CA. NO. 19-000987

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,

Petitioner-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent-Appellee

and

CITY OF GREENLAWN, NEW UNION,

Respondent-Appellant.

On Appeal from the United States District Court for the State of New Union

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BRIEF FOR THE UNITED STATES ARMY CORPS OF ENGINEERS

Respondent-Appellee

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STATEMENT OF JURISDICTION

Appellant New Union Oystercatchers, Inc. filed a Complaint in the United States District of New Union under both § 7 of the Endangered Species Act, 16 U.S.C. § 1536 and § 9 of the Endangered Species Act, 16 U.S.C. § 1538. On May 15, 2019, the district court granted the first three motions for summary judgment and denied the final motion for summary judgment. The district court's order is final, and jurisdiction is proper in this Court.

QUESTIONS PRESENTED FOR REVIEW

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

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

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

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

STATEMENT OF THE FACTS

The City of Greenlawn, New Union (Greenlawn) is situated on the Green River Bypass Reach (Bypass) and owns the riverfront on both sides of the Bypass within city limits, including the underlying river bed. (R. at 5). Since 1893, Greenlawn has maintained municipal water intakes in the Bypass. *Id.* Due to increases in population, Greenlawn enlarged its municipal water system in 1968 to provide domestic and industrial water supply to over 100,000 customers within city limits. *Id.* The City averages a withdrawal of 6 million gallons per day (MGD) and up to 20 MGD during the summer months, with five percent or less of this water returning back to the Green River. *Id.* at 5-6.

The Bypass was created by the United States Army Corps of Engineers (ACOE) concurrent with their construction of the Green River Diversion Dam and the Howard Runnet Damn on the Howard Runnet Lake in 1947 (the Diversion Dam and the Howard Runnet Dam and collectively referred to as the Howard Runnet Dam Works or just "the dam"). *Id.* When constructing the dam, the ACOE realized the dam would cut off the natural flow to the Bypass and Greenlawn's water supply, so the ACOE entered into a legally binding contract with Greenlawn. *Id.* at 6. The contract established the ACOE would be able to construct the dam and Greenlawn would retain the ability to maintain flows in the Bypass, allowing it to withdrawal water in conformity with the rights afforded to riparian landowners in the State of New Union. *Id.* The dam is currently used for flood control, hydroelectric power, recreation, and fish and wildlife purposes; the hydroelectric power generated by the dam reflects a large portion of power generation for air conditioners in the summer season. *Id.*

The Water Control Manual (WCM) dictates the ACOE's operation of the Howard Runnet Dam, establishing regulations for water releases maintaining flood control storage capacity as well as recreation water levels, hydroelectric generation, and enabling flow for Greenlawn's

water intake facilities in the Bypass. *Id.* The WCM assesses historical flows and water demands to create a target lake elevation level for different times throughout the year. *Id.* In order to maintain adequate lake levels for recreational use, downstream water is released to support in-water recreation and fishing and to maintain flood storage capacity during the rainy months from December to April. *Id.* Any excess natural inflow is released downstream through the Bypass, the hydroelectric generation turbine, and the Howard Runnet Dam. *Id.* If the natural inflow rates would cause flood conditions downstream of the Howard Runnet Dam, the releases are capped the water level of the lake increases. *Id.* at 6-7. The WCM asserts a normal summer flow of 50 cubic feet per second (CFS) released from the Diversion Dam into the Bypass, 200 CFS provided to the hydroelectric turbine as needed, and 200 CFS on Saturday mornings for recreational flow releases. *Id.*

The WCM also establishes the following lake level zones to determine how the flow rate should be altered in the case of a drought:

> (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.
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> (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.

Id. at 7. Furthermore, the Howard Runnet Damn Works must also comply with any water supply agreements entered into by the ACOE and with the law of riparian rights of property owners in New Union. *Id.*

In the spring of 2017, the lake levels reached a Zone 2 condition, and the ACOE, pursuant to the WCM, implemented the requisite restrictions. *Id.* at 8. Greenlawn argued against the 7 CFS flow restriction, asserting the restriction was outdated due to population growth and too severe for the spring season when people are required to plant and grow as well as water their lawns and ornamental plants. *Id.* The District Commander responded to Greenlawn's argument declaring Greenlawn needed to institute drought restrictions on the water consumers. *Id.* Greenlawn responded as well, pointing to its rights as a riparian landowner and arguing against the WCM requirements. *Id.* The District Commander agreed with Greenlawn and allowed the City to increase its flow rate, which then caused the lake level to drop to Zone 3. *Id.* at 9. Pursuant to the WCM, the District Engineer ordered the curtailment of hydroelectric power released from the dam, but still allowed Greenlawn to maintain their increased flow rate, causing the Bypass to lose almost all flow and the Green River to become a series of stagnant pools of water with narrow trickles where water used to flow freely. *Id.*

Due to the lack of flowing water in the river, several beds of the federally listed endangered oval pigtoe mussels (mussels) were exposed. *Id.* Mussels thrive in a gravel or silty sand riverbed with slow to moderate currents and require sailfin shiner fish to be in the area so the larval mussels may attach to their gills to mature. *Id.* Due to the severe drought conditions in 2017, 25% of the mussels died. *Id.* at 9-10. Plus, if the conditions were to continue, the entire species would be wiped away. *Id.* Furthermore, due to the increasing salinity the Green Bay and the reduced flow of nutrients, predators of the mussels, such as conch and crabs, have entered the ecosystem and feed on juvenile oysters. *Id.* at 10. The ACOE has not consulted with the Fish and Wildlife Service regarding this issue, and Greenlawn does not have a take permit. *Id.*

The New Union Oystercatchers, Inc. (NUO) is a not-for-profit membership association representing the interests of oyster fishermen of Green Bay. *Id.* No members of the NUO retain

any riparian landowner rights, nor does NUO itself. *Id.* The members of the NUO make their living by catching and selling oysters, but due to the lack of oysters in the river, their incomes have declined. *Id.* Some members have seen such a dramatic decrease in income they decided to sell their boats. *Id.* All members are also customers of the New Union Regional Electric Cooperative and will have to pay an increase in fuel surcharges when the Howard Runnet Dam hydroelectric plant does not operate as a peaking facility. *Id.*

STATEMENT OF THE CASE

On May 17, 2017, NUO served a Notice of Intent to sue ACOE and Greenlawn alleging violations under the Endangered Species Act (ESA) from ACOE's curtailment of hydroelectric peaking and Greenlawn's water withdrawals, which reduced water flow in the Green River. *Id.* at 10-11. After waiting the requisite sixty days, NUO filed action to the United States District Court for New Union on July 17, 2017, which included a common law riparian rights claim against Greenlawn under the Court's supplemental jurisdiction. *Id.* at 11. ACOE filed a cross claim and motion for summary judgment against Greenlawn joining NUO's claim that Greenlawn's water withdrawals is an illegal "take" of endangered oval pigtoe mussels under § 9 of the ESA. *Id.* Greenlawn filed a counterclaim and motion for summary judgment against ACOE seeking a declaration of its right as a riparian landowner. *Id.*

On May 15, 2019, the district court first determined NUO is not a riparian landowner, and lacked common law standing in asserting riparian rights claims against Greenlawn. *Id.* at 13. Summary judgment was granted in Greenlawn's favor against NUO. *Id.* at 14. Second, ACOE is not subjected to ESA's consultation process under § 7(a), because the construction of the Howard Runnet Dam Works and the adoption of the Water Control Manual (WCM) predates the ESA. *Id.* at 15. Therefore, summary judgment was entitled to ACOE. *Id.* Third, Greenlawn's withdrawal of nearly all the drought-reduced flow from the Howard Runnet Dam Works constitutes a "take" of the endangered oval pigtoe mussel violating § 9 of the ESA, and is the but-for cause of the downstream conditions. *Id.* at 16. NUO is entitled to summary judgment. *Id.* at 17. Lastly, the district court issued an injunction prohibiting Greenlawn from making water withdrawals that have the effect of reducing downstream flows below the rate necessary for mussel survival. *Id.* at 18.

The City of Greenlawn, New Union and the New Union Oystercatchers Inc., have both filed a timely Notice of Appeal following the final order from the United States District Court for New Union. *Id.* at 1. NUO challenges the following: Greenlawn has riparian landowner rights to the Green River Bypass; and the ACOE did not violate the consultation requirement under § 7(a) of the ESA, 16 U.S.C. § 1536(a), when ACOE continued Howard Runnet Dam Works operations during drought conditions to provide flow to Greenlawn. *Id.* Greenlawn appeals the district court's determination that their water withdrawals constituted a "take" of the endangered oval pigtoe mussel and violated the ESA, and the court does not need to balance the equities of a municipal activity against the threat to a species when enjoining a municipal activity to prevent extirpation of that endangered species. *Id.* at 2. Jurisdiction properly lies in this Court.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court of Appeals reviews the district court's decision to grant or deny summary judgment de novo and construes the evidence in the light most favorable to the non-moving party. *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000).

SUMMARY OF THE ARGUMENT

The ACOE requests that the district court's conclusions on the first three issues be affirmed. However, the ACOE takes issue with the decision regarding injunctive relief under ESA Citizen Suit Provision, 16 U.S.C. § 1540(g).

First, the district court did not err in granting summary judgment for Greenlawn against NUO, dismissing the Third Claim for Relief in Plaintiff's Complaint. The district court's finding that Greenlawn has a right to continue water withdrawal for municipal purposes during drought without any water conservation measures is correct, because Greenlawn has the rights of a riparian landowner, under the minority rule. NUO, on the other hand, is not a riparian landowner, thus their requests are subordinate to a true riparian landowner like Greenlawn. With no other riparian landowners challenging Greenlawn's rights, its rights clearly prevail.

Second, the district court did not err in determining ACOE is entitled to summary judgment and dismissing the First Claim for Relief. The district court correctly found the operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn does not constitute a discretionary action subject to the consultation requirement of § 7 of the ESA, because the ACOE complies with their contract with Greenlawn requiring them to respect Greenlawn's common-law riparian rights to water flow in the Bypass for its municipal use. Therefore, this is not a discretionary action falling within the definition of "action" in § 7(a) of the ESA.

Third, the district court did not err in concluding Plaintiff NUO is entitled to summary judgment on the Second Claim for Relief. The district court accurately determined Greenlawn's withdrawal constitutes a "take" of the endangered oval pigtoe mussel in violation of § 9 of the ESA, because direct and indirect harm constitutes a prohibited "take" under the EPA's standard. Greenlawn's indirect action of decreasing the flow and increasing water withdrawals during

drought conditions, is the but-for cause for the 25% mussel reduction in the area. A strict proximate cause analysis is the appropriate standard by which to measure Greenlawn's actions because they are solely liable for the take. Additionally, Greenlawn has no authority for its claim that "only activities physically occurring on the habitat in question can be considered habitat modification." Greenlawn simply makes this conclusory statement and supports their reasoning using an unrelated theory regarding logging; however, even these cases fail to demonstrate a requirement that activities affecting habitats must physically occur in the specific habitat described.

Finally, the district court erred in enjoining a beneficial municipal activity without first balancing the equities. NUO argues the general procedural requirement of balancing species eradication against the claimed public benefits of agency activities is unnecessary due to the incalculable value of endangered species. However, simply because the balancing of equities may be difficult does not absolve the court of its duty to uphold generally accepted procedural requirements. NUO requests injunctive relief as its remedy, and case law indicates the courts may balance the competing claims and consider the effect of judgment on each party.

Therefore, this Court should affirm the district court's rulings on issues one, two, and three, and reverse and remand for further proceedings consistent with this opinion on issue four.

ARGUMENT

I. Greenlawn has a right to continue water withdrawal for municipal purposes during drought without any water conservation measures.

In *City of Canton v. Shock*, the Ohio court held a municipality situated on a stream may exercise the rights of a riparian owners and take water from the stream to supply its inhabitants with water within the municipality. 66 Ohio St. 19, 63 N.E. 600 (1902). The city of Canton took water from the stream to supply its residence with water for domestic, commercial and manufacturing purposes at a price fixed by the city; however, this use impaired the water supply for the plaintiff running his grist mill downstream. *Id.* at 602. On appeal, the Court took the view that the city was acting within its rights as a riparian owner and the plaintiff could not recover by way of his action. *Id*. The court reasoned the city owns the streets and all other public property, so in its capacity, it provides for the welfare of its inhabitants by supplying water in such capacity, the city overshadows the individuals as a single proprietor extending throughout its entire limits being entitled to all the rights of a riparian landowner on the stream. *Id*.

Although this decision established the minority rule, the State of New Union has decided to follow this reasoning and adopted the minority rule. *Tubbs v. Potts*, 45 N.U. 999 (1909). Therefore, Greenlawn has a right to continue water withdrawal for municipal purposes during drought without any water conservation measures because it has the rights of a riparian landowner. Therefore, NUO's challenge of those rights fails, and we do not contest those rights.

A. Greenlawn has riparian landowner rights

The riparian rights doctrine, recognized by New Union, grants the right of riparian landowners to install impoundments or diversions and to withdraw water to make reasonable use of the water in the stream. (R. at 12). This doctrine states that riparian owners are permitted to make "reasonable use" of this water provided it does not unreasonably interfere with the reasonable use of this water by other riparian landowners. Barton Thompson, Jr. et al., *Legal*

Control of Water Resources 33 (5th ed. 2018). Therefore, this reasonable use theory enables domestic and commercial activities that are carried out in a practical and reasonable manner. *Harris v. Brooks*, 225 Ark. 436, 444 (1955). When riparian owners assert competing claims over the exercise of water rights, the courts apply this reasonable use theory in an attempt to measure the value of the water rights to each owner. *Id.* The purpose of this balancing test is to evaluate the value to society that would result from a riparian owner's proposed use, while also considering the possible costs, in order to ensure each riparian owner has equal use of the water. *Id.* at 443. Factors necessary to consider are: what the use is for; its extent, duration, necessity, and application; the several uses to which it is put; the extent of injury to one proprietor; and the benefit to the other, and all other facts which may bear upon the reasonableness of the use. *Id.* at 444-45.

Under the minority rule, Greenlawn falls within the definition of a riparian landowner, thus Greenlawn is permitted to use the water as described above, unless it impedes on other riparian landowners' rights. See *Okaw Drainage Dist. v. Nat'l Distillers & Chem. Corp.*, 882 F.2d 1241 (7th Cir. 1989) (finding that a riparian landowner had a right to pump water into river for its use downstream, as long as this use did not infringe on the rights of other riparian owners).

However, in the case at hand, no riparian landowners have raised a competing claim to contest Greenlawn's use. Thus, Greenlawn's' right to withdrawal water for municipal purposes prevails.

B. Greenlawn's rights are not challenged by a riparian landowner

NUO claims to have riparian rights to challenge Greenlawn's riparian rights. (R. at 13). However, this claim lacks merit. NUO is not a riparian landowner because neither NUO nor any of its members own any property abutting the Green River. *Id.* Additionally, riparian water law does not recognize ecological rights to instream flows. Riparian rights are the only rights of

landowners that are protected. *Id.* at 14. Therefore, NUO lacks common law standing to assert any riparian rights claims against Greenlawn, and NUO did not raise an issue of standing on appeal. *Id.* at 2, 13. Considering the riparian rights doctrine is only concerned with conflicting claims of riparian landowners, NUO's argument fails to meet that standard and is not persuasive. *Id.* at 12.

NUO also asserts we are a riparian owner that could contest Greenlawn's riparian rights. *Id.* at 12. However, we do not contest Greenlawn's demands, because we have already complied with Greenlawn's orders to maintain flow in the Bypass. *Id.* Further, Greenlawn does not need to share the shortage with us, because our power generation use must yield to Greenlawn's domestic water demands. *Id.* at 13. We constructed our upstream diversion of the Green River long after Greenlawn's municipal use was established. *Id.* Upon completing our dams, we agreed with Greenlawn to maintain flows in the Bypass sufficient to allow Greenlawn to continue water withdrawals at specific rates and times, which Greenlawn is entitled to as a riparian property owner under the laws established in New Union. *Id.* at 6.

Therefore, Greenlawn's rights as a riparian landowner dominate here. We do not challenge those rights, nor does any riparian landowner. Thus, Greenlawn clearly has a right to continue water withdrawal for municipal purposes during drought without any water conservation measure because it has the right to reasonable use of the water, so long as it does not interfere with another riparian landowner, which it has not here.

II. The operation of Howard Runnet Dam Works during drought to provide flow to Greenlawn is not a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536.

The passing of the ESA "represented the most comprehensive legislation for the preservation of endangered species ever by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). "Its stated purposes were 'to provide a means whereby the ecosystems upon which

endangered species and threatened species depend may be conserved,' and 'to provide a program for the conservation of such . . . species . . . .'" *Id.* at 180 (quoting 16 U.S.C. § 1531(b)). Furthermore, Congress explicitly stated all federal departments and agencies must seek to conserve endangered and threatened species. 16 U.S.C. § 1531(c).

In order to better protect certain species from becoming extinct by allowing them to recover, § 4 of the ESA provides that species be listed as either "endangered" or "threatened species." 16 U.S.C. 1533(a). Only listed species receive full ESA protection. While § 4 lists the species, § 7 requires cooperation and consultation for listed species and habitats. 16 U.S.C. 1536(a). Section 7(a) of the ESA states in pertinent part:

> (2) Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . .
>
> (3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

Id. This section effectively imposes a consultation requirement on federal agencies when they desire to take actions that may "impact [endangered] species or [their] habitat[s]." (R. at 14). This requirement involves a "Biological Assessment" and a "Biological Opinion" to be written by "the consulting agency if it concludes the action make safely be taken, or a 'Jeopardy Opinion' if it concludes that the action would impermissibly place the species in jeopardy." *Id.* at 14-5.

"Section 7 [of ESA] imposes on all agencies a duty to consult . . . the Fish and Wildlife Service . . . before engaging in any discretionary action that may affect a listed species or critical habitat." *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012).

"The Fish and Wildlife Service (FWS) administers the ESA with respect to species under the jurisdiction of the Secretary of the Interior." *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 651 (2007). However, the consultation requirement is not absolute.

A. ESA provision enacted after dam was built.

"Under certain circumstances, prior agreement, permit, or management decision that predates the listing of a species may constrain a federal agency's ability to take action on behalf of that listed species, absolving the agency from the requirement of consultation." *NRDC v. Kempthorne,* 621 F. Supp. 2d 954, 976 (2009); *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (1995) (federal agency's agreement with a landowner predating the passage of the ESA did not retain for the agency discretion to "implement measures that inure to the benefit of . . . protected species").

Here, Congress authorized the building of the Howard Runnet Dam in 1945, and it was subsequently completed in 1948 by the ACOE. (R. at 6). During the seventy-one years following the completion of the Howard Runnet Dam, the record does not indicate either the ACOE or Greenlawn knew the federally listed endangered species of oval pigtoe mussels were downstream of the confluence of the Bypass and the Howard Runnet Dam tailrace. *Id.* at 9. Page 9 of the record states "None of these mussel populations are found on the stretch of the Bypass owned by Greenlawn." Furthermore, the record is silent as to whether the oval pigtoe mussels were federally listed under ESA during the time the dam was constructed by ACOE.

"Congress could have provided that once a species is listed as threatened or endangered under the ESA, federal agencies must consult with expert agencies . . . about the impact of all ongoing operations . . . Congress did not so provide, however." *Cal. Sportfishing Prot. Alliance v. FERC*, 472 F.3d 593 (9th Cir. 2006). Without knowledge of a federally listed threatened or endangered species under the ESA, the ACOE is not required to consult with the FWS about a

federally listed endangered species under § 7 of the ESA. Therefore, ACOE is not subject to the consultation requirement. However, even if ACOE or Greenlawn knew about the endangered specie's presence, they would still not subject to § 7's consultation requirement.

B. No agency action took place.

"There is 'agency action' whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed." *Karuk Tribe of Cal.* 681 F.3d at 1011. "Agency action" inquiries therefore invoke a two-part test. "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 the activity for the benefit of a protected species." *Id.* at 1021. Further, "the ESA consultation requirement applies only if the agency has the discretionary control 'to inure to the benefit of a protected species.'" *Grand Canyon Trust v. United States Bureau of Reclamation*, 691 F.3d 1008, 1018 (9th Cir. 2012) (quoting *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir. 2003)). The task then becomes determining the limits of agency action and applying them to the case at bar.

The ACOE's water release parameters from the WCM does not constitute an agency action. The WCM provides different target lake elevations based on historical flows. (R. at 6). Therefore, the WCM makes projections based on historical trends which could differ based on what the environmental conditions actual are, as well as Greenlawn's water demands as the year progresses. *Id.* Because "[t]he WCM provides for different target lake elevations at different times of the year based on historical flows and water demands," this does not equate to an agency action. *Id.*

The facts of this case are analogous to that of *Grand Canyon*. Grand Canyon Trust filed suit asserting the United States Bureau of Reclamation (Reclamation) violates the ESA whenever

they do not consult with FWS for each of the dams' annual operating costs (AOP) situated on the Colorado River. *Grand Canyon*, 691 F.3d at 1014. The district court concluded Reclamation's AOPs are not "agency actions" subject to the consultation requirements of the ESA. *Id.* at 1014-15. The appellate court affirmed, holding that AOPs are not affirmative "agency action" requiring formal consultation under the ESA, and Reclamation did not exercise discretion that could inure to the benefit of a federal endangered species.

"The Supreme Court has said that 'not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion.'" *Id.* at 1018 (quoting *Home Builders,* 551 U.S. at 668). In *Home Builders*, the Supreme Court held "that a federal agency need not consult with FWS with respect to an action that the agency is required to take by law." (R. at 15) (quoting *Home Builders*, 551 U.S. at 644).

Section 7(a)(2) is read to apply only to "discretionary" agency actions; however, the decision to operate during a drought to provide flow to Greenlawn is not one that exercises such discretion. 16 U.S.C. § 1536. ACOE's operation of the Green River Diversion Dam and the Howard Runnet Dam is subject to some uncertainty. For example, variances include annual water and electricity demand, food storage capacity, and drought conditions. (R. at 6-8). Therefore, increased releases to the Bypass during a drought warning subsequently exposing several beds of oval pigtoe mussels downstream—not found on the stretch owned by Greenlawn—is not an exercise of discretion signifying agency action under ESA's consultation requirements. (R. at 9).

In *W. Watersheds Project v. Matejko*, the plaintiffs challenged whether a failure to exercise discretion constitutes an "agency action" requiring consultation for purposes of § 7(a)(2) of the ESA. 456 F.3d 922, 930 (2005). The Ninth Circuit held since private parties were diverting the water, and not the government, that no agency action existed requiring consultation.

Id. at 931; *see also NRDC v. Norton*, 236 F. Supp. 3d 1198, 1207 (2005) (holding that Federal Defendants lacked sufficient discretionary involvement and control over implementation of existing contracts to give rise to obligation to reinitiate consultation).

While the consultation requirements of the ESA are well intentioned, it does not apply to the ACOE in this case because both the Howard Runnet Dam Works and the WCM were created prior to the ESA. Additionally, Greenlawn and the ACOE have a contract whereby the ACOE is required to relinquish water to Greenlawn pursuant to their contractual terms. Further, in order to assert consultation is required, it must be determined that the "decision constitutes an 'action' subject to ESA § 7(a)." 16 U.S.C. § 1536. That is not the situation in this case; rather, the ACOE instead simply complied with the longer standing WCM procedures and their contract with Greenlawn requiring them to permit Greenlawn to take action granted to them under the state of New Union's riparian landowner laws.

Thus, operation of Howard Runnet Dam Works during drought conditions is not a discretionary action subject to the consultation requirement within § 7 of the ESA.

III. Greenlawn's withdrawal constitutes a "take" of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1536.

Pursuant to the ESA, "it is unlawful for any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(B). In this context, a take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect, or attempt to engage in any such conduct. (R. at 16). As used in the statutory definition of "take," the term "harm" is further defined by regulation to mean

> an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.

50 C.F.R. § 17.3 (*see Babbitt v. Sweet Home Chapter of Communities for a Great Or.,* 515, U.S. 687 (1995)). Greenlawn's water withdrawals from the Bypass was the proximate cause of the harm to the mussels, because they indirectly caused the mussels to lose their habitat and prey.

In order to determine if a "take" has occurred, courts look to tort law for guidance. *Sweet Home*, 515 U.S. at 712. When looking at tort law, courts consider whether or not a party proximately caused an event to occur; here, the Court must determine whether Greenlawn destroyed the mussels' habitat. When alleging one party proximately caused harm, the other party must prove "that it was not just any cause, but one with a sufficient connection to the result." *Paroline v. United States,* 572 U.S. 434, 444 (2014). Effectively, "there must be 'some direct relation between the injury asserted and the injurious conduct alleged.'" *CSX Transp., Inc. v. McBride,* 564 U.S. 685, 707 (2011) (citing *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). The appropriate standard to determine proximate cause is the classic two prong analysis: cause in fact (using a strict but-for analysis) and proximate cause (using a foreseeability analysis).

A. No joint liability exists

There is an alternative argument for a less strict standard of causation in fact. This means the strict but-for application would turn into a causal test applied "when the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them." *NRDC v. Zinke,* 347 F. Supp. 3d 465, 488 (2018) (quoting *Paroline*, 572 U.S. at 451).

In *Paroline*, the defendant attempted to argue the link between the offense committed and the alleged harm was so attenuated that the outcome was not proximately caused by him. 575 U.S. at 451. The defendant in *Paroline* also argued he was not the only bad actor, but it was merely coincidental that his actions were connected to the harm asserted. The Court rejected that

argument asserting the defendant's actions were sufficiently connected to the harmful outcome that he would still be required to pay damages for his actions. *Id.*

Greenlawn may attempt to imply liability by arguing this point and asserting that the ACOE runs the Howard Runnet Dam Works. However, this argument is unavailing. While the ACOE does run the dam, it is important to note the dam provides water to the Bypass. Due to ACOE's contract with Greenlawn, the ACOE is required to provide water sufficient to meet Greenlawn's needs. Therefore, Greenlawn is pulling the strings causing the ACOE to open the dam to provide water to the Bypass. Joint liability between Greenlawn and the ACOE is therefore an unattainable argument. It is Greenlawn alone who requests the water and the ACOE simply complies with their contract.

Further, in *Seattle Audubon Soc'y v. Sutherland*, the court found that "the plain language of the ESA supports the proposition that a government official violates the ESA take prohibition when that official authorizes someone to exact a taking of an endangered species, which, but for the authorization, could not have taken place." 2007 U.S. Dist. LEXIS 31880. The defendants in *Seattle Audubon* argued Congress did not intend to hold states liable for authorizing third party takes. *Id.* The court rejected this theory, asserting "the plain language of the statute makes states and state officials liable when they 'cause to be committed' take." *Id* at 23.

The case here is inapposite to *Seattle Audubon* and other similar cases because, as stated above, the ACOE did not authorize Greenlawn to withdrawal water at such a rate that it would cause the take of the mussels. Rather, the ACOE simply complied with their contractual obligation with Greenlawn to provide them water. Greenlawn's choices when withdrawing water are not subject to the ACOE's approval or lack thereof, and thus the ACOE is not responsible for the choices Greenlawn makes.

Unlike in *Seattle Audubon* and other related cases, the ACOE's actions were not a condition precedent to the taking of the mussels and did not cause the committed take. Therefore, the proper analysis in this case is to analyze only Greenlawn's actions pursuant to a strict but-for analysis and to use a foreseeability analysis to address proximate cause.

B. Causation in fact

As noted above, the correct analysis of cause in fact in this case is to use a strict but-for analysis. The but-for analysis requires a showing of the factual relationship between the conduct and injury. In this case, but-for Greenlawn's water withdrawals, the mussels would not have lost their habitat and prey. During the time at issue, there was a Zone 2 Drought Warning condition present. (R. at 8). This means the "Bypass Reach flow from the Diversion Dam [should have been] reduced to 7 CFS; [and] daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained." *Id.* at 7. However, as noted in the prior section, pursuant to their contract with Greenlawn, the ACOE was obligated to increase the water release to the Bypass from 7 CFS to 30 CFS per Greenlawn's request.

Because of this action, during drought conditions, the lake was lowered to a Zone 3 Drought Emergency level. *Id.* at 9. This causes the Green River, which is downstream from the Howard Runnet Dam, to turn into "stagnant pools of water and narrow trickles." *Id.* Due to the low water levels, the mussels were then exposed and no longer had their ideal habitat of a "gravel or silty sand riverbed[], with slow to moderate currents." *Id.* Further, the low water level prevented the mussels' best source of food, the sailfin shiners, from migrating to the area; so, not only did the mussels lose their habitat, but they also lost their source of prey. Furthermore, the new water level allowed predators to enter the mussels' habitat, eating the juvenile mussels. *Id.* at 10.

Due to the lack of a habitat and prey, 25% of the mussels died, and if the water levels stayed that way, the entire population would have been extirpated. *Id.* It is clear but-for Greenlawn's large water withdrawals, the mussels would not have lost their habitat and prey for the time period at issue in this litigation. Greenlawn may argue they could not have facilitated this type of water withdrawals without the ACOE's help via the Howard Runnet Dam; however, this argument fails, because the ACOE was required to comply with Greenlawn's water request pursuant to the WCM. Greenlawn is the puppet master here, and the ACOE is only acting pursuant to the strings Greenlawn is pulling.

C. Proximate Cause

In this case, proximate cause is determined using a foreseeability analysis. This means, while a party should not be held liable for consequences they could not reasonably have foreseen, the party should be held liable for their actions when the outcomes of such are reasonably foreseeable. *Animal Welfare Inst. v. Martin,* 623 F.3d 19 (1st Cir. 2010).

Here, it was reasonably foreseeable that Greenlawn's water withdrawals would lower the water levels, and subsequently exposing the fish and wildlife normally living in the water. The Supreme Court has asserted that so long as a take is "foreseeable rather than merely accidental," a party will be held liable. *Sweet Home*, 515 U.S. at 700. Greenlawn argues they could not have reasonably foreseen the consequences of their actions because they were not operating in the mussels' habitat; however, this argument fails because actions that cause indirect harm to endangered species still constitute a prohibited take. *Id.* at 697-98. Greenlawn took water from the Bypass; it is clear to anyone that when water is taken from an area, the overall water level will go down, reducing the downstream levels of water as well.

Just like "mistakenly shooting a wolf is the reasonably anticipated or foreseen natural consequence of knowingly shooting wildlife," so is decreasing the water levels downstream the

reasonably anticipated or foreseen natural consequence of decreasing the water levels upstream. *WildEarth Guardians v. United States DOJ*, 283 F. Supp 3d 783, 811 (2017). Greenlawn cites to no authority on point that asserts their actions are not foreseeable. Furthermore, just because Greenlawn did not take any of the mussels by directly destroying their habitat, indirectly causing the mussels' habitat to be destroyed by withdrawing water that reduced the downstream flow still constitutes a take under the ESA.

Because Greenlawn's water withdrawal was the proximate cause of the mussels losing their habitat and prey, Greenlawn's actions constitute a take under the ESA.

IV. The district court must balance the equities before enjoining a beneficial municipal activity, when the activity will cause the extirpation of an entire population of endangered species.

Generally speaking, "almost all equitable remedies are discretionary." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (citing D. Dobbs, Remedies 52 (1973)). Therefore, "the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion." D. Dobbs, Remedies 52 (1973). Furthermore, since 1982, the Supreme Court has held federal courts can enjoin violations of federal statutes only if the balance of equities support an injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 320 (1982). As the Court repeatedly recited, federal statutes authorizing injunctive relief should be read to require equitable balancing because "a major departure from the long tradition of equity practice should not be lightly implied." *Romero-Barcelo*, 456 U.S. at 320.

NUO may argue the balancing of equities in this case is unnecessary pursuant to *Tenn. Valley Auth. v. Hill*; however, this argument is dispositive. With a closer reading to *Tennessee Valley*, even though it would be difficult to make a "final utilitarian calculation[]," it is not impossible, and it is the Court's responsibility to follow the long tradition of equity practice. Although "Congress has removed from the courts their traditional equitable discretion in

injunction proceedings of balancing the parties' competing interests" due to the "balance of hardships and the public interest tips heavily in favor of protected species," "these cases do not stand for the proposition that courts no longer must look at the likelihood of future harm before deciding whether to grant an injunction under the ESA. Federal courts are not obligated to grant an injunction for every violation of the law." *Friends of Earth v. United States Navy,* 841 F.2d 927, 933 (1988); *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (1993). Furthermore, like in the case of *Strahan v. Pritchard,* the Court here may consider how an injunction would impact the citizens of Greenlawn. 473 F. Supp. 2d 230 (2007). Greenlawn's citizens' interests would tip the balance—even against an endangered species—because the withdrawn water ultimately goes to their municipal purposes, without which they may be unable to live.

In *Pritchard,* the plaintiff sued to enjoin state offices from licensing commercial fishing equipment that was allegedly endangered whales in violation of the ESA. *Id.* at 232. The Court in *Pritchard* underwent the balancing test because the Court found the injunction could possibly cause significant damage to the people living in the city. *Id.* at 240. The Court ended up denying broad injunctive relief in favor of issuing a temporary monitoring system of the threat to the endangered species. *Id.* at 241.

Like the Court in *Pritchard*, The Court here should, and has the authority to, balance the equities before enjoining a beneficial municipal activity in order to ensure the interests of the citizens of Greenlawn are considered. Additionally, "[t]he plaintiff must make a showing that a violation of the ESA is at least likely in the future." *National Wildlife*, 23 F.3d at 1511. This means the burden is on the plaintiff to show that the violation, the taking of the mussels, is likely to happen again in the future.

The plaintiffs here have failed to meet their burden, and it is within the courts discretion to balance the equities. First, while it is established that Drought Warning conditions are likely to occur again in the near future, plaintiffs fail to make a showing the drought conditions are likely to constitute an ESA violation. Instead, plaintiffs rely upon the proposition that Greenlawn's previous water withdrawals posed a threat to the mussels. They do provide any basis as to why this will be the same situation in the future.

Further, like in *National Wildlife,* it has been two years since the violation of the ESA occurred. (R. at 8). There is currently no imminent threat to the mussel population because the water levels are sufficient for the mussels' needs. The Court here is not in an emergency situation requiring it to make a decision immediately; rather, since there is no imminent harm to the mussels, the Court has the ability to follow the long-standing precedent and complete a balancing procedure here.

Additionally, the water used by Greenlawn is primarily used for municipal purposes. The Court must also consider how the injunction would affect the citizens of Greenlawn, who are just as important as an endangered species. Failing to balance the hardships in this case before issuing an injunction undermines the city's interest in protecting their citizens.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court for issues 1-3, and reverse and remand the decision of the district court for issue 4.

Respectfully submitted,

Counsel for the Respondent,

Army Corps of Engineers