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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FALLON PAIUTE-SHOSHONE TRIBE; CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs-Appellees, v. U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT; JAKE VIALPANDO, in his official capacity as Field Manager of the Bureau of Land Management Stillwater Field Office, Defendants, and ORMAT NEVADA, INC., Intervenor-Defendant-Appellant.	No. 22-15092 D.C. No. 3:21-cv-00512-RCJ-WGC MEMORANDUM*
FALLON PAIUTE-SHOSHONE TRIBE; CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs-Appellants, v.	No. 22-15093 D.C. No. 3:21-cv-00512-RCJ-WGC

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

U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT; JAKE VIALPANDO, in his official capacity as Field Manager of the Bureau of Land Management Stillwater Field Office,

Defendants-Appellees,

ORMAT NEVADA, INC.,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted June 15, 2022
San Francisco, California

Before: BYBEE, CALLAHAN, and COLLINS, Circuit Judges.

This case involves an ongoing challenge to the development of a geothermal project on federal public land located over forty miles outside of Fallon, Nevada. Although the parties are familiar with the factual and procedural history of this case, we briefly summarize it as it frames the narrow issue presented for review.

In 2015, ORNI32, LLC, a subsidiary of Ormat Nevada, Inc. ("Ormat"), applied to the Bureau of Land Management ("BLM") to construct and operate a geothermal project on federal public land located adjacent to the Dixie Meadows hot springs (the "Project"). Under the proposal, the facilities would generate power using heat from geothermal fluid extracted from deep geothermal reservoirs

underlying the land. In November 2021, after several years of environmental and cultural resource review and tribal consultation, BLM granted Ormat's application subject to several conditions, including that the Project be constructed and operated in phases. The Fallon Paiute-Shoshone Tribe (the "Tribe") and the Center for Biological Diversity ("CBD") (collectively, "Plaintiffs") jointly filed suit against BLM alleging violations of the National Environmental Policy Act ("NEPA"), the Religious Freedom Restoration Act ("RFRA"), and the Administrative Procedure Act ("APA")[1] and sought a preliminary injunction to stop the Project's construction during the pendency of the litigation, which the parties agreed could be resolved within six months.

This case involves two separate appeals, both challenging the district court's order imposing a preliminary injunction halting construction on the Project for a limited period of ninety days from January 4, 2022 but denying preliminary injunctive relief beyond that period of time. Although we dismiss Ormat's appeal as moot, we have jurisdiction over Plaintiffs' cross-appeal under 28 U.S.C. § 1292(a)(1), and we affirm.

We review the grant or denial of a preliminary injunction for abuse of discretion. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The district court's conclusions of law are reviewed de novo, while factual

[1] Plaintiffs also assert other claims not relevant to this appeal because they weren't raised in the motion for preliminary injunction.

findings are reviewed for clear error. *Id.* A factual finding constitutes clear error if it is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) (quoting *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014)).

1. As a threshold matter, we determine whether we have jurisdiction to review Ormat's appeal. An appeal is moot and we lose jurisdiction to hear it "[i]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party." *In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001) (quoting *United States v. Arkison (In re Cascade Roads, Inc.)*, 34 F.3d 756, 759 (9th Cir. 1994)).

A Ninth Circuit motions panel granted Ormat's motion to stay the ninety-day preliminary injunction on February 4, 2022, effectively providing Ormat all the relief it sought on appeal as construction was allowed to commence shortly thereafter. Even without the stay, the limited ninety-day injunction would have expired by its own terms on April 4, 2022—thus there is no longer an injunction in place from which Ormat may seek relief. *See Ahlman v. Barnes*, 20 F.4th 489, 494 (9th Cir. 2021) (holding that stay of preliminary injunction on appeal did not toll its expiration date). Accordingly, Ormat's appeal is moot and we dismiss it on that ground.

2. We turn now to Plaintiffs' cross-appeal. The Supreme Court has explained that plaintiffs seeking a preliminary injunction must establish that (1) they are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm absent preliminary relief," (3) "the balance of equities tips in their favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). We employ a "sliding scale test," which allows a strong showing on the balance of hardships to compensate for a lesser showing of likelihood of success. *Cottrell*, 632 F.3d at 1134–35. Thus, when plaintiffs establish that the balance of hardships tips sharply in their favor, that there is a likelihood of irreparable injury, and that the injunction is in the public interest, they need only show "serious questions" on the merits. *Id.* at 1135. However, where plaintiffs have not made such showings, the original four-factor *Winter* test applies. *See All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017).

The district court did not err in applying the legal standard as it did. While the district court found that Plaintiffs showed they would suffer irreparable harm in the absence of an injunction, it nonetheless concluded that (1) the balance of hardships tipped sharply in favor of Ormat, not Plaintiffs, after ninety days and (2) that the public interest disfavors the requested injunction. The district court therefore properly considered whether Plaintiffs had demonstrated a likelihood of success on the merits, and not whether they had merely raised "serious questions."

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