Team 15

United States Court of Appeals
For The Twelfth Circuit

NEW UNION OYSTERCATCHERS, INC.,
Plaintiff-Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS
Defendant-Appellee

v.

CITY OF GREENLAWN, NEW UNION
Defendant-Appellant

C.A. No. 19-000987

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

Brief for NEW UNION OYSTERCATCHERS, INC.,
Plaintiff-Appellant

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STATEMENT OF JURISDICTION

This court has jurisdiction to review the decision of the U.S. District Court for the District of New Union in the matter docketed C.A. No. 19-000987. Federal courts have jurisdiction over any action brought to enforce the various provisions of the Endangered Species Act ("ESA"). 16 U.S.C. § 1540(c) (2012). This matter arose in regard to §§ 7 and 9 of the ESA as they relate to the actions of the United States Army Corps of Engineers ("ACOE") and the City of Greenlawn, New Union ("Greenlawn"). Plaintiff-Appellant New Union Oystercatchers, Inc. ("NUO") and Defendant-Appellant Greenlawn each timely filed notices of appeal for judicial review of the District Court's decision. Record ("R.") at 1. This court has subject-matter jurisdiction over claims involving state law via supplemental jurisdiction. 28 U.S.C. § 1367(a).

STATEMENT OF THE ISSUES

I. When a riparian landowner consumes nearly all of a river's flow in order to water grass during a drought, is such a use unreasonable given the resulting energy price increases and diminished fishing harvests?

II. Does a federal agency's decision to modify dam flows and consequently jeopardize an endangered species habitat trigger the consultation requirement for discretionary actions under § 7 of the Endangered Species Act?

III. Did Greenlawn commit a "take" in violation of § 9 of the Endangered Species Act when their withdrawal of all drought-reduced water flows dried up the habitat of the endangered oval pigtoe mussel located downstream?

IV. Is it an abuse of a district court's discretion to enjoin municipal activities in order to prevent extirpation of an endangered species, based on the equities balanced by Congress in enacting the ESA and which it was precluded from balancing itself?

STATEMENT OF THE CASE

I. Facts

The Howard Runnet Dam Works (the "Dam") sits on the Green River upriver from Greenlawn. The Dam was completed in 1948 and was originally authorized for flood control, hydroelectric power, and recreational purposes. R. at 6. The ACOE is tasked with operating the Dam and maintains unilateral control over its flow levels pursuant to a Water Control Manual ("WCM") last revised in 1968. *Id.* at 6. The WCM provides guidance on reductions in flow levels during drought conditions and was last revised in 1968. *Id.* at 7-8.

In the Spring of 2017, the ACOE restricted the flow levels of the Dam into the Bypass Reach in response to Zone 2 Drought Warning conditions. *Id.* at 8. Greenlawn lodged a written complaint with the ACOE on April 12, 2017, requesting flow levels be restored as the WCM was outdated and provided inadequate water to the city's residents. *Id.* Initially, the ACOE disregarded this complaint and requested that Greenlawn temporarily bar its citizens from engaging in excessive water uses, such as watering lawns and washing cars. In response, Greenlawn asserted self-designated property rights to the Green River Bypass Reach and reiterated their demand to lift the restrictions. The ACOE gave in and restored flow levels, lowering the upriver lake level to Zone 3 Drought Emergency levels. *Id.* Continuing to rely on the outdated WCM, the ACOE chose to curtail hydroelectric power releases. *Id.* at 8–9. This decision substantially lowered the downriver levels of the Green River, exposing beds of the endangered oval pigtoe mussel to conditions unfit for continued survival. *Id.* at 9.

The oval pigtoe mussel is a federally-listed endangered species whose habitat has been considered critically endangered since 2007. Final Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Five Endangered and Two Threatened Mussels in Four

Northeast Gulf of Mexico Drainages, 72 FR 64286-01. The effects of the reduced flow levels on the indigenous mussel population were drastic. The oval pigtoe mussel requires slow to moderate currents to flow across its habitat in gravel or silty sand. *Id.* Stagnant river flows cause silt to build up atop the mussel beds, smothering the nested animals. *Id.* Additionally, the reproduction of these mussels is dependent upon the presence of the sailfin shiner, a small species of fish to which larval mussels attach themselves as they mature. The reduced flow caused the river levels to become extremely low, preventing the sailfin shiners from migrating through the mussel habitat. *Id.* As was stated in expert testimony at trial, and was uncontested by all parties, the ACOE's flow reduction resulted in the death of approximately twenty-five percent of the downriver mussel population. *Id*. In tandem with the absence of sailfin shiners in the area, the flow reduction resulted in death of mature mussels and prevented the proper maturation of those in their larval state. It was undisputed at trial that, if the flow reduction was to persist, the entire endangered mussel population on the Green River would be eliminated. *Id.*

The reduction in flow levels has impacted the overall oyster population in the Green River. *Id.* at 10. Oyster harvests have been in gradual decline due to the effects of the reduction on river levels and increased salinity of oyster habitats. *Id.* Many oyster fishermen in the Green Bay region have been forced to abandon their livelihoods and sell their boats due to reduced income from small harvests. *Id.* New Union Oystercatchers ("NUO") is a membership organization and designated representative of Green Bay-area oyster fishermen. *Id.* NUO brought this suit on behalf of its members. *Id.*

II. **Procedural History**

NUO brought suit in the U.S. District Court for the District of New Union alleging the following: (1) that the ACOE violated § 7 of the ESA in its adjustment of Dam flow levels without

consulting the Fish and Wildlife Service; and (2) that Greenlawn violated § 9 of the ESA with its withdrawals from the Green River. The District Court granted ACOE's motion for summary judgment, dismissed the first claim, granted NUO's motion for summary judgment finding Greenlawn in violation of § 9 of the ESA on the second claim, and granted Greenlawn's motion for summary judgment on a cross-claim recognizing Greenlawn as a riparian rightsholder. Additionally, the District Court issued an injunction against further water withdrawals that would cause the downstream Green River flows to drop to levels which would endanger the native mussel populations. NUO timely filed an appeal to the U.S. Court of Appeals for the Twelfth Circuit, disputing the District Court's decisions to grant ACOE's motion for summary judgment on the first claim and to grant Greenlawn's motion for summary judgment recognizing the city as a riparian rightsholder.

SUMMARY OF THE ARGUMENT

Greenlawn's water withdrawals are an unreasonable exercise of its riparian rights because watering one's grass is not a "domestic use" entitled to preference. NUO has common law standing to challenge Greenlawn's riparian rights because such withdrawals infringe on the public right to fish. Further, such interference with public rights by Greenlawn makes its withdrawals per se unreasonable. Alternatively, if the withdrawals are not per se unreasonable, this court must remand for a factual determination of "reasonableness."

The ACOE is subject to the consultation requirement outlined in § 7 of the ESA. By reducing and eventually curtailing the flows of the Dam, the ACOE engaged in discretionary action that jeopardized the habitat of an endangered species. A federal agency engaging in discretionary action is required to consult with the relevant federal regulatory body before taking such action. Here, the ACOE was required to consult with the Fish and Wildlife Service in order to assess the

impact of its flow adjustment on downriver endangered species. If the Fish and Wildlife Service had found a sufficient risk to any endangered species, the ACOE would have been required to engage in alternative measures in order to avoid eliminating a species protected by the ESA. However, because the ACOE shirked its obligation to consult with the Fish and Wildlife Service, large-scale damage was done to the downriver endangered oval pigtoe mussel population.

The ACOE's actions were discretionary because they were not carried out pursuant to an existing statutory obligation or congressional review protocol. Agency dam management is governed by a WCM that was drafted in 1968 based on annual demand estimates of the time. The WCM sets forth guidelines for dam flows and hydroelectric power generation during various levels of drought conditions. The ACOE decided to adjust flow levels to provide more water to Greenlawn, which resulted in lowering lake levels to prescribed "drought emergency" levels. The ACOE then chose to curtail downriver flows pursuant to this decision, exposing beds of oval pigtoe mussels to uninhabitable conditions without first consulting the Fish and Wildlife Service. The ACOE's lack of compliance with oversight measures is in direct violation of its obligations as a federal agency under the ESA.

Section 9 of the ESA prohibits any person from "taking" an endangered or threatened species. "Take" is defined very broadly to ensure protected species are afforded the highest level of protection and prohibits all forms of harm. By taking nearly all of the water flows headed towards the oval pigtoe mussels Greenlawn turned their habitat into stagnant pools. This species requires a steady flow of water in order to survive, and their habitat was virtually eliminated when water flows ceased. Thus, Greenlawn violated § 9 of the ESA by causing the death of one-quarter of oval pigtoe mussels living in the Green River, degrading their habitat, and threatening future harm.

The District Court was correct to refrain from balancing the equities before enjoining Greenlawn from engaging in a beneficial municipal activity. Typically, a federal court can balance competing interests and equities in determining whether to issue an injunction. However, federal courts are precluded from balancing equities prior to issuing an injunction under the ESA. Further, once a "take" has occurred, the district court was required to issue the injunction. Discretion to allow a person to "take" an endangered species lies only with the Secretary of the Interior by issuing incidental take permits. Greenlawn did not have a permit to "take" oval pigtoe mussels; thus, they are liable under the ESA. Even if the District Court balanced the equities as Greenlawn urges, the injunction still would have issued.

STANDARD OF REVIEW

The application of riparian law is reviewed de novo as a question of law. *See Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) (stating questions of state law are reviewed de novo in Erie cases); *Felder v. Casey*, 487 U.S. 131, 150 (1988) (applying the Erie doctrine to supplemental jurisdiction cases). Compliance with the ESA is reviewed under the Administrative Procedure Act, pursuant to which an appellate court may set aside a lower court decision if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012); 5 U.S.C. § 706(a)(2) (2012). In reviewing the lower court decision, the appellate court must address whether the relevant facts were considered and whether there was a clear error in judgment. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Greenlawn's liability under § 9 is an issue of causation, which is a question of fact reviewed for clear error. *Oahn Nguyen Chung v. StudentCity.com, Inc.*, 854 F.3d 97, 102 (1st Cir. 2017); *Urbach v. U*nited States, 869 F.2d 829, 831 (5th Cir. 1989). Injunctive relief that was granted by a District Court is reviewed under the

highly deferential abuse of discretion standard. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018); *Burlington N. & Santa Fe Ry. Co. v. Bhd. of Locomotive Eng'rs*, 367 F.3d 675, 678 (7th Cir. 2004).

ARGUMENT

I. GREENLAWN EXCEEDED ITS RIGHTS AS A RIPARIAN LANDOWNER BY UNREASONABLY WITHDRAWING WATER FOR ORNAMENTAL PURPOSES DURING A DROUGHT TO THE DETRIMENT OF PUBLIC RIGHTS.

Despite the District Court's error, Greenlawn's use of river water for watering grass is not a domestic use entitled to preference. *See Rhodes v. Whitehead*, 27 Tex. 304, 304 (1863); *Reisert v. City of New York*, 174 N.Y. 196, 200 (1903). Further, NUO does have common law standing to sue because Greenlawn's withdrawals interfere with the public right to fishing. *See Collins v.* Gerhardt, 237 Mich. 38, 48 (1926); Restatement (Second) of Torts § 856(4) (Am. Law Inst. 1979). To that end, the private rights of a riparian landowner ("Riparian") must yield to the public rights exercised by NUO's members. *See Knickerbocker Ice Co. v. Shultz*, 71 Sickels 382, 387 (N.Y. 1889). Greenlawn's withdrawals are thus per se unreasonable. *See id.* Even if this court finds that it is not per se unreasonable, "reasonableness" is a question for the trier of fact and should be remanded. *See McCavit v. Lacher*, 447 P.3d 726, 735 (Alaska 2019).

When analyzing ambiguous state law, federal courts respect the sovereignty of the states by hypothesizing what the highest court of the respective state would decide. *See* Arthur R. Miller, *Federal Practice and Procedure* § 4507 (3d ed. 2019). The application of this doctrine is known as an "Erie Guess." *Id.* Rather than creating common law, the federal judiciary must predict the natural development of the law. *See Burris Chemical, Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993). Courts look to other state supreme courts, dicta, and scholarly works to determine what

such a natural development would be. *Norfolk S. Ry. v. Basell USA, Inc.*, 512 F.3d 86, 92 (3d Cir. 2008) (citing *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1445 (3d Cir. 1996)).

A. NUO Has Common Law Standing to Sue Riparian Landowners for Unreasonable Water Withdrawals Because such Withdrawals Infringe on the Public Right to Fishing.

NUO has common law standing to sue for unreasonable use of water in the Green River. *See Collins*, 237 Mich. at 48; Restatement (Second) of Torts § 856(4). Where the rights of the public are demolished by the exercise of private rights, the latter must yield. *See Collins*, 237 Mich. at 48 (1926); *Willow River Club v. Wade*, 76 N.W. 273, 281 (Wis. 1898); Restatement (Second) of Torts § 856(4). The District Court of New Union (the "District Court") incorrectly stated that only riparian landowners ("Riparians") may assert riparian rights claims. *See Collins*, 237 Mich. at 48; *Wade*, 76 N.W. at 281; R. at 13. However, those who do not own riparian land ("Non-Riparians") can sue Riparians under common law. Restatement (Second) of Torts § 856; *see Collins*, 237 Mich. at 48. Where a Non-Riparian exercises a public right that is infringed by a Riparian, she has standing to sue that Riparian. *See Collins*, 237 Mich. at 48; Restatement (Second) of Torts § 856(4).

The right to fish, as part of the public trust in waterways, is a public right. *See e.g., Collins*, 237 Mich. at 48; *Wade*, 76 N.W. at 281; *see also* Restatement (Second) of Torts § 856 cmt. g (noting that the "public rights" upon which a Non-Riparian may sue include "transportation, pleasure boating, *fishing*, swimming, skating, hunting and other purposes.") (emphasis supplied). Greenlawn's withdrawals have decimated the harvest from Green Bay—severely diminishing the right to fish. *See Collins*, 237 Mich. at 48; *Wade*, 76 N.W. at 281; Restatement (Second) of Torts § 856(4). Holding that a private party may destroy a public right would be paradoxical—not even New Union may destroy that which is held in the public trust. *See Collins*, 237 Mich. at 48, 49 ("In

this right [to fish] [plaintiffs] are protected by a high, solemn, and perpetual trust, which is the duty of the state to forever maintain."). As a matter of law, NUO has common law standing to sue on behalf of its members for the infringement of their public rights. *See id.*; *see also United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 551 (1996) (organizations may assert the rights of its members).

B. Greenlawn's Water Withdrawals Are Unreasonable Because Such Private Rights Are Subordinate to NUO's Public Rights Either Requiring a Per Se Finding of "Unreasonableness" or Remand for a Determination of the Facts.

When determining the "reasonableness" of a use of water, courts look to a variety of factors. *See* Restatement (Second) of Torts § 850A (listing factors to consider such as "purpose of the use," "economic value," "extent and amount of the harm [the use] causes," and "the practicality of adjusting the quantity of water used by each [Riparian]"). When a Riparian consumes water for "domestic uses," such a use may, at times, be given preference. *See Rhodes*, 27 Tex. at 304. While citing *Harris v. Brooks*, 225 Ark. 436, 442 (1955), the District Court found that "gardening" was a domestic use, and "watering lawns and ornamental plants" constitutes gardening. R. at 13. The word "gardening" in *Harris* plainly does not include watering lawns and other ornamental uses. *See* 255 Ark. at 442; *see also Reisert*, 174 N.Y. at 200 (listing "gardening" alongside "farming" and "fishing").

1. *Because watering ornamental plants is not necessary to sustain life, it is not a "domestic use" entitled to preference.*

The domestic-use preference was classically known as *ad lavandum et potandum*—literally "for bathing and drinking." *Harvey Realty Co. v. Borough of Wallingford*, 150 A. 60, 63 (Conn. 1930). At common law, only uses that are necessary to sustain life are domestic uses. *See e.g., Cowell v. Armstrong*, 290 P. 1036, 1038 (Cal. Ct. App. 1930) (finding that domestic uses include

drinking and supplying water to domestic animals); *Harvey Realty Co.*, 150 A. at 63; *Taylor v. Tampa Coal Co.*, 46 So.2d 392, 394 (Fla. 1950) (finding that "drinking, cooking, bathing, washing clothes, and flushing toilets" are domestic uses). Even in states that have adopted statutory schemes to address competing water rights, most limit the definition to uses necessary to sustain life. *See e.g.,* Fla. Stat. Ann. § 373.019(6) (West 2019) ("'Domestic use' means the use of water for the . . . purposes of drinking, bathing, cooking, or sanitation. All other uses shall not be considered domestic"); Ky. Rev. Stat. Ann. § 151.100(9) (West 2019) ("The word 'domestic use' shall mean the use of water for ordinary household purposes, and drinking water for poultry, livestock, and domestic animals."). In Kansas, the legislature broadened the definition of "domestic use," but Kansas follows appropriation law rather than riparian, unlike New Union, and thus is not authoritative. Kan. Stat. Ann. § 82a-701(c) (West 2019); *see Norfolk S. Ry.*, 512 F.3d at 92 (outlining the factors for an Erie Guess).

Because of one court's use of the word "gardening," the District Court found that domestic use encompassed ornamental uses. R. at 13. First, a basic inquiry into the doctrine of domestic use makes such an interpretation suspect—the inclusion of ornamental uses would transform a doctrine designed to preserve life into a preference for aesthetics. *See Harvey Realty Co.*, 150 A. at 63; *Taylor*, 46 So.2d at 394. Second, the language in *Harris* was dicta because it was merely a passing remark by the court while discussing the ancient "natural flow theory." *See* 225 Ark. at 442.

The central reasons the courts created the domestic-use preference was (1) to preserve life over economic development and (2) the "quantity needed for household purposes is often minuscule in comparison to other needs." Restatement (Second) of Torts § 850A cmt. c. On average, Greenlawn consumes six million gallons per day ("MGD") from the Bypass Reach. R. at 8, 9. The city's consumption dramatically spikes 233 percent to 20 MGD during July and August—

entirely attributable to ornamental uses. *Id.* at 5. The twin policy rationales for the domestic-use preference—necessity to live and small usage—do not apply. *See Harvey Realty Co.*, 150 A. at 63; *Taylor*, 46 So.2d at 394. More than doubling the water withdrawals cannot be a "small usage," nor is an ornamental use necessary to sustain life. *See* Restatement (Second) of Torts § 850A cmt. c. The lower court's determination that "ornamental watering" is a domestic use goes against the common law, the commands of the Erie Doctrine, and defies the purpose of the domestic-use preference. *See Harvey Realty Co.*, 150 A. at 63; *Taylor*, 46 So.2d at 394; Restatement (Second) of Torts § 850A cmt. c; *see also Auburn v. Water Power Co.*, 90 Me. 576, 585 (1897) ("Water for domestic use is a necessity. Man cannot exist without it.").

2. *Trampling a public right by a private party is per se unreasonable because private rights yield to the public.*

Because Greenlawn is not entitled to the domestic-use preference, the water withdrawals are per se unreasonable. *See Knickerbocker Ice Co.*, 71 Sickels at 387. In *Knickerbocker Ice Company* the New York Court of Appeals held that "[t]he rights to navigate the public waters, and to fish therein, are public rights belonging to the people at large. . . . [A] riparian proprietor cannot interfere with such user[sic] by the public." *Id.* Because the water withdrawals have decimated the harvests of NUO's members, Greenlawn is interfering with public rights. *See id.*; R. at 10. The state itself may not destroy that which Greenlawn has held in public trust. *Collins*, 237 Mich. at 48, 49 ("In this right [to fish] [plaintiffs] are protected by a high, solemn, and perpetual trust, which is the duty of the state to forever maintain."). Thus, as a matter of law, Greenlawn's interference with the exercise of a public right is unreasonable. *See id.*; *Knickerbocker Ice Co.*, 71 Sickels at 387; Restatement (Second) of Torts § 850A.

3. *Whether Greenlawn's water withdrawals are unreasonable, if the trampling of public rights is not a per se violation, is a question of fact that should be remanded.*

If this court does not find Greenlawn's use to be per se unreasonable as a violation of public rights, this court should remand for a factual determination. Greenlawn is not entitled to the domestic-use preference, and thus its use must be balanced with the rights of others. *See Harris*, 225 Ark. at 442; Restatement (Second) of Torts § 850A. Upon balance, Greenlawn's water withdrawals may be unreasonable—but that is not a question for this court; it is a question for the trier of fact. *See McCavit*, 447 P.3d at 735 (holding, before remanding to the trial court for a factual finding, that "[w]hat is reasonable [use of riparian water rights] is a question of fact, to be determined by weighing a variety of factors.") (citation omitted).

Among the factors that the trial court may consider are: (i) the economic value of the use; (ii) the social value of the use; (iii) the extent and amount of harm it causes; and (iv) the practicality of avoiding the harm by adjusting one's use. Restatement (Second) of Torts § 850A. As the District Court noted, NUO's members—third- and fourth-generation oyster fishermen—suffered and continue to suffer reduced harvests because of the reduced flow of the Green River. R. at 10. Increased water withdrawals have decimated the once robust industry. *Id.* The salinity of Green Bay, due to reduced floodplain inundation as a result of the diminished waterflow, has so altered the ecosystem of Green Bay to reduce the harvests by half. *Id.* Among the things the court did not find was the reasonableness of the use. The District Court erred in its legal determination that ornamental watering is a domestic use, but if this court does not find that public rights are per se preferred, then it must remand for a factual finding. *See McCavit*, 447 P.3d at 735; Restatement (Second) of Torts § 850A; *supra* section I(B)(1).

II. THE ACOE FAILED TO SATISFY ITS CONSULTATION OBLIGATION UNDER § 7 OF THE ESA

Section 7 of the ESA requires federal agencies to consult with the relevant regulatory body before taking any agency action that may threaten any endangered species. Endangered Species Act of 1969 § 7, 16 U.S.C. § 1536(a). These consultations are intended to ensure that the proposed agency action 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" as determined by the Secretary of the Interior and the States which would potentially be affected by the action. *See* 16 U.S.C. §§ 1531, 1536(a). NUO has standing to obtain judicial review of ACOE's failure to satisfy the consultation requirement pursuant to the "citizen suit" provision of the ESA, which authorizes any person to bring an enforcement action before a federal district court. *Id.* § 1540(g).

In order to fulfill its obligations under the consultation requirement, a federal agency is required to submit a written request to the regulatory body detailing the proposed action and provide the consulting agency with commercial and scientific data relating to the proposed project. 50 C.F.R. § 402.14(c) (2019). The consulting agency then issues a biological opinion ("BiOp") stating its opinion on whether the proposed action would affect the habitat of an endangered species. 16 U.S.C. § 1536(b)(3)(A). If the consulting agency finds that the habitat would be potentially jeopardized, it must provide "reasonable and prudent alternatives" to the proposed action. *Id.* Upon a "jeopardy opinion" being issued, a federal agency may apply for an exemption, provided that it is able to show adherence with prescribed mitigating factors. *Id.* § 1536(h).

A. The ACOE Is a Federal Agency Subject to Compliance with the Consultation Requirement

The ACOE is a federal instrumentality charged with the operation of the Dam. R. at 5. The Dam was constructed by the ACOE in 1945 and was made subject to the Fish and Wildlife

Coordination Act upon its passage in 1958. *Id.* at 6. For the purposes of the ESA, a "federal agency" is defined as "any department, agency, or instrumentality of the United States." 16 U.S.C. § 1532(7). The ACOE runs the Dam in its capacity as a federal agency, controlling the flow rates of water to Greenlawn and the Green River, including the downriver habitat of the oval pigtoe mussel. R. at 6.

The consultation requirement imposes an obligation on federal agencies that undertake affirmative actions which may impact an endangered species. *See* 16 U.S.C. § 1536(a)(2); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (holding that the ACOE was obligated to comply with the § 7 consultation requirement in its operation of a dam upriver from endangered salmon habitats). The ongoing operation of a dam by a federal agency is considered an affirmative agency action triggering the consultation requirement. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173-74 (1978) (holding that the continued operation of the Tellico Dam was an agency action that would jeopardize and risk eradication of a federally-recognized endangered species). The ACOE has been specifically recognized as an agency subject to the § 7 consultation requirement of the ESA in its dam management capacity. *See Nat'l Marine Fisheries Serv.*, 524 F.3d at 930.

Further, the oval pigtoe mussel is a federally-designated endangered species with its habitat downstream from the Dam. R. at 9. This designation requires the ACOE to consult with the Fish and Wildlife Service before taking any discretionary agency action. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S.Ct. 361, 365–66 (2018) (stating that "[a critical habitat designation] places conditions on the Federal Government's authority to effect any physical changes to the designated area, whether through activities of its own or by facilitating private development"); *Tenn. Valley Auth.*, 437 U.S. at 160. The Dam sits upriver from the habitat of the oval pigtoe

mussel, and the adjustment of its operation during drought conditions has a profound effect on the survival of the species in the Green River. R. at 9. As a federal agency, any decision the ACOE makes which threatens to effect change on an endangered species habitat on the Green River triggers the agency's requirement to consult with the Fish and Wildlife Service pursuant to § 7 of the ESA. *Weyerhaeuser*, 129 S.Ct. at 367.

B. The ACOE Engaged in Discretionary Action Subject to the Consultation Requirement by Adjusting Dam Flow Levels and Subsequently Jeopardizing an Endangered Species Habitat

An action taken by a federal agency is considered to be discretionary if it was not compelled by an existing statutory obligation placed upon that agency. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 667 (2007); 50 C.F.R. § 402.03. Discretionary action which bears the risk of jeopardizing an endangered species habitat must be assessed by the federal government to determine alternative measures. 16 U.S.C. 1536(a)(2).

1. The ACOE action was discretionary and was not made pursuant to a statutory obligation or congressional review protocol

The Supreme Court has focused its consultation requirement jurisprudence on obligations imposed on federal agencies by statute. In *Defenders of Wildlife*, the Court stated that "the regulation's focus on 'discretionary' actions accords with the commonsense conclusion that, when an agency is required to do something by statute, it simply lacks the power to 'insure'[sic] that such action will not jeopardize endangered species." 551 U.S. at 667. It, therefore, follows that, if an agency is acting in a manner that is not specifically mandated by statute, then a court must consider the agency's action to be discretionary and subject to the requirements of § 7(a)(2) of the ESA. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) (holding that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect").

The ACOE was under no statutory obligation to adjust the Dam flow levels. Instead, the ACOE's actions were driven by the WCM, which "provides for different target lake elevations at different times of the year based on historical flows and water demands." R. at 6. The targets established under the drought level guidelines of the WCM are not binding statutory provisions that the ACOE is mandated to follow; the guidelines are flow level ranges set five decades before this matter arose. *See A.O. Smith Corp. v. United States*, 774 F.3d 359, 365 (6th Cir. 2014) (holding that the broad permissive language of an ACOE WCM regarding flow levels for a dam on the Cumberland River did not rise to the level of a mandate and any WCM-motivated action was discretionary). This lack of a mandate places the ACOE's actions squarely within the Supreme Court's definition of what constitutes a discretionary action under the consultation requirement. *Defs. of Wildlife*, 551 U.S. at 669 (stating that "§ 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions … that an agency is required by statute to undertake once certain specified triggering events have occurred").

The ACOE has argued that its action was undertaken in compliance with a WCM provision requiring it to allow flows to Greenlawn as a riparian owner. R. at 15. However, this argument runs contrary to the Supreme Court's rationale in *Weyerhaeuser*, in which the Court held that the ESA consultation requirement extended to federal agencies authorizing third-party use that would jeopardize a critical habitat. 139 S.Ct. at 366. Additionally, it was the ACOE's decision to modify the flow rates to appease Greenlawn which transitioned the lake from a Zone 2 drought warning to a Zone 3 drought emergency, at which time the ACOE curtailed hydroelectric generation and caused destruction of the downriver mussel habitats. R. at 8–9.

Further, "[w]hen an agency, acting in furtherance of a broad Congressional mandate, chooses a course of action which is not specifically mandated by Congress and which is not

specifically necessitated by the broad mandate, that action is, by definition, discretionary and is thus subject to § 7 consultation." *Nat'l Marine Fisheries Serv.*, 524 F.3d at 929. While the ACOE may have been acting in furtherance of the broad Congressional mandate that it manage federally controlled dams, its decision to adjust the water flow rates to harmfully low levels was not specifically necessitated by this mandate.

This case is distinguishable from prior court decisions regarding operation of dams. For example, in *Grand Canyon Trust v. U.S. Bureau of Reclamation*, the Ninth Circuit found that a federal agency controlling the flow levels of a dam on the Colorado River was not subject to the consultation requirement because its flow control processes required annual congressional review. 691 F.3d 1008, 1020 (9th Cir. 2012). While these dam operations affected the habitat of the endangered humpback chub, the court held that the congressional intent underlying this federal agency's operation of one specific dam made it clear that Congress purposefully exempted it from the consultation requirement. *Id.* at 1019-20. The ACOE operation of the Dam differs in that its operations were not subject to mandatory annual congressional review and were therefore not exempted from the consultation requirement. The ACOE adjusted flow levels at the beckoning of Greenlawn and to the detriment of the endangered mussels; it did not manage the Dam pursuant to congressional review. The action undertaken by the ACOE was the type intended to be regulated by Congress in its passage of the ESA. *Tenn. Valley Auth.*, 437 U.S. at 181.

Additionally, "[i]f the [discretionary] agency action 'may affect' any listed [endangered] species, the acting agency must formally consult with the federal agency responsible for the protection of the species in question." *Grand Canyon Tr.*, 691 F.3d at 1012 (citing *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998)). The ESA and its accompanying consultation requirement were drafted with the intent that all federal agencies be required to adhere

to its tenets if any federal action risked jeopardizing the habitat of an endangered species. *Tenn. Valley Auth.*, 437 U.S. at 182–83 (stating that "[section 7] substantially amplifie[s] the obligation of [federal agencies] to take steps within their power to carry out the [Endangered Species] Act").

The ACOE's modification of the Dam flow levels jeopardized and subsequently damaged the habitat of the endangered oval pigtoe mussel. By lowering the flow rates, the ACOE reduced the downriver water levels and ultimately exposed beds of endangered oval pigtoe mussels. R. at 9. These mussels require a slow, silty current in order to obtain the nutrients required for continued survival. *Id.* The effect of this action is compounded by the fact that years of water flow adjustments have changed the salinity of Green Bay, allowing predators to enter the estuary and cause harm to the mussel habitat at a level that would have otherwise been impossible. *Id.* at 10. As in *Tennessee Valley Authority*, the ACOE was mandated to engage in action that was consistent with the goals of the ESA, namely the conservation of endangered and threatened species. *See* 437 U.S. at 183; 16 U.S.C. § 1531(b)–(c) (stating that the purposes and policy of the ESA are required to be upheld by all federal agencies). The ACOE failed to adhere to its obligation to carry out the goals of the ESA by shirking its duties under the consultation requirement, resulting in large-scale harm to an endangered species.

2. *The ACOE action does not qualify for an exemption from its responsibilities under the ESA*

A federal agency action that is found to jeopardize an endangered species habitat may be exempted from compliance with the ESA if the reviewing committee finds that:

> (i) there are no reasonable and prudent alternatives to the agency action; (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; (iii) the action is of regional or national significance; and (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d)

16 U.S.C. § 1536(h)(1)(A). Additionally, the agency must establish "such reasonable mitigation and enhancement measures … as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned." *Id.* § 1536(h)(1)(B).

The ACOE did not comply with the requirements for a statutory exemption because it did not consult with the federal government and subsequently submit an exemption application through the necessary channels. *See generally id.* § 1536. An exemption may only be sought following the issuance of a "jeopardy opinion" finding that the proposed action may jeopardize the habitat of an endangered species. *Defs. of Wildlife*, 551 U.S. at 652. The ACOE did not consult with the federal government and was not issued a BiOp on its proposed discretionary action, removing any prospect of qualifying for an exemption under the statute. This failure renders any ACOE argument that its action was exempted from the ESA provisions unworkable, as it failed to comport with the authorized procedural safeguards.

The § 7 consultation requirement is a prophylactic measure intended to protect federally designated endangered species from suffering harm at the hands of federal agencies. 16 U.S.C. §§ 1531(b), 1536. Consultation ensures interagency cooperation and analysis of a proposed course of action, so congressionally mandated protections may be upheld. *Id.* § 1536(a)(2). The ACOE's failure to comply with the consultation requirement risks doing harm to the entirety of the ESA's protections, as it represents an outright flaunting of the requirement to comport with duties to protect the nation's designated at-risk biological communities.

In conclusion, the ACOE engaged in discretionary action subject to the consultation requirement and failed to follow the relevant procedures to ensure that endangered species were

not affected by its course of flow modifications. The District Court erred in granting the ACOE's motion for summary judgment on this issue.

III. THE DISTRICT COURT WAS CORRECT IN DETERMINING THAT GREENLAWN COMMITTED A "TAKE" BY CAUSING THE DEATH OF ONE-QUARTER OF THE OVAL PIGTOE MUSSEL POPULATION AND ELIMINATING THEIR HABITAT.

Section nine of the ESA prohibits any "person" from "taking" a listed species. 16 U.S.C. § 1538(a)(1)(B). A person commits an unlawful "taking" if they "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct." *Id.* § 1532(19). The term "person" includes "any officer, employee, agent, department, or instrumentality . . . of any State, municipality, or political subdivision of a state." *Id.* § 1532(13). The citizen suit provision of the ESA allows private plaintiffs to sue on behalf of an endangered species to enjoin activities that are reasonably certain to cause "harm." *Bennett v. Spear*, 520 U.S. 154, 165-66 (1997); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995). Citizen suits may be brought against both private and public violators of the ESA. *Spear*, 520 U.S. at 166.

The District Court held the City of Greenlawn liable for an unlawful "take" when its excessive water withdrawals caused the death of one-quarter of the Green River's oval pigtoe mussels. R. at 5, 17. As a municipality, Greenlawn is a "person" who is prohibited from "taking" a listed species under the ESA. *See* 16 U.S.C. § 1532(13). If allowed to continue diverting water at those rates, Greenlawn will cause the Green River's remaining oval pigtoe mussel population to be eliminated. R. at 18.

The only issue on appeal regarding Greenlawn's violation of § 9 is whether they caused the harm to the oval pigtoe mussels. Causation is a question of fact, reversible only when clearly erroneous. *Oahn Nguyen Chung v. StudentCity.com, Inc.*, 854 F.3d 97, 102 (1st Cir. 2017); *Urbach v. United States*, 869 F.2d 829, 831 (5th Cir. 1989). Greenlawn cannot ignore the standard of

review and re-urge this Court to weigh evidence that the district court already weighed. Nevertheless, mistakenly reviewing causation as a mixed question of law and fact would not change the result.

A. By Taking Nearly All of the Water that was En Route to the Oval Pigtoe Mussels, Greenlawn Directly Caused the Death of One-Quarter of the Population.

It is not disputed that about one-quarter of the Green River's oval pigtoe mussel population died following Greenlawn's excessive water withdrawals. R. at 9. The District Court was correct to find that these withdrawals caused the "clearly foreseeable" degradation to the oval pigtoe mussels' downstream habitat. R. at 17. Habitat modification, which significantly impairs the breeding and sheltering of a protected species, is deemed to unlawfully "harass" and constitutes a "take" under the ESA. 50 C.F.R. § 17.3; *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996).

The benefit of the water flowing down the Green River is a zero-sum game. Every drop that Greenlawn withdraws to wash its' citizens' cars and water their ornamental plants reduces the amount flowing downstream to the oval pigtoe mussels. Greenlawn withdrew nearly all of the water in the Bypass Reach, reducing downstream flows to zero. R. at 9. Once there was no water flowing downstream, the oval pigtoe mussels' habitat was eliminated. *Id.* Many oval pigtoe mussels were no longer submerged in water and suffocated to death in stagnant pools of silt. R. at 8-9. By eliminating the habitat, Greenlawn went well-beyond the "modification" required to be liable for a "take." *See Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1075 (9th Cir. 2001).

An examination of the competing uses leading up to the harm reveals the immediate connection between Greenlawn's withdrawals and the degradation of the mussels' habitat

downstream. *See* R. at 8-9, 16-17. In the early Spring of 2017, ACOE was instituting Zone 2 drought flow restrictions in the Bypass Reach, as required by the WCM. R. at 8. At this time, the water levels were low, but the drought restrictions ensured sufficient downstream flows to sustain the oval pigtoe mussels' habitat. *Id.* It was not until April 23, when Greenlawn strong-armed the ACOE into lifting flow restrictions, that the Green River dried up downstream of the Bypass Reach. *Id.* By May 15, Greenlawn was the only remaining user of Green River's water flows, as the ACOE had curtailed all other competing uses to make-way for the self-purported "property owner" of the Green River. R. at 9. Following this, Greenlawn consumed nearly all of the water flows, leaving no water for the oval pigtoe mussels downstream, one-quarter of which died from insufficient water flows. *Id.* As the only user of water flows in the Green River's Bypass Reach, it could only have been Greenlawn that caused the harm.

Greenlawn committed an act that modified and degraded the habitat of an endangered species by withdrawing nearly all of the water flows, regardless of drought conditions were present. *Id.* Any attempt to blame this harm on ACOE or the drought is foolhardy, as Greenlawn had an independent responsibility to refrain from "taking" an endangered species. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F.Supp. 1126, 1133 (E.D. Cal. 1992). Furthermore, the allocation of responsibility for the harm speaks to remedies Greenlawn may have against other parties, including ACOE, and is not pertinent to these proceedings. *Id.* ("the remedies [defendant] may have under state law against the [agency] do not absolve it from its responsibility under federal law to avoid any 'taking'"). By blaming the drought or ACOE for their contributions, Greenlawn does not absolve themselves of liability for their own independent actions that caused harm an endangered species. Thus, the District Court did not clearly err in finding that Greenlawn violated § 9 by committing an act that caused "harm" to the oval pigtoe mussels.

B. The Distinction Between Greenlawn's Activities Being A Direct or Indirect Cause of Harm to Oval Pigtoe Mussels Has No Bearing on These Proceedings.

At best, Greenlawn can argue that their activities were an indirect cause to the destruction of the oval pigtoe mussel habitat. However, actions that indirectly modify the habitat of a protected species are strictly prohibited by the ESA. 50 C.F.R. § 402.02; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 (1995); *M. Rio Grande Conservancy Dist. v. Babbitt*, 206 F.Supp.2d 1156, 1171 (D.N.M. 2000) ("[d]estruction or adverse modification is . . . a direct or indirect alteration" that affects survival or recovery of a protected species). In addition, Greenlawn chose not to pursue the alternatives available to increase their water withdrawals lawfully. Therefore, Greenlawn is liable for a "take" regardless of the causation analysis they urge this Court to employ.

1. Greenlawn is still liable under § 9 if they successfully urge this Court that they were merely an indirect cause of the harm to oval pigtoe mussels.

A person need not cause direct harm to a protected species for the ESA to intervene. *See e.g., Sweet Home*, 515 U.S. at 687. Moreover, Greenlawn's suggestion that the ESA does not apply to indirect harms caused by activities occurring outside of a habitat is "antithetical to the basic purpose of the ESA to protect endangered species and prevent their further decline." *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995); *see also San Carlos Apache Tribe v. United States*, 272 F. Supp.2d 860, 874 (D. Ariz. 2003) ("'harm' can be realized through the modification or degradation . . . indirect or prospective"); R. at 16.

There is nothing unusual about the facts of this case, nor the District Court's finding of a "take." It is well-established that adverse downstream effects from the management of competing uses in a water system may constitute a "take." *In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 625-26 (8th Cir. 2005) (operating river flows at an unnatural rate may result in "taking" three

protected species); *Nat. Res. Def. Council v. Norton*, 236 F. Supp.3d 1198, 1240-41 (E.D. Cal. 2017) ("take" resulted from failing to divert sufficient water flows from proper sources); *American Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp.2d 230, 258-60 (D.D.C. 2003) (allowing heavy flows will flood nests of protected bird downstream); *Glenn-Colusa Irrigation Dist.*, 788 F. Supp. at 1133 (river pumping operations caused "harm" to protected salmon).

Moreover, the location of activities that cause harm to a protected species is not a consideration under § 9, contrary to Greenlawn's continued beliefs. Although distance is not considered, the sixty-mile distance from which Greenlawn's harmful activities occurred, is not so great a distance that is beyond the reach of the ESA. *See Middle Rio Grande Conservancy*, 206 F. Supp.2d at 1164 (continuous sufficient water flows required over 163 mile stretch of a river to prevent a 'take' of endangered minnow). Likewise, it is irrelevant that the Green River is not designated as a critical habitat for the oval pigtoe mussels. *Loggerhead Turtle v. County Council of Volusia Cty.*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995) ("[i]t is irrelevant for the purposes of the [ESA] whether the 'taking' at issue involves a critical habitat or not").

While opposing NUO's motion for summary judgment, Greenlawn could not cite a single case that supported their proposition that a "take" cannot occur from outside the habitat in question. R. at 17. On appeal, the story remains the same. The complete absence of law supporting Greenlawn's position indicates that the District Court did not clearly err by ruling that the upstream water withdrawals caused a "take" of endangered oval pigtoe mussels living downstream.

2. Greenlawn could have increased its water withdrawals last Spring while at the same time complying with the ESA but chose not to do so.

The ESA allows a person that conducts activities which create a threat of serious harm to an endangered species to apply for an incidental take permit. 16 U.S.C. § 1539(a). An applicant for an incidental take permit must submit an application to the Secretary of the Interior,

accompanied by a conservation plan. *Id.* If the application is granted, the permit holder is not liable for any "take" that falls within the scope of the taking authorized by the Secretary of the Interior. *Id.* Greenlawn was not a holder of an incidental take permit, making their "takes" of oval pigtoe mussels unlawful.

On a local level, Greenlawn may seek relief from other competing users of the Green River's water flows. Nothing prevented Greenlawn from revising the WCM to provide them with additional water flows, or adjusting the procedures during the various drought levels. However, Greenlawn cannot take it upon themselves to reallocate the competing uses of Green River's water and "take" a protected species in the process. *See Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 327 (D.C. Cir. 1987) (a party may not deviate from procedures governing the competing uses of a public resource). Of course, any change to the WCM would have to continue sending an average daily flow of twenty-five CFS second downstream to sustain the population of oval pigtoe mussels.

IV. THE ENDANGERED SPECIES ACT REMOVED THE DISTRICT COURT JUDGE'S DISCRETION TO BALANCE THE EQUITIES OF GREENLAWN'S MUNICIPAL ACTIVITIES PRIOR TO ENJOINING THEIR HARMFUL CONDUCT.

This action was brought under § 11 of the ESA which authorizes citizen suits "to enjoin any person . . . who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof . . ." 16 U.S.C. § 1540(g)(1)(A). The citizen-suit provision is an "authorization of remarkable breadth" and grants standing to any person in bringing a civil suit to enjoin alleged violations of the ESA. *Spear*, 520 U.S. at 164-66. Any prudential standing requirement is eliminated, and plaintiffs need only establish the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This case must continue regardless of the motivations of NUO in bringing this suit on behalf of the oval pigtoe mussel. *Loggerhead Turtle*, 896 F. Supp. at 1177.

When an injunction is granted by a federal court, it is reviewed under the highly deferential abuse of discretion standard. *Atchafalaya Basinkeeper*, 894 F.3d at 696; *Bhd. of Locomotive Eng'rs*, 367 F.3d at 678. The District Court's determinations of law are reviewed de novo and determinations of fact are reviewed for clear error. *Atchafalaya Basinkeeper*, 894 F.3d at 696. The fact that the District Court did not hear live testimony on the motion does not invoke a different standard of review. *Pogliana v. U.S. Army Corps of Eng'rs*, 49 Fed. Appx. 327, 329 (2d Cir. 2002) (citing *Zervous v. Verizon New York, Inc*., 252 F.3d 163, 171 (2d Cir. 2001)) ("a district court's decision to grant or deny a preliminary injunction is . . . reviewed for abuse of discretion, and there is no exception for cases in which the district court heard no live testimony"). For the reasons that follow, the District Court did not abuse its discretion in granting an injunction to prevent further harm to an endangered species.

A. The District Court was Correct Not to Re-balance the Equities of Beneficial Municipal Activities Prior to Enjoining Greenlawn From Causing the Extirpation of Green River's Oval Pigtoe Mussel Population.

For injunctive relief under the ESA, the equities have already been balanced by Congress, and they afforded endangered species the highest order of priority. *Tenn. Valley Auth.*, 437 U.S. at 194. Congress enacted the ESA with the intent to "halt and reverse the trend towards species extinction, *whatever the cost*." *Id.* at 184-85 (emphasis added). In accordance with *Tenn. Valley Auth. v. Hill*, courts have recognized that the ESA completely removes a federal court's discretion in balancing the hardships between the parties. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1510-11 (9th Cir. 1994); *Alabama v. Army Corps of Eng'rs*, 441 F. Supp.2d 1123, 1130 (N.D. Ala. 2006); *Greenpeace Found. v. Mineta*, 122 F. Supp.2d 1123, 1136-37 (D. Haw. 2000). Likewise, a federal court's discretion to analyze and weigh the competing considerations of social utility is also eliminated.

Glenn-Colusa Irrigation Dist., 788 F. Supp. at 1132. Nevertheless, Greenlawn argues that the District Court abused its discretion by granting the injunction, notwithstanding the fact that it had no discretion to abuse.

With the equities balanced by Congress, the District Court needed only to consider two factors prior to imposing injunctive relief. First, that there was a substantial likelihood that NUO would succeed on the merits of their § 9 claim. *Cascadia Wildlands v. Scott Timber Co.*, 715 Fed. Appx. 621, 623-24 (9th Cir. 2017). Second, that irreparable injury would result if the injunction is not granted. *Id.* This standard is the same for both preliminary and permanent injunctions. *Idaho Rivers United v. U.S. Army Corps of Eng'rs*, 156 F. Supp.3d 1252, 1260 (W.D. Wash. 2015) (citing *Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th Cir. 2010)).

NUO needed only establish a likelihood of succeeding on the merits of one of their claims to satisfy the first part of the injunction analysis. *Burford*, 835 F.2d at 319. The District Court granted summary judgment in favor of NUO on their § 9 claim asserted against Greenlawn. R. at 5, 17. By actually succeeding on the merits of their claim, NUO satisfied their need to show a "substantial likelihood" of success.

For an injunction under the ESA, the requisite irreparable injury is established if harm to a protected species is sufficiently likely. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely "an injunction must issue). Past injury to a protected species is not needed. *Rosboro Lumber Co.*, 50 F.3d at 785-86. However, one-quarter of Green River's oval pigtoe mussel population has already died. R. at 9. On that basis alone, the District Court's injunction was proper.

The ESA goes further and actually required the District Court to enjoin Greenlawn specifically from causing a future "take" of an oval pigtoe mussel. The Supreme Court has repeatedly recognized that the ESA, at a minimum, requires an injunction to stop actions that cause a "take" of an endangered species. *Amoco Prod. Co.*, 480 U.S. at 543, n.9; *Weinberger*, 456 U.S. at 313-14; *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000) (injunction must issue to prevent actions that "would result in an unlawful 'take'"). When a person causes a "take" of a protected species, "[r]efusal to enjoin the action would have ignored the 'explicit provisions of the Endangered Species Act.'" *Weinberger*, 456 U.S. at 314 (quoting *Tenn. Valley Auth.*, 437 U.S. at 173). In fact, once a "take" has occurred, only the Secretary of the Interior has discretion to allow activities that threaten future "takes" by issuing an incidental take permit. *Loggerhead Turtle*, 896 F. Supp. at 1178 ("Congress gave the Secretary of the Interior the authority to weigh these circumstances in deciding whether to issue an incidental take permit."); *see* 16 U.S.C. § 1539. The federal courts were not granted similar discretion in deciding whether to issue an injunction").

Greenlawn does not dispute that average daily water flows below twenty-five CFS downstream of the Bypass Reach cause harm to oval pigtoe mussels and their habitat. R. at 9. These withdrawals significantly modify their habitat, and constitute "harm" resulting in a "take" under the ESA. *See* 50 C.F.R. § 17.3; R at 8-9. Without an incidental take permit, the District Court did not have any discretion, and was required to enjoin Greenlawn from causing average daily water flows downstream of the Bypass Reach to fall below twenty-five CFS. It follows that the District Court could only have abused their discretion through a "refusal to enjoin" Greenlawn's harmful actions. *See Weinberger*, 456 U.S. at 314 (quoting *Tenn. Valley Auth.*, 437 U.S. at 173).

In any event, injunctions may be issued to prevent threats of future harm that are likely to occur. *Amoco Production Co.*, 480 U.S. at 545; *Nat'l Res. Def. Council v. Zinke*, 347 F. Supp.3d

465, 504-505 (E.D. Cal. 2018). With drought conditions becoming more frequent, harm to oval pigtoe mussels is certain to reoccur if Greenlawn continues their excessive water withdrawals. R. at 8-9 ("Plaintiff's expert offered uncontradicted deposition testimony that . . . if allowed to persist, these conditions would entirely eliminate the Green River population of the oval pigtoe mussel"). The reasonably certain threat of extirpation of an endangered species clearly warrants injunctive relief. Hence, the injunction issued by the district court must stand.

B. Had the District Court Balanced the Equities as Greenlawn Requests the Injunction Would Still Have Been Issued Thus Their Failure to Do so Would Constitute Harmless Error.

When a party requests relief on appeal that would not change the outcome below, the decision must be upheld even if potentially erroneous because it was a harmless error. 28 U.S.C. § 2111 (2012); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 540, 553-54 (1984). Had the District Court balanced the equities of Greenlawn's municipal activities against the extirpation of oval pigtoe mussels in the Green River, the injunction would still have issued, as it served both the plain language and purpose of the ESA. In addition, the conditions upon which the injunction was issued were within the District Court's power and could have issued simply to enforce the WCM. Therefore, the District Court's reluctance to balance the equities as requested by Greenlawn constitutes harmless error, and the injunction must stand.

After finding that a "take" had occurred, the District Court could have ordered a more extreme remedy, such as prohibiting all water diversions. Instead, the District Court very narrowly crafted injunctive relief that achieved the goals of the ESA, without terminating Greenlawn's use of the water flows. R. at 5, 17-18. The injunction issued simply ensures that Greenlawn cannot "take" any additional oval pigtoe mussels, which is plainly authorized by the ESA. 16 U.S.C. § 1540(g)(1)(A) (the district court shall "enjoin any person . . . who is alleged to be in violation of

any provision of this Act or regulation issued under the authority thereof . . ."); R. at 18. It follows that, if the District Court can enjoin activities that "take" a protected species, then it can also specify the conditions under which the otherwise enjoined activity can occur. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("[t]he essence of equity jurisdiction has been the power . . . to mould each decree to the necessities of the particular case"); *see also Pac. Coast Fed'n of Fishermen's Assns. v. U.S. Bureau of Reclamation,* 138 F. Supp.2d 1228, 1247-50 (N.D. Cal. 2001) (court tailored injunctive relief to ensure continued compliance with ESA). Thus, the District Court did not abuse its discretion by specifying the condition that Greenlawn may withdraw water from the Green River so long as they do not cause the average daily flows to drop below twenty-five CFS.

Not only was the District Court correct to "preserve the status quo where endangered species are threatened," but it was also justified in preserving the multiple uses of the Green River as they were structured before Greenlawn began violating the WCM. *See Burford*, 835 F.2d at 327; *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1070 (6th Cir. 1977), *aff'd* 437 U.S. 153. Since Greenlawn has caused past harm and a threat of future harm, only an injunction that undermined efforts to preserve and protect the oval pigtoe mussel would have been properly denied. *See Idaho Rivers United*, 156 F. Supp.3d at 1266-67. Here, however, the opposite is true. No ESA purpose would be served by waiting for additional harm to occur before enjoining Greenlawn's excessive water withdrawals. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *Idaho Rivers United*, 156 F. Supp.3d at 1266-77.

Furthermore, Greenlawn should have been familiar with the restrictions imposed by the District Court's injunction. Greenlawn and ACOE were bound by a scheme whereby their use of the Green River's water flows was subject to specified procedures, which already balanced the

equities of beneficial municipal activities. *See Burford,* 835 F.2d at 327; R. at 6-7. This scheme was documented in the WCM and has governed competing uses of water flow since 1968. R. at 6. On April 23, Greenlawn, by strong-arming ACOE, set aside the equities and public interests that guided the creation of the WCM, and began withdrawing excessive amounts of water from the Bypass Reach. R. at 8-9. To nobody's surprise, this operation had detrimental effects downstream, including the decimation of oval pigtoe mussels. *Id.* Greenlawn's actions did not represent the proper balance of competing uses of the Green River as set forth by the WCM and violated the procedures therein. *See Burford,* 835 F.2d at 327. Therefore, separate from their authority under the ESA, the District Court could have properly issued the injunction to bring Greenlawn back into compliance with the WCM.

c. The ESA Does Not Yield to Those Holding State Water Rights

Unless a statute clearly restricts the federal court's discretion to design appropriate injunctive relief, the court is free to do so. *United States v. Oakland Cannabis Buyers' Co-Op*, 532 U.S. 483, 488 (2001). Nothing in the ESA suggests that there is a restriction on the federal court's power to grant injunctive relief. *Aransas Project v. Shaw*, 835 F. Supp.2d 251, 272 (S.D. Tex. 2011). To the contrary, the ESA bestows broad and mostly unrestricted equitable powers upon federal to enforce its provisions. *Id.* at 272-73.

The purported riparian rights asserted by Greenlawn did not restrict the District Court's equitable powers to grant an injunction. The ESA provides no exemption from compliance to persons possessing state water rights and empowers a federal court to restrict any property owner's rights in order to prevent a "take." *Aransas Project*, 835 F. Supp.2d at 280 n.13; *Glenn-Colusa Irrigation Dist.*, 788 F. Supp. at 1134. Fortunately for Greenlawn, the injunction does not ban the use of water for municipal activities and merely requires downstream water flows to maintain at a

certain rate. R. at 5, 18. This does not even interfere with Greenlawn's purported rights; rather, only the manner in which it exercises those rights. *See Glenn-Colusa Irrigation Dist.*, 788 F. Supp. at 1134.

Moreover, the vast differences of riparian rights across the states would produce absurd and inconsistent results through different applications of the ESA depending on state law. *Id.* at 1134 ("[i]t is doubtful that Congress intended that the Endangered Species Act would apply differently in different states depending on state law"). States are permitted to enact laws and regulations only if they afford greater protection to endangered and threatened species than the ESA. 16 U.S.C. § 1535(f) ("[a]ny state law or regulation . . . may be more restrictive than . . . this chapter, but not less restrictive than the prohibitions so defined"). Thus, to the extent New Union's law on riparian rights permits a "take" of the oval pigtoe mussel, it is preempted.

CONCLUSION

During drought conditions, Greenlawn unreasonably withdraws water from the Green River. By using such withdrawals for lawn watering, Greenlawn is not entitled to the domestic-use preference. Through its massively increased consumption due to watering grass, Greenlawn has decimated the public right to fish. As a public right, the water withdrawals are per se unreasonable because private rights are subordinate to those of the public. Even if there is not a per se violation, a determination of reasonableness is a question of fact that is in dispute, in which case this court should reverse the District Court and remand for further proceedings. The District Court erred in granting the ACOE's motion for summary judgment under § 7 of the ESA. The ACOE engaged in discretionary action by adjusting the dam flow levels in a manner that jeopardized the habitat of the endangered oval pigtoe mussel. Summary judgment against under § 9 must be upheld, as the District Court did not clearly err by finding that there were no genuine

disputes of material facts regarding Greenlawn's causation of harm to oval pigtoe mussels and habitat modification. It follows that the injunction issued by the District Court must stand, as it was necessary to prevent Greenlawn from committing future "takes" of endangered oval pigtoe mussels.