C.A. No. 19-000987

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC., *Plaintiff-Appellant,*	)	
v.	)	**Appeal from the United States District Court of New Union**
CITY OF GREENLAWN, NEW UNION, *Defendant-Appellee,*	)	**Case No. 66-CV-2017(RMN)**
AND	)	
UNITED STATES ARMY CORPS OF ENGINEERS, *Defendant-Appellee.*	)	

BRIEF OF PLAINTIFF-APPELLANT

Team 18
Attorneys for New Union
Oystercatchers, Inc.,
Plaintiff-Appellant.

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes

Federal Code of Regulations

Federal Rules of Civil Procedure

Federal Register

U.S. Supreme Court Cases

U.S. Circuit Court Cases

U.S. District Court Cases

State Statutes

State Supreme Court Cases

State Appellate Court Cases

Secondary Sources

Restatements

STATEMENT OF JURISDICTION

Plaintiff, New Union Oystercatchers ("NUO"), brought suit alleging that Defendant, City of Greenlawn, New Union ("Greenlawn"), unlawfully withdrew water from the Green River Bypass Reach ("Bypass Reach"), in violation of Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1)(B). Plaintiff further asserted that the actions of Defendant, Army Corps of Engineers ("ACOE"), while operating the Howard Runnet Dam Works were agency actions subject to Section 7 ESA consultation requirements. 16 U.S.C. § 1536(a). The United States District Court of New Union exercised jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 16 U.S.C §1540(c). The district court held supplemental jurisdiction over Greenlawn's common law riparian rights claims. *See* 28 U.S.C. § 1367. From the district court's final Order, entered May 15, 2017, Plaintiff, NUO, and Defendant, Greenlawn, filed timely notices of appeal, thereby giving this Court proper jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

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

II. Whether ACOE's operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is a discretionary "action" subject to the consultation requirement within ESA § 7, 16 U.S.C. § 1536(a)?

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 ESA § 9, 16 U.S.C. § 1538(a)(1)(B)?

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 a listed endangered species?

STATEMENT OF THE CASE

On July 17, 2017, NUO filed suit alleging riparian right claims against Greenlawn and violations of the ESA against Greenlawn and ACOE in the United States District Court for the District of New Union. R. at 11. ACOE joined NUO's ESA claim that Greenlawn's water withdrawals constitute an illegal "take" of an endangered species under ESA § 9. R. at 11. Greenlawn filed a counterclaim against ACOE requesting declaration of its riparian landowner rights and asserting that, under such rights, ACOE has an obligation to maintain Bypass Reach flows sufficient to meet its municipal water needs. R. at 11.

This is an appeal from the district court's final order. NUO appeals the district court's determination that Greenlawn, under New Union riparian rights law, has the right to continue water withdrawals for municipal purposes during a drought without any water conservation measures. R. at 13. NUO further appeals the court's holding that ACOE's decision to continue 30 CFS flows to Bypass Reach while operating under Drought Emergency conditions was a non-discretionary action not subject to ESA § 7. R. at 15. NUO contends that the undisputed facts in the record demonstrate that ACOE held discretionary control and involvement in the operation of the Howard Runnet Dam Works invoking responsibility under ESA § 7. NUO also appeals the district court's dismissal of NUO's ESA § 7 claim against ACOE. R. at 15.

NUO respectfully requests this court to affirm the district court's grant of summary judgment declaring Greenlawn's action of water withdrawals constitutes a "take" of Green River's oval pigtoe mussel population in violation of ESA §. 9. R. at 17. NUO respectfully

requests this court uphold the district court's decision to enjoin Greenlawn from committing water withdrawals that result in Green River flows lower than 25 CFS. R. at 18.

STATEMENT OF THE FACTS

Greenlawn is situated along the historical banks of the Green River on what is now known as the Green Bypass Reach. R. at 5. ACOE created the Bypass Reach in 1947 when they built the Green River Diversion Dam and the Howard Runnet Dam on the Howard Runnet Lake (collectively referred to as the "Howard Runnet Dam Works"). R. at 5. Greenlawn owns the riverbed and waterfront on both sides of Bypass Reach within city limits. R. at 5.

Greenlawn has maintained water intakes from Bypass Reach for domestic and industrial water supply provided to the city's consumers since 1893. R. at 5. In 1968, Greenlawn enlarged its municipal water system to accommodate a housing influx. R. at 5. At the time of this appeal, Greenlawn's water withdrawals average 6 million gallons every day, each year. R. at 5. During summer months, Greenlawn will withdraw up to 20 million gallons a day. R. at 5. However, less than 5% of the water withdrawn by Greenlawn returns to the Green River Basin. R. at 5-6.

The Howard Runnet Dam is authorized for flood control, hydroelectric power, fish and wildlife, and recreational purposes. R. at 6. ACOE maintains and operates the Howard Runnet Dam Works. R. at 6. The Water Control Manual ("WCM"), last revised in 1968, governs the dam system. R. at 6. The completion of the dam works was conditioned on ACOE maintaining river flows in the Bypass Reach to allow for Greenlawn to continue water withdrawals consistent with New Union riparian rights law. R. at 6.

Greenlawn's Rights as a Riparian Municipality

The State of New Union applies common law riparian rights doctrine to the resolution of competing claims to water." R. at 11. Furthermore, New Union adheres to the minority rule that a municipality, as a riparian landowner, has the right to withdraw water for the beneficial use by

non-riparian landowners within the municipality. R. at 12. New Union courts apply a reasonable-use theory when resolving competing claims. R. at 12.; *see* Restatement (Second) of Torts § 850 (1979). According to the district court, "riparian water law does not recognize ecological rights to instream flows; only the rights of landowners are protected." R. at 12. New Union has not adopted any legislation to resolve competing claims to water by riparian landowners. R. at 12.

The Howard Runnet Dam Works Water Control Manual

The WCM governs water releases from the dams to: (1) maintain flood control storage capacity and recreational water; (2) provide for hydroelectric generation; and (3) maintain flow for Greenlawn's water facilities in the Bypass Reach. R. at 6. T The WCM establishes target lake elevations contingent on historical flows, water demand, and seasonal changes. R. at 6. The WCM dictates downstream releases in accordance with one of three zones when target lake elevations are not maintained. R. at 7.

Zone 1 (*Drought Watch*), provides that all recreational releases must be curtailed and a minimum flow of 50 cubic feet per second ("CFS") must be maintained for fish and wildlife purposes. R. at 7. During Zone 1 conditions, a 50 CFS flow into the Bypass Reach and daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained. R. at 7. When the lake level reaches Zone 2 (*Drought Warning*), the Bypass Reach flow must be reduced to 7 CFS while all recreational uses are curtailed. R. at 7. Under Zone 2 conditions, daily hydroelectric power releases of up to 200 CFS for up to three hours per day may be maintained. R. at 7. If the lake level reaches Zone 3 (*Drought Emergency*), all recreational and hydroelectric releases are to be curtailed while a maximum flow of 7 CFS shall be maintained into the Bypass Reach. R. at 7.

The conditional agreement between ACOE and Greenlawn dictates that ACOE must maintain the flow to allow for Greenlawn to continue its water withdrawals from the Bypass

Reach for domestic purposes. R. at 7. With this agreement in mind, ACOE determined the flow rate of 7 CFS during both Zone 2 and 3 based upon the annual average water demand of Greenlawn in 1968. R. at 7. However, in 1968, consumptive uses of water in the Green River watershed upstream of Howard Runnet Lake were virtually non-existent. R. at 7. This changed in the 1980's when large agricultural operations upstream from Howard Runnet Lake began irrigation practices resulting in increased evaporative water losses. R. at 7-8. Rainfall and groundwater recharge supported downstream flows and a healthy ecosystem through the end of the 20th century. R. at 8.

Bypass Reach Water Shortages

Beginning in 2006, drought conditions in New Union became far more frequent. R at 8. The once thriving oyster industry in Green Bay felt the consequences of the water shortages. R. at 10. The reduced flows significantly impacted the Green River estuary by reducing nutrient flows and increasing the salinity of Green Bay. R. at 10. As a result, oyster harvests in 2016 were half the volume of 2000. R at 10. Oyster fishermen have suffered declining incomes, forcing many to sell their boats, move, or change profession. R. at 10.

With drought conditions occurring more frequently, ACOE applied Zone 1 conditions multiple times between 2006 and 2012. R. at 8. ACOE needed to apply Zone 1 conditions again in 2016 when precipitation levels were below, and temperatures were above average. R at 8. Still, ACOE did not revise the WCM. R. at 8. Precipitation levels remained low while temperatures remained high through the spring of 2017 resulting in lake levels reaching Zone 2 conditions. R at 8. Upon reaching Zone 2 conditions, ACOE instituted limits, including flow restrictions in Bypass Reach. R at 8.

Immediately after flows reached 7 CFS, Greenlawn sent a letter dated April 12, 2017, to the District Commander arguing that the flow limitations in the WCM were outdated and did not

comport with the town's water supply needs as the town has expanded since 1968. R. at 8. The District Commander requested that Greenlawn impose drought restrictions on water consumers such as a ban on lawn watering and car washing, while the drought conditions persisted. R at 8. Greenlawn refused and demanded increased flows as ornamental lawn maintenance was a reasonable riparian water use. R. at 8. On April 23, 2017, the District Commander ordered an increase of water releases from 7 CFS to 30 CFS consistent with Greenlawn's requests. R at 8. The heightened release level coupled with the hydroelectric releases effectively lowered the lake levels to Zone 3 (*Drought Emergency*). R at 8.

When the lake reached *Drought Emergency* levels, ACOE imposed Zone 3 conditions by curtailing all hydroelectric power releases but maintained the 30 CFS flows to the Bypass Reach at Greenlawn's insistence. R at 9. The curtailment of hydroelectric power releases acting in concert with Greenlawn's continued water withdrawals, had severe effects on downstream Green River flows. R at 9. Normally, the Green River flowed an average 25 CFS per day during daily hydroelectric peaking operations. R at 9. However, when the hydroelectric peaking was curtailed the flow dropped to almost 0 CFS. R at 9. Greenlawn's withdrawals consumed almost all the flows of Bypass Reach, which caused the Green River to become stagnant pools of water downstream from the Howard Runnet Dam. R at 9.

Water Shortage's Effect on Endangered Species in the Green River.

The Green River, downstream from Bypass Reach, is home to several beds of oval pigtoe mussels. R. at 9. In 1998, the United States Fish and Wildlife Service ("FWS") listed oval pigtoe mussels as a protected endangered species. 63 F.R. 12664, 3/16/1998; 50 C.F.R. § 17.95(f). In

1998, the oval pigtoe mussel existed in only 28 sites nationwide.[1] While FWS did put a recovery plan in place for the mussels, the species' population continues to decrease primarily due to residential and commercial development, water impoundments and natural flow modifications, agriculture, aquaculture, and pollution. Cummings and Cordeiro, *supra* n.1. As of 2019, there are only 2,500 mature oval pigtoe mussels known to be in existence within the United States. *Id.*

Oval pigtoe mussels require gravel or silty riverbeds with slow moderate currents. R. at 9. A healthy population of host fish is required as oval pigtoe larva mature while attach to the gills of sailfish shiners. R at 9. The oval pigtoe was deprived of their necessary habitat when Green River's flow was depleted to "stagnant pools of water and narrow trickles." R at 9. This depletion of flow prevented host fish migration and the mussels were exposed to dry land. R at 9. Usually, an adult oval pigtoe mussel will be able to adapt to minor flow changes by moving to a deeper area of water but the severe flow changes in Spring 2017, "essentially eliminated any possibility for the oval pigtoe mussels to remain submerged." R at 9. Further, stagnant water poses a significant threat to the mussels because it can cause increased siltation which can smother the population. R. at 9.

The Spring 2017 conditions led to the death of 25% of Green River's oval pigtoe population. R at 10. At no time during the operation and maintenance of the Howard Runnet Dam Works has ACOE consulted with FWS regarding dam operation impacts on the oval pigtoe mussels. R at 10. The Greenlawn has never acquired an incidental take permit pursuant to ESA § 9, 16 U.S.C. § 1539. R at 10. If these conditions are permitted to continue, the entire oval pigtoe mussel population within the Green River will be eliminated. R at 10. At the minimum, a flow of

[1] Cummings, K., and Cordeiro, J., *The IUCN Red List of Threatened Species*: e.T17690A1452398, IUCN RED LIST OF THREATENED SPECIES (Mar. 12, 2012), http://dx.doi.org/10.2305/IUCN.UK.2012.RLTS.T17690A1452398.en.

25 CFS averaged over 24 hours is necessary to prevent complete extirpation of the Green River oval pigtoe population.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The standard of review for an award of summary judgment is de novo. *See Forest Conservation Counsil v. Rosboro Lumber Co.*, 50 F. 3d 781, 783 (9th Cir. 1995). The interpretation of the Endangered Species Act "is a question of law reviewed de novo." *Id.* As such, this Court should review Appellants' claims de novo without affording any deference to the opinions and conclusions of the district court. *See Forcum v. Via Christi Health Sys., Inc.*, 137 P.3d 1250 (Okla. Civ. App. 2006).

SUMMARY OF THE ARGUMENT

The district court incorrectly asserted that Greenlawn's riparian rights allowed them to maintain water withdrawals without conservation measures. Such water withdrawals are violative of the Public Trust Doctrine which holds "navigable" waters in trust for the greater public's pleasure and profit. Further, much like they do not supersede other federal environmental statutes, riparian rights do not override the ESA. The district court improperly granted summary judgment to ACOE on the issue of its alleged violation of ESA § 7 consultation requirements. The court incorrectly asserted that ACOE was acting in a non-discretionary manner when authorizing water releases to the Bypass Reach during drought conditions, this is invalid. ACOE maintained federal discretionary control and involvement therefore invoking ESA § 7. ACOE violated ESA § 7 when it failed to consult FWS regarding the WCM and water releases. The court properly granted summary judgment of the issues of

Greenlawn's "take" of an endangered species in violation of ESA § 9. The district court properly enjoined Greenlawn from continuing water withdrawals from Bypass Reach resulting in detrimentally low flows in the Green River.

DISCUSSION

I. REGARDLESS OF GREENLAWN'S RIPARIAN RIGHTS, IT DOES NOT HAVE THE RIGHT TO CONTINUED UNRESTRICTED WATER WITHDRAWALS DURING DROUGHT CONDITIONS.

Greenlawn's New Union riparian rights must yield to the paramount public interest in the "navigable" waters of Bypass Reach because:

> few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished . . . and . . . the private property of riparian proprietors cannot be supposed to have deeper root.

See Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908). "New Union has not adopted legislation or any sort of permitting authority to resolve competing riparian claims to water"; thus, the district court had to "predict how New Union would resolve" competing riparian claims. R. at 12. Under New Union riparian law, Greenlawn has the right as a municipality to make water withdrawals to supply non-riparian citizens. R. at 12; *see*, *e.g.*, *City of Canton v. Shock*, 66 Ohio St. 19 (1902); *Barre Water Co. v. Carnes*, 65 Vt. 626 (1893); *City of Philadelphia v. Collins*, 68 Pa. 106 (1871). Additionally, New Union courts apply the reasonable use theory to competing claims of riparian rights of instream flows. R. at 12. *See*, *e.g.*, *Hendrick v. Cook*, 4 Ga. 241 (1848); *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.R.I. 1827).

The district court concluded that the principles of riparian rights law recognize Greenlawn's superior right, as an upper riparian municipality, to withdraw water for modern "domestic uses," without regard to the impact on other riparian landowners. *See Harris v. Brooks*, 225 Ark. 436, 444 (1955). In coming to its conclusions, the district court failed to

consider NUO's rights under the common law public trust doctrine ("PTD"), to the unobstructed use of "navigable" waters for pleasure and profit. *See Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 458 (1892). The district court also failed to recognize that "state water rights do not provide . . . a special privilege to ignore the Endangered Species Act." *See United States v. Glenn-Colusa Irr. Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992). An examination of authority from other riparian rights jurisdictions, reveals that the authority cited by the district court is distinguishable from the present case. The paramount public interest in the right to "navigable" waters supersedes Greenlawn's right as a riparian municipality to unrestricted domestic water withdrawals during a period of drought. *See Cottrill v. Myrick*, 12 Me. 222, 229 (1835).

a. Unlike the Authority Cited by the District Court, Bypass Reach and Green River are "Navigable" Waters.

In support of its conclusion that, as a New Union riparian municipality, Greenlawn's domestic water withdrawals are superior to all other claims, the court cited *City of Canton*, *Barre Water Co.*, *City of Philadelphia*, *Tyler*, and *Hendrick.* R. at 12. However, these cases are distinguishable from the present case in that they either involve non-navigable waters—not subject to the PTD—or they recognize the public common right to "navigable" waters. The watercourse at issue in *City of Canton* was a "creek" that supplied a municipality's "inhabitants with water for domestic, commercial, and manufacturing purposes," and provided power for a mill downstream from the municipality. *See* 63 N.E. at 602. Nothing in the opinion indicates that the creek was "navigable," or used for any purpose other than municipal water supply and power generation. *See id.* Similarly, the court in *Barre Water Co.*, gave no indication that the "stream" of water that flowed through the villages of East Barre and Barre was "navigable," or supported any other purpose than "supplying the inhabitants of East Barre with water for domestic,

sanitary, and fire purposes." *See* 65 Vt. at 626. Again, in *Tyler*, the court concluded that the contested watercourse was a non-navigable water. 24 F. Cas. at 472.

The court in *Tyler* held that it is an implied limitation in the right of any person's use, including riparian municipalities, that "diminution, retardation, or acceleration," of a watercourse must not be "positively and sensibly injurious by diminishing the value of the common right." *See id.* at 474. Because common law water rights function "with a reasonable reference to public convenience and general good," they should not be "betrayed into a narrow strictness, subversive of common sense . . . ." *Id.* Likewise, the court in *Hendrick* recognized that the unobstructed use of "navigable" waters as public highways was a common right of the public. *See* 4 Ga. 241 at 253.

Finally, the court in *City of Philadelphia* held that it was the policy of Pennsylvania to require all private rights in "navigable" waters to be subordinate to the public rights in such waters, and that "[t]he right to navigation is superior to every other riparian right except that of using the water for domestic purposes." *See* 68 Pa. at 121. The changes in Pennsylvania law make it unclear if the Pennsylvania Supreme Court would come to the same conclusion regarding "domestic purposes." *See* 32 Pa. Stat. Ann. § 637 (West). Current Pennsylvania law gives a public water agency[2] the right to water withdrawals that are "reasonably necessary for the present purposes and future needs," *but only to the extent* that such right "will not interfere with navigation, jeopardize public safety, or cause substantial injury" to the State. *Id.*

Greenlawn's unrestricted domestic water withdrawals from the "navigable" Green River nearly eliminate downstream navigation in the lower Green River, and are injurious to every

[2] "[A]ny corporation or any municipal or quasi-municipal corporation, district, or authority." 32 Pa. Stat. Ann. § 631 (West)

downstream inhabitant, including NUO members, as well as the entire Green River Basin and Green Bay estuary. Greenlawn's withdrawals, if allowed to continue, would only exacerbate the consequences of decades of reduced flows that have detrimentally impacted the entire Green Bay region. *See* R. at 10. The district court failed to properly apply case law concerning the common right to "navigable" waters.

b. The Public Trust Doctrine Recognizes the Greater Public Interest in Preserving the "Navigable" Waters of Bypass Reach and Green River, and NUO's Common Right to Their Use for Profit or Pleasure.

The PTD recognizes that the state of New Union, as a portion of its inherent sovereignty, holds the beds under "navigable" waters, such as Green River and Bypass Reach, in trust for the common use of the people. As the natural highways of the U.S., any obstruction to the public's common right, or exclusive appropriation of their use, is injurious to commerce, and would render the common right null and void. *See Illinois Cent. R. Co.*, 146 U.S. at 458. Accordingly, the PTD legally protects the people's right to "navigable" waters for transportation, commerce, and recreation, as well as the public's right to the conservation and preservation of the natural resources in "navigable" waters. *See generally* Restatement (Second) of Torts § 856 (1979). Therefore, Greenlawn does not have the right to the exclusive appropriation of the instream flow from Bypass Reach to continue water withdrawals for municipal purposes during a drought without any water conservation measures. Green River and Bypass Reach are "navigable" waters, and Greenlawn's withdrawals obstruct NUO's common right to unobstructed navigation on Bypass Reach. *See Illinois Cent. R. Co.*, 146 U.S. at 458.

Under the PTD, NUO members have "the right to . . . unobstructed navigation . . . of all watercourses, whether tidal or inland, that are in their natural condition capable of such use.'" *See Bauman v. Woodlake Partners, LLC*, 199 N.C. App. 441 (2009) (quoting of *Gwathmey v.*

State Through Dep't of Env't, Health, & Nat. Res. Through Cobey, 342 N.C. 287, 300 (1995)). An analysis of public trust doctrines of all the states east of the Mississippi River, reveals differing approaches for determining whether a watercourse is "navigable" for purposes of the PTD. *See* Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 14 (2007).

Three eastern states[3] still recognize the common law tidal test of navigability for public trust doctrine determinations. *Id.* Another group of states[4] recognize a "gradually changing concept of navigability," *see*, *e.g.*, *Coleman v. Schaeffer*, 163 Ohio St. 202, 203 (1955), which declares waters "navigable," regardless of "navigation-in-fact," where the waters support public recreation. *See* Robin Craig, *supra*. The majority of states,[5] however, adhere to a "navigable-in-fact" test under which navigability is determined by either of the following: (1) the federal commerce test, *see*, *e.g.*, *Bear Dredging L.L.C. v. Alabama Dept. of Rev.*, 855 So.2d 513, 519 (Ala. 2003); (2) by a "legitimate and beneficial public use" test, *see*, *e.g.*, *White's Mill Colony, Inc. v. Williams*, 609 S.E.2d 811, 815 (S.C. Ct. App. 2005) (internal quotation omitted); (3) by a "boatable" waters test, *see*, *e.g.*, *New England Trout & Salmon Club v. Mather*, 35 A. 323, 324 (Vt. 1896); or (4) a log flotation test, *see*, *e.g.*, *Schulte v. Warren*, 75 N.E. 783, 785 (Ill. 1905). *See* Robin Craig, *supra* at 12-14.

[3] Maryland, New Jersey, and Massachusetts.

[4] Arkansas, Ohio, Michigan, and Minnesota.

[5] Indiana, Tennessee, Wisconsin, Florida, North Carolina, Alabama, Connecticut, South Carolina, Louisiana, Maine, New Hampshire, Kentucky, Vermont, Illinois, New York, Missouri, Michigan, Mississippi, West Virginia, Florida, Delaware, and North Carolina.

Bypass Reach and Green River are "navigable" waters under the common tests except the tidal test. Bypass Reach qualifies under the federal commerce test where, in its ordinary condition, it is a highway for commerce to the Green Bay. R. at 10. Bypass reach also satisfies the "navigable-in-fact" and "legitimate and beneficial public use" tests where it has supported four generations of NUO boat fisherman, and provides crucial instream flows necessary to support the commerce of the Green Bay estuary. *Id.* Therefore, this Court should declare Bypass Reach and Green River "navigable" waters protected under the PTD.

c. Courts in Other Riparian Jurisdictions Have Held that State Riparian Rights are Subordinate to the Public Trust Doctrine.

Courts have not bound themselves by inflexible standards in regards to the public interests protected by the PTD. Courts have had "no difficulty in finding that, in this latter half of the twentieth century, the public rights . . . are not limited to the ancient prerogatives of navigation and fishing but extend as well to recreational uses." *See, e.g.*, *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 309 (1972). Courts have "asserted the public rights in such land to be superior to private or municipal interests." *See id.* (collecting cases across jurisdictions supporting a superior public right). Courts have also acknowledged that public interests evolve. *See id.* Thus, PTD principles should be formulated and extended to meet the evolving conditions presented. *See*, *e.g.*, *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 78 (1976). For example, the Illinois Supreme Court expanded the state's PTD to include environmental protection after determining that a strong public "interest in conserving natural resources and in protecting and improving our physical environment" has developed. *See id.* at 79.

There is no authority that addresses the unique facts presented here, regarding the relation between the PTD and the right of riparian municipalities to domestic water withdrawals, without

regard to downstream riparians. No authority has ruled on whether a public's common right to the natural and commercial resources of "navigable" waters supersedes or limits a municipality's riparian right. The PTD regards the public as the beneficial owner of the riverbeds in "navigable" waters protected by the trust. *See* Richard Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 435 (1986). Accordingly, the public should be regard as riparian owner of the beds below "navigable" waters held in trust by the State; thereby giving the public standing to claim riparian rights. Therefore, Greenlawn's water withdrawals during an ongoing period of drought violate the PTD and Greenlawn's riparian rights must yield "to the paramount claims of the public" to riparian rights in "navigable" waters. *See Cottrill*, 12 Me. at 229.

Under the PTD, the private right to appropriate water should be subject to the rights of downstream riparians and "to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health." *See Hudson Cty. Water Co.*, 209 U.S. at 356. Although the Court's holding in *Hudson Cty. Water Co.* was mainly concerned with a riparian diverting water out of state, the principle should apply all the same. *See id.* The PTD also protects the public's increasing interest in preserving the environment and its natural resources. *See*, *e.g.*, *People ex rel. Scott*, 360 N.E.2d at 780; *Borough of Neptune City*, 294 A.2d at 54-55; *La. Seafood Mgmt. Council v. La. Wildlife & Fisheries Comm'n*, 719 So. 2d 119, 124 (La. Ct. App. 1998); *State ex rel. Town of Westerly v. Bradley*, 877 A.2d 601, 607 (R.I. 2005).

NUO, as the beneficial owner of the riverbeds in Green River and Bypass Reach, has standing under the PTD as a riparian proprietor to request an injunction of Greenlawn's unreasonable appropriation of Bypass Reach for domestic water supply. *See* Restatement (Second) of Torts § 856 (comment g) (1979). Greenlawn's exclusive appropriation causes NUO

irreparable harm by unreasonably interfering with NUO's common right to all "navigable" purposes in Bypass Reach, by nearly eliminating NUO's commerce, and by causing irreparable harm to the entire Green Bay ecosystem and New Union commerce, *see Illinois Cent. R. Co.*, 146 U.S. at 458. *See also* Richard Ausness, *supra* at 435. As a result of Greenlawn's actions, several NUO members—and likely many others across the region—have lost their entire livelihoods. R. at 10. Greenlawn's domestic withdrawals, if continued, would lead to the extermination of the entire population of the oval pigtoe mussel, increased salinity in the Green Bay, and reduced nutrient inflows into the estuary. R. at 10.

d. ESA Constraints Prevail over Greenlawn's Right to Appropriation Under New Union Riparian Rights Law.

"Although there is no explicit provision in the ESA allowing the curtailment of state water rights, a reading allowing such action follows naturally from the prohibition against placing a species in jeopardy or destroying its habitat." Melissa K. Estes, *The Effect of the Federal Endangered Species Act on State Water Rights*, 22 ENVTL. L. 1027, 1050–51 (1992). The ESA expands the PTD to include the preservation of the habitats of protected species. *Id.* at 1052. With respect to water appropriation, the constraints placed on water appropriators by the ESA are similar to the constraints put on persons under the Clean Water Act ("CWA"). *Id.* at 1053. Where the CWA prevails over state water rights to protect aquatic life from harm caused by the polluter, the ESA prevails over state water rights to protect aquatic life from harmed caused by water appropriators. *Id.* Just as there is no constitutional or state right permitting the pollution of waters under the CWA, "by analogy, it would be illogical for the courts to recognize a constitutional right to destroy a stream by water depletion." *Id.* As such, the ESA "provides no exemption from compliance to persons possessing state water rights, and . . . state water rights do

not provide . . . a special privilege to ignore the Endangered Species Act." *Glenn-Colusa Irr. Dist.*, 788 F. Supp. at1134.

Considering the substantial economic and environmental harm that would result from Greenlawn's continued withdrawals, it would be unreasonable to find that the riparian rights of Greenlawn have "a deeper root" than the common public right, *see Hudson Cty. Water Co.*, 209 U.S. at 349, to the unobstructed navigation on Bypass Reach as a public highway for all purposes of recreation and commerce, *see Bauman*, 199 N.C. App. at 448. Although "New Union has not adopted legislation," this Court need not wait for the New Union Legislature to codify the PTD to find Greenlawn in violation of PTD where NUO's claim to Bypass Reach is of a paramount public interest. *See Cottrill*, 12 Me. at 229. Therefore, this Court should find that riparian rights law does not give Greenlawn the right to continued domestic water withdrawals, without implementing conservations measures.

II. ACOE'S DECISION TO CURTAIL POWER GENERATION WHILE MAINTAINING UNRESTRICTED FLOWS TO BYPASS REACH CONSTITUTES A DISCRETIONARY ACTION TRIGGERING ESA § 7 CONSULTATION REQUIREMENTS.

ESA § 7 dictates that a federal agency is obligated to consult with the relevant wildlife agency if the federal agency's actions may affect a listed endangered species to determine the potential impacts of its actions on the species and their habitat. 16 U.S.C § 1536(a)(2). ACOE was obligated to avoid actions that would "likely to jeopardize the continued existence" of a threatened or endangered species or lead to the "destruction or adverse modification of habitat of such species." *See* 16 U.S.C. § 1536(a). ESA § 7 and the requirements of 50 C.F.R. § 402 et seq., only apply to "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Courts in other jurisdictions have held that "environmental—and wildlife—protection statutes do not apply where they would render an agency unable to fulfill a non-

discretionary statutory purpose or require it to exceed its statutory authority." *See In re Operation of Missouri River Sys. Litig.*, 421 F.3d 618, 630 (8th Cir. 2005). Here, ESA § 7 consultation requirements apply because ACOE's decision to curtail hydroelectric power generation while continuing unrestricted flows to the Bypass Reach constitutes a discretionary federal action. *See id.*

a. Implementing the Drought Zone Protections while Maintaining Flows to Bypass Reach Was a Discretionary "Action" Subject to ESA § 7 Consultation Requirements.

ESA § 7 regulations instruct federal agencies to review its actions at the "earliest time possible" to determine whether they "may affect" listed species. 50 C.F.R. § 402.14. The purpose of the consultation requirement is to "inure that any action authorized, funded, or carried out by such agency is not likely to jeopardize endangered or threatened species or their habitats." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 649 (2007). Regulations governing ESA § 7 dictate that "non-discretionary" actions are exempt while the consultation requirement applies to all actions in which there is "discretionary" federal involvement or control. *See* 50 C.F.R. § 402.03. To determine whether an agency action is discretionary, courts look to whether "the agency retained some discretionary involvement or control over the action at issue." *Wild Fish Conservancy v. United States EPA*, 331 F. Supp. 3d 1210, 1222-23 (W.D. Wash. 2018). Agency action is not defined narrowly as "the discrete moment of approval," but rather, is decided upon "whether the agency has any discretion to act in a manner beneficial to a protected species or its habitat." *Id.* As the ninth circuit recently clarified, an "agency lacks discretion only if another legal obligation makes it impossible for the agency to exercise discretion for the protected species' benefit." *Cottonwood Envtl. Law Ctr.v. United States Forest Serv.*, 789 F.3d 1075, 1077 (9th Cir. 2015). Here, ACOE maintained discretionary control while operating the Howard Runnet Dam Works, held the ability to change river flows to benefit the oval pigtoe

mussel, and was not bound by any other statutory obligation. *See id.* Therefore, ACOE was subject to ESA § 7 consultation requirements. *See id.*

In *Cottonwood Envtl. Law Ctr.*, the court held that the United States Forest Service ("USFS") was subject to ESA § 7 consultation requirements as it "fell squarely within the 'discretionary' parameters of 50 C.F.R. §§ 402.03 and 402.16 because through the Forest Plans, the Forest Service retains a 'continuing ability . . . to control forest management projects . . . .'" 789 F.3d at 1087 (quoting *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995)). The court also pointed to USFS's "exclusive control" over the forest. *Cottonwood Envtl. Law Ctr.,*789 F.3d at 1087. Here, ACOE retains exclusive control of the Howard Runnet Dam works and retains a continuing ability to control the water released to the Bypass Reach and Green River. *See id.* The consultation requirement applies only to discretionary actions since "if the federal agency has no discretion to modify the activity at issue to accommodate the mandate of the ESA, then the consultation process would be pointless." *Strahan v. Linnon*, 967 F. Supp. 581, 607 (D. Mass. 1997). For example, in *Sierra Club v. Babbitt,* the court held that the ESA § 7 requirements were meaningless because "the agency simply [did] not possess the ability to implement measures that inure to the benefit of the protected species." 65 F.3d at 1507.Here, ACOE had both the ability to change the flows from the Howard Runnet Dam Works and amend the WCM but failed to do so. ACOE acted with discretion when failing to update the WCM to account for Greenlawn's population growth, changes in the ecosystem, and increased use of aquaculture. *See id.* ACOE further acted with discretion when authorizing and implementing high flow volume water releases to the Bypass Reach during drought conditions. Therefore, ACOE's actions cannot be exempt from ESA § 7 while they had full ability to influence

Greenlawn's actions, the flows to Bypass Reach, and the WCM to protect the oval pigtoe mussel but failed to take proper steps to do so. *See id.*

b. ACOE's "Action" was Discretionary Because New Union Riparian Rights Law Did Not Require ACOE to Take Such Action.

ACOE's decision was a discretionary action where New Union riparian law must yield to the public's common right to the unobstructed use of "navigable" waters in Bypass Reach. *See Illinois Cent. R. Co.*, 146 U.S. at 458. Furthermore, Greenlawn's "state water rights do not provide . . . a special privilege to ignore the Endangered Species Act." *See Glenn-Colusa Irr. Dist.*, 788 F. Supp. at 1134. Finally, New Union riparian law is subordinate to the "explicit congressional decision . . . requir[ing] agencies to afford first priority to the declared national policy of saving endangered species." *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

The PTD is an important principle with respect to riparian water rights "that may compete with the rule of priority." *See Nat. Res. Def. Council v. Kempthorne*, 621 F. Supp. 2d 954, 994 (E.D. Cal. 2009), *decision clarified*, 627 F. Supp. 2d 1212 (E.D. Cal. 2009), *on reconsideration*, 2009 WL 2424569 (E.D. Cal. Aug. 6, 2009) (quoting *El Dorado Irrigation Dist. v. State Water Res. Control Bd*., 142 Cal. App. 4th 937, 966 (2006)). While the priority given to the water rights of riparians under New Union law should be protected, the priority must yield to the State's affirmative duty to protect public interests in the "navigable" waters of Green River and Bypass Reach. *See id.* Ecological interests, including the preservation of endangered species, are among the interests protected by the PTD. *See El Dorado Irrigation Dist*., 142 Cal. App. 4th at 966. Accordingly, New Union's duty to protect the public interests, including ecological interests, in Bypass Reach for profit and pleasure, "'prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.'" *See id*. at 994-995 (quoting *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 434 (1983)).

Second, as the CWA would prevail over Greenlawn's state water rights to protect aquatic life from being poisoned by Greenlawn, the ESA prevails over Greenlawn's state water rights to protect aquatic life from being suffocated by Greenlawn's unreasonable appropriations. *See* Melissa K. Estes, *supra* at 1053. Additionally, where Federal and State authority to subvert water state water rights to protect the public interests in "navigable" waters, by analogy, the broad Federal authority to protect endangered species under the ESA, "whatever the cost," *see Hill*, 437 U.S. at 184; should subsume the private state water rights of riparians. *See* Melissa K. Estes, *supra* at 1053. Finally, New Union water rights law should not prevail over ESA constraints because "[t]he Act provides no exemption from compliance to persons possessing state water rights," and any interpretation to the contrary, "would render the Act a nullity." *See Glenn-Colusa Irr. Dist*., 788 F. Supp. at 1134.

Lastly, New Union riparian rights law cannot have priority over the requirements placed on ACOE by the ESA where "[t]he plain intent of Congress in enacting" the ESA "was to halt and reverse the trend toward species extinction, whatever the cost." *See Hill*, 437 U.S. at 184. Moreover, Congress made a conscious decision to "give endangered species priority over the 'primary missions' of federal agencies," *see id.* at 184-85; which here, would be ACOE's obligation to maintain flows to Greenlawn to supply its domestic needs, "as it is entitled to as a riparian property owner under the laws of the State of New Union." R. at 6. Finding the riparian rights of Greenlawn superior to the requirements placed on ACOE by the ESA, would be a finding contrary to the stated intent of Congress requiring federal agencies to give priority "to the declared national policy of saving endangered species." *See Hill*, 437 U.S. at 185.

Therefore, based on the foregoing, ACOE's decision to provide Greenlawn with unrestricted flows during a time of drought was a discretionary decision, not required by law

where New Union's affirmative duty under the PTD subsumes Greenlawn's state riparian water rights, where state water rights provide no exemption to ESA compliance, and where the express intent of congress was to give priority to the protection of endangered species over state water rights. As such, ACOE's discretionary decision to not abide by the WCM drought restrictions on Greenlawn's flows, triggered ESA § 7 consultation requirements.

c. ACOE had a Duty to Initiate Consultation when the Oval Pigtoe Mussel was Listed as an Endangered Species.

The federal regulations governing ESA § 7 state, in relevant part:

> [r]einitiation of formal consultation is required and shall be requested by the Federal agency . . . where discretionary Federal involvement or control over the action has been retained or is authorized by law and: . . . (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; . . . or (d) if a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16. Here, ACOE failed to reinitiate consultation with FWS pursuant to subsection (b), after substantial changes took place effecting Green River and the Howard Runnet Dam Works, including, but not limited, to Greenlawn's population growth, the enactment of ESA and Fish and Wildlife Services Act, an increase in upstream aquaculture, and increasingly frequent droughts. *See id.* ACOE also failed to consult FWS pursuant to subsection (d) when the oval pigtoe mussel was listed in 1998. *See id.; Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1094.

d. The Agreement Between ACOE and Greenlawn Does Not Exempt ACOE from Its Consultation and Reinitiation Requirements Under ESA § 7.

ACOE argues that they are exempt from ESA § 7 because they were adhering to the agreement with Greenlawn which dictates that ACOE shall always maintain flows to satisfy Greenlawn's municipal water need. This is contention is invalid as Congress did not write the

ESA with the intent of allowing for such exceptions. The "[ESA]'s very words affirmatively command all federal agencies 'to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence'" of an endangered or threatened species. *Hill*, 437 U.S. 153 at 173 (quoting16 U.S.C. § 1536). Such "language admits of no exception." *Hill*, 437 U.S. 153, 173.

A contractual agreement does not supersede the ESA. For example, the federal government entered into a long-term water service contract with land owners to maintain water annually, the court held that "the contract did not obligate [the federal agency] to furnish [the landowners] with the full contract amount of water if it could not be delivered consistent with the requirements of the ESA." *O'Neill v. United States*, 50 F. 3d 677, 680 (9th Cir. 1995). Similarly, here, maintaining full flows to Bypass Reach during drought conditions for Greenlawn's municipal use was not consistent with the requirements of the ESA. *See id.* As such, ACOE was not bound by the agreement, and had a duty to imitate consultation under ESA § 7. *See id.*

It is well settled that subsequent Congressional legislation can alter contractual arrangements. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982); *Westlands Water Dist. v. United States, Dep't of the Interior, Bureau of Reclamation*, 850 F. Supp. 1388, 1394 (E.D. Cal. 1994). "Even in circumstances where the ESA was passed well after the agreement, the legislation still applies as long as the federal agency retains some measure of control over the activity." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1209 (9th Cir. 1999). Here, ACOE retained discretionary federal involvement and control over the Howard Runnet Damn Works and had a duty to "initiate or reinitiate consultation" of the WCM. *See Sierra Club v. United States Dep't of Energy*, 255 F. Supp. 2d 1177, 1188 (D. Colo. 2002).

Agreements entered by a federal agency and a private or municipal entity are subject to amendment pursuant to subsequent statutory changes. *See Sierra Club v. Babbitt*, 65 F.3d at 1504. Within constitutional limits, "Congress has the power to modify an agency's contractual commitments to a private entity. *Id.* at 1510 (citing court's explanation in *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1400-01 (9th Cir. 1993). "Through enactment of subsequent statutory provisions, Congress can . . . limit the corresponding contractual rights of a private entity." *Sierra Club v. Babbitt*, 65 F.3d at 1510. The agreement in this case between ACOE and Greenlawn is subject to § 7(a)(2) of the ESA as long as ACOE retains discretionary federal action even though the agreement predates the ESA. *See id.* "[A] project undertaken pursuant to a preexisting agreement cannot avoid the procedural requirements of § 7(a)(2) if the project's implementation depends on an additional agency action." *Id.*

ACOE had a duty to curtail the flows to the Bypass Reach under the ESA. *See Patterson*, 204 F.3d at 1209. In *Patterson*, Defendants owned and controlled a dam works and entered a contract with water users including Plaintiffs. *See id.* The court held that because Defendants owned and operated the dam, they had responsibilities under ESA, "includ[ing] taking control of the dam when necessary to meet the requirements of the ESA, requirements that override the rights of irrigators." *Id.* Here, the requirements imposed on ACOE by the ESA overrode the rights of Greenlawn regarding water withdrawals during drought conditions. *See id.*

III. GREENLAWN'S SUBSTANTIAL WITHDRAWAL FROM BYPASS REACH DURING DROUGHT CONDITIONS CONSTITUTES A "TAKE" OF THE OVAL PIGTOE MUSSEL IN VIOLATION OF § 9 OF THE ENDANGERED SPECIES ACT.

ESA § 9 prohibits a "take" of an endangered species in the absence of an incidental take permit. 16 U.S.C. § 1538(a)(1)(B). The ESA defines a "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16

U.S.C. § 1532(19). The Supreme Court interprets a "take" in "the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703-704 (1995). Here, Greenlawn's water withdrawals constitute a "take" under ESA § 9. *See id.* Here, it was foreseeable that the water withdrawals during drought conditions would lead to the downstream habitat degradation for the oval pigtoe mussel. *See Aransas Project v. Shaw*, 775 F.3d 641, 820 (5th Cir. 2014). Greenlawn's water withdrawals, as "a link on the causal causation chain," were a but-for-cause of the harm done to the oval pigtoe mussel in violation of ESA § 9. *See Natural Resources Defense Council v. Zinke*, 347 F. Supp. 3d 465, 511 (E.D. Cal. 2018).

a. Greenlawn's Water Withdrawals Constitute an Indirect "Take" Because the Withdrawals Modified and Degraded the Habitat of the Oval Pigtoe Mussel.

"Harm" includes "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; *see Babbitt*, 515 U.S. at 700. In *Babbitt*, the Supreme Court held that a "take" can be deliberate or indirect in nature. *Babbitt*, 515 U.S. at 704-705. The legislative history of the ESA "makes clear that Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions." *Id*. Courts routinely follow the precedent set in *Babbitt* and hold that actions that indirectly cause harm to a protected species constitute a "take" ESA §9. *See Shaw*, 775 F.3d at 646; *Am. Soc. for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 677 F. Supp. 2d 55, 63 (D.D.C. 2009). An indirect "take" can exist when an action affects water conditions downstream, causing significant habitat modification. *Zinke*, 347 F. Supp. 3d at 516 (concluding that water transfers during drought conditions that changed water temperatures downstream degraded salmon habitat could constitute "take").

In *Swinomish Indian Tribal Community v. Skagit County Dike Dist. No. 22*, the court held that a county district's construction of tidegates that affected downstream water conditions in a river delta constituted a "take" of threatened Chinook Salmon. 618 F. Supp. 2d 1262, 1271 (W.D. Wash. 2008). The court focused on the National Marine Fisheries Services ("NMFS") investigation that showed that the tidegate reduced "the 'extent and quality of' the habitat downstream of the tidegate by 'eliminating tidal influence and reducing sediment deposition.'" *Id.* at 1270 (quoting NMFS 2006 Biological Opinion at 6, 16–21). The significant habitat modification caused by the tidegate made it impossible for the juvenile chinook salmon to use the habitat to grow into adulthood. *Swinomish Indian Tribal Community*, 618 F. Supp. 2d at 1270. Analogously here, Greenlawn withdrawals from an already-reduced water flow affected water and sediment levels, smothering the mussels, eliminating necessary habitat, and impairing their breeding behavior. *See id.*

Habitat modification constitutes "harm" and a "take" under Section 9 if it significantly impairs the breeding and sheltering of a protected species. *Loggerhead Turtle v. County Council of Volusia County, Florida*, 148 F.3d 1231, 1258 (11th Cir. 2000). For example, the court in *Loggerhead Turtle* found there could be "harm" when artificial beach lighting indirectly affected breeding patterns of the endangered loggerhead turtle. *Id*. In *Zinke*, defendant's water withdrawals, which changed water temperatures downstream affected salmon breeding habits by harming and killing salmon eggs and fry constituted "harm" to an endangered species. 347 F. Supp. 3d at 516. Here, Greenlawn's water withdrawals indirectly affected the breeding patterns of the oval pigtoe by preventing host fish migration. *See id.* Greenlawn contends that activities must take place directly on top of the critical habitat to constitute a "take." R. at 16. This contention is inconsistent with court precedent that consistently finds that an indirect "take" can

violate ESA § 9. *See*, *e.g.*, *Babbitt*, 515 U.S. at 704-705; *Swinomish Indian Tribal Community*, 618 F. Supp. at 1270.

b. Greenlawn's Water Withdrawals were the Proximate Cause of the Harm Suffered by the Oval Pigtoe Mussels.

The ESA is subject to "ordinary requirements of proximate cause and foreseeability." *Babbitt*, 515 U.S. at 700 n.13. Proximate cause may be an "indirect" cause and "need not be the sole and only cause." *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *see Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994) (holding that "proximate cause is not . . . the same thing as a sole cause"). Proximate cause "'refers to the basic requirement that . . . there must be "some direct relation between the injury asserted and the injurious conduct alleged."'" *Paroline v. United States*, 572 U.S. 434, 444 (2014) (quoting *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 706 (2011) (ROBERTS, C.J., dissenting) (quoting *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268 (1992))). Greenlawn's failure to adjust the level of its withdrawals, despite the reduced flow in Bypass Reach, is a plausible "link" in the chain of causation of harm.

While "proximate cause" limits Section 9 liability for actions over which an agency or government actor has no control, "such a limit naturally wouldn't not apply" where the agency or government actor "retains some degree of control." *Nat'l Resources Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1239 (E.D. Cal. 2017). For example, in *Norton*, the court held that a "take" existed where an agency authorized water transfers that hurt salmon populations downstream. *Id.* at 1240. A chain of causation may have "more than one link, but [may not be] hypothetical or tenuous." *Natl'l Audubon Soc'y v Davis*, 307 F.3d 835, 849 (9th Cir. 2002). In *Zinke*, the court analyzed the causal chain to determine if the defendant's water withdrawals exposed them to Section 9 liability. 347 F. Supp. 3d at 512. The defendant's water withdrawals were a key factor

in the temperature changes that harmed downstream salmon habitat even though they took place alongside other action. *Id.* at 516. The court held that the connection was not too tenuous, proximate cause of harm existed, and a "take" of the salmon was committed. *Id.* Here, even if the drought was outside the realm of Greenlawn's control, the "casual chain is not speculative," and the harm committed to the oval pigtoe mussel is "traceable" to Greenlawn's water withdrawals. *Id.* at 517.

The district court was correct in distinguishing the current case from *Shaw* because there is a sufficient causal connection between Greenlawn's water withdrawals and the degradation of the oval pigtoe mussel's habitat. R. at 17; *see* 775 F.3d 641. In *Shaw*, the court held that a "take" did not exist because the connection between water withdrawals and the whooping cranes was too tenuous. 775 F.3d at 823. The court determined that the whooping cranes experienced a population drop due to the habitat degradation faced by their food supply and uncontrollable weather phenomenon, rather than a more direct harm to the crane population. *Id.* at 820. Here, unlike in *Shaw*, Greenlawn's water withdrawals were a direct and reasonably foreseeable cause of the harm to the oval pigtoe population's habitat and breeding patterns, in addition to the sailfish shiner the oval pigtoe relies on for breeding. *See id.*

IV. COURTS ARE NOT REQUIRED TO BALANCE THE EQUITIES BEFORE ISSUING AN INJUNCTION REGARDING AN ENDANGERED SPECIES ACT VIOLATION.

The ESA instructs courts to "enjoin any person, including . . . any . . . governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g). Concerning ESA violations, courts need not consider a balance of equities when issuing an injunction because the value of an endangered species is incalculable. *See Hill*, 437 U.S. at 187; *Biodiversity Legal Found v. Badgley,* 309 F.3d 1166, 1169 (9th Cir. 2002). When deciding a case concerning an ESA

violation, courts must look at whether it is reasonably certain that the action will result in harm to the species and whether the injunction is "necessary to effectuate the congressional purpose behind the statute." *Badgley*, 309 F.3d. at 1177; *see Center for Biological Diversity v. Abraham*, 218 F. Supp. 2d 1143, 1163 (N.D. Cal. 2002).

Here, considering that Greenlawn's continued water withdrawals will indisputably lead to the total extirpation of an endangered species, issuance of an injunction was proper. *See Defs. of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 1999). Refusal to enjoin Greenlawn from such water withdrawals would "ignore the explicit provisions of the [ESA]." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543 n.9 (1987).

a. Traditional Equity Balancing Tests are Insufficient in Light of the Incalculable Value of an Endangered Species.

Federal courts typically consider four factors when granting injunctive relief. The four factors include: (1) plaintiff's ability to prove irreparable harm; (2) harm to both defendant and plaintiff; (3) where the public interest will be served: and (4) whether plaintiff will prevail on the merits. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 391 (1981). The four-factor test does not apply to ESA violations as "the clear objectives and language of Congress in passing the ESA removes the traditional discretion of courts in balancing the equities before awarding injunctive relief." *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987). Courts do not have the authority to nor is it within the scope of their judicial role to balance species eradication against municipal use considering the incalculable nature of an endangered species. *See Hill*, 437 U.S at 187. "[N]iether the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations." *Id.*

The plain language and clear intent of Congress when drafting the ESA allows the balance of equities and the public interest to be inherently "'struck in favor of affording

endangered species the highest of priorities.'" *Badgley*, 309 F.3d. at 1177 (quoting *Hill*, 437 U.S. at 194). "'Congress [has] foreclosed the exercise of the usual discretion possessed by a court of equity.'" *Badgley*, 309 F.3d. at 1178 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Thus, when a highway construction project jeopardized the habitat of two federally listed species, the court enjoined the company from continuing construction until habitat mitigation had been completed. *See Marsh*, 816 F.2d at 1383. In *Marsh*, the court held that Congress views the harm caused by projects that adversely impact endangered species as incalculable. *Id.* "[A]ccordingly, it [was] decided that the balance of hardships and the public interest tip heavily in favor of endangered species," and courts "may not use equity's scales to strike a different balance." *Id.*

Courts routinely hold that judges are not equipped to balance species eradication against municipal uses since, under the ESA, the value of an endangered species is *incalculable*. *See Hill* 437 U.S. at 187; *Marsh*, 816 F.2d at 1383; *Bob House v. United States Forest Serv*., 974 F. Supp. 1022, 1027-28 (E.D. Ky. 1997). When a virtually completed federally funded dam was found to be materially affecting a listed endangered species, the Supreme Court held that an injunction was proper regardless of the money already expended for dam construction. *See Hill*, 437 U.S. at 173. The Supreme Court in *Hill* stated that balancing equities is impossible in ESA cases, as "it would be difficult for a court to balance the loss of a sum certain . . . against a congressionally declared 'incalculable' value." *Id.* at 187. Similarly, in the present case, balancing equities is impossible as it is undisputed that Greenlawn's continued water withdrawals will result in the total extirpation of the oval pigtoe population in the Green River. *See id.* Even if this Court had the authority to balance equities, which it "emphatically do[es] not," it would be impossible to do so because endangered species are invaluable. *See id.*

Hill and its progeny did not completely strip courts of all discretion when granting an injunction for an ESA violation. *See All. for the Wild Rockies, Native Ecosystems Council v. Kruger*, 35 F. Supp. 3d 1259, 1264-65 (D. Mont. 2014). Courts are not inherently required to issue an injunction even though the public interest and equities are inherently struck in favor of the endangered species. *See id.* Plaintiffs still have the burden to show that there is a reasonably certain threat of imminent harm to the protected species if the action is allowed to continue. *Shaw*, 775 F.3d at 663-64. With respect to the ESA, "it is not necessary to show harm to the species as a whole," rather, it is sufficient to show reasonably certain threat of imminent harm to the any populations of the species. *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1111 (N.D. Cal. 2017).

In determining whether the evidence is sufficient to show reasonably certain threat of imminent harm, courts consider all probative evidence, expert testimony, the best scientific or commercial evidence in contrast to what might arguably be done under other sections of the ESA, and "treats evidence of past harms or their lack as indicative of the likelihood of future harm." *Idaho Watersheds Project v. Jones*, 127 F. App'x 976, 977 (9th Cir. 2005). Here, based upon the death of 25% of the Green River's oval pigtoe mussel population and uncontested expert testimony that continued water withdrawals will result in the total extirpation of the oval pigtoe, injunction was proper. *See id.*

Harm must be reasonably certain and imminent in order to justify an injunction. *See Kruger*, 35 F.3d at 1264-65. For example, when a non-profit environmental group sought to enjoin operation of a barge fleeting facility for fear of potential harm to two endangered turtle species, the court found that an injunction was not necessary because plaintiffs could only show that harm to an endangered species *might* happen. *Friends of Lydia Ann Channel v. United States*

Army Corps of Eng'rs, 701 F. App'x 352, 355-56 (5th Cir. 2017). The plaintiffs in *Friends of Lydia Ann Channel* provided testimony that a "cold stunning event," which was "highly likely" to occur, would detrimentally impact the two endangered species. *Id*. The court found that this was insufficient evidence to issue an injunction because while the harm in the event of the cold stunning was imminent and certain, the cold stunning event itself was not. *See id*. In the present case, Greenlawn's water withdrawals during the drought warning led to the destruction of 25% of Green River's oval pigtoe mussel population. R. at 9. It is uncontested that if the flows in Bypass Reach are not at a minimum of 25 CFS, the entire population will be extirpated. R. at 10. Therefore, an injunction under ESA § 9 is proper. *See Jones,* 127 F. App'x at 977.

b. An Injunction on Greenlawn's Continued Water Withdrawals During Drought Conditions is Necessary to Effectuate the Congressional Purpose Behind the Endangered Species Act.

A court may look to whether the injunction is "necessary to effectuate the congressional purpose behind the statute." *Badgley*, 309 F.3d. at 1177. The enactment of the ESA was based upon congressional findings that irreparable harm, specifically the extinction of various species, had resulted from economic growth and human development. *See* 16 U.S.C. § 1531. The purpose of the ESA is to create a program that protects endangered and threatened species and their habitats. *See id.* The intent of Congress is quite clear from the plain language of the ESA: conservation, preservation, and protection of endangered and threatened species must be afforded the highest priority. *See Hill*, 437 U.S. at 174. Courts have established that the ESA was enacted "to halt and reverse the trend toward species extinction, whatever the cost." *Id.* In passing the ESA, Congress did not intend to allow for any exceptions to the ESA including those based upon municipal or governmental use. *See id.* In fact, evidence from congressional hearings suggests that Congress considered then rejected language that would have permitted an agency to

weigh the preservation of species against the agency's primary mission. *See Marsh*, 816 F.2d. at 1383.

Injunction is often the only way to properly effectuate the statute, "'[o]nly by requiring substantial compliance with the act's procedures can we effectuate the intent of the legislature.'" *Badgley*, 309 F.3d.at 1178 (quoting *Marsh*, 816 F.2d at 1384). Courts lack the authority "to ignore Congress' clear mandate to prevent the extinction of an endangered species," instead they hold a duty to effectuate the mandate. *Red Wolf Coal. v. United States Fish & Wildlife Serv.*, 210 F. Supp. 3d 796, 806 (E.D.N.C. 2016). Allowing Greenlawn's water withdrawals to continue has "an effect counter to Congress' goals" which courts do not have the authority to permit. *See id*. An injunction effectuates the purpose of the ESA because without it Greenlawn would be free to continue water withdrawals to bring about the total extirpation of an endangered species in total defiance of the statute. *See id*.

CONCLUSION

For the foregoing reasons, NUO respectfully requests that this Court both affirm and reverse the district court's grant of summary judgment. This Court should vacate the holding that Greenlawn's riparian rights supersede ESA constraints or the paramount public interest in the "navigable" waters of Green River and Bypass Reach. Greenlawn's municipal riparian landowner rights are not without limits, and they must be required to implement conservation measures—especially during drought conditions. This Court should reverse the district court's grant of summary judgment regarding ACOE's § 7 violations. ACOE's decision to curtail power generation while maintaining unrestricted flows to Bypass Reach constitutes a discretionary action triggering ESA § 7 consultation requirements. NUO has demonstrated that ACOE had discretionary control and involvement leading to the discretionary action of continuing high

flows to Bypass Reach during drought conditions. Such discretionary actions trigger ESA § 7 consultation requirements. This Court should affirm the district court's grant of summary judgement to NUO that Greenlawn's water withdrawals constitute a "take" of an endangered species oESA § 9. This Court should uphold the injunction placed upon Greenlawn because prohibiting Greenlawn's water withdrawals is essential for the survival of the endangered oval pigtoe mussel.