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Ninth Circuit Reasserts Sliding Scale Injunction Standard, Gives Great Weight to Environmental Harms [FN**]

By Jessica K. Ferrell [FN*]

A Ninth Circuit panel has reasserted the viability of a "sliding scale" approach to injunctive relief, even though the Circuit had appeared to discard that test following the Supreme Court's 2008 ruling in *Winter v. Natural Resources Defense Council*. [FN1] The *Winter* decision, which reversed a Ninth Circuit ruling that applied principles of the sliding scale approach, [FN2] reaffirmed a four-part test for injunctive relief, including a demonstrated likelihood of success on the merits. However, in *Alliance for the Wild Rockies v. Cottrell*, [FN3] the Ninth Circuit concluded last month that the Supreme Court had not addressed the question of whether various flexible approaches to injunctive relief survived *Winter*. The panel held that preliminary injunctive relief is still allowed on a weaker showing on the merits, so long as the balance of hardships imposed by an injunction "tips sharply" toward the plaintiffs. The court also put great weight on what some courts might consider relatively modest claims of environmental harm, suggesting an ongoing sympathy to preliminary injunctive relief in environmental cases.

Legal Background

In 2008 and 2010, the United States Supreme Court reiterated its four-part test for injunctive relief in environmental cases in *Winter and Monsanto Co. v. Geertson Seed Farms* (addressing permanent injunctive relief). [FN4] The standard requires a showing of: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities between the parties favors the movant; and (4) that the public interest would not be disserved. [FN5] In both opinions, the Court reversed holdings by the Ninth Circuit, which had applied standards that the Court found overly lenient (i.e., requiring only a possibility rather than a likelihood of irreparable harm). See S. Brandt-Erichsen, Supreme Court Rules on Preliminary Injunction Standard in Environmental Cases, Marten Law News (Nov. 13, 2008); S. Jones, Supreme Court Reasserts Standard for Injunctive Relief in NEPA Cases, Marten Law News (June 28, 2010).

In *Alliance*, the Ninth Circuit applied an arguably different and lower standard, holding that the sliding-scale "serious questions" test still applies. Under this approach, a court may issue a preliminary injunction by balancing the four *Winter* factors, such that "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits ... where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" [FN6] The court seems to equate raising "serious questions" with demonstrating probability of success on the merits-- even though in the pre-*Winter* formulation of the test, "serious questions" equated to the lesser standard of "possibility of success on the merits." In fact, it was issuance of an injunction on the basis of only a possibility of success that was the basis for the Supreme Court's reversal in *Winter*. Under *Alliance*, the bar for irreparable injury also appears lower than that set forth by the Supreme Court, and courts in the Ninth Circuit can grant the extraordinary remedy of injunctive relief should they decide that one factor in the test outweighs another and equity favors the plaintiffs. If the opinion stands, injunctive relief will (continue to) be an easier remedy for environmental plaintiffs to obtain in the Ninth Circuit than in some other circuits.

Factual Background

In 2007, the Rat Creek Wildfire burned about 27,000 acres in the Beaverhead-Deerlodge National Forest in Montana. In 2009, the Forest Service made an "Emergency Situation Determination for the Rat Creek Salvage Project" (the "emergency determination") under which salvage logging of between 1,600 and 27,000 acres of burned trees was allowed, without being subject to the Forest Service's administrative appeals process. According to the Forest Service, the purpose of the logging is to recover and use timber from trees that are dead or dying as a result of the fire, reforest the harvested areas with healthy trees, supply wood to the forest products industry, and prevent transmission of dwarf mistletoe by cutting those trees infested with it. [FN7] The Forest Service determined that the logging project would not significantly affect the quality of the human environment within the meaning of the National Environmental Protection Act, so an Environmental Impact Statement (an "EIS") was not required.

Plaintiffs, a coalition of environmental advocacy groups, filed suit in federal district court, alleging that the Forest Service's emergency determination violated the Appeals Reform Act (the "ARA"), the National Forest Management Act, and NEPA. Plaintiffs sought a preliminary injunction. The district court, applying *Winter*, found that plaintiffs did "not show a likelihood of success on the merits, nor that irreparable injury is likely in the absence of an injunction," so denied the request. Plaintiffs filed an interlocutory appeal.

Analysis

***Viability of "Sliding Scale" Injunctive Relief Test After* Winter**

Considering plaintiffs' appeal in *Alliance*, the Ninth Circuit acknowledged the test for injunctive relief that the Supreme Court reiterated in *Winter*. It also acknowledged that *Winter* requires plaintiffs to "establish that irreparable harm is *likely*, not just possible"--which is all the Ninth Circuit required before *Winter*--"in order to obtain a preliminary injunction." [FN8] Yet it held that the sliding scale approach, under which a court can grant a request for injunctive relief if a strong showing of likely success on the merits outweighs a weak showing of irreparable harm, still applies.

First, the court noted that the majority in *Winter* did not "explicitly discuss the continuing validity of the 'sliding scale' approach to preliminary injunctions employed by th[e Ninth Circuit] and others." Judge William Fletcher also noted that Justice Ginsberg mentioned in her dissent to *Winter* that the "Court has never rejected [the sliding scale] formulation and I do not believe it does so today." [FN9]

Judge Fletcher acknowledged that, although the Ninth Circuit had not addressed the viability of the sliding scale approach after *Winter*, it has acknowledged in other opinions that, "[t]o the extent that our cases have suggested a lesser standard [than that articulated in *Winter*], they are no longer controlling, or even viable." [FN10] Three other circuits have addressed the question of whether their versions of the sliding scale test survived *Winter*. The Fourth Circuit held that it did not. [FN11] According to the Ninth Circuit's interpretation, the Seventh and Second Circuits held that it did.

In 2009, the Seventh Circuit acknowledged that, while irreparable injury alone is not sufficient to support equitable relief ("there also must be a plausible claim on the merits, and the injunction must do more good than harm"), "[h]ow strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." [FN12] In an opinion containing a more explicit retention of the sliding scale test, the Second Circuit wrote that *Winter* and related jurisprudence "have not undermined [the Supreme Court's] approval of the more flexible approach .... None of the ... cases comments at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict 'likelihood' [of success] requirement in cases that warrant it." [FN13]

In the Ninth Circuit, plaintiffs must still satisfy the *Winter* test, but "a preliminary injunction is appropriate when a plaintiff demonstrates... that serious questions going to the merits were raised and the balance of hardships tips

sharply in the plaintiff's favor." [FN14]

Application of the "Sliding Scale"

Applying the *Winter* factors in combination with the sliding scale approach, the Ninth Circuit found that injunctive relief was appropriate in *Alliance*. First, it considered whether the environmental groups' members would suffer irreparable harm if prevented from using and enjoying 1,652 acres of forest. The Forest Service noted that the logged areas covered only about 6% of the acreage damage by fire. [FN15] The Ninth Circuit found plaintiffs' showing sufficient to establish likely irreparable harm, emphasizing that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." [FN16]

With respect to plaintiffs' likelihood of success on the merits, the Ninth Circuit determined that, because the Forest Service considered the local economy in making its emergency designation for logging--a factor that the ARA does not allow it to consider in that context--plaintiffs raised "serious questions on the merits of its claim" regarding the validity of the emergency determination.

Balancing the hardships, the Ninth Circuit found that plaintiffs would suffer more harm than defendants, as logging will result in "work and recreational opportunities [being] ... irreparably lost," and plaintiffs were denied their right to seek an administrative remedy through the Forest Service process due to the emergency determination. The Ninth Circuit found that the Forest Service's potential loss of between $16,000 and $70,000 in revenue, as well as its potential inability to mitigate the mistletoe infestation, did not weigh as heavily.

Finally, the Ninth Circuit weighed the public interest in (a) between 18 and 26 temporary jobs for one year and associated benefits to the local economy against (b) "preserving nature and avoiding irreparable environmental injury." [FN17] The court determined that the scales tipped sharply toward the latter interest.

Accordingly, the Ninth Circuit reversed the district court and remanded the case with direction to enjoin the logging project.

Conclusion

In *Winter* and related cases, the Supreme Court explicitly rejected the Ninth Circuit's lower standards for finding irreparable harm in the context of injunctive relief requests, requiring that harm to be likely, not just possible. In *Alliance*, the Ninth Circuit purports to follow Winter. Whether it actually does is arguable. Regardless, the court has set a low bar to establish irreparable harm, possibly improving plaintiffs' prospects for obtaining injunctive relief in environmental cases.

[FN**].

[FN1]. *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 380-82 172 L. Ed. 2d 249 (2008).

[FN2]. See *Natural Resources Defense Council, Inc. v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008), cert. granted, 128 S. Ct. 2964, 171 L. Ed. 2d 883 (2008) and rev'd, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) ("A district court may grant a preliminary injunction if one of two sets of criteria are met. Under the 'traditional' criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships

tips sharply in his favor.") (internal citations, quotations omitted).

[FN3]. No. 9-35756, *Alliance for Wild Rockies v. Cottrell,* 2010 WL 2926463 (9th Cir. 2010).

[FN4]. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010).

[FN5]. *Winter*, 129 S.Ct. at 380-82.

[FN6]. *Alliance*, 2010 WL 2926463 at *4 (quoting *Clear Channel Outdoor Inc., a Delaware Corp. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)).

[FN7]. *Alliance*, 2010 WL 2926463 at *1.

[FN8]. *Alliance*, 2010 WL 2926463 at *3 (emphasis in original, citing *Winter*, 129 S.Ct. at 374).

[FN9]. *Alliance*, 2010 WL 2926463 at *4 (quoting *Winter*, 129 S.Ct. at 392 (Ginsberg, J., dissenting).

[FN10]. *Alliance*, 2010 WL 2926463 at *4 (quoting *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009), rev'd in part on other grounds, *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 596 F.3d 602 (9th Cir. 2010)).

[FN11]. *Real Truth About Obama, Inc. v. Federal Election Com'n*, 575 F.3d 342, 347 (4th Cir. 2009), cert. granted, judgment vacated, 130 S. Ct. 2371, 176 L. Ed. 2d 764 (2010) and adhered to in part, 607 F.3d 355 (4th Cir. 2010) (holding that the circuit's prior test, which permitted "flexible interplay" among the elements, "may no longer be applied" after *Winter*), vacated on other grounds, 130 S. Ct. 2371 (2010).

[FN12]. *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (internal citations omitted).

[FN13]. *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

[FN14]. *Alliance*, 2010 WL 2926463 at *7 (internal citations omitted).

[FN15]. The Beaverhead-Deerlodge National Forest, the largest of the national forests in Montana, covers 3.35 million acres; thus, the burned area that Plaintiffs would be prevented from enjoying covers less than 0.05% of that forest. See USFS, Beaverhead-Deerlodge National Forest (visited August 4, 2010).

[FN16]. *Alliance*, 2010 WL 2926463 at *10 (citing *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) at 1004).

[FN17]. *Alliance*, 2010 WL 2926463 at *11.

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