Team No. 12

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 19-000987

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
Case No. 66-CV-2017

BRIEF OF NEW UNION OYSTERCATCHERS, INC., *Appellant*

Oral Argument Requested

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STATEMENT OF JURISDICTION

New Union Oystercatchers ("Oystercatchers") appeals from a final opinion and order issued by the District Court for the District of New Union. R. at 1. The United States Court of Appeals for the Twelfth Circuit accordingly has jurisdiction over this case pursuant to 28 U.S.C. § 1291 (2018). This Court also has subject matter jurisdiction pursuant to 28 U.S.C §§ 1331, 1367 (2018), because Oystercatchers' claims arise under the Endangered Species Act ("ESA"), 16 U.S.C. § 1539 (2018) *et seq.*, and Oystercatchers' state law claim against Greenlawn is part of the same case or controversy under Article III of the United States Constitution.

STATEMENT OF ISSUES

I. Do Greenlawn's rights as a riparian landowner entitle it to unrestricted municipal water withdrawals during a drought without any water conservation measures when its withdrawals affect the rights of downstream users?

II. Is the ACOE's operation of the Howard Runnet Dam Works to provide exclusive flows to Greenlawn outside of the WCM's guidelines during drought conditions a discretionary agency action subject to consultation under ESA § 7?

III. Does Greenlawn's withdrawal of nearly all the drought-reduced flow from the Howard Runnet Dam Works constitute a "take" of the endangered oval pigtoe mussel in violation of ESA § 9 when they result in adverse downstream conditions that harm and harass the mussels?

IV. Was the District Court required to balance the equities before enjoining Greenlawn's withdrawals when an injunction is the only way to prevent the extirpation of an entire population of the endangered oval pigtoe mussel?

STATEMENT OF THE CASE

I. Statement of Facts

Appellant, New Union Oystercatchers ("Oystercatchers"), is an organization comprised of multi-generational commercial fishermen who have fished, boated, and harvested oysters in Green Bay, New Union for nearly a century. R. at 9. Green Bay is fed by the Green River, which is home to a population of endangered oval pigtoe mussels ("mussels"), a species protected under the ESA, 16 U.S.C. § 1539 *et seq.* Appellant, the City of Greenlawn ("Greenlawn"), lies on both banks of the Green River in what is known as Bypass Reach, upstream of the mussels' habitat. R. at 5. Since its founding, Greenlawn has withdrawn water from the Green River for municipal purposes. R. at 5.

In 1945, Congress passed the River and Harbor Act ("RHA") authorizing the Howard Runnet Dam Works ("HRDW") on the Green River upstream from Greenlawn. R. at 6. The HRDW's original purposes under the RHA included flood control, hydroelectric power, and recreation. R. at 6. The Army Corps of Engineers ("ACOE") constructed the Green River Diversion Dam and the Howard Runnet Dam to create Howard Runnet Lake Reservoir, all of which comprise the HRDW. R. at 5. The HRDW provides water to the Green River through diversion dam releases into the Bypass Reach and hydroelectric power releases that enter the Green River through a tailrace downstream from Greenlawn. R. at 6–7. The endangered oval pigtoe mussels are nestled along 60 miles of the Green River, from where the tailrace and the Green River meet down to the mouth of Green Bay. R. at 9. In 1947, Greenlawn and the ACOE agreed the ACOE would maintain flows into Bypass Reach sufficient for Greenlawn to continue withdrawals "in such quantities and at such rates . . . as it is entitled to as riparian property owner . . . ." R. at 6. In 1958, Congress passed the Fish and Wildlife Coordination Act of 1958

("FWCA"), which broadened the purposes of all ACOE-administered dams to include "promotion of fish and wildlife." R. at 6.

The ACOE operates the HRDW in accordance with a self-developed Water Control Manual ("WCM") that establishes parameters for allowing water releases to maintain flows sufficient for all the HRDW's statutorily mandated purposes. R. at 6–7. When drought conditions lower the Howard Runnet Lake below target levels, the WCM prescribes curtailing flows entering the Green River and Bypass Reach. R. at 7. These curtailments vary in severity, instating less-restrictive measures during "Drought Warnings" and further decreasing flows as water levels reach "Drought Watch" or "Drought Emergency" conditions. R. at 7. When the lake reaches "Drought Warning" levels, the WCM mandates curtailing flows into Bypass Reach to 7 cubic feet per second (CFS), a rate found to be historically adequate to supply Greenlawn's average annual water demands. R. at 7.

Since enlarging its intake system in 1968 after experiencing a population boom, Greenlawn has effectively provided water to 100,000 users by withdrawing an annual average of 6 million gallons per day (MGD). R. at 5. However, in dry summer months, Greenlawn's withdrawals increase exponentially to 20 MGD due to "summer lawn and ornamental watering demands" of its residents. R. at 5. High evaporation and absorption rates, coupled with municipal discharges into a different watershed, result in less than five percent of Greenlawn's withdrawals returning to the Green River. R. at 5–6.

Greenlawn's massive summer withdrawals have resulted in harmful impacts to Green Bay, harming Oystercatchers' livelihood. R. at 9. Over recent decades, Greenlawn's withdrawals have resulted in reduced flows in the Green River, which have in turn increased the salinity of Green Bay. R. at 9. This increased salinity allows conch and crabs to enter the Bay and prey on

juvenile oysters. R. at 9. Further, the reduced flows have decreased the nutrients entering the Bay, further hindering the oysters' development. R. at 9. As a result, harvests plummeted by 50% from 2000 to 2016. R. at 9.

In the 21st century, drought conditions have become more prevalent in New Union. R. at 8. Warmer weather and decreased rainfall have triggered "Drought Watch" conditions five separate times since 2006, most recently in the Fall of 2016. R. at 8. In Spring 2017, water levels reached Drought Warning conditions, and ACOE accordingly restricted flows in Bypass Reach to 7 CFS in accordance with the WCM's guidelines. R. at 8. On April 12, 2017, Greenlawn sent a letter protesting these restrictions, asserting that 7 CFS was insufficient to meet its needs during "planting and growing season." R. at 8. Greenlawn flatly refused the ACOE's request that it institute reasonable drought restrictions on activities like lawn watering and car washing, asserting it had riparian rights to withdraw as much water as it needed to irrigate "lawns and ornamental plantings." R. at 8.

On April 23rd, the District Commander of the ACOE yielded to Greenlawn's demand, increasing flow rates in the Bypass Reach to 30 CFS. R. at 8. As a result, Howard Runnet Lake further dropped to Drought Emergency levels. R. at 8. In line with the WCM, ACOE curtailed hydroelectric power releases while maintaining 30 CFS flows to supply Greenlawn's ornamental watering demands. R. at 8–9. Elimination of flows through the tailrace, combined with Greenlawn's withdrawal of nearly all the water through Bypass Reach, reduced the Green River downstream of Greenlawn from a thriving aquatic habitat to stagnant pools and narrow trickles of water. R. at 9. This choking off of water supply eliminated the possibility of mussels from migrating to deeper waters, increased aquatic salinity, and prevented adult mussels from releasing larvae into the gills of sailfish shiner fish to continue to populate. R. at 9. The exposed

mussel beds and trickling water flows resulted in the death of 25% of the endangered oval pigtoe population. R. at 9.

II. Procedural History

Oystercatchers sued Greenlawn and ACOE under the ESA on July 17th, 2017, after waiting the requisite 60-day notice period. R. at 10. Oystercatchers alleged Greenlawn's drought-time withdrawals caused an unlawful take of the endangered mussel under ESA § 9, 16 U.S.C. § 1538 (2018), and that ACOE failed to consult with appropriate agencies under ESA § 7, 16 U.S.C. § 1536 (2018), before releasing waters to Greenlawn on April 23rd. R. at 4, 10. Oystercatchers also brought a common law riparian rights claim against Greenlawn, asserting its drought-time withdrawals unreasonably infringe on rights of downstream users and accordingly must be limited. R. at 10. ACOE joined Oystercatchers' claim against Greenlawn, and Greenlawn counter-claimed against ACOE, seeking a declaratory judgment that its riparian rights entitle it to unrestricted municipal withdrawals regardless of impacts on downstream users. R. at 10–11.

Oystercatchers moved for summary judgment on its ESA claims, and Greenlawn cross moved for summary judgment to declare its riparian rights. R. at 4. The lower court granted summary judgment to Oystercatchers on its § 9 claim and enjoined Greenlawn from causing flows in the mussels' Green River habitat to drop below 25 CFS. R. at 18. The lower court erroneously granted summary judgment to ACOE on Oystercatchers' § 7 claim, and it also erred in granting summary judgment to Greenlawn declaring its riparian rights. R. at 18.

SUMMARY OF THE ARGUMENT

First, Greenlawn does not have riparian rights to continue municipal withdrawals during a drought without any water conservation measures when its withdrawals infringe upon the rights of downstream users. Contrary to the lower court's holding, watering ornamental plants is

not a natural use because it is not necessary to sustain Greenlawn's residents, and at any rate, municipal withdrawals are not entitled to a natural use preference. Further, Oystercatchers properly brings a claim because its members have public rights to fish in Green Bay, and this Court should recognize public rights to in-stream flows sufficient to sustain wildlife as well. Greenlawn's use is unreasonable in light of the harms caused to the rights of Oystercatchers and the ACOE, and therefore its withdrawals must be limited to the extent necessary to vindicate these rights.

Second, the ACOE's operation of the HRDW to provide exclusive flow to Greenlawn outside its WCM guidelines was discretionary and therefore subject to § 7 consultation. The ACOE exercised discretion in multiple ways. The ACOE's operation of the dam is an ongoing agency action, subjecting it to ESA review. The ACOE also retains ongoing authority in the dam's operation, and its WCM has ongoing and lasting effects on wildlife. Next, the ACOE has discretion in implementing its statutory mandates. While the statutes set broad purposes of the dams, the WCM's specific guidelines for water levels and releases are acts of agency discretion regardless of when they were developed. Further, the ACOE retained discretion to benefit the endangered oval pigtoe mussel in its review of third-party legal claims and implementation of guidelines. Where an agency can benefit a listed species by taking an action, it has discretion. Finally, the April 23rd release was an affirmative agency action subject to consultation. The release under temporary guidelines, not the WCM, was discretionary.

Third, Greenlawn's use of nearly all the drought-reduced flow through Bypass Reach causes significant habitat modification that harms and harasses the endangered oval pigtoe mussels. Under § 9 of the ESA, both harm and harassment constitute a take. Harm encompasses both direct and indirect actions that cause actual injury or death to listed species. Harassment

occurs when the action at issue disrupts normal behavioral patterns of a listed species. Greenlawn's withdrawals have harmed and harassed the mussels' by creating adverse downstream conditions which have actually killed 25% of the Green River mussel population and disrupted their breeding and sheltering. Greenlawn's withdrawals are one of multiple sufficient causes of, and are fairly traceable to, this harm and harassment. Accordingly, this court should affirm the lower court's holding that Greenlawn's withdrawals are the "but-for" and foreseeable cause of a take under § 9.

Finally, the district court properly declined to balance the equities when issuing its injunction under Oystercatchers' ESA claims. The Supreme Court held that Congress foreclosed courts' traditional equitable discretion in ESA cases, and it has consistently reaffirmed that precedent when distinguishing the ESA from other environmental statutes. Further, nearly all circuit courts endorse this approach, rejecting equitable balancing when an injunction is the only means of ensuring compliance with the ESA. Because an injunction is the only means to prohibit Greenlawn and ACOE from violating § 9 and § 7, Congress has foreclosed courts' equitable discretion in the case at hand. Accordingly, the lower court properly issued its injunction upon finding that Greenlawn's withdrawals cause harm and harassment to a listed species.

STANDARD OF REVIEW

Courts review lower courts' denial or grant of summary judgment de novo. *Groves v. Cmty. Workers of Am.*, 815 F.3d 177, 180–81 (4th Cir. 2015). In reviewing the district court's determinations, this Court should inquire whether, when viewing the undisputed facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(a).

ARGUMENT

As a threshold matter, this case is not moot. Courts have an affirmative obligation to consider *sua sponte* whether intervening events have mooted a case, as this implicates Article III's case or controversy requirement. *See Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Consumers Assoc.*, 420 F.3d 1082, 1088 (10th Cir. 2005). When a controversy is "capable of repetition," it is not moot. *Cal. Coastal Comm'n et al. v. Granite Rock Co.*, 480 U.S. 572, 590 (1987). Here, as all parties agree, reduced precipitation and warming temperatures resulting from climate change make Drought Warning conditions, which triggered this controversy, "likely to occur again in the near future." R. 11.

This Court should reverse the lower court's grant of summary judgment to Greenlawn because it does not have riparian rights to drought-time withdrawals without any water-conservation measures in place. It should also reverse the lower court's grant of summary judgment to ACOE because its operation of the HRDW during drought conditions is a discretionary agency act subject to ESA § 7. Finally, this Court should affirm the lower court's grant of summary judgment and injunction under ESA § 9. Greenlawn's withdrawals cause a take of the endangered oval pigtoe mussel, and the lower court properly declined to balance the equities because an injunction is the only way to ensure compliance with the ESA in this case.

I. Greenlawn does not have riparian rights to unrestricted drought-time municipal withdrawals that unreasonably interfere with the rights of Oystercatchers and ACOE.

Riparian rights are legal rights that attach to a waterbody, and courts in eastern states have historically applied riparian law to resolve competing claims to water. Robert L. Beck & Amy K. Kelley, *Waters and Water Rights*, § 6.01, 6-4 to 6-5 (3d ed. 2009). "The fundamental principle of this system is that each riparian proprietor has an equal right to make a reasonable

use of the waters of [a] stream, subject to the equal right of . . . other riparian proprietors likewise to make a reasonable use." *United States v. Willow Power Co.*, 324 U.S. 499, 504–05 (1945).

The lower court erred in holding Greenlawn has a riparian right to continue drought-time withdrawals without any water conservation measures for three reasons. R. at 13. First, Greenlawn's withdrawals are subject to the rights of other users because municipal withdrawals for ornamental irrigation are not a "natural use." *See* Beck & Kelley, *supra*, § 7.02(b)(1), at 7-26; *Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955). Second, Oystercatchers may legally assert its members' public rights to use Green Bay for oyster fishing and to maintain sufficient in-stream flows for fish and wildlife. *E.g.*, *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (N.Y. 1998). Finally, proper application of riparian 'reasonableness' factors shows Greenlawn's withdrawals are unreasonable and thus must be limited to protect the rights of Oystercatchers and ACOE. *See* Restatement (Second) of Torts § 850A (American Law Institute 1979); *e.g.*, *Michigan Citizens for Water Conservation v. Nestle Waters North America*, 709 N.W.2d 174, 203–07 (Mich. App. 2005), *rev'd on other grounds*.

A. Greenlawn's municipal withdrawals for ornamental irrigation do not receive a natural use preference over Oystercatchers' and ACOE's uses.

When assessing competing claims to use water, courts in riparian jurisdictions have a strong preference for "natural" over "artificial" uses. *See* Restatement (Second) of Torts § 850A, cmt. c; *see Harris*, 283 S.W.2d at 134. This preference extends to uses of water for "strictly personal wants" and grants them "an automatic and unlimited preference" when threatened by high-impact uses, such as withdrawals by municipalities to supply their residents. Beck & Kelley, *supra*, at § 7.02(b)(1), 7-28.

The district court erred in holding that Greenlawn's withdrawals receive this natural use preference for two reasons. First, irrigation for ornamental gardening is not a natural use because

it is not necessary to sustain Greenlawn's residents. Second, even if ornamental gardening is a natural use, the natural use preference does not extend to large-scale municipal withdrawals.

Natural uses of water include domestic uses, which are those that "contribute to the *maintenance and sustenance* of the riparian proprietor and his family." Restatement (Second) of Torts § 850A, cmt. c (emphasis added). Some jurisdictions have outright held that irrigation is not a natural use. *E.g.*, *Cox v. Howell*, 65 S.W. 868, 869 (Tenn. 1901). Others only extend the preference to irrigation for subsistence gardening and livestock maintenance. *See* Beck & Kelley, *supra*, at § 7.02(b)(1), 7-26; *Harris*, 283 S.W.2d at 134.

Further, the natural use preference does not extend to municipal withdrawals. Courts have consistently held that withdrawals by municipalities are always subject to reasonable uses of others, regardless of how their residents use the water. Beck & Kelley, *supra*, at § 7.02(b)(1), 7-28; *see also* Restatement (Second) of Torts, § 850A, cmt. c; *e.g.*, *City of Emporia v. Soden*, 25 Kan. 588, 606–07 (1881). In *Soden*, the court found that the natural uses of a municipality's residents did not entitle the municipality to the preference, stating: "The corporation is not taking the water for its own domestic purposes . . . but to supply a multitude of individuals." *Id.* at 607; *see also Stratton v. Mount Hermon Boys' School*, 103 N.E. 87, 88 (Mass. 1913).

Greenlawn's municipal withdrawals are not a natural use. First, Greenlawn's massive withdrawals during the summer—a 14 MGD increase from its annual average—are used for "summer lawn and ornamental watering demands." R. at 5, 8. Unlike irrigation of kitchen gardens, which sustain landowners and their families, ornamental irrigation is purely decorative and accordingly is not a natural use. Second, Greenlawn does not receive a natural use preference because it is a municipality. Greenlawn Water Agency is nearly identical to the defendant in *Soden*—"provid[ing] domestic and industrial water supply to over 100,000

customers." R. at 5. Therefore, assuming *arguendo* this Court finds ornamental irrigation is a natural use, Greenlawn's municipal withdrawals still receive no preference.

Ornamental irrigation is not a natural use, and the natural use preference does not extend to municipalities. Thus, this Court should find that Greenlawn's withdrawals receive no preference, and it must weigh Greenlawn's rights against the rights of other riparian users.

B. Oystercatchers' members have public rights to use Green Bay's waters, and they are empowered to assert these rights against Greenlawn's unreasonable use.

The district erroneously held Oystercatchers "lacks common law standing to assert any riparian rights claims against Greenlawn." R. at 13. Public rights to use navigable waters for oyster fishing are well established in riparian law, *Smith v. Maryland*, 59 U.S. 71, 75 (1855), and policy considerations should guide this Court to recognize public rights to sufficient in-stream flows for fish and wildlife, *see* Beck & Kelley, *supra*, at § 9.05(b), 9-182. Further, Oystercatchers may bring a claim against riparian landowners to prevent unreasonable interference with these rights. Restatement (Second) of Torts, § 856, cmt. g; *e.g.*, *State v. McIlroy*, 595 S.W.2d 659, 663 (Ark. 1980); *Nugent ex rel. Collins v. Vallone*, 161 A.2d 802, 804 (R.I. 1960).

1. Because Green Bay is navigable-in-fact, Oystercatchers' members have public rights to fish in its waters and to water levels sufficient for wildlife.

Public rights to use navigable waters are well established. Beck & Kelley, *supra*, at § 29.01, 29-1; Restatement (Second) of Torts, § 856, cmt. g. The Supreme Court has noted the "established principle" that public rights to water include fishing, which extends to digging for shellfish. *Smith*, 59 U.S. at 75. In riparian jurisdictions, public rights are reserved in waters that are navigable-in-fact. *See* Beck & Kelley, *supra*, § 32.01, at 32-1, 32-2; *e.g.*, *Adirondack League*, 706 N.E.2d at 1194; *McIlroy*, 595 S.W.2d at 663.

Whether a waterway is navigable-in-fact depends on its historic use by the public. *Adirondack*, 706 N.E.2d at 1193–94; *McIlroy*, 595 S.W.2d at 664–65. Earlier courts looked to whether the public had commercially used the waterway for floating timber or navigating boats. *McIlroy*, 595 S.W.2d at 664–65 (compiling cases from riparian jurisdictions). However, many jurisdictions now look to recreational uses as well. In *Adirondack*, plaintiff landowners claimed the river abutting their land was not navigable-in-fact because it had not been used for commercial purposes. *Adirondack*, 706 N.E.2d at 1193–94. The court found the public had historically used the river for canoeing and kayaking, and it accordingly held the river was navigable, noting its decision reflected "modern circumstances." *Id.* The court in *McIlroy*, facing nearly identical facts, found that historic recreational use established navigability-in-fact, and it similarly held that the public had rights to use the stream. *McIlroy*, 595 S.W.2d at 660, 665.

Green Bay is navigable-in-fact because of its historic use for commercial fishing and boating. Just as the public had historically used the streams in *McIlroy* and *Adirondack* for recreation, Oystercatchers' members and their families have boated and fished in Green Bay for upwards of four generations. R. at 10. Whereas *Adirondack*'s and *McIlroy*'s recognition of recreational uses was novel at the time, public rights to oyster fishing and commercial navigation have been recognized for centuries. *Smith*, 59 U.S. at 75. Therefore, Green Bay is navigable-in-fact, and Oystercatchers' members have public rights to boat and fish in its waters.

This Court should also recognize public rights to in-stream flows sufficient to sustain wildlife in Green Bay. The lower court properly acknowledged that no riparian jurisdiction has expressly recognized a public right to in-stream flows for wildlife. R. at 13. However, this conclusion misses a critical point. Nearly all riparian jurisdictions have adopted "regulated riparianism" systems, implemented through permitting regimes, and a primary purpose of these

systems is the "protection of in-stream flows." Beck & Kelley, *supra*, § 9.05(b), at 9-182. Indeed, thirteen jurisdictions expressly require maintenance of minimum flows for wildlife. *Id.* at 9-183 n.1084. While New Union has yet to institute such a system, this Court can and should recognize public rights to in-stream flows sufficient to sustain wildlife in Green Bay.

2. Oystercatchers properly asserts its members' public rights, and Greenlawn's rights are limited to the extent they interfere with these public rights.

Individuals can legally assert public rights to limit riparian uses that unreasonably infringe upon those rights. Restatement (Second) of Torts, § 856, cmt. g; *e.g.*, *Adirondack*, 706 N.E.2d at 1194; *McIlroy*, 595 S.W.2d at 665; *Vallone*, 161 A.2d at 804. In *Adirondack* and *McIlroy*, public rights to recreation precluded riparian landowners from excluding canoers and kayakers from waterways abutting their property. *Adirondack*, 706 N.E.2d at 1194; *McIlroy*, 595 S.W.2d at 665. Similarly, in *Vallone*, non-riparian plaintiffs sued to enjoin a riparian landowner from constructing a dock due to its potential "interfere[nce] with the riparian rights of the public." *Vallone*, 161 A.2d at 804. While the court ultimately held the landowner's use was reasonable, it acknowledged that the landowner's riparian rights were limited to the extent necessary "to preserve [public] rights of fishery, navigation, and commerce." *Id*. at 805.

It follows that Oystercatchers has "common law standing" to bring its claim against Greenlawn. Here, Oystercatchers asserts public rights to limit Greenlawn's interference with those rights: Greenlawn's 20 MGD withdrawals have reduced flows in the Green River, thereby impairing public rights to fish in Green Bay and sustain its wildlife. R. at 13. While the above cases involved riparian rights to exclude and to construct docks, Greenlawn's consumptive use of water analogously interferes with the exercise of public rights—perhaps even more drastically. Therefore, this Court should reverse the district court's determination that Oystercatchers lacked "common law standing" to assert rights to use Green Bay. This Court must accordingly

determine whether Greenlawn's withdrawals are reasonable in light of the harms caused to Oystercatchers' and ACOE's rights.

C. Greenlawn's unrestricted summer withdrawals are unreasonable in light of their interference with the rights of Oystercatchers and ACOE.

When a use of water unreasonably impairs the rights of other users, it must be limited to vindicate those rights. *E.g.*, *Harris*, 283 S.W.2d at 136; *Michigan Citizens*, 709 N.W.2d at 207. Determining if a use is reasonable in light of harmful effects on downstream users is fact-intensive, and courts look to multiple factors. Restatement (Second) of Torts, § 850A. While the lower court properly consulted the Restatement to discern these factors, R. at 13, it failed to properly apply them.

The Restatement provides eight factors to determine reasonableness of a use.[1] Restatement (Second) of Torts, § 850A. However, courts applying the Restatement have distilled these factors into four considerations: (1) the purpose of the uses at issue; (2) the suitability of the uses to the waterbody; (3) the benefits of the challenged use in relation to the harms it causes; and (4) the necessity of the amount and manner of the uses, including the feasibility of adjusting each to minimize the harm. *E.g.*, *Michigan Citizens*, 709 N.W.2d at 205–07.

If the manner of a use is not suitable to the waterbody and is capable of being modified, courts should enjoin the use even if it is economically beneficial. *Michigan Citizens*, 709 N.W.2d at 203. In *Michigan Citizens*, plaintiffs argued that defendant corporation's capturing and bottling of stream water to sell outside the watershed impaired their rights to use the stream for

[1] These factors are: "(a) The purpose of the use, (b) the suitability of the use to the watercourse or waterbody, (c) the economic value of the use, (d) the social value of the use, (e) the extent and amount of the harm it causes, (f) the practicality of avoiding the harm by adjusting the use . . . of one proprietor or the other, (g) the practicality of adjusting the quantity of water used by each proprietor, (h) the protection of existing values of water uses . . . and (i) the justice of requiring the user causing harm to bear the loss." Restatement (Second) of Torts, § 850A.

boating, fishing, and wildlife observation. *Id*. at 205. The court first analyzed the purpose of each party's use, finding that because neither were natural uses, neither received a preference. *Id.* at 206. Next, the court analyzed whether the corporation's use was suitable to the stream, finding the proposed large-volume extraction was ill-suited to its low-flows and historic recreational use. *Id.* The court then balanced the benefits and harms of the bottling: while the withdrawals would cause increased stream temperatures and harmful vegetative growth, the court found this factor neutral because the corporation would provide significant employment and tax revenue. *Id.*

Finally, the court found the necessity of the amount and manner of uses weighed heavily against defendant. *Id.* at 207. Assessing the feasibility of adjustment, the court found the corporation could source water from different locations. *Id.* In contrast, plaintiffs' recreational and wildlife uses removed no water, but "require[d] a minimum [water] level" which could not be modified. *Id.* Because the (1) suitability of the use to the waterbody and (2) the capability of modification both weighed heavily against defendant, the court held the corporation's withdrawals must be limited to amounts that preserve plaintiffs' uses. *Id.* at 207–08.

In considering a use's suitability, the amount of water returned can be dispositive. *Hoover v. Crane*, 106 N.W.2d 563, 565–56 (Mich. 1960).[2] In *Hoover*, plaintiffs sued to enjoin defendant's withdrawal of lake waters for irrigation. *Id.* at 563–64. The court affirmed the lower court's injunction limiting defendant's drought-time withdrawals, noting irrigation causes "water loss due to increased evaporation and absorption . . . and *at some point the use of the water which causes loss must yield to the common good*." *Hoover*, 106 N.W. at 556 (emphasis added).

Greenlawn's summer withdrawals without any drought restrictions are unreasonable because (1) they are ill-suited to the Green River Watershed, (2) their benefits are outweighed by

[2] While *Hoover v. Crane* did not *apply* the Restatement's factors, the Restatement's drafters relied on this case in formulating this factor. *See* Restatement 2d of Torts, § 850A, cmt. j.

their harms, and (3) they are capable being modified through drought restrictions. First, the suitability of the parties' uses to the watershed weighs heavily against Greenlawn. Like *Michigan Citizens* and *Hoover*, where defendants' uses returned minimal water, Greenlawn's withdrawals return only 5% of water to the Green River due to evaporation, absorption, and discharge into a different watershed. R. at 6. In contrast, Oystercatchers' use of Green Bay for fishing, navigation, and wildlife observation do not consume any water, like the plaintiffs' uses in *Michigan Citizens* and *Hoover*. The ACOE's uses of the HRDW are similarly not consumptive in nature. R. at 6, 10. Accordingly, the Court should find this factor weighs heavily against Greenlawn.

Second, the balance of benefits and harms further weighs against Greenlawn. While the economic benefits of the corporation's bottling plant in *Michigan Citizens* weighed evenly with the harms caused to recreation and wildlife, Greenlawn's withdrawals do not. Ornamental irrigation generates minimal employment and tax benefits while causing substantial economic harm to Oystercatchers' members, such as reduced harvests and higher electric rates. R. at 10. The ecological impacts of increased salinity and reduced nutrient flow in Green River and Green Bay further tip the scales against Greenlawn. R. at 9.

Finally, the necessity of the amount and manner of the uses also weighs against Greenlawn. Just as the corporation in *Michigan Citizens* could modify its use by diversifying its sources, Greenlawn can modify its use by implementing reasonable drought restrictions—but it has flatly refused to do so. R. at 8. In contrast, Oystercatchers' uses, like plaintiffs' in *Michigan Citizens*, do not remove water from Green River or Green Bay and are accordingly incapable of modification. ACOE's uses are similarly non-consumptive in nature and are capable of minimal modification—indeed, ACOE has already modified its operation of the HRDW due to the

drought conditions. R. at 8–9. Because three of the four factors weigh heavily against Greenlawn, Greenlawn's unrestricted drought-time withdrawals are unreasonable.

Greenlawn's summer withdrawals without drought restrictions unreasonably infringe on the rights of other users. Therefore, Greenlawn's riparian rights to do not entitle it to continue drought-time municipal withdrawals without any drought restrictions in place, and this Court should accordingly reverse the lower court's grant of summary judgment on this issue.

II. The ACOE's operation of the dam works outside the WCM's guidelines to provide exclusive flow to Greenlawn during drought conditions is subject to ESA § 7 consultation because the ACOE exercised discretion in its operation of the dams.

This Court should reverse the lower court's dismissal of Oystercatchers' claim that the ACOE failed to consult under § 7 of the Endangered Species Act ("ESA") before increasing water releases to Greenlawn during a drought. R. at 15. This is because the ACOE's management of water flows under the WCM, and outside of its guidelines, are ongoing agency actions.

The ESA imposes broad mandates upon federal agencies to protect listed species, including a consultation requirement. 16 U.S.C. § 1536 *et seq.*; 50 C.F.R. § 402.02 (2018). Section 7 of the ESA requires "[e]ach Federal agency [to] . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize . . . any endangered species." 16 U.S.C. § 1536(a)(2). This obligation has "priority over the 'primary missions' of federal agencies," *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978), and it affirmatively applies to all federal agencies, *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990). In fulfilling this jeopardy avoidance requirement, agencies have a duty to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service before undertaking agency actions that may affect a listed species. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003); *see Am. Tunaboat Assn. v. Ross*, 391 F. Supp. 3d 98, 107 (D.D.C. 2019). While "agency action" is construed broadly, *Natural*

Res. Def. Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998), implementing regulations limit § 7's scope to "actions in which there is discretionary involvement or control," *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 666 (2007) (citing 50 C.F.R. § 402.03).

The District Court erred in holding that the ACOE's drought releases were not discretionary for four reasons. First, the ACOE's discretion did not expire after it completed the dam and entered into its agreement with Greenlawn because the ACOE retained authority over the HRDW's operation. Second, because its statutory purposes are broad, the WCM's specific guidelines for water levels and releases are acts of agency discretion regardless of when they were developed. Third, the ACOE retained discretion to benefit the oval pigtoe mussel when determining to release additional water to the Bypass Reach. Finally, the April 23rd release performed under temporary guidelines outside of the WCM was discretionary.

A. The ACOE's operation of the dam works is an ongoing agency action because the ACOE retains authority over the HRDW.

Agency discretion is determined by examining agency involvement in a project. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 665–66 (2007). Where the agency has acted in the past but *retains authority to act further*, the agency actions are ongoing and subject to § 7 consultation. *Washington Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1023, 1033 (9th Cir. 2005).

When an agency retains authority, it retains discretion. *Washington Toxics*, 413 F.3d at 1033. In *Washington Toxics*, plaintiff, a group of commercial fishermen, sued to enjoin the EPA from registering pesticide ingredients, asserting the agency failed to consult under § 7. *Id.* at 1028. The court held the EPA violated § 7 because it retained ongoing authority to manage the pesticides listed under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). *Id.* at 1033. The court explained that because the listing of pesticides was not a one-time act, the EPA retained discretion. *Id.* at 1034–36. Under this ongoing agency action view, the Ninth Circuit

distinguished previous landmark cases of *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (holding that an agency's construction of roads under previous agreement was not discretionary), and *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1083 (9th Cir. 2001) (holding defendant agency did not retain discretion in issuing a permit) because those cases dealt with one-time, rather than ongoing, agency acts. *Id.* at 1033.

Resource management plans are considered ongoing agency actions. *Pacific Rivers v. Thomas*, 30 F.3d 1050, 1053–55 (9th Cir. 1994). In *Pacific Rivers*, an environmental group sued the Forest Service under the ESA claiming its Land and Resource Management Plans ("LRMPs") adversely impacted a listed species. *Id.* at 1051. Notably, the Forest Service adopted the LRMPs before the species' listing. *Id.* at 1052. The Forest Service argued § 7 only applied when the plans were adopted or amended, because merely following the LRMPs' guidelines was not an ongoing agency action. *Id.* at 1053. However, the Ninth Circuit rejected this argument, reasoning "the LRMPs have an ongoing and long-lasting effect [on resources] even after adoption . . . ." *Id.* at 1053, 1055. The court explained the time of the LRMPs' adoption was irrelevant because they were still in effect, and it held the agency had a duty to consult after the species was listed because LRMPs are ongoing agency actions. *Id.* at 1051–53, 1056.

Like *Washington Toxics*, the ACOE retained authority in the management of the HRDW, thus retaining discretion. Despite the ACOE's 1968 agreement with Greenlawn, the ACOE independently developed the WCM's release guidelines and continues to operate the HRDW under that plan. R. at 5–6. Like *Washington Toxics*, the ACOE has continuing supervisory authority over the HRDW's operation—specifically releases and water levels—and it therefore retained discretion in that operation like the EPA over the FIFRA list. Further, like the EPA's statutory authority over FIFRA's implementation, the ACOE has exclusive statutory authority

over the HRDW's water releases. R. at 6. The 1968 agreement does not render the ACOE's dam operation a one-time decision void of discretion. The exact opposite is true, as the ACOE retains authority to operate the HRDW to modify water levels in the Lake Reservoir and Green River by making diversion releases into Bypass Reach and hydropower releases through the tailrace.

Further, the WCM itself represents an ongoing agency action like the LRMPs in *Pacific Rivers*. The WCM and LRMPs are practically identical. Like the forests of *Pacific Rivers*, the HRDW's waters are (1) a resource (2) managed by an agency (3) under their own guidelines. R. at 5. Like the LRMPs in *Pacific Rivers*, the adoption of the WCM predated the mussels' listing as an endangered species, but still has "ongoing and lasting effects" on the oval pigtoe mussels—namely the impending extirpation of the Green River population. R. at 5, 7. Therefore, § 7 applies to the ACOE's operation of the HRDW because the WCM represents an ongoing agency action that has ongoing and lasting effects on listed species. R. at 5–8.

Sierra Club does not conflict with this result, as it is distinguishable on multiple grounds. *Sierra* Club, 65 F.3d at 1502. In *Sierra Club*, plaintiffs sued when construction of logging roads on federal land threatened an endangered species. *Id.* at 1507–10. The court held, *inter alia*, that a previous right of way agreement did not trigger agency consultation. *Id.* at 1509. Two distinctions make this case inapplicable. First, the *Sierra Club* agreement provided limited ability for the agency to enforce the terms of the agreement. *Id.* at 1511–13. Here, the enforcement of the 1968 agreement is squarely on the ACOE, and in fact includes agency development of release criteria. R. at 5–7. Second, as shown above, *Sierra Club* involved a one-time agreement to pave roads while the WCM is an ongoing agency action.

Because the ACOE retained authority over the HRDW, its operation of the dam during drought conditions is an ongoing agency action subject to § 7 consultation.

B. The ACOE exercised discretion in creating the WCM because its statutory mandates are broad.

Agency discretion exists when an agency implements broad statutory mandates. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–64 (2004) (finding agencies' actions taken under broad statutory mandates are discretionary); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008); *see also In re Operation of Missouri River System Litig.*, 421 F.3d 618, 631 (8th Cir. 2005).

In *Marine Fisheries*, citizens argued ACOE's operation of a dam under its "reference operation document" constituted a § 7 discretionary act. *Marine Fisheries*, 524 F.3d at 923. The NMFS contended that their reference operation document left no discretion because (1) the Northwest Power Act mandated its operation of the dam, (2) the reference operation document outlined the specific operations of the dam, and (3) power generation, irrigation, and flood control are nondiscretionary operations of the dam. *Id.* at 926. The court found the agency retained discretion, reasoning that when Congress imposes broad mandates – but not specific actions – then actions taken pursuant to those broad mandates "[are] by definition, discretionary." *Id.* at 929. Because the agency could simultaneously obey their statutory mandates and § 7's consultation requirement, the ACOE had an affirmative duty to consult because its specific releases may affect a listed species. *Id.* at 928–29.

Like the "reference operation manual" in *Marine Fisheries*, the WCM was developed in line with broad Congressional goals, not specific guidelines R. at 6. Like the Northwest Power Act in *Marine Fisheries*, both the RHA of 1945 and FWCA of 1958 authorized the dams and prescribe broad goals of flood control, hydroelectric power, recreation, and fish and wildlife. R. at 6. Like *Marine Fisheries*, the specific flow rates from the Diversion Dam, Howard Runnet

Dam tailrace, and levels of the Lake Reservoir are discretionary decisions of the ACOE that may affect listed species. Therefore, operation under the WCM is subject to § 7 consultation.

C. The ACOE retained discretion because it was capable of benefitting the oval pigtoe mussel when releasing drought waters for Greenlawn.

When an agency can act to benefit a protected species, it retains discretion. *Turtle Island*, 340 F.3d at 974; *see Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't. of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (holding the Navy did not have discretion to benefit a species because missile tests were not discretionary). This inquiry centers on whether the agency was *capabl*e of benefitting the species, not that it was *required* to do so. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1025 (9th Cir. 2012) (quoting *Turtle Island*, 340 F.3d at 977); *see Nat'l Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014).

An agency has discretion to benefit a species when reviewing third-party legal claims to resources. *Karuk Tribe*, 681 F.3d at 1017. In *Karuk Tribe*, a Native American tribe sued to enjoin the Forest Service from allowing third-party mining authorized by statute. *Id.* at 1009. The Ninth Circuit reasoned that when reading the agency's enabling regulations in conjunction with the ESA, the agency not only had discretion to benefit a protected species when reviewing legal claims to resources, but it had an affirmative duty to do so. *Id*. at 1025–26. The court accordingly held the Service's review of mining proposals was subject to § 7 consultation. *Id.* at 1017.

Like *Karuk Tribe*, a third party (Greenlawn) served a notice of intent claiming a legal right to a resource (reservoir water) under agency control. R. at 8. Just as the enabling regulations in *Karuk Tribe* had environmental purposes, all ACOE dams have explicit "fish and wildlife purposes" under the FWCA. R. at 6. This puts the ACOE in the same position as the Forest Service in *Karuk Tribe* in reviewing legal claims to resources it manages. Applying the court's reasoning, the ACOE had discretion to benefit the mussel when reviewing Greenlawn's claim to

reservoir water based on its purpose. Further, the ACOE retained discretion to benefit the mussel when it released additional waters on April 23rd. R. at 8. The 30 CFS flow rate and closure of tailrace releases was not based on any observable data or standards—rather, this modification was an independent act of the District Commander in Progress City, who could have released tailrace waters to benefit the oval pigtoe mussel. R. at 8–9.

D. The District Commander's temporary April 23rd release was an affirmative discretionary act.

Temporary resource management plans are affirmative discretionary acts subject to § 7. *Lane Cty. Audubon Soc. v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992). In *Jamison*, an environmental group sought to enjoin the Forest Service from implementing temporary guidelines for timber sales due to harmful impacts on a listed species. *Id.* at 291–92. The circuit court held that although the resource management guidelines were temporary, they nonetheless "may affect" a listed species and therefore were subject to consultation. *Id.* at 294–95.

The District Commander's April 23rd release is similarly a temporary affirmative agency act that constitutes discretion. Like the temporary plan in *Jamison*, the District Commander's April 23rd release was an interim resource management plan not specified by existing guidelines. R. at 8. The modified flow rate of 30 CFS and the elimination of all tailrace discharges were not actions outlined in the WCM. R. at 8–9. This is the very definition of discretion. The release came from a third-party request, and levels were not determined by WCM guidelines but solely by the District Commander. R. at 8–9.

This Court should find the ACOE's actions were discretionary because it retained authority in operating the dam, had broad discretion in developing the WCM, had the capability to benefit the mussels, and exercised discretion in modifying its flow rates on April 23rd. Therefore, this Court should reverse the lower court's holding that the ACOE's release of

drought waters was not subject to § 7, and it should enter an order enjoining the ACOE to fulfill its consultation requirement before making any further releases that may affect the mussel.

III. Greenlawn's use of nearly all the flow through Bypass Reach causes significant habitat modification that harms and harasses oval pigtoe mussels, constituting a take under § 9 of the ESA.

The ESA's ultimate purpose is to promote the continued existence of endangered species at all costs. See *Hill*, 437 U.S. at 153. In furtherance of this purpose, § 9 makes it unlawful to "take" any endangered species in the United States. 16 U.S.C. § 1538(a)(1)(B). The term "take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §1532(19) (2018). Given the ESA's purpose and history, courts have long held the take provision should be "construed liberally, in the broadest possible manner." *See Strahan v. Coxe*, 127 F.3d 155, 162 (1st Cir. 1997).

Protection under the ESA extends to species' habitat. "Harm" includes any action which results in "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns . . . ." 50 C.F.R. § 222.102 (2018). The Supreme Court has clarified that harm encompasses both direct and indirect actions that actually kill or injure a species. *Babbitt v. Sweet Home Chapters of Cmtys. for a Greater Oregon*, 515 U.S. 687, 697–98 (1995) ("[U]nless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define 'take.'"). Additionally, "harassment" is defined as "an . . . act . . . which creates the likelihood of injury to wildlife by . . . significantly disrupt[ing] normal behavioral patterns." 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3 (2018).

The district court correctly held that Greenlawn's actions constitute a take of the endangered oval pigtoe mussels under § 9. While an exception to § 9 liability exists where an incidental take permit has been issued, Greenlawn has not applied for nor been granted any such

permit. R. at 9; *see* 16 U.S.C. § 1539. Since Greenlawn resumed its 20 MGD withdrawals after the April 23rd release, using "the last drops of flow in the Green River upstream of the mussel habitat," oval pigtoe mussels in the Green River have been harmed and harassed through adverse habitat modification. R. at 8, 17. Because Greenlawn's withdrawals directly and foreseeably caused this harm and harassment, Greenlawn has violated § 9.

A. Since Greenlawn's withdrawals after April 23rd, oval pigtoe mussels have been harmed and harassed.

It is well established that a § 9 take occurs where there is actual injury or death of identifiable members of a protected species. *Sweet Home*, 515 U.S. at 700 n.13; *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 165 (1st Cir. 1993) (finding "[t]he proper standard for establishing a tak[e] under the ESA. . . has been unequivocally defined as a showing of 'actual harm.'"). However, courts have suggested the standard for proving "harassment" requires less certainty. *Animal Welfare Inst. v. Beech*, 675 F. Supp. 2d 540, 564 (D. Md. 2009); *see also Swinomish Indian Tribal Cmty. v. Skagit Cty. Dike Dist. No. 22*, 618 F. Supp. 2d 1262, 1270 (W.D. Wash. 2008) (finding a plaintiff can prevail under § 9 by showing the action at issue more likely than not harassed the species to an extent that disrupted normal behavioral patterns). Because harm and harassment are two distinct ways to commit a take under § 9, the existence of one is sufficient to create liability under the ESA. *See Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d 711, 746 (W.D. Tex. 2017).

The lower court correctly found Greenlawn's withdrawals resulted in a take of the endangered oval pigtoe mussels for two reasons. First, Greenlawn's withdrawals resulted in actual death and injury—proving harm. Second, Greenlawn's withdrawals disrupt normal behavioral patterns—proving harassment.

1. Greenlawn's 20 MGD withdrawals during a drought result in *actual* death of the oval pigtoe mussels.

The ESA restricts activities that cause both direct physical injury and indirect harm to protected species. 50 C.F.R. § 222.102; *Sweet Home*, 515 U.S. at 697–98. Courts have consistently found that indirect actions, such as habitat modification, constitute a take when there is *actual* injury or death of listed species. *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 924–25 (9th Cir. 2000); *see also Defs. of Wildlife v. Envtl. Prot. Agency*, 882 F.2d 1294, 1301 (8th Cir. 1989) (finding an illegal take occurred when endangered species ingested poison, either directly or indirectly, and died); *House v. U.S. Forest Serv.*, 974 F. Supp. 1022, 1031–32 (E.D. Ky. 1997) (finding proposed timber sale would harm the Indiana bat by eliminating its habitat).

In the case at hand, Greenlawn's withdrawals from the Green River have resulted in actual injury and death of the oval pigtoe mussel through adverse modification of its downstream habitat. R. at 17. Greenlawn's withdrawals reduce flows in the Green River so severely that mussels are no longer able to remain submerged in the water, resulting in the death of approximately 25% of the species' population in the Green River. R. at 9. Therefore, as in the above cases, this Court should find that harm is established under § 9.

2. Greenlawn's drought withdrawals harass the oval pigtoe mussels by disrupting normal behavioral patterns.

Harassment differs from harm in that its definition does not include the word "actually." 16 U.S.C. § 1532(19). Instead, establishing harassment requires a plaintiff to show that the action at issue "creates the *likelihood* of injury" through the disruption of normal behavioral patterns, including breeding, feeding, or sheltering. *Id*. (emphasis added). Courts have consistently found habitat modification that significantly impairs such behavioral patterns constitutes a take. *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 879 (D. Ariz. 2003), *aff'd* 417 F.3d 1091 (9th Cir. 2005); see *Greenpeace v. Nat'l Marine Fisheries Serv.*, 106 F. Supp. 2d 1066,

1079 (W.D. Wash. 2000) (finding the operation of a fishery may constitute a take where fisheries are catching fish that are eaten by the endangered Stellar sea lion); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996) (finding the removal of trees impaired the murrelets' ability to breed). Accordingly, § 9 liability attaches where the action at issue is likely to impair breeding, feeding, or sheltering of an endangered species. *Bensman v. U.S. Forest Service*, 984 F. Supp 1242, 1249 (W.D. Mo. 1997).

Here, Greenlawn's withdrawals harass the mussels by modifying their habitat in a way that impairs their ability to breed and shelter. R. at 9–10. Oval pigtoe mussels rely on a healthy population of host fish to spawn and reproduce, and the extremely low water levels caused by Greenlawn's withdrawals prevent these fish from migrating into the mussels' habitat. R. at 9. Thus, like in *Marbled Murrelet*, the withdrawals have impeded the mussels' ability to breed. R. at 9. The mussels' ability to shelter has likewise been impaired. Oval pigtoe mussels require slow to moderate currents to submerge themselves into the riverbed to survive. R. at 9. Low water levels after April 23rd exposed the mussels' habitat, inhibiting their ability to shelter through a sixty-mile stretch of the Green River. R. at 9. Because Greenlawn's withdrawals impair the mussels' ability to breed and shelter, harassment is established under § 9.

Greenlawn's modification of the oval pigtoe mussels' habitat not only harms the mussels by causing actual death, but it also harasses the mussels. This Court should accordingly find that harm and harassment have been established under § 9.

B. Greenlawn's withdrawals are the but-for and proximate cause of harm and harassment of the oval pigtoe mussels.

As the Supreme Court has noted, the tort concept of proximate causation applies to § 9 claims. *Sweet Home*, 515 U.S. 687 at 700; *see Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 486 (E.D. Cal. 2018). Under the ESA, courts look for both the factual causal connection and

"notions of foreseeability" to establish proximate cause. *Sweet Home*, 515 U.S. at 700; *see Paroline v. United States*, 572 U.S. 434, 449–50 (2014) (citing 4 F. Harper, F. James & O Gray, *Torts* § 20.2 at 100 (3d ed. 2007)) (stating proximate cause requires both "but-for" causation and a "sufficient connection" between the act and result). That is, the impact caused by a specific action must be a foreseeable, rather than merely accidental, result. *Sweet Home*, 515 U.S. at 700.

This Court should affirm the lower court's holding that Greenlawn's withdrawals proximately caused a take of the mussels for two reasons. First, Greenlawn's withdrawals from the Bypass Reach are the factual cause of harm and harassment of oval pigtoe mussels. Second, Greenlawn's actions are fairly traceable to adverse downstream conditions.

1. Greenlawn's withdrawals are one of multiple sufficient "but-for" causes of harm and harassment to the oval pigtoe mussels.

Establishing factual causation requires showing a particular event would not have occurred "but for" the action at issue. *Paroline*, 572 U.S. at 449. Because strict but-for causation can sometimes be difficult to apply, the Supreme Court has found that less demanding causal standards are sometimes necessary to "vindicate a law's purpose." *Burrage v. United States*, 571 U.S. 204, 214 (2014); *Paroline*, 572 U.S. at 452. This is especially so in cases where "multiple sufficient causes produce a result" and when a strict causal standard would undermine congressional intent. *Paroline*, 572 U.S. at 458.

Factual causation is established under § 9 where the conduct of multiple actors collectively results in a take. *Zinke*, 347 F. Supp. 3d at 491. In *Zinke*, water diversions of multiple defendants during drought conditions raised downstream water temperatures to fatal levels for endangered salmon. *Id*. at 486, 520. Defendants argued that each of their actions alone did not cause the death of the Chinook salmon, but rather the death resulted from drought conditions and diversions of non-parties. *Id*. at 518–20. The court explained that a relaxed causal

standard must be applied when strict but-for causation would "exclude from § 9 liability any party whose conduct is individually insignificant but is collectively significant." *Id*. at 491. Accordingly, the court held that each defendant violated § 9 because the aggregate diversions of the group caused harm to the endangered Chinook salmon. *Id*. at 517.

Greenlawn's water withdrawals from the Green River are the factual cause of harm and harassment to the mussels, like the defendants in *Zinke*. While Greenlawn argued in the lower court that they are not liable because their withdrawals are happening outside of the mussels' habitat, R. at 15, this logic is flawed. Like the downstream effects in *Zinke*, effects of Greenlawn's withdrawals include nearly non-existent flow rates, increased salinity, and lower mussel navigability, all of which have killed nearly a quarter of the Green River oval pigtoe population and are disrupting their behavioral patterns. R. at 9. Under the multiple sufficient causes standard articulated in *Zinke*, there is a clear connection between Greenlawn's actions and these adverse downstream effects. While Greenlawn's withdrawals alone may not result in a take, as agricultural withdrawals and drought conditions play *some* role, its withdrawal of 95% of the flow of the Green River is far from individually insignificant. R. at 5–6. Further it is certainly significant when combined with these other conditions. R. at 6, 16. Accordingly, the Court should find Greenlawn factually caused the take of the mussels in violation of § 9.

2. Harm and harassment of the oval pigtoe mussels are fairly traceable to, and a foreseeable consequence of, Greenlawn's withdrawals.

It is well established that proximate causation is necessary to establish a take under § 9. *See Sweet Home*, 515 U.S. 687 at 700; *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1084 (D. Or. 2012); *see also Loggerhead Turtle v. Cty. Council of Volusia Cty.*, 92 F. Supp. 2d 1296, 1306 (M.D. Fla. 2000); *Strahan*, 127 F.3d at 164. Establishing proximate cause under § 9 requires determining whether the alleged injury is foreseeable or "fairly traceable" to the action

of the defendants. *Sweet Home*, 515 U.S. at 700; *Cascadia Wildlands*, 911 F. Supp 2d at 1084. In applying notions of foreseeability, one district court noted requiring absolute certainty would "frustrate the purpose of the ESA." *Beech*, 675 F. Supp. 2d at 564.

A link between the injury and the injurious conduct is fairly traceable if it is not "too remote, purely contingent, or indirect." *Cascadia Wildlands*, 911 F. Supp. 2d at 1085. In *Cascadia Wildlands*, plaintiffs alleged the actions of defendants State Forester and District Foresters were causing the take of endangered marbled murrelets. *Id*. The court found the connection between the State Forester's *approval* of increased timber sales, which did not comply with ESA requirements, and take of murrelets was rather straightforward. *Id*. While the court found the "link" between District Foresters' *development* of operation and implementation plans and the take was more attenuated, the court nevertheless found District Foresters responsible for the increase in logging which disrupted the nesting of murrelets. *Id*. This increase coupled with the District Foresters' failure to follow ESA requirements to protect murrelet habitat established a "plausible claim for relief based on proximate causation." *Id*.

Greenlawn's withdrawals of 20 MGD from the Bypass Reach during drought conditions, R. at 9, are traceable to adverse downstream conditions which cause a take. Like the court in *Cascadia Wildlands*, this Court should find a sufficient link to establish proximate causation: Greenlawn's withdrawals of nearly all the flow through Bypass Reach cause severely reduced flows into the Green River, thereby causing harm and harassment of the endangered oval pigtoe mussels. The reduced flows expose mussel beds, create stagnant pools of water that promote siltation, and increase the salinity of Green Bay—all of which kill the mussels and disrupt their behavioral patterns. R. at 9–10. The link between Greenlawn's withdrawals and the reduced flows which result in the take of the oval pigtoe mussels is less attenuated than District Foresters'

development of plans which proximately caused a § 9 violation. Accordingly, this Court should find Greenlawn's withdrawals are the proximate cause of adverse downstream conditions that harm and harass the mussels.

The Fifth Circuit's decision in *Aransas* does not conflict with this result. *Aransas Project v. Shaw*, 775 F.3d 641, 641 (5th Cir. 2014). In *Aransas*, the court found there was a "long chain of causation" between the Texas Commission on Environmental Quality's ("TCEQ") issuance of permits and endangered whooping cranes' deaths. *Id*. at 660. The court listed a plethora of links that TCEQ could not be held liable for—including unpredictable weather, tides, and temperature changes; overfishing; and TCEQ's lack of authority in controlling the flows entering the river. *Id*. at 661–63. The court found that imposing liability upon TCEQ when "multiple, natural, independent, unpredictable, and interrelated forces" affected the crane's environment went beyond the scope of proximate cause. *Id*. at 663.

The causal chain between Greenlawn's withdrawals and the take of the mussels is much less attenuated than that in *Aransas*. Adverse downstream conditions are the direct result of Greenlawn's withdrawal of nearly all the flow through Bypass Reach. While agricultural withdrawals and drought cause diminished flows upstream of Bypass Reach, the ACOE's 30 CFS release would be sufficient to support ecology downstream absent Greenlawn's enormous withdrawals. Effects of Greenlawn's withdrawals are not unpredictable—they are directly impacting downstream conditions. Greenlawn's reliance on the *Aransas* decision is in error and, accordingly, the Court should give it no weight.

IV. Through the ESA's strict language, Congress has precluded courts from balancing the equities when an injunction is the only means of preventing an unlawful take.

The district court correctly held that Congress has removed courts' equitable discretion when issuing injunctions under the ESA. R. at 17. Typically, courts must weigh an injunction's

potential benefits against potential negative consequences to parties and the public. *United States v. Oakland Cannabis Buyers' Co-Op*, 532 U.S. 483, 496–97 (2001). However, the Supreme Court held in *Hill* that Congress foreclosed courts' traditional equitable discretion in ESA cases. *Hill*, 437 U.S. at 194–95. The *Hill* Court reasoned separation of powers principles affirmed Congress' role in establishing policy, and it found the ESA's plain language, structure, and legislative history highlighted Congress' intent to "afford[] endangered species the highest of priorities." *Id.*

This Court should affirm the district court's holding that an injunction must be issued when irreparable harm to a species is established for two reasons. First, the Supreme Court has consistently reaffirmed the approach taken in *Hill* when distinguishing the ESA from other environmental statutes. *E.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313–15 (1982). Second, nearly all Circuits have endorsed this approach, *e.g.*, *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, 478 n.13 (3d Cir. 1997), and the only Circuit to hold otherwise misapplied Supreme Court precedent, *see Water Keeper All. v. U.S. Dep't of Def.*, 271 F.3d 21, 34–35 (1st Cir. 2001).

The Supreme Court has consistently reaffirmed that courts may not balance the equities when an injunction is the only means of ensuring compliance with the ESA. *Oakland*, 456 U.S. at 497; *Romero-Barcelo*, 456 U.S. at 313–15; *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543 n.9 (1987). In *Romero-Barcelo*, defendants argued the lower court should have balanced the equities before issuing an injunction under the Clean Water Act (CWA). *Romero-Barcelo*, 456 U.S. at 310–11. Reversing the lower court, the Court distinguished *Hill* on multiple grounds. *Id.* at 313–14. While an injunction was the only means of preserving the snail darter's habitat in *Hill*, fines and penalties could deter defendant's water pollution. *Id.* Further, while in

Hill no hardship exemptions could have permitted the dam's construction, defendant's water pollution would be permitted if defendant obtained an appropriate discharge permit. *Id.* at 314–15. In *Amoco*, the Court used similar reasoning to hold that equitable balancing was required under the Alaska National Interest Lands Conservation Act (ANILCA). *Amoco,* 480 U.S. at 543 n.9. The Court contrasted the ESA's strict prohibitions against ANILCA's permission of otherwise prohibited acts when "they are necessary and if adverse effects are minimized." *Id.*

In both cases, the Court highlighted the ESA's "flat ban on destruction of critical habitats" and affirmed that injunctions *must* be issued under the ESA when doing so is the only means of ensuring compliance with the statutory provision being violated. *Romero-Barcelo,* 456 U.S. at 314; *Amoco*, 480 U.S. at 543 n.9; *see also Oakland*, 456 U.S. at 497 ("The District Court [in *Hill*] lacked discretion because an injunction was the 'only means of ensuring compliance.'").

The Ninth Circuit has correctly applied this precedent, holding equitable balancing may not be performed in ESA cases, *e.g.*, *Cascadia Wildlands v. Scott Timber*, 715 Fed. App'x 621, 624 (9th Cir. 2017), and the Fifth and Third Circuits have expressly endorsed this approach, *Aransas*, 756 F.3d at 824; *Hawksbill Sea Turtle*, 126 F.3d at 478 n.13. In *Cascadia Wildlands*, the Ninth Circuit affirmed that courts "may not use equity's scales to strike a different balance" in ESA cases. *Cascadia Wildlands*, 715 Fed. App'x at 624. In *Aransas*, while the court framed its application of *Hill* as tipping "the balance of equities . . . more heavily in favor of protecting wildlife," it endorsed Ninth Circuit precedent holding that injunctive relief must issue under the ESA whenever a plaintiff shows a "reasonably certain threat of imminent harm to a protected species." *Aransas*, 775 F.3d at 824. Finally, in *Hawksbill Sea Turtle*, the Third Circuit discussed equitable balancing in § 9 cases in dicta; noting recent amendments to the ESA's language, the

court stated "it would seem improper to require a plaintiff to meet a different injunctive standard [than that in *Hill]* with respect to" a § 9 violation." *Hawksbill Sea Turtle,* 126 F.3d at 478 n.13.

Further, the Eighth and Seventh Circuits have implicitly endorsed the same approach. *Burlington N. R.R. Co. v. Bair*, 957 F.2d 599, 602 (8th Cir. 1992); *State of Wisc. v. Weinberger*, 745 F.2d 412, 425–27 (7th Cir. 1984). In *Burlington*, the Eighth Circuit reviewed an injunction granted under the Railroad Revitalization and Regulatory Reform Act, finding Congress limited courts' equitable discretion through the statute's strict mandates and express provision of injunctive relief. *Burlington*, 957 F.2d at 602. The court noted the "well-established rule that where Congress expressly provides injunctive relief to prevent violations of a statute, . . . it is not the province of the courts to balance the equities . . . ." *Id.* at 601. In *Wisconsin*, the Seventh Circuit similarly distinguished NEPA from the ESA. *Wisconsin*, 745 F.2d at 425–27. Accordingly, both the Supreme Court and the majority of Circuit Courts recognize the ESA's strict language does not permit courts to balance the equities when an injunction is the only means of ensuring compliance, and this Court should hold in line with them.

Congress precluded the lower court from balancing the equities in the current case. As the Third Circuit noted in *Hawksbill Sea Turtle*, ESA's § 9 prohibition is at least as strict as § 7's jeopardy avoidance requirement. Further, issuance of an injunction is the only way to prevent the extirpation of the Green River oval pigtoe mussel population, R. at 9, and Congress has expressly provided for injunctive relief in the ESA's citizen suit provision, 16 U.S.C. § 1540(g) (2018). Because issuing an injunction is the only way to ensure that Greenlawn and ACOE comply with the ESA, the lower court properly refrained from balancing the equities in this case.

While the First Circuit is the only Circuit to deny injunctive relief in an ESA case based on equitable balancing, its approach misinterprets Supreme Court precedent. *Water Keeper*, 271

F.3d at 34–35. In *Water Keeper*, plaintiffs sued to enjoin defendant defense agency from conducting military tests that were harming wildlife. *Id.* at 24. While the court noted that "Congress has already determined the balance of hardships and public interest tips heavily in favor of species protection," it went on to deny the injunction, finding its potential to jeopardize national security interests outweighed the benefit of protecting listed species. *Id* at 34–35.

However, this result directly conflicts with the Supreme Court's reasoning in *Hill*. In finding that Congress had limited courts' equitable discretion in ESA cases, the Court expressly referenced a congressman's remarks that the ESA would alter "Air Force practice bombing . . . [an activity] intimately related to the national defense." *Hill*, 437 U.S. at 186–87. Thus, the Court explicitly considered national security interests in *Hill* and found that even those interests would not justify equitable balancing under the ESA. Because the First Circuit's approach contradicts *Hill*, this Court should decline to adopt it.

CONCLUSION

For the foregoing reasons, Oystercatchers requests this Court to affirm the lower court's injunction restricting Greenlawn's withdrawals under ESA § 9. Oystercatchers also request the Court to reverse the lower court's grant of summary judgment under § 7, and enter an injunction requiring ACOE to consult with appropriate agencies before modifying release schedules during drought conditions. Oystercatchers also request the court to reverse the lower court's grant of summary judgment on Greenlawn's riparian rights claim and hold that Greenlawn is not entitled to unrestricted drought-time withdrawals without imposing water-conservation measures.