

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

NOV 16 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

CASCADIA WILDLANDS, et al.,

No. 17-35038

Plaintiffs-Appellees,

D.C. No. 6:16-cv-01710-AA

v.

MEMORANDUM\*

SCOTT TIMBER CO. and ROSEBURG  
FOREST PRODUCTS CO.,

Defendants-Appellants.

Appeal from the United States District Court  
for the District of Oregon  
Ann L. Aiken, District Judge, Presiding

Argued and Submitted October 2, 2017  
Portland, Oregon

Before: PAEZ and BEA, Circuit Judges, and LAMBERTH,\*\* District Judge.

Plaintiffs-Appellees Cascadia Wildlands, Center for Biological Diversity,  
and Audubon Society of Portland (collectively “Cascadia”), filed suit under the  
citizen-suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. §

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Royce C. Lamberth, United States District Judge for  
the District of Columbia, sitting by designation.

1540(g)(1)(A), and subsequently moved to enjoin implementation of Defendants-Appellants Scott Timber Co. and Roseburg Forest Products Co.'s (collectively "Scott Timber") logging project. Cascadia alleges that the project will result in a taking of the marbled murrelet, a seabird listed as a threatened species under the ESA. 57 Fed. Reg. 45328; *see* 16 U.S.C. § 1538(a)(1)(B). Scott Timber appeals the district court's order granting Cascadia's motion for a preliminary injunction. We have jurisdiction under 28 U.S.C. § 1292(a)(1). We reverse and remand for further proceedings.

We review *de novo* a district court's finding on standing. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 902 (9th Cir. 2002). We review for abuse of discretion a grant of a preliminary injunction. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). Conclusions of law are reviewed *de novo*, while factual determinations by the district court are reviewed for clear error. *Id.*

At the outset, we conclude that the district court properly held that Cascadia has standing to pursue this case. Cascadia's alleged injury—diminished ability to view the marbled murrelets—is cognizable as a recreational and aesthetic injury. *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). And Cascadia's injuries are imminent, given members' concrete plans to visit the area to view marbled murrelets in the near future. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

To obtain a preliminary injunction, plaintiffs must establish: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In *Winter*, the Supreme Court held that plaintiffs must demonstrate that harm is likely, not just possible, to obtain a preliminary injunction. *Id.* at 22. Here, the district court applied a sliding scale standard. Under that standard, a plaintiff can meet the burden of obtaining a preliminary injunction even when there are “serious questions going to the merits”—a lesser showing than a likelihood of success on the merits— if the balance of hardships strongly favors the plaintiff. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). This Court highlighted, however, that even under the sliding scale standard, the other two *Winter* factors—likelihood of irreparable harm and that the injunction is in the public interest—must be satisfied for a preliminary injunction to be issued. *Id.* at 1135.

The district court did not abuse its discretion by ruling that there were serious questions going to the merits in this case. The merits of this case center on whether a taking of marbled murrelets will occur as a result of the logging project—an issue the district court found hinges on whether the birds occupy the tract. 16 U.S.C. § 1538(a)(1)(B). Since the district court found that both parties

plausibly rely on qualified experts who differ on whether a taking will occur, this Court agrees that the “serious questions” standard is met. *See Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988).

The district court was also correct that the third and fourth factors of the preliminary injunction standard—balance of hardships and public interest favoring an injunction—are satisfied in this case. In cases brought under the ESA, the balance of hardships and public interest factors always tip heavily in favor of protecting the endangered species. *See Nat. Wildlife Fed’n v. Burlington Northern R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (“The ‘language, history, and structure’ of the ESA demonstrates Congress’ determination that the balance of hardships and the public interest tips heavily in favor of protected species.”) (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978)). This court has noted that “[w]e may not use equity’s scales to strike a different balance” in an ESA preliminary injunction case. *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987). Thus, we conclude that the district court did not abuse its discretion in finding these two factors supported issuing a preliminary injunction.

In its approach to evaluating irreparable harm, the district court correctly required harm to Cascadia’s interest in individual members of the marbled murrelet species as opposed to harm to the entire species itself. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995) (quoting S. Rep. No.

93–307, p. 7 (1973)) (finding that Congress intended “take” to be defined “in the broadest possible manner to include every conceivable way in which a person can “take” or attempt to “take” any fish or wildlife.”); *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1040 (9th Cir. 2007) (finding that Section 9 of the ESA “issues a blanket prohibition on the taking of any member of a listed species.”). However, the district court did err as a matter of law by requiring a lesser showing of irreparable harm than necessary to satisfy *Winter*. The district court stated:

[T]he likelihood of irreparable injury – like the likelihood of success on the merits – depends on which scientific method to follow in determining occupancy. The first and second preliminary injunction factors are inextricably intertwined. Since these two factors are bound together, plaintiffs have provided sufficient showing of likely irreparable harm by showing that serious questions exist as to the merits.

In other words, the district court found that by showing that there were serious questions as to the merits, plaintiffs had also shown a likelihood of irreparable harm. But we have held that the standard for serious questions is lower than the standard for likelihood of success on the merits. *See Republic of the Philippines*, 862 F.2d at 1362 (internal citation omitted) (“Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a ‘fair chance of success on the merits.’”); *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017) (finding that serious questions standard is a “lesser showing than likelihood of success on the merits.”). Therefore, the district court

erred in treating the two standards as equivalent. In essence, the district court found that there were “serious questions” as to whether any marbled murrelets inhabited the area in question and would therefore be harmed as a result of the logging project when the district court was actually required to find that it was *likely* that marbled murrelets inhabited the area in question and would be harmed by the project. Because a likelihood of irreparable harm, and not merely a serious question of irreparable harm, is necessary to grant a preliminary injunction, we remand to the district court to apply the proper standard. *See Winter*, 555 U.S. at 22.

**REVERSED and REMANDED.**

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.



- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

### United States Court of Appeals for the Ninth Circuit

### BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

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\*\* *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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Date

Name of Counsel:

Attorney for:

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Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk