

**2020 National Environmental Law Moot
Court Competition**

**UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**

NEW UNION)	
OYSTERCATCHERS, INC.,)	
<i>Plaintiff – Appellant</i>)	
)	
v.)	
)	CA. NO. 19-000987
UNITED STATES ARMY)	
CORPS OF ENGINEERS,)	
<i>Defendant – Appellee</i>)	
)	
and)	
)	
CITY OF GREENLAWN,)	
NEW UNION, <i>Defendant –</i>)	
<i>Appellant</i>)	

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR NEW UNION IN NO. 66-CV-2017 (RMN),
JUDGE ROMULUS N. REMUS**

ORDER

Following the issuance of the Opinion and Order of the District Court dated May 15, 2019, in Civ. 66-2017, the City of Greenlawn, New Union and the New Union Oystercatchers, Inc., have both filed a timely Notice of Appeal.

The New Union Oystercatchers, Inc., (NUO) takes issue with the district court’s determination that the City of Greenlawn has riparian landowner rights to the Green River Bypass Reach. NUO further appeals the district court’s holding that the United States Army Corps of Engineers (ACOE) did not violate the consultation requirement under § 7(a) of the Endangered Species Act, 16 U.S.C. § 1536(a), when ACOE continued Howard Runnet Dam Works operations during drought conditions to provide flow to the City of Greenlawn.

The City of Greenlawn (Greenlawn) takes issue with the district court's determination that Greenlawn's withdrawals from the reduced-flow of the Bypass Reach constitutes a "take" of the endangered oval pigtoe mussel, and that Greenlawn's actions violated § 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B). Greenlawn also appeals the district court's determination that when enjoining a municipal activity to prevent the extirpation of an endangered species, a court need not balance the equities of the municipal activity against the threat to the species.

The court has determined that jurisdiction properly lies in this court. The parties have not disputed standing under Article III of the U.S. Constitution, and no party raises the issue of standing on appeal. All issues raised in the petitions were properly preserved for appeal.

Therefore, it is hereby ordered that the parties brief all of the following issues:

1. Whether Greenlawn has the right, as a riparian landowner, to continue water withdrawals for municipal purposes during a drought without any water conservation measures? (NUO argues it does not; ACOE argues it does; and Greenlawn argues it does.)
2. 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? (NUO argues it is; ACOE argues it is not; and Greenlawn argues it is not.)
3. 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? (NUO argues it does; ACOE argues it does not; and Greenlawn argues it does not.)
4. Whether the District Court must balance the equities before enjoining a beneficial municipal activity, when the activity will cause the extirpation of an entire population of an

endangered species? (NUO argues it does not; ACOE argues it must; and Greenlawn argues it must.)

SO ORDERED.

Entered 1st day of September, 2019.

[NOTE: No decisions decided or documents dated after September 1, 2019 may be cited either in the briefs or in the oral argument.]

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW UNION**

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NEW UNION)		
OYSTERCATCHERS, INC.,)		
<i>Plaintiff,</i>)		
)		
v.)		
)		
UNITED STATES ARMY)	Case No. 66-CV-2017	
CORPS OF ENGINEERS,)	(RMN)	
<i>Defendant and Cross-Plaintiff</i>)	OPINION AND	
)	ORDER	
and)		
)		
CITY OF GREENLAWN,)		
NEW UNION, Defendant.)		
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REMUS, District Judge:

INTRODUCTION

Plaintiff New Union Oystercatchers, Inc. (NUO) brings this action against the United States Army Corps of Engineers (ACOE) and the City of Greenlawn, New Union (Greenlawn), alleging violations of the Endangered Species Act (ESA) in connection with Greenlawn’s water withdrawals from the Green River and the ACOE’s operation of the Howard Runnet Dam Works. ACOE filed a cross-claim against Greenlawn, joining NUO’s ESA claim against Greenlawn. ACOE moved for summary judgment dismissing the ESA claims against it. NUO moved for summary judgment declaring Greenlawn to be in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538, and the ACOE to be in violation of § 7 of the Endangered Species Act, 16 U.S.C. § 1536, and Greenlawn cross moved for summary judgment to declare its rights as a riparian landowner and to dismiss the ESA claims against it.

For the following reasons, this Court grants the ACOE's motion for summary judgment dismissing the First Claim for Relief, denies Greenlawn's motion for summary judgment dismissing the Second Claim for Relief and the ACOE's Cross Claim, grants Greenlawn's motion for summary judgment on its cross-claim declaring its rights as a riparian landowner and dismissing the Third Claim for Relief, and grants NUO's motion for summary judgment declaring Greenlawn to be in violation of § 9 of the Endangered Species Act, 16 U.S.C. § 1538.

Because Greenlawn's activities threaten significant losses to the populations of endangered mussels on the Green River, this court is issuing an injunction against water withdrawals that cause the flow of the Green River downstream of the Howard Runnet Dam Works to drop below 25 cubic feet per second averaged over twenty four hours.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are essentially undisputed, and are drawn from the uncontradicted assertions of the pleadings, depositions, affidavits, and expert reports submitted by the parties.

The City of Greenlawn, New Union lies on both historical banks of the Green River, on what is now known as the Green River Bypass Reach (Bypass Reach). The Bypass Reach was created when the United States Army Corps of Engineers built the Green River Diversion Dam and the Howard Runnet Dam on the Howard Runnet Lake in 1947 (the Diversion Dam and the Howard Runnet Dam are collectively referred to as the Howard Runnet Dam Works). Greenlawn owns the riverfront on both sides of the Bypass Reach within city limits, as well as the underlying riverbed, and has maintained municipal water intakes in the Bypass Reach since the City was founded in 1893. Greenlawn experienced a housing construction boom during the 1960s when a new interstate highway connected Greenlawn to Progress City, and it enlarged its municipal water system in 1968 to accommodate this demand. The Greenlawn Water Agency provides domestic and industrial water supply to over 100,000 customers within Greenlawn city limits. The City of Greenlawn has a small downtown area, but the City consists largely of residential districts with single family homes. Water withdrawals by Greenlawn average 6 million gallons per day (MGD) annually, but peak at 20 MGD during July and August due to summer lawn and ornamental watering demands. Because

Greenlawn's sewage treatment plant discharges into the Progress River, in a different watershed, and because the water used for lawn irrigation is largely lost to evaporation and ground absorption, it is estimated that very little of the water withdrawn by Greenlawn (less than 5%) returns to the Green River.

The Howard Runnet Dam was authorized by Congress in the River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945),ⁱ and was completed in 1948. The dam was originally authorized for flood control, hydroelectric power, and recreation purposes. Subsequent legislation, the Fish and Wildlife Coordination Act of 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958), added fish and wildlife purposes as an authorized purpose for all ACOE administered dams. Because the design of the dam and the Howard Runnet Lake impoundment would cut off the natural flow to the Green River Bypass Reach and the Greenlawn water supply, upon completion of the dams, the ACOE entered into an agreement with Greenlawn to maintain flows in the Bypass Reach sufficient to allow the City of Greenlawn to continue water withdrawals "in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." Hydroelectric power generated by the Howard Runnet Dam Works is a significant source of peak load power generation during the summer air conditioning season.

ACOE operation of the Green River Diversion Dam and the Howard Runnet Dam is governed by a Water Control Manual (WCM), which was last revised in 1968. The WCM establishes parameters for allowing releases of water from the dams for maintaining flood control storage capacity and recreation water levels, providing for hydroelectric generation, and maintaining flow for the City of Greenlawn's water intake facilities in the Bypass Reach. The WCM provides for different target lake elevations at different times of the year based on historical flows and water demands. The goals of the WCM 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. As long as the target lake elevations are maintained, excess natural inflow is released downstream through the Bypass Reach, the hydroelectric generation turbine, and the Howard Runnet Dam. When natural inflow rates would cause flood conditions downstream of the

Howard Runnet Dam, releases are capped below the flood damage rate, and the lake level is allowed to increase. The WCM provides that during normal summer (peak electric demand) operation, a flow of 50 cubic feet per second (CFS) will be released from the Diversion Dam into the Bypass Reach, flows of up to 200 CFS are provided to the hydroelectric turbine as needed, and recreational flow releases of 200 CFS are provided on Saturday mornings.

When lake levels drop below the seasonal target levels, the WCM provides for downstream releases to be curtailed in accordance with the following lake level zones:

- 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.

The 7 CFS flow rate in the Bypass Reach during drought warnings and drought emergencies was based on the annual average water demand in Greenlawn at the time the WCM was adopted in 1968. In addition to these specific operating provisions, the WCM has a general provision which states in pertinent part that, “At all times the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply agreements entered into by the United States Army Corps of Engineers, and with the

riparian rights of property owners established under New Union law.”

At the time of the adoption of the WCM in 1968, there were practically no consumptive uses of water in the Green River watershed upstream of Howard Runnet Lake. During the 1980s, several large agricultural operations in the Green River valley commenced diversions of water for irrigation, resulting in evaporative water losses to the system. Nevertheless, precipitation and groundwater recharge remained adequate to support downstream flows and a healthy ecosystem. From 1968 until the end of the 20th century, water shortages were not a problem. ACOE was forced to apply Zone 1 restrictions only once, in 1998, and was not forced to apply Zone 2 or Zone 3 restrictions. However, drought conditions have become more frequent in the 21st century, and Zone 1 (Drought Watch) conditions occurred during 2006-2007, 2008, 2009-10, and 2012. Zone 1 Levels were reached again during the Fall of 2016 due to below-average precipitation and above normal temperatures, which increased evaporation rates in the region. This condition persisted into the Spring of 2017, when the lake levels reached Zone 2 (Drought Warning) conditions and ACOE instituted flow restrictions in the Bypass Reach, as provided by the WCM.

The City of Greenlawn immediately protested the 7 CFS flow restriction to the Bypass Reach. A letter addressed to the ACOE Field Office in Progress City, New Union, dated April 12, 2017, argued that the 7 CFS flow limitation was outdated, as the population of Greenlawn had grown substantially since the time the 1968 WCM was adopted, and that use of an annual average flow rate was not appropriate during the Spring planting and growing season. During the Spring, residential water consumers use additional water for watering lawns and ornamental plants. The District Commander responded with a request that Greenlawn institute drought restrictions on its water consumers, such as bans on lawn watering and car washing, as long as drought conditions persisted. The City of Greenlawn responded with a letter asserting that Greenlawn had a common law right as riparian landowner to make reasonable use of the historic flows of the Green River Bypass Reach, and that it was under no obligation to impose drought restrictions because watering lawns and ornamental plantings was a reasonable riparian water use for domestic and commercial purposes.

The District Commander relented, and, on April 23, ordered the Dam Works operator to increase the water releases to the Bypass Reach from 7 CFS to 30 CFS. Combined with peaking hydroelectric power demands, the water release demands lowered the lake level to the Zone 3 (Drought Emergency) level on May 15, 2017. Invoking the Zone 3 guidelines of the WCM, the District Engineer ordered curtailment of hydroelectric power releases from the Howard Runnet Dam, but continued the 30 CFS flows to the Bypass Reach for Greenlawn water supply.

The curtailment of hydroelectric power releases, combined with Greenlawn water withdrawals, had severe effects on downstream Green River flows. Greenlawn's water withdrawals consumed nearly all of the flows in the Bypass Reach. During daily hydroelectric peaking operations, Green River flows averaged about 25 CFS over each 24-hour day. But when hydroelectric peaking was curtailed on May 15, downstream flow rates dropped close to zero. The Green River downstream of the Howard Runnet Dam turned into stagnant pools of water and narrow trickles, through what was formerly a flowing river habitat with stretches of sand and bedded gravel.

The reduced river water level exposed several beds of oval pigtoe mussels, a federally listed endangered species, downstream of the confluence of the Bypass Reach and the Howard Runnet Dam tailrace.¹ Oval pigtoe mussels require gravel or silty sand riverbeds, with slow to moderate currents, as habitat. These mussels also require a healthy population of host fish species in order to spawn, as the larval mussels must attach themselves to the gills of a particular fish species, the sailfin shiner, in order to mature. Stagnant water causes increased siltation, smothering mussel populations and eliminating necessary habitat. Extreme low water levels prevent the migration of sailfin shiners. Although adult oval pigtoe mussels can adapt to minor changes in water levels by moving themselves to habitat that remains submerged, the severely reduced flows in the Green River in the Spring of 2017 essentially eliminated any possibility for the oval pigtoe mussels to remain submerged. Oval pigtoe habitat was exposed from the confluence of the Bypass Reach and the tailrace downstream to the estuary, 60 miles from the Howard Runnet Dam Works. Plaintiff's expert

¹ None of these mussel populations are found on the stretch of the Bypass Reach owned by Greenlawn.

offered uncontradicted deposition testimony that these conditions resulted in the death of approximately 25% of the Green River oval pigtoe population. If allowed to persist, these conditions would entirely eliminate the Green River population of the oval pigtoe mussel. At no point has the ACOE engaged in consultation with the Fish and Wildlife Service concerning the impacts of Howard Runnet Dam Works operations on the oval pigtoe mussel, and the City of Greenlawn does not have an incidental take permit under § 10 of the Endangered Species Act, 16 U.S.C. § 1539, authorizing the take of oval pigtoe mussels incidental to its operation of the municipal water intake. Plaintiff's expert deposition testimony established, without contradiction, that a minimum flow of 25 CFS averaged over 24 hours is necessary to prevent extirpation of the Green River oval pigtoe mussel population.

The recent decades of reduced flows have also impacted the Green River estuary, increasing the salinity of Green Bay and reducing the flow of nutrients into the ecosystem. Increased salinity allows predators, including conch and crabs, to enter the bay and feed on juvenile oysters. Green Bay historically supported a thriving oyster industry, but reduced floodplain inundation has eliminated nutrient inflows into the estuary. Oyster harvests in 2016 were only 50% of the level of 2000.

Plaintiff New Union Oystercatchers, Inc. is a not-for-profit membership association representing the interests of oyster fishermen of Green Bay. Its members include individuals who are third- and fourth-generation oyster fishermen. These members have suffered reduced catches and declining incomes because of the smaller oyster harvests. Several of NUO's members have been forced to sell their fishing boats because their oyster fishing income no longer sufficed to make loan payments. NUO's members are also retail customers of the New Union Regional Electric Cooperative, and will be forced to pay electric rate fuel surcharges during times that the Howard Runnet hydroelectric plant cannot operate as a peaking facility. None of NUO's members are waterfront property owners on Green Bay or the Green River.

NUO served a Notice of Intent to sue the ACOE and Greenlawn under the Endangered Species Act, 16 U.S.C. § 1540(g), on May 17, 2017, alleging violations based on the flow reductions in the Green River that resulted from ACOE's curtailment of hydroelectric peaking and Greenlawn's water

withdrawals. After waiting the requisite sixty days, NUO filed this action on July 17, 2017. The complaint also included common law riparian rights claims against the City of Greenlawn asserted under the Court's supplemental jurisdiction. ACOE filed a cross claim against Greenlawn joining NUO's claim that Greenlawn's water withdrawals constitute an illegal "take" of endangered oval pigtoe mussels under ESA § 9, 16 U.S.C. § 1538(a)(1)(B). Greenlawn answered the complaint and cross-complaint, and filed a counterclaim against ACOE seeking a declaration of its right as a riparian landowner to continued flows in Bypass Reach sufficient to meet its municipal water needs.

During the pendency of NUO's sixty-day notice letter, heavy rains fell in the Green River watershed, filling Howard Runnet Lake back to Zone 1 levels, and allowing resumption of flows for fish and wildlife purposes. This eliminated the immediate threat to the Green River oval pigtoe mussel population. However, all parties agree that based on recent trends and scientific assessments of precipitation patterns and temperature trends resulting from climate change, Drought Warning conditions are likely to occur again in the near future and this case is not moot.

DISCUSSION

Summary judgment is appropriate where, based on the admissible evidence submitted by the parties, there is no genuine dispute of material fact, and a party is entitled to judgment in their favor as a matter of law. Fed. R. Civ. P. 56. For the following reasons, this court grants ACOE's motion dismissing the ESA claims against it, grants Greenlawn's motion for summary judgment declaring that it has a riparian right to continued flows in the Bypass Reach, and grants NUO's and ACOE's motion for summary judgment declaring the City of Greenlawn to be in violation of the Endangered Species Act.

1. GREENLAWN'S RIPARIAN RIGHTS TO 30 CFS / 20 MGD WATER WITHDRAWALS

Because ACOE's obligations under the ESA may turn on its legal obligation to divert water to the Bypass Reach for Greenlawn's municipal withdrawals, this Court will address Greenlawn's riparian rights claim first. Greenlawn seeks a declaration that it is entitled to continue withdrawing up to 20 MGD from the bypass reaching during times of increased residential

water demands for ornamental irrigation. ACOE, having already acquiesced to Greenlawn’s demand to maintain flow in the bypass reach, has not contested this claim. However, NUO, whose members are harmed by Greenlawn’s water withdrawals, does contest Greenlawn’s claimed right to withdraw unlimited amounts of water during drought warning conditions.

The State of New Union applies common law riparian rights doctrine to the resolution of competing claims to water. In general, common law riparian rights doctrine recognizes the right of landowners abutting flowing rivers and streams to install impoundments and diversions, and to withdraw water to make reasonable use of the water in the stream so long as that use does not interfere with the reasonable use of the flowing water by other riparian landowners. *See generally* Barton Thompson Jr. et al., *Legal Control of Water Resources* 32, 33 (6th Ed. 2018). Riparian doctrine does not establish fixed rights to the use of water, but applies common law principles to resolve disputes between riparian landowners. *Id.* at 29. New Union follows the minority rule, and recognizes the right of a municipality to be a riparian landowner and withdraw water as a supply to the benefit of non-riparian parcels within the municipality. *See Tubbs v. Potts*, 45 N.U. 999 (1909) (citing *City of Canton v. Shock*, 66 Ohio St. 19, 63 N.E. 600 (1902); *City of Philadelphia v. Collins*, 68 Pa. 106 (1871); *Barre Water Co. v. Carnes*, 65 Vt. 626, 627 (1893)).ⁱⁱ

Unlike many other riparian jurisdictions, New Union has not adopted legislation or any sort of permitting authority to resolve competing riparian claims to water. Counsel has not cited, and this Court has not discovered, any New Union precedents specifically resolving the conflicting claims to the flow of the Green River presented in this case. Accordingly, this Court must predict how New Union would resolve these claims based on authoritative treatises and precedents from other riparian rights jurisdictions.

Although ancient cases referred to downstream riparian owners’ right to “natural flow,” which would preclude all consumptive uses of in-stream flows, American riparian law has rejected an absolute right to undiminished in-stream flow. *Hendrick v. Cook*, 4 Ga. 241 (1848); *see also* Thompson, *supra*, at 35. Rather, courts apply a rule of reason, allowing reasonable consumptive uses of water so long as these uses do not interfere with the reasonable use of water by downstream riparian

landowners. *See Hendrick v. Cook*, 4 Ga. 241 (1848); *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.R.I. 1827).

NUO asserts that during periods of diminished flow Greenlawn has no right to withdraw more than its annual average flow rate from the Bypass Reach, and the ACOE is not obligated to provide more than the 7 CFS flow rate provided in the WCM. This flow rate would be more than adequate to cover Greenlawn's annual average water demand of 6 MGD. NUO asserts that ACOE has its own right as a riparian landowner to divert water for use in hydroelectric generation, while maintaining the 7 CFS flow in the Bypass Reach. In essence, NUO argues that Greenlawn must "share the shortage" and reduce its water use during times of reduced flow. *See generally* Thompson, *supra*, at 34.

Principles of riparian rights law seem to preclude this "share the shortage" argument between Greenlawn and ACOE, however. Domestic use, including domestic water use for gardening, is considered a "natural use" allowed to riparian owners without regard to the impact on other riparian landowners. *See Harris v. Brooks*, 225 Ark. 436, 283 S.W.2d 129 (1955); *see generally* Robert E. Beck, *Waters and Water Rights* § 7.02(d)(2) (1991 & Supp. 1999). This principle would apply to the modern domestic uses of watering lawns and ornamental plants. In addition, while not determinative, Greenlawn's municipal use was long established at the time the ACOE constructed its upstream diversion of the Green River. *See* Restatement (Second) of Torts § 850A(h) (1977). ACOE's power generation use, while also serving the public interest, must yield to Greenlawn's domestic water demands. Accordingly, this Court grants summary judgment to Greenlawn, declaring that Greenlawn is entitled to sufficient flow in the Bypass Reach to supply its municipal water needs.

NUO also asserts its own riparian rights claims against Greenlawn, alleging that Greenlawn's undiminished water consumption during times of scarcity is unreasonable, especially in light of the impacts on downstream ecosystems supporting the Green Bay oyster fishery and oval pigtoe mussel habitat. Riparian rights doctrine, however, is only concerned with adjusting competing claims of riparian landowners. *See* Thompson, *supra*, at 28. As neither NUO, nor any of its members, claims to own property abutting the Green River, NUO is not a riparian landowner and lacks common law standing to assert any riparian rights claims

against Greenlawn. In any event, riparian water law does not recognize ecological rights to instream flows; only the rights of landowners are protected. Thompson, at 29. Accordingly, this Court grants summary judgment in Greenlawn's favor against plaintiff NUO, dismissing the Third Claim for Relief in Plaintiff's Complaint.

2. *ACOE'S CONSULTATION REQUIREMENT UNDER ESA § 7*

Section 7 of the ESA imposes two primary obligations on federal agencies such as the ACOE, whose actions may affect endangered species. First, such agencies must consult with the appropriate wildlife agency (in this case, the Fish and Wildlife Service (FWS)) concerning the potential impacts of their actions on listed endangered species. Second, such agencies must avoid activities that threaten the extinction of a listed species. Section 7(a) provides in pertinent part:

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Interior], 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. . .

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

ESA § 7(a), 16 U.S.C. § 1536(a). The consultation process for agency actions that might impact species or habitat normally includes preparation of a detailed study of the effects of the action the species in question, known as a "Biological Assessment," and preparation of a "Biological Opinion" by the consulting agency if it concludes that the action may safely be taken, or a "Jeopardy

Opinion” if it concludes that the action would impermissibly place the species in jeopardy. 16 U.S.C. § 1536.

Because the construction of the Howard Runnet Dam Works and the adoption of the WCM both predate the ESA, these actions of the ACOE were not subject to these ESA § 7(a) requirements. NUO points to ACOE’s release of 30 CFS to the Bypass Reach during the 2017 drought warning, which led to the reduction in downstream flows and consequential application of drought emergency restrictions, including the curtailment of hydroelectric power releases, as an agency action subject to the ESA § 7(a) consultation requirement. NUO has standing to enforce the requirements of the ESA under its citizen suit provision, ESA § 13(g), 16 U.S.C. § 1540(g), which broadly authorizes suit to enforce the act by “any person.” *See Bennet v Spear*, 520 U.S. 154 (1997).

Whether ACOE was required to consult with FWS prior to increasing the water releases from the Diversion Dam to the Bypass Reach during the 2017 drought warning turns on the question of whether this decision constitutes an “action” subject to ESA § 7(a). NUO contends that the increased releases to the Bypass Reach during a drought warning constituted a modification of the WCM guidelines, invoking ESA § 7. ACOE argues that it is complying with the WCM provision that requires it to respect Greenlawn’s common law riparian rights to water flow in the Bypass Reach for its municipal use.

Department of Interior regulations specifically exempt non-discretionary actions from compliance with ESA § 7(a) consultation and jeopardy requirements. *See* 50 C.F.R. § 402.03 (2018). Likewise, the Supreme Court held in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), that a federal agency need not consult with FWS with respect to an action that the agency is required to take by law. Since this Court has already determined that ACOE is required by the riparian rights law of New Union to continue providing flows to the Bypass Reach sufficient to meet Greenlawn’s municipal needs, the ACOE has not made any discretionary action to which the ESA § 7(a) triggering consultation requirement would apply. Accordingly, ACOE is entitled to summary judgment dismissing the First Claim for Relief.

3. ESA § 9 PROHIBITION AGAINST TAKING ENDANGERED SPECIES

ESA § 9 prohibits the “take” of any listed endangered species. 16 U.S.C. § 1538(a)(1)(B). The ESA defines the term “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). FWS regulations further define “harm,” to specifically include conduct that modifies or destroys habitat:

Harm in the definition of “take” in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3; see *Babbitt v. Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 687 (1995). NUO and ACOE argue that, by withdrawing the entire flow of water from the Bypass Reach during drought warning conditions, Greenlawn has committed an act that modifies and degrades oval pigtoe mussel habitat downstream, causing actual harm to the mussels, and that it has therefore committed a prohibited “take” of the endangered mussels. Greenlawn asserts in response that it cannot be guilty of habitat modification based on activities occurring entirely outside the habitat in question, and that, in any event, there is an insufficient causal connection between its water withdrawals and the drying up of the Green River downstream of the Bypass Reach.

Greenlawn cites no cases to support its claim that only activities physically occurring on the habitat in question can be considered habitat modification. Instead, Greenlawn cites only cases recognizing the self-evident proposition that direct physical habitat destruction, such as logging, is prohibited. E.g., *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996); *Forest Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995). None of these cases preclude a finding that activities outside of a species’ habitat which result in habitat modification can be a prohibited “take.” Indeed, courts have routinely held that state regulatory activities that indirectly result in harm to endangered species, such as issuance of permits for private activity, can constitute a prohibited “take.” See e.g., *Animal Welfare Inst. v. Martin*, 623 F.3d 19 (1st Cir. 2010) (State authorization of foothold traps that harmed lynx); *Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997) (State

licensing of fishing gear which harmed endangered Right Whales); *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998) (county's refusal to ban beach driving during turtle nesting season). The Supreme Court specifically acknowledged that the regulatory definition of “harm” includes indirect as well as direct harms in *Sweet Home*: “unless the statutory term ‘harm’ encompasses indirect, as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that [ESA] § 3 uses to define ‘take.’” *Sweet Home*, 515 U.S. at 697-98.

Greenlawn’s causation argument fares no better. Greenlawn argues that its water withdrawals do not by themselves cause modification of the oval pigtoe mussel habitat, but only do so in combination with the increased upstream agricultural withdrawals, precipitation conditions, and the ACOE’s operation of the Howard Runnet Dam Works, which Greenlawn does not control. Greenlawn points out that it has not changed its rate of water withdrawals during the drought warning, and asserts that it is the naturally occurring drought, not the water withdrawals, that has harmed the oval pigtoe mussels.

This argument is unavailing. Unlike *Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014), where the Fifth Circuit held that a water regulatory agency’s actions were not the proximate cause of a chain of events resulting in the death of endangered whooping cranes, the destruction of mussel habitat and loss of mussels is the direct and foreseeable result of Greenlawn’s water withdrawals. Greenlawn’s withdrawals are the but-for cause of the downstream conditions, and the downstream effects are clearly foreseeable, as Greenlawn consumes the last drops of flow in the Green River upstream of the mussel habitat. *Natural Resources Defense Council v. Zinke*, 347 F. Supp. 465 (E.D.Ca. 2018) (water transfers pursuant to State water rights could constitute habitat modification due to temperature effects on downstream salmon habitat).

Accordingly, Plaintiff NUO is entitled to summary judgment in its favor on the Second Claim for Relief.

4. *INJUNCTIVE RELIEF UNDER ESA CITIZEN SUIT PROVISION, 16 U.S.C. § 1540(g)*

Having determined that Greenlawn is in violation of ESA § 9, there remains the question of to what relief, if any, NUO is entitled. The ESA citizen suit provision does not authorize civil penalties, but rather, authorizes only a suit “to enjoin any person, including . . . any . . . 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 chapter or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g). This Court must either leave the ESA’s important protections for endangered species unenforced and allow a significant endangered mussel population to be extirpated, or issue an injunction. The Supreme Court held in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978), that it is not the role of the courts to balance species eradication against the claimed public benefits of agency activities:

But neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make . . . fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as “incalculable.”

As the Ninth Circuit has held, a court must issue an injunction if the plaintiff establishes that there is “a reasonably certain threat of imminent harm to a protected species.” *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000).

Plaintiff has established beyond dispute that Greenlawn’s water withdrawals during drought conditions pose a reasonably certain threat of imminent harm to oval pigtoe mussels. Accordingly, this Court will issue an injunction prohibiting Greenlawn from making water withdrawals that have the effect of reducing downstream flows below the rate necessary for mussel survival.

CONCLUSION

For the foregoing reasons, this Court grants the ACOE’s motion for summary judgment dismissing the First Claim for Relief, denies Greenlawn’s motion for summary judgment dismissing the Second Claim for Relief and the ACOE’s Cross Claim, grants Greenlawn’s motion for summary judgment on its

cross-claim declaring its rights as a riparian landowner, grants summary judgment dismissing the Third Claim for Relief in the Complaint, and grants NUO's motion for summary judgment declaring Greenlawn to be in violation of § 9 of the Endangered Species Act. Greenlawn is hereby enjoined from causing water withdrawals that result in the flow of the Green River downstream of the confluence of the Howard Runnet Dam tailrace with the Bypass Reach to drop below 25 cubic feet per second averaged over twenty four hours.

SO ORDERED.

Dated this 15th Day of May, 2019

/s/

Romulus N. Remus
United States District Judge

ⁱ Editor's note: For the purpose of this competition, participants should assume that Section 2 of the Pub. L. No. 79-14 at 31 included authorization of the Howard Runnet Dam Works, and that the State of New Union and the Green River and its tributaries all lie east of the 97th meridian.

ⁱⁱ Editor's note: For the purpose of this competition, participants should assume that the case *Tubb v. Potts* is a 1909 decision of the New Union Supreme Court, and is properly cited for the proposition that a riparian municipality may withdraw water for use by non-riparian lots within the municipality.

Green River, Greenlawn and Howard Runnet Lake and Dam

