Team #31

MEASURING BRIEF
for Defendant–Appellee,
The United States Army Corps of Engineers

CA. NO. 19-00987

UNITED STATES COURT OF APPEALS
for the
TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,
PLAINTIFF – APPELLANT,

-v.-

UNITED STATES ARMY CORPS OF ENGINEERS,
DEFENDANT – APPELLEE,

-v.-

CITY OF GREENLAWN, NEW UNION,
DEFENDANT – APPELLANT.

Appeal from the United States District Court
For the District of New Union

BRIEF FOR DEFENDANT–APPELLEE,
UNITED STATES ARMY CORPS OF ENGINEERS

Team #31

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT

UNITED STATES COURT OF APPEALS

FEDERAL DISTRICT COURT

STATE SUPREME COURT

FEDERAL STATUTES

FEDERAL ADMINISTRATIVE & EXECUTIVE MATERIALS

TREATISES & OTHER MATERIALS

JURISDICTIONAL STATEMENT

This case comes before this Court on appeal from the final order of the United States District Court for the District of Bliss. Federal district courts have original jurisdiction to hear actions arising under the citizen suit provision of the Endangered Species Act (ESA). 28 U.S.C. § 1331; 16 U.S.C. § 1540(g). Under 28 U.S.C. § 1367(a), federal courts have supplemental jurisdiction over claims which are so related as to form part of the same case or controversy as claims in which the federal court has original jurisdiction. Pursuant to 28 U.S.C. § 1291, the Twelfth Circuit Court of Appeals has jurisdiction to hear appeals from any final decisions of a district court below. The district court entered its final judgment on May 15, 2019, and parties filed a timely notice of appeal. R. at 3.

STATEMENT OF THE ISSUES

I. Whether the City of Greenlawn, a riparian property owner entitled to withdrawals for municipal purposes under New Union law, must reduce its water withdrawals from the Green River Bypass Reach during drought conditions.

II. Whether Army Corps of Engineers' operation of the Howard Runnet Dam Works pursuant to agreements and riparian rights constitutes discretionary action subject to the consultation requirements of Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536.

III. Whether the City of Greenlawn's withdrawal of virtually all the available water in the Bypass Reach during a drought constitutes a "take" of endangered oval pigtoe mussels when low river flows caused the extirpation of 25% of the local mussel population, in violation of Section 9 of the ESA, 16 U.S.C. § 1538(a)(1).

IV. Whether the district court erred by failing to balance the equities before enjoining an activity that provides a substantial public benefit.

STATEMENT OF THE CASE

This case is an appeal of an order of the District Court from the District of Bliss granting summary judgement with respect to three claims and issuing an injunction against the City of Greenlawn (Greenlawn). New Union Oystercatchers (NUO) timely filed suit against Greenlawn and the United States Army Corps of Engineers (Corps) pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g). R. at 10.

NUO's complaint alleged ESA violations against the Corps and Greenlawn and brings a common law riparian rights claim against Greenlawn. *Id.* The Corps joined NUO's claim that Greenlawn caused an illegal "take" of the oval pigtoe mussels under ESA Section 9, 16 U.S.C. § 1538(a)(1)(B). *Id.* Greenlawn filed a crossclaim against the Corps, seeking a declaration of its right as a riparian landowner to continued flows in the Green River Bypass Reach (Bypass Reach) sufficient to meet its municipal water needs. R. at 10–11.

On May 15, 2019, the district court entered summary judgment on all three claims: (1) granting summary judgment for the Corps, dismissing NUO's claim alleging a violation of Section 7(a)(2) of the ESA; (2) granting summary judgment for Greenlawn, declaring its rights as a riparian landowner; (3) granting summary judgment for NUO, declaring Greenlawn in violation of Section 9 of the ESA and enjoining Greenlawn from causing water withdrawals that result in the flow downstream to drop below 25 cubic feet per second (CFS) over 24 hours. R. at 18. Greenlawn and NUO both filed a timely Notice of Appeal. R. at 1. This Court granted review on September 1, 2019. R. at 3.

STATEMENT OF FACTS

I. The Howard Runnet Dam Works and Greenlawn's Riparian Rights

This case places the Corps in the middle of competing interests vying for water resources, tasked with balancing these needs with its State and Federal obligations. Greenlawn owns the riverfront and riverbed along a portion of the Bypass Reach from which Greenlawn has been withdrawing water for municipal needs since 1893, and currently supplies over 100,000 customers. R. at 5. In 1947, Corps constructed the Green River Diversion Dam and the Howard Runnet Dam (Dam Works) pursuant to the River and Harbor Act of 1945, which authorized the dam for flood control, hydropower, and recreational uses. R. at 6. The Howard Runnet Dam generates electricity for the New Union Regional Electric Cooperative. R. at 10. Construction of the Dam Works threatened to entirely cut off Greenlawn's historic water supply. R. at 6. Accordingly, the Corps entered an agreement with Greenlawn requiring the Corps to maintain flows into the Bypass Reach from the Diversion Dam (the Agreement). *Id.* The Agreement requires the Corps to allow flows to Greenlawn in "such quantities and at such rates and at times as it is entitled to as a riparian property owner" under New Union law. *Id.* New Union recognizes municipalities as "riparian proprietors" holding a right to withdraw water to serve the domestic and commercial needs of their inhabitants.

The Corps operates the Dam Works pursuant to a Water Control Manual (the Manual) which was last revised in 1968. *Id.* The Manual, which guides rates at which water is released from the Dam Works under various conditions, establishes that "[a]t all times the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply

agreements entered into by the United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law." R. at 7.

II. The Spring 2017 Drought and Reduced Green River Flows

Water availability has not historically been a problem along the Green River. *Id.* However, climate change, population growth, and increased upstream withdrawals have recently upset the Corps' ability to balance Greenlawn's riparian rights, the Agreement, and the Manual guidelines. R. at 8. Responding to drought conditions in the spring of 2017, the Corps applied the Manual's Zone 2 "Drought Warning" parameters, which provide that all recreational releases be curtailed, hydropower peaking maintained, and releases into the Bypass Reach reduced to 7 CFS. R. at 8. However, the reduced flows in the Bypass Reach proved insufficient to meet Greenlawn's municipal needs. *Id.* Greenlawn subsequently demanded that the Corps increase water releases, in accordance with its riparian rights to flows in the Bypass Reach. *Id.* In response, the Corps increased water releases into the Bypass Reach from 7 CFS to 30 CFS. *Id.* Greenlawn consumed nearly all of these increased flows in the Bypass Reach. R. at 9.

The increased flows to the Bypass Reach coupled with peaking hydroelectric power demands triggered Zone 3 "Drought Emergency" guidelines requiring curtailment of hydroelectric peaking operations. *Id.* The hydroelectric curtailment and Greenlawn's withdrawals turned the Green River downstream of the Dam Works into "stagnant pools of water and narrow trickles." *Id.* The severely reduced flows exposed beds of oval pigtoe mussels, a federally listed endangered species, all the way to the estuary 60 miles downstream of the Dam Works. *Id.* The mussels must remain submerged to survive, and were unable to move to any suitable nearby habitat. *Id.* The low flows severely impacted the ecosystem as a whole by

increasing siltation, destroying oval pigtoe habitat, blocking the migration of sailfin shiners (a host fish required for oval pigtoe reproduction), and affecting the Green Bay downstream of the Dam Works. *Id.* While no mussels were located on the portion of the river owned by Greenlawn, the reduced flow conditions resulted in the death of approximately 25% of the Green River oval pigtoe mussel population downstream. *Id.* Greenlawn did not obtain, and has not since obtained, an incidental take permit under Section 10 of the ESA to authorize death of endangered mussels ancillary to their consumption of the "last drops" of the Bypass Reach flows. R. at 10, 17. Accordingly, NUO filed suit under the ESA citizen suit provision. During the sixty-day notice period, increased rainfall eliminated the immediate threat to the Green River mussel population. R. at 11. However, all parties agree that changing weather patterns indicate that Drought Warning conditions are likely to occur again in the future. *Id.*

STANDARD OF REVIEW

This case comes before this Court on appeal from the district court's grant of summary judgment. An appellate court reviews the grant of summary judgment de novo, applying the same legal standard as a district court. *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 557–58 (1988). Appellate courts review facts in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 380 (2007). District courts' grants of injunctive relief are reviewed for abuse of discretion. *See, e.g.*, *Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014).

SUMMARY OF THE ARGUMENT

The district court properly granted summary judgment on three of the four issues, because: (1) under riparian principles, Greenlawn's riparian rights to the Bypass Reach flows remain during drought periods; (2) the Corps' operation of the Dam Works during drought

conditions to provide flows to Greenlawn was a non-discretionary action not subject to consultation under Section 7 of the ESA; and (3) Greenlawn's withdrawals during drought warning conditions caused a "take" of the endangered oval pigtoe mussel in violation of Section 9 of the ESA. However, the district court erred by entering an injunction against Greenlawn without considering the public interest weighing in favor of Greenlawn's water usage.

First, common law riparian principles dictate that Greenlawn may continue water withdrawals for its municipal needs, even during drought conditions. Neither NUO or its members are riparian landowners, and therefore cannot assert riparian claims against Greenlawn. Although NUO's alleges that the Corps has its own riparian right to divert water for hydroelectric generation, riparian principles dictate that Greenlawn's municipal water use must take priority over the Corps' power generation. Finally, principles of federalism dictate that arguments for changes in state law governing water resource allocation should be addressed to state courts and legislatures, not federal judges.

Second, the Corps was not required to consult before increasing the releases to Greenlawn because it could not refuse the increase. Section 7(a)(2)'s consultation requirement is limited to discretionary agency actions. The Supreme Court recognized in *National Association of Home Builders* that not every agency action is a product of that agency's exercise of discretion, as discretion presumes an agency can exercise judgement in connection with a particular action. The Corps did not retain the ability to act with judgement in connection with the increasing flows to the Bypass Reach because the terms of the Manual and the Agreement require the Corps to provide Greenlawn with sufficient flows to meet their withdrawal needs as a

riparian property owner. Because the Corps course of action was governed by these requirements, the increase was not a discretionary act requiring consultation.

Third, Greenlawn's withdrawals during drought warning conditions constituted unlawful "harm" to the endangered oval pigtoe mussel by causing significant modification and degradation to the mussel habitat, which reduced the Green River mussel population by 25%, in violation of Section 9 of the ESA. Greenlawn's actions were the cause-in-fact of this harm because the drought emergency conditions would not have occurred but for Greenlawn's water usage during the drought warning conditions. And the harm to the endangered mussels was a proximate and foreseeable result of Greenlawn's usage of nearly all the water upstream of aquatic habitat.

Fourth, the district court erred by not considering the contravening public interest in maintaining Greenlawn's withdrawals from the Bypass Reach. The Supreme Court has recently emphasized the importance of the traditional test for equitable relief. *TVA v. Hill*, however, does not displace the traditional test when the challenged activity is a non-federal actor's exercise of its riparian landowner rights that will not cause the listed species to go extinct or destroy its critical habitat.

Therefore, summary judgment was proper on all three issues, but the district court abused its discretion by failing to balance the equities before enjoining Greenlawn's water withdrawals.

ARGUMENT

I. COMMON LAW RIPARIAN RIGHTS PRINCIPLES DICTATE THAT GREENLAWN HAS A RIGHT TO CONTINUE WATER WITHDRAWALS FOR ITS MUNICIPAL NEEDS, EVEN DURING DROUGHT CONDITIONS.

Under common law riparian principles, Greenlawn has a right to continue water withdrawals to satisfy the needs of its inhabitants. First, because neither NUO nor its members are riparian landowners, they cannot assert riparian claims against Greenlawn. And even if NUO or its members were riparian landowners, claims to in-stream water use would fail under riparian law. Second, while NUO asserts that the Corps has its own riparian right to divert water for hydroelectric generation, riparian principles dictate that Greenlawn's right to municipal water use must take priority over the Corps' power generation. Finally, although NUO may argue that a growing scarcity of water resources calls for modifications of governing state law, those arguments do not belong in federal court. Fundamental principles of federalism dictate that changes in state law governing water resource allocation are more properly addressed by State courts and legislatures than Federal courts.

A. Under Riparian Law, NUO Cannot Assert Riparian Rights Claims Against Greenlawn, Because NUO's Members are not Riparian Landowners.

Under riparian principles, NUO lacks standing to assert any riparian rights claims against Greenlawn, because no members of NUO are riparian landowners. As the Supreme Court declared in *United States v. Willow River Power Co.*, the "essence" of riparian rights doctrine is that "each riparian proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the *other riparian proprietors* to make a reasonable use." 324 U.S. 506, 505 (1945) (emphasis added). The riparian rights doctrine limits a riparian's water use *only* where one riparian owner challenges another riparian owner's water use as

unreasonable. Barton Thompson, Jr. et. al, *Legal Control of Water Resources* 29 (6th Ed. 2018). This bedrock principle was well-established in early riparian rights cases, *Evans v. Merriweather*, 4 Ill. 492, 492 (Ill. 1842) (Illinois Supreme Court holding that a riparian proprietor must use water "as to do no injury to any other *riparian proprietor*" (emphasis added)), and holds true today, *Koch v. Aupperle*, 737 N.W.2d 869, 881 (Neb. 2007) (Supreme Court of Nebraska holding that plaintiffs showing no riparian rights to tributary had no common-law standing to oppose construction of upstream dam). Neither NUO nor any NUO members assert ownership of any property abutting the Green River. R. at 13. Therefore, under riparian law NUO does not have standing to challenge Greenlawn's water use as unreasonable.[1]

Further, even if NUO or its members were riparian landowners, their claim of right to in-stream water use would fail. An exhaustive survey of riparian rights cases revealed that "no private riparian rights cases involv[e] maintenance of flow for fish or wildlife habitat." Peter N. Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri*, 47 Mo. L. Rev. 429, 438 (1982). NUO does not have standing to assert riparian rights claims against Greenlawn, and even if it did, riparian claims do not extend to the in-stream uses to which NUO claims a right.

[1] Despite NUO's lack of common law standing to assert that Greenlawn's use is unreasonable, NUO may argue that Greenlawn's diversion of treated sewage into another watershed is per-se unreasonable. But only a small minority of courts have indicated that "material diversions" are per-se unreasonable, and further, that view "undercuts the entire thrust of the theory" of riparianism, "which is precisely to allow diversions so long as they do not unreasonably impact *on other riparians*." 1 *Waters and Water Rights* § 7.02(d)(1) (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2019) (emphasis added). Moreover, nothing in the record indicates that this diversion has any "material" impact on water returned to the Green River Bypass Reach.

B. Riparian Principles Dictate that Greenlawn's Right to Use Water for Lawn and Ornamental Gardening Must Take Priority Over the Corps' Right to Use Water for Hydroelectric Power Generation.

The New Union Supreme Court in *Tubbs v. Potts* established the right of municipalities to withdraw water for use by non-riparian lots in their municipality. 45 N.U. 999 (N. U. 1909). Under this 'minority rule,' municipalities are "riparian proprietors" with a right to withdraw water to serve the domestic and commercial needs of all their inhabitants. *City of Canton v. Shock*, 63 N.E. 600, 602 (Ohio 1902) (holding that a municipality "overshadows the individuals, and stands in its corporate capacity as a single proprietor extending throughout its entire limits"). Under this rule, not only is "no use within the city [] unreasonable *per se*," but where a city's use competes with another riparian's use, a determination of which use takes priority "must take into account all customers within the city limits on the city's side of the equation." 1 *Waters and Water Rights* § 7.05 (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2019). Because Greenlawn consists primarily of residential districts, where conflicts arise, courts must weigh that aggregate domestic use against use by other riparian landowners. Although NUO argues that the Corps has its own riparian rights to water use, riparian principles dictate that this Court must give Greenlawn's domestic use priority over the Corps' use for hydroelectric power generation.

1. Ornamental gardening is a domestic use, and therefore takes per-se priority over the Corps' right to use water for hydroelectric generation.

Under riparian law, Greenlawn's domestic water use must take priority over the Corps' artificial use. Courts resolve disputes between competing riparian proprietors by first distinguishing between "natural" (or "domestic") and "artificial" uses, with natural uses taking priority over artificial uses. Kelley, *supra*, § 7.02. Riparian rights principles dictate that between competing proprietors, water used for "strictly domestic purposes . . . such as for household use"

takes priority over artificial uses. *Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955). Because ornamental watering is a domestic use, and hydroelectric power generation is an artificial use, the Corps' power generation uses must yield to Greenlawn's ornamental watering use.

2. Ornamental watering is a domestic use.

Although older cases held a narrower view of the specific class of preferred uses, often referred to as natural uses, more modern cases hold that the class of preferred uses is that of domestic uses. In the mid-1800s, courts considered "natural" uses to be those uses which were "absolutely necessary . . . [for] existence," versus "artificial" uses which merely increased "comfort and prosperity." *Evans v. Merriweather*, 4 Ill. at 495–9. However, this rule evolved such that later courts began to classify the per-se superior uses as "domestic." For example, in *Harris v. Brooks*, the Arkansas Supreme Court contrasted water used for "strictly domestic purposes," including "household use," with all "other lawful uses of water," which the court regarded as inferior. 283 S.W.2d 129 at 134. The Supreme Court of Georgia recently noted the "well-established consensus" that water used for these "strictly domestic purposes is usually accorded a preference over [other uses]." *Tunison v. Harper*, 690 S.E.2d 819, 821 (Ga. 2010).

Ornamental watering is a domestic use. NUO may point out that that the *Harris v. Brooks* court (among others) included "irrigation" among non-household uses, and argue that ornamental watering is therefore an inferior use. 283 S.W.2d at 134 ("The right to use water for strictly domestic purposes—such as for household use—is superior to many other uses of water—such as for fishing, recreation and irrigation.")[2] But in the riparian context, the inferior "irrigation" use

[2] The Manual also recognizes this hierarchy, curtailing releases for recreation and wildlife before limiting Greenlawn's withdrawals.

involves irrigation specifically for commercial purposes. *See, e.g.*, *Nesalhouse v. Walker*, 88 P. 88 129, 134 (Wash. 1955) (referring to water used for "irrigation" as distinct from water used for "domestic purpose" in the context of riparian owners' commercial crop production); *accord Taylor v. Tampa Coal Co.*, 46 So. 2d 392, 393 (Fla. 1950) ("irrigation" used in reference to water diversions made for "commercial purposes"). Water used by homeowners for lawns and ornamental gardening is not used for such commercial purposes. Because ornamental gardening is a domestic use, under riparian principles this Court must afford that use absolute priority over competing, artificial uses.

3. Power generation is an artificial use.

Power generation is an artificial water use, and therefore inferior to Greenlawn's domestic use. The Corps' does not generate power for its own domestic needs, but instead generates electricity for the New Union Regional Electric Cooperative. Although NUO might argue that this electricity is used at least partially domestically—specifically for peak load power generation supporting household air conditioning—the dispositive fact is that the Corps does not generate this electricity for its own domestic needs. With respect to its dam operations, the Corps is thus similar to corporations, which, as the Supreme Court of Alabama has noted, are "artificial bodies" that can have no "natural wants." *Stein v. Burden*, 24 Ala. 130, 146 (Ala. 1854).[3] Furthermore, the fact that that electricity might eventually be sold to households cannot transform electricity generation into a "domestic" use; if that were the case, then large-scale commercial irrigation would be considered "domestic" simply because the crops it produces are eventually consumed in households. But courts have held the opposite. *See Taylor v. Tampa*

[3] No cases of which the Corps is aware hold that hydropower generation is a "domestic use."

Coal Co., 46 So. 2d at 393 (noting that irrigation for commercial purposes is not domestic use); *Nesalhouse v. Walker*, 88 P. 88 at 134 (same). Unlike Greenlawn, which under the 'minority rule' may, as a municipality, withdraw water to benefit non-riparian parcels, *City of Canton v. Shock*, 63 N.E. at 601–02, the Corps has no such right. Accordingly, the Corps' hydropower generation must yield to Greenlawn's municipal needs.

C. Federal Court is an Improper Venue for NUO to Advocate for a Modification of State Law Governing Water Resource Allocation.

Although NUO might argue that increasing water shortages make pure riparianism an outdated water resource allocation regime, principles of federalism, dictate that needs for state law modifications are properly addressed by New Union State courts or the state legislature, and not by a federal court. In *California v. United States*, Justice Rehnquist surveyed decades of precedent evincing the Supreme Court's recognition that under fundamental federalism principles, states must determine laws that directly impact water resource allocation. 438 U.S. 645, 654, 662–64 (1978). Justice Rehnquist noted that in *Kansas v. Colorado*, for example, the Court recognized that "each State has full jurisdiction over . . . the beds of streams and other waters," and "reaffirmed that each State 'may determine for itself'" what laws would govern the allocation of water resources. *Id.* at 663 (quoting *Kansas v. Colorado*, 206 U.S. 46, 94 (1907)). The *California v. United States* Court noted only two limitations on this dominion—where "reserved rights or the navigation servitude of the United States are invoked," *id.* at 662—neither of which applies here.[4] Water resource allocation is a state matter, and—subject only to these exceptions—changes to state laws governing water resource allocation should be left to the states.

[4] The legislative purposes of the Howard Runnet Dam do not include navigation.

All parties agree that climate change will likely lead to drought conditions in the future. But as the Supreme Court recognized in *California v. United States*, bedrock principles of federalism dictate that states must take the primary role where scarcity of water resources warrants a reallocation of those resources. *Id.* at 654, 662–64. And state water law *has* historically evolved to meet these challenges, whether through changes in the common law or through legislation. Many western states that initially adopted riparianism eventually moved to prior appropriation (or a "dual" system incorporating aspects of both regimes) due to increasingly scarce water resources. Thompson, *supra*, at 27, 173; *see also* Kelley, *supra*, §§ 8.01–8.04 (noting how most prior appropriation states at one time followed riparian doctrine). And legislatures in states with riparian, prior appropriation, or dual systems have also adopted legislation that allocates scarce resources through a permitting system. Thompson, *supra*, at 177–78. Most significantly, the Corps is unaware of any federal case in which a plaintiff successfully advocated for changes to state water laws. In light of this history and bedrock principles of federalism, this Court should apply riparian rules as they exist today, and leave modifications of state water resource allocation laws to New Union state courts or the state legislature.[5]

II. BECAUSE THE CORPS' OPERATION OF THE DAM WORKS IS ULTIMATELY GOVERNED BY THE AGREEMENT TO MAINTAIN GREENLAWN'S WATER WITHDRAWALS, INCREASING RELEASES TO THE BYPASS REACH WAS NOT A DISCRETIONARY ACTION SUBJECT TO CONSULTATION.

The ESA requires that federal agencies ensure that any action "authorized, funded, or carried out" by such an agency is not likely to jeopardize the existence of any listed species, or

[5] These same principles apply to public trust claims. As the Supreme Court noted in *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603, 132 S. Ct. 1215, 1235, 182 L. Ed. 2d 77 (2012) "the public trust doctrine remains a matter of state law." 565 U.S. 576, 603 (2012).

adversely affect their critical habitat. 16 U.S.C. § 1536(a)(1). This requirement is effectuated through the ESA's "consultation requirement" in Section 7, which requires agencies to formally consult with the Secretary of the Interior (Secretary) when an agency action may affect listed species. 16 U.S.C. § 1536(a)(2). The consultation requirement is limited to actions where agency is discretionary—that is, the consultation requirement is not triggered by actions that an agency is bound to take. 50 C.F.R. 402.03; *Nat'l Ass'n of Home Builders v. Def.s of Wildlife* (*Home Builders*), 551 U.S. 644, 652 (2007) (affirming 50 C.F.R. 402.03). Likewise, discretion presumes that an agency can exercise some judgment in connection with a particular course of action. *Home Builders*, 551 U.S. at 668. The Ninth Circuit has developed a two-fold inquiry for determining whether there has been agency action triggering consultation. Agencies are not required to consult unless they (1) affirmatively act to carry out an activity, and (2) retain some discretion to influence or change the activity for the benefit of a protected species. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012). This is the only logical application of the ESA—if an agency cannot act to benefit a protected species, consultation would be meaningless. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

Any action the Corps takes in its operation of the Dam Works is constrained by the Agreement, which requires it to supply Greenlawn with flows sufficient to maintain water withdrawals. The Manual requires the Dam Works to comply with previous agreements and riparian rights. Thus, Greenlawn's riparian rights and the Agreement stripped the Corps of discretion whether to maintain 7 CFS releases into the Bypass Reach, and thereby the ability to act for the benefit of any protected species. Because the increase to 30 CFS represents the

ongoing operation of the Dam Works pursuant to a vested right, it cannot be considered a discretionary agency action requiring consultation.

A. The Agreement Required the Corps to Increase Releases into the Bypass Reach, Stripping It of Discretion.

In *Home Builders*, the Supreme Court recognized that "not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion." 551 U.S. at 668. In *Home Builders*, which posed a "problem of conflicting 'shalls,'" the Court determined that Section 7(a)(2) does not override express statutory mandates binding agencies. *Id.* at 649, 673 (Stevens, J., dissenting). There, the state of Arizona sought to take over administration of the state pollution permitting program under the Clean Water Act (CWA). *Id.* at 653. The CWA mandates that the United States Environmental Protection Agency (EPA) transfer administration to states when certain criteria are met. *Id.* at 661. However, under Section 7 of the ESA, the EPA was required to consult before transferring the permitting authority. *Id*. at 653. Noting that the ESA would not impliedly repeal earlier enacted legislation, the court harmonized the conflicting mandates by determining that Section 7(a)(2)'s requirements are limited to discretionary agency actions. *Id.* at 662, 669. Writing for a five-Justice majority, Justice Alito explained: "Agency discretion presumes that an agency can exercise 'judgment' in connection with a particular action." *Id.* at 668. The court went on to hold that Section 7(a)(2) duties do not attach to actions an agency is required to take by statute. *Id.* at 669.

In cases arising outside of the statutory mandate context, the Ninth Circuit has held that the question of whether consultation is triggered turns on whether an agency retains any discretion to act in a manner beneficial to a protected species or its habitat. *Karuk Tribe of Cal.*, 681 F.3d at 1021. When an agency retains no discretion to act, "consultation would be a

meaningless exercise," and it follows that the ESA does not apply. *Sierra Club*, 65 F.3d at 1509. An agency may enter an agreement that strips it of discretion to act, negating the need to consult. *See Sierra Club*, 65 F.3d at 1505.

In *Sierra Club*, a private timber company held a right-of-way agreement with the Bureau of Land Management (BLM). *Id.* When the timber company sought to build a road over public lands pursuant to this agreement, Sierra Club sued, alleging that the BLM was required to consult about the project's potential impact on spotted owls, a listed species. *Id.* at 1507. However, the terms of the right-of-way agreement restricted the BLM's ability to stop or alter the project. *Id.* at 1506. The court held that the BLM was not required to consult, explaining "Congress did not intend for section 7 to apply to an agreement finalized before passage of the ESA where the federal agency currently lacks the discretion to influence the private activity for the benefit of the protected species." *Id.* at 1511–12. This holding mirrors the Supreme Court's decision in *Public Citizen v. Department of Transportation*—a case that stands for "the intuitive proposition that an agency cannot be held accountable for the effects of actions it has no discretion not to take." *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008) (citing *Public Citizen*, 541 U.S. 752, 773 (2004)).

In incorporating the Agreement, the Manual stripped the Corps of discretion to reduce releases into the Bypass Reach, thereby rendering consultation a "meaningless exercise."[6] Much like the CWA language in *Home Builders*, the language at issue here is mandatory: "*At all times*

[6] At least one court has held that Water Control Manuals are binding on the Corps. *See South Dakota v. Ubbelohde*,, 330 F.3d 1014, 1029 (8th Cir. 2003) (holding that Master Water Control Manual was binding on Corps, though the Corps could elaborate on its details). However, the present case can be decided without a determination of whether the Manual is binding on the Corps, because it incorporates otherwise binding preexisting rights and agreements by reference.

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." (emphasis added).[7] The Agreement itself requires the Corps to maintain releases to the Bypass Reach sufficient to allow Greenlawn to withdraw water "in such quantities and at such rates and times as it is entitled to as a riparian property owner." The terms of the Agreement are consistent with the Dam Works' authorizing statute's policy of "recognizing the interests and rights of states in determining the watersheds within their borders," and predates the ESA by a quarter century. River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945). As the Ninth Circuit recognized in *Sierra Club,* Congress did not intend for the ESA to apply to an agreement finalized before its enactment which leaves an agency unable to act for the benefit of a protected species. This holding is a logical continuation of the Supreme Court's discussion in *Home Builders*, which explained that the ESA would not impliedly repeal earlier legislation. Because the Corps' actions were constrained by the requirements of the Agreement, increasing the releases to Greenlawn was not a discretionary action.

The present case poses a fact pattern nearly indistinguishable from *Sierra Club*. There, a logging company sought to build a road pursuant to a right-of-way agreement with BLM, which potentially impacted spotted owls. Here, Greenlawn sought to withdraw water pursuant to its Agreement with the Corps, which impacted the pigtoe mussels. NUO asserts that because the

[7] Unlike the requirement to abide by previous agreements, the Manual's Zone 2 guidelines at issue here do not use mandatory language. ("Bypass Reach flow from Diversion Dam reduced to 7 CFS"—compared with "Daily hydroelectric power releases of up to 200 CFS for up to three hours *shall* be maintained.").

Corps retains control over the operation of the dam under the Manual, the Corps is required to consult. But like the plaintiffs in *Sierra Club*, NUO misses the point: the Corps retains *no discretion* as to whether to comply with the Agreement. Because the Corps is ultimately bound by the Agreement, they lack discretion to act for the benefit of the protected species. In light of Ninth Circuit case law and the Supreme Court's reasoning in *Home Builders* (explaining discretion presumes that an agency can exercise some judgment in connection with a particular course of action), this court should uphold the district court's determination that the Corps providing flow to Greenlawn during drought conditions was not a discretionary.

B. Continued Operation of the Dam Works Does Not Represent Ongoing Agency Action Subject to Consultation.

Under Section 7, only discretionary agency actions are subject to consultation. For the reasons discussed above, the Manual required the Corps to increase water releases into the Bypass Reach. As such, deviation from the (nonmandatory) 7 CFS guideline in the Manual is best thought of as an operation of the dam pursuant to the overarching mandates of the Manual, rather than a modification of its terms. NUO may allege that even actions pursuant to these guidelines constitute an ongoing agency action that triggers consultation. However, the Supreme Court has rejected this reasoning in a similar context, and other circuits have held similarly under the ESA. *See Norton v. S. Utah Wilderness All.* (*SUWA*), 542 U.S. 55, 72–73 (2004); *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1159 (10th Cir. 2007). While the issue comes to this court as a case of first impression, judicial economy, policy, and logic compel a holding that operation pursuant to the Manual does not trigger consultation.

The Ninth Circuit has explained that an agency has no duty to consult when private activity is proceeding pursuant to a vested right, absent some further affirmative action by the

agency. *Karuk Tribe*, 681 F.3d 1006 at 1102. Likewise, there is no "ongoing agency action" when an agency acted earlier, but did not retain authority or was otherwise constrained by statute, rule, or contract. *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1109 (9th Cir. 2006). Similarly, actions pursuant to longstanding agreements do not trigger Section 7(a)(2). *Cal. Sportfishing Prot. All. v. Fed. Energy Regulatory Comm'n.,* 472 F.3d 593, 599; *see also W. Watersheds Project*, 468 F.3d at 1102 (9th Cir. 2006) (holding that BLM did not act with discretion when failing to regulate vested rights to water diversions for irrigation). In fact, Ninth Circuit jurisprudence consistently finds agency discretion only when contracts, permits, or plans are first issued or renewed. *See, e.g., Nat. Res. Def. Council v. Jewell,* 749 F.3d 776, 784–85 (9th Cir. 2014) (renewal of a water contract required consultation because while agency's ability to change terms was limited, it retained discretion not to renew at all, which would have benefitted listed fish species); *Karuk Tribe,* 681 F.3d at 1102 (Forest Service's approval of notices of intent to conduct mining operations was discretionary action because agency enjoyed discretion in formulating criteria for approval of such notices); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (Holding that National Marine Fisheries Service's ongoing issuance of fishing permits was a discretionary action because the agency could condition permits to benefit a listed species).

The Supreme Court's holding in *SUWA* supports this reasoning. Though *SUWA* concerned the National Environmental Policy Act (NEPA), the statutory language is similar to that of the ESA: only "major Federal action" triggers certain requirements under NEPA. *Id.* at 72. In *SUWA*, the court held that while the *approval* of a land management plan would be considered a major federal action, their existence alone would not be. 524 U.S. at 73. The 10th

Circuit has since applied similar reasoning to a case arising under the ESA. *Forest Guardians,* 478 F.3d at 1159 (holding that a land resource management plan (LRMP) itself is not a discretionary agency action). There, the court recognized that while LRMPs have "ongoing and long-lasting effect[s]" on the forest, it is the *promulgation* of plans, not the plans themselves that would trigger consultation.[8] *Id.*

Like the resource management plans in *SUWA* and *Forest Guardians*, the Manual itself should not trigger an ongoing duty to consult once implemented. Here, the Corps was not renewing a contract as in *Jewell*, nor were they issuing a permit as in *Turtle Island Restoration Network*, nor were they approving a notice of intent as in *Karuk Tribe*. Instead, it was operating the Dam Works pursuant to a longstanding agreement regarding vested state rights. The Manual was last revised in 1968 after Greenlawn experienced a housing boom and expanded their municipal water system. That the Manual contains a clause requiring the Dam Works to be operated in compliance with water supply agreements and riparian rights *at all times* indicates the Corps may be required to override the general Zone guidelines. These considerations may have triggered consultation when the Manual was last revised, but operation pursuant to it does not represent ongoing agency action.[9]

Greenlawn's rights as a riparian property owner, and the Corps' agreement to comply with them stripped the Corps' discretion in their operation of the Dam Works with respect to the

---

[8] *But see Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 (9th Cir. 2015) (holding Forest Service should have reinitiated consultation after implementation of resource management plan when critical habitat for a listed species was updated).

[9] Courts have inferred a six-year statute of limitations for claims alleging an agency failed to comply with ESA's procedural requirements. *See Ctr. for Biological Diversity v. Envtl. Prot. Agency*, 847 F.3d 1075, 1087 (9th Cir. 2017).

increased releases to Greenlawn. The Tenth Circuit in *Forest Guardians* recognized that management plans may have ongoing and lasting effects on the resources they govern, but still held that it is their development and adoption, not their ongoing existence, that triggers consultation. This is the only logical outcome after *SUWA.* Accordingly, this court should not hold that the continued operation of the dam pursuant to the Manual constitutes discretionary action. To hold otherwise would allow post hoc attacks on all agency permits, contracts or operating plans, circumventing the statute of limitations. In light of the obligations binding the Corps, this Court should affirm the district court's finding that the increase from 7 CFS to 30 CFS was not a discretionary action subject to consultation under Section 7(a)(2).

III. GREENLAWN'S WITHDRAWALS OF THE DROUGHT-REDUCED FLOW FROM THE HOWARD RUNNET DAM WORKS CONSTITUTED A "TAKE" OF THE ENDANGERED OVAL PIGTOE MUSSEL IN VIOLATION OF SECTION 9 OF THE ESA.

Greenlawn's activities during drought conditions caused a "take" of the endangered oval pigtoe mussels by significantly modifying and degrading their habitat. Under Section 9 of the ESA, it is unlawful for any person to "take" any endangered or threatened species. 16 U.S.C. § 1538(a)(1). "Take" is defined in the Act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at § 1532(19). The Secretary has promulgated regulations defining "harm" in Section 9 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 CFR § 17.3; *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.* (*Sweet Home*), 515 U.S. 687 (1995) (upholding definition). Any take of an endangered species by a private party is thus unlawful unless authorized by an incidental take permit under Section 10. 16 U.S.C. § 1539(a)(1). Under Section 10, the Secretary may grant a permit "if such taking is

incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id.* § 1539(a)(1)(B).[10]

Greenlawn's withdrawals of 30 CFS during Zone 2 Drought Warning conditions, which lead to Zone 3 conditions, and elimination of nearly all flows downstream of the Bypass Reach, caused a take of the endangered oval pigtoe mussel, because they resulted in harm to the mussel by causing significant habitat modification and degradation that actually killed the endangered mussels. Greenlawn does not have an incidental take permit to authorize its take of the mussels. Its actions thus violated Section 9 of the ESA.

A. Greenlawn's Withdrawals Constitute a "Take" of the Oval Pigtoe Mussel Because They Significantly Modify and Degrade Mussel Habitat, Thereby Killing the Mussels.

Greenlawn's activities constitute a take because they significantly directly modify and degrade oval pigtoe mussel habitat within the meaning of harm. *See* 50 CFR § 17.3. Habitat modification constitutes harm—and thus take—so long as it "actually kills or injures wildlife significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3; *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 924–25 (9th Cir. 2000). Harm under Section 9 includes activities or actions that indirectly harm an endangered species. *Sweet Home*, 515 U.S. at 697–98 (1995) (rejecting respondent's argument that harm was limited to direct applications of force against a listed species, and noting "unless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not

[10] Federal agencies may also receive authority to incidentally take endangered species during the Section 7 consultation process through an "Incidental Take Statement" issued by the consulting agency. 16 U.S.C. § 1536(b)(4). But because no federal agency action requiring Section 7 consultation was implicated by Greenlawn's withdrawals during the drought conditions, Greenlawn's take could not have been authorized by an incidental take statement.

duplicate the meaning of other words that § 3 uses to define 'take'"). Harm can be established by evidence of past, present, or an imminent threat of future injury. *See, e.g.*, *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1068 (9th Cir. 1996) (affirming permanent injunction based upon "reasonable certainty of imminent harm" to endangered species).

Greenlawn's withdrawals during Drought Warning conditions directly led to the Drought Emergency conditions by lowering lake levels when hydroelectric power demands were also peaking, resulting in the curtailment of hydroelectric peaking operations. Greenlawn's withdrawals consumed nearly all of the flows in the Bypass Reach, reducing downstream flows so much that oval pigtoe mussel habitat was exposed from the Bypass Reach–tailrace confluence all the way to the estuary nearly 60 miles downstream.

The extreme reduction to the river levels and flow as a result of Greenlawn's withdrawals modified the mussels' habitat in a way that significantly impaired essential behavior patterns thereby actually killing mussels. First, the mussels' necessary habitat was directly eliminated by the stagnant and reduced water flows. *Id.* The conditions were so severe that the mussels were not even able to move to nearby submerged habitat. *Id.* And second, their spawning behaviors were impacted by the reduction in flows because the sailfin shiner, which larval mussels rely on in order to spawn, are unable to migrate when water levels are extremely low. *Id.* Greenlawn's withdrawals significantly impaired the mussels' essential behavioral patterns, resulting in unlawful harm to the endangered mussels. 50 C.F.R. § 17.3. In *Pyramid Lake Paiute Tribe of Indians v. U.S. Department of Navy*, the Ninth Circuit found no take of the endangered cui-ui where the evidence did not establish that any one year's diversions of water caused the fish's spawning problems. 898 F.2d 1410, 1420 (9th Cir. 1990). But here, uncontradicted expert

testimony revealed that these conditions resulted in the death of roughly 25% of the Green River mussel population. It is thus conclusive that the harm to the mussels occurred because of Greenlawn's withdrawals during the Spring 2017 drought.

It makes no difference that Greenlawn's activities occurred outside of the habitat in question. The relevant inquiry is whether Greenlawn's activities constituted an unlawful take of the oval pigtoe mussel within the meaning of Section 9. *Sweet Home*, 515 U.S. at 697–98. In *Bernal*, the Ninth Circuit found there was no take of the endangered pygmy owl, because the owls only used the portion of the school site that would remain undeveloped. 204 F.3d at 925–26. But the mussels' habitat—the river—is distinct from the owls' habitat in *Bernal*—arroyos—because the river is a continuously flowing resource. So, even though Greenlawn's withdrawals are from the Bypass Reach where the mussels don't physically reside, the withdrawals reduced water levels and exposed beds of mussels immediately downstream and for 60 miles all the way to the estuary, eliminating the possibility that mussels could move around to remain in submerged beds. These withdrawals thus undoubtedly caused a take of the oval pigtoe mussels because they directly impacted mussel habitat.

Finally, the evidence of past harm to the mussels is undisputed and definitive: the conditions created by Greenlawn's withdrawals during the Spring 2017 drought period resulted in the death of approximately 25% of the Green River oval pigtoe mussel population. While the record shows no evidence of a present threat to mussels all parties agree that based on recent weather pattern trends Drought Warning conditions are likely to occur again in the near future.

B. Greenlawn's Withdrawals of the Entire Flows of Water from the Bypass Reach Were the Cause-in-Fact and Proximate Cause of Harm to the Oval Pigtoe Mussels.

In assessing liability under Section 9 of the ESA, general principles of causation apply. *Sweet Home*, 515 U.S. at 700 n.13. In order to be liable for take under Section 9, Greenlawn's withdrawals must have been both the cause-in-fact and the proximate cause of harm to the mussels. *Id.* Greenlawn's actions were the cause-in-fact of harm to the mussels, because its demand for, and consumption of, virtually all of the flows to the Bypass Reach during Drought Warning conditions resulted in a Drought Emergency condition, which in turn caused the water level to lower so much that the entire stream bed was exposed for 60 miles, leaving the mussels with no alternative suitable habitat. This was a proximate and foreseeable result of Greenlawn's consumption of the last drops of water in the Bypass Reach upstream of mussel habitat during drought conditions. Thus, because Greenlawn's activities resulted in a take, and because there is a sufficient causal connection between the activities and the resulting take, Greenlawn violated Section 9.

1. Greenlawn's Withdrawals During Drought Warning Conditions are the Cause-In-Fact of Harm to the Oval Pigtoe Mussels.

To determine whether a party's action was the cause-in-fact of a Section 9 take, courts apply principles of tort law. *Sweet Home*, 515 U.S. at 700 n.13; *see also Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 487 (E.D. California, 2018) (discussing ways of assessing cause-in-fact under Section 9). To show but-for causation, a party must prove that a result would not have occurred "but for" the challenged conduct. *Paroline v. United States*, 572 U.S. 434, 450 (2014). In the context of an alleged Section 9 violation under the ESA, plaintiffs must prove that the harm to the mussels would not have occurred but-for Greenlawn's withdrawals during the drought conditions. Here, Greenlawn is the cause-in-fact of take of the oval pigtoe mussels,

because it is the but-for cause of the habitat degradation that caused death to 25% of the population.

But-for causation is established in this case. Had Greenlawn not demanded—and used—30 CFS during the drought warning conditions, the lake levels would not have reached Drought Emergency levels requiring the curtailment of hydroelectric electric power releases—thus diminishing *any* substantial flow from the tailrace downstream. If these drought emergency conditions had not been reached, deadly destruction and modification of the mussel habitat would not have occurred.

Neither the initial drought conditions themselves nor the other uses of the Green River negate this causation. As the record states, the mussels require a submerged habitat. Because Greenlawn requested and used 30 CFS during the periods of reduced flows while hydropower generation was peaking, a Drought Emergency was triggered. This resulted in curtailment of hydroelectric power releases from the Howard Runnet Dam, such that there was no longer sufficient flows in the tailrace to keep the mussels submerged. There were merely "stagnant pools of water and narrow trickles." The record unequivocally demonstrates that had Greenlawn not demanded the increase in water releases and used the entirety of those flows, the lake level would not have lowered as to warrant drought emergency conditions. Because the harm to the oval pigtoe mussel population would not have occurred without Greenlawn's withdrawals during the drought conditions, Greenlawn is the but-for cause of take to the mussels.[11]

[11] Even if Greenlawn's withdrawals were not the but-for cause of harm to the mussels, Greenlawn is still the cause-in-fact of harm under the alternative causation theory that its independent conduct in concert with other independent actors is a but-for cause. *See Paroline* 572 U.S. at 451–52. Such alternative tests of causation may be necessary when a strict

2. *The Downstream Effects on the Oval Pigtoe Mussels Was a Clearly Foreseeable and Proximate Result of Greenlawn's Withdrawals of the Entire Flows of Water During Drought Warning Conditions.*

The harm caused to the oval pigtoe mussels as a result of Greenlawn's water withdrawals was also a clearly foreseeable and proximate result, thus meeting the requirements of proximate causation outlined by the Supreme Court in *Sweet Home*. In *Sweet Home*, the Court stated that a take is prohibited so long as it is "foreseeable rather than merely accidental." 515 U.S. at 700. In concurrence, Justice O'Connor further explained the proximate cause and foreseeability dynamic in the context of Section 9 liability, stating that it operates to "eliminate[] the bizarre" and "depends to a great extent on considerations of the fairness of imposing liability for *remote consequences*." *Id.* at 713 (emphasis added). The Supreme Court has more recently described the proximate cause requirement as precluding liability "where the causal link between conduct and result is so attenuated that the consequence is more aptly described as *mere fortuity*." *Paroline*, 572 U.S. at 445 (2014) (emphasis added).

This is not a case where the harm resulting from Greenlawn's actions is "mere fortuity" or a "remote consequence[]." *Id.*; *Sweet Home*, 515 U.S. at 713. Greenlawn affirmatively asked for more water to consume during a known period of reduced water flows. It is reasonable to expect that this might cause the river to drop to Zone 3 conditions, and it is also reasonable to expect that there are species dependent on the river that would be harmed by a lack of flowing water. The occurrence of the drought itself does not make the harm unforeseeable. The Manual, even in 1968, foresaw the possibility of periods of reduced water input and thus established

---

application of the but-for test would disserve statutory purpose or congressional intent. *Id.; see also NRDC v. Zinke*, 347 F. Supp. 3d 465 at 490.

drought-dependent restrictions on water flow. Further, all parties agree that recent climate trends indicate the likelihood of drought warning conditions occurring in the future.

The foreseeability of this harm is further evident when contrasted to instances with a proximate cause or foreseeability issue. For example, in *Sweet Home* Justice O'Connor illustrated what would be an unforeseeable chain of events: "[t]he farmer whose fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge." 515 U.S. at 713 (O'Connor, J., concurring). Here, Greenlawn's withdrawals are immediately upstream from the mussel habitat and directly reduce the levels of the very river that the mussels rely on to survive. And in contrast to Justice O'Connor's tornado example, there is nothing "bizarre" about drought conditions, especially when they have been occurring with increased frequency in recent years.

Aransas Project v. Shaw involved a long and attenuated chain of causation between the issuance of permits to take water and the mortality of endangered whooping cranes. 775 F.3d 641, 660 (5th Cir. 2014). Key to the court's conclusion that there was no proximate cause was the fact that every link in the chain of causation was contingent on modeling and estimation, making the deaths of the whooping cranes "a fortuitous confluence of adverse factors." *Id.* at 660–62. Here, the chain of causation does not require any estimation or contingencies. Greenlawn's withdrawals are inextricably tied to the level of the Green River, which directly impacts the downstream water levels critical to mussel survival. Adverse modification to the mussel habitat causes deadly impairments to the mussels' behavior patterns, such as spawning. These facts are undisputed.

Importantly, to the extent that the curtailment of hydroelectric power releases also reduced the Green River flows, the Corps cannot be liable for a take. Because the Corps'

operation of the Dam Works constitutes non-discretionary agency action, the curtailment of hydroelectric power releases are not a proximate cause of harm to the mussels. An agency cannot be liable for take resulting from non-discretionary actions. *See U.S. Dep't. of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) (stating that in the context of claims under NEPA, there is no sufficient causal connection if an agency "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions"); *see also Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1238 (E.D. Cal. 2017) (applying the logic of *Public Citizen* and finding an agency cannot be liable under Section 9 where it has no discretion over the activities resulting in the alleged taking).[12]

Because Greenlawn's withdrawals of 30 CFS during the drought conditions were both a cause-in-fact and a proximate cause of harm to the endangered oval pigtoe mussels, Greeenlawn's actions causing take of the mussels violated Section 9 of the ESA.

IV. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER THE PUBLIC BENEFIT OF GREENLAWN'S WATER USAGE BEFORE ISSUING AN INJUNCTION AGAINST GREENLAWN.

The ESA authorizes any person to commence a civil suit "to enjoin any person. . .who is alleged to be in violation of this chapter or regulation issued under the authority hereof. . . ." 16 U.S.C. § 1540(g)(1). A court may grant injunctive relief only after considering the traditional four-factor test, balancing the equities. *Monsanto v. Geerston Seed Farms*, 561 U.S. 139, 156–57 (2010). That the injunction would be issued pursuant to a violation of the ESA does not change

[12] This case is also distinct from those in which the agency was responsible for authorizing the challenged actions, such as through issuance of a permit. *See, e.g. Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (finding that the ESA also "bans those acts of a third party that bring about the acts exacting a taking"). Greenlawn's withdrawals are authorized by common law riparian rights, not through any discretionary action by the Corps.

these requirements and the district court misconstrued the Supreme Court's holding in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), in finding otherwise. To the extent that the Court in *TVA v. Hill* did not perform the traditional test balancing the equities, it was because of the unique circumstances of that case. Thus, given the circumstances surrounding Greenlawn's take of the mussel the district court erred by not balancing the equities before enjoining Greenlawn.

A. Unless Congress Has Expressly Indicated Otherwise, Courts are Required to Balance the Equities Before Issuing an Injunction.

An injunction is an extraordinary remedy that is not awarded as of right. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). The Supreme Court has recently emphasized the need for courts to analyze the traditional equitable factors before granting an injunction. Under this four-factor test,

> "[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."

Monsanto, 561 U.S. at 156–57 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)) (internal quotations omitted). While Congress may guide courts' exercise of this equitable discretion, "a major departure from the long tradition of equity practice should not be lightly implied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

In *Winter*, the Supreme Court discussed equitable remedies in the context of alleged NEPA violations. 555 U.S. at 16–17. The Court, emphasizing the need to weigh the public consequences before issuing an injunction, found the lower courts had "significantly understated the burden the preliminary injunction would impose" on the challenged Navy training activities. *Id.* at 24, 32. Similarly in *eBay*, a Patent Act case, the Supreme Court held that equitable discretion "must be exercised consistent with traditional principles of equity." 547 U.S. at 394.

Because neither the district court nor the court of appeals properly applied the four-factor test, the court remanded. *Id.* These recent Supreme Court opinions clarify that consideration of the public interest in denying an injunction is a crucial component of the analysis.

No provision in the ESA can be read to indicate Congress' intent to fully dispose of this traditional equitable discretion. While *TVA v. Hill* does state that the equitable balance weighs in favor of protecting the listed species, that case should not be stretched beyond its narrow facts to stand for a statute-wide alteration of the traditional equitable balancing test. *See* 437 U.S. at 194. In light of these more recent Supreme Court opinions, it is clear that to the extent that the Court in *TVA v. Hill* did not balance the equities it was because of the distinct factual circumstances that were at issue in the case.[13] Courts considering equitable relief in ESA cases must still consider (in addition to the other factors) any contravening public interests. *See Water Keeper All. v. U.S. Dep't of Def.*, 271 F.3d 21, 34–35 (1st Cir. 2001). The district court thus erred by failing to consider the substantial public interests weighing in favor of Greenlawn's withdrawals before issuing an injunction against Greenlawn.

B. *TVA v. Hill* Cannot be Stretched to Preclude Equitable Balancing in All ESA Cases.

In light of more recent Supreme Court cases, it is clear that *TVA v. Hill* is limited to the unique facts of that case. In *TVA v. Hill*, if an injunction was not issued, the operation of the federal dam would have destroyed the entire critical habitat of the endangered snail darter, thereby eliminating the *entire species*. The Court found a permanent injunction was necessary to effectuate the ESA's mandate in Section 7 "to insure that actions authorized, funded, or carried

[13] And to the extent that some lower courts have held otherwise, they are also in conflict with the recent pronouncements from the Supreme Court.

out by [federal agencies] do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species," given the "irreconcilable conflict between operation of the Tellico Dam and the explicit provisions of § 7." *TVA v. Hill*, 437 U.S. at 193 (citing 16 U.S.C. § 1536). An injunction was *the only way* to avoid extinction of the entire snail darter species and destruction of its critical habitat. *Id.*

In later cases, the Supreme Court has clarified that it was within that distinct context that the court found it did not have the power to deny injunctive relief. *See Romero-Barcelo*, 456 U.S. at 314; *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 27 (1st Cir. 2010). In *Romero-Barcelo*, a more recent case involving a violation of the CWA, the Supreme Court denied an injunction after considering equitable factors, and distinguished *TVA v. Hill* as a case where an injunction was the only way to "vindicate the objectives of the Act." *Romero-Barcelo*, 456 U.S. at 214. Lower courts have also rejected the notion that injunctive relief is mandatory upon finding a violation of the ESA. *See also Animal Welfare Inst.*, 623 F.3d at 27 (First Circuit rejecting plaintiff's argument that a Section 9 violation mandated an injunction as "mistak[ing] the question of what violates the statute with the question of the appropriate remedy for a violation."); *Aransas Project*, 775 F.3d 641, 664 (5th Cir. 2014) (finding that the district court erred when it applied a relaxed standard for injunctive relief under the ESA).

The present case contains none of the facts that were crucial to the Courts' decision in *TVA v. Hill*. For one, it is only the Green River oval pigtoe mussel population that is harmed by Greenlawn's actions—not the entire species. Greenlawn's withdrawals constitute a take of the Green River oval pigtoe mussel population, but not the entire species. Second, this portion of the Green River is not the mussels' critical habitat. And third, unlike in *TVA v. Hill* where the mere

operation of the dam would cause extirpation of the snail darter, here Greenlawn's withdrawals only cause take under specific circumstances.

Moreover, Greenlawn is a non-federal actor with significant riparian landowner rights to Green River flows. *TVA v. Hill* dealt with a federal dam, which was bound to follow the substantive mandates of Section 7 requiring federal agencies to carry out programs for the conservation of endangered species and take actions necessary to insure agency actions do not jeopardize their continued existence. Conversely, Greenlawn is not a federal actor and had no affirmative duty to act to benefit endangered species. Greenlawn is a city seeking to preserve its common law riparian right to provide water for over 100,000 of its residents. Given the importance of common law riparian landowner rights, the district court should have been especially wary to extend *TVA v. Hill* to these circumstances and decline to weigh the public benefits that cut against the issuance of an injunction. Some lower courts have expressly found the public interest to weigh against issuance of an injunction in ESA cases. *See Water Keeper All.*, 271 F.3d at 35 (holding that the public's national security interest in the Navy's training activities weighed against granting an injunction for Section 7 violations); *Hamilton v. City of Austin*, 8 F. Supp. 2d 886, 897 (W.D. Tex. 1998) (finding harm to the defendants and the public interest in pool cleaning activities also weighed against granting an injunction to protect an endangered species of salamander).

Finally, an injunction is not the only way in which to achieve the ESA's substantive mandates. In fact, the immediate threat to the mussels has been eliminated by the natural occurrence of rainfall. And even if an injunction is the appropriate remedy, courts must still balance the equities in order to determine the scope of the injunction. For instance, in *Strahan v.*

Coxe, the First Circuit upheld the district court's issuance of an injunction that was more narrowly tailored to remedy the violation at issue, declining to impose the full injunction the plaintiff sought. 127 F.3d 155, 171 (1st Cir. 1997). District courts have similarly limited the scope of injunctions because of detrimental impacts to the non-moving party. *See, e.g. Strahan v. Pritchard*, 473 F. Supp. 2d 230, 241 (D. Mass. 2007); *Animal Prot. Inst. v. Martin*, 511 F. Supp. 2d 196, 197–98 (D. Me. 2007).

In conclusion, because Greenlawn is a riparian landowner and its withdrawals will not cause the extinction of the oval pigtoe mussel or destruction of its critical habitat, the district court abused its discretion by failing to consider the contravening interests in favor of Greenlawn's exercise of its riparian rights before issuing an injunction against Greenlawn.

CONCLUSION

For the foregoing reasons, Defendant–Appellee, the United States Army Corps of Engineers, respectfully requests that this Court affirm the district court's holdings that the City of Greenlawn's riparian rights entitle it to continue withdrawals for municipal purposes without water conservation measures, that the Corps did not violate the consultation requirement under Section 7 of the ESA by maintaining Greenlawn's riparian rights, and that Greenlawn's withdrawals during drought conditions constituted an unlawful "take" in violation of Section 9 of the ESA. The Corps respectfully requests that this Court reverse the district court's holding that it need not balance the equities before issuing an injunction under the ESA.