Team 3

NO. 19-0009897

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION
OYSTERCATCHERS, INC.,

Plaintiff – Appellant,

vs.

UNITED STATES ARMY
CORPS OF ENGINEERS,

Defendant – Appellee

and

CITY OF GREENLAWN,
NEW UNION,

Defendant – Appellant

Appeal From The United States District Court
For New Union,
Case No. 19-000987
The Honorable Judge Romulus N. Remus Presiding

BRIEF OF DEFENDANT-APPELLANT, CITY OF GREENLAWN

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STATEMENT OF JURISDICTION

The district court properly found jurisdiction, and no party disputes standing under Article III of the U.S. Constitution. R. at ?; *see* 16 U.S.C. § 1540(a) (2002), 28 U.S.C. § 1331 (1980). The parties timely appealed the district court's decision; therefore, jurisdiction lies with this Court under 28 U.S.C. § 1291 (1982).

STATEMENT OF ISSUES

1. Whether Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures?

2. Whether the operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536?

3. Whether Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitutes a "take" of the endangered Oval Pigtoe Mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538?

4. Whether the District Court must balance the equities before enjoining a beneficial municipal activity, when the activity will cause the extirpation of an entire population of an endangered species?

STATEMENT OF THE CASE

Plaintiff New Union Oystercatchers INC. (NOU), brought action against Defendants, Army Corps of Engineers (ACOE) and The City of Greenlawn (Greenlawn), alleging that Greenlawn's water withdrawals from the Green River Bypass Reach (Reach) and the ACOE's operation of the Howard Runnet Dam Works violates the Endangered Species Act (ESA). Plaintiff alleges that both Defendants' actions resulted in a "take" against a protected species under the ESA. This case is about a municipality's right to its citizens' water, an agreement between riparian landowners, and confusion in the law, which resulted in an erroneous holding.

Plaintiff NOU and Defendant Greenlawn each bring two issues for review by the Twelfth Circuit. In dealing with these complex issues, the district court correctly granted summary judgment regarding Defendant Greenlawn's riparian land ownership, Greenlawn's rights entitled to that status, and the ACOE's lack of participate in a discretionary action with relation to the operation of the Howard Runnet Dam (Runnet Dam). However, the district court erred when it determined Greenlawn violated the ESA and enjoined Greenlawn's water usage for that violation. The Defendants appealed the district court's grant of summary judgement and injunction.

I. Factual Background

Greenlawn lies on both sides of the historical banks of the Green River in the State of New Union. R. at 5. Upon completion of the Runnet Dam and Diversion Dam (collectively known as the Howard Runnet Dam Works (Dam Works)), the historic Green River became known as the Green River Bypass Reach (Reach). *Id.* The Reach is within the city limits of Greenlawn and Greenlawn has used the Green River (and the Reach) as its source of water since 1893. *Id.* Over the decades Greenlawn has expanded and has increased its water withdrawals

from the Reach to meet its water needs. *Id.* Greenlawn's water supply is controlled through an agreement with the ACOE and the operation of the Dam Works. *Id.* at 6. This agreement promised the continued flow of water in the Reach as entitled to Greenlawn as a riparian landowner in the State of New Union. *Id.*

The Dam Works was completed in 1948 and is operated by the ACOE. *Id.* The ACOE's operation of the Dam Works is governed by the Water Control Manual (WCM). *Id.* During times of drought, the ACOE and WCM restrict the amount of water that is released to maintain water levels in Howard Lake. *Id.* at 7. During a recent time of drought, the ACOE reduced water flow to Greenlawn from 50 CFS to 7 CFS, as directed by the WCM. *Id.* at 8. Greenlawn protested this restriction of water flow, stating that the 7 CFS limit in the WCM was outdated due to Greenlawn's growth and did not honor the original agreement between the parties. *Id.* After eleven days of correspondence, on April 23, the ACOE increased the flow rate to Greenlawn from 7 CFS to 30 CFS. *Id.* On May 15, the ACOE curtailed all hydroelectric power releases from the dam but maintained the 30 CFS to Greenlawn. *Id.* at 8-9. The WCM provides that at Zone 1 drought levels, 50 CFS will be released into the confluence of the Runnet Dam and the Reach for fish and wildlife purposes. However, at Zone 2 and 3, this requirement drs.

This curtailment of hydroelectric releases on May 15, combined with Greenlawn's withdrawals and the forces of nature had detrimental effects on the lower parts of the Green River, and exposed several beds of oval pigtoe mussel, a listed endangered species. *Id.* at 9. Plaintiff NOU, a non-for-profit membership association that represents the oyster fishmen of Green Bay, filed action against Greenlawn and ACOE under the ESA alleging that Greenlawn's withdrawals constitute an illegal take of the endangered oval pigtoe mussel. *Id.* at 10. The oval pigtoe mussel is a mussel that has habitat in the lower part of Green River. *Id.* at 9. No

oval pigtoe mussel habit is with Greenlawn city limits, and none of NOU's members are riparian landowners on either Green River or the Reach. *Id.* at 10. During the sixty-day Notice of Intent to sue under the ESA waiting period, the drought ended and water levels returned to regular levels. *Id.* at 11. All parties agreed that this case is not moot due to the likely occurrence of similar drought conditions in the future. *Id.* at 11.

SUMMARY OF ARGUMENT

The Appellant asks this Court to affirm the district court's decision of granting summary judgement as the City of Greenlawn is a riparian landowner and is entitled to such rights in the State of New Union. Likewise, this Court should affirm the district court's decision of granting summary judgement as the ACOE in their operation of the Runnet Dam did not require consultation under Section 7 of the ESA because the ACOE did not commit a discretionary action. Furthermore, Greenlawn asks this court to reverse the district court's injunction and hold that Greenlawn did not violated section 9 of the ESA.

First, the State of New Union is among a select number of states that recognize a municipality as a riparian landowner that may withdrawal water for the benefit of non-riparian citizens within the municipality's limits. This provides Greenlawn a priority status in water use from the Reach as Greenlawn's use of the water is domestic in nature, which has priority over other riparian landowner's artificial uses. Following in the footsteps of similar riparian states, lower riparian landowners would not have a cause of action against Greenlawn's water use because of the priority given to domestic uses. A reasonable use analysis would be unwarranted here because other than the ACOE, there are no other riparian landowners.

Second, the ACOE did not trigger the consultation requirements of Section 7 of the ESA because it did not partake in a discretionary action. Section 7(a)(2) of the ESA requires an acting

agency to seek consultation to determine if its actions would harm a protected species. The Supreme Court in *National Association of Home Builders* held that this agency action must be discretionary and that non-discretionary actions do not trigger section 7 consultation requirements. The ACOE did not act with discretion in their operation of the Dam Works because it was bound to the State of New Union's riparian system and Greenlawn's riparian rights. The ACOE did not act with discretion in the increase of water flow into the Reach because this release was required by agreement.

Third, Greenlawn's withdrawals were not the proximate cause of the harm to the oval pigtoe Mussel. There are far too many uncontrollable causes at play regarding the water crisis in the Green River Valley. Population and subsequent water use has been on the rise for decades after the WCM was established in 1968, the ACOE is the only actor that can control the amount of water released to Greenlawn or the oval pigtoe mussel's habitat, and most importantly, the forces of nature cannot be blamed on Greenlawn. The citizens of Greenlawn depend on the water released from the Diversion Dam into the Reach, and the mussel depends on the water released from the Runnet Dam trailrace; however, the ACOE has complete control over the amounts of water released by both Dams.

Fourth, the district court failed to balance the equities of the parties before granting the injunction. This is an erroneous application of the law and should be remanded with instructions to apply the proper standard. In light of recent Supreme Court decisions, its opinion in *Tennessee Valley Authority v. Hill* should be read narrowly, and it should not apply to non-federal actors or section 9 of the ESA. Further, the district court abused its discretion in failing to apply any of the other elements required to grant an injunction, each of which tips in favor of reversing the injunction.

ARGUMENT

I. STANDARD OF REVIEW.

Circuit courts review the grant of a summary judgement motion de novo. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012). Summary judgement is appropriate when there is no genuine issue of material fact and the party is entitled to judgement as a matter of law. *Sierra club v. Bosworth,* 510 F.3d 1016, 1022 (9th Cir. 2017).

II. UNDER THE STATE OF NEW UNION'S RIPARIAN SYSTEM, THE CITY OF GREENLAWN HAS THE RIGHT AS A MUNICIPALITY TO MAINTAIN ITS CURRENT WATER WITHDRAWAL AMOUNTS.

Under the State of New Union's common law regarding riparian rights, the City of Greenlawn is entitled to provide water for domestic uses to all of its citizens. Following in the footsteps of other riparian states, the New Union Supreme Court in *Tubbs v. Potts*. 45 N.U. 999 (1909) held that the State of New Union would recognize the right of municipalities such as Greenlawn, to be a riparian landowner with the ability to withdraw and supply water for the benefit of its citizens, both riparian and non-riparian parcel owners. *See Tubbs v. Potts,* 45 N.U. 999*,* R. at 12. Under this type of riparian system, a city is no different than any other riparian owner in that it may conduct water to any part of their "property" for use, so long as they have the infrastructure. *See Barre Water Co. v. Carnes*, 27 A. 609 (Vt. 1893). As with other riparian owners, a city is limited to the actual use of water within their "property" which in this case would be the city limits. *See Stauffer v. East Stroudsburg Borough*, 215 Pa. 143 (Pa. 1906) (A municipality was allowed to build a reservoir and channel the water to its citizens but was prohibited from supplying the reservoir water outside of city limits.)

Along with the state of New Union, the states of Ohio, Pennsylvania and Vermont follow this type of riparian system.[1] This riparian system favors a city in two distinct ways. *See* 1 Water and Water Rights §7.05(1) (Amy K. Kelley, ed. 3rd ed. LexisNexis/Matthew Bender 2019). The first is that no use within the city is unreasonable per se, as the use is likely to be domestic in nature. *Id.* Second, when a court is balancing the uses to determine reasonableness, the court must take into account all of the citizens within the city limits on the city's side of the equation. *Id.*

A. The City of Greenlawn is entitled to its riparian right to water withdrawal as domestic uses have priority over other artificial uses.

The use of water for domestic purposes is the top priority for the use of water in a riparian system. While all riparians have an equal access to the use of the water, priority is given to domestic use or "natural" wants. *See* 1 Water and Water Rights §7.02(a.01) (Amy K. Kelley, ed. 3rd ed. LexisNexis/Matthew Bender 2019). This priority of domestic use stems from an 1842 Illinois Supreme Court case, *Evans v. Merriweather*, in which the Illinois court separated domestic uses such as drinking, cooking, washing, gardening, and general household use from "artificial uses" such as commercial irrigation, generating power, and other industrial or manufacturing uses. *Evans v. Merriweather*, 4 Ill. 491 (Ill. 1842). This separation and priority of domestic uses such as household use and gardening set by the *Evans* court has been adopted as the standard for riparian systems.[2] Under the New Union riparian system, the majority of Greenlawn's water usage would fall under the domestic use priority as the use is household use and gardening. R. at 8. *See Harris v. Brooks*, 283 S.W.2d 129, 132-34 (Ark. 1955).

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[1] *See* New Union: *Tubs v. Potts,* 45, N.U. 999 (1909), Ohio: *City of Canton v. Shock,* 63 N.E. 600 (Ohio 1902), Pennsylvania: *City of Pennsylvania v. Collins*, 68 Pa. 106 (Pa. 1871), Vermont: *Barre Water Co. v. Carnes*, 27 A. 609 (Vt. 1893).

[2] *See* 1 Water and Water Rights §7.02(b)(1) (Amy K. Kelley, ed. 3rd ed. LexisNexis/Matthew Bender 2019), for complete list of riparian states.

The domestic use of water takes priority over artificial uses such as power production. *Evans*, 4 Ill. at 491. Greenlawn's use of the water from the Reach as a domestic use would take priority over other riparian owner's artificial uses. This is evident in the Ohio Supreme Court case, *City of Canton v. Shock*, 63 N.E. 600 (Ohio 1902) which established the municipality riparian water use rule for Ohio and was cited by the New Union Supreme Court in *Tubbs.* R. at 12. In *Canton*, the City of Canton was a riparian owner on a creek in which the city drew its water from, resulting in the inability of a lower riparian owner to run their mill. 63 N.E. at 601. The court ruled in favor of the City of Canton stating that the "primary use of water has been domestic purposes, and its secondary use for power." *Id.* at 603. The Ohio court continues, citing a Pennsylvania case: "People on the upper stream have the right to quench their thirst, and the thirst of their flocks and herds, even though by so doing the wheels of every mill on the lower stream should stand still." *Id.*, *citing Pennsylvania R. Co. v. Miller*, 112 Pa. 34, 41 (Pa. 1886). The U.S. Supreme Court cited to *Canton* in *Sears v. City of Akron*, 246 U.S. 242 (1918), using it as the benchmark for the city's legal riparian rights. This priority of domestic use is echoed in *City of Philadelphia v. Collins*, 68 Pa. 106 (Pa. 1871) in which the Pennsylvania Supreme Court similarly ruled for the taking of water for the citizens of the city to use for domestic purposes. Like the stated cases, Greenlawn's domestic uses have a priority over other riparian owner's artificial uses, (such as the ACOE power generation use) as well as lower riparian's domestic uses.

While the petitioners are not lower riparian owners on the Green River and no other lower riparian owners are stated in the record, the petitioners will likely argue that the totality of Greenlawn's domestic use of the water in the Reach is unlawful but this is not supported by case law in similar riparian jurisdictions. In Vermont, the *Barre* court ruled that if all the water

from a source is taken through a legal use, the lower riparian owners have no cause of action. 27 A. 609 at 610. If the water reaches the citizens of a city first, they can lawfully use as much as necessary for domestic uses, including sanitation and fire prevention. *Id.* The Pennsylvania Supreme Court ruled in a similar way, calling the situation a case of *damnum absque injuria*. Clark v. Pennsylvania R. Co., 145 Pa. 438, 449 (Pa. 1891). In *Canton*, the Ohio Supreme Court continued this line of reasoning from their counterparts and continued to place the burden on the lower riparian owners. 63 N.E. at 603. The *Canton* court states that lower riparian owners have no cause of complaint, because they should have anticipated the potential growth and development of the upper riparian city. *Id.* Applying similar riparian systems, if there were any lower riparians in this case, they would have no cause of action against Greenlawn's domestic use of the Reach waters. As New Union's riparian system is modelled after these states' riparian system it should follow that New Union takes a similar stance that lower riparian owners have no legal cause of action if an upper riparian owner utilizes the complete flow of water for a domestic use.

Although Greenlawn's use of the Reach waters does include industrial or artificial uses, this does not render the above argument invalid as the petitioner may argue. The record states Greenlawn main water use is for planting and watering the citizens of Greenlawn's gardens, a domestic use. R. at 5, *See Harris,* 283 S.W.2d 129, 132-34. This domestic use of water is evident in that the increased water demand occurs in periods of growing seasons for the gardens. *Id.* at 8. The ACOE in their 2017 letter to Greenlawn recognizes that Greenlawn's main water use is a domestic use. *Id.* It is unnecessary for Greenlawn to "share the load" or provide conservation measures as the City of Greenlawn is entitled to its riparian rights and the priority of its domestic uses. Artificial uses further up in the Green River Valley, such as large-scale agriculture

irrigation would have to be considered and adjusted due to domestic use's priority over artificial uses. R. at 8. *Evans*, 4 Ill. at 491. Greenlawn's main use of the Reach water is for domestic purposes and should be recognized in a similar manner as Vermont, Pennsylvania and Ohio as the New Union riparian system is modelled after these states' systems.

B. A reasonable use analysis would be unwarranted as, outside of the Army Corps of Engineers, there are no competing riparian owners to Greenlawn's use.

In jurisdictions where there are competing riparian interests, the theory of reasonable use applies. Reasonable use is the only limit to the exercise of a legal riparian right. *Lawrie v. Silsby,* 56 A. 1106, 1108 (Vt. 1904). The theory of reasonable use has developed over the generations through a state's case law or the adoption of Section 850A: Reasonableness of the Use of Water in the Second Restatement of Torts. In determining reasonableness, the seminal case is *Snow v. Parsons*, 28 Vt. 459, (Vt. 1856) in which the court established a three-step analysis for determining reasonableness. The first step is to establish an industry standard and compare the actor against similar actors. *Snow*, 28 Vt. at 463. In *Snow*, the case dealt with a tannery releasing "spent bark" which resulted in the inability of a lower riparian owner to run their water wheel. *Id.* at 459. The second step is to look at the nature of the water course. *Id.* at 463. Lastly, the third step is to compare the benefit of the activities against each other. *Id.* at 464.

Two of these steps pose the problem faced by the petitioner in this case in that a reasonable use analysis requires another riparian in order to compare the uses, something plainly missing under the current facts. R. at 13. Steps one and three of the *Snow* analysis demonstrate this in that they require the use in question to be compared against either or similar users with step three directly calling for the court to compare the uses in questions. 28 Vt. at 463-64. This is

recognized by the *Canton* court ruling that the City of Canton, in providing water to citizens for power purposes, had to take into account lower riparian owners and cause as little injury as possible. 63 N.E. at 603. While the City of Canton's domestic use of the water was protected, its use of water for power purposes or artificial uses was subject to a reasonableness analysis. (In some jurisdictions, like Ohio, this reasonableness analysis of competing upper and lower riparian owners is a question for the jury.) *Id*.

Mason v. Hoyle, 14 A. 786 (Conn. 1888) is another case a court can use to determine the factors of reasonableness but it faces the same problems as *Snow* when the facts are missing another riparian to compare uses against. *Mason* asks the court to consider the injuries done to the other riparian owner in addition to considering accommodations for future shortages in a fair manner to all riparians. *Id.* These factors do not apply though in this case as the only other competing riparian is the ACOE and it recognized that Greenlawn's domestic use has a priority over their own artificial use.

The application of the Section 850a of the Second Restatement of Torts would be equally unworkable to the current facts of the case. In determining reasonableness, a court may choose to consider factors listed in the Restatement among their own case law factors or as a supplement for missing case law. The Restatement relies on two principles in its reasonableness analysis: that riparian rights are a property right and that water law should be utilitarian and focus on the best use of the water in question. *Pyle v. Gilbert,* 265 S.E.2d 584, 589 (Ga. 1980) (overruled on other grounds). These factors face the same problem as the factors discussed in *Snow* and *Mason* in that they require a completing riparian owner for a fair comparison.

Some states have turned to the legislature in deciding reasonableness and have enacting statutes and regulations to govern the use of water. One such jurisdiction is Pennsylvania which

enacted the Pennsylvania State Water Plan in 2008. This plan regulates limitations during droughts as well as reasonable use of the water. Even without riparian systems such as New Union, Ohio, Pennsylvania and Vermont, cities have a strong claim in a reasonableness analysis and courts have generally found a way to protect a city's water supply for its citizens. *See Dimmock v. City of New London*, 245 A.2d 569 (Conn. 1968). As NOU are not riparian owners on the Green River and the ACOE recognizes Greenlawn's domestic use priority over their own artificial use, there are no riparian owners to compete with Greenlawn's riparian use for its citizens. The reasonable use analysis and Section 850a of the Second Restatement of Torts do not apply

III. IN THEIR OPERATION OF THE DAM WORKS, THE ARMY CORPS OF ENGINEERS WERE NOT REQUIRED UNDER SECTION 7(A)(2) OF THE ENDANGERED SPECIES ACT TO SEEK AGENCY CONSULTATION AS IT DID NOT PARTAKE IN A DISCRETIONARY ACTION.

When an agency action may affect a listed endangered species, Section 7 of the Endangered Species Act (ESA) comes into effect. Section 7(a)(2) states that a federal agency:

> shall, in consultation with and with the assistance of the [Fish and Wildlife Service], 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 habitat of such species . . .

ESA §7(a)(2), 16 U.S.C. §1536(a)(2) (1988). This consultation is described and governed by the Endangered Species Consultation Handbook provided by the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS). FWS & NMFS, Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act, (March 1998.)

Consultation under Section 7(a)(2) is only triggered though when an agency takes an "affirmative" or discretionary action, as opposed to a non-discretionary action. *Wildearth Guardians v. EPA*, 759 F.3d 1196 (10th Cir. 2014). As defined by the FWS in the Consultation Handbook, an action is defined as: "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." Consultation Handbook at *X*. While this definition is broad by design, not every occurrence of an agency action warrants consultation with the FWS in regards to a listed endangered species. While the operation of the Dam Works may affect the oval pigtoe mussel, the ACOE's action did not warrant the consultation requirements found in Section 7(a)(2).

A. The Army Corps of Engineers did not act with discretion as it was bound by New Union's riparian system.

As held by the District Court, the ACOE did not participate in any discretionary action that would trigger the consolation requirement under Section 7(a)(2) in that the release of the water to Greenlawn during drought conditions was required due to Greenlawn's riparian property rights. Discretionary and non-discretionary action was the subject of the Supreme Court case *National Association of Home Builders v. Defenders of Wildlife,* 551 U.S. 644 (2007). Justice Alito in his opinion held that Section 7(a)(2) applies solely to discretionary actions and not when an agency is involved in a non-discretionary action. *Home Builders*, 551 U.S. at 673. The Justice continues to state that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." *Id.* This framework provided by the Supreme Court requires the court reviewing a Section 7 claim to determine whether an agency performed a discretionary action or acted without discretion.

When determining a Section 7(a)(2) consultation claim, the court must determine whether the agency's action was discretionary or non-discretionary. The 9th Circuit Court of Appeals has

examined this question and has produced several tests for the courts to follow. One such test for the court to inquire is provided in *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012). Citing to *Home Builders*, the 9th Circuit states that an "agency action" inquiry involves two steps. *Karuk*, 681 F.3d at 1021. This first being that the court must ask whether the federal agency "affirmatively authorized, funded or carried out the underlying activity." *Id.* In *Karuk*, the U.S. Forest Service did not consult either the FWS or NOAA Fisheries Service regarding the approval of mining notice of intents (NOI) and their potential effect on the ESA listed coho salmon and was ultimately determined to violate Section 7. *Id.* The court held that despite being authorized by statute to authorize NOI's, it was ultimately the Forest Service's discretion to approve or reject the NOIs. *Id.*, *see Home Builders,* 551 U.S. at 665-66, (finding that if a statute leaves an agency with no discretion, that action is not subject to Section 7.)

The present case differs from *Karuk*, in that that the ACOE does not have the same level of discretion as the Forest Service operated under in *Karuk*. The ACOE is statutorily charged with operation of the Dam Works and the release of water into the Reach but recent and future releases in question are not discretionary as they are preempted by Greenlawn's riparian rights and access to water for domestic uses. The ACOE does not have the same decision-making power as the Forest Service did in *Karuk*, the ACOE is required to release the water Greenlawn is entitled to.

This lack of decision-making power directly relates to the second step established in *Karuk*. 681 F.3d at 1021. The second step involves the potential harm to a listed ESA species and examines whether the "agency had some discretion to influence or change the activity for the benefit of a protected species." *Id.* It is important to note that this step does not require a specific

protected species to be identified before the action has happened, but rather simply the "benefit of a protected species." This lack of an identified a specific species does not change the ACOE's lack of discretion though in regards to the Reach. The ACOE had no influence or ability to change the activity for the benefit of the oval pigtoe mussel as the ACOE was bound to release the water to Greenlawn.

Lack of an agency's discretion in its actions has been reiterated in cases following *Karuk*, each adding another aspect for a court to consider in determining a discretionary or non-discretionary action. In *Cottonwood Envtl. Law Center v. U.S. Forest Service*, the court stated that the appropriate test for whether an agency action triggered the duty to consult is not "whether the agency has completed its action, but whether it retains regulatory authority over the action." 789 F.3d 1075, 1087 (9th Cir. 2015). Under this standard, the focus is on the continued authority or ability to continue the agency action in question. (*See Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003), in that the issuing of fishing permits was agency action that could potentially implicate the Section 7 consultation requirement as the agency had to continually issue fishing permits.) For the ACOE, it does not possess the regulatory authority over the action of how much water to release to Greenlawn during drought conditions as the ACOE is bound by Greenlawn's riparian rights. Agencies should not be held to an unreasonable standard for actions outside of their control. *Center for Biological Diversity v. UFWS*, 807 F.3d 1031, 1051-52 (9th Cir. 2015).

B. The increase of water flow from 7 CFS to 30 CFS was not a discretionary action as the increase was subject to an established agreement

The increase of water flow into the Reach from the 7 CFS flow restriction dictated in the Water Control Manuel to the current riparian authorized 30 CFS is not a discretionary action taken by the ACOE. "Where private activity is proceeding pursuant to a *vested right* or to a

previously issued license, an agency has no duty to consult under Section 7 if it takes *no further affirmative action* regarding the activity." *Karuk*, 681 F.3d at 1021 (emphasis added), *Cal. Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 598-99 (9th Cir. 2006). If the agency action stems from an inherited or vested right, the courts have ruled that this action is non-discretionary and not subject to Section 7 consultation. This is demonstrated in the 9th Circuit case, *Cal. Sportfishing Protection Alliance v. F.E.R.C.*. 472 F.3d at 593.

The 2006 9th Circuit case bares many similarities to the present case at hand. In *Cal. Sportfishing*, the Federal Regulatory Commission (FERC) issued a thirty-year license to the respondent for the operation of a hydroelectric facility. *Id.* at 594. Nineteen years into the thirty year license the Chinook Salmon became an ESA listed species prompting the petitioner to bring suit for the respondent to seek consultation with appropriate agency. *Id.* As stated above, the court ruled that the new listing of the endangered species did not trigger the consultation requirement as there was a vested right precluding the agency action. *Id.* at 598-99. Similar to *Cal. Fishing*, the ACOE and Greenlawn entered into an agreement before the listing of an endangered species though the ACOE and Greenlawn decision predates the ESA itself as the WCM was adopted in 1968. R. at 8. Like the hydroelectric facility in *Cal. Sportfishing*, the Dam Works and the ACOE are not subject to consultation as the riparian right was established in the agreement and the passing of the ESA and the listing of the oval pigtoe mussel does not abrogate the agreement. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995).

The original agreement between Greenlawn and the ACOE is not determinative on the 7 CFS flow limit, as petitioner may argue, but rather it is based on the providing of an adequate water supply to the city of Greenlawn. While the 7CFS has been used as the basis for the drought response levels, this is an error in the application of the original agreement. R. at7. The original

agreement between Greenlawn and the ACOE was based on the maintaining of water flow into the Reach "in such *quantities* and at such *rates* and *times* as it is *entitled* to as a riparian property owner . . . ." (emphasis added). This is the standard the ACOE should follow in their future releases of water into the Reach. Petitioner may argue that an action based on a preexisting agreement cannot avoid Section 7 consultation requirements if the implementation of the agreement depends on additional agency action. *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995). This argument would be misplaced as the current case does not require the ACOE to depend on additional agency action as the ACOE is bound to a non-discretionary action in honoring Greenlawn's riparian rights.

In addition to *Cal. Sportfishing*, other cases have addressed a preexisting agreement that has precluded Section 7 consultation requirements. In *Sierra Club v. Babbitt*, a case regarding the spotted owl, the court ruled that the Bureau of Land Management (BLM) did not violate Section 7 as the agreement for a logging road preempted and limited BLM's discretionary ability. 65 F.3d at 1509. Similar to the ACOE and the respondent in *Cal. Sportfishing*, the ESA did not abrogate the preexisting agreement. *Id.* at 1510.

While the managing and operating of a hydroelectric power facility provides many opportunities for the Section 7 consultation requirement to be triggered, the current issues before the court are not among them. Consultation would be triggered if the agreement between Greenlawn and the ACOE were to be renegotiated or renewed. *Cal. Sportfishing* 472 F.3d at 599, *see Natural Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998). Section 7(a)(2) would be triggered if this case involved the drafting or revision of the WCM or other water management strategies. *See Lane Cnty. Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992). Famously, the construction and operation of a federal dam requires agency consultation. *Tenn.*

Valley Auth. V. Hill, 437 U.S. 153 (1978). Lastly, the courts have stated that inaction is not action for Section 7 purposes. *Western Watershed Project v. Matejko*, 468 F.3d 1099, 1107 (9th Cir. 2006).

The agreement between Greenlawn and the ACOE for the release of water into the Reach is not a discretionary action by the ACOE because it is bound by the agreement to allow the release of water to meet Greenlawn's domestic uses. The ACOE's releasing of water from 7CFS to 30 CFS does not constitute a discretionary action as it was bound by the agreement and the passing of the ESA did not abrogate the agreement. To allow an ESA challenge on the amount released to the Reach on an annual basis would be "unduly cumbersome and unproductive in addressing the substance of environmental issues" because there would be an "unending judicial process concerning annual [] requirement that Congress mandated." *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1021 (9th Cir. 2012)

IV. GREENLAWN'S WATER WITHDRAWALS FROM THE REACH DO NOT CONSTITUTE A TAKE UNDER SECTION 9 OF THE ESA BECAUSE IT IS NOT THE PROXIMATE CAUSE OF THE INJURY TO THE PIGTOE MUSSEL.

The Endangered Species Act (ESA) was enacted in 1973 with the expressed purpose of "provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and of] provid[ing] a program for the conservation of such endangered and threatened species." 16 U.S.C. § 1531(b) (2012). The drafters of the ESA recognized that humankind possessed the "ability to destroy . . . all intelligent life on the planet[,]" and called for "caution, for self-searching and for understanding." H.R. Rep. No. 93-412, at 141 (1973). Furthermore, the Supreme Court stated in the seminal ESA case, *Tennessee Valley Authority v. Hill*, that the "plain intent of Congress in enacting this statute was to halt and

reverse the trend towards species extinction, whatever the cost." 437 U.S. 153, 184 (1978) (*TVA*).

To effectuate that purpose, Congress made it "unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered species] within the United States." 16 U.S.C. § 1538 (a)(1)(B) (1988). The ESA defines "take" as "to . . . harm, . . . or to attempt to engage in any such conduct." 16 U.S.C. § 1532 (19) (1988). Although the Act does not define "harm," it does authorize the Secretary of the Fish and Wildlife Service (FWS) to do so. *See* 16 U.S.C. § 1531 (1988). Pursuant to that authority, the FWS has interpreted "harm" to mean

> an act which actually kills or injures wildlife. 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.

50 C.F.R. 17.3 (2006); *see Babbitt v. Sweet Home Chapter of Cmty's for a Great Ore.*, 515 U.S. 687, 697 (1995) (holding that the Secretary's interpretation of "harm" is reasonable).

The "significant habitat modification or degradation" regulation only applies to critical habitats. *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361, 368 (2018).[3] If a person significantly modifies or degrades a critical habitat to an extent that actually kills or injures a protected species, a "take" under section 9 of the ESA has occurred. 16 U.S.C. § 1532 (19) (1988); 50 C.F.R. § 17.3 (2006). However, ordinary requirements of proximate causation and foreseeability are incorporated into the ESA, and the chain of causation between critical habitat modification and the actual harm to the protected species must not be broken to constitute a take. *See Sweet Home*, 515 U.S. at 697 n.9 (majority opinion) (Liability for a take under the ESA "incorporate[s] ordinary requirements of causation and foreseeability.").

[3] It is undisputed that the oval pigtoe mussel's critical habitat is located downstream from the confluence of the Reach and the Runnet Dam trailrace. R. at 9. It is also undisputed that none of the mussel's critical habitat is located on property owned by Greenlawn. *Id*.

Justice O'Conner, in her concurring opinion in *Sweet Home*, recognized that "[p]roximate causation is not a concept susceptible of precise definition." *Id*. at 713 (O'Conner, J., concurring). However, she also recognized that

> [i]t is easy enough, of course, to identify the extremes. The farmer whose fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby. At the same time, the landowner who drains a pond on his property, killing endangered fish in the process, would likely satisfy any formulation of the principle.

Id. (O'Conner, J., concurring). The main distinguishing factor between those two examples of the "extremes" is that an act by a party that could directly and *foreseeably* lead to harm of a protected species is present in the latter. "[P]roximate cause principles inject a foreseeability element into [the ESA]." *Id.* (O'Conner, J., concurring). Simply put, the concept of proximate causation and foreseeability "normally eliminate[s] the bizarre." *Id.* (O'Conner, J., concurring) (quoting *Jerome B Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536 (1995)).

Therefore, "the 'harm' regulation applies where significant habitat modification . . . proximately (foreseeably) causes actual death or injury to identifiable [protected endangered species]." *Id.* (O'Conner, J., concurring). Although the application of these principles has proven difficult for the lower courts,[4] in cases with many remote causes and unforeseeable consequences, like the one at hand, the application becomes simple.

For example, in *Aransas Project v. Shaw*, the Fifth Circuit reversed the district court and held that the Texas Commission on Environmental Quality's (TCEQ) actions in administering

[4] *Compare* R. at 16-17 (District Court for New Union decision applying a but-for test for cause-in-fact but not addressing proximate cause.), *and Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 786 (S.D. Tex. 2011) (applying a but-for test for cause-in-fact but not addressing proximate cause, or "eliminat[ing] 'proximate' from 'proximate cause'" (quoting *Aransas Project v. Shaw*, 775 F.3d 641, 658 (5th Cir. 2014) (reversing 930 F. Supp 2d 716 because of its "erroneous view on proximate cause standards.))), *with NRDC v. Zinke*, 347 F. Supp. 3d 465, 492-95 (E.D. Cal. 2018) (applying a "relaxed" but-for test for cause-in-fact and a foreseeability approach of proximate cause).

licenses to take water from rivers for human, manufacturing, and agricultural use did not, as a matter of law, foreseeably and proximately cause the deaths of an endangered species during a drought. 756 F.3d 641, 663 (5th Cir. 2014), cert. denied, 135 S. Ct. 2859 (2015). In *Shaw*, it was uncontradicted that TCEQ's licensing activities, which had been occurring for years before and after the injury, decreased freshwater inflows and increased salinity in a protected species' critical habitat. *Id*. at 660. The increase in salinity caused a decrease in available food, and the decrease in food caused "harm" to the protected species. *Id*. However, the court highlighted various uncontrollable contingencies that affected the chain of causation. *Id*. at 661-62. "[P]ermitees' and others' water use [which had been steadily increasing], the forces of nature, and the availability of particular foods to the [protected species] demonstrate that only a fortuitous confluence of adverse factors caused the unexpected 2008-2009 die-off found by the district court." *Id*. at 662.

The court stated that "[a]t best" the district court found but-for causation. *Id.* at 660. However, relying heavily on both the majority and Justice O'Conner's concurrence in *Sweet Home*, the Fifth Circuit recognized that ordinary principles of proximate cause and foreseeability act to limit liability under the ESA. *Id.* at 657-58. These "limit[s] to the ESA must therefore mean liability may be based neither on the 'butterfly effect' nor on remote actors in a vast and complex ecosystem." *Id.* (quoting source and footnote explaining the "butterfly effect" omitted). Applying these limitations to the circumstances of the case, the court held that "[f]inding proximate cause and imposing liability on the State defendants in the face of multiple, natural, independent, unpredictable and interrelated forces affecting the cranes' estuary environment goes too far." *Id.* at 663.

Turning to the case before the Court, the record is clear that Greenlawn's withdrawals are not, as the district court held, "the but-for cause of the downstream conditions." R. at 17. This holding is an erroneous application of the law and should be reversed.[5] The record states that "[t]he curtailment of hydroelectric power releases, *combined* with Greenlawn water withdrawals, had sever effects on downstream Green River flows." *Id*. at 9 (emphasis added). Even further, it is uncontradicted that "[d]uring daily hydroelectric peaking operations, Green River flows averaged about 25 CFS over each 24-hour day. *Id*. at 7.

However, when hydroelectric peaking was curtailed on May 15, downstream flow rates dropped close to zero." *Id*. at 9. Greenlawn's water withdrawals were ultimately *lowered* from 50 CFS to 30 CFS, and this change was commenced on April 23, over two weeks before the downstream flow rates dropped close to zero. *Id*. at 8-9. Moreover, it is undisputed expert evidence that to prevent the expiration of the oval pigtoe mussel population, "a minimum flow of 25 CFS averaged over 24 hours is necessary . . . ." *Id*. at 10. Therefore, because Greenlawn withdrawals 30 CFS during the drought periods, even if Greenlawn could maintain its citizen's domestic water needs with 7 CFS, the amount set in the 1968 WCM, downstream flows would only increase to 23 CFS and the mussels would not be able to survive.

Moreover, when only 30 CFS of flow is allocated to Greenlawn in the Reach, the water that actually reaches the mussel's habitat does not flow from the Reach. Greenlawn sits on both sides of the Reach, and the Runnet Dam trailrace intersects the Reach downstream from Greenlawn. *Id*. at 5. The oval pigtoe mussel's critical habitat is downstream from the intersection of the Reach and trailrace in the Green River. *Id*. at 9. After the ultimate decrease of flow into the

[5] A district court's finding of proximate cause is reviewed for clear error. *Bertucci Contracting Corp. v. M/V ANTWERPEN*, 465 F.3d 254, 259 (5th Cir. 2006). When the District Court's factual finding "rest[s] on an erroneous view of the law[,]" the reviewing court is not bound by the district court's factual findings. *Shaw*, 757 F.3d at 658.

Reach from 50 CFS to 30 CFS on April 23, the flow remained constant until the drought restrictions were lifted. R. at 8-9. On May 15, the ACOE implemented Zone 3 drought restrictions and curtailed hydroelectric peaking releases. *Id*. at 8-9. This had detrimental effects and "when hydroelectric peaking was curtailed on May 15, downstream flow rates dropped close to zero." *Id*. at 9. The only change in water use from April 23 to May 15 is the curtailment of hydroelectric power releases. *Id*. at 7-9.

Thus, between April 23 and May 15, Greenlawn withdrew nearly all of the 30 CFS that it was allocated, and the Reach is releasing very little to no water into the confluence of the Reach and the trailrace, and ultimately into the Green River. Therefore, but-for the curtailment of hydroelectric power, the curtailment or recreational releases, and most importantly, the absolute oversight of the 50 CFS allocated to the "confluence of the Howard Runnet Dam trairace and the Bypass Reach for fish and wildlife purposes[,]" *Id*. at 7, all of which Greenlawn has no control over, the oval pigtoe mussel would not be in danger. However, even assuming this is not enough to limit liability, there are many other material contingencies, which demonstrate that a fortuitous confluence of adverse factors caused the harm to the mussels.

Even if but-for causation exists in the case at hand, it is not foreseeable, and it is bizarre to claim, that water usage at a level 40% lower than the amount maintained for decades would result in habitat destruction and the actual injury of a protected species. This case is analogous *Shaw*, in which the Fifth Circuit denied to extend proximate cause to the TCEQ because, *inter alia*, the species had been endangered "for many decades[,]" and the defendant's alleged causal conduct was continuous up until 2010, and the only alleged "take" occurred in 2008-2009. *Shaw*, 775 F.3d at 664. First, like the defendants in *Shaw*, there was no new act on behalf of Greenlawn that caused less water to flow downstream. Greenlawn did not change its water usage between

April 23 and May 15, and the ACOE did not further restrict water flows into the Reach when the Zone 3 drought levels were reached. R. at 7-9. However, despite the consistent flow to Greenlawn, the Green River dried up. This is direct evidence that there were other factors at play that caused the habitat destruction. These factors are analogous to those in *Shaw*.

Like the facts in *Shaw*, the human population surrounding the river has been on a steady increase, and thus, the use of the water by other people has increased as well. The increases in the case at hand, however, has been occurring for over a century. The most influential increase in use occurred in the 1980s, when "several large agricultural operations in the Green River valley commenced diversions of water for irrigation, resulting in evaporative water losses to the system." R. at 7-8. Furthermore, like the defendants in *Shaw*, Greenlawn has no power to control the amount of water diverted by these sources beyond what is reasonable. Moreover, analogous to *Shaw*, the increase in population and use was not the only, or most important, uncontrollable causal factor.

As the court recognized in *Shaw*, the most unpredictable and uncontrollable causal factors are the forces of nature. In the case at hand, "drought conditions have become more frequent[,]" and "below-average precipitation and above normal temperatures" have "increased evaporation rates in the region." R. at 8. As the court in *Shaw* recognized, "these natural conditions can change quickly is a truism, and that the seriousness or duration of a drought cannot be foreseen in advance is equally trite." *Shaw*, 775 F.3d at 662. The same idea holds true in the present case, and it would be bizarre to hold otherwise.

However, this case is even more compelling because the ACOE is another uncontrollable causal factor at play. The ACOE is responsible for all the water that flows into both the Reach and the Runnet Dam trailrace. R. at 7. Therefore, all the water that reaches the oval pigtoe

mussel's habitat is under the ACOE's control. Greenlawn has no control over the ACOE, and if drought conditions persist and the ACOE curtails the releases to the Reach below 25 CFS (which is what it would do at Zone 2 or 3 drought restrictions), there would be no way for Greenlawn to comply with the district court's order, or more importantly, provide the necessary flow for the mussels.

Deeper examination of various lower court decisions amplifies this position. In *Alabama v. U.S. Army Corps of Engineers*, the U.S. District Court for the Northern District of Alabama held that proximate cause principles limited the ACOE's liability under section 9 of the ESA. 441 F. Supp. 2d 1123, 1135 (N.D. Ala. 2006). In *Alabama*, Florida argued that the ACOE's "choice as to the amount of water to retain upstream in storage verses the amount to release downstream to support protected mussels violates [section 9] of the ESA." *Id*. at 1134. The court, however, disagreed. *Id*. Highlighting the more severe drought conditions the basin had encountered in recent years, the court recognized that "[b]ecause of decreased rainfall and increased evaporation, the amount of water available in the [river] basin has fallen sharply." *Id*. Therefore, it held that "[it] cannot hold the Corps responsible for the absence of rain[,]" and "[t]akes that result from acts of nature do not fall within the prohibition of § 9[.]" *Id*. Thus, there was not a causal connection between any take of the mussels and the actions by the ACOE. *Id*. at 1135. The case at hand is wholly analogous to *Alabama* in that this Court cannot hold Greenlawn responsible for the absence of rain and increase in evaporation. Furthermore, as in *Alabama*, this force of nature is so significant that it breaks the causal connection between Greenlawn's actions and the harm to the mussels.

For the reasons stated above, Greenlawn did not violate the ESA, and the District Court's order enjoining Greenlawn's use is rested on an erroneous application of the law and should be

reversed. However, assuming *arguendo* that Greenlawn did violate the ESA, the District Court's injunction was an abuse of discretion and still improper for the reasons highlighted below.

V. THE DISTRICT COURT'S INJUNCTION WAS IMPROPER BECAUSE IT MUST BALANCE THE EQUITIES BEFORE GRANTING AN INJUNCTION, AND EVEN IF THE BALANCE IS NOT NECESSARY, IT FAILED TO ADDRESS THE OTHER ELEMENTS OF AN INJUNCTION.

A preliminary injunction is an equitable and "extraordinary remedy never awarded as a matter of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). Traditional principles of equitable balance with regards to injunctive relief can be traced back centuries. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). It is well-established that a plaintiff seeking a preliminary injunction must show that s/he is (1) likely to succeed on the merits, (2) likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in her/his favor, and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id.* at 24 (quoting *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987)). Furthermore, the Supreme Court has made it clear that when "exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Although Congressional intent can relax the federal courts' obligation to adhere to traditional standards of injunctive relief, inferring such intent should be done with extreme caution and respect to the separation of powers.[6]

[6] *See TVA*, 437 U.S. at 194 (observing that under the separation of powers doctrine, the role of the courts is to enforce the law, not to reformulate the directives of Congress).

The district court in this case failed to balance the equities before granting the injunction. This is an erroneous application of the law, and the holding must be reversed.[7] First, *TVA* does not apply to non-federal actors accused of violating section 9 of the ESA; therefore, the district court was obligated to balance the equities in the case at hand, and its failure to do so was an abuse of discretion. Second, even if the district court did not abuse its discretion when failing to balance the equities, its failure to address the other three elements of injunctive relief is wholly inappropriate and requires reversal in and of itself.

A. The District Court must balance the equities before enjoining a beneficial municipal activity, when the activity would cause the expiration of an entire endangered species.

Several courts have held that the plain language of the ESA, as interpreted in *TVA*, precludes federal courts of equity from balancing the parties' harms when ruling on an injunction under the ESA. *See e.g.*, *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (citing *TVA* and holding that "the balance of hardships and the public interest tips heavily in favor of protected species."). This conclusion is based entirely on the Supreme Court's decision in *TVA*, which was only reviewing discretionary federal actions and section 7 of the ESA. *TVA*, 437 U.S. at 174, 193-94 ("[T]he language, history, and structure *of the legislation under review here* . . . [,]" and recognizing that the injunction at issue was based on the "irreconcilable conflict between operation of the Tellico Dam and the explicit provisions of § 7.") (emphasis added). In light of *NAHB* and *Winter*, it is improper to stretch such a factually and legally narrow holding to non-federal actors and every section of the ESA.

[7] A district court's grant or denial of injunctive relief is reviewed for abuse of discretion. *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 620 (5th Cir. 2013). When fashioning its injunctive relief, a district court abuses its discretion if it relies on erroneous conclusions of law, or it misapplies the factual or legal conclusions. *Shaw*, 757 F.3d at 663 (quoting *Peaches Entm't Corp. v. Entm't Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir.1995)).

Although in *TVA* the Supreme Court seemingly relaxed the traditional standards of injunctive relief for violations of the ESA, 30 years later, in *National Association of Home Builders v. Defenders of Wildlife*, the Court clarified that the *TVA* holding has limits. *See* 551 U.S. 644, 670-71 (2007) (*NAHB*) ("[*TVA*] did not speak to the question . . . at issue here."). Furthermore, in *Winter v. Natural Resources Defense Council*, the Court held that "the balance of equities and consideration of the public interest—are pertinent in assessing the propriety of *any* injunctive relief, preliminary or permanent." 555 U.S. 7, 32 (2008) (emphasis added). The relaxed standard introduced through dicta in *TVA* should be read narrowly and apply to only discretionary federal actions that violate section 7 of the ESA.[8]

The Supreme Court of the United States stated in *Winter* that "[i]n each case, courts '*must* balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (quoting *Amoco*, 480 U.S. at 542) (emphasis added). Traditional considerations applicable to actions seeking an injunction reflect a "'practice with a background of several hundred years of history,' a practice of which Congress is assuredly well aware." *Id*. at 313 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). Congress may intervene and control the exercise of the courts' discretion, "but we do not lightly assume that Congress has intended to depart from established principles." *Id*. Equitable jurisdiction is "not to be denied or limited in the absence of a clear and valid legislative command." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

Therefore, traditional equitable discretion is required unless Congressional intent is clear to limit or guide it. In *Amoco Production Co. v. Village of Gambell*, for instance, the Supreme

[8] *See, e.g.,* Steven G. Davison, Comment, *Federal Agency Action Subject to Section 7(A)(2) of the Endangered Species Act*, 14 Mo. Envtl. L. & Pol'y Rev. 29, 48 (2006) (noting that *TVA* only addressed "the issue of whether appropriations for the Tellico Dam after the enactment of [S]ection 7 amended or partially repealed that section of the ESA").

Court of the United States held that courts must engage in a traditional equitable analysis when considering a preliminary injunction under the Alaska National Interest Lands Conservation Act. 480 U.S. 531, 542 (1987). The Court highlighted "the well-established principles governing the award of equitable relief in federal courts.'" *Id*. Included within these principles was that:

> [i]n each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. Although particular regard should be given to the public interest, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances . . . . [W]e do not lightly assume that Congress has intended to depart from established principles .... 'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'"

Id. (quoting *Weinberger*, 456 U.S. at 313).

Statutes that have restricted federal courts' equity jurisdiction are expressed and clear on this intent. For example, the Supreme Court of the United States, in *Weinberger v. Romero-Barcelol*, discussed the difference between the Clean Water Act's (CWA) general grant of authority to federal courts to hear civil actions seeking an injunction and the CWA's more specific "rule of immediate cessation" that directs the EPA to "seek an injunction to restrain immediately discharges of pollutants he finds to be presenting 'an imminent and substantial endangerment to the health of persons or to the welfare of persons.'" 456 U.S. 305, 317 (1982). This is important because "the statutory scheme as a whole contemplates the exercise of discretion and balancing of equities militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute." *Id*. at 316. Congress, therefore, knows how to expressly limit this discretion, but there is no limiting provision in the ESA. This should be understood to grant courts their traditional equitable discretion in enforcing the statute, not limiting it.

Moreover, it is not unheard of for a federal court of equity to balance the hardships of the parties in the context of section 9 of the ESA. For example, in *Hamilton v. City of Austin*, the Western District of Texas balanced the harm to the public in not cleaning a well-known swimming area and the possibility of directly harming a protected species during the cleaning. 8 F. Supp. 2d 886, 894-97 (W.D. Tex. 1998). The plaintiffs in *Hamilton* sought to preliminarily enjoin the cleaning of Barton Springs Pool in order to protect an endangered species of salamander. *Id.* at 891-92. The court held that "the harm to the defendants and the public interest . . . weigh heavily against granting the injunction." *Id.* at 897. Furthermore, the court examined the other elements of injunctive relief, which the district court in the case at hand did not, which was an abuse of discretion and requires reversal.

Lastly, a narrow application of *TVA* would better protect private land owners as well as endangered species. Brandon M. Middleton, *Restoring tradition: The Inapplicability of TVA v. Hill's Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non- Federal Actors*, 17 Mo. Envtl. L. & Pol'y Rev. 318, 353 (2010). Because the prohibition on "takes" applies to all persons, it has served as a barrier for private landowners to make beneficial use of their property. Diana Kirchheim, Comment, *The Endangered Species Act: Does 'Endangered' Refer to Species, Private Property Rights, the Act Itself or All of the Above?*, 22 Seattle U. L. Rev. 803 passim (1999). This barrier also "shift[s] the burden of species conservation to private property owners instead of encouraging property owners to become part of the solution by conserving species on their own property." *Id*. at 805. Broadly applying *TVA* to non-federal actors accused of violating section 9 would foreclose the courts from examining the economic hardships of the injunction, and circumvent any Fifth Amendment taking analysis, in which economic hardships of the injunction are relevant.

Although many courts have held otherwise, *TVA* is silent, or at lease ambiguous, as to whether its application applies to non-federal actors who violate section 9 of the ESA. Until there is direct guidance from Congress or the Supreme Court, this court should interpret and apply *TVA* narrowly and conduct the traditional balancing of equities entrusted with the federal courts for centuries. However, in this case, the district court failed to recognize the other elements necessary to grant an injunction, which is an abuse of discretion.

B. Even if the district court did not need to balance the equities before granting the injunction, it failed to address the other elements for a preliminary injunction, which is an abuse of discretion.

The remaining elements to consider when granting or denying an injunction are: (1) the asking party is likely to succeed on the merits; (2) the asking party will suffer irreparable harm in the absence of an injunction; and (3) the injunction would serve the public interest. *See Winter*, 555 U.S. at 24. Although each of these elements weigh in favor of reversing the injunction, the district court failed to address them all. R. at 11-18.

1. The ACOE and NOU are not likely to succeed on the merits.

As stated in section III of this brief, Greenlawn's withdrawals are not the proximate cause of the harm to the mussel. Therefore, Greenlawn has not violated the ESA, and the ACOE and NOU are not likely to succeed on the merits. Because the district court relied on erroneous conclusions of law and misapplied the factual conclusion to that erroneous conclusion, it abused its discretion. *See Abraham*, 708 F.3d at 620.

2. The ACOE and NOU will not suffer irreparable harm in the absence of an injunction.

There is certainly nothing in the ESA that explicitly, "or by a necessary and inescapable inference," restricts a court's discretion to decide whether a plaintiff has suffered irreparable injury. *See Amoco*, 480 U.S. at 542 (internal quotation marks omitted); 16 U.S.C. § 1540(g)(1)(A) (2002). To establish irreparable harm, plaintiffs bear the burden of demonstrating that irreparable injury "is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). In *Winter*, the Supreme Court adopted this heightened standard and rejected the Ninth Circuit holding "that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." *Id.* at 21 (quoting *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (9th Cir. 2007).

For example, the Fifth Circuit applied the heightened standard introduced in *Winter* and reversed the district court's granting of an injunction because future injury was not "certainty impending." *Shaw*, 757 F.3d at 664. The reviewing court criticized the district court's finding because it "made no subsidiary findings to buttress" the statement that there was a "reasonably certain threat of imminent harm." *Id*. However, the court earlier held that there was no proximate cause on behalf of the plaintiffs because of "multiple, natural, independent, unpredictable and interrelated forces[,]" and that this was a "unique" year with regards to "the forces of nature." *Id*. at 663-64. Therefore, based heavily on the fact that the defendants had not changed their actions and that the plaintiffs could not prove "takes" in any year before the year at issue, the court could not justify irreparable harm. *Id*. The court stated that "[i]njunctive relief for the indefinite future cannot be predicated on the unique events of one year without proof of their likely, imminent replication." *Id.*

Turning to the case at hand, it is undisputed "that based on recent trends and scientific assessments of precipitation patterns and temperature trends resulting from climate change, Drought Warning conditions are likely to occur again in the near future . . . ." R. at 11. However, this statement only amplifies the position that Greenlawn's actions are not the cause of the harm to the mussel, which, like the district court in *Shaw*, is the basis for the district court's injunction. If irreparable harm is present in this case because "drought warning conditions are likely to occur again in the near future[,]" then it is clear that the harm will continue regardless of Greenlawn's activities. In fact, Greenlawn has not changed its water usage and does not have any means to control the forces of nature or drought conditions. Therefore, any injunction placed on Greenlawn would not change the amount of harm facing the oval pigtoe mussels.

Lastly, even if irreparable harm is likely in the absence of an injunction, the ACOE has the final decision on how much water to release into the Reach. *See* R. at 7. If the WCM is to govern the releases, then Greenlawn will only be allocated 7 CFS during Zone 2 and 3 drought restrictions from the ACOE, making it impossible for Greenlawn to release 25 CFS (the amount needed to sustain the mussels) into the Green River. Greenlawn has no control over the ACOE's actions. This is evident in the fact that Greenlawn had to send a letter *requesting* that 30 CFS be allocated to Greenlawn to sustain its citizens. Although the "District Commander relented[,]" it is at issue if the District Commander was obligated to accommodate the request. It is quite possible that even if this Court affirms the injunction, the drought conditions will persist (or even worsen), and the ACOE will curtail all downstream releases based on the lake levels. This would make it impossible for Greenlawn to comply with the order and we would be before the courts again. The remaining element of a preliminary injunction requires a court to ask if the injunction would serve the public interest.

3. The injunction would not serve the public interest.

If the instantaneous measures to alleviate some of the potential harm to the protected species may not be sustainable, the injunction is not in the public interest. *See Alabama*, 441 F. Supp. 2d at 1137. When analyzing this element, the courts must look not only to the parties in the action, but the public as a whole. *See Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 261-62 (D.C. Cir. 2003). Greenlawn provides water for over 100,000 members of the public. R. at 5. All of this water comes from the Reach, and an order enjoin Greenlawn from accessing it could have detrimental effects on every citizen in the city limits and thousands more. Furthermore, it does not guarantee the mussels will not be harmed in the long run.

This was the case in *Alabama*, where the Norther District of Alabama determined that an injunction would be improper when, *inter alia*, the court "cannot find . . . that the public interest in preserving the endangered species would be served by granting the injunction." *Alabama*, 441 F. Supp. 2d at 1137. The court reasoned that a minimum flow to the habitat might "do more harm than good to the mussels and the [river basin] ecosystem" because a loss to upstream reservoirs may be harmful in the long run. *Id.* The same is true in the case at hand. In the case before the Court, the district court failed to examine this element, so there are not many relevant facts available to examine. However, the drought conditions in the Green River Valley are unpredictable, and a loss in upstream reservoirs may, like in *Alabama*, cause more harm than good in the long run. A proper analysis of this element requires examination of the effect of the injunction on the protected species, the basin's ecosystem, and the public as a whole. *Am. Rivers*, 271 F. Supp. 2d at 261-62. In the present case, the district court did not address this element, so it is impossible to say what factors it *would* have examined. Therefore, its conclusion was an abuse of discretion.

CONCLUSION

Greenlawn asks this Court to affirm the district court's decision of granting summary judgement. Greenlawn is a riparian landowner and is entitled to such rights in the State of New Union. Likewise, this Court should affirm the district court's decision of granting summary judgement because the ACOE's non-discretionary operation of the Dam Works did not require consultation. Furthermore, Greenlawn asks this court to reverse the district court's injunction because it failed to examine any of the elements necessary for an injunction. Lastly, Appellant asks that this Court to hold that Greenlawn was not the proximate cause of the harm to the mussel because of the many uncontrollable causes and contingencies at issue. All of which demonstrate that a fortuitous confluence of adverse factors caused the harm to the mussels, and the district court's determination that Greenlawn was the sole cause is an abuse of its discretion.