2020 National Environmental Law Moot Court Competition (NELMCC)

CA. NO. 19-000987

In the United States Court of Appeals for the Twelfth Circuit

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NEW UNION OYSTERCATCHERS, INC.,
Plaintiff - Appellant,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant - Appellee,

and

CITY OF GREENLAWN, NEW UNION
Defendant - Appellee,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION IN NO. 66-CV-2017 (RMN)

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Brief for New Union Oystercatchers, Inc.

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Attorneys for
New Union Oystercatchers, Inc.

Team Brief

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I. STATEMENT OF JURISDICTION

This is a petition for review of a summary judgment ruling by the District Court of New Union concerning the Endangered Species Act (ESA) and riparian landowner rights of the City of Greenlawn (Greenlawn). The District Court had federal question jurisdiction over the ESA claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the state-law riparian rights claims under 28 U.S.C. § 1367.

The New Union Oystercatchers (NUO) and Greenlawn both filed a timely Notice of Appeal of the district court order and properly preserved all issues in their petitions. The case is not moot because the oval pigtoe mussel is still listed as an endangered species and parties agree that drought conditions are likely to occur again because of recent climate trends. R. at 11. This court has appellate jurisdiction under 28 U.S.C. § 1291.

NUO has standing to sue under the citizen suit provision of the ESA § 13(g). 16 U.S.C. § 1540(g). The citizen suit provision authorizes enforcement of the ESA by "any person," including non-profit organizations. *See Bennett v. Spear*, 520 U.S. 154 (1997). Though the Supreme Court restricted this broad grant of standing in *Lujan v. Defenders of Wildlife*, NUO satisfies the Article III injury-in-fact requirement. 504 U.S. 555 (1992). Life has been dire for the fishers of NUO and their families since the reduced Green River water flow reduced the flow of nutrients into the ecosystem and increased its salinity. R. at 10. These changes reduced catches, forcing several fishers to sell their boats to avoid defaulting on their loans. *Id.* Coupled with the increasing electric rate fuel surcharges from the recurrently inoperable Howard Runnet hydroelectric plant, these palpable injuries have caused desperate times for fishers in Green Bay.

II. ISSUES PRESENTED

1. Does Greenlawn have the right, as a riparian landowner, to continue water withdrawals for municipal purposes during drought conditions without any water conservation measures?
2. Did the Army Corps of Engineers (Army Corps) engage in a discretionary action subject to the consultation requirement within § 7 of the ESA when it increased the water flow to Greenlawn?
3. Did Greenlawn's withdrawal of the drought-reduced flow from the Howard Runnet Dam Works (HRDW) constitute a "take" of the endangered oval pigtoe mussel in violation of § 9 of the ESA?
4. Must the district court balance the equities before enjoining a beneficial municipal activity likely to cause the extirpation of an entire population of an endangered species?

III. STATEMENT OF THE CASE

This is a petition for appellate review of the District Court for New Union's decision concerning the eradication of 25% of the oval pigtoe mussel from the Green River by Greenlawn and the Army Corps. Greenlawn takes its municipal water supply from the Green River Bypass Reach. During a drought in the spring of 2017, the Army Corps had to curtail hydroelectric power releases and water flow into the Bypass Reach in accordance with the Water Control Manual's instructions. The Army Corp's drought restrictions were to preserve the target Howard Runnett Lake water levels. Managing the Howard Runnett Lake's water level is critical to sustaining the wellbeing of the Green River Valley during drought and flood conditions. Following the Army Corp's curtailment of water releases into the Bypass Reach, Greenlawn made threatening complaints asserting a riparian landowner right to unmitigated water withdrawal. Disregarding foreseeable harm to downstream species and the WCM's drought

procedures, the District Commander for the Army Corps relented and increased the water flow rate into the Bypass Reach to unsustainable levels.

Greenlawn's consequent consumption of nearly all of the water in the Bypass Reach had disastrous effects on the endangered oval pigtoe mussel population and health of the Green Bay ecosystem. NUO objected to the Army Corps' decision to increase the water flow rate and to Greenlawn's unmitigated water withdrawals and served a Notice of Intent to sue under the ESA, 16 U.S.C. § 1540(g). The District Court for New Union granted in part and denied in part cross-motions for summary judgment by NUO, Greenlawn, and the Army Corps. While the court enjoined Greenlawn to limit its water withdrawals to remove the risk of harm to the oval pigtoe mussel, it otherwise held that Greenlawn has a riparian right to water flow into the Bypass Reach. The court also concluded that the Army Corps did not need to consult with the Fish and Wildlife Service (FWS) before increasing the water flow rate.

IV. STATEMENT OF THE FACTS

NUO is a non-profit association of multigenerational fishers suing to prevent the eradication of the endangered oval pigtoe mussel. R. at 10. The oval pigtoe mussel is a federally listed endangered species. R. at 9. The endangered oval pigtoe mussel is currently on the brink of extirpation in the Green River due to Greenlawn's overconsumption of water eliminating its natural environment. *Id.* Though the oval pigtoe mussel is normally resilient enough to adapt to minor changes in water level by migrating to new habitats, conditions in the region have become so dire that the mussels are unlikely to survive if this overconsumption continues. *Id.* at 9.

The source of this destruction lies with Greenlawn, an emerging municipality located on the historic banks of the Green River. R. at 5. Composed of mostly single-family homes, Greenlawn withdraws nearly 6 million gallons of water per day (MGD) on average to support the

domestic and industrial needs of over 100,000 residents. *Id.* Due to summer lawn and ornamental plant watering demands, these withdrawals peak at 20 MGD in July and August. *Id.* The entirety of this vast quantity of water comes from the Green River Bypass Reach, which lies downstream of the Green River Diversion Dam and Howard Runnet Dam (collectively the "Howard Runnet Dam Works"). *Id.* at 6. Less than 5% of the water that Greenlawn withdraws returns to the Green River because Greenlawn discharges its sewage into a different watershed and the water it uses for lawn irrigation is largely lost to evaporation and ground absorption. *Id.*

Congress authorized the HRDW in 1945 to support flood control, hydroelectric generation, community recreation, and fish and wildlife purposes in the region. R. at 6. Hydroelectric power generation is critically important to the Green River Valley because it is a significant source of power during the summer air conditioning season. *Id.* In 1948, Greenlawn entered into an agreement with the Army Corps to accommodate Greenlawn's riparian right to withdraw water from the Bypass Reach. *Id.* The agreement provides the Army Corps would maintain flows in the Bypass Reach 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 under the laws of the State of New Union." *Id.*

The Army Corps' operation of the HRDW is regulated by a Water Control Manual (WCM). R. at 6. By manipulating the two dams to adjust downstream flow, the Army Corps is supposed to sustainably serve the interests of the region. *Id.* The WCM establishes parameters for releasing water from the lake to maintain the target lake elevation. *Id*. These parameters were formed by considering historic flows and Greenlawn's seasonal water demands.[1] *Id.* Last revised

[1] The WCM also provides: "At 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." R. at 7.

in 1968, the WCM provides for a generous volume of water to the Bypass Reach. *Id.* at 7. Only under drought conditions which seriously risk destabilizing the river ecosystem does the WCM provide for restricting water releases to the Bypass Reach. *Id.* at 7. The different water target levels are achieved as follows:

1. Normal (*Peak summer electric demand*): 50 cubic feet per second (CFS) is released into the Bypass Reach; 200 CFS is provided to the hydroelectric turbine; 200 CFS is provided for recreational use during Saturday mornings.
2. Zone 1 (*Drought Watch*): 50 CFS is maintained into the Bypass Reach; 200 CFS is maintained to the hydroelectric turbine for up to three hours per day; recreational releases are curtailed.
3. Zone 2 (*Drought Warning*): Bypass Reach flow is curtailed to 7 CFS; 200 CFS is maintained to the hydroelectric turbine for up to three hours per day; recreational releases are curtailed.
4. Zone 3 (*Drought Emergency*): Bypass Reach flow is curtailed to 7 CFS; hydroelectric turbine releases are curtailed; recreational releases are curtailed.

Id. (emphasis in original).

Since 2006, worsening climate conditions have forced the Army Corps to apply Zone 1 restrictions five times. R. at 8. Most recently, below-average precipitation and above normal temperatures in Fall 2016 and Spring 2017 forced the drought protocol into Zone 2. *Id.*

Greenlawn dismissed the dangerously low water levels and immediately protested the Zone 2 flow restriction. R. at 8. On April 12, Greenlawn sent a letter to the Army Corps Field Office arguing that the 7 CFS flow limitation in the Bypass Reach was outdated in light of Greenlawn's recent population growth. *Id.* Despite the Army Corps District Commander's

reasonable response encouraging Greenlawn to prioritize watershed stability over lawn watering and car washing, Greenlawn refused to cooperate. *Id*. Instead, Greenlawn asserted a common law riparian landowner right to the flows of the Bypass Reach. *Id.* Regardless of drought risking permanent harm to the watershed and the life contained in the Green River, Greenlawn asserted it had no obligation to limit its water consumption. *Id*. Greenlawn maintained that watering lawns and ornamental plantings is a reasonable riparian water use even during a drought. *Id.*

The Army Corps ceded to Greenlawn's demands and increased the Bypass Reach flow to 30 CFS. R. at 8. Combined with peaking summer hydroelectric power demands, this increase lowered the lake level to a Zone 3 Drought Emergency. *Id.* At this point, the Army Corps curtailed water releases for power generation, taking the hydroelectric plant offline and causing electricity prices to rise. *Id.* at 8-10. Despite this, the Army Corps maintained 30 CFS flow into the Bypass Reach so that Greenlawn could continue its water consumption unabated. *Id.* at 8-9. Greenlawn eliminated "nearly all of the flows in the Bypass reach," leaving nothing but a trickle downstream. Id. at 9. Greenlawn's unmitigated water withdrawals transformed the formerly blooming river habitat into sand and gravel spotted with stagnant pools of water. *Id.* at 9.

The endangered oval pigtoe mussel requires gravel or silty sand riverbeds and a slow to moderate current to survive. R. at 9. The oval pigtoe also relies on a healthy population of host fish species to attach to as larval mussels before maturation. *Id.* The water stagnation increased siltation in the riverbed, smothering the endangered mussels and causing the death of nearly 25% of their population. *Id.* Though adult oval pigtoe may adapt to small changes in water levels by migrating to a more suitable habitat, Greenlawn's water withdrawals eliminated any possibility for the mussels to stay submerged. *Id.* Though none of the mussels reside on the Bypass Reach itself, overconsumption exposed the oval pigtoe mussel population downstream of the

confluence of the Bypass Reach and the Howard Runnet Dam tailrace. *Id.* Uncontroverted expert testimony highlighted the harsh reality: if not stopped, the lack of water flow will permanently eliminate the endangered oval pigtoe mussel from the Green River. *Id.* at 10.

The reduced flow in the Green River also undermined Green Bay's historically thriving oyster industry. R. at 10. The reduction of the Green River's water level increased the salinity of Green Bay and reduced the flow of nutrients into its ecosystem. *Id.* These deleterious effects allowed predators, including conch and crabs, to feast on juvenile oysters in the bay and wreak havoc on the once booming oyster industry. *Id.* Oyster harvests in 2016 were 50% less than 2000 levels, pushing many of NUO's members to the brink of bankruptcy. *Id.*

V. PROCEDURAL HISTORY

NUO sued the Army Corps and Greenlawn in the District Court for New Union, alleging multiple violations of the ESA in connection with Greenlawn's water withdrawals and the Army Corp's operation of the HRDW. R. at 10. The Army Corps cross-claimed against Greenlawn for violating the ESA and moved for summary judgment to dismiss NUO's opposing claim. *Id.* NUO followed suit and also moved for summary judgment against both the Army Corps and Greenlawn. *Id.* Greenlawn responded by cross-moving for summary judgment to declare its rights as a riparian landowner and to dismiss opposing claims under the ESA. *Id.*

In May 2019, the District Court for New Union ruled on the competing motions for summary judgment. The court: (1) granted summary judgment for Greenlawn, holding that Greenlawn has a right as a riparian landowner to continue water withdrawals for municipal purposes; (2) granted summary judgment for the Army Corps, holding that it did not make any discretionary action which triggered the ESA Section 7 consultation requirement; (3) granted summary judgment for New Union Oystercatchers, holding that Greenlawn's water withdrawals

constitute an ESA Section 9 "take" of the oval pigtoe mussel; and (4) issued an injunction prohibiting Greenlawn from making water withdrawals that reduce downstream flows below the rate necessary for oval pigtoe mussel survival. R. at 18. NUO and Greenlawn both filed a timely Notice of Appeal seeking to reverse the District Court ruling. *Id.* at 1.

VI. SUMMARY OF THE ARGUMENT

The District Court erred when it granted summary judgment in favor of Greenlawn, declaring that its riparian rights entitled it to 30 CFS flow in the Bypass Reach and 20 MGD withdrawals during drought conditions. Riparian rights have never been recognized as without limit: they are checked by the equal rights of other riparian owners and the demands of public welfare. *See U.S. v. Willow River Power*, 324 U.S. 499, 504-05, 510 (1945); *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908). Greenlawn's claim of an absolute right to the waters of the Green River violates both of these limitations. Greenlawn's demand for 30 CFS flow into the Bypass Reach during a drought deprives another riparian owner, the Army Corps, of its own right to reasonable use of the water. *See* R. at 8-9. Further, Greenlawn's 20 MGD withdrawals during a drought severely harm the public interest in preserving endangered species and yield little benefit in return. *See id.*; *Thompson v. Enz*, 154 N.W.2d 473, 485 (Mich. 1967). The ultimate touchstone of riparian doctrine is reasonableness, and Greenlawn's actions are unreasonable on both counts. *See Willow River Power*, 324 U.S. at 504-05.

The Army Corps violated Section 7 of the ESA by failing to consult with the FWS before increasing the water flow rate to the Bypass Reach. Federal agencies must consult when they affirmatively engage in a discretionary action with the potential to affect a listed species. 16 U.S.C. § 1536(a). Increasing the water flow rate to the Green River was an affirmative authorization and discretionary action because the Army Corps does not have a legal duty to

provide Greenlawn with unmitigated water flow. Further, even though the Army Corps agreed to provide Greenlawn with reasonable water flow for municipal use, the District Commander unilaterally selected the water flow rate of 30 CFS. *See* R. at 8. Because this action had a deleterious effect on the habitat of the oval pigtoe mussel, the Army Corps violated Section 7. *See id.* at 9.

The District Court appropriately held that Greenlawn's unmitigated water withdrawals from the Bypass Reach violated Section 9 of the ESA. *See* R. at 18; 16 U.S.C. § 1538(a). The ESA protects listed endangered species by prohibiting "takes" of members of such species. 16 U.S.C. § 1538(a). Under the ESA's Section 9, a "take" includes actions that injure or kill an endangered creature by modifying its habitat. 50 C.F.R. § 17.3. Greenlawn's consumption of nearly all of the water in the Bypass Reach had the direct and foreseeable result of almost entirely eliminating the water downstream. *See* R. at 9. Greenlawn's obliteration of the Green River caused siltation to smother endangered oval pigtoe mussels and left the mussels with no way to survive by remaining submerged. *Id*. Because Greenlawn's water withdrawals devastated the endangered oval pigtoe's habitat and consequently members of the species, the withdrawals constituted a "taking" in violation of ESA's Section 9. *See id*; 16 U.S.C. § 1538(a).

The District Court was correct to conclude that it did not need to balance the equities before enjoining Greenlawn from excessive water withdrawals. Though courts ordinarily balance the equities before issuing an injunction, Congress removed that equitable discretion with respect to the ESA. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978). When an injunction is the only way to achieve the ESA's vital protection of endangered species, an injunction must be issued. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). Having found that Greenlawn's actions constitute a "take," an injunction was the only way to prevent the endangered oval pigtoe

mussel from extirpation. Given that a critically imperiled species was at risk, the District Court was correct to issue an injunction without balancing the equities. R. at 16-17. Further, even if the court *did* balance the equities, the benefits of preserving an endangered species outweigh the minor harms to Greenlawn, and the injunction would still be appropriate.

VII. STANDARD OF REVIEW

Circuit courts exercise de novo review of a district court's ruling on parties' motions for summary judgement. *Cottonwood Env. Law. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1079 (9th Cir. 2015) ("We review de novo a district court's decisions on cross-motions for summary judgement."). A grant of summary judgment is appropriate when 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). This court may affirm the U.S. District Court for New Union's grants of summary judgement only where the District Court's decision was correct as a matter of law. *Whatley v. CNA Ins. Co.*, 189 F.3d 1310, 1313 (11th Cir. 1999).

VIII. ARGUMENT

1. Greenlawn does not have a riparian landowner right during a drought to unabated water withdrawals for municipal purposes.

Riparian rights have never been recognized as without limits. As the Supreme Court put it, "rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them." *U.S. v. Willow River Power*, 324 U.S. at 510. Greenlawn claims that it has an absolute right to consume all available water in the Green River, that even in a severe drought it has no responsibility to reduce its water use, and that others, including an endangered species, must suffer the costs of its exorbitance. Greenlawn is wrong.

A. Greenlawn's riparian rights do not entitle it to 30 CFS flow at all times.

Greenlawn argues that its riparian rights preclude the Army Corps from reducing flow into the Bypass Reach, as the Army Corps initially did in response to worsening drought conditions. R. at 8. Specifically, Greenlawn argues that it must be allowed to intake 20 MGD per day, even in drought conditions, and thus that the Army Corps must release 30 CFS flow into the Bypass Reach rather than reduce flow to 7 CFS in accordance with the WCM. *Id.* at 8-9. However, because Greenlawn's municipal intake is not a "domestic" use, the correlative nature of riparian rights bars Greenlawn's contention.

i. Greenlawn's municipal water withdrawals are not a "domestic" use.

Among riparian owners, "domestic" uses have a superior claim of right to all other uses. *Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955); *Taylor v. Tampa Coal Co.*, 46 So. 392, 394 (Fla. 1950). Greenlawn argues that, because some residents engage in domestic uses of the water the city supplies, its municipal intake qualifies as a domestic use. R. at 13. However, this not only misreads which uses count as domestic, but also threatens to so aggrandize the domestic use doctrine as to eviscerate the rights of other riparian owners.

In most riparian jurisdictions, Greenlawn's municipal intake would not even be a *valid* riparian use, let alone a privileged domestic one. In general, a riparian owner's intake for a "water supply for public distribution" is not considered a riparian use. *Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Auth.*, 84 A.2d 433, 436 (Me. 1951). However, New Union follows the minority rule that recognizes supplying municipal water needs as a riparian use. *See Tubbs v. Potts*, 45 N.U. 999 (1909). Yet even though Greenlawn's public distribution of water may qualify as a riparian use, it does not constitute a domestic use.

Domestic uses are those that supply basic household purposes, such as drinking, washing, or cooking. *Taylor*, 46 So. at 394. These uses take precedence over "artificial" uses, such as irrigation, manufacturing, and recreation. *Id.*; *Harris*, 283 S.W.2d at 134, n. 4.

Greenlawn's use of the water for its municipal water supply is not a domestic use. For one, its water intake is most analogous to irrigation in that the essence of both is taking water for distribution to areas beyond the water source. In *Taylor v. Tampa Coal Co.*, the court held that the defendant's intake of water to irrigate his citrus grove was not a domestic use, and the result should be no different here. *See Taylor*, 46 So. at 394.

Greenlawn contends that because some residents put the water it supplied to domestic uses, its intake should be considered domestic, but this argument has no currency. Water is also used by commercial businesses in the city, and by that reasoning, the intake could just as fairly be characterized as artificial. *See id.*; *Harris*, 283 S.W.2d at 134, n. 4. Even among the residential users, the majority of their use in the spring was for lawn watering, which can hardly be considered among the necessities of home life, like drinking or cooking, that are at the core of domestic use. *See Taylor*, 46 So. at 394; R. at 5. To say that the entirety of a riparian owner's water intake is domestic because she uses a portion of it for domestic purposes goes beyond the bounds of the rule. To go even further and say that an entire city's water intake is domestic because *some* residents use it for domestic uses *some* of the time would swallow the rule completely. Greenlawn's municipal intake is not a domestic use.

ii. The Army Corps is not required to bear all the costs of drought; Greenlawn must "share the shortage."

One of the most basic tenets of riparian rights is that they are correlative. *See Willow River Power*, 324 U.S. at 504-05. "The fundamental principle of this system is that each riparian

proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal rights of the other riparian proprietors likewise to make a reasonable use." *Id.* at 505 (internal citations omitted). Except for the priority given to domestic uses, all other uses and users are equal. *See id.*; *Harris*, 283 S.W.2d at 134.

Because Greenlawn's use is not domestic, it enjoys no superior claim of right over the Army Corps'. During droughts, the correlative nature of riparian rights means that riparian users must "share the shortage." *See* Barton Thompson Jr. et al., *Legal Control of Water Resources* 33 (5th ed. 2018). Here, however, in the face of water shortages, Greenlawn demanded that the Army Corps release sufficient flow into the Bypass Reach to permit full 20 MGD withdrawals. R. at 8. As the drought worsened, delivering sufficient flow drained the lake to the point where the Army Corps had to discontinue its own water intake and operation of its hydroelectric power facilities. *Id.* at 8-9. Under riparian principles, the Army Corps is not obligated to bear the burdens of shortage alone, especially when that means completely depriving the Army Corps of its own right to use of the water.

B. Greenlawn's riparian rights do not entitle it to an unqualified right to withdraw 20 MGD during drought conditions.

Though riparian ownership vests a right to use the water, "the common law only requires that riparian owners be allowed reasonable access and use." *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 788 (Wis. 2001). Riparian rights, therefore, are "restricted to that which is a . . . reasonable use." *Id.* (citing *Apfelbacher v. State,* 167 N.W. 244, 245 (Wis. 1918)). The ultimate touchstone of the riparian rights doctrine is reasonableness. *See Willow River Power* 324 U.S. at 505. Greenlawn's undiminished water intake in the midst of a drought was unreasonable.

i. Withdrawal of 20 MGD is unreasonable because it infringes on the Army Corps' equal right to reasonable use.

Greenlawn's demand that the Army Corps release flow sufficient to withdraw 20 MGD violates the correlative principle that precludes infringement upon another riparian owner's right to reasonable use of the water. *See id*. In resolving what is "reasonable" among competing uses, courts may look to factors such as the purpose of the use, the suitability of the use to the watercourse, the economic or social value of the use, and the extent of harm and practicality of avoiding it by adjusting the use. 78 Am. Jur. 2d Waters § 37 (citing Restatement Second, Torts § 850A). Release of 7 CFS flow is entirely adequate to satisfy Greenlawn's average daily water needs while still permitting peaking hydroelectric power generation. R. at 5, 7. While 7 CFS would not be enough for the city's lawn-watering needs, the value of greener yards is simply outweighed by the economic harm to the Army Corps and electric customers from shuttering dam operations. Further, Greenlawn can more easily adjust its use through water conservation or reclamation measures to provide water for lawns, whereas the Army Corps has no other means of operating its power generation facilities.

Ultimately, one need look no further than *Taylor*, to decide this case. There, the Florida Supreme Court enjoined the defendant's irrigation of his citrus groves during drought conditions, because the irrigation withdrew so much water from the adjacent lake that it prevented another riparian owner from using it recreationally. *Taylor*, 46 So. at 394. Demanding that the Army Corps facilitate full 20 MGD withdrawals does not simply deprive the Army Corps of its riparian right to reasonable use, it deprives the Army Corps of *any* use. *See* R. at 8-9. When one riparian owner's use completely precludes another's, it is plainly unreasonable.

ii. Withdrawal of 20 MGD is unreasonable because it harms the public welfare by extirpating an endangered species.

Riparian rights are not limited solely by the rights of other riparian owners; they are also checked by the demands of the public interest. "The private right to appropriate [water] is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health." *Hudson Cnty. Water Co.*, 209 U.S. at 356.

The Michigan Supreme Court in *Thompson v. Enz* recognized that evaluating the public welfare consequences of a riparian owner's use of water is part of considering whether the use is reasonable. *See Thompson v. Enz*, 154 N.W.2d at 485. Further, it explicitly acknowledged the public interest in the conservation of species. *Id.* As such, it is clear that pushing a species to the brink of extirpation by depleting the water flow in the Green River, all so that homeowners can water their lawns, is unreasonable.

Balancing Greenlawn's unmitigated use of water against the public interest is simple in light of the relative benefits and harms and the ease of adjustment. *See* 78 Am. Jur. 2d Waters § 37. Undoubtedly there is some economic and social value in Greenlawn's withdrawals to fulfill the city's basic water needs. However, the *marginal* value of withdrawing up to 20 MGD to water lawns and plants across the city is minimal. On the other hand, eliminating an endangered species is a major harm. *See Tenn. Valley Auth. v. Hill*, 437 U.S. at 179-80. Not only does the permanent loss of a species invoke more devastation to the natural world by undermining an ecosystem, but it also means lost potential economic value. *See id*. And while Greenlawn can easily implement water conservation measures or otherwise adjust its use to withdraw less water, the oval pigtoe mussel is unable to respond to this impending tragedy. *See* 78 Am. Jur. 2d Waters § 37. Greenlawn's excessive withdrawals leave so little water downstream that the mussel cannot

even move to areas of greater depth as it normally does in response to changes in water level. R. at 9.

Riparian rights are not unqualified. They are, as all rights are, subject to balance against the rights of others. The public interest in conserving an endangered species far outweighs the benefits of nicer lawns. As such, Greenlawn's water intake is unreasonable.

2. The Army Corps violated § 7 of the Endangered Species Act by failing to consult with the FWS before increasing the water release rate from the Diversion Dam into the Bypass Reach.

Congress passed the ESA to satisfy an overwhelming national interest in prioritizing the protection of wildlife over beneficial economic activities. *Tenn. Valley Auth.*, 437 U.S. at 185. Section 7(a)(2) of the ESA carries out this national interest by requiring federal agencies to consult with either the FWS or National Marines Fisheries Service before engaging in a potentially harmful action.[2] *Babbitt v. Sweet Home Chapter,* 515 U.S. 687, 692 (1995) (citing 16 U.S.C. § 1536(a)(2)). Unlike the autonomy federal agencies generally enjoy, Section 7(a)(2) imposes a "broad, affirmative duty" to ensure any "agency action" is not likely to jeopardize a listed species or result in adverse modification of their critical habitat. *Id.* at 703. An agency's duty to consult applies whether an action is "ongoing" or "complete." *Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1086, *cert. denied*, 137 S.Ct. 293, (2016).

The only limitation on Section 7(a)(2) is that federal agencies need not consult when they lack "discretionary involvement or control" over the potentially harmful "action." 50 C.F.R. § 402.02. Indeed, Section 7(a)(2) applies "regardless of the expense or burden its application might pose." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671

[2] The consultation process entails preparation of a "Biological Assessment" by the acting agency detailing the potential effects on the endangered species. The consulting agency responds with a "Biological Opinion" if it concludes the action may be safely taken, or "Jeopardy Opinion" if it concludes the action would impermissibly harm the species. 16 U.S.C. § 1536.

(2007). When determining whether an agency violated the consultation requirement, courts inquire whether: (1) the agency engaged in an affirmative action; (2) the agency retained discretionary control over the action; and (3) whether the action may affect a listed species or habitat. *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012).

NUO argues that the Army Corps violated Section 7(a)(2) by failing to consult with the FWS before increasing the water releases to the Bypass Reach during the 2017 drought warning. R. at 14. The Army Corps and Greenlawn argue that the Army Corp's increase of water releases did not require consultation because Greenlawn has a common law riparian right to unmitigated water flow in the Bypass Reach for municipal use, meaning the Army Corps lacked discretion over the decision. This Court should rule in favor of NUO because the District Court for New Union improperly granted summary judgment for the Army Corps. The district court should have denied summary judgment because increasing the water flow to 30 CFS constituted a discretionary action subject to the Section 7(a)(2) consultation requirement.

A. The Army Corps engaged in a discretionary action when it increased the water release rate to 30 CFS from the Diversion Dam to the Bypass Reach.

The Army Corps erroneously argues that increasing the water release rate to 30 CFS did not constitute a discretionary agency action. While the District Court for New Union correctly held that the WCM requires providing sufficient water use to Greenlawn, increasing the flow rate is discretionary because Greenlawn is not entitled to an unqualified amount of water. The Army Corps owes Greenlawn a general duty, but the act is subject to the consultation requirement because the management of the program is left to the discretion of the agency.

i. Increasing the water release rate to 30 CFS is an "affirmative authorization" because New Union riparian rights law does not set a specific flow rate.

Congress defines agency action as "any action authorized, funded, or carried out by [a federal] agency." 16 U.S.C. § 1536(a)(2). Implementing regulations of the ESA further define "action" to include anything "directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. Though "inactions" are not considered "actions" subject to consultation, federal agencies are not exempt from consultation when they merely manage the specific details of a program. *Karuk Tribe*, 681 F.3d at 1021.

The Army Corps acted affirmatively by increasing the water release rate because it regulated the flow to a specific level not required by any other legal duty. In *Karuk Tribe*, the Ninth Circuit explicitly provided, "examples of agency actions triggering Section 7 consultation include . . . the ongoing construction and operation of a federal dam." *Id.* at 1021. In *Center for Biological Diversity v. Environmental Protection Agency*, the Ninth Circuit also instructed that agencies engage in an affirmative authorization when they grant approval of an activity. 847 F.3d 1075, 1091 (9th Cir. 2017). There, though the Environmental Protection Agency evaluated pesticide registration based on a set of statutory guidelines, it ultimately acted by granting approval based on weighing the unreasonableness of adverse effects. *Id.*

Whether an agency "acted" is connected to the level of authority vested in the agency and private parties. The level of involvement by the Army Corps is greater than that of agencies which do nothing but facilitate prior vested grants to water rights. In *Western Watersheds Project v. Matejko*, the Ninth Circuit held the Bureau of Land Management did not affirmatively act by diverting river flow for irrigation use by private parties. 468 F.3d 1099, 1108 (9th Cir. 2006). The court pointed to the fact that in diverting river flow, the agency simply maintained the status

quo established by an 1866 act appropriating water rights on public lands. *Id*. Though the Bureau of Land Management retained the ability to enforce dam diversion violations through legal action, the private rights automatically vested unless the parties substantially deviated in the use or location of their granted activity. *Id.* In this case, the Army Corps did more than merely maintain the status quo because it chose not to follow the WCM. R. at 8.

The Army Corps' continuous regulation and operation of the dam is further evidence that they made an affirmative authorization. In *California Sportfishing Protection Alliance v. Federal Energy and Regulatory Commission*, the Ninth Circuit held FERC did not need to consult because FERC's interest in the hydroelectric power plant ended when it issued the original operating permit to PG&E. 472 F.3d 593, 595 (9th Cir. 2006). Similarly, the Ninth Circuit held in *Sierra Club v. Babbitt* that the Bureau of Labor Management did not need to consult because a right-of-way agreement discharged its ability to prohibit road-building by a logging company likely to harm the spotted owl, thus discharging the matter from its purview. 65 F.3d 1502, 1512 (9th Cir. 1995). Unlike these two cases, the Army Corps did not discharge operation of the HRDW, rather it continues to adjust the water levels during drought and provide flow for hydroelectric power and recreational use under the River and Harbor Act of 1945. R. at 8. This activity constitutes an affirmative action.

ii. Increasing the water release rate to 30 CFS is "discretionary" because the Army Corps unilaterally determined the flow rate.

Federal agencies must consult when they retain discretion regarding implementation or administration of an action. *Karuk Tribe*, 681 F.3d at 1024. While federal agencies bound by a separate legal duty are not required to consult, agencies may not escape the consultation requirement unless the competing legal duty mandates the performance of a specific non-

discretionary act out of their control. *Id.* This exception is designed to only exempt the agency when consultation would be a "meaningless exercise." *Babbitt*, 65 F.3d at 1509.

To resolve the problem of federal agencies unable to "simultaneously obey" legal duties mandating conflicting actions, the Supreme Court limited the consultation requirement to only apply to discretionary actions. *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. In *National Ass'n of Home Builders*, the Court held the Environmental Protection Agency did not need to consult before issuing a pollution discharge permit because the Clean Water Act mandated the agency issue the permit automatically when a state met nine statutory prerequisites. 551 U.S. at 669. But following this consultation limitation, agencies may not avoid the consultation requirement when their competing legal duty only mandates the achievement of a broad or general goal. Here, the District Court for New Union erred by failing to acknowledge that the Army Corps is not required by law to automatically grant Greenlawn an unmitigated water supply.

Courts regularly hold that the management of a river flow rate is a discretionary action when federal agencies are only tasked with implementing the general purposes of a statute. In *In re Operation of Missouri River System Litigation*, the Eighth Circuit determined the Army Corps retained discretion in how to accomplish the statutory mandate of supporting downstream river navigation. 421 F.3d 618, 631 (8th Cir. 2005). The consultation requirement applied because the statute did not mandate a specific level of river flow rate; rather, it left the discretion to the Army Corps. *Id.* Similarly, in *Grand Canyon Trust v. U.S. Bureau of Reclamation*, the Ninth Circuit only ruled that the Bureau of Reclamation did not violate the consultation requirement when managing a hydroelectric dam because the agency lacked the authority to deviate from the pre-selected operating criteria. 691 F.3d 1008 (9th Cir. 2012). Though the agency prepared an annual plan for state officials on predicted water flow changes for the following year, all changes

complied with operation criteria previously approved by the FWS. *Id.* And in *TVA v. Hill*, the Court held the Tennessee Valley Authority retained discretion over the operation of a dam despite nearly $100 million being appropriated by Congress because the funding did not include a specific statutory command. 437 U.S. 153 (1978).

In this case, increasing the water flow rate to 30 CFS is a discretionary action because: (1) it is not mandated by Greenlawn's riparian landowner right; and (2) the Army Corps unilaterally selected the new flow rate. Because Greenlawn's water use is not domestic, it must share the shortage with the Army Corps. *See supra* Part 1.a. As such, Greenlawn's demand that it receive sufficient flow for 20 MGD withdrawals during the drought, which deprived the Army Corps of reasonable use of the Green River's water, is unreasonable, and the Army Corps had no legal duty to do so. This is distinct from *National Ass'n of Home Builders*, where the Clean Water Act simultaneously bound the Army Corps to grant a permit. *See* 551 U.S. at 669.

Additionally, the decision is discretionary even if Greenlawn were deemed to have a riparian right to sufficient flow for 20 MGD withdrawals. This is because the Army Corps selected a 30 CFS flow rate on its own initiative. *See* R. at 8. The HRDW provides a flow rate of 50 CFS during normal summer conditions, 50 CFS during Zone 1 conditions, and 7 CFS during Zone 2 and Zone 3 conditions. R. at 7. Like in *In re Operation of Missouri River*, at no point did the WCM suggest providing 30 CFS to Greenlawn. *See* 421 F.3d at 631. Though the flow rate for Greenlawn may be outdated because its population increased and residents have special spring planting and growing needs, the District Commander still acted with discretion by unilaterally selecting 30 CFS as the new flow rate. Even if Greenlawn had a general right to 20 MGD, and the Army Corps had a concomitant general obligation to provide sufficient flow for

such withdrawals, the choice of 30 CFS as the flow rate was not mandated and arose entirely from the Army Corps volition. That choice was therefore discretionary.

B. The Army Corp jeopardized the continued existence of the oval pigtoe mussel when it increased the water release rate from the Diversion Dam to the Bypass Reach.

When agencies retain discretionary control over an action, Section 7 requires consultation when the agency discretion "may affect" an endangered species or critical habitat. *Karuk Tribe*, 681 F.3d at 1024. Agencies are only exempt from consultation regarding discretionary actions when they would be able to influence a private activity to benefit a listed species. *Id.* "May affect" is a "relatively low" threshold to trigger the requirement that agencies must satisfy their consultation duty. *Id.*

While the District Court for New Union correctly held the construction of the HRDW and WCM were not subject to the consultation requirement because they predate the ESA, the Army Corp is obliged to honor the ESA because its actions put the oval pigtoe mussel at risk of extirpation during the next drought. R. at 11. In *Turtle Island Restoration Network v. National Marine Fisheries Service*, the Ninth Circuit required the Fisheries Service to consult because it retained discretion to condition the fish permits it issued to benefit the listed species. 340 F.3d 969, 974 (9th Cir. 2003). Though the court did not decide whether the Fisheries Service had discretion to deny the permits altogether, it did retain discretion to establish necessary and appropriate conditions and restrictions on the permits. *Id.*

Like in *Turtle Island*, where the Fisheries Service had discretion to tailor its statutory duty to benefit sea turtles and seabirds, the Army Corps retains discretion to comply with the New Union riparian rights while simultaneously protecting the oval pigtoe mussel. *See Turtle Island*, 340 F.3d at 974. Consulting with FWS would have the capacity to benefit the protected species by producing a flow rate satisfactory to all parties.

3. Greenlawn's withdrawal of all of nearly all of the flow of the Bypass Reach constitutes a "take" of the endangered oval pigtoe mussel under Section 9 of the ESA.

Section 9 of the ESA prohibits the 'taking' of any listed endangered species. 16 U.S.C. § 1538(a). To "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id*. § 1532. The Department of the Interior defines "harm" as an action which "may include significant habitat modification . . . where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

Greenlawn's unmitigated withdrawal of water from the Green River constituted a taking of the endangered oval pigtoe mussel because the withdrawals injured and killed mussels by modifying their habitat. R. at 9.

A. Greenlawn's water withdrawals constitute a taking because the ESA provides a broad mandate for courts to prohibit actions which harm listed endangered species.

Greenlawn contends that the withdrawals did not constitute a taking because they occurred in the Bypass Reach and not directly in the area where the mussels were found. R. at 16. They are incorrect.

Takings are not limited to actions that occur within the habitat of an endangered species. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *Defs. of Wildlife v. Adm'r, E.P.A*, 882 F.2d 1294 (8th Cir. 1989); *Loggerhead Turtle v. Cty. Council of Volusia Cty.*, Fla., 148 F.3d 1231 (11th Cir. 1998); *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260 (4th Cir. 2018). Such a limitation is inconsistent with the ESA's aim of "afford[ing]" endangered species "the highest of priorities" in "preserv[ing] . . . [them]" and "provid[ing] a means by which the ecosystems upon which [they] . . . depend may be conserved." *Tenn. Valley Auth.*, 437 U.S. at 174-75; *Babbitt*,

515 U.S. at 698. The Supreme Court emphasized that, to pursue the ESA's "broad purpose," Congress intended a 'take' to be "defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *Id*. at 704 (quoting S. Rep. No. 93-307, at 7 (2000)). To exclude from Section 9 Greenlawn's devastation of an ecosystem that the endangered mussels depend on would undermine the ESA's commitment to protecting endangered species.

To arbitrarily limit takings to actions which occur within the harmed endangered species' habitat also conflicts with judicial precedent that applies Section 9 broadly. For example, the Supreme Court held that the harm done by a taking does not have to be intentional. *Babbitt*, 515 U.S. at 700 (acknowledging "Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings"). Furthermore, many circuit courts have established that a third-party's authorization of an action that harms an endangered species constitutes a taking. *See Strahan*, 127 F.3d 155, 165-66 (finding that the issuance of licenses for fishing practices that harmed endangered whales was a taking); *Defs. of Wildlife*, 882 F.2d 1294, 1301 (holding that the EPA's registration of certain pesticides that harmed endangered species constituted a taking); *Loggerhead Turtle*, 148 F.3d 1231, 1250-51 (stating that "indirect control" over lighting which harms endangered turtles "is sufficient" for liability under Section 9).

Given this precedent, the Fourth Circuit did not extend the reach of Section 9 when it found that an act which occurred outside of the endangered species' habitat was nonetheless a taking. *Sierra Club*, 899 F.3d at 275. In *Sierra Club*, the Fourth Circuit accepted the FWS's conclusion that the construction of a pipe through "the upstream drainage area" of Hackers Creek would constitute an "incidental take" of an endangered clubshell mussel population downstream. *Id*. The court endorsed the FWS's reasoning that the construction was a taking because its

"resulting sediment load" would harm the endangered mussels. *Id*. The mussels were "located at Life's Run Bridge" and the "pipeline will introduce sediment upstream" of this bridge. *Id*. The court found that the construction would take mussels located throughout Hacker's Creek and not just in the 585-meter range on either side of the bridge that "contains suitable clubshell habitat." *Id*. Therefore, the court acknowledged that an action upstream in a river is a taking of any downstream listed endangered species that it harms. *Id*.

Like in *Sierra Club*, where construction that harmed downstream endangered mussels constituted a taking, Greenlawn's water withdrawals should be recognized as such. *See* 899 F.3d at 275. In *Sierra Club*, sediment that upstream construction caused to wash "through all of Hackers Creek" harmed endangered mussels. *Id*. Likewise, Greenlawn's upstream withdrawals "smothered" the mussels because it increased siltation in the endangered mussels' habitat. R. at 9. Greenlawn's withdrawals caused greater harm than the construction in *Sierra Club*. While in *Sierra Club*, the construction merely added sediment to the river, here, Greenlawn not only increased siltation in the river, but also almost entirely eradicated its water flow. *See Sierra Club*, 899 F.3d at 275; R. at 9. Oval pigtoe mussels need to be submerged in water, and Greenlawn's drying up of the Green River "eliminated any possibility" for the mussels to survive. R. at 9. This court should join the Supreme Court and the Fourth Circuit by continuing to prioritize the harm to an endangered species above other factors in determining where Section 9 should apply. *See Babbitt*, 515 U.S. at 700; *Sierra Club*, 899 F.3d at 275.

B. Even if takes are arbitrarily limited to actions which cause harm from within an endangered species' habitat, Section 9 applies to Greenlawn's water withdrawals.

The 'habitat' of an endangered species is not limited to the location of the individual members of that species at any one time. Rather, courts must look at the "ecosystems upon which

the endangered species . . . depend" as the species' habitat within Section 9. *Palila v. Haw. Dep't of Land and Nat. Res.*, 852 F.2d 1106, 1108 (9th Cir. 1988) ("Palila II"). To focus only on where the endangered species is present at a particular moment would be to leave them vulnerable to the habitat modifications that threaten their survival. Thus, to honor the purpose of the ESA - the protection of endangered species - 'habitat modification' must include the modification of areas that the species depend upon for survival. *See Palila II*, 852 F.2d at 1108 (stating that to "conserve[s] the Palila's threatened ecosystem" is to "serve[s] the overall purpose of the Act"). Indeed, the ESA declares that its "overall purpose" is to "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved." *Id.* (quoting 16 U.S.C. § 1531(b)). Because the endangered oval pigtoe mussels depend on the Bypass Reach for their survival, the Bypass Reach is a part of their habitat for purposes of Section 9.

In *Palila II*, the Ninth Circuit affirmed the district court's conclusion that modification of "the mamane woodland upon which the Palila depend entirely for their existence" constituted a taking. *Palila II*, 852 F.2d at 1109. The court noted that the Palila, a listed endangered bird species, depended on the mamane woodland for feeding, nesting, and sheltering. *Id*. at 1107 n.2. The opinion below had explained that the Palila's "critical habitat" was "a 200 km^2 ring around the upper slopes of Mauna Kea." *Palila v. Haw. Dep't of Land and Nat. Res.*, 649 F.Supp. 1070, 1073 (D. Haw. 1986) ("Palila I"). In *Palila I*, the district court also stated that "the bird is only found in 140 km^2 of its 200 km^2 habitat, and that 75–80% of the population is located in a 10 km^2 area." *Id*. at 1074. The Ninth Circuit agreed with the district court that "the mouflon sheep destroy the mamane woodland" and affirmed its order to remove the mouflon sheep from Mauna Kea." *Palila I*, 649 F.Supp. at 1082; *Palila II*, 852 F.2d at 1109-10.

Like the Palila's habitat, which the court found to include areas uninhabited by Palila, the mussels' habitat includes the Bypass Reach. *See Palila I,* 648 F.Supp. at1074. In *Palila I,* the court found that the Palila habitat included woodland which did not contain any Palila, but which offered them potential for shelter and feeding. *See id.* Similarly, the Bypass Reach offers the possibility of shelter to the endangered mussels. When the water that covers oval pigtoe mussels dries up, the mussels survive by "moving themselves to habitat that remains submerged." R. at 9. Therefore, if the Bypass Reach had not dried up, the mussels likely would have survived the elimination of Green River's water by moving upstream to the Bypass Reach to be submerged. Like the 60 km of woodland uninhabited by Palila, but which within their habitat, the Bypass Reach is part of the mussel's habitat because it is a vital part of their ecosystem. *See Palila I,* 649 F.Supp. at 1074.

Greenlawn's withdrawals violated Section 9 even if habitat modification is limited to actions that occur within the relevant species' habitat. Greenlawn's water withdrawals from the Bypass Reach modified the endangered mussels' habitat from within it and caused actual injury and death to the mussels.

C. Greenlawn's water withdrawals were a foreseeable and proximate cause of harm to the oval pigtoe mussels.

Greenlawn's suggestion that their water withdrawals had an "insufficient causal connection" to the harm suffered by the endangered mussels is undermined by the close relationship between the withdrawals and the harm done. R. at 16. Oval pigtoe mussels must be "submerged" in water that has "slow to moderate currents" to survive. R. at 9. By reducing the water levels in the mussels' habitat until they were "close to zero," Greenlawn's withdrawals eliminated the conditions that the mussels need to live. *Id*. Consequently, 25% of Green River's oval pigtoe mussel population died. *Id*.

According to the Supreme Court, there is no bright line definition of the causal connection to harm that is sufficient to induce liability under Section 9. *See Babbitt*, 515 U.S. at 708 (warning that "enforcement" of the ESA will involve "difficult questions of proximity and degree" that should be resolved on a "case-by-case" basis). However, when applying Section 9, courts must be guided by the ESA's "broad purpose" of "providing comprehensive protection for endangered and threatened species" and "halt[ing] and revers[ing] the trend towards species extinction, whatever the cost." *Id.* at 687, 699 (quoting *Tenn. Valley Auth.*, 437 U.S. at 180); *see also Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 785 (9th Cir.1995) ("Any ambiguity in what Congress meant by the term "harm" is resolved by looking to the underlying purpose of the ESA").

The Supreme Court stated that the ESA "prohibits takes so long as they are foreseeable." *Babbitt*, 515 U.S. at 700. The First and Fifth circuits have also ruled that a take within Section 9 must be the proximate cause of harm. *See Strahan*, 127 F.3d at 163 (stating that Congress intended causation under the ESA "to be interpreted as in the common law"); *Aransas Project v. Shaw*, 775 F.3d 641, 656 (5th Cir. 2014) (holding that "proximate cause and foreseeability are required for fixing liability for ESA violations"). The Fifth Circuit held that "Applying a proximate cause limit to the ESA . . . mean[s] that liability may be based neither on the "butterfly effect" nor on remote actors in a vast and complex ecosystem." *Aransas Project*, 775 F.3d at 658.

In *Aransas Project*, the Fifth Circuit held that the issuance of "licenses to take water from the Guadalupe and San Antonio rivers" did not constitute a taking because it did not "foreseeably and proximately cause" harm to a listed endangered species. *Id*. at 655. The withdrawals from the Guadalupe and San Antonio rivers reduced the "freshwater inflow" into the "adjacent" San

Antonio Bay, which was part of the endangered whooping crane's "critical habitat." *Id*. at 645-46. This, alongside a drought, "increased salinity in the bay," which led to a reduction of two of the cranes' "staple foods." *Id*. at 646-47. Consequently, cranes starved and engaged in stress behavior which increased their emaciation, and 23 died. *Id*. at 647. The court highlighted "the number of contingencies affecting the chain of causation from licensing to crane deaths" which were "outside of the state's and often outside of human control." *Id*. at 661-62. The court concluded that the connection between the state's licensing and the crane deaths was too "remote, attenuated and fortuitous" to constitute proximate causation. *Id*. at 656. Further, the court held that where a connection between events is too remote, "it disavows foreseeability." *Id*. at 658. Thus, the court concluded that the inadequate causal connection between the harm and the permits precluded liability under Section 9. *Id*. at 664.

The relationship between Greenlawn's withdrawal of nearly all of the water upstream of the mussels and the mussel deaths is a far cry from the "bizarre" connection that the court found unsatisfactory in *Aransas Project*. *See id.* at 657. Whereas in *Aransas Project*, the purported taking was the state's issuance of permits for water withdrawals, here the taking is the water consumption itself. *See id*. at 645. Furthermore, in *Aransas Project*, the state issued licenses for water withdrawals from rivers "adjacent" to the cranes' critical habitat. *See id*. In contrast, Greenlawn eliminated water from within the mussels' ecosystem, just upstream of their location. R. at 9. Finally, unlike in *Aransas Project*, where the habitat modification caused by the water withdrawals affected creatures that the crane ate, here, Greenlawn's habitat modification directly harmed the mussels. *See Aransas Project*, 775 F.3d at 647; R. at 9. Greenlawn's elimination of most of the water flow in the Bypass Reach left behind stagnant pools, causing sediment to "smother" and kill mussels. R. at 9.

Furthermore, it was foreseeable that consuming "nearly all" of the water in the Bypass Reach would devastate the mussels' habitat downstream. *Id*. Unlike in *Aransas Project*, where the remote causal chain between the licensing and the crane deaths "disavow[ed]" foreseeability, here, the link between unmitigated water consumption and harm to the mussels was clear and simple. *See Aransas Project*, 775 F.3d at 658. It is obvious that reducing a flowing river to shallow, stagnant pools threatens species that the river contains. *See* R. at 9.

Greenlawn counters that the drought, and not their water withdrawals, caused the harm to the endangered mussels. R. at 16. Concededly, both here and in *Aransas Project*, a drought contributed to the habitat modification that harmed endangered species. *See Aransas Project*, 775 F.3d at 647; R. at 8. However, no precedent states that to be proximate and foreseeable, a causal relationship has to be exclusive. Although the drought reduced the water level of the Howard Runnet Lake, Greenlawn's direct withdrawals from the Green River were what dramatically decreased the river's flow. R. at 8-9. Unlike in *Aransas Project*, where the state was not responsible for the "decisions to draw river water by hundreds of users" during the drought, Greenlawn alone consumed nearly all of the water in the Bypass Reach. *See Aransas Project*, 775 F.3d at 658-69; R. at 9. By ignoring the drought and severely reducing Green River's water level, and then "consum[ing] the last drops of flow," Greenlawn directly and foreseeably devastated the endangered mussels' habitat. R. at 17. Fairness demands holding Greenlawn accountable for the destruction it has caused.

4. The District Court was not required to balance the equities before enjoining Greenlawn's water withdrawals.

The District Court was correct to conclude that it did not need to balance the equities before issuing its injunction. As the Supreme Court recognized, Congress removed a court's usual equitable discretion when it passed the ESA to achieve the statute's protective ends.

Weinberger v. Romero-Barcelo, 456 U.S. at 313. Thus, having found that Greenlawn's actions constitute a "take," an injunction was the only way to vindicate the ESA's purposes and protect the endangered oval pigtoe mussel. R. at 18.

Further, even if a court *did* balance the equities, the scales would tip in favor of issuing the injunction because the significant public interest in preserving endangered species outweighs the relatively minor harms to Greenlawn.

A. The District Court does not need to balance the equities before enjoining a beneficial municipal activity causing the extirpation of an endangered species.

In general, to obtain an injunction, a plaintiff must demonstrate "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Courts are not "mechanically obligated to issue an injunction for every violation of the law." *Tenn. Valley Auth.*, 437 U.S. at 193 (1978).

However, in *TVA v. Hill*, the Supreme Court recognized that the clear mandate of the ESA is to remove such discretionary balancing of the equities from the purview of judges. *See id.* at 194. "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.*

The Supreme Court reaffirmed this principle in *Weinberger v. Romero-Barcelo*, though distinguishing the case on its facts, by noting that "in *TVA v. Hill*, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity." 456 U.S. at 313.

While *TVA v. Hill* concerned a Section 7 violation, and Greenlawn's water use represents a Section 9 violation, the mandate for injunction does not turn on such formalist distinctions. As the Third Circuit explained, "Although *TVA v. Hill* addressed § 7 of the ESA, this standard for injunctive relief might appropriately extend to claims asserted under § 9" because "the provisions are intended to work in tandem towards the same objective, namely, protection of endangered species." *Hawksbill Sea Turtle v. Fed Emergency Mgmt. Agency*, 126 F.3d 461, 478 n. 13 (3d. Cir. 1997). In fact, the demand for injunction is even stronger in Section 9 cases because its protections for endangered species are even stronger than Section 7's. *Id.*; *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987) (holding that plaintiffs are "entitled to injunctive relief" for violation of a "substantive or procedural provision of the ESA").

Courts are not devoid of all discretion in issuing an injunction in ESA cases, however. Courts must still consider the first prong of injunction analysis: irreparable harm. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018) ("The ESA removes the latter three factors in the four-factor injunctive relief test from our equitable discretion"). "A plaintiff must show irreparable injury to justify injunctive relief." *Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1091; *see also Animal Welfare Inst. v. Martin*, 623 F.3d 19, 16-27 (1st Cir. 2010) (explaining that the holding in *TVA v. Hill* was premised on the threat of irreparable harm without an injunction: extinction of an entire species). Similarly, the Ninth Circuit has noted that injunction is only justified when "a violation of the ESA is at least likely in the future." *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994).

Thus, in a case brought under the ESA, if a plaintiff shows that an endangered species faces irreparable harm absent injunction, courts are not to engage in balancing the equities because Congress has definitively struck that balance in favor of protecting endangered species.

When an injunction is the only means to vindicate the ESA's purposes, an injunction must issue. *Weinberger*, 456 U.S. at 313-314.

Here, it is plainly apparent that irreparable injury will occur without an injunction. Greenlawn concedes that drought conditions are likely to occur again in the near future, meaning that its excessive withdrawals will again put the oval pigtoe mussel at risk. R. at 11; *see Burlington*, 23 F.3d at 1511. While the take of a single animal may not be sufficient harm to warrant an injunction, this is not such a case. *See Martin*, 623 F.3d at 29. Greenlawn's water withdrawals have already killed 25% of the Green River population of the oval pigtoe mussel, and if not enjoined, will eliminate it entirely. R. at 10. Extirpation of an endangered species is clearly an irreparable harm. As such, courts are not to balance the equities because Congress has already done so; an injunction must be issued.

B. Even if a court does balance the equities, the benefits of preserving an endangered species clearly outweigh the costs of Greenlawn reducing its water usage.

Even if a court *did* conduct a traditional balancing of the equities, that balance clearly tips in favor of preserving the oval pigtoe mussel population.

The broader harms of Greenlawn's water use cannot be remedied by monetary damages. *See eBay Inc.*, 547 U.S. at 391. While NUO members may be suffering pecuniary harm from the threat to their livelihood, the full scope of the damage is not reducible to financial terms. *See* R. at 10. Not only are there ecological harms from losing a species, which may cause widespread ripples through the ecosystem, but further, loss of a species may deprive society of some unknown future benefit. Our history is replete with examples of species that were discovered to provide some scientific, medical, or other advancement; losing a species risks losing such benefits. *See Tenn. Valley Auth*, 437 U.S. at 179-80.

Further, in considering the relative balance of hardships, injunction is clearly warranted. *See eBay Inc.*, 547 U.S. at 391. The hardships that Greenlawn would suffer from an injunction pale in comparison to those resulting from the extirpation of the mussel population, which, as previously mentioned, may create far-reaching and unforeseeable harms. The injunction merely precludes Greenlawn from drawing in excessive amounts of water. R. at 18. It does not prevent the city from all water intake, but rather it largely functions to prevent it from withdrawing the massive amounts of water needed to water lawns and gardens across Greenlawn. *See* R. at 5. Further, the city has other ways of trying to keep the grass greener: it can implement water conservation or reclamation measures. This reduces the amount of Greenlawn's "hardship" to trivial levels, far outweighed by the threat to the oval pigtoe mussel's very survival.

Finally, the public interest is not disserved by injunction. *See eBay Inc.*, 547 U.S. at 391. While some of Greenlawn's residents may object to limits on their ability to water their grass, the "public interest" goes far beyond the preferences of some city residents. As the Supreme Court noted in *TVA v. Hill*, the entire impetus for passing the ESA is the recognition that preservation of species is in the public interest, both from a self-interested perspective and a broader, normative one. *See Tenn. Valley Auth*, 437 U.S. at 179-80. It cannot be maintained that sacrificing the general social value of conservation for the benefit of a select few is in the public interest.

Accordingly, even under a traditional balancing of the equities, the District Court properly issued the injunction.

IX. CONCLUSION

The oval pigtoe mussel is one of the most imperiled animals in the United States because its complex lifestyle makes it especially vulnerable to human disturbances. When Congress

enacted the ESA, it sought to protect all endangered creatures from the danger of untempered economic growth and development. This includes the federally listed endangered oval pigtoe mussel.

In the interest of protecting the oval pigtoe mussel, NUO requests this Court reverse the District Court summary judgment rulings in favor Greenlawn and the Army Corps and affirm the summary judgment ruling enjoining Greenlawn's take of the mussel.