
IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 19-000987

NEW UNION
OYSTERCATCHERS, INC.,

Appellant,

- v. -

UNITED STATES ARMY
CORPS OF ENGINEERS,

Appellee,

and

CITY OF GREENLAWN,
NEW UNION

Appellant.

On Appeal from on order of the United States
District Court for New Union

BRIEF OF THE ORGANIZATION OF THE ARMY CORPS OF ENGINEERS,
Appellee

Oral Argument Requested

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STATEMENT OF JURISDICTION

This case involves an appeal from the District Court of New Union. (R. at 1.) Jurisdiction was proper in the District Court because this is a claim arising under §7(a) of the Endangered Species Act, 16 U.S.C. § 1536(a). The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this case because it is an appeal from a final decision of a district court of the United States. 28 U.S.C. § 1291 (2018). The notice of appeal was filed in a timely manner. Fed. R. App. 4(a).

STATEMENT OF THE ISSUES

- I. Whether Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without taking water conservation measures?
- II. Whether ACOE's operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536?
- III. Whether Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitutes a "take" of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538?
- IV. Whether the District Court must balance the equities before enjoining a beneficial municipal activity, when the activity will cause the extirpation of an entire population of an endangered species?

STATEMENT OF THE CASE

I. Facts

The City of Greenlawn (Greenlawn) lies on both historical banks of the Green River Bypass Reach (Bypass Reach) and owns the riverfront on both sides of the Bypass Reach within city limits, as well as the underlying riverbed. Greenlawn has maintained municipal water intakes in the Bypass Reach since the City was founded in 1893. (R. at 5.) The United States Army Corps of Engineers (ACOE) built the Howard Runnet Dam Works in 1947. (R. at 5.) Because of the housing construction boom during the 1960s, in order to satisfy the domestic and industrial water demand, Greenlawn enlarged its municipal water system in 1968. (R. at 5.) The Howard Runnet Dam was originally authorized for the purposes of flood control, hydroelectric power, and recreation by Congress in River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. (R. at 6.) The Fish and Wildlife Coordination Act of 1958 further authorizes the Howard Runnet Dam for the purposes of fish and wildlife conservation. (R. at 6.) Since the design of the dam would cut off the natural flow of the Green River Bypass Reach and the Greenlawn water supply, the ACOE and Greenlawn entered into an agreement to allow Greenlawn to continue water withdrawals “in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union.” (R. at 6.)

ACOE operation of Howard Runnet Dam Works is governed by a Water Control Manual (WCM). (R. at 6.) To maintain adequate lake levels for recreational use during the summer, the WCM regulates the releases of water from the dams for different target lake elevations at different times of the year based on historical flows and water demands. (R. at 6.) When lake levels drop below the seasonal target levels, the WCM provides for downstream releases to be

curtailed in accordance with the lake level zones defined in accordance with the severity of the drought. (R. at 6.) In addition to these specific operating provisions, the WCM contains a general provision which states that “[a]t all times the [dam] shall be operated in a manner that complies with any supply agreements entered into by ACOE and with the riparian right of property owner ...” (R. at 7.) When drought conditions became more frequent in the 21st century, “Zone 1 (Drought Watch)” Levels were reached again during the Fall 2016. (R. at 8.) In the Spring of 2017, the lake levels reached “Zone 2 (Drought Warning)” Levels. (R. at 8.) Each time, ACOE instituted flow restrictions in the Bypass Reach as provided by the WCM. (R. at 8-9.) The City protested during the Spring of 2017 and argued that the WCM was outdated. (R. at 8.) The ACOE District Commander requested Greenlawn to institute further drought restrictions on its water consumers. (R. at 8.) However, when Greenlawn responded with a letter asserting its common law right as a riparian landowner to make reasonable use of the historic flows, the District Commander relented and ordered ACOE to continue complying with the WCM. (R. at 8.)

The curtailment of hydroelectric power releases, combined with Greenlawn water withdrawal, had severely reduced the downstream Green River flows. (R. at 9.) Oval pigtoe mussels, a federally listed endangered species with beds in the downstream of the confluence of the Bypass Reach, require gravel or silty sand riverbeds, with slow to moderate currents, as habitat. (R. at 9.) These mussels also require a healthy population of host fish species in order to spawn. (R. at 9.) However, the stagnant water caused increased siltation, smothering mussel populations and eliminating their habitat. (R. at 9.) The extremely low water levels prevented the migration of mussels’ host fish, preventing effective spawning. (R. at 9.) These conditions

resulted in the death of approximately twenty-five percent of the Green River oval pigtoe population. (R. at 9.) If allowed to persist, these conditions would entirely eliminate the Green River population of the oval pigtoe mussel. (R. at 9.)

The recent decades of reduced flows have also impacted the oyster population. Oyster harvests in 2016 were only fifty percent of the level of 2000. (R. at 10.) The members of Plaintiff New Union Oystercatchers, Inc. (NUO) suffered reduced catches and declining incomes because of the smaller oyster harvests. (R. at 10.) Moreover, as none of NUO's members are waterfront property owners on Green Bay or the Green River, they are forced to pay electric rate fuel surcharges during times that the Howard Runnet hydroelectric plant cannot operate as a peaking facility. (R. at 10.)

II. Procedural History

NUO sued the ACOE and Greenlawn under the Endangered Species Act, 16 U.S.C. § 1540(g), alleging violations based on the flow reductions resulting from ACOE's curtailment of hydroelectric peaking and Greenlawn's water withdrawals, including common law riparian rights claims against Greenlawn. (R. at 10.) ACOE filed a cross claim against Greenlawn joining NUO's claim that Greenlawn's water withdrawals constitute illegal "take" of endangered oval pigtoe mussels. (R. at 10.) Greenlawn answered the complaint and cross-complaint, and filed a counterclaim against ACOE seeking a declaration of its right as a riparian landowner to continued flows in the Bypass Reach sufficient to meet its municipal water needs. (R. at 11.)

The District Court of New Union dismissed NUO's ESA claims against ACOE and entered summary judgement declaring Greenlawn's riparian right to continued flows in the

Bypass Reach. (R. at 11.) The District Court also granted NUO's and ACOE's motion for summary judgement declaring Greenlawn to be in violation of the Endangered Species Act. (R. at 11.)

SUMMARY OF ARGUMENT

The United States District Court's decision dismissing the New Union Oystercatchers' (NUO) claim against Greenlawn on Riparian Grounds should be upheld. NUO lacks standing to claim that Greenlawn's withdrawals harmed NUO's putative riparian rights because neither the NUO corporation nor its constituents possess land that borders the Green river. In contrast, Greenlawn is a riparian owner whose water withdrawals are for "natural uses" and therefore are within the scope of usage rights favored by the common law for riparian landowners. Finally, Greenlawn's water withdrawals are "reasonable" under common law.

ACOE's operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is not a discretionary action subject to the consultation requirement within §7 of the ESA, 16 U.S.C. §1536. Section 7 of the ESA imposes an obligation on federal agencies whose action will negatively impact endangered species that such agencies must consult with the appropriate wildlife agency, in this case, the Fish and Wildlife Service (FWS). However, since the ACOE's operation of the Howard Runnet Dam Works is non-discretionary, it is not subject to Section 7's requirements. Each action taken by the ACOE to operate the dam is regulated by either the Water Control Manual or the common law (Greenlawn's riparian landowner right) that the ACOE must adhere to, so the actions of ACOE are never discretionary.

Greenlawn committed a prohibited take of the endangered oval pigtoe mussel habitat by increasing their water flow usage during a drought period. The mussel beds were modified indirectly but in a foreseeable manner due to the use of an unsustainable amount of water during a Zone 2 drought warning. Greenlawn's increased water withdrawals were the proximate cause of the modification of the mussel habitat that caused the deaths of twenty-five percent of the pigtoe population. While the water levels have returned to normal, affirmation of the District Court's injunction against Greenlawn is necessary due to the imminent threat of future droughts.

Finally, the District Court must engage in balancing the equities of enjoining Greenlawn from engaging in continued water withdrawals from the Bypass Reach when doing so will likely result in the extirpation of the oval pigtoe mussel. The District Court erred in interpreting the text of U.S.C. §1540(g), and the court is not explicitly compelled to issue an injunction. The District Court also erred by interpreting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) to mean that it is not permitted to balance the equities of allowing Greenlawn to draw water against the probability that allowing the city to do so would result in the death of the local pigtoe population, and instead should have applied the dissent's approach. ACOE cannot be held responsible for the "take" of the mussels because the withdrawal of water from the river for the purpose of power generation did significantly modify the habitat of the mussels; Greenlawn's water withdrawal was the proximate cause. Supreme Court precedent regarding injunctions relating to property rights controls should be considered before affirming the injunction from the lower court. ACOE's operation of the Dam provides a public service by supplying hydroelectric power, and

Greenlawn's withdrawals were so significant that they accounted for the majority of the reduction of water flow, so any injunction should fall solely on Greenlawn.

ARGUMENT

I. PROPERTY LAW PRINCIPLES PROTECT GREENLAWN’S RIGHT OF CONTINUED WATER WITHDRAWAL FOR MUNICIPAL PURPOSE AS A RIPARIAN LANDOWNER DURING A DROUGHT.

The United States District Court’s decision dismissing the New Union Oystercatcher’s claim against Greenlawn on Riparian grounds should be upheld for three main reasons. (R. at 11-13, 18.) First, NUO lacks standing to bring a claim that Greenlawn’s withdrawals harmed NUO’s putative riparian rights. Second, Greenlawn is a riparian owner whose water withdrawals are for “natural uses” and are therefore within the scope of usage rights favored by the common law for riparian landowners. Third, Greenlawn’s water withdrawals are “reasonable” under the common law.

Greenlawn, the Army Corps of Engineers, and NUO agree that Greenlawn’s withdrawals from the Bypass Reach are a matter of riparian law. (R. at 2, 10.) Neither any New Union legislation nor any permitting authority has been adopted to address competing riparian right of use claims. (R. at 12.) Furthermore, no New Union precedents specifically resolve the conflicting claims regarding limits on riparian right of use and the maintenance of the flow of the Green River. (R. at 12.) Finally, the Supreme Court of the United States has not ruled on the issue. Therefore, this case is a matter of first impression before this Court. Therefore, this Court would be justified in adopting the Appellee’s interpretation of the common law that Greenlawn is entitled to continued, unencumbered withdrawal of water from the Bypass Reach in accordance with its right of use as a riparian landowner.

A. NUO lacks standing to bring a claim against Greenlawn for violating its and its members putative riparian rights.

The New Union Oystercatchers, Inc. (NUO) lacks standing to bring a claim against Greenlawn asserting that the city’s water withdrawal from the Bypass Reach violated NUO’s right of use by taking 20 MGD during peak demand, significantly reducing the downstream flow of the Green River. (R. at 11-13). Riparian rights are property rights that extend to the owner of waterfront—specifically river and stream front—property, recognizing the “natural advantage” of use of the water that abuts the land. 1 Joseph W. Dellapenna, *Waters and Water Rights*, §7.02 (a.01) (2019). While all riparian owners have an equal right to the use of the water that borders their land and owners share a duty not to “injure unreasonably” another riparian user upstream or downstream of their property, in order to have a riparian right, a landowner must own riparian land. *Id.*

The Courts have adopted three tests to determine if land is riparian:

[(1)] [T]he land must be contiguous to the water body;

[(2)] [T]he land must meet the applicable test regarding title to the land;

[(3)] [I]n some states, the land must be within the relevant watershed.

Id.

However, neither the NUO corporation nor its constituents possess land that borders the Green River. (R. at 13.) The common law of riparian rights is used to settle conflicts of apportionment between riparian owners, not between a riparian owner and a non-owner or non-owners. Barton Thompson, Jr. et al., *Legal Control of Water Resources* 34 (5th Ed. 2018). Therefore, NUO and its constituents lack riparian property interests and lack standing to bring a

claim against Greenlawn for unreasonable interference with a right of use of water from the Green River. (R. at 13.)

Furthermore, the riparian rights doctrine does not extend to non-riparian owners who bring an action against riparian owners on the basis of ecological harms. Thompson, at 34. The doctrine only extends to riparian owners who have sustained a harm to their personal property interests. Dellapenna, *supra*, §7.02 (a.01). Therefore, NUO and its constituent members lack standing to bring a riparian rights claim against Greenlawn on the theory that Greenlawn's continued water withdrawals during a drought present a danger to the downstream habitats of the oval pigtoe mussel and the Green Bay oyster fishery, thereby unreasonably interfering with their right of use.

B. Greenlawn is a riparian owner whose water withdrawals are for "natural uses" and are therefore within the scope of usage rights favored by the common law for riparian landowners.

The State of New Union applies the common law riparian rights doctrine when determining water rights disputes and recognizes the right of landowners with lands that abut its streams and rivers to withdraw water for their own reasonable uses and construct any necessary barriers necessary to make "reasonable use" of the water flowing past their land. *See generally* Thompson; *Also See Tyler v. Wilkinson*, 24 Fed. Cas. 472, 474 (No. 14,312) (D. R.I. 1827). New Union also recognizes the riparian rights of municipalities such as Greenlawn, and allows cities such as Greenlawn to withdraw water from the streams and rivers they abut to provide for their non-riparian citizens' and municipal needs. *Tubbs v. Potts*, 45 N.U. 999 (1909) (citing *Canton v. Shock*, 63 N.E. 600 (Ohio 1902); *City of Philadelphia v. Collins*, 68 Pa. 106 (1871); *Barre Water Co. v. Carnes*, 65 Vt. 626, 627 (1893)).

Under the common law of riparian rights, though all riparians have an equal right to the use of the body of water bordering their lands, priority is given to those uses described by the courts as “domestic” or “natural” over those that are “artificial uses” and “other uses. . .such as for fishing, recreation, and irrigation.” Dellapenna, *supra*, §7.02 (b)(1), (d)(2), citing *Harris v. Brooks*, 283 S.W.2d 129 (Ark. 1955). Domestic uses have been viewed by the courts as necessarily (“*per se*”) reasonable in any conflict with a less pressing (“artificial”) want, and include such uses as “drinking, cooking, washing. . . watering livestock for household use and keeping a kitchen garden.” Dellapenna, *supra*, §7.02 (b)(1) (2019), citing *Evans v. Merriweather*, 4 Ill. 491 (1842).

Though the traditional common law rules have barred irrigation, modern law considers the withdrawal of water for watering lawns and ornamental plants a “natural use”. *Harris*, 238 S.W. 2d 129 (Ark. 1955); Robert E. Beck, *Waters and Water Rights* § 7.02(d)(2) (1991 & Supp. 1999). Furthermore, New Union has adopted the minority rule that recognizes the Greenlawn’s rights as a riparian owner to provide for its non-riparian citizens, superseding the traditional common law rule that prevents a municipality from claiming a “domestic use” preference when it withdraws water from the river or stream for domestic uses by its citizens. *Tubbs*, 45 N.U. 999 (1909).

Therefore, Greenlawn’s withdrawal of water from the Bypass Reach in order to satisfy the water needs of its citizens, including for drinking, bathing, cooking, cleaning, and watering their lawns is not only recognized by New Union, it is protected by the common law’s preference for withdrawals and uses of water by riparian owners for “domestic” or “natural” use.

Dellapenna, *supra*, §7.02(a.01) (2019). By contrast, the riparian rights claimed by NUO would,

even if recognized, necessarily be considered secondary in preference when weighed against Greenlawn's rights, since riparian rights for economic or corporate use and fishing are considered "artificial uses" or "less pressing want[s]". *Id.* at (b)(1), (d)(2). Similarly, the ACOE's riparian right to water retention for power generation would yield to Greenlawn's riparian right because power generation is also an "artificial use". *Id.* at (b)(1).

C. Greenlawn's water withdrawals are "reasonable" under the common law of property.

The American common law of riparian rights applies a "reasonable use" standard instead of the English "natural flow theory". *Id.* at (c), (d); *See also, Hendrick v. Cook*, 4 Ga. 241 (1848) *and see generally* Thompson. "Natural flow theory" is solely concerned with the prevention of any water use that would alter the rate, quantity, or quality of the flow of the water, to such a degree that any significant water withdrawal would result in the alteration of the body's flow. Thus, for an upstream owner to make use of his right, he would be required to purchase the permission of every downstream owner to draw from the water regardless of whether actual damage to the downstream owners was inflicted. *Id.* at (c).

By contrast, reasonable use allows riparian landowners to withdraw and use water from the waterbody regardless of its effect on the level of the body of water, except for when such use would cause a "substantial harm" or "unreasonable injury" to another riparian's right of use. *Id.* at (d) (1.01).

In determining whether a use is "reasonable", courts weigh the relative interests of one riparian owner's right against that of another, applying a multi-factor test. *Id.* at (d)(2). Namely, courts examine:

- (a) The purpose of the use,
- (b) the suitability of the use to the watercourse or lake,
- (c) the economic value of the use,
- (d) the social value of the use,
- (e) the extent and amount of the harm it causes,
- (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
- (g) the practicality of adjusting the quantity of water used by each proprietor,
- (h) the protection of existing values of water uses, land, investments, and enterprises, and
- (i) the justice of requiring the user causing harm to bear the loss.

Restatement (Second) of Torts §850A (a)-(i) (1979).

Even assuming that the NOU is a riparian proprietor, neither its presumptive rights, nor the riparian right of the Army Corps of Engineers to retain water for generation of hydro-electric power supersedes the rights of Greenlawn to maintain its pre-drought withdrawal levels under the factor test.

Applying the facts of the record to each factor, Greenlawn's primary purpose in withdrawing water from the Bypass Reach is to provide water for its citizens' use; the withdrawals are 'suitable' to the Bypass Reach due to the nature of the volume of water normally provided by the Bypass Reach and the artificial use by competing riparian proprietors such as the ACOE; Greenlawn's water withdrawals are of high social and economic value because they sustain the local population that in turn forms the economy of the area; and Greenlawn's use of the Bypass Reach's waters predates the ACOE's Green River dam, requiring the protection of the "existing value" of its "water uses, land, investments and enterprises" by the court.

Restatement (Second) of Torts §850A(h).

Though other factors may weigh against the continuance of Greenlawn's unencumbered withdrawals such as the extent and amount of the harm such a use may cause—with primary

focus on the threat that the reduction of water downstream poses to the endangered mussel population—as well as the apparent ease of avoiding such a harm by requiring Greenlawn to reduce its use of water, thereby requiring it to bear the risk of loss, courts may only address actual sustained harms in another’s riparian right. It is also unclear whether such concerns could outweigh the benefits of Greenlawn’s withdrawals in light of the factors that weigh in the city’s favor, and the application of the common law.

In fact, *Tyler v Wilkinson*, the case in which then Circuit Justice Story promulgated the reasonable use theory speaks directly to the issue at hand. In *Tyler*, a group of downstream plaintiffs sued to enjoin upstream trench owners to prevent their continued withdrawal of a high volume of water, claiming their water rights were injured. *Tyler v. Wilkinson*, 24 Fed. Cas. 472, 473-74 (No. 14,312) (D. R.I. 1827). However, Justice Story held that the “trench owners have an absolute right to the quantity of water which has usually flowed therein, without any adverse right on the plaintiffs to interrupt that flow in dry seasons, when there is a deficiency of water . . . they are limited to the accustomed quantity, and may not exceed it.” *Id.* at 476. The justice wrote that “how much water has been actually used, is not always decisive of the nature and extent of the right [of use].” *Id.* at 475. Nor are occasional interruptions of the use, under peculiar circumstances, conclusive of a superior right to control and limit the entire use . . .” and that the question of reasonable use depended on the accustomed flow during the twenty years before the suit. *Id.* at 474-75. Furthermore, the plaintiff riparian owners had no “pre-eminent right” over the defendants as it pertained to the use of water. *Id.* at 475-76.

Accordingly, Greenlawn’s withdrawal should be presumed reasonable and Greenlawn should be allowed to take up to 20 MGD worth of water during the month of July and August

because the town has historically withdrawn water at this rate since 1968, well past the twenty-year benchmark period. This level of use has continued uninterrupted, barring a brief restriction in 1998 due to a shortage of water, the type of “peculiar circumstance” that Justice Story believes should not be conclusive of a limitation of the right of use. *Id.* at 475. Additionally, as the Justice makes clear, it cannot be interpreted that either NOU or the ACOE has a “preeminent right” that could limit Greenlawn’s usage. *Id.* at 475-76.

II. ACOE’S OPERATION OF HOWARD RUNNET DAM WORKS DURING DROUGHT CONDITIONS TO PROVIDE FLOW TO GREENLAWN IS NOT A DISCRETIONARY ACTION SUBJECT TO THE CONSULTATION REQUIREMENT WITHIN § 7 OF THE ESA, 16 U.S.C. § 1536.

The ACOE respectfully asks this honorable Court to uphold the decision of the District Court that ACOE’s operation of Howard Runnet Dam Works is not a discretionary action subject to the consultation requirement of the Section 7 of the Endangered Species Act (ESA). Section 7 of the ESA imposes an obligation on federal agencies whose action will “negatively impact the continued existence of listed species” that such agencies must consult with the appropriate wildlife agency, in this case, the Fish and Wildlife Service (FWS). 16 U.S.C. § 1539. The oval pigtoe mussel is one of the endangered species on the list of the ESA, and it may be affected by the flows of the Bypass Reach which is controlled by the Howard Runnet Dam Works operated by ACOE. Therefore, the plaintiff alleged that ACOE violated the consultation requirement under Section 7 of the ESA. (R. at 9.) However, the actions of the ACOE were not subject to the consultation requirement under Section 7 of the ESA, because the construction and operation of the Howard Runnet Dam Works, which has always been an adoption of the WCM and limited by

Greenlawn's riparian right, is never discretionary. In *National Association of Home Builders*, the Supreme Court held that a non-discretionary action of a federal agency will not be subject to the consultation requirement of the ESA. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668 (2007). The "action" of ACOE is not simply increasing releases, but adopting the WCM's mandatory provision that requires the ACOE to respect Greenlawn's common law riparian rights to water flow in the Bypass Reach for municipal use. (R. at 7-9.) Thus, no consultation is required under the ESA regarding ACOE's action, and the District Court decision shall be upheld.

A. ACOE's operation of the Howard Runnet Water Dam is not subject to the consultation requirement under the ESA because the operation is non-discretionary.

An agency's action will not be subject to the consultation requirement under Section 7 of the ESA if the action is non-discretionary. In *National Associate of Home Builders*, respondent environmental organization alleged that the EPA's approval of a transfer to a state permitting authority under the National Pollution Discharge Elimination System is required to comply with the ESA. *See* 16 U.S.C. § 1531; *Nat'l Ass'n of Home Builders*, 551 U.S. at 656. However, the EPA's approval is compulsory under the Clean Water Act (CWA) because the state satisfied all of the statutory criteria for transfer of permitting authority. *See* 33 U.S.C. § 1251. The CWA established the National Pollution Discharge Elimination System to prevent harmful discharge into the nation's waters. *Nat'l Ass'n of Home Builders*, 551 U.S. 644, 655. The EPA typically

administers this system, but a state may apply for a transfer of permitting authority to state officials. *Id.* at 656. Under the CWA, such transfer is mandatory if nine specified criteria are met. *Id.* at 662. When Arizona officials sought EPA authorization to administer the State's NPDES program, the EPA initiated consultation with the U.S. Fish and Wildlife Service (FWS). *Id.* at 654. The FWS found that this approval would result in the increased issuance of discharge permits which in turn might jeopardize endangered species. *Id.* However, the EPA found that the CWA's mandatory nature as to transferring authority to states stripped the FWS's authority to disapprove a transfer based on ESA considerations, and the EPA granted the transfer. *Id.* at 655.

The U.S. Supreme Court held that the no-jeopardy duty under the ESA only applied to discretionary actions, and thus, it did not apply to the permitting transfer approval which was mandatory under the CWA once the specified triggering criteria were met. *Id.* at 663. Justice Alito pointed out that if the nine specified criteria were satisfied, the EPA did not have the discretion to deny a transfer application, and the ESA's similarly imperative language would literally add a 10th criterion, repealing that mandatory and exclusive lists of criteria set forth in the CWA. *Id.* at 667. Although the duties under the CWA and the ESA were both couched in mandatory terms, 50 C.F.R. § 402.03 appropriately construed the ESA to require the no-jeopardy assessment only if the agency action was discretionary, and there was no basis for an implicit repeal of the permitting transfer approval requirement by imposing the additional requirement of

a no-jeopardy duty to obtain such approval. *Id.* at 666. Therefore, the EPA’s mandatory approval of the transfer is not a discretionary action subject to the consultation requirement of the ESA.

ACOE’s administration of the Howard Runnet Dam was first authorized by Congress in the River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945) for the purposes of flood control, hydroelectric power, and recreation; and then, the Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958) added fish and wildlife conservation purposes to ACOE’s administration. (R at 6.) Furthermore, the ACOE entered into an agreement with Greenlawn to maintain flows in the Bypass Reach sufficient to allow the City of Greenlawn to continue withdrawals “in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union.” (R at 6.) Finally, ACOE’s operation of the Green River Diversion Dam and the Howard Runnet Dam is governed by a Water Control Manual (WCM). (R. at 6.) Thus, both the construction and the operation by ACOE are authorized and controlled by the laws rather than its own discretion, which should not be subject to the consultation requirement of the ESA.

Each time ACOE adjusts the water release of the Works, the operation is mandated by the WCM. (R. at 7-8.) The WCM establishes bright-line rules on the parameters of the water flow when each type of drought situation is approached. (R. at 6.) As drought conditions became more frequent in the 21st century and persisted into the Spring of 2017, the lake levels reached Zone 2

(Drought Warning) conditions. (R. at 8.) ACOE immediately instituted flow restrictions in the Bypass Reach complying with the WCM. (R. at 8.) ACOE has no interest in adjusting the water flow, and the ACOE could only regulate water flows in accordance with the WCM. Similar to the EPA in *National Associate of Home Builders*, every step of ACOE's operation is mandated by the WCM. (R. at 6-8.) Therefore, the operation of the Howard Runnet Dam Works by ACOE is not discretionary, and it is not subject to the consultation requirement of the ESA.

Additionally, ACOE has entered into an agreement with Greenlawn to maintain flows in the Bypass Reach sufficient to allow the city to continue water withdrawals “in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union.” (R. at 6.) When the District Commander requested Greenlawn institute drought restrictions on its citizens, Greenlawn contended that it had a common law right as riparian landowner to make reasonable use of the historic flows of the Green River Bypass Reach. (R. at 6.) Additionally, Greenlawn has no obligation to impose drought restrictions because watering lawns and ornamental plantings are a reasonable riparian water use for domestic purposes. (R. at 6.) As a result, the District Commander relented and increased the water releases from 7 CFS to 30 CFS in compliance with Greenlawn's riparian right. (R. at 6.) At this time, the increased-volume water releases were governed by the agreement between ACOE and Greenlawn, which ensures Greenlawn's common law right of use as a riparian landowner. As the Court has explicitly pointed out in *National Association of Home Builders*, it is not Congress's intent to burden the agency when the “action” is mandatory under the laws. *Nat'l Ass'n of Home Builders*, 551 U.S. at 667. Therefore, ACOE lacked any discretion to increase or

decrease the water releases to the Bypass Reach, and its operation is not subject to the consultation requirement under the ESA.

III. GREENLAWN COMMITTED A PROHIBITED TAKE OF THE ENDANGERED OVAL PIGTOE MUSSEL HABITAT BY LOWERING WATER LEVELS AS IT WAS FORESEEABLE AND THE PROXIMATE CAUSE OF THE MODIFICATION OF THE MUSSELS' HABITAT.

Greenlawn has committed a prohibited take of the endangered pigtoe mussel habitat by modifying the mussels' environment to the point where it caused actual harm to the mussel population. A plain reading of the statute is clear. "[W]ith 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 take any such species within the United States or the territorial sea of the United States." 16 U.S.C.A. § 1538 (West). The ESA defines the term "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §1531(19). As noted in the appellate court order, the U.S. Fish and Wildlife Service (FWS) regulations specifically define "harm" as include habitat modification or destruction:

Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3; see (R. at 15.)

Greenlawn has modified the oval pigtoe mussels' habitat by overconsuming water during a Zone 2 drought, against the recommendation of the ACOE's District Commander.

A. Indirect takings still constitute takings under the Act as long as they are foreseeable and not merely accidental, as the Supreme Court has previously discussed.

The Supreme Court in *Babbitt* has already addressed the issue of whether draining a body of water would be considered a taking under the Act. The issue in *Babbitt* was whether “the word ‘take’ in §9 should include habitat regulation, as the Secretary’s “harm” regulation provides.”

Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687, 693, (1995).

[Respondents] ask us to invalidate the Secretary’s understanding of “harm” in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat. Given Congress’ clear expression of the ESA’s broad purpose to protect endangered and threatened wildlife, the secretary’s definition of “harm” is reasonable.

Babbitt, 515 U.S. at 699-700.

The Supreme Court’s example of an activity that an actor would reasonably know would affect a listed species’ habitat was draining a body of water, which is directly analogous to the case at hand. The Court also recognized that Congress “had in mind foreseeable rather than merely accidental effects on listed species,” due to the existence of permits for incidental takings. *Id.* at 700. It is foreseeable that using customarily high-volumes of water during drought periods, after being asked to institute conservation measures, could result in a reduction in the Green River’s water levels, thus destroying the habitats of its aquatic animals.

B. Greenlawn’s water withdrawals during a drought period constitute a modification of the oval pigtoe mussel habitat because the effect of withdrawing water from the Green River Bypass Reach is the same as directly taking water from the Green River itself.

Greenlawn did not drain water directly from the Green River, where several beds of oval pigtoe mussels live. (R. at 9.) However, Greenlawn went from using a sustainable 7 CFS flow restriction during drought periods to 30 CFS for frivolous purposes, and in doing so, the Green River’s mussel population was left exposed and in danger. (R. at 9.) Greenlawn attempts to

distance itself from the crime of harming an endangered species by saying its activities were outside of the mussels' habitat, and there is an insufficient causal connection between its water withdrawals, and the drying of the habitat. (R. at 16.) However, it is evident that in drought conditions, draining an excessive amount of water from interconnected waterways would indirectly affect other areas along the River.

Courts have held that activities that indirectly result in harm to endangered species can constitute a prohibited take. In *Palila v. Hawaii Department of Land & Natural Resources*, a decision which the 9th Circuit affirmed, the United States District Court for the District of Hawaii held that maintaining a sheep population within an endangered birds' habitat was harmful to the birds because the sheep degraded the ecosystem and negatively impacted the birds' population. *Palila v. Haw. Dep't of Land & Nat. Res.*, 471 F. Supp. 985 (D. Haw. 1979); see also *Palila v. Haw. Dep't of Land & Nat. Res.*, 852 F.2d 1106 (9th Cir. 1988). This case demonstrates the extent to which a "take" can occur indirectly. The sheep grazed on land that was within the habitat of the endangered Palila bird species. *Id.* at 989-90. Though the state was not actively harming the birds' habitat, it was passively allowing sheep to graze in the area, which prevented the regeneration of the forest that the Palila resided in. *Id.* at 990.

In the current case, the indirect taking has a closer causal connection than the degradation of endangered birds' habitat due to overgrazing. Greenlawn used too much water, and the oval pigtoe mussels were left exposed and vulnerable. One factor that the court in *Palila* considered was the feasibility of removing the sheep from the Palila's critical habitat, and concluded that it would be of relatively little expense. *Palila*, 471 F.Supp at 991. Likewise, Greenlawn merely has

to reduce its water use for ornamental planting until the drought has passed to prevent further habitat loss and additional pigtoe mussel deaths.

C. Greenlawn's increased usage during a Zone 2 Drought Warning is the proximate cause of the oval pigtoe mussels' habitat being modified, resulting in the death of a large portion of the endangered species.

Greenlawn's assertion that its water withdrawals only affect the mussel populations in combination with the upstream agricultural withdrawals, precipitation conditions, and the ACOE's operation of the Howard Runnet Dam Works is untrue. Greenlawn argues that their water withdrawals are not the proximate cause of the modification to the oval pigtoe mussel habitat, but Greenlawn's demand for increased water releases is the only major change in waterway conditions. In fact, Greenlawn's water consumption is the proximate cause of the habitat's destruction.

Proximate cause requires the causal factors and the result to be reasonably foreseeable. *Babbitt*, 515 U.S. at 697. The agricultural withdrawals that Greenlawn points out have been in place since the 1980's, and the ACOE only began to apply Zone 1 restrictions starting in 1998. (R. at 8.) Therefore, it is clear that the recent Zone 2 restrictions were not proximately caused by the agricultural withdrawals. Likewise, the Howard Runnet Dam was completed in 1947, so the project has been in operation for 70 years. (R. at 5.) Neither the Dam's operation nor the agricultural withdrawals have recently changed; the only substantial changes in usage of the watercourse are Greenlawn's increased water withdrawals during drought conditions.

Greenlawn asserts that it has not changed its rate of water withdrawals during the drought warning, which is exactly the problem. (R. at 17.) Greenlawn protested the potential limitation of its water withdrawals on April 12, 2017. (R. at 8.) The ACOE District Commander requested

that Greenlawn place drought restrictions on its water consumers and asked them to stop watering lawns and washing cars during the drought. (R. at 8.) Greenlawn refused, and the District Commander was pressured to increase the water releases for Greenlawn. (R. at 8.) Greenlawn was asked to conserve water during a natural drought period, and decided that its lawns and ornamental gardens were more important than the health of local river ecosystems. (R. at 8.) Therefore, Greenlawn's continued usage of high-volume water releases during drought conditions is the proximate cause of the mussel beds exposure, because it was foreseeable that the river could dry up if it used the same amount of water as it would during regular non-drought conditions.

The case at hand is different from *Aransas Project v. Shaw*, in which a water regulatory agency's actions were not the proximate cause of the death of endangered whooping cranes. The Fifth Circuit Court in *Aransas Project* noted that while several cranes had starved to death, the crane population actually increased before and after the time period in question. *Aransas Project v. Shaw*, 775 F.3d 641, 660 (5th Cir. 2014). The court found that the state could not have reasonably foreseen any impact on the whooping cranes, because only one sentence in a recovery plan for the birds noted that freshwater flows would be reduced. *Id.* at 661. There was no mention of anything that would specifically impact the cranes, and there was a long chain of causation (the salinity of the water in the bay increased, which increased the salinity of the estuary and marsh water, which in turn affected the growth of blue crabs and wolfberry plants, which are the principal food sources of whooping cranes once they have flown to their winter habitat). *Id.* at 660. The court concluded that the State could not have reasonably foreseen that the salinity of the bay could have affected the whooping crane population. *Id.* at 664.

The instant case is substantially different. Greenlawn took a large amount of water from an interconnected waterway during drought conditions. There is no chain of causation, there is just one party (Greenlawn), taking one action (using too much water), which caused one result (the death of pigtoe mussels from a lack of water in their habitat).

D. This issue is timely despite water levels returning to normal because of the imminent threat future droughts will have on the mussel population.

Despite the fact that water levels have returned to normal, this issue is not moot because drought conditions are likely to reoccur, which would once again leave the oval pigtoe mussels vulnerable to exposure. Since the water levels have risen in Howard Runnet Lake, the threat to the mussel population is not immediate. (R. at 11.) However, “all parties agree that based on recent trends and scientific assessments of precipitation patterns... Drought Warnings are likely to occur again in the near future.” (R. at 11.) “In [the ninth] circuit, we have repeatedly held that an imminent threat of future harm is sufficient for the issuance of an injunction under the ESA.” *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064 (9th Cir. 1996), as amended on denial of reh'g (June 26, 1996). An injunction can be issued only if future injury is “certainly impending.” *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). In this case, all parties have agreed that drought is imminent, which means the mussel population will be injured again soon. Therefore, it is appropriate for this court to affirm the appellate court’s injunction.

It is "beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 175, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978). Mussels are vulnerable to human activities more so than other endangered species, because they are sessile organisms and can be disturbed by any disturbance, transfer or elimination of the substrate of rivers. Eric Biber, *The Application of the Endangered Species Act*

to the Protection of Freshwater Mussel: A Case Study, *Envtl. L.* 93, Winter 2002 at 100. There has been uncontradicted expert testimony that approximately 25% of the Green River oval pigtoe population was killed in the drought conditions of Spring 2017. (R. at 9.) The prospect of further annihilation of a registered endangered species warrants an affirmation of the lower court's injunction to prevent Greenlawn from killing even more animals.

IV. The District Court must engage in balancing the equities of enjoining Greenlawn from engaging in continued water withdrawals from the Bypass Reach when doing so will likely result in the extirpation of the local population of the pigtoed mussel.

The District Court's decision finding that it is not required to balance the equities when considering whether to issue an injunction encumbering Greenlawn's riparian right should be overturned for three main reasons. First, the court erred in its interpretation of the plain text of the Endangered Species Act, 16 U.S.C. § 1540(g). *Endangered Species Act*, 16 U.S.C.S. §1540(g) (LexisNexis 2019). Second, the court erred in its application of the holding of the Supreme Court in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) and the Ninth Circuit's discussion of §1540(g) in *Def. of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 1999). Third, Supreme Court precedent dealing with the issuance of injunctions as it relates to property rights controls and overarching policy concerns should be considered before issuing an injunction.

A. The Court Erred in Interpreting the Text of U.S.C. §1540(g)

The plain text of U.S.C. §1540(g) does not require the automatic issuance of an injunction upon a person who is “alleged to be in violation of any provision of this Act the Endangered Species Act] or regulation issued under the authority thereof”, it merely allows “any person” to seek an injunction by “commencing a civil suit on his own behalf”. *Endangered Species Act* § 1540(g). Though a plaintiff could be entitled to relief in the form of injunction if

the plaintiff pursues a suit under §1540(g)(1)(A) and demonstrates his case, §1540(g) does not explicitly compel the court to issue an injunction. Rather §1540(g) provides a person the right to bring a private suit and outlines three separate theories the person may pursue in order to obtain relief. Furthermore, §1540(g) is silent as to whether the court may undertake a weighing of the equities in deciding to issue an injunction and as to whether it may undertake a weighing of the equities in deciding the contents of the injunction. Moreover, as Justice Rehnquist wrote in his dissenting opinion in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), “a grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances.” *Tennessee Valley Auth.* at 212 (Rehnquist, J., dissenting). There is little proof that Congress intended to force the courts to take “such a drastic departure from the traditions of equity practice.” *Id.* Therefore, the district court erred in interpreting §1540(g) to forbid a weighing of the equities.

B. *The Court erred in its application of Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) and the Ninth Circuit’s Discussion of U.S.C. § 1540(g) in Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir. 1999) to the instant case.*

Furthermore, the district court erred in its application of the Supreme Court’s holding in *Tennessee Valley Authority. Tennessee Valley Auth. v. Hill*, 437 US 153 (1978). The District Court cites *Tennessee Valley Auth.* for the proposition that it is not permitted to balance the equities of allowing Greenlawn to continue to provide for its citizenry by continuing to draw water against the probability that allowing the city to continue to do so would likely result in the destruction of the pig-toe mussels’ habitat and the death of the local pig-toe population. (R. at 17-18.) Specifically, the district court quotes:

But neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make. . . fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as ‘incalculable.’

Tennessee Valley Auth., 437 U.S. 153, 187 (1978).

As noted above, the text of the act does not deem the value of endangered species “incalculable”. U.S.C.S. §1540(g) (LexisNexis 2019); *See Also Tennessee Valley Authority*, 437 U.S. 153, 187 (1978). Furthermore, though the intent of Congress in passing the Endangered Species Act was to create and enforce regulations to prevent the extinction of wildlife, as Justice Powell wrote in his dissent, the Court in *Tennessee Valley Auth.*, “adopted a sweeping construction,” finding “the Act covers. . . every river and harbor project. . .however essential to the Nation’s economic health and safety. . . [t]he ‘actions’ that an agency would be prohibited from ‘carrying out’ would include the continued operation of such projects or any change necessary to preserve their usefulness.” *Id.* at 203 (Powell, J., dissenting). Likewise, the district court, in adopting the Supreme Court’s view of the Endangered Species Act as forbidding a weighing of interests would justify any reduction necessary, including and up to the ending of all withdrawals by the Army Corps of Engineers to generate power. *Id.* at 203, 210.

However, assuming that an injunction is compelled by the mandate of the Endangered Species Act regardless of utilitarian calculation, the injunction is to be placed against the party that carries out an unlawful “take” of the threatened species. 16 U.S.C.S. §1538(a)(1)(B) (LexisNexis 2019). According to the statute as interpreted by the Ninth Circuit Court of Appeals, a “take” means “to harm. . . or kill” the endangered species. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924 (9th Cir. 2019), citing 16 U.S.C. §1532(19). “Harm” itself “include[s] significant habitat modification or degradation where it actually kills or injures wildlife by significantly

impairing essential behavioral patterns, including breeding, feeding or sheltering”. *Id.*, citing 50 C.F.R. §17.3. Applying this standard, the Court found that the construction of a local school in an area that abutted the endangered pygmy-owls’ habitat did not constitute a take, because the plaintiffs failed to demonstrate that the modification of the owls’ habitat in the surrounding area would interfere with the behaviors of the owl. Plaintiffs also failed to prove that any owls lived in the immediate area of the construction that would alter their habitat. *Id.* at 925-27.

Similarly, in the instant case, the ACOE cannot be held responsible for the “take” that resulted from the significant habitat alteration that affected the mussels’ ability to eat and reproduce. (R. at 9.) There are no mussels within sixty miles of the Howard Runnet Dam Works, let alone the immediate area of the ACOE’s dam, nor did the withdrawal of water from the river for the purpose of power generation significantly modify the habitat of the mussels. (R. at 6, 9.) Instead, the take of the mussels is due to the high volume of water withdrawal from Greenlawn which is the proximate cause for the threatening of the mussel beds. (R. at 8-9.) Therefore, in undertaking a weighing of the equities, Greenlawn must bear the burden of the loss in reducing its water consumption.

C. Supreme Court precedent dealing with the issuance of injunctions as it relates to property rights controls and overarching policy concerns should be considered before issuing an injunction.

That Greenlawn should bear the burden of the loss is also borne out by property jurisprudence. Greenlawn has a right as a riparian landowner to make withdrawals from the river. *Tubbs v. Potts*, 45 N.U. 999 (1909). As an upstream riparian owner, the Army Corps of

Engineers could not unreasonably interfere with Greenlawn's rights to use of the water, and could not deny the water it demanded. Dellapenna, *supra* §7.02 (a.01). Therefore, even if an injunction is mandated under the Endangered Species Act, applying property law principles affirms that Greenlawn should bear the burden of loss.

In *eBay Inc. v. MercExchange, L.L.C.*, 547 US 388, the Supreme Court of the United States held that equitable relief in property was subject to a four-factor test:

A plaintiff must demonstrate:

- (1) that it has suffered an irreparable injury
- (2) that remedies at law, such as monetary damages are inadequate to compensate for that injury
- (3) that considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted
- (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 US 388, 391 (2006).

In the instant case, assuming that the NOU has satisfied the first two factors by demonstrating that the loss of the pig-toe mussels due to the withdrawals of water by Greenlawn represents and irreparable harm that cannot be remedied by legal means such as damages, then it falls upon the judges to consider balancing the hardships between the plaintiff and the defendants as well as whether the public interest would be disserved by the issuance of a permanent injunction.

Here, the hardships and loss must fall on Greenlawn. The challenges of NOU cannot be ignored, and they have been incurred primarily as a result of the actions taken by Greenlawn in removing high volumes of water to provide water for its citizens' needs, including ornamental

watering of its lawns. (R. at 8.) Though the ACOE released water from the dam to Greenlawn, it was legally bound by property right not to interfere with Greenlawn's right of use and its actions were therefore non-discretionary. (R. at 8.) The public interest is served in the preservation of the pig-toe mussel. The ACOE's use of water for power generation also represents a public interest that would be disserved if an injunction would be granted against it, preventing its continued use of water. Therefore, the equities should be weighed by the court in granting its injunction, allowing the ACOE to continue its operation of the Howard Runnet Dam Works while preventing withdrawals by Greenlawn that would cause the flow of the Green River below the Howard Runnet Dam tailrace and Bypass Reach to drop below 25 cubic feet per second averaged over twenty-four hours. (R. at 18.)

CONCLUSION

For the forgoing reasons, Greenlawn does have a riparian right to continue water withdrawal municipal purpose. With regard to Greenlawn's riparian right, the ACOE's increased water releases of the Howard Runnet Dam Works is not a discretionary action subject to the consultation requirement under the ESA. However, Greenlawn's withdrawal of nearly all of the drought-reduced flow constitute a "take" of the endangered oval pigtoe mussel, and Greenlawn should bear the burden of loss under the weighing of the equities.

Therefore, ACOE respectfully asks this honorable court to uphold the District Court decision in declaring Greenlawn's riparian landowner right, in finding that the ACOE has not made any discretionary action which the ESA §7(a) triggering consultation requirement would apply, in finding that Greenlawn violated the ESA by committing a prohibited take, and dismissing the ESA claim against ACOE. Furthermore, ACOE respectfully requests this court to overturn the District Court ruling that weighing of the equities is not mandatory.