Team No. 16

THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket CA. No. 19-000987

NEW UNION OYSTERCATCHERS, INC.,

Appellant,

- v. -

UNITED STATES ARMY CORPS OF ENGINEERS,

Appellee,

and

CITY OF GREENLAWN, NEW UNION,

Appellant.

On Appeal from an Order Dismissing Appellant's First and Third Claims for Relief

BRIEF OF NEW UNION OYSTERCATCHERS, INC., Appellant

Oral Argument Requested

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STATEMENT OF JURISDICTION

New Union Oystercatchers, Inc. ("Appellant") appeals from an Opinion and Order dismissing Plaintiffs' First and Third Claims for Relief, entered May 15, 2019, by the honorable Judge Remus in the U.S. District Court for New Union, No. 66-CV-2017. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2018), given the Complaint raises questions arising under the federal Endangered Species Act. Supplemental jurisdiction was also proper over the state common law claim under 28 U.S.C. § 1367 (2018). Appellants filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4 (2018). The U.S. Court of Appeals for the Twelfth Circuit has valid jurisdiction over the appeal under 29 U.S.C. § 1291 (2018).

STATEMENT OF ISSUES

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

II. Whether the Army Corps of Engineers' operation of the Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is a discretionary action subject to the consultation requirement within Section 7 of the Endangered Species Act?

III. Whether Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitutes a "take" of the endangered oval pigtoe mussel in violation of Section 9 of the Endangered Species Act?

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

STATEMENT OF CASE

I. FACTUAL BACKGROUND

Since its founding in 1893, the City of Greenlawn (Greenlawn) has withdrawn water from what is now the Bypass Reach portion of the Green River to supply its municipal residents. R. at 5. The flow of water available for Greenlawn's withdrawal is determined by the volume of water released by the Army Corps of Engineers (ACOE) in its operation of the Diversion Dam and Howard Runnet Dam, collectively Howard Runnet Dam Works (HRDW), located upriver from Greenlawn at Howard Runnet Lake. R. at 5. The ACOE's operation of the HRDW is governed by a Water Control Manual (WCM), which prescribes the appropriate release levels under normal conditions, as well as during varying degrees of drought conditions. R. at 7. The ACOE's operation of the HRDW is further guided by an agreement entered into with Greenlawn promising to release sufficient water to satisfy Greenlawn's riparian rights under New Union law. R. at 6.

While the ACOE initially followed the protocol outlined by the WCM when drought conditions occurred in the spring of 2017, the ACOE later deviated from its governing document to supply Greenlawn with increased flows for municipal consumption. R. at 9. The ACOE followed Greenlawn's assertion that it had no choice but to deviate from the WCM and increase flows in order to fulfill Greenlawn's riparian rights. R. at 9. However, the ACOE had no guidance regarding the extent of Greenlawn's riparian rights and was left to interpret common law riparian doctrine. Without consulting with any other federal agency, the ACOE chose to agree with Greenlawn's interpretation that it was entitled to essentially unlimited water to supply its municipal residents under a domestic preference. R. at 8–9.

Because the ACOE allowed Greenlawn to withdraw these increased levels during drought conditions, the Green River dried up downstream. R. at 9. These dry conditions severely impaired

the habitat of the oval pigtoe mussels (OPM), a listed endangered species requiring a flowing current to survive. R. at 9. In fact, 25 percent of the OPM population residing in the Green River downstream from Greenlawn died before drought conditions lifted. R. at 10. Acquiescing to increase releases to the Bypass Reach for Greenlawn forced the ACOE to halt its hydroelectric power operations, which also caused increased electric rates for area consumers including all of the members of New Union Oystercatchers, Inc. (NUO). R. at 9–10. NUO is a not-for-profit membership association representing the interests of oystercatchers in the Green Bay. R. at 10. In addition, the reduced river flow increased the salinity of the Green Bay, severely reducing the oyster population there and causing extreme economic hardship for NUO's members. R. at 10.

II. PROCEDURAL HISTORY

On May 17, 2017, NUO served a Notice of Intent to sue the ACOE and Greenlawn, alleging violations of the Endangered Species Act (ESA). R. at 10. NUO waited the necessary 60 days and then filed a complaint against the ACOE and Greenlawn in the U.S. District Court for New Union. R. at 11. NUO asserted claims against the ACOE for a violation of Section 7 of the ESA and against Greenlawn for a violation of Section 9 of the ESA. The Complaint also included a riparian rights claim against Greenlawn under state common law. The ACOE filed a cross-claim against Greenlawn joining NUO's claim that Greenlawn's water withdrawals are an illegal "take" of the oval pigtoe mussels in violation of Section 9 of the ESA. Greenlawn answered the Complaint and Cross-Complaint, and filed a counterclaim against the ACOE seeking a declaration of its riparian right to continued flows in the Bypass Reach. R. at 11. On May 15, 2019, Judge Remus issued an Opinion and Order granting Greenlawn's motion for summary judgment declaring its riparian rights and dismissing NUO's common law claim, granting the ACOE's motion for summary judgment dismissing NUO's Section 7 claim, and granting summary judgment for NUO and the

ACOE on the Section 9 claim and cross-claim against Greenlawn. R. at 11. Judge Remus also issued an injunction enjoining Greenlawn from causing water withdrawals which would result in the downstream flows to drop below 25 cubic feet per second. R. at 19. Appellants filed a timely Notice of Appeal, granted by this Court. R. at 1.

SUMMARY OF ARGUMENT

Greenlawn does not have a right to continue water withdrawals for municipal purposes during a drought without conservation measures. As a riparian landowner, Greenlawn is entitled to make reasonable use of the Green River at all times. However, changing environmental circumstances and water uses create a dynamic understanding of what constitutes reasonable use. Therefore, a timely inquiry must be made to balance Greenlawn's interest in the river with that of other parties holding a stake in the water, namely, NUO, the ACOE, and the public at large. NUO's rights to the downstream flow stem from its members' oyster harvesting licenses, which are government-granted rights to use the water that may not be infringed upon by a riparian proprietor's otherwise reasonable use. In addition, the ACOE's right as a co-riparian on the Green River requires its interest in using the water be accounted for in determining the extent of Greenlawn's reasonable use. Finally, the public trust doctrine places natural resources like the Green River in a "trust" held by the government for the public's use. This doctrine has always included a right to fish, which was not considered when the Green River was allowed to drop to near-zero flow rates during the drought. Because NUO, the ACOE, and the public all hold rights in the Green River, Greenlawn's right to water withdrawals is not unlimited and it must impose conservation measures to strike a balance with these other parties during a drought.

The ACOE's deviation from the WCM was a discretionary agency action requiring consultation under Section 7 of the ESA. Altering the volume of water qualifies as an agency

action because the ACOE is a federal agency and is the entity actually releasing the flow to modify the river. Moreover, the ACOE retained discretion over this action that could have been exercised for the benefit of the endangered OPM. This discretion was inherent in the judgment the ACOE had to employ in determining the extent of Greenlawn's riparian rights. Under common law riparian doctrine, the ACOE had to balance the competing interests at stake in the Green River. In so doing, the ACOE could have chosen to release a smaller volume of water for Greenlawn's consumption and maintained a flowing river habitat for the OPM. Therefore, the ACOE had an opportunity to account for the impact on the endangered species and should have at least engaged in consultation in accordance with the ESA.

By withdrawing the entire flow of water from the Green River Bypass Reach during a drought, Greenlawn caused significant habitat modification to the OPM habitat, which constitutes a take in violation of Section 9 of the ESA. Greenlawn argues actions occurring outside of the habitat cannot constitute a take of the endangered species, however, the broad intention of the ESA supports protecting endangered species from a variety of harms, whether direct or indirect. Additionally, the administrative agencies charged with implementing the ESA have provided guidance on the types of actions which will constitute harm to an endangered species, including actions occurring outside of the habitat which have the effect of significantly impairing essential behavioral patterns. Greenlawn also argues its withdrawals were one of many causes of the reduced Green River flows and therefore cannot be held responsible for the take. However, Greenlawn's water withdrawals were fairly traceable to the resulting harm to the OPM, and the reduced downstream flows were a foreseeable result of Greenlawn's excessive water consumption; therefore, Greenlawn was the proximate cause of the unlawful take of the endangered OPM.

The District Court for New Union was not required to balance the equities before enjoining Greenlawn's unreasonable water withdrawals when the court found such withdrawals, if allowed to continue, would cause the extirpation of the OPM population in Green River. The traditional bases for injunctive relief are irreparable harm and inadequacy of legal remedies. These bases were met because this relief is the sole remedy for concerned citizens such as NUO and the district court found irreparable harm to the OPM. The court was not required to balance the equities because Congress already balanced the equities in favor of protecting endangered species; therefore, cases brought under the ESA do not require balancing where irreparable harm to the species is found, as it was by the district court. This finding ends the district court's analysis and requires the court to issue an injunction regardless of the injury presented by the other party.

Appellant New Union Oystercatchers, Inc. respectfully requests the Twelfth Circuit Court of Appeals reverse the district court's decision on the first and second issues and remand for further proceedings, and affirm the district court's decision on the third and fourth issues before the court.

STANDARD OF REVIEW

The U.S. District Court for New Union granted summary judgment on the first, second, and third issues now before the Court; therefore, these decisions should each be reviewed de novo. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) ("We review the district court's ruling on summary judgment de novo."). Accordingly, the district court's legal determinations are entitled to little or no deference. *Id.* Alternatively, appellate review of injunctions granted by lower courts are afforded significant deference and reviewed only for abuse of discretion. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). Therefore, the fourth issue regarding the injunction issued against Greenlawn is limited to a determination of whether the district court abused its discretion. *See id.*

ARGUMENT

I. RIPARIAN RIGHTS DO NOT GUARANTEE GREENLAWN THE RIGHT TO WITHDRAW UNLIMITED AMOUNTS OF WATER FOR MUNICIPAL PURPOSES DURING A DROUGHT.

Greenlawn is undisputedly a riparian proprietor entitled to assert its right to a reasonable use of the Green River. *See generally* BARTON THOMPSON JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 32 (6th ed. 2018) (explaining riparian rights extend to owners of land abutting water and afford the owner a reasonable use of such water's flow). But reasonable use certainly does not mean unlimited use. Although cities are typically not recognized as riparians, Greenlawn enjoys this title because the State of New Union has adopted the minority rule permitting it to do so. *See Tubbs v. Potts*, 45 N.U. 999 (1909). However, this status does not bestow special rights beyond those common to all riparians. *See* RESTATEMENT (SECOND) OF TORTS § 844 cmt. f (AM. LAW INST. 1979) (maintaining riparian municipalities must still curtail their use to the extent it injures the reasonable use of other riparians). As such, the meaning of "reasonable use" for Greenlawn, like for all other riparians on the Green River, must be recalibrated in times of drought. *See id.* This adjustment is necessary because the rights of several other parties curtail Greenlawn's permissible water consumption, including NUO, the ACOE, and the public at large.

A. Greenlawn Cannot Use Its Riparian Rights To Withdraw Water from the Green River When It Harms Nonriparians Licensed To Use Public Water, Like NUO.

"A riparian proprietor is subject to liability for making a use of the water of a watercourse or lake that causes harm to a nonriparian exercising a right created by governmental authority, permit or license to use public or private water." RESTATEMENT (SECOND) OF TORTS § 856(3). The members of NUO possess such a licensed right to use the Green Bay at the mouth of the Green River and have been harmed in this right as a result of Greenlawn's riparian activities. NUO's right to use the water is protected despite admittedly not being a riparian landowner. R. at 13. Whether

a riparian proprietor's use is found unreasonable against its co-riparians is irrelevant in the context of liability to a nonriparian. *See* RESTATEMENT (SECOND) OF TORTS § 856.

As in all Eastern states where oyster harvesting is available, NUO's members presumably must possess commercial fishing licenses to use the Green Bay. *See, e.g.*, GA. CODE ANN. § 27-4-190 (2019); N.J. STAT. ANN. § 50:2-1 (2019). Due to the unique nature of oyster harvesting, this permitting process often goes beyond mere permission to take a boat out on the water—it also requires leasing the waterbody's floor to dredge or scrape the bottom during harvesting. *See, e.g.*, LA. STAT. ANN. § 56:425 (2019). By virtue of their licenses to use Green Bay and dredge its floor for oyster harvesting, NUO's members have a government-granted right to use this water body. Riparian rights give the landowner "no privilege to inflict harm on the person holding rights so derived from the United States." RESTATEMENT (SECOND) OF TORTS § 856 cmt. e.

The rights of NUO's members have been harmed by Greenlawn's excessive water consumption. All NUO members suffered reduced harvests, and thereby incomes, during the most recent drought in the Spring of 2017. R. at 10. Several NUO members were even forced to give up operations altogether. *Id.* These minimal harvests were the direct result of reduced flows coming from the Green River, from which Greenlawn insisted on withdrawing amounts of water sufficient for residents to maintain their green lawns and ornamental plants. R. at 8. However, Greenlawn is not entitled to continue withdrawing water without conservation measures during a drought to the extent that such withdrawal harms those with government-granted rights to use the water, such as NUO. *See* RESTATEMENT (SECOND) OF TORTS § 856 cmt. e.

B. Regardless of Liability to Nonriparians Like NUO, Unlimited Water Withdrawal, and Even That Requested by Greenlawn, is Unreasonable Under the Circumstances.

Riparian rights are primarily defined by the riparian's relationship to other riparians. *See generally* THOMPSON, *supra*, at 33. Common law riparian doctrine prescribes that proprietors are

entitled to reasonable use not as an abstract understanding of reasonable, but in the sense of reasonable as a balance among other riparians. *See id.* Therefore, what use is reasonable is largely fact-based and dependent on the particular circumstances, such as the purpose of the use in question, water level conditions, and riparian proprietors involved. RESTATEMENT (SECOND) OF TORTS § 850A. This reality means it is often difficult to know with any certainty the exact extent of one's right to water use under riparian doctrine. *See* THOMPSON, *supra*, at 34 ("The only path to certainty lies in expensive, highly fact-specific litigation that is of limited precedential value."). Even so, it is entirely certain that Greenlawn is not entitled outright to unlimited water consumption during a drought. While the precise amount of withdrawal is unknown, it cannot go unchecked during a drought because Greenlawn is not the only party holding a right in the Green River.

1. *The Preference for Domestic Water Uses Does Not Extend to Municipalities Like Greenlawn.*

As the district court indicated, riparian states like Arkansas have recognized "[t]he right to use water for strictly domestic purposes—such as for household use—is superior to many other uses of water—such as for fishing, recreation and irrigation." *Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955); *see also* R. at 13. However, this superiority is traditionally in regard to individual households, not municipalities. *See* RESTATEMENT (SECOND) OF TORTS § 844 cmt. f ("the withdrawal of water to supply the domestic needs of the public is a commercial use and not a privileged exercise of the domestic use preference"). As compared to domestic use by an individual, "the taking of water for the supply of a populous and growing city stands upon an entirely different basis." *Lonsdale Co. v. City of Woonsocket*, 56 A. 448, 451 (R.I. 1903). In fact,

> [t]he rule giving an individual the right to consume water for his domestic needs is founded upon the needs of the single individual and the possible effect which his use will have on the rights of others, and cannot be expanded so as to render a collection of persons numbering thousands, and perhaps hundreds of thousands,

> organized into a political unit, a riparian owner, and give this unit the right of the natural unit.

Pernell v. City of Henderson, 16 S.E.2d 449, 451 (N.C. 1941). Moreover, municipalities are corporations, which by definition cannot possess domestic or natural needs. Joseph W. Dellapenna, *The Right to Consume Water Under "Pure" Riparian Rights*, in 1 WATERS AND WATER RIGHTS § 7.02 (3rd ed. 2019). Consequently, cities have been summarily precluded from invoking the domestic preference. *See id.*; *City of Elkhart v. Christiana Hydraulics*, 59 N.E.2d 353, 359 (Ind. 1945); *Purcellville v. Potts*, 19 S.E.2d 700, 702 (Va. 1942).

The exception to this pattern lies in the case of *City of Canton v. Shock*, which has been recognized as an anomaly among jurisdictions across the eastern United States for its decision to grant a municipality the domestic preference as a riparian. *Compare City of Canton v. Shock*, 63 N.E. 600, 602 (Ohio 1902) [hereinafter *Canton*], *with Lonsdale Co.*, 56 A. at 451 ("we think [*Canton*] is opposed to the better reason and to the weight of authority"). "The case of [*Canton*] seems to stand practically alone in its suggestion to the contrary," and courts have found it lacking in valid argument to support the conclusion reached. *Pernell*, 16 S.E.2d at 451. Although New Union follows the principle set out in *Canton* with regard to municipalities being permitted to exercise riparian rights to supply water to their residents, this decision does not mean New Union necessarily follows *Canton*'s ruling with regard to the domestic preference. *See Tubbs*, 45 N.U. at 999 (citing *Canton*, 63 N.E. at 602). Rather, recognizing a municipality as riparian merely allows cities in New Union to account for all of their customers, even those on nonriparian lands, when determining what use is reasonably balanced with other riparians. *See* Dellapenna, *supra*, § 7.05.

2. *Even if the Preference Did Extend to Municipalities, It Could Not be Extended Outright, as Watering Lawns and Ornamental Plants Does Not Qualify as a Domestic Use.*

The preference for domestic water uses among riparian proprietors does not include any use a household could desire, but rather, refers to the residents' natural needs. *See id.* § 7.02.

"Natural wants include domestic needs such as drinking, cooking, and washing, and other uses necessary for the *immediate sustenance of a household*, such as watering livestock for household use and keeping a kitchen garden." *Id.* (emphasis added); *see also Taylor v. Tampa Coal Co.*, 46 So. 2d 392, 394 (Fla. 1950). The domestic preference among riparians is motivated by "maintaining life and carrying out the ordinary processes of living" as well as the fact that domestic uses "usually involve small quantities that require no large diversion of water and produce no appreciable interference with most streams." *See* RESTATEMENT (SECOND) OF TORTS § 850A cmt. c. For this reason, irrigated agriculture is not a recognized domestic use given its large-scale nature and commercial purpose. *E.g.*, *Tunison v. Harper*, 690 S.E.2d 819, 821 (Ga. 2010). In this way, irrigation under the domestic use preference is specifically qualified as that which is necessary to sustain a household; therefore, such irrigation does not extend to commercial or ornamental use. *See, e.g.*, *Scott v. Slaughter*, 373 S.W.2d 577, 579 (Ark. 1963).

Local government can and has regulated certain uses of water in the interest of water conservation. Dellapenna, *supra*, § 7.05. For example, Michigan has upheld regulations on lawn sprinklers by a public water utility. *See Antisdel v. Macatawa Resort Co.*, 220 N.W. 768, 768 (Mich. 1928). Likewise, a city's police power interest in the safety and comfort of all people can justify the regulation of water consumption, such as by requiring air conditioners to have water conservation measures. *See Garvar v. State*, 282 N.Y.S.2d 1009, 1011 (Sup. Ct. 1967). Therefore, Greenlawn could take lawful measures to implement conservation restrictions on its consumers, distinguishing between true domestic water use and that which is unnecessary for household sustenance, such as ornamental watering.

3. The ACOE is a Co-Riparian Incurring Injury from Greenlawn's Unchecked Water Withdrawal During Times of Drought.

Because New Union employs common law riparian rights doctrine, each riparian proprietor enjoys the right to make reasonable use of the water to the extent it does not interfere with the reasonable use of other riparians. *See* R. at 11–12; *Hendrick v. Cook*, 4 Ga. 241, 256 (1848); *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.R.I. 1827). Because the ACOE owns and operates a dam on the Green River, the ACOE is one such riparian with whom Greenlawn must balance the reasonability of its use. *See* THOMPSON, *supra*, at 29 (defining riparian status by ownership of land abutting water). While the district court mistakenly afforded Greenlawn a preference for domestic use, the parties' reasonable uses should in fact be placed on an equal playing field. *See* RESTATEMENT (SECOND) OF TORTS § 844.

A riparian must incur "material, substantial" injury in order to assert another riparian's use is unreasonable. *Portage Cty. Bd. of Comm'rs v. City of Akron*, 846 N.E.2d 478, 490 (Ohio 2006). In Virginia, the case of *Purcellville v. Potts* demonstrated that an injury is obvious when no water is afforded to another riparian for his or her use because of another riparian's excessive withdrawal of what would otherwise be a reasonable type of water use. 19 S.E.2d at 702 (finding no water was left to pass through the plaintiffs' property during the summer months because the defendant town's water use increased during this season). Because the ACOE had to suspend its hydroelectric power generation in order to accommodate Greenlawn's commercial use, the ACOE incurred injury sufficient to make Greenlawn's use unreasonable. *See* R. at 9.

C. Above and Beyond Any Riparian or Nonriparian's Right To Check the Extent of Withdrawal Reasonable by Greenlawn During a Drought Exists the Right of the Public to Enjoy a Navigable Waterway and Fish Therein.

"At the core of the [public trust] doctrine is the antecedent principle that every sovereign government holds vital natural resources in 'trust' for the public—present and future generations

of citizen beneficiaries." Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 45 (2009). While adopted from English common law, this doctrine has included since its inception in U.S. courts the right of the public to enjoy a navigable waterway and to fish therein. *Arnold v. Mundy*, 6 N.J.L. 1, 72 (1821); *see also Peterman v. State Dep't of Nat. Res.*, 521 N.W.2d 499, 508 (Mich. 1994) ("From the time Michigan was a territory, the public's interest in the navigable waters has been recognized. Hence, . . . plaintiffs' riparian rights are subject to the navigational servitude retained by the State of Michigan."). Being rooted in societal needs, the public trust doctrine has at times been expanded to protect other public concerns, such as recreation and aesthetics, but was originally founded upon and continues to protect the public's interest in navigation, fishing, and commerce. Wood, *supra*, at 80.

The public trust doctrine exists in combination with the riparian landowner's ability to own the streambed. *Rock-Koshkonong Lake Dist. v. State Dep't of Nat. Res.*, 833 N.W.2d 800, 819 (Wis. 2013) ("the public trust doctrine in Wisconsin gives riparian owners along navigable streams a qualified title in the stream beds to the center of the stream, while the state holds the navigable waters in trust for the public"). Thus, the fact that Greenlawn owns the riverbed does not preclude the state's preserved title to the navigable waters in trust for the public. *See id.* In fact, "[r]iparian rights exist under the common law as private property rights, independent of and subject to the public trust doctrine." *Movrich v. Lobermeier*, 905 N.W.2d 807, 825 (Wis. 2018); *see also Nelson v. De Long*, 7 N.W.2d 342, 346 (Minn. 1942) ("A riparian owner's rights are qualified, restricted, and subordinate to the paramount rights of the public."). Because the public trust must be protected, this obligation is a necessary factor in calculating Greenlawn's right to reasonable use in times of drought. Given the heightened summer withdrawals during a drought result in a dried-up riverbed

incapable of supporting navigation or fishing in violation of the public trust, such use is unreasonable. *See* R. at 9.

II. THE ACOE'S OPERATION OF THE HOWARD RUNNET DAM WORKS DURING DROUGHT CONDITIONS IN A MANNER CONTRARY TO THE WATER CONTROL MANUAL CONSTITUTES A DISCRETIONARY AGENCY ACTION SUBJECT TO THE CONSULTATION REQUIREMENT OF SECTION 7 OF THE ESA.

Section 7 of the Endangered Species Act (ESA) provides both procedural and substantive mandates in the form of consultation with the Secretary of the Interior and a prohibition on actions likely to jeopardize the existence of an endangered species. Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2018). In the context of citizen suits, "[a] plaintiffs' burden in establishing a procedural violation is to show that the circumstances triggering the procedural requirement exist, and that the required procedures have not been followed." *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985). Section 7's procedural mandate to consult the Secretary is triggered by a discretionary federal agency action with the capacity to affect an endangered or threatened species. *See, e.g.*, *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1019 (9th Cir. 2009) (construing 16 U.S.C. § 1536(a)(2)). The question of whether an agency action is sufficiently established to trigger Section 7 consultation is answered through a two-part inquiry. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020–21 (9th Cir. 2012). First, the court considers "whether a federal agency affirmatively authorized, funded, or carried out the underlying activity," and second, the court "determine[s] whether the agency had some discretion to influence or change the activity for the benefit of a protected species." *Id.*

A. The ACOE is a Federal Agency Carrying Out a Qualified Action When It Deviates from the Water Control Manual's Prescribed Water Releases.

Given the Army Corps of Engineers (ACOE) is indisputably a U.S. federal agency, the initial inquiry turns on whether the ACOE's deviation in operation of the Howard Runnet Dam

Works (HRDW) constitutes a qualifying agency action. Under the ESA regulations, "agency action" is defined as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02 (2019). Moreover, "[e]xamples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." *Id.* The agency's activity need only constitute one of these types of examples to qualify as an action. *See id.*

The decision to significantly alter the volume of water released at a dam is necessarily a modification to the water carried out by the ACOE. The ACOE alone is responsible for the operation of the HRDW. R. at 6. The ACOE's release is an indirect action because the Greenlawn municipal corporation is the downstream entity directly consuming the water in this watershed. *See* R. at 6. The ACOE's decision about the volume of water to be released is made with full knowledge of and intentional accounting for Greenlawn's downstream consumption. *See* R. at 6. Because altering the volume of water released indirectly modifies the water of the Green River, the ACOE's deviation from the volume prescribed in the Water Control Manual (WCM) for the HRDW constitutes an agency action. *See* 50 C.F.R. § 402.02.

B. The ACOE Had Discretion To Influence or Change the Action for the Benefit of the Protected Species.

Section 7's application is limited to "actions in which there is discretionary Federal involvement or control." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (quoting 50 C.F.R. § 402.03). The Supreme Court has affirmed the breadth of this mandate "applies to every discretionary agency action—regardless of the expense or burden its application might impose." *Id.* at 671; *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 166, 195 (1978)

[hereinafter *TVA*] (preventing the completion of a dam construction project to protect an endangered species despite $53 million being lost). While the WCM was entered into prior to adoption of the ESA and therefore not subject to its requirements, the ACOE's deviation from the WCM is subject to its Section 7 consultation requirement because of the discretion it retains to act for the benefit of the oval pigtoe mussels (OPM). *See Nat. Res. Def. Council v. Kempthorne*, 621 F. Supp. 2d 954, 976 (E.D. Cal. 2009) (finding contracts predating the ESA only exempt future observance of such contracts from ESA compliance if no discretion is retained for the agency to act to the benefit of future-listed species). Moreover, the discretion available to the federal agency must be over that which may have the slightest possible effect on the threatened species. *See* Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) [hereinafter Interagency Cooperation] ("[A federal agency] must initiate formal consultation if its proposed action 'may affect' listed species or critical habitat.").

1. *The Judgment Required by the Unique Nature of Determining Riparian Rights Evidences the Requisite Degree of Discretion Retained by the ACOE Regarding the Amount of Water To Be Released from the HRDW.*

"Agency discretion presumes that an agency can exercise 'judgment' in connection with a particular action." *Nat'l Ass'n of Home Builders*, 551 U.S. at 668 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971)). The low standard for discretionary influence in the "agency action" assessment is reflected in the Ninth Circuit's holding that an agency need only retain "some discretion" in order to trigger the consultation requirement. *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 779 (9th Cir. 2014). The ACOE's discretion to determine the amount of water reasonable for Greenlawn's consumption under riparian doctrine, and therefore the amount to be released at the HRDW during a drought, meets this threshold.

The ACOE retained this discretion by nature of its role as operator of the dam and through the obligations created in the WCM, according to which the ACOE would have to determine the withdrawal entitled to Greenlawn under New Union law. *See* R. at 6 (referencing the WCM in which the ACOE agreed to maintain flows sufficient for Greenlawn to continue water withdrawals "in such quantities and at such rates and times as it is entitled as a riparian property owner under the laws of the State of New Union"). However, the law of riparian rights is not an exact science and prescribes no certain amount to which riparian proprietors are entitled. *See supra* Section I.B. Rather, the amount lawfully permitted to a riparian fluctuates based on a number of dynamic circumstances. THOMPSON, *supra*, at 34. As a result, the determination of how much water Greenlawn is entitled to at any one time necessarily involves a degree of judgment. *See id.*

The amounts originally set forth in the WCM were the amounts determined to satisfy Greenlawn's riparian rights in those hypothetical circumstances. *See* R. at 7. The ACOE is obligated to release at least those amounts prescribed in the WCM and potentially more, subject to Greenlawn's riparian rights. R. at 7–8. Because riparian doctrine provides no checklist of criteria that would guarantee a riparian the amount of water it desires if all were satisfied, but rather, a list of criteria to balance reasonable uses among riparians with no particular weight afforded to any of the criteria, the ACOE must use its best judgment and exercise discretion to determine the extent of Greenlawn's riparian rights. *See* RESTATEMENT (SECOND) OF TORTS § 850A.

2. The ACOE Had No Legal Obligation Preventing an Exercise of Discretion.

An agency lacks discretion "only if another legal obligation makes it impossible for the agency to exercise discretion for the protected species' benefit." *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1133, 1144 (D. Mont. 2014); *see also Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 976–77 (9th Cir. 2003) [hereinafter *Turtle Island*] (holding Section

7 consultation was required because the Compliance Act authorized agency discretion to issue permits for the benefit of the species). The only legal requirement inured to the ACOE with regard to operating the HRDW stems from the WCM's prescription that Greenlawn be afforded the opportunity to withdraw water to the extent entitled by law. *See* R. at 6. This legal obligation not only authorizes discretion but requires the ACOE to make a judgment call when ascertaining Greenlawn's riparian rights.

Furthermore, there exists no advisories or other memoranda regarding the activity in question. In *National Association of Home Builders v. Defenders of Wildlife*, the federal agencies involved had already determined the activity was not a discretionary agency action and declared this conclusion in its advisories. 551 U.S. at 672. The agencies were able to affirmatively draw this conclusion because the action was statutorily required if certain criteria were met. *Id.* This statutory prescription meant there could be no discretion in the agency's decision beyond determining whether the statute's criteria were satisfied. *Id.* Again, no such statutory guidance exists in the case at bar. The ACOE is under no obligation to acquiesce to the profit-motivated calculations of a corporation like Greenlawn and must use its own judgment to determine what constitutes reasonable use among the riparians with an interest in the Green River.

3. The Discretion Retained by the ACOE Held the Capacity To Influence or Change Its Action for the Benefit of the Protected Species.

The standard for ESA consultation is whether the conduct "may affect" an endangered species. *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994). The federal regulations make clear the discretion available to the federal agency must have the capacity to make any discernible effect on the listed species. *See* Interagency Cooperation, 51 Fed. Reg. at 19,949. This threshold is intentionally low in order to enable federal agencies to meet their substantive mandate of insuring their actions do not jeopardize a listed species or critical habitat.

Id. In fact, "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement . . . ." *Id.* The ACOE had discretion regarding the amount of water to be released for Greenlawn's consumption. *See supra* Section II.B.1. The amount of water to be released necessarily has an effect on the OPM because their survival depends on remaining submerged in a riverbed. R. at 9. Therefore, the ACOE's indirect reduction in the flow of the Green River adversely impacted the OPM, an impact which could have been avoided for the species' benefit by choosing a different release volume at the Diversion Dam.

C. No Exemption Can Excuse the ACOE's Failure To Engage in Consultation.

There is no exemption for federal agencies to avoid the procedural consultation mandate set forth in Section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1536(a)(2). The only exemptions provided for exist to waive the substantive mandate otherwise required, but only after initial consultation has determined whether the agency action would violate Section 7(a)(2). *See id.* § 1536(g). When an agency is uncertain whether an action will trigger Section 7's requirements, it may choose to engage in informal consultation to receive guidance from the Secretary. 50 C.F.R. § 402.13. If during informal consultation the agency and Secretary concur in finding any effect on the listed species is not likely to be adverse, the agency would not need to engage in formal consultation. *See Cal. ex rel. Lockyer*, 575 F.3d at 1019 (interpreting 50 C.F.R. §§ 402.13, 403.14).

While no exemption can waive consultation altogether, an agency is also permitted to engage in informal consultation until an emergency is "under control" should there be such a need for expedited procedure. 50 C.F.R. § 402.05. The agency must still undertake formal consultation once the emergency has passed if the informal inquiry found it warranted. *Id.* A drought likely qualifies as an emergency situation, which is defined as those "involving acts of God, disasters, casualties, national defense or security emergencies, etc." *Id.* Informal consultation in such

situations can be as simple as placing a telephone call to the Fish & Wildlife Service (FWS). Interagency Cooperation, 51 Fed. Reg. at 19,926. Therefore, any contention that the drastic times of the drought prevented the ACOE from meeting its procedural mandate to consult is null. *See id.*

D. The ACOE's Administrative Decision To Alter the Volume of Water Released at the HRDW Without Engaging in Consultation Was a Procedural Violation Under the ESA and Not in Accordance with the Law.

The district court erred as a matter of law when it granted summary judgment to the ACOE on NUO's action under Section 7(a)(2) of the ESA. Being a summary judgment ruling, this Court must review its finding anew. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995). More specifically, administrative decisions are reviewed according to Section 706 of the Administrative Procedure Act (APA). *See Turtle Island*, 340 F.3d at 977 (citing 5 U.S.C. § 706 (2018)). The APA directs courts to overturn agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," as well as those actions determined to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(a). This analysis of administrative decisions applies equally to district and appellate court proceedings. *Turtle Island*, 340 F.3d at 973. Because the ACOE's conclusion about the discretionary nature of its action was not in accordance with the common law of riparian rights and the ACOE therefore did not meet its procedural mandate to consult with the FWS, this Court must overturn the ACOE's finding.

III. GREENLAWN'S WITHDRAWAL OF NEARLY ALL OF THE REMAINING FLOW FROM THE GREEN RIVER CONSTITUTES A "TAKE" OF THE ENDANGERED OVAL PIGTOE MUSSEL IN VIOLATION OF SECTION 9 OF THE ESA.

By withdrawing the entire flow of water from the Green River Bypass Reach during a drought, Greenlawn has harmed the endangered OPM in violation of the ESA. Section 9 of the ESA prohibits the "take" of the OPM, a listed endangered species. *See* 16 U.S.C. § 1538(a)(1)(B). The term "take" includes harming a species. *Id.* at § 1532(19). "Harm" is further defined as: "an act which actually kills or injures wildlife, including significant habitat modification or

degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. Greenlawn incorrectly argued those acts constituting significant habitat modification or degradation will only constitute a take if the action occurred within the habitat, rather than including those actions occurring outside of the habitat and indirectly effectuating a take. R. at 16. Nonetheless, the District Court for New Union correctly held Greenlawn's withdrawal of nearly all of the water flowing from the HRDW, although occurring outside of the OPM habitat, was the cause of harm to the OPM population downstream, and therefore was an unlawful take under the ESA. R. at 15–16.

A. Congress Intended for the ESA To Protect Endangered Species from a Variety of Possible Harms and Provided Limited Means for a Taking To Occur.

The call of the ESA explicitly states that actions which are "likely to jeopardize the continued existence" of an endangered species or which "*result* in the destruction or adverse modification of habitat" of endangered species are prohibited. 16 U.S.C. § 1536 (emphasis added). The purpose of enacting the ESA was to protect endangered species and prevent their extinction at any cost and by all means necessary. *TVA*, 437 U.S. at 184. Therefore, "Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 (1995) [hereinafter *Sweet Home*].

1. The Broad Intention of the ESA Supports Protecting Endangered Species from Any and All Harms Regardless of Whether the Harm-Inducing Action Occurs Within the Habitat.

The expansive intent of the ESA is exemplified through the Senate and House reports involved in the implementation of the Act. The Senate Report reiterated that take is to be defined in the "broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take'" an endangered species. S. REP. NO. 93-307, at 7 (1973). Additionally, the House Report included "harassment, *whether intentional or not*" in the definition of take. H.R. REP. NO.

93-412, at 11 (1973) (emphasis added). When explaining this inclusion, the Report noted its definition would allow the Secretary "to regulate or prohibit the activities of birdwatchers where the *effect* of those activities might disturb the birds and make it difficult for them to hatch or raise their young." *Id.* (emphasis added). Between the text of the statute and the legislative reports, the words "result," "effect," and "intentional or not" illustrate the intention of Congress: takings can occur from indirect actions occurring outside of the species' habitat, when the consequences of such actions harm an endangered species. Congress did not aim to prohibit only deliberate actions where the sole purpose is to take an endangered species, but rather, to protect species at any cost, through "all methods and procedures which are necessary" to conserve species and their habitats. *See Sweet Home*, 515 U.S. at 705; *TVA*, 437 U.S. at 180.

2. Congress Contemplated Incidental Takings May Be Necessary and Provided the Sole Avenue for Such Takings to Lawfully Occur by Creating an Incidental Take Permit.

An incidental taking is "any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 50 C.F.R. § 17.3. Because Congress understood incidental takings may occur through otherwise lawful land use, lawmakers amended the ESA to authorize the Secretary to issue an Incidental Take Permit (ITP) as appropriate and only where proper mitigation measures are in place to protect endangered species. *See Sweet Home*, 515 U.S. at 700; 16 U.S.C. § 1539(a). Although Greenlawn likely did not intend to harm the mussel population or modify their habitat, Congress intended for actors such as Greenlawn to obtain an ITP where activities that are otherwise lawful would nevertheless result in an indirect take under the ESA. *See Sweet Home*, 515 U.S. at 701. Obtaining an ITP provides landowners "with a means of continuing to use their property while addressing possible incidental take of listed species." Endangered and Threatened Wildlife and Plants; Definition of "Harm", 64 Fed. Reg. 60,727, 60,729 (Nov. 8, 1999) [hereinafter Definition of Harm]. Greenlawn was capable of

applying for an ITP in order to continue its water withdrawals (to the extent such withdrawals were deemed reasonable), but would have been required to implement a conservation plan which would "minimize and mitigate" any adverse impacts on the OPM habitat while allowing water withdrawals at an adequate level for Greenlawn's distribution. 16 U.S.C. § 1539(a)(2)(A). Congress has created the ITP as a flexible mechanism for addressing landowners' needs in light of the range of circumstances in which endangered species live. *See id.* Applying for an ITP is not mandatory, but failure to apply and receive an ITP means Greenlawn's activity resulted in a take under the ESA. *See Defs. of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000).

B. The Final Rule by the National Marine Fisheries Service Affirms Indirect Habitat Modification Constitutes Harm When It Significantly Impairs Essential Behaviors.

Courts have long recognized administrative deference by giving considerable weight to the interpretations of the agencies entrusted with implementing an act. *Chevron, U.S.A., Inc. v. Nat. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The Secretary of the Interior administers the ESA through two agencies: the Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). These agencies have been entrusted with broad discretion in carrying out the ESA, and the rulings they have articulated about habitat modification as a type of harm should not be cast aside by the court's third-party views. *Sweet Home*, 515 U.S. at 708.

After the FWS definition of harm was upheld as a reasonable interpretation by the Supreme Court in *Sweet Home*, the NMFS issued a final rule clarifying its interpretation of harm is consistent with the FWS definition. Definition of Harm, 64 Fed. Reg. at 60,727. Mirroring the FWS, this final rule likewise defines the term "harm" to include "significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns." *Id.* In the NMFS Final Rule, the agency expressed its main concern lies in habitat degradation which affects the essential behavioral patterns of animals, such as migrating,

feeding, sheltering, rearing, and spawning. *See id.* The ruling identified a specific example of how habitat degradation can affect these patterns when excessive harvests *near* a breeding site—not completely within the site—could impair feeding and rearing by reducing the available food supply. *Id.* Another example pointed out that migration is an essential pattern and adult animals must be able to return to spawning grounds. *Id.* at 60,727–28. Water quality barriers which significantly impede spawning or migration, such as a lack of water, would be considered by NMFS to be within the definition of harm under the ESA. *Id.* at 60,728. The NMFS was clear that habitat modification which significantly impairs these behavioral patterns, whether or not originating from within the habitat, constitutes a harm. *See id.*

Greenlawn's removal of nearly all of the water from the Green River creates an array of issues resulting from the lack of flow: insufficient currents to sustain the OPM population; an inability for sailfin shiners to migrate, preventing OPM spawning; and essentially impossible migration conditions preventing the adult OPM from relocating to submerged waters. R. at 9. The reduced flows following Greenlawn's unreasonable consumption result in habitat modification that significantly impedes the OPM's essential behavioral patterns; therefore, Greenlawn harmed the species by NMFS standards, and therefore, by those of the FWS as well. *See* Definition of Harm, 64 Fed. Reg. at 60,728.

C. The Distinctive Character of Aquatic Habitats Requires the Definition of Harm Include Actions Occurring Outside of the Principal Habitat.

OPM require riverbeds with slow to moderate currents as habitat. R. at 9. The water supplying this necessary element of the species' habitat naturally comes from a source upstream from the OPM population in Green River. Greenlawn's assumption that its actions, occurring in another portion of the Green River, cannot harm the OPM population downstream because the action occurs outside of the habitat is a misunderstanding of the habitat in question. The portion

of the river where Greenlawn withdraws water is "intimately linked" to the portion of the river forming the OPM habitat. *See Cappaert v. United States,* 426 U.S. 128, 142 (1976) (identifying the cause of reduced water levels in a pond was nearby groundwater pumping). In the case of *Center for Biological Diversity v. United States Bureau of Land Management*, the government presented the position that groundwater withdrawals could not impact the listed fish species in a nearby river because the fish did not live in the water being removed. 698 F.3d 1101, 1122 (9th Cir. 2012). The court responded to this position by explaining that groundwater and the surface water in the river are "physically interrelated as integral parts of the hydrological cycle" and "intimately linked" in most areas. *Id.* at 1122. Drawing from the guidance of the U.S. Department of the Interior, the court acknowledged that withdrawing nearby groundwater "can diminish the available surface-water supply by capturing some of the ground-water flow that otherwise would have discharged to surface water." *Id.*

Greenlawn is not pumping groundwater which would otherwise end up in the Green River watershed. However, it is removing water directly from the river upstream, which *would* otherwise end up in the lower portions of the Green River if not used up by Greenlawn. This action has the net result of a reduction of flow to surface water. *See Ctr. for Biological Diversity*, 698 F.3d at 1123. Although occurring outside of the habitat, Greenlawn's actions have a direct impact on the OPM habitat due to the intimate link between the portion of the river where Greenlawn removes water and the portion where the OPM live and require sufficient flows to survive.

D. Greenlawn's Water Withdrawals Are Sufficiently Connected to the Injury Imposed on the OPM Habitat To Satisfy Principles of Causation.

The broad intention of the ESA supports a definition of harm that includes actions occurring outside of the habitat. *See supra,* Section III(A)–(C). Despite this definition, Greenlawn argues its withdrawals cannot constitute a take of the OPM because it was not the only actor using

water from the Green River. R. at 16–17. However, principles of proximate causation apply to Section 9 takings. *Sweet Home*, 515 U.S. at 700 n.13. The take of an endangered species cannot be found where causation is lacking. *See e.g.*, *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) ("for there to be 'harm' under the ESA, there must be actual injury to the listed species"). Causation requires a sufficient connection between the injury to the species and the action complained of, such that the injury is fairly traceable to the defendant's action, and not to the independent actions of another. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Causation imposes aspects of foreseeability and direct relationships to insure the proper actor is held responsible for the effects of their actions, and eliminates liability where the action is too remote or attenuated to have caused injury. *Aransas Project v. Shaw*, 775 F.3d 641, 658 (5th Cir. 2014).

1. *Greenlawn's Actions Occurring Outside of the OPM Habitat Were Fairly Traceable to the Resulting Habitat Modification.*

"In the context of the ESA, the proximate cause inquiry requires determining whether the alleged injury . . . is fairly traceable to the challenged action of [the d]efendants." *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1084 (D. Or. 2012) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)). Determining whether the resulting injury is fairly traceable to the defendant's action requires a factual inquiry into the unique circumstances of the case. *See id.* For example, the First Circuit found the act of authorizing an activity that was likely to result in a take was fairly traceable to the take for causation to exist. *See Strahan v. Coxe*, 127 F.3d 155, 164 (1st Cir. 1997) ("The causation here, while indirect, is not so removed that it extends outside the realm of causation . . . ."). Therefore, an indirect harm, where the action deemed to have caused the injury occurs outside of the habitat, may nevertheless be considered an unlawful take if the act has a sufficient connection which is fairly traceable to the resulting harm. *See id.* Greenlawn's excessive water withdrawals had an obvious impact on the

flow of the Green River both at the point on the river where the city is located and, quite logically, downstream where the OPM habitat is located. *See* R. at 9–10. Therefore, Greenlawn's withdrawals were at least fairly traceable to the harm incurred by the OPM when its habitat was modified. *See Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 517 (E.D. Ca. 2018) (finding water diversions were fairly traceable to the harm to the endangered salmon).

2. Despite the Existence of Multiple Causes of Reduced Water Levels, Greenlawn is the Proximate Cause of the Take of the OPM Because Its Actions Were Not Remote and the Effects Were Foreseeable.

It is true that all events have many causes, but only some of those causes can be considered proximate. *See Paroline v. United States*, 572 U.S. 434, 444 (2014). Greenlawn argues its withdrawals alone did not reduce the Green River flows to the extent of harming the OPM habitat, but did so in combination with upstream circumstances and drought conditions. R. at. 17. However,

> sometimes it is difficult to isolate factors causing injury to listed species. All factors that reasonably could have caused the habitat modification or the injury itself must be carefully examined. Whenever an action alone or in combination with, or in concert with other actions is reasonably certain to injure or kill listed species, it will constitute a take. An action which contributes to injury can be a "take" even if it is not the only cause of the injury.

Definition of Harm, 64 Fed. Reg. at 60,728. Accordingly, there will not be a take if the act is too far-removed, but there will be for those sufficiently connected actions in which the harmful results are "foreseeable rather than merely accidental." *See Sweet Home*, 515 U.S. at 700.

The Fifth Circuit in *Aransas Project v. Shaw* found the authorization of water diversions was too remote of an act to have caused the death of several endangered cranes and denied imposing liability for the alleged take. 775 F.3d at 660. This case is distinguishable because the court identified several "natural, independent, unpredictable and interrelated forces" between the authorization and the injury to the cranes. *Id.* at 663. The identified contingencies affecting the

chain of causation were outside of the actor's control and "often outside human control." *Id.* at 661–62. The court believed these contingencies were adequate to break the connection between the issuance of a permit and the death of an endangered species because the chain of causation was extremely long, with unforeseeable results caused by uncontrollable forces. *Id.* at 660, 661–662.

Unlike the intervening and unpredictable circumstances in *Aransas Project*, Greenlawn's withdrawals of the entire water supply at its location on the Green River was temporally the last event causing all reduced water flows downstream. *See id.* Here, the action of withdrawing water and reducing flows was within Greenlawn's control, a control based entirely on human desire and needs. R. at 8. Moreover, with the knowledge that drought conditions had reduced the available water in Green River, the unreasonable withdrawal would foreseeably result in extremely reduced water levels causing a direct impact on downstream habitats. *See* Definition of Harm, 64 Fed. Reg. at 60,729–30 (clarifying the agency's belief "it is reasonably foreseeable that these . . . and similar activities may injure or kill fish" and providing as an example the "remov[al] of water or otherwise altering streamflow when it significantly impairs . . . essential behavioral patterns"). Greenlawn drained the Green River, a body of water it would at least reasonably foresee to be the habitat of wildlife requiring minimal water levels to survive. Greenlawn may not have been the only cause of reduced water levels, but its actions were not so remote nor the results so unforeseeable to find its actions did not harm, and therefore take, the endangered oval pigtoe mussels in Green River.

IV. THE DISTRICT COURT IS NOT REQUIRED TO BALANCE THE EQUITIES BEFORE ENJOINING GREENLAWN'S UNREASONABLE WITHDRAWALS WHEN SUCH WITHDRAWALS WILL CAUSE THE EXTIRPATION OF AN ENTIRE POPULATION OF AN ENDANGERED SPECIES.

The citizen suit provision of the ESA allows anyone to bring suit "to enjoin any person, including the United States and any other governmental instrumentality . . . who is alleged to be in violation of any provision of this chapter . . . ." 16 U.S.C. § 1540(g). This injunctive relief is the

sole remedy for concerned citizens such as the members of NUO who bring a claim under the ESA. *See id.* When presented with this request for relief, the district court had two options: enjoin the actions of Greenlawn by issuing an injunction, or ignore the call of the ESA and allow a federally listed endangered species to be extirpated by Greenlawn's unlawful take. *See* R. at 18. The district court correctly issued an injunction after finding Greenlawn violated the ESA by harming the OPM population in the Green River. *Id.* No balancing of the equities was necessary because such balancing is not required in cases arising under the ESA where the traditional bases for injunctive relief are met.

A. The District Court for New Union Had an Obligation to Exercise Its Jurisdiction and Enforce the Injunction To Protect the Endangered OPM.

Section 11 of the ESA provides district courts with jurisdiction to enforce its provisions, and federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also* 16 U.S.C. § 1540(g). Where the issue arises under federal law, as in this case arising under the federally enacted ESA, it is the district court's responsibility to enforce the federal law. *See Aransas Project*, 775 F.3d at 649. The District Court for New Union correctly enforced the mandate of the ESA and opted to protect the OPM population by enjoining Greenlawn's unreasonable water withdrawals. R. at 18.

B. The Inexistence of Other Legal Remedies and Irreparable Injury Incurred by the OPM Satisfy the Required Standards for Injunctive Relief.

The bases for injunctive relief are inadequacy of legal remedies and irreparable injury in the absence of an injunction. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). Section 11 of the ESA confirms injunctive relief is the sole legal remedy for NUO; therefore, the only determination in granting an injunction is whether irreparable injury will ensue without an

injunction. *See id.* NUO argues that without enjoinment of Greenlawn's water withdrawals, the entire OPM population in the Green River will be eliminated by a take in violation of the ESA. R. at 10. Alternatively, if the injunction is granted, Greenlawn's claimed injury stems from its inability to withdraw water in amounts sufficient to provide residential consumers with additional water for watering lawns and ornamental plants during drought conditions. *See* R. at 8.

Where both parties present competing claims of injury, the typical function of equity requires a court to balance the competing injuries and consider the effect on each party of the granting or withholding of the requested relief, with particular attention given to the public interest as well. *Amoco Prod. Co.*, 480 U.S. at 542. Thus, plaintiffs seeking injunctive relief must prove they are likely to suffer irreparable harm in the absence of the injunction, the remedies available at law are inadequate to compensate for the injury, the balance of equities tips in their favor, and an injunction is in the public interest. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982); *see also Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). While both parties have presented claims of irreparable harm that would typically require a balancing of the equities, the court need not balance the equities at all in cases brought under the ESA. *See TVA*, 437 U.S. at 185. Without the need to balance the equities, NUO satisfies the other requirements for injunctive relief: irreparable injury due to the loss of an entire population of endangered OPM; inadequacy of legal remedies due to the limited remedies provided by the ESA; and, the injunction would be in the public interest because Congress has declared the protection of endangered species to be of public importance. *See TVA*, 437 U.S. at 177–78 (discussing the Report of the House Committee leading to the enactment of the ESA which identified the importance of protecting endangered species in order to maintain their "genetic heritage" and that of humans).

C. Congress Has Already Balanced the Equities in Favor of Protecting Endangered Species and Precedent Requires the Court To Issue an Injunction in the Presence of Irreparable Harm.

Equity allows the court to adjust the typical framework in order to achieve the proper result. *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) (declaring equity as the power to "[mold] each decree to the necessities of the particular case"). The balance of equities is usually exercised in requests for injunctive relief to determine which party will face a greater inconvenience. *See Yakus v. United States*, 321 U.S. 414, 440 (1944). But in cases brought under the ESA, congressional intent has already balanced the equities in favor of the endangered species when the existence of irreparable injury to the species has been found. *See TVA*, 437 U.S. at 194. "Environmental 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." *Amoco Prod. Co.*, 480 U.S. at 545. Because of the high degree of harm at issue in ESA cases, courts need not balance the equities as they would in a typical request for injunctive relief. *See id.* Instead, the balance has already been struck with a decision rendered for the protection of endangered species. *See TVA*, 437 U.S. at 187–88 ("it would be difficult for a court to balance the loss of a sum certain—even $100 million—against [the] congressionally declared 'incalculable' value [of endangered species]").

1. *The Clear Purpose of the Endangered Species Act Requires the Court to Prioritize Endangered Species When a Prohibited Taking Has Occurred.*

As elucidated herein, the statutory mandate of the ESA is incredibly unwavering, requiring federal agencies and other actors to protect endangered species and conserve their habitats. *See supra*, Section III.A; 16 U.S.C. § 1536(a). The language and history of the ESA embody the need to prioritize the preservation of endangered species—the value of which Congress deemed to be "incalculable." *TVA*, 437 U.S. at 185, 187. To carry out congressional intent, the court must issue an injunction where the failure to do so would allow a prohibited taking to occur in direct violation

of Section 9 of the ESA. *See id.* at 193–95; *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) ("In Congress's view, projects that jeopardized the continued existence of endangered species threatened incalculable harm: accordingly, . . . the balance of hardships and the public interest tip heavily in favor of endangered species. We may not use equity's scales to strike a different balance.").

The ESA's language and purpose essentially removed the traditional discretion courts have when determining whether to issue injunctive relief. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002). Congress established procedures for carrying out the ESA and placed the responsibility of enforcing its provisions on the district courts. 16 U.S.C. § 1540(e)(2). Only by complying with the procedures and purpose of the ESA can the court effectuate its intent and prevent the conditions, that if allowed to persist, would cause the death of additional endangered species. *Biodiversity Legal Found.*, 309 F.3d at 1177; *see also* R. at 10 ("[T]hese conditions resulted in the death of approximately 25% of the Green River oval pigtoe population. If allowed to persist, these conditions would entirely eliminate the Green River population of the oval pigtoe mussel."). Favoring the endangered species and granting an injunction is necessary to effectuate the purpose of the ESA when the court finds the statute was violated, as the district court found in Greenlawn's case. R. at 18; *see also TVA*, 437 U.S. at 194.

2. Supreme Court Precedent Confirms the Balancing of Equities is Not Required Before Issuing an Injunction Because Plaintiffs Have Shown Irreparable Injury.

"Congress has spoken in the plainest of words, making it abundantly clear that the balance [of equities] has been struck in favor of affording endangered species the highest of priorities." *TVA*, 437 U.S. at 194. The holding of *Tennessee Valley Authority v. Hill* was not an anomaly—it is the law the Supreme Court has promulgated and it continues to carry precedential authority in actions arising under the ESA. *See Weinberger*, 456 U.S. at 313 ("In *TVA v. Hill*, we held that

Congress had foreclosed the exercise of the usual discretion possessed by a court of equity."); *Amoco Prod. Co.*, 480 U.S. at 543 n.9 ("[the ESA] foreclosed the traditional discretion possessed by an equity court and had required the District Court to enjoin completion of the [project to preserve the] endangered species."). The Supreme Court held the courts do not have the discretion to balance competing interests in ESA cases as they do in other cases. *TVA*, 437 U.S. at 185. The doctrine of stare decisis obligates this court to follow Supreme Court precedent where the same issues of law arise. *See Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Where injury to an endangered species has occurred, as the District Court for New Union found, the discretion to balance the equities has been removed, and the court must issue an injunction to stop those actions which would continue to violate the ESA. *Bernal*, 204 F.3d at 925.

It is incorrect to imply that the courts are obligated to issue an injunction in any and all cases involving an endangered species. *Weinberger*, 456 U.S. at 313. However, where the plaintiff shows irreparable injury has occurred, or establishes a real and immediate threat that the endangered species will suffer a similar injury again in the future, then the court must issue an injunction. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Bernal*, 204 F.3d at 925. Even if the current circumstances did not result in the death of 25 percent of the OPM population in Green River, an injunction may nevertheless be issued because future injury is "certainly impending." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, this is enough."); *see also* R. at 10–11. All parties have agreed, "Drought Warning conditions are likely to occur again in the near future." R. at 11. Without an alteration of Greenlawn's ability to withdraw water in unlimited amounts during drought conditions, there is a real and immediate threat to the entire OPM population in the Green River. R. at 10. The parties'

acknowledgement that the status quo will result in future harm to the OPM population shows irreparable harm is certain to occur again and an injunction is required to prevent such harm. *See Amoco Prod. Co.*, 480 U.S. at 545; R. at 10.

3. The Presence of Irreparable Harm to the Endangered OPM Ends the District Court's Analysis and Commands an Injunction.

The district court acknowledged the injuries presented by both parties and was left with a simple decision. *See* R. at 18. In explaining its ruling, the court stated it must either "leave the ESA's important protections for endangered species unenforced and allow a significant endangered mussel population to be extirpated, or issue an injunction." R. at 18. The court identified the harms presented by each party, but by this statement made clear balancing was not necessary because the presence of irreparable injury to the endangered species requires the court to issue an injunction to prevent further ESA violations. *See supra* Section IV.C.2.

Where other courts have seemingly balanced the equities, these courts have in reality failed to find irreparable injury to the endangered species, meaning it was proper to deny the injunction in opposition of the endangered species. *See, e.g.*, *Winter*, 555 U.S. at 26 (identifying the injury as the research group's inability to observe and study the marine mammals); *Amoco Prod. Co.*, 480 U.S. at 545 (finding injury to certain resources was improbable); *Bernal*, 204 F.3d at 922 (acknowledging the alleged injury fell short because the land at issue only had the potential of being habitat for an endangered owl and was not its actual habitat). Alternatively, where the endangered species faces irreparable injury, the court must grant an injunction regardless of the burdens imposed on the other party. *See TVA*, 437 U.S. at 184–85 (deciding a nearly complete dam project could not supersede the irreparable harm it would cause to the endangered fish). The district court found irreparable harm occurred when a significant portion of the OPM population died, and acted accordingly by issuing an injunction to prevent further harm. R. at 18.

D. The Injunction Must Stand Because the District Court Made No Abuse of Discretion.

Appellate review of the decision to grant an injunction is restricted to a determination of whether the lower court abused its discretion. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). A district court abuses its discretion in granting an injunction if it bases its decision on an erroneous legal standard or clearly erroneous findings of fact. *Id.* Therefore, as long as the district court applied the correct law, its ruling cannot be overturned simply because the appellate court would have reached a different result. *Id.* The appellate court is unable to weigh the evidence presented to the district court and must not reverse the lower court's exercise of its own granted discretion unless there is a definite and firm conviction the lower court committed a clear error in its conclusion. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005). In the case at bar, the district court held limited discretion regarding whether to issue an injunction. In light of the congressional and Supreme Court guidance on the ESA, the court only had discretion to determine whether irreparable harm was present and then issue an injunction if answered affirmatively. *See TVA*, 437 U.S. at 185. The death of the OPM met this threshold and no additional evidence suggests an error, much less an unjustifiable one, was committed. Therefore, the district court made no abuse of discretion and the injunction must be affirmed.

CONCLUSION

Upon the foregoing, Appellant, New Union Oystercatchers, Inc., respectfully requests this appellate court reverse the district court's decision on the first and second issues, and affirm the district court's decision on the third and fourth issues.

Respectfully submitted this 21st day of November, 2019,

Attorneys for the Appellant,
New Union Oystercatchers, Inc.

CERTIFICATION

We hereby certify that a copy of the foregoing has been furnished, by mail, this 21st day of November, 2019 to:

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Respectfully submitted this 21st day of November, 2019,

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