No. 05-782

In the Supreme Court of the United States

NEBRASKA PUBLIC POWER DISTRICT,
CROSS-PETITIONER

v.

UNITED STATES FISH AND WILDLIFE SERVICE,
ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Fish and Wildlife Service reasonably determined that, for purposes of evaluating whether the Army Corps of Engineers' actions in managing the waters of the Missouri River Basin were likely to result in "jeopardy" of a listed species or "adverse modification" of its critical habitat under the Endangered Species Act, 16 U.S.C. 1536(a)(2), the "environmental baseline" of the Corps' operations was the operation of preexisting dams without flow controls.

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The opinion of the court of appeals (05-631 Pet. App. 1a-28a) is reported at 421 F.3d 618. The memorandum and order of the district court (05-631 Pet. App. 29a-77a) is reported at 363 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari in No. 05-631, *Environmental Defense* v. *United States Army Corps of Engineers*, was filed on November 14, 2005. This conditional cross-petition for a writ of certio-

rari was filed on December 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of lawsuits filed by various States and other entities concerning the operation of dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. In the action that is the subject of the petition for a writ of certiorari in No. 05-631, several environmental groups alleged that the actions of the Corps and the Fish and Wildlife Service (FWS) in the Department of the Interior violated the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* In the claims that are the subject of this conditional cross-petition, cross-petitioner contended that FWS used an erroneous "environmental baseline" in evaluating the Corps' actions for purposes of the ESA. The district court granted summary judgment to the federal defendants on all of the above claims. 05-631 Pet. App. 29a-77a. The court of appeals affirmed in relevant part. *Id.* at 1a-28a.

The factual background of this case is generally set forth in the statement in the brief of the federal respondents in opposition to the petition for a writ of certiorari in No. 05-631. The following statement provides additional facts relevant to the conditional cross-petition.

1. The Endangered Species Act provides that a federal agency, in consultation with the responsible agency (here, the Fish and Wildlife Service), must ensure that any action it takes 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" which is designated as "critical." 16 U.S.C. 1536(a)(2). At the conclusion of its consultation, the responsible agency must produce a biological opinion in which it determines whether the agency action is likely to result in "jeopardy" or "adverse modification," and, if so, whether there are "reasonable and prudent alternatives" (RPAs) that the consulting agency could undertake to mitigate the impact of its action on the affected species. 16 U.S.C. 1536(b)(3)(A); 50 C.F.R. 402.14.

The Corps' management of the Missouri River Basin affects several endangered or threatened species, three of which are at issue here: the pallid sturgeon, an endangered fish; the least tern, an endangered migratory bird; and the piping plover, a threatened migratory bird. In 2000, pursuant to the ESA, the Corps consulted with FWS concerning the effects of its Missouri River operations on the three species at issue. In 2000, FWS issued a biological opinion in which it concluded that the Corps' management plan was likely to jeopardize the continued existence of the three species. In issuing its opinion, FWS was required to evaluate "the effects of the action," which are defined by regulation as "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." 50 C.F.R. 402.02. The "environmental baseline," in turn, is defined as "includ[ing] the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone * * * consultation [under 16 U.S.C.

1536], and the impact of State or private actions which are contemporaneous with the consultation in process." 50 C.F.R. 402.02. In preparing its opinion, FWS used as its environmental baseline a so-called "run-of-the-river" baseline, in which it assumed that the preexisting dams were operating, but without flow controls (*i.e.*, with the floodgates wide open). 05-631 Pet. App. 5a-8a, 18a; C.A. App. 10111-10115, 10117-10128.

Because FWS concluded in the 2000 biological opinion that the Corps' management plan was likely to jeopardize the continued existence of the three species, it identified in that opinion a reasonable and prudent alternative that the Corps could undertake to reduce the impact of its action on the species. Specifically, FWS proposed that the Corps increase river flows in the spring and decrease river flows in the summer, and also proposed a variety of other changes to the Corps' management plan. In 2003, however, because of the ongoing drought in the Missouri River Basin, the Corps concluded that it was unable to implement the flow changes mandated by the 2000 biological opinion. The Corps therefore reinitiated consultation with FWS pursuant to the ESA. As a result, FWS issued a supplemental biological opinion, using the same environmental baseline, in which it ratified the Corps' proposal to suspend the flow changes for the period from May 1 to August 15, 2003. 05-631 Pet. App. 7a.

2. In February 2003, various environmental groups, including petitioners in No. 05-631, filed suit against the federal respondents in the United States District Court for the District of Columbia, challenging FWS's issuance of the supplemental biological opinion. The district court granted a preliminary injunction, reasoning that the plaintiffs were likely to succeed on their claim, *inter*

alia, that FWS had failed sufficiently to explain why it had abandoned its earlier conclusion that flow changes were necessary to protect the species at issue. *American Rivers* v. *United States Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 255-257, 262 (D.D.C. 2003).

Cross-petitioner operates power plants in Nebraska, some of which use water from the Missouri River for cooling purposes. Cross-petitioner intervened as a defendant in the *American Rivers* litigation, opposing the plaintiffs' efforts to challenge FWS's 2003 supplemental biological opinion (and therefore to resurrect the preexisting restrictions on summer river flows). Cross-petitioner also filed a cross-claim against the federal respondents, contending, *inter alia*, that the Flood Control Act of 1944 (FCA), ch. 665, 58 Stat. 887, required the Corps to operate the Missouri River Main Stem System primarily for flood control and navigation, and that the Corps therefore lacked the discretion to implement any alternative that restricted river flows. Answer and Proposed Cross-Claim 26.

The Judicial Panel on Multidistrict Litigation subsequently consolidated the *American Rivers* litigation with other litigation involving the management of the Missouri River Basin before a single court in the District of Minnesota for pretrial proceedings. *In re Operation of the Missouri River Sys. Litig.*, 277 F. Supp. 2d 1378, 1379 (2003).

3. In November 2003, the Corps again reinitiated consultation with FWS pursuant to the ESA, based on new information the Corps had developed since the 2000 biological opinion. The Corps proposed a new set of changes that did not include the flow changes specified in the 2000 opinion. Later in 2003, in light of the new information, FWS issued an amended biological opinion,

using the same environmental baseline, with a revised RPA. In the amended opinion, FWS again proposed that the Corps decrease summer river flows, but stated that it would reconsider that requirement if the Corps constructed new shallow-water habitat for the pallid sturgeon. In 2004, the Corps issued a revised version of its Master Manual, the plan governing its operation of the Main Stem System, in which it indicated that, under certain circumstances, it was prepared to reduce or eliminate support for downstream navigation. 05-631 Pet. App. 8a, 29a; C.A. App. 6108-6134, 6626-6922, 7241-7246, 8568-8569, 9764-9800; C.A. Supp. App. 1, 49-51.

In the wake of those developments, cross-petitioner amended its claims in the now-consolidated litigation. Cross-petitioner renewed its claim that the FCA imposed a non-discretionary duty on the Corps to operate the Main Stem System primarily for flood control and navigation (and therefore to maintain flow levels sufficient for navigation). Second Amended Cross-Claim 17-18. Cross-petitioner also alleged, *inter alia*, that FWS had erred in issuing its initial biological opinion in 2000 by "measur[ing] the effects of the Corps' proposed action against an improper environmental baseline." *Id.* at 19.

4. The district court granted the federal defendants' motion for summary judgment on cross-petitioners' claims. 05-631 Pet. App. 33a-37a, 39a, 49a-50a. With regard to the FCA claim, the court reasoned that "the FCA does not impose a non-discretionary duty to maintain minimum navigation flows or season lengths" and concluded that "prioritization of river interests is discretionary." *Id.* at 35a. With regard to the claim concerning FWS's selection of the environmental baseline, the court noted that cross-petitioner's contention was that

"the environmental baseline used in the 2003 [amended opinion] is improper because it fails to include non-discretionary operations such as minimum flow levels." *Id.* at 49a. Because the court had concluded, with regard to cross-petitioner's FCA claim, that "the Corps does not have a non-discretionary duty to maintain minimum water flows," it likewise concluded that cross-petitioner's claim concerning the appropriate environmental baseline lacked merit. *Ibid.*

5. On appeal, cross-petitioner renewed its contentions that the Corps has a non-discretionary duty to support flood control and navigation over other uses of the Main Stem System and that, for that reason, FWS should have included existing operations in determining the environmental baseline. Cross-Pet. C.A. Br. 26-31; Cross-Pet. C.A. Reply Br. 6-16.

The court of appeals affirmed in relevant part. 05-631 Pet. App. 1a-28a. As is pertinent here, the court of appeals agreed with the district court that "the FCA imposes no duty to maintain a minimum level of downstream navigation independent of consideration of other interests." *Id*. at 11a. And with regard to cross-petitioner's argument concerning FWS's selection of the environmental baseline, the court of appeals agreed with the district court that "this argument is essentially a different twist on the argument that the Corps has no discretion in operating the reservoir system." *Id.* at 18a. The court recognized that, "[i]f the FCA mandated that the Corps must manage the system to enable, for example, a barge of specific size riding a specific depth below the waterline to navigate the river between Sioux City and the Mississippi River at all times between April 1 and December 1, there would be some merit to including that non-discretionary condition in the environmental

baseline along with the permanent physical presence of the dams and channel modifications." *Id.* at 18a-19a. The court concluded, however, that "we cannot say that it was arbitrary and capricious for FWS not to include a specific operational profile in the environmental baseline." *Id.* at 19a.

ARGUMENT

Cross-petitioner contends (Cross-Pet. 13-19) that the court of appeals erred by rejecting its challenge to FWS's determination of the "environmental baseline" for purposes of preparing its biological opinions pursuant to ESA. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Even if the petition in No. 05-631 were to be granted, therefore, the conditional cross-petition should be denied.

1. The court of appeals rejected cross-petitioner's contention that the Corps has a non-discretionary duty to support flood control and navigation over other uses of the Main Stem System (and that FWS therefore should have included existing operations in determining the "environmental baseline" under 50 C.F.R. 402.02). 05-631 Pet. App. 18a-19a. As cross-petitioner concedes (Cross-Pet. 17), "[t]here is no dispute * * * that the Eighth Circuit decided an issue of first impression." Although cross-petitioner correctly notes (Cross-Pet. 14) that there are a large number of cases in which federal agencies are required to engage in consultation under 16 U.S.C. 1536 (and in which an agency such as FWS is therefore required to select an environmental baseline), cross-petitioner does not identify a single decision of another court of appeals in which FWS's selection of the environmental baseline has been questioned—much

less on a ground similar to that advanced by cross-petitioner below.

Instead, cross-petitioner merely contends (Cross-Pet. 18-19) that FWS defined the environmental baseline in this case differently than did the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA Fisheries) in issuing a biological opinion concerning the Federal Columbia River Power System. Even assuming, however, that cross-petitioner's characterization of NOAA Fisheries' reasoning in its Columbia River biological opinion is correct, a federal district court, in an unpublished opinion, subsequently *rejected* that reasoning. See *National Wildlife Fed'n* v. *National Marine Fisheries Serv.*, No. 01-CV-640, 2005 WL 1278878, at *13 (D. Or. May 26, 2005). The government has appealed the decision in that case, and that appeal has not yet been briefed or argued in the Ninth Circuit. There is no reason for this Court to depart from its ordinary practice of awaiting a conflict in the circuits before granting review.

2. In any event, the court of appeals correctly rejected cross-petitioner's argument that FWS should have included existing operations in determining the "environmental baseline" under 50 C.F.R. 402.02. Specifically, the court of appeals correctly recognized that a necessary premise of cross-petitioner's argument is that the Corps had no discretion in its management of the Main Stem System. 05-631 Pet. App. 18a. And the court of appeals correctly rejected that premise, on the ground that (as it recognized in its earlier opinion in *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1027 (8th Cir. 2003), cert. denied, 541 U.S. 987 (2004)) the Corps in fact has a "good deal of discretion" in operating the Main Stem System. 05-631 Pet. App. 19a.

Cross-petitioner does not challenge that determination before this Court.[1] Instead, cross-petitioner recasts its argument, contending that FWS erred by failing to use a "baseline of existing operations" (regardless of whether it has a non-discretionary duty to support flood control and navigation over all other uses), and suggesting that, if existing operations were included in the environmental baseline, FWS would have been required to issue a biological opinion stating that the Corps' action was *not* likely to result in "jeopardy." Cross-Pet. 12.[2] Cross-petitioner, however, simply ignores the fact that, even assuming that existing operations were included in the environmental baseline, FWS would still be required to assess whether the proposed *future* action of the consulting agency—here, the Corps—would have the effect of jeopardizing the continued existence of an endangered or threatened species. See, *e.g.*, 16 U.S.C.

[1] In No. 05-611, the States of North Dakota and South Dakota have filed their own petition for a writ of certiorari, challenging language in the court of appeals' opinion suggesting that the abandonment of navigation *altogether* would violate the FCA. That contention is quite different from, and far more limited than, the proposition that the Corps must *always* give priority to navigation and flood control over all other potential uses of Missouri River waters in its day-to-day operations of the Main Stem System.

[2] As cross-petitioner notes (Cross-Pet. 9), the court of appeals did not pass on this argument—perhaps because cross-petitioner did not discretely advance it until its reply brief. See Cross-Pet. C.A. Reply Br. 16-18; cf. Cross-Pet. 9 (citing reply brief for proposition that cross-petitioner had argued below that "FWS' environmental baseline was unlawful even assuming Congress vested the Corps with absolute discretion") (internal quotation marks omitted). See generally *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir.), cert. denied, 126 S. Ct. 356 (2005) ("Claims not raised in an initial brief are waived, and we do not generally consider issues raised for the first time on appeal in a reply brief.").

1536(a)(2). In this case, it is unclear whether FWS would have concluded that the Corps' proposed action was not likely to result in "jeopardy," even if certain effects of existing operations were taken into consideration in setting the environmental baseline. And, contrary to cross-petitioner's contention (Cross-Pet. 12 n.5), to the extent that ESA requires FWS to assess the impact of a *future* action by a federal agency, it would not have an impermissibly retroactive effect, regardless of the environmental baseline against which that action is measured. See *TVA* v. *Hill*, 437 U.S. 153, 186 n.32 (1978).

3. Finally, further review is unwarranted because the agency action challenged by cross-petitioner is of limited prospective importance. The Corps complied with FWS's 2003 amended opinion by constructing new shallow-water habitat for the pallid sturgeon. At least for the foreseeable future, therefore, the Corps will be able to operate the Main Stem System without being obligated under the ESA to decrease summer flows below the quantities required for downstream uses. Because cross-petitioner's avowed interest in this litigation is to prevent the Corps from decreasing downstream flows, see, *e.g.*, Answer and Proposed Cross-Claim 21, its continued interest is at best academic. Nor would its interest necessarily be more substantial if a writ of certiorari were granted in No. 05-631. Even if petitioners were ultimately to prevail on the merits of their claims, the result would be at most to vacate FWS's amended biological opinion and to remand, whereupon FWS could reach the same substantive result, albeit with more detailed reasoning or factual evidence. See 05-631 Fed. Resp. Br. in Opp. 20. Because resolution of the question presented would therefore have limited (if any) practical

impact on the Corps' management of the Missouri River Basin, and because cross-petitioner identifies no relevant conflict, further review is unwarranted.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
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MARCH 2006

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ARGUMENT

Cross-petitioner contends (Cross-Pet. 13-19) that the court of appeals erred by rejecting its challenge to FWS's determination of the "environmental baseline" for purposes of preparing its biological opinions pursuant to ESA. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Even if the petition in No. 05-631 were to be granted, therefore, the conditional cross-petition should be denied.

1. The court of appeals rejected cross-petitioner's contention that the Corps has a non-discretionary duty to support flood control and navigation over other uses of the Main Stem System (and that FWS therefore should have included existing operations in determining the "environmental baseline" under 50 C.F.R. 402.02). 05-631 Pet. App. 18a-19a. As cross-petitioner concedes (Cross-Pet. 17), "[t]here is no dispute * * * that the Eighth Circuit decided an issue of first impression." Although cross-petitioner correctly notes (Cross-Pet. 14) that there are a large number of cases in which federal agencies are required to engage in consultation under 16 U.S.C. 1536 (and in which an agency such as FWS is therefore required to select an environmental baseline), cross-petitioner does not identify a single decision of another court of appeals in which FWS's selection of the environmental baseline has been questioned—much

less on a ground similar to that advanced by cross-petitioner below.

Instead, cross-petitioner merely contends (Cross-Pet. 18-19) that FWS defined the environmental baseline in this case differently than did the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA Fisheries) in issuing a biological opinion concerning the Federal Columbia River Power System. Even assuming, however, that cross-petitioner's characterization of NOAA Fisheries' reasoning in its Columbia River biological opinion is correct, a federal district court, in an unpublished opinion, subsequently *rejected* that reasoning. See *National Wildlife Fed'n* v. *National Marine Fisheries Serv.*, No. 01-CV-640, 2005 WL 1278878, at *13 (D. Or. May 26, 2005). The government has appealed the decision in that case, and that appeal has not yet been briefed or argued in the Ninth Circuit. There is no reason for this Court to depart from its ordinary practice of awaiting a conflict in the circuits before granting review.

2. In any event, the court of appeals correctly rejected cross-petitioner's argument that FWS should have included existing operations in determining the "environmental baseline" under 50 C.F.R. 402.02. Specifically, the court of appeals correctly recognized that a necessary premise of cross-petitioner's argument is that the Corps had no discretion in its management of the Main Stem System. 05-631 Pet. App. 18a. And the court of appeals correctly rejected that premise, on the ground that (as it recognized in its earlier opinion in *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1027 (8th Cir. 2003), cert. denied, 541 U.S. 987 (2004)) the Corps in fact has a "good deal of discretion" in operating the Main Stem System. 05-631 Pet. App. 19a.

Cross-petitioner does not challenge that determination before this Court.[1] Instead, cross-petitioner recasts its argument, contending that FWS erred by failing to use a "baseline of existing operations" (regardless of whether it has a non-discretionary duty to support flood control and navigation over all other uses), and suggesting that, if existing operations were included in the environmental baseline, FWS would have been required to issue a biological opinion stating that the Corps' action was *not* likely to result in "jeopardy." Cross-Pet. 12.[2] Cross-petitioner, however, simply ignores the fact that, even assuming that existing operations were included in the environmental baseline, FWS would still be required to assess whether the proposed *future* action of the consulting agency—here, the Corps—would have the effect of jeopardizing the continued existence of an endangered or threatened species. See, *e.g.*, 16 U.S.C.

[1] In No. 05-611, the States of North Dakota and South Dakota have filed their own petition for a writ of certiorari, challenging language in the court of appeals' opinion suggesting that the abandonment of navigation *altogether* would violate the FCA. That contention is quite different from, and far more limited than, the proposition that the Corps must *always* give priority to navigation and flood control over all other potential uses of Missouri River waters in its day-to-day operations of the Main Stem System.

[2] As cross-petitioner notes (Cross-Pet. 9), the court of appeals did not pass on this argument—perhaps because cross-petitioner did not discretely advance it until its reply brief. See Cross-Pet. C.A. Reply Br. 16-18; cf. Cross-Pet. 9 (citing reply brief for proposition that cross-petitioner had argued below that "FWS' environmental baseline was unlawful even assuming Congress vested the Corps with absolute discretion") (internal quotation marks omitted). See generally *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir.), cert. denied, 126 S. Ct. 356 (2005) ("Claims not raised in an initial brief are waived, and we do not generally consider issues raised for the first time on appeal in a reply brief.").

1536(a)(2). In this case, it is unclear whether FWS would have concluded that the Corps' proposed action was not likely to result in "jeopardy," even if certain effects of existing operations were taken into consideration in setting the environmental baseline. And, contrary to cross-petitioner's contention (Cross-Pet. 12 n.5), to the extent that ESA requires FWS to assess the impact of a *future* action by a federal agency, it would not have an impermissibly retroactive effect, regardless of the environmental baseline against which that action is measured. See *TVA* v. *Hill*, 437 U.S. 153, 186 n.32 (1978).

3. Finally, further review is unwarranted because the agency action challenged by cross-petitioner is of limited prospective importance. The Corps complied with FWS's 2003 amended opinion by constructing new shallow-water habitat for the pallid sturgeon. At least for the foreseeable future, therefore, the Corps will be able to operate the Main Stem System without being obligated under the ESA to decrease summer flows below the quantities required for downstream uses. Because cross-petitioner's avowed interest in this litigation is to prevent the Corps from decreasing downstream flows, see, *e.g.*, Answer and Proposed Cross-Claim 21, its continued interest is at best academic. Nor would its interest necessarily be more substantial if a writ of certiorari were granted in No. 05-631. Even if petitioners were ultimately to prevail on the merits of their claims, the result would be at most to vacate FWS's amended biological opinion and to remand, whereupon FWS could reach the same substantive result, albeit with more detailed reasoning or factual evidence. See 05-631 Fed. Resp. Br. in Opp. 20. Because resolution of the question presented would therefore have limited (if any) practical

impact on the Corps' management of the Missouri River Basin, and because cross-petitioner identifies no relevant conflict, further review is unwarranted.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys

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