

CA. NO. 19-000987

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**

**NEW UNION OYSTERCATCHERS, INC.,
PLAINTIFF – APPELLANT**

V.

**UNITED STATES ARMY CORPS OF ENGINEERS,
DEFENDANT – APPELLEE**

AND

**CITY OF GREENLAWN, NEW UNION,
DEFENDANT – APPELLANT**

On Appeal from the United States District Court for New Union, No. 66-CV-2017 (RMN),
Honorable Romulus N. Remus, Presiding

BRIEF FOR CITY OF GREENLAWN, NEW UNION
Defendant – Appellant

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JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 over New Union Oystercatcher’s (“NUO”) statutory challenges brought under the Endangered Species Act of 1973 (“ESA”), 16 U.S.C. §§ 1531-1544, against the Army Corps of Engineers (“ACOE”) and City of Greenlawn, New Union (“Greenlawn”). On May 15, 2019, the district court issued a final order, under Fed. R. Civ. P. 54(b), that granted summary judgment to ACOE dismissing NUO’s First Claim for Relief, granted summary judgment to NUO in its Second Claim for Relief, granted summary judgment for Greenlawn dismissing NUO’s Third Claim for Relief, and entered a permanent injunction against Greenlawn from making water withdrawals that will cause the convergence Howard Runnet Dam tailrace and Bypass Reach to drop below 25 cubic feet per second averaged over twenty-four hours. The City of Greenlawn, New Union and the New Union Oystercatchers, Inc. have both filed a timely Notice of Appeal. *see also* R. at 1.¹ This Court has jurisdiction over the appeal under 28 U.S.C. § 1291;

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures.
2. Whether the operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536.
3. Whether 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 The citations “R. at __” refer to pages of the Final Problem, Revised on October 29, 2019.

4. Whether the District Court must balance the equities before enjoining a beneficial municipal activity, when the activity will cause the extirpation of an entire population of an endangered species.

STATEMENT OF THE CASE

I. Facts

The City of Greenlawn lies on both banks of the Green River Bypass Reach (“Bypass Reach”). R. at 5. Greenlawn owns the riverfront on both sides of the Bypass Reach within city limits, as well as the underlying riverbed, and has maintained municipal water intakes in the Bypass Reach since the City was founded in 1893. *Id.* Greenlawn averages 6 million gallons per day (“MGD”) in water withdrawals to its over 100,000 inhabitants in mostly single-family units. *Id.* The Howard Runnet Dam was completed in 1948 and began diverting water into the Howard Runnet Lake. *Id.* at 6. At this time, ACOE entered into an agreement with Greenlawn to continue water withdrawals now from the newly created Bypass Reach in accordance with Greenlawn’s status as riparian landowner. *Id.*

In 1968, ACOE revised its Water Control Manual (“WCM”). *Id.* This manual provides that ACOE maintain consistent flow releases during normal summer operation (dry season and peak electric demand). *Id.* at 7. When lake levels drop below seasonal target levels, ACOE is to curtail downstream releases pursuant to the WCM. *Id.* The WCM organizes the drought conditions into three zones with corresponding curtailments for each zone. *Id.*

Since the adoption of the WCM in 1968, the Green River Valley and Greenlawn experienced development. *Id.* at 7-8. In the 1980s, large agricultural operations began to divert water upstream of Greenlawn. *Id.* These agricultural operations used water withdrawals for irrigation which resulted in water loss to the Green River due to evaporation. *Id.*

In the Spring of 2017, after persisting conditions of above-normal temperatures and below-average precipitation, the Howard Runnet lake levels reached Zone 2 (Drought Warning), and ACOE curtailed release to the Bypass Reach. *Id.* However, Greenlawn asserted its common law riparian rights and ACOE increased water releases in respect of Greenlawn's rights. *Id.* On May 15, the lake level dropped into Zone 3 (Drought Emergency) and ACOE curtailed releases for hydroelectric power. *Id.* at 9. Without this water release, Greenlawn withdrew nearly all of the remaining waterflow of the Bypass Reach. *Id.*

The combined conditions of the drought, the curtailment of water releases, and the water use by multiple entities reduced the Green River 60 miles downstream which exposed several beds of oval pigtoe mussels, a federally protected endangered species. *Id.* The exposure resulted in the death of approximately 25% of the Green River oval pigtoe mussels. *Id.* During the following procedural history, heavy rains refilled Howard Runnet Lake to Zone 1 levels, alleviating any immediate risk of further damage to the oval pigtoe mussels. *Id.* at 11.

II. Procedural History

On May 17, 2017, NUO served a Notice of Intent to sue ACOE and Greenlawn under ESA, 16 U.S.C. §1540(g). R. at 10. After 60 days, NUO filed its complaint alleging violations based ACOE's curtailments and Greenlawn's water usage, and common law riparian rights claims against Greenlawn. *Id.* ACOE joined NUO and filed a cross claim against Greenlawn, alleging Greenlawn's water usage constituted a "take" of the oval pigtoe mussels under ESA § 9, 16 U.S.C. § 1538(a)(1)(B). *Id.* Greenlawn answered and filed a cross-complaint and counterclaim against ACOE seeking declaration of its riparian right to continue water usage. *Id.* at 11.

On May 15, 2019, the District Court of New Union issued its order on the matter. *Id.* at 18. The district court granted ACOE's motion dismissing the ESA claims against it, granted summary judgment to Greenlawn declaring its rights as riparian landowner, and granted summary judgment to ACOE and NUO declaring Greenlawn to be in violation of ESA § 9, 16 U.S.C. §1538. *Id.* at 11. The district court also issued an injunction against Greenlawn for water withdrawals that would cause the flow of Green River to drop below 25 cubic feet per second averaged over 24 hours. *Id.* at 5.

Following the district court's order, Greenlawn and NUO have both filed a timely Notice of Appeal. *Id.* at 1.

SUMMARY OF ARGUMENT

This Court should affirm the district court's granting of summary judgment in part, and reverse in part. Specifically, this Court should affirm the district court's granting of summary judgment declaring Greenlawn as a riparian landowner and finding that ACOE was not required to consult with FWS. This Court should reverse the district court's decision granting summary judgment to NUO finding that Greenlawn's water use constituted a taking under the ESA. Finally, this Court should find that the district court abused its discretion in issuing a permanent injunction against Greenlawn and lift the injunction.

Greenlawn is a riparian landowner and is entitled to reasonable use, as such. Municipalities have long been recognized to hold riparian rights under common law. As a riparian landowner, Greenlawn is empowered to all reasonable use, which includes domestic, agricultural, and manufacturing use. Under a fair participation analysis, Greenlawn's water use provides a greater benefit to society than NUO's use.

ACOE was not required to consult with FWS prior to curtailing water release, as it performed a non-discretionary action. ACOE entered into an agreement recognizing the riparian rights of the city of Greenlawn prior to the enactment of the ESA. This agreement removed any discretion ACOE had in its operation of the Howard Runnet Dam, and exempted the ACOE from consultation.

Greenlawn's water withdrawals did not constitute a taking under the ESA. In order for liability to be assigned under the ESA, a defendant's actions must be the proximate and foreseeable cause of the harm. Multiple actors contributed to the reduced waterflow of the Green River. Greenlawn's actions took place outside of the mussels' habitat, and was not the proximate nor foreseeable cause of the pigtoe mussels' deaths.

Prior to issuing an injunction, courts are required to balance the hardships imposed on a defendant versus the scope of potential harm to a plaintiff. Had the court balanced the hardships, Greenlawn would not be enjoined from exercising its rights as a riparian landowner. The potential harm that the district court relied on was speculative, and should not have outweighed a municipality's right to provide for its citizens.

This Court should affirm the district court's decision granting summary judgment declaring Greenlawn to be a riparian landowner and the district court's decision granting summary judgment to ACOE finding they did not perform a discretionary action. This Court should reverse the district court's granting of summary judgment finding that Greenlawn committed a taking under the ESA. This Court should lift the injunction imposed against Greenlawn, as the district court did not properly balance the hardships of the parties.

ARGUMENT

I. AS RIPARIAN LANDOWNER, GREENLAWN IS ENTITLED TO REASONABLE USE OF WATER WITHDRAWALS FOR MUNICIPAL PURPOSES.

Under the common law doctrine of riparian rights, the City of Greenlawn is a riparian landowner and has the right to withdraw water from the river for municipal purposes without any water conservation measures. R. at 12; *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.R.I. 1827) (No. 14,312); *City of Canton v. Shock*, 66 Ohio St. 19, 28 (1902); *City of Philadelphia v. Collins*, 68 Pa. 106, 106 (1871). As the *only* riparian landowner in this matter, Greenlawn may withdraw water for reasonable use which includes municipal use, as long as it does not injure the use of another riparian proprietor. Drought conditions do not diminish a riparian landowner's right to reasonable use. Further, under tort and case law, courts seek to use water policy to benefit society over an individual such that Greenlawn's use is prioritized over that of the NUO. *See* Restatement (Second) of Torts §§ 841-64 (Am. Law Inst. 1977); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

A. Standard of Review

Summary judgment should be granted when there is no genuine issue to a material fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 422, 442 (1986); Fed. R. Civ. P. 56. As there is no genuine issue of material fact to Greenlawn's riparian status and use, the district court correctly granted summary judgment on this issue. R. at 11. This Court should use a de novo standard of review on a grant of summary judgment. *See United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

B. The City of Greenlawn is the Sole Riparian Landowner in this Matter.

It is uncontested that the City of Greenlawn owns land on both banks of the Green River Bypass Reach and the land covered with water to the middle of the stream. R. at 5. From this ownership stems the right to use of the water flowing over the land as a riparian proprietor. *Id.*; *Tyler*, 24 F. Cas. at 474. Courts have routinely recognized cities as riparian landowners with rights to provide water to non-riparian inhabitants. *See Tubb v. Potts*, 45 N.U. 999 (1909); *City of Philadelphia*, 68 Pa. at 106 (1871), (“where large bodies of people live upon the banks of a stream, as they do in large cities, the collective body of the citizens has the same (riparian) right – the same, but, of course, in a greatly exaggerated degree”); *City of Canton*, 66 Ohio St. at 28 (granting a municipality all rights and liabilities of an individual riparian landowner); *Barre Water Co. v. Carnes*, 65 Vt. 626, 629-630 (1893) (granting riparian rights to a town). Following this line of cases from similarly situated states, this Court should affirm the district court’s finding that Greenlawn, as municipality, has riparian status.

C. Domestic, Agricultural, and Manufacturing Water Use is Reasonable Use.

From this riparian status flows a landowner’s right to the reasonable use of the water, for domestic, agricultural, and manufacturing purposes. *Hendrick v. Cook*, 4 Ga. 241, 256 (1848); *See also United States v. Willow River Power Co.*, 324 U.S. 499, 504-505, (1945); *Harris v. Brooks*, 225 Ark. 436, 445 (1955). Greenlawn’s water use consists of providing water to mostly residential areas with single-family households. R. at 5. The normal household water use includes seasonally appropriate uses like watering plants. R. at 8.

In *Pernell v. Henderson*, the Supreme Court of North Carolina held that a municipal corporation that provides water for inhabitants is “not in the exercise of the traditional right of a riparian owner to make a reasonable domestic use of the water without accountability to other

riparian owners who may be injured...” 220 N.C. 79, 81 (1941). As the New Union court already decided that municipalities have riparian status in *Tubb v. Potts*, this Court should focus on the second aspect of the *Pernell* holding. 45 N.U. One must be a riparian landowner in order to contest another’s use. NUO’s oyster fishermen do not own any land on Green River or Green Bay. R. at 10. Without this landownership, NUO is not a riparian proprietor and it has no right to contest Greenlawn’s use under riparian doctrine. NUO simply cannot claim riparian rights for protections from Greenlawn’s water use.

D. Under a Fair Participation Analysis, Greenlawn’s Reasonable Use Provides a Far Greater Benefit than NUO’s Use.

In addition to the cases listed above in which courts gave riparian status to cities and municipalities for the reasonable use of providing water to their inhabitants, courts have also used a balancing test to determine reasonable use. In *Mich. Citizens for Water Conserv. v. Nestlé Waters N. Am.*, the court recognized that a reasonable use inquiry is case-specific and three underlying principles govern the process of balancing reasonable use. 269 Mich. App. 25, 70-74 (2005). Courts should first consider “fair participation” in the resource striking a balance between the complaining party and preserving the beneficial uses of the common resource. *Id.* Then, courts should only allow uses that are reasonable. *Id.* Finally, courts should only seek to redress harms that are unreasonable. *Id.*

The “fair participation” prong of this test is supported by tort riparian common law principles. The *Restatement of Torts* acknowledges water use to “fulfill some significant or worthwhile human need or desire.” Greenlawn’s use meets the *Restatement’s* purpose as it provides water for its 100,000 inhabitants for normal domestic and seasonal use. Further, the US Supreme Court recognized that water rights are meant to benefit the whole over the individual. “Their improvement by individuals, when permitted, is incidental or subordinate to the public

use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.” *Shively*, 152 U.S. at 57. Courts have also recognized that an individual may lose riparian rights when the water is not utilized to its full potential. “When the riparian owner...is unable...to improve and use the water on his own land, he must be deprived of a right incident to his land, and which may constitute its principal value.” *Hoy v. Sterrett*, 2 Watts 327, 331 (Pa. 1834). Applying this policy to the fair participation test, Greenlawn’s water use provides the common resource as a far greater benefit to the thousands of families of inhabitants over any benefit that the NUO oyster fishermen may gain from profits.

Like the courts of New Union, Pennsylvania, Ohio, Vermont, and Michigan, this court should find Greenlawn’s water use to be reasonable. Under the balancing test, Greenlawn’s use is reasonable use, as Greenlawn provides water to a greater number of individuals, and the injury to NUO cannot be redressed under riparian common law.

E. If Water Use is Reasonable in Ordinary Conditions, an Imposition of Drought Conditions does not Affect this Reasonable Status.

The addition of drought conditions upon a municipality’s riparian right does not diminish that right if the use during ordinary water conditions is reasonable. *Gould v. Boston Duck Co.*, 79 Mass. 442 (1859). As the Supreme Court of Massachusetts recognized, a riparian owner’s reasonable use of water interfering with another riparian’s right downstream was *damnum absque injuria* (“loss or damage without injury”). *Id.* at 453. So long as Greenlawn’s water use is reasonable, this Court should not enjoin use that begets no injury.

Greenlawn is a riparian landowner. Its water use, providing water to the inhabitants of Greenlawn for normal domestic and seasonable use, is reasonable use. When a riparian owner’s reasonable use causes harm to another riparian owner, that harm, even in drought conditions, cannot give rise to recovery.

II. THE OPERATION OF THE HOWARD RUNNET DAM WORKS DURING DROUGHT CONDITIONS DOES NOT REQUIRE CONSULTATION UNDER THE ENDANGERED SPECIES ACT BECAUSE IT IS NOT A DISCRETIONARY AGENCY ACTION UNDER § 7.

The Endangered Species Act requires federal agencies to consult with the Fish and Wildlife Service (FWS) to, “...insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species...” 50 C.F.R. § 402.03; 16 USCA § 1536. This no-jeopardy requirement under the act does not apply to non-discretionary actions by federal agencies. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). An agency's action is not discretionary when it is a legal obligation for the agency under a separate act, contract, or legal authority. *NRDC v. Kempthorne*, 621 F. Supp. 2d 954. The operation of the Howard Runnet Dam Works during drought conditions is not a discretionary action because Greenlawn, as riparian landowner, is entitled to use of the water in the Green River Bypass Reach.

A. Standard of Review

Under the Administrative Procedure Act (“APA”), this Court shall decide “questions of law” and “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 USC § 706(2)(A). Upon a review of federal agency action under the APA, the Court reviews the grant of summary judgment. A movant is entitled to summary judgment where the movant shows 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; *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

B. An Agency is Obligated to Comply with the Consultation Requirement Under the Endangered Species Act Only when the Agency Action is Discretionary.

In *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, the Supreme Court held that the no-jeopardy consultation requirement is only applied to actions that are discretionary. 551 U.S. 644, 667 (2007). To hold otherwise would require multilateral compliance by federal agencies. Because multilateral compliance would ultimately lead to the repeal of obligations, this is not favored under the canon against repeal. *Id.* The Court reasoned that, unless there is clear Congressional intent, obligations under a prior statute cannot be compounded with or repealed by the obligations of a new statute that comes later in time. *Id.* In *Home Builders*, the Environmental Protection Agency ("EPA") argued that it was stripped of discretion to act under the requirements of the ESA because of its obligations under the Clean Water Act ("CWA"). *Id. at 654.* The Court reasoned at length that there is strong support for a canon against implied repeal and that enactment of a new statute does not override obligations under a previous one if there is no specific Congressional intent or language stating as much. *Id. at 666.*

The term "action" includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including the granting of permits. *Env'tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 at 1075 (9th Cir. 2001) ("E.P.I.C."). The Court found that, although FWS had some ongoing involvement through its oversight of the take permit it issued to Simpson Timber Co., it was not involvement significant enough to equal discretion triggering the consultation requirement under the ESA. *Id.* The Habitat Conservation Plan ("HCP") in *E.P.I.C.* had provisions that looked after listed species, specifically. *Id. at 1077.* Even with this plan, the Court found that an agency is neither required to create provisions and plans for the protection of endangered and threatened species to be *subsequently* listed as such by the FWS nor is it to be assumed that a federal agency maintains ongoing discretion and authority

once a contract has been executed. *Id* at 1079, 1082 (citing *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) and *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998)).

The holding in *Home Builders* is foundational and can be applied to the instant case. Accordingly, the District Court relied on this decision in finding that the ACOE had no obligation to consult with the FWS when operating the dam during drought conditions. R. at 15. When ACOE contracted with Greenlawn, it upheld Greenlawn's riparian rights, a common law property right established in 1893. R. at 7. The WCM establishes that, "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 United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law." *Id.* Extending the canon against repeals to the case in question, it is inapposite to require the ACOE to violate those property rights based on the enactment of a statute with no indication or explicit declaration of application in this type of case. Further, the ACOE has no discretion in its actions regarding the rate of waterflow to Greenlawn. Pursuant to the WCM, ACOE had an obligation to provide Greenlawn with the necessary and appropriate water levels previously agreed upon. When the ACOE attempted to curtail Greenlawn's water usage, Greenlawn asserted their riparian rights of property owners established under New Union law. R. at 8-9. The ACOE was ultimately obligated to provide the required amount of water to Greenlawn, through no discretion of its own. *Id.* Further, ACOE maintains no discretion to act outside of the three "zones" established in the WCM and is entirely limited by the provisions of the WCM. The decision to enact one zone or another is not one of discretion as it is a category with specifically delineated actions in the WCM. Similarly, the WCM provides only steps for drought conditions, with no provisions specifically delineating species conservation measures, unlike the HCP in *E.P.I.C.* Where the

agency in *E.P.I.C.* was not found to have any ongoing discretion in its involvement with the local timber company while acknowledging the possible impacts their activities may have on endangered and threatened species in the area, it logically cannot be argued that the ACOE had any discretion pursuant to the measures within its own WCM, which has no measures or procedures regarding threatened and endangered species.

C. An Agency’s Discretion is Limited When it has a Legal Obligation Under Contract or Management Decision Outside the Endangered Species Act.

In *Nat’l Resource Def. Council v. Kempthorne*, the Court held, “To trigger *Home Builders’* application, an agency’s discretion must be substantially constrained by a federal statutory command, international treaty, or *prior contract, permit, or management decision.*” (emphasis added). 621 F.Supp.2d 954 at 976 (9th Cir. 1998). In that case, the United States entered into an agreement with local contractors and implemented water usage guidance based on a year-long study of the water use. *Id.* The parties mutually agreed that reasonable and beneficial use of the water reported in the study conferred water rights on the local area. *Id.* This contractual agreement among the parties lasted over 40 years and contains provisions by which the United States is not allowed to limit or confine the local population’s water usage. *Id.*

In the instant case, Greenlawn obtained its rights to municipal water use when it was founded in 1893. R. at 5. Later, in 1947, the Howard Runnet Dam Works was constructed by the ACOE, to be operated pursuant to the WCM, last revised in 1968. *Id.* This 1968 WCM includes language highlighting and maintaining the riparian rights of Greenlawn: “At all times the Howard Runnet Dam Works shall be operated in a manner that complies with...the riparian rights of property owners under New Union law.” R. at 7-8. The ESA was enacted in 1973, after the last modification of the WCM and significantly later than the establishment of Greenlawn as the riparian landowner in 1893. Greenlawn’s riparian rights are similar in

principle to the water use rights of the Sacramento area. As long as Greenlawn's use is reasonable, it is entitled to full use of water to fulfill those reasonable purposes. In *Kemphorne*, the United States ultimately lacked the discretion to go above and beyond the agreement and was required to provide the water the local area needed as part of its reasonable and beneficial uses. Here, ACOE is likewise required to provide Greenlawn with the water it needs for its reasonable and beneficial purposes under its riparian rights. Pursuant to the WCM, ACOE must supply water as Greenlawn is entitled to for ordinary and recreational use. This WCM is based on water levels in 1968, when the WCM was created and last revised, and includes "zones" that address drought conditions in the area. R. at 6. In 2017, the District Commander of the ACOE attempted to restrict the amount of water used by Greenlawn pursuant to lake levels that dropped to drought conditions and was ultimately unsuccessful due to ACOE's obligations to honor Greenlawn's water rights as the riparian landowner. R. at 8. During this time, the District Commander had an obligation to provide 30 CFS of water to Greenlawn as the riparian landowner for ordinary use. *Id.* This action by the District Commander does not amount to an act of discretion but a legal obligation under the agreement and Greenlawn's rights as the riparian landowner.

ACOE's operation of the Howard Runnet Dam Works is not a discretionary action requiring consultation under the Endangered Species Act. Where a federal agency is under contractual obligation to perform and is not obligated by law to incorporate or adhere to the provisions of the subsequently enacted Endangered Species Act, it is not required to consult with FWS.

III. GREENLAWN'S WITHDRAWAL OF WATER FOR REASONABLE USE AS A RIPARIAN LANDOWNER DID NOT CONSTITUTE A TAKE OF THE ENDANGERED PIGTOE MUSSELS BECAUSE GREENLAWN'S

WITHDRAWAL HAD AN INDIRECT EFFECT ON THE MUSSELS AND WAS NOT THE PROXIMATE CAUSE NOR FORESEEABLE CAUSE OF THE MUSSELS' DEATH.

Greenlawn's withdrawal of water did not have a direct effect on the habitat of the pigtoe mussel, and as such cannot constitute a taking under the ESA, 16 U.S.C. § 1538. Greenlawn's withdrawals were not the proximate cause of the pigtoe mussels' death. Greenlawn's continued withdrawals at historic levels did not foreseeably cause the pigtoe mussels to die.

A. Standard of Review

Summary judgment should be granted when there is no genuine issue to a material fact, and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 422, 442 (1986); Fed. R. Civ. P. 56. There is no genuine issue of material fact to Greenlawn's reasonable water withdrawals as a riparian landowner, however, the district court incorrectly granted summary judgment because as a matter of law Greenlawn's actions did not constitute a taking of the pigtoe mussel. R. at 18. This court should use a de novo standard of review on a grant of summary judgment. *See United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

B. Greenlawn's Withdrawals had an Indirect Effect on the Mussels' Habitat and does not Constitute a Taking Under the ESA.

Greenlawn did not take any action that had a direct effect within the habitat of the pigtoe mussels. *E.P.I.C.*, 255 F.3d 1073; *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060 (9th Cir. 1996). All actions by Greenlawn took place 60 miles upstream, and removed from where the mussels extirpated. R. at 9.

In *E.P.I.C.*, the Ninth Circuit ruled that harm includes any elimination of a habitat that kills or injures wildlife. 255 F.3d. at 1075. Simpson Timber owned land that was home to the endangered northern spotted owl. *Id.* at 1076. The timber company was required to apply for an

incidental take permit before it took direct action on its land, and was successfully granted a permit. *Id.*

In *Murrelet*, the Ninth Circuit held that harm includes significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavior patterns. 83 F.3d at 1064. The activity in question was logging, where Pacific Lumber was actively involved in logging of the habitat of the secretive marbled murrelet. *Id.* at 1062.

Unlike the companies in *Simpson Timber* and *Pacific Lumber*, Greenlawn is not directly affecting the habitat in question. Greenlawn is located 60 miles upriver, and its water withdrawal is not the only water is taken from along Bypass Reach. Greenlawn's actions take place outside of the habitat in question, and therefore Greenlawn's water withdrawal cannot be considered a taking under the ESA. Greenlawn is removed from the habitat in question, not just geographically, but proximately as well.

C. Greenlawn's Withdrawals were not the Proximate nor Foreseeable Cause of the Mussels' Deaths.

Before liability can be affixed under the ESA, proximate cause and foreseeability must be established. The standard of review for legal issues is reviewed de novo. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995); *Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997).

In *Babbitt*, the Supreme Court ruled that harm is an act which kills or injures wildlife, including any habitat modification or degradation, and denied that the ESA established strict liability. *Id.* at 690-708. The Court stated that the "knowingly violates," language has the ordinary requirements of proximate causation and foreseeability. Justice O'Connor, in her concurrence, stated that she joined the majority with the understanding that the ordinary limits of proximate cause were in place. *Id.* at 709. Justice O'Connor explained that while proximate

cause does not have a precise definition, there are understandings of its extremes. She cites the clear case of proximate cause is a farmer who drains a pond and kills the endangered species of fish that lived inside the pond. *Id.* at 713.

In *Aransas*, the Fifth Circuit held that a state agency issuing permits for water usage did not foreseeably result in the deaths of an endangered species. 775 F.3d at 645. The trial court enjoined the Texas Commission on Environmental Quality (“TCEQ”) from issuing water-use permits to municipalities, as the water withdrawals during a period of drought increased the salinity of the bay area. *Id.* This increased salinity resulted in the death of the main food source of the whooping crane, an endangered species. *Id.* at 647. The Fifth Circuit reversed the trial court’s decision, and stayed the injunction, stating that the licensing of the water withdrawals was not the proximate cause of the crane’s deaths. *Id.* At 663. The court criticized the issuance of an injunction when nowhere did, “the court explain why the remote connection between water licensing, decisions to draw river water by hundreds of users, whooping crane habitat, and crane deaths that occurred during a year of extraordinary drought compels ESA liability.” *Id.* at 658-659. The court looked at the chain of causation between the issuance of the permits and the death of the cranes and held proximate cause is not but-for causation, but instead requires causal factors and the result to be reasonably foreseeable. *Id.* at 660. The court stated that the ESA prohibits takes as long as they are foreseeable rather than accidental. *Id.* at 657. The court noted that TCEQ cannot control the amount of water that is diverted. *Id.* at 661. The court noted the most unpredictable factor is the weather, which cannot be foreseen. *Id.* at 661. The court held that proximate cause and foreseeability are lacking as a matter of law. *Id.*

In *Strahan*, the First Circuit held that the licensing of a state agency was a proximate cause to the death of the northern right whales. 127 F.3d at 171. In that case, there was

substantial evidence that the whales suffered injury from the nets that the state was licensing. *Id.* at 159. The First Circuit stated the only way for an entity to escape proximate causation is if, “it is so removed that it extends outside the realm of causation that is understood under common law.” *Id.* at 164.

Like the issue before the court in *Babbitt*, this Court must consider the ordinary requirements of proximate cause and foreseeability before establishing the liability of Greenlawn. Greenlawn is distinguishable from the example given by Justice O’Connor, where the farmer was draining water from a pond that no one else had a claim to. There, the farmer solely withdrew water from a closed source pond. This is distinguishable from the instant case as Greenlawn withdraws from an open source river that has a variety of other diversions upstream. The drought, large agricultural operations north of the dam, and the ACOE all affect water before it gets to the city of Greenlawn. Just like the water withdrawals in *Aransas*, Greenlawn’s water withdrawals are not the proximate nor foreseeable cause of the mussel’s death. Just like the area conditions in *Aransas*, a drought was also occurring and affecting the Green River. Similar to the TCEQ in *Aransas*, Greenlawn could not control the amount of water that is diverted prior to reaching the city. The cumulative effect of the upstream water withdrawals, coupled with the drought conditions, created the unforeseeable result of a 60-mile downstream water flow under 25 cubic feet per second. Greenlawn’s water use had the accidental effect of exposing the pigtoe mussel during a time of drought and was not foreseeable. Greenlawn’s water use has not significantly changed for the year of 2018, and the drought, farmers, and ACOE are the proximate and foreseeable causes of the mussel’s death. For these reasons, Greenlawn cannot be held liable for takings of an endangered species under the ESA.

IV. THE DISTRICT COURT ABUSED DISCRETION BY ENJOINING GREENLAWN’S REASONABLE WATER USE WITHOUT BALANCING

THE HARDSHIPS OF A DENIAL OF GREENLAWN’S RIPARIAN RIGHTS AGAINST A SPECULATIVE HARM TO LOCALIZED SUBSET OF GREEN BAY’S PIGTOE MUSSELS.

Before a court issues an injunction, the court must balance the equities between the defendant and the plaintiff. *Animal Welfare v. Martin*, 623 F.3d 19 (1st Cir. 2010). The court should look to the hardship imposed on the defendant versus the potential harm posed to the endangered species. *Id.*

A. Standard of Review

The standard of review over a district court’s issuance of injunction is abuse of discretion. However, the review of the underlying legal issues is de novo. *Id.* at 26.

B. The Future Harm to the Pigtoe Mussels is Speculative and is Neither Imminent Nor Irreparable.

When issuing an injunction, the court must look to the harm posed to the endangered species and ensure that the threat is imminent and irreparable. *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

In *Strahan v. Coxe*, the First Circuit denied plaintiff’s requests for a permanent injunction, but held a preliminary injunction. 127 F.3d at 172. In *Strahan*, the First Circuit looked at the effect of state regulations on the deaths of the endangered Northern Right whales. *Id.* at 159. The court stated the test for a preliminary injunction is: the likelihood of success on the merits, the potential for irreparable harm if the injunction is denied, the balance of relevant impositions, hardship to the nonmovant if enjoined as contrasted to the movant if no injunction issued, and the effect of the court’s ruling on the public interest. *Id.* at 160. The court noted that nearly half of the whales bore scars showing past entanglements. *Id.* at 159. The court said, “the balance of hardships and the public interest tip in favor of protected species.” *Id.* at 171.

In *Tennessee Valley Authority v. Hill*, the Supreme Court affirmed the Sixth Circuit and held that an injunction should have been issued when a dam would eradicate the habitat of an endangered species and wipe out the entire snail darter species. 437 U.S. at 171. The dam was being funded by Congress and continued to be appropriated by Congress. *Id.* at 156. The Court held that the value of the endangered species was, “incalculable.” *Id.* at 178. Nobody disputed that the operation of the dam would eradicate a species, and the injunction was the appropriate remedy. *Id.* at 171. The Supreme Court acknowledged that even under the ESA, “courts are not mechanically obligated to grant an injunction for every violation of law.” *Id.* at 193.

Unlike the future potential harm to the whales in *Strahan*, the potential harm to the pigtoe mussel is speculative and conditional on external factors outside of Greenlawn’s control. Whereas in *Strahan* the fishing gear had been found entangled in the whales, it was an unforeseeable drought that caused the death of the pigtoe mussels in the instant case. Unlike the snail darter in *Hill*, the pigtoe mussel will not be completely eradicated if Greenlawn continues its water use. The harm posed to the pigtoe mussels is not imminent, in that there are multiple extrinsic factors outside of Greenlawn’s control that must be met in order for the mussels to be harmed. Additionally, the harm posed to the pigtoe mussels is not irreparable, as approximately 75% of the mussels remain, unlike the potential harm to the snail darters in *Hill*. In order for the mussels to be at risk again, there would need to be another drought, continued mass water withdrawals by the agricultural operations north of the dam, and continued operation of the Howard Runnet dam. Unlike the dam in *Hill*, the operation of the Howard Runnet dam is not eradicating the mussels’ sole habitat.

C. The Injunction's Burden is Unjustly and Solely Placed on the City of Greenlawn, and a Balancing of the Hardships Against the Speculative Harm to the Pigtoe Mussels Warrants a Reversal of the Trial Court’s Decision in Issuing an Injunction.

When considering an injunction, the Court must consider the balance of hardships between the plaintiff and defendant and determine whether a remedy in equity is warranted. *Animal Welfare v. Martin*, 623 F.3d 19 (1st Cir. 2010).

In *Animal Welfare v. Martin*, the First Circuit held that a trial court did not abuse its discretion when it balanced the hardships between plaintiffs and defendants before denying an injunction. *Id.* at 29. In *Martin*, Maine had regulations in place allowing the Conibear trap, which could potentially harm the endangered Canada lynx. *Id.* at 22. The trial court required the plaintiffs to prove irreparable harm prior to issuing an injunction. *Id.* at 26. The trial court held that, “the death of one member is an isolated event that would not call for judicial action,” and, “has only a negligible impact on the species as a whole.” *Id.* at 29. The First Circuit acknowledged that a single taking may violate the statute, but that violation does not require an injunction as a remedy. *Id.* The district court stated that, “the death of a single animal may call for an injunction in some circumstances, while in others, the death of one member is an isolated event that would not call for judicial action.” *Id.* The First Circuit, citing the Supreme Court in *United States v. Oakland Cannabis*, 532 U.S. 483, 496 (2001), stated that *Hill*’s injunction was the result of the strong and undisputed showing of irreparable harm of an entire species going extinct absent the injunction. *Id.* at 27.

Unlike the trial court in *Martin*, the present trial court abused its discretion when it failed to balance the hardships between the plaintiffs and the defendants. The record does not reflect that Greenlawn’s continued use of their water rights as riparian owners will cause an imminent and irreparable harm to the species. The drought condition that led to the deaths of the pigtoe mussels was an isolated event. As explained in *Martin*, isolated events do not call for judicial

action. An unwarranted injunction would prevent Greenlawn from reasonable water use within its city limits. Additionally, the hardship falls solely on the city of Greenlawn and its citizens, whereas there are multiple other entities withdrawing from Green River. The multiple large agricultural operations north of the diversion dam not only have water withdrawals, but also return no water back into the river itself. The ACOE diverts the rest of the water into the Howard Runnet Lake, and allows only a restricted amount of water through to Greenlawn. The large agricultural operations, along with the ACOE, are free of any imposition due to the current injunction. As the trial court failed to properly balance the hardship of Greenlawn's riparian rights to water usage against the speculative harm to the pigtoe mussels, this court should reverse the trial court's granting of summary judgement and injunction against Greenlawn.

CONCLUSION

For the foregoing the reasons, the City of Greenlawn, New Union respectfully asks the Court to affirm the judgment of the district court for: (1) finding Greenlawn, as riparian landowner, may continue its reasonable water withdrawals for municipal purposes and (2) that the operation of the Howard Runnet Dam Works during drought conditions is not a discretionary action by the ACOE subject to the consultation requirement of § 7 of ESA, 16 U.S.C. § 1536 and to reverse the judgments of the district court for: (3) that Greenlawn's withdrawal constituted a "take" of the oval pigtoe mussel in violation of § 9 of the ESA, 16 U.S.C. § 1538 and (4) require the district court to balance the equities prior to ordering a permanent injunction. Additionally, Greenlawn requests relief by way of lifting the injunction improperly ordered upon Greenlawn.