IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket C.A. No. 19-000987

NEW UNION OYSTERCATCHERS INC.,

Plaintiff – Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant – Appellee,

and

CITY OF GREENLAWN, NEW UNION,

Defendant – Appellant

On Appeal From The United States District Court For
New Union

BRIEF OF NEW UNION OYSTERCATCHERS INC.,
Plaintiff – Appellants

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STATEMENT OF JURISDICTION

This case involves an appeal from the U.S. District Court for New Union. For the three claims that arise under the federal Endangered Species Act, 16 U.S.C. §§ 1538–44 (2012), the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2012). The fourth claim involves riparian rights arising under state law. Because the existence and nature of these rights may be a predicate issue to the parties' obligations under the Endangered Species Act, the District Court granted supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) (2012). This Court has jurisdiction over these appeals under 28 U.S.C. § 1291 (2012).

ISSUES PRESENTED FOR REVIEW

I. Does Greenlawn have a right as a riparian landowner to continue unmitigated withdrawals from the Green River for uses such as lawn-watering and car washing, when such withdrawals violate the reasonable use rule and public trust doctrine by harming protected public rights?

II. Was Army Corps of Engineers' allocation of additional water to Greenlawn during a drought, in contravention of multiple statutes and the agency's operating manual, a discretionary action subject to the consultation requirement of Section 7 of the Endangered Species Act?

III. Did Greenlawn "take" the endangered oval pigtoe mussel, in violation of Section 9 of the Endangered Species Act, when it consumed nearly all the water supplying the Green River during drought conditions, destroying mussel habitat and actually killing mussels?

IV. Must the District Court balance the equities before enjoining Greenlawn's unmitigated water withdrawals under the citizen suit provision of the Endangered Species Act, when continued withdrawals will cause extirpation of an entire population of an endangered species?

STATEMENT OF THE CASE

I. Factual Background

The Green River flows through the state of New Union into Green Bay. Record at 10. The Bay has historically supported a productive oyster fishery. *Id.* Upstream, the U.S. Army Corps of Engineers (ACOE) diverts water from the river, via Green River Diversion Dam, into a lake that is impounded by the Howard Runnet Dam (collectively, Dams). R. at 5. Water is released from the lake via the Runnet Dam back into the River to produce hydropower. *Id.* Oval pigtoe mussels, a listed endangered species, live in the river between the Dam and Bay. R. at 9. The mussels require "slow to moderate" river flows and must remain submerged to survive. *Id.*

Water not diverted through the Dams flows into the river's Bypass Reach (Reach). R. at 5–6. The City of Greenlawn (Greenlawn) owns land on both sides of the Reach, and withdraws water from the Reach for use by its residents and businesses. R. at 5. Pursuant to an agreement with Greenlawn (Agreement), ACOE must provide flows in the Reach sufficient for "such quantities and at such rates as [Greenlawn] is entitled to as a riparian property owner under [New Union law]." R. at 6.

The Dams are authorized by federal statute for "flood control, hydroelectric power, and recreational purposes," R. at 6 (citing River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945)), as well as fish and wildlife needs. R. at 6 (citing Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 562 (1958)). A 1968 Water Control Manual (WCM) guides ACOE's operation of the Dams. R. at 6. The WCM includes parameters for maintaining flows in the Reach, releasing water to generate power, and support fishing and recreation in the river. *Id.* The WCM directs ACOE to curtail releases when the lake reaches certain levels (Zones), as a result of drought conditions. R. at 7. When the lake level reaches Zone 2 or Zone 3, the WCM directs ACOE to reduce flows through the Reach to 7 cubic feet per second (CFS). *Id.* The WCM

also directs ACOE to maintain hydroelectric power releases of up to 200 CFS through the Runnet Dam during Zone 2, but curtail Runnet Dam releases during Zone 3. *Id.*

Greenlawn's water withdrawals have grown greatly in recent decades. R. 5. The city now withdraws up to 20 million gallons per day during peak summer times, and only 5% of this water returns to the river. R. 5–6. Agricultural withdrawals from the river have also increased. R. at 8. The resulting lowered flows in the river increased Green Bay's salinity, decimating the oyster fishery and reducing harvests by 50% since 2000. R. at 10. New Union Oystercatchers, Inc. (NUO), is a non-profit association representing fishermen impacted by the damaged fishery. *Id.* They have suffered reduced catches and incomes, forcing several members to sell their boats. *Id.*

In 2017, drought caused lake levels to reach Zone 2, spurring ACOE to reduce flows in the Reach to 7 CFS, as provided by the WCM. R. at 8. Greenlawn protested, arguing that 7 CFS was outdated for its needs. *Id.* ACOE requested that Greenlawn impose conservation measures on its users during the drought; Greenlawn rebuffed, asserting that "watering lawns and ornamental plants" was a reasonable use. *Id.* On April 23, ACOE relented and increased releases into the Reach from 7 CFS to 30 CFS, ignoring the WCM. R. at 9. As a result, the lake dropped to Zone 3 on May 15. *Id.* Pursuant to the WCM, ACOE ceased releases through the Runnet Dam. *Id.* Meanwhile, ACOE continued allowing 30 CFS to flow into the Reach, nearly all of which Greenlawn consumed. *Id.* The Runnet Dam curtailment and Greenlawn's withdrawals caused the river to turn into "stagnant pools" and "narrow trickles" from the dams to the Bay. *Id.*

The severely reduced flows eliminated any possibility for the mussels to remain submerged, causing 25% of the mussels in the Green River to die. R. at 10. Greenlawn lacked an incidental take permit for the dead mussels. *Id.* Had these conditions continued, the river's

mussel population would have been "entirely eliminated." *Id.* An average minimum flow of 25 CFS over 24 hours is needed to prevent extirpation of the mussels in the river. *Id.*

II. Legal Framework

ESA § 7. Section 7 of the Endangered Species Act (ESA) requires any federal agency to "consult" with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) prior to taking an "agency action" when there is "reason to believe" its action "will likely affect" an endangered or threatened. ESA § 7(a), 16 U.S.C. § 1536(a)(3) (2012). An "agency action" is "any action authorized, funded, or carried out" by a federal agency. *Id.* § 1536(a)(2). This includes, but is not limited to, "granting of licenses or contracts" and "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (2019). The consultation supports § 7's mandate that agencies "insure" their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat." 16 U.S.C. § 1536(a)(2) (2012). Department of Interior (DOI) regulations provide that ESA § 7 only applies to "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03.

ESA § 9. Section 9 of the ESA prohibits the "take" of any endangered species by any person . 16 U.S.C. § 1538(a)(1)(B) (2018). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). "Person" includes any "individual, corporation, partnership, trust, association, or any other private entity" and any "State, municipality, or political subdivision of a State," or officer thereof. *Id.* § 1532(13). Pursuant to the ESA, the FWS promulgated a regulatory definition of "harm" that includes "significant habitat modification or degradation" that "actually kills or

injures wildlife by significantly impairing essential behavioral patterns." 50 C.F.R. § 17.3 (2019).

ESA Citizen Suit Provision. Any "person" may initiate a civil suit "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof." 16 U.S.C. § 1540(g) (2012). "Person" is broadly defined to include almost any private or governmental entity. *Id.* § 1532(13).

Common Law Principles in Riparian States. New Union applies the common law riparian rights doctrine, which grants water rights to owners of land abutting surface water bodies. 1 Waters and Water Rights ("W&WR") § 7.02(a)(1.01) (2019). These landowners are known as known as riparian landowners or riparians. *Id.* Riparian water rights are usufructuary, meaning that riparians do not "own" the water itself, but instead possess a right to use it. *Id.* The public owns the water itself, and riparians' use is limited by the public's rights under both the reasonable use rule and public trust doctrine. *Id.* The reasonable use rule holds that riparians' use of the water must be reasonable as compared to other uses of the same waterbody. *Id.* § 7.02(d)(1.01). The public trust doctrine obligates the state and courts to protect public uses of navigable waters and their tributaries, including navigation, fishing, commerce. *Id.* § 7.05(b).

III. Procedural History

Following the procedures set forth in 16 U.S.C. § 1540(g), NUO filed suit in the U.S. District Court for New Union, alleging Greenlawn violated ESA § 9 and asserting NUO's common law riparian rights, and alleging ACOE violated ESA § 7. R. at 10. ACOE filed a cross claim against Greenlawn, also alleging an ESA § 9 violation. *Id*. Greenlawn filed a counterclaim against ACOE, seeking a declaration of its rights as a riparian landowner. R. at 10–11. The

District Court granted Greenlawn's summary judgment motion on the riparian rights issue, granted ACOE's summary judgment motion on the ESA § 7 claim, granted NUO's summary judgment motion on the ESA § 9 claim, and enjoined Greenlawn from causing water withdrawals that cause river flows to drop below 25 CFS averaged over a 24-hour period. R. at 18.

SUMMARY OF THE ARGUMENT

First, this Court should overturn the District Court's finding that Greenlawn has a right under riparian common law to unmitigated water withdraws from the Green River during a drought, to the detriment of downstream public rights. Greenlawn's exercise of its riparian rights are subject to "public rights" under the reasonable use and public trust doctrines. Further, NUO has common law standing to sue on behalf of its members, who hold fishing, navigation, and commerce rights that have been injured by Greenlawn. Finally, Greenlawn's use of the river was unreasonable because it destroyed the equal and lawful rights of other users.

Second, this Court should overturn the District Court's finding that ACOE's allocation to Greenlawn was nondiscretionary and therefore exempt from ESA § 7. The regulatory exemption for nondiscretionary actions under ESA § 7, 50 C.F.R. § 402.03 (2019), only applies when an agency is expressly required by statute to take the specific action conflicting with the ESA. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007). No statute here expressly requires ACOE to allocate unlimited water to Greenlawn during a drought. Even if the nondiscretionary action exemption applied more broadly, it does not apply here because the Dams' authorizing statutes, the WCM, the Agreement, and common law riparian rights leave ACOE discretion to "consider" wildlife in its decisions. *See id.* at 671.

Third, this Court should uphold the District Court's holding that Greenlawn violated ESA § 9 when it destroyed mussel habitat, killing 25% of the mussel population in the River. ESA § 9 and its regulations prohibit the "significant modification or degradation" of habitat that "actually kills" endangered species. 50 C.F.R. § 17.3 (2018); 16 U.S.C. §§ 1538(a)(1)(B), 1532(13), 1532(19) (2019). Greenlawn directly and foreseeably caused significant habitat degradation and mussel deaths when it demanded ACOE release 30 CFS of water into the Reach during a drought, refused to impose restrictions, and consumed nearly all the flows released.

Fourth, this Court should uphold the District Court's injunction against Greenlawn for its § 9 violation. The Supreme Court made clear in *Tennessee Valley Authority v. Hill* that courts need not apply traditional injunction standards to ESA violations. 437 U.S. 153, 194 (1978). Once an ESA violation and reasonably certain harm are established, courts must enjoin the defendant without balancing equities. *Id.* Circuit courts consistently apply *TVA v. Hill*'s injunction rule to ESA § 7 and § 9 violations. Even if this Court were to apply a balancing test, the record shows that the balance weighs in favor of issuing an injunction to protect the mussels.

STANDARD OF REVIEW

This is an appeal of the District Court's orders granting and denying summary judgment (Issues I through III) and granting a permanent injunction (Issue IV). Federal appellate courts review a district court's summary judgment order *de novo*. *See, e.g.*, *Dullmaier v. Xanterra Parks & Resorts*, 883 F.3d 1278, 1283 (10th Cir. 2018). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ P. 56(a). A circuit court will disrupt the grant of a permanent injunction only if the court finds an abuse of discretion. *eBay Inc. v. MercExchange*, L.L.C., 547 U.S. 388, 391 (2006).

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FAILING TO RECOGNIZE THAT GREENLAWN'S USE WAS CONSTRAINED BY PUBLIC RIGHTS UNDER THE PUBLIC TRUST DOCTRINE AND REASONABLE USE RULE.

The public trust doctrine and water rights principles such as the reasonable use rule exist alongside one another as "parts of an integrated system of water law." *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 732 (Cal. 1983). Whereas the public trust doctrine prevents the government from "abdicat[ing] its trust [responsibility] . . . over navigable waters," *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 453 (1892), "reasonable use" is a property-based principle that constrains riparians' rights to use water compared to other uses. Restatement (Second) of Torts § 856(4) cmt. g. (Am. Law. Inst. 1979) [hereinafter Restat. 2d of Torts].

The District Court's dismissal of NUO's common law claim was erroneous because it: (A) failed to recognize that the public trust doctrine constrains adjudication of matters that affect protected public trust waters; and (B) relied on an outdated interpretation of reasonable use law to support its holding that NUO lacked common law standing to bring an unreasonable use claim.

A. Greenlawn's Water Withdrawals Injure Protected Public Trust Values in Green Bay.

The District Court erred when it failed to apply the public trust doctrine to Greenlawn's withdrawals because: (1) Green Bay is a public trust waterway with protected fishing and ecological values that are impacted by Green River flows; (2) NUO has common law standing to bring a public trust claim because it represents members of the general public; and (3) Greenlawn's use violated the public trust doctrine by severely injuring a public fishery.

1. The Public Trust Doctrine Protects Green Bay and Prevents Harm to the Bay Caused by Diversions from the Green River.

Under the American public trust doctrine, states manage navigable waters in trust for the public to engage in navigation, commerce, and the "liberty of fishing." *Ill. Cent.*, 146 U.S. at 452. The public trust doctrine is rooted in common law and requires states to manage its waters in a quasi-fiduciary capacity for the benefit of the public. W&WR § 30.02(a). Although states can strengthen their public trust doctrines by statute, the doctrine exists as a common law baseline which prevents all subdivisions of the State from taking actions that injure public values of navigable waters. *See Ill. Cent.*, 146 U.S. at 453. ("The State can no more abdicate its trust over . . . navigable waters . . . than it can abdicate its police powers.").

The public trust doctrine also "protects navigable waters from harm caused by diversion of nonnavigable tributaries." *Nat'l Audubon*, 658 P.2d at 720. The protection of tributaries to navigable water is particularly important for supporting public fisheries. *Cal. Trout v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585, 630 (1989) ("[A] variety of public trust interests pertain to non-navigable streams which sustain a fishery."). In *Nat'l Audubon*, diversions from nonnavigable tributaries of Mono Lake, a navigable water, caused lower lake levels and injured protected public interest values of the lake—a fishery, recreational use, and ecological values. 658 P.2d at 719. Because Mono Lake was protected by the public trust doctrine due to its navigability, the California Supreme Court held that the lake was protected from "harm caused by diversion of [water from] nonnavigable tributaries." *Id.* at 721.

Similarly here, Green Bay is a quintessentially navigable waterway, *see Ill. Cent.*,146 U.S. at 453 (a "bay" is a navigable water), and supports a public fishery and ecological values associated with the estuary. Accordingly, uses of the Green River, a tributary to Green Bay

whose flows impact the quality of oyster habitat and the commercial viability of a public fishery, are also constrained by the public trust doctrine.

2. NUO has Standing to Assert Public Rights Under the Public Trust Doctrine.

"[A]ny member of the general public has standing to raise a claim of harm to the public trust," including nonprofit organizations. *Nat'l Audubon*, 658 P.2d at 716 n.11. Because NUO represents the interests of members of the general public and has alleged facts sufficient to show that harm was caused to protected public interests in Green Bay—a traditional navigable water protected by the public trust doctrine—NUO has standing to raise a public trust claim. Thus, the District Court erred when it summarily dismissed NUO's claim for "lack[ing] common law standing," *See* R. at 13.

3. Greenlawn Violated the Public Trust Doctrine by Injuring Protected Values in Green Bay.

As the only arbiter of conflicting uses of water in "pure" riparian jurisdictions like New Union, courts have the final (and only) say over the legality of a riparian use. *See* W&WR § 7.01(b). Further, when analyzing water diversions, courts "should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." *Nat'l Audubon Soc'y*, 658 P.2d at 712.

Here, Greenlawn's water diversions from the Green River impaired public trust resources by reducing flows into Green Bay for years, and the water quality and fishery within the bay degraded significantly. R. at 9. The District Court had the legal responsibility to recognize the public trust doctrine and enjoin state activities that injure protected public trust resources. Accordingly, a remand is appropriate instructing the District Court to recognize the public trust doctrine and Greenlawn's injury of protected public trust resources in Green Bay.

B. Greenlawn Violated the Reasonable Use Rule Because it Injured Other Coequal Uses in the Green River.

The District Court incorrectly found that "only the rights of landowners are protected" under riparian common law, *see* R. at 14, because: (1) the reasonable use doctrine recognizes public rights and protects instream uses; (2) NUO has public interest standing to sue; and (3) Greenlawn's use was unreasonable under the circumstances when it injured coequal instream uses of the Green River without sharing the shortage.

1. The Reasonable Use Rule Recognizes and Protects Public Rights to Use Water in the Streambed, Including for Fishing, Navigation, Recreation, and Wildlife Uses.

Under the reasonable use rule, a riparian's use is unreasonable when "it is so excessive as to cause substantial damage to the property of other riparian owners, *or materially interferes with public rights*." *Meyers v. Lafayette Club*, 197 Minn. 241, 250 (1936) (emphasis added). "'Public rights in water' are legally protected rights to use . . . public waters for transportation, . . . fishing, . . . and other purposes." Restat. 2d of Torts § 856(4) cmt. g. Riparians are liable for uses that "interfere[] with the exercise of a public right to use [public] waters." *Id.* § 856(4).

The application of public rights to limit riparian proprietors' private uses is not merely academic. Courts have consistently recognized the doctrine, including in the seminal case of *Harris v. Brooks*, 283 S.W.2d 129, 132 (Ark. 1955) (concluding that "the best interest of the parties and the public in general will be served" by enjoining an irrigating riparian in favor of recreational and fishing use); *see also St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U.S. 349, 369 (1897) ("The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right."). Here, multiple uses of the Green River downstream of the Dams are protected by public rights: namely, fishing, navigation, instream recreation, and wildlife habitat downstream of the Dams. Thus, upstream riparians may not unreasonably interfere with these protected uses.

2. NUO has Public Interest Standing to Enforce Public Rights to Flows in the Green River

Although it is unclear what common law standing doctrine the District Court relied on in reaching its conclusion, standing is generally defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Standing*, *Black's Law Dictionary* (11th ed. 2019). As opposed to Article III standing, which has not been challenged here, courts typically recognize common law standing when the plaintiff asserts harm to the public interest or an injury that is disproportionate to the plaintiff compared to the public at large. For instance, New Jersey has "liberal rules of standing" that give "due weight to . . . the public interest," requiring that plaintiffs only demonstrate "a sufficient stake and real adverseness with respect to the subject matter of the litigation." *Jen Elec., Inc. v. County of Essex*, 964 A.2d 790, 801–02 (N.J. 2009). Other states grant standing to parties "that will be detrimentally affected in a manner different from the citizenry at large if the [law] is not enforced." *Lansing Schools Educational Ass'n v. Lansing Board of Education*, 792 N.W.2d 686, 702 (Mich. 2010) (holding that, even where a law "[did] not create an express cause of action or expressly confer standing," stakeholders with "a substantial interest in the enforcement" of the law had standing).

Applying the *Lansing Schools* test, NUO has common law public interest standing simply because its members "will be detrimentally affected in a manner different from the citizenry at large" if Greenlawn's withdrawals continue unfettered. Early courts might have denied a non-riparian standing because the reasonable use rule developed to resolve conflicts over the use of water between riparians. *See* W&WR § 7.02(a.01) (framing the rule as "an obligation not to injure unreasonably another riparian user."). However, such a mypoic and outdated view fails to recognize public rights to use water in place. *See* Restat. 2d of Torts § 856(4) cmt. g. Public rights under the reasonable use rule "may be exercised by members of the public although the users own no shoreline property fronting that portion of the watercourse or lake subjected to the

use." *Id.* Thus, as long as "a member of the public is regarded as . . . being the beneficiary of [public rights], he may have standing to sue in his own right." *Id.*

3. Greenlawn's Use was Unreasonable Because it was not Entitled to the Domestic Use Preference and it Interfered with the Exercise of Coequal Public Rights in the Green River.

The reasonable use rule recognizes that water users may not "destroy" or "interfere" with the lawful use of another where the interference is "unreasonable"—accounting for "all the facts and circumstances of that particular case" and the "reasonable rights of each." *Harris v. Brooks*, 283 S.W.2d at 134. *Harris* also recognized "*strictly* domestic purposes" as superior, while "all other lawful uses are equal." *Id.* (emphasis added). The District Court incorrectly relied on *Harris* to support the claim that Greenlawn's municipal use qualifies for the domestic preference. *See* R. at 13. This interpretation is contrary to the Restatement, which provides, "[t]he preference for domestic use does *not* extend to withdrawals by a municipality . . . that supplies the domestic needs of a city . . . . " Restat. 2d of Torts § 850A cmt. c. "These large public and commercial uses receive no preference and are subject to liability if the taking of their supplies unreasonably causes harm . . . ." *Id.* Thus, Greenlawn's use is not "strictly domestic," and the District Court erred when it determined that Greenlawn's unlimited use to water lawns and ornamental plants received preference over all other uses of the River.

Because Greenlawn is unable to take advantage of the domestic use preference, its use is equal to "all other lawful uses," including fishing and ecological uses in the Green River, and the reasonableness of its use must be judged "under all the facts and circumstances of [a] particular case." *Harris*, 283 S.W.2d at 134. In *Harris*, the plaintiff owned land abutting a non-navigable lake and operated a boating and fishing business. *Id.* at 130. During a drought, the defendant, a riparian irrigator on the same lake, withdrew more water from the lake than in previous years. *Id.* at 131. This caused the water level to drop so low that fish stopped biting, reducing the plaintiff's

income "to practically nothing." *Id.* The court concluded that the uses were equal, and directed the trial court to enjoin the defendant from making withdrawals when the water level reached a specific level, because the plaintiff's use and the public's recreation interest would be destroyed if pumping were to continue. *Id.* at 135. Similar to *Harris*, Greenlawn's diversions damaged recreational and fishing uses in the Green River that benefit the public, and resulted in severe economic loss for fishermen downstream. Further, Zone 2 is an identifiable point at which the District Court can order Greenlawn to impose conservation measures or cease pumping. Therefore, Greenlawn's use was unreasonable "under all the facts and circumstances."

Reasonable use is a "flexible" determination that must "change with the times." W&WR § 4.01. Thus, it is irrelevant whether Greenlawn's use might have been considered reasonable in the past; what matters is whether Greenlawn's use interferes or destroys another lawful use at present and into the future. Because Greenlawn's withdrawals are unreasonable, a remand is appropriate directing the District Court to reach the merits of NUO's reasonable use claim.

II. ACOE MUST COMPLY WITH ESA § 7 BECAUSE THE ALLOCATIONS TO GREENLAWN DURING DROUGHT CONDITIONS WERE DISCRETIONARY.

The ESA is bold and broad. Its exceptions are narrow. The statute reflects Congress's "conscious decision . . . to give endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth. (TVA) v. Hill*, 437 U.S. 153, 185 (1978). The District Court erred when it found that ACOE's water allocations to Greenlawn during drought conditions were nondiscretionary and therefore exempt from ESA § 7. ESA § 7 requires any federal agency to "consult" with FWS or NMFS prior to taking an action that will "likely affect" endangered or threatened species. 16 U.S.C. § 1536(a)(3) (2018). While Department of Interior regulations create an ESA § 7 exemption for actions that are not "discretionary," 50 C.F.R. § 402.03 (2019),

the Supreme Court narrowly "read § 402.03 to mean . . . that § 7(a)(2) . . . does not attach to actions . . . that an agency is *required* by *statute* to undertake once certain *specified triggering events* have occurred." *Nat'l Ass'n of Home Builders (NAHB) v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007) (second and third emphases added).

The District Court's decision failed to comport with the limitations articulated in *NAHB*, instead creating an exception that swallows the rule. This Court should overturn the District Court's decision and hold that ACOE must comply with ESA § 7 because: (A) ACOE was not expressly required by statute to provide additional flows to Greenlawn during drought conditions; and (B) even if the nondiscretionary action exemption could apply more broadly, the exemption does not apply here because ACOE had ample discretion under the Dams' authorizing statutes, the WCM, its agreement with Greenlawn, and New Union water law.

A. ACOE Must Comply with ESA §7 Because Only Express Statutory Mandates Can Exempt An Action from § 7, And No Expressly Mandates Applies Here.

The District Court erred by ignoring the fact that the U.S. Supreme Court has only upheld the nondiscretionary action exemption where the agency "is *required* by *statute* to undertake" the specific action. *NAHB,* 551 U.S. at 669 (second emphasis added); *see also Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012) (recognizing that *NAHB* "harmonizes the ESA consultation requirement with other statutory mandates that leave an agency no discretion to consider the protection of listed species"). Moreover, this "statutory command" must be express to exempt the action from Section 7; Congressional intent alone, even in Congressional reports, is insufficient to deem the action nondiscretionary. *See NAHB,* 551 U.S. at 670, n.9. The nondiscretionary action should only apply to actions expressly required by statute—rather than contracts, manuals, or common law—for four reasons: (1) the Court in NAHB was concerned with the canon against implied statutory repeals; (2) the sovereign acts

doctrine allows the federal government to supersede its contracts; (3) agency manuals lack the force of law; and (4) the ESA preempts conflicting state common law.

1. The Nondiscretionary Action Exemption Resolves Conflicts Between Statutes.

The Supreme Court's primary concern in *NAHB* was resolving conflicts between statutes. Cabining the nondiscretionary action exemption to express statutory mandates "gives effect to the ESA's provision, [and] also comports with the canon against implied [statutory] repeals." 551 U.S. at 669. It avoids implicitly overriding "otherwise mandatory statutory duties," *id.*, while also avoiding the administrative creation of a cavernous exemption that, if applied to manuals, contracts, or common law, would undermine the purpose and structure of § 7. Exempting an agency from a § 7 consultation results in uninformed decisionmaking, which inhibits the government's ability to fulfill its §7 mandate to "insure" that the survival of endangered species is not jeopardized. Thus, a narrow exemption is the only way to maintain the ESA's integrity.

2. Contractual Obligations Do Not Satisfy the Exemption Because the Sovereign Acts Doctrine Allows the ESA to Override Contractual Obligations.

Under the Sovereign Acts Doctrine, any contract to which the federal government is a party "remain[s] subject to subsequent legislation by the sovereign" unless the contract expressly provides in "unmistakable terms" that subsequent legislation will not affect it. *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986) (quotations omitted). The federal government is not liable for breach of contract when it implements a "public and general act," such as the ESA and its § 7 consultation requirement, which makes compliance with the contract "impossible." Courts have repeatedly refused to honor federal water contracts by using the ESA to invoke the sovereign acts doctrine. *See, e.g., Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 521 (Fed. Cir. 2011) (citations omitted); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288 (Fed. Cir. 2008); *Rio Grande Silvery Minnow v. Keys*, 333

F.3d 1109, 1138-39 (10th Cir. 2003) (Seymour, J., concurring). Because the sovereign acts doctrine allows the ESA to override the contractual obligations of federal agencies, including ACOE, contractual obligations cannot trigger the ESA § 7 nondiscretionary action exemption.

3. Agency Manuals Adopted Through Informal Procedures are Discretionary.

Agency manuals adopted outside of the Administrative Procedure Act's notice and comment procedural requirements typically do not carry the "force of law" and thus are not binding on the agency, nor must courts given them deference. *See United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (holding that the agency "classification rulings" at issue were "beyond *Chevron*" deference, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines"). Because such manuals do not bind the agency, they do not fall under the nondiscretionary action exemption to ESA § 7.

4. The ESA Preempts New Union State Water Law When There is a Conflict.

The ESA preempts state water law when it poses an "obstacle" or "actually conflicts" with the "execution of the full purposes and objectives of Congress." *See, e.g., Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158 (1978). Because the ESA's "take" prohibition extends to "any State, municipality, or political subdivision of a State," 16 U.S.C. § 1532 (2018), Congress "intended to preempt any action of a state [or city] inconsistent with and in violation of the ESA." *Strahan v. Coxe*, 127 F.3d 155, 168 (1st Cir. 1997). Consequently, asserted obligations of preempted state water rights do not satisfy the nondiscretionary action exemption to ESA § 7. Greenlawn's interpretation of its riparian rights conflict with ACOE's statutory mandate to consult with FWS. Consequently, the ESA preempts Greenlawn's asserted state water rights, and ACOE's decision to fulfill Greenlawn's water demand was a discretionary action subject to § 7.

B. The Dam Statutes, WCM, Contract, and Common Law Allow Discretion To Consider Wildlife, Sufficient to Trigger § 7.

Even if the nondiscretionary action exemption applied beyond actions expressly "*required* by statute," *NAHB*, 551 U.S. at 669, the exemption would still not apply here because the Dams' authorizing statutes, the WCM, the Agreement, and fulfillment of riparian water rights all provide discretion sufficient to trigger ESA § 7. The exemption only applies when the statute contains a "mandatory and exclusive list" of "specified triggering events" that prevent the agency from fulfilling § 7's mandate to "insure that the actions it authorizes, funds, or carries out are not likely to jeopardize listed species or their habitats." *Id.* at 662–71.

Circuit courts have held that an agency must comply with § 7 so long as the agency "retains some discretion to take action for the benefit of a protected species." *NRDC v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (internal quotation marks removed). "[T]he requisite discretion for section 7(a)(2) of the ESA [is] the discretion 'to consider the protection of threatened or endangered species as an end in itself.'" *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (quoting *NAHB*, 551 U.S. at 671). In addition, an agency action done "in furtherance of a broad Congressional mandate," is still discretionary and subject to § 7 if Congress has neither "quantified" nor "specified the manner in which agencies must fulfill" its broad goals. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928–29 (9th Cir. 2008) (citations omitted). An agency decision requiring the agency to "bring its expertise to bear" is subject to ESA § 7. *See Nat'l Wildlife Fed'n v. Sec'y of the DOT*, 374 F. Supp. 3d 634, 660–63 (E.D. Mich. 2019). Here, ACOE is subject to ESA § 7 because none of the above tests of the nondiscretionary action exemption are satisfied by: (1) the Dams' authorizing statutes; (2) the WCM; or (3) the Agreement and any riparian water rights.

1. The Dam Statutes Do Not Require Water Allocations for Riparian Demands.

Neither the Dams' authorizing statute nor the Fish and Wildlife Coordination Act bind ACOE to divert water to Greenlawn during a drought. These statutes bear no resemblance to the scheme at issue in *NAHB*, where the Supreme Court concluded that an EPA action taken pursuant to the Clean Water Act (CWA) was nondiscretionary and thus exempted from ESA § 7. 551 U.S. at 669. The CWA required that the EPA "shall approve" an application to transfer regulatory authority to a state agency upon satisfaction of a "mandatory and exclusive list" of specific criteria. 551 U.S. at 662-64. This list left no room for "the EPA to consider the protection of endangered species." *Id.* at 671.

By contrast, the Dams' authorizing statute, the River and Harbor Act of 1945, authorized the dam for the purposes of "flood control, hydroelectric power, and recreational purposes." R. at 6. The Act also required "consideration of the proper utilization and *conservation in the public interest* of the resources of the region." 59 Stat. 10, 12 (emphasis added). None of these purposes require unlimited flows be furnished for all municipal uses. Moreover, Congress evidenced its intent in the Act of 1945 that state or municipal riparian water demands should *not* take precedence over the dam's federally declared purposes. The Act provides that, "in States lying . . . *west* of the ninety-eighth meridian," federal uses of dams "shall . . . not conflict with any beneficial or consumptive use," 59 Stat. 10, 11 (emphasis added), but it did not include a similar provision for states *east* of the ninety-eight meridian, where Greenlawn sits. Thus, applying the canon of statutory construction "expressio unius est exclusio alterius," Congress knew how to expressly make certain uses of the dam subservient to others, and it chose not to do so for eastern riparian states such as New Union. *See Tenn. Valley Auth.*, 437 U.S. at 188 (determining under the same canon that the ESA did not exempt a federal dam project, because the ESA "creates a number of limited hardship exemptions," none of which applied to federal agencies).

In addition, the Fish and Wildlife Coordination Act of 1958 expressly mandates that any water diversion "shall be made . . . for the conservation, maintenance, and management of wildlife resources thereof, and its habitat thereon." 72 Stat. 562, 566 (1958). Thus, unlike the statute at issue in *NAHB*, the Act of 1958 plainly "authorizes [ACOE] to consider the protection of threatened or endangered species as an end in itself" when evaluating its choices in operating the dams. See *NAHB*, 551 U.S. at 671. There is not only *room*, there is a *requirement* for ACOE to consider wildlife and fulfill the purposes of ESA § 7. In sum, the applicable statutory authority demonstrates that ACOE's decision to divert water away from the protected habitat of an endangered species was, at the very least, discretionary, if not plainly contrary to ACOE's enabling statutes.

2. Operation under the Water Control Manual is Discretionary.

The WCM does not require ACOE to prioritize Greenlawn's erroneous view of its riparian water rights above all statutory purposes of the Dams. ACOE's interpretation of its obligations under the WCM and 50 C.F.R. § 402.03 are not entitled to any deference by this Court. ACOE's own regulations state that its "water control plans" are "under the *discretionary* authority of the Chief of Engineers." 33 CFR § 22.5(d) (emphasis added). Thus, WCM is not a regulation "carrying the force of law" and does not qualify for deference under *Chevron v. NRDC*, 467 U.S. 837, 842 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Likewise, ACOE's interpretation of 50 C.F.R. § 402.03, which is a DOI regulation, is not entitled to deference under *Auer v. Robbins*, which affords deference only to agencies' interpretations of their "own regulations." 519 U.S. 452, 461 (1997).

Further, the text of the WCM shows it is discretionary. Although the WCM directs ACOE to operate the Dam "in a manner that complies with any water supply agreements" and

"the riparian rights of property owners established under New Union law," the WCM also contains competing provisions requiring ACOE to reduce flows to Greenlawn during times of drought. R. at 6–7. ACOE's decision to choose one provision of the WCM over another imposing conflicting responsibilities is an inherently discretionary action. Moreover, the provision ACOE chose—to comply with the Agreement— gives ACOE discretion, as discussed below. Finally, other circuits have held that ACOE's operation of a dam pursuant to a WCM, including the decision to release or not release water from a reservoir, was discretionary under ESA § 7. *See American Rivers, Inc. v. U.S. Army Corps of Engineer*, 421 F.3d 618, 631 (8th Cir. 2005).

3. The Agreement with Greenlawn and Fulfillment of Riparian Water Rights Requires Ongoing Discretion and Expert Judgement.

ACOE has ample discretion under its Agreement with Greenlawn to trigger ESA § 7. The Agreement requires ACOE to maintain flows "*sufficient* to allow the City of Greenlawn to continue water withdrawals and at such *rates and times* as it is entitled to as a riparian property owner." R. at 6 (emphasis added). This language calls for agency discretion and expertise in three ways. First, such language does not require ACOE to manage the Dams *solely* for the benefit of Greenlawn, nor does it preclude ACOE from "consider[ing] the protection of threatened or endangered species as an end in itself when evaluating" water allocation decisions. See *NAHB,* 551 U.S. at 671. Second, significant judgment is needed for determining what flows are "sufficient" and at what "rates and times." *Cf. NRDC v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (holding BoR had discretion sufficient to trigger ESA §7 where contract gave irrigation districts had a "first right" to "the project's available water supply"). Third, there is a great deal of flexibility and uncertainty involved in assessing what Greenlawn may be "entitled to as a riparian property owner," particularly given that, as discussed in Part I, the extent of

common law riparian rights are subject to reasonable use, public interest and public trust considerations. These kinds of judgement calls are inherently discretionary, requiring the agency to use its expertise to continually assess available water supply and demands in the context of varying riverine conditions. Such ongoing, dynamic, and multi-factor decisions are quite different from the one-time, checklist decisions courts have held to be nondiscretionary, such as the "mandatory and exclusive" list of requirements in *NAHB*. 551 U.S. at 662.

The Agreement and decisions thereunder are akin to *Rio Grande Silvery Minn v. Keys,* where the Tenth Circuit held that BoR's allocation of water pursuant to contracts with a city was discretionary and subject to ESA § 7. 333 F.3d at 1122–31. The contract in *Rio Grande* did not specify quantities of water, and it required the parties to share the shortage if "actual available water supply" was less than expected. *Id.* The court found these clauses gave BoR "discretion to determine the 'available water' from which allocations would be made, allotments, which, in times of scarcity, might be altered for 'other causes,' [such as] the prevention of jeopardy to an endangered species." 333 F.3d at 1129. The court also reasoned any conclusion to the contrary would "disconnect[BoR] from [its] congressional authorization." *Id.* Just as the requirements to determine "available water" and adjust in times of scarcity gavie the agency discretion in *Rio Grande,* this Court should likewise find that ACOE retained contractual discretion to determine "sufficient" water at appropriate "rates and times," as well as discretion in its WCM to determine quantities and adjust flows in times of drought, while supporting the Dam's primary statutory purposes of flood control, hydroelectric power, recreation, fish, and wildlife. R. at 6. And, just as the Tenth Circuit aptly decided that ESA § 7 applied in *Rio Grande,* so too does § 7 apply here.

III. GREENLAWN VIOLATED ESA § 9 WHEN IT WITHDREW THE ENTIRE FLOW OF WATER FROM THE BYPASS REACH DURING DROUGHT CONDITIONS, DIRECTlY AND FORESEEABLY DEGRADING MUSSEL HABITAT.

The District Court correctly found that Greenlawn violated ESA § 9 when it demanded ACOE quadruple the flows into the Reach during drought conditions, refused to restrict its water use, and consumed nearly all those flows. Greenlawn's water consumption left almost nothing for the downstream river, destroying mussel habitat and killing 25% of the mussels. R. at 9.

ESA § 9 prohibits the "take" of any endangered species by any "person," including a municipality. 16 U.S.C. §§ 1538(a)(1)(B), 1532(13) (2012). And "take" includes "harm," *Id.* § 1532(19), which by regulation includes "significant habitat modification or degradation" that "actually kills or injures wildlife by significantly impairing essential behavioral patterns." 50 C.F.R. § 17.3 (2019). Here, Greenlawn violated ESA § 9 when: (A) its extravagant water consumption during drought conditions caused significant degradation of mussel habitat in the Green River, actually killing many mussels; and (B) Greenlawn proximately caused this significant degradation of habitat because that degradation was the foreseeable result of Greenlawn's actions.

A. Greenlawn's Actions Actually Killed Endangered Mussels, Violating ESA §9.

The Endangered Species Act extends broad protections to threatened and endangered species. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *TVA v. Hill*, 437 U.S. 153, 184 (1978). To effectuate this expansive Congressional intent to protect endangered species, ESA § 9 prohibits the "take" of any endangered species. 16 U.S.C. § 1538(a)(1)(B) (2019). Recognizing that habitat modification is the greatest threat to endangered species' long-term survival, FWS

regulations adopted pursuant to the ESA further define "harm" within "take" to include "significant habitat modification or degradation" that "actually kills or injures wildlife by significantly impairing essential behavioral patterns." 50 C.F.R. § 17.3 (2019). The Supreme Court has held this definition of "harm" to be consistent with the intent of Congress. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 707 (1995).

In the present case, the District Court appropriately found that Greenlawn's water withdrawals violate § 9 by significantly "modif[ying] and degrad[ing] oval pigtoe mussel habitat, causing actual harm to the mussels." R. at 16. The mussels live in the beds of the Green River downstream from Greenlawn and require a minimum flow of 25 CFS in the Green River averaged over a 24-hour period if they are to survive in the ecosystem. *Id.* at 9–10. However, Greenlawn's withdrawals of 30 CFS from the Bypass Reach during the 2017 drought reduced the Green River to a series of stagnant pools. *Id.* at 9. In demanding that ACOE quadruple flows into the Bypass Reach during those drought conditions, Greenlawn also caused Lake levels to drop from Zone 2 to Zone 3, resulting in ACOE's curtailment of hydroelectric power releases. R. at 8. When ACOE requested that Greenlawn restrict certain water uses such as lawn watering and car washing, Greenlawn refused.

Greenlawn's unmitigated water consumption during drought conditions left essentially no water flowing downstream for the mussels. If these conditions were allowed to persist, the Green River population of the oval pigtoe mussel would have been "entirely eliminate[d]." R. at 9. Therefore, the District Court appropriately found it "beyond dispute" that Greenlawn's actions substantially degraded mussel habitat in the Green River, actually killing mussels.

B. Greenlawn's Water Diversions Are the Proximate Cause of Mussel Deaths.

The District Court correctly found that degradation of the endangered mussels and their habitat was the "direct and foreseeable result" of Greenlawn's withdrawals and, therefore, that Greenlawn was both the actual and proximate cause of the mussel deaths. R. at 17. Although the ESA itself makes no mention of proximate causation, the Supreme Court, in a footnote in *Sweet Home*, implied that § 9 liability incorporates "ordinary requirements of proximate cause and foreseeability." 515 U.S. at 696. n. 9. Justice O'Connor's concurring opinion particularly stressed the importance of a proximate causation requirement. *Id.* at 709–13 (O'Connor, J., concurring). She explained that while liability may not attach to a "a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby injures protected fish," liability would attach to a landowner who drains a pond on his property, killing endangered fish in the process. *Id* at 713 (O'Connor, J., concurring). Although the proximate causation discussion in *Sweet Home* was dicta, federal courts have since applied a proximate causation analysis to habitat destruction as a possible "take" under ESA § 9.

Proximate causation is "a flexible concept" that is met when the causal link between conduct and result is not "so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 572 U.S. 434, 445 (2014) (citations and internal quotations omitted). The concept examines the "foreseeability or the scope of the risk created by the predicate conduct." *Id.* In the ESA context, courts have little difficulty finding proximate causation when defendants engage in "direct" habitat modification—where conduct on a particular piece of land modifies the habitat on that land. *See, e.g., Envt'l. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F. 3d 1073 (9th Cir. 20001) (logging); *Arizona Cattle Growers' Assoc. v. United States Fish & Wildlife Serv.*, 63 F. Supp. 2d 1034 (D. Ariz. 1998) (grazing).

But direct habitat modification is not a requirement. Courts have found the ESA "not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking." *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (emphases added). Courts have found ESA § 9 liability where a state or local government permits or licenses private activities in "specifically the manner that is likely to result in violation of [the ESA]." *Id.* at 164 (holding that licensing of fishing and lobstering equipment, which was likely to harm endangered species, violated ESA). Likewise, a government violates the ESA where licensure of a private activity is the "stimulus" for incidental takings. *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1079–80 (D. Minn. 2008) (holding that state licensure of hunting bobcats and fishercats using "foothold" traps violated the ESA where the traps posed a risk of taking threatened lynx); *see also Sierra Club v. Yeutter*, 926 F.2d 429, 438–39 (5th Cir. 1991) (finding Forest Service's timber stand management was a taking of a listed woodpecker); *Loggerhead Turtle v. Volusia Cty. Council*, 896 F.Supp. 1170, 1180–81 (M.D. Fla. 1995) (holding county's authorization of vehicular beach access during mating season of endangered turtles was a taking).

Of particular factual relevance to the present case, several courts have found that withdrawals from federal water projects can improperly destroy downstream habitat of endangered species, triggering ESA § 7 requirements and restrictions. *See e.g. Nez Perce Tribe v. NOAA Fisheries*, No. CV-07-247-N-BLW, 2008 U.S. Dist. LEXIS 28107, *21 (D. Idaho Apr. 7, 2008) (Bureaus of Reclamation's (BoR) diversion of water away from downstream critical spawning and rearing habitat of the endangered fish could destroy or adversely modify critical habitat); *Am. Rivers, Inc. v. United States Army Corps of Eng'rs.*, 421 F.3d 618 (8th Cir. 2005) (ACOE operation of dam and reservoir threatened downstream endangered species); *NRDC v.*

Jewell, 749 F.3d 776, 779 (9th Cir. 2014) (en banc) (BoR water allocations threatened listed smelt); *Rio Grande Silvery Minn v. Keys*, 333 F.3d 1109 (10th Cir. 2003), *vacated as moot,* 355 F.3d 1215 (10th Cir. 2004) (BoR operation of dam flows risked killing endangered minnow downstream). Such situations would also trigger ESA § 9 if, as is the case with Greenlawn, a non-federal entity withdrew water without an incidental take permit. So long as the resulting harm is not too "remote, attenuated, and fortuitous," *Aransas Project v. Shaw*, 775 F.3d 641, 656 (5th Cir. 2014), the ESA's "broad purpose" demands that Section 9 applies to activities and permitting schemes that enable or prompt the taking of listed species and significant modification of habitat. *See Sweet Home*, 515 U.S. at 700.

Strahan v. Coxe is illustrative of circumstances where an indirect action proximately causes the taking of endangered species. 127 F.3d 155. The First Circuit held a state government liable for ESA § 9 violations for the "indirect causation of a taking" due to its fishing licensing scheme, even though private third parties were the direct cause of the takings. *Id.* at 163–64. At issue was the state's licensure of gillnet fishing and lobster traps that were known to entangle and kill endangered whales. *Id.* at 158–59. The court rejected the state's argument that licensure of the traps did "not cause the taking any more than its licensure of automobiles and driver solicits or causes federal crimes" or accidents. *Id.* at 163–64. The court reasoned that while licensed drivers only violate federal law when they make an "independent decision to disregard or go beyond the license[]," by contrast it was impossible to use the traps without risking a take of the listed whales, even when in compliance with the permits. *Id.* at 164. Thus, because the state licensed conduct "in specifically the manner that is likely to result in [a taking]," the state was liable under § 9. *Id.*

By contrast, in *Aransas Project v. Shaw*, the Fifth Circuit refused to impose ESA § 9 liability on the state of Texas for its permitting of water withdrawals that contributed to the death of 23 endangered cranes. 775 F.3d 641, 656–63 (5th Cir. 2014). There, the withdrawals and drought conditions decreased freshwater inflows into a downstream bay, which increased salinity levels in the bay, which reduced the growth of blue crabs and wolfberries, and which finally caused "food stress" to the cranes. *Id.* at 656–60. The court found the causal link between the state's conduct and the habitat degradation to be too "remote, attenuated, and fortuitous" for ESA § 9 liability to attach. *Id*. The court also noted multiple times that the crane population continued to *increase*, significantly undermining the plaintiffs' claims. *Id.* at 660–62.

Here, like in *Strahan,* Greenlawn enabled activities "in specifically the manner that is likely to result in [a taking]" when it demanded that AOCE quadruple flows through the Bypass Reach during drought conditions and rejected ACOE's pleas to impose restrictions on water use. Unlike in *Aransas,* the resulting degradation of habitat and animal deaths were not the result of an "attenuated" and "fortuitous" causal chain that originated with Greenlawn's actions. The causation here is direct and foreseeable: based on its communications with ACOE, Greenlawn knew, or reasonably should have known, that Greenlawn was consuming the last of the water feeding the Green River and the mussels. Greenlawn protested ACOE's restrictions of flows during Zone 2 drought conditions and expressly rejected the District Commander's request that Greenlawn institute reasonable restrictions on lawn watering and car washing. R. at 8. Even after Greenlawn's withdrawals drained the Lake and spurred ACOE to implement Zone 3 (Drought Emergency) curtailment of flows through the hydroelectric dam, Greenlawn continued to consume nearly all the 30 CFS of water released into the Bypass Reach—more than four times as much water as called for in WCM Zone 2 and 3 drought scenarios. R. at 8. Rather than restrict its

own water use, Greenlawn demanded more water and consumed it all, directly and foreseeably destroying the mussels' downstream habitat.

Other factors that Greenlawn blames for the mussel deaths, *see* R. at 16, do not alleviate Greenlawn's liability. The upstream agricultural withdrawals have existed since the 1980's and never adversely affected mussel habitat. Further, the agricultural uses return far more water to the watershed than Greenlawns's water consumption for decorative watering, which is 95% consumptive. Similarly, ACOE's operations of the hydroelectric dam do not consume any water and thus do not lessen Greenlawn's liability. And ACOE only curtailed hydroelectric releases after Greenlawn's quadrupled withdrawals drained the Lake and caused Zone 3 drought conditions. Finally, Greenlawn cannot blame the habitat degradation and mussel deaths on the weather, given that drought conditions have become frequent over the last 13 years, yet the mussels had survived until now.

In sum, this Court should uphold the District Court's ruling that Greenlawn's continued withdrawals of 30 CFS during severe drought conditions violated ESA § 9 because Greenlawn directly and foreseeably caused the substantial degradation of oval pigtoe mussel habitat.

IV. THE DISTRICT COURT APPROPRIATELY ENJOINED GREENLAWN FROM MAKING WATER WITHDRAWALS THAT REDUCE DOWNSTREAM FLOWS BELOW THE RATE NECESSARY FOR MUSSEL SURVIVAL.

An appellate court will disrupt a permanent injunction only if the issuing court abused its discretion in granting the injunction. *eBay Inc. v. MercExchange*, L.L.C., 547 U.S. 388, 391 (2006). This level of review establishes a "high bar" for the appellant to surmount. *United States v. LeShore*, 543 F.3d 935, 939 (2008). Here, the District Court did not abuse its discretion when it enjoined Greenlawn from "making water withdrawals that have the effect of reducing

downstream flows below the rate necessary for mussel survival." *See* R. at 18. This Court should uphold the injunction because: (A) the District Court correctly determined that it need not "balance species eradication against the claimed public benefits of agency activities," see R. at 17–18; and (B) even if the court were required to balance the equities, the record demonstrates that such balancing would favor issuing the injunction.

A. Courts Need Not Balance the Equities to Issue an Injunction under the ESA.

The seminal case of *TVA v. Hill* held that courts should not "strike a balance of equities" when determining the appropriateness of a permanent injunction for an ESA violation. 437 U.S. at 193–94. The Court recognized that Congress has the "exclusive province" to alter the "balancing of the equities" test traditionally used in determining whether injunctive relief is appropriate. *Id.* at 194. Moreover, in passing the ESA, "Congress [spoke] in the plainest of words, making it abundantly clear that *the balance has been struck in favor of affording endangered species the highest of priorities*." *Id.* (emphasis added). The Supreme Court found Congress' mandate so clear that it enjoined the construction of a "virtually completed dam for which Congress ha[d] expended more than $100 million," in order to protect a "relatively small number of three-inch fish" that were endangered. *Id.* at 172.

Pursuant to *TVA v. Hill*, this Court should uphold the District Court's determination that it need not balance the equities in the instant case because: (1) the traditional four-factor test for injunctions does not apply to ESA violations; and (2) *TVA v. Hill's* holding is applicable to permanent injunctions issued under ESA § 9 and the Citizen Suit provisions.

1. The Traditional Four-Factor Test for Injunctive Relief Does not Apply to ESA Violations.

Although injunctions issued under other statutes must ordinarily undergo a four-factor test which includes a balancing of the equities,[1] the U.S. Supreme Court has repeatedly reaffirmed that the ESA "foreclose[s] the traditional discretion possessed by an equity court" and "contains a flat ban on the destruction of critical habitats of endangered species." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543 n.9 (1987); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). Numerous U.S. courts of appeals have reaffirmed the Supreme Court's refusal to balance the equities when granting injunctions pursuant to ESA violations. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018) ("[t]he ESA removes the [all but the irreparable injury] factor[] in the four-factor injunctive relief test from our equitable discretion."); *Fla. Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1284-85 (S.D. Fla. 2005), *aff'd sub nom. Fla. Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) (affirming that the ESA forecloses a balancing of the equities and consideration of the public interest.); *Fish v. Kobach*, 840 F.3d 710, 751 n.24 (10th Cir. 2016) (ESA "contains a flat ban on destruction of critical habitats," and Congress intentionally "depart[ed] from established principles of equity jurisprudence" with the ESA).

Recent rulings by the Supreme Court requiring the four-factor injunction test under *other* statutes such as the National Environmental Policy Act (NEPA)—a purely procedural statute—are inapposite to the injunction test under the ESA, which contains a clear mandate to prevent or

[1] This "traditional" injunction test examines whether (1) the plaintiff has suffered "irreparable injury"; (2) that "monetary damages[] are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (citation omitted) (holding that the four-factor test applies to permanent injunctions under NEPA).

cease activities that threaten listed species. *Cf. Winter v. NRDC, Inc.*, 555 U.S. 7 (2008); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

2. TVA v. Hill Applies to ESA § 9 Claims Brought as Citizen Suits.

The standard of injunctive relief established by *TVA v. Hill* applies to both ESA § 9 and § 7 violations. The Court explained that Congress made clear "in *literally every section of the Statute*" that its "plain intent . . . was to halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill*, 437 U.S. at 184 (emphases added). The Court later repeated this conclusion and expressly applied it to ESA § 9 in *Sweet Home*. 515 U.S. at 698–99. Further, lower courts have applied *TVA v. Hill*'s standard of injunctive relief to citizen suit claims for ESA § 9 violations, holding that the normal "balance of equities" test is inapplicable in such situations. *Strahan v. Coxe*, 127 F.3d 155, 158-60 (1st Cir. 1997); *see also Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014) (but concluding an injunction was not warranted in that case because the district court had applied an incorrect causation test).

ESA § 9, even more than § 7, makes "abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *See TVA*, 437 U.S. at 194. While ESA § 7 prescribes a consultation and risk evaluation before imposing restrictions, § 9 flatly bans all actions that "take" or "harass [or] harm" listed species. 16 U.S.C. §§ 1538(a)(1), 1532(19) (2012). Thus, because ESA § 9 is even more protective than § 7, the injunctive relief standard of *TVA v. Hill* makes even more sense under ESA § 9 than it does under § 7. Further, injunctive relief is the only form of relief available for claims brought under the ESA's citizen suit provision. *Id.* § 1540(g). This provision's lack of available civil penalties or monetary damages thus satisfies the traditional injunction requirement that "monetary damages[] are

inadequate to compensate for that injury," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010) (citation omitted), as the District Court aptly noted. R. at 17.

B. Even if Balancing Equities were Necessary, the Balance Favors Enjoining Greenlawn.

Even if the traditional equitable balancing test applies to permanent injunctions issued pursuant to ESA §9, the record establishes District Court did not abuse its discretion when it granted an injunction. Cases in which courts have declined to issue injunctions under the ESA after balancing the equities typically involve military and national security interests, *see, e.g. Water Keeper All. v. United States DOD*, 271 F.3d 21, 34 (1st Cir. 2001), or situations in which an injunction might actually *hurt* the listed species' long-term survival. *See, e.g., Alabama v. United States Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1137 (N.D. Ala. 2006) (declining to issue an injunction that would require water releases out of an ACOE dam where the "reduction of water stored in the upstream reservoirs . . . may well affect the ability to protect these mussel species and the endangered sturgeon over the long term."); *Heartwood, Inc. v. Peterson*, No. 07-114-KSF, 2008 U.S. Dist. LEXIS 40735, at *13-15 (E.D. Ky. May 21, 2008) (declining to preliminarily enjoin the Forest Service from implementing a forest recovery project where the project would help the "overall health of the forest, including those portions of the forest that service the [endangered] bats").

Thus, when an injunction will not adversely affect national security or the long-term survival of the species, courts heavily favor the interest of the endangered species over other asserted public interests. For example, one court held that a preliminary injunction was warranted to protect critical habitat of an endangered lynx, even though the proposed forestry project would reduce wildfire risk to a nearby community. *All. for Wild Rockies v. Marten*, 253 F. Supp. 3d 1108, 1112 (D. Mont. 2017). The court concluded that "the risk of fire danger to the

community . . . though a serious matter, does not outweigh this Court's obligation to ensure that the Forest Service is complying with the ESA." *Id.* Another court concluded it was appropriate to issue a permanent injunction requiring the Bureau of Reclamation to release additional water from a dam in order to protect endangered salmon downstream, even though "the proposed measures might cause hardship to the farmers, ranchers, and their communities" who rely on the water for their livelihoods. *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1141 (N.D. Cal. 2017). The court concluded that it could not "favor economic interests over potential harm to endangered species." *Id.*

Here, the balance of equities weighs in favor of an injunction preventing Greenlawn from withdrawing water past a point where its withdrawals will endanger the survival of downstream mussels. On the mussels' side, the District Court found that "Greenlawn's water withdrawals during drought conditions pose a reasonably certain threat of imminent harm." R. at 18. 25% of the mussel population had already died, and the entire population faced extirpation if Greenlawn's withdrawals continued. R. at 9. On Greenlawn's side, the District Court noted that the city claimed an unencumbered right for its residents to withdraw 20 million gallons per day during peak summer months, for uses including "summer lawn and ornamental watering." R. at 5. Greenlawn claimed this right after refusing ACOE's reasonable requests to restrict "lawn watering and car washing." R. at 5, 8.

Thus, the question is whether Greenlawn's interests in lawn watering, ornamental plants, and car washing outweigh the local extinction of the endangered Oval Pigtoe Mussel in the Green River. The answer is that the equities tip in favor of the mussels, given that Congress intentionally struck the balance of equities in the ESA "in favor of affording endangered species

the highest of priorities." Thus, the District Court did not abuse its discretion when it enjoined Greenlawn's water withdrawals.

CONCLUSION

This case is ultimately about upholding the public's interest in our nation's water resources and the integrity of the Endangered Species Act. In adopting the ESA, Congress intended to comprehensively protect endangered species. Greenlawn seeks to create and exploit a loophole that would eviscerate the effectiveness of the ESA, for the benefit of unlimited lawn watering and car washing.

For all the above reasons, New Union Oystercatchers, Inc., respectfully requests this Court affirm the District Court's granting of summary judgment on Issues III and IV, and reverse the District Court's granting of summary judgment on Issues I and II and remand those issues for further proceedings.