WINTER IS COMING: UNCERTAINTY OVER THE REQUIREMENTS FOR ESTABLISHING IRREPARABLE HARM FOR INJUNCTIVE RELIEF IN SECTION 7 CASES UNDER THE ENVIRONMENTAL SPECIES ACT POST-*WINTER* AND *COTTONWOOD*

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The question is not, can they reason? Nor, can they talk? But can they suffer." [1]

I. Introduction

In the early 1970s, the gray wolf, which had once wandered free from the Arctic to Mexico, had been eliminated from more than ninety-nine percent of its former habitat in forty-eight U.S. states.[2] Several species of whales were on the verge of extinction, and only a few hundred grizzly bears could be found in the wild.[3] And our nation's symbol – the bald eagle – teetered dangerously close to being eliminated from U.S. forests.[4]

In response to these dark realizations, Congress passed the Endangered Species Act (ESA) with strong, bipartisan support.[5] Under the ESA, a species may be listed as either endangered or threatened.[6] The purpose of the ESA is "to *protect* and *recover* imperiled species and the ecosystems upon which they depend."[7] Once a species is listed, the ESA makes it unlawful for any person – including private and public entities – to "take" individuals of an endangered species and, by regulation, a threatened species.[8] Many animals require large, contingent land areas for survival; a disturbance such as a

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[1] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 310-11 n.1 (Oxford, Clarendon Press 1781) (alteration from original). This quote "is often used today as a rallying cry for those seeking to promote the cause of animal rights" as Bentham argued that "the capacity for suffering is the vital characteristic that gives a being the right to legal consideration." David S. Favre, *The Development of Anti-Cruelty Laws During the 1800s*, 1993 DET. C.L. REV. 1, 3 (1993).

[2] DEFENDERS OF THE WILDLIFE, ASSAULT ON WILDLIFE: THE ENDANGERED SPECIES ACT UNDER ATTACK 6 (2011), *available at* http://www.defenders.org/sites/default/files/publications/assault_on_wildlife_the_endangered_species_act_under_attack.pdf [hereinafter ASSAULT ON WILDLIFE].

[3] *Id.*

[4] *Id.*

[5] *Id.*; *see also generally* 16 U.S.C. § 1536. For a more lengthy discussion on the Endangered Species Act (ESA), *see generally* Michigan State Univ., Animal Legal & Historical Ctr., *Overview of the U.S. Endangered Species Act* (2003), *available at* https://www.animallaw.info/article/overview-us-endangered-species-act.

[6] *See* ASSAULT ON WILDLIFE, *supra* note 2.

[7] U.S. FISH & WILDLIFE SERV., *Endangered Species Act: Overview* (2015), *available at* http://www.fws.gov/endangered/laws-policies/ (emphasis added).

[8] 16 U.S.C. § 1538(a) (protecting endangered or threatened species); 16 U.S.C. § 1533(d) (authorizing the extension of the ESA to prohibit the taking of protected species by regulation). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.* at § 1532(19).

newly constructed road could jeopardize the local habitat.[9] Yet, animals from these protected species continue to be threatened – and often, by the actions of the U.S. federal government.[10]

Since its inception, private individuals, and environmental and activist groups, have used the citizen suit provision in the ESA to stop unlawful conduct and procedural violations by federal agencies.[11] Section 7 of the ESA (Section 7) requires federal agencies to "insure that any action authorized, funded or carried out by [the] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species."[12] As most federal agencies are not experts about impacts on endangered or threatened species, this section requires agencies to consult with the U.S. Fish & Wildlife Services (FWS) and National Marine Fisheries Services (NMFS) to determine any potential impact on a protected species.[13] During consultation, the agency receives a biological opinion addressing the proposed action.[14] If the FWS or the NMFS make a jeopardy determination,[15] the agency offers "reasonable and prudent alternatives" about how the proposed action could be modified to avoid jeopardy to protected animals.[16] If an agency does not follow the procedures required under Section 7, persons

[9] NATURAL RES. DEF. COUNCIL, *Protecting the Last Wild Forests* (Apr. 4, 2009), *available at* http://www.nrdc.org/land/forests/qroadless.asp.
[10] *See generally id.* (stating that in many areas of the U.S. wildlife habitat has been fragmented or entirely destroyed because of road construction).
[11] 16 U.S.C. § 1540(g)(4).
[12] 16 U.S.C. § 1536(a)(2).
[13] *See* U.S. FISH & WILDLIFE SERV., ESA BASICS: 40 YEARS OF CONSERVING ENDANGERED SPECIES 1-2 (2013), *available at* http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf.
[14] *Id.*
[15] During formal consultation, the U.S. Fish & Wildlife Services (FWS) or the National Marine Fisheries Services (NMFS) develops an analysis of the agency's actions that would impact protected species and their designated critical habitat, including impacts resulting from any indirect and cumulative effects. *See* 50 C.F.R. § 402.14(g)(3), (4). In performing this jeopardy determination, the FWS or NMFS are required to make informed decisions regarding the action's effects based on the best scientific and commercial data available. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).
[16] *Id.*

meeting Article III standing requirements[17] can sue for injunctive relief[18] alleging a procedural violation of the ESA.[19]

In 2008, the Supreme Court of the United States (Supreme Court) handed down the *Winter v. Natural Resources Defense Council, Inc*. decision.[20] In *Winter*,[21] within the National Environmental Policy Act (NEPA) context, the Court rejected the Ninth Circuit's "possibility" of irreparable harm test, and instead held that the proper standard for granting a preliminary injunction is if an irreparable harm is "likely" in the absence of such an injunction.[22] *Winter* has had a snowball effect in changing the standard of irreparable harm outside the NEPA context.[23]

Within the Section 7 context, an interesting situation is now unfolding in the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) concerning the proper benchmark for irreparable harm when courts consider whether to issue an injunction. *Cottonwood*

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[17] To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized[17] and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 528 U.S. 167, 180-81 (2000). Animals do not currently have the right to be heard on their own behalf. *See, e.g.*, Ceteacean Community v. Bush, 386 F.3d 1169 (9th Cir. 2004) (holding that animals lack standing to sue under the ESA, Administrative Procedure Act, Marine Mammal Protection Act, and NEPA); Tilikum v. Sea World, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (holding that whales lack Article III standing to bring action against operator of sea aquarium under the Thirteenth Amendment). *But see Tilikum*, 842 F. Supp. at 1176 (leaving open the possibility that Congress could authorize suit in the name of an animal, similar to authorizing standing to "artificial persons such as corporations, partnerships or trusts. . . ."). However, legal persons can sue to protect animals under the ESA to enforce duties created by the statute. 16 U.S.C. § 1540(g)(1)(A). The Supreme Court of the United States (Supreme Court) has held "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). An association or organization has standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Cottonwood Envtl. Law Ctr. v. United States, 789 F.3d 1075, 1079 (9th Cir. 2015).

[18] *See* discussion *infra* Part II.

[19] *See, e.g.*, Wash. Toxics Coal. v. EPA, 413 F.3d 1024 (9th Cir. 2005); Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001).

[20] *See generally* Winter v. Natural Resources Defense Council, Inc. 129 S.Ct. 365 (2008).

[21] The *Winter* decision will be discussed in more detail later in this paper. *See* discussion *infra* Part III.A.

[22] *See Winter*, 129 S.Ct. at 375.

[23] *See generally* discussion *infra* Part III.

Environmental Law Center v. United States Forest Service[24] read *Winter* to extend to the ESA Section 7 context. Extending *Winter's* irreparable harm requirement for purposes of injunctive relief is a dangerous trend. *Cottonwood* has arguably changed the game for establishing irreparable harm for injunction relief purposes in Section 7 cases. Of particular significance, *Cottonwood* can also now be used to argue that a plaintiff must show species-level harm to establish irreparable harm for injunctive relief purposes.

This paper argues that a plaintiff's interest in individuals of a species should be enough to establish irreparable harm to a plaintiff's interests for injunctive relief purposes in Section 7 cases. Part II of this paper will set the backdrop by discussing injunctive relief in the Ninth Circuit prior to *Winter* and *Cottonwood*. Next, Part III will discuss the landmark Supreme Court case *Winter* and Ninth Circuit case *Cottonwood*. Part IV will discuss issues with the *Cottonwood* decision, and discuss what the Ninth Circuit should do moving forward to remedy the confusion and potential abuse following its *Cottonwood* decision. Finally, Part V will provide a brief conclusion.

II. Injunctive Relief in the Ninth Circuit Before *Winter* & *Cottonwood*

Plaintiffs in Section 7 ESA lawsuits generally seek an injunction as the remedy.[25] The traditional four-part legal standard for injunctive relief requires a plaintiff to show that: (1) he is likely to suffer irreparable harm absent injunctive relief, (2) he is likely to

[24] *See generally Cottonwood*, 789 F.3d 1075.
[25] *See generally* Eric J. Murdock and Andrew J. Turner, *How "Extraordinary" is Injunctive Relief in Environmental Litigation? A Practitioner's Perspective*, HUNTON & WILLIAMS LLP (2012), *available at* https://www.hunton.com/files/Publication/2e2131a6-ff93-4877-8839-b8a8f85d1e10/Presentation/PublicationAttachment/d1f87b44-4f05-4cb4-b970bffaead2cba2/How_Extraordinary_Is_Injunctive_Relief_in_Environmental_Litigation.pdf [hereinafter *How Extraordinary*].

succeed on the merits, (3) the balance of harms weighs in his favor, and (4) the public interest favors an injunction.[26]

Historically, courts have employed a balancing test that weighs four factors to decide whether to grant an injunction. These factors are: (1) the likelihood that the moving party will succeed on the merits of the lawsuit, (2) the likelihood that a failure to issue a preliminary injunction will cause irreparable harm to the plaintiff's interests, (3) the balance of hardships of issuing an injunction on both parties, and (4) the effect that granting the injunction will have on the public interest.[27]

Following the Supreme Court's decision in *Tennessee Valley Authority v. Hill*,[28] many federal appellate courts departed from a strict application of the traditional four-part test. The Ninth Circuit led this trend in 1985 with its decision in *Thomas v. Peterson*.[29] In *Thomas*, the court cut out an exception to the traditional test for injunctive relief when addressing procedural violations under the ESA. There, the court determined that irreparable damage is *presumed* to flow from a failure to properly evaluate the environmental impacts of an agency action.[30] It reasoned that, "[o]nly by following the procedures can proper evaluations be made. It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed."[31]

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[26] KIRSTEN STOLL-DEBELL ET AL., INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS, SECTION OF LITIGATION – AM. BAR ASS'N 20-21 (2009).
[27] *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 388 (2006).
[28] 437 U.S. 153 (1978). In *Tennessee Valley*, the Court enjoined a nearly complete dam construction project worth over $100 million based on the finding that the project would violate Section 7 of the ESA by jeopardizing the continued existence of the snail darter. *Id.* at 171, 195.
[29] 753 F.2d 754 (9th Cir. 1985).
[30] *Id.* at 765 (emphasis added).
[31] *Id.*

Therefore, under *Thomas* a plaintiff did not have to establish irreparable harm to the protected species to justify injunctive relief – the irreparable harm was presumed if the government did not correctly abide by procedural requirements. The Ninth Circuit maintained that, "[i]f a project is allowed to proceed without substantial compliance with procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result."[32] A plaintiffs' burden in establishing a procedural violation was "to show that the circumstances triggering the procedural requirement exist, and that the required procedures have not been followed."[33]

III. Examining *Winter* and *Cottonwood*

For over thirty years, *Thomas*' presumption of irreparable harm for procedural violations of the ESA remained the authority for injunctive relief determinations.[34] But in 2008, the Supreme Court issued its landmark case *Winter*, which signaled a change to the legal landscape for injunctive relief in NEPA cases. And then, in 2015, *Cottonwood* abrogated *Thomas*' thirty years of precedent, changing the standard in Section 7 cases in a case riddled with ambiguity language that is arguably unclear as to what a plaintiff must show to establish irreparable harm.

[32] *Id.*
[33] *Id.*; *see also, e.g.*, Washington Toxics Coal. v. Envtl. Protection Agency, 413 F.3d 1024, 1034-35 (9th Cir. 2005) (reiterating that "the appropriate remedy for violations of the ESA consultation requirements is an injunction pending compliance with the ESA."); Ctr. for Biological Diversity v. U.S. Forest Serv., 820 F.Supp. 2d 1029 (D. Ariz. 2011) (granting preliminary injunction against the FWS for procedural violation by FWS); Pac. Rivers Council v. Thomas, 936 F.Supp. 738, 745 (D.Idaho 1996) (preventing agencies from "sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species.").
[34] Cottonwood Envtl. Law Ctr. v. United States, 789 F.3d 1075, 1088 (9th Cir. 2015).

A. Discussion of *Winter*

In *Winter*, the plaintiffs[35] asserted that the U.S. Navy's use of "mid-frequency active" (MFA) sonar during training exercises caused serious injuries to the thirty-seven species of marine mammals, including dolphins, whales, and sea lions inhabiting the waters off the coast of California.[36] Plaintiffs sought injunctive relief on the grounds that the MFA training violated NEPA and other federal laws like the ESA.[37] In support, the plaintiffs submitted declarations asserting that they "take whale watching trips, observe marine mammals, conduct scientific research on marine mammals, and photograph animals in their natural habitat."[38] The plaintiffs maintained that the Navy impaired their ability to study and observe the animals because the "MFA sonar will injure marine mammals or alter their behavioral patterns."[39] Firing back, the Navy argued that the MFA training had been conducted in the waters "for 40 years with no documented episode of harm to a marine mammal."[40]

The district court and the Ninth Circuit concluded that the plaintiffs showed a likelihood of success on the merits of their NEPA claim.[41] Both courts also held that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction only requires a ''possibility'' of irreparable harm.[42] They reasoned that the plaintiffs' met this standard because "the scientific studies, declarations,

[35] The plaintiffs were a group of individuals and environmental organizations "devoted to the protection of marine mammals and ocean habitats." Winter v. Natural Resources Defense Council, Inc. 129 S.Ct. 365, 366 (2008).
[36] *Id.*
[37] *Id.*
[38] *Id.* at 377.
[39] *Id.*
[40] *Id.* at 366.
[41] *Id.* at 380-81.
[42] *Id.*

and other evidence in the record established ‘‘a near certainty’’ that the Navy’s training exercises would cause irreparable harm.”[43]

The Supreme Court disagreed, holding that the standard for properly granting a preliminary injunction is not based on the “possibility” of irreparable harm but rather than “irreparable injury is *likely*” in the absence of such an injunction.[44] In doing so, the Court rejected the Ninth Circuit’s “possibility” standard as being “too lenient.”[45] The Court reasoned that because a preliminary injunction “is an extraordinary remedy never awarded as a right,” courts must engage in an *ad hoc*, factual inquiry when considering a request for a preliminary injunction.[46] By balancing “the competing claims of injury, and consider[ing] the effect of granting or withholding the requested relief,” courts should pay “particular regard to the public consequences.”[47] The Supreme Court ultimately found that the public interest in effective, realistic training by the Navy to protect national security “plainly outweigh[ed]” any possible harm to the ecological, scientific, and recreational interests asserted by the plaintiffs.[48] The Court held that this finding “alone require[d] denial of the requested injunctive relief” regardless of whether the other factors might have supported an injunction.[49]

In sum, *Winter* requires a NEPA plaintiff to demonstrate that irreparable harm is *likely* in the absence of an injunction.[50] It seemingly places a burden on the plaintiff to meet *all* four elements under the injunctive relief test, rather than balancing the factors

[43] 530 F.Supp.2d, at 1118.
[44] *Winter,* 129 S.Ct. at 375 (emphasis in original).
[45] *Id.*
[46] *Id.* at 367.
[47] *Id.* at 376-77.
[48] *Id.* at 378.
[49] *Id.* at 376.
[50] *Id.* at 375.

against one another.[51] Although the Court maintained that "courts must balance the competing claims of injury"[52] of the plaintiff and defendant, it instructed courts to "pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[53]

In the year following *Winter*, roughly eighty percent of district courts in the Ninth Circuit continued to evaluate claims for injunctive relief by balancing the four factors on a "sliding scale."[54] Then, in 2010, the Supreme Court issued an opinion in *Monsanto Co. v. Geertson Seed Farms*, which both reaffirmed *Winter* and made clear that a plaintiff in a NEPA case must demonstrate that a plaintiff will suffer irreparable injury in seeking permanent relief.[55] But courts within the Ninth Circuit remained unclear as to how to evaluate claims for injunctive relief for alleged procedural violations beyond the scope of NEPA – until *Cottonwood* extended *Winter* beyond the NEPA context and changed the game for establishing irreparable harm for injunctive relief purposes.

B. Discussion of *Cottonwood*

In June 2015, the Ninth Circuit overruled *Thomas*'[56] presumption of irreparable harm for procedural violations in Section 7 cases in its *Cottonwood* decision. There, the Cottonwood Environmental Law Center (CELC) filed suit against the U.S. Forest Service

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[51] *See, e.g.*, *How Extraordinary*, *supra* note 25, at 3. This reading of *Winter* "is consistent with the familiar principle of statutory construction that the use of the conjunctive "and" at the end of a list of requirements means that all of the listed requirements must be satisfied." *See id.* at n. 12 (referring to Norman J. Singer, Statutes and Statutory Construction, vol. 1A §21.14.). Furthermore, in a case following *Winter* the Court stated that "a court must determine that an injunction should issue under the traditional four-fact test . . . ." *See* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157 (2010) (observing that there is nothing in NEPA that allows courts considering injunctive relief to put their "thumb on the scales.").

[52] *Winter,* 129 S.Ct. at 376-77.

[53] *Id.* at 376.

[54] *See* Susan J. Brown & Rachel Fazio, *Preliminary Injunctive Relief in the Ninth Circuit after Winter v. Natural Resources Defense Council*, W. ENVTL. LAW CTR. (2010), *available at* http://www.westernlaw.org/article/preliminary-injunctive-relief-ninth-circuit-after-winter-v-natural-resources-defense-council.

[55] *See generally Monsanto*, 561 U.S. 139 (2010).

[56] *See generally* Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

alleging that the agency had violated the ESA when it declined to reinitiate consultation[57] after the FWS revised its critical habitat designation for Canada lynx[58] to include National Forest land, even though the Forest Service had conducted project-specific consultations.[59] The parties filed cross-motions for summary judgment.[60] The district court granted summary judgment to the CELC and ordered reinitiation of consultation, but declined to enjoin any specific project through an injunction.[61] Both parties filed timely cross-appeals.[62]

On appeal, the Ninth Circuit agreed with the Forest Service's argument that the *Thomas* presumption of irreparable harm had been effectively overruled by two recent Supreme Court cases – *Winter* and *Monsanto*. The panel majority saw the central issue as whether *Winter* and *Monsanto*'s standards of injunctive relief under NEPA "extend[ed] to the ESA, or whether the differences between the two statutes warrant a different test."[63] The Ninth Circuit concluded that "there is nothing in the ESA that explicitly . . . restricts a court's discretion to decide whether a plaintiff has suffered irreparable injury"[64] or allows a court to put its "thumbs on the scales"[65] in weighing the need for injunctive relief. The panel majority further reasoned that, "even though *Winter* and *Monsanto* address NEPA, not the ESA, they nonetheless undermine the theoretical

[57] ESA regulations require agencies to reinitiate consultation when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extend not previously considered." *See* 50 C.F.R. § 402.16. The regulations also require reinitiation if new "critical habitat [is] designated that may be affected by the identified action." *Id.*
[58] In 2000, the FWS listed the Canada lynx as a threatened species under the ESA, after eight years of litigation by conservation groups. *See Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Contiguous U.S. Distinct Population Segment of the Canada Lynx and Related Rule*, 65 Fed.Reg. 16052–01, 16052, 16061 (Mar. 24, 2000).
[59] *See Cottonwood*, 789 F.3d at 1078-79.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 1089.
[64] *Id.* at 1090.
[65] *Cottonwood*, 789 F.3d at 1090.

foundation for our prior rulings on injunctive relief."[66] The majority ultimately held that there is no longer a presumption of irreparable injury where there has been an alleged procedural violation of the ESA, and that a plaintiff must show irreparable injury to justify injunctive relief.[67]

Judge Pregerson dissented from the portion of the *Cottonwood* decision concerning injunctive relief, and stated that he "would [have] followed settled precedent [to] protect the Canada Lynx and its critical habitat first" by "applying *Thomas v. Peterson* rather than finding it to be implicitly overturned as the majority does."[68] He argued that the majority's opinion "makes it harder to protect the threatened Canada Lynx and its critical habitat, and puts the species at increased risk."[69] He disagreed with the majority's inferences drawn from the Supreme Court's NEPA decisions, and asserted that "Congress has spoken in the plainest of words, making it abundantly clear"[70] in the ESA context that the "balance [must be] struck in favor of affording endangered species the highest of priorities."[71] Judge Pregerson also strongly objected to the uncertainty created by the new standard and to "the elimination of *Thomas*'s [sic] procedural protections as a global storm of extinction rages."[72] He further maintained that majority's opinion wrongly assumed that "establishing irreparable injury should not be an onerous task for plaintiffs"[73] and argued that it would "prove more difficult in practice than the majority assumes."[74]

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[66] *Id.*
[67] *Id.* at 1091-92.
[68] *Id.* at 1095 (J. Pregerson dissenting).
[69] *Id.* at 1092 (J. Pregerson dissenting).
[70] *Cottonwood*, 789 F.3d at 1093 (J. Pregerson dissenting).
[71] *Id.* at 1094 (J. Pregerson dissenting).
[72] *Id.* (J. Pregerson dissenting).
[73] *Id.* (J. Pregerson dissenting).
[74] *Id.* at 1094 (J. Pregerson dissenting).

In response, the panel majority maintained that Judge Pregerson's dissenting opinion "overstated the significance of [the majority's] holding."[75] The panel majority argued that the fundamental principle "when evaluating a request for injunctive relief to remedy an ESA procedural violation, [is that] the equities and public interest factors always tip in favor of the protected species."[76] Additionally, the majority argued that overturning *Thomas* did not put "the district courts . . . at a disadvantage in remedying procedural violations . . . [because] district courts are quite capable of identifying harm to protected species, and in crafting an injunction to remedy the precise harm."[77] The panel concluded its rebuttal of the dissent's concerns by insisting that "the presumption of irreparable harm . . . cannot survive the [Supreme] Court's recent opinions in *Winter* and *Monsanto*."[78]

The Ninth Circuit ultimately affirmed the district court's denial of injunctive relief, but remanded to provide the CELC the opportunity to make an evidentiary showing that "specific projects will likely cause irreparable damage to its members' interests,"[79] as "district courts are quite capable of identifying harm to protected species."[80]

It remains to be seen how district courts will put this restated directive into practice when confronted with procedural violations of the ESA, and how parties will interpret and argue under *Cottonwood* moving forward. For now, both plaintiffs and defendants should be aware that in cases alleging Section 7 ESA procedural violations, the rules for injunctive relief remedies have officially changed.

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[75] *See Cottonwood*, 789 F.3d at 1091.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 1092.
[79] *Id.* at 1092.
[80] *Id.* at 1091.

C. Post-*Cottonwood*: Uncertainty in the Appropriate Standard to Show Irreparable Harm for Injunctive Remedies in Section 7 Cases

Due to language in the *Cottonwood* decision, it remains unclear as to what the new standard to establish irreparable harm is for Section 7 procedural violations is in the Ninth Circuit. Prior to *Winter* and *Cottonwood*, defendants and plaintiffs often disagreed over the appropriate standard for irreparable harm for *substantive* provisions under the ESA. But *Cottonwood* left behind questions over the appropriate standard for injunctive relief for alleged Section 7 *procedural* violations.

Particularly, the statement in the opinion that "district courts are quite capable of identifying harm to protected *species*"[81] creates ambiguity over whether a plaintiff must establish irreparable harm to the protected *species as a whole*, rather than irreparable harm to the *plaintiff* (the individual legal person).[82] Although the majority panel held that "establishing irreparable injury should not be an onerous task for plaintiffs," the other language in the opinion could be "misconstrued to mean that a plaintiff must show irreparable harm to the species as a whole . . . before an injunction would issue."[83] In fact, the panel majority cited to two cases that does suggest a plaintiff must show an irreparable harm to the species.[84] In light of the inclusion of this language, CELC filed a

[81] *Id.* (emphasis added).
[82] *See Amicus Curiae* Brief in Support of Limited Petition for Panel Rehearing, Cottonwood Envtl. Law Ctr. v. United States, Nos. 13-35631, 13-35624, at 1-3 (9th Cir. Sept. 11, 2015).
[83] *See* Appellee's Petition for Limited Panel Rehearing, Cottonwood Envtl. Law Ctr. v. United States, Nos. 13-35631, 13-35624, at 2 (9th Cir. Sept. 4, 2015).
[84] *See Cottonwood*, 789 F.3d at 1091 (discussing that "in South Yuba River Citizens League v. National Marine Fisheries Service, the district court . . . held that the plaintiff 'must show that irreparable harm to the listed species will result from defendants' violation of the ESA in the absence of each [protective] measure plaintiffs request.' 804 F.Supp.2d 1045, 1054 (E.D.Cal. 2011)); *Cottonwood* 789 F.3d at 1091-92 (discussing that in Nat'l Wildlife Federation v. Nat'l Marine Fisheries Serv., 839 F.Supp.2d 1117, 1131 (D.Or. 2011) the district court acknowledged *Thomas* but then proceeded to "review the record" to determine whether the "protected fish would suffer irreparable harm" without "certain protective measures sought by the plaintiffs.").

Petition for Limited Rehearing "to seek clarifying language regarding the new burden of showing irreparable harm."[85]

Furthermore, if the focus is on harm to the *species*, questions revolve around whether establishing irreparable harm to a *single* animal (i.e., the "take" of a single animal) from the species is sufficient to establish irreparable harm for injunctive relief purposes, or if not, what the appropriate standard now is.[86] The majority panel also quotes a case that held a plaintiff "must show that irreparable harm to the listed species will result from defendants' violation of the ESA."[87] The panel's ambiguity will result in confusion for future district courts and both litigating parties.

For example, the State of Idaho recently relied on *Cottonwood* to argue that plaintiffs are required "to establish irreparable harm to the listed species" to obtain an injunction preventing the future take of lynx in the state.[88] The State asserted that plaintiffs must demonstrate a threat to "the overall ability" of the species "to persist."[89] But alternatively, plaintiffs and *amicus curiae* can argue that, "this is surely at odds with the guidance from the panel that 'establishing irreparable injury should not be an onerous task for plaintiffs.'"[90]

Additionally, following *Cottonwood*, the Forest Service filed a Petition for Rehearing *En Banc*, where they argued in part that, "the effects of any particular action

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[85] *See* Appellee's Petition for Limited Rehearing, Cottonwood Envtl. Law Ctr. v. United States (No. 13-35631), at 2 (9th Cir. Sept. 4, 2015).
[86] *Id.*
[87] *See Cottonwood*, 789 F.3d at 1091.
[88] *See* Brief in Opposition in Plaintiffs' Motion for Summary Judgment and Injunctive Relief (ECF No. 86) at 19, Ctr. for Biological Diversity v. Idaho Governor C.L., Case No. 1:14-CV-00258-BLM (D. Idaho Aug. 28, 2015).
[89] *Id.*
[90] *See, e.g.*, *Amicus Curiae* Brief in Support of Limited Petition for Panel Rehearing, Cottonwood Envtl. Law Ctr. v. United States, Nos. 13-35631, 13-35624, at 5 (9th Cir. Sept. 11, 2015) (quoting *Cottonwood*, 789 F.3d at 1091).

[should be] evaluated in the context of the species' current status, the actual environmental baseline, and the action's cumulative effects."[91] Although the Forest Service "agrees [with CELC] . . . that the proper inquiry focuses on . . . irreparable harm to the plaintiff's interests,"[92] it insists that the irreparable harm standard analysis consider the "broader impacts on the species"[93] as a whole. It argues that most plaintiffs "do not assert interests in individual members of a protected species" and therefore, it would be inappropriate to grant injunctions "based on injury to individual members of a species without showing irreparable harm to the broader species."[94] The Forest Service maintained that Section 7 of the ESA "does not create public or private rights in the protection of individual animals"[95] and that a plaintiff must demonstrate irreparable harm at a minimum to a "distinct population segment"[96] of a protected species.

Furthermore, language in the *Cottonwood* opinion creates confusion over whether a plaintiff must establish irreparable harm to *its own interests*, or to the *species*, as "harm to the plaintiff and harm to the species are not interchangeable concepts."[97] And beyond *where* exactly the burden of irreparable harm lies, questions exist around what the Ninth Circuit meant by the term "species" as it can have different meanings, each which obviously impact the burden on plaintiffs in a different way.[98]

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[91] *See* Appellants Petition for Rehearing or Rehearing *En Banc*, Cottonwood Envtl. Law Ctr. v. United States (No. 13-35631), at 12 (9th Cir. Sept. 4, 2015).
[92] *See* Appellants Response to Appellee's Petition for Limited Panel Rehearing, Cottonwood Envtl. Law Ctr. v. United States (No. 13-35631), at 1 (9th Cir. Oct. 5, 2015).
[93] *See* Appellants Petition for Rehearing or Rehearing *En Banc*, Cottonwood Envtl. Law Ctr. v. United States (No. 13-35631), at 12, n.4 (9th Cir. Sept. 4, 2015).
[94] *See* Appellants Response to Appellee's Petition for Limited Panel Rehearing, Cottonwood Envtl. Law Ctr. v. United States (No. 13-35631), at 2 (9th Cir. Oct. 5, 2015).
[95] *Id.* at 3.
[96] *Id.*
[97] *See Amicus Curiae* Brief in Support of Limited Petition for Panel Rehearing, Cottonwood Envtl. Law Ctr. v. United States, Nos. 13-35631, 13-35624, at 4 (9th Cir. Sept. 11, 2015) (emphasis added).
[98] *Id.* at 4, n. 3 ("For example, a species can refer to a member of a species or a collective group of such members that together compromise a species. *Species*, Merriam-Webster Dictionary, http://www.meriam-

Clearly, the majority panel's opinion has already generated uncertainty as to the appropriate standard for establishing irreparable harm for injunctive relief – first for both appellees and appellants in *Cottonwood*, who both filed petitions for rehearing, as well as arguments already being pursued in the district courts. Unfortunately, the Ninth Circuit recently denied CELC and the United States' respective petitions for rehearing[99] so this confusion for courts and litigants will remain for the immediate future.

IV. How *Cottonwood* got it Wrong and What the Ninth Circuit Should do to Remedy the Confusion Moving Forward

Cottonwood undermines the policy objectives of the ESA, and creates confusion and uncertainty for the federal courts, federal agencies, and future litigants. The Ninth Circuit should clarify its intent in its next Section 7 case. Specifically, *Cottonwood* should be interpreted to mean that a plaintiff must demonstrate irreparable harm to the *plaintiff's* interests in individual animals, rather than the *species* overall, before injunctive relief is granted for Section 7 cases.

A. *Cottonwood* took *Winter* too far

Thousands of species become extinct each year because of continued population pressures, deforestation, pollution, and other problems.[100] When agencies do not abide by Section 7 procedural requirements, they can seriously harm protected animals under

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webster.com/dictionary/species (last viewed September [sic] 11, 2015). Or the term can refer to the taxonomic species, subspecies, or distinct population segment. *See* 16 U.S.C. § 1532(16).").

[99] *See* Order Denying Petitions for Rehearing, Cottonwood Envtl. Law Ctr. v. United States, Nos. 13-35624, 13-35631, at 1 (9th Cir. Dec. 17, 2015).

[100] Ninety-nine percent of currently threatened species are at risk from human activities, primarily those driving habitat loss, introduction of exotic species, and global warming. Endangered Species. ENCYCLOPEDIA BRITANNICA ONLINE, Endangered Species (2009), *available at* http://www.britannica.com/EBchecked/topic/186738/endangered-species. The Center for Biological Diversity reports that "scientists estimate we're now losing species at 1,000 to 10,000 times the background rate, with literally dozens going extinct every day." CTR. FOR BIOLOGICAL DIVERSITY, *The Extinction Crisis*, *available at* http://www.biologicaldiversity.org/programs/biodiversity/elements_of_biodiversity/extinction_crisis/.

the ESA. The *Cottonwood* decision creates ambiguity as to the standard a plaintiff needs to establish irreparable harm to animals that are protected by the ESA.

The Ninth Circuit incorrectly extended *Winter*'s NEPA holding into the ESA Section 7 context, by failing to appreciate the critical difference between the NEPA and the ESA. The ESA's statutory goal "is to substantively provide for the conservation of endangered and threatened species and their ecosystems,"[101] whereas NEPA's statutory goals are "fundamentally procedural, and designed to create an environmental policy process that promotes the nation's general welfare."[102] In fact, in *Winter* the Supreme Court even remarked that "NEPA itself does not mandate particular results. Instead, NEPA imposes only procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts."[103] Therefore, the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements than in NEPA because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA's procedural requirements call for a systematic determination of the effects of a federal project on an endangered species. If a project proceeds without substantial compliance with these procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result.

Furthermore, misconstruing the distinctions between the NEPA and the ESA creates uncertainty over what hurdles a plaintiff must jump to establish irreparable harm in Section 7 cases, where the agency has failed to follow appropriate procedures. Requiring a plaintiff to show species-level harm would go too far as the taking of any

[101] *See Cottonwood*, 789 F.3d at 1093 (J. Pregerson dissenting); *see also* 16 U.S.C.A. § 1531(b).
[102] *See Cottonwood*, 789 F.3d at 1093 (J. Pregerson dissenting); *see also* 42 U.S.C. § 4331.
[103] *See Winter*, 129 S.Ct. at 365 (internal citation and quotation marks omitted).

animal from a protected species can have a significant impact on the species' recovery.[104] This would set a dangerous precedent and create a slippery slope by making it more difficult to establish irreparable harm and to hold agencies to meeting procedural requirements under the ESA. It could even be construed to require a plaintiff to wait for portions of an affected species to be taken to meet the irreparable harm requirement to award injunctive relief for Section 7 violations. Requiring a plaintiff to demonstrate harm to the species as a whole before issuing an injunction would prevent a plaintiff from protecting his concrete interests in specific individuals of a species. This would be at odds with the express purpose of the ESA to preserve and recover threatened and endangered species.[105]

B. How the Ninth Circuit can Remedy Ambiguity *Cottonwood* Left Behind

Given the Ninth Circuit recently declined both a limited rehearing or rehearing *en banc* of the *Cottonwood* decision,[106] the court should explicitly clarify its intent in its next Section 7 or injunctive relief case. Specifically, the court should clarify that by using the term harm to the "species" in *Cottonwood*, it does not mean to suggest that a plaintiff must show harm to an entire species. Instead, *Cottonwood* should be explicitly construed to mean that a plaintiff must demonstrate irreparable harm to the *plaintiff's interests*

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[104] By way of example, the killing of a single Woodland Caribou, which is a protected endangered species under the ESA, can have a big impact on the overall number of the species that remain wild in the United States. The Woodland Caribou is "one of the most critically endangered mammals in the U.S., with only a few woodland caribou" found in the United States each year. *See Fact Sheet: Woodland caribou - Basic Facts About Woodland Caribou*, DEFENDERS OF THE WILDLIFE (2015), *available at* http://www.defenders.org/woodland-caribou/basic-facts. The Woodland Caribou only has one calf a year, and there are less than forty left in the *last* U.S. herd. *Id.* (emphasis added). Therefore, the taking of one Woodland Caribou would have a big impact on the number of the species overall. For more examples of animals currently protected under the ESA, *see generally ECOS Envtl. Conservation Online System: Conserving the Nature of America, Species Search Results*, U.S. FISH & WILDLIFE SERV. (2015), *available at* http://ecos.fws.gov/tess_public/pub/SpeciesReport.do?groups=A&listingType=L&mapstatus=1.

[105] Nat'l Wildlife Federation v. Burlington Northern R.R., 23 F.3d at 1512, n. 8.

[106] *See* Order Denying Petitions for Rehearing, Cottonwood Envtl. Law Ctr. v. United States, Nos. 13-35624, 13-35631, at 1 (9th Cir. Dec. 17, 2015).

before injunctive relief is granted. A plaintiff's interest in individuals of a species should be sufficient to establish irreparable harm to a plaintiff's interests for injunctive relief purposes in Section 7 cases.

V. Conclusion

Thousands of species become extinct each year due to human-caused habitat destruction and climate change.[107] When agencies do not abide by Section 7 procedural requirements, they can seriously harm animals protected under the ESA. Section 7 requires federal agencies to "insure that any action authorized, funded or carried out by [the] agency . . . is not *likely* to jeopardize the continued existence of any endangered species or threatened species."[108] Establishing irreparable harm in the context of Section 7 should not be an onerous task for plaintiffs.

Winter did not need to be read as overruling *Thomas* as the two cases involved different statutes; however, ultimately, it did. But now, *Cottonwood* creates confusion over the appropriate standard for meeting irreparable harm. *Cottonwood*'s extension of *Winter's* irreparable harm requirement for purposes of injunctive relief for Section 7 violations is a dangerous trend that will impact hundreds of future cases all over the country – and poses an immediate threat to the protected of animals under the ESA.

As such, the Ninth Circuit should explicitly clarify its intent for establishing irreparable harm in its next Section 7 case. A plaintiff's interest in individuals of a

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[107] Ninety-nine percent of currently threatened species are at risk from human activities, primarily those driving habitat loss, introduction of exotic species, and global warming. Endangered Species. ENCYCLOPEDIA BRITANNICA ONLINE, Endangered Species (2009), *available at* http://www.britannica.com/EBchecked/topic/186738/endangered-species. The Center for Biological Diversity reports that "scientists estimate we're now losing species at 1,000 to 10,000 times the background rate, with literally dozens going extinct every day." CTR. FOR BIOLOGICAL DIVERSITY, *The Extinction Crisis*, *available at* http://www.biologicaldiversity.org/programs/biodiversity/elements_of_biodiversity/extinction_crisis/.

[108] 16 U.S.C. § 1536(a)(2).

species should be enough to establish irreparable harm to a plaintiff's interests for injunctive relief purposes. This clarification will help avoid future confusion over a plaintiff's burden in establishing irreparable harm, will avoid unnecessary litigation, and will uphold the overall goals of the ESA by preserving the role of federal courts in reviewing agency decisions.