Courts May Be Shifting Review Of Preliminary Injunctions

Law360, New York (September 21, 2015, 11:15 AM ET) -- The oil and gas industry recently received an unexpected surprise in New Mexico. There, in *Dine Citizens Against Ruining Our Environment v. Jewell (Dine CARE)*,[1] a federal court denied a motion for a preliminary injunction to block horizontal drilling and hydraulic fracturing on federal lands in New Mexico’s Mancos Shale based on a strict application of traditional legal standards for preliminary injunctions.

In doing so, the court rejected the relaxed preliminary injunction standards used by many courts, including the Tenth Circuit, when movants allege environmental harms. The U.S. Supreme Court was thought to correct this laxity in *Winter v. Natural Resources Defense Council Inc.* by scolding the Ninth Circuit for its lenient standards in awarding preliminary injunctions under the National Environmental Policy Act.[2] Yet, old habits have largely persisted in the lower courts. The decision in *Dine CARE* may indicate that courts are beginning their correction in applying traditional legal standards when considering motions for preliminary injunctions.

**Preliminary Injunctions in Environmental Cases: From Extraordinary to Ordinary**

Black letter law states that preliminary injunctions are difficult to obtain, requiring the moving party to establish that it is substantially likely to prevail on the merits, that it is likely to suffer irreparable harm without the injunction, that this irreparable harm will outweigh the harm inflicted on the opposing party if the injunction issues but the opposing party ultimately prevails, and that the injunction is in the public interest.[3]

Over the years, however, the standards for preliminary injunctions to block federal actions that could produce potential environmental harms changed. In most courts, the traditional four criteria for preliminary injunctions were degraded into an amorphous mess of multifactored balancing tests, sliding scales, relaxed showings or “either/or” options to benefit movants.[4] This can frequently involve courts discounting the harms to enjoined parties or summarily dismissing the public interest in the enjoined activities.[5]

The Supreme Court in *Winter* attempted to right the ship by rebuffing the various flexible preliminary injunction tests that tend to benefit movants. Most importantly, it reminded the courts that a preliminary injunction is extraordinary relief, only available when a movant carries the burden of meeting all four of the traditional criteria — including a likelihood of prevailing on the merits and that they are likely to suffer irreparable harm without a preliminary injunction — not portions here and there to some lesser degree of satisfaction.

In *Winter*, the Supreme Court reversed the Ninth Circuit’s issuance of a preliminary injunction against the U.S. Navy’s sonar training due to the “possibility” of injury to marine wildlife, even where the record contained no evidence of documented injury during the training program’s 40-year history.[6] It noted that “the Ninth Circuit’s ‘possibility’ standard is too lenient”[7] and rapped the lower courts for their “cursory”
treatment of the Navy’s interests, which should have easily outcompeted Natural Resources Defense Council in the public interest analysis.[8]

Despite the clear message from Winter, several circuits deny that the cases changed much of anything. Despite being reversed by the Supreme Court, one Ninth Circuit panel relied on Justice Ruth Bader Ginsburg’s dissent in Winter to hold that movants need only raise “serious questions” about the merits and satisfy a “sliding scale” of balancing factors to obtain a preliminary injunction.[9]

The Second, Seventh and Tenth circuits have all reaffirmed the use of lesser standards for preliminary injunctions after Winter.[10] Although some of these courts have paid lip service to Winter, many continue to implement bowdlerized standards for preliminary injunctions that maximize judicial flexibility, almost always to the benefit of movants.

**Dine CARE: Shifting Back the Burdens**

The New Mexico district court in Dine CARE called into question the Tenth Circuit’s preliminary injunction standard, citing its conflict with Winter — a welcome advancement given the expanse of federal land within the Tenth Circuit’s jurisdiction. In doing so, it denied a motion to enjoin the Bureau of Land Management from issuing drilling permits and demonstrated the difficulty that many environmental plaintiffs can have navigating the traditional preliminary injunction standards enforced by Winters.

Several environmental groups filed suit to block the BLM from approving applications for a permit to drill (“APDs”) on federal lands within the Mancos Shale (a subsection of the heavily developed San Juan Basin), claiming that two prior APDs violated NEPA in tiering back to a 2003 resource management plan and accompanying environmental impact statement, which purportedly failed to account for the environmental and aesthetic impacts of horizontal drilling and fracking, even though the BLM anticipated over 9,900 conventional oil and gas wells in the San Juan Basin. Two months after filing suit, the groups moved for a preliminary injunction to invalidate 265 recently approved APDs, stop all ground disturbances and other associated drilling activities and bar the BLM from issuing any new permits until it conducted a new environmental impact statement. In other words, the movants sought to block all development in the Mancos Shale for years with a single lawsuit.

Far from automatically issuing a preliminary injunction based on a creditable presentation of a NEPA violation, the court applied the more stringent standard elucidated in Winter. The movants failed to satisfy three of the four criteria. Most notable was the court’s effective rejection of the Tenth Circuit’s standard for evaluating the merits of a movant’s legal arguments and providing significant weight to the economic interests of the defendant (the BLM), as well as the several intervening oil and gas companies — something that is commonly omitted from decisions on preliminary injunctions for environmental harms.

**Likelihood of Success on the Merits**
The movants argued that the BLM began approving APDs for horizontal drilling and fracking in 2010, issuing two permits to WPX Energy Inc, in conjunction with environmental assessments and findings of no significant impact that tiered back to the 2003 regional management plan and environmental impact statement.[11] The BLM was subsequently inundated with more than 250 applications to develop the Mancos Shale between January 2014 and March 2015, prompting it to begin an amendment to its regional management plan accounting for horizontal drilling and fracking instead of conventional development.[12] According to the movants, the 2003 regional management plan and environmental impact statement never contemplated the noise, air emissions, chemicals and potential water contamination involved in horizontal drilling and fracking, thus violating NEPA.

The court began its analysis, however, by holding that the Tenth Circuit’s existing standard for evaluating a movant’s case on the merits could not survive Winter. According to the court, the movants would need to do more than “only bring up ‘questions going to the merits [that] are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.’”[13] This was because “Winter raises serious doubts about the continued vitality of the Tenth Circuit’s relaxed substantial-likelihood-of-success standard.”[14] Instead, the court imposed a more stringent two-part standard where movants would have to: (1) make a prima facie case “sufficient to survive a motion for directed verdict if it were presented at trial” and (2) satisfy a likelihood of satisfying its burden of persuasion.[15] For purposes of this case, brought under NEPA and the Administrative Procedure Act, the plaintiffs had to satisfy their burden of persuading the court that BLM either failed to take the requisite “hard look” under NEPA or that its approvals of the APDs were arbitrary and capricious.[16]

This burden was simply too much for the movants to bear and they failed to show that the BLM’s actions involved significantly new or different environmental impacts than those previously considered under NEPA. The court found that the BLM considered the potential environmental impacts of horizontal drilling and fracking to a lesser degree in its 2003 resource management plan and environmental impact statement and to a greater degree in the environmental assessments accompanying the APDs.

The court held that, although horizontal drilling and fracking are different from conventional drilling, the movants failed to demonstrate that they are quantitatively more harmful. In fact, the court provided an extensive discussion regarding the environmental benefits of horizontal drilling and fracking when compared to conventional drilling.[17] The groups actually agreed, arguing that the increased production and profitability of unconventional drilling methods should be assumed to increase aggregate environmental impacts over a scenario where only conventional drilling was permitted. The court, however, refused to assume the existence of an environmental Jevons Paradox when the record demonstrated decreased environmental impacts on a per-production basis and the movants offered no record evidence on aggregate impacts.[18] Although the movants made much of the BLM’s pending amendment to the 2003
resource management plan to account for the aggregate impacts of horizontal drilling and fracking, the court refused to punish the BLM for updating its data and declined to consider what the nonfinal amendment would show.[19]

Irreparable Harm

Addressing the rest of the preliminary injunction criteria, the court agreed that there is evidence of environmental harms from horizontal drilling and fracking and that those harms are irreparable, yet even this lone victory was bittersweet for the movants. The court rebuked their proposed standard, based on pre-

Winter case law, that they need to show only that irreparable injuries were possible.[20] It held that each of the Tenth Circuit cases cited by the movants were overruled by Winter. Also overruled was the Tenth Circuit’s long-standing premise that environmental harms are presumed to exist when there is a showing that an agency failed to comply with NEPA. As the court stated, “[T]he presumption that a NEPA violation constitutes per se irreparable harm … would be tantamount to removing the irreparable-harm prong from the preliminary-injunction analysis in all NEPA cases.”[21]

Balance of the Harms and the Public Interest

In many NEPA cases, a court’s analysis of the balance of the harms is often a perfunctory affair where economic harms or lost time are viewed with disinterest. These summary calculations, pitting priceless and irreparable environmental harms against course profit motives, then drive the public interest finding to a predictable outcome. The Dine CARE court, however, applied more traditional views of preliminary injunction standards, resulting in a much different conclusion. Its opinion provided a detailed estimation (provided primarily by the intervenor companies) of the profits, taxes, royalties and jobs that would be lost to a preliminary injunction if the defendants and intervenors ultimately prevail.

The court went even further by construing these economic interests as legitimate interests entitled to protection, going so far as to dismiss the movants’ reliance on Tenth Circuit precedent holding that economic interest can never outweigh environmental harms.[22] Instead, it chided the movants for failing to advance any fact-specific arguments balancing the interests in this particular case.

Given that the movants failed to develop any concrete estimation of the potential environmental harms at issue, and could not protect the potential losses by the defendant and intervenors with a bond, the court held that the movants essentially lost the balance of interests criterion by forfeit. Nor did the movants provide any discussion of how the public interest would be better served by an injunction restricting oil and gas development in the San Juan Basin to only conventional drilling. Thus, the defendant and intervenors’ interests — bolstered by the importance of a national energy policy that has already determined that the benefits of horizontal drilling and fracking outweigh the costs — easily carried the public interest finding. Although the court never cited Winter in its balance of the harms or public interest analyses, the message from
those cases clearly permeated the court’s reasoning: Movants will no longer benefit from presumptions and leniencies that make preliminary injunctions anything less than extraordinary relief.

—By Jim Wedeking, Sidley Austin LLP

Jim Wedeking is a staff attorney in Sidley Austin’s Washington, D.C., office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.


[4] See Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006) (likelihood of prevailing on the merits allows for a diminished showing of irreparable harm); Fund for Animals v. Norton, 281 F. Supp. 2d 209, 219 (D.D.C. 2003) (describing various phrasings of the multifactored preliminary injunction test used in the D.C. Circuit); Davis v. Mineta, 302 F.3d 1104, 1116-17 (10th Cir. 2002) (describing “sliding scale test” that excuses movant’s need to show likelihood of prevailing on the merits where other factors are met); Strahan v. Coxe, 127 F.3d 155, 160 (1st Cir. 1997) (plaintiffs have a reduced showing in Endangered Species Act cases); Ayres v. City of Chicago, 125 F.3d 1010, 1013 (7th Cir. 1997) (plaintiff need not show likelihood of prevailing on the merits where potential harm is high and potential harm to defendant is low); Nat’l Wildlife Fed’n v. Burlington N.R.R., 23 F.3d 1508-1510-11 (9th Cir. 1994) (reduced showing in Endangered Species Act cases); Sweeney v. Bane, 996 F.2d 1384, 1388 (2d Cir. 1993) (plaintiff need only show irreparable harm plus likelihood of success or that it raised “serious questions going to the merits” and win a balance of the hardships).

[5] See, e.g., Mineta, 302 F.3d at 1116 (Utah Department of Transportation’s contractual penalties were “self-inflicted” by entering into construction contracts); NRDC v. Winter, 518 F.3d 658, 698-99 (9th Cir. 2008) (injunction modifying Navy sonar training created only “speculative” harm despite Navy testimony that injunction’s terms would cripple its ability to train, create unacceptable safety risks and compromise national security).


[7] Id.
[8] Id. at 376-78.

[9] Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Other Ninth Circuit panels have sought to faithfully apply Winter. See Center for Food Safety v. Vilsack, 636 F.3d 1166 (9th Cir. 2011) (reversing injunction because movants failed to demonstrate a likelihood of irreparable harm despite NEPA violation).

[10] Citigroup Global Markets Inc. v. VCG Spec. Opport. Master, 598 F.3d 30, 35-36 (2d Cir. 2010) (rejecting Winter and retaining the circuit’s “serious questions” standard as requiring a movant to show a likelihood of success on the merits would reduce judicial flexibility); Hoosier Energy Rural Elec. Co-Op v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) (the greater the potential harm to the movant, the weaker their showing on success on the merits may be); RoDA Drilling Co. v. Siegel, 552 F.3d 1203, 1208 n.3 (10th Cir. 2009) (retaining “serious questions” test for disfavored mandatory injunctions).


[12] Id. at 15.

[13] Id. at 69 (quoting Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002)) (alteration in original).

[14] Id. at 71.

[15] Id. at 72-73. It should be noted that, with respect to the second prong, the court preserved something of a sliding scale where the burden of persuasion “will vary depending on the movant’s showing on the other” requirements of a preliminary injunction. Id. at 73. Although this formulation may be imperfect, it is more faithful to the traditional “likely to succeed on the merits” standard elucidated in Winter.

[16] Id. at 77-78.

[17] See id. at 20-24, 85 (discussing reduced surface area disturbance and increased productivity).

[18] See id. at 86 (By the movants’ “logic, the most egregiously anti-environmental methods imaginable could be deemed environmentally friendly, provided they are, additionally, unprofitable to the operators. For example, a requirement that all operators in a region use only 1930s-era drilling technology, or that they burn off half of their production at the well, would likely result in fewer adverse environmental impacts — because there would be less production in the first place. An economic benefit to operators, however, is not considered an adverse environmental impact under NEPA, unless the benefit arises from a practice that increases environmental harm on a per-production basis.”).
[19] *Id.* at 90.

[20] *Id.* at 91.

[21] *Id.* at 93.

[22] *Id.* at 31 (citing *Valley Cnty. Pres. Comm’n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004)).