal if the Amendment's protections were insufficient. When Judge Paez pointed to ESA regulations, which seem to impose an obligation to reinitiate consultation in this case, Mr. Brabender claimed the provision only applies when an agency action occurs and the continued existence of the forest plan is not action.

Mr. Brabender then argued that the plaintiffs lacked standing in this case because they failed to show any concrete harm. While Judge Paez

[1] Oral Argument Audiofile, *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, http://www.ca9.uscourts.gov/ media/view.php?pk_id=0000013005 (9th Cir. July 7, 2014) (No. 13-35624).

viewed the plaintiffs' declarations as "pretty carefully drawn," Judge Watford asked if the plaintiffs needed to challenge a particular project to establish injury. Mr. Brabender responded affirmatively, and that the plaintiffs failed in that respect.

### *B. Environmental Plaintiff-Appellee CELC*

Mr. Kenna attempted to begin his argument on the merits, but he was quickly redirected by Judge Watson's clear concern with the standing issue. He asked why the court shouldn't require the plaintiffs to establish injury stemming from a specific project and how they could be impacted absent the approval of a plan's particular project. First, Mr. Kenna responded that the plaintiffs did allege injury from three USFS projects, which stemmed from the implementation of the Amendment. Mr. Kenna also argued that case law allows plaintiffs to mount a facial challenge to a programmatic plan if they demonstrate impacts to them in a specific place. Further, he argued that just because a plaintiff can bring a site specific challenge, does not mean they cannot challenge the programmatic plan instead. Judge Watford asked what injury the plaintiffs could have possibly suffered if a consultation was completed for a site specific plan. Mr. Kenna countered that site specific consultation alone is insufficient, even where cumulative impacts are considered.

With the prompting of Judge Paez, Mr. Kenna was able to resume his arguments on the merits. He cited a litany of case law for the proposition that USFS was required to reinitiate consultation on the Amendment because the agency retains discretion to protect the lynx under the ESA. Judge Watford then prompted Mr. Kenna to make his argument for injunctive relief. Mr. Kenna stated that while there was no need to show irreparable harm in this case, such harm is presumed from USFS's procedural violation because of the ESA's clear mandate to protect endangered species. Mr. Kenna also claimed that, absent the pressure of an injunction, there was no incentive for USFS to reinitiate consultation on the Amendment.

### *C. USFS's Rebuttal Argument*

Mr. Brabender's rebuttal argument was significantly frustrated by Judge Pregerson's demands to know why USFS could not just "talk" to FWS after a significant change in lynx critical habitat designation. While Mr. Brabender claimed that consultation occurs on specific projects, he could not say if any occurred in the last year. Judge Pregerson's frustration with Mr. Brabender was evident, accusing him of putting up "smokescreens" and failing to "talk straight." In the last few minutes of his time, Mr. Brabender was able to argue against injunctive relief,

stating that the plaintiffs failed to show irreparable harm. However, Judge Paez contended that it wouldn't "take much" for the plaintiffs to show such harm when an endangered species is involved.

## II. ANALYSIS

Toward the end of Mr. Kenna's argument, Judge Pregerson asked him "where the shining path is to help you get where you want to go." This statement seems indicative of the general support for CELC's arguments on the merits, at least by the majority of the court. While Mr. Kenna sailed smoothly through his § 7 argument, Judge Paez and Judge Pregerson besieged Mr. Brabender with questions and challenges.

While CELC's biggest challenge seems to be Judge Watford's reluctance to accept their standing argument, the plaintiffs will likely survive the threshold challenge to standing. Near the end of his long exchange with Mr. Kenna on the issue, Judge Watford said he was still "stuck" on the idea that injury had to stem from a specific project. However, neither Judge Paez nor Judge Pregerson seemed to join Judge Watford in his concern.

The majority of the court also seemed receptive to Mr. Kenna's argument for injunctive relief. While Judge Paez briefly asked about the presence of irreparable harm, he focused more on the timber projects involved and how the injunction would work overall. Additionally, Judge Pregerson seemed convinced that USFS would not act to reinitiate consultation without an injunction. Thus, if the plaintiffs win on their standing and § 7 arguments, there is a real possibility that an injunction will be granted.

Lower Court: District of Montana Cause No. CV 12-45-M-DLC; Honorable Dana L. Christensen, District Court Judge of the United State District Court, District of Montana.

Attorney for Appellants: John Philip Meyer, Cottonwood Environmental Law Center, Bozeman, Montana and Matt Kenna, Durango, Colorado.

Attorneys for Appellees: Allen M. Brabender, Attorney, Department of Justice, Washington, DC and Mark Stegar Smith, Assistant U.S. Attorney, Billings, Montana.