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

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| **NEW UNION OYSTERCATCHERS, INC.,** Plaintiff-Appellant | ) | |
| v. | ) | CA. NO. 19-000987 |
| **UNITED STATES ARMY CORPS OF ENGINEERS** Defendant-Appellee | ) | |
| and | ) | |
| **CITY OF GREENLAWN, NEW UNION,** Defendant-Appellant | ) | |

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# BRIEF OF PLAINTIFF-APPELLANT NEW UNION OYSTERCATCHERS

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**Oral Arguments Requested**

**Team 49**

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## STATEMENT OF THE ISSUES

There are four issues before this Court:

**(1) Should water conservation measures be imposed upon the City of Greenlawn during a drought?**

**(2) Is the operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536?**

**(3) Did the City of Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitute a "take" of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538?**

**(4) Was the District Court correct in refusing to apply a balancing of equities test before enjoining a municipal activity, when the activity will cause the extirpation of an entire population of endangered mussels?**

*Suggested answers: In the affirmative.*

## STATEMENT OF THE CASE

On July 17, 2017, New Union Oystercatchers, Inc. (NUO) sued the U.S. Army Corps of Engineers (ACOE) and the City of Greenlawn in the state of New Union, alleging violations of the Endangered Species Act (ESA). NUO is a nonprofit membership association representing interests of oyster fishermen of Green Bay. Greenlawn is a city located in New Union on both banks of the Green River and has municipal water intakes into the river. The ACOE operates the Howard Runnet Dam.

NUO alleged that Greenlawn's water removals and the ACOE's curtailment of hydroelectric power releases negatively affected downstream Green River flows, harming its members' economic interests (since they suffered reduced oyster catches) and the oval pigtoe mussel (an endangered species that makes its habitat 60 miles downriver from the dam, and, as a result of the reduced river flows, experienced a significant reduction in its population's viability).

The ACOE filed a cross-claim against Greenlawn, joining NUO's ESA claim against the city. The ACOE also moved for summary judgment on NUO's ESA claim against it, and NUO moved for summary judgment against Greenlawn (alleging a violation of section 9 of the ESA) and the ACOE (alleging a violation of section 7 of the ESA). Greenlawn cross moved for summary judgment to declare its rights as a riparian landowner and to dismiss the ESA claims against it.

On May 15, 2019, Judge Remus issued an Opinion and Order of the District Court. His order: (1) granted the ACOE's motion for summary judgment dismissing the First Claim for Relief; (2) denied Greenlawn's motion for summary judgment dismissing the Second Claim for Relief and the ACOE's Cross Claim; (3) granted Greenlawn's motion for summary judgment on its cross-claim declaring its rights as a riparian landowner; (4) granted summary judgment dismissing the Third Claim for Relief in the Complaint; (5) granted NUO's motion for summary judgment declaring Greenlawn to be in violation of section 9 of the Endangered Species Act; (6) issued an injunction preventing Greenlawn from causing water withdrawals that result in the flow of the Green River downstream of the confluence of the Howard Runnet Dam tailrace with the Bypass Reach to drop below 25 cubic feet per second averaged over 24 hours.

On September 1, 2019, the U.S. Court of Appeals for the Twelfth Circuit, in response to timely appeals from both NUO and Greenlawn, ordered NUO, ACOE, and Greenlawn to brief the aforementioned issue

## STATEMENT OF THE FACTS

In 1893, the City of Greenlawn was established on both sides of the Green River. *Record* at 5. The Green River is the sole supply of domestic water for Greenlawn residents. *Id.* In 1947, the Army Core of Engineers (ACOE) constructed a Diversion Dam, and the Howard Runnet

Dam (collectively known as the Howard Runnet Damn Works) on both sides of Howard Runnet Lake. *Id*. Howard Runnet Lake lies above Greenlawn and is adjacent to the Green River. *Id*. The Howard Runnet Dam Works was authorized by the Harbor Act of 1945 for flood control, hydroelectric power, and recreation purposes. *Id*. In 1958, the Fish and Wildlife Coordination Act added fish and wildlife purposes as an authorized purpose for all ACOE dams. *Id*. at 6.

The natural flow of the Green River was cut off by the construction of the Howard Runnet Dam Works. Id. Now, the ACOE controls the flow of water going into the Green River Bypass Reach, and the Tailrace. *Id*. The ACOE uses a Water Control Manual (WCM) to govern the amount of water flowing through the dams. *Id.* The goal of the WCM was to maintain adequate lake and river flow levels to support fisheries and recreational uses. *Id*. The latest version of the WCM was the result of negotiations that took place in 1968 between Greenlawn and the ACOE to ensure their water supply in order to maintain water withdrawals. *Id*.

During the 1960's, the City of Greenlawn experienced a housing boom, and currently supplies water to over 100,000 customers by withdrawing 6 million gallons per day (MGD) on average. Id. at 5. During the summer months Greenlawn peaks its daily water withdrawals at a rate of 20 MGD to support lawn and ornamental watering demands. *Id* at 5.

The WCM provides a flow of 50 cubic feet per second (CFS) into the Bypass Reach, and up to 200 CFS to the hydroelectric turbine at the Howard Runnet Dam. *Id*. at 7. When lake levels drop below the seasonal target levels, the WCM provides drought watch, warning, and emergency procedures to reduce the flows at both the Diversion and Howard Runnet Dams. See *Id*. During drought warning and emergencies, the WCM calls for 7 CFS to be released into the Bypass Reach. *Id*. The figure of 7 CFS was the amount of water needed to support Greenlawn's daily water withdrawals in 1968 when the WCM was last negotiated. *Id*.

Entering the 21st century, droughts have become more frequent and pervasive in the region forcing ACOE to enforce some level of water restriction every year since 2006. *Id.* In the Spring of 2017, lake levels dropped drastically forcing ACOE to resort to WCM Zone 2 Drought Warning restrictions. *Id*. at 8. The City of Greenlawn protested, and somehow forced the ACOE to go against the WCM and release 30 CFS flows through the Bypass Reach to support the cities ornamental watering. *Id*. This caused the lake to reach Zone 3 Drought Emergency levels on May 15, 2017, which curtailed hydroelectric releases, but for some reason the ACOE District Commander continued to release 30 CFS into the bypass reach. *Id*. at 9.

The result of the decreased flow levels, and Greenlawn's unabated withdrawals during this Drought Emergency reduced the once flowing Green River to stagnate pools. *Id*. This major reduction in flow had a devastating effect on a federally listed endangered species, the oval pigtoe mussel, as their habitat was exposed resulting in the death of 25% of the Green River population. *Id*. at 9-10. Expert testimony revealed that 25 CFS must flow through the Green River in order to support the oval pigtoe mussel habitat, failure to maintain these levels will result in the elimination of the Green River population. The City of Greenlawn does not have an incidental take permit under the Endangered Species Act. *Id*. at 10.

Plaintiff-Appellees New Union Oystercatchers, Inc. (NUO) is a not-for-profit membership association that represents the interests of third and fourth generation Green Bay oyster fisherman. *Id*. The reduced flows caused by Defendant-Appellant's ACOE and Greenlawn, have impacted the salinity of Green Bay which has diminished the ecosystem of oysters in the region. *Id*. The regional oyster harvests in 2016 were 50% of the level of 2000, causing many of NUO's members to sell their fishing boats. *Id*.

# ARGUMENT

## I. UNDER COMMON LAW PRINCIPLES APPELLANT'S CAN ASSERT RIGHTS TO CONTINUED USE OF PUBLIC WATERS BECAUSE APPELLEE'S MUNICIPAL USES DURING DROUGHT CONDITIONS ARE UNREASONABLE.

### *A. NUO's rights of the general public to use public waters are recognized under common law principles.*

Section 856 of the Second Restatement of Torts is titled "Harm by Riparian Proprietor to Nonriparian." Restatement (Second) of Torts § 856 (Am. Law Inst. 1975). "Its thrust is that nonriparians making uses pursuant to grants from riparians or lawfully issued government permits, as well as the general public exercising public rights are all protected against unreasonable uses of riparians." Barton Thompson Jr. et al., *Legal Control of Water Resources* 42 (6th Ed. 2018) (*citing* Restat. 2d of Torts, § 856). Section 856 clearly recognizes that nonriparians have a right to claim liability against unreasonable uses of other riparian landowners.

The District Court relied upon Restatement (Second) of Torts § 850A(h) in its discussion of establishing Greenlawn's riparian rights, however, the court incorrectly determined that "NUO is not a riparian landowner and lacks common law standing to assert *any* riparian rights claims against Greenlawn . . . only the rights of landowners are protected*." New Union Oyster Catchers, Inc. v. United States Army Corps of Engineers*, No. 66-CV-2017, at 13-14 (D.N.U. May 15, 2019). While § 850A(H) *does not* give NUO the standing to sue, a few sections down, § 856 *does*. "A riparian proprietor is subject to liability for making a use of the water of a watercourse or lake that causes harm to a non-riparian exercising a right created by governmental authority, permit or license to use public or private water." Restat. 2d of Torts, § 856.

Comment 1 to Section 856 states, "nonriparian members of the public may have certain rights in public waters . . . the interest of a riparian proprietor is the right to make a reasonable use of the water . . . and the reasonableness of the use would be tested, for the purposes of this Section, by the factors stated in §§ 850A(a)-850A(g)." Restat. 2d of Torts, § 856, cmt. 1.

Here, the oystermen of NUO have enjoyed a public right to use Green Bay for four generations. Their livelihoods depend on the ability to fish these bodies of water. Their economic livelihoods have been jeopardized by Greenlawn and ACOE reducing the flow of waters going in the Green Bay. *Oyster Catchers*, at 10. At a minimum NUO's members have a license or usufructuary right that was created when the Federal Government added fish and wildlife purposes as an authorized purpose for all ACOE administered dams. Fish and Wildlife Coordination Act (FWCA) of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958). Because the FWCA creates a right for Appellants to use the water for fishing purposes, it also gives them standing to challenge whether Greenlawn's use is reasonable in accordance with Restat. § 850's reasonableness factors, or any reasonableness analysis for that matter.

The District Courts assertion that NUO enjoys no rights presupposes New Union law is applicable to interpret a federal statute that applies in all states. "It is doubtful that Congress intended that the [FWCA] would apply differently in different states depending on state common law [principles of riparianism]. *United States v. Glenn-Colusa Irrigation Dist*., 788 F. Supp. 1126, 1133-34 (E.D. Cal. 1992). Therefore, the district court must remand this case to the trial court where a reasonable use analysis can take place.

*B. Greenlawn's Municipal Riparian Rights Are Distinguishable From Individual Riparian's And Must Be Analyzed By This Court The Under Reasonable Use Doctrine.*

If Greenlawn's customers are treated as exercising a domestic preference to riparian rights, the city's needs will immediately displace virtually any competitor's needs—including perhaps

another public system. *See* 1 *Waters and Water Rights* § 7.05 (2019). Courts have finessed this problem by falling back on the notion that a corporation, which virtually any public water system will be, is incapable of having domestic needs. Judge Brewer persuasively explained the proposition in *City of Emporia v. Soden*:

> A city cannot be considered a riparian owner within the scope of the [domestic preference]. The amount of water which an individual living on the banks of a stream will use for domestic purposes is comparatively trifling. Such use may be tolerated upon the principle *de minimis non curat lex* … , [b]ut the taking of water for a populous and growing city stands upon an entirely different basis … . [A city does not take] the water for its own domestic purposes; it is not an individual; it has no natural wants; … it takes to sell.
>
> 25 Kan. 588, 606–07 (1881).

The early case law, as established in *City of Emporia*, and others, simply does not comprehend a municipality receiving riparian rights the same way it would another riparian owner. If the municipal system is found to be making a reasonable use and not unreasonably interfering with the uses of other riparian proprietors, the City of Greenlawn, need not give credence to other riparians whose uses are cut off by Greenlawn's overconsumption. The results of the district court's order would be to force virtually all users in a region to accept subordination to the City of Greenlawn.

Treating a municipality as completely riparian, as in *City of Canton v. Shock*, inequitably favors municipalities because no domestic use within the city would be considered unreasonable per se. However, *City of Canton*, which the District Court relied on, can be distinguished from the facts of the case at bar. "The principle established by a long line of decisions is that the upper riparian owner has the right to the use of the stream on his land for any legal purpose, provided he returns it to its channel uncorrupted and without any essential diminution." *Canton v. Shock,* 66 Ohio St. 19, 19, 63 N.E. 600, 601 (1902). This shows that the court in *City of Canton* contemplated

that there be some return flow back into the source. Here, Greenlawn prevents that from happening in two different ways. The first, is that wastewater returns from Greenlawn flow into the Progress River and not into the Green River—where they are being withdrawn. *Oyster Catchers*, at. 6. Because Greenlawn consumes almost all of the water flowing into the Bypass Reach it substantially corrupts the flow of water going into the Green Bay, which has negative effects on the fishing rights that are enjoyed by NUO. Second, Greenlawn's unaltered use during drought conditions turns the Green River turns into stagnate ponds cutting off the flow of water completely. In general, Greenlawn, as a riparian owner can make reasonable use of the waters that flow through their property, but only to the point that others downstream can still enjoy at a minimum some flow in the river. However, this property right to make withdrawals is vested in the land surrounding the river, not in the water itself. Because NUO asserts that they also have right to use the water, this conflict between the parties requires either a judicial or legislative remedy to resolve the problem and determine how reasonable each parties' uses are.

To remedy this, states generally have adopted statutes to authorize some or all public water systems to use water from certain or all sources of supply as necessary to meet public needs, these statutes almost invariably require compensation to affected riparian owners. *See* 1 *Waters and Water Rights* § 7.05 (2019). Since the legislative body in New Union does not have any regulatory framework in place to solve the issue, this Court must apply reasonableness in order to preserve the rights recognized to at least some flow in the Green River. "Nothing was made by God for man to spoil or destroy . . . Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man." John Locke, *Second Treatise of Civil Government*, Chap. V. of Property, Sec. 31-33 (1689).

Locke, as one of the founders of American property law, clearly recognizes that there are limits to using the land, and that limit is whenever a use unreasonably injures another. This principal of reasonableness is so deeply rooted in property, tort, and contract law that it becomes patently erroneous to leave unchecked an obvious transgression like the one caused by Greenlawn. The City of Greenlawn, whether receiving a municipal preference or not, cannot completely stop the flow of water to the Green River if doing so interferes with the rights of other public users.

The principles of reasonableness are a contribution from many influencers of American and English law. James Kent, who has long been remembered for his *Commentaries on American Law* cited Justice Story's opinion in *Tyler v. Wilkinson* in his discussion of water rights, and stated the rule to be: "All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a *reasonable* manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors below on the stream." 3 Kent, Commentaries 354 (1st ed. 1828) (*quoting Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827)) (emphasis added). This holding in *Tyler v. Wilkinson*, and the commentaries of James Kent represent the establishment of the reasonable use doctrine.

Another persuasive case that shows aptly the possible bounds of the reasonable use doctrine is *Webb v. Portland Mfg.*, Justice Story again so instructively held, "[w]here there is a mere fugitive and temporary diversion of water, without damage, and without pretense of right, a court of equity will not interfere, by way of injunction." *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838). In *Webb*, the learned court found reasonable a defendant's diversion of water because the diversion went around his mill and then flowed back into the dam. The principle is that property rights in the water itself are only to the extreme that the supply of water may still be useful to others.

The reasonable use theory requires courts to compare the benefit of one use against the benefit of another, incompatible use, to determine which use is reasonable. *See* 1 *Waters and Water Rights* § 7.02 (2019). "Just how one calculates this balance of reasonableness has never been made clear, although courts began in the nineteenth century to acknowledge the process." *Id.* Courts will decide whether a use is reasonable by comparing the economic and social cost to the plaintiff caused by the defendant's conduct to the economic and social cost to the defendant of modifying the defendant's conduct to accommodate the plaintiff's use. This process is necessarily complex and difficult. Courts therefore often seek to abort the process by giving special attention to whether the harm to one or the other could be avoided or minimized by adjusting either the amount or the method of use by one or both users. *Id.*; *See, e.g.*, *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 81 P.2d 533 (1938) (holding that neither a lower nor an upper riparian is entitled to the full flow of the stream as it existed in a state of nature); *Half Moon Bay Land Co. v. Cowell*, 173 Cal. 543, 160 P. 675 (1916) (finding that a riparian owner is entitled to use his reasonable share of the water on riparian land at any time he may choose to do so); *Stamford Extract Mfg. Co. v. Stamford Rolling Mills Co*., 101 Conn. 310, 125 A. 623 (1924) (supporting the theory that parties are injured as to such rights by use of water by an upper riparian owner which unreasonably diminishes or unreasonably pollutes it); *Hazard Powder Co. v. Somersville Mfg. Co*., 78 Conn. 171, 61 A. 519 (1905) (using a broad approach to determine temporal considerations involving defendant's reasonable use of a dam); *Rock Mfg. Co. v. Hough*, 39 Conn. 190 (1872) (holding that respondent would be enjoined from unreasonably using the water by operating his mills at night, as the intention of the parties was that their agreement should subserve their common interests, which was best done by using the water only during the working hours of the day in dry seasons, when all could use it to advantage); *Willis v. City of Perry*, 92 Iowa 297, 60 N.W. 727 (1894) (holding a

city liable for overconsuming water supply.); *Parker v. American Woolen Co*., 195 Mass. 591, 81 N.E. 468 (1907) (holding riparian proprietor may use stream in such reasonable manner "according to usages and wants of community, as will not be inconsistent with like use by other proprietors above and below"); *Bollinger v. Henry*, 375 S.W.2d 161 (Mo. 1964) (finding that reasonable use of waters of non-navigable stream by riparian owners is a question of fact depending on the circumstances, including volume of water, seasons, climatic conditions, and needs of other riparian proprietors); *Wilson v. Dressler*, 52 Va. Cir. 410 (2000), 2000 Va. Cir. LEXIS 305 (Preliminary injunction against defendant granted because plaintiff had a riparian right to the undiverted flow and defendant's use was unreasonable).

The prodigy of cases above clearly shows that when overconsumption becomes an issue, the party's use that is infringing the uses of others needs to be modified. This is not to say that Greenlawn's residents need to stop withdrawing water from the Green River entirely, but when the Howard Runnet Lake levels drop to drought conditions, they may only withdraw water in amounts that allow the Green River to keep flowing water downstream. By enjoining Greenlawn from consuming all of the flow in the Green River, this court will force Greenlawn and ACOE to come up with alternative ways to fulfill their municipal needs. It is appropriate for a court to determine what those measures are, but rather Greenlawn and ACOE should determine how they can solve the problem. If the economic considerations force Greenlawn to limit the uses of its customers during drought conditions, then Greenlawn would have the ability to implement those conservation measures. If Greenlawn decides that it can supplement its water needs from a different water supply, such as the Progress River, it has the ability to build that infrastructure. The fact of the matter is that there is no place in any of the preceding case that would allow a

municipality to completely stop the flow of the river without either being held liable for the losses to other users or modifying their consumptive practices.

The reasonable use doctrine, if recognized by this Court offers a way to resolve the conflicts between riparian users, creates a framework that analyzes each use on a case by case basis by considering any and all social, economic, and environmental factors. The District Court simply did not consider any of the relevant social, economic, or environmental factors when it ordered summary judgment for the Appellees. Because none of these considerations were weighed by the court-which is required by common law principles established by the reasonable use doctrine-there has been an error as a matter of law. Based on these standard's pronounced throughout the reasonable use doctrine common law, this court must reverse the District Courts opinion and remand this issue for a trial on its merits and to consider any relevant economic, social, or environmental factors and whether Greenlawn's withdrawals during drought conditions are reasonable.

## II. THE OPERATION OF HOWARD RUNNET DAM WORKS DURING DROUGHT CONDITIONS TO PROVIDE FLOW TO GREENLAWN IS A DISCRETIONARY ACTION SUBJECT TO THE CONSULTATION REQUIREMENT WITHIN § 7 OF THE ENDANGERED SPECIES ACT, 16 U.S.C. § 1536.

The jeopardy consultation requirement in § 7(a)(2) of the ESA requires all federal agencies to consult with the Fish and Wildlife Service (FWS) to "insure that any action authorized, funded, or carried out by such agency (. . . 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). The term "agency action" has been interpreted by regulation to mean any action where "there is discretionary Federal

involvement or control." 50 C.F.R. § 402.03; *see Nat'l Ass'n of Home Builders v. Defs. of Wildlife*. 551 U.S. 644 (2007) (applying *Chevron* deference to § 402.03). As such, the test for agency action under § 7(a)(2) is two-fold: (1) "whether a federal agency affirmatively authorized, funded, or carried out the underlying activity," and (2) "whether the agency had some discretion to influence or change the activity for the benefit of a protected species." *Ctr. for Biological Diversity v. United States EPA*, 847 F.3d 1075, 1090 (9th Cir. 2017) (quoting *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012)). Agency action is to be construed broadly. *Id.* Additionally, the determination that consultation is required is entitled to *Auer* deference only if made by the FWS or the NMFS. *Home Builders*, 551 U.S. at 672 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Therefore, the ACOE's determination that consultation is not required is not entitled to any deference.

The "affirmative action" in this case is the deviation from the Water Control Manual (WCM) during drought conditions. After pressure from Greenlawn, the District Commander altered the flows into the Bypass Reach from 7 CFS to 30 CFS, on April 23, 2017. This alteration of flows is the action that the ACOE should have consulted with FWS on in this case. *See* 50 C.F.R. § 402.02 (defining action as including "actions directly or indirectly causing modifications to the land, water, or air"). Because the alteration of the flow of water is an action, we now turn to whether the ACOE had the requisite discretion.

The ACOE maintains discretion in its operation of the Howard Runnet Dam Works (the dam). The only governing authority of the dam is the WCM, which does not have the same authority of a statute. The ACOE's statutory authority to operate the dam and its duties under the ESA is best characterized as being complementary rather than in opposition. The authorization for the dam comes from the River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945), and

the Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958). The purposes of the dam include flood control, hydroelectric power, recreation, and fish and wildlife purposes. Nowhere is a statutory mandate as to how the ACOE must operate the dam; instead it must operate the dam for those purposes.

In *Home Builders*, the United States Supreme Court found that the statutory mandate of § 402(b) of the Clean Water Act (CWA), 33 U.S.C. § 1342(b), conflicted with the jeopardy consultation requirement of § 7(a)(2) of the ESA. 551 U.S. at 669. Section 402(b) of the CWA provides a mechanism for States to implement their own permit programs under the CWA. It specifically directs "[t]he Administrator shall approve each such submitted program," if nine enumerated criteria are met. 33 U.S.C. § 1342(b); *see Home Builders*, 551 U.S. at 663 ("The provision operates as a ceiling as well as a floor.") The inclusion of ESA § 7(a)(2) would alter the statutory mandate set by Congress in the CWA. *Home Builders*, 551 U.S. at 663-64. The EPA administrator was required by the CWA to approve State programs if the listed criteria are met. *Id.* at 669. Because the criteria listed in § 402(b) are the only criteria for the EPA administrator to consider, the agency lacked the discretion required for an ESA § 7(a)(2) consultation. *Id.* at 673. Otherwise, the ESA would have implicitly repealed this provision of the CWA and potentially many other statutory provisions where agencies lack discretion. *Id.* at 664.

This approach to the ESA conflicting with other statutory mandates has been followed in other cases. See e.g., *Coal. for a Sustainable Delta v. FEMA*, 812 F. Supp. 2d 1089, 1132 (E.D. Cal. 2011) (holding FEMA's "issuance of flood insurance to qualified applicants is *mandatory*") (emphasis in original); *Grand Canyon Tr. v. United States Bureau of Reclamation*, 691 F.3d 1008, 1019 (9th Cir. 2012) (holding annual operating plan required by statute was "a mere description of how Reclamation in the past year has, and in the upcoming year will, operate the Dam '*under*

*the adopted criteria*'" of the statute) (emphasis added); *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225 (9th Cir. 2015) (holding no discretion when approval of oil spill response plans was mandated by six statutory criteria).

However, an agency maintains discretion when competing statutes have "different, but complementary purposes," *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005), or, stated differently, when Congress has directed an agency to achieve particular goals. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928 (9th Cir. 2008). Where compliance with both the ESA and a statute administered by an agency is possible the agency retains discretion. *See e.g., Am. Rivers, Inc. v. United States Army Corps of Eng'rs*, 421 F.3d 618, 631 (8th Cir. 2005) (noting that the Flood Control Act of 1944 does not mandate particular action, but allows a balance of interests); *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1142 (11th Cir. 2008) (noting one of FEMA's statutory purposes in developing insurance discounts is to consider the protection of "natural and beneficial floodplain functions"); *Wildlife*, 524 F.3d at 928 (holding statutory purposes for "flood control, irrigation, and power production" from dams not inconsistent with the ESA requirements).

A recent case dealing with substantially similar facts as the current case is *Wildearth Guardians v. United States Army Corps of Eng'rs*. 314 F. Supp. 3d 1178 (D.N.M. 2018). The issue in that case was whether the ACOE needed to do a § 7(a)(2) consultation based on its operations on Middle Rio Grande Project (the Project), specifically relating to dams and water flow. *Id.* at 1183-85. Two listed species are impacted by the Project, the Rio Grande silvery minnow, and the southwestern willow fly catcher. *Id.* at 1184. The ACOE jointly with the Bureau of Reclamation consulted with FWS in 2000 leading to the 2003 Biological Opinion (BiOp) which expired in 2013. *Id.* at 1186. Initially, the ACOE sought to reconsult with FWS individually for the new BiOp

but withdrew from consultation deciding to first internally examine its actions and legal obligations on the project to determine whether the ACOE maintained the requisite discretion to trigger § 7(a)(2). *Id.*

The ACOE then prepared the 2014 reassessment cataloguing and determining its discretion over 13 actions. *Id.* Because the reassessment involved the Crops interpretation of statutes it administers the district court granted *Skidmore* deference. *Id.* at 1193; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding agency's nonbinding interpretation of its authorizing statute has the "power to persuade"); *but see Home Builders*, 551 U.S. at 672 (holding FWS, not the acting agency, determination that an action is discretionary is entitled to *Auer* deference). While it is unclear whether *Skidmore* deference should be given to the acting agency's interpretation of "discretionary action," under FWS regulations, within its own statute, it does not matter in this case because the because the ACOE is interpreting its own guidance document, the WCM, and its agreements with Greenlawn—not its authorizing statutes.

The 2014 assessment determined that all 13 actions by the ACOE on the Project were non-discretionary. The district court ruled in favor of the Corps, holding the 2014 reassessment was not arbitrary or capricious. *Wildearth*. 314 F. Supp. 3d at 1205. The district court primarily relied on the ACOE argument that it lacked discretion under a statutory mandate found in the Flood Control Act (FCA) of 1960, 86 P.L. 645, 74 Stat. 480, (1960) which governed operations of the dams along the Project.

Unlike the cases where complementary but different purposes were found between the ESA and another statute, the district court pointed out that the FCA of 1960 mandated that "all . . . reservoirs constructed by the [ACOE] . . . as a part of the Middle Rio Grande project will be operated *solely* for flood control and sediment control." *Wildearth*, 314 F. Supp. 3d at 1194

(quoting 86 P.L. 645) (emphasis in original). The district court found that 1960 FCA § 203(b) created a floor and a ceiling as to the amount of water the ACOE dams could release during the summer months. *Id.* at 1195-96. Other parts of the 1960 FCA similarly mandated activity by the Corps; such as, mandating "maximum rate of flow that can be carried at the time . . . without causing flooding of areas protected by levees or unreasonable damage to channel protective works." During the spring flood season. *Id.* at 1196 (quoting 86 P.L. 645 § 203(a)). These statutory mandates are most similar to the CWA § 402(b) mandate discussed in *Home Builders*; the ACOE is obligated by statute to take these actions when triggering events or criteria occur. *Home Builders*, 551 U.S. at 669. As a result of the conflicting statutory obligations between the 1960 FCA and the ESA the court held that the discussed actions under these statutes were discretionary. *Wildearth*, 314 F. Supp. 3d at 1196 ("The ESA cannot implicitly repeal and rewrite the 1960 FCA to add another reason to deviate from the strict operating schedule.")

The *Wildearth* court also addressed the effect of the subsequent Fish and Wildlife Coordination Act (FWCA) of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958), on the ACOE operations on the Project. The FWCA added fish and wildlife purposes to all federal water projects, including the Rio Grande Project at issue in *Wildearth*, and the Howard Runnet Dam Works in the current case. 16 U.S.C. § 661 ("[W]ildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of this Act in the United States.") The *Wildearth* court pointed out that the FWCA is limited so as to not conflict with the original purposes of the Project. *Wildearth*, 314 F. Supp. 3d at 1200-01 (quoting 16 U.S.C. § 662(c) ("*provided*, That for projects authorized by a specific Act of Congress before the date of enactment of the [FWCA] (1) such modification or

land acquisition shall be compatible with the purposes for which the project was authorized.") (emphasis in original))

The same argument as to the Corps' discretion under the 1960 FCA defeated application of the FWCA. The statutory mandate in the 1960 FCA makes the new purposes of the FWCA incompatible with the Projects original authorization. *Id.* at 1201. The court also used the statutory interpretation canon "that the specific governs the general" to reason that the specific provisions of the 1960 FCA were not changed by the general provisions of the FWCA. *Id.* While the FWCA still applies generally the "the specific provisions [of the 1960 FCA] governing the specific operation in the specific geographic area controls over conflicting statutes of general applicability." *Id.*

Lastly, the *Wildearth* court distinguishes itself from numerous cases where dams or other federal water projects were authorized under difference statutes. *Id.* at 1201-02. The court distinguished cases dealing with the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944), where that act provided for "other purposes." *Wildearth*, 314 F. Supp. 3d at 1202. *See e.g.*, *In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1152-53 (D. Minn. 2004) ("This 'unified' plan was intended to 'secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation' in the Missouri River."); *Am. Rivers v. United States Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 252 (D.D.C. 2003) (holding the ESA is one of the "other interests" in the 1944 FCA).

The case it hand is more similar to the cases dealing with the 1944 FCA than the *Wildearth* case, because the River and Harbor Act (RHA) of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945), does not mandate the ACOE take any specific action but generally allows the ACOE to operate the dam for its multiple purposes. The Howard Runnet Dam Works was originally authorized for

flood control, hydroelectric power and recreation purposes. *New Union Oyster Catchers, Inc. v. United States Army Corps of Eng'rs*, No. 66-CV-2017, at 13-14 (D.N.U. May 15, 2019) (citing Pub. L. No. 79-14). Nowhere in the 1945 RHA is the operation of the dam curtailed to a specific operation in the way that the 1960 FCA mandate forces the ACOE to hold or release water in the Rio Grande during the flood or dry seasons.

The only language limiting discretion in the 1945 RHA is in § 1(b):

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

This section does not apply to the dam, because the State of New Union, the Green River, and its tributaries all lie east of the 97th meridian. *Oyster Catchers*, at 6 n.i. As such the ACOE's discretion is not limited by § 1(b).

The only control over the ACOE operations at the dam is the WCM, which is a guidance documents lacking the authority of a statute. *See Am. Rivers v. United States Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 252-53 (D.D.C. 2003) (distinguishing between statutory discretion in the 1944 FCA and Master Manual governing operations along the Missouri River). In fact, the action at issue in this case is a deviation from the operating procedures established by the WCM, showing that the Crops have discretion even over that document.

This discretion is bolstered by the FWCA specifically adding fish and wildlife purposes to the operation of the dam. Unlike in *Wildearth*, there is no specific-general issue between these two statutes because they both operate in general terms. Furthermore, the limiting language of the FWCA does not apply, because there is no indication that fish and wildlife purposes are incompatible with the original purposes of the dam. Neither the RHA, the FWCA, nor the ESA

are in conflict. This is clearly a case where the ESA and the statutes authorizing the dam have complimentary purposes, leaving discretion with the ACOE to simultaneously fulfill its obligations under both.

*A. The agreements to respect Greenlawn's riparian rights must give way to the ESA.*

The ACOE entered into an agreement with Greenlawn to maintain flows in the Bypass Reach sufficient to allow the City of 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." These agreements with respect to Greenlawn's riparian rights do not affect the ACOE's discretion in the operation of the dam. The Supreme Court's holding in *Home Builders* was specific to conflicting mandates in federal statutes, the ESA and the CWA, not as part of an agreement between a federal agency and another party. 551 U.S. at 669 ("[Section] 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required by statute* to undertake once certain specified triggering events have occurred.) (emphasis added). The agreements between the ACOE and Greenlawn simply do not rise to the level of a federal statute. Furthermore, contracts where the federal government is a party may be modified by subsequent legislation. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999).

The agreement respecting Greenlawn's riparian rights is subservient to the ACOE's obligations under the ESA. Multiple agreements entered into prior to the enactment of the ESA, or the listing of a species, have been held to be modified by the ESA. See e.g., *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) (holding plaintiffs' water rights subservient to the ESA in 1956 water supply contract); *Nat. Res. Def. Council v. Houston*, 146

F.3d 1118, 1126 (9th Cir. 1998) ("Even if the original contracts guaranteed the Non-federal Defendants a right to a similar share of available water in the renewal contracts, the Bureau had discretion to alter other key terms in the contract, and the Bureau may be able to reduce the amount of water available for sale if necessary to comply with ESA."); *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995) (holding a contract with the federal government implicitly contemplates future changes in the law). The issue is whether the acting agency "retains some measure of control over the activity." *Id.* (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995). This is because "Congress' power to exercise sovereign authority 'will remain intact unless surrendered in unmistakable terms.'" *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995) (quoting *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986)). Contracts with the federal government do not need to explicitly reserve this authority, it is implicit in all contracts with the government as a party. *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986) (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147-48 (1982)).

As discussed, the ACOE maintains control or discretion over its operations of the dam. The AOCE owns and operates the dam under federal law including the ESA. *See Klamath*, 204 F.3d at 1213. Also, the agreements with Greenlawn do not surrender the authority of ACOE in unmistakable terms. In *O'Neill v. United States*, the court found the water supply contract "was executed pursuant to the 1902 Reclamation Act and all acts amendatory or supplementary thereto." 50 F.3d at 686. This was not an unmistakable surrendering of authority, and the ESA could modify the amount of water delivered under the contract even though it was not an amendment to the 1902 Reclamation Act. *Id.* Here, the agreement states that ACOE will maintain flows into the 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." *Oyster Catchers*, at 6. These terms do not surrender

the ACOE unmistakably to maintain a specific rate, nor do they surrender sovereign authority of the federal government over one of its projects, nor are they sufficiently certain to eliminate ACOE's discretion on flow into the Bypass Reach.

This agreement can also be distinguished from the agreements in the *Wildearth* case. There the agreements were mandated by statute in the same way that the ACOE's operations on the Rio Grande Project were mandated by the 1960 FCA. *Wildearth*, 314 F. Supp. 3d at 1197. The San Juan-Chama Act allowed water contracts "for storage of up to 200,000 ac-ft of that water in Abiquiu Reservoir" and releases of that stored water to contracting entities. *Id.* (citing 97 P.L. 140, 95 Stat. 1717). Not only does the contract in the *Wildearth* case has statutory authority to remove agency discretion, its terms are also sufficiently certain. The ACOE may *store and release* the water it to contracting parties. In the current case, the ACOE is required to maintain flows into the Bypass Reach, but the exact flows are subject to change, and therefore subject to discretion. Furthermore the ACOE is not merely storing the water for Greenlawn, but is also generating hydroelectric power, maintaining flood controls, and other uses at its dam operations.

Lastly, the common law riparian rights of Greenlawn must give way to the ESA under the supremacy clause. U.S. Const. art. VI, cl 2.; see also Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use*, 2006 Utah L. Rev. 241, 307 (2006) (discussing cases where the ESA trumped state water rights); *see e.g.*, *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 732 (E.D. Cal. 1993), *aff'd sub nom. O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995) ("Even assuming, *arguendo*, that the Movants hold water rights based on statute which are broader than their contractual rights, they are not exempt from compliance with environmental statutes."); and *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp. 2d 990, 993 (D. Or. 1998), *aff'd*, 204 F.2d 1206 (9th Cir. 1999) ("Finally,

plaintiffs' rights to water in the basin, whether as third party beneficiaries to the 1956 contract or under their individual repayment contracts with Reclamation, are subservient to senior tribal water rights and to subsequent legislative enactments by Congress, such as the Endangered Species Act.")

In *Klamath*, the 9th circuit held that the plaintiffs water rights were subservient to both the ESA, a federal statute, and Tribal water treaty rights. 204 F.3d 1206, 1214 (9th Cir. 1999) (recognizing "only Congress can abrogate treaty rights" (citing *United States v. Dion*, 476 U.S. 734, 738 (1986)). Greenlawn's water rights come from New Union's common law, while the tribal rights to water in *Klamath* came from a treaty. Furthermore, it is incongruous that in exercising its water rights Greenlawn can be in violation of the ESA § 9 take provision, but in respecting Greenlawn's water rights the ACOE is immune from ESA § 7 consultation requirement.

## III. THE LOWER COURT CORRECTLY HELD THAT NUO IS ENTITLED TO SUMMARY JUDGMENT IN ITS FAVOR ON ITS CLAIM AGAINST GREENLAWN BECAUSE THE CITY, BY WITHDRAWING THE ENTIRE FLOW OF WATER FROM THE BYPASS REACH DURING DROUGHT CONDITIONS, VIOLATED ESA § 9.

ESA § 9 makes it unlawful for "any person" to "take" any "endangered species of fish or wildlife." 16 U.S.C. § 1538(a)(1)(B). Under the ESA, "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Greenlawn's unreasonable use of water in the Bypass Reach during drought resulted in the stagnation of the Green River, which in turn is a "take" of the oval pigtoe mussel.

*A. Harm to wildlife amounting to a take.*

"Harm," according to FWS regulations, 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.

While not without boundaries, this definition affords FWS significant leeway in determining what is or is not harm. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* – the seminal case on § 9 take violations – the Supreme Court upheld the Secretary of the Interior's right to exercise "broad administrative and interpretive power" in defining harm. 515 U.S. 687, 708 (1995). In that case, loggers and landowners were disallowed from engaging in logging activities in an area occupied by an endangered species, the red-cockaded woodpecker, and a threatened species, the spotted owl. *Id.* at 692. Their activities were forbidden under the Department of the Interior's definition of harm, which included habitat modification and degradation. *Id.* at 691.

Plaintiffs challenged the rule, arguing that Congress didn't intend an ESA "take" to include habitat modification or degradation. *Id.* at 693. The Court, in rejecting this argument, affirmed *Palila v. Hawaii Dept. of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981) ("*Palila I*"), wherein the Ninth Circuit found that "harm" was an ambiguous term that qualified the agency's own reasonable definition for Chevron deference. *Sweet Home*, 515 U.S. at 693, 703. The majority also upheld the FWS definition because Congress, following *Palila I*, amended the ESA without changing the definition of "take" that had been adopted by the FWS in 1975. *Id.*

The *Sweet Home* Court rejected Justice Scalia's dissenting view (and that of the respondents) that "harm" could only mean "affirmative conduct intentionally directed against a particular animal or animals." *Sweet Home*, 515 U.S. at 697, 720. The majority explicitly held that

harm could be direct or indirect, and did not have to be intentional: "unless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that [ESA] § 3 uses to define 'take.'" *Id.* at 697-98, 701 n.15.

As Judge Remus correctly noted in his opinion, Greenlawn cited "no cases to support its claim that only activities physically occurring on the habitat in question can be considered habitat modification. Instead, Greenlawn cite[d] only cases recognizing the self-evident proposition that direct physical habitat destruction, such as logging, is prohibited." *New Union Oyster Catchers, Inc. v. United States Army Corps of Eng'rs*, No. 66-CV-2017, at 16 (D.N.U. May 15, 2019); *see also* Steven Quarles & Thomas Lundquist, *Land Use Activities and the Section 9 Take Prohibition, in Endangered Species Act: Law, Policy, and Perspectives* 172 (2nd ed., 2010) ("The first sentence of the harm regulation shows that 'harm' is defined as a specific effect: 'an act which actually kills or injures wildlife' [while the second sentence] 'clarifies that the actual injury to wildlife could occur through an indirect mechanism: the habitat modification could 'significantly impair' essential behavioral patterns to the point that this causes actual injury or death to a member of a listed wildlife species.")

On the other hand, the FWS has made it clear that "habitat modification or degradation, standing alone, is not a taking pursuant to § 9." 46 Fed. Reg 54, 748 (1981). This position was later adopted explicitly by the Ninth Circuit in *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-25 (9th Cir. 1999) (citing *Sweet Home*, 515 U.S. at 700 n.13) (holding that "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife'").

Actually killing an animal is clear and unambiguous. But what qualifies as an injury? Courts have, at times, considered two different possibilities: an individual animal may be found to have suffered an injury, or an entire population may be found to have suffered an injury. The former option is "more strongly supported by the regulatory text, by FWS' contemporaneous regulatory interpretation, by the *Sweet Home* opinions and the United States' explanation of the harm rule to the Supreme Court, and by the subsequent lower court case law and law review commentary." Quarles, *supra*, at 172.

Finally, the habitat modification or degradation must lead to significant impairment of behavioral patterns. The injury to the animal in question cannot be considered synonymous with impairment of its behavioral patterns. "FWS' commentary accompanying its promulgation of its regulation defining 'harm' indicates that significant impairment of an essential behavioral pattern by itself should not be considered an 'injury.'" Steven Davison, *The Aftermath of* Sweet Home Chapter: *Modification of Wildlife Habitat as a Prohibited Taking in Violation of the Endangered Species Act*, 27 Wm. & Mary Envtl. L. & Pol'y Rev. 541, 577 (2003). Animals may, after all, suffer loss or alteration of habitat without being injured, as where they adapt to the change in conditions by finding alternative food sources, breeding grounds, or shelter. *Id.* at 577-79.

To reprise and simplify the § 9 elements at operation in the instant case, the court, to find a take, must locate: (1) significant habitat modification or degradation; (2) that significantly impairs essential behavioral patterns, including breeding, feeding or sheltering; (3) leading to death or injury of a threatened or protected species.

Taking these elements of harm one-by-one, it is clear that Greenlawn has violated § 9 of the ESA and the district court properly concluded that the city inflicted harm upon the oval pigtoe mussel, an endangered species.

The oval pigtoe mussel lives on "gravel or silty sand riverbeds with slow to moderate currents." *Oyster Catchers*, at 9. They also require the presence of sailfin shiner, a fish species upon which the mussels depend to propagate their population. *Id.* In 2017, defendants Greenlawn and ACOE's water withdrawals and curtailment of hydroelectric power releases, respectively, conspired to produce "severely reduced flows in the Green River." *Id.* Flow rates dropped from around 25 CFS per day to nearly zero. *Id.* This flow reduction caused "increased siltation, smothering mussel populations and eliminating necessary habitat." *Id.* Greenlawn's actions thus constituted a significant habitat modification or degradation.

This conclusion is supported by the holding in *Sweet Home*, where the Supreme Court held that the logging company's removal of certain trees in an area populated by two protected bird species was a significant habitat modification or degradation. It is also akin to the holding in *Palila I*, wherein the Ninth Circuit found that the grazing sheep and goats unleashed by Hawaii upon the palila's habitat for game management purposes qualified as a "significant environmental modification or degradation of the endangered animal's habitat" that amounted to a taking. *Palila I*, 639 F.2d at 496. In both cases, the defendants engaged, without malice, in significant habitat modification that negatively affected the protected species in an indirect way. Here, too, the City of Greenlawn changed the mussels' habitat, unintentionally threatening their chances for long-term survival.

As a result of defendants' habitat degradation, the mussels were unable to take shelter in their traditional habitat. *Id.* The inability to shelter oneself is one of the paradigmatic examples of impaired behavioral patterns enumerated in the FWS' regulations. 50 C.F.R. § 17.3. This fact alone amount to a significant impairment of essential behavioral patterns. Additionally, the fact that the low flow rates prevented the migration of the sailfin shiner,

which in turn prevented larval mussels from maturing, should be considered as a significant impairment of an essential behavioral pattern. *Oyster Catchers*, at 9. The situation is not unlike that in *Sweet Home*, wherein Justice O'Connor, concurring, worried that without an injunction against the logging company, the listed birds would find it impossible to reproduce, thus "impair[ing]" their "most essential physical functions" and "render[ing]" them and their "genetic material[] biologically obsolete." *Sweet Home*, 515 U.S. at 710 (O'Connor, J., concurring).

While in this case, the mussels are able to reproduce, the larval mussels are unable to reach maturity due to defendant's significant habitat modification. Thus, the effect here is the same as that in *Sweet Home*: the mussels' "genetic material" is being rendered "biologically obsolete" by the inability of successive generations to maintain the species, and this inability is caused by the significant change in behavior brought on by defendants' habitat modification.

Finally, the record indicates that the mussels have suffered – in the words of the regulation – a harm that "actually kills or injures" them. As a result of defendants' actions, around 25% of the Green River oval pigtoe mussel population died. *Oyster Catchers*, at 10. The entirety of the population is expected to die if these conditions continue. *Id.* And all parties agree that "based on recent trends and scientific assessments of precipitation patterns and temperature trends resulting from climate change," conditions like those in 2017 are "likely to occur again in the near future," rendering it foreseeable that the mussel population in the Green River will again be exposed to low water levels and again suffer harm amounting to a take under the ESA. *Id.* at 11.

The existence of historical harm distinguishes this case from *West Coast*, in which the court held for the lumber company in part because the government failed to demonstrate to a reasonable certainty that the defendant lumber company had committed (or was imminently threatening to commit) a take. *United States v. W. Coast Forest Res. Ltd. Pshp.*, Civil No. 96-1575-HO, 2000

U.S. Dist. LEXIS 19099 (D. Or. Mar. 10, 2000). Here, by contrast, all parties agree the harm is imminent. The case is also distinguishable in that there is no allegation that the oval pigtoe mussels here at issue – unlike the owls in *West Coast* – have access to an alternative habitat in which they could thrive or recover. *Id.*

The instant case is more akin to *Marbled Murrelet,* since there the court granted an injunction on the basis that the murrelet was facing an "imminent threat of future harm ... sufficient for the issuance of an injunction under the ESA." *Marbled Murrelet v. Pacific Lumber, Co.,* 83 F.3d 1060, 1064 (9th Cir. 1996). It also has similarities to *Sweet Home*, wherein the court found a take when logging interests made significant habitat modifications to the habitat of one threatened and one endangered species of bird. In both *Marbled Murrelet* and *Sweet Home,* the threats were indirect; neither defendant was charged with directly or intentionally killing, hunting, or injuring the animals themselves. Rather, they were charged with harming the protected species' habitats, obligating courts to find a take and triggering injunctive action.

Proving that a particular habitat modification produced (or will produce) significant impairment of behavioral patterns – which then caused (or will cause) harm or injury to a particular animal – can be difficult. Through at least the early 2000s, agencies and courts applying ESA section 9 to water use issues often ignored "the rich body of tort scholarship, legislation, and case law on causation," adopting instead an ad hoc approach to allocating responsibility for river flow deficits. James Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers,* 33 Environmental Law 595, 598 (2003). This is likely because, as Professor Rasband notes, the "element of proximate cause is notoriously malleable." *Id*. at 606. Since *Sweet*

*Home*, some cases "focus … on foreseeability," while "[i]n others, the test is directness. In many cases it is both." *Id.*

These issues are even more difficult when a take could be attributed to multiple parties. Here, Greenlawn might argue that its withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works cannot constitute a "take" because it was not the only cause of the reduced flow—the ACOE, in curtailing hydroelectric power releases, was also responsible for the flow reduction. This seems, at first glance, to be a compelling argument; "it is very difficult for plaintiffs to prove causation and to obtain injunctions where multiple parties are modifying the same habitats." Quarles, *supra*, at 178.

Fortunately, there are several cases that illustrate how causation might be traced in such situations. In *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, for instance, the Pyramid Lake Paiute Tribe of Indians alleged that the Navy's practice of leasing land and contiguous water rights in the Truckee River to Nevada farmers violated the Endangered Species Act, since the leases "seriously threaten[ed] the continued viability of an endangered species of fish" by making spawning difficult or impossible. 898 F.2d 1410, 1412-13 (9th Cir. 1990). Along with the farmers to whom the Navy had leased the land and water rights, multiple other upstream users – including municipal, industrial, and agricultural entities – also withdrew water from the Truckee River that flowed into Pyramid Lake, where the endangered fish lived. *Id.* After exploring the § 7 issues, the Ninth Circuit addressed whether the Navy had engaged in a take under § 9. *Id.* at 1419. The court declined to find a take, holding that it was unclear "that any one of the diversions of [the Truckee River] actually caused" the spawning difficulties facing the fish. *Id.* at 1420. Especially fatal to the Tribe's claim was the fact that, as Judge O'Scannlain wrote, "the Tribe fail[ed] to

distinguish the Navy from other users of Truckee River water" and "the Tribe itself diverts [river] water for its own use." *Id.*

In other cases, courts are more willing to find defendants committed a taking even if multiple parties are implicated, especially where the defendant's conduct was egregious and obviously causal of the harm inflicted. In *U.S. v. Glenn-Colusa Irrigation District*, for example, the District Court for the Eastern District of California held that the Glenn-Colusa Irrigation District was the proximate cause of a taking of a protected species. 788 F. Supp 1126 (E.D. Cal. 1992). The district had a contract allowing it to pump water from the Sacramento River. *Id*. at 1129. The National Marine Fisheries Service brought suit, alleging the district's pumping activity threatened the winter-run chinook salmon. *Id.* at 1128. The district defended on the basis that the true cause of harm to the salmon was not its own pumping activity but rather the fish screen installed and owned by the California Department of Fish and Game Commissioners (CDFGC) in which salmon continued to get entangled. *Id*. at 1133. The court rejected that argument, reasoning that whether there was or was not a screen, the district's pumping was harming the salmon, and it was this pumping that was at issue in the litigation. *Id.* The court further rejected the district's argument that California's definition of proximate cause rather than the federal common law definition of proximate cause should govern the suit. *Id.* at 1133-34.

We do not dispute that the ACOE as well as Greenlawn contributed to the reduced flow of the river. But the *Sweet Home* Court suggested that "harm" could be read to "incorporate ordinary requirements of proximate causation and foreseeability," while emphasized that "actual death or injury of a protected animal is necessary for a [harm] violation." *Sweet Home,* 515 U.S. at 691 n.2, 696 n.9, 700 n.13. Among these principles is the doctrine of multiple sufficient causes, which says that where multiple causes conspire to cause harm and it is unclear which of the causes actually

led to the harm, both parties are held liable, with each party being given the opportunity to prove that they were innocent. The doctrine is well-illustrated by *Summers v. Tice*, wherein three men were hunting together and two negligently fired their rifles at the same moment. 199 P.2d 1, 1-2 (1948). As a result of one shooter's negligence (and it was unclear which shooter it was), the third man was struck in the eye. *Id.* The court held that judgment against both defendants could stand despite the fact that it was not clear which one had in fact shot the victim. *Id*. at 3-4.

Here, likewise, Greenlawn should be found to have committed a take, even if responsibility lies with both Greenlawn and ACOE. Such a conclusion would be consistent with *Glenn-Colusa* and *Pyramid Lake.* In *Pyramid Lake,* the court rejected the plaintiff's claim because the Tribe failed to demonstrate "that any one of the diversions of [the Truckee River] actually caused the" spawning difficulties facing the protected fish. *Pyramid Lake*, 898 F.2d at 1420. Here, on the other hand, it is clear that the water withdrawals of ACOE and Greenlawn, together, led to reduced flows. As Judge Remus found in his opinion, "The curtailment of hydroelectric power releases, combined with Greenlawn water withdrawals, had severe effects on downstream Green River flows," leading to downstream flow rates dropping to nearly zero. *Oyster Catchers*, at 9. Moreover, the NUO is wholly blameless insofar as the problem of reduced flows is concerned, unlike the plaintiff in *Pyramid Lake*.

While in *Glenn-Colusa*, the court found that only one party – the district – was the cause of taking the winter-run chinook salmon, it admitted that the district might have valid legal claims against the California Department of Fish and Game. Still, the court emphasized, those claims did "not absolve it from its responsibility under federal law to avoid any taking of the winter-run salmon." *United States v. Glenn-Colusa Irrigation Dist*., 788 F. Supp. 1126, 1133 (E.D. Cal.

1992). Here, similarly, the City of Greenlawn had an affirmative duty not to engage in a taking of endangered oval pigtoe mussels, yet it did so anyway.

## IV. NUO IS ENTITLED TO INJUNCTIVE RELIEF BECAUSE BOTH THE ESA AND CASE LAW DEMAND IT IN CASES OF SECTION 9 VIOLATIONS.

The City of Greenlawn would argue that the instant case should be governed by common law injunction factors. We need not address these factors here, however, since they are abrogated by statute.

In 1978's *Tennessee Valley Authority v. Hill*, the Supreme Court held that courts may not make "fine utilitarian calculations" to balance public benefits or agency action against species eradication. 437 U.S. 153, 187 (1978). The ESA compels the federal government, the Court's view, to "halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184-85. Moreover, the Court found, Congress had rejected statutory language that would have allowed an agency to weigh the preservation of species against the agency's primary mission. *Id.* at 185. Applying these principles, the Court held that Congress had explicitly removed from the federal courts authority to balance competing interests in deciding whether to issue an injunction in cases of an ESA violation. *Id.*; *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) (holding that Congress "foreclosed the exercise of traditional equitable discretion by the courts" when those courts redress ESA takings). While the case nominally dealt with a § 7 violation, lower courts have consistently applied it to procedural violations of § 9. *See e.g.*, *Marbled Murrelet*, 83 F. 3d at 1064 (ESA authorizes citizen suits "to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof"); and *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir.

1994) ("In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests.")

For courts to grant an injunction, the plaintiffs need only show "to a reasonable certainty" that the proposed habitat degradation "will result in significant habitat modification that actually kills or injures the" listed species by significantly impairing their essential behavior patterns. *United States v. West Coast Forest Resources Ltd. Pshp*., 2000 U.S. Dist. LEXIS 19099, at *13 (D. Or. Mar. 10, 2000). This standard has also been used by the Ninth Circuit in *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 1999) (*quoting Marbled Murrelet*, 83 F.3d at 1066 ("a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA")).

A historic harm "is relevant but not sufficient" for meeting this standard. Patrick Parenteau, *The Take Prohibition, in Endangered Species Act: Law, Policy, and Perspectives* (2nd ed.) 154. In *National Wildlife Federation*, for instance, a number of trains struck and killed seven grizzly bears near Glacier National Park. *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1509 (9th Cir. 1994). Despite the damage done, the Ninth Circuit found "no clear evidence that the [train] operations will result in the deaths of members of a protected species" and thus declined to issue an injunction. *Id.* at 1512. "While we do not require that future harm be shown with certainty before an injunction may issue," Judge Goodwin wrote, "we do require that a future injury be sufficiently *likely*" *Id.* (emphasis in original).

Here, NUO clearly meets this standard. Not only have the Green River oval pigtoe mussels suffered a harm amounting to a take – losing some 25% of their population – but their entire number is expected to die if the low-flow conditions continue. *Oyster Catchers*, at 9. All parties agree that "based on recent trends and scientific assessments of precipitation patterns and

temperature trends resulting from climate change," conditions like those that led to the initial harm are "likely to occur again in the near future," making it "sufficiently likely" that the mussel population in the Green River will again be exposed to low water levels and again suffer harm amounting to a take under the ESA. *Id.* at 11.

For the foregoing reasons, we ask this Court to affirm the district court's holding that NUO "has established beyond dispute that Greenlawn's water withdrawals during drought conditions pose a reasonably certain threat of imminent harm to oval pigtoe mussels" and "an injunction prohibiting Greenlawn from making water withdrawals that have the effect of reducing downstream flows below the rate necessary for mussel survival" is warranted. *Id*. at 18.

## CONCLUSION

For the foregoing reasons Appellants ask that this honorable Court rule in their favor on all issues.