C.A. NO. 19-000987

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

_____

NEW UNION OYSTERCATCHERS, INC.,

Plaintiff–Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant–Appellee

and

CITY OF GREENLAWN, NEW UNION,

Defendant–Appellant

_____

On Appeal from the United States District Court for New Union.

_____

Brief of Appellee, United States Army Corps of Engineers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Regulations

STATEMENT OF JURISDICTION

New Union Oystercatchers' initial claims against the Army Corps of Engineers under 16 U.S.C. § 1536(a)(2) and against the City of Greenlawn under 16 U.S.C. § 1538(a)(1)(B) were brought under the grant of standing in 16 U.S.C. § 1540(g). The United States District Court for New Union properly exercised jurisdiction over these claims as civil actions arising under the laws of the United States per 28 U.S.C. § 1331. New Union Oystercatchers' common law property claim against Greenlawn under New Union law was properly joined to this case under 28 U.S.C. § 1367(a), and the District Court did not decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c). The Army Corps of Engineers' cross-claim against Greenlawn was properly joined to this case under 28 U.S.C. § 1367(a). Greenlawn's counterclaim against the Army Corps of Engineers was properly joined to this case under 28 U.S.C. § 1367(a), and the District Court did not decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c).

The Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The final judgment that is being appealed from disposed of all issues in this case and was entered on May 15, 2019.

ISSUES PRESENTED

1. Whether Greenlawn's rights as a riparian landowner permitted it to withdraw water from the Green River to satisfy the natural wants of its inhabitants.

2. Whether the operation of the Howard Runnet Dam Works according to the drought control procedures of the Water Control Manual is a discretionary action subject to the consultation requirement of § 7 of the Endangered Species Act, 16 U.S.C. § 1536.

3. Whether Greenlawn's withdrawal of so much 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.

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

STATEMENT OF THE CASE

Factual Background

The City of Greenlawn, New Union (Greenlawn) includes territory on both banks of a former section of the Green River now known as the Bypass Reach. Record (R.) at 5. The Bypass Reach runs between the Green River Diversion Dam and the tailrace of the Howard Runnet Dam. *Id.* The Army Corps of Engineers (the Corps) built these two dams, collectively known as the Howard Runnet Dam Works, in 1947 and operates them for flood control, hydroelectric power, recreational, and fish and wildlife purposes. *Id.* at 6. Construction of the dams and the first three purposes were authorized by Congress in the Rivers and Harbors Act of 1945, Pub. L. No. 79-14, 59 Stat. 10, and later amended by the Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 563. *Id.* Hydroelectric power from the Dam Works is particularly important to satisfy peak loads during the summer air conditioning season. *Id.*

Construction of the dams greatly reduced flows in the Bypass Reach, where Greenlawn had maintained its municipal water intakes since its founding in 1893. *Id.* at 5. In order to maintain Greenlawn's water supply, Greenlawn and the Corps entered into an agreement upon completion of the dam that the Corps would maintain flows in the Bypass Reach. *Id.* at 6. Per the agreement, these flows would be sufficient to allow the city to continue its 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.* Greenlawn's wastewater processing facility empties into the Progress River, resulting in only a tiny fraction of Greenlawn's withdrawals returning to the Green River. *Id.*

Operation of the Howard Runnet Dam Works is governed by a Water Control Manual. *Id.* This manual establishes how water should be released from the two dams in order to satisfy the Corps' hydroelectric, flood control, recreational, and fish and wildlife goals while supplying Greenlawn with water. *Id.* Natural inflow beyond what is needed to maintain lake levels is released downstream, but the lake level is allowed to rise if releasing the full natural inflow would cause flood damage. *Id.* at 6–7. The manual provides for different target lake levels based on historical flows and water demands at different times of year. *Id.* at 6. Typical summer releases include 50 cubic feet per second (cfs) in the Bypass Reach, up to 200 cfs for hydroelectric power as needed, and recreational releases of 200 cfs on Saturday mornings. *Id.* at 7.

The Water Control Manual (WCM) also provides drought control procedures when lake levels drop below seasonal targets according to a system of zones:

> 1) Zone 1 *(Drought Watch)* – All recreational releases curtailed; minimum flow of at least 50 CFS shall be maintained in the Green River at the confluence of the Howard Runnet Dam tailrace and the Bypass Reach for fish and wildlife purposes; flow of 50 CFS shall be maintained into the Bypass Reach from the Diversion Dam; daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained.
> 2) Zone 2 *(Drought Warning)* – All recreational releases curtailed; Bypass Reach flow from the Diversion Dam reduced to 7 CFS; daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained.
> 3) Zone 3 *(Drought Emergency)* – All recreational releases curtailed; flow of 7 CFS shall be maintained into the Bypass Reach from the Diversion Dam; daily hydroelectric power releases curtailed.

Id. The manual also contains a general provision 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.* at 7–8.

Since the adoption of the WCM, the Green River watershed, including Greenlawn, has experienced considerable growth. *Id.* at 8. In recent years, the Green River watershed has also experienced more frequent drought conditions. *Id.* The lake level reached Zone 2 for the first time in the Spring of 2017. *Id.* The Corps accordingly reduced flows through the Diversion Dam to 7 cfs, which Greenlawn protested in a letter on April 12, 2017. *Id.* The District Commander responded with a request that Greenlawn institute drought restrictions, but the city maintained that its rights as a riparian landowner to make reasonable use of water for domestic and commercial purposes included no obligation to impose drought restrictions. *Id.* On April 23, 2017, the District Commander ordered flows through the Diversion Dam to be increased to 30 cfs. *Id.* at 9. On May 15, 2017, the lake level reached Zone 3, resulting in the curtailment of hydroelectric releases, but the flow in the Bypass Reach was maintained. *Id.*

These curtailments and Greenlawn's near total withdrawals from the Bypass Reach resulted in downstream flow rates of close to zero, reducing the river to stagnant pools and narrow trickles. *Id.* This exposed several downstream beds of oval pigtoe mussels, a federally listed endangered species. *Id.* The mussels require a habitat of gravel or sand riverbeds and slow to moderate currents, as well as healthy populations of host fish species for spawning and larval maturation. *Id.* The drought conditions resulted in the death of approximately 25% of the oval pigtoe population in the Green River and would eventually threaten extirpation of the species there. *Id.* at 9–10. Preserving the oval pigtoe mussel population of the Green River will require average flows of 25 cfs over a 24-hour period. *Id.* at 10. The reduced flows also harmed the Green River estuary, increasing salinity and reducing nutrient flows into the Green Bay. *Id.* This

threatened the area's historically robust oyster industry, which had already seen harvests fall 50% from 2000 to 2016. *Id.*

Procedural Background

In response to the economic losses experienced by its members, the New Union Oystercatchers (NUO) served a Notice of Intent to sue the Corps and Greenlawn under the Endangered Species Act, 16 U.S.C. § 1540(g), on May 17, 2017. *Id.* at 10–11. After the requisite 60 days, NUO filed this action on July 17, 2017. *Id.* at 11. The complaint alleged that the Corps had violated 16 U.S.C. § 1536(a)(2) (ESA § 7) by failing to consult with the Secretary of the Interior regarding its operation of the Howard Runnet Dam Works, and that Greenlawn's water withdrawals constituted an illegal take of oval pigtoe mussels under 16 U.S.C. § 1538(a)(1)(B) (ESA § 9). *Id.* NUO's complaint also asserted state common law riparian claims against Greenlawn, joined under supplemental jurisdiction. *Id.* The Corps filed a cross-claim against Greenlawn under ESA § 9. Greenlawn answered these complaints and counter-claimed against the Corps requesting a declaration of its rights as a riparian landowner to flows in the Bypass Reach sufficient for its municipal needs. *Id.*

Heavy rains in the Green River watershed restored Howard Runnet Lake to Zone 1 levels during the pendency of NUO's notice letter. *Id.* The suit continued due to the agreement of all parties that the case was not moot, because climate change rendered drought conditions sufficiently likely to recur in the near future. *Id.*

The Corps moved for summary judgment dismissing the ESA claims against it. *Id.* at 4. NUO moved for summary judgment declaring Greenlawn to be in violation of § 9 of the ESA and the Corps to be in violation of § 7 of the ESA. *Id.* Greenlawn moved for summary judgment to declare its rights as a riparian landowner and to dismiss the ESA claims against it. *Id.* The district

court granted the Corps' motion for summary judgment dismissing the ESA claims against it. *Id.* at 5. The court denied Greenlawn's motion for summary judgment on the ESA claims against it. *Id.* The court granted Greenlawn's motion for summary judgment declaring its rights as a riparian landowner and dismissing NUO's riparian rights claim against Greenlawn. *Id.* The court granted NUO's motion for summary judgment declaring Greenlawn to be in violation of § 9 of the ESA. *Id.* The district court enjoined Greenlawn from withdrawals of water that would cause the flow of the Green River downstream of the Dam Works to drop below 25 cubic feet per second averaged over 24 hours. *Id.*

NUO appealed the district court's determination that Greenlawn has riparian rights to the Green River Bypass Reach and that the Corps did not violate § 7 of the ESA. *Id.* at 1. Greenlawn appealed the district court's determination that it violated § 9 of the ESA and that the court need not balance the equities when enjoining a municipal activity to prevent the extirpation of an endangered species. *Id.* at 2.

SUMMARY OF THE ARGUMENT

The Army Corps of Engineers contends that under New Union law, a municipality that is a riparian landowner has a right to withdraw water for domestic use within its boundaries. Under the "reasonable use" model of riparian rights, the right to such domestic uses may be enforced against other riparian landowners using water for power generation. Because of the City of Greenlawn's riparian rights and the binding language of the Water Control Manual, the Corps had no discretion to deny sufficient water for municipal domestic use, and thus was not required to consult with the Secretary of the Interior. Further, the City of Greenlawn's actions constituted a harm and a violation of § 9 of the ESA. The City of Greenlawn's actions modified and degraded the oval pigtoe mussel's habitat, which foreseeably lowered flow levels downstream of the Bypass

Reach and led to the death of approximately twenty-five percent of the mussel's population. However, the district court erred by granting injunctive relief without first balancing the equities.

For these reasons, the Corps asks that the decision of the United States District Court for the District of New Union be affirmed as to the motions for summary judgment, the injunction vacated, and this case remanded to balance the equities in consideration of injunctive relief.

ARGUMENT

Review of a motion for summary judgment is conducted *de novo*. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 465 n.10 (1992) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

I. Operation of the Howard Runnet Dam Works Is Limited by Greenlawn's Rights to Water for Domestic Use

The New Union District Court correctly granted summary judgment in Greenlawn's favor on its riparian claims to sufficient water in the Green River Bypass Reach ("Bypass Reach") for its municipal needs. Under the "reasonable use" model of riparian rights, riparian landowners must limit their consumption so as not to interfere with the reasonable use of downstream riparian landowners. *See Hendrick v. Cook*, 4 Ga. 241, 256 (1848) ("Each riparian proprietor is entitled to a reasonable use of the water, for domestic, agricultural and manufacturing purposes; provided, that in making such use, he does not work a material *injury* to the other proprietors." (emphasis in original)). Under New Union law, a municipality may make withdrawals from its riparian property to supply water to non-riparian parcels within the municipality. *Tubbs v. Potts*, 45 N.U. 999 (1909). Domestic uses of water, including drinking, cooking, washing, and gardening, are "natural wants" distinct from "artificial uses" such as power generation. *Evans v. Merriweather*, 4 Ill. (3 Scam.) 491, 495 (1842). The right to water used for such domestic uses is limited only by need and limits

the artificial uses of upstream riparian landowners. *Id.* Therefore, the artificial use of water for the Howard Runnet Dam Works must be limited such that the natural wants of New Union are satisfied. Appellee prays this Court affirm the district court's grant of summary judgment on Greenlawn's riparian claims.

A. Under New Union Law, Municipalities May Use Riparian Rights to Supply Water to Non-Riparian Lots Within the Municipality

New Union recognizes the right of a riparian municipality to withdraw water for use by non-riparian lots within the municipality. *Tubbs v. Potts*, 45 N.U. 999 (1909). This is a minority rule, but not unique. *Compare City of Canton v. Shock*, 63 N.E. 600, 602 (Ohio 1902) ("[A] municipality should be held and regarded, in its entirety, as an individual entity, having in its corporate capacity the rights, and subject to the liabilities, of a riparian proprietor . . . ."), *with Wallace v. Winfield*, 149 P. 693, 695 (Kan. 1915) ("[T]he mere fact that a riparian owner is undertaking to supply the inhabitants of a city with water . . . does not confer any special or additional right to the water of the stream . . . ."), *and Pernell v. Henderson*, 16 S.E.2d 449, 451 (N.C. 1941) ("It has been held with practical unanimity that a municipal corporation . . . 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 . . . ."). The City of Greenlawn, as a municipal riparian landowner, has the right to withdraw water from the Green River for the use of even non-riparian lots within its boundaries.

This right is still subject to the general limitations applicable to all riparian proprietors. Each riparian landowner has a right to the reasonable use—and even consumption—of flowing water so long as they do not transgress the equal right of other riparians to use the water. *Dumont v. Kellogg*, 29 Mich. 420, 423–24 (1874). An upper riparian proprietor has a right to use such water

as it needs and return all the water that is not consumed to the river. *City of Canton v. Shock*, 63 N.E. at 602. Greenlawn has a right equal to other riparian landowners on the Green River to make use of its water and return what is not consumed in the use to the river.

B. Reasonable Domestic Water Uses Are Natural Wants Privileged Over Artificial Uses such as Power Generation

A riparian proprietor may consume water for domestic purposes without regard for downstream landowners but may not use it for artificial uses to the exclusion of downstream domestic needs. *Evans v. Merriweather*, 4 Ill. (3 Scam.) at 495 (1842). These domestic uses are known as "natural wants." *Id.* Other, non-essential uses, such as irrigation or propelling machinery, are by contrast "artificial" uses. *Id.* Upstream mechanical uses of water must be limited such that they respect downstream natural wants.

1. Domestic Water Uses Including Drinking, Cooking, Washing, and Water for Gardens and Household Livestock Are Natural Wants

The natural wants of riparian proprietors include the "domestic uses such as bathing, drinking, gardening, and stock watering." *Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 855 P.2d 568 (Okla. 1990); *see Taylor v. Tampa Coal Co.*, 46 So. 2d 392, 394 (Fla. 1950) (finding that natural wants include "the use of water for domestic purposes of home or farm, such as drinking, washing, cooking, or for stock of the proprietor . . . ."). Even under the natural flow theory, a riparian landowner was entitled to such use. *See Harris v. Brooks*, 283 S.W.2d 129, 133 (Ark. 1955) ("[U]nder the natural flow theory, a riparian owner can take water for domestic purposes only, such as water for the family, livestock, and gardening . . . ."). In the modern reasonable use theory, domestic needs are given the highest level of priority when determining reasonableness of uses between riparian landowners. *See Id.* at 134 ("The right to use water for

strictly domestic purposes—such as for household use—is superior to many other uses of water—such as for fishing, recreation and irrigation."). Greenlawn's riparian right to use water for natural wants protects its distribution of water to its residents for their domestic needs.

The unused portion of water diverted, after natural wants are satisfied, must be returned to the stream. *See Wadsworth v. Tillotson*, 15 Conn. 366, 377 (1843) (finding that a defendant would not be liable for the portion of water consumed in natural wants and incidental losses because the remainder was returned to the stream). Lower riparian owners may thus have claims against Greenlawn if its use is unreasonable or on account of it returning its treated wastewater not to the Green River, but to the Progress River. But because the only riparian rights implicated in this appeal are those of Greenlawn and the upstream dams of the Corps, Greenlawn's water consumption must only be considered for its reasonableness vis-à-vis the Corps' power generation.

2. Power Generation is an Artificial Use Akin to Commercial Irrigation, Mining, Manufacturing, and Recreation

By contrast, other uses of water are held to be artificial uses. *See Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 128 N.W. 596, 598 (S.D. 1910) ("The extraordinary or artificial use including manufacturing, mining, and irrigation."); *see also Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, 709 N.W.2d 174, 194 (Mich. App. 2005), *rev'd on other grounds*, 737 N.W.2d 447 (2007) (quoting Restatement 2d of Torts, introductory note to §§ 850–857, 210, "Beyond this, the owner may use the water for 'reasonable' artificial or commercial purposes, subject to the very large proviso that he may not substantially or materially diminish the quantity.").

Such artificial uses must be balanced against the rights of other riparian proprietors. *See Harris v. Brooks*, 283 S.W.2d at 134 (setting forth the principles that lawful uses of water other than natural uses are equal, that such uses which destroy another use may be enjoined, and that

balancing is required when lawful uses interfere with each other). Power generation, as an artificial use, is subject to these limitations. *See L & S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.*, 146, 150 (N.C. App. 2011) (balancing the riparian rights of a hydroelectric power company against other riparian proprietors); *Crum v. Mt. Shasta Power Corp.*, 4 P.2d 564, 569 (Cal. App. 1931) (limiting the beneficial purpose of generating hydroelectric power to the extent that other riparian owners are not in need of water). Because it is an artificial use, power generation in the Howard Runnet Dam must be balanced against the rights of other riparian proprietors to make reasonable use of water.

3. Natural Uses Are Allowed to Riparian Landowners Without Regard to Their Impact on Other Riparian Landowners

Natural wants, though, are not balanced against the uses of other riparian proprietors. *See Taylor v. Tampa Coal Co.*, 46 So. 2d at 394 (excepting natural wants from the principle that the rights of riparian proprietors are equal and limited such that they are not detrimental to the rights of other riparians). A riparian landowner may use the entire flow of a stream if it is necessary to satisfy natural wants. *See Evans v. Merriweather*, 4 Ill. (3 Scam.) at 495 ("[A]n individual owning a spring on his land, from which water flows in a current through his neighbor's land, would have the right to use the whole of it, if necessary to satisfy his natural wants."). Each riparian proprietor along a stream has a right to take water for their natural wants out of the flow that reaches their land. *See Frizell v. Bindley*, 58 P.2d 95, 101 (Kan. 1936) (applying the right to water for natural wants to riparian owners as water flows past their land). Greenlawn, then, has a right to as much of the water of the Bypass Reach flowing through the city as is needed to satisfy the natural wants of the population without any balancing of interests.

C. Greenlawn's Rights to Water for Domestic Use as a Riparian Landowner Are Enforceable Against Non-Consumptive Artificial Uses of Other Riparian Landowners

The rights of a riparian proprietor to water for natural wants are so strong that they serve as a limit on the artificial uses of upstream proprietors. *See Evans v. Merriweather*, 4. Ill. (3 Scam.) at 495 ("If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor."). The domestic uses of downstream proprietors are treated as superior to artificial uses of upstream proprietors, regardless of the benefits of those artificial uses. *See Brummond v. Vogel*, 168 N.W.2d 24, 28 (Neb. 1969) (holding that the right to use water for domestic purposes is superior to the right to construct a dam for beneficial agricultural and recreational uses, and may not unreasonably diminish the flow of water to the lower riparian). A riparian proprietor could enforce a right to the entire flow of a stream against the artificial uses of an upstream proprietor, if that flow were necessary for natural wants.

Greenlawn, as a riparian proprietor, has the right to withdraw as much water as it needs for natural wants within its boundaries. Power generation at the Howard Runnet Dam is an artificial use limited by the natural wants of downstream proprietors such as Greenlawn. Therefore, the Corps is bound by Greenlawn's riparian rights to operate the Howard Runnet Dam Works in a way that ensures the satisfaction of the domestic, gardening, and livestock water needs of Greenlawn.

II. Operation of the Howard Runnet Dam Works Is Not an Action Subject to the Consultation Requirement of § 7 of the Endangered Species Act

Additionally, the New Union District Court correctly granted summary judgment to the Corps on the claims against it under the Endangered Species Act ("ESA"). *See generally* 16 U.S.C. § 1536(a)(2) (providing that Federal agencies must consult with the Secretary of the Interior to

ensure that any of their actions will not jeopardize endangered species or harm their critical habitat). The consultation requirement only applies to discretionary actions of federal agencies. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007) (deferring to the Department of the Interior's reasonable interpretation in 50 C.F.R. § 402.03 that § 7 of the ESA applies to discretionary actions). The operation of dams according to established procedures such as the Water Control Manual (WCM) is not considered a discretionary action. *See South Dakota v. Ubbelohde*, 330 F.3d 1014, 1029 (8th Cir. 2003) (concluding that the Army Corps of Engineers was bound by the Master Control Manual for the Missouri River).

The Corps did not deviate from the WCM in maintaining flows in the Bypass Reach to satisfy Greenlawn's riparian rights to water for natural wants as per their standing agreement. R. at 6–9. Supplying Greenlawn with water for its natural wants during a drought is not a discretionary action subject to the consultation requirement of § 7 of the ESA. *See id.* at 7 (describing the WCM procedures for operating the Howard Runnet Dam Works). Because the Corps did not take a discretionary action, the operation of the Howard Runnet Dam Works was not subject to the consultation requirement. *See* 50 C.F.R. § 402.03. Appellee therefore prays this Court affirm the district court's grant of summary judgment dismissing the ESA claims against the Army Corps of Engineers.

A. Compliance with Mandatory Instructions in Water Control Manuals Is Not a Discretionary Action Subject to Consultation

The ESA requires that each Federal agency consult with the Secretary of the Interior to ensure that its actions are "not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of" critical habitat of that species. 16 U.S.C. § 1536(a)(2). "Section 7 and the requirements of this part apply to all actions in which

there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added). Water control manuals provide the Corps with regulations for handling emergency situations like droughts. 33 C.F.R. § 222.5(i)(5). The Corps lacks discretion to ignore such manuals. *See South Dakota v. Ubbelohde*, 330 F.3d at 1029 (stating that "courts can review the Corps's actions to ensure conformity" with water control manuals).

1. The Consultation Requirement of § 7 of the Endangered Species Act Only Applies to Discretionary Actions

The ESA is meant to be a strong restriction on Federal agencies. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.' "). The consultation requirement of § 7 of the ESA ensures that agencies do not take actions likely to jeopardize endangered species and their critical habitats. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703 (1995) ("Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications . . . ."). If an action would not jeopardize the endangered species or modify its critical habitat, an incidental take statement (ITS) allows an otherwise lawful action to incidentally harm some members of the species. *See Sierra Club v. U.S. Dept. of Interior*, 899 F.3d 260, 269 (4th Cir. 2018) (describing the process for issuing an ITS for a natural gas pipeline after consultation between the Federal Energy Regulatory Commission and the U.S. Fish and Wildlife Service).

"However, agency actions are subject to Section 7(a)(2)'s consultation requirements only if 'there is discretionary Federal involvement or control.' " *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1169 (W.D. Wa. 2004) (quoting 50 C.F.R. § 402.03). "[T]his

interpretation is reasonable in light of the statute's text and the overall statutory scheme, and . . . is therefore entitled to deference under *Chevron*." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. at 666 (2007) (referencing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

The consultation requirement, then, depends on whether an action is considered discretionary.

> Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:
> (a) actions intended to conserve listed species or their habitat;
> (b) the promulgation of regulations;
> (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
> (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02. The distinction of whether an agency action requires consultation often turns on the question of whether the agency retains "the power to implement measures that inure to the benefit of the protected species." *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d at 1170; *compare Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (determining that the Bureau of Reclamation had sufficient discretion in renegotiating a municipal water contract to require consultation), *with Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1081 (9th Cir. 2001) (denying that the Fish and Wildlife Service retained discretionary authority to make new requirements on an already-issued incidental take permit). When a federal agency lacks discretion to influence the activity causing harm to an endangered species, "consultation would be a meaningless exercise . . . ." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

2. The Operation of Dams According to Mandatory Language in Established Manuals Is Not a Discretionary Action

In general, Congress's authorization for the Corps to manage rivers and dams includes a broad degree of discretion. *See, e.g.*, *A.O. Smith Corp. v. United States*, 774 F.3d 359, 368 (6th Cir. 2014) (noting the Corps' discretion as to whether to keep a surcharge pool empty); *South Dakota v. Ubbelohde*, 330 F.3d at 1027 (noting that the Flood Control Act gives the Corps "a good deal of discretion" to manage the Missouri River); *Raymond Proffitt Found. v. U.S. Army Corps of Eng'rs*, 175 F. Supp. 2d 755, 769 (E.D. Pa. 2001) (determining that the Corps' broad discretion in managing the Walter Dam supports its decisions to balance different recreational interests). When the Corps' manuals for the operation of a dam create requirements for given actions, though, taking those actions is not a matter of discretion. *See Florida v. Georgia*, 138 S. Ct. 2502, 2522 (2018) ("[W]hether the Corps must initiate drought operations is not a matter of discretion . . . . The Master Manual requires that, when the total amount of water stored in pools behind the Corps' Chattahoochee dams drops below a certain level, the Corps must reduce the amount of water it releases . . . ."). Therefore, the test for whether a water manual leaves the Corps with discretion is whether the manual's language is mandatory. *See South Dakota v. Ubbelohde*, 330 F.3d at 1028 (concluding that "the Master Manual is binding on the Corps because it sets out substantive requirements, and its language and context indicate that it was intended to bind the Corps's discretion.").

B. The Water Control Manual Provides Mandatory Instructions for Drought Management and Releases to Provide Water to Greenlawn

The WCM for the Howard Runnet Dam Works provides explicit instructions for water releases during drought conditions. *See* R. at 7 (detailing releases for each of the three drought

levels). The WCM is also explicit in its direction that water must be managed in a way that complies with the riparian rights of downstream landowners and any established water supply agreements. *Id.* at 7–8. Both of these instructions are expressed in mandatory language and are non-discretionary.

1. The Water Control Manual Provides Explicit Instructions for Water Releases During Drought Conditions

The Water Control Manual for the Howard Runnet Dam Works provides for the curtailment of downstream releases based on lake levels. *Id.* at 7. At the first level, Drought Watch, all recreational releases are curtailed, while flows of 50 cfs are maintained in the Bypass Reach and at the confluence of the Bypass Reach and dam tailrace, with daily limits on hydroelectric releases. *Id.* At the second level, Drought Warning, releases are reduced further to 7 cfs in the Bypass Reach with only the daily hydroelectric releases flowing through the tailrace. *Id.* At the third level, Drought Emergency, hydroelectric releases are eliminated entirely, and only the 7 cfs in the Bypass Reach is maintained. *Id.*

The manual's reliance on mandatory language such as "shall be maintained" indicates the Corps' intention that it would govern operations. *See Florida v. Georgia*, 138 S. Ct. at 2522 (finding that a water control manual using mandatory language left the Corps without discretion in the operation of a dam); *Id.* at 7–8. The Corps' operation of the dams in accordance with these mandatory instructions does not constitute discretionary action. *See Florida v. Georgia*, 138 S. Ct. at 2522 (differentiating drought operations from discretionary operations of a dam); *Ass'n of Civil Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive."). Because the drought operations of the dam in accordance with the WCM

are not discretionary, they are not subject to the ESA's consultation requirement. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. at 661 (examining the Clean Water Act's requirement that EPA transfer control over Arizona's NPDES program to the state and finding that it does not constitute a discretionary action due to the statute's mandatory language).

2. Maintaining Flows in the Bypass Reach in Accordance with Greenlawn's Riparian Rights Is Also Non-Discretionary

The Corps also lacked discretion regarding the release of water to Greenlawn in satisfaction of the city's riparian rights. The WCM included an instruction 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." R. at 7–8. The inclusion of the word "shall" in the direction that the dam's operations comply with riparian property rights indicates that this is beyond the Corps' discretion. *Ass'n of Civil Technicians v. Fed. Labor Relations Auth.*, 22 F.3d at 1153. Because the manual's instruction in this area is mandatory, any release of water to satisfy riparian rights under New Union law is not a discretionary action.

Greenlawn has a right as a riparian proprietor to withdraw water for the natural wants of lots within its city limits. *See Tubbs v. Potts*, 45 N.U. 999 (1909) (municipal riparian landowners may withdraw water for non-riparian lots within municipal boundaries); *Harris v. Brooks*, 283 S.W.2d at 133 (Ark. 1955) ("[U]nder the natural flow theory, a riparian owner can take water for domestic purposes only, such as water for the family, livestock, and gardening . . . ."). Furthermore, the Corps' agreement with Greenlawn requires it to maintain sufficient flows in the Bypass Reach to satisfy Greenlawn's riparian rights. R. at 6. When Greenlawn invoked this agreement and its riparian rights to receive water for natural wants, the Corps lacked discretion to

refuse to release sufficient water in the Bypass Reach to satisfy those wants. *See Sierra Club v. Babbitt*, 65 F.3d at 1509 ("[W]here, as here, the federal agency lacks the discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species."). Because the Corps had no discretion in the release of water to Greenlawn, this action was not subject to the consultation requirement of § 7 of the ESA. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. at 669 (finding that a non-discretionary action is not subject to the consultation requirement).

III. The New Union District Court Correctly Granted Summary Judgement by Concluding that the City of Greenlawn's Actions Constitute a Taking Under § 9 of the Endangered Species Act

The City of Greenlawn must be held liable under § 9 of the ESA if their activities (1) modified or degraded the habitat, regardless of if the activities occurred outside the habitat (2) actually injured the endangered species, and (3) proximately caused the injury. *See* 50 C.F.R. § 17.3; *see generally Sweet Home*, 515 U.S. 687 (1995). The New Union District Court correctly determined that the City of Greenlawn's actions violated § 9 of the ESA. R. at 5. The ESA prohibits, "any person subject to the jurisdiction of the United States to … take any such species within the United States or the territorial sea of the United States . . . ." 16 U.S.C. § 1538(a)(1). "Take" includes "means to…harm . . . ." 16 U.S.C. § 1532(19). The Fish and Wildlife Service's regulations explain:

> Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3; *see also Sweet Home*, 515 U.S. at 708 (deciding that the Fish and Wildlife Service's interpretation is reasonable). Harm does not exclude habitat modification based on activities occurring entirely outside the habitat in question. Further, there is sufficient causal connection between the City of Greenlawn's water withdrawals and the injury sufferd by the oval pigtoe mussels. Appellee prays this Court affirm the district court's grant of summary judgment on the New Union Oystercatchers' claim against Greenlawn under 16 U.S.C. § 1538(a)(1).

A. The Ordinary Meaning of the Statute's Text Supports an Interpretation of Harm to Include Habitat Modification from Activities Occurring Outside the Habitat

"[T]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The plain, ordinary meaning of "harm" is "to cause hurt or damage to: injure." *Sweet Home*, 515 U.S. at 697 (citing Webster's Third New International Dictionary 1034 (1966)). The dictionary definition of "harm" does not include any limitation that the hurt, damage, or injury must be caused directly.

The plain, ordinary meaning of harm is consistent with the act as a whole. 16 U.S.C. § 1539(a)(1)(B) provides that the Secretary may permit, "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." This provision demonstrates that Congress intended that "take" include both indirect and deliberate takings. *See Sweet Home*, 515 U.S. at 700 ("16 U.S.C. § 1539(a)(1)(B), strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings.").

B. The Spirit of the ESA Requires that Harm Be Interpreted to Include Habitat Modification Caused by Actions Occurring Outside the Habitat in Question

To determine the spirit of a statute, one may look to the state of the law before and after enactment, general public knowledge of the mischief to be remedied, and the published legislative history as it sheds light on the statute's general aims. Henry M. Hart Jr. et al., *The Legal Process: Basic Problems in the Making and Application of Law* 1374–80 (William N. Eskridge et al. eds., 1994).

Species were declining and the scientific community was becoming increasingly concerned about the loss of biodiversity and maintenance of the "balance of nature." S. Rep. No. 93-307 at 2990 (1973). Prior to the Endangered Species Act of 1973, Congress passed two statutes aimed at preserving endangered species. *See Hill*, 437 U.S. at 174–75 (describing the legislative history of the ESA). The Endangered Species Act of 1966 established a National Wildlife Refuge System and prohibited disturbing animals or their habitats within the system. *Gibbs v. Babbitt*, 214 F.3d 483, 502 (4th Cir. 2000); *see Hill*, 437 U.S. at 175 (describing the legislative history of the ESA). The Endangered Species Conservation Act of 1969 expanded the endangered species program significantly. *See Gibbs v. Babbitt*, 214 F.3d at 502 (explaining that the new act required the Secretary of the Interior to develop a list of endangered species and prohibited the import of these animals or their by-products). However, the statutes were not doing enough. *See Gibbs v. Babbitt*, 214 F.3d at 502 ("In response to concerns that these Acts had little impact, Congress amended the ESA in 1973 . . ."). Species were still being lost at the rate of about one per year. *See Hill*, 437 U.S. at 176 (citing the statement of Stephen R. Seater, for Defenders of Wildlife). Congress was "persuaded that a more expansive approach was needed if the newly declared national policy of preserving endangered species was to be realized." *Hill*, 437 U.S. at 176.

When Congress drafted the Endangered Species Act of 1973, the two major causes of extinction were hunting and destruction of natural habitat. S. Rep. No. 93-307, at 2990 (1973). To expand the practical effect of the program in line with the spirit of the original legislation, Congress defined "take" in the "broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 93-307, at 2995 (1973); *see also* H.R. Conf. Rep. No. 93-740 at 3001–02 (1973) (adopting the Senate's definition of "take" without discussion).

C. A Reasonable Interpretation of "Harm" Requires an Entity Who Modifies a Habitat Based on Activities Occurring Outside the Habitat in Question be Exposed to Liability

Interpreting harm to expose entities whose habitat modifying actions occur outside of the habitat in question to liability is reasonable. A broad interpretation of what actions may constitute habitat modification is permissible, because 50 C.F.R. § 17.3 limits when these actions violate § 9 of the ESA. There must be actual harm, and the actions must proximately cause the harm. *See San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 873–74 (D. Ariz. 2003), *aff'd* 417 F.3d 1091 (9th Cir. 2005) (requiring actual injury to be proximately caused by habitat modification); Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm," 46 Fed. Reg. 54,748 (Nov. 4, 1981) (codified at 50 C.F.R. 17.3) (explaining why "actually kills or injures wildlife" was added to the Fish and Wildlife Service's definition of "harm").

In 1981, the Fish and Wildlife Service (FWS) redefined "harm." FWS understood that the ESA mandated a broad interpretation of what actions could be subject to liability. *See* Endangered and Threatened Wildlife and Plants, 46 Fed. Reg. 54,748 (acknowledging that Congress intended to construe "take" very broadly, but declining to find a violation of § 9 when there has been no actual injury as a result of habitat modification). However, FWS expressed concern about the scope

of liability under their unrevised definition. *See id.* (explaining the issues with the existing harm definition). Liability could be extended beyond Congress's intent. *Id.* In response, FWS limited the scope of habitat modifying actions that were subject to liability under § 9 of the ESA. *See id.* (" 'Harm' covers actions . . . which actually (as opposed to potentially), cause injury . . ."). Liability was limited to actions that actually killed or injured wildlife. *See id.* ("The purpose of the rulemaking was to make it clear that an actual injury to a listed species must be found for there to be a taking under section 9."). The Service sought to strike a balance between avoiding injury "to protected wildlife due to significant habitat modification, while at the same time precluding a taking where no actual injury is shown." *Id.*

This interpretation is also reflected in court precedent. In *Sweet Home*, the court stated that, "the statutory term 'harm' encompasses indirect as well as direct injuries . . . ." 515 U.S. at 687–98. The Arizona District Court that " 'harm' can be realized through the modification or degradation of a listed species' habitat where it is shown that such modification or degradation, *indirect* or prospective, will either kill or injure wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *San Carlos Apache Tribe*, F. Supp. 2d at 874, *aff'd* 417 F.3d 1091 (9th Cir. 2005) (emphasis added). The fact that the actions, which modified the habitat, occurred outside the habitat is not dispositive nor does it eliminate Greenlawn's liability.

D. There Is a Sufficient Causal Connection Between the City of Greenlawn's Water Withdrawals and Reduced Flows in the Green River Downstream of the Bypass Reach

Proximate cause is a key element to imposing liability under § 9 of the ESA. *See Sweet Home*, 515 at 712 (describing "proximate causation and foreseeability" as "ordinary requirements" under § 9 of the ESA). "A requirement of proximate cause thus serves, *inter alia*, 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, 445 (2014) (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838–39 (1996)). For an event to proximately cause another event, the first event must be (1) an actual cause or cause in fact for the second event, and (2) sufficiently connected to the result that it is considered a proximate cause. *See Nat'l Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 486 (E.D. Cal. 2018) (explaining the two components of proximate cause).

1. The City of Greenlawn's Actions Meet the Requirement of Actual Cause Under a Proper Relaxed Causation Standard

The traditional way to determine actual cause or cause in fact is to "show that the latter [event] would not have occurred 'but for' the former [event]." *Zinke*, 347 F. Supp. at 487 (citing *Paroline v. United States*, 572 U.S. 434, 449–50 (2014)). However, in light of the circumstances of the case, court precedent, and purposes of the ESA, a relaxed application of the actual causation test may be required. *See id.* at 492 (concluding that a relaxed actual causation standard may be appropriate). In *Paroline v. United States*, the Supreme Court recognized that there may be factual scenarios where a showing of but-for causation cannot be shown. *See* 572 U.S. at 450 ("In this case, however, a showing of but-for causation cannot be made."). In *Paroline*, the defendant was one possessor of child pornography photographs in a large, loosely connected network. *Id.* at 450. "It [could] not be shown that [the victim's] trauma and attendant losses would have been any different but for Paroline's offense." *Id.* As a result, the court adopted a less stringent actual cause standard:

> When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.

Id. at 451 (citing Prosser and Keeton on Law of Torts § 41, p. 268 (5th ed. 1984)). Despite cautioning that alternative causal standards can be taken too far, the Supreme Court adopted the alternative causal standard, because it was necessary to vindicate the law's purposes. *See id.* at 452 ("Nonetheless, tort law teaches that alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes.").

The District Court in the Eastern District of California similarly adopted an alternative causal standard to determine whether the federal defendants had violated § 9 of the ESA. *See Zinke*, 347 F. Supp. 3d at 489–92 (explaining why the court should adopt a less strict causal standard). The Natural Resources Defense Council sued the defendants, because the defendants had failed to keep an adequate supply of cold water. *Id.* at 503. The defendants then could not maintain control of the temperature of water out of Keswick Dam and downstream. *See id.* at 484–86. This resulted in approximately 97% of the winter-run Chinook egg and fry to perish by the end of the season. *Id.* at 486. The District Court in *Zinke* acknowledged that the Supreme Court briefly touched upon actual causation in footnote thirteen of *Sweet Home*. *See id.* at 489–91 (explaining the significance of footnote thirteen). However, the District Court adopted a less strict actual causation standard based on its reading of *Sweet Home* and *Paroline*. *See id.* at 492 ("In sum, the Court finds that it [sic] the facts and circumstances of this case, in light of *Paroline* and the purposes of the ESA, may require application of a relaxed but for causation standard, at least with respect to some defendants in this case.").

In *Sweet Home*, the Supreme Court explained that the legislature intended to define "take" as broadly as possible. *See Sweet Home*, 515 U.S. at 704 ("The Committee Reports . . . make it clear that Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions.") Because the case focused on the facial challenge to FWS's regulation, footnote thirteen

was mostly a response and rebuttal to the dissent's concern that the majority decision was imposing "strict liability" upon "routine" activities of landowners. *Zinke*, 347 F. Supp. 3d at 490 (citing *Sweet Home*, 515 U.S. at 700 n.13 and 716–23). Further, the Supreme Court in *Paroline* gave a later and more detailed exposition of exceptions to "but-for" causation. *Id.* at 490.

Similar to *Paroline* and *Zinke*, a more relaxed actual causation standard clarifies this case. There are several events that contributed to the lack of water in the mussel habitat. Under a strict but-for causation test, a court might not be able to find that the damage to the mussel's habitat would have been any different but for Greenlawn's water withdrawals. In fact, under this standard, it is possible that no party could be held responsible for the degradation of the mussel's habitat. This would violate the law's purpose: to create strong protections to conserve endangered and threatened species and their habitats. *See* 16 U.S.C. § 1531(b) ("[P]rovide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ."). A less stringent causal standard, as in *Paroline* and *Zinke* is required. When conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, then the conduct of each is a cause in fact. *Paroline*, 572 U.S. at 451; *Zinke*, 347 F. Supp. 3d at 488–92.

2. Greenlawn's Water Withdrawals Are Sufficiently Connected to the Degradation of the Oval Pigtoe Mussel Habitat to Constitute Proximate Cause

The second element of proximate cause requires one to determine whether the alleged injury is fairly traceable to the challenged action of the defendants. *Zinke*, 347 F. Supp. 3d at 492 (citing *Cascadia Wildlands v. Kitzhaber*, 911 F.Supp2d 1075, 1084 (D. Oregon 2012)). The Supreme Court in *Sweet Home*, rejected the idea that § 9 of the ESA imposed a form of strict liability. *See Sweet Home*, 515 U.S. at 700 n.13 (dismissing the dissent's contention that the

majority was interpreting the ESA to impose strict liability). Rather, the court explained that, "the ESA prohibits 'takes' so long as they are 'foreseeable rather than merely accidental'." *Aransas Project v. Shaw*, 775 F.3d 647, 657 (5th Cir. 2014) (citing *Sweet Home*, 515 U.S. at 700); *see also Sweet Home*, 515 U.S. at 700 n.13 ("[T]he regulation merely implements the statute, . . . and ordinary requirements of proximate causation and foreseeability."). Therefore, proximate causation eliminates bizarre scenarios where liability would be imposed based on inconsequential and attenuated actions. *See Sweet Home*, 515 U.S. at 713 (O'Connor, J., concurring) ("We have recently said that proximate causation 'normally eliminates the bizarre'. . . ."); *Aransas Project*, 775 F.3d at 657–58 ("Proximate causation depends to a great extent on considerations of fairness of imposing liability for remote consequences.").

The Fifth Circuit in *Aransas Project v. Shaw* decided that there was not a sufficient causal link between the Texas Commission on Environmental Quality's (TCEQ) management of freshwater flows into the bay and the deaths of endangered whooping cranes. *See* 775 F.3d at 663 ("For these reasons, proximate cause and foreseeability are lacking as a matter of law."). TCEQ's actions did not constitute a "take" under the ESA. *See generally* 775 F.3d 641 (5th Cir. 2014). The causal chain between TCEQ's issuance of permits and whooping crane deaths in 2008–2009 was too long, and each link in the causal chain depended on modeling and estimation. *Id.* at 660.[1]

[1] The plaintiff's position was that the water withdrawals from the rivers resulted in a decline of freshwater inflows, which increased the salinity of the estuary and marsh water. *Id.* This affected the conditions in which blue crabs and wolfberry plants grow, which affected the whooping crane's food source at one point along their thousands-mile migration. *Id.* The plaintiffs argued that this caused the whooping cranes to succumb to food stress, and ultimately, lead to the death of twenty-

Further, for the six decades before this incident, human demand for water had increased, and there were periodic, severe droughts. *Id*. at 661. Yet, the whooping crane population increased significantly. *See id.* The court concluded that it was not reasonably foreseeable that TCEQ's management of freshwater flows into the bay would result in the death of several endangered whooping cranes between 2008 and 2009. *See id.* at 664 ("Because the deaths of the whooping cranes are too remote from TCEQ's permitting withdrawal of water . . . defendants cannot be held liable for a take or for causing a take under the ESA.").

In contrast, the Eastern District of California recognized that water transfers approved by the State, which affected water temperatures downstream, could constitute habitat modification and a 'take" under the ESA. *See Zinke*, 347 F. Supp. 3d at 520 (finding that there may be a sufficient causal connection). Because of disputed facts, the court did not grant summary judgement for the plaintiff. *See id.* at 520 ("Proximate cause is a highly fact intensive inquiry generally inappropriate for resolution on summary judgement."). However, the court recognized that NMFS's guidelines indicate, "[r]emoving water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding, or other essential behavioral patterns," may fall within the scope of habitat-modifying activities, violating the ESA. *Zinke*, 347 F. Supp. 3d at 491 (citing 64 Fed. Reg. at 60,730) (drawing comparisons from the NMFS's guidelines to situations under FWS's oversight). Assuming all of the plaintiff's facts were admissible and true, the court decided that the plaintiff would be able to demonstrate that the State proximately caused

---

three cranes. *See id.* at 660 ("Necropsies of two cranes that died during 2008–2009 winter showed signs of emaciation, and overall an estimate 23 cranes died.").

the modification of the Chinook salmon's habitat. *See id.* at 499 (explaining that the plaintiff's case is compelling but relies on disputed temperature measurements).

Unlike *Aransas Project*, there is not a long, unforeseeable causal chain between the City of Greenlawn's actions and the degradation of the oval pigtoe mussel's habitat downstream. When Greenlawn's water withdrawals consumed nearly all flow, there was not an adequate supply of water downstream. *See* R. at 9–10 (explaining that Greenlawn's water withdrawals reduced flow in the Green River to nearly zero, while at least 25 cfs averaged over 24 hours was necessary for the oval pigtoe mussels). This foreseeably degraded the mussel habitat and resulted in the death of approximately twenty-five percent of the mussel's population. Greenlawn was on notice that if the lake level dropped to a Zone 3 rating, because of drought conditions, the Corps would curtail daily hydroelectric power releases. *See id.* at 6–7 (detailing the adoption and procedures of the WCM). This would cause a further decrease in the volume of water downstream. Additionally, Greenlawn knew there was a drought and that the Corps was implementing the WCM guidelines. *See id.* at 8–9 (summarizing communications between the Corps and Greenlawn regarding the drought). The Corps instituted the Zone 2 flow restrictions in the Spring of 2017. *Id.* at 8. Greenlawn immediately protested. *Id.* Greenlawn also asserted that they were under no obligation to impose drought restrictions. *Id.* It was reasonably foreseeable that when the drought continued, the Corps would not continue its hydroelectric releases, and Greenlawn's withdrawals consuming nearly all of the flow in Bypass Reach would result in decreased flow and water levels downstream.

While proximate cause is a highly fact-intensive inquiry, the district court properly granted summary judgement. *See Zinke*, at 520 (explaining that proximate cause is highly fact intensive analysis). In this case, none of the pertinent facts are disputed. R. at 5. Greenlawn's water withdrawals upstream modified and degraded the mussel habitat downstream. Because of

decreased water levels, twenty-five percent of the oval pigtoe mussel population perished. R. at 10. Greenlawn knew there was a drought and what measures the Corps would take during a severe drought. *See id.* at 7–8 (explaining the WCM's drought response and Greenlawn's communications with the Corps). It was reasonably foreseeable that a substantial decrease in the flow of water downstream from Bypass Reach would directly and negatively impact the amount of water downstream. Based on these facts, the only conclusion a reasonable fact finder could reach is that Greenlawn violated § 9 of the ESA.

IV. The District Court Erred by Not Balancing the Equities Before Enjoining a Beneficial Municipal Activity

"A major departure from the long tradition of equity practice should not be lightly implied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). Traditionally, a plaintiff seeking a permanent injunction must satisfy a four-factor test before the court may grant the requested relief. *See eBay Inc. v. MerExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (explaining the traditional test for injunctive relief).

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id. A long practice of granting permanent injunctions is not enough to stray from the four-factor test. *See id.* at 395 (Roberts, C.J. concurring) ("This historical practice, as the Court holds, does not *entitle* a patentee to a permanent injunction or justify a *general rule* that such injunctions should issue."). To stray from applying the four-factor test for injunctive relief, there must be clear Congressional intent. *See id.* at 391–92 (explaining that this intent must be clear from the statute's text). The ESA lacks the clear congressional intent required to depart the long tradition of equity practice except when an entire species would become extinct as the result of a single action. *See*

Animal Welfare Institute v. Martin, 623 F.3d 19, 27 (1st Cir. 2010) ("The Supreme Court has since explained that the drastic result in *Hill* stemmed from the strong and undisputed showing of irreparable harm that would occur absent an injunction: an entire species would become extinct."); *see also* Hill, 437 U.S. at 194 (explaining that Congress has made it clear that when a species will be eradicated from a single action the balance of equities must weigh in favor of the species). The District of New Union erred, because it did not apply the complete four-factor test before deciding to issue a permanent injunction. *See Hill*, 437 U.S. at 193 (explaining how a judge should approach granting injunctive relief when a party has violated the ESA).

In *Hill*, the Supreme Court affirmed the Court of Appeals' decision to enjoin the construction and operation of the dam. *Id.* at 195. The Supreme Court explained that the statute mandated that the *balance of equities* strike on the side of the endangered species. *See id.* at 194 (implying that there was still an analysis of the four factors). The court did not lack discretion in fashioning injunctive relief, rather it lacked discretion because "an injunction was the 'only means of ensuring compliance'." *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 496 (2001) (citing *Romero-Barcelo*, 456 U.S. at 314 (explaining the Supreme Court's decision in *Hill*, 437 U.S. 153)). The four-factor test remained present, but Congress' intent influenced the lens through which the court examined each factor. *See Hill*, 437 U.S. at 193–95 (explaining that the balancing within the third factor weighed in favor of the endangered species); *see also Animal Welfare Institute*, 623 F.3d at 26–28.

Through the text of the statute and legislative history, Congress conveyed that the loss of an entire species would constitute an irreparable harm, and the hardship of extinction far outweighed any monetary hardship. *See Hill*, 437 U.S. at 194 ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording

endangered species the highest priorities . . . ."). It was almost certain that the completion and operation of the dam, in *Hill*, would completely destroy the snail darter's habitat. *See id.* at 162 (quoting the Secretary's determination that the proposed Tellico Dam would result in "total destruction of the snail darter's habitat"). The court noted that rather than viewing the ESA "reasonably" and shape a remedy "that accords with some modicum of common sense and the public weal," the court had to follow Congressional intent. *Id.* at 194. The court had to afford the endangered species the highest of priorities. *Hill*, 437 U.S. at 194. A refusal to enjoin would have ignored the explicit provisions of the act. *Id.*

The District Court of New Union improperly concluded that *Hill* precluded the court from balancing the equities to determine whether to grant injunctive relief. In the particular scenario where it is known with almost one hundred percent certainty that a species habitat will be eradicated, the third factor must weigh in favor of the endangered wildlife. *See id.* at 193–95 (explaining that the court must grant injunctive relief because of Congressional intent). Like *Hill*, there is the potential for the endangered mussels to be eradicated from Greenlawn's conduct. Yet, unlike *Hill*, Greenlawn's actions by themselves do not guarantee that the mussel's population will be eradicated. *See* R. at 6–10 (discussing upstream development, drought conditions, the Corps' dam operations, Greenlawn's water withdrawals, and the reduced flow downstream). In *Hill*, the only option was to complete construction and operate the dam or not to. *See Hill*, 437 U.S. at 161–62 (citing the Secretary who explained that if the dam is completed and used it would lead to the destruction of the snail habitat). In this case, there can be multiple causes to the degradation of the mussel's habitat and the severity of these causes can have varying effects on the mussel's habitat. There may be times that Greenlawn's water withdrawals could temporarily reduce flow

downstream without decimating the Green River oval pigtoe mussel population. *See* R. at 9 (discussing how adult oval pigtoe mussels can adapt to minor changes in water level).

Further, in *Hill*, the Tennessee Valley Authority (TVA) was constructing the Tellico Dam for economic development. *See id*., at 157 ("Tellico is a multipurpose regional development project designed principally to stimulate shoreline development, generate sufficient electric current to heat 200,000 homes, and provide flatwater recreation and flood control, as well as improve economic conditions . . . ."). The TVA's proposed use of that water was for an artificial use. *See Lone Tree Ditch Co.*, 128 N.W. at 598 (describing artificial uses such as mining, manufacturing, and irrigation as "at the best, but indirectly needful"). In contrast, Greenlawn is withdrawing water to satisfy natural wants, which have historically been given the highest priority of all water uses. *See Harris*, 283 S.W.2d at 134 (explaining that household uses of water are superior to recreational and commercial uses).

Therefore, because there can be multiple causes to the degradation of the mussel's habitat and Greenlawn is withdrawing water to satisfy natural wants, *Hill* did not preclude the district court from applying the balance of equities before determining to grant injunctive relief. Upon application of the balancing of equities a court may come to the same result of granting injunctive relief, but the longstanding tradition of balancing the equities must be maintained.

CONCLUSION

Because a municipal riparian landowner may withdraw water to satisfy natural wants within its boundaries, Greenlawn has a right to withdraw water from the Bypass Reach for domestic use. Because the Corps lacked discretion in its operation of the Howard Runnet Dam Works, the Corps was not required to consult with the Secretary of the Interior under § 7 of the Endangered Species Act. Because Greenlawn's withdrawals from the Bypass Reach caused the

adverse modification of oval pigtoe mussel habitat, Greenlawn violated § 9 of the Endangered Species Act by taking an endangered species. Because a court may only stray from applying the four-factor test for injunctive relief when there is clear Congressional intent, the District Court should have balanced the equities before issuing an injunction against Greenlawn's withdrawal of water. For these reasons, the judgment below should be affirmed as to the motions for summary judgment, the injunction vacated, and this case remanded to balance the equities in consideration of injunctive relief.