No. 97-774

In the Supreme Court of the United States

OCTOBER TERM, 1997

NEWTON COUNTY WILDLIFE ASSOCIATION, ET AL., PETITIONERS

v.

GEORGE ROGERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, prohibits the United States Forest Service from undertaking timber sales in the Ozark National Forest until it has developed comprehensive management plans for adjacent river segments subject to the Act and has "coordinated" the sales with the plans.

2. Whether the Forest Service violated the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, by undertaking timber sales without obtaining a permit from the United States Fish and Wildlife Service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 113 F.3d 110. The orders of the district court (Pet. App. 13-14, 18-22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1997. A petition for rehearing was denied on August 6, 1997. Pet. App. 25. The petition for a writ of certiorari was filed on November 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Wild and Scenic Rivers Act (WSRA), 16 U.S.C. 1271 *et seq.*, establishes a National Wild and Scenic Rivers System (WSRS) and provides for the administration, management, and protection of the rivers included within the System. Under the WSRA, selected rivers that possess "outstandingly remarkable" features "shall be preserved in free-flowing condition," and "they and their immediate environments shall be protected." 16 U.S.C. 1271. The Act contains a list of the rivers designated by Congress, and appoints the Secretary of the Interior or the Secretary of Agriculture, or both Secretaries, as administrator of each designated river segment. 16 U.S.C. 1274.

The agency charged with administering each component of the WSRS must "establish detailed boundaries therefor (which boundaries shall include an average of not more than 320 acres of land per mile measured from the ordinary high water mark on both sides of the river)." 16 U.S.C. 1274(b). Those detailed boundaries are to be established "within one year from the date of designation." *Ibid.* After establishing the boundaries of a component, the administering federal agency is required to prepare "a comprehensive management plan for such river segment to provide for the protection of the river values." 16 U.S.C. 1274(d). The required plans "shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of [the WSRA]." *Ibid.* The Act states that a comprehensive plan "shall be coordinated with and may be incorporated into resource management planning for

affected adjacent Federal lands." *Ibid.* Plans are to be prepared "within 3 full fiscal years after the date of designation." *Ibid.* The Act does not specify any consequences if a comprehensive management plan is not completed within the three-year period.

Segments of the Buffalo River, Richland Creek, Mulberry River, Big Piney Creek, Hurricane Creek, and North Sylamore Creek, chiefly within the Ozark National Forest, were added to the WSRS on April 22, 1992. See Pub. L. No. 102-275, § 2, 106 Stat. 123-125. Pursuant to Section 1274(b), the Forest Service established "detailed boundaries" for the new components. See 59 Fed. Reg. 45,663 (1994).

2. The Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.*, is a criminal statute enacted in 1918 to implement a convention between the United States and Great Britain (on behalf of Canada) for the protection of migratory birds. It has since been amended to cover conventions with Mexico, Japan and the former Soviet Union. 16 U.S.C. 703, 712. The Act provides that, "[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill * * * any migratory bird, [or] any part, nest, or eggs of any such bird, * * * included in the terms of the conventions." 16 U.S.C. 703.[1]

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[1] The MBTA does not define the statutory term "take." Compare 16 U.S.C. 1532(19) (term "take" in Endangered Species Act of 1973 (ESA) defined broadly to include "harm"); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (construing ESA definition); *Seattle Audubon Soc'y* v. *Evans*, 952 F.2d 297, 302-303 (9th Cir. 1991) (contrasting MBTA and ESA prohibitions).

Enforcement of the MBTA is entrusted to the Secretary of the Interior.[2] The Secretary is authorized to determine when, and to what extent, to permit takings of migratory birds. 16 U.S.C. 704. Authorized employees are empowered to investigate violations, conduct searches, and make arrests. 16 U.S.C. 706. With respect to penalties for violations, the Act provides:

> (a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both.
>
> (b) Whoever, in violation of this subchapter, shall knowingly—
>
> (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or
>
> (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a

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[2] Responsibility for enforcement of the MBTA has been delegated to the United States Fish and Wildlife Service (FWS), an agency within the Department of the Interior. See 50 C.F.R. 10.1. FWS regulations implementing the MBTA and other federal wildlife protection statutes are codified at 50 C.F.R. Pts. 10-24. An extensive list of bird species protected under the MBTA is published at 50 C.F.R. 10.13.

> felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

16 U.S.C. 707.

3. The Department of Agriculture's Forest Service is responsible for managing the 191 million acres of land that comprise the National Forest System. See 58 Fed. Reg. 19,369 (1993). Under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 (NFMA), the Secretary of Agriculture is required to "develop, maintain, and, as appropriate, revise land and resource management plans [LRMPs or forest plans] for units of the National Forest System." 16 U.S.C. 1604(a). LRMPs "establish the overall management direction for the forest unit for ten to fifteen years." *Sierra Club* v. *Robertson*, 28 F.3d 753, 755 (8th Cir. 1994). When an individual project (such as a timber sale) is proposed, the agency undertakes an individualized assessment of its likely environmental effects and renders a formal decision regarding it. See *id*. at 758; 53 Fed. Reg. 26,832 (1988); 58 Fed. Reg. 19,370-19,371 (1993).

The LRMP for the Ozark National Forest was issued in 1986, along with an environmental impact statement. 96-1994 Gov't C.A. Br. 6. The Ozark LRMP established management standards and guidelines for the 13 rivers and streams within the Forest that were eligible for possible inclusion in the WSRS as of 1986. *Ibid*. In response to the April 1992 addition of six streams in the Forest to the system, the Forest Service promulgated Amendment #7 to the Ozark LRMP in February 1994. *Id*. at 7. That amendment established interim direction for managing those streams to protect them while the

statutorily required procedures, including the preparation of WSRA comprehensive management plans, were being carried out. *Ibid.*

4. The instant case involves four timber sale projects in the Ozark National Forest. The projects were approved by the Forest Service between August 23, 1994, and September 12, 1995. See Pet. App. 2-3. Each of the projects is scheduled to occur on land outside the boundaries of the new WSRS components identified in September 1994. See *id.* at 4-5. Petitioners filed administrative appeals of the timber projects at issue. The Forest Service considered those appeals and affirmed the District Ranger's decision. 96-3463 Gov't C.A. Br. 10.

On October 30, 1995, petitioners filed suit under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, alleging that the Forest Service's approval of the four timber sales violated several statutes, including the WSRA and the MBTA. See Pet. App. 32. On March 12, 1996, petitioners moved for a preliminary injunction, arguing that the sales should not be permitted to go forward because the Forest Service had failed to adopt comprehensive management plans for any of the six Wild and Scenic Rivers in the Ozark National Forest within the time specified by the WSRA. *Ibid.*; see *id.* at 2-3.[3] The district court denied that motion. *Id.* at 13-14.

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[3] The comprehensive management plans were required to be completed "within 3 full fiscal years after the date of designation" of the six river segments, 16 U.S.C. 1274(d)(1)—*i.e.*, by September 30, 1995. In response to petitioners' request for preliminary injunctive relief, the government did not dis-pute that the comprehensive management plans had not been completed by the deadline, but

On June 18, 1996, petitioners filed a second motion for a preliminary injunction against the same timber sales, this time focusing on alleged violations of the MBTA. See Pet. App. 32. Petitioners contended that the sales were unlawful because the Forest Service had failed to obtain a Fish and Wildlife Service (FWS) permit authorizing the "taking" or "killing" of migratory birds that allegedly would result from the conduct of logging operations. See *id.* at 7; note 1, *supra*. On July 29, 1996, the district court denied petitioners' motion for a preliminary injunction on the ground that the court did not have subject-matter jurisdiction over the MBTA claim. Pet. App. 19-22.

5. The court of appeals affirmed the district court's denials of petitioners' motions for preliminary injunctive relief. Pet. App. 1-12.[4] The court first held that petitioners' WSRA claim was without merit, both because the Act "does not mandate completion of [comprehensive management] plans before timber sales may be approved," *id.* at 3, and because the four timber sales in question lay outside the boundaries of the WSRA river segments, see *id.* at 5. The court observed, in the latter regard, that, "[b]ecause the Forest Service may limit WSRA plans to lands lying within designated river segments, failure to timely prepare the Plans cannot be a basis for enjoining

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urged that an injunction against timber harvesting outside the WSRA corridors would be an improper remedy. The comprehensive management plans for the six new WSRA corridors were completed in October 1996 and have not been challenged.

[4] Petitioners' appeal from the district court's final judgment dismissing their claims is currently pending before the Eighth Circuit. See *Newton County Wildlife Ass'n* v. *Rogers*, No. 97-1852 (argued Dec. 10, 1997).

timber sales on lands lying outside any designated area." *Id.* at 6.

The court of appeals also rejected petitioners' claim under the MBTA.[5] The court expressed the view that the terms "take" and "kill" in 16 U.S.C. 703 "mean 'physical conduct of the sort engaged in by hunters and poachers'" rather than "conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds." Pet. App. 10 (quoting *Seattle Audubon Soc'y* v. *Evans*, 952 F.2d 297, 302 (9th Cir. 1991)).[6] The court also "agree[d] with the Forest Service that MBTA does not appear to apply to the actions of federal government agencies." *Ibid.* The court explained that the penalties imposed by the MBTA "apply to 'any person, association, partnership, or corporation,'" and that the term "person" is not typically construed to include the government.

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[5] With respect to the MBTA claim, petitioners appealed both from the district court's order denying preliminary injunctive relief and from a subsequent order granting partial summary judgment and dismissing the claim on the merits. See Pet. App. 7. Because it found the reasons for denying injunctive relief under the MBTA to be inextricably intertwined with the district court's subsequent order dismissing petitioners' MBTA claim, the court of appeals concluded that it had jurisdiction to consider petitioners' interlocutory appeal of the latter order, and it affirmed the dismissal. See *id.* at 12.

[6] That aspect of the court of appeals' decision is inconsistent with the position taken by the government in this case. The government argued that "the activities regulated by the MBTA are not limited to hunting," 96-3463 Gov't C.A. Br. 16, and that the prohibitions of the MBTA "extend to timber harvesting activities conducted by private individuals," *id.* at 17.

Ibid. (quoting 16 U.S.C. 707(a)). Finally, the court observed:

> [Petitioners'] real dispute is with the Fish and Wildlife Service, for that agency's failure to enforce MBTA against Forest Service timber sales in the manner [petitioners] desire[]. But [petitioners] ha[ve] not asserted that claim, which would run afoul of the * * * presumption that agency failure to take enforcement action is not subject to APA review. Whatever the reason the Fish and Wildlife Service does not require the Forest Service to obtain MBTA permits, this enforcement policy is committed to agency discretion and is not a proper subject of judicial review.

Id. at 11-12.

ARGUMENT

1. The court of appeals affirmed the denial of preliminary injunctive relief and purported to make a final disposition of petitioners' MBTA claim. See Pet. App. 12; note 5, *supra*. Petitioners' still-pending appeal from the final judgment entered by the district court in this case, however, presents a variety of statutory challenges to the timber sales at issue here. See note 4, *supra*. The pendency of those proceedings renders the case unsuitable for this Court's review at the present time. This Court generally will deny certiorari if the case is in an interlocutory posture. See, *e.g.*, *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) (this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Brotherhood of Locomo-*

tive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). Petitioners identify no overriding exigency that would justify a departure from this Court's usual practice.

2. The WSRA provides that the comprehensive management plan developed for each designated river segment "shall be coordinated with and may be incorporated into resource management planning for affected adjacent Federal lands." 16 U.S.C. 1274(d)(1). Petitioners contend (Pet. 10-17) that Section 1274(d)(1) required the Forest Service to "coordinate" the timber sales at issue here with the comprehensive management plans for the six new WSRS components, and that the courts below should have enjoined the sales based on the agency's failure to develop those plans by the statutory deadline. That claim is without merit.

Under the WSRA, the agency charged with the administration of each WSRS component must "establish detailed boundaries" for that component, 16 U.S.C. 1274(b), thereby "determining how much land adjacent to the river is included in the designation," Pet. App. 5. The agency is then required to "prepare a comprehensive management plan for such river segment to provide for the protection of the river values." 16 U.S.C. 1274(d)(1). Because the timber sales at issue in this case "lie outside the boundaries of the WSRA-designated river segments," Pet. App. 5, and because "WSRA plans need only encompass lands lying within a designated segment," *ibid.*, the court of appeals correctly held that the sales

could not properly be enjoined based on the Forest Service's failure to complete the plans in a timely fashion, see *id.* at 5-6.

The WSRA does require that the comprehensive management plans are to be coordinated with "resource management *planning* for affected adjacent Federal lands." 16 U.S.C. 1274(d)(1) (emphasis added). The Forest Service accomplishes that objective by coordinating the corridor plans with LRMPs developed under the NFMA (see p. 5, *supra*) for adjacent lands within the National Forest System.[7] Nothing in the WSRA requires that individual site-specific activities, such as timber sales, must be "coordinated" with the comprehensive management plans for adjacent river segments.[8]

3. Petitioners' MBTA claim is also without merit. As the court of appeals correctly recognized (Pet. App. 10), the MBTA's prohibition on unauthorized takings or killings of migratory birds does not apply to actions taken by the government itself. The Eighth Circuit's decision is consistent with that of the only other court of appeals to address the question. See *Sierra Club* v. *Martin*, 110 F.3d 1551,

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[7] We have been informed by the Forest Service that the LRMPs for the adjacent National Forest lands were amended in October 1996 to incorporate the corridor plans for the rivers at issue in this case, as specifically contemplated by Section 1274(d)(1).

[8] Contrary to petitioners' contention (Pet. 11), we do not agree that "timber sales are a form of 'resource management planning.' " A timber sale may properly be characterized as a form of resource management, but it is neither a plan nor a "form of * * * planning."

1556 (11th Cir. 1997) (Forest Service's approval of timber sales is not subject to the MBTA).[9]

The MBTA provides that "any person, association, partnership, or corporation" who violates the statute shall be subject to criminal penalties. 16 U.S.C. 707(a); see p. 4, *supra*. Although the statutory term "person" is undefined, this Court's decisions make clear that the word will ordinarily be construed to exclude the federal government. See *United States* v. *Cooper Corp.*, 312 U.S. 600, 604 (1941) ("Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it."); *id.* at 606 (Sherman Act's authorization for suits by or against "any person" held not to authorize suits by or against the United States); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (citing cases). Contrary to petitioners' contention (see Pet. 24), the pertinent FWS

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[9] Petitioners' reliance (see Pet. 18-20) on *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), and *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), is therefore misplaced. The Court in *Bowen* held that APA review of the government's Medicare reimbursement decisions was not precluded by the potential (though uncertain) availability of an alternative remedy in the Claims Court. See 487 U.S. at 902-908. In *Chrysler*, the Court held that APA review was available to determine whether contemplated disclosures of information by the government would violate the Trade Secrets Act, 18 U.S.C. 1905. See 441 U.S. at 317-319. The Court reached that conclusion, however, only after determining that Section 1905 applies to formal agency action (as well as to unauthorized actions taken by individual federal employees). See *id.* at 298-301. Neither of those cases suggests that the conduct of a federal agency may be reviewed under the APA, and declared to be "not in accordance with law," 5 U.S.C. 706(2)(A), if the "law" in question is inapplicable to actions taken by the federal government.

regulations support the conclusion that federal agencies are not subject to the MBTA. The class of "persons" prohibited from killing or taking migratory birds is defined in those regulations to include "any individual, firm, corporation, association, partnership, club, or private body, any one or all, as the context requires." 50 C.F.R. 10.12; see 50 C.F.R. 10.11 (scope of definitions).[10]

Contrary to petitioners' contention (Pet. 20-22), this Court's decisions in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), and *Andrus* v. *Allard*, 444 U.S. 51 (1979), do not compel reversal of the judgment below. In *Seattle Audubon*, the Court considered a constitutional challenge to Section 318(b)(6)(A) of the Department of the Interior and Related Agency Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 747 (1989). The Court upheld the provision, concluding that Section 318(b)(6)(A) had, for a one-year period, replaced the legal standards that would otherwise govern timber harvesting activities in the Pacific Northwest with alternative requirements contained in Section 318 itself. See 503 U.S. at 433, 438-439. One paragraph of the Court's opinion appears to assume that the Forest Service's conduct of timber harvesting operations would otherwise be subject to the requirements of the MBTA. See *id*. at 437-438. The coverage of the MBTA, however, simply was not at issue in the case. Rather, the question before the Court was whether the legal requirements and prohibitions—whatever they might be—to which federal land management agencies would

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[10] Compare 16 U.S.C. 1532(13) (term "person" in ESA is defined to include "any officer, employee, agent, department, or instrumentality of the Federal Government").

otherwise have been subject had permissibly been superseded by the provisions of Section 318.

Petitioners' reliance on *Andrus* v. *Allard* is also misplaced. The Court in *Andrus* held that the MBTA's prohibition on transportation or possession of migratory birds applied to bird parts obtained before the Act became applicable. See 444 U.S. at 59-60. The Court explained that, "[o]n its face, the comprehensive statutory prohibition is naturally read as forbidding transactions in all bird parts, including those that compose pre-existing artifacts"; that "nothing in the statute *requires* an exception for the sale of pre-existing artifacts"; and that "no such statutory exception can be implied." *Id.* at 60. Nothing in *Andrus* speaks to the question whether the MBTA applies to the activities of the federal government.[11]

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[11] Petitioners also contend that, even if the Forest Service is not a "person" subject to the MBTA in its own right, its "approval of timber sale contracts that require private purchasers to log migratory bird habitat during the nesting season despite the lack of any MBTA permits cannot be considered 'in accordance with law' under the APA." Pet. 23. Petitioners did not raise that argument in the courts below, and this Court therefore should not consider it. See, *e.g.*, *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1, 8 (1993). In any event, responsibility for enforcement and administration of the MBTA lies with the FWS, not with the Forest Service. The determination whether private companies harvesting timber in the National Forests must obtain MBTA permits is therefore entrusted to the FWS in the first instance. As the court of appeals recognized (see Pet. App. 11-12), the FWS's decision not to undertake an enforcement action in a particular instance would not be subject to APA review. See *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985).

Finally, contrary to petitioners' contention (Pet. 24-28), application of the MBTA to federal agencies is not necessary to ensure that the United States complies with its treaty obligations.[12] To the contrary, the MBTA goes further than the conventions require.[13] See *Andrus*, 444 U.S. at 62 n.18 ("[The Conventions] establish minimum protections for wildlife; Congress could and did go further in developing domestic conservation measures."). Moreover, other statutes that expressly apply to federal agencies furnish additional protection for migratory bird species that are protected by the conventions. Thus, the North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.*, requires each federal agency to cooperate with the FWS in "restor[ing], protect[ing], and enhanc[ing] the wetland ecosystems and other habitats for migratory birds." 16 U.S.C. 4408. The Endangered Species Act of 1973 imposes various obligations on federal agencies respecting endangered or threatened species, including a prohibition on "takings" of endangered species. See 16 U.S.C. 1531(a)(4), 1536, 1538. In managing the National Forest System pursuant to the NFMA, the Forest Service considers the likely impact of land management activities on existing species within the forests. See 36 C.F.R.

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[12] Petitioners do not appear to contend either that the timber sales at issue in this case would violate the international obligations of the United States, or that the treaties implemented by the MBTA would be judicially enforceable at the behest of a private party.

[13] For example, the 1916 Convention with Great Britain (on behalf of Canada) did not prohibit the possession of migratory bird parts without a permit, but the MBTA has done so since its original enactment in 1918. Compare Convention with Great Britain, Art. VI, 39 Stat. 1704 (1916) with 16 U.S.C. 703.

219.19 ("Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.").

Thus, a variety of statutory and regulatory requirements to which federal agencies are indisputably subject furnish protection to migratory birds. The MBTA is properly viewed as supplementing those provisions by regulating the activities of the nonfederal parties that the government would otherwise be unable to control. There is consequently no basis for petitioners' contention that the United States' ability to satisfy its international obligations will be compromised if the MBTA does not apply to federal agencies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1998