Case NO.: 66-CV-2017 (RMN)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,

Plaintiff – Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant – Appellee

and

CITY OF GREENLAWN, NEW UNION.

Defendant – Appellant

APPEAL FROM THE DISTRICT COURT
FOR NEW UNION

BRIEF FOR THE CITY OF GREENLAWN, NEW UNION

Defendant – Appellant

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STATEMENT OF THE ISSUES

(1) Does the City of Greenlawn ("Greenlawn"), as a riparian landowner, have the right to use the amount of water necessary for its reasonable municipal uses, especially in light of the fact that the New Union Oystercatchers, Inc. ("NUO") does not have standing to challenge its use?

(2) Does the contractual obligation of the Army Corps of Engineers ("ACOE") to supply Greenlawn with sufficient water for its reasonable municipal uses remove the ACOE's discretion to consult with the Fish and Wildlife Service (the "FWS") under section 7 of the Endangered Species Act (the "ESA")?

(3) Does a beneficial municipal water use, lacking a clear causal connection to an unforeseeable harm to a protected species, constitute a "take" under section 9 of the ESA?

(4) Did the District Court err by failing to undertake the traditional injunction analysis, including a balance of the equities, choosing instead to use a more the limited approach, when there is an overwhelming public interest that weighs against the issuance of the injunction?

STATEMENT OF JURISDICTION

This action was properly brought to the District Court of New Union pursuant to the ESA § 11, 16 U.S.C. § 1540(g). The common law claims were also properly brought under the District Court's supplemental jurisdiction pursuant to 27 U.S.C. § 1367(a) because they form part of the same case or controversy as the federal claims at issue. On May 15, 2019, the District Court issued its Opinion and Order No. 66-CV-2017 (the "Order"), to which NUO and Greenlawn both filed a timely appeal seeking review under this Court's jurisdiction pursuant to 28 U.S.C. § 1291. This appeal is from the Order for summary judgement that resulted in judgement on the parties' claims and an injunction against Greenlawn.

The Twelfth Circuit Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291. This Court also has supplemental jurisdiction to decide the common law issues in this case pursuant to 27 U.S.C. § 1367(a) for the reasons stated above.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Greenlawn serves its community's water needs

Greenlawn, New Union is a community made up mostly of single-family residences situated on the banks of the Green River Bypass Reach. (Record ("R.") p. 5.) Since the founding of Greenlawn 126 years ago, the city has depended upon the Green River – and, for the last 70 years, the Bypass Reach – for its municipal water needs. *Id*. The city owns the riverfront within city limits, as well as the underlying riverbed. *Id*. In 1968, after a period of growth, the city expanded its water system to continue to ensure access to clean water for its residents. *Id*. Today, Greenlawn's water system serves over 100,000 residential and industrial customers inside the city. *Id*.

The ACOE controls Greenlawn's water supply

In order to maintain an adequate water supply, Greenlawn must withdraw a yearly average of 20 million gallons of water per day ("MGD") in the warm summer months from the river. (R. p. 5.) The ACOE completely controls the downstream flow of the river to Greenlawn through its operation of the Howard Runnet Dam Works (the "Dam Works"), which consists of the Howard Runnet Dam and the Diversion Dam. (R. pgs. 5, 6.)

The U.S. Congress originally approved the Dam Works in 1945 and authorized the Howard Runnet Dam for flood control, hydroelectric power, and recreation purposes – all purposes that directly benefit the Greenlawn community. (R. p. 6.) It was completed in 1948, almost 50 years after Greenlawn's founding. *Id*. Meanwhile, the Diversion Dam exists for the purpose of redirecting the flow of the Green River into Howard Runnet Lake, directing the

remaining flow through the Bypass Reach to Greenlawn along the Green River's pre-dam path. *Id.* In this manner, the ACOE manages Greenlawn's water supply. *See id*.

The ACOE-Greenlawn water supply agreement and the Water Control Manual

Because the Dam Works cuts off the natural flow of water to Greenlawn, the ACOE entered into a contract with the city in 1948 to ensure it would continue to have sufficient water. (R. p. 6.) The contract provides that the ACOE will supply water to Greenlawn "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. p. 6.) Additionally, in 1968, the ACOE adopted the Water Control Manual ("WCM"), which facilitates the ACOE's operation of the Dam Works. *Id*.

The WCM incorporates the ACOE-Greenlawn water supply agreement into the operation of the Dam Works. (R. pgs. 7-8.). Specifically, it provides: "[a]t all times the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply agreements entered into by the United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law." *Id.* The WCM also sets parameters for the ACOE's flood control and recreation-related water releases, its generation of hydroelectric power, and its provision of water to Greenlawn. (R. p. 6.)

Ten years after the ACOE completed dam construction, the Fish and Wildlife Coordination Act of 1958 ("FWCA"), 16 U.S.C. § 662, authorized the ACOE to operate all dams in the U.S. to benefit fish and wildlife species, in addition to their previously-authorized purposes. *Id*.

In recent decades, climate change has begun to negatively affect the Green River area

The effects of global climate change, as well as other extraneous circumstances, have begun to sap the natural flow of the Green River and stress Greenlawn's water supply. (*See* R.

pgs. 8; 9; 10.) In the 1980s, large agricultural projects upstream of the Dam Works began diverting Green River water for irrigation. (R. p. 8.) Then, in the 2000s, the effects of climate change on the river became apparent. *See id*. Before the turn of the century, the ACOE only needed to institute the WCM's water shortage procedures once, in 1998. *Id*. But since 2000, the Green River has experienced five water shortages. *Id*. These instances of reduced river flows have wreaked havoc on the ecosystem. (*See* R. p. 10.) For instance, the reduced flows caused increased salinity in Green Bay, downstream from Greenlawn, allowing non-native predator species such as conch and crabs to encroach on the estuary habitat. *Id*. As a result, the oyster population in the bay was cut in half. *Id*.[1]

The 2017 drought and Greenlawn's efforts to enforce its longstanding riparian rights

The worsening situation in the Green River came to a head in 2017, when an unprecedented drought struck the Green River area. (R. p. 8.) The WCM provides the ACOE's procedures for handling such water shortages. (R. pgs. 6; 7; 8.) During a "drought watch," the ACOE operates the Dam Works according to target level Zone 1, and releases roughly 32 MGD to Greenlawn. (R. p. 7.) That amount is sufficient to meet the city's municipal needs. *Id*. However, when conditions reach Zone 2, the WCM provides for releases of only 4.5 MGD to Greenlawn – one-seventh of the amount provided during Zone 1. (R. p. 8.) That amount was perhaps sufficient for Greenlawn's municipal uses in 1968, but it is not sufficient today. *See id*.

In April of 2017, water levels reached Zone 2 for the first time since the ACOE implemented the WCM in 1968. (R. p. 8.) The ACOE promptly reduced flow to Greenlawn to 4.5 MGD. *Id*. Greenlawn protested in defense of its community needs, asking the ACOE to recognize its riparian rights and to comply with the water supply agreement of 1948. *Id*.

[1] Further, the design of Greenlawn's sewage system and the nature of its municipal uses do not allow much of the water it uses to return to the Green River. (R. pgs. 5-6.)

Greenlawn pointed out that the WCM was nearly 50 years old, that its guidelines were outdated, and that the city had grown substantially over the decades. *Id*.

Rather than providing the amount of water needed, the ACOE requested that Greenlawn ask its residents to reduce their water use instead. *Id*. Greenlawn declined to compromise over its water needs. (R. p. 9.) Ultimately, the ACOE complied with Greenlawn's request, increasing the flow to nearly 20 MGD. (R. p. 9.) Finally, worsening conditions, including increased hydroelectric demands that coincided with the warm spring weather, forced the ACOE to institute Zone 3 guidelines. *Id*. Accordingly, the ACOE curbed hydroelectric releases from the Dam Works, but continued to provide Greenlawn with necessary water. *Id*.

The NUO group blames Greenlawn for 2017 drought harm

Unfortunately, the drought had an unprecedented negative effect on one Green River species, the oval pigtoe mussel, which dwells downstream from Greenlawn. (R. p. 9.) According to the plaintiff's expert, the reduced flow during the water crisis, as well as a decline in the sailfin shiner population, resulted in the loss of 25 percent of the oval pigtoe mussels in the river. (R. p. 9; 10.) Greenlawn never obtained an incidental take permit for the species from the FWS, nor has the ACOE consulted with the FWS on how its dam operations impact the species. *Id*.

In any event, long-awaited rains returned to the Green River area not long after the ACOE implemented Zone 3 procedures. (R. p. 11.) The rain restored Howard Runnet Lake to Zone 1 levels and extinguished the immediate threat to the oval pigtoe mussels. *Id*.

Nevertheless, NUO, a special interest group representing commercial oyster fishermen in Green Bay, blamed Greenlawn and the ACOE for harming its business by causing the reduction in oval pigtoe mussels. (R. p. 10.) However, NUO's business involves fishing for oysters, not

oval pigtoe mussels. *Id*. Unlike Greenlawn, none of the members of NUO are Green River or Green Bay riparian property owners. *Id*.

PROCEDURAL HISTORY

NUO planned to sue under the ESA's citizen suit provision, and, while the drought was ongoing, served a sixty-day Notice of Intent on the ACOE and Greenlawn pursuant to 16 U.S.C. § 1540(g)(2)(A). (R. p. 10.) NUO waited for the sixty days to elapse, then sued. (R. p. 11.) It filed a claim against Greenlawn, which the ACOE joined, alleging that the city's water use during the 2017 drought constituted a take of the oval pigtoe mussel under ESA § 9, 16 U.S.C. § 1538(a)(1)(B). *Id*. It also filed a claim under ESA § 7, 16 U.S.C. § 1536(a) against the ACOE, asserting that the agency was required by law to consult with the FWS before it released 20 MGD of water to Greenlawn during the drought. (R. pgs. 1; 11.) Greenlawn answered and filed a counterclaim asking the court to declare that it has the right to 20 MGD of water, including during drought conditions, for its reasonable municipal use. (R. p. 11.)

Greenlawn moved for summary judgement on its single claim. *Id*. The ACOE also moved for summary judgement, to dismiss NUO's ESA § 7 claim. *Id*. And NUO moved for summary judgement on its two ESA claims against Greenlawn and the ACOE, respectively. (R. p. 4.)

The District Court entered judgement for Greenlawn on its single claim, declaring that, as a riparian landowner, Greenlawn is entitled to a flow of 20 MGD through the Bypass Reach, including during periods of drought. (R. p. 11.) The court also ruled that Greenlawn is not required to reduce its consumption in such situations. (R. p. 13.) That is because, the court explained, Greenlawn's water use is reasonable as a matter of law, and riparian owners may use water reasonably without accommodating the priorities of other riparian owners. *Id*. That includes the ACOE, and its priority of balancing flow management with, for instance,

hydroelectric power generation. *Id*. The court ruled that NUO lacks standing to challenge Greenlawn's water use because it is not a riparian owner. (R. p. 14.)

The court also entered judgement for the ACOE against NUO on its ESA § 7 claim, ruling that the agency was not required to consult with the FWS before it released 20 MGD to Greenlawn during the drought. (R. p. 15.) The Court explained that the ACOE is obligated by law to provide Greenlawn with the amount of water necessary to meet Greenlawn's municipal needs, and because it did not have the discretion to do otherwise, it did not need to consult. *Id*.

The court entered judgement in favor of NUO on its ESA § 9 claim. (R. p. 17.) Without engaging in the traditional preliminary injunction analysis, it issued an injunction prohibiting Greenlawn from withdrawing water in a manner that reduces downstream flows below a certain level. (R. p. 18.)

Greenlawn and NUO appealed the court's decision to this Court. (R. p. 1.) Greenlawn appealed the ruling that its withdrawals constitute a take as well as the District Court's failure to undertake the traditional preliminary injunction analysis. *Id*. NUO appealed the ruling regarding Greenlawn's basic riparian landowner rights, as well as the ruling that the ESA did not require the ACOE to consult with the FWS before its drought-period water releases. *Id*.

STANDARD OF REVIEW

The Court may grant summary judgement only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgement as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56. It is the burden of the moving party to demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

The Court conducts de novo review when considering the appeal of a ruling on a motion for summary judgement in an ESA case. See *Swan View Coalition, Inc. v. Turner*, 824 F. Supp.

923 (D. Mont. 1992); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991). The Court must draw all reasonable inferences in favor of the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 379 (2007). Here, the District Court granted summary judgement against NUO on its first and third claims, granted summary judgement in favor of NUO on its second claim, and granted summary judgement for Greenlawn on its cross-claim. Therefore, the Court reviews these issues de novo.

Additionally, a court overturns an agency's action only if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Wyoming v. U.S. Dep't of Agric*., 661 F.3d 1209, 1227 (10th Cir. 2011). Finally, a grant of a preliminary injunction is reviewed for abuse of discretion. *Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers*, 894 F.3d 692, 696 (5th Cir. 2018). In reviewing a preliminary injunction, factual findings are reviewed for clear error, while legal conclusions are reviewed de novo. *Id*.

SUMMARY OF THE ARGUMENT

As a riparian landowner, Greenlawn has a duty to protect its right to make reasonable use of the Green River for the benefit of its community. Because a third party, the ACOE, controls the river's flow, Greenlawn must sometimes defend those rights. That is especially true during a drought, when the city's rights are most vulnerable. Unfortunately, such circumstances may also make some wildlife species more vulnerable. Here, NUO contends that Greenlawn's defense of its rights did cause harm to one vulnerable species – the oval pigtoe mussel. However, Greenlawn respectfully submits that its actions during the drought of 2017 constituted a simple defense of its basic municipal water rights. The harm that befell the oval pigtoe mussel was not caused by Greenlawn, but was, rather, the result of a long chain of unfortunate circumstances that have created hardship for every party in this suit.

First, Greenlawn's water use is reasonable as a matter of law, and therefore Greenlawn need not accede its rights to the interests of the ACOE or any other fellow riparian landowner. Similarly, NUO does not have standing to challenge Greenlawn's water use, because it is not riparian landowner. However, even if it the court should find that NUO has standing under an alternative theory – such as a public nuisance or public property trust theory – Greenlawn's riparian rights prevail. The balancing of the severe burden on the residents of Greenlawn, caused by the diminishment of the city's riparian rights, with NUO's purely business-related harm counsels strongly in favor of the protection of Greenlawn's rights.

Second, Greenlawn asserts that ESA § 7 did not require the ACOE to consult with the FWS before the ACOE released 20 MGD of water to Greenlawn during the drought of 2017. The ACOE is not required to consult when it takes an action that it is required to take by law. Because the ACOE was required to supply Greenlawn with water sufficient for its municipal needs pursuant to its 1948 water supply contract with the city, it had no discretion to consult, and did not violate ESA § 7.

Third, Greenlawn contests the District Court's ruling that Greenlawn is the legal cause of a take of the oval pigtoe mussels. As an initial matter, Greenlawn contends that temporary habitat degradation does not constitute a take at all, and because the changes to the mussels' habitat in this case only lasted until the drought ended, and are not likely to occur again absent the same dramatic weather circumstances, there was no take. However, should the Court conclude that there was a take, the Court must also find that Greenlawn was both the actual and proximate cause of the harm to the mussels in order to hold Greenlawn liable. Yet, the myriad factors involved in this case – including a remarkable drought, long-term ecological degradation, and increasingly intense uses in the Green River – created a situation where the impact to the

oval pigtoe mussel was not a direct foreseeable result of Greenlawn's actions. It is, therefore, not the proximate cause of a take of the mussels.

Fourth, the District Court erred by issuing a preliminary injunction without undertaking the traditional analysis set forth in *Winter v. National Resources Defense Council*. Instead, the court followed the more limited analysis from *Tennessee Valley Authority v. Hill*, and discounted the significant public interest at issue in this case. Additionally, the injunction should not have issued because the actions that the District Court sought to enjoin have already ceased.

Therefore, this Court should hold that Greenlawn is a riparian landowner and that its municipal use of the Green River is reasonable; that the ACOE was not required to consult with the FWS before it released water to which Greenlawn is entitled by law; that Greenlawn was not the legal cause of a take or any other harm to the oval pigtoe mussel; and that the District Court erred when it issued the preliminary injunction in this case.

ARGUMENT

I. GREENLAWN'S RIGHTS AS A RIPARIAN LANDOWNER ALLOW FOR CONTINUED WITHDRAWALS FROM THE BYPASS REACH REGARDLESS OF CONDITIONS.

In general, every riparian owner has the right to make reasonable use of waters as long as that use does not interfere with another riparian landowner's reasonable uses. *See Scott v. Slaughter*, 237 Ark. 394, 398 (1963); *U.S. v. Willow River Power Co.*, 324 U.S. 499 (1945). This is known as the reasonable use theory. *See id.*; *see also Baker v. Ore-Ida Foods*, 95 Idaho 575, 579 (1973). In most circumstances, a riparian landowner is only subject to liability if the landowner's water use is unreasonable and that unreasonable use causes harm to another riparian landowner's reasonable use of the water. *See Bd. of Water Works Trs. of City of Des Moines v.*

Sac Cty. Bd. of Sups., 890 N.W.2d 50, 102 (Iowa 2017); Restatement (Second) of Torts § 850 (Am. Law Inst. 1979).

When using the water from a natural waterway for domestic purposes, a riparian landowner may "exhaust an entire stream even if it means that fellow riparians will receive no water whatever." Robert H. Abrams & Barton H. Thompson, *Legal Control of Water Resources: Cases and Materials*, 43 (Joseph L. Sax ed., 2d ed. 1991). In the event that the general public's rights in water are involved, a state can follow one of two approaches. Restatement (Second) of Torts § 856 cmt. g (Am. Law Inst. 1979). The state can protect the public rights through, on the one hand, a public nuisance approach or, on the other, a public trust approach. *Id*. However, in most jurisdictions, these public rights are not absolute. *See id*.

In this case, because Greenlawn is a riparian landowner and makes use of water from the Bypass Reach, it has the right to withdraw as much water as necessary to supply its needs. Abrams, *supra*, at 43. These rights are superior to the rights of New Union non-riparians because regardless of the approach New Union uses to categorize public rights in water, its uses are reasonable domestic and municipal uses to which Greenlawn is entitled by law. *Canton v. Shock*, 66 Ohio St. 19, 31 (1902); *Tubbs v. Potts*, 45 N.U. 999 (1909). Accordingly, Greenlawn respectfully asks this Court to uphold the District Court's ruling that Greenlawn is a riparian landowner and that, because its use is reasonable, it is entitled to the 20 MGD that the ACOE released during the 2017 drought. Greenlawn further respectfully asks this Court to overturn the injunction against Greenlawn and allow its continued withdrawals from the Bypass Reach, as the water uses are well within Greenlawn's legal rights as a riparian landowner.

A. Greenlawn is entitled to use the amount of water necessary for its reasonable municipal purposes.

The term "riparian rights" indicates a bundle of legal rights associated with land abutting a body of water. 1 *Waters and Water Rights* § 6.01 (Amy K. Kelley ed., 3d ed. LexisNexis/Matthew Bender 2019); *see also Harris v. Brooks*, 225 Ark. 436, 441 (1955). In *Canton v. Shock*, which helped shape the New Union Supreme Court's decision in *Tubbs v. Potts*, the Ohio Supreme Court emphasized that "[a]n incorporated municipality situated on a natural flowing stream is, in its corporate capacity, a riparian proprietor." *Masley v. Lorain*, 48 Ohio St. 2d 334, 338 (1976) (interpreting *Canton*).

Additionally, domestic uses are prioritized above all other uses, including power generation. *See, e.g.*, Wyo. Stat. § 41-3-102 (listing "water for drinking purposes" and "water for municipal purposes" above "Water . . . for steam and hot water heating plants, and steam power plants"; *see also* Ariz. Rev. Stat. Ann. § 45-157(B); Colo. Const. art. XVI § 6; Idaho Const. art. XV, § 3; Kelley, *supra*, at § 7.02; *see also Canton v. Shock*, 66 Ohio St. at 31. *Canton* also found that "[t]he primary use of water is for domestic purposes [and] the secondary use for purposes of power." *Masley*, 48 Ohio St. 2d at 338. NUO contends that ACOE's use is superior to Greenlawn's because it is an upstream landowner. (R. p. 13.) However, because the ACOE uses the dam for hydropower and Greenlawn uses it for municipal and domestic uses, Greenlawn's use is prioritized. Under New Union law, a municipality's riparian rights also extend to the non-riparian parcels within its borders. *See Tubbs*, 45 N.U. at 999.

In *Canton*, the city, a riparian landowner, used the Nimishiller Creek for its constituents' domestic uses, for municipal uses, and for manufacturing purposes. *Canton*, 66 Ohio St. 19 at 29. Another riparian landowner, a downstream mill, used the Nimishiller Creek to power a water wheel. *Id*. at 21. For years, these two riparian landowners were both able to use the creek to meet

their water needs. *Id.* However, the city grew and began using so much water that there was not enough flowing downstream for the mill. *Id*. The court ruled that, the city would have "no right" to materially diminish the flow to supply the water to "outsiders" or for "power purposes." Id. at 33. But "water consumed by the city for its own purposes, or…to its inhabitants for domestic use…" is permitted. *Id*. at 33.

Here, NUO charges that Greenlawn is required to cede some of its rights to another riparian landowner in the area, the ACOE – to "share the shortage." However, Greenlawn is a riparian landowner that engages in "preferred" domestic and municipal water uses. (R. p. 5.) The ACOE uses water for, among other purposes, power generation. *Canton* provided that the use of water for municipal and domestic needs trumps the use of water to generate power. *See generally Canton*, 66 Ohio St.19; *see also Caviness v. La Grande Irr. Co*., 60 Or. 410, 420 (1911) (stating a riparian owner may take for domestic use… as may be necessary… although none may be left for other riparian owners). Therefore, because Greenlawn's preferred uses trump the ACOE's uses, it is not required to "share to shortage" at the behest of the ACOE but may act freely to use water for the benefit of its community.

B. NUO's public rights in water do not limit Greenlawn's water use.

In general, a riparian landowner is not subject to liability for using water in a way that causes harm to the use of water by a non-riparian. Restatement (Second) of Torts § 856, (Am. Law Inst. 1979).[2] If a riparian landowner makes an unreasonable use of water within a waterway,

[2] Restatement (Second) of Torts § 856 reads: (1) Except as stated in Subsections (2), (3) and (4), a riparian proprietor is not subject to liability for making a use of the water of a watercourse or lake that causes harm to a use of water by a nonriparian.
(2) A riparian proprietor is subject to liability for making an unreasonable use of the water of a watercourse or a lake that causes harm to a reasonable use of water by a nonriparian who holds a grant from another riparian proprietor of the grantor's right to use the water.
(3) A riparian proprietor is subject to liability for making a use of the water of a watercourse or lake that causes harm to a nonriparian exercising a right created by governmental authority, permit or license to use public or private water.

the landowner is usually only subject to liability if the unreasonable use of the water causes harm to *another riparian landowner's* reasonable use of the water. *See id*. § 850 (emphasis added); *see also Lopardo v. Fleming Cos*., 97 F.3d 921 (7th Cir. 1996). Here, the District Court found that NUO "lacks common law standing to assert *any* riparian rights claims against Greenlawn" because "neither NUO, nor any of its members, claim to own property abutting the Green River." (R. pgs. 13-14); *see also Humphreys-Mexia Co. v. Arseneaux*, 116 Tex. 603, 605 (1927) (stating that only a lower riparian can complain when an upper riparian's use is unreasonable). Therefore, NUO cannot assert any traditional riparian rights claims against Greenlawn.

However, a riparian landowner *may* be liable for using public waters if that use interferes with the exercise of a "public right." Restatement (Second) of Torts § 856(4) (Am. Law Inst. 1979). Public rights in water are defined as legally protected rights to use public waters for "transportation, pleasure boating, fishing, swimming . . . and other purposes." *Id.* § 856, cmts. f, g; *see* Kelley, *supra*, at § 6.01. Usually, public rights can be exercised by members of the public regardless of their riparian landowner status, and can prevent a riparian landowner from infringing upon those public rights. Restatement (Second) of Torts § 856, cmts f, g. However, in most jurisdictions, these public rights are not absolute. *Id.*

There are two competing doctrines a state can adopt to evaluate the public rights of non-riparians. Restatement (Second) of Torts § 821B (Am. Law Inst. 1979). The first defines public rights as an extension of the general public's right to navigate the waters in question, and interference with these rights constitutes a public nuisance. *Id.* The second considers the public right to be a type of public property right or public trust in the waterway. *Id*. Both of these conceptions require a reasonableness balancing test when a riparian landowner's use of the water

(4) A riparian proprietor is subject to liability for making a use of public waters that interferes with the exercise of a public right to use the waters.

is involved. *See id*. § 821B cmt. e; *Id*. § 856 cmt. g; Kelley, *supra*, at § 7.02 (stating that a nuisance-style balancing test is conducted where there is a non-riparian use.); *Id*. § 7.05(b); *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 454-55 (1983) (stating the importance of balancing public trust values and riparian landowners interests.)

Because each approach requires balancing the reasonableness of the uses, the main characteristics of reasonableness will be analyzed, with results applicable under either theory. As discussed below, NUO's interests do not overpower the benefits of Greenlawn's uses.

i. Greenlawn's benefits from their water use outweigh the interests of NUO.

To enforce public rights under the public nuisance approach, courts analyze reasonableness by weighing the harm the conduct causes against the utility it creates. *See* Restatement (Second) of Torts § 821B (Am. Law Inst. 1979). Enforcing those same public rights under the public trust approach also requires an understanding of both parties' interests. *Nat'l Audubon Soc'y*, 33 Cal. 3d at 454-55. Seemingly, regardless of the approach, a riparian use that interferes with public rights must be analyzed for its relative reasonableness through a balancing approach. Restatement (Second) of Torts § 821B cmt. E; § 856 cmt. g (Am. Law Inst. 1979); Kelley, *supra*, at § 7.02; § 7.05(b); *Nat'l Audubon Soc'y*, 33 Cal. 3d at 454-55. If a riparian use "greatly increase[s] the public welfare" the riparian use can "impair or even destroy a public use." Restatement (Second) of Torts § 856 cmt. g (Am. Law Inst. 1979). There are typically eight characteristics a court can weigh to determine the reasonableness of the use. *Id*. § 850A. However, courts usually focus on whether a use is reasonable by comparing the economic and social costs incurred by both parties and, in fact, will focus more on the economic factor over the social factor. Kelley, *supra*, at § 7.02 (comparing *Harris v. Brooks*, 225 Ark. 436 (1955) with *Nilsson v. Latimer*, 281 Ark. 325 (1984)). However, where an incorporated city's domestic uses

are involved, those uses should also be considered in the balancing analysis because a city's domestic uses will immediately supersede almost any other competitor's needs. *Barre Water Co. v. Carnes*, 65 Vt. 626 (1893); Kelley, *supra*, at § 7.05.

1. Domestic purposes

The reasonableness of a use of water depends in part on its purpose. Restatement (Second) of Torts, § 850A cmt. b (Am. Law Inst. 1979). A reasonable use must be one that is beneficial and that fulfills some significant human need or desire. *Id.*; *see* Abrams, *supra*, 165. Domestic uses qualify as beneficial uses and are preferred over other uses. *Id.*; *Cent. & W. Basin Water Replen. Dist. v. S. Cal. Water Co.*, 109 Cal. App. 4th 891, 913 (2003). A riparian landowner may "exhaust an entire stream" for domestic purposes "even if it means that [others] will receive no water whatever." Abrams, *supra*, at 43. Domestic uses of water include "use for drinking, cooking, bathing, laundry, sanitation and other household purposes that contribute to the maintenance and sustenance of the riparian proprietor" as well as the irrigation of gardens. Restatement (Second) of Torts, § 850A cmt. c (Am. Law Inst. 1979); *see also Prather v. Hoberg*, 24 Cal. 2d 549, 562 (1944).

Here, Greenlawn provides domestic water supply to over 100,000 city customers. (R. p. 5.) Greenlawn's domestic purposes are a preferred use and supersede NUO's use of the water for localized fishing. To force Greenlawn to not only modify, but completely cease six-sevenths of its water withdrawals imposes a severe cost on 100,000 customers who depend on this water for everyday uses. Greenlawn's need to provide water for its 100,000 residents clearly outweighs NUO's interest in maintaining adequate fishing conditions for its business purposes. The balancing of these interests supports the conclusion that Greenlawn's water use is reasonable.

2. Economic value

Economic value is a "major consideration in determining the reasonableness of a use of water." Restatement (Second) of Torts, 850A cmt. e (Am. Law Inst. 1979). The use's "utility and value to the user" help to determine its economic value. *Id.*

Here, NUO faces an economic hardship that Greenlawn did not create. Its hardship is due to increasingly severe droughts, which have increased the salinity of the oyster habitat – an occurrence outside of Greenlawn's control. Greenlawn, on the other hand, depends on the Green River to supply water to its city. The economic value of its use is extremely high. Greenlawn has relied on water from the Bypass Reach for 126 years. The city's growth relies on this water for both domestic and industrial uses. Its industrial uses provide jobs and resources for the city and beyond. The entire economy of the city depends on water from the Bypass Reach. The incalculable value of its dependency on water indicates Greenlawn is the higher priority user.

3. Social value

The use of the water must also be reasonable from a social standpoint. Restatement (Second) of Torts, § 850A cmt. f (Am. Law Inst. 1979). The use has social value if "the general public good is in some way advanced or protected." *Id*. Industrial uses are an advantage to the community, both socially and economically. *Id*.

Here, the social value weighs in favor of Greenlawn. The social value in providing Greenlawn with the water it needs is substantial. This water flows life into the city – both into the homes of its residents and into its industry. To deprive Greenlawn of its full rights to use the water from the Bypass Reach is to essentially deny the rights to each of its residents.

NUO does less to advance the public good. Its fishing activities benefit its bottom line, but do not provide a special public good beyond simply adding more food products to the

marketplace. Further, while it faces its own challenges, they are the result of changing environmental conditions, not Greenlawn's water use. Depriving Greenlawn of its riparian rights will not even help NUO boost whatever scant public benefit it does provide.

As stated above, Greenlawn's use is directed to domestic and municipal needs, which can override almost any other use. Additionally, the social and economic impact of the water use is more critical to Greenlawn than to NUO. Overall, Greenlawn's established riparian rights outweigh any NUO's bottom line.

II. ACOE WAS NOT REQUIRED TO CONSULT UNDER ESA § 7.

Section 7(a)(2) of the ESA mandates that each Federal agency consult with the Secretary of the Interior to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species." 16 U.S.C. § 1536(a)(2). If the agency finds that the contemplated action puts an endangered or threatened species in jeopardy, the FWS will suggest "reasonable and prudent alternatives" to the action. 16 U.S.C. § 1536(b)(3)(A).

However, a regulation promulgated by the FWS, 50 C.F.R. § 402.03, clarifies that the requirement only applies to actions where "there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. In other words, where the agency does not have discretion to act on behalf of an endangered or threatened species in the course of fulfilling its legal obligations, the agency need not consult. *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1125–26 (9th Cir. 1998).

In this case, the ACOE's agreement to provide sufficient water to Greenlawn for its reasonable municipal use is a legal obligation that stripped away the ACOE's discretion to consult with the FWS before it released 20 MGD to Greenlawn. (R. pgs. 6; 7.) The District Court

recognized that this contract left the ACOE with no discretion. (R. p. 15.) Greenlawn respectfully asks the Court to affirm the District Court's ruling and hold that the ACOE had no legal duty to consult before the water release.

A. The ESA does not require a federal agency to consult if a federal statute removes its discretion to do so.

In *National Association of Home Builders v. Defenders of Wildlife (NAHB)*, the U.S. Supreme Court upheld § 402.03 and its discretion requirement as a proper exercise of the FWS's power to administer the ESA. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 647 (2007). The Court explained that the regulation resolved an ambiguity in the consultation requirement: What happens when an agency is required to take a specific action by law, but the consultation requirement prevents it from taking that action? *Id*. at 666. In such a situation, the requirement would have the effect of "implicitly abrogat[ing] or repeal[ing]" the original legal requirement. *Id*. Section 402.03 resolves the ambiguity and allows agencies to avoid an absurd result by eliminating the consultation requirement in such a scenario. *Id*.

The *NAHB* case exemplified this type of situation. *NAHB*, 551 U.S. at 649. The case involved the Environmental Protection Agency's ("EPA") responsibility under the Clean Water Act ("CWA") § 402(b) to transfer certain Federal permitting powers to individual states. *Id*. at 650-51. The statute required the EPA to evaluate whether each program conformed to nine specific criteria. *Id*. If the programs did conform, the statute mandated that the EPA transfer the powers. *Id*. at 671. The Court held that the ESA consultation requirement conflicted with the CWA provision because the ESA requirement would have essentially added a tenth criteria – the transfer's effect on endangered or threatened species. *Id*. This result was impermissible because CWA functioned as "a ceiling as well as a floor," *comprehensively* delineating the EPA's responsibilities and allowing no deviation. *Id*. at 663.

In that situation, § 402.03 resolves the conflict by relieving the agency of its duty to consult. *NAHB*, 551 U.S. at 666, The court explained that its reading "harmonizes the statutes by applying § 7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates." *Id*. Section 7(a)(2) requires agencies to "insure" that their actions do not harm endangered or threatened species. 16 U.S.C. § 1536(a)(2). The holding supports the conventional causation logic that an agency cannot insure the outcome of an action over which it has no control. *NAHB*, 551 U.S. at 667.

B. Contractual obligations can also operate as a "ceiling as well as a floor," stripping an agency of its ability to consult.

Lower courts have held that other, non-statutory legal obligations, including agreements with non-federal entities, can remove an agency's discretion and make consultation impossible. *See, e.g., Envtl. Prot. Info. Ctr. v. Simpson Timber Co. (EPIC)*, 255 F.3d 1073 (9th Cir. 2001); *Houston*, 146 F.3d 1118 (9th Cir. 1998). Once an agency enters into an agreement – such as the ACOE's water agreement with Greenlawn – the agency has completed its "action" with regard to that agreement. *EPIC*, 255 F.3d at 1080. It does *not* have ongoing discretion to amend the agreement to benefit an endangered or threatened species. *Id*. at 1081.

Further, the agency's ability to consult *during* the duration of the contract depends on whether the contract's terms allow it "some discretion to take action to benefit a protected species." *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784-85 (9th Cir. 2014); *EPIC*, 255 F.3d at 1080. If the agreement reserves it no discretion, it cannot consult. *See Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008).

If an agency *were* required to consult with the FWS, and the FWS ultimately recommended some action to preserve a listed species – and its contract left it no discretion to act outside the contract's provisions – then the recommended action would require the agency to

breach the contract. *See Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1218 (E.D. Cal. 2017). This is the type of absurd result the Supreme Court sought to avoid in *NAHB*, when it explained that the ESA cannot "implicitly abrogate or repeal" existing legal obligations. *See NAHB*, 551 U.S. at 666.

In *EPIC*, 255 F.3d at 1083, the FWS issued an incidental take permit to a logging company for the spotted owl. The permit provided for an FWS compliance review after 10 years; gave the FWS the authority to suspend the permit in the event of a significant breach; and gave it the power to revoke the permit if any other species were taken. *Id*. at 1078. The Ninth Circuit concluded that these terms were exclusive, and that the FWS had no discretion to "make new requirements," such as a requirement that it intervene in logging operations for the benefit of a new species. *Id*. at 1080. Because the contract did not specifically preserve the FWS's discretion to benefit any other species, the agency had no discretion to consult. *Id*. at 1080.

C. The ACOE's water agreement with Greenlawn left it no discretion to consult with the FWS.

NUO argues that the ACOE modified the terms of the WCM when it released 20 MGD to Greenlawn during the 2017 drought. (R. p. 11.) In fact, the ACOE acted in accordance with the WCM, which includes the provisions of the 1948 water agreement with Greenlawn. (R. p. 7-8.) That agreement requires the ACOE to provide Greenlawn with water sufficient for Greenlawn's reasonable riparian use. *Id*. Like the permit in *EPIC*, it does not give the ACOE the discretion to "make new requirements," such as a requirement to involve the FWS in the decision. *EPIC*, 255 F.3d at 1083. Because the agreement does not leave the ACOE any discretion to act for the benefit of the oval pigtoe mussel, the ACOE did not have discretion to consult with FWS, and it did not violate § 7(a)(2). (R. p. 8.)

i. The water supply agreement eliminates the ACOE's discretion to consult.

An agency is only required to consult on an action taken pursuant to a contract when the contract reserves the agency "some discretion to take action to benefit a protected species." *Jewell*, 749 F.3d at 784-85. The agreement at issue in this case is straightforward: The ACOE agreed to provide Greenlawn with water "in such quantities and at such rates and times *as it is entitled to as a riparian property owner*." (R. p. 6) (emphasis added). The ACOE and Greenlawn entered the agreement in acknowledgment of the fact that the ACOE, after construction of the Dam Works, had total control over Greenlawn's water supply. *Id.* Accordingly, it enunciates the ACOE's common law obligation to make sure the city continues to have enough water for its reasonable riparian use. *See supra* p. 7. It contains no terms that indicate that the ACOE retains discretion to consider effects on listed species before it provides the water. *See EPIC*, 255 F.3d at 1081 (explaining that an agency did not have discretion because the permit it issued did not reserve it discretion to act for the benefit of two listed species). Rather, the agreement is a "ceiling as well as a floor" that permits no deviation from its terms. *See NAHB*, 551 U.S. at 663.

If the ACOE *had* consulted with the FWS before it released the water, the FWS might have made a jeopardy determination and advised against the release. *See Norton*, 236 F. Supp. 3d at 1218 (E.D. Cal. 2017). It might have required the ACOE to delay or even cancel its release of the 20 MGD that Greenlawn needed. In other words, it would have forced the ACOE to "implicitly abrogate or repeal" its contract with Greenlawn. *See NAHB*, 551 U.S. at 666. This is exactly the outcome that § 402.03 helps the agency avoid, as the Supreme Court acknowledged in *NAHB*, by relieving its duty to consult. *Id.* Section 402.03 gives the ACOE the opportunity to keep its agreement with Greenlawn intact by avoiding agency consultation altogether.

ii. The water supply agreement supersedes conflicting provisions in the WCM, as well as statutory purposes that might otherwise leave the ACOE some discretion to consult.

The WCM provides the specific guidelines that dictate the amount of water to be released to the Bypass Reach in the event of a drought, and divides those amounts into three "zones" based on the severity of the drought. (R. p. 7.) These zone guidelines, however, conflict with the water supply agreement's requirement that the ACOE provide water to Greenlawn in whatever amounts the city is entitled to under law. (*See* R. pgs. 7-8.) The water supply agreement prevails. That is because the supply agreement is a binding legal contract while the WCM is merely a "guidance document" that does not create a countervailing legal obligation. Intent to Prepare Draft Environmental Impact Statement for Updated Water Control Manuals for the Apalachicola-Chattahoochee-Flint River Basin, 73 Fed. Reg. 9780-01 (Feb. 22, 2008). The WCM's provisions relate "primarily to the *functional* regulation" of the Dam Works; they do not create fresh legal requirements. 33 C.F.R. § 222.5(i)(1) (emphasis added).

Additionally, the supply agreement overrides the Dam Works' authorized "fish and wildlife purpose" – a purpose that was added to the Dam Works' already-existing purposes by the FWCA 13 years after the Dam Works was first authorized. The fact that the Dam Works have a "fish and wildlife purpose" at all might seem to give the ACOE discretion to act for the benefit of listed species as it operates the dam. However, the purpose comes with a caveat: "[F]or projects authorized by a specific Act of Congress before the date of enactment of the [FWCA], [any] modification . . . shall be compatible with the purposes for which the project was authorized." 16 U.S.C. § 662; *see also WildEarth Guardians v. U.S. Army Corps of Engineers*, 314 F. Supp. 3d 1178, 1200-01 (D. N.M. 2018). The Dam Works is such a project. And, in this case, its original purposes are at odds with the fish and wildlife purpose.

The Dam Works was originally authorized, in 1945, to benefit Greenlawn (as well as, presumably, other communities) by providing recreation, flood control, and hydropower for Greenlawn's citizens. (R. p. 6.) Further, the Diversion Dam, one of the two dams comprising the Dam Works, was specifically created in part to preserve sufficient water flows to Greenlawn from the Green River. *See id*. The water supply agreement simply converted this pro-Greenlawn statutory purpose into a binding contractual obligation – a promise to preserve this statutory purpose. In the face of this pre-existing statutory purpose, elucidated by a contract – the water supply agreement – the fish and wildlife purpose takes a backseat. *See WildEarth Guardians*, 314 F. Supp. at 1201 (D. N.M. 2018). In absence of the purpose and the agreement, perhaps the fish and wildlife purpose *would* give the ACOE might have the discretion to consult. *See id.* But the water supply agreement is a "ceiling as well as a floor." *See NAHB*, 551 U.S. at 663. It closes off any pre-existing discretion to consult.

Therefore, the water supply agreement strips the ACOE's of its discretion to consult and it did not violate ESA § 7 when it released 20 MGD to Greenlawn.

III. THERE WAS NO TAKE OF THE OVAL PIGTOE MUSSEL POPULATION, AND EVEN IF THERE WAS, GREENLAWN WAS NOT THE PROXIMATE CAUSE OF THE TAKE.

Congress passed the ESA in 1973 with the goal of creating a mechanism for listing and protecting endangered or threatened species. 16 U.S.C. § 1531. Section 9 of the ESA prohibits the "take" of any listed endangered species. 16 U.S.C. § 1538(a)(1)(B); *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 708 (1995) (viewing the legislative intent and executive interpretation of the ESA to allow the definition of harm to include "significant habitat modification or degradation that actually kills or injures wildlife."). A "take" is defined as an activity that affects, kills, or harms a species. 16 U.S.C. § 1532(19). An

individual, corporation, local government or federal government agency may be responsible for the take of an endangered species. 16 U.S.C. § 1532(13). However, the statute falls silent on how far liability extends when multiple parties and factors contribute, even in small or temporary ways, to the take of a listed species.

First, Greenlawn asks this Court to recognize that there was no take in this case because of the temporary nature of the wildlife impact. Second, even if the Court concludes there was a take, Greenlawn respectfully contends that the lower court erred in finding a violation of the ESA § 9. Greenlawn's withdrawals, to which it is entitled by right, are just one part of a sequence of natural events, the majority of which are unrelated to Greenlawn's water use, that has stressed the Green River ecosystem.

A. No permanent habitat modification occurred to the oval pigtoe mussel ecosystem, and therefore there was no take.

While the Supreme Court is clear on the broad latitude given to the terms "harm" and "taking," courts have held that "mere habitat degradation is not always sufficient to equal harm." *Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1240 (9th Cir. 2001); *see also Natl. Wildlife Fedn. v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1513 (9th Cir.1994). The Ninth Circuit also added a temporal element to this requirement, determining that there is no take under ESA § 9 when evidence does not establish that "any one year's [water] diversions . . . actually caused a [species] spawning problems." *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). Other courts have concluded that non-permanent habitat degradation is even less likely to be a take because of the temporary nature of the activities. *Burlington*, 23 F.3d at 1510.

In *Burlington N. R.R., Inc.*, a train operator's negligent corn spills on a railroad led to the death of numerous grizzly bears, who had stopped to eat the scattered kernels and were struck by

passing trains. *Burlington*, 23 F.3d at 1509. The negligence of the train operator was the sole activity that led to the deaths, establishing clear causation. *Id.* at 1513. Yet even though the incident led to modified grizzly bear feeding behavior, a type of habitat degradation, the court found the degradation insignificant due to its temporary nature, and there was no take. *Id*.

In *Pyramid Lake*, water diversions by the Navy impacted river spawning flows and threatened the sole habitat of an endangered fish. *Pyramid Lake*, 898 F.2d at 1413. The diversions imperiled the continued viability of the species to such an extent that the FWS was forced to develop a Restoration Plan to insure its survival. *Id.* However, the diversions were time-limited; no evidence could establish that any one year's diversions caused the fish's spawning problems. *Id.* at 1420. Ultimately, the Ninth Circuit determined that the time-limited habitat modification was not sufficient to establish a take. *Id*. at 1420.

Although Greenlawn's beneficial use of water reduced the amount of water downstream, its activities fall within the scope of *Burlington N. R.R., Inc.* and *Pyramid Lake*. The event that caused the chain of consequences here was a historic 100-year drought, the conditions and severity of which may not occur again in this century. (R. p. 8). Additionally, heavy rains have replenished the Green River watershed and filled Howard Runnet Lake back to Zone 1 levels. (R. p. 11). The rains provided natural remediation to the temporary habitat impact, akin to railroad company's cleanup efforts after their corn spills. Therefore, there was no take because the harm was only temporary.

B. The connection between Greenlawn's use of water from the Diversion Dam and the degradation of the oval pigtoe mussel habitat is not clear enough to give rise to liability under ESA § 9.

Even if the Court determines that a take has occurred, Greenlawn lacks the causal connection to the harm to be held liable under ESA § 9. Determining which actor is liable for the

harm to the endangered species requires the Court to undertake a traditional tort causation analysis[3]. *Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 486 (E.D. Cal. 2018). Under such an analysis, the plaintiff bears the burden of establishing actual *and* proximate cause for the harm. *Sweet Home*, 515 U.S. at 709. In *Sweet Home*, the Supreme Court held that "but-for" causation is "obviously require[d]" to make out a claim for a take. *Id*. at 700 n.13. However, the "ordinary principles of proximate causation, which introduce notions of foreseeability," must be established. *Id.* at 709, 713-714; *see also Cold Mt. v. Garber*, 375 F.3d 884, 890 (9th Cir. 2004).

Justice O'Connor, concurring, explained that "in the absence of congressional abrogation of traditional principles of causation . . . private parties should be held liable . . . only if their habitat-modifying actions proximately cause death or injury to protected animals." *Sweet Home*, 515 U.S. at 712; *see also Benefiel v. Exxon Corp.*, 959 F.2d 805, 807–808 (9th Cir. 1992). Justice O'Connor elaborated that proximate causation "depends to a great extent on considerations of the fairness of imposing liability for remote consequences." *Id*. at 713.

In *Aransas Project*, licensed water withdrawals from a river resulted in a decline in freshwater inflows to a bay; the bay's salinity increased, impacting the food source for migrating whooping cranes. *Aransas Project v. Shaw*, 775 F.3d 641, 656–57 (5th Cir. 2014). The Fifth Circuit held that "in the face of multiple, natural, independent, unpredictable and interrelated forces," proximate cause and foreseeability were lacking. *Id.* at 663. Instead of imposing liability, the court held that it was the "fortuitous confluence of adverse factors" that caused unintended deaths. *Id.* at 662. The evidence failed to show that the agency should have known its

[3] *See* Restatement (Second) of Torts § 431, 433 (Am. Law Inst. 1979) (Three-factor test for determining whether an action is a "substantial factor" in bringing about the harm. The three factors are: "(1) the number of other factors that contributed in producing the harm and the extent of the effect; (2) whether the actor's conduct created a force which continued until the harm occurred, or created a situation which was harmless until an independent force intervened for which the actor is not responsible; and (3) the lapse of time" between the action and the harm.)

actions would impact salinity levels during an unusually severe drought enough to a degree that would deplete the cranes' food source. *Id.* at 660.

Additionally, the Court should look to the impacts of drought and other intervening causes before ruling on whether a take has occurred. *See Alabama v. U.S. Army Corps of Engineers*, 441 F. Supp. 2d 1123, 1134 (N.D. Ala. 2006). In *Alabama,* as here, the case concerned drought conditions that exposed a protected species of mussels. *Id*. at 1125. The amount of water available for an agency's dam release steadily declined because of decreased rainfall and increased evaporation. *Id.* at 1134. The mussels could not escape the adverse conditions and were harmed. *Id.* at 1125. Drought conditions had also become more severe than had been anticipated at the time of the dams' construction. *Id.* at 1134.

The court held that the plaintiff was unable to demonstrate "but for" causation because the drought did not "res[t] at the feet" of the agency. *Alabama,* 441 F. Supp. 2d at 1132; 1134. The court further asserted that "takes that result from acts of nature do not fall within the prohibition of [ESA] § 9," and thus water user is not culpable. *Id.* at 1134. Ultimately, the court held that the agency's actions fell short of a take because it could not "control the weather, nor [could] it be held responsible for the effects of the weather" on the species habitat. *Id*. at 1137.

Here, the District Court erred when it contrasted Greenlawn's case with the circumstances in *Aransas Project.* The cases are, in fact, analogous because circumstances made the ultimate outcomes in both cases unforeseeable. Because of the numerous actors withdrawing and managing water supply along the Green River, the impacts to the oval pigtoe mussel habitat were not a foreseeable result of Greenlawn's lawful water use. (R. p. 17.)

Greenlawn's withdrawal from the Green River was one link in a chain. Because there were so many interrelated, independent, and uncoordinated withdrawals from Green River, it is

impossible that any one actor is responsible. As in *Alabama*, the court can weigh the effect of the drought in its assessment of causation. Many factors outside Greenlawn's control, most notably the unforeseeable drought, caused Green River to reach unprecedentedly low water levels.

Three intervening causes eliminated Greenlawn's foreseeability. First, agricultural projects upstream of the Dam Works have exacerbated the river's diminished flow by diverting large quantities for decades. (R. p. 8.) Only after the launch of thirsty agricultural operations did water shortages become a troublesome issue for the region. Second, the oval pigtoe mussel habitat only became exposed after hydroelectric peaking was curtailed. (R. p. 9). Third, increased salinity in Green Bay and limited sailfin shiner migration played a significant role in the population decline during the drought. *Id*. Low water levels caused by the drought and upstream agricultural irrigation withdrawals left the larval mussels without a healthy population of host sailfin shiner. *Id.* The young mussels could not mature nor spawn, furthering their decline. *Id.* The NUO's expert offered uncontradicted testimony that it was *these* conditions that caused the death of approximately 25 percent of the oval pigtoe population. *Id.*

Overall, it does not comport with traditional notions of fairness and equity, as discussed by Justice O'Connor in *Sweet Home*, to impose liability for the decline of a species that lies miles downstream and that is already suffering the effects of a changing habitat. (R. p. 9; 10.)

IV. THE COURT SHOULD OVERTURN THE DISTRICT COURT'S PRELIMINARY INJUNCTION BECAUSE THE DISTRICT COURT DID NOT USE THE TRADITIONAL PRELIMINARY INJUNCTION ANALYSIS.

Injunctions are "designed to deter, not to punish." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Because of this, it is imperative that a court balance the equities of a beneficial use prior to enjoining a party to consider broader implications. In a typical case where injunctive

relief is at issue, the *Winter* test applies, and a court does balance the equities. *Winter v. Nat. Resources Def. Council, Inc*., 555 U.S. 7, 20 (2008).

Under *Winter*, a party seeking a preliminary injunction must show that four factors weigh in its favor: (1) Its likelihood of succeeding on the merits; (2) Its likelihood of suffering irreparable harm in the absence of preliminary relief; (3) Whether the balance of equities tips in its favor, and (4) Whether an injunction is in the public interest. *Id*. The *Winter* test incorporates a sliding scale analysis that weighs the four factors against each other. *Id.* A court must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 24. In employing "the extraordinary remedy of injunction," courts have a particular need to consider a potential injunction's public consequences. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

In this case, the District Court erred by failing to undertake the analysis laid out in *Winter*. Instead, the court followed the reasoning of *Tennessee Valley Authority v. Hill*, which established that endangered species are to be afforded "the highest of priorities." *Tennessee Valley Auth. v. Hill (TVA)*, 437 U.S. 153, 174 (1978). The Court should invalidate the injunction because the District Court did not engage in the correct analysis.

In *TVA*, the Supreme Court concluded the intent of the ESA is to "halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. So, when faced with weighing the annihilation of a species against the completion of a financially imprudent and uneconomical dam project[4] meant to aid a struggling Federal agency, the court held against the widely panned

[4] Elizabeth Garrett, *The Story of TVA v. Hill: Congress Has the Last Word*, 12 (USC Law Legal Studies, Paper No. 09-42, 2009) https://gould.usc.edu/assets/docs/contribute/TVAvHillssrn.pdf ("The Tennessee Valley Authority's connections to congressional appropriators and regional political forces allowed it to persevere with the project even though the cost-benefit analysis supporting it was unconventional and, to many, unpersuasive. The dam was not mainly designed to produce power for the region, to enhance navigation or to mitigate the threat of floods; rather, it was built to enhance economic development.")

project. *See id.* at 187. When interpreting the ESA in that case, the court held that because Congress had the "clear intention of preventing federal actors from causing species extinction," an injunction is an appropriate remedy when faced with a threat to a species, and that the traditional injunction analysis does not apply. *Id.* at 184. However, the Supreme Court did concede that "federal courts are not obligated to grant an injunction for *every* violation of the law." *Id*. at 193 (citing *Hecht Co.*, 321 U.S. at 329) (emphasis added). Even though the decision in *TVA* altered the injunctive relief landscape for ESA cases, the court made clear that a court should not *automatically* grant injunctive relief in such cases. *See id.*

In this case, Greenlawn's lawful use of Green River is just one of many actions that led to declined downstream flows. While other local water uses are not being curtailed, the current injunction is unfairly and unduly preventing Greenlawn from providing water to its residents. Without undertaking a complete analysis of the equities, the District Court singled out and punished Greenlawn for events outside of its control. The public interest of Greenlawn's duty to its community outweighs an unguaranteed attempt to preserve the mussels.

A. The ESA does not deny courts their traditional equitable discretion in deciding whether an injunction is appropriate.

The District Court concluded that the ESA circumscribes the reviewing courts' traditional role of balancing the equities in determining whether injunctive relief should be issued for purported violations of ESA § 9. (R. p. 18.) Yet, the First Circuit stated that "the advantage given to the endangered species is not necessarily dispositive, and that the presumption is rebuttable." *Animal Protec. Inst. v. Martin*, 511 F. Supp. 2d 196, 198 (D. Me. 2007) (citing *Water Keeper All. v. U.S. Dep't of Def.*, 271 F.3d 21 (1st Cir. 2001)).

Although certain ESA cases have stated that endangered species should be given priority and advantage, the role of the court is to balance equities based on the holistic factual situation

placed before them. *Water Keeper*, 271 F.3d at 29. When the balance of equities favors "concrete" public interest concerns over more "abstract" potential harm to species, and the public interest would consequently be harmed by a grant of preliminary injunctive relief, a court can deny or overturn an injunction. *Id.*

Even when injunctive relief is appropriate, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell, Alaska,* 480 U.S. 531, 542 (1987). The Supreme Court has ruled "flexibility rather than rigidity" distinguishes the court's role in fashioning equitable relief to the "necessities of the particular case." *Romero-Barcelo*, 456 U.S. at 312. Courts must use discretion and "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Railroad Comm'n. v. Pullman Co*., 312 U.S. 496, 500 (1941).

In *Romero-Barcelo,* the Supreme Court balanced the benefit of military training activities off the coast of Puerto Rico with the military's ongoing violations of the Federal Water Pollution Control Act ("FWPCA"). *Id.* at 310. The FWPCA (which later became the CWA) is similar to the ESA as a regulatory restriction on conduct effecting the environment. *See generally* 33 U.S.C. § 1251(a) (concluding that the objective of the FWCPA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters.") Even though the law prohibited permitless discharges into coastal waters, the court did not enjoin the military because of the immense public interests their services provided. *Romero-Barcelo*, 456 U.S. at 311.

Two decades later, the First Circuit reached a similar conclusion in *Water Keeper,* 271 F.3d at 29. The court ruled that enjoining military exercises off the coast of Puerto Rico would have a significant negative effect on the public interest, despite the military's ongoing ESA

violations. *Id.* at 35. Rather than being "blindly compelled" to weigh the endangered species priority over all other concerns, the *Water Keeper* court followed the *Winter* test to balance the equities. *Id*. at 31. And it weighed in favor of the public interest. *Id.* at 34. While explicitly prioritizing national security over economic harms, the court gave credence to assessing economic concerns in *any* analysis. *See id.*

Although *Romero-Barcelo* addressed the FWPCA instead of the ESA, the Supreme Court emphatically protected the court's discretion to decide appropriate relief when faced with a decision that dramatically implicates the public interest. In contrast to the Navy's actions in *Romero-Barcelo*, Greenlawn's actions are not the clear cause of harm to the mussel population, nor are they engaged in ongoing pollution. Similar to the *Romero-Barcelo* decision, which allowed the military to continue to discharge pollution, this Court can overturn the injunction and provide an alternative solution. *Romero-Barcelo* and *Water Keeper* counsel that a court should evaluate public interest and economic harms. *Water Keeper,* 271 F.3d at 34. Therefore, this Court should determine that the public interest demands a consideration of competing factors, and therefore conclude that the District Court should have utilized the *Winter* test. With the water rights of more than 100,000 customers at stake, a significant public interest hangs in the balance, and the demands that the relative interests of the parties be weighed. (R. p. 5). In the meantime, the public interest is manifestly harmed by this injunction.

As an additional consideration, recent FWS amendments to its ESA regulations have introduced the idea that FWS should consider economic factors in some decisions.[5] The

[5] 50 C.F.R § 424. Fish and Wildlife Services Comments on Presentation of Economic or Other Impacts, Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat. 84 Fed. Reg. 45020 (August 27, 2019). The Federal Register: The Daily Journal of the United States. Web. Accessed: https://www.federalregister.gov/documents/2019/08/27/2019-17518/endangered-and-threatened-wildlife-and-plants-regulations-for-listing-species-and-designating).

amendments allow FWS to "compil[e] economic information or presenting that information to the public" when making decisions about which species should be listed. 50 C.F.R § 424. In short, the amendments recognize the necessity of analyzing not only the harm to species, but also the harm to the public and economic interests that can result from regulation that is too narrowly focused, as is the case with the injunction remedy here.

Finally, there is no guarantee that the mussels will even benefit from this injunction. Upstream agricultural diversions, inclement weather, and ACOE management decisions could again conspire to harm the mussels without Greenlawn's involvement. In the meantime, Greenlawn must meet its residents' water needs. Managing resources in an era of climate change will become more difficult if cities are enjoined from meeting the needs of its residents. [6]

By enjoining only one user of Green River's flow, the court prevents Greenlawn from serving its 100,000 residents and businesses. And by foregoing the traditional preliminary injunction analysis, the District Court discounted a significant public interest. Since 1893, Greenlawn has depended on this water for its municipal water needs. Hindering its ability to exercise its water rights will cast a dark shadow on municipalities as the climate crisis worsens.

B. Injunctive relief cannot be awarded for past violations.

Generally, injunctions "must be tailored to remedy the particular violations in the case." *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977). An injunction is inappropriate where the actions cease and are unlikely to occur in the future. *Hecht Co.*, 321 U.S. at 326. Injunction issued because of past actions fail to serve their purpose. *Id.* at 329-30.

The District Court issued the injunction in this case even though the conditions were caused by severe drought. (R. p. 8.) Moreover, the drought has ceased and the threat to the

[6] *See* Upmanu Lall, et. al., 2018: Water. In Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II pp. 145–173

mussels has abated. (R. p. 11.) These rains filled Howard Runnet Lake back to normal levels. *Id.* Here, because there is no current harm, a court has the ability to overturn an injunction. Thus, the issuance of an injunction would not be prospective and would be based solely on past violations.

In sum, enjoining a city from providing water to residents will establish a detrimental precedent as more regions are faced with water stresses caused by climate change. This Court should hold that the traditional preliminary injunction rule applies in this case because of the stark public interest involved, and should overturn the injunction, allowing Greenlawn to serve the water needs of its community members.

CONCLUSION

For the reasons set forth above, Greenlawn respectfully requests that the Court affirm the District Court's holding that Greenlawn does have riparian rights with regard to its withdrawals from the Bypass Reach, and that its uses are reasonable. Additionally, Greenlawn requests that the Court overturn the District Court's ruling and hold that Greenlawn is not liable for a take of the oval pigtoe mussel under ESA § 9. Greenlawn requests that the Court also hold that the ACOE was not required to consult with the FWS under ESA § 9. Finally, Greenlawn urges the Court to reverse the District Court's injunction against its reasonable municipal water use.