Team # 51

# Measuring Brief

On Behalf of New Union Oystercatchers, Inc.

United States Court of Appeals for the Twelfth Circuit

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# STATEMENT OF JURISDICTION

The New Union Oystercatchers, Inc., (NUO) (plaintiffs) and the City of Greenlawn (Greenlawn) both appeal from an Opinion and Order issued on May 15, 2019 by the honorable Judge Remus in the U.S. District Court for New Union Island, No. 66-CV-2017. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2018), given the Complaint raises questions arising under federal law, namely the application of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1531-1544 (2012).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures.

II. Whether the operation of the 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.

III. Whether Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitutes a "take" of the endangered oval pigtoe mussel in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538.

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

## STATEMENT OF THE CASE

There is little doubt that the upcoming years, in light of climate change and continued population growth, are going to negatively impact ecosystems around the world and simultaneously limit the availability of resources that are necessary for humankind's wellbeing. In the wake of these changes, including the drought in the spring of 2017 in New Union, existing environmental regulations and existing riparian rights laws must be read and strengthened to ensure no single actor can act in excess and purely in self-interest, at the detriment of other people and the environment.

The Endangered Species Act was passed to protect and recover imperiled species and the ecosystems that they depend on. New Union Oystercatchers, Inc. does not wish to efface the City of Greenlawn's or the ACOE's access to water. Rather, it asks that Greenlawn and ACOE comply with, and be subject to the appropriate penalties for violations of the ESA to ensure that the oval pigtoe mussel is not completely extirpated from the Green River basin. NUO asks that the City of Greenlawn refrain from its unreasonable use of water during drought conditions, and the ACOE comply with the consultation requirement under the Endangered Species Act.

## STATEMENT OF FACTS

Increased population growth, in company with climate change, is going to result in a marked, and significant impact on water management and water availability in the United States in the 21st Century. Thomas C. Brown et al., 2019; *Adaptation to Future Water Shortages in the United States Caused by Population Growth and Climate Change* (Feb. 2019). The City of Greenlawn, New Union, experienced the adverse effects of drought conditions in the Spring of 2017. R. at 8. The ACOE and the City of Greenlawn's water management practices during Spring 2017, including permitting residents of Greenlawn to continue to water lawns and ornamental plants, reduced water levels of the confluence of the Green River and Howard Runnet Dam tailrace to stagnant pools of water and narrow trickles, resulting in the exposure of several beds of the river containing oval pigtoe mussels, a federally listed endangered species. R. at 9. Reduced flows have increased the salinity of the Green River Estuary and allowed predators like conch and crabs to enter the bay and feed on the mussels. R. at 10.

Greenlawn lies on the banks of the Green River, which became known as the Green River Bypass Reach (Bypass Reach) when the United States Army Corps of Engineers built the Green

River Diversion Dam upstream of the City and the Howard Runnet Dam on the Howard Runnet lake in 1947. R. at 5. To manage the operation and release of water from both dams, collectively called the Howard Runnet Dam Works, the Army Corps of Engineers (ACOE) established a Water Control Manual (WCM), last revised in 1968. R. at 6. When water levels in the Howard Runnet lake drop below seasonal target levels, the WCM requires that downstream releases from the Dams be curtailed in accordance with three lake level zones: Zone 1 (*Drought Watch*), Zone 2 *(Drought Warning*), and Zone 3 (*Drought Emergency*). R. at 7.

Following the adaption of the WCM through the end of the 20th century, water shortages in Greenlawn were not an issue—the ACOE only applied Zone 1 restrictions once, in 1998. R. at 8. The demand for water from the Green River increased as the City of Greenlawn experienced a housing boom in the 1960s, and as several agricultural operations in the Green River valley commenced diversions of water for irrigation during the 1980s. R. at 5, 8. Drought conditions became more persistent in the 21st century, resulting in Zone 1 levels four times before the drought in the Spring of 2017, when lake levels reached Zone 2. R. at 8.

The City of Greenlawn protested the reduced flow restrictions placed on Green River pursuant to the WCM, and sent a letter to the ACOE field office on April 12, 2017, claiming it had a common law right as a riparian landowner to make reasonable use of the Green River. *Id.* The District Commander of the ACOE, persuaded by the City's arguments increased water releases to the Bypass Reach on the 23rd of April. R. at 9. On May 15, Howard Runnet lake levels, due to water release demands, were lowered to Zone 4. *Id.*

## PROCEDURAL HISTORY

New Union Oystercatchers, Inc. brought this action against the United States Army Corps of Engineers and the City of Greenlawn, New Union alleging the parties violated the Endangered

Species Act as a result of Greenlawn's water withdrawals from the Green River and ACOE's operation of the Howard Runnet Dam Works. R. at 4. The ACOE filed a cross-claim against Greenlawn by joining NUO's ESA claim against Greenlawn. R. at 4. Both ACOE and NUO moved for summary judgment. R. at 4. NUO moved for summary judgment declaring Greenlawn violated § 9 of the ESA, 16 U.S.C. § 1536, and ACOE violated § 7 of the ESA, 16 U.S.C. § 1536. R. at 4. ACOE moved to dismiss the ESA claims against it. R. at 4. Greenlawn cross moved for summary judgment to declare its riparian landowner rights and to dismiss ESA claims against it. R. at 4.

The United States District Court for New Union ruled in this case, Civ. 66-2017, on May 15, 2019. R. at 1. The District Court held: (1) the City of Greenlawn has riparian landowner rights to the Green River Bypass Reach, (2) the United States Army Corps of Engineers did not violate the consultation requirement under § 7(a) of the Endangered Species Act when it continued operations to Greenlawn during drought conditions, (3) Greenlawn's withdrawals from the reduced-flow of the Bypass Reach constitutes a "take" of the endangered oval pigtoe mussel, in violation of § 9 of the ESA, and (4) when enjoining a municipal activity to prevent the extirpation of an endangered species, a court need not balance the equities of the municipal activity against the threat to the species. R. at 1-2. Greenlawn's activities threaten significant losses to the population of an endangered species; therefore, the court ordered an injunction against water withdrawals that cause the flow of the Green River downstream of the Howard Runnet Dam Works to drop below 25 CFS averaged over twenty four hours. R. at 5.

The City of Greenlawn, New Union and the New Union Oystercatchers, Inc. have both filed a timely Notice of Appeal. R. at 1.

## SUMMARY OF THE ARGUMENTS

First, the City of Greenlawn's use of water as a riparian landowner is unreasonable and a reasonable adjustment of use should be made. Though NUO is not a riparian landowner, NUO can challenge Greenlawn's unreasonable use through the public importance exception to standing. A weighing of factors is used to determine if riparian use is reasonable and upon weighing the factors, Greenlawn's use is unreasonable under the circumstances in this case. "Natural use" doctrine is misapplied by Greenlawn to defend their use, and should not be adopted in the state of New Union.

Second, the operation of the 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 ESA. Federal action mandated by the ESA supersedes any local agreements, and because the local agreement between Greenlawn and ACOE is partially contrary to federal law, it should not be upheld as valid. The action taken by ACOE to modify the WCM showed discretion. However, even if the agreement is upheld, the ACOE could still be utilizing discretion.

Third, Greenlawn's excessive water withdrawal during drought conditions constitutes a take under §9 of the ESA. A "take" of an endangered species is not limited to direct harm, and can be effectuated by harm that results in significant damage or modification to the habitat of an endangered species. When Greenlawn sent a request to the regional director of the ACOE responsible for the management of the Howard Runnet Dam Works, its actions became the precise reason why the flows of the Green River were reduced to nothing more than a trickle. The resulting decrease in flow and subsequent trickle constitutes as significant habitat modification.

Fourth, the purpose of the ESA to protect and preserve endangered species precludes this Court's need to balance the City of Greenlawn's interest in water use against extirpation of Pigtoe Mussels in the Green River Basin. In drafting the ESA, Congress decided that the value of species is incalculable, and therefore precluded a balance of equities. As such, were the court to weigh the

Greenlawns' interest in water use during drought conditions against the almost certain extirpation of the pigtoe mussel, it would be opposition to the purposes of the ESA.

# ARGUMENTS

## I. CITY OF GREENLAWN'S USE OF WATER AS A RIPARIAN LANDOWNER IS UNREASONABLE AND A REASONABLE ADJUSTMENT OF USE SHOULD BE MADE

Greenlawn's undiminished water use during times of scarcity is unreasonable, especially considering the impacts of this use on downstream ecosystems supporting the endangered oval pigtoe mussel habitat and the oyster fishery. R. at 13. It is reasonable for the District Commander of ACOE to request that Greenlawn institute drought restrictions on its water consumers, such as bans on lawn watering and car washing, as long as drought conditions persist.

### A. NUO Can Challenge Greenlawn's Unreasonable Riparian Use Through the Public Importance Exception to Standing

States across the country recognize that traditional standing can be insufficient when it comes to redressing harms and as a result, have recognized the "public importance" exception as a way for parties to address injustices that may not otherwise be addressed. *ATC South, Inc. v. Charleston County,* 380 S.C. 191 (2008), *ACLU v. City of Albuquerque*, 142 N.M. 259 (2007), *Schwartz v. Lopez*, 132 Nev. 732 (2016), *Godfrey v. State*, 752 N.W.2d 413 (2008), *Com. v. Packer Tp.*, 60 A.3d 189. The "public importance" exception to the general requirements of standing is a

doctrine that can be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. *ATC South, Inc. v. Charleston County,* 380 S.C. 191 (2008). A determination to apply the public importance exception turns on competing policy concerns, and therefore rejects a formulaic approach and instead relies on specific facts. *ATC South, Inc. v. Charleston County,* 380 S.C. 191 (2008). Based on the exceptional circumstances of this case, and the profound public interest involved, we ask the court to find NUO fulfills the public importance exception to standing in order to bring this claim of unreasonable riparian use against Greenlawn.

In the public importance exception for standing, standing will be conferred "without requiring the plaintiff to show he has an interest greater than other potential plaintiffs." *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007).

NUO argues protecting the habitat of the endangered oval pigtoe mussel by increasing the flow of Green River is of the highest public importance, because the rich, natural heritage is of esthetic, educational, ecological, and scientific value to the people of New Union. *See* Endangered Species Act of 1973, 16 U.S.C. § 1531. Greenlawn's unreasonable use of water has caused the flowing Green River to be reduced to "narrow trickles" and "stagnant pools." R. at 9. NUO asserts the protection of the mussels' habitat from complete ruin forms the basis of a public importance exception to standing.

The public importance exception also requires a showing the decision is needed for future guidance. *ATC South, Inc.*, 380 S.C. at 191. In South Carolina jurisprudence, "it is this concept of future guidance that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *S. Carolina Public Interest Foundation v. S. Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 645 (2013) (citing *ATC South, Inc. v. Charleston County,* 380 S.C. 191 (2008)). This decision to allow the public importance exception to standing is needed for

future guidance for two reasons. First, climate change is ushering in a new era of riparian issues that require modern solutions. Second, New Union does not have any precedent on claims to the flow of the Green River, and allowing NUO to use the public importance exception to standing, the court can finally establish law regarding riparian rights and the Green River, which will aid all future parties to have precedent as a guide. This will allow the court to address and speak on the issue, and enhance judicial economy by establishing a decision which will limit potential repetitive future cases.

NUO asserts the use by Greenlawn during droughts is unreasonable and must be curtailed to protect the habitat of the endangered oval pigtoe mussel.

### B. A Weighing of Factors Shows Greenlawn's Use is Unreasonable Under the Circumstances

The city of Greenlawn is a riparian owner and has a right to use of the water, but only to the extent the use is reasonable. *Harris v. Brooks*, 225 Ark. 436, 283 S.w.2d 129 (1955). Under the current conditions of the Green River and New Union, utilizing water for ornamental watering is unreasonable. Courts apply a rule of reason to riparian rights, which allows reasonable uses of water by a riparian proprietor as long as the uses do not work a material injury to another proprietors. R. at 12, *Hendrick v. Cook*, 4 Ga. 241 (1848).

Under reasonable use theory of riparian rights, a weighing of factors is used to determine reasonableness. *Harris v. Brooks*, 225 Ark. 283 S.W.2d 129 (1955) citing 56 Am. Jur.. Determinations of reasonable use are fact-specific and the facts of this case show Greenlawn's use is not reasonable under the circumstances. Factors that have been used to determine reasonableness include necessity, extent of injury to one party, benefit to the other party, the practicality of avoiding the harm by adjusting the method of use of one owner, the social value of the use, and existing value of the use. *Lummis v. Lilly*, 385 Mass. 41, 429 N.E.2d 1146 (1982), *Harris v. Brooks*,

225 Ark. 283 S.W.2d 129 (1955), Restatement (Second) of Torts § 850A (1979). Each factor will be addressed in turn.

First, the necessity of water for protecting the mussels' habitat is greater than water for ornamental and decorative lawns. The downstream habitat needs a slow to moderate current in order to provide the proper environmental factors for the mussels to spawn. R. at 9. The District Court recognized the necessity of water to protect the endangered species and the causation by Greenlawn when it stated "Because Greenlawn's activities threaten significant losses to the populations of endangered mussels on the Green River, this court is issuing an injunction against water withdrawals…" R. at 5. In contrast, if Greenlawn curbs their use of water for ornamental lawns, the only loss is possible browning of yards. Even this minimal harm to the residents of Greenlawn my be avoided altogether with a few simple rain showers. The need for a current, even a slow current, to protect the endangered mussels' habitat is undoubtedly more essential than the mere loss of aesthetic pleasure from one's lawn.

Second, the extent of injury to the endangered mussel and its habitat will be greater than the injury to Greenlawn if Greenlawn reduces their use in order to allow some level of flow in the Green River. There is little to no redress for an endangered species living in a river that is not flowing. The species is unable to move to a new habitat, and the lack of flow will undoubtedly decimate the population of the federally protected mussel. On the other hand, injury caused by browning lawns are more easily redressed.

Third, the benefit of the public's interest in protecting the endangered species and its habitat greatly outweighs the benefit of ornamental watering for Greenlawn. The benefit to the mussels' habitat gained by reducing Greenlawn's use to a reasonable level is substantial as it ensures that there are no impediments to ensuring there is adequate water flow to allow the mussels to continue

living in Green River. Society as a whole benefits from the esthetic, educational, ecological, and scientific value of the protection of the oval pigtoe mussel and its habitat, whereas the benefit of well-watered ornamental plants do not benefit society, but only offer esthetic value to the owner of the plants. Endangered Species Act of 1973, 16 U.S.C. § 1531.

There is a practical solution to avoiding the harm to mussels' habitat by adjusting the method of use of Greenlawn. The mussel habitat is situated in the Green River and incapable of moving to another habitat that it would be better suited for, like a land animal could; therefore, its habitat is bound solely to the Green River. However, the city of Greenlawn is situated between Green River and Progress River. R. at 6. While Greenlawn may not be a riparian owner on Progress River, drawing water from the nearby river is a practical solution and there may already be a relationship between Greenlawn and a riparian owner of Progress River, as Greenlawn's sewage treatment plant discharges into the Progress River. R. at 6.

The social value of allowing flow in the Green River for the mussels' habitat is much higher than any conceivable social value of allowing non-restricted ornamental use in Greenlawn. As stated in the ESA, protected species "are of esthetic, ecological, educational, historical, recreational, and scientific value." Endangered Species Act of 1973, 16 U.S.C. § 1531. By reducing Greenlawn's use to a reasonable level, the river will be able to maintain the lives of the oval pigtoe mussels, and all other species along and in the river that depend on water for survival.

The last factor to determine reasonableness in case law is existing value of a current use. Greenlawn asserts it has a long established municipal use of water in Green River which should be considered in allowing Greenlawn to maintain its current rate of withdrawal. While it is true Greenlawn has a long history of municipal use, municipal use does not necessarily include

ornamental watering. In addition, Greenlawn admits this is simply a factor for consideration and not determinative. R. at 13.

When all of these factors are considered together in this case, in light of climate change causing increasing unpredictability and the importance of protecting endangered species habitat, reasonableness weighs in favor of reducing water flow to Greenlawn to protect the habitat of the oval pigtoe mussel.

### C. "Natural Use" Doctrine is Misapplied by Greenlawn, and Should Not be Adopted in the state of New Union

Greenlawn argues domestic use, including gardening, is considered a "natural use" and therefore the city should be allowed to continue its use without regard to the impact on other riparian landowners. R. at 13. Greenlawn misinterprets the meaning of the natural use doctrine, but even if properly interpreted, it should not be adopted in New Union.

Natural use doctrine has been utilized in states that are arid, dry, and where water controversies involve ranching or agriculture such as Texas and California. *Rhodes v. Whitehead*, 27 Tex. 304 (1863), *Prather v. Hoberg*, 24 Cal.2d 549, 560 (1944). In addition, these cases interpreting natural use are mostly arising out of the late 1800's and early 1900's as the doctrine has been replaced by modern doctrines, such as reasonable use. *Rhodes,* 27 Tex. at 310, *Prather*, 24 Cal.2d at 560, *Cowell v. Armstrong*, 210 Cal. 218, 225 (1930), Jospeh W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 MARQLR 53, 68 (2011).

"Natural use" doctrine defines natural uses as "thirst of people and cattle and household purposes." *Rhodes*, 27 Tex. at 310. In the California case *Prather v. Hoberg*, a "natural use" is a use "arising out of the necessities of life on the riparian land, such as a household and drinking use and the watering of stock…" *Prather*, 24 Cal.2d at 560,; *See Cowell*, 210 Cal. at 225.

Case law shows that the natural use doctrine is based around sustaining human life as is expressed by the inclusion of drinking water, and uses within the household, such as cooking and hygiene, and sustaining livestock. Utilizing water for gardening does not fit into this limited definition. Such necessary uses to human life explain why this drastic doctrine allows for the total use of the water, even if there are lower riparian owners.

While natural use doctrine may be best suited to handle riparian controversies in these aforementioned states, reasonable use doctrine is better suited for the riparian issues in New Union due to the differences in topography, the variety of riparian owners and uses in New Union, as well as the availability of a modernized method of settling disputes.

## II. THE OPERATION OF THE 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 ESA

When an agency, acting in furtherance of a broad congressional mandate, chooses a course of action which is not specifically mandated by Congress and which is not specifically necessitated by the broad mandate, the action is, by definition, discretionary. *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Service*, 524 F.3d 917 (9th Cir. 2008). The ACOE utilized discretion by determining how much flow it will allow into Bypass Reach that will also adhere to the general ESA mandate and the Fish and Wildlife Coordination Act to protect wildlife and habitat. R. at 9.

Federal action mandated by the ESA supersedes any local agreements, and because the local agreement between Greenlawn and ACOE is partially contrary to federal law, it should not

be upheld as valid.[1] However, even if the agreement is upheld, the ACOE could still be utilizing discretion.

The ESA requires ACOE to take action to protect endangered species, which requires an exercise of discretion, therefore, agency action by ACOE is subject to the consultation requirement under the ESA.

### A. Federal Action Mandated by the ESA Supersedes the Local Agreement, but Even if the Local Agreement is Upheld, ACOE is Still Utilizing Discretion

The increased water releases by ACOE to Bypass Reach during a drought warning, which were contrary to the terms of the manual, constitute a modification of the manual guidelines and this discretionary action invokes § 7 of the ESA. However, if the court finds this action did not constitute a modification of the manual, the manual still contains provisions in which the ACOE can utilize discretion. R. at 6.

The agreement between Greenlawn and ACOE states that ACOE will maintain flows in the Bypass Reach sufficient to allow 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 state laws of the State of New Union." R. at 6. The state of New Union applies common law riparian rights doctrine to resolve competing claims to water, and common law riparian rights doctrine recognizes landowners can make reasonable use of water, as long as it does not interfere with reasonable use of another riparian landowner. *Hendrick v. Cook*, 4 Ga. 241 (1848), R. at 12. Therefore, in the State of New Union under the common law riparian doctrine of reasonable use, it is inherent that ACOE will utilize discretion in weighing what constitutes a reasonable use by Greenlawn. *Hendrick*, 4 Ga. 241.

[1] U.S. Const. art. IV, § 2 or the Supremacy Clause

In 2017, ACOE released 30 CFS to the Bypass Reach during the drought warning which was not in accordance with the drought warning terms. R. at 9. This agency action modifies the manual and therefore is subject to ESA § 7(a) consultation requirement.[2] As a result of this discretionary decision, the water demands lowered the lake level to Zone 3 (drought emergency) in May 2017. R. at 9. The District Engineer ordered curtailment of hydroelectric power which is consistent with Zone 3, but continued the 30 CFS flows for Greenlawn's water supply. R. at 9. This May 2017 action was the second time the agency utilized discretion and did not adhere to the strict release rules of Zone releases. R. at 9.

Riparian rights doctrine does not establish fixed rights to the use of water, meaning that Greenlawn was not entitled to definite release amounts during droughts. Barton Thompson Jr. et al., *Legal Control of Water Resources* 29 (6th Ed. 2018). If ACOE followed the rules of the Zones unflinchingly, the agency would also be going against this principle of riparian rights.

If the agreement between Greenlawn and the ACOE is found valid, it requires ACOE to take the action of providing flows to Bypass Reach for Greenlawn's municipal needs on a daily basis. NUO asserts that to determine needs under reasonable use doctrine, the ACOE must use their discretion in determining how much flow to release.

### B. Federal Law Supersedes Local Agreements, and the ESA Requires the ACOE to Take Action Necessary to Protect Endangered Species, and Such an Action is Discretionary.

Section 7 of the ESA requires federal agencies, in consultation with the Fish and Wildlife Service, to conserve species listed under the ESA. Agencies must "insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse

[2] NUO has standing to enforce ESA requirements pursuant to the citizen suit provision, ESA § 13(g).

modification of [designated critical] habitat…" Endangered Species Act of 1973, 15 U.S.C. § 1536(a)(2). This is a broad congressional mandate that requires the ACOE to choose a course of action that is not specifically mandated in order to protect the oval pigtoe mussel habitat downstream. The ESA allows ACOE discretion to determine how it will comply with the mandate to protect endangered species.

In this case, the ACOE showed discretion in their action by modifying the WCM and allowing increased flow through the Bypass Reach to continue providing water supply to a municipality. R. at 15. These two modifications by ACOE were not specifically contemplated by the terms of the ESA, but it is such an action that triggers a consultation requirement due to their discretionary nature. ESA § 7(a), 16 U.S.C. § 1536(a).

Compliance with the ESA is not optional and cannot be avoided by ACOE claiming adherence to its local agreement or any other statute. U.S. Const. art. IV, § 2 or The Supremacy Clause, *Washington Toxics Coal v. EPA*, 413 F.3d 1024 (9th Cir. 2005). "[A]n agency cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives." *Washington Toxics Coal*, 413 F.3d at 1032.

## III. GREENLAWN'S EXCESSIVE WATER WITHDRAWAL DURING DROUGHT CONDITIONS CONSTITUTES A TAKE UNDER §9 OF THE ESA

The ESA was enacted with the purpose of conserving endangered and threatened species and the ecosystems on which they depend. *See* 16 U.S.C. § 1531. A species is listed according to §4 16 U.S.C. § 1533 of the ESA, at which point the act prevents any person from "taking any [endangered] species within the United States or the territorial sea of the United States." §1538(a)(1)(B). Under the ESA, "take" is defined broadly as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct." *See* 16 U.S.C.A.

§ 1532 (19); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or*., 515 U.S. 687, 704, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995) (quoting S. Rep. No. 93-307, at 7 (1973)) ("'take' is defined in the statute "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.'").

The ESA prohibition on taking applies "to all actors, not just the federal government." 16 U.S.C.S. § 1538(a)(1*); Defs. of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1095 (E.D. Wash. 2006). The punitive enforcement that may result from a non-federal actor's "take" in violation of §9 may be exempted, and therefore lawful, when the take complies with the terms and conditions set forth in §10 incidental take permit issued by the Secretary of the Interior. 16 U.S.C.A. § 1539. Greenlawn does not receive an exemption from the ESA as it has no incidental take permit.

While Greenlawn contends that it cannot be guilty of habitat modification of the pigtoe mussel, the district court's decision that the activities of Greenlawn constituted a take was correct for two reasons. First, Greenlawn's water consumption during drought conditions were the precise reason behind the degradation and modification of the pigtoe mussel's habitat. Second, Greenlawns' water use during the Spring of 2017 was the proximate cause for the "take" of the pigtoe mussels.

### A. Greenlawns' Water Usage During the Drought of Spring 2017 that Resulted in the Degradation and Modification of the Pigtoe Mussels' Habitat Constitute a "take" Under ESA §9.

To ensure that culpable parties cannot escape punitive measures under the ESA by not carrying out the act themselves, courts and the ESA itself have interpreted the activity that constitutes a "take" broadly. *See Babbitt* 515 U.S. at 694. Under the ESA, the word "harm," as included in the definition of "take" at 16 U.S.C.A. § 1532 is defined as "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; *Id.* at 697-98 (finding that the definition of harm must include indirect harm, for "unless the statutory term "harm" encompasses indirect, as well as indirect injuries, the word has no meaning that does not duplicate the meaning of other words that §3 uses to define 'take.'").

Habitat modification that is significant enough to result in the extinction of a species is considered a "taking." *Coalition v. McCamman*, 725 F. Supp. 2d 1162, 1168 (E.D. Cal. 2010); *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988); *See also Loggerhead Turtle v. Cty. Council*, 92 F. Supp. 2d 1296, 1304 (M.D. Fla. 2000). ("habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to "harm." ). In *Sierra Club v. Lyng*, the court held that the very shelter upon which the red-cockaded woodpecker depended for survival was threatened by the Forest Service's management. *See* 694 F. Supp.

Indirect harm caused by a third party constitutes a "take" if the actions of the authorizing party are "critical" towards the resultant taking. *Defs. of Wildlife v. Adm'r, EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989); *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991) (finding the Forest Service's management of timber stands constituted a taking of the red-cockaded woodpecker.). In *Defenders of Wildlife v. EPA*, the EPA was found to have violated the ESA for registering pesticides that contained the chemical strychnine. *See Defs. of Wildlife*, 882 F.2d 1294. The court held that because "endangered species have eaten the strychnine bait, either directly or indirectly, and as a result, they have died" and the poison could only be distributed by third parties pursuant to a permit they had been granted by the EPA, the EPA's actions were "critical to the resulting poisonings of endangered species" and therefore constituted a "take." *Id.* at 1301.

In some instances, the threat of future harm to an endangered species' habitat will also constitute a take. *See Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1513 (9th Cir. 1994);

*See also Greenpeace Found. v. Mineta,* 122 F. Supp. 2d 1123, 1134 (D. Haw. 2000); *See also Palila v. Hawaii Dept. of Land and Natural Resources*, 639 F.2d 495, 11 Envtl. L. Rep. 20446 (9th Cir. 1981). In *Greenpeace,* the court found that the removal of lobsters (an important piece of the seal's diet) from the endangered monk seal's habitat, may qualify as habitat modification. 122 F. Supp. 2d at 1134 (court denied plaintiff's request for summary judgment finding there was a dispute of fact whether the removal of the lobster would "doom the monk seal to extinction."). In contrast, the court in *Palila,* found that the Hawaii Department of Natural Resources affected a take by maintaining feral sheep and goats in the critical habitat of the Palila bird because the goats and sheep were destructive to the habitat in which the Palila dwelled. *See Palila* 639 F.2d 495. Here, Greenlawn's water withdrawal practices during the drought in the Spring of 2017 resulted in a taking of the oval pigtoe mussel because it destroyed the mussel's critical habitat. The oval pigtoe mussel requires gravel or silty sand riverbeds, in conjunction with slow and moderate moving water. R. at 9. However, because of Greenlawn's consumptive use, the Greenriver turned into stagnant pools, leading to decreased water flows and increased siltation that smothered the organism, and resulted in the death of 25% of the species. R. at 9,10. Similar to *Sierra Club v. Lyng,* where the forest management plan of the FWS threatened the "very shelter" that the red cockaded woodpecker depended on, here, Greenlawn's use of water during drought conditions dries the streambeds that are the precise habitat the pigtoe oyster needs to survive. *Sierra Club,* 694 F. Supp. at 1260.

Further, while the City argues that it cannot be liable for actions that occur outside of the direct city limits, this does not preclude their actions being "critical" to the harm inflicted on the pigtoe mussel, and therefore a "take." One of the purposes of the Water Control Manual (WCM) established by the ACOE to manage the operations of the Howard Runnet Dam Works is to insure

adequate downstream water releases to support in-water recreation and fishing. R. at 6. To ensure that it's goals are met, the WCM requires that downstream releases are curtailed pursuant to three different levels of water in the Howard Runnet lake. R. at 7. Here, similar to *Defenders of Wildlife,* Greenlawn's actions were critical to the "take" of the pigtoe mussel. *Defs. of Wildlife*, 882 F.2d 1294. If the City had not submitted a letter to the ACOE field office requesting increased water release, the water levels would not have dropped to a level that resulted in harm to the pigtoe mussel. Like *Defenders*, where the poison that third parties distributed was only possible at the EPA's behest, the increased water flow that the ACOE permitted to Greenlawn was only possible because of Greenlawn's intervention. *See Id.*

In addition to the actual harm that the City has caused on the pigtoe oyster at the population and individual level, their actions may have also caused the threat of harm that takes the form of potential reduced flows and increased predation on the pigtoe mussel because of the increased salinization of the bay. Unlike *Greenpeace,* there is no dispute by the parties that if water flows are maintained at their reduced levels, brought on by Greenlawn, it will result in the extirpation of the pigtoe mussel. *Greenpeace Found,* 122 F. Supp. 2d 1123. Similar to *Palila,* the increased salinity in the Green River due to reduced flows has introduced predators, including conchs and crabs, to enter the Green Bay and feed on juvenile mussels. 639 F.2d 495. Greenlawn's significant contribution to these decreased flows and subsequent introduction of predators to the mussel's habitat also constitutes a "take."

### B. Greenlawns' Water withdrawals are the proximate cause for the taking of the Pigtoe Oyster in the Green River Basin

While the scope of what constitutes a "take" is very broad, liability under the ESA complies with the traditional principles of causation. *Strahan v. Coxe,* 127 F.3d 155, 163 (1st Cir. 1997). The ESA prohibits "takes" so long as they are "foreseeable, rather than merely accidental effects

on listed species." *Babbitt* 115 S. Ct. 2407 at 2414 (1995). (finding that "nothing in the regulation purports to weaken [ordinary requirements of foreseeability and proximate cause]. Far from holding innocent actors liable by virtue of the "butterfly effect," courts have found that there is ESA liability where there is a close connection between the liable actor's conduct and habitat destruction or killing of endangered species, even when the third parties actions are "indirect." *Animal Welfare Inst. v. Martin* 623 F. 3d 19 ( 1st Cir. 2010).

An indirect "taking" does not break the chain of causation when the harm inflicted by third party is at the directive of a regulatory body like a local government. See *Strahan v. Coxe*, 939 F. Supp. 963 (D. Mass. 1996); *See also Sierra Club v. Yeutter*, 926 F.2d 429, 432-33 (5th Cir. 1991). (finding the Forest Service's permitting of excessive timber removal in Texas forests whose trees are home for red cockaded woodpeckers was a "take."). In *Strahan*, a Massachusetts law banned fishing companies from using gillnet and lobster fishing equipment without first being granted a permit from a State agency vested "with broad authority to regulate fishing." 939 F. Supp. at 975 The district court found that "commercial fishing regulatory scheme likely exacted a taking in violation of the ESA" because the "fishing vessels cannot, legally, place gillnets and lobster gear in Massachusetts waters without permission from [the agency]." *Id.* Addressing causation, the district court stated that it was "irrelevant that [the agency's] permitting of commercial fishing gear is only an indirect cause of whale entanglement[.]" *Id.* at 985.

Here, as in *Strahan,* it is irrelevant that Greenlawns request of the ACOE to permit increased water flow to the city during drought conditions is an indirect "take," as it was extremely foreseeable that if the City acted contrary to the WCM, it would harm wildlife like the pigtoe mussel. *Id.* at 985. The precise reason that the WCM implemented these restrictions was to prevent Green River from becoming a near trickle. Like the fishing vessels in *Straham,* that could only

affect a "take" pursuant to an issuance of a Massachusetts state agency, the ACOE's contravention of the WCM was only done because of Greenlawn's directive.

## IIII. THE PURPOSE OF THE ESA TO PROTECT AND PRESERVE ENDANGERED SPECIES PRECLUDES THIS COURT'S NEED TO BALANCE GREENLAWN'S INTEREST IN WATER USE AGAINST THE EXTIRPATION OF PIGTOE MUSSELS IN THE GREEN RIVER BASIN.

Injunctive relief is"[t]he most common form of remedy sought by citizens suing federal agencies in environmental cases." *Sierra Club v. Espy*, 822 F. Supp. 356, 362 (E.D. Tex. 1993). The traditional equitable relief analysis, which requires a balance of the harm of the injunction on an affected party against the assessment of the public benefit was foreclosed during issues where courts are faced with a violation of §7 of the ESA a few years after the ESA was passed in 1973. *Tenn. Valley Auth. v. Hill*, 98 S. Ct. 2279, 2298 (1978). (finding "the plain language of the [ESA], buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as incalculable."); *See also Friends of the Earth v. United States Navy* 841 F.2d 927, ( 9th Cir. 1988) (following *TVA*, "Congress removed from the courts their traditional equitable discretion in injunction proceedings.").

Most courts have interpreted the decision in *TVA* as foreclosing equitable balancing when plaintiffs assert that there is a violation of the ESA and there is "a reasonably certain threat of imminent harm to a protected species.'" *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 422 F.3d 782, 793 (9th Cir. 2005); *See also Palila v. Haw. Dep't of Land & Natural Res.*, 649 F. Supp. 1070, 1081 (D. Hawaii 1986). ( holding that once a take is determined, the ESA "leaves no room for policy considerations.")

A minority of courts, mostly in the First Circuit, have held that a violation of the ESA alters, rather than forecloses, the weighing of equities for a preliminary injunction standard in favor

of the endangered species. *Water Keeper Alliance v. United States Department of Defense.* 271 F.3d 21 (1st Cir. 2001) (finding that district court did not abuse its discretion when not awarding a preliminary injunction); *See also Animal Prot. Inst. v. Martin*, 511 F. Supp. 2d 196, 197-98 (D. Me. 2007). (Finding that, of the four traditional factors a court must weigh when deciding to issue a preliminary injunction, the "balance of hardships and the public interest [factors] tip[] heavily in favor of protected species.") However, under either the First Circuit or Ninth Circuit's approach to awarding a preliminary injunction, Greenlawn's water use during drought conditions warrants this court to award a preliminary injunction.

### A. Greenlawn's water use practices constitute a reasonably certain threat of imminent harm to the pigtoe mussel sufficient for the award of a preliminary injunction.

For cases involving the ESA, "the traditional preliminary injunction analysis does not apply." *Nat'l Wildlife Fed'n* 422 F.3d at 793. Rather than permit courts to balance parties' competing interests, "congress removed from the courts their traditional equitable discretion in injunction proceedings." *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, Inc., 23 F.3d at 1511 (citing *Friends of the Earth v. United States Navy*, 841 F.2d 927, 933 (9th Cir. 1988)). As relaxed as the standard for granting injunction is, "federal courts are not obligated to grant an injunction for every violation of the law." *Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014).

A court may issue a preliminary injunction if there is "a reasonable likelihood or reasonable certainty of actual future harm." *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996); *Humane Soc'y of the United States v. Kienzle*, 333 F. Supp. 3d 1236, 1251 (D.N.M. 2018);
*See also Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 563-64 (D. Md. 2009) ("to require absolute certainty [] would frustrate the purpose of the ESA to protect endangered species before they are injured."). In *Nat'l Wildlife,* the Ninth Circuit held that because

the endangered grizzly bears at issue had not been hit by trains in the areas of the spilled corn for more than three years outside of their regular habitat, the plaintiff had failed to establish a reasonable likelihood of future injury. *Nat'l Wildlife Fed'n,* 23 F.3d at 1511-12. In contrast, in *Animal Welfare,* the court found that, "like death and taxes," Indiana bats were virtually certain to be harmed, wounded, or killed if a wind turbine farm was built because of the height and flight patterns of the bats, and because bats of the species were already being killed by turbines. *Animal Welfare Inst.* 675 F. Supp. 2d at 579.

If this court does not issue an injunction, continued destruction of the pigtoe mussel's habitat is practically certain. Drought conditions have become more persistent throughout the 21st century. The ACOE has implemented Zone 1 restrictions in 6 years since the turn of the century, whereas it only had to apply Zone 1 restrictions in one year before 2000. R. at 8. In addition, all parties agree that based on recent trends in precipitation and in light of climate change, droughts are going to continue to occur. R. at 11. Unlike *Nat'l Wildlife,* where the Grizzly Bear traveled from it's regular habitat to eat the spilled corn, the Greenriver is no unfamiliar setting for the pigtoe mussel, which at most can move small distances to find habitat that is still submerged. *Nat'l Wildlife Fed'n,* 23 F.3d at 1511-12; R. at 9. If Greenlawn continues to withdraw water at such a high level during the next drought, there is no doubt that the endangered species will become a sitting mussel. (as opposed to duck)

**B. Even if the First Circuit's balance of equities test is applied, the balance shifts in favor of a preliminary injunction being awarded to New Union Oystercatchers.**

In very narrow circumstances, the First Circuit has found that the "advantage given to endangered species [for courts deciding to issue a preliminary injunction] is not necessarily dispositive, and that the presumption is rebuttable." *Animal Prot. Inst.* 511 F. Supp. 2d at 198; *See also Water Keeper* 271 F.3d 21 at 34. In these cases, there are four factors that courts consider to

determine whether the preliminary injunction is appropriate. The four factors for the balancing of equities are:

> First, the likelihood that the party requesting the injunction will succeed on the merits; second, the potential for irreparable harm if the injunction is denied; third, the hardship to the nonmovant if enjoined compared to the hardship to the movant if injunctive relief is denied; and fourth, the effect of the court's ruling on the public interest.

*Water Keeper* 71 F.3d 21 at 34.. These factors are still read in light of the purpose of the Endangered Species Act, and therefore, the "balance of hardships and the public interest tips heavily in favor of protected species." *Id.* at 34 quoting *Strahan v. Pritchard* 473 F. Supp. 2d 230 (D. Mass. 2007).

Given that two of the four factors are, by default, shifted in favor of protected species, courts will only deny granting preliminary injunctions when the factors against the injunction heavily outweigh the presumption favoring the endangered species. *Water Keeper All.* 271 F.3d at 34 (1st Cir. 2001); *Hamilton v. City of Austin*, 8 F. Supp. 2d 886, 888 (W.D. Tex. 1998). In *Waterkeeper,* the first circuit held that "the district court did not abuse its discretion in finding that the public interest weighed in favor of denying a preliminary injunction" when the harm asserted by the Navy includes affected the public interest that is national security. 271 F.3d at 35. Similarly, the court in *Hamilton* held that if the City of Austin did not clean out a particular spring that was used recreationally for swimming by large numbers of people, a person could drown. *See* 8 F. Supp. 2d at 888. The fear of a person drowning was weighed against the stress caused by the cleaning on the salamander, and the court hard received no proof that "any individual Salamander has been killed or maimed by the pool cleaning activities." *Id.* at 896. The Court in *Hamilton* summarized the dilemma nicely in a short poem with notable lines like: "*Both salamander and*

*swimmer enjoy the springs that are cool, And cleaning is necessary for both species in the pool."* *Id.* at 888.

Here, if the court were to balance equities, the presumption of the factors of hardship and public interest shifting in favor of the pigtoe mussel could not be overcome. In contrast to *Hamilton* or *Water Keeper,* if the court were to award a preliminary injunction, the impact on the public interest would be insignificant. *See Water Keeper* 271 F.3d 21; *Hamilton* 8 F. Supp. 2d 886. In *Hamilton,* had the court not cleaned the swamp, it could have resulted in the death of a swimmer. *See* 8 F. Supp. 2d 886. In *Water Keeper,* the grant of a preliminary injunction would have jeopardized the public's interest in national security. *See* 271 F.3d 21 Here, the worst that the City will face is an inability of residential water consumers to use additional water for watering lawns and ornamental plants. R. at 8. This can hardly be compared to the *complete* extirpation of the pigtoe mussel. R. at 10. With regard to the second factor, the actions of Greenlawn have already resulted in the death of 25% of the mussel species in the Green River, showing that the likelihood of irreparable harm is significant, in contrast to *Hamilton,* where there was no proof that a salamander had been harmed before. 8 F. Supp. 2d at 886.

## CONCLUSION

For the foregoing reasons, the Plaintiff-Appellant, New Union Oystercatchers, Inc., respectfully request this Court reverse the district court's dismissal of summary judgment that the ACOE did not violate the consultation requirement under §7(a) of the ESA, 16 U.S.C. §1536(a), reverse the court's holding of summary judgment declaring Greenlawn a riparian landowner, affirm the court's holding that Greenlawn violated § 9 of the ESA, 16 U.S.C. §1536(a), and find the District Court must balance the equities before enjoining a beneficial municipal activity.