Team # 55

No. 19-000987

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.

PLAINTIFF – APPELLANTS

V.

UNITED STATES ARMY CORPS OF ENGINEERS

DEFENDANT – APPELLEE

&

CITY OF GREENLAWN, NEW UNION

DEFENDANT – APPELLANT

On Appeal from the United States District Court, Eastern District of Louisiana, No. 66-CV-2017, Honorable Romulus N. Remus, Presiding

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BRIEF FOR APPELLANT

Counsel for New Union Oystercatchers, Inc.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered its final Order on May 15, 2019, granting Army Corps of Engineers's motion for summary judgment dismissing the first claim for relief; denying the City of Greenlawn's motion for summary judgment dismissing the Second Claim for Relief and the Army Corps's Cross Claim; granting New Union Oystercatcher, Inc.'s motion for summary judgment regarding the Endangered Species Act § 9 violation; and issuing a preliminary injunction against Greenlawn. Record pp. 1-18. Jurisdiction was proper at the District Court because this suit arose under the Endangered Species Act and related common law claims. 28 U.S.C. § 1331 (2018); *id.* § 1367. Plaintiff-Appellant, New Union Oystercatchers, Inc., and Defendant-Appellant, the City of Greenlawn, each filed a timely Notice of Appeal. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2018).

ISSUES PRESENTED FOR REVIEW

1. Whether the City of Greenlawn's riparian rights entitle it to withdraw water for landscaping without water conservation measures, particularly considering the severe downstream impacts of its use.

2. Whether operating the Howard Runnet Dam Works during drought conditions in a manner that provides flow to the City of Greenlawn is a discretionary action subject to the Endangered Species Act § 7 consultation requirement.

3. Whether the City of Greenlawn has taken endangered oval pigtoe mussels, violating § 9 of the Endangered Species Act, when it withdrew nearly all of the drought-reduced flow from the Green River Bypass Reach.

4. Whether the District Court must balance the equities before enjoining a municipal activity when the activity will extirpate an entire population of an endangered species.

STATEMENT OF THE CASE

This case concerns the decreased flow rate in the Green River resulting from the City of Greenlawn, New Union ("Greenlawn") withdrawing water for its citizens to water their lawns and ornamental plants during drought conditions. No party contests the following facts. Record p. 5.

I. Factual History

Congress authorized the Howard Runnet Dam (the "Dam") in the River and Harbor Act of 1945. *Id.* at 6; *see also* Pub. L. No. 79-14, 59 Stat. 10 (1945); Fish and Wildlife Coordination Act, Pub. L. No. 85-624, 72 Stat. 563 (1958) (adding additional fish and wildlife purposes). The Dam cut off the natural flow of the Green River, Greenlawn's water supply. Record p. 6. Thus, the United States Army Corps of Engineers ("ACOE") created the Green River Diversion Dam, which releases water into the Green River Bypass Reach ("Bypass Reach"). *Id.* at 5. Collectively, the Dam and the Bypass Reach make up the Howard Runnet Dam Works ("Dam Works"). *Id.* The Bypass Reach rejoins the Dam's tailrace downstream. *See* Appx. A (map of Green River watershed).

Greenlawn currently lies on the Bypass Reach. Record p. 5. Greenlawn owns the riverfront on both sides of the Bypass Reach, and it has maintained municipal water intakes since its foundation in 1893. *Id.* Since that time, Greenlawn experienced a housing boom, which required it to enlarge its municipal water system. *Id.* The Greenlawn Water Agency provides domestic and industrial water use to over 100,000 customers. *Id.* Following Greenlawn's new increased demand for water, the ACOE and Greenlawn entered into an agreement to "maintain flows in the Bypass Reach sufficient to allow [Greenlawn] to continue water withdrawals in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." *Id.* at 6 (internal quotations omitted).

Currently, the Water Control Manual ("WCM") governs the ACOE's operation of the Dam, establishing parameters for releasing water from the Dam and the Bypass Reach. *Id.* The WCM's goals include "maintaining adequate lake levels for recreational use during the summer months, providing downstream water releases to support in-water recreation and fishing, and maintaining flood storage capacity during the rainy season from December to April." *Id.* If the lake maintains target elevations, the ACOE releases excess natural inflow through the Bypass Reach. *Id.* During normal summer operation, the ACOE must release 50 cubic feet per second ("CFS") into the Bypass Reach to meet Greenlawn's seasonal water demands. *Id.* at 6-7. The ACOE will also release up to 200 CFS to the hydroelectric turbine, as needed. *Id.* at 7. Saturday recreational purposes quadruple the water demand. *Id.* Accordingly, the ACOE increases the Saturday water release in the Bypass Reach to 200 CFS. *Id.*

However, when the lake drops below target levels, the WCM allows the ACOE to curtail its downstream releases according to the following lake levels:

> 1) Zone 1 (*Drought Watch*) – All recreational releases curtailed; minimum flow of at least 50 CFS shall be maintained in the Green River at the confluence of the Howard Runnet Dam tailrace and the Bypass Reach for fish and wildlife purposes; flow of 50 CFS shall be maintained into the Bypass Reach from the Diversion Dam; daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained.
>
> 2) Zone 2 (*Drought Warning*) – All recreational releases curtailed; Bypass Reach flow from the Diversion Dam reduced to 7 CFS; daily hydroelectric power releases of up to 200 CFS for up to three hours per day shall be maintained.
>
> 3) Zone 3 (*Drought Emergency*) – All recreational releases curtailed; flow of 7 CFS shall be maintained into the Bypass Reach from the Diversion Dam; daily hydroelectric power releases curtailed.

Id. This guidance is up to date as of 1968, when the ACOE adopted the WCM. *Id.* Additionally, the WCM notes: "At all times the [Dam] shall be operated in a manner that complies with any

water supply agreements entered into by [the ACOE], and with the riparian rights of property owners established under New Union law." *Id.* (internal quotations omitted).

When the ACOE adopted the WCM, there were practically no water uses upstream of the Dam. *Id.* Currently, however, several large agricultural operations divert upstream water for crop-irrigation, resulting in evaporative loss. *Id.* at 7-8. Under normal conditions, precipitation and groundwater recharge adequately maintain downstream flows and a healthy ecosystem. *Id.* at 8. Historically, drought has not been a problem in the system. *Id.* In the 21st Century, though, drought conditions have been more frequent. *Id.* ("Zone 1 (Drought Watch) conditions occurred during 2006-2007, 2008, 2009-10, and 2012[, and] again during the Fall of 2016. . . ."). In the Spring of 2017, the lake levels reached Zone 2 (Drought Warning), and the ACOE followed the WCM, restricting flow in the Bypass Reach. *Id.*

Greenlawn protested the 7 CFS flow rate that the WCM requires, arguing the flow restrictions are outdated. *Id.* When the ACOE suggested that Greenlawn impose conservation measures on water consumers, Greenlawn asserted its common law riparian right to its use of flows in the Bypass Reach. *Id.* Due to evaporation, ground absorption, and Greenlawn's sewage treatment plant discharging into a different watershed, very little of the withdrawn water returns to the Green River. *Id.* at 5-6. Generally, Greenlawn withdraws an annual average of 6 million gallons of water per day ("MGD"). *Id.* at 5. However, beginning in the Spring, Greenlawn requires additional water "for watering lawns and ornamental plants," peaking at 20 MGD in July and August. *Id.* at 5, 8. In short, Greenlawn refused to decrease its exorbitant water withdrawals so its residents could continue watering their landscaping. *Id.* at 8.

After 11 days of back-and-forth, the ACOE acquiesced to Greenlawn's demand for increased water usage and sent 30 CFS through the Bypass Reach. *Id.* Because of this increased

flow and peaking hydropower demands, the lake level dropped to Zone 3 (Drought Emergency) on May 15, 2017. *Id.* Following WCM guidance, the ACOE curtailed water releases from the Dam, but it continued the 30 CFS flow rate through the Diversion Dam and Bypass Reach. *Id.* at 8-9.

Because of Greenlawn's withdrawals, which do not return to the Green River, downstream flowrates dropped from 25 CFS to nearly zero, causing "[s]evere effects." *Id.* at 9. The downstream Green River turned into 60 miles of stagnant pools and narrow trickles of water, rather than its historically flowing river habitat. *Id.* The reduced flow and lower water level exposed several beds of oval pigtoe mussels, a federally listed endangered species residing throughout the Green River, from the confluence of the Bypass Reach and the Dam's tailrace to the estuary. *Id.* For survival, the Green River population of oval pigtoe mussels requires a minimum flow of 25 CFS averaged over 24 hours. *Id.* at 10. In Spring 2017, the mussels received virtually no flowing water. *Id.* at 9.

These conditions caused the death of approximately 25% of the Green River oval pigtoe mussel population. *Id.* The mussels require gravel or silty sand riverbeds and slow-to-moderate currents. *Id.* Stagnant waters, such as those caused by the decreased flow, cause increased siltation, which smothers mussel populations and eliminates habitat. *Id.* Even though adult mussels are somewhat resilient to changes in flow, the severely reduced flows "essentially eliminated any possibility for the oval pigtoe mussels to remain submerged." *Id.* The mussels also require a healthy population of host-fish species, like the sailfin shiner, in order to reproduce. *Id.* Low water levels affect the migration of sailfin shiners, impacting the mussels' reproduction ability. *Id.*

If the ACOE allows these conditions to persist, the Green River's population of oval pigtoe mussels will inevitably join the growing list of permanently extinct species. *Id.* Yet, at no point has the ACOE consulted with the U.S. Fish and Wildlife Service ("USFWS") regarding the Dam Work's impacts on the mussel. *Id.* Also, Greenlawn does not have an incidental take permit that

would allow the take of mussels incidental to its municipal water withdrawals. *Id.* at 9-10; *see also* Endangered Species Act § 10, 16 U.S.C. § 1539(a)(1)(B) (2018) (governing incidental take permits).

Besides the immediate impacts to the endangered oval pigtoe mussel, the recent decades of reduced flows have impacted the Green River estuary and Green Bay. Record p. 10. Decreased flows have increased the Green Bay's salinity and constricted the flow of nutrients into the system. *Id.* "Green Bay has historically supported a thriving oyster industry." *Id.* However, increased salinity has allowed predators to enter the Bay and feed on juvenile oysters. *Id.* Reduced nutrient inflow has also impacted the estuary's health. *Id.* Thus, "[o]yster harvests in 2016 were only 50% of the level of 2000." *Id.*

Appellant, New Union Oystercatchers, Inc. ("NUO"), is a not-for-profit membership association that represents the interests of Green Bay oyster fishermen. *Id.* Decreased flows from the Green River have stifled the oyster industry, injuring NUO's members. *Id.* For instance, several members have had to abandon their livelihoods and sell their boats. *Id.* Further, NUO's members will have to bear a disproportionate burden of the dam's costs by paying electric rate fuel surcharges when the Dam cannot operate as a peaking facility. *Id.*

II. Procedural History

On May 17, 2017, NUO served a Notice of Intent ("NOI") to sue on the ACOE and Greenlawn under the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g). *Id.* The NOI alleged violations based on flow reductions in the Green River resulting from Greenlawn's water withdrawals and the ACOE's subsequent curtailments. *Id.* During the NOI's 60-day waiting period, heavy rains filled Howard Runnet Lake back to Zone 1 levels, eliminating the immediate

threat to the mussels. *Id.* at 11. However, it is undisputed that Drought Warning conditions are likely to occur again and more frequently in the near future, and, therefore, this case is not moot. *Id.*

On July 17, 2017, after the 60-day waiting period, NUO filed this action against the ACOE and Greenlawn alleging ESA violations. *Id.* at 10. The complaint also included a common law riparian rights claim against Greenlawn. *Id.* The ACOE filed a cross-claim against Greenlawn, agreeing with NUO that Greenlawn's water withdrawals constitute an illegal take of endangered oval pigtoe mussels. *Id.*; *see also* ESA § 9, 16 U.S.C. § 1538(a)(1)(B) (2018) (prohibiting illegal takes). Greenlawn answered the complaint and cross-complaint. Record p. 10. It also filed a counterclaim against the ACOE seeking a declaration of its riparian rights to continued flows in the Bypass Reach sufficient to meet its municipal water needs. *Id.* at 10-11.

In the lower court, the ACOE moved for summary judgment to dismiss the ESA claims against it. *Id.* at 4. NUO moved for summary judgment to declare Greenlawn to be in violation of § 9 of the ESA. *Id.*; 16 U.S.C. § 1538 (2018). NUO also moved for summary judgment to declare the ACOE to be in violation of § 7 of the ESA. Record p. 4; 16 U.S.C. § 1536 (2018). Greenlawn cross-moved for summary judgment to dismiss the ESA claim against it and to declare its rights as a riparian landowner. Record p. 4.

The District Court granted the ACOE's motion for summary judgment to dismiss the ESA claim against it. *Id.* at 4-5. The court also granted Greenlawn's motion for summary judgment to declare its rights as a riparian landowner. *Id.* The court denied Greenlawn's motion for summary judgment to dismiss the ESA claim against it and granted NUO's motion for summary judgment declaring that Greenlawn violated the ESA. *Id.* at 5. Additionally, because Greenlawn's activities threaten the endangered oval pigtoe mussel, the lower court issued an injunction "against water

withdrawals that cause the flow of the Green River downstream of the [Dam] to drop below 25 cubic feet per second averaged over twenty four [sic] hours." *Id.*

Following the District Court's order, Greenlawn and NUO both filed timely notices of appeal. *Id.* at 1. NUO now appeals: (1) the court's determination that Greenlawn has unfettered riparian landowner rights in the Bypass Reach, and (2) the court's holding that the ACOE did not violate the ESA § 7 consultation requirement when the ACOE continued the Dam operations during drought conditions to provide flows to Greenlawn. Greenlawn, on the other hand, appeals: (1) the court's determination that the reduced Bypass Reach flow constitutes a take of the oval pigtoe mussel, and (2) the court's injunction.

SUMMARY OF THE ARGUMENT

The lower court erred in two respects: its application of the riparian rights doctrine and its application of ESA § 7. This Court should reverse the lower court's related decisions. However, this Court should uphold the lower court's finding that Greenlawn is subject to liability pursuant to ESA § 9 and the associated preliminary injunction.

First, the lower court erred in its declaration that Greenlawn's riparian rights allow it to withdraw water for municipal purposes without any conservation measures during a drought. As an initial matter, the court did not perform the entire reasonable use analysis. Instead, the court mistakenly determined that Greenlawn's water use was domestic, and, therefore, Greenlawn was entitled to unfettered water use. This classification was incorrect since landscaping is not a domestic use. Continuing the reasonable use analysis, then, the remaining factors of the balancing test weigh so heavily in favor of declaring Greenlawn's use unreasonable that this Court should reverse the lower court's decision. The lower court also erred by applying a prior appropriations analysis, which has no place in a riparian rights state. Additionally, the lower court found that

NUO did not have any rights since it was not a riparian landowner. This is incorrect, as courts recognize certain non-riparian rights in watersheds. For these reasons, this Court should reverse the lower court's decision and hold that Greenlawn is not entitled to unfettered water use in times of drought.

Second, the lower court erred in finding that the ACOE's actions did not trigger the ESA § 7 consultation requirement. A literal interpretation of the statute and relevant case law demonstrate that ACOE's actions constituted a discretionary act. Initially, when the ACOE acquiesced to Greenlawn's request to increase the flow to the Bypass Reach, and it subsequently acted to do so, that was an act "authorizing" and "carrying out" an activity, making this act an agency action. The ACOE's actions fall in line with the plain language and definitions of both "authorize" and "carry out." The ACOE also did not simply advise Greenlawn. Rather, it affirmatively acted when it increased the flow to the Bypass Reach. Additionally, because the ACOE had the authority over the Dam itself, it was required to comply with ESA § 7. Thus, the lower court erred in finding the ACOE did not have to consult with USFWS, and this Court should reverse its decision.

Third, the lower court correctly held Greenlawn liable for its take of oval pigtoe mussels without an incidental take permit, violating ESA § 9. Courts have long held that protecting essential habitat for endangered species is at the heart of the ESA. Accordingly, Greenlawn's irresponsible water use and withdrawal during drought has decimated the oval pigtoe mussel's habitat, causing the mussels to bake in the sun and suffocate in stagnant, silty water. Furthermore, had Greenlawn met its statutory duty to receive an incidental take permit, it could have come into compliance with the ESA and *still* potentially maintained its current water-consumption levels. But instead, Greenlawn relies on the incorrect assumption that the ESA is subservient to common

law riparian rights. This argument flagrantly ignores the ESA's express purpose, courts' repeated and clear application of the ESA, and Congress's basic constitutional power to legislate. For these reasons, this Court should affirm the lower court's decision to hold Greenlawn accountable for violating § 9 the ESA.

Finally, the lower court's decision to issue an injunction was proper. The injunction prohibited Greenlawn from withdrawing water during drought conditions when such withdrawal would imminently threaten the oval pigtoe mussel population. Initially, courts lack discretion under the ESA to balance the equities, and the lower court properly recognized that Congress intended the balance be struck in favor of the endangered species. Further, even if this Court does determine that it may balance the equities, the balance still tips in favor of NUO. Greenlawn has stated that the increased need for water in the municipality is for landscaping and watering "ornamental plants." This use is nonessential and does not outweigh the impacts on the oval pigtoe mussel and NUO, including putting its members out of business and forcing them to pay electric rate fuel surcharges.

ARGUMENT

I. Greenlawn does not have an unfettered right to use Green River water without adopting drought measures.

New Union applies the common law riparian rights doctrine when evaluating water rights. Record p. 11.[1] The doctrine recognizes riparian landowners' right to withdraw and make beneficial use of the water their land abuts. *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982); *see also Wisniewski v. Gemmill*, 465 A.2d 875, 877 (N.H. 1983) ("At common law, a riparian owner has a

[1] As noted by the lower court, New Union case law does not contain precedent addressing this issue. Record p. 12. Thus, like the lower court's decision, this brief relies on authoritative treatises, precedent from other riparian rights jurisdictions, and secondary sources as examples of how New Union would resolve this claim. *Id.*

right to the beneficial use of the water of a river or a stream passing through or adjacent to his land."). New Union applies the minority rule, which recognizes that a municipality has a right to exist as a riparian landowner and withdraw water for the benefit of non-riparian community members. *Tubbs v. Potts*, 45 N.U. 999 (1909). However, no riparian landowner may use the water in a way that interferes with the rights of other riparian landowners. *Colorado*, 459 U.S. at 179 n.4 ("[A]ny riparian proprietor may make whatever use of the water that is reasonable with respect to the needs of other appropriators."). Yet, the lower court allowed Greenlawn to continue to withdraw up to 20 MGD of water from the Bypass Reach to the detriment of downstream users and ACOE. Record pp. 9-10, 13.

The lower court granted Greenlawn's motion for summary judgment, declaring its unfettered rights as a riparian landowner. *Id.* at 18. In making its decision, the court determined that: (1) the riparian rights doctrine precluded the "share the shortage" argument without undertaking the entire reasonable-use analysis because gardening is a "natural use"; (2) ACOE's riparian rights were subsequent to Greenlawn's despite the riparian rights doctrine not embracing a prior appropriations analysis; and (3) NUO did not have rights in the Green River because members did not own riparian land, even though non-riparian owners can establish limited rights in water. *Id.* at 13. The lower court erred in each of these determinations. Therefore, this Court should reverse the lower court's decision and declare that Greenlawn's unfettered water use violates the riparian rights doctrine.

A. <u>The lower court erred in its application of the reasonable use theory of the riparian rights doctrine.</u>

The majority of states apply the reasonable use theory in evaluating riparian rights, which inherently embraces sharing the shortage. 78 Am. Jur. 2d *Waters* § 56 (noting correlative nature of riparian rights doctrine); Joseph W. Dellapenna, *The Evolution of Riparianism in the United*

States (Symposium), 95 Marq. L. Rev. 53, 65-66 (2011) (noting a shift in application of riparian rights doctrine to applying the reasonable use theory). Under the reasonable use theory, courts determine which rights are permissible based on the relative reasonableness of the competing uses. Dellapenna, *supra*, at 54. Therefore, a riparian landowner may only exercise his rights reasonably as to not injure others in the enjoyment of their rights. *Harris v. Brooks*, 283 S.W.2d 129, 133 (Ark. 1955) (quoting 6 Am. Jur. § 728); *see also Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468, 470 (4th Cir. 1975) ("[A] riparian landowner has a right to the agricultural, recreational, and scenic use and enjoyment of the stream bordering his land, subject, however, to the rights of upstream riparian owners to make reasonable use of the water without excessively diminishing its quality.").

To determine whether a use is reasonable, the Court evaluates a variety of factors: the (1) use's purpose; (2) use's suitability to the watercourse; (3) use's economic value; (4) use's social value; (5) extent and amount of harm; (6) practicality of adjusting the use to avoid the harm; (7) practicality of adjusting each user's quantity; (8) protecting existing values, including water uses, land, investments, and enterprises; and (9) justice of requiring the harmful user to bear the loss. 78 Am. Jur. 2d *Waters* § 37; Restatement (Second) of Torts § 850A (1979). The lower court here did not apply this analysis. Instead, it based its analysis entirely on the purpose of Greenlawn's water use. Record p. 13. The subsequent sections discuss: (1) how the court erred in its classification of the purpose of Greenlawn's use and (2) the other reasonable-use factors the lower court should have considered in its analysis. Taken together, the reasonable use balancing test indicates that Greenlawn's use is unreasonable and must be conditioned in periods of drought.

i. The lower court improperly classified Greenlawn's purpose in withdrawing the water to support its finding that Greenlawn could continue its withdrawals.

This Court should reverse the lower court's decision because the lower court improperly categorized Greenlawn's purpose in using the water withdrawals for ornamental landscaping and lawn care. Generally, riparian landowners are limited to the reasonable use of water. *United States v. Willow River Power Co.*, 324 U.S. 499, 505 (1945). However, some jurisdictions recognize a preference for domestic uses above other uses. *Id.* at 505 n.2; *Harris*, 283 S.W.2d at 134; *see also Scott v. Slaughter*, 373 S.W.2d 577, 579 (Ark. 1963) (noting Arkansas embraced the reasonable use theory, but did not adopt the existing interpretations, instead adding the domestic purpose nuance). Domestic uses include "water for the family, live stock [sic], and gardening." *Harris,* 283 S.W.2d at 133. The lower court classified Greenlawn's use of the water for landscaping as a domestic use, equating landscaping with gardening. Record p. 13 (citing *Harris*, 283 S.W.2d at 134).

The lower court's classification was incorrect. According to Merriam-Webster Dictionary, the most applicable use of the word means to create or work in "a plot of ground where herbs, fruits, flowers, or vegetables are cultivated." *Garden*, Merriam-Webster, https://www.merriam-webster.com/dictionary/garden (last visited Nov. 16, 2019). Watering the lawn and ornamental flowers does not fall within this common meaning. *Id.*

Additionally, it would be contrary to the purpose of prioritizing domestic uses to include landscaping in the definition. Natural uses are those that are necessary for a riparian user to sustain their existence. *See, e.g., Evans v. Merriweather*, 3 Scam. 492, 495 (Ill. 1842) ("Natural [water uses] are such as are absolutely necessary to be supplied, in order to his existence."). To the contrary, artificial uses are those that are unnecessary for the user to survive. *See id.* ("Artificial [uses], such only as, by supplying them, his comfort and prosperity are increased."); Lynda L.

Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests*, 47 U. Pitt. L. Rev. 95, 127 (1985) ("Artificial uses, on the other hand, are uses that are not needed to sustain life. . . ."). Watering lawns and ornamental plants is not necessary for survival. Instead, it simply increases the user's comfort. Thus, use for landscaping does not receive priority under the riparian rights doctrine. Therefore, the lower court erred by giving preference to Greenlawn's water usage.

ii. The lower court erred in only examining the first factor of the reasonable use balancing test, rather than looking to the cumulative impact of all the factors which weigh in favor of declaring Greenlawn's current use of water unreasonable.

When evaluating the reasonableness of Greenlawn's use, the lower court relied entirely, and incorrectly, on the purpose of the use. Record p. 13. However, purpose is just one factor in the reasonable use balancing test. *See, e.g.*, Restatement (Second) of Torts § 850A (listing nine factors for courts to balance in assessing reasonable use). Because the lower court incorrectly identified Greenlawn's purpose as "domestic," it neglected to continue the reasonable use analysis. The remaining factors in the analysis so strongly tip the balance toward Greenlawn's use being unreasonable that this Court should reverse the lower court's determination.

First, the lower court should have considered the suitability of the use to the water body. Most of the year, Greenlawn's average water withdrawal is 6 MGD. Record p. 5. However, in Spring and Summer, Greenlawn increases its withdrawals up to 20 MGD for "lawn and ornamental watering demands." *Id.* While this landscaping use may normally be suitable to the Bypass Reach, under drought conditions, the withdrawal is no longer suitable because of the decreased water upstream and the impacts downstream. This tips the scale toward declaring Greenlawn's withdrawal unreasonable.

Next, the lower court should have examined the economic and social value of Greenlawn's use. Greenlawn's use for landscaping lacks significant economic or social value. *See, e.g.*, Pesticide Envtl. Stewardship Program, *Benefits and Risks Associated with Landscapes*, EPA (May 30, 2018), https://www.epa.gov/pesp/benefits-and-risks-associated-landscapes (listing limited economic and social benefits related to keeping a landscaped yard, with regard to pest management). Thus, this factor tips the scale toward limiting Greenlawn's water rights during drought conditions.

The lower court should have also considered the harm resulting from Greenlawn's water use. The 20 MGD withdrawal impacts downstream flows and the level of the reservoir. Record pp. 9-10. One factor the trial court failed to consider was whether Greenlawn returned the withdrawn water to the watershed. *See, e.g.*, *Roberts v. Company*, 66 A. 485, 485 (N.H. 1907) (noting an upstream riparian owner may divert water for lawful use as long as they return the water to the channel above the next riparian owner's land); *Hoover v. Crane*, 106 N.W.2d 563, 566 (Mich. 1960) ("[A]t some point the use of the water which causes loss [within the watershed] must yield to the common good."). The Michigan Supreme Court examined a similar situation where two legal uses conflicted because drought drastically lowered the lake level. *Hoover*, 106 N.W.2d at 563. It noted that, while resort use and agricultural use were both legitimate purposes of the lake, irrigation could cause water loss and "might constitute a threat to the very existence of the lake in which all riparian owners have a stake." *Id.* at 566. Thus, the Michigan Supreme Court determined that the farmer could not use more than a mandated amount of lake water if the lake level dropped so low that it no longer drained into the outlet. *Id.*

Greenlawn's actions similarly threaten the water bodies' existence. Very little of the water Greenlawn uses returns to the Green River. Record pp. 5-6. Howard Runnet Lake's level decreased

so much due to Greenlawn's withdrawal that the ACOE had to cease hydroelectric generation. *Id.* at 8-9. Given the lack of water flowing over the Dam and Greenlawn's withdrawal, downstream flowrates have dropped to practically zero, destroying the Green River. *Id.* at 9. It is now just "stagnant pools of water and narrow trickles, through what was formerly a flowing river habitat with stretches of sand and bedded gravel." *Id.* The reduced flow has impacted the endangered pigtoe mussels and downstream habitat. *Id.* The formerly thriving oyster industry has suffered. *Id.* at 10. These harmful impacts on the water bodies, the ACOE, and other downstream users weigh in favor of this Court declaring Greenlawn's use unreasonable.

The remaining factors also support holding that Greenlawn's use is unreasonable. For instance, it would be practical for Greenlawn to limit its residents' use of water for landscaping. Residents could limit watering to mornings and evenings or temporarily forego watering their lawns. Limitations on landscaping would address the amount of water Greenlawn uses, allowing the lake level to rise and the ACOE to operate the Dam—an existing riparian use with high value and investment. Without the Dam, citizens of Greenlawn, including members of NUO, "will be forced to pay electric rate fuel surcharges," demonstrating the Dam's high economic value. *Id.* at 10. Operating the Dam would also allow more water to travel downstream, restoring the Green River habitat and bolstering the oyster industry. Finally, it would not be unjust for Greenlawn to reasonably reduce its withdrawal due to the drought. Greenlawn residents would still enjoy unrestricted access water in their homes for true domestic uses. The only potential harm is to their landscaping. This, compared to the damage the water withdrawal has caused, including forcing another riparian user to halt operations, renders Greenlawn's water use unreasonable.

Therefore, under the reasonable use theory, the balancing test weighs heavily in favor of declaring Greenlawn's water use during these drought conditions unreasonable. Further,

Greenlawn's unreasonable use directly impacts other riparian rights holders, including the ACOE, and non-riparian users. The reasonable use doctrine prohibits unreasonable water uses that impact other riparian rights holders. Thus, this Court should reverse the lower court's decision and mandate that Greenlawn implement mitigation measures to lessen its water withdrawals during inevitable future droughts.

B. The lower court incorrectly inserted a prior-appropriations analysis into the riparian rights doctrine.

Even though it stated it was "not determinative," the lower court allowed Greenlawn's continued withdrawals because Greenlawn established its riparian right before the ACOE. *Id.* at 13. However, this prior appropriations analysis is irrelevant here. The common law riparian rights doctrine does not apply a first-in-time analysis, particularly in states that are not arid or semi-arid, like New Union. Joseph W. Dellapenna, *Introduction to Riparian Rights*, 1 Waters & Water Rights § 7.02(d)(2) (Robert E. Beck ed., repl. Vol. 2001); Carrol B. Graves, *The Desirability of Harmonizing State and Federal Statutes on Irrigation*, 13 Am. Lawyer 383, 383-84 (1905); *see also* Record p. 19 n.i (noting New Union is east of the 97th parallel); *World Map of the Koppen-Geiger Climate Classification Updated Map for the United States of America*, http://koeppen-geiger.vu-wien.ac.at/usa.htm (last visited Nov. 16, 2019) (showing the climate zones of the United States). Instead, every riparian owner has a right to use the water, so long as their use does not interfere with other riparian landowners' reasonable water uses. Barton Thompson, Jr., et al., *Legal Control of Water Resources* 33 (5th ed. 2018). The ACOE's riparian rights cannot be subsequent to Greenlawn's because there are no subsequent rights in the common law riparian rights doctrine. Rather, Greenlawn's and the ACOE's riparian rights are subject to one another's reasonable use, and Greenlawn does not have priority over the ACOE or any other riparian landowners for access

to water. Therefore, this Court should reverse the lower court's decision and declare that Greenlawn's rights do not have priority in the watershed.

C. The lower court erred in determining that NUO did not have water rights because non-riparian landowners can have a legal interest in a body of water.

The lower court incorrectly determined that non-riparian landowners do not have any rights to in-stream flows. It is true that, generally, a non-riparian landowner does not have any riparian rights, unless granted by a riparian landowner. Restatement (2d) Torts § 856 (1979). However, "a nonriparian who is making a reasonable and beneficial use of water that causes no harm to a riparian is entitled to protection from the wasteful features of an inefficient use of water by a riparian." *Id.*

NUO and its members make beneficial use of the lower Green River and the Green River Estuary without impacting riparian users. NUO represents the interests of oyster fishermen who rely on the Green Bay, into which the Green River feeds, for their livelihoods. Record p. 10 (establishing that NUO's members "have suffered reduced catches and declining incomes because of the smaller oyster harvests."). Their use is a reasonable and beneficial one. NUO does not withdraw water, so its use does not harm riparian landowners. Therefore, NUO and its members are "entitled to protection from the wasteful features of an inefficient use of water" by Greenlawn. Restatement (2d) Torts § 856.

Further solidifying NUO's claim to a legal right in the watershed, public rights in water "are legally protected rights to use navigable and other public waters for transportation, pleasure boating, fishing, swimming, skating, hunting and other purposes." *Id.* Wisconsin even includes "enjoyment of scenic beauty" as a public right in water. *Madison v. State*, 83 N.W.2d 674, 678 (Wis. 1957). Riparian owners, like Greenlawn, may not infringe upon or prevent use of public waters by those asserting public rights in water. Restatement (2d) Torts § 856 cmt. f-g. Here,

NUO's members exercise a public right in water by catching oysters in the Green River Estuary and Green Bay, navigable water bodies downstream of Greenlawn, and Greenlawn's water withdrawal directly harms NUO's public right. There is no dispute that the reduced flows due to Greenlawn's use have impacted the Green River estuary and Green Bay, the navigable water bodies where NUO's members collect oysters. Record p. 10.

Greenlawn's large withdrawals are almost entirely used for watering lawns and ornamental landscaping. *Id.* at 5. As established above, this is an unreasonable use of water that is harming NUO's lawful interest. NUO's asserted public rights in water create a legal course of action for NUO to assert its legal right in a riparian rights dispute. Therefore, this Court should reverse the lower court and hold that NUO has a non-riparian right in the Green River that Greenlawn's wasteful, unreasonable use harms. Thus, Greenlawn's water rights should be limited in drought conditions to allow the Green River's flowrate to increase.

II. The ACOE was required to consult the USFWS prior to altering the flow to the Bypass Reach because the act constituted an agency action prompting the ESA § 7(a) consultation requirement.

The lower court found that the ACOE was entitled to summary judgment and dismissed the First Claim for Relief. *Id.* at 15. It reasoned that the riparian rights doctrine requires the ACOE to ensure that flows to the Bypass Reach remain sufficient to meet Greenlawn's municipal needs. *Id.* at 15. Therefore, the court found that the ACOE's decision to increase the water output to the Bypass Reach did not trigger the ESA § 7(a) consultation requirement. *Id.*

ESA § 7(a) requires consultation with USFWS to "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. . . ." ESA § 7(a), 16 U.S.C. § 1536(a). Thus, whether the ESA requires a

consultation depends on whether the activity causing harm to an endangered species is an "agency action." *Id.* Evaluating an agency action requires a two-pronged analysis. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012). First, the court must determine whether "a federal agency affirmatively authorized, funded, or carried out the underlying activity." *Id.* Second, the Court must determine "whether the agency had some discretion to influence or change the activity for the benefit of a protected species." *Id.*

The ACOE's act in raising the water level to the Bypass Reach constituted an agency action. The ACOE authorized and carried out the act. Further, it was a discretionary act that the ACOE chose to authorize, though they could have declined to.

A. Looking at the plain text of the law, the ACOE's act in raising the flow to the Bypass Reach during a drought was both an authorization and an act carrying out Greenlawn's request, making it an agency action under *Karuk Tribe of Cal. v. U.S. Forest Service*.

A literal interpretation of the statute and relevant case law support a finding that when the ACOE raised the flow to the Bypass Reach, that act constituted an agency action. *Karuk Tribe of Cal.* stated that an agency action exists when "a federal agency affirmatively authorized, funded, or carried out the underlying activity." *Id.* at 1021. When Greenlawn requested that the ACOE raise the amount of water flowing into the Bypass Reach, this was an authorization, followed by the ACOE "carrying out" the action. Record pp. 8-9.

Initially, the plain meaning of "authorize" explains how this definition comports with the ACOE's actions. Merriam-Webster defines "authorize" as: "to endorse, empower, justify, or permit by or as if by some recognized or proper authority (such as custom, evidence, personal right, or regulating power)." *Authorize*, Merriam-Webster, https://www.merriam-webster.com/dictionary/authorize (last visited Nov. 16, 2019). Dictionary.com defines "authorize" as: "to give authority for; formally sanction (an act or proceeding)." *Authorize*, Dictionary.com,

https://www.dictionary.com/browse/authorize?s=t (last visited Nov. 16, 2019). Further, Black's Law Dictionary defines an "authorized act" as: "An undertaking sanctioned by a principal, esp. an employer, or necessarily involved in the performance of an agent's duties." *Act*, Black's Law Dictionary (11th ed. 2019).

When the District Commander ordered the Dam Works operator to increase the water release to the Bypass Reach, he authorized the action. The act of raising the flow into the Bypass Reach was a formal sanction of Greenlawn's request. For clarity, Dictionary.com defines "sanction" as: "to authorize, approve, or allow." *Sanction,* Dictionary.com, https://www.dictionary.com/browse/sanction?s=t (last visited Nov. 16, 2019). Greenlawn lacked the authority to increase the flow to the Bypass Reach, as evidenced by its need to write letters and make arguments in an attempt to convince the ACOE to authorize and carry out its request. But for the ACOE's decision to allow for Greenlawn's request, Greenlawn would have been required to adjust and conform with the rules established in the WCM. This means the ACOE was "necessarily involved in the performance of the agent's duties" as it was required to decide to raise the flow to the Bypass Reach, and was the agent carrying out the request. *Act*, Black's Law Dictionary (11th ed. 2019); Record p. 8.

Not only did the ACOE authorize the action, it carried the action out as well. Merriam-Webster defines "carry out" as: "to put into execution." *Carry Out,* Merriam-Webster, https://www.merriam-webster.com/dictionary/carryout (last visited Nov. 16, 2019). The record states: "on April 23, [the District Commander] ordered the Dam Works operator to increase the water releases to the Bypass Reach from 7 CFS to 30 CFS." Record p. 8. The Dam Works operator acquiesced. *Id.* The Dam Works operator acted under the orders of the District Commander and "carried out" or "executed" the action.

The ACOE's argument that the act complied with the WCM does not change the nature of this action. *Id.* at 15. Whether or not the ACOE believed it was acting in accordance with the WCM, the choice was still an authorization and execution of Greenlawn's request. Greenlawn could neither make the decision to increase the flow itself, nor carry out the action. It required the ACOE to authorize and execute their request. Therefore, the ACOE's action constituted an agency action.

B. The ACOE's act in increasing the flow to the Bypass Reach was an agency action because it was discretionary.

Agencies act within their discretion when they use their enabling authority to carry out an action. *Am. Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 251 (D.D.C. 2003). The ACOE raised the flow to the Bypass Reach at Greenlawn's insistence to allow the municipality to continue supplying its citizens with water for watering lawns and ornamental plants. Record p. 8. The ACOE carried out the activity in a manner consistent with qualifying this action as an agency action.

By contrast, in *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996), the court declined to find an agency action. In *Marbled Murrelet*, private corporations in the lumber business wanted to harvest dead, dying, and decayed trees. The corporations were required to engage in a procedural process with a state agency for approval, but not a federal agency. *Id.* at 1071-1072. The corporations did meet with the USFWS. *Id.* The USFWS, however, only advised the corporations on how they could avoid a "take" under the ESA. *Id.* The court found that "the USFWS provided advice under its power to enforce section 9 of the ESA." *Id.* at 1075. Since this was not an exercise of control over the harvest operations, and the action, where a private party consulted a federal agency regarding requirements under the ESA, was not an agency action. *Id.* at 1075.

In *Karuk Tribe of Cal.*, a corporate entity proposed mining activities that "might cause disturbance of surface resources." *Karuk Tribe of Cal.*, 681 F.3d at 1011. The mining businesses were required to submit an NOI for approval, and the District Manager was required to respond. *Id.* at 1022. Because the Forest Service had to decide whether or not to authorize mining, pursuant to the NOI, and notify the party of its decision, the Ninth Circuit held that approving an NOI constitutes a federal action. *Id.* at 1023. The court determined that an NOI approval is not advisory, but it "mark[s] the consummation of the agency's decision-making process' and is an action 'from which legal consequences will flow.'" *Id.* at 1023 (citing *Hells Canyon Pres Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010)).

In *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1021 (9th Cir. 2012), the court found that each annual operating plan does not require a separate ESA consultation. This would result only in an endless judicial process year after year. *Id.* However, the court further held that an environmental challenge under the ESA to demand a consultation is appropriate in the instance where an "agency establishes material operating criteria for a dam," as well as "when it embarks on a significant new direction in its operations." *Id.*

Karuk Tribes of Cal. and *Grand Canyon Trust* parallel the situation in this case. In order to increase the releases into the Bypass Reach, Greenlawn had to write a letter to the ACOE Field Office. Record p. 8. Greenlawn argued that the 7 CFS flow limitation was outdated and needed to be raised during the Spring to allow for the "Spring planting and growing season." *Id.* Initially, the District Commander requested that Greenlawn institute drought restrictions to conserve water. *Id.* Greenlawn asserted that it was a riparian landowner, and, as such, did not need to impose drought restrictions, because it was making reasonable use of the water. *Id.* In response, the District

Commander ordered the Dam Works operator to increase the water releases in line with Greenlawn's request, to the detriment of the Dam's power releases. *Id.*

This rises far above the level of the federal agency actions taken in *Marbled Murrelet*. The District Commander affirmatively carried out the action after Greenlawn requested it do so. In *Karuk Tribe of Cal.*, the court found it significant that the mining businesses were required to submit a request, and the agency was required to respond. *Karuk Tribe*, 681 F.3d at 1022. Here, Greenlawn also had to request that the ACOE raise the flow into the Bypass Reach, and the ACOE responded to Greenlawn's request. Record p. 8. This is not "advisory." *Karuk Tribe*, 681 F.3d at 1023. While the ACOE may have initially advised Greenlawn to institute conservation measures, it ultimately authorized and carried out those measures when Greenlawn refused to comply. This is "a significant new direction in its operations" as it does not comport with the drought requirements in the WCM. *Grand Canyon Trust*, 691 F.3d at 1021; Record p. 7.

Moreover, where an agency has authority, it has an obligation under the ESA to protect endangered species. *Am. Rivers*, 271 F. Supp. 2d at 251. ("In assessing statutory authority and discretion with regard to ESA obligations, courts have found that if an agency has any statutory discretion over the action in question, that agency has the authority, and thus the responsibility, to comply with the ESA."). The agency retains this obligation even when the action in question began years prior to the ESA's passing, as long "as the federal agency retains some measure of control over the activity." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999), opinion amended on denial of reh'g, 203 F.3d 1175 (9th Cir. 2000).

Accordingly, the Ninth Circuit held in *Klamath*, that because the Bureau of Reclamation had control over the Klamath Dam and reservoir, it had discretion over the Klamath Dam, and thus an obligation to follow the ESA. *Id.* ("Because Reclamation retains authority to manage the Dam,

and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators.").

Similarly then, because the ACOE retains some control over the Dam through the WCM, it has discretion over the Dam. Therefore, the ACOE's control and discretion obligate it to follow the ESA by complying with § 7. Thus, the lower court erred by finding that the ACOE did not have to consult with the USFWS. This Court should reverse the lower court's decision.

III. Greenlawn is in violation of § 9 of the ESA for illegally taking Oval Pigtoe Mussels without permission of the Secretary.

The lower court granted NUO's motion for summary judgment and declared Greenlawn to be in violation of ESA § 9. Record p. 18. This Court should affirm the lower court's decision and continue to hold Greenlawn liable under ESA § 9.

Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Bypass Reach constitutes a "take" of the endangered oval pigtoe mussel in violation of ESA § 9, 16 U.S.C. § 1538. Section 9 of the ESA states in relevant part:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to [. . .] take any such species within the United States or the territorial sea of the United States.

16 U.S.C. § 1538(a)(1)(B). As an initial matter, Greenlawn is a liable party under the ESA. The ESA explicitly defines "person" to include municipalities and any political subdivision subject to United States jurisdiction. *Id.* § 1532(13). Accordingly, this Court may hold Greenlawn liable for violating the ESA as a municipal corporation.

A. Greenlawn's unchecked habitat degradation violates the ESA's prohibition on taking endangered species.

The ESA defines the word "take" 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). Habitat degradation is considered a "take" under the ESA, as habitat degradation *harms* endangered species. In 1995, the Supreme Court provided three reasons for finding that that "harm" under the ESA's take definition includes indirect actions and habitat modification that injures endangered species, like the pigtoe mussel. *Babbitt v. Sweet Home Chapter of Comm. for a Great Or.*, 515 U.S. 687, 697 (1995). First, "an ordinary understanding of the word 'harm' supports" the conclusion that the ESA take prohibition includes "habitat modification that results in actual injury or death to members of an endangered or threatened species." *Id.* Second, takes under the ESA must necessarily include remote harms to fully actualize the purpose of the statute as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.* at 698 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978)). Third, the congressional authorization for the Secretary to issue incidental take permits implies that "Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings." *Id.* at 700. Because incidental takes require a permit under the ESA, the ESA must ordinarily prohibit actions that incidentally take an endangered species.

Greenlawn's demand to maintain an irresponsible withdrawal rate regardless of drought stage, contrary to the ACOE's initial action, has indisputably caused a significant decline in the endangered pigtoe mussel population. Record p. 9. Greenlawn's increased water demand for landscaping is the only reason for the increased CFS flow to the Bypass Reach. This increased CFS has degraded the Green River habitat and thus decimated the endangered pigtoe mussel population. Therefore, Greenlawn violated the ESA by degrading the Green River habitat.

B. The ESA supersedes any agreement Greenlawn may have with the ACOE and common law riparian water rights.

Courts have previously held that the ESA supersedes common law defenses. In *Loggerhead Turtle v. Cty. Council of Volusia Cty.,* the plaintiff-municipality asserted the common law defense of laches to justify its continued incidental take of sea turtles. 896 F. Supp. 1170, 1178 (M.D. Fla. 1995). The court responded that to rely on the common law laches defense, simply because it has gone unchallenged, was "tenuous as to be absurd." *Id.* (defendants cannot "thwart the intention of Congress by using as a shield the fact that for the last seventeen years it has continuously placed at risk the welfare of these federally protected sea turtles."); *see also Wishtoyo Found. v. United Water Conservation Dist*., No. CV163869DOCPLAX, 2018 WL 6265099, at *63 (C.D. Cal. Sept. 23, 2018) (denying a latches defense in a dam ESA case).

Furthermore, courts have denied defenses to ESA takes under more recognizable common law and statutory rights. For example, courts have found that there is no religious exemption to the ESA. *United States v. Adeyemo*, 624 F.2d 1081, 1089 (N.D.Cal. 2008). Even statutory exceptions for pre-existing rights, such as aboriginal rights, must be narrowly construed as to not supersede the ESA. *United States v. Nuesca*, 945 F.2d 254, 256-57 (9th Cir. 1991) (finding that where defendants did not meet the explicit Alaskan Native exception, the ESA did not recognize an aboriginal right to hunt endangered species). The Supreme Court even held that the ESA abrogated long-standing Native American treaty rights that conflict with the ESA. *United States v. Dion*, 476 U.S. 734, 746 (1986).

Greenlawn offers a flimsy argument that their common law riparian rights give them the authority to exempt themselves *carte blanche* from the requirements and penalties of the ESA. But as the lower court correctly noted, this argument cannot stand. Surely, courts have refused to entertain the argument that the common law supersedes the clear and unambiguous text of the

ESA. For Greenlawn to be the only exception to the rule would be antithetical to precedent, the common law tradition, and respect for Congress's constitutional authority to regulate.

C. Congress has absolute constitutional authority to abrogate common law through legislation.

It is a basic principle of the balance of federal powers that where Congress speaks to an issue, statute abrogates common law. 15A C.J.S. Common Law § 16. Accordingly, Congress unambiguously intended that the ESA afford the strongest possible protections to saving the last members of an endangered species. *Tenn. Valley Auth. v. Hill* [*TVA*], 437 U.S. 153, 177 (1978) (internal citations omitted) ("The dominant theme pervading all Congressional discussion of the proposed [Endangered Species Act of 1973] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources."). At the time it was passed, the ESA was "the most comprehensive legislation for the preservation of endangered species *ever enacted by any nation*." *Id.* (emphasis added).

The historic and all-encompassing nature of the ESA, in conjunction with the lengthy congressional statements speaking to congressional intent, make absolutely clear that Congress intended to abrogate any common law contrary to the express purpose of the ESA. Accordingly, any riparian rights Greenlawn may have cannot exempt them from the ESA. To do so would be offensively contrary to the ESA's statutory purpose and emphatic congressional intent.

IV. Injunctive relief under the ESA citizen suit provision was appropriate because the balance of equities always favors the protected species.

A. The court lacked discretion under the ESA to balance the equities.

The relevant section of the ESA states:

> any person may commence a civil suit on his own behalf– (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this Act or regulation issued under the authority itself thereof.

16 U.S.C. § 1540(g) (2018).

An injunction is appropriate when the moving party can demonstrate the four requisite elements. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). These elements are:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id. However, *TVA* altered this test by placing a premium on the interests of the protected species.

"A district court cannot . . . override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001). In *TVA*, the United States Supreme Court stated with respect to whether a balancing of the equities is appropriate, that, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" 437 U.S. at 194. The Supreme Court highlights that courts lack any expert knowledge in relation to endangered species and found it would "pre-empt congressional action" if the court took it upon itself to balance the equities. *Id.* at 195.

The Ninth Circuit highlighted this exception to the traditional test for injunctive relief with respect to ESA violations. *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 (9th Cir. 2015). The court recognized that the Supreme Court "substituted" its usual discretion of balancing the parties' interests with a standard that favors the affected species. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 787 (9th Cir. 1995).

Some courts have found ways around *TVA*. In *All. for the Wild Rockies v. Kruger*, the District Court determined that in order for the moving party to receive the benefit of *TVA*'s "tip in

their favor," it must show that its interest is actually in line with the best interest of the protected species at issue. 35 F.Supp.3d 1259, 1266-67 (D. Mont. 2014). However, in this case NUO's interest in the oyster habitat is closely aligned with the long-term preservation of the species. NUO is harmed by the severe reduction of the oyster species.

The lower court correctly found that an injunction is appropriate, and a balancing of the parties' competing interests would be judicial overreach. Thus, this Court should affirm.

B. If this Court determines it does have discretion to balance the equities, the balance favors NUO.

Greenlawn's average daily water withdrawal is 6 MGD. Record p. 5. In the most extreme drought conditions, Zone 2 (Drought Warning) and Zone 3 (Drought Emergency), the WCM mandates that the ACOE reduce the flow to the Bypass Reach from 50 CFS to 7 CFS. *Id.* at 7. Yet, the ACOE allowed more water to flow through the Bypass Reach at Greenlawn's insistence. *Id.* at 8. Greenlawn specifically states that the increased need in the summer can be attributed to non-essential water use, such as "summer lawn and ornamental watering." *Id.* at 5.

By contrast, the interest in maintaining the population of oysters reflects an interest in protecting an endangered species. Initially, oval pigtoe mussels serve an essential purpose to keep the water clean. *Atlantic Pigtoe*, USFWS, https://www.fws.gov/southeast/wildlife/mussels/atlantic-pigtoe/ (last visited Nov. 17, 2019). Further, the Supreme Court has already expressed that protecting wildlife from eradication is an interest that should carry legitimate weight. *TVA*, 437 U.S. at 194. Moreover, Greenlawn's actions contribute to undercutting an entire industry. The reduction in native fishery populations due to altered flows has already forced oyster fisherman to sell their fishing boats and pay electric rate fuel surcharges when the hydroelectric plant cannot run as a peaking facility. Record p. 10. The

interest of watering ornamental plants does not outweigh the interest in protecting a species from eradication and preserving an entire fishing industry.

In the context of NEPA, which allows for a balance of the equities, the Ninth Circuit consistently holds that "the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim[.]" *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008).

In *All. for the Wild Rockies,* the Ninth Circuit found that the plaintiffs were concerned with a Salvage Project, under which loggers could salvage fallen timber from areas that are dead or dying as a result of forest fires. 632 F.3d at 1129. The defendants' interest was that the Project would aid the economy, which was distinctly struggling, and would prevent job loss. *Id.* at 1138. The court found that the Project would create only 18 to 25 temporary jobs and would not have a serious impact on the economy. *Id.* at 1138-39. Therefore, the court found that the interest in avoiding irreparable environmental injury outweighed the interests of economic stimulation and job creation. *Id.* at 1139.

The United States District Court for the Northern District of California considered the conflicting interests between two parties with conflicting needs. In that case, the plaintiffs brought an action against various defendants because the Forest Service allowed special use permits for commercial padstock operations in the Ansel Adams and John Muir Wilderness areas. *High Sierra Hikers Ass'n v. Moore*, 561 F. Supp. 2d 1107, 1111 (N.D. Cal. 2008). Defendant-intervenors specifically stated concern that the court's restrictions on their commercial use of packstock in the wilderness areas would threaten their livelihoods. *Id.* at 1113. In fact, the defendant-intervenors

submitted eleven affidavits defining the harm they anticipated if the injunction was granted. *Id.* at 1111.

The court, while sympathetic to this harm, found that the parties did not suffer under a previous injunction, and none of them went out of business. This type of harm is in line with the harm to the residents of Greenlawn. In this case, the interests of watering landscaping during a drought do not outweigh the interests of preserving a protected species or protecting an entire fishing industry. Therefore, this Court should affirm the lower court's decision to issue an injunction prohibiting Greenlawn from making water withdrawals that threaten the oysters' survival.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's decisions relating to Greenlawn's riparian rights and the ACOE's obligation to consult pursuant to ESA § 9. This Court should affirm the lower court's finding that Greenlawn's actions constitute a take under ESA § 7. This Court should also affirm the lower court's injunction.

APPENDIX A

Green River, Greenlawn and Howard Runnet Lake andDam