

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILD EQUITY INSTITUTE, *et al.*,

No. C 11-00958 SI

Plaintiffs,

**ORDER DENYING PLAINTIFFS’
MOTION FOR A PRELIMINARY
INJUNCTION**

v.

CITY AND COUNTY OF SAN FRANCISCO,
et al.,

Defendants.

On September 23, 2011, plaintiffs filed a motion requesting a preliminary injunction to halt defendants’ water pumping activities at Sharp Park, as well as its lawn mower and golf cart usage on holes 9 through 18 of the Sharp Park Golf Course. Defendant City and County of San Francisco (the “City”) and defendant-intervenor San Francisco Public Golf Alliance (“SFPGA”) filed separate oppositions on October 21, 2011, and the plaintiffs replied on November 4, 2011. A hearing was held on this motion on November 18, 2011. Having considered the papers submitted and the arguments of counsel, the Court hereby DENIES plaintiffs’ motion.

BACKGROUND

Plaintiffs, a collection of non-profit conservation groups, filed suit against the City and its officials for violation of the Endangered Species Act (the “ESA”), 16 U.S.C. §§ 1531-1544. Plaintiffs allege that defendants' operations and activities at Sharp Park Golf Course have caused the “taking” of the threatened Californian red-legged frog (the "Frog") and the endangered San Francisco garter snake

1 (the "Snake"), and that therefore, defendants should have obtained an Incidental Take Permit ("ITP")
2 pursuant to Section 10 of the ESA, 16 U.S.C. § 1539(a)(1)(B). Compl. at ¶ 1. Specifically, plaintiffs
3 contend that defendants' water management at Sharp Park has exposed frog egg masses to the air,
4 causing fatal desiccation of the egg masses, thereby reducing the frog population. *Id.* at ¶¶ 54-60.
5 Plaintiffs also claim that other golf course operation activities -- lawn mowing and golf cart usage --
6 harm the Snake and Frog by running them over. *Id.* at ¶¶ 54-62. Along with other relief, plaintiffs seek
7 a declaration that defendants are violating the ESA by illegally taking the Frog and the Snake without
8 an ITP, and an injunction against defendants to prevent ongoing activities allegedly causing take. *Id.*
9 at 16. Defendant City owns and operates the park; the Court allowed the SFPGA to intervene as a
10 defendant in this action as well. Doc. 44.

14 **1. The Endangered Species Act**

15 The Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531, contains a variety of
16 protections designed to save from extinction species that the Secretary of the Interior designates as
17 endangered or threatened. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515
18 U.S. 687, 690 (1995). Section 9 of the Act makes it unlawful for any person to "take" any endangered
19 or threatened species. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined to mean "harass, harm, pursue,
20 hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct." 16 U.S.C.
21 § 1532(19). The U.S. Fish and Wildlife Service's ("FWS") regulations further define "harm" to include
22 any "significant habitat modification or degradation where it actually kills or injures fish or wildlife by
23 significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50
24 C.F.R. § 17.3; see also *Sweet Home*, 515 U.S. 687 (upholding FWS' definition of "harm"). The
25 prohibition on take extends to both endangered and threatened species, and includes any "egg or
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1 offspring” thereof. 16 U.S.C. § 1532(8); *see also* 50 C.F.R. § 17.31(a). The Ninth Circuit has
2 interpreted the take prohibition to make unlawful “[a] reasonably certain threat of imminent harm to a
3 protected species.” *Marbeled Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060 (9th Cir. 1996).

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5 The fact that an activity is likely to “take” a listed species does not necessarily proscribe that
6 activity altogether. Instead, the ESA allows the FWS to authorize certain types of incidental take.
7 Section 7(a)(2) requires each Federal agency, in consultation with FWS, to insure that any action
8 authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of
9 any listed species; such action requires consultation with the FWS. 16 U.S.C. § 1536(a)(2). Non-
10 federal entities can pursue a Section 10(a)(1)(B) Incidental Take Permit (“ITP”), which requires the
11 submission of a conservation plan to the FWS. 16 U.S.C. § 1539(a)(1)(B). The conservation plan
12 requires, *inter alia*, a description of the impact resulting from any take, the reasons why alternatives are
13 not being utilized, and what steps the applicant will take to minimize and mitigate impacts of its actions.
14
15 *Id.*

16 17 18 **2. The Protected Animals**

19 **A. The California Red-Legged Frog**

20 The California Red-Legged Frog, *Rana draytonii*, the largest frog native to the western United
21 States, has been lost from over 70% of its historic range, and has suffered a population decline of 90%.
22 See Recovery Plan for the Frog (FWS 2002) (Pl. Ex. 17 at 1). According to one of plaintiffs' experts,
23 the Frog is one of many amphibian species that have endured massive declines in recent decades, and
24 is “currently only found in select coastal drainages from Marin County south to Baja California, with
25 a few isolated populations in the Sierra Nevada and the Transverse ranges.” Pl.'s Mot. at 5 (citing
26 Vrendenberg Decl. ¶ 9). In 1996, the FWS listed the Frog as a “threatened” species -- i.e., “likely to
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1 become an endangered species within the foreseeable future throughout all or a significant portion of
2 its range," 16 U.S.C. § 1532(20); *see* 61 Fed. Reg. 25,813 (1996).

3
4 The Frog breeds in aquatic habitats from November to April. Vrendenberg Decl. ¶ 8. "In recent
5 years, the egg masses have been found in Sharp Park beginning in late December." Pl.'s Mot. at 6; *see*,
6 *e.g.*, Dec., 2010 Data Sheets (Pl. Ex. 18). The Frog's breeding involves females laying eggs while
7 being fertilized by males, and attaching the eggs to emergent vegetation near the water surface. *Id.*;
8 Vrendenberg Dec. ¶ 8. The egg masses can contain between 2,000-5,000 eggs. Pl.'s Mot. at 6. The
9 Frogs lay their eggs near the water surface to "maximiz[e] growth potential [through] high water
10 temperatures" and to "minimize[e] exposure to aquatic predators." If left undisturbed, the Frog's eggs
11 hatch within 6 to 14 days, and the tadpoles typically metamorphose into frogs between July and
12 September. Pl.'s Mot. at 6 (citing Vredenberg Dec. ¶ 8). According to plaintiffs, "there is a significant
13 breeding population of the Frog at Sharp Park, part of a larger population that includes the Frog in the
14 adjacent Mori Point National Park." *Id.*

15 16 17 18 **B. The San Francisco Garter Snake**

19 The Snake, *Thamnophis sirtalis tetrataenia*, "is a harmless and fantastically colored serpent
20 identified by its reddish-orange head with red, black, and turquoise blue racing stripes on its sides and
21 back." Pl.'s Mot. at 7. Unlike the threatened Frog, the Snake is listed as endangered, and, according to
22 the plaintiffs, is the most endangered serpent in North America; Snake populations remain in only a few
23 fragmented locations. Pl.'s Mot. at 7. The Snake typically eats frogs, including the California red-
24 legged frog. *Id.* In 2004, four Snakes were captured and released at Horse Stable Pond in Sharp Park.
25 Def.'s Opp. at 3 (*citing* Sharp Park Conceptual Restoration Alternatives Report, App. C. 10 (Nov.
26 2009)). In 2008, two Snakes were observed in Sharp Park near Horse Stable Pond. *Id.* Since that time,
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1 there have been no reported sightings of the Snake in Sharp Park. Def.'s Opp. at 5.

2 **3. Sharp Park**

3
4 The City owns and operates Sharp Park, which is a public park located in the City of Pacifica
5 in San Mateo County. The Park is approximately 417 acres, and it contains an 18-hole golf course
6 constructed in 1930. The western border of the Park is the Pacific Ocean. A seawall constructed
7 between 1941 and 1952 eliminated the hydrologic connection between the Pacific Ocean and the
8 principal surface water body in Sharp Park, Laguna Salada. The parties dispute whether the water in
9 Laguna Salada was fresh or brackish prior to the construction of the seawall, a pertinent question as to
10 whether the protected animals (which cannot live in brackish water) inhabited the area prior to the
11 construction of the golf course.
12

13 Sharp Park and its golf course are divided by Highway 1. Residential development abuts
14 portions of the north and south boundaries of the park. Two portions of the National Park Service's
15 Golden Gate National Recreation Area ("GGNRA") -- Mori Point and Sweeney Ridge -- border Sharp
16 Park to the South and East. Pl.'s Mot. at 8. The park includes a wetlands complex, made up of Laguna
17 Salada, Horse Stable Pond, a channel that connects the two water bodies, and adjacent wetlands.
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20 **4. Defendant's Allegedly Harmful Activities**

21 **A. Water Pumping**

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23 During winter rains, large volumes of water drain into Sharp Park, raising the water levels in
24 Park water bodies and flooding portions of the golf course. Pl.'s Mot. at 8 (*citing* Kamman Hydrology
25 Report, Pl. Ex. 25). In 1941, a pump system was installed to control the water level in Horse Stable
26 Pond. Decl. Virginia Elizondo, Ex. 1 (Laguna Salada Resource Enhancement Plan). Currently, two
27 pumps exist in the pond, a primary pump with the capacity of 1,500 gallons per minute, and a backup
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1 pump with a capacity of 10,000 gallons per minute. The pumped water leaves the Park in pipes through
2 the seawall to an outfall on the beach. The primary issue in this case is whether the pumping of water
3 lowers water levels from Horse Stable Pond such that it "strands" egg masses laid by the Frog, leaving
4 them to dessicate and die. A secondary issue with respect to the pumps is whether Frog tadpoles
5 become "entrained" in the pumps and die.
6

7 Concerns over the effect of the water pumping at Horse Stable Pond on the Frog egg masses
8 have existed for years. A 1992 letter from an Earth Island Institute biologist encouraging listing the
9 Frog as "threatened" warned, "Present water management practices at Sharp Park to reduce flooding of
10 the golf course is killing the red-legged frog eggs, probably in violation of the Endangered Species Act."
11 Pl.'s Ex. 27 at 1. The biologist concluded that pumping led to the desiccation of 50 egg masses in Sharp
12 Park. *Id.* In the Federal Regulation listing the Frog as threatened, the FWS specifically relied on the
13 1992 letter, noting that "poorly timed releases of storm water from Horse Stable Pond at Sharp Park in
14 February 1992 resulted in exposure and desiccation of 62 California red-legged frog egg masses." 61
15 Fed. Reg. at 25,825.
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18 In 2005, FWS sent a letter to San Francisco Recreation and Parks Department ("RPD") regarding
19 the effects of the pump operation at Horse Stable Pond. The letter stated that:

20 It is our understanding that beginning in early 2003 through 2004 and
21 presently, the operation of a water pump that is controlled by the City and
22 County of San Francisco Recreation and Parks Department (during the
23 winter rainfall events) lowered the water level at Horse Stable Pond and
24 resulted in the stranding and exposure of a number of egg masses of the
25 California red-legged frog. This action apparently caused the death of an
26 unknown quantity of embryonic tadpoles of the completely aquatic early
27 stage of this animal's lifecycle.
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26 Pl.'s Ex. 30 (February 1, 2005 Letter from FWS) at 1. The letter went on to describe the definition of
27 take under the ESA, stating that the Frog is protected from actions that damage or destroy its habitat.
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1 The FWS then recommended that "in order to avoid further potential violations of the [ESA], we
2 recommend that you obtain authorization for incidental take through either Section 7 or 10(a)(1)(B), as
3 appropriate for the California red legged frog, and also the San Francisco garter snake which also has
4 been documented to inhabit the area." *Id.*

5
6 The City never applied for an ITP for water pumping, but did commence other measures
7 designed to mitigate harm to the Frog. According to the City's Natural Areas Program Director Lisa
8 Wayne, toward the end of 2005, the City instituted a new protocol for monitoring for Frog during the
9 rainy season, including "modulating operation of the pumps at Horse Stable Pond to further reduce risk
10 of egg mass strandings due to water level fluctuations." Wayne Decl. ¶ 20. Accordingly, since that
11 time, every time there is significant rainfall, according to defendants, a staffmember of the City surveys
12 the Laguna Salada wetlands complex for any Frog egg masses recently deposited. *Id.* at ¶ 21.
13 Whenever egg masses are observed, information on their location, size, and vulnerability to stranding
14 is recorded. *Id.* at ¶ 22.

15
16 In 2008 and 2010, San Francisco applied for and received permits from the FWS for localized
17 improvements to the pump system and removal of accumulated sediment from the pump house,
18 respectively. In October 2008, FWS issued a biological opinion and incidental take statement for the
19 storm drain repair project, and in 2010, amended its 2008 biological opinion to account for the 2010
20 project. Def.'s Opp. at 6.

21
22 In 2009, San Francisco completed an Endangered Species Compliance Plan for Sharp Park Golf
23 Course ("Compliance Plan"). Pl.'s Ex. 8. The Compliance Plan is a 17-page document that purports
24 to set forth measures to protect the Frog and the Snake in Sharp Park. It enumerates a number of self-
25 imposed regulations, such as requiring that "once egg masses are detected [by qualified staff], water
26 levels will not be manipulated by Department personnel such that egg masses would be exposed to air
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1 by active water management actions." *Id.* at 12. In a regulation regarding the risk of entrainment, the
2 Compliance Plan requires that staff immediately halt pumping if tadpoles are deemed at risk of being
3 drawn into the pumps. *Id.*

4
5 Another recent solution implemented by the City has been to move vulnerable egg masses with
6 FWS's permission, a process known as translocation. *See* Pl.'s Ex. 5. Plaintiffs provide a series of
7 emails between the City's National Areas Program employee Jon Campo and FWS over the course of
8 the 2010-2011 winter season, wherein Campo requests permission to move egg masses at risk of
9 dessication on a case-by-case basis. *Id.* The FWS authorized the movement of the egg masses as a way
10 to mitigate the "emergency" facing the egg masses. *Id.* at 2. During the winter of 2010-2011, Campo
11 found 159 egg masses; he requested and received permission to move 128 of them. Campo Dep. at 104.
12 The parties dispute the efficacy of translocating the egg masses, particularly whether surveys can reveal
13 all of the vulnerable egg masses and whether translocation even allows the eggs to survive.
14

15 Experts for both sides agree that the overall Frog population has increased over the last 20 years.
16 Hayes Supp. Decl. ¶ 11 (for Plaintiffs); Jennings Decl. at 16 (for Defendants). Plaintiffs argue, however,
17 that the increase is due to habitat improvements in adjacent Mori Park, while defendants contend that
18 it is due, at least in part, to the management of Sharp Park. Neither side disputes that the number of egg
19 masses found last winter in Sharp Park was the highest ever recorded.
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23 **B. Mowing and Golf Cart Use**

24 The presence of the golf course in Sharp Park necessarily brings the use of lawn mowers and golf
25 carts. Plaintiffs argue that the City mows the course near Park water bodies that are "particularly
26 important habitat for the Frog and Snake." Pl.'s Mot. at 12. Plaintiff also provides evidence that golf
27 carts are used both on cart paths and off of them, in violation of the City's own 2009 Compliance Plan.
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1 See Pl.'s Ex. 11. Plaintiffs argue that use of the vehicles is "certain to cause ongoing take of the Frog
2 and the Snake." Pl.'s Mot. at 12. In support, it provides evidence that in 2005, a Snake was found "after
3 it had been run over by a lawn mower." *Id.* Defendants contend that the cause of death of that snake
4 is inconclusive, and, more generally, that neither mowing nor golf cart usage causes take of the Snake
5 or Frog.¹ Def.'s Opp. at 11.

8 LEGAL STANDARD

9 The parties dispute the legal standard the Court should apply to the plaintiffs' motion. The
10 standard test for preliminary injunctive relief requires establishment of four factors by a preponderance
11 of the evidence: (i) likelihood of success on the merits; (ii) likelihood the moving party will suffer
12 irreparable harm absent injunctive relief; (iii) that the balance of equities tips in the moving parties'
13 favor; and (iv) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*,
14 555 U.S. 7, 20 (2008). The Court in *Winter* clarified that plaintiffs must establish that "irreparable harm
15 is likely, not just possible, in order to obtain a preliminary injunction." *Alliance For the Wild Rockies*
16 *v. Cottrell*, 632 F.3d 1127, 1311 (9th Cir. 2011). A preliminary injunction is an extraordinary remedy,
17 never awarded as of right. *Winter*, 555 U.S. at 9.

18 The traditional preliminary injunction analysis, however, "does not apply to injunctions issued
19 pursuant to the ESA." *National Wildlife Fed. v. Nat'l Marine Fisheries Svc.*, 422 F.3d 782, 793 (9th Cir.
20 2005). "Instead, in cases involving the ESA, Congress removed from the courts their traditional
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25 ¹On November 2, 2011, defendants filed objections to certain portions of plaintiffs' experts'
26 testimony. Because this case is at the preliminary injunction stage, the Court makes no ruling on the
27 merits of defendants' arguments and OVERRULES defendants' objections. See *Flynt Distributing*
28 *Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984)("The urgency of obtaining a preliminary
injunction necessitates a prompt determination . . . The trial court may give even inadmissible evidence
some weight, when to do so serves the purpose of preventing irreparable harm before trial.") Defendants
can re-raise their objections before trial.

1 equitable discretion in injunction proceedings of balancing the parties' competing interests." *Id.* at 794.
2 The reason for this is that in passing the ESA, Congress determined that "the balance of hardships
3 always tips sharply in favor of endangered species." *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073
4 (9th Cir. 1996).

5
6 Plaintiffs argue that this means that in the context of the ESA, "under Supreme Court and Circuit
7 precedent, so long as it is likely that ongoing, illegal -- and especially, as here, lethal -- take will occur,
8 injunctive relief to address that take must be crafted, because Congress has afforded listed species the
9 'highest of priorities,' and has eliminated the equitable balancing otherwise required." Pl.'s Mot. at 21
10 (*citing TVA v. Hill*, 437 U.S. 153, 194 (1978)). In other words, according to plaintiffs, they need only
11 show that defendants' activities are likely to cause take of a listed species. Pls.' Mot. at 21. Plaintiffs
12 make no mention of the requirement of showing irreparable harm absent injunctive relief in their moving
13 papers.
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15 However, "even in the Ninth Circuit, plaintiffs 'must establish the likelihood of irreparable harm
16 in the future.'" *ABA Section of Environment, Energy, and Resources*, "Endangered Species Act," 172
17 (Donald Baur et al., eds., 2nd ed. 2010) (*citing National Wildlife Federation v. Burlington Northern*
18 *R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994)); *see also Defenders of Wildlife v. Salazar*, 2009 U.S.
19 Dist. Lexis 131058, *6 (D. Mt. 2009) (although plaintiffs likely to succeed on the merits that delisting
20 wolves violated the ESA, they failed to show irreparable harm to the wolf population, instead of
21 individual wolves). In support of their proposed legal standard, plaintiffs rely on a variety of cases that
22 grant *permanent* injunctive relief, not preliminary injunctive relief. *See* Pls.' Mot. at 21; *citing Marbled*
23 *Murrelet*, 83 F.3d at 1067 (affirming permanent injunction upon finding that "implementation of Pacific
24 Lumber's harvesting plan would likely harm marbled murrelets"); *Ctr. for Biological Diversity v.*
25 *Marina Point Development Associates*, 434 F. Supp. 2d. 789, 795 (C.D. Cal. 2006) (granting permanent
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1 injunction against developer); *Animal Protection Institute v. Holsten*, 541 F.Supp. 2d 1073, 1081 (D.
2 Minn. 2008) (issuing injunction on summary judgment where the "Court finds it likely that additional
3 takings may occur unless further regulations are implemented.") Plaintiffs might be correct that at the
4 final judgment stage, they need only show the likelihood of future take of a protected species to warrant
5 injunctive relief. However, that question is not before the Court; instead, plaintiffs seek the
6 extraordinary remedy of a preliminary injunction. Plaintiffs provide no support that the issuance of a
7 preliminary relief should occur absent a showing of irreparable harm.
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9 The plaintiff may be simply assuming that the death of any listed animal, or any of its eggs,
10 constitutes irreparable harm for purposes of issuing a preliminary injunction. However, the law does
11 not go quite so far. No court has held that as a matter of law, the taking of a single animal or egg, no
12 matter the circumstance, constitutes irreparable harm. *See Animal Welfare Inst. v. Martin*, 588 F. Supp.
13 2d 70, 109 (D. Me. 2008); *Alabama v. U.S. Army Corps of Engineers*, 441 F. Supp. 2d 1123, 1135-36
14 (N.D. Al. 2006) (collecting opinions); *Defenders of Wildlife*, 2009 U.S. Dist. LEXIS 131058 at *14
15 ("[T]o consider any taking of a listed species as irreparable harm would produce an irrational result"
16 because the ESA allows for incidental take permits.) The court in *Pacific Coast Federation of*
17 *Fisherman's Association v. Gutierrez*, 606 F. Supp. 2d 1195 (E.D. Ca. 2008) (Wanger, J.), considered
18 the types of harms that a plaintiff must show to demonstrate a reasonable likelihood of irreparable harm
19 in the Ninth Circuit. The *Gutierrez* court noted that the standard does not require a showing of likely
20 "extirpation" of the species, *id.* at 1207, but rather considers whether the action sought to be enjoined
21 "will reduce appreciably [the species'] likelihood of survival or recovery or appreciably diminish the
22 value of their critical habitat." *Id.* (citing *National Wildlife Federation v. National Marine Fisheries*
23 *Service*, 524 F.3d 917, 931 (9th Cir. 2007)). The court accepted the FWS' definition of "appreciably
24 diminish" to mean "considerably reduce." *Id.* at 1208 (citing USFWS/NMFS, ESA Section 7
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1 Consultation Handbook (March 1998), at 4-34).

2 In sum, the plaintiffs must demonstrate both that they are likely to succeed on the merits of their
3 claim, and demonstrate that there will be a reasonable likelihood of irreparable harm absent injunctive
4 relief.
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6 7 **DISCUSSION**

8 The Court need not engage in an analysis of whether plaintiffs are likely to succeed on the merits
9 because the Court finds that regardless of the outcome of that inquiry, the plaintiffs have failed to show
10 a likelihood of irreparable harm absent injunctive relief.
11

12 13 **1. Water Pumping Activities**

14 At this preliminary injunction stage, the Court must examine the context of defendant's activities
15 and their effect on the local Frog and Snake populations. Experts for both sides agree that the overall
16 Sharp Park Frog population has increased during the last 20 years. Hayes Supp. Decl. ¶ 11 (for
17 Plaintiffs); Jennings Decl. at 16 (for Defendants). The Court finds persuasive the testimony of
18 defendant's expert Dr. Mark Jennings, a Herpetologist/Fisheries Biologist who, along with plaintiffs'
19 expert Dr. Marc Hayes, was one of the scientists to originally petition the FWS to list the Frog under
20 the ESA. Dr. Jennings states, and it is undisputed, that:
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23 Over the course of the past two decades, all available scientific evidence
24 shows that the Frog population at Sharp Park has dramatically increased.
25 When I first surveyed Sharp Park in 1990, my co-scientists and I received
26 recommendations to study the Sharp Park area precisely because earlier
27 studies had shown that the Frog was not present and scientists were very
28 concerned about its survival. However, I was highly encouraged to find
Frogs at Sharp Park during our survey work at night at Laguna Salada and
Horse Stable Pond . . .

1 Examining the Sharp Park area today, it is evident that the Frog population
2 has dramatically increased in size. For example, I see that it has been
3 common for the past couple of years at Sharp Park to find dozens and dozens
4 of juvenile and adult Frogs, as well over [sic] a hundred egg masses during
5 each breeding season alone (and that number includes just the egg masses
6 that are readily available to the surveyors). This is evidenced from even a
7 simple examination of Frog survey documents provided by the City. To put
8 this in perspective, finding a site that can sustain hundreds of adult Frogs is
9 a rare occurrence -- there are relatively few sites within the current
10 geographic range of the species that have such large populations of adult
11 Frogs.

12 Jennings Decl. ¶ 32. Jon Campo, the City's National Areas Program employee and the person with
13 perhaps the most "on the ground" experience with the Frog in Sharp Park, wrote to the FWS on January
14 21, 2011, stating, "I have some good news in regards to the Frogs at Sharp Park golf course. The egg
15 masses we have moved appear to be healthy as they approach Gosner stage 15-21. Also, we seem to
16 be having a banner year for breeding. I have been documenting the Frog egg masses at Sharp Park for
17 over 8 years and this year I have recorded more than 3 times the egg masses than any other year." Pls.'
18 Ex. 5. The Court finds persuasive the testimony that the Frog population is increasing each year and
19 is, in fact, "thriving." Jennings Decl. ¶¶ 39-40.

20 Plaintiffs, perhaps relying on their theory that they need only show the existence of take and not
21 irreparable harm, provided no arguments in their initial motion regarding the population trends of the
22 Frog in Sharp Park. Along with their reply, plaintiffs provided a supplemental declaration from Dr.
23 Hayes and a new theory: that "any increase in population is due to improved habitat conditions at
24 [adjacent] Mori Point, which is part of the contiguous habitat for the one overall Frog population that
25 inhabits both areas. Thus, while the improved conditions at Mori Point are assisting the Frog
26 population, conditions at Sharp Park remain a 'population sink' that is adversely affecting the overall
27 population." Pls.' Reply at 20 (citing Hayes Supp. Decl. ¶¶ 11-14).

28 The Court need not decide whether plaintiffs' Mori Point theory is correct, because even if

1 accepted as true, it simply does not meet plaintiffs' burden of demonstrating irreparable harm in the
2 absence of a preliminary injunction. A preliminary injunction is an extraordinary remedy, never
3 awarded as of right. *Winter*, 555 U.S. At 9. Here, the circumstances do not warrant the exceptional act
4 of prohibiting activity that has gone on for decades before the case can be decided on its merits. It is
5 uncontroverted that the local Frog population is increasing. The Court finds persuasive defendants'
6 assertions that they will continue careful monitoring of water levels, and continue to seek authorization
7 from FWS for the movement of any vulnerable egg masses. There may be other circumstances where
8 even if a listed population is increasing, preliminary injunctive relief is warranted because despite the
9 increase, a defendant's actions will, "reduce appreciably [the animal's] likelihood of survival or recovery
10 or appreciably diminish the value of their critical habitat." *Gutierrez*, 606 F. Supp. 2d. at 1207.
11 However, this is not that case.² The expansion of the Frog population, coupled with defendants' careful
12 attention to moving any vulnerable egg masses and their continuing interactions with FWS seeking
13 authorization to do so, make this a situation that does not warrant the temporary, immediate, and drastic
14 relief afforded by a preliminary injunction.
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18 Therefore, because plaintiffs failed to meet their burden with respect to the second prong, the
19 Court DENIES plaintiffs' motion for a preliminary injunction to stop pumping water at Horse Stable
20 Pond.
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23 2. Lawn Mower and Golf Cart Usage

24 The Court also finds that the plaintiffs have failed to establish the likelihood of irreparable harm
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26 ² Importantly, this is not a case where a preliminary injunction is sought to preserve the status quo.
27 Instead, plaintiffs are seeking to halt activities that have gone on for years. *See Save Strawberry Canyon*
28 *v. Dep't of Energy*, No. C 08-3494 WHA, at *1-3 (N.D.Ca. 2009) (analyzing whether the Supreme Court
in *Winter* meant to deprive district judges of the power to preserve the status quo when clear irreparable
injury would otherwise result).

1 to the Snake or the Frog absent an injunction prohibiting the use of Golf Carts and Lawn Mowers on
2 Holes 9-18 of the Sharp Park Golf Course. The only evidence that plaintiffs provide that take is
3 occurring with respect to the use of these vehicles was a single Snake that died six years ago. However,
4 since that time, defendants have implemented the 2009 Compliance Plan, which self-imposes protective
5 regulations regarding use of the vehicles for the sake of the animals. *See* 2009 Compliance Plan, Pl.'s
6 Ex. 8, at 10 (for example, the creation of "no mow zone" areas as well as golf play suspension when
7 either the Frog or Snake is observed on a green scheduled for maintenance). More importantly, there
8 have been no reported sightings of the Snake in Sharp Park in 3 years. Wayne Decl., ¶¶ 7-10. When
9 there is a significant question as to whether a listed species even exists in an area, the plaintiffs have a
10 high burden of showing that the species will be irreparably harmed absent an injunction. The plaintiffs
11 have failed to meet that burden here. Accordingly, the Court DENIES plaintiffs' motion for a
12 preliminary injunction to prohibit use of Golf Carts and Lawn Mowers on Holes 9 through 18 of Sharp
13 Park.
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18 CONCLUSION

19 Plaintiffs have failed to meet their burden of showing irreparable harm to the California Red
20 Legged Frog or the San Francisco Garter Snake absent the issuance of a preliminary injunction on
21 defendants' activities at Sharp Park. Accordingly, the motion for a preliminary injunction is DENIED.
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23
24 **IT IS SO ORDERED.**

25 Dated: November 29, 2011



26 _____
27 SUSAN ILLSTON
28 United States District Judge