Team # 40

CA. No. 19-000987

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS
Defendant-Appellee,

and

CITY OF GREENLAWN, NEW UNION,
Defendant-Appellant

On Appeal from the United States District Court
for New Union
No. 66-CV-2017

Brief for United States Army Corps of Engineers,
Defendant-Appellee

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JURISDICTIONAL STATEMENT

The United States District Court for New Union properly exercised jurisdiction over the original law suit under 28 U.S.C. § 1331, which provides, that "[d]istrict courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The law suit is a civil suit brought under a federal law, the Endangered Species Act, via a citizen suit provision of said law and the suit bring challenges to violations of the federal law. Additionally, the Endangered Species Act gives allows the district court in which the violation occurs jurisdiction over any law suit brought under the citizen suit provision. 16 U.S.C. § 1540(g)(3)(B). The United States Court of Appeals for the Twelfth Circuit has appellate jurisdiction to hear this appeal via 28 U.S.C. § 1291, which states: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of United States . . . ." Both the City of Greenlawn and New Union Oystercatchers, Inc. filed timely appeals. Cite page 1 of the record. This is an appeal from the final decision of the United States District Court for New Union, which was entered on May 15th, 2019. Cite page 18.

QUESTIONS PRESENTED

1. Under riparian common law, can Greenlawn continue to divert 20 mgd during times of drought without curtailment?

2. Under 16 U.S.C. § 7 of the Endangered Species Act, was the act of discharging 30 CFS to the Bypass Reach during drought conditions a discretionary action subject to the consultation requirement?

3. Under 16 U.S.C. § 9 of the Endangered Species Act, did Greenlawn's actions constitute a take by withdrawing nearly all the flow from the Bypass Reach, which caused significant modification to the oval pigtoe mussel's habitat?

4. Can a court balance the equities when a taking resulted from the lawful withdrawal of water pursuant to Greenlawn's riparian rights?

STATEMENT OF THE CASE

On July 17, 2017 New Union Oyster Catchers, Inc. ("NUO"), a not-for-profit association for oyster fisherman, filed a complaint against the United States Army Corps of Engineers ("ACOE") and the City of Greenlawn ("Greenlawn") seeking action for violations of the federal Endangered Species Act. R. 11. NUO claimed that by curtailing the hydroelectric releases combined with Greenlawn's water withdrawals, ACOE detrimentally reduced the downstream flow of the Green River, which resulted in the endangerment of the oval pigtoe mussel. R. 2. Additionally, NUO claimed that ACOE failed to consult the Fish and Wildlife Service when increasing the flow from the Diversion Dam to the Bypass Reach during drought conditions. R. 1. The complaint also included a common law riparian rights claim against the City of Greenlawn. *Id*. In response, ACOE denied the consultation claim and joined NUO in a crossclaim against Greenlawn asserting Greenlawn's withdrawals constituted an illegal "take" of endangered mussels. R. 4. The ACOE did not consult with the Fish and Wildlife Service concerning its operation of the dams, nor did the city of Greenlawn have an incidental take permit. R at 10.

The city of Greenlawn, New Union lies on both banks of the Green River, commonly known as the Green River Bypass Reach (Bypass Reach). R at 5. Greenlawn owns the riverfront on both sides of the Bypass Reach within city limits and has historically maintained municipal water intakes from the Bypass Reach since the City was founded in 1893. *Id*. Today, Greenlawn municipality services over 100,000 customers within city limits, and requires anywhere from 6 to 20 million gallons of water a day, with demand peaking in July and August summer conditions. *Id*. Greenlawn's water demand is contributable to its large residential area

of single-family homes with ornamental planting, and significate reliance on hydroelectric power. *Id.*

Greenlawn's municipal water demand is not satisfied by the natural flow of the Bypass Reach. R at 6. This is because the Howard Runnet Lake, which provided natural downstream flow into the Green River, was impounded by two dams, the Diversion Dam and Howard Runnet Dam. *Id.* Collectively, these dams are known as the Howard Runnet Dam Works (HRDW). *Id.* The HRDW were authorized by Congress to manage the Howard Runnet Lake water runoff for the purpose of hydroelectric power, flood control, recreational fishing and the protection wildlife species. *Id.* Since initial construction in 1948, the ACOE has operated the HRDW. *Id.* However, the implementation of the HRDW caused the Bypass Reach to no longer produce enough natural downstream flow for Greenlawn's municipal needs. *Id.* Understanding this, ACOE entered into a water agreement with Greenlawn to continue water withdrawals "in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." *Id.* Thus, by operating the HRDW, the ACOE was responsible for balancing the water demands of Greenlawn with the Congressional purposes of the HRDW. *See Id.*

The parameters for balancing these demands are listed in the Water Control Manual (WCM). R. 6. ACOE relied on the HRDW to operate the WCM since its creation in 1968. *Id.* The WCM governed the operation of HRDW before the enactment of the Endangered Species Act in 1973. *See Id.* Based on historical flows and water demands in 1968, The WCM provides for different target lake elevations at different times of the year. R at 7. When lake levels drop below the seasonal target levels, the WCM provides for downstream release to be curtailed in accordance with three zones. Zone 1, drought watch, curtails the Bypass Reach flow to 50 cubic

feet per second (CFS), and 200 CFS to the hydroelectric peaking for up to three hours. *Id.* Zone 2, drought warning, restricts the Bypass Reach flow to 7 CFS and maintains Zone 1 hydroelectric peaking releases. *Id.* Zone 3, drought emergency, maintains the 7 CFS to the Bypass Reach but ceases all hydroelectric releases. *Id.* In addition to these specific operating provisions, the WCM has a general provision that states, "at all times the [HRDM] shall be operated in a manner that complies with any water supply agreements entered into by the [ACOE], and with the riparian rights of property owners established under New Union law." R. 7-8.

From 1968 until the end of the 20th century, water shortages were not a problem. R at 8. In 2006, 2007, 2008, 2009, 2010, and 2012 drought conditions reached Zone 1 restrictions. *Id.* The amount of Greenlawn's water withdraws stayed consistent prior to and during drought conditions. R at 16–17. In Spring of 2017, drought conditions reached Zone 2. R. 8. In accordance with the WCM, the ACOE instituted the 7 CFS flow restriction to the Bypass Reach and the 3-hour hydroelectric peaking. *Id.* The city of Greenlawn promptly protested. *Id.* Greenlawn refused to implement any drought restrictions on water use and asserted a common law right as a riparian landowner. *Id.* In response, on April 23, the District Commander relented and ordered ACOE to increase the water releases to the Bypass Reach from 7 CFS to 30 CFS. After, Green River flows averaged about 25 CFS a day. R. 9.

By May 15, the target lake level entered a Zone 3 drought emergency. *Id.* All hydroelectric releases were ceased and the 30 CFS to the Bypass Reach continued, and downstream flow rates dropped close to zero. *Id.* In addition, due to evaporation, ground absorption, and Greenlawn's sewage treatment plant discharging processed water into a different watershed, less than 5% of Greenlawn's water use returned to the Green River. R at 6. Consequently, portions of the Green River downstream turned into stagnant pools of water,

exposing several beds of oval pigtoe mussels, a federally listed endangered species. R. 9. With substantially reduced flow, the oval pigtoe mussel could not stay submerged. *Id.* As a result, twenty-five percent of the oval pigtoe mussel population died. R. 10.

STANDARD OF REVIEW

This case appears before the court on appeal from summary judgment and the court is free to resolve *de novo* the question of whether summary judgment should be granted. *Westlands Water Dist. v. United States DOI*, 376 F.3d 853 (9th Cir. 2004). In this context, *de novo* review "means that [the court] view[s] the case from the same position as the district court." *Nev. Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, (9th Cir. 1993). Summary judgment may only be granted when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. GREENLAWN HAS THE RIGHT AS A RIPARIAN LANDOWNER TO WITHDRAW WATER FOR MUNICIPAL USES WITHOUT CURTAILMENT BECAUSE DOMESTIC USE IS A SUPERIOR USE.

Summary judgement was properly granted by the District Court because domestic use for water in riparian jurisdictions is a superior use and is not subject to the "share the shortage" doctrine. Under riparian law, property owners who's land borders a riparian or littoral body of water poesses a right to use water from the stream for their own purposes (reasonable use) before returning the remaining water to the stream. *Canton v. Shock*, 66 Ohio st. 19, 29 (1902). If a jurisdiction has not codified a definition of "reasonable use" then common riparian law applies which recongnizes natural use (domestic use), industry, irrigation, and recreation as reasonable uses. *See e.g., Storley v. Armour & Co.*, 107 F.2d 499 (8th Cir. 1929); *Heisse v. Shultz*, 204 P.2d 706 (Kan. 1949). When riparian uses conflict with eachother, common law courts weigh nine

factors identified in the Restatement (Second) of Torts and adjust each user's allottement to best accomidate all users on the system in way that is economically and socially equitable, otherwise known as "sharing the shortage." § 850(A) (1977). However, Courts in riparian jurisdictions have long held the priority of domestic uses of water over others such as fishing, recreation and irrigation and have refused to curtail domestic uses to satisfy other downstream, non-domestic uses. *See Harris v. Brooks*, 283 S.W.2d 125 (Ark. 1955); *Hudson River Fisherman's Assc. v. Williams*, 531 N.Y.S. 2d 379 (1988). Generally, upstream appropriators are recognized as having a superior right, even when their use consumes nearly all the available water. *Canton*, 66 Ohio st. at 31. When courts apply the Restatement factors, all customers within the city limits are to be weighed together on the side of the munipality, and no in-city use is unsreasonable per se. 1 Water & Water Rights § 7.05(c)(1) (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2019). Courts have also declined to curtail municipal water uses presuming that lower stream landowners were "aware of . . . [inevitable] growth and land development [of municipalities]." *Munn v. Horvtz Co.*, 175 Ohio St. 521, 528 (1964); *see also*, *Canton*, 66 Ohio st., 19; *Hudson River Fisherman's Assc.*, 531 N.Y.S. 2d at 383.

The New York Supreme Court dismissed a claim against expanding municipal uses on the grounds that the proposed amount of diverted water needed for municipal uses would destroy a major trout population in the area. *Hudson River Fisherman's Assc.*, 531 N.Y.S. 2d. The proposed project was intended to satisfy the needs of a rapidly growing population in Rock County by committing surrounding water to municipal uses. *Id. at 380*. Acquisition of the water supply served the purposes of (1) satisfying present water supply deficits and (2) supplying water for future needs. *Id.* The Department of Environmental Conservation (DEC) placed conditions on the project requiring an in-stream flow of 7.3 MGD to sustain the major trout population. *Id.* at

383. The Court struck down DEC's conditions reasoning that it would "effectively subvert the project" and even though the amount was determined to be critical to sustain the trout population, the "trout stream must unfortunately give way to the predictable and unrelenting growth in human water demands." *Id.*

New Union is governed by common riparian law and has not codified definitions for reasonable use or remedies for competing uses. R. at 11-12. Because priority uses have not been codified, R. at 12, common law governs what uses this Court should consider as reasonable. As a long-established domestic water user, Greenlawn's use of water is protected by strong commonlaw precendent across multiple jurisdictions. Greenlawn has shown that to meet its needs, there must be 20 MGD available through the Green River Bypass. R. at 5. The recommended 7 MGD would disrupt Greenlawn's water supply in the same way the New York Supreme Court determined to be unacceptable in *Hudson River*. Similar to Rock County, Greenlawn's absolute right to use the river for domestic uses is being challenged by downstream interests in fishing. However, NUO's claim fails because, even if fishing were a reconginized reasonable use, their use was always subject to Greenlawns domiant upstream use.Therefore, this court should affirm summary judgment in favor of Greenlawn.

II. UNITED STATES ARMY CORPS OF ENGINEERS OPERATED THE HOWARD RUNNET DAM WORKS AT ALL TIMES IN COMPLIENCE WITH THE WATER CONTROL MANUAL AND AS SUCH IS NOT SUBJECT TO § 7 OF THE ENDANGERED SPECIES ACT, THEREFORE THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S JUDGMENT .

Section 7 of the ESA requires federal agencies to proactively conserve all threatened and endangered species listed in the ESA. 16 USC §1536. In particular, Section 7(a)(2) requires interagency cooperation and mandatory consultation with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) to "insure that any action authorized, funded, or

carried out by such agency… is not likely to jeopardize the continued existence of any endangered species… or result in the destruction or adverse modification of habitat of such species which is determined… to be critical." 16 USC §1536(a)(2). This is referred to as the duty to consult. *See Id*. The duty to consult requires the acting agency to submit an impact study, known as a "Biological Assessment," to the FWS or NMFS when its actions will likely modify a listed species habitat. 16 U.S.C. § 1536(c). Once consultancy begins, the agency subsumes the burden of avoiding actions that commit to the irreversible loss of resources, including any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d). The FWS and NMFS have jointly defined the term action broadly to include any activities carried out by federal agencies, including a modification of a plan. 50 C.F.R. § 402.02. However, the consultancy process is required only for actions within the discretionary involvement or control of the agency. *See* 50 C.F.R. § 402.03. Likewise, the Supreme Court held that an action the agency is required to take by law is not discretionary. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 670 (2007). Thus, if the agency is required to act by law, such action is neither discretionary nor subject to the Section 7 duty to consult. *Id*.

ACOE did not violate the Section 7 duty to consult when it increased the water flow release to the Bypass Reach during a drought warning. This is because the interagency consultation requirement applies only to discretionary actions in control of the agency. §402.03. Likewise, in *Defenders of Wildlife*, the Supreme Court held that an action compelled by law is not a discretionary action. *Defenders of Wildlife*, 551 U.S at 670. Thus, if the agency is required to act by law, such action is not subject to the Section 7 duty to consult. *Id* at 671. Because ACOE was compelled by New Union contract and riparian law to maintain 30 CFS

waterflow to the Bypass Reach, the action was *ipso facto* non-discretionary and should therefore not be subject to the §7 consultancy requirement.

NCU claims that ACOE modified the WCM when releasing 30 CFS to the Bypass Reach during drought conditions. However, this is not the case. At all times, ACOE operated the HRDW in compliance with the WCM. When the ACOE released 30 CFS during drought conditions it did so accordingly to a WCM general provision. The WCM general provision states that "at all times the [HRDW] shall be operated in a manner that complies with any water supply agreements entered into by the [ACOE], and with the riparian rights of property owners established under New Union law." Thus, Greenlawn was protected two-fold. First, ACOE was contractually obligated to the riparian water rights of owners, to which Greenlawn was one. Under "riparian rights of property owners," Greenlawn was entitled to all water needed to fulfill domestic and municipal purposes. This included the 30 CFS maintained during drought conditions. Without considering the enforceability of ACOE's water agreement with Greenlawn, the WCM bound ACOE by New Union common riparian law to not violate Greenlawn's rights as a property owner.

However, the water agreement still has full legal effect. In 1948, ACOE entered into a water agreement with Greenlawn to maintain flows in the Bypass Reach to the extent that "such rates are afforded under riparian law of New Union." For the same reasons discussed above, Greenlawn had common law riparian water rights in 30 CFS, well above the 7 CFS limit placed in the Zone 2 procedure. Also, there is no evidence the contract was void, or for any reason unenforable during drought conditions in Spring 2017. Therefore, under WCM procedure to honor "at all time… any water supply agreements," ACOE was compelled to discharge 30 CFS downstream Greenlawn at all times. Because ACOE was controlled by New Union contract and

riparian law, the act was non-discretionary. Thus, under the Supreme Court rule in *Defenders of Wildlife*, ACOE should not be subject to the §7 consultancy requirement.

It is notable that the WCM has conflicting procedures. The Zone 2 procedure provides that ACOE should curtail Bypass Reach water discharge to 7 CFS. As discussed above, there is also a general provision granting that ACOE should honor any riparian water right and pre-existing water supply agrements, which included the release of 30 CFS during Zone 2 drought conditions. However, the general provision should be controlling. Two salient facts support this position. First, the use of the word "shall." The customary legal use of shall when drafting a legal document is used to convey when something must be done. This is opposed to using the term "may" which simply means that something is allowed. Second, the provisions specificly uses the language "at all times." The plain meaning of "at all times" suggests a reasonable interpretation of being without interruption or fail. When drafting legislation or agreements, specific language is important. Thus, when ACOE and the District Commisoner interpreted the general provision as controlling, and remitted the curtailment of Bypass Reach discharge, they operated the HRDW in compliance with the WCM. Therefore, ACOE did not modify the WCM.

Last, public policy supports a finding of non-discretionary action for ACOE's operation of the Howard Runnet Dam Works. In reality, federal agencies have limited agency resources. Conversely, even with the recent addition of expedited consultation and streamlined revisions of conulting efficency, any consultation is time-consuming, and blocks ACOE from marshaling its already limited resources. *See* 84 FR 44976. When the consultancy period begins and ACOE is barred from distributing more than 7 CFS downstream, there will substantial harm to the population of Greenlawn; considering the citys growth demands sufficent resources. Also, it is not efficient to require ACOE to continually consult when acting within its well established

guidelines and procedures. Since the drought periods are typically seasonal and not historically persistent, by the time consultancy concludes, the summer drought will likely have subsided, leaving only harm suffered by the citizens of Greenlawn. Thus, the purported benefits the ACOE would receive from consulting the FWS would likely outweigh the consequences.

III. GREENLAWN'S WITHDRAWAL CAUSED A TAKING OF THE ENDANGERED OVAL PIGTOE MUSSEL IN VIOLATION OF § 9 OF THE ENDANGERED SPECIES ACT, THEREFORE THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S JUDGMENT.

Section 9 of the Endangered Species Act establishes the prohibition against takings of protected species. 16 U.S.C. § 1538(a)(1)(B). To succeed on a § 9 claim, the plaintiff must show a take occurred and that the defendant's actions were the cause of that take. The Endangered Species Act defines a take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Federal Register futher clarifies what constitutes a take by defining harm: an act which actually kills or injures wildlife, which may include significant habitat modification where it actually kills or injures wildlife by significantly impairing behavior patterns, including breeding, feeding, or sheltering. 50 C.F.R. § 17.3. To carry its burden of proof, a plaintiff need only establish, by a preponderance of the evidence, that the challenged action is reasonably certain to result in a take. *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009).

A. The activity that significantly modifies the habitat does not have to occur on the habitat in question, and therefore, Greenlawn's water withdrawals resulted in significant modification of the oval pigtoe mussel's habitat.

One need only look to the broad policy objectives of the Endangered Species Act to conclude that broad interpretation of the term "habitat modification"–a type of harm–is proper. This broad purpose is particularly true for the term "taking"; the term is meant to be conceived in the broadest possible manner to include every way in which an individual can harm or attempt to

harm an endangered species. *Am. Bird Conservancy v. Harvey*, 232 F. Supp. 3d 292, 295, (E.D.N.Y. 2017); *Forest Conservation Council v. Rosboro Lumber Co*., 50 F.3d 781, 784 (9th Cir. 1995); *Strahan v. Coxe*, 939 F. Supp. 963, 983 (D. Mass, 1996).

In one of the leading takings cases, Justice Stevens wrote that the dictionary definition of harm "does not include the word "directly" or suggest in any way that only direct or willful action that leads to injury constitutes harm." *Babbit v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697 (1995). Stevens further explained that construing harm to include only direct injuries would render the word meaningless in the statute; without encompassing indirect injuries, the word harm has no meaning "that does not duplicate the meaning of other words that statute uses to define take." *Id.* at 698.

Courts have routinely found a taking occurred where the conduct in question indirectly harmed the endangered species' habitat. Light pollution from vehicles and buildings next to a beach resulted in harm to Loggerhead turtles. *Loggerhead Turtle v. Cnty, Council*, 92 F. Supp. 2d. 1296 (M.D. Fla. 2000). Freshwater withdrawals from rivers flowing into a bay, which increased salinity in that bay, resulted in harm to whooping cranes. *Aransas Project v. Shaw*, 756 F.3d 801, 806 (5th Cir. 2014). These examples are indicative of a trend among courts recognizing that the activity which causes significant and averse habitat need not occur directly on the habitat in question.

The indirect action in this case–Greenlawn's withdrawals from the reach–are the same as the freshwater withdrawals in *Shaw*; in both cases the action that caused the harm was done upstream of the modified habitat. Additionally, the withdrawals from the reach are similar to artificial light production adjacent to a beach; in the present case, the withdrawals occurred above the modified habitat and in *Loggerhead* the light production happened next to, not on the

beach. Each of these examples support the conclusion that actions which significantly modify a habitat do not have to occur directly on said habitat to constitute a take. Moreover, this conclusion is supported by the clear policy goals of the Endangered Species Act and the plain understanding of and definition of the word "harm."

B. The harm to the oval pigtoe mussel was a foreseeable consequence of Greenlawn's withdrawals from the Bypass Reach.

To establish causation under ESA § 9, the plaintiff must prove the defendant proximately caused the harm by showing the injury was a foreseeable consequence of the injurious conduct. *Shaw*, 756 F.3d 801 at 817. This analysis does not require a showing of but-for caustion, meaning it precludes arguments that a defendant's action was not the sole cause of the harm. *NRDC v. Zinke*, 347 F. Supp. 3d 465, 491 (E.D. Cal. 2018). The focus in this analysis is not on how many links are in the proverbial causation chain. Rather, the focus is on the defendant's link–the alleged injurious conduct–and whether the resulting injury was foreseeable given the defendant's conduct.

The First Circuit conducted a broad proximate cause analysis in *Strahan v. Coxe.* 939 F. Supp. 963. The Massachusetts Executive Office of Environmental Affairs, in concert with other state agencies, issued permits authorizing gillnet and lobset pot fishing in Massachusetts' coastal waters. *Id.* at 158. The Massachusetts coastal waters are also home to the endangered Northern Right whales and on nine occasions scientists reported the whales were entangled in the state permitted fishing gear. *Id.* at 159. The state defendant argued that the plaintiff's claims should fail because authorizing permits for certain fishing gear is too attenuated from the resulting harms. *Id.* at 163. The court reasoned that there was no way for Massachusetts to authorize permits for gillnets and lobster pot fishing in its coastal waters without risking danger to

Northern Right whales. *Id.* at 164. Following this logic, the court held that a third party's actions could be the proximate cause of a taking of an endangered species. *Id.*

A United States District Court in Florida provided an example of conduct that constitutes a take but one that was not proximately caused by the defendant. *Loggerhead,* 92 F.Supp.2d 1296 at 1308. Ms. Alexander and Ms. Reynolds brought a citizen suit on behalf of various endangered turtle species against Volusia County, Florida. *Id.* at 1298. The plaintiffs argued that the county's ordinances regulating lighting and vehicular beach access posed a danger to Loggerhead and Grean sea turtles because the artificial light distracts turtle hatchlings from the natural reflection of the night sky on the water. *Id.* at 1298, 1304. The court held that the artificial lighting undoubtedly increased turtle hatchling mortality. *Id.* at 1305. However, the court found that the county ordinance at issue did seek to ban artificial lighting even though harmful lighting persisted despite the county's best efforts. *Id.* at page 1306. The court held that because the true violators of the Endangered Species Act were not before the court it could not find cause or enjoin the harmful behavior. *Id.* at 1308.

In a case with many links in the causal chain, the Fifth Circuit determined that permitted water withdrawals were not the proximate cause of whooping crane deaths. *Shaw*, 756 F.3d 801 at 806. The Texas Commission on Environmental Quality allowed private parties with permits to withdraw water from a number of rivers that eventually flowed into the San Antonio Bay–the whooping crane habitat. *Id.* at 807. The withdrawals from the river decreased the freshwater in the bay and the salinity increased, which in turn caused a reduction in food for the whooping cranes. *Id.* As a result of the modification to the habitat, twenty-three cranes died. *Id.* In arriving at its judgement, the court explained that the Commission could not foresee its actions would harm the cranes because the Commission was not aware there was a material decrease in

freshwater inflows to the bay compared to prior years. *Shaw*, 756 F.3d 801 at 821. Additionally, while there were many links in the causal change, the real issue was that many of those links were contingent on factors beyond the Commission's control, such as the amount of water each permitted individual would use. *Id.* at 822. These factors all weighed against a finding of proximate cause.

Exposure of the oval pigtoe mussel habitat, which resulted in the death of the twenty-five percent of the population, was a foreseeable consequence of Greenlawn's water withdrawals. R at 9. Greenlawn's water withdrawals are similar to the issuing of fishing permits in *Strahan* because it was impossible to safely withdrawl twenty-five CFS each day without harming the mussels, just as it was impossible to deploy certain fishing gear without threatening the whales. Additionally, Greenlawn argued that during the drought conditions it did not change the amount of water it withdrew from the reach. R at 16–17.This argument, which is meant to demonstrate the drought caused the harm to the mussels, rather than Greenlawn's actions, falls flat. Unlike *Shaw*, where a lack of understanding of the relationship between freshwater withdrawals and historic decreases in salinity led the court to find no cause, in this case there is a long history of drought and a manual for how to handle drought conditions. In 2006, 2007, 2008, 2009, 2010, and 2012 drought conditions reached Zone 1 restrictions, providing Greenlawn and its citizens adequate warning, experience with coping with drought conditions, and a general knowledge of the dam restrictions. R at 8. Further, unlike *Loggerhead* where the parties causing the harm by producing artificial light were not before the court, Greenlawn–the party responsible for exposing mussel habitat–is before the court.

Greenlawn could argue that a chain of events caused the exposure of mussel habitat and mortality and therefore the city's withdrawals are not the sole cause of the harm. Greenlawn is

correct that upstream water withdrawals, drought, cessation of hydroelectric power releases, increased releases to the reach, and the city's water withdrawals were all part of a long causation chain. However, Greenlawn's argument only holds water if the causation test is a but-for analysis, which the case law soundly rejects in favor of proximate caustion. Given the past drought conditions, and the location of the reach in relation to the confluence, and the curtailments of hydroelectric power releases, it is utterly implausible that Greenlawn could not foresee that by withdrawing nearly all the water from the reach downstream habitat would be exposed. Therefore, Greenlawn's water withdrawals from the reach were a foreseeable proximate cause of the harm to the mussels and constituted a violation of § 9 of the Endangered Species Act.

IV. THE DISTRICT COURT ERRED IN GRANTING AN INJUNCTION OF A MUNICIPAL ACTIVITY WITHOUT FIRST BALANCING THE EQUITIES

The actions in this case that constitute a violation of the Endangered Species Act, and therefore require enjoining, are § 9 violations and are distinct from cases barring courts from balancing the equities. The body of case law that greatly restricts a court's ability to balance the equities when determining whether or not to grant an enjoin certain activities applies to violations of § 7 of the Endangered Species Act. *Biodiversity Legal Found v. Badgley*, 309 F.3d 1166 (9th Cir. 2002); *Cottonwood Envtl. Law Ctr. v. United States Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015); *Tennessee Valley Auth. V. Hill*, 437 U.S. 153 (1978); *see also Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531 (1987). While there is Supreme Court precedent that bars courts from conducting an equity analysis, this case is distinct from those previously cited because the district court found that the operation of Howard Runnet Dam Works was not subject to consultation under § 7. This case does not require the court to balance the public

interest in a project, such as construction of a dam, against the value of endangered species. Rather, the interest in this case is between public riparian rights–rights the ACOE cannot deny–and the value of endangered species. Given the validity of both interests, the district court erred in not balancing the equities before enjoining Greenlawn's activities.

Further support for this position is found in the Endangered Species Act itself. Section 10 allows parties to obtain permits to take endangered species when the taking is incident to lawful activity. 16 U.S.C. § 1539. This allowance clearly shows there is room for agency discretion regarding takings and indicates that the same restrictions on a court's analysis for other sections of the Endangered Species Act should not be present for takings violations.

CONCLUSION

For the reasons discussed above, the Twelfth Circuit Court of Appeals should affirm the District Court's determination that Greenlawn has riparian landlowner rights to the Green River Bypass Reach, and because of that right, the United States Army Corps of Engineers did not violate the § 7 consultation requirement of the Endangered Species Act. Further, this Court should affirm the District Court's finding that Greenlawn's withdrawals constituted a take, which violated § 9 of the Endangered Species Act. Finally, this Court should balance the equities before enjoining Greenlawn's lawful water withdrawals.

Respectfully submitted,

Counsel for U.S. Army Corps of Engineers