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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Protecting Arizona's Resources and Children
et al., and Gila River Indian Community,

Plaintiffs,

v.

Federal Highway Administration, et al.,

Defendants.

No. CV-15-00893-PHX-DJH
No. CV-15-01219-PHX-DJH

ORDER

This matter is before the Court on the PARC Plaintiffs' Motion for Injunction Pending Appeal (Doc. 136)¹ and Plaintiff Gila River Indian Community's ("GRIC") Motion for Injunction Pending Appeal. (Doc. 140). The Federal Defendants ("FHWA") filed a Response in Opposition to Plaintiffs' Motions for Injunction Pending Appeal. (Doc. 142). The Arizona Department of Transportation ("ADOT") also filed an Opposition to Plaintiffs' Motions for Injunction Pending Appeal. (Doc. 144). The PARC Plaintiffs and GRIC then each filed a Reply. (Docs. 145, 146).

As the parties are aware, this Court issued an Order (Doc. 132) on August 19, 2016, in which the Court granted Defendants' cross-motions for summary judgment and denied Plaintiffs' motions for summary judgment. Following the entry of judgment, the PARC Plaintiffs filed a Notice of Appeal (134) on September 6, 2016. GRIC then filed a Notice of Appeal (Doc. 139) on September 9, 2016. In the motions currently pending,

¹ The PARC Plaintiffs also filed a Motion to Exceed the Page Limits Set Forth in LRCiv 7.2(e), which the Court will grant.

1 Plaintiffs ask the Court to issue an injunction that stops construction of the Loop 202
2 South Mountain Freeway Project (“Freeway Project”) pending the outcome of the appeal
3 in the Ninth Circuit Court of Appeals.

4 **I. Background**

5 In the recently issued summary judgment order, the Court summarized the factual
6 and procedural background of the case. (Doc. 132). The Court will therefore not repeat
7 that background information here. The Court will proceed directly to the legal standards
8 for, and analysis of, the pending motions for injunction pending appeal.

9 **II. Discussion**

10 **A. Legal Standards**

11 In deciding a motion for injunction pending appeal, courts apply the same
12 standard used to decide a motion for preliminary injunction. *See Golden Gate Restaurant*
13 *Ass’n v. City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008); *Tribal*
14 *Village of Akutan*, 859 F.2d 662, 663 (9th Cir. 1988); *Lopez v. Heckler*, 713 F.2d 1432,
15 1435 (9th Cir. 1983). “A preliminary injunction is an extraordinary remedy never awarded
16 as of right.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24, 129 S.Ct. 365, 172
17 L.Ed.2d 249 (2008). In order to obtain a preliminary injunction, the moving party “must
18 establish that he is likely to succeed on the merits, that he is likely to suffer irreparable
19 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and
20 that an injunction is in the public interest.” *Winter*, 555 U.S. at 20.

21 The Ninth Circuit has adopted a "sliding scale approach under which a preliminary
22 injunction could issue where the likelihood of success is such that 'serious questions
23 going to the merits were raised and the balance of hardships tips sharply in [plaintiff's]
24 favor.'" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)
25 (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir.
26 2003)). This approach survives the four-element test set forth in *Winter* when applied as
27 part of that test. *Id.* at 1131-1132. Thus, "'serious questions going to the merits' and a
28 balance of hardships that tips sharply towards plaintiff can support issuance of a

1 preliminary injunction, so long as the plaintiff also shows that there is a likelihood of
2 irreparable injury and that the injunction is in the public interest." *Id.* at 1135. The
3 moving party "bears the heavy burden of making a 'clear showing' that it [is] entitled to a
4 preliminary injunction." *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1312
5 (9th Cir. 2015) (citing *Winter*, 555 U.S. at 22).

6 As noted above, "[u]nder *Winter*, plaintiffs must establish that irreparable harm is
7 likely, not just possible, in order to obtain a preliminary injunction." *Alliance for the*
8 *Wild Rockies*, 632 F.3d at 1131 (emphasis in original). "A plaintiff must do more than
9 merely allege imminent harm sufficient to establish standing; a plaintiff must
10 demonstrate immediate threatened injury as a prerequisite to preliminary injunctive
11 relief." *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir.
12 1988) (emphasis in original).

13 **B. Application**

14 In its summary judgment order, the Court explained that it was not persuaded by
15 Plaintiffs' arguments that the analysis and approval of the Freeway Project by FHWA
16 and ADOT violated the National Environmental Protection Act ("NEPA") and the
17 Department of Transportation Act ("Section 4(f)"). In the 35-page order, the Court
18 addressed the merits of the arguments raised by the PARC Plaintiffs and GRIC and
19 concluded that Plaintiffs had not established a violation of NEPA or Section 4(f). In their
20 pending motions for an injunction pending appeal, and specifically in support of their
21 contention that they are likely to succeed on the merits, Plaintiffs re-urge the same
22 arguments. For the reasons stated in the prior order, however, the Court finds that
23 Plaintiffs are not likely to succeed on the merits of their claims. The Court need not
24 repeat its analysis here. By failing to establish a likelihood of success on the merits,
25 Plaintiffs have not satisfied the first element of the *Winter* test. Plaintiffs are therefore
26 not entitled to an injunction pending appeal.

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1 The Court’s conclusion is not altered by applying the more flexible sliding scale
2 approach. Plaintiffs argue that at a minimum, despite the Court’s ruling on the merits,
3 their appeal raises serious legal questions concerning compliance with NEPA and Section
4 4(f). They further argue that the balance of hardships tips sharply in their favor, thus
5 supporting an injunction pending appeal. The PARC Plaintiffs argue they will suffer
6 irreparable harm in that “[w]ithout an injunction, Defendants will eminently [sic] begin
7 clearing, grading, and eventually blasting activities in furtherance of construction of the
8 Freeway, resulting in irreparable environmental harms.” (Doc. 136 at 33). They further
9 claim that the construction related activities will irreparably harm their recreational and
10 aesthetic interests. (*Id.*). GRIC argues that its members will suffer irreparable harm due
11 to the destruction of portions of three separate ridges of South Mountain. (Doc. 140 at
12 15). GRIC argues, on the other hand, that the only harm to Defendants is a delay in
13 starting construction of the Freeway Project, which it claims is outweighed by the
14 permanent harm that will be done to the Community. (*Id.*).

15 In response, Defendants argue that Plaintiffs have not demonstrated irreparable
16 harm and that the balance of equities favors Defendants. FHWA argues that both the
17 PARC Plaintiffs and GRIC treat the essential element of irreparable injury as an
18 afterthought in their briefs and that neither provided any declarations with their motions
19 to assert how moving forward with the Freeway Project will impair their interests. (Doc.
20 142 at 8). With regard to work that affects South Mountain, FHWA, through a
21 declaration by Karla Petty, explains that construction work in that area is not expected to
22 begin until July 2018 at the earliest. FHWA further argues that despite Plaintiffs’ claims
23 to the contrary, delaying construction of the Freeway Project carries significant economic
24 impacts.

25 ADOT makes similar arguments regarding irreparable harm, asserting that given
26 the construction timelines, “[t]here is simply no imminent and irreparable environmental
27 change that merits issuance of an injunction pending appeal.” (Doc. 144 at 4). ADOT
28 contends that Plaintiffs’ presented only generalized assertions of harm that are not

1 sufficient to satisfy the *Winter* standard. (*Id.*). Additionally, ADOT presents declarations
2 in support of their opposition to an injunction that show substantial economic costs that
3 will result if an injunction is ordered. (*Id.*). For example, ADOT, through multiple
4 declarations, asserts that enjoining the Freeway Project activities will result in additional
5 costs of \$188,000 per day for every day that the injunction is in place, among other
6 potential financial impacts to the public. (*Id.*).

7 After full consideration of the parties' arguments and in view of its previous order
8 (Doc. 132), the Court finds that Plaintiffs have not demonstrated that the balance of
9 hardships tips sharply in their favor. Construction activities have just recently begun and
10 the specific harm identified by Plaintiffs will not occur in the immediate future. As noted
11 above, any construction work on South Mountain, which was urged by both parties as
12 basis to halt construction, is not scheduled to occur until the summer of 2018. Likewise,
13 without any specific declarations in support of their motions for injunctions pending
14 appeal, Plaintiffs have not demonstrated immediate and irreparable harm based on the
15 construction activities currently taking place or set to take place in the immediate future.
16 Plaintiffs will therefore have an opportunity to present their arguments on the merits to
17 the Ninth Circuit, including in a motion for injunctive relief if they so choose, before any
18 immediate and irreparable harm occurs. *See* Fed.R.App.P. 8(a)(2). Moreover, the Court
19 finds Defendants have demonstrated, through the declarations attached to their motions,
20 the significant financial costs to the public of halting the Freeway Project construction
21 activities. Thus, applying the more flexible sliding scale approach identified above, the
22 Court finds that Plaintiffs have not met their burden to show the balance of hardships tips
23 sharply in their favor. Having failed to make such a showing, and given the Court's
24 determination that Plaintiffs are not likely to succeed on the merits of their claims on
25 appeal, the motions for an injunction pending appeal will be denied.

26 Accordingly,

27 **IT IS ORDERED** that the PARC Plaintiffs' Motion for Injunction Pending
28 Appeal (Doc. 136) and Plaintiff Gila River Indian Community's Motion for Injunction

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Pending Appeal (Doc. 140) are **DENIED**.

IT IS FURTHER ORDERED that the PARC Plaintiffs' Motion for Leave to File Excess Pages (Doc. 135) is **GRANTED**.

Dated this 26th day of October, 2016.



Honorable Diane J. Humetewa
United States District Judge