No. 66-2017

In the Court of Appeals for the Twelfth Circuit

NEW UNION OYSTERCATCHERS, INC.,
Petitioner,
v.
UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent
and
CITY OF GREENLAWN, NEW UNION,
Respondent.

On a Notice of Appeal to the United States Court of Appeals for the Twelfth Circuit

BRIEF FOR PETITIONERS

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November 21, 2019

STATEMENT OF JURISDICTION

The United States District Court for the District of New Union exercised federal question jurisdiction over the Plaintiff's claims against the Appellees under 28 U.S.C. § 1331 (2012). Appellant filed a timely Notice of Appeal pursuant to FED. R. APP. P. 4 (2016). The United States Court of Appeals for the Twelfth Circuit has determined that this court has valid jurisdiction over the appeal based on 29 U.S.C. § 1291 (2012). Record (R.) at 2.

QUESTIONS PRESENTED

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

2. Whether the operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536.

3. 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 § 9 of the Endangered Species Act, 16 U.S.C. § 1538.

4. Whether the District Court must balance the equities before enjoining a beneficial municipal activity, when the activity will cause the extirpation of an entire population of an endangered species.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

REGULATIONS

DECISION BELOW

The opinion of the District Court is unreported and is reproduced at R. 4–19.

RELEVANT STATUTES AND RULES

This case involves the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1973), and Federal Rule of Civil Procedure 56(c).

STATEMENT OF THE CASE

I. Factual Background

Congress authorized the creation of the Howard Runnet Diversion Dam and the Howard Runnet Dam (the Howard Runnet Dam Works) in 1945 and both dams were completed in 1948. R. at 6. That same year, the Army Corps of Engineers (ACOE) entered into an agreement (the Agreement) with the City of Greenlawn (collectively, the Appellees) to protect Greenlawn's riparian rights to flow from the Green River Bypass Reach (Bypass Reach). *Id.* Following a population boom in the 1960s, Greenlawn enlarged its municipal water system. *Id.* at 5. Greenlawn's water withdrawals average 6 million gallons per day (MGD) annually, but reach all the way to 20 MGD during peak summer months for the mere purpose of watering lawns and ornamental plants. *Id.* Due to poor design of Greenlawn's municipal sewage treatment plant and water loss to evaporation and ground absorption, Greenlawn's water withdrawals are drying up the Green River. *Id.* at 5–6. Less than five percent of all water consumed by Greenlawn returns to the Green River watershed. *Id.* at 6.

The operation of the Howard Runnet Dam Works by ACOE is governed by a Water Control Manual (WCM) last revised in 1968, toward the tail or after when Greenlawn had experienced its population boom. *Id.* The WCM establishes parameters for water releases for

seasonal target levels and sub-seasonal target levels. *Id.* at 6–7. According to the WCM, ACOE is instructed to maintain flow into the Bypass Reach at a rate of 50 cubic feet per second (CFS) during Zone 1 drought watch periods and to reduce flow into the Bypass Reach to 7 CFS during Zone 2 drought warnings and Zone 3 drought emergencies. *Id.* at 7. ACOE is also directed to release up to 200 CFS for up to three hours per day during Zone 1 and 2 for vital hydroelectric generation. *Id.* Daily hydroelectric power releases halt during Zone 3. *Id.* At the turn of the 21st century, drought conditions became more frequent[1] and in the spring of 2017, ACOE reduced flow into the Bypass Reach to 7 CFS under Zone 2 procedures because lake levels dropped well below seasonal target levels. *Id.* at 8. Nonetheless, Greenlawn continued to consume.

Immediately after ACOE carried out Zone 2 procedures, Greenlawn protested the 7 CFS flow restriction in the Bypass Reach. *Id.* ACOE's District Commander made a request that until drought conditions improve, Greenlawn institute reasonable water restrictions, including a ban on unnecessary and overly consumptive lawn watering and car washing. *Id.* Greenlawn refused, and days later the District Commander increased flow into the Bypass Reach from 7 CFS to 30 CFS. *Id.* The record is unclear why the 30 CFS flow rate was chosen. Only weeks later, water levels in the Howard Runnet Lake plummeted to Zone 3 drought emergency levels. *Id.* at 9. At this point, ACOE's hydroelectric power releases were halted. *Id.* Nonetheless, Greenlawn continued to consume.

As a direct, foreseeable, and unfortunate result of Greenlawn's unreasonably consumptive use, flow in the Green River downstream of the Howard Runnet Dam dropped to

[1] The lowest level drought threat, Zone 1, occurred during 2006-2007, 2008, 2009-10, 2012, and the fall of 2016. *Id.* at 8.

almost zero. *Id.* The artificially reduced flow had the effect of exposing beds of oval pigtoe mussels and degrading their habitat. *Id.* The oval pigtoe mussel is a federally protected endangered species under the Endangered Species Act (ESA)—a species whose value is "incalculable." *Id.*; *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978). All parties agree that the reduced flow conditions caused by the Appellees' actions resulted in the death of approximately twenty-five percent of oval pigtoe mussels in the Green River. R. at 9–10. ACOE and Greenlawn's actions will inevitably lead to the extirpation of the endangered oval pigtoe mussel if these practices are not enjoined. *Id.* at 10. Nonetheless, Greenlawn continues to consume.

The artificially reduced flow in the Green River also negatively impacted the Green River estuary and Green Bay. Salinity in the estuary and in Green Bay has risen, allowing predators to enter Green Bay and devastate entire populations of oysters. *Id.* at 10. What oysters manage to survive this predation are suffering from nutrient deficiency; vital nutrient inflow into the estuary has been eliminated by reduced flow. *Id.* Nonetheless, Greenlawn continues to consume.

Appellant New England Oystercatchers, Inc. (NUO) is a non-profit membership organizations devoted to representing the interests of oyster fishermen in Green Bay. *Id.* None of its members are riparian landowners on Green Bay or Green River. *Id.* Some of its members include third- and fourth-generation oyster fishermen who have been forced to sell their boats because declining oyster harvests have robbed them of their ability to make loan payments. *Id.* Not only is its multi-generational historic industry being destroyed by Greenlawn's unreasonable consumptive use, NUO members are paying electric surcharges during times the Howard Runnet hydroelectric plant cannot operate. *Id.* ACOE's release and Greenlawn's withdrawal have

caused substantial damage to NUO members' livelihoods. Nonetheless, Greenlawn continues to consume.

Appellant brings the present claims to prevent future harm to an endangered species and to save an endangered historic industry. Appellant asserts a claim against Greenlawn based on its unreasonable water use as a riparian, therefore violating Appellant's public trust rights. *Id.* at 4. Appellant's other claims concern ACOE's violation of § 7 of the ESA, 16 U.S.C. § 1536 (2012), and Greenlawn's violation of § 9 of the ESA, 16 U.S.C. § 1538 (2012). *Id.* Appellee ACOE moved for summary judgment on NUO's § 7 claim, and cross-claimed against Greenlawn on NUO's § 9 claim. *Id.* Greenlawn cross moved for summary judgment on the riparian claim and to dismiss the ESA claims against it. *Id.* NUO sought an injunction against Appellees under 16 U.S.C. § 1540(g) (2012). *Id.* at 18.

II. Procedural History

Appellant NUO appeals from a summary judgment decision of the United States District Court for the District of New Union holding that the Appellee City of Greenlawn has riparian landowner rights to the Green River Bypass Reach entitling the City to continue water withdrawals during a drought without water conservation measures. *Id.* at 1. The New Union court rejected NUO's claim that the Appellee ACOE is not obligated to provide more than 7 CFS flow rate during periods of diminished flow. *Id.* at 14. As a result of the New Union District Court holding against Appellant on their riparian rights claim, the court granted the ACOE's summary judgment motion against NUO's 16 U.S.C. § 1536 claim because the ACOE was not required to conduct § 7 consultation under the ESA for a nondiscretionary action. *Id.* at 14. NUO appeals the court's determination that ACOE did not violate the consultation requirements of § 7(a) of the ESA, 16 U.S.C. § 1536(a) (2012). *Id.* at 1. After the Appellee City of Greenlawn

failed to present any applicable case law to support its position, the court granted Appellant's summary judgment motion on violation of § 9 of the ESA, 16 U.S.C. § 1538 (2012). *Id.* at 17. Greenlawn appeals the court's determination that a court does not need to balance the equities of a municipal activity against the threat of the species when enjoining a municipal activity to protect an endangered species. *Id.* at 2.

SUMMARY OF ARGUMENT

The public trust doctrine is a principle that the sovereign holds in trust for public uses some resources, such as rivers and bays to protect the public's rights to use those waters for navigation, commerce, and fishing. These public rights attach to rivers that are navigable, like the Green River, and to Green Bay. Appellant NUO is comprised of third- and fourth-generation fishermen who have long exercised their public trust rights to navigation and fishing in Green River and Green Bay.

The District Court for New Union erred when it denied Appellant's riparian rights claim. The court applied natural use water principles and improperly analogized Greenlawn's use of lawn watering and car washing to uses necessary to sustain human life—the category of uses the natural use preference was intended for. The court failed to recognize that not only is Greenlawn's use not a natural use, but that municipalities like Greenlawn do not qualify for the *per se* reasonable natural use preference. As a result, Greenlawn's use is an artificial use, just like ACOE's use. If Greenlawn wanted to create a statutory preference for one artificial use over another it could have done so. In the absence of a specific artificial use statutory preference, Greenlawn's use does not necessarily defeat ACOE's.

In fact, Greenlawn's water use is *per se* unreasonable. Transfer of water from one watershed to another is unreasonable because it is destructive of flow expectations of

downstream riparians. This limitation is necessary to ensure that enough water remains within the Green River watershed to prevent violation of NUO's public rights to navigation and fishing on Green River and in Green Bay.

ACOE's use is more reasonable than Greenlawn's use under the Restatement (Second) 850A factors. The first four factors analyze the reasonableness of both uses by (a) the purpose of the use; (b) the suitability of the use to the watercourse; (c) economic value of the use; and (d) social value of the use. Although both uses are artificial, the purpose of ACOE's use allows for natural uses. For example, not only does the Restatement explicitly approve of hydroelectric generation, it enables approved domestic uses by providing the electricity needed to operate laundry machines or to flush toilets.

The suitability of the uses to the watercourse is impacted by the economic and social value and costs associated with each use. ACOE's use is much more economically valuable. Nearly every modern profitable economic enterprise is dependent on electricity. If electricity generation were curtailed due to Greenlawn's use, there would be tremendous economic costs on these enterprises. Electricity customers also are charged electricity surcharges due to limited hydroelectric generation. NUO members' livelihoods are also being destroyed. Since Greenlawn caused Zone 3 drought conditions, many members have experienced reduced oyster catches and incomes, and have been forced to sell their boats. On the other hand, Greenlawn residents gain relatively little economic value from watering lawns or washing cars.

The social value of a use will depend on economic factors and must consider the social value to society as a whole. ACOE's use enables many electricity-dependent economic enterprises to exist, which provide public benefits. ACOE's use also allows for many artificial uses that have come to define modern comfort. Greenlawn's use, on the other hand, has

relatively little social value associated with it and imposes high social costs, including harm to recreational and environmental values. NUO's members face the extinction of their historic oyster industry, and the federally endangered oval pigtoe mussel faces extirpation. The high social costs render Greenlawn's use unsuitable for the Green River. For all these reasons, Greenlawn's use is unreasonable compared to ACOE's and must be limited to 7 CFS.

Because the District Court erred when it denied NUO's riparian claim, it mistakenly concluded that ACOE's decision to provide 30 CFS of flow to the Bypass Reach was a nondiscretionary action exempt from § 7 consultation under the ESA. ACOE's decision to provide 30 CFS of flow instead of 7 CFS of flow, as required by the Agreement and the WCM, was a discretionary action. ACOE's action was discretionary because, construing the facts most in favor of NUO, ACOE retained discretion to modify the Agreement. ACOE's action was also arbitrary and capricious because it provided 30 CFS of flow without any support or explanation of how that amount was chosen.

Discretionary actions must undergo § 7 consultation if they are likely to jeopardize an endangered species or adversely modify its habitat. Because "the destruction of mussel habitat and loss of mussels is the direct and foreseeable result of Greenlawn's water withdrawals," ACOE's discretionary decision will jeopardize the endangered oval pigtoe mussel. R. at 9–10, 17.

In addition, Greenlawn's actions constitute an impermissible taking of an endangered species in violation of § 9 of the ESA. The ESA defines "take" as "to 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) (2012). To prevail under this section of the ESA, NUO must prove by a preponderance of the evidence that a challenged activity is reasonably certain to "imminently

harm, kill, or wound the listed species." *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 564 (D. Md. 2009). The existence of the WCM, which dictates the flow levels that compromised the mussels' habitat in the first place, satisfies this element–as another drought is inevitable, so is the enforcement of the dangerous conditions imposed by the manual.

Greenland both harmed and harassed the endangered oval pigtoe mussel by reducing the flow to the Bypass Reach. The mussels' habitat was destroyed by silt deposits that smothered the mussel and by the reduced water flow that exposed the mussels to air. R. at 9. Habitat destruction such as this constitutes harm as it further drives an endangered species to extinction. *Palila v. Hawaii Dep't of Land & Nat. Res.*, 852 F.2d 1106, 1108 (9th Cir. 1988). The reduced flow also harasses the mussels by disrupting their "normal behavior patterns,"[3] which is an additional impermissible method of taking. 50 C.F.R. § 17.3 (2006).

Therefore, an injunction to prohibit Greenlawn from making water withdrawals that reduce downstream flows below the rate necessary for mussel survival is the proper remedy. A party may seek an injunction to enjoin a government instrumentality who is alleged to be in violation of the ESA. 16 U.S.C. § 1540(g) (2012). Because NUO is both alleging, and has proven, that Greenlawn has violated § 9 of the ESA, this Court may grant an injunction.

Using a balancing test to determine if the municipal activity of drought control is more important than protecting an endangered species is inappropriate. Courts that are faced with an ESA-related injunction are cautioned against making "fine utilitarian calculations." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978). Even if a calculation were to be made, endangered species are "afforded the highest of priorities." *Sierra Club v. Marsh*, 816 F.2d 1376, 1382, 1383

[3] Specifically, the reduced flow compromised young mussels' ability to attach to the sailfin shiner, which was essential for their growth. R. at 9.

(9th Cir. 1987) (citation omitted). Therefore, the only question would be if there is a "reasonably certain threat of imminent harm to a protected species." *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000). The mussel population has already suffered a substantial loss and it is enviable that their population will be hit once the drought provisions are enacted again. An injunction is the proper remedy to prevent the extirpation of the oval pigtoe mussel.

STANDARD OF REVIEW

The Court reviews a summary judgment order de novo. *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 431 (6th Cir. 2006); *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (4th Cir. 2001); *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994). Summary judgment is appropriate when, after considering all the pleadings, admissions on file, and facts in evidence, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of showing there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party. . . ." *Scott v. Harris*, 550 U.S. 372, 380 (2007). If there is a factual dispute, it must be genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," summary judgment will not lie. *Anderson*, 477 U.S. at 248. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury reasonably could find for the plaintiff." *Id.* at 252.

ARGUMENT

I. Greenlawn is not entitled as a riparian landowner to unreasonable water withdrawals during drought conditions.

A. NUO has standing to protect its rights in navigation and fishing of Green River and Green Bay under the Public Trust Doctrine.

NUO has standing to protect its public trust rights in navigation and fishing on the Green River and in Green Bay. Under the public trust doctrine, "each state holds title to the beds and banks of the federally-defined navigable waters within its borders in trust for the people of that state, to protect the public's right to use those waters for navigation, commerce, and fishing." Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VER L. REV. 781, 784 (2010) (citing *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)). This federal definition "extends to the entire surface and bed of [bays] subject to tidal action." 33 C.F.R. § 329.12(b) (1986). Green Bay satisfies this definition. The federal definition of "navigable waters" also includes rivers that "are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." *Id.* § 329.4 (1986). It is "especially clear" that the Green River meets the federal definition because "it physically connects with a generally acknowledged avenue of interstate commerce," in this case Green Bay. *Id.* § 329.7 (1986). It does not matter that stretches of the Green River have been rendered non-navigable by Greenlawn's and ACOE's actions. *Id.* § 329.9(a) (1986) ("A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement . . . retains its character as 'navigable in law' even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions."). Moreover, California has extended the public trust to "protect[] navigable waters from harm caused by diversion of nonnavigable tributaries." *Nat'l Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419, 437 (1983). The court perceptively observed "[i]f the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply

to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest." *Id.* at 436–37 (citing Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233, 257–58 (1980)). The Restatement (Second) of Torts endorses California's approach of including nonnavigable waters that impact navigable waters in its public trust doctrine. *See* RESTATEMENT (SECOND) OF TORTS § 847A cmt. a (AM. LAW INST. 1979) ("Congress may also regulate the use of and activities in nonnavigable waters if those uses and activities affect the navigable capacity of navigable waters of the United States or affect interstate commerce in some other way.").

NUO are third- and fourth-generation oyster fishermen who have long exercised their public rights to navigate and fish Green River and Green Bay. R. at 10. In order to acquire standing, NUO must show: (1) a concrete and particularized injury that is actual; (2) a causal connection between the injury and the appellees' actions; and (3) a likelihood that the injury can be redressed if the court finds in NUO's favor. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

The violation of the public trust doctrine can act as an actual injury for standing purposes. *See Friends of the Parks v. Chicago Park Dist.*, No. 14-CV-09096, 2015 WL 1188615 (N.D. Ill. Mar. 12, 2015) (finding that non-profit organization had standing and a concrete imminent injury on the basis of the public trust doctrine); *see also* RESTATEMENT § 856(4) ("A riparian proprietor is subject to liability for making a use of public waters that interferes with the exercise of a public right to use the waters.") . NUO has suffered an actual concrete injury in the form of a violation of the public trust to navigate and fish Green River and Green Bay. R. at 9–10 ("The Green River downstream of the Howard Runnet Dam turned into stagnant pools of water and narrow trickles . . . . [R]educed flows have also impacted the Green River estuary,

increasing the salinity of Green Bay and reducing the flow of nutrients into the ecosystem. Increased salinity allows predators, including conch and crabs, to enter the bay and feed on juvenile oysters. . . . Oyster harvests in 2016 were only 50% of the level of 2000."). This injury is directly causally connected to the Appellees', Greenlawn and ACOE, actions of unreasonable water use and water release of 30 CFS, respectively. R. at 17 ("Greenlawn's withdrawals are *the* but-for cause of the downstream conditions . . . ") (emphasis added). NUO's injury to the public trust can be redressed if the Court finds in NUO's favor by enforcing the agreement between Greenlawn and ACOE to only 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. Redressability is a function of a declaration of what Greenlawn is entitled to as a riparian property owner under the laws of the State of New Union, discussed below.

B. Greenlawn's use of water is not a *per se* reasonable natural use.

The District Court erred in determining the extent of Greenlawn's riparian right to use of water in Green River. As the District Court noted, New Union applies a rule of reason, allowing reasonable uses of water so long as these uses do not interfere with the reasonable use of water by riparian landowners. *See* R. at 12–13 (citing *Hendrick v. Cook*, 4 Ga. 241 (1848); *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.R.I. 1827)). There are many ways to categorize use. One such way is to categorize uses as natural or artificial. *Evans v. Merriweather*, 4 Ill. 492 (1842). Natural uses include domestic needs such as drinking, cooking, and washing, and other uses necessary for the immediate sustenance of a household, such as keeping a kitchen garden. *Id.* at 495. Any other use, including using water for commercial irrigation, in mining, in manufacturing, to generate power, or for recreation, are classified as artificial uses. *See, e.g.*,

Mich. Citizens for Water Conserv. v. Nestle Waters N. Am., Inc., 269 Mich. App. 25, 54–56, 71–72 (2005), *rev'd on other grounds*, 479 Mich. 280 (2007); *Brummund v. Vogel*, 184 Neb. 415 (1969). There is generally a preference for natural use. RESTATEMENT (SECOND) OF TORTS § 850A cmt. c (AM. LAW INST. 1979) ("The use of water for domestic purposes has always received preferential treatment in the law.").

The District Court erred by primarily resting its holding on the natural use-artificial use distinction. It is clear that the District Court misapplied the natural use principles when it held that "[t]his principle would apply to the modern domestic uses of watering lawns and ornamental plants." R. at 13. The natural use preference is justified on two grounds. First, courts and legislatures assume that natural uses in the aggregate consume only insignificant quantities of water. RESTATEMENT § 850A cmt. c ("[U]ses for domestic [natural] purposes usually involve small quantities that require no large diversion of water and produce no appreciable interference with most streams."). For this reason the preference does not extend to large institutions such as municipalities like Greenlawn that provide water to individual households. *Id.* ("*The preference for domestic use does not extend to withdrawals by a municipality*, water company or public district that supplies the domestic needs of inhabitants of a city or other service area. These large public and commercial users receive no preference and *are subject to liability if the taking of their supplies unreasonably causes harm to the reasonable use of riparians*.") (emphasis added); *Stratton v. Mount Hermon Boys' School*, 216 Mass. 83 (1913); *Bank of Hopkinsville v. Western Ky. Asylum*, 108 Ky. 357 (1900); *Filbert v. Dechert*, 22 Pa. Super. 362 (1903). Second, natural uses, tied as they are to "the necessity of maintaining life and carrying out the ordinary process of living," RESTATEMENT (SECOND) OF TORTS § 850A cmt. c , are *per se* reasonable in any conflict with a less pressing artificial use. LUDWICK A. TECLAFF, WATER LAW IN HISTORICAL

PERSPECTIVE 9 (1985); Jacob H. Beuscher, *Wisconsin's Law of Water Use*, 31 WIS. B. BULL. 30, 42 (Oct. 1958); *see also Brummund v. Vogel*, 184 Neb. 415 (1969). Because Greenlawn is a municipality whose withdrawals consume a significant amount of water, it cannot receive the natural use preference over the ACOE's use. And because Greenlawn's use to water its lawns are not necessary to sustain life, and thus materially different from watering a noncommercial garden, which is necessary for the sustenance of a household, Greenlawn cannot receive the natural use preference under this justification either.

Greenlawn's use of water to wash cars and water lawns and ornamental plants is an artificial use. ACOE's use for electricity generation is also an artificial use. As Justice Ward held in the seminal *Harris v. Brooks* case, all artificial uses are equal (absent legislation to the contrary). 225 Ark. 436, 445–46 (1955). Therefore, ACOE's use need not necessarily "yield to Greenlawn's domestic water demands." R. at 13.

Many states have adopted statutes creating preferences between competing artificial uses. For example, Wisconsin has a statute giving preference to "[riparians] owning lands adapted to the cultivation of cranberries." Wis. Stat. §§ 94-26 to 94-35. In the absence of any such law declaring watering lawns to be in the public interest, Greenlawn does not necessarily defeat ACOE's riparian claims, and thus its artificial use is subject to reasonableness restrictions.

C. Greenlawn's use of water is a *per se* unreasonable use.

The District Court should have found that Greenlawn's use of water to wash cars and water lawns and ornamental plants is a *per se* unreasonable use. Under the riparian doctrine, a riparian proprietor cannot divert riparian waters to land lying outside the watershed (the "watershed rule"). Christine A. Klein *et al.*, *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403, 407 (2009) (citing *Dimmock v. City of New London*, 245 A.2d 569, 570,

573 (Conn. 1968)); *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327 (1907); *Watkins Land Co. v. Clements*, 98 Tex. 576 (1905). Use that is reasonable is limited to the watershed "to protect the return flow expectations of downstream riparians [as] implicit in the correlative rights of riparian landowners." Anthony Dan Tarlock & Jason Anthony Robinson, *L. of Water Rights and Resources § 3:51* (July 2019). The District Court found that only five percent of water withdrawn by Greenlawn returns to the Green River watershed. R. at 5–6. Therefore, violation of the watershed rule is a *per se* unreasonable use, violative of NUO's public rights in navigation and fishing on Green River and in Green Bay.

D. Greenlawn's use of water is unreasonable compared to ACOE's use.

Even if this court were unpersuaded that Greenlawn's use was unreasonable *per se*, ACOE's is more reasonable. NUO continues to assert that "ACOE has its own right as a riparian landowner to divert water for use in hydroelectric generation, while maintaining the 7 CFS flow in the Bypass Reach." R. at 13. To determine whether Greenlawn's use unreasonably impairs the riparian rights of ACOE, the District Court should have analyzed both uses under the Restatement (Second) of Torts § 850A factors. RESTATEMENT (SECOND) OF TORTS § 850A cmt. a (AM. LAW INST. 1979) ("In a suit between two riparian users of water the reasonableness of both uses is in issue."). The list contains the general characteristic of a use that the court is to weigh. They include (a) the purpose of the use; (b) the suitability of the use to the watercourse or lake; (c) economic value of the use; (d) social value of the use; (e) extent and amount of harm it causes; (f) the practicability of avoiding the harm by adjusting the use or method of use of one proprietor or the other; (g) the practicality of adjusting the 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 causing harm to bear the loss. *Id.* § 850A. This inquiry "will normally call for the application of the first four factors . . . ." *Id.* § 850A cmt. a.

The Section 850A factors are multi-layered. If NUO can show that ACOE's "use is reasonable and has been harmed and that [Greenlawn's] use does not serve a beneficial purpose, is not suited to the source or has little or no economic or social value, [NUO] has established a prima facie case that [Greenlawn's] use is unreasonable. *Id.*

Factor (a) examines the purpose of the use. ACOE's use of water for hydroelectric generation should be given more weight than Greenlawn's use for lawn watering. Not only does hydroelectric generation receive explicit approval in the Restatement, *see id.* § 850A cmt. b, it enables many natural uses approved by the courts and the Restatement, such as supplying electricity to enable laundry machines to operate or for toilets to flush. *See id.* § 850A cmt. c ("The domestic use of water includes its use for drinking, cooking, bathing, *laundry*, *sanitation* and other house purposes that contribute to the maintenance and sustenance of the riparian proprietor and his family.") (emphasis added). Although there "is no closed class of beneficial purposes," *id.* § 850A cmt. b, it is clear that the benefit of hydroelectric power outweighs the benefit of a green lawn.

Factor (b) examines the suitability of the use to the watercourse. The Restatement advises that suitability of the use of the watercourse is related to other factors, including the social values and social costs of a use. This factor will be analyzed, *infra*, with factor (d).

Factor (c) examines the economic value of the uses. "The value of the use may be derived from the productivity of the water . . . ." *Id.* § 850A cmt. e. It is clear that there is tremendous economic value from the ACOE's use of the water for daily hydroelectric power releases. A relevant consideration is whether "a profitable enterprise is dependent on the use of

water." *Id.* Nearly every economic venture imaginable today relies on electricity. By unreasonably curtailing ACOE's ability to conduct daily hydroelectric power releases, Greenlawn is placing the profitability of every economic enterprise that relies on electricity from the Howard Runnet Dam in jeopardy. Furthermore, NUO's members "will be forced to pay electric rate fuel surcharges during times that the Howard Runnet hydroelectric plant cannot operate as a peaking facility." R. at 10. In comparison, Greenlawn gains relatively little value from its unreasonable use. Whatever the economic benefits of lawn watering may be, it is difficult to imagine they outweigh the economic costs associated with the loss of nearly every economic enterprise's ability to conduct its business. One of its economic costs, however, is the assassination of a historic oyster industry that has served the community for generations. *See* R. at 10 ("[NUO's] members include individuals who are third- and fourth-generation oyster fishermen. These members have suffered reduced catches and declining incomes because of the smaller oyster harvests. Several of NUO's members have been forced to sell their fishing boats because their oyster fishing income no longer sufficient to make loan payments.").

Factor (d) examines the social value of the use. The Restatement notes that social "value will depend in part upon economic factors . . . ." RESTATEMENT § 850A cmt. f. ACOE's strong economic factor provides great social value to the State of New Union. The collective total of nearly every economic enterprise within range of the Howard Runnet Dam provides a wealth of social services and amenities that have come to characterize modern life. The private enterprises that produce goods and services promote the general public good. *Id.* The District Court did not find any social costs to ACOE's use, and specifically found that ACOE's power generation use "serv[ed] the public interest." R. at 13.

Greenlawn's use, on the other hand, provides little social value. It is possible that Greenlawn places great social value on its residents being able to withdraw unreasonable amounts of water in order to have well-watered lawns. However, if this were the case, then it is likely that the District Court would have found statutory authority elevating the importance of artificial use for lawn watering. Such examples of high social value placed on specific artificial uses are plentiful in other states. *See, e.g.*, Wis. Stat. §§ 94-26 to 94-35 (Wisconsin's cranberry statutes).

Not only does Greenlawn's use provide little social value, it imposes high social costs. This court is also to consider the social cost to society as a whole. *See* RESTATEMENT § 850A cmt. f. The Restatement explicitly recognizes "harm to recreational and environmental values" as "social harms." *Id.* § 850A cmt. d. It is undisputed that Greenlawn's use of the Green River has had negative environmental impacts. R. at 9–10 ("Plaintiff's expert offered uncontradicted deposition testimony that these conditions resulted in the death of approximately 25% of the Green River oval pigtoe population."). An entire multi-generational historic industry is on the verge of collapse due to Greenlawn's use. *Id.* at 10. This had led to "adverse effects on . . . public interests," including NUO's. RESTATEMENT § 850A cmt. f; *supra* Part I(A). The result is that "the presence of these social harms . . . render[s] the use unsuitable for" the Green River. *See* RESTATEMENT § 850A cmt. d.

In defense of its public trust rights in the navigation and fishing of the Green River, NUO has made a prima facie case that Greenlawn's use of the Green River is unreasonable. Because "the product of [Greenlawn's] use has only slight or trifling economic value and the use has destructive or harmful side effects on other persons [and] the public, factors (b) and (c) are not met." *See id.* § 850A cmt. a. It is also doubtful that factor (d) has been met due to the high

social benefits of ACOE's use and the social cost of Greenlawn's use. As a result, this Court need not proceed any further down the layer of Section 850A factors. *See id.* Therefore, this court should find that Greenlawn is not entitled as a riparian landowner to more than 7 CFS during drought warning and emergency conditions.

II. ACOE's operation of the Howard Runnet Dam Works is a discretionary action subject to section 7 consultation under the ESA.

A. Section 7 consultation under the ESA only applies to discretionary actions.

The District Court observed that "[w]hether ACOE was required to consult with FWS [(the United States Fish and Wildlife Service)] prior to increasing the water releases from the Diversion Dam to the Bypass Reach . . . turns on the question of whether this decision constitutes an 'action' subject to ESA § 7(a)." R. at 15. In the ESA's implementing regulations, the Department of the Interior defines "action" as "all activities or programs of any kind authorized, funded, *or carried out*, in whole or in part, by Federal agencies in the United States . . . ." 50 C.F.R. § 402.02 (2019) (emphasis added). An example of agency action includes "actions directly or indirectly causing modification to the land, water, or air." *Id.* § 402.02(d). In the court below, NUO argued that ACOE's release of 30 CFS to the Bypass Reach during the 2017 drought warning was an agency action. R. at 15. ACOE's actions clearly meet the federal definition of action because the release was an activity carried out by a federal agency (the ACOE) in the United States, and was an action that caused a modification to water. *See* 50 C.F.R. §§ 402.02, 402.02(d) (2019); R. at 9 ("The Green River downstream of the Howard Runnet Dam turned into stagnant pools of water and narrow trickles, through what was formally a flowing river habitat . . . .").

The heart of the ESA for federal actions is the § 7 consultation requirement, which requires that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction of adverse modification of habitat of such species . . . .

16 U.S.C. § 1536(a)(2) (2012). When an agency chooses a course of action that is not specifically mandated by Congress nor specifically necessitated by broad mandate, that action, by definition, is discretionary and subject to consultation under § 7 of the Endangered Species Act. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008).

B. ACOE's decision to supply 30 CFS is a discretionary action that will jeopardize the federally endangered pig ovaltoe mussel and adversely modify its critical habitat.

Several federal courts of appeal have ruled that the § 7 consultation requirement applies to contract rights to water in federally operated water projects. *See, e.g.*, *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014); *In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 631 (8th Cir. 2005); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999); *Nat. Res. Def. Council v. Houston*, 146 F.3d 118, 1125–26 (9th Cir. 1998). The section applies so long as the agency "retains some measure of control over the activity" or "some discretion" to take action for the benefit of the protected species. *Klamath*, 204 F.3d at 1213; *Jewell*, 749 F.3d at 784. In the present case, ACOE entered into an agreement with Greenlawn to maintain flow sufficient to allow Greenlawn to continue 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. The record is unclear whether ACOE retained discretion to impose a contract amendment or modification for the benefit of the species. Viewing the facts in the light most favorable to NUO (the nonmoving party) this court must assume that ACOE retained discretion to impose a contract amendment or modification for the

benefits of endangered species. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). Because ACOE retains discretion to impose a contract amendment, it was required to conduct § 7 consultation with the FWS. *See Jewell*, 749 F.3d at 785 (ruling that § 7 applies where federal agencies have discretion in negotiating contracts).

Even if ACOE did not retain discretion under its water supply agreement to impose a modification, ACOE's decision to supply 30 CFS of flow to the Bypass Reach was a discretionary action. During drought warning and drought emergency conditions, Greenlawn is contractually entitled to no more than 7 CFS of flow. *See supra* Part I. This means, in effect, that ACOE would not be required to conduct § 7 consultation for releases of 7 CFS of flow or less because they are nondiscretionary actions required by law. However, any release in excess of 7 CFS likely to jeopardize the continued existence of an endangered species is a discretionary action requiring § 7 consultation.

Under the Administrative Procedure Act, a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed" 5 U.S.C. § 706(1) (2012), and must overturn an agency action if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "without observance of procedure required by law." *Id.* §§ 706(2)(A), (D) (2012). An agency action is arbitrary and capricious if "the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency . . . ." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When conducting an action contrary to long-standing policy, ACOE must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when their "new policy rests upon factual findings that contradict those which underlay [its] prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). ACOE lacks

authority to carry out actions "manifestly contrary to the statute. *Chevron, U.S.C., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984); *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703 (1995).

ACOE acted arbitrarily and capriciously when it failed to provide a detailed justification for its decision to release 30 CFS into the Bypass Reach. First, the evidence before the agency demonstrates that Greenlawn is only contractually entitled to up to 7 CFS of flow in the Bypass Reach. *See supra* Part I. The District Commander made no factual findings otherwise and simply modified a long-standing policy that set flow parameters based on specific factual findings of historic use. *See* R. at 9. Second, ACOE offered no explanation how it arrived at the 30 CFS flow number. Nowhere in ACOE's WCM—or anywhere else in the record—are specific factual findings demonstrating that 30 CFS, specifically, is the amount of flow Greenlawn is entitled to. The actions of ACOE and Greenlawn led to the death of twenty-five percent of Green River's oval pigtoe mussels and in time, if allowed to continue, will led to the extirpation of the entire species. R. at 9–10. Because ACOE performed a discretionary act not in accordance with the law, manifestly contrary to 16 U.S.C. § 1536(a)(2) (2012), and without observance of procedure required by the law, this court can compel ACOE to perform the unlawfully withheld § 7 consultation. *See* 5 U.S.C. § 706(1) (2012).

III. Greenlawn's withdrawal of flow from the Howard Runnet Dam Works is an impermissible taking of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act.

A. The reduced flow is a taking under § 9 of the ESA.

Section 9 of the Endangered Species Act prohibits the "take" of any listed endangered species. 16. U.S.C. § 1538(a)(1)(B) (2012). The ESA, "defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such

conduct." *Id.* The rule against takings is a general prohibition. 9 A.L.R. Fed. 3d 3. The prohibition against takings under § 9 was intended to be expansive. *See Sweet Home Chapter of Cmtys. for a Great Or. v. Lujan*, 806 F. Supp. 279, 283 (1992) ("Congress made clear that the definition of 'take' was to be interpreted 'in the broadest possible manner to include every conceivable way in which a person can "take" or attempt to "take" any fish or wildlife.'").

i. The reduced flow harms the oval pigtoe mussel.

"Harm" includes not only physical injury to species, but also injury caused "by impairment of essential behavior patterns via habitat modification that can have significant and permanent effects on a listed species. 50 C.F.R. § 17.3 (2006). For example, habitat destruction that could drive an endangered species to extinction constitutes harm, and therefore is a taking under § 9. *Palila v. Hawaii Dep't of Land & Nat. Res.*, 852 F.2d 1106, 1108 (9th Cir. 1988). A finding of harm does not require death to individual members of the species nor does it require a present finding that the current habitat degradation is driving the species further toward extinction. *Bensman v. U.S. Forest Serv.*, 984 F. Supp. 1242, 1248 (W.D. Mo. 1997) (citation omitted).

Water diversion can result in the taking of endangered species. *See, e.g.*, *Swinomish Indian Tribal Cmty. v. Skagit Cty. Dike Dist. No. 22*, 618 F. Supp. 2d 1262, 1271 (W.D. Wash. 2008) (holding that a dike violated the ESA because the constructed tidegates prevented an endangered species from entering habitat necessary for reproduction). In order for water diversion to be considered a taking the moving party must prove that there was harm. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990).

By withdrawing the entire flow of water from the Bypass Reach during drought warning and emergency conditions, Greenlawn has acted in a way that has modified and degraded the

downstream population and habitat of oval pigtoe mussels. Greenlawn's management of the Dam flow during drought conditions has had a "significant and permanent" effect on the mussels, which alone is considered a harmful action. *Palila*, 852 F.2d at 1108 (citation omitted). In addition, Greenlawn has modified and degraded the population of an endangered species, specifically by exposing beds of mussels to the air and reduced the amount of sailfin shiners in their habitat. R. at 9. This significant "habitat modification or degradation" has resulted in the death of mussels and is therefore considered a taking. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687**,** 690 (1995). *See also* 50 C.F.R. § 17.3(c)(3) (1994) ("Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.").

Therefore, Greenlawn's policies for withdrawing flow during droughts harms the oval pigtoe mussel and are takings under § 9 of the ESA.

ii. The reduced flow harasses the oval pigtoe mussels.

In addition to harming endangered species, harassment of a species can also be considered a taking. The Department of the Interior defines "harassment" as an "intentional or negligent act which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns . . . ." *Ala. v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1126 (N.D. Ala. 2006) (quoting 50 C.F.R. § 17.3 (2006)). An activity that disrupts an endangered species' "normal behavior patterns" harasses the species. 50 C.F.R. § 17.3.

Greenlawn has harassed the oval pigtoe mussel by reducing the flow of water to their habitat. What makes Greenlawn's actions both harmful and harassing is that the reduced flow actually killed off some population and it modified the habitat to the point of disruption. Specifically, the mussel was living in a gravel or silty sand river bead to live, and the stagnant water caused increased siltation. R. at 9. This smothered the mussels and eliminated their necessary habitat. *Id.* The low water levels affected the mussel's ability to feed as sailfin shiners were not available to attach to for the mussels to mature. *Id.*

While not categorically as severe as § 9 "harm," harassment of an endangered species is still enough to constitute a taking and is a prohibited action. 50 C.F.R. § 17.3. *See also Animal Welfare Institute v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 561 (D. Md. 2009) ("Although the Act is silent as to the requisite degree of certainty for establishing a take under § 9 . . . regulations implementing the ESA suggest that the standard for 'harm' is higher than for 'harassment.'"). Greenlawn has sufficiently harassed the mussels' environment and food source that their actions must be considered both harmful and harassing.

B. The Agreement is an existing imminent threat to an endangered species.

To prevail under the take provision of the ESA, a plaintiff must establish by a preponderance of the evidence that the challenged activity is "reasonably certain to imminently harm, kill, or wound the listed species." *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 564 (D. Md. 2009). A plaintiff is required to show that a violation of the ESA is "at least likely in the future." *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1137 (D. Haw. 2000) (quoting *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511, 1511 (9th Cir. 1994)). The majority of district courts have adopted this standard. *Animal Welfare Institute* at 562–63.

The extraordinarily outdated Agreement[4] dictates how ACOE is to handle the operation of the Howard Runnet Dam in a drought. R. at 7. While ACOE's District Commander circumvented the requirements in spring of 2017 by arbitrarily raising the Zone 2 required flow from 7 CFS to 30 CFS in the Bypass Reach in response to public opposition, this executive decision worsened the conditions of the lake and moved the conditions into Zone 3. *Id.* at 9. Once at Zone 3, the District Commander followed the WCM provision that required hydroelectric flow to be curtailed, departed from the WCM by holding the flow at 30 CFS. *Id.* The low flow to the Bypass Reach coupled with the City's consumptive use of water adversely altered the oval pigtoe mussels' habitat. *Id.*

As long as the Agreement is the guiding principles for the operation of the Howard Runnet Dam there will be an imminent threat to the oval pigtoe mussel. The Agreement has not been revised to address the threats to the ecosystem in the Bypass Reach. In addition, harm is currently impending: the reduced flows have impacted the Green River estuary, which allows predators to enter the bay and feed on juvenile oysters. *Id*. at 10. There will be another drought that requires ACOE to consult the Agreement; any argument that the immediate threat to the oyster population is not immediately threatened is untrue.

There is no evidence that Greenlawn has an incidental take permit, issued under 16 U.S.C. § 1539 (2012), which would extend the scope of permitted activities. Therefore, by withdrawing the entire flow from the Bypass Reach during drought, and by continuing to rely on the Agreement without modification, Greenlawn has violated the taking provision of the ESA.

IV. The District Court is not required to determine the incalculable value of an endangered species to balance against the benefits of a municipal activity in order to issue an injunction encouraged by the ESA.

[4] In addition, the WCM was adopted in 1968 based on the annual average water demand in Greenlawn at the time. R. at 7.

A. An injunction is the appropriate remedy.

A party is permitted to seek an injunction 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 . . . ." 16 U.S.C. § 1540(g) (2012). Seeking a preliminary injunction in response to the taking of an endangered species is a common course of preventive remedial action. *See, e.g.*, *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F3d 1508, 1510 (9th Cir. 1994) (demonstrating a situation where plaintiffs, pursuant to the ESA, argued that a preliminary injunction was necessary to protect threatened grizzly bears); *Leatherback Sea Turtle v. Flagler County Bd. of County Comm'rs*, 359 F. Supp. 2d 1209, 1211 (M.D. Fla. 2004) (demonstrating a situations where plaintiffs, pursuant to the ESA, argued that a preliminary injunction was necessary to protect threatened Loggerhead sea turtles). A preliminary injunctions is the appropriate remedy because the ESA explicitly requires federal agencies to ensure that any action they authorize is not likely to jeopardize endangered species or adversely modify the species' critical habitat. *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 992 (8th Cir. 2011) (citing 16 U.S.C. § 1536(a)(2) (2012)).

Therefore, under this precedent, NUO is entitled to seek an injunction to cease water withdrawals that cause the flow of the Green River to drop below 25 CFS in any portion of the river containing endangered oval pigtoe mussels. This is a necessary condition to prevent extirpation of the mussels in the Green River. R. at 10. All that is required is an "allegation" against ACOE for violating "any provision" of the ESA. 16 U.S.C. § 1540(g) (2012). As there is

an allegation,[5] an injunction to prohibit the continued conduct would be appropriately within the court's powers to grant.

Greenlawn and ACOE may argue that the present case is analogous to the Northern District of Alabama's decision in *Ala. v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123 (N.D. Ala. 2006). In that case, an injunction was sought against ACOE to maintain a recommended flow of river waters downstream to protect a critical habitat of mussel species listed as threatened and endangered. *Id.* at 1124. The injunction was not issued for two reasons: (1) the moving party failed to show that ACOE did not consult with the Fish and Wildlife Services to ensure that their actions did not destroy the critical habitat, in compliance with 16 U.S.C. § 1536(a)(2) (2012), and (2) the moving party failed to meet their burden of demonstrating that it had a likelihood of success on the merits. *Id.* at 1126, 1138.

Aside from being a case about protecting a mussel population, the present case and *Alabama v. U.S. Army Corps of Eng'rs* lack common ground. If operating on the premise that an ESA-related injunction may be denied for lack of proof of non-compliance with 16 U.S.C. § 1536(a)(2) and the moving party does not demonstrate a likelihood of success on the merits, *id.*, Greenlawn and ACOE fail in opposing the injunction. First, it is evident that ACOE did not consult with FWS concerning the impact of their actions on the oval pigtoe mussel. This is unambiguously proven by the fact that an issue in this case is whether or not they would be required to in the first place.[6] Second, the "substantial likelihood of success on the merits" failed in *Alabama v. United States Army Corps of Eng'rs* because the moving party failed to prove a

[5] The allegation is supported by expert testimony and actual proof that the mussel population has decreased by approximately 25% since the substantial water withdrawals began. R. at 10.
[6] For a discussion on ACOE's noncompliance with 16 U.S.C. § 1536(a)(2) (2012), see *supra* Part III.

causal link between the actions of ACOE and the harm to the mussels. *Id.* at 1134. In the present case, the destruction of the habitat and the death of the oval pigtoe muscle is directly attributed to ACOE's outdated method of handling droughts in the Howard Runnet Lake.

B. Courts have been cautioned against making "fine utilitarian calculations," and therefore a balancing test would be inappropriate.

In pursuance of an injunction, the court is presented with and Greenlawn advocates for a balancing test of sorts: either weigh in favor of the utilitarian practicality of the Dam operation as it is, or issue an injunction to protect an endangered species. However, *Tennessee Valley Auth. v. Hill* cautioned against making "fine utilitarian calculations" when enforcing a provision of the ESA. 437 U.S. 153, 187 (1978). This is because the value of an endangered species is "incalculable." *Id.*

Outside of ESA enforcement, a party seeking a preliminary injunction will be entitled to such injunction after demonstrating either (1) "a likelihood of success on the merits and the possibility of irreparable injury" or (2) "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party seeking relief." *Sierra Club v. Marsh*, 816 F.2d 1376, 1382 (9th Cir. 1987). However, neither test is appropriate for assessing permissibility of injunctions under the ESA. *Id.* at 1383. Congress has "explicitly foreclosed the exercise of traditional equitable discretion by courts faced with a violation . . . ." *Id.* (citation omitted). The language, history, and structure of the ESA indicates "beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Id.* (citation omitted). Therefore, a court is not permitted to "use equity's scales" to favor anything other than an endangered species when determining whether or not an ESA-related injunction is appropriate. *Id.*

If the life of an endangered species were to somehow be quantified, the scale would tip heavily in favor of the species in almost all situations. It would be extraordinarily difficult for any hardship claimed by a municipality or a public interest consideration to outweigh the value of protecting an endangered species. *Id.* at 1383.

Therefore, this court should not attempt to calculate the value of the oval pigtoe mussel in an attempt to balance the equities. Instead, an injunction should be issued if the plaintiff establishes that there is "a reasonably certain threat of imminent harm to a protected species." *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000). Here, there is a reasonably certain threat of imminent harm to a protected species. In fact, there already has been, and will continue to be, a reasonably certain threat of imminent harm to the oval pigtoe mussels. Approximately 25% of the Green River oval pigtoe mussel population has died as a result of Greenlawn's water withdrawals. R. at 10. An injunction is the appropriate remedy to prevent Greenlawn from reducing downstream flows below the rate at which it causes a take of the oval pigtoe mussel.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of New Union granting summary judgment to Greenlawn should be REVERSED, the decision granting summary judgment to ACOE should be REVERSED, the decision granting summary judgment to NUO should AFFIRMED, and the decision to grant an injunction against Greenlawn should be AFFIRMED.

Respectfully submitted,

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