IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

ALLIANCE FOR THE WILD ROCKIES,

Plaintiff,

vs.

DANIEL ASHE, TOM TIDWELL, FAYE KRUEGER, PAUL BRADFORD, UNITED STATES FOREST SERVICE, and UNITED STATES FISH & WILDLIFE SERVICE,

Defendants.

CV 13–92–M–DWM

ORDER

In this case Plaintiff Alliance for the Wild Rockies argued that the Forest Service and the Fish & Wildlife Service violated the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA") when they approved the Young Dodge Project ("the Project") located largely within the Kootenai National Forest. On the parties' cross-motions for summary judgment, it was determined the agencies fully complied with the ESA and NEPA when they approved the Project. (Doc. 66.) Plaintiff appealed. (Doc. 68.) Plaintiff now wants, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, an injunction pending the appeal. (Doc. 70.) For the reasons discussed below,

Plaintiff's motion is denied.

LEGAL STANDARD

"While an appeal is pending from [a] . . . final judgment that . . . denies an injunction, the court may . . . grant an injunction on terms . . . that secure the opposing party's rights." Fed. R. Civ. P. 62(c). Courts evaluate motions for preliminary injunction and motions for preliminary injunction pending appeal using the same standard. *See S.E. Alaska Conserv. Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1100 (9th Cir. 2006). "A plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Nat. Resources Def. Council*, 555 U.S. 7, 20 (2008). "[I]f a plaintiff can only show that there are serious questions going to the merits—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the balance of hardships tips sharply in the plaintiff's favor, and the other two *Winter* factors are satisfied." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (internal quotation marks omitted). Injunctive relief "is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24.

ANALYSIS

Injunctive relief *pendente lite* is not warranted in this case. Plaintiff has neither raised serious questions going to the merits of this matter nor demonstrated that irreparable harm is likely attendant to the implementation of the Project. Further, the balance of equities does not tip in Plaintiff's favor.

Likelihood of success on the merits requires a showing of serious questions going to the merits. "Serious questions are substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Republic of the Philip. v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Plaintiff merely rehashes its summary judgment arguments, which were previously considered and rejected. (*See* Doc. 66.) Such reasoning is insufficient for demonstrating serious questions going to the merits. *See Alliance for the Wild Rockies v. Krueger*, ___ F. Supp. 2d ___, 2014 WL 3865936 at *7 (D. Mont. 2014) ("[I]njunctions are extraordinary remedies. This maxim carries particular significance when a plaintiff seeks an injunction pending appeal following the court's resolution of the case" on the merits.).

"[P]laintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction." *Alliance for the Wild Rockies v.*

Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Winter*, 555 U.S. at 21–22).[1] First, Plaintiff fails to establish that irreparable harm to the grizzly bear is likely. Plaintiff argues that "oversized clearcuts directly adjacent to major roads *could* lead to additional take" of the grizzly bear, (Doc. 71 at 12 (emphasis added)), but this possibility is insufficient to establish requisite likelihood. The remaining propositions concern only the grizzly bear's current condition and fail to link Project activities to alleged harms. Additionally, the finding that the agencies did not fail in their duty to conduct a lawful consultation, (Doc. 66 at 7–15), belies the additional arguments Plaintiff offers in its reply brief. Moreover, the record shows that the Project is a restoration project designed to improve wildlife habitat, forage, and vegetation. *See Alliance for the Wild Rockies v. Bradford*, 979 F. Supp. 2d 1139, 1141–42 (D. Mont. 2013) (finding that enjoining the project in question was more likely to cause damage to grizzly bears than allowing it to proceed). Second, Plaintiff has not shown that irreparable harm to its members is likely. Plaintiff insists the Project will irreparably harm its members' affection for the forest and wildlife in the Project area because "it will take decades for cover to be reestablished in the [P]roject's clearcuts." (Doc. 71 at 13.) However, the

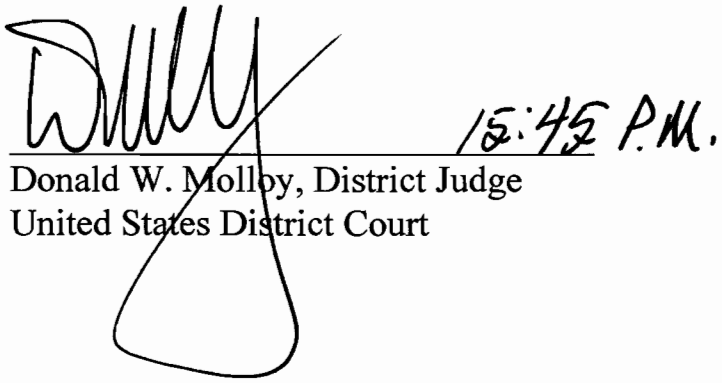
[1] Because the agencies did not violate the ESA, (Doc. 66), application of the *Alliance for the Wild Rockies v. Krueger* ("*Bozeman*") burden-shifting standard is unnecessary. 950 F. Supp. 2d 1196, 1202 (D. Mont. 2013).

record shows that the felling of trees will take place near existing open cover areas, and the agencies properly incorporated measures to mitigate adverse effects on grizzly bears caused by logging, (Doc. 66 at 17).

When the government is a party, the balance of equities and public interest factors may be merged. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2013). In ESA claims, the balance of equities and the public interest tip in favor of the species. *Krueger*, 2014 WL 3865936 at **4–5 (citing *Wash. Toxics Coalition v. Envtl. Protec. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 933 (9th Cir. 1988)). Plaintiff has failed to demonstrate that the balance of equities weigh in its favor. Plaintiff conflates its own interests with that of the grizzly bear. The record supports the agencies' conclusion that the Project does not adversely affect the grizzly bear. (Doc. 66 at 11–13.) Additionally, the Project will enhance the environment, restore wildlife habitat and vegetation, provide recreation opportunities, and reduce wildfire risk. *See Winters*, 555 U.S. at 23–24 (recognizing a public interest in considerations other than the environment). Weighing these interests against the possible environmental harms asserted by the Plaintiff and previously rejected by the Summary Judgment Order (Doc. 66) tips the equities in favor of allowing the Project to proceed. In sum, Plaintiff fails to satisfy the *Winter* factors.

Accordingly, IT IS ORDERED that Plaintiff's Motion for Injunction Pending Appeal (Doc. 70) is DENIED.

Dated this 20th day of January, 2015.



12:45 P.M.

Donald W. Molloy, District Judge
United States District Court