Team 1

Docket No. 19-000987

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,

Plaintiff – Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant – Appellee,

and

CITY OF GREENLAWN, NEW UNION,

Defendant – Appellant.

On Appeal from the United States District Court for New Union in No. 66-CV-2017, Judge Romulus N. Remus

BRIEF OF DEFENDANT – APPELLANT, CITY OF GREENLAWN, NEW UNION

Oral Argument Requested

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union had federal question jurisdiction to hear Claims Two through Four of this case and supplemental jurisdiction to hear Claim One. 28 U.S.C. § 1331. The Endangered Species Act (ESA) grants original jurisdiction to the United States district courts "without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision" of the Act. 16 U.S.C. § 1540(g)(1). Federal district courts also have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367. The United States Court of Appeals for the Twelfth Circuit, as do all federal courts of appeals besides the Federal Circuit, has "jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The District Court's Order granting summary judgment for dismissal of the First Claim for Relief, denying summary judgment for dismissal of the Second Claim for Relief, and granting summary judgment for declaring Defendant-Appellant to be in violation of § 9 of the ESA was a final decision by that court. *New Union Oystercatchers, Inc. v. United States Army Corps of Engineers and City of Greenlawn, New Union*, Case No. 66CV2017 (RMN), slip op. (D. New Union May 15, 2019) [hereinafter cited to as the Record]. Therefore, the United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear this appeal of the Order.

STATEMENT OF THE ISSUES

I. Whether Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without implementing any water conservation measures.

II. Whether the operation of Howard Runnet Dam Works during a drought to provide flow to Greenlawn is a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536.

III. Whether Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitutes a "take" of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538.

IV. Whether the District Court must balance the equities before enjoining a beneficial municipal activity, when the activity will cause the extirpation of an entire population of an endangered species.

STATEMENT OF THE CASE

A. Facts

The City of Greenlawn, New Union lies on the Green River Bypass Reach, on both banks of the historical Green River. R. at 5. "The Bypass Reach was created when the United States Army Corps of Engineers [(ACOE)] built the Green River Diversion Dam and the Howard Runnet Dam, forming Howard Runnet Lake, in 1947," creating what is now referred to as the Howard Runnet Dam Works. *Id*; *see infra* App. A.

"Greenlawn owns the riverfront on both sides of the Bypass Reach, as well as the underlying riverbed." *Id*. Greenlawn withdraws from Green River and discharges into the Progress River; "Greenlawn has maintained municipal water intakes on the Bypass Reach since the City was founded in 1893." *Id*. After enlarging its municipal water system in 1968, the Greenlawn now provides domestic and industrial water supply to over 100,000 customers within [city] limits"—mostly to "residential districts with single-family homes." *Id*. Greenlawn's water withdrawals average 6 million gallons per day (MGD) annually, but due to the summer's higher water demands, the withdrawals peak at 20 MGD during the months of July and August. *Id*.

The Howard Runnet Dam was originally authorized by Congress in 1945 for flood control, hydroelectric power, and recreation purposes, and fish and wildlife purposes were added in 1958.

Id. at 6. Because the dam would "cut off the natural flow to the Green River Bypass Reach and the Greenlawn water supply," the ACOE and Greenlawn entered into an agreement that the ACOE would "maintain flows in the Bypass Reach sufficient for the City of Greenlawn to continue water withdraws 'in such quantities and at such rates and times as it is entitled to as a riparian owner under the laws of the State of New Union.'" *Id*. (quoting the agreement).

The ACOE's operation of the Howard Runnet Dam Works is governed by the Water Control Manual (WCM) that "establishes parameters for allowing releases of water from the dams for maintaining flood control storage capacity and recreation water levels, providing for hydroelectric generation, and maintaining flow for the City of Greenlawn's water intake in the Bypass Reach." *Id*. The WCM also provides for varying lake elevations depending on historical flows and water demands; it prescribes three different lake level "Zones" for when the lake levels drop below the seasonal target levels. *Id*. at 7. The WCM provides for recreational releases to be curtailed during all three drought zones and for downstream flows in the Bypass Reach to be reduced to 50 cubic feet per second (CFS) during a Zone 1 "drought watch" and to 7 CFS during Zone 2 "drought warnings" and Zone 3 "drought emergencies." *Id*. In addition to the specific operating conditions for each zone, the "WCM has a general provision which states, 'At all times the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply agreements entered into by the United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law.'" *Id*.

From the creation of this WCM in 1968 until now, droughts have been a rare occurrence. Between 1968 and 2012, lake levels never reached Zones 2 or 3, and the ACOE was forced to apply Zone 1 restrictions only five times. *Id*. at 8. Zone 1 conditions began again in fall 2016 and persisted on into spring of the next year to such a degree that the lake levels reached Zone 2

conditions. The ACOE enforced the flow restrictions in the Bypass Reach as provided in the WCM. *Id*. Once the flow was restricted to 7 CFS and thereby threatened Greenlawn with municipal water shortages, Greenlawn addressed a letter to the ACOE requesting more water flow, as it was entitled to under riparian law and the water-supply agreement. *Id*. In compliance with the agreement, and the WCM, the ACOE fulfilled the riparian rights of Greenlawn and increased the water supply to 30 CFS. *Id*.

The worsened drought conditions revealed the habitat of the oval pigtoe mussel, a federally listed endangered species, "from the confluence of the Bypass Reach and the tailrace downstream to the estuary, 60 miles from the Howard Runnet Dam Works." *Id*. at 9. No oval pigtoe mussels live in the portion of the river Greenlawn makes its withdrawals from. *Id*. Because of the lower water levels in the Green Bay during the recent drought, members of the New Union Oystercatchers, Inc. (NUO), "a not-for-profit membership association representing the interests of oyster fishermen," have recently found that their oyster catches have reduced. *Id*. at 10. Neither the NUO or its members own riparian land on Green Bay or the Green River. *Id*. Heavy rains have since fallen in the Green River, and the threat to the oval pigtoe mussel is no longer imminent. *Id*. at 11.

B. Procedural History

On July 17, 2017, NUO filed this lawsuit in the U.S. District Court for the District of New Union against the ACOE and Greenlawn pursuant to the ESA's citizen suit provision, ESA § 11(g), 16 U.S.C. § 1540(g). R. at 10. NUO claimed that the ACOE violated ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2), by failing to consult with the U.S. Fish and Wildlife Service (FWS) in regard to its "water releases from the Diversion Dam," R. at 15; and that Greenlawn violated ESA § 9, 16 U.S.C. § 1538, because of the alleged impact of the city's water withdrawals on the endangered

oval pigtoe mussel, R. at 10. The ACOE joined NUO in its ESA § 9 claim against Greenlawn. R. at 10. NUO additionally asserted "common law riparian rights claims against . . . Greenlawn." *Id.* In response, Greenlawn asserted its own riparian rights in a crossclaim against the ACOE seeking declaratory relief. *Id.* at 10–11.

Parties moved for summary judgment. *Id.* at 4. The District Court dismissed NUO's riparian rights claim and held for Greenlawn on its riparian rights crossclaim, "declaring that Greenlawn is entitled to sufficient flow in the Bypass Reach to supply its municipal water needs." *Id.* at 13. The court then dismissed NUO's ESA § 7(a)(2) claim against the ACOE, holding that the ESA's consultation requirement did not apply because the ACOE had not made a "discretionary action" in light of Greenlawn's water entitlement under the riparian law of New Union. *Id.* at 15. However, the District Court granted NUO's motion for summary judgment as to its ESA § 9 claim against Greenlawn, in which it was joined by the ACOE. *Id.* at 4–5. The court held that Greenlawn's otherwise legitimate municipal withdrawals were a foreseeable factual cause of a take of an endangered species. *See id.* at 17. Consequently, the District Court declined to balance the equities and enjoined "Greenlawn from making water withdrawals that have the effect of reducing downstream flows below the rate necessary for mussel survival." *Id.* at 18. NUO and Greenlawn both appealed the District Court's final decision to this Court. *Id.* at 1–2.

STANDARD OF REVIEW

An appellate court "review[s] questions of law de novo." *Fifth Third Mortg. Co. v. Kaufman*, 934 F.3d 585, 588 (7th Cir. 2019) (emphasis omitted). De novo review extends to questions of state law considered by a federal district court. *Netto v. Atl. Specialty Ins. Co.*, 929 F.3d 214, 216–17 (5th Cir. 2019). Thus, the Court of Appeals for the Twelfth Circuit reviews de novo the District Court's findings on Greenlawn's riparian rights; the applicability of ESA §

7(a)(2), 16 U.S.C. § 1536(a), to the ACOE's operation of the Howard Runnet Dam Works; and whether Greenlawn's municipal water withdrawals constituted a "take" of an endangered species under ESA § 9, 16 U.S.C. § 1538.

While a district court's decision to grant an injunction is reviewed for abuse of discretion by the appellate court, *Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 (9th Cir. 2019), "any determination underlying the grant of an injunction" is reviewed "by the standard that applies to that determination," *id.* (quoting *Ting v. AT&T*, 319 F.3d 1126, 1134–35 (9th Cir. 2003)). Accordingly, whether the District Court should have balanced the equities before enjoining Greenlawn's municipal withdrawals is reviewed de novo as a question of law.

SUMMARY OF THE ARGUMENT

The U.S Court of Appeals for the Twelfth Circuit should affirm the District Court's declaration of Greenlawn's riparian right to withdraw water from the Bypass Reach for its citizens' use and its conclusion that the ACOE had no duty to consult under ESA § 7(a)(2). The Court should reverse the lower court's determination that Greenlawn's water withdrawals constituted an illegal "take" of an endangered species under ESA § 9, and it should reverse the court's injunction against Greenlawn's withdrawals, which was based on this erroneous determination and failed to consider the equitable interests at stake.

Greenlawn's municipal water withdrawals from the Bypass Reach are protected by riparian doctrine's rule of reasonable use. The water used by Greenlawn's residents, including for their lawns and gardens, is considered "domestic use" that takes priority over all other uses, meaning that Greenlawn can continue supplying its residents even to the extent that such use consumes the entirety of the Bypass Reach's waters. As to Greenlawn's "artificial uses"—specifically, the water it supplies to industrial and commercial customers—the reasonable use rule resolves competing

claims according to a system of correlative rights, whereby only owners of riparian land possess water rights. Because NUO and its members do not own riparian land and thus lack rights to enforce, and because no riparian rightsholders have complained about Greenlawn's withdrawals, riparianism's system of correlative rights cannot compel a reduction in Greenlawn's artificial use. Therefore, Greenlawn's domestic and artificial uses are both reasonable uses that the City is entitled to make unabated.

In its operation of the Howard Runnet Dam Works to provide water to satisfy Greenlawn's riparian rights, the ACOE did not commit a "discretionary agency action" subject to the consultation requirement of ESA § 7(a)(2). This consultation requirement attaches only to *affirmative* agency actions that threaten a listed endangered or threatened species, such as an agency's issuance of a permit, entry into a contract, or construction of a dam. The ACOE has done none of these things. Instead, the ACOE is being challenged over its operation of a dam in compliance a preexisting agency manual and water-supply agreement with Greenlawn. Operation of the Howard Runnet Dam Works, as such, is not "affirmative" and does not rise to the level of agency action requiring § 7(a)(2) consultation. Moreover, even if operation of the dam could be construed as an action, this action was not discretionary because the ACOE was obligated by the water-supply agreement and its manual to fulfill Greenlawn's water demands. Hence, the ACOE had no duty to consult under § 7(a)(2).

Finding that Greenlawn's lawful water withdrawals constituted a "take" of the endangered oval pigtoe mussel under ESA § 9, as the District Court did, grossly expands liability under this statute. Although the ESA is a strong law, it remains bound by the principles of causation. The necessary causal connection, between Greenlawn's water consumption and the loss of mussels, was not met in this case. Cases involving habitat destruction indicate that liability under § 9

requires that the challenged activity relate directly to the habitat of a listed species. In contrast, Greenlawn's withdrawals occurred outside of the oval pigtoe mussels' habitat, in a manner similar to that in *Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014), wherein water withdrawals that increased salinity in a downstream estuary were held not to be the proximate cause of whooping crane deaths. Owing to the interconnected nature of ecosystems, it is wise to apply proximate causation to limit § 9 liability for actions taken outside a listed species' habitat—especially where, as here, harm to the species would not have occurred but for the contingency of a drought.

The District Court's injunction against Greenlawn's water withdrawals is fatally flawed because it is based on an erroneous ESA § 9 finding. But even if the Court affirms this finding, it should still reverse the injunction for the lower court's decision to not balance the equities at stake, in which it relied on *TVA v. Hill* for the proposition "that it is not the role of courts to balance *species eradication* against . . . public benefits." R. at 17 (citing 437 U.S. 153, 187 (1978)) (emphasis added). While the eradication of the snail darter as a species was indeed at stake in *TVA*, the same is not true in this case, where only the Green River *population* of the oval pigtoe mussel is at risk. Moreover, the activity enjoined in this case is no mere diversion dam as in *TVA*, but the water supply upon which a city has flourished for over a century. ESA § 10's incidental take permits and hardship exemptions plainly contemplate the weighing of economic factors against conservation, and given that the activity at issue—the use of water—would otherwise be subject to equitable balancing under riparian law, the District Court should have taken a more holistic approach to its injunction.

In holding as it did, the District Court issued contradictory commands: On the one hand, it held that Greenlawn "is entitled to sufficient flow . . . to supply its municipal water needs," which it correctly concluded are not subject to rationing. R. at 13. On the other hand, the District Court

then proceeded to enjoin Greenlawn from the very withdrawals which it had held Greenlawn is entitled to make. As between these contradictory commands by the District Court, only the former should be validated by the Twelfth Circuit.

ARGUMENT

I. RIPARIAN DOCTRINE PROTECTS GREENLAWN'S RIGHT TO WITHDRAW WATER FOR MUNICIPAL PURPOSES WITHOUT HAVING TO "SHARE THE SHORTAGE."

The defining characteristic of riparian doctrine is its system of correlative rights. The right of an owner of riparian land—that is, land abutting a natural stream or lake—to withdraw and use water is not determined by any static, mathematical formula but is instead subject to the rule of "reasonable use." *See Prather v. Hoberg*, 150 P.2d 405, 411 (Cal. 1944); RESTATEMENT (SECOND) OF TORTS §§ 841, 843 (AM. LAW. INST. 1979) [hereinafter R2T]. Whether a given use is reasonable varies from case to case: a use may be reasonable in one set of circumstances and unreasonable under different circumstances. *Hackensack Water Co. v. Village of Nyack*, 289 F. Supp. 671, 678 (S.D.N.Y. 1968). Riparian water rights are *correlative* in that the extent of any particular riparian landowner's right to make reasonable use of a stream is determined in relation to the uses made by other riparian landowners on the same stream. *Stein v. Burden*, 29 Ala. 127, 132 (Ala. 1856).

In addition to the reasonable use requirement, two more rules may constrain a riparian landowner's use of water. The "on-tract" rule limits the use of water to riparian tracts and bars its use on nonriparian land; the "in-basin" or "in-watershed" rule prohibits diversions of water from one watershed to another. Heather Elliott, *The Failings of Alabama Water Law*, 68 ALA. L. REV. 759, 773, 781 (2017). Together, these restrictions comprise the vestiges of the ancient English doctrine of "natural flow," which—as presently modified by the American rule of reasonable use—may direct a riparian water user to return unused water back to the stream of origin. *Pyle v.*

Gilbert, 265 S.E.2d 584, 587 (Ga. 1980), *overruled on other grounds by Tunison v. Harper*, 690 S.E.2d 819 (Ga. 2010); BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 35 (6th ed. 2018).

Traditional natural flow doctrine is no longer the law today in the United States, and even the attendant on-tract and in-basin limitations have lost much of their force. *See Pyle*, 265 S.E.2d at 587 ("Georgia's law of riparian rights is a natural flow theory modified by a reasonable use provision."); THOMPSON ET AL., *supra*, at 64–65. Perhaps the best evidence of erosion of these restrictions is the prevailing rule in New Union, which "recognizes the right of a municipality to be a riparian landowner and withdraw water as a supply to the benefit of *non-riparian* parcels within the municipality." R. at 12 (citing *Tubbs v. Potts*, 45 N.U. 999 (1909)) (emphasis added).

A. Greenlawn's Municipal Water Withdrawals Are Reasonable in General.

The analysis of Greenlawn's municipal withdrawals starts with considering the overall reasonableness of these withdrawals, before narrowing the analysis to consider the reasonableness of the particular uses to which this water is put. Courts over time have developed a number of factors to organize the various circumstances that can inform the reasonableness of a use of water. *See, e.g.*, *Hackensack Water Co.*, 289 F. Supp. at 678, 680; *Smith v. Stanolind Oil & Gas Co.*, 172 P.2d 1002, 1005 (Okla. 1946). These factors are helpfully summarized by the Restatement (Second) of Torts, which reflects the contemporary approach to riparian rights:

> (a) The purpose of the use,
> (b) the suitability of the use to the watercourse or lake,
> (c) the economic value of the use,
> (d) the social value of the use,
> (e) the extent and amount of harm it causes,
> (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
> (g) the practicality of adjusting the quantity of water used by each proprietor,
> (h) the protection of existing values of water uses, land, investments and enterprises and

(i) the justice of requiring the user causing harm to bear the loss.

R2T § 850A; *see also Mich. Citizens for Water Conservation v. Nestlé Waters N. Am. Inc.*, 709 N.W.2d 174, 194 (Mich. Ct. App. 2005) (stating that Michigan follows a Restatement-like approach), *rev'd on other grounds*, 737 N.W.2d 447 (Mich. 2007).

Without engaging in an exhaustive analysis at the present juncture, several of the above factors indicate the overall reasonableness of Greenlawn's municipal water withdrawals. Although riparianism does not explicitly recognize prior appropriation doctrine's "first in time, first in right" principle, "most courts have applied the reasonable use rule so as to give legal protection to the prior use." R2T § 850A cmt. k. Greenlawn has withdrawn water for municipal purposes from the Green River (or Bypass Reach as it is currently known) since 1893—126 years as of this writing in late 2019. R. at 5. This makes Greenlawn senior to the only other riparian owner involved in this suit: the ACOE, which completed the Howard Runnet Dam Works in the late 1940s. *Id.*; *id.* at 13 (holding that "NUO is not a riparian landowner"). Greenlawn's withdrawals support the life of an entire city, supplying water "to over 100,000 customers," R. at 5, and thus have enormous economic and social value. R2T § 850A(c), (d). Throughout the long history of Greenlawn's withdrawals, the Green River has proven to be a suitable source for the City's water supply, as well as other riparian users. R2T § 850A(b). In the half-century since 1968, when the ACOE instituted its WCM, drought restrictions on flows from the Howard Runnet Dam Works have been imposed a mere six times, and out of those six times, only once—in the most recent case giving rise to this suit—has the Howard Runnet Lake dropped to Zone 2 and Zone 3 levels. R. at 8. These episodes therefore represent a deviation from the norm and speak to the fleeting nature of any harm incurred by Greenlawn's valuable municipal withdrawals. R2T § 850A(e).

Admittedly, Greenlawn's sewage treatment discharges into the Progress River watershed may raise questions as to the reasonableness of its withdrawals from the Green River watershed.

See R. at 5. Nevertheless, this prima facie violation of the in-basin rule does not render Greenlawn's overall water usage per se invalid. As discussed earlier, the in-basin rule, as well as the on-tract rule, have withered under modern, reasonable use-centered riparian doctrine. *See* THOMPSON ET AL., *supra*, at 64–65. Facing facts similar to those in this case, the court in *Hackensack Water Co.* did not find a defendant municipality's use unreasonable as a matter of law where it discharged unconsumed water into a different watershed, to the injury of the downstream plaintiff. 289 F. Supp. at 674, 680. Instead, the court largely bypassed the out-of-watershed diversion issue and appears to have folded it into its general assessment of reasonable use. *Id.* at 677–80. This Court should give comparable weight to Greenlawn's discharges into the Progress River by abstaining from treating the entirety of Greenlawn's withdrawal as per se unreasonable on the basis of this activity alone.

B. Greenlawn Has an Absolute Right to Withdraw Water for Its Citizens' Domestic Use.

Riparian doctrine distinguishes between "domestic" and "artificial" uses of water. *See, e.g.*, *Stein*, 29 Ala. at 132–33 (using the older term "natural wants" for "domestic use"). Whereas the right to put water to an artificial use is correlative to the rights of other riparians, the right of domestic use is virtually unlimited. *Id.* As stated in *Stein*: "[E]ach riparian proprietor has the right to use the water which flows . . . through his lands, for all ordinary purposes, and for the gratification of natural wants, *even though, in such use, he consume the entire stream*." *Id.* at 132 (emphasis added). Per *City of Canton v. Shock*, upon which New Union law is based, a municipality situated on a watercourse is a riparian proprietor, standing in for its water customers such that their individual uses are attributable to the municipality as a corporate entity. 63 N.E. 600, 602 (Ohio 1902). Thus, the domestic-versus-artificial use framework applies to municipalities writ large. *See id.* Within this context, domestic use is the use of water "made by the

[municipality's] citizens in the ordinary conduct and for the ordinary purposes of domestic life." *Gallagher v. City of Philadelphia*, 4 Pa. Super. 60, 64 (1896). Meanwhile, artificial use describes every other lawful use, including industrial and commercial uses of water. *Pa. R.R. Co. v. Miller*, 3 A. 780, 781 (Pa. 1886).

Greenlawn is a largely residential city and supplies water to its residents as well as to some industrial consumers and "a small downtown area" presumably consisting of commercial enterprises. R. at 5. Hence, while the small portion of water going to the industrial and commercial customers is for artificial use, the outstanding majority of Greenlawn's water withdrawals are for the domestic use of its residents. To the extent that Greenlawn residents use municipal water for recognized domestic purposes like "drinking, bathing, cooking, flushing toilets, [and] washing clothes," *Crommelin v. Fain*, 403 So. 2d 177, 180 (Ala. 1981), satisfaction in full of this residential use takes priority over all competing downstream uses and upstream artificial uses, *see Tunison*, 690 S.E.2d at 821.

Having shown the foregoing uses are protected domestic uses, the question that remains is whether the residential "lawn and ornamental watering" that causes peaking water demand during summer months also counts as a domestic use. The weight of authority holds that it does. Among the various examples of domestic uses provided by *Crommerlin*, cited above, is "watering the grass." 403 So. 2d at 180. Likewise, *Harris v. Brooks* recognizes "gardening" as a domestic use. 283 S.W.2d 129, 133 (Ark. 1955). Moreover, some states' "regulated riparian"[1] statutes, codifying riparian law and typically updating it with permit systems, explicitly define domestic use to cover home gardens and lawns. *See* ARK. CODE ANN. § 15-22-202(5); HAW. REV. STAT. § 174C-3; MISS. CODE ANN. § 51-3-3(c). And finally, the water at issue is not used to manufacture products or

[1] The term "regulated riparian" originates from the REGULATED RIPARIAN MODEL WATER CODE (AM. SOC'Y OF CIVIL ENG'RS 2004).

generate a commercial profit—as might be the case if Greenlawn residents were watering produce for market, rather than their home lawns and ornamental gardens. *See Mich. Citizens for Water Conservation*, 709 N.W.2d at 206 (treating "commercial profit" as a marker of artificial use). Instead, maintaining the grass in front of one's home plainly comports with a layman's understanding of "the ordinary purposes of domestic life." *Gallagher*, 4 Pa. Super. at 64.

NUO might assert that while treating gardening and lawn care as domestic uses is reasonable in the context of individual riparian landowners, it is unreasonable when scaled up to the municipality-level. However, this line of reasoning would call for refusing riparian status to municipalities in the first place. *Cf. Pernell v. City of Henderson*, 16 S.E.2d 449, 451 (N.C. 1941). New Union law already accepts that municipalities can exercise riparian rights, and riparian law only prioritizes domestic uses over artificial uses, not particular domestic uses over others. Therefore, all of the water Greenlawn supplies to meet its residents' domestic needs, including lawn care and gardening, constitutes a reasonable use and is not subject to rationing.

C. Greenlawn's Artificial Uses Are Protected Under Riparian Doctrine's System of Correlative Rights Because No Riparian Landowners Have Complained About Greenlawn's Withdrawals.

The reasonableness of Greenlawn's artificial uses—specifically the water used by its industrial and commercial customers—is determined by the application of riparianism's system of correlative rights. *City of Canton*, 63 N.E. at 602–03. With the exception of domestic use, this system requires each user to adjust his use to "share the shortage" when a water supply cannot satisfy all claimed uses, as in a drought. THOMPSON ET AL., *supra*, at 33–34. Thus, the extent of any riparian owner's right of reasonable use remains inchoate until it is given form by a competing use. *Stanolind Oil & Gas* underscores this point:

> It is a rule of general acceptation that a riparian owner has the right to make any use of water, beneficial to himself, which his situation makes possible, so long as

> he does not inflict substantial or material injury on those below him who are to be deemed as having corresponding rights.

172 P.2d at 1005. Who has the "corresponding rights" necessary to define another's right of reasonable use? Only owners of riparian land, because riparian rights are appurtenant to the land abutting a natural watercourse and furthermore "are not alienable, severable, divisible or assignable" from such land. *Thompson v. Enz*, 154 N.W.2d 473, 478 (Mich. 1967) (quoting *Harvey Realty Co. v. Borough of Wallingford*, 150 A. 60, 63 (Conn. 1930)); *id.* at 483.

Thus, Greenlawn is permitted under riparian doctrine to continue water withdrawals for artificial uses without any water conservation measures because no riparian owners have challenged this practice. *See* R2T § 856(1). Neither NUO or its members own land on the Green River or Green Bay. R. at 10. Consequently, as the District Court correctly held, R. at 13, they do not possess the riparian rights needed to delineate Greenlawn's right of reasonable use to supply its industrial and commercial customers. Moreover, the record is silent as to the existence of any riparian landowners downstream from Greenlawn—much less downstream riparians who have been substantially injured by the City's water withdrawals. As between Greenlawn and the ACOE, which is a party to this suit and holds upstream riparian rights by merit of the Howard Runnet Dam Works, no mutual reductions in their respective water uses are necessary because the ACOE's WCM already contemplates the agency undertaking unilateral reductions in times of shortage. R. at 7. Under these circumstances, requiring Greenlawn to curb its artificial uses would produce a logical fallacy: absent any conflicting riparian uses, with whom could Greenlawn *share* the shortage?

Finally, natural flow doctrine does not bar Greenlawn from supplying its artificial uses unabated under the exigent circumstances of a drought. The entire premise of the doctrine is that upstream riparians should let water they do not consume pass from their property so that

downstream riparians can make likewise reasonable use. *See Pyle*, 265 S.E.2d at 406. Hence, the rationale for natural flow doctrine is the notion of correlative rights. This rationale does not apply where, as here, no riparian landowners claim they have been injured by another riparian's *artificial* use—recalling that one may "consume the entire stream" for *domestic* purposes, *Stein*, 29 Ala. at 132. It follows that natural flow doctrine should not restrict Greenlawn's use.

The District Court unfortunately neglected to consider Greenlawn's artificial use of water. But it was nevertheless correct in its ultimate conclusion "that Greenlawn is entitled to sufficient flow in the Bypass Reach to supply its municipal water needs." Riparian doctrine protects Greenlawn's existing domestic use, and absent other riparian landowners injured by Greenlawn's artificial use, the City cannot be compelled to share the shortage. This Court should therefore affirm the judgement of the lower court on this issue.

II. THE CONTINUED OPERATION OF THE HOWARD RUNNET DAM WORKS DURING DROUGHT CONDITIONS TO PROVIDE WATER TO GREENLAWN IS NOT SUBJECT TO THE CONSULTATION REQUIREMENT WITHIN § 7 OF THE ENDANGERED SPECIES ACT, 16 U.S.C. § 1536.

Section 7 of the ESA imposes two obligations on federal agencies like the ACOE: (1) agencies must consult with the appropriate wildlife agency concerning the potential impacts of their actions on listed endangered and threatened species, and (2) such agencies must avoid activities that threaten a listed species. 16 U.S.C. § 1536. A regulation adopted by the U.S. Fish and Wildlife Service (FWS) defines "action" to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02. The duty to consult is triggered only when these two obligations are followed and when the agency's actions are nondiscretionary. 50 C.F.R. § 402.03. Thus, an agency's degree of discretion, or lack of discretion, in regard to the particular action or inaction, is key in determining the applicability of § 7 of the ESA.

A. The ACOE's Decision to Operate a Dam During Drought Conditions Is Not an "Agency Action" for the Purposes of the § 7(a)(2) Consultation Requirement.

Section 7(a)(2) of the ESA requires federal agencies to consult with the FWS before authorizing, funding, or carrying out any action that could affect a listed species. 16 U.S.C. § 1536(a)(2). Furthermore, the ESA requires federal agencies to ensure that their actions are "not likely to jeopardize the continued existence" of a listed species or "result in the destruction or adverse modification of [the critical] habitat of such species." *Id*. While § 7(a)(2) covers many types of federal actions, it does not cover situations where the government fails to act or where legislation requires the government to act.

In *Western Watersheds Project v. Matejko*, environmental groups sued the Bureau of Land Management (BLM) for failing to consult with the FWS regarding hundreds of river and stream diversions on public lands in the Upper Salmon River basin of central Idaho. 468 F.3d 1099, 1102 (9th Cir. 2006). The trial court found that the BLM had discretion under the Federal Land Policy Management Act of 1976 to regulate the diversions, and that BLM's failure to exercise that discretion constituted an agency action for purposes of § 7(a)(2). *Id*. It also found that the water diversions could jeopardize threatened species of fish. *See id*. at 1103. Therefore, the trial court concluded that BLM had a duty to consult under § 7(a)(2) and ruled for the plaintiffs. *Id*. at 1106. The question on appeal was whether such a failure to exercise discretion—assuming the BLM had discretion—was an agency action for purposes of § 7(a)(2), so as to require consultation. *Id*. at 1107. The Ninth Circuit answered *no* and reversed: the failure to exercise discretion is not an agency action subject to the consultation requirement. *Id*. at 1111.

Instead, the Ninth Circuit found that the affirmative nature of § 7(a)(2) and the absence of "failure to act" from the statute's language, "which refers to 'agency action' as 'any action authorized, funded, or carried out by such agency,'" differed from the other sections of the ESA.

Id. at 1107–08 (quoting 16 U.S.C. § 1536(a)(2)). Other sections, such as ESA § 11(g)(1)(C), "authorizing citizen suits 'where there is alleged a failure of the Secretary to perform any act or duty . . . which is not discretionary,'" explicitly refer to an agency's failure to act. *Id*. at 1108 (quoting 16 U.S.C.S. § 1540(g)(1)(C)). Although the term "agency action" is to be construed broadly, *see Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998), courts have found that § 7(a)(2) consultation is required only for "affirmative actions." For example, in *Defs. of Wildlife v. U.S. EPA*, § 7(a)(2) was said to be "a do-no-harm directive pertaining to *affirmative* agency action with likely adverse impact on listed species." 420 F.3d 946, 970 (9th Cir. 2005) (emphasis added), *rev'd on other grounds by Nat'l. Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664 (2007). As such, the ACOE's "action" in this case stands in contrast to cases involving true affirmative actions, such as when the federal government decides to build a dam or other water projects as in *TVA v. Hill*, 437 U.S. 153 (1978). The court in *California Sportsfishing Protective Alliance v. Federal Energy Regulatory Commission (FERC)* found FERC's inaction did not require consultation, where FERC took no affirmative action to modify a dam license and its previous action of granting the license was already completed. 472 F.3d 593, 598–99 (9th Cir. 2006). The court moreover emphasized that continued operation of the dam pursuant to this license was "not a federal agency action" subject to ESA § 7(a)(2). *Id*. at 598 (citing 50 C.F.R. § 402.02).

In this case, the ACOE did not fund the diversions. It did not issue permits. It did not grant new contracts. Nor did it build dams or divert new streams. The ACOE merely operated the dam in a manner that has been established since 1968, and in compliance with its existing operating manual. R. at 6, 8. This mundane operation of the dam merely fulfills the nondiscretionary requirements laid out in the WCM and the ACOE's water-supply agreement with Greenlawn. The

ACOE did not affirmatively act in a way that would require consultation with the FWS, as it was not "an entity responsible for [the challenged] decisionmaking [sic]." *Defs. of Wildlife*, 420 F.3d at 968 (citing *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1033 (9th Cir. 2005)).

Additionally, construction of the Howard Runnet Dam Works and the adoption of the WCM both predate the ESA, R. at 14, and thus these initial actions of the ACOE were not subject to ESA § 7(a)(2)'s consultation requirement. *See TVA*, 437 U.S. at 186 n.32 (stating that Congress did not intend to apply § 7 retroactively). The Howard Runnet Dam Works was authorized by Congress in 1945 for flood control, hydroelectric power, and recreational uses, with fish and wildlife purposes added in 1958. R. at 6. Upon completion of the dams in 1948, an agreement was entered into between the ACOE and Greenlawn to maintain the flows in the Bypass Reach sufficient for the city's water withdrawals. *Id*. As the ESA was not adopted until 1973, the duty to consult in § 7(a)(2) does not attach to the actions that established this particular dam. *Cf. TVA*, 437 U.S. 153. The actions of creating the agreement and the WCM also occurred before 1973; therefore, any such actions regarding mere ordinary operation of the dam would not fall under § 7(a)(2).

As the ACOE's decision to continue operating the dam did not result from an affirmative action authorizing, funding, or carrying out the operation of the dam during drought conditions, there is no duty to consult. To hold otherwise would lead to an absurd result in which non-affirmative, repetitive daily actions would require equally repetitive consultation.

B. Even if the Court Finds that the ACOE's Operation of the Dam Is an Agency Action, It Is a Nondiscretionary Action and Is Not Subject to the Consultation Requirement Under § 7 of the Endangered Species Act.

The ESA regulations specifically exempt nondiscretionary actions from compliance with ESA § 7 consultation requirements. 50 C.F.R. § 402.03; *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666–67 (2007). The action in this case is the ACOE's release of water

in keeping with an existing policy, which requires the ACOE to adhere to state law and its agreement with the City of Greenlawn. *See* R. at 6–7. The agreement provides that the ACOE will "maintain flows in the Bypass Reach sufficient to allow the City of Greenlawn to continue water withdrawals 'in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union.'" R. at 6 (quoting the agreement). This is exactly what the ACOE has done: the agency has followed its agreement with Greenlawn and maintained the water flow in quantities sufficient to meet Greenlawn's entitlement under riparian law.

Although it is true that "where challenged action comes within the agency's decision-making authority and remains so, it falls within § 7(a)(2)'s scope," *Defenders of Wildlife*, 420 F.3d at 969, there is no ongoing agency action, as in this case, where the agency acted earlier but specifically did not retain authority or was otherwise constrained by statute, rule, or contract. In *Environmental Protection Information Center v. Simpson Timber Co.*, the Ninth Circuit found there was no §7(a)(2) consultation requirement where the FWS had already issued a permit but had not retained discretion to amend it to protect endangered species. 255 F.3d 1073, 1082 (9th Cir. 2001). As in *Simpson Timber Co.*, there is no ongoing discretionary agency involvement by the ACOE in this case.

Congress has given the authority to implement water allocations by contract to the principal federal dam operating agencies, the ACOE and the Bureau of Reclamation. 43 U.S.C. § 390. Because Congress gave the ACOE control over the timing and amount of release from the dams, and because of the Howard Runnet Dam's potential interference with Greenlawn's water supply, the ACOE entered into a contract with the City of Greenlawn in 1958 stating in pertinent part that the ACOE will "maintain flows in the Bypass Reach sufficient to allow the City of Greenlawn" to meet its riparian needs. R. at 6. The ACOE further solidified this agreement and the riparian rights

of the City of Greenlawn when it enacted its current manual in 1968. The WCM states, "At all times the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply agreements entered into by the ACOE, and with the riparian rights of property owners established under New Union law." R. at 7. The use of "shall" is mandatory language, and normally creates an obligation without discretion. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

In addition, *National Association of Home Builders* holds that a federal agency need not consult with FWS with respect to an action that the agency is required to take by law. 551 U.S. 644, 655–67 (2007). As the riparian rights doctrine is the law of New Union, and the binding agreement between Greenlawn and the ACOE as well as the WCM expressly bind the ACOE to this law, the ACOE need not consult with FWS where, as demonstrated earlier, Greenlawn is entitled to satisfaction of its water demands in full under riparian law. Although "some discretion" was found on appeal, in *Natural Resources Defense Council v. Kempthorne*, where the plaintiffs sought rescission of various contracts, the district court found no duty to consult because the discretion of the Bureau of Reclamation was "substantially constrained" under the logic of *National Association of Home Builders*. 621 F. Supp. 2d. 954, 976, 979 (E.D. Cal. 2009). The case was stayed for circumstances in which there was failure on behalf of the Bureau to consult prior to renewing the contract, but the court dismissed the claims against the agency for failing to consult in relation to the ongoing contracts because the agency had no discretion to change them. *Nat. Res. Def. Council v. Norton*, 236 F. Supp.3d 1198, 1209, 1230 (E.D. Cal. 2017). The ACOE's decision-making power is similarly constrained here because it is not renewing the contract, nor does the language in the agreement between the ACOE and the City of Greenlawn support a change in the contract.

For these reasons, the ACOE has not made any discretionary actions to which the ESA §7(a)(2) consultation requirement would apply.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GREENLAWN'S WITHDRAWALS FROM THE GREEN RIVER WERE NOT THE PROXIMATE CAUSE OF THE DECREASE IN THE OVAL PIGTOE MUSSEL POPULATION, AND TO ASSIGN LIABILITY TO SUCH AN INDIRECT ACTION WOULD CREATE AN UNWORKABLE STANDARD OF LIABILITY UNDER § 9 OF THE ENDANGERED SPECIES ACT.

The ESA exists to prevent the complete loss of species that are close to extinction by listing those species and then regulating ways in which people can interact with them. 16 U.S.C. § 1531. One way the Act regulates behavior is through the prohibition of taking, or harming, any member of a listed species. 16 U.S.C. § 1538. In order to find liability on the part of an actor, however, a harm must be tied to an action by causation. *Waters v. Merchs.' Louisville Ins. Co.*, 36 U.S. 213, 223 (1837); *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008) (bringing a claim itself requires an initial effort to show causation). This is one of the most basic principles of the justice system, and the ESA is not an exception. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697 n.9 (1995). Because of the interconnected nature of ecosystems, to allow for actions wholly outside of an endangered species' habitat to qualify as a taking in that habitat would create an unworkable standard of liability. Without proximate cause, there is no fault attributable for a harm under § 9 of the ESA.

A. Greenlawn's Consistent Withdrawals from the Bypass Reach Were Too Indirectly Related to the Decrease in Population of Oval Pigtoe Mussels to Amount to a Violation of the Endangered Species Act.

Causation is one of the foundations of assigning responsibility. *See Waters*, 36 U.S. at 223. This is true for establishing liability under the Endangered Species Act as well. *Babbitt*, 515 U.S. at 697 n.9 (stating the Act includes the "ordinary requirements of proximate causation and foreseeability"); *Aransas Project v. Shaw*, 775 F.3d 641, 656 (5th Cir. 2014). To establish a party

as the cause of an injury, the action must not be too far removed from the consequences. *Babbitt*, 515 U.S. at 697 n.9 ("We do not agree with the dissent that the regulation covers results that are not 'even foreseeable . . . no matter how long the chain of causality between modification and injury.'"). In addition to normal causation requirements, the plain language of the ESA suggests a direct harm is required for an action to amount to a violation of the prohibition on taking endangered species. 16 U.S.C. § 1538 (prohibiting any "take" of an endangered species); *id.* § 1532 (defining "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct").

Though the Code of Federal Regulations suggests that more indirect causes also result in a violation of the prohibition against taking an endangered species, the basic requirement of a causal connection still limits this liability for indirect takings. *Compare* 50 C.F.R. § 17.3 ("Harm in the definition of 'take' . . . means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife . . ."), *with Babbitt*, 515 U.S. at 700 n.13 ("[T]he regulation merely implements the statute, and it is therefore subject to . . . ordinary requirements of proximate causation and foreseeability. Nothing in the regulation purports to weaken those requirements.") (citation omitted), *and Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995). Factual causation is necessary but insufficient on its own to establish a violation of the ESA's take prohibition. *Aransas Project*, 775 F.3d at 660 (citing *Babbitt,* 515 U.S. at 697 n.9). Establishing proximate cause is necessary and requires a fact-specific analysis that makes such questions "generally inappropriate for resolution on summary judgment." *Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 520 (E.D. Cal. 2018) ("[I]f there is a dispute as to any one of many fundamental lynchpins in the causal chain, summary judgment in inappropriate.").

Though the ESA and accompanying regulations allow for liability in cases of indirect takings, the longstanding requirements of factual and proximate causation limit the applicability of liability to cases of direct habitat destruction. *See Simpson Timber Co.*, 255 F.3d at 1075; *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067–68 (9th Cir. 1996); *Forest Conservation Council*, 50 F.3d at 786. The lower court erred in finding these cases did not preclude a finding of liability under the ESA for actions wholly outside of an endangered species' habitat. *See* R. at 16. They do preclude such a finding by demonstrating the end of the "chain of causation" presented by independent intervening causes, which limit liability to those actions occurring in that habitat. *See also Aransas Project*, 775 F.3d at 660; *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008) (citing R2T § 441).

In *Palila v. Hawaii Department of Land and Natural Resources*, the court held that grazing sheep and goats which were killing saplings that would otherwise have grown to become habitat for the Palila bird was enough to violate the ESA. 639 F.2d 495, 498 (9th Cir. 1981). The present case is distinguishable from *Palila*, where the grazing was in the endangered birds' habitat, because no oval pigtoe mussels live in the portion of the river Greenlawn makes its withdrawals from. *See* R. at 9. This illustrates the role that proximate cause plays in limiting how the destruction of habitat can amount to a taking under the ESA. Similarly, the line of cases holding agencies liable under the ESA when they grant permits that result in the habitat-harming actions by third parties is also limited to those permitted actions that take place within the endangered species' habitat. *Loggerhead Turtle v. Council of Volusia Cty.,* 148 F.3d 1231 (11th Cir. 1998) (allowing nocturnal beach traffic within the loggerhead turtle nesting area); *Sierra Club v. Yeutter*, 926 F.2d 429, 432–33 (5th Cir. 1991) ("Forest Service permitted excessive timber removal in Texas forests whose trees are home for red cockaded woodpeckers."); *see also Welfare Inst. v. Martin,* 623 F.3d

19 (1st Cir. 2010); *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110, 1121 (D. Haw. 2000). Greenlawn neither withdrew water directly from the critical habitat of oval pigtoe mussels or authorized a third party to do so.

Not only do the above-cited cases differ from the current case because the actions were carried out in the endangered species' habitat—unlike here, they also differ with respect to the foreseeability of the habitat's destruction. In *Palila*, the defendants isolated the cause of the endangered birds' habitat to the grazing of their sheep and goats by conducting "[f]encing experiments," which "showed that in the absence of [this activity], the forest regenerated." 639 F.2d at 496. Showing a party was actually present in the habitat and witnessed its degradation firsthand plainly establishes that party had the ability to foresee that destruction. Similarly, in *Yeutter*, the permits given by the Forest Service guaranteed the trees would be cut down by those receiving the permits; both parties involved knew the effects their actions would have on the habitat of the endangered red-cockaded woodpecker. 926 F.2d at 438–39. This direct interference in the critical habitat of an endangered species did not happen in Greenlawn; the City's withdrawals were outside of the oval pigtoe mussel's habitat, R. at 9, and foreseeability is reduced the farther removed the habitat is from the action. Furthermore, unlike *Palila* and *Yeutter*, there were multiple independent intervening causes that broke whatever chain of causation existed between Greenlawn and the reduction of oval pigtoe mussel habitat. *Cf. Palila*, 639 F.2d at 496; *Yeutter,* 926 F.2d at 438. Upstream from Greenlawn are "several large agricultural operations"—the second most consumptive use of freshwater in general, far exceeding municipal withdrawals[2]—and dams operated by the ACOE. R. at 5, 7–8. These two groups of users were also responsible for withholding water from reaching the oval pigtoe mussel habitat downstream.

[2] CHERYL A. DIETER ET AL., U.S. GEOLOGICAL SURVEY, CIRCULAR 141, ESTIMATED USES OF WATER IN THE UNITED STATES IN 2015 8 fig.1 (2018).

For those reasons and the facts themselves, the case at hand more closely resembles *Aransas Project* than any of the cases listed above. 775 F.3d at 662. In *Aransas Project*, the court held that freshwater withdrawals upstream from the habitat for a population of whooping cranes were not the proximate cause for the rise in salinity that ultimately decreased the bird's numbers. *Id.* at 646–47, 660. The drop in the number of oval pigtoe mussels was due to a decrease in water reaching their habitat and is not something Greenlawn could have foreseen for similar reasons. First, like in *Aransas Project*, the die off of the species occurred during an unexpected drought. *Id.* at 658–59. This inability to foresee relevant possible impacts is compounded in the current case, like it was in *Aransas Project*, by the fact that Greenlawn was not the only user of the Green River's water. *Id.* The lower court failed to consider the other users of the Green River in concluding the City's withdrawals were the proximate cause of the decrease in the river's oval pigtoe mussel population. Without accounting for the consumptive actions of agricultural users and the ACOE, as well as Greenlawn, there is no way to establish the City's withdrawals as the proximate cause of the decrease in mussel populations downstream. At the very least, a genuine issue of material fact exists as to the relative responsibility of each entity.

Differences do exist between the two cases, however. In the case at bar, the mussel's habitat is wholly outside of Greenlawn's jurisdiction, while in *Aransas Project*, the whooping crane's migratory habitat was in the jurisdiction of the permitting authority. *Id.* at 645. Still, the *Aransas Project* court found that the Texas Commission on Environmental Quality's decision to permit water withdrawals was too far removed from the whooping cranes' deaths. *Id.* at 664. Additionally, the ACOE's hydroelectric operations at the Howard Runnet Dam discharge at a point downstream from Greenlawn's water intakes, *see infra* App. A-1., and therefore the City cannot know the full effects of the ACOE's water use until *after* it has made its own withdrawals. Greenlawn's

withdrawals, being even more attenuated than those authorized in *Aransas Project*, should be found too remote to have been the proximate cause of the decrease in the Green River's oval pigtoe mussel population.

Neither is Greenlawn the factual cause of the decline in oval pigtoe mussels in the Green River. Greenlawn has consistently withdrawn water from the Green River since 1893 without upsetting the oval pigtoe mussel population. R. at 5. Upstream agricultural uses, the ACOE-run Howard Runnet Dam, and drought conditions all played a part in the reduction of the Green River's flow. Section 9 of the ESA prohibits takes by "any person." 16 USC § 1538(a)(1)(B). In *Alabama v. U.S. Army Corps of Engineers*, the court interpreted this language to exclude "acts of nature" from the reach of the ESA's taking prohibition and held that the natural decrease in rainfall during a drought was not the fault of the ACOE. 441 F. Supp. 2d 1123, 1134 (N.D. Ala. 2006). Similar to the present case, *Alabama* involved dam operations and listed mussels species. *Id.* at 1125. Unable to establish that the ACOE's operation of its dams was the cause of worsened conditions, versus "the absence of rain," the court could not hold the agency liable for the harm to the mussels. *Id.* at 1134; *see also Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 538 F. Supp. 2d 242, 262 (D.D.C. 2008). Moreover, even though severe drought conditions existed prior to the ACOE's establishment of the dams, the court found that there was not enough evidence to suggest that dam operations were the cause of the loss of mussels in the affected river. *Alabama*, 441 F. Supp. 2d at 1134. Here, it is even less likely that Greenlawn's withdrawals were the cause of the loss of mussels in the Green River, given the long history of its withdrawals without adverse effects on water quantity. *See supra* 11. It was the addition of drought conditions in the case at bar that caused the worsened conditions, ultimately leading to the loss of oval pigtoe mussels. This Court cannot hold Greenlawn responsible for acts of nature—nor the actions of others. Therefore,

this case does not fall within the existing limits of liability under the taking prohibition. The Court would have to add links to the chain of causation to reach Greenlawn's actions. To do so would result in an unworkable standard of liability by weakening the requirement of causation to a point that is unprecedented.

B. Allowing for Actions Wholly Outside of an Endangered Species' Habitat to Qualify as a Taking in that Habitat Would Create an Unworkable Standard of Liability.

The ESA and accompanying regulations prohibit a broad range of actions, including some that indirectly affect endangered species. *See Babbitt*, 515 U.S. at 697 n.9. Absent the limits imposed by proximate cause, this broad coverage coupled with the interconnectedness of ecosystems could result in the regulation of actions based on the "butterfly effect." *Aransas Project*, 775 F.3d at 657. A decision to punish Greenlawn for actions wholly outside of the habitat of an endangered species would expand the ESA to the reach feared by the dissent in *Babbitt* to include a prohibition of "habitat modification . . . regardless of whether the end result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury." 515 U.S. at 715 (1995) (Scalia, J., dissenting). In doing so, the standard for whether an action is a violation of the Act's taking prohibition would become so blurry as to halt most necessary uses of natural resources to avoid the harsh penalties allowed for under the Act. Many businesses and municipalities would be unable to serve their customers; in this case, tens of thousands of people would go without water.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING GREENLAWN'S BENEFICIAL MUNICIPAL WATER WITHDRAWALS BECAUSE IT FAILED TO BALANCE THE EQUITIES.

Even if this Court finds Greenlawn violated the ESA, it should still find that the District Court abused its discretion by issuing an injunction that imposes an inequitable burden on Greenlawn. Though the ESA is meant to be a strict prohibition against harm to endangered species,

a court still must consider the appropriateness of an injunction rather than automatically issuing one. *See TVA*, 437 U.S. at 173; *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511–12 (9th Cir. 1994). Though the ESA's citizen suit provision permits injunctions as a remedy, it does not mandate one be issued in every case where a violation is found. 16 USC § 1540(g). In determining the appropriateness of an injunction as a remedy in this case, this Court should remand to the District Court and instruct that court to balance the equities.

The traditional test for whether a court should issue an injunction has been skewed when applied to ESA cases. *Nat'l Wildlife Fed'n*, 23 F.3d at 1510 (analyzing preliminary injunctions under the ESA). With that being said, courts are not required to issue an injunction for every statutory violation, and the ESA is no exception. *Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944); *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919); *see also TVA*, 437 U.S. at 193. When an injunction is not necessary to prevent the violation of the ESA, a court must consider other options.

A. The ESA Requires the District Court to Balance Equities in Deciding the Appropriate Remedy for a Violation in Light of the 1982 ESA Amendment Adding the Incidental Take Permitting System and Existing Balancing Under the Hardship Exemption Provision.

The traditional rule for determining whether an injunction is appropriate is to balance the implicated interests. *TVA*, 437 U.S. at 194. The ESA is not exempt from the balancing test; rather, the balancing was heavily skewed, by the language Congress chose, to favor the preservation of endangered species. *Id*. Even with this skewed balancing test, an injunction is only appropriate when the damage would be irreparable and imminent if an injunction did not issue. *See id.* at 193–94; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982) (regarding the Clean Water Act but citing, among other sources, *TVA*, 437 U.S. at 193).

This imbalance should level out when considering that certain "hardship exemptions" have existed since the Act's passage to allow for limits to the statute's otherwise broad reach. *See TVA*,

437 U.S. at 188 (considering whether the Tellico Dam might fit into the Act's existing hardship exemptions). *TVA*'s maximalist approach to conservation was watered down by Congress in 1982 when it amended the ESA to create an exception to the prohibition against taking a member of an endangered species through the "incidental take" permitting system. 1982 ESA Amendment Act, Pub. L. No. 97-304, sec. 6, § 10, 96 Stat. 1411, 1422; *see* ESA § 10(a), 16 U.S.C. § 1539(a). The existence of permitting within an environmental statute shows the appropriateness of "traditional equitable discretion." *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 934 (9th Cir. 1988) ("[T]he CWA's prohibition against discharge of pollutants without a permit can be overcome by the very permit the district court ordered the Navy to seek.") (citing *Weinberger*, 456 U.S. at 313). In enacting the incidental take permit system via the 1982 Amendments, Congress has spoken to soften the language that the Supreme Court had found offered no exception in *TVA*, 437 U.S. at 188. Given the new openness to allow for some takings, a violation is no longer as clear cut, and neither is the remedy. Therefore, balancing the equities in determining whether to issue an injunction is necessary under the ESA.

Thus, the District Court can no longer point to the statute and say Congress does not allow balancing of equities in remedying an ESA violation like it did in *TVA*. *See id.* at 194–95. The District Court abused its discretion by doing exactly this. R. at 17–18. The adoption of the incidental take permit provision shows that Congress thinks endangered animals, in some instances, are secondary to development. The incidental take provision allows a person to apply for the ability to "harm" an endangered animal without liability. *See* 16 USC § 1539(a)(1)(B). The value of an endangered animal subject to an incidental take permit has been found to be less than that of the project that puts it in harm's way and is no longer "incalculable." *Cf. TVA*, 437 U.S. at 187. In instructing agencies to balance the worth of an endangered animal against a proposed

project, Congress has spoken in the manner that the Court in *TVA* indicated would allow it to engage in a traditional balancing of equities in deciding on the appropriateness of an injunction. *Id.* at 194.

Under this applicable balancing test, an injunction against Greenlawn would be inappropriate. In *TVA*, the Court granted an injunction halting the construction of a nearly complete, multimillion-dollar dam, to prevent the TVA from taking a newly listed species of fish, the snail darter. 437 U.S. at 172–73. Because the snail darter was, at the time,[3] believed to reside exclusively in the portion of the Little Tennessee River to be inundated by the TVA project, *id.* at 161–62, the injunction was necessary to prevent the eradication of the entire species by way of critical habitat destruction. *Id.* at 172–73. Here, unlike in *TVA*, oval pigtoe mussel populations exist outside of the Green River affected by Greenlawn's withdrawals. R. at 9 (referring to the "Green River population of the oval pigtoe mussel" rather than the species as a whole). In fact, all of the mussels concerned live outside the area that Greenlawn withdraws from. Therefore, the habitat concerned is not critical to the survival of the species and does not rise to the level of irrevocable harm necessary to mandate the issuance of the injunction.

Finally, Greenlawn's withdrawals are more likely to balance the scales against an injunction than the construction of a new dam. First, Greenlawn has consistently withdrawn water from the Green River since 1893, and it is only as a result of drought and other actors that there is now a problem. This alone points to the inappropriateness of an injunction against Greenlawn: if others are contributing to the take, why is Greenlawn bearing the burden alone? Second, the

[3] Shortly after the *TVA* decision, previously-unknown populations of the snail darter were discovered in other watercourses not impacted by the Tellico Dam project. Joanne Omang, *Wee Snail Darter Alive and Well Far from Home*, WASH. POST (Nov. 8, 1980), https://www.washingtonpost.com/archive/politics/1980/11/08/wee-snail-darter-alive-and-well-far-from-home/3f5b617b-09c9-456b-b9c1-75e59160bb29/.

provision of drinking water and sanitation to a city of thousands of people—mostly for their domestic use—is a highly valuable use of resources. R2T § 850; *see also Mich. Citizens for Water Conservation*, 709 N.W.2d at 194. Third, the fact that there is no longer a drought tips the scales away from enjoining Greenlawn. In *National Wildlife Federation*, the court held that past takings were instructive but did not guarantee the likelihood of future harm. 23 F.3d at 1512. The fact that the company in that case was not intending to harm the endangered bears and that the habitat modifications were localized led the court to refuse to enjoin the activity. *Id.* at 1512–13. In the present case, the drought has ended, the damages to the oval pigtoe mussel populations were localized, and Greenlawn has a long track record of harmless use of the Green River that disputes NUO's assertion that future harm is likely, let alone imminent.

B. Even if the District Court Were to Follow a Skewed Balancing Test in Keeping with Pre-1982 Amendment Decisions, the Present Lack of Drought Conditions Means an Injunction Is Not the Appropriate Remedy.

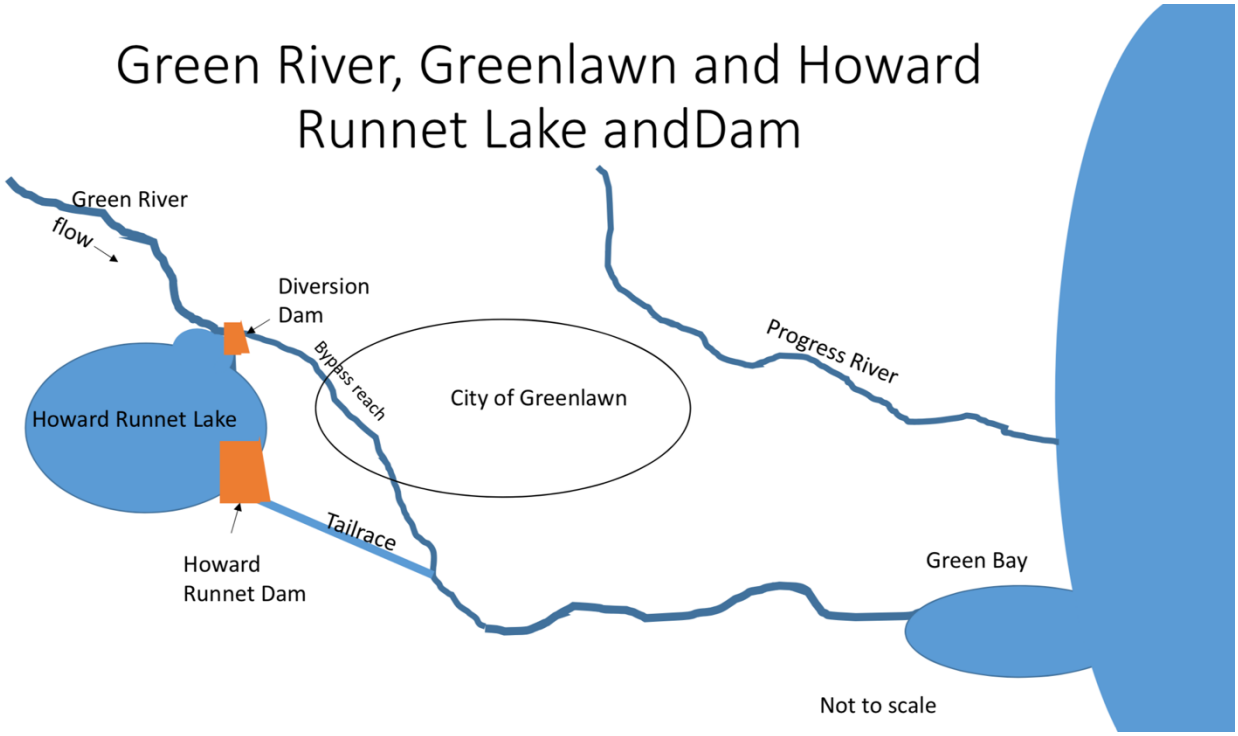
Even under a strict application of *TVA* as to whether an injunction is appropriate in an ESA case, the District Court should not have enjoined Greenlawn's withdrawals. The role of an injunction is to ensure future compliance in a way that other remedies are not be able to. *Hecht Co.,* 321 U.S. at 326; *see also Weinberger*, 456 U.S. at 313; *TVA*, 437 U.S. at 194. The party asking for an injunction must establish that there is a reasonable likelihood that their adversary will violate the Act in the future. *Nat'l Wildlife Fed'n*, 23 F.3d at 1511. As stated above, the adverse party must also establish irrevocable damage if an injunction does not issue. *TVA*, 437 U.S. at 193. Though a showing of possible future harm can suffice to grant preliminary injunctions under the ESA, the future harm must be likely and imminent. *Id.*; *Nat'l Wildlife*, 23 F.3d at 1510. The previous harm to oval pigtoe mussels is not enough to require a court to enjoin Greenlawn's provision of water to its citizens.

The same analysis for whether an injunction should issue under the traditional balancing test applies to the skewed test put forth in *TVA*. The fact that Greenlawn's actions were outside of the oval pigtoe mussel's habitat and would not jeopardize the entire species distinguishes the present case from *TVA* and weighs against enjoining the City. *TVA*, 437 U.S. at 193 (finding an injunction appropriate because the operation of the dam would result in the eradication of the endangered species at issue). Additionally, the current absence of drought conditions means there is no danger to the mussels, as shown by the almost half-century of withdrawals by Greenlawn up to the most recent drought, therefore, other remedies would suffice. There is no imminent harm to an endangered species, and, given the fact that Greenlawn shares the river with other users, those users should share in the development of a comprehensive solution.

CONCLUSION

NUO's claims fail to recognize developments in the application of the ESA and seek to devastate a municipality's ability to provide for its constituents based on a past unpredictable weather event. In asking for consultation and injunction, NUO seeks to indefinitely forestall any productive use of the Green River in fear of another period of extreme dryness. To do so would unduly burden a city in providing basic necessities to its people and set a precedent for liability far beyond an entity's ability to address. Therefore, this Court must reverse the District Court's decision to enjoin the City of Greenlawn's water withdrawals.

APPENDIX A


Green River, Greenlawn and Howard Runnet Lake andDam
Green River
flow
Diversion
Dam
Bypass reach
City of Greenlawn
Progress River
Howard Runnet Lake
Tailrace
Howard
Runnet Dam
Green Bay
Not to scale