Team Number 41

C.A. No. 19-000987

United States Court of Appeals for the Twelfth Circuit

New Union Oystercatchers, Inc.,

Plaintiff - Appellant,

v.

United States Army Corps of Engineers,

Defendant – Appellee

v.

City of Greenlawn, New Union,

Defendant – Appellee.

On Appeal From the United States District Court of New Union

Brief for Appellants City of Greenlawn, New Union

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The United States District Court District of New Union had proper jurisdiction to address issues related to the Endangered Species Act, 16 U.S.C. §1538 (2018), as federal questions under 28 U.S.C. § 1331 (2018). Also, the district court properly implemented supplemental jurisdiction for the riparian land issues under 28 U.S.C. § 1367 (2018). The district court entered its summary judgment on May 15, 2019. The City of Greenlawn and the New Union Oystercatchers, Inc. both filed a timely notice of appeal. This Court's jurisdiction is proper to review the final decisions of the district court under 28 U.S.C. § 1291 (2018). This Court ordered the parties to brief the issues on September 1, 2019.

STATEMENT OF THE ISSUES PRESENTED

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

II. Under § 7 of the Endangered Species Act, 16 U.S.C. §1536 (2018), was the ACOE's decision to provide sufficient flow to Greenlawn a non-discretionary action not subject to the consultation requirement?

III. Under § 9 of the Endangered Species Act, 16 U.S.C. §1538 (2018), was Greenlawn not liable for a "take" when plaintiff presented insufficient evidence to establish a causal connection between Greenlawn's withdrawal and the actual harm suffered by the mussel, and where the harm was unforeseeable and not proximately caused by Greenlawn?

IV. Prior to issuing an injunction under the Endangered Species Act, must the Court balance the equities before enjoining a municipality from providing water to its residents?

STATEMENT OF THE CASE

Since 1893, the City of Greenlawn (Greenlawn or City) has provided water for its residents through intakes from a portion of Green River (River). *Record (R.)* at 5. The River provides water to over 100,000 residents. *Id.* The City owns the land on both sides of the River. *Id.* On average, Greenlawn withdrawals 6

million gallons per day (MGD). *Id.* During the hottest summer months, demand can peak to 20 MGD, in part for plant watering. *Id.*

Greenlawn is authorized to withdraw water by the Army Corps of Engineers (Corps or ACOE). *Id.* When the Corps dammed Howard Runnet Lake, which flows into the River, the dams cut off the natural flow of water to Greenlawn's water intakes. *Id.* Thus, the Corps formalized an agreement to allow the City to withdraw water as it was entitled to as the riparian landowner. *Id.* One dam, the Howard Runnet, operates as a peaking electricity facility. *Id.* The other dam, Diversion Dam, controls water releases to Bypass Reach, the part of the River that runs through Greenlawn. *Id.* at 7

The Corps manages the dams' flow according to the Water Control Manual (Manual or WCM). *Id.* at 6. The Manual has not been updated since 1968. *Id.* Since then, water usage has increased due to upstream industrial agricultural operations. *Id*. at 7-8, 16. Nevertheless, water releases have remained the same, in accordance with the Manual. *Id.* at 6. In recent years, expanded use combined with climate change has led to lower water levels of the River. *Id*. at 8. In fact, the ACOE issued drought watches in 2006-2007, 2008, 2009-2010, 2012, and 2016. *Id*. at 8.

Then, in the spring of 2017, the Corps issued a drought warning and limited flow to Bypass Reach to seven cubic feet per second (CFS), as required by the Manual. *Id*. Greenlawn protested the curtailment, and the Corps increased the flow to the 30 CFS. *Id*. Shortly after, there was a drought emergency because the River's flow dropped close to zero, exposing a population of endangered oval pigtoe mussels downstream from Greenlawn. *Id*. at 9.

The mussels must remain submerged to live. *Id*. Also, the mussels depend on a fish to reproduce, and without flowing water, the larva cannot attach to the fish. *Id*. It was estimated that the River's mussel bed decreased by one fourth after the spring of 2017. *Id.* It has been asserted that if droughts continue, the mussels could die. *Id*. However, there are several populations of oval pigtoe mussels throughout Florida and Georgia[1]. Thus, there are more beds of these mussels outside of New Union.

[1] U.S. Fish & Wildlife Service, https://myfwc.com/wildlifehabitats/profiles/invertebrates/oval-pigtoe/ (last visited Nov. 18, 2019).

Thus, the appellant, New Union Oystercatchers (Oystercatchers or NOU), sued Greenlawn on July 17, 2017, regarding downstream water levels. *Id*. at 10. Oystercatchers claim that decreased water levels have caused harm to the mussels. *Id.* Oystercatchers also claim that Greenlawn has caused increased salinity to Green Bay, which has led to more predators eating their farmed oysters. *Id.* They asserted in 2016 their harvests were half of what they were in 2000. *Id.* Both the oysters and mussels are located outside of Greenlawn. *Id*. at 9-10. There is no other data regarding increased deaths of mussels or oysters. Oystercatchers do not own waterfront property. *Id*. at 10.

The district court granted several summary judgments. *Id*. at 18. The court found that Greenlawn had rights as the riparian landowner. *Id.* Also, the court found that the Corp's decision to provide flow to Greenlawn was not a discretionary action. *Id*. It additionally found that Greenlawn violated § 9 of the Endangered Species Act and committed a taking. *Id*. The court ordered an injunction that discharges average 25 feet-per-second without balancing the equities. *Id.*

SUMMARY OF THE ARGUMENT

Greenlawn has the right to continue water withdrawals for municipal purposes without implementing any conservation measures. Though Greenlawn is a municipality, under the minority rule, it is considered a riparian landowner. Greenlawn's withdrawals of water for municipal purposes include law and ornamental care. These uses are domestic, as they are needed to maintain one's household. Even if this Court finds that the utilization is not domestic, this Court should find that the use is reasonable under multiple riparian jurisdictions. Different courts have applied different approaches. But by and large, Greenlawn's water use is for a legitimate purpose and does not impact other riparian landowners. Hence, Greenlawn has a right to continued water withdrawals.

Additionally, the ACOE's operation of the Howard Runnet Dam during the drought was not a discretionary action subject to ESA § 7 consultation. The River and Harbor Act and the Water Control Manual both require the ACOE to operate the dam in compliance with Greenlawn's riparian water rights. When the flow of water into the Bypass Reach was restricted by the drought, Greenlawn's riparian water

rights were violated. The ACOE then had a legal obligation to increase the flow of water into the Bypass Reach, and did not have any discretion to do otherwise. Therefore, this was not a discretionary action.

Greenlawn's withdrawal of water cannot be found to be a take under ESA § 9. While the evidence was sufficient to show the oval pigtoe mussel was harmed, it did not show a sufficient causal connection between Greenlawn's withdrawal and the harm suffered by the mussel. Moreover, even if the court found Greenlawn's withdrawal caused harm to the mussel, Greenlawn still should not be found liable under § 9. The Supreme Court has interpreted § 9 to include principles of foreseeability and proximate cause. The harm suffered by the mussel was not the foreseeable result of Greenlawn's conduct, nor did Greenlawn's conduct proximately cause harm to the mussel. Thus, Greenlawn did not commit a take of the mussels.

Lastly, the district court had an obligation to balance the equities before issuing the injunction, and once these values are considered, this Court should reverse the injunction. Although some courts hold there is no need to balance the equities when there is a violation of the ESA, this conclusion is based on a faulty interpretation. Thus, this Court must consider that Greenlawn will not be able to provide water to its residents during a crucial time of the year. With the injunction in place, 100,000 will be limited access to water, which could result in lower property values and even death. Therefore, the equities must be balanced.

STANDARD OF REVIEW

The U.S. District Court for New Union erred as a matter of law when it granted summary judgment for Oystercatchers stating that Greenlawn took the mussels and that there was no need to balance the equities. However, the district court was correct to grant summary judgment for Greenlawn establishing the City as the riparian landowner and stating the Corps's action was not discretionary. Appellate courts review a lower court's grant of summary judgment de novo, applying the same standard under Fed. R. Civ. P. 56(c) (2018). *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996); *Castlewood Prods. v. Norton*, 365 F.3d 1076 (D.C. Cir. 2004); *Baker v. City of Trenton*, 936 F.3d 523, 529 (6th Cir. 2019). Thus,

this Court should review the decision de novo. *Id*. The district court's legal determinations are entitled to little or no deference. *Id*.

ARGUMENT

I. AS A RIPARIAN LANDOWNER, GREENLAWN HAS A RIGHT TO CONTINUE WATER WITHDRAWALS FOR MUNICIPAL PURPOSES BECAUSE SUCH USE IS REASONABLE UNDER COMMON LAW RIPARIAN DOCTRINE.

The District Court correctly found that Greenlawn is entitled to continue water withdrawals from the Bypass Reach for municipal purposes. *R.* at 13 The District Court applied principles of common law riparian doctrine, finding that Greenlawn's withdrawals from the Bypass Reach constitute domestic uses of water, and thus adverse impacts on other riparian landowners do not need consideration in the analysis. *Id*. (citing *see Harris v. Brooks*, 283 S.W.2d 129 (1955)); *see also* Robert E. Beck, *Waters and Water Rights* § 7.02(d)(2) (1991 & Supp. 1999).

New Union does not have any statutes or relevant cases governing this matter. *R*. at 12. Thus, this brief includes precedents from other common law riparian districts. Such precedents generally provide that a riparian landowner has a right to reasonable use of water, with consideration given to the adverse impacts on other riparian landowners. Joseph W. Dellapenna, *Water Law in the Eastern United States*, 26 Energy & Min. L. Inst. Ch. 11, 373 (2005). Domestic water use is given priority over other water uses. *Id*.

Greenlawn's withdrawals are for reasonable purposes. Thus, we ask this Court to affirm the grant of summary judgment on Greenlawn's riparian rights declaration. Further, because NUO does not own any land adjacent to the Green River, we ask this Court to affirm the lower court's finding that NUO is not entitled to riparian rights.

A. District Court Correctly Concluded Greenlawn is a Riparian Landowner.

As a preliminary matter, it is necessary to clarify a pivotal premise in this dispute—a municipality's rights as a riparian proprietor. Jurisdictions disagree on the issue. *R.* at 12. The District Court correctly applied the minority rule in this case, which holds that municipalities maintain rights as riparians. *Tubbs v. Potts*, 45 N.U. 999 (1909) (citing *Canton v. Shock*, 63 N.E. 600 (Ohio 1902)); *City of Philadelphia v. Collins*, 68 Pa. 106 (Pa. 1871); *Barre Water Co. v. Carnes*, 27 A. 609, 611 (Vt. 1893). Oystercatchers will likely reject an application of the minority rule, in this case, finding that Greenlawn is not entitled to rights as a riparian. This Court should maintain the minority rule.

In *Canton v. Shock*, the Ohio Supreme Court applied the minority rule in a water rights action against the city. *Canton v. Shock*, 63 N.E. 600, 602 (Ohio 1902). The court reasoned that similar to individuals, towns and municipalities own property (fire departments, streets, etc.) that provide for the city. *Id*. With this ownership, the city could face various liabilities. *Id*. Thus, the municipality should accordingly be entitled to the rights and benefits of such ownership, including reasonable use of water as a riparian proprietor. *Id*. Applying *Canton* to the present, matter this Court should very plainly find that Greenlawn is a riparian landowner. Greenlawn, like any city, owns the streets and public areas of the town. It faces liabilities from such ownership; thus, it should be given rights as a riparian.

Admittedly, other cases reject an application of the minority rule. In *Pernell v. Henderson*, the Supreme Court of North Carolina asserted that the minority rule should not be applied. *Pernell v. Henderson*, 16. S.E.2d 449, 451 (N.C. 1941). Supporting its reasoning, the court examined that riparian rights had been established under individual use. *Id*. Thus, the scope should not be expanded to groups of individuals. *Id*. As part of this point, the court noted that the rights would be provided to "thousands and perhaps hundreds of thousands" of people. *Id*. Finally, the court

emphasized that the minority rule is not common. *Id*. It stated, "The case of [*Canton v. Shock*] seems to stand practically alone…" *Id*.

The reasoning in *Pernell* is weak and overstated. To start, *Pernell* did not consider the fairness of the issue. Municipalities, like all other owners of property, are subject to liabilities. It thus only makes sense that they would be given the same benefits as other property owners. Additionally, the *Pernell* court failed to explain *why* expanding riparian rights to a collective is unjustified. The *Pernell* court's reasoning merely consists of stating the original purpose of the doctrine. Perhaps this is an insinuation that large groups of people will abuse water sources. But this too would be an invalid criticism. A large group, even if afforded riparian rights, is still subject to restrictions under the doctrine. Namely, the group would not be able to withdraw unreasonable amounts of water.

B. Greenlawn's Water Withdrawals for Municipal Purposes are Reasonable.

Riparian doctrine is a product of the common law, helping to resolve competing water claims. *Harris v. Brooks*, 283 S.W.2d 129, 132 (Ark. 1955). The doctrine includes two main applications—natural flow theory and reasonable use theory. *Id*. at 132-33. Under natural flow theory, riparian proprietors have the right to access water sources in their natural state or at their natural level. Richard C. Ausness, *Water Use Permits in a Riparian State: Problems and Proposals*, 66 Ky. L.J. 191, 198 (1977). The theory does not place a complete ban on consumptive uses of water. *Id*. But it does create a distinction between "natural uses" and "artificial uses." *Id*. at 198-99.

Natural uses are those that are needed to maintain one's livelihood. *Id*. at 198. They are often associated with domestic purposes, such as drinking, bathing, and providing water to animals. *Id*. Artificial uses are merely water withdrawals that increase one's quality of life but are

nonessential. *Id*. at 198-99. Under natural flow theory, riparian landowners are entitled to withdraw water for natural purposes without regard to impacts on the water source. *Id*. at 198. Artificial purposes do not maintain such protection. *Id*. at 198-99.

In contrast, reasonable use theory entitles riparian landowners to withdraw water, as long as such use does not unreasonably impact other riparian proprietors. *Id*. at 199-200. Similar to natural flow theory, reasonable use theory assesses natural uses and artificial uses differently. *Id*. at 200. Natural and domestic consumption is always considered fair use under this doctrine. *Id*. But artificial applications may not be protected depending upon impacts on other riparian landowners. *Id*. 200-01.

In the present case, the District Court applied the reasonable use theory. *R.* at 13. Specifically, the District Court found that Greenlawn's withdrawals, "including domestic water use for gardening, is considered a 'natural use' allowed to riparian owners without regard to impact on other riparian landowners." *Id*. Similarly, we ask this Court to apply the same standard at the appellate level and find in favor of Greenlawn because the use of the water is domestic.

1. Greenlawn's Water Withdrawals are Natural Uses

This Court should find that water withdrawals for municipal purposes, including law and ornamental care, are domestic use. Consistent with the above analysis, this Court should find that such removals are inherently reasonable because they are a natural use.

Kundel Farms involves a water claim between two neighbors after one erected a fence between their properties. *Kundel Farms v. Vir-Jo Farms, Inc.*, 467 N.W.2d 291, 292 (Iowa Ct. App. 1991). The fence blocked the flow of a water source, limiting water access for livestock and agriculture. *Id*. at 292, 295. To resolve the dispute under riparian law, the Iowa Court of Appeals assessed the meaning of "domestic" and "natural" use. *Id*. at 294. It stated, "[o]rdinary or natural

uses have been held to include the use for domestic purposes, including household purposes, such as cleansing, washing, and supplying an ordinary number of horse or stock with water." *Id*. The court ultimately concluded that the neighbor's use of water for livestock purposes is natural. *Id*. at 295.

Applying the *Kundel* case to the present matter, all of Greenlawn's water withdrawals should be treated as domestic uses. Under the *Kundel* standard, "household" purposes are very explicitly covered as domestic uses. Quite literally, Greenlawn residents using water to support their lawn growth and to grow plants are caring for their households. These are common and typical ways to support and maintain one's home.

Further, it is arguable that *Kundel*'s inclusion of livestock watering also support's Greenlawn's position. Being a product of the common law, the riparian doctrine likely included livestock watering as a natural and domestic use because individuals had their economic livelihoods tied to a successful agrarian economy. But over many decades, the economy has evolved. People today are now building wealth through other means, such as purchasing real estate. So, by maintaining one's home via lawn care and ornamental plant watering, people are indirectly supporting their economic livelihoods. Therefore, the law should account for this change and cover such new uses.

Admittedly, this argument is more attenuated than the first. Oystercatchers will likely distinguish between livestock maintenance, which is directly needed for the operation of a business, versus decorative home care. Such a distinction is conceded, but it is also essential to recognize that as change occurs in the economy, people are changing their behaviors accordingly. Thus, viewing these ambiguities in an abstract light may be necessary.

Some cases do seem to reject the argument that water provided to residents of a town or municipality is a domestic or natural use. However, these cases are superficial and not applicable to the present day. For example, in *Crawford*, water was provided to a town for "sprinkling streets" and "lighting power for a plant." *Crawford Co. v. Hathaway*, 93 N.W. 781, 797 (Neb. 1903). The court rejected that these were domestic uses of water. *Id*. Instead, it indicated that other applications, such as "drinking and cooking" and "watering livestock," are more reflective of what is meant by withdrawing water for domestic purposes. *Id*.

At the surface, this case seems to advocate against Greenlawn's position. It involves a municipality that is attempting to provide a public water source to benefit its residents. That is strikingly similar to the dynamics of Greenlawn's dispute. However, unlike the *Crawford* case, Greenlawn's withdrawals are not focused on general maintenance of the town; the withdrawals are ultimately being distributed to individual residents. Residents in Greenlawn are using the water for essential home maintenance purposes. The water is not being used for public purposes. Further, the *Crawford* case is an earlier decision. It came from a time where proper maintenance of the home was not quite as accessible as it is today. Thus, the conception of what is "domestic" can be thought of in a broader light.

2. If not domestic, Greenlawn's Withdrawals for Municipal Purposes are Reasonable

If found that Greenlawn's water withdrawals are not domestic, this Court should still conclude that the withdrawals are a reasonable use of water under riparian law. As previously stated, riparian law allows landowners to use water so long as it does not unreasonably impact other riparian landowners. *Permits in a Riparian State* at 199-200. The meaning of "reasonable" use is a comprehensive analysis and depends upon many factors. Christine A. Klein, *Modernizing Water Law: The Example of Florida*, 61 Fla. L. Rev. 403, 407 (2009). Greenlawn's withdrawals

for municipal purposes fall within the standards from two prominent riparian jurisdictions, Connecticut and Michigan.

Connecticut Analysis

Greenlawn's withdrawals fall within Connecticut's reasonableness standards. *Mason v. Hoyle* is an early decision providing a multi-factored framework for assessing reasonable use of water under riparian law. *Mason v. Hoyle*, 14 A. 786 (Conn. 1888). The case involves a mill owner who stored water from a stream, adversely impacting downstream riparian landowners. *Id*. at 789. In determining whether or not the mill owner had engaged in a reasonable use of water, the court provided multiple factors for analysis. *Id*. at 261-73l. The factors include: equal uses of water, changed capacity of stream / seasonal droughts, natural flow, customs in the community, and the costs and benefits of use. *Id*.

First, the *Mason* court noted that "there must be as near as possible an equal use, or, rather, an equal opportunity to use." *Id*. at 789. In the present matter, it is clear that there is not an equal use. Greenlawn is an upper riparian. The Oystercatchers are downstream users. The use is inherently unequal. However, this point should not be given substantial weight because the Oystercatchers are not riparian landowners. Thus, their utilization of the water should be outside the scope of this analysis. Other riparian landowners impacted by Greenlawn's withdraws can be considered, but not the Oystercatchers.

Second, *Mason* analyzed the "changed capacity of the stream" with the context of "seasonal droughts." It noted that during fall, winter, and spring months, the stream had flowed normally. *Id*. at 792. However, during the summer, the stream reduced the amount of flow. *Id*. Despite this dynamic, the mill owner did not mitigate his use. *Id*. The court found this aspect of the case to be critical because it was almost certain the mill owner would have been able to

anticipate the lower water level. *Id*. at 792-93. This framework supports Greenlawn's position. In *Mason*, the stream was certain to reduce its capacity during the summer months. It was part of an annual cycle. The present matter does not involve such certainty. The ACOE had issued drought watches in previous years. This unfortunate trend does not have any guarantee of further repetition. Without such a degree of certainty, people should not need to adjust their behavior.

Third, the *Mason* case suggests that uses that do not impede the natural flow of water are considered reasonable. *Id*. at 790. In the present matter, Greenlawn's withdraws admittedly manipulates natural flow by taking water out of the stream. However, it should be recognized that Greenlawn is doing so for important community purposes.

Fourth, regarding customs within the community, the *Mason* court held, "the immemorial custom upon the stream… has an important bearing upon question." *Id*. at 793. It is difficult to apply such a factor in the present matter because the *Mason* court did not expand upon this meaning. However, it should be noted that Greenlawn had been withdrawing water for over 100 years. It was custom within the community. To upend this would be a tremendous change in community expectations.

Finally, *Mason* utilized a cost-benefit analysis. *Id*. at 793-94. The *Mason* court concluded that there was a disproportionate benefit and cost in the matter. *Id*. Here, a cost-benefit analysis is not as easily applicable because of the different rights of each party. While Greenlawn has rights as a riparian, the Oystercatchers do not. Putting this context aside, Greenlawn incurs substantial municipal and economic benefits through withdrawal. By withdrawing water for city purposes, Greenlawn is indirectly increasing its home values over its 100,000 residents. Even if each resident only sees a marginal gain, when spread across the town's population, the net economic benefit is substantial. The fishermen on the Green River, in comparison, do not have such a net effect. In

sum, the majority of the Mason factors support Greenlawn's position that withdrawals are reasonable.

Michigan Analysis

Hoover v. Crane involves Michigan's assessment of reasonable water use under common law riparian rights. *Hoover v. Crane*, 106 N.W. 2d 563, 563 (Mich. 1960). In this case, a dispute arose between two riparian landowners, a fruit farmer and a resort owner. *Id*. The resort owner accused the fruit farmer of lowering the lake level by pumping water out for his crop. *Id*. at 564. The Supreme Court of Michigan did not find unreasonable water use, largely due to an inability to pinpoint the exact cause of the reduction. *Id*. at 566. However, the court did establish factors for assessing reasonableness under Michigan riparian law. *Id*. at 565. The court stated, "we must consider what the use is for, its extent, duration, necessity, and its application; the nature and size of the stream and the several uses to which it is put; the extent of the injury to the one proprietor and the benefit to the other; and all other facts which may bear upon reasonableness of use." *Id*.

Later, in *West. Michigan v. Lakeland*, the Michigan Court of Appeals molded these factors into a three-part framework. *West. Michigan Dock & Mkt. Corp. v. Lakeland Invs.*, 210 Mich. App. 505, 513 (Mich. Ct. App. 1995). In the case, a man moored his boats to a dock for extended periods. *Id*. at 508. The court provided that an assessment of reasonableness includes: 1) the natural state of the water source, 2) type and purpose of the use, and 3) costs and benefits. *Id*. at 513. The court found that although the lake had been transformed for industrial and commercial purposes, the businessman's history of using the dock for non-business purposes did not match his alleged intent. *Id*. at 513-514. Further, the court concluded that the use of the dock in this manner disproportionately spread costs and benefits. *Id*. at 514.

This Court should find that Greenlawn's withdrawals are reasonable under Michigan riparian law. The first factor in this framework encourages courts to preserve areas that are still natural. In *West. Michigan* case, the court hesitated to give the factor weight because the area had already been industrialized. Similarly, Bypass Reach has been impacted by a growing society. It is situated between the Howard Run Dam Works and the City of Greenlawn. Given this context, this Court should provide a minimal weight to the first element.

The second factor holds that the type and purpose of the use should be examined. In the previous case, the court analyzed the intended purpose and historical purpose of use. The court emphasized the fact that the businessman claimed he needed to use the dock for business purposes, but also had a history of non-business use. This shows that the utilization needs to be consistent and for a legitimate purpose. Greenlawn maintains that the withdrawals are required for municipal purposes. For the past 100 years, Greenlawn has used the Bypass Reach for municipal withdrawals. That is their stated intent.

Finally, the third factor requires a cost-benefit analysis. As demonstrated in the Connecticut riparian law analysis, this supports Greenlawn's position as a significant beneficiary of the use, while imposing minimal costs on other riparian landowners. In sum, Greenlawn's withdrawals for municipal purposes satisfy the test provided under Michigan law.

Arkansas Counter Analysis

Greenlawn's withdrawals are reasonable under Connecticut and Michigan riparian law. However, it could be argued that under Arkansas riparian law, the use is unreasonable. In *Harris v. Brooks*, the Supreme Court of Arkansas resolved a dispute between two riparian landowners using its reasonableness analysis. *Harris* at 132-33. In the case, a rice farmer irrigated his crop from the lake adjacent to his property. Id. at 130. Evidence showed a long history of using the lake

as a water source, dating back many years prior. *Id*. at 131. Ultimately, this caused a reduction in the water level, which in turn, caused another riparian landowner to lose sales on his boat and rental operation. *Id*. The court ordered the farmer not to pump water out of the lake when the level was below 189.67 feet above sea level. *Id*. at 135. This finding was not based on an objective "normal" level. *Id*. The court stated it was "based on the fact that we think the evidence shows this level happens to be the level below which appellants would be unreasonably interfered with." *Id*.

The *Harris* case demonstrates that previous water use, even extending back many years, may not be relevant in assessing the reasonableness of water use. In essence, the *Harris* court did not afford any weight to the duration the rice farmer utilized the lake for irrigation for many years. This principle undercuts both the "customs" argument in the Connecticut analysis and the "purpose" argument in the Michigan framework. Further, it could undermine the fact that Greenlawn had been withdrawing water before the construction of the diversion dam. Regardless, this analysis in *Harris* should not be given much weight. The *Harris* case did not provide any succinct factors or framework for analyzing reasonableness water use under Arkansas law. It merely stated a conclusion in response to the dispute. The scholarship has noted this. *See Dellapenna* at 375.

C. Oystercatchers are not Entitled to Riparian Rights as Non-Riparian Owners.

Landowners acquire property rights by owning land adjacent to a water source. *Ausness* at 196-97. The area must have contact with the water to carry riparian rights. *Id*. Riparian rights are transferred with the title of a property. Wells A. Hutchins, *Basic Water Rights Doctrines and Their Implications for the River Basin Development*, 22 Law & Contempt. Prob. 276, 283 (1957).

This court must find the Oystercatchers' claim for relief invalid. The organization is not representing any riparian landowners. The Oystercatchers allege that Greenlawn's withdrawals are

impacting the fishing industry, specifically those bringing this lawsuit. However, none of the litigants own property that has contact with the Green River. This alone should defeat their claim for riparian rights.

In some circumstances, riparian rights can be acquired outside of the transfer of water adjacent property. However, these circumstances do not apply to Greenlawn's situation. In *Pyle v. Gilbert*, a dispute arose regarding a non-navigable water source. *Id*. *Pyle v. Gilbert*, 245 Ga. 403, 403 (Ga. 1980). The court ultimately held that "the right to reasonable use of water in a non-navigable watercourse on non-riparian land can be acquired by a grant from riparian landowner." *Id*. at 411. This extension of the law does not apply here because the Oystercatchers are not seeking riparian rights through a non-navigable water source. Their claim for riparian rights relates to its *use* of the Green River, not the ownership of any land.

Also, there is no indication that the Oystercatchers acquired a prescriptive easement of the Green River. The establishment of a prescriptive easement requires the use to be "adverse, notorious, continuous and uninterrupted, and… made under a claim of right or titled." *Ausness* at 205-06. There is no evidence that the Oystercatchers have satisfied this criterion.

In conclusion, Greenlawn has riparian rights as a municipality. This Court should find that Greenlawn's withdrawals from the Bypass Reach are domestic uses of water. If not, this Court should still find that Greenlawn's withdrawals are reasonable. Thus, no water conservation measures are necessary.

II. THE ACOE DID NOT COMMIT A DIGRESSIONARY ACTION SUBJECT TO CONSULTATION WHEN IT INCREASED THE FLOW RATE BECAUSE THE ACOE WAS OBLIGATED TO DO SO

The ACOE's operation of the Howard Runnet Dam Works during drought conditions was not a discretionary action subject to ESA § 7 consultation requirements. Therefore, the ACOE was not required to consult with FWS before increasing the flow of water to Greenlawn to ensure its action was not likely to harm the oval pigtoe mussel.

Section 7 of the Endangered Species Act (ESA) imposes on all agencies a duty to consult with either the Fish and Wildlife Service (FWS) or the NOAA Fisheries Service (NOAA) before engaging in any agency action that may affect a listed endangered species or that species' critical habitat. *See* 16 U.S.C. § 1536(a)(2) (2018); *see also Karuk Tribe of CA v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (citing *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 692 (1995)). "The purpose of the consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat…[it] reflects a conscious decision by Congress to give endangered species priority over the primary missions of federal agencies." *National Resources Defense Council v. Jewell*, 749 F.3d 776, 779 (9th Cir. 2014) (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978))(internal quotation marks omitted).

Whether the agency action is subject to § 7 of the ESA is controlled by current Department of the Interior regulations and judicial interpretations of both the regulations and ESA § 7 itself. The applicable regulation is 50 C.F.R. § 402.02, which states:

> Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, ... (d) actions directly or indirectly causing modifications to the land, water, or air.

See 16 U.S.C. § 1536(a)(2) (authorizing statute).

The phrase "agency action" has always been broadly interpreted by the courts. *See Karuk Tribe*, 681 F.3d at 1021 (citing *W. Watersheds*, 468 F.3d at 1108). The variety of agency actions

subject to consultation demonstrate this broad interpretation. *See Karuk Tribe,* 681 F.3d at 1021 (citing *Hill*, 437 U.S. at 173-74). Such actions have included the renewal of water contracts, the creation of interim management strategies, and the ongoing construction and operation of a federal dam. *Id*.

Courts apply a two-factor test to determine whether an agency activity is an action subject to consultation. *See Friends of the River v. National Marine Fisheries Serv.*, 293 F.Supp.3d 1151, 1166-67 (E.D. Ca. 2018) (citing *Ctr. for Biological Diversity v. U.S. Environmental Protection Agency*, 847 F.3d 1075, 1090 (9th Cir. 2017). First, the court determines whether the agency committed an affirmative action. *See Karuk Tribe*, 681 F.3d at 1021. The affirmative nature of the language in ESA § 7(a)(2) , authorized, funded, or carried out, is key to deciding this factor. *W. Watersheds*, 468 F.3d at 1107-08. Therefore, a failure of the agency to act, such as when the agency chooses not to regulate a private party acting pursuant to an already issued permit, does not require agency consultation. *Friends of the River*, 293 F.Supp.3d at 1167 (citing *California Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 598 (9th Cir. 2006)).

The second factor is that the agency must have discretion over whether to commit the action in question. "Section 7 and the requirements of the Part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. In *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666-67 (2007), the Supreme Court granted Interior Chevron deference and upheld this regulation as a reasonable interpretation of the ESA. "[Section 402.03]'s focus on 'discretionary' actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species." *Id.* "[W]here there is no agency discretion to act, the ESA does not apply." *Turtle Island Restoration Network v. National Marine Fisheries*

Service, 340 F.3d 969, 974 (9th Cir. 2003) (quoting *National Resources Defense Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998).

The district court granted summary judgment to ACOE finding "...ACOE is required by the riparian rights law of New Union to continue providing flows to the Bypass Reach sufficient to meet Greenlawn's municipal needs." *R.* at 15. The court found ACOE did not have discretion over its increase in flow rate into the Bypass Reach, and so this action did not trigger ESA § 7 consultation. The district court's judgment should be affirmed.

A. The ACOE's Action was not Discretionary

1. The River and Harbor Act creates a binding legal obligation on the Corps which removes its discretion to provide water to Greenlawn

To determine whether the ACOE's discretion to act was removed by a conflicting statute, the legislation that authorized the Howard Runnet Dam's operations must be examined is the River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945) which authorized the dam's construction and operation. It states in relevant part:

> …it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes of the waters of the Nation's Rivers…

River and Harbor Act.

The Act requires Corps dams to be operated in a manner that recognizes States' water rights over the development, utilization, and control of rivers and watersheds within their borders. The Act shows the federal government saw the need to protect the States' water rights and enacted this policy accordingly.

Both the agreement between the Corps and Greenlawn and the Manual align with this policy. Prior to construction of the Howard Runnet Dam, Greenlawn relied on the natural flow of the River for its water supply. *R.* at 6. Recognizing the dam's construction would cut this supply

off, the Corps agreed with Greenlawn to continue to supply water into the Bypass Reach. *Id.* The Manual contains a provision that its operation will conform with state riparian water rights. "At all times the Howard Runnet Dam Works 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." *Id*. at 7.

Also, the Act prevents the Corps from infringing upon New Union's water rights in its operation of Howard Runnet Dam. The Corps has no discretion whether to remedy an action that violates Greenlawn's riparian water rights. When the Corps reduced the Bypass Reach flow rate to 7 CFS, it prevented Greenlawn from making reasonable use of the Bypass Reach, and thus violated Greenlawn's riparian rights.

The legal obligation created by the Act established a policy to respect States' water rights. The Act declares it to be the policy of Congress to "recognize...the interests and rights of the States…" River and Harbor Act. It further states that it will "protect and preserve" the "established and potential uses" of the States' rivers and watersheds "to the fullest possible extent." River and Harbor Act. This interpretation of the Act is supported by ACOE's agreement with Greenlawn to flow water into the Bypass Reach for Greenlawn's use, and the Manual provision that the dam's operation will abide by Greenlawn's riparian rights.

The language contained in the Act is very similar to the language the Supreme Court evaluated in *Home Builders*. In *Home Builders*, the Court interpreted § 402(b) of the Clean Water Act requiring the EPA "shall" transfer regulatory authority to state agencies made the transfer a "nondiscretionary" EPA action. *Id.* at 665-68. Here, the River and Harbor Act declares it will uphold state water rights to the fullest extent possible. Thus, the Corps does not have discretion to alter the flow into the Bypass Reach beneath what will be sufficient to maintain Greenlawn's

riparian right of reasonable use. Since the EPA did not have discretion to transfer regulatory authority to the state, the transfer was not subject to § 7 consultation

2. The Manual creates a second legal obligation

There is also support in the caselaw that the Manual should be interpreted as a legal requirement removing ACOE's discretion to increase the flow into the Bypass Reach. *Natural Resources Defense Council v. Norton*, 236 F.Supp.3d 1198 (E.D. Ca. 2017). In *Norton*, the district court details a line of cases evaluating whether agencies have sufficient discretion to engage in consultation regarding permits that have already been issued or contracts that have already been executed. *Id*. at 1212-1215. In summary, the line of cases, held the agreement terms must be examined to decide if an agency retained discretion to implement protections of the species. *Id.* at 1215 (citing *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001)); *see also Houston*, 255 F.3d at 1082.

The Manual provides that the dam shall operate at all times in compliance with Greenlawn's riparian rights and in compliance with its agreement to provide Greenlawn a sufficient water supply. The only question is whether the remaining terms of the Manual give the Corps discretion to alter its actions for the benefit of a protected species. It does not.

The terms of the Manual provide for specific operations depending on water levels for the purpose of achieving four goals, none of which are to protect fish or wildlife. Furthermore, the WCM's general provision ensures these goals must also comply with Greenlawn's riparian rights. If the Manual was renegotiated or if a new manual was established, it would indeed be subject to ESA § 7; however, no such provision exists.

The River and Harbor Act and the Manual require the Corps's operation of the Howard Runnet Dam to comply with state riparian rights. The reduction of flow into the Bypass Reach

violated Greenlawn's riparian rights. Therefore, the ACOE had a legal obligation to increase the flow of water into the Bypass Reach. Since this legal obligation removed ACOE's discretion to take this action, ACOE's action was not subject to ESA § 7 consultation requirements. The district court's judgment should be affirmed.

III. GREENLAWN DID NOT TAKE THE MUSSELS BY WITHDRAWING WATER

Greenlawn was not liable under ESA § 9 for withdrawing water during the drought. Not only is there insufficient evidence to prove Greenlawn's withdrawal of water caused actual harm to the oval pigtoe mussel, but the harm was not proximately caused by nor the foreseeable result of Greenlawn's withdrawal. Therefore, it was incorrect for the district court to conclude that Greenlawn committed a taking, and this Court must reverse this error.

Section 9 of the Endangered Species Act makes it illegal for any person to "take" any endangered or threatened species. *Babbitt v. Sweet Home Chapter of Communications for a Great Oregon*, 515 U.S. 687, 689 (1995); *see* 16 U.S.C. § 1538(a)(1) (2018). The Act further defines "take" to mean to "harm." 16 U.S.C. § 1532(19) (2018).

The Department of the Interior (Interior) has also issued several regulations that clarify the many acts that can constitute a § 9 "take." *See Babbitt*, 515 U.S. 687 (2018); 50 C.F.R. § 17.3 (2019). Accordingly, Interior has defined "harm" to 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. Although it is not always easy to discern when a defendant becomes liable under ESA § 9, Greenlawn cannot be found to have caused harm to the oval pigtoe mussel.

1. Oystercatchers Failed to Provide Sufficient Evidence that Greenlawn Harmed the Oval Pigtoe Mussel

At trial, Oystercatchers offered uncontradicted expert testimony that water withdrawal from the Green River resulted in harm to the oval pigtoe mussel. The testimony showed the mussel's habitat suffered substantial modification and degradation along the Green River beneath Greenlawn. Although the plaintiff's evidence sufficiently proved the oval pigtoe mussel suffered harm, it did not provide a sufficient causal connection between Greenlawn's withdrawal and the harm suffered by the mussel.

A plaintiff must establish several factors before it can establish liability for taking a protected species through habitat modification. Alan M. Glen & Craig M. Douglas, *Taking Species: Difficult Questions of Proximity and Degree*, 16 Nat. Resources & Env. 65, 68 (2001); *see also* THE ENVIRONMENTAL LAW REPORTER, ENDANGERED SPECIES HANDBOOK, 68-70 (2nd ed. 2010). Plaintiffs must offer evidence showing identifiable members of the species have been killed or injured; or, in the case of future harm, identifiable members that are substantially likely to be killed or injured. *Id.* And plaintiffs must also prove the conduct of the defendant was the actual cause of the death or injury. *Id.* Mere showings of speculative harm will not suffice, and courts cannot blindly rely on expert opinion to find actual harm. *Id.* at 69 (quoting *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 2000); discussing *Wildlife v. Bernal*, No. CV-98-TUC-FRZ)(internal quotes omitted)). A court needs case-specific data to find a take. *Id.*

For example, three expert opinions were found insufficient to prove a take in the case of *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 11. F.Supp.2d 529 (D. V.I. 1998). There, plaintiffs brought a § 9 claim against FEMA seeking to enjoin the agency from constructing temporary housing for displaced hurricane victims. *Id.* at 531-32. They argued the construction violated § 9 by harming the endangered tree boa, and actually produced evidence of not only the construction and modification but two dead tree boas. *Id.* at 552-53. "Plaintiffs have

failed to present any direct or circumstantial evidence establishing the presence of the Tree Boas on the project site during construction. They have also failed to produce any direct evidence that the acts of clearing the site or constructing the Project actually killed or injured a Tree Boa." *Id.* The plaintiffs did not provide sufficient evidence that FEMA's conduct caused actual harm to the tree boa.

Conversely, an example of evidence sufficient to find the defendant committed a § 9 "take" occurred in the case of *Loggerhead Turtle v. County Council of Volusia County, FL*, 896 F.Supp. 1170 (M.D. Fl. 1995). Plaintiffs brought suit against the county government for authorizing a third-party to commit the "take" in question through local law. *Id.*; *see U.S. v. Town of Plymouth, MA*, 6 F.Supp. 2d 81, 90 (D. Ma. 1998) (…[T]he ESA's prohibitions contemplate both the actions of individuals who directly take a species and those of a third party authorized by the government to engage in activity resulting in a taking). The plaintiffs sought to enjoin both lighting and beachfront illumination ordinances along with a vehicle ordinance that allowed cars to drive on the beach. *Loggerhead Turtle*, 896 F.Supp. at 1178-83.

Interestingly, the court found both for and against the plaintiffs. The court partially ruled for plaintiffs by banning vehicles on the beaches at night after determining the evidence showed driving on the beaches at night harmed the turtles. *Id.* at 1182-83. Plaintiffs offered not just scientific testimony but also eyewitness accounts of vehicles causing harm to the turtles and their nesting grounds at night. *Id.* at 1173-75. Plaintiffs established that turtles were disoriented and distracted by vehicle headlights, could become trapped in vehicle tire tracks, and that parked cars could smother or crush their eggs. *Id.* at 1182. Given this sufficient evidence of the harm and its cause, the court barred night driving and driving at any time near the turtles' nesting grounds. *Id.* at 1182-83.

In the same case, however, the court also declined to ban daytime driving after finding plaintiffs offered insufficient proof to show the turtles were harmed by vehicles driving during the daytime. *Id.* The court would not speculate or infer as to the likelihood of harm or injury to the turtles that could be prevented if the enjoinment were simply expanded to ban all beach vehicle traffic. *Id.* at 1182 (emphasis added). Thus, the court tailored its enjoinment only to where the evidence offered by the plaintiffs was sufficient to support a taking but refused to stretch its ruling any further. *Id.* at 1182-83.

Here, Oystercatchers' evidence did not establish a sufficient causal connection to meet the high standard of showing Greenlawn's conduct caused actual harm to the species. As in *Hawksbill Sea Turtle*, the plaintiff's evidence did not find a sufficient causal connection between Greenlawn's conduct and the harm suffered by the mussel. Unlike *Hawksbill Sea Turtle* where three experts stated the construction would result in harm, Oystercatchers only presented one expert. This expert stated that the conduct would lead to the death of the entire mussel bed, however it failed to show how Greenlawn's action would result in this harm. Rather, the expert stated that if the conditions persisted, not if Greenlawn's withdrawal persisted.

The evidence presented to the trial court is similar to the evidence the experts in *Hawksbill Sea Turtle* presented because neither are sufficient to actually link the action to the harm. Similar to how increased runoff could not be shown to harm a species, Greenlawns withdrawal of water cannot be shown to harm the species. Greenlawn has been withdrawing the same amount of water for years, and yet no harm has come to the mussels. Also, the Corps control the flow of the water. Therefore, this shows that Greenlawn has not caused the harm, just as FEMA's construction did not cause harm.

Furthermore, none of the oval pigtoe mussels were found in Bypass Reach, the part of the River Greenlawn utilizes for its municipal water supply. Oystercatchers testimony focused solely on oval pigtoe mussel beds located outside of Greenlawn's control. Unlike *Loggerhead*, no testimony was offered to show people within Greenlawn's jurisdiction harmed the oval pigtoe mussel by withdrawing water. In fact, no testimony was offered to show any oval pigtoe mussel was harmed on any part of the River subject to Greenlawn's water withdrawal.

Furthermore, Oystercatchers should have differentiated Greenlawn's water withdrawals from the Corps' and the upriver agricultural interests. Greenlawn does not directly control the amount of water either uses. The Corps also directly controls the amount of water that flows into the River. And according to the plaintiff's evidence, the amount of water flowing through the Bypass Reach was sufficient to prevent harm to the mussel prior to the Corps ceasing hydroelectric power releases. Also, the harmed mussel beds were where the Corps' hydroelectric power releases flow into the River. Plaintiff's evidence is speculative and seems to prove the Corps caused a "take" of the oval pigtoe mussel.

Oystercatchers' testimony presents only speculative evidence that Greenlawn's water withdrawal caused actual harm to the oval pigtoe mussel. Given the lack of evidence of harm done to the oval pigtoe mussel in water authorized for withdrawal by Greenlawn, and the inability to account for the impact of the two other parties' water withdrawal, plaintiff's evidence cannot do more than speculate that Greenlawn's conduct resulted in harm. The court should not leap beyond what the evidence can prove. Inferring that Greenlawn's conduct caused the actual harm to the mussels because Greenlawn withdraws water from the Green River, the oval pigtoe mussel was harmed in the River, is erroneous. Therefore, this Court must reverse and find that Greenlawn did not harm the oval pigtoe mussels, and thus, did not engage in a taking.

V. Greenlawn did not take the Mussels because the Harm was not Foreseeable and Greenlawn did not Proximately Cause the Harm

It is not always clear when a party's actions make them liable for a take due to habitat modification. Thankfully, *Babbitt* sheds light on when habitat modification actually becomes a take. Individuals who were dependent on the logging industry sought clarification of when habitat modification is a take. *Babbitt*, 515 U.S. at 692, 697. The Court reasoned that the Interior's interpretation of take was still subject to the "knowingly" element of the ESA. *Id.* at 700 n.13 (citing 16 U.S.C. §§ 1540(a)(1), 1540(b)(1)). Thus, proximate cause and foreseeability must be shown to establish that a defendant actually harmed a protected species. *Id.* So by extension, an action is not a take unless the traditional concepts of Tort law causation are met. *See id.* at 713.

Thus, liability for habitat modification or degradation depends on finding both an actual injury or death to the protected species and that the accused party's actions were the proximate cause of that injury. *Id.* at 699; *see also Id*. 708-14 (O'Connor Concurrence).

Additionally, if the harm is not reasonably foreseeable, it is not the proximate cause of the take. *Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014) (*per curiam*). Aransas Project, an environmental conservation organization, sought to enjoin the Commission from issuing water permits withdrawing from an endangered species' habitat. *Id.* at 644-46. The plaintiff organization formed after the world's only flock of whooping cranes declined by 8.5% following a 2008-09 drought. *Id.* at 645-46. It was believed the birds starved to death. *Id.* at 645. The Aransas Project alleged that the Commission committed a take by issuing permits for water withdrawal during the drought. *Id.* at 646. The district court found the Commission had committed a § 9 take and granted the injunction, however, the appeals court ruled the lower court misapplied the law of proximate causation. *Id.* at 645.

The 5th Circuit reversed the injunction and held the permits were not the proximate cause of the whooping cranes deaths, in part, because the deaths were unforeseeable. *Id.* at 656-653. The court reasoned that it is essential that proximate cause be established before liability is placed. *Id.* at 657 (*citing Babbitt*, 515 U.S.); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996) ("proximate causation principles are … a necessary limitation on liability"); *Paroline v. United States*, 572 U.S. 434, 445 (2014). The Court reasoned that the connection between the permits, the withdrawls, and the cranes was remote, and the deaths were unforeseeable because the drought was extraordinary. *Shaw*, 775 F.3d at 658-59. Ultimately, the court found that because there was no proximate cause between the permits and the birds' deaths, the district court committed a clear error. *Id.* at 658 (citing *Bertucci Contracting Corp. v. M/V Antwerpen*, 456 F.3d 254, 259 (5th Cir. 2006)).

Additionally, the *Shaw* court found that the Commission's licensing activity could not be considered an "indirect take" as first described in *Babbitt. Id.* at 659 n. 12 ("As [*Babbitt*] implies, licensing is … indirect and far removed from committing acts with knowledge that a habitat will be adversely affected and the species killed"). In *Babbitt*, the Supreme Court illustrated its meaning of "indirect take" with the parable of the farmer who drains a pond knowing it contains an endangered species of fish. *Id.* at 659 (citing *Babbitt*, 515 U.S. at 699-700). The court further distances itself from § 9 "indirect take" liability by distinguishing the facts at issue from other Circuit decisions that found agencies committed "takes" through issuing licenses. *Id.* at 659 (citing *Sierra Club v. Yeutter*, 926 F.2d 429, 432-33 (5th Cir. 1991) (finding a take where "the Forest Service permitted excessive timber removal in Texas forests whose trees are home for red cockaded woodpeckers")); *Coxe*, 127 F.3d at 165 (1st Cir. 1997) (finding a take where the state licensed fishermen to use traps that caused harm to whales); *Animal Welfare Institute v. Martin*,

623 F.3d 19 (1st Cir. 2010) (finding a take where the licensing of animal traps had trapped an endangered lynx). Thus, the Supreme Court showed that these cases dealt with agencies directly authorizing harm to protected species,

Turning to the facts at hand, it cannot be established that Greenlawn caused the harm to the mussels because the harm was not a foreseeable result that was proximately caused by Greenlawn. Greenlawn simply provides water to residents. It does not monitor the water, nor is it responsible for ensuring adequate flows. Therefore, Greenlawn did not act in any way which harmed the mussels.

Furthermore, the district court incorrectly held that Greenlawn's withdrawals were the cause of the harm, however they jump to this conclusion just like the district court in Shaw. This situation is very similar to Shaw. Both involve water withdrawals that increased salinity which lead to harm of an endangered species. Just as the withdrawals in that case were too removed from the harm to the animal, the same is true here. Greenlawn is even further removed from regulating water flow than the Commission was in *Shaw*. The Commission directly granted users the right to the water, whereas here, Greenlawn simply provides the infrastructure as it has for over a hundred years. Greenlawn is not directly responsible for withdrawing the water. Therefore it would be illogical to hold Greenlawn liable in this instance.

Moreover, *Shaw* illustrates how the district court's conclusion were too far removed to prove causation. In both cases, the district court should have considered the sheer number of contingencies that the chain of causation would have to rely upon to find the defendants liable. The chains of both cases involved an unprecedented drought, the inability of the government to restrict the water rights of its citizens, the unrestricted withdrawal of local farmers, and the

availability of water from nearby reservoirs. Thus, just like the appellate court in *Shaw* rejected this stretched chain of causation, this Court should also reject finding a link.

Also, any harm caused was not foreseeable by Greenlawn. Similar to *Shaw*, the extreme weather during the Spring of 2017 was unprecedented. The record shows that this is the first time since the dam's construction that the water level decreased to the point where the Corps had to institute a drought emergency. There is no way Greenlawn could have anticipated this drought or have known how to properly react, just like the Commission was unsure of the proper procedure, and therefore continued to issue permits. However, unlike *Shaw*, Greenlawn was not regulating the flow of the River. The Corps was to be responsible for adequate flow. Thus, to hold Greenlawn liable for this taking would be unfair, because the harm to the mussels was completely unforeseeable, and Greenlawn had no control over the River's flow.

Additionally, the district court examined Oystercatchers' evidence of causation using the incorrect standard. The district court found Greenlawn's withdrawal were the but-for cause of the foreseeable harm. But it does not find Greenlawn's conduct was the proximate cause of the harm. *R.* at 17. The district court does not pay sufficient attention to Supreme Court precedent and subsequent federal court decisions interpreting ESA § 9 liability. *See Shaw*, 775 F.3d at 660 ("[at] best, the court found but-for causation. Proximate cause, however, requires the causal factors and the result to be reasonably foreseeable"). The district court did not fully examine proximate causation in its ruling, and therefore their conclusion is incorrect.

The district court also erred because it cited several cases which found government agencies liable for indirect takings. The cases the district court cites holding governmental authorities liable for indirectly taking endangered species all involved authorizations of conduct that itself directly caused harm to the endangered species. For example, in *Strahan* state officials

authorized commercial fishing traps that harmed Right Whales. *Coxe*, 127 F.3d at 163-64. In *Animal Welfare Inst. v. Martin*, 623 F.3d 19 (1st Cir. 2010), the Minnesota Dept. of Natural Resources authorized hunters to use foothold traps that harmed endangered lynx. In the cases cited by the district court, the authority's conduct was the proximate cause and foreseeable result of the harm it caused to the endangered species. This case is much more similar to *Shaw* than it is to the cases cited by the district court.

Therefore, the district court was incorrect to hold that Greenlawn was the but-for cause of the harm, because Greenlawn was not the proximate cause and the harm was not foreseeable. We therefore urge this Court to reverse the district court's ruling.

III. EVEN IF THE ESA IS VIOLATED, BEFORE ISSUING AN INJUNCTION, A COURT MUST BALANCE THE EQUITIES

The district court failed to engage in a balancing test before issuing the injunction, and therefore the injunction is invalid. This Court must now consider the harm if Greenland cannot provide water to over 100,000 residents. Ultimately, with climate change only expected to get worse[2], Greenlawn is fearful its residents will be without water if this injunction remains in place.

Before a court may issue an injunction, a court must engage in a four-part test. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008); *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 26 (1st Cir. 2010). A plaintiff must show (1) an irreparable injury; (2) remedies at law are inadequate; (3) a balance of hardships between the plaintiff and defendant; and (4) that an injunction would be in the public's interest. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010); *Sierra*

[2] U.S. Global Change Research Program, Climate Change Impacts in the United States: The Third National Climate Assessment (2014)(inter-governmental agency report detailing, in part, that climate change will cause increased droughts and therefore lead to more water shortages); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66497, 66532 (Dec. 15, 2009) (stating that droughts are likely to increase across the United States, which will lead to uncertainty for water supplies).

Club v. United States Army Corps of Eng'rs, 990 F. Supp. 2d 9, 24 (D.D.C. 2013); *Winter*, 555 U.S. at 20. An injunction is an extraordinary and drastic remedy that should only be awarded after these factors are examined. *Winter*, 555 U.S. at 22 (quoting *Munaf v. Geren*, 553 U.S. 674, 689 (2008)). Consequently, a violation of the ESA does not automatically result in an injunction. Mark S. Dennison, *Citizen-Suit Claims Under § 11(g)(1) of the Endangered Species Act*, 89 Am. Jurisprudence Proof of Facts 3d 125, § 19 (2019). Thus, the Court must examine this test to determine if an injunction was appropriate.

Even if the actions result in the death of an endangered species, the court must consider the harm of an injunction. *Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014). In *Shaw*, 8.5% of the entire world's population of whooping cranes died or disappeared in one year, and thus, the district court issued an injunction limiting water withdrawal permits. *Shaw*, 775 F.3d at 645-46. The plaintiff connected the deaths to water permits because increased water withdrawals lead to increased salinity in the cranes' habitat, which led to decreased food, causing the birds to starve. Id. at 660. Nevertheless, the court stated there is no relaxed standard for issuing an injunction under the ESA, and courts must weigh the potential harms and consider the public interest. Id. at 663-64. Ultimately, the court found that the crane deaths were not connected enough to the water withdrawals to justify the injunction. Id. at 664.

Although the Ninth Circuit and the district court have held there is no need for a balancing test when there is a violation of the ESA, this is incorrect. This incorrect assertion results, in part, from a false interpretation of *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 26-27 (1st Cir. 2010). Some courts have taken *Hill* to mean there is no need for a balancing test when the ESA is violated and assert a violation of the ESA results in an automatic injunction. *Animal*, 623 F.3d at 26-27. However, even the Supreme Court clarified

that the conclusion in *Hill* was because an entire newly discovered species would have gone extinct otherwise. *Hill*, 437 U.S. at 197; *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496-97 (2001); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314, 316 (1982); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987). *Hill* does establish that when weighing the equities, the scales tip in favor of the species; however, the equities must still be balanced. *Animal*, 623 F.3d at 26-27; *Strahan v. Coxe*, 127 F.3d 155, 160 (1st Cir. 1997); *Am. Rivers v. United States Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 248-49 (D.C. Cir. 2003) (deciding to use "the most conservative alternative" and balance the equities). Therefore, even if Greenlawn violated the ESA, an injunction is not proper unless the equities are balanced.

The district court failed to engage in the four-part test before issuing an injunction, and therefore this Court must consider the potential harm to the citizens of Greenlawn. The district court should have first determined that the injury of losing the mussels was irreparable. Instead, the district court jumped right into quoting *Hill* and claimed the species would be eradicated. However, the oval pigtoe will not be extinct if the entire bed in the River dies off. Thus, it cannot be shown that the harm is irreparable.

Next, even if this Court finds the harm to be irreparable, the Court must determine that the remedies at law are inadequate. The district court never even considered what other types of solutions could have been imposed. The court could have ordered payment for the loss of oysters. It also could have remedied that situation by requiring Greenlawn to facilitate the mussels' relocation. Diana Yates, *Researchers move endangered mussels to save them*, Illinois News Bureau (Sept. 10, 2013). This remedy seems more likely to fix the problem, especially considering drought events are predicted to increase. Therefore, if the mussels stay in the River, the River may

nevertheless run dry even with curtails on withdrawals. Thus, rather than rush to an injunction, the court should have considered how else the situation might be fixed.

Then, the district court should have balanced the hardships between the plaintiff and the defendant and determine if the injunction would disserve the public interest. This step is crucial because Greenlawn must continue to supply water to over 100,000 people, despite the growing threat of climate change. Thus, the district court had an obligation to evaluate the potential harms if withdrawals were curtailed and droughts increased. If Greenlawn cannot supply water to residents during the hottest months, it is foreseeable that people could die from dehydration and overheating.

Additionally, the people of Greenlawn represent the public, and therefore their use of water is within the public interest. Even though water withdrawals are partly used for ornamental watering, this use helps foster an attractive community. Citizens would be unlikely to want to stay in Greenlawn if all lawns were brown. Thus, without water to maintain the atmosphere in the city, property values can plummet as people look to move to new areas where water is abundant. This could ultimately have a ripple effect in which the entire economy of Greenlawn collapses. Thus, it is likely that the public will face harm if the injunction remains. Consequently, it is imperative that this Court balance the equities and find that the injunction disserves the public.

Furthermore, the facts are very similar to *Shaw*, and therefore this Court should also reverse the injunction. In both instances, water withdrawals were halted for an endangered species. However, unlike *Shaw*, the New Union population of oval pigtoe mussels is not the only population of the species. Other populations have been documented in Florida and Georgia. Thus, harm to this population of mussels poses less of a risk to the species as a whole.

Additionally, the court in *Shaw* also found it very telling that crane deaths only occurred in one year. Thus, this Court should also consider the lack of harm to the mussels since 2015. Ultimately, the *Shaw* court recognized the potential injuries to the public, as this Court should do.

Finally, this Court should not be persuaded by the narrow interpretations of *Hill* and should engage in a balancing test. The Supreme Court never stated there should never be a balancing test, but rather, under those circumstances, found that scales tipped in favor of saving the species. *Hill* involved the potential eradication of a newly discovered species, whereas here, the oval pigtoe mussels in the River are only a segment of the species. In fact, there are other beds of the oval pigtoe in Florida and Georgia. Thus, *Hill* is distinguishable because the entire population of oval pigtoe mussels is not at stake, and therefore this Court needs to balance the hardships.

In conclusion, the district court's failure to balance the equities was an error. This Court must correct this error by engaging in the traditional four-part injunction test, which will show that the injunction is invalid.

CONCLUSION

For the reasons stated herein, this court must decide for Greenlawn.