

Appendix B

The Truth About the Red Rock Lookout

It is undisputed that the Red Rock Lookout was the first to report the Moonlight Fire at 2:24 p.m. on September 3, 2007, and no witness claims it was visible sooner. (WildCad Incident Report (Dkt. 596-31) at 48; Rpt. of Inv. (Dkt. 596-31) at 15.) Both Forest Service employees at the lookout that day confirmed they observed smoke almost simultaneously and that it could not have been spotted earlier. (Juska Depo., 6 R.E. US-1508-1510; Lief Depo., 6 R.E. US-1589, 1602, 1654-1655; Lief Sept. 12, 2007 Stmt. (Dkt. 596-33) at 94; Juska Sept. 3, 2007 Statement (Dkt. 596-32) at 88.) When Juska first saw the fire it was only a “thin line” of white smoke from a fire she described as “a very light wisp” and “just starting to get established and coming over a ridge.” (Juska Depo., 6 R.E. US-1506, 1508; Juska Sept. 3, 2007 Statement, (Dkt. 596-32) at 88; Juska Memo. (Dkt. 598-6) at 2.) This description is consistent with the testimony of defendants’ own contractor, Sugarpine Aviators. Sugarpine’s pilot, Herschel Beail, was flying his plane in the same vicinity that afternoon, and saw what appeared to be haze in the Moonlight Valley. As he began to head toward the area for a better look, he heard the Red Rock Lookout call in the fire. (Beail Depo., Aug. 9, 2010, 1 R.E. US-80-83; Beail Witness Statement, (Dkt. 596-33) at 109.) Beail testified he was “surprised” Red Rock could see the fire from their vantage point because the wind was blowing and “kept everything flat.” (Beail Depo., 1 R.E. US-82-83, 91-92.) Sierra Pacific’s roving ground patrol also confirmed that smoke from the fire was not visible until the Red Rock Lookout reported it. (Whitlock Depo., Oct. 1, 2010, 11 R.E. US-3165-3167.)

At the same time that the Red Rock Lookout had spotted the fire and the Forest Service was beginning to dispatch suppression forces, Howell’s bulldozer operator J.W. Bush was still back at camp drinking a soda, after having abandoned his worksite and failed to conduct the mandatory fire walk and fire watch. (Bush Depo., 1 R.E. US-244-246; Crismon Dep., 3 R.E. US-650.) By about 3:00 p.m., when Bush was finally trying to return

1 to the worksite he had abandoned hours before—but was prevented from doing so by a
2 wall of heat and smoke, the Forest Service was already combating the fire from the air and
3 ground resources were arriving to the remote site, with more resources *en route*. (Bush
4 Depo., 1 R.E. US-247-252; WildCad Incident Report (Dkt. 596-31) at 48-49.) According to
5 Sierra Pacific’s own admission, had the Howell’s employees stayed and spotted the fire as
6 soon as it became visible, the “fire would have been contained and extinguished before it
7 could reach [the United States’] property.” (Sierra Pacific’s Answer (Dkt. 57) ¶ 75.)

8
9 ***Lief’s Conduct at the Lookout***

10 Sierra Pacific claims Caleb Lief was under “the influence of marijuana” on
11 September 3, 2007. (Def. Rev. Supp. Br. at 93.) But Lief emphatically denied being stoned
12 on that day. (Lief Depo., 6 R.E. US-1643.) Juska herself stated categorically: “I have
13 never claimed to see Caleb stoned or had reason to believe that he was.” (Juska Depo., 6
14 R.E. US-1484, 1511.) She testified that, on September 3, 2007, Lief’s eyes were not
15 bloodshot, his breath did not smell like marijuana, and he did not appear stoned. (Juska
16 Depo., 6 R.E. US-1485.)

17 Sierra Pacific makes much of the fact that Lief was “urinating on his bare feet.”
18 (Def. Rev. Supp. Br. at 92.) If he had used the outhouse instead, he would have had to exit
19 the tower, walk down a flight of stairs, walk across a long driveway, and enter a
20 completely enclosed outhouse below a ridge. (Lief Depo., 6 R.E. US-1655-1656; Dorris
21 Photo, 6 R.E. US-1687-1688.) He chose not to do this on September 3, 2007, because this
22 was a “red flag warning day,” and he “did not want to go too far.” (Lief Depo., 6 R.E. US-
23 1586.)

24 Sierra Pacific claims that “[v]ehicles approaching the tower on these roads create
25 large dust plumes easily seen from the tower for miles.” (Def. Rev. Supp. Br. at 90.) But
26 the winding road leading to the lookout is obscured in many parts by large trees and
27 foliage, and the road and parking area are in the back of the lookout, away from where
28 Lief would have been standing to scan for fire in the area around Moonlight Valley. (Reza

1 Rpt., Oct. 6, 2011, 8 R.E. US-2271; Photo, 8 R.E. US-2271; Lief Depo., 6 R.E. US-1590,
2 1593-1597.) Further, Lief testified that “when winds are blowing at 30 miles per hour” as
3 they were on September 3, 2007, the “dust lays down in the trees” and you cannot see
4 anyone coming. (Lief Depo., 6 R.E. US-1593-1594, 1657.) Sierra Pacific states that Lief
5 was able to see the dust kicked up by Howell’s work “during the morning hours” (Def. Rev.
6 Supp. Br. at 92), but defendants’ pilot confirmed that in the afternoon strong winds and
7 haze in the valley made the smoke difficult to identify. (Beail Witness Stmt, (Dkt. 596-33)
8 at 109; Beail Depo., 1 R.E. US-81-83.)

9 Sierra Pacific claims Lief should not have been surprised by Juska because she “had
10 called in her plans via radio earlier that day.” (Def. Rev. Supp. Br. at 92.) But Juska only
11 advised dispatch she would be there sometime that day. (Juska Depo., 6 R.E. US-1507.)
12 Sierra Pacific also suggests Lief should have heard Juska coming. (Def. Rev. Supp. Br. at
13 92.) But both Lief and Juska confirmed it was difficult to hear anything even while
14 standing on the catwalk of the lookout because the wind “howls up there.” (Lief Depo., 6
15 R.E. US-1587-1588, 1657-1658; Juska Depo., 6 R.E. US-1486.) This would have been
16 especially true given the strong winds on September 3, 2007.

17 Sierra Pacific argues it was also “consistent with Lief’s bizarre behavior” that “the
18 fire coordinates he provided were off by approximately one mile.” (Def. Rev. Supp. Br. at
19 93.) But Lief explained that Juska called in the fire from her truck before he had time to
20 figure out the exact location using the fire finder, which was difficult to use and in need of
21 repair. (Lief Depo., 6 R.E. US-1608, 1613-1614.) Lief also testified that he felt “really
22 nervous” and under “a lot of pressure” to give the details to dispatch quickly, especially
23 once he realized that there were “two forests” listening in and waiting for him to call in the
24 coordinates over the air. (Lief Depo., 6 R.E. US-1607-1608, 1611-1612.) Juska later told
25 him that he had done well, and that it was hard to get an accurate reading given the
26 terrain. (Lief Depo., 6 R.E. US-1614-1615.)

1 ***The Forest Service’s Handling of Juska’s Allegations***

2 Sierra Pacific argues that the Forest Service’s failure to investigate Juska’s
3 allegations was evidence of “the intent of USFS management to engage in a cover-up of
4 the events that transpired at the Red Rock Lookout Tower.” (Def. Rev. Supp. Br. at 96-
5 97.) That is false. The Forest Service exercised appropriate discretion in handling Juska’s
6 allegations. For one, there were never any “allegations of drug use” against Lief. As noted
7 above, Juska, the employee who said she saw a pot pipe in the Lookout, testified: “I have
8 never claimed to see Caleb stoned or had reason to believe that he was.” (Juska Depo., 6
9 R.E. US-1484, 1511.)

10 Juska’s allegations were also irrelevant to the Forest Service’s origin-and-cause
11 investigation. When Investigator Welton first contacted Juska by phone to set up an
12 interview, Juska asked Welton whether Welton was investigating Juska’s allegations
13 about Lief or the Moonlight Fire, and Welton advised she was investigating the fire.
14 (Juska Depo., 6 R.E. US-1495-1496, 1501, 1514-1515.) When the interview occurred on
15 September 12, 2007, Juska was “reluctant” to include in her description of events what she
16 considered to be irrelevant personnel issues and believed that a Forest Service employee
17 could not investigate alleged misconduct by another employee. (Juska Depo., 6 R.E. US-
18 1489-1496, 1503-1504.) Juska had no problem with the way Welton took her statement.
19 (Juska Depo., 6 R.E. US-1497-1498, 1501-1502, 1511-1512.) Nor did Welton believe these
20 allegations were relevant to her investigation.¹

21 After interviewing Juska, Welton immediately contacted her supervisor, Assistant
22 Special Agent in Charge Craig Endicott, and told him about Juska’s accusations against
23 Lief, including the claim of a pot pipe in the lookout.² Endicott already knew of the
24 accusations because Plumas National Forest Supervisor Alice Carlton had called him days

25 ¹ Welton Depo., March 21, 2011, 9 R.E. US-2533-2594; Welton Depo., Aug. 15, 2011,
26 10 R.E. US-2633-2644, 2655-2660.

27 ² Welton Depo., March 21, 2011, 9 R.E. US-2526-2533; Welton Depo., Aug. 15, 2011,
28 10 R.E. US-2618-2632; Endicott Depo., June 13, 2011, 3 R.E. US-855-856, 864.)

1 earlier to report it.³ Endicott told Welton that he too considered Juska's allegations
2 irrelevant to the origin-and-cause investigation and that he would handle the matter.
3 (Endicott Depo., June 13, 2011, 3 R.E. US-858-859; Endicott Depo., June 14, 2011, 4 R.E.
4 US-884; Welton Depo., 9 R.E. US-2528, 2547.)

5 Endicott later decided not to investigate Juska's allegations because he "did not
6 view this incident worthy of a criminal investigation" and he "did not have the resources to
7 deal with that level of what may or may not be a criminal offense." (Endicott Depo., June
8 13, 2011, 3 R.E. US-858-859; Endicott Depo., June 14, 2011, 4 R.E. US-884 .) He also
9 explained that if a criminal investigation had been conducted, it would have been an
10 internal affairs investigation because Lief was an employee, and Endicott did not believe
11 the additional process and requisite approvals were warranted by Juska's allegations.
12 (Endicott Depo., June 13, 2011, 3 R.E. US-858-860.)

13 When Endicott told Forest Supervisor Carlton that he was not going to investigate
14 Juska's allegations, she did not believe further action was necessary. (Carlton Depo., 2
15 R.E. US-411-412, 440-445.) Carlton explained at her deposition: "We had a 65,000-acre
16 fire going. I had other litigation I was trying to settle. I had a lot of issues. . . . It didn't
17 seem like to me it was worth pursuing when law enforcement said [it] can't be pursued."
18 (Carlton Depo., 2 R.E. US-445.)

19 Similarly, Deputy Forest Supervisor Maria Garcia explained that, once Lief was no
20 longer working, there was no need for an administrative investigation. Lief was
21 evacuated from the Red Rock Lookout tower when the Moonlight Fire threatened that
22 structure and was subsequently laid off for lack of work while the fire was still burning.
23 (Lief Depo., 6 R.E. US-1660-1663; Garcia Depo., 4 R.E. US-1017; Warne Dec., Ex. 89,
24 Heinbockel Memo. (Dkt. 598-8) at 1.) Garcia testified: "Because Mr. Lief had been
25 evacuated from the lookout tower, because he was being laid off and because our priority
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27 ³ Endicott Depo., June 13, 2011, 3 R.E. US-856-858, 861-862; Endicott Depo., June
28 14, 2011, 4 R.E. US-882-883; Carlton Depo., 2 R.E. US-403-422, 430-436.

1 was to deal with a fire that was threatening lives and homes in the community, we
2 [decided we] would not take further action.” (Garcia Depo., 4 R.E. US-1013-1018, 1020.)

4 ***Lief’s Employment Rating and Re-Hire***

5 Sierra Pacific claims that the Forest Service’s decision to give Lief a “fully
6 satisfactory” performance review for 2007 and to hire him back for the 2008 fire season
7 were also part of the alleged “cover-up” because “certain members of the USFS did not
8 want to make Lief angry as they did not want him to shoot his mouth off.” (Def. Rev.
9 Supp. Br. at 95-97 (internal quotations omitted).) As explained in the United States’
10 Opposition, this argument is based largely on a misrepresentation of Heinbockel’s
11 deposition testimony. (U.S. Opp at 85-86.) In fact, the Forest Service’s reasons for rating
12 Lief successful in 2007 and hiring him back in 2008 were unrelated to the Moonlight Fire
13 and were instead an effort to resolve and/or avoid EEO claims. (Carlton Dec. (Dkt. 128-2)
14 ¶ 4, 5, 6; Carlton Depo., 2 R.E. US-423-429; Lief Depo., 6 R.E. US-1667-1672.)

15 At the end of the 2007 season, Heinbockel wanted to rate Lief unsuccessful because
16 of the “alleged possibility of marijuana use.” (Heinbockel Depo., 4 R.E. US-1114, 1119-
17 1127, 1131-1133.) But because employees cannot be given a negative performance rating
18 based on an “alleged possibility,” and because Heinbockel had failed to do anything to
19 document unsuccessful performance by Lief, Heinbockel’s supervisors did not believe
20 sufficient support existed to give Lief an unsuccessful rating. (Carlton Dec. (Dkt. 128-2) ¶
21 4.)

22 In addition, although the Forest Service had intended to staff the Red Rock Lookout
23 with a different employee in 2008, those plans changed when Heinbockel mishandled
24 Lief’s inquiry about the position that year. (Carlton Dec. (Dkt. 128-2) ¶¶ 5, 6; Carlton
25 Depo., 2 R.E. US-437-439.) Heinbockel advised Lief that not only would Lief not be
26 rehired for the lookout, but Heinbockel would also tell prospective future employers about
27 Lief’s alleged drug possession and use. (Heinbockel Note (Dkt. 128-2) Ex. A; Heinbockel
28 Depo., 4 R.E. US-1146-1147; Lief Depo., 6 R.E. US-1592, 1597-1601.) Lief filed an EEO

1 claim in response to Heinbockel's comments and the Forest Service, which did not believe
2 there was adequate support for Heinbockel's accusation and threat, subsequently settled
3 the EEO action by hiring Lief back for the 2008 season. (Lief Aug. 18, 2009 EEO Stmt., 6
4 R.E. US-1682-1686; Lief Depo., 6 R.E. US-1618-1620, 1622-1623; Carlton Dec. (Dkt. 128-
5 2) ¶ 6; Heinbockel Depo., 4 R.E. US-1148.)

6 The Forest Service's actions were not motivated by the litigation or an effort to
7 "cover up" anything that allegedly occurred at the lookout on September 3, 2007. (Carlton
8 Dec. (Dkt. 128-2) ¶ 8.) Instead, the Forest Service was trying to avoid further employment
9 claims, which it ended up being burdened with anyway. (Carlton Dec. (Dkt. 128-2) ¶ 8:
10 Lief Depo., 6 R.E. US-1676.)