Team No. 52

2020 Jeffrey G. Miller National Environmental Law Moot Court Competition

CA. NO. 19-000987

In the
UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,
Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS
Appellee

-and-

CITY OF GREENLAWN, NEW UNION
Appellant

On Appeal from the United States District Court for New Union

Brief of Appellee UNITED STATES ARMY CORPS OF ENGINEERS

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JURISDICTIONAL STATEMENT

The U.S. District Court for the District of New Union had federal question jurisdiction over claims concerning the Endangered Species Act pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over claims concerning state riparian law pursuant to 28 U.S.C. § 1367. The Opinion and Order of the District Court were issued May 15, 2019, in Civ. 66-2017, and the City of Greenlawn, New Union and the New Union Oystercatchers, Inc. both filed a timely Notice of Appeal. The U.S. Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal from a final order pursuant to 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Whether Greenlawn has the right, as a riparian landowner, to continue water withdrawals for natural uses during drought conditions when its citizens rely on agreed-upon minimum flows.

2. Whether the US Army Corps of Engineers must consult with the US Fish & Wildlife Service before obeying its agreement with Greenlawn to release water from the Howard Runnet Dam Works sufficient to fulfill Greenlawn's rights as a riparian landowner.

3. Whether Greenlawn's withdrawal of drought-reduced flow from the Green River system, such that 25% of the endangered oval pigtoe mussel population died, constitutes a "take" of the mussel in violation of § 9 of the Endangered Species Act.

4. Whether the District Court must balance the equities before enjoining Greenlawn's use of its riparian landowner right, when the balance is between a city of people who need water and one population of mussels.

STATEMENT OF THE CASE

As a federal agency, the U.S. Army Corps of Engineers can only confine itself to the limited legal options before its officers. Once the Army Corps manages an infrastructure project as the law requires, it is the responsibility of the Americans who benefit from that project to

make "wise use" of the resources they receive.[1] Given present environmental realities, Greenlawn and the oystercatchers downstream are both in difficult positions with their citizens and constituents. The law requires that all parties take a hard look at their present practices in order to navigate towards an equitable outcome. For its part, the Army Corps must follow its mission: to "[d]eliver vital public and military engineering services; partnering in peace and war to strengthen our Nation's security, energize the economy and reduce risks from disasters."[2]

a. History of the Howard Runnet Dam Works

The Howard Runnet Dam Works stand at the center of the present controversy. The Army Corps was authorized by Congress to construct them in the River and Harbor Act of 1945, which enumerated a long list of public works projects to be completed on American rivers once the "present wars" were terminated. Pub. L. No. 79-14, 59 Stat. 10 (1945). The Corps built the Green River Diversion Dam and the Howard Runnet Dam on the Howard Runnet Lake in 1947, completing the Howard Runnet Dam in 1948. R. at 5, 6.

Pursuant to its enabling statute, the dam was "originally authorized for flood control, hydroelectric power, and recreation purposes." R. at 6. The Fish and Wildlife Coordination Act of 1958, a precursor to the Endangered Species Act, required agencies making new water infrastructure projects to consult with the Fish & Wildlife Service. Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958) at Sec. 2(a). For those projects already completed at the time of the Act's passage, Congress "added fish and wildlife purposes for all ACOE administered dams." R. at 6. This infrastructure turned the section of the

[1] Gifford Pinchot: A Legacy of Conservation. U.S. DEPARTMENT OF THE INTERIOR (Aug. 9, 2017). https://www.doi.gov/blog/gifford-pinchot-legacy-conservation.
[2] Mission & Vision. US ARMY CORPS OF ENGINEERS HEADQUARTERS. https://www.usace.army.mil/About/Mission-and-Vision/.

Green River running through Greenlawn into a 'Bypass Reach.' R. at 5. The city had been withdrawing water from the river for its municipal needs since its founding in 1893. R. at 5.

b. Agreements Between the Army Corps and Greenlawn

In 1948, shortly after completing the Howard Runnet Dam Works, the Army Corps entered into an agreement with Greenlawn which has never been renegotiated. R. at 5–6. In their agreement, the Army Corps agreed to "maintain flows in the Bypass Reach sufficient to allow the City of Greenlawn to continue water withdrawals 'in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union.'" R. at 6. This 70-year-old agreement predates and was incorporated into the Army Corps' Water Control Manual (1968) ("Manual"), which guides the operations of the Howard Runnet Dam Works. R. at 6. The Manual includes as a goal: "maintaining flow for the City of Greenlawn's water intake facilities in the Bypass Reach." R. at 6. The Manual also expressly references the 1948 agreement to give Greenlawn what it is entitled to as a riparian property owner: "At all times the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply agreements entered into by the United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law." R. at 7.

c. Recent Events Resulting in Decimation of the Endangered Oval Pigtoe Mussel Population

Beginning in Fall 2016, ACOE had to instigate Zone 1 water restrictions for drought reasons. R. at 8. However, despite these restrictions, drought conditions persisted and by Spring of 2017 ACOE instigated "Zone 2 (Drought Warning) conditions and ACOE instituted flow restrictions [of 7 CFS] in the Bypass Reach." R. at 8. Despite this and the agreed restrictions in the WCM, Greenlawn issued a demand letter for 30 CFS, citing that the WCM was out of date.

R. at 8. As a result, the District Commander relented and approved 30 CFS flow, which resulted in necessary Zone 3 (Drought Emergency) status. R. at 8. This forced ACOE to curtail hydroelectric power releases, reducing the water being released through the tailrace and downstream of Greenlawn. R. at 8–9. Downstream of Greenlawn, the previously "flowing river habitat" of the Green River "turned into stagnant pools of water and narrow trickles." R. at 9. The reduced water flow "exposed several beds of oval pigtoe mussels." R. at 9. Requiring slow to moderate currents as habitat, the pigtoe mussels were left with stagnant water and siltation, which eliminated necessary habitat. R. at 9.

SUMMARY OF THE ARGUMENT

The matrix of federal statutes and state common law overlaying contemporary American water management creates an often intractable tangle, exacerbated by climate change. *See* R. at 11. Common law riparian water rights form the backbone of how Greenlawn, the Army Corps of Engineers (ACOE), and the New Union Oystercatchers (NUO) can legally relate to the Green River, but federal statutes further constrain each party. Greenlawn, as a municipality bordering the Green River, has the right to withdraw the water it needs even during drought conditions. The Army Corps has no discretion in bending to this right. However, the Endangered Species Act does not allow Greenlawn to disregard the effect of its choices on an endangered species with a comparable need for water from the Green River. On these issues, the Court should uphold the district court's rulings. However, the lower court was incorrect in failing to balance the equities before issuing an injunction on Greenlawn's water use. It has the responsibility to limit Greenlawn's use, but must take a clear-eyed and common-sense look at the interests at stake before categorically reducing Greenlawn's water withdrawals. All issues are questions of law, to be reviewed de novo.

ARGUMENT

I. As a riparian landowner, Greenlawn has the right to withdraw the water its citizens need during drought conditions.

Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any conservation measures. "As long ago as the Institutes of Justinian, running waters, like the air and the sea, were *res communes*—things common to all and property of none." *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 744 (1950) (emphasis added). This core principle establishes riparian water law.

In states that follow a riparian system of water rights, a riparian rights holder may make use of the water abutting their land in any manner not inconsistent with another riparian's reasonable use. *See Harris v. Brooks*, 225 Ark. 436, 442, (1955). When a riparian landowner challenges the use of a co-riparian, they must first prove that their own use is reasonable; only after doing so may they attempt to show that the co-riparian's use is unreasonable and must therefore be diminished. *Id.*

Greenlawn is the only owner of property fitting within the definition of riparian land, and therefore the only riparian in this case. As Greenlawn is the sole riparian present, the court need not engage in a reasonable use analysis. If the court does engage in a reasonable use analysis, Greenlawn's is reasonable because as a town, it needs water for public health. Greenlawn's use is not unreasonably harming another riparian's reasonable use.

a. Only co-riparians may challenge one another's use.

i. Riparian rights are generally appurtenant to those owning "riparian land."

Before engaging in the discussion of riparian rights, it serves to understand who may hold those rights. Black's Law Dictionary defines the term "riparian" as "belonging or relating to the bank of a river." *Riparian*, BLACK'S LAW DICTIONARY, (2d ed.). Naturally then, riparian rights attach to the ownership of the bank of a river.

The Supreme Court has affirmed that riparian status is defined by ownership of land abutting water. In *Potomac Steamboat Co. v. Upper Potomac Steamboat Co*., the Court explained that "[a] riparian proprietor . . . is one whose land is bounded by a navigable stream." 109 U.S. 672, 682 (1884) (quoting *Yates v. Milwaukee*, 10 Wall. 497, 594 (1870)). "[T]he rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river." *Id.* (quoting *Stockport Water-works Co. v. Potter*, 3 Hurl. & Co. 300-326).

The Restatement (Second) of Torts supports this general concept asserted by the Supreme Court and further defines key terms. Section 844 of the Restatement defines a "Riparian Proprietor" as a person who possesses riparian land. RESTATEMENT (SECOND) OF TORTS § 844 (AM. LAW. INST. 1979). Following naturally, riparian land is defined as a "tract of land that borders on a watercourse or lake, whether or not it includes a part of the bed of the watercourse or lake." *Id. See also Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 329 (Cal. 1907) (holding that a plaintiff's land, which constituted a part of the bed of a stream, was riparian land).

Some individuals have tried to claim riparian rights via express easement and prescriptive rights. In *Gould v. Eaton*, the California Supreme Court found that even though defendants had contracted the right to divert water, they still had no riparian rights against other riparian owners. 49. P. 577, 557–78 (Cal. 1897). On the other hand, in *Williams v. Wadsworth*, the Connecticut Supreme Court affirmed the prescriptive water rights of a non-riparian. 51 Conn. 277, 302 (Conn. 1883). The non-riparian landowner had first purchased the right to divert water from a

landowner, and subsequently secured from all lower proprietors a release by deed for his diversion. *Id.* Because of this longstanding acceptance within the riparian community, the court found a that the non-riparian had a prescriptive right to the water. *Id.*

ii. The United States is subject to state riparian law when water serves a secondary purpose on a federal reservation.

When water is a secondary purpose for a reservation of federal land, that federal land is in the same position as other riparians under state law. *In re Water of Hallett Creek Stream Sys*., 44 Cal. 3d 448, 457 (1988). When the federal government "reserves land from the public domain for federal purposes, it implicitly reserves sufficient water to accomplish the purposes of the reservation." *Id.* This is the doctrine of federal reserved water rights, which "exist independently of state law." *In re Application for Water Rights of U.S.*, 101 P.3d 1072, 1079 (Colo. 2004). A federal reservation is "any body of land, large or small, which Congress has reserved from sale for any purpose." *U.S. v. Celestine*, 215 U.S. 278, 285 (1909). When a federal reservation is created, it carries with it the right to water necessary to accomplish its primary purpose. *John v. U.S.*, 720 F.3d 1214, 1225 (9th Cir. 2013).

In *U. S. v. New Mexico*, the Supreme Court held that if water "is only valuable for a secondary use of the reservation" then there is a presumption that the federal landowner operates on the same priority level as other private water rights holders. 438 U.S. 696, 702 (1978). Since water was essential for the primary purposes of the reservation—preserving timber forests and securing favorable water flows on the Gila National Forest—water rights were reserved only for those purposes. *Id.* at 717 n. 23. Water rights were not reserved for aesthetic, recreational, wildlife preservation, or stock watering purposes. *Id.* at 705. This system applies to riparianism

as well as western prior appropriation. *In re Water of Hallett Creek Stream Sys*., 44 Cal. 3d at 457.

b. Neither ACOE nor NUO are subject to New Union riparian law, and therefore cannot challenge Greenlawn's use as unreasonable.

In this case, no party can challenge Greenlawn's water right as a co-riparian. Greenlawn is a riparian landowner, holding rights to water in the Bypass Reach. R. at 12. No other party in this case has the status of a co-riparian, and therefore cannot challenge Greenlawn's reasonable use.

i. NUO does not own riparian land on the Green River.

NUO is not a co-riparian. The lower court acknowledged that neither NUO nor any of its members own property abutting the Green River. R at 13. Furthermore, the record contains no information about any deeds, contracts, or agreements entered into by NUO or any of its members with a riparian landowner for the right to use water. Therefore, the situation of NUO is unlike even those plaintiffs in *Williams v. Wadsworth*, where a prescriptive easement to water was granted due to the acceptance of the new use by the riparian community. 51 Conn. 277, 302 (Conn. 1883).

ii. ACOE does not own riparian land; the Howard Runnet Dam Works is not a federal reservation, but a works.

ACOE is also not a co-riparian. It does not have a federal reservation in the Howard Runnet Dam Works ("dam works" or "dam") such that it would be subject to New Union riparian law. ACOE's federal ownership in this case is distinct from the circumstances identified where the United States holds status as a riparian.

As noted in *Celestine*, the central aspect to federal reserved water rights is the reservation of land. 215 U.S. 278, 285 (1909). In the case at bar, the record does not specify how land was

reserved to construct the dam works. The Howard Runnet Dam was authorized by the Rivers and Harbors Act of 1945 (RHA). R. at 6. The RHA does not grant that land is being reserved.[3] Instead, it is the purpose of the Act to promote the consideration and development of "works" to facilitate navigation. Pub L. 79-14 (1994). This differs from the federal reservations of land in *New Mexico*. 438 U.S. 696, 702 (1978).[4] That and other similar federal reservations were discrete, identifiable tracks of land. That is not the case here. Therefore, the federal reserved water rights doctrine does not apply to this case. Since there is no federal reservation, there can be no secondary use of water under *New Mexico.* Thus, ACOE does hold the rights to water as a riparian under New Union common law.

Since neither ACOE nor NUO is a riparian landowner on the Green River with water rights, Greenlawn's reasonable use cannot be challenged in this case. As such, the district court was correct in granting summary judgment in Greenlawn's favor, and the ruling should be upheld.

c. Greenlawn's use of water is reasonable under their riparian rights.

Assuming arguendo that there are other riparians who can challenge Greenlawn's right, Greenlawn still survives a reasonable use analysis. Under New Union law as evidenced in the Restatement, Greenlawn meets the first four factors for reasonable use in a riparian system.

iii. A riparian landowner's rights are subject to their co-riparian's reasonable use.

[3] The Rivers and Harbors Act of 1945 states in pertinent part that "in connection with the exercise of jurisdiction over the rivers of the Nation, through the construction of works of improvement…it is hereby declared to be the policy of Congress…to facilitate the consideration of projects… and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom…" Pub L. 79-14 (1994).
[4] Although *New Mexico* addresses federal reserved water rights in a Western prior appropriation system, *In re Water of Hallett Creek Stream Sys*. makes clear that federal reserved rights also apply in riparian systems. 44 Cal. 3d 448, 457 (1988). California is a hybrid state which applies both prior appropriation and riparianism.

Each riparian's right is correlative; no one may harm the other with an unreasonable use of water. *Harris v. Brooks*, 225 Ark. 436, 442, (1955). This is the "reasonable use" doctrine. *Id.* The Restatement (Second) of Torts summarizes modern riparian law on reasonable use with six factors, as developed from centuries of common law in the United States. RESTATEMENT (SECOND) OF TORTS § 850A (AM. LAW. INST. 1979).

In *Herminghaus v. Southern California Edison Co.*, the Supreme Court of California explained that each riparian "is entitled to the reasonable use of . . . waters and of the ordinary and usual flow thereof for such customary and domestic uses as inhere in riparian owners along similar streams, and for irrigation of their said riparian lands." *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 108 (1926). The court found that building a dam to generate electricity would dry up all other uses downstream. *Id.* Allowing such an action would deny the water rights of downstream riparians, and would deny the dam builders those same rights if another riparian further upstream were to do the same. *Id.* at 111. This kind of pattern "would, if permitted, put an end to the whole doctrine of riparian rights." *Id.*

This presents the challenge of defining "reasonable use." Many courts have acknowledged that "[n]o statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case." *Hoover v. Crane*, 362 Mich. 36, 40 (1960) (quoting *Gehlen v. Knorr*, 101 Iowa 700, 70 N.W. 757, 758 (1897)). For example, in *Hoover v. Crane*, the court found that the defendant's water use was reasonable. *Id.* The defendant's co-riparians could not prove that his use unreasonably reduced the water level of their common lake. *Id.*

In *Mason v. Hoyle*, a foundational case, the defendant operated a mill on a stream whose waters flowed for nine months out of the year. *Mason v. Hoyle*, 14 A. 786, 794 (Conn. 1888). To compensate for the months of water scarcity, the defendant filled a reservoir, and deprived others

of water in a manner the court found to be unreasonable. *Id.* The court considered six factors that contributed to the evolution of the modern-day Restatement.

Finally, the Second Restatement of Torts lists nine factors for determining whether a riparian's water use is reasonable, which do not limit the factors courts can consider:

> (a) the purpose of the use, (b) the suitability of the use to the watercourse or lake, (c) the economic value of the use, (d) the social value of the use, (e) the extent and amount of the harm it causes, (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other (g) the practicality of adjusting the quantity of water used by each proprietor, (h) the protection for existing values of water uses, land, investments, and enterprises, and (i) the justice of requiring the user causing harm to bear the loss.

RESTATEMENT (SECOND) OF TORTS § 850A. The first four factors assess the reasonableness of the use, and the last five assess the harm of the use in context with the other parties to the case. For a use to be deemed unreasonable, the co-riparian's use must suffer significant harm. *Id.* Significant harm will be found when there is a major loss suffered by the opposing riparian. *Id.*

iv. Greenlawn's municipal use is reasonable.

In a suit between two riparians, the challenger must show that their own use is reasonable before challenging the other riparian's use as unreasonable. RESTATEMENT (SECOND) OF TORTS § 850A. Here, NUO wants to show that ACOE and Greenlawn, as parties to this case, must respect each other's uses. Yet ACOE and Greenlawn already have an agreement, made when the dam works were first created. R. at 6. ACOE agreed to respect Greenlawn's water rights as they stood in 1948. R. at 6. There are other riparians on Green River, including upriver agricultural users, but they are not party to this case. R. at 7. Even if they were, Greenlawn's use would still be declared reasonable under riparian common law because it meets the first four Restatement factors.

In assessing the first four Restatement factors, the purpose of Greenlawn's water use is to meet its citizens' basic human needs. Water is necessary to keep the town functioning in every way: for drinking water, hygiene, safe food preparation, and waste management.

Second, Greenlawn's use is suitable to the Green River. During normal flows, the river provides enough water for Greenlawn and the needs of other riparians not party to this suit. It is necessary and suitable to withdraw water for municipal use from the watershed in which the municipality sits. The normal flow of the river, as safely mediated by ACOE for flood control and other uses, is sufficient and suitable for municipal use.

Third, the economic value of Greenlawn's water use is enormous. The "Greenlawn Water Agency provides domestic and industrial water supply to over 100,000 customers within Greenlawn city limits" R. at 5. To a certain degree, all cities run on water. Greenlawn grew massively in the late 1960s when it was connected to Progress City via a new interstate highway. R. at 5. The city still needs water to drive its economy.

Fourth and finally, the social value: without these withdrawals Greenlawn would be unable to support its population, provide proper sanitation, or support necessary infrastructure for social services. Towns are made of people, and people need water. Greenlawn's common law riparian rights support its need for undiminished withdrawals from Green River.

v. Greenlawn need not "share the shortage."

In cases of drought, riparians are sometimes required to "share the shortage." RESTATEMENT (SECOND) OF TORTS § 850A. When there is not enough water to supply all needs, then the shortage must be shared among riparians. *Id.* The foreseeability of a drought can play a factor in how or whether a shortage need be shared. *Mason v. Hoyle*, 14 A. 786, 794 (Conn. 1888). Unlike

in *Mason*, Greenlawn cannot predict when drought will occur, and could never store water to use in times of shortage. ACOE does that for them, subject to federal statutes.

ACOE has no need to share the shortage with Greenlawn under riparian water law. Our federal interests are expressed in the Endangered Species Act, *see* Sections II & III, *infra.* That leaves NUO as the only party to this action that wants Greenlawn to share the shortage under riparian common law, yet NUO has no standing to assert this claim because they are not a co-riparian with Greenlawn.

vi. Municipalities are given preference by judges.

Municipalities are not extended the preference that domestic uses receive as a reasonable use, RESTATEMENT (SECOND) OF TORTS § 850A (1979), but judges nevertheless recognize the importance of an entity that provides water for a whole town or city. In a New York case pitting a trout stream against municipal needs, a court found that "[i]n light of the high priority of domestic and municipal water uses . . . the trout stream must unfortunately give way to the predictable and unrelenting growth in human water demands." *Hudson River Fisherman's Ass'n v. Williams*, 139 A.D.2d 234, 241, 531 N.Y.S.2d 379, 383 (1988). Cases like this also demonstrate why common judges are reluctant to make municipalities "share the shortage."

When Greenlawn withdraws water as a municipality, it does not know whether the water molecules will go to a hospital or to a lawn. Common law is the not the answer to NUO's water conservation concerns. To that, NUO must turn to the Endangered Species Act. The district court was correct in granting summary judgment in Greenlawn's favor, and the ruling should be upheld.

II. The Army Corps was not required to consult with the U.S. Fish & Wildlife Service before obeying its agreement with Greenlawn to deliver water needed by the municipality's citizens.

In operating the Howard Runnet Dam Works in accordance with the law, the Army Corps does not have the discretion to ignore Greenlawn's riparian water rights. As such, the district court was correct in dismissing the Oystercatchers' First Claim for Relief and holding that the ESA § 7(a) consultation requirement does not attach to the Army Corps' actions.

The Endangered Species Act ensures species survival in part by requiring that federal agencies consult the Secretary of the Interior before taking an action that could "jeopardize the continued existence of any endangered species" or its habitat. 12 U.S.C. § 1536(a)(2). For inland creatures like mussels, this means consulting with the U.S. Fish & Wildlife Service. *See e.g.* 50 C.F.R. § 17.11. After formal consultation, Fish & Wildlife will prepare a Biological Opinion on how to avert or mitigate effects on endangered species with "reasonable and prudent alternatives." 16 U.S.C. § 1536(b)(3)(A). If the status quo changes, an agency may be required to reinitiate consultation to ensure ESA compliance. 50 C.F.R. § 402.16.

"Agency action" means "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," 50 C.F.R. § 402.02, "including the granting of permits or causing indirect modifications to land." *Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, No. 18-10541, 2019 WL 5690619, at *13 (11th Cir. Nov. 4, 2019). In this case, the Army Corps' use of the Water Control Manual constitutes continuing or "ongoing agency action." *See e.g. Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994) (holding that comprehensive forest management plans are ongoing agency action because they have an "ongoing long-lasting effect even after adoption"). However, the consultation requirement is not triggered because the action is not discretionary.

a. The ESA Section 7 consultation requirement does not apply to nondiscretionary agency action.

Section 7 consultation requirements do not apply to the Army Corps' management of the dam works pursuant to the Water Control Manual because consultation requirements apply only to discretionary agency actions. Agency discretion "presumes that an agency can exercise 'judgment' in connection with a particular action." *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–416 (1971)). Circuit courts have clarified that an agency uses discretion when, "acting in furtherance of a broad Congressional mandate, [it] chooses a course of action which is not specifically mandated by Congress and which is not specifically necessitated by the broad mandate." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 524 F.3d 917, 929 (9th Cir. 2008).

As interpreters of the Endangered Species Act, the National Marine Fisheries Service and U.S. Fish & Wildlife Service jointly promulgated a regulation which states that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. In a landmark case, the Supreme Court interpreted this regulation to mean that section 7 does not "impliedly repeal[] nondiscretionary statutory mandates, even when they might result in some agency action. Rather, the ESA's requirements … come into play only when an action results from the exercise of agency discretion." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007).

In that case, the EPA was required to transfer certain water permitting powers to a state once the state had met a statutorily enumerated list of factors. *Id.* The court held that the ESA did not add an extra factor to the list by requiring the EPA to find that transferring the permit power would not place endangered species in jeopardy. *Id.* Thus, an agency is exempt from the

consultation requirement when it cannot "simultaneously obey" the differing mandates in its own statute and the ESA. *Nat'l Wildlife Fed'n*, 524 F.3d at 929 (quoting *Home Builders*, 551 U.S. at 666).

The underlying rationale for this state of the law is this: "where an agency cannot take into account environmental concerns in its decisionmaking, then compliance with NEPA and the EPA would serve no purpose. So long as some elements of the decisionmaking involve environmental judgments for which information supplied through . . . ESA processes might reasonably be useful, the decisionmaking is discretionary. *Nat'l Wildlife Fed'n v. Sec'y of Dep't of Transportation*, 374 F. Supp. 3d 634, 661–62 (E.D. Mich. 2019) (emphasis original).

b. Settled contracts that require agency action do not leave agencies with discretion.

In the context of agreements with non-governmental entities, whether an agency has discretion is a highly fact-specific inquiry. In one case where the Bureau of Reclamation was renewing dam water service contracts, the court held that the agency had discretion to alter terms and could have reduced the total amount of water for sale to comply with the ESA. *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998). Thus, the section 7 consultation requirement was triggered. *Id.*; *see also Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (consultation requirement triggered because contract renewal was not automatic and so agency had discretion to not renew the contract).

In a different case, the Fish & Wildlife Service had issued an incidental take permit to a logging company for endangered spotted owls. *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1083 (9th Cir. 2001). The court held that when new species are listed as endangered, the agency does not have discretion to renegotiate the permit and is not required to reinitiate

consultation. *Id.* A new agreement is unnecessary, because the logging company still violates the ESA if they "take" an animal from newly listed population. *Id.*; *see also Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 32–34 (D.C.Cir.1992) (holding that ESA did not apply to hydropower licenses because ESA did not allow FERC to override statutory prohibition on altering the licenses). These cases illustrate the difference in agency position when a contract or permit is up for negotiation, versus when a contract is simply in force.

c. The Army Corps does not have discretion in its contract to release water to Greenlawn, and so Section 7 consultation is not triggered.

In this case, the U.S. Army Corps of Engineers does not have discretion in the management of the Howard Runnet Dam Works, and so the section 7 consultation requirement is not triggered.

After completing the Dam Works in 1948, the Army Corps agreed to "maintain flows in the Bypass Reach sufficient to allow the City of Greenlawn to continue water withdrawals 'in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union.'" R. at 6. This agreement predated the creation of the Water Control Manual, was incorporated into it when the Manual was adopted. *Id.*

The series of agreements made between the Army Corps and Greenlawn demonstrates how the Army Corps is mandated to maintain flows in the Bypass Reach sufficient to meet Greenlawn's rights as a riparian property owner. Since the Howard Runnet Dam Works were constructed, the Army Corps has been required honor its contract with Greenlawn. Greenlawn's water rights have been integrated into the management of Howard Runnet Dam Works since its inception, without renegotiation of that clause. Unlike in *National Wildlife Federation*, the Army Corps here is not trying to follow "broad [statutory] mandates which do not direct agencies to

perform any specific nondiscretionary actions." *Nat'l Wildlife Fed'n*, 524 F.3d at 928. Rather, it is required to meet "particular goals" in honoring Greenlawn's riparian rights. *Id.*

This case is most like *Simpson Timber Co.*, because the agency does not have discretion to renegotiate the agreement with Greenlawn. Army Corps' deference to the Greenlawn's water right has been settled since 1948. In *Simpson Timber Co.*, the incidental take permit for spotted owls had been negotiated and closed before two new species were listed as endangered. Here, the agreement with the municipality predates the listing of the oval pigtoe mussel as endangered because the agreement predates the Endangered Species Act itself. Like in *Home Builders*, the agreement has a finite list of factors the Army Corps of Engineers can take into account in managing the flow of water from the Howard Runnet Dam Works. Fish and wildlife purposes are an authorized purpose of the dams since 1958, but the agreement to honor Greenlawn's common law water rights was made in 1947–1948 as the dam was being completed. Unlike in *Houston*, Army Corps does not have leave to change the total amount of water for sale. The Oystercatchers have alternative methods for enforcing the ESA on Greenlawn, as explained in the following section on ESA § 9, but the § 7 consultation requirement is not triggered here.

In *Simpson Timber Co.*, the court recognized that the endangered species were still protected even though there was not an incidental permit in place. If the logging company made a "taking" of one of the two new species listed as endangered, there would still be a violation of the Endangered Species Act. The same situation is present in this case: no consultation required in triggered, but Greenlawn has "taken" 25% of the endangered oval pigtoe mussel population, *see* Section III, *infra*, and that violation rightfully triggers an injunction of their overuse of their riparian water right.

The Army Corps of Engineers has a settled, longstanding agreement to capitulate to the municipality's needs under riparian common law, and it does not have discretion to change this agreement. As such, the district court was correct in holding that the ESA § 7 consultation requirement is not triggered in this case.

III. Greenlawn's overuse of its water right during drought conditions has resulted in a "take" of the endangered oval pigtoe mussel population, in violation of Section 9 of the Endangered Species Act.

By ignoring drought conditions and withdrawing enough water to kill 25% of the endangered mussel population downstream, Greenlawn has committed an unlawful take in violation of the Endangered Species Act. Section 9 of the ESA makes it "unlawful for any person subject to the jurisdiction of the United States to … take any [endangered species of fish or wildlife] within the United States." 16 U.S.C. § 1538(a)(1)(B). The law defines "take" 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). The Fish & Wildlife Service defines "harm" as "an act which actually kills or injures wildlife. Such acts 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. By removing water from the Bypass Reach and drowning 25% of the mussel population in air, Greenlawn harmed, and therefore unlawfully took, the mussels.

a. Harming an endangered species population is an unlawful take within the meaning of Section 9.

Greenlawn is guilty of habitat modification that resulted in an illegal take of endangered mussels. An entity violates ESA Section 9 if its actions directly or indirectly result in a taking. 16 U.S.C. § 1538(a)(1)(B); *see also Babbitt v. Sweet Home Chapter of Communities for a Great*

Oregon, 515 U.S. 687, 704 (1995). In *Babbitt*, plaintiff logging companies challenged 50 C.F.R. § 17.3, which interprets indirect harms to be included in the definition of a taking. *Id.* The Supreme Court upheld this longstanding[5] regulation as a reasonable statutory interpretation of the meaning of "harm" in the ESA. *Id.* at 700. A broad definition of harm is consistent with congressional intent in ESA legislative history. *Id.* Congress intended "take" to be defined "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) (quoted in *Babbitt*, 515 U.S. at 704).

Further, Congress made it possible for entities to apply for incidental take permits under Section 9, which would be pointless if Congress had only intended to prohibit direct harms. *Babbitt*, 515 U.S. at 700. "[T]he fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, 'if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,' 16 U.S.C. § 1539(a)(1)(B), strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings." *Id.* As similar litigation has continued to play out in the courts, it has become clearer which indirect harms result in an unlawful taking.

For example, state licensing schemes can indirectly result in unlawful takings. *See e.g. Strahan v. Coxe,* 127 F.3d 155 (1st Cir. 1997) (upholding injunction on state permitting of gillnets because they entangle Northern Right whales). In *Strahan*, the First Circuit held that "a governmental third party, pursuant to whose authority an actor directly exacts a taking of an endangered species, may be deemed to have violated the provisions of the ESA." *Id.* at 165. This is a fact specific inquiry. If a taking of an animal from an endangered species was an isolated

[5] At the time, the regulation had been on the books for two decades. *Id.* at 700.

incident, then an injunction is generally unwarranted. *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 29 (1st Cir. 2010). But when there is a threat to a species as a whole, the issue of a taking becomes clearer. *Id.* In *Martin*, a case about Canada lynx, the court issued an injunction on state permitting of Conibear traps because they threatened takings of the whole endangered population. *Id.* In contrast, the court did not enjoin state permitting of foothold traps because the entire population was not in jeopardy. *Id.*

b. By directly and indirectly harming the mussel population with their over-withdrawal of water, Greenlawn made an unlawful taking of an endangered species.

Greenlawn's over-withdrawal of water during a drought caused both direct and an indirect "take" of the pigtoe mussel population within the meaning of the ESA. Greenlawn's water withdrawal and unwillingness to work within water restrictions during droughts led to the de facto elimination of water flow downstream of the city on the Green River. As the mussels require a certain amount of flow to survive, Greenlawn's excessive use of water critically endangered the local population. This activity led to the harm of the mussel population within the meaning elucidated by *Babbitt*. Greenlawn's actions fit within the broad definition Congress intended in the statute because their use of water went far beyond what was necessary for basic human needs to uses such as "watering lawns and ornamental plants." R. at 8. Greenlawn made no attempt to curtail their use to accommodate drought conditions. This excessive use directly impacted the flow and caused significant change in the downstream habitat. This is largely a direct effect on the mussel habitat by Greenlawn. However, this is also an indirect effect as Greenlawn's actions in reducing water flow led to increased siltation and exposure of the river beds holding the mussels. Additionally, another indirect of this reduced flow was the reduction,

and in some areas loss, of the sailfin shiner, a fish species necessary for mussel spawning and larval maturing. R. at 9.

Greenlawn can argue that their take was the result of state-issued rights per riparian law; however, under existing law, this would also constitute a take within a meaning of the federal statute and is vulnerable to enjoinment. Even if, as in *Strahan*, Greenlawn possessed some state permit for withdrawal of water for municipal ornamental watering, such practice can still be enjoined because of the irreparable harm it causes to downstream endangered species. Unlike in *Martin*, water withdrawal for lawn and ornamental use is unlikely to be an isolated event. Greenlawn's growth has skyrocketed since the 1960s when a "new interstate highway connected Greenlawn to Progress City." R. at 5. Additionally, while "[t]he City of Greenlawn has a small downtown area . . . the City consists of largely residential districts with single family homes." R. at 5. It seems more likely than not that with rising population, land use devoted to single family use will expand, along with the lawns and ornamental plants that need watering. This makes Greenlawn's water use more akin to the Conibear traps rather than the foothold traps in *Martin*.

Thus, the court should view Greenlawn's extensive, wasteful, and copious use of water as both a direct and indirect take of the oval pigtoe mussel. While Greenlawn does have a legitimate use for some of their water withdrawals, such use goes beyond necessity and encroaches on reckless wastefulness.

c. Greenlawn proximately caused a taking of the endangered mussels downstream.

Greenlawn's water withdrawals during a drought proximately caused a taking of the endangered oval pigtoe mussel. The Endangered Species Act and its regulations are "limited by ordinary principles of proximate causation, which introduce notions of foreseeability." *Babbitt*, 515 U.S. at 704 (O'Connor, J., concurring). Proximate cause requires causal factors and the

result to be reasonably foreseeable. *Id.* at 697 n. 9. A causal chain that is too attenuated will not constitute a taking. *Aransas Project v. Shaw*, 775 F.3d 641, 660 (5th Cir. 2014).

In *Aransas Project*, the plaintiffs unsuccessfully argued that the Texas Commission on Environmental Quality proximately caused the deaths of whooping cranes by issuing permits to withdraw water from San Antonio Bay. *Id.* With less freshwater inflows, the bay's salinity increased slightly, which decreased the populations of blue crabs and wolfberry plants (principal food sources for whooping cranes). *Id.* Twenty-three cranes died, but the population had increased the year prior, and increased again the year following these deaths. *Id.* Further, the water permits had long placed no limits on water withdrawals. *Id.* "Every link of this chain depends on modeling and estimation." *Id.*

This case is different from *Aransas Project* in every respect. Here, Greenlawn's water withdrawals had previously modulated according to the Army Corps's Water Control Manual. This case is not about animals that would have eaten the oysters that are dying in a saline Green Bay. Instead, this case is about animals that died in the river from which Greenlawn withdrew water. In *Aransas Project*, the causal chain was at least five steps long. In this case, the causal chain is two steps at maximum: Greenlawn withdrew too much water, and the river dried up downstream, causing the deaths of a significant proportion of endangered mussels. Further, the reduced flow and stagnant pools led to the decreased availability and disappearance of the sailfin shiner. Greenlawn argues that other causes—agricultural withdrawals, reduced precipitation, and the Army Corps' operation of the dam works—supersede or preempt the results of its behavior. However, even with that water usage, Greenlawn's actions caused the ultimate decimation of the flow of the downstream portion of the Green River. By forcing ACOE's hand to increase CFS from 7 to 30, Greenlawn forced the shut-down of water release through the tailrace in order to

preserve a viable water level in the Howard Runnet Lake. Greenlawn refused to make concessions in their water usage which led to the massive hemorrhage of water into the Bypass Reach to be entirely used up before the water could make it beyond the borders of Greenlawn.

Even with upstream usage, it was foreseeable that when Greenlawn withdrew almost all the water from the Bypass Reach for watering its lawns, the downstream Green River would dry up and mussels would die. No matter what other causes could have contributed to drought conditions, Greenlawn put the nail in the coffin.

IV. Though Greenlawn has violated the Endangered Species Act, the district court must balance the equities before enjoining the municipality's use of its water right in consideration of the human need for water.

a. In ESA cases, Courts balance the equities when an entire species is not at risk, and when human health and safety is at stake.

With regards to relief based on NUO's Endangered Species Act (ESA) § 9 claim, the court must balance the equities as the relief relates to Greenlawn's actions. Balancing the equities is a crucial part of deciding the question of irreparable harm in a claim asking for injunctive relief.

Traditionally, when a party moves for an injunction, that party must satisfy a four-pronged test. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). In this test a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Id.* The implementation of an injunction "is an extraordinary remedy never awarded as of right" and "[i]n each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requesting relief.'" *Id.* (quoting *Amoco Production Co. v. Village of Gambell*,

480 U.S. 531, 542 (1987)). Under the Endangered Species Act, "any person may commence a civil suit on his own behalf-to enjoin any person, including the United State and other governmental instrumentality . . . who is alleged to be in violation of any provision" of the Act. 16 U.S.C. § 1540(g)(1)(A).

Under the ESA, it is generally "unlawful for any person subject to the jurisdiction of the United States to . . . take any species within the United State" classified as endangered or threatened. 16 U.S.C § 1538(a)(1)(B). A permit can be obtained for the incidental taking of a species in the process of "carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). However, the ESA directs all federal agencies to " 'insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species or 'result in the destruction or modification of habitat of such species . . .'" *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978) (emphasis omitted) (quoting 16 U.S.C. § 1536)). A citizen may sue "the United States and any other governmental instrumentality or agency . . . alleged to be in violation of any provision of this chapter . . ." 16 U.S.C. § 1540(g).

Based on the plain language of the ESA, "Congress intended endangered species to be afforded the highest priorities" in legislative conflicts. *Tennessee Valley Authority*, 437 U.S. 153 at 174 (discussing the conflict between Congressionally approved expenditure of funds on dam building and proper execution of the ESA). The main issue in *TVA* was the Tennessee Valley Authority's claim that Congress did not intend to allow an ESA claim to enjoin the completion of the Tellico Dam, the completion of which would have directly resulted in the eradication of an endangered species. *Tennessee Valley Authority*, 437 U.S. at 184. The court in *TVA* concluded that Congress intended to give "endangered species priority over the 'primary missions' of federal agencies," where federal agency action resulted in the direct eradication of a species. *Id.*

at 185. The court reasoned that "utilitarian calculations" are not for federal courts to determine. *Id.* (discussing the power conferred to the courts by Article III of the U.S. Constitution and the Endangered Species Act).

However, the Court noted that courts are "not mechanically obligated to grant an injunction for every violation of law." *Id.* at 193. After its decision in *TVA,* the Supreme Court acknowledged that the result in that case "stemmed from the strong and undisputed showing of irreparable harm that would occur absent an injunction: an entire species would become extinct." *Animal Welfare Institute v. Martin*, 623 F.3d at 27 (citing *U.S. v. Oakland Cannabis Buyers' Co-op*, 523 U.S. 483, 496-97 (2001)). Unlike the case at bar, the decision to grant an injunction in *Tennessee Valley Authority* was largely based on the fact that irreparable harm to the entire endangered species was conceded. *Id.* The concession of irreparable harm resulted in the Court's conclusion that it was "abundantly clear that the balance ha[d] been struck in favor of" the endangered species. *Id.* (quoting *Tennessee Valley Authority*, 437 U.S. at 194). In *Animal Welfare Institute*, the court found the circumstances "none so dire" as those in *Tennessee Valley Authority*. *Id.* at 27. Additionally, a moving party must still show irreparable harm for a court to grant a permanent injunction. *Id.* at 29. In *Animal Welfare Institute* the Court affirmed the lower court's denial of a permanent injunction, as the lower court properly reasoned that the death of a single animal may not always call for an injunction since it could merely be an isolated event with only a "negligible impact on the species as a whole." *Id.*

The balance of the equities prong of the injunction test is far from dead. "The plaintiff must make a showing that a violation of the ESA is at least likely in the future." *National Wildlife Federation v. Burlington Northern R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (citing *Amoco Production Co.*, 480 U.S. at 545). To expect a court to issue an injunction once a taking

is found "expect[s] more from the [*TVA*] case than its facts and holding will allow." *Id.* at 1512–13. The court in *National Wildlife Federation* further differentiated *TVA* from their present question as the "*completion* of the [Tellico] dam" would, without a doubt, "[lead] to a *future* violation of the ESA." *Id.* at 1512 (emphasis added).

The 11th Circuit has established that a court may grant injunctive relief after a moving party fulfills the requirements of the four-prong injunction test, with the fourth prong stating, "if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F. 3d 1163, 1176 (11th Cir. 2000) (en banc) (per curiam). The 11th Circuit applies this standard in cases concerning injunctions under the ESA. *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1128 (11th Cir. 2005) (remanding the case with instructions to apply the balance of the equities prong of the injunction test). For example, the court found that upon balancing the equities in a case involving downstream mussel populations and upstream release of water, the "public interest in preserving the endangered [mussel] species" would not be served by granting the injunction, as over the long term, "instantaneous measures to alleviate some of the potential harm to all the protected species may not be sustainable." *Alabama v. U.S. Army Corps of Engineers*, 441 F.Supp.2d 1123, 1137 (N.D. Ala. 2006). On remand, the court in *Alabama* found that the movant's claim lacked proof that actions of the Army Corps of Engineers had or would cause a take of protected mussels in the Apalachiola River basin as the Corps cannot control weather or be held responsible for the effects of weather on mussel habitat. *Id.* The Court in *Alabama* came to this decision even after acknowledging that "the purpose and policy embodied in the ESA weigh[s] heavily in favor of protecting endangered species and must be given deference." *Id*. Furthermore, "Congress has not nor does *TVA v. Hill* elevate species protection

over the health and safety of humans." *Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1169 (E.D. Cal. 2010).

b. The Court must balance the equities before issuing an injunction on Greenlawn.

In this case, the court must balance the equities prior to enjoining Greenlawn's withdrawal for its citizen's needs. Though Greenlawn's behavior constitutes a "take" of an endangered species, *see* Section III, *supra*, case law subsequent to *TVA* establishes that the court must still perform an analysis of irreparable harm and balance the equities prior to granting an injunction. First, this case is substantially different than *TVA*. While in that case complete eradication of a species would have occurred as a direct result of the agency's actions, in this case extirpation of the mussel population in the area is an indirect result of Greenlawn's activity. *See* Section III, *supra.* Thus, a key fact in *TVA* is missing in this case: a "strong and undisputed showing of irreparable harm." *U.S. v. Oakland Cannabis Buyers' Co-op*, 523 U.S. at 496–97 (2001). The facts presented here more closely resemble those in *Animal Welfare Institute*, and while Greenlawn has violated Section 9 of the ESA, the court must still balance the equities prior to enjoining or limiting the city's water withdrawal. In essence, there are clear issues of fact as to whether Greenlawn's actions demand a complete injunction or whether a partial injunction will suffice.

Greenlawn's actions must be assessed through a balance of the equites. It is unclear how their actions will impact the mussel population in the future, and such an extreme injunction may be uncalled for. Enjoining Greenlawn's beneficial municipal use of water in no way guarantees the long-term survival of the local mussel population. There is too attenuated a link between Greenlawn's long-term water usage, the current injunction in place, and the deterioration of the oval pigtoe mussel population downstream. The mussel habitat can just as easily be disrupted or

destroyed by pollution from upstream agricultural practices. R. at 7–8. Runoff from nearby agricultural fields can lead to an overload of nutrients in the water, causing algal blooms and the creation of an anerobic environment downstream. Such an event in the environment is just as likely to damage the oval pigtoe mussels as the scenario leading to this suit, but NUO has failed to seek an injunction against those businesses.

The existing injunction in this case would be averse to the public interest. This is a crucial qualifying factor in the 11th Circuit test for granting an injunction under an ESA claim. In *Alabama*, a case very similar in facts and parties to this one, the court withheld the injunction for its inability to serve the public interest. As here, enjoining Greenlawn from further municipal use of water, or ordering ACOE to adjust releases through the Bypass Reach or Tailrace has an unknown impact on the future outcome of the mussel population. Such measures would be temporary "fixes" in a problem that reaches beyond the activities of one small town: droughts have become more common as a result of global climate change. Just after the filing of this case, heavy rains populated the Green River watershed with water. R. at 11. It is likely that drought conditions will again plague this region. *Id.* However, issuing an extreme injunction that precludes most of Greenlawn's activities in no way provides the certainty of species preservation that such an injunction granted in *TVA*.

As discussed earlier, Greenlawn has committed a "take" under the broad definition in the ESA. *See* Section III, *supra.* However, this take should not result in an injunction that completely eliminates their beneficial use of water. Greenlawn's varied and broad use of water ranges from necessary purposes such as drinking water to superfluous uses such as lawn and ornamental plant watering. Considering the geographic make-up of Greenlawn and that a majority of the city is

single-family residences,[6] lawn and ornamental watering constitutes a misuse of resources. These are the sort of factors that the court should have taken under advisement before issuing an injunction to ensure that only unnecessary use of water was being curtailed rather than necessary beneficial use. Species protection does not outweigh the health and survival of people in nearby cities, and even if water consumption for drinking and sanitary uses is high, it is necessary and cannot be enjoined for the benefit of one species, as this would not be in line with Congress's intent.

As such, the position of the Army Corps of Engineers is that the Court should remand this case to the district court for a full analysis and balance of the equities. The district court should determine what amount of water is acceptable for Greenlawn to use during different drought Zones, and what use should be enjoined for the protection of downstream conditions and species. There is overwhelming case law that in a situation so complex and delicate as that between Greenlawn and the mussel die-off at issue a balance of the equities is necessary to issue an injunction. The smaller risk to the oval pigtoe mussel population present here is not synonymous to the destruction that the Tellico Dam would have had on the snail darter species in *TVA*. As such, this Court should remand the case to the district court to balance the equities before enjoining Greenlawn's water use.

[6] R. at 5.