TEAM #6

THIRTY-SECOND ANNUAL
JEFFREY G. MILLER PACE
NATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION

Measuring Brief

C.A. No. 19-000987
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief of UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

This case concerns questions of common law riparian rights as well as the application of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531 et seq. This Court has proper jurisdiction over this appeal from the District Court's final decision pursuant to 28 U.S.C. § 1291. *See also* R. at 2.

STATEMENT OF THE ISSUES

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

II. Whether the operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn is a discretionary action subject to the consultation requirement within § 7 of the Endangered Species Act, 16 U.S.C. § 1536.

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

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

STATEMENT OF CASE

I. Facts

The United States Army Corps of Engineers ("ACOE") administers the Howard Runnet Dam Works ("Dam Works") on the Howard Runnet Lake in the state of New Union. R. at 5. The

Dam Works was authorized by Congress in 1945 and consists of a diversion dam and the Howard Runnet Dam. The diversion dam lies on the Green River and diverts water from the river into Howard Runnet Lake. *Id.* The Howard Runnet Dam is a hydroelectric dam which is located at the southern end of Howard Runnet Lake, where its tailrace creates a confluence with the original Green River. R. at 5, 20. The City of Greenlawn ("Greenlawn") was founded on the banks of the original Green River in 1893, an area now referred to as the Bypass Reach, situated downstream from the diversion dam and upstream of the Howard Runnet Dam tailrace. R. at 5. Greenlawn is a riparian water user under common law riparian water rights which are recognized by the state of New Union. R. at 12. Greenlawn draws water for their municipal supply from the Bypass Reach of the Green River. R. at 6. Downstream from Greenlawn, the Green River flows into the Green Bay. R. at 10.

ACOE operates the Dam Works under the authority of the River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945) and the Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958). The uses approved by these statutes include flood control, hydroelectric power, recreation purposes, and fish and wildlife purposes. R. at 6. To meet their statutory obligations, ACOE operates the Dam Works under the terms of a 1968 Water Control Manual ("WCM") which provides different target lake elevations at different times of the year based on historical flows and the water demands of Greenlawn. *Id.*

The WCM sets standards for acceptable lake levels to manage for drought conditions while maintaining adequate water in the lake for recreational uses. R. at 6. During the rainy season of December to April, the WCM caps releases into the Green River to prevent flood damage. *Id.* During normal operations the WCM allows for releases of 50 cubic feet per second ("CFS") from the diversion dam into the Bypass Reach for Greenlawn's use, and allows releases

of 200 CFS through the Howard Runnet Dam to power the turbines for electrical generation and maintain flow into the portion of the Green River downstream from the Bypass Reach. *Id.* The WCM contains three management zones to curtail releases when lake levels drop below target levels. *Id.*

In the Spring of 2017, ACOE determined that lake levels met the criteria for Zone Two (drought warning) conditions and reduced flows into the Bypass Reach to 7 CFS accordingly. Greenlawn protested the reductions, citing the city's significant growth since the adoption of the WCM in 1968 and Greenlawn's right to make reasonable use of the historic flows of the river as a riparian landowner. R. at 8. ACOE acquiesced to the city's request and increased flows into the Bypass Reach to 30 CFS while maintaining flows to the Howard Runnet Dam for power generation of 25 CFS over each 24-hour day. About a month later, the lake levels hit Zone Three criteria and ACOE was forced to curtail releases through the Howard Runnet Dam while maintaining 30 CFS releases to Greenlawn. R. at 9.

During Zone Three operations, Greenlawn consumed nearly all of the water released into the Bypass Reach. *Id.* Without the ability to resume flows through the Howard Runnet Dam, water delivered to the Green River downstream of the Bypass Reach was reduced to a trickle. *Id.* The reduced water levels in the river exposed several beds of oval pigtoe mussels, an endangered species listed by the U.S. Fish and Wildlife Service in 1998. 63 FR 12664. The oval pigtoe mussel's habitat consists of a 60-mile stretch of the historic Green River downstream from the confluence of the Howard Runnet Dam tailrace and the Bypass Reach. R. at 9. Reduced water levels in the mussel's habitat during the first half of 2017 killed approximately 25% of the River's mussel population. R. at 9. The mussel requires minimum flows of 25 CFS through its river habitat to prevent the extirpation of the species. R. at 10.

II. Procedural History

This appeal follows a final decision of the U.S. District Court for New Union. R. at 1. Due to the reduction in downstream flows into the oval pigtoe mussel habitat, New Union Oystercatchers, Inc. (NUO), a nonprofit association of oyster fishermen in the Green Bay area, filed a notice of intent to sue ACOE and Greenlawn under §11 of the Endangered Species Act ("ESA"). 16 U.S.C. §1540(g). Following the 60-day appeal period NOU filed a claim in the District Court challenging ACOE's operation of the Dam Works under § 7 of the ESA. 16 U.S.C. § 1536. R. at 15. NOU also claimed that Greenlawn's consumption during drought conditions was not protected by common law riparian water rights. R. at 13. NOU further argued that Greenlawn's withdrawal of nearly all the water from the Green River was a violation of §9 of the ESA. 16 U.S.C. § 1538. R. at 16. ACOE filed a cross claim to join NOU's §9 claim against Greenlawn stating that the city's actions resulted in a "take" of an endangered species. R. at 16. The District Court dismissed the §7 claims against ACOE, finding that the agency's actions were not discretionary and therefore not subject to the ESA provision. R. at 15. While the District Court found that Greenlawn's riparian rights protected their use of the water, the court also determined that their withdrawals resulted in a taking of the mussels downstream in violation of §9 of the ESA. R. at 14, 17. The court granted NOU's motion for summary judgement on their §9 claim and enjoined Greenlawn from withdrawing water to the extent that flow of the Green River downstream of the Bypass Reach drops below 25 cubic feet per second averaged over twenty-four hours. R. at 19.

SUMMARY OF ARGUMENT

New Union Oystercatchers Inc.'s § 7 claim against the U.S Army Corps of Engineers lacks a sufficient legal basis for this court to overturn the District Court's finding in the

Corps' favor. Likewise, the District Court's finding that Greenlawn violated § 9 of the Endangered Species Act must also stand. However, the District Court erred by not balancing the equities of all parties involved prior to issuing its injunction.

The Army Corps of Engineers acted to the full extent of its authority to prevent harm to the oval pigtoe mussel population downstream of Greenlawn. Because Greenlawn is a municipal riparian landowner under the common law of New Union, it is entitled to water withdrawals in the amount necessary to satisfy its reasonable demand, notwithstanding the drought conditions. ACOE has no authority to object to these withdrawals. Greenlawn owns the requisite property on the historic banks of the Green River to maintain all rights and obligations of a riparian landowner. Although the Bypass Reach is a semi-artificial flow different from that of the historic Green River, this does not affect Greenlawn's riparian rights. Additionally, because neither NUO, nor any of its members, are riparian landowners, it does not have common law standing as a downstream proprietor to object to Greenlawn's water withdrawals. Likewise, ACOE has no common law standing to assert the rights of an upstream riparian landowner to withhold water release through the Howard Runnet Diversion Dam because it also is not a riparian landowner. Even if ACOE was a riparian landowner, it does not have a superior right to use of the Green River for artificial uses like hydroelectric generation, recreation, or agriculture irrigation. Greenlawn's withdrawals for "natural use" have priority under the common law of New Union.

NUO's assertion that ACOE skirted its obligations under the Endangered Species Act is unsupported by the vast body of statutory, regulatory, and case law governing operation of federal dams like the one at issue here. ACOE is not required to engage in consultation with the Fish and Wildlife Service under § 7 of the Endangered Species Act prior to releasing

water through the Howard Runnet Diversion Dam because this action is non-discretionary. The Howard Runnet Dam Works' authorizing statute requires operation of the project to be consistent with the riparian common law of New Union. Additionally, the Dam Works itself, as well as its governing operating plans and agreements, all predate enactment of the ESA. As long as operation of the Dam Works is consistent with the original governing authorities, § 7 consultation is not required, as no discretionary action occurs to trigger the requirement. Finally, no statute requires ACOE to modify the terms of the Diversion Dam water release agreement with Greenlawn, nor does ACOE have the discretion to do so.

The District Court properly determined that Greenlawn's water withdrawals were a proximate cause of low water levels downstream in the Green River, which resulted in an unlawful take of the endangered oval pigtoe mussel due to substantial habitat modification. Under § 9 of the ESA, a taking attributable to habitat modification can be established if the habitat modification is significant, if it impairs essential behavioral patterns, and if it results in the actual injury or death of a protected species. The District Court found that, during the time in question, Greenlawn's water withdrawals consumed nearly all of the water that would have otherwise flowed downstream to sustain the oval pigtoe habitat. The low water levels both exposed mussel habitat and made it impossible for the mussels to migrate to more viable habitat. Greenlawn did not dispute evidence that low water levels downstream from the city resulted in the death of nearly 25% of the oval pigtoe mussel population in the river. Additionally, it was foreseeable that Greenlawn's high level of water consumption during drought conditions would have an adverse impact on downstream conditions, as evidenced by the Water Control Manual, which specifically contemplated the need for reduced water consumption by the City during droughts of increasing severity.

This Court should adopt the traditional four-part test for injunctive relief as a consistent standard of review for injunctions of beneficial municipal activities and remand this case to the District Court to analyze the request for injunctive relief under that proper standard.

The decision below relies on an antiquated view of Congress' intent underlying the ESA by ignoring subsequent amendments to the law designed to increase flexibility in light of violations or potential violations of the Act. When a municipal activity is a beneficial use of a resource and a claim is filed under § 11 of the ESA, a court may issue an injunction but is not mandated to do so as a matter of course. Injunctions are a form of equitable relief and even where deference is given to species, many options remain when crafting an injunction to maintain some equity, but such an outcome can only be the byproduct of the four-part test that balances those equities at stake. The District Court's opinion excluded this analysis and as a result creates the near-sighted outcome of preventing the city from withdrawing the water necessary to support its citizens. If the city grows and demand increases, the court's order remains, begging the question of when the water required for survival of an endangered mussel outweighs the water required for the survival of a community?

Before issuing an injunction against a beneficial use a court must first balance the equities of doing so using the traditional four-part test for injunctive relief. This is the direction that more and more courts have taken in the four decades since the passage of the ESA. The District Court failed to apply this analysis and enjoined the city from withdrawing necessary water to support their citizenry. Greenlawn then has a duty to provide water to their citizens. In drought conditions or otherwise, that water use has an effect both on the citizenry of Greenlawn and on the flow of the river downstream. This analysis does not preclude the issuance of an injunction, nor does the ACOE suggest that it should. If an injunction ultimately issues, the

analysis provides that such relief is crafted with equity in mind while achieving its purpose. This proper standard would ensure both the preservation of the listed species, and the continued prosperity of a community.

ARGUMENT

I. AS A MUNICIPAL RIPARIAN LANDOWNER, GREENLAWN IS ENTITLED TO WATER WITHDRAWALS IN THE AMOUNT NECESSARY TO SATISFY ITS REASONABLE DEMAND, NOTWITHSTANDING THE DROUGHT CONDITIONS.

A grant of summary judgment settling a common law riparian claim is reviewed *de novo*. *Portage County Bd. of Comm'rs v. City of Akron*, 846 N.E.2d 478 (Ohio 2006)*; Koch v. Aupperle*, 737 N.W.2d 869, 875 (Kan. 2007) (reviewing *de novo* the district court's determination of whether a downstream claimant has common law standing as a riparian landowner to seek an injunction). This court should affirm the District Court's grant of summary judgment recognizing Greenlawn's right to reasonable consumptive use of the Green River for three reasons. First, Greenlawn is a riparian landowner and possesses all rights associated with riparian landownership. Second, NUO is not a riparian landowner and therefore does not have common law standing to contest Greenlawn's consumptive use of the Green River. Finally, ACOE is not a riparian landowner and does not have a superseding right to withhold water to which Greenlawn is entitled.

A. Greenlawn is a municipal riparian landowner and has the right to reasonable consumptive use of the Green River.

Because the state of New Union has not adopted a statutory scheme governing riparian rights, we look to the common law of the jurisdiction to resolve disputes over competing riparian claims. *See Martinez v. Cook*, 244 P.2d 134, 138 (N.M. 1952) (referencing *Walker v. New Mexico & S. P. R. Co*., 165 U.S. 593 (1897) ("[I]n the absence of a statute on surface waters

[states] should apply the common law. . . .”). For land to be “riparian” under traditional common law principles, “it must have “actual contact of the land with the water.” *See, e.g.* Robert E. Beck, *Waters and Water Rights* § 7.02 (*Beck*); *Mobile Dry-Docks Co. v. City of Mobile*, 40 So. 205 (Ala. 1906); *Harvey Realty Co. v. Borough of Wallingford*, 150 A. 60 (Conn. 1930). Some courts in common law riparian jurisdictions go so far as to hold that “[land] ownership extend into the bed of the waterbody” before classifying the land itself as “riparian land.” *See* Beck *supra* 1, at § 7.02; *Kilgo v. Cook*, 295 S.W. 355 (Ark. 1927); *Rockwell v. Baldwin*, 53 Ill. 19 (1869). As Greenlawn owns the land on both historic banks of the Green River and the land beneath the river, the city possesses the requisite property necessary to be a “riparian landowner.” R. at 5.

Courts in common law riparian jurisdictions often rely on three tests to further limit the reach of riparian rights on land contiguous with waterways: The “unity of title” test; the “source of title” test; and the “watershed limitation” test. *See* Beck at § 7.02(d). Under the “unity of title” test, land held under a single title is riparian, regardless of prior division of property, as long as one tract of land abuts a riparian waterway. *E.g. Clark v. Allaman*, 80 P. 571 (Kan. 1905); *Jones v. Conn*, 64 P. 855 (Conn. 1901). Under the “source of title” test, only the smallest tract of land touching the waterway is considered riparian land, and any subsequent division of property severs the riparian nature of land that does not abut the waterway. The watershed limitation test limits “withdrawals of water from a watersource only if the water is returned to the original source without material change in quantity or quality.” *See* Beck *supra* 1, at § 7.02(d); *see also Dimmock v. City of New London*, 245 A.2d 569 (Conn. 1968). While Greenlawn’s consumption from the Green River would be restricted by the watershed limitation test, New Union does not follow this doctrine for consumptive use by a municipality. *Tubbs v. Potts*, 45 N.U. 999 (1909).

Similarly, any restrictions to Greenlawn's rights as riparian land under a source of title test do not apply, as no evidence in the record indicates the city's riparian land was ever severed from the original title. *See id.*

New Union recognizes municipalities' rights as riparian landowners to provide reasonable consumptive use for their non-riparian landowning residents. *Tubbs*, 45 N.U. 999 (1909); *Canton v. Shock*, 63 N.E. 600, 602 (Ohio 1902). Additionally, a municipality with riparian rights can provide its inhabitants the water they need for reasonable domestic use, as doing so is a function of providing the necessary amenities of modern life. *See Canton*, 63 N.E. at 602 (holding that the municipality "stands in its corporate capacity as a single proprietor extending throughout its entire limits, and entitled as such to all the rights [of] . . . a riparian proprietor on the stream upon which it is situated."). Greenlawn meets all the necessary common law criteria to serve its residents as a municipal riparian landowner from a natural watercourse abutting the city's riparian land. But what about an artificial watercourse?

As this case involves a river altered by construction of an upstream dam, analyzing common law principles applied to artificial flow is necessary to determine Greenlawn's rights as a riparian landowner. *See* Alvin E. Evans, *Riparian Rights in Artificial Lakes and Streams*, 16 MO. L. REV. 93 (1951). When upstream development alters the historic flow of a watercourse, the downstream riparian landowners do not lose the right to reasonable consumption. *See Tyler v. Wilkinson*, 24 F.Cas 472 (C.C.R.I. 1827) (Story, J.) ("[N]o one has the right to diminish the quantity which will, according to the natural current, flow to a proprietor below . . . ."). If construction of a dam diverts or alters the natural flow of a watercourse, the new, artificial path of a river is still a natural flow that brings with it all the rights and obligation of riparian landownership that would exist absent development. *See Hendrick v. Cook*, 4 Ga. 241, 255

(1848) (upstream riparian landowners "cannot divert or diminish the quantity of water which would naturally flow in the stream, so as to prejudice the rights of [downstream riparian landowner] without their consent."). Additionally, when construction of a dam alters the natural flow of a watercourse, common law riparian doctrines eventually recognize the resulting artificial flow as "natural" after enough time passes. *See Kray v. Muggli*, 86 N.W. 882, 885 (Minn. 1901) (holding that a dam maintained for forty years had created an artificial flow that is now regarded as natural); *see also Fin and Feather Club v. Thomas*, 138 S.W. 150 (Tex. Civ. App. 1911). Given the longstanding common law recognition that riparian rights do not terminate simply because a dam alters the watercourse, construction of the Howard Runnet Dam Works does nothing to diminish Greenlawn's rights as a municipal riparian landowner.

B. NUO is not a riparian landowner and cannot contest Greenlawn's water use through a competing claim of riparian rights.

NUO's appeal of the District Court's grant of summary judgment regarding Greenlawn's water use must fail because neither NUO, nor any of its members, are riparian landowners. R. at 10 ("None of NUO's members are waterfront property owners on Green Bay or the Green River."). As such, NUO cannot object to an upstream riparian landowner's consumptive use. *See Humphreys-Mexia Co. v. Arseneaux*, 297 S.W. 225, 229 (Tex. 1927) (holding that a non-riparian landowner downstream cannot seek injunctive relief as it has "no justiciable interest in the riparian water."); *see also* 78 Am. Jur. 2d Waters § 77 ("[O]ne who is not a riparian proprietor cannot ordinarily complain of a wrongful diversion or use.").

Under common law principles of riparianism, an upstream riparian landowner's interference with a downstream riparian landowner's right to reasonable use of navigable water abutting their land is actionable as a matter of tort law. *See, e.g. Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468 (4th Cir. 1975); *see also* Restatement (Second) of Torts § 850 ("[A]

riparian proprietor is subject to liability for making an unreasonable use of the water of a watercourse or lake that causes harm to another riparian proprietor's reasonable use of water or his land."). However, to claim an actionable injury for interference with riparian rights, a plaintiff must possess such rights in the first place. *See id.* at § 844 ("The term 'riparian proprietor,' . . . means a person who is in possession of riparian land or who owns an estate in it."); *Koch,* 737 N.W.2d at 882 (holding that a downstream non-riparian landowner was not entitled to injunctive relief for a riparian tort claim against an upstream riparian landowner).

Riparian rights under common law principles are reserved only for those who own riparian land. *See* 78 Am. Jur. 2d Waters § 39 ("[R]iparian rights subsist only for riparian proprietors, and those who do not own or control riparian land cannot claim them."). Any claim by a non-riparian landowner attempting to diminish an upstream riparian landowners' reasonable use must fail for want of a legally cognizable riparian interest. *See Michigan Citizens for Water Conservation v. Nestle Waters of North America Inc.*, 709 N.W.2d 174, 194 (Mich. Ct. App. 2005) (referencing Restatement (second) of Torts § 850) ("[A] riparian owner may make any and all reasonable uses of the water, as long [as] they do not unreasonable interfere with the other riparian owners' opportunity for reasonable use."). If a plaintiff lacks ownership of riparian land, it follows that the plaintiff also lacks a possessory interest in any associated riparian rights. If a plaintiff lacks possessory interest in riparian rights, no standing exists to assert any claim of injury under riparian common law principles.

NUO does not have standing under New Union common law to assert the rights of a riparian landowner. As such, NUO cannot assert a claim against Greenlawn for interfering with its riparian rights, as it does not possess any riparian rights to assert. Neither NUO as an organization, nor any of its members, own any riparian land downstream from Greenlawn.

Without an ownership interest in riparian land, NUO cannot claim any interference with a riparian right.

C. ACOE is not a riparian landowner and does not have a superseding right to withhold water Greenlawn is entitled to for reasonable use.

The ACOE also lacks common law standing to prevent Greenlawn from making reasonable use of the historic flow of the Green River. ACOE lacks such authority because: (1) it is not an upstream riparian landowner; and (2) it does not have a superseding right to withhold water Greenlawn is entitled to for reasonable use.

1. ACOE is not a riparian landowner.

Upon construction of the Howard Runnet Dam Works, the ACOE obtained no ownership in the land abutting the historic banks of the Green River, and therefore obtained no upstream riparian rights. *See* River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945) ("RHA"); *see also PPL Mont., LLC v. Montana*, 565 U.S. 576, 589 (2012) (referencing *Shively v. Bowlby*, 152 U.S. 1 (1894) ("the States, in their capacity as sovereigns, hold title to the beds under navigable waters."). Without ownership of riparian land upstream from Greenlawn, the ACOE has no common law standing to assert any claim of riparian rights. 78 Am. Jur. 2d Waters § 39. Even if the ACOE had upstream riparian rights, the agreement with Greenlawn to "maintain flows in the Bypass Reach sufficient to allow Greenlawn to continue water withdrawals 'in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union[,]" precludes any claim of by ACOE of unreasonable use by the city. R. at 6. *See also* Water Supply Act of 1958 43 U.S.C. §390b (stating that a key feature of the ACOE's mission to "cooperate with States and local interests" in "developing water supplies for domestic, municipal, industrial, and other purposes.").

2. ACOE does not have a superseding right to withhold water that Greenlawn is entitled to for reasonable use.

Even if the ACOE did hold riparian landowner rights under the common law of New Union, Greenlawn's use of water from Howard Runnet Lake takes priority. When Congress authorized construction of the Howard Runnet Dam Works, it did so for the benefit of downstream landowners. *See* RHA; R. at 6. The original purpose of the Howard Runnet Dam Works was for flood control, recreation, and hydroelectric generation. R. at 6. Additional uses such as agricultural irrigation and wildlife were subsequently added as an intended purpose for which the dam should operate. R. at 6. The Howard Runnet Dam Works Water Control Manual (WCM) also expressly states that the ACOE shall operate the Dam Works "in a manner that complies with any water supply agreements entered into by the United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law." R. at 7-8. The common law of New Union prioritizes Greenlawn's use of the historical flow of the Green River.

Riparian common law recognizes two discrete categories of consumptive water use: Natural use and artificial use. *See* Barton Thompson Jr. et al., *Legal Control of Water Resources,* 32 (6th Ed. 2018) ("Thompson"). The reasonable use of water for "domestic purposes, such as drinking [and] bathing" are considered "natural uses." *Id.* Such use is generally recognized by courts in riparian jurisdictions as "an absolute right" that "may be exercised without regard to its effect on co-riparians." *Id.* By contrast, "artificial uses" generally encompasses things like "power generation, raising dairy and livestock herds, manufacturing and recreation." *Id.*

Under most common law riparian doctrines, "artificial uses" must yield to the "natural uses" of the downstream riparian landowners. *See id*. Common law riparian principles demand that upstream riparian landowners not diminish the watercourse so as to injure downstream

riparian rights. But such a rule "would be of little practical use to any proprietor" if it prevented upstream use to the extent reasonably necessary. *Price v. High Shoals Mfg. Co.*, 64 S.E. 87, 88 (Ga. 1909). However, when competing demand for a waterbody exists between a natural use and an artificial use, the natural use prevails. *See Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955) ("The right to use water for strictly domestic purposes . . . is superior to many other uses of water -- such as for fishing, recreation and irrigation."); *see also* Thompson at 32.

Withholding water from the Diversion Dam to allow increased flow through the Howard Runnet Dam for electricity generation is inconsistent with the riparian common law of New Union. Greenlawn's use of flow through the Bypass Reach is to serve the residents of the city; largely a demand for natural use. Electricity generation at the Howard Runnet Dam is an artificial use. Increasing the flow to the hydroelectric facility while simultaneously decreasing the flow through the diversion dam would prioritize artificial use of the Green River over the City's natural use. *See In Re MDL-1824 Tri State Water Rights Litigation*, 644 F.3d 1160, 1203-04 (11th Cir. 2011). Even if the ACOE had a claim of right as a riparian landowner, it would not be able to divert water away from Greenlawn for artificial uses such as electricity generation, recreation, or upstream irrigation.

II. WHEN REQUESTED BY GREENLAWN, RELEASING WATER THROUGH THE DIVERSION DAM IS A NON-DISCRETIONARY AGENCY ACTION NOT SUBJECT TO § 7 CONSULTATION.

The Administrative Procedures Act (APA) governs review of citizen suits alleging an agency failed to consult with the U.S. Fish and Wildlife Service (FWS) under § 7 of the Endangered Species Act (ESA). *Am. Rivers, Inc. v. United States Army Corps of Eng'rs.*, 421 F.3d 618, 628 (8th Cir. 2005); *Coalition for Sustainable Res., Inc. v. United States Forest Serv.*, 259 F.3d 1244, 1249 (10th Cir. 2001). Review of an agency decision under the APA is limited.

Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 763 (8th Cir. 2004). A court may set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, reviewing courts give "agency decisions a high degree of deference." *Voyageurs Nat'l Park Ass'n*, 381 F.3d at 763 (citing *Sierra Club v. EPA*, 252 F.3d 943, 947 (8th Cir. 2001)); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

NUO's claim that ACOE failed to engage in § 7 consultation with the U.S. Fish and Wildlife Service fails for three reasons. First, requiring the ACOE to engage in § 7 consultation prior to releasing water through the Diversion Dam would force ACOE to exceed its authority under the Howard Runnet Dam Works' authorizing statutes. Second construction of the Dam Works—and the agreement between ACOE and Greenlawn—both precede enactment of § 7 and therefore any agency action legally required by the agreement is not subject to consultation. Finally, ACOE is not required, nor does it have the discretion, to modify any terms of the existing water release agreement with Greenlawn.

A. Requiring § 7 consultation prior to water release through the diversion dam would force the ACOE to exceed its statutory authority.

Federal agencies are required to engage in consultation under § 7 of the Endangered Species Act only when the "agency action" in question is discretionary. 50 C.F.R § 402.03 (2019); *see Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007) (Alito, J.) ("[W]hen an agency is required to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species."). When a federal statute requires the agency to enter into a legally binding agreement with a third party, subsequent action restricted to and compelled by the terms of that agreement is not discretionary. *See id.*; *Grand Canyon Trust v. United States Bureau of Reclamation*, 691 F.3d 1008, 1017-19 (9th Cir.

2012); *NRDC v. Norton*, 236 F. Supp. 3d 1198, 1229-30 (E.D. Cal. 2017). *Contra Am. Rivers, Inc.*, 421 F.3d at 630-31 (holding that the Flood Control Act did not create a non-discretionary duty in ACOE to maintain minimum navigation flows on the Missouri River). Ultimately, what courts must determine when analyzing the nature of agency action is whether the agency may "adopt an alternative course of action." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662.

A fundamental principle of the ESA is that it "does not expand the powers conferred on an agency" by the statute governing the underlying action. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998). Instead, the ESA "directs the agencies to 'utilize' their existing powers to protect endangered species." *Id.* at 299 (quoting *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992)). If an agency is obligated to act consistent with an authorizing statute's mandate, § 7 consultation is not required if no other course of action is available to consider without exceeding the grant of authority. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 669; *DOT v. Public Citizen*, 541 U.S. 752, 770 (2004) ("[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.").

While an agency "cannot escape its obligation to comply with the ESA simply because it is bound to comply with another statute [,]" (*Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005)), the agency still needs some discretion to trigger § 7's consultation requirement. *Id; see also Grand Canyon Trust*, 691 F.3d at 1020. In *Grand Canyon Trust v. United States Bureau of Reclamation*, the Ninth Circuit held that the U.S. Bureau of Reclamation was not required to engage in § 7 consultation for ongoing operation of the Glen Canyon Dam because it lacked the necessary discretion to determine ongoing manner of operation. *See Grand*

Canyon Trust, 691 F.3d at 1020. The court reasoned that the Bureau did not have discretion to alter the flow of water through the dam because such operations were governed by an annual operating plan, the criteria of which was prescribed in statute. *Id.* at 1020. Such is the case here.

1. The Rivers and Harbors Act requires operation of the Dam Works consistent with the riparian laws of New Union.

The Rivers and Harbors Act of 1945 (RHA) requires the ACOE to operate the Howard Runnet Dam Works consistent with the common law riparian rights of New Union. River and Harbors Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945). *See also California v. United States,* 438 U.S. 645, 678-79 (1978) ("[I]t is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State.")[1]; *United States v. Rio Grande Dam & Irrigation Co*., 174 U.S. 690, 702-03 (1899) (holding that, when authorized by Congress, state law controls water consumption of navigable interstate waterways within the state's jurisdiction). When authorizing the Howard Runnet Dam Works, it was "the policy of the Congress to recognize the interests and rights of the States." RHA, Pub. L. No. 79-14, 59 Stat. 10 (1945). As such, operation of the dam cannot supersede the vested rights of downstream riparian landowners in New Union. *See id.* Additionally, Congress expressly stated that states play a pivotal role "in determining the development of the watersheds within their borders[,]" and that the RHA was not intended to supplant the states' "interests and rights in water utilization and control" of waterways within their borders. *Id.* The RHA only authorized projects "which can be operated consistently with appropriate and economic use of the waters of such river by other users." *Id. See also* Frank J. Trelease, *Federal Limitations on State Water Law*, 10 BUFF. L. REV.

[1] Referencing the Senate Report on the McCarran Amendment at S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951).

399, 403 (1966) ("It is, of course, possible for Congress to exercise less than its complete power, and submit to state regulation as a matter of comity.").

By authorizing an extensive deployment of infrastructure projects affecting the nation's waterways, the RHA also sought to preserve the lawful consumptive use of water users within the jurisdictions where the projects were located. The RHA affirmatively states that operation of authorized projects "not conflict with any beneficial consumptive use, present or future . . . ." RHA Pub. L. No. 79-14 at § (b). Construction and operation of such projects must not be to the detriment of water use necessary for "domestic, municipal, stock water, irrigation, mining, or industrial purposes." *Id.* Admittedly, this affirmative protection applies to operation of projects lying west of the Ninety-Eighth Meridian. *Id.* Greenlawn and the Howard Runnet Dam Works do not fall into this category of projects. R. at 6, citing text at nii. But this section of the statute limiting recognition of states' consumptive use also plainly applies only to "[t]he use for navigation, in connection with . . . operation" of authorized projects. RHA Pub. L. No. 79-14 at § (b) (emphasis added). It should not be interpreted to exclude recognition of the consumptive rights within the jurisdictions where projects built for non-navigation purposes are located.

Regulating navigability of interstate waterways is typically the province of the federal government. *See PPL Mont., LLC*, 565 U.S. at 591-92. It makes sense that Congress would find it appropriate to express its intent that federal projects in the navigability context not disturbed states' water laws. But this express geographical limitation of statutory deference afforded to state water law should not be interpreted to apply to projects not intended for navigability purposes. Where a project does not serve the federal purpose of interstate waterway navigation, the principles of federalism compel deference to state water law unless Congress expressly states otherwise. *See California,* 438 U.S. 678-79. As construction and operation of the Howard Runnet

Dam Works was "for flood control, hydroelectric power, and recreation purposes[]" rather than navigation of the Green River, it stands to reason that Congress intended recognition of consumptive water rights within the jurisdiction, regardless of whether it was constructed west of the Ninety-Eighth Meridian.

2. The Fish and Wildlife Coordination Act does not provide ACOE the authority to divert water around the Bypass Reach to benefit wildlife.

The Fish and Wildlife Coordination Act of 1958 (FWCA) also does not provide the ACOE the statutory authority to divert or withhold water from the Howard Runnet Lake that downstream riparian landowners are entitled to under the common law of New Union. Through the FWCA, Congress intended "that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs." Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958). Additionally, Congress intended through the FWCA that agencies first consult with the Fish and Wildlife Service "prior to water bodies being impounded, diverted, the channel deepened, or . . . otherwise controlled or modified for any purpose whatever . . . ." *Id.* However, the consultation requirements of the FWCA do not apply to projects completed prior to the effective date of the Act. *See id.* (providing that the consultation requirements of the FWCA "shall not be applicable to any project or unit thereof authorized before the date of enactment of the Fish and Wildlife Coordination Act if the construction of the particular project or unit thereof has been substantially completed."). Put simply, to the extent the FWCA is applicable to the operation of the Howard Runnet Dam Works, it does not provide the ACOE any "alternative course of action" that would allow the agency to act inconsistently with the riparian common law of New Union.

The Dam Works' authorizing statute requires the ACOE to adhere to all existing riparian water rights under the common law of New Union. River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945). Such adherence includes allowing water to flow through the diversion dam to the extent Greenlawn needs for reasonable use. R. at 6. Additionally, the agreement the ACOE entered into to provide Greenlawn flow at the level "it is entitled to as a riparian property owner under the laws of the State of New Union[,]" is the product of ACOE's statutory authority to operate the dam. R. at 6. That agreement binds the ACOE, as it is derivative of the authorizing statute's plain intention that development of projects respect the water law of the jurisdiction where the project is located. Given the strong statutory directive governing operation of the Howard Runnet Dam Works, any agency action inconsistent with the riparian common law of New Union would exceed the ACOE's statutory authority. As the ACOE is compelled by the Howard Runnet Dam Work's enabling statute to operate the dam consistent with the riparian common law of New Union, ACOE has no "alternative course of action" to consider that would trigger § 7 consultation.

B. Construction of the Dam Works, and the effective date of the agreement between ACOE and the city of Greenlawn, both predate enactment of the ESA.

Because construction of the Howard Runnet Dam Works and the adoption of the dam's governing operating agreements both predate enactment of the ESA, § 7 consultation is not required for ongoing operations. An agency serving as the operator of a federally owned dam need not engage in § 7 consultation when it is merely complying with the terms of an existing operating agreement. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 186, n32 (1978) (rejecting the notion that § 7's consultation requirement applies to past agency action); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995); *Grand Canyon Trust*, 691 F.3d at 1020. The

agency need not engage in § 7 consultation for ongoing operation of the Dam Works so long as the terms of the underlying operating agreement do not change. *Grand Canyon Trust*, 691 F.3d at 1018. A federal "action" under the ESA does not include past agency action. *Tennessee Valley Auth.*, 437 U.S. at 186, n32. Ongoing agency action is exempt when no new federal action occurs to trigger a § 7 consultation requirement. *Id.*

Here the Rivers and Harbors Act, the Wildlife Conservation Coordination Act, the 1968 Water Control Manual, and the agreement ACOE made with Greenlawn upon completion of the Dam Works all govern the ACOE's operation. R. 6-7. Adoption of each governing authority occurred prior to the enactment of the ESA. The WCM provides the explicit criteria ACOE must follow in operation of the Howard Runnet Dam Works. *Id.* However, the ACOE is under no statutory obligation to revise the WCM. RHA, Pub. L. No. 79-14, 59 Stat. 10 (1945). Once the ACOE does modify the manual, the ESA likely would compel consultation with the Fish and Wildlife Service as such action would be discretionary. But until the ACOE revises its WCM, ongoing operation of the Howard Runnet Dam Works consistent with the current manual does not trigger § 7's consultation requirement.

C. ACOE is not required to modify any terms of the water release agreement with Greenlawn, nor does it have discretion to do so.

The ACOE is under no statutory obligation to modify its operation of the Howard Runnet Dam Works. Absent such an obligation, ongoing operation of the Dam Works under the existing plan does not trigger § 7's consultation requirement. While the ACOE does have discretion to modify the overarching WCM, it does not have the discretion to modify the specific water release agreement with Greenlawn. Because the ACOE lacks an alternative course of action, its water release through the diversion dam is non-discretion agency action.

An agency must consult under § 7 only when it makes an "affirmative" act or authorization affecting a listed species. *See Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012); *Cal. Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n*, 472 F.3d 593, 595-98 (9th Cir. 2006); *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1108 (9th Cir. 2006). Where private activity proceeds pursuant to a vested right or to a previously issued license, an agency has no duty to consult under § 7 if it takes no further affirmative action regarding the activity. *Id.*; *Cal. Sportfishing*, 472 F.3d at 595, 598-99. Additionally, "where no federal authorization is required for private-party activities" Section 7 consultation is likewise not required. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 662; *Karuk Tribe of Cal.*, 681 F.3d at 1021.

Here, Greenlawn's water withdraws are the actions of private parties that undoubtedly affect a listed species. However, no "federal authorization" occurred in the release of water through the Howard Runnet Diversion Dam because authorization of the Dam Works' entire operating structure predates enactment of the ESA. Additionally, the water use agreement between the ACOE and Greenlawn is not a discretionary contractual agreement, but rather a statutorily compelled agreement. The ACOE has no obligation or discretion to modify its terms, nor does it have the discretion to terminate it. *See Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 68 (D. D.C. 2003). *Contra NRDC v. Jewell*, 749 F.3d 776, 784-85 (9th Cir. 2013) (holding that renewing settlement contracts provides enough agency discretion to trigger § 7's consultation requirement). The relevant question is whether the ACOE has any ability to pursue and alternative course of action to benefit the listed species. *Nat'l Ass'n of Home Builders*, 551 U.S. at 662. Given the statutory requirement that operation of the Dam Works is consistent with the riparian rights of New Union, the ACOE lacks any alternative course of action.

Any argument that rests on ACOE's discretion to modify terms of the WCM—thus taking "affirmative action" to trigger § 7 consultation—must also fail. Although the ACOE has the authority to modify the terms of the WCM, any modification cannot conflict with the common law riparian rights of downstream landowners. Greenlawn's rights as a riparian landowner supersede the Howard Runnet Dam Works' WCM. If a discrepancy arises between Greenlawn's water needs and the volume authorized by the operating manual, the manual must yield to Greenlawn's needs. The ACOE must release as much water as Greenlawn needs for reasonable use at any given time, even if that exceeds the requirements of the WCM. In any event, the WCM also has a general provision, which states, "[a]t all times the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply agreements entered into by the United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law." R. at 7. The agreement between ACOE and Greenlawn to ensure water releases "it is entitled to as a riparian property owner under the laws of the State of New Union[,]" is consistent with, and in fact compelled by the authorizing statute. Given the lack of statutory authority afforded to ACOE to modify the terms of the operating agreement, any argument resting on ACOE's discretion to alter the agreement must fail.

The perpetual and static nature of the agreement between ACOE and Greenlawn required by the Dam Works' enabling statutes precludes discretionary water releases through the diversion dam. Had the agreement been contractual in nature, and therefore subject to periodic negation and reevaluation, ACOE would retain some discretion in future operation of the dam. *See NRDC*, 749 F.3d 784-85. As ACOE has no authority to modify its diversion dam flow agreement with Greenlawn, the agency lacks discretion that would trigger § 7's consultation requirement.

III. GREENLAWN'S WATER WITHDRAWALS FROM BYPASS REACH DURING DROUGHT CONDITIONS WERE A FORESEEABLE AND PROXIMATE CAUSE OF EXCESSIVELY LOW WATER LEVELS DOWNRIVER, RESULTING IN A TAKE OF THE ENDANGERED OVAL PIGTOE MUSSEL UNDER §9 OF THE ENDANGERED SPECIES ACT.

Section 9 of the Endangered Species Act ("ESA"), along with related regulations promulgated by the Department of Interior, prohibits all unauthorized takings of endangered fish or wildlife species. 16 U.S.C. §1538(a)(1)(B). A "take" includes any act that harms or kills a listed species. *Id.* §1532(19). "Harm" encompasses both direct and indirect harms, including "significant habitat modification or degradation" that impairs "essential behavior patterns," thus leading to the injury or death of a protected species. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 700 (1995); 50 CFR §17.3 (1994). Any take that is not explicitly permitted is unlawful. 16 U.S.C. §1538(a)(1).

Under the ESA, any act causing either direct or indirect harm to a protected species constitutes a take so long as the alleged act is a foreseeable and "fairly traceable" proximate cause of the harm. *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1084 (D. Or. 2012). The standard of review for a district court's finding of proximate cause is clear error. *Aransas Project v. Shaw*, 775 F.3d 641, 658 (5th Cir. 2014).

A. Consumption of the water necessary to keep the habitat of the endangered pigtoe mussels submerged constitutes a substantial habitat modification under §9 of the ESA.

Reduced water levels in the Green River in early 2017, which exposed beds of the endangered oval pigtoe mussel and led to the deaths of a quarter of the Green River mussel population, constituted a take in violation of §9 of the ESA. R. at 9. An unlawful taking due to habitat modification occurs when the modification is significant, has impaired essential behavioral patterns of a protected species, and has led to actual injuries or deaths. *Hawksbill Sea*

Turtle v. Fed. Emergency Mgmt. Agency, 11 F. Supp. 2d 529, 553 (D. V.I. 1998). Activities that might cause significant habitat modification include "'[r]emoving water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding or other essential behavioral patterns.'" *NRDC v. Zinke*, 347 F. Supp. 3d 465, 491 (E.D. Cal. 2018) (citing 64 Fed. Reg. 60,730).

Low water levels constitute a significant enough modification to the endangered oval pigtoe mussel's habitat to impair essential behavioral patterns. Essential behavioral patterns include "breeding, feeding or sheltering." 50 C.F.R. §17.3. The oval pigtoe mussel requires "slow to moderate" water currents in its habitat in order to survive. R. at 9. The extremely low water levels in the Green River in early 2017 exposed entire beds of mussels while simultaneously reducing the mussels' remaining habitat to "stagnant pools." *Id.* Stagnant water leads to increased siltation, which "smother[s]" mussels. *Id.* Mussels whose habitat had been exposed thus faced the unviable alternative of migrating to pools of water with no regular current. *Id.* As a result, significant portions of the oval pigtoe mussel population were left unable to shelter. *Id.*; *see also* 50 C.F.R. §17.3.

The low water levels and the resulting unavailability of adequate shelter in the mussels' habitat led directly to the death of "approximately 25% of the Green River oval pigtoe population." R. at 9. Greenlawn did not contest expert testimony that these conditions led to the deaths recorded. *Id.* Additionally, the District Court held that if these conditions had persisted, the entire Green River oval pigtoe population would have faced extirpation. *Id.* In addition to actual, recorded injury and death due to significant habitat modification, habitat modification "that *could* result in extinction" violates §9 of the ESA. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 786 (9th Cir. 1995) (citing *Palila v. Hawaii Dept. of Land & Natural*

Resources, 852 F.2d 1106, 1110 (9th Cir. 1988)). Here, both the actual, recorded deaths as well as the likelihood that such conditions, if left unaddressed, could "entirely eliminate" the Green River oval pigtoe mussel population in the future constituted a taking prohibited by §9 of the ESA. *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 11 F. Supp. 2d at 553.

B. Greenlawn's refusal to modify its water withdrawals from the Bypass Reach during drought warning conditions was a foreseeable and proximate cause of the significant modification of the endangered oval pigtoe mussel's Green River habitat.

The District Court's factual determination that Greenlawn's water withdrawals were a proximate cause of the significant modification to the oval pigtoe mussel's habitat should be upheld. Courts have routinely held that liability under §9 of the ESA "should be read to incorporate ordinary requirements of proximate causation and foreseeability." *Aransas Project v. Shaw*, 756 F.3d 801, 817 (5th Cir. 2014). A proximate cause analysis under §9 thus requires "determining whether the alleged injury…is fairly traceable to the challenged action." *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1084 (D. Or. 2012); *see also NRDC v. Zinke*, 347 F. Supp. 3d 465, 492 (E.D. Cal. 2018). Because of this, acts causing either direct or indirect harm to a protected species can constitute a taking. *See, e.g. Strahan v. Coxe*, 127 F.3d 155, 164 (1st Cir. 1997)**;** *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1237 (11th Cir. 1998). While the link between act and injury "cannot be too remote," the injury can "involve more than a single cause." *Cascadia Wildlands*, 911 F. Supp. 2d at 1084-85; *see also NRDC*, 347 F. Supp. 3d at 491. The proximate cause analysis is meant to curtail liability where the connection between an act and the resulting harm is "so attenuated that that the consequence is more aptly described as mere fortuity." *Id.* at 487 (emphasis added) (internal citation omitted).

1. Excessively low water levels in the Green River oval pigtoe mussel habitat were a fairly traceable consequence of Greenlawn's water withdrawals.

Greenlawn's water withdrawals are the final instance in which water is removed from the Green River before its flow reaches the oval pigtoe habitat. R. at 9, 17. This is not a case of a "remote actor[] in a vast and complex ecosystem,"[2] nor is it a case where "drought alone" has reduced water levels substantially enough to render the mussel's habitat uninhabitable.[3] Greenlawn actively opposed the ACOE's measures to sustainably manage the Green River water supply during the ongoing drought conditions, contributing directly to increasingly low water levels in the Howard Runnet Lake. R. at 6, 8. As a result of falling water levels in the lake, the ACOE was required to curtail hydroelectric power releases, after which downstream flow rates dropped further. R. at 8-9. At this point, Greenlawn consumed "nearly all of the flows in the Bypass Reach." R. at 9. As a direct result of this consumption, the Green River's downstream water levels dropped so low that expanses of riverbed were exposed, including oval pigtoe mussel habitat. R. at 9.

Greenlawn's actions did not have to be the sole cause of low water levels in the oval pigtoe mussel's habitat in order to be fairly traceable to the harm that resulted. *See, e.g. NRDC,* 347 F. Supp. 3d at 492 (holding that "[w]henever an action alone or in combination with . . . other actions is reasonably certain to injure or kill listed species, it will constitute a take."). Harm to a protected species can "involve more than a single cause." *Cascadia Wildlands,* 911 F. Supp. 2d at 1084, *see also NRDC v. Zinke,* 347 F. Supp. 3d at 491. In this case, while upstream agricultural withdrawals may have contributed to the cumulative impacts of water loss in the

[2] *Aransas Project v. Shaw*, 775 F.3d 641, 657-58 (5th Cir. 2014).
[3] *Alabama v. United States Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1134 (N.D. Ala. 2006).

Green River ecosystem,[4] there is no evidence in the record to suggest that those withdrawals are so significant that, even if Greenlawn's acts were disregarded, the low water levels fatal to the endangered oval pigtoe mussel would have persisted. *See id.*

Additionally, Greenlawn's actions did not have to take place within oval pigtoe mussel habitat in order to be a "fairly traceable" cause of the harm done to the mussels. *Cascadia Wildlands,* 911 F. Supp. 2d at 1084. Challenged actions do not have to take place directly within a protected species' habitat in order to cause substantial modification or degradation. *See Loggerhead Turtle v. County Council of Volusia County,* 148 F.3d 1231, 1238 (11th Cir. 1998). In *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency,* the court made it clear that it was the absence of factual support concerning possible harm to the marine environment in a bay nearby a construction project, combined with the absence of any actual recorded deaths of the endangered sea turtles, that was fatal to the plaintiff's case, not the fact that the activities allegedly modifying the sea turtles' feeding habitat were happening off-site. 11 F. Supp. 2d 529, 553 (D. V.I. 1998); *see also Babbitt v. Sweet Home,* 515 U.S. at 700.

2. It was foreseeable that Greenlawn's refusal to modify its water withdrawals from the Green River during ongoing drought conditions would have an adverse impact on downstream conditions.

Given the ongoing drought conditions, the adverse impact that Greenlawn's unmitigated water withdrawals would have on the downstream segment of the Green River was eminently foreseeable. "Foreseeability" under the ESA requires that the harm done to a protected species cannot be "merely accidental." *Babbitt v. Sweet Home,* 515 U.S. at 700.

Both the ACOE and Greenlawn anticipated that drought conditions would eventually require both parties to periodically modify their activities on the Green River in order to avoid

[4] R. at 16.

detrimental impacts on the river system, as evidenced by the 1968 Water Control Manual. R. at 7. Nonetheless, Greenlawn voluntarily chose to maintain high seasonal water consumption rates during drought conditions, despite ACOE's recommendation. R. at 8. Similarly, in the past decade, drought conditions have occurred with near-annual frequency. R. at 8. While the drought conditions in 2016-2017 were more severe than in past years, the conditions were far from analogous to those in *Aransas Project v. Shaw*, where the court found that "a year of extraordinary drought," combined with other factors and in the absence of certain factual evidence, mitigated § 9 liability. 775 F.3d at 659. If drought conditions had been severe enough to suddenly threaten Greenlawn's essential water needs, the foreseeability analysis might have tipped in the City's favor, but that was not the case here. *Id.* at 661. Similarly, the record gives no indication that "drought alone" created conditions sufficient to threaten and, ultimately, harm the mussel population. *Alabama v. United States Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1134 (N.D. Ala. 2006).

IV. BEFORE ENJOINING A BENEFICIAL MUNICIPAL ACTIVITY UNDER THE ENDANGERED SPECIES ACT, COURTS MUST BALANCE THE EQUITIES OF THE ACTIVITY WITH THE RISK OF HARM TO THE SPECIES TO DETERMINE AND APPROPRIATE REMEDY.

When reviewing injunctions on appeal, the court reviews questions of statutory construction *de novo* and reviews questions of fact or law for clear error. *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 286 (1st Cir. 2006) (finding that *de novo* review appropriate for the statutory interpretation of the "citizen suit" provision of the Resource Conservation and Recovery Act); *Lattab v. Ashcroft*, 384 F.3d 8, 21 (1st Cir. 2004) (stating that the appeal of injunctive relief on the grounds of factual or legal application which requires clear error review.)

Section 11 of the ESA, in pertinent part provides:

> 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 (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof.

16 U.S.C. § 1540(g). Some lower courts have inappropriately determined that a court "must issue an injunction" when it is reasonably certain that an imminent threat exists to a protected species. *New Union Oyster Catchers Inc v. Greenlawn*, NO. 66-CV-2017, 5 (D. N.U. 2019). This calculus ignores centuries of caselaw encouraging the balancing of equities and the consideration of alternative remedies before issuing an injunction. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)*; Weinberger v. Romero-Barcelo*, 456 U.S. 305, 321 (1982)*; Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (holding that statutory language granting jurisdiction to issue injunctions does not "suggest an absolute duty to do so under any and all circumstances."); *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821 (C.C.D.N.J. 1830). The test has also been applied inconsistently by lower courts. *Cf. Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) (applying *TVA*); *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1133 (11th Cir. 2005) (applying traditional four-factor test).

A. The Endangered Species Act Does Not Mandate an Injunction as a Matter of Course.

While the ESA does allow for citizen suits to enjoin that activity suspected of offending the act, the statute does not demand a specific remedy any more than it dictates a specific victor. 16 U.S.C. § 1540(g). The court in *Tennessee Valley* held that the ESA requires injunctive relief when "an irreconcilable conflict exists" between a discretionary action and the statute. *Tennessee*

Valley Auth., 437 U.S. at 193.[5] The *TVA* court relied heavily on Congressional intent to support their view of injunctive relief under the ESA. *Id. at* 174.[6]

Following the *TVA* court's injunction of the Tellico dam, Congress responded by amending the ESA. P.L. 95-632.[7] In its report for the 1978 amendment, Congress specifically discusses the Tellico dam and ensuing court decisions. Of particular note, the report states "Some flexibility is needed in the act to allow consideration of those cases where a Federal action cannot be completed or its objectives cannot be met without directly conflicting with the requirements of § 7." S. Rept. 95-874. Congress again amended the act in 1982 to provide further flexibility in the act by allowing the Secretary to issue permits for the incidental "taking" of a listed species. 16 U.S.C. § 1539.

While the *TVA* court's decision was laudable and perhaps appropriate in 1978 in light of the congressional intent of the ESA as originally written, Congress has made clear since then that their intent to afford listed species great protection does demand some flexibility in certain circumstances. *See* Pub. L. No. 95-632; S. Rept. 95-874.

Here, the trial court paints a bleak and false choice in their analysis that the language and intent of the ESA leaves it with two options, injunction or extinction. R. at 17. In *Tennessee Valley*, this was the case. 437 U.S. at 193. Following the passage of the ESA it was found that the construction of the Tellico dam posed an imminent threat to the continued existence of the

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[5] In *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) a citizen suit was filed after the near completion of the Tellico Dam to enjoin the Tennessee Valley Authority from finishing the dam because doing so would eradicate the known population of endangered snail darter fish. The court granted the permanent injunction despite the project's cost and status.

[6] *Id. at* 174 ("[E]xamination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.").

[7] P.L. 95-632 created a panel of cabinet level officials to review petitions for exemptions ESA takings.

snail darter, a federally listed threatened species. *Id. at* 161. The Tellico example is a rare instance where the stakes are black and white. In the present case, and others where the facts do no precisely mirror the binary nature of *TVA*, the court could have called for an alternative remedy that would be less draconian than a hard stop on municipal water use. Such a balancing is consistent with the Congressional intent of the ESA as amended and subsequent caselaw which have overtaken the *TVA* ruling and called for greater analysis before issuing an injunction. *See Winter*, 555 U.S. at 20; *Alabama*, 424 F.3d at 1133.

B. Courts Have Recognized the Necessity to Consider Beneficial Uses Before Issuing an Injunction.

When an action is a beneficial use and an injunction is not the only means of ensuring compliance, or the action is non-discretionary, the court must balance the public interest in the activity with the possible injury that would result before molding their opinion to the "necessities of the particular case." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 670 (2007) (finding that *TVA v. Hill* applies to discretionary actions but in non-discretionary actions deference should be given to agency regulations); *Yakus v. United States*, 321 U.S. 414, 440 (1944);[8] *Alabama*, 441 F. Supp. 2d at 1132 ("out of an abundance of caution, the court holds that the proper standard in this case is the traditional four-prong test"); *Strahan*, 127 F.3d 155.[9]

When the conflicting use at issue is one that provides a benefit to the public, courts must examine the issue using the traditional four-part test to determine proper equitable relief. Though

[8] *Yakus v. United States*, 321 U.S. 414, 440 (1944) ("[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.")
[9] In *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) the appellate court upheld a district court decision to require commercial fishing operations in Massachusetts to apply for an incidental take permit under the ESA rather than outright enjoin the operations.

deference is given to endangered species, this merely tips the scales, it does not end the analysis. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 670; *Alabama*, 441 F. Supp. 2d at 1132; *Strahan*, 127 F.3d 155. In *Strahan v. Coxe*, the district court found the commonwealth of Massachusetts in violation of § 9 of the ESA due to the effect of allowing the use of gill nets and permitting of lobster pot fishing on listed species. *Id. at* 158. Rather than resort to the substantially burdensome action of issuing an injunction to prevent the fishermen from continuing to operate the court issued an order that required them to seek an incidental take permit from the Fish and Wildlife Service and develop methods of modifying their equipment to prevent further takings. *Id. at* 158.

In *Alabama v. United States Army Corps of Eng'rs*, the court reviewed the issuance of an injunction against ACOE mandating the releasee of water a dam works along the Apalachicola river during drought conditions due to the effects on an endangered mussel therein. 441 F. Supp. 2d at 1125. The *Alabama* court considered the history of the *TVA* test and the merits of a truncated analysis for injunctive relief but ultimately determined that because of the facts at hand and the lack of clear Eleventh Circuit precedent, the four-part test was more appropriate. *Id.* at 1132.

The facts of *Alabama* almost perfectly mirror those in the case at hand. This circuit has not definitively determined that the *TVA* test is the most appropriate for considering injunctive relief, especially when considering a beneficial use. This court should take heed from the ruling by the *Alabama* court given the similarities of fact, and geographic location which would pertain to common law riparian water rights. An "abundance of caution" as stated by the court in *Alabama* is almost certainly always a prudent course for courts, especially given the changes in the field of ESA injunctions post-*TVA*. *Id.* In Strahan, the value of the fishing industry of

Massachusetts was important enough for a court to conclude that additional analysis was prudent, and indeed that analysis lead to equitable relief that satisfied the ESA without condemning the fishermen altogether. 127 F.3d at 158. Where a city's beneficial water use, and thereby the public health and safety, is concerned, courts must balance the equities before taking action. Such measures do not preclude the use of an injunction, they merely ensure that the court weighs the facts before potentially condemning a city to save a species.

CONCLUSION

For the reasons discussed above, the Army Corps of Engineers respectfully requests that this Court affirm the District Court's grant of summary judgement finding that Greenlawn is municipal riparian landowner and is entitled to water withdrawals in the amount necessary to satisfy its reasonable demand, notwithstanding the drought conditions. Additionally, this court should affirm the District Court's finding that the ACOE did not violate § 7 of the ESA prior to releasing water through the Diversion Dam, as such action is non-discretionary, and affirm the District Court's finding that Greenlawn's actions constituted a take of the endangered oval pigtoe mussel in violation of § 9 of the ESA. Finally, this Court should adopt the traditional four-part test for injunctive relief as a consistent standard of review for injunctions of beneficial municipal activities and remand this case to the District Court on the specific issue of the request for injunctive relief under the proper standard.