Team No. #32

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CA. No. 19-000987

NEW UNION OYSTERCATCHERS, INC.,
Appellant,

- v. -

UNITED STATES ARMY CORPS OF ENGINEERS,
Appellee,

and

CITY OF GREENLAWN, NEW UNION,
Appellant.

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

BRIEF OF NEW UNION OYSTERCATCHERS, INC.
Appellants

Oral Argument Requested

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 (2018), and venue was proper pursuant to 28 U.S.C. § 1391 (2018). New Union Oystercatchers (NUO) brought suit against both Greenlawn and the Army Corps of Engineers (ACOE) under 16 U.S.C. § 1540(g) (2018), the citizen suit provision of the Endangered Species Act (ESA), after properly waiting until 60 days after serving an initial Notice of Intent to sue, as provided for in the citizen suit provision. 16 U.S.C. § 1540(g)(1)(C) (2018) further provides that district courts shall have jurisdiction to enforce any provision of the ESA regardless of the citizenship of the parties or amount in controversy, and § 1540(g)(3)(A) (2018) authorizes suits to be brought in the judicial district in which the violation occurred. The Court properly exercised supplemental jurisdiction over Greenlawn's common law counterclaim. The U.S. District Court for New Union thus had complete jurisdiction in this case. Since ACOE and NUO both filed a timely Notice of Appeal, and no parties have raised issues of Article III standing, the Twelfth Circuit has jurisdiction over this appeal.

STATEMENT OF ISSUES

I. Does Greenlawn have the right, as a riparian landowner, to continue water withdrawals for its lawns and ornamental gardens during drought conditions without any water conservation measures?

II. Is ACOE's operation of the Howard Runnet Dam Works during drought conditions a discretionary action subject to the consultation requirement within the ESA § 7, 16 U.S.C. § 1536 (2018)?

III. Does Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitute a "take" of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538 (2018)?

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

STANDARD OF REVIEW

Federal appellate courts review grants of summary judgment *de novo*. *See e.g. Mass. Museum Of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 52 (1st Cir. 2010); *Peck ex rel. Peck v. Baldwinsville Cent. School Dist.*, 426 F.3d 617, 625 (2d Cir. 2005). Accordingly, they grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

When evaluating a district court's grant or denial of a permanent injunction, federal appellate courts review for abuse of discretion. *See e.g. M. D. by Stukenberg v. Abbott*, 907 F.3d 237, 248 (5th Cir. 2018); *Tennessee Hospital Ass'n v. Azar*, 908 F.3d 1029, 1046 (6th Cir. 2018). Abuse of discretion exists where the court "(1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *Alliance for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 911 F.3d 104, 108-09 (2d Cir. 2018) (quoting *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 627 (2d Cir. 2018)).

STATEMENT OF CASE

I. Facts

The City of Greenlawn, New Union lies on the banks of the Green River Bypass Reach. *New Union Oystercatchers, Inc. v. United States Army Corps of Engineers*, NPDES Appeal No. 66-CV-2017, slip op. at 5 (D.N.U 2019). In 1945, Congress authorized the Howard Runnet Dam through the River and Harbor Act of 1945. *Id.* at 6. The Green River Bypass Reach project and Howard Runnet Dam were completed in 1947 and 1948, respectively. *Id.* at 5-6. The Dam was originally authorized for flood control, hydroelectric power and recreational purposes. *Id.* Nearly 20 years after the original construction of the Dam, Greenlawn experienced a housing construction boom, making the Greenlawn Water Agency responsible for the domestic and industrial water supply of over 100,000 customers. *Id.* at 5. As a result of the population surge the city enlarged its municipal water system in 1968. *Id.*

ACOE and Greenlawn agreed to maintain flows in the Bypass Reach to allow sufficient water withdrawals by Greenlawn, because the Howard Runnet Lake's impoundment cuts off natural flow to the Green River Bypass Reach. *Id.* at 6. The Water Control Manual (WCM) developed by ACOE governs their operation of the Green River Diversion Dam and establishes parameters for water release from the dams. *Id*. The WCM establishes downstream release curtailments to be applied when lake levels drop below seasonal target levels. *Id.* 7. The three levels of flow release are Zone 1 (Drought Watch), Zone 2 (Drought Warning), Zone 3 (Drought Emergency). *Id.* When the WCM was adopted in 1968, water consumption was relatively low. *Id.* at 8. However, increased agricultural operations in the Green River valley in 1980 lead to some evaporative water losses in the system. *Id.*

There were no forced applications of Zone 2 or Zone 3 restrictions prior to the 20th century, as drought conditions were rare. *Id.* at 8. In Spring 2017, the lake reached Zone 2 (Drought Warning) conditions, which require that Bypass Reach flow from the Diversion Dam be reduced to 7 CFS. *Id.* ACOE properly instituted flow restrictions in the Bypass Reach as per the WCM. *Id.* In response, Greenlawn protested the 7 CFS water flow restrictions and argued that the WCM was outdated and the limitations did not account for its increased population. *Id.* The residents of Greenlawn use additional water for watering their lawns, ornamental plants and washing their cars during the spring. *Id.* at 8. Additionally, Greenlawn asserted that its riparian landowner common law rights exempted them from any obligation to impose restrictions. *Id.* On April 23, the District Commander gave in to Greenlawn's requests and increased water releases to the Bypass Reach from 7 CFS to 30 CFS. *Id.* at 9. On May 15, the lake levels lowered to a Zone 3 (Drought Emergency) due to a combination of the increased release and the peaking hydroelectric power demands. *Id.* at 9. The protocol during a Zone 3 (Drought Emergency) reads "[a]ll recreational releases curtailed; flow of 7 CFS shall be maintained into the Bypass Reach from the Diversion Dam; daily hydroelectric power releases curtailed. *Id.* at 7. The District Engineer abided by the guidelines of the WCM and ordered the Zone 3 curtailments. *Id.* at 9.

The low lake levels led to a near complete drying up of the downstream Green River, which exposed several beds of oval pigtoe mussels. *Id*. The mussels are a federally listed endangered species. *Id.* at 9. The stagnant water conditions increased siltation which smothers mussel populations and eliminates their necessary habitat. *Id.* The host species that the mussels rely on for spawning have been unable to migrate to the mussels' breeding grounds. *Id.* Expert testimony indicates that approximately 25% of the oval pigtoe population in Green River died in the Spring of 2017 as their habitat was exposed from the confluence of the Bypass Reach and

tailrace downstream of the estuary. *Id.* at 10. If flow remains reduced the population will be completely extirpated. *Id.* The immediate threat to the oval pigtoe mussel population has been temporarily subdued by heavy rainfall, but all parties agree that a permanent resolution to this dispute is necessary. *Id*. at 11.

In addition to the impact on the oval pigtoe mussels, the reduced flows have increased the salinity of Green Bay, causing a decrease in the flow of nutrients in the ecosystem that supports the oysters. *Id.* at 10. The heightened salinity increased the presence of conch and crabs which feed on juvenile oysters. *Id.* The most recent data demonstrates that the historically thriving oyster industry has suffered a 50% decreased harvest from 2000 levels. *Id*. at 10. NUO's third- and fourth-generation oyster fishermen have experienced declining incomes as a result of reduced catches. *Id*. Some members have even sold their boats because they have not been able to make enough money from their normal fishing income to cover their loan payments. *Id*. They are also burdened by the potential threat of price surges when New Union Regional Electric Cooperative cannot operate as a peak facility. *Id.*

II. Procedural History

In the Opinion and Order of the District Court dated May 15, 2019, in Civ. 66-2017, the Court granted summary judgment for Greenlawn's counterclaim affirming its right as a riparian landowner to continued flows in the Bypass Reach sufficient to meet its municipal needs. The Court granted summary judgment for ACOE dismissing the claims brought against it under § 7 of the ESA. The Court granted summary judgment for NUO in its claim against Greenlawn asserting illegal takes under § 9 of the ESA, and thereby enjoined Greenlawn from making water withdrawals which have the effect of reducing downstream flows below the rate necessary for the survival of the oval pigtoe mussels. NUO and Greenlawn have filed timely Notices of Appeal, and no parties have raised issues of Article III standing on appeal.

SUMMARY OF ARGUMENT

Summary judgment on the Third Claim of Relief should be reversed as Greenlawn's right to municipal water consumption is not unlimited. Though not riparian landowners, NUO members can assert common law standing under the public trust doctrine. Greenlawn cannot claim a riparian right to continue water withdrawals during a drought without any water conservation measures because their water usage is "unreasonable" under the Restatement (Second) of Torts*'* interpretation of reasonableness. Greenlawn's water usage for ornamental lawn and garden watering is not a "natural use," it is causing substantial downstream harm, there are practical alternatives to this overconsumption, and finally, justice will be served by curtailing Greenlawn's water usage. Restatement (Second) of Torts § 850A (Am. Law Inst. 1977).

ACOE's operation of the Howard Runnet Dam Works during drought conditions represents a discretionary agency action, so summary judgment for ACOE on the First Claim of Relief should be reversed. Only non-mandatory discretionary agency actions are subject to the consultation requirement. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 55 U.S. 644 (2007). Because no Congressional statute mandated ACOE's increase of the municipal water release to 30 CFS and ACOE retained the ability to alter its actions for the benefit of the endangered mussels, its actions were a discretionary violation of the WCM. ACOE and Greenlawn are wrong to assert that the riparian rights provision in the WCM exempts them from compliance with the ESA, as the provision is not sufficiently specific. *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012). Alternatively, comparisons with the actions of other federal agencies suggest that ACOE's execution of the WCM is a continuing, discretionary agency action. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994). In

light of evidence that ACOE's water withdrawals harmed the oval pigtoe mussel, ACOE had a duty to consult with the FWS.

The District Court was correct to grant summary judgment on the Second Claim of Relief for NUO because the withdrawal of nearly all of the drought-reduced flow from the Green River plainly constitutes a "take" of the endangered oval pigtoe mussel. Congress' broad legislative intent with the ESA allows for indirect actions to be considered "takes" in the ESA context. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995). Habitat destruction, both indirect and direct, falls under the "harm" component of the ESA's statutory definition of "take." *Palila v. Haw. Dept. of Land and Nat. Resources*, 852 F.2d 1106, 1108 (9th Cir. 1981). Greenlawn's excessive municipal consumption in light of worsening droughts has led to drying of the downstream Green River and destruction of the oval pigtoe mussel's habitat.

Finally, the District Court was correct in declining to balance the equities. The Supreme Court in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) created an ESA exception to balancing the equities, and federal courts have consistently followed the exception in similar cases to this one. *See e.g. Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). In the few instances where courts have balanced the equities within the context of the ESA, they have done so based on facts not present in this case. *See e.g. Water Keeper Alliance v. U.S. Dept. of Defense* 271 F.3d 21 (1st Cir. 2001). Greenlawn's implicit claim is that their purely ornamental lawn and garden watering should be valued over the continued existence of an endangered species. This is precisely the type of municipal consumption that Congress sought to protect endangered species from in passing the ESA. Balancing the equities in a case where ornamental garden and lawn watering threatens a species' existence would undermine the ESA's core purpose.

ARGUMENT

I. GREENLAWN IS NOT ENTITLED TO DEPLETE THE DROUGHT-REDUCED FLOW IN THE BYPASS REACH FOR ITS ORNAMENTAL MUNICIPAL CONSUMPTION.

As a preliminary matter, a party must have common law standing before enjoining the water usage of a riparian owner. The District Court correctly noted that none of NUO's members live or own property on Green River and thus do not have standing as fellow riparian landowners. However, NUO is entitled to assert its members' common law rights as citizens of the state under the public trust doctrine. As a municipality within New Union, Greenlawn has a duty to maintain its natural resources in trust for the benefit of the public at large in accordance with the public trust doctrine. Greenlawn neglects that duty by engaging in overconsumption that harms the NUO fishermen. These fishermen are permitted to state claims as members of the public who have a right to enjoy the waters of the state.

Now, given that NUO has standing, the District Court's error in characterizing Greenlawn's modern day domestic water usage as permissible "natural use" during a drought can be assessed. A plain reading of the Restatement (Second) of Torts § 850A shows that domestic purposes are those that necessitate human survival, and otherwise should be limited when unreasonable under the circumstances. Restatement (Second) of Torts § 850A. The maintenance of lawns and ornamental plants falls outside of this categorical definition. As such, Greenlawn's exploitation of the flow within the Bypass Reach is not reasonable and must be curtailed. Restatement (Second) of Torts § 850A lists nine factors that affect the determination of reasonableness, the most pertinent being the purpose and value of consumptive use, the practicality of avoiding harm through adjustments in method and quantity, the extent and amount of harm caused, and whether justice will be served by requiring the entity that caused the harm to bear the loss. *Id.*

A. NUO can assert common law standing by invoking the public trust doctrine to stop Greenlawn's exploitation of the water flow in the Bypass Reach.

The public trust doctrine is rooted in English law but has been recognized by U.S. federal courts, most notably by the United States Supreme Court in *Illinois Centr. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892). This doctrine acknowledges the obligation of each state to protect natural resources for the benefit of the public. *Id.* at 452. While private ownership, such as riparian rights, are recognized, every state has an affirmative duty to preserve the public's interest by holding in trust the earth and air within its domain. *Georgia v. Tennessee Copper Co.* 206 U.S. 230, 236 (1907).[1] *See also Shively v. Bowlby*, 152 U.S. 1, 48 (1894); *Montana v. United States*, 450 U.S. 544, 551 (1984). Navigable fresh waters, tide and non-tide waters are "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." 146 U.S. at 452. Justice Holmes further solidified the value the Court places on the public's interest in the Earth's natural resources in *Hudson County Water Co. v. McCarter*.

> Few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of the opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.
>
> . . . The private right to appropriate is subject not only to the rights of lower owners but to the *initial limitation that it may not substantially diminish one of the great foundations of public welfare and health*.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908) (emphasis added).

[1] Justice Holmes was widely recognized for placing value on the rights of private ownership. However, he made several statements that have been fundamental to the acknowledgement of the state's right to protect its rivers for public use. Barton Thompson Jr. et al., *Legal Control of Water Resources* 32, 33 (6th Ed. 2018).

States have the individual power to interpret the scope of the public trust doctrine because it not controlled by the Constitution. *See PPL Mont., LLC v. Mont.*, 565 U.S. 576, 604 (2012) ("The states retain residual power to determine the scope of the public trust over waters within their borders . . . "); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1256 (D. Or. 2016) ("Public trust obligations are inherent aspects of state sovereignty; it follows that the public trust doctrine to a particular state is necessarily a statement of that state's laws . . . "). Article X, § 4 of the Constitution of the State of California 1879 provides freedom of access to and right of navigation upon navigable waters for its citizens[2]. Cal. Const. art. X, § 4. Similar provisions exist in some form of state law as it is an accepted principle of federalism that states possess and retain public trust over their waters. *See e.g. Idaho v. Coeur d'Alene*, 521 U.S. 261, 284-86 (1997); *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441 (Cal. 1983); *Arnold v. Mundy*, 6 N.J.L. 1, 9-10 (N.J. 1821).

Marks v. Whitney held that being a member of the general public was sufficient to allow a single man standing to request the court's declaration of a public trust easement against a riparian owner. 6 Cal.3d 251, 261 (Cal. 1971). In his capacity as an individual member of the public, Whitney invoked the public trust doctrine to raise issue with Marks' assertion that he could develop his property with little regard to the public. *Id*. As collective members of the public who are adversely impacted by the effects of Greenlawn's actions, NUO is entitled to assert common law standing on this issue. If such merit can be placed in one individual, the combined interests of all NUO's members must be considered. As fishermen who have coexisted

[2] "Sec. 4. No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigations of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof." Cal. Const. art. X § 4.

with the Green Bay for three to four generations to provide food and financial security for their families, these fishermen are invested in protecting and defending the Green River estuary. New Union and Greenlawn have an inalienable duty to preserve the natural environment for the public and NUO's members are entitled to hold them accountable for their failure to fulfill that obligation.

B. Greenlawn's water usage is "unreasonable," which prevents their usage from taking precedence over other uses.

Restatement (Second) of Torts § 850A lists nine nonexclusive factors that affect the determination of reasonableness, the most pertinent being the purpose and value of consumptive use, the practicality of avoiding harm through adjustments in method and quantity, the extent and amount of harm caused, and whether justice will be served by requiring the entity that caused the harm to bear the loss.[3] Restatement (Second) of Torts § 850A. The factors are often equated with states' tests for nuisance, thus the list above is an abridged version of the full Restatement (Second) of Torts § 850A's list, highlighting those most frequently cited. *See Lopardo v. Fleming Cos.*, 97 F.3d 921, 929-30 (7th Cir. 1996); *Ripka v. Wansing*, 589 S.W.2d 333, 335 (Mo. App. 1979). Considering these factors, Greenlawn's overconsumption of flow from the Bypass Reach during a drought to water lawns and ornamental flowers is unreasonable.

1. Greenlawn's modern day domestic uses of water are not "natural uses."

The riparian doctrine evolved from the natural flow theory to the reasonable use theory as modern society's water uses evolved. *See generally Thompson v. Enz*, 154 N.W.2d 473 (Mich. 1967); *Harris v. Brooks*, 283 S.W.2d 129 (Ark. 1955). The natural flow theory entitles riparian owners to deplete a water body as long as the use is for natural or domestic purposes. 283

[3] These "purpose and value" and "practicality" prongs represent a combining of several factors that have been listed separately in Restatement (Second) of Torts § 850A. However, they have been combined for this application because the analysis is very closely interrelated.

S.W.2d. at 132. Water usage was divided into two categories, "natural" and "artificial." *Duval v. Thomas,* 107 So.2d 148, 152 (Fla. 1958). Natural use encompasses domestic purposes closely associated with the sustenance of a riparian owner including drinking, cooking, bathing, and sanitation. Restatement (Second) of Torts § 850A cmt b. Artificial uses, in contrast, do not substantially contribute to one's existence, but merely increase one's comfort and prosperity. 154 N.W.2d. at 484.

In contrast, the reasonable use theory allows for optimal utility of a source, as riparian owners are only permitted full reign over a water body if their usage does not negatively impact fellow riparians. *See generally U.S. v. Willow River Power Co.*, 324 U.S. 499 (1945); *Southland Co. v. Aaron*, 72 So.2d 161 (Miss. 1954); *Borough of Westville v. Whitney Home Builders, Inc.*, 122 A.2d 233 (N.J. Super. Ct. App. Div. 1956); *Daniels v. Bethlehem Mines Corp.*, 137 A.2d 304 (Pa. 1958). If there is a conflict, "natural" domestic uses are prioritized because they are considered more reasonable. 283 S.W.2d. at 132. Jurisdictions will often apply one theory or both. However, the majority have abandoned the natural use theory's dichotomy for the reasonable use theory's preference for domestic use. *See Evans v. Merriweather*, 3 Scam. 492 (Ill. 1842); *Prather v. Hoberg*, 150 P.2d 405, 412 (Cal. Ct. App. 1944). Awarding riparian status to municipalities is a minority practice, and does not entitle municipalities to the preferential treatment afforded to an individual's domestic needs. *See generally, Purcellville v. Potts,* 19 S.Ed.2d. 700 (Va. Ct. App. 1942) (municipality was prohibited from diverting water from a stream via a dam); *Emporia v. Soden*, 25 Kan. 588 (Kan. 1881) (city not permitted to undiminished flow to provide water for city inhabitants).

Although the "natural" and "artificial" contrast does not persist, Greenlawn's water uses would be excluded from the "natural" categorization under both the natural flow and reasonable

use theories. The modern domestic uses that Greenlawn cites are namely the watering of lawns and ornamental plants in large quantities. *NUO*, slip op. at 8. Entitlement to water for daily rituals closely associated with one's survival is vastly different from a desire to maintain a plot of decorative plants for its aesthetic value. Ultimately, the term "natural" cannot be stretched to incorporate Greenlawn's modern domestic uses. This is an inaccurate classification which falls outside of the scope of both recognized domestic uses and therefore natural uses. Greenlawn is not justified in their near total consumption of water flow in the Bypass Reach. Additionally, as a municipality, Greenlawn is not entitled to the benefits of the domestic use preference. Neither domestic nor commercial water withdrawals by municipalities and water companies are given priority, and they may be subject to liability for the harm caused.

2. *Greenlawn's water usage is causing substantial harm.*

In *New Jersey v. New York*, Justice Holmes found that increased water withdrawals by New York would inflict too negative of an impact on the state of New Jersey to be permissible. 283 U.S. 336, 345 (1931). The Court held that limitations should be placed on New York's proposed water withdrawals because they would increase the salinity of the Delaware River and injure the oyster industry of Delaware Bay. *Id.* at 343.[4] Courts continue to apply this approach in interstate water disputes as drought and the impacts of climate change continue to manifest within the United States. *Florida v. Georgia*, 138 S. Ct. 2502 (2018).

It is not reasonable for one to consume the last drop of water to quench the thirst of their petunias while their neighbors struggle to put food on the table. As Greenlawn's citizens are allowed to indulge their domestic pleasures, the very livelihood of their neighbors hangs in the

[4] The court did not grant New Jersey's request for an injunction to prohibit New York from diverting water from the Delaware River. However, the order did restrict New York from diverting water in excess of 440 million gallons daily which would prevent any substantial negative impacts on the oyster industry. 283 U.S. at 346.

balance. The most recognizable harm to NUO is the economic aspect. However, unemployment, particularly when rooted in community loss, can lead to depression, stress, and lasting impacts on families. Jennie Brand, *The Far-Reaching Impact of Job Loss and Unemployment*, 41 Ann. Rev. Soc., 359, 365-68 (2015). Additionally, as members of the greater New Union at large, NUO's members have a vested interest in the health of the natural environment. Greenlawn must be held responsible for its actions.

3. There are practical alternatives to reducing Greenlawn's over consumption.

To limit overconsumption, particularly during a drought, it is reasonable for water usage to be curtailed to eliminate waste. Restatement (Second) of Torts § 850A, cmt a. Imposing water restrictions during water shortages is a legitimate government purpose and duty. *Express Carwash of Charlottesville v. City of Charlottesville*, 320 F. Supp. 2d 466, 473 (W.D. Va. 2004).

The purpose of ACOE's operations via the WCM is to monitor the lake levels and prevent unreasonable overconsumption. *NUO*, slip op. at 6. Greenlawn could readily reduce its usage through community behavioral change campaigns or drought restriction ordinances as requested by the District Engineer. *Id.* at 8. Greenlawn both knows how and has the means to reduce their consumption to reasonable levels, but is simply choosing inaction.

4. Justice will be served by curtailing Greenlawn's water usage.

The most reasonable uses receive preferential treatment when balancing utility against the harm. Restatement (Second) of Torts § 850A, cmt c. "States also have an affirmative duty to take reasonable steps to conserve and even to augment the natural resources within their borders." *Idaho ex rel. Evans. v. Oregon*, 462 U.S. 1017, 1025 (1983).

The extent of the harm inflicted on NUO members and the natural environment severely outweighs the domestic value to Greenlawn. Greenlawn cannot neglect their duty to protect natural resources. Greenlawn is not the first municipality to encounter drought nor will it be the

last. If upheld, the District Court's decision to prioritize riparian rights for these unreasonable uses will set a dangerous precedent that may lead to more severe and sustained nationwide water storages as the effects of climate change manifest.

II. OPERATION OF THE HOWARD RUNNET DAM WORKS DURING DROUGHT CONDITIONS TO PROVIDE FLOW TO GREENLAWN IS A DISCRETIONARY ACTION SUBJECT TO THE CONSULTATION REQUIREMENT OF THE ESA.

§ 7(a)(2) of the ESA requires that each federal agency "in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536. The Supreme Court has clarified that these consultation and no-jeopardy mandates only apply in situations of discretionary federal involvement or control. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 55 U.S. 644.

ACOE is subject to the consultation requirement because it exercised discretionary agency action. First, ACOE's decision to increase the water release to 30 CFS during Zone 2 drought conditions was a discretionary violation of the WCM. No Congressional act mandated this violation and ACOE retained the authority to act in a way that would have prevented harm, or benefited, the mussels. Second, the riparian rights provision in the WCM does not exempt ACOE from compliance with the ESA because the provision does not include a sufficiently specific mandate. Alternatively, ACOE's daily operation of the Howard Runnet Dam Works constitutes an ongoing agency action, and in light of evidence that their activities harmed the oval pigtoe mussel, it had a duty to consult with the FWS.

A. Increasing the water release to 30 CFS on April 23, 2017 was a discretionary violation of the WCM.

Only discretionary actions are subject to the consultation requirement. The term "discretionary" is not defined in the ESA, so it is left to judicial interpretation. Two perspectives on the definition prevail in current case law. Under both definitions, ACOE's water release increase was a discretionary agency action subject to the ESA consultation requirement.

1. ACOE retained discretion to consider the endangered species.

The first definition comes from *National Ass'n of Home Builders v. Defenders of Wildlife*, in which the Supreme Court defined discretionary under the ESA as the discretion "to consider the protection of the threatened or endangered species as an end in itself." 551 U.S. at 671. By contrast, mandatory actions are those the agency is "required by statute to undertake once specific triggering events have occurred." *Id.* at 669. In *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1143 (11th Cir. 2008), the Eleventh Circuit Court of Appeals followed this definition to conclude that the Federal Emergency Management Agency (FEMA) did have a duty to consult because "[the court was] satisfied that FEMA has discretion to consider endangered and threatened species in its administration of the NFIP."

ACOE could have chosen to comply with the stated drought protocols in the WCM or to renegotiate the WCM in response to Greenlawn's claims that it was outdated. Either of these alternative choices would have prevented the low downstream river levels that harmed the mussels' habitat, meaning ACOE retained discretion to act in a way to prevent harm to the endangered mussels. In the analogous case of *In re Operation of Missouri River System Litigation*, 421 F.3d 618 (8th Cir. 2005), several states sought injunctions against ACOE related to its management of the Missouri River during a drought. The Eighth Circuit Court of Appeals held that because the Flood Control Act of 1944 did not specify the exact levels of necessary

down-river flow, ACOE retained discretion in carrying out the interstate upstream and downstream water level management of the river. Therefore, its agency actions were subject to the consultation requirement of the ESA. *Id.*

Here, ACOE similarly does not have a statutory mandate controlling their daily operation of the Dam Works, so it retains discretion in operating the Dam to provide municipal water flow to Greenlawn. ACOE does have the WCM, which guides their daily operations and specifies a mandatory level of 7 CFS flow from the Bypass Reach to the Diversion Dam during Zone 2 drought conditions. Had ACOE complied with the stated drought protocols, it is likely that the downstream Green River flow would have remained strong enough to keep the mussels adequately covered.

2. ACOE lacked a Congressional mandate.

A second prevailing definition of discretionary agency action comes from the Ninth Circuit. In *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 929 (9th Cir. 2008), the court held when an agency "chooses a course of action which is not specifically mandated by Congress and which is not specifically necessitated by the broad mandate, that action is, by definition, discretionary and is thus subject to Section 7 consultation." The 30 CFS release during the Zone 2 drought was not mandated by any Congressional act, or even ACOE's own WCM. ACOE chose to relent to pressure from Greenlawn to increase the release in violation of the drought protocol, which led to the low downstream water levels that threatened the endangered oval pigtoe mussels with extirpation.

In the analogous case of *Tennessee Valley Authority v. Hill,* the Supreme Court blocked the completion of a multimillion dollar dam because it would have destroyed the critical habitat of an endangered snail species. 437 U.S. 153. The lack of a Congressional command to build or operate the dam was central to their decision. *Nat'l Ass'n of Home Builders v. Defenders of*

Wildlife, 55 U.S. at 670 (clarifying the rationale behind *Hill*). Neither the River and Harbor Act of 1945 nor the Fish and Wildlife Coordination Act of 1958 mandated ACOE to increase the water release during the drought. In fact, the WCM, which ACOE developed itself, required that ACOE cap municipal flow to 7 CFS during drought conditions. Due to the lack of a specific Congressional mandate or any other explicit statutory mandate, ACOE's action constituted a violation of the WCM that was subject to the § 7 consultation requirement.

In sum, ACOE's decision to increase the water release to 30 CFS during the drought was by definition, a discretionary agency action because no legislation expressly mandated it. The agency also retained some discretion to act in a way to benefit the endangered mussels. This discretionary increase was a violation of the WCM that was subject to the § 7 requirement.

B. The riparian rights provision in the WCM does not relieve ACOE from the ESA consultation requirement.

"ESA compliance is not optional." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008). There is "little doubt" that Congress intended the term "agency action" to have a broad definition in the ESA. *Pacific Rivers Council v. Thomas* 30 F.3d at 1054. The Supreme Court has interpreted the § 7 consultation requirement in line with Congress' broad intent, noting that the ESA's legislative history shows a "conscious congressional design to give endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth. v. Hill*, 437 U.S. at 185.

In *Karuk Tribe of California v. United States Forest Service*, the U.S. Forest Service alleged that local mining regulations left them no discretion in approving private mining activities that threatened the endangered coho salmon's habitat, so it was exempt from the § 7 consultation requirement. 681 F.3d 1006. The Ninth Circuit rejected this argument, holding that when an agency faces a contradictory statutory mandate to the ESA, that competing mandate

must require the agency to perform "specific nondiscretionary acts rather than achieve broad goals." *Id.* at 1024.

ACOE contends that the riparian rights provision of the WCM exempts it from the consultation requirement. The provision reads that "[a]t all times the Howard Runnet Dam Works shall be operated in a manner that complies with … the riparian rights of property owners established under New Union law." *NUO*, *s*lip op at 7. ACOE's argument is without merit. Under the Ninth Circuit's interpretation, this provision is too broad to qualify as mandating ACOE to take any specific actions. Applying the Supreme Court's definition of mandatory in *National Ass'n of Home Builders v. Defenders of Wildlife*, the provision offers no "specific acts that the agency must take once specific triggering events have occurred." 55 U.S. at 669. ACOE's contention may have been stronger had the WCM mandated ACOE to increase the water release to 30 CFS during Zone 2 drought conditions. However, the WCM specified a water release of 7 CFS during drought conditions, which ACOE expressly violated. The lack of a specific competing mandatory statute means that ACOE is not released from complying with the ESA consultation requirement when it undertakes actions that may jeopardize an endangered species. In choosing to increase the water release in violation of the WCM protocols, ACOE had a duty to consult with the FWS.

ACOE's contention that the WCM riparian rights provision relieved them of complying with the ESA consultation requirement is meritless because the WCM did not specifically require ACOE to violate the WCM drought protocol. In increasing the water release to 30 CFS, ACOE conducted a discretionary action that was subject to the ESA consultation requirement.

C. Alternatively, ACOE has a duty to consult because their execution of the WCM is a continuing discretionary agency action.

The ESA states that federal agencies must consult with the relevant Secretary to ensure their agency actions do not jeopardize an endangered species. 16 U.S.C. § 1536. The consultation duty is triggered when evidence comes to light that an agency's actions are harming or may harm such a species. It is undisputed that ACOE's operation of the Dam Works harmed the endangered mussels, so ACOE had a duty to comply with the consultation requirement.

Retaining authority to control dam operations equates to a continuing responsibility under the ESA. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) (because the Bureau of Reclamation retained authority to manage the Dam and it remained the owner in fee simple, it had responsibilities under the ESA). The Ninth Circuit has distinguished between completed and continuing agency actions in determining whether an agency had obligations under the ESA. Issuing permits that could not be altered post-issuance were considered completed acts and therefore not subject to ESA obligations. *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001). In contrast, regulating pesticides or cancelling pesticide registrations is subject to ESA obligations because the agency retains authority, so it has a continuing obligation to follow the requirements of the ESA. *Wash. Toxics Coal. v. Envtl. Prot. Agency* 413 F.3d 1024 (9th Cir. 2005). Further, developing a resource management plan and conducting daily operations in line with that plan constitutes ongoing agency action. In *Pacific Rivers Council v. Thomas*, the U.S. Forest Service claimed it was absolved from the ESA consultation requirement because its land resource management plans (LRMPs) for timber sales, range activities and road building in two national forests were developed before chinook salmon were listed as threatened. 30 F.3d 1050. The Ninth Circuit rejected their claim, holding that "LRMPs are programmatic documents that set guidelines for

resource management and therefore constitute continuing agency action requiring consultation." *Id.* at 1051.

ACOE is vested with the authority to control the operations of the Howard Runnet Dam Works, so its daily operation is an ongoing discretionary action subject to the consultation requirement. In light of evidence that their actions may threaten an endangered species, federal agencies have an explicit duty to follow the consultation requirement under the ESA. The WCM governs ACOE's operation of the Green River Diversion Dam and the Howard Runnet Dam. It establishes parameters, sets target lake levels, and provides drought protocols. The LRMPs in *Pacific Rivers Council v. Thomas* are closely analogous to ACOE's WCM. They are both agency-developed agreements with the relevant interest groups, such as the timber sales groups and road builders in *Pacific Rivers* and the town of Greenlawn in this case. They both set guidelines to direct daily resource management. Given the similarities, the Ninth Circuit's holding that operationalizing the LRMPs was an ongoing discretionary action subject to the consultation requirement should extend to ACOE's execution of the WCM. The oval pigtoe mussel was not a listed endangered species at the time of the latest WCM revision in 1968. Even so, as the Ninth Circuit held with regards to the chinook salmon, ACOE has a consultation requirement under the ESA when evidence arises that their ongoing agency actions threaten an endangered species, even if their endangered classification is relatively recent. After increasing the water release to 30 CFS as part of their ongoing operation of the Dam and learning of the threat to the mussels, ACOE had a consultation requirement under the ESA.

In sum, ACOE's choice to violate the WCM by increasing the water release to 30 CFS during the Zone 2 drought was an agency action subject to the § 7 consultation requirement. ACOE's assertion that the riparian rights provision of the WCM exempts them from the

consultation requirement cannot stand because the provision is not sufficiently specific. Alternatively, ACOE's execution of the WCM in the operation of the Howard Runnet Dam Works is an ongoing agency action. The evidence that their actions are harming the downstream shellfish triggers the § 7 consultation requirement.

III. GREENLAWN'S WITHDRAWAL OF NEARLY ALL OF THE DROUGHT-REDUCED FLOW FROM THE HOWARD RUNNET DAM WORKS CONSTITUTES A "TAKE" OF THE OVAL PIGTOE MUSSEL IN VIOLATION OF § 9 OF THE ENDANGERED SPECIES ACT, 16 U.S.C. § 1538.

§ 9 of the Endangered Species Act states that ". . .with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to… (B) take any such species within the United States or the territorial sea of the United States;" 16 U.S.C. § 1538. The statute defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532 (2018). The Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 affirmed that Congress intended "take" to be broadly defined and apply to indirect as well as direct actions. The First Circuit Court of Appeals has also held up a liberal definition of take under the ESA. *Strahan v. Coxe*, 127 F.3d 155 (holding that injunctive relief was properly granted against Massachusetts officials in light of evidence of injury to northern right whales). The Ninth Circuit in *Palila v. Hawaii Dept. of Land and Natural Resources* held that habitat destruction which may lead to species extirpation constitutes "harm" within the definition of "take." 852 F.2d at 1108.

A. By continuing to withdraw water at a rate of 20 MGD during drought conditions, Greenlawn proximately caused the drying up of Green River downstream of the Bypass Reach.

In holding that "take" applies to indirect as well as direct actions, the *Babbitt* Court clarified in dicta that alleged ESA violations must still show proximate and foreseeable harm.

515 U.S. at 696. The Fifth Circuit Court of Appeals in *Aransas Project v. Shaw*, 775 F.3d 641, 656 (5th Cir. 2014), adopted this reasoning by formally holding that "foreseeability and proximate cause are required to affix liability for ESA claims." There has historically been no formal standard for "proximate cause" in the ESA contexts, and in other environmental contexts courts have looked to Black's Law Dictionary. *See United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999);[5] *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).[6] In 2018, a district court applied the general common law standard for proximate cause in an ESA case for the first time. *Natural Resources Defense Council v. Zinke*, 347 F. Supp. 3d 465 (E.D. Cal. 2018) (citing *Paroline v. U.S.*, 572 U.S. 434 (2014)). To say that one event proximately caused another is to say that the latter event following from the former event was foreseeable, rather than merely fortuitous. 572 U.S. at 445. However, before proximate cause can be established, causation in fact, or "but for" cause, must be demonstrated. *Id.* at 444. Both causes are present in this case.

1. Causation in fact exists.

Causation in fact exists whenever one event would not have occurred "but for" a previous event occurring. 572 U.S. at 449-50. Greenlawn's 20 MGD water withdrawals meet the but for causation test, because without Greenlawn's water consumption, the downstream water levels would not have been so greatly diminished and extirpation of 25 percent of the oval pigtoe mussel population in Green River would not have occurred.

First, Greenlawn has already conceded causation in fact by failing to dispute NUO's standing to bring suit under Article III of the Constitution. In order to establish standing under

[5] holding that the Bald and Golden Eagle Protection Act (BGEPA) and Migratory Bird Treaty Act (MBTA) applied to both intentionally and unintentionally harmful conduct.
[6] holding that MBTA was not unconstitutionally vague.

Article III, a plaintiff must demonstrate, among other things, "a causal connection between the injury and the conduct complained of," i.e. that the injury is fairly traceable to the conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). While the federal courts have not clarified exactly what kind of cause "causal connection" entails, the Supreme Court has used the language of "but for" cause in analyzing Article III causation in at least one instance. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 (1978). By failing to dispute Article III causation, Greenlawn has therefore likely already conceded causation in fact. A review of ESA cases has revealed that "causation in environmental law cases has been forced into jurisdictional standing analysis, even where the inquiry is more appropriate for later determination on the merits." Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 Harv. L. Rev. 2256 (2015). Greenlawn has therefore effectively forgone the opportunity to dispute causation as it pertains to the merits of NUO's ESA take claim.

Even if Greenlawn had not conceded causation in fact by failing to dispute standing, under *Aransas Project*, circuit courts review district courts' findings on causation in the ESA context for clear error, and here the record was more than sufficient to support a finding of causation in fact. 775 F.3d at 658. Undisputed expert testimony suggests that after Greenlawn resumed water withdrawals at 20 MGD, 25 percent of the population of oval pigtoe mussels in Green River was killed, and that if such withdrawals continued, the entire population would be extirpated. *NUO*, slip op. at 10. Further, the court found that "Greenlawn's water withdrawals consumed nearly all the flows in the Bypass Reach." *Id.* at 9. Therefore, but for these 20 MGD water withdrawals, the Bypass Reach would have maintained its flow and the oval pigtoe mussels would not have died. Causation in fact has thus been established.

2. *Proximate cause exists.*

Proximate cause exists where the injury which results from the conduct in question is foreseeable, rather than merely fortuitous. *See* 572 U.S. at 445. Because the extirpation of oval pigtoe mussels following resumption of 20 MGD water withdrawals was foreseeable, proximate cause exists in this case. The presence of such foreseeability in this case is best elucidated by analogizing to similar cases. Courts in the First, Seventh, and Ninth Circuits have found proximate cause virtually every time a government agency issues licenses which permit licensees to engage in behavior that causes takes. *See e.g. Strahan v. Coxe*, 127 F.3d 155; *Natural Resources Defense Council v. Zinke*, 347 F. Supp. 3d 465; *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008); *Seattle Audubon Soc'y v. Sutherland*, No. CV06-1608MJP, 2007 U.S. Dist. LEXIS 31880 (W.D. Wash. May 2, 2007). Thus, even though the government agency in these cases did not directly take an endangered species, it is foreseeable that by issuing licenses, licensees will perform such takes. It follows logically that in this case, where the causal chain between Greenlawn's water withdrawals and mussel extirpation is even more direct, foreseeability is present. There is no intermediary causal actor between Greenlawn and the harmed mussels. Rather, Greenlawn is itself eliminating flow in the Bypass Reach by its own actions, thus directly modifying the habitat in a way which prevents the mussels from surviving. The extirpation of these mussels is therefore foreseeable as a result of Greenlawn's water withdrawals, and proximate cause exists.

B. Greenlawn's upstream activities are adversely modifying the habitat of the oval pigtoe mussels.

Although Greenlawn's plant and lawn watering occur outside of the oval pigtoe mussel's habitat, Greenlawn is in fact modifying the mussels' critical habitat. 16 U.S.C. § 1532 (2018) defines critical habitat as (i) the specific areas within the geographical area occupied by the

species, at the time it is listed on which are found those physical or biological features (ii) essential to the conservation of the species and (iii) which may require special management considerations or protection; and (iv) *specific areas outside the geographical area occupied by the species at the time it is listed*. 16 U.S.C. § 1532. (Emphasis added). A plain reading of the ESA shows that actions that lead to critical habitat modification do not need to originate in the same physical place as the habitat in question. *See e.g. Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1178 (D.N.M. 2000) (holding that designation of critical habitat might limit designation to less than the entirety of species habitat contrary to the duties of ESA).

50 C.F.R. § 402.02 (2018) defines destruction or adverse modification to include "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." 50 C.F.R. § 402.02 (2018).

Greenlawn's actions upriver are indirectly causing adverse habitat modification. Due to the interconnected nature of water bodies, the changes in surface water storage and stream flows upstream indirectly harm the mussel's habitat downstream. Similar to the Dead Zone in the Gulf of Mexico, where a hypoxic area now exists in the mouth of the Mississippi River, one can still be held liable for actions taking place outside the specific habitat in question. Cheryl Lyn Dybas, *Dead Zones Spreading in World Oceans*, 55 BioScience 552, 554 (2005). A farmer whose fertilizers entered the Mississippi after a heavy rain cannot escape his culpability simply because his farm is not centered within the specific oxygen depleted section of the Gulf. *Id.* at 553. Waterways, like the Mississippi and New Union's Green River, are connected. It is logical to expect that what happens upstream is likely to impact life downstream.

In sum, pursuant to 50 C.F.R. § 402.02's prohibition of alterations adversely modifying any of those physical or biological features that were the basis for categorizing a habitat as critical, Greenlawn is required to assess the impacts of their actions, both "direct" and "indirect." *Natural Res. Def. Council v. Rodgers*, 381 F. Supp. 2d 1212, 1241 (E.D. Ca. 2005). As Greenlawn acknowledged, climate conditions are becoming more variable. This lends even more reason to emphatically support preserving endangered species' critical habitats.

IV. THE DISTRICT COURT DID NOT ERR BY DECLINING TO BALANCE THE EQUITIES BEFORE ENJOINING GREENLAWN'S WATER WITHDRAWALS.

Generally, for a plaintiff to succeed in obtaining a permanent injunction, a court must find (1) that the plaintiff will likely suffer irreparable harm absent the injunction, (2) that remedies at law, i.e. damages, would be inadequate in compensating the injury, (3) that the balance of equities favors an injunction, and (4) that the injunction is in the public interest. *eBay Inc. v. MercExchange, L.L.C*, 547 U.S. 388, 391 (2006). However, in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the U.S. Supreme Court created an exception to the traditional permanent injunction test where the alleged harm stems from a violation of the ESA. Specifically, after examining the text and legislative history of the ESA, the Court determined that "Congress has spoken in the plainest of words, making it abundantly clear that the balance [of equities] has been struck in favor of affording endangered species the highest of priorities." *Id*. at 194. *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987), expanded this exception by applying it to preliminary injunctions, as well as by removing the public interest requirement. The exceptions thus constitute a mandate directing courts not to balance the equities or perform a public interest inquiry in ESA cases. These exceptions apply, given that this case concerns the ESA, and federal courts have consistently applied them in ESA cases subsequent to *Hill* and *Marsh*. Further, the few ESA cases which have diverged from the *Hill* exception did so in light

of facts which differed dramatically from those in this case. Finally, if the Court were permitted to balance the equities where the competing interest consisted in watering lawns, the ESA would be undermined.

A. Federal courts' application of *Hill* has created a virtual mandate not to balance the equities when deciding whether to grant injunctions under the ESA.

Since the time *Hill* was decided, courts have regularly declined to balance the equities in cases where the plaintiff seeks an injunction following an ESA violation. *Strahan v. Coxe* is an early exemplar of the way courts have treated injunctive relief under the ESA following *Hill* and *Marsh*. In *Strahan*, The First Circuit stated plainly that the balance of equities and public interest prongs "have been answered" by Congress in enacting the ESA and altogether declined to engage in any analysis of those prongs, thus upholding the injunction. *Id.* at 159. Similarly, the Ninth Circuit in *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9th Cir. 2002) upheld an injunction mandating the FWS to make a formal determination as to whether certain species could be classified as endangered under the ESA. The FWS had neglected to make such a determination for over a year after the plaintiffs had petitioned them to do so, violating § 4 of the ESA. The court neglected to analyze even a single prong of the traditional four-factor test, relying almost exclusively on *Hill* and treating it as a virtual mandate for injunctions where the ESA is violated. *Id.* at 1177; *See also Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1180 (D. Ariz. 2003) (declining to balance equities or evaluate public interest in denying a motion to modify a previous injunction, even where defendant was financially incapable of abiding by the injunction).

In the past decade, federal courts have continued to presume that the balance of equities always favors endangered species, just as *Hill* directs. This has held true in diverse contexts, including where sea walls built alongside coasts to prevent erosion caused a take of sea turtles

under section 9 of the ESA by interfering with their nesting, *Sierra Club v. Kolnitz*, No. 2:16-cv-03815-DCN, 2017 U.S. Dist. WL 3480777, at *23-24 (D.S.C. Aug. 14, 2017); where a government agency directly authorized takes of an endangered red wolf species, *Red Wolf Coalition v. United States Fish and Wildlife Service*, 210 F. Supp. 3d 796, 806 (E.D.N.C. 2016); where a planned riverbed dredging failed to conform with ESA procedural requirements, *Audubon Society of Portland v. National Marine Fisheries Service*, 849 F. Supp. 2d 1017, 1033 (D. Or. 2011); and even where the party *seeking* injunction would have caused takes under § 9 of the ESA were the injunction granted. *Humane Soc'y of U.S. v. Bryson*, Case No. 3:12-cv-00642-SI, 2012 U.S. Dist. LEXIS 74688 (D. Or. May 30, 2012).

Consistent with the uniform application of *Hill*, the District Court did not err in declining to balance the equities before enjoining Greenlawn from withdrawing water at a rate of 20 MGD.

B. Balancing the equities should be avoided because this case does not comport with the narrow exceptions to favoring the endangered species in an ESA context.

Federal courts have occasionally diverged from *Hill* by balancing the equities in ESA contexts, but they have only ever done so for reasons entirely inapposite to the present case. There are two narrow categories into which these cases fall: (1) cases where the irreparable harm prong is disputed by the parties, and where such harm may be lacking; and (2) cases where the competing interest pertains to national security or human safety. This case does not fall under either category.

1. <u>There is no dispute that Greenlawn's water withdrawals cause irreparable harm.</u>

Federal courts have distinguished ESA cases from *Hill* in situations where irreparable harm is disputed. As the Ninth Circuit stated in *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1090-91 (9th Cir. 2015), "*Hill* did not resolve whether plaintiffs must establish irreparable injury" since "that factor was not at issue in *Hill*," and "[w]e must

therefore conclude that there is no presumption of irreparable injury where there has been a procedural violation in ESA cases." *See also Nat'l Wildlife Fed'n v. Burlington Northern R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994); *Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1211 (D. Mont. 2009); *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 27 (1st Cir. 2010) ("the drastic result in *Hill* stemmed from the *strong and undisputed showing* of irreparable harm that would occur absent an injunction." (Emphasis added)).

These considerations are entirely inapposite to Greenlawn, because there is no dispute that Greenlawn's withdrawals will cause irreparable harm if allowed to continue. Undisputed expert testimony in the record states that as a result of the reduced flow caused by Greenlawn's water withdrawals during drought conditions, 25% of the oval pigtoe mussel population in the Green River have died. *NUO*, slip op. at 10. The reduced flow which Greenlawn's withdrawals cause would, if allowed to continue, completely extirpate the Green River population of oval pigtoe mussels. *Id.* If the complete extirpation of a population of an endangered species does not constitute "irreparable harm," it is difficult to fathom what would. The question which both NUO and Greenlawn must address, that is, "[w]hether the District Court must balance the equities . . . *when the activity will cause the extirpation of an entire population of an endangered species*," underscores the lack of dispute that such harm exists. *Id.* at 2 (emphasis added). Thus, since there is no dispute that Greenlawn's withdrawals would cause irreparable harm to the oval pigtoe mussels in Green River if allowed to continue, *Hill* applies.

2. *Greenlawn's interest in 20 MGD water withdrawals does not pertain to national security or human safety.*

Apart from cases in which irreparable harm is disputed, the only instances in which courts have elected to diverge from *Hill* are those in which the competing interest in the balance of equities test implicates national security or an interest otherwise deemed fundamental to

human health or safety. With respect to national security, the First Circuit denied a motion for a preliminary injunction arising under ESA claims where the proposed injunction would have banned bombing tests on an island which housed several endangered species. *Water Keeper All. v. U.S. Dept. of Defense*, 271 F.3d 21, 34 (1st Cir. 2001) ("the harm asserted by the Navy implicates national security and therefore deserves greater weight than . . . economic harm."). With respect to human health and safety, where the injunction would have barred the construction of a project designed for the purpose of housing displaced victims of a hurricane who had taken to living in disease-ridden, mosquito-infested emergency shelters, the District Court for the U.S. Virgin Islands declined to follow the *Hill* exception. *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 939 F. Supp. 1195, 1209 (D.V.I. 1996) ("[I]f this court grants an injunction, the potential loss is not merely pecuniary. Instead, the loss involves the equally incalculable value of the sanctity and quality of human life."). *See also Consol. Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1069 (E.D. Cal. 2010) ("Congress has not nor does *TVA v. Hill* elevate species protection over the health and safety of humans.").[7]

Neither of these considerations are at issue in this case. First, there is no national security interest. Second, Greenlawn's interest in 20 MGD water withdrawals stems exclusively from "summer lawn and ornamental watering demands," as cited in Greenlawn's 2017 letter to ACOE demanding the continuance of 30 CFS dam flows following Zone 2 drought conditions. *NUO*, *s*lip op. at 5, 8. There is no contention from Greenlawn that without either 30 CFS dam flows or 20 MGD water withdrawals, it would be unable to provide enough water to its residents to meet their needs with respect to consumption, hygiene, plumbing, or any other interest which could

[7] Though the injunction sought in *Consolidated Delta Smelt Cases* pertained to the activities of a two water management projects in California, the actual interests at stake which clashed with those of the endangered species, among them ameliorating hunger and mitigating the loss of thousands of jobs, are not at all present in this case. *Id.* at 104-05.

reasonably be said to implicate human health or safety. If anything, the interest in "the sanctity and quality of human life" which *Hawksbill* identified cuts against Greenlawn, since NUO's members face loss of income and loan default in the event that Greenlawn's 20 MGD withdrawals continue. *Id.* at 10. Likewise, members of the New Union Regional Electric Cooperative have been forced to pay more for electricity as a result of Greenlawn's actions. *Id*. Because Greenlawn's very own framing of its interests does not implicate national security or human health and safety, those exceptions are not relevant in this case. *Hill*'s presumption in favor of the endangered species applies here.

C. Balancing the equities where the competing interest consists in decorative lawn watering would undermine the ESA.

As the above exceptions suggest, courts have only chosen to balance human interests against the interests of endangered species when protecting the species would endanger some members of the human species. This interpretation reflects Congress' intent in passing the ESA "to provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction." S. Rep. No. 93-307 at 1 (1973). In passing the ESA, Congress was well aware that "economic growth and development untempered by adequate concern and conservation" were the primary cause of extinction, thus implying that Congress considered species preservation more important than these aims. *Id.* at 12. Indeed, Congress referred to the value lost by the extinction of species as "invaluable," and analogized humanity's role in protecting these species to that of a custodian in charge of protecting a library which contains a copy of every book ever made. H.R. Rep No. 93-412 at 4-5 (1973). Most significantly, Congress declared that the interest in endangered species' survival "*goes beyond the aesthetic*," S. Rep. No. 93-307 at 2 (emphasis added), because these species promote biological diversity and contribute to medical research efforts. H.R. Rep No. 93-412 at 5. In sum, Congress declared

that "*it is in the best interests of mankind* to minimize the losses of genetic variations." *Id.* (emphasis added).

Conversely, lawns and ornamental gardens do not "go beyond the aesthetic," and exist solely for the visual enjoyment for their owners. Even relative to other cases in which motions to enjoin arising under ESA claims were granted, this is a minimal interest: Greenlawn does not even contend, for example, that it will lose out economically without 20 MGD withdrawals. Aesthetic interests are not insignificant, and both occupy our leisure time and provide us with a considerable source of pleasure. Nevertheless, there are innumerable contexts in which they are curtailed by law for the sake of a competing interest, often one much less significant than that of an endangered species' survival. A tenant, for instance, may place enormous aesthetic value in playing loud dance music at two in the morning, but his co-tenant's competing interest in the quiet enjoyment of her premises may not permit such an interest to be legitimated by law. *See generally* 9 Richard R. Powell & Michael Wolf, *Powell on Real Property* § 64.2 (Michael Allan Wolf ed., 1949). If the interest in ornamental gardens and lawns was worthy of balancing against the survival of an endangered species, it is difficult to imagine what would not be. The doors would thus open for cities throughout the country to withdraw as much water as they wanted to satisfy their aesthetic whims. Further, since virtually every violation of the ESA involves the furtherance of some human interest, permitting such a balancing test would effectively reduce the ESA to a simple acknowledgement that endangered species are merely one interest to be considered amongst countless others, thus unequivocally repudiating Congress's explicit statement that endangered species are not merely an interest, but rather in "the best interests" of mankind. There would therefore be no guarantee whatsoever that the ESA would actually be

enforced in any given instance of violation. Such a reading would be inconsistent with Congress's intention in passing the ESA and must be avoided.

In sum, the District Court acted properly in declining to balance the equities before issuing an injunction, because declining to do so was consistent with decades of federal courts' reliance on the *Hill* presumption that Congress has already struck the balance by passing the ESA. Further, the few exceptions in which courts have diverged from *Hill* by choosing to balance the equities are not present in this case. Finally, ignoring precedent by balancing the equities in this case would undermine the ESA.

CONCLUSION

Greenlawn does not have the right to continue withdrawing water without any drought conservation measures because ornamental watering is not a reasonable, natural use of water. NUO has rights under the public trust doctrine that must be considered. Summary judgment for Third Claim should be reversed so that NUO can assert these valid claims on behalf of the fishermen who depend on the vitality of the Green River for their livelihoods.

ACOE's operation of the Howard Runnet Dam Works is a discretionary action subject to the § 7 consultation requirement under the ESA. Compliance with the ESA is mandatory for all agency actions, save for specific situations where an agency has absolutely no discretion. Under the prevailing definitions of discretionary agency action, ACOE's water release increase during Zone 2 drought conditions was a discretionary violation of the WCM. The riparian rights provision in the WCM is too broad to exempt ACOE from the consultation requirement. Alternatively, ACOE's operation of the Dam Works pursuant to the WCM is a continuing agency action subject to the ESA consultation requirement.

In line with Congress' broad legislative intent with the ESA, Greenlawn's water withdrawals that led to the diminished downstream flow of the Green River plainly constitute a take within the statutory definition in the ESA. Summary judgment for the Second Claim of Relief should be reversed.

Finally, the District Court was right to refuse to balance the equities because the *Hill* exception applies. *Tennessee Valley Authority v. Hill*, 437 U.S. 153. To ignore Congress' intent with the ESA by balancing the equities would be to fundamentally undermine the ESA by doing irreparable violence to its animating purpose.

For the foregoing reasons, this Court should reverse summary judgment on the First Claim of Relief, affirm summary judgment on the Second Claim of Relief, and reverse summary judgment on the Third Claim of Relief.