Team No. 25

SUBMISSION BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION
OYSTERCATCHERS, INC.,

Petitioner-Appellant

v.

UNITED STATES ARMY
CORPS OF ENGINEERS,

Respondent- Appellee

and

CITY OF GREENLAWN,
NEW UNION,

Respondent – Appellee

ON APPEAL FROM UNITED STATES DISTRICT
COURT FOR NEW UNION
Hon. Romulus N. Remus
Docket No. 66-CV-2017 (RMN)

BRIEF FOR NEW UNION OYSTERCATHERS, INC. AS PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

Table of Contents

Table of Authorities

Statutes

Rules

Cases

Regulations

Other

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over this case pursuant to 28 U.S.C. § 1331, which grants federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Federal question jurisdiction is generally available in suits against the federal government and its agencies and in actions against federal officers and employees. *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971). Since the Plaintiff asserted their claim under the Endangered Species Act ("ESA"), the district court had federal question jurisdiction.

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 because the judgment below is a final judgment of a United States district court. All parties, New Union Oystercatchers ("NUO"), United States Army Corps of Engineers ("USACE"), and the City of Greenlawn ("Greenlawn") filed timely Petitions for Review. This appeal is from a final judgment that both grants and denies summary judgement. Pursuant to 28 U.S.C. § 1291, this Court has appellate jurisdiction over final decisions of federal district courts.

STANDARD OF REVIEW

I. De Novo

The standard of review for this appeal is de novo, under which this Court considers the questions of law presented anew and independently, without regard to the conclusions reached by the lower courts. As defined in The Wolters Kluwer Bouvier Law Dictionary (2012), a standard of review is the degree of deference that a judge, who is reviewing a decision, should give to the other official or judge who rendered the decision prior. A de novo review is applied when there is no dispute as to the evidence or the credibility of the witnesses and the trial court decides a question of law. The district court is owed no deference in this proceeding; therefore, this Court will review the legal question of the controversy completely unencumbered by the district court's decision.

II. Standard for Summary Judgement

Rule 56 of the Federal Rules of Civil Procedure describes that a moving party is entitled to summary judgment "if the movant shows that 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 order to determine this, the "record cannot lead a rational trier of fact to find for the nonmoving party." *Fall v. Ind. Univ. Bd. Of Trs.*, 12 F. Supp. 2d 870, 875 (N.D Ind. 1998) (quoting *Jurarez v. Ameritech Mobil Comm's., Inc.*, 957 F.2d 317, 322 (7th Cir. 1992)).

To determine if the motion for summary judgment is appropriate in this case, the Court must consider "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In addition, under Rule 56 of the Federal Rules of Civil Procedure, the movant possesses the burden of demonstrating that no genuine issue of material fact exists. Fed. R. Civ. P. 56 (a). A "genuine"

issue is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Garside v. Osco Drug, Inc.,* 895 F.2d 46, 48 (1st Cir. 1990) (*quoting Anderson*, 477 U.S. at 250). Additionally, "A "material" issue is one that "affects the outcome of the suit, ..." *Garside v. Osco Drug, Inc.,* 895 F.2d 46, 48 (1st Cir. 1990) (*quoting Anderson*, 477 U.S. at 248).

STATEMENT OF THE ISSUES

I. **Whether Greenlawn has the right to continue withdrawing up to twenty million gallons of water per day during drought conditions without any water conservation measures under riparian common law; when Greenlawn's water withdrawals are for ornamental irrigation, they average just six million gallons of water per day annually, and their water usage interferes with the USACE use of water for generating public power.**

II. **Whether Greenlawn violated NUO's public right to fish under the public trust doctrine, when Greenlawn's water withdrawal caused a 50% reduction in the oyster harvest, in the navigable waters of Green Bay.**

III. **Whether the USACE had discretion in their operation of the Howard Runnet Dam Works during drought conditions under the Water Control Manual, when they acted in complete disregard to both their own regulation and the Water Control Manual.**

IV. **Whether Greenlawn's water withdrawals constitute a "take" under the Endangered Species Act, when the withdrawals caused the water levels to drop so severely that the Oval Pigtoe mussel could no longer remain submerged, resulting in 25% of the local population dying.**

V. **Whether a court should balance the equities under a violation of the Endangered Species Act, when enjoining a municipal activity which would lead to the destruction of an endangered species.**

STATEMENT OF THE CASE

I. Statement of the Facts

Greenlawn was founded in 1893 and is on the historical banks of the Green River. R. at 5. Greenlawn owns land on both sides of the river, as well as the riverbed. *Id*. Greenlawn has maintained municipal water withdrawals since the city was founded. I*d*. The USACE built the Howard Runnet Dam Works ("HRDW") in 1947. Id. Due to the design and intended purpose of the dam, the USACE entered into an agreement with Greenlawn to maintain a flow sufficient to allow Greenlawn to continue water withdrawals "in such quantities and at such rates and times as it is entitled to as a riparian property owner…" R. at 6. HRDW is governed by the Water Control Manual ("WCM"), which establishes parameters for: allowing the release of water from the dam for maintaining flow for Greenlawn, recreation water levels, drought and flood contingencies, providing for hydroelectric generation, ect. *Id*. The WCM was last updated in 1968. *Id*.

The WCM provides that during normal summer operation, a flow of 50 cubic feet per second ("CFS") will be the baseline and up to 200 CFS are provided for hydroelectric and recreation needs. R. at 6-7. The WCM specified that if water levels dropped below seasonal targets, then the flow would be curtailed in one of three ways. R. at 7. If the water levels reach Zone 1 (Drought Watch) then all recreational releases are curtailed, a minimum flow of 50 CFS will be maintained, and daily hydroelectric power releases of up to 200 CFS for up to three hours. *Id*. Zone 2 (Drought Warning) all recreational releases curtailed, flow reduced to 7 CFS, and daily hydroelectric power releases of up to 200 CFS for up to three hours. *Id*. Zone 3 (Drought Emergency) all recreational releases curtailed, flow will maintain at 7 CFS, and daily hydroelectric power releases curtailed. I*d*. The 7 CFS flow rate during drought warning and

emergency was based on the annual average of Greenlawn's withdrawal in 1968, when the WCM was adopted. *Id*. In 1968, there was essentially no consumptive use of water upstream of the HRDW, but in the decades since, several agricultural operations began diverting water for irrigation. R. at 7-8.

From 1968 until 2005, USACE was compelled to apply Zone 1 restrictions only in 1998. R. at 8. Since then, Zone 1 restrictions were entered in 2006-2007, 2008, 2009-2010, and 2012. *Id*. Then in the fall of 2016 water levels fell and Zone 1 restrictions were put in place again. *Id*. The conditions persisted and, in the Spring of 2017, USACE implemented Zone 2 restrictions. *Id*. Then on April 12, 2017, Greenlawn protested the water flow being reduced to 7 CFS as an "outdated" measure, and cited population growth as well as the need for lawn and ornamental plant irrigation needs. *Id*. The District Commander of the USACE requested that Greenlawn implement drought restrictions on water use. *Id*. Greenlawn refused and cited their riparian rights. *Id*. Ultimately, the District Commander modified the water flow to 30 CFS on April 23, while maintaining the other Zone 2 restrictions. *Id*. Due to the continuing drought conditions, the increased water flow, and hydroelectric power demands; USACE implemented Zone 3 restrictions on May 15. *Id*. Except, the water flow remained at 30 CFS. R. at 8-9. At this point, Greenlawn consumed nearly all of the flow that moved down the Green River; dropping downstream flow close to zero. R. at 9. The river turned into "stagnant pools and narrow trickles". *Id*. This severe drop in water level exposed several beds of Oval Pigtoe mussel, a federally listed endangered species. *Id*. The mussel requires "gravel or silty sand riverbeds", and slow to moderate water currents for their habitat. *Id*. Stagnant water smothers the mussels and eliminates their natural habitat. *Id*. "These conditions resulted in the death of approximately 25% of the Green River's Oval Pigtoe population." *Id*. At no juncture did the USACE consult

with the Fish and Wildlife Service ("FWS") concerning the effects of the HRDW on the mussel. *Id*. A minimum flow of 25 CFS must be averaged over a 24-hour period to prevent the local extinction of the Oval Pigtoe. R. at 9-10. The cycle of reduced flow that began in 2006 has reduced many of the biological advantages of the Green River. R. 10. The salinity of the water has increased drastically leading to increased predation of the Green Bay oyster population. *Id.* In addition, there has been a reduction in nutrient flow. *Id.* These factors combined led to a reduction of 50% of oyster harvests since 2000. *Id.* This reduction in oyster harvest caused a decline in income so drastic that they had to sell their fishing boats. *Id.* NUO members are also retail customers of the New Union Regional Electric Cooperative and will be forced to pay electric rate fuel surcharges. *Id.*

II. Procedural History

The district court found that Greenlawn has a riparian right to continued flow and granted their motion for summary judgment to dismiss the case. The court refused to recognize NUO's riparian right. Next, the lower court granted USACE's motion to dismiss the ESA consultation requirement claim brought against them. Then the Court found that Greenlawn's water withdrawals did constitute a "take" under the ESA and granted summary judgement in favor of NUO. Finally, the district court enjoined Greenlawn from causing water withdrawals that resulted in the flow of the Green River of the confluence of the HRDW tailrace with the Bypass Reach to drop below 25 CFS averaged over twenty-four hours. From this order, each party responded in a timely manner to this Appellate Court.

SUMMARY OF THE ARGUMENT

Greenlawn's water withdrawals must be enjoined because under riparian common law, their withdrawals for ornamental irrigation are not a domestic use and they are interfering with the USACE's water usage. In riparian common law, a domestic use is one necessary for the survival of man and these uses are superior to all other uses. All other uses are treated equally and must be weighed against each other when they interfere with one another. Courts weigh competing uses by looking at all the facts and circumstances, including which use is most valuable and beneficial, and must enjoin the least reasonable use. Greenlawn's use is not a domestic use because ornamental irrigation is not necessary for any citizen's survival and their use is less reasonable compared to the USACE use for public power. Therefore, Greenlawn's water use for ornamental irrigation must be enjoined and the District Court's ruling must be reversed.

Greenlawn's water usage also interfered with NUO's right to fish in the Green Bay and therefore it must be enjoined under the public trust doctrine. Under the public trust doctrine, any private action interfering with the public right to fish on navigable waters is a violation of the public's rights and must be enjoined. Here, Greenlawn's water withdrawals have caused a 50% reduction in oyster harvests in the Green Bay, a navigable water, thereby interfering with NUO's right to fish there. Therefore, Greenlawn violated the public trust doctrine and their water withdrawals for ornamental irrigation must be enjoined.

An agency is required by the ESA § 7 to consult with other agencies and use the best science available when a discretionary action is taken that is likely to jeopardize a "threatened" or "endangered" species. However, if the agency action is mandated by law the consultation requirement is not applicable. The USACE's regulations require that both the WCM and the

Drought Contingency Plan have deviation protocols within them. Finally, the District Commander altered the flow from the prescribed amount in the WCM, which demonstrates that discretion was used which means that USACE's actions implicate the ESA § 7.

Greenlawn's water withdrawals constitute a prohibited "take" of the endangered Oval Pigtoe mussel under the ESA § 9. A "take" occurs when a person significantly modifies the habitat of an endangered species and this modification results in the injury or death of a species. Greenlawn's water withdrawals severely decreased the water level of the Oval Pigtoe's habitat resulting in their death because they could no longer remain submerged. Thus, Greenlawn's actions constitute a "take" and the District Court's ruling must be upheld.

This Court should grant injunctive relief without utilizing a balancing of the equities test. Here, a balancing of the equities is not required in understanding if injunctive relief should be granted when a breach of the ESA occurs. However, if a balancing test is seen to be required injunctive relief should still be granted as the factors all fall in favor of the Appellant.

Legal Argument

I. Greenlawn does not have the right, as a riparian landowner, to continue water withdrawals used for ornamental irrigation during a drought without any water conservation measures.

States who apply common law riparian rights principles allow riparian landowners to make reasonable use of adjacent water sources so long as their use does not interfere with other riparian landowners. *Harris v. Brooks,* 283 S.W.2d 129 (Ark. 1955). Riparian landowners are entitled to a reasonable use of water but have no right to use it in such a manner as would injure or prejudice another riparian landowner. *Hendrick v. Cook,* 4 Ga. 241 (1848); *Tyler v. Wilkinson,* 24 F. Cas. 472 (C.C.R.I. 1827). As the court stated in *Hendrick,* "the principle of the common law is that a man must so use one's own as not to injure others." *Hendrick,* at 257.

In order to determine the reasonableness of competing riparian landowners use of water, courts must first determine whether or not each use is natural or artificial. Natural uses are generally thought of as such uses that are "absolutely necessary for man's existence." *Evans v. Merriweather*, 4 Ill. 491,495 (1842). These types of uses are superior and are treated more favorably. All other uses are known as artificial uses or uses that only "increase comfort and prosperity." *Id.* All uses declared non-domestic or artificial are treated equal. *Harris v. Brooks,* 283 S.W.2d 129, 134 (Ark. 1955). If a court deems both uses as artificial, then the court must then determine "whether, under all the facts and circumstances of that particular case, the interfering use shall be declared unreasonable and as such enjoined, or whether a reasonable and equitable adjustment should be made, having due regard to the reasonable rights of each." *Id.* Courts typically employ various multifactor tests, such as the one laid out in the Restatement (Second) of Torts, in order to determine which use is most reasonable in light of all the facts and circumstances.

Here, Greenlawn is using approximately fourteen million gallons of water a day for the sole purpose of watering their lawns and their ornamental plants. Although watering small gardens is typically considered a domestic or natural use, *see* Robert E. Beck, *Waters and Water* Rights § 7.02(b)(2) (1991 & Supp. 1999), watering a lawn and ornamental plants is far from being absolutely necessary for man's existence. This is an artificial use and should be treated as equal and not superior to the USACE's use of hydroelectric power. Furthermore, after balancing the competing uses with one another in light of all the facts and circumstances, the use of water by Greenlawn for watering lawns and ornamental plants should either be enjoined, or an equitable adjustment should be made in the quantity of their water withdrawals during a drought. The District Court erred in declaring Greenlawn's artificial use of water a domestic use, and summary judgment should be reversed in favor of appellant.

A. Greenlawn's increased usage of water during the summer months for watering lawns and ornamental plants must be deemed a non-domestic use because it is not necessary for the survival of man or beast.

The first step in balancing competing riparian landowners water uses is to determine if any use is a natural or domestic use, as courts treat these types of uses as superior to all others when determining the reasonableness of competing uses. *Harris v. Brooks,* 283 S.W.2d 129, 134 (Ark. 1955). Natural and domestic "uses encompass all those absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purposes; without these uses, both man and beast will perish." *Pierce v. Riley*, 192 N.W.2d 366, 367 (Mich. Ct. App. 1971) (quoting *Thompson v. Enz,* 154 N.W.2d 473 (Mich. 1967). *See* e.g., *Kundel Farms v. Vir-Jo Farms, Inc.,* 467 N.W.2d 291, 294 (Iowa Ct. App. 1991) (natural uses are for "domestic purposes, including household purposes, such as cleansing, washing, and supplying an ordinary number of horses or stock with water, and it is said that natural uses are

limited to the purposes above stated."); *Cox v. Howell,* 65 S.W. 868, 869 (Tenn. 1901) (riparian landowners have the right to use water for "domestic purposes for the support of life, of man and beast"); *Cowell v. Armstrong,* 290 P. 1036, 1038 (Cal. 1930) ("natural uses are those arising out of the necessities of life on the riparian land, such as household use, drinking, watering domestic animals").

Essentially, if a use is not necessary for survival, then it must be deemed non-domestic. All other uses are deemed artificial and are treated as inferior to domestic uses, but equal to one another. *Harris v. Brooks,* 283 S.W.2d 129, 134 (Ark. 1955). Artificial uses include such uses as irrigation, recreational, or uses that are meant to increase one's comfort or prosperity. Artificial uses are neither essential nor indispensable to man's existence. *Evans v. Merriweather*, 4 Ill. 491,495 (Ill. 1842).

Here, Greenlawn's use of the Green River to water their many lawns and numerous ornamental plants is an artificial use of water and not a domestic use. First, well-kept lawns and decorative plants are in no way essential to any Greenlawn citizen's existence and sustenance as a human being. No citizen of Greenlawn will perish without watering their lawn and decorative plants regularly. Watering lawns and ornamental plants is not necessary for the survival of man or beast and therefore these are not domestic uses according to riparian common law, but rather artificial uses.

These are artificial uses because watering lawns and decorative plants is done for pleasure and is a recreational hobby used to provide comfort and prosperity. Although maintaining a small garden for sustenance is a domestic use, lawns and ornamental plants provide no sustenance for man or beast and therefore cannot be considered necessary for man's existence. Therefore, this use of water is artificial and not domestic and must therefore be

balanced against the USACE's use for the generation of public power. The District Court erred in deeming Greenlawn's water use domestic and therefore the District Court's ruling granting summary judgment to defendants must be overruled.

B. Greenlawn's increased usage of water for watering lawns and ornamental plants must be deemed unreasonable and enjoined because it is less valuable than the Army Corps' use and it interferes with the Army Corps' use.

In riparian common law jurisdictions, riparian owners each have equal rights to make a reasonable use of waters while respecting and giving due regard to the rights of other riparian owners. *Harris v. Brooks,* 283 S.W.2d 129, 133 (Ark. 1955). The court in *Harris* stated the rule that:

> When one lawful use of water interferes with or detracts from another lawful use, then a question arises as to whether, under all the facts and circumstances of that particular case, the interfering use shall be declared unreasonable and as such enjoined, or whether a reasonable and equitable adjustment should be made, having due regard to the reasonable rights of each.

Id. at 134. When comparing competing uses it does not matter whether or not a landowner is above or below the course of a river. *Tyler v. Wilkinson,* 24 F. at 474.

Courts have created a variety of similar multifactor tests used to effectively weigh competing uses and determine which use should be enjoined under all the facts and circumstances. The Restatement (Second) of Torts provides a comprehensive test used to balance competing reasonable water uses. According to the Restatement (Second) of Torts:

> The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole. Factors that affect the determination include the following: (a) The purpose of the use, (b) the suitability of the use to the watercourse or lake, (c) the economic value of the use, (d) the social value of the use, (e) the extent and amount of the harm it causes, (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other, (g) the practicality of adjusting the quantity of water used by each proprietor, (h) the protection of existing values of water uses, land,

> investments and enterprises, and (i) the justice of requiring the user causing harm to bear the loss.

Restatement (Second) of Torts § 850A (Am. Law Inst. 1965). Although not all courts have utilized this test in their examinations of reasonable uses, some courts have used this test as an analytical framework. See *Ripka v. Wansing,* 589 S.W.2d 333, 335 (Mo. Ct. App. 1979).

Courts who have created their own tests employ highly similar factors when analyzing the reasonable uses of riparian owners. For examples of some tests *see* e.g., *Hoover v. Crane,* 106 N.W.2d 563, 565 (Mich. 1960); *Red River Roller Mills v. Wright,* 15 N.W. 167, 169 (Minn. 1883); and *Kundel Farms v. Vir-Jo Farms, Inc.*, 467 N.W.2d 291 (Iowa Ct. App. 1991). However slightly deviant these tests are, the most prevalent and underlying theme amongst them is that courts will always weigh competing water uses in light of all the underlying facts and circumstances and they will take into consideration which use is most beneficial.

Here, Greenlawn's excessive use of water for ornamental irrigation must be deemed unreasonable after weighing it against the USACE's use for generating power. Greenlawn's use is not beneficial or valuable to society, especially in comparison to the USACE's use. Even if maintaining an aesthetically pleasing yard could be construed as slightly beneficial and valuable to some, providing public power is certainly more socially and economically valuable to the public. Without power, modern day society as we know it could no longer continue. Without aesthetically pleasing yards, society would be nearly the same.

Furthermore, Greenlawn's excessive intake of water is harming the USACE's use. Greenlawn's use forces the USACE to curb their hydroelectric power releases more than they should need to because Greenlawn is using fourteen million more gallons per day than their annual average daily use. Without these additional power releases during the day, there will be

less energy and power to provide people with sufficient energy to effectively cool and power their homes.

In addition, Greenlawn's use is almost entirely consumptive, returning almost no water back to the watershed, whereas the USACE's use is almost entirely non-consumptive, returning almost all of their water used back to the watershed. Wasteful water usage is generally deemed unreasonable when comparing uses and "if one user takes more water than is necessary, reasonableness may be achieved by the elimination of waste." *See* Restatement (Second) of Torts § 850A cmt. i (Am. Law Inst. 1965).

Also, courts sometimes require the water and the harm to be shared in times of drought or temporary water shortage if feasible. *See e.g.,* Restatement (Second) of Torts § 850A cmt. j (Am. Law Inst. 1965); *Half Moon Bay Co. v. Cowell,* 160 P. 675 (Cal. 1916); *Nesalhous v. Walker,* 88 P. 1032 (Wash. 1907). Here, there is a highly severe drought and water conservation measures should be taken. Therefore, Greenlawn should have to share the shortage with the USACE and their uses should be limited to not include watering lawns and ornamental plants.

In considering all the facts and circumstances, Greenlawn's water withdrawals for watering their lawns and ornamental plants should be deemed unreasonable and restricted. Therefore, the district court's judgment should be reversed and Greenlawn should be enjoined from unreasonably consuming an exorbitant amount of water for artificial purposes.

II. Greenlawn's water withdrawals must be enjoined because they violated NUO's rights under the public trust doctrine by interfering with NUO's rights to fish on the Green Bay and although this issue was not directly raised below, it should be heard on appeal because it is related to an issue raised below where the factual record was fully developed.

The general rule that a party must raise an issue or waive it can be granted an exception. *Singleton v. Wulff,* 428 U.S. 106, 121(1976). Exceptions are generally granted where a new issue

involves a fully developed factual record and either purely legal issues. *Readco, Inc. v. Marine Midland Bank,* 81 F.3d 295, 302 (2d Cir. 1996). Here, this new issue involving the public trust doctrine should be heard because no new factual determinations are necessary, and it is simply a new legal theory based upon the issue raised below on whether or not NUO had riparian rights.

The public trust doctrine means that states hold in trust for the public all navigable waters so that certain public uses can be protected from private interference such as navigation, commerce, and fishing. *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892). This doctrine only applies to navigable waters, which includes all tidal waters and any water which could be used for commerce. States have also recognized additional rights such as recreation and conservation.

Here, Greenlawn's water withdrawals interfered with NUO's right to fish for oysters in the Green Bay, which is a navigable water. Greenlawn's withdrawals caused an increase in salinity which has caused over half the oyster population since 2000 to either succumb to predation or die from a lack of nutrients. Therefore, Greenlawn should be held liable for interfering on NUO's right to fish in the Green Bay under the public trust doctrine, and the court must enjoin their excessive water withdrawals.

A. This issue should be heard on appeal because it is related to NUO's riparian rights claim and it does not involve or require any additional factual information.

The general rule for raising issues on appeal requires one to either raise it or waive it. *Singleton v. Wulff,* 428 U.S. 106, 120 (1976) (stating that the general rule, of course, is that a federal appellate court does not consider an issue not passed upon below). However, courts have granted exceptions to this general rule. Courts have held that "the rule against considering arguments raised for the first time on appeal 'is prudential, not jurisdictional.'" *United States v.*

Brunner, 726 F.3d 299, 304 (2d Cir. 2013) (quoting *Sniado v. Bank Austria AG,* 378 F.3d 210, 213 (2d Cir. 2004)). Indeed, even the Supreme Court stated that appellate courts have the discretion to hear a new issue. *Singleton,* 428 U.S. at 121 (stating that there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below). However, when applying such exceptions, courts often note that a determination to consider an issue raised for the first time on appeal is discretionary only and not a right. *Sniado*, 378 F.3d at 213.

Two major exceptions courts allow to the general rule are when it is a purely legal issue or is an issue sufficiently related to one raised below. Both exceptions require that no new factual determinations be made. Courts have stated that "it is 'generally appropriate' for an appellate court to reach the merits of an issue even if the district court has not done so, provided that 'the factual record is developed, and the issues provide purely legal question upon which an appellate court exercises plenary review.'" *Comite de Apoyo a los Trabajadores Agricolas v. Perez,* 774 F.3d 173, 182 (3d Cir. 2014) (quoting *Hudson United Bank v. LiTenda Mortg. Corp.,* 142 F.3d 151, 159 (3d Cir. 1998)). The Second Circuit has also acknowledged that the "general rule may be disregarded where the issue is purely legal and there is no need for additional fact-finding." *Readco, Inc. v. Marine Midland Bank,* 81 F.3d 295, 302 (2d Cir. 1996).

Issues that are sufficiently related to ones raised below are sometimes heard on appeal as well. For example, the Second Circuit chose to hear an issue that "concerned an issue already considered at some length by the district court." *Ford v. Bernard Fineson Development Center,* 81 F.3d 304 (2d Cir. 1996). Essentially, courts will use their discretion to hear issues not raised below, where the issue involves either a purely legal question or a related issue based upon a different legal theory using the same factual record. Most importantly, the factual record must be the same and no new determinations of fact can be necessary.

Here, the issue of whether Greenlawn interfered with NUO's rights under the public trust doctrine involves the same factual record as developed below and is simply just a new legal theory of liability based upon an issue raised below. This issue is substantially related to the issue raised below of whether or not Greenlawn interfered with NUO's riparian rights. Therefore, since the factual record is fully developed and because this new issue simply involves a new legal theory of liability based on a related issue raised below, the court should grant an exception to the general rule and hear this new issue based upon the public trust doctrine.

B. Greenlawn's water withdrawals must be enjoined because their overly consumptive withdrawals interfered with NUO's rights to fish in navigable waters under the public trust doctrine.

The Supreme Court officially acknowledged and clearly described the federal public trust doctrine in 1892. See *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892). The Supreme Court declared that "it is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. *Id*. at 452.

The Supreme Court's definition of the federal public trust doctrine established three public uses of water protected from private interference: navigation, commerce, and fishing. In addition to being limited to these three uses, the federal public trust doctrine expressed by the Supreme Court only applies to navigable waters and the land beneath them as well. *Id.* at 435. States are not limited; however, to the federal public trust doctrine, and may expand upon their definition of navigable waters as well as these three uses. Indeed, many states have extended public rights upstream of navigable waters and have added additional rights such as recreation.

There are two main ways of defining what a navigable water is: the navigable-in-fact test and the English common law tidal test. Under the old English common law tidal test, a body of

water is deemed navigable if it is subject to the ebb and flow of the tide. *Id.* at 435. Under this test, tidewaters "are those in which the tide ordinarily ebbs and flows, including the sea, and also bays, rivers, and creeks, so far as they answer this description." *Sibson v. State,* 259 A.2d 397 (N.H. 1969)

The Supreme Court later developed a separate test called the navigable-in-fact test. *The Daniel Ball,* 77 U.S. 557 (1870). Under this test, "a stream is navigable in fact when it is used, or is susceptible of being used, as a highway for commerce." *United States v. Sasser,* 738 F. Supp. 177, 179 (D.S.C. 1990). In addition, some states have expanded their tests for defining navigable waters, such as Michigan, which held "that the true test is whether a stream is inherently and in its nature, capable of being used for the purposes of commerce for the floating of vessels, boats, rafts, or logs." *Moore v. Sanborne,* 2 Mich. 519, 524-25 (Mich. 1853).

In addition to expanding the definition of navigable waters, states have also expanded their lists of protected public uses upon these waters. *See* e.g., Va. Code Ann. § 28.2-1200 (stating that navigable waters "may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish"); *Arnold v. Mundy,* 6 N.J.L. 1, 78 (N.J. Sup. Ct. 1821) (holding that the public "may clear and improve fishing places, to increase the product of the fishery; and may create, enlarge, and improve oyster beds, by planting oysters therein in order to procure a more ample supply"); *United States v. 1.58 Acres of Land,* 523 F. Supp. 120, 122 (D. Mass. 1981) (including "rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics"); *Bruce v. Dir., Dep't of Chesapeake Bay Affairs,* 275 A.2d 200, 211 (Md. 1971) (holding that "the crab and oyster resources found in the tidal waters are common property held in trust by the State for all of its citizens"); *see also* Robin Kundis Craig, A Comparative Guide

to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries, 16 Penn St. Envtl. L Rev. 1 (2007) (providing a more comprehensive overview of the additional public uses eastern states have begun to recognize in their public trust doctrines).

It is evident then, that multiple states have started to recognize more public uses and rights including such rights as conservation and the protection of common resources, such as oysters. Indeed, Mississippi has even gone so far as to include: "environmental protection and preservation, the enhancement of aquatic, avarian and marine life, sea agriculture and doubtless others." *Columbia Land Dev., LLC. v. Sec'y of State,* 868 So. 2d 1006, 1012-13 (Miss. 2004). In addition, they have even codified their public trust doctrine by stating it is "the public policy of the State of Mississippi regarding that trust has been stated by the Legislature as the preservation of the natural state of the public trust tidelands and their ecosystems and to prevent the despoliation and destruction of them." Miss. Code Ann. § 29-15-3 (Rev. 2000).

Here, Greenlawn violated NUO's public trust rights. First off, the Green Bay falls under the protection of the public trust doctrine because it is a navigable water. It is a navigable water because it is a bay, and bays are subject to the ebb and flows of the tide and capable of being used as highways for commerce. Greenlawn violated NUO's rights to fish in the Green Bay, as well as potentially other rights, such as the right to conservation and the protection of common resources, recognized in certain states. Greenlawn's water withdrawals sap the majority of the water flowing into the Green Bay which leads to increased salinity and a reduction in the flow of nutrients into the Green Bay ecosystem. This increase in salinity allowed more predators to enter the bay and feed on the oysters. In addition, without sufficient nutrients these oysters cannot survive. Therefore, Greenlawn's withdrawals led to a drastic reduction in the oyster population.

Since 2000, oyster harvests have dropped 50% or more. This reduction caused members of the NUO to suffer reduced catches and declining incomes. Some members have even been forced to sell their fishing boats. Therefore, because Greenlawn's water withdrawals led to a severe decrease in oyster harvests they have thus interfered with NUO's rights to fish in the Green Bay. Greenlawn's interference on NUO's right to fish in the Green Bay invokes the protections of the public trust doctrine and therefore Greenlawn should be enjoined from withdrawing such unreasonable amounts of water during a drought.

III. USACE took discretionary action when the flow levels deviated from WCM.

A. HRDW and ACOE are subject to ESA § 7 Consultation Requirement.

Actions taken by the USACE in the operation of the HRDW are subject to the consultation requirements of § 7(a) of the ESA. 16 U.S.C. § 1536(a)(2). Further, the district court errored in ruling that, "[b]ecause the construction of the [HRDW] and the adoption of the WCM predate the ESA, these actions of the USACE were not subject to these ESA § 7(a) requirements." R. at 14. The ESA is clear on who must submit to the requirements, "[a]ll other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorizes in furtherance of the purposes of this chapter…." 16 U.S.C. § 1536(a)(1). The term "Federal Agency" is defined in the ESA as "any department, agency, or instrumentality of the United States. 16 U.S.C. § 1532 (7). The USACE is a Federal Agency under the Department of Defense.

Beyond the clear and direct language of the statute, the USACE has regulation that pertains to the district court's argument that the HRDW is not subject to ESA § 7(a) because the act establishing the dam predates the ESA:

> [Water Control Manuals] shall be revised as necessary to conform to changing requirements resulting from developments in the project area and downstream, improvements in technology, improved understanding of ecological response and sustainability, *new legislation*, and other relevant factors….

E.R. 1110-2-240 (3-1) (e) (2016) (emphasis added). The mere fact that the establishing act and the HRDW WCM predate the ESA does not exclude them from applicability.

Next, an internal memorandum from within the USACE indicates that they believed that all of their projects could be subject to the requirements of ESA § 7(a). In June of 2013, the General Council for USACE circulated a memorandum about ESA guidance; see the excerpt below:

> As the Corps conducts planning studies for new Civil Works projects, *the Corps seeks the views of, and works closely with, the resource agencies pursuant to Section 7 consultation requirements of the ESA*…The ESA presents different challenges for Civil Works projects that have already been constructed and that are now being operated and maintained by the Corps. Many of those projects were planned, designed, and built before the ESA was enacted in 1973, and sometimes the listed species or designated critical habitats were not present in the area until after the Corps project was built. Determining the Corps' ESA legal responsibilities for such existing Civil Works projects requires care and precision.

Eric Stockdale, MEMORANDUM FOR ALL COUNSEL, HQ, DIV, DIST, CENTER, LAB & FOA OFFICES SUBJECT: ESA Guidance (Nov. 20, 2019, 12:33 PM) https://planning.erdc.dren.mil/toolbox/library/MemosandLetters/13Jun11-ESA.pdf. The final sentence demonstrates that the General Council of the USACE was aware that the requirements of the ESA § 7(a) were applicable to projects that predate the enactment of the ESA. The General Council sent this memorandum to prepare the various district and regional councils to be in compliance with the ESA.

In *Weyerhaeuser Co.* v. *U.S. Fish and Wildlife Service* the Supreme Court indicated that the USACE must consult with the FWS before taking a discretionary action. *See generally, Weyerhaeuser Co.* v. *U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (2018) (acknowledging in

dicta that the USACE must consult with the FWS before issuing a permit). In addition, the Supreme Court ruled in *National Ass'n of Home Builders* v. *Defenders of Wildlife*, that the consultation mandate only exists when there is a discretionary action. *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S.Ct. 2518 (2007). Both of these examples illustrate that USACE would be subject to the consultation requirements. While the projects in the cases above do not predate the ESA, it demonstrates previous and future acquiescence to the statute.

The Supreme Court has said that actions taken by the ACOE would be subject to the consultation requirement if no exception applied. See generall*y Id.* The USACE is a Federal Agency and they had actual knowledge that legal liability existed for their existing projects under the ESA § 7(a). Therefore, the district court erred in ruling that the actions of the USACE were not subject to the consultation requirements of the ESA § 7(a).

B. USACE Actions Were Discretionary.

The Department of the Interior regulations mandate that ESA § 7 applies to all discretionary action. 50 C.F.R. 402.03. Which the Supreme Court reaffirmed this in *National Ass'n of Home Builders* v. *Defenders of Wildlife*. See *National Ass'n of home builders*, 127 S.Ct. 2518 **(**holding that an agency need not hold to the consultation requirement if their action is mandated by law). USACE regulation states that:

> In general, a water control manual *defines rules or provides guidance* for direction operation, and management of water storage at an individual project or system of projects in addition to other pertinent information subject to criteria in this regulation…

E.R. 1110-2-240 (3-1) (a) (2016) (emphasis added). The opening section of WCM regulation makes it clear that not all parts of the manual have the force of law. Next the Engineering Regulation asserts that "all [WCM] shall contain provisions authoring the operating agency to deviate temporarily from operations prescribed …." E.R. 1110-2-240 (3-4) (a) (2016). The

mandatory action in the WCM is that deviation must be allowed, not that the guidelines set are unwavering. Additionally, the Drought Contingency Plan regulation further mandates that:

> to reduce dependency on use of the deviation process described in reference 3b. Using the deviation process is an option but should be the exception and not the preferred practice during drought conditions.

E.R. 1110-2-1941 (9)(c). This provision of the regulation makes it explicit that even during droughts that deviation is needed. After evaluating the plain language of the regulation, it is clear that the WCM exists as a guideline for the USACE and is not a mandate of law.

Beyond the regulations, it clear that USACE had the ability to deviate from the WCM because there are facts on the record that clearly indicates discretion was used in the operation of the HRDW. The District Commander departed from the Zone 2 restrictions just sixteen days after they were implemented. R. at 8. Then on May 15, the water levels dropped again, and Zone 3 was only partly implemented because USACE did not alter the flow to Greenlawn as prescribed in the WCM. R. at 8. It is apparent then, that the District Commander used his discretion in the departure from the WCM.

ESA § 7 applies to all discretionary actions taken by an agency. Both the WCM and the Drought Contingency Plan require that deviation methods exist to remedy situations that were not accounted for in the manual. The USACE took actions that were outside the four corners of the WCM, which is inherently discretionary. Therefore, § 7 of the ESA applies to USACE's actions. Thus, the district court's ruling must be reversed.

IV. Greenlawn's water withdrawals constitute a "take" under the Endangered Species Act because their water withdrawals significantly modified the Oval Pigtoe Mussels habitat causing the mussels to suffer injury and death.

When enacting the Endangered Species Act (ESA), Congress intended to define "take" "in the broadest possible manner to include every conceivable way in which a person can 'take'

or attempt to 'take' any fish or wildlife." S. REP. NO. 307, 93d Cong., 1st Sess. 1, 7 (1973). Accordingly, the ESA's prohibition on "takings" now explicitly includes significant habitat modifications which result in actual injury or death of a listed species by significantly impairing essential behavioral patterns. 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995). Here, both tests lead to the same conclusion that Greenlawn's water withdrawals significantly modified the Pigtoe mussel's habitat causing actual injury and death upon them. Pigtoe Mussels cannot survive in a habitat that is not submerged and will die without a proper water level. Greenlawn caused this significant change in habitat by consuming almost the entire flow of water. Their excessive consumption essentially eliminated any possibility for the mussels to remain submerged. This significant habitat modification drastically impaired the mussel's ability to breed and remain sheltered, directly causing the death of approximately 25% of the Green River's Oval Pigtoe mussel population. Therefore, Greenlawn's withdrawals constitute a prohibited "take."

Section 9 of the ESA prohibits the "take" of any endangered "species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Fish and Wildlife Service (FWS) broadly defines the term "harm" to include any conduct that significantly modifies or degrades a habitat which "actually kill or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. The Supreme Court in *Sweet Home* upheld this expansive definition stating that the Act's broad purpose to protect endangered and threatened wildlife as well as Congress' intent to provide comprehensive protection to such wildlife supports upholding the definition extending protections for such

species against activities causing habitat modifications. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698-700 (1995). Courts have since followed the broad intentions of Congress by expanding their interpretations of the ESA even further. Although the language of the "harm" definition requires a habitat modification to actually injure or kill wildlife, some courts have concluded that a "harm" includes any "imminent threat of injury to wildlife" or any "definite threat of future harm to a protected species," not just past and present injuries. *Forest Conservation Council v. Rosboro Lumber Co.,* 50 F.3d 781, 784 (9th Cir. 1995); *Marbled Murrelet v. Pac. Lumber Co.,* 880 F. Supp. 1343, 1367 (N.D. Cal. 1995). This reasoning in *Rosboro Lumber Co.* led the court to enjoin a lumber companies' activities that would result in habitat modification and were "reasonably certain to injure the Swartz Creek owl pair by impairing their essential behavioral patterns." *Rosboro Lumber Co., 50 F.3d* at 784.

Notwithstanding the ESA's broad intentions and comprehensive protections, habitat modification is not alone sufficient to prove a "take." A plaintiff must also show "some proof of 'the critical link between habitat modification and injury to the species.'" *Joy Morrill v. Manuel Lujan*, 802 F. Supp. 424, 430 (S.D. Ala. 1992) (quoting *Palila v. Hawaii Dep't of Land & Natural Resources,* 649 F. Supp. 1070, 1077 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988) (Palila II)). Similarly, the National Marine Fisheries Service (NMFS) stated that in order to find a "harm," a plaintiff must establish a causal link between the habitat modification and the injury or death of a listed species. 64 FR 60727, 60730. The NMFS then lists a non-exhaustive list of activities that could constitute a habitat modification including "removing water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding or other essential behavioral patterns." *Id.*

Courts have found critical links in somewhat attenuated or non-foreseeable circumstances. For example, in *Palila II*, the district court held that the conduct of state officials, in permitting mouflon sheep in the endangered Palila bird species' designated critical habitat, constituted a prohibited "take" where the mouflon sheep destroyed mamane seeds, causing them to not grow into fully-grown mamane trees, which the Palila bird relied on for feeding, breeding, and shelter. *Palila v. Hawaii Dep't of Land & Natural Resources,* 649 F. Supp. 1070, 1077 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988).

Other courts have established critical links in similarly indirect and not quite foreseeable takings. For example, the court in *Hodel* found a sufficient causal link to constitute a "take" where the FWS authorized the use of lead shot ammunition, which resulted in secondary poisoning of bald eagles because they ate lead infested prey. *Nat'l Wildlife Fed'n v. Hodel,* Civ. No. S-85-0837 EJG, 1985 U.S. Dist. LEXIS 16490 (E.D. Cal. Aug. 26, 1985). Indeed, many courts have consistently held that state regulatory activities involving indirect harm to a protected species can constitute a "take." *See* e.g., *Strahan v. Coxe,* 127 F.3d 155 (1st Cir. 1997) (Massachusetts officials found to have violated ESA for issuing licenses that authorized a type of fishing gear that harmed the Northern Right Whale); *Animal Prot. Inst., Ctr. for Biological Diversity v. Holsten*, 541 F. Supp. 2d 1073, 1077–78 (D. Minn. 2008) (where the District Court found that the Minnesota Department of Natural Resources had taken the endangered Canada Lynx by authorizing trapping and snaring activities; *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 148 F.3d 1231, 1258 (11th Cir. 1998) (where the court agreed with the Turtles that they showed a sufficient causal connection to hold Volusia County liable for "harmfully" inadequate regulation of artificial beachfront lighting because it caused fatal disorientations and misorientations in the newly hatched turtles).

In spite of these prior cases, a few courts have chosen to require a different, stricter showing of causation. Following the dicta and concurring opinion laid out in *Sweet Home*, these courts have adopted a requirement that plaintiffs must show "ordinary requirements of proximate causation and foreseeability." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 696 n.9 (1995). The most notable decision choosing this method of interpreting the ESA's requirements is perhaps *Aransas Project v. Shaw*, which held a state agency who granted permits for water withdrawals not liable under the ESA. *Aransas Project v. Shaw,* 775 F.3d 641 (5th Cir. 2014).

Aransas involved the deaths of multiple whooping cranes. The cranes allegedly died because of a lengthy and attenuated chain of events involving the withdrawal of water, which then increased the salinity of the water, which then flowed from the river into a bay and estuary, which in turn reduced some of the cranes' food sources, which then led to stress migration, and which finally led to emaciation and death of the cranes. *Id.* at 646-47. The court found that "imposing liability on the State defendants in the face of multiple, natural, independent, unpredictable and interrelated forces affecting the cranes' estuary environment goes too far." *Id.* at 663. According to the court, "every link in this chain involves modeling and estimation," and therefore they held that no proximate cause or foreseeability existed. *Id.* at 660.

Here, the water withdrawals by Greenlawn constitute a "take" under the ESA because their withdrawals significantly modified the Pigtoe mussel's habitat resulting in injury and death. Greenlawn must be held liable for their withdrawals because under both causation tests the severe reduction in water led to the Pigtoe mussel's injury and death. The habitat modification that Greenlawn caused was the severe lowering of the water level in the Green River to almost

nothing. Greenlawn's consumption of water turned what was formerly a flowing river habitat that sheltered the Pigtoe mussels, into stagnant pools of water and narrow trickles.

This drastic transformation essentially eliminated any possibility for the Pigtoe mussels to remain submerged. If Pigtoe mussels cannot remain submerged they will die. Approximately 25% of the oval Pigtoe mussels died because they could no longer remain submerged and they lost the ability to move to habitat that was submerged. This significant reduction in the water levels to nothing more than insignificant trickles was a habitat modification that caused the death of around 25% of the Pigtoe population. A critical link was established between the habitat modification and the actual deaths because without enough water to remain submerged, the Pigtoe mussels died.

This significant change in their habitat also foreseeably and proximately caused their death. Unlike in *Aransas*, where the causal chain was highly attenuated and involved conclusions based upon scientific modeling and estimations, this case involves a direct change in habitat which directly caused the mussel's deaths. This direct change in habitat was the actual and "but for" cause of the Pigtoe's injuries and deaths. Greenlawn consumed almost all of the water in the Bypass Reach leaving none leftover to keep the Pigtoe mussels submerged, and without the ability to remain submerged, the Pigtoe mussels died.

This "harm" upon the Pigtoe mussel was foreseeable because it is certainly foreseeable that by consuming almost the entire amount of water in a stream and leaving almost nothing leftover to trickle downstream, that a habitat would change. It is also foreseeable that certain species will die without sufficient levels of water. Species who inhabit the water habitats cannot survive without enough water, and so by consuming almost all of the water in the Bypass Reach, Greenlawn foreseeably and proximately caused the death of around 25% of the Pigtoe mussel

population. Therefore, Greenlawn's actions constituted a prohibited "take" under the ESA. Thus, the district court's decision to enjoin Greenlawn's water withdrawals must be upheld.

V. The Equities should not be balanced when enjoining a beneficial municipal activity as it would lead to the destruction of the population of an endangered species of mussels.

As previously discussed above, the activities of the Defendants is a clear violation of the ESA. Here, these activities have led to the destruction of not only the environment that the endangered Oval Pigtoe mussels use for breeding, but a decline in the population itself. In order to prevent further damage, injunctive relief must be granted. As seen in the case of *Tennessee Valley Authority v. Hill,* when there is a violation of the ESA there does not need to be a weighing of the equities. *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 194 (1978) (*citing Post*, at 196.) Here the "common sense" approach and most beneficial approach would be to grant injunctive relief in order to prevent the endangered Oval Pigtoe Mussels from facing further destruction. *Id.*

A. Injunctive relief is the proper method of relief to protect the endangered mussels.

In this case, injunctive relief should be granted in order to prevent further damage to the endangered Oval Pigtoe mussels. The actions of the Defendants are in violation of the ESA, 16 U.S.C. § 1536. This states, "... the Federal agency and the permit or license applicant shall not make any *irreversible or irretrievable* commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)." 16 U.S.C. § 1536 (emphasis added). If the Defendants are allowed to continue their water withdrawals, the mussel population would never again reach levels that would keep them from going extinct because their actions are causing irreversible damage. To put it plainly, if the defendants are allowed to

continue withdrawing water for ornamental irrigation, the endangered mussels would cease to exist. In order to prevent the loss of an endangered species, injunctive relief must be granted to help prevent further damage to the species. According to *Save our Ecosystems v. Clark*, "Only in a rare circumstance may a court refuse to issue an injunction when it finds a NEPA violation." *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984); see also *Nat'l Wildlife Fed'n v. Burlington N. R.R.,* 23 F.3d 1508, 1511 (9th Cir. 1994) (stating that there is no longer a balancing test used in deciding if an injunction should be granted under the ESA). This shows that an injunction is not only formal, but it is rare that it is not granted when there is a question of protection for the environment.

Additionally, Courts have granted injunctive relief when it is clear that there is a violation of the Endangered Species Act. In the case of *Sierra Club v. Marsh*, the Ninth Circuit granted injunctive relief to prevent the building of a highway and flood plain in San Diego, California. *Sierra Club v. Marsh,* 816 F.2d 1376, 1378 (9th Cir. 1987); see also *NRDC v. United States DOI,* 13 F. App'x 612, 622 (9th Cir. 2001) (discussing how Courts grant injunctive relief when it regards the protection of an endangered species). In this case, the court granted injunctive relief against the Army Corp of Engineers as the ESA had been violated. *Id.* at 1389. The court in *Marsh* concluded "that the Sierra Club is entitled to injunctive relief if the Army Corp of Engineers violated a substantive or procedural provision of the ESA by allowing construction to continue in the face of the County's failure to transfer the mitigation lands or by refusing to reinitiate consultation with the FWS." *Id.* at 1384. *Marsh* mirrors the present case as there is a violation of the ESA and injunctive relief should therefore be granted to prevent further destruction of the endangered Oval Pigtoe mussel.

B. A balancing test should not be utilized when determining if injunctive relief should be granted.

In this case, a balancing test should not be utilized to determine if injunctive relief should be granted as there is a breach of the ESA. In the case of *Tennessee Valley Authority v. Hill,* the Supreme Court discussed the use of a balancing test in determining if injunctive relief should be granted. *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 194 (1978). Here, the Court stated that:

> We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. 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 of priorities, thereby adopting a policy which it described as "institutionalized caution."

Id.; see also *Sierra Club v. Marsh,* 816 F.2d 1376, 1378 (9th Cir. 1987) (describing the useful nature of injunctive relief in relation to the ESA). In this case, there is a clear violation of the ESA and as such injunctive relief should be granted in order to protect the endangered species from further harm and irreparable damage.

C. If a balancing test is required, the factors are in favor of granting injunctive relief for the respondents.

Conversely, if this court finds that a balancing test is needed in order to determine if injunctive relief is needed the factors align with the Plaintiffs request for injunctive relief. The case of *Sierra Club v. Hathaway* explains the factors considered in the balancing test. *Sierra Club v. Hathaway,* 579 F.2d 1162, 1167 (9th Cir. 1978). The court in Hathaway stated that "the considerations in determining whether to grant or deny injunctive relief are threefold: (1) have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; and (3) does the public interest favor granting the injunction?" *Id.* Here, these three factors are determined and weighed together in order to

determine if injunctive relief should be granted. Here, all three of the factors lean toward granting injunctive relief for the plaintiff.

The first factor examines if the movants, the NUO in this case, have established a strong likelihood of success on the merits. *Id.* Here, the plaintiffs must establish that because of the severely low waters and if the severely low waters continue, the mussels will continue to suffer a lower population. The facts have established this here, as it is due to the overuse of the water by Greenlawn and the lowering of the amount of water through the dam from the USACE that caused the river to become too low for the mussels to survive. This shows that the Plaintiffs have a strong likelihood for success on the merits of the suit.

The second factor examines if the balance of irreparable harm favors the movants. *Sierra Club v. Hathaway,* 579 F.2d 1162, 1167 (9th Cir. 1978). Irreparable harm is defined in *Save Our Ecosystems v. Clark*, where the court states that "[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action." *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984). Here, the USACE did not thoroughly examine the environmental impact of their use of water and lower levels of the river. In fact, the defendants did not have knowledge of the damage caused by their actions. Therefore, irreparable damage is presumed if this action were allowed to continue without an injunction.

The third and final factor examines if there is public favor of granting the injunction. Here, public favor would weigh in favor of the injunction as the NUO represents a collection of individuals who have lost their livelihoods due to the smaller oyster harvests. These fishermen, as members of the public, have had to sell their fishing boats, and quit a career that they have had for years due to the lower pay and inability to pay off loans. Moreover, the NUO also has members that are customers of the New Union Regional Electric Cooperative. As a member of

this cooperative they will be forced to pay electric rate fuel surcharge during times that the Howard Runnet hydroelectric plant cannot operate. This forces the public to spend more money, because they must spend more money on electricity when the dam is not operating as it should. On the other hand, the public could also be against granting the injunction as it could limit the amount of water, they can withdraw from the river for things other than necessities. However, this small negative does not outweigh the positive public opinion that will come from granting the injunction.

Overall, even if the court requires a balancing test to determine if an injunction should be granted, the factors would all weigh in favor of the plaintiff. Therefore, the court should grant injunctive relief to not only protect the endangered mussels from future harm, but also to benefit the community as a whole. Thus, the district court's ruling should be upheld.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court affirm the United States District Court's decision in affirming issues III and IV. Further, Petitioner respectfully requests this Court reverse the lower court's decision on issues I, II, and IV.