Team No. 26

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CA. No. 19-000987

NEW UNION OYSTERCATCHERS, INC.,
Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Appellee,

and

CITY OF GREENLAWN, NEW UNION,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR NEW UNION
No. 66-CV-2017

BRIEF OF THE NEW UNION OYSTERCATCHERS, INC., *Appellant*

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union had original jurisdiction over Plaintiff's claims under the Endangered Species Act ("ESA"). 16 U.S.C. § 1540(c) (2002). The Court also had supplemental jurisdiction over the common law riparian rights claims asserted against the Defendant-Appellee (City of Greenlawn) , as they are related to Plaintiff-Appellant's (New Union Oystercatchers, Inc.) claim under the ESA. 28 U.S.C. § 1367(a) (1990). This United States Court of Appeals for the Twelfth Circuit retains jurisdiction over all final orders of district courts. 28 U.S.C. § 1291 (1982).

STATEMENT OF ISSUES

I. Do the New Union Oystercatchers, as nonriparian landowners, have the right to assert a common law riparian rights claim against the City of Greenlawn? Assuming they are able to assert a claim, is Greenlawn's consumption of water unreasonable?

II. Did the Army Corps of Engineers, have sufficient discretion over the operation of the Howard Runnet Dam Works to trigger the consultation requirement under § 7(a) of the Endangered Species Act when they took an action which would affect the Oval Pigtoe Mussel and their habitat?

III. Did the actions by Greenlawn constitute a "take" of the endangered Oval Pigtoe Mussel, in violation of § 9 of the Endangered Species Act, when they continued withdrawals in drought conditions until the downstream flow fell to nearly zero cubic feet per second?

IV. Did the District Court abuse its discretion when granting the injunction against Greenlawn's excessive water withdrawals? In exercising that discretion, should the District Court have balanced the equities of enjoining a beneficial municipal activity when that activity will extirpate an entire population of an endangered species?

STATEMENT OF CASE

I. Facts[1]

The City of Greenlawn ("Greenlawn") is situated on the banks of the historic Green River, now known as the Green River Bypass Reach ("Bypass Reach"). (R. at 5.) The Bypass Reach was created in 1947 when the Army Corps of Engineers ("ACOE") constructed the Howard Runnet Dam and the Diversion Dam (collectively referred to as "Howard Runnet Dam Works" or "Dams").[2] (R. at 5.) Since the design of the Dams would impact the natural flow of the Green River to Greenlawn, ACOE and Greenlawn entered into an agreement to maintain water flows "in such quantities and at such rates and times as [Greenlawn] is entitled to as a riparian property owner under the laws of the State of New Union." (R. at 6.) Water withdrawals by Greenlawn average six million gallons per day annually; however, the average rises to twenty million gallons per day in July and August. (R. at 5.)

The Dams are operated by ACOE and governed by the Water Control Manual[3] ("WCM") which was last revised in 1947. (R. at 6.) The WCM provides that during the peak summer hours a flow of 50 Cubic Feet Per Second ("CFS") be released from the Diversion Dam to the Bypass Reach. (R. at 6–7.) Additionally, 200 CFS are released as needed to a hydroelectric turbine; and, another 200 CFS are released on Saturday mornings for recreational purposes. (R. at 7.) Importantly when water levels drop below normal for a season, the WCM provides guidelines

[1] All facts are referenced by (R. at _.) and are taken from the Districts Court's Order No. 66-VC-2017 that was revised on 10/31/2019.

[2] For a diagram of the relevant waterways, the city of Greenlawn, and the Howard Runnet Dam Works, see Appendix "A."

[3] The WCM has a general provision which states, "[a]t all times the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply agreements entered into by the United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law."

for limiting the amount of water released from the Dams.[4] (R. at 7.) The 7 CFS curtailment for Zone two ("2") and three ("3") from the Diversion dam to the Bypass Reach was based on the average annual water demand of Greenlawn in 1968. (R. at 7.)

The events which give rise to this litigation arose in the Spring of 2017 when Howard Runnet Lake reached Zone 2 Drought Warning conditions for the first time. (R. at 8.) In a letter to ACOE dated April 12, 2017, Greenlawn protested to that 7 CFS flow restriction. (R. at 8.) Initially ACOE did not lift the flow restrictions; however, the District Commander conceded and ordered the water releases increase to 30 CFS on April 23, 2017. (R. at 8.) Of note, the District Commander did not consult with the Fish and Wildlife Services ("FWS") before taking this action. (R. at 9.) As a result of Greenlawn's water demands, the water level in the Howard Runnet Lake dropped to Zone 3 Drought Emergency conditions on May 15, 2017, invoking Zone 3 restrictions. (R. at 8.) After Zone 3 restrictions were enforced, Greenlawn continued the excessive withdrawals of water that caused flow rates downstream from the Bypass Reach drop close to zero. (R. at 9.)

These reduced water levels caused beds of Oval Pigtoe Mussels, a federally recognized endangered species, to become exposed. (R. at 9.) These beds are located approximately sixty miles downstream of the Howard Runnet Dam Works. (R. at 9.) Uncontradicted testimony by an

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[4] WCM lake level zones:

> Zone 1 (Drought Watch) – All recreational releases curtailed; minimum flows of at least 50 CFS shall be maintained in the Green River at the confluence of the Howard Runnet Dam tailrace and the Bypass Reach for fish and wildlife purposes; flow of 50 CFS shall be maintained into the Bypass Reach from the Diversion Dam; daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained.
>
> Zone 2 (Drought Warning) – All recreational releases curtailed; Bypass Reach Flow from the Diversion Dam reduced to 7 CFS; daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained.
>
> Zone 3 (Drought Emergency) – All recreational releases curtailed; flow of 7 CFS shall be maintained into the Bypass Reach from the Diversion Dam; daily hydroelectric power releases curtailed.

expert establishes that 25% of the mussel population died as a result of these conditions. (R. at 9.) The expert further testified that if these conditions persist the population of Oval Pigtoe Mussels will be completely eliminated from the Green River. (R. at 9.) The expert concluded that a minimum flow of 25 CFS averaged over 24 hours is necessary to protect the Mussel population. (R. at 10.)

The Plaintiffs, New Union Oyster Catchers, Inc. ("NUO"), is a not-for-profit association representing of oyster fisherman of Green Bay. (R. at 10.) While no member of NUO owns property on the Green River or Green Bay, their very livelihood has been affected by the decades of reduced flows from the Green River. (R. at 10.) As of 2016, the oyster harvest levels are down 50% from what they were in 2000. (R. at 10.) This has caused some of the members to be forced to sell their fishing boats because their income is not sufficient to cover their loan payments. (R. at 10.)

II. Procedural History

NUO, filed suit against Greenlawn, and ACOE; alleging Greenlawn's water withdrawals of the Green River and ACOE's operation of the Howard Runnet Dam Works violated the Endangered Species Act ("ESA"). (R. at 4.) As with this appeal, the district court was tasked with deciding four issues. (R. at 2–3.)

The district court held that Greenlawn has riparian landowner rights to the Green River Bypass Reach. (R. at 1.) Further, the court held ACOE did not violate the consultation requirement under § 7(a) of the ESA. (R. at 1.) Additionally, the court held that Greenlawn's withdrawals from the Bypass Reach constituted a "taking" of the Oval Pigtoe Mussel. (R. at 2.) Finally, the court held they need not balance the equities of municipal activity when issuing an injunction. (R. at 2.) The district court granted ACOE's motion to dismiss the ESA claims

against them; granted Greenlawn's motion for summary judgment declaring it has riparian rights to the Bypass Reach; and granted NUO's and ACOE's motion for summary judgment declaring Greenlawn in violation of the § 7(a) and § 9 of the ESA. (R. at 11.)

On appeal before this Court are four issues. First, whether Greenlawn may withdraw unlimited water during drought conditions. (R. at 11.) Second, whether ACOE was subject to the consultation requirement under § 7(a) of the ESA when they increased water releases from the Diversion Dam to the Bypass Reach during the 2017 drought. (R. at 14–15.) Additionally, whether Greenlawn withdrawing water from the Bypass Reach harmed the habitat of the Oval Pigtoe Mussel and constituted a "take" of an endangered species. (R. at. 15–16.) Finally, whether NUO is entitled, under § 9 of the ESA, to injunctive relief that would limit the water withdrawals of Greenlawn to maintain the necessary flow levels for Mussel survival. (R. at 18.)

NUO respectfully asks this Court to reverse the district courts grant of summary judgment both to Greenlawn on the issue of riparian landowner rights and to ACOE regarding the consultation requirement. NUO further asks this Court to affirm the districts court's decision granting NUO's motion for summary judgment on the issue of Greenlawn's actions constituting a "take" of the Oval Pigtoe Mussel. Finally, NUO asks this Court to affirm the injunction issued by the district court prohibiting Greenlawn from making water withdrawals which would deplete the minimum downstream flows necessary for Mussel survival.

STANDARD OF REVIEW

A de novo standard of review applies when considering a trail court's decision to grant summary judgment. *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003) (citations omitted) (affirming districts courts denial of summary judgment for city against private riparian landowner). Additionally, the de novo standard of review applies when considering if

the actions by a governmental agency constituted a "taking" of an endangered species. *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 937 (D. Mont. 1992). But, a court analyzes an agency's decision not to consult under an arbitrary and capricious standard. *National Parks Conservation Assoc. v. Jewell*, 62 F. Supp. 3d 7, 18 (D.D.C. 2014) (held that governmental agency was required to initiate a consultation with Fish and Wildlife service before taking action).

Finally, a court of appeals must review the decision by a district court to issue an injunction under an abuse of discretion standard. *National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782, 799 (9th Cir. 2005) (affirming decision of district court enjoining government from operating a in a way the court determined would result in irreparable harm).

SUMMARY OF ARGUMENT

The State of New Union follows the doctrine of riparian rights, which allows for a reasonable use of water so long as it does not interfere with the use of water by downstream riparian owners. *See Hendrick v. Cook*, 4 Ga. 241, 257 (Ga. 1848). Ordinarily, this doctrine only allows claims by other riparian landowners. But, in an action to protect a public trust, such as riverbeds, a nonriparian landowner may pursue an action. *Friends of Earth, Inc. v. Laidlaw Environmental Service (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Serra Club v. Morton*, 405 U.S. 727, 735 (1972)); *Montana v. U.S.*, 450 U.S. 544, 552 (1981) (citations omitted).

Accordingly, since NUO has the right to pursue a claim for relief against Greenlawn, this Court should remand this case to the district court so that a jury may make a determination as to the reasonableness, or lack thereof, of Greenlawn's water consumption. *Hendrick*, 4 Ga. at 257. Nevertheless, should this Court decide the reasonableness issue based on the facts in the record,

summary judgment should be rendered in favor of NUO because the actions by Greenlawn were in excess of any reasonable amount given the obvious drought conditions.

Section 7(a) of the ESA requires that all governmental agencies that take an action which could modify the habitat of an endangered species to consult with FWS to ensure that species is protected. 16 U.S.C. § 1536(a) (1988). Where ACOE has discretion to manage their activities, they must fulfill their obligations [of consulting] under the ESA. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. F.E.R.C.*, 862 F.2d 27, 34 (D.D.C Cir. 1992). Here, ACOE had the discretion to modify the flow of water under the WCM. (R. at 6.) The action in this instance occurred when the district commander raised the flow of water from 7 CFS to 30 CFS without consulting with FWS. (R. at 8.) Had ACOE fulfilled their obligations by consulting with FWS, the destruction and harm to the endangered Oval Pigtoe Mussel could likely have been avoided.

Section 9 of the ESA prohibits the "take" of any listed endangered species. 16 U.S.C. § 1538 (a)(1)(B). The ESA defines the term "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). When a harm results in significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavior patterns like sheltering or breeding, it constitutes a "take" for the purposes of the ESA. *Babbitt v. Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 687, 708 (1995). In this case, Greenlawn's continued water withdrawals in drought conditions depleted nearly the entire flow to the Mussel habitat downstream. (R. at 9.) That depletion led to the destruction and substantial modification of the Oval Pigtoe Mussels' habitat necessary for sheltering and breeding. Therefore, Greenlawn's actions constitute a "take" in violation of § 9 of the ESA.

The Supreme Court has held that it is not the role of the courts to balance species eradication against the claimed public benefits of agency activities. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 (1978). The question to be considered when determining whether an injunction is necessary to prevent a violation of § 9 of the ESA is whether there is a reasonably certain threat of imminent harm to a protected species. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000). Therefore, the Court should not balance the risk of eradicating the Oval Pigtoe Mussel population with the alleged benefits to Greenlawn. Furthermore, the Court should affirm the injunction issued by the district court since there is uncontradicted testimony that drought conditions will occur again and, unless enjoined, Greenlawn's actions will continue and entirely eradicate the Mussel population.

ARGUMENT

I. NUO MAY BRING AN ACTION AGAINST GREENLAWN IN ORDER TO PROTECT THE PUBLIC TRUST BECAUSE GREENLAWN'S CONSUMPTION OF WATER IS UNREASONABLE GIVEN CURRENT DROUGHT CONDITIONS.

The State of New Union follows the common law riparian rights doctrine in resolving disputes over the use of water. (R. at 11). Generally speaking, this doctrine allows for landowners bordering waterways to make *reasonable* use of that waterway as long as that use does not interfere with other riparian landowners downstream. *See generally* Barton Thompson, Jr. et al., *Legal Control of Water Resources* 33 (6th ed. 2018) (emphasis added).

The district court granted Greenlawn's motion to for summary judgment because they did not recognize NUO as a proper riparian landowner. (R. at 13). However, while the Plaintiffs are not themselves riparian landowners, they still have a cause of action against Greenlawn because they have been utilizing lands held by the State of New Union in public trust. Riparian landowners adjacent to navigable waters carry no interest in the riverbed. *Montana*, 450 U.S. at

552 (citing *Packer v. Bird*, 137 U.S. 661, 672 (1891); *Railroad Co. v. Schurmeir*, 74 U.S. 272, 289 (1868); 33 U.S.C. § 10; 42 U.S.C. § 931). The ownerships of riverbeds are an incident to the sovereignty of the States. *Montana*, 450 U.S. at 552 (citing *Martin v. Waddell*, 41 U.S. 367, 411 (1842)). The riverbeds owned by the state are held in public trust for the benefit and use of the public. *Movrich v. Lobermeier*, 905 N.W.2d 807, 814 (Wis. 2018) (citations omitted); *Orr v. Mortvedt*, 735 N.W.2d 610, 616 (Iowa 2007)(citations omitted); *Holland v. Fort Pierce Financing & Const. Co.*, 27 So. 2d 76, 81 (Fla. 1946) (citations omitted). As oyster fishman, the members of NUO have relied on the riverbeds, which are owned by the State of New Union, for their very livelihood. Unless they are allowed to purse a cause of action against Greenlawn, their way of life is in jeopardy.

The rights of a riparian owner are *always* subordinate to the rights of the general public. *New Jersey v. Delaware*, 552 U.S. 597, 613 (2008) (emphasis added). Greenlawn, as a riparian landowner, is subject to liability for actions that cause harm to a nonriparian exercising a right created by governmental authority. Restatement (Second) of Torts § 856 (1979). An association, such as NUO, may bring an action to protect the public trust where the challenged action would lessen the value of the affected area. *Friends of Earth, Inc. v. Laidlaw Environmental Service (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Serra Club v. Morton*, 405 U.S. 727, 735 (1972)). Therefore, NUO has the right to bring an action against Greenlawn in order to protect areas, such as Green Bay, held in public trust.

Following the minority rule, New Union recognizes that a municipality, such as Greenlawn, may withdraw water to supply and benefit non-riparian landowners within the municipality. *See Tubbs v. 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 (Pa. 1871); *Barre Water Co. v.*

Carnes, 65 Vt. 626, 627 (Vt. 1893)). The Riparian Doctrine allows for the reasonable consumption of water by a landowner. *Hendrick*, 4 Ga. at 257. However, when a party complains about the use of water by a riparian landowner *it should be left to the jury to decide* whether the usage complained of was appropriate. *Id.* at 603 (citing *Evans v. Merriweather*, 4 Ill. 492, 497 (Ill. 1842)) (emphasis added). Summary judgment is appropriate where the movant shows that there is *no* dispute as to any material fact. Fed. R. Civ. P. 56 (a) (emphasis added).

To put it succinctly, the question of whether Greenlawn's use of water was reasonable is a question for the jury; thus, the district court erred in granting summary judgment to Greenlawn with the question of fact undecided. This Court should reverse the decision of the district court and allow for NUO to make its case in front of an appropriate factfinder.

A. In Order To Preserve The Riverbeds Of The Bypass Reach And Green Bay, NUO May Bring An Action Against Greenlawn To Protect The Public Trust.

Greenlawn's western border encompasses both sides of the Bypass Reach, making them a riparian landowner. (R. at 5.); *See also* Appendix "A." There is no contention by the Plaintiffs to this point. However, Plaintiffs do take issue with the unreasonable consumption of water by Greenlawn starting on April 23, 2017. Ordinarily, riparian landowners are only subject to a cause of action against another riparian landowner; and, Plaintiffs concede that no member of NUO is in fact a riparian landowner. But that does not preclude NUO from asserting an action against Greenlawn because they are bringing this action to protect a public trust.

The ownership of riverbeds is an incident to the sovereignty of the States. *Montana*, 450 U.S. at 552 (citations omitted). The riverbeds owned by the state are held in public trust for the benefit and use of the public. *Movrich*, 905 N.W.2d at 814 (holding that lakebed was held in trust by the state) (citations omitted); *Orr*, 735 N.W.2d at 616 (citations omitted); *Holland*, 27 So. 2d at 81 (citations omitted).

In *Montana* the Court was tasked with determining if the United States owned riverbeds as public land. 450 U.S. at 551. At issue were two treaties entered into between the United States and Indian tribes as to whether or not they had conveyed ownership of the riverbeds to the tribes. *Id.* The Court, looking at prior precedent which determined that the control over property underlying navigable waters is "so strongly identified with the sovereign power of government," would not hold that the rights to the soil had been conveyed absent clear language. *Id.* at 552 (citing *United States v. Oregon*, 295 U.S. 610, 615 (2001)). The Court ultimately held that the rights to the riverbeds had not been conveyed to the Indian tribes but had remained with the United States, finally passing to the state of Montana once it was admitted into the Union. *Id.* 556–57.

It is important to note that Greenlawn does in fact hold title to the riverbeds *within their city limits*. (R. at 5.) (emphasis added). As to all other riverbeds located outside of Greenlawn's city limits, those beds are owned by the State of New Union and are held in Public Trust. The benefit that NUO receives arises from farming the soil beneath the Green River and Green Bay for oysters, not the riverbed within Greenlawn's city limits.

The unreasonable use of water by Greenlawn has all but diminished any benefit the members of NUO receive as members of the general public. An association, such as NUO, may bring an action to protect the public trust where the challenged action would lessen the value of the affected area. *Friends of Earth, Inc.*, 528 U.S. at 183 (holding that an association of plaintiffs could bring an action claiming violations of Clean Water Act). The oyster industry has already seen a 50% decrease in productivity since 2000. The effects of Greenlawn's actions are already being felt in Green Bay, lessening the value of this area for every member of NUO as well as the general public.

The rights of a riparian owner are *always* subordinate to the rights of the general public. *New Jersey*, 552 U.S. at 613 (emphasis added). This Court should allow for the Plaintiffs action to proceed against the City of Greenlawn in order to protect the rights of the general public.

B. There Exists A Question As To Material Facts That May Only Be Decided By A Jury, Thus The Granting Of Summary Judgment Was In Error.

Since it has been determined that NUO may properly bring an action against Greenlawn, this Court should reverse the decision granting summary judgment in favor of Greenlawn. The question of whether Greenlawn's use of water is reasonable is a question of fact and therefore should be presented in front of a jury.

Summary judgment is appropriate where the movant shows that there is *no* dispute as to any material fact. Fed. R. Civ. P. 56 (a) (emphasis added). The Riparian Doctrine allows for the reasonable consumption of water by a landowner. *Hendrick,* 4 Ga. at 257. But, the question of whether the party complained of has used more water than his fair proportion is a question for a jury. *City of Canton*, 63 N.E. at 603 (citations omitted); *See also Martin v. British Am. Oil Producing Co.*, 102 P.2d 124, 126 (Okla. 1940). Reasonableness, being a question of fact, is not resolvable on the pleadings. *Santa Barbara Channelkeeper v. City of San Buenaventura*, 228 Cal. Rptr. 3d 584, 591 (Cal. Ct. App. 2018).

In *City of Canton*, the court had to determine whether a city, who was the upper riparian landowner, was liable for damages for diverting the flow of water from a lower riparian landowner. 63 N.E. at 602. The court opined that no riparian landowner has the right to use all of the water, only what may be considered reasonable. *Id.* at 603. However, the court did not come to the conclusion as to whether the use was reasonable. *Id.* at 604. The matter was ultimately remanded back to the trial court so that a jury could determine the issue of whether the city's use of water was reasonable. *Id.*

Likewise, this Court should allow a jury to determine the question of whether the water consumption by Greenlawn was reasonable. The binding authority in the State of New Union, *Tubbs v. Potts*, relies primarily on *City of Canton* in establishing the state's doctrine of riparian rights. This case, among the other state court decisions, establishes that the question should go before a jury.

"What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need." *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 45 P.2d 927, 1007 (Cal. 1935). Therefore, a jury should be the finder of fact to determine if Greenlawn's consumption of water given the conditions that existed at the time in question. For that reason, this Court should reverse the decision of the district court and allow Plaintiff's riparian rights claim against Greenlawn to go forward.

C. In The Alternative, The Facts In The Record Weigh In Favor Of Greenlawn's Water Consumption Being Unreasonable.

While Plaintiffs maintain that the question of reasonableness should be decided by a jury, should this Court decide to rule on the issue the facts in the record weigh more in favor of Greenlawn's water consumption being unreasonable The Riparian Doctrine allows for the *reasonable* consumption of water by a landowner. *Hendrick*, 4 Ga. at 257 (emphasis added).

In *Hendrick*, the court had to determine if a riparian landowner altering the flow of water was unreasonable. *Id.* at 244. The court opined that every riparian owner is entitled to have the source of water in its *natural channel, as it has been accustomed to flow*. *Id.* at 251 (emphasis in original). Since the defendant had altered the flow of the water, the court held that the plaintiff may maintain his action as long as damages could be proven. *Id.* at 252.

In April 2017, when Zone 2 Drought Warning restrictions were enacted, Greenlawn refused to institute drought restrictions, such as lawn watering and car washing, on its consumers. (R. at 8.) Greenlawn argued it had a right to make any reasonable use of the Bypass Reach despite drought conditions. (R. at 8.) When Zone 3 Drought Emergency restrictions were enforced, the District Engineer ordered hydroelectric power releases to be curtailed and 30 CFS flows to the Bypass Reach to be continued, despite the agreed upon restricts only mandating 7 CFS flows when in Zone 3 circumstances. (R. at 8-9.) Before curtailment of hydroelectric power, the downstream flow rates averaged 25 CFS over a 24-hour day, allowing that flowing river habitat to endure. (R. at 9.) However, after the curtailment went into effect on May 15, 2010, Greenlawn continued withdrawing water at pre-drought rates and consumed almost all of the flows in the Bypass Reach, reducing the downstream flow to nearly zero. (R. at 9.)

The end result of these action are reduced flows to the Green River Bay. (R. at 10.) Those decreased flows into the Bay have increased the salinity and decreased the amount of nutrients of the bay. (R. at 10.) Overall, the oyster population has seen a 50% decrease in population since the year 2000. (R. at 10.) Surely, all of this amounts to an unreasonable use of water by Greenlawn. Accordingly, this Court should reverse the decision of the district court and enter judgment in favor of the Plaintiffs.

II. ACOE HAD SUFFICIENT DISCRETION OVER THE OPERATION OF THE HOWARD RUNNET DAM WORKS, WHICH TRIGGERED THE CONSULTATION REQUIREMENT UNDER § 7(A) WHEN THEY TOOK AGENCY ACTION THAT MIGHT AFFECT THE OVAL PIGTOE MUSSEL HABITAT.

The ESA affords endangered species protection from both private and governmental activities that might threaten their survival. Section 7 of the ESA requires governmental agencies to consult with FWS and the National Marine Fisheries Service before taking discretionary

actions that may affect the habitat of an endangered species. In regard to this consultation requirement, Section 7(a) of the ESA provides:

> (2) Each Federal Agency shall, in consultation with and assistance of the Secretary [of interior], insure that *any action* authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the] habitat of such species . . . .
>
> (3) Subject to such guidelines as the Secretary may establish, a Federal agency *shall consult* with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

16 U.S.C. § 1536(a) (emphasis added). An "action" is anything an agency can contemplate doing while there is still an alternative decision available. *Tennessee Valley Authority*, 437 U.S. at 206. Further, the Code of Federal Regulation's provides the definition and examples of what may constitute an action:

> [a]ction means all activities or programs of any kind, authorized, funded, or carried out, in whole or in part, by federal agencies in the United States or upon the high seas. Examples include . . . d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02 (2019). ACOE was required to consult with FWS in order to satisfy this consultation requirement. (R. at 13–14.)

Plaintiffs contend that ACOE was subjected to this consultation requirement when the District Commander ordered the flow of water raised from 7 CFS to 30 CFS on April 23, 2017, during Zone 2 Drought Conditions. (R. at 8.) This act shows ACOE had the discretion to change the flow of water into the bypass reach, thus triggering the consultation requirement. Additionally, language in the WCM, such as "minimum flow of at least," indicates that ACOE has some discretion during drought conditions. (R. at 7.) Where ACOE has discretion to manage their activities, they must fulfill their obligations [of consulting] under the ESA. *Platte River*,

862 F.2d at 34; *See American Rivers v. United States Army Corps of Engineers*, 271 F. Supp. 2d 230, 252 (D.D.C. 2003) (holding ACOE master manual afforded the Corps sufficient discretion in its management of a river basin to fulfill responsibilities under the ESA).

When there is an action by a governmental agency that might affect a protected species or habitat, the normal procedure would be to have a "biological assessment" or "Biological Opinion" prepared. *See* 16 U.S.C. § 1536(c)(1)–(2). Under the ESA, ACOE is required to consider the direct and indirect environmental impact when discharging water. *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512–13 (10th Cir. 1985); *See Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1025 (9th Cir. 2012) (holding agencies approval of suction dredge mining threatening salmon habitat was agency action requiring consultation); *See also Sierra Club v. Yeutter*, 926 F.2d 429, 439 (5th Cir. 1991) (holding that agency failed to meet consultation requirement when approving the cutting of trees jeopardizing the habitat of a protected species). In the case at bar, ACOE did not conduct any sort of environmental impact study before taking their action. (R. at 1–19.)

Finally, the district court opines that since the construction of the Howard Runnet Dam Works predates the ESA, any action by ACOE would not be subject to the consultation requirement under the ESA. (R. at 14.) But, the district court cites no statutory or case law that supports this position. There is but one case, which is not controlling on this Court, that provides some authority on this issue. *See Natural Resources Defense Council v. Kempthorne*, 612 F. Supp. 2d 954, 977 (E.D. Cal. 2009) (holding water contracts entered into before passage of the ESA contained requirements that water be diverted certain way did not allow for agency discretion). Even so, that case is distinguishable because ACOE in this case did have discretion.

Based on the following, this Court should find that ACOE failed to meet the requirements set forth under § 7(a) of the ESA. Because ACOE failed to even conduct a consultation, their inaction was arbitrary and capricious. Accordingly, summary judgment for ACOE should be reversed and granted in favor of NUO. Thus, NUO is entitled to appropriate injunctive relief under the ESA.

A. ACOE Committed An Action When The District Commander Ordered The Flow Of Water To Be Increased From 7 CFS To 30 CFS.

ACOE was in charge of operating the Howard Runnet Dam Works and was governed by the WCM. As a federal agency, ACOE was obligated to ensure their actions did not adversely affect an endangered species in any way. Under the ESA, governmental agencies are obligated to protect endangered species when their governing authority gives them the power to do so. *Platte River*, 962 F.2d at 34; *See also American Rivers*, 271 F. Supp. 2d at 252.

Furthermore, under the ESA, ACOE is required to consider the direct and indirect environmental impact when they act by discharging water. *Riverside Irr. Dist*, 758 F.2d at 512–13; *See Karuk Tribe of California*, 681 F.3d at 1025 (holding agencies approval of suction dredge mining threatening salmon habitat was agency action requiring consultation); *See also Sierra Club*, 926 F.2d at 439 (holding that agency failed to meet consultation requirement when approving the cutting of trees jeopardizing the habitat of a protected species).

Karuk illustrates where there has been indirect agency action. In that case, members of an Indian tribe brought suit against the forest service for approving mining operations in a river that was home to an endangered salmon species. 681 F.3d at 1012. The forest service never consulted with FWS or any other consulting agency. *Id.* at 1015. The court found that the mining activities "may affect" the salmon population in the river. *Id.* at 1030. Since the forest service had the

discretion to approve these mining operations, the court held that the forest service was subject to the consultation requirement under the ESA. *Id.*

While ACOE did have to respect the riparian rights of Greenlawn, they did have some discretion as to how the dam was operated. (R. at 6.) The WMC permitted ACOE discretion to control the flow of water to the hydroelectric plant during Zone 1 and 2 drought conditions. (R. at 7.) Similar to *Karuk*, ACOE granted Greenlawn more water than the WCM provided for.

In operating the Howard Runnet Dam Works, ACOE had an obligation to protect any endangered species that could be affected by the operation of the Dams. In this case, ACOE failed to consider how meeting Greenlawn's demand for water could impact the Oval Pigtoe Mussel habitat. Thus, they were required to follow the consultation requirement under § 7(a) of the ESA.

B. Since ACOE Committed A Discretionary Action, They Were Required To Consult With FWS, Which They Did Not Do.

After determining that the action by ACOE did trigger the consultation requirement under § 7(a) of the ESA, the Court must then determine if ACOE met this requirement. Nothing in the record indicates that ACOE consulted with the appropriate Federal agency. (R. at 1-19.) Therefore, the consultation requirement is clearly not satisfied.

This action by ACOE required consultation with FWS to ensure the increase in the flow of water would not affect the Oval Pigtoe Mussel in any way. *See* 16 U.S.C. § 1536(a). Actions directly or indirectly modifying water, such as the flow of the Green River, constitutes an action that requires consultation pursuant to §7(a) of the ESA. 50 C.F.R. § 402.02. The actions by ACOE, without contradiction, allowed Greenlawn to destroy and modify the habitat of the Oval Pigtoe Mussel below the Bypass Reach.

The discretionary action of raising the flow of water from 7 CFS to 30 CFS for Greenlawn's use ultimately led to the death of approximately 25% of the Mussel population (R. at 9.) The record clearly indicates that the natural flow of water in the Green River was impacted as a result of ACOE's discretionary action. Had ACOE consulted FWS before giving in to Greenlawn's demands, Greenlawn likely would not have been able to reduce the downstream flow rates to 0 CFS. Furthermore, avoiding that reduction would have roevented the formerly healthy habitat from being reduced to stagnant pools of water; and exposed Mussel beds (R. at 9.) By definition, the Green River was modified, and no consultation took place. (R. at 1–19.) The FWS should have been consulted before ACOE gave into the demands of Greenlawn.

When there is an action by a governmental agency that might affect a protect species or habitat, the normal procedure would be to have a "biological assessment" or "Biological Opinion" prepared. *See* 16 U.S.C. § 1536(c)(1)–(2). But again, the record does not indicate any sort of biological assessment took place.

Further, where a biological opinion is *simply lacking necessary information*, the decision by the federal agency is arbitrary and capricious. *National Wildlife Federation v. National Marine Service*, 524 F. 3d 917, 926 (9th Cir. 2008) (Inadequate analysis on impact of species in assessment was arbitrary and capricious); *South Yuba River Citizens League v. National Marine Fisheries Service*, 723 F. Supp. 2d 1247, 1268 (E.D. Cal 2010) (Failure to include cumulative effects of dam project in assessment was arbitrary and capricious); *National Wildlife Federation v. Harvey*, 574 F. Supp. 2d 934, 953 (E.D. Ark. 2008) (Assessment without providing adequate facts or explanations was arbitrary and capricious). Clearly, the authority on at least conducting a biological assessment should weigh heavily on this Court. It can only be assumed, but had this

consultation been done, Greenlawn's damage to the Oval Pigtoe Mussel population could have been prevented.

To that end, this Court should find that ACOE failed to meet the consultation requirement under § 7(a) of the ESA and, thus, have violated the ESA. As a result, this Court should reverse the decision of the district court and grant summary judgment in favor the Plaintiffs. Additionally, these actions contributed to Greenlawn's ability to commit an illegal "take" of this endangered species.

III. GREENLAWN'S CONTINUED WITHDRAWALS IN DROUGHT CONDITIONS IS A TAKE OF THE ENDANGERED OVAL PIGTOE MUSSEL UNDER § 9 OF THE ENDANGERED SPECIES ACT.

The Court must find Greenlawn has committed a take of the endangered Oval Pigtoe Mussel by withdrawing the entire flow of water from the Bypass Reach during drought warning conditions. The Endangered Species Act § 9 prohibits the "take" of any listed endangered species. 16 U.S.C. § 1538 (a)(1)(B). The ESA defines the term "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1988). The Supreme Court has specifically acknowledged that the regulatory definition of "harm" includes indirect as well as direct harms in *Babbitt*, stating: "unless the statutory term 'harm' encompasses indirect, as well as direct injuries, the word has no meaning that does not duplicate the meaning of the other words that [ESA] § 3 uses to define 'take.'" 515 U.S. at 697–98.

Prior to May 15, 2017, when hydroelectric releases were still being made from the Dam Works, there was a 25 CFS downstream flow rate. (R. at 9.) After curtailing the hydroelectric releases, 30 CFS was still being released to the Bypass Reach specifically for Greenlawn's water supply. (R. at 9.) However, the downstream flow rate dropped close to zero, despite those 30

CFS, immediately after hydroelectric releases were curtailed on May 15, 2017. Therefore, Greenlawn was consuming nearly all available downstream flow despite drought conditions. This behavior upstream was the cause, whether directly or indirectly, of depleting the thriving ecosystem downstream, which resulted in the death of endangered Oval Pigtoe Mussels. Therefore, Greenlawn's actions constitute a "take" of the endangered Pigtoe Mussel because their behavior harmed the species in a way that resulted in the death of that species.

A. Greenlawn Committed A Take By Destroying And Significantly Modifying Habitat Necessary For The Mussels' Essential Behavior Patterns.

FWS regulations define "harm," to specifically include conduct that modifies or destroys habitat. 50 C.F.R. § 17.3. Furthermore, harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. *Id.* Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. *See Babbitt,* 515 U.S. at 708 (1995). While direct physical habitat destruction, such as logging, is prohibited, there has been no finding which precludes that activities outside of a species' habitat which result in habitat modification can be a prohibited "take." *E.g.*, *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996); *Forest Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995).

Oval Pigtoe Mussel habitats require two essential elements to survive. (R. at 9.) First, the Mussels require a gravel or silty sand riverbed and slow to moderate currents in order to shelter themselves. (R. at 9.) Second, the Mussels require a healthy population of the sailfin shiner fish species in order to breed. (R. at 9.) Greenlawn's continued water withdrawals upstream, despite drought conditions, eliminated these essential elements downstream. (R. at 9.) The elimination of those elements both destroyed and significantly modified the habitat necessary for the Mussels'

essential behavior patterns of sheltering and breeding, respectively. Furthermore, that modification and destruction resulted in the death of approximately 25% of the Green River Oval Pigtoe population. (R. at 9.) Therefore, Greenlawn's actions constitute a "take" of the endangered Oval Pigtoe Mussel because their actions, whether directly or indirectly, both destroyed and modified the downstream habitat in a way that resulted in the death of Mussels.

1. Greenlawn committed a take by destroying the Oval Pigtoe Mussels' habitat necessary for the essential behavior pattern of sheltering.

Greenlawn's continued withdrawals from the Bypass Reach in drought conditions constitutes a "take" of the Oval Pigtoe Mussel because the action killed Mussels when it destroyed the habitat necessary for sheltering. In *Tennessee Valley Authority* ("TVA"), the TVA had nearly completed the construction of a dam when the plaintiff sought to enjoin its completion. 437 U.S. at 156. While the construction of the dam had been both approved and funded by congress, the Court held the injunction was proper because completion of the dam would, consequently, violate § 9 of the ESA. *Id.* at 172. Specifically, completion of the dam would destroy the downstream "critical habitat" of the endangered snail darter. *Id.* at 183. Therefore, the Court upheld the injunction based on the dam completion's likelihood to destroy the habitat of an endangered species. *Id.*

In the case at bar, Greenlawn's action of withdrawing water was approved by their agreement with ACOE just as the actions in TVA were approved by Congress. In TVA, completion of the dam would have destroyed snail darter habitat downstream. Similarly, Greenlawn's actions upstream already have and, if allowed, will continue to destroy the critical Oval Pigtoe Mussel habitat downstream. Furthermore, unlike TVA, where the agency was acting fully within the confines of their permit, Greenlawn's action was outside of their rights as a

riparian landowner since their water use was unreasonable. (*supra* pg. 13.) This only makes their violation of § 9 all the more significant.

The Green River downstream of the Howard Runnet Dam has always been a flowing river habitat with stretches of sand and bedded gravel that served as the necessary habitat for the endangered Oval Pigtoe Mussel. (R. at 9.) Uncontradicted expert testimony established that a minimum flow of 25 CFS over a 24-hour period is necessary to sustain this habitat and prevent the extirpation of the Green River Oval Pigtoe population. (R. at 10.) However, when drought restrictions were in place, Greenlawn's unreasonable use completely depleted the flow of 25 CFS immediately after the hydroelectric releases were curtailed on May 15. (R. at 9.) Greenlawn's continued withdrawals in severe drought conditions reduced the once thriving downstream ecosystem into stagnant pools of water and narrow trickles, which eliminated moderate currents and exposed several beds of the endangered Mussels. (R. at 9.) Furthermore, the stagnation of those trickling pools of water increased the siltation of the riverbed, destroying the necessary gravel or silty sand habitats. (R. at 9). With no moderate currents and riverbeds ruined by increased siltation, the Mussels' necessary habitat was destroyed, and the population was left to smother. (R. at 9.) While adult Oval Pigtoe Mussels can adapt to minor changes in water levels by moving themselves to habitat that remains submerged, Greenlawn's withdrawals were so extensive and depleting that there was no chance for the Mussels to remain submerged. (R. at 9.) It is uncontradicted expert testimony that these conditions led to the death of approximately 25% of the Green River Oval Pigtoe population.

Therefore, the Court should find Greenlawn's withdrawal of nearly all the drought-reduced Bypass Reach flow constituted a take of the endangered Oval Pigtoe Mussel because it

significantly degraded the habitat by impairing the Mussel's ability to shelter, which resulted in the death of the 25% of the species population.

2. Greenlawn committed a take by significantly modifying the Oval Pigtoe Mussels' habitat necessary for the essential behavior pattern of breeding.

Additionally, Greenlawn's continued withdrawals from the Bypass Reach in drought conditions constitutes a take of the Oval Pigtoe Mussel because the action killed mussels by significantly degrading in a way that impaired the Mussel's essential behavior pattern of breeding. In *Babbitt,* the parties alleged to have committed a "take" were individual landowners, families, and small logging companies. *Babbitt*, 515 U.S. at 692. These parties were engaging in, what would usually be, entirely proper logging practices that they depended on for economic success *Id.* However, the legal logging practices also happened to detrimentally change the natural habitats of the endangered red-cockaded woodpecker and threatened spotted owl. *Id.* at 696. Furthermore, it was clear that habitat modification would result in members of those species being injured or killed. *Id.* Therefore, the Court ruled that these actions would constitute a harm, and thereby at "take," since they would result in serious habitat modification that actually caused the injury or death of endangered or protected species. *Id.* at 697.

Greenlawn's "take" is the consequences of their unreasonable withdrawal of water from the Bypass Reach. Just as in *Babbitt*, where mere logging was not the "take," Greenlawn's withdrawal alone is not the "take." Similar to *Babbitt*, where the logging was appropriate under normal circumstances, Greenlawn's actions in non-drought conditions might not be considered a "take." Furthermore, even with Greenlawn's unreasonable use, the withdrawal alone would not be considered a "take." In *Babbitt*, the logging was not considered a "take" until it threatened to alter the endangered woodpecker or owl habitat in a way that would result in the species' injury or death. Similarly, Greenlawn's withdrawal became a "take" when it significantly modified the

downstream Mussel habitat in a way that resulted in the injury and death of endangered Oval Pigtoe Mussels.

In the case at bar, the significant habitat modification resulting from Greenlawn's withdrawals was the modified population of sailfin shiner fish. Oval pigtoe habitats require a healthy population of sailfin shiners, the particular host fish species to which Oval Pigtoe Mussel larval must attach themselves to in order to spawn and mature. (R. at 9.) Therefore, a healthy population of this fish is necessary for the Mussels' essential behavior pattern of breeding. However, Greenlawn's withdrawal of nearly all the water flow made this essential behavior pattern impossible. As discussed, Greenlawn's unreasonable withdrawals resulted in the once thriving downstream ecosystem's depletion into stagnant pools of water and narrow trickles. (R. at 9.) These water levels made it impossible to support a healthy sailfin shiners population, as extremely low water levels prevent their migration. (R. at 9.) Consequently, this impaired the endangered Mussels' breeding abilities since it prevented them from being able to properly spawn and mature. Therefore, the Court should find Greenlawn's withdrawal of nearly all the drought-reduced Bypass Reach flow constituted a "take" of the endangered Oval Pigtoe Mussel because it significantly degraded the habitat by impairing the Mussel's ability to breed, which resulted in the death of the 25% of the species population.

B. GREENLAWN'S WITHDRAWAL IS A "TAKE" BECAUSE THE CITY'S REGULATED ACTIVITIES UPSTREAM WERE THE PROXIMATE CAUSE OF THE HABITAT DESTRUCTION DOWNSTREAM.

Greenlawn attempts to assert that their actions cannot be a "take" since they occurred entirely outside the habitat in question and "do not have a causal connection" to the river drying up. (R. at 16.) However, there are no cases to support the premise that a municipality's activities cannot be a "take" when they only physically occurred outside of the habitat in question. In fact,

in the context of states' regulatory activities that may impact endangered species, several courts have specifically recognized that indirect harm can constitute a "take." *See* e.g., *Animal Welfare Inst. v. Martin*, 623 F.3d 19 (1st Cir. 2010) (State authorization of foothold traps that harmed lynx); *Strahan v. Coxe,* 127 F.3d 155 (1st Cir. 1997) (State licensing of fishing gear which harmed endangered Right Whales); *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998) (county's refusal to ban beach driving during turtle nesting season). In *Babbitt*, the Court determined the regulatory definition of "harm" includes indirect as well as direct harms, stating: "unless the statutory term 'harm' encompasses indirect, as well as direct injuries, the word has no meaning that does not duplicate the meaning of the other words that [ESA] § 3 uses to define 'take.'" 515 U.S. at 697–98. In doing so, the Supreme Court specifically acknowledged that harm constituting a "take" can be the result of indirect or direct actions. *Id.*

As for causal connections, in the instance of a state regulation's indirect harm resulting in a prohibited "take," it is true that where that action was not the proximate cause of a chain of events resulting in the death of endangered species, there is no "take." *Arkansas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014). However, where the destruction of habitat is the direct and foreseeable harm of upstream activities and constitutes the but-for cause of the downstream conditions, such activities can constitute habitat modification. *Natural Resources Defense Council v. Zinke*, 347 F. Supp. 464 (E.D. Cal. 2018) (water transfers pursuant to State water rights could constitute habitat modification due to temperature effects on downstream salmon habitat).

Greenlawn's attempt to escape liability for a violation of the ESA is unsupported by case law. Furthermore, there is strong precedent to infer that the ESA's definition of the word "harm" intends to prohibit all harm, whether direct or indirect, that results in the destruction or

significant modification of an endangered species' habitat. Therefore, the destroyed riverbeds and modified fish populations that resulted from Greenlawn depleting downstream flow constitute, at a minimum, indirect harm that would constitute a prohibited "take." Additionally, Greenlawn's further attempt to escape liability rests on the connection between its water withdrawals and the depletion of downstream flow, arguing one was not the but-for cause of the other. However, even with the drought, the downstream flow did not fall below the necessary 25 CFS downstream flow until after the hydroelectric flow was curtailed and Greenlawn continued to withdrawal the water until near total depletion.

1. *Opposing council's argument that they cannot be guilty based on activities occurring only outside of the habitat in question is unavailing.*

Greenlawn's continued withdrawal of the water from the Bypass Reach constitutes a "take" since it actually resulted in harm, directly or indirectly, to the Oval Pigtoe Mussels downstream. Opposing council asserts that they cannot be guilty of habitat modifications based on activities occurring entirely outside the habitat in question. However, as stated, the Court has already determined that harm need not be direct to constitute a "take" under the ESA. Therefore, even if the Court today determines that Greenlawn's actions only indirectly harmed the habitat downstream, that would not be enough for Greenlawn to escape liability under the ESA.

Greenlawn's action of withdrawing water from the Bypass Reach despite drought conditions resulted in depleted flows downstream. (R. at 9.) Those depleted flows resulted in substantial habitat modification and habitat destruction downstream. (R. at 9.) The modified and destroyed habitat resulted in the death of 25% of the Oval Pigtoe population. (R. at 9.) Therefore, it is clear to see harm befell the Oval Pigtoe Mussels because of Greenlawn's unreasonable water withdrawals. Consequently, that harm, whether direct or indirect, constitutes a prohibited "take" under the ESA.

2. Opposing councils argument that there is an insufficient causal connection is also unavailing.

Greenlawn's continued withdrawal of the water constitutes a "take" since it is the proximate cause of the harm and death of Oval Pigtoe Mussels downstream. Opposing council's argument that there is an insufficient causal connection between its water withdrawals and the drying up of the Green River downstream. (R. at 19.) This argument rests on the premise that its water withdrawals only caused modification of the habitat when combined with the increased upstream agricultural withdrawals, precipitation conditions, and ACEO's operation of the Howard Runnet Dam Works. However, this argument is unavailing.

In the past when large agricultural operations occurred upstream and caused evaporative water losses, the downstream flows remained healthy. (R. at 7–8). While precipitation, which was also limited here, contributed to that fact, it still maintains that the river can be kept above proper levels even with increased agricultural use. Furthermore, ACEO's operation of the dams imposed no greater restrictions than agreed upon for the appropriate drought conditions. (R. at 8-9). In fact, it lessened those restrictions by supplying the Bypass Reach with 30 CFS instead of 7. (R. at 8-9). Therefore, while ACEO's failure to comply with the consultation requirement (*supra* pg. 14.) may have led to the harm of the Mussels, the only way it did so was by meeting Greenlawn's demands for increased water supply.

Greenlawn further asserts that, since the city has not changed its rate of water withdrawals during the drought warning, it is the naturally occurring drought, not their withdrawals, that has harmed the Mussel habitat. However, this argument is defeated by the fact that from August 12 to May 15, 2017, while in both Zone 1 and Zone 2 drought conditions, the downstream flow remained at the necessary levels. (R. 8-9.) It was only after the curtailment of hydroelectric power, when Greenlawn's consumption alone entirely consumed the downstream

flow, that the Mussel habitat was harmed. (R. at 9.) The downstream effects on the Mussel habitat were clearly foreseeable as Greenlawn consumed the last drops of the flow from upstream. Moreover, the destruction of Mussel habitat and loss of Mussels is the direct and foreseeable result of Greenlawn's unreasonable water withdrawals. Therefore, since Greenlawn's withdrawals are the but-for cause of the downstream conditions, Greenlawn should be held liable for their "take" of the endangered Oval Pigtoe Mussel.

IV. THE COURT MUST NOT BALANCE EQUITITES IN DETERMINING THAT AN INJUNCTION IS NECESSARY TO PREVENT THE COMPLETE EXIRPTATION OF AN ENDANGERED SPECIES.

In this case, the lower court issued an injunction to avoid leaving the ESA's important protections for endangered species unenforced and allowing a significant endangered Mussel population to be extirpated. The standard of review for a decision by a district court to issue an injunction is abuse of discretion. *National Wildlife Federation*, 422 F.3d at 799 (affirming decision of district court enjoining government from operating in a way the court determine would result in irreparable harm). Once it is determined there has been a violation of ESA § 9, as with any suit, the Court must determine what relief, if any, the plaintiff is entitled to. *Tennessee Valley Authority*, 437 U.S. at 193. The ESA citizen suit provision does not authorize civil penalties, but rather, authorizes only a suit "to enjoin any person, including . . . any . . . governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g).

The Ninth Circuit has held a court must issue an injunction if the plaintiff establishes that there is "a reasonably certain threat of imminent harm to a protected species." *Defenders of Wildlife*, 204 F.3d at 925. In making these determinations, the Supreme Court held that it is not

the role of the courts to balance species eradication against the claimed public benefits of agency activities. *Tennessee Valley Authority*, 437 U.S. at 187. In doing so the Court made it clear that "neither the [ESA] nor Article III of the Constitution provides federal courts with authority to make . . . fine utilitarian calculations." *Id.* Moreover, the plain language of the Act and its legislative history shows that Congress clearly "viewed the value of endangered species as 'incalculable.'" *Id.*

In order to overturn the district court's injunction, this Court would need to determine the lower court abused its discretion in granting the injunction against Greenlawn's water withdrawals that might harm the Mussel population. As Greenlawn's actions do constitute a "take" under § 9 of the endangered species act, the Court must simply determine what relief NUO is entitled to. Since ESA's citizen suit provision only authorizes the relief of an injunction against anyone in violation of the act, the question is simply whether the Court should issue an injunction against Greenlawn's water withdrawal in this matter. The only determinative question in this matter is whether NUO has established that there is a "reasonably certain threat of imminent harm" to the Oval Pigtoe Mussel. In coming to this decision, the Court must not balance the anticipated eradication of the Mussels with Greenlawn's claimed rights and benefits as riparian landowners. Doing so would be a "fine utilitarian calculation" the Court is unauthorized to make and; furthermore, would violate Congress' view that the value of the endangered Oval Pigtoe Mussel is "incalculable."

Greenlawn's water withdrawals during the drought condition pose a reasonably certain threat of imminent harm to the endangered Oval Pigtoe Mussels, making necessary an injunction that will prohibit Greenlawn from making water withdrawals that reduce downstream flows below the rate necessary for Mussel survival. While the threat of harm that induced this case has

been temporarily alleviated by the heavy rains that returned the lake to Zone 1 levels, the threat is still imminent. (R. at 11.) All parties have agreed, based on recent trends and scientific assessments of precipitation patterns and temperature trends, that Zone 3 Drought Warning conditions are likely to occur again in the near future. (R. at 11.) Furthermore, according to uncontradicted testimony, if the conditions are allowed to persist, they would entirely eliminate the Green River population of the Oval Pigtoe Mussel. (R. at 9.)

Therefore, the Court should not balance equities in coming to the conclusion that the lower court did not abuse their discretion in granting the injunction. Furthermore, the Court should uphold the injunction since allowing Greenlawn to resume their unreasonable water withdrawals presents a reasonably certain threat of imminent harm to the endangered Oval Pigtoe Mussel.

CONCLUSION

The district court of New Union improperly granted summary judgment to Greenlawn on the Riparian Rights Claim. NUO has a valid cause of action under the public trust doctrine that will allow them to assert their riparian rights claims against Greenlawn. However, because there is a question of fact on whether or not the consumption was "reasonable" this issue should be remanded to be heard in front of a jury.

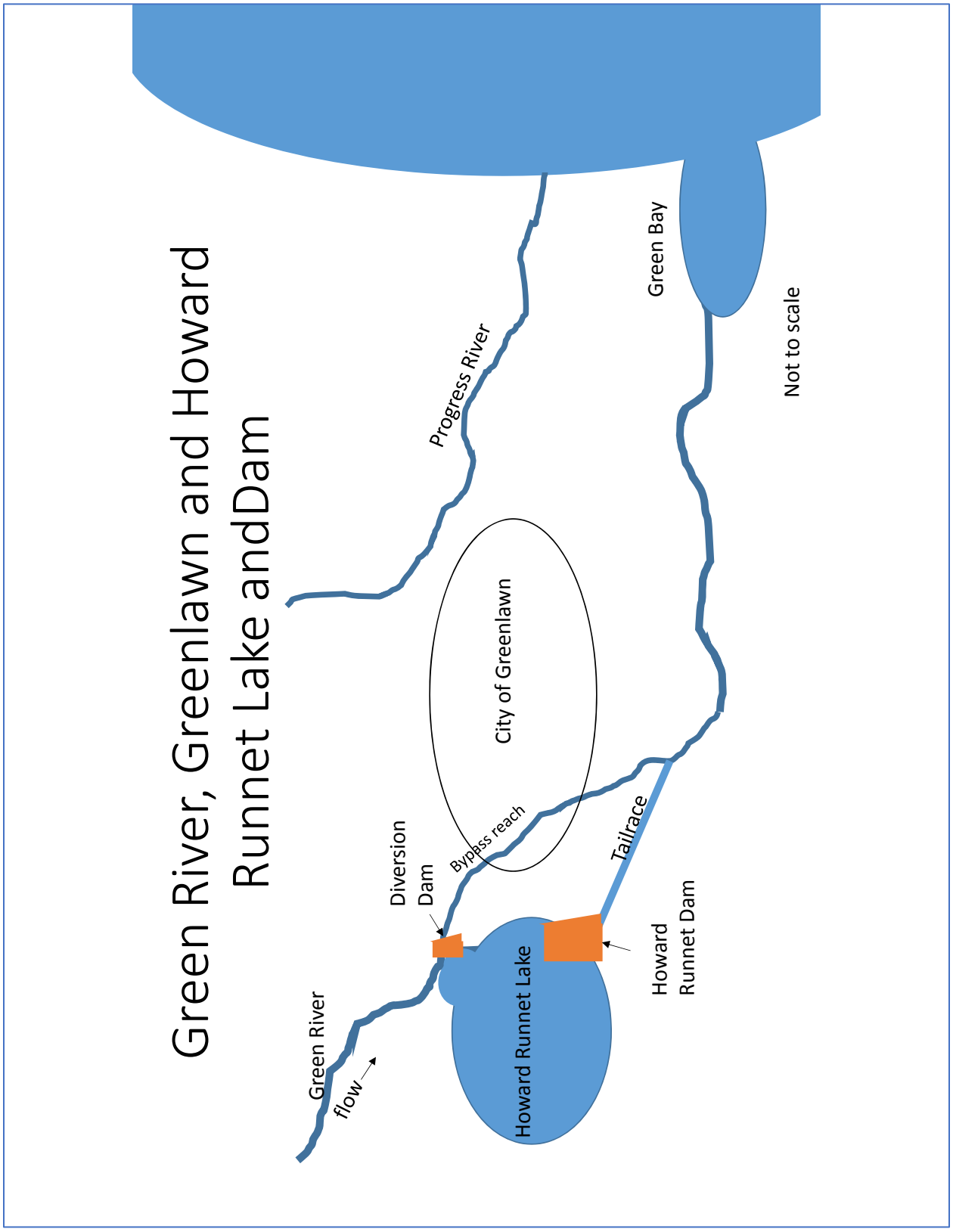
The district court also erred in granting summary judgment in favor of ACOE on the consultation requirement under § 7(a) of the ESA. The action of increasing the flow of water to the Bypass Reach by ACOE triggered the consultation requirement under the ESA.

This Court should affirm the decision of the district court granting summary judgment in favor of NUO concluding Greenlawn did commit a "take" of the endangered Oval Pigtoe Mussel under § 9 of the ESA.

Finally, the Court should affirm the injunction against Greenlawn that bars them from making unreasonable water withdrawals that pose a certain threat of imminent harm to the Green River Oval Pigtoe Mussel population downstream.

Due to the foregoing, this Court should reverse the decision of the district court on issues one and two; and, affirm the district courts decisions on issues three and four in favor of the Plaintiffs, NUO.

APPENDIX "A"


Green River, Greenlawn and Howard Runnet Lake andDam
Progress River
Green Bay
Not to scale
City of Greenlawn
Diversion Dam
Bypass reach
Tailrace
Howard Runnet Dam
Howard Runnet Lake
Green River
flow