Team No. 2

CA. NO. 19-000987

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,
Plaintiff – Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant – Appellee – Cross-Appellant

And

CITY OF GREENLAWN, NEW UNION,
Defendant – Appellant

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR NEW UNION OYSTERCATCHERS, INC.,
Plaintiff – Appellant

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I. Jurisdictional Statement

The Federal District Courts of the United States have subject matter jurisdiction over claims arising under federal law and the United States Constitution. 28 U.S.C. § 1331 (2019). Therefore, jurisdiction was proper in the District Court because New Union's claims and ACOE's cross-claims raise questions arising under the Endangered Species Act, a federal statute. 16 U.S.C. § 1531 *et seq* (2019).

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over appeals of any final decision of the United States District Court for the District of New Union. This case involves appeals of a final decision of that court. Therefore, the Twelfth Circuit has jurisdiction over the appeals in this case. 28 U.S.C. §§ 1291 (2019).

II. Issues Presented

Issue 1: In riparian states, landowners may divert as much water as they want as long as their use reasonably accommodates the rights of other riparian landowners and the public. In the present case, the City of Greenlawn's water usage for lawn maintenance stopped power generation at a riparian hydroelectric dam and dried up the Green River. Is Greenlawn's water use reasonable?

Issue 2: Under ESA § 7, federal agencies must do a Biological Assessment before taking any action that could jeopardize an endangered species. When the Army Corp of Engineers choose to modify its drought procedures, it risked drying up a river ecosystem and killing endangered mussels. Did the Army Corp of Engineers have an obligation to consult under § 7 before changing their drought distribution?

Issue 3: Issue 3: Under ESA § 9 and related regulations, a prohibited take occurs when significant habitat modification results in the actual death or injury of an endangered

species. Greenlawn's refusal to conserve water reduced downstream flows, exposing and killing twenty five percent of a colony of endangered mussels. Did Greenlawn violate ESA § 9?

Issue 4: Under Amoco, Congress may limit a court's jurisdiction to balance the equities by explicit reference or inescapable inference to an intended outcome in one of its laws. In Hill, the Supreme Court found that the ESA shows clear congressional intent to constantly weigh equities in favor of the survival of endangered species. Was the district court required to balance the equities when municipal activity would cause an endangered species to go extinct?

III. Statement of the Case

Green River: Long before any development along its banks, the Green River made a meandering path down what is now the Bypass Reach to the Green Bay estuary. R. at 6. Within its waters, Green River sustains the endangered Oval Pigtoe Mussel ("the Mussels"). *Id*. at 9. This humble brown mollusk lives in graveled and sandy riverbeds and depends on migratory fish like the sailfin shiner to spawn. *Id*. Downstream in the estuary, the water is home to an oyster ecosystem. *Id*. at 10. Oyster fisherman, such as those in Plaintiff New Union Oystercatchers, Inc. (NUO), have harvested oysters in the estuary for generations. *Id*.

Consumptive Uses: Over the years, numerous parties diverted water away from the river. The City of Greenlawn came first in the 1890s—withdrawing water from Bypass Reach and then discharging its wastewater into the Progress River watershed. *Id*. at 5. Next came a public works project—a dual-dam system consisting of the Howard Runnet and Green River Dams. *Id*. at 6. The dams, operated by the Army Corp of Engineers (ACOE), supply hydroelectric power to the region along with flood control, recreation, and fish and wildlife

protections. *Id*. Finally, in the 1980s, large upstream irrigators began diverting water upstream of ACOE and Greenlawn. *Id*. at 7–8. Still, the instream flows remained steady despite Greenlawn's burgeoning water demands. *Id*.

Drought Begins: In Spring 2017, events took a turn to the unamicable. In response to the area's sustained drought, ACOE wanted to institute water conservation measures. *Id*. at 8. ACOE's Green River dams operate under a Water Control Manual. *Id*. at 6. In times of drought, the manual requires federal dam projects to preserve water levels in their reservoirs. For ACOE, that meant two options: (1) withholding flows to Greenlawn or (2) curtailing power generation's related releases back into the Green River. *Id*. at 7.

To address Greenlawn's riparian concerns, ACOE contractually agreed upon the dam's completion that ACOE would maintain flows that the city was "entitled to as a riparian property owner." *Id*. at 6. The Water Control Manual—last revised in 1968—gave further guidance on how this worked in practice in times of water shortages. *Id*. at 7. ACOE would curtail hydroelectric power releases to three hours a day and Greenlawn would reduce its water use to 7 cubic feet per second (CFS). *Id*. at 7. When it came time to implement the Manual's drought provisions, however, Greenlawn balked. Seven CFS is enough for Greenlawn residents to drink, cook, and clean their homes, but is not enough water to keep Greenlawn's yards and ornamental plants manicured during the Spring and Summer months. *Id*. at 8. The City government instead demanded ACOE reinstate flows despite the fact that doing so would mean curtailment of all hydroelectric power generation. *Id*.

Death of the Mollusks: ACOE—without negotiating or initiating an Environmental Review under the Endangered Species Act (ESA)—agreed. *Id*. at 8. The Agency's decision had an ugly side effect. Without water from power releases or from Bypass Reach, sixty miles of

riverine habitat dried up into muddy puddles. *Id*. at 9. The Mussels were exposed to predators and smothered by silt. *Id*. at 9. The saltfin shiners could not migrate upstream—preventing the endangered species from spawning. *Id*. Twenty-five percent of the Green River Mussels died. *Id*. at 10. Uncontroverted expert testimony concluded that if conditions continue, the species will be entirely eliminated from the ecosystem. *Id*. Downstream in the estuary, commercial oyster harvesting came to a shuddering halt as increased salinity in the bay decimated the oyster population. *Id*.

The Lawsuit: NUO filed suit against Greenlawn and ACOE under the ESA, 16 U.S.C. § 1540(g), for the consequences of their actions to the Mussels' survival, and asserting common law riparian claims against Greenlawn. *Id*. at 10–11. Greenlawn counterclaimed asking for a declaratory judgment on its riparian rights. *Id*. at 11. ACOE crossclaimed against Greenlawn, asserting an ESA § 9 taking. The lower court denied summary judgment to NUO on the riparian question and on whether ACOE needed to initiate an ESA § 7 consultation. *Id*. The lower court granted summary judgment on the takings issue and issued an injunction on further Greenlawn water withdrawals. *Id*.

IV. Summary of the Argument

First, Greenlawn is not entitled to extraneous water for lawncare. Private riparian rights such as Greenlawn's are subject to the rights of other riparian user and the general public. Given their relative social and economic utility as compared to the harms suffered by other parties, Greenlawn's beneficial use of the water for lawn maintenance is unreasonable during drought circumstances. As such, its use is not protected under its contract with the Army Corps of Engineers.

Second, the Army Corps of Engineers had a duty to initiate a consultation under ESA § 7 because before they modified the Water Control Manual and gave Greenlawn more water than the city was entitled to under riparian common law. ACOE retained discretion to act because the agency had its own water law claims and because the contract language was affected by subsequent federal legislation.

Third, Greenlawn violated ESA § 9 by engaging in water use practices that significantly modified the Oval Pigtoe Mussel habitat downstream, killing many of them and leaving surviving Mussels unable to breed or shelter. Greenlawn's attempts to shield itself from liability must fail. Although Greenlawn did not withdraw water directly from the Mussel habitat, its conception of harm is narrow to the point of direct conflict with Supreme Court precedent. Greenlawn's argument that a naturally-occurring drought was the proximate cause of the Mussels' demise is similarly unfounded because it ignores the well-established principle that multiple causes may be proximate causes.

Finally, the District Court applied the proper standard when it enjoined the take-inducing water use practices by Greenlawn. Recent decisions by the Supreme Court do not invalidate the controlling effect *TVA v. Hill* holds over the award of injunctive relief in ESA cases. Asking the District Court to balance the equities between Greenlawn's municipal water use and the survival of an endangered species is tantamount to asking the impossible of a federal judge.

V. Standard of Review

This Court reviews a lower court's ruling on summary judgment *de novo* and applies the same procedural standard as the lower court. *See AES Puerto Rico, L.P. v. Trujillo-Panisse*, 857 F.3d 101, 110 (1st Cir. 2017). Summary judgment is appropriate where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.

Civ. P. 56(a). In other words, the Court applies its own judgment to issues of law while deferring to the lower court on issues of fact. *Id*.

VI. Greenlawn's continued withdrawals for lawn maintenance are unreasonable under riparian water law.

Greenlawn comes to this Court asking to kill a river and call it reasonable. New Union is a riparian state. Riparian states build their water systems on the premise that streams should accommodate as many reasonable and beneficial uses as possible. *See Coastal Plains Utilities, Inc. v. New Hanover Cty.*, 601 S.E.2d 915, 927 (N.C. 2014). To that end, in the event of a drought, riparian owners should adjust their quantity and usage so as to share the shortage. *Meng v. Coffey*, 93 N.W. 713, 719 (Neb. 1903). In the present case, Greenlawn asserts that it alone deserves water from the Green River in times of drought and that its citizens' desire for ornamental trees should be preferred over both power generation and the public interest. The Court should reject Greenlawn's common law defenses because (1) riparian use is limited by the public interest and the rights of other riparians and (2) the use is unreasonable under the Restatement of Torts' factor test.

A. Greenlawn's use is subject to the rights of other riparian owners and public use rights.

The first step to determine whether or not lawn watering during a drought is reasonable under the circumstances is to determine who has rights at stake. Certainly, ACOE has rights as a riparian dam operator, but Greenlawn's actions have also infringed on public rights. Riparian rights are "qualified, restricted, and subordinate to the paramount rights of the public. As against the state, a riparian owner can exercise no dominion or make a valid grant of rights in waters adjacent to riparian lands…." *Nelson v. De Long*, 7 N.W.2d 342, 346 (Minn. 1942). In other

words, where there are public rights at stake, riparian owners cannot infringe on them without some explicit grant of authority from the state.

Public rights derive from the concept that the public has a right to commercial navigation, fishing, and recreation on navigable waterways. *State v. Sorenson*, 436 N.W.2d 358, 362 (Iowa 1989); *See also Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892). "Substantial" impairments—such as draining a navigable lake to the point of making it unfishable—violate these rights. *Merwin v. Houghton*, 131 N.W. 838 (Wis. 1911); *State v. Pub. Serv. Comm'n*, 81 N.W.2d 71, 74 (Wis. 1957). Public rights do not "deprive the riparian owner of any right," but "merely regulate[] and limit[] the exercise of existing rights." *Nelson v. De Long*, 7 N.W.2d at 347.

Because of their public nature, "[i]t has…been suggested that both the state and the federal government have the power to extinguish private consumptive uses that conflict with public rights pursuant to the exercise of the navigation servitude." A. Dan Tarlock, *Law of Water Rights and Resources* 3:19 (2019 Supp.)(This group of rights constitutes what is sometimes called "the navigation servitude.") This restriction on consumptive use makes sense when the riparian rule excluding nonriparians from suit is brought to its logical extreme. Without public rights, a riparian owner could divert all the water in an artery of commerce like the Mississippi River so long as other riparians did not protest. The public—accustomed to using the river for commercial shipping—would lose.

To determine whether there are public rights at stake, the Court asks if Green River is a navigable watercourse. The District Court asserted that Greenlawn owns the underlying riverbed of Bypass Reach, but such ownership is disputable depending on navigability. If the watercourse is navigable, the riverbed is owned by New Union. *See Vill. of Four Seasons Ass'n, Inc. v. Elk Mountain Ski Resort, Inc.*, 103 A.3d 814, 820 n. 3 (Pa. 2014)(State owns the bed of navigable

waters). States define navigability differently,[1] but generally speaking, a watercourse suitable for commercial navigation and fishing is navigable. In the present case, there is nothing in the record to suggest Green River is non-navigable. Also, the Green River estuary has long been home to commercial fishing. Even if the Green River were non-navigable in parts, Greenlawn's actions are having an adverse impact on the navigability of the estuary downstream. As far back as 1899, the Supreme Court recognized that if a state appropriates so much water for domestic use that it impacts navigability downstream, it implicates public rights. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709 (1899). As such, this is a public watercourse subject to public use considerations.

Finally, one of the reasons the lower court ruled in favor of Greenlawn on the common law water claim is because it viewed the issue as a conflict between riparian and nonriparian uses. NUO did not sue as a nonriparian, but as a group whose public rights to navigate and fish were infringed upon. As such, NUO has standing.

B. Greenlawn's demand for water at the stake of its residents' gardening is unreasonable because it came at the expense of other riparian owners or public use.

Turning from the standing problem to substantive law, riparian jurisdictions balance competing uses by comparing their "reasonability" as applied to the circumstances. *See, e.g. Vill. of Four Seasons Ass'n, Inc. v. Elk Mountain Ski Resort, Inc.*, 103 A.3d 814, 820 (Pa. 2014). Whether or not a particular riparian use is reasonable is determined as a matter of law. *Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Tpk. Auth.*, 71 A.2d 520, 525 (Me.

[1] At least nine riparian states use the "pleasure boat" test to decide navigability for the purposes of public rights. *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893) (a waterbody is navigable if it can be navigated by oar or small craft); *Wehby v. Turpin*, 710 So. 2d 1243, 1250 (Ala. 1998); *State v. MelIroy*, 595 S.W.2d 659, 662 (Ark. 1980); *Ryals v. Pigott*, 580 So. 2d 1140 (Miss. 1990); *Elder v. Delcour*, 269 S.W.2d 17, 23 (Mo. 1954); *Mentor Harbor Yahting Club v. Mentor Lagoons, Inc.*, 163 N.E.2d 373, 377–78 (Ohio 1959); *State v. Head*, 498 S.E.2d 389, 394 (S.C. App. 1997); *Muench v. Pub. Serv. Com.*, 53 N.W.2d 514 (Wis. 1952).

1950). As a guide for reasonability, most states point to the factors laid out in Restatement (Second) of Torts § 850A (1973). Courts should consider:

(a) purpose of the water use

(b) suitability of the use to the waterbody

(c) the economic value of the use

(d) the social value of the use

(e) the extent and amount of harm the use causes

(f) the practicality of adjusting any of the competing uses to avoid the harm

(g) the practicality of adjusting the quantity of water used by the competing uses

(h) the existing values of water uses, land, investments & enterprises, and

(i) the justice of requiring the user causing the harm to bear the loss. *Id*.

Comment A of § 850A provides more insight on how to apply these factors. The Court should go through the first four factors to see if the use is reasonable compared to the other competing considerations. *Id*. Essentially, this half of the test compares the intended uses and weighs their advantages and disadvantages. Courts then move on to the remaining factors which ask whether the harm is substantial and if it could be avoided by changing practices or adjusting parties consumptive use. *See id*.

(a) Greenlawn does not receive the domestic use preference.

The lower court's reasonability analysis came to an abrupt halt on the first factor: water use. The court refused to go through the full factors test because it erroneously believed that Greenlawn's status as a municipal water supplier was outcome-determinative. Under its interpretation, Greenlawn is a "domestic user" and thus preferred over any other beneficial use of

the stream. R. at 13. This approach distorts both the common law rule and the original intent behind the domestic use preference.

Most jurisdictions derive the domestic use preference from dicta in the seminal case, *Evans v. Merriweather*, which put domestic use to "quench thirst, and for household purposes" at the top of the beneficial use hierarchy. 4 Ill. 492, 495 (1842). Later cases explained that domestic use, which included water diverted for drinking and washing was preferred as a "natural use" of the stream over other uses such as manufacturing. *Harris v. Brooks*, 283 S.W.2d 129 (Ark. 1955). Courts gave this preference in part because of the practicalities of early water usage. The average riparian homesteader needed only small withdrawals in comparison to manufacturers who needed "large quantities" and could pose "considerable interference with [a stream's] ordinary course and flow." *Meng v. Coffee*, 93 N.W. 713, 717 (Neb. 1903).

Municipal and commercial users, in contrast, consume much larger quantities of water. Cities are not homesteaders trying to fill up the family horse trough. Rather, they are providing a service to consumers. As such, "the common law of riparianism makes no special provision for municipal water use." Joseph Sax et al., *Legal Control of Water Resources: Cases & Materials* 56 (2009). Courts have declined to extend a domestic use preference to cities, prisons, and military installations. *Purcellville v. Potts*, 19 S.E.2d 700 (Va. 1942) (city); *Salem Flouring Mills v. Lord*, 69 P. 1033 (Or. 1902) (penitentiary); *United States v. Fallbrook Pub. Utility Dist.*, 109 F.Supp. 28 (S.D. Cal. 1952) (military camp). New Union may be in the minority of states that allow cities to distribute water to their nonriparian denizens, but it does not get additional domestic protections as a result. Rather, the traditional common law solution is to allow municipal users to exercise eminent domain on other private water rights to solve shortage

issues—such as condemning upstream irrigators. *See Van Etten v. City of New York*, 124 N.E. 201, 202 (N.Y. 1919).

Even jurisdictions that protect communal water suppliers hierarchically distinguish between types of domestic uses. For example, in *Filbert v. Dechert*, the Pennsylvania Superior Court allowed a psychiatric institution to divert water for its residents. 22 Pa.Super. 362 (1903). But the *Filbert* court distinguished between the water the institution needed for human health and water intended for extraneous purposes such as a fountain over other riparians. *Id*. The *Filbert* court only gave domestic preference to water for drinking and bathing. Other courts have distinguished between necessity uses and water intended for "swimming pools [or] ornamental pools." *Prather v. Hoberg*, 150 P.2d 405, 412 (Cal. 1944). Likewise, irrigating large stretches of grass for golf courses is not protected. *Lancaster Milling Co. v. Media Heights Golf Club*, 59 Lanc. L. Rev. 159, 162 (Pa. Com. Pl. 1964) ("[H]ousehold uses [include] drinking, cooking, laundry and bathing….the watering of fairways…does not appear to us to be a domestic use of water."); *Meyers v. Lafayette Club*, 266 N.W. 861, 865 (Minn. 1936). Applying this rule to the present case, Greenlawn did not threaten the ACOE because it feared for its customers' health and sanitation. It arbitrarily decided it had the unilateral right to kill the river so its citizens could water their ornamental trees. This is extraneous use and not accorded preferential status.

Finally, even if the Court finds that Greenlawn is a domestic user with preferential status, its use is still subject to the limits of reasonability. "The question is whether under all the circumstances of the case, the use of water by the one is reasonable and consistent with the corresponding enjoyment of the right by the other." *Prather v. Hoberg*, 150 P.2d 405, 412 (Cal. 1944). Public and commercial users may still be subject to liability for domestic use if their use

causes unreasonable harm. Restatement (Second) of Torts § 850A cmt. c (1979). Thus, even considering domestic use preferences, Greenlawn's use is unreasonable.

(b) Power generation and protecting wildlife have more economic and social utility than watering lawns.

As the water usage factor is not determinative in this case, the next step is to consider the economic and social utility of lawncare in Greenlawn as compared to power generation and public use. *Id*. Outside perhaps minimal lawn and garden businesses, preserving Greenlawn's ability to water lawns has a negligible economic impact. This contrasts to ACOE power generation which serves businesses and manufacturers throughout the Green River region. The loss of public use rights in the Green Bay area, in turn, decimated a once thriving commercial fishing industry.

Social utility, however, is Greenlawn's true Achilles' heel. By endangering the Mussels, Greenlawn is breaking federal law and asking the Court to ignore a Congressional mandate that the country should protect species from extinction where possible. In addition, preserving Green River means preserving public uses such as navigation and recreation. Finally, even if the Court focused only on concerns relevant to Greenlawn's citizens, it is dubious that Greenlawn's asserted use has greater social utility than power generation. Realistically, which use would Greenlawn's citizens prefer—water for their lawns or air conditioning during the summer?

(c) Greenlawn cannot cause substantial harm to public use and other riparians to protect against minor inconveniences, even if they have prior investment.

The final step in the analysis is to examine the potential harms and if they can be addressed by adjustment of uses. Generally, just as riparian owners are protected from liability for causing minor inconveniences to their neighbors, they also cannot hoard water to stave off their own inconveniences. *See* Restatement (Second) of Torts § 850A cmt. g (1979). Most of the potential harms have been discussed, but it is worth noting that even state courts before the

advent of the ESA have found extreme environmental harms unreasonable. For example, an early New York case, *Strobel v. Kerr Salt Co.*, found:

> When the diversion, or pollution, which is treated as a form of diversion…not only permanently diverts a large quantity of water from the stream, but also renders the rest so salt [sic] at times that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed and machinery rusted, such use as a matter of law is unreasonable….58 N.E. 142, 144 (N.Y. 1900).

Next, the water distribution that results in the least harm is to reduce Greenlawn's extraneous usage. To do otherwise, forces a shutdown at the power plant and violates federal environmental law. Lastly, the lower court stated that one of the reasons that Greenlawn's use was preferred over the others was because it was there first. R. at 13. The State of New Union is not a prior appropriation state. As such, Greenlawn's first in time status does not matter in determining if their continued use is reasonable. *McCarter v. Hudson Cty. Water Co.*, 65 A. 489, 709 (N.J. Eq. 1906). Other states recognize an equity argument if the first riparian to divert invested substantial time and money, but is not a dispositive factor and the senior diverter must still share in times of shortage. *See Meng v. Coffey*, 93 N.W. 713 (Neb. 1903).

VII. ACOE had a duty to consult under ESA Section 7 because it modified its contract with Greenlawn.

Section 7(a) of the ESA requires that, "each Federal agency shall…insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species…." 16 U.S.C. § 1536 (2012). As part of that process, agencies must initiate a Biological Assessment which examines the action's impact on endangered species. 16 U.S.C. § 1536(a)(1) (2012). Section 7's requirements, "apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. In the present case, ACOE failed to consult with the Department of the Interior or to take action to save the Mussels.

First, changing the water distribution schedule to Greenlawn's benefit was an "agency action." Regulation 50 C.F.R. § 402.02 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…Examples include, but are not limited to…actions directly or indirectly causing modifications to the land, water, or air." Directing the water go to Greenlawn and curtailing power generation caused a direct modification to water—the Green River. Thus, ACOE should have initiated a § 7 Biological Assessment.

Still, ACOE skirts its obligations under the ESA by claiming the terms of its water contract with Greenlawn made its actions nondiscretionary. An agency claiming an act is nondiscretionary is an odd creature in legal literature. When an agency has discretion, a court may go to the agency's original statute to determine the scope of their authority. *See Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014). But when an agency claims they lack discretion, it forces the court to smoke out underclaiming of authority by asking how far the agency could go to protect wildlife. *See id*. In the present case, ACOE is underselling its authority because it had discretion. The indicia of discretion in this case are ACOE materially changed the terms of the preexisting Water Control Manual and it ignored contractual language which recognizes other sources of authority.

A. Modifying the Water Control Manual was a discretionary agency action subject to § 7.

The Supreme Court recognized that certain agency actions could be nondiscretionary in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). In *Home Builders*, the plaintiffs sued over the transfer of Clean Water Act permitting authority to the State of Arizona. *Id*. The Court held that agencies have no authority where another statute mandates a particular result because otherwise one statute impliedly repeals the other. *Id*. at 644. Some lower

courts expanded on this concept based on their pre-*Home Builders* precedent to say agencies lack discretion wherever there is common law legal authority such as contracts. *Nat. Res. Def. Council v. Kempthorne,* 621 F. Supp. 2d 954, 976 (E.D. Cal. 2009) (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995)); *WildEarth Guardians v. United States Army Corps of Engineers*, 314 F. Supp. 3d 1178, 1195 (D.N.M. 2018).

This argument has two primary flaws. First, contracts are not statutes. As such, they do not present the same implied repeal problems that were fundamental to the Court's analysis in *Home Builders*. Second, *Home Builders* gives no indications that there are other limitations beyond statutory authority. 551 U.S. 644 (2007). In virtually every subsequent water contract case discussing agency discretion, there is another relevant federal statute. For example, much of the litigation over the Bureau of Reclamation's Central Valley Project in the Ninth Circuit is set to the backdrop of a federal statute passed after the ESA. *See Madera Irr. Dist. v. Hancock*, 985 F.2d 1397, 1405 (9th Cir. 1993); 43 U.S.C. § 390b. Indeed, the administration of a large federal water project is full of discretionary decisions. Agencies must schedule water releases, determine flood conditions, and draft operating plans. They also retain discretion on how to balance their various statutory obligations. *In re Operation of Missouri River Sys. Litig.*, 421 F.3d 618, 638 (8th Cir. 2005) (finding ACOE retained discretion over meeting the purposes of the Flood Control Act for taking of Missouri River fish). All of these decisions include moments of discretion where agencies can make policy decisions.

This view of water contracts and public works projects as discretionary is also in line with comparisons between the ESA and the Clean Water Act. In the Clean Water Act, the Wallop Amendment stipulates that the federal government may not "supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. 1251(g) (2012). In

other words, for a Clean Water Act issue, federal agencies have no discretion over limiting water rights. The ESA, passed a year after the Clean Water Act, only requires agencies to "cooperate…to resolve water issues." 16 U.S.C. § 1531 (2012). In other words, the ESA gives agencies more freedom—and more discretion—in resolving water conflicts than other federal environmental laws. This interpretation is also consistent with *Tenn. Valley Auth. v. Hill*, which at its heart, was a reservoir case. 437 U.S. 153 (1978).

Even if the Court finds that contractual obligations may restrict agency discretion in some instances, the ACOE still retained discretion here. Courts in the 9th and 10th Circuits have examined agency discretion in water contracts. They distinguish between actions changing the amount of dispersed water—such as contract renewals—and merely implementing them. *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014) (discretion in settlement renewals); *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1131 (9th Cir. 1998) (contract renewals); *cf. Nat. Res. Def. Council v. Kempthorne*, 621 F. Supp. 2d 954, 971 (E.D. Cal. 2009) (implementation). *Home Builders* reasoned that "[a]gency discretion presumes that an agency can exercise 'judgment' in connection with a particular action," *Id.* at 2535. In contract renewal actions, the agency has discretion to negotiate for more environmentally-conscious terms. *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014). Whereas, complying with the previously agreed quantity amounts may not. *Nat. Res. Def. Council v. Kempthorne*, 621 F. Supp. 2d 954, 971 (E.D. Cal. 2009)

In the present case, ACOE had an ongoing contract with Greenlawn that only gave the city the water accorded to them under riparian water law. To aid in interpreting that contract, ACOE created guidelines in the Water Control Manual. But when faced with the citizens of Greenlawn's frustration at the prospect of not being able to water their lawns, they folded at the

first sign of trouble. In doing so, ACOE made two material changes. First, they modified their established policy on how to resolve water conflicts during droughts. Second, they gave Greenlawn more water than the city had right to under riparian law. As discussed previously, ACOE has its own riparian claims which it could have brought to bear at a negotiation table. The very presence of this right suggests that ACOE should have held further discussions with Greenlawn over adjusting water usage and initiated a Biological Assessment.

B. ACOE had discretion because the contract contemplates other legal authority.

Even if the Court finds that Greenlawn may have a domestic use preference under New Union common law, it should still find an ESA § 7(a) violation under the contract terms. The contract says that ACOE only owes the water that Greenlawn would be "entitled to as a riparian property owner under the laws of the State of New Union." R. at 6. The language, "laws of the State of New Union," is significant because federal laws are "New Union laws" by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2.

State law cannot frustrate the purpose of federal legislation. *Perez v. Campbell*, 402 U.S. 637, 652 (1971). As such, whenever the two systems directly conflict, federal legislation preempts state law. *Id*. In the present case, the conflicting legal principle is not even state statutory authority, but state common law. As such, Greenlawn's riparian rights cannot extend to the point of nullifying the ESA's statutory purpose to, "halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184, (1978). "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved…." 16 U.S.C. § 1531(b).

This inclusion under "New Union laws" is not unorthodox in contracts. In most international business to business sales, the default applicable law is the United Nations Convention on Contracts for the International Sale of Goods (CISG). *Valero Mktg. & Supply Co.*

v. Greeni Oy, 373 F. Supp. 2d 475, 480 (D.N.J. 2005). Parties can opt out of the CISG and choose state contract law, but they must explicitly exclude the treaty. *Id.* Unwary contract drafters still find themselves saddled with CISG rules because their contract language stated it was governed, "under the laws" of a particular state. *Id.* Treaties—like federal laws such as the ESA—are included within the "laws" of the state by virtue of the Supremacy Clause, even though they were not passed by the state legislature or decided by a state judge. *Id.*

Still, Greenlawn is likely to protest that its contract with ACOE predates the passage of the ESA and thus it should not apply. Generally, subsequent federal legislation applies to contracts going forward unless there are specific contractual terms excluding it from future legislation. *United States v. Winstar Corp.*, 518 U.S. 839, 878 (1996) (Souter, J. concurring). This concept is sometimes called the "unmistakable terms doctrine" because the contract is immune from the applicability of subsequent federal legislation if its terms state plainly that the government cannot modify the agreement. *See id.*

Like riparian water law, the origins of this doctrine go back to the nascent United States. State legislatures would make contracts with private parties "granting them some concession" like a tax benefit. *Id.* The state legislature would then try to rescind the grant and the private party would sue the state under the Contract Clause of the U.S. Constitution. *Id.* To prevent legislatures from hampering their ability to govern and to avoid retroactivity-related constitutional questions, the Supreme Court ruled that states—and Congress—must be explicit in contracts restricting future government action. *Id.* This is similar to contracting parties needing to exclude the CISG for international contracts. There is no implied waiver for future legislation because sovereigns cannot waive their rights in silence. *United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987).

The unmistakability doctrine exists on a spectrum of contracts. *United States v. Winstar Corp.*, 518 U.S. 839, 880 (1996) (Souter, J. concurring); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1139 (10th Cir. 2003) (Seymour, J. concurring), *vacated*, 355 F.3d 1215 (10th Cir. 2004). On side of the spectrum, any contracts regarding tax payments or relief must include an explicit prospective provision because it involves the government's sovereign power to tax. Id. On the other end of the spectrum are contracts where the government has promised to buy something—such as supplies for the army. *Id*. For the latter, there is no risk of abrogating authority for future action.

Under the unmistakable terms doctrine, water contracts are "not immune from subsequently enacted statutes." *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995); *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998). In the present case—and in other water contract cases—the "defendants are water users who seek to prevent the government from taking any of the water for ESA purposes." *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1140 (10th Cir. 2003) (Seymour, J. concurring), *vacated*, 355 F.3d 1215 (10th Cir. 2004). As such, Congress—or by extension, the federal agency—would have needed to explicitly bind itself in the contract.

By modifying the contract and giving Greenlawn more than its fair share under New Union's riparian system or implied restrictions under the Endangered Species Act, the agency carried out a discretionary action that affected wildlife. As such, the agency must conduct a Biological Assessment under ESA §7(a) and it should limit its commitment of resources that endanger the mussels under § 7(d).

VIII. Greenlawn violated ESA § 9 because its water usage during the 2017 drought desiccated the Mussels' habitat, resulting in the actual death of 25 percent of the Green River Mussel population.

From its opening words, the ESA proclaims that the "precise harm" it contemplates is death by dwindling habitat. *See Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995). The overarching purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend…may be conserved." 16 U.S.C. § 1531(b).

Section 9 of the ESA prohibits the "take" of any endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B). "Take" is broadly defined: "'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id*. at § 1532(19). A regulation clarifies that "harm" under the ESA includes "significant habitat modification, or degradation…" 50 C.F.R. § 17.3. Habitat modification is not only at the core of the ESA, but also at the core of this case.

Whether significant habitat modification constitutes "harm" has been settled law for nearly a quarter century. In *Sweet Home*, the Supreme Court upheld the inclusion of significant habitat modification in the aforementioned regulation. The *Sweet Home* decision binds this Court to consider a Defendant that engages in significant habitat modification to be in violation of ESA § 9. Thus, in this case the Court need only determine whether Greenlawn's water withdrawals during the 2017 drought amounted to "significant habitat modification."

The District Court found Greenlawn's water usage in 2017 reduced a "[formerly] flowing river habitat with stretches of sand and bedded gravel," to mere "stagnant pools of water and narrow trickles." R. at 9. Greenlawn seeks to distance its water usage from the "severe effects" that usage had on the Mussels' habitat downstream. *Id*. Unable to deny the destructive effects of its water usage on the Mussels' habitat, Greenlawn seeks to legally lay blame elsewhere.

Greenlawn's after-the-fact characterization of its water usage cannot undo the conclusion that the extremely reduced water flows led to Mussel habitat exposure and death. The Court should conclude Greenlawn "harmed" the Mussels for two reasons: (1) the fact that Greenlawn withdrew water outside the Mussels habitat does not prevent a finding that Greenlawn actually destroyed the habitat, and (2) Greenlawn proximately caused the Mussel habitat exposure.

A. Greenlawn's 2017 water withdrawals constituted a taking because they disrupted the Mussels' ability to breed and shelter, ultimately leading to their death from overexposure.

ESA Section 9 is a statutory Swiss Army Knife. Judges have applied the Section 9 framework in cases involving diverse species and climates, finding violations for activities including logging, trapping, and permitting. The Section's comprehensive utility reflects the Congressional intent that "take" be defined "in the broadest possible manner to include *every conceivable way* in which a person can 'take' or 'attempt to take' any fish or wildlife.'" *See Sweet Home*, 515 U.S. at 704 (citing S. Rep. No. 93-307, p. 7 (1973)) (emphasis added). For the reasons below, it is certainly conceivable that withdrawing all water flowing toward the habitat of an aquatic species "harms" that species by significantly modifying its habitat.

1. Greenlawn's water withdrawals resulted in the precise behavioral disruption indicative of harm by significant habitat modification.

Greenlawn's water usage is emblematic of a taking by significant habitat modification because it rendered the Mussels unable to breed, shelter, or survive. Two Fish and Wildlife Service (FWS) regulation clarifies the contours of harm by significant habitat modification or degradation. Regulation 50 C.F.R. § 17.3 explains that habitat modification or degredation constitutes harm "where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." As Justice O'Connor remarked

in *Sweet Home*, "[b]reeding, feeding, and sheltering are what animals do." *Sweet Home*, 515 U.S. at 710. If significant habitat modification interferes with these behaviors in an endangered or protected species, it causes harm within the meaning of § 17.3. *Id*.

Greenlawn's water diversions altered the composition of the Mussels' habitat and interfered with their essential behaviors. When the 2017 drought arrived, Greenlawn refused to entertain commonplace conservation measures. Rather than instruct its residents to restrict their water usage *at all*, Greenlawn continued to divert water at its heightened spring and summer rate for the sake of decorative upkeep of lawns and topiaries. Predictably, the Mussels' once flowing, silted, underwater homes became less and less submerged until they were no more than stagnant pools. Stagnation increased the River's salinity downstream and "smothered" the Mussels. Without moving water, shiners could not reach larval Mussels so they might attach to the fish and mature. Ultimately, river conditions caused the death of 25% of the Green River Mussel population. Notably, these conditions are as unsustainable as they are harmful. Uncontroverted expert testimony offered by NUO indicates that should they persist, all the Green River Mussels will die.

2. ESA § 9 is broad enough to encompass liability for extra-habitat activities that result in modification or destruction of a habitat.

Greenlawn seeks to avoid liability by arguing that because it did not withdraw water directly from the segment of the river occupied by the Mussels, it is not liable under Section 9. This argument suggests that the regulation's requirement of "actual death or injury" additionally requires that a protected species be physically present in the area subject to habitat modification. *See generally Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1238 (9th Cir. 2001); *see also San Carlos Apache Tribe v. United States*, 272

F.Supp.2d 860, 880-81 (D. Ariz. 2003), aff'd 417 F.3d 1091 (9th Cir. 2005). To accept Greenlawn's contention on this point is unnecessary for several reasons.

First, Greenlawn's view would validate an inappropriately narrow construction of "significant habitat modification." Section 9 liability for habitat modification derives from liability for harm, which in turn derives from liability for a taking. As noted above, Congress explicitly stated its preference that "take," be construed broadly. *Sweet Home*, 515 U.S. at 704. Likewise, the Supreme Court has observed that harm is "an obviously broad word," deserving of a "respectful reading." *Id*. at 705. A respectful reading of this Russian nesting doll of statutory terms which ends with "significant habitat modification" would construe that term as broadly as Congress and the federal courts have construed its parent terms. Absolving activities outside the habitat from Section 9 liability would do the opposite.

Critically, the *Sweet Home* Court held that Section 9 contemplates both direct and indirect harm. *Id*. at 701—702. (holding the Ninth Circuit erred in asserting that "harm" refers to direct application of force). Ruling that a defendant can only modify or destroy a habitat by physically acting upon that habitat would directly conflict with the *Sweet Home* Court's clear instruction that harm can be inflicted without doing so.

Taking heed that "harm" is to be interpreted broadly, Federal Courts of Appeal have rejected attempts to limit the scope of Section 9 liability on such grounds as timing and immunity. *See, e.g.*, *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996) (holding past, present, and future harm are all actionable under Section 9); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (finding a Section 9 liability applies to permitting agencies as well as third parties who directly exact takings). An explicit holding by this Court that extra-habitat actions may give

rise to liability under Section 9 would not constitute any broader a construction of the ESA than was exhibited by its sister circuits in *Marbled Murrelet* and *Strahan*.

Furthermore, requiring that an actor be physically present in an endangered species' habitat would inject problems of under-inclusiveness into the ESA because it would unable to capture countless actions which destroy habitat and harm endangered species. As the *Arizona Cattle Growers'* Court observed, "every term in the regulation of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife.'" *Arizona Cattle Growers*, 273 F.3d at 1238 (citing *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-25 (9th Cir. 1999)). Greenlawn's proposed definition of "actual harm" is incongruent with scientific understanding that external forces can internally degrade a habitat. *See* James M. Auslander, student author, *Reversing the Flow: The Interconnectivity of Environmental Law in Addressing external Threats to Protected Lands and Waters*, 30 HARV. ENVTL. L. REV. 481, 483 (2006) ("[T]here are real, growing threats to protected areas from surrounding land uses."). If the Court stated that this type of harm did not give rise to ESA § 9 liability, it would run afoul of the Congressional mandate that all conceivable ways species can be taken should be discouraged by the statute.

B. There is a causal link between Greenlawn's water usage during the 2017 drought and the harm to the Mussels.

While the scope of § 9 is broad, it is admittedly not limitless. *Sweet Home* inspired division regarding the type of causation required to find an actor liable under ESA § 9. *See* 3 Coggins & Glicksman, *Pub. Nat. Resources L.* § 29:40 (2d ed. 1995) ("The incorporation into the ESA taking prohibition of a common law tort concept that has befuddled generations of law students, lawyers, and courts is sure to provide fertile ground for argument as to the exact parameters of the regulatory definition of harm."). The *Sweet Home* majority addressed proximate causation almost exclusively in its footnotes, stating Section 9 requires "but for" causation. *Id.* at 700, n.13.

Some circuits find the *Sweet Home* discussion of proximate causation so lacking that they treat it as mere dictum. *See Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1251, n. 23 (11th Cir. 1998). Others declare "it is well established that principles of proximate cause apply to Section 9 claims." *See Nat. Res. Defense Council v. Zinke*, 347 F.Supp.3d 465, 487 (E.D. Ca. 2018).

Taken together, various interpretations of proximate cause in Section 9 indicate proximate causation in this context may be viewed as a spectrum of sorts. On the one hand, proximate causation should preclude liability "in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Id; see also Aransas Project v. Shaw*, 775 F.3d 641, 657-58 (5th Cir. 2014) (explaining that Section 9 liability cannot be based on the "butterfly effect," or "remote actors in a vast and complex ecosystem."). At the same time, "[a] proximate cause is not … the same thing as a sole cause." *Loggerhead Turtle*, 148 F.3d at 1251, n. 23.

Justice O'Connor's *Sweet Home* concurrence provides a policy-oriented moniker for this recurrent theme in Section 9 cases: fairness. *See Sweet Home*, 515 U.S. at 713. Proximate causation, O'Connor instructed, "depends to a great extent on considerations of the fairness of imposing liability for remote consequences." *Id*.

A robust causal link connects Greenlawn's 2017 drought-time water usage and the harm that came to the Mussels downstream. For decades, Greenlawn and ACOE managed the City's water withdrawals under a Water Control Manual that anticipated a practical need to reduce water usage in the event of a drought. Nevertheless, when the drought arrived, Greenlawn insisted on maintaining water usage rates high enough to support endeavors generously characterized as hobbyist. Greenlawn's contends that it is not the proximate cause of the downstream river

conditions because it withdrew water at a steady rate before, during, and after the drought. In other words, "we didn't change, something else did." Namely, the drought.

Greenlawn's characterization of its water use is deceptive for two reasons. First, case law does not reflect that a behavior engaged in consistently is incapable of being the proximate cause of a discrete harm. Taken to the extreme, Greenlawn's argument might go to prove a driver who hits a pedestrian with his car is not responsible for the pedestrian's injury so long as the driver takes the same route every day. Second, Greenlawn's contention ignores the principle that one cause may exist within a multi-cause ecosystem and nonetheless satisfy legal contentions of proximate causation. The Court need not – and should not – equate proximate causes with singular causes. The record certainly reflects a group of potential contributors to the riverbed conditions downstream of Greenlawn. Nevertheless, that group consists of only four contributors: Greenlawn, ACOE, the drought, and the irrigation activity upstream. This is not the type of "vast, complex ecosystem" which could raise concerns about the court's ability to properly identify which forces are fairly attributable to the changes in the Green River.

Ultimately, the Court should defer to Justice O'Connor's fairness principles. Her opinion in *Sweet Home* appears to encourage restraint when attribution of proximate cause to a defendant would hold him liable for the far-off consequences of otherwise innocuous behavior. Greenlawn is not the defendant O'Connor had in mind. Greenlawn prioritized its recreational enjoyment of water above the health of a greater ecosystem. Holding Greenlawn liable under Section 9 is fair.

IX. In ruling on injunctive relief under the Endangered Species Act, the Court need not engage in a balancing of the equities because the statute expresses clear Congressional intent that the balance be struck in favor of endangered species.

NUO filed the current case pursuant to the ESA's citizen suit provision. *See generally* 16 U.S.C. § 1540. The exclusive remedy under this provision is injunction; therefore, the District

Court considered the availability of injunctive relief upon finding in NUO's favor on its Section 9 claim. 16 U.S.C. 1540(g). The District Court did not specify whether it ruled in favor of injunctive relief using the standard for a preliminary injunction or a permanent injunction.[2] Given the similarity between the two standards, such a lack of distinction is common.[3] Cases examining a permanent injunction often cite case law on preliminary injunctions, and vice versa.[4] The injunction below is best considered a permanent injunction because a ruling on summary judgment is a valid, appealable judgment on the merits. *See* R. at 17 ("Having determined that Greenlawn is in violation of ESA § 9…").

This Court requested briefing on whether a 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." R. at 2. The answer is no.

The phrase "balance the equities" invokes what is oft called the "general" or "traditional" standard for injunctive relief. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010). Under this standard, a movant prevails when he demonstrates: (1) he suffered an irreparable injury; (2) remedies available at law are inadequate compensation for the injury; (3) that a remedy in equity is warranted after the court considers *the balance of hardships* between the parties; and (4) the public interest would not be disserved by a permanent injunction. *Id.* (emphasis added). Factors (3) calls upon the district court to "balance the equities." Although

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[2] A preliminary injunction is effective until a trial court reaches a decision on the merits. *See* 11A Wright & Miller, *Federal Practice and Procedure* § 2941 (2d ed. 1995). By contrast, permanent injunctions are available following valid, appealable judgments. *Id.* at n. 15.

[3] *See, e.g.*, *South Yuba River Citizens League v. Nat'l Marine Fisheries Service*, 804 F.Supp.2d 1045, 1051 (E.D. Cal. 2011) ("Courts evaluating injunctive relief in environmental cases have…conflated the two types of injunctions.").[3]

[4] As such, for some of the issues in this case, the law of preliminary relief may inform the law of permanent relief, and vice versa. *See Monsanto* 561 U.S. at 157-58 (citing *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7 (2008) for the "permanent injunction" standard even though *Winter* is a case regarding preliminary injunctions).

factors (3) and (4) are distinct, some courts find the factors merge when the government is a party. *See ,e.g.*, *Alliance for the Wild Rockies v. Kruger*, 35 F.Supp.3d 1259, 1268 (D. Mont. 2014).

Critically, the Supreme Court declared in *Hill* that analysis of factors (3) and (4) is atypical under the ESA because, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest priorities." *Hill*, 437 U.S. at 194. In ESA cases, this "abundantly clear" intent in favor of endangered species displaces a court's traditional discretion to balance the equities. Lower courts have interpreted the mandate from *Hill* to essentially eliminate any requirement to "balance the equities." *See, e.g.*, *Florida Key Deer v. Brown*, 386 F.Supp.2d 1281, 1284—85 (S.D. Fla. 2005) ("[I]n cases involving the ESA, the standard is different. Specifically, the third and fourth prongs of the injunction analysis have been foreclosed by Congress."); *see also Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 788 (explaining that *Hill* "substituted the traditional equitable discretion of balancing the parties' competing interests with a standard that favors endangered species…").

The District Court did not need to balance the equities before enjoining Greenlawn's municipal activity for three reasons: (1) Congressional intent to protect endangered species forecloses the courts' ability to exercise discretion regarding equities; (2) the uniqueness of the ESA demands an independent standard for injunctive relief under that law.

A. Under *Hill*, courts do not balance the equities in ESA cases because Congressional intent displaced judicial discretion with a constant preference in favor of saving endangered species.

ESA case law precludes any balancing of equities because Congress has preemptively guided the federal courts' discretion to balance the equities in a singular direction. Congress may

guide courts' discretion when, "in so many words, or by a necessary and inescapable inference," one of its laws restricts the court's jurisdiction in equity. *See Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987). Appellate courts do not "lightly assume" that Congress intends a departure from general principles. *Id*. Even still, the Supreme Court's opinion in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), indicates that the ESA is a paradigmatic example of a statute which displaces judicial discretion regarding equitable relief.

Hill concerned a threat to the critical habitat of an endangered fish —the snail darter — posed by construction of the Tellico Dam. *Id*. at 156-57. In *Hill*, the Supreme Court engaged in a lengthy examination of the ESA's text, structure, and purpose, ultimately observing that "literally every section" of the ESA reflects a Congressional intention to reverse the trend of species extinction. *See Hill*, 437 U.S. at 184. The Court quoted extensively from the record of Congressional deliberations over the ESA and found it "replete with expressions of concern over the risk that might lie in the loss of *any* endangered species." *Id*. at 177 (emphasis in original). Indeed, Congress observed the value of the genetic heritage of these species to be "incalculable," and did so "in the plainest of words." *Id*. at 178, 194.

Nevertheless, TVA essentially called for a balancing of the equities. *Id*. at 184. The snail darter's survival stood against nearly $100 million appropriated by Congress to construction and operation of the Dam and its design to generate enough power for 20,000 homes. *Id*. at 157. "Incalculable," versus $100 million. Put simply, the *Hill* Court found judges cannot weigh values against one another when one value is unascertainable: "[I]t would be difficult for a court to balance the loss of a sum certain—even $100 million—against a Congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, *which we emphatically do not*." *Id*. at 188 (emphasis added). In the context of the ESA, any

balancing between the value of endangered species and the value of appropriated monies was pre-determined by the appropriating body itself.

The binding precedent from *Hill* indicates the ESA explicitly ("in so many words") articulates a restriction on judicial discretion. Its text is clear – so clear that the majority only endeavored to explore legislative history to directly address the dissent's concerns. *See id*. at 184, n.29. Nevertheless, the legislative history of the ESA consistently expressed the need for a law which protects endangered species' contribution to genetic diversity and natural resources. *See id*. at 177. The Supreme Court's binding interpretation of the ESA leads to the conclusion that asking courts to balance the equities would ask of them the impossible: "neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make…fine utilitarian calculations." *Id*. at 187.

Greenlawn and ACOE contend that *Hill*'s special test for injunctive relief results in awarding injunctions under the ESA as a matter of course. *See, e.g*., *Animal Welfare Inst. v. Martin*, 623 F.3d. 19, 26–27 ("[C]ourts are 'not mechanically obligated to grant an injunction for every violation of law.'"). This argument fails because federal district and appellate courts applying the *Hill* test in ESA do not read that test to dispose of the remaining requirements for injunctive relief. For instance, in *Florida Key Deer*, the Court observed that the unique ESA standard for injunctive relief only discloses the third and fourth prongs of the general standard. *Florida Key Deer*, 386 F.Supp.2d at 1284. The District of Florida then examined the remaining two factors and examined the fourth prong "[i]n an abundance of caution." *Hill* mechanizes the applicable standard, it does not mechanize any result.

Additionally, Greenlawn and ACOE argue displacement of judicial discretion is only appropriate when the District Court is confronted by a "Hobson's choice;" in which injunction is

the "only means of ensuring compliance." *See U.S. v. Oakland Cannais Buyers' Co-Op.*, 532 U.S. 483, 497 (2001). Like the *AWI* court, Respondents seek to say "[t]he circumstances here are none so dire," and do not pose "the ultimate danger of extinction to which the *Hill* Court responded." Without the threat of a similar degree, displacement of judicial discretion is arguably inappropriate. But Respondents' position mischaracterizes the stakes in this case.

Greenlawn's water usage in 2017 did not lead to complete extinction of the Mussels. Even still, a 25 percent loss to a colony of an endangered species should not be construed as an insignificant threat. Furthermore, despite a lack of complete population loss, this case illustrates a circumstance in which injunction may be the court's only way to follow the congressional mandate to save the species. The District Court found that Greenlawn was unwilling to engage in conservation measures when drought conditions began. Buttressed by the fact that uncontroverted testimony found the Mussels will die off completely if Greenlawn's unrestrained water use continued, the Court has its Hobson's Choice. There is no way for Greenlawn to withdraw water during a flood as it did in 2017 without killing the entire downstream Mussel population. *See Hill*, 437 U.S. 153 at 184, n. 30 ("We do not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter.").

B. *Winter* and *Monsanto* do not alter the standard for injunctive relief in ESA cases.

Greenlawn seeks to undermine the seminal ESA case of the nation's highest court with its rulings on injunctions in non-ESA cases: *Winter v. Nat. Res. Defense Council,* 555 U.S. 7 (2008), and *Monsanto*, both brought under the National Environmental Policy Act (NEPA). This Court should hold to the standard from *Hill*, however, for two reasons: (1) the contents of the *Winter* ruling did not reach the ESA; and (2) the substantive differences between ESA and NEPA justify maintenance of distinct standards for injunctive relief under the two statutes.

In *Winter*, the Supreme Court vacated a preliminary injunction issued by the Ninth Circuit requiring the Navy to suspend training operations using SONAR. *Winter*, 555 U.S. at 20. The Court stated a plaintiff seeking preliminary injunction must establish: (1) likelihood of success on the merits; (2) that irreparable injury will occur absent preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Id*. (citing *Munaf v. Geren*, 553 U.S. 674, 689–09 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 1982)). Two years later, the Court approvingly invoked the standard from *Winter* for permanent injunctions. *Monsanto*, 561 U.S. at 157-58.

Remedies scholars Laycock and Hasen opined that *Winter* created "a mess in the lower courts." DOUGLAS LAYCOCK & RICHARD L. HASEN: MODERN AMERICAN REMEDIES (CONCISE FIFTH ED.) 361. Their observation related primarily to a resulting circuit split over its implications for how plaintiffs prove irreparable injury. *Id*.[5] Nevertheless, some lower courts speculate that *Winter*, *Monsanto* and related cases are phrased broadly enough to extinguish the impact of *Hill* in ESA cases and subject all ESA plaintiffs to meet the general, four-factor standard. *See, e.g.*, *Defenders of Wildlife v. Salazar*, 812 F.Supp.2d 1205, 1207 (D. Mont. 2009); *see also Alabama v. U.S. Army Corps of Engineers*, 441 F.Supp.2d 1123, 1132 (applying the four-factor test "out of an abundance of caution.").

The standard from *Winter*, and its adoption in *Monsanto*, should be construed as inapplicable in ESA cases for two reasons. First, *Winter* is not an ESA case. Although the NRDC brought claims against the Navy under NEPA *and* ESA, the Supreme Court did not

[5] NUO notes that a sub-category of this split relates to *Winter*'s effect on proof of irreparable injury under the ESA. In the wake of *Winter*, some circuits require proof that an action will result in irreparable harm to an entire species. Others find that harm to one member of the species is sufficient to prove irreparable harm in the takings context. *See generally* Danny Lutz, *Harming the Tinkerer: The Case for Aligning Standing and Preliminary Injunction Analysis in the Endangered Species Act*, 20 ANIMAL L. 311 (2014).

discuss the merits or procedure of the ESA claims. *See Winter*, 555 U.S. at 31 ("[W]e do not address the underlying merits of plaintiffs' claims.") Thus, *Winter* should not be read to overturn the precedent from *Hill*. Even Courts which now apply the *Winter* test in the context of the ESA express reluctance to abandon the species-favoring measures from *Hill*, or they continue to place a thumb on the scale in favor of endangered animals in their factor (3) analyses. *See Aransas Project*, 775 F.3d at 663 (observing the ESA standard for injunctive relief is "relaxed…only…insofar as the balance of equities will lean more heavily in favor of protecting wildlife than it would in the absence of the ESA.").

Second, although the language from *Winter* and *Monsanto* is broad, they cannot undo the command from *Hill* because the ESA is exceptional—a "powerful and substantially unequivocal statute." *See Strahan v. Linnon*, 967 F. Supp. 581, 618 (D. Mass. 1997). ESA has several distinct qualities — even when compared to other environmental statutes — which lead environmental law scholars and judges alike to classify it as conspicuously powerful. *See* George Cameron Coggins, *An Ivory Tower Perspectives on Endangered Species Law*, 8 NATURAL RESOURCES & ENVT. 3 (noting judicial interpretation of the ESA gave rise to its nickname: "the pit bull of environmental law.'"). Taken to its logical extreme, such a finding would call for courts to sterilize the differences among statutes so long as they are in the same substantive area of law.

Because the District Court was not required to balance the equities between beneficial municipal activity and the extirpation of a species, it did not abuse its discretion in awarding injunctive relief without doing so.

X. Conclusion

For the reasons stated herein, the Court should reverse the judgment of the lower court regarding standing to bring common law water claims and the NUO's claims under ESA § 7.

The Court should affirm the judgment below regarding NUO's claims under ESA § 9 and the award of injunctive relief.