Team No. 4

Case No. 19-000987

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,
Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Appellee,

and

CITY OF GREENLAWN, NEW UNION,
Appellant

(Appeal from the United States District Court District of New Union)

MEASURING BRIEF OF APPELLANT, NEW UNION OYSTERCATCHERS, INC.

Oral Argument Requested

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JURISDICTIONAL STATEMENT

This case involves an appeal from the District Court of New Union. R. at 1. Jurisdiction was proper in the district court because this is a claim arising under the Endangered Species Act. 16 U.S.C. §§ 1536, 1538. The United States Court of Appeal for the Twelfth Circuit has jurisdiction over this case because it is an appeal from a final decision in a District Court of the United States. 28 U.S.C § 1291. The notice of appeal was filed in a timely manner. Fed. R. App. 4(a).

ISSUES

1. Under New Union law, in determining the validity of riparian water uses, is it appropriate for the Court to allow a municipality to utilize all the water in a stream during drought conditions especially when its uses are largely ornamental, and it does not consider the rights of other riparian owners?

2. Is the decision to operate Howard Runnet Dam at higher flow rates than required during drought conditions without consulting appropriate wildlife agencies a discretionary action that violates § 7 of the Endangered Species Act?

3. Under § 9 of the Endangered Species Act, does a city's decision to remove the last bit of drought-reduced water flow from a river constitute a prohibited "take" of an endangered species when the removal causes the destruction of the species' habitat downstream and multiple members of the species are actually killed as a result of the destruction, even though the species does not live in the stretch of river owned by the city?

4. Is a District Court required to engage in standard "equity balancing" prior to issuing an injunction pursuant to the citizen-suit provision of the Endangered Species Act when the

Supreme Court has ruled that Congress intended to remove such balancing tests from the authority of the courts?

STATEMENT OF THE CASE

Plaintiff New Union Oystercatchers, Inc. ("NUO") brought this action against the United States Army Corps of Engineers ("ACOE") and the City of Greenlawn, New Union ("the City"), alleging violations of the Endangered Species Act ("ESA") surrounding the City's water withdrawals from the Green River and ACOE's operation of the Howard Runnet Dam Works. (R. at 4.) Plaintiff's suit arose from their claim that the City's use of the Green River significantly threatened the population of endangered mussels downstream. R. at 9-10. On May 15, 2019, the District Court granted NUO's motion for summary judgment declaring the City to be in violation of § 9 of ESA, but the District Court also granted the City's cross-claim motion for summary judgement by recognizing its rights as a riparian land owner. R. at 18. Further, the District Court granted ACOE's motion for summary judgement. *Id.* From that order, Plaintiff appeals. R. at 1.

STATEMENT OF THE FACTS

The Green River Bypass Reach ("Bypass Reach") was created when the United States Army Corps of Engineers built a series of dams on the Green River, collectively known as the Howard Runnet Dam Works. R. at 5. The City, located on the Bypass Reach, owns the riverfront and underlying riverbed on both sides of the Bypass Reach that is within City limits. *Id.* Since the City's founding, it has maintained municipal water intakes from the Bypass Reach and has enlarged its water system and intake to accommodate growing demand. *Id*. The City's water withdrawals average 6 million gallons per day (MGD) annually, but far exceed that during

summer months where it peaks at 20 MGD during, largely due to non-essential summer lawn and ornamental watering demands. *Id*. Of these large water withdrawals, particularly the water used for lawn irrigation, less than 5% returns to the Green River. *Id*. at 5-6.

The Howard Runnet Dam was authorized under the River and Harbor Act of 1945 for the broad purposes of flood control, hydroelectric power, and recreation purposes. *Id*. at 6. Subsequently, the Fish and Wildlife Coordination Act of 1958 added fish and wildlife purposes to all dams under ACOE's discretion. The creation of this dam impacted the natural flow of the Bypass Reach, and so as to not fully cut-off the City's water supply, ACOE entered into an agreement with the City to allow the City to continue water withdrawals only in quantities and rates as it is entitled to as a riparian property owner. *Id*.

ACOE's operation of the Howard Runnet Dam works is governed by a Water Control Manual (WCM) which establishes parameters for water releases from the dams for the general purposes of maintaining flood control storage capacity and water levels for certain recreational use, providing for hydroelectric generation, and maintaining the proper flow for the City's water intake facilities. *Id.* The WCM is based on target lake elevations at different times of the year according to historical flows and water demands. *Id*. ACOE ensures that target lake elevations are maintained and appropriate inflow rates are managed, allowing during normal summer operation a flow of 50 cubic feet per second (CFS) to release from the dam to Bypass Reach, along with 200 CFS for hydroelectricity and 200 CFS for recreational flow. *Id.* During drought conditions when lake levels drop below target level, the WCM provides for specific operating provisions of three zones of drought monitoring in which downstream releases of water from the dam are curtailed. *Id*. In Zone 1, all recreational releases are cut, but minimum flow of at least 50 CFS for the Bypass Reach and 200 CFS for the hydroelectric power are maintained. *Id*. Zone 2

further reduces water flow by limiting hydroelectric flow to 200 CFS for up to three hours and reducing Bypass Reach flow to 7 CFS. *Id*. In the most extreme drought emergency, Zone 3 curtailment cuts all recreational and hydroelectric releases, but maintains a flow of 7 CFS into the Bypass Reach. *Id*.

These provisions and flow rates curtailments, including the allowed 7 CFS for the Bypass Reach, were set at the time of the WCM adoption in 1968, though they largely posed no problem as ACOE was not forced to apply Zone 2 or 3 restrictions until 2017. *Id.* at 8. However, during more recent years, Zone 1 curtailment have been enforced multiple times, and in Spring of 2017 lake levels reached Zone 2, prompting ACOE to enforce the proper flow restrictions in the Bypass Reach to 7 CFS as provided in the WCM. *Id*. The City protested this flow restriction, claiming it was outdated, not sufficient for their planting season, and that consumers required additional water for watering their lawns and various other purely ornamental purposes. Despite requests from ACOE District Commander for the City to institute simple drought restrictions on its water consumers, like banning lawn watering and car washing, the City continued to protest the WCM's directed flow restrictions, asserting that it had a common law right as a riparian owner to make reasonable use of the historic flows of the Green River into the Bypass reach. *Id*. The City argued that this right entitled it to continue its ornamental uses of water during the drought restrictions, claiming that this was a reasonable riparian use of the limited water supply. *Id*. Without consulting any wildlife agencies or other authority, the District Commander increased the water releases into the Bypass Reach from the WCM's mandated 7 CFS, tripling the releases to 30 CFS. *Id*. These increased water releases led to the invocation of the drought emergency Zone 3 guidelines, in which hydroelectric releases were cut to zero. *Id.* However, ACOE still maintained the City's demanded releases of 30 CFS to the Bypass Reach. *Id.* at 8-9.

The City's consumption of nearly all the flows in the Bypass Reach, in conjunction with the curtailment of hydroelectric power, severely reduced downstream flow rates, dropping them from the normal daily 25 CFS rate to close to zero. *Id*. at 9. The normally flowing river habitat was turned into stagnant pools of water, exposing several beds of oval pigtoe mussels, a federally listed endangered species, in the downstream confluence of the Bypass Reach and the Howard Runnet Dam tailrace, though none were found on the stretch of the Bypass Reach owned by Greenlawn. *Id*. Mussels can adapt to minor changes in water levels by moving themselves to submerged areas, but the severely reduced flows during the Spring of 2017 eliminated all possibility for the oval pigtoe mussel to remain submerged. *Id*. These conditions resulted in the death of approximately 25% of the Green River oval pigtoe population, and if the conditions persist will eliminate the species. *Id*. Pigtoe mussels require at least a minimum flow of 25 CFS, the normal daily flow rate, to prevent extirpation of the specifies population. Despite these actual and potential effects on the pigtoe mussel population, ACOE never consulted with Fish and Wildlife Services (FWS) and the City never maintained an incidental take permit under § 10 of the Endangered Species Act.

SUMMARY OF THE ARGUMENT

First, the City does not have a right to withdraw nearly all of the water from the Bypass Reach during drought conditions because, under either theory of riparian law, such exhaustive use of a shared natural resource is improper. Riparian law is a state common law doctrine and the state of New Union has no precedent or statutory rule which resolves this case. R. at 12. However, it is generally agreed that riparian owners can do no harm to each other. From this overarching principle the states developed two theories of riparian law: the natural flow theory and the reasonable use theory. Under the natural flow theory, irrigation is a disfavored artificial

use, and riparian owners cannot use water for irrigation purposes if it creates a sensible diminution in the flow of the river. Under the reasonable use theory, consumptive rights, like irrigation, are allowed, however such use that materially diminish the river are unreasonable and unlawful.

Second, ACOE violated § 7 of the Endangered Species Act by failing to consult with Fish and Wildlife Services when it took agency action and increased water flows from Howard Runnet Dam Works during drought warnings. The increased water flows were an affirmative and discretionary choice made only by ACOE. The agreement between the City and ACOE in the WCM did not force ACOE into increasing water flow releases, and its action in doing so was an affirmative and discretionary modification of the WCM. ACOE's governing statutory authority only required broad goals to be met, and so the increase in water flows was exclusively due to ACOE's discretion and when the ACOE did not consult FWS in regard to that action, they violated § 7 of the ESA.

Third, the City violated § 9 of the ESA because removing nearly all the water from the Bypass Reach destroyed the habitat of the Pigtoe Mussel, which actually killed a substantial portion of the population, and such destruction was a reasonably foreseeable consequence of removing the last bit of water from a flowing river. Under § 9 of the ESA, actions that harm a protected species are considered a take. Destruction of a protected species' habitat such that the species is actually killed or injured is considered harm to the species. While proximate cause limitations apply to finding a human action caused a take in habitat destruction cases, when the plaintiff can show that the defendants actions actually destroyed the habitat of a protected animal, protected animals were killed as a result, and the link between the action and the

destruction is not too attenuated (as NUO has shown here), the action is considered a proximate cause of the taking.

Finally, District Courts are not required to balance the equities of the parties to the case before issuing an injunction pursuant to the citizen-suit provision of the ESA because Congress removed that requirement from the courts, and even if the courts conduct a balancing test, it will come out in favor of the injunction when the plaintiff shows that there is imminent threat of significant harm to the species and an injunction is in the best interest of the protected species. While the Supreme Court has broadly held that courts should balance equities as part of their test when issuing environmental injunctions, the Court has spoken in clear, narrow terms when it comes to injunctions specifically pursuant to the ESA--an exception to the broad rule. Even if the court does delve into an equity balancing test, the balance is so heavily tipped in favor of the species that any showing of imminent harm to the species which an injunction can prevent satisfies this prong. Thus, the courts do not engage in true equity balancing--the test is satisfied by showing that the injunction is in the best interest of the endangered species when there is a threat of imminent harm in the absence of the injunction. Since it is undisputed in this case that there is an imminent threat of future harm (and even total annihilation) of the Pigtoe Mussel population if the City does not slow down its water withdrawals, the court need not delve further into balancing equities before enjoining them to protect the Pigtoe Mussel population.

ARGUMENT

I. THE CITY DOES NOT HAVE A RIGHT TO WITHDRAW WATER WITHOUT CONSERVATION EFFORTS BECAUSE SUCH EXHAUSTIVE USES ARE NOT PERMITTED UNDER EITHER THEORY OF RIPARIAN LAW.

The district court incorrectly reasoned that the City made reasonable use of its water withdrawals because under both theories of riparian law, utilizing nearly all of the water in the

Bypass Reach largely for ornamental lawn watering is not a reasonable or permitted use. Therefore, the district court's decision on this issue to grant summary judgement in favor of Greenlawn should be reversed. It is undisputed that the City thoughtlessly rejected any flow restrictions, and instead the city consumed "nearly all of the flows in the Bypass Reach" such that the Green River downstream of the city "turned into stagnant pools of water." (R. at 9.) Furthermore, it is assumed that the City has the right as a municipality to be a riparian landowner, standing is not at issue, and this case is not moot because all parties agree that the Drought Warning conditions are likely to occur again. *See* R. at 2, 11-12. Consequently, the decision of the district court should be reversed on the reasoning that Greenlawn's actions do not meet the common law standards of reasonableness.

The issue before the Court goes right to the fundamental elements of federalism and division of power which have guided the jurisprudence of our nation since its founding. It is undisputed that New Union has not enacted legislation which would resolve competing riparian claims, nor do any precedents exist in New Union which would resolve this case. R. at 12. Ultimately, the riparian use of water rights can be broken down into two doctrines: the doctrine of natural flow and the doctrine of reasonable use. *Harrell v. Conway*, 271 S.W.2d 924, 926 (Ark. 1954); *see generally* Restat 2d of Torts, § 850. Importantly, under either theory the right to use water is usufructuary which requires that the riparian owner do no injury to any other riparian owner. *See Evans v. Merriwather*, 4 Ill. 491, 494 (1842); *Canton v. Shock*, 63 N.E. 600, 603 (Ohio 1902). Unfortunately, the states have each made variations to the original English common law such that no single state now utilizes the exact same standard. *See generally United States v. Gerlach Live Stock Co.*, 399 U.S. 725, 742-751 (1950) (discussing the development of riparian law in the United States). As such, this is a case of first impression for the Court, but,

while the Court must no doubt analyze persuasive authorities, the Court should resist the urge to apply loose principles broadly without considering the totality of the circumstances.

A. Under the Natural Flow Theory, the City's Exhaustive Use of the Bypass Reach Was Unacceptable Because It Was Not a Natural Domestic Use.

The district court erred by offhandedly rejecting the natural flow theory as a means of resolution because, while the majority of states have adopted the reasonableness test, some states still consider natural flow limitations, and natural flow principles are intrinsically applied to the reasonableness test of the majority. *See Harrell*, 271 S.W.2d at 926-27 (recognizing both theories while ultimately creating a test that combines both). "According to the natural flow theory, each riparian owner is entitled to have the watercourse maintained in its natural state, not sensibly diminished in quantity or impaired in quality." *Harrell*, 271 S.W.2d at 926.

Consequently, water usage was divided between "natural uses" and "artificial uses." *See Evans*, 4 Ill. at 495. Natural uses are those which are "absolutely necessary to be supplied, in order to [maintain human] existence" and include drinking water for family and cattle. *Id.* Conversely, artificial uses serve only to support human "comfort and prosperity" and include irrigation of land. *Id.* "The supply of man's artificial wants is not essential to his existence . . . he could live if water was not employed in irrigating lands, or in propelling his machinery" *Id.* The general rule of natural flow theory is that natural uses are permitted while artificial uses violate the rights of lower riparian owners. *See Harrell*, 271 S.W.2d at 929 (McFaddin, J., concurring).

Illustrating these rules, courts have found that, even when a lower riparian owner is making no use of a stream, an upper riparian owner cannot supply a municipality with water from the stream without returning the excess water to its natural channel because such diversion is an extraordinarily artificial use. *See Ulbricht v. Eufula Water Co.*, 86 Ala. 587, 6 So. 78, 79

(Ala. 1888). The upper riparian owner in *Ulbricht* was a water company that owned property on both sides of the stream at issue and supplied water to the adjacent town of Eufaula. *Id.* at 78. The court found that the diversion by the water company caused a "sensible diminution in flow" especially during the dry season. *Id.* Interestingly, the court also found that the lower riparian owner made "no particular use of the stream." *Id.* Ultimately, the court reasoned that such a diversion for the city's use was "extraordinary or artificial," especially because no water was returned to its natural channel, and that the water company was liable even without showing of any special damages on the plaintiff's part. *Id.* at 79. In conclusion, the court determined that a lower riparian owner has the "legal right to have the stream to continue to flow through his land, irrespective of whatever he may need it for any special purpose or not." *Id.* at 80.

Similarly, courts have held that a municipality with riparian rights cannot remove all the water from a stream during drought conditions without consideration for other riparian owners. *See Harrell*, 271 S.W.2d at 927. The City of Conway constructed a dam on Cadron Creek in order to supply water to its municipality. *Id.* at 925-26. Farmers upriver from the city began using water for irrigation purposes during a drought. *Id.* The city sought an injunction to restrain the farmers from withdrawing water from the stream during drought conditions. *Id.* The court reasoned that a city, acting as a riparian owner, has the right to "reasonable use of water for domestic and other ordinary purposes . . ." but it does not retain the right to provide water to its inhabitants without compensating other riparian owners whose water rights have been violated. *Id.* at 927. Ultimately, the court determined that the city's water rights were not greater than those of any other riparian owner, and therefore using all the water in a stream during drought conditions without consideration of others was unreasonable. *Id.*

Applying these factors to the case at bar, the City's withdrawal of all the water in the Bypass Reach during drought conditions was an unacceptable artificial use and therefore the City does not have the right to continue this activity under the natural flow theory. *See* R. at 9. Following the general principals of natural flow theory, the diversion of water by the City for watering of lawns is unquestionably an artificial use because such activity in no way is "essential" to the existence of its inhabitants. *See* R. at 5, 8-9. Like the power company in *Ulbricht*, the City diverted a substantial amount of water from the Bypass Reach without returning any to the natural channel. *See* R. at 5-6. Further, similar to *Ulbricht*, even though no riparian owners have alleged injury, the City cannot leave downstream riparian owners with "stagnant pools of water and narrow trickles" because it restricts the right of downstream riparian owners to have the river flow through their property. Similarly, like the municipality in *Harrell*, the City used all of the water in the Bypass Reach without regard for the rights of other riparian owners. *See id.* The record, like that of *Harrell*, does not support that the City made any compensation to downstream riparian owners. *See generally* R. It follows that the exhaustive use of the Bypass Reach constitutes an artificial use that is excessive and unreasonable such that the City has no right to continue such withdrawals in similar conditions.

B. Under the Reasonable Use Theory, Ornamental Use that So Drastically Diminishes Instream Flow is Unreasonable.

Even if the Court decides to reject the natural flow theory, the district court erred in finding that the City's ornamental use was reasonable because, while ornamental use is allowed under the reasonable use theory, the district court failed to properly balance the situation which would show that such exhaustive use was unreasonable. "Under the reasonable use theory each

landowner is entitled to make any reasonable use of the water, provided that such use does not unreasonably interfere with the beneficial use of the stream by others." *Harrell*, 271 S.W.2d at 926. Therefore, water can be used as necessary for any lawful purpose as long as: 1) the use is reasonable; and 2) the use does not reasonably interfere with the legitimate needs of other proprietors. *See Elmore v. Ingalls*, 17 So. 2d 674 (Ala. 1944); *West Mich. Dock & Mkt. Corp. v. Lakeland Invs.*, 534 N.W.2d 212 (Mich. Ct. App. 1995). Unfortunately, there is no clear test for reasonableness as agreed on by the multitude of states. At least one jurisdiction has developed a three pronged test which calls for the court to consider: 1) the size, character, and natural state of the water course; 2) the type and purpose of the uses proposed and their effect; and 3) require a balancing of the benefit that the user would receive with the injury to other riparian owners. *Lakeland*, 534 N.W.2d at 216. Along similar lines, various courts have adopted the reasoning in the Restatement of Torts, which focuses on the suitability of the use as well as the practical effect of avoiding the harm by adjusting the use, in order to determine reasonableness. *See, e.g., Lopardo v. Flemming Co.*, 97 F.3d 921 (7th Cir. 1996) (citing Restatement of Torts); *See* Restat 2d of Torts, § 850A.

Importantly, under the Restatement, "if the use serves no beneficial purpose and requires an inordinate amount of water," the use is unreasonable. *See* Restat 2d of Torts, § 850A, comment a. Additionally, like the natural flow theory, the reasonable use theory dictates a general hierarchy of uses which favors domestic uses over recreational and irrigational uses. *See e.g., Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955); Restat 2d of Torts, § 850A, comment c (stating "Although many courts have abandoned the nomenclature of the old classifications of 'natural' and 'artificial' uses, they still expressly state the existence of the preference for domestic use."). The important distinction is that consumptive rights like irrigational rights,

although disfavored, are still allowed under the reasonable use theory so long as they do not interfere with another riparian owners use. *See American Cyanamid Co. v. Sparto,* 267 F.2d 425 (5th Cir. 1959); *Harris*, 283 S.W.2d at 129; *Hoover v. Crane,* 106 N.W.2d 563 (Mich. 1960). Crucially, when regarding the competing uses of riparian owners, a court must take into consideration all the facts and circumstances of a particular case and properly balance the situation. *See id.*; *Lakeland*, 534 N.W.2d at 216.

Illustrating these rules, courts have found that even when ornamental use is allowed, it cannot materially diminish the quantity of water including accounting for evaporation and absorption. *See Pierson v. Speyer*, 70 N.E. 799 (N.Y. 1904); *Canton*, 63 N.E. at 600. The court in *Pierson* reasoned that while the upper riparian owner had first right to the stream, such right must be reasonable, and the trial court must amply investigate the facts. *See Pierson,* 70 N.E. 799. Similarly, courts have determined that a municipality does not have the right to materially diminish or exhaust the water quantity except potentially for domestic purposes even if a lower riparian owner suffers no actual damage as a matter of equity. *See Purcellville v. Potts*, 19 S.E.2d 700, 702 (Va. 1942). The court in *Potts* reasoned that "the diversion of a natural stream is a private nuisance" such that it is "an infringement of a legal right [that] . . . a court of equity will prevent. *Id.* at 703-04. Conversely, a court found that irrigation alone cannot be grounds for an injunction when the weight of the evidence does not show the irrigation substantially diminished the flow of the river. *See Hoover*, 106 N.W. 2d at 563. The court in *Hoover* reasoned that since the plaintiffs could not determine the normal lake level with certainty, they failed to prove that the defendant substantially diminished the flow of the river. *See id.* at 565 (developing a contrast with *Harris v. Brooks*). However, the court noticed that extensive irrigation could threaten the existence of a watercourse such that the use of water must eventually "yield to the common

good," and ultimately afforded plaintiffs the option to sue again should the factual situation change. *See id.* at 566. Importantly, each of the cases above, at least implicitly, apply the rule that riparian owners "share the shortage," and further such rule is supported by the Restatement. *See* Restat 2d of Torts § 850A, comment on clause (g), j (stating "[a]s a general rule, all users stand on an equal footing and in case of a shortage caused by drought they must suffer equally and reduce their uses proportionately.").

Applying these factors to the case at bar, the City's exhaustive consumptive use materially diminished the flow the river, and therefore the City's use was unreasonable. As contemplated by the court in *Pierson*, the water used in the City's ornamental lawn watering is largely lost to evaporation and absorption such that "less than 5%" returns to Green River. R. at 5-6. Furthermore, while no riparian owner has alleged any injury like the situation in *Potts*, the City still exhausted the water in the Bypass Reach to such an extent that cannot be equitably ignored. *See* R. at 9. Finally, unlike the plaintiffs in *Hoover*, the record is replete with factual data which supports the conclusion that the City's municipal withdrawals caused the downstream shortage of water. *See* R. at 5, 8-9. It follows that the City's exhaustive use of the Bypass Reach for ornamental purposes materially diminished the flow of the Green River such that it was unreasonable. The City, acting irresponsibly and in disregard for downstream owners, is not entitled to withdraw nearly four times its yearly average and materially diminishing the stream. Therefore, the district court erred by casually assuming that ornamental use was proper without taking into account the full circumstances of the case and balancing them against the competing interests of riparian owners.

II. ACOE VIOLATED § 7 OF THE ENDANGERED SPECIES ACTS BY NOT CONSULTING WITH FISH AND WILDLIFE SERVICES WHEN IT MADE THE

AFFIRMATIVE AND DISCRETIONARY CHOICE OF INCREASED WATER FLOWS FROM HOWARD RUNNET DAM WORKS DURING DROUGHT CONDITIONS.

The Army Core of Engineers' release of 30 CFS to the Bypass Reach, despite a drought warning, leading to a reduction in downstream flows and a curtailment of hydroelectric power releases, was discretionary agency action that required consultation with Fish and Wildlife Services (FWS) under § 7 of the Endangered Species Act (ESA). ESA § 7 requires that federal agencies ensure that none of their activities will jeopardize the continued existence of listed endangered species or adversely modify a species' critical habitat. ESA § 7(a), 16 U.S.C. § 1536(a)(2)). § 7 of the ESA has been categorized as the heart of the ESA. *W. Watersheds Project v. Kraayenbrink,* 632 F.3d 472, 495 (9th Cir.2011). Agencies must review their actions at the earliest possible time to determine whether an action may affect protected species or habitats. 50 C.F.R. § 402.14(a). If this determination is made, consultation with appropriate wildlife agencies about the action is required.

This consultation requirement is limited to all affirmative agency actions in which there is discretionary federal involvement or control. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666-67 (2007). A two part test determines whether there is agency action and includes analysis both of (1) whether a federal agency affirmatively authorized, funded, or carried out the underlying activity and (2) whether the agency had some discretion to influence or change the activity for the benefit of a protected species. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012). The ESA's use of the term agency action is to be construed broadly. *Id.*; *W. Watersheds Project v. Matejko,* 468 F.3d 1099, 1108 (9th Cir.2006); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003). The increase in water flows after the City's demands during the 2017 drought

warnings was a discretionary agency action, an affirmative ACOE authorization of a modification of the WCM, and enacted without the required consultation with FWS, thereby violating § 7 of the ESA.

A. The Increased Water Flow Releases Was an Affirmative and Discretionary Modification of The Water Control Manual Requiring § 7 Consultation.

The Army Corps of Engineer's decision to increase the water releases to Bypass Reach from 7 CFS to 30 CFS was an affirmative agency action. The ESA's term of "agency action" has repeatedly been held to be construed broadly and triggers the § 7 consultation requirement when an agency takes affirmative action. *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1108 (9th Cir. 2006); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994). The plain language of § 7(a)(2) refers to agency action as "any action authorized, funded, or carried out by such agency." ESA § 7(a), 16 U.S.C. § 1536(a)(2). Agency action can cover, but is not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

Where agencies have altered their operating procedures and agreements at their discretion, courts have found that this constituted affirmative agency actions. For example, the court held in *Houston* that the Bureau of Reclamation (BOR) violated § 7 of the ESA by not consulting with the appropriate wildlife agency prior to renewing a contract to supply water from a dam unit. *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998). The BOR had taken affirmative and discretionary agency action both in negotiating and in executing the contract's term, such as increasing the amount of water for sale. *Id*. at 1125-26. Similarly, courts have found affirmative agency action in the issuing of permits, long term flow diversion

contracts, and approval or disapproval of permissive notices. *Natural Resources Defense Council v. Jewell*, 749 F.3d 766, 1517 (9th Cir. 2014) (holding that the BOR had discretion to take action for benefit of protected species in the renewal of long-term service contract for flow diversion); *Karuk*, 681 F.3d at 1021 (finding agency's affirmative authorizing of Notices of Intent to mine was agency action subject to ESA); *Turtle Island Restoration Network*, 340 F.3d at 977 (holding that § 7(a)(2) applies to the "continued issuance of fishing permits").

In contrast, courts have found that there was no discretionary agency action where the agencies had no authority to change the actions of third parties or where agencies made a decision not to regulate, as inaction is not considered to be agency action. *See*, *Cal. Sportfishing Protection Alliance v. FERC*, 472 F.3d 593, 598 (9th Cir. 2006) (holding that operations of a hydroelectric plant that were authorized by an earlier ongoing permit with private party did not trigger consultation requirement where agency was empowered to amend the license but did not"); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1081–82 (9th Cir. 2001) (finding no duty to reinitiate consultation for previously issued permits where Fish and Wildlife Service lacked discretion to add protections for newly listed species and could not influence private activity to benefit a listed species).

Here, ACOE increased water flows from the WCM directed Zone 2 levels of 7 CFS to 30 CFS, effectively modifying the WCM in an affirmative and discretionary action. Like in *Houston*, ACOE affirmatively modified the terms of an agreement between itself and the City, by allowing the increased amount of water releases. *See Houston*, 146 F.3d at 1125-26. Though this was not a formal contract modification, ACOE's actions still constitute agency action as it affirmatively authorized the increased flow thereby directly or indirectly causing modifications to the pigtoe mussel habitat. *See* 50 C.F.R. § 402.02. ACOE was obligated to follow the drought

Zone restrictions during the 2017 drought warning, but upon objection by the City it took the unprecedent and discretionary action to increase the water flow release well above the drought restriction. R. at 8-9. Additionally, the action here was taken wholly at ACOE's discretion as it was ACOE, and not the private party, the City, who had any and all ability to release the water flow and subsequently affect the listed species. *See, Envtl. Prot. Info. Ctr*, 255 F.3d at 1081–82. Unlike in *Cal. Sportfishing Protection Alliance,* though the City requested an increased water flow due to an existing agreement, ACOE's actions were not simply inactive allowance of the terms of the agreement, but an affirmative authorization to amend the agreed upon terms in the WCM that only ACOE had the discretion to implement. The allowance of increased water flows effectively modified the WCM at ACOE's discretion and was agency action that required consultation under § 7 of the ESA.

B. ACOE's Allowance of Increased Water Flows Was Not Required By Statutory Mandate and Was A Discretionary Decision That Triggered The ESA § 7 Consultation Requirement.

ACOE's increase of water flows and acquiesce to the City's demands and refusal to abide by WCM drought guidelines was a discretionary action not mandated by any statutory obligations. Discretion is defined as "'the power or right to decide or act according to one's own judgment; freedom of judgment or choice.'" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668 (2007) (quoting Random House Dictionary of the English Language 411 (unabridged ed.1967)). Actions that an agency is required by law to undertake, and are therefore not discretionary, trigger no duty to consult with the ESA. *Home Builders*, 551 U.S. at 669. However, an agency is not relieved of its duty to consult unless the agency's statutory authority mandates it to perform specific nondiscretionary acts in reaching its required goals. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928–29 (9th Cir. 2008). If the competing

statutory objectives that would conflict with the ESA's objectives, and thus trigger the duty to consult, involve broad goals and leave the agency some discretion, the agency cannot escape its obligation to comply with the ESA's consultation requirement. *Washington Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024 (9th Cir. 2005); *Houston*, 146 F.3d at 1126.

Where courts have found that statutory mandates only have broad directives, agencies still have a duty to consult with appropriate wildlife agencies if these directives come into conflict with the ESA. In *Karuk*, the court examined the statutory mining regulations that had an overarching purpose to "minimize [the] adverse environmental impacts of federal forest land," and found that the Forest Service had discretion to approve or disprove Notices of Intent (NOI) to mine because its approval was based on criteria it chose. *Karuk*, 681 F.3d at 1025. Similarly, in *National Marine Fisheries*, the court held that the National Marine Fisheries' argument that it had competing mandates for flood control, irrigation, and power did not create immutable obligations such that they had no obligation to comply with the ESA and its consultation requirements. *Nat'l Marine Fisheries Serv.*, 524 F.3d at 928. As Congress did not require precise steps that NMFS must take to achieve its flood control and other directives, the agency was subject to § 7 consultation. *Id*. The court held that, "When an agency, acting in furtherance of a broad Congressional mandate, chooses a course of action which is not specifically mandated by Congress and which is not specifically necessitated by the broad mandate, that action is, by definition, discretionary and is thus subject to Section 7 consultation" *Id.*

Where courts have found that agencies did not make a discretionary choice and had no duty to consult under § 7 of the ESA, the competing statutory mandates required specific goals and directives to be met instead of broad objectives. *See Home Builders*, 551 U.S. at 669 (no duty to consult where Clean Water Act required Environmental Protection Agency to transfer

regulatory authority to a state upon satisfaction of nine specified criteria). In *Grand Canyon Trust*, the court held that the Glenn Canyon? Dam's authorizing statute required Annual Operating Plans (AOP) to direct the operation of the Dam under specific operating criteria. *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1018 (9th Cir. 2012), as amended (Sept. 17, 2012). The agency thus had no discretion to select different operating criteria, outside the AOP and was obliged to perform specific non-discretionary acts to meet this statutory requirement. *Id.* at 1019. Similarly, courts have also held that agencies have no discretion where the agency has no control or discretion over the actions of private parties. *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir.2004) (holding that because Navy could not influence cessation of missile testing operations of a private activity there is no duty to consult); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1508-09 (9th Cir. 1995) (no duty to consult for approval of right of way where the federal agency lacked in to influence private action and use of right of way to inure to the benefit of protected species).

Here, the statutory mandates that govern ACOE's decisions regarding water management only require broad goals to be met, making the action of increased water releases a discretionary action that required consultation under § 7 of the ESA. Howard Runnet Dam Works' controlling statutes, the River and Harbor Act of 1945 and the Fish and Wildlife Coordination Act of 1958, authorize actions for the broad purposes of flood control, hydroelectric power, and recreation purposes, as well as fish and wildlife purposes. R at 6. To achieve its statutorily authorized goals for dam operation, ACOE entered into an agreement with the City, governed by the WCM, to continue water withdrawals in such quantities and at such rates and times as the City is entitled to as a riparian property owner. *Id*. The broad purposes of this agreement were for maintaining flood control storage capacity and recreation water levels, providing for hydroelectric generation,

and maintaining flow for the City's water intake facilities in the Bypass Reach. *Id*. As ACOE is not required to provide unrestrained water flows to the Bypass Reach as a riparian owner, these broad objectives govern ACOE operation of the Dam and its actions in water releases. Like in *National Marine Fisheries*, these broad mandates required no specific course of action to meet these broad goals. *See Nat'l Marine Fisheries Serv.*, 524 F.3d at 928. ACOE thus had discretion in the actions it took to meet these broad objectives and in establishing the parameters of the WCM. Where the WCM does create specific criteria for the ACOE to consider, as in the drought zones, these criteria are unlike those in *Grand Canyon Trust* or *Home Builders*, where the governing statutes themselves required specific criterion to be a part of agency decision making in conjunction with overarching goals. *See Home Builders*, 551 U.S. at 669; *Grand Canyon Tr.*, 691 F.3d at 1018.

While the WCM establishes criteria for ACOE to consider during the three zones in drought times, these specific steps were not mandated in the governing objectives themselves and worked again to meet only a general WCM provision of complying with water supply agreement and the riparian rights of property owners. R. at 7. ACOE is not mandated by riparian rights claims nor statutory obligation to ignore the drought zoning restriction of 7 CFS because of the City's protest. The zoned drought warnings and the reduction in water are the discretionary steps that ACOE chose in order to meet these goals and their decision to not adhere to their own zoned water releases demonstrates the discretionary nature of the action. Thus, ACOE's actions in acquiescing to the City's demands and increasing the water releases to the Bypass Reach, without any required criteria to consider, demonstrates the discretionary nature of ACOE's decisions regarding water flow and operation of the Howard Runnet Dam. Even if ACOE determined that this zoning water restriction was not sufficient for current population

growth in the City, the decision to increase the water flows is still within their discretion, not a mandate, and would have been subject to the ESA § 7 consultation requirement.

III. THE CITY'S WATER WITHDRAWALS FORESEEABLY DESTROYED THE PIGTOE MUSSEL HABITAT, RESULTING IN THEIR DEATHS.

The City's unfettered removal of water from Green River constitutes a "take" under the Endangered Species Act because it directly caused the destruction of the Pigtoe Mussels' habitat downstream, significantly harming the Pigtoe Mussel population, and habitat destruction was foreseeable. The Endangered Species Act (ESA) makes it unlawful to "take" any endangered species within the United States. ESA § 9, 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). While the term "harm" is not defined in the ESA, the Interior Department regulations that implement the act define "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 691 (1995). As the Supreme Court noted in *Sweet Home*, take is defined "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *Sweet Home,* at 515 U.S. at 726 (quoting S. Rep. No. 93-307, p.7 (1973)). While causation and proximate cause limits apply to liability for taking an endangered species, it is typically only a bar to liability when the link between the habitat degradation and the injury to the species is so attenuated that it defies rationality to hold the actor liable for the take. *See Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 490-91 (E.D. Cal. 2018). Because The City's actions caused the destruction of the habitat where the Pigtoe Mussel lived, and there was no break in the causal

chain between their removal of water and habitat destruction, it's actions constitute an illegal take of the Pigtoe Mussel.

A. The City Destroyed the Pigtoe Mussels' Habitat, Killing a Substantial Portion of the Population.

The City's water withdrawal, while not itself from the Pigtoe Mussel's habitat, caused the destruction of the Mussel's habitat downstream, constituting an illegal take in the absence of an Incidental Take Permit. The Supreme Court in *Sweet Home* held that the ESA prohibits not only direct and willful takings, but also indirect and unintended takings. *Sweet Home*, 515 U.S. at 700-01. The ESA's provision to apply for an incidental take permit in the event someone's actions may unintentionally cause a take is strong evidence that the ESA reaches even unintended and indirect takings. *Id*. Simply stated, when a person's actions modify or harm a protected species' habitat such that one or more of the species in question are killed or injured, the act is considered a take. *See Id*. at 708. While it is important to introduce evidence that the species in question is actually using the destroyed land as its habitat, the inquiry focuses on whether the species was present in the destroyed habitat and not whether it was present in the location of the human actions. *See, e.g., Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978). It is not the location of the act, but the location of the habitat destruction that is the issue. However, destruction itself is insufficient, the destruction must actually kill or injure protected animals. *Sweet Home*, 515 U.S. at 708.

Courts consider actions to violate the "take" provision of the ESA when a protected species is shown to be present in the habitat that was destroyed and the destruction actually leads to the death or injury of one or more particular animals, or threatens future death or injury, even when the act is not done directly on the habitat in question. *See American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 257-59 (D.D.C. 2003); *Westlands Water Dist. v. U.S.*

Dept. of Interior, 175 F. Supp. 2d 1157, 1223-24 (E.D. Cal. 2002). For example, in *Westlands Water*, a California District court found in relevant part that a proposed dam and river restoration project would cause a take of Coho Salmon downstream from the physical construction site due to decreased water flow and sedimentation. *Westlands Water*, 175 F. Supp. 2d at 1223-24. The court rejected the argument that since the overall health of the population would likely be helped by the project, the short-term harm to the species was not considered a take. *Id*. The court determined that since the act of construction caused a change in stream conditions downstream that would actually kill or injure one or more individual protected salmon, the action constituted an incidental take. *Id*. Similarly, in *American Rivers*, the District Court ruled that, by altering the flow of the Missouri River via dams and reservoirs, certain bird species would be "taken" because their downstream habitats, namely exposed sandbars, would be destroyed and evidence showed at least one hundred birds would be killed as a result. *American Rivers*, 271 F. Supp. 2d at 257-59. The court was not concerned with the location of the act in question. *Id*. It found that a take would occur because the act of altering dams and reservoirs would significantly degrade the habitat of a protected species, the species was using the downstream sandbars as a habitat, and birds would actually be killed as a result of the altered flow. *Id*. In these cases, as well as cases with more direct habitat destruction, the courts are not concerned with the location of the human action, but the location of the habitat in question and whether it was destroyed. *See Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1067-68 (9th Cir. 1996); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995). When that habitat is destroyed and protected animals are killed, it is considered an illegal take under the ESA.

On the other hand, courts determine there was no take in habitat destruction cases when there is no proof the animals in question were using the destroyed land as a habitat, would not

use it as a habitat in the future, or there is no evidence the animals were actually killed or harmed by the destruction. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-27 (9th Cir. 2000); *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 879-81 (E.D. Cal. 2004). In *Bernal*, the Court of Appeals upheld the District Court finding that construction of a school would not "take" a protected owl because the forest that would be cleared to build the school was not a habitat used by the owl. *Bernal*, 204 F.3d at 927. There was no evidence that even a single owl used the parcel of land that was to be cleared. *Id*. at 926. As the lower court found, the evidence showed that the only portion of the land in question that the owl used or occupied was the portion that was going to be left undeveloped. *Id*. Since the owl was not present in the habitat that would actually be destroyed, there was no "harm" to the owl within the definition of the ESA. *Id*. Since the lower court's factual determination that the owl was not present in the area that would be destroyed was not clearly erroneous, the Court of Appeals affirmed the decision. *Id.* at 927. Similarly, in *Flowers*, the Court ruled that there was insufficient evidence to find that road construction would result in death or injury to protected frogs and foxes due to habitat destruction, thus there was no take. *Flowers*, 377 F. Supp. 2d at 879-81. While there was some evidence that the foxes and frogs were present in the vicinity of the habitat that would be destroyed, there was "no evidence that the habitat modification, for example resulting from excavation of potential kit fox dens…and degradation of the kit fox habitat has actually resulted in the death or injury of a kit fox." *Id.* at 880. Likewise, the Court noted that "the Administrative record contains no evidence that any actual death or injury to a red-legged frog has occurred," and ruled that the frog had not been taken. *Id.* at 881. Since there was no actual death or injury to a protected species, there was no take.

In this case, it is undisputed that the reduced flow downstream from the City's withdrawal caused the destruction of the habitat where the mussel lived, which actually killed the mussels. R. 9-10. Unlike in *Bernal*, there is undisputed evidence that the Pigtoe Mussels use the area downstream that was degraded as a habitat. *Id.*; *see Bernal*, 204 F.3d at 924-27. There is also undisputed evidence that the habitat modification has actually killed 25% of the Pigtoe Mussels using this habitat, unlike in *Flowers*. R. 10; *see Flowers*, 377 F. Supp. at 879-81. Furthermore, that the City's actions were taken on parts of the river that are not used by the Pigtoe Mussel is inconsequential. Like in *Westlands Water* and *American Rivers*, habitat modification and destruction downstream from the City's actions caused the death or injury of a protected species. *See American Rivers*, 271 F. Supp. 2d at 257-59; *Westlands Water*, 175 F. Supp. 2d at 1223-24. The District Court, based on undisputed evidence, properly ruled that Greenlawn's actions resulted in a take of the Pigtoe Mussel and the ruling should be affirmed.

B. It Was Reasonably Foreseeable That Removing the Last Bit Of Water From A River Would Kill Animals Living In The River.

The City's withdrawal of drought reduced flow was a proximate cause of the destruction because it was reasonably foreseeable that removing the last bit of water from a stream would harm any animals living downstream. *Sweet Home* makes clear that traditional limits of proximate cause apply to liability for the take provisions of the ESA. *See Sweet Home*, 515 U.S. at 700 n.13. Under the ESA, traditional "but-for" causation is relaxed, and liability is limited only to what is reasonably foreseeable as a result of an action. *See Zinke*, 347 F. Supp. 3d at 486-95. It is not limited to one actor or cause—there may be multiple causes of a take. *Id.* The proper inquiry is whether it is reasonably foreseeable that an action could result in habitat destruction that would result in a take. *Id.* Actions that are so far removed as to appear implausible, where the causal chain is so attenuated, are not considered a proximate cause. But actions, even actions

chained together where no one action would be sufficient to cause the take, can be considered proximate causes so long as the link is not too attenuated. *See Id.*; *but see Aransas Project v. Shaw*, 775 F.3d 641, 656-64 (5th Cir. 2014). "A district court's finding of proximate cause is reviewed for clear error." *Shaw*, 775 F.3d at 658.

Courts have applied proximate cause limitations to cases of habitat disruption under the ESA when the link between the act and habitat destruction is highly attenuated and the destruction is not reasonably foreseeable. *See Shaw*, 775 F.3d at 656-64; *Alabama v. U. S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123 (N.D. Alabama 2006). In *Shaw*, the court found the link between a government agency issuing water permits and the death of a protected crane species to be too attenuated and ruled the agency did not "proximately cause" the deaths so they were not liable for the take. *Shaw*, 775 F.3d at 660. In that case, "licensed water withdrawals from the rivers resulted in a decline in freshwater inflows" to a bay. *Id*. Less freshwater thus increased the bay's salinity, which in turn increased the salinity of local estuaries and marsh water. *Id*. This, in turn, caused fewer blue crabs and wolfberry plants to grow in those marshes. *Id*. Since these are food sources for the endangered crane, the plaintiff alleged the water withdrawals caused the take. *Id*. The court found the link to be far too attenuated and held that the agency licensing water withdrawals could not have reasonably foreseen this long chain of events leading to a bird to be harmed in a wholly different body of water. *Id*. In *Alabama*, the court ruled that the Army Corps of Engineers was not the cause of the destruction of a mussel species' habitat during drought conditions when the Corps did not release more water from one side of a dam to increase the flow in the river and keep the mussels alive. *See Alabama*, 441 F. Supp. 2d at 1133-35. In that case, the Corps had an agreement to release water "commensurate with the amount of inflow into the basin." *Id.* at 1135. Other factors besides lack of rain, including increased sedimentation in

the river, were also at fault. *Id*. While the court noted that it "cannot hold the Corps responsible for the absence of rain," much of its finding that causation was lacking was based on evidence that the Corps had considered the mussel's population in coming up with a minimum flow rate that must be maintained, and it maintained that flow rate. *Id*. The Corps took steps to protect the mussels, but unfortunate circumstances caused their deaths anyway. *Id*.

The case here is very different. Unlike in *Shaw*, the link between the City's actions and the Pigtoe Mussels' death is quite direct. *See Shaw*, 775 F.3d at 656-64. The City removed the last bit of flow from the river, which directly resulted in there being no more flow and the mussel's habitat being reduced to standing puddles. R. at 9. Since the mussels cannot survive in stagnant pools, they died. R. at 9-10. That is hardly a long-attenuated chain such as the one in *Shaw*. *See Shaw*, 775 F.3d at 656-64. Furthermore, unlike in *Alabama*, the Corps is not the alleged taker. *See Alabama*, 441 F. Supp. 2d at 1134-35. In that case the Corps made an effort to protect the mussel species and was simply maintaining an existing dam. *Id*. The drought occurred after the Corps' actions. *Id*. Here, The City's withdrawal occurred after the drought had already reduced the flow of water. *See* R. at 8-9. The City made no efforts to protect any species in the stream, and no efforts to even consider the drought-reduced flow when they continued to take water for aesthetic purposes. *Id*. A drought by itself is natural and may not cause a "take", but here that is not the case. *See Alabama*, 441 F. Supp. 2d at 1134-35. The drought by itself significantly reduced the flow, but the mussel can survive with reduced flow. *See* R. at 9; *see also U.S. v. Glenn-Colusa Irr. Dist.*, 788 F.Supp.1126, 1133 (E.D. Cali. 1992)(Finding that even though installed screens killed salmon, the screen presented no hazard without the District's water pumping, which occurred after the screens had been installed). The City's decision to remove the last bit of water from the river, so that there is effectively no more flowing river, is

what caused the destruction. Even some consideration or attempt to manage water in drought conditions might make the City's position more sympathetic, but their refusal to consider anything but themselves, including the endangered wildlife downstream, is the essence of what the ESA's take provisions are designed to prevent. *See Sweet Home*, 515 U.S. at 699 (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978)) ("'The plain intent of Congress in enacting this statute,' we recognized, '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.'"). It was easily foreseeable that removing the last bit of water from a river will harm animals trying to live in the river, and there were no more links in the chain. The Court should affirm the District Court's finding that the City took Pigtoe Mussels in violation of the ESA because their actions foreseeably caused the destruction of a protected species' habitat, actually killing members of that species.

IV. INJUNCTIONS PURSUANT TO THE ESA DO NOT REQUIRE THE TRADITIONAL "EQUITY BALANCING" PRONG OF STANDARD INJUNCTIONS.

The District Court properly issued an injunction pursuant to the ESA without balancing equities because the Supreme Court has ruled that Congress removed authority to do so from the courts in ESA cases, and courts that still do have mischaracterized the test as equity balancing following the Supreme Court's decision in *Winter*. Under the ESA's citizen suit provision, any "person" may commence a suit in federal courts on her own behalf to force compliance with the provisions of the ESA. 16 U.S.C. § 1540(g). The ESA defines "person" as:

> individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

16 U.S.C. § 1532(13). Citizen suit plaintiffs can either obtain injunctive relief to stop a party from violating the ESA, or declaratory relief compelling the government to comply with the act. ESA § 11, 16 U.S.C. § 1540(g)(1-3). While ordinarily injunctive relief requires a District Court to balance equities, the standard for issuing an injunction under the ESA is different. *See Hill*, 437 U.S. at 193-195. "Under the traditional test, a party is entitled to a preliminary injunction if it demonstrates: (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor." *Nat'l Wildlife Federation v. Burlington N. R.R.*, 23 F.3d 1508, 1510 (9th Cir. 1994). Under § 9 of the ESA, however, "a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction." *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000). However, in 2008 the Supreme Court ruled that District Courts must weigh the consequences of issuing an injunction under a different environmental protection statute against other public interests before the Court. *Winter v. Nat'l Res. Defense Council, Inc.*, 555 U.S. 7, 24-31 (2008). While some courts feel that the decision in *Winter* commands them to continue balancing equities in ESA injunctions, others feel that *Hill*'s narrowly tailored language is controlling and their discretion in that area has been removed by Congress. *Compare Winter*, 555 U.S. 7, *with Hill*, 437 U.S. 153 (1978). Given *Hill*'s specificity to the ESA and the "equity balancing" courts have done post-*Winter*, this Court should hold that District Courts need not, and should not, balance equities in their decisions to issue injunctions to prevent takings pursuant to the citizen suit provision of the ESA. Because it is undisputed that there is reasonable certainty of imminent harm to the Pigtoe Mussel population, the District Court properly issued an injunction to ensure the City does not continue its destructive water habits.

A. The Supreme Court ruled in Hill that Congress Stripped the Courts of the equity balancing prong in ESA injunctions.

In *Hill*, the Supreme Court properly ruled that Congress stripped the courts of their equity balancing duty in issuing ESA injunctions. *Hill* was a landmark case in the arena of environmental law. "Tennessee Valley Authority v. Hill dealt with a substantive violation of the ESA where it was undisputed that completion of the Tellico Dam would destroy the only known habitat of the snail darter, resulting in extinction of the species." Mark S. Dennison, *Citizen-Suit Claims Under § 11(g)(1) of the Endangered Species Act*, 89 Am. Juris. Proof Of Facts 125, § 19 (2019 Update). The Court was faced with the same question here, whether traditional equity balancing is required before issuing an injunction to stop violations of the ESA. *Hill*, 437 U.S. at 193-94. The Court, however, ruled that even though the dam was all but completed, and great weight would be placed on the side of the equity scale for the completion of the dam, the Court of Appeals was right to issue the injunction anyway. *Id*. at 169, 195. The Court noted that "examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Id*. at 174. The Court further recognized that during the Congressional discussions surrounding the ESA, there was an "'overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources.'" *Id*. at 177 (citing Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 Notre Dame L. Rev. 315, 321 (1975)). Citing this strong motive, Congressional intent, legislative history, and the language of the statue, the Court held that balancing equities is unnecessary because Congress decided that the interest of protecting endangered species carries the greatest weight. *Id*. at 194. "Congress has spoken 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, thereby adopting a policy which it described as 'institutionalized caution.'" *Id*.

Though *Hill* was concerned with § 7 of the ESA rather than § 9 takings, Courts have followed the same reasoning in cases regarding § 9 taking violations. *See, e.g., Burlington R.R.*, 23 F.3d at 1510-12. In *Burlington R.R.,* the Ninth Circuit affirmed a District Court ruling that the National Wildlife Federation did not meet its burden of proving the likelihood of future harm to a protected bear species in order to issue an injunction against the railroad to prevent the "taking". *Id*. at 1509. In its analysis, the Court noted that the "traditional test for preliminary injunctions…is not the test for injunctions under the Endangered Species Act." *Id*. at 1510. The Court continued, recognizing that Congress removed from the courts their typical role in balancing the "competing interests" of the parties. *Id*. "The 'language, history, and structure' of the ESA demonstrates Congress' determination that the balance of hardships and the public interest tips heavily in favor of protected species." *Id*. (citing *Hill*, 437 U.S. at 174). The Court held that the plaintiff just needs to prove that there is a reasonable likelihood of future violations, namely a future likelihood that habitat degradation will cause members of a protected species to be injured or killed, for the Court to issue an injunction. *Id*. at 1511. While the Court in *Burlington R.R.* held that the plaintiff failed to meet this standard, the holding stood for the concept that Congress did not intend for Court's to balance the equities of the parties before issuing an injunction under the Endangered Species Act. *Id*.

B. The post-*Winter* analysis is mischaracterized as equity balancing.

While the holdings in *Hill* and *Burlington R.R.* are seemingly clear on the issue, some Courts improperly interpret another Supreme Court case, *Winter*, to mean courts must balance equities before issuing an ESA injunction. *See Winter*, 555 U.S. 7 (2008); *Hill*, 437 U.S. at 194;

Burlington R.R., 23 F.3d at 1510. In *Winter*, the Court determined that the preliminary injunction standard highlighted in *Hill* and *Burlington R.R.* was too lenient, and installed a four-prong test more similar to the traditional test—one that requires the court to balance the parties' equities. *Winter*, 555 U.S. at 23-24. However, the preliminary injunction at issue in *Winter*, and all the equity balancing discussion in the opinion, is in regard to the National Environmental Policy Act, not the Endangered Species Act. *Id*. While the language of the opinion tends to be generally broad, it is clear that the opinion was considering the National Environmental Policy Act, and the narrow language of *Hill* and its progeny is hard to ignore and has not been overruled by this decision. *Id*. *Hill* effectively stands as an ESA exception to the broad, general holding in *Winter*. Even if this Court disagrees, most of the cases following the *Winter* decision and trying to reconcile it with the clear language of *Hill* purport to be balancing equities, but in reality are just following the standard used in *Burlington R.R.*. *See, e.g., Alliance for the Wild Rockies v. Kruger*, 35 F. Supp. 3d 1259, 1266-67 (D. Mont. 2014).

The holding in *Winter* is not dispositive of the language in *Hill* and the two can be reconciled by understanding exactly what equities are being balanced. *See id*. As the Montana District Court noted, "Courts and litigants often conflate the interests of the plaintiff and the interests of the endangered or threatened species, thus invariably placing Congress's thumb on the plaintiff's side of the scale." *Id*. While the species' and plaintiff's interest tend to align, they may not always. *Id*. "The law is clear that the threatened and endangered species are the beneficiaries of Hill, rather than plaintiffs professing to act on their behalf." *Id*. In order to satisfy the "equity balancing" prong, "a plaintiff must present the court with some basis on which it can conclude that an injunction would in fact benefit the protected species." *Id*. at 1267. There may be cases, like *Kruger*, where the Defendant is able to produce evidence that an injunction would actually

harm the species, or the Plaintiff is unable to show that an injunction would benefit the species. *See id*. The balance will be tipped "in favor of whatever action is in the best interest of the species, regardless of which party supports that action." *Id*. This serves the *Hill* holding that the protection of the species is given the highest priority by Congress, but also allows follows the *Winter* decision's purported requirement to balance equities.

However, in most cases, a showing that there is a reasonable likelihood of future harm to a species for violations of the taking provision of the ESA will subsume this balancing test. If there is a reasonable likelihood of future harm to a species due to a person's actions, then an injunction stopping those actions is undoubtedly in the "best interest of the species." *See Kruger*, 35 F. Supp. 3d at 1267. Thus, without explicitly going through the analysis, the equity balancing prong of the *Winter* test for issuing environmental injunctions pursuant to the ESA is met in cases like this when there is no dispute over the likelihood of future harm to the species in the absence of the injunction. See R. at 9-10 (showing the Pigtoe Mussel will be wiped out if withdrawals continue as is). Since the beneficiaries of *Hill* and the ESA are the endangered species, it would be wrong to balance the equities of the parties to the case. *See Kruger*, 35 F. Supp. 3d at 1266. Since Congress has already tipped the scale so heavily in favor of the species, a showing that an injunction is in the best interest of the species satisfies the balancing prong of the *Winter* test and there is no need for further analysis. Because it is undisputed in this case that an injunction is in the best interest of the Pigtoe Mussel, the District Court correctly issued the injunction without delving into a deeper analysis balancing the equities of the parties to the case.

CONCLUSION AND PRAYER

In conclusion, the district court incorrectly granted the City and ACOE's motions for summary judgment regarding the City's riparian rights and ACOE's violation of § 7 of ESA. Regarding the City's motion, the court failed to sufficiently analyze the factual situation which would have shown that the City's water usage was improper under riparian law. Further, regarding ACOE's motion, the court incorrectly determined that ACOE exercised a non-discretionary action. Conversely, the district court correctly held that the City violated § 9 of ESA because the City could reasonably foresee that its water withdrawal would affect animal species. For the above reasons, NUO respectfully prays that the Court reverse the district court's decision in part and affirm in part.