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PRESERVING FLEXIBILITY: *ALLIANCE FOR THE WILD ROCKIES v. COTTRELL* AND THE PRELIMINARY INJUNCTION STANDARD

LAWRENCE LEE BUDNER*

Abstract: A preliminary injunction is an order granted prior to a final judgment on the merits which prevents a party from continuing with a certain conduct. The traditional standard for a preliminary injunction requires that a plaintiff show the existence of four elements: likely irreparable harm, likely success on the merits, balance of hardships in their favor, and that the public interest favors the injunction. Some courts, including the Ninth Circuit Court of Appeals, have applied more flexible versions of this standard in which there is interplay between the elements such that a strong showing of one element might offset a weaker showing of another. This Comment argues that such variations of the preliminary injunction standard are both in line with recent Supreme Court jurisprudence and beneficial to environmental plaintiffs seeking to enjoin parties from destructive practices.

INTRODUCTION

Forest land makes up roughly one-third, or 747 million acres, of the United States.¹ After centuries of steep decline, U.S. forestland is now only two-thirds of what it was four centuries ago, a result primarily of agricultural land conversion and urban expansion.² Deforestation poses significant domestic and global problems.³ Most obviously, deforestation threatens the ecological communities within forest regions.⁴ On a global level, deforestation greatly contributes to ongoing climate change and related atmospheric and hydrological problems.⁵ Nevertheless, the timber industry in the United States is immense, with the combined reve-

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2011–12.

¹ *Forest Resources of the United States*, NAT'L ATLAS OF THE U.S., nationalatlas.gov/articles/biology/a_forest.html (last modified Jan. 26, 2011).

² *Id.*; *Loss of U.S. Forest Land*, SOC'Y OF AM. FORESTERS, (Dec. 5, 2009), http://www.eforester.org/fp/documents/Loss_of_forest_land.pdf.

³ ROSS W. GORTE & PERVAZE V. SHEIKH, CONG. RESEARCH SERV., R41144, DEFORESTATION AND CLIMATE CHANGE 3–4 (2010); SOCIETY OF AMERICAN FORESTERS, *supra* note 2.

⁴ SOCIETY OF AMERICAN FORESTERS, *supra* note 2.

⁵ *See* GORTE & SHEIKH, *supra* note 3, at 3–4.

nue of the logging industry reaching approximately \$9.6 billion in 2010.⁶

The U. S. Forest Service (Forest Service) is a federal agency within the U. S. Department of Agriculture.⁷ The primary function of the Forest Service is to administer the country's national forests.⁸ Its lofty mission is "to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations."⁹ Wildfires, like the 2007 Rat Creek Wildfire in Montana, can bring environmental devastation and the opportunity for potential economic gain through timber sales.¹⁰ Wildfires test the veracity of the Forest Service's mission and the Forest Service's dedication to it.¹¹ Two years after the Rat Creek Wildfire ended, the Forest Service declared the situation an emergency, designating large portions of the Beaverhead-Deerlodge National Forest to be logged immediately by the highest bidder.¹²

As a result, Alliance for the Wild Rockies (AWR), an environmental advocacy group, brought an action against the Forest Service requesting a preliminary injunction to prevent logging of the Beaverhead-Deerlodge National Forest.¹³ The district court, however, refused to grant AWR's request for a preliminary injunction, failing to apply the more flexible serious questions test in its determination.¹⁴ In *Alliance for the Wild Rockies v. Cottrell*, the United States Court of Appeals for the Ninth Circuit considered whether the district court erred in failing to apply the serious questions test.¹⁵ Central to this question was whether the leading Supreme Court case on the issue, *Winter v. Natural Resources*

⁶ IBIS WORLD, LOGGING IN THE U.S.: U.S. INDUSTRY REPORT (June 30, 2011).

⁷ *About Us*, U.S. FOREST SERV., <http://www.fs.fed.us/aboutus/> (last modified Jan. 12, 2012).

⁸ *Id.*

⁹ *Mission, Motto, Vision, and Guiding Principles*, U.S. FOREST SERV., <http://www.fs.fed.us/aboutus/mission.shtml> (last modified Mar. 7, 2008).

¹⁰ See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127(9th Cir. 2011); DOUGLAS C. MORTON ET AL., YALE UNIVERSITY'S GLOBAL INSTITUTE OF SUSTAINABLE FORESTRY, ASSESSING ENVIRONMENTAL, SOCIAL, AND ECONOMIC IMPACTS OF WILDFIRE 49 (2003), http://environment.yale.edu/gisf/files/pdfs/wildfire_report.pdf.

¹¹ *Alliance for the Wild Rockies*, 632 F.3d at 1127.

¹² *Id.* at 1129–30.

¹³ *Id.* at 1128–29; *Alliance for the Wild Rockies*, ALLIANCE FOR THE WILD ROCKIES, <http://wildrockiesalliance.org> (last visited May 20, 2012).

¹⁴ *Alliance for the Wild Rockies*, 632 F.3d at 1135.

¹⁵ *Id.* at 1131–32.

Defense Council, allows for the application of the serious questions test when assessing a request for a preliminary injunction.¹⁶

A lack of consensus among federal circuit courts as to the legitimacy of the serious questions test raises two important questions.¹⁷ First, was *Alliance* correct in holding that *Winter* does not foreclose the serious questions test?¹⁸ Second, which preliminary injunction standard is most beneficial from an environmental standpoint? This Comment argues that *Alliance's* affirmation of the serious questions test is valid notwithstanding *Winter*, and that the decision will ultimately preserve flexibility and benefit environmental plaintiffs seeking equitable relief.

I. FACTS AND PROCEDURAL HISTORY

In August and September of 2007, the Rat Creek Wildfire raged through Montana, burning about 27,000 acres of the Beaverhead-Deerlodge National Forest.¹⁹ Roughly two years after the fire, on July 1, 2009, the Chief Forester of the U. S. Forest Service (Forest Service) made an Emergency Situation Determination (ESD).²⁰ This determination authorized immediate logging on thirty-five units of land, a total of approximately 1642 acres.²¹ Through the ESD, the Forest Service was able to bypass delays that would likely have resulted from its administrative appeals process—processes that ensure the soundness of the Forest Service's decision-making.²²

According to the Forest Service, the logging project sought to “recover and utilize timber from trees that are dead or dying as a result of the Rat Creek Wildfire or forest insects and disease”²³ In turn, the Forest Service would supply the harvested trees to the forest products

¹⁶ *Alliance for the Wild Rockies*, 632 F.3d at 1131–32; see *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

¹⁷ See *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010) (affirming the validity of the sliding scale approach); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (holding that a high degree of “net harm” can offset a weaker claim on the merits); *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 347 (4th Cir. 2009) (invalidating the sliding scale approach).

¹⁸ Compare *Alliance for the Wild Rockies*, 632 F.3d at 1135 (affirming the validity of the serious questions test), with *Real Truth*, 575 F.3d at 347 (holding more flexible standards invalid in light of *Winter*).

¹⁹ See *Alliance for the Wild Rockies*, 632 F.3d at 1129.

²⁰ See *id.*

²¹ See *id.*

²² *Id.* at 1136.

²³ *Id.* at 1129.

industry.²⁴ The project included the logging of trees from four to fifteen inches in diameter at “breast height” that died or were considered likely to die.²⁵ The Forest Service used its own internal “species-specific guidelines for determining likelihood of mortality,” and therein which trees should be cut down and sold.²⁶ Additionally, the project called for the construction and alteration of roads within the Beaverhead-Deerlodge National Forest.²⁷ After the completion of the logging project, the temporary roads would be destroyed.²⁸

That April, the Forest Service provided an Environmental Assessment (EA) of the project for public comment.²⁹ This routine administrative function allows the public to weigh in on Forest Service “activities implementing land and resource management plans.”³⁰ In June of 2009, the Acting Forest Supervisor requested that the Chief Forester issue an ESD for the Beaverhead-Deerlodge National Forest.³¹ According to the Forest Supervisor, the project would, “prevent substantial economic loss to the Federal Government.”³² Within the request, the Supervisor cited local economic concerns, stating that “[a]s markets decline and harvest activities on private lands decrease, the timber industry in Montana increasingly depends on National Forest System timber supply as an essential element to keep their mills operational.”³³

On June 22, 2009, the Regional Forester in turn forwarded the ESD request to the Chief Forester, similarly positing that a delay in logging would, “result in substantial loss of economic value to the Federal Government.”³⁴ Less than three weeks later, the Chief Forester issued the ESD, taking note that the failure to commence logging would adversely affect the federal government and the local Montana economy and lumber mills.³⁵

On July 22, 2009, the Forest Service issued a Decision Notice and Finding of No Significant Impact as well as the final EA.³⁶ The Forest Service concluded that the logging project would not have a significant

²⁴ *Id.*

²⁵ *Alliance for the Wild Rockies*, 632 F.3d at 1129.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See 36 C.F.R. § 215.1 (2011).

³¹ See *Alliance for the Wild Rockies*, 632 F.3d at 1129.

³² *Id.*

³³ *Id.* at 1130.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *id.*

adverse effect on the environment, and therefore an Environmental Impact Statement was not required.³⁷ Shortly thereafter, the Forest Service began the bidding process.³⁸ On July 10, 2009 the highest bid went to Barry Smith Logging.³⁹ That August, Barry Smith Logging began the project, successfully logging forty-nine percent of the planned areas before winter interrupted their progress.⁴⁰

Alliance for the Wild Rockies (AWR) filed suit in the United States District Court for the District of Montana.⁴¹ AWR alleged violations of the Appeals Reform Act, the National Forest Management Act, and the National Environmental Policy Act.⁴² Along with these allegations, AWR requested a preliminary injunction.⁴³ On August 14, 2009, the district court issued a brief order denying AWR's request for a preliminary injunction.⁴⁴ On January 25, 2011, AWR filed its appeal with the Ninth Circuit.⁴⁵ Although the logging was already underway at the time AWR filed its appeal, the appeal was not moot as a significant portion of the project was incomplete.⁴⁶

II. LEGAL BACKGROUND

The Supreme Court's decision in *Winter v. Natural Resources Defense Council* articulates the standard for issuing a preliminary injunction.⁴⁷ In *Winter*, plaintiffs sought a preliminary injunction to enjoin the U.S. Navy from conducting warfare training in the biologically diverse Southern California area.⁴⁸ These military training exercises involved the use of active sonar, which adversely affects the physiology and behavior of marine mammals.⁴⁹ The Court denied plaintiffs' request for a preliminary injunction, and invalidated the Ninth Circuit Court of Ap-

³⁷ *Alliance for the Wild Rockies*, 632 F.3d at 1130; see also 42 U.S.C. § 4332(c) (“[A]ll agencies of the Federal Government shall . . . include in every recommendation or report . . . a detailed statement by the responsible official on . . . the environmental impact of the proposed action.”).

³⁸ *Alliance for the Wild Rockies*, 632 F.3d at 1130.

³⁹ *Id.*

⁴⁰ *Id.* at 1131.

⁴¹ See *id.* at 1130.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Alliance for the Wild Rockies*, 632 F.3d at 1130.

⁴⁵ *Id.* at 1127.

⁴⁶ *Id.* at 1131.

⁴⁷ *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

⁴⁸ *Id.* at 14–16.

⁴⁹ *Id.* at 52 (Ginsburg, J., dissenting).

peals' approach to issuing such injunctions.⁵⁰ The Supreme Court stated that "[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."⁵¹ Thus, the Supreme Court refuted the Ninth Circuit's previous standard that preliminary injunctions may be issued based on the *possibility* of irreparable harm.⁵² According to the Court, the more stringent requirement is consistent with traditional conceptions of a preliminary injunction "as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."⁵³

Winter did not, however, explicitly discuss the validity of either the "sliding scale" approach or the serious questions test.⁵⁴ Employed by the Ninth Circuit and other federal circuits, the sliding scale approach balances the elements of a preliminary injunction test "so that a stronger showing of one element may offset a weaker showing of another."⁵⁵

The serious questions test slightly modifies the sliding scale approach.⁵⁶ The test has a long history within the Ninth Circuit and elsewhere.⁵⁷ Under the serious questions test, a court could issue a preliminary injunction "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.'"⁵⁸ Simply put, a plaintiff need not show that his case is likely to succeed, but rather that serious questions going to the merits exist.⁵⁹

Despite *Winter's* silence on the matter, Justice Ginsburg's dissent in the case suggests that *Winter* left the sliding scale and serious questions

⁵⁰ *Id.* at 12, 22 (majority opinion).

⁵¹ *Id.* at 20 (emphasis added).

⁵² *Id.* at 22.

⁵³ *Winter*, 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

⁵⁴ See *Alliance for the Wild Rockies*, 632 F.3d at 1131; see also *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting) (stating that the Supreme Court has never rejected the sliding scale approach).

⁵⁵ *Alliance for the Wild Rockies*, 632 F.3d at 1131 (citing *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). For example, under the sliding scale approach, "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Id.*

⁵⁶ See *id.* (citing *Clear Channel Outdoor, Inc.*, 340 F.3d at 813).

⁵⁷ See, e.g., *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980); *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975).

⁵⁸ *Alliance for the Wild Rockies*, 632 F.3d at 1131 (citing *Clear Channel Outdoor, Inc.*, 340 F.3d at 813).

⁵⁹ See *Alliance for the Wild Rockies*, 632 F.3d at 1131.

approaches intact.⁶⁰ The dissent emphasized flexibility as a “hallmark of equity jurisdiction,” noting that courts have traditionally assessed “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.”⁶¹

Before *Alliance for the Wild Rockies v. Cottrell*, three other federal circuit courts confronted the issue of whether the sliding scale, or its modifications, survived *Winter*.⁶² These courts split on the issue.⁶³ Although the Fourth Circuit Court of Appeals held the sliding scale approach to be invalid in *Real Truth About Obama, Inc. v. Federal Election Commission*, both the Seventh Circuit Court of Appeals and the Second Circuit Court of Appeals found otherwise.⁶⁴ In *Hoosier Energy Rural Electric Co-operative, Inc. v. John Hancock Life Insurance Co.*, the Seventh Circuit held the sliding scale test to be valid, finding that a high degree of “net harm” can offset a weaker claim on the merits.⁶⁵ The *Hoosier* court issued a preliminary injunction preventing a third party from demanding payment.⁶⁶ Although the court did not find a *likelihood* of success on the merits, plaintiffs’ arguments that the transaction was an “abusive tax shelter” and that the IRS had previously declined similar transactions were sufficient to raise serious questions on the merits.⁶⁷

Similarly embracing the sliding scale approach, the Second Circuit found that the *Winter* decision did not undermine the legitimacy of a more flexible approach.⁶⁸ In *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, the Second Circuit affirmed a lower court’s issuance of a preliminary injunction enjoining the defendants from proceeding with an arbitration initiated before the Financial Industry Regulatory Authority (FINRA).⁶⁹ In *Citigroup* the contested issue as to whether VCG was a “customer” within the FINRA rules was suffi-

⁶⁰ *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting).

⁶¹ *Id.*

⁶² See *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 347 (4th Cir. 2009).

⁶³ Compare *Citigroup*, 598 F.3d at 37, and *Hoosier*, 582 F.3d at 725, with *Real Truth*, 574 at 347.

⁶⁴ Compare *Citigroup*, 598 F.3d at 37, and *Hoosier*, 582 F.3d at 725, with *Real Truth*, 574 at 347.

⁶⁵ 582 F.3d at 725.

⁶⁶ See *id.* at 724–25.

⁶⁷ *Id.* at 725.

⁶⁸ *Citigroup*, 598 F.3d at 37.

⁶⁹ *Id.* at 39–40.

cient to pose a serious question going to the merits and thus justify the issuance of the preliminary injunction.⁷⁰

Some district courts within the Ninth Circuit have confronted the issue of *Winter*'s effect on the sliding scale and serious questions approaches; others have simply applied the serious questions test, *Winter* notwithstanding.⁷¹ For example, in *Save Strawberry Canyon v. Department of Energy*, the United States District Court for the Northern District of California held that the sliding scale approach survived *Winter*.⁷² In a subsequent order, the court cited traditional equitable powers of district courts, and Justice Ginsberg's dissent in *Winter*, to support the continuing validity of the sliding scale approach.⁷³ The issue of whether *Winter* forecloses the application of the sliding scale test was one the Ninth Circuit sought to clarify in *Alliance*.⁷⁴

III. ANALYSIS

In *Alliance for the Wild Rockies v. Cottrell*, the Ninth Circuit Court of Appeals reversed the lower court's failure to apply the serious questions test and held the serious questions test to be valid.⁷⁵ "That is, 'serious questions going to the merits' and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction."⁷⁶ Applying the test, the court further held that there existed a likelihood of irreparable harm, that there were serious questions going to the merits, that the balance of hardships tipped sharply in plaintiff's favor, and that public interest favored a preliminary injunction.⁷⁷ The court accordingly concluded that the trial court erred in denying

⁷⁰ *Id.* at 39.

⁷¹ See, e.g., *Save Strawberry Canyon v. Dep't of Energy*, No. C 08-03494 WHA, 2009 WL 1098888, at *3 (N.D. Cal. Apr 22, 2009) (order regarding preliminary injunction standard); *Quinault Indian Nation v. Kempthorne*, No. C 09-5064 RBL (W.D. Wash. Mar. 18, 2009); *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. C 08-2649 CW (N.D. Cal. Jan. 20, 2009).

⁷² *Save Strawberry Canyon*, 2009 WL 1098888, at *3 (order regarding preliminary injunction standard).

⁷³ *Id.*

⁷⁴ See *Alliance for the Wild Rockies*, 632 F.3d at 1129. The Ninth Circuit did, however, previously provide in a footnote in *Greater Yellowstone Coalition v. Timchak* that "*Winter* did not reject the sliding scale approach we employ in the alternative," despite declining "to define the sliding-scale-formulation's precise post-*Winter* contours." 323 F. App'x 512, 513 n.1 (9th Cir. 2009) (mem.).

⁷⁵ See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1139.

the request by Alliance for the Wild Rockies (AWR) for a preliminary injunction, and remanded the case.⁷⁸

With regard to the first consideration in a preliminary injunction analysis, the Ninth Circuit held that the logging project was likely to cause irreparable harm.⁷⁹ In this, the Ninth Circuit followed the Supreme Court's lead in requiring *likely*, rather than merely possible, harm.⁸⁰ Despite the U.S. Forest Service's (Forest Service) arguments that AWR members will still be able to enjoy and utilize other areas of the Forest, the court held that the logging project would irreparably harm AWR members insofar as it would prevent them from fully viewing, experiencing, and utilizing the forest.⁸¹

The court then found that there existed serious questions going to the merits.⁸² Among AWR's strongest arguments going to the merits was that the Forest Service violated the Appeals Reform Act by granting the Emergency Situation Determination (ESD).⁸³ The issuance of the ESD deprived AWR of the administrative appeals process ordinarily available for such logging projects.⁸⁴ Had the Forest Service's ESD been appealed administratively, members of the public, such as AWR, would have had the opportunity to object to the logging project.⁸⁵ The Forest Service gave no such opportunity.⁸⁶ In granting the ESD, the Chief Forester considered (1) the economic loss to the government due to the Project's delayed commencement;⁸⁷ (2) "the potential loss of an 'opportunity to accomplish Douglas-fir planting and dwarf mistletoe control objectives;'"⁸⁸ and (3) the Project's potential contribution to the

⁷⁸ *Id.*

⁷⁹ *Id.* at 1135.

⁸⁰ *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008); *Alliance for the Wild Rockies*, 632 F.3d at 1135.

⁸¹ *Alliance for the Wild Rockies*, 632 F.3d at 1135.

⁸² *Id.* at 1137.

⁸³ *Id.* at 1135–36.

⁸⁴ *Id.* at 1136.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Alliance for the Wild Rockies*, 632 F.3d at 1136. With regard to the first factor, the loss of receipts to the government, the court found that the \$16,000 to \$70,000 loss was not "substantial." *Id.* Conceding that in some contexts, \$70,000 might be a substantial loss, the court emphasized that the figure was "highly speculative." *Id.*

⁸⁸ *Id.* With regard to the second factor in the Chief Forester's analysis, the court found that the potential loss of opportunity to accomplish Douglas-fir planting "would be an actual loss only if there were no successful bid on the Project" and that such a possibility was "highly speculative." *Id.* at 1137.

local Montana economy.⁸⁹ The Ninth Circuit held that there were at least serious questions on the merits as to whether these three factors were sufficient to justify the ESD.⁹⁰ Moreover, the court emphasized that the Forest Service's delay in waiting two years before issuing the ESD undermined their contention that there was an emergency that justified the elimination of the usual administrative appeals process.⁹¹

In regard to the third element of the preliminary injunction analysis, the Ninth Circuit found "that the balance of hardships between the parties tip[ped] sharply in favor of AWR."⁹² In analyzing the "balance of hardships" courts look at the extent of the harm that has resulted, or will result, if the preliminary injunction is either granted or refused.⁹³ The court broke AWR's hardships into two categories: the harm to the recreational and work opportunities that would otherwise be available on the land, and the harm resulting from AWR's inability to engage in the administrative appeals process.⁹⁴ The court balanced these hardships with the Forest Service's estimated potential loss of \$16,000, and the "more speculative loss of up to \$70,000."⁹⁵ These potential monetary losses, however, did not outweigh the harm done to AWR.⁹⁶

Finally, the court considered the public interest element, finding that the public interest favored the issuance of the injunction.⁹⁷ In favor of granting the injunction, the court emphasized the "public interest in preserving nature and avoiding irreparable environmental injury."⁹⁸ Moreover, the court held that suspending federal projects until a "careful consideration of environmental impacts . . . comports with the public interest."⁹⁹ Comparing the public interest in environmental

⁸⁹ *Id.* at 1136. With regard to the third, and final, consideration in the Chief Forester's analysis, the court held that in considering local economic effects, "the Chief Forester relied on factors Congress did not intend [her] to consider." *Id.* at 1137. Although such economic effects may be relevant to the public interest element of the preliminary injunction analysis, local economic effects are not a consideration under Forest Service regulations. *Id.*

⁹⁰ *Id.* at 1137.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *Alliance for the Wild Rockies*, 632 F.3d at 1137–38.

⁹⁴ *Id.* at 1137.

⁹⁵ *Id.* at 1138.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1139.

⁹⁸ *Id.* at 1138 (quoting *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008)) (internal quotations omitted).

⁹⁹ *Alliance for the Wild Rockies*, 632 F.3d at 1138 (quoting *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009)) (internal quotations omitted).

preservation with the economic concerns raised by the Forest Service, the court found that the public interest favored the issuance of the injunction.¹⁰⁰ Accordingly, the court found that AWR's request established all four elements of the preliminary injunction standard.¹⁰¹

The positive impact of the Ninth Circuit's decision in *Alliance* extends beyond the Beaverhead-Deerlodge National Forest.¹⁰² Barring any contrary Supreme Court directives, *Alliance* solidifies, at least within the Ninth Circuit, the legitimacy of the more flexible serious questions and sliding scale approaches to issuing a preliminary injunction.¹⁰³ As previously mentioned, however, not all courts have joined the Ninth Circuit in embracing these tests.¹⁰⁴ Most notably, in *Real Truth About Obama, Inc. v. Federal Election Commission*, the Fourth Circuit Court of Appeals held that *Winter* precludes interplay among the elements of a preliminary injunction.¹⁰⁵ According to the Fourth Circuit's narrow interpretation of *Winter*, the decision requires a plaintiff to clearly demonstrate that they are *likely* to succeed on the merits, rather than simply show that serious questions going to the merits exist.¹⁰⁶ This inconsistency among federal circuits raises two questions. First, and most obviously, which characterization of the serious questions test is correct in light of *Winter*?¹⁰⁷ Second, which approach is most beneficial from an environmental standpoint?

Potentially, the Ninth Circuit's decision in *Alliance* sidesteps the *Winter* Court's attempt to raise the bar for plaintiffs seeking preliminary injunctions.¹⁰⁸ On its face, the *Winter* decision's requirement that plaintiffs show a *likely* irreparable harm signals a road block for environmental plaintiffs seeking to enjoin parties who are engaging in environmentally destructive practices.¹⁰⁹ Although the *Alliance* court

¹⁰⁰ *Id.* at 1138–39.

¹⁰¹ *Id.* at 1139.

¹⁰² *Id.* at 1135.

¹⁰³ *See id.* at 1132, 1135.

¹⁰⁴ *See supra* text accompanying notes 55–56.

¹⁰⁵ *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009).

¹⁰⁶ *See id.*

¹⁰⁷ Compare *Alliance for the Wild Rockies*, 632 F.3d at 1135 (affirming the validity of the serious questions test), with *Real Truth*, 575 F.3d at 347 (holding more flexible standards invalid in light of *Winter*).

¹⁰⁸ *See Winter*, 555 U.S. at 22; *Alliance for the Wild Rockies*, 632 F.3d at 1135 (upholding the “serious questions test” notwithstanding *Winter*'s characterization of a preliminary injunction as an extraordinary remedy).

¹⁰⁹ *See* Benjamin I. Narodick, *Winter v. Natural Resources Defense Council: Going into the Belly of the Whale of Preliminary Injunctions and Environmental Law*, 15 B.U. J. SCI. & TECH. L. 332, 345–47 (2009) (“[t]he combination of increasing judicial deference to the execu-

heeded the Supreme Court's directive to employ a *likely* harm standard, its application of the serious questions test negated the heightened standard.¹¹⁰ In effect, *Alliance* shifts emphasis to the other elements of the preliminary injunction standard without actually raising the bar for plaintiffs.¹¹¹ *Alliance* acquiesces to the Supreme Court's "likely harm" standard while at the same time leniently construing the "likelihood of success on the merits" element such that a plaintiff need only show "serious questions going to the merits."¹¹² One commenter accurately notes that the issue becomes one of semantics.¹¹³ As long as the Ninth Circuit continues to apply the sliding scale and serious questions tests, *Winter*'s impact will be slight.¹¹⁴

Although *Alliance* is not directly in line with *Winter*, the decision's affirmation of the serious questions test is valid.¹¹⁵ The Supreme Court's conspicuous decision to not invalidate the sliding scale and serious questions approaches explicitly supports the legitimacy of the *Alliance* decision, especially considering the Ninth Circuit's lengthy history of applying these tests.¹¹⁶ As the Second Circuit Court of Appeals notes, if the Supreme Court meant to "abrogate the more flexible standard[s], one would expect some reference to the considerable history of the flexible standards applied in various circuits and the Supreme Court."¹¹⁷ *Winter*, however, lacks any command that would preclude the application of the of the serious questions test.¹¹⁸

Moreover, the Ninth Circuit's lenient construction of the *Winter* standard for a preliminary injunction is consistent with equitable principles.¹¹⁹ To consider the standard as four discrete criteria rather than

tive branch, a diminished judicial value of environmental protection, and greater procedural barriers to obtain injunctions may make environmental litigation not only more difficult, but also create an atmosphere where such litigation is in an objectively adverse legal position by default.").

¹¹⁰ See *Alliance for the Wild Rockies*, 632 F.3d at 1135.

¹¹¹ See *id.*; Joel R. Reynolds et al., *No Whale of a Tale: Legal Implications of Winter v. NRDC*, 36 *ECOLOGY L.Q.* 753, 763–64 (2009).

¹¹² See *Alliance for the Wild Rockies*, 632 F.3d at 1132.

¹¹³ Reynolds et al., *supra* note 111, at 763–64.

¹¹⁴ See *Alliance for the Wild Rockies*, 632 F.3d at 1132; Reynolds et al., *supra* note 111, at 764.

¹¹⁵ See *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting); *Alliance for the Wild Rockies*, 632 F.3d at 1132.

¹¹⁶ See *Winter*, 555 U.S. at 52 (Ginsburg, J., dissenting); *supra* note 57.

¹¹⁷ *Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010).

¹¹⁸ See *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting).

¹¹⁹ See *id.* ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility

an interplay between four equitable considerations is inconsistent with the concept of equitable relief.¹²⁰ As Justice Ginsburg notes in her dissent in *Winter*, “[f]lexibility is the hallmark of equity jurisdiction 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.”¹²¹ *Alliance* succeeds in preserving the flexibility necessary for administering equitable relief.¹²² If *Winter* puts environmental plaintiffs seeking equitable relief at a disadvantage, *Alliance* succeeds in minimizing these effects.¹²³ In applying the sliding scale and serious questions tests, courts are in a better position to respond to the particular equities of a complex factual scenario.¹²⁴ These approaches prevent potentially deserving environmental plaintiffs from being shut out early in the litigation process.¹²⁵

Not only is the serious questions test not inconsistent with *Winter*, it is more beneficial from an environmental standpoint.¹²⁶ In the face of the Supreme Court’s blow to environmental plaintiffs, *Alliance* provides relief insofar as plaintiffs are more likely to succeed in seeking to enjoin parties from engaging in environmentally destructive conduct.¹²⁷ In holding that plaintiffs may obtain a preliminary injunction by showing serious questions going to the merits, rather than a “likelihood of success on the merits,” the Ninth Circuit alleviates the heavy weight that *Winter* seemingly placed on plaintiffs seeking equitable relief.¹²⁸

The *Alliance* decision has already proven beneficial to environmental plaintiffs seeking injunctive relief.¹²⁹ In *Confederated Tribes and Bands of Yakama Nation v. U.S. Department of Agriculture*, the court granted plaintiff’s request to enjoin the USDA from shipping garbage from Ha-

rather than rigidity has distinguished it.” (quoting *Weinberger v. Romero-Barcelo*, 465 U.S. 305, 315 (1982))) (internal quotation marks omitted); *Alliance for the Wild Rockies*, 632 F.3d at 1132, 1134.

¹²⁰ See *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting); *Weinberger v. Romero-Barcelo*, 465 U.S. 305, 312 (1982).

¹²¹ See *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting).

¹²² See *id.*; *Alliance for the Wild Rockies*, 632 F.3d at 1132.

¹²³ See *Alliance for the Wild Rockies*, 632 F.3d at 1132; Narodick, *supra* note 109, at 345–47.

¹²⁴ See *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting).

¹²⁵ See *Confederated Tribes and Bands of Yakama Nation v. U.S. Dep’t of Agric.*, No. CV-10-3050 EFS, 2010 WL 3434091, at *4–5 (E.D. Wash. Aug. 30, 2010) (order granting preliminary injunction).

¹²⁶ See *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting); *Alliance for the Wild Rockies*, 632 F.3d at 1132.

¹²⁷ See *Alliance for the Wild Rockies*, 632 F.3d at 1135; Narodick, *supra* note 109, at 345–47.

¹²⁸ See *Winter*, 555 U.S. at 20 *Alliance for the Wild Rockies*, 632 F.3d at 1131, 1135; Narodick, *supra* note 109, at 345–47.

¹²⁹ *Confederated Tribes and Bands of Yakama Nation*, 2010 WL 3434091, at *4.

waii to a landfill located within the Yakama nation's territory.¹³⁰ If successful, the dumping would likely have negatively impacted hunting, gathering, and fishing practices in the area, as well as introduced invasive species and contamination to the land's resources and waterways.¹³¹ Citing to *Alliance*, however, the *Confederated Tribes and Bands of Yakama Nation* court found that serious questions existed as to whether the USDA's Environmental Assessment "sufficiently analyzed the impacts that the shipment of Hawaiian garbage [would have had] on the affected Northwest area."¹³² Although the court did not find that plaintiffs were *likely* to succeed on this issue, the serious questions raised were sufficient to justify the issuance of the injunction.¹³³ As such, the court's application of the serious questions test allowed the issuance of a preliminary injunction that might otherwise not have been granted.¹³⁴ The *Alliance* decision and future application of the serious questions test will yield similar results within the Ninth Circuit.¹³⁵ As long as plaintiffs are able to show that a balance of hardships tips sharply in their favor, an inability to show a *likelihood* of success will no longer preclude plaintiffs from obtaining a preliminary injunction.¹³⁶

CONCLUSION

In its validation of the serious questions and sliding scale approaches for issuance of a preliminary injunction, *Alliance* affirms within the Ninth Circuit Court of Appeals a more flexible approach.¹³⁷ Although the decision arguably runs counter to the Supreme Court's decision in *Winter*, *Alliance's* validity should not be questioned because *Winter* does not expressly invalidate these more flexible approaches.¹³⁸ Moreover, the flexible approaches allow courts to better assess complex factual scenarios and make it easier for environmental plaintiffs to obtain equitable relief.¹³⁹

¹³⁰ *Id.* at *1, *5.

¹³¹ *Id.* at *4.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Winter*, 555 U.S. at 22; *Confederated Tribes and Bands of Yakama Nation*, 2010 WL 3434091, at *4.

¹³⁵ See *Alliance for the Wild Rockies*, 632 F.3d at 1135; *Confederated Tribes and Bands of Yakama Nation*, 2010 WL 3434091, at *4.

¹³⁶ See *Alliance for the Wild Rockies*, 632 F.3d at 1132, 1135; *Confederated Tribes and Bands of Yakama Nation*, 2010 WL 3434091, at *4.

¹³⁷ See *supra* notes 56–59 and accompanying text.

¹³⁸ See *supra* notes 115–118 and accompanying text.

¹³⁹ See *supra* notes 119–125 and accompanying text.