Team # 11

CA. 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 THE DISTRICT OF NEW UNION

Brief for UNITED STATES ARMY CORPS OF ENGINEERS
Plaintiff – Appellee

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STATEMENT OF JURISDICTION

This case is an appeal from the United States District Court, District of New Union. R. at 1. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2018) because the Complaint raises questions arising under federal law. Appellants filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4 (2016), and all parties are now seeking review under this Court's jurisdiction pursuant to sections 7 and 9 of the Endangered Species Act (ESA). 16 U.S.C. § 1536, 1538. The petitions have been rightfully consolidated by this Court for the purpose of its review. The U.S. Court of Appeals for the Twelfth Circuit has valid jurisdiction over the appeal based on 28 U.S.C. § 1291 (2018).

STATEMENT OF THE ISSUES

1. Whether Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures?
2. Whether operating the Howard Runnet Dam Works to meet Greenlawn's flow demands during drought conditions is a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536?
3. Whether Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Bypass Reach constitutes a "take" of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538?
4. Whether the District Court must balance the equities before enjoining a beneficial municipal activity, when the activity will cause the extirpation of a population of an endangered species from an area?

STATEMENT OF THE FACTS

The Green River flows to the Howard Runnet Lake in the Green River valley. R. at 5. The Army Corps of Engineers (ACOE) operates the Howard Runnet Dam Works, which consists of the Green River Diversion Dam, at the river's entrance to the lake, and the Howard Runnet Dam, which lets water flow from the lake. Id. When ACOE built the Diversion Dam, it diverted water away from the historical path of the Green River into the lake. Id. Flows are still maintained to that historical path, now known as the Green River Bypass Reach. Id. The City of Greenlawn, New Union lies on both historical banks of the Green River in the area that is now the Bypass Reach. Id. The city owns the riverfront on both sides of the Bypass Reach within city limits, as well as the underlying riverbed, and has maintained municipal water intakes from the Bypass Reach since the city was founded in 1893. Id. These intakes provide domestic and industrial water supply to over 100,000 customers within Greenlawn city limits. Id. The city consists mostly of residential districts with single family homes, with only a small downtown area. Id. Greenlawn withdraws water from the Bypass Reach at an average of 6 million gallons per day (MGD) annually but draws up to 20 MGD each summer to meet summer lawn and ornamental watering demands. Id. Less than 5% of the water withdrawn by Greenlawn returns to the Green River. R. at 5–6.

ACOE operates the Howard Runnet Dam Works in accordance with the Water Control Manual (WCM). R. at 6. The WCM governs operation of the Dam Works and dictates allowable water releases for maintaining flood control storage capacity and recreation water levels, providing for hydroelectric generation, and maintaining flow for Greenlawn's water intake from the Bypass Reach. Id. The WCM provides target lake elevation levels for the Howard Runnet

Lake. Id. When the lake drops below these target levels, the WCM provides for downstream releases to be curtailed in accordance with the following lake level zones:

1) Zone 1 (Drought Watch) – 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.

2) Zone 2 (Drought Warning) – 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.

3) Zone 3 (Drought Emergency) – 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. at 7. In addition to these zones, 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 United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law." Id.

When the WCM was originally adopted in 1968, there were no substantial consumptive water uses upstream of the Howard Runnet Lake. Id. In the 1980s, however, several large agricultural operations in the Green River valley diverted water for irrigation, resulting in losses to the system. R. at 7–8. But the natural water cycle still maintained adequate flows. R. at 8. Water shortages were not a severe problem until the 21st century, when Zone 1 (Drought Watch)

conditions occurred numerous times. Id. In Spring of 2017, lake levels reached Zone 2 (Drought Warning) and ACOE restricted flow in the Bypass Reach to 7 Cubic Feet per Second (CFS), as required by the WCM. Id. The City of Greenlawn protested the restrictions, and in a letter dated April 12, 2017, demanded that the water releases be raised to 30 CFS to meet the city's needs. Id. ACOE requested that Greenlawn institute drought restrictions, but Greenlawn responded that the city has the right as riparian landowner to make reasonable use of the historic flows of the Bypass Reach, and that it was under no obligation to impose drought restrictions because watering lawns and ornamental plantings was a reasonable riparian water use for domestic and commercial purposes. Id.

ACOE abided by Greenlawn's demands, and on April 23rd, increased water releases to the Bypass Reach from 7 CFS to 30 CFS. Id. Combined with the continued hydroelectric power releases, these withdrawals lowered the lake to Zone 3 (Drought Emergency) level on May 15th, 2017. Id. As required by the WCM, ACOE curtailed hydroelectric power releases from the Howard Runnet Dam, but continued to release 30 CFS flow to the Bypass Reach to provide for Greenlawn's demand. R. at 9. Before the lake levels reached Zone 3, downstream Green River flows averaged about 25 CFS over each 24-hour day. Id. After the lake reached Zone 3 and the hydroelectric power releases were curtailed, downstream flows fell to almost zero as Greenlawn withdrew nearly all 30 CFS supplied to them in the Bypass Reach. Id.

Populations of oval pigtoe mussels, a federally listed endangered species, are found downstream of the Howard Runnet Dam Works in the Green River. Id. The mussel populations are not in the stretch of the Bypass Reach owned by Greenlawn. Id. If a downstream flow rate of at least 25 CFS over each 24-hour day is not maintained in the Green River where these mussels are located, they face local extirpation. R. at 10. The City of Greenlawn does not have an

incidental take permit under § 10 of the Endangered Species Act, 16 U.S.C. § 1539, authorizing the take of oval pigtoe mussels. R. at 9–10. ACOE did not consult with the Fish and Wildlife Service concerning the impact of the reduced flow on the oval pigtoe mussel. R. at 9.

The reduced flows to the Green River since the start of the 21st century have also impacted populations of juvenile oysters in Green Bay, downstream of the Green River. R. at 10. Oyster fisherman of Green Bay have seen oyster harvests reduced: harvests in 2016 were 50% of what they were in 2000. Id. New Union Oystercatchers, Inc. (NUO) represents the interests of these fisherman and has brought this action against Greenlawn and the ACOE.

PROCEDURAL HISTORY

NUO filed a claim in 2017 against ACOE and Greenlawn alleging violations of the Endangered Species Act in connection with the ACOE's operation of the Howard Runnet Dam Works during drought conditions and Greenlawn's water withdrawals from the Bypass Reach. R. at 4. NUO moved for summary judgment declaring Greenlawn to be in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538, and the ACOE to be in violation of § 7 of the Endangered Species Act, 16 U.S.C. § 1536. Id. Greenlawn cross-moved against NUO for summary judgment to declare its rights as a riparian landowner and to dismiss the ESA claims against it. Id. ACOE filed a cross claim against Greenlawn, joining NUO's ESA claims. Id.

The district court correctly determined that the City of Greenlawn has riparian landowner rights to the Green River Bypass Reach, and that ACOE did not violate the consultation requirement under § 7(a) of the Endangered Species Act, 16 U.S.C. § 1536(a). R. at 2. The district court also correctly concluded that Greenlawn's withdrawals from the reduced flow of the Bypass Reach constitutes a "take" of the endangered oval pigtoe mussel, and that

Greenlawn's actions violated § 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B). Id. Finally, the district court enjoined Greenlawn from causing water withdrawals that result in the flow of the Green River downstream of the confluence of the Howard Runnet Dam tailrace with the Bypass Reach to drop below 25 cubic feet per second averaged over twenty-four hours. R. at 18. In making this determination, the district court erred, ruling that when enjoining a municipal activity to prevent the extirpation of an endangered species, a court need not balance the equities of the municipal activity against the threat to the species. R. at 2.

SUMMARY OF THE ARGUMENT

Greenlawn has the right to unrestricted use of the Green River's water flow for municipal and domestic purposes as a riparian landowner. Under the *Brooks* reasonable use test, domestic uses are given priority over all other uses, and a riparian landowner can use the entire flow for "domestic" or "natural" purposes. Any natural uses, such as water for drinking, household uses, watering livestock, or watering a garden, are considered domestic or natural uses, and cannot be curtailed except under emergency circumstances that warrant public necessity. The doctrine of public necessity is not applicable here because the Mayor of New Union has not declared a drought emergency, and only gubernatorial declarations of emergency can restrict a riparian owner's rights to natural use.

The ACOE did not take a "discretionary action" under § 7 of the ESA because it was bound by the Water Control Manual to meet Greenlawn's demand for increased flow during drought conditions, and because any discretion that the ACOE retained could not have benefitted the oval pigtoe mussel population. The Water Control Manual's binding nature is derived from its language and context: its provision of substantive requirements and its use of "shall" creates

an imperative directive, indicating that it was intended to bind the ACOE. For an action to be "discretionary" for the purposes of ESA § 7, the action must have the ability to benefit the endangered species in question. Here, the Water Control Manual required the ACOE to comply with Greenlawn's demands for water such that, coupled with Greenlawn's consumption from the Bypass Reach, the flow levels downstream of the Howard Runnet Dam Works were too low to sustain the oval pigtoe mussel population. The ACOE could not have taken any action sufficient to prevent the mussel's extirpation, and thus no action "discretionary" under ESA § 7.

ACOE asserts that Greenlawn's withdrawal of nearly all water flow from the Bypass Reach constitutes a "take" under § 9 of the ESA. A "take" occurs when a species is harmed. The pigtoe mussel is harmed by the City's actions that modify the mussels' habitat. Specifically, the City's withdrawal of water results in the mussels' downstream habitat being modified. Habitat modification can occur even when the harmful activity is outside of the species habitat. Here, the City's external activity of withdrawing water from the Bypass Reach affected the mussels' habitat and therefore resulted in habitat modification and consequently a "take" under § 9 of the ESA.

ACOE takes issue with the District Court's refusal to balance the equities when considering whether to enjoin Greenlawn. The balancing of the equities is only foreclosed when a species is at risk of extinction. When the harm at risk is less severe than extinction, the court must grant the species significant weight but need not completely forego balancing the equities. Here, the pigtoe mussel does not face the risk extinction from Greenlawn's actions – it faces local extirpation. Therefore, the traditional injunction factors apply, and the court must balance the equities while granting the interests of the mussel significant weight.

STATEMENT OF APPELLATE STANDARD OF REVIEW

This case concerns the district court's grant of summary judgment. Summary judgment should be granted when there is no genuine dispute of material fact. An appellate court reviews the grant of summary judgment *de novo*, applying the same legal standard as a district court. Pucino v. Verizon Wireless Commc'ns, Inc., 618 F.3d 112, 117 (2d Cir. 2010); Pierce v. Underwood, 487 U.S. 552, 557-58 (1988). Courts will construe the facts in a light most favorable to the nonmoving party, but only when there is a genuine dispute as to those facts. Scott v. Harris, 550 U.S. 372, 380 (2007). Summary judgment should be granted when the non-moving party is unable to show a genuine issue of material fact. Fed. R. Civ. P. 56(c).

ARGUMENT

I. GREENLAWN, AS A RIPARIAN OWNER, HAS THE RIGHT TO MAKE NATURAL USE OF THE GREEN RIVER BYPASS FOR MUNICIPAL AND DOMESTIC PURPOSES WITHOUT CURTAILMENT ABSENT A DECLARATION OF EMERGENCY BY THE GOVERNOR OF NEW UNION.

A. Greenlawn is a common law riparian landowner.

The common law riparian doctrine is a system of water law that "recognizes the right of landowners abutting flowing rivers and streams" to use the waters and streams. R. at 11; Hill v. Newman, 5 Cal. 445, 446 (1855). Riparian owners have two inherent rights under the common law: (1) a right to receive the natural flow of the stream in both quantity and quality, and (2) a right to make reasonable use of the water in the stream. Bollinger v. Henry, 375 S.W.2d 161, 166 (Mo. 1964); Harris v. Brooks, 283 S.W.2d 129 (1955); Evans v. Merriweather, 4 Ill. 492 (1842).

Municipal corporations may be considered private riparian owners. See Peter N. Davis, Protecting Waste Assimilation Streamflows by the Law of Water Allocation, Nuisance, and

Public Trust, and by Environmental Statutes, 28 Nat. Resources J. 357, 364 (1988). The District of New Union recognizes this "right of a municipality to be a riparian landowner," and to "withdraw water as a supply to the benefit of non-riparian parcels within the municipality." R. at 12; See Tubbs v. Potts, 45 N.U. 999 (1909) (citing City of Canton v. Shock, 63 N.E. 600 (1902); City of Philadelphia v. Collins, 68 Pa. 106 (1871); Barre Water Co. v. Carnes, 27 A. 609 (1893)). The municipality may make these withdrawals for non-riparian lands so long as the withdrawals are reasonable. Adams v. Greenwich Water Co., 83 A.2d 177, 183-84 (1951) (ruling that a city may continue diverting waters to non-riparian land but requiring the city to compensate a lower riparian owner deprived of water rights).

Here, because Greenlawn, a municipal corporation, owns riverfront on both sides of the Green River within the bypass reach (R. at 5), it is a riparian owner under New Union law.

B. Greenlawn may divert water from the bypass reach for natural and domestic uses without consideration for lower riparians.

Generally, riparian landowners are entitled to make reasonable and equitable use of the waters flowing through their land provided that such use is not inconsistent with a similar reasonable and equitable use of the same waters by lower riparian owners. U.S. v. Willow River Power Co., 324 U.S. 499, 505 (1945). In Harris v. Brooks, the court offered general principles to guide lower courts in determining what activities constitute "reasonable use":

> [1] The right to use water for strictly domestic purposes – such as household use – is superior to many other uses of water – such as fishing, recreation, and irrigation. [2] Other than [domestic use], all other lawful uses of water are equal. [3] When one lawful use of water is destroyed by another lawful use the latter must yield, or it may be enjoined. [4] When one lawful use of water interferes with or detracts from another lawful use, then a question arises as to whether,

> under all the facts and circumstances of that particular case, the interfering use shall be declared unreasonable and as such enjoined, or whether a reasonable and equitable adjustment should be made . . . .

Brooks, 283 S.W.2d at 134. In other words, unless the riparian landowner is using the water for domestic purposes, and is thus privileged, then both parties' uses will be subject to a review under the "reasonable use" test. This ensures that a court balances the interests of all riparians owners with the interests of others who may benefit from use of the waters. See Restatement (Second) of Torts § 850, cmt. d (Am. Law Inst. 1977).

In addressing domestic uses in riparian ownership rights, the Strobel court noted that, "[a]s the enjoyment of each must be according to his opportunity and the upper owner has first chance, the lower owners must submit to such loss as is caused by reasonable use." Strobel v. Kerr Salt Co., 58 N.E. 142 (1900). Domestic use, including use for gardening, is considered a "natural use" allowed to riparian owners without regard to the impact on other downstream riparian landowners. Prather v. Hoberg, 150 P.2d 405 (Cal. 1944); Bollinger, 375 S.W.2d at 165. "Domestic purposes" or "natural uses" include those integral to the sustenance of human beings, including water for household convenience, water for domestic gardens/orchards, and water for the care of livestock. Rancho Santa Margarita v. Vail, 81 P.2d 533 (Cal. 1938); Cowell v. Armstrong, 290 P. 1036 (1930). In keeping with this priority, courts have established that municipalities have the authority to divert water for the use of such types of domestic consumption. Wisconsin v. Illinois, 388 U.S. 426, 427 (1967) (permitting the continued diversion of additional water for domestic use when the reasonable needs of the metropolitan

area cannot be met from other water resources in the region); El Paso County Water Imp. Dist. No. 1 v. City of El Paso, 133 F. Supp. 894 (W.D. Tex. 1955) (holding that El Paso had the right to claim water for domestic purposes which had been appropriated for local industrial irrigation without paying for the water).

Greenlawn's demand for increased flow to the bypass reach from 7 CFS to 30 CFS was not only reasonable, but necessary to accommodate the city's "domestic" and "natural" uses. Greenlawn has no other sources from which to draw water to accommodate these uses, and 7 CFS simply will not sustain them. The city was left with no option but to demand a flow increase to meet its needs. As discussed above, Greenlawn's status as a common law riparian landowner gives it the right to make reasonable use of these historic flows to the Green River Bypass Reach. Accordingly, because Greenlawn's use for watering lawns and ornamental plantings is considered a reasonable riparian water use for domestic and natural purposes, Greenlawn satisfies the "reasonable use" test. See Rancho, 81 P.2d at 533; see also Cowell, 290 P. 1036. So long as the water diverted by Greenlawn is for domestic purposes like ornamental watering and household consumption (R. at 6), there is no limitation to the quantity that Greenlawn may draw from the Bypass Reach under the common law riparian doctrine.

C. Greenlawn's right as a riparian landowner may not otherwise be restricted.

No other authority requires Greenlawn to impose drought restrictions on its residents. A riparian owner has a real property interest in navigable waters abutting their land. Yates v. City of Milwaukee, 77 U.S. 497, 498 (1870). Under the minority jurisdiction, this interest runs in fee simple and cannot be unreasonably curtailed or destroyed. See Tubbs, 45 N.U. 999. Some states have created regulatory and statutory schemes providing for water conservation measures when water resources are strained. See, e.g., 15A N.C. Admin Code § 2E.0502 (Aug. 2002) (requiring

permittees to "develop and implement a feasible water conservation plan"). In states where statutory or regulatory schemes for such conservation is implemented, the state has the authority to exercise those rights over municipalities. New Jersey v. Delaware, 552 U.S. 597, 613 (2008). In the minority jurisdiction, supplementing or altering common law rules with this type of regulatory action is a form of "regulated riparianism" as defined by the American Society of Civil Engineers. See Regulated Riparian Model Water Code, § 1-R-l-01 at 1 (2004); Ala. Code § 9-10B-2 (2019); Conn. Gen. Stat. Ann. § 22a-366 (2019); Del. Code Ann. tit. 7, § 6001 (2019); Fla. Stat. Ann. §373.016 (2019); Ga. Code Ann. §§ 12-5-21, 12-5-91 (2019).

New Union has not adopted any regulatory or statutory measures that fit into this "regulated riparian" model, nor does New Union have a controlling authority that regulates riparian landowners during water shortages or droughts. To require Greenlawn to implement any form of water conservation measures, New Union would need enact or adopt a statute or regulation.

In Westland Water Dist., the court determined that the riparian owner's rights could be curtailed because a state statutory provision permitted the intervention of the state in times of drought. Westland Water Dist. v. United States, 153 F. Supp. 2d 1133, 1173 (E.D. Cal. 2001). The same was also true in Stupak-Thrall, where the court found that the regulatory scheme in place allowed regulation of riparian ownership. Stupak-Thrall v. United States, 843 F. Supp. 327, 331 (W.D. Mich. 1994), aff'd, 70 F.3d 881 (6th Cir. 1995).

Greenlawn, however, is not bound by statutes enacted or adopted in other jurisdictions. Even in states where there are regulations or legislation requiring municipal conservation, there are limits. Restrictions of riparian land ownership, even in emergency situations such as drought, can result in a regulatory taking. In Estate of Hage, the Court found that the Forest Service's

construction of fences on federal land around water and streams in which the Hages had a vested water right constituted a physical taking which required just compensation. Estate of Hage v. United States, 82 Fed. Cl. 202, 204-08 (2008).

Aside from statutes or regulations, the only instance where a riparian owner's rights may be restricted is when an ongoing emergency calls for an injunction out of public necessity. Surocco v. Geary, 3 Cal. 69, 73 (1853). The public necessity doctrine recognizes that in times of true emergency, private rights yield to public needs, with no need for the acting government to pay. Id. ("At such times, the individual rights of property give way to the higher laws of impending necessity."); United States v. Caltex, Inc., 344 U.S. 149, 154 (1952) ("The common law had long recognized that in times of imminent peril . . . the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.").

For a drought to constitute an "emergency" for the purposes of the public necessity doctrine, it must be declared an emergency by the governor of the State in which the water shortage occurs. Friant Water Auth. v. Jewell, 23 F. Supp. 3d 1130, 1140 (E.D. Cal. 2014); P. Coast Fed'n. of Fishermen's Ass'ns v. Gutierrez, 606 F. Supp. 2d 1195, 1225 (E.D. Cal. 2008); Express Carwash of Charlottesville, L.L.P. ex rel. Weinschenk v. City of Charlottesville, 320 F. Supp. 2d 466, 467 (W.D. Va. 2004); Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1133 (10th Cir. 2003). There is no instance when an emergency drought operation has been put into effect before the governor's declaration of an emergency in the drought-inflicted state. The Federal Reclamation States Emergency Drought Relief Act ("RSEDRA") of 1991 provides that "[t]he Secretary may make water from Federal Reclamation projects and non-project water available on a non-reimbursable basis for the purposes of protecting or restoring fish and wildlife

resources, including mitigation losses, that occur as a result of drought conditions or the operation of a Federal Reclamation project during drought conditions." 43 U.S.C. § 2212(d) (1992). However, the provisions of the RSEDRA only come into play when the governor of a state has "made a request for temporary drought assistance and the Secretary has determined that such temporary assistance is merited." Id. § 104(a). While the RSEDRA enhances the ability of others to infringe upon riparian ownership rights for the benefit of fish and wildlife, it is inappropriate to apply the Act here because there has been no official declaration of emergency by the Governor of New Union. Therefore, curtailing Greenlawn's water use is not authorized under the RSEDRA.

Though New Union may be subject to an extended dry season and drought-like conditions, no emergency has been declared. Accordingly, the rights of riparian owners trump any assertion of public necessity. Additionally, the term "drought operations" need not correspond to dry periods, nor need the term "non-drought operations" refer to wet periods as the applicability depends in part upon the amount of water that is stored behind the ACOE's dam. Florida. v. Georgia, 138 S. Ct. 2502, 2521 (2018). The implementation of the WCM's Zone 3 "Drought Emergency" does not indicate a declared emergency that would enjoin Greenlawn from exercising their full rights as riparian owners for domestic and natural uses under the public necessity doctrine. Rather, the use of the term "emergency" is merely the language chosen by the drafters of the WCM at the time of its implementation in 1968. Accordingly, Greenlawn's right to draw water for domestic and natural purposes may not be curtailed for any reason in times of drought without the official gubernatorial declaration of emergency.

II. OPERATING THE HOWARD RUNNET DAM WORKS TO MEET GREENLAWN'S FLOW DEMANDS DURING DROUGHT CONDITIONS IS NOT A "DISCRETIONARY ACTION" SUBJECT TO THE CONSULTATION REQUIREMENT WITHIN § 7 OF THE ENDANGERED SPECIES ACT.

The ACOE's operation of the 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 ESA. The ACOE is bound by the Water Control Manual (the "Manual") such that it had no choice but to abide by Greenlawn's claims as a riparian owner, and thus, the ACOE's activities do not meet the standard for "discretionary action."

A. The Water Control Manual creates a binding directive.

The Water Control Manual, by its substantive requirements and use of mandatory language, creates a binding directive for the ACOE to operate the Howard Runnet Dam in accordance with Greenlawn's riparian rights. Agency statements like the Manual can be binding upon an agency if so intended. South Dakota v. Ubbelohde, 330 F.3d 1014, 1028 (8th Cir. 2003). Intent is determined by looking to the Manual's language and context. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997). In South Dakota v. Ubbelohde, the 8th Circuit parsed the language of a Master Manual promulgated by the ACOE to determine whether it bound the Corps to follow its provisions. 330 F.3d at 1027. The Court found that it did, reasoning that because the Master Manual used language implying that it "was intended to bind the Corps' discretion, and because the Master Manual set out substantive requirements, the Master Manual had the effect of a legislative rule. Id. at 1028.

Here, like in Ubbelohde and its related cases, the Manual uses language implying that it is binding. In various places, the Manual provides that the Corps "shall" maintain certain flow levels in drought conditions, and that the Howard Runnet Dam "shall" be operated in a certain manner. R. at 7. Multiple courts have ruled that the word "shall" generally creates an "imperative

or mandatory" instruction. Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 662, (2007) (quoting Black's Law Dictionary 1375 (6th ed. 1990)); see also Association of Civil Technicians v. FLRA, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"). Beyond its use of mandatory language, the Manual's substantive requirements to maintain certain flow levels in drought conditions also indicate its intent to bind the Corps to the Manual's terms. See Ubbelohde, 330 F.3d at 1027-28 (finding that "where a policy statement purports to create substantive requirements, it can be a legislative rule . . .").

The Manual provides that "[a]t all times the Howard Runnet Dam Works shall be operated in a manner that complies . . . with the riparian rights of property owners . . . ." R. at 7. This provision, along with the language and other substantive provisions of the Manual, creates a binding directive for the ACOE.

B. The ACOE's activities do not meet the prevailing standard for "agency action" that is "discretionary" for the purposes of the ESA's consultation requirement.

Section 7 of the ESA defines agency action as "any action authorized, funded, or carried out by [a federal] agency." 16 U.S.C. § 1536(a)(2) (1973). The ESA implementing regulations limit § 7's application to "actions in which there is *discretionary Federal involvement or control.*" 50 C.F.R. § 402.03 (1986) (emphasis added). In National Association of Home Builders v. Defenders of Wildlife, a case interpreting competing statutory mandates under ESA § 7(a)(2) and the Clean Water Act, the Supreme Court explained that limiting the ESA's consultation requirement to only apply to discretionary agency actions harmonizes the ESA with other statutory mandates by which the agency must abide. Home Builders, 551 U.S. at 665-66.

The Ninth Circuit applied the standards of ESA § 7(a)(2) and 50 C.F.R. § 402.03 as articulated in Home Builders to create a two-pronged "agency action" inquiry: "First, we ask

whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species." Karuk Tribe of Cal. v. United States Forest Serv., 681 F.3d 1006, 1021 (9th Cir. 2012). This clear and concise inquiry serves the interests of all future parties when interpreting the ESA's consultation requirement, and the Court should use it today.

1. The ACOE did not "affirmatively authorize, fund, or carry out" the operation of the Howard Runnet Dam Works to provide flow to Greenlawn.

Justice Powell's dissent in a case that interprets ESA § 7(a)(2) but predates the adoption of 50 C.F.R. 402.03's "discretionary" provision illustrates the nature of the Karuk's first prong:

> In terms of planning and executing various activities, it seems evident that the "actions" referred to are not all actions that an agency can ever take, but rather actions that the agency is *deciding whether to authorize*, to fund, or to carry out. In short, these words reasonably may be read as applying only to *prospective actions*, i.e., actions with respect to which the agency has reasonable decisionmaking alternatives still available, actions *not yet* carried out.

Tenn. Valley Auth. v. Hill, 437 U.S. 153, 205 (1978) (Powell, J., dissenting). This interpretation of the word "action" in the ESA's context is aligned with the later adoption of § 402.03's "discretionary" requirement. For an activity to be an "action" such that it satisfies Karuk's first prong, then, it must be *affirmative*, the agency must be able to *decide* whether to authorize, fund, or carry it out, and there must be an alternative course of action available to the agency.

Some existing case law illustrates the kind of "agency actions" deemed discretionary such that they are subject to the ESA: renewing existing water contracts, Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998), construction of a highway interchange,

Aquifer Guardians in Urban Areas v. FHA, 779 F. Supp. 2d 542, 553 (W.D. Tex. 2011), creating interim management strategies, Lane Cnty. Audubon Soc'y v. Jamison, 958 F.2d 290, 293-94 (9th Cir. 1992), federal agencies' authorization of private activities, Wash. Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024, 1031-33 (9th Cir. 2005), and issuing permits allowing fishing on the high seas, Turtle Island Restoration Island v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 974 (9th Cir. 2003). See also Karuk, 681 F.3d at 1021.

Each of the examples above involves an *affirmative* action by a federal agency, where the agency was able to *decide* whether to authorize, fund, or carry out the activity, and where there were *alternative courses of action* available. When an agency renews an existing water contract, it makes an *affirmative* decision to extend the term of that water contract. The agency has an alternative course of action still available – *not* to renew the contract. When an agency constructs a highway interchange, it does so because it believes that constructing that particular highway interchange is the best way for the agency to further its stated purpose – for example, to provide transportation infrastructure. In acting on such belief, the agency makes an *affirmative decision*. When an agency authorizes private activities, it does so by making an *affirmative* determination that the private activity meets the conditions for authorization. When an agency authorizes a permit for fishing on the high seas, it makes a determination that had *not yet* been made – to grant the particular permit.

When the ACOE operated the Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn, it took no affirmative action. As we argue above, Greenlawn has the rights of a riparian property owner established under New Union law. Accordingly, the ACOE was bound by the terms of Manual to provide flow to Greenlawn. The ACOE could not *decide* whether to release 30 CFS to the Bypass Reach – there were no alternatives available. The

agency had to comply. Plainly, the activity in question fails to meet the prevailing standard for what qualifies as an "agency action" under ESA § 7(a)(2).

2. The ACOE had no discretion to influence or change the activity for the benefit of the oval pigtoe mussel.

Even if this court finds that the ACOE took an "agency action," it would still not be a "discretionary action" under § 402.03 because the agency had no discretion to influence or change private activity for the benefit of the oval pigtoe mussel. "If an agency cannot influence a private activity to benefit a listed species, there is no duty to consult because 'consultation would be a meaningless exercise.'" Karuk, 681 F.3d at 1024 (quoting Sierra Club v. Babbit, 65 F.3d 1502, 1509 (9th Cir. 1995)). The essence of Karuk's second prong lies in the agency's *ability* to make a meaningful difference with its discretion: "The relevant question is whether the agency *could* influence a private activity to benefit a listed species[.]" Karuk, 681 F.3d at 1025 (citing Turtle Island, 340 F.3d at 977). Without the discretion to take an action that will "inure to the benefit of a protected species," any discretion that the agency does retain is hollow for the purposes of the Endangered Species Act. Sierra Club, 65 F.3d at 1509; see also Environmental Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001).

Any action that the ACOE might have taken within its discretion could not have benefitted the oval pigtoe mussel. When the Howard Runnet Lake entered Zone 2 (*Drought Warning*), the ACOE reduced the Diversion Dam flow to the Bypass Reach to 7 CFS and maintained daily hydroelectric power releases of "up to 200 CFS for up to three hours per day," as was required by the Manual. R. at 7. In other words, the maximum hydroelectric power releases from the Howard Runnet Dam which the ACOE was able to release fell to 25 CFS over each 24-hour day:

200 CFS x 3 hours per day = 600 CFS per day

600 CFS ÷ 24 hours = 25 CFS averaged over 24 hours

Indeed, the downstream flow rates during this time fell to 25 CFS over each 24-hour day. R. at 9. This is the minimum flow rate required to prevent the extirpation of the Green River oval pigtoe population, making Zone 2 the last possible lake level where the mussels can avoid extirpation while Greenlawn continues to draw virtually all waters from the Bypass Reach. When the ACOE complied with Greenlawn's demand for a flow of 30 CFS to the Bypass Reach – as the agency was bound to do by the Manual – the lake entered Zone 3 (*Drought Emergency*). R. at 7. At this point, the ACOE was required to curtail daily hydroelectric power releases even further than those in Zone 2, meaning that flow to the Green River downstream of the Howard Runnet Dam would necessarily be less than 25 CFS averaged over 24 hours – the amount of water necessary to prevent the oval pigtoe mussel's extirpation – while Greenlawn continued to draw 30 CFS per day.

At no point in the series of events leading to the reduction of flow to below 25 CFS averaged over 24 hours did the ACOE have the discretion to take an action that would have benefitted the oval pigtoe population. The agency was bound by the requirement to implement Zone 2 curtailments, then bound to comply with Greenlawn's request for increased flow, then bound to further curtail hydroelectric power releases when the Howard Runnet Lake finally entered Zone 3 drought conditions. Even if the ACOE had discretion to select the flow rate of hydroelectric power releases within the constraints of Zone 3, it could not select a flow rate high enough to benefit the mussel population – it could not adjust flow rates to inure to the benefit of the protected species. Accordingly, the ACOE could not have taken a "discretionary action" such that the ESA's consultation requirement was triggered.

III. THE CITY OF GREENLAWN'S WITHDRAWAL OF FLOW FROM THE BYPASS REACH AFTER MAY 15, 2017 CONSTITUTES A TAKING BECAUSE THE WITHDRAWAL CAUSED DEGRADATION OF THE OVAL PIGTOE MUSSEL'S HABITAT AND HARMED THE SPECIES.

The parties do not dispute whether Greenlawn's actions helped facilitate the degradation of the mussels' habitat in part. Instead, the dispute centers on whether Greenlawn's action outside of the habitat rise to the level of culpability required to be held liable under the ESA § 9. Endangered Species Act § 9, 16 U.S.C. § 1538 (2012). To be liable under ESA § 9 a party must illegally take a species and be the proximate cause of the take. Id. § 1538(a)(1)(B). Greenlawn's withdrawals outside of the mussel's habitat constitute a habitat modification and therefore an "illegal take" under ESA § 9. Further, after May 15th, Greenlawn's withdrawals were the proximate cause of the degradation of the mussel's habitat.

A. An action outside of an endangered species' habitat can nonetheless cause habitat modification or degradation that results in harm and an illegal taking.

Section 9 of the ESA states that it is "unlawful for any person … to take any such [endangered or threatened] species within the United States . . . ." Id. Under the ESA, a person includes any "State municipalities." Id. § 1532(13). Both case law and the broad purpose of the ESA demonstrate that an external activity can be a legal habitat modification under the ESA.

1. Case law outside of the 12th Circuit supports the proposition that activity outside of a species' habitat that harms a species' habitat can result in "habitat modification" and a "take" under the ESA.

"Take" is defined as engaging in action or an attempt to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered or threatened species. Id. § 1532(19). The Secretary of the Interior defined "harm" as "any act[ion]" that kills or injures a listed species. 50 C.F.R § 17.3 (2006). "Any act[ion]" includes the "modification or degradation" of the species' habitat that kills or injures the species "by significantly impairing essential

behavioral patterns, including breeding, feeding, or sheltering." Id. See generally Babbit v. Sweet Home, 515 U.S. 687 (1995). "Harm" includes both direct and indirect "harms" to the endangered or threatened species. Sweet Home, 515 U.S. at 698; Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997); Palila v. Hawaii, 639 F.2d 495, 497-98 (9th Cir. 1981).

An external action outside of an endangered species' habitat that damages said habitat is considered habitat degradation and is an indirect harm in violation of ESA § 9. Loggerhead Turtle v. Cty. Council of Volusia Cty., 92 F. Supp. 2d 1296 (M.D. Fl. 2000), enforcing, 148 F.3d 1231 (11th Cir. 1998); Aransas Project v. Shaw, 775 F.3d 641, 656 (5th Cir. 2014) (finding that external activity caused habitat modification but ultimately no liability attached because of a failure to prove causation). Remanded from the 11th Circuit, the Loggerhead III District Court considered whether Volusia County was liable for the takings of three different turtle species that occurred when artificial light from beachfront properties flooded onto the beach. Loggerhead III, 92 F. Supp. 2d at 1300. The 11th Circuit found, the district court agreed, and neither party disputed the fact that artificial lighting caused newly-hatched turtles' beach habitat to be modified, resulting in "disorientation" and fatalities for the turtles. Loggerhead II, 148 F.3d at 1238 n.6; Loggerhead III, 92 F. Supp. 2d at 1300. The district court noted that the harmful artificial lighting was of external origin, originating from "buildings, streetlights, beach lamps, and nearby vehicles" outside of the turtles' beach habitat. Loggerhead III, 92 F. Supp. 2d at 1304. The external nature of the artificial lighting did not give the court pause in holding that the artificial light resulted in habitat degradation and "harmed" the turtles under the ESA. Id. at 1304-05.

In Alabama v. United States Army Corps of Engineers, another court found external activity caused habitat modification as defined in the ESA. 382 F. Supp. 2d 1301 (N.D. Ala. 2005). In Alabama, the Corps controlled water flow into the "ACF River Basin" by operating Woodruff Dam. Id. During a 2006 drought, the Corps' discharges from the Woodruff Dam into the River Basin steadily declined throughout the summer resulting in lower water flows and the death of "hundreds, if not thousands" of endangered mussels in the River Basin. Id. The court found, and the Corps did not deny, that the habitat of the endangered mussels in the River Basin were "being modified by the decreased flows so that they" faced harm and death. Id. The court concluded that despite the action of habitat modification being upstream and outside of the mussels' habitat, the death of the numerous mussels constituted a "take" under the ESA. Id. In doing so the court implicitly rejected any per se rule that external activity could not cause "habitat modification" as understood by the ESA. Id. See also Environmental Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1083 (9th Cir. 2001) (finding logging operations outside of the Coho Salmon's habitat to be capable of resulting in a taking); Pac. Rivers Council v. Brown, No. CV 02-243-BR, 2002 WL 32356431, at *11–12 (D. Or. Dec. 23, 2002) (finding logging operations outside of the endangered Oregon Coho Salmon's river habitat could result in a "taking" under the ESA § 9).

Similar to both the turtles in Loggerhead and the mussels in Alabama being harmed by external activity, the endangered pigtoe mussel is hurt by Greenlawn's withdrawal activity outside of the mussel's habitat. R. at 9. As discussed above, the courts' findings in Loggerhead and Alabama that the external habitat modification resulted in "takings" demonstrates that Greenlawn's external activity can certainly result in habitat modification and a "taking" of the pigtoe mussel under the ESA.

2. Further, the broad purpose of the ESA supports an expansive reading of "habitat modification" and therefore external activity can constitute "habitat modification" and therefore result in a take.

The interpretation of a statute must first look to the actual text of the statute. The ESA states that "harm" results in a "taking." 16 U.S.C. § 1538 (2018). ESA's implementing regulation defines "harm" as habitat modification. 50 C.F.R § 17.3 (2006). The regulation does not specifically make clear whether habitat modification can be caused by external activity. When the actual words cannot resolve the controversy of a statute's meaning, the purpose of the statute can help. Smith v. United States, 508 U.S. 223 (1993) (holding that statutory "construction is a . . . holistic endeavor" and that a court may look to the purpose of the entire "statutory scheme" to discern the meaning of an ambiguous word or phrase). The purpose of the ESA demonstrates that Congress intended for external activity to be capable of effectuating a habitat modification. The ESA's purpose "[is] to halt and reverse the trend toward species extinction, whatever the cost." Sweet Home, 515 U.S. at 699 (quoting Tenn. Valley Auth., 437 U.S. at 184). In accordance with the statute's purpose, Congress required that a "take" receive the "broadest possible" interpretation. S.Rep. No. 93-307, at 7 (1973). Sweet Home, 515 U.S. at 704; Strahan, 127 F.3d at 162 (holding that "take" should be "defined … in the broadest possible manner to include every conceivable way in which a person can 'take'"). Accordingly, in Sweet Home, the Court found the ESA provided a basis of liability for both "deliberate" and "indirect takings" of endangered species. Sweet Home, 515 U.S. at 698. The establishment of "indirect takings" liability led numerous circuits to hold States liable for merely permitting private action that results in a "take." See generally Palila v. Hawaii, 639 F.2d 495 (9th Cir. 1981) (finding the state liable for an indirect "take" where state sponsored goat grazing resulted in habitat destruction of the Palila); Strahan 127 F.3d (finding the state liable for takings of whales because the state

issued permits to allow lobster traps that ensnared whales); Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70, 99 (D. Me. 2008) (finding "state authorized" fox traps indirectly "took" endangered lynx).

Palila, Strahan, and AWI demonstrate the breadth with which courts have interpreted the ESA to fulfill Congress' purpose in enacting it. A finding that external activity can cause habitat modification certainly does not stretch the definition of "take" further than Palila, Strahan, and AWI. In those three cases, the courts found "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA." Strahan, 127 F.3d at 163. See also Palila, 639 F.2d at 497-98; Animal Welfare Inst., 588 F. Supp. 2d at 99. In the present case, the City's action itself effectuated a "take." If the broadest interpretation of the statute can support an indirect taking where an actor is held to commit a "take" by merely permitting an action, a finding that liability can attach to an actor whose external action causes habitat modification certainly is consistent with the broadest interpretation of "take" heretofore used.[1] With any contrary finding, "take" would not be granted the broadest possible interpretation.

B. There is sufficient causal connection between the city's water withdrawals and the dry riverbed downstream to find liability under the ESA.

For ESA § 9 liability to attach, there must be sufficient causal connection between the defendant's action and the harm. Sweet Home, 515 U.S. at 696 n.9, 700 n.13; NRDC v. Zinke, 347 F. Supp. 3d 465, 518 (E.D. Cal. 2018); 16 U.S.C. 1538(a)(1)(B); 50 C.F.R. § 17.3 (2006). Causation includes a showing of "cause in fact" and proximate cause. Sweet Home, 515 U.S. at

[1] The City is likely to again argue that without a definitional limit on "take," liability could be opened up to nearly any activity, no matter how attenuated. However, the City forgets that for any liability to attach under § 1538(a)(1)(B), proximate cause must be shown. Therefore, a broad definition of "take" does not implicate concerns of unfairly attaching liability to any action that may result in a take.

700 n.13 ("The Secretary did not need to include 'actually' to connote 'but for' causation, which the other words in the definition obviously require."); Aransas Project, 775 F.3d at 656 ("Proximate cause and foreseeability are required to affix liability for ESA violations.").

1. The City's diversion of water after May 15th was the cause in fact of the destruction of the mussels' habitat.

An act is the cause in fact or but for cause of an outcome if, in the absence of the act, the outcome would not have occurred. Burrage v. United States, 571 U.S. 204, 211 (2014); Nemmers v. Ford, 686 F.3d 486 ("A defendant's conduct is not a cause in fact if the plaintiff would have suffered the same harm had the defendant not acted negligently."); CSX Transp. Inc. v. McBride, 546 U.S. 685, 710 (Roberts, C.J., dissenting) ("It never would have happened ***but for*** [CSX's actions]."); William L. Prosser & Page Keeton, Prosser and Keeton on Torts 265 (5th ed. 1984). But for causation still exists when the "predicate act" is joined by "other factors," if the "other factors" would not be sufficient alone to cause the result – that is the "predicate act" must be "the straw that broke the camel's back." Burrage, 571 U.S. at 211.

It is clear that but for the City's "predicate act," specifically draining 30 CFS after the May 15th "drought emergency," the result, specifically the Green River running dry, would not have occurred. Only 30 CFS travelled through the Bypass Reach once the ACOE lowered releases to "drought emergency" levels. If the City had not drained all 30 CFS, other factors, namely upstream withdrawals and drought, could not have caused the Green River to run dry when it did.[2] Thus, but for the City's action, the Green River would have had water flow following May 15th. Therefore, there is no genuine issue of material fact that the City's actions were the cause in fact of the River running dry.

[2] A longer and more sustained drought or an increase in upstream diversion could have, over a few months, caused the Green River to run dry. However, following May 15th, 30 CFS would have flowed through the Bypass Reach to the mussel's habitat for the foreseeable future.

2. The City's diversion of water after May 15th proximately caused the destruction of the mussel's habitat.

A showing of proximate cause is necessary before liability is attached for under § 1538(a)(1)(B) violations. Sweet Home, 515 U.S. at 696 n.9, 700 n.13; Aransas, 775 F.3d at 657. A proximate cause finding under the ESA must find foreseeability and a "direct relationship" between the causal factors and the result. Aransas, 775 F.3d at 658. Foreseeability and a "direct relationship" require the causes of a result to be "closely connected" and of "such significance" to the result. NRDC, 347 F. Supp. 3d at 494. The relationship between the causal factors and the result must be foreseeable "rather than accidental." Aransas, 775 F.3d at 657 (quoting Sweet Home, 515 U.S. at 700).

The court in Aransas failed to find proximate cause. In Aransas, the court ruled that the chain of causation was too attenuated for the defendant to have reasonably foreseen the result of its actions – allowing water permits. 775 F.3d at 657-63. The municipality permitted residents to withdraw water, resulting in actual water withdrawals, which caused in a decrease of flow into San Antonio Bay, which increased the bay's salinity, hurting the populations of blue crabs and wolfberry plants, which injured whooping cranes by adjusting their habitat and disrupting their feeding. Id. at 660. The chain of causation is six distinct events long. Id. The plaintiff argued that a scientific study made clear to the defendant that water permitting could led to destructive results. Id. at 661. However, the court noted that this study predicted destructive results in *fifty years*, not in the short-term. Id. The defendants argued, and the court agreed, that there was "no reason to anticipate a significant die-off" resulting from water permits "only one year after this report issued." Id. Thus, the court ruled the defendant could not have reasonably foreseen the

long chain of events culminating in the death of cranes, its water permitting scheme resulted in and ruled no "take" occurred under the ESA. Id.

Unlike the lengthy line of causation in Aransas, the steps between the City's action and the resulting death of mussels was one factor long. After the ACOE declared the drought emergency, the Bypass Reach received only 30 CFS and was the only source of water flow to the Green River. 30 CFS was enough flow to ensure the survival of the pigtoe mussels. Yet the City continued drawing 30 CFS. The result was no significant amount of water left in the Bypass Reach, resulting in the mussels' habitat destruction, deaths, and "taking."[3] There is no long Aransas-like chain of events; the city withdrew 30 CFS and as a result the river ran dry. Compared to confluence of events in Aransas, this result was certainly reasonably foreseeable.

In Aransas, the court found the allowance of water withdrawals did not foreseeably result in the cranes' death as required by proximate cause because a "number of contingencies" occurred after the defendant's actions that essentially were intervening causes and shaped the cause of events and lead to the cranes' death. Id. at 661-62. Primarily, the court noted that the independent choices of those holding the water permits to withdraw water affected the chain of events significantly in a way the defendant could not have foreseen. Id. The defendant could not have foreseen that allowing independent water withdrawals would result in habitat modification under the ESA. Further, the court found the defendant could not have foreseen a calamitous drought occurring, further reducing the river's water levels.

[3] Of course, the river needs about 25 CFS over a 24-hour period for the mussels to survive, ensuring the city faced an impossible choice of cutting water supply drastically or "taking" the mussel. The existence of a difficult choice is not a legal defense to the city's "takings" under the ESA. In such a situation the City could have applied for an incidental take permit under § 1539 to ensure they were free from liability, yet they choose not to do this. ESA liability applies.

Unlike the inability to foresee independent water withdrawals causing habitat modification in Aransas, the City could have easily foreseen independent water withdrawals impacting habitats downstream. The City knew only 30 CFS were coming into the Bypass Reach. R. at 8–9. The City also knew that it traditionally consumed about 30 CFS of water from the Bypass Reach at that time of year. Id. Therefore, unlike the defendant's ability to foresee independent withdrawals causing a problem in Aransas, it was clear the City knew independent withdrawals would likely result in downstream habitat modification and result in a violation of federal law. Strahan clearly states that a state action that allows for independent action that would "likely result in a violation of federal law" is enough of an indirect cause to find the state had proximate cause to be held liable for the takings. Strahan, 127 F.3d at 164.

Further, unlike the defendant's inability to foresee the drought in Aransas, by May 15th, Greenlawn had known for months they were facing drought conditions. R. at 8. Further, unlike the Aransas drought conditions reducing water flow into the bay, after May 15th, drought conditions did not decrease the amount of water flowing into the Bypass Reach. Irrespective of how badly the drought affected upstream water flows after May 15th, 30 CFS was constantly supplied to the Bypass Reach by the ACOE. Therefore, Greenlawn cannot argue that drought conditions were a "contingency" that absolves them of being the proximate cause of the mussels' death because, first, the drought was not unforeseeable as it was in Aransas as it began months before, and in fact prompted, the May 15th curtailment of flow. Second, after May 15th the drought simply did not affect the amount of CFS reaching the Bypass Reach and therefore could not be a contingency affecting Greenlawn's proximate causation of the mussels' habitat modification.

Thus, unlike the defendant in Aransas, Greenlawn was the but for and proximate cause of the pigtoe mussels' harm. Causation combined with a "take" results in ESA § 9 liability for Greenlawn.

IV. GREENLAWN'S ACTIVITY DOES NOT THREATEN THE OVAL PIGTOE MUSSEL WITH EXTINCTION AND THEREFORE THE COURT MUST BALANCE THE EQUITIES BEFORE ENJOINING GREENLAWN'S ACTIVITY.

Appellant NUO erroneously contends that the traditional test for injunctions does not apply to Endangered Species Cases. Instead, NUO argues the test for an injunction pursuant to ESA §10 requires only a showing of a "threat of imminent harm to a protected species." Defenders of Wildlife v. Bernal, 204 F.3d 920, 925 (9th Cir. 2000). This argument is based off of an erroneous reading of TVA. Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

The Supreme Court foreclosed the balancing of equities in TVA only because of the "undisputed showing" that an entire species would become extinct if the Court did not grant an injunction. Oakland Cannabis, 496-97 (holding that the "ESA required the District Court [in *TVA*] to enjoin completion of a dam" because completion would "eradicate the known population of the snail darter . . . ."); Animal Welfare Inst., 623 F.3d 19, 27 (1st Cir. 2010). The court in TVA found that when a species faced extinction, Congress already balanced the equities on the side of the endangered species. TVA, 437 U.S. at 188, 194; United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 497 (2001) (overruling the district court's balancing of the equities, saying: "Congress' 'order of priorities,' as expressed in the statute, would be deprived of effect if the District Court chose to deny injunctive relief"). In less dire situations, where an endangered species does not face extinction, courts possess the usual discretion to balance the equities. See generally Animal Welfare Inst., 623 F.3d at 27; Water Keeper Alliance v. United States Dep't of Defense, 271 F.3d 21 (2001); Fund for Animals, Inc., 1991 U.S. Dist.

LEXIS13426 (holding that the grizzly bear does not face the "possibility that the limited hunting . . . will eradicate the species" and therefore a court may balance the equities in consideration of an injunction); North Slope Borough, 486 F. Supp. 326, 331-36 (D.D.C. 1979); Friends of Merrymeeting Bay v. Nextera Energy, No. 2:11-cv-38-GZS, 2013 WL 1835379 at *12-13 (D. Me. Apr. 30, 2013) (finding a lack of a threat of extinction and therefore balancing the equities when considering an injunction).

In an ESA suit where an endangered species does not face extinction, the ESA still requires that a court in equity must "tip" the balance heavily in favor of the endangered species. Strahan, 127 F.3d at 160. However, the favoritism due to the endangered species does not require courts to mechanically grant an injunction for every violation of the ESA. Tenn. Valley Auth., at 193; Animal Welfare Inst., 623 F.3d at 26. Instead, a court must apply the traditional four factor injunction test with the balance of the equities tipped heavily in favor of protecting the endangered species.

First Circuit precedent is especially informative. In AWI, the 1st Circuit found the state "took" the endangered Canadian Lynx by allowing certain traps to be used. Animal Welfare Inst. v. Martin, 558 F. Supp. 2d 70, 107 (D. Me. 2008). In determining whether an injunction was required, the court noted that circumstances facing the Canadian Lynx were not nearly as "dire" as the threat posed to the snail darter in TVA. Animal Welfare Inst., 623 F.3d at 27, aff'd, 558 F. Supp. 2d 70 (D. Me. 2008). In TVA, the snail darter faced extinction whereas in AWI a few isolated Canadian Lynx faced remote risk of injuries from the permitting of foothold traps. Id. As a result, the 1st Circuit court concluded the district court's balancing of the equities was appropriate because Congress' priorities in preventing the eradication of species was not as strongly implicated as it was in TVA. Id.; Animal Welfare Inst. v. Martin, 558 F. Supp. 2d 70,

107-08 (D. Me. 2008) (the district court weighed the balance of the equities in determining whether to grant an injunction).

Further, in Water Keeper Alliance v. United States, the Alliance sought an injunction to prevent the Navy from performing military exercises on the island of Vieques that harmed an endangered species. 271 F.3d 21 (2001). The court stated that TVA required the endangered species to receive the "utmost consideration" when considering whether to grant an injunction but such findings did not preclude balancing of the equities. Id. at 34-35. The court continued, holding that TVA's grant of the "utmost consideration" to endangered species cannot "blindly compel our decision" when the extinction of a species is not at risk. Id. The court noted that balancing the equities was allowed, not only when the risk of harm to the species was not too dire as expressed by the 1st Circuit in AWI, but also when the risk of harm to the defendant was grave. Id. The court found that the risk of harm to the defendant was grave because an injunction implicated national security concerns. Id. Therefore, the court balanced the harm to the endangered species, granting the species significant weight against the harm to the defendant. Id.

Here, similar to the situations in AWI, the lack of an injunction will not create a threat of extinction to the pigtoe mussel. Appellant NUO is correct to point out that without an injunction, harm will occur to the pigtoe mussel but, similar to AWI, a violation of the ESA does not automatically or "blindly compel" this court to issue an injunction. Further, similar to the finding of grave harm stemming from national security issues in Water Keeper, the harm that Greenlawn could face, a water shortage, would be grave because it could result in a public emergency.

Instead, when the ultimate harm of extinction is not possible and the harm to the defendant is grave, the court must balance the equities with deference to the endangered species and only then can the court reach a decision on the merits.

CONCLUSION

For the reasons stated above, the Army Corps of Engineers respectfully requests the following: 1) that this Court affirm the District Court's grant of summary judgment to Greenlawn on the count that Greenlawn's domestic and natural use cannot be curtailed in the absence of a declaration of emergency from the Governor of New Union; 2) that this Court affirm the District Court's grant of summary judgement to the Army Corps of Engineers on the count that the Howard Runnet Dam's discharge to Greenlawn during drought conditions cannot be considered a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536; 3) that this Court affirm the District Court's grant of summary judgement to NUO on the count that Greenlawn's withdrawals resulted in a "take" of the oval pigtoe mussel; and 4) that this Court hold that the district court need not balance the equities when enjoining Greenlawn's water withdrawals which cause the extirpation of the oval pigtoe mussel.