Team 5

CA. No. 19-000987

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,

Plaintiff - Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant - Appellee,

and

THE CITY OF GREENLAWN, NEW UNION

Defendant - Appellant.

Appeal from the United States District Court for New Union in No. 66-CV-2017, Judge Romulus N. Remus.

BRIEF FOR UNITED STATES ARMY CORPS OF ENGINEERS

Appellee

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The U.S. Court of Appeals for the Twelfth Circuit has appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291 (2012). Plaintiffs, New Union Oystercatchers, Inc., and Defendant, the City of Greenlawn, have filed a timely Notice of Appeal following the Order of the District Court dated May 15, 2019 in Civ. 66-2017. This Notice of Appeal was granted by the Twelfth Circuit, ordering the following issues be briefed.

ISSUES PRESENTED FOR REVIEW

1. Does the City of Greenlawn have the right, as a riparian landowner, to continue water withdraws for municipal purposes during a drought without any water conservation measures?

2. Is the operation of Howard Runnet Dam Works, during drought conditions to provide flow to the City of Greenlawn, a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act?

3. Does the City of Greenlawn's withdrawal of nearly all 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?

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

STATEMENT OF THE CASE

A. Statement of Relevant Facts

Oval pigtoe mussels are a federally listed endangered species, living downstream of the confluence of the Bypass Reach and the Howard Runnet Dam tailrace. R. at 9. Plaintiff's expert offered uncontradicted deposition testimony that a minimum flow of 25 cubic feet per second ("CFS") averaged over 24 hours is necessary to prevent extirpation of the Green River oval pigtoe mussel population. *Id.*

The defendant, City of Greenlawn, ("Greenlawn"), New Union, lies on both historical banks of the Green River. R. at 5. Greenlawn owns both sides of the Bypass Reach, as well the

underlying riverbed. *Id.* Greenlawn has maintained municipal water intakes to the Bypass Reach since the City's founding in 1893. *Id.*

The Bypass Reach was created when the United States Army Corps of Engineers, ("ACOE"), built the Green River Diversion Dam and the Howard Runnet Dam on the Howard Runnet Lake in 1948, referred to as Howard Runnet Dam Works, ("HRDW"). R. at 6. The HRDW were authorized by Congress in the River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945), and were completed in 1948. *Id.* The Dam was originally authorized for flood control, hydroelectric power, and recreational purposes, and later amended to add fish and wildlife purposes, under the Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958). *Id.*

The design of the HRDW would cut off the natural flow to the Bypass Reach and Greenlawn's water supply. *Id.* The ACOE entered into an agreement with Greenlawn to maintain flows in the Bypass Reach sufficient to allow Greenlawn to continue water withdrawals "in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." *Id.*

The ACOE operation of the HRDW is governed by a Water Control Manual ("WCM"), last revised in 1968. *Id.* When the WCM was adopted, there were practically no consumptive uses of water in the Green River watershed upstream of Howard Runnet Lake. R. at 8. When lake levels drop below the seasonal target levels, the WCM provides for downstream releases to be curtailed in accordance with the following lake level zones:1) Zone 1 (Drought Watch - all recreational releases curtailed; 50 CFS for fishing and wildlife; 50 CFS to Bypass Reach; 200 CFS for hydroelectric release); 2) Zone 2 (Drought Warning - all recreational curtailed; 7 CFS to the Bypass Reach; 200 CFS for hydroelectric); 3) Zone 3 (Drought Emergency - all recreational

releases curtailed; 7 CFS to Bypass Reach; hydroelectric curtailed). R. at 7. The flow rate in the Bypass Reach during drought warnings and drought emergencies was based on the annual average water demand in Greenlawn in 1968. *Id.*

In addition to these specific operating provisions, the WCM has a general provision which states in pertinent part that, "At all times the [HRDW] shall be operated in a manner that complies with any water supply agreements entered into by the [ACOE] and with the riparian rights of property owners established under New Union laws." R. at 7-8.

Drought conditions have become more frequent in the 21st century. R. at 8. Zone 1 levels were reached in Fall 2016 and persisted into the Spring of 2017, when the lake levels reached Zone 2 (Drought Warning) conditions and the ACOE instituted flow restrictions of 7 CFS to the Bypass Reach, as provided by the WCM. *Id*. Greenlawn immediately protested. *Id.* The ACOE complied and increased the water releases to 30 CFS, and invoked Zone 3 guidelines of the WCM, the District Engineer ordered curtailment of hydroelectric power releases from the HRDW. R. at 9. Greenlawn's water withdrawals consumed nearly all of the flows in the Bypass Reach. *Id.*

The curtailment of hydroelectric power releases, combined with Greenlawn water withdrawals, had severe effects on downstream Green River flows. R. at 9. The severely reduced flows in the Green River in the Spring of 2017 essentially eliminated any possibility for the oval pigtoe mussels to remain submerged. *Id.* The curtailment of flows in the Green River led to stagnant, low water levels downstream. *Id.* The stagnant water increases siltation and smothers the Green River oval pigtoe mussels, and prevents sailfin shiner migration. *Id.* The sailfin shiner is an essential species that the mussels are dependent upon for survival. *Id*. Oval pigtoe habitat was exposed from the confluence of the Bypass Reach and the tailrace downstream to the estuary, 60 miles from the HRDW. *Id*. Plaintiff's expert offered uncontradicted deposition testimony that these

conditions resulted in the death of approximately 25% of the Green River oval pigtoe population. R. at 10. If allowed to persist, these conditions would entirely eliminate the Green River population of the oval pigtoe mussel. *Id.*

Plaintiff - Appellees, New Union Oystercatchers, Inc. ("NUO") is a not-for-profit membership association representing the interests of oyster fishermen of Green Bay. *Id.* Green Bay historically supported a thriving oyster industry, but reduced floodplain inundation has eliminated nutrient inflows into the estuary. *Id*. In 2016, oyster harvests produced only 50% of the oysters produced in 2000. *Id.* Its members have suffered reduced catches and declining incomes because of the smaller oyster harvests. *Id.*

After NUO informed the ACOE and Greenlawn of its intent to sue, heavy rains fell in the Green River watershed, filling Howard Runnet Lake back to Zone 1 levels and allowing resumption of flows for fish or wildlife purposes. R. at 11. This eliminated the immediate threat to the Green River oval pigtoe mussel population. *Id*. However, all parties agreed, based on scientific data, that Drought Warning conditions are likely to occur again in the near future. *Id*.

B. Procedural History

NUO filed suit against the ACOE and Greenlawn. R. at 4. Plaintiffs filed suit (case Civ. 66-2017) in the United States District Court of New Union. *Id*. NUO alleged violations of the Endangered Species Act ("ESA") in connection with Greenlawn's water withdrawals from the Green River and the ACOE's operation of the HRDW. *Id*. NUO moved for summary judgment declaring Greenlawn to be in violation of § 9 of the ESA, and the ACOE to be in violation of § 7 of the ESA. *Id*. The ACOE filed a cross-claim against Greenlawn, joining NUO's ESA claim against Greenlawn, and moved for summary judgment dismissing the ESA claims against it. *Id.*

Greenlawn cross moved for summary judgment to declare its rights as a riparian landowner and to dismiss the ESA claims against it. *Id*.

District Court Judge Remus issued Order of the District Court on May 15, 2019. R. at 1. Judge Remus dismissed the NUO claims under the ESA against the ACOE and declared Greenlawn's rights as riparian landowner. R. at 4. Judge Remus further held that Greenlawn violated § 9 of the ESA, 16 U.S.C. § 1538. R. at 5. The District Court issued an injunction against the water withdrawals by Greenlawn that would cause the flow of the Green River downstream from HRDW to drop below 25 CFS averaged over twenty four hours. *Id*. In issuing the injunction, the Court held that a court does not need to balance the equities of the municipal activity against the threat to the endangered species. R. at 2. Plaintiffs, NUO (now Appellants), and Defendants, Greenlawn (now Appellants), file a Notice of Appeal. R. at 1.

STANDARD OF REVIEW

Because the District Court's determinations were based on questions of law, the standard of review in this Court is *de novo.* The *de novo* standard applies when issues of law predominate in the district court's decision. *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000). Federal statutory interpretation, as well as Constitutional interpretation, are both questions of law to be reviewed under the *de novo* standard. *Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011); *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

Greenlawn has the right, as riparian land owner, to continue water withdrawals for municipal purposes during a drought without water conservation measures. The State of New Union follows the minority rule for riparian rights, as set out in *Tubbs v. Potts.* 45 N.U. 999 (1909). The minority rule recognizes the "right of a municipality to be a riparian landowner and withdraw

water as a supply to the benefit of non-riparian parcels within the municipality." Under the minority rule, Greenlawn has the right to withdraw water during a drought without conservation measures to supply its citizens with water for domestic use.

The ACOE operation of the HRDW is exempt from the consultation process under § 7 of the ESA. The Supreme Court has held that a federal agency is exempt from the process when the agency action is non-discretionary and required by law. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 673 (2007). Furthermore, the Department of the Interior specifically exempts non-discretionary actions from the consultation process. 50 C.F.R. § 402.03 (2018). The water release allowance to maintain the flow to Greenlawn's water intake facilities, the riparian landowner, is governed by the WCM. The ACOE is required to comply with the WCM, and therefore actions taken in compliance with the WCM are non-discretionary actions.

Under the deliberately broad definition of "take" in the ESA, Greenlawn violated the ESA by "taking" an endangered species. 16 USC § 1532(19). Greenlawn "took" the oval pigtoe mussel through its withdrawal of nearly the entire flow of water from the Bypass Reach during drought warning conditions. This "taking" did not need to be unilateral and direct. Greenlawn withdrew substantial amounts of water, and this was the but-for cause of the negative downstream impacts to the mussels. Greenlawn's behavior violated the ESA by "harming" the mussels through significant habitat modification that led to the death of mussels and their hosts, the sailfin shiner. 50 C.F.R. § 17.3 (2001). Greenlawn's behavior further harmed the endangered mussels by impairing essential behavioral patterns such as breeding and sheltering.

Finally, courts are required to balance the equities before enjoining a beneficial municipal activity, when the activity will cause the extirpation of an entire population of an endangered species. Even though a strong presumption exists favoring endangered species' interests, courts

must still consider the equities of the parties and determine if a great enough public interest exists to rebut the presumption favoring endangered species' interests.

ARGUMENT

This Court should affirm the District Court's decision that Greenlawn has the right, as riparian landowner, to continue water withdrawals for municipal purposes during a drought without water conservation measures, and that the operation of HRDW during drought conditions to provide flow to Greenlawn was a non-discretionary action exempt from the consultation requirement under the ESA. This Court should also affirm the District Court's determination that Greenlawn's withdrawal of nearly all the drought-reduced flow constituted a "take" of the oval pigtoe mussel under the ESA. Furthermore, this Court should reverse the District Court's determination that courts are not required to balance the equities before enjoining a beneficial municipal activity, when that activity will cause the extirpation of an entire population of an endangered species.

I. DEFENDANT, GREENLAWN, AS A RIPARIAN LANDOWNER, CAN CONTINUE WATER WITHDRAWALS FOR MUNICIPAL PURPOSES DURING A DROUGHT WITHOUT ANY WATER CONSERVATION MEASURES.

Under the laws of the State of New Union, the City of Greenlawn has the right to withdraw water for municipal purposes. Common law riparian rights are governed by the reasonable use doctrine, which exempts Greenlawn from implementing conservation measures due to the priority of domestic use. Under the minority rule, Greenlawn, as a riparian landowner, has the right to continue water withdrawals for municipal purposes during a drought without any conservation measures, even if it depletes the water in the Green River Bypass Reach ("Bypass Reach").

A. Greenlawn is a riparian landowner under the minority rule.

The District Court was correct in holding that Greenlawn has riparian landowner rights to the Bypass Reach. R. at 1. Under the common law riparian rights doctrine, a riparian landowner is one who owns land, bounded on either side by water. *Hendrick v. Cook*, 4 Ga. 241, 244 (1848). Greenlawn owns the riverside land on both sides of the Bypass Reach within Greenlawn's city limits; and it has exercised its right to withdraw water from the Green River to supply its inhabitants with water for domestic use since the city's founding in 1893. R. at 5.

Under common law, a landowner's riparian rights continue to exist even after an artificial change has been introduced into a stream or body of water.[1] In 1948, the Howard Runnet Dam Works ("HRDW") were created and the Green River ceased to be a free-flowing body of water. R. at 6. The design of the HRDW cut off the natural flow to the Bypass Reach and Greenlawn's water supply. *Id*. The ACOE entered into an agreement with Greenlawn to maintain flows to the Bypass Reach that provide Greenlawn with as much water as it is entitled to under the riparian property laws of New Union. *Id.* The agreement with ACOE reinforced Greenlawn's status as a riparian landowner after the ACOE instituted an artificial flow to the Bypass Reach. *Id.*

New Union follows the minority rule for riparian rights, as set out in *Tubbs v. Potts*, which "recognizes the right of a municipality to be a riparian landowner and withdraw water as a supply to the benefit of non-riparian parcels within the municipality." R. at 12. The New Union Court in *Tubbs v. Potts* followed well established jurisprudence when holding that the minority rule governs New Union. 45 N.U. 999 (1909). *See also, City of Canton v. Shock*, 66 Ohio St. 19, 63 N.E. 600

[1] 2 James Backmen & David Thomas, *A Practical Guide To Disputes Between Adjoining Landowners-Easements* § 13.03 (LexisNexis ed., 2019) . *See*, *Kray v. Muggli*, 84 Minn. 90, 86 N.W. 882 (1901); *Taggart v. Town of Jaffrey*, 75 N.H. 473, 76 A. 123 (1910); *Cloyes v. Middlebury Elec. Co*., 80 Vt. 109, 66 A. 1039 (1907).

(1902); *City of Philadelphia v. Collins*, 68 Pa. 106 (1871); *Barre Water Co v. Carnes*, 65 Vt. 626, 627 (1893). Based on the case law of the New Union Court, the common law riparian right of priority to water for domestic use extends to withdrawals by a municipality.

In *City of Canton*, the Supreme Court of Ohio held that a municipality situated on a natural flowing stream, in its entirety and as an individual entity, has the rights of a riparian landowner. 66 Ohio St. at 29. Canton, which is situated between the east and west forks of the Nimishiller Creek, established a system of waterworks on the west branch of the creek for its local water supply. *Id.* at 19. The city used as much of the water supply as was necessary for regular municipal use and to provide its inhabitants with water for domestic, commercial, and manufacturing purposes. *Id*. As the city grew and extended its waterworks, its water withdrawals increased in quantity, which reduced the water supply to the plaintiff's waterpower mill. *Id*. In the dry seasons of the year, there was not a sufficient supply of water to consistently run the mill. *Id.*

The court stated that "the water taken by the city from the stream for its own use, and so supplied to its inhabitants, is taken by virtue of its rights as a riparian proprietor. . ." *Id*. at 33. Since the use of water by Canton was a reasonable consumption, the court held that the city was not liable to the plaintiff's mill for any diminution, even if all of the available water was consumed. *Id*. Canton could only be liable for supplying water to people outside of the city limits, for transporting water away from the city for commercial use, or for using an unreasonable supply of water for power purposes. *Id*.

The holding in *City of Canton* establishes that a municipality may exercise its right to withdraw as much water as necessary for domestic purposes without considering the effect on lower riparian proprietors. This holding was expanded in the *City of Philadelphia v. Collins*, where the court held that the superior right to use water for domestic purposes applied to municipalities

" in a greatly exaggerated degree." 68 Pa. at 115. As the above cases show, Greenlawn has the right as a riparian landowner to withdraw water from the Bypass Reach to supply its inhabitants with water for domestic purposes.

B. Under the common law riparian rights doctrine, it is reasonable for Greenlawn to withdraw nearly all the water in the Bypass Reach for domestic purposes.

The State of New Union applies the common law riparian rights doctrine to the resolution of competing claims to water. R. at 11. Although New Union has not adopted specific legislation to resolve competing claims to water, the majority of riparian jurisdictions use a test of reasonableness. *Id.* As defined in §850A of *Restatement (Second) of Torts* ("*Restatement*"), a riparian landowner can only use as much water as is reasonable, so long as it does not interfere with the reasonable use of water by downstream riparian landowners. R. at 12.

Under §850A, "a reasonable use must be one that is beneficial and that fulfills some significant or worthwhile human need or desire." *Restatement*, §850A cmt. b. (1979). In modern times, "beneficial" has been expanded to include recreational and aesthetic purposes. *Id.* In *Tyler v. Wilkinson*, Justice Story explains that the requirement, that one's use may not interfere with another's use, does not preclude the diminution of water. 24 F. Cas. 472, 474 (C.C.R.I. 1827). In fact, Justice Story states that diminution will occur, and it must be allowed if the use is reasonable. *Id.*

The reasonable use theory aims at maximizing the beneficial use while minimizing the harm to others. *See generally* Robert E. Beck, *Waters and Waters Rights* § 7.02(d)(2) (1991). Under the rule of reasonable use, when there are two competing uses, the court must consider both the facts and circumstances of a particular case, and determine whether the interfering use is reasonable. *Harris v. Brooks*, 283 S.W.2d 129, 135 (1955). A riparian landowner only has the right to complain about another landowner's water use if the use is unreasonable. *Id.*

Under the common law riparian rights doctrine, the right to withdraw water for strictly domestic use is superior to any other use of water. *Id.* at 134. Under §850A, water for domestic uses is "so necessary to be preferred over others." *Restatement*, §850A cmt. b. Historically, the primary use of water has been for domestic purposes necessary to sustain human life, such as water for drinking and maintaining a small garden. Barton Thompson Jr. et al., *Legal Control of Water Resources* 32 (6th Ed. 2018). Greenlawn utilizes water from the Bypass Reach to supply over 100,000 local inhabitants within Greenlawn's city limits with water for domestic use. R. at 5. This utilization is its riparian right under the minority rule. R. at 12. Greenlawn's use of water for its lawn and ornamental plant demands is a reasonable domestic use, based on the historical preference of allowing domestic water for a "small garden." Thompson, *supra*, 32.

Greenlawn is exempt from imposing conservation measures on its inhabitants. Water for domestic use, unlike any other purpose, can be prioritized without the need to consider the impact of its use on other riparian landowners. R. at 12. §850A acknowledges that competing uses do not always stand on equal footing, stating "a person using water for domestic supply has a legal preference and need not reduce his use to accommodate persons using the water for other purposes." *Restatement*, §850A cmt. j. Under the *Restatement*, it is reasonable for a riparian landowner to consume all of the available water, if necessary, for domestic purposes. *Id*. Greenlawn's withdrawal of 20 million gallons per day ("MGD") is reasonable even if it consumes all the water in the Bypass Reach.

Regional drought has no effect on Greenlawn's right as riparian landowner to take water for domestic purposes. In the City *of Philadelphia*, the court established that "the existence of the extraordinary drought would in no respect alter the rights of the parties." 68 Pa. at 114. The priority

of domestic use may be "exercised at any time" and one's withdrawals do not need to be reduced "in time of drought to accommodate users for other purposes." *Restatement*, §850A cmt. c.

Additionally, in situations where the demand for water exceeds the supply and there is not enough for two reasonable uses, §850A directs courts to consider factor (h), "the protection of existing values of water, land, investment, and enterprises." *Restatement*, §850A cmt. a. In 1893, Greenlawn began supplying its inhabitants with water from the Green River for domestic purposes for over 50 years before the HRDW were created. R. at 5. After the construction of the HRDW, Greenlawn continued withdrawing water to supply its citizens with water for domestic use for nearly 70 years. *Id.* Although not irrefutable, §850A makes clear this long standing domestic use is intended to be protected under the rule of reasonableness. *Restatement*, §850A cmt. k.

C. Greenlawn's right as a riparian landowner to withdraw 20 MGD from the Bypass Reach is supported by its agreement with the ACOE and the Water Control Manual.

The HRDW are governed by the Water Control Manual ("WCM"). R. at 6. The WCM establishes parameters for allowing release of water from the dams, and provides for different target lake levels at different times of the year based on historical flows and water demands. *Id.* The WCM contains a general provision which states "*at all times* the [HRDW] shall be operated in a manner that complies with any water supply agreements entered into by the [ACOE], and with the riparian rights of property owners established under New Union law." R. at 7-8. (emphasis added). ACOE's agreement with Greenlawn specifies that the ACOE will maintain flows in the Bypass Reach sufficient to allow 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." R. at 6.

The court in the *City of Philadelphia v. Collins* established that "a party cannot justify himself for violating an agreement by any severity or stress of weather." 68 Pa. at 114. Philadelphia

used water from the Schuylkill River to supply the city with power during a severe drought to the extent that it prevented navigation of the channel. *Id*. at 106. The court found that the city's right to take water from the Schuylkill River for waterpower existed to the extent given in a contract established between the City of Philadelphia and Schuylkill Navigation Co. *Id.* at 114. The contract limited the city's right to take on the condition that the city could not, at any time, reduce the water below the comb of the dam. *Id*. The court held that Philadelphia had no right to use the water as a propelling power if by doing so the city would breach its contract with the Schuylkill Navigation Co., by preventing navigation of the stream. *Id*. at 115.

Just as in the *City of Philadelphia*, Greenlawn's agreement with the ACOE and the WCM must be considered in determining Greenlawn's right to take water from the Bypass Reach. The WCM states that when lake levels reach Zone 2 (Drought Warning) and Zone 3 (Drought Emergency), a flow of 7 CFS shall be maintained into the Bypass Reach. R. at 7. However, the curtailed flow mandated by the WCM is incompatible with the WCM's general provision to provide Greenlawn with as much water as it is entitled to as a riparian landowner. R. at 7. The WCM's compliance with this provision is mandated by ACOE's agreement with Greenlawn. R. at 6-7.

Greenlawn's population has expanded since the WCM's last revision in 1968. R. at 6. From the time of the WCM's adoption until the 21st century, the flow restriction of 7 CFS was never applied. R. at 7. It wasn't until 2017 that the first flow restrictions were applied, almost 50 years after the WCM's adoption. *Id*. In the *City of Philadelphia*, the court stated that "the use of water for domestic purposes cannot be restrained by legislation or grant." 68 Pa. at 123. Greenlawn's citizens' need for water for domestic purposes has increased by necessity to 20 MGD, which gives rise to Greenlawn's right under the minority rule to withdraw up to 20 MGD. R. at 5.

The WCM's curtailed flows of 7 CFS during drought conditions do not adequately supply Greenlawn with the water it is entitled to as a riparian landowner. R. at 8. The WCM's operation of HRDW is in violation of the ACOE's agreement with Greenlawn. The WCM must conform with Greenlawn's right as a riparian landowner and provide Greenlawn with 30 CFS flows, regardless of drought conditions.

II. THE OPERATION OF HRDW DURING DROUGHT CONDITIONS TO PROVIDE FLOW TO GREENLAWN IS A NON-DISCRETIONARY ACTION EXEMPT FROM THE CONSULTATION REQUIREMENT WITHIN § 7 OF THE ESA, 16 U.S.C. § 1536.

The ESA under § 7 imposes two obligations on federal agencies whose actions may affect endangered species. If the actions may affect endangered species, the federal agency must first consult with the appropriate wildlife agency to evaluate the potential impacts of its actions on the listed endangered species. 16 U.S.C. § 1531 *et. seq*. (1973). The agency must also avoid activities that threaten the extinction of a listed species. 16 U.S.C. § 1536(a). Each Federal agency is required to engage in consultation to ensure that any agency action is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species. 16 U.S.C. § 1536(a)(2).[2]

If the agency action may impact a listed species or its habitat, the consultation process requires the preparation of a detailed study of the effects of the action on the listed species and/or habitat. 50 C.F.R. § 402.10 *et. seq.* (1996). The detailed study is known as the biological assessment, which contains information on each possible affected species and describes the

[2] The Federal Agency must also engage in consultation with the relevant wildlife agency if there will be agency action at the request of, or in cooperation with, a prospective permit or license applicant if the applicant reasonably believes that there is an endangered or threatened species present in the area where the applicants project is located, and the listed species may be affected by the action. 16 U.S.C. § 1536(a)(3).

potential for a "take" of the identified species or habitat.[3] If the relevant wildlife agency determines through the biological assessment that the project is likely to adversely affect a listed species or habitat, the federal agency submits to the wildlife agency a request for formal consultation. 50 C.F.R. § 402.12.

After the formal consultation, the wildlife agency will prepare a biological opinion which will contain the wildlife agency's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.14. If the wildlife agency issues a jeopardy determination, the federal agency can adopt the reasonable and prudent measures outlined in the determination, which will authorize an Incidental Take Permit to allow the project to proceed. 50 C.F.R. § 402.14(i).

The ACOE operation of the HRDW is exempt from the consultation process under § 7 of the ESA. Jurisprudence has demonstrated that non-discretionary federal actions are exempt from the consultation process. Furthermore, non-discretionary actions are specifically exempt from the consultation process under the Department of the Interior regulations. 50 C.F.R. § 402.03 (2018). The water release allowance to maintain the flow to Greenlawn's water intake facilities, the riparian landowner, is governed by the WCM. R. at 6. The ACOE is required to comply with the WCM, and therefore actions taken in compliance with the WCM are non-discretionary actions.R. at 7.

The Supreme Court has held that a federal agency is not required to consult with Fish and Wildlife Service ("FWS") with respect to an action that the agency is required to take by law. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 673 (2007). The

[3] The term "take" under the ESA is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

Department of the Interior has implemented this Supreme Court holding into its agency regulations, specifically exempting non-discretionary agency actions from compliance with ESA § 7(a) consultation and jeopardy requirements. 50 C.F.R. § 402.03 (2018). The focus on discretionary actions demonstrates that when an agency is required to do something by statute, it simply lacks the power to "insure" that the action will not jeopardize endangered species. 551 U.S. at 667. Furthermore, the Supreme Court has held that an agency cannot be considered the legal cause of an action that it has no statutory discretion not to "take". *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

In *National Association of Home Builders*, the Environmental Protection Agency ("EPA") approved a transfer of permitting authority to a state under the National Pollution Discharge Elimination System ("NPDES"). 551 U.S. at 649. The plaintiffs alleged that the EPA was required to comply with the ESA to ensure that the transfer would not jeopardize endangered or threatened species. *Id*. Justice Alito, writing for the majority, held that the no-jeopardy duty under the ESA only applied to discretionary actions and did not apply to the permitting transfer approval; it was mandatory under the Clean Water Act ("CWA") once specific triggering criteria were met. *Id*. at 673.

Under the CWA, Section 402(b) requires that the EPA approve each submitted program for transfer of permitting authority to a state unless the EPA determines that adequate authority does not exist to ensure that nine specified criteria are satisfied.[4] If the criteria are met, the transfer is mandatory and therefore the EPA must approve it. *Id*. at 649. Once the criteria are met, the EPA is stripped of its authority to disapprove of the transfer based on any other considerations. *Id*. at

[4] These criteria all relate to whether the state agency that will be responsible for permitting has the requisite authority under state law to administer the NPDES program. 33 U.S.C. § 1251 *et. seq*. (2011).

654. ESA § 7(a) does not attach to actions that an agency is required by statute to take once certain triggering events have occurred. *Id*. at 673. The action was non-discretionary, and the EPA did not have authority to deny the transfer once the criteria was met under the CWA. *Id*.

Like the EPA, the ACOE is a federal agency under the ESA, which is defined as any department, agency, or instrumentality of the United States. 16 U.S.C. § 1532. The operation of the HRDW by the ACOE is governed by the WCM, which establishes the parameters for the allowance of water releases. R. at 6. The WCM states, "At all times the [HRDW] *shall* be operated in a manner that complies with any water supply agreements entered into by the [ACOE], and with the riparian rights of property owners established under New Union law." R. at 7 (emphasis added). The word "shall" generally is a command that gives no discretion on the part of the person instructed to carry out the command. Black's Law Dictionary 1375 (6th ed. 1990). The use of "shall" within the WCM demonstrates that the operation of the HRDW by the ACOE is a non-discretionary action. The construction of the HRDW and the adoption of the WCM were discretionary, but these actions predated the ESA and therefore, were not subject to the consultation requirements under ESA § 7. R. at 14. The ACOE is required to provide for allowances to maintain the flow to Greenlawn's water intake facilities, the riparian land owner, under the WCM. R. at 6.

In *Tennessee Valley Auth. v. Hill*, the Supreme Court held that although there are a limited number of "hardship exemptions" under the ESA, none of these apply to federal agencies. 437 U.S. 153, 188 (1978). The ESA has "first priority" over all other federal action. *Id*. at 185; *See also* 16 U.S.C. § 1539. However, as the Supreme Court noted in *National Association of Home Builders*, *Hill* was decided almost a decade before the Department of the Interior regulations under 50 C.F.R. § 402.03 were adopted. 551 U.S. at 670. Furthermore, the construction project at issue

in *Hill* was clearly discretionary; there was no statutory mandate requiring the dam to be constructed. *Id*. The operation of the HRDW by the ACOE is non-discretionary and is governed by the WCM, which must comply with the riparian rights of property owners, such as Greenlawn, along the Bypass Reach. R. at 6. The non-discretionary action of operation by the ACOE falls within the exemptions to ESA §7(a) outlined in the Department of Interior regulations. 50 C.F.R. § 402.03.

The Ninth Circuit in *National Wildlife Fed'n v. National Marine Fisheries Service*, held that "all aspects of [Federal Columbia River Power System] operations, and any dam maintenance or structural modifications, are within the agencies' discretion" and are subject to ESA § 7. 481 F.3d 1224, 1234 (9th Cir. 2007). In this case, the ACOE and the Bureau of Reclamation were the action agencies that were challenged under the ESA for the effect the operation of the dam would have on eight different endangered species. *Id*. at 1224. The crucial part of the holding was that the agencies could not clearly define the limits of their discretion. *Id*. at 1235. Due to the lack of sufficient precision in separating the ACOE's and the Bureau of Reclamation's discretionary actions from their non-discretionary actions, the Ninth Circuit was quick to dismiss the assertions of non-discretion. *Id.*

However, § 8 of the Reclamation Act of 1902, which governs the Bureau of Reclamation, states that the Act is not to be construed as interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation" and that "the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformance with such laws. . ." 43 U.S.C. § 383 (1902). § 8 affords the Bureau of Reclamation no discretion with water allocation to respect the concepts of federalism and the states' sovereign interests. Under the language of § 8, the Bureau of Reclamation is not subject to ESA § 7, because the water allocation is a non-

discretionary action and the court was too quick to dismiss the actions as discretionary. The WCM governs the water allocation by the ACOE, requiring the ACOE to yield to Greenlawn's riparian rights as property owner. R. at 6. The WCM, like § 8 of the Reclamation Act, does not give the ACOE any discretion with water allocation.

Furthermore, the ACOE releases during the drought warning did not constitute a modification of the WCM guidelines. NUO contends that the increased releases to the Bypass Reach during a drought warning constituted a modification of the WCM guidelines, invoking ESA § 7. R. at 15. However, the ACOE allowed the releases in compliance with the WCM, which requires that the HRDW be operated in coordination with the riparian rights of property owners established under New Union law. R. at 7. Greenlawn is the riparian land owner. R. at 5. The ACOE releases did not constitute a modification of the WCM, and the action remains exempt from ESA § 7.

The ACOE was required to yield to Greenlawn's riparian rights as property owner under the WCM, and the release of 30 CFS to the Bypass Reach during 2017 was a non-discretionary agency action. The District Court of New Union correctly held that the ACOE is bound to comply with the riparian rights laws of New Union. Continuing to provide flows to the Bypass Reach is a non-discretionary action that is exempt from the ESA § 7(a) consultation requirement.

III. GREENLAWN'S WITHDRAWAL OF NEARLY ALL OF THE DROUGHT-REDUCED FLOW FROM THE HRDW CONSTITUTES A "TAKE" OF THE ENDANGERED OVAL PIGTOE MUSSEL IN VIOLATION OF § 9 OF THE ESA, 16 U.S.C. § 1538(A)(1)(B).

The ESA broadly defines both the class that must abide by its taking prohibitions, and the act of "taking" itself. Regarding the class that must follow the ESA's taking prohibitions, the ESA states:

> With respect to any endangered species of fish or wildlife pursuant to section 4 of this Act [16 USC § 1533] it is unlawful for any person subject to the jurisdiction of the United States to [. . .] (B) take any such species within the United States or the territorial sea of the United States[.]

16 U.S.C. § 1538(a)(1).

For purposes of the ESA, the term "person" includes any state, municipality, or political subdivision of a state; or any other entity subject to the jurisdiction of the United States. 16 U.S.C. § 1532(13). "By including the states in the group of actors subject to the Act's prohibitions, Congress implicitly intended to preempt any action of a state inconsistent with and in violation of the ESA." *Strahan v. Coxe*, 127 F.3d 155, 168 (1st Cir. 1997). Greenlawn is a city in the State of New Union, subject to the jurisdiction of the United States. Therefore, Greenlawn is within the broad class that must follow the ESA's rules that prohibit takings of endangered species.

A. Greenlawn committed a taking under the ESA's broad definition of "take" and the Secretary of the Interior's definition of "harm."

Regarding the definition of a "taking", the ESA states: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 USC § 1532(19). Greenlawn's withdrawal of nearly all the drought-reduced flow from the HRDW violates the ESA by harming the Green River oval pigtoe mussel. While the ESA does not define most of the terms used in 16 USC § 1532(19), the Department of the Interior regulations that implement the statute expound on the statutory meaning of "harm." "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 (2001).

The Supreme Court discussed the Department of the Interior's statutory definition of "harm" within the ESA in the case *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or*. 515 U.S. 687 (1995). In *Babbitt*, the Supreme Court said that the dictionary definition of "harm" does not require or suggest that only direct or willful action constitutes harm. *Id*. at 697. Furthermore, the Court stated, "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 [the ESA] uses to define 'take.'" *Id*. at 698. The Supreme Court in *Babbitt* held that the Secretary of the Interior's "indirect inclusive" definition of harm, as used in the ESA's definition of take, was a reasonable interpretation. *Id*. at 703.

The Supreme Court further held that Congress intended to define "takings" of endangered species under the ESA, "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, p. 7 (1973). *Babbitt,* 515 U.S. at 704. The House Report accompanying the ESA bills "explained that the definition [of take] 'would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.'" *Id*. at 704-05, citing H. R. Rep. No. 93-412, p. 15 (1973). This example shows that Congress intended to consider even indirect and attenuated actions as ESA takings.

Greenlawn's behavior comports with the ESA's broad definition of "take" and the Department of the Interior's definition of "harm" within the ESA definition of " take." Greenlawn harmed, and therefore "took", the Green River oval pigtoe mussel by withdrawing nearly all of the drought-reduced flow from the HRDW. This behavior led to significant habitat modification that

actually killed and injured the mussels, and also significantly impaired their essential behavioral patterns, including breeding and sheltering. R. at 9.

The FWS and the National Oceanic and Atmospheric Administration ("NOAA") are the two agencies that administer the ESA. The FWS oversees land and freshwater organisms while the NOAA administers marine life.[5] To review an agency's statutory interpretation, a court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). When a statute itself and the intent behind it are both silent or ambiguous regarding an issue at hand, a court must decide "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. The Supreme Court held that the Secretary of the Interior's interpretation of "harm" as used in the ESA's definition of "take" was reasonable under the *Chevron* standard. *Babbitt*, 515 U.S. at 703.

In order to survive, the Green River oval pigtoe mussel requires the Green River to maintain a minimum flow of 25 CFS averaged over twenty four hours. R. at 10. Greenlawn's substantial water withdrawals (less than 5% of which return to the Green River), combined with peaking hydroelectric power demands, lead to Zone 3 (Drought Emergency) conditions for the Howard Runnet Lake. R. at 9-10. Under Zone 3 guidelines, the ACOE must curtail hydroelectric power releases in order to prevent droughts from low water levels in Howard Runnet Lake. *Id*.

However, even during Zone 3 (Drought Emergency) conditions, Greenlawn continues to withdraw 30 CFS flows to the Bypass Reach for Greenlawn's water supply. R. at 9. Greenlawn's continued withdrawals consume nearly all of the water flows from the Bypass Reach and lead to

[5] *ESA Basics: 40 Years of Conserving Endangered Species*, U.S. Fish & Wildlife Service (Jan. 2013), https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf.

downstream flow rates close to zero CFS. *Id*. This, in turn, leads to stagnant and low water levels downstream. The stagnant water increases siltation and smothers the Green River oval pigtoe mussels. *Id.* The low water levels expose and suffocate the mussels, and quash sailfin shiner migration. The sailfin shiner is an essential species that the mussels are dependent upon for survival. *Id*.

Plaintiff's expert offered deposition testimony that the conditions created by Greenlawn's substantial water withdrawals resulted in the death of approximately 25% of the Green River oval pigtoe mussel population, and that a minimum flow of 25 CFS averaged over 24 hours is necessary to prevent extirpation of the oval pigtoe mussel population in Green River. R. at 10. Plaintiff's expert went on to say that: "If allowed to persist, these conditions would entirely eliminate the Green River population of the oval pigtoe mussel." *Id.* The plaintiff's expert's testimony is uncontradicted by all parties. *Id.*

Furthermore, Greenlawn does not have an incidental take permit under §10 of the ESA, 16 U.S.C. § 1539, authorizing the take of oval pigtoe mussels incidental to its operation of the municipal water intake. *Id*.

B. Greenlawn's withdrawals were the but-for cause of Green River oval pigtoe mussel takings.

In *Babbitt*, the Supreme Court held that enforcement of the ESA will lead to "difficult questions of proximity and degree . . . [that] must be addressed in the usual course of the law, through case-by-case resolution and adjudication." 515 U.S. at 708.

Greenlawn may argue that any alleged effects stemming from its actions are too indirect and attenuated to attribute blame. However, "courts have routinely held that state regulatory activities that indirectly result in harm to endangered species, such as issuance of permits for

private activity, can constitute a prohibited take."[6] R. at 16-17. Greenlawn does not need to directly and unilaterally harm the Green River oval pigtoe mussels for this Court to hold it liable under the ESA. Greenlawn needs to have only indirectly harmed the mussels to have committed a prohibited "taking" under the ESA. The District Court held that Greenlawn's consumption of the last drops of flow upstream from the mussels was the foreseeable and but-for cause of the mussels' death and habitat destruction. R. at 17, *citing Natural Resources Defense Council v. Zinke*, 347 F. Supp. 465 (E.D.Ca. 2018).

In *United States v. Glenn-Colusa Irrigation Dist*., the Eastern District Court of California held that a water district committed a taking under the ESA by pumping water from a river for irrigation during the chinook salmon's peak downstream migration in winter, where the district's pumping resulted in a 97% reduction in the fish's population, causing the fish to be listed as an endangered species under 16 USC § 1533(a)(1). 788 F. Supp. 1126, at 1129, 1133 (E.D. Cal. 1992). While Greenlawn's behavior caused a 25% reduction in an endangered species rather than a 97% reduction, the oval pigtoe mussel was already listed as an endangered species. Greenlawn's substantial water withdrawals affect the mussels by altering downstream flows in a way similar to the water district's ESA violating altered flows in *Glenn-Colusa*.

In *Strahan v. Coxe*, state licensing of fishing gear that scarred more than half of the Northern Right whale population was considered a form of "taking." 127 F.3d 155, 159 (1st Cir. 1997). The state licensing did not intend to harm the whales, but they were still considered a form

[6] "See e.g., *Animal Welfare Inst. v. Martin*, 623 F.3d 19 (1st Cir. 2010) (State authorization of foothold traps that harmed lynx); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (State licensing of fishing gear which harmed endangered Right Whales); *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998) (county's refusal to ban beach driving during turtle nesting season)." R.at 16-17.

of "taking." Similarly, while Greenlawn surely did not intend to harm the mussels, that does not mean they are not liable for "taking" them.

As the District Court held, Greenlawn is the proximate cause of the Green River oval pigtoe mussel extirpation. R. at 17. Greenlawn should have reasonably foreseen the consequences that inevitably occurred from withdrawing so much water during Zone 3 (Drought Emergency) conditions. Withdrawing substantial water upstream will obviously lead to low water levels and decreased water flows downstream. This, in turn, will negatively affect wildlife species downstream. As the previously mentioned cases show, takings do not need to be overtly direct or intentional. Greenlawn did not need to purposefully know about the mussels and deliberately withdraw water in order to "harm" them.

Overall, under the deliberately broad definition of "take" in the ESA, Greenlawn violated the ESA by "taking" an endangered species. Greenlawn "took" the oval pigtoe mussel through its withdrawal of nearly the entire flow of water from the Bypass Reach during drought warning conditions. This "taking" did not need to be unilateral and direct. Greenlawn withdrew substantial amounts of water, and this was the but-for cause of the negative downstream impacts to the mussels. Greenlawn's behavior violated the ESA by "harming" the mussels through significant habitat modification that led to the death of mussels and their hosts, the sailfin shiner. Greenlawn's behavior further harmed the endangered mussels by impairing essential behavioral patterns such as breeding and sheltering.

IV. THE DISTRICT COURT MUST BALANCE THE EQUITIES BEFORE ENJOINING A BENEFICIAL MUNICIPAL ACTIVITY, WHEN THE ACTIVITY WILL CAUSE THE EXTIRPATION OF AN ENTIRE POPULATION OF AN ENDANGERED SPECIES.

This Court must balance the equities in a suit before enjoining a beneficial municipal activity, when the activity will cause the extirpation of an endangered species. Here, that means

this Court must balance equities before enjoining Greenlawn from making water withdrawals that have the effect of reducing downstream flows below the rate necessary for Green River oval pigtoe mussels to survive.

In *Animal Welfare Inst. v. Martin*, pursuant to 16 U.S.C. § 1540(c), the federal district court had jurisdiction to exercise its traditional equitable injunctive powers because waiting through a regulatory gap presented immediate risk to the Canada lynx, a threatened species." 588 F. Supp. 2d 70, 73 (D. Me. 2008). Similarly, while recent heavy rains fell in the Green River watershed, filling Howard Runnett Lake to Zone 1 levels, the threat of extirpation of the Green River oval pigtoe mussel is only on hiatus. R. at 11. This Court has jurisdiction to rule on an injunction in this situation.

The recent heavy rains provide only temporary relief. The *Animal Welfare Inst. v. Martin* court held that the district court could provide equitable injunctive powers because a threatened species would suffer immediate risk waiting through a regulatory gap for relief. 588 F. Supp. 2d at 73. Here, an endangered species (the oval pigtoe mussel) could suffer immediate risk if the court does not equitably rule on injunctive relief. Drought conditions are not a matter of "if." They are a matter of "when."

From 1968 to 1998, water shortages were not a problem for the Green River region. ACOE only had to apply Zone 1 conditions once (in 1998) over thirty years. R. at 8. ACOE never had to apply Zone 2 or Zone 3 conditions until the 21st century. *Id.* Since the 21st century, water shortages are far more frequent for the Green River region. *Id.* Zone 1 conditions occurred during 2006-2007, 2008, 2009-2010, 2012, and 2016. *Id.* In 2017, Zone 2 and Zone 3 conditions followed the 2016 Zone 1 conditions. R. at 8-9.

The test for the issuance of a preliminary injunction under the ESA considers three factors: 1) the movant's likelihood of success on the merits, 2) the likelihood of irreparable harm in the absence of injunctive relief, and 3) the effect on the public interest, bearing in mind that "the balance of hardships and the public interest tips heavily in favor of protected species." *Strahan v. Pritchard*, 473 F. Supp. 2d 230, 235 (D. Mass. 2007), *quoting National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994).

Applying the above test to the present case, there is a likelihood of success on the merits of the underlying claim that violated the ESA. The oval pigtoe mussel is an endangered species. R. at 9. The plaintiff's expert witness confirmed that 25% of the Green River mussel population was eliminated in part by Greenlawn's substantial water withdrawals in times of drought susceptibility. R. at 10. As discussed previously, the ESA broadly defines "takings." Greenlawn's water withdrawals have a detrimental effect on water levels in the lake and decreased water flows downstream of the Bypass Reach in the Green River. *Id*. These effects lead to low water levels and flows that cannot support the mussels, their habitat; or sailfin shiner migration. The sailfish shiner is an essential species for the mussels' survival. R. at 8-10.

Secondly, the alleged activity caused actual harm to the endangered mussels and will likely continue to harm the mussels in the absence of injunctive relief. The plaintiff's expert witness claimed that 25% of the Green River mussels were eliminated in part by Greenlawn's withdrawal of nearly all the drought reduced flow in the HRDW. R. at 10. The injunction requires flows of 25 CFS averaged over 24 hours throughout the Green River. R. at 5. The plaintiff's expert states that flows of 25 CFS averaged over 24 hours are the minimum flows required to prevent extirpation of the mussels. R. at 10. Therefore, injunctive relief will prevent irreparable harm to the mussels.

The third and final prong of the test analyzes the injunction's effect on the public interest. The presumption for this test strongly favors endangered species over the public interest. However, while the presumption is strong, this Court should not completely bypass considering the equity of parties that are not endangered species when making an injunctive determination.

In *Sweet Home Chapter of Cmtys. for a Great Or. v. Lujan*, the FWS placed restrictions on timber harvesting to protect the northern spotted owl, even when these restrictions forced unemployment, limited income, reduced timber supply, and put people in positions where they were unable to support their families. 806 F. Supp. 279, 281 (D.D.C. 1992). This case illustrates the strength of the presumption favoring endangered species' interests.

In *Tennessee Valley Auth. v. Hill*, the Supreme Court precluded the completion of the $100 million Tellico Dam because of its predicted impact on the survival of the snail darter. 437 U.S. at 193. The Court stressed that, "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.* at 184. This case is another example of the strength of the presumption favoring endangered species' interests. However, the Supreme Court has explained that the drastic result in *Hill* stemmed from the strong showing that the entire known population of a species (the snail darter) would become extinct absent an injunction. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982).

In the case at hand, extirpation could occur absent an injunction if current behaviors continue. R. at 10. But extirpation is not the same as an entire species going extinct. Extirpation is local extinction. And the Green River oval pigtoe population is not the entire known population of the species. So, it is fair to question if courts should limit issuing drastic injunctions such as the

one in *Hill* short of dealing with the prospect of an entire species' extinction. The injunction at issue is arguably quite drastic. Approximately 100,000 Greenlawn citizens' usage of water will be restricted by this injunction. R. at 5. This Court should carefully balance interests before making a decision.

Furthermore, the Supreme Court has held that a public interest can outweigh the heavily weighted presumption favoring endangered species' interests. This is not a completely unprecedented determination. In *Winter v. NRDC*, the Supreme Court considered whether to uphold the Ninth Circuit's injunction against certain Navy underwater training exercises that used high intensity sonar until the plaintiffs' claims for violations of statutes including the ESA and NEPA could be heard on the merits. 555 U.S. 7 (2008). The Supreme Court held that "even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief." *Id*. at 23.

The Supreme Court ruled this way even after acknowledging that the plaintiffs had established "ecological, scientific, and recreational interests that are legitimat[e]." *Id.* at 25. So in *Winter*, the Court used its equitable discretion to favor the public's interest in the Navy over environmental interests. The Court denied injunctive relief despite the likelihood of environmental harms, including potential ESA violations (the Navy's training was alleged to affect at least 37 species of marine mammals). *Id*. at 14.

Since the Supreme Court held that the public interest in the Navy outweighed potential ESA violations in the circumstances surrounding *Winter*, then this Court should not immediately defer to the presumption favoring endangered species' interests. This Court should assess whether

the public interest in municipal activities (that benefit approximately 100,000 Greenlawn citizens) outweighs the interest in preventing local extirpation of the Green River oval pigtoe mussel. R. at 5. Even if this Court determines that a particular action would result in irreparable harm to the mussels, it may still use its discretion to deny relief if the municipality and/or the public's equities outweigh that of the endangered mussels.

Overall, even though a strong presumption exists favoring endangered species' interests, this Court must still consider the equities of the parties and determine if a great enough public interest exists to rebut the presumption favoring endangered species' interests. Before enjoining a beneficial municipal activity, this Court must balance the equities.

CONCLUSION

For the foregoing reasons, the Appellees respectfully requests that this Court affirm the District Court's holding that Greenlawn has the right, as riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures and the operation of HRDW during drought conditions to provide flow to Greenlawn was a nondiscretionary action exempt from the consultation requirement under the Endangered Species Act. The Appellees also request that this Court affirm the District Court's determination that Greenlawn's withdrawal of nearly all the drought-reduced flow constituted a "take" of the oval pigtoe mussel under the Endangered Species Act. Further, the Appellees request that this Court reverse the District Court's determination that the Court is not required to balance the equities before enjoining a municipal activity, when that activity will cause the extirpation of entire population of an endangered species.

Respectfully submitted,

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