Team #17

CASE NO.: 19–000987

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,
Plaintiff – Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant – Appellee

and

CITY OF GREENLAWN, NEW UNION
Defendant – Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR NEW UNION

BRIEF FOR UNITED STATES ARMY CORPS OF ENGINEERS, APPELLEES

Date: November 21, 2019

Counsel for U.S. Army Corps of Engineers

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Regulations

U.S. Supreme Court Cases

U.S. Appellate Court Cases

U.S. District Court Cases

U.S. Court of Federal Claims Cases

State Court Cases

Rules

Treatises

Secondary Sources

STATEMENT OF JURISDICTION

This case involves the application of the Endangered Species Act of 1973 ("ESA'), 16 U.S.C. §§ 1531–1544 (2012), as well as questions of constitutional law. Jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1331 (2012). This Court has jurisdiction over this appeal from the final order of the district court. 28 U.S.C. § 1291 (2010); *see also* R. at 2.

STATEMENT OF THE ISSUES PRESENTED

I. Under the common law riparian doctrine, riparian landowners abutting flowing streams have the right to withdraw water for reasonable use, so long as that use does not interfere with the reasonable use of the stream by other riparian landowners. Is Greenlawn entitled to continued water withdrawals for municipal use without conservation where Greenlawn's use is reasonable and no competing water use claim has been brought by another riparian proprietor?

II. Under § 7(a)(2) of the Endangered Species Act, a federal agency conducting a discretionary action which may jeopardize a protected species must first consult with the appropriate wildlife agency. Was the U.S. Army Corps of Engineers' discharge of 30 CFS of water into the Green River Bypass Reach a discretionary act subject to the consultation requirement?

III. Under § 9 of the Endangered Species Act, a person illegally takes an endangered species if they engage in conduct that results in foreseeable and unreasonable risk of harm to the protected animals. Greenlawn has withdrawn water for its own domestic use, leaving no water left to shelter the endangered oval pigtoe mussel. Did Greenlawn's conduct constitute an illegal take of the oval pigtoe mussel?

IV. In statutory cases, a judge formulating injunctive relief must honor the legislature's goals. Balancing the equities to tailor injunctive relief in a case with multiple water diverters honors Congress' goals when enacting the ESA. Must the court balance the equities to

apportion responsibility between multiple parties before enjoining a beneficial municipal activity?

STATEMENT OF THE CASE

A. Factual Background

Plaintiff in this case is New Union Oystercatchers, Inc. ("NUO"), an industry group representing the interests of the oyster fishers of Green Bay. R. at 10. Defendants are the City of Greenlawn, a municipal riparian landowner in the state of New Union which sources its municipal water supply from the Green River Bypass Reach, and the Army Corps of Engineers ("the Corps"), who operates the Howard Runnet Dam Works upstream of the city and Green Bay. R. at 5–6.

For nearly seventy years, the Corps has operated the Howard Runnet Dam Works on the Green River, upstream of Green Bay. R. at 6. Together, the Howard Runnet and Diversion Dams create Howard Runnet Lake, a reservoir which discharges excess inflow through the dams and into the Bypass Reach and Tailrace, which converge again further downstream before the river terminates at Green Bay. R. at 5–6. The Corps operates the Works according the Water Control Manual, which establishes parameters water storage and releases. R. at 6. During drought conditions, the Manual provides for tiered restrictions on water discharges depending on the water level in the reservoir, divided into Zone 1 (Drought Watch), Zone 2 (Drought Warning), and Zone 3 (Drought Emergency) tiers. R. at 7. The Manual further provides that, "at all times," the Dam Works shall be operated in a manner complying with riparian rights and the water supply agreements entered into by the Corps. *Id.*

Through the Diversion Dam, the Corps discharges water into the Bypass Reach, which is flanked on both sides by the City of Greenlawn. R. at 5–6. Greenlawn owns the riverfront on both sides of the Bypass Reach within City Limits and has long maintained municipal water

intakes in the river. *Id.* For over a century, Greenlawn, predominantly a residential city, has drawn from the river to provide water for its 100,000 residents, who use the water primarily for domestic purposes, including lawncare and ornamental gardening. R. at 5, 7–8. When the dams opened in 1948, the Corps entered into an agreement with Greenlawn providing that the Corps would maintain flows into the Bypass Reach sufficient to allow Greenlawn to continue water withdrawals "in such quantities and at such rates and times as it is entitled to as a riparian property owner." R. at 6. Through the hydroelectric Howard Runnet Dam, the corps discharges water into the Tailrace, which loops around the Greenlawn city limits, converges with the Bypass Reach downstream, and feeds directly into Green Bay. *Id.*

In Spring 2017, drought conditions caused the water level in the reservoir to drop from safe levels to Zone 2 (Drought Warning). R. at 8. As required by the Manual, the Corps instituted flow restrictions through the dams, curtailing Bypass Reach flow from 50 cubic feet per second (CFS) to 7 CFS and capping hydroelectric releases at 200 CFS for up to three hours per day. *Id.* Greenlawn protested the restriction, invoking its riparian rights and the water supply agreement to demand that the Corps lift the restrictions. *Id.* Greenlawn argued that it had a common law right to make reasonable use of the historic flows of the Bypass Reach and was under no obligation to institute the Corps' suggested drought restrictions. *Id.*

On April 23, 2017, the Corps was forced to release 30 CFS into the Bypass Reach, which the City almost entirely consumed. R. at 8–9. Coupled with peaking hydroelectric operations, the increased water discharges plunged reservoir levels to Zone 3 (Drought Emergency) by May 15, 2017. *Id.* As a result, the Manual required the Corps to throttle hydroelectric releases into the Tailrace. *Id.* Following the curtailment of hydroelectric releases, downstream river flow dried up almost entirely. R. at 9. The reduced flows destroyed the habitat of the endangered oval pigtoe

mussel and the oyster fisheries of Green Bay, drawing the ire of the Green Bay oyster industry. R. at 9–10.

B. Procedural History

In 2017, NUO brought these actions against the Corps and City of Greenlawn in the U.S. District Court for the State of New Union. R. at 4. NUO alleges that the Corps failed to consult the appropriate wildlife authority prior to proceeding with the Bypass Reach releases, in violation of § 7 of the Endangered Species Act ("ESA"). NUO also alleges that Greenlawn's water withdrawals constituted a "take" of the endangered oval pigtoe mussel in violation of § 9 of the ESA. *Id.* The Corps filed a crossclaim against Greenlawn, joining NUO's § 9 claim against the City of Greenlawn. R. at 10. NUO also brought common law riparian rights claims against Greenlawn. R. at 10–11. In response, Greenlawn filed a counterclaim against the Corps seeking a declaration of its riparian water rights. *Id.*

Greenlawn moved for summary judgment declaring its water withdrawal rights as a riparian landowner. R. at 11. The District Court granted Greenlawn's motion, finding that, under the common law of the state of New Union, Greenlawn's status as a riparian owner entitled it to continued flows into the Bypass Reach sufficient to meet its municipal water needs. *Id.* At the same time, the Corps moved for summary judgment dismissing NUO's ESA § 7 claim. *Id*. The District Court granted the Corps' motion for summary judgment, holding that, because ESA § 7 only required consultation prior to discretionary acts, the Corps' non-discretionary increase of Bypass Reach releases did not trigger a consultation requirement. As a result, NUO's § 7 claim against the Corps was dismissed. R. at 11, 15. Finally, NUO and the Corps moved for summary judgment declaring that Greenlawn violated the prohibition on "takes" of endangered species under § 9 of the ESA. R. at 11. The District Court granted the Corps' and NUO's motion, finding

as a matter of law that the habitat destruction caused by Greenlawn's water withdrawals constituted a prohibited take of the oval pigtoe mussel. R. at 16–17.

Greenlawn and NUO have both filed a timely Notice of Appeal with the Twelfth Circuit Court of Appeals. R. at 1. Greenlawn appeals the District Court's determination that its withdrawals of water from the Bypass Reach constituted an unauthorized "take" under § 9 of the ESA. R. at 2. Greenlawn also appeals the District Court's holding that, when enjoining municipal activities to prevent extirpation of endangered species, the court need not balance the equities of the municipal interest against the threat to the protected species. R. at 2. Furthermore, NUO appeals the District Court's determination that the Corps was not required to undergo § 7 consultation prior to increasing water releases into the Bypass Reach. R. at 1.

SUMMARY OF THE ARGUMENT

Common law riparian doctrine recognizes the right of riparian landowners abutting flowing waters to withdraw water for reasonable use so long as that use does not interfere with the reasonable use of the stream by other riparian proprietors. A large majority of common law riparian jurisdictions where this issue has been presented have ruled that an upper riparian proprietor has superior right over downstream riparians to use water out of the stream for reasonable purposes with the highest priority being water used for domestic use. NUO's unreasonable use claim against Greenlawn fails because NUO is not a riparian proprietor, and therefore fails to establish common law standing. Furthermore, Greenlawn's municipal consumption is "reasonable" under riparian common law because as multiple riparian jurisdictions clarified, domestic use and use for the municipality itself is considered reasonable use prioritized above other uses such as power generation. Therefore, the district court was correct in granting summary judgment that Greenlawn is entitled to sufficient flow in the Bypass Reach to supply its municipal water needs.

Second, the Corps lacked discretion to take any action that would benefit the oval pigtoe mussel with respect to its Bypass Reach releases and was thus not required to initiate consultation under § 7 of the ESA. Section 7 of the Endangered Species Act requires federal agencies to consult with the appropriate wildlife authority prior to taking any action which may affect endangered species. This consultation requirement applies only to "discretionary" actions – an agency must only consult regarding those actions over which the acting agency has sufficient discretion to take measures for the benefit of the protected species. Where an agency is required to act by law – including statute, regulation, contract, and treaty – the action is considered non-discretionary, and the agency is therefore not required to initiate consultation. NUO argues that the Corps should have consulted with the U.S. Fish and Wildlife Service prior to releasing water into the Bypass Reach at a rate of 30 CFS during Drought Warning conditions. However, the Corps' releases were not exercises of discretion. Rather, the Corps was bound to release 30 CFS into the Bypass Reach by the Howard Runnet Water Control Manual, Greenlawn's riparian rights, and the Corps' water supply agreement with Greenlawn. Each of these legal instruments dictated that the Corps release water into the Bypass Reach in quantities and at rates no less than what Greenlawn required to meet its domestic municipal water supply needs.

Third, when determining whether an illegal take has occurred under § 9 of the ESA, this Court should focus on the foreseeability of harm and the unreasonable risk of harm Greenlawn's water withdrawals pose to the endangered oval pigtoe mussel species. Although Greenlawn has a common law right to withdraw water for washing cars and watering lawns, Greenlawn is also bound by Congress' mandate in ESA § 9 to conserve the endangered oval pigtoe mussel species. During the summer 2017 drought emergency, ACOE curtailed all recreational and power uses of

water, but allowed a flow of 7 CFS to be maintained into the Bypass Reach to be used by Greenlawn. The ACOE advised Greenlawn to enact restrictions on its water consumers to conserve a healthy downstream ecosystem, but Greenlawn refused. As a result, there was no water left to submerge the endangered oval pigtoe mussel downstream from the city and 25% of the oval pigtoe population died. Maintaining consumption of water usage during drought conditions foreseeably and unreasonably poses a risk of harm to endangered downstream species and thus set the stage for Greenlawn's illegal taking of the oval pigtoe mussel species.

Fourth, although Congress has spoken via statute regarding balancing the equities in favor of endangered species, in a case where there exist multiple defendants, the judiciary has limited discretion to tailor injunctive relief. To preserve separation of powers and respect for coordinate branches of government, departure from strict statutory enforcement is justified when balancing the equities is consistent with the goals of the statute, and where the case involves a factor not reflected in Congress' original formulation. Because Congress wrote the ESA with a single defendant in mind, departure under the present facts is justified in order to conserve the endangered oval pigtoe mussel.

Lastly, as a matter of law, justice dictates that this court uphold the district court's injunction prohibiting Greenlawn from making future water withdrawals in the interest of conserving the endangered oval pigtoe mussel. Applying the Restatement (Second) of Torts reasonable use inquiry to balance the equities leaves no question of material fact that Greenlawn engaged in conduct foreseeably posing an unreasonable risk of harm to a species protected by Congress under ESA § 9 and that this conduct will continue in the future, but for a court order. Although it may seem that an injunction against Greenlawn and not against the ACOE results in

a constitutionally impermissible taking, Greenlawn has not proven that the injunction will be permanent, nor has Greenlawn exhausted its administrative remedies.

STANDARD OF REVIEW

Appeals courts review decisions on motions for summary judgment de novo, applying the same standard as the district court. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009). In reviewing a motion for summary judgment, courts examine the record and draw all reasonable inferences that might be drawn from it in the light most favorable to the non-movant. *Id.* Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

ARGUMENT

I. Common law riparian rights doctrine entitles Greenlawn to sufficient flow in the Bypass Reach to supply its municipal water needs.

New Union does not currently have legislation or any other permitting authority to resolve conflict between riparian claims. Considering the lack of New Union precedent, this Court should base its opinion on precedents from other riparian rights jurisdictions. Most eastern states follow the common law doctrine of riparian-based water rights—primarily the principle of "reasonable use." *See generally* Jan G. Laitos, NATURAL RESOURCES LAW 378 (2002). The reasonable use doctrine is a common rights system under which property owners whose land adjoins flowing rivers and streams possess riparian rights, which entitle each riparian to make their own reasonable use of the water resource. *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.R.I. 1827); *City of Waterbury v. Town of Washington*, 260 Conn. 506, 580 (2002) (citing *Harvey Realty Co. v. Wallingford*, 111 Conn. 352, 358 (1930)). The riparian right to use the water is not absolute but is usufructory in nature such that the riparian is limited to the ordinary and reasonable use of the water, which typically should not interfere with reasonable uses by other riparians. *Parker v. Griswold*, 17 Conn. 288 (1845); *Robertson v. Arnold*, 182 Ga. 664, 672

(1936) (citations omitted); *Portage Cty. Bd. of Comm'rs v. City of Akron*, 109 Ohio St. 3d 106, 117 (2006). Accordingly, Greenlawn is entitled to continued flow sufficient to satisfy its municipal needs because a competing riparian right has not been asserted against it and Greenlawn's municipal withdrawals are considered ordinary and reasonable use.

A. Summary judgment is appropriate because NUO is not a riparian landowner and cannot assert its own riparian rights claims against Greenlawn.

NUO contends the trial court erred in granting Greenlawn unlimited use of the water from Bypass Reach. R. at 4. While the issue of whether the use of water by riparian co-owners was reasonable or unreasonable presents a triable question in some cases, the district court correctly granted summary judgment in the present case. *See* Scott B. Simpson, *Forging Connecticut's Water Policy Future: Registered Diversions, Riparian Rights, and the Courts after Waterbury v. Washington*, 8 CONN. PUB. INT. L. J. 255, 267 (2009) (citing *Lake Williams Beach Ass'n v. Gilman Bros.*, 197 Conn. 134, 496 A.2d 182 (1985) ("Judgments of reasonableness of competing uses are questions of fact that depend on the circumstances of a particular case."); *Pyle v. Gilbert*, 245 Ga. 403, 409 (1980) (same). First, NUO failed to present any testimony regarding its ownership of any riparian rights to the waters of Bypass Reach. "The 'reasonable use' doctrine itself only makes sense when one riparian owner challenges another's use as unreasonable and the court makes a subsequent determination of reasonableness." *Stupak-Thrall v. U.S.*, 89 F.3d 1269, 1276 (6th Cir. 1996); *Portage Cty. Bd. of Comm'rs*, 109 Ohio St. 3d at 111-12 (finding that one party did not own any riparian property and therefore lacked standing to present an unreasonable use claim; only the parties owning riparian rights had sufficient standing to contest city's water use). Because none of NUO's members are waterfront property owners on Green Bay or the Green River, NUO lacks common law standing to assert any riparian rights claims against Greenlawn. R. at 10. Second, the district court also correctly held that because

there is not currently a question of competing uses between Greenlawn and ACOE—the respective riparian owners—there does not exist a question of fact and summary judgment is proper. R. at 12.

B. Greenlawn as a municipality is a riparian proprietor.

Regardless of the summary judgment inquiry, Greenlawn is rightfully entitled to sufficient withdrawals for the benefit of the municipality. The district court correctly cites the minority rule in recognizing that a municipality is a riparian proprietor and is entitled to withdraw water to supply non-riparian parcels within the municipality. *Tubbs v. Potts*, 45 N.U. 999 (1909); *City of Canton v. Shock*, 66 Ohio St. 19, 63 N.E. 600 (1902) ("Such municipality is itself, in its corporate capacity, a riparian proprietor, and entitled as such to riparian rights in the stream upon which it is situated.") (citing *City of Phila. v. Collins*, 68 Pa. 106 (1871); *Barre Water Co. v. Carnes*, 65 Vt. 626, 627 (1893)); *Portage Cty. Bd. of Comm'rs*, 109 Ohio St. 3d at 117-18. As a riparian landowner, Greenlawn is entitled to reasonable consumptive uses of water so long as these uses do not interfere with the "reasonable use" of water by downstream riparian landowners. *See Hendrick v. Cook*, 4 Ga. 241 (1848); *Tyler*, 24 F. Cas. 472. The New Union district court embraced this "reasonable use" standard and rejected the natural flow theory on riparian rights, which dictates that riparian owners may rightfully expect water to flow by their land in its natural condition, without any alteration or reduction of flow by other users. *Hendrick*, 4 Ga. at 258; *City of Waterbury*, 260 Conn. at 581.

C. Greenlawn's municipal withdrawals constitute "reasonable use."

Courts have identified a range of factors to be considered in determining whether a use is reasonable including the purpose of the use, the status of the user as an upper or lower riparian, and local custom. *See generally* Restatement (Second) of Torts § 850A (1977) (listing factors to determine reasonableness of water use). Not dispositive but relevant to this inquiry is the fact

that Greenlawn's municipal use was long established prior to the construction of the upstream diversion of the Green River. *See id.* at § 850A(h) (1977) (noting that a few courts in riparian jurisdictions have specifically mentioned priority in time as an important factor affecting the reasonableness of a use). However, combined with other factors, such as the domestic nature of a riparian's use, these factors favorably affect Greenlawn's use priority.

An analogous case concerning the riparian rights of municipalities is *Canton v. Shock* in which suit was brought against the city, an upstream landowner, for supplying water for the natural wants of its inhabitants at the detriment of a lower riparian owner desiring to use the water for power purposes. *Canton*, 66 Ohio St. at 20, 25–26. At issue was whether the water consumption by the city and its inhabitants was "reasonable." *Id.* at 20. In determining "reasonable use," the *Canton* court considered whether the flow of the water in the stream was materially diminished to the injury of the lower proprietors "by the supplying of water by the city to people outside its limits, or to be transported away from the city for commercial purposes, or by an unreasonable supply of water for power purposes." *Id.* at 34. The Court held that the city was not liable for the water consumed by the city for its own purposes or so supplied to its inhabitants for domestic use. *Id.* at 33.

Similarly, the upper riparian municipality in the present case—Greenlawn—has been brought to court to determine the extent of its "reasonable use" as a riparian owner, albeit there is not a lower riparian owner bringing a competing claim. Applying the holding in *Canton*, Greenlawn's municipal consumption is reasonable because it has not supplied water outside city limits, transported water for commercial purposes, or used an unreasonable amount for power use. *Id.* at 34. Likewise, domestic use, including water used for lawns and ornamental plants, is considered a "natural use" allowed to riparian owners *without regard* to impact on other riparian

landowners. *Harris v. Brooks*, 225 Ark. 436, 283 S.W.2d 129 (1955). The Greenlawn Water Agency provides domestic and industrial water supply to largely residential districts with single-family homes, along with a small downtown area; water withdrawals by Greenlawn peak in July and August due to residential summer lawn and watering demands. R. at 5. The residential nature of Greenlawn's population and the resultant water use for these suburban demands is demonstrably domestic. Accordingly, these uses upon riparian lands are for "domestic and agricultural or manufacturing purposes [and] is in its nature a reasonable use." *Mayor, etc. of Paterson v. E. Jersey Water Co.*, 74 N.J. Eq. 49, 75 (1908).

NUO's argument that Greenlawn has no right to withdraw more than its annual average flow rate of 7 CFS provided in the WCM is similarly without merit. The 7 CFS flow limitation set by the 1968 Water Control Manual no longer reasonably reflects the needs of the municipality because both the city itself and the population of Greenlawn has grown substantially. *See Portage Cty. Bd. of Comm'rs*, 109 Ohio St. 3d 106, 119 (finding that water releases from the lake involve balancing the changing needs of competing riparian owners). The court in *Portage County Board of Commissioners* also determined that current water releases at flow rates higher than the originally contracted rate was appropriate where the use was reasonable and has been maintained for the last past eight years. *Id.* Similar to the case in *Portage County Board of Commissioners*, Greenlawn's needs have evolved since the inception of the WCM, and Greenlawn had also customarily received higher water flow rates from the Bypass Reach since 1948, a period of time far longer than eight years. Taking into account the consideration that Greenlawn's additional residential water consumption for watering lawns and ornamental plants is for domestic purposes, unquestionably constituting reasonable use, Greenlawn is not required to institute drought restrictions on its water consumers.

D. ACOE's hydroelectric power generation must yield to Greenlawn's domestic water demands.

The district court correctly recognized that ACOE's power generation use must yield to Greenlawn's domestic water demands. *Harris*, 225 Ark. at 444 ("the right to use water for strictly domestic purposes—such as for household use—is superior to many other uses of water…"); *Canton*, 66 Ohio St. at 31 (noting that the primary use of water has been for domestic purposes, and its secondary use for the purposes of power); *Tunison v. Harper*, 286 Ga. 687, 688 (2010) ("well-established consensus that the use of water for domestic purposes is usually accorded a preference over other uses") (quotations omitted). When a conflict arises, domestic uses receive the highest priority, at times even permitting an upstream riparian to exhaust the water in a watercourse without leaving any water for downstream riparians. *See Evans v. Merriweather*, 4 Ill. (3 Scam.) 492, 496 (1842); *Norfolk & W. Ry. Co. v. Graham Land & Improvement Co.*, 10 Va. L. Reg. 983, 984 (Cir. Ct. 1904); *see generally* Restatement (Second) of Torts § 850A comment c (1977) (explaining preferences under reasonable use). Therefore, NUO's argument that Greenlawn must "share the shortage" so as to allow ACOE to divert water for use in hydroelectric power generation is without basis in riparian law.

Indeed, courts have held that "where there is not sufficient water in a stream to supply fully the needs of all the proprietors on the stream for *power purposes*…the water should be [] divided and used that each one may bear his reasonable portion of the loss." *Canton*, 66 Ohio St. at 30 (emphasis added). However, in the present case Greenlawn's water consumption during the elevated periods at issue is for domestic uses; it is well settled that the right of a lower proprietor to the use of the waters for power purposes is subject to the superior right of upper proprietors for domestic purposes and must yield thereto. *Id.* at 31 ("People on the upper stream have the right to quench their thirst and the thirst of their…herds, even though by so doing the wheels of

every mill on the lower stream should stand still.") (citation omitted); *Masley v. Lorain*, 48 Ohio St. 2d 334 (1976).

Further, "if the upper proprietors have grown so large…as to consume most, or all of the water, the lower proprietors have no cause of complaint, because it is only what they should have reasonably expected in the growth and development of the country, and subject to which contingency they established their water powers." *Canton*, 66 Ohio St. at 31. This principle is evidenced by the 1948 agreement between Greenlawn and ACOE guaranteeing sufficient flows in the Bypass Reach to allow Greenlawn to continue water withdrawals "in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." R. at 6. Greenlawn's subsequent growth and development was foreseeable and the resultant increases in water consumption was provided for in the agreement between ACOE and Greenlawn. Accordingly, Greenlawn is entitled to sufficient water withdrawals for its domestic use without regard for ACOE's power generation use because common law riparian doctrine dictates water used for domestic purposes to be superior to that used for power purposes.

II. The Corps did not violate the consultation requirement of ESA § 7(a)(2) because its Bypass Reach releases were non-discretionary actions compelled by the Water Control Manual, water supply agreement, and Greenlawn's riparian rights.

Because the Corps' release of water into the Bypass Reach at a rate of 30 CFS was a non-discretionary action, the Corps was not required to undergo prior consultation with wildlife agencies to ensure that the release would not jeopardize the oval pigtoe mussel. Accordingly, the District Court properly granted the Corps' motion for summary judgment. Section 7(a)(2) of the Endangered Species Act provides that, before conducting an "agency action," a federal agency must consult with the appropriate federal wildlife agency concerning the potential impacts of the action on protected species. 16 U.S.C. § 1536(a)(2). This requirement applies only to agency

actions "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03 (2009); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007). Conversely, agencies are exempt from the consultation requirement if the action is non-discretionary. *Id.*

In *Home Builders*, the Supreme Court reasoned that "when an agency is *required* to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species." *Nat'l Ass'n of Home Builders*, 551 U.S. at 667. As a result, an agency lacks discretion when it cannot "implement measures that inure to the benefit of the protected species." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995); *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014), cert. denied, 135 S. Ct. 676 (2014). This inquiry does not examine the agency's ability to protect species in the abstract – to overcome the motion to dismiss, NUO must "allege facts to show that [the action agency] retained sufficient discretionary involvement or control over [*the action in question*] to implement measures that inure to the benefit of the [relevant species]." *Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1216 (E.D. Cal. 2017) (quoting *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001)).

This inquiry requires a definition of the alleged "action" and what constitutes a "benefit" to the species. Here, NUO has identified the relevant action as the Corps' "release of 30 CFS to the Bypass Reach during the 2017 drought warning." R. at 14–15. NUO argues this release "led to the reduction in downstream flows and consequential application of drought emergency restrictions, including the curtailment of hydroelectric power releases." *Id.* at 15. Therefore, the Court's analysis should be confined to the Corps' discretion over *water releases into the Bypass Reach during drought conditions*, as opposed to a broader inquiry into the Corps' discretion over its general operation of the dam system. Furthermore, the record indicates that relevant harm to

the mussels stems entirely from reduced river flows into Green Bay. R. at 9–10. To avoid extirpation of the mussels, a daily average flow of at least 25 CFS is required. R. at 10. For an action to inure to the benefit of the species, it must therefore maintain an average daily downstream flow of at least 25 CFS. Stated fully, the issue before the Court is whether the Corps had discretion over water releases into the Bypass Reach to implement measures which would ensure an average daily flow of at least 25 CFS into Green Bay.

In determining the extent such discretion, the court must undertake "a careful examination of the authority claimed to control the agency's discretion." *Nat. Res. Def. Council v. Kempthorne*, 621 F. Supp. 2d 954, 976 (E.D. Cal.). The Corps' discretion may be controlled not only by federal statutes and regulations, but also by other legal obligations, including "prior contract[s], permit[s], or management decision[s]." *Kempthorne*, 621 F. Supp. 2d at 976; *see also Defs. of Wildlife v. Norton*, 257 F. Supp. 2d 53, 66–69 (D.D.C. 2003); Reed D. Benson, *Reviewing Reservoir Operations: Can Federal Water Projects Adapt to Change?*, 42 COLUM. J. ENVTL. L. 353, 375 (2017). Here, the Corps' discretion over the Bypass Reach is limited by several legal obligations. First, the Corps' dam operations are controlled by the Water Control Manual, which establishes tight parameters for water releases at the dam. R. at 6–7. Second, the Corps is bound by a water supply agreement with Greenlawn, which imposes water release obligations based on Greenlawn's riparian water rights. R. at 6. These instruments divested the Corps of the discretion required to act for the protection of the species. Therefore, the Corps was not required to undergo consultation pursuant to § 7(a)(2) of the ESA.

A. The Howard Runnet Water Control Manual imposed a non-discretionary duty to deliver at least 30 CFS into the Bypass Reach.

Army Corps projects are authorized by statutes which "specify the purposes for which that project was designed and constructed" and "generally dictate the operating priorities of a

project." Reed D. Benson, *Can A State's Water Rights Be Dammed? Environmental Flows and Federal Dams in the Supreme Court*, 8 MICH. J. ENVTL. & ADMIN. L. 371, 378 (2019). These authorizing statutes require the Corps to operate the project to serve specified purposes, without dictating specific operating practices. *Id.* at 378. Specific practices are dictated by "plans" formulated by the Corps, which are codified into Manuals. *Id.*; 33 C.F.R. § 222.5 (2010).

The Howard Runnet Dam was authorized by the River and Harbor Act of 1945 and the Fish and Wildlife Coordination Act of 1958. River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945); Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958). These statutes authorize the dams to operate for flood control, hydroelectric power, recreation, and fish and wildlife purposes. *Id.* Furthermore, section 6 of the 1944 Flood Control Act authorizes the Corps to "make contracts" with municipalities for "for domestic and industrial uses for surplus water." 33 U.S.C. § 708; Benson, 42 COLUM. J. ENVTL. L. at 424. The 1944 Act requires the Corps to ensure that such an agreement, when made, will not "adversely affect *then existing* lawful uses of such water." 33 U.S.C. § 708 (emphasis added).

The Corps entered into this agreement upon the completion of the dams in 1948. R. at 6. Therefore, the 1944 Act required the Corps to ensure that the agreement would not adversely affect the lawful uses of water *then existing* at the time of the agreement—namely, the flood control, hydroelectric power, and recreation uses of the water, as they existed in 1948. Because operation of the dam for "fish and wildlife purposes" was not authorized until 1958, such purposes were not "then existing lawful uses" when the agreement was formed. Therefore, in setting its operating procedures, the Corps is not required to prioritize fish and wildlife purposes above performance of its water supply agreement with Greenlawn. To the contrary, when exercising statutory discretion to formulate operational plans, agencies are not permitted to

unilaterally breach pre-existing, non-discretionary contractual terms, even recognizing the ESA's broad mandate in favor of species protection. *Sierra Club*, 65 F.3d 1502, 1510–12 (distinguishing *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)).

Instead, the Corps' discretion is controlled by the Water Control Manual. *Florida v. Georgia*, 138 S. Ct. 2502, 2522 (2018) ("[W]hether the Corps must initiate drought operations is not a matter of discretion" because it depends on conditions set by a Master Manual); Benson, 42 COLUM. J. ENVTL. L. at 375. Despite not being promulgated through notice-and-comment rulemaking procedures, Water Control Manuals are substantive legal obligations which bind the Corps and are enforceable in the courts. *Florida*, 138 S. Ct. at 2522; Benson, 42 COLUM. J. ENVTL. L. at 375. Here, the Howard Runnet Water Control Manual places tight restrictions on the discretion of the Corps' Bypass Reach Releases, particularly in "Drought Warning" conditions. R. at 7. On April 23, 2017, the Manual directed the Corps to reduce Bypass Reach flow to 7 CFS, and to cap hydroelectric releases at 200 CFS for three hours per day. R. at 7. On the other hand, the Water Control Manual overlays a mandate that "*[a]t all times* the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply agreements entered into by the United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law." R. at 7. The Manual's powerful "at all times" language sets an overriding imperative binding the Corps to conducting Bypass Reach Releases at a rate at least equal to Greenlawn's reasonable use. This refutes NUO's argument that the Corps' release of 30 CFS into the Bypass Reach constituted a "modification" of the Manual. R. at 15. Rather than modifying the Manual, the Corps had incorporated the Bypass Reach release requirements into the Manual itself.

B. The Corps was bound by Water Supply Agreement and Riparian Rights to deliver 30 CFS into the Bypass Reach.

The discretion of the Corps may further be constrained by contractual obligations, including water supply agreements. *See Jewell*, 749 F.3d at 784; *Sierra Club*, 65 F.3d at 1509–10. This is true despite the ESA's broad mandates requiring the protection of endangered species—although the ESA is construed broadly, it does not permit an agency to unilaterally breach pre-existing, non-discretionary contractual terms. *See Sierra Club*, 65 F.3d at 1511–12. This rule is grounded in the long-standing principle establishing the government's solemn obligations to honor its contractual commitments. *See Perry v. United States*, 294 U.S. 330 (1935); *Union Pac. R.R. v. United States*, 99 U.S. 700, 719 (1878).

Upon completion of the Dams in 1948, Army Corps entered into an agreement with Greenlawn obligating it to maintain sufficient flows to the Bypass Reach to allow the City to withdraw water "in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." R. at 6. The contract provides no other provisions that may act as exceptions to this mandate. *Id*. The phrase "sufficient flows" means that the Corps is contractually bound to deliver *no less* than what Greenlawn withdraws for its reasonable consumptive uses of water. At peak demand during the summer, the record stipulates that this translates to 20 million gallons per day, equivalent to an average rate of 30.94 CFS over 24 hours. R. at 5.

C. The Corps lacked any discretion over its water releases into the Bypass Reach that would allow it to implement measures which would ensure inure to the benefit of the oval pigtoe mussels.

In *NRDC v. Jewell*, the Ninth Circuit evaluated whether the Water Reclamation Bureau was required to consult prior to renewing water supply contracts which would potentially affect populations of endangered delta smelt. *Jewell*, 749 F.3d at 784 (9th Cir. 2014). The court

evaluated the Bureau's discretion to renegotiate contractual terms prior to renewal. *Id.* The Bureau argued that its discretion to act within the scope of contract renegotiations for the benefit of the delta smelt was eliminated by the original contracts, whose terms would control "as to the quantities of water and the allocation thereof" for all future contract renewals. *Id.* The Ninth Circuit disagreed, pointing out that the Bureau had discretion under the contract to take other actions to benefit the smelt, like renegotiating other terms and opting to not renew the contracts at all. *Id.* at 785.

In contrast, in *Rio Grande Silvery Minnow v. Keys*, the court found that the Corps lacked discretion over the operation of its Rio Grande reservoir facilities to act for the benefit of the endangered silvery minnow. *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 994–97 (D.N. M. 2002), *aff'd* 333 F.3d 1109 (10th Cir. 2003), *and vacated as moot* 355 F.3d 1215 (10th Cir. 2004). The court determined that operation of the reservoirs was tightly controlled by "clear operating criteria, under which emergency deviation appear[ed] to be warranted only for short term situations of very limited duration and at the determination of the damsite manager." *Id.* The court concluded that the Corps lacked discretion to operate for the benefit of the silvery minnow and was therefore not subject to the § 7(a)(2) consultation requirement. *Id.*

In *Jewell*, the court found sufficient discretion to trigger consultation by identifying specific beneficial actions the Bureau could have taken under the renegotiated contract. In contrast, the *Silvery Minnow* court found no such actions because the actions of the Corps were entirely controlled by regulation, with no options which would have benefited the species. This case most closely resembles *Silvery Minnow*—much as reservoir operations there were controlled by specific protocols contained in regulations, the Corps' operation of the Howard Runnet Dam is prescribed by protocols in the Water Control Manual, which dictate that the Corps provide

Greenlawn with water supply at least equal to its reasonable consumption "at all times." This places a floor on the Corps' discretion over the rate and quantity of Bypass Reach releases, below which it lacks discretion to venture. Moreover, unlike the Corps in *Silvery Minnow*, the Corps here is also *contractually* bound to provide a specific amount of water, placing yet another shackle on the Corps' discretion. Unlike both *Silvery Minnow* and *Jewell*, there is no "emergency exception" or other contractual term around which the Corps may navigate. Put simply, with regards to the rate and quantity of water to be delivered to the Bypass Reach, the Corps' hands are tied.

Even if we enlarge the scope of analysis to encompass all dam operations, the Corps still lacked discretion to take any actions which would have saved the species. While the Corps retained discretion to decrease hydroelectric releases to offset the increase in Bypass Reach releases, such an action would have immediately jeopardized the mussels. Because Greenlawn consumed all of the 30 CFS Bypass Reach releases, the oval pigtoe relied on peak hydroelectric releases to maintain the required 25 CFS flow. R. at 9. Because 200 CFS for three hours every day equates to exactly 25 CFS averaged over 24 hours, *any* decrease in hydroelectric releases would have doomed the mussel. Because its hands were tied with respect to Bypass Reach releases, and no other operational configuration would have saved the oval pigtoe mussel, the Corps lacked any discretion that would allow it to implement measures which would ensure inure to the benefit of the oval pigtoe mussels. Therefore, the Corps was not subject to the ESA's § 7(a)(2) consultation requirement, and the District Court properly granted summary judgment in the Corps' favor.

III. Greenlawn's water withdrawals constitute an illegal take of the endangered oval pigtoe mussel species under § 9 of the Endangered Species Act.

The district court did not err in finding Greenlawn's water withdrawals constituted an illegal take of the endangered oval pigtoe mussel. To establish an illegal "take" under ESA § 9, a plaintiff must prove the defendant directly or indirectly harmed an endangered species via habitat modification resulting in actual injury or death to the protected animals. *See* 16 U.S.C. § 1538(a)(1)(B) ("[W]ith respect to any endangered species…it is unlawful for any person…to take any such species."); 16 U.S.C. § 1532(1) ("[T]he term "take" means to…harm…); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) (applying principles of statutory interpretation to hold that "harm" in the ESA refers to both direct and indirect applications of force); 50 C.F.R. § 17.3 (1994) ("'Harm' in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such an act may include . . . significant habitat modification…"). Significant habitat modification includes removing water, altering streamflow, and conducting land-use activities in a riparian area. *See* Endangered and Threatened Wildlife and Plants; Definition of "Harm," 64 Fed. Reg. 60,727, 60,730 (Nov. 8, 1999). Liability will be imposed on a careless actor in circumstances where the consequences are proximately caused by the actor's conduct—meaning the consequences are "foreseeable" and more than a "mere fortuity." *Sweet Home*, 515 U.S. at 700; *Paroline v. United States*, 572 U.S. 434, 445 (2014). Congress passed the ESA to conserve the ecosystems upon which endangered species depend. 16 U.S.C. § 1531(b). This purpose, although broadly stated, is meant to prevent a specific end—the extinction of species. *See* 16 U.S.C. § 1531(a)(1)–(2). It would be a mistake for this court to find Greenlawn did not "take" the oval pigtoe mussel species in violation of ESA § 9 because Greenlawn's water withdrawals foreseeably and unreasonably create a risk of death and injury to the endangered oval pigtoe mussel in contravention of Congress' conservation

mandate. For this reason, the court should uphold the district court's injunction enjoining Greenlawn from future water withdrawals as a matter of law.

A. Greenlawn's water withdrawals foreseeably harm the endangered oval pigtoe mussels.

Finding an actor liable for harm to an endangered species is only proper in contexts where the actor is the proximate cause of harm to the species, meaning that the resulting harm is reasonably foreseeable. *See Paroline*, 572 U.S. at 445 (citing Restatement (Third) of Torts § 29, p. 493 (2005)). When an actor's conduct is too attenuated from its result, liability will not lie. *Sweet Home*, 515 U.S. at 714–15; *see also Paroline*, 572 U.S. at 445. The foreseeability requirement used to establish proximate cause is consistent with the ESA's goal of species conservation. *See* 16 U.S.C. § 1531(a)(1)–(2). This court should uphold the district court's finding that Greenlawn's water withdrawals are the proximate cause of harm to the oval pigtoe mussel species because Greenlawn's water withdrawals are not so attenuated from the resulting harm to the endangered species as to be unreasonably anticipated.

Greenlawn incorrectly insists that injury and death to the oval pigtoe mussel is not foreseeable because their water withdrawals are too remote in time and space. R. at 17. In *Sweet Home*, Justice O'Connor set the stage for what conduct is too attenuated to incur liability under ESA § 9, stating that "permitting mouflon sheep to eat mamane-naio seedlings that, when full grown, might have fed and sheltered endangered palila…merely prevented the regeneration of forest land not currently sustaining actual birds" and was consequently was too remote a consequence for liability to lie. *See Sweet Home*, 515 U.S. at 713–14 (O'Connor, J., concurring). While Justice O'Connor's example is relevant with respect to forest habitats, the Fifth Circuit in *Aransas Project v. Shaw*, spoke directly to conduct in the river habitat that is too attenuated to enjoin the state from further water withdrawals. *See Aransas Project v. Shaw*, 775 F.3d 641,

656–63 (5th Cir. 2014). *Aransas* involved a case where a population of endangered whooping cranes died after migrating from Canada to Texas. *Id*. at 645–48. The chain of causation began with the endangered whooping crane landing in an estuary where prey was scarce due to severe drought and upstream water usage. *Id.* The cranes decided to look elsewhere for food and in the interim, experienced food stress, emaciation, starvation and ultimately death. *Id.* In its reasoning, the *Aransas* court cited a total of nine steps—from the state's water withdrawal to the death of the whooping crane—to support its finding of no proximate cause. *Id.* at 660. While the number of steps in the chain of causation is not determinative, the number of steps is informative to the court's finding that the government did not proximately cause death to the endangered whooping crane. *See id.* Increasing steps between the act or omission and the injury or death to the protected species, increases the probability that the causal factors will be less foreseeable. *See id.* While the government's water withdrawals may have impacted the situation, the impact was merely a "fortuitous confluence of adverse factors" causing an unanticipated die-off result making the government's conduct too remote to impose liability for a take in violation of ESA § 9. *Id*. at 662.

In the present case, Greenlawn's water withdrawals are more than a mere "fortuitous confluence of adverse factors." Although not determinative, but highly informative, Greenlawn's act of withdrawing water is the last human water withdrawal prior to the flow reaching the oval pigtoe habitat. R. at 17. This is distinguishable from the nine steps in the chain of causation found in *Aransas*, therefore increasing fairness in finding proximate cause between Greenlawn's conduct and the resulting harm to the oval pigtoe mussel species. The present case is also distinguishable from the facts in *Aransas* because unlike the migratory whooping crane making its travel from Canada to an unascertainable location in Texas, the oval pigtoe mussel is not a

migratory species, and the requirements of the habitat to the survival of the species, can be ascertained with great certainty. R. at 9–10. This case is also unlike the hypothetical cited in Justice O'Connor's *Sweet Home* concurrence, where the actor's conduct was too attenuated for liability to lie, for two reasons. First, the features of a river habitat in the present case is distinguishable from the features of the forest habitat cited in *Sweet Home*. Modifications in a forest habitat can be isolated to a single tree, whereas modifications in a river habitat affect the entire downstream. Second, like the nine steps in *Aransas* between conduct and result outside human control, the *Sweet Home* hypothetical also involves a number of factors outside human control including the animal's choice of food, and the probability that that food would have successfully germinated and grew into a tree that another animal population would have chosen to eat. Here, there is only one factor outside human control—the lack of precipitation couched in general concerns regarding climate change. All other factors, such as watering lawns and washing cars, are well within the control of humans choosing to divert water from the Green River flows. *See* R. at 8–9.

Greenlawn insists proximate cause should not lie because they are not diverting water at the exact latitude and longitude of the oval pigtoe mussel habitat. *See* R. at 16–17. As support, Greenlawn cites to logging cases recognizing that ESA § 9 prohibits direct physical habitat destruction. R at 16. While this argument may make sense in ESA § 9 claims involving forest habitats, a distinction must be made when an actor's conduct takes place along a river stream. The removal of forest trees occurs in isolation whereas the removal of water "directly" affects the water levels downstream available to submerge and conserve the oval pigtoe mussel species. Greenlawn admits to this reality when it argues ACOE, and not Greenlawn, should be held responsible for harming the oval pigtoe mussel due to the downstream effects of its Howard

Runnet Dam Works operation. R. at 17. Even if the court considers removal of upstream water supplies and its downstream effects as "indirect," *Sweet Home*'s analysis of "harm" including both direct and indirect applications of force should be applied. *See Sweet Home*, 515 U.S. at 690–91, 701–08. Accordingly, Greenlawn's water withdrawals foreseeably result in harm to the endangered oval pigtoe mussel species and liability should lie under ESA § 9.

B. Greenlawn's refusal to curtail its water withdrawals creates unreasonable risk to the survival of the endangered oval pigtoe mussels.

Because there are multiple humans choosing to divert water from the Green River flows resulting in harm to the endangered oval pigtoe mussel, precedent is instructive for defining the contours of conduct that creates an unreasonable risk of injury or death to the oval pigtoe mussel. Determining unreasonable risk creation in light of a proximate cause analysis is a task best left to the lower courts. *Sweet Home*, 515 U.S. at 713. When deciding whether an injunction should be issued to enjoin an actor from withdrawing water, district courts have used the extent of a party's affirmative action taken to protect an endangered species as determinative. *See Alabama v. United States Army Corps*, 441 F. Supp. 2d 1123 (N.D. Ala. 2006); *United States v. Town of Plymouth*, 6 F. Supp. 2d 81 (D. Mass. 1998).

The *Alabama* court refused to subject the government to liability under ESA § 9 in a case involving multiple upstream water withdrawals, severe drought, and habitat modification resulting in harm to an endangered species of mussels. *See Alabama*, 441 F. Supp. 2d 1123 at 1125–28. The *Alabama* court found that ACOE was not subject to liability for two reasons. First, the ACOE had already taken significant affirmative action to protect the endangered species. *Id.* at 1135. Second, the government could not further be held responsible for the absence of rain and lack of water flow in the reservoir. *Id*. In its reasoning, the court relied on evidence of ACOE's proactive action to protect the endangered species including consultation with the Fish and

Wildlife Service, the development of an IOP plan, and the engagement in a settlement agreement to address water flows. *Id.*

Conversely, the *Plymouth* court upheld a finding of proximate cause in a case where a city government was engaged in a willful omission to act resulting in harm to an endangered species. In *Plymouth*, the court granted the government's motion for a preliminary injunction against the defendant township, prohibiting the use of recreational off-road vehicles on a beach that provided significant income to the city. *Plymouth*, F. Supp. 2d 81 at 91–92. Although not a water withdrawal case, *Plymouth* touched upon a city's common law right to use their property in light of the ESA's established protections for the endangered piping plover shore bird species. *Id*. at 89–90. After five years of death and injury to the piping plover, and the city's refusal to curtail the use of off-road vehicles in favor of protecting the endangered species. The government filed a complaint to enjoin the city from further using the beach for off-road vehicle use. *Id.* at 88–89. Although the *Plymouth* court did not make a conclusion regarding the cause of harm to the piping plover, when upholding the injunction, the court emphasized that "Plymouth's persistent refusal over the last five years to undertake adequate and timely precautionary measure…creat[ed] a likelihood that piping plover chicks [would] be killed and disturbed and that the nesting and feeding habitat will be adversely modified during the upcoming breeding season." *Id.* at 91. In granting the preliminary injunction, the *Plymouth* court relied on evidence that the town officials failed to "act quickly and decisively" to protect the endangered plover chicks and "the long-standing intransigence of town officials" against protecting the endangered piping plover species necessitated the injunctive order. *Id.* Furthermore, the court reasoned that despite the fact that off-road vehicle recreationalists and the endangered piping plover could theoretically "happily co-exist," restricting off-road vehicle use on the beach was necessary to

protect the species. *Id*. In dicta, the *Plymouth* court remarked, "I am hopeful that the Town will work with appropriate state and federal officials to reach an acceptable beach management plan which will make the attached court order no longer necessary." *Id.* at 92.

This court should similarly hold, as in *Plymouth*, that an injunction is necessary to protect the endangered oval pigtoe mussel species from Greenlawn's intentional water withdrawals. As in *Plymouth*, where the citizens had a common law right to use the beach for recreational use, Greenlawn has a common law right to withdraw water from the Green River flows for washing cars and watering lawns. Furthermore, as in *Plymouth*, Greenlawn's reasonable uses of property resulted in harm to a federally listed endangered species. Like *Plymouth*, Greenlawn has actual notice that this harm is occurring, yet continues to engage in their deleterious use of property to the conservation of endangered species notwithstanding. Although *Plymouth* involved an impasse that lasted for five years between the municipality and the government, this lack of analogy should not persuade the court that an injunction is not yet proper. Ultimately, the ESA mandates protection of endangered species and the sooner Greenlawn can be enjoined from harming a protected species, the more. Unlike *Alabama*, Greenlawn has failed to demonstrate sufficient affirmative action, apart from controlling the weather, to protect the endangered species. Putting restrictions on washing cars and watering lawns is a reasonable request to make in favor of promoting the ESA's conservation policies. Greenlawn has been invited to the negotiating table but has failed to take a seat. Therefore, as the court in *Plymouth* was hopeful an injunction would encourage Greenlawn to work with state and federal officials to create a plan acceptable to all parties, including the endangered piping plover, here, we are also hopeful an injunction will encourage Greenlawn to consider the impact of its water uses. Thus, in the

interest of conserving the endangered oval pigtoe mussel species, upholding an injunction to enjoin Greenlawn's future water withdrawals is proper.

IV. Justice requires equities to be balanced to tailor injunctive relief in an ESA case involving multiple water diverters.

This case presents a question of whether equities must be balanced prior to enjoining a beneficial municipal activity, when the activity will cause the extirpation of a federally listed endangered species; as such, this Court should not automatically assume that the balance decided by Congress in giving endangered species the highest of priorities as stated in *Tennessee Valley Authority v. Hill* is the same balance to be considered under the facts of the present case. The Court in *Tennessee* held that it is not the role of the courts to balance species eradication against the claimed public benefits of agency activities. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978). Moving forward, this Court should adopt Justice Rehnquist's *TVA* dissent and rely on the principle of statutory construction announced in *Hecht Co*. *See TVA*, 437 U.S. at 211–12. *Hecht Co*. stands for the proposition that where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a "nice adjustment and reconciliation between the competing claims. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). In such cases, the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction*." Yakus v. United States*, 321 U.S. 414, 440 (1944). An injunction may be enforced, in spite of past conduct, if the defendant presents a threat of future violation. *See Hecht Co.*, 321 U.S. at 326. Flexibility in structuring injunctive relief in statutory cases is compatible with respecting Congress' legislative intent. David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the* Remedy, 72 MINN. L. REV. 627, 647–48 (1988). In a case where different relief is consistent with the goals of the statute, and the case

involves a factor not reflected in Congress' original formulation of its rule, a departure from strict statutory enforcement is justified. *Id.*

Balancing the equities in the present case is necessary to conserve the oval pigtoe mussel and tailor injunctive relief when multiple parties are involved in causing an indivisible harm to an endangered species. The ESA did not anticipate when the "person" inflicting harm to an endangered species was actually multiple entities. *See* 16 U.S.C. § 1532(13) ("[t]he term 'person' means *an* individual…*or*…" (emphasis added)). Because the facts of this specific case were not anticipated, a departure *TVA*'s strict statutory enforcement and reliance on the principle in *Hecht Co.* is justified.

In *TVA,* there was a single water diverter, whose unfinished public works project, if completed, would harm a population of endangered species. *TVA*, 437 U.S. at 168. The *TVA* court was asked to consider whether an anticipated $ 53 million in nonrecoverable obligations and the public's loss of a beneficial municipal activity should be balanced against protecting an endangered species that was sure to be harmed if the public works project was completed. *Id.* at 166–67. The *TVA* court held that a balancing test was not required because Congress had already decided the balance in favor of protected species. *Id.* at 188. The facts in *TVA* were distinguishable from those in *Hecht Co*. where the Court completely deferred to Congress' statutory definition of permissible pricing conduct, while applying limited judicial discretion to the form of remedy when there were multiple departments in violation of the Congressional mandate. *See Hecht Co*. 321 U.S. at 321–22, 328; Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 589–92 (1982) (discussing how *Hecht* drew the proper distinction between the potential confrontation between the courts and Congress when confronted with a discussion of statutory effect on judicial discretion).

As in *TVA* and as in *Hecht Co*, the district court correctly relied on Congress's mandate to decide the case in favor of the endangered species. However, this is not the balance the court is being asked to consider. This court may not substitute their own judgment for that of Congress with respect to abating statutory violations, but like *Hecht Co*. this court *can* maintain limited judicial discretion with respect to tailoring injunctive relief, particularly when there exist multiple defendants who present a threat of future harm to the endangered species. *See* DAN B. DOBBS, LAW OF REMEDIES, 84–91, (3d ed. 2018) (discussing the scope of the court's opinion in *TVA* and the nuances of statutory rights and equitable discretion). In the present case, Greenlawn has given no indication that they intend to prioritize the endangered oval pigtoe mussel when considering their water withdrawals during droughts certain to occur in the future. R. at 11. Additionally, the ACOE makes water withdrawals from the Green River flow, affecting the water remaining to submerge the endangered oval pigtoe mussel species, subjecting the species to risk of harm. R. at 6–9. The ACOE has no plans to end operation of its hydroelectric power plant, as it provides economic and social utility to the region. *See* R. at 6. Accordingly, in light of Congress' mandate to conserve the oval pigtoe mussel species, and in light of *Hecht Co*.'s allowance of limited judicial discretion in cases where there exist multiple defendants who present a threat of future harm, this court should decide that a balancing of equities is proper to tailor injunctive relief.

V. After balancing the equities, enjoining Greenlawn from making future water withdrawals is constitutionally valid and should be upheld as a matter of law.

The Restatement (Second) of Torts description of reasonable water use allocation is relevant to the balancing of equities in the present case. In an eastern riparian rights jurisdiction, fairness dictates that a reasonable use inquiry inform the proportional allocation of water. The Restatement (Second) of Torts describes this reasonable use as follows:

> The determination involves considering the interest of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole. Factors that affect the determination include the following: (a) The purpose of the use, (b) the suitability of the use to the watercourse or lake, (c) the economic value of the use, (d) the social value of the use, (e) the extent and amount of the harm it causes, (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other, (g) the practicality of adjusting the quantity of water used by each proprietor, (h) the protection of existing values of water uses, land, investments and enterprises, and (i) the justice of requiring the user requiring the user causing harm to bear the loss.

Restatement (Second) of Torts § 850A; *see also Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104 (1978) (for a discussion on takings and the Fifth Amendment, holding that to determine whether a regulation constitutes a taking, courts must balance the "economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations…[and] the character of the governmental action.").

Applying these factors to the present case, Greenlawn should be enjoined from future water withdrawals, as a matter of law, until the harm to the oval pigtoe mussel population is abated. Greenlawn's purpose for water withdrawals include lawn watering and car washing. R. at 8. While these uses were suitable in the past, the population of Greenlawn has grown substantially since the 1968 revision of a Water Control Manual establishing parameters for water usage between the ACOE and Greenlawn. R. at 6–8. Lawn watering and car washing can have some economic and social value, but ACOE's management of the Howard Runnet Dam and its hydroelectric power releases also have economic and social value—namely providing electricity to meet the significant energy demands during air conditioning season. R. at 6. While the extent and amount of the harm caused by Greenlawn's water withdrawals cannot be measured with precision, it is reasonable to believe that using less water will allow more water to be present in the downstream Green River flows, providing necessary shelter for the oval pigtoe mussel habitat. *See* R. at 9. ACOE's water withdrawals, (at the time of Greenlawn's assertion of

riparian rights to water lawns and wash cars), were lowered to a "Zone 3 Drought Emergency"—meaning all water release for recreational activities and daily hydroelectric power were curtailed, while a flow was maintained into the Bypass Reach to allow the City of Greenlawn to continue water withdrawals. R. at 7, 9. In light of the Zone 3 drought emergency, the ACOE requested that Greenlawn institute drought restrictions on its water consumers as long as drought conditions persisted to ensure that the downstream flow remained adequate to support the oval pigtoe population. R. at 8–9. In response, Greenlawn asserted it was under no obligation to impose drought restrictions and stood on their common law rights as a riparian landowner to continue watering lawns and ornamental plants, despite the ACOE taking dramatic measures to conserve water flows. R. at 8. Greenlawn is the water diverter immediately preceding the oval pigtoe mussel habitat. R. at 9. When the water arrived from the ACOE to Greenlawn, Greenlawn had enough to continue watering lawns and washing cars, but the oval pigtoe mussel was left unsubmerged and exposed to conditions resulting in the death of approximately 25% of the endangered species' population. R. at 9–10. After a consideration of the undisputed facts from the district court record, Greenlawn's engagement of water withdrawals during a severe drought and abdication of responsibility for maintaining the oval pigtoe mussel habitat because the mussel populations are not found on *their* stretch of the Bypass Reach, begs justice to step in and require Greenlawn to be held accountable and responsible for harm to the oval pigtoe mussel species.

If Greenlawn is denied complete use of their common law riparian water rights during drought conditions, it may seem that the ACOE is engaged in a *per se* taking as per the Supreme Court's decision in *Lucas* (holding that regulations eliminating economically viable uses of property, without common law justification, constitute a *per se* taking). *See Lucas v. South*

Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001) (where the court held a *per se* taking had occurred with the mere reduction of a diverter's water right). However, the Supreme Court also held in *Tahoe-Sierra* that a temporary thirty-two-month moratorium on development was not a taking because it was merely a temporary restriction on property usage. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 328–29 (2002). Therefore, if Greenlawn wishes to continue washing cars and watering lawns during drought conditions and suspect an unlawful taking under the Fifth Amendment, they may either demonstrate how this injunction is more than a mere temporary restriction on property usage or exhaust their administrative remedies and apply for an incidental take permit under §10 of the Endangered Species Act to remove the injunction. *See* 16 U.S.C. § 1539; *McKart v. United States*, 395 U.S. 185, 193–95 (1969) (discussing judicially created exhaustion as a prudential matter).

Thus, after balancing the equities and finding Greenlawn is engaged in conduct posing future harm to the endangered oval pigtoe mussel, in violation of ESA § 9, and because Greenlawn has not (1) demonstrated that enjoining its water withdrawals is permanent and (2) has not exhausted its administrative remedies by applying for an incidental take permit under § 10 of the Endangered Species Act, justice requires Greenlawn be enjoined from future water withdrawals until the oval pigtoe mussel species is conserved. Accordingly, the district court's injunction is proper.

CONCLUSION

For the foregoing reasons, the U.S. Army Corps of Engineers respectfully requests that this court uphold the findings of the District Court in full.

Dated this 21st day of November 2019.

Respectfully submitted,

Team #17
Counsel for U.S. Army Corps of Engineers