Nos. 98-926 and 98-1018

In the Supreme Court of the United States

OCTOBER TERM, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

CHOWCHILLA WATER DISTRICT AND MADERA IRRIGATION DISTRICT, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 3406(c)(1) of the Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4721-4722, which sets out a federal program concerning the reestablishment of flows in the San Joaquin River below the Friant Unit of the Central Valley Project, facially preempts the possible application of a California statute which provides that the owner of any dams shall allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dams.

2. Whether the Bureau of Reclamation, Department of the Interior, complied with consultation requirements of the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, in connection with the renewal of certain long-term water supply contracts for water from the Friant Unit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37)[1] is reported at 146 F.3d 1118. The district court's order of April 30, 1992, is reported at 791 F. Supp. 1425. The

[1] Unless otherwise noted, references to "Pet." and "Pet. App." are to the petition and appendix in No. 98-926.

district court's orders of October 12, 1993 (Pet. App. 38-88), May 3, 1995 (Pet. App. 89-137), January 16, 1997, and April 16, 1997, are unreported.

JURISDICTION

The court of appeals entered its judgment on June 24, 1998. Petitions for rehearing were denied on September 8, 1998. Pet. App. 138. The petitions for a writ of certiorari were filed on December 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation concerns the operations of the Friant Unit of the Central Valley Project (CVP), a federal reclamation project located in California and administered by the Bureau of Reclamation (Bureau), an agency within the Department of the Interior. The suit also involves the renewal of long-term contracts for the delivery of CVP water to water districts in the Friant Unit of the CVP (Friant Unit renewal contracts).

1. The construction of the CVP began under a presidential allocation of funds appropriated by the Emergency Relief Appropriation Act of 1935, ch. 48, 49 Stat. 115. The CVP was subsequently reauthorized by Section 2 of the Act of August 26, 1937, ch. 832, 50 Stat. 850.

This Court described the CVP's essential features and operations in *Dugan* v. *Rank*, 372 U.S. 609, 611-614 (1963); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279-287 (1958); and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 727-730 (1950). In brief, Friant Dam, situated above Gravelly Ford on the upper San Joaquin River in the southern Central Valley of California, impounds and stores the river's waters behind the dam in Millerton Lake. Since at least the early 1950s, virtually the entire flow of the river has

been diverted at the dam for storage of the water and for the delivery of water to CVP contractors via the Madera and Friant-Kern Canals, or directly from the lake, for beneficial use in the southern Central Valley area.

Prior to the Friant Unit's construction, various entities held water rights on the San Joaquin River downstream from Gravelly Ford. The United States agreed to provide substitute water to certain of those entities. See *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993). CVP facilities in the northern Central Valley store waters of the Sacramento, Trinity, and American Rivers. Those waters are released when needed and flow south down the Sacramento River to the Sacramento-San Joaquin Delta, east of San Francisco. The waters are then diverted from the Delta by the Tracy Pumping Plant for conveyance by the Delta-Mendota Canal to the canal's southern terminus at the Mendota Pool. That arrangement, however, leaves the stretch of the San Joaquin River between Gravelly Ford and the Mendota Pool essentially dewatered.

2. Beginning in the late 1940s, the Bureau, acting pursuant to Section 9(e) of the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1196, 43 U.S.C. 485h(e), entered into 40-year water service contracts to supply 28 entities with water from the Friant Unit. The contract with the Orange Cove Irrigation District (OCID) was the first of those contracts due to expire, on February 28, 1989. The Bureau therefore commenced contract renewal negotiations with the Friant contractors in June 1988. In November 1988, the Bureau announced completion of negotiations with OCID. The OCID contract was renewed in May 1989, after this litigation had been initiated. The Bureau

subsequently entered into 13 additional renewed long-term Friant Unit water service contracts. All 14 of those renewal contracts[2] provided for water delivery for 40-year periods in amounts essentially identical to those provided for by the previous contracts. See Pet. App. 10-11, 39.

3. The Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, Tit. XXXIV, 106 Stat. 4706 (Pet. App. 147-212), was signed into law on October 30, 1992, several years after this suit was filed. The CVPIA was enacted for the purpose, *inter alia*, of "achiev[ing] a reasonable balance among competing demands for use of [CVP] water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." CVPIA § 3402(f), 106 Stat. 4706 (Pet. App. 162).

Section 3404(c) of the CVPIA limits the renewal term of long-term renewal contracts that had not been previously renewed to a maximum period of 25 years. 106 Stat. 4708-4709 (Pet. App. 167). In addition, Section 3404(c)(1) provides that no 25-year renewal contract may be executed until after the completion of the environmental review required by, *inter alia*, CVPIA § 3409.[3] Pending the completion of that review, the

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[2] Those contracts are referred to as "renewal contracts" because the Act of July 2, 1956, ch. 492, 70 Stat. 483, 43 U.S.C. 485h, provides for "rights of renewal" for contracts issued under Section 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(e). The original Friant contracts were Section 9(e) contracts.

[3] CVPIA § 3409 states that "the Secretary shall prepare and complete a programmatic environmental impact statement * * * analyzing the direct and indirect impacts and benefits of implementing this title, including all fish, wildlife, and habitat restoration actions and the potential renewal of all existing Central Valley Project water contracts." 106 Stat. 4730 (Pet. App. 210).

Bureau is restricted to issuing initial interim renewal contracts of no more than three years, followed by successive interim renewal contracts of no more than two years. CVPIA § 3404(c)(1), 106 Stat. 4709 (Pet. App. 167-168).

Section 3406(b) of the CVPIA directs the Bureau to operate the CVP "to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act, 16 U.S.C. 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project." 106 Stat. 4714 (Pet. App. 178). The Bureau is also directed to develop and implement "a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991." CVPIA § 3406(b)(1), 106 Stat. 4714 (Pet. App. 178). Section 3406(b)(1) further provides, however, that "this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota Pool, for which a separate program is authorized under subsection 3406(c)." 106 Stat. 4714 (Pet. App. 178-179).

Under the "separate program" set out in CVPIA § 3406(c)(1), the Secretary is directed to

> develop a comprehensive plan, which is reasonable, prudent, and feasible, to address fish, wildlife, and habitat concerns on the San Joaquin River, including but not limited to the streamflow, channel, riparian habitat, and water quality improvements that would be needed to reestablish where necessary and to sustain naturally reproducing anadro-

> mous fisheries from Friant Dam to its confluence with the San Francisco Bay/Sacramento-San Joaquin Delta Estuary.

106 Stat. 4721 (Pet. App. 191-192). Section 3406(c)(1) further provides that the Secretary may not make releases from Friant Dam "as a measure to implement this title" absent further congressional authorization.[4] Finally, Section 3406(c)(1) establishes a special surcharge to be paid by purchasers of Friant Unit water, which will remain in effect until the flows necessary to meet the anadromous fish needs identified in the Section 3406(c)(1) plan are provided. 106 Stat. 4722 (Pet. App. 192).

4. Congress enacted the Endangered Species Act of 1973 (ESA) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species. See 16 U.S.C. 1533.[5] Section 7(a)(2)

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[4] The pertinent sentence states:

> During the time that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan, with or without modifications, the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases.

106 Stat. 4721 (Pet. App. 192).

[5] The Secretary of the Interior and the Secretary of Commerce share responsibility for listing species and for other ESA duties. See 16 U.S.C. 1532(15). The Secretary of the Interior implements the ESA through the Fish and Wildlife Service (FWS) with respect to the species under his jurisdiction. See 50 C.F.R.

of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, 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." 16 U.S.C. 1536(a)(2).

Regulations promulgated jointly by the two Secretaries furnish a structure for consultation. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b) and (c). Under the regulations, the agency proposing the action (the action agency) determines in the first instance whether a proposed action "may affect" a listed species. 50 C.F.R. 402.14. If the action agency determines that the proposed action "may affect" a listed species, it is then to enter into formal consultation with the FWS and/or NMFS (the wildlife agencies, see note 5, *supra*), unless the action agency has concluded through preparation of a biological assessment or informal consultation[6] that the action is not likely to adversely affect the listed species. *Ibid.* Following formal consultation, the wildlife agency issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of the listed species. 16 U.S.C.

17.11, 402.01(b). The National Marine Fisheries Service (NMFS) administers the ESA with respect to the species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.23(a), 227.4.

[6] Informal consultation is an optional process that includes all discussions between the action and wildlife agencies and that is "designed to assist the Federal agency in determining whether formal consultation * * * is required." 50 C.F.R. 402.13(a). If, as a result of the informal consultation process, the action and wildlife agencies mutually conclude that the contemplated action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated. 50 C.F.R. 402.13, 402.14(b).

1536(b); 50 C.F.R. 402.14. If the wildlife agency concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A). Section 7(d) of the ESA provides that, after the initiation of consultation, the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. 1536(d).

The FWS is the wildlife agency with jurisdiction over various non-marine listed species that are present in the vicinity of the Friant Unit. The Bureau began informal consultation (see note 6, *supra*) with the FWS in 1988 when Friant Unit contract renewal negotiations were underway, and commenced formal consultation with the FWS in May 1991. The FWS issued a "no jeopardy" biological opinion on October 15, 1991. By then, the Bureau had already executed ten Friant Unit renewal contracts. Pet. App. 21, 113-114.

NMFS is the wildlife agency with jurisdiction over listed anadromous fish species occurring in the Sacramento and San Joaquin river and estuary system. In August 1989, NMFS listed the Sacramento River winter-run chinook salmon as a threatened species, which listing was subsequently changed to endangered. Pet. App. 108 n.18. The Bureau determined that the renewal of the Friant Unit contracts would not adversely affect the winter-run chinook, and it requested NMFS's concurrence in that determination. See *id.* at 19, 127-128.

On November 1, 1991, NMFS advised the Bureau that it disagreed with the Bureau's "no adverse effect" conclusion. See Pet. App. 229. NMFS further advised

(see *id.* at 229-231), however, that formal consultation regarding the impact of the renewal of the Friant Unit contracts on the winter-run chinook salmon was unnecessary because the effects of the Friant Unit operations could be addressed in the context of a broader ongoing consultation process encompassing CVP operations generally.[7] On February 14, 1992, NMFS issued a biological opinion addressing the impacts of CVP operations in 1992. See *id.* at 215-228. The biological opinion concluded "that the proposed 1992 operation of the CVP by the Bureau is likely to jeopardize the continued existence of Sacramento River winter-run chinook salmon." *Id.* at 218-219. The opinion therefore identified "reasonable and prudent alternatives" by which, in NMFS's view, the 1992 CVP operations could

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[7] NMFS's November 1, 1991, letter stated in part (Pet. App. 229-230):

> While we disagree with the Bureau's determination that renewal of [the] Friant contracts are [*sic*] not likely to affect winter-run adversely, for the reasons discussed below, we do not believe a formal consultation on Friant contract renewals is necessary.
>
> While the Friant division of the [CVP] is remote from the winter-run chinook in the Sacramento River, the interrelated export of Sacramento River water through the Delta Mendota Canal does adversely affect the winter-run of chinook salmon. This diversion contributes to the entrainment of winter-run juveniles into the delta through the delta cross channel and other channels that lead to the Federal pumps at Tracy, California. * * * However, the issue of delta exports is being addressed in our ongoing consultation on the CVP (see the Bureau's request for consultation on the CVP, dated April 11, 1991) and we believe this will allow us to address the adverse impacts from activities interrelated to the renewal of the Friant contracts.

be modified to avoid jeopardizing the salmon. *Id.* at 219-228.

5. The Natural Resources Defense Council and others (collectively NRDC) initiated this litigation in December 1988. NRDC alleged that the Bureau intended to renew Friant Unit contracts without satisfying the requirements of Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). Affected Friant Unit renewal contractors, including petitioners, intervened as defendants. See Pet. App. 12, 39-40. The district court denied NRDC's request for a preliminary injunction barring the Bureau from renewing the contracts, and the Bureau renewed the 14 contracts at issue here. *Id.* at 12.

NRDC subsequently amended its complaint to allege violations of ESA § 7(a)(2), 16 U.S.C. 1536(a)(2). NRDC further alleged that Section 8 of the Reclamation Act of 1902, 43 U.S.C. 372, 383, which generally requires the Bureau to comply with state laws relating to the control, appropriation, use, and distribution of water used in irrigation, see *California* v. *United States*, 438 U.S. 645 (1978), makes Section 5937 of the California Fish and Game Code (West 1998) applicable to the operations of the Friant Unit.[8] Section 5937 requires owners

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[8] Section 8 states:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from

of dams to allow sufficient water to pass to keep in good condition any fish that may be planted or exist below the dams.[9]

The Bureau and the Friant Unit renewal contractors moved to dismiss the Section 8/Section 5937 claim, asserting that Section 5937 falls outside of the ambit of Section 8 of the Reclamation Act. The district court denied that motion on April 30, 1992. *Natural Resources Defense Council* v. *Patterson*, 791 F. Supp. 1425 (E.D. Cal.). After the CVPIA was signed into law on October 30, 1992, the Bureau and the Friant contractors again moved for dismissal of the Section 8/Section 5937 claim. They asserted, *inter alia*, that CVPIA § 3406(c)(1), on its face, preempts any possible application of Section 5937 to the Friant Unit's opera-

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> any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

Act of June 17, 1902, ch. 1093, 32 Stat. 390 (codified at 43 U.S.C. 372, 383).

[9] Section 5937 provides:

> The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway.

tions. The district court rejected that argument and denied the motions to dismiss. See Pet. App. 38, 62-88.

The parties subsequently filed cross-motions for summary judgment on the NEPA and ESA issues. The district court ruled on those motions on May 31, 1995. See Pet. App. 89-137. The court found no NEPA violation. See *id.* at 92-107. The court concluded, however, that the Bureau's renewal of the relevant contracts violated the ESA because the Bureau had not adequately discharged its obligation to consult with the wildlife agencies regarding the effects of those renewals on listed species. See *id.* at 113-130.

With respect to the species falling within the jurisdiction of the FWS, the district court held that the Bureau had violated ESA § 7(a)(2), 16 U.S.C. 1536(a)(2), by renewing nine of the Friant Unit contracts before the date (October 15, 1991) when the FWS issued its "no jeopardy" biological opinion. Pet. App. 113-126.[10] The court likewise concluded (*id.* at 119-121) that the execution of those nine contracts during the pendency of consultation constituted an "irreversible or irretrievable commitment of resources" in violation of ESA § 7(d), 16 U.S.C. 1536(d). The court also held (Pet. App. 119-125) that the post-contracting completion of the

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[10] The Bureau had executed a total of ten Friant Unit renewal contracts at the time that the FWS issued its biological opinion. See p. 8, *supra*. As to one of those contracts, the Bureau had completed informal consultation with the FWS before the date of contract execution. Insofar as that contract was concerned, the district court found no violation of the ESA with respect to the species falling within the FWS's jurisdiction. Pet. App. 125-126. The court ordered that contract rescinded, however, on the ground that the Bureau had failed to pursue formal consultation with NMFS regarding the listed salmon species. *Id.* at 126-130; see p. 13, *infra*.

FWS consultation did not render the issue moot, since the court could enter effective relief by ordering rescission of the renewal contracts.

The district court also held (Pet. App. 128-130) that the Bureau had violated the ESA by failing to complete consultation with NMFS with respect to the winter-run chinook salmon. The court observed (*id.* at 128) that NMFS had refused to concur in the Bureau's determination that the contract renewals would not adversely affect the listed salmon species. In light of that non-concurrence, the court held, the Bureau could not properly rely on NMFS's contemporaneous statement that formal consultation on the contracts was unnecessary. *Id.* at 130. The court concluded that "[b]ecause all contracts at issue were executed without completed NMFS consultation, they are procedurally invalid." *Ibid.* In a subsequent order dated January 16, 1997, the district court (a) ordered rescission of all 14 renewal contracts on ESA grounds, and (b) held that the Section 8/Section 5937 claim was not ripe for decision and dismissed that claim. See *id.* at 13.

6. The Friant Unit renewal contractors appealed, challenging the district court's decision to set aside the renewal contracts on ESA grounds, as well as that court's resolution of the CVPIA facial preemption issue. NRDC appealed from the dismissal of its Section 8/Section 5937 claim and from the district court's NEPA ruling. The Bureau did not appeal. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1-37.

a. The court of appeals held (Pet. App. 18-21) that because NMFS had declined to concur in the Bureau's determination that the contract renewals were not likely to affect adversely the winter-run chinook, the Bureau had violated the ESA by renewing the con-

tracts without requesting a formal consultation. The court found that the Bureau had acted arbitrarily and capriciously in relying upon NMFS's view that formal consultation addressing the contract renewals was not required. The court explained:

> The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species, and the NMFS letter clearly disagreed with the agency's determination of no adverse impact. Under those circumstances, regardless of the NMFS position that a formal consultation was "unnecessary," the Bureau had a clear legal obligation to at least request a formal consultation. The reason that the NMFS gave for stating that a consultation was unnecessary was not supported by statute or regulation and had no rational relationship to the Bureau's independent obligations to ensure that its proposed actions were not likely adversely to affect the salmon.

Id. at 20 (citations omitted).

b. The court of appeals next found (Pet. App. 21) that "the Bureau also failed to follow its obligations under [the ESA] with respect to its consultation with the FWS" by entering into nine renewal contracts prior to the issuance of the FWS biological opinion. The court upheld the district court's determination that the Bureau's execution of the contracts before the completion of the consultation process violated ESA § 7(d), 16 U.S.C. 1536(d). Pet. App. 22-23. The court of appeals held that NRDC's challenge to the premature execution of the renewal contracts was not rendered moot by the subsequent issuance of the FWS biological opinion finding that no jeopardy would result from the contract renewals, since the district court could enter

effective relief by ordering that those renewal contracts be rescinded. *Id.* at 23-25. The court further "conclude[d] that the district court's decision to rescind the contracts was not an abuse of discretion." *Id.* at 26.

The court ended its ESA analysis by discussing the particular situations presented by certain individual renewal contracts. The court found that the special circumstances concerning the various individual contracts did not serve to distinguish any one of them from the other contracts for ESA purposes. See Pet. App. 26-30. In light of its disposition of the ESA issues, the court held that it need not resolve NRDC's NEPA claim. See *id.* at 30-31.

c. The court of appeals held that the district court had erred in finding that the NRDC's Section 8/Section 5937 claim was not ripe for adjudication. Pet. App. 31-32. The court then concluded (*id.* at 33-34) that CVPIA § 3406(c)(1) does not, on its face, preempt the possible application of Section 5937 to the operations of the Friant Unit. The court found "no clear directive in the CVPIA which preempts the application of § 5937 if the state law could be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below the Friant dam in a manner that is 'reasonable, prudent, and feasible.'" *Id.* at 33-34. The court concluded its discussion by stating (*ibid*):

> The district court, as the Bureau points out, never explicitly ruled that § 5937 applied to the Friant dam. There are several other issues that the district court did not address. For example, the district court did not determine whether § 5937 is applicable to the Friant dam under state law. It is preferable to determine whether the state law applies before reaching a determination that state

law has been preempted. The district court also did not reach the issue of whether the actual application of § 5937 is inconsistent with the CVPIA. It has yet to be determined how much water release would be required under § 5937 and whether that would be consistent with the CVPIA. We remand these issues to the district court for a determination on the merits.

ARGUMENT

The decision below satisfies none of the usual criteria that this Court applies in determining whether to exercise its certiorari jurisdiction. There is no conflict among the courts of appeals, the issues presented are unlikely to recur with any frequency, and the case is still in an interlocutory posture. The petitions for a writ of certiorari should be denied.

1. Petitioners seek review (Pet. 12-20; 98-1018 Pet. 16-30) of the question whether CVPIA § 3406(c)(1) facially preempts the possible application of Section 5937 of the California Fish and Game Code (West 1998), through Section 8 of the Reclamation Act, to the operations of the Friant Unit. At least in its current posture, that question does not warrant this Court's review.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see also, *e.g.*, *Brotherhood of Locomotive Firemen* 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"). At present, the question whether Friant Unit operations are subject to Section 5937 of

the California Fish and Game Code is not ripe for resolution by this Court. The court of appeals rejected petitioners' contention that CVPIA § 3406(c) (1) on its face precludes the application of Section 5937 to the Friant Unit. Pet. App. 33-34. In remanding the case to the district court, however, the court of appeals left open the questions (a) whether Section 5937 applies to the Friant dam as a matter of California law, and (b) if so, whether application of that Section to the Friant Unit is inconsistent with the overall CVPIA scheme and therefore preempted. *Id.* at 34. If either of those issues is resolved favorably to petitioners, the question whether CVPIA § 3406(c)(1) on its face preempts the application of Section 5937 to the Friant Unit will be of no practical significance. Review by this Court would accordingly be premature.

2. Petitioners contend (see Pet. 20-22, 27-29) that the courts below erred in ordering rescission of nine of the Friant Unit renewal contracts on the ground that the contracts were executed before the FWS issued its biological opinion. Although we disagree with that aspect of the court of appeals' decision, we do not believe that the issue warrants review by this Court.

a. This Court has repeatedly emphasized that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982). Rather, "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or

withholding of the requested relief." *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987).

Well before the district court rendered its decision in this case, the FWS issued a biological opinion stating that renewal of the pertinent contracts would not jeopardize the continued existence of species falling within that agency's jurisdiction. Neither of the courts below cast doubt upon the adequacy of that biological opinion. Absent any showing that renewal of the contracts would result in harm to listed species, the rescission remedy ordered by the district court and affirmed by the court of appeals was inappropriate. Compare *Village of Gambell*, 480 U.S. at 544 (vacating grant of injunctive relief and noting that the court of appeals "erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect").

We do not believe, however, that this aspect of the court of appeals' decision warrants further review. Although the district court ordered rescission of the contracts previously executed between petitioners and the Bureau, it did not enjoin the parties from executing new contracts for Friant Unit water. The Department of the Interior informs us that the Friant contractors whose 40-year renewal contracts were rescinded in this litigation are currently receiving water under interim contracts issued pursuant to CVPIA § 3404(c)(1), as are the additional 14 Friant contractors whose contracts were not renewed prior to the passage of the CVPIA. Nor, contrary to petitioners' contention (see Pet. 28), did the court of appeals announce a per se rule mandating the rescission of a contract or lease whenever the relevant federal agency fails to comply in a timely fashion with applicable procedural requirements. The court held only that under the circumstances of this

case, "the district court's decision to rescind the contracts was not an abuse of discretion." Pet. App. 26. Particularly in light of the limited practical impact of the rescission remedy in the circumstances of this case, that fact-specific holding does not warrant this Court's review.[11]

b. Petitioners also contend (Pet. 20-23) that the issuance of the FWS biological opinion rendered NRDC's ESA claim moot. In our view, the mootness inquiry is essentially derivative of the remedial issue discussed above. If rescission of the pertinent contracts was inappropriate, then completion of the consultation process did effectively render moot any controversy as to the propriety of the pre-completion execution of those contracts. If (as the courts below held) rescission remained an appropriate remedy even after the FWS biological opinion was issued, then issuance of that opinion could not be thought to have rendered the question moot. In either event, petitioners' mootness argument adds nothing of substance to their contention that the district court improperly ordered the contracts rescinded.[12]

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[11] NRDC asserted, as a separate ESA claim, that the biological opinion issued by the FWS in 1991 was inadequate. The courts below found it unnecessary to address that issue in light of their determination that rescission of the contracts was an appropriate remedy for the untimeliness of the FWS consultation. See Pet. App. 25 n.8, 132. As we explain above, we disagree with that determination. We note, however, that if this Court were to grant the petition for a writ of certiorari and reverse that holding, the result would not be to terminate the controversy regarding the FWS consultation process. Rather, such a decision would likely lead to further litigation concerning the adequacy of the 1991 biological opinion.

[12] Contrary to petitioners' contention (Pet. 21-22), the court of appeals' decision in this case does not conflict with the decisions in

3. Petitioners contend (Pet. 23-24) that the courts below erred in ordering rescission of all 14 of the Friant Unit renewal contracts on the additional ground that the Bureau breached its ESA obligations with respect to the winter-run chinook salmon. We agree that the Ninth Circuit's analysis on that point was also mistaken, but we do not believe that the error warrants this Court's review.

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the 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." 16 U.S.C. 1536(a)(2). That provision does not, however, speak to the *manner* in which ESA consultation must be conducted. In particular, Section 7(a)(2) does not suggest that the action and wildlife agencies are required to engage in a

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Southern Utah Wilderness Alliance v. *Smith*, 110 F.3d 724, 727-729 (10th Cir. 1997), and *Sierra Club* v. *Glickman*, 156 F.3d 606, 618-620 (5th Cir. 1998). In each of those cases, the only relief sought for the alleged procedural violation was an order directing the relevant federal agency to engage in consultation with the FWS. Under those circumstances, the Fifth and Tenth Circuits held that completion of the consultation processes rendered the controversies moot, since after consultation was completed the courts lacked the ability to award meaningful relief. See *Sierra Club*, 156 F.3d at 619 (issue was moot since "there is no relief that can be obtained from this court"); *Southern Utah*, 110 F.3d at 728 (plaintiff "does not explain how an injunction ordering another round of consultation would provide any meaningful relief"). Those decisions have no bearing on the instant case, where the court of appeals' resolution of the mootness issue was expressly based on its determination that an additional remedy (rescission of the contracts) remained available.

separate consultation process for each discrete agency "action." Rather, insofar as Section 7(a)(2) may be said to impose a "procedural" obligation on federal action agencies, that obligation is simply to engage in consultation at such time and in such manner as is necessary to "insure" that the agency's activities are not likely to jeopardize the continued existence of any listed species. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) ("this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments").

In the instant case, NMFS concluded that consultation specifically directed to the Friant Unit contracts was unnecessary because any indirect adverse effects of Friant Unit contract renewals on the listed salmon could adequately be addressed in a larger ongoing consultation on the CVP as a whole. Pet. App. 230; see note 7, *supra*. In our view, that determination was well within NMFS's considerable range of discretion. In light of that determination by the wildlife agency having jurisdiction over the listed salmon species, the Bureau did not behave arbitrarily in declining to make further efforts to initiate formal consultation with respect to the contracts themselves.[13]

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[13] For the foregoing reasons, we believe that NMFS and the Bureau could permissibly agree to consider the effects of Friant Unit operations on the listed salmon within the context of the overall CVP operations, rather than in a separate consultation directed at the Friant contracts themselves. Petitioners suggest (Pet. 9, 20) that a biological opinion issued by NMFS on February 14, 1992 (Pet. App. 215-228) adequately addressed the effects on the salmon of the pertinent Friant renewal contracts. That opinion

We do not believe, however, that the court of appeals' contrary ruling warrants review by this Court. The court of appeals did not purport to issue any broad pronouncement concerning the nature of the procedural obligations imposed by the ESA. Nor does the court's holding conflict with any decision issued by this Court or by another court of appeals. Further review of this fact-specific question is not warranted.

4. Petitioners contend (Pet. 25-27) that the court of appeals erred in applying ESA § 7(d) to the Bureau's consultation with FWS. Section 7(d) provides that, after the initiation of consultation between the action and wildlife agencies, the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. 1536(d). Petitioners assert that the restrictions of Section 7(d) apply only after the initiation of consultation (Pet. 25-26); that, under the applicable regulations, "consultation begins when an agency requests a list of species that may be present in the proposed action area" (Pet. 26); and that "consultation in this case, for purposes of Section 7(d), began on April 13, 1988, not May 22, 1991, as the Ninth Circuit concluded" (Pet. 27).

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stated, however, that "NMFS and the Bureau agreed that this initial consultation would include only CVP operations in 1992, but consultation would continue on the long-term impacts, and a new opinion would be issued for future operations." *Id.* at 217. We are informed by the Department of the Interior that on February 12, 1993, NMFS issued a biological opinion that addressed the Bureau's long-term operation of the CVP. Neither of the courts below addressed that biological opinion.

The court of appeals, however, did not hold that the "consultation" commenced for ESA § 7(d) purposes on May 22, 1991—it merely observed (correctly) that "[f]ormal consultation was requested on May 22, 1991." Pet. App. 21. In any event, petitioners do not explain how an *earlier* "initiation of consultation" date could work to their advantage here. Indeed, petitioners maintain (Pet. 26) that Section 7(d) "imposes restrictions on agency action that do not exist before the initiation of consultation."[14] If, as petitioners maintain, the Bureau's ability to act became more restricted once consultation with FWS had been initiated, then an earlier "initiation of consultation" date could not possibly change any aspect of this litigation to petitioners' advantage. Accordingly, the ESA § 7(d) question does not warrant review by this Court.[15]

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[14] The initial Friant Unit renewal contract was executed in May 1989, after consultation had been initiated by the Bureau's request to FWS for a species list. See Pet. App. 26-29, 113. Hence, this case does not concern what effects, if any, ESA § 7(d) may have with respect to agency commitments of resources undertaken prior to the initiation of consultation.

[15] Petitioners in No. 98-1018 raise a variety of claims unique to the circumstances of petitioners Chowchilla Water District and Madera Water District. See 98-1018 Pet. 30-38. Those claims raise no issues of general importance warranting this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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