Team No. 45

Case No. 19-000987

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,

Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Appellee,

and

CITY OF GREENLAWN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION ISLAND

BRIEF OF THE CITY OF GREENLAWN
Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

District Court Cases

United States Code

Code of Federal Regulations

Restatement

Miscellaneous

STATEMENT OF JURISDICTION

NUO's complaint was properly before the United States District Court District of New Union, as such the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2019). The court issued an Opinion and Order on May 15, 2019. The case in controversy was brought by Plaintiff, New Union Oystercatchers, Inc. (NUO), against Defendant, City of Greenlawn, New Union (Greenlawn), and Defendant and Cross-Plaintiff, United States Army Corps of Engineers (ACOE). Appellants timely filed notice of appeal in the district court. Fed. R. App. P. 4(a)(1)(A). This Court has valid jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2019).

STATEMENT OF THE ISSUES

1. Does Greenlawn have the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures?
2. Does the operation of Howard Runnet Dam Works during drought conditions providing water flow to Greenlawn constitute a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536?
3. Does Greenlawn's withdrawal of drought-reduced water flow from the Howard Runnet Dam Works constitute a "take" of the oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538?
4. Must the District Court 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 CASE

I. Statement of Facts

The City of Greenlawn, New Union, was founded in 1893 on the historic banks of the Green River, which is now known as the Green River Bypass Reach (Bypass Reach). R. at 5. As such, Greenlawn has riparian landowner rights. *Id.* Since its founding, Greenlawn has used the river for municipal water intake. *Id.* In 1968, Greenlawn expanded its municipal water system to accommodate a significant increase in residential and business growth. *Id.*

Now, over 100,000 customers rely on Greenlawn Water Agency to provide 6 million gallons per day (MGD) annually for the City's small downtown area, and the large residential district consisting of primarily single-family homes. *Id.* During hot and dry periods, Greenlawn peaks its water usage to 20 MGD to accommodate residents watering their lawns, gardens, and other ornamental purposes. *Id.* The water is then treated and discharged to the Progress River. *Id.*

The growth of Greenlawn is not the only change to occur along the Green River. During the 1980s, several large agricultural operations in the Green River valley began diverting water from the river for irrigation. *Id.* at 8. In 1947, the United States Army Corps of Engineers (ACOE) created Bypass Reach as part of the Green River Diversion Dam. *Id.* at 6. The ACOE also created the Howard Runnet Dam on the Howard Runnet Lake for flood control, recreation, and hydroelectric power—which is now a significant source of peak load power generation. *Id.* at 6. When the dam was constructed, ACOE entered into an agreement with Greenlawn to ensure that the natural flow of water would not be cut off from Greenlawn. *Id.* The agreement stated that the ACOE would maintain flows into Bypass Reach sufficient to allow Greenlawn to continue water withdrawal "in such quantities and at such rates and times as it is entitled to as a riparian owner under the laws of the State of Union." *Id.*

The dam is governed by the Water Control Manual (WCM), which establishes parameters for the release of water that provides target lake levels at different times of the year based on historical flows and water demands. *Id.* If the lake is at a sufficient level, more water is released into the river. *Id.* at 7. However, if the lake falls below desired targets, downstream releases are curtailed based on the severity of the drought and in accordance with zone policies. *Id.* There are three drought zones that correlate with increasing restrictions given the severity of drought conditions; the zones dictate the amount of water released into Bypass Reach and are divided into drought watch, drought warning, and drought emergency. *Id.* The most severe zone, drought emergency, caps flow rate. *Id.* The cap is based on the water demands of Greenlawn at the time the WCM was adopted, set by the 1968 annual average water demands in Greenlawn. *Id.*

The agreement met the needs of the ACOE and Greenlawn until the end of the 20th Century, with the ACOE applying the drought watch restrictions only once. *Id.* at 8. However, between 2006 and 2017 the area experienced drought watch conditions at least five times. *Id.* A 2016 drought watch was attributed to below-average precipitation and above normal temperatures which increased evaporation in the region and increased water demand. *Id.*

In 2017, the lake level reached drought warning conditions for the first time since the WCM was adopted in 1968. *Id.* In response, the ACOE instituted a flow restriction into Bypass Reach. *Id.* Greenlawn opposed the flow restriction because the restriction was outdated and based on water needs for a significantly smaller population—one that Greenlawn had substantially outgrown since the WCM was adopted. *Id.* Greenlawn stated that following this restriction hinders the spring planting and growing season, which are reasonable riparian water uses for domestic and commercial purposes. *Id.* When the ACOE requested Greenlawn institute

restrictions on water consumers Greenlawn objected, asserting common law rights as a riparian landowner to make reasonable use of water flowing through Bypass Reach. *Id.* As a result, the ACOE increased water flow into Bypass Reach to meet Greenlawn's need. *Id.*

On May 15, 2017, water levels in the lake reached drought emergency levels. *Id.* The ACOE ordered curtailment of hydroelectric power releases but continued the water flow to Bypass Reach at the same level, a level which Greenlawn's consumption was less than. *Id.* at 9.

Downstream of the confluence of the Bypass Reach and the Howard Runnet Dam tailrace—60 miles from the Howard Runnet Dam Works—reduced water levels exposed beds of oval pigtoe mussels (pigtoe), a federally listed endangered species. *Id.* The ACOE has never consulted with the Fish and Wildlife Service (FWS) concerning the impacts of the Howard Runnet Dam Works operation on pigtoe populations. *Id*.

Downstream, the members of the New Union Oystercatchers (NUO) claim to be injured by reduced water levels in the Green River allegedly impacting their oyster harvesting. *Id.* at 10. However, none of the members of NUO are waterfront property owners, with riparian landowner rights, on Green Bay or the Green River. *Id*.

Between May 17 and July 17, 2017 (during the sixty-day notice period), heavy rain fell in the Green River watershed, filling Howard Runnet Lake back to drought watch levels. *Id.* at 11. This allowed the ACOE to increase water flows, which eliminated the threat to the Green River pigtoe. *Id.* However, the district court still issued an injunction that limits Greenlawn from withdrawing any water that would result in a far downstream area experiencing a flow rate of less than 25 cubic feet per second averaged over twenty-four hours. *Id.* at 5.

II. Procedural History

NUO served a Notice of Intent to sue the ACOE and Greenlawn under the Endangered Species Act (ESA), 16 U.S.C. § 1540(g) on May 17, 2017. After waiting the requisite sixty days, NUO filed this action on July 17, 2017. ACOE filed a cross-claim against Greenlawn, joining NUO's claim that Greenlawn's water withdrawals constituted a "take" of pigtoe under the ESA, § 9, 16 U.S.C. § 1538(a)(1)(B). Greenlawn answered the complaint and cross-complaint and filed a counterclaim against ACOE seeking a declaration of its rights as a riparian landowner to continued flows in Bypass Reach sufficient to meet its municipal water needs.

The district court granted Greenlawn's motion for summary judgment declaring it has a riparian right to continued flows. In addition, the court dismissed the ESA claim against the ACOE and granted NUO's and ACOE's motion for summary judgment declaring Greenlawn to be in violation of the ESA. Finally, the district court instituted an injunction limiting Greenlawn's water withdrawals during drought conditions.

Greenlawn and NUO both filed a timely Notice of Appeal to the Twelfth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

Pursuant to the riparian rights doctrine, a riparian landowner may reasonably use as much water from the water body abutting their property as needed, provided the use does not infringe upon the reasonable use of another riparian landowner. As a riparian landowner, Greenlawn pumps water out of Bypass Reach into its municipal water system. The use of water in this manner is reasonable under riparian rights doctrine. Therefore, Greenlawn may continue to use water in this fashion, until such time as another riparian landowner can show that their ability to reasonable use the resource is being impacted.

The NUO has failed to establish a claim against Greenlawn because NUO is not a riparian landowner. As such, relief cannot be granted through riparian rights doctrine, and NUO cannot compel Greenlawn to adopt drought condition measures. In addition, prior to adoption of the ESA, Greenlawn and the ACOE entered into an agreement providing that the ACOE would provide water to Bypass Reach "in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." Since the ESA had not been instituted at the time of the agreement, the consultation requirement of the ESA—requiring agencies to consult with a designated agency when an agency's discretionary acts could impact an endangered species—was not triggered.

In addition, NUO and the ACEO claim that Greenlawn's water usage as a riparian landowner constitutes a take under the ESA because Greenlawn's actions have led to modifications of oval pigtoe mussel (pigtoe) habitat. This claim does not pass muster because Greenlawn's water withdrawal from the Bypass Reach does not constitute a "take" of pigtoe under § 9 of the ESA given that the proximate cause and foreseeability requirement articulated in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* is not present here. As *Sweet Home* suggests, actions that are indirect and far removed from the knowledge that a habitat will be adversely affected do not warrant liability for a violation of the ESA. In the case at bar, Greenlawn's water intakes in the Bypass Reach are far removed from the actual pigtoe habitat downstream.

Additionally, the causal connection between water withdrawal by Greenlawn alone and modification to the pigtoe habitat is too attenuated to lead to the conclusion that a taking pursuant to § 9 of the ESA occurred. NUO's argument does not account for contributory factors such as the increased drought conditions or water use by others in the area, such as the several

large agricultural operations in the Green River valley. Moreover, as the gatekeeper, the ACOE had a duty to ensure that natural resources such as pigtoe are protected.

Finally, if the Court finds that Greenlawn violated the ESA, then the district court must balance the equities before enjoining a beneficial municipal activity—the reasonable withdrawal of water for citizen's personal and commercial needs. An injunction is a remedy the court does not historically apply lightly, and courts typically balance equities when deciding to issue an injunction. Pigtoe populations are unlikely to suffer irreparable harm if an injunction is not granted given the unpredictable drought concerns and varying water level needs of the pigtoe at its different life stages.

Granting the injunction will hurt the public interest for residents of Greenlawn and the surrounding area because greenery in a town is beneficial to the mental health of residents and visitors, as well as for attracting new businesses. The lack of greenery can impact the overall productivity and happiness of a community. Therefore, with these health and wellness factors in mind, the district court should balance the equities before enjoining a beneficial municipal activity.

Appellants respectfully request that the Twelfth Circuit Court of Appeals find in favor of the City of Greenlawn on all four issues.

STANDARD OF REVIEW

When the district court grants a motion for summary judgement, the Appellate Court reviews the case de novo, reviewing the facts and all reasonable inferences in the light most favorable to the nonmoving party, then applying the same standard as the district court. *McGinnis v. American Home Mortgage Servicing, Inc.*, 817 F.3d 1241, 1251 (11th Cir. 2016).

The scope of an injunction is reviewed for abuse of discretion or when a district court exercises its discretion based on error of law, clearly erroneous factual findings, or an error of judgment in weighing relevant factors. *Broadcom Corp. v. Emulex Corp.*, 732 F.3d 1325, 1336 (Fed. Cir. 2013).

ARGUMENT

I. AS A RIPARIAN LANDOWNER, GREENLAWN, HAS A RIGHT TO CONTINUE WATER WITHDRAWALS FOR MUNICIPAL PURPOSES DURING A DROUGHT CONSISTENT WITH CITY NEEDS.

As a riparian landowner, the City of Greenlawn (Greenlawn) has a right to water withdrawals without water conservation measures. The question is not whether Greenlawn has a right to withdrawals without conservation measures, but rather whether Greenlawn has a right to use the water and whether that right infringes on another landowners' riparian rights. Riparian rights doctrine not only establishes a landowner's right to reasonably use water, it is also a tool to settle disputes between riparian landowners—and the only parties in this case that have riparian rights are Greenlawn and the Army Corp of Engineers (ACOE). The Court should rule in favor of Greenlawn, because Greenlawn's water use was reasonable and a legitimate competing riparian claim does not exist.

A. Greenlawn's Use of Water is Reasonable.

A riparian landowner is "one who owns land bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with a body of water, such as a river, bay, or running stream,". *Kirby v. Hook*, 701 A.2d 397, 402 (Md. 1997) (quoting *People's Counsel v. Maryland Marine Mfg. Co.*, 560 A.2d 32, 33 n. 1 (Md. 1989)). Additionally, in New Union, a municipality can obtain riparian landowner rights, and, through those rights, may pump and distribute water to its citizens. *Tubbs v. Potts*, 45 N.U. 999 (1909) (citing *City of Canton v. Shock*

63 N.E. 600 (1902); *City of Philadelphia v. Collins*, 68 Pa. 106 (1871); *Barre Water Co. v. Carnes*, 65 Vt. 626, 627 (1893)).

Greenlawn owns a portion of the Bypass Reach riverfront that runs within city limits, thus establishing the Greenlawn as a riparian landowner. Greenlawn's municipal water system pumps water out of Bypass Reach and distributes anywhere from 6 to 20 million gallons per day, depending on the season, to over 100,000 customers within city limits. R. at 5. The variation in consumption per day is dependent on the time of year with more water consumed in summer months given the warmer temperatures and less rain. *Id.*

In general, riparian rights doctrine recognizes a right of reasonable use for landowners bordering water bodies. *See generally* Barton Thompson, Jr. et al., *Legal Control of Water Resources* 32, 33 (6th Ed. 2018). This doctrine does not provide a riparian landowner with an absolute right to water, instead it is used as a tool for disputes between riparian landowners. *Id.* The purpose of this right of use is "to assure…the riparian owner that [they will] never be cut off from [their] access to water." *Bd. of Pub. Works v. Larmar Corp.*, 277 A.2d 427, 432 (Md. 1971) "[Reasonable Use Theory] recognizes that there is no sound reason for maintaining our lakes and streams at a normal level when the water can be beneficially used…." *Id.* A right of use is deemed "necessary for the use and enjoyment of [the landowner's] abutting property and the business lawfully conducted thereon…." *Id.* Activities that fall within the definition of reasonableness are subjective and depend upon the facts of the case. *Meng v. Coffey*, 93 N.W. 713, 718 (Neb. 1903).

When a dispute between riparian landowners arises, a trier of fact is tasked with determining the reasonableness of use, they should focus upon the concept of obtaining "greater benefits" from a supply of water. *Harris v. Brooks*, 283 S.W.2d 129, 133 (Ark. 1955). The

comment on clause (a) of § 850A of the Restatement (Second) of Torts states that "[a] reasonable use must be one that is beneficial and that fulfills some significant or worthwhile human need or desire." Restatement (Second) of Torts § 850A cmt. b (Am. Law Inst. 1979). The comment indicates that, the types of uses that can be considered reasonable are expansive. Irrigation and activities connected to commerce, such as recreation and aesthetic purposes like those in the case at bar, are considered beneficial. *Id*. comment on clause (a) (b). The clear limitation is for uses motivated by the desire to cause "harm or designed to advance illegal enterprise…." *Id.* Those activities are unreasonable. *Id*.

Water is necessary for survival and providing water to a municipality fulfills that critical human need. Citizens of Greenlawn have relied on this municipal water source water since 1893. R. at 5. This water is used not only for personal consumption, but also for watering lawns and ornamental plants. R. at 5. This provides a secondary purpose of pleasing aesthetics, which in turn can keep residents happy, and attracts new residents and businesses to Greenlawn. Courts have previously held that these types of uses are reasonable. *See Hendrick v. Cook*, 4 Ga. 241, 256 (1848) (finding that "[e]ach riparian owner is entitled to a reasonable use of the water, for domestic, agricultural and manufacturing purposes."); *see generally* Robert E. Beck, *Waters and Water Rights* § 7.02(d)(2) (1991 & Supp. 1999). Since Greenlawn's use of water falls within the definition of reasonable as explained in the Restatement, Greenlawn may use as much of the resource until that use imposes on another riparian landowners' ability to use the water.

B. A Legitimate Competing Riparian Claim Against the City of Greenlawn has not Been Raised.

Jurisdictions have held that as long as the activity of one riparian landowner does not impact the reasonable use of another, the riparian landowner may use as much water as needed. *See generally* Thompson, *supra* at 33; *see also People's Counsel for Baltimore County v.*

Maryland Marine Mfg. Co., Inc., 560 A.2d 32, 36 (Md. 1989). For example, the Supreme Court of Michigan found that a property owner could pump water until such time as other riparian landowner's rights were infringed upon. *Hoover v. Crane*, 106 N.W.2d 563, 564 (Mich. 1960); *Pere Marquette R. Co. v. Siegle*, 244 N.W. 239, 239 (Mich. 1932).

When the activity of a riparian landowner impacts the riparian rights of another, the impacted party may seek relief. To prevail, the impacted party must show that (1) they are a riparian landowner; (2) that the impacted riparian landowner is "exercising [their] riparian right by putting the water to a reasonable use…;" and (3) that the offending riparian landowner's use of the water is causing substantial harm to the plaintiff's use. Restatement (Second) of Torts § 850A cmt. k (Am. Law Inst. 1979).

Riparian landowner doctrine provides a narrow mechanism by which a third party, who does not have riparian landowner rights, can force a riparian landowner to adopt specific water use practices. However, that mechanism is narrow, and favors the reasonable use of the riparian landowner. The Restatement Second of Torts, § 856 provides that "a riparian proprietor is not subject to liability for making use of the water of a watercourse or lake that causes harm to a use of water by a non-riparian." Restatement (Second) of Torts § 856, Subsection (1) (Am. Law Inst. 1979).

While the Restatement provides routes for a landowner to be subject to liability, preference is granted to a riparian landowner when their use is deemed reasonable. The Restatement provides three routes in which a landowner could be subject to liability. While these routes could be open for a non-riparian to bring a claim, preference is granted to a riparian landowner where their use is deemed reasonable. Restatement (Second) of Torts § 856 cmt. a (Am. Law Inst. 1979). One route to obtain riparian water rights occurs when rights are granted

from a riparian landowner. Restatement (Second) of Torts § 856, Subsection (2) (Am. Law Inst. 1979). A riparian right is a property right, and thus can be transferred as one. *Id*. cmt. b. The grant of riparian right is "a transfer of the riparian right itself, one that gives the non-riparian the right to exercise the riparian right of the grantor…." *Id*.

The second route is created when a riparian landowner infringes on a non-riparian right to use water granted by the state through a permit or license. Restatement (Second) of Torts § 856, Subsection (3) (Am. Law Inst. 1979). Historically, the route is been taken when the United States issues licenses to build dams which divert water for electricity and other recreational uses. *Id*. Additionally, States have allowed non-riparian entities water rights through permit and licensing programs. *See generally In re Waters of Long Valley Creek Stream Sys*., 599 P.2d 656 (1979). It is important to note that the first and second routes are affirmative grants of riparian rights. In the case at bar, New Union Oystercatchers, Inc., (NUO) have not been, nor do they allege, an affirmative grant of riparian water rights. As such, this analysis will turn on the third route.

The final route is available when a riparian landowner "interferes with the exercise of a public right to use the waters." Restatement (Second) of Torts § 856, sub. (4) (Am. Law Inst. 1979). According to the Restatement, "A riparian [landowner] may not exercise his private rights in such a way as to infringe upon or prevent the use of public waters by members of the public who are exercising public rights." Restatement of Torts (Second) § 856 cmt. g (Am. Law Inst. 1979). For instance, the Supreme Court of Ohio determined that a riparian landowner directly infringed on a business owner without riparian rights by placing steel cables and a wire across a stream. *Coleman v. Schaeffer*, 126 N.E.2d 444, 445 (Ohio 1955). The infringement on the use of the navigable water body injured the plaintiffs boat rental business. *Id.* However, discretion is granted to the state to determine the value the riparian landowner brings to the public welfare.

Restatement (Second) of Torts § 850A cmt. f (Am. Law Inst. 1979). The state must weigh the costs and benefits of the service provided and the public use of water. *Id*. In instances where the riparian landowners service is favored, the state may allow for the impairment or destruction of a public use. Restatement (Second) of Torts § 856, Subsection cmt. f (Am. Law Inst.1979). It is important to note, that this route is only available for claims concerning the use of water. Riparian rights are concerned with uses of water, and not ecological impacts those uses can have. Thompson, *supra*, at 28.

In the case at bar, a competing claim for riparian relief may be brought in one of two ways. Either by a riparian landowner whose use has been impacted by Greenlawn's water use, or by a citizen who can show their use of public water was impaired. Aside from Greenlawn, only the ACOE has riparian rights. When the Howard Runnet Dam was completed in 1968, the ACOE recognized the need to maintain a flow of water to Greenlawn. R. at 6. As such, the parties entered into an agreement allowing sufficient water flows "in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." R. at 6. Furthermore, the ACOE's Water Control Manual (WCM)—which sets the parameters for water release—reiterates that all agreements with riparian landowners which the ACOE enters will be complied with. *Id.*

NUO is a not-for-profit organization that represents oyster fishermen. *Id.* at 10. The members of NUO are not riparian landowners who own tracts of land adjacent to the Green River or Bypass Reach. *Id.* As such, a claim from a competing riparian landowner against Greenlawn's water use is not present in this case.

Moreover, NUO is unable to show that Greenlawn's use of water inhibited its members ability to use public waters. First, NUO argues that their members have been injured by reduced

oyster harvests, and some have been forced to sell their boats due to an inability to make payments. *Id.* Greenlawn's use of water during this recent drought cannot reasonably be the only factor attributing to business failures connected to a reduction in oyster harvests over the past decade. Greenlawn's use of water has been consistent throughout the periods of drought over the recent decades. R. at 8. The lowered oyster harvest is most likely symptomatic of larger environmental impacts and not a result of Greenlawn's water withdrawals alone. In addition, fisherman can move and find locations where oyster population densities are greater. NUO holds the burden of proof to establish a causal connection between Greenlawn's use of water and their member's injury, and NUO has failed to provide evidence that Greenlawn's water withdrawal activities are causally connected to their members reduced oyster harvests. As such, NUO has failed to establish that their members have a public use riparian claim.

Greenlawn's water withdrawal and water distribution to its citizens is a reasonable use of their riparian landowner rights. In addition, there are no competing claims by other riparian landowners or others who can claim riparian rights. As such, Greenlawn is entitled to continue water withdrawals without water conservation measures because there are no other riparian landowner claiming Greenlawn's use is impeding upon that riparian landowner's reasonable use.

II. PROVIDING GREENLAWN FLOW THROUGH THE OPERATION OF THE HOWARD RUNNET DAM WORKS IS A NON-DISCRETIONARY ACTION AND NOT SUBJECT TO THE CONSULTATION REQUIREMENT WITHIN § 7 OF THE ENDANGERED SPECIES ACT, 16 U.S.C. § 1536.

Providing Greenlawn sufficient flow from the Howard Runnet Dam Works is a non-discretionary action, consequently ACOE is not subject to the consultation requirement of § 7 of the Endangered Species Act (ESA). The ESA imposes a consultation requirement with a designated agency when a decision could impact an endangered species. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 644 (2007). The designated agency is assigned by the

Secretaries of Commerce and the Interior. *Id.* Generally, the Fish and Wildlife Service is the consulting agency. *Id.*

An agency action that would trigger the consultation requirement is one in which there is "discretionary Federal involvement or control." 50 C.F.R. § 402.03 (2019). Administrative discretion, in the context of this case, is defined as "… an agency's power to exercise judgement in the discharge of its duties." Administrative Discretion, Black's Law Dictionary (10th ed. 2014). However, not every action conducted by an agency is an "exercise of discretion." *Home Builders*, 551 U.S. at 668. For example, when an agency acts under the clear direction of Congress, they are acting without discretion. *Id*. at 665 (referencing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-843 (1984). Stated differently, if an agency is required to act, and must do so in a certain way, then the agency action is acting without discretion. *Id.* at 669. The language of § 402.03 is clear that it is to be applied to "discretionary Federal involvement or control, and therefore exempts non-discretionary agency actions from triggering the consultation requirement. *See id.* at 669 (interpreting 50 C.F.R. § 402.03 to mean that § 7 (a)(2) of the ESA covers only discretionary actions and does not attach to actions agencies are required to do by law).

While the Supreme Court has spoken directly on non-discretionary agency actions as linked to statutes, the Court of Appeals has addressed non-discretionary actions initiated through other means. Generally, if an agency issues a permit or enter into a contract with a private entity, that act alone would trigger the consultation requirement. However, a contractual obligation entered prior to the enactment of the ESA does not trigger the consultation requirement. In *Sierra Club v. Babbit*, the Ninth Circuit Court of Appeals, determined that the Bureau of Land Management did not violate the consultation requirement by following an agreement executed

prior to the enactment of the ESA. 65 F.3d 1502, 1512 (9th Cir. 1995). Specifically, because the ESA contained safeguards such as the citizen suit provision in 16 U.S.C. § 1540(g) (2018). *Id.* This provision allows, public interest groups to enjoin private entities from harming endangered species. *Id.* Thus, Congress did not intend for the abrogation of agreements finalized prior to the passage of the ESA. *Id.*

When the Howard Runnet Dam Works was completed in 1968, ACOE recognized the necessity to continue providing water to Greenlawn through Bypass Reach. R. at 6. As such, the two parties entered into an agreement which allows Greenlawn to continue water withdrawals "in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." *Id.* The dam is governed by the WCM which was last revised in 1968, prior to the enactment of the ESA. *Id.* The WCM mandates that "[a]t 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." R. at 6. Thus, the ACOE recognizes Greenlawn's right to water through two lenses, a contractual agreement and the rights of a riparian landowner.

Because the ESA exempts non-discretionary actions from the consultation requirement, ACOE was not required to consult with the Fish and Wildlife Service with respect to the 30 CFS release into Bypass Reach. As the court in *Babbit* determined, agencies do not practice discretion when complying with an agreement., 65 F.3d at 1512. Because complying with the 1968 agreement, as well as respecting the rights of another riparian landowner, was a non-discretionary act, the consultation requirement was not triggered. As such, the district court's determination of summary judgment for ACOE should be affirmed.

III. GREENLAWN'S WATER WITHDRAWAL FROM THE HOWARD RUNNET DAM WORKS DOES NOT CONSTITUTE A "TAKE" OF THE ENDANGERED OVAL PIGTOE MUSSEL IN VIOLATION OF § 9 OF THE ENDANGERED SPECIES ACT

The ESA defines ''take'' to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 50 CFR § 17.3 (2018). In addition, "harm" is defined 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." *Id. (emphasis added).*; *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 691 (1995).

Greenlawn's actions did not constitute habit modification because the water withdrawal was outside pigtoe habitat. As a result, there is an insufficient causal connection between Greenlawn's water withdrawals and the modification of the pigtoe habitat downstream Green River. Moreover, ACOE had a responsibility as the designated gatekeeper of natural resources such as the oval pigtoe mussel (pigtoe) to ensure that the Howard Runnet Dam project would not significantly modify or degrade pigtoe habitat.

A. Based On Activities Occurring Entirely Outside The Habitat In Question, Proximate Cause Is Not Met Therefore Greenlawn Cannot Be Guilty Of Habitat Modification

NUO and ACOE claim that Greenlawn's withdrawal of the entire flow of water from the Bypass Reach during drought warning conditions resulted in the modification and degradation of pigtoe habitat downstream, causing actual harm to the pigtoe, which constitutes a prohibited "take." R. at 16. However, both proximate cause and foreseeability are necessary in order to establish whether a prohibited taking under the ESA occurred. In *Sweet Home,* Justice O'Connor explained that proximate cause and foreseeability are important because these factors help fairly assign liability by not merely assigning liability for remote or bizarre consequences. *See* 515 U.S. at 713 (O'Connor, S., concurring). Later, *Paroline v. United States* echoed Justice O'Conner

by stating that requiring proximate cause helps "to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 572 U.S. 434, 443 (2014) (citation omitted).

There are two main factors demonstrating that proximate cause does not exist and Greenlawn's actions to be too attenuated to trigger a take violation under 50 C.F.R. § 17.3. First, from the 1980s to date, water has been diverted for the irrigation of several agriculture operations in the Green River area These agricultural withdrawals have essentially limited the amount of water available to Greenlawn in the Bypass reach. Therefore, the amount of water Greenlawn is able to withdraw is already limited because of these large agricultural operations. *See* R. at 8; *see also* R. App. Historically, the withdrawals for agricultural operations have led to "evaporative water losses to the system," which can only become exacerbated during the drought-like conditions being experienced in the region. *See* R. at 8. Second, since the completion of the Howard Runnett Dam Works, drought conditions have become more frequent. This act of God that has led to a reduction in downstream flows, undoubtedly contributed to degradation of the pigtoe habitat. *See* R. at 15. Therefore, on its own, the reasonable use of water by Greenlawn, does not rise to the level of a § 9 violation.

Case law related to § 9 violation involve a clearly defined actor and actions that are in proximity to the habitat in question. That is not the case here with Greenlawn. For example, in *Palila v. Hawaii Department of Land and Natural Resources*, the court held that the state agency was liable for taking of an endangered species because the agency maintained herds of feral goats and sheep for sport of hunting. *Palila v. Hawaii Dep't of Land & Nat. Res.*, 639 F.2d 495, 496 (9th Cir. 1981). Consequently, the grazing of the goats and sheep on the habitat the

endangered Palia bird led to the destruction of the bird's habitat. *Id.* at 497. Also, in *Loggerhead Turtle v. County Council of Volusia County*, the court found that the County's actions adversely affected the specific nesting area of loggerhead turtles, and the County was liable for the takings that occurred as a result of its actions. *Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 148 F.3d 1231, 1242 (11th Cir. 1998).

Moreover, in *Sweet Home*, the Court explained that "to be subject to the ESA's criminal penalties or the more severe of its civil penalties, one must 'knowingly violat[e]' the [ESA] or its implementing regulations." *Sweet Home,* 515 U.S. at 697 n.9 (quoting 16 U.S.C. §§ 1540(a)(1), (b)(1)). Greenlawn could not knowingly violate the ESA by degrading pigtoe habitat because Greenlawn's withdrawal of water is at least 60 miles away from the actual habitat. Therefore, withdrawing water at this distance given other intervening factors such as drought conditions and agricultural uses, result in activities that too attenuated "that the consequence is more aptly described as mere fortuity." 572 U.S. at, 443 (citation omitted).

B. There Is An Insufficient Causal Connection Between Greenlawn's Water Withdrawals And The Drying Up Of The Green River Downstream Of The Bypass Reach.

Greenlawn's water withdrawals do not by themselves cause modification to pigtoe habitat. The modification to pigtoe habit is a result of a combination of increased upstream agricultural withdrawals, precipitation conditions, and the ACOE's operation of the Howard Runnet Dam Works. The latter are not in Greenlawn's control, in fact, water withdrawal came as a result of a project initiated by ACOE. This case is similar to *Aransas Project v. Shaw* because in *Shaw*, as is the case here, the actions that gave rise to a takings claim involved water withdrawal during drought periods. *Aransas Project v. Shaw*, 775 F.3d 641, 646 (5th Cir. 2014). In addition, *Shaw* similarly involved a government actor that permitted the withdrawal of water.

Id. However, in *Shaw* the claim was rightfully brought against the state issuing the permits, not against the parties with permission to withdraw water. *Id.*

Here the ACOE entered into an agreement with Greenlawn, which provided that water would flow to Greenlawn in accordance with riparian right laws. R. at 6. In addition, upstream agricultural withdrawals were also permitted to take place. R. at 6. As stated previously, the court in *Sweet Home* noted that the ESA prohibits takings that are foreseeable and not incidental. 515 U.S. at 699-700.

The core of the issue at bar revolves around two factors. First, Greenlawn had a right to withdraw water from Bypass Reach. R. at 6. When Greenlawn entered into an agreement with the ACOE, it had no reason to anticipate a taking of the pigtoe would occur or that its agreement with the ACOE would be a cause of such a taking. Second, Greenlawn's actions cannot be considered foreseeable because the ACOE never consulted with Fish and Wildlife Services (FWS) as required under the FWCA. *See id.*; *see also id.* at 8. Additionally, because the agreement predated the ESA, a Biological Assessment detailing the effects of water withdrawal on pigtoe habitat was never completed. R. at 14.

When ACOE continued Howard Runnet Dam Works operations during drought conditions to provide flow to Greenlawn, this was a discretionary act exempt from the consultation provision of the ESA. *See* 551 U.S. 669 Consequently, the lack of the consultation meant that pigtoe habitat was not formally recognized, and neither were any efforts of cooperation between ACOE and Geenlawn in order to resolve the "water resource issues in concert with conservation of endangered species." See 16 U.S.C. § 1531 (c)2. (2019). Therefore, Greenlawn had no evaluation or notice of the parameters that would affect the pigtoe habitat located at least 60 miles away from Bypass Reach. R. at 9.

As *Sweet Home* explains, an indirect taking subject to liability occurs when a landowner *knowingly* drains a pond with endangered fish. 515 U.S. at 699-700. (emphasis added). Stated differently, liability is appropriate when a person knowingly causes harm to the habitat on an endangered species. *See id.* Yet, ACOE and NUO would have this Court believe that as one of the many users of this water source, far from the actual habitat of the pigtoe, Greenlawn is solely responsible for the drying up the Green River downstream of the Bypass Reach. See R. at 16.

C. ACEO Is The Designated Gatekeeper For Resources Such As The Pigtoe, And Has A Responsibility To Ensure That Any Contracts It Enters Into Are Not Adverse To Its Role As A Gatekeeper

The agreement between Greenlawn and ACOE predated the ESA, however the Fish and Wildlife Coordination Act of 1958 (FWCA) was in place. R. at 6. In order to guard against the habitat degradation, the FWCA required federal agencies to consult with other agencies, such as the Fish and Wildlife Service (FWS), to determine the impact of a project that impounds, controls or diverts water on wildlife. Specifically, the FWCA states:

> whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, *such department or agency first shall consult with the United States Fish and Wildlife Service* . . . . with a view to the conservation of wildlife resources by preventing loss of and damage to such.

16. U.S.C. § 662 (a) (1958). Unlike the ESA, the FWCA did not include a 'non-discretionary actions exception.' *See Home Builders* 551 U.S. at 669. Therefore, ACOE was required to consult with FWS, but it failed to do so. As a result, no workable parameters for water withdrawals were set. Moreover, the ACOE had a responsibility as the designated gatekeeper of natural resources, such as the pigtoe, to ensure that the Howard Runnet Dam Works could be completed and maintained in a manner that would conserve "wildlife resources by preventing

loss of and damage to [pigtoe habitat]." 16. U.S.C. § 662 (a). ACOE failed to perform its duty as a gatekeeper, and its actions jeopardized the continued existence of an endangered species and adversely modified a critical habitat because the ACOE failed to operate the Howard Runnett Dam Works "with a view to the conservation of wildlife resources by preventing loss of and damage to such." *See* 16. U.S.C. § 662 *(a); see also* 16 U.S.C. §1536(a).

In the alternative, if this Court finds that the Greenlawn is subject to the ESA the Court must consider *Strahan.* In *Strahan v. Coxe,* the court explained the actions of a third party that cause "acts exacting a taking" are forbidden and constitute a take. *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997). Therefore a government agency such as ACEO commits a taking, violating the ESA when it initiates an agreement authorizing an act that has the potential to result in the prohibited taking of an endangered species.

IV. THE DISTRICT COURT MUST BALANCE THE EQUITIES BEFORE ENJOINING A BENEFICIAL MUNICIPAL ACTIVITY

Historically, when courts have looked at enjoining a party in cases involving environmental issues and ESA claims, courts have relied on the balance of equities because—whether temporary or permanent—injunctive relief is an "extraordinary remedy, never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 9 (2008). If the Court finds that Greenlawn violated the ESA, the Court must balance the equities before enjoining a beneficial municipal activity. Because courts are not obligated to grant an injunction, the balance of equities and hardships is appropriate and provides a guide for discretion. When balancing equities, courts conclude that when the moving party will not suffer irreparable harm absent an injunction, and an injunction is not in the public interest, the injunction should not be granted. *American Trucking Ass'n v. City of Los Angeles,* 559 F.3d. 1046, 1052 (9th Cir. 2009).

Moreover, if the Court finds NUO's ESA claim survives on the merits, the Court should also balance the equities before enjoining any beneficial municipal activity because Supreme Court precedent in ESA cases has shifted from a hard line of not balancing equities to including a balance of equities in cases similar to the one at bar. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). When balancing the equities, the court must decide whether pigtoe populations are likely to suffer irreparable harm absent an injunction and whether an injunction is in the public's interest. *Id*. at 534. Pigtoe are not likely to suffer irreparable harm since drought conditions will continue to be unpredictable and, because the injunction harms the public interest. Therefore, an injunction should not be issued.

A. Supreme Court Precedent Has Shifted to be More Inclined to Balance the Equities in Endangered Species Cases.

Tennessee Valley determined that courts should not balance equities, because the congressional intent of the ESA was to protect endangered species. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978) [hereinafter *TVA*]. However, subsequent cases related to the ESA blur that hard line. In the *Village of Gambell*, the Court held that equitable discretion of courts is not foreclosed absent a clear statement of congressional intent to do so. 480 U.S. at 531 (1987). The shift in the subsequent case to an explicit statement of congressional intent, which is absent in the ESA, highlights the fact that the Court should balance the equities in this case. As the Supreme Court has already taken steps to distinguish cases from *TVA*, so should the Court distinguish this case. Unlike *TVA*, where the snail darter's "critical habitat" would be completely destroyed if a federal project was allowed to be built. 437 U.S. at 187. Here, Greenlawn is not requesting project development, rather a continuation of water usage. Usage Greenlawn, as a riparian landowner, has right to and is in line with the ACOE agreement. As such, NUO has failed to establish that pigtoe will be harmed absent injunctive relief.

B. The Court Must Consider the Balance of Equities that Lean in Favor of Greenlawn and the Public Interest.

The ESA citizen suits provision allows for the enjoinment of any "governmental instrumentality or agency" in violation of the ESA. 16 U.S.C. § 1540(g) (2018). However, injunctions are an "extraordinary remedy" because they enjoin a party's ability to act and are issued only when harm is irreparable and no adequate remedy at law exists. *Wilson v. Lucerne Canal & Power Co.*, 77 P.3d 412, 416 (Wyo. 2003). In addition, *Winter v. NRDC, Inc.* established that because an injunction is an "extraordinary remedy," it warrants review of competing claims of injury and the effects of granting or withholding an enjoinment. *Winter v. NRDC, Inc.*, 555 U.S. 7, 9 (2008) (reversing a lower court's holding on a motion for a preliminary injunction brought in a case raising ESA, Coastal Zone Management Act and National Environmental Protection Act claims). Therefore, the Court should consider the extraordinary impact an injunction would have, not only on Greenlawn, but also on the 100,000 customers that rely on Greenlawn for water.

The water supplied to the residents of Greenlawn helps create a community that has greenery, which is beneficial to people's mental health and has compound benefits to the community through increased productivity and overall happiness. Jo Barton and Mike Rogerson, *The Importance of Greenspace for Mental Health,* 14(4) BJPSYCH INTERNATIONAL 79-81 (2017). The latter are aspects that Greenlawn relies on in order to ensure the economic and social wellbeing of its citizens. The greenery also plays a vital role in establishing property values in Greenlawn, especially for residential properties. Agnieska Szczepanska et al., *Urban Greenery as a Component of Real Estate Value*, 24 (4) REAL ESTATE MANAGEMENT AND VALUATION 79, 79 (2016). This directly impacts the interests of the residents and business owners that own property. The property values also impact the viability of Greenlawn and other governmental

bodies because it impacts the tax revenue a governing body is likely to receive. Byron F. Lutz, *The Connection Between House Price Appreciation and Property Tax Revenue,* Federal Reserve Board (2008).

Greenlawn's water demand includes reasonable riparian water uses, like irrigation, and also mirror the needs of a city that underwent significant expansion. Flow rates determined prior to Greenlawn's population growth are unrealistic for the current community and should not be viewed as a gauge of what is acceptable for Greenlawn's current water needs.

C. The New Union Oystercatchers are Unable to Establish that Greenlawn's Actions are Likely to Violate the Endangered Species Act in the Future

While all the parties agree that based on recent trends and scientific assessments of precipitation patterns and trends, drought warning conditions are likely to occur again, R. at 11, but the likelihood of droughts does not necessitate that absent an injunction the pigtoe will be harmed. It is not enough for NUO to simply state that there was a violation of the ESA, which there are not enough facts to establish, but NUO must also establish that a violation of the ESA is likely to occur in the future. *National Wildlife Federation v. Burlington Northern Railroad,* 23 F.3d 1508, 1511 (9th Cir. 1994).

There is little evidence to suggest that Greenlawn would violate the ESA in the future because as is, Greenlawn has not violated the ESA, nor is there evidence that a continuation of Greenlawn's actions alone would harm pigtoe. Furthermore, while changing weather patterns makes droughts more likely, they remain unpredictable. In the history of the diversion dam, droughts have been rare and the ACOE has only had to revert to the WCM drought watch level a few times since 1968, so future risk to the pigtoe as a result of Greenlawn's water withdrawal during drought conditions is nothing more than speculation and is not able to meet the standard

needed to establish a risk of a future violation. Because of these variable and unpredictable weather patterns, the Court of Appeals should reverse the injunction.

D. An Injunction Does Not Consider Unpredictable Drought Patterns and the Risk of Future Harm Absent an Injunction

Even if the Court were to find that there is a chance of future ESA violations, given the uncertainty of drought conditions, NUO is unable to establish the requisite risk of imminent harm. In order to enjoin a party, an animal population must be facing *imminent* harm to push the court to issue an injunction. *Defenders of Wildlife v. Bernal,* 204 F.3d 920, 925 (9th Cir. 2000).

The pigtoe's habitat is below the convergence of Bypass Reach and the Tailrace, both of which are impacted by and receive water from Howard Runnet Lake. R. at 9. The drought conditions experienced in the region lowered the overall water levels of the lake and, as a result, both the Tailrace and Bypass Reach are likely to pass on less water to the pigtoe habitat. Drought conditions have been rare since the diversion dam was instituted in 1968 and even while they have occurred in recent years, they are still unpredictable and can be short-lived. R. at 8. For instance, during the sixty-day notice period for this case, heavy rain fell, alleviating the threat to pigtoe populations. R. at 11. This is evidence that that drought conditions are unpredictable and are likely to be short-lived.

Greenlawn does not have control over its water levels and or when water is released into pigtoe habitat, and as evidenced above, weather conditions continue to be unpredictable. The region also has other parties withdrawing water that would otherwise flow downstream, for instance, agricultural operations divert water from the Green River that would otherwise flow to the pigtoe habitat. R. at 17. Therefore, solely burdening Greenlawn to limit its right to water withdrawals oversimplifies the problem faced by pigtoe. Consequently, enjoinment without considering the unique needs of seasonal timing, for instance planting crops in spring, would

have a significant burden on the livelihood of Greenlawn and if the drought is short-lived, may have little impact on the pigtoe.

E. The Injunction Issued by the District Court Will Intrude on the Functions of Municipal Government

The injunction issued by the district court provided that Greenlawn could not withdraw any water that would result in a far downstream area experiencing a flow rate of less than 25 cubic feet per second averaged over twenty-four hours. R. at 5. However, this standard is set to leave Greenlawn even more vulnerable to drought conditions and could leave Greenlawn left to figure out which of its citizens get water. Making the City's limit contingent on the water levels of other areas would compound the vulnerability of Greenlawn residents to drought conditions in the region. The current injunction sets no minimum reserved for Greenlawn—essential striping Greenlawn of its riparian right to use if the water gets too low. The inability of Greenlawn to provide water to its residents from Bypass Reach could force residents to debate whether to shower or have drinking water. As the dissent by Justice Powell points out in *TVA*, Congress would not intend for the ESA to be interpreted in ways that are impractical. *TVA*, 437 U.S. at 196. As the dissent points out that, while protecting animals is a worthy goal, Congress would not have intended it to prevent community and regional investments that are designed to provide water, promote industrial and recreational development, or generally improve the economic condition of an area. *Id.* at 197. The ESA's injunction provision was not intended hinder the expansion and development of a historic city that has adjusted its water system to keep up with a population and economic development growth.

The curtailment imposed by the injunction could require Greenlawn to abandon current water infrastructure and invest in new infrastructure which would ship water to Greenlawn, which could a significant amount of time and money. The Court in *TVA* explained that the

interpretation of the ESA "reasonably" and "shape a remedy 'that accords with some modicum of common sense and the public weal.'" 437 U.S. 153, 195 (1978) Upholding an injunction that would force a municipality to rethink and reinvest in its water infrastructure and likely put citizens at risk for limited water supplies is unreasonable and not a remedy that fits with the ESA interpretation outlined by the Court.

An injunction is an "extraordinary remedy" that is not in the public's best interest and not necessary given the lack of imminent harm. Accordingly, the Court should balance the equity when considering whether to enjoin Greenlawn from providing water to citizens for beneficial and reasonable uses.

III. CONCLUSION

For the foregoing reasons, Appellant, the City of Greenlawn, respectfully requests that this Court find in favor of the City on all four issues.

Respectfully submitted,
Attorneys for the Appellant, City of Greenlawn