Team No. 14

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CA. No. 19-000987

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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NEW UNION OYSTERCATCHERS, INC.,
Plaintiff–Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant–Appellee,

and

CITY OF GREENLAWN, NEW UNION,
Defendant–Appellant.

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

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BRIEF OF UNITED STATES ARMY CORPS OF ENGINEERS
Defendant–Appellee

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

STATEMENT OF JURISDICTION

This Court has jurisdiction over an appeal from the District Court of New Union after the district court issues a final decision. 28 U.S.C. § 1291. The district court had federal question subject matter jurisdiction over the claims arising under the Endangered Species Act (ESA). 28 U.S.C. § 1331. Additionally, the district court had supplemental jurisdiction over the common law riparian rights claims. 28 U.S.C. § 1367. The district court's opinion and order are final, the notice of appeal was filed in a timely manner, and jurisdiction is proper in this Court of Appeals. Fed. R. App. P. 4(a).

QUESTIONS PRESENTED

I. Does Greenlawn have a right as a riparian landowner to continue water withdrawals for municipal purposes during a drought without any water conservation measures?

II. Is the operation of Howard Runnet Dam Works to provide flow to Greenlawn pursuant to Greenlawn's water rights a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536?

III. Does Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Bypass Reach constitute a "take" of the endangered oval pigtoe mussel in violation of the Endangered Species Act, 16 U.S.C. § 1538?

IV. Must the District Court balance the equities before enjoining Greenlawn's water withdrawal for its residents' domestic use, even though the activity will extirpate an endangered species?

STATEMENT OF THE CASE

This case is an appeal from the District Court for the District of New Union's grant of summary judgment. R. at 1. Plaintiff New Union Oystercatchers, Inc. (NUO) is a non-profit association representing the interests of oyster fisherman of Green Bay. R. at 4. It filed a citizen suit under the Endangered Species Act, 16 U.S.C. § 1540 (g) against the United States Army Corps of Engineers (ACOE) and the City of Greenlawn. R. at 10. In its complaint, NUO alleged that

ACOE violated the consultation requirement of § 7(a) of the ESA in its operation of the Howard Runnet Dam Works and that Greenlawn violated the prohibition of "take" of endangered species of § 9 of the ESA with its water withdrawals from the Green River. R. at 11. The complaint also included common law riparian claims against Greenlawn. *Id.* ACOE filed a cross claim against Greenlawn joining NUO's § 9 claim. R. at 12. Greenlawn answered the complaint and cross-complaint and filed a complaint against ACOE seeking a declaration of its rights as a riparian landowner to continued flows in Bypass Reach for its municipal water needs. *Id.*

NUO moved for summary judgment on both its ESA claims against ACOE and Greenlawn. R. at 4. ACOE moved for summary judgment dismissing the § 7 claim against it. *Id.* Greenlawn cross-moved for summary judgment to declare its rights as a riparian landowner and to dismiss the § 9 claim. *Id.* The district court resolved all the disputes in the claims and counterclaims in summary judgment: (1) it granted Greenlawn's motion for summary judgment declaring its rights as a riparian landowner; (2) it granted ACOE's motion for summary judgment dismissing NUO's § 7 claim; (3) it granted NUO's motion for summary judgment declaring its § 9 claim against Greenlawn. R. at 18-19. All other motions for summary judgment were denied. *Id.* The District Court also issued an injunction prohibiting Greenlawn from making water withdrawals from the Green River Bypass Reach. R. at 19.

NUO and Greenlawn have both filed a timely notice of appeal. R. at 1. NUO appeals the district court's holding that Greenlawn has riparian landowner rights to the Green River Bypass Reach. R. at 1. NUO also appeals the district court's holding that ACOE did not violate the consultation required under § 7 of the ESA. R. at 1. Greenlawn appeals from the district court's holding that its water withdrawals from the reduced flow of the Bypass Reach constitute a "take" of the endangered oval pigtoe mussel in violation of § 9 of the ESA. R. at 2. Greenlawn also takes

issue with the district court's holding that when enjoining a municipal activity to prevent the extirpation of an endangered species, a court need not balance the equities of the municipal activity against the threat to the species. R. at 2.

STATEMENT OF THE FACTS

Defendant City of Greenlawn is a municipality in the state of New Union and is located on land through which the Green River flows before emptying into the Green Bay. R. at 5. Plaintiff New Union Oystercatchers, Inc. (NUO) is a non-profit group that represents the interests of oyster fishermen of Green Bay. *Id.* at 10. The United States Army Corps of Engineers (ACOE) operates the Howard Runnet Dam Works located on the Green River and Howard Runnet Lake. *Id.* at 5.

The Green River flows from a direction originating northwest of the City of Greenlawn to the southwest and empties into Green Bay. *Id.* at 20. The Diversion Dam lies upstream from Greenlawn is situated to the northeast side of Howard Runnet Lake. *Id.* The Howard Dam lies on the southeast side of the Lake and is located just east of the City of Greenlawn. *Id.* Moreover, the Howard Runnet Dam trailrace connects the Dam to the Green River just south of the City of Greenlawn. *Id.* The Bypass Reach is the stretch of the Green River that flows through the eastern side of Greenlawn and connects the Diversion Dam to the confluence of the Howard Runnet Dam trailrace and the Green River downstream of the City of Greenlawn. *Id.*

The City of Greenlawn has used the Green River for its residents since its founding in 1893. *Id.* at 5. In 1947, Congress approved construction of the Howard Runnet Dam Works project which created the two dams along the Green River. In the 1960s, Greenlawn experienced a population surge and expanded its municipal water system to accommodate its residents' needs. *Id.* at 5. After this development, Greenlawn's water usage ranged from an average of 6 million gallons per day (MGD) in the winter to an average of 20 MGD in the summer. *Id.*

After construction of the Howard Runnet Dam Works and around the time Greenlawn expanded its water system, ACOE agreed to maintain flows through the Diversion Dam and into the Bypass Reach in the quantities that Greenlawn had grown accustomed to. *Id.* at 6. In 1968, as Greenlawn began to grow, ACOE created a Water Control Manual (WCM) to manage releases of water through the dams so as to provide for Greenlawn's water rights and manage the dam effectively. *Id.* The WCM also contained some provisions for water management during drought conditions—in all three zones of drought water reductions, ACOE maintains flow to the Bypass Reach for Greenlawn's use, even when it halts other uses completely. *Id.* at 7. Drought was not a serious issue for Greenlawn until Spring 2017 when drought conditions reached Zone 2 and ACOE had to reduce the City's water from the normal 50 cubic feet per second (CFS) to a mere 7 CFS. *Id.* at 7. After the City pointed out to ACOE that the 7 CFS was no longer appropriate given Greenlawn's growth, ACOE agreed it must increase the flow from the Diversion Dam into the Bypass Reach to 30 CFS pursuant to Greenlawn's legal riparian rights. *Id.* at 8. Greenlawn's water consumption lowered resulted in drought conditions reaching Zone 3; accordingly, ACOE ordered the curtailment of hydroelectric power releases, but maintained the flow to the Bypass Reach. *Id.* at 8.

The increased flow through the Diversion Dam for Greenlawn's domestic use, along with the decreased flow through the Howard Runnet Dam, depleted the in-stream flows of the Green River. *Id.* at 9. Greenlawn's continued use of 30 CFS of water led the Green River downstream of the City to transform into stagnant puddles and narrow rivulets. *Id.* at 9. The low water levels led to exposure of oval pigtoe mussels—a federally protected species—which require slow or moderate currents to survive. Id. at 9. The depleted river also prevented migration of the sailfin shiner, a species of fish that is essential for pigtoe mussel maturation. *Id.* Already, approximately

25% of the pigtoe mussel population died because of the water depletion, and a flow of at least 25 CFS is required to prevent complete extirpation. *Id.* at 9, 10. However, before NUO could file suit, heavy rains fell and replenished the water levels in the Howard Runnet Lake, restoring the flows in the Green River and oval pigtoe mussel habitat. *Id.* at 11.

STANDARD OF REVIEW

Because the Court is reviewing a grant of summary judgment, questions of law and grants of summary judgment are reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, "there is no genuine issue of material fact and…the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court affords the lower court no deference in its conclusions of law.

SUMMARY OF THE ARGUMENT

NUO filed suit against ACOE and Greenlawn, alleging claims under the ESA against both parties. All three parties moved for summary judgment in relation to the ESA claims and Greenlawn's water rights as a riparian landowner. The district court correctly granted summary judgment to Greenlawn affirming the City's riparian water rights. Additionally, the district court correctly determined that ACOE's operation of Howard Runnet Dam Works is not subject to ESA § 7(a) consultation requirements and granted summary judgment to ACOE. Finally, the district court correctly ruled that Greenlawn's withdrawal of water from the drought-reduced Bypass Reach constitutes a "take" under § 9 of the ESA, but erred when it failed to balance the equities before issuing an against Greenlawn's water withdrawals. This Court should hold that the lower court must balance the equities before enjoining a beneficial municipal activity, but affirm the district court on all other issues.

First, the district court properly ruled that Greenlawn has a riparian water right to supply its municipal water needs. Under the riparian common-law regime of New Union, riparian landowners have a right to reasonably use and enjoy the waters running through their properties. Generally, reasonable use encompasses the use of water for domestic purposes such as watering lawns and use in the home. Reasonable use is not calibrated to ensure that a waterway remains at historic levels, but is based on use at the rate that a landowner is accustomed to. Moreover, reasonable use does not change in drought conditions. Here, Greenlawn is a riparian landowner with a right to reasonably use water for domestic purposes such as watering lawns. Neither NUO nor its members own land downstream of Greenlawn, so the organization cannot assert injury from Greenlawn's reasonable use of the water in the Bypass Reach.

Second, ACOE's operation of Howard Runnet Dam Works to supply water to Greenlawn is mandatory and is not subject to the consultation requirements of ESA § 7(a). Thus, the district court correctly held that ACOE had no duty to consult before releasing water for Greenlawn's riparian right. The consultation requirements of the ESA do not apply to actions that agencies are required to take by law, regulation, or private agreement. Here, ACOE was obligated by both local law and the WCM to provide water to Greenlawn subject to the city's riparian right. ACOE's dam operation and water release was therefore a mandatory agency action and exempt from any consultation requirement. Reading the ESA to require consultation in this instance would effectively rewrite the law and add a previously nonexistent hurdle to Greenlawn's water right. In cases where an agency initially had discretion to take an action, but abdicated this discretion in a private agreement, the action is considered mandatory. In this case, ACOE abdicated discretion when it promulgated the WCM and is bound by law to supply water to Greenlawn—the lower court was correct in holding that ACOE has no duty to consult under the ESA.

Third, Greenlawn's withdrawal of water from the Bypass Reach was a "take" under § 9 of the ESA because it actually harmed the oval pigtoe mussel and the harm was foreseeable. A take is defined as a harm that actually injures or kills wildlife, and can include significant negative habitat modification or degradation. Here, Greenlawn's water withdrawals caused significant modification to the habitat of the mussels. The reduced flow exposed the mussels to air, prevented the mussels from breeding, and smothered the mussels to death. Furthermore, it was foreseeable that Greenlawn's water withdrawals would cause harm to the oval pigtoe mussels. The causation requirement in the ESA is meant to eliminate bizarre, "butterfly effect" claims. In contrast, here there is a direct, foreseeable, causal link between Greenlawn's water withdrawals and the harm to the mussels—the habitat destruction is traceable to the water withdrawal, the habitat destruction is a foreseeable consequence of the water withdrawal in drought conditions, and, but for Greenlawn's water withdrawal, the habitat would have remained intact. The lower court correctly determined that Greenlawn's water withdrawals in drought-reduced conditions constituted a take of the oval pigtoe mussel.

Finally, the lower court erred when it determined that it need not balance the equities before enjoining a beneficial municipal activity. Generally, courts balance four factors when determining whether to issue an injunction. Here, the lower court mistakenly relied on inappropriate past precedent and enjoined Greenlawn's water withdrawals without first balancing the equities. That precedent should not apply because the future harm to the oval pigtoe mussels is uncertain rather than definite. Additionally, Greenlawn's water withdrawals are a municipal rather than federal activity; anti-commandeering doctrine dictates that the federal government may not use its power to compel a municipality to enforce a federal regulatory program. Finally, the water withdrawals

are not for financial benefit so the exception to balancing the equities does not apply. Thus, the district court mistakenly issued an injunction without balancing the equities.

ARGUMENT

I. The city of Greenlawn has a right, as a riparian landowner, to withdraw the amount of water it is accustomed to from the Bypass Reach and has no obligation to reduce the amount it uses—even in times of drought.

Riparian landowners have rights to water in association with real property ownership. *See Harris v. Brooks*, 225 Ark. 436, 441 (1955). Property owners have rights incident to land ownership, such as the right to use and enjoy the land to its fullest extent. *Hendrick v. Cook*, 4 Ga. 241, 258 (1848). Landowners with bodies of water running through their land are riparian landowners and have a right to use and enjoy those waters. Barton Thompson, Jr. et al., Legal Control of Water Resources 27 (6th Ed. 2018). Common law riparian doctrine recognizes a correlative relationship between riparian landowners—all riparian landowners along a body of water have an equal right to use the waters, and one landowner's use should not hinder any other's use. *Id.* at 33. American riparianism recognizes the reasonable use doctrine over the English natural flow doctrine. *Id.* The reasonable use doctrine does not require that a waterway retains the same amount of water at all times, but favors uses that support development of water resources. *Id.* at 35. Use for domestic purposes—watering lawns and providing a drinking source for homes—is the quintessential reasonable use. *Harris*, 225 Ark. at 444 (1955). Riparian landowners may use the amount of water they are accustomed to use, even if it depletes the level of water in the waterway, and even in conditions that exacerbate that depletion, such as drought. *See Tyler v. Wilkinson*, 24 F. Cas. 472, 476 (1827).

The City of Greenlawn is a riparian landowner because the Bypass Reach flows through its land. As a riparian landowner, Greenlawn has a right to reasonably use the waters that flow in

the Bypass Reach. Greenlawn's use of such waters for domestic purposes, like watering lawns and household plants, is the classic reasonable use that takes priority over all other needs. Although Greenlawn's accustomed level of use may decrease the water level downstream in the Green River, its use does not negatively affect the use and enjoyment of any other riparian landowners because neither NUO nor any of its members own land along the Green River—NUO cannot assert injury to any recognized right. Furthermore, NUO has not gained any rights to the use or enjoyment of the waters in the Bypass Reach or the rest of the Green River through any other legal avenue.

A. Greenlawn is a riparian landowner; it has a right to reasonably use the waters in the Bypass Reach for domestic purposes, and has no obligation to reduce its accustomed amount used, even in times of drought.

Riparian landowners have a right to reasonably use the waters that course through their property so long as that use does not negatively affect other riparian landowners. *Tyler*, 24 F. Cas. at 474. Court's analyze one landowner's use in relationship to other landowners' uses. *See generally Tyler*, 24 F. Cas. 472; *Hendrick v. Cook*, 4 Ga. 241 (1848). Simply using more water than a neighboring landowner is not automatically unreasonable—the primary consideration is the effect of one landowner's use on another's use. *Tyler*, 24 F. Cas. at 474. Municipalities that are riparian landowners have a right to distribute their waters to their non-riparian citizens. *Barre Water Co. v. Carnes*, 65 Vt. 626, 629 (1893). Courts view domestic use as the primary reasonable use of water. *Harris*, 225 Ark. at 444. Furthermore, reasonable use does not mean that municipalities or other riparian landowners cannot deplete the water source at all. *Tyler*, 24 F. Cas. at 474. Indeed, riparian rights speak primarily to use and consumption of water resources, not the amount of water in the stream. Thompson at 29. Riparian landowners also have a right to the continued use of the quantity they are accustomed to. *Tyler*, 24 F. Cas. at 475. This continued use

of accustomed quantity applies even if it begins to deplete the amount of in-stream flow. *Id.* at 476.

The City of Greenlawn owns land through which the Green River Bypass Reach flows, and such real property ownership entitles it to a reasonable use of the water in the Bypass Reach. As a riparian landowner, Greenlawn can make reasonable use of the waters of the Bypass Reach so long as that use does not negatively affect other riparian landowners. Neither NUO nor its members own any land through which the Green River flows downstream of Greenlawn. Thus, NUO is unable to claim injury because it holds no rights on which Greenlawn could infringe.

As a municipality, the City of Greenlawn can use its rights to the water in the Bypass Reach for use by its non-riparian landowning citizens. Greenlawn residents' use of the water for domestic purposes, such as watering lawns and other plants, is a use that is traditionally recognized as the use of the highest priority among riparian landowners. Despite drought conditions, Greenlawn maintains its rights to the accustomed 30 CFS flow in the Bypass Reach. Even if the maintenance of such flow decreases the amount of in-stream flow, the use of that amount of water is reasonable. Because it is not a riparian landowner, NUO cannot assert any right to in-stream flow in the Green River downstream of Greenlawn.

1. Greenlawn is a riparian landowner entitled to reasonably use the waters that flow through its land, and its use for domestic purposes does not negatively affect any other riparian landowners along the Green River.

Courts have recognized the right of riparian landowners to the equitable and valuable use of the water flowing through their property. *Tyler*, 24 F. Cas. at 474. Thus, reasonable use does not mean that riparian landowners along a watercourse all have a right to an equal quantity of water, or that reasonable use precludes any diminution, addition, obstruction, or diversion. *Id.* Rather, reasonable use focuses on the effect of one landowner's use on another landowner's use.

Id.; *accord Hendrick*, 4 Ga. at 256; *Harris*, 225 Ark. at 442. Use of water for domestic purposes is the quintessential reasonable use, and outweighs other uses such as navigation, fishing, and recreation. *Harris*, 225 Ark. at 444; *City of Canton v. Shock*, 66 Ohio St. 19, 31 (1902).

Courts have reiterated that one riparian landowner's use should not infringe on the reasonable use of another riparian landowner, and that if such use results in an injury to another landowner, then the offending landowner's use is unreasonable. *Harris*, 225 Ark. at 446. For a riparian's use to be unreasonable, it must deprive the other proprietor of a legal right. *Hendrick*, 4 Ga. at 257. If there is no injury to a cognizable legal water right, then the party alleging injury has no cause of action. *Id.*

Greenlawn's use of the water that flows through its land is a reasonable use. Greenlawn uses as much water as it needs to fulfill its high priority need for domestic purposes. While it may use enough water to deplete the overall downstream water level, such use is not automatically unreasonable. Greenlawn's use does not negatively affect another riparian landowner along the Green River, and, if it does, such a landowner has yet to assert any impact on their own use.

NUO is not a riparian landowner and therefore cannot assert injury by Greenlawn's use because they do not have a legal right to use the water in the Bypass Reach or Green River. Neither NUO nor any of its members assert ownership of any land along any portion of the Green River. NUO is not a riparian landowner entitled to any of the legal rights of assured use of the water in the Green River because it has no land through which the Green River can flow. Thus, Greenlawn is rightfully exercising its rights as a riparian landowner.

2. Greenlawn and ACOE have no obligation to reduce the flow to the Bypass Reach below 30 CFS because riparian landowners are entitled

to use the amount of water they are accustomed to, regardless of other external conditions.

A riparian municipality has a right to distribute water from the water course that flows through its property to non-riparian residents that live within its city limits. *Canton*, 66 Ohio St. at 28; *Barre Water Co.*, 65 Vt. at 629. Additionally, household uses for citizens for have been interpreted to be the highest priority for municipalities. *Canton*, 66 Ohio St. at 31; *Philadelphia v. Collins*, 68 Pa. 106, 123 (1871). An upstream riparian city that supplies its residents with water for domestic purposes will have a superior right to use of the water over downstream riparian landowners that use the water for other purposes—such as navigation, power generation, or recreation. *Canton*, 66 Ohio St. at 32.

Riparian landowners have a right to use their accustomed amount of water to serve their purposes, particularly when such use has continued for many years. *Tyler*, 24 F. Cas. at 475. This presumption is even stronger when those uses serve domestic purposes. *See, e.g.*, *Canton*, 66 Ohio St. 19; *Philadelphia*, 68 Pa. 106 (1871). In *Tyler*, the court held that defendant trench owners were entitled to the amount of water that flowed through the trench for more than 20 years and plaintiffs who owned a downstream dam could not force the trench owners to interrupt that amount, even in dry seasons. *Tyler*, 24 F. Cas. at 476. The court also reasoned, however, that the trench owners were not entitled to any increase in the amount of water that normally flowed through the trench. *Id.*

Greenlawn, as a municipal riparian landowner, rightfully supplied water to its residents for domestic purposes. This use by an upstream riparian landowner takes precedent over any potential downstream claims for any other purpose. Even the expansion of Greenlawn's water use as the City grew in the 1960s was not unreasonable under riparian common law.

Greenlawn has a right to continued use of the amount of water it is accustomed to for its residents, and drought conditions do not abrogate that right. Like the trench owner in *Tyler*, Greenlawn was accustomed to 50 CFS of water in the Bypass Reach for many years, beginning in 1968. In the more than 50 years since implementing that standard water amount, Greenlawn never had any reason to grow accustomed to any less water. Even in the few years that Zone 1 (Drought Watch) conditions were implemented through the Howard Runnet Dam Works, Greenlawn continued to receive the 50 CFS form the Diversion Dam into the Bypass Reach for its own use. Furthermore, unlike the trench owner in *Tyler*, Greenlawn never asserted a right to more than 50 CFS. Therefore, the City of Greenlawn had no obligation to reduce its consumption of water during the drought stages, and the continued withdrawal of 30 CFS was not an unreasonable use.

B. NUO cannot assert riparian rights to the Green River because neither it nor any of its members are riparian landowners, and use for fishing and navigation takes secondary priority to Greenlawn's use for domestic purposes.

Property law allows parties to obtain rights without owning property through prescription. *Tyler*, 24 F. Cas. at 474. Individuals who do not own a parcel of land may gain rights of ownership or enjoyment to that land through use or possession in ways that are adverse to the true owner and that continue for the requisite period of time. *Id.* Prescriptive riparian rights to the use of water function much like adverse possession or prescriptive easements in property law. Robert E. Beck, *Waters and Water Rights* § 7.04(c). Users of water ways may obtain legally cognizable rights to the use and enjoyment of water, even if they are not riparian landowners. *Id.* However, courts impose strict burdens of proof on parties attempting to assert prescriptive rights to land or waters. *Tyler*, F. Cas. at 475. Even when a party does successfully assert a right to waters through prescription or agreement, some water rights must yield to others. *Philadelphia*, 68 Pa. at 121. For

example, valid rights for fishing, navigation, or recreation must yield to rights for domestic purposes. *Harris*, 225 Ark. at 444.

NUO has not alleged any facts that support any claim for a prescriptive riparian right. Nor has it proven it obtained rights through agreement with any riparian landowners. It claims to have rights to the waters in the Green River yet gives no justification for such a claim. NUO also does not allege that it or any of its members own land along the Green River. NUO arbitrarily claims that it has rights similar or equal to that of the City of Greenlawn without any way to prove such claim.

Even if NUO managed to allege facts that would prove it obtained prescriptive riparian rights, its alleged right to fish and navigate the waters in the Green River downstream of Greenlawn and the Bypass Reach must cede to the rights of Greenlawn to provide water to its residents. Domestic uses of water will always be superior to other legally valid uses of water. Thus, regardless of whether NUO does have legally valid riparian rights, its purported rights to fish and navigate the River do not outweigh Greenlawn's right to provide water to its residents' homes.

1. NUO has not offered any evidence to support any alleged riparian claims obtained through prescription because its use was not adverse to Greenlawn's use.

The requirements for obtaining a prescriptive riparian right are actual, hostile, exclusive, and continuous possession of the water or land upon which the water flows in a way that is open and notorious so as to provide the true owner with actual or constructive notice of the possession for 15 to 20 years. *Scott v. Burwell's Bay Imp. Ass'n.*, 281 Va. 704, 710 (2011). Any party seeking to reduce or diminish the rights of a riparian landowner bears the burden of proof to show that such a reduction is justified. *Tyler*, 24 F. Cas. at 475. Courts will strictly construe the elements of prescriptive property and water rights against the claimant, meaning only the most solid claims

prevail. *See Matto v. Dan Beard, Inc.*, 15 Conn. App. 458, 475 (1988). To be adverse, the adverse user must use the water in a way that harms the riparian landowner's legal right to use the water. *Hendrick*, 4 Ga. At 457.

The facts are undisputed that NUO never fished for any oysters within the section of river that flows through Greenlawn's city limits. There is no factual issue as to whether NUO's use of the waters of the Green River were adverse to the City of Greenlawn's use because NUO never used those waters for its fishing or navigation purposes. NUO has not alleged any use of the Green River that is adverse to any other riparian landowner and therefore has not proven that it obtained rights to those waters through legally cognizable means.

2. Even if NUO could prove it had a prescriptive water right, its alleged rights for purposes of fishing and navigation are secondary to Greenlawn's use for domestic purposes, and therefore Greenlawn cannot be enjoined from using the waters.

Reasonable use of water for domestic purposes takes precedent over any other use of water in disputes between riparian users. *E.g. Harris*, 225 Ark. 436; *Philadelphia*, 68 Pa. 106; *Canton*, 66 Ohio St. 19. While courts note that other purposes such as fishing, navigation, manufacturing, and power generation are reasonable uses of riparian resources, they agree that domestic uses have the highest priority over other reasonable uses. *E.g. Harris*, 225 Ark. 436; *Philadelphia*, 68 Pa. 106; *Canton*, 66 Ohio St. 19. Furthermore, cities, as riparian landowners, also have a right to provide their non-riparian citizens with the waters that flow through their land for residential domestic use. *Philadelphia*, 68 Pa. 106; *Canton*, 66 Ohio St. 19. In *Philadelphia*, the court held that the City of Philadelphia was liable for damages to the boat owners because the City provided water to its citizens for power purposes to the detriment of boat owners who could not move their boats because of the City depleted the reservoir. *Philadelphia*, 68 Pa. at 121, 123. However, the court also reasoned that had the City used the water for domestic purposes rather than power

purposes, the boat owners would have no cause of action because water use for domestic purposes would have justified depleting the water source, and the boat owners would then have no cause of action. *Id.* at 123.

Here, the City of Greenlawn's withdrawal of water from the Bypass Reach for its residents far outweighs any right NUO alleges for fishing. Unlike the City in *Philadelphia*, Greenlawn needs its water to water lawns and other ornamental plants, which is a legitimate domestic purpose. And unlike the boatowners in *Philadelphia*, NUO cannot prevail in its claim because its use of the river for fishing and navigation purposes does not outweigh the necessity of Greenlawn's use for household and domestic purposes. NUO's alleged riparian rights to the Green River for fishing oysters does not overtake Greenlawn's undeniable right, as riparian landowners, to the use of water in the Bypass Reach for domestic purposes.

II. ACOE's operation of the dam works to provide flow to Greenlawn during drought conditions was not a discretionary federal action subject to the consultation requirement within § 7 of the Endangered Species Act because it had a legal obligation to provide water to Greenlawn and the release was not an ongoing, affirmative action.

In general, before undertaking any federal action, an agency must consult with the U.S. Fish and Wildlife Service (FWS) about the action's effects on endangered species. 16 U.S.C. § 1536(a)(2). Congress intended the consultation requirement to ensure that agencies confirm that federal action will not jeopardize the continued existence of endangered or threatened species. *Id.* Nevertheless, the duty to consult is constrained by the definition of "agency action." *Wildearth Guardians v. U.S. E.P.A.*, 759 F.3d 1196, 1208 (10th Cir. 2014). FWS defines "action" using affirmative terms; action means "activities or programs…authorized, funded, or carried out…by Federal agencies. . . ." 50 C.F.R. § 402.02. Notably, in contrast to other sections of the ESA that reference an agency's failure to act, here the definition of "action" references only affirmative agency action. *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1107-08 (9th Cir. 2006).

Critically, the consultation requirement is subject to a broad limitation—§ 7(a)(2) of the ESA applies only to "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Thus, federal agencies need not consult with FWS if they have a mandatory legal obligation pursuant to statute, regulation, or contract. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). In *Home Builders*, the Court recognized that to require agencies to consult before taking mandatory action would effectively "repeal the mandatory and exclusive list of criteria [to take an action], and replace it with a new, expanded list. . . ." *Id.*

In some cases, courts have extended the consultation requirement to "on-going agency action" if the action "falls within the agency's decision making authority and remains so." *Defenders of Wildlife v. E.P.A.*, 420 F.3d 946, 969 (9th Cir. 2005). But, in cases where an agency initially exercised discretion in an action but did not abdicate discretionary authority in statute, rule, or contract, the consultation requirement does not apply. *W. Watersheds*, 468 F.3d at 1109.

In this case, ACOE had no duty to consult with FWS before releasing water from the Howard Runnet Dam Works during drought conditions for two reasons. First, ACOE is legally obligated to release water for Greenlawn's riparian water use—thus, the release was a mandatory legal obligation not subject to consultation. Second, when ACOE agreed to respect Greenlawn's riparian water rights in the WCM it abdicated discretionary authority over the release of water from the dam; the release is not an ongoing affirmative action. ACOE has not made any discretionary federal action and the Court should affirm the lower court with respect to ACOE's consultation duties.

A. ACOE had no duty to consult with FWS because the duty only applies to discretionary federal actions and the Corps had a mandatory duty in the WCM to supply water subject to Greenlawn's riparian water rights.

Non-discretionary federal actions are specifically exempt from the consultation requirements of the ESA. § 402.03. If an agency is required to take an action by statute, rule, or contract then the action is considered mandatory and the agency need not consult with FWS. *Home Builders*, 551 U.S. at 662. In *Home Builders*, the Court held that the EPA had no duty consult with FWS where the Clean Water Act stated that the EPA "shall approve" a program transfer application if nine factors are satisfied. *Id.* at 673. There, the statutory language was mandatory; if the applicant satisfied nine factors then the EPA was obligated to turn over the program and had no discretion to deny the application. *Id.* at 661. The Court reasoned that if the ESA required consultation before program transfer then it would effectively repeal the statutory mandate of the Clean Water Act and append a tenth requirement (consultation on endangered species) that does not exist in the text of the statute. *Id.* at 663.

Generally, an agreement that governs water releases from a dam and mandates that ACOE satisfy certain water rights creates a mandatory legal obligation for the agency. *Wildearth Guardians v. U.S. Army Corps of Eng'rs*, 314 F. Supp. 3d 1178, 1195-96 (D.N.M. 2018). In *Wildearth Guardians v. U.S. Army Corps of Engineers*, the court held that ACOE had no duty to consult under the ESA where the Corps was operating a dam subject to the legal obligations of the Rio Grande Compact, a 1960 Flood Control Act (FCA), and various private contracts. *Id.* In that case, the 1960 FCA set a ceiling and a floor for the amount of water the dams could release during summer months, and private contracts dictated that the Corps must release water on demand to provide for private water rights. *Id.* at 1195, 97. The court reasoned that the Corps has no discretion on water releases during the summer months and that to require ESA consultation would implicitly

raise the FCA's ceiling and force the Corps to release more water than necessary to control summer floods. *Id.* at 1196. While releasing water to protect fish and wildlife is admirable, the court recognized that the law in that case bound the Corps to abide by mandatory legal authority when planning water releases. *Id.*

Here, ACOE had a mandatory legal obligation to release water for Greenlawn therefore the action was not discretionary; ACOE had no duty to consult with FWS. The language of the binding WCM is mandatory—ACOE must manage the dam in a manner that complies with all water supply agreements and the riparian rights of property owners. If the court required ESA § 7(a)(2) consultation before ACOE could act to fulfill existing riparian rights then it would effectively repeal the legal obligations of ACOE and replace those obligations with its own requirements that include consultation. Like the statutory obligation in *Home Builders*, the obligations of the WCM are mandatory and ACOE must act when certain conditions are fulfilled. There is no room for ACOE to exercise discretionary authority; requiring consultation would append a mandatory duty that does not exist in the current legal scheme.

The WCM creates a mandatory legal obligation that governs the release of water from the Howard Runnet Dam. Like the Corps in *Wildearth Guardians v. U.S. Army Corps of Engineers*, here ACOE is operating a dam subject to local laws and private agreements. Thus, ACOE has no discretion regarding the floor for the amount of water that it may release—it must provide flows sufficient to satisfy Greenlawn's riparian rights. Requiring ESA consultation would implicitly lower the floor for flow from the Howard Runnet Dam and would alter the legal agreement binding the Corps. While here, unlike in *Wildearth Guardians v. U.S. Army Corps of Engineers*, fish and wildlife purposes are an authorized purpose for the dam, ACOE nonetheless lacks discretion to reduce flows to unacceptable levels and starve Greenlawn of its riparian water right. Ultimately,

because the WCM creates a mandatory obligation for ACOE to provide water for Greenlawn's riparian rights and because requiring consultation would impose an additional legal mandate on the agency, ACOE's release of water was mandatory and is not subject to § 7(a)(2) consultation requirements.

B. ACOE has no duty to consult with FWS because when it entered the WCM it relinquished any discretionary authority over water releases and the release was not an ongoing, affirmative agency action.

An agency action, such as the operation of a dam, may be subject to the consultation requirements of the ESA if the action is a discretionary, ongoing, affirmative agency action. *Defenders of Wildlife*, 420 F.3d at 969. For an action to be ongoing and affirmative the agency must retain discretionary authority to alter the scope of their activities—if the agency did not retain that authority or is constrained in their action by statute, rule, or contract then the action is not subject to consultation. *W. Watersheds*, 468 F.3d at 1109. In *Western Watersheds*, the court held that the BLM was not required to consult with FWS after acquiescing to the diversion of water for parties with private rights-of-way. *Id.* at 1111. There, multiple private parties held rights-of-way and water rights that were historically recognized and acknowledged by local customs and laws. *Id.* at 1103. The court reasoned that the BLM did not act affirmatively and could not be subject to consultation requirements; "even if the BLM could have regulated the diversions to protect endangered species, it did not retain such discretion." *Id.* at 1110. Ultimately, if an agency retains no discretion to take action and acquiesces to a private right then there is no ongoing affirmative action and no consultation requirement. *Id.* at 1109; *compare Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1082 (9th Cir. 2001) (holding that there was no ongoing agency involvement or consultation requirement where FWS was constrained by statute and had not retained discretion to amend a permit to protect endangered species), *with Wash. Toxics Coalition*

v. EPA, 413 F.3d 1024, 1033 (9th Cir. 2005) (holding the EPA had a continuing, discretionary duty under the Federal Insecticide, Fungicide and Rodenticide Act to register and alter pesticide registrations).

In this case, ACOE was required to release water to Greenlawn pursuant to the city's riparian water rights and the WCM; the release was not an ongoing affirmative action and was not subject to ESA consultation requirements. The operation of Howard Runnet Dam is governed by the WCM, and the WCM dictates that ACOE shall operate the dam in a manner that complies with "the riparian rights of property owners established under New Union law." Like in *Western Watersheds,* where the BLM acquiesced to water releases to provide for existing private rights-of-way, here ACOE was obligated to provide water pursuant to a private right. In both cases the governing agency relinquished any discretionary right to make decisions about water releases, so the release of the water was not an ongoing, affirmative agency action. Indeed, here ACOE is specifically constrained by private agreement and state law; it has no choice but to release the water for Greenlawn's riparian use. Unlike the agency in *Washington Toxics*, here ACOE had no ongoing duty to take discretionary actions. Instead, ACOE's duty was decided and mandatory when the WCM was signed. Because ACOE did not act affirmatively and merely satisfied its existing legal obligations, it did not take an ongoing, affirmative, agency action and it is not subject to § 7(2)(a) consultation requirements.

III. Greenlawn's water withdrawal constitutes a "take" under the Endangered Species Act because it significantly modified the depleted the flow of the Bypass Reach which habitat of the oval pigtoe mussel and because it proximately caused the destruction of the species' habitat .

The district court's summary judgment on the issue of Section 9 of the Endangered Species Act was appropriate because Greenlawn's water withdrawals constitutes a "take." There was no

genuine dispute as to any material fact because NUO made a sufficient showing and Greenlawn failed to support its defense by providing proper legal authorities.

A. Greenlawn's water withdrawal constitutes a take because it actually injured the oval pigtoe mussel by depleting nearly all of the flow of the Bypass Reach even though its activities occurred entirely outside the mussels' habitat.

Section 9 of the Endangered Species Act prohibits any person from "tak[ing] any [endangered] species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). The ESA further defines a take as an action to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engaged in any such conduct." § 1531 (19). The Secretary of Interior has defined harm as "an act which actually kills or injures wildlife." 50 C.F.R. § 17.3. This includes "significant habitat modification or degradation [that] kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering." *Id.* The Supreme Court upheld the Secretary's definition of "harm" and thus integrated significant habitat modification into the definition of "take" for the purpose of Section 9 of the ESA. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 (1995).

1. Greenlawn's water withdrawal significantly modified the habitat of the oval pigtoe mussel by depleting nearly all of the water from the Bypass Reach.

Greenlawn's water withdrawals directly reduced the river level and had several adverse impacts on the habitat of the oval pigtoe mussel: (1) it exposed the mussels to the air; (2) it prevented the migration of sailfin shiners, which the young mussels depend on for shelter; and (3) it caused siltation which smothered the mussels to death.

As long as the alleged conduct caused actual injury, courts interpret "harm" very broadly. *San Carlos Apache Tribe v. U.S.*, 272 F. Supp. 2d 860, 873 (D. Ariz. 2003). "Harm" does not need

to be acute to an individual member of the species; rather, general injury on the entire population is sufficient evidence of a take. *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996). That said, the modified habitat must be decidedly critical to the species' survival. *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1134 (D. Haw. 2000).

For example, in *Greenpeace Foundation*, where the plaintiff claimed that defendant's lobster fishery modified the habitat by reducing the availability of the endangered monk seals' food, the court found no take because the lobster does not play a critical role in the seals' diet. 122 F. Supp. 2d at 1134. In contrast, where a defendant's forest harvest modified the habitat which was essential to the breeding behaviors of birds, the court found there is a take. *Marbled Murrelet*, 83 F.3d at 1060. The court gave weight to the evidence that the birds displayed "occupied behavior" on the trees, which showed the trees are decidedly critical for the species' survival. *Id.* at 1067.

In this case, Greenlawn's consumption of nearly all of the water flows in the Bypass Reach changed the most critical feature of the mussels' habitat: the water. When Greenlawn depleted the last drops of water, it took away any meaningful possibility for the mussels to survive. The reduced water level had a destructive impact on both the young and adult mussels. For the young, it meant loss of shelter because water is required for the migration of sailfin shiners, upon which the young mussels attach. For the adults, it meant loss of any possibility of submersion and survival because the river was dry from the Bypass Reach to the estuary. These severe conditions have already resulted in the death of approximately 25% of the mussel population and would extirpate the species if they continued. Therefore, Greenlawn's conduct falls easily within the scope of a take.

2. Despite Greenlawn's defense, activities that occur entirely outside of the habitat of a species may still constitute a take of that species.

Greenlawn failed to support its contention that only activities that occur inside a habitat can be considered habitat modification. In fact, legislative history and case law strongly suggest

the opposite. From the reasonable interpretation of law: (1) "take" is interpreted broadly to capture every conceivable injury to an endangered species; (2) the standard to find a take is a result-oriented test, not an inquiry into where some conduct physically occurred; and (3) Greenlawn's defense is logically inconsistent with the U.S. Supreme Court's decision in *Sweet Home*.

First, the scope of "take" is broad enough to include activities outside the habitat. Congress enacted the ESA with the purpose of conserving endangered and threatened species and the ecosystems on which they depend. *See* 16 U.S.C. § 1531. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The Act's Senate report clarifies that "'take' is defined in the broadest manner. . . ." S. Rep. No. 93-307, 7 (1973); *see also Sweet Home*¸ 515 U.S. at 703-04 (citing Senate and House Reports indicating that "take" is to be defined broadly). Thus, a narrow focus on where some harmful conduct occurred would defeat the legislative intent of the statute.

Second, a take is determined by examining the cause rather than the location of the taking. The requirement for a "take" is "a showing of actual harm." *American Bald Eagle v. Bhatti*, 9 F.3d 163, 165 (1st Cir. 1993). As correctly stated by the district court, several circuits held that state regulatory activities that result in harm to endangered species can constitute a take. R. at 16. (citing *Animal Welfare Inst. v. Martin*, 623 F.3d 19 (1st Cir. 2010); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); and *Loggerhead Turtle v. Cty. Council of Volusia Cty.*, 148 F.3d 1231 (11th Cir. 1998)). Those circuits' holdings are strong evidence against Greenlawn's argument because governmental regulation, such as the issuance of a license or permit, always occurs outside a habitat. Furthermore, regulatory activities are included in the definition of take to prevent the harm to the

species. *Strahan v. Coxe*, 127 F.3d at 163 ("but for the permitting process, the actual injury could not take place"). The same rationale applies to activities happen outside of the habitat.

Third, although no past decisions have precisely stated that habitat modification by activities outside of a habitat may constitute a take, *Sweet Home* indicates that such activities would fall within the statutory definition of the term. In that case, respondents argued that the definition of "harm" should be limited to direct or willful action. *Sweet Home*, 515 U.S. at 697. The Court disagreed because the dictionary definition of harm does not include the word "directly" or support such a limited interpretation. *Id.* Moreover, unless "harm" encompasses indirect as well as direct injuries, the word has no meaning than other words in § 3 ("pursue, hunt, shoot, wound, kill, trap, capture …") *Id.* at 698. The same rationale applies to activities outside a habitat as well: the dictionary definition of "harm" does not indicate that it must be caused from inside the habitat; and unless "harm" encompasses conduct from the outside, it would have the same meaning as the other terms in the statute. Furthermore, because harm from activities occurring outside a habitat must be indirect harm, differentiation between activities inside and outside of the habitat is akin to differentiation between direct and indirect harm, which the Court has already determined is irrelevant.

B. Greenlawn's water withdrawal meets the causation requirement for a take because it proximately caused actual injury on the oval pigtoe mussel.

Greenlawn's water withdrawals meet the causation requirement for a prohibited take. *Sweet Home* established that proximate cause is required to affix liability for ESA violations. *Sweet Home*, 515 U.S. at 700. This requirement serves to exclude the "butterfly effect" as a basis for ESA violations. *Id.* at 713 (O'Connor, J., concurring) ("An example is the idea that a butterfly stirring the air today in China can transform storm systems next month in New York.") The definition of proximate cause is fluid and merely reflects the limitation of legal responsibility—

there must be some connection between the cause and the result. *Nat'l Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 494 (E.D. Cal. 2018). The causal link between Greenlawn's water withdrawal and the habitat destruction is clear under three complementary tests: (1) the habitat destruction is traceable to Greenlawn's water withdrawal; (2) the habitat destruction is a foreseeable consequence of the unrestrained water withdrawal during drought conditions; and (3) the water withdrawal is a strict but-for cause of the habitat destruction.

1. The habitat destruction is traceable to Greenlawn's water withdrawal because there were no intervening causes that rendered the extirpation of the mussel too remote from Greenlawn's conduct.

Greenlawn's defense that its conduct caused the injury only in combination with other factors is ineffective because its conduct is directly traceable to the habitat disruption. Although the traditional standard of proximate cause is but-for causation (the result would not have occurred "but for" the alleged conduct), the Supreme Court held that a strict but-for causal standard would be inappropriate where doing so would conflict with congressional intent. *Nat'l Res. Def. Council v. Zinke*, 347 F. Supp. 3d at 489 (citing *Paroline v. United States*, 572 U.S. 434, 458 (2014)). In the context of the ESA, proximate cause focuses on whether the result is "fairly traceable" to the alleged conduct. *Id.* at 465; *Arkansas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014); *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1084 (D. Or. 2012); *Loggerhead Turtle*, 148 F.3d at 1247. If the causal link between the illegal conduct and injury is too attenuated, the conduct fails to meet the proximate cause requirement. *Loggerhead Turtle*, 148 F.3d at 1247.

The causal link between the alleged conduct and the result is too attenuated if there is an independent intervening cause. *Animal Protection Inst., Ctr. for Biological Diversity v. Holsen*, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008). A situation stimulated by an actor's conduct cannot also be an intervening cause. *Id.* (citing Restatement (Second) Torts § 441). Where the defendant

authorized and permitted trapping of animals, the court held that the specific activities of "trapping" engaged in by third parties were not intervening causes that cut the causal link. *Id.* Instead, the court viewed the defendant's licensure and regulation as the "stimulus" for the trappers' conduct. *Id.* Accordingly, the chain of causation remained intact. *Id.*

Likewise, no intervening causes broke the chain of causation between Greenlawn and the incidental taking. Greenlawn directly stimulated the curtailment of hydroelectric power releases. After the river level lowered to Zone 2, Greenlawn continued its rate of consumption and thus lowered the river level to Zone 3. ACOE's curtailment of hydroelectric power was reasonable and dictated by the WCM in the of Zone 3 drought conditions. Greenlawn knew or should have known that its conduct would ultimately cause downstream flow to diminish.

In addition, the natural drought conditions and temperature were preexisting conditions and thus cannot be recognized as an intervening cause that cut the causal link. Greenlawn's violation is its ignorance of adverse natural conditions and continued withdrawal for its own demand. Therefore, the adverse natural conditions are the factors that make Greenlawn liable rather than vice versa.

2. The habitat destruction is a foreseeable consequence of Greenlawn's water withdrawal during the drought conditions.

The district court correctly held that the habitat destruction is a foreseeable result of Greenlawn's withdrawals and thus the causation element is established.

In *Arkansas Project v. Shaw*, the plaintiff tried to show causation between the licensing of water withdrawals and the death of the endangered cranes by a long chain: withdrawals caused reduction of water flow, which increased salinity in the water, which further reduced the population of blue crabs (the cranes' food), and scarcity of food further triggered the cranes' stress behavior that ultimately their led to death. 775 F.3d at 647. The court found that there was no established

causation because of a number of contingencies and unpredictable factors in the chain. *Id*. at 661. For example, the salinity levels, tides, and temperature. *Id*. at 662.

In contrast, the court in *Natural Resources Defense Council v. Zinke* found causation between a water release and the destruction of salmon habitat after the temperature of the water increased. 347 F. Supp. 3d at 512. The court reasoned that, although there might be other factors that warmed the water, that specific water released by the defendant foreseeably raised the water temperature. *Id.* at 516.

In the present case, every step in the causation chain between Greenlawn's withdrawal and destruction of the habitat is foreseeable. Although Greenlawn challenged the causation by pointing out other factors, its withdrawal is significant in that it consumed nearly all of the flows in the Bypass Reach. In addition, Greenlawn should have reasonably anticipated the curtailment of the hydroelectric power release since it was dictated by the WCM guidelines.

3. Greenlawn's water withdrawal met the strict but-for test and thus clearly meets the causation requirement.

The but-for causal standard is the strictest causal standard. *Paroline*, 572 U.S. at 458. For instance, in *Strahan*, but for the defendants' issuance of licensing and permits that authorized gillnet and lobster pot fishing, a "take" could not take place; thus, the defendants committed a prohibited take. *Strahan v. Coxe*, 127 F.3d at 163. The "actual injury" in the but-for test formula could be any injury that threatens extirpation of the species. *Id.* at 165 (where the evidence showing that the whales have become entangled in fishing gear is sufficient because ESA § 9 requires only a showing of injury rather than death or extinction of the species).

Applying the above rule to the present case, the result in the but-for test need not be the complete destruction of the habitat, which would inevitably lead to the extinction of the mussels, but it could be satisfied by partial habitat destruction that dried-up river beds. But for Greenlawn's

water withdrawal, the habitat of the oval pigtoe mussel would not have been destroyed to the extent that it eliminated any possibility for the oval pigtoe mussels to remain submerged in the Spring of 2017.

In addition, Greenlawn's conduct was the but-for cause of the cutbacks in hydroelectric power releases. In the summer months, Greenlawn's water consumption rate reaches 20 million gallons per day. Watering lawns and ornamental plantings is the reason that Greenlawn protested the Zone 2 flow restriction. Consequently, it is reasonable to infer that Greenlawn's withdrawal after April 23 was 20 MGD. Considering the fact that the other uses had already been restricted in Zone 2 operation, Greenlawn's conduct was the but-for cause of Zone 3 operation, which required the curtailment of hydroelectric power releases.

Lastly, Greenlawn's withdrawal is a long-lasting depletion process. After 1968, Greenlawn consumed 20 MGD from the Green River, and due to evaporation and ground absorption less than 5% of its withdrawals would return to the river. Therefore, but for Greenlawn's dozens of years of withdrawal with no restriction or conservation measures, the River level would not have reached the extreme low level that shuttered any possibility of survival for the oval pigtoe mussels.

IV. The district court must balance the equities before enjoining Greenlawn's water withdrawal which is a beneficial municipal activity, even though the activity will likely contribute to the extirpation of an endangered species.

The district court's grant of injunctive relief was inappropriate because it didn't balance the equities between the harm to an endangered species and Greenlawn's municipal need to provide residents with water. In general, claims for injunctive relief are governed by a four-factor balancing test: (1) there will be an irreparable harm if the violation continues: (2) remedies at law, such as monetary damages, are not adequate to compensate the harm; (3) balance of hardships between the plaintiff and defendant supports the requested relief; and (4) the relief is within the

public interest. *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). Traditionally, courts use discretion and balance equities when deciding whether to grant injunctive relief. *U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). The ESA itself does not limit courts' discretion in imposing an injunction. Moreover, the Court's holding in *Tennessee Valley Authority v. Hill* only gives extra weight to the protection of endangered species on the balancing scale and doesn't command an automatic injunction when there is a violation of the ESA. The issue in *Tennessee Valley Authority v. Hill* was whether the ESA requires a court to enjoin a Congressionally-funded project which would eradicate the entire known population of the snail darter or destroy its critical habitat. 437 U.S. at 156. The Court held that the ESA mandated an injunction that put an end to the construction of a dam, even though Congress spent more than $100 million on the project and it was virtually completed. *Id.* at 188. The court stated it was not free to make utilitarian calculations and must enforce the congressional intent of the ESA which viewed the value of endangered species as "incalculable." *Id.*

The circumstances in this case are different from *Tennessee Valley Authority v. Hill* in three aspects: first, the future harm of Greenlawn's water withdrawal is uncertain because the past harm was caused by a combination of multiple factors; second, Greenlawn's withdrawal is a municipal activity rather than a federal project; and third, the burden imposed by the injunction on the public is not financially calculable.

A. The future harm from Greenlawn's water withdrawals is uncertain.

As the Supreme Court explained in later opinions, the district court in *Tennessee Valley Authority v. Hill* lacked discretion in balancing equities because the completion of the dam would certainly eliminate an endangered species and an injunction was the "only means of ensuring compliance." *Oakland Cannabis*, 532 U.S. at 497; *Weinberger v. Romero-Barcelo*, 456 U.S. 305,

314 (1982). Relatively remote possibility of harm weights against injunctive relief. *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1511 (9th Cir. 1994). For example, in *Strahan v. Holmes*, the court found the fisherman's conduct was a "take" but refused to order an injunction because the risk of future harm was uncertain. *Strahan v. Holmes*, 595 F. Supp. 2d 161, 165 (D. Mass. 2009). As the court reasoned, "the hardship that would be imposed upon [defendant] by an injunction, i.e. being prevented from pursuing his livelihood, far outweighs the relatively remote possibility of harm resulting from future entanglements of whales in his fishing gear." *Id.* at 166.

In this case, future harm from the violation of ESA is uncertain, and thus, an injunction is not required before balancing the equities. Before the district court ordered an injunction, heavy rains fell and the threat to the mussels was immediately eliminated. The return to drought warning conditions is possible but far from certain. Moreover, because the threat is not urgent, there are other options to ensure Greenlawn's compliance with the ESA, such as compelling Greenlawn to gradually decrease consumption rates or reducing Bypass Reach flow back to 7 CFS. Injunctions are improper for an uncertain and non-urgent threat.

B. Greenlawn's water withdrawal is a municipal activity rather than a federal project or an individual activity that Congress has the power to regulate.

Although Congress intends to give the highest priority to the conservation of endangered species, it does not intend to intervene in a state or municipal government's activity. Nor does it have the power to do so.

The Supreme Court limited *Tennessee Valley Authority v. Hill*'s scope in a later opinion: district courts acting as courts of equity have discretion unless a statute clearly provides otherwise. *Oakland Cannabis*, 532 U.S. at 496. 16 U.S.C. § 1531(c) states that "all Federal departments and agencies shall seek to conserve endangered species and threatened special species. Without

inserting the word "State" after "Federal," Congress left intact the traditional requirement for an injunction imposed on state government.

Moreover, the injunctive relief granted by the district court goes beyond the scope of remedies against a state or municipal government. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." U.S. Const. amend. X. The Amendment bars federal action that commandeers state governments into the service of federal regulatory programs because it is inconsistent with the Constitution's separation of powers between federal and state governments. *New York v. United States*, 505 U.S. 144, 175 (1992). Under the Amedment's suggested federalism structure, the States retain a significant measure of sovereign authority. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). Generally, while Congress may regulate the conduct of individuals, it may not regulate the conduct of the States for a federal regulatory purpose. *New York v. United States*, 505 U.S. at 166.

In this case, the district court, lacked the authority to enjoin Greenlawn's municipal conduct. The Constitution confers upon Congress the power to regulate individuals, not state or municipal governments. The district court, through its grant of injunctive relief, directly compelled the municipal government of the City of Greenlawn to enforce a federal regulatory program and thereby oversteps the delicate federalism line.

C. Greenlawn's water withdrawals are for its residents' livelihood rather than any financial benefit.

Tennessee Valley Authority v. Hill displaced the need to balance the equities only in circumstances where the public interest on one side of the scale is a financial interest that is calculable. In that decision, the Court granted an injunction to a Congressional project even though it noticed that the burden on the public imposed by that remedy would be the loss of millions of

dollars. *Tennessee Valley Auth.*, 437 U.S. at 187. The Court chose not to engage in "utilitarian calculations," and stated it cannot balance the loss of a sum certain monetary value against the value of genetic heritage. *Id.* at 187-88.

As opposed to the sum certain monetary value in *Tennessee Valley Authority v. Hill*, here, the public interest weighing against the injunctive relief is incalculable. For Greenlawn residents, the injunction granted by the district court would result in loss of means to obtain clean water for drinking, cleaning, farming, and living. Water is fundamental to people's daily life and the burden on the public imposed by the injunction is too heavy and not calculable. There is no indication that Congress favors conservation of endangered species over the citizens' rights to have convenient water sources. Thus, the injunctive relief ordered by the district court is unnecessary to enforce the legislative intent of the ESA.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's ruling as to the determination of Greenlawn's riparian water rights, the finding that ACOE had no duty to consult under the ESA § 7, and the fact that Greenlawn's water withdrawals constituted a take under ESA § 9. However, this court should compel the lower court to balance the equities before issuing an order to enjoin a beneficial municipal activity.