No. 14-___

IN THE

Supreme Court of the United States

STATE WATER CONTRACTORS, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, COALITION FOR A SUSTAINABLE DELTA, KERN COUNTY WATER AGENCY, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, AND WESTLANDS WATER DISTRICT,

Petitioners,

v.

SALLY JEWELL, ET AL.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Endangered Species Act, if the Secretary of the Interior concludes that a federal agency action will jeopardize a species listed as threatened or endangered, then the Secretary "shall use the best scientific and commercial data available" to identify "reasonable and prudent alternatives" that are "economically and technologically feasible." 16 U.S.C. §§ 1536(a)(2), (b)(3)(A); 50 C.F.R. § 402.02.

This case involves alternatives specified by the Secretary for two of the nation's largest water projects, resulting in substantial curtailments of water supplies in California during a period of extraordinary drought. A divided Ninth Circuit panel upheld the Secretary's determination, notwithstanding that the Secretary neither addressed whether the alternatives were economically and technologically feasible nor used the best scientific data available.

The Questions Presented Are:

1. Whether the Secretary must address in the administrative record the economic and technical feasibility of proposed "reasonable and prudent alternatives," including the effects of the proposed alternatives on third parties.
2. Whether the Secretary may disregard the "best scientific data" on the ground that considering the data would lead to a less "conservative" result, because scientific certainty is impossible, or because the Secretary has considered a range of data in reaching a conclusion.

This case also presents an issue closely related to the Question Presented in No. 14-48, *Glenn-Colusa Irrigation District v. Natural Resources Defense Council*: does a federal agency have discretion to trigger application of Section 7(a)(2) of the Endangered Species Act where legal obligations imposed by state and federal law mandate the agency action? This case involves the issue whether, once consultation is triggered by some discretion in operating a water project, the Secretary may apply the no-jeopardy mandate of Section 7(a)(2) to actions involved in water project operations that are compelled by specific legal obligations.

PARTIES TO THE PROCEEDINGS BELOW

The following parties were plaintiffs-appellees below: the Coalition for a Sustainable Delta; Kern County Water Agency; Stewart & Jasper Orchards; Arroyo Farms, LLC; King Pistachio Grove; Family Farm Alliance.

The following parties were plaintiffs-appellees/cross-appellants below: San Luis & Delta-Mendota Water Authority; Westlands Water District, State Water Contractors; and Metropolitan Water District of Southern California.

The California Department of Water Resources was an intervenor-plaintiff-appellee/defendant-appellee below.

The following parties were defendant-appellants below: Sally Jewell, as Secretary of the Department of the Interior; U.S. Department of the Interior; U.S. Fish & Wildlife Service; Daniel M. Ashe, as Director of the U.S. Fish And Wildlife Service; Ren Lohoefener, as Regional Director of the U.S. Fish & Wildlife Service, Pacific Southwest Region, U.S. Department of the Interior; United States Bureau of Reclamation; Michael L. Connor, as Commissioner of the U.S. Bureau of Reclamation, U.S. Department of the Interior; David Murillo, as Director of the U.S. Bureau of Reclamation, Mid-Pacific Region, U.S. Department of the Interior.

The following parties were intervenors-defendants-appellants/cross-appellants below: Natural Resources Defense Council; and the Bay Institute.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state the following:

The Metropolitan Water District of Southern California and the Kern County Water Agency are government agencies.

The State Water Contractors organization is a non-profit mutual benefit corporation consisting entirely of public agencies. Accordingly, it has no parent company, and no publicly traded company owns 10% or more of its stock.

The Coalition for a Sustainable Delta is a non-profit organization with no parent corporations. It has not issued stock. Accordingly, no publicly traded company owns 10% or more of its stock.

The San Luis & Delta-Mendota Water Authority and the Westlands Water District are not corporations. Accordingly, they have not issued any stock, neither has a parent corporation, and no publicly traded corporation owns any stock in either agency.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kern County Water Agency, Coalition for a Sustainable Delta, Metropolitan Water District of Southern California, State Water Contractors, San Luis & Delta-Mendota Water Authority, and the Westlands Water District respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The revised opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-187a) is published at 747 F.3d 581. The district court's November 13, 2009 opinion (Pet. App. 188a-241a) is published at 686 F. Supp. 2d 1026. The district court's December 14, 2010 opinion (Pet. App. 246a-506a) is published at 760 F. Supp. 2d 855.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2014. Pet. App. 15a. The court of appeals denied petitioners' timely petitions for rehearing en banc on July 23, 2014. Pet. App. 512a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, provides, in relevant part:

> (a) Federal agency actions and consultations
>
> . . .

(2) Each 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 (hereinafter in this section referred to as an "agency action") 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 determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

. . .

(b) Opinion of Secretary

. . .

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would

not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

50 C.F.R. § 402.02 provides, in relevant part:

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.14(g)(8) provides:

In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

STATEMENT OF THE CASE

California is parched, facing the third consecutive year of one of the worst droughts in its history. The entire state is in drought, and more than eighty percent is in a state of extreme or exceptional drought.[1] The governor has declared an emergency and called on residents to radically cut consumption, even as farmers are leaving land fallow and aquifers are being drained to disturbingly low levels.[2]

Against this backdrop, the output of two of the state's largest water projects — indeed, "perhaps the two largest and most important water projects in the United States," Pet. App. 25a — has been substantially curtailed to comply with a Biological Opinion (BiOp) issued by the U.S. Fish and Wildlife Service (FWS), which found that the projects' operations threaten the delta smelt, a finger-sized

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[1] *See U.S. Drought Monitor — California*, Nat'l Drought Mitigation Ctr., http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA (last visited Oct. 4, 2014).

[2] *See, e.g.*, Doyle Rice, *California's 100-year Drought*, USA Today (Sept. 3, 2014), http://www.usatoday.com/story/weather/2014/09/02/california-megadrought/14446195/; Alan Bjerga, *California Drought Transforms Global Food Market*, Bloomberg (Aug. 11, 2014 6:09 PM), http://www.bloomberg.com/news/2014-08-11/california-drought-transforms-global-food-market.html; Dennis Dimick, *If You Think the Water Crisis Can't Get Worse, Wait Until the Aquifers Are Drained*, Nat'l Geographic News (Aug. 19, 2014), http://news.nationalgeographic.com/news/2014/08/140819-groundwater-california-drought-aquifers-hidden-crisis/.

fish listed as threatened under the Endangered Species Act (ESA). Although the district court found gross flaws in the BiOp and required FWS to reconsider it, a divided panel of the Ninth Circuit reversed.

As relevant here, the majority held that in issuing the BiOp and its reasonable and prudent alternatives (RPAs), FWS was precluded as a matter of law from considering the economic effects of its proposed restrictions on Project operations on Californians, even while excusing the agency's failure to use the best available scientific data in formulating its opinion. The Ninth Circuit's decision exacerbates the harmful effects of California's drought, creates multiple circuit splits, and contravenes this Court's precedents.

I. Legal Background

Section 7(a)(2) of the ESA requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat of those species. *See* 16 U.S.C. § 1536(a)(2). When an agency determines that its activity is likely to adversely affect a listed species or its critical habitat, then the agency is required to engage in formal consultation with the Secretary of the Interior, or her delegee — in this case, FWS. *See id.* § 1536(a)(3). As part of the consultation, FWS must issue an opinion, known as a "biological opinion," stating whether the proposed action is, in fact, likely to jeopardize the species or result in the destruction or adverse

modification of its critical habitat. *See id*. § 1536(b); 50 C.F.R. § 402.14.

If FWS concludes that the answer is "yes," then the statute requires FWS to "suggest those reasonable and prudent alternatives which [it] believes" would avoid jeopardizing the species and adversely modifying its critical habitat. 16 U.S.C. § 1536(b)(3)(A).[3]

Congress required development of RPAs in direct response to this Court's decision in *TVA v. Hill*, 437 U.S. 153, 184 (1978), which was widely regarded as holding that the ESA requires protection of endangered species, whatever the cost. *See, e.g.*, H.R. Rep. No. 95-1625, at 1, 10, 13 (1978). As defined by agency regulation, RPAs are:

> [A]lternative actions identified during formal consultation [i] that can be implemented in a manner consistent with the intended purpose of the action, [ii] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [iii] that is [sic] *economically and technologically feasible*, and [iv] that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or

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[3] Technically, an agency is not compelled to implement the RPAs. But if it does not, the agency loses its immunity from liability unless it terminates the action under review or secures a (very rarely granted) exemption under the statute. 16 U.S.C. § 1536(e), (h). As a consequence, RPAs have a "powerful coercive effect on the action agency." *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

> resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02 (emphasis added).

In developing a BiOp and RPAs, the Secretary is required to "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.14(g)(8). The "obvious purpose of the requirement . . . is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise," and to therefore "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

II. Factual Background

1. Most of the water in the state of California is in the northern half of the state, but much of the state's most fertile farmland, as well as the bulk of its population, is located in the center and south of the state. The State Water Project (SWP) and the Central Valley Project (CVP and, together with the SWP, the Projects) are massive public undertakings that collectively supply water "to more than 20,000,000 agricultural and domestic consumers in central and southern California." Pet. App. 25a.[4] The Projects comprise dams, reservoirs, power plants, pumping stations, and aqueducts, all designed to distribute water throughout the state.

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[4] The SWP is operated by California's Department of Water Resources. The CVP is operated by the U.S. Bureau of Reclamation. The Projects coordinate their operations.

Over time, the demand for water from the Projects has increased as the state's population has grown and as government restrictions have limited California's ability to use surplus water from the Colorado River.

The Projects attempt to meet the needs of more than twenty million people along California's central coast, in southern California, and in portions of the San Francisco Bay Area by pumping water from an estuary at the confluence of the San Francisco Bay and Sacramento-San Joaquin Delta (Bay-Delta) into canals and aqueducts that carry the water to the south and west. The CVP pumping station is capable of diverting water at a rate of 4,600 cubic feet per second (cfs); the SWP station has a capacity of 10,300 cubic feet per second, but typically operates at or below 6,680 cfs. *Id*. 31a.

The Bay-Delta also encompasses habitat for the delta smelt, a small fish that grows to two to three inches long and is listed as threatened under the ESA. *Id*. 34a.

The Projects' pumping stations affect the delta smelt in two ways. First, individual fish may be swept into (or "entrained" in) the pumping stations. *See id*. 32a. Second, when the pumps draw fresh water from the Delta, they can reverse the natural flow of two tributaries to the San Joaquin River known as Old and Middle Rivers (OMR), creating a "negative flow" that can affect habitat conditions for the delta smelt, including turbidity, salinity, and flow patterns. *See id.* 31a-34a.

2. In 2004, the Bureau of Reclamation sought a biological opinion from FWS regarding the operation

of the Projects. FWS issued the opinion in 2005, finding that the proposed coordinated operations of the CVP and SWP were not likely to jeopardize the continued existence of the delta smelt or result in the destruction or adverse modification of its critical habitat. After judicial review, the 2005 opinion was vacated and FWS was ordered to prepare a new one. On December 15, 2008, FWS issued a new BiOp. Pet. App. 37a-38a.

As the court of appeals noted, the revised BiOp document "is a bit of a mess. And not just a little bit of a mess, but, at more than 400 pages, a big bit of a mess." *Id*. 55a. Indeed, it is "is a jumble of disjointed facts and analyses"; "a ponderous, chaotic document, overwhelming in size, and without the kinds of signposts and roadmaps that even trained, intelligent readers need in order to follow the agency's reasoning." *Id*. 57a.

The BiOp concluded that unless the "quality and quantity" of the delta smelt habitat improved, the smelt would not be able to recover from the downward trend in their population. *Id*. 39a-40a. It also performed an about-face from the 2005 non-jeopardy biological opinion, finding that the Projects were likely to jeopardize the continued existence of the delta smelt and adversely modify its critical habitat. *Id*.

The BiOp specified various actions as RPAs to the status quo. As relevant here, several of the actions were designed to address entrainment of fish by substantially limiting the amount of water the

Projects can pump for agricultural, industrial, municipal, and other uses. *Id*. 40a-42a.[5]

Separately, the RPAs also required the Projects to release water from reservoirs upstream of the Delta and limit pumping to the extent necessary to ensure that "X2" — the point in the Delta where salinity reaches two parts per thousand — remains at seventy-four and eighty-one kilometers east of the Golden Gate Bridge during the autumn months of "wet" and "above normal" precipitation years, respectively. *Id*. 41a.

The cumulative effect of the BiOp's RPAs is to reduce the amount of water the Projects can deliver by hundreds of thousands of acre feet per year. And the Projects must reduce pumping the most during the wettest months, thus inhibiting their ability to refill reservoirs to store water for later delivery during dry years and in the dry summer months, when agricultural and municipal demand is highest. Reclamation provisionally accepted and then implemented the BiOp and its RPAs. Pet. App. 189a. Estimates show that the amount of water sacrificed to implement the RPAs could have met the needs of over one million households for a year, or irrigated two hundred thousand acres of farmland.[6]

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[5] The reasoning behind the RPAs is described in greater detail in Part III, *infra*.

[6] *See* Lisa Lien-Mager, *Water Supplies Curtailed Once Again to Protect Delta Smelt*, Ass'n of Cal. Water Agencies (Feb. 12, 2013, 6:52 PM), http://www.acwa.com/news/delta/water-supplies-curtailed-once-again-protect-delta-smelt.

III. Proceedings Below

Petitioners, alongside the California Department of Water Resources, filed this lawsuit alleging that the BiOp violated the National Environmental Policy Act, the ESA, and the Administrative Procedure Act. After a hearing on cross motions for summary judgment, the U.S. District Court for the Eastern District of California ruled that the "BiOp and its RPA are arbitrary, capricious, and unlawful, and are remanded to FWS for further consideration." Pet. App. 505a.

A. The District Court's Decision

The district court held the BiOp invalid, issuing two holdings that are relevant to this petition.

First, the court held that FWS had failed to establish that its RPAs met the requirements for a reasonable and prudent alternative under 50 C.F.R. § 402.02, including the requirement that the proposed restrictions be "economically and technologically feasible." Pet. App. 452a-73a. The court explained that it was "undisputed that there is no explicit analysis anywhere in the record" of the feasibility requirement. *Id*. 456a. The court then rejected FWS's assertion that it was not required to explain — in the BiOp or anywhere else in the administrative record — how its RPAs satisfied the regulatory definition, noting that accepting that "view would be to abdicate the judicial review function." *Id*. 469a.

The court also rejected FWS's claim that satisfaction of the regulatory criteria was "so obvious that explicit analysis is unnecessary." Pet. App. 456a. The court concluded, for example, that the economic

feasibility factor was not met, as the agency had provided no justification for "interdict[ing] the water supply for domestic human consumption and agricultural use for over twenty million people who depend on the Projects for their water supply." *Id*. 473a.

Second, the district court held that "the analyses supporting the specific flow prescriptions set forth in the RPA are fatally flawed and predominantly unsupported." Pet. App. 503a-04a. Specifically, the court found that FWS had violated the statutory requirement to use the best available scientific evidence in two respects.

First, FWS failed to use the best available science in calculating flow rates to reduce the number of fish drawn into the pumping stations. FWS based those restrictions on an alleged relationship between pumping rates and the number of fish salvaged at the stations. To establish that relationship, FWS charted the absolute number of fish salvaged at various times against the pumping rate at the time the fish were salvaged. It concluded that there was a significant increase in salvage once OMR flow rates exceeded -5,000 cfs. *Id*. 307a-08a. FWS accordingly used the -5,000 cfs figure to establish a maximum flow rate for the Projects during as much as six months of the year (December through June). *Id*. 40a-41a, 58a-59a, 313a.

FWS's own scientific advisors, as well as the court's appointed experts and petitioners' expert witnesses, all concluded that this measurement was unreliable because it failed to account for the variation in fish populations in the Delta during the study period. *See Id*. 315a-17a. That is, it was

possible that a large number of fish were entrained at certain periods simply because there were more fish in the Delta at those times, not because of any relationship with the flow rates. It was equally possible that low numbers of fish were entrained at certain periods not because of low negative flow rates, but instead because there simply were not as many fish in the system. *See id.* 315a ("Considering raw salvage numbers alone provides no means of distinguishing an event in which 10,000 fish are salvaged out of a population of 20,000 from an event in which 10,000 fish are salvaged from a population of 20 million.").

There was an easy solution at hand, recommended by FWS's own scientific advisors: the agency could simply "normalize" the salvage rates for each year by dividing the total number of fish salvaged by available indices of the overall smelt population. The court explained that "[t]here is widespread agreement among the scientific experts that the use of normalized salvage data rather than gross salvage data is the standard accepted scientific methodology among professionals in the fields of fisheries biology/management." *Id.* 315a (citing a consensus of experts that it would be unreasonable to rely solely on gross salvage data to impose flow restrictions). In fact, "FWS itself had stated that it could verify its conclusion 'by normalizing the salvage data by the estimated population size,'" *id.* 64a (citation omitted), having used the normalized data in another portion of the BiOp, *id.* 317a. But the agency inexplicably declined to do so and failed to explain in the BiOp "why it selectively used

normalized salvage data in some parts of the BiOp but not in others." *Id*. 317a.

The district court noted that petitioners' expert, using normalized data, found "no statistically significant relationship between OMR flows and adult salvage" until flow rates reached much higher levels than permitted by the RPAs. *Id*. 327a. The difference, the court observed, could have "very substantial" effects on "the amount of lost annual water supply, with resulting adverse effects on human welfare and the human environment." *Id*. 328a.

Second, the court held that the BiOp adopted a flawed methodology to set limits on salinity in the Delta in the autumn of years categorized as above normal or wet. To judge the effects of future operations on the salinity of potential delta smelt habitat, FWS used computer models to compare the effect of future operations against a simulated historical baseline. *Id.* 82a-84a. On the basis of that comparison, the BiOp concluded that Project operations were responsible for shifting the median location of X2 upstream by ten to fifteen percent and, as a consequence, reducing the amount of "abiotic habitat" available for the delta smelt. *See* 5 C.A. E.R. 966-967. FWS then established further flow restrictions designed to counteract that assumed effect. Pet. App. 41a, 82a. The restrictions require the Projects to release hundreds of thousands of acre feet of additional stored water to maintain X2 at kilometers 74 and 81 in wet and above normal years by literally pushing the Pacific Ocean's salty water westward toward the Golden Gate. *Id.* As a

consequence, less water is in storage and available for use in later, drier years.

The problem, however, the court explained, was that FWS used one model to establish the baseline (called "DAYFLOW") and a vastly different model (called "CALSIM II") to predict the effect of future operations. *Id*. 333a-43a. The "undisputed expert evidence," the court found, was that "using such comparisons for quantitative purposes is scientifically improper" because all the "experts in this case agree[d] that data from two different models should not be compared without calibration." *Id*. 358a. Because, in "the absence of calibration of the two models, the Calsim II to Dayflow comparison has the potential to introduce significant, if not overwhelming, bias to the analysis that the BiOp nowhere discussed or corrected." *Id*. 387a. Thus, the agency's decision "was arbitrary and capricious and ignored the best available science showing that a bias was present." *Id*. 353a.

In light of these violations of the statute and implementing regulations, the district court remanded to the agency for further consideration. Pet. App. 359a.

B. The Ninth Circuit's Decision

Respondents appealed. The panel frankly acknowledged the "enormous practical implications" of the case, which imposed substantial restrictions on the Projects, which supply "irrigation for seven million acres of agriculture and more than twenty million people, nearly half of California's residents." Pet. App. 28a, 29a. The Court further acknowledged that the BiOp was "a big . . . mess." *Id*. 55a. But by a

divided vote, the panel nonetheless upheld the BiOp in all respects. *Id*. 47a.

1. The panel majority agreed with FWS that the agency was not required to explain why its proposed RPAs met the feasibility standard set forth in the agency's own regulations. It reasoned that the feasibility requirement was set forth in "a definitional section," a provision that was "not setting out hoops that the FWS must jump through." *Id*. 125a.

The panel further accepted FWS's assertion that feasibility was obvious in this case because all the statute and regulations require is that the RPAs be "financially and technologically possible" for the *agency*. *Id*. 128a-29a. It makes no difference, the panel held, "whether restricting [water flow] will affect its *consumers*." *Id.* 129a (emphasis added). On that basis, the majority held that it was irrelevant as a matter of law whether there were "downstream economic impacts of Reclamation being unable to continue its . . . operations as it has in the past." *Id*. Having thereby strictly limited the feasibility requirement, the majority found that it was "nearly self-evident" that the RPAs were feasible because "the RPAs do not require major changes affecting *Reclamation*'s ability — financially or technologically — to comply with the RPAs." *Id*. 131a-32a (emphasis added).

2. The Ninth Circuit also reversed the district court's decision regarding best available science. It acknowledged that "[t]he OMR flow limit has a great practical significance, not merely to the delta smelt but to Californians, as it represents the ultimate limit on the amount of water available to sustain

California's millions of urban and agricultural users." Pet. App. 60a. It also accepted as "uncontroverted" that "FWS could have done more in determining OMR flow limits," *id*. 62a, casting little doubt on the district court's conclusion that the agency failed to use the best scientific evidence available. It nonetheless held that these failures did not constitute grounds to vacate the BiOp. *Id.*

With regard to the use of salvage data, the court of appeals admitted that normalized data would provide "a more accurate reflection of the relative impact of OMR flows on the smelt population." *Id*. 66a-67a. But the majority nevertheless upheld FWS's decision to use raw salvage data, concluding that normalized data was "not tailored to protect the maximum absolute number of individual smelt, as the BiOp's approach is; the process of adjusting raw salvage for the smelt population size results in normalized numbers, but it does so at the potential cost of minimizing the impact of each individual smelt lost." *Id*. 67a. The court further held that additional data points supported FWS's choice of flow rates, and that other aspects of the BiOp accounted for population effects, thus mitigating the impact of the error. *Id.* 71a-79a. Consequently, even though the court "agree[d] that the FWS should have at least prepared a graph . . . based on normalized data or explained why it could not," substantial evidence elsewhere in the record supported the agency's ultimate conclusions. *Id*. 81a.

The Ninth Circuit also reversed the district court's holdings relating to the location of X2. The court of appeals again acknowledged the importance of its decision: "Because the location of X2 directly

affects how much water can be exported to southern California for agricultural and domestic purposes, the determination of where X2 is located was critical to the parties." *Id*. 83a. But it upheld FWS's choice to base its decision on a comparison of CALSIM II data to DAYFLOW data, concluding that the agency was justified in doing so once it determined that using *only* CALSIM II data would also yield an erroneous result. *Id*. 83a-94a. Addressing the district court's conclusion that FWS should have attempted to calibrate the models to square their assumptions, or at least explained why it could not, the court of appeals agreed that, "[i]deally, the FWS would have thoroughly discussed its reasoning with regard to possible issues arising from the use of DAYFLOW with CALSIM II." *Id*. 93a. But again it decided that FWS's choice was entitled to deference. *Id*. The court of appeals also refused to consider the expert testimony on which the district court relied, having concluded that admission of extra-record testimony did not fall within any of the exceptions to the record review doctrine. *See id*. 92a-93a; *see also id*. 49a-54a.

3. Judge Arnold, sitting by designation from the Eighth Circuit, dissented in relevant part. He argued that because the concerns relating to the RPAs' feasibility had been raised, FWS was required, at least, to address those concerns in the BiOp or the administrative record, which it never attempted to do. *See* Pet. App. 177-78a. That failure violated 50 C.F.R. § 402.02. *Id*.

The dissent also argued that FWS had failed to use the best available science, first by using raw salvage data to determine flow rates. *Id*. 174a-75a. The dissent noted that respondents themselves had

not disputed that raw data was not the best available, but had instead attempted to rationalize their conclusions by pointing to other information in the record. *Id*. 174a. But, as the dissent explained, "the BiOp did not connect [this information] to flow limits at all, or there was no explanation for why it yielded the flow prescription that the BiOp specified." *Id*. "Because FWS based its flow prescription solely on the unexplained use of raw salvage data," the dissent concluded that the agency's "expertise in methodological matters is not entitled to deference, since that use was not rationally connected to the best available science, and because FWS did not consider all relevant factors or articulate a rational connection between the facts found and the choices made." *Id*. 174a-75a (citation omitted).

The dissent also argued that "the BiOp's determination of X2 was arbitrary and capricious." *Id*. 175a. Comparing the results of the CALSIM II and DAYFLOW models "was unsupported by the requisite reasoned analysis." *Id*. 176a. Because FWS had been on notice that its methodology would introduce bias, the dissent argued that it "was required to provide some evidence supporting its conclusions to ensure that no clear error of judgment rendered its actions arbitrary and capricious." *Id*. Moreover, as with the salvage data, respondents did "not dispute that the sources of bias existed, or that the biases were significant or material; and the clear purpose of requiring FWS to use the best scientific evidence available is to ensure that the ESA is not implemented haphazardly or based on surmise or speculation." *Id*. 177a.

On both of these questions, the dissent disagreed with the majority's decision to ignore the expert witnesses, who were properly admitted to address technical matters, and whose testimony was not substantially contradicted by respondents' experts. *See id*. 173a-74a.[7]

4. Petitioners, as well as the California Department of Water Resources and two additional water authorities, sought rehearing en banc. Their petitions received substantial *amicus* support, including briefs from six states. However, the petitions were denied. *See* Pet. App. 507a-12a.

This petition followed.[8]

REASONS FOR GRANTING THE WRIT

The Ninth Circuit erroneously decided three questions of exceptional national importance, in conflict with the decisions of other circuits and this Court. Those legal errors led the court to uphold drastic restrictions on water deliveries from two of the largest water projects in the country to millions of families and businesses in California during the worst drought in living memory, without any assurance that the harm imposed on the public is necessary, or even helpful, to preserving the delta smelt. The case thus presents the Court an opportunity to correct the widely held

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[7] Judge Rawlinson also dissented in part on grounds not relevant to this petition. *See* Pet. App. 180a-87a.

[8] Three other parties to the case below have filed a petition that is presently pending under Docket No. 14-377.

misimpression — based in significant part on language in *TVA v. Hill*, 437 U.S. 153 (1978), that requires this Court's clarification — that the Endangered Species Act requires the Government to protect species at all costs, without regard for the impact on the public.

I. Certiorari Is Warranted To Resolve A Circuit Conflict Over Whether A Consulting Agency Must Consider The Effects On Third Parties When Proposing "Reasonable And Prudent Alternatives" To Agency Action.

The Ninth Circuit's conclusion that FWS was not required to consider whether its RPAs are economically feasible for third parties squarely conflicts with a contrary decision from the Fourth Circuit, as well as the text of the statute and the regulations.

1. In *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013), the Fourth Circuit expressly rejected the argument — accepted as dispositive by the Ninth Circuit in this case — that a consulting agency need not address the economic feasibility in selecting an RPA. *Dow* involved a BiOp which concluded that certain pesticides "would jeopardize the viability of certain Pacific salmonids and their habitat." *Id*. at 464. The BiOp proposed, as an RPA, a uniform pesticide-free buffer zone around every body of water, regardless of its size. *See id.* at 473. In *Dow*, as here, the agency admitted that it had not discussed the economic feasibility of its RPA, but argued that it was not required to. *See id.* at 474 (recounting the

government's argument that "the economic feasibility requirement" is "simply a limitation that the reasonable and prudent alternative be economically *possible*, without any need for discussion" (emphasis in original)).

The Fourth Circuit resoundingly rejected that argument, which would "effectively read[] out the explicit requirement of Regulation 402.02 that the agency evaluate its reasonable and prudent alternative recommendation for, among other things, economic and technological feasibility." *Id*. at 474-75. The concern was salient because uniform buffers would have imposed a substantial economic cost on anybody attempting to use pesticides, *i.e.*, third parties. The court thus concluded that "[b]y not addressing the economic feasibility of its proposed 'reasonable and prudent' alternative," the agency had "made it impossible for us to review whether the recommendation satisfied the regulation and therefore was the product of reasoned decision-making. This failure provides another basis for our conclusion that the BiOp was arbitrary and capricious." *Id*. at 475.

The Ninth Circuit majority attempted to distinguish *Dow*, characterizing the decision as turning on a special "concern[] that the FWS had imposed an especially onerous requirement without any thought for whether it was feasible," rather than holding as a general matter that FWS must "address economic and technological feasibility as a procedural matter." Pet. App. 127a n.42. That is incorrect. Rather, the *Dow* court found that by refusing to address economic feasibility, "the Fisheries Service has made it impossible for us to review whether the

recommendation satisfied the regulation and therefore was the product of reasoned decision-making." 707 F.2d at 475. The impossibility of judicial review presents itself whenever agencies fail to state their reasoning. Moreover, the Ninth Circuit's attempts to distinguish *Dow* say nothing about the core issue — that *Dow* interpreted the economic feasibility inquiry to require an examination of the effects on third parties. In *Dow*, it is obvious that if the only relevant question were whether the agency could feasibly have implemented a uniform buffer for pesticides, the answer would have been "yes." The fact that the Fourth Circuit reached a different result confirms that it interpreted the governing regulation to require the agency to ask a different question than the one the Ninth Circuit addressed in this case.

2. The circuit conflict warrants review. Whether the ESA requires or precludes an agency from considering the economic impact of its proposed restrictions on agency activity on third parties is a question of recurring importance. The federal government conducts thousands of ESA consultations every year.[9] Those consultations regularly result in BiOps proposing RPAs.

As this case illustrates, the government activities restricted by BiOps often serve profoundly important public purposes and their curtailment can have a

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[9] *See* U.S. Fish and Wildlife Service Consultations with Federal Agencies, Section 7 of the Endangered Species Act, *available at* http://www.fws.gov/endangered/esa-library/pdf/consultations.pdf.

dramatic effect on millions of people. *See, e.g.*, Sharon Levy, *Turbulence in the Klamath River Basin*, 53 BIOSCIENCE, no. 4, April 2003, at 213, (discussing $200 million in agricultural losses caused by RPAs in BiOp covering Klamath Basic Project in northern California and southern Oregon);[10] Phuong Le, *Puget Sound FEMA flood program focus now salmon and whales*, SEATTLE TIMES (Aug. 7, 2010) (describing building moratoria resulting from RPAs in BiOp regarding National Flood Insurance Program's provision of insurance to homeowners in Puget Sound region);[11] Energy and Water Development Act of 2004, Pub. L. No. 108-137, § 208, 117 Stat. 1827, 1849 (special statute enacted by Congress to prevent implementation of RPAs that would have threatened water supply of the City of Albuquerque and other water users in New Mexico); Douglas Jehl, *Rio Grande Choice: Take City's Water or Let Minnow Die*, N.Y. TIMES (Jan. 19, 2003) (describing the controversy regarding efforts to protect the Rio Grande silvery minnow and their effects on regional water supplies);[12] *At Risk: American Jobs, Agriculture, Health and Species – the Costs of Federal Regulatory Dysfunction: Joint Oversight Hearing Before the H. Comm. on Natural Res. & H. Comm. on Agric.*, 112th Cong. 111-14 (2011) (statement of the

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[10] *Available at* http://mkwc.org/old/publications/fisheries/Turbulence%20in%20the%20Klamath%20River%20Basin.pdf.

[11] *Available at* http://seattletimes.com/html/localnews/2012564838_apwafloodingandfish1stldwritethru.html.

[12] *Available at* http://www.nytimes.com/2003/01/19/us/rio-grande-choice-take-city-s-water-or-let-minnow-die.html.

American Farm Bureau Federation) (describing the controversy regarding stream buffers ranging up to 1000 feet imposed by RPAs to limit the effects of pesticides on fish and other aquatic species); Jim Cowles & Kirk Cook, THE ENDANGERED SPECIES ACT AND THE IMPACTS TO PESTICIDE REGISTRATION AND USE (2010) (indicating that BiOps and RPAs respecting EPA pesticide registration will have unavoidable significant and adverse effects on agricultural production).[13]

The difference in the courts of appeals' interpretation of the statute and implementing regulations could hardly be more pronounced — the Fourth Circuit holds that the impact on third parties *must* be considered expressly in the text of the BiOp, while the Ninth Circuit has held that third-party impacts *may not* be taken into account in any form. This case dramatically illustrates the practical stakes of that disagreement. In this time of drought, with no relief in sight, the ability to store or otherwise keep that much water in the system would have significantly alleviated the drought's devastating consequences for many Californians.[14]

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[13] *Available at* http://agr.wa.gov/pestfert/natresources/docs/ESAAndImpactsToPesticideRegistrationAndUse.pdf.

[14] *See, e.g.*, Jim Carlton, *California Drought Will Cost $2.2 Billion in Agriculture Losses This Year*, WALL ST. J., July 15, 2014, http://online.wsj.com/articles/drought-will-cost-california-2-2-billion-in-losses-costs-this-year-1405452120; Henry Fountain, *Hopes for a Strong El Niño Fade in California*, N.Y. TIMES (Sept. 9, 2014), http://www.nytimes.com/2014/09/10/science/earth/el-nino-california-drought.html?_r=0.

The Ninth Circuit's rule allows FWS to ignore those consequences altogether as it limits the flow of water to California's farms and residents. The Fourth Circuit would require FWS to explain in the record — so that a court could review — why those harms are necessary to protect the species and why less intrusive measures would not suffice to avoid jeopardy. That dramatically disparate interpretation of what was intended to be a national regime for the conservation of species is untenable.

3. Certiorari is also warranted because the Ninth Circuit's interpretation of the statute and regulations is wrong, both in failing to require FWS to address feasibility in the BiOp and in construing feasibility to pertain only to the agency's ability to implement the RPAs.

a. The panel held that the agency was not required to address feasibility or the other "non-jeopardy factors" in the BiOp because the regulations do not expressly impose that requirement. That is, the feasibility requirement is set out in "a definitional section" that is "defining what constitutes an RPA." Pet. App. 125a. And the definitional section does not specify what FWS must address in the BiOp. *Id*. Contrary to the court of appeals' view, the presence of the feasibility requirement in the foundational definition section of the regulations makes it *more* central to the agency's obligation of reasoned explanation than it would be if it appeared elsewhere. It is one of the fundamental requirements that determines whether the alternative identified by the agency is in fact a "reasonable and prudent alternative" required by the statute and implementing regulation.

The obligation to explain why an RPA meets the regulatory definition thus arises directly from the agency's general administrative law obligation, formalized in the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), to give a reasoned explanation for its conduct. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The panel acknowledged that general principle, recognizing that the APA required FWS to explain, for example, why the RPA would avoid jeopardy to the species and its critical habitat. Pet. App. 127a-28a. But it concluded that the feasibility requirement was different because, in the panel's view, feasibility is required only by regulation and not by the statute itself. *Id*. 128a.

As this Court has explained, however, "regulations, if valid and reasonable, authoritatively construe the statute itself," *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001). Accordingly, when an agency issues a regulation defining its statutory obligations, its duty of reasoned explanation extends to its compliance with regulation. In any event, even if the APA distinguished between requirements imposed by statute and those imposed solely by regulation, that principle would have no bearing here because — as the regulation itself acknowledges — feasibility is, *by definition*, required for a proposal to be "reasonable and prudent." 16 U.S.C. § 1536(b)(3)(A); *see* 50 C.F.R. § 402.02. By failing to even consider the question, FWS "entirely failed to consider an important aspect of the problem," and therefore acted arbitrarily and capriciously. *State Farm*, 463 U.S. at 43. Moreover, as the Fourth Circuit has explained, because there is no question

that the RPA must, in fact, meet all aspects of the regulatory definition to be lawful, a discussion of feasibility is necessary to make meaningful judicial review possible. *Dow AgroSciences*, 707 F.3d at 475; *see SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding.").

b. The panel erred even more egregiously in holding that feasibility must be judged solely from the perspective of the agency implementing the RPA, without regard for the effects on third parties. Pet. App. 128a-30a. On its face, the statute requires that the proposed alternatives be "reasonable" and "prudent." 16 U.S.C. § 1536(b)(3)(A). As a matter of simple common English usage, an alternative is not reasonable or prudent when it unnecessarily imposes economic dislocation on third parties that could be avoided by choosing a different RPA that also adequately protects species at much lower cost. If all Congress had meant was to require that the proposed alternatives be capable of implementation by the agency, it would have omitted the phrase "reasonable and prudent" altogether, requiring only that the Secretary propose alternatives that avoid jeopardy and "can be taken by the Federal agency or applicant in implementing the agency action." *Id*.

The panel nonetheless concluded that the feasibility mandate is an interpretation of the statutory requirement that an RPA must propose steps that "'*can* be taken by the Federal agency . . . in

implementing the agency action,' 16 U.S.C. § 1536(b)(3)(A) (emphasis added), not to whether restricting [Project] activities will affect its consumers." Pet. App. 129a. [15] It based that conclusion in large part on the language in *TVA v. Hill*, 437 U.S. 153 (1978), reasoning that under the ESA, an agency's duty is solely "to halt and reverse the trend toward species extinction, *whatever the cost*." Pet. App. 130a (quoting *Hill*, 437 U.S. at 184 (emphasis added by Ninth Circuit)).

But the panel ignored that the RPA requirement was enacted as part of the immediate legislative backlash to the very language in *Hill* the panel quoted. *See* Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752-53 (1978); H.R. Rep. No. 95-1625, at 10 (1978). The 1978 amendments to the ESA were intended to "introduce some flexibility into the Act" by requiring agencies to avoid unnecessary economic disruption and dislocation in the name of species protection. H.R. Rep. No. 95-1625, at 3; *see also, e.g.*, *id.* at 10, 13; S. Rep. No. 95-874, at 2-4 (1978). Congress sought to create that balance through the twin means of the agency consultation process (including the proposal of RPAs) and a new provision authorizing exemptions to the statute as a last resort, *see* S. Rep. No. 95-874, at 5-6; 16 U.S.C. § 1536(h).

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[15] Just a few pages earlier, however, the panel had acknowledged that the feasibility element is set forth as part of the definition of the statutory phrase "reasonable and prudent alternative," Pet. App. 125a, not the language stating that the RPAs must be capable of implementation by the agency.

Under the revised statute, the consultation process was expected to avoid "[m]any, if not most, conflicts between the Endangered Species Act and federal actions," through the RPA requirement. S. Rep. No. 95-874, at 5-6. Exemptions, therefore, were permitted only if "there are no reasonable and prudent alternatives to the agency action." 16 U.S.C. § 1536(h)(1)(A)(i). In the absence of any such alternative, a special board was authorized to grant exemptions if it found, among other things, that the "benefits of [the agency] action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat." *Id*. § 1536(h)(1)(A)(ii).

The Ninth Circuit's interpretation substantially disrupts the 1978 amendments' coordinated scheme when there are alternatives short of a complete exemption that would avoid jeopardy but impose much less economic harm on third parties than the RPA an agency selects based on an exclusive focus on feasibility for the implementing agency.

An example helps illustrate the point. Suppose that there are two alternatives — RPA #1 and RPA #2 — that would both avoid jeopardy and are feasible for an agency to implement. Suppose further, however, that RPA #1 will impose massive economic dislocation on third parties, while RPA #2 would not. Under the Ninth Circuit's interpretation, FWS is free to choose either RPA because both are feasible for the agency and would avoid jeopardy. And FWS might in fact prefer RPA #1, despite its impact on third parties, because it offers marginally greater protection for endangered species (even though RPA #2 meets the statutory threshold of avoiding

jeopardy). The federal agency requesting the consultation, however, might quite reasonably think that RPA #2 is far better (given that the agency will understandably be concerned about the broader public welfare). The Ninth Circuit's decision places that agency in the untenable position of either having to ignore the RPA — thereby inviting a lawsuit that it may well lose, *see supra* note 3 — or seek an exemption. But an exemption would be overkill. The agency does not need to be excused from complying with the statute; it just needs the more sensible RPA.

To the extent that the Ninth Circuit would nonetheless require agencies in such positions to seek an exemption, its interpretation contradicts Congress's intent that the exemption process be a last resort, available to provide a remedy that is otherwise unavailable in the consultation process. *See* S. Rep. No. 95-874, at 3 (explaining expectation that the exemption process would be invoked only when "an agency believes it has encountered an irresolvable conflict with the act which cannot be resolved through consultation"); *id.* at 6 ("An irresolvable conflict *cannot* be found to exist *unless* the project agency had thoroughly reviewed all modifications *and alternatives*." (emphasis added)).

Accordingly, even if the regulations themselves did not require feasibility from the perspective of the affected third parties, the statutory language, structure, and history would compel that consideration.

This is not to say that the RPA requirement authorizes FWS to "balanc[e] the life of the delta smelt against the impact of restrictions on [Project] operations." Pet. App. 130a. That is the role of the

exemption committee. But it *is* to say that in choosing among possible alternatives that would avoid jeopardy, an agency is required to consider the impact of the various effective alternatives on third parties, in order to avoid *unnecessary* harm to humans in the course of protecting plants and animals.

4. Finally, the Court should grant certiorari in this case to address the common misconception, fostered by language in *Hill* and evident in the Ninth Circuit's decision, that even in its current amended form, the ESA requires the Government to protect endangered species without regard to the consequences on people. That misimpression continues to pervade much of the interpretation and application of the ESA, at the cost of fidelity to Congress's subsequent efforts to restore balance to the statute and the greater public welfare.

II. Certiorari Is Warranted To Address The Ninth Circuit's Erroneous Interpretation Of The Best Available Science Requirement.

This Court should also grant certiorari to establish the proper interpretation of the ESA's best available science requirement. 16 U.S.C. § 1536(a)(2). In this case, there was little dispute that FWS failed in important respects to use the best scientific evidence available. The court of appeals acknowledged these lapses, but excused them because the better data did not support the more "conservative" result FWS favored, because scientific certainty was impossible, and because the Secretary considered a range of data in reaching a conclusion.

That holding conflicts with the text of the statute and the decisions of this and other courts.

1. The court of appeals did not cast serious doubt on the district court's finding that FWS had failed to use the best scientific evidence available when it refused to use normalized salvage data, and compared the results of incompatible computer models, to set flow restrictions in the RPAs. *See* Pet. App. 62a ("That the FWS could have done more in determining OMR flow limits is uncontroverted."); *id*. 68a-70a n.24 (describing how court-appointed experts "believed the BiOp to have fallen short in this analysis" because of the failure to consider normalized data); *id*. 89a-92a (discussing criticisms — from FWS's own scientific advisory panel, the court's experts, and petitioners' experts — of FWS's decision to compare results of different computer models).[16]

But it nonetheless sustained the BiOp. The panel held that it was "within the FWS's discretion" to ignore normalized data — notwithstanding that the data were the statutorily required best available scientific data — because that decision led to a more

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[16] Nor did the majority contest the district court's conclusion that the error could have had a drastic impact on the water restrictions FWS imposed. *See* Pet. App. 327a (noting that petitioners' expert, using normalized data, found "no statistically significant relationship between OMR flows and adult salvage for flows less negative than -6,100 [cfs] at the very least"); *id*. 328a (observing that differences of this magnitude could have "very substantial" effects on "the amount of lost annual water supply, with resulting adverse effects on human welfare and the human environment").

"conservative" result, *id*. 61a, intended to "protect the maximum absolute number of individual smelt," *id.* 67a, in a context in which "precision [was] virtually impossible," *id*. 66a. The majority further concluded that the agency's reliance on invalid data was excused because the non-normalized data was not the *sole* information taken into account in setting the flow limits. It was thus possible that the agency would have reached the same decision if it had instead followed the law and actually used the best available data. *See id*. 71a-78a. With respect to the comparison of results from distinct computer models, the majority reasoned that it was sufficient that FWS reasonably concluded that *other* possibilities for determining X2 than calibrating the models — the options of using either the DAYFLOW model or the CALSIM II model *exclusively* — would be imperfect, too. *See id.* 88a-89a.

The Ninth Circuit effectively held that FWS's decision not to use the best available science was a judgment call that fell within the agency's discretion and warranted deference. But that is incorrect. The language of the statute is mandatory, providing that the Secretary "shall" use the best science available. *See* 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.14(g)(8) (the Service "*will* use the best scientific and commercial data available" (emphasis added)). This Court thus held unanimously in *Bennett v. Spear*, 520 U.S. at 172, that such language is "plainly [that] of obligation rather than discretion."[17] In turn:

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[17] In *Bennett*, the Court construed the parallel language of Section 1533(b)(2).

> the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he . . . use "the best scientific data available."

Id. (brackets and emphasis in original).

The court below thus departed from text and precedent by holding that FWS could ignore normalized salvage data because doing so led to the more "conservative" result favored by the agency. Pet. App. 68a. But even if FWS has discretion to adopt a "conservative" approach to setting flow limits, the statute is clear that it must exercise that discretion on the basis of the best available scientific data. It cannot, as the majority held, rely upon invalid data simply because they support a purportedly more conservative result. As this Court explained in *Bennett*, the "obvious purpose" of the best available science requirement is to prevent precisely this sort of "zealous[] but unintelligent[]" enforcement, and the "economic dislocation" that would result. 520 U.S. at 176-77.

The court of appeals likewise erred in holding that FWS was excused from using the best scientific information available because, in the end, estimating a safe level of flow was an inherently uncertain task. Pet. App. 68a. That conclusion is directly contrary to the decisions of other circuits holding that uncertainty in the best available data is no excuse for ignoring it. *See S.W. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (holding that the statute "prohibits the Secretary from disregarding available scientific evidence . . . . [e]ven if the available scientific and commercial data were

quite inconclusive"); *see also Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1265 (11th Cir. 2009) (explaining that "the Service is required to seek out and consider all existing scientific data"); *Ecology Center v. U.S. Forest Serv.*, 451 F.3d 1183, 1194-95 n.4 (10th Cir. 2006) (same); *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 436 (8th Cir. 2004) (same). And it is, of course, also contrary to the text of the statute. Scientific ambiguity does not mean that there is no "best" science.

For the same reasons, the fact that FWS also considered other data does not excuse its failure to consider the best available science. *Compare* Pet. App. 71a-82a *with Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1055 (1st Cir. 1982) (agency must consider best available data even if doing so might not alter its conclusions based on other considerations).

The Ninth Circuit's decision affirming FWS's methodology for locating X2 is equally pernicious. Confronted with the fact that using only the CALSIM II model would produce an erroneous result, the court of appeals effectively decided that the agency had carte blanche to adopt whatever methodology it wanted, with no further explanation. But essentially *all* of the scientific expertise in the case argued that some effort at calibrating the models was standard scientific procedure and necessary before their data could readily be compared. Perhaps FWS could have explained why its chosen methodology was, in fact, the best available — but at a minimum it should have to do that, and it did not.

The panel's conclusion that the agency's violation of the best available science requirement was

effectively harmless (because the agency took other data into account and because the error affected only one component of the RPA) ignores both that courts lack the expertise to determine what an agency would have decided with better information and the "rudimentary administrative law [principle] that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett*, 520 U.S. at 172.

2. The court of appeals further erred by ignoring the expert witnesses upon which the district court relied. *See* Pet. App. 51a-54a. Extra-record expert testimony is often essential to establishing that data not considered by an agency represents the best scientific data available. In cases involving particularly complex scientific issues, it is not possible to establish that the Secretary's action was not based on the "best" data until *after* the Secretary acts. In the context of enforcing the best available science mandate, the administrative record, almost by definition, will be devoid of evidence relating to the ignored data. And it is unlikely that the agency itself will build a record showing that the missing data are better than the data the agency considered. Expert witness testimony is an appropriate means of introducing the required, but missing, information. Especially when, as here, the BiOp was an acknowledged "mess," Pet. App. 55a, expert testimony is needed to facilitate meaningful judicial review. And as the dissent explained, this was not a case in which the district court created a "battle of the experts." *See id.* 174a. Indeed, on all of the most critical points to this petition, the experts essentially

agreed. And where they did not, the trial court affirmed the position of the federal government.

3. The Ninth Circuit's failure to enforce the requirement to use the best available science is of a piece with its misinterpretation of the "reasonable and prudent alternatives" requirement. Both provisions are intended to temper agency zeal for the protection of endangered species by requiring careful consideration of whether, in light of the best available science, the restrictions proposed are *necessary* and *effective*, thereby avoiding infliction of economic and other harms on the general public for no good reason. The Ninth Circuit gave both forms of protection for the public short shrift.

That is not to say, however, that the court of appeals' lenience will always redound to the benefit of endangered species. In fact, it may not. Although the BiOp in this case imposes onerous restrictions on the Projects' water deliveries, in later cases the panel's ruling inevitably will be employed to reject challenges by environmental organizations and others to BiOps that fail to adequately protect endangered species. *E.g.*, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (invalidating BiOp declining to restrict operations of river power system); *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988) (invalidating BiOp authorizing oil and gas leases).[18]

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[18] This case also presents another aspect of the question raised in the pending petition in *Glenn-Colusa Irrigation District v. Natural Resources Defense Council*, No. 14-48: the application of Section 7(a)(2) of the ESA where legal obligations

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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imposed by state and federal law mandate the agency action. *See* Pet. App. 450a-52a. For the reasons set forth in the briefing in *Glenn-Colusa*, the Ninth Circuit erred in this case as well in measuring the impact of *all* Project operations on the delta smelt and its habitat, disregarding that substantial portions of the Projects' activities are not discretionary but rather are compelled by statute or contract. Accordingly, should the Court grant the petition in *Glenn-Colusa*, it should at the very least hold this petition pending its resolution of that case and, if it reverses in *Glenn-Colusa*, remand this case to the Ninth Circuit for reconsideration.

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