

CHAPTERS

PRELIMINARY INJUNCTIONS IN ENVIRONMENTAL LAWSUITS: THE NINTH CIRCUIT'S DISCRETIONARY APPROACH IN *LEAGUE OF WILDERNESS DEFENDERS V. CONNAUGHTON*

BY

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The Ninth Circuit Court of Appeals' recent decision in League of Wilderness Defenders v. Connaughton exemplifies its continued resistance to the Supreme Court's approach to preliminary injunctions. This Chapter analyzes the Ninth Circuit's discretionary approach to preliminary injunctive relief, despite Supreme Court precedent in Winter v. Natural Resources Defense Council requiring courts to apply an inflexible, four-factor test. Through a detailed discussion of each part of the four-factor test, this Chapter shows that the Ninth Circuit did not faithfully apply the Supreme Court's preliminary injunction standard and that certain factors remain unclear. Finally, this Chapter concludes that environmental plaintiffs in the Ninth Circuit have benefited from the lack of clarity, but should be wary of unsettled legal standards when seeking preliminary injunctive relief.

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I. INTRODUCTION

At the turn of the twentieth century, the Pacific Northwest was the last unexploited frontier for the American timber industry.¹ A logging industry developed quickly and the national forests of the Pacific Northwest accounted for approximately half of all harvests from the national forest system as recently as 1982.² As a result of declining forest inventory, passionate debate frequently occurs between logging communities and environmental groups over national forest management.³ In addition to timber, forests provide important ecosystem services, including purifying water, sequestering carbon, and providing shelter and habitat for plant and animal species.⁴ Among the “Key Findings” in a 2010 Resources Planning Act Assessment, the United States Department of Agriculture predicted that forest inventory and carbon stored in forests will peak between 2020 and 2040, and then decline through 2060.⁵ Concerns over the right to extract resources versus environmental conservation lie at the heart of *League of Wilderness Defenders v. Connaughton (Wilderness Defenders)*,⁶ a lawsuit that turned on important legal procedural issues.⁷

In *Wilderness Defenders*, plaintiff-environmental groups League of Wilderness Defenders and Hells Canyon Preservation Council (LOWD)⁸ sought to enjoin the Snow Basin Project, a forest management project in northeastern Oregon’s Wallowa-Whitman National Forest.⁹ LOWD filed suit on the grounds that the United States Forest Service (USFS) and the United States Fish and Wildlife Service (USFWS) violated the National

¹ JAMES RASBAND ET AL., NATURAL RESOURCE LAW AND POLICY 1199–200 (Robert C. Clark et al. eds., 2d ed. 2009) (discussing the history of logging in the Pacific Northwest, “the last of the major forested regions to undergo exploitation” (quoting MICHAEL WILLIAMS, AMERICANS AND THEIR FORESTS: A HISTORICAL GEOGRAPHY 290 (1989))).

² CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 9 (Island Press 1987).

³ RASBAND ET AL., *supra* note 1, at 1201.

⁴ *Id.* at 1206.

⁵ UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE FACT SHEET, *available at* <http://www.fs.fed.us/research/docs/rpa/2010/2010-RPA-fact-sheet.pdf>.

⁶ 752 F.3d 755 (9th Cir. 2014).

⁷ *Id.*

⁸ Plaintiffs included League of Wilderness Defenders and Hells Canyon Preservation Council, both Oregon non-profit corporations. *Id.* at 755.

⁹ *Id.* at 758–59.

Environmental Policy Act (NEPA)¹⁰ and the Endangered Species Act (ESA).¹¹ In particular, LOWD sued to protect old growth forests from timber sales for private commercial logging.¹² The Snow Basin Project would disturb an area encompassing 29,000 acres of forest that provides habitat for elk and contains streams allegedly home to threatened bull trout.¹³ On the other hand, the planned timber harvest would support a “vital part of the regional economy and help small communities” by providing about 300 jobs and approximately \$275,000 in revenue.¹⁴ According to USFS, the project would provide timber, pulpwood, and firewood.¹⁵ In addition, USFS would manage selective forest harvesting and controlled burning to “promote the development of more characteristic pine forests.”¹⁶

The critical legal issue in *Wilderness Defenders* involved the use of preliminary injunctive relief.¹⁷ LOWD appealed from the denial of its motion for a preliminary injunction by the U.S. District Court for the District of Oregon.¹⁸ On appeal to the Ninth Circuit, LOWD succeeded on just one of its five claims for a preliminary injunction, halting a portion of the largest timber sale in Wallowa-Whitman’s recent history.¹⁹ However, the Ninth Circuit arguably departed from Supreme Court precedent on the availability of a preliminary injunction as applied to these circumstances.

Plaintiffs in an environmental lawsuit typically file for a preliminary injunction as one of their first steps, especially when challenging a permit or approval for a specific project.²⁰ A motion for preliminary injunction occurs after the plaintiff gets a foot in the door by establishing standing and the court requires the plaintiff to show more than the standing criteria.²¹ The court must use the limited evidence available at an early stage in the litigation to weigh the danger of incorrectly awarding preliminary relief.²² The court investigates the harm an erroneous interim decision may cause

¹⁰ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012).

¹¹ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2011); *Wilderness Defenders*, 752 F.3d 755, 759 (9th Cir. 2014).

¹² *Wilderness Defenders*, 752 F.3d at 760.

¹³ Snow Basin Vegetation Management Project, U.S. Dep’t of Agric. Forest Serv. (March 30, 2012), <http://www.fs.usda.gov/detail/wallowa-whitman/news-events/?cid=STELPRDB5361437> (last visited July 18, 2015); *Wilderness Defenders*, 752 F.3d at 760.

¹⁴ Snow Basin Vegetation Management Project, *supra* note 13; *Wilderness Defenders*, 752 F.3d at 765.

¹⁵ Snow Basin Vegetation Management Project, *supra* note 13.

¹⁶ *Id.*

¹⁷ *Wilderness Defenders*, 752 F.3d at 758.

¹⁸ *Id.*

¹⁹ *Id.*; Terri Harber, *Forest Planning Biggest Timber Sale in Many Years*, Baker City Herald (Mar. 30, 2012), <http://www.bakercityherald.com/Local-News/Forest-planning-biggest-timber-sale-in-many-years> (last visited July 18, 2015).

²⁰ Eric J. Murdock & Andrew J. Turner, *How Extraordinary is Injunctive Relief in Environmental Litigation? A Practitioner’s Perspective*, 42 ENVTL. L. REP. 10464 (2012).

²¹ Christopher Kendall, *Dangerous Waters? The Future of Irreparable Harm Under NEPA After Winter v. NRDC*, 39 ENVTL. L. REP. 11109, 11115 (2009).

²² U.S. Magistrate Judge Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 507 (2003).

and tries to minimize that harm.²³ Once awarded, a preliminary injunction provides a plaintiff relief from further harm pending final adjudication of the dispute.²⁴ Preliminary injunctions are particularly important forms of relief in environmental cases, where harms are often inadequately redressed by money damages and are permanent or irreparable within the plaintiff's lifetime.²⁵

This Chapter analyzes the Ninth Circuit's discretionary approach to preliminary injunctive relief, despite Supreme Court precedent in *Winter v. Natural Resources Defense Council (Winter)*²⁶ requiring courts to apply an inflexible, four-factor test.²⁷ Section II provides background on the preliminary injunctive relief doctrine and development of the modern standard through case law. Section III argues that the Ninth Circuit in *Wilderness Defenders* did not faithfully apply the Supreme Court's preliminary injunction standard from *Winter* and that certain factors in the Court's standard remain unclear. Finally, this Chapter concludes that environmental plaintiffs in the Ninth Circuit have benefited from the lack of clarity in *Winter*; but should be wary of unsettled legal standards when seeking preliminary injunctive relief.

II. THE DOCTRINE OF PRELIMINARY INJUNCTIVE RELIEF

The equitable remedy of injunction developed in the English Court of Chancery and the United States adopted the remedy in the Judiciary Act of 1789.²⁸ Traditionally, courts granted injunctive relief when a legal remedy was inadequate to satisfy the plaintiff's claim.²⁹ A specific standard for preliminary injunctive relief appeared at the end of the nineteenth century, requiring a plaintiff to show "a fair question to raise as to the existence of a right which he alleges" and "that he will suffer greater harm than the nonmovant if the injunction is not granted."³⁰ Today, plaintiffs rely upon Federal Rule of Civil Procedure 65 (FRCP 65) to file a motion for a preliminary injunction.³¹ FRCP 65 requires notice to the adverse party when the court issues a preliminary injunction and permits the court to consolidate the hearing on a motion for a preliminary injunction with the trial on the merits.³² However, FRCP 65 does not define the circumstances in which a court may grant a preliminary injunction, nor the standard to apply

²³ John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541 (1978).

²⁴ STEPHEN C. YEAZELL, CIVIL PROCEDURE 345 (Wolters Kluwer 8th ed. 2012).

²⁵ *Wilderness Defenders*, 752 F.3d 755, 764 (9th Cir. 2014) (citing *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987)).

²⁶ 555 U.S. 7 (2008).

²⁷ *Id.* at 20.

²⁸ Denlow, *supra* note 22, at 500–01.

²⁹ *Id.* at 501.

³⁰ *Id.* at 501–02.

³¹ *Id.* at 502; FED. R. CIV. P. 65.

³² FED. R. CIV. P. 65.

when determining whether to grant relief.³³ The lack of guidance in the federal rule allows courts to grant preliminary injunctive relief according to standards developed in case law.³⁴

The modern standard for preliminary injunctive relief requires federal courts to consider four factors: 1) the plaintiff's likelihood of success on the merits; 2) the prospect of irreparable harm; 3) the comparative hardship of the parties of granting or denying relief; and 4) the impact of relief on the public interest.³⁵ Prior to the Supreme Court's attempt to clarify the standard in *Winter*, the circuit courts applied these factors with significant variation.³⁶ On the first factor—the plaintiff's likelihood of success on the merits—courts applied derivations including a fair question on the merits,³⁷ a substantial probability of success,³⁸ a reasonable certainty,³⁹ or a clear right.⁴⁰ Certain courts used only two of the factors from the four-factor test.⁴¹ Other courts used the factors to conduct a flexible balancing test.⁴² For example, as recently as 2011 the Ninth Circuit applied a sliding scale version of a balancing test in which “a stronger showing on one element could offset a weaker showing on another.”⁴³ The Supreme Court's approach to preliminary injunctions also lacked consistency.⁴⁴ In *Winter*, the Supreme Court attempted to end the lower courts' application of various deviations from the four-factor test.⁴⁵ The Court's ruling signaled that even plaintiffs in environmental lawsuits must satisfy the more onerous standard.⁴⁶

In *Winter*, the Supreme Court vacated a preliminary injunction restricting the Navy's sonar training due to alleged harm to marine mammals.⁴⁷ Chief Justice Roberts, writing for the majority, stated that “a preliminary injunction is an extraordinary remedy never awarded as of

³³ *Id.*

³⁴ Denlow, *supra* note 22, at 502–03.

³⁵ *Id.* at 497–98.

³⁶ *Id.* at 507–09.

³⁷ *See, e.g.*, Brandeis Mach. & Supply Corp. v. Barber-Greene Co., 503 F.2d 503, 505 (6th Cir. 1974).

³⁸ *See, e.g.*, Minn. Bearing Co. v. White Motor Corp., 470 F.2d 1323, 1326 (8th Cir. 1973).

³⁹ *See, e.g.*, Robinswood Cmty. Club v. Volpe, 506 F.2d 1366, 1368 (9th Cir. 1974).

⁴⁰ *See, e.g.*, Sameric Corp. of Market Street v. Goss, 295 A.2d 277, 278–79 (Pa. 1972); *see* Leubsdorf, *supra* note 23, at 526 (discussing the lack of coherence in standards applied by courts).

⁴¹ *See, e.g.*, Chote v. Brown, 342 F. Supp. 1353, 1355–56 (N.D. Cal. 1972), *aff'd*, 411 U.S. 452 (1973); Denlow, *supra* note 22, at 509.

⁴² *See, e.g.*, Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979); Murdock & Turner, *supra* note 20, at 10464.

⁴³ *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

⁴⁴ Denlow, *supra* note 22, at 510–11. *Compare* *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Autotruck Drivers*, 415 U.S. 423 (1974) (requiring the court to apply a two-factor test showing likelihood of irreparable injury and likelihood of success on the merits), *with* *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987) (adding an additional factor requiring the court to balance the hardships faced by each party in granting or withholding relief).

⁴⁵ Murdock & Turner, *supra* note 20, at 10465.

⁴⁶ *Winter*, 555 U.S. 7 (2008).

⁴⁷ *Id.* at 12.

right.”⁴⁸ The Court explained that the district court and Ninth Circuit had “significantly understated” the burden the preliminary injunction would impose on Navy sonar trainings and ultimately the public interest in national defense.⁴⁹ The Supreme Court agreed with the Navy that the Ninth Circuit’s “possibility” of irreparable injury standard was too lenient and that plaintiffs must show that irreparable injury is *likely*.⁵⁰ The Court announced the preliminary injunction standard as the four-factor test rather than a balancing test.⁵¹ However, Justice Ginsburg’s dissent endorsed the “sliding scale” approach to equitable relief, which would allow courts to grant relief when plaintiffs show high likelihood of success, though lower likelihood of harm.⁵² Justice Ginsburg noted that the Supreme Court “never rejected that formulation” in past decisions, nor had it formally done so in the *Winter* majority opinion.⁵³ Interpreted broadly, the Court restricted preliminary injunctions to “extraordinary” circumstances.⁵⁴ However, construed narrowly, the Court declined to decide the likelihood of success on the merits and the irreparable harm factors, and rested its holding primarily on the public interest factor.⁵⁵ Therefore, the following careful analysis of *Winter* reveals continued uncertainty surrounding the Supreme Court’s preliminary injunction standard.

After the Supreme Court decided *Winter*, some circuits found that their flexible preliminary injunction standards could not be reconciled with the Supreme Court’s decision.⁵⁶ However, the Ninth Circuit continues to exhibit a highly discretionary approach to preliminary injunction motions.⁵⁷ The Ninth Circuit relied on Justice Ginsburg’s dissent in *Winter* to apply a

⁴⁸ *Id.* at 24 (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)).

⁴⁹ *Id.*

⁵⁰ *Id.* at 22.

⁵¹ *Id.* at 20 (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”); *id.* at 21 (“The District Court and the Ninth Circuit also held that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a ‘possibility’ of irreparable harm.”); *id.* at 22 (“We agree with the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient.”).

⁵² *Id.* at 51–52 (Ginsburg, J., dissenting) (describing the “sliding scale” standard as “[c]onsistent with equity’s character,” and opining that “NRDC made the required showing”).

⁵³ *Id.* (“[C]ourts 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.”)

⁵⁴ *Id.* at 24 (“A preliminary injunction is an extraordinary remedy.”).

⁵⁵ YEAZELL, *supra* note 24, at 346, 352 (“The outcome of [*Winter*] turns on the majority’s understanding of the public interest on the facts of the case, rather than the other elements of the standard.”).

⁵⁶ *Murdock & Turner*, *supra* note 20, at 10467; *see* *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 346 (4th Cir. 2009) (stating that its prior rule “now stands in fatal tension” with *Winter*); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) (stating that “the analysis in *Winter* could be read to create a more demanding burden” with respect to likelihood of success, while observing that “the decision does not squarely discuss whether the four factors are to be balanced on a sliding scale”).

⁵⁷ *See* *Murdock & Turner*, *supra* note 20, at 10468.

variation of the sliding scale approach in *Alliance for the Wild Rockies v. Cottrell* (*Alliance for the Wild Rockies*).⁵⁸ The court held that “serious questions going to the merits” and a balance of the equities favoring the plaintiff supported a preliminary injunction.⁵⁹ The court explained that *Winter* is ambiguous as to whether the sliding scale approach to the four-factor test continues to be valid.⁶⁰ Applying the sliding scale approach, the court stated that “a stronger showing of irreparable harm . . . might offset a lesser showing of likelihood of success on the merits.”⁶¹ Thus, the Ninth Circuit continues to apply a discretionary approach despite the Supreme Court’s directive to reserve preliminary injunctive relief for “extraordinary” circumstances.⁶²

III. THE FLEXIBLE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF IN WILDERNESS DEFENDERS

The preliminary injunction granted in *Wilderness Defenders* exemplifies the Ninth Circuit’s continued resistance to the *Winter* approach. LOWD brought five claims against USFS alleging violations of NEPA and the ESA.⁶³ The Ninth Circuit first addressed whether LOWD was likely to succeed on the merits of each claim.⁶⁴ The court found that LOWD was not likely to succeed on three of its NEPA claims or its ESA claim and went no further in its analysis of those claims.⁶⁵ The court held that LOWD was likely to succeed on its claim that USFS’s final environmental impact statement (FEIS) was inadequate to address the potential harm to elk in Snow Basin after USFS withdrew its Travel Management Plan (TMP).⁶⁶ When the court evaluated whether the harm to LOWD was irreparable, it explained that although an environmental injury will not always warrant an injunction, such an injury can rarely be remedied by money damages and is often permanent.⁶⁷ The court concluded that the logging of thousands of mature trees would cause irreparable harm.⁶⁸ Next, the court balanced the equities and determined that they tipped in favor of LOWD because logging would

⁵⁸ 632 F.3d 1127, 1131–32 (9th Cir. 2011) (citing Justice Ginsburg’s *Winter* dissent for the proposition that the majority opinion in *Winter* did not disapprove of the sliding scale approach and holding that the “serious question” version of the sliding scale test “remains viable”); see also *Murdock & Turner*, *supra* note 20, at 10468.

⁵⁹ *Alliance for the Wild Rockies*, 632 F.3d at 1135.

⁶⁰ *Id.* at 1131 (“The majority opinion in *Winter* did not, however, explicitly discuss the continuing validity of the ‘sliding scale’ approach to preliminary injunctions employed by this circuit and others.”)

⁶¹ *Id.*

⁶² *Winter*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)).

⁶³ *Wilderness Defenders*, 752 F.3d 755, 760 (9th Cir. 2014).

⁶⁴ *Id.*

⁶⁵ *Id.* at 762–64.

⁶⁶ *Id.* at 761.

⁶⁷ *Id.* at 764.

⁶⁸ *Id.* at 764–65 (finding that “the Snow Basin project will lead to the logging of thousands of mature trees” and, as a result, the project is “likely to irreparably harm [the LOWD] members’ interest in the project areas”).

cause permanent harm, whereas jobs and revenue from the project would only be deferred if LOWD later lost at trial.⁶⁹ Finally, the court held that public interest favored granting the preliminary injunction.⁷⁰

The Ninth Circuit's preliminary injunction analysis in *Wilderness Defenders* took advantage of ambiguities in *Winter* and failed to faithfully apply the Supreme Court's standard to each of the four factors. The Ninth Circuit deviated from the Supreme Court's approach in *Winter* by: 1) reaffirming the "serious questions" standard as an alternative to the stricter "likelihood of success on the merits" standard;⁷¹ 2) applying a special standard in environmental lawsuits for irreparable harm;⁷² 3) balancing the irreparable environmental harms in the equities balance;⁷³ and 4) weighing competing public interests.⁷⁴ The following discussion reviews each part of the four-factor test in detail.

A. Likelihood of Success on the Merits

In *Wilderness Defenders*, in dicta placed in a footnote, the Ninth Circuit reiterated its sliding scale approach, which permits less likelihood of success on the merits—the first factor—if the plaintiff makes a stronger showing on the balance of the hardships—the third factor.⁷⁵ However, the Supreme Court in *Winter* mandated a more difficult approach, requiring the plaintiff to persuade the court on each factor of the four-part test.⁷⁶ Although the Ninth Circuit actually applied the "likelihood of success" standard, it preserved the "serious question" standard for future discretionary use.⁷⁷

In *Winter*, the Supreme Court applied the stricter standard that a plaintiff must establish that they are likely to succeed on the merits of the claim in order to obtain a preliminary injunction.⁷⁸ The district court and the Ninth Circuit had held that a preliminary injunction properly followed from a "serious question" about the lawfulness of the "emergency circumstances" under which the Navy claimed NEPA compliance.⁷⁹ The Supreme Court declined to address whether the plaintiffs had established a likelihood of success on the merits and therefore did not expressly reject the lower courts' approach to this factor.⁸⁰ However, the Court's four-factor test uses the word "and" between the third and fourth factors, suggesting that a

⁶⁹ *Id.* at 765–66.

⁷⁰ *Id.* at 766–67.

⁷¹ *See infra* Part III.A.

⁷² *See infra* Part III.B.

⁷³ *See infra* Part III.C.

⁷⁴ *See infra* Part III.D.

⁷⁵ *Wilderness Defenders*, 752 F.3d at 759 n.1; *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008).

⁷⁶ *Winter*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. at 689–90 (2008)).

⁷⁷ *Wilderness Defenders*, 752 F.3d at 765, 765 n.3.

⁷⁸ *Winter*, 555 U.S. at 20.

⁷⁹ *Id.* at 19–20; *Nat. Res. Def. Council v. Winter*, 543 F.3d 1152, 1155, 1162 (9th Cir. 2008); *Nat. Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216, 1225–27, 1238–39 (C.D. Cal. 2008).

⁸⁰ *Winter*, 555 U.S. at 23–24.

plaintiff must meet each of the four factors, rather than succeed in a balancing test.⁸¹

Accordingly, in *Wilderness Defenders*, the Ninth Circuit treated LOWD's likelihood of success on the merits as a threshold issue.⁸² The Ninth Circuit addressed the likelihood of LOWD's success on four challenges under NEPA and an additional challenge under the ESA.⁸³ Although the Ninth Circuit followed the *Winter* "likelihood of success" standard, it also cited *Alliance for the Wild Rockies* for the proposition that "serious questions going to the merits and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction."⁸⁴ The "serious questions" standard means the court is less certain that the plaintiff will succeed in the lawsuit, but, at the outset, the plaintiff faces significantly more hardship from withheld relief than the defendant will endure from temporarily granted relief.⁸⁵

1. Successful Supplemental Environmental Impact Statement Claim

The Ninth Circuit concluded that LOWD was likely to succeed on the merits of one of its five challenges to the Snow Basin Project.⁸⁶ LOWD argued that under NEPA, USFS's withdrawal of its TMP from the project required a supplemental environmental impact statement (EIS) to evaluate how the project would endanger certain wildlife.⁸⁷ Before explaining its analysis, the Ninth Circuit reaffirmed its sliding scale standard in dicta, stating that "substantial questions" regarding the effects of a policy change to a project are sufficient to halt the project.⁸⁸ Therefore, the Ninth Circuit suggested that it would not restrict itself to the *Winter* standard in future cases. However, the Supreme Court had previously expressed disapproval for preliminary injunctions issued by the same court based on a similar standard—the plaintiff raising "serious questions" and a "fair ground for litigation."⁸⁹ Furthermore, nothing in the Supreme Court's *Winter* opinion indicated that a lower court should apply any standard other than "likely to succeed on the merits."⁹⁰ The Ninth Circuit issued a reversal-proof decision

⁸¹ Murdock & Turner, *supra* note 20, at 10466 n.12.

⁸² *Wilderness Defenders*, 752 F.3d 755, 760 (9th Cir. 2014) ("Upon determining that [plaintiffs] are [likely to succeed on the merits], we then proceed to consider the remaining prongs of the *Winter* test.").

⁸³ *Id.*

⁸⁴ *Id.* at 759 n.1 (quoting *Alliance for the Wild Rockies*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

⁸⁵ Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1530–31 (2011).

⁸⁶ *Wilderness Defenders*, 752 F.3d at 760.

⁸⁷ *Id.* at 761.

⁸⁸ *Id.* at 760 (citing *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006)).

⁸⁹ Murdock & Turner, *supra* note 20, at 10466. Just prior to *Winter* the Supreme Court vacated a preliminary injunction, which the lower court granted based on the plaintiff raising issues "so serious, substantial, difficult and doubtful as to make them fair ground for litigation." *Munaf v. Geren*, 553 U.S. 674, 690 (2008).

⁹⁰ Murdock & Turner, *supra* note 20, at 10466.

in *Wilderness Defenders* by following the likelihood of success standard, while simultaneously trying to preserve grounds for future elaboration of the doctrine by the Supreme Court with reference to environmental claims.

In applying the more rigorous “likelihood of success” standard to evaluate LOWD’s NEPA claims, the Ninth Circuit substantially relied upon USFS’s FEIS.⁹¹ The Ninth Circuit reasoned that LOWD was likely to succeed on the merits of its first NEPA claim based on the contradiction in the FEIS statements and USFS’s later abandonment of the TMP.⁹² The FEIS explained that the elk population indicates “the quality and diversity of the general forested habitat,” but identified roads as “a major factor influencing elk distribution.”⁹³ The FEIS predicted that the TMP would improve conditions for elk by reducing road density in the project area.⁹⁴ The Ninth Circuit explained that the FEIS relied enough on the defunct TMP to likely require USFS to prepare a supplemental EIS.⁹⁵ Additionally, the court explained that public policy favored a supplemental EIS.⁹⁶ The court emphasized that a “lack of clarity” would frustrate NEPA’s purpose of informing the public.⁹⁷ The court’s analysis of the FEIS suggests that LOWD had to present evidence of obvious contradiction between the FEIS and subsequent USFS decisions in order to show a likelihood of success on the merits of their claim and move forward to the next step of the analysis for a preliminary injunction.

2. Remaining Unsuccessful Claims

The Ninth Circuit’s significant reliance on the FEIS in determining whether LOWD was likely to succeed made a favorable ruling on LOWD’s four other claims nearly impossible. In denying relief on LOWD’s four other claims, the court deferred to USFS’s decision to omit or disregard certain issues in the FEIS.⁹⁸ One of LOWD’s unsuccessful claims provides an example. Applying straightforward legal analysis to LOWD’s argument that USFS must complete a cumulative impacts analysis, the Ninth Circuit held that LOWD was not likely to prevail.⁹⁹ The Ninth Circuit explained that a cumulative impacts analysis requires the agency to have a goal while actively preparing to make a decision on the means to accomplish it.¹⁰⁰ In addition, the Ninth Circuit explained that the court must look at “a proposal’s

⁹¹ *Wilderness Defenders*, 752 F.3d at 760.

⁹² *Id.* at 760–61.

⁹³ *Id.* at 760 (quoting U.S. DEP’T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT, SNOW BASIN VEGETATION MANAGEMENT PROJECT 247 (2012), available at http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/50026_FSPLT2_120637.pdf).

⁹⁴ *Wilderness Defenders*, 752 F.3d at 761.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 762.

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing 36 C.F.R. § 220.4(a)(1)(2012)) (stating that NEPA applies if the “Forest Service has a goal and is actively preparing to make a decision”).

parameters as the agency defines them.”¹⁰¹ The Ninth Circuit held that although USFS included 130 acres of group selection treatment in its Correction Notice,¹⁰² LOWD had not shown a likelihood of USFS proceeding on this particular logging, nor a timetable for the action.¹⁰³ The Ninth Circuit’s analysis of the remaining NEPA and ESA claims followed the same approach regarding deference to the agency.¹⁰⁴

B. Irreparable Harm

In the second prong of the preliminary injunction test in *Wilderness Defenders*, the Ninth Circuit generalized harm to the environment as the basis for its determination that LOWD succeeded in showing irreparable harm.¹⁰⁵ The Supreme Court never clearly approved of this basis of harm, as exhibited by the following examples. First, dicta in *Amoco Production Co. v. Village of Gambell, Alaska (Amoco)*¹⁰⁶—a Supreme Court case predating *Winter*—established the principle of a more lenient environmental harm standard.¹⁰⁷ Second, in *Winter*, the Court declined to address whether plaintiffs adequately showed a likelihood of irreparable injury, so it never reached the question of whether there is a special standard for environmental harm.¹⁰⁸

The Ninth Circuit in *Wilderness Defenders* cited to *Amoco* for the proposition that environmental lawsuits warrant a more lenient standard for irreparable harm.¹⁰⁹ In *Amoco*, the Supreme Court stated that “environmental injury, by its nature, can seldom be remedied by money damages and is often permanent or at least of long duration; i.e. irreparable.”¹¹⁰ The Court further explained that if the plaintiff shows sufficient likelihood of harm, “the balance of harms will usually favor the issuance of an injunction to protect the environment.”¹¹¹ Plaintiffs in environmental lawsuits often cite to *Amoco* despite the fact that the Supreme Court did not find injury “at all probable” and vacated the injunction.¹¹² *Amoco* focused on injury to plaintiffs’ subsistence fishing and hunting as a result of defendant’s oil drilling

¹⁰¹ *Id.* (citing *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

¹⁰² U.S. DEP’T OF AGRIC., CORRECTION NOTICE TO SNOW BASIN VEGETATION MANAGEMENT PROJECT ENVIRONMENTAL IMPACT STATEMENT 3 (2012), available at http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/50026_FSPLT3_14_28493.pdf.

¹⁰³ *Wilderness Defenders*, 752 F.3d at 762.

¹⁰⁴ *Id.* at 762–63 (accepting the agency’s factual determinations and stating that plaintiffs were not likely to succeed on their claims).

¹⁰⁵ *Id.* at 764.

¹⁰⁶ 480 U.S. 531 (1987).

¹⁰⁷ *Id.* at 545 (explaining why environmental injuries require a different standard).

¹⁰⁸ *Winter*, 555 U.S. 7, 23–24 (2008).

¹⁰⁹ *Wilderness Defenders*, 752 F.3d at 764 (quoting *Amoco*, 480 U.S. at 545).

¹¹⁰ *Amoco*, 480 U.S. at 545.

¹¹¹ *Id.*

¹¹² *Id.*; *Murdock & Turner*, *supra* note 20, at 10467.

activities, rather than generalized environmental harm, in determining that a preliminary injunction was improper.¹¹³

The Supreme Court in *Winter* disapproved of a standard more lenient than the likelihood of irreparable harm for the second prong in the preliminary injunction test.¹¹⁴ Although the Supreme Court's basis for vacating the preliminary injunction against the Navy was not the lower courts' irreparable harm standard, the Court devoted a paragraph to what it referred to as "our frequently reiterated standard."¹¹⁵ The Court stated that "a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy."¹¹⁶ Instead, the plaintiff must show "that irreparable injury is *likely* in the absence of an injunction."¹¹⁷ With respect to alleged irreparable harm under NEPA, the Supreme Court noted that the statute "does not mandate particular results," but rather ensures the availability of "detailed information concerning significant environmental impacts."¹¹⁸ Consequently, the Supreme Court indicated that irreparable harm should not be easier for environmental plaintiffs to satisfy under NEPA than for plaintiffs in any other type of lawsuit.

At least one law review comment proposes an alternate standard for irreparable harm for claims under NEPA and similar procedural statutes.¹¹⁹ The standard derives from opinions by Justice Stephen Breyer, then of the U.S. Court of Appeals for the First Circuit, prior to his appointment to the Supreme Court, and his dissent in *Winter* reiterated it.¹²⁰ Justice Breyer endorsed the presumption that a violation of NEPA, in failing to perform the procedures the statute requires, is irreparable harm.¹²¹ In *Winter*, Justice Breyer reasoned that "the *absence* of an injunction means that the Navy will proceed with its exercises in the absence of the fuller consideration of environmental effects that an EIS is intended to bring," which is inconsistent with NEPA's purpose to inform public officials positioned to make decisions with environmental consequences.¹²² However, this standard for irreparable harm makes it easier for a plaintiff in an environmental lawsuit to seek a preliminary injunction, which conflicts with the majority's explanation of the standard in *Winter*.¹²³ Furthermore, a presumption of irreparable harm based

¹¹³ *Amoco*, 480 U.S. at 545; Murdock & Turner, *supra* note 20, at 10467.

¹¹⁴ *Winter*, 555 U.S. 7, 22 (2008) ("We agree with the Navy that the Ninth Circuit's 'possibility' standard is too lenient.").

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 23 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989)).

¹¹⁹ See Kendall, *supra* note 21, at 11110.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Winter*, 555 U.S. at 35; *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989); 40 C.F.R. § 1500.1(c) (2014).

¹²³ See Kendall, *supra* note 21, at 11,109–10 (explaining that while the Supreme Court standard requires a showing of the likelihood of irreparable harm, Justice Breyer viewed the "failure to perform the process and procedures required by [NEPA]" as the irreparable harm itself).

on a NEPA violation impermissibly merges the first and second prongs of the test, for which the Supreme Court requires distinct analyses.¹²⁴ Following Justice Breyer's approach, a plaintiff who is likely to succeed on the merits of a NEPA claim would automatically satisfy a showing of irreparable harm.

The Ninth Circuit, in *Wilderness Defenders*, arrived at the same presumption of harm as Justice Breyer.¹²⁵ The court explained that arguments against a preliminary injunction in an environmental lawsuit are more "aptly aimed at the remaining prongs of the *Winter* analysis."¹²⁶ The court characterized the irreparable harm as "the logging of thousands of mature trees" that "neither the planting of new seedlings nor the paying of money damages" could remedy.¹²⁷ The Ninth Circuit focused generally on harm to the environment, while Justice Breyer examined the procedural injury in failing to follow NEPA. Both approaches carve out a special standard for irreparable harm, either broadly in all environmental lawsuits or more narrowly in NEPA claims. Neither approach focused on "a clear showing that the plaintiff is entitled to such relief" based upon likely harm to *their* specific environmental interests.¹²⁸ Therefore, the Ninth Circuit deviated from *Winter* by applying a special standard for environmental harm.

C. The Balance of Hardships

After the Ninth Circuit determined that LOWD showed irreparable harm to the environment, the court weighed this against the potential hardship of a preliminary injunction to the defendant-intervenors under the third prong of the test. According to the precedent in *Winter*, the Ninth Circuit should have balanced the likelihood of irreparable injury to LOWD itself against the defendant-intervenors' economic interests.¹²⁹ The Supreme Court in *Winter* provided minimal guidance as to when general environmental harm can support the plaintiff in the balance of hardships.

In *Winter* the Supreme Court explained that courts must balance the possible injury claimed by each party when considering whether to grant a motion for a preliminary injunction.¹³⁰ The Court held that the circuit court failed to adequately weigh the harm to the Navy's ability to use sonar training to practice locating and tracking modern diesel-electric enemy submarines.¹³¹ The Court compared the inability of the Navy to conduct realistic training exercises, which it considered of high importance to defense preparedness, to the impairment of the plaintiffs' research and

¹²⁴ *Winter*, 555 U.S. at 20.

¹²⁵ *Wilderness Defenders*, 752 F.3d 755, 764–65 (9th Cir. 2014) (concluding that, for preliminary injunction analysis, a logging project was likely to irreparably harm environmental plaintiff's interests if the logging turned out to be "incorrect in law").

¹²⁶ *Id.* at 764.

¹²⁷ *Id.*

¹²⁸ *Winter*, 555 U.S. at 22.

¹²⁹ *Id.* at 25–26.

¹³⁰ *Id.* at 24.

¹³¹ *Id.* at 12–13, 24.

observation of marine mammals.¹³² The Court stated that it did not “question the seriousness” of the plaintiffs’ interests.¹³³ However, the Supreme Court did not appear persuaded that the plaintiffs had shown irreparable harm, noting that no episode of harm to a marine mammal had been documented in forty years of training.¹³⁴ On the other hand, the Court determined that sonar training to thwart potential enemy submarine activity caused the balance of equities to “tip strongly in favor of the Navy.”¹³⁵ The Court further strengthened its holding for the Navy by explaining the public interest in national defense.¹³⁶ Even though the Court declined to decide whether plaintiffs showed irreparable harm, it suggested that a lack of scientific evidence showing harm to marine mammals weakened their argument in the hardships balance.¹³⁷ Whereas the duration and scope of environmental harm may make a compelling argument for granting a preliminary injunction in some instances, the more concrete and quantifiable harms to Navy training exercises weighed heavier in the balance for the Court in *Winter*.¹³⁸

In *Wilderness Defenders*, the Ninth Circuit balanced the equities by comparing a likelihood of irreparable environmental harm to potential economic harm to the defendant-intervenors based upon delay of the Snow Basin Project.¹³⁹ In substituting harm to the environment for harm to LOWD, the Ninth Circuit failed to strictly apply Supreme Court precedent in the equities balance. In *Winter*, the Supreme Court considered the potential inability of the plaintiffs to study the marine mammals affected by sonar training, while the Ninth Circuit never discussed harms LOWD alleged to its members’ own recreational and spiritual interests in the Snow Basin Project area.¹⁴⁰ The Ninth Circuit’s standard differs from *Winter* in that the Supreme Court did not compare harm to marine mammals and the ocean ecosystem to the inability to conduct Navy sonar-training exercises.¹⁴¹ While the Ninth Circuit’s error is purely formalistic, since LOWD’s interests extended to general environmental conservation,¹⁴² it is unclear whether the Supreme Court would approve of this approach.

¹³² *Id.* at 25–26.

¹³³ *Id.* at 26.

¹³⁴ *Id.* at 33.

¹³⁵ *Id.* at 26.

¹³⁶ *Id.* at 24.

¹³⁷ *Id.* at 33.

¹³⁸ *Id.* at 33.

¹³⁹ *Wilderness Defenders*, 752 F.3d 755, 765 (9th Cir. 2014).

¹⁴⁰ *Winter*, 555 U.S. at 25–26; Brief for Appellant at 52, *Wilderness Defenders*, 752 F.3d 755 (9th Cir. 2014) (No. 13-35653). *See also Wilderness Defenders*, 752 F.3d at 764–65 (considering only environmental harms and not addressing harms alleged by LOWD members).

¹⁴¹ *See Winter*, 555 U.S. at 26 (balancing the Navy’s inability to conduct training exercises with NRDC members’ alleged harms of decreased study and observation opportunities rather than with effects on marine mammals themselves).

¹⁴² *See* First Amended Complaint for Vacatur of Illegal Agency Decisions, Injunctive and Declaratory Relief at 5–6, *Wilderness Defenders*, 752 F.3d 755 (9th Cir. 2014) (No. 3:12-cv-02271-HZ) (identifying LOWD as “a nonprofit environmental advocacy organization dedicated to the conservation of the natural ecosystems of the Pacific Northwest and the native flora and fauna they harbor.”).

Additionally, the Ninth Circuit focused on the two specific economic harms defendant-intervenors alleged: “loss of jobs and loss of government revenue.”¹⁴³ In determining that defendant-intervenors’ economic interests in the Snow Basin Project faced delay, but not complete loss, the Ninth Circuit held that the balance of equities tipped in favor of preventing “permanent” harm from “logging thousands of mature trees.”¹⁴⁴ Just as “permanent” harm to LOWD members may result from logging old growth trees that will not regenerate in their lifetime, it is equally possible that defendant-intervenors may not completely recover their anticipated economic benefit after the delay. A preliminary injunction may cause irreparable harm to a defendant in the form of “increasing costs and uncertainties that can undermine the project economics or jeopardize financing.”¹⁴⁵ The danger of harm to either party from an incorrect preliminary assessment is central to the court’s preliminary injunction analysis and a subtle change to the characterization of the harm makes the outcome less certain.

D. Public Interest

Under the final prong of the preliminary injunction analysis, the Ninth Circuit took a highly discretionary approach in characterizing and balancing the harm as it considered equitable. According to the precedent in *Winter*, the Ninth Circuit was required to identify and weigh the potential injuries to the public.¹⁴⁶ In establishing environmental injury as practically certain and natural disasters or economic harm as speculative or temporary, the Ninth Circuit balanced the competing public interests in favor of awarding the preliminary injunction.¹⁴⁷

In *Winter*, the Supreme Court determined the outcome of the plaintiffs’ preliminary injunction motion based primarily upon the public interest prong.¹⁴⁸ The Court stated that the Navy’s interest and the public interest in national defense were the same.¹⁴⁹ The Court held that the public interest in Navy sonar training exercises performed under realistic conditions “plainly” outweighed the plaintiffs’ interests in studying marine mammals.¹⁵⁰ The Court cited the President, the elected representative of the people and the Commander in Chief, as stating that “training with active sonar is ‘essential to national security.’”¹⁵¹ While the Supreme Court made an inference about public interest based on the President’s statement, it also chided the district

¹⁴³ *Wilderness Defenders*, 752 F.3d at 765.

¹⁴⁴ *Id.* at 764–65.

¹⁴⁵ *Murdock & Turner*, *supra* note 20, at 10469.

¹⁴⁶ *Winter*, 555 U.S. at 26.

¹⁴⁷ *Wilderness Defenders*, 752 F.3d at 764.

¹⁴⁸ *See Winter*, 555 U.S. at 24 (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982))).

¹⁴⁹ *Id.* at 25.

¹⁵⁰ *Id.* at 26.

¹⁵¹ *Id.* (citing Petition for Writ of Certiorari at 2, *Winter*, 555 U.S. 7 (2008) (No. 07-1239)).

court for “address[ing] these considerations in only a cursory fashion.”¹⁵² The Supreme Court explained that the lower courts got the outcome wrong by underestimating the burden of a preliminary injunction on the Navy’s ability to conduct adequate training to fulfill the public interest in national defense.¹⁵³ According to the Supreme Court, a proper analysis of the public interest prong requires the court to identify the public interest and fully examine the effects of a preliminary injunction on that interest.¹⁵⁴

The Ninth Circuit in *Wilderness Defenders* analyzed the public interest prong separately from the balance of the hardships.¹⁵⁵ The court stated that the public interest inquiry generally “addresses impact on non-parties rather than parties” to the lawsuit, except when the government is a party.¹⁵⁶ The court explained that the defendant-intervenors’ interests in this case made it “appropriate to consider the factors separately.”¹⁵⁷ The Ninth Circuit held that the public interest in reducing the risk of forest fires and insect infestation did not outweigh the public interest in maintaining elk habitat and old growth forests.¹⁵⁸ Unlike the Supreme Court in *Winter*, the Ninth Circuit discussed the public interest elements in both the plaintiff and the defendant’s arguments for either granting or denying the injunction.¹⁵⁹ This differs from the *Winter* approach in that the Supreme Court did not also consider the public interest in conservation of marine mammals and a healthy ocean ecosystem.¹⁶⁰

In weighing competing public interests, the Ninth Circuit defined harm to the public interest from granting or withholding preliminary injunctive relief in terms of likelihood, imminence, and permanence.¹⁶¹ The court based the outcome of the public interest prong on “imminent” harm, while also recognizing that mitigating even speculative risk “is a valid public interest.”¹⁶² The court looked to the FEIS, which predicted fire suppression “to continue and to be highly successful” and possible “periodic insect outbreaks” to conclude that these public interest risks were neither likely, nor imminent.¹⁶³ The Ninth Circuit agreed with defendant-intervenors that the *Winter* analysis permits the court to consider “private harms” in the public interest analysis.¹⁶⁴ However, the Ninth Circuit explained that any economic benefit

¹⁵² *Id.*

¹⁵³ *Id.* at 27.

¹⁵⁴ *Id.* at 24.

¹⁵⁵ *Wilderness Defenders*, 752 F.3d 755, 766 (9th Cir. 2014).

¹⁵⁶ *Id.* at 765.

¹⁵⁷ *Id.* at 766.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 766–67 (discussing the public interest in reducing the risk of forest fires, insect infestation, and economic impacts in comparison to the public interest in preserving old growth forests and elk habitat).

¹⁶⁰ *Winter*, 555 U.S. 7, 25–26 (2008) (discussing the “ecological, scientific, and recreational interests” specific to the plaintiffs rather than the general public interest in marine conservation).

¹⁶¹ *Wilderness Defenders*, 752 F.3d at 764–66.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 767.

in the form of funding for public services, such as education and mental health, would be deferred, but not eliminated if the Snow Basin Project received approval after trial.¹⁶⁵ In defining “public interest” the Ninth Circuit considered any interests it deemed relevant and at stake in issuing a preliminary injunction.¹⁶⁶ Since the Ninth Circuit thoroughly explained its broad public interest analysis, it is unlikely the court misapplied the Supreme Court’s extremely discretionary standard.

IV. CONCLUSION

The foregoing examination shows that the Ninth Circuit did not faithfully apply Supreme Court precedent to each prong of its preliminary injunctive relief analysis. The Ninth Circuit took a highly discretionary approach by: 1) reaffirming the “serious questions” standard as an alternative to the stricter “likelihood of success on the merits” standard; 2) applying a special standard in environmental lawsuits for irreparable harm; 3) balancing the irreparable environmental harms in the equities balance; and 4) weighing competing public interests. Had the Ninth Circuit applied *Winter* faithfully on the likelihood of irreparable harm and balance of hardships factors, the court may not have issued the preliminary injunction.

However, the Ninth Circuit left open the possibility of more easily granting preliminary injunctions in future environmental lawsuits. *Wilderness Defenders* encourages environmental organizations to bring lawsuits challenging permits or projects because the sliding scale approach accommodates weakness on the merits if the plaintiff makes a strong argument on the balance of equities.¹⁶⁷ *Wilderness Defenders* also makes a showing of irreparable injury easier for an environmental organization because it is not limited to harm to its members, as it can also point to general environmental harm.¹⁶⁸ Furthermore, the Ninth Circuit can adjust its approach to these standards depending on the laws challenged and the facts presented.

In planning a motion for a preliminary injunction, environmental groups should prepare for the possibility of a district court applying the more onerous requirements of *Winter* even if they ultimately benefit from the court applying a flexible standard. Continuing discretionary approaches to preliminary injunctions in the circuit courts may eventually provoke a response from the Supreme Court, resulting in less flexibility for lower courts in future environmental cases.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* 766–67

¹⁶⁷ *See id.* at 765 (recognizing that the balance of equities tips toward the LOWD plaintiffs, “because the harms they face are permanent, while the intervenors face temporary delay”).

¹⁶⁸ *See id.* at 764 (“[T]he Supreme Court has instructed us that [e]nvironmental 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.” (quoting *Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008) (en banc))).