

NORTON V. SOUTHERN UTAH WILDERNESS ALLIANCE*

William Gerard**

The federal government owns roughly twenty-nine percent of the land area of the United States. In Utah, as in several other western states, it owns more than sixty percent of the land.¹ Federal land management thus implicates unparalleled environmental, recreational, and aesthetic values, and offers the only possibility of managing significant tracts of undeveloped land in a way that maximizes these values for present and future generations. The Department of Interior's ("DOI") Bureau of Land Management supervises these federal lands under the Federal Land Policy Management Act of 1976 ("FLPMA"). Last Term, in *Norton v. Southern Utah Wilderness Alliance* (argued Mar. 29, 2004),² the Supreme Court considered DOI's duty under the Act to preserve the natural value of "wilderness study areas." The decision will address a question with ramifications across environmental and administrative law: at what point can litigants challenge agencies for *failing to act* when they are statutorily required to protect lands under their charge? If the Court concludes that failing to act does not constitute a "final decision" reviewable by the courts, the danger of agency inaction in the face of irreversible environmental harm will be greatly increased.

BACKGROUND

Among its many requirements, FLPMA requires DOI³ to identify areas within federal lands that have "wilderness characteristics" and to designate such areas as "wilderness study areas" ("WSAs").⁴ FLPMA contemplates that some of these WSAs will eventually be designated by Congress as full wilderness areas, subject to the National Wilderness Preservation System and its many legal protections.⁵ Congress retained exclusive authority to transform legally WSAs into wilderness areas, and in order

* Argued March 29, 2004.

** J.D. Candidate, Harvard Law School, 2005.

¹ U.S. Census Bureau, Statistical Abstract of the United States 2003, at 226 tbl. 360 (2003).

² 124 S. Ct. 462 (Nov. 3, 2003) (No. 03-101).

³ For simplicity, this Comment will refer to both the Bureau of Land Management and the Department of the Interior as "DOI," although statutes, reports, and briefs may refer to one or the other. The Bureau of Land Management is an entity within the Department of the Interior and the two are essentially equivalent for the purposes of this comment.

⁴ 43 U.S.C. § 1782 (2000).

⁵ "[T]o secure for the American people of present and future generations the benefits of an enduring resource of wilderness," Congress in 1964 passed the Wilderness Act, requiring designated wilderness areas to be "administered . . . in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to . . . [preserve] their wilderness character." 16 U.S.C. § 1131 (2000).

to protect its prerogative to make these eventual designations, FLPMA orders DOI to manage WSAs “in a manner so as not to impair the suitability of such areas for preservation as wilderness.”⁶

In 1980, DOI created WSAs encompassing 2.5 million acres of land in Utah.⁷ Although impairment is not defined in FLPMA, DOI promulgated, through public notice and comment procedures, an Interim Management Plan (“IMP”) which defined “the nonimpairment standard.”⁸ Finding that motor vehicles can harm pristine areas in a number of ways, the IMP mandated exclusion of vehicles from WSAs except on existing ways or boundary roads or in specific circumstances, such as emergencies or official business,⁹ asserting that “[c]ross-country vehicle use off . . . existing ways is surface disturbing” and this type of activity “must be denied.”¹⁰ The IMP further acknowledges that “[m]anagement under the nonimpairment standard protects Congress’ right to make the [wilderness] designation decision by preventing actions that would preempt that decision;”¹¹ and that “[DOI] will take all actions necessary to ensure full compliance with the Interim Management Policy.”¹²

Since the promulgation of the initial IMP in 1979, however, widespread and increasing recreational off-road vehicle (“ORV”) use has caused damage in the WSAs.¹³ DOI admits that it has not “carr[ied] out or enforce[d]” the ORV policies in the IMP¹⁴ and that ORV use impairs the WSAs.¹⁵ ORVs are known to cause a wide variety of lasting environmental harms: soil compaction, resulting in erosion and decreased vegetation; damage to fragile cryptobiotic crusts; oil and gas pollution; destruction of fragile desert vegetation; the killing and disturbing of wildlife and prevention of

⁶ 43 U.S.C. § 1782 (2000).

⁷ *S. Utah Wilderness Alliance v. Babbitt*, 2000 WL 33914094, at *4 (D. Utah 2000) (internal citation omitted).

⁸ Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72,014, 72,022 (Dec. 12, 1979). The IMP has since been revised. *See infra* note 10.

⁹ IMP, 44 Fed. Reg. 72,014, 72,020–21 (Dec. 12, 1979).

¹⁰ Revised IMP at I.B.3., available at <http://www.ut.blm.gov/utahwilderness/imp/imp.htm> (last accessed on Apr. 29, 2004) (on file with the Harvard Environmental Law Review).

¹¹ IMP, 44 Fed. Reg. at 72,016 (Dec. 12, 1979).

¹² *Id.* at 72,023.

¹³ *See S. Utah Wilderness Alliance v. Babbitt*, 2000 WL 33914094, at *3, *5 (D. Utah 2000).

¹⁴ Brief of Respondents Southern Utah Wilderness Alliance at 6, *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 462 (2003) (No. 03-101), available at http://www.abanet.org/publiced/preview/briefs/pdfs_03/101RespSUWA.pdf (on file with the Harvard Environmental Law Review) [hereinafter Brief for Respondent] (citing BUREAU OF LAND MANAGEMENT, NATIONAL MANAGEMENT STRATEGY FOR MOTORIZED OFF-HIGHWAY VEHICLE USE ON PUBLIC LANDS 20 (2001), available at http://www.blm.gov/ohv/OHV_FNL.pdf (on file with the Harvard Environmental Law Review)).

¹⁵ Joint Appendix at 120, *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 462 (2003) (No. 03-101), available at http://supreme.lp.findlaw.com/supreme_court/briefs/03-101/03-101.mer.ja.pdf (on file with the Harvard Environmental Law Review) [hereinafter Joint Appendix] (noting that ORV use impairs the WSAs). *See also* Brief for Respondent, *supra* note 14, at 8 (claiming that DOI has admitted impairment has occurred in the WSAs).

nesting; and the scarring of pristine wild lands with tire tracks.¹⁶ The severity of the ORV problem grew alongside the more than 900% increase in the number of registered ORVs in Utah since the time of DOI's initial wilderness inventory.¹⁷

In 2000, Southern Utah Wilderness Alliance ("SUWA") sued DOI over its handling of four Utah WSAs, claiming that DOI's failure to stop the damaging activities violated both FLPMA and DOI's own IMP. Jurisdiction for the challenge was premised on the Administrative Procedure Act ("APA").¹⁸ While most such challenges fall under § 706(2), which provides for judicial review of agency action,¹⁹ the APA also provides for challenges to an agency's failure to act: § 706(1) instructs that "the reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."²⁰ DOI admitted that damage was occurring in spite of legally confining vehicle use to existing tracks, but argued that SUWA nevertheless was "not asserting a genuine failure-to-act claim," because DOI had not actively taken steps to allow this damage, but in fact actively had taken steps to address the problem.²¹

The district court dismissed SUWA's suit, holding that jurisdiction under § 706(1) of the APA was inappropriate.²² Since DOI had not abdicated its statutory responsibility completely, the court reasoned, SUWA's complaint merely amounted to questioning the sufficiency of the agency's actions in reaching the nonimpairment standard, for which there is no specific, "ministerial," statutorily mandated agency response.²³ The district court expressed discomfort with judging the sufficiency of DOI's actions in response to the ORV issue, characterizing this as a question of day-to-day management under FLPMA requiring agency, not judicial, expertise.²⁴

SUWA appealed, and the Tenth Circuit reversed the dismissal, holding that jurisdiction for review under APA § 706(1) was proper where there was evidence that DOI inaction was resulting in serious impairment to the WSAs, violating FLPMA's immediate, continuous, mandatory, and non-discretionary duty to prevent such impairment.²⁵ The court found juris-

¹⁶ Brief of Amici Curiae Natural Resources Defense Council, et al. at 5–7, Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 462 (2003) (No. 03-101), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/145/AmiciCuriae_NaturalResourcesDefenseCouncil_othergroups.pdf (on file the Harvard Environmental Law Review). See also Joint Appendix, *supra* note 15, at 187–91 (photographic evidence of ORV damage).

¹⁷ Brief for Respondent, *supra* note 14, at 6 (noting a 900% increase between 1980 and 2000 alone).

¹⁸ 5 U.S.C. § 706 (2000).

¹⁹ 5 U.S.C. § 706(2) (2000).

²⁰ 5 U.S.C. § 706(1) (2000).

²¹ S. Utah Wilderness Alliance v. Babbitt, 2000 WL 33914094, at *5 (D. Utah 2000).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at *3, *5.

²⁵ S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1233 (10th Cir. 2002). The court would apply § 706(1) only where, as it found in FLPMA, the statute establishes a

diction proper even though DOI had taken some preliminary steps in response to the impairment threat, and in spite of the discretion DOI enjoys under FLPMA in terms of what steps to take to prevent impairment.²⁶ DOI petitioned for, and the Supreme Court granted, certiorari,²⁷ with argument scheduled for March 29, 2004 and a decision expected after this journal goes to print. Although a decision has not yet been rendered in this case, the following arguments made by the parties to the case are likely to shape the Court's analysis.

DOI's primary argument is that courts do not have jurisdiction over SUWA's claim under APA § 706(1) because the agency can satisfy FLPMA's "general statutory standards" through an ongoing land management program instead of through a discrete, final action such as an order or rule.²⁸ "Agency action" reviewable under § 706(2) is defined in § 551(13) to include "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."²⁹ DOI argues that only when an agency must meet its statutory mandate through one of these final, discrete forms of action is such a "failure" reviewable under § 706(1). Any other means of statutory compliance would implicate agency discretion and ongoing management, and courts, acting on insufficient expertise and guidance, should not interfere in such arenas, as this would be contrary to separation of powers principles and the APA.³⁰ Since DOI can meet FLPMA's nonimpairment standard through discretionary, ongoing action, DOI concludes that § 706(1) cannot provide jurisdiction for courts to review DOI compliance.³¹

SUWA responds that DOI did fail to act in the APA sense, and thus § 706(1) applies in this case. Review of DOI's failure to meet FLPMA's nonimpairment standard is supported by the text of the APA. First, SUWA alleges that because FLPMA created an immediate, mandatory, and non-discretionary duty of nonimpairment, DOI's failure to meet this duty is "agency action unlawfully withheld or unreasonably delayed"; DOI is misreading § 706(1) because not only is "failure to act" specifically listed as

mandatory, nondiscretionary duty with a clear deadline for action. *Id.* at 1226.

²⁶ *Id.* at 1227–32.

²⁷ See *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 462 (2003) (No. 03-101).

²⁸ Brief for the Petitioners at 12, *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 462 (2003) (No. 03-101), available at http://www.abanet.org/publiced/preview/briefs/pdfs_03/101Pet.pdf (on file with the Harvard Environmental Law Review) [hereinafter Brief for Petitioner].

²⁹ 5 U.S.C. § 551(13) (2000).

³⁰ Brief for Petitioner, *supra* note 28, at 16–30.

³¹ *Id.* at 13–15, 23–24, 31–35. DOI cites *Lujan v. National Wildlife Federation* for the proposition that a plaintiff "must direct its attack against some particular agency action that causes it harm, and cannot demand a general judicial review of . . . day-to-day operations." Brief for Petitioner at 15 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891, 899 (1990)) (internal quotations omitted). SUWA notes that in *Lujan*, the Court assumed that plaintiffs had standing to challenge DOI's actions affecting a single parcel, but merely could not leverage that to challenge 1250 parcels nationwide; unlike the plaintiffs in *Lujan*, SUWA is challenging four specific WSAs, not DOI's nationwide land policy program. Brief for Respondent, *supra* note 14, at 39–40 (citing *Lujan*, 497 U.S. at 892–93).

agency “action” in § 551(13), but nothing in § 706(1), or in relevant sections that inform the meaning of § 706(1), requires the compelled action to be specific, discrete, or ministerial.³² Further, since § 551(13) begins, “agency action . . . includes,” the list is meant to be inclusive, but not exhaustive.³³ Second, in terms of the APA’s finality requirement, SUWA argues that it is DOI’s inaction, and not the action to be compelled by a court, that must be definitive and final.³⁴ DOI’s inaction satisfies four categories in which courts have found inaction sufficiently consequential and definitive to be “final”: (1) DOI failed to meet a mandatory statutory deadline, because FLPMA imposes a continuous nonimpairment duty equivalent to a deadline; (2) DOI’s inaction is resulting in imminent and irreparable harm to the wilderness value of the WSAs, a legally protected interest, which cannot be remedied by delayed judicial review; (3) DOI’s inaction is partially related to legal error since in the district court DOI erroneously maintained that it had no duty to prevent impairment limited to only part of a WSA; and (4) DOI inaction could also be considered “unreasonably delayed” since the delay is sufficiently egregious.³⁵

In addition, review of DOI’s inaction is supported by the purposes and policies behind the APA. DOI’s approach would create a “no-man’s-land of agency inaction that is both unlawful and immediately harmful, yet unreviewable,”³⁶ so that “disregard of the duty imposed by Congress will *never* be reviewable so long as DOI does not take final . . . action subject to review under § 706(2).”³⁷ Such a result creates an illogical asymmetry in § 706, and seems contrary to the remedial purpose of the APA. SUWA concedes that DOI has discretion concerning *what measures to take to comply* with its statutory mandate, but distinguishes this from discretion regarding *whether to comply* with the nonimpairment mandate. A court could order DOI to comply with the mandate without specifying the precise actions to be taken, thereby avoiding inappropriate judicial interference.³⁸

DOI argues that even if SUWA is correct that FLPMA’s nonimpairment duty can be reviewed under § 706(1), review is inappropriate in this case because DOI has not completely failed to act. SUWA’s claim, premised on “inaction,” necessarily fails because DOI has taken active steps to

³² Brief for Respondent, *supra* note 14, at 16–19.

³³ *Id.* See also Brief of Amici Curiae Professors of Administrative and Environmental Law in Support of Respondents Southern Utah Wilderness Alliance, et al. at 21, Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 462 (2003) (No. 03-101), available at 2004 WL 319124 [hereinafter Brief for Amici Professors].

³⁴ Brief for Respondent, *supra* note 14, at 20, 24–27. See also S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1228–30 (10th Cir. 2002).

³⁵ Brief for Respondent, *supra* note 14, at 24–27.

³⁶ *Id.* at 13 (internal quotations omitted).

³⁷ *Id.* at 16 (emphasis in original).

³⁸ *Id.* at 27–31, 36. There are a number of measures that DOI could take to prevent this damage. See, e.g., GENERAL ACCOUNTING OFFICE, PUB. NO. RCED-95-209, FEDERAL LANDS, INFORMATION ON THE USE AND IMPACT OF OFF-HIGHWAY VEHICLES 8–14 (1995); Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977).

meet its statutory mandate, and thus a reviewing court would be inappropriately second-guessing DOI's choice of measures.³⁹ However, SUWA rejects DOI's contention that only complete failure to act is reviewable. As noted above, SUWA argues that such a requirement would leave a gaping hole in judicial review, allowing the continuation of much harmful inaction. This would be particularly damaging to results-oriented mandates such as FLPMA's, and would be contrary to case law which has held that unreasonable delay is reviewable.⁴⁰

Finally, DOI questions what remedy a court could order in this case if it found DOI's actions insufficient, and expresses concern that SUWA's expansive reading of § 706(1) would allow private citizens to bypass agency procedures in favor of litigation and would result in improper intereference in agency affairs.⁴¹ DOI argues that nonjudicial checks on agency discretion, such as political action through the executive branch and Congress and direct pressure on the agency, are more effective and efficient than expansive judicial review.⁴² SUWA responds that a court can order DOI to comply without mandating what measures it must take to prevent impairment.⁴³ SUWA also casts doubt on DOI's picture of a paralyzing increase in litigation, pointing to powerful existing limits on judicial review such as express statutory preclusion of review or commitment to agency discretion, standing doctrine, ripeness and finality doctrine, and the fact that § 706(1) applies only to an agency's failure to meet a mandatory, non-discretionary statutory command.⁴⁴

ANALYSIS

Whether the Court accepts the scope of § 706(1) review asserted by the Tenth Circuit and SUWA, or that proposed by DOI, its decision will have significant ramifications throughout administrative law, and particularly environmental law and land policy. The dangers of SUWA's position are exaggerated, while a decision for DOI will reinforce incentives for agencies to neglect statutory mandates, tilt further the availability of judicial review in favor of regulated entities, and subvert separation of powers principles. Given the interests the APA was intended to protect, the Court should affirm the Tenth Circuit's holding.

DOI's reading of § 706(1) is undesirable because it will reinforce both internal incentives and external pressures for agencies not to act to meet their statutory mandates, particularly when those mandates benefit broad groups of citizens. In order to meet statutory mandates, agencies need to

³⁹ Brief for Petitioner, *supra* note 28, at 35.

⁴⁰ Brief for Respondent, *supra* note 14, at 32–33.

⁴¹ Brief for Petitioner, *supra* note 28, at 25–30.

⁴² *Id.* at 22, 36.

⁴³ *See supra* note 38.

⁴⁴ Brief for Respondent, *supra* note 14, at 18, 35–36.

act. However, agencies will often find it easier not to act, since inaction is rarely as costly or burdensome. Regulatory action entails (1) the time and expense involved in assessing needs and scientific bases for regulation, as well as procedural hurdles such as notice-and-comment requirements and/or environmental assessments; (2) the political costs of regulation, including political pressure from the regulated entities, through the executive branch, and through legislatures at state and federal levels; and (3) the risk and obstruction associated with regulated entities challenging the action through litigation.

Many of these burdens are heightened in environmental regulation, where Congressional mandates are often ambitious responses to environmental crises⁴⁵ and thus are more burdensome for agencies and more threatening to regulated parties;⁴⁶ where scientific uncertainty is pervasive; where the field is characterized by deeply partisan politics and hard-fought litigation; and where the agencies are frequently underfunded, understaffed, controversial, and subject to intense political pressures from Congress, the White House, the Office of Management and Budget, the public, regulated entities, and environmental watchdog groups.

Failure to act, on the other hand, entails far fewer costs, avoids unwelcome negative attention, and frees agency resources. Although an agency may invoke the wrath of Congress if delay or inaction is particularly egregious, Congress cannot police every statute and may be unwilling or unable to achieve the consensus needed to force the agency's hand through detailed, prescriptive, and burdensome provisions.

Given an imbalance in costs and risks between action and inaction, heightened by external pressures as well as funding and staffing shortfalls, even the most public-interest-minded agencies will often prefer not to act. While most civil servants may have the public's interests at heart, this imbalance is certain to influence agency decisionmaking, so that agencies will often need to be coaxed into acting to meet their statutory mandates.

In theory, the beneficiaries of agency action could defend their interests and force agencies to act through judicial review, indirect political pressure, or direct pressure on the agencies. However, since beneficiaries of environmental regulation are generally dispersed, and receive dispersed benefits, collective action problems will prevent them from organizing and wielding the leverage necessary to influence agencies.⁴⁷ Given this, it

⁴⁵ This is particularly true with the foundational environmental statutes of the 1970s, which have been described as "exceedingly ambitious, if not unrealistic." Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law*, 20 VA. ENVTL. L.J. 75, 78 (2001).

⁴⁶ In the realm of land policy, "[DOI] has always been a battleground between interests seeking to conserve the resources in the public domain and those seeking generous access to them." WALTER A. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY 120 (3d ed. 1995).

⁴⁷ See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 37-39 (1991); Brief for Amici Professors, *supra* note 33, at

is often necessary for groups to act as watchdogs for the beneficiaries. Such watchdog groups typically have far less direct or political influence on agencies than regulated entities, and as a result rely on litigation or the threat of litigation for leverage with the agencies.

Countering the watchdog groups' effort to force agency action are the targets of regulation, who are typically far more influential with agencies. Regulated entities, who face concentrated costs, are generally well-organized and better financed; as a result, they have a greater capacity to apply direct and political pressure on agencies, and historically have had more influence with agencies.⁴⁸ This level of influence is magnified by some level of agency capture which, while perhaps only rarely a result of bribes or career-opportunities in industry, can nevertheless result from a more subtle, pervasive professional pressure and asymmetric negative pressure that results in a pattern of accommodation to industry desires.⁴⁹ Particularly given the "awkward Constitutional position of administrative agencies," there are "especially intense fears of factional influence over governmental processes and of decision free from public scrutiny and review."⁵⁰

In fact, such concerns were a significant motivation for enacting the APA.⁵¹ The APA embodies and reinforces the strong presumption of judicial review in administrative jurisprudence⁵² and construes it "as serving a broadly remedial purpose."⁵³ Further, giving less protection to regulatory beneficiaries when an agency fails to act than is given to regulated entities when an agency does act reflects the anachronistic belief that statutorily created rights are inferior to common law rights, and that regulation is intervention in an otherwise "natural" state of affairs—the sort of logic that was repudiated by the Court during the New Deal.⁵⁴

The picture that emerges is one of agencies with an internal bias toward inaction, reinforced by influential regulated entities and resisted by relatively less powerful watchdog groups. DOI's interpretation of § 706(1)

12–13.

⁴⁸ Brief for Amici Professors, *supra* note 33, at 12–13.

⁴⁹ Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1673 (1991) (asserting that regulated parties' more frequent contact with agency staff means that their criticisms are more likely to be internalized by agency staff, resulting in undue influence over agency agendas).

⁵⁰ Cass R. Sunstein, *Reviewing Agency Inaction after Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 655 (1985).

⁵¹ Brief for Amici Professors, *supra* note 33, at 14–15 (citing Administrative Procedure in Government Agencies, S. Doc. No. 8, 76 (1941)).

⁵² *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 140–41 (1967) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.") (citation omitted); *Block v. Community Nutrition Inst.*, 104 S. Ct. 2450, 2456–57 (1984) ("[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling").

⁵³ *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156 (1970).

⁵⁴ Brief for Amici Professors, *supra* note 33, at 7–9, 27. *See, e.g., W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937), *Miller v. Schoene*, 276 U.S. 272 (1928).

would further disadvantage these watchdog groups by narrowing their single most powerful tool: litigation and the threat of litigation. Meanwhile, regulated entities will retain free access to the courts to challenge regulation and other agency action under § 706(2). The result will be that agencies will have an even greater incentive not to act, since inaction will insulate them from judicial scrutiny in the face of statutory mandates which can be met by something other than a rule, order, or similar action. In effect, extreme dereliction of duty will become more attractive than even half-hearted enforcement in these contexts, since acting will potentially subject the agency to legal challenge while total inaction will not. Since Congressional mandates are a more democratic measure of the public interest than agency decisions, agency dereliction of these mandates is troubling.

Furthermore, shielding such dereliction from judicial review is counter to both the purpose and structure of the APA as well as to separation of powers principles. DOI's approach to § 706(1) undermines separation of powers principles in a number of ways. To begin with, DOI is troubled by the thought of private citizens and courts dictating to DOI how it should manage federal lands, an area delegated to it by Congress and requiring its technical expertise. However, DOI misconstrues the role given to courts and citizen groups under the Tenth Circuit's reading of § 706(1). First, the judicial review of agency compliance with clear legislative mandates supports rather than undermines separation of powers principles. Determining whether there is a clear statutory mandate is a task of statutory construction, widely accepted as the province of the courts. Determining whether agencies are in compliance with Congressional mandates is a question of fact similar to the bread-and-butter fact-finding done by courts at all levels. The case for judicial resolution is even stronger where, as here, statutory ambiguity has been resolved by agency regulation through public notice-and-comment procedures.

Second, DOI's fear of judicial interference is overstated, since the remedy imposed by courts would be similar to the remedies provided under DOI's own suggested formulation of § 706(1)—the court will simply order the agency to comply with the clear mandate. That is, even under DOI's formulation, where an agency can only comply with a clear statutory mandate by issuing a discrete order or promulgating a regulation, the court will compel the agency to comply without involving itself in the content or form of that order beyond what is statutorily mandated. In addition, the court would likely give substantial deference to the agency's interpretation of statutory mandates and evidence regarding the attainment of those mandates.⁵⁵

In addition to misconstruing the role of the courts, DOI's approach improperly expands executive power at the expense of Congress by effec-

⁵⁵ See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1227 (10th Cir. 2002).

tively giving agencies a veto over legislative mandates. Congress's ability to legislate broad guidelines and delegate the details of implementation to agencies leaves the judiciary in the position of policing this arrangement. Yet under DOI's interpretation, where Congress finds it inappropriate, burdensome, or otherwise undesirable to mandate that the agency act *only* through an order, rulemaking, or similar discrete action,⁵⁶ agency failure to meet that mandate may not be judicially reviewable. As a result, from the judiciary's perspective, the agency can effectively ignore the mandate. Congress could always go back and spell out what it wants in great detail, requiring agencies to act pursuant to one of the items listed in § 551(13), but this puts a tremendous burden on Congress to research and create detailed legislation, as well as having repeatedly to revisit legislation as the circumstances change.

DOI's approach would require SUWA to go to Congress in order to vindicate protections already mandated for WSAs. However, not only has Congress already spoken clearly on WSAs through the 1976 FLPMA, but Congress's slow, procedure-heavy workings make it an imperfect avenue for revisiting and resolving the impairment issue quickly enough to prevent irreversible damage. Impairment of WSAs, like many environmental harms, is irreversible if not halted promptly. The damage done to fragile soils, wildlife, vegetation, and terrain will often take a very long time to remedy, or, like the wilderness value of an area, may be irreversible—ORVs are increasingly creating conditions on the ground that are robbing these areas of their pristine, wilderness character.⁵⁷ Therefore, even assuming that SUWA and other citizen groups could motivate Congress to act specifically on the nonimpairment issue—for example, through legislation banning ORVs from DOI land or by closing all roads through WSAs—it may be too little, too late.

While the Tenth Circuit reading of § 706(1) may increase litigation against agencies, it avoids turning the APA into a vehicle for an overwhelming volume of "agency inaction" suits, as DOI seems to fear. First, most such challenges will simply be dismissed. Agency inaction will only be subject to judicial review where, as here, the agency has an "unequivocal, mandatory statutory duty to act" with a statutory deadline, and where a plaintiff can introduce colorable evidence that the agency is not meeting

⁵⁶ Given the slow and burdensome nature of notice-and-comment rules and their vulnerability to legal challenge, it is not difficult to imagine that Congress would not prefer them as a tool, for example, for protecting WSAs.

⁵⁷ ORVs used off-trail in WSAs create new trails that then reduce the wilderness value of the area. SUWA notes that many WSAs are in jeopardy of losing their WSA designation as a result of ORV damage, and that ORV-caused damage has led to all of Arch Canyon WSA and part of Behind the Rocks WSA being disqualified for consideration as a wilderness areas. SUWA, *OVERRIDING UTAH'S WILDERNESS: THE SEARCH FOR BALANCE AND QUIET IN UTAH'S BACKCOUNTRY* (1999), available at http://www.suwa.org/page.php?page_id=43 (last accessed Apr. 29, 2004) (on file with the Harvard Environmental Law Review).

this mandate. In response, an agency can introduce evidence casting doubt on the challenge, and courts are likely to defer to agencies on any disputed interpretations. Second, as SUWA has observed, many other doctrinal hurdles exist for plaintiffs challenging agency inaction, such as a recently invigorated standing requirement and a ripeness requirement. As a result, a large number of frivolous challenges will be screened out, while allowing meritorious challenges to proceed to trial. Upholding the Tenth Circuit's ruling will likely result in more litigation against agencies;⁵⁸ however, this result may not be undesirable, and in any case is less worrisome than the imbalance that would accompany DOI's constrained reading of § 706(1).

If the Supreme Court reverses the Tenth Circuit's ruling and constrains jurisdiction to review agency inaction under § 706(1), its decision will further weaken environmental protection in general, and will compromise the ability of citizen groups to prevent irreversible environmental harms—in this case, permanent damage to the few pristine wilderness areas that remain—by forcing agencies to comply with statutory duties. What will be lost will not only be the solitude and natural beauty of those lands, but also an important tool for vindicating the public interest in the administrative process.

⁵⁸ As Amicus Montana Wilderness Association points out, this decision has immediate impact on other federal lands managed by DOI and the Forest Service. Brief *Amicus Curiae* of Montana Wilderness Association in Support of Respondents at 1–2, 8, Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 462 (2003) (No. 03-101), available at 2004 WL 314094. See, e.g., Montana Wilderness Ass'n, Inc. v. United States Forest Service, 314 F.3d 1146 (9th Cir. 2003).