Team No. 10

IN THE TWELFTH CIRCUIT
COURT OF APPEALS

NEW UNION
OYSTERCATCHERS, INC.,

Plaintiff-Appellant,

v.

UNITED STATES ARMY
CORPS OF ENGINEERS,

Defendant-Appellee

and

CITY OF GREENLAWN,
NEW UNION,

Defendant-Appellant.

No. 19-000987

On Appeal from the United States
District Court for New Union.

BRIEF OF APPELLEE,
THE UNITED STATES ARMY
CORPS OF ENGINEERS

Law Firm

Law School

123 Street

Smith, XX xxxxx

Attorneys for Defendant-Appellee

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JURISDICTIONAL STATEMENT

The United States District Court for New Union had jurisdiction over this case pursuant to 16 USC § 1540(c), which states that the several district courts of the United States, shall have jurisdiction over any actions arising under the Endangered Species Act (ESA). NUO filed suit against Greenlawn and ACOE claiming violations of Section 7 and Section 9 of the ESA.

This Court has jurisdiction of this appeal pursuant to Article III, Section 2 of the United States Constitution as an appeal from a final decision from the United States District Court for New Union.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without water conservation measures. The court determines this pursuant to riparian rights established through common law where domestic water use is superior to all other uses, and all other uses are subject to a reasonable use assessment; here, Greenlawn's domestic water use is superior to NUO's commercial water use and Greenlawn's water use is reasonable in light of relevant case law. Therefore, the District Court correctly held that Greenlawn has the right to undiminished domestic water use during drought conditions.

II. ACOE's operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn was not a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536. In order for the consultation require to be triggered, an ACOE would ahve taken both affirmative and discretionary action. Here, ACOE took neither as they were acting pursuant to law.

Therefore, the district court correctly granted the ACOE's request for summary judgement.

III. 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. The District Court must balance the equities before enjoining a beneficial municipal activity, regardless of whether the activity could cause the extirpation of an entire population of an endangered species.

STATEMENT OF FACTS

The City of Greenlawn, New Union lies on both banks of the Green River, now known as the Green River Bypass Reach (Bypass Reach). R. 5. The Army Corps of Engineers built the Green River Diversion Dam and the Howard Runnet Dam which created the Bypass Reach. R. 5. Greenlawn has used the water from the Bypass Reach since the city founded in 1893. R. 5. The system remained consistent until 1968, when, due to a construction boom, the city expanded its municipal water system to account for the increase in population. R. 5. Municipal water primarily delivers domestic water for the large residential districts, and industrial water for its small downtown area. R. 5. The water withdrawals are typically 6 million gallons per day, with peak demands reaching 20 million gallons per day during summer months for lawn maintenance and ornamental watering. R. 5. Greenlawn returns about 5% of its water intake back into the Green River after use, due to evaporation, different watershed discharges, and ground absorption. R. 5-6.

The Howard Runnet Dam was authorized by Congress in the River and Harbor Act of 1945 and was completed in 1984. R. 6. The dam was constructed upstream from Greenlawn, and

was designed to divert water from the Green River into the Howard Runnet Lake for water storage purposes. R. 6. This design left Greenlawn vulnerable to losing essential municipal water by over extraction from the Green River. R. 6. With this in mind, Greenlawn entered into an agreement with the Army Corps of Engineers to maintain flows from the Bypass Reach in order to for Greenlawn to maintain its municipal needs. R. 6. Riparian landowner laws and a Water Control Manual (WCM) controls water dispersal. R. 6. The WCM was last revised in 1968 after the construction boom to Greenlawn, and established the parameters for the release of water, considering factors such as maintaining flood control storage, maintaining recreational water levels, generating hydroelectric power, and maintaining Greenlawn's municipal intake. R. 6. However, the primary focus of the WCM is maintaining lake levels, to allow for adequate downstream use of the excess water. R. 6. Excess water flow is released to downstream riparian landowners, unless potential flood conditions present themselves and continuing flow would cause damages. R. 6.

The WCM provides that during normal summer operations, 50 cubic feet per second (CFS) will be released from the Diversion Dam to Bypass Reach, 200 CFS may be provided to the hydroelectric turbine as needed, and 200 CFS will be released from the Howard Runnet Dam for recreational use. R. 7. When lake levels drop below seasonal targets, curtailment of these standard releases begin according to the extent of the lake level. R. 7. The extent of the lake level is defined by three lake level zones: Zone 1 (Drought Watch), Zone 2 (Drought Warning), and Zone 3 (Drought Emergency). During a Zone 1 lake level:

> All recreational releases curtailed; minimum flow of at least 50 CFS shall be maintained in the Green River at the confluence of the Howard Runnet Dam tailrace and the Bypass Reach for fish and wildlife purposes; flow of 50 CFS shall be maintained into the Bypass Reach from the Diversion Dam; daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained.

R. 7. During a Zone 2 lake level:

> All recreational releases curtailed; Bypass Reach flow from the Diversion Dam reduced to 7 CFS; daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained. R. 7.

During a Zone 3 lake level:

> All recreational releases curtailed; flow of 7 CFS shall be maintained into the Bypass Reach from the Diversion Dam; daily hydroelectric power releases curtailed. R. 7.

These release quantities were based off of the annual average water demand in Greenlawn at the time the WCM was adopted in 1968. R. 7. Additionally, the WCM had a provision which read:

> At all time the Howard Runnet Dam Work 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. R. 7.

At the time the WCM was adopted , no major upstream diversions were in place on the Green River; however, in the 1980's consumptive water use began for commercial irrigation. R. 7-8. Despite this additional consumption, groundwater and precipitation remained adequate to sustain healthy downstream flows. R. 8. ACOE only applied Zone 1 restrictions once in 1998, and never applied a Zone 2 or 3 restriction until recently. R. 8. Below average precipitation and above average temperatures increased evaporation, and Zone 1 restrictions were applied only seven times from 2006-2016. R. 8. In late 2016 ,a Zone 1 restriction was applied, and lasted until early 2017. R. 8. Later that year Zone 2 conditions appeared in the lake, and ACOE applied the WCM Zone 2 standard. R. 8.

Greenlawn protested the 7 CFS restriction, and ACOE asked Greenlawn to restrict water use until Zone 2 conditions subsided. R. 8. However, Greenlawn contended that as riparian landowner they were not obligated to impose restrictions on its water use. R. 8. Applying the

WCM agreement, the district commander for the ACOE ordered the Dam Works operator to increase water supply to Greenlawn to its historic intake. R. 8. This action, combined with peaking hydroelectric power demands, created a Zone 3 condition in the Lake. R. 8. The district commander then applied Zone 3 restrictions on hydroelectric power releases, but maintained the water releases to Greenlawn. R. 8-9. The mandated restriction on hydroelectric power releases decreased the downstream flow from 25 CFS to nearly 0 CFS. R. 9.

The reduced water flow downstream exposed beds of oval pigtoe mussels. R. 9. Oval pigtoe mussels require gravel or silty sand riverbeds with slow to moderate currents as habitat. R. 9. They also require a healthy fish population in order to spawn. R. 9. Stagnant water increased saltation and smothered some of the mussel populations. R. 9. Adult mussels can adapt to minor water level changes by moving themselves to a habitat that remains submerged. R. 9. However, the reduced flows prevented some of the mussels from making this transition. R. 9. New Union Oystercatcher's (NUO) expert estimated that approximately 25% of the mussel population died as a result. R. 9.

ACOE has not engaged in consultation with the Fish and Wildlife Service concerning the impacts on the mussels, and Greenlawn does not have an incidental take permit under § 10 of the Endangered Species Act, authorizing the take of oval pigtoe mussels incidental to its operation of the municipal water intake. R. 10. NUO is a not-for-profit membership representing the interest of commercial oyster fisherman. R. 10. It is asserted that the reduction in water has caused a 50% decrease in oyster production since 2000. R. 10. NUO's members are claiming to have suffered reduced catches and declining incomes. R. 10. NUO is also represented by the New Union Regional Electric Cooperative, who will pay fuel charges while hydroelectric power is not being

produced. R. 10. None of NUO's members are waterfront property owners on the Green River. R. 10.

During the pendency of NUO's sixty-day notice letter, heavy rains have filled the Howard Runnet Lake back to Zone 1 levels. R. 11. Thus, the immediate threat to the Green River oval pigtoe mussels was eliminated. R. 11. However, the parties agree that Zone 3 Lake levels are likely to occur again. R. 11.

SUMMARY OF THE ARGUMENT

Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes because Greenlawn's riparian rights are superior to NUO's rights and therefore warrant undiminished use. Additionally, ACOE's operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn was not an action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536. ACOE took no affirmative action and had no discretion in its operation of the dam as it was operating pursuant to WCM regulations and New Union law. Furthermore, Greenlawn's withdrawal of nearly all the drought-reduced flow from the Howard Runnet Dam Works constituted a "take" of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538, because the city proximately caused the substantial modification of the oval toe mussel's necessary habitat. Lastly, the lower court incorrectly failed to balance the equities before enjoining a beneficial municipal activity. An injunction is an extreme remedy, thus this court must consider both public interests as well as environmental risks.

ARGUMENT

I. The district court did not err in concluding that Greenlawn, as riparian landowner, has the right to consume water withdrawals for municipal purposes during a drought without any water conservation measures.

The appellate court should affirm the district court's decision that Greenlawn has the right to undiminished domestic water use as riparian landowner. Greenlawn, as riparian landowner, has the right to continue water withdrawals for municipal purposes during a drought without any water conservation measures. The Riparian Doctrine, "is based on the old common law which gave to the owners of land bordering on streams the right to use the water therefrom for certain purposes, and this right was considered an incident to the ownership of land." *Harris v. Brooks*, 283 S.W.2d 129, 132 (Ark. 1955). The Riparian Doctrine is further partitioned into the Reasonable Use Theory, which the United States Supreme Court defines as "each riparian proprietor ha[ving] an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian proprietors likewise to make a reasonable use." *United States v. Willow River Power Co.*, 324 U.S. 499, 505 (1945).

Justice Ward of the Supreme Court of Arkansas further defined the Reasonable Use Theory with four rules (the three listed herein apply in this case): (1) the right to use water for strictly domestic purposes is superior to many other uses of the water; (2) besides domestic, all other lawful uses of the water are equal . . . and (4) when one lawful use of the water interferes with or detracts from another lawful use, then the question arises as to whether, under all the facts and circumstances of that case, the interference shall be declared unreasonable or be declared reasonable and equitable adjustment should be made. *See Harris*, 283 S.W.2d at 134. This court should affirm the district court's ruling because (1) Greenlawn's water use should be considered domestic water use and therefore superior to NUO's commercial use; and (2) Greenlawn's water use is reasonable as its uses are customary throughout the United States.

A. Greenlawn's water use should be considered a domestic use, and therefore superior to the commercial use of NUO.

Greenlawn's domestic water use for the benefit of its residents is superior to the industrial use of the New Union Oystercatchers, Inc. The United States Supreme Court has said that "[d]rinking and other domestic purposes are the highest uses of water." *State of Connecticut v. Com. of Mass.*, 282 U.S. 660, 673 (1931). The Supreme Court of Florida has acknowledged the same concept, and further defined domestic uses broadly as "purposes of home or farm, such as drinking, washing, cooking, or for stock of the proprietor." *Taylor v. Tampa Coal Co.*, 46 So.2d 392, 394 (Fla. 1950). The Supreme Court of Ohio has also recognized the upper proprietors superior right of domestic water use and additionally added the caveat that growing cities have the authority to consume as much domestic water as needed to fulfill the cities growing needs, even to the detriment of the lower proprietor. *See City of Canton v. Shock*, 63 N.E. 600, 602 (Ohio 1902).

Courts have not expressly defined "domestic water use." *See City of Canton*, 63 N.E. at 602 (listing general uses of water, but not expressly defining domestic use); *See Barre Water Co. v. Carnes*, 27 A. 609, 610 (Vt. 1893) (explaining water can be used for ordinary uses of domestic life, but not expressly defining domestic use); *See Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955) (noting superiority of domestic use, but not expressly defining domestic use). Congress passed the Organic Act of March 3, 1879 (Organic Act), which established the United States Geological Survey (USGS). 43 U.S.C. § 31 (West 1995) (structured under the Department of the Interior). The Organic Act directed the USGS to classify public lands, including mineral resources. *Id.* Congress then passed the Omnibus Public Land Management Act of 2009 (Omnibus), which authorized the USGS to conduct the Water Availability and Use Science Program (WASUP). 42 U.S.C. § 10368 (West 2009). WASUP was created in part to evaluate the

quantity and quality of water for economic, energy production, and environmental uses. U.S. Geological Survey, https://www.usgs.gov/water-resources/water-av ailability-and-use-science-program (last visited Nov. 6, 2019). WASUP releases the *Established Use of Water in the United States* report every five years, which defines precisely how all water is used across the United States. Cheryl A. Dieter, Molly A. Maupin ET AL, U.S. Geological Survey, No. 1441, Estimated Use of Water in the United States, https:doi.org/10.3133/cir1441 (Supersedes USGS Open-File Report 2017-1131) [hereinafter Water Use Study]. The Water Use Study expressly defines domestic water use including, indoor and outdoor uses at residences. R. 22. Common indoor water uses are drinking, food preparation, washing clothes and dishes, bathing, and flushing toilets. *Id.* Common outdoor uses are watering lawns and gardens or maintaining pools, ponds, or other landscape features in a domestic environment." *Id.*

In *City of Canton v. Shock*, the City of Canton used the Nimishiller Creek to supply its inhabitants with water for domestic, commercial, and manufacturing purposes. *Canton*, 63 N.E. at 601. Canton primarily used the water for domestic purposes, including "extinguishing fires, sprinkling streets, and other public purposes." *Id* at 602. The opposing parties located further downstream in this case, Shock, owned a water-powered gristmill used for grinding grain into flour. *See Id.* Shock used the stream to operate their mill for 50 years. *Id.* However, "as the city grew, and extended its waterworks, it used larger quantities of water, and thereby the supply to the mill became reduced," to an extent that during dry seasons there was not sufficient water to run the mill. *See Id* at 601. Shock then sued the city for its extensive water use, claiming the city did not have the right to diminish the stream. *Id.* The court ruled that the City of Canton was entitled to such a right, stating the upper proprietor's right of domestic use is superior to a downstream industrial use. *Id* at 603.

In this case, the City of Greenlawn lies upstream from a commercial oyster farm. R. 10. Greenlawn primarily uses the stream for domestic purposes, with minor industrial use in the small downtown area. R. 5. The oyster farmers downstream use the stream strictly for commercial fishing of the oval pigtoe mussels. R. 10. The *Canton* case similarly had a situation where a city was primarily using a stream for domestic water use; whereas, the downstream petitioners used the stream for commercial activities. *Canton*, 63 N.E. at 603. Additionally, the oyster farmers in our case have used the creek for oyster farming for decades. R. 10. Analogously, the petitioners in *Canton* used the stream for 50 years before the city's growth rendered the stream useless; however, the court ruled in favor of Canton's domestic use notwithstanding the petitioner's historical use. *See Canton,* 63 N.E. at 601-603.

NUO contends that Greenlawn's water use, including lawn watering and car washing fall outside the realm of domestic use. R. 8. However, the only substantive definitions for what domestic use entails, come from sporadic generalized definitions in old court decisions. *Taylor v. Tampa Coal Co.*, 46 So.2d 392, 394 (Fla. 1950). ("purposes of home or farm, such as drinking, washing, cooking, or for stock of the proprietor."); *See City of Canton v. Shock*, 63 N.E. 600, 602 (Ohio, 1902) (ruling "sprinkling streets and other public purposes" as domestic use). Greenlawn's disputed water, in fact, falls squarely within the washing, sprinkling streets, and other public purposes that older cases define as domestic use.

However, ACOE believes that this court should consider using USGS's more modern, precise, and research-based definition from the USGS. The USGS's report is compiled by "State and local agencies that manage water resources, operate data-collection programs, and administer regulations for use of water and other natural resources." Water Use Study, *Supra* at iii. The report is issued every five years since 1950, and currently "represents the longest

compilation record of water-use data by a Federal agency in the United States." *Id* at 2. The report provides reliable information about the current and historical data of water use throughout the United States, and "is also essential to accurately understand how future water demands will be met while maintaining adequate water quality and quantities for human and ecosystem needs in the United States." *Id.* The scientific community has been progressively updating their water information for 65 years, and ACOE believes the courts should consider updating to the more precise definition established in these technical documents. This definition directly incorporates watering lawns and gardens, as well as maintaining pools. *Id.* at 22. Should the court adopt this well-calculated definition, as opposed to the generalized definition from older cases, Greenlawn's water use will fall directly into the category of domestic use. Therefore, Greenlawn should be entitled to continued unrestricted domestic use of the water because lawn watering and car washing should be considered domestic use, and Greenlawn's domestic use is superior to the Oyster Farmer's commercial use.

B. Greenlawn's water use is reasonable because its uses are customary throughout the United States.

If this court determines that Greenlawn's water use is not domestic, NUO should still fail because Greenlawn's water use reasonable. Excluding domestic purposes, all rights of riparian landowners are to be considered equal. *See Taylor v. Tampa Coal Co.*, 46 So. 2d 392, 394 (Fla. 1950). The Supreme Court of Georgia stated in *Pool v. Lewis,* that riparian landowners must non-domestically use water in such a way that every riparian proprietor shall have use and enjoyment of it; however, subject to disturbances that are necessary and unavoidable, "in and by the reasonable and proper use of it." *Pool v. Lewis,* 41 Ga. 162, 168 (1870).

> In determining whether an artificial use of the water of a stream is reasonable or not, it is necessary to consider what the use is for, its extent, duration, necessity, and application, the nature and size of the stream, and the several uses to which it is put, the extent of the

> injury to one proprietor and the benefit to the other, and all other facts which may bear upon the reasonableness of the use.

Harris v. Brooks, 283 S.W.2d 129, 134 (S. Ct. Ark. 1955). Additionally, when assessing the reasonableness of water use, courts have not typically included an environmental impact assessment in their reasoning. *See Barre Water Co.*, 27 A. at 610 (assessing reasonableness of dam from stopping domestic water supply to downstream city); *See Canton*, 63 N.E. at 603 (assessing reasonableness of municipal water withdrawals of upper riparian landowner from stopping downstream commercial water use); *Harris*, 283 S.W.2d at 132 (assessing reasonableness of lake pumping preventing recreational use); *See Tyler v. Wilkinson*, 24 F.Cas 472, 475 (R.I. C.Ct. D. 1827) (assessing reasonableness of mill operations upstream preventing downstream mill operations); *See Tampa Coal Co.*, 46 So. 2d at 392 (assessing reasonableness of lake pumping preventing recreational use).

In, *Taylor v. Tampa Coal Co.*, the defendant pumped water from a small lake during a drought to irrigate his citrus grove. *Tampa Coal Co*., 46 So. 2d at 392. The lake in question was "shallow" and had "no water springs or other underground sources of supply in the lake bed." *Id.* The defendant's irrigation consisted of 6 acres of citrus trees, amounting to nearly 500 trees. *Id.* at 393. On the other hand, the numerous plaintiffs in the suit used the lake for recreational purposes. *Id*. The pumping caused a 49 inch drop from the normal lake level, and caused a serious impairment to the other riparian landowner's use. *Id* at 394. The court ruled that the defendant's agricultural use was unreasonable during a drought, because it seriously impaired the other riparian owner's right to use of enjoyment. *Id.*

In another relevant case, a company that supplied water to the suburbs of Philadelphia was attempting to pull water from a tributary of the Schuylkill. *City of Philadelphia v. Philadelphia Suburban Water Co.*, 163 A. 297, 300 (Pa. 1932). However, Philadelphia has

historically pulled water from the Schuylkill River since 1801, and argued that the supplier's water withdrawal would directly interfere with the city's ability to provide water for its residents. *See Id.* at 298 and 301. The company argued that if Philadelphia simply did not waste so much of its domestic water it would not notice the water being taken from the tributary. *Id.* at 300. At the time, Philadelphia allowed open fire hydrants to pour water on the streets during the heat of summer. *Id.* The Supreme Court of Pennsylvania ruled the city's water use "should not be considered waste," and is considered part of the "water [that] was necessary for reasonable present and future needs," to which the city is entitled to. *Id.*

If the court rules Greenlawn's use as non-domestic, Greenlawn's right is equal to the rights of NUO. *See generally Tampa Coal Co.*, 46 So. 2d at 394 (stating that all water rights non-domestic are equal). Similar to the *Tampa* case, both parties have an equal right to their lawful non-domestic uses. *Id*. However, Greenlawn has used the Green River for the municipal needs of its inhabitants since 1893. R. 5. In contrast, the water in *Tampa* was used by one person for their personal economic gain. *Id*. In comparison, the diminution of a water body for the benefit of an entire city is more reasonable than diminution for the economic gain of a single individual.

Additionally, while Greenlawn has been using the water from Green River for over a century; the defendant in *Tampa* began pumping within a year of when serious effect began to arise. *See Tampa Coal Co.*, 46 So. 2d at 394; R. 5. NUO further contends that Greenlawn's water usage is wasteful. R. 13. NUO specifically asserts, that the water Greenlawn uses for car washing and lawn watering is wasteful, and should be limited during a drought. R. 8. However, courts have ruled more egregious water usage to be reasonable; such as the *City of Philadelphia*, where spraying water to cool city streets during summer was deemed not wasteful. *City of Philadelphia,*163 at 300. If precedent shows such an egregious use of water is not wasteful, this

court should similarly rule that the conventional water uses of lawn watering and car washing is wholly reasonable and not wasteful. Additionally, NUO asserts that Greenlawn's water use is unreasonable during a drought "especially in light of the impacts on downstream ecosystems…" R. 13. However, courts have not typically considered ecological impacts in its assessment of reasonableness. Courts look to human utilitarian uses when weighing factors of reasonableness against one another. *See Barre Water Co.*, 27 A. at 610 (assessing reasonableness of dam from stopping domestic water supply to downstream city); *see Canton*, 63 N.E. at 603 (assessing reasonableness of municipal water withdrawals of upper riparian landowner from stopping downstream commercial water use); *Harris*, 283 S.W.2d at 132 (assessing reasonableness of lake pumping preventing recreational use); *see Tyler v. Wilkinson*, 24 F.Cas 472, 475 (R.I. C.Ct. D. 1827) (assessing reasonableness of mill operations upstream preventing downstream mill operations); *see Tampa Coal Co.*, 46 So. 2d at 392 (assessing reasonableness of lake pumping preventing recreational use). Therefore, Greenlawn's water use should be ruled as reasonable.

In conclusion, this court should rule that Greenlawn, as riparian landowner, has the right to consume water withdrawals for municipal purposes during a drought without any water conservation measures, because the water use is (1) domestic and therefore superior to NUO's commercial use, and (2) reasonable.

II. The district court correctly granted summary judgement in favor of ACOE.

The appellate court should affirm the district court's order granting summary judgement in favor of ACOE. ACOE's operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is not a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536. Section 7(a)(2) of the ESA states:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to

> jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . .

6 U.S.C. § 1536(a)(2); *See also, Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (Cal. 2012) ("Section 7 of the ESA defines agency action as 'any action authorized, funded, or carried out by [a federal] agency.'") (citing 16 U.S.C. § 1536(a)(2)).

According to "established case law, there is 'agency action' whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed. *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1011 (9th Cir. 2012) (emphasis added). To determine whether "agency action" under the consultation requirement has been triggered, the courts apply a two-part test. *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1021 (Cal. 2012). First, it must be determined whether "a federal agency affirmatively authorized, funded, or carried out the underlying activity." Karuk Tribe of California v. U.S. Forest Service, 681 F.3d 1006, 1021 (Cal.9th Cir. 2012). Second, it must be decided "whether the agency had some discretion to influence or change the activity for the benefit of a protected species." *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1021 (9th Cir. 2012).

In addition, the Supreme Court has stated that environmental legislation "should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted." *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 409 U.S. 1207, 1217–18 (1972). In the instant case, ACOE neither (1) affirmatively authorized the operation of Howard Runnet Dam Works, nor (2) have discretion to influence or change the operation of Howard Runnet Dam Works for the benefit of the oval pigtoe mussel habitat.

A. ACOE did not take affirmative action.

ACOE did not trigger ESA Section 7 consultation as it did not affirmatively authorize the flow of water into Greenlawn, but rather released the water according to existing law. The term "agency action" is broad. *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir.1998). However, "Ninth Circuit cases have emphasized that section 7(a)(2) consultation stems only from 'affirmative actions.'" *Western Watersheds Project v. Matejko*, 456 F.3d 922, 930 (9th Cir. 2006); *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1021 (Cal. 2012) ("An agency must consult under Section 7 only when it makes an 'affirmative' act or authorization.") (citing *Cal. Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n*, 472 F.3d 593, 595, 598 (9th Cir. 2006)); *Western Watersheds Project v. Matejko*, 456 F.3d 922, 930 (9th Cir. 2006) ("Ninth Circuit cases have emphasized that section 7(a)(2) consultation stems only from "affirmative actions.").

"[T]he test under the ESA is whether the agency authorizes, funds, or carries out the activity, at least in part." *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1023–24 (Cal. 2012) (citing 50 C.F.R. § 402.02); *see also Western Watersheds Project v. Matejko*, 456 F.3d 922, 930–31 (9th Cir. 2006) (citing *Defenders of Wildlife v. EPA*, 420 F.3d 946, 967 (9th Cir. 2005) (explaning that such affirmative action is that which is "both within [the agency's] decision making authority and unconstrained by earlier agency commitments."). "The regulations promulgated pursuant to the ESA make it clear that the operation of a project pursuant to a permit is not a federal agency action." *California Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 598 (9th Cir. 2006) ("The regulations expressly define the term 'action' to include the *granting* of licenses and permits." (emphasis added)). Therefore, even if an agency has some discretion to regulate diversions, "the existence of such discretion without

more is not an 'action' triggering a consultation duty." *Western Watersheds Project v. Matejko*, 456 F.3d 922, 931 (9th Cir. 2006).

For example, in *California Sportfishing Protection Alliance v. F.E.R.C.*, the consultation requirement was at issue. *California Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 594 (9th Cir. 2006). In this case, the plaintiff (environmental groups) sought consultation in regard to the Federal Energy Regulatory Commission's ("FERC") ongoing operation of a hydroelectric dam. *Id.* The plaintiffs brought their claim because "[t]he operation of the dam system affects the flow of water in the creek, which provides spawning grounds for Chinook Salmon." *Id.* at 595. However, according to that court, "[t]he regulations promulgated pursuant to the ESA ma[de] it clear that the operation of a project pursuant to a permit is not a federal agency action." *Id.* at 598. Thus, whereas in contrast to the granting of a license is a federal agency action, the court held that the continued operation of a project, was not a federal agency action. *Id.* at 599.

Next, *Western Watersheds Project v. Matejko*, is another example in which plaintiff environmental groups alleged that the defendant, the federal Bureau of Land Management ("BLM") violated ESA's Section 2 consultation requirement. *Western Watersheds Project*, 468 F.3d at 1103. Specifically, plaintiffs argued that BLM failed to consult on "hundreds of river and stream diversions on public lands . . . [for] agricultural and other irrigation uses by private parties holding vested rights-of-way to divert water." *Id.* The plaintiff brought that action because the "diversions could jeopardize threatened species of fish." *Id.* The Court of Appeals held that the agency's failure to regulate the diversions at issue did not constitute an *affirmative* agency action because "[it] did not fund the diversions, it did not issue permits, it did not grant contracts, . . . nor did it divert streams." *Id.* at 1107-09. Instead, it was those with the rights-of-way who

diverted the water. *Id.* Therefore, the defendant agency did not take made anyno affirmative action and was "not an entity responsible for the challenged decision[-]making." *Id.* (citing *Defenders of Wildlife*, 420 F.3d at 968 (brackets omitted)).

In the instant case, Congress authorized ACOE to administer the Howard Runnet Dam for flood control, hydroelectric power, recreation purposes, and fish and wildlife purposes. R. 6. Just as the agency in *California Sportfishing Protection Alliance* operated the hydroelectric dam project pursuant to a previous authorization, ACOE's role is to administer the Howard Runnet Dam pursuant to Congress's authorization. *California Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 598 (9th Cir. 2006). As a result, ACOE's authorized operation of the previously authorized dam, like the permitted operation of the previously authorized hydroelectric project in *California Sportfishing Protection Alliance*, is not an agency action requiring consultation. *Id.* Simply put, while the granting of permits or authorization qualifies as an affirmative agency action, the continued operation of a dam pursuant to such authorization does not. *See id.*

Furthermore, ACOE operated the dam pursuant to an agreement with Greenlawn requiring that the agency, must "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. 6. This is comparable to the BLM agency's inability to regulate the diversions in *Western Watersheds Project* because ACOE is required to release water to Greenlawn and has no control over Greenlawn's diversions. *Western Watersheds Project*, 468 F.3d at 1103. As a result, ACOE, like the agency in *Western Watersheds Project*, took no affirmative action, and caused no harm. *Id.*

Therefore, ACOE's operation of the Howard Runnet Dam Works project pursuant to Greenlawn's riparian rights is not an affirmative federal agency action under ESA § 7(a).

B. ACOE did not take discretionary action.

The second prong to the court's two-part test in determining whether the ESA § 7(a) consultation requirement is triggered is whether an agency took discretionary action. "The ESA implementing regulations provide that Section 7 applies only to actions 'in which there is discretionary Federal involvement or control.'" *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1024 (Cal. 2012) (citing 50 C.F.R. § 402.03). In other words, "[t]here is no duty to consult for actions 'that an agency is required by [law] to undertake once certain specified triggering events have occurred.'" *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1024 (9th Cir. Cal. 2012) (citing *Home Builders*, 551 U.S. at 669 (emphasis in original)). As a result, if an agency is legally required to do something, "it simply lacks the power to 'insure' that such action will not jeopardize listed species." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 647 (2007). ESA Section 7 has been interpretted as "direct[ing] agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. F.E.R.C.*, 962 F.2d 27, 34, 295 (D.C. Cir. 1992).

Furthermore, "the discretionary control retained by the federal agency must have the ability to inure to the benefit of a protected species." *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 974 (9th Cir. 2003); *see Environmental Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001). Otherwise, "consultation would be a meaningless exercise." *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 974 (9th Cir. 2003). In short, "[w]here there is no agency discretion to act,

the ESA does not apply." *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125–26 (9th Cir. 1998); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (consultation was not required for the approval of logging roads because [the agency]'s narrow discretion, in accordance to a prior right-of-way agreement, did not relate to protecting listed species).

For example, in *Sierra Club v. Babbitt* , plaintiff, an environmental group, brought an action against the defendant, Bureau of Land Management ("BLM") a federal agency, for failing to consult under ESA Section 7 before allowing the construction of a road, which impacted an endangered owl species. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1502 (9th Cir. 1995). However, the federal agency was obligated to operate pursuant to a right-of-way agreement and other regulations that predated the ESA. *Id.* at 1506. As a result, the court concluded that in situations like *Sierra Club*, where an agency "lacks the discretion to influence private actions, consultation would be a meaningless exercise." *Id.* at 1509. According to the court, the agency lacked "the ability to implement measures that inure to the benefit of the protected species," and thus, lacked the ability to take discretionary action. *Id.* at 1509. Specifically, the court concluded that "Congress did not intend for section 7 to apply to an agreement finalized before passage of the ESA where the federal agency . . . lacks the discretion to influence the private activity for the benefit of the protected species." *Id.* at 1511-12.

Another case in which the court similarly held that an agency's action was non-discretionary , is *California Sportfishing Protection Alliance*. As mentioned above, this case dealt involved the operation of a hydroelectric dam. *California Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 594 (9th Cir. 2006). There, the federal agency operated the dam in accordance with specific regulations that "gave the agency discretion to decide whether to exercise discretion, subject to the requirements of notice and hearing." *Id.* at 599. Nevertheless,

the court held that such provisions were "not sufficient to constitute any discretionary agency 'involvement or control' that might mandate consultation." *Id.*

Like the actions of the agencies in *Sierra Club* and *California Sportfishing*, ACOE's action in this case was required by law. Namely, the terms of the agreement with Greenlawn required ACOE to respect Greenlawn's common law riparian rights to water flow in the Bypass Reach for its municipal use. R. 15.This is like *Sierra Club*, where the agency allowed road construction, without consultation, because such action was required by the right-of-way agreement that predated the ESA. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1506 (9th Cir. 1995). Just as the court in *Sierra Club* held that such action was non-discretionary, ACOE's water flow to Greenlawn during the 2017 drought to meet their municipal needs was pursuant to WCM's general provision which also predated the ESA. *Id.* at 1509; R.7. The provision, in pertinent part, states that, "'[a]t 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.'" R. 7. In short, once Greenlawn requested that ACOE release additional water, ACOE lacked the ability to exercise discretion and was required by the riparian rights law of New Union to provide such flows.

Moreover, even if the WCM provides ACOE with some discretion to maintain the release of water under certain circumstances, the court in *California Sportfishing Protection Alliance* made it clear that discretion granted to an agency by a controlling regulation this does not constitute the type of discretionary action that requires consultation. *California Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 599 (9th Cir. 2006). If a federal agency is acting

in accordance with a prior agreement or regulation, they still lack the control sufficient to trigger the ESA requirements. *Id.*

Conversely, in *Karuk Tribe of California v. U.S. Forest Service*, where the plaintiff, an Indian tribe, sued the Forest Service, a federal agency, for failing to consult before allowing mining activities to proceed under a Notice of Intent ("NOI") in a critical habitat of a listed species." *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1011 (9th Cir. 2012). It was solely up to the agency to approve the NOI, allowing the private mining activities. *Id.* at 1025. In fact, the agency stated that it had "'broad discretion to regulate the manner in which mining activities are conducted on the national forest lands.'" *Id.* (citing 70 Fed.Reg. at 32,720). This meant the agency had discretion to approve or disapprove NOIs that would affect listed species. *Karuk Tribe of California*, 681 F.3d at 1025. As a result, the court held that the agency, by deciding "about whether, or under what conditions, to allow private activity to proceed," took discretionary action. *Id.*

Here, unlike the Forest Service in *Karuk Tribe*, ACOE had no discretion over Greenlawn's private activities. For this reason, the agency's discretionary action in *Karuk Tribe of California* is easily distinguished from ACOE's flow of water to Greenlawn. *Karuk Tribe of California*, 681 F.3d at 1025. While Forest Service in *Karuk Tribe of California* made the decision regarding whether to allow certain private activities to commence, here, ACOE had no such authority. *Id.* For instance, the District Commander tried to convince Greenlawn to limit the city's water usage and had to accept the city's refusal because, as a riparian owner, Greenlawn had the common law right to reasonably use the water and was under no obligation to adhere to the ACOE's recommendations. R. 8.

Whereas Greenlawn's legal rights trumped ACOE's ability to exercise any discretion, the adverse action in *Karuk Tribe of California* occurred as a result of the agency's discretionary power to determine which private activities may or may not proceed. *Karuk Tribe of California*, 681 F.3d at 1025. Consequently, ACOE had no discretion to determine the private activities Greenlawn could partake in. Thus, ACOE's action was non-discretionary, which is not subject to ESA § 7(a)'s consultation requirement.

As the foregoing analysis demonstrates, Congress authorized ACOE to operate the Diversion Dam, and ACOE's release of 30 CFS from the Diversion Dam to the Bypass Reach, was mandated by both WCM regulations and New Union law that predated the ESA. R. 7. Under these circumstances, ACOE was incapable of taking both meaning that such action was neither affirmative nor discretionary. Therefore, ACOE's action did not constitute the type of "agency action" that is governed by the ESA § 7(a) consultation requirement.

III. The lower court correctly held that Greenlawn committed a prohibited "take" of the endangered oval toe mussel.

Greenlawn's continuous water withdrawal, despite drought conditions, caused a prohibited "take" of the endangered oval pigtoe mussel population in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538 (a)(1)(B). Section 9 of the ESA prohibits the "take" of any listed endangered species. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" as: "[t]o harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The United States Supreme Court has explained that Congress intended "take" to be defined in the "broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *Babitt v. Sweet Home Chapter of Communities for a Great Ore*., 515 U.S. 687, 705 (1995); *see also Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995). (finding that

Congress "explicitly intended take to be construed broadly.") (Citing S.Rep. No. 93–307, p. 7 (1973)). The United States Supreme Court has described the ESA as the "most comprehensive legislation for the preservation of endangered species." *T.V.A v. Hill*, 437 U.S. 153, 180. (1995).

"Harm" within the definition of "take" is defined in the Code of Federal Regulations as: "[an] act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3; *see also Babitt*, 515 U.S. at 708 (holding that the Secretary of Interior "reasonably construed" harm to include "significant habitat modification or degradation that actually kills or injures wildlife."). To determine whether an actor committed a prohibited "take", courts will decide whether the "challenged activity is reasonably certain to imminently harm, kill, or wound the listed species." *Animal Welfare,* 675 F. Supp. 2d 540, 563 (D. Md. 2009). Additionally, the Ninth Circuit has emphasized that the ESA does not require "absolute" certainty of imminent harm. *,Marbled Murrelet* 89 F.3d 1060, 1065 (9th Cir. 1996) ; *see also Animal Welfare* (explaining that an absolute certainty requirement defeats the ESA's purpose to protect endangered species) *Animal Welfare*, 675 F. Supp. 2d 540, 563 (D. Md. 2009).

Here, Greenlawn's water withdrawal activities during drought conditions were reasonably certain to imminently harm, kill, and wound the federally listed endangered oval pigtoe mussels.

A. Greenlawn's water withdrawals harmed the mussels by eliminating the mussels' necessary habitat to survive.

Greenlawn's constant water withdrawals harmed the oval pig toe population by causing stagnant water conditions which smothered and eliminated the mussels' necessary habitat. Harm is an act which "actually kills or injures wildlife." 50 C.F.R. § 17.3. The Supreme Court has held

that harm naturally encompasses "habitat modification that results in injury or death to members of an endangered or threatened species." *Babbitt,* 515 U.S. at 698. Furthermore, acts which impair a protected species' essential behavior patterns constitute "harm" and are proscribed under the ESA. *Forest Council v. Rosoro Lumber Co.,* 50 F.3d 781,784 (9th Cir. 1995); *United States v. Town of Plymouth, Mass.,* 6 F. Supp. 2d 81, 91 (D. Mass. 1998) (finding that changes to breeding patterns constitute "harm"). The Ninth Circuit has held that harm is not exclusively limited to "actual injury or death." *Id.* Thus, harm includes acts which create an imminent threat of injury. *see Forest Council,* 50 F.3d at 784 (finding "The Secretary's use of the term "actually" was not intended to foreclose claims of an imminent threat of injury to wildlife."). Finally, actions occurring outside of a species' habitat but still causing harm, are proscribed under the ESA. *Id.* at 784.

In *Town of Plymouth,* Fish and Wildlife Services sought to enjoin the defendant town from allowing off road vehicles to access the beach near a threatened species' habitat. *Town of Plymouth,* 6 F.Supp. 2d at 82. There, the plaintiff alleged that the off-road vehicles "harmed" the threatened species by killing twenty-two chicks and two adults and by damaging their habitat. *Id.* at 82. Because the off-road vehicle access not only killed, but also created a likelihood of harm to the threatened species, the court held that the town's refusal to stop their practice caused "harm". *Id.* at 91. The court reasoned that the town failed to promptly prohibit the challenged action and thus created a likelihood that the species' "nesting and feeding habitat would be adversely modified during their breeding season." *Id.*

Equally important is the Supreme Court's holding that the Secretary of interior reasonably construed harm to include habitat modification. *See Babitt,* 515 U.S. at 699. In *Babitt v. Sweet Home Chapter of Communities for a Great Oregon,* small landowners challenged the

Secretary of Interior's adoption of "habitat modification and degradation within the definition of harm" on the basis of economic injury. *Id.* at 699. The Supreme Court held that "Congress' intent to provide comprehensive protection for endangered and threatened species" supported the Secretary's inclusion of habitat modification and degradation. *Id.* at 699.

In *Forest Council v. Rosboro Lumber Co.*, the defendant applied for a permit to clear-cut 40 acres of timber on land adjacent to the habitat of two endangered northern spotted owls. *Forest Council,* 50 F.3d at 783. The plaintiff alleged that the lumber company's clear-cutting would "imminently harm" the owls through substantial habitat modification and impairment to the owls' essential behavioral patterns. *Id* at 788. The Ninth Circuit held that the plaintiffs offered sufficient evidence that future clear-cutting would imminently harm the owls' habitat through significant habitat modification and impairment. *Id.* at 788. The court reasoned that "past, present or future" injury to the owls was sufficient to establish "harm". *Id.* at 784.

Here, Greenlawn persistently refused to follow the ACOE's drought restrictions and instead requested water release demands which had severe effects on the oval pigtoe's downstream habitat. R. 9 Just as the town in *Town of Plymouth* persistently refused to stop an activity which destroyed a threatened species habitat, Greenlawn's protest of the drought water conditions created stagnant water conditions which eliminated the mussels' necessary habitat. *Town of Plymouth,* 6 F.Supp. 2d at 91. The drought conditions triggered by Greenlawn's demand for increased water releases to the Bypass Reach smothered and killed 25% of the mussels, just as the town's beach management practice destroyed the nesting and feeding conditions and similarly resulted in the death of twenty-two chicks. *Id.* Moreover, while the town in *Plymouth*'s beach management practices created a likelihood of harm to the threatened species, Greenlawn's

water withdrawals create a likelihood of harm that would be so severe as to "entirely eliminate the Green River population of the oval pig toe mussel." R. 10.

Further, much like Rosoboro Lumber Company's clear-cutting in *Forest Council* created imminent harm to endangered owls located on adjacent land to the timber cutting land (by likely adversely impacting their habitat and breeding patterns), the drought conditions in this case imminently harm the downstream conditions necessary to keep the mussel population submerged and alive. R. 17. In *Forest Council*, the lumber company's proposed clear-cutting of timber was located on land separate and apart from the owl's actual habitat but nonetheless indirectly and imminently harmed the population. *Forest Council,* 50 F.3d at 785. Likewise, while Greenlawn asserts that they have not committed a "harm" because the water withdrawals occured indirectly from the mussel habitat, their indirect actions eliminated a necessary habitat and killed twenty-five percent of the mussel population.

Greenlawn's ownership of the Green River stretch and ability to demand water withdrawals still harmed the mussels outside habitat by directly creating uninhabitable and adverse habitat conditions. R. 9-10. Mussels require submerged water conditions, yet Greenlawn's water demands created stagnant water conditions and prevented the mussel population from necessary submersion and survival. R. 9. Because Greenlawn's water withdrawals eliminated the mussels' necessary habitat, killed 25% of the population, and creates a substantial likelihood that the entire endangered population will be eliminated, Greenlawn has committed the type of "harm" the ESA was designed to prevent.

B. Assuming arguendo, that Greenlawn indirectly caused "harm", indirect harm still constitutes the proximate causation necessary to establish a prohibited "take."

Liability under the "take" provision of the ESA attaches where the actors are the proximate cause of the harm, and the harm was reasonably foreseeable. *Aransas Project v. Shaw*, 775 F.3d 641, 656 (2014). Actors who adopt habit modifying practices, which result in the actual death or injury to an endangered population have proximately caused the prohibited "take." *see Babitt,* 515 U.S. at 712. Proximate cause is established where a direct connection exists between the defendant's acts and the harm suffered. *Aransas Project*, 775 F.3d at 661. Therefore, neither remote nor attenuated connections constitute proximate causation. *Id.* at 658.; *see Cascadia Wildlands v. Kitzhaber*, 911 F.Supp.2d 1075,1084 (D. Md.2012) (finding that a direct relationship is required). Greenlawn incorrectly presumes that indirect acts negate the direct relation required to establish proximate causation. However, courts have held that indirect acts "likely resulting in violation of the ESA" constitute proximate causation. *see Strahan v. Coxe,* 112 F.3d 155, 164 (5th Cir. 1997) (finding that indirect acts which are not too remote proximately caused harm). Further, the ESA proscribes indirect acts by third parties. *Id.* Thus, third party acts which produce a "taking" proximately cause harm. *Id.* Where a third party takes "affirmative" acts to prevent the "take" of an endangered species, the party is not the proximate cause of the "take." *see Loggerhead Turtle v. County Council of Volusia County, Fla.*, 92 F. Supp.2d 1296, 1306 (M.D. Fla. 2000). Finally, liability attaches where the actor should have "reasonably anticipated" that their actions would "take" the endangered species. *Aransas Project,* 775 F.3d at 659. Unpredictable or uncontrollable forces which cause harm are not reasonably foreseeable. *Id* at 662.

In *Aransas Project v. Shaw*, the defendant (state entity) issued licenses to withdraw water for manufacturing and agriculture use which was adjacent to a refuge habitat for endangered whooping cranes. *Aransas*, 775 F.3d at 646. Plaintiff (environmental groups) alleged that the state's issuance of water licenses proximately caused the whooping cranes death. *Id.* The court held thatfar too many unforeseeable "contingencies" existed as well as forces such as weather, tides, and temperature changes outside of the state's control contributing to the deaths to establish proximate causation. *Id.* at 658.

Similarly, in *Strahan v. Coxe*, the state issued licenses authorizing commercial fishing operations to use gillnets and lobster pots. *Strahan*, 112 F.3d at 164. The plaintiffs alleged that the licensing scheme entangled whales and proximately caused the whale's death. *Id.* The court agreed with the defendants that generally, licensing indirectly causes harm to a species, the court held that indirect harm to the whale was still proximately caused. *Id.* at 164. The court reasoned that the state's licensing scheme indirectly and proximately caused the whale's death because the fishing nets were likely to result in the "take" of an endangered species. *Id.* at 165. Further, the causation between the licensing and the harm was not too removed to preclude a finding of proximate causation. *Id.*

In *Loggerhead Turtle v. County Council of Volusia County, Fla.*, the city adopted a minimum lighting ordinance, using artificial lighting in order to protect endangered sea turtles. *Loggerhead*, 92 F. Supp.2d at 1297. Nonetheless, artificial lighting still constituted a "take" of the turtles by causing harm to their habitat on the beach. *Id.* at 1299. The court held that the city did not proximately cause the "take" of the turtles, because the ordinance was explicitly designed to protect sea turtles from a "take." *Id.* Even if the lighting caused harm, the court reasoned that the ESA does not proscribe affirmative acts designed to protect endangered species. *Id.*

Here, Greenlawn's water withdrawals alone modified the mussels' habitat. Unlike in *Aransas Project v. Shaw*, where the court identified multiple significant factors, such as a series of independent weather conditions which caused harm to the whooping cranes outside of the state's activity, the significant factor in this case contributing to the death and injury of the mussels is the water withdrawal. R.17. In this case, no uncontrollable weather patterns submerging the mussel population, but rather, only Greenlawn's water withdrawals that reduced water flow destroyed the mussels' habitat. R. 9-10. Unlike unforeseeable weather conditions, Greenlawn should have reasonably foreseen that persistent water withdrawals during a drought period would adversely impact a species whose survival depends on submersion by water. R. 9-10. Greenlawn cites insufficient evidence that the "precipitation conditions" were so strong that they disrupted the direct relationship between Greenlawn's water withdrawal during drought conditions and the harm to the mussel population.

Further, just as the defendants in *Strahan*, whose commercial fishing scheme indirectly harmed an endangered species, Greenlawn did not directly withdraw water from the mussels' habitat. R. 8-10. However, the evidence shows that the upstream water withdrawals directly caused the destruction and elimination of the mussels' necessary habitat. R.9. Without the water withdrawals, the mussel's downstream habitat would not have been adversely impacted.

Finally, unlike the defendants in *Loggerhead*, who took affirmative acts to prevent and reduce harm to an endangered population, Greenlawn has taken no such affirmative acts to prevent the destruction of the mussels' necessary habitat nor did they seek to prohibit future harm. Instead, Greenlawn believes it has no responsibility to stop the drought, as it was "naturally" occurring. R.17. However, Greenlawn's persistent water demands increased the severity of the drought conditions. Because Greenlawn's water withdrawals harmed the mussels

and the harm was reasonably foreseeable, this court should rule that that Greenlawn proximately caused the harm to the oval pigtoe mussel population.

Greenlawn has proximately caused the substantial modification of the oval toe mussel's habitat and its water withdrawal demands resulted in a prohibited "take" of the endangered mussels. For the foregoing reasons, we respectfully request that this court find that Greenlawn violated the "take" provision under the ESA.

IV. The District Court erred in granting an injunction over Greenlawn's beneficial municipal activities.

Courts must balance the equities before enjoining a beneficial municipal activity regardless of whether that activity may cause the extirpation of an endangered species. The Court has determined that preliminary injunctions are "extraordinary and drastic." *Munaf v. Geren*, 553 U.S. 674, 690 (2008). Accordingly, "[i]n *each* case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987) (emphasis added); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (explaining that the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." (citing *Yakus v. United States*, 321 U.S. 414, 440 (1944)). The ESA's citizen suit provision, allows a suit "to enjoin any person, including . . . any . . . governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g). Congress's purpose in enacting the ESA citizen suit provision was to "halt and reverse the trend toward species extinction." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). Nevertheless, the Supreme Court has held that "[a]n injunction is not the only means of ensuring compliance."

Weinberger, 456 U.S. at 314. Subsequently, "a federal judge . . . is not mechanically obligated to grant an injunction for every violation of law." *Tennessee Valley Authority*, 437 U.S. at 193; ("A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances.").

Resultantly, it is important that "courts of equity . . . pay particular regard for the public consequences in employing the *extraordinary remedy* of injunction," especially when there are alternative means to achieve compliance. *Weinberger*, 456 U.S. at 312 (emphasis added). Moreover, injunctions should only be issued "where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'" *Id.* at 311 (citing *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)).

In *Tennessee Valley Authority v. Hill*, the court decided whether the Endangered Species Act of 1973 required the court to enjoin the operation of a federal dam, that was still being constructed, "when the Secretary of the Interior ha[d] determined that operation of the dam would eradicate an endangered species." *Tennessee Valley Authority*, 437 U.S. at 156. The *Tennessee Valley* case involved the construction of the Tellico Dam and Reservoir Project. *Id.* at 157. The dam's construction would drastically transform the river it lied on from "shallow, fast flowing waters into a deep reservoir over 30 miles long." *Id.* Before the dam was completed, a previously unknown species of perch, the snail darter, was discovered downstream from the dam. *Id.* at 158. If completed, the dam's drastic river alteration would unequivocally result in the extirpation of the snail darters. *Id.* at 162. In light of this destruction, the parties negotiated alternative dispute resolutions for an entire year; however, these negotiations were to no avail because the dam constructors stubbornly only accepted the alternative of relocating the darters to an alternative site. *Id.* The Secretary of the Interior was not satisfied with this alternative because

"'little evidence that [dam constructors] have carefully studied the Hiwassee to determine whether or not' there were 'biological and other factors in this river that [would] negate a successful transplant.'" *Id.* at 163. That court ultimately issued an injunction to cease construction of the dam, because no realistic alternatives existed to remedy the problem. *Id.* at 162.

Then, the *Weinberger v. Romero- Barcelo*, the court decided whether injunctive relief was the only option to ensure compliance with the Federal Water Pollution Control Act. The plaintiffs sought to enjoin the Navy from using a portion of land near a state owned island to conduct navy training operations. 456 U.S. 305, 307 (1982). That court declined to issue an injunction, holding that an injunction was unnecessary, as there were alternative means to ensure compliance with the Federal Water Pollution Control Act. *Id*. at 315. Moreover, alternative means would sufficiently vindicate the act's objectives, while also remedying the problem. *Id.*

This case is functionally different from that of *Tennessee Valley*. Here, it is not unequivocally certain that Greenlawn and ACOE's actions will result in the destruction nor eradication of the mussels. R. 11. In *Tennessee*, it was unquestioned that the completion of the dam would result in the "total destruction" of the darters. *Tennessee Valley Authority*, 437 U.S. at 162. In our case, three quarters of the mussel population survived the Zone 3 (Drought Emergency) that occurred in 2017. R. 8-9. Additionally, the mussels in our case "can adapt to minor changes in water levels by moving themselves to habitat that remains submerged," unlike in *Tennessee Valley*, where the darters lived "only in that portion of the Little Tennessee River which would be completely inundated by the reservoir created." *Tennessee Valley Authority*, 437 U.S. at 161; R. 9. TVA's dam was also going to change the river from a "shallow, fast flowing waters into a deep reservoir over 30 miles long." *Tennessee Valley Authority*, 437 U.S. at 157. In

this case, Greenlawn and ACOE's wate 50 F.3d 781 r use restricted water to the mussel's habitat, but it did not significantly alter the physical characteristics of the mussel's habitat. Significantly, in this instance, the mussel's habitat is undisturbed by Greenlawn and ACOE's water use, and instead is affected by various outside factors such as evaporation rates and other ecological factors that may not persist. R. 9. For comparison, the *Tennessee Valley* courts did not have to consider these ecological factors, because if the dam was completed the darters would have unquestionably been extirpated. In *Tennessee Valley,* even where the dam's construction would completely eradicate the darters, the Secretary of Interior still gave the constructors one year to develop alternatives that would sufficiently accomplish the ESA's objectives. *Tennessee Valley Authority*, 437 U.S. at 162. The constructors stubbornly rejected all alternative resolutions other than relocating the endangered species to a new location, which was not "carefully studied" to see if the transplant would be successful. *Id.* at 163.

In this case, this court should exercise its discretion and reach an equitable decision. *See id.* The court in *Tennessee Valley Authority* viewed the injunction as the only means to accomplish Congress's goal. *See Id.*; *see also Weinberger v. Romero-Barcelo,* 456 U.S. 305, 314 (1982) (explaining that the Supreme Court decided to issue an injunction in *Tennessee Valley Authority* because it was the only way to "vindicate the objectives of the Act," but there are alternative means to ensure compliance). Here, balancing the equities will allow this court to follow the precedent set by *Tennessee Valley*, while simultaneously complying with the ESA's goals to protect endangered species. Because the ESA's objectives can be vindicated through alternative measures, this court should balance the equities before issuing an injunction.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the ACOE requests that this Court affirm the District Court's grant of summary judgment in Greenlawn's favor against Plaintiff, NUO, dismissing the Third Claim for Relief in Plaintiff's Complaint. The appellee specifically requests that this Court find Greenlawn's rights as riparian landowner grant them the exclusive right to domestic water use. Additionally, the appellee requests that this Court affirm the district court's order granting ACOE summary judgment, dismissing the First Claim for Relief. Specifically, the appellee further requests that this Court find that ACOE has not made any discretionary action to which the ESA § 7(a) triggering consultation requirement would apply. Further, the appellee requests that this Court affirm the district court's decision that NUO is entitled to summary judgment in its favor on the Second Claim for Relief. Specifically, the appellee further requests that this Court find that Greenlawn's water withdrawals constituted a "take" of an endangered species under ESA § 9, 16 U.S.C. § 1538(a)(1)(B). Lastly, the appellee requests that this Court reverse the District Court's issuance of an injunction prohibiting Greenlawn from making water withdrawals affect downstream flows. Specifically, the appellee further requests that this Court finds it necessary to balance the equities before issuing such a remedy.