THE SHRINKING SCOPE OF JUDICIAL REVIEW IN *NORTON V. SOUTHERN UTAH WILDERNESS ALLIANCE*

JUSTIN C. KONRAD*

In Norton v. Southern Utah Wilderness Alliance, *the U.S. Supreme Court issued its first decision definitively construing § 706(1) of the Administrative Procedure Act ("APA"). This section ostensibly provides for review of agency action "unlawfully withheld or unreasonably delayed." However, the Court's opinion narrowly construed section 706(1) so as to allow review only for discrete agency actions that are legally required. As a result, the Court held that Bureau of Land Management compliance with a Federal Land Management and Policy Act ("FLPMA") provision mandating management of certain public lands so as to prevent impairment of their wilderness characteristics was not subject to judicial review. This article examines the Court's opinion and concludes that by limiting the scope of review under section 706(1), the Court effectively immunized agencies from compliance with broad congressional mandates. This article further argues that such a result was not required by the language or history of section 706(1), and that the purposes of both the APA and FLPMA would be better served by a more expansive interpretation of section 706(1).*

INTRODUCTION

In a decision with far-reaching implications for the future of administrative agency authority and citizen action under the Administrative Procedure Act ("APA"), the United States Supreme Court in June 2004 handed down its first decision interpreting judicial review of agency inaction under § 706(1) of the APA.[1] In *Norton v. Southern Utah Wilderness Alliance* (*"Norton v. SUWA"*),[2] Justice Scalia's opinion for a unanimous Court rejected an environmental group's contention that, in failing to prevent degradation of wilderness study areas by off-road vehi-

* Candidate for Juris Doctor degree, University of Colorado School of Law, May 2006.

1. 5 U.S.C. § 706(1) (2000).

2. 542 U.S. 55, 66 (2004).

cle ("ORV") use, the Bureau of Land Management ("BLM") failed to perform agency action required by the Federal Land Policy and Management Act of 1976 ("FLPMA").[3] The Court therefore refused to use § 706(1) of the APA to compel the BLM to comply with its statutory mandate.[4] As a result, the BLM remains free to continue to allow ORV impairment of wilderness study areas in which Congress explicitly legislated to prevent impairment.

Section 706(1) of the APA directs reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed."[5] This note argues that the Court in *Norton v. SUWA* significantly and unnecessarily narrowed the scope of judicial review available under the APA by reading a "discreteness" requirement into § 706(1). The result in this case is to make ineffective the wilderness protection provision in § 1782(c) of FLPMA, which requires the BLM to prevent impairment of wilderness study areas.[6] By holding that FLPMA's non-impairment mandate is effectively unreviewable, the Court grants the BLM plenary authority to ignore this congressional mandate entirely. This note argues that a different result was required in this case—one which accords meaning to APA § 706(1) and FLPMA § 1782(c) by requiring the BLM to prevent impairment of wilderness study areas ("WSAs") as Congress mandated.

Part I illustrates the situation prior to the Southern Utah Wilderness Alliance lawsuit. It explains the statutory framework enacted by Congress to protect WSAs from impairment while awaiting designation under the Wilderness Act and describes the BLM's failure to prevent ORV use that led to the suit. Part II traces the procedural history of the suit through the district court and Tenth Circuit opinions. Part III describes the Supreme Court's interpretation of APA § 706(1), which concluded that § 706(1) allows for judicial enforcement only of discrete, legally required agency action, and that FLPMA's non-impairment mandate does not contain such a discrete requirement. Part IV critiques this reasoning and contends that the Court improperly narrowed § 706(1) by requiring a statute to expressly mandate "discrete" agency action to justify judicial review of agency inaction. Part IV therefore argues that the Court should have enforced § 1782(c) of FLPMA's explicit mandate as legally requir-

3. The case also involved two additional claims against BLM relating to the same issue: that the BLM's failure to act violated its own binding Land Use Plan ("LUP"), and that the BLM had failed to take a "hard look" at ongoing impairment of the land in question as required by the National Environmental Policy Act ("NEPA"). *Id.* at 61. This note, however, is concerned only with the first claim, that the BLM's failure to act violated FLPMA's non-impairment mandate.

4. *See id.* at 66.

5. 5 U.S.C. § 706(1).

6. *See* 43 U.S.C. § 1782(c) (2000).

ing agency action. Finally, Part V argues that this result would be preferable as a means of supporting congressional intent while maintaining the BLM's discretion to determine the best manner in which to reach its statutorily defined goals. The Court's approach in *Norton v. SUWA* created an unnecessarily narrow avenue of judicial review under § 706(1), thus immunizing agencies from review of failures to act even if such inaction clearly violates a broad congressional mandate.

I. MANAGEMENT OF WSAS UNDER THE WILDERNESS ACT AND FLPMA

In the Wilderness Act of 1964, Congress expressed its intent to protect designated wilderness areas so as to allow them to remain wild for future generations.[7] In order to ensure that such areas did not lose their pristine wilderness characteristics while under consideration for designation, Congress mandated that the BLM protect WSAs to prevent "impair[ment of] the suitability of such areas for preservation as wilderness."[8] But the BLM, while acknowledging that ORV use in WSAs impairs their wilderness characteristics, nevertheless continued to allow ORV use and impairment within several WSAs.

A. Congressional Protection of WSAs

Over forty years ago, Congress enacted the Wilderness Act with the goal of setting aside certain federal lands to be preserved in their most natural state as strictly protected wilderness areas, to 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.[9]

Using atypically graceful language, the Wilderness Act defined wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[10] The Wilderness Act, however, did not expressly cover public

7. *See* 16 U.S.C. § 1131(a) (2000).
8. 43 U.S.C. § 1782(c).
9. 16 U.S.C. § 1131(a).
10. 16 U.S.C. § 1131(c). *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 62 (1992).

lands under BLM management, which were instead subject to "a myriad of public land laws serving a variety of competing and often conflicting interests."[11] To remedy this lack of unified BLM direction, Congress in 1976 passed FLPMA to "establish a coherent, comprehensive scheme of federal land management."[12] Although FLPMA generally mandates multiple uses of public land, § 1782 directed the Secretary of the Interior to identify and set aside WSAs—land parcels of 5,000 acres or more that lack roads and possess characteristics of wilderness—for possible designation as protected wilderness areas under the Wilderness Act, exempt from multiple use management.[13] However, the process of designation by Congress is not immediate, since the time between the beginning of a BLM study period and Congress's eventual decision may take many years.[14] Therefore, in order to ensure that WSAs do not lose their pristine wilderness character while being considered for designation, FLPMA mandated that, "until Congress has determined otherwise, the Secretary shall continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness."[15] Congress's intent in providing this management mandate was clear: "The purpose of the WSA management scheme is to maintain the status quo existing October 21, 1976 [the date of FLPMA's enactment], so that lands then suitable for wilderness consideration will not be rendered unfit for such consideration before the Secretary makes a recommendation and the Congress acts on the recommendation . . . ."[16]

B. The BLM's Interpretation of FLPMA's Non-Impairment Mandate

Agencies, including the BLM, generally issue regulations to guide compliance with statutory mandates. In its Interim Management Policy and Guidelines for Lands Under Wilderness Review ("IMP"), the BLM interpreted FLPMA's non-impairment mandate and provided the procedure by which it would implement the statute.[17] The current IMP was revised in 1995.[18] The BLM's own interpretation of FLPMA is particu-

11. Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 737 (10th Cir. 1982).

12. Presidential Authority Over Wilderness Areas, 6 Op. Off. Legal Counsel 63, 64 (1982).

13. *See* 43 U.S.C. § 1782(a); *see also* H.R. REP. NO. 94-1163, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175 ("This section [§ 1782 of FLPMA] extends the Wilderness Act to the public lands.").

14. *See* Presidential Authority Over Wilderness Areas, 6 Op. Off. Legal Counsel 63, 64 (1982).

15. 43 U.S.C. § 1782(c).

16. *Rocky Mountain Oil & Gas Ass'n*, 696 F.2d at 749.

17. *See* 44 Fed. Reg. 72,014, 72,014–16 (Dec. 12, 1979).

18. *See* U.S. Dep't of Interior, BLM, No. H-8550-1, Interim Management Policy for

larly important because if a statute is deemed ambiguous, a reviewing court must generally defer to the agency's interpretation of the statute as provided in the IMP as long as the interpretation is a reasonable one.[19] According to the Revised IMP, the BLM considers use of public lands nonimpairing and therefore permissible within a WSA only if two criteria are met:

a) The use, facility, or activity must be temporary. This means a temporary use that does not create surface disturbance or involve permanent placement of facilities may be allowed if such use can easily and immediately be terminated upon wilderness designation.

b) When the use, activity, or facility is terminated, the wilderness values must not have been degraded so far as to significantly constrain the Congress's prerogative regarding the area's suitability for preservation as wilderness.[20]

The Revised IMP defines "surface disturbance" as "any new disruption of the soil or vegetation requiring reclamation within a WSA."[21] Specifically, ORV use is designated as surface disturbing: "Cross-country vehicle use off boundary roads and existing ways is surface disturbing because the tracks created by the vehicle leave depressions or ruts, compact the soils, and trample or compress vegetation."[22] According to the Revised IMP, if the BLM determines that a particular use of land in a WSA fails to satisfy the non-impairment criteria, permission to undertake that use of the land must be denied.[23] The Revised IMP also recognizes the potential for impairment resulting from the cumulative impact of multiple uses that are themselves individually non-impairing. In such circumstances, "[i]f impacts are becoming so great that the area's wilderness suitability could be impaired, the BLM will take steps to control those impacts by adjusting the conditions of use (such as time, place, and quantity), by prohibiting the expansion of the use, or by prohibiting the use altogether."[24]

Lands Under Wilderness Review (1995) [hereinafter *Revised IMP*], *available at* http://www.ut.blm.gov/utahwilderness/imp/imp.htm (last visited Feb. 6, 2006).

19. *See* Sierra Club v. Clark, 774 F.2d 1406, 1408–09 (10th Cir. 1985) (deferring to BLM's interpretation in the IMP); *see also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984) (establishing judicial deference to agency interpretation of statutes).

20. *Revised IMP*, *supra* note 18, at I.B.2.

21. *Id.* at I.B.3.

22. *Id.*

23. *See id.* at I.B.2.

24. *Id.* at I.B.5.

C. *The BLM's Approach to Preventing ORV Impairment of Utah's WSAs*

Utah contains vast amounts of public land under BLM management, totaling about 23 million acres.[25] By 1991, the Secretary of the Interior had identified approximately 3.3 million acres of BLM land in Utah as WSAs and recommended to the President and Congress that approximately 2 million acres of these identified WSAs were suitable for wilderness designation under FLPMA § 1782(b).[26] Congress, however, was under no obligation to make an immediate decision regarding the possible designation of these WSAs: "In the legislative phase of the wilderness review, there is no deadline or timetable for Congress to act . . . ."[27] The WSAs thus remained in legislative limbo, pristine enough to be selected by the BLM and the Secretary of the Interior for their unspoiled wilderness character but not yet accorded the congressional protection of designated wilderness area status under the Wilderness Act. It is for precisely these circumstances that Congress mandated, under FLPMA § 1782(c), that the BLM manage WSAs "so as not to impair the suitability of such areas for preservation as wilderness" while the decision as to designation remains to be made.[28]

However, as Utah's WSAs awaited congressional consideration, the very wilderness character that gave rise to their WSA status was threatened by an increase in ORV use.[29] ORV use in the United States "roughly doubled" in the five years prior to 2004, with almost 900,000 sales occurring in 2003.[30] That ORV use has negatively affected Utah's public lands was not questioned in this case; the Supreme Court stated as uncontested fact in its opinion that ORV use has "negative environmental consequences, including soil disruption and compaction, harassment of animals, and annoyance of wilderness lovers."[31] The Court cited and relied upon an amicus curie brief submitted by the Natural Resources Defense Council and other environmental groups that summarized numer-

25. *See* U.S. Dep't of Interior, BLM, *2000 Facts and Figures, Land Ownership and Administration*, http://www.ut.blm.gov/FactsFigures/FactsFigures00/ff15.html (last visited Feb. 6, 2006).

26. *See* U.S. Dep't of Interior, BLM, *2000 Facts and Figures, Utah Wilderness Review*, http://www.ut.blm.gov/FactsFigures/FactsFigures00/ff25.html (last visited Feb. 6, 2006).

27. *Id.*

28. 43 U.S.C. § 1782(c) (2000); *see* Presidential Authority Over Wilderness Areas, 6 Op. Off. Legal Counsel 63, 72 (opining that § 1782(c) requires "that the land be managed to protect its wilderness characteristics 'until Congress has determined otherwise'").

29. *See* BLM, OHV Interim Management Approach, Oct. 2001, http://www.ut.blm.gov/OHV/ohvimapproach.html (last visited Feb. 6, 2006).

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

31. *Id.*

ous studies, concluding that the environmental impacts of ORV use are "well documented, and are particularly pronounced in desert and shrubland ecosystems, such as the public lands in the State of Utah."[32] In particular, the brief notes that

> ORVs cause intense soil disruption and compaction, which reduces moisture infiltration rates, soil porosity and soil permeability, and impedes seed germination and seedling growth. In areas with arid soils, ORVs can damage fragile cryptobiotic crusts that help stabilize the soil, which may take from 40 to 250 years to recover. ORVs are also heavy polluters; it is estimated that ORVs spill tens of millions of gallons of gasoline and oil on public lands in the United States each year. . . . The soil damage caused by ORVs results in accelerated and excessive erosion. . . . The number, diversity, and biomass of vertebrates are also reduced by ORV use.[33]

Perhaps most importantly, the BLM itself conceded that "impairment has been caused by ORVs within some Utah wilderness study areas" managed by the BLM.[34] This evidence indicates fundamental agreement among the parties and the Court that the use of ORVs impairs the wilderness quality of public lands within WSAs.

Based upon FLPMA's unambiguous language requiring the BLM to manage WSAs "so as not to impair the suitability of such areas for preservation as wilderness," any activities that concededly impair wilderness, such as ORV use, are inconsistent with Congress's mandate to preserve WSAs prior to congressional designation and are therefore prohibited by FLPMA.[35] The stage was thus set for the confrontation between Utah's environmental watchdog groups and the BLM.

II. THE LEGAL EFFORT TO FORCE BLM ACTION UNDER FLPMA AND THE APA

A coalition of environmental non-profit corporations including the Southern Utah Wilderness Alliance ("SUWA") brought suit against the BLM under APA § 706(1), claiming that the BLM failed to act to pre-

32. Brief for Natural Res. Def. Council et al. as Amici Curiae, at 4, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) (No. 03-101), 2004 WL 319125, [hereinafter NRDC Brief].

33. *Id.* at 5–6.

34. Brief for the Respondent in Opposition to Petitions for a Writ of Certiorari, at app. 59, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) (No. 03-101), 2003 WL 22428082. The BLM claimed in its response that no impairment had occurred within certain listed WSAs, but the four WSAs at issue in *Norton v. SUWA* were not included within those the BLM claimed as unimpaired.

35. 43 U.S.C. § 1782(c) (2000).

vent impairment from ORV use in WSAs contrary to FLPMA's non-impairment mandate.[36] The district court in Utah dismissed the claim, finding lack of jurisdiction under the APA. The Tenth Circuit, however, reversed and remanded the case for consideration on its merits.

A. Compelling "Agency Action Unlawfully Withheld"

SUWA contended that the BLM did not act to exclude ORV use in WSAs but left them largely open for such use, resulting in impairment that violated FLPMA's non-impairment mandate.[37] After unsuccessfully attempting to directly convince the BLM to close WSAs to ORV use, SUWA commenced suit in the United States District Court for the Central Division of Utah (the "district court").[38] In its suit, SUWA focused on four specific Utah WSAs in which the BLM had permitted ORV use: Parunuweap, Moquith Mountain, Behind the Rocks, and Side Mountain.[39]

SUWA sought, among other remedies, a preliminary injunction under APA § 706(1) to prevent further "substantial [ORV] damage and impairment to BLM lands."[40] This provision of the APA authorizes judicial review of agency inaction, directing that "[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."[41] SUWA argued that the BLM's duties under FLPMA included the duty to ensure that the WSAs at issue were not impaired by ORVs, and that the BLM's failure to prevent such ORV use therefore constituted "agency action unlawfully withheld."[42]

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36. The other plaintiff corporations include The Wilderness Society, Sierra Club, Great Old Broads for Wilderness, Utah Council of Trout Unlimited, American Lands Alliance, and Friends of the Abajos. For ease of reference, however, this article will refer to the plaintiffs as "SUWA."

37. *See* Brief for the Respondent, at 7, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) (No. 03-101), 2004 WL 522594 [hereinafter SUWA Brief]. FLPMA requires the BLM to manage WSAs through LUPs. *See* 43 U.S.C. § 1712 (2004). The LUPs relevant to the WSAs in *Norton v. SUWA* left "most or all of each of the [WSAs] open to ORV use." SUWA Brief, *supra*, at 7.

38. *See* S. Utah Wilderness Alliance v. Babbitt, No. 2:99CV852K, 2000 WL 33914094, *1 (D. Utah Dec. 22, 2000). Prior to suit, SUWA claims that it "wrote to and met with the responsible BLM officials to demand that the agency comply with its legal duties concerning ORV use on Utah lands." SUWA Brief, *supra* note 37, at 8. According to SUWA, however, BLM was unresponsive. *Id.* Other non-profit conservation groups also participated as plaintiffs in the suit including The Wilderness Society, Sierra Club, and others. *See* S. Utah Wilderness Alliance v. Babbitt, 2000 WL 33914094, at *1.

39. *See S. Utah Wilderness Alliance v. Babbitt*, 2000 WL 33914094, at *3.

40. *Id.* at *1.

41. 5 U.S.C. § 706(1) (2000).

42. *See S. Utah Wilderness Alliance v. Babbitt*, 2000 WL 33914094, at *2.

B. The District Court Decision

The district court dismissed SUWA's § 706(1) claim for lack of jurisdiction.[43] The district court held that the requirements of FLPMA's non-impairment mandate were "far from clear," and thus permitted the BLM discretion in choosing the means by which it defined and attempted to prevent impairment of the wilderness qualities within WSAs.[44] Jurisdiction under § 706(1) is, according to the district court, a "limited exception to the finality doctrine" available "only where there is a genuine failure to act."[45] The district court held that SUWA's claim "appears to be a complaint about the sufficiency of the BLM's action, rather than a genuine failure to act" as required by § 706(1).[46] The BLM's failure to close WSAs to ORV use did not, in the eyes of the district court, constitute a failure to act but represented instead an alternative approach to addressing WSA impairment that was within the BLM's discretion to pursue under FLPMA and the BLM's Revised IMP.[47] The district court emphasized that the BLM had taken some action to address impairment from ORV use (including closure of some WSAs other than those at issue in the case), and thereby "attempt[ed] to perform a complex balancing of many factors that bear on this issue" (although most such actions were taken after SUWA filed its lawsuit).[48] Thus, the district court held that jurisdiction was not available to compel BLM action under § 706(1).

C. The Tenth Circuit Opinion

The United States Court of Appeals for the Tenth Circuit, in an opinion written by Judge Ebel, reversed the district court's dismissal and remanded the case for consideration on its merits.[49] In holding that the district court should have adjudged SUWA's FLPMA claim under §

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43. *See id.* at *6.

44. *Id.* at *4.

45. *Id.* at *3 (quoting Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999)). The "finality doctrine" expresses the basic requirement that judicial review is only available for "final agency action." 5 U.S.C. § 704 (2000). Section 706(1) arguably represents an exception to this doctrine since it permits review of agency inaction, despite the fact that an agency action "unlawfully withheld" is by its nature not a "final agency action." *Ecology Ctr., Inc.*, 192 F.3d at 926. The Tenth Circuit offered a different interpretation, however, opining that agency inaction is equivalent to a final agency action where the agency expressly refuses to act. S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1229 (10th Cir. 2002). *See* discussion *infra* at Part II.C.

46. *S. Utah Wilderness Alliance v. Babbitt*, 2000 WL 33914094, at *5.

47. *See id.*

48. *Id.* at *5, *6.

49. *See S. Utah Wilderness Alliance v. Norton*, 301 F.3d at 1222.

706(1), the Tenth Circuit rejected three arguments raised by the BLM and parties intervening on behalf of the BLM.

First, the Tenth Circuit held that although the BLM has discretion in determining how best to comply with FLPMA's non-impairment mandate, this does not immunize the BLM from its "clear, nondiscretionary duty" to comply with the mandate generally.[50] Since FLPMA presents such a duty, § 706(1) provides jurisdiction for a court to compel the BLM to comply.[51] Thus, because SUWA had presented "colorable evidence" indicating that the BLM was permitting ongoing impairment of wilderness values in WSAs, the district court had jurisdiction under § 706(1) to compel the BLM to prevent such impairment consistent with its legal duty.[52] According to the court, the BLM's discretion to determine its means of compliance does not render the congressional mandate itself "wholly discretionary."[53]

Second, the Tenth Circuit rejected the BLM's argument that § 706(1) only permits judicial compulsion of actions that are themselves "final, legally binding" agency actions.[54] It held instead that under the APA, agency inaction in the face of a mandatory, nondiscretionary duty "is, in essence, the same as if the agency had issued a final order or rule declaring that it would not complete its legally required duty."[55] According to the court, failure to comply with FLPMA's non-impairment mandate could thus be considered a final action subject to judicial compulsion under § 706(1).[56]

Third, the Tenth Circuit rejected the BLM argument upon which the district court had placed the most reliance: that the BLM had taken some steps to act to address ORV impairment within WSAs and was therefore immune from judicial compulsion to fulfill FLPMA's non-impairment mandate under § 706(1). The court acknowledged that the BLM had indeed taken some action (such as closing roads and posting signs to prevent ORV use in certain areas).[57] However, according to the court,

> it does not follow . . . that just because the BLM attempts to comply with the nonimpairment mandate, it thereby deprives a court of subject matter jurisdiction to determine whether it has actually fulfilled

50. *Id.* at 1228.
51. *See id.* at 1227.
52. *Id.*
53. *Id.* at 1228.
54. *Id.* at 1230.
55. *Id.* at 1229.
56. *See id.*
57. *See id.* at 1230.

> the statutorily mandated duty and potentially compel action if that duty has not been fulfilled.[58]

The court illustrated its holding by imagining a federal law prohibiting logging in a forest with which the BLM claimed compliance because it prohibited logging in half of the forest.[59] Such action, while representing a step towards meeting the statutory mandate, would nonetheless be judicially reviewable under § 706(1) and a court could compel the BLM to satisfy its statutory mandate by prohibiting logging in the remainder of the forest, regardless of the steps it had already taken.[60] Similarly, the court held that the BLM could not claim immunity from review under § 706(1) simply because it had taken steps towards fulfilling its non-impairment mandate under FLPMA; as long as a case was made that the BLM had failed to meet the requirements of that mandate, jurisdiction exists under § 706(1).[61] Thus, the Tenth Circuit held that the district court should consider SUWA's claim that the BLM had violated FLPMA's non-impairment mandate by permitting ORV use in certain WSAs, and remanded the case to "determine whether the BLM . . . failed to comply with the FLPMA's . . . nonimpairment mandate."[62] The BLM promptly sought certiorari to the U.S. Supreme Court, which granted certiorari and subsequently reversed the Tenth Circuit holding.[63]

III. THE U.S. SUPREME COURT'S INTERPRETATION OF § 706(1)

Justice Scalia's opinion for a unanimous Court begins, after a description of the facts, by examining the requirements for a cause of action under § 706(1) of the APA (which, until this case, had never been definitively construed by the Court).[64] Section 706, entitled "Scope of Review," sets out the circumstances under which judicial review of agency conduct is required by the APA.[65] Section 706(2), the more commonly used provision, provides standards for judicial review of

58. *Id.* at 1231.
59. *See id.* at 1231 n.12.
60. *See id.*
61. *See id.* at 1233.
62. *Id.*
63. *See* Norton v. S. Utah Wilderness Alliance, 540 U.S. 980 (2003) (granting certiorari).
64. Although prior Court opinions have mentioned § 706(1), none have gone into detail regarding its requirements for a cause of action. *See, e.g.*, United States v. Bean, 537 U.S. 71, 75 (2002) ("[I]t is not clear that respondent would prevail were he to file a requisite action under 5 U.S.C. § 706(1)."). The Court in *Norton v. SUWA* does not cite any previous decision of any court construing § 706(1).
65. 5 U.S.C. § 706 (2000).

"agency action, findings, and conclusions."[66] Section 706(1) provides a complementary standard for review of agency inaction or delay: "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed . . . ."[67] According to the Court's interpretation in *Norton v. SUWA*, § 706(1) contains two preliminary requirements that must be met for a court to compel agency action: the agency must fail to take (1) "a *discrete* agency action" that it is (2) "*required to take*."[68]

A. Section 706(1) Can Only Compel Discrete Agency Action

The APA defines the term "agency action" in § 551(13) as including "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[69] Justice Scalia's opinion narrowly interprets this definition to require a particular, discrete action, noting that the types of agency action listed in the definition "[a]ll . . . involve circumscribed, discrete agency actions."[70] In particular, "failure to act" should, according to Justice Scalia, be interpreted as failure to take one of the discrete agency actions listed or be ascribed "the same characteristic of discreteness shared by all the preceding items" under the interpretive canon of *ejusdem generis*.[71] This canon instructs that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[72] Justice Scalia's stated rationale for utilizing this canon to limit judicial review is to avoid "broad programmatic attack[s]" that challenge an agency's general approach rather than its resolution of a particular issue through rulemaking

66. 5 U.S.C. § 706(2). The text of § 706(2) provides that

> [t]he reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Id. *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.1 (4th ed. 2002).

67. 5 U.S.C. § 706(1).

68. 542 U.S. 55, 64 (2004).

69. 5 U.S.C. § 551(13) (2000).

70. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. at 62.

71. *Id.* at 62–63.

72. Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003); *see also* 73 AM. JUR. 2D *Statutes* § 135 (2001) (defining *ejusdem generis*).

or adjudication.[73] He supports this discreteness requirement with reference to the Court's previous decision in *Lujan v. National Wildlife Federation*, which limited APA review of affirmative agency actions under § 706(2) to particular actions of an agency and therefore denied the National Wildlife Federation's challenge to the BLM's so-called "land withdrawal review program."[74] Under § 706(1), then, agency compliance with a broad statutory mandate is not judicially reviewable because such a mandate compels an overall goal or policy and not a particular, discrete agency action.[75]

B. Section 706(1) Can Only Compel Legally Required Agency Action

Norton v. SUWA also limits § 706(1) to allow judicial compulsion of agency action only where the action to be compelled is "legally required."[76] In contrast with the opinion's prior discussion of the discreteness requirement, this holding does not rely upon textual analysis of the statute's language. Indeed, Justice Scalia only briefly references the statutory language, holding that the necessity of a legally required agency action "appears in § 706(1)'s authorization for courts to 'compel agency action *unlawfully* withheld'" and thus implying that any action not legally required could be withheld without being "unlawful."[77]

The opinion instead compares judicial review under the APA to the early twentieth-century remedy of mandamus. Justice Scalia explains that "the APA carried forward the traditional practice prior to its passage, when judicial review was achieved through the use of . . . writs of mandamus."[78] He cites several nineteenth- and early twentieth-century opinions that provide examples of the requirements for a writ of mandamus, including a "precise, definite act . . . about which [an official] had no discretion whatever."[79] The opinion also cites the Attorney General's Manual on the Administrative Procedure Act ("AGM"), "a document whose reasoning [the Court has] often found persuasive," for the proposition that the APA permits judicial compulsion only of actions required of an agency by statute; actions left to agency discretion may not be

73. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. at 64.

74. 497 U.S. 871, 891 (1990) ("Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm.").

75. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. at 64.

76. *Id.* at 63.

77. *Id.*

78. *Id.*

79. *Id.* (quoting United States *ex rel.* Dunlap v. Black, 128 U.S. 40, 46 (1888)).

compelled.[80] In addition, Justice Scalia notes that even where a court could legitimately compel action, it could not compel a specific act based on its own interpretation of a statute but could only "compel an agency . . . to take action upon a matter, without directing *how* it shall act."[81] Thus, the opinion concludes that § 706(1) can only permit judicial compulsion if the agency is legally required by statute to take action.

C. The Court's Application of § 706(1) to FLPMA's Non-Impairment Mandate

Thus, the relevant holding of *Norton v. SUWA* is that "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*."[82] Applying this rule to SUWA's claim of BLM inaction, Justice Scalia concludes that FLPMA's non-impairment mandate does not require discrete agency action, and therefore that the Court may not use § 706(1) to compel BLM action: "Section 1782(c) is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it. It assuredly does not mandate, with the clarity necessary to support judicial action under § 706(1), the total exclusion of ORV use."[83] From these words it is difficult to discern clearly whether Justice Scalia finds that FLPMA's non-impairment mandate is unreviewable because it is not *discrete*, because it is not *legally required*, or because it fails both tests.

The better interpretation seems to be that Justice Scalia finds that FLPMA's non-impairment mandate, while legally required, contains no discrete action to be compelled. The first sentence apparently concedes that the "legally required" element of § 706(1) is satisfied, since describing the non-impairment mandate as "mandatory" necessarily admits that it is "legally required" by the statute.[84] Thus, the BLM's mandate to "manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness" is legally required.[85] Justice Scalia's primary concern must therefore be with the lack of discreteness in that mandate; although the "object" is mandated (preservation of wilderness character), the discrete agency action itself (exclusion of ORV

80. *Id.* at 63–64 (citing, for example, Darby v. Cisneros, 509 U.S. 137, 148 n.10 (1993)).

81. *Id.* at 64 (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947)).

82. *Id.*

83. *Id.* at 66.

84. *See* BLACK'S LAW DICTIONARY 665 (8th ed. 2004) (defining "mandatory statute" as "a law that requires a course of action as opposed to merely permitting it").

85. 43 U.S.C. § 1782(c) (2000).

use in WSAs) is not specifically provided in the statute.[86] The opinion also states that FLPMA's non-impairment mandate lacks "the clarity necessary to support judicial action under § 706(1)," apparently using "clarity" as a synonym for "discreteness."[87] Because Justice Scalia finds that no discrete agency action is statutorily required, he refuses to consider the BLM's lack of action and whether it complied with FLPMA's mandate.

Justice Scalia therefore rejects SUWA's contention that the Court could compel BLM compliance with the statutory non-impairment mandate without compelling a specific action.[88] This part of the opinion responds to SUWA's argument that § 706(1) permits judicial enforcement of "mandatory duties that are stated in general terms."[89] SUWA's argument, however, relied upon an interpretation of § 706(1) that does not require the governing statute to mandate a *discrete* agency action.[90] Because the newly-minted *Norton v. SUWA* rule requires a discrete agency action expressly required by Congress in order to support review under § 706(1), Justice Scalia rejected SUWA's argument that general compliance with a statutory mandate could be judicially compelled.[91] The opinion states that a court cannot "simply enter a general order compelling compliance with [a general statutory] mandate, without suggesting any particular manner of compliance."[92] To do so, according to Justice Scalia, would be tantamount to judicially addressing "[g]eneral deficiencies in compliance," a concept similar to the "broad programmatic attack" that the Court previously rejected in *Lujan v. National Wildlife Federation*.[93]

The Court's primary concern with judicial review of agency compliance under broad statutory mandates appears to be that such review would lead to unnecessary and invasive judicial meddling with agency functions. Were courts to have such power, Justice Scalia argues, "it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management."[94] This level of

86. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. at 66.
87. *Id.*
88. *Id.* at 66–67.
89. SUWA Brief, *supra* note 37, at 29.
90. *See* discussion *supra* Part II.B.1.
91. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. at 66–67.
92. *Id.* at 66.
93. *Id.* at 64, 66.
94. *Id.* at 66–67.

control by the judiciary is not within the scope of the APA, according to Justice Scalia.[95]

IV. A BROADER INTERPRETATION OF § 706(1)

The Court's interpretation of § 706(1) in *Norton v. SUWA* reads into it a requirement, "discreteness," that is not expressly stated in the language of the APA as passed by Congress. While such judicial statutory modification-by-interpretation is sometimes permissible if necessary to make sense of a statute, in this case the narrowing of Congress's definition of "agency action" unnecessarily and improperly changes the scope of agency review as contemplated by the APA. Canons of construction should not be used to infer a narrow scope of reviewable actions where other compelling evidence indicates that the purpose of § 706(1), and the APA generally, was to allow a broad scope of reviewable action and inaction. This section argues for such a broader scope of reviewable agency action based upon prior Supreme Court precedent and congressional intent. It also challenges the Court's comparison to *Lujan v. National Wildlife Federation* and the Court's assertion that mandamus practice categorically rejected compulsion of broad statutory mandates. It then applies this interpretation to SUWA's claim regarding the BLM's failure to act.

A. Prior Court Precedent Supports a Broad Interpretation of "Agency Action" in APA § 551(13)

The Court's narrow interpretation in *Norton v. SUWA* of the kind of agency action and inaction over which the APA permits judicial review relies largely upon textual analysis—Justice Scalia's preferred method for statutory interpretation.[96] Regardless of one's beliefs regarding the merits of various theories of statutory interpretation, however, Justice Scalia was not writing upon a blank slate in this case. Although the *Norton v. SUWA* opinion does not claim to look beyond the text of § 551(13), prior Court opinions have done just that and have come to the opposite conclusion. The Court has previously espoused an inclusive view of judicially reviewable agency action, citing the legislative history

95. *Id.* at 67.

96. *See, e.g.*, Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 SAN DIEGO L. REV. 465, 467 (2005) (describing Justice Scalia as an "exclusive textualist"); Barbara K. Bucholtz, *The Interpretive Project and the Problem of Legitimacy*, 11 TEX. WESLEYAN L. REV. 377, 382 n.16 (2005) (describing Justice Scalia as "the most renown textualist on the bench today").

of the APA as evidence of Congress's intent that "agency action" as defined in the APA should receive a broad treatment:

> The term "agency action" brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 [of the APA] and to *assure the complete coverage of every form of agency power, proceeding, action, or inaction.* In that respect the term includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the action or inaction.[97]

The Court affirmed this broad reading as recently as 2001, when a decision (authored by Justice Scalia) cited to the above language as evidence that the "action" in "final agency action" is "meant to cover comprehensively every manner in which an agency may exercise its power."[98]

Indeed, Justice Scalia's near-exclusive reliance in *Norton v. SUWA* upon a literal interpretation of the APA's text seems inconsistent given the Court's long history of relying upon congressional intent and the purposes animating the APA for its interpretation. In the APA, "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers," and judicial review of agency action was the means by which Congress enforced this legislative direction.[99] The interpretation advanced by Justice Scalia in *Norton v. SUWA* is therefore, in essence, both a *sub silentio* overruling of the Court's prior broad reading of the term "agency action" and a rejection of the Court's previous reliance upon congressional intent as the benchmark for interpreting the statute.[100]

B. Statutory Interpretation Based Upon Congressional Intent is Superior in this Case to Strict Textual Interpretation

Given that the Court's prior interpretations of "agency action" under the APA have adopted a broad reading based upon congressional intent,

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97. FTC v. Standard Oil Co., 449 U.S. 232, 238 n.7 (1980) (emphasis added) (quoting S. DOC. NO. 79-248, at 255 (2d Sess. 1946)).

98. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 478 (2001).

99. Heckler v. Chaney, 470 U.S. 821, 833 (1985); *see also* Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955) (holding that the purpose of the APA's review provisions "was to remove obstacles to judicial review of agency action under subsequently enacted statutes"); Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (recognizing a presumption of judicial reviewability of agency action that should "not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

100. 73 AM. JUR. 2D *Statutes* § 62 (2001).

one might think that the Court's opinion in *Norton v. SUWA* would offer a convincing rationale for its departure from prior settled precedent. No such explanation is provided. Indeed, it seems unlikely that reliance upon a single canon of construction to interpret a complex statute will best achieve the substantive goals of that statute, especially in light of ample clear expressions of the intent behind the statute; such an approach threatens to turn statutory interpretation into a meaningless semantic game. "[S]ince all rules for interpretation of statutes of doubtful meaning have for their sole object the discovery of legislative intent, every technical rule as to the construction of a statute must yield to the expression of the paramount will of the legislature."[101] Under this view, canons of construction are aids for interpretation when the purpose of statutory language is unclear; they are not substitutes for clear prior enunciations of that purpose. In particular, "the doctrine of *ejusdem generis* is not a positive rule of law, but a rule of construction to aid in ascertaining and giving effect to the legislative intent where there is uncertainty."[102]

That strict construction based only upon the text of the statute cannot provide meaningful results in this case is illustrated by the application of other textual analysis techniques to reach a different result. *Ejusdem generis*, the tool utilized by Justice Scalia to interpret the APA in the Court's opinion, is but one of many interpretive techniques available. For example, the language of § 551(13) sets out a list of actions that are "included" within the definition of "agency action" under the APA without any express words of limitation. The statutory use of the term "includes" in a definition instead of a more limiting term, such as "means," has been interpreted in other cases as textual evidence that the definition is intended to be broad and inclusive, not narrow and exclusionary.[103] From this, one could conclude that, contrary to Justice Scalia's reasoning, the list of actions included in the term "agency action" is not limited to the items in the list but also encompasses other possible types of action or inaction.

Since strict textual analysis in this case can yield such opposing results, reliance upon one such result to interpret the APA seems arbitrary

101. *Id.* American Jurisprudence 2d supports this assertion by referencing cases including *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) and *Kapral v. United States*, 166 F.3d 565 (3d Cir. 1999).

102. 73 AM. JUR. 2D *Statutes* § 136 (2001).

103. *See* Helvering v. Morgan's, Inc., 293 U.S. 121, 125 n.1 (1934) (describing possible different interpretation of terms "includes" and "means" within statutes: "The natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition.").

at best, and a means of reaching a pre-determined conclusion at worst.[104] Reliance upon congressional intent and prior settled precedent, by comparison, in this case produces a single result justified by both the language of the statute and the intentions of the Congress that enacted it.

C. *The Court's Reasoning in* Lujan v. National Wildlife Federation *Supports the Availability of Review in* Norton v. SUWA

The Court's reliance upon *Lujan* to support a discreteness requirement under the APA is also misleading in the context of § 706(1). The plaintiff in *Lujan* presented a very different claim, one that concerned a much broader scope of BLM conduct. The claim in *Lujan* challenged the BLM's "land withdrawal review program" ("LWRP") as violating various FLPMA provisions relating to BLM review and reclassification of public lands.[105] The Court denied the claim on various grounds, one of which was that the BLM's LWRP did not represent an "agency action" under the APA's definition.[106] This conclusion does not require a narrow definition of "agency action," since the LWRP was not in fact a recognized BLM program of action at all.[107] Instead, it was an informal grouping of the BLM's general operations concerning review of land withdrawal revocation applications, classifications of public lands, and development of land use plans.[108] According to the Court, the LWRP as conceived by the plaintiffs would include at least 1,250 separate actions by the BLM, including various land classification terminations and withdrawal revocations.[109] As such, a challenge to this loose conglomerate of actions could reasonably be termed an attempt at "wholesale improvement" of the BLM's program that is outside of the scope of an "agency action" under the APA.[110]

SUWA's claim in *Norton v. SUWA*, however, involves at most four individual instances where the BLM failed to take action (one for each of the WSAs at issue). Rather than attempting to improve the BLM's con-

104. There is some evidence in *Norton v. SUWA* that Justice Scalia is utilizing statutory construction techniques strategically. The opinion states that "[t]he prospect of pervasive oversight . . . is not contemplated by the APA." 542 U.S. 55, 67 (2004). But statutes and other inanimate concepts do not "contemplate"; rather, the Congress that enacts them contemplates the scope that the statute is intended to cover. Thus, this phrase seems to interpret the scope of the statute using congressional intent.

105. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 875 (1990).

106. *Id.* at 890 (BLM's "land withdrawal review program . . . is not an 'agency action' within the meaning of [the APA's] § 702.").

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 891.

duct generally, SUWA sought only to enforce a single FLPMA mandate—the non-impairment mandate in § 1782(c)—within four defined WSAs. Such a claim, in fact, falls within the Court's own language in *Lujan* describing an acceptably limited "agency action" actionable under the APA.[111] The Court described a reviewable agency action as one in which "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."[112] In SUWA's claim, the scope of the controversy is reduced to a particular, concrete failure by the BLM: the failure to deny ORV use so as to prevent impairment of the named WSAs. Thus, the loose limitation imposed in *Lujan* upon "agency actions" requiring a particular, concrete inaction was met in SUWA's claim.

D. Discrete Agency Action was Not Categorically Required for Mandamus Relief

The Court is well supported in asserting that § 706(1) of the APA represented Congress's support of mandamus theory to provide for review of agency inaction or delay.[113] Courts traditionally issued a writ of mandamus only where a statute created a duty on an agency that was legally required.[114] But where a statute created such a legally required duty, mandamus was the primary means for the courts to prevent an agency from ignoring such a congressional mandate.[115] This aspect of mandamus carried over into APA § 706(1), as the Court states in *Norton v. SUWA*.[116] But the AGM and the mandamus cases cited therein indi-

111. *Id.*

112. *Id.*

113. *See, e.g.*, Carol R. Miaskoff, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 635, 637–38 (1987) ("traditional mandamus practice . . . provides the legal theory for section 706(1)").

114. *See, e.g.*, ICC v. United States *ex rel.* Humboldt S.S. Co., 224 U.S. 474, 484 (1912) (affirming appellate court's issuance of a writ of mandamus for ICC to take jurisdiction based upon duty that was "defined, and, in the main, explicitly directed" by the ICC's organic act); ICC v. N.Y., New Haven & Hartford R.R. Co., 287 U.S. 178, 203 (1932) (refusing to enforce ICC duty of specific valuation because duty is "imposed upon the Commission too vaguely and obscurely" to be legally required).

115. *See, e.g.*, *Humboldt S.S. Co.*, 224 U.S. at 484 ("But if [the ICC] absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its nonaction be reviewed?").

116. 542 U.S. 55, 63 (2004). *See also* Miaskoff, *supra* note 113, at 642 ("Certainly, a violation of a statutory mandate to act is unlawful; the use of section 706(1) to compel action in such circumstances is clearly consistent with traditional mandamus practice.").

cate another characteristic of mandamus practice as well, one that does not accord with the interpretation given to § 706(1) by Justice Scalia: that courts at times issued writs of mandamus to enforce agency action where such action was mandated by statute, while allowing agency discretion to determine how best to fulfill the statutory mandate.[117] The AGM cites *Safeway Stores v. Brown*, which stated that "mandamus will lie where an . . . agency refuses to act even though the act required involves the exercise of judgment and discretion."[118] This holding came in the context of the *Safeway* plaintiff's claim seeking to compel action by the wartime Price Administrator to answer a protest of certain price control regulations, to which the Administrator was statutorily required to respond within thirty days.[119] In denying the plaintiff's claim under the judicial review provision of the Emergency Price Control Act of 1942, the court held that an affirmative denial by the Administrator was required to initiate judicial review but had not been demonstrated, thereby precluding review.[120] However, in dicta the court advised that the plaintiff could have successfully sought to compel a response by seeking a writ of mandamus.[121] Importantly, the court stated that a writ of mandamus would be available to compel action generally despite the lack of a statutory requirement of any particular response by the agency: "in such a case the decree of the court would merely require the Administrator to exercise his discretionary power with respect to the protest without any direction as to the manner in which his discretion should be exercised."[122]

Similarly, the AGM cited *Interstate Commerce Commission v. United States ex rel. Humboldt Steamship Co.* to illustrate the elements of mandamus as applied in § 706(1).[123] In *Humboldt Steamship Co.*, the Court affirmed a writ of mandamus to compel the Interstate Commerce Commission (ICC) to exercise its jurisdiction over the setting of railway rates in Alaska, without compelling any particular outcome that the ICC

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117. This interpretation of mandamus practice was argued to the Court in the SUWA Brief, *supra* note 37, at 30–32. This section delves further into this argument in light of the Court's response.

118. 138 F.2d 278, 280 (Emer. Ct. App. 1943).

119. *Id.* at 278. The statute, § 203(a) of the Emergency Price Control Act, provided:

> Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order . . . in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith.

Id. at 279 (quoting 50 U.S.C.A. app. § 923(a) (2004)).

120. *Id.* at 280.

121. *Id.*

122. *Id.*

123. Miaskoff, *supra* note 113, at 638.

must reach.[124] The ICC in that case refused to exercise jurisdiction over a railway company operating in Alaska, arguing that Alaska at that time was not yet a territory of the United States as required for ICC jurisdiction.[125] The Court disagreed, however, and affirmed a writ of mandamus to compel the ICC to assert jurisdiction and act to resolve the issue, though the Court did not specify any particular resolution.[126] The Court in *Humboldt Steamship Co.* was concerned that lack of judicial review would provide too much "latitude" to the agency, even in areas where the agency had some discretion, and provide "the power to nullify its most essential duties."[127] It therefore issued a general order for the ICC "to take jurisdiction of said cause and proceed therein as by law required."[128]

These cases demonstrate that traditional mandamus practice did not necessarily require a statute to mandate discrete agency action, but left room for a court to compel action in compliance with the statutory mandate without dictating any specific manner of action. Indeed, one phrase from the AGM quoted in *Norton v. SUWA* states this concept directly: "§ 706(1) empowers a court only to compel an agency . . . 'to take action upon a matter, without directing *how* it shall act.'"[129]

In *Norton v. SUWA*, Justice Scalia directly addresses this criticism of his mandamus reasoning, and in fact concedes that precedent such as the *Safeway* case permits judicial compulsion of specific agency action even where discretion is statutorily granted to the agency.[130] However, he avoids this result in *Norton v. SUWA* by holding that the "action" which could be compelled by a writ of mandamus was required to be a *discrete* agency action, as discussed earlier in the opinion.[131] This argument is flawed because it imports the Court's definition of "agency action" in the context of the APA into its discussion of pre-existing mandamus practice. Apart from the separate problems of the Court's narrow interpretation of "agency action" under the APA,[132] this interpretation

124. 224 U.S. 474, 484 (1912).

125. *Id.* at 477. The statute in question, § 1 of the Interstate Commerce Act, provided that the ICC had jurisdiction over railroad carriers transporting passengers or property "from one State or Territory of the United States . . . to any other State or Territory, . . . or from one place in a Territory to another place in the same Territory." *Id.* at 479 (quoting 34 Stat. 584).

126. *Id.* at 485.

127. *Id.* at 484.

128. *Id.* at 485.

129. 542 U.S. 55, 64 (2004) (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947)).

130. *Id.* at 66 (finding that mandamus may be used to compel agency action where "the action . . . is *discrete* agency action" even if an agency is statutorily entitled to discretion as to how to act).

131. *Id.*

132. *See* discussion *supra* Part III.A.

relied entirely upon a particular reading of the language in § 551(13) of the APA—language that did not exist at the time of the mandamus decisions cited in *Norton v. SUWA*.[133] A better means of ascertaining the scope of "agency action" under mandamus practice is to examine the actions actually compelled by writs of mandamus. For example, the Court in *Humboldt Steamship Co.* held that the ICC could be compelled to take jurisdiction over commerce activities in Alaska, despite maintaining discretion over the specific action or outcomes resulting from the exercise of such jurisdiction.[134] The ICC was therefore ordered "to take jurisdiction, [but] not in what manner to exercise it."[135] And in *United States ex rel. Dunlap v. Black*, another mandamus decision in which the Court engaged in extensive discussion of the requirements for issuance of a writ, it concluded that a writ may be issued in two instances: where an agency has a discrete, "ministerial" duty imposed upon it by statute, *or* where the agency refuses to act under a statute that legally requires some action, even though the agency may have discretion in determining how to act.[136]

The logical conclusion to be drawn from these opinions is that when an agency refused to act under a legally required statutory duty, courts could compel action with a writ of mandamus, even though the statutory duty was not itself "discrete," that is, it left room for interpretation and discretion on the part of the agency in deciding how to act in fulfilling the duty. In such cases, "the performance of the discretionary task itself becomes a statutory duty" and "[t]he use of section 706(1) under these circumstances is entirely consistent with established mandamus practice."[137] At the very least, it must be conceded that cases construing the limits of mandamus practice were not entirely consistent and therefore left some uncertainty as to the scope of reviewable agency actions.[138]

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133. The APA was enacted in 1946. *Safeway Stores, Inc.* was decided in 1943, and *Humboldt Steamship Co.* in 1912.

134. ICC v. United States *ex rel.* Humboldt S.S. Co., 224 U.S. 474, 484 (1912).

135. *Id.* at 485.

136. 128 U.S. 40, 48 (1888) ("[B]ut when [executive officers] refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them . . . then, if they refuse, a mandamus may be issued to compel them.").

137. Miaskoff, *supra* note 113, at 644. This article cites for this principle the case of *Matzke v. Block*, 564 F. Supp. 1157 (D. Kan. 1983), *aff'd in part and rev'd in part on other grounds*, 732 F.2d 799 (10th Cir. 1984), which held that although an amended statute conferred discretion upon the Farmers Home Administration to decide whether to defer loan payments owed by farmers, such discretion did not include the ability to decline to implement the amendment entirely. *Id.* at 644–45. Thus, the court had jurisdiction to compel the Farmers Home Administration to undertake otherwise discretionary action under § 706(1). *Id.* at 645.

138. *See, e.g.*, PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINSTRATIVE LAW 1118 (9th ed. 1995) (indicating that mandamus cases leave much "doctrinal uncertainty" regarding the scope of reviewable agency action and whether review is available where agency

The Court is therefore disingenuous in implying that mandamus practice categorically required a discrete agency action without engaging in any discussion or analysis of this requirement in actual mandamus cases.

E. Application of the Broad Standard of § 706(1) to FLPMA's Non-Impairment Mandate

As explained *supra* in Part III.C, Justice Scalia in *Norton v. SUWA* apparently accepts that FLPMA's non-impairment mandate is itself legally required.[139] This reading of § 1782(c) is well supported by the Interior Department's interpretation, which read the non-impairment mandate as "*requiring* all activities not protected under the section's 'grandfather' clause [which exempts most preexisting mining claims from the non-impairment mandate] to be regulated so as not to impair a Wilderness Study Area's . . . suitability as wilderness."[140] In an opinion by the Office of Legal Counsel, the Department of Justice also described the mandatory nature of § 1782(c): "The statute *explicitly states* how the land is to be managed in the interim between the beginning of the study period and the final decision, a period that may last years."[141] Thus, FLPMA provides a legal mandate requiring that the BLM manage WSAs so as to prevent impairment.[142] Under the broader interpretation of APA § 706(1), this is all that is necessary to provide judicial review of the BLM's compliance with its statutory duty to prevent impairment. As both the district court and Tenth Circuit opinions acknowledged, SUWA presented "significant evidence" that impairment was occurring in the named Utah WSAs.[143] Thus, there was evidence that the BLM was failing to take action legally required to meet its duty under § 1782(c), and a court could consider the claim under § 706(1) in order to prevent the BLM from "nullify[ing] its most essential duties."[144]

It should be emphasized that the Court's denial in *Norton v. SUWA* was a denial of scope under § 706(1); that is, the opinion did not address

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discretion under a broad mandate exists, but concluding that "most scholars believe that the broader view is also the better view").

139. Norton v. SUWA, 542 U.S. 55, 66 (2004) ("[s]ection 1782(c) [of FLPMA] is mandatory as to the object to be achieved").

140. Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 739 (10th Cir. 1982) (emphasis added).

141. Presidential Authority Over Wilderness Areas, 6 Op. Off. Legal Counsel 63, 64 (1982) (emphasis added).

142. 43 U.S.C. § 1782(c) (2000).

143. S. Utah Wilderness Alliance v. Babbitt, No. 2:99CV852K, 2000 WL 33914094, *5 (D. Utah Dec. 22, 2000); S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1227 (10th Cir. 2002).

144. ICC v. United States *ex rel.* Humboldt S.S. Co., 224 U.S. 474, 484 (1912).

the merits of SUWA's claim, but peremptorily held that no remedy was available under § 706(1) and therefore reversed the Tenth Circuit court's holding remanding the case for review by the district court.[145] This note's argument that § 706(1) in fact supplies a means of judicial review of BLM action under § 1782(c) does not lead to the conclusion that SUWA would necessarily succeed in its claim on the merits. Instead, the case should have been remanded with instructions that the district court holds jurisdiction to review the BLM's compliance with FLPMA. The district court would consequently consider, under § 706(1), whether the BLM in fact failed to fulfill its statutory duty under FLPMA to prevent impairment of the WSAs in question. It is possible—even likely—that the district court, considering evidence of the BLM's claimed attempts at compliance, would conclude that the BLM had acted sufficiently to meet FLPMA's management requirements and therefore dismiss the claim on its merits. But by failing to proceed with such consideration and instead denying review entirely, the district court and the Supreme Court not only allowed the BLM to escape review of its actions but also significantly narrowed the scope of future agency conduct that is subject to judicial review under the APA.

V. POLICY SUPPORT FOR A BROADER APPROACH TO JUDICIAL REVIEW OF AGENCY ACTION UNDER § 706(1)

In addition to precedential and interpretive reasons for preferring a broad interpretation of APA § 706(1), there exist policy reasons going to the heart of both the APA and FLPMA that argue for judicial review of agency inaction in the face of a broad statutory mandate. First, Congress clearly intended § 1782(c) of FLPMA to be given effect, yet the Court's narrow interpretation of § 706(1) of the APA would effectively remove it as an enforceable section of FLPMA. Second, a broader reading of § 706(1) of the APA is more consistent with prevalent interpretations of the other judicial review sections of the APA. Third, allowing enforcement of broad statutory mandates does not tread on agency discretion but in fact better supports the degree of agency discretion permitted by Congress in its statutory mandate. Finally, statutes intended to protect environmental values of public lands are particularly vulnerable to agency noncompliance, and judicial review is necessary to prevent statutory protection of such lands from becoming moot.

145. 542 U.S. 55, 73 (2004).

A. The Court Should Not Read All Meaning Out of FLPMA § 1782(c)

The APA's provisions for judicial review are not plenary, but must contain some limits so as to "protect agencies from undue judicial interference with their lawful discretion."[146] The examples the Court mentions aptly illustrate the danger of unfettered judicial interference, namely that courts would become ultimately responsible for dictating the minute requirements of agency compliance with statutory duties.[147] However, Congress "did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers."[148] Thus, Congress can set priorities to limit an agency's enforcement powers, and the APA empowers courts to enforce these priorities.[149] A compromise is therefore created in the APA, allowing judicial review to prevent an agency's total disregard for its statutory mandates while limiting such review in order to preserve the discretion afforded the agency by Congress.

The Court's opinion in *Norton v. SUWA*, however, does not discuss the salutary function of the APA in allowing for judicial review, but instead focuses upon the perils of possible judicial overreaching in review of agency actions.[150] In doing so, it allows agencies to effectively ignore the limits imposed upon agency action by Congress, specifically those limits created by FLPMA's non-impairment mandate. A statute that is interpreted to be judicially unreviewable and unenforceable cannot properly be called a mandatory statute, since it becomes more or less discretionary within the agency to decide whether to comply.[151] As discussed *supra* in Part I.A, Congress intended § 1782(c) to be a legally binding guide for BLM conduct regarding WSAs, and it was interpreted as such by both the Interior Department and the Justice Department.[152] A "common-sense principle of statutory construction" requires a reading that supports this result: statutes should be read "to give effect, if possible, to

146. *Id.* at 66.

147. *Id.* at 66–67.

148. Heckler v. Chaney, 470 U.S. 821, 833 (1985) (holding that although a presumption of unreviewability applies to agency action under the APA, this presumption may be rebutted where an agency fails to follow substantive guidelines provided by Congress in a statute).

149. *Id.*

150. 542 U.S. at 67 (describing the danger of empowering courts to interpret the requirements of broad statutes).

151. *See* BLACK'S LAW DICTIONARY 1449 (8th ed. 2004) (defining "mandatory statute" as "[a] law that requires a course of action as opposed to merely permitting it").

152. *See* Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 739 (10th Cir. 1982); Presidential Authority Over Wilderness Areas, 6 Op. Off. Legal Counsel 63, 64 (1982).

ble, to every clause."[153] "All the words of a law must have effect, rather than that part should perish by construction."[154] Indeed, it seems manifestly unreasonable to read the plain language of FLPMA § 1782(c) in combination with the APA so as to deny any substantive content to a mandate that "explicitly states how the land [in a WSA] is to be managed" by the BLM prior to congressional designation.[155] If a statute mandating that the BLM manage WSAs so as to prevent impairment may be interpreted so as to allow the BLM to explicitly permit impairment, then the effect of that statute is lost, as it no longer binds the BLM management action in any way. This would have the perverse result of creating, in the words of the Tenth Circuit, "a 'no-man's-land' of judicial review, in which a federal agency could flaunt mandatory, nondiscretionary duties."[156]

To adopt a construction of the statutory framework around FLPMA that undermines the clear, explicit language of the statute is contrary to the purpose of statutory interpretation.[157] As a Department of Justice opinion from 1982 explained, "[o]ne of the express congressional purposes for the FLPMA was to reassert Congress' control over federal lands."[158] Congress expressly provided in the Wilderness Act and FLPMA that wilderness areas and WSAs should be exempted from multiple use standards, and instead should be protected for the single use of preserving the nation's remaining wilderness areas.[159] In these areas, the BLM is not constrained by multiple use mandates, but instead is charged with a sole purpose: to protect the pristine wilderness character of the land.[160] To remove this requirement from FLPMA is to remove the expressed intention of Congress through the process of judicial interpretation. The remedy, therefore, is to enforce the words and intent of FLPMA § 1782(c) by allowing judicial review of BLM action and inac-

153. *Heckler*, 470 U.S. at 829 (citing United States v. Menasche, 348 U.S. 528, 538–39 (1955)).

154. Salt Lake County v. Utah Copper Co., 93 F.2d 127, 133 (10th Cir. 1937) (quoting Aaron v. United States, 204 F. 943 (8th Cir. 1913)).

155. 6 Op. Off. Legal Counsel at 64.

156. S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1230 n.10 (10th Cir. 2002).

157. "[S]ince all rules for the interpretation of statutes of doubtful meaning have for their sole object the discovery of the legislative intent, every technical rule as to the construction of a statute must yield to the expression of the paramount will of the legislature." 73 AM. JUR. 2D *Statutes* § 62.

158. 6 Op. Off. Legal Counsel at 71.

159. *See id.* at 63–64 (opining that the President does not have the power to unilaterally remove land from WSA status and thereby return it to multiple use management); 16 U.S.C. § 1131(a) (2000) (purpose of wilderness areas is "preservation and protection [of wilderness areas] in their natural condition"); *Id.* at § 1131(c) (wilderness areas to remain "untrammeled by man").

160. 16 U.S.C. § 1131(c).

tion where a plaintiff demonstrates sufficient evidence of noncompliance. As discussed *supra* in Part IV.E, where a statute mandates agency action and the agency fails to act, a court should enter a "general order compelling compliance with that mandate, without suggesting any particular manner of compliance."[161] Thus, the district court on remand could compel the BLM to satisfy its FLPMA mandate without dictating the manner in which such action must be taken. Conversely, the court could decide upon review that the BLM had taken action sufficient to satisfy a reasonable interpretation of § 1782(c) (by instituting certain closures and engaging in meetings with the community, for example). Either result would emphasize that FLPMA's non-impairment mandate is indeed mandatory and help ensure future agency compliance with all mandatory statutes, broad or specific.

B. Minimal Review of Unlawful Agency Inaction is Consistent with Other Provisions of § 706

This note argues that APA § 706(1) permits judicial review of agency inaction under statutes that broadly require agency action, despite the lack of a mandate for a specific, discrete action. An agency in these circumstances retains the discretion contemplated in the statute to determine its means of compliance. However, the agency is not free to entirely disregard the statutory mandate. This assurance of compliance with congressional intent is achieved through the minimal approach of allowing judicial review and compulsion only where the agency has manifestly disregarded its statutory mandate by failing to act in such a way as to *directly contravene* the statutory mandate to act. This is entirely consistent with the manner in which the courts and commentators have interpreted other provisions of § 706 to require a "rational basis" review of agency action.

Section 706(2)(A), the most commonly invoked standard for review of agency action under the APA, provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[162] This standard of review is interpreted to require rational basis review of an agency's action or decision, despite the absence of the words "rational basis" in the statute itself.[163]

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

162. 5 U.S.C. § 706(2)(A) (2000).

163. *See, e.g.*, Bowman Transp. v. Arkansas Best Freight, 419 U.S. 281, 285 (1974) (holding that, in § 706(2)(A) review, an agency must articulate a "rational connection between the facts found and the choice made"); Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976) (§

Such review is deferential to the agency's own interpretation of the law, but provides a manner in which the courts can prevent agency action wholly at odds with statutory requirements:

> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors . . . ." Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful."[164]

Thus, in cases where unlawful agency action is claimed to have been "arbitrary and capricious," the courts are empowered by the APA to conduct a basic review of the agency's action to ensure that the agency complied with its statutory mandates.

Similarly, within § 706(1) there exists another available standard of judicial compulsion for agency action "unreasonably delayed," a phrase that itself creates judicial power to act only in cases where the delay in action is not reasonable.[165] This is another form of deferential review, requiring the court to inquire into several factors to determine whether the agency decision was made under a "rule of reason."[166] The purpose is to provide courts with "useful guidance" in determining whether agency delay is unreasonable, a purpose that requires flexibility in the court's approach while still permitting judicial compulsion in cases where action is indeed found to have been unreasonably delayed.[167]

706(2)(A) requires "affirmance if a rational basis exists for the agency's decision"). *See generally* Ernest M. Jones, *A Component Approach to Minimal Rationality Review of Agency Rulemaking*, 39 ADMIN. L. REV. 275 (1987).

164. *Ethyl Corp.*, 541 F.2d at 34–35 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16 (1971)).

165. 5 U.S.C. § 706(1) (2000).

166. Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984). The D.C. Circuit Court set out a six-point test for determining unreasonable delay of agency action:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply context for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interest prejudiced by delay; and, (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Id. at 80 (citations omitted); PIERCE, *supra* note 66, at 839.

167. Miaskoff, *supra* note 113, at 652.

"[A]lthough occasional administrative delays may be justifiable and even unavoidable, extensive or repeated delays are unacceptable," and may therefore result in judicially-compelled action under § 706(1).[168]

The fact that Congress intended the APA to provide courts with the ability to perform deferential review in other contexts within § 706 makes it likely and desirable that a similar standard be applied within § 706(1) claims for action "unlawfully withheld." However, *Norton v. SUWA* suggests a different, narrower approach: where a broad statutory mandate is imposed upon an agency, that agency's actions under the mandate are effectively immune to judicial review, deferential or otherwise.[169] No rational basis or other deferential review can take place, since the agency has plenary authority to determine its manner of compliance (or noncompliance) with the statute. This outcome is illustrated by Justice Scalia's FCC example, which he uses in describing the limits of APA review where agency action is not mandated by statute.[170] Congress passed a statute, 47 U.S.C. § 251(d)(1), requiring the FCC to "establish regulations to implement" certain interconnection requirements "[w]ithin 6 months" of the enactment of the Telecommunications Act of 1996.[171] Justice Scalia asserts that, under § 706(1), the only enforceable section of this statute is its timeframe; action must be completed within six months.[172] The content of the regulations, however, is immune from review.[173] Thus, the FCC could, according to this example, promulgate regulations entirely unrelated to the statute—or indeed opposed to the interconnection requirements intended to be implemented by the statute—and, so long as the regulations were promulgated within six months, be entirely immune from judicial review of its total noncompliance with the substance of the statutory mandate. Such a result is obviously perverse, allowing the FCC to completely avoid compliance with Congress's statutory mandate while remaining free of judicial review.

Unlike the Court's interpretation of § 706(1), however, a deferential review interpretation would provide the courts with power to examine the statute's broad mandate that the regulations implement certain interconnection requirements. A court could therefore compel the FCC to revise its regulations if they clearly violated Congress's intent as expressed in the statute. The court's order would not, of course, specify the content

168. *Id.* at 652–53 (citing MCI Telecomms. Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980)).
169. 542 U.S. 55, 65 (2004).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*

of those regulations, but would simply require the FCC to reconsider and issue regulations that did not facially violate the statutory mandate.

C. *Allowing Congress to Mandate Goals Does Not Impermissibly Tread on Agency Discretion*

The Court's concern that allowing enforcement of broad statutory mandates would lead to court assumption of "day-to-day agency management" is misplaced, though the underlying concern is a valid one.[174] Certainly, the courts cannot be expected to intervene in matters committed to agency discretion, as this would violate separation of powers principles and be highly inefficient.[175] In statutes such as FLPMA, Congress has granted the agency in question broad discretion to determine how best to comply with the statutory goal, but the goal itself is not discretionary. Indeed, the Court in *Norton v. SUWA* acknowledges that the non-impairment mandate "is mandatory as to the object to be achieved."[176] Thus the courts need not be involved in any day-to-day decisions, but could review only broad compliance with the mandate—generally only egregious situations where the agency has manifestly violated its statutory mandate by utterly failing to take a required action. As discussed *supra* in Part IV.D, such review was previously available and utilized in cases where the plaintiffs sought writs of mandamus, and did not result in judicial overstepping (indeed, courts were properly deferential to agencies and issued writs of mandamus only where agencies had manifestly violated a statutory duty). In addition, the remedy available under the broad interpretation of § 706(1) is similarly broad, allowing the court only to "require the [agency] to exercise [its] discretionary power" but "without any direction as to the manner in which [its] discretion should be exercised."[177] Such an order hardly treads upon permissible agency discretion; a proper court order under § 706(1) is essentially identical to the statute originally passed by Congress, simply directing the agency to comply with the mandate "without suggesting any particular manner of compliance."[178] Agency discretion is thus permitted in all manners allowed by the original statutory mandate, while allowing for enforcement of the mandatory provisions of the statute.

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174. *Id.* at 67.

175. The use of judicial review under § 706(1) "to direct the outcome of particular exercises of administrative discretion . . . clearly offends separation of powers principles." Miaskoff, *supra* note 113, at 645.

176. 542 U.S. at 66.

177. Safeway Stores v. Brown, 138 F.2d 278, 280 (Emer. Ct. App. 1943).

178. 542 U.S. at 66.

D. Environmental Protection Statutes Require Timely Judicial Review

Environmental issues are not well suited to ex post facto legislative control. Once a WSA is irrevocably impaired, the ability of Congress to legislatively control an agency regarding that WSA becomes moot.[179] Congress's passage of FLPMA's non-impairment mandate is itself evidence of this fact, since the purpose of the statutory requirement was to proactively ensure that "no activity on the public lands following [FLPMA's] passage be allowed to degrade lands containing wilderness values on the date of enactment, precluding their consideration for wilderness suitability before the review process was concluded."[180] Only judicial review holds the ability to issue timely injunctions that can stop degradation before it is irrevocable. An infrastructure has developed in the United States of citizen environmental watchdog organizations that use access to judicial review as a means of ensuring that agencies adhere to their legislative mandates. APA provisions allowing for judicial review, such as § 706(1), are critical to the effectiveness of such organizations as they allow interested parties to bring about enforcement actions, rather than relying upon internal government or agency procedures. Similar scrutiny is more difficult to find in Congress, where legislators have to be concerned about pleasing a wide range of constituents who may or may not support a particular statutory requirement. Only the courts are empowered to impartially consider whether an agency has adhered to its statutory mandates without having to also consider political ramifications of aligning themselves with popular or unpopular political causes.

CONCLUSION

The Court's interpretation of APA § 706(1), by allowing review only of discrete actions legally mandated by statute, unnecessarily limits the powers of judicial review over agency inaction as conferred by Congress in the APA. As a result, the Court found § 1782(c) of FLPMA to be judicially unenforceable, paving the way for the BLM to ignore its statutory mandate to manage WSAs so as to prevent impairment of wilderness characteristics. This result fails to honor Congress's intent in passing FLPMA and the APA and substantially narrows the ability of future courts to review cases of clear agency inaction in the face of a broad

179. NRDC Brief, *supra* note 32, at 11 (describing wilderness as "something of immeasurable value, which, if lost, could never be retrieved").

180. Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 747 (10th Cir. 1982).

statutory mandate. The Court should instead have construed § 706(1) to require only a clear, legally required statutory mandate, thereby providing courts with a deferential but powerful means to enforce Congress's statutory will and deter agency noncompliance. Under this interpretation, the BLM's alleged failure to prevent impairment to certain Utah WSAs would have been reviewable by the district court, and the court could have considered the merits of whether the BLM's actions in fact constituted a violation of FLPMA—potentially halting the continuing impairment of formerly pristine wilderness land.