Team No. 53

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

CA. No. 19-000987

NEW UNION OYSTERCATCHERS, INC.,

Plaintiff-Appellant,

- v. -

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellee,

and

CITY OF GREENLAWN, NEW UNION,

Defendant-Appellant

On Appeal from the United States District Court for the District of New Union in No. 66-CV-2017, Review of Summary Judgment

---

BRIEF OF THE NEW UNION OYSTERCATCHERS, INC.,

Plaintiff-Appellant

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL DISTRICT COURT CASES

STATE SUPREME COURT CASES

STATE COURT OF APPEALS CASES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Plaintiff-appellant New Union Oystercatchers, Inc., ("NUO") appeals the judgments issued against it in an Opinion and Order entered on May 15, 2019, by the honorable Judge Romulus N. Remus for the U.S. District Court for New Union, No. 66-CV-2017. The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because NUO's complaint raised questions of federal law, specifically alleging violations of the federal Endangered Species Act, 16 U.S.C. §§ 1531–1544. NUO filed a timely Notice of Appeal as required by FED. R. APP. P. 4. The district court's Opinion and Order adjudicated all of NUO's claims for relief and disposed of all parties' respective motions for summary judgment, constituting a final order by the court. Accordingly, this Court has valid jurisdiction over the appeal as required by 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Can Greenlawn, as a riparian landowner, continue water withdrawals for municipal purposes during a drought without any water conservation measures?
2. Is the operation of Howard Runnet Dam Works during drought conditions, to provide flow to Greenlawn, a discretionary action subject to the consultation requirement within Section 7 of the Endangered Species Act, 16 U.S.C. § 1536?
3. Did Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitute a "take" of the endangered oval pigtoe mussel in violation of Section 9 of the Endangered Species Act, 16 U.S.C. § 1538?
4. Is the district court required to balance the equities before enjoining a municipal activity when the activity will cause the extirpation of an entire population of an endangered species?

STATEMENT OF THE CASE

NUO brought this citizen suit under the Endangered Species Act ("ESA") on July 17, 2017, in the U.S. District Court for the District of New Union against the City of Greenlawn ("City" or "Greenlawn") in the state of New Union and the Army Corps of Engineers ("Army"), asserting that the City and the Army violated, respectively, Section 9 and Section 7 of the ESA. On May 15, 2019, Judge Remus issued an Opinion and Order granting the following motions for summary judgment: (1) the Army's motion to dismiss the Section 7 claim against it; (2) Greenlawn's motion to declare it has a riparian right to unaltered flows in the Bypass Reach of the Green River during droughts; and (3) NUO's motion and the Army's cross-claim motion to declare that Greenlawn violated Section 9. R. at 11. NUO and the City both filed timely Notices of Appeal that were granted by this Court. R. at 1.

FACTUAL BACKGROUND

The Green River flows through the state of New Union and deposits into the Green Bay. Appx. 1. On the eastern bank of a stretch of the Green River known as the Bypass Reach lies the City of Greenlawn and in which the City has maintained municipal water intakes for its own use since 1893. R. at 5; *see* appx. 1. Then, in 1948, the Army completed construction of the Green River Diversion Dam and the Howard Runnet Dam on the Howard Runnet Lake (collectively referred to as the "Howard Runnet Dam Works"), which were built to control floods and provide hydroelectric power and recreation. R. at 5–6; *see* appx. 1.

Because the Diversion Dam cut off the natural flow of water to Greenlawn, the Army and the City entered into an agreement upon the completion of the project in which the Army would maintain flows to the Bypass Reach sufficient for the City's withdrawals "in such quantities and at such rates and times as it is entitled to as a riparian property owner." R. at 6. As the City

developed and a new interstate highway was built sometime in the 1960s, Greenlawn experienced a significant influx of residents, so it enlarged its municipal water system in 1968 to accommodate its increased (and increasing) population. R. at 5. Perhaps acknowledging Greenlawn's need for additional water, the Army in 1968 adopted and revised a Water Control Manual ("WCM"), which delineates the operating procedures for the Howard Runnet Dam Works. R. at 6. Significantly, the WCM adopted the 1948 water-rights agreement made between Greenlawn and the Army, so the Army adjusted the WCM's parameters—which provided procedures, from least to most restrictive, for Zone 1, Zone 2, and Zone 3 drought conditions—based on Greenlawn's annual average water demand in 1968: a flow of 7 c.f.s from the Bypass Reach. R. at 7. Accordingly, Zone 1 conditions require maintenance of a minimum flow of 50 c.f.s. to the Bypass Reach, and in Zone 2 and Zone 3 conditions, the flow shall not be reduced to less than 7 c.f.s., although the Army must curtail nearly all flows for hydroelectric power and recreation. R. at 7. Despite Greenlawn's explicit recognition in the 1960s that it had an increasing need for additional water due to the City's rapid growth, it took no issue with the WCM's guaranteed flow of 7 c.f.s. to the Bypass Reach. And although there were not any serious consumptive uses of water upstream of the Bypass Reach in 1968, significant agricultural operations started to develop in the 1980s. R. at 7–8. Still, Greenlawn took no issue with the WCM's parameters.

Water shortages were largely absent for the next few decades until 1998 when the Army invoked Zone 1 conditions. R. at 8. However, the story of the 21st century is much different. The Army invoked Zone 1 conditions every year from 2006 to 2010 and once in 2016. R. at 8. Zone 1 conditions were reached again in the spring of 2017, but this time drought conditions became more severe than ever, requiring invocation of Zone 2 procedures. R. at 6. Thus, for the first time, flows to the Bypass Reach were restricted to 7 c.f.s. Also, for the first time, Greenlawn objected to the

WCM's provisions. Greenlawn complained to the Army that a flow of 7 c.f.s. was outdated because Greenlawn's water needs increased in correspondence with its population growth since 1968. R. at 8. The City particularly lamented that limiting flow to 7 c.f.s. during the spring would inhibit its residents from maintaining their lawns and growing plants. R. at 8. In response, the District Commander of the dams requested Greenlawn institute bans for such uses as long as the drought conditions persisted. R. at 8. Greenlawn refused and subsequently demanded the Commander divert enough flow to allow the City's residents to use water as normal, claiming that it does not have to impose water restrictions on its citizens because the alleged uses are reasonable for a riparian owner. R. at 8. In contradiction to the WCM's drought parameters, on April 23, 2017, the District Commander conceded to Greenlawn's demand and ordered the Dam Works operator to increase flow to the Bypass Reach from 7 c.f.s. to 30 c.f.s. R. at 8. The increased flow to the Bypass Reach in conjunction with peaking hydroelectric power demand led to a decreased Howard Runnet Lake water level, requiring the Army to invoke Zone 3 conditions on May 15, 2017, resulting in curtailment of all flows other than the flow of 30 c.f.s. to the Bypass Reach. R. at 8–9.

Importantly, prior to ordering the increased diversion, the Army never consulted with the Fish and Wildlife Service ("FWS") about whether the diversion may impact endangered species downstream in the Green River. R. at 9. Although Green River flows downstream of the Bypass Reach were maintained at a rate of about 25 c.f.s. during Zone 2 conditions, once Zone 3 conditions were reached, downstream flows were reduced to nearly zero. R. at 9. Nearly depleted flows created extensive stretches of exposed riverbed and gravel, leaving only stagnant pools of water. R. at 9. Lying within these exposed areas of riverbed were oval pigtoe mussels, a federally listed endangered species. R. at 9. The mussel needs a moderate current to survive, and it also needs a host fish, such as the sailfin shiner found in the Green River, to attach to in order to mature. R. at

9. However, without a sufficient flow of water, the shiner cannot make its way into the River for the mussels to survive. R. at 9. And the flows were reduced to such an extent that it was impossible for even mature mussels, which are more resilient than larval mussels, to survive and submerge themselves underwater. R. at 9. Thus, the mussels' habitat was destroyed and nearly 25 percent of the oval pigtoe mussel population in the Green River died as a consequence. R. at 9. The impacts of the depleted flows in the Green River are not limited to the River's ecosystem—they also affect life in the Green Bay into which the River deposits. The estuary where the Green River and the Green Bay meet is home to many species, including oysters. R. at 10. As a result of decreased flows, the salinity of the estuary increased, allowing more oyster predators to enter and feed. R. at 10.

NUO is a non-profit association made up of and representing Green Bay oyster fishermen, and the invasion of predators in the estuary led to decreased oyster harvests, affecting the individual livelihoods of NUO's members. *See* R. at 10. Further, NUO's members alleged they would have to pay unnecessary surcharges on their utility bills as a result of curtailed hydroelectric power generation that serves the region. R. at 10.

NUO consequently filed this case under the ESA citizen suit provision, asserting that: (1) the City's riparian rights do not entitle it to withdraw unlimited amounts of water during drought conditions; (2) the Army's diversion of additional flow to Greenlawn was a discretionary action that required consultation with the FWS under Section 7 of the ESA; and (3) the City's withdrawals effected a prohibited "take" of the oval pigtoe mussel in violation of Section 9 of the ESA. R. at 10–11. NUO therefore requested injunctive relief to enjoin Greenlawn from reducing downstream Green River flows to less than 25 c.f.s.—the minimum flow necessary to sustain the oval pigtoe mussels' habitat—and to enjoin the Army from diverting a flow greater than 7 c.f.s. to Greenlawn

during Zone 2 and Zone 3 drought conditions. Although drought conditions returned to Zone 1 just before NUO brought this action, all parties agree that more severe drought conditions are likely to recur and that this case is not moot. R. at 11.

SUMMARY OF THE ARGUMENT

First, Greenlawn has a riparian right to a flow of no more than 7 c.f.s. from the Bypass Reach during Zone 2 and Zone 3 drought conditions. New Union recognizes that individual property owners, and municipals supplying for those in the municipality, have a common law riparian right to water that abuts or passes through their property. Under this water rights system, users can only withdraw from the stream or river what is reasonable, unless the user is withdrawing water for typical household or domestic purposes. This test of reasonableness requires the courts to look at a number of things, including the withdrawals' effects on other riparian users and the effects on the stream as a whole. In this case, Greenlawn is withdrawing water during drought conditions for non-domestic and superfluous uses, namely, irrigation for ornamental and aesthetic purposes. Furthermore, because of the drought and the effects of the withdrawals downstream, Greenlawn's withdrawals are unreasonable. Therefore, the City is only entitled to withdraw a flow of 7 c.f.s. from the Bypass Reach to meet its reasonable and domestic needs during drought conditions.

Second, the Army violated Section 7 of the ESA when it failed to consult the FWS prior to releasing additional water to the City of Greenlawn during drought conditions. To trigger Section 7's consultation requirement, a federal agency must take a discretionary action that may affect a listed endangered species or a critical habitat. The Army took an action, as defined by 50 C.F.R. § 402.02, because it authorized the release of additional flow to Greenlawn. Further, this action was discretionary because it surpassed the contractually agreed upon amount the Army was required

to divert by law. The Army and Greenlawn agreed to a flow of 7 c.f.s. during Zone 2 drought conditions, yet the Army released 30 c.f.s. at Greenlawn's demand. By releasing additional water flows to Greenlawn in excess of the WCM's provisions, the Army took a discretionary action and triggered Section 7's consultation requirement, which the Army failed to perform. As a result, the survival of the endangered oval pigtoe mussel in the Green River is jeopardized.

Third, Greenlawn committed a prohibited "take" of the oval pigtoe mussel under Section 9 of the ESA by causing "harm" to the species. "Harm" to a species is specifically defined to include conduct that degrades a species' habitat and that results in actual injury or death to the species. The City withdrew nearly all the 30 c.f.s. of flow diverted to the Bypass Reach by the Army during Zone 2 and Zone 3 drought conditions, consequently reducing downstream Green River flows to a rate of almost zero. Thus, the City's withdrawals destroyed the mussels' habitat and caused the death of about 25 percent of the mussel population in the River, constituting "harm" to the mussel and, therefore, a take of the species. Greenlawn's contentions that it is not the cause of the harm to species and that, even if it were, it cannot be held liable for taking the mussel because it lives downstream of the Bypass Reach are belied by the facts and unsupported by the law.

Finally, the ESA citizen suit provision allows any person to enjoin another person's unlawful conduct under the ESA and does not require a court to balance the equities when determining whether to grant the injunctive relief. The plain text of the provision does not explicitly require, or implicitly suggest, a balancing of the equities, and Congress has made its intent abundantly clear that the protection of endangered species should outweigh almost all other considerations. Further, an injunction enjoining Greenlawn from reducing downstream Green River flows to less than 25 c.f.s. is necessary in this case because if the City is allowed to continue its superfluous withdrawals during drought conditions, there will exist a reasonably certain threat

of imminent harm to the oval pigtoe mussel. Accordingly, NUO respectfully requests this Court grant such relief.

ARGUMENT

I. THE CITY OF GREENLAWN, AS A RIPARIAN, IS ENTITLED TO ONLY 7 C.F.S. DURING A DROUGHT.

Standard of review: The district court granted Greenlawn's motion for summary judgment declaring that it has a riparian right to a continued flow in the Bypass Reach. R. at 11. This Court reviews the district court's grant of summary judgment *de novo,* construing the evidence in the light most favorable to the nonmoving party. *Riker v. Lemmon*, 798 F.3d 546, 551 (7th Cir. 2015).

The question of Greenlawn's riparian rights must be addressed first because the Army's obligations under the ESA may turn on its obligation to divert water into the Bypass for municipal withdrawals. R. at 11. The principles of common law riparian rights apply to this dispute over the waters of New Union, as the state has not adopted a permitting authority for such matters. R. at 11–12. Additionally, the New Union Supreme Court has adopted the minority rule that allows municipal withdrawals for the benefit of non-riparian parcels within the municipality. *See Tubbs v. Potts*, 45 N.U. 999 (N.U. 1909).

Here, Greenlawn's riparian right only allows it to withdraw 7 c.f.s. from the Bypass Reach during Zone 2 and Zone 3 drought conditions, in accordance with the WCM and the principles of riparianism. The City's withdrawals are not domestic uses, but, rather, are artificial uses that it must curtail during times of drought. The City's agreement with the Army, which is incorporated in the Army's WCM, are binding on the City and allow the Army to limit Greenlawn's artificial, non-domestic uses during times of drought for the benefit of other users on the Bypass Reach.

Therefore, this Court should reverse the lower court and rule that Greenlawn does not have a riparian right to more than 7 c.f.s. during a drought.[1]

A. Riparian users only have a property right to withdrawals that are reasonable, unless the withdrawals are for domestic uses.

Riparianism is a form of property law that recognizes a landowner's right to use the water flowing through, or abutting against, his property. *See Hendrick v. Cook*, 4 Ga. 241 (Ga. 1848); *see also* David H. Getches, Sandra B. Zellmer, and Adell L. Amos, *Water Law in a Nutshell*, 5th ed. at 3–4 (2015). However, this right is not absolute; instead, it is qualified by the rights of other riparian users to the stream preserved in its natural size, flow, and purity. *Pierson v. Speyer*, 70 N.E. 799, 800 (N.Y. App. Div. 1904) (holding that the "use of each [riparian user] must, therefore, be consistent with the rights of others"); *see also Greenwood v. Evergreen Mines Co.*, 19 N.W.2d 726, 734 (Minn. 1945); *Kyser v. New York Cent. R. Co.*, 271 N.Y.S. 182, 185 (N.Y. Sup. Ct. 1934).

In the early years of water rights, the theory of natural flow worked as limit on a riparian user's ability to withdraw water. Dan A. Tarlock et. al, *Water Resource Management, 7th ed.*, at 49 (2014). The natural flow theory "permits every riparian owner to consume as much water as needed for domestic purposes," but "beyond this, the owner may use the water for 'reasonable' artificial or commercial purposes, subject to the very large proviso that he may not substantially or materially diminish the quantity or quality of water, and no water may be transported to land beyond the riparian land." RESTATEMENT (SECOND) OF TORTS §§ 850 to 857, introductory note (AM. LAW INST. 1977). As pollution and industrial development increased, the courts replaced the natural flow theory with the theory of reasonable use. Tarlock, at 49. The reasonable use theory of riparian rights allows reasonable withdrawals for domestic, agricultural, and manufacturing

[1] As stated on page 2 of the record, the parties do not dispute standing on appeal, and therefore, this brief will not address any potential third-party standing issues.

purposes, as long as the withdrawals do not interfere with the riparian rights of others on the stream or river (*see* Section ii, *infra*, explaining reasonableness). *See Crommelin v. Fain*, 403 So.2d 177, 184 (Ala. 1981); *Mich. Citizens for Water Conservation v. Nestle Waters N. Am.*, 709 NW.2d 174, 194–95 (Mich. Ct. App. 2005).

Both the reasonable use theory and the natural flow theory allow riparian users to continue withdrawing for domestic uses, even if it would harm downstream riparian users because domestic uses are necessary for the continuance of life. *Scott v. Slaughter*, 237 Ark. 394, 579 (Ark. 1963) ("[T]he right to use water for strictly domestic purposes—such as for household use—is superior to many other uses of water—such as for fishing, recreation and irrigation."); *Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955); *see also Mich. Citizens for Water Conservation*, 709 NW.2d at 194–95.

Both theories protect the essential principles of equity that riparianism was founded on. Combined, these theories create a mixed theory approach which dictates that riparian users may withdraw what is reasonable so long as their withdrawals do not cause injury to other users downstream, and do not cause complete depletions to the waterway. New Union should adopt this mixed theory to allow the City to withdraw only what is necessary for domestic uses, while still maintaining a natural flow in the watercourse.[2] *See Evans v. Merriweather*, 4 Ill. 492 (Ill. 1842). Application of this theory would entitle the City to either unlimited domestic use withdrawals or reasonable artificial withdrawals, but under either option, the City could not withdraw so much water as to diminish the natural flow, as Greenlawn did here.

[2] Watercourse may include natural streams, lakes, ponds, springs, marshes, underground springs, and other natural waterways as well as artificial bodies of water made by humans. *See* David H. Getches, Sandra B. Zellmer, and Adell L. Amos, *Water Law in a Nutshell*, 5th ed. at 3–4 (2015).

i. Greenlawn's withdrawals are not for a domestic use.

Under both the natural flow theory and the reasonable use theory, domestic uses are seen as an exception, which allows water to be withdrawn for domestic purposes under any circumstances, even if it harms other riparian users. To frame it another way, when withdrawing for domestic uses, the reasonableness of the withdrawals is irrelevant, and the riparian owner may withdraw as much as necessary to satisfy the domestic uses. However, if the court determines the withdrawals are not for domestic uses, then the reasonable use analysis applies to decide whether the amount withdrawn was reasonable given the circumstances.

The Kansas Supreme Court reasoned that the domestic use diversions normally have very little impact on the overall waterway's levels, and emphasized the difference in the historic classification of ordinary, domestic uses versus the artificial, extraordinary uses that do not fall within the domestic use exemption. *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164, 1168 (Kan. 1981) (distinguishing between the qualification of domestic use for the purposes of watering livestock, and clarifying the reason behind the distinction and exemption of domestic uses from the ordinary requirements of water law). These natural uses, which fall within the domestic use classification, are those that are "absolutely necessary" for one's existence, while artificial uses are those that increase comfort and prosperity. *Merriweather*, 4 Ill. at 495–96. The courts have defined domestic uses to include drinking, cooking, bathing, washing clothes and flushing toilets, or as household conveniences, and care of livestock. *Crommelin*, 403 So. 2d at 177; *Deetz v. Carter*, 232 Cal. App. 2d 851 (Cal. Dist. Ct. App. 1965).

Clearly beyond the scope of domestic uses are Greenlawn's withdrawals for "ornamental irrigation," R. at 5, for it cannot be said that keeping one's lawn green during a severe drought is absolutely necessary or essential for the continuance of life. Additionally, Greenlawn's use here

does not fit within the distinction the Kansas Supreme Court makes because the excess use for watering one's lawn has a large impact on the Green River's water levels.

Yet, Greenlawn argues that it has no obligation to follow the drought restrictions because watering lawns is a reasonable riparian use for domestic purposes. R. at 8. However, the City's belief that there is any common law right to irrigation under the riparian use doctrine is inaccurate. Courts recognize that this common law right relies on the individual state's constitution, which may provide a protection for irrigation uses. *See Crawford v. Hathaway*, 93 N.W. 781, 785 (Neb. 1903), overruled by *Wasserburger v. Coffee*, 141 N.W.2d 738, 744 (Neb. 1966) (overruling on issues related to the doctrine of prior appropriation); *Omernick v. Dep't of Nat. Res.*, 238 N.W.2d 114, 116 (Wisc. 1976). These courts have also relied on the general ability of individuals to use property rights in a number of instrumentalities. *Crawford*, 93 N.W. at 785; *Omernick*, 238 N.W.2d at 116. Conversely, Greenlawn's constitution provides no such protection over irrigation rights, and the general principles of property would still prevent Greenlawn from using the water for irrigation because the City is causing unnecessary harm to other property owners on the stream. *See Wasserburger*, 141 N.W.2d at 744. Thus, the domestic use exception does not include ornamental, artificial uses such as irrigating one's lawn for aesthetics.

ii. Greenlawn's withdrawal in excess of 7 c.f.s. for non-domestic use is not reasonable.

As demonstrated, the City's use of water for ornamental irrigation is not domestic, but neither the theory of reasonable use nor the natural flow theory provides the City protection for the use of water beyond what is reasonable in quantity. In taking water for artificial or non-domestic uses, riparian users must be reasonable with respect to the other riparian users to also

make reasonable use of the watercourse. Barton Thompson, Jr. et al., *Legal Control of Water Resources* 33 (4th ed. 2006).[3]

In *Mason v. Hoyle*, the Supreme Court of Connecticut adopted a test for determining whether a use was reasonable, which includes: (1) whether there is an equal opportunity to all riparian users to use the stream; (2) the maxim that no owner can use his own property so as to injure another; (3) the character and capacity of the stream; (4) foreseeable shortages and apportioning them in a manner that permits all riparian users to secure a fair proportion of the benefit; and (5) customary practices as an indicium of reasonableness. 14 A. 786, 788–89 (Conn. 1888). Furthermore, the Second Restatement of Torts establishes factors that consider the riparian's use against that use's harm on other riparian users or society as a whole. RESTATEMENT (SECOND) OF TORTS § 850A (AM. LAW INST. 1977). Comments on this section state that "when a concurring cause of the harm is a drought or temporary water shortage, it is usually reasonable to require the water and the harm to be shared." RESTATEMENT (SECOND) OF TORTS § 850A cmt. a (AM. LAW INST. 1977). In *Harris v. Brooks*, the Arkansas Supreme Court applied the Restatement to find that low levels of water in a lake required a farmer to stop withdrawing water for irrigation because the withdrawals were unreasonably interfering with the use of the lake for commercial boating. 283 S.W.2d at 445.

Although courts have not applied the *Mason* factors during times of drought, the test to determine reasonableness is heavily fact dependent. Applying it here, would require curtailment of Greenlawn's withdrawals. Curtailing the withdrawals would fit within the *Mason* factors to allow the other riparian users on the stream an adequate opportunity to use the water during

[3] The 4th edition of the Thompson, Jr. et al. book is cited to here, rather than the 6th and most recent edition, as the university's library did not have access to the 6th edition, and the book did not arrive by November 21st.

drought, and it fits with the character and capacity of the river as to not completely deplete its flows. Additionally, the WCM establishes practices that dictate the curtailment of the City's water. The principles established in the Restatement apply for the same result, as the excess withdrawal is not suitable to the river, not economically valuable, and causes great harm to individuals and the oval pigtoe mussels. Moreover, the Restatement provides that courts may determine a use is unreasonable if the user can practically adjust the amount its withdrawing. Here, the City can practically limit its withdraws to 7 c.f.s. without causing extreme harm to itself or its citizens.

Both the Restatement and the *Mason* factors consider the foreseeability of the drought, so this Court should determine that the WCM provided the City adequate warning that the Army could curtail flow to the Bypass Reach during any drought period. Furthermore, although neither *Mason* nor the Restatement provides environmental protection considerations in the reasonableness determinations, the City would be able to adequately provide for all of its needs besides ornamental irrigation with 7 c.f.s., while the pigtoe mussel will cease to exist without more than 25 c.f.s. of flow in the Green River. This in itself should be enough to determine the withdrawals are unreasonable under the basic principles of equity and sharing the shortage.

Not only is watering one's lawn outside the scope of the reasonable use doctrine, ornamental watering is a superfluous use that does not fit within the broader foundational elements of water law also, which attempt to guarantee everyone a right to use water for beneficial and necessary purposes. The courts and the equitable laws of this country cannot grant one user the ability to use water in excess, for unnecessary purposes, while requiring others to halt uses for necessary parts of life.

B. The 1948 agreement between the City of Greenlawn and the Army only entitles the City to 7 c.f.s.

The agreement made between the Army and Greenlawn in 1948 with the completion of the dams entitles Greenlawn only 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. Riparian users are only entitled to what is reasonable, unless the withdrawal is for a domestic use. As ornamental watering is not a legitimate household need, it is not a domestic use, and the City's withdrawals in excess of 7 c.f.s. are not reasonable under the Restatement or *Mason*. Therefore, the agreement between the City and the Army does not guarantee the City 30 c.f.s. as it claims. Thus, the Army has a right to curtail Greenlawn's uses during Zone 2 and Zone 3 drought conditions by diverting a flow of only 7 c.f.s. to the Bypass Reach, which still allows the City to withdraw the amount necessary for its residents to meet their legitimate needs, preventing any harm to the City's riparian rights.

Moreover, the WCM is the Army's reasonable and effective conservation effort that recognizes legitimate federal and citizen interests, and it is effectuated by a contract with Greenlawn. This Court must allow the people living within the City, and the Federal Government through the Army, to protect both of their interests with drought conservation measures. Although cities have a legitimate interest in protecting the stability and security of property rights, such as water, in order to continue industrial and domestic growth, cities also have a duty to protect the interests of their citizens and all life living within their borders. Without stability in public resources, fundamental parts of life will crumble. If the citizens have no guarantee that the City will protect its interests in fishing, recreational uses, and hydropower, then the growth of the City will stall. The citizens' interests are protected by curtailing municipal consumers' use for

ornamental irrigation during times of increased drought as long as the curtailment does not inadvertently erase the City's riparian right.

Furthermore, Greenlawn was a party to the 1948 agreement and was on notice, after the expansion of its water right, that the Army could curtail flows to the Bypass Reach to 7 c.f.s. during a drought season. This Court should recognize this agreement as a binding contract between parties that Greenlawn cannot change the terms of now, especially when it made no effort to amend the agreement's conditions during the 60 years that the City's normal use was expanding.

As a result of the Army diverting a flow of 30 c.f.s. to Greenlawn through the Bypass Reach whenever Zone 2 conditions are reached, Zone 3 conditions must automatically be invoked by needing to significantly curtail flow for hydroelectric power generation in order to meet Greenlawn's demands. This means that flow restrictions for the Howard Runnet Dam Works will be absent, or either reach only Zone 1 or Zone 3 levels, eliminating the possibility of sustaining Zone 2 conditions. But even the Zone 3 level that was sustained in this case was not effectuated as prescribed in the WCM due to the additional flows provided through the Diversion Dam. If the Army must modify the provisions of the WCM whenever Greenlawn requests, the manual's provisions would become meaningless.

* * *

In conclusion, the City of Greenlawn is only entitled to a flow of 7 c.f.s. during a drought because it is withdrawing for non-domestic uses and anything in excess of the 7 c.f.s. during droughts is unreasonable. Therefore, curtailing the City's withdrawals to 7 c.f.s. is still in accordance with the WCM's guarantee that the City will have access to what it is entitled to as a riparian property owner. Accordingly, this Court should reverse the district court, and rule that Greenlawn does not have a riparian right to more than 7 c.f.s. during a drought.

II. THE ARMY'S ADDITIONAL RELEASE OF WATER TO GREENLAWN CONSTITUTES A DISCRETIONARY ACTION TRIGGERING THE CONSULTATION REQUIREMENT UNDER SECTION 7 OF THE ESA.

Standard of review: The district court granted the Army's motion for summary judgment dismissing NUO's ESA claims against it and found the Army did not violate the consultation requirement under Section 7(a)(2) of the ESA when the Army provided additional flow to Greenlawn during drought conditions. This Court reviews the district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the nonmoving party. *Ricker*, 798 F.3d at 551. The Administrative Procedure Act is not applicable to a failure to consult claim and, therefore, does not govern the standard of review; the ESA independently authorizes a private right of action. *Wash. Toxics Coal. v. Envt'l Prot. Agency*, 413 F.3d 1024, 1034 (9th Cir. 2005).

The district court erred in determining the Army did not have a duty to consult the FWS prior to diverting water to Greenlawn during drought conditions pursuant to Section 7(a)(2) of the ESA, which states:

> "Each Federal agency shall . . . 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 modification of habitat of such species . . . after consultation as appropriate . . . unless such agency has been granted an exemption." 16 U.S.C. § 1536(a)(2).

Consultation pursuant to Section 7 requires: (1) a federal agency to contemplate or take an affirmative action, (2) that the action was discretionary, and (3) that the action may affect a listed endangered species or critical habitat.[4] *Nat'l Ass'n of Home Builders v. Def. of Wildlife*, 551 U.S. 644 (2007); *Coal. for a Sustainable Delta v. FEMA*, 812 F. Supp. 2d 1089 (E.D. Cal. 2011). Congress deliberately introduced a consultation requirement to force federal agencies to obtain the

[4] 16 U.S.C. § 1536 prescribes the consultation requirements. However, *Home Builders* interprets § 1536 as applying only to discretionary agency actions.

expert opinion of wildlife agencies, and thus prevent an unfavorable impact on endangered or threatened species. *NRDC v. Jewell*, 749 F.3d 776, 779 (9th Cir. 2014). Pursuant to Section 7(a)(2), the phrase "jeopardize the continued existence" is further defined as "an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of . . . the survival and recovery of a listed species." 50 C.F.R. § 402.02; *see Cabinet Res. Group v. United States Fish & Wildlife Serv.*, 465 F. Supp. 2d 1067, 1089 (D. Mont. 2006).

This claim turns on whether the mandatory provisions of Section 7 were triggered by the Army's decision to release additional flow to Greenlawn in drought conditions. Here, the Army chose to provide Greenlawn with an additional water supply of 30 c.f.s. in Zone 2 drought conditions, surpassing the contractually agreed flow of 7 c.f.s., and without mandatory consultation as required by ESA Section 7(a)(2). R. at 7. The district court found the additional water distribution did not constitute a discretionary agency action because the additional diversion was mandated by the water-rights agreement adopted by the WCM. R. at 14. However, the WCM only mandated the Army to provide 7 c.f.s. of flow during Zone 2 and Zone 3 drought conditions; therefore, provisions of any additional flow constitute the Army's deliberate and discretionary action.

A. The Army's release of additional water to Greenlawn constitutes an agency action.

Precedent favors a broad interpretation of agency action. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978); *Karuk Tribe of Cal. v. United States Forest Serv.*, 640 F.3d 979, 999 (9th Cir. 2011); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003). Under 50 C.F.R. § 402.02, "action" means as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies." This regulation further provides that actions include promulgating regulations, granting contracts, and modifying land water or air. *Id.* Interpreting the consultation requirement broadly, agency action

includes existing projects, prospective and contemplated actions, and the "terminal phases of an ongoing project." *See TVA,* 437 U.S. at 168 (finding a virtually completed dam constituted continued agency action). Negotiating and executing a contract also constitutes an agency action. *See NRDC v. Houston,* 146 F.3d 1118, 1125 (9th Cir. 1998) (finding "negotiating and executing contracts is 'agency action'").

The Army manages the Howard Runnet Dam Works, and the Army District Commander manages the diversion of water to Greenlawn pursuant to the WCM. R. at 8. The Army's decision to divert additional water to Greenlawn conclusively and undoubtedly constitutes an agency action; thus, this issue turns on whether the Army's action was discretionary.

B. The Army had a duty to consult pursuant to Section 7 prior to releasing additional water surpassing the contractual amount.

i. Section 7's consultation requirement is triggered by a discretionary action, which courts interpret to include a broad range of conduct.

Section 7 requires agencies "not only to consider the effect of their projects on endangered species but to take such actions as necessary to insure that species are not extirpated as a result of federal activities." *TVA*, 437 U.S. at 189 n.34; *see also Carson Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984) (noting Section 7's purpose is "to ensure the federal government does not take actions, such as building a dam or highway, that incidentally jeopardizes the existence of endangered or threatened species"). Though Section 7 is applied broadly, the U.S. Supreme Court has confined the duty to consult to only those actions which are "discretionary." *Nat'l Ass'n of Home Builders*, 551 U.S. at 652. The Court declined to define "discretion," but subsequent cases have interpreted and applied the discretionary element. *Id.* These cases found a discretionary action under Section 7 to include the implementation of land resource management plans, implementation of federal insurance plans, construction grants, and the distribution of

permits. *Pac. Legal Found. v. Watt*, 539 F. Supp. 841, 847 (C.D. Cal. 1982)*; Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151, 1173 (W.D. Wash. 2004).

In *Home Builders*, the Court determined whether an agency must comply with Section 7's consultation requirement while simultaneously satisfying the Clean Water Act's mandatory permitting transfer requirements. 551 U.S. at 667. The Court reasoned that if an agency is "required to do something by statute, it simply lacks the power to [e]nsure such action will not jeopardize endangered species" and therefore an agency has discretion unless another legal obligation makes it "impossible for the agency to exercise discretion." *Home Builders*, 551 U.S. at 667; *see Jewell*, 749 F.3d at 784; *see also Karuk Tribe of Cal.*, 640 F.3d at 1008 (Fletcher, W., dissenting) (defining a discretionary decision as "one that is not dictated or controlled by precise rules or regulations"); *see also Nat'l Wildlife Fed'n v. Sec'y of the Dep't of Transp.*, 374 F. Supp. 3d 634, 661 (E.D. Mich. 2019) ("[W]here an agency cannot take into account environmental concerns . . . then compliance with NEPA and the EPA would serve no purpose").

In *Jewell*, the court found the agency retained discretion in renewing settlement contracts because it could, if desired, renegotiate the terms of the contracts. *Jewell*, 749 F.3d at 784. Though the agency's discretion was "substantially constrained," a small amount of discretion remained. *Id.* The Ninth Circuit determined the duty to consult "does not turn on the *degree* of discretion . . . but on whether the agency has any discretion to act in a manner beneficial to a protected species or its habitat." *Id.* at 779; *see also FEMA*, 345 F. Supp. 2d at 1172 (noting discretion turns on whether an agency *could* influence third party activities to benefit endangered species, not whether it must); *see also Houston*, 146 F.3d at 1128 (finding the agency's execution of a 40-year water contract was discretionary and required Section 7 consultation). The definition of "discretion" boils down to whether the agency has an opportunity to act "for the benefit of the protected

species." *Turtle Island Restoration Network*, 340 F.3d at 970; *see also Sec'y of the Dep't of Transp.*, 374 F. Supp. 3d at 661–62 (commenting that if "some elements of the decision making involve environmental judgments" for which the ESA consultation may help inform or be useful to, "the decision making is discretionary").

While the Supreme Court has yet to define or interpret "discretion," precedent reflects a push by courts to encourage federal agencies to comply with Section 7 and preserve endangered species. *Jewell*, 749 F.3d at 784; *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 2334 (9th Cir. 2007) (noting agencies cannot label an action or parts of action "nondiscretionary" to avoid ESA consultation requirement).

ii. The Army exercised discretion by diverting additional water to Greenlawn in violation of the WCM.

The determination of whether the Army possessed "discretion" is critical to the case at hand. The district court's ruling that the Army did not exercise discretion in providing additional water flows to Greenlawn because the WCM mandated the Army to do so fails to accurately assess the Army's contractual demands. Similar to *Home Builders*, the Army is required, by law, to supply Greenlawn with water from the Diversion Dam pursuant to the WCM. However, the Army chose to supply additional water, surpassing the contractually agreed 7 c.f.s. amount, constituting a discretionary action. The WCM requires the Army to provide a flow of 7 c.f.s. to Greenlawn during Zone 2 drought conditions, consistent with the City's riparian rights. *See* Argument I, *supra*.

The WCM includes provisions for drought shortage, which prohibits Greenlawn from seeking 30 c.f.s. in drought conditions. *O'Neill v. United States*, 50 F.3d 677, 689 (9th Cir. 1995). The WCM only holds the Army contractually liable for supplying 7 c.f.s. to Greenlawn during drought conditions, therefore, provision of any flow exceeding that rate is discretionary. *See Id.*

(finding the government was absolved of all liability for failing to deliver the full contracted amount of water during a water shortage).

Additionally, *Home Builders* only introduced the discretionary element because the Clean Water Act required the EPA to *automatically* transfer permitting power to states if a closed list of criteria was satisfied. Here, unlike in *Home Builders*, the Army was not required to automatically release 30 c.f.s. of water to Greenlawn during drought conditions, only 7 c.f.s. was necessary.

Similar to the renewal of settlement contracts in *Jewell*, the Army's discretion may have been "substantially constrained" by the terms of the WCM, in that the agency was not able to wholly cut off the water supply, but its discretion was still present. If the Army acted in compliance with the WCM and provided Greenlawn with 7 c.f.s. of flow, the endangered oval pigtoe mussel could maintain a viable habitat. The Army, therefore, had the opportunity to act for "the benefit of" the oval pigtoe mussel pursuant to the definition of discretion provided in *Turtle Island Restoration Network*, thereby triggering Section 7(a)(2)'s mandatory consultation requirement.

Additionally, Greenlawn's contention that the WCM is outdated and Greenlawn's water needs are significantly different than they were in 1968 makes no difference to the issue at hand. In fact, renegotiation of the WCM's terms demonstrates the Army's discretion. If the Army chose to renegotiate the WCM with Greenlawn to accommodate the City's present water needs, the Army is automatically obligated to consult. The Army's decision to increase water flows to Greenlawn from 7 c.f.s. to 30 c.f.s. effectively constitutes a renegotiation of contract terms. Greenlawn's letter to the Army Field Office demanding additional water due to the outdated nature of the WCM constitutes a renegotiation process. R. at 8. Thus, the Army triggered the consultation requirement after exchanging negotiations with Greenlawn resulting in the provision of an additional 23 c.f.s. to Greenlawn.

C. The Army's action affects listed species or critical habitat pursuant to 50 C.F.R. § 402.14(a).

The last element required to trigger consultation pursuant to Section 7(a)(2) is the action must be one that "may affect listed species or critical habitat," regardless of whether that effect is positive or negative, unless the action is environmentally neutral. 50 C.F.R. § 402.14(a); *see Coal. for a Sustainable Delta*, 812 F. Supp. 2d at 1123. As the Army could reasonably foresee, increasing water diversions to the Bypass Reach for Greenlawn—whom the Army should have also foreseen would withdraw most of the flow—during drought conditions would drastically affect wildlife in the Green River's ecosystem. The Army's action allowed Greenlawn to withdraw enough flows from the Bypass Reach to result in significant degradation to the oval pigtoe mussels' habitat and the death of approximately 25 percent of the mussel population. R. at 9.

This Court must reverse the district court's finding that the Army did not violate ESA Section 7 because the Army committed a discretionary agency action when it exceeded the contractually mandated supply of 7 c.f.s. during Zone 2 drought conditions and provided Greenlawn with 30 c.f.s. of water flow. Therefore, the Army's discretionary action triggered its duty to comply with the consultation requirement in ESA Section 7(a)(2), which the Army failed to perform.

III. THE CITY OF GREENLAWN COMMITTED A "TAKE" OF THE OVAL PIGTOE MUSSEL IN VIOLATION OF SECTION 9 OF THE ESA BY DEPLETING GREEN RIVER FLOWS AND DESTROYING THE SPECIES' HABITAT.

Standard of review: The district court granted NUO's (and the Army's) motion for summary judgment to declare that Greenlawn violated Section 9 of the ESA. R. at 11. This Court reviews the district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the nonmoving party. *Riker*, 798 F.3d at 551.

Greenlawn committed a "take" of the oval pigtoe mussel, a federally listed endangered species, in violation of Section 9 of the ESA. As NUO will explain, Greenlawn caused "harm" to the species by significantly degrading its habitat, resulting in the death of 25 percent of the species' population in the Green River, and the City's withdrawals are indisputably the but-for and proximate cause of the harm.

A. 25 percent of the oval pigtoe mussel population in the Green River has been killed through habitat destruction.

Section 9 of ESA provides that "it is 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."[5] 16 U.S.C. § 1538(a)(1)(B). A "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). To clarify the meaning of "harm" within the takings provision, the FWS promulgated a regulation defining "harm" as "an act which actually kills or injures wildlife . . . which 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.

The oval pigtoe mussel is a federally listed endangered species that lives in freshwater systems. 50 C.F.R. § 17.11(h); *see also* Determination of Endangered Status for Five Freshwater Mussels and Threatened Status for Two Freshwater Mussels, 53 Fed. Reg. 50,12664, 50,12664–87 (Jan. 23, 1998). It is a small to medium-sized species that can grow up to about two and half inches in length. 53 Fed. Reg. at 50,12668. Once a species of "localized abundance . . . [with] populations sometimes numbered in the hundreds," the mussel's average population density

[5] A "person" under the ESA is defined to include municipalities, such as Greenlawn. 16 U.S.C. § 1532(13).

decreased to about five mussels per historical site in 1998, and it has already been extirpated from two river systems in the United States. *Id.*

Threatening the species' extirpation from yet another river system, Greenlawn's water withdrawals have killed about 25 percent of the oval pigtoe mussel population in the Green River by destroying the species' habitat (*see* Section B, *infra*, explaining causation). R. at 9. As a result of Greenlawn's withdrawals, the Green River downstream of the Bypass Reach has dried up, leaving oval pigtoe mussels to lay in dirt baking in the sun. This is clearly "significant habitat modification or degradation [that] actually kill[ed]" the oval pigtoe mussel and is a textbook example of harm and, thus, a taking under the ESA. *See Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 165 (1st Cir. 1993) (explaining that "the proper standard for establishing a taking under the ESA . . . has been unequivocally defined as a showing of 'actual harm'").

B. Greenlawn is liable for taking the oval pigtoe mussel because its withdrawals are the but-for and proximate cause of the species' habitat degradation and consequent death.

In addition to requiring actual harm to an endangered species, a taking under the ESA also requires a showing that the actor's conduct was the but-for and proximate cause of the take. "Harm" is described as "an act which *actually* kills" wildlife, 50 C.F.R. § 17.3 (emphasis added), which connotes but-for causation. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 700 n.13 (1995) (upholding the Secretary of the Interior's interpretation of its regulation defining "harm" as reasonable). Additionally, "[t]he ESA's language itself infers proximate causation: 'it is unlawful for any person . . . to commit . . . or cause to be committed [an ESA violation].'" *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1084 (D. Or. 2012) (quoting 16 U.S.C. § 1538(g)); *see Babbitt*, 515 U.S. at 700 n.13 (explaining that "harm" is subject to "ordinary requirements of proximate causation and foreseeability"). "To establish proximate causation, [there must be] a direct relation between the injury asserted and the injurious conduct

alleged, and the link between the two cannot be too remote, purely contingent, or indirect." *Cascadia Wildlands*, 911 F. Supp. 2d at 1085.

NUO's expert testimony regarding the death of the oval pigtoe mussel population in the Green River is uncontradicted. R. at 9. However, Greenlawn advances the argument that its withdrawals did not cause the drying up of the River downstream of the Bypass Reach that resulted in the death of the mussels. In other words, Greenlawn disputes that it is not the but-for cause of the harm to the species because its withdrawals were harmful only in conjunction with natural precipitation conditions, the Army's operation of the Howard Runnet Dam Works, and other upstream uses of water. R. at 16. The record amply rebuts this assertion.

After the Zone 2 conditions were reached, the Army altered the flow to the Bypass Reach through the Diversion Dam from 7 c.f.s., which the WCM mandated for Zone 2 conditions, to 30 c.f.s. at Greenlawn's demand—a flow four times greater than to which Greenlawn is entitled. R. at 8–9. NUO's expert witness explained, again without contradiction, that a minimum flow of 25 c.f.s. through the Bypass Reach would be sufficient to prevent a taking of the oval pigtoe mussel in the Green River downstream. R. at 10. Clearly, then, this aspect of the Army's operation of the Howard Runnet Dam Works did not in itself effect a taking because the Army provided enough flow to sustain the mussels' habitat.

Therefore, Greenlawn's superfluous withdrawals are necessarily the cause of harm to the species. The City's withdrawals reduced the downstream flow rates of the Green River to nearly zero, destroying the livable habitat of the mussels and causing one-quarter of the River's mussel population to die. R. at 9. The fact that other riparian owners may use water upstream from Greenlawn is irrelevant because there would be enough flow for the mussels but-for Greenlawn's

withdrawals. And nothing in the record indicates that riparian users downstream from Greenlawn reduced the River's flow.

The logical conclusion from these facts is that Greenlawn should have foreseen that its withdrawals from the Bypass Reach would result in extremely low tides and dried up portions of the riverbed downstream, causing harm not only to the oval pigtoe mussel, but also stress to all life within the River's ecosystem. Coupled with the fact that the region was experiencing extreme droughts, there is no excuse for Greenlawn's failure to foresee the impacts downstream from its withdrawals.

However, precisely because the effects are downstream, Greenlawn contends that it is not liable for harm to the mussels because the causal activity occurred outside of the degraded habitat. R. at 16. Specifically, Greenlawn argues that its withdrawals occurred in the Bypass Reach, exempting it from blame because the mussels do not live in the Bypass Reach but, instead, live downstream in the Green River. R. at 16. Nowhere in the enforcement section or the takings provision of the ESA is there any mention—much less an exception—of liability affixing only when the injury to a species is the result of activity that physically occurred in the species' habitat. *See* 16 U.S.C. §§ 1538, 1540. In fact, a simple reading of the statute actually compels the conclusion that indirect takings *must* be possible. For example, Section 10 allows the Secretary of the Interior to issue "incidental take" permits that shield a person from liability for a taking as a result of conducting "an otherwise lawful activity." *Id.* § 1539(a)(1)(B). This must necessarily read to mean that without such a permit, a person will be liable for a taking that is the result of carrying out "an otherwise lawful activity."

Applying this to the instant case, Greenlawn believes its riparian rights entitle it to a flow of 30 c.f.s. in the Bypass Reach—which NUO maintains is erroneous as a matter of law—and,

therefore, withdrawing water from that flow is a lawful activity that coincidentally caused "harm" to an endangered species downstream, far past the City's water intake. This fits squarely within the type of conduct Section 10 allows the Secretary to protect, so an incidental take permit could have potentially shielded Greenlawn from liability here, but the City failed to obtain one.

Greenlawn cannot dispute that it caused the Green River downstream of the Bypass Reach to dry up, destroying the habitat of the oval pigtoe mussel and resulting in the death of 25 percent of the mussel population in the River. Accordingly, this Court should hold that Greenlawn committed a prohibited taking of the oval pigtoe mussel in violation of Section 9 of the ESA and enjoin it from making withdrawals from the Bypass Reach that reduce downstream Green River flows to less than 25 c.f.s.

IV. THE CITIZEN SUIT PROVISION OF THE ESA DOES NOT REQUIRE A BALANCING OF EQUITIES BEFORE ENJOINING THE CITY OF GREENLAWN'S WATER WITHDRAWALS TO PREVENT THE EXTIRPATION OF AN ENDANGERED SPECIES.

Standard of review: The district court issued an injunction enjoining Greenlawn from making water withdrawals from the Bypass Reach that cause downstream Green River flows to drop below 25 c.f.s. R. at 18. This Court reviews the district court's issuance of an injunction for abuse of discretion. *Barnes v. City of Cincinnati*, 401 F.3d 729, 738–39 (6th Cir. 2005).

Congress has made its intent clear that the ESA's goal of protecting endangered species quashes almost all other considerations. In alignment with this intent, the plain text of the ESA's citizen suit provision, which allows judicial review only to enjoin a person's unlawful conduct under the Act, makes no mention that the court must balance the equities when determining whether it should grant injunctive relief. Further, in this case, Greenlawn's superfluous withdrawals present a threat of imminent harm to the oval pigtoe mussel, which can only be neutralized by an injunction enjoining the City from making withdrawals that reduce downstream

flows to a rate of less than 25 c.f.s. Accordingly, NUO respectfully requests that this Court grant such relief.

A. The plain text of the ESA's citizen suit provision, supported by clear Congressional intent behind the ESA, does not require a court to balance the equities when determining whether to enjoin conduct that violates the ESA.

Section 11 of the ESA provides that "any person may commence a civil suit . . . to enjoin any person . . . who is alleged to be in violation of any provision" of the ESA. 16 U.S.C. § 1540(g)(1)(A). The statute further states that "district courts shall have jurisdiction . . . to enforce any provision of the act that has been violated." *Id.* § 1540(g). There is no other qualifying language with regard to the remedy in a citizen suit, and nothing else in these provisions of the ESA suggests a balancing of equities when enjoining unlawful conduct.

This is consistent with the spirit and purpose of the ESA, and Congress has expressed in various ways that the ESA's mission to protect endangered should not be compromised by human activity. For example, Congress has said that "take" should 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." *Palila v. Haw. Dep't of Land and Nat. Res.*, 852 F.2d 1106, 1108 (9th Cir. 1988) (quoting 1973 Senate Report on the ESA, S. REP. NO. 93-307 (1973)). A broad interpretation of "take" lowers the standard required to commit a taking and gives courts leeway and comfortability to find a taking in order to support ESA's mission. Another example of a relatively relaxed standard is the *mens rea* requiring an actor to "knowingly" commit a taking in order to be subject to civil or criminal penalties. *See* 16 U.S.C. §§ 1540(a)(1), (b)(1) (explaining requirements for civil and criminal penalties for violations of the ESA). The criminal penalties provision of the ESA initially required the actor to have acted "willfully"—a higher standard than "knowingly"—but Congress wanted to "make it clear that the Act's civil and criminal sanctions apply to violations involving an omission or failure to act as well as to violations involving the commission of a

prohibited act." H.R. REP. NO. 95-1804, at 26 (1978) (Conf. Rep.). Congress elaborated that "knowledge of the law [is not] an element of either civil penalty or criminal violations of the Act." *Id.*

The express Congressional intent of the ESA has weighed heavily in the judiciary's decisions when determining whether a violation of the ESA occurred. In the seminal case *Tennessee Valley Authority v. Hill*, the Supreme Court halted construction of the Tellico Dam, a project that the federal government had invested over $100 million, because its operation would eradicate the three-inch snail darter fish, an endangered species. 437 U.S. 153 (1978). The Court stated that "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend towards species extinction, *whatever the cost*." *Id.* at 184 (emphasis added). The Court further stated that Congress "intended endangered species to be afforded the highest of priorities," *id.* at 174, and that the "value of endangered species is incalculable." *Id.* at 187.

Both the Court's and Congress' statements regarding the ESA demonstrate that Congress, in no uncertain terms, intended that preservation of an endangered species should override almost all other considerations, meaning that the judiciary should not make its own determinations of equity when deciding whether to enjoin conduct that violates the ESA. In recognition of this principle, the Supreme Court articulated that:

> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto." *Id.* at 194–195.

In affirming the court of appeals' decision in *TVA v. Hill,* the Supreme Court noted the court's explanation that the court's "responsibility under § 1540(g)(1)(A) [(ESA citizen suit provision)] is merely to preserve the status quo where endangered species are threatened." *Id.* at 169. An injunction achieves exactly that in this case. Before the Army conceded to Greenlawn's

demand for a flow 30 c.f.s. of water in the Bypass Reach, and before the City unlawfully withdrew nearly all of that water, there was a healthy flow in the Green River—enough flow to prevent the destruction of the oval pigtoe mussel's habitat and consequent death. Thus, this Court should affirm the district court's decision to issue an injunction enjoining Greenlawn from withdrawing an amount of water from the Bypass Reach that curtails flow to the Green River downstream to less than 25 c.f.s..

B. An injunction is necessary to neutralize a reasonably certain threat of imminent, continued harm to the oval pigtoe mussel population in the Green River generated by Greenlawn's water withdrawals.

Not only was an injunction necessary to halt the ongoing harm to the oval pigtoe mussel resulting from Greenlawn's withdrawals, it was, and still is, necessary to prevent a threat of imminent harm. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064 (9th Cir. 1996) (holding that a threat of imminent harm is sufficient for the issuance of an injunction under the ESA). If this Court reverses the district court's decision to issue an injunction, Greenlawn can resume its withdrawals from the Bypass Reach during drought conditions when they inevitably recur, presenting a threat of imminent harm to the oval pigtoe mussel in the Green River. This Court should affirm the district court's decision in order to prevent the potential extirpation of the mussel from the River.

The district court found that the threat of imminent harm to the oval pigtoe mussel was reasonably certain because of the uncontested evidence presented by NUO demonstrating the harm that has already occurred. R. at 18. In other words, the court decided that if Greenlawn's conduct continues, so will the corresponding harm to the mussel. The evidence presented by NUO in the below supports the district court's finding.

As NUO has explained, one quarter of the oval pigtoe mussel population in the Green River has died as a result of Greenlawn's withdrawals. R. at 9. This in itself logically leads one to

presume that continuance of Greenlawn's withdrawals would cause the death of more mussels, perhaps even to complete extirpation from the Green River. But one does not need to even make such a presumption because NUO's expert testified that "[i]f allowed to persist, these conditions would entirely eliminate the Green River population of the oval pigtoe mussel." R. at 9. Like much of NUO's other evidence regarding this issue, this evidence was uncontradicted by Greenlawn. R. at 9. The record also demonstrates that droughts in the region have been more frequent since 2006 than in the entire 20th century. R. at 8. Droughts have also become more severe, for a Zone 2 condition had never existed until 2017. R. at 8. Greenlawn's desire for excessive flows exacerbates these conditions.

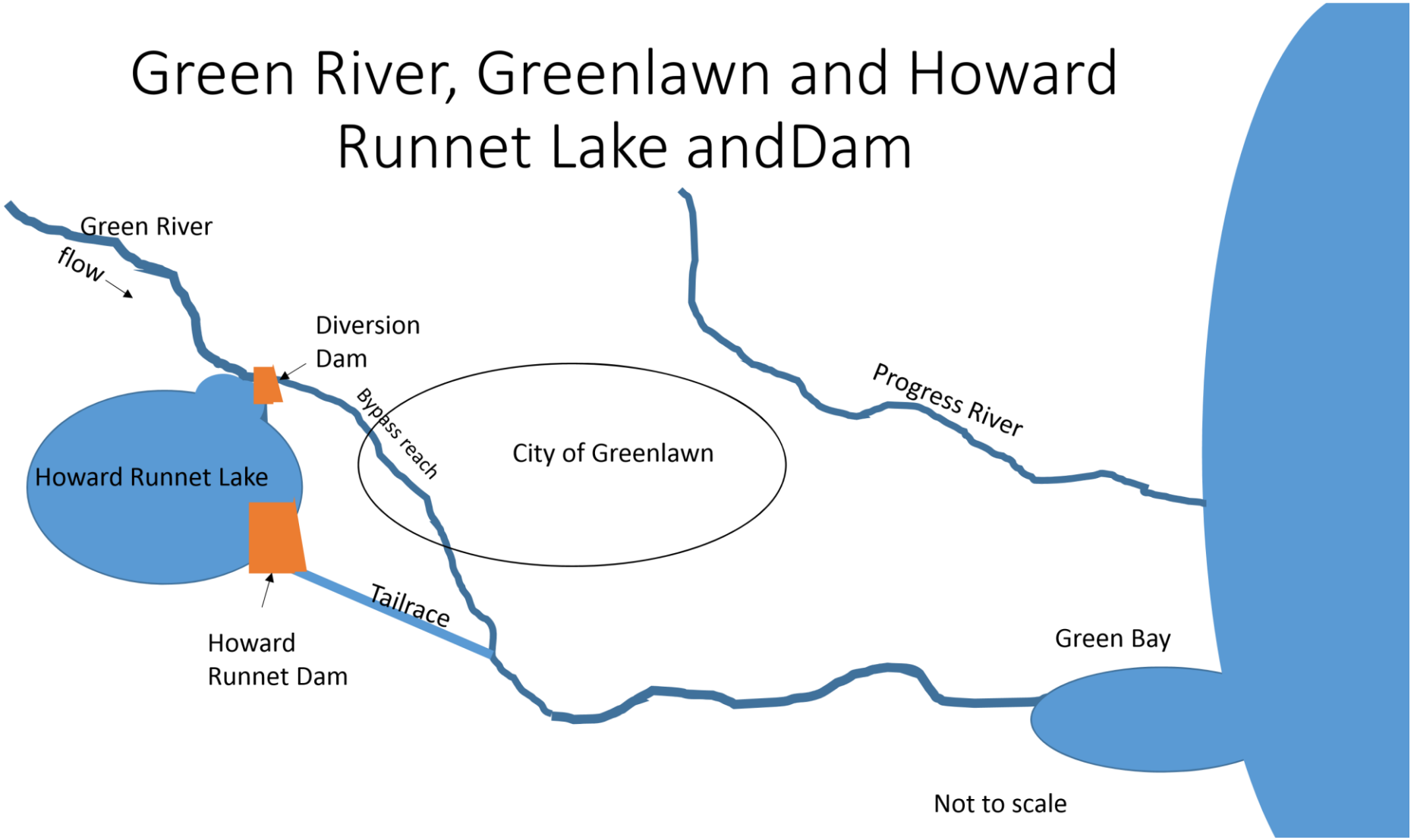
Although drought conditions have returned to Zone 1, all parties agree that extreme drought conditions are likely to recur in the near future. R. at at 11. NUO thus reiterates that this Court should affirm the district court's issuance of an injunction in order to prevent a reasonably certain threat of imminent harm to the oval pigtoe mussel.

V. CONCLUSION

For the foregoing reasons, NUO respectfully requests that this Court: (1) declare that the City of Greenlawn, as a riparian user, is entitled only to a flow of 7 c.f.s.—the amount allotted in the WCM; (2) hold that the Army Corps of Engineers violated Section 7 of the ESA when it modified the flows described in the WCM without complying with Section 7 of the ESA, and, therefore, enjoin the Army from diverting additional flow to Greenlawn; (3) hold that the City of Greenlawn committed a prohibited "take" of the oval pigtoe mussel in violation of Section 9 of the ESA by killing the species through habitat destruction resulting from the City's water withdrawals; (4) uphold the district court's grant of an injunction prohibiting the City of

Greenlawn from reducing the flows of the Green River downstream of the Bypass Reach to less than 25 c.f.s.; and (5) grant any further relief this Court deems just and proper.

APPENDIX 1


Green River, Greenlawn and Howard Runnet Lake andDam
Green River
flow
Diversion
Dam
Bypass reach
City of Greenlawn
Progress River
Howard Runnet Lake
Tailrace
Howard
Runnet Dam
Green Bay
Not to scale