Team 43

CA No. 19-000987

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

BRIEF OF NEW UNION OYSTERCATCHERS, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

UNITED STATES COURT OF APPEALS CASES:

STATE CASES:

FEDERAL STATUTES:

OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

This case involves an appeal from the United States District Court for the District of New Union. The Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The district court had jurisdiction of the case pursuant to 28 U.S.C. § 1331 following its removal to federal court pursuant to 28 U.S.C. § 1441. The district court's federal question jurisdiction was based on alleged violations of the Endangered Species Act, 16 U.S.C. 1536, 38. The final judgment that is being appealed after disposal of all issues in this cause and was entered on May 15, 2019.

STATEMENT OF THE ISSUES

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

II. Did the District Court err in concluding that Greenlawn is entitled to withdraw water under riparian landowner rights when such actions threaten a species and in violation of the Endangered Species Act?

III. Was the Army Corps of Engineers required to consult with the Fish and Wildlife Service before it improperly increased flow to the Bypass Reach and curtailed hydroelectric when those actions were likely to jeopardize the continued existence of the oval pigtoe mussel?

IV. Did the District Court correctly enjoin Greenlawn water withdrawals because those withdrawals posed a threat of imminent harm to the endangered oval pigtoe mussel?

STATUTORY PROVISIONS AT ISSUE ON APPEAL

The text of the following statutory provisions are relevant to the determination of the present case:

16 U.S.C. § 1532(19):

> "[H]arass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

16 U.S.C. § 1536(a)(1)-(3):

> "Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species."
>
> "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."
>
> "[A] Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species."

16 U.S.C. §1538(a)(1)(B):

> "[W]ith respect to any endangered species of fish or wildlife listed . . . it is unlawful for any person . . . to take any such species."

16 U.S.C. § 1540(g)(1)(A):

> "[A]ny person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof."

STATEMENT OF THE CASE

Factual Background

New Union Oystercatchers, Inc., a not-for-profit membership association, advocates for the interests of Green Bay's oyster industry and fisherman, many of whom are multi-generational oyster catchers. R. 10. NUO members have experienced great adverse impact due to reduced catch and declining incomes because of smaller oyster harvests.

Greenlawn, New Union sits adjacent to the Green River at the Green River Bypass Reach R. 5. Greenlawn owns riverfront property and withdraws water through riparian landowner rights for both domestic and industrial purposes for approximately 100,000 customers, many of whom are single family residents. R. 5. Greenlawn's typical water usage is six million gallons per day (MGD) annually. During summer months, this usage increases significantly to twenty MGD for domestic purposes, including lawn and garden watering. R. 5. Approximately ninety-five percent of the water used by Greenlawn does not return to the Green River. R. 6.

ACOE built the Green River Diversion Dam and the Howard Runnet Dam, known as the Howard Runnet Dam Works and, subsequently, the Bypass Reach. R. 5. The basis for authorization of the dam was for *flood control*, hydroelectric power, and recreational purposes. R. 6 (emphasis added). ACOE and Greenlawn created an agreement to maintain sufficient water flow within the Green River Bypass where both parties would maintain limits on quantities, rates and times where water was affected or withdrawn. R. 6.

As a result of both Greenlawn's water withdrawals and ACOE's hydroelectric power releases, the flow of the Green River has been severely impacted. This severe impact adversely affected the habitat of the oval pigtoe mussel, a listed endangered species. The mussels require fish to which they attach to mature and silty, non-stagnant riverbeds. R. 9. Because of the

extremely low water flow, which adversely impacted the mussel ecosystem, twenty-five percent of the Green River oval pigtoe population died. R. 9. Such conditions are certain to extirpate the entire population of pigtoe mussels in the Green River.

Procedural History

In 2017, NUO served a Notice of Intent to sue ACOE and Greenlawn pursuant to the Endangered Species Act, 16 U.S.C. § 1540(g). NUO asserted violations based on flow reductions in the Green River that occurred due to ACOE's curtailment of hydroelectric peaking and Greenlawn's water withdrawals. R. 10. ACOE filed a cross-claim against Greenlawn and joined NUO's ESA claim against Greenlawn and moved for summary judgment to dismiss NUO's ESA claim against ACOE. R. 4. NUO moved for summary judgment to show that Greenlawn violated ESA § 9 and that ACOE violated ESA § 7. R. 4. Greenlawn cross moved for summary judgment to dismiss ESA claims because of riparian landowner rights. R. 4. On May 15, 2019, Judge Remus issued an Opinion and Order and granted ACOE's motion for summary judgment dismissing the First Claim for Relief, denied Greenlawn's motion for summary judgment dismissing the Second Claim for Relief and ACOE's Cross Claim, granted Greenlawn's motion for summary judgment on its cross-claim declaring its rights as a riparian landowner and dismissed the Third Claim for Relief, and granted NUO's motion for summary judgment declaring Greenlawn to be in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538. R. 5.

SUMMARY OF THE ARGUMENT

Plaintiff – Appellant New Union Oystercatchers, Inc. respectfully requests that this Court upholds the district court's determination that Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitutes a "take" of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538. *See also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 691 (1995). Greenlawn's water withdrawal actually harms the Green River population of mussels by exposing them to air and burying them beneath silt. Both of these effects directly result in the death of part of the endangered population. Greenlawn's water withdrawal also harms the oval pigtoe mussel through significant habitat modification. *See id*. Reduced flow (1) increases siltation, which eliminates necessary habitat; (2) prevents the migration of other aquatic species on which oval pigtoe mussels depend; and (3) eliminates the ability of the mussels to migrate.

Further, this Court should hold that Greenlawn does not have the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures. Under the Restatement (Second) of Torts § 850A(a)-(i), Greenlawn's riparian landowner rights are not absolute and subject to reasonable use limitations. The district court failed to address many of these factors and ultimately failed to thoroughly weigh the impact of harm caused by Greenlawn. The extent and amount of harm caused by Greenlawn's water withdrawals and the practicality of avoiding this harm weigh in favor of this Court restricting Greenlawn's withdrawals during a drought to protect the endangered oval pigtoe mussel. Additionally, Greenlawn's riparian landowner right to water withdrawal does not outweigh regard for severely adverse ecological impacts. Despite New Union's antiquated method of allocating water rights, there is a legislative trend toward prioritizing the minimization

of ecological impacts at the expense of unfettered water withdrawals. *See* Joseph W. Dellapena, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53, 86 (2011). The presence of an endangered species in the Green River gives this Court an additional reason to require Greenlawn to limit its water withdrawals during periods of drought.

This Court should also reverse the district court's determination that the ACOE was not required to consult with the Fish and Wildlife Service before increasing water flow to the Bypass Reach and curtailing hydroelectric power releases. These decisions are discretionary actions subject to ESA § 7. *See Nat'l Ass'n of Homebuilders v. Def. of Wildlife*, 551 U.S. 644 (2007). ACOE modified the WCM when it increased water flow to the Bypass Reach, which is a discretionary action subject to ESA consultation, because ACOE was not required to increase flow to the Bypass Reach to thirty CFS and did not carry out an ongoing activity. Furthermore, the WCM's language and purpose provide sufficient discretion to allow ACOE to ensure its actions do not jeopardize the endangered oval pigtoe mussel.

Finally, NUO requests that this Court uphold the district court's injunction prohibiting Greenlawn's water withdrawals during a drought because the withdrawals pose a reasonably certain threat of imminent harm to oval pigtoe mussels. This district court properly concluded that it did not need to balance the equities when determining whether an injunction was appropriate because "Congress has . . . [made] it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

ARGUMENT

I. Standard of Review

The standard of review for this appeal is de novo. *Fenney v. Dakota, Minn. & R.R. Co.*, 327 F.3d 707, 711 (8th Cir. 2003). Summary Judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one "that could affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a "dispute about a material fact is genuine if a reasonable jury" could find in favor of the non-moving party. *Id.* In reviewing the record to determine whether there is a genuine issue of material fact, this Court may "[draw] all reasonable inferences in favor of the non-moving party." *Holly v. Clairson Indus., L.L.C.,* 492 F.3d 1247 (11th Cir. 2007).

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

1. Greenlawn's water withdrawal constitutes a take because its actions harm the mussels resulting in the death of a significant percentage of the population of an endangered species.

The Endangered Species Act states that "with respect to any endangered species of fish or wildlife listed . . . it is unlawful for any person . . . to take any such species." 16 U.S.C. §1538(a)(1)(B) (1973). The Act defines the term "take" to include "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) (1973). The U.S. Supreme Court articulated that "harm" "means an act which actually kills or injures wildlife." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or*., 515 U.S. 687, 691 (1995) (quoting 50 CFR § 17.3 (1994)). The Court further determined that "'harm' encompasses indirect as well as direct injuries." *Id*. at 697-98. Finally, the Court "acknowledged

that the regulatory definition of 'harm' includes indirect as well as direct harms," R. 16, and made clear that "words that accompany 'harm' in the § 3 definition of 'take' . . . refer to actions or effects that do not require direct applications of force." *Babbitt* at 701.

Courts have interpreted the definition of harm in favor of protecting animals within threatened species classification. In *Animal Welfare Institute v. Martin*, the First Circuit held that the State of Maine violated the Endangered Species Act because the threat of harm to a single animal of the threatened species constituted a threat to the entire species. *Animal Welfare Institute v. Martin*, 623 F.3d 19, 22 (1st Cir. 2010). Maine prohibited trapping of the Canadian Lynx while allowing the trapping of other animals, given the animals' threatened species classification. *Id*. at 22. Plaintiffs argued that the lynx would be incidentally caught in the traps and the court agreed, awarding plaintiffs an injunction regarding some of the traps that threatened the Lynx species. *Id*. Thus, the First Circuit acknowledged that the threat to even individual animals is prohibited and cause for enjoinment.

Greenlawn has withdrawn water in a way that harms the oval pigtoe mussels, a listed endangered species. This act constitutes a taking under the Endangered Species Act. The flow of the Green River downstream dropped as a result of Greenlawn's water withdrawals. The drop in flow exposed the mussels to air, "an act which actually kills or injures wildlife." *Babbitt* at 697-98. Even if Greenlawn did not intentionally cause such direct harm, Greenlawn's actions still fall within a taking under the Endangered Species Act because the effect of the water withdrawals "do not require direct applications of force." *Babbitt* at 701. Like the Canadian lynx in *Animal Welfare Institute*, Greenlawn's water withdrawals caused harm to individual oval pigtoe mussels and threatened the entire population in the Green River. The District Court found that twenty-five percent of the Green River oval pigtoe population died. R. 9. Here, Greenlawn has, in fact,

already caused a take by causing the death of individual mussels as a direct result of reduced water flows. The oval pigtoe mussel is also harmed when reduced flows lead to increased siltation. R. 9. Buried under a fine mud, oval pigtoe mussels suffocate. For these reasons, the District Court's decision to grant an injunction on Greenlawn's act of water withdrawal was proper.

2. The withdrawal of water flow caused a significant habitat modification of the oval pigtoe mussels by causing habitat degradation, as well as behavioral pattern impairments.

As referenced above, a taking of a species means "harm" that may kill or injure wildlife. *Babbitt*, 515 U.S. at 691. The U.S. Supreme Court clarified the meaning of "harm" under the Endangered Species Act by noting that "such act[s] may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id*. (quoting 50 CFR § 17.3 (1994)). The U.S. Supreme Court further elaborates on the statutory definition of 'harm' by considering legislative intent:

> "The statutory context of 'harm' suggests that Congress meant that term to serve a particular function in the ESA, consistent with, but distinct from, the functions of the other verbs used to define 'take'. The Secretary's interpretation of 'harm' to include indirectly injuring endangered animals through habitat modification permissibly interprets 'harm' to have 'a character of its own not to be submerged by its association.'"

Id. at 702 (quoting *Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923)). Although the action that occurred may be incidental, "harm" to a species can be either a direct or indirect cause to the habitat or behavioral pattern of the species. *Id*. at 701.

In *Palila v. Hawaii Department of Land & Natural Resources*, the court held that the maintenance of sheep within the habitat of an endangered bird species was harmful and required that the sheep be removed from the habitat. *Palila v. Haw. Dep't of Land & Nat. Res.*, 649 F.2d

1070, 1079 (9th Cir. 1986). The issue presented was whether the sheep grazing harmed the habitat of the birds, and thus caused a taking under the ESA; in determining that the birds were harmed, the court issued an injunction for the "State of Hawaii to remove all [] sheep from the critical habitat of the [birds]." *Id.* An expert witness explained that the sheep "are presently degrading the mamane forest . . . that the [birds] depend on mamane for their existence, and that continued degradation could drive the [birds] into extinction." *Id*. at 1075. The Court held that the continuance of the sheep causing destruction to the forest "would have driven the bird[s] into extinction," and that the sheep "degrade the mamane ecosystem to the extent that there is an actual present negative impact on the [bird] population that threatens the continued existence and recovery of the species." *Id*. at 1078, 1082.

Here, Greenlawn's water withdrawals caused the Green River to have significantly low flow rates, which "degrade[s] the [oval pigtoe mussel] ecosystem to the extent that there is an actual present negative" on the population. *Id*. at 1082. This significant habitat modification falls within the ESA's definition of harm. Thus, Greenlawn's actions constitute a taking under the Endangered Species Act. The water withdrawals adversely modified the oval pigtoe mussel's habitat in several ways. First, the low or nonexistent water flow increased siltation, which eliminated necessary habitat. R. 17. Extreme low water levels also prevented the migration of the sailfin shiner, which the oval pigtoe mussel depends on to reproduce.[1] *Id.* And the severely reduced flows trapped oval pigtoe mussels in exposed areas, eliminating any possibility for them to migrate to submerged areas. *Id.* This exposure resulted in death to a significant amount of the population. *Id.* As the District Court articulated, "the destruction of mussel habitat and loss of

[1] "[L]arval mussels must attach themselves to the gills of a particular fish species, the sailfish shiner, in order to mature." R. 17.

mussels is the direct and foreseeable result of Greenlawn's water withdrawals." R. 17. Not only has Greenlawn's water withdrawal caused significant habitat modification and death, these withdrawals, should they continue, will result in the elimination of the Green River habitat of oval pigtoe mussels altogether. For these reasons, NUO asserts that the District Court properly enjoined Greenlawn's water withdrawal.

III. Greenlawn does not have the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures.

Greenlawn may not use riparian landowner rights to continue water withdrawals without regard for water conservation measures because such landowner rights are governed by reasonable use limitations and the withdrawals result in both a significant and detrimental ecological impact.

1. Greenlawn's riparian landowner rights are not absolute and subject to reasonable use limitations.

Riparian landowners may generally withdraw water for reasonable use as long as that use does not conflict with another riparian landowner's reasonable use.[2] R. 12. As stated, riparian landownership rights necessarily have limits that derive from reasonable use theory. In considering reasonable use, the Restatement (Second) of Torts outlines a variety of reasonability factors[3] for consideration. Although the district court's opinion acknowledges the pre-existing

[2] NUO's standing to challenge a riparian landownership claim has not been raised as an issue on appeal. For this reason, standing will not be addressed in this brief.

[3] The nine reasonability factors include the purpose of the use, the suitability of the use to the watercourse or lake, the economic value of the use, the social value of the use, the extent and amount of the harm it causes, the practicality of avoiding the harm by adjusting the method or use of one proprietor or the other, the practicality of adjusting the quantity of water used by each proprietor, the protection of existing values of water uses, land, investments and enterprises, and the justice of requiring the user causing harm to bear the loss. Restat. 2d of Torts, §850A(a)-(i).

use factor, the court did not weigh this factor against the extent and amount of harm caused and the practicality of avoiding the harm. R. 13.

Other jurisdictions have applied both reasonable use theory and the Restatement's factors in determining the reasonableness of competing uses of water. In *Ripka v. Wansing*, the Court of Appeals of Missouri for the Southern District applied reasonable use theory in a riparian landowner dispute where one landowner appealed for an injunction against another landowner who withdrew stream water for irrigation purposes. *Ripka v. Wansing*, 589 S.W.2d 333, 334 (Mo. Ct. App. 1979). The injunction was denied because the appellant landowners did not provide evidence that (1) the flow of the stream was impacted and (2) appellants did not experience harm or damage. *Id*. at 336.

Turning to the present case on appeal, Greenlawn's water withdrawals significantly impacted downstream Green River flow. The water withdrawals harmed an endangered species population, as discussed in the previous section. To avoid this harm, Greenlawn must adjust the quantity of water it uses during times of reduced flow. This Court should consider not only the interests of other riparian landowners, but society as a whole. *See* Restat. 2d of Torts, §850A (noting that societal harm should be taken into account in determining reasonableness). The district court observes that domestic water use is a natural use and a riparian landowner can withdraw water for that purpose without regard to the impact on other riparian landowners. R. 13. However, the U.S. Supreme Court has noted that, although withdrawal for domestic purposes is permissible, the federal government and states, as long as state action is not preempted, may exercise police powers by controlling the initiation and conduct of both riparian and nonriparian water use. *Virginia v. Maryland*, 540 U.S. 56, 81 (2003) (Stevens. J. dissenting) (quoting Restat. 2d. of Torts §856, cmt. e (1979)). In this case, Greenlawn's actions as a riparian

landowner are in conflict with federal statutes designed to protect endangered species. This Court should hold that analysis of Greenlawn's right to withdraw water through riparian landownership rights must consider water conservation measures because Greenlawn's water withdrawal is in conflict with federal statutes designed to protect endangered species.

Importantly, the district court properly issued an injunction against Greenlawn's water withdrawals because such withdrawals threaten the endangered mussels on the Green River. R. 5. It is because of these significant losses, and the real danger of the extirpation of a species in this particular habitat, that this Court should hold that riparian landowner rights are not absolute. They are subject to reasonable use limitations, and should also be subject to public policy considerations. Given there are no state-level legislative or administrative regulations to resolve this dispute, it vital that this Court factors the ecological impact in its analysis of riparian landownership rights.

2. Greenlawn's right to water withdrawal as a riparian landowner does not outweigh regard for severely adverse ecological impact.

The district court notes that riparian water law does not recognize ecological rights to instream flows and that only rights of landowners are protected. R. 13. As previously stated, this jurisdiction does not currently have legislation or permitting authority to resolve competing claims to water. R. 12. *See also* Shelley Ross Saxer, *The Fluid Nature of Property Rights In Water*, 21 DUKE ENVTL. L. & POL'Y F. 49, 110 (2010) ("Property rights in water depend upon state law to the extent that constitutional or legislative pronouncements establish or negate private claims to a protectable interest in water"). Specifically, because there is no legislation or permitting authority to resolve competing riparian claims to water, this Court has both an opportunity and an obligation to expand the scope of its review with respect to riparian landownership rights to include public policy considerations.

Traditional riparian landownership did not prioritize greater interests outside the scope of individual landowners, but over time, riparianism has grown to include consideration of a broader scope of interests, including public policy concerns. James Rasband, et. al., *Natural Resources Law & Policy*, 845-47 (3rd Ed. 2016). As of 2011, almost 20 states had begun to utilize a form of regulated riparianism. Joseph W. Dellapena, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53, 86 (2011). These states utilize administrative systems designed to protect public interest and also determine individual rights. *Id*. at 87 ("[T]hese states have moved from a common property system to a public property system in which the uses of water are managed at the state or local level by a governmental agency with varying degrees of community involvement."). And, eastern states have started to utilize permit systems. *See* Rasband, at 852. This regulatory function is based on the act of water withdrawal instead of simply landownership. *Id*. The shift toward permit systems is noteworthy because the issuance of permits accounts for not simply public policy considerations, but more specifically ecological impacts. The legislative and administrative trend toward prioritizing ecological impacts is also bolstered by ESA federal statutes. Although New Union does not have a relevant state statute on point, this Court should also weigh federal statutes designed to protect endangered species in its analysis of reasonability.

The District Court found that "the destruction of mussel habitat is the direct and foreseeable result of Greenlawn's water withdrawals." R. 17. Furthermore, "recent decades of reduced flows have also impacted the Green River estuary," by increasing salinity and reducing nutrient flows. R. 10. This Court should require Greenlawn to internalize the cost of these adverse ecological impacts, whether through new common law or a directive to the legislature. For these reasons,

NUO asserts that Greenlawn does not have the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures.

IV. The Army Corps of Engineers was required to consult with the Fish and Wildlife Service before increasing water flow to the Bypass and curtailing hydropower electric releases because these decisions are discretionary actions subject to § 7 of the Endangered Species Act.

ACOE's operation of the Howard Runnet Dam Works is subject to ESA § 7 consultation and should be considered because (1) increased releases to the Bypass Reach during a drought warning constitutes a modification of the Water Control Manual (WCM), and (2) even if the increased releases did not constitute a modification of the WCM, ACOE still retained sufficient discretion under the WCM to ensure dam operations do not jeopardize the oval pigtoe mussel.[4]

The ESA § 7 consultation requirement is the "heart of the [Endangered Species Act.]" *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). It reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth. V. Hill*, 437 U.S. 153, 185 (1978). "Federal agencies shall . . . utilize their authorities . . . to carry[] out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). ESA § 7(a)(2) requires that:

> [e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, 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 threatened species or result in the destruction or adverse modification of habitat of such species.

16 U.S.C. § 1536(a)(2). Regulations implementing the ESA further provide that "[a]ction means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by

[4] As the District Court noted, the construction of the Howard Runnet Dam and adoption of the WCM predate the passage of the ESA and were not initially subject to ESA § 7 requirements. R. 14.

Federal agencies [including] . . . the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. ESA § 7 applies "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. *See also National Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (holding that the Interior Department reasonably interpreted the ESA when it applied the consultation requirement to only discretionary actions).

The Ninth Circuit used a two-step inquiry, which this Court should find persuasive, to determine an "agency action": first, whether a federal agency has carried out the underlying activity; second, whether "the agency had some discretion to influence or change the activity for the benefit of a protected species." *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1021 (9th Cir. 2012). "Whether an agency must consult does not turn on the *degree* of discretion that the agency exercises regarding the action in question, but on whether the agency has any discretion to act in a manner beneficial to a protected species or habitat." *Natural Resources Defense Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014). Here, the district court found that ACOE did not consult the Fish and Wildlife Service (FWS) before increasing water releases from the Diversion Dam to the Bypass Reach during the 2017 drought and that ACOE "carried out" the increase of water releases on April 23. R. 8-9. To determine whether ACOE violated ESA's consultation requirement, this Court must decide whether ACOE "had discretion to influence or change the activity for the benefit of" the oval pigtoe mussel.

1. <u>The ACOE modified the WCM when it increased water flow to the Bypass Reach, which is a discretionary action subject to ESA consultation.</u>

The Ninth Circuit held that ESA § 7 required the Bureau of Reclamation (Bureau) to consult with FWS when renewing water supply contracts because it retained "'some discretion'" to act for the benefit of the threatened California delta smelt. *NRDC*, 749 F.3d at 784. The contracts

determined the amount of water users could draw from the Central Valley Project. *Id*. at 780. The district court, which improperly upheld the Bureau's decision to renew the contracts, focused on language in the original agreement[5] that it said "'substantially constrained' the Bureau's discretion to negotiate new terms." *Id*. at 784. In overturning the district court, the Ninth Circuit emphasized that the Bureau still retained some discretion to act for the benefit of a protected species. *Id*. at 784-85. The court explained that nothing in the original contracts required the Bureau to renew them. *Id*. at 785. Since water diversions were the most significant cause of the delta smelt's decline, "a decision not to renew [the contracts] could [plausibly] benefit the delta smelt." *Id*.

In contrast, the ESA does not require consultation for ongoing agency activity. *E.g. California Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 598 (9th Cir. 2006). Therefore, the continued operation of a dam by Pacific Gas & Electric after the Chinook Salmon was declared threatened did not constitute a federal agency action subject to the ESA's consultation requirement. *Id*. at 599. ESA § 7 "looks to the future effect of contemplated actions by the agency." *Id*. at 597. The Ninth Circuit distinguished future effects from the effects of present or ongoing activities carried out in accordance with a valid permit. *Id*. at 598.

Turning to the issue at hand, ACOE's decision to increase waterflows to the Bypass Reach above seven CFS during a drought warning constitutes a modification of the WCM subject to ESA § 7 consultation because, in doing so, ACOE retained some discretion to act for the benefit of the endangered oval pigtoe mussel. The WCM provides that during a drought warning

[5] The original contracts provided in pertinent part: "During the term of this contract and any renewals thereof . . . [i]t shall constitute full agreement as between the United States and the Contractor *as to the quantities of water and the allocation thereof*." *Id.* at 784 (emphasis in original).

"Bypass Reach flow from the Diversion Dam [is] reduced to [seven] CFS." (District Opinion pg. 7). Like the contract renewals in *NRDC*, nothing in the WCM required ACOE to increase flow to thirty CFS. When peaking hydroelectric power demands reduced the lake level to a drought emergency, ACOE retained some discretion to act for the benefit of the oval pigtoe mussel. ACOE could have reduced flow to the Bypass Reach from thirty CFS, thereby maintaining enough water in the lake to prevent a drought emergency from occurring. Even if ACOE was required to maintain a flow of thirty CFS to the Bypass Reach, ACOE could have curtailed flow from the dam to a lesser extent. Alternatively, ACOE could have combined these two options. Any of these actions would have benefited the oval pigtoe mussel by providing it with water flows sufficient for survival.

Furthermore, unlike in *California Sportfishing*, ACOE did not carry out an ongoing activity when it increased flow to the Bypass Reach, which would exempt the agency from the consultation requirement. The WCM requires ACOE to divert only seven CFS to the Bypass Reach during a drought warning. ACOE's ongoing activity in this context, then, is diverting water to the Bypass Reach at the specific rate defined in the WCM. When ACOE increased flow to the Bypass Reach, it ceased operating pursuant to the WCM. Once ACOE contemplated increasing flow to the Bypass Reach above what the WCM allows, it should have consulted FWS on the future effect its action would have on the oval pigtoe mussel population.

2. <u>Even if ACOE did not modify the WCM, it provides sufficient discretion to allow ACOE to ensure its actions do not jeopardize the endangered oval pigtoe mussel.</u>

An action is nondiscretionary (and, thus, does not require consultation) when either a statute requires the agency to perform a specific act Rather than achieve a broad goal) or the agency performing the act lacks the power to ensure that its action will not jeopardize an endangered species.

The ESA did not require consultation when the Clean Water Act (CWA) required the Environmental Protection Agency (EPA) to approve an application transferring wastewater discharge permitting authority to a state. *National Ass'n*, 551 U.S. at 666-68. The CWA provision at issue "provides that the EPA 'shall approve each submitted program' . . . [if] nine specified criteria are satisfied." *Id*. at 650-51 (quoting 33 U.S.C. § 1342(b)). Because the statute uses mandatory language and the specified criteria are exclusive, the EPA did not have the discretion to deny an application. *Id*. at 661. To hold otherwise, the Court reasoned, "would effectively repeal the mandatory and exclusive list of criteria . . . and replace it with a new, expanded list that includes § 7(a)(2)'s no-jeopardy requirement." *Id*. at 662. Reading the ESA to require consultation only for discretionary agency actions, then, is reasonable. It "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*. at 667 (emphasis in original).

However, consultation was required when a statute merely imposed broad mandates, rather than directed an agency to take specific actions. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928-29 (9th Cir. 2008). In 2004, the National Marine Fisheries Service issued a biological opinion that analyzed how operation of the Federal Columbia River Power System (FCRPS) effects Chinook salmon and steelhead trout. *Id*. at 922-23. NMFS determined that certain FCRPS operations, including Congressionally mandated, competing operations for flood control, irrigation, and power production, were nondiscretionary and should not be part of the ESA action under review. *Id*. at 926. Here, though, in contrast to *Homebuilders*, Congress "imposed broad mandates" and did "not quantif[y] any of those broad goals." *Id*. at 928. NMFS, therefore, "retain[ed] considerable discretion in choosing what specific

actions to take in order to implement" those goals and was subject to ESA § 7 consultation. *Id*. at 929.

Likewise, the issuance of fishing permits by NMFS under the High Seas Fishing Compliance Act was discretionary action subject to ESA consultation. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir. 2003). The act provided that the Secretary of Commerce "shall establish such conditions and restrictions on each permit . . . as are necessary and appropriate to carry out the obligations of the United States." *Id*. at 976. These conditions included, "but [were] not limited to[,]" certain boat marking and reporting requirements. *Id*. Because "including but not limited to" language is not exclusive and the permit issuance has "an ongoing and lasting effect" that constitutes ongoing agency activity, the Secretary had "authority to place conditions on permits that inure to the benefit of protected species." *Id*. at 975, 977. The court thus concluded that the ESA required consultation before NMFS could issue these permits. *Id.* at 977. *See also Karuk*, 681 F.3d at 1024 (9th Cir. 2012) (holding that ESA § 7(a)(2) requires consultation when the agency has some discretion to take action for the benefit of a protected species).

Here, even if the increased release to the Bypass Reach does not constitute a modification of the WCM, the language of the manual itself provides discretion to ACOE. During a drought warning, the WCM requires ACOE to curtail all recreational releases, reduce flow to the Bypass Reach to seven CFS, and maintain hydroelectric power releases of up to 200 CFS for up to three hours per day. Hydroelectric releases are curtailed if a drought emergency develops. Curtail means "to reduce or limit something." *Curtail*, CAMBRIDGE ENGLISH DICTIONARY, (last visited Nov. 15, 2019), https://dictionary.cambridge.org/us/dictionary/english/curtail. The WCM does not say recreational and hydroelectric releases should cease or be limited to some specific flow

rate, as it does for discharges into the Bypass Reach. Therefore, unlike in *Homebuilders*, requiring ESA consultation does not effectively amend the WCM. The inherent discretion the WCM provides through the word "curtail" allows ACOE to consult FWS and carry out its duty to operate Howard Runnet Dam Works at the same time.

And, although the WCM does require some specific acts, those acts are subject to the broad goals ACOE must balance when operating the Howard Runnet Dam. So, even assuming, *arguendo*, that ACOE was required to increase flow to the Bypass Reach above seven CFS for Greenlawn's use, there is no evidence that establishes the exact amount of water to which Greenlawn is entitled. As a result, ACOE has discretion to con trol the degree to which it either increases flow to the Bypass Reach or curtails Howard Runnet Dam Works operation based on the severity of the drought, hydroelectric power demand, Greenlawn's reasonable needs, and the WCM's broader goals.[6] Like in *National Wildlife Federation*, where FCRPS had to balance flood control, irrigation, and power production goals, ACOE has the discretion to balance its operational goals and was required to consult with FWS when increasing flows to the Bypass Reach. *See also Turtle Island*, 340 F.3d at 975-77; *Karuk*, 681 F.3d at 1024; *NRDC*, 749 F.3d at 785. Because of this discretion, ACOE can act for the benefit of the oval pigtoe mussel and, thus, was required to engage in ESA § 7 consultation before increasing flow to the Bypass Reach.

V. This Court is required to enjoin Greenlawn water withdrawals because those withdrawals pose a threat of imminent harm to the endangered oval pigtoe mussel.

The ESA "provide[s] a means [to conserve] the ecosystems upon which endangered species and threatened species depend." 16 U.S.C. § 1531(b). To achieve this purpose, "any

[6] "The goals of the WCM include maintaining adequate lake levels for recreational use during the summer months, providing downstream water releases to support in-water recreation and fishing, and maintaining flood storage capacity." R. 6.

person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A). This authority extends to private plaintiffs seeking to enjoin private parties. *Bennett v. Spear*, 520 U.S. 154, 164-66 (1997).

Typically, a plaintiff seeking an injunction must show: (1) irreparable injury; (2) that remedies at law are inadequate to compensate for the injury; (3) a remedy in equity is warranted considering the balancing of the hardships; and (4) the public interest would not be disserved by a permanent injunction. *Cottonwood Envtl. Law Ctr. v. U.S. Forest Service*, 789 F.3d 1075, 1088 (9th Cir. 2015). However, "the ESA strips courts of at least some of their equitable discretion in determining whether injunctive relief is warranted." *Id*. at 1090.

The U.S. Supreme Court enjoined the continued operation of the Tellico Dam because doing so would violate ESA § 7. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193-96 (1978). Even though the Tellico Dam was nearly completed and an injunction could burden "the public through the loss of millions of unrecoverable dollars," the Court "emphatically" determined it did not have "the power to engage in such a weighing process." *Id*. at 188. "[N]either the [ESA] nor Article III of the Constitution provides federal courts with authority to make [the] fine utilitarian calculations" required to balance the equities when issuing an injunction. *Id*. at 187. "On the contrary . . . Congress viewed the value of endangered species as 'incalculable.'" *Id*. Thus, the Court concluded, "Congress has . . . [made] it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *Id*. at 194.

Therefore, "[w]hen considering an injunction under the ESA, [courts] presume that remedies at law are inadequate, that the balance of interests weighs in favor of protecting

endangered species, and that the public interest would not be disserved by an injunction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018); *Cottonwood*, 789 F.3d at 1090. This means that "a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA." *Def. of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996) ("[A]n imminent threat of future harm is sufficient for the issuance of an injunction under the ESA.").

Here, the district court concluded "that Greenlawn's water withdrawals during drought conditions pose a reasonably certain threat of imminent harm to oval pigtoe mussels." There is uncontradicted evidence that the conditions in the Green River during the spring of 2017 "resulted in the death of approximately [twenty-five] percent of the Green River oval pigtoe population. If allowed to persist, these conditions would entirely eliminate the Green River population of the oval pigtoe mussel." R. 9. Because there is a reasonably certain threat of imminent harm and the ESA requires courts to assume the remaining injunctive factors are satisfied, NUO asserts that this Court is required to enjoin Greenlawn from making water withdrawals that will reduce downstream flow rates below those necessary for mussel survival.

CONCLUSION

In conclusion, Greenlawn does not have the right as a riparian landowner to continue water withdrawals for municipal purposes during a drought without any water conservation measures. The operation of the Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is a discretionary action subject to the consultation requirement within ESA § 7. Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitutes a take of the endangered oval pigtoe mussel in violation of the ESA § 9. The District Court does not need to balance the equities before enjoining a beneficial municipal activity when the activity will cause the extirpation of the entire population of an endangered species.

For the reasons stated above, Plaintiff – Appellant, New Union Oystercatchers, respectfully requests that the U.S. Court of Appeals for the Twelfth Circuit uphold the district court's issuance of an injunction on Greenlawn's water withdrawals and the court's finding of a take of the oval pigtoe mussels pursuant to ESA § 9. Further, we request that this appellate court reverse and remand the district court's holding on the issues of riparian landowner rights and ESA § 7 consultation requirement.

Respectfully submitted,

Team 43