

# NOTES

## *NORTON v. SOUTHERN UTAH WILDERNESS ALLIANCE: THE U.S. SUPREME COURT FAILS TO ACT ON AGENCY INACTION*

*Christopher M. Buell\**

### INTRODUCTION

Citing inaction by the Bureau of Land Management (BLM) in preventing damage to lands designated for possible preservation from explosive increases in off-road vehicle use, the Southern Utah Wilderness Alliance (SUWA) sued BLM in 1998 to force it to prevent impairment of the lands.<sup>1</sup> Although the case involved preservation and land-use management statutes, the conflict ultimately came down to the courts' power under the Administrative Procedure Act (APA)<sup>2</sup> to force an agency to comply with a statutory mandate to preserve wilderness areas.<sup>3</sup> After a Utah district court dismissed SUWA's claims and the Tenth Circuit reversed and remanded, the U.S. Supreme Court granted certiorari in the case and issued a unanimous opinion in June 2004.<sup>4</sup> In *Norton v. Southern Utah Wilderness Alliance*,<sup>5</sup> the Court dismissed

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\* Candidate for J.D., 2006. The author would like to thank his wife and family for their love and support throughout.

1. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 60 (2004).

2. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2000).

3. *Norton*, 542 U.S. at 57-58.

4. *Id.* at 57.

5. *Id.* The Court also granted certiorari in another case from the Ninth Circuit dealing with the same issue of compelling agency action in the case of a wilderness preservation mandate. *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 314 F.3d 1146 (9th Cir. 2003); *see also* Maria E. Heckel, Note, *Finding the Line Between Action and Inaction: SUWA v. Norton and Judicial Review of Statutory Land Management*

SUWA's claims for a lack of subject matter jurisdiction, reasoning that the APA does not sanction judicial review of agency inaction unless the action sought to be compelled is "discrete agency action."<sup>6</sup>

The Court's decision adopts a narrow interpretation of the APA's judicial review provisions, continuing a more than decade-long trend in which the Court has eroded environmental groups' abilities to pursue conservation goals and challenge government action via litigation.<sup>7</sup> This latest opinion in the series unnecessarily handcuffs environmental groups who seek to ensure agency compliance with statutory mandates. It also unfairly tips the scales against these environmental groups by keeping the courtroom doors open to their opponents' challenges. The resulting access imbalance will leave environmental groups increasingly on the defensive in land-use conflicts over public lands throughout the country. It will leave natural resources and lands unprotected and subject to irreparable harm because statutes designed to protect them go unheeded.

The result is particularly troublesome in this situation because of the immediate, ongoing and irreparable damage to the lands in question—a result Congress sought to avoid with a statutory mandate to the BLM. The value of suits such as SUWA's in this case is illustrated by the fact that BLM took action only after it was sued. The Court's decision, however, removes the main jurisdictional vehicle used by environmental groups in challenging or seeking agency action on a particular issue. The political process is an inadequate alternative in cases such as this where time is essential. As a result of the Court's holding, federal agencies will have free reign when not constrained by specific and narrow statutory obligations and congressional monitoring, both of which are often impractical.

In Part I, this note will provide an overview and background of the statutory framework under which *Norton* was decided, including the

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*Standards*, 2004 UTAH L. REV. 789. The Court vacated the Ninth Circuit's judgment and remanded the case in light of its decision in *Norton*. *Veneman v. Mont. Wilderness Ass'n*, 124 S. Ct. 2870 (2004). This note focuses solely on *Norton*, however.

6. *Norton*, 542 U.S. at 64.

7. *See, e.g.*, *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 728 (1998) (holding that a group's challenge of a U.S. Forest Service land-use plan was not yet ripe because the Forest Service had not taken any site-specific action); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-66 (1992) (holding that plaintiffs challenging an Endangered Species Act regulation lacked standing because they failed to demonstrate injury and redressability); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 (1990) (holding that an entire agency program did not constitute "agency action" for judicial review under the APA).

Wilderness Act,<sup>8</sup> the Federal Land Policy and Management Act (FLPMA)<sup>9</sup> and the APA. Part II will provide the factual background and procedural history of the case, and the Court's opinion will then be outlined and discussed in Part III. Part IV will discuss the Court's conclusion and why it appears to belie the purpose of the APA by removing agency accountability in courts for all duties other than those falling under the Court's narrow definition of "discrete agency action." Part V concludes that the Court's decision will result in increasing agency inaction in cases such as this one.

### I. LAND MANAGEMENT AND THE BLM

Since the passage of FLPMA in 1976, federally-owned lands in the United States under BLM control have been managed under the directives of "multiple use" and "sustained yield."<sup>10</sup> The balance between such competing interests is nearly impossible to strike, as illustrated by the amount of litigation the mandate has generated.<sup>11</sup> The FLPMA, however, also instructs the Secretary of the Interior to identify and set aside certain undeveloped lands

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8. Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890.

9. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (2000).

10. *Id.* § 1732(a). The FLPMA further defines "multiple use" as:

the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

*Id.* § 1702(c).

"Sustained yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." *Id.* § 1702(h).

11. *See, e.g.*, Pub. Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999); Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist., 914 F.2d 1174 (9th Cir. 1990). *See generally* George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307 (1990). The United States Forest Service is under a similar management mandate. *See* Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (2000). Not surprisingly, it has been a party to significant amounts of litigation as well. *See, e.g.*, Sierra Club v. Espy, 38 F.3d 792 (5th Cir. 1994); Minn. Pub. Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976).

from this traditional, or default, management framework.<sup>12</sup> These lands are to be considered for possible incorporation into the wilderness system created in the Wilderness Act.<sup>13</sup> Only areas of 5,000 acres or more that retain “wilderness characteristics” can qualify for inclusion.<sup>14</sup> Once identified by the Secretary, the lands are known as “wilderness study areas” (WSAs).<sup>15</sup> While the Secretary recommends WSAs to Congress for preservation, Congress reserved for itself the power to designate lands as wilderness areas, thereby blocking future development.<sup>16</sup> To ensure Congress has an opportunity to do so, BLM must manage all WSAs “so as not to impair the suitability of such areas for preservation as wilderness.”<sup>17</sup> This is the statutory mandate at the center of controversy in this case and the one that SUWA alleged had been violated by BLM.<sup>18</sup>

To effectively manage the lands under its jurisdiction, BLM creates and implements land use plans, which it calls “resource management plans.”<sup>19</sup> The plans are adopted through notice-and-comment rulemaking and include a variety of information, such as land uses, goals and objectives, general management practices, and general implementation and monitoring plans.<sup>20</sup> According to BLM, the plans are intended to promote multiple-use management methods and to ensure public participation in the management process.<sup>21</sup> The plans are “designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.”<sup>22</sup>

Although the land-use framework provides the backdrop for the case, the actual legal dispute centers on the judicial review provisions of the APA.<sup>23</sup> Passed in 1946, the APA provides the default statutory framework governing

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12. See 43 U.S.C. § 1714.

13. For a general overview of the wilderness system and its current state, see George Nickas, *Preserving an Enduring Wilderness: Challenges and Threats to the National Wilderness Preservation System*, 76 DENV. U. L. REV. 449 (1999).

14. 43 U.S.C. § 1782(a).

15. 43 C.F.R. § 3802.0-5(c) (2004).

16. 43 U.S.C. § 1782(b).

17. *Id.* § 1782(c). The statutory mandate also provides that, “in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.” *Id.*

18. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004).

19. 43 C.F.R. § 1601.0-5(k).

20. *Id.*

21. 43 C.F.R. § 1601.0-2 (2004).

22. *Id.*

23. *Norton*, 542 U.S. at 57-58.

federal agencies when no independent statutory right of action exists.<sup>24</sup> The statute is an admittedly complex body of law raising myriad issues.<sup>25</sup> The portion that is the focus of *Norton*—§ 706 of the APA—provides the legal remedies available to those parties affected by agency actions. One of the review provisions in particular, and the focus of this case, is § 706(1) which provides that a court shall “compel agency action unlawfully withheld or unreasonably delayed.”<sup>26</sup> At first glance, the meaning of this section may seem clear, but, as always, wading deeper into the APA reveals murkier issues and contradictory analyses among the circuit courts.<sup>27</sup>

It has been widely noted that Congress sought to simply adopt the prevailing practices of judicial review at the time the APA was enacted, including the common law equivalents of § 706(1): writs of mandamus and injunctions compelling action.<sup>28</sup> This fact has led many courts and observers to turn to the legislative history of the statute and the accompanying Attorney General’s Manual on the Administrative Procedure Act<sup>29</sup> for guidance on striking a balance between judicial oversight and agency discretion on meeting statutory requirements.<sup>30</sup> A major concern of the APA’s drafters was the possible separation of powers problem created by courts ordering agencies to act, so they made clear that courts could not “specify administrative action to be taken.”<sup>31</sup> As a result, the Attorney General’s Manual and the case law since the APA’s adoption have established that courts cannot use § 706(1) to compel a particular action or outcome in the case of a discretionary duty; a reviewing court may only order the agency to take action.<sup>32</sup>

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24. 5 U.S.C. § 704 (2000).

25. See, e.g., Catherine Zaller, Note, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under § 706(1)*, 42 WM. & MARY L. REV. 1545, 1545 (2001).

26. 5 U.S.C. § 706(1).

27. See, e.g., *Telecomms. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) (adopting a six-part test to analyze agency delays under a statutory mandate). *But cf.* *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 (10th Cir. 1999) (holding that a court cannot exercise discretion on whether to order agency action if a statutory deadline is present).

28. See, e.g., Carol R. Miaskoff, Note, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 635, 635 (1987).

29. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) [hereinafter ATTORNEY GENERAL’S MANUAL], available at [http://www.oalj.dol.gov/PUBLIC/APA/REFERENCES/REFERENCE\\_WORKS/AGTC.HTM](http://www.oalj.dol.gov/PUBLIC/APA/REFERENCES/REFERENCE_WORKS/AGTC.HTM) (last visited Jan. 5, 2006).

30. Miaskoff, *supra* note 28, at 636-42.

31. *Id.* at 637.

32. *Id.* at 637-40.

## II. SUWA AND THE LOWER COURTS

The Bureau of Land Management manages about 23 million acres of federal lands within Utah.<sup>33</sup> These vast tracts of land are primarily managed under BLM's traditional method of adopting land-use plans to meet the congressionally prescribed multiple-use and sustained yield goals.<sup>34</sup> Some of this land, however, was set aside for alternative management as potential wilderness areas.<sup>35</sup> BLM designated 2.5 million acres as WSAs in 1980, and the Secretary recommended 1.9 million acres of those for wilderness designation by Congress.<sup>36</sup> Congress had not yet acted on the recommendation by 2003.<sup>37</sup> As a result, BLM was required to manage the lands in the interim so they would not be impaired to such a degree that they could no longer be designated as wilderness—i.e., a non-impairment mandate.<sup>38</sup>

SUWA and several other groups sued BLM in 1999, alleging that increased off-road vehicle (ORV) use was damaging four particular WSAs and five other areas that could potentially qualify as WSAs.<sup>39</sup> SUWA argued that BLM was doing little to address the problem to the detriment of the potential wilderness areas.<sup>40</sup> In its suit, SUWA alleged a three-part claim: (1) BLM had failed to manage the WSAs according to the statutory requirement of non-impairment, (2) BLM had failed to implement portions of its land-use plans dealing with management of the WSAs, and (3) BLM had failed to take a "hard look" at whether it should update its environmental analyses under the National Environmental Protection Act (NEPA) due to the increase in ORV use.<sup>41</sup>

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33. Utah Bureau of Land Management—Facts and Figures 2000, <http://www.ut.blm.gov/FactsFigures/FactsFigures00/ff15.html> (last visited Jan. 5, 2006).

34. 43 U.S.C. § 1732(a) (2000).

35. *Id.* § 1782(a).

36. Brief for the Petitioners at 3-4, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) (No. 03-101) [hereinafter Brief for the Petitioners], available at [http://www.jenner.com/files/tbl\\_s69NewsDocumentOrder/FileUpload500/138/BriefForThePetitioners.pdf](http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/138/BriefForThePetitioners.pdf) (last visited Jan. 5, 2006).

37. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 59 (2004).

38. 43 U.S.C. § 1782(c) (2000).

39. Brief of Respondents Southern Utah Wilderness Alliance et al. at 6-9, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 59 (2004) (No. 03-101) [hereinafter Brief for the Respondents], available at [http://www.jenner.com/files/Ho1\\_s69NewsDocumentOrder/FileUpload500/139/Brief\\_Respondents.pdf](http://www.jenner.com/files/Ho1_s69NewsDocumentOrder/FileUpload500/139/Brief_Respondents.pdf) (last visited Jan. 5, 2006).

40. *Id.* at 8-9.

41. Brief for the Petitioners, *supra* note 36, at 5.

According to SUWA, ORV use skyrocketed during the two decades since BLM first designated the WSAs in Utah.<sup>42</sup> Registered ORVs in the state jumped from 9,000 in 1980 to 83,000 in 2000.<sup>43</sup> During this time, SUWA alleged that BLM changed little about how it regulated ORV use on the four WSAs, leaving most of the areas open to ORV use without designated trails to restrict them.<sup>44</sup> As a result, SUWA noted that even BLM had admitted the WSAs were being impaired by ORV use.<sup>45</sup>

After SUWA filed suit against BLM, several groups of ORV activists, including the Utah Shared Access Alliance, intervened in the suit and filed a motion to dismiss for lack of subject matter jurisdiction.<sup>46</sup> The district court in the case granted the ORV groups' motion to dismiss SUWA's claims, refusing to issue a preliminary injunction against the agency.<sup>47</sup> The court reasoned that, although there was evidence of impairment of the WSAs from the ORVs, the court's power to compel agency action was limited to "clear nondiscretionary dut[ies]" and "only where there is a genuine failure to act."<sup>48</sup> The court based its decision not to intervene on the fact that there was not a complete failure to act by BLM because it had taken some steps to implement its land-use plans, albeit limited ones.<sup>49</sup> The court also reasoned that the decision of how to respond to the ORV use, particularly whether supplemental analyses were needed under NEPA, was a discretionary one best suited to agency expertise.<sup>50</sup>

On appeal, the Tenth Circuit reversed and ruled that SUWA's claims were justiciable under § 706(1) of the APA.<sup>51</sup> The Tenth Circuit agreed with the district court that its powers to compel agency action under the APA were limited to "mandatory, nondiscretionary dut[ies]," but it concluded that BLM was subject to such a duty under the FLPMA and its own land-use plans.<sup>52</sup> Judge Ebel, writing for the majority, declined to accept arguments by BLM that it had discretion in how to meet its statutory mandate and that it had taken

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42. Brief for the Respondents, *supra* note 39, at 6.

43. *Id.* SUWA has noted that the number of registered ORVs in Utah has continued to increase, surpassing 120,000 in 2005. Southern Utah Wilderness Alliance, Off-Road Vehicle Campaign, [http://www.suwa.org/page.php?page\\_name=Camp\\_Orv\\_Home](http://www.suwa.org/page.php?page_name=Camp_Orv_Home) (last visited Jan. 5, 2006).

44. Brief for the Respondents, *supra* note 39, at 7.

45. *Id.* at 8.

46. *Id.* at 9.

47. Brief for the Petitioners, *supra* note 36, at 5.

48. *Id.* at 6.

49. *Id.* at 6-7.

50. *Id.*

51. *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002).

52. *Id.* at 1233.

some action to meet that mandate. Judge Ebel argued that discretion in how to meet a mandate does not make the mandate itself discretionary, and that, if the court accepted BLM's argument that it had taken some steps to prevent impairment, agencies could effectively avoid review of their compliance by simply doing the bare minimum.<sup>53</sup> The court's analysis was consistent with its previous case law recognizing a court's ability to enforce statutory mandates allowing agency discretion by ordering the agency to act without specifying how the agency should proceed.<sup>54</sup>

Judge McKay dissented from the majority's opinion with respect to SUWA's claims stemming from BLM's alleged duties under the FLPMA and the agency's land-use plans.<sup>55</sup> Judge McKay argued that the court's authority to order relief under § 706(1) was narrow.<sup>56</sup> It was limited to those situations where the agency's duty was a ministerial one, or one "without the exercise of personal judgment upon the propriety of the act and usually without discretion in its performance."<sup>57</sup> The majority's decision, according to Judge McKay, would result in attacks on the day-to-day operations of agency programs and policies, a result already rejected by the Supreme Court over a decade earlier.<sup>58</sup>

A little over a year later, the Supreme Court granted certiorari to hear the case and resolve the split in the circuits<sup>59</sup> over courts' authority to review agency inaction under § 706(1) of the APA.<sup>60</sup>

### III. THE SUPREME COURT'S OPINION

The Supreme Court, in a unanimous opinion authored by Justice Scalia, held that it did not have subject matter jurisdiction over the matter because SUWA's claims did not allege "discrete agency action" that BLM was

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53. *Id.* at 1227-33.

54. *See, e.g.*, *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (stating that "courts must compel agency action unlawfully withheld or unreasonably delayed"); *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) (noting that "[a]dministrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform").

55. *Norton*, 301 F.3d at 1240-47 (McKay, J., dissenting).

56. *Id.* at 1240-41.

57. *Id.* at 1241.

58. *Id.* at 1243 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990)).

59. *Compare* *Telecomms. Research and Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) (adopting a six-part test to analyze agency delays under a statutory mandate) *with* *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002) *and* *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 314 F.3d 1146 (9th Cir. 2003) (holding that a court may compel agency action).

60. *Norton v. S. Utah Wilderness Alliance*, 540 U.S. 980 (2003).

required to take and had failed to do, under either the FLPMA, BLM's land-use plans or NEPA.<sup>61</sup> The Court reached its conclusion based on the APA, which it interpreted as plainly limiting challenges to both agency action and inaction to a narrow category of final agency actions that were "discrete" rather than "programmatic."<sup>62</sup> The Court then moved to SUWA's assertions that BLM had violated its land-use plans. On this claim, the Court held that the plans were not binding commitments on the part of the agency without a clear indication from the agency that it intended them to be.<sup>63</sup> Finally, the Court considered whether BLM should have re-evaluated its environmental analyses under NEPA; on this count, it held that because there was no ongoing agency action, no supplement was necessary.<sup>64</sup> As a result, the Court dismissed SUWA's claims in their entirety, leaving it without a remedy and the fate of the disputed Utah WSAs in the hands of the BLM.

Before considering any of SUWA's actual claims, the Court began its analysis by first turning to the text of the judicial review provisions of the APA, which the Court pointed to as providing for judicial review with certain limitations.<sup>65</sup> Section 702 provides a right to judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."<sup>66</sup> If judicial review is not provided for by a specific statute, the APA's catch-all review requires that the agency action under review be final.<sup>67</sup> The Court then noted that, under § 706(1), a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."<sup>68</sup>

From this overview, the Court concluded that the common denominator throughout the judicial review provisions is "agency action," either to be reviewed or to be compelled.<sup>69</sup> The term "agency action" is defined by the APA as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."<sup>70</sup> Each of the five delineated examples of agency action and their definitions under the APA are

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61. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

62. *Id.*

63. *Id.* at 69.

64. *Id.* at 73.

65. *Id.* at 61-65.

66. 5 U.S.C. § 702 (2000).

67. *Id.* § 704.

68. *Norton*, 542 U.S. at 62 (quoting 5 U.S.C. § 706(1)).

69. *Id.*

70. 5 U.S.C. § 551(13) (2000). The APA further defines rule, order, license, sanction and relief. *Id.* § 551(4), (6), (8), (10), (11).

“discrete” or limited in scope, according to the Court.<sup>71</sup> The Court then argued that it follows that a “failure to act” is a failure to take “agency action,” and therefore should be limited to a similar discreteness.<sup>72</sup> Furthermore, the statutory interpretation canon of *eiusdem generis* supports the same limitation on “failure to act” as on the preceding types of “agency action.”<sup>73</sup>

The Court also held that, in addition to being discrete, agency action to be compelled under the APA must also be legally required.<sup>74</sup> In order for action to be “unlawfully withheld” as described in § 706(1), an agency must be under some legal requirement to act. The Court attributed the incorporation of this limitation in the APA to the traditionally narrow remedy provided by writs of mandamus at common law and under the All Writs Act.<sup>75</sup> The Court also noted that, according to the *Attorney General’s Manual on the APA*, § 706(1) empowers a court to order the performance of a non-discretionary act or to order action upon a discretionary matter, without specifying how the agency should act.<sup>76</sup> The Court concluded that, based on its analysis, § 706(1) can only be used when a party alleges that an agency failed to take a discrete action that it was legally required to take.<sup>77</sup>

After establishing these prerequisites for § 706(1) review under the APA, the Court turned to SUWA’s claims.

#### A. *Is a Statute a Mandate?*

The Court initially considered SUWA’s claim that BLM had violated its mandate under the FLPMA to prevent impairment of the WSAs such that they can no longer be preserved as wilderness.<sup>78</sup> However, according to the Court, this argument suffered from a fatal flaw—no discrete agency action is required of the BLM.<sup>79</sup> Although the FLPMA provides BLM with a mandatory objective, it does not mandate how that objective is to be achieved. Presumably BLM could use a variety of means to prevent impairment to the WSAs by ORV users, from a complete ban to designating limited areas for

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71. *Norton*, 542 U.S. at 62.

72. *Id.* at 62-63.

73. *Id.*

74. *Id.* at 63.

75. *Id.*

76. *Id.* at 63-64 (citing ATTORNEY GENERAL’S MANUAL, *supra* note 29, at 108).

77. *Id.* at 64.

78. 43 U.S.C. § 1782(c) (2000).

79. *Norton*, 542 U.S. at 66.

ORV use. As a result, it lacks discreteness or “the clarity necessary to support judicial action under § 706(1).”<sup>80</sup>

Under this analysis, a court could not simply order the agency to comply with the mandatory objective—the solution suggested by the Tenth Circuit—because the mandate is too broad. It is not based on the types of “discrete actions” reviewable under the APA. The Court argued that if courts were able to issue orders to comply with such broad mandates, “they would necessarily be empowered . . . to determine whether compliance was achieved,” thereby placing the courts, rather than the agency, at the wheel.<sup>81</sup> Taken to its limit, such pervasive review would lead to an administrative bureaucracy overseen by the courts rather than the President. Such a result is not provided for in the APA, the Court concluded.<sup>82</sup>

#### *B. Can an Agency Bind Itself?*

The Court next took up SUWA’s claim that BLM has failed to follow its own land-use plans in violation of a requirement that it manage lands under its control “in accordance with the land use plans.”<sup>83</sup> The Court pointed out that several of the actions specified in the land-use plans were completed after the litigation began and that claims regarding those actions were moot.<sup>84</sup> However, at least one commitment in the land-use plans—an ORV monitoring program in one of the WSAs—remained incomplete according to SUWA and unenforceable according to BLM, and Justice Scalia concluded that it, therefore, was not moot.<sup>85</sup>

Although the FLPMA instructs BLM to manage lands in accordance with land-use plans, it does not follow that the plans are binding, according to the Court. The statutory instruction is sufficient to challenge an agency action inconsistent with the land-use plans.<sup>86</sup> The Court argued that the land-use plans are not sufficient, however, to be a “binding commitment” subject to being compelled under the APA, without some clear indication from the agency that it intends itself to be bound by the plan.<sup>87</sup>

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80. *Id.*

81. *Id.* at 66-67.

82. *Id.* at 67.

83. 43 U.S.C. § 1732(a) (2000).

84. *Norton*, 542 U.S. at 67-68.

85. *Id.* at 68-69.

86. *Id.* at 69. According to the Court, inconsistent actions can be set aside as contrary to law under 5 U.S.C. § 706(2). *Id.*

87. *Id.* Of course, however unlikely it was that agencies would voluntarily bind themselves to any

To support this conclusion, the Court marshals several examples of statutory and regulatory language that suggest land-use plans are guides rather than commitments, as well as practical considerations of agency management.<sup>88</sup> For instance, the FLPMA describes land-use plans as a means to project present and future use.<sup>89</sup> BLM's regulations on the matter state that land-use plans are "designed to guide and control future management actions" rather than mandate those future actions.<sup>90</sup> And perhaps most clearly, BLM's regulations provide that land-use plans are "not a final implementation decision on actions which require further specific plans."<sup>91</sup>

The Court also argued that binding land-use plans do not make sense from a practical standpoint either. The plans are often immense in subject matter and scale and deal with agency actions far into the future that are not yet funded.<sup>92</sup> As a result, the land-use plans operate as a means for BLM to prioritize its plans and actions. Making them judicially enforceable would eliminate BLM's discretion in altering or reordering priorities.<sup>93</sup> Based on these facts, the Court concluded that agency land-use plans are not commitments unless the agency clearly states otherwise in the plan.<sup>94</sup>

### C. *No Hard Look Needed*

Finally, the Court considered SUWA's argument that BLM was obligated to take a hard look at its environmental analyses under NEPA and supplement them due to the increased ORV use on the WSAs. The Court began and ended its discussion by considering whether NEPA requires an update in this situation and concluded that it does not.<sup>95</sup> The Court noted that it has previously held that supplemental environmental analyses may be required, but only if "there remains 'major Federal actio[n]' [sic] to occur."<sup>96</sup> In this case, the major Federal action was BLM's adoption of a land-use plan, but

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commitment in a plan previously, in light of this language in the Court's opinion, it is almost assured that agencies will not use such language in the future.

88. *Id.* at 69-70.

89. 43 U.S.C. § 1701(a)(2) (2000).

90. 43 C.F.R. § 1601.0-2 (2004).

91. 43 C.F.R. § 1601.0-5(k) (2004).

92. *Norton*, 542 U.S. at 70-71.

93. *See id.* at 71.

94. *Id.* at 72.

95. *Id.* at 72-73.

96. *Id.* at 73 (quoting *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360 (1989)).

that action was completed when BLM approved the plan.<sup>97</sup> Therefore, absent a revision or amendment of the plan, BLM is not required to supplement its environmental analysis.<sup>98</sup>

Following its discussion of these issues, the Court remanded the case to the Tenth Circuit for further proceedings.<sup>99</sup>

#### IV. THE SUPREME COURT FAILS TO ACT

In deciding this case, the Court faced a power struggle between the judiciary and executive branches over ensuring the fulfillment of legislative mandates—in this case, BLM’s preservation of WSAs. However, the Court’s final decision not to compel BLM to act strikes a balance too far in the executive’s favor. The Court’s decision on the non-impairment mandate under the FLPMA grants BLM so much discretion as to make compliance with the mandate itself discretionary. The Court reaches this result by downplaying courts’ ability to adequately review the statutory mandate in this case, and by exaggerating any increase in litigation and judicial intervention that the opposite outcome might actually cause. As a result, environmental groups will be stripped of one of their most effective means of ensuring that preservation of public lands and natural resources is carried out in accordance with statutes.

##### A. *A Deferential View of Discretion*

The Court began its analysis of SUWA’s claims under the FLPMA by noting that the mandate provided under the statute is not clear enough to support judicial review.<sup>100</sup> The Court argued that the built-in limitations in

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 65-66. This assertion seems to ignore that the statute and accompanying regulations are not completely devoid of any standards or guidelines from which to gain traction for review. In addition to the non-impairment mandate found within the FLPMA itself, BLM adopted an Interim Management Policy for WSAs by notice-and-comment rulemaking in 1979. Interim Management Policy and Guidelines for Lands Under Wilderness Review, 44 Fed. Reg. 72,014 (Dec. 12, 1979). That policy provides an elaboration on the non-impairment mandate contained in the FLPMA and BLM’s interpretation of what constitutes compliance. Clearly, a reviewing court would not be working in a vacuum in trying to weigh BLM’s compliance with the mandate. The policy has been revised since its initial promulgation. Interim Management Policy and Guidelines for Lands Under Wilderness Review, 48 Fed. Reg. 31,854 (July 12, 1983). For the current version, see Interim Management Policy for Lands Under Wilderness Review, at <http://www.ut.blm.gov/utahwilderness/imp/imp.htm> (last visited Jan. 5, 2006) [hereinafter Interim

APA review discussed earlier in the opinion—namely discreteness and a legal requirement<sup>101</sup>—are designed to uphold agency discretion against the threat of overbearing courts.<sup>102</sup> While this certainly is a case involving agency discretion, the Court’s analysis fails to recognize that BLM’s discretion, while admittedly broad under the FLPMA, is not complete. Congress did not include within the universe of management options for BLM the choice to take no action with regard to WSAs. Where, as here, the agency itself has admitted that its actions have not met its statutory mandate,<sup>103</sup> it borders on the absurd to defend that action as an exercise of discretion.

The existence of agency discretion has not prevented review in other cases involving broad mandates. Indeed, courts have shown themselves to be quite capable of effectively reviewing broad agency management directives by simply giving adequate deference to the agency.<sup>104</sup> This balance is achieved by the use of a relatively deferential standard of review, such as arbitrary and capricious review, rather than by denying courts jurisdiction to hear the case at all, as the Court did here.<sup>105</sup> In this way, courts would be able to review agencies’ compliance with statutory mandates, no matter how broad, for at least a minimal amount of rationality. It is hard to believe that such a minimal amount of rationality exists in this case when the agency itself has admitted that it failed to meet its non-impairment mandate.

An example illustrates how easily such a standard of review could be incorporated into potential judicial review of agency inaction. Assume BLM had undertaken a limited program to monitor ORV use in the WSAs and had

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Management Policy]. The current version is cited in the remainder of this note.

101. It is worth noting that the Court’s narrow view of “agency action” in this case is inconsistent with the view it espoused only three years earlier in an opinion, again by Justice Scalia, in which it stated that “agency action” was “meant to cover comprehensively every manner in which an agency may exercise its power.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 478 (2001). In contrast to *Norton*, where the Court held that the limitation on judicial review was found in the form of agency action, in *Whitman*, the Court noted that the “bite” in the phrase was whether the action was “final.” *Id.*

102. *Norton*, 542 U.S. at 66-67.

103. Brief for the Respondents, *supra* note 39, at 8.

104. *See, e.g.*, *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994) (holding that the Forest Service’s decision on timber harvesting methods fell within its discretion granted by the National Forest Management Act); *Headwaters, Inc. v. Bureau of Land Mgmt.*, Medford Dist., 914 F.2d 1174 (9th Cir. 1990) (holding that a multiple-use analysis by BLM satisfied the requirements of the FLPMA).

105. The arbitrary and capricious standard of review was perhaps most clearly described in *Motor Vehicle Manufacturers Ass’n of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). In that case, the Court held that arbitrary and capricious review “is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* at 43.

restricted access only in the most vulnerable and heavily used segments of the lands, but left the WSAs otherwise open to ORVs. If SUWA were to bring the same suit in that situation, a court would be able to review BLM's factual findings made in implementing its monitoring program and in determining which segments of the WSAs to close. A reviewing court would be limited to reviewing the rationality of the connection between the agency's reasoning and its chosen action. In such a case, it seems more likely that some rationality exists between the agency's action and its mandate. In this case, though, BLM has offered no reasoning or support for its chosen action—which was to not act—other than that it was not required to act. As a result, a reviewing court would likely find BLM's management decisions to be arbitrary and capricious because the agency was required under the mandate to take at least some action.

This approach to judicial review is consistent with an already existing limitation imposed by APA § 701(a)(2), which provides that review will not hold when “agency action is committed to agency discretion by law.”<sup>106</sup> This limit on judicial review is considered a “very narrow exception . . . applicable in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”<sup>107</sup> The court expanded the exception somewhat in later cases,<sup>108</sup> but the statutory mandate present here does not appear to fall within the § 701(a)(2) exception. Given the statutory language and BLM's own interpretation of it, there is law for a reviewing court to apply.<sup>109</sup>

In addition to the statutory mandate found in the FLPMA, BLM has adopted a management policy in which it interprets its non-impairment mandate.<sup>110</sup> The policy provides that non-impairment requires “[w]hen the activity is terminated, . . . the area's wilderness values must not have been degraded so far . . . as to significantly constrain the Secretary's recommendation with respect to the area's suitability or unsuitability for preservation as wilderness.”<sup>111</sup> The policy also clearly provides that BLM

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106. 5 U.S.C. § 701(a)(2) (2000).

107. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 752, at 26 (1945)).

108. *See Webster v. Doe*, 486 U.S. 592, 599-601 (1988) (holding that the language and structure of a statute allowing employee termination when the CIA director deems necessary precludes judicial review); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding that agency decisions on enforcement actions were presumptively unreviewable by courts).

109. *See supra* note 100.

110. Interim Management Policy, *supra* note 100.

111. *Id.* at I.B.2.b.

should deny impairing uses, one of which is surface disturbances.<sup>112</sup> The policy goes on to provide that cross-country vehicle use of trails and existing ways is necessarily surface disturbing, and would therefore constitute impairment.<sup>113</sup> Although this language may not mandate the “total exclusion of ORV use,”<sup>114</sup> for the Court to assert that there is insufficient clarity in the existing statutory and regulatory framework to review BLM’s inaction is an abdication of judicial responsibility.<sup>115</sup>

The Court’s argument that the judiciary would be thrown into day-to-day management duties if it were to grant review in this case exaggerates any potential impact on litigation that such a decision would have. Given courts’ traditional willingness to defer to agencies’ discretion,<sup>116</sup> a dramatic surge in judicial involvement in management decisions does not seem likely. Even assuming judicial review were allowed in this case, it would still be limited by § 701(a)(2) and traditional prudential requirements, such as standing and ripeness.<sup>117</sup> These requirements would ensure that only the most clearly defined cases reach courts for review, and that courts only insert themselves into a matter in a limited way.

### B. *The Resulting Imbalance*

The Court’s decision is also troublesome because it strips environmental groups of one of their primary means of accomplishing preservation goals while not replacing it. The Court clearly holds that it does not view the judiciary as the proper forum for this dispute, but it does not indicate what SUWA’s remedy is in this situation. The Court’s opinion and its citation to *National Wildlife Federation* suggests that SUWA should air its complaint to the agency itself or to Congress.<sup>118</sup> However, neither of those options will adequately ensure agency compliance with statutory mandates.

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112. *Id.* at I.B.2., I.B.2.a.

113. *Id.* at I.B.3.

114. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004).

115. The Court references several other particularly broad agency mandates at this point. *Id.* at 67. While it is debatable whether the statutory mandate in this case is as broad as those, those directives surely cannot be accomplished by inaction either.

116. *See, e.g., Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Nat’l Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988).

117. Brief for the Respondents, *supra* note 39, at 36; William Gerard, *Norton v. Southern Utah Wilderness Alliance*, 28 HARV. ENVTL. L. REV. 581, 591 (2004).

118. *See Norton*, 542 U.S. at 64-65.

The Court correctly notes that the first step SUWA should take is to petition BLM about the alleged impairment of the WSAs and seek some action on the problem.<sup>119</sup> The problem with limiting SUWA's remedy to this approach, however, is that it still does not offer any oversight of the agency's compliance with the statutory mandate. If the agency refuses to act on a group's petition, as BLM did here,<sup>120</sup> then, absent judicial review, there will be no authority to ensure the agency's decision was consistent with its mandate. As a result, the agency rather than the courts would be the interpreter of the law, a concept clearly contrary to precedent.<sup>121</sup>

The Court implies that the other proper remedy in this situation is an appeal to Congress through the traditional political channels.<sup>122</sup> That remedy is clearly unsuited to this problem, however. To begin with, Congress has already acted on this issue by enacting the FLPMA to instruct BLM on how to manage lands under its control. Further, it is unlikely that sufficient political momentum could be mustered in Congress to address the issue again because the harm has occurred in the WSAs—relatively limited areas that are not home to any political constituency.<sup>123</sup> The notoriously slow legislative body is also not suited to such time-sensitive issues as this case, where delay will result in continued damage to the WSAs.<sup>124</sup> Even assuming Congress could act in a specific situation, it is unreasonable to expect Congress to monitor the implementation of every statute it passes. Such case-specific oversight seems more naturally suited for the courts than Congress.<sup>125</sup>

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119. *Cf. id.* at 64 (“[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.” (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990))).

120. Brief for the Respondents, *supra* note 39, at 8.

121. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

122. *Norton*, 542 U.S. at 64-65.

123. Brief of Amici Curiae Professors of Administrative and Environmental Law in Support of Respondents Southern Utah Wilderness Alliance et al., at 11-13, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) (No. 03-101), available at [http://www.jenner.com/files/tbl\\_s69NewsDocumentOrder/FileUpload500/146/AmiciCuriae\\_Professors\\_Administrative\\_Environmental\\_Law.pdf](http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/146/AmiciCuriae_Professors_Administrative_Environmental_Law.pdf) (last visited Jan. 5, 2006).

124. The problems that arise when Congress over-legislates a relatively time-sensitive issue have been previously shown. *See, e.g., Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (upholding an agency interpretation of provisions in the Clean Air Act that set specific dates for the Environmental Protection Agency to act on non-attainment of air quality standards); *see also* Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223, 257-58 (2004).

125. The Court does not expressly say that this is a case of an environmental group seeking programmatic review of the wilderness program, but it suggests that in its citation to *Lujan v. National Wildlife Federation*. *Norton*, 542 U.S. at 64. However, this does not appear to be such a case because SUWA has only alleged harm and sought review of agency inaction in specific WSAs rather than review

The Court's decision is also problematic because it creates an imbalance in access to the courts between environmental groups seeking regulation and the regulated parties. Following the Court's holding, if the agency does not act consistently with a statutory mandate, environmental groups will be barred from using the APA to force the agency to comply with that mandate. However, if the agency takes some action to manage the resources, such as a regulation, the regulated parties will be able to seek judicial review of that action under § 706(2) of the APA. Although the Court views the statutory mandate as too vague to allow review in the first situation,<sup>126</sup> the same mandate is sufficiently specific to allow for judicial review in the second case. The entire basis of the Court's argument on this point is that courts should not be empowered to determine whether the statutory mandate has been satisfied,<sup>127</sup> but courts already do so in reviewing agency action under § 706(2). A better result is reached by allowing review, but limiting it to a deferential standard.

What is left unanswered in the wake of the Court's opinion is why regulated parties such as the ORV users should hold greater procedural rights than groups such as SUWA that are seeking government action. The resources in question in this scenario are public lands, to which both parties presumably should have equal rights. The Court's interpretation of the APA and the impact it will likely have on public land management by agencies such as BLM and the U.S. Forest Service, however, gives the ORV users greater ability to vindicate their rights to public lands than groups such as SUWA.

As a result, the Court's decision assuredly will lead to an increase in agency inaction despite mandatory, nondiscretionary duties requiring some action. The value of litigation in forcing an otherwise sluggish agency to comply with statutory duties is apparent from the fact that BLM finally began work on long-promised land-use plans for the WSAs only after SUWA brought suit.<sup>128</sup> The potential litigation imbalance also encourages agencies not to act. If an agency does take action, that action can be challenged under § 706(2), but if the agency does not act, no such challenge is possible. The

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of its entire management program for WSAs. *But cf.* *Sierra Club v. Peterson*, 228 F.3d 559, 566-68 (5th Cir. 2000) (holding that identification of specific wrongdoing cannot be used to disguise a broader, programmatic challenge).

126. *Norton*, 542 U.S. at 66.

127. *Id.* at 66-67.

128. *Id.* at 68; Brief for the Respondents, *supra* note 39, at 12-13. For more on the effectiveness of using litigation to force agency action on mandatory duties, see Robert L. Glicksman, *The Value of Agency-forcing Citizen Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353 (2004).

fact that action will result in litigation, while inaction will not, is likely to be a hefty incentive for any agency not to act.

#### V. REWARDING INACTION

The Court's decision not to hold BLM to its non-impairment mandate under FLMPA is decidedly troubling. The Court uses a straightforward analysis, but it ignores the larger realities and impact that its decision will have. In its rush to respect BLM's discretion in implementing statutory directives, the Court ignores the judicial system's traditional and firmly established characteristics, such as deference and restraint, which would enable it to review agency inaction in this situation.

One can expect to see agency inaction continue and increase because there will be little incentive for agencies to act in a timely manner, and there will be little recourse for those seeking to check inevitable bureaucratic inertia. Already, the impact of the Court's decision can be seen in decisions that have since been handed down. The Ninth Circuit has rejected a claim by environmental groups that the U.S. Forest Service failed to consider certain rivers for inclusion in the Wild and Scenic Rivers System in contravention of the Wild and Scenic Rivers Act.<sup>129</sup>

The danger is particularly acute in the environmental realm because many of the statutory mandates that will be affected by the Court's decision are those dealing with valuable natural resources that may be irreparably harmed or destroyed during the agencies' inaction. The Court correctly observed that this is a case of conflicting land uses, but it is a case where Congress has already weighed in on the conflict, the agency has ignored that mandate, and the Court has now refused to uphold it. The result can be seen in this case where WSAs in Utah, mismanaged or not managed at all for the past decade, now have been permanently damaged by uncontrolled ORV use.

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129. See *Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108 (9th Cir. 2005). For an example of the *SUWA* decision being used by environmental groups against an ORV group, see *Shawnee Trail Conservancy v. Nicholas*, 343 F. Supp. 2d 687 (S.D. Ill. 2004).