Norton v. Southern Utah Wilderness Alliance:

Supreme Court Eschews Agency’s Failure to Protect Wilderness in Redrock Country

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On the fortieth anniversary of the Wilderness Act, the Supreme Court refused to enforce a statute that sought to protect the wilderness qualities of public lands. Recognizing the intrinsic value of wilderness, Congress ordered the Bureau of Land Management (BLM) to prevent impairment to lands awaiting wilderness designation. In Southern Utah Wilderness Alliance, citizen groups challenged BLM’s failure to prevent off-road vehicle damage to public lands. In a unanimous opinion, the Supreme Court declared the case unreviewable. The decision expanded unreviewability doctrine under the Administrative Procedure Act and presented a setback for environmental protection. The Court also limited citizen enforcement of environmental laws and restricted supplemental environmental review under the National Environmental Policy Act. Meanwhile, wilderness destruction continues, thus undermining congressional intent to preserve wilderness.

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INTRODUCTION

The desert sands and redrock plateaus of southern Utah make up some of the nation’s largest tracts of publicly owned wild lands. The federal government owns thirty-five million acres in Utah (63% of the Utah’s land),¹ and the Bureau of Land Management (BLM) manages about twenty-three million acres of that land.² In 1991, BLM recommended that Congress designate two million acres in Utah as

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wilderness. While these fragile ecosystems await congressional review, time takes its toll. In contrast to the slow evolution of rare desert species and riparian plants, human impact on the land is evident in a few short years. The effects of four-wheeling, mining, and grazing scar the redrock landscape.

In 1964, Congress passed the Wilderness Act to ensure that some pristine lands in the United States remain free from human development. However, protection of these lands lags behind their destruction. In Norton v. Southern Utah Wilderness Alliance, environmental organizations (collectively "SUWA") challenged BLM's failure to prevent recreational off-road vehicle use from impairing potential wilderness areas, in violation of a congressional mandate. On the merits, the lawsuit sought review of BLM's mismanagement and failure to protect Utah's wilderness areas. The Supreme Court granted certiorari to Southern Utah Wilderness Alliance to clarify the hazy legal doctrine surrounding judicial review of agency inaction — a fundamental issue in environmental law. In 2004, the Court unanimously held that SUWA's claims were unreviewable, and never reached the merits of the case.

This Note argues that the Supreme Court's decision to avoid addressing the merits of this case frustrates Congress' attempt to protect wilderness. Part II presents the background of the environmental and administrative laws at issue, and places particular emphasis on the judicial review provisions of the Administrative Procedure Act (APA). Part III describes the facts, claims, and procedural posture of the case. It also summarizes the Supreme Court's opinion. Finally, Part IV analyzes the outcome and impact of Southern Utah Wilderness Alliance. This Note suggests that the Supreme Court's refusal to review broad legislative mandates, such as BLM's duty to prevent impairment to wilderness areas, undermines Congress' intent to protect the environment. However, it agrees that promises in land use plans should not be legally binding as suggested by the Court. Finally, this Note urges a restricted application of

5. See Part III, A, infra, explaining the Wilderness Act in more detail.
7. S. Utah Wilderness Alliance, 124 S. Ct. at 2378.
9. S. Utah Wilderness Alliance, 124 S. Ct. at 2385.
the Court's National Environmental Policy Act (NEPA)\textsuperscript{11} decision because a broad application would erode the efficacy of NEPA.

1. BACKGROUND

The case against BLM drew from key environmental laws. BLM is charged with identifying potential wilderness areas and preserving their pristine qualities. The Wilderness Act and the Federal Land Management Policy Act (FLMPA)\textsuperscript{12} guide these BLM management activities. In \textit{Southern Utah Wilderness Alliance}, SUWA alleged that BLM mismanagement of off-road vehicle use violated FLPMA and the NEPA. This section will describe the relevant elements of these environmental laws, and it will explain the scope of judicial review under the APA.

A. Wilderness Study Areas

With the Wilderness Act, Congress sought to preserve a network of wilderness areas in the United States. The Wilderness Act protects certain lands as part of a National Wilderness Preservation System. Congress wanted this network of lands to remain "unimpaired for future use and enjoyment," and it ordered preservation of their "wilderness character."\textsuperscript{13} Only Congress has the power to designate wilderness pursuant to the Wilderness Act,\textsuperscript{14} but BLM recommends which public lands are suitable for wilderness protection.

Section 1782 of FLPMA governs BLM's management of potential wilderness areas, and it directs BLM to identify potential wilderness areas and designate them as Wilderness Study Areas (WSAs).\textsuperscript{15} The minimum qualifications of WSAs are 5,000 acres or more of roadless lands with wilderness qualities.\textsuperscript{16} Wilderness is "an area of undeveloped federal land retaining its primeval character and influence, without permanent improvements or human habitation."\textsuperscript{17} After BLM identifies WSAs, it recommends them to Congress for future protection as part of the Wilderness Preservation System.

\begin{itemize}
\item \textsuperscript{11} 42 U.S.C. § 4321 (2000).
\item \textsuperscript{12} 43 U.S.C. § 1782 (2000).
\item \textsuperscript{13} 16 U.S.C. § 1131.
\item \textsuperscript{14} The Wilderness Act of 1964 established congressionally designated wilderness areas that shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.
\item \textsuperscript{15} § 1131.
\item \textsuperscript{16} § 1782(a); 16 U.S.C. § 1131(c).
\item \textsuperscript{17} 16 U.S.C. § 1131(c).
\end{itemize}
Congress established a “non-impairment” mandate under FLPMA that BLM maintain the WSAs wilderness character “so as not to impair the suitability of such areas for preservation as wilderness” until Congress decides whether to incorporate each area into the Wilderness Preservation System. BLM interpreted its non-impairment mandate in the Interim Management Policy. The Interim Management Policy is an agency regulation that guides management of lands under wilderness review. BLM evaluates the impairment caused by activities based on three criteria: (1) whether the activity is temporary; (2) whether the impacts of the activity are reclaimable; and (3) whether the activity will degrade the wilderness characteristics of the land.

Together FLPMA, the Wilderness Act, and the Interim Management Plan define the duties and direct the management of BLM lands that are under the wilderness review process. In Southern Utah Wilderness Alliance, the plaintiffs claimed that BLM violated FLPMA because it failed to regulate off-road vehicle recreation, which impaired WSAs during the long-awaited review by Congress.

B. Land Use Plans

FLPMA not only guides BLM’s management of WSAs, it also provides guidance for the management of all BLM lands. According to FLPMA, BLM must create and approve a land use plan for each area and then manage the lands according to objectives in these plans. Section 1732 of FLPMA mandates that BLM “shall manage the public lands... in accordance with the land use plans developed... under section 1712 [of the FLPMA].” Section 1712 guides BLM to develop land use plans by giving “priority to the designation and protection of areas of critical environmental concern.”

Tension exists between a land use plan’s ability to bind an agency and the plan’s flexible nature. Land use plans are not always legally binding due to their nature as “tools for agency planning and management.” In Ohio Forestry Association v. Sierra Club, the Supreme Court refused to review a claim that a Forest Service land use plan

18. The Wilderness Act, defines “wilderness” as “an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions.” § 1131(c).
19. 43 U.S.C § 1782(c).
21. Id.
23. § 1732(a).
24. § 1712(c).
permitted too much logging because the Court found that no legal rights or obligations flowed directly from the plan.\textsuperscript{26} In contrast, courts have found an agency's action unlawful when the act is inconsistent with a land use plan.\textsuperscript{27} In \textit{Neighbors of Cuddy Mountain v. United States Forest Service}, the Ninth Circuit held that the Forest Service violated the law because its site-specific project was inconsistent with the land use plan.\textsuperscript{28} The distinction this precedent creates is that an agency cannot be held to every promise in a land use plan; however, it can be liable for actions that contradict a land use plan.

In the instant case, the land use plans at issue promised specific actions to curb off-road vehicle impacts, but BLM never undertook the promised actions. The Court sought to determine if these land use plan promises were binding.

\textbf{C. Supplemental Environmental Review}

The National Environmental Policy Act (NEPA) requires that agencies consider the environmental impacts of their projects prior to approval. NEPA is a procedural, rather than substantive statute. Its purposes are to ensure that agencies are aware of environmental effects and alternatives and to allow public participation.\textsuperscript{29} Under NEPA, an agency must prepare an environmental impact statement (EIS) for all "major federal actions significantly affecting the quality of the human environment."\textsuperscript{30} The courts have clarified what types of projects meet this characterization.\textsuperscript{31} Examples of major federal actions include a timber

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\item \textsuperscript{26} The Court stated,\
\begin{quote}
[T]he provisions of the Plan that the Sierra Club challenges do not create adverse effects of a strictly legal kind \ldots they do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations. Thus, for example, the Plan does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees being cut.
\end{quote}
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\begin{itemize}
\item \textsuperscript{27} See, e.g., Friends of Southeast's Future v. Morrison, 153 F.3d 1059 (9th Cir. 1998) (holding Forest Service violated NMFA by failing to conduct area analysis for proposed timber sale as required by land management plan before preparing site-specific EIS.); Klamath Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., No. Civ.03-3006-CO, 2004 WL 1289704, at *6 (D. Or. Jan. 12, 2004) ("Failure of a project to comply with the requirements of the Resource Management Plan is a violation of FLPMA and its implementing regulations.").
\item \textsuperscript{28} 137 F.3d 1372, 1377-78 (9th Cir. 1998).
\item \textsuperscript{29} Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989).
\item \textsuperscript{30} 42 U.S.C. § 4332(c) (2000).
\item \textsuperscript{31} Kleppe v. Sierra Club, 427 U.S. 390, 399 (1976). Agency inaction is not considered a "major federal action." See, e.g., Defenders of Wildlife v. Andrus 627 F.2d 1238, 1243 (D.C. Cir. 1980); Mayaguezanos por la Salud y el Ambiente v. United States, 198 F.3d 297, 301 (1st Cir. 1999).
\end{itemize}
sale, a permit to construct a dam, and approval of a federally funded highway. However, courts have held that in some cases ongoing management activities will not trigger NEPA.

NEPA also requires government agencies to prepare a supplemental EIS (SEIS) if significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts arises.

[T]he decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major federal action[]' to occur, and if the new information is sufficient to show that the remaining action will 'affect[] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Courts use a two-part test to review an agency's failure to prepare a SEIS: first they evaluate whether the agency took a "hard look" and second, they review the agency's decision to determine if it was arbitrary and capricious. Agencies enjoy great deference in a decision to prepare a SEIS. However, if significant new circumstances or information arise, the agency must, at minimum, take a "hard look" before deciding.

The NEPA question in *Southern Utah Wilderness Alliance* turned on whether an agency can be required to take "hard look" at its management practices after approving a land use plan. This question hinged on whether ongoing land management is a major federal action.

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32. Native Ecosystems Council v. United States Forest Serv., 54 Fed. Appx. 901, 902 (9th Cir. 2003) (finding that the agency took the required "hard look" under supplemental NEPA that the timber sale would have no effect on old growth forests); Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 975 (9th Cir. 2002) (enjoining timber sale because methods violated NEPA).


34. Burkholder v. Peters, 58 Fed. Appx. 94, 96 (6th Cir. 2003) (relocation of a highway segment funded by the Federal Highway Administration is subject to the procedural requirements of NEPA); Utahns for Better Transp. v. United States Dep't. of Transp., 305 F.3d 1152, 1161 (10th Cir. 2002) (because Legacy Parkway will connect to the interstate highway system and will require filling of wetlands, it must receive approval from the Federal Highway Administration and a permit from the U.S. Army Corps of Engineers, both the approval and the permit qualify as major federal actions subject to NEPA).

35. *ENVIRONMENTAL LAW PRACTICE GUIDE* § 1.04 (Michael Gerrard ed., 2004); Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 235 (9th Cir. 1990) (agency's monitoring and control of the flow rate of a dam is not a major federal action).


38. Id. at 385.
D. Administrative Procedure Act

Even though administrative agencies, including BLM, enjoy great deference in their decision making, most of their actions are subject to judicial scrutiny. The APA works in conjunction with many environmental statutes by granting judicial oversight of agencies that implement environmental laws. SUWA sought relief under section 706(1) of the APA because neither NEPA nor FLPMA provides a private right of action.

1. Scope of Judicial Review

The scope of review available under the APA is broad. Most agency actions are subject to judicial review, with few exceptions. This judicial power checks that agencies neither exceed authority nor abdicate duties.

The APA gives courts the authority to review final agency actions. The Act defines agency action as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." This definition enumerates several examples of agency actions; however, the statute does not define a "failure to act." The Supreme Court has indicated that administrative inaction is reviewable under this provision of the APA. Specifically, an agency's failure to act is reviewable if the law mandates action. Thus, a reviewable agency action can be an affirmative activity such as a promulgation of a rule or an approval of a permit, or an agency's inaction so long as the agency had a duty to act. Examples of a reviewable agency action include, inter alia,

42. Abbott Labs, 387 U.S. 136.
43. 5 U.S.C. § 704.
44. § 551.
45. For example in Dunlop v. Bachowski, the Supreme Court found the Labor Secretary's failure to take action to set aside an allegedly invalid union election reviewable. 421 U.S. 560 (1975); overruled on other grounds by Local No. 82 v. Crowley, 467 U.S. 526 (1984); and limited by Heckler v. Chaney, 470 U.S. 821 (1985) (precluding review of non-enforcement actions that are not mandated by statute). The Supreme Court reviewed the agency's failure to act but limited review to ensure that the agency had a rational basis for refusing to act. CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 5.30 (2d ed. 1997). Also in Andrus v. Idaho, the Supreme Court reviewed the Secretary of Interior's failure to grant the State of Idaho certain lands for desert reclamation. 445 U.S. 715, 716 (1980) (finding no duty to reserve specific lands for reclamation).
46. Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (reviewing Native American's claims that the Secretary of the Interior, acting as trustee, had failed to perform certain fiduciary duties for many years. Despite the fact that an on-going program or policy is not considered a "final agency action" the circuit court reasoned that the case involved a failure to act because of unreasonable time delay or unlawfully withheld action).
an agency's decision to approve a permit,\textsuperscript{48} deny a petition,\textsuperscript{49} or appoint a position.\textsuperscript{50} In contrast, an agency's "program" is not discrete enough to merit review as a final agency action.\textsuperscript{51}

There are, however, two exceptions to the presumed reviewability of agency actions. An agency action is unreviewable if (1) a statute precludes judicial review,\textsuperscript{52} or if (2) an action is committed to agency discretion.\textsuperscript{53} While the first prong is self-evident, the second prong of unreviewable action merits explanation. An action is committed to agency discretion if there is no basis for meaningful review.\textsuperscript{54} The Supreme Court has adopted a very narrow reading of this 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.'"\textsuperscript{55} Other actions are committed to agency discretion by law such as political questions, military affairs, foreign relations, and issues of national security.\textsuperscript{56}

\textsuperscript{47} Agency actions that have failed the finality requirement include: an agency's advertising campaign (Invention Submission Corp. v. Rogan, 357 F.3d 452 (4th Cir. 2004)); implementation of intra-agency rule (Peoples Nat. Bank v. Office of Comptroller of Currency of United States, 362 F.3d 333 (5th Cir. 2004)); failure to designate wolf kills (Gordon v. Norton, 322 F.3d 1213, 1221 (10th Cir. 2003)); pronouncement of intent to defer or to engage in future rulemaking (\textit{In re Bluewater Network}, 234 F.3d 1305, (D.C. Cir. 2000)); failure to discontinue exclusive private use of certain buildings (Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229 (11th Cir. 2003)).

\textsuperscript{48} Ocean Advocates v. United States Army Corps of Eng'rs, 361 F.3d 1108, 1121 (9th Cir. 2004) (a permit allowing addition to an oil refinery dock).

\textsuperscript{49} Fox Television Stations, Inc. v. F.C.C., 280 F.3d 1027 (D.C. Cir. 2002) (a denial of a petition to institute rulemaking).

\textsuperscript{50} Colo. Envtl. Coalition v. Wenker, 353 F.3d 1221, 1232 (10th Cir. 2004) (appointment of resource advisory councils members).

\textsuperscript{51} In \textit{Lujan v. National Wildlife Federation}, a wildlife organization challenged BLM's "land withdrawal review program" that opened new lands to mining, 497 U.S. 871 (1990). The Supreme Court found that the program was not an identifiable final agency action within the meaning of the APA. \textit{Id.} at 890. The Court reasoned that the continuing operations of BLM were unreviewable because a plaintiff "cannot seek wholesale improvement of [a] program by court decree." \textit{Id.} at 891 (emphasis in original).

\textsuperscript{52} See \textit{e.g.}, Johnson v. Robison, 415 U.S. 361 (1974) (constitutional question permitted review despite statute forbidding review of Veteran's Administration decisions); I.N.S. v. St. Cyr, 533 U.S. 289 (2001) (constitutional question permitted review despite statutory provision that a deportation order was unreviewable); Block v. Community Nutrition Inst., 467 U.S. 340 (1984) (holding milk marketing orders unreviewable by consumers because it would foreclose timely review for milk producers and handlers as required in the statute).


\textsuperscript{54} KOCH, supra note 45, § 13.1. An action is discretionary if a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," Heckler v. Chaney, 470 U.S. 821, 830 (1985) (holding unreviewable FDA's refusal to take enforcement action against the use of lethal injections because the agency had prosecutorial, enforcement discretion).

\textsuperscript{55} Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1972) (citing the legislative history of the APA).

\textsuperscript{56} See Webster v. Doe, 486 U.S. 592 (1988) (barring review of CIA's decision to dismiss employees for national security reasons); Nat'l Federation of Fed. Employees v. United States, 905 F.2d 400, 406 (D.C. Cir. 1990) (finding military decisions on base closures unreviewable);
2. **Compelling Agency Action**

In addition to granting judicial review, the APA also provides special relief for an agency's failure to act. The APA provides a powerful remedy in section 706(1): the ability of a court to compel an agency to act. Section 706(1) states that a "court shall...compel agency action unlawfully withheld or unreasonably delayed."57 The Attorney General's Manual, a respected source for APA interpretation, clarifies that while a court may require an agency to act, it cannot direct an agency how to act.58

The Supreme Court limited the scope of section 706(1) by interpreting it to apply only to mandatory duties,59 and courts often refrain from compelling agency action.60 Even so, federal courts have occasionally forced action. In a recent case, the D.C. Circuit ordered an agency to answer a six-year-old petition.61 The Third Circuit compelled an agency to proceed with rulemaking after a nine-year delay.62 The Tenth Circuit held that an agency could be compelled to designate critical habitat for an endangered species.63 This action compelling remedy has proven to be a powerful tool for forcing agencies to comply with environmental statutes.

In summary, courts have the authority to review any final agency action or inaction with few exceptions. The courts can also compel an agency to take action if it has violated a duty to act. Citizen groups, such

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57. 5 U.S.C. § 706(1).


59. See [Japan Whaling Ass'n v. Am. Cetacean Soc'y](https://www.courts.gov/1986/00007214.htm) (478 U.S. 221, 241 (1986)) (refusing to compel the Secretary of Commerce to certify that Japan had violated the International Whaling Commission's sperm whale quota because there was no requirement that the Secretary certify each departure from the quotas).

60. [Ecology Ctr., Inc. v. United States Forest Serv.](https://www.courts.gov/1999/00007214.htm), 192 F.3d 922 (9th Cir. 1999) (affirming dismissal of action to compel forest service to monitor Kootenai National Forest as required by the National Forest Management Act for want of subject matter jurisdiction because failure to monitor did not constitute a final agency action; Envtl. Defense Fund, Inc. v. Costle, 657 F.2d 275 (D.C. Cir. 1981) (upholding summary judgment granted for agencies that allegedly failed to act to abate salinity in the Colorado River).


as SUWA, employ the APA’s judicial review provisions to ensure that agencies comply with environmental laws, which lack citizen suit provisions such as FLPMA and NEPA described above.

II. SUPREME COURT DECLARES AGENCY’S INACTION UNREVIEWABLE

In *Southern Utah Wilderness Alliance*, the Supreme Court acknowledged that off-road vehicles are degrading America’s wildlands, but it refused to review the claim that BLM violated its duty by failing to protect certain lands from off-road vehicle recreation. The Court never reached the merits of the case because, according to the Court, the APA excluded review of SUWA’s claims. First, this Part describes SUWA’s claims and rationale for bringing them. Second, a review of the procedural posture of the case demonstrates how this case made its way to the Supreme Court. Third, a summary of the Supreme Court opinion explains the Court’s reasons for dismissing SUWA’s claims.

A. Case Background

Concerned by the explosion of off-road vehicle use, SUWA feared that Utah’s public lands were in danger of irreparable injury from new roads, erosion, and habitat destruction. SUWA initiated an action in 1999 to force BLM to restrict off-road vehicle recreation on federal land. It alleged that the agency violated FLPMA and NEPA by unlawfully withholding action and brought claims pursuant to APA section 706(1). Three of SUWA’s claims reached the Supreme Court in this case: (1) BLM’s failure to prevent cross-country off-road vehicle travel from impairing WSAs; (2) BLM’s failure to comply with the requirements of its land use plans; and (3) BLM’s failure to determine whether new information triggered supplemental NEPA analysis.

SUWA’s first claim was that BLM violated its duty to prevent impairment of four WSAs. SUWA alleged that off-road vehicle use impaired the wilderness qualities of the Parunuweap, Canaan Mountain, Behind the Rocks, and Sids Mountain WSAs. Pursuant to APA section 706(1), SUWA complained that BLM failed to carry out its non-impairment mandate.

64. 124 S. Ct. at 2377.
65. Id. at 2385.
68. Brief in Opposition to Petitions for a Writ of Certiorari at *15-16, 2003 WL 22428082, *S. Utah Wilderness Alliance* (No. 02-1703) [hereinafter Opposition Brief].
Second, SUWA claimed that BLM's failure to carry out commitments designated in two of its land use plans violated FLPMA. 70

First, the San Rafael land use plan limited off-road vehicle use to designated roads and trails, but left designation of those routes to a separate plan due in 1992. 71 BLM had not yet completed the plan when SUWA filed suit, seven years later. 72 Second, the Henry Mountains land use plan instructed BLM to conduct intensive off-road vehicle monitoring in the Factory Butte area to determine if access should be restricted. BLM conceded that it did not fully comply with the monitoring provision between 1990 and 2000. 73 Through the lawsuit, SUWA sought to compel BLM to implement these land use plan provisions.

The third claim alleged that BLM violated NEPA by failing to produce a SEIS. 74 SUWA contended that BLM must consider whether significant increases in off-road vehicle use on certain BLM lands triggered the need for a supplemental environmental review. This presented another failure to act claim in which the court had to decide if section 706(1) permitted judicial review.

B. Procedural Posture

SUWA sought a preliminary injunction from Utah's district court to protect certain WSA lands from off-road vehicle damage. 75 In response, off-road vehicle user groups, who intervened in the suit, filed a motion to dismiss for lack of subject matter jurisdiction. 76 The district court granted the motion to dismiss. 77 The district court asserted that the claims were not justiciable because they addressed the sufficiency of BLM's management actions rather than a genuine failure to act. 78

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70. Id. § 66.
71. Opposition Brief, supra note 68, at 6.
72. Id.
73. S. Utah Wilderness Alliance v. Norton (S. Utah Wilderness Alliance 2), 301 F.3d 1217, 1233 (10th Cir. 2002).
75. S. Utah Wilderness Alliance, 124 S. Ct. at 2377-78.
77. Id.
78. S. Utah Wilderness Alliance 1, 2000 WL 33914094, at *5. The district court reasoned that the plaintiffs did not meet their burden of showing that BLM failed to act because (1) the agency had discretion to choose management options to address the non-impairment mandate and (2) BLM had taken some steps to prevent impairment. Id. Besides refusing jurisdiction because of agency discretion the district court made other findings that (1) inaction cannot be reviewed unless there was some affirmative, site-specific action taken by BLM that did not conform to the specified land use plan. Id. at *6. That under NEPA an agency has discretion to choose not to prepare an SEIS. Id. at *9.
Reviewing the case *de novo*, the Tenth Circuit Court of Appeals held that all three of SUWA’s claims deserved judicial review. It reversed the district court ruling and remanded for findings on the merits, making three significant findings.79 First, the Tenth Circuit found that the non-impairment mandate under FLPMA was not discretionary, and that BLM had an immediate and continuous obligation to manage the WSAs to prevent impairment of their wilderness values.80 Second, the court held BLM had a legally binding duty to carry out the specific activities promised in the land use plans.81 Third, the Tenth Circuit held that BLM could be compelled to take a hard look at new information even though an agency retains discretion on a decision whether or not to prepare a SEIS.82

The Supreme Court granted *certiorari* to answer the justiciability issues raised in *Southern Utah Wilderness Alliance*, specifically to answer whether federal courts can review BLM land management practices.83

C. Supreme Court's Decision

In a unanimous opinion written by Justice Scalia, the Supreme Court declared that BLM’s alleged failures to act were unreviewable.84 At the outset, the Court defined the limits of judicial review that the APA places on agency inaction.85 First, the Supreme Court provided an interpretation of “failure to act” within the APA. It confined the definition of “failure to act” to discrete agency actions like those enumerated in the statute: “agency rule, order, license, sanction [or] relief.”86 Under this interpretation, only an agency’s failure to take a discrete, listed action (or its equivalent) is within the purview of judicial review. Additionally, the Court emphasized that only a legally mandated action can be compelled under section 706(1).87 “Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.”88 Having clarified these basic principles of the scope of judicial review of agency inaction, the Court proceeded to discard each of SUWA’s claims.

79. *S. Utah Wilderness Alliance* 2, 301 F.3d 1217.
80. *Id.* at 1226 n.5.
81. *Id.* at 1234.
82. *Id.* at 1239.
85. *Id.* at 2378-79.
86. *Id.* at 2378.
87. *Id.* at 2379.
88. *Id.* at 2380 (emphasis in the original).
The Court found that SUWA’s first claim, that BLM violated its non-impairment mandate by permitting off-road vehicle damage in WSAs, evaded review.\textsuperscript{89} Despite the commanding nature of the non-impairment mandate,\textsuperscript{90} the Court declared BLM’s duty too broad for review.\textsuperscript{91} The Court proclaimed that the statute lacked the clarity necessary to compel action under section 706(1).\textsuperscript{92} Essentially, the Court held that the statute left so much discretion to the agency that review was precluded — the congressional mandate was not discrete enough for meaningful review. Underlying the holding was the policy that federal courts should not judge the sufficiency of an agency’s actions.\textsuperscript{93}

On the second claim, that BLM failed to comply with land use plans, the Court held that land use plans are not binding commitments.\textsuperscript{94} The Court distinguished a situation where an agency’s act is inconsistent with a plan and thus unlawful, from a promise of a future action, which is not legally binding. According to the Court, a land use plan is a projection, not a requirement.\textsuperscript{95} The off-road vehicle management activities that BLM promised, but failed to conduct, were therefore not unlawfully withheld because they were not legally required. “[A] land use plan is generally a statement of priorities; it guides and constrains actions, but does not prescribe them.”\textsuperscript{96} The Court reasoned that interfering with BLM by compelling compliance with land use plans might “ultimately operate to the detriment of sound environmental management.”\textsuperscript{97}

Finally, the Court held that supplemental review under NEPA applies only when there is an ongoing “major federal action,” but the instant case lacked a major federal action yet to occur.\textsuperscript{98} The Court decided that ongoing land management does not amount to a “major federal action,”\textsuperscript{99} rather; agency approval of the land use plans in Utah completed the actions.\textsuperscript{100} Accordingly, the Court reversed the Tenth Circuit’s holding that BLM could be compelled to take a “hard look” at the new information about the increase in off-road vehicle use.\textsuperscript{101}

\begin{footnotes}
89. \textit{S. Utah Wilderness Alliance}, 124 S. Ct. at 2381.
90. “The [BLM] \textit{shall} continue to manage such lands . . . so as not to impair the suitability of such areas for preservation as wilderness.” 43 U.S.C. § 1782(c) (2000) (emphasis added).
92. \textit{Id.}
93. \textit{Id.}
94. \textit{Id. at 2384.}
95. \textit{Id.}
96. \textit{S. Utah Wilderness Alliance}, 124 S. Ct. at 2383.
97. \textit{Id. at 2384.}
98. \textit{Id. at 2384-85.}
99. \textit{Id.}
100. \textit{Id.} (However, BLM is required to perform additional NEPA analysis if a land use plan is amended or revised.)
101. \textit{Id. at 2384-85.}
\end{footnotes}
Court sought to avoid “pervasive interference with BLM’s ordering of priorities.”

In Southern Utah Wilderness Alliance, the Supreme Court denied the justiciability of each of SUWA’s claims. It limited review of agency inactions to failures to perform discrete duties. It proclaimed land use plans unbinding. The Court also quashed supplemental NEPA claims in some land management situations.

III. ANALYSIS

The Supreme Court in Southern Utah Wilderness Alliance narrowed the scope of judicial review for agency inaction. Citizen groups expressed disappointment with the setback that this decision creates for the enforcement of environmental laws. This section argues that the limitations on judicial review are repugnant to the intent and purpose of the governing laws. Next, it supports the conclusion that land use plans should remain flexible and unbinding; however, it emphasizes the distinction between unenforceable promised actions and actions inconsistent with land use plans, which are reviewable. Finally, this Note advocates for a narrow application of the Court’s NEPA decision because a broad approach could undermine the purpose of NEPA.

A. The Scope of Judicial Review for Agency Inaction Is Too Narrow

When the Court avoided the merits of SUWA’s lawsuit, it abetted the destruction of Utah’s existing wilderness and frustrated Congress’ intent to preserve roadless wilderness areas. The Court interpreted the APA’s judicial review provision narrowly. However, there is support for a broad reading, and this alternate approach could have furthered Congress’ goal of protecting wilderness.

1. Limiting review to discrete agency inaction erodes enforceability of broad statutes.

The Supreme Court narrowed the scope of judicial review to deny review of the non-impairment claim. Justice Scalia, writing for a unanimous court, interpreted the APA’s text to limit review of an agency’s failure to act to discrete activities (e.g. rule, order, license, etc.) that are required by law. The APA defines agency action as “the whole

102. Id. at 2384.
104. The text of the APA defines agency action narrowly (e.g. rule, order, license, etc.), and the Court applied an interpretive canon to find that a “failure to act” should have the same attributes as the enumerated examples. S. Utah Wilderness Alliance, 124 S. Ct. at 2378-79. The
or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." The Court applied an interpretive canon to find that a "failure to act" should have the same attributes as the enumerated examples. Therefore, an agency's inaction is only reviewable if its duty was to carry out one of these discrete activities. This interpretation excluded SUWA's claim because the non-impairment mandate was broad—not discrete. The mandate could have been satisfied through various discrete actions but Congress did not dictate a specific action that BLM should have taken to prevent impairment.

The decision to narrow review of agency inaction in Southern Utah Wilderness Alliance leaves courts unable to enforce broad, goal-oriented statutes. In FLPMA, Congress crafted a law that mandated a specific goal—non-impairment—rather than a procedure. It is generally easy for courts to determine an agency's failure to act with a procedural statute; however, the courts are relatively inexperienced with laws that require a specific goal. The Supreme Court's interpretation that a failure to act only applies to a failure to carry out one of the enumerated actions (i.e. rule, order, etc.) essentially renders goal-oriented statutes unenforceable.

In contrast, in NAACP v. Secretary of Housing and Urban Development the First Circuit upheld the enforcement of a goal-oriented statute, the Fair Housing Act. The NAACP alleged that the agency failed to carry out programs and activities in a manner that furthered policies of prohibiting housing discrimination under the Fair Housing Act. The First Circuit concluded that the case called for "a more straightforward evaluation of whether agency activity over time has furthered the statutory goal," and held that the claim was reviewable pursuant to section 706(1). This type of statute may now be unenforceable under the new rule announced in Southern Utah Wilderness Alliance. It is unlikely that Congress intended to eliminate the enforcement of broad, goal-oriented statutes under the APA. As one scholar has argued, "[w]hile judges must be careful not to subjugate matters of agency discretion to judicial decree, likewise, judges must not

Court limited judicial review only to an agency's failure to comply with a discrete duty that Congress dictated with specificity. Id.

106. S. Utah Wilderness Alliance, 124 S. Ct. at 2379.
107. Id.
108. Interview with Jim Angell, Staff Attorney, Earthjustice (Oct. 20, 2003).
109. Id.
110. 817 F.2d 149 (1st Cir. 1987).
111. Id. at 151.
112. Id. at 151, 158.
abridge their function of providing meaningful judicial review of agency decisions.\footnote{Thomas Schmid, \textit{Off-Road and Into Court: The Tenth Circuit Appropriately Allows Environmentalists' Challenges to the Bureau of Land Management's Failure to Prevent ORV Impairment to Federal Lands}, 10 MO. ENVTL. L. & POL'Y REV. 179, 197 (2003).}

2. \textit{A broad scope of judicial review furthers the purpose and intent of Congress}

An evaluation of the APA in the context of its text, purpose, and policy indicates that review should be available in a case like \textit{Southern Utah Wilderness Alliance}. The APA lacks a precise definition of failure to act. Furthermore, the definition of agency action includes failure to act as a distinct category, separate from the enumerated examples.\footnote{Agency action is defined as "the whole or part of an agency rule, order, license, sanction, relief, or equivalent thereof, or failure to act." 5 U.S.C. § 551 (2000).} As a distinct category, it is not inconsistent with the text of the APA to allow review of BLM's failure to prevent impairment.

According to the Tenth Circuit's \textit{Southern Utah Wilderness Alliance} holding, failure to comply with a duty can be final agency action even if compliance would allow an agency to choose among various types of discrete action.\footnote{Id. at 1230.} The Tenth Circuit's overruled opinion rejected the argument that the non-impairment claim failed to challenge a final agency action. It equated BLM’s inaction to a final decision not to act and found that it fit within the scope of judicial review under section 706(1).\footnote{S. Utah Wilderness Alliance v. Norton (S. Utah Wilderness Alliance 2), 301 F.3d 1217, 1229 (10th Cir. 2002).} The Supreme Court stands by a rule that unreviewability should be a rare exception, and that rule supports this broad reading of the statute.\footnote{Abbott Labs., 387 U.S. at 141 ; Ronald M. Levin, \textit{Understanding Unreviewability in Administrative Law}, 74 MINN. L. REV. 689, 742-43 (1990).} Instead of following its own rationale, however, the Court placed SUWA's claim among the narrow exceptions of unreviewable agency action.\footnote{Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2381 (2004).}

A broad scope of review for agency inaction accords with section 706(1)'s remedy provision and with its legislative history. Additionally, the APA’s review provisions interpreted alongside the non-impairment mandate of FLPMA and the Wilderness Act suggest reviewability. First, considering agency action in the context of section 706(1) of the APA bolsters the contention that an agency’s failure to carry out even a broad congressional mandate should be reviewable. One canon of statutory interpretation guides a court to avoid interpreting a provision in a way that is inconsistent with the policy of another provision. The Court’s
narrow interpretation of what constitutes an agency action conflicts with the remedy provided in section 706(1). That provision specifies that "[t]he reviewing court shall... compel agency action unlawfully withheld or unreasonably delayed."\textsuperscript{119} Congress recognized that agency delay or inaction could frustrate the purpose of activities delegated to administrative agencies.\textsuperscript{120} Concerned that agency delays would circumvent legislation, Congress enacted section 706(1) as a way to ensure that agencies comply with legislation.\textsuperscript{121}

The legislative history supports this view. Proceedings from the congressional record explain that the section's purpose was to give courts a way to force agencies to carry out congressional will and hasten action.\textsuperscript{122} House proceedings on the APA reveal that the House intended the provision to induce agencies to take action when they "improvidently refuse to act."\textsuperscript{123} The legislative intent of section 706(1) was to make sure that agencies carry out duties mandated to them through Congress.

Second, it is difficult to square the Southern Utah Wilderness Alliance decision with Congress' stated purpose to preserve wilderness. Congress ordered BLM to keep WSAs suitable for future designation as wilderness. The purpose of the Wilderness Act was to guarantee that lands remain in their original untouched natural state.\textsuperscript{124} In FLPMA, Congress clearly stated that it wanted BLM to manage WSAs so as not to impair their wilderness quality.\textsuperscript{125} Congress wanted WSAs to remain roadless and to retain wilderness characteristics until it can decide whether to include them in the Wilderness Preservation Network.\textsuperscript{126} Congress must have assumed that BLM's implementation of this law would be enforceable, thus the Court's ruling contradicts congressional intent.

3. Review of the non-impairment claim would not contravene separation of powers principles.

The Court reinforced its decision in Southern Utah Wilderness Alliance with a separation of power policy argument. However, FLPMA and the Interim Management Plan provided sufficient guidance for a

\textsuperscript{120}. See Administrative Procedure Act: Legislative History 79th Congress, 1944-46 377 (Government Printing Office 1946).
\textsuperscript{122}. Administrative Procedure Act: Legislative History 79th Congress, 1944-46 377 (1946).
\textsuperscript{123}. Id. at 278.
\textsuperscript{125}. 43 U.S.C § 1782(c) (2000).
\textsuperscript{126}. § 1782(c).
court to judge the agency's actions. Because these laws provide meaningful standards for a court, judicial review of the non-impairment claim would not contravene separation of powers principles.

The purpose of threshold justiciability requirements is to ensure that the judiciary does not interfere with the other branches of government. Specifically, agency actions are unreviewable when there are no meaningful standards for a court to judge the agency's actions. These restraints on judicial review ensure that a judge cannot replace his or her own decision for that of the agency. The Court suggested that SUWA's complaint about administrative programs belonged in the legislature. Revisiting Lujan v. National Wildlife Federation, the Court implied that SUWA launched an attack on the BLM's entire program. While National Wildlife Federation was primarily a standing case, the Supreme Court quashed the plaintiff's efforts to use the judicial system to keep an agency's programs in check. According to the Court, an agency's program is unreviewable when a plaintiff seeks improvements that should be made "in the offices of the Department or the halls of Congress." In the same vein, the Supreme Court in Southern Utah Wilderness Alliance decided not to review the BLM programs that allegedly failed to prevent off-road vehicles from damaging public lands. The Court found that "general deficiencies in compliance...lack the specificity requisite for agency action [that can be compelled]."
The Court reasoned that the statute's broad terms made review of the non-impairment claim impractical.

Contrary to the Court's view, the non-impairment claim should have been justiciable because avoiding impairment is a meaningful standard that could guide review of BLM's actions. FLPMA, the Wilderness Act, and the Interim Management Policy provided standards to judge whether BLM had unlawfully withheld action. The test for unreviewability is whether there is "law to apply," and in this case the non-impairment requirement is a mechanism, albeit general, with which to judge an agency's actions. "Even a broad statutory mandate, which gives an agency wide latitude to strike a balance among varied pubic policy factors, can have teeth when a litigant alleges that the agency failed to take the prescribed factors into account."

The non-impairment requirement in FLPMA and the Wilderness Act provided unambiguous law upon which federal courts could have

129. Lujan, 497 U.S. at 891.
130. S. Utah Wilderness Alliance, 124 S. Ct. at 2381.
133. Id. at 735.
based meaningful review of BLM’s failure to act. FLPMA clearly states that BLM should manage WSA lands so as not to impair their wilderness suitability. The Wilderness Act defines wilderness suitability as roadless areas with pristine qualities. Second, BLM explicitly listed several factors in the Interim Management Policy to guide management of the Utah WSAs including temporariness, reclaimability, and wilderness degradation. These factors provided meaningful standards that a court could have used to judge BLM’s actions. Such standards assuage separation of powers fears because Congress and BLM articulated the rules that guide judicial review.

4. Unreviewability of the non-impairment claim eschews the policy of wilderness protection

Unreviewability leaves wilderness destruction unchecked. Congress passed the Wilderness Act because it decided “some lands should be set aside as wilderness at the expense of commercial and recreational uses.” Yet, off-road vehicle recreation continues to destroy WSAs and may result in irreparable injury and disqualification from wilderness designation. BLM data reveals that 94% of Utah BLM lands are available for use by off-road vehicles. Off-road vehicle recreation has more than doubled in the past twenty years. Even the Supreme Court opinion recognized that the explosion of off-road vehicle recreation has negative environmental consequences. According to BLM, increased visitation and the use of more powerful vehicles has contributed to the widening, deepening, braiding and erosion of some existing vehicle routes; an increase in the number of hill climb, play, and camping areas; damage to vegetation; damage to cryptobiotic soils; increased litter; damage to rock formations... and dead lichen on slickrock; new “pirate” routes; wildlife disturbance; localized siltation of water courses; and noise in once quiet areas.

The Supreme Court’s decision that SUWA’s claims were unreviewable blocked an avenue to ensure that BLM implements Congress’ wishes. Congress wanted BLM to manage WSAs so as not to impair their wilderness quality. Meanwhile, off-road vehicles carve

134. IMP, supra note 20.
135. S. Utah Wilderness Alliance, 124 S. Ct. at 2376.
137. S. Utah Wilderness Alliance, 124 S. Ct. at 2377 (citing H. CORDELL, OUTDOOR RECREATION FOR 21ST CENTURY AMERICA 40 (2004)).
138. Id.
140. 43 U.S.C § 1782(c) (2000).
new roads and leave WSAs unsuitable for wilderness designation. The
Supreme Court should have allowed a broader reading of reviewable
agency inaction thus comporting with the presumption of reviewability,
creating consistency among statutes, and furthering the policy of
protecting wilderness.

5. Southern Utah Wilderness Alliance impacts many environmental law
cases.

In Southern Utah Wilderness Alliance, the Supreme Court stretched
the net of unreviewable discretion to unprecedented limits. Wilderness
groups responded with disappointment that this decision “will make it
more difficult for citizens groups to force BLM to comply with the law
and protect the land from the damaging effects of off-road vehicles.”141
The Court’s refusal to review the non-impairment mandate expanded the
sphere of laws that are too broad for judicial enforcement. Other laws
that require an agency to protect biodiversity, conserve natural and
historic objects, minimize destruction of wetlands, inter alia, may now be
beyond the purview of the judiciary.142 “[T]he landmark ruling has
implications far beyond the narrow issue of wilderness: it limits the ability
of all citizens to sue the government over how its agencies manage the
entire range of natural resources.”143

Montana Wilderness Association, Inc. v. United States Forest Service
was the first lawsuit to feel the ripples of Southern Utah Wilderness
Alliance. In this parallel case, the plaintiffs in Montana Wilderness
Association complained that the Forest Service acted unlawfully by
failing to maintain the wilderness characteristics of seven WSAs that had
been degraded by off road recreation.144 The Supreme Court vacated and
remanded the Ninth Circuit’s opinion that granted review of the claim
against the agency.145 In light of Southern Utah Wilderness Alliance, a
dismissal is expected.

Southern Utah Wilderness Alliance precedent has already had effects
in federal courts outside the Tenth Circuit. In Center for Biological
Diversity v. Veneman, the Ninth Circuit denied review of the Forest
Service’s failure to consider preservation issues when engaging in land

141. Joint Statement By Respondents Southern Utah Wilderness Alliance, et al., supra note
103; see also Ray Ring, Supreme Court Reins in Citizens’ Right to Sue, HIGH COUNTRY NEWS
(July 19, 2004), available at http://www.hcn.org/servlets/hcn.Article?article_id=14856 (“‘It’s a real
setback for conservation interests’ says John Leshy [former Department of Interior attorney and
Professor at U.C. Hastings]”).
142. See S. Utah Wilderness Alliance, 124 S. Ct. at 2381.
143. Ring, supra note 141.
144. Mont. Wilderness Ass’n, Inc. v. United States Forest Serv., 314 F.3d 1146, 1149 (9th
Cir. 2003).
The plaintiffs claimed that the Forest Service had unlawfully failed to take rivers and streams that qualify for wild and scenic river designation into account while planning for land use.\textsuperscript{147} According to the Ninth Circuit, "\textquoteleft\textquoteleft[t]he Court's reasoning in \textit{[Southern Utah Wilderness Alliance]} compels us to conclude that the Center does not assert a failure to take a \textquoteleft\textquoteleft discrete agency action'.\textsuperscript{148} However, the Ninth Circuit permitted the plaintiffs to amend their complaint to allege discrete agency inaction.\textsuperscript{149}

In response to the Court's decision to narrow judicial review, citizen groups will look to new methods of keeping agency inaction in check. To circumvent the \textit{Southern Utah Wilderness Alliance} limitation, citizen groups can allege discrete activities withheld by agencies. In \textit{Natural Resources Defense Council v. Patterson}, environmental groups circumvented the justiciability limitation by specifically pleading discrete agency inaction.\textsuperscript{150} Also, citizen groups can force review of agency inaction by petitioning an agency to take actions desired.\textsuperscript{151} An agency's denial or delayed answer of such a petition would be an action subject to judicial review.\textsuperscript{152}

In light of \textit{Southern Utah Wilderness Alliance}, citizen groups must take advantage of other mechanisms to enforce environmental laws. Petitioning agencies, community organizing, public education, and media advocacy can catalyze agency action in lieu of a court order.

\textbf{B. Land Use Plans: Distinguishing Between Promised Actions and Inconsistent Actions}

The Court held that land use plans do not legally bind agencies. It distinguished between actions promised in land use plans and actions that contradict a land use plan—the latter are invalid and enforceable.\textsuperscript{153} The

\begin{itemize}
  \item \textsuperscript{146} 394 F.3d 1108, 1113 (9th Cir. 2005).
  \item \textsuperscript{147}  Id. at 1110.
  \item \textsuperscript{148}  Id. at 1113.
  \item \textsuperscript{149}  Id. at 1114.
  \item \textsuperscript{150}  333 F. Supp. 2d 906 (E.D. Cal. 2004) (holding that an alleged agency failure to release sufficient water to reestablish and maintain historic fisheries is discrete enough of an agency action that the \textit{S. Utah Wilderness Alliance} decision did not apply).
  \item \textsuperscript{151}  The right to petition the government is ensured by the First Amendment of the Constitution and interested parties may petition for the issuance, amendment, or repeal of a rule pursuant to the 5 U.S.C. § 553(e) (2000).
  \item \textsuperscript{152}  See, e.g., \textit{In re Am. Rivers & Idaho Rivers United}, 2004 U.S. App. LEXIS 12238.
  \item \textsuperscript{153}  Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 124 S. Ct. 2373, 2382 (2004)
\end{itemize}

(The statutory directive that BLM manage 'in accordance with' land use plans, and the regulatory requirement that authorizations and actions 'conform to' those plans, prevent BLM from taking actions inconsistent with the provisions of the land use plan...The claim presently under discussion, however, would have us go further, and conclude that a statement in a plan that BLM 'will' take this, that, or the other action,
Court drew its argument from the text in FLPMA and BLM regulations that indicate that land use plans dictate aspirations rather than obligations.154 BLM land use plans, according to the Supreme Court, are "tools by which present and future use is projected" and "not a legally binding commitment enforceable under § 706(1)."155 This decision comports with *Ohio Forestry Association v. Sierra Club*, in which the Court found that a forest plan created no legal rights or obligations.156

The decision to relieve BLM from strict implementation of land use plans is sensible because the opposite conclusion could dilute future land use plans.157 An opposite result, finding that plans are legally binding, would create a perverse incentive for agencies to make unambitious land use plans. Influential jurists including the unanimous Supreme Court and Judge McKay (dissenting from the Tenth Circuit decision),158 as well as other critics believe it is impractical to require BLM to fulfill promises made in land use plans.159 A legally binding effect could deter agencies from making detailed commitments in a plan. Rather, agencies should be encouraged to develop robust land use plans.

Challenges are still available with legal planning and strategy. A plaintiff must distinguish between suing for a promise in a land use plan which is unenforceable and suing when an agency acts inconsistently with a plan that has legal merit.160 A plaintiff can raise claims about administrative action so long as they are tied to a specific, final agency action. For example, a recent District Court case avoided the *Southern Utah Wilderness Alliance* threshold justiciability restrictions. In *Oregon Natural Desert Association v. United States Forest Service*, an environmental organization sought an injunction on livestock grazing on certain public lands.161 Plaintiffs claimed that the Forest Service failed to meet the applicable planning standards established in forest plans and

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154. But, the Court distinguished claims in which a particular site-specific future action is inconsistent with plans. *Id.* at 2383-84.
155. *Id.*
158. *Id.* at 1240.
160. See, e.g., Or. Natural Res. Council Fund v. Brong, No. 04-693-AA, 2004 U.S. Dist. LEXIS 23251 (D. Or. Nov. 8, 2004) (finding a claim that BLM failed to conform the site-specific project to the provisions of a resource management plan was proper pursuant to *S. Utah Wilderness Alliance*).
riparian management objectives. In a lengthy explanation, the court distinguished this case from Southern Utah Wilderness Alliance. In this case, the plaintiffs challenged discrete final agency actions such as decisions to authorize grazing that were inconsistent with the Forest Plan. They also challenged unreasonable delays in adopting allotment management plans and undertaking NEPA analyses. "These challenges are valid pursuant to section 706(1) of the APA." Thus, the line between actions promised in land use plans and inconsistent actions is a fine, but important distinction.

C. The Court's NEPA Decision Should Be Narrowly Construed

Courts should narrowly apply Southern Utah Wilderness Alliance's NEPA decision because it creates a slippery slope of government actions that could escape environmental review. Excluding ongoing land management activities from supplemental environmental review erodes the purpose of NEPA. In Southern Utah Wilderness Alliance, the Court held that the ongoing land management activities scrutinized by SUWA were not a "major federal action" subject to supplemental NEPA. The purpose of requiring the preparation of an EIS is to guarantee that environmental goals are "infused into the ongoing programs and actions of the Federal Government." In this case, increased off-road vehicle recreation created a new circumstance that outdated the EIS for ongoing WSA management. The new situation rendered the past management strategy insufficient. Thus, BLM continued to implement management activities that were inappropriate for new conditions—exactly the situation NEPA sought to remedy through the SEIS process.

The Court's NEPA decision should be narrowly applied because it could have negative repercussions. In a couple of paragraphs on the NEPA claim, the Court proclaimed that a land use plan was only a major federal action until approved; afterwards there is no ongoing action. The Ninth Circuit has already expanded this concept to find a Forest Service permit unreviewable once approved. In Cold Mountain v. United States Forest Service, the plaintiffs challenged the Forest Service's issuance of a permit to operate a bison capture facility in Montana. Concerned about hazing and capture of bison, the plaintiffs claimed, inter alia, that new information required a SEIS under NEPA. The court

162. Id. at *6.
163. Id. at *9.
164. Id.
167. Id.
169. Id. at *9.
rejected the supplemental NEPA claim because the Forest Service already approved and issued the permit therefore "major federal action" was already completed. According to the Ninth Circuit, the Forest Service fulfilled its obligation under NEPA. This example demonstrates how the Southern Utah Wilderness Alliance decision creates a category of management activities that regardless of new environmental effects, could evade review.

The Court's NEPA decision in Southern Utah Wilderness Alliance should be strictly limited to the facts of this case. A blanket application of the Supreme Court's new evaluation of ongoing agency action has the potential to eliminate most supplemental environmental review under NEPA. It may also affect other challenges to government action. To avoid an outcome that is antithetical to the purpose of NEPA, courts should continue to evaluate the need for a supplemental EIS on a case-by-case basis. In Marsh v. Oregon Natural Resources Council, the Supreme Court addressed a complaint that the Army Corps of Engineers failed to address new information about a dam building project in a supplemental EIS. The Court determined that NEPA requires an agency to take a "hard look" at a project's environmental impact despite its prior approval. In Marsh, the approval of the project did not end the "major federal action." Comparing Marsh to Southern Utah Wilderness Alliance suggests a spectrum for classifying actions. Some activities specified in land use plans may not be "major federal actions" while others, like construction projects in Marsh, may be subject to supplemental NEPA.

A case-by-case approach to supplemental NEPA should emerge. It would be inappposite to the purpose of NEPA for an agency to ignore environmental effects of its actions simply because the agency already approved the action in a land use plan. Agencies should still be required to generate or supplement an EIS when outstanding government action would be environmentally significant. A factual

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170. Id. at *23.
171. Id.
172. Interview with Brendan Cummings, Staff Attorney, Center for Biological Diversity (July 27, 2004); see also, In re Operation of the Mo. River Sys. Litig., No. 03-MD-1555, 2004 U.S. Dist. LEXIS 11410, at *49 n.9 (D. Minn. July 21, 2004) (dismissing a plaintiff's claim that a river management plan required supplemental EIS and citing SUWA for the proposition that supplemental EIS is not required if major federal action already completed).
173. For example, the Court's interpretation of ongoing action may affect a large percentage of failure to consult cases under the Endangered Species Act. Id. Under the Endangered Species Act section 7, an agency must consult with FWS or NMFS regarding the potential effects of a proposed or ongoing action if the action may affect listed species. 50 C.F.R. § 402.01(b) (2005).
175. Id. at 373-74.
176. See Marsh, 490 U.S. at 371.
177. Id. at 372 (citing TVA v. Hill, 437 U.S. 153, 188, n.34 (1978)).
inquiry for each case will ensure that the process serves Congress' vision of NEPA.

CONCLUSION

The Supreme Court's decision in Southern Utah Wilderness Alliance prioritized separation of powers values over the judiciary's role in checks and balances. The Court denied review of SUWA's claims to avoid interfering with BLM's operations. This, however, allowed BLM to abdicate duties imposed by Congress.

First, the limitation of review for the non-impairment claim allowed the BLM to ignore the harms of off-road vehicle recreation. This contradicts Congress' instructions to protect wilderness. Second, the Court decided that land use plans are not binding. Although disappointing in this case, the decision may prevent future land use plans from being unambitious. Third, the Court decided that there was no ongoing major federal action subject to supplemental NEPA review. This precedent needs to be limited to avoid nullifying the role of SEIS.

Despite the outcome in Southern Utah Wilderness Alliance, it is important that BLM safeguard Utah's remaining wilderness. BLM has no enviable task with its dual role of conservation and allocation of resources. It struggles to manage the unexpected growth of motorized recreation. BLM's mandate to manage lands for multiple uses often pits environmental concerns against motorized recreation. To balance these concerns BLM should designate specific off-road vehicle trails that minimize the degradation of potential wilderness areas. Furthermore, Congress should spur the protection of redrock country by incorporating qualifying BLM lands into the Wilderness Preservation Network.


179. America's Redrock Wilderness Act will designate and protect as wilderness certain BLM lands with wilderness qualities The bill was introduced in the 108th Congress as H.R. 1796 (House of Representatives) and S. 639 (Senate).