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Preliminary Injunctive Relief in the Ninth Circuit after *Winter v. Natural Resources Defense Council*

Susan Jane Brown & Rachel Fazio***

INTRODUCTION

On November 12, 2008, the U.S. Supreme Court issued a ruling on *Winter v. Natural Resources Defense Council* (*Winter*).[1] The *Winter* case originated in March of 2007[2] in the Central District of California when multiple environmental groups challenged the Navy's issuance of an environmental assessment approving the use of mid-frequency active (MFA) sonar in exercises used to train strike teams (groups of surface ships, submarines, and aircraft) in antisubmarine warfare. Environmental groups sued pursuant to the National Environmental Policy Act (NEPA),[3] Endangered Species Act,[4] and Coastal Zone Management Act of 1972,[5] asserting that the use of MFA sonar could have a potentially significant effect on the environment and that the Navy should have

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1. Winter v. Natural Res. Def. Council (*Winter*), 129 S. Ct. 365 (2008).

2. In 2006, prior to the March 2007 lawsuit, a smaller group of environmental plaintiffs sued the Navy over the use of mid-frequency active sonar in Southern California and were awarded a temporary restraining order. *See* Natural Res. Def. Council v. Winter, CV 06-4131 FMC, 2006 U.S. Dist. LEXIS 97385, *12 (C.D. Cal. July 5, 2006) (denying the Navy's request to convert temporary restraining order to a preliminary injunction and staying the preliminary injunction pending appeal). This case was subsequently settled. *See* Natural Res. Def. Council v. Winter, 502 F.3d 859, 861 n.1 (9th Cir. 2007).

3. National Environmental Policy Act of 1969 § 102, 42 U.S.C. §§ 4321–4347(d) (2006).

4. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

5. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2006).

prepared an environmental impact statement.[6] After several proceedings at both the district court and Ninth Circuit,[7] the district court issued a narrowly tailored preliminary injunction, imposing six mitigation measures that the Navy was required to implement pending completion of an environmental impact statement.[8] The Ninth Circuit upheld the injunction.[9] The Navy, having agreed to implement four of the six mitigation measures, appealed the imposition of the two remaining mitigation measures to the U.S. Supreme Court.[10] The only legal claims remaining when the Navy petitioned for a writ of certiorari were plaintiffs' NEPA claims.[11] The Supreme Court accepted certiorari and found that due to the balancing of harms and the public interest, issuance of an injunction against the Navy's use of MFA sonar in their Southern California training exercises was improper.[12]

It has now been twenty months since this important decision. This Article examines the current status of the test for obtaining a preliminary injunction in the Ninth Circuit and offers practitioner points on how to approach a request for preliminary injunction post-*Winter*.

WHAT IS THE CURRENT TEST FOR A PRELIMINARY INJUNCTION IN THE NINTH CIRCUIT?

Prior to the Supreme Court's ruling in *Winter*, plaintiffs could employ one of two tests to obtain a preliminary injunction. As articulated

6. *See* Natural Res. Def. Council v. Winter, 645 F. Supp. 2d 841, 845–46 (C.D. Cal. 2007) (issuing a broad preliminary injunction against the use of MFA sonar in remaining Southern California naval exercises.).

7. *See id.*; *see also* Natural Res. Def. Council v. Winter, 502 F.3d 859, 865 (9th Cir. 2007) (motions panel) (granting the Navy's request to stay the broad preliminary injunction, which prohibited the use of any MFA sonar in the southern California naval exercise, and ordering an expedited briefing schedule on the merits of preliminary injunction); Natural Res. Def. Council v. Winter, 508 F.3d 885, 886–87 (9th Cir. 2007) (merits panel) (vacating the stay pending appeal, and remanding to the district court to issue a more tailored injunction which would allow MFA sonar use so long as mitigation measures were employed).

8. National Res. Def. Council v. Winter, 530 F. Supp. 2d 1110, 1112 (C.D. Cal. 2008) (issuing modified preliminary injunction to allow use of MFA sonar in southern California exercises so long as specified mitigation measures are employed); Natural Res. Def. Council v. Winter, 8:07-cv-00335-FMC-FMOx, 2008 U.S. Dist. LEXIS 28551, *3–10 (C.D. Cal. Jan. 10, 2008) (ordering Navy to immediately implement the mitigation measures identified in its previous order, resolving disputes, and providing further clarification on each mitigation measure); Natural Res. Def. Council v. Winter, 527 F. Supp. 2d 1216, 1219 (C.D. Cal. 2008) (denying request from Navy to vacate and stay the modified injunction).

9. Natural Res. Def. Council v. Winter (*NRDC v. Winter*), 518 F.3d 658, 703 (9th Cir. 2008). This decision is the final determination by the Ninth Circuit, which rejected the Defendants' motion to vacate and stay the injunction and affirmed the district court's modified tailored injunction; the discussion regarding the probability that the Natural Resources Defense Council will succeed on the merits is limited to their NEPA claims.

10. Winter v. Natural Res. Def. Council (*Winter*), 129 S. Ct. 365, 373 (2008).

11. *Id.* at 373–74.

12. *Id.* at 370.

by the Ninth Circuit in *Natural Resources Defense Council v. Winter* (*NRDC v. Winter*):[13]

> 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.

These are separate tests that courts can use to evaluate whether injunctive relief is appropriate. The alternative test, usually called the "sliding scale test,"[14] has often been utilized by conservation plaintiffs because it provides courts with more flexibility to maintain the status quo when faced with very tight timelines, imminent irreparable harm, and limited bodies of evidence to review.

After citing both tests in its opinion, the Ninth Circuit in *NRDC v. Winter* proceeded to analyze plaintiffs' claims under the traditional test. The court neither mentioned nor cited the sliding scale test again in its opinion.[15]

The Supreme Court's Majority Opinion in Winter

Because the Ninth Circuit did not utilize the sliding scale test in evaluating Natural Resources Defense Council's (NRDC) request for injunctive relief, it is not surprising that the Supreme Court's review was based entirely on whether the Ninth Circuit properly formulated and applied the traditional test. The majority opinion never dealt directly with the viability of the sliding scale test.[16] Instead, the majority explained:

> the Ninth Circuit's "possibility" standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.... Issuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.[17]

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13. *NRDC v. Winter*, 518 F.3d at 677 (internal citations omitted).

14. It is also known as the "serious questions" test. *See* United States v. Nutri-Cology, Inc., 982 F.2d 394, 396 (9th Cir. 1985).

15. *See NRDC v. Winter*, 518 F.3d at 677–703.

16. *See generally* Winter v. Natural Res. Def. Council (*Winter*), 129 S. Ct. 365, 370–87 (2008).

17. *Id.* at 375–76 (emphasis added).

The Court held that plaintiffs employing the traditional test for injunctive relief must demonstrate: (1) a strong likelihood of success on the merits; (2) a *likelihood* of irreparable injury to plaintiff if preliminary relief is not granted; (3) a balance of hardships favors the plaintiff; and (4) the public interest favors an injunction.[18]

Justice Ginsburg's Dissent in Winter

Justice Ginsburg penned an eloquent dissent in *Winter*, where, among other things, she addressed the question of whether the majority opinion eviscerated a court's ability to issue an injunction when the likelihood of irreparable harm was less than clear:

> Consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a "sliding scale," sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high.... This Court has never rejected that formulation, and I do not believe it does so today.[19]

Importantly, the majority did not address or invalidate Justice Ginsburg's observation that the sliding scale test remained good law post-*Winter*.[20] Had the Supreme Court intended to abolish the sliding scale test, it could have expressly done so. Failing that, any subsequent argument that the alternative test was eliminated by *Winter* amounts to a suggestion that it was abrogated by implication, which is unpersuasive and disfavored.[21]

The Continued Viability of the Sliding Scale Test Post-Winter

Although the Supreme Court addressed only the Ninth Circuit's formulation of the traditional test of injunctive relief, leaving the sliding scale test untouched, courts within the Ninth Circuit have wrestled with whether to use the sliding scale approach to evaluate a request for a preliminary injunction post-*Winter*. Out of 60 district court cases within the Ninth Circuit decided after March 2009 and before early October 2009, approximately 80 percent of these cases employed the sliding scale test or a combination of the sliding scale and *Winter* test, while 14 percent

18. *Id.* at 374.

19. *Id.* at 392 (Ginsburg, J. dissenting) (internal citations omitted).

20. *Id.* at 381 n.5.

21. *See* Save Strawberry Canyon v. U.S. Dep't of Energy, No. C 08-03494 WHA, 2009 WL 1098888, *3 (N.D. Cal. Apr. 22, 2009) (noting that abolishing the sliding scale test "would be such a dramatic reversal in the law that it should be very clearly indicated by appellate courts before a district court concludes that it has no such power" to grant preliminary relief based on the alternative test); *see also* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored") (internal quotations omitted).

eschewed the sliding scale test in favor of the traditional test as articulated in *Winter*.[22]

Among these cases, a strong district court decision persuasively suggested that the sliding scale test remains good law post-*Winter*.[23] In *Save Strawberry Canyon v. U.S. Department of Energy*, the Northern District of California noted that:

> It would be most unfortunate if the Supreme Court or the Ninth Circuit had eliminated the longstanding discretion of a district judge to preserve the *status quo* with provisional relief until the merits could be sorted out in cases where clear irreparable injury would otherwise result and at least "serious questions" going to the merits are raised.... Can it possibly be that the Supreme Court and Ninth Circuit have taken away the ability of district judges to preserve the *status quo* pending at least some discovery and further hearing on the merits in such cases? This would be such a dramatic reversal in the law that it should be very clearly indicated by appellate courts before a district court concludes that it has no such power.[24]

Clearly, district courts are sensitive to the claim that *Winter* somehow deprived judges of the discretion to grant injunctive relief based on the facts—including a showing of irreparable harm—of individual cases. This concern echoes Justice Ginsburg's dissent, which highlights judicial discretion to grant injunctive relief when a court sits in equity, regardless of some "predetermined quantum of probable success or injury."[25]

In *American Trucking Associations v. City of Los Angeles*, the appellate court referenced *Winter* in its application of the traditional test and held that "as the Court explained, an injunction cannot issue merely because it is *possible* that there will be an irreparable injury to the plaintiff; it must be *likely* that there will be."[26] However, this result is not surprising since the Supreme Court in *Winter* only reviewed the traditional test, determining that the Ninth Circuit must require a demonstration that irreparable harm is *likely*, rather than merely *possible*, in order to support the issuance of a preliminary injunction. There was no requirement that the Ninth Circuit utilize the sliding scale test in reviewing *American Trucking*, because it is an alternative test to the traditional one. So, the Ninth Circuit's failure to discuss the sliding scale test was not dispositive of its survival post-*Winter*.

However, in *Greater Yellowstone Coalition v. Timchak*, an unpublished opinion, the Ninth Circuit stated that "*Winter* did not reject

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22. *See* Appendix.

23. *See Save Strawberry Canyon*, 2009 WL 1098888, at *3.

24. *Id* at *2–3 (internal citations omitted).

25. Winter v. Natural Res. Def. Council (*Winter*), 129 S. Ct. 365, 392 (2008) (Ginsburg, J. dissenting).

26. Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (emphasis added).

the sliding scale approach we employ in the alternative."[27] Decided after *American Trucking*, the *Timchak* decision indicated that at least some judges on the Ninth Circuit still viewed the sliding scale test as a viable alternative to the traditional test for a grant of injunctive relief.[28]

A New Hybrid Test?

Until the Ninth Circuit clarified its stance on the continued viability of the sliding scale test, practitioners have been left to guess at whether the test survives. During a recent oral argument for a case where the viability of the sliding scale test was directly at issue,[29] a Ninth Circuit panel mentioned with approval the Seventh Circuit's decision in *Hoosier Energy v. John Hancock Life Ins. Company*.[30] In the Seventh Circuit decision, Judge Easterbrook explained that post-*Winter*,

> [i]rreparable injury is not enough to support equitable relief. There also must be a plausible claim on the merits, and the injunction must do more good than harm (which is to say that the "balance of equities" favors the plaintiff).... How 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.[31]

The *Hoosier Energy* case may very well have established a new test, wherein the court balances the probable success on the merits; likelihood of irreparable injury; and the equity of the injunction, where the more harm an injunction can prevent, the weaker the movant's claim on the merits can be while still supporting some preliminary relief.[32] While containing some elements of the traditional test, the *Hoosier Energy* test also reiterates much of the sliding scale test.

Combining the traditional and sliding scale tests into a single hybrid test which provides judges with the discretion to grant injunctive relief, while still requiring a moving party to demonstrate likely irreparable harm, may strike an appropriate balance between equity and law.

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27. Greater Yellowstone Coalition v. Timchak, No. 08-36018, 2009 U.S. App. LEXIS 7820, *3–4 n.1 (9th Cir. 2009).

28. *Id.*

29. Audio recording of the Ninth Circuit oral argument is available at United States Court of Appeals for the Ninth Circuit. Audio tape: Oral argument for Alliance for the Wild Rockies v. Jane Cottrell, No. 09-35756 (Feb. 2, 2010) (http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004867).

30. Hoosier Energy v. John Hancock Life Ins., 582 F.3d 721, 725 (7th Cir. 2009) (reformulating the sliding scale test in light of *Winter*).

31. *Id* at 725.

32. *See id*.

PRACTITIONER POINTS FOR DEALING WITH *WINTER*

If your legal practice includes requesting preliminary injunctions in the Ninth Circuit, it may be common to encounter a district court judge who is inclined to strictly and solely apply the traditional test articulated in *Winter*. Here are some tips on how to focus your arguments.

National Security Trumps Harm to Plaintiffs and the Environment

In reversing the imposition of a preliminary injunction against the Navy's MFA sonar testing off the coast of southern California, the Supreme Court in *Winter* determined that any injury to plaintiffs and marine mammals from the Navy's training exercises "is outweighed by the public interest [in national security] and the Navy's interest in effective, realistic training of sailors."[33] Contrary to many defendants' assertions, the Court in *Winter* did not find that plaintiffs *failed* to establish harm to the environment, marine mammals, and their members which would likely be irreparable, absent issuance of an injunction.[34] Rather, the *Winter* decision accepted plaintiffs' proffered claims of harm as legitimate and of the character necessary to require a balancing of the harms.[35] Indeed, the irreparable nature and the likelihood of the harm complained of by plaintiffs were not at issue in *Winter*.[36] These facts can be used to rebut attempts, by defense counsel or a court, to assert that the *Winter* holding established that harm to members of environmental groups and the environment is not irreparable or was not proven to be likely in *Winter*.

Winter Did Not Change the Definition of "Irreparable"

In 1987, the U.S. Supreme Court determined that because "[e]nvironmental injury... can seldom be adequately remedied by money damages and is often permanent or at least of long duration" it is, by its very nature, irreparable.[37] This legal tenet has been incorporated into numerous Ninth Circuit decisions.[38] The Supreme Court's ruling in *Winter* did not change or overturn this precedent. Thus, reliance on pre-*Winter* cases is appropriate to support an assertion that the type of

33. Winter v. Natural Res. Def. Council (*Winter*), 129 S. Ct. 365, 376 (2008).

34. *See id.* at 377–78.

35. *See id*. at 377–78, 382 ("We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines.").

36. *Id.* at 377–378.

37. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

38. See, for example, Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1299 (9th Cir. 2003), and Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d. 1372, 1382 (9th Cir. 1998), both of which finding that because of long term environmental consequences, Forest Service logging projects often fulfill the *irreparable* injury criterion.

environmental injury that may result from the challenged activity is *irreparable*, regardless of the fact that those previous cases articulated the chance that irreparable harm could occur in terms of being *possible* rather than *likely*. In addition, developing facts that clearly illuminate the environmental injury which will likely flow from the challenged project, and the long duration of such harm, will bolster a claim that the proffered harm is irreparable. Simultaneous development of facts showing that environmental harm will be permanent or of long duration, and could not be remedied by money damages or other legal remedies, will make it more likely that a court will balance the harms in favor of issuing an injunction.

Winter "Likelihood" versus "Possibility": Is There a Real Difference?

The *Winter* majority explained that any test that included a consideration of the *possibility* of irreparable harm—as opposed to the *likelihood* ("likely") of such harm—was too generous.[39] While the use of a particular term, as opposed to another term, should be given persuasive weight, it is far from clear whether the Supreme Court's preference for likelihood over possibility matters in practice.[40] A review of the previous twenty years of Ninth Circuit case law indicates that, in the Ninth Circuit, granting of preliminary relief has always been predicated on irreparable harm that is imminent,[41] and is not speculative[42] or remote—in other words harm that is likely to occur. The Ninth Circuit has never granted preliminary injunctive relief without a strong showing that irreparable harm may occur in the absence of an injunction. *Winter* did not change this calculus.

In addition, the actual meaning of the terms "likelihood" and "possibility" suggest that *Winter* did not change the burden of proof plaintiffs bear when moving for injunctive relief. Black's Law Dictionary defines "likelihood" as "probability;... the word imports something less than reasonably certain."[43] In turn, "probable" is defined as "having the character of probability;... supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely. *See also* 'possible.'"[44] Based on the dictionary definitions of the terms at issue in *Winter*, "likelihood" is equivalent to "possible" and "probable," suggesting that the terms can be used interchangeably. In fact, even the *Winter* Court

39. Winter v. Natural Res. Def. Council (*Winter*), 129 S. Ct. 365, 375 (2008).

40. *See* United States v. Hathaway, 242 F.2d 897, 900 (9th Cir. 1957) ("A fundamental rule of construction is that a court must give effect to every word or term.").

41. *See* Caribbean Marine Servs. Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

42. *See* Goldie's Bookstore, Inc. v Superior Court, 739 F.2d 466, 472 (9th Cir. 1984).

43. BLACK'S LAW DICTIONARY 925 (6th ed. 1990).

44. *Id*. at 1201.

itself substituted the word "likely" with "possible" in its discussion of irreparable harm.[45]

While a district court that is inclined to strictly apply *Winter* might dismiss all case law prior to the *Winter* decision based on the fact that previous cases articulated the standard as only requiring a "possibility" of irreparable harm, this type of blanket rejection is inappropriate. In fact, in *Winter* the Supreme Court acknowledged that the Ninth Circuit, although utilizing the word "possible," had correctly applied the standard because the irreparable harm to marine mammals was a near certainty,[46] and remand for the purpose of re-examining the case in light of the correctly articulated legal standard was not necessary.[47] Similarly, in a recent decision, the Ninth Circuit determined that it could review and rule on a preliminary injunction decision that was issued prior to *Winter*, as opposed to simply remanding the case for further proceedings consistent with the traditional injunction test articulated in *Winter*.[48] Although the district court articulated the standard as only requiring a "possibility" of irreparable harm, it actually based its ruling on the fact that the National Meat Association faced a "significant threat" of irreparable injury if an injunction was not issued.[49] This indicates that when a court is determining what persuasive weight to assign a case that was decided pre-*Winter*, the mere articulation of the standard ("possible" rather than "likely") is not determinative; rather, a reviewing court should analyze the actual facts of the case that supported the initial findings and determine whether the substance of the test was appropriately applied. Moreover, because the other three prongs of the traditional test remain the same,[50] pre-*Winter* cases that applied the traditional test can and should be relied upon with regard to these three requirements of the test.

As a practical matter, most environmental cases where motions for preliminary injunction are necessary involve environmentally destructive activities that are either set to begin on a certain date, or are ongoing at the time the request for preliminary relief is filed. Thus, although the Ninth Circuit's pre-*Winter* preliminary injunction test employed the use of the word "possible" to define the degree to which one must show irreparable harm, the facts of the cases themselves frequently demonstrate that the irreparable harm was more than just "possible."[51]

45. Winter v. Natural Res. Def. Council (*Winter*), 129 S. Ct. 365, 377 (2008).

46. *Id.* at 376.

47. *Id.* at 378.

48. *See* National Meat Association v. Brown, 599 F.3d 1093, 1097 (9th Cir. 2010).

49. *Id*. at 1097 n.3.

50. The three prongs—likelihood of success on the merits; balance of harms tips in plaintiffs' favor; and the public interest favors issuance of an injunction—are evaluated individually. *Winter*, 129 S. Ct. at 376.

51. *See, e.g*., Earth Island Inst. v. Forest Serv., 442 F.3d 1147, 1156 (9th Cir. 2006) (logging activities ongoing at the time the injunction was requested).

Therefore, whether a pre-*Winter* decision employs the sliding scale or traditional test, it remains good law so long as the particular facts of the cited case establish that irreparable harm was *likely* to occur.

Tailor Your Request for Relief

The Supreme Court made clear in *Winter* that the balancing of harms, and review of the public interest, must occur in the context of the specific relief requested.[52] This approach was applied by the Ninth Circuit in *Sierra Forest Legacy v. Rey*, when it overturned a district court's denial of preliminary injunctive relief for failure to analyze the balancing of harms and public interest in the context of the narrow injunction requested by environmental plaintiffs.[53] In *Sierra Forest Legacy*, plaintiffs did not request an injunction against all logging on national forests in the Sierra Nevada but, rather, requested that logging occur in accordance with a forest plan developed in 2001, rather than in compliance with an allegedly illegal forest plan amendment issued in 2004.[54] However, the district court judge refused to issue an injunction because he determined that enjoining *all* logging activities would tip the balance of harms in favor of defendants and would not benefit the public interest, even though plaintiffs never requested such a broad injunction.[55]

Based upon this analysis, a request for injunctive relief which is carefully crafted to alleviate or reduce an opponent's counterclaims of harm could result in the balancing of harms tipping in favor of an injunction. Similarly, any request for a narrowly tailored injunction should focus on minimizing or eliminating any public interest concerns that might weigh against the issuance of an injunction. This will increase the potential that a court will find that the public interest would be furthered by issuing an injunction. Thus, post-*Winter,* requesting a specific and targeted injunction can increase your chances of obtaining preliminary injunctive relief.

CONCLUSION

The Supreme Court's decision in *NRDC v. Winter* represents an important reiteration of the traditional test for the grant of preliminary injunctive relief. But it is not a watershed moment in environmental law. Instead, the sliding scale test remains good law because it preserves a

52. Winter v. Natural Res. Def. Council (*Winter*), 129 S. Ct. 365, 376 (2008).

53. Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1022–23 (9th Cir. 2009) (citations omitted) ("When deciding whether to issue a narrowly tailored injunction, district courts must assess the harms pertaining to injunctive relief in the context of that narrow injunction.").

54. *Id.* at 1018, 1022–23.

55. *Id.* at 1022–23; *see also* Sierra Forest Prot. Campaign v. Rey, No. 2:05-cv-0205-MCE-GGH, 2007 U.S. Dist. LEXIS 76765, *36–37 (E.D. Cal. Oct. 16, 2007).

court's equitable discretion to protect the status quo with temporary injunctive relief.

EPILOGUE

As this Article was going to press, the Ninth Circuit issued its decision in *Alliance for the Wild Rockies v. Cottrell*, and definitively announced its position on the viability of the sliding scale test. In holding that the test remains alive and well, the Ninth Circuit explained:

> We hold that the "serious questions" approach survives *Winter* when applied as part of the four-element *Winter* test. In other words, "serious questions going to the merits" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.[56]

The unanimous panel also noted that the Ninth Circuit's position upholding the sliding scale test was consistent with that of the Second and Seventh Circuits, but inconsistent with the Fourth Circuit: a circuit split had already developed. The Department of Justice has indicated that it is considering *en banc* review of the *Cottrell* decision.[57]

56. Alliance for the Wild Rockies v. Cottrell, No. 09-35756, 2010 U.S. App. LEXIS 15537, *10–11 (9th Cir. July 28, 2010).

57. *See* Unopposed Motion for a 30-Day Extension of Time within which to File a Petition for Rehearing and/or Rehearing En Banc, Alliance for the Wild Rockies v. US Forest Service (9th Cir. 2010) (No. 09-35756).

APPENDIX

LIST OF CITATIONS FOR POST-*WINTER* DISTRICT COURT CASES CATEGORIZED BY PRELIMINARY INJUNCTION TEST APPLIED

Out of approximately 55 cases decided since *American Trucking* that applied the sliding scale test:

- 36 cases mention *Winter*
- 8 cases mention *American Trucking*

Cases Applying Sliding Scale:

- Maier v. Multnomah County Sheriff's Office, 2009 U.S. Dist. LEXIS 95258 (D. Or. Oct. 9, 2009).
- United States v. Lang, 2009 U.S. Dist. LEXIS 89740 (S.D. Cal. Sept. 29, 2009).
- W.H. v. Clovis Unified Sch. Dist., 2009 U.S. Dist. LEXIS 88545, *4–5 (E.D. Cal. Sept. 10, 2009).
- Davis v. Schwarzenegger, 2009 U.S. Dist. LEXIS 88123 (N.D. Cal. Sept. 8, 2009).
- Tumbling v. Merced Irrigation Dist., 2009 U.S. Dist. LEXIS 80853 (E.D. Cal. Aug. 21, 2009).
- Chetal v. Am. Home Mortgage, 2009 U.S. Dist. LEXIS 77806 (N.D. Cal. Aug. 24, 2009).
- Stassart v. Lakeside Joint Sch. Dist., 2009 U.S. Dist. LEXIS 72841, * (N.D. Cal. Aug. 18, 2009) (citing Justice Ginsberg's dissent in *Winter* and noting that the *Winter* Court did not directly address the viability of the balancing approach).
- Benyamini v. Liou, 2009 U.S. Dist. LEXIS 70961 (E.D. Cal. Aug. 12, 2009).
- Witherow v. Cortez-Masto, 2009 U.S. Dist. LEXIS 88788 (D. Nev. Aug. 3, 2009).
- Nichols v. Jacoby, 2009 U.S. Dist. LEXIS 67288 (D. Or. July 31, 2009).
- Hagens Berman Sobol Shapiro L.L.P. v. Rubinstein, 2009 U.S. Dist. LEXIS 69632, *10-11 (W.D. Wash. July 29, 2009) (citing Justice Ginsberg's dissent and observing that post-Winter, "[d]espite this change, the well-recognized 'sliding scale' approach to injunctive relief remains intact").
- Matthews v. Nevada, 2009 U.S. Dist. LEXIS 87777 (D. Nev. July 27, 2009).
- Veterans for Peace Greater Seattle v. City of Seattle, 2009 U.S. Dist. LEXIS 77040 (W.D. Wash. July 24, 2009).

- Sutherlin v. Bannister, 2009 U.S. Dist. LEXIS 82680 (D. Nev. July 17, 2009).
- Sterr v. Baptista, 2009 U.S. Dist. LEXIS 66039 (C.D. Cal. July 20, 2009).
- Rivero v. McDaniel, 2009 U.S. Dist. LEXIS 77983 (D. Nev. July 17, 2009).
- Smith v. Gibbons, 2009 U.S. Dist. LEXIS 85904 (D. Nev. July 17, 2009).
- Numbers Licensing, LLC v. bVisual USA, Inc., 2009 U.S. Dist. LEXIS 72455 (E.D. Wash. July 15, 2009).
- Stevens v. Superior Court, 2009 U.S. Dist. LEXIS 56968 (E.D. Cal. July 2, 2009).
- Wood v. Aegis Wholesale Corp., 2009 U.S. Dist. LEXIS 57151 (E.D. Cal. July 6, 2009).
- Hughey v. Wells Fargo & Co., 2009 U.S. Dist. LEXIS 51302 (E.D. Cal. June 18, 2009).
- Mangindin v. Wash. Mut. Bank, 2009 U.S. Dist. LEXIS 51231 (N.D. Cal. June 18, 2009).
- Okwuosa v. City of Elk Grove, 2009 U.S. Dist. LEXIS 49592 (E.D. Cal. June 12, 2009).
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- Barendt v. Gibbons, 2009 U.S. Dist. LEXIS 83333 (D. Nev. June 4, 2009).
- Matthews v. LeGrand, 2009 U.S. Dist. LEXIS 88154 (D. Nev. Aug. 7, 2009).
- Mesde v. Am. Brokers Conduit, 2009 U.S. Dist. LEXIS 59632, *5–6 (N.D. Cal. June 30, 2009) (explaining that "'[r]egardless of how the test for a preliminary injunction is phrased, the moving party must demonstrate irreparable harm'") (quoting Am. Passage Media Corp. v. Cass Comm'ns, Inc. 750 F.2d 1470, 1473 (9th Cir. 1985)).
- Stewart v. City of San Diego, 2009 U.S. Dist. LEXIS 44032 (S.D. Cal. May 26, 2009).
- Nev. Area Council v. Margiotta, 2009 U.S. Dist. LEXIS 43064 (E.D. Cal. May 21, 2009).

- Gilding v. Carr, 2009 U.S. Dist. LEXIS 45110 (D. Ariz. May 19, 2009).
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- Cachil Dehe Band of Wintun Indians v. State, 2009 U.S. Dist. LEXIS 89371 (E.D. Cal. Sept. 11, 2009).
- G. v. Hawaii, 2009 U.S. Dist. LEXIS 73810 (D. Haw. Aug. 20, 2009).
- Carter v. Gregoire, 2009 U.S. Dist. LEXIS 75730 (W.D. Wash. Aug. 12, 2009).

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- Affiliates, Inc. v. Armstrong, 2009 U.S. Dist. LEXIS 37136 (D. Idaho Apr. 30, 2009).
- Reganit v. Kay-Co. Invs., 2009 U.S. Dist. LEXIS 34883 (E.D. Cal. Apr. 24, 2009).
- Wells v. Oregon, 2009 U.S. Dist. LEXIS 35574 (D. Or. Apr. 24, 2009).