CA. NO. 19-000987 Team Number: 20

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,
Plaintiff – Appellant

v.

UNITED STATES ARMY
CORPS OF ENGINEERS,
Defendant – Appellee

and

CITY OF GREENLAWN,
NEW UNION,
Defendant –Appellant

On appeal from the United States District Court
for the District of New Union

BRIEF OF APPELLANT CITY OF GREENLAWN, NEW UNION

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STATEMENT OF JURISDICTION

Because this case arises under the Endangered Species Act ("ESA"), 16 U.S.C. § Ch. 35, the United States District Court for the District of New Union had jurisdiction to review this case pursuant to 16 U.S.C. § 1540(c) and 28 U.S.C. § 460(a), which grants "to each court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States" jurisdiction "over any actions arising under" the ESA. *See* R. at 4.

This Court has jurisdiction to review the final order of the United States District Court for the District of New Union under 28 U.S.C. § 1291, which provides that United States Courts of Appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE ISSUES

1) Was the district court correct in holding that Greenlawn is permitted to continue to withdraw water from the Green River as needed for its municipal activities under its right as a riparian landowner?
2) Was the district court correct in holding that the Army Corps of Engineers' maintenance of downstream flow consistent with Greenlawn's rights as a riparian landowner pursuant to a 1948 agreement—under which ACOE did not retain discretion to consider the protection of listed species—was not a discretionary action subjecting ACOE to the consultation requirements of the ESA?
3) Did the district court err in holding that Greenlawn's water withdrawals constituted a "take" under the ESA, where multiple independent factors outside of Greenlawn's control contributed to the decreased downstream flow in the Green River and the oval pigtoe mussels' habitat was restored under natural conditions?
4) Did the district court err in issuing an injunction limiting Greenlawn's water withdrawals without first balancing the equities, where Greenlawn's municipal water withdrawals are supported by significant public interest?

STATEMENT OF THE CASE

I. Statement of Facts

The City of Greenlawn ("Greenlawn") lies on the banks of the Green River, downstream of the Howard Runnet Dam Works, which is operated by the Army Corps of Engineers ("ACOE"). R. at 6. Greenlawn owns the riverfronts and riverbed of the Green River within city limits and has maintained municipal water intakes there since 1893. *Id*. Since the creation of the dam, the city has relied on ACOE's 1948 contractual agreement to maintain flows in the Bypass Reach sufficient for Greenlawn's 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." *Id*. This binding agreement was created before the passage of the Endangered Species Act and the listing of the oval pigtoe mussel as an endangered species.

The operation of the dam is further governed by a Water Control Manual ("WCM") that was last revised in 1968. *Id*. The WCM is designed to provide adequate downstream water releases while maintaining lake levels for recreational use during the summer months and flood storage capacity for the winter months. *Id*. During normal summer operation, the WCM calls for a flow release of 50 cubic feet per second (CFS). *Id*. During drought conditions, the WCM provides a schedule for reducing release amounts. *Id*. In a drought watch, recreational releases are curtailed; in a drought warning, flows to Greenlawn are reduced to 7 CFS but hydroelectric power releases are maintained; and during a drought emergency 7 CFS is maintained and hydroelectric power releases are curtailed. R. at 7. The WCM has a general provision stating that at all times the dam will be operated in a manner which complies with water supply agreements entered into by the Corps and in accordance with the riparian rights of property owners established under New Union law. *Id*. Since the WCM was last revised in 1968, demands on the

Green River have increased dramatically. The city's population has grown substantially, and large-scale agricultural operations have started diverting water from the Green River upstream of the dam. R. at 7-8.

During the spring planting and growing season in 2017, ACOE responded to drought conditions by reducing flows to Greenlawn to 7 CFS and requesting that the city impose bans on citizens' use of water for lawns and ornamental plants. R. at 8. In a letter addressed to the local ACOE field office, Greenlawn responded by reminding ACOE of its common-law right to reasonable use of the Green River's historic flows as riparian landowner, and that neither the drastically-reduced flows nor water usage bans would be appropriate impositions on the city. *Id*. Moreover, the city the city pointed out that the 7 CFS restriction laid out in the WCM was based on outdated records of the city's water needs, and withdrawal requirements for domestic use now surpass 7 CFS during drought emergencies. *Id*.

ACOE agreed to increase the water releases to Greenlawn up to 30 CFS in accordance with Greenlawn's needs. *Id*. Due to the drought conditions and various demands on the Green River, flows downstream of the city were reduced, resulting in the exposure of the oval pigtoe mussels' habitat as much as 60 miles downstream of the dam. R. at 9. These drought conditions reduced the oval pigtoe population by approximately 25%. *Id*.

II. Procedural History

Plaintiff New Union Oystercatchers, Inc. ("NUO"), a group of oyster fishermen who work far downstream of Greenlawn, filed this action in the United States District Court for the District of New Union on July 17, 2017, under the ESA, 16 U.S.C. 1540(g), alleging violations based on the flow reductions in the Green River that resulted from ACOE's curtailment of hydroelectric peaking and Greenlawn's water withdrawals. *Id.* at 10.

The United States District Court for the District of New Union published a decision, *New Union Oystercatchers, Inc. v. United States Army Corps of Engineers*, *et al.*, No. 66-CV-2017 RMN (D.N.U. May 15, 2019), ruling on all four issues presented *supra*. First, the district court held that Greenlawn is entitled to sufficient flow in the Bypass Reach consistent with its rights as a riparian landowner to supply its municipal water needs. R. at 13. Second, the district court held that ACOE's provision of water flow through the Bypass Reach at levels sufficient to meet Greenlawn's municipal needs was not a "discretionary action for the purposes of ESA § 7(a) consultation requirements, because ACOE was required by law to yield to Greenlawn's rights as a riparian landowner. R. at 15. Third, the district court held that Greenlawn's act of withdrawing water from the Bypass Reach constituted a "take" under Section 9 of the ESA because it "modifie[d] and degrade[d] oval pigtoe mussel habitat downstream." R. at 16. Finally, without first balancing the equities, the district court issued an injunction prohibiting Greenlawn from making water withdrawals that have the effect of reducing downstream flows below the rate necessary for mussel survival. R. at 18.

Following the district court's decision, Greenlawn timely filed a Notice of Appeal as to (1) the district court's determination that Greenlawn's withdrawals constitute a "take" under the ESA § 9 and (2) the district court's decision to enjoin Greenlawn from withdrawing water to prevent harm to the oval pigtoe mussels' habitat, without first balancing the equities of the municipal activity against the threat to the species. R. at 2. ACOE joins Greenlawn in both of its arguments on appeal. *Id.*

Additionally, NUO filed a Notice of Appeal as to (1) the district court's determination that Greenlawn has riparian landowner rights to the Bypass Reach and (2) the district court's determination that ACOE's provision of flow to the Bypass Reach was not a discretionary action

subject to the consultation requirements of the ESA § 7(a). R. at 1. ACOE joins NUO in its first argument, but opposes NUO in its second argument. R. at 2.

On September 1, 2019, this Court issued an Order recognizing the jurisdiction of this Court to hear the appeal and requiring the parties to brief the aforementioned issues. *Id.*

SUMMARY OF THE ARGUMENT

This Court should affirm the ruling of the district court with respect to its holdings that (1) Greenlawn possesses riparian landowner rights guaranteeing it withdrawals sufficient to meet its municipal water needs and (2) ACOE's diversions at levels consistent with these riparian rights were not a "discretionary action" under Section 7 of the ESA. Additionally, this Court should reverse the ruling of the district court with respect to its holdings that (1) Greenlawn's withdrawals constituted a "take" of the oval pigtoe mussel under Section 9 of the ESA and (2) Greenlawn must be enjoined from withdrawing water to the extent it harms downstream habitat of the oval pigtoe mussel.

Greenlawn is justified in withdrawing water as it needs for municipal purposes. The right of a riparian to withdraw water for natural use may be exercised without regard to other riparians, and these rights of individual riparians extend to municipal riparians. *See* Barton Thompson, Jr. et al., *Legal Control of Water Resources* 33 (5th ed. 2013); *City of Canton v. Shock*, 63 N.E. 600, 602 (Ohio 1902). Though if a riparian water use is considered an artificial use, it must be reasonable against other riparians' artificial uses, where domestic purposes are superior to power generation purposes. *See* Barton Thompson, Jr. et al., *Legal Control of Water Resources* 34 (5th ed. 2013); *Hendrick v. Cook*, 4 Ga. 241 (1848); *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.R.I. 1827); *Canton*, 63 N.E. at 603. Greenlawn's municipal water withdrawals for domestic purposes, such as gardening, are considered a natural use and thus need not consider other riparians. Even if municipal activities are considered an artificial use, Greenlawn's municipal withdrawals for domestic use are superior to ACOE's power generation use.

Under Section 7 of the ESA, federal agencies are required to consult with the Fish and Wildlife Service for any actions that are "discretionary," i.e., where the agency can utilize its

"judgment" in deciding whether or not to undertake the action. 50 C.F.R. § 402.03; *see Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666-68 (2007). Where an agency is required to act under a binding agreement that predates the ESA and the listing of the species in question, the agency may not renege on its commitments under the agreement simply because of a remote possibility of harm to a species listed under the ESA. Unless the federal agency retained some discretion to unilaterally alter the terms of the agreement or to consider harm to species in carrying out its obligations under the agreement, the agency cannot use Section 7(a) of the ESA to escape its duties under the agreement. Here, ACOE was not subject to Section 7 consultation requirements because ACOE was operating pursuant to a pre-ESA agreement under which it (1) was required to provide Greenlawn with adequate flows consistent with its rights as a riparian landowner and (2) did not retain discretion to consider harm to species or to unilaterally alter the terms of the agreement.

Greenlawn's exercise of its riparian rights does not constitute a "take" of the oval pigtoe mussels' habitat under Section 9 of the ESA because Greenlawn's withdrawals were not the proximate cause of the oval pigtoe mussels' habitat modification. For Greenlawn to be held liable under the Endangered Species Act, the city must have been the but-for factual cause of habitat changes and such changes must have been reasonably foreseeable outcome of Greenlawn's withdrawals. *Aransas Project v. Shaw*, 775 F. 3d 631, 656 (5th Cir. 2014). Greenlawn is not the but-for cause of habitat changes because any change to the oval pigtoe mussels' habitat can be traced back to multiple independent causes, including drought and increased agricultural withdrawals. Further, the habitat modification is not a reasonably foreseeable outcome because of the attenuated chain of causation between Greenlawn's withdrawals and the change to the oval pigtoe mussels' habitat. As neither but-for causation nor

reasonable foreseeability are present, imposing liability on Greenlawn would, in effect, create strict liability that does not exist under the Endangered Species Act. Moreover, because the oval pigtoe mussels' habitat has been restored from natural rainfall, Greenlawn's withdrawals do not result in irreparable harm to the mussels' essential behavioral patterns. *Nat. Wildlife Federation v. Burlington Northern Railroad, Inc.*, 23 F. 3d 1508, 1513 (9th Cir. 1994).

The district court erred in automatically issuing an injunction against Greenlawn under ESA § 9 and § 11. Unless Congress makes clear its intent to prohibit courts' from exercising discretion in issuing injunctions, courts must balance competing interests of each party. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987). When balancing, particular regard is paid to public consequences before issuing an injunction. *Winter v. NRDC*, 555 U.S. 7, 24 (2008). The district court erroneously relied on *TVA v. Hill*'s ESA Section 7 analysis where injunctions usually apply. This case involves ESA Sections 9 and 11, which do not contain explicit or implicit statements by Congress to prohibit courts from exercising equity discretion. Further, the public interest in Greenlawn's municipal use weighs against an injunction, especially since an injunction would be an inadequate remedy given other causes diminishing the Green River and other remedies available.

ARGUMENT

I. GREENLAWN HAS THE RIGHT AS A RIPARIAN LANDOWNER TO WITHDRAW AS MUCH WATER AS NEEDED FOR ITS DOMESTIC USES WITHOUT REGARD TO OTHER RIPARIANS AND NON-RIPARIANS, AND ITS MUNICIPAL USES ARE REASONABLE AGAINST ACOE'S POWER GENERATION USE AND THEREFORE NOT SUBJECT TO LIMITATION.

Greenlawn has a right, as a riparian landowner, to withdraw as much water from the Bypass Reach as needed for its municipal purposes. Riparian landowners may withdraw water for "natural uses" without regard to its effect on co-riparians. *See* Barton Thompson, Jr. et al.,

Legal Control of Water Resources 33 (5th ed. 2013). In addition, any "artificial use" must be reasonable with respect to the other riparians to make simultaneous reasonable use of the water. *Id.* at 34. Because the municipality's withdrawals for watering lawns and plants for domestic purposes is considered a natural use, Greenlawn is justified to withdraw water regardless of any effect on water use by ACOE. Even if municipal use is considered an artificial use, water withdrawals for domestic uses is reasonable with respect to ACOE's artificial use of power generation, and thus is not subject to abatement.

A. Greenlawn has an unqualified right to withdraw water for natural uses without regard to other riparians and without regard to other interests, including ecological interests.

As the district court recognized, "riparian doctrine does not establish fixed rights to the use of water, but applies common law principles to resolve disputes between riparian landowners." R. at 12 (citing Barton Thompson, Jr. et al, *Legal Control of Water Resources* 33 (6th ed. 2018)). With competing uses of the water by riparians, riparian doctrine favors natural use over artificial use. *See City of Canton v. Shock*, 63 N.E. 600, 603 (Ohio 1902); *City of Philadelphia v. Collins*, 68 Pa. 106, 123 (1871); *Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955). Natural uses are an absolute right in that it may be exercised without regard to other riparian landowners.[1] *See* Barton Thompson, Jr. et al., *Legal Control of Water Resources* 33 (5th ed. 2013). Natural uses include domestic purposes such as drinking, bathing, raising livestock, and gardening. *Id.*

New Union recognizes municipalities as riparian landowners with the right to withdraw water as a supply to the benefit of non-riparian customers within the municipality. R. at 12 (citing *Tubb v.*

[1] Some courts even state that a riparian may exhaust the entire stream in making such natural use, even if fellow riparians receive no water whatsoever. *See* Barton Thompson, Jr. et al., *Legal Control of Water Resources* 33 (5th ed. 2013).

Potts, 45 N.U. 999 (1909) (citing *City of Canton v. Shock*, 63 N.E. 600 (Ohio 1902); *City of Philadelphia v. Collins*, 68 Pa. 106, 123 (1871); *Barre Water Co. v Carnes*, 27 A. 609 (Vt. 1893)). As such, a municipality is regarded as an individual entity, having in its corporate capacity the rights of a riparian proprietor. *City of Canton*, 63 N.E. at 602. *See Barre Water Co.*, 27 A. at 610 ("Dwellers in towns and villages watered by a stream may use the water for domestic purposes to the same extent that a riparian owner can . . . ."). In *Collins*, the court considered Philadelphia's water use during a drought which caused the Schuylkill River to be non-navigable. *Collins*, 68 Pa. at 106. The court found that cities situated along a stream have the same rights as an individual would to use the water for domestic purposes. *Id.* at 115. Thus, the city of Philadelphia had a right to take "as much water out of the . . . river as was necessary for the use of every citizen in Philadelphia . . . for the ordinary purposes of domestic use." *Id.* The court held in favor of the plaintiff because the municipal's water supply was for power generation, but maintained if the water supply was for domestic purposes, then there would be no remedy. *Id.* at 123.

Greenlawn thus has a right to use as much water from Bypass Reach as it needs for its municipal purposes. Because riparian doctrine is meant to resolves disputes between riparian landowners, there is no evaluation for water uses by non-riparians, such as NUO, nor an evaluation for other interests, including ecological interests. The domestic use gardening, including watering lawns and ornamental plants, is considered natural use, and so Greenlawn may withdraw the water without regard to other riparians, including ACOE. Where the *Collins* court found that diminishing a waterway during a drought was a right of a municipality for domestic use, here Greenlawn has no obligation to impose drought restrictions on its domestic

uses. Accordingly, Greenlawn is entitled to continue withdrawing 20 MGD from the Bypass Reach during times of increased residential water demands.

B. Greenlawn's municipal water use is a reasonable riparian use superior to ACOE's power generation use and thus no remedy issues.

Even where Greenlawn's municipal use is not considered a natural use, the domestic and public water uses of the municipality are reasonable and not subject to abatement or injunction. Artificial uses of a riparian must be reasonable with respect to the ability of other riparians to make simultaneous use of the waterway. *See* Barton Thompson, Jr. et al., *Legal Control of Water Resources* 34 (5th ed. 2013); *Hendrick v. Cook*, 4 Ga. 241 (1848); *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.R.I. 1827). Unreasonable uses are subject to abatement and are enjoinable, but there is no redressability for reasonable uses. *Id.* at 34, 48.

Many jurisdictions specify factors to determine reasonableness for competing artificial uses. *Id.* at 34. This approach is explained in the Restatement (Second) of Torts § 850A.[2] *See* Restatement (Second) of Torts § 850A (1977). In balancing the factors, comment a to § 850A recognizes the preference for domestic uses, and similarly "states have uniformly recognized domestic uses as among the highest uses of water." Restatement (Second) of Torts § 850A cmt. a (1979); *In re Water Use Permit Applications*, 9 P.3d 409, 449 (Haw. 2000). *See also Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*, 709 N.W.2d 174, 195 (Mich. App. 2005) ("while in theory no single factor is conclusive, '[d]omestic uses are so favored that they will generally prevail over other uses.'"); *Harris*, 283 S.W.2d at 444 (one of the

[2] The factors described in the Restatement include: the purpose of the use; the suitability of the use to the watercourse or lake; the economic value of the use; the social value of the use; the extent and amount of the harm it causes; the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other; the practicality of adjusting the quantity of water used by each proprietor; the protection of existing values of water uses, land, investments and enterprises; and the justice of requiring the user causing harm to bear the loss. *See* Restatement (Second) of Torts § 850A (1977).

principles guiding "reasonable use" theory is that the right to use water for domestic purposes is superior to many other uses of water).

In addition, treating a municipality as completely riparian, as New Union does, weighs the balance of reasonableness in favor of municipalities in two ways. First, no use within the city is unreasonable per se. *See* 1 *Water and Water Rights* § 7.05(c)(1), 7-158 (Amy K. Kelly & Robert E. Beck 3rd ed. 2010). Second, any balancing of uses to determining which use is reasonable must consider all customers within the city limits. *Id.* If a city's customers are treated as exercising a domestic preference, the city's needs will immediately displace virtually any competitors' needs, including another public system. *Id.* at § 7.05(c)(1), 7-158–59 (citing *Barre Water Co. v. Carnes*, 27 A. 609 (1893) (court denied enjoining inhabitants of a city from diminishing water for domestic purposes even though defendants needed water for a dam)). In *City of Canton v. Shock*, cited in New Union's *Tubbs v. Potts* decision, the court weighed the competing water uses of riparian landowners between a municipality and a proprietor for manufacturing purposes, where the City of Canton had diminished the water stream so that lower riparian landowners were unable to use the water for their mill. *Canton*, 63 N.E. at 601–02. The court found that power uses by a riparian must yield to the superior right of all upper proprietors for domestic purposes. *Id.* at 603.

Even without displacement of a city's competitor's rights under a claim to a domestic preference, to hold the city as a whole to be riparian shifts the balance of convenience strongly in favor of the municipal system. *See Water and Water Rights, supra,* at § 7.05(c)(1), 7-159 (citing *Dimmock v. City of New London*, 245 A.2d 569 (Conn. 1968)). In *Dimmock***,** the city of New London suffered diminished water during a drought and diverted water from a pond to continue supplying water to its inhabitants. The court refused to enjoin the city, even though the city's use

of the pond water was at the expense of other riparian landowners' right to use the water, because the water use was a public use and necessary to protect the communities; the measures taken by the city were not unreasonable; and that its action was necessary and to grant an injunction would adversely affect the interest of the public. *Id.* at 571–73.

Greenlawn's municipal use is a reasonable use and therefore not subject to abatement. New Union recognizes the right of a municipality to be a riparian landowner, and where the *City of Canton* court found that domestic uses of a city's inhabitants are superior to commercial uses, Greenlawn's withdrawals from Bypass Reach for domestic use is superior to ACOE's use of power generation. Similar to *Barre Water Co.*, where the municipality's use of water was reasonable in light of a drought, Greenlawn need not abate its water use. In fact, it is because of drought conditions that Greenlawn's water withdrawals are even more reasonable in order to supply its communities, and also like *Barre Water Co.*, an injunction would adversely affect the public interest. The district court was thus correct in balancing reasonableness in favor of Greenlawn. Though both Greenlawn and ACOE withdraw water for public use, Greenlawn is also providing domestic uses and the "municipal use was long established at the time the ACOE constructed its upstream diversion of the Green River." R. at 13. Because Greenlawn's water use is reasonable, even with drought conditions, there is no remedy available to plaintiffs NUO.

II. ACOE'S DIVERSION OF WATER AT QUANTITIES CONSISTENT WITH THE 1948 AGREEMENT IS NOT A DISCRETIONARY ACTION SUBJECT TO THE CONSULTATION REQUIREMENT OF SECTION 7 OF THE ESA

Section 7(a) of the ESA requires federal agencies to consult with the United States Fish and Wildlife Service (FWS) to "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(a). Under the ESA's implementing regulations, this consultation requirement

applies only to those actions "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03; *see Nat'l Ass'n of Home Builders*, 551 U.S. at 666 (2007). An action is "discretionary" for the purposes of the ESA's consultation provisions where the agency can utilize its "judgment" in deciding whether or not to undertake the action. *Nat'l Ass'n of Homebuilders*, 551 U.S. at 668.

While the ESA "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act" by allowing agencies to exercise judgment where they previously were not authorized to do so. *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992). Accordingly, where the agency acts pursuant to a preexisting agreement under which the agency may not consider potential harms to threatened or endangered species—and retains no authority to unilaterally modify the terms of the agreement—Section 7(a) of the ESA does not apply. *See Sierra Club v. Babbit*, 65 F.3d 1502, 1510 (9th Cir. 1995) (citing *Platte River Whooping Crane Trust*, 962 F.2d at 33-34). Because the pre-ESA agreement between ACOE and Greenlawn guarantees water flow consistent with Greenlawn's rights as a riparian landowner—and because ACOE did not retain authority to modify that provision—ACOE was not subject to Section 7(a) requirements.

A. ACOE's diversions were required pursuant to the vested riparian rights of Greenlawn in an agreement that predates the ESA

When an agency pledges to recognize a vested right—irrespective of its impact on threatened or endangered species—in an agreement predating the ESA, courts have held that the ESA does not allow the agency to abrogate or change its prior duties under the agreement. *See, e.g.*, *Babbit*, 65 F.3d at 1508. In *Babbit*, the Ninth Circuit held that the Bureau of Land Management's ongoing operation under a contract predating the ESA, the terms of which

granted a right-of-way to a private party, was not a discretionary action for the purposes of Section 7 because the agency was required to adhere to the terms it agreed to in the original contract. *Id.* While the agency had discretion to consider certain enumerated factors in its performance under the contract, none of these factors involved protection of species. *Id.* The court reasoned that consultation would be a "meaningless exercise" because "the right-of-way was granted prior to the enactment of the ESA and there is no further action relevant to the threatened spotted owl that the BLM can take prior to [the private party's] exercise of their contractual rights." *Id.* at 1509. Under these circumstances, "the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species." *Id.*

Similarly, here, the agreement between Greenlawn and ACOE was entered into before the enactment of the ESA, and it unequivocally grants Greenlawn access to a water supply consistent with the "riparian rights of property owners established under New Union law." R. 7. This agreement affords ACOE even less discretion than the agreement in *Babbitt*, because here, ACOE does not even have the authority to "influence the private conduct" based on factors unrelated to the protection of endangered species. Regardless of ACOE's needs or other considerations, it is required to provide Greenlawn with water flow "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 Ninth Circuit reiterated this principle in *Karuk Tribe of California v. U.S. Forest Service*, where it stated that "[w]here private activity is proceeding pursuant to a vested right or to a previously issued license, an agency has no duty to consult under Section 7 if it takes no further affirmative action regarding the activity." 681 F.3d 1006, 1021 (9th Cir. 2012) (citing *California Sportfishing Prot. All. V. FERC*, 472 F.3d 593, 597 (9th Cir. 2006)). At issue in

Karuk was the US Forest Service's ongoing approvals of mining activities pursuant to a controlling regulation. *Id.* at 1013 (citing 36 C.F.R. § 228.4(a)). While recognizing the aforementioned rule, the court ultimately held that, by repeatedly signing off on the private party's applications, FERC was undertaking a discretionary action for the purposes of Section 7 consultation requirements. *Id.* Especially significant to the court was the fact that the lawfulness of any action on behalf of the applicant depended on the explicit authorization from the agency. *Id.* at 1021-22.

In contrast to the circumstances of *Karuk*, here, Greenlawn did not submit anything to ACOE, and ACOE did not "approve" anything under any regulation or statute. Rather, Greenlawn asserted its vested rights as a riparian landowner under common law and under the agreement entered into with ACOE, thus precluding ACOE from taking any action other than allowing Greenlawn to access its lawfully required quantity of river flow. Unlike the situation in *Karuk*, it was Greenlawn's common law riparian rights that dictated the legality of ACOE's actions, not the other way around. Had ACOE decided not to comply with Greenlawn's rights under common law and under the aforementioned agreement, it would have directly and unlawfully violated the explicit terms it agreed to in 1948. *See NRDC v. Norton*, 236 F. Supp. 3d 1198, 1213–1218 (E.D. Cal. 2017) (reasoning that the ESA cannot force an agency to breach a pre-existing contract under which the agency agrees to provide diversions consistent with state law, because doing so would prevent the agency from operating "in compliance with state law"); *see also Defs. of Wildlife v. Norton*, 257 F. Supp. 2d 53, 69 (D.D.C. 2003) (holding that an agency's discretion to affect downstream flows to the benefit of a listed species can be significantly constrained when contracts between the agency and water users exist).

B. ACOE did not retain discretion to amend the 1948 agreement to protect endangered species

Where an agency enters into an agreement respecting the vested rights of a third party, the agency cannot commit a "discretionary action" under the ESA if the agency did not retain the discretion to protect endangered species under the agreement. In *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.* ("*EPIC*"), the Ninth Circuit held that the USFWS was not subject to Section 7 consultation requirements under an existing permit to a timber company, after the marbled murrelet and the coho salmon were listed as endangered species under the ESA. 255 F.3d 1073, 1081 (9th Cir. 2001). The Court reasoned that even though the permit contained language requiring FWS to initiate mitigation measures to prevent harm to existing listed species, this language did not trigger consultation under Section 7 when a newly listed species was implicated, because "nowhere in the various permit documents did the FWS retain discretionary control to make new requirements to protect species that subsequently might be listed as endangered or threatened." *Id.* Similarly, the agreement between Greenlawn and ACOE does not give ACOE discretion to consider future listed species. In fact, the agreement does not provide ACOE with discretion *to consider any factor* in providing water flow to Greenlawn. Rather, ACOE has an absolute requirement to provide Greenlawn with water flow consistent with its rights as a riparian landowner. *See Babbit*, 65 F.3d at 1508 (holding that the agency's ability to consider certain factors unrelated to protection of species did not make agency's duties under the contract "discretionary" for the purposes of Section 7).

The Ninth Circuit reiterated this principle in *California Sportfishing Prot. All. V. FERC*, where the court held that "the continued operation" of a project under a prior licensing agreement was "not a federal agency action" for the purposes of Section 7 after the Chinook Salmon was declared threatened under the ESA. 472 F.3d 593, 599 (9th Cir. 2006). The court went so far as to hold that a reopener provision in the licensing agreement allowing FERC to

modify the terms of the license after notice and a hearing did not provide FERC with "discretion" under 50 C.F.R. 402.03. *Id.* Here, the 1948 agreement contains no such provision allowing ACOE to modify the terms of the agreement. While ACOE may modify the WCM, these modifications do not constitute "discretion" because any modifications would have to comply with the original terms of the agreement that guarantees Greenlawn water flow consistent with its riparian landowner rights. *See* R. at 6.

Our circumstances are distinguishable from those cases finding that, upon renewal of an existing contract, an agency must meet Section 7 consultation requirements, because here, no renewal was at issue. *See NRDC v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (holding that renewal of water contracts provided the agency with "some discretion" to decrease the total supply of water for sale thereby benefiting impacted species); *see also NRDC v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014) (same). Moreover, while the original 1948 agreement, if implemented *after* the passage of the ESA, would be subject to the Section 7 consultation requirement, "[c]ongress did not intend for section 7 to apply retroactively, but only to 'projects which remain to be authorized, funded, or carried out' by the federal agency." *Babbitt*, 65 F.3d at 1510 (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978)). Because the agreement between ACOE and Greenlawn existed long before the passage of the ESA or the listing of the oval pigtoe mussel, this court should hold that Section 7 does not apply to a binding agreement under which ACOE has not "retained the power to 'implement measures that inure to the benefit of the protected species.'" *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1109 (9th Cir. 2006) (quoting *EPIC*, 255 F.3d at 1080).

III. GREENLAWN'S LEGAL EXERCISE OF ITS RIPARIAN RIGHTS TO THE WATERS OF THE BYPASS REACH DOES NOT CONSTITUTE A "TAKE" OF THE OVAL PIGTOE MUSSELS' HABITAT IN VIOLATION OF THE ENDANGERED SPECIES ACT.

Section 9 of the Endangered Species Act (ESA) prohibits "takes" of endangered species. 16 U.S.C. § 1538(a)(1)(B). ESA takes include actions that harm endangered species, where "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." *See* 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3. However, not all harm to endangered species constitutes a take under the ESA. *See San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 874 (D. Az. 2003) ("habitat degradation, by itself, does not equal harm"). Further, "proximate cause and foreseeability are required to affix liability for ESA violations," and where there are multiple sources of harm and an alleged violator cannot control these sources, there is no proximate cause. *Aransas Project v. Shaw*, 775 F. 3d. 631, 656 (5th Cir. 2014); *Alabama v. U.S. Army Corps of Engineers*, 441 F. Supp. 2d 1123, 1134–35 (N.D. Ala. 2006). Greenlawn's water withdrawals are not the proximate cause of the oval pigtoe mussels' habitat modification because of a long chain of causation, multiple independent withdrawals on the water supply, and drought conditions outside of Greenlawn's control. Further, any effect that Greenlawn's riparian withdrawals has on the oval pigtoe mussels' habitat does not rise to the level of irreparable harm necessary to constitute an ESA take.

A. Greenlawn's exercise of its riparian rights did not proximately cause the harm to the oval pigtoe mussels' habitat because it is neither the but-for cause of the Green River drying up downstream of the Bypass Reach nor is the habitat modification a reasonably foreseeable outcome of Greenlawn's withdrawals.

When determining if there has been a take prohibited by Section 9 of the ESA, courts must apply concepts from tort law. *Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d. 465, 486 (E.D. Ca. 2018). For Greenlawn to be liable for an ESA take of the oval pigtoe mussels' habitat based on the city's exercise of its riparian rights, Greenlawn's actions must (1) have factually

caused the harm and (2) be the proximate cause of the harm. *Paroline v. United States*, 572 U.S. 434, 444 (2014) (discussing broadly applicable proximate causation requirements). The requirement of proximate cause precludes liability where a causal link between conduct and result is so attenuated and remote as to be "a mere fortuity." *Id*. at 445. The result must have been reasonably foreseeable. *Aransas Project*, 775 F. 3d. at 660. Under the ESA, courts cannot simply assume proximate cause from the authorization of an activity that allegedly caused a take. *Id*. at 659 (no take despite causal linkage between activity and alleged harm). The fundamental inquiry for assessing whether a party has proximately caused harm is "the fairness of imposing liability for remote consequences." *Babbitt v. Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 697, 713 (1995) (O'Connor, J., concurring). Here, it would be unfair to hold Greenlawn liable for remote and unforeseeable habitat harms for which Greenlawn was not the but-for cause.

"But for" factual causation is required for a successful ESA take claim. *Sweet Home*, 515 U.S. at 700, n. 13 (the ESA "obviously requires" a showing that the harm would not have occurred but for the actions of a party). In *Alabama v. U.S. Army Corps of Engineers*, defendant argued that ACOE's operation of the dam failed to satisfy the flow needs of endangered mussel species considering recent droughts. 441 F. Supp. 2d 1123, 1132 (N.D. Ala. 2006). The court determined ACOE's actions were not "but for" causation of the harm because the weight of evidence pointed to other causes, including sediment buildup and prolonged drought conditions where ACOE is "not responsible for the absence of rain." *Id.* at 1132–1135. Further, though defendant contended that a significant percentage of the mussels, more than half of the population, face *exposure* from the reduced flow rates, "exposure does not mean death" and therefore does not constitute a take under the ESA. *Id.* at 1136.

Like *Alabama v. ACOE*, where there was no Section 9 take because of drought and other various independent causes for the habitat modification breaking the link of causation, here there is an insufficient connection between Greenlawn's conduct and the harm to the oval pigtoe mussels' habitat because multiple independent factors—including drought—increase demand on the water supply. In addition to 100,000 Greenlawn customers who depend on water from the Green River—a significantly higher number than was contemplated by the 1968 Water Control Manual—upstream consumption of the Green River by large agricultural customers has increased since the 1980s. R. at 7-8. Further, ACOE's large releases from the dam for hydroelectric peaking are another independent factor increasing demand on the Green River. Most notably, climate-related drought conditions have increased in the 20th century, reducing overall flows in the Green River. R. 8. As the *Alabama v. ACOE* court found, acts of nature like droughts do not fall within the prohibitions of the ESA, so Greenlawn should not be liable for such events. 441 F. Supp. 2d at 1134. The reduced flows of the Green River and subsequent modifications to the oval pigtoe mussels' habitat could result from any independent cause, so Greenlawn's withdrawals alone are too attenuated to be the proximate cause. In addition, where reduced water flow in *Alabama v. ACOE* only resulted in exposure of the pigtoe mussel, here too the reduced flow rates of the Green River result in exposure of the pigtoe mussel. *See* R. at 9. So even if there was proximate causation between Greenlawn's water withdrawals and the significantly reduced water flows, the result is a mere exposure of the pigtoe mussel, not death, and therefore is not a take under the ESA.

Further, under the Endangered Species Act, parties are only liable for reasonably foreseeable harm. *Aransas Project*, 775 F. 3d. at 660. Thus, even where but-for causation is present, ESA liability cannot be based on the "butterfly effect," where harm to an endangered

species is a result of a string of events set off by an inconsequential act. *Id*. at 657, n. 10. In *Aransas Project*, the 5th Circuit expressly rejected the lower court's finding of an ESA take, holding that harm was not foreseeable to whooping cranes who lived in waterways for which the state had administered licenses to withdraw water for residential and agricultural purposes. *Id*. The state was not liable for a § 9 take because of the long chain of causation between the licenses and the harm. As Justice O'Connor explained in her *Sweet Home* concurrence, a hypothetical farmer would not be liable for a Section 9 take if when tilling his field, he causes erosion that makes silt that runs into a nearby river and depletes oxygen in the water, causing harm to protected fish. 515 U.S. at 713.

The chain of causation here is similarly attenuated. Greenlawn is not liable for a take simply because of external events stemming from some combination of acts of nature and its legal exercise of its riparian rights to the Bypass Reach. Like in *Aransas Project*, there is a long and complicated chain of causation between Greenlawn's withdrawals and the downstream habitat modification. As such, the lower court erroneously distinguished *Aransas Project*. R. at 17. Further, by law and agreement with the Army Corps of Engineers, Greenlawn is entitled to reasonable historical use of its riparian rights. R. at 7. *See* Section I.A. As no oval pigtoe mussels live in the stretch of the Bypass Reach owned by Greenlawn, R. at 9, it is unreasonable that Greenlawn city administrators, exercising riparian rights in response to the needs of their community, would foresee harm to a specific species of mussels far downstream.

B. Imposing liability based on results which are not proximately caused by Greenlawn would impose strict liability on the city, which is an inappropriate interpretation of the ESA's liability regime.

The Endangered Species Act does not create strict liability for harm that allegedly results from a party's actions. *Sweet Home*, 515 U.S. at 712 (O'Connor, J., concurring). "Strict liability

means liability without regard to fault." *Id*., citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 599-560 (5th ed. 1984). Unless Congress explicitly decides to abrogate traditional principles of causation, fault-based liability must be applied. *Id*. As such, because the ESA does not abrogate traditional principles of causation, private parties can only be held liable for ESA violations if their actions proximately caused death or injury to protected species. *Id*. *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (CERCLA does not require showing of causation only because Congress explicitly rejected such a requirement). On this basis, Justice O'Connor's concurrence in *Sweet Home* explains that the necessity of proximate causation requirements supersedes holdings by district courts which seem to impose strict liability under the ESA. *Sweet Home*, 515 U.S. at 709 (O'Connor, J., concurring) (rejecting the holding of *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), because it appears to impose strict liability under the ESA).

Defining Greenlawn's use of its riparian rights as an ESA take—despite the lack of but-for causation and foreseeability—would impose strict liability on the city. This would directly contravene settled authority on the scope of liability for ESA takes as stated by Justice O'Connor in her *Sweet Home* concurrence. 515 U.S. at 712. Further, such a decision would muddy traditional principles of statutory interpretation and open the door to revisionist interpretations of Congress' causation requirements. If government agencies may infer strict liability from statutes for which Congress has not explicitly authorized a modification of causation requirements, our entire liability regime is called into question. *See, e.g., Sweet Home*, 515 U.S. at 712 (O'Connor, J., concurring) (proximate cause requirements are a "well-entrenched" principle of statutory interpretation). As it stands, our current system requires courts to follow precedent and apply proximate causation requirements when analyzing alleged ESA takes.

C. Greenlawn's exercise of its riparian rights does not result in irreparable harm to the oval pigtoe mussels' essential behavioral patterns because the species can recover under natural conditions.

Despite the causal connection drawn by the district court between Greenlawn's use of its riparian rights and the degradation of the oval pigtoe mussels' habitat, mere habitat degradation is not alone sufficient to prove an ESA take warranting an injunction. *Arizona Cattle Growers' Association v. United States Fish and Wildlife*, 273 F. 3d 1229, 1238 (9th Cir. 2001). "Harm" includes significant habitat degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3. To find that harm constituted a Section 9 take warranting an injunction, a court must find significant impairment of a species' breeding or feeding habits and prove that habitat degradation prevents or retards recovery of the species. *National Wildlife Federation v. Burlington Northern Railroad, Inc.*, 23 F. 3d 1508, 1513 (9th Cir. 1994) (injunction not warranted where the alleged harm would have little long-term overall effect on a species' habitat). In *Burlington Northern Railroad*, the court held that an ESA-take injunction was not warranted where a railroad's potential future spills could harm grizzly bears because the railroad's operations did not threaten irreparable harm to the bears. *Id*.

Since the start of this litigation, natural rainfall has filled the Green River basin back to its original flows. R. 11. Like in *Burlington Northern Railroad*, there is no threat of irreparable harm to the oval pigtoe mussels' habitat because it has been restored completely by natural cycles. There is no present danger to the species' essential behavioral patterns, breeding or feeding habits. As the district court found, there is no current threat to the Green River oval pigtoe mussel population. R. 11. Despite evidence of impairment, the reduced flows of the Green River do not rise to the level of "irreparable harm" because natural processes have already

restored the habitat to its original state. Therefore, the reduced flows will have little long-term overall effect on the oval pigtoe mussels' habitat and there is no ESA take warranting plaintiffs' requested injunction.

IV. BECAUSE NEITHER ESA § 9 NOR § 11 EXPLICITLY FORECLOSE TRADITIONAL EQUITABLE ANALYSIS, THE COURT IS REQUIRED TO BALANCE THE EQUITIES OF THE MUNICIPAL ACTIVITY AGAINST THE PURPOSES OF THE ESA, AND THE PUBLIC INTEREST IN GREENLAWN'S MUNICIPAL ACTIVITY WEIGHS AGAINST AN INJUNCTION OF GREENLAWN'S WATER WITHDRAWALS.

The court has equitable discretion whether to issue an injunction under ESA Sections 9 and 11. Unless Congress specifically prohibits courts from exercising their equity jurisdiction, courts are required to balance competing interests before issuing an injunction. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). Since Sections 9 and 11 do not contain explicit or implicit commands foreclosing equitable discretion, the court is required to balance the competing interests of Greenlawn's municipal use of water withdrawals against interests under the ESA. In addition, courts need not issue an injunction where there are other remedies that allow violators to come into compliance with a statute, such as ordering defendants to obtain "incidental take" permits under the ESA. *Id.* at 321; *Strahan v. Coxe*, 127 F.3d 155, 171 (1st Cir. 1997). Because an injunction would harm the public interest at stake in Greenlawn's water use and is not necessary for Greenlawn to come into compliance with the Act, an injunction is not an appropriate remedy.

A. ESA § 9 does neither explicitly nor implicitly restricts courts' equity jurisdiction.

An injunction is an equitable remedy which does not issue automatically from a success on the merits. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (citing *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–338 (1933)). Accordingly, courts are not

mechanically obligated to grant an injunction for every violation of law. *Id.* at 313 (citing *TVA v. Hill*, 437 U.S. 153, 193 (1978); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). Instead, in each case where injunctive relief is sought, "a court *must* balance the competing claims of injury and *must* consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987) (emphasis added).

The courts' equity jurisdiction to exercise this discretion is not to be denied or limited in the absence of a clear and valid legislative command. *Romero-Barcelo*, 456 U.S. at 313 (citing *Hecht Co.*, 321 U.S. at 329). In *Hecht Co.*, the Supreme Court examined whether Section 205(a) of the Emergency Price Control Act of 1942 (EPCA) required the Administrator to issue an injunction when there was any violation of the Act. *Hecht Co.*, 321 U.S. at 321. The EPCA provision provided: "upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices [which constitute or will constitute a violation of any provision of Section 4 of this Act] a permanent or temporary injunction, restraining order, or other order shall be granted without bond." *Id.* (quoting 50 U.S.C.A. app. § 925). The Court rejected plaintiff's argument that "shall" is not permissive, stating "we do not think that under all circumstances the court must issue the injunction or other order which the Administrator seeks." *Id.* at 327–28. Instead, it is within the court's discretion whether to issue an injunction and the *Hecht Co.* Court reasoned "if Congress desired to make such an abrupt departure from traditional equity practice, . . . it would have made its desire plain." *Id.* at 330. The Court thus resolved the ambiguities of s 205(a) in favor of an interpretation which affords courts to treat enforcement proceedings in accordance with their traditional practices. *Id.* (citing *United States v. Morgan*, 307 U.S. 183, 194 (1939)).

The Supreme Court continuously echoes the reasoning in *Hecht Co*. to maintain equity jurisdiction of the courts unless Congress explicitly states otherwise, including where environmental statutes are involved. *See Amoco Production Co. v. Gambell*, 480 U.S. 531 (1987). For example, in *Amoco*, the Court found no clear indication in the Alaska National Interest Lands Conservation Act (ANILCA) § 810 that Congress intended to deny federal district courts their traditional equitable discretion. *Id.* at 544. Accordingly, the Supreme Court reversed the Ninth Circuit's finding that public interest favored injunctive relief because the interests served by federal environmental statutes, such as ANILCA, superseded all other interests that might be at stake. *Amoco*, 480 U.S. at 545–46. Instead, the Court found that "Congress clearly did not state in ANILCA that subsistence uses are always more important than development of energy resources, or other uses of federal lands; rather, it expressly declared that preservation of subsistence resources is *a* public interest and established a framework for reconciliation, where possible, of competing public interests." *Id.* at 546. There is thus equity balancing in deciding whether to issue an injunction even where environmental interests are a competing interest.

Given the above precedent, the United States District Court of New Union erroneously relied on *Tennessee Valley Auth. v. Hill* that an injunction must issue under the ESA. The *TVA* ourt's refusal to balance the eradication of an endangered species with any other competing interests surrounded around Section 7 of the ESA. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). In *TVA*, the Court affirmed the injunction of TVA completing the Tellico Dam where the operation of the dam "would result in total destruction of the snail darter's habitat." *Id.* at 162. Because the language of Section 7 was clear, "its very words affirmatively [commanding] all federal agencies 'to in to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or

modification of habitat of such species," the Court found the provision "admits of no exception." *Id.* at 173. The Court further found the "legislative history undergirding Section 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." *Id.* at 185. Thus, since TVA is a federal corporation, it had the obligation to prioritize endangered species over its "primary missions."

The holding in *TVA*, however, is limited to Section 7 of the ESA and the specific facts in that case as later cases indicate that the Supreme Court allows for equity balancing in context of the ESA. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) ("the [ESA] encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of law, through case-by-case resolution and adjudication"); *Bennett v. Spear*, 520 U.S. 154, 176 (1997) ("the 'best scientific and commercial data' provision [of ESA] is . . . intended, at least in part, to prevent uneconomic . . . jeopardy determinations."). Given this guidance from the Supreme Court, lower courts have allowed equity balancing before issuing injunctions under the ESA. *See Water Keeper Alliance v. U.S. Department of Defense*, 271 F.3d 21, 35 (1st Cir. 2001) ("the district court did not abuse its discretion in finding that the public interest weighed in favor of denying a preliminary injunction."); *Hamilton v. City of Austin*, 8 F. Sup. 2d 886, 897 (W.D. Tex. 1998) ("the harm to the defendants and the public interest also weigh heavily against granting the injunction."); *Strahan v. Pritchard*, 473 F. Supp. 2d 230, 243 (D. Mass. 2007) (the court refused to grant the injunction because it "would be devastating to the livelihood of fishermen and to the survival of their communities"); *Animal Protection Institute v. Martin*, 511 F. Supp. 2d 196, 198 (D. Maine 2007) (although "the balance of hardships and the public interest tips heavily in favor of protected species," "the advantage given to the endangered species is not necessarily dispositive,

and . . . the presumption is rebuttable."). Notably, the First Circuit has held that the ESA does not limit equity discretion available in a citizen suit. *See Strahan v. Coxe*, 127 F.3d 155, 170 (1st Cir. 1997).

Reliance on *TVA v. Hill* in the context of ESA Section 9 is erroneous also because the Supreme Court has not found an implicit foreclosure on equity jurisdiction even where an environmental statute explicitly prohibits violations. *See Romero-Barcelo*, 456 U.S. at 31 (Stevens, J., dissenting). In *Romero-Barcelo*, the Court examined the Federal Water Pollution Control Act (FWPCA), which stated "the discharge of any pollutant by any person shall be unlawful." *Id.* at 308; 33 U.S.C. § 1311(a) (1976). Distinguishing the *TVA v. Hill*, the Court found that where Section 7 of the ESA commanded federal agencies to prioritize endangered species, no such command existed in the FWPCA, and ultimately found there was no explicit or implicit command by Congress to foreclose equity jurisdiction. *Id.* at 313–314.

This case concerns the ESA "take" provision under Section 9, brought under a citizen suit as allowed under Section 11. So not only does *TVA*'s Section 7 analysis not apply, but precedent requires that courts balance equities before issuing an injunction. Unlike the defendant in *TVA*, the City of Greenlawn is not a federal agency, so any special obligation under Section 7 to endangered species does not apply to the municipal operations. In addition, nothing in the language of Sections 9 or 11 indicates that Congress intended to foreclose courts' discretion when issuing an injunction. Specifically, Section 11 provides "any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." Where the *Hecht Co.* court refused to interpret a provision including the word "shall" to require an injunction, it makes little sense

for ESA Section 11 to be read as requiring an injunction at every violation, where not even directive words such as "shall" appear in the provision. This supports the First Circuit's finding that Section 11 allows full scope of courts' traditional equity powers.

Similar to *Romero-Barcelo* where the FWPCA contained an explicit prohibition on a violation of the law, Section 9 of the ESA also contains such a provision: "it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States." *See* 16 U.S.C. §1538(a)(1)(B). Without more, such as the ESA Section 7 command to federal agencies, Section 9 does not indicate an implicit foreclosure on court's equity jurisdiction. Much like *Amoco* where the statute's environmental purpose was just one of the interests to be considered in balancing and does not supersede all other interests, here preventing harm to species under the ESA is not determinative of an injunction, and Greenlawn's municipal interests are not superseded.

Absent from both § 9 and § 11 is an explicit or implicit statement that Congress means to withhold courts' traditional equity discretion. Because the district court erroneously relied on *TVA*, and there is no clear indication that Congress meant to prohibit courts' equity jurisdiction, the court must balance the equities in the present case.

B. The public interest in Greenlawn's municipal activities weighs against an injunction of its water withdrawals.

In exercising their sound discretion in balancing equities, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (quoting *Romero-Barcelo*, 456 U.S. at 312). In *Romero-Barcelo,*

supra, the Supreme Court examined a provision under the FWPCA similar to ESA § 9.[3] 456 U.S. at 308–09. Even though the Navy, by missile testing Vieques Island, was discharging pollutants into navigable waters, a direct violation of the Act, the Court rejected issuing an injunction. *Id.* at 320. The harm an injunction would cause to the public interest of the nation's welfare weighed against such a remedy. *Id.* at 309–10. Instead, the court ordered the Navy to obtain a NPDES permit, which allows discharges under the Act, so that the Navy could come into compliance. *Id.* at 320.

Lower courts have come to similar conclusions under the ESA. In *Strahan v. Coxe*, endangered whales had been "taken" within the meaning of Section 9 as a result of entanglement in gillnets from fishing, the licenses for which were issued by Massachusetts. 127 F.3d at 158. Despite this, the court rejected issuing a permanent injunction against Massachusetts from issuing the fishing licenses because the district court was not required to go any farther than ensuring that any violation would end. *Id.* at 171 (citing *Romero-Barcelo*, 457 U.S. at 311–16). Instead, the court upheld the district court's order for Massachusetts to obtain an incidental take permit to come into compliance. *Id.* Two years later, the same plaintiff brought a similar action in *Strahan v. Pritchard*. 473 F.Supp.2d 230 (D. Mass. 2007). There, the District Court of Massachusetts found that the public interest weighed against an injunction of issuing the gillnet licenses because the requested injunction would adversely affect Massachusetts' fishing industry and would devastate to the livelihood of fishermen and the survival of their communities. *Id.* at 240.

[3] FWPCA § 1311, the provision at issue in *Romero-Barcelo*, provides "the discharge of any pollutant by any person shall be unlawful" where ESA § 9 provides "it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States." *See* 33 U.S.C. § 1311(a) (1976); 16 U.S.C.A §1538(a)(1)(B).

In this case, Greenlawn has public interests at stake that weigh against issuing an injunction. As in *Romero-Barcelo* and *Pritchard* where the public interest weighed against an injunction even where there was direct violation of federal statutes, including the ESA, here the public interest also weighs against an injunction. Greenlawn withdraws water for the domestic uses of its 100,000 inhabitants, who would be adversely affected by an injunction limiting the withdrawals. With droughts becoming more common, Greenlawn will continually be restricted in its water use. The 7 CFS flow rate in the Bypass Reach during drought warnings and emergencies is based on water demand at the time the WCM was adopted in 1968, which is not enough to account for the population expansion over the last 50 years. As discussed earlier, Greenlawn does not cause the droughts which adversely affect the pigtoe mussel, and therefore an injunction is unlikely to repair the harm. Even where Greenlawn's water withdrawals are considered an "indirect take" under the ESA, an injunction is not necessary for Greenlawn to come into compliance. Like the decisions in *Romero-Barcelo* and *Coxe* where defendants were ordered to obtain permits under the federal statutes to cease violations, the court here has discretion to order Greenlawn to obtain an incidental take permit under the ESA. Thus, an injunction is not appropriate relief since the court has discretion to balance equities, and the public interest weighs against the injunction.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the district court as to Greenlawn's rights as a riparian landowner and the inapplicability of ESA § 7(a) to ACOE's non-discretionary release of water flow to the bypass reach. Additionally, this Court should reverse the ruling of the district court as to the applicability of ESA § 9 to Greenlawn's water withdrawals and the injunction on Greenlawn's water withdrawals.