THIRTY-SECOND ANNUAL
JEFFREY G. MILLER PACE
NATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION

C.A. No. 19-000987
UNITED STATES COURT OF APPEALS
FOR THE TWELTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,

Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Appellee,

-and-

CITY OF GREENLAWN, NEW UNION

Appellee,

On Appeal from the United States District Court for New Union.

Brief of Appellant, NEW UNION OYSTERCATCHERS, INC.

Table of Contents

Table of Authorities

Cases

Statutes and Regulations

Other Authorities

Statement of Jurisdiction

The United States Court of Appeals for the Twelfth Circuit properly exercises jurisdiction over this appeal under 28 USC § 1291. This appeal arises from a final decision by a district court of the United States within the Twelfth Circuit. R. at 1. The United States District Court of New Union properly exercised jurisdiction under 28 U.S.C. §1331 and under the Endangered Species Act provision 16 USC § 1540(c), as this action arises under the Endangered Species Chapter of Title 16 of the United States Code. Parties New Union Oystercatchers, Inc., and the City of Greenlawn filed timely Notices of Appeal pursuant to Fed. R. App. P. 4 (2016).

Statement of the Issues Presented for Review

I. Does Greenlawn have the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures?

II. Is the operation of the Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536?

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

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

///

Statement of the Case

Plaintiff New Union Oystercatchers, Inc. ("NUO") brought this action against Defendants the United States Army Corps of Engineers ("ACOE") and the City of Greenlawn, New Union ("Greenlawn") for violations of the Endangered Species Act ("ESA"). Plaintiffs' claim arose from ACOE's violation of ESA § 7 through its failure to consult with the United States Department of Fish and Wildlife ("FWS") concerning actions taken by ACOE as operator of the Howard Runnet Dam Works, and Greenlawn's take of the endangered oval pigtoe mussel in violation of ESA § 9 by its water withdrawals from the Green River during drought conditions. On May 15, 2019, the District Court granted ACOE's motion for summary judgement dismissing NUO's claim that ACOE violated ESA § 7, and granted Greenlawn's motion for summary judgment dismissing NUO's common law riparian claims against Greenlawn and declaring the Greenlawn has riparian rights to the waters of the Green River. From that order, NUO appeals.

Statement of the Facts

The Green River is a watercourse located in the state of New Union, which flows out into the sea at Green Bay. R. at 5. The river provides habitat for an array of species of fish and wildlife, including the oval pigtoe mussel, a federally listed endangered species. R. at 9. The oval pigtoe mussel requires a gravel or silty riverbed as habitat, with a slow to moderate current of at least 25 cubic feet per second ("CFS") averaged over a 24 hour period. R. at 10-11. In the Spring of 2017, however, reduced flows in the Green River exposed beds of oval pigtoe mussel, causing the death of approximately 25% of the population. R. at 9. Should the reduced flows continue, the entire oval pigtoe mussel population in the Green River would cease to exist. R. at 9.

Appellant NUO is a not-for-profit association whose members consist of third- and fourth-generation oyster fishermen who make their living by fishing in Green Bay, at the mouth

of the Green River. R. at 10. Reduced flow rates in the Green River in recent decades have lead to increased salinity in Green Bay, and as a result, predator species have reduced the oyster population considerably, leading to a 2016 harvest which was only half of that of the harvest in 2000. *Id*. The decreased oyster population has lead to reduced catches and incomes for NUO's members, and some have been forced to sell their fishing boats as they are unable to make loan payments. *Id*. Additionally, NUO's members are customers of the New Union Regional Electric Cooperative, and when insufficient river flows prevent hydroelectric power generation, those members are forced to pay electric rate fuel surcharges. *Id.*

Greenlawn is a municipality which lies along the banks of the Green River. R. at 5. To meet its water needs, Greenlawn makes withdrawals from the Green River; while Greenlawn's withdrawals average at 6 million gallons per day ("MGD") over the course of a year, demand more than triples – reaching 20 MGD – during July and August. *Id.* The spike in demand for water is fueled by lawn and ornamental watering demands during the hot summer months, and between evaporation, ground absorption, and the fact that Greenlawn's sewage treatment plant discharges into a different river, less than 5% of the water withdrawn by Greenlawn ends up back in the Green River. R. at 5-6. Despite the considerable burden which its withdrawals place on the Green River, Greenlawn maintains that it is not required to implement water control measures – even during drought conditions – and is entitled to as much water from the Green River as its residents need to water lawns and ornamental plants. R. at 8.

ACOE is a federal agency which operates the Howard Runnet Dam Works, a hydroelectric dam located along the Green River which was authorized by Congress in the River and Harbor Act of 1945. R. at 5-6. The Howard Runnet Dam Works consists of two dams: the Diversion Dam, which is located upstream from Greenlawn and diverts water to the Howard

Runnet Lake, and the Howard Runnet Dam, a hydroelectric dam which releases water back into the Green River Downstream from Greenlawn. R at 6. ACOE's operation of both dams is guided by the WCM. *Id*. In the event of a Zone 2 drought warning or a Zone 3 drought warning – as determined by the level of water in the lake – the WCM directs the ACOE to restrict hydroelectric water releases, and to reduce flows into the Bypass Reach, which flows through Greenlawn, to 7 CFS. R. at 7.

In the Spring of 2017, lake water levels decreased to Zone 2, and to ACOE reduced water releases both into the Bypass Reach and for hydroelectric purposes in accordance with the WCM. R. at 8. However, on April 12, 2017, Greenlawn sent a letter to ACOE, demanding that it increase the amount of water released into the Bypass Reach, as the residents use additional water during the spring for watering lawns and ornamental plants. *Id.* The ACOE's District Commander requested that Greenlawn impose water restrictions – such as banning car washing and watering lawns – until drought conditions abated, but Greenlawn refused, claiming that it had no obligation to do so. *Id.* The District Commander gave in to Greenlawn's demand on April 23, increasing water releases into the Bypass Reach to 30 CFS. *Id.* While the ACOE deviated from the WCM's protocols in this regard, it maintained its restrictions on hydroelectric releases; when the lake level eventually decreased to Zone 3, a drought emergency level, ACOE curtailed hydroelectric releases entirely, while still releasing 30 CFS into the Bypass Reach. R. at 8-9. Between the curtailment of hydroelectric releases and Greenlawn's substantial withdrawals, virtually no water flowed in the Green River below the Howard Runnet Dam. R. at 9.

Summary of the Argument

First, Greenlawn's riparian rights do not entitle it to withdraw sufficient water from the Green river to meet its need of watering lawns and ornamental plants during drought conditions,

and it must enact water conservation measures during drought conditions. Unlike life-sustaining "natural uses" of water, which enjoy priority over other uses, watering lawns and ornamental plants is an artificial use, which is subject to limitation by the correlative rights of other riparians and the reasonable use doctrine. In drought conditions, Greenlawn's use of water is unsuitable for the limited supply of the Green River, provides minimal social benefit, and causes harm to society generally by depriving the endangered oval pigtoe mussel of needed water, driving up the cost of electricity for ratepayers, and harming the livelihood of oystercatchers in the Green Bay. Greenlawn's use for watering lawns and ornamental plants is thus unreasonable. Furthermore, as ACOE also holds riparian rights, its artificial uses – including hydroelectric operations and fish and wildlife conservation – are on equal footing with Greenlawn's; Greenlawn must therefore impose water conservation measures to share the shortage with its fellow riparians.

Second, ACOE is required to consult with FWS under ESA § 7(a)(2) because ACOE, a federal agency, modified its Water Control Manual ("WCM") protocols, which is likely to jeopardize the continued existence of the oval pigtoe mussel or result in the adverse modification of the mussel's habitat. In deviating from the WCM's protocols for operating the Howard Runnet Dam Works, ACOE undertook an agency action, and it did so while having the discretion to act differently so as not to jeopardize the continued existence of the oval pigtoe mussel. ACOE was not required by law to release water into the Bypass Reach for Greenlawn's use, and even if it was, it still exercised discretion in deciding to continue curtailing water releases from the Howard Runnet Dam and thereby deprive the oval pigtoe mussel of needed flow in the Green River.

Third, Greenlawn's water withdrawals violated the ESA by causing a 'take' against the oval pigtoe mussel, a species listed as endangered under the ESA section 16 USC § 1538. FWS

regulations establish that a 'take' includes harms caused in the form of "significant habitat modification" that "actually kills or injures wildlife." Greenlawn's water withdrawals caused drastic habitat modification by eliminating flow of the Green River and exposing populations of oval pigtoe mussels, killing 25% of the Green River oval pigtoe mussel population. Significant habitat modifications like this are considered 'take' of an endangered species, even if they occur upstream or downstream of the species' actual habitat. There is no requirement that the defendant's injurious conduct occurred within the species' habitat itself. Greenlawn's withdrawals were the proximate cause of these habitat modifications, because the withdrawals were an actual and legal cause of the taking. Destruction of the oval pigtoe mussel's habitat was the natural and probable consequence of the conduct and would not have occurred but for Greenlawn's water withdrawals. The reasonable foreseeability of other factors affecting Green River's flow preclude Greenlawn's arguments based on intervening causes.

Fourth, it is not the role of Courts to engage in a balancing of equities when considering whether to enjoin action that violates the ESA. The question of balancing has already been answered by Congress' determination in the ESA that endangered species are worth protecting despite potentially substantial burdens on the public. Recent case law has maintained the exclusion of any balancing analysis as established by the Supreme Court in *TVA v. Hill*. The rule against applying a balancing test applies regardless of how substantial countervailing public or private interests are.

Argument

I. Greenlawn Must Enact Water Conservation Measures During Drought Conditions Because Watering Lawns and Ornamental Plants is an Artificial and Unreasonable Use.

The District Court below erred in dismissing the Third Claim for Relief because the city of Greenlawn's riparian right does not entitle it to "sufficient flow in the Bypass Reach to supply its municipal water needs" irrespective of drought conditions and the ACOE's correlative rights as a riparian landowner. R. at 13. New Union recognizes riparian rights doctrine, along with "the right of a municipality to be a riparian landowner and withdraw water as a supply to the benefit of non-riparian parcels within the municipality." *Tubbs v. Potts*, 45 N.U. 999 (1909). However, riparian rights, including Greenlawn's, are subject to a variety of restrictions, including "the possibility of being limited or regulated under the reasonable use doctrine." *Stupak-Thrall v. U.S.*, 843 F.Supp. 327, 335 (W.D.Mich. 1994) (internal quotation marks omitted). In short, the District Court erred because it wrongly identified Greenlawn's artificial use as a natural one, failed to recognize that Greenlawn's use is not reasonable, and ignored the fact that the water taken by Greenlawn is not returned to the Green River.

A. Greenlawn Does Not Have the Right to Unlimited Withdrawals From the Green River Because Its Use is an Artificial Use.

Greenlawn does not have a right to withdraw unlimited supplies of water during a shortage because watering lawns and ornamental plants is an artificial use, not a natural one. Under riparian common law, there are two classes of uses. The first class consists of "natural" or domestic uses, which includes "all [uses] *absolutely necessary* for the existence of the riparian proprietor and his family, such as to quench thirst and household purposes." *Thompson v. Enz*, 154 N.W.2d. 473, 483 (Mich. 1967) (italics added). Natural uses benefit from "a preferred non-proratable position with respect to all other uses rather than a correlative one." *Id.* The second class consists of "use for artificial purposes," which "are those which merely increase one's comfort and prosperity and do not rank as essential to his existence, such as commercial profit and recreation." *Id.* Artificial uses are "correlative … with respect to other riparians in exercise

of their riparian rights for artificial purposes," and "must be … reasonable in light of the correlative rights of the other proprietors." *Id.* at 483-84. In short, while natural uses enjoy priority, a riparian's artificial use must be reasonable when compared with the riparian rights of other artificial users.

Greenlawn's watering lawns and ornamental plants is an artificial use, not a natural one, and thus must be evaluated for reasonableness on equal footing with the ACOE's use of water for power generation. The District Court's conclusion that the "modern domestic uses of watering lawns and ornamental plants" are among the category of natural uses is unwarranted, as such uses are out of place with sorts of uses other courts have recognized as natural. R. at 13. The uses which courts have generally recognized as natural have been those which allow the riparian to meet their and their family's life-sustaining needs, including drinking, maintaining hygiene, and producing food for themselves. *Harris v. Brooks*, 283 S.W.2d 129, 133 (Ark. 1955) (listing "water for the family, live stock, and gardening" as examples of "domestic purposes"); *Crommelin v. Fain*, 403 So.2d 177, 184 (1981) ("The water drawn by [respondent] is used solely for domestic purposes, i.e., drinking, cooking, bathing, washing clothes and flushing toilets."); *Deetz v. Carter*, 43 Cal. Rptr. 321, 324 (Cal. Ct. App. 1965) ("Domestic use includes the watering of barnyard animals, but not herds raised for profit.") Such uses are in line with what is "absolutely necessary for the existence of the riparian proprietor and his family," as is gardening, which allows a family to put food on the table. *See Thompson*, 154 N.W.2d. at 483. In contrast, watering a lawn and ornamental plants is the sort of use which may "increase one's comfort and prosperity," but does not address an essential need, and thus is artificial. *Id.* Because watering a lawn or ornamental plants does not address an essential need, and requires so much water that it drives the city's withdrawals from the annual average 6 MGD up to 20 MGD during the hot

summer months, the Court should hold that watering lawns and ornamental plants is an artificial use. R. at 5.

B. Greenlawn's Use is Not Reasonable Because It is Unsuitable for Drought Conditions, Provides Minimal Value, and Causes Considerable Harm to Society as a Whole.

Greenlawn is not entitled to take unlimited water during a drought for the artificial purpose of watering lawns and ornamental plants because doing so is unreasonable in light of ACOE's correlative right as a riparian landowner to divert water for power generation and other purposes. While natural uses enjoy priority over other types of uses, artificial purposes "must be … reasonable in light of the correlative rights of other proprietors." *Thompson*, 154 N.W.2d. at 484. In assessing the reasonableness of a use, courts will look to the interests of "any riparian proprietor harmed by it and of society as a whole," as well as the interest of the user. Restatement (Second) of Torts § 850A (Am. Law Inst. 1979). Courts will consider multiple factors in assessing reasonableness, including a use's purpose, suitability for the watercourse, economic and social value, and the extent and amount of harm the use causes. *Id*; see also *Franco-American Charolaise, Ltd. v. Okla. Water Resources Bd.*, 855 P.2d 568, 590 n.40 (Okla. 1990) (listing "size of the stream, custom, climate, season of the year, size of the diversion, … type of use and its importance to society … needs of other riparians … suitability of the use to the stream" among factors considered by court in assessing reasonableness of use).

In the present case, Greenlawn's artificial use of 20 MGD for watering lawns and ornamental plants is unreasonable in the event of drought conditions and in light of ACOE's correlative riparian right. Greenlawn's use may provide some social value in contributing to an aesthetic enhancement of the town, but the economic value provided by maintaining lawns and ornamental plants is minimal. In the Spring of 2017, Greenlawn's excessive demand from the

limited water resources significantly restricted the amount of water which the ACOE – another riparian right-holder – could divert into the Howard Runnet Lake, driving the lake level from a drought warning down to a drought emergency. R. at 8-9. The resulting curtailment of water releases through the hydroelectric dam prevents the ACOE from generating electricity through the Howard Runnet Dam, which will force New Union Regional Electric Cooperative customers to pay an electric rate fuel surcharge. R. at 10. Additionally, between the curtailment of hydroelectric releases and Greenlawn's exorbitant water withdrawals, the flow of the Green River downstream of the Howard Runnet Dam dropped from an average of 25 CFS to nearly nothing. R. at 10. R. This caused the death of about a quarter of the endangered oval pigtoe mussel population, which requires a minimum flow of 25 CFS; such harm to an endangered species carries a cost to social values which far outweighs the meager social value generated by green lawns. R. at 9-10. Furthermore, the reduced flows have increased the salinity of Green Bay, thereby reducing the oyster population to half of its 2000 size; this in turn has driven several oyster fishermen out of business and threatened the livelihood of many more, which constitutes a significant economic harm to society as a whole. R. at 10; *see* Restatement (Second) of Torts § 850A (Am. Law Inst. 1979) (providing that the interests of society as a whole are considered when determining the reasonableness of a use of water). Because Greenlawn's use provides meager social or economic benefit, is unsuitable for drought conditions on the Green River, and causes considerable harm to endangered species, electricity ratepayers, and oyster fisherman, Greenlawn's withdrawals for watering lawns and ornamental plants is an unreasonable use. Consequently, this Court should hold that Greenlawn must adopt water conservation measures during drought conditions, or curtail withdrawals from the Green River.

C. Even if Greenlawn's Use is Not Unreasonable, Greenlawn Must Curtail Withdrawals in Order to Share the Shortage with ACOE.

Should this Court determine that Greenlawn's use for watering lawns and ornamental plants is not unreasonable, Greenlawn nonetheless must adopt conservation measures or curb withdrawals during drought conditions because riparian rightsholders are required to "share the shortage" with other riparian rightsholders. As noted by the court in *U.S. v. State Water Resources Control Bd.*, 227 Cal. Rptr. 161, 170 (Cal. Ct. App. 1986), riparian rightsholders are not entitled "to a specific amount of water," but instead "enjoy as an incident of common ownership with other riparians on the stream a correlative share of the natural flow." As a consequence of this common ownership, "in times of water shortage, all riparians must curtail their usage in order that they share the available water." *Id.*

The District Court below erred in holding that Greenlawn was not required to "share the shortage" with ACOE. As explained above (see Section I.A., *supra*), Greenlawn's watering of lawns and ornamental plants is an artificial use, not a natural one, and therefore enjoys no priority over ACOE's artificial uses. Congress has authorized the Howard Runnet Dam complex to be managed for artificial purposes, including hydroelectric power generation, recreation, and the well being of fish and wildlife. R. at 6. However, because ACOE has been made to shoulder the entire burden of the water shortage, these artificial uses have been precluded during times of water scarcity: Saturday recreational releases have been wholly curtailed, hydroelectric power generation grinds to a halt, and no flow can be provided for endangered oval pigtoe mussels. R. at 7, 9. Because these artificial uses by a riparian are on equal footing with Greenlawn's use, this Court should hold that Greenlawn must "share the shortage" and that ACOE is not required to maintain sufficient flow in the Bypass Reach for Greenlawn to take for watering lawns and ornamental plants.

II. ACOE is Required to Consult with FWS Under ESA § 7 Because Modifying the WCM was an Agency Action.

The District Court below erred in dismissing the First Claim for Relief because the ACOE's modification of the WCM was a discretionary agency action, and thus ACOE was required to consult with FWS pursuant to Section 7 of the ESA. Under ESA § 7(a)(2), an agency must consult with the appropriate wildlife agency to "insure that any action authorized, funded, or carried out by such agency" – known as an "agency action" – "is not likely to jeopardize the continued existence " of endangered or threatened species, or "result in the destruction or adverse modification of habitat of such species…" 16 USC § 1536. In determining whether there has been an agency action which triggers the consultation requirement of ESA § 7(a), a court will ascertain: (1) "whether a federal agency affirmatively authorized, funded, or carried out the underlying activity," and (2) if so, "whether the agency has some discretion to influence or change the activity for the benefit of a protected species." *Karuk Tribe of Cal/ v. U.S. Forest Service,* 681 F.3d 1006, 1021 (9th Cir. 2012).

A. ACOE Carried Out an Underlying Action When It Deviated From the Protocols in, and Thus Modified, the WCM.

The ACOE, a federal agency, "affirmatively authorized … or carried out" the underlying activity – the modification of the WCM – on April 23, 2017, when the District Commander directed the Dam Works operator to increase water releases to the Bypass Reach to 30 CFS. R. at 8. Regulations implementing the ESA provide that the term "[a]ction" includes "*all* activities or programs *of any kind* authorized, funded, or carried out, in whole or in part, by Federal agencies," and enumerate as an example "actions directly or indirectly causing modifications to the land, *water*, or air." 50 C.F.R. § 402.02 (italics added). In *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 172-173 (1978), the Supreme Court understood the "plain language" of the term

"agency action" to apply broadly, holding that the section required halting construction on a nearly-completed dam which had been authorized before the ESA was passed. Furthermore, courts in sister circuits have noted that "there is little doubt that Congress intended to enact a broad definition of agency action…" *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994).

As "agency action" is meant to be broadly construed, ACOE's change in operating procedures at the Diversion Dam – releasing 30 CFS where it had previously been following a policy of releasing 7 CFS – constitutes an agency action. R. at 8. The *Tenn. Valley Authority* court noted that "[i]t ha[d] not been shown … how TVA can close the gates of the Tellico Dam without carrying out an action that has been authorized and funded by a federal agency." *Tenn. Valley Authority*, 437 U.S. at 173 (internal quotation marks omitted). Likewise, ACOE cannot direct agency personnel to adjust the release of water from an agency-owned dam without that constituting an action authorized, funded, or carried out by a federal agency. Because ACOE directed its staff to change operating procedures for the Diversion Dam, and thus modified the WCM, ACOE authorized or carried out the underlying action, and thus was required to consult with FWS if ACOE had discretion in the matter.

Respondents may argue that what is at issue is not the ACOE's action in releasing water into the Bypass Reach, but its inaction in failing to release water from the Howard Runnet Dam. Respondents may argue that while discretionary agency action can trigger § 7(a)(2)'s consultation requirement, agency inaction cannot. *WildEarth Guardians v. U.S. E.P.A.* 759 F.3d 1196, 1209 (10th Cir. 2014) ("…the ESA consultation requirement cannot be invoked by characterizing agency nonaction as action…"). Consequently, respondents may argue that ACOE had no duty to consult with FWS because its inaction in failing to release water for the benefit of

the oval pigtoe mussel is the underlying action at issue. However, this argument must fail because the underlying conduct at issue is neither ACOE's release of water into the Bypass Reach nor its inaction in failing to release water from the Howard Runnet Dam, but its modification of the WCM's protocols for Zone 2 and Zone 3 lake levels. The Diversion Dam and Howard Runnet Dam are not wholly independent facilities, but two components of a single water management system governed by the WCM; this is evident in that the Zone 2 and Zone 3 protocols in the WCM prescribe limits on releases for *both* dams in the event that the lake reaches a given level. R. at 7. As such, in modifying the WCM, the ACOE affirmatively acted with regards to Zone 2 and Zone 3 protocols which govern the operation of Diversion Dam and Howard Runnet Dam. As the operations of both dams are part of single connected system governed by the same WCM and under the control of the ACOE, the choice to modify the Zone 2 and Zone 3 protocols with respect to releases into the Bypass Reach is not distinct from the choice to curtail releases into the Tailrace. Because ACOE affirmatively acted to modify the WCM, ACOE undertook an "agency action."

B. ACOE Exercised Discretion When Changing the WCM Because ACOE Could Have Taken A Different Course of Action for the Benefit of the Oval Pigtoe Mussel.

ACOE must consult with FWS pursuant to ESA § 7(a)(2) because ACOE could exercise discretion to influence or change the modified WCM for the benefit of the oval pigtoe mussels. Under the regulations implementing ESA § 7(a)(2), a federal agency must undertake consultation if it undertakes, funds, or authorizes an action "in which there is *discretionary* Federal involvement or control." 40 C.F.R. § 402.03 (italics added); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007) (holding that ESA § 7(a)(2)'s no-jeopardy mandate applies to every discretionary agency action, but not to nondiscretionary actions). In

other words, the if an agency could "influence or change the activity for the benefit of a protected species," that agency had discretion in the action and must consult with the appropriate agency. *See Karuk Tribe of Cal.,* 681 F.3d 1006 at 1021.

i. ACOE Exercised Discretion in Deciding to Release Water into the Bypass Reach Because It Was Not Required to Do So Under the Riparian Rights Laws of New Union.

ACOE exercised discretion in modifying the WCM because, as explained above (see Section I, *supra*), Greenlawn's riparian right to the waters of the Green River does not require ACOE to release 30 CFS into the Bypass Reach. As the District Court noted, an action which a federal agency is required by law to undertake is nondiscretionary, and thus does not require consultation. *Nat'l Ass'n of Home Builders*, 551 U.S. at 669. However, as ACOE is not required by law to modify the WCM and increase releases into the Bypass Reach, ACOE's decision to do so was discretionary. Because ACOE undertook the underlying action and, not being legally bound to increase releases, could have exercised discretion in order to take a different course and benefit the oval pigtoe mussel, ACOE must consult with FWS pursuant to ESA § 7(a)(2).

ii. Even if ACOE Was Required to Release Water Into the Bypass Reach, ACOE Must Consult Under § 7 Because It Exercised Discretion in Deciding to Still Curtail Water Releases From the Howard Runnet Dam When Modifying the WCM.

If this Court holds that ACOE is required by the state riparian rights law of New Union to release 20 CFS into the Bypass Channel, ACOE still must consult with FWS under because it exercised discretion in choosing to still curtail water releases through the Howard Runnet Dam. In the Spring of 2017, water levels in the lake were in the range of Zone 2, also known as a "drought warning"; for such a situation, the WCM directed the ACOE to curtail all recreational releases, reduce flow in the Bypass Reach to 7 CFS, and limit hydroelectric power releases. R. at 7. However, on April 23, the District Commander decided to modify the plan set forth in the

WCM, increasing diversions to the Bypass Reach over fourfold – from 7 CFS to 30 CFS. R. at 8. In electing to change its policy governing water releases during drought warnings and drought emergencies, the ACOE undertook an action which required it to exercise discretion and adopt another set of practices. In this case, once the lake level lowered to the point of a "drought emergency," the District Commander chose to curtail water releases for hydroelectric purposes, consistent with protocols for Zone 3 in the WCM, but maintain a flow of 30 CFS into the bypass reach, counter to the Zone 3 protocols in the WCM. R. at 8-9. This choice to selectively adhere to protocols for Zone 3 reflects an exercise of discretion on the agency's part, in which it chose to prioritize restoring the water level in the lake over generating power and maintaining flows for the benefit of the oval pigtoe mussel. Because the ACOE exercised discretion in modifying the WCM protocols, ACOE's course of action in the Spring of 2017 was an "agency action," requiring that ACOE consult with FWS pursuant to ESA § 7(a)(2).

Respondents may point to *Nat'l Ass'n of Home Builders*, in which the court held that EPA's decision to transfer National Pollutant Discharge Elimination System permitting authority to a State was nondiscretionary because the Clean Water Act provided nine "enumerated statutory criteria" which the EPA was meant to consider, and the "statute clearly does not grant [EPA] the discretion to add another entirely separate prerequisite," such as compliance with ESA § 7(a)(2), "to that list." *Nat'l Ass'n of Home Builders*, 511 U.S. at 671-72; 33 U.S.C. § 1342(b). Respondents may argue that like the EPA in *Nat'l Ass'n of Home Builders*, the ACOE here has been given "authorized purpose[s]" which it must fulfill, and it does not have the discretion to add criteria – such as compliance with § 7(a)(2) – to its objectives. However, this argument fails because while § 402(b) of the Clean Water Act only granted the EPA the ability to "exercise some judgment in determining whether a State has demonstrated that it has the authority to carry

out § 402(b)'s enumerated statutory criteria," the ACOE here must exercise its discretion in order to attain policy goals which may require tradeoffs. Through the River and Harbor Act of 1945 and the Fish and Wildlife Coordination Act of 1958, Congress has enumerated flood control, hydroelectric power, recreation, and fish and wildlife purposes as authorized purpose[s] for the dam. 59 Stat. 10 (1945); 72 Stat. 563 (1958); R. at 6. However, acting to fulfill one purpose may come at the cost of another, as seen in the current controversy where retaining water by curbing releases from the Howard Runnet Dam has come at expenses to both hydroelectric power and fish and wildlife. Because, ACOE exercises far greater discretion in choosing which authorized purposes to prioritize with its WCM protocols than did the EPA in deciding whether to grant NPDES permitting authority to the state, ACOE's modification of the WCM was a discretionary agency action, and so it must consult with FWS pursuant to § 7(a)(2).

III. Greenlawn's Water Withdrawals from the Drought-Reduced Flow of the Howard Runnet Dam Works Constitutes a 'Take' of the Oval Pigtoe Mussel Under the Endangered Species Act.

Greenlawn violated the Endangered Species Act by causing a "take" of a listed endangered species, the oval pigtoe mussel. 16 USC § 1538. Under the ESA, the definition of 'take' includes "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 USC § 1532(19). When drought conditions were already threatening healthy water flow in the Green River System, Greenlawn's water withdrawals brought the total water flow in the reach to practically zero, devastating pigtoe mussel habitat. R. at. 9. As a direct result, 25% of the Green River pigtoe mussel population was killed, causing a 'take' in direct violation of the ESA's 'take' prohibition in 16 USC § 1538. R. at 10.

A. ACOE Carried Out an Underlying Action When It Deviated From the Protocols in, and Thus Modified, the WCM.

Greenlawn's water withdrawals constitute a 'taking' under the ESA because they cause significant harm to the oval pigtoe mussel's habitat. Regulations from FWS extend the meaning of 'harm' to include "an act which actually kills or injures wildlife," which may include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. The Supreme Court has made clear that "Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions." *Babbitt v. Sweet Home*, 515 U.S. 687, 704 (1995) (emphasis added). The fact that the pigtoe mussel's habitat is directly downstream of Greenlawn, rather than within the Bypass Reach itself, does not make the destruction of the mussel's habitat any less of a 'taking.' The city's water withdrawals cause the type of drastic, physical changes to the pigtoe mussel's habitat that courts have consistently held to constitute habitat-based 'takings' under the ESA. Greenlawn caused significant habitat modifications that "actually kills or injures wildlife," as shown by the 25% drop in oval pigtoe mussel population resulting from reduced flow of the Green River. R. at 10.

In *Hill v. Tennessee Valley Authority*, a decision affirmed by the Supreme Court, the Sixth Circuit enjoined construction of a major dam based on modifications the dam would cause to the habitat of the snail darter fish. 549 F.2d 1064 (6th Cir. 1977), aff'd, 437 U.S. 153, 98 S. Ct. 2279. The court noted that the dam would alter the snail darter's habitat by converting it from a "free-flowing river to a reservoir." *Id*. at 1069. The record of the case showed that "intrinsic environmental differences between river and reservoir bottom" would inevitably "destroy large numbers of snail darter eggs" and interfere with the snail darter's spawning instinct. *Id.* The court held that these effects constituted an "adverse modification" of the snail darter's habitat, in violation of the ESA under 16 USC § 1536.

The court in *Hill* found that TVA's dam project impacted the habitat an endangered aquatic species, despite the fact that the dam itself was at the "mouth" of the Little Tennessee river while the habitat of snail darters was ".5 to 17" miles upstream of the dam. *Id.* at 1068. The fact that the dam was not physically within the bounds of the snail darter's habitat did not prevent the court from recognizing its obvious detrimental impacts on that habitat. *Id.* Similarly, the fact that the oval pigtoe mussel's habitat is downstream of the Bypass Reach, where Greenlawn's water withdrawals occur, does not change the fact that these withdrawals "result in the destruction… of habitat." *Id.* In similar cases, courts have found upstream actions result in takings of endangered species where the actions reduce the "extent and quality" of habitats downstream. *Swinomish Indian Tribal Cmty. v. Skagit Cty. Dike Dist. No. 22*, 618 F. Supp. 2d 1262, 1270 (W.D. Wash. 2008) (Holding that upstream tidegates caused a "take" against chinook salmon by reducing the extent of their estuarine habitat). Greenlawn's argument that they are not liable for habitat modifications that are caused by actions outside of that habitat are contradicted by aforementioned case law enjoining harmful actions taking place adjacent to species' habitats.

The habitat destruction at issue here is strongly factually analogous to that considered in *Hill*: both cases involve endangered aquatic species, whose water-based habitat would be detrimentally transformed by water diversions taking place adjacent to their actual habitat. If anything, the habitat impacts in the instant case are more drastic than in *Hill*, as oval pigtoe mussels are being "exposed" to air rather than shifting from one type of submerged habitat to another. R. at. 9. The fact that the court in *Hill* focused on critical habitat of the entire species of snail darters, as opposed to only a subset of that species, is irrelevant as the ESA "does not distinguish between a taking of the whole species or only one member of the species."

Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla., 896 F. Supp. 1170, 1180 (M.D. Fla. 1995).

B. Greenlawn's Water Withdrawals were the Proximate Cause of the 'Take' against the Green River Oval Pigtoe Mussel Population

Greenlawn's water withdrawals were the proximate cause of the adverse modification of the oval pigtoe mussel's habitat because the withdrawals were a but-for cause and have a "direct relation" to those habitat impacts. *Paroline v. United States*, 572 U.S. 434, 444 (2014). Courts use concepts from tort law when applying the 'take' prohibition under the ESA, including the principle of proximate causation. *Id.* at 486. Proximate causation refers to the "basic requirement" that there is "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 444. Proximate causation is made up of two parts: "actual cause," whereby the "former event caused the latter," and legal cause, whereby the defendant's conduct "has a sufficient connection to the result." *Id.* The concept of proximate cause serves to preclude liability where the causal link between the conduct and the injury is best described as a "mere fortuity." *Id.* at 445. Far from being a 'mere fortuity,' the devastating impacts on the oval pigtoe mussel's population were "natural and probable consequences" of Greenlawn's water withdrawals. *Thurmond v. Fed. Signal Corp.*, 769 F. App'x 904, 906 (11th Cir. 2019).

Greenlawn's withdrawal rate in the context of drought conditions demonstrates its direct relationship and role as an actual cause of the 'taking' against the oval pigtoe mussel. Greenlawn's consumptive water withdrawals depleted the 30 CFS flow into the Bypass Reach, which is over three times flow provided for in Zone 2 and Zone 3 scenarios of the ACOE's Water Control Manual. R. at 7-9. Despite threats to endangered species downstream, Greenlawn continued this rate of consumptive use as Green River flow rates dropped "close to zero." R. at 9. This conduct directly and foreseeably turned the Green River into "stagnant pools" and "narrow

trickles" unable to adequately support the river's pigtoe mussels. *Id.* The inevitable harms to the oval pigtoe mussel's habitat and population were "foreseeable rather than merely accidental" impacts proximately caused by the withdrawals, even if these impacts were not "deliberate." *Babbitt v. Sweet Home*, 515 U.S. 687, 700 (1995). In this case, there is no "long chain of causation" separating Greenlawn's water withdrawals and the habitat impacts of the pigtoe mussels: Greenlawn withdrawals simply brought Green River flow to near-zero rates, and pigtoe mussel downstream habitat was predictably devastated. *Aransas Project v. Shaw*, 775 F.3d 641, 660 (5th Cir. 2014).

Greenlawn cannot claim that other factors prevent it from being the proximate cause of the 'take' against the oval pigtoe mussel. A party is not "relieved of liability by an intervening cause" where that cause "could reasonably have been foreseen." *Coyne v. Taber Partners I*, 53 F.3d 454, 460 (1st Cir. 1995). The 'naturally occurring' drought conditions were reasonably foreseeable, as drought conditions already existed when Greenlawn demanded that ACOE increase the water releases into Bypass Reach. R. at 8. Furthermore, ACOE's curtailment of hydroelectric power releases was entirely predictable as an explicit, non-discretionary protocol under the WCM, which remained unchanged since 1968. R. at 6. Likewise, agricultural withdrawals from Green River upstream were foreseeable, as they had been occurring since the 1980s. R. at 8. None of the factors that affected the Green River's flow were beyond reasonable foreseeability, nor do they prevent Greenlawn's water withdrawals from being "fairly traceable" to the harm to the oval pigtoe mussels. *Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 492 (E.D. Cal. 2018). These factors therefore cannot preclude finding that Greenlawn was the proximate cause of the habitat modifications constituting a 'take' against the oval pigtoe mussel. *Coyne*, 53 F.3d at 460. Arguments from Greenlawn against the foreseeability of these impacts

are especially uncompelling given Greenlawn's unlawful failure to consult with FWS under the ESA to ensure that their action will not "result in the destruction or adverse modification of habitat" of any endangered species (see Section II, *supra*). 16 USC § 1536.

IV. The Court is not Permitted to Balance Equities before Enjoining Greenlawn's Unlawful 'Take' of the Oval Pigtoe Mussel.

Greenlawn cannot demand that this court weigh its interests or engage in any other 'balancing of the equities' before affirming the injunction against Greenlawn for violations of the ESA. The Supreme Court has recognized that Congress "clearly" considered the value of protecting endangered species under the ESA is "incalculable." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978). When considering arguments relating to the "burden on the public" from issuing an injunction under the ESA, which would result in "the irretrievable loss of millions," the Court emphasized that it did not have "the power to engage in such a weighing process." *Id.* at 169, 188. Although courts often "weigh and balance the relative harms" that injunctive relief would cause to a defendant, "that balancing has been answered by Congress' determination" that the public interest "tips heavily in favor of protected species." *Strahan v. Coxe*, 127 F.3d 155, 171 (1st Cir. 1997). The ESA "clearly leaves" the job of balancing "economic and social enterprises" to the Secretary of the Interior and FWS, not to courts. *Loggerhead Turtle*, 896 F. Supp. At 1179. The balancing of equities affected by the ESA involves "fundamental policy questions" that were *already* resolved by "Congress and the agencies to which Congress has delegated authority," including the FWS. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 593 (9th Cir. 2014).

This rule for enjoining violations of the ESA without balancing affected equities is not altered by even "enormous practical implications." *Id.* In *Tennessee Valley Authority*, the Supreme Court upheld an ESA-based injunction against completion of a dam project that would

result in "an ever greater waste of tax dollars" beyond the "$110 million [already] spent on the Project." 437 US at 200 n. 6 (Powell, J. dissenting). This rule has recently been applied by the Ninth Circuit in an ESA case involving water distribution and river flow, even where a "critical [state] water problem" was implicated in an action for injunctive relief. *San Luis,* 747 F.3d at 593. The Ninth Circuit stated that the balance between the life of endangered species and impacts on even "the largest state-built water project" had "already been struck by Congress in the ESA." *Id.* at 594, 637. In response to arguments that the Supreme Court changed this standard in *Babbitt v. Sweet Home*, courts have interpreted *Babbit* as "addressing the balancing of competing interests and policies which the *Interior Department* undertakes in issuing its regulations and taking permits, and *not* as giving the lower courts license to balance related social and economic concerns." *Loggerhead Turtle*, 896 F. Supp. at 1180.

Conclusion

For the foregoing reason, this court should (1) hold that Greenlawn is not entitled to unlimited water withdrawals for watering lawns and ornamental plants, and must adopt water conservation measures during drought conditions; (2) hold that ACOE's modification of the WCM was a discretionary agency action and so it is required to consult with FWS pursuant to ESA § 7(a)(2); (3) hold that Greenlawn caused significant modification of habitat and the 'take' of oval pigtoe mussel populations in violation of 16 USC § 1538; (4) hold that Greenlawn was not entitled to a 'balancing of equities' analysis before their violation of the ESA was enjoined.