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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. Southern Utah Wilderness Alliance v. Norton

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CASENOTE

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

Southern Utah Wilderness Alliance v. Norton[1]

I. INTRODUCTION

Under the Federal Land Management and Policy Act (FLMPA), the Bureau of Land Management (the Bureau) is required to preserve the wilderness characteristics of designated federal lands.[2] The Bureau is required to manage the Federal lands according to the Bureau's own management plans, which are to be revised and updated under the National Environmental Policy Act's (NEPA) environmental review process.[3]

In *Southern Utah Wilderness Alliance v. Norton*, the Tenth Circuit held that subject matter jurisdiction was appropriate under the Administrative Procedure Act (APA) to consider an environmental group's challenge that the Bureau unlawfully withheld management actions mandated by FLMPA.[4] In reaching this conclusion, the court appropriately relied on a straightforward interpretation of FLMPA's nonimpairment mandate, fulfilled its judicial function by providing meaningful review of agency "action," and limited its holding by refusing to rule on the merits of the case.[5]

II. FACTS AND HOLDING

The Southern Utah Wilderness Alliance (SUWA), among a coalition of environmental groups,[6] initiated a preliminary injunction action against the United States Bureau of Land Management (the Bureau) in the United States Federal District Court for the District of Utah.[7] The motion for injunction sought to protect federally managed wilderness lands from irreversible environmental damage caused by off-road vehicles (ORVs).[8] The environmental groups were concerned about ORV traffic "result[ing] in soil erosion and

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[1] 301 F.3d 1217 (10th Cir. 2002) (hereinafter *Norton*).
[2] *Infra* pt. III.
[3] *Id.*
[4] *Infra* pts. II, IV.
[5] *Infra* pt. V.
[6] The Wilderness Society, the Sierra Club, the Great Old Broads for Wilderness, Wildlands CPR, Utah Council of Trout Unlimited, Americans Lands Alliance, and the Friends of the Abajos' – all joined SUWA as plaintiffs. *Southern Utah Wilderness Alliance v. Babbitt*, 2000 WL 33914094, *1 (D. Utah 2000) (hereinafter *Babbitt*).
[7] *Babbitt*, 2000 WL 33914094 at *1.
[8] *Norton*, 301 F.3d at 1222-23. ORVs include dirt bikes, snowmobiles, motorcycles and some four-wheel-drive vehicles. Donna M. Kemp, *Utah wilds rated among nation's most endangered*, Deseret News B02 (May 25, 2000) (available in 2000 WL 21035134).

vegetation destruction in the sensitive, arid desert."[9] According to Heidi McIntosh, SUWA's conservation director, "One guy on a dirt bike can do an enormous amount of damage in just one afternoon."[10]

SUWA filed suit on October 27, 1999, claiming that the Bureau "failed to perform its statutory and regulatory duties by not preventing harmful environmental effects associated with ORV use."[11] After numerous recreational interests (primarily ORV users) successfully petitioned the district court to intervene on behalf of the Bureau in defending the lawsuit,[12] SUWA filed a second amended complaint seeking to compel the Bureau to take action under the Federal Administrative Procedure Act (APA).[13] After the trial date was set for May 2001, McIntosh was quoted as saying, "We can't wait until the trial. We want the roads closed now pending a resolution of the case."[14] Thus, SUWA filed the motion for preliminary injunction and the district court held hearings on August 28 and December 13, 2000.[15]

SUWA claimed that the Bureau's failure to properly manage ORV activity on federal WSAs violated FLMPA and NEPA.[16] Consequently, SUWA sought to compel the Bureau in the performance of its statutory and regulatory duties by suing under § 706(1) of the APA.[17] In response, the Bureau filed a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction,[18] claiming that, under the APA, SUWA was challenging "the sufficiency of the BLM's actions," rather than the Bureau's failure to act.[19]

The district court agreed, granting the Bureau's motion to dismiss, reasoning that an agency undertaking its mandatory duties cannot be compelled under the § 706(1) of the APA.[20] Additionally, the district court concluded that an agency cannot be compelled to comply with its existing Land Use Plan until the agency takes "affirmative" steps to implement such provisions.[21] Finally, the district court concluded that the Bureau properly used its discretion in deciding not to consider new information on ORV activity in a supplemental Environmental Impact Statement.[22] On appeal to the 10th Circuit, the court reversed, holding that the Bureau's failure to act constituted final agency action,[23] that partial compliance with FLMPA is not sufficient to void § 706(1) review under the APA,[24] that the Bureau could be compelled to comply with the existing provisions of

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[9] Donna M. Kemp, *Immediate ORV ban is sought*, Deseret News B01 (June 15, 2000) (available in 2000 WL 22773920). The BLM lands at issue are the Parunuweap, Moquith Mountain, Behind the Rock, Sids Mountain, Muddy Creek, Factory Butte, Wild Horse Mesa, and Indian Creek – all official or proposed Wildlife Study Areas. *Id.*

[10] Glen Warchol, *Environmentalists Want Areas Closed to ORVs*, The Salt Lake Tribune E8 (June 16, 2000) (available in 2000 WL 3768196).

[11] *Norton*, 301 F.3d at 1223 (internal punctuation omitted); *see also* Kemp, *supra* n. 9 ("The suit alleges that the BLM has consistently ignored its own rules and procedures for determining legal off-road vehicle routes on the 23 million acres of federal land it manages in Utah.").

[12] *Id.*; Utah Shared Access Alliance, Blue Ribbon Coalition, Elite Motorcycle tours, Anthony Chatterley, the State of Utah, Emery County, Grand County, Kane County, San Juan County, and Wayne County intervened on behalf of defendant BLM. *Babbitt*, 2000 WL 33914094 at *1.

[13] *Id.*

[14] Donna M. Kemp, *Immediate ORV ban is sought*, Deseret News B01 (June 15, 2000) (available in 2000 WL 22773920).

[15] *Babbitt*, 2000 WL 33914094 at *1.

[16] *Norton*, 301 F.3d at 1222.

[17] *Id.*

[18] *Babbitt*, 2000 WL 33914094 at *2; *see* F.R.C.P 12(b)(1) (2001).

[19] *Id.* at *3.

[20] *Norton*, 301 F.3d at 1222.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 1229-30.

[24] *Id.* at 1231.

its Land Use Plan,[25] and that the district court erred in determining that it could not order the Bureau to conduct further analysis under NEPA.[26] In short, the Court of Appeals held that the district court did have subject matter jurisdiction to consider whether the Bureau's failure to act warranted granting SUWA's motion for preliminary injunction under the APA.[27]

III. LEGAL BACKGROUND

"Environmental law is translated into policy through the regulatory process,"[28] thus, it is not surprising that environmental and administrative law are closely related. Environmental statutes typically delegate the responsibility to promulgate regulations to administrative agencies so that they may implement the laws.[29] Thus, the following sections discuss the relationship between the Wilderness Act and the Federal Land Policy and Management Act, judicial review under the Administrative Procedure Act, and the National Environmental Policy Act.

A. The Wilderness Act of 1964 and the Federal Land Policy and Management Act of 1976

Congress enacted the Wilderness Act, establishing the National Wilderness Preservation System, "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."[30] "[I]ncreasing population. . .expanding settlement and growing mechanization" created concern that ever fewer lands would remain in their natural condition.[31] Thus, federal wilderness areas were to be "administered for the use and enjoyment of the American people in such manner that will leave them unimpaired for future use and enjoyment as wilderness, and so as to . . . [preserve] their wilderness character . . . ."[32] Section 1131(c) defines 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. An area of wilderness is further defined to mean in this chapter an area of underdeveloped 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 and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.[33]

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[25] *Id.* at 1236.
[26] *Id.* at 1239.
[27] George Cameron Coggins & Robert L. Glicksman, *The Overlay Doctrines and Mechanisms of Public Natural Resources Law: Federal Land Use Planning* 2 *Pub. Nat. Resources L.* § 10F:22 (2003).
[28] Robert V. Percival, *Environmental Law: Statutory Supplement and Internet Guide* 25 (Aspen 2002). Statute Supplement.
[29] *Id.*
[30] 16 U.S.C. § 1131(a) (2000).
[31] *Id.*
[32] *Id.*
[33] 16 U.S.C. § 1131(c).

As discussed below, this provision of the Wilderness Act was incorporated into the wilderness review provisions of the Federal Land Policy and Management Act (FLMPA).[34]

In 1976, Congress redefined its relationship with public lands, declaring it to be the policy of the Federal government that the public lands be managed in a manner preserving their scenic, historical, and environmental values, that preserves the land's natural conditions and wildlife habitats, and that provides for human use.[35] This policy incorporates the principles of "multiple use" and "sustained yield."[36] In pursuing these goals, Congress expressly requires that administration procedures "assure adequate third party participation,"[37] and that "judicial review of public land adjudication decisions be provided by law."[38]

FLMPA established a fifteen-year review process, directing the Bureau to review and recommend lands for wilderness designation,[39] and required the Secretary of the Interior (the Secretary) to inventory public lands with wilderness characteristics pursuant to the Wilderness Act.[40] The Secretary has a duty to report to the President recommendations as to the suitability of the areas reviewed for wilderness protection.[41] Additionally, the review must follow the procedure specified in the Wilderness Act.[42] Then, the President has a duty to report the President's recommendation to Congress, and the designation of a public land as wilderness area will only "become effective . . . if so provided by an Act of Congress."[43] During the review process and until Congress acts, the Secretary is governed by FLMPA's § 1782 nonimpairment provision. This section requires the Secretary

> to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness . . . . *Provided*, that, in managing the public lands *the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources* or to afford environmental protection. . . .Once an area has been designated for

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[34] *See* 43 U.S.C. § 1702(i) (2000).

[35] 43 U.S.C. § 1701(a)(8). That "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use; . . ." *Id.*

[36] "The term 'sustained yield' means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." 43 U.S.C. § 1702(h). "The term multiple use' means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; . . . a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values;" . . . 43 U.S.C. § 1702(c).

[37] 43 U.S.C. § 1701(a)(5).

[38] 43 U.S.C. § 1701(a)(6).

[39] *Babbitt*, 2000 WL 33914094, *4. "In 1980, the BLM identified approximately 2.5 million acres of its lands in Utah as wilderness study areas. In 1991, the Secretary of Interior recommended that approximately 1.9 million acres of those lands become designated wilderness, and President Bush forwarded that recommendation to Congress. Congress, however, has not acted on BLM's recommendation, and thus the 3.2 million acres of WSAs remain under consideration for entry into the National Wilderness Preservation System, and are managed pursuant to Section 603(c) of FLMPA, 43 U.S.C. § 1782(c)." *Id.* (citations omitted).

[40] 43 U.S.C § 1782(c); *see generally* 16 U.S.C. § 1331(c).

[41] *Id.*

[42] *Id.*; *see generally* 16 U.S.C. § 1132(d) (notice and hearing requirements under the Wilderness Act).

[43] 43 U.S.C. § 1782(b).

> preservation as wilderness, the provisions of the Wilderness Act (16 U.S.C. §§ 1131 et seq.) which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area, . . .[44]

Additionally, under § 1732(a), "[t]he Secretary shall manage the public lands . . . in accordance with the land use plans developed by him under section 1712 . . . ."[45] Section 1712 requires the development, maintenance, and revision of land use plans,[46] and the section further enumerates nine criteria for development and revision.[47]

Land use plans are further addressed by the Bureau's general management regulation,[48] which defines a resource management plan (RMP) as FLMPA's land use plan.[49] An RMP is a written document that should generally establish (1) the lands to be managed, (2) the allowable resource uses, (3) goals and objectives for resource conditions, (4) program constraints and general management practices, (5) the need for an area to be covered by more detailed and specific plans, (6) support action required to achieve goals, (7) general implementation sequences, and (8) standards for monitoring and evaluating the plan to determine its effectiveness.[50] The approval of an RMP "is considered a major Federal action significantly affecting the quality of the human environment,"[51] which raises NEPA issues within the context of FLMPA's management of public lands.[52] The regulation provides for monitoring and evaluation of the plan based on intervals and standards that address the success of mitigation measures, significant changes in related plans, and new data of significance to the plan.[53] The District Manager is required to monitor the RMP according to the intervals and standards and "at other times as appropriate."[54] The District Manager is directed to revise an RMP, when necessary, as determined by the monitoring and evaluation process.[55]

The Bureau's land management policies for "lands under wilderness review" are set forth in the Interim Management Policy (IMP).[56] "Lands under wilderness review" include lands for which the Bureau has not completed the FLMPA proscribed wilderness inventory process and lands for which the Bureau has determined

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[44] 43 U.S.C. § 1782(c) (emphasis added). This provision applies to all activities on managed land, including "grandfathered uses," which are exempted under FLMPA.

[45] 43 U.S.C. § 1732(a).

[46] 43 U.S.C. § 1712(a).

[47] 43 U.S.C. § 1712(b). "In the development and revision of land use plans, the Secretary shall – (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law; (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences; (3) give priority to the designation and protection of areas of critical environmental concern; (4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values; (5) consider present and potential uses of the public lands; (6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values; (7) weigh long-term benefits to the public against short-term benefits; (8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and (9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located." . . . . 42 U.S.C. § 1712(c).

[48] *See generally* 43 C.F.R. §§ 1601-1610 (2002).

[49] *Id.* at § 1601.0-5(k).

[50] *Id.*

[51] *Id.* at § 1601.0-6.

[52] *See id.*

[53] 43 C.F.R. § 1610.4-9.

[54] *Id.*

[55] *Id.* at § 1610.5-6.

[56] *Interim Management Policy and Guidelines for Land Under Wilderness Review* 44 F.R. 72014 (Dec. 12, 1979)

the existence of wilderness characteristics (known as WSAs).[57] In managing these lands, the IMP relies on FLMPA's nonimpairment standard, requiring the lands to remain suitable for wilderness preservation.[58] "Suitability," according to the IMP, has two meanings. First, the lands must at least comply with the standards of § 2(c) of the Wilderness Act.[59] Second, the land must not be in a state to undermine the Secretary's suitability recommendation to the President.[60] According to the IMP,

> it seems clear that the principal factor to be used by the Secretary in arriving at a suitable/nonsuitable recommendation is the value of an area as wilderness compared to its value for other uses, such as commercial forest management or mineral development. The Department therefore has a responsibility to ensure that an area's existing wilderness values are not degraded so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability or nonsuitability for preservation as wilderness.[61]

In determining whether the nonimpairment standard is being upheld in the case of an activity on the Bureau's land, the Bureau considers three nonimpairment criteria: whether the activity is temporary, whether temporary impacts resulting from the activity can be reclaimed by the time the Secretary makes a recommendation to the President, and whether the activity has degraded the wilderness value of the land so "as to significantly constrain the Secretary's [suitability] recommendation . . ."[62] Conclusions as to whether these criteria have been met are drawn from NEPA's environmental assessment and environmental impact analysis.[63]

Specifically addressing ORV use, "the BLM *will* move to control [impacts that threaten to impair wilderness suitability] and *may* designate the area as 'closed' . . . in order to control the impacts."[64] The Bureau's enforcement provision states that "BLM will take all actions necessary to ensure full compliance with the [IMP]. Every effort will be made to obtain voluntary compliance with the [IMP] by users of the public lands. Where such efforts fail, BLM will promptly initiate additional appropriate action to achieve immediate compliance with the [IMP]."[65]

B. The Administrative Procedure Act of 1946[66]

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[57] *Id.*

[58] *Id.* at 72015. "The Secretary shall . . . [manage the lands] . . . in a manner so as *not to impair the suitability of such areas for preservation as wilderness* . . ." *Id.*

[59] *Id.* at 72016. "As a practical matter, this means that it must meet this definition by the time the Secretary reports his recommendation to the President, because the President might immediately send his recommendation to Congress, and Congress might act immediately." *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 72018.

[63] *Id.* at 72022.

[64] *Id.* at 72024 (emphasis added). "There is a possibility that a continuing use or an increasing use could gradually cause increased impacts and, over time, impair the area's wilderness suitability. An example might be erosion caused by increased off-road vehicle travel on trails. To prevent this type of impairment caused by cumulative impacts, the BLM *will* monitor ongoing recreation uses and, *if necessary*, adjust the time, location, or quantity of use, or prohibit that use in the impacted area." *Id.* (emphasis added).

[65] *Id.* at 72023.

[66] *See generally* 5 U.S.C. §§ 551-706 (2000) (hereinafter APA).

Congress "call[ed] a halt to the process of administrative expansion" through the enactment of the APA.[67] The APA established minimum procedural standards that federal agencies must follow in the rulemaking and adjudication processes.[68] While APA §§ 551-559 generally address hearing requirements and rulemaking and adjudicatory procedures, §§ 701-706 concern judicial review of agency decisions.[69] Section 702 makes judicial review available to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[70] Section 706 specifies the scope of judicial review under the APA.

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .[71]

However, access to judicial review is subject to certain jurisdictional requirements such as exhaustion of remedies and final agency action.[72] Additionally, § 701(a) restricts APA review when so prohibited by statute or when "agency action is committed to agency discretion by law."[73]

C. The National Environmental Policy Act of 1969[74]

While NEPA "sets forth a ringing and vague statement of purposes,"[75] its practical purpose is to ensure that all federal agencies consider environmental factors equally with other decision-making factors in the administrative process.[76] NEPA begins with a short declaration of purpose "to promote efforts which will prevent or eliminate damage to the environment."[77] This section is followed by Subchapter I,[78] clarifying

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[67] Bernard Schwartz, *Administrative Law*, § 1.13, 32 (3d ed., Little, Brown and Co. 1991).

[68] *Id.* Wholesale delegations became the rule rather than the exception; the broad grants [of Congressional delegations of power to agencies] made during the later New Deal, World War II, and the Cold War period were all sustained by the courts. . . . Thus, if delegation without a standard is 'delegation running riot,' such delegation had by midcentury [1900s] become normal." *Id.* at 31 (footnote omitted).

[69] *See* 5 U.S.C. §§ 551-706.

[70] 5 U.S.C. § 702.

[71] 5 U.S.C. § 706(1).

[72] *See* 5 U.S.C. § 704. "Agency action made reviewable by statute and *final agency action* for which there is *no other adequate remedy in a court* are subject to judicial review." *Id.* (emphasis added).

[73] 5 U.S.C. § 701(a); *see National Wildlife Federation v. Browner*, 1996 WL 601451 (D. D.C.) ("As long as the decision at issue is not committed to agency discretion as a matter of law, discretionary inaction by an agency can be challenged under the APA.") (citations omitted).

[74] President Richard Nixon signed NEPA into law on January 1, 1970. Statute Supplement; *see generally* 42 U.S.C. §§ 4321-47 (2000).

[75] William H. Rodgers, Jr., *Environmental Law*, § 9.1, 801 (2d ed., West 1994).

[76] James W. Spensley, Esq., *National Environmental Policy Act*, in *Environmental Law Handbook*, ch. 10, 413 (Thomas F. P. Sullivan ed., 15th ed., Government Institutes 1999).

[77] 42 U.S.C. § 4321. "The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the

Congress' policies and goals, and Subchapter II,[79] establishing the Council on Environmental Quality (CEQ). Subchapter I instructs "the Federal Government to use all practicable means" in furthering NEPA's environmental and social purposes.[80] It then directs all Federal agencies to conduct environmental impact analysis "for legislation and other major Federal actions significantly affecting the quality of the human environment."[81]

1. Background on CEQ Regulations

Curiously, NEPA does not authorize CEQ to promulgate regulations; rather NEPA was intended to impose new requirements to incorporate environmental impact analysis into each agency's own regulations.[82] However, CEQ has been authorized to promulgate its own regulations through a series of Executive Orders.[83] Nevertheless, CEQ regulations raise special problems since they do not arise out of an express statutory authorization and are, thus, unconventional regulations.[84] The United States Supreme Court, in *Andrus v. Sierra Club*,[85] indicated that it would "accord considerable weight to CEQ regulations."[86] The Court, however, "did not hold that the CEQ regulations were controlling."[87] Nevertheless, since *Andrus*, several "lower federal courts have held that the 1978 CEQ's regulations are controlling."[88]

2. CEQ Regulations and the Supplemental Environmental Impact Statement

Pursuant to Executive Order 11991, CEQ promulgated regulations governing federal agencies' implementation of NEPA.[89] The regulations implement NEPA's "action-forcing" provisions found in § 4332, making sure "that federal agencies act according to the letter and spirit of the Act."[90] The environmental impact statement is an "action-forcing device."[91] Thus, the environmental impact statement "shall provide full and fair

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environment and biosphere and stimulate health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." *Id.*

[78] *See generally* 42 U.S.C. §§ 4331-4335.

[79] *See generally* 42 U.S.C. §§ 4341-4347.

[80] *See* 42 U.S.C. § 4331(b).

[81] 42 U.S.C. § 4332(C). Specifically, this subsection requires "a detailed statement by the responsible official on – (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.*

[82] *See* Daniel R. Mandelker, *NEPA Law and Litigation* § 2.06[2] (2d ed. West 1998).

[83] *See id.* "A 1970 Order [Executive Order 11514] issued by President Nixon delegated to the Council on Environmental Quality (CEQ) the authority to adopt 'guidelines' for the preparation of environmental impact statements. The guidelines did not have the status of formal agency regulations. President Carter modified the 1970 Executive Order in 1977, and authorized CEQ to adopt regulations rather than guidelines on impact statement preparation [Executive Order 11990]." *Id.*

[84] *Id.* at § 2.06[3].

[85] 442 U.S. 347 (1979). "CEQ's interpretation of NEPA is entitled to substantial deference." *Id.* at 358.

[86] Mandelker, *NEPA Law and Litigation* at § 2.06[3]. "The Court cited the CEQ regulations 27 times in its opinion, and quoted extensively from them in its notes." *Id.*

[87] *Id.*

[88] *Id.*; *see generally National Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981).

[89] *See generally* 40 C.F.R. § 1500-1508 (2002).

[90] 40 C.F.R. § 1500.1(a).

[91] 40 C.F.R. § 1502.1.

discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[92] CEQ regulation § 1502.9 states that "environmental impact statements . . . may be supplemented."[93] Furthermore,

> (c) Agencies:
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> (1) Shall prepare supplements to either draft or final environmental impact statements if:
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> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.
>
> (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.[94]

The language of § 1502.9(c) provides for both mandatory and discretionary preparation of supplemental environmental impact statements.[95] However, CEQ gives no procedural guidance to agencies faced with the decision whether or not to supplement the environmental impact statement.[96] Additionally, within subsection (c)(1), the regulations require a supplemental environmental impact statement for "significant new circumstances," but also for "substantial changes" without specifying whether these changes must also be significant.[97] Contention over these issues between agency and third-party challenger is perhaps what Professor Rodgers was referring to when he described "the decision to write supplemental EIS's [as] one of the more contentious topics in NEPA jurisprudence."[98]

3. Judicial Review of Agency Action under NEPA

Because NEPA contains no provision for judicial review, Congress may not have contemplated such review, believing "that compliance with NEPA was to be determined by the federal agencies."[99] Nevertheless, "NEPA case law is firmly within the body of legal doctrine associated with judicial review of administrative action."[100] The Supreme Court has held NEPA to be procedural statute and has no substantive component.[101]

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[92] *Id.*

[93] 40 C.F.R. § 1502.9.

[94] 40 C.F.R. § 1502.9(c)(1)-(2).

[95] *See* Rodgers, *Environmental Law* § 9.7D. 932.

[96] Mandelker, *NEPA Law and Litigation* § 10.18[1].

[97] *Id.*

[98] Rodgers, *Environmental Law* § 9.7D. 931.

[99] Mandelker, *NEPA Law and Litigation* at § 2.02[3]. Mandelker suggests that Congress may not have been concerned about the prospect of judicial review, since the landmark Supreme Court case, *Sierra Club v. Morton,* 405 U.S. 727 (1972), granting standing in federal courts to third-party litigants, had not yet been decided. *See id.* Thus, "[j]udicial review is not likely if third parties cannot challenge an agency's compliance with NEPA." *Id.*

[100] Rodgers, *Environmental Law* § 9.3. 839.

[101] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (Justice Rehnquist observed, "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

Thus, "a procedural NEPA challenge is a claim under the Administrative Procedure Act that the agency's decision was 'without observance of procedure as required by law.'"[102]

Citizens to Preserve Overton Park, Inc. v. Volpe,[103] held that the APA requires a "reviewing court to engage in substantial inquiry."[104] While an agency was entitled to a presumption in its favor, the presumption would not "shield [agency] action from a thorough, probing, in-depth review."[105] The decision in *Overton Park* laid the groundwork for the establishment of the "hard look" doctrine. Generally, the "hard look" doctrine stands for the principle that a reviewing court demand reasoned agency decision making.[106] In *Marsh v. Oregon Natural Resources Council*,[107] the Supreme Court reaffirmed the role of the "hard look" doctrine in NEPA judicial review and ruled that the decision to supplement an environmental impact statement in light of new information should be reviewed under the APA's arbitrary and capricious standard.[108]

IV. Instant Decision

The Court of Appeals considered three of SUWA's claims on appeal—"that the Bureau failed to comply with the FLMPA, refused to implement provisions of various land management plans, and did not take a 'hard look' under NEPA at increased ORV use."[109] Ultimately, the court held that the district court did have subject matter jurisdiction to consider whether the Bureau's failure to act warranted granting SUWA's motion for preliminary injunction under the APA.[110]

A. FLMPA claim brought under § 706(1) of the APA

The court began by addressing the FLMPA claim brought under the APA.[111] Section 1782(c) of the FLMPA states that the Bureau "shall continue to manage [the WSAs] in a manner so as not to impair the suitability of such areas for preservation as wilderness," until Congress expressly decides to protect or reject a wilderness area for preservation.[112] Thus, the court concluded that the FLMPA creates "an immediate and continuous obligation" that the Bureau manage the wilderness areas so that they are eligible for wilderness protection until Congress makes a decision.[113] Section 706(1) of the APA requires federal courts to "compel

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[102] Mandelker, *NEPA Law and Litigation* § 10.05 (citing *Natural Resources Defense Council, Inc. v. Securities & Exchange Commn.*, 606 F.2d 1031 (D.C. Cir. 1979)).
[103] 401 U.S. 402 (1971).
[104] Mandelker, *NEPA Law and Litigation* § 3.04[3]. While *Overton Park* is " not a NEPA case, [it] is the leading Supreme Court decision on the judicial review standard to be applied to informal agency decision making." *Id.*
[105] *Id.* (quoting *Overton Park*).
[106] *See id.* at § 3.04[4]. "[A]ssumptions must be spelled out, inconsistencies explained, methodologies disclosed, contradictory evidence rebutted, record references solidly grounded, guesswork eliminated and conclusion supported in a manner capable of judicial understanding." *Id.* (internal quotations omitted).
[107] 490 U.S. 360 (1989).
[108] Rodgers, *Environmental Law* § 9.3, 848.
[109] *Norton*, 301 F.3d at 1223.
[110] Coggins and Glicksman, 2 *Pub. Nat. Resources L.* § 10F:22.
[111] *Norton*, 301 F.3d. at 1223-33.
[112] *Id.* at 1225.
[113] *Id.* The court notes that the IMP defines surface disturbance as "any new disruption of the soil or vegetation which would necessitate reclamation," and that any activity on the wilderness land "must not have [degraded the wilderness values] so far as to significantly constrain the Congress's prerogative regarding the area's suitability for preservation as wilderness" *Id.* at 1225, n. 5.

agency action unlawfully withheld or unreasonably delayed."[114] However, courts may only compel action when the agency has failed to perform a "mandatory, nondiscretionary duty."[115] Additionally, the court pointed out that "compelling agency action is distinct from ordering a particular outcome."[116]

Upon this background, the court addressed the Bureau's claims on appeal. First, the Bureau claimed that the IMP gave the agency discretionary authority in deciding how and whether it would act, thus removing the agency's inactions from APA review.[117] Stating that the Bureau's argument goes to the merits of the claim rather than the jurisdictional issue under the APA,[118] the court concluded that deference to the Bureau's interpretation of its own regulations does not relieve the court from compelling the Bureau to comply with its clear statutory mandate under § 1782(c).[119] Second, the Bureau argued that the APA requires a final agency action to establish ripeness under § 706(1).[120] The court rejected the Bureau's argument, stating that when an agency misses a deadline or unreasonably delays in carrying out a mandatory statutory duty, "the failure to carry out that duty is itself 'final agency action.'"[121] Thus, the Bureau's "alleged failure to comply with the FLMPA's nonimpairment mandate can be considered a final action under § 704 that is subject to compulsion under § 706(1)."[122] Third, the Bureau argued that because it had already taken partial action in response to the ORV activity, it cannot be compelled under § 706(1).[123] Acknowledging and crediting the Bureau for its action,[124] the court reasoned that "if we were to accept [the Bureau's] argument, we would, in essence, be holding that as long as an agency makes some effort to meet its legal obligations, even if that effort falls short of satisfying the legal requirement, it cannot be compelled to fulfill its mandatory, legal duty."[125] Thus, the court rejected the Bureau's partial compliance argument,[126] and it reversed the district court's dismissal of SUWA's claims, since SUWA had presented "colorable evidence" that ORV damage was occurring on federally protected WSAs.[127]

B. Land Use Plans

In 1990 and 1991, the Bureau created LUPs for the wilderness areas of Factory Butte and San Rafael respectively.[128] It is undisputed that, at the time of the action, the Bureau had only partially implemented these

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[114] *Id.* at 1225; *see also* 5 U.S.C. § 706(1) (2000).
[115] *Norton*, 301 F.3d. at 1226.
[116] *Id.*
[117] *Id.* at 1227.
[118] *Id.* at 1228.
[119] *Id.* "We do not address on this appeal whether ORV use in the region is impairing the WSA's wilderness values. Upon remand, the district court will have to address that issue after analyzing the evidence before it and giving appropriate deference to the IMP." *Id.*
[120] *Id.* at 1228-29.
[121] *Id.* at 1229; *see also* 5 U.S.C. § 551(13) (2000).
[122] *Norton*, 301 F.3d at 1229.
[123] *Id.* at 1230.
[124] *Id.*
[125] *Id.* at 1231. The court notes an illustration of the problem. "Imagine, for example, that applicable federal law prohibited logging in a national forest, yet the BLM only prohibited logging on half the forest, permitting, for one reason or another, logging on the remaining half. The logic of the BLM's argument would have us hold that, because the BLM successfully prevented logging on half, it could not be ordered to prevent logging on the remaining half, notwithstanding the BLM's failure to satisfy its legal obligation to prevent logging in the forest." *Id.* at 1231, n. 12.
[126] *Id.* at 1232.
[127] *Id.* at 1233.
[128] *Id.* at 1233-34.

plans.[129] FLMPA requires the Bureau to "manage the public lands . . . in accordance with the land use plans developed under section 1712."[130] Section 1732 demands that "[t]he Secretary shall manage the public lands. . . in accordance with the land use plans developed by him."[131] Based on a "straightforward reading of the relevant LUPs, as well as applicable statutes and regulations,"[132] the court rejected the Bureau's first claim that it did not have a mandatory, nondiscretionary duty to carry out the LUPs.[133] Thus, SUWA had presented a "colorable claim" that the Bureau had failed to follow its LUPs, and subject matter jurisdiction under the APA to compel agency action was proper.[134] Second, the Bureau argued that it can only be compelled to act on LUPs when "undertak[ing] a future, site-specific project."[135] Turning again to § 1732(a), the court reiterated that the Bureau must adhere to its own LUPs.[136] Additionally, rejecting the Bureau's suggestion that agency inaction could not constitute a violation of an LUP, "the failure to implement a program specifically promised in an LUP carries the same effect as if the agency had taken an 'affirmative' or 'future' action in direct defiance of its LUP obligations."[137] Third, the Bureau raised a partial compliance claim.[138] Again, the court rejected this argument, stating that partial agency efforts do not establish jurisdictional deficiency that would deny a court the power to compel action under § 706(1).[139] However, the court stated that upon remand, the district court, reviewing the merits, "can take into account the LUP's mechanism for addressing changing circumstances and conditions in determining the scope of the duties involved and the agency's attempted compliance."[140]

C. "Hard look" claim under NEPA

Finally, the court considered SUWA's NEPA claim requesting the Bureau to take a "hard look" at new information relating to damage caused by ORVs.[141] NEPA requires that "'major Federal actions significantly affecting the quality of the human environment' must be preceded by an environmental impact statement or EIS."[142] Under federal regulation, an agency may be required to prepare a supplemental environmental impact statement (SEIS) if "'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts' arise."[143] The Bureau claimed that because it was planning to conduct further NEPA analysis of the effects of ORV activities "within the next several years," subject to

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[129] *Id.* at 1234.
[130] *Id.* at 1233. "Section 1712, in turn, identifies a number of criteria and concerns that must be taken into account in developing LUPs." *Id.*
[131] *Id.* at 1234.
[132] *Id.*
[133] *Id.* The LUPs stated that BLM would monitor Factory Butte and close the area from ORV activity if warranted, while the San Rafael LUP called for the designation of ORV trails after the completion of an IMP (which had never been fully implemented). *Id.*
[134] *Id.* at 1235.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 1236.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 1236-37.
[142] *Id.* at 1237.
[143] *Id.* at 1238. The Court describes the evaluation of an agency's decision not to develop an SEIS as a two part test: 1) did the agency take a "hard look" at the new information before determining that further analysis was not necessary, and 2) if so, the Court reviews the agency's decision under the arbitrary and capricious standard. *Id.*

budget constraints, it could not be compelled to act.[144] While the court recognized that an agency cannot be compelled to act every time new information becomes available, "[t]he issue is whether the subsequent information raises new concerns of sufficient gravity such that another, formal in-depth *look* at the environmental consequences of the proposed action is necessary."[145] The district court held that "based on the evidence currently before it, an actual SEIS or supplemental EA could not be ordered."[146] However, SUWA claimed before the district court that "[The Bureau]'s failure to take [a] 'hard look'. . . is a clear violation of NEPA's requirements."[147] The court pointed out that while the district court had initially acknowledged that SUWA wanted the Bureau to take a "hard look" at the new ORV activity information, it ultimately held that SUWA was improperly seeking to compel the production of an SEIS.[148] Thus, the court held that the district misinterpreted SUWA's "hard look" claim,[149] which had, indeed, been "adequately raised and preserved."[150]

Having established that SUWA had properly raised its "hard look" claim, the court turned to the Bureau's future action claim on appeal. The court found the Bureau's argument unpersuasive, succinctly stating that

> [t]he BLM's budgetary argument wrongly conflates financial constraints with the legal issue in this case: whether the BLM is required to take a hard look at increased ORV use under NEPA. An agency's lack of resources to carry out its mandatory duties, we have reasoned does not preclude a court from compelling action under § 706(1).[151]

Additionally, the court was quite skeptical of the Bureau's claim "in light of its budget-based arguments."[152] While the Bureau suggested that it would conduct SEIS review within "the next several years," the Bureau's lack of resources "raise[d] serious questions," in the view of the court, whether the promised review would actually occur.[153] Thus, for these reasons, the court reversed the district court's decision, because the district court misinterpreted the nature of SUWA's "hard look" claim and the Bureau's arguments for affirming the district court's ruling were unconvincing.[154]

However, as to all three issues on appeal, the court stated that its remand was "a narrow one, concluding only that the district court erred in dismissing this case for lack of subject matter jurisdiction, and in concluding, at the motion to dismiss stage, that SUWA failed to state a claim that the BLM had a duty to consider a SEIS based on new circumstances."[155] Thus, the district court will need to consider the merits of the claim upon remand.[156]

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[144] *Id.*
[145] *Id.* (emphasis added).
[146] *Id.* at 1239.
[147] *Id.*
[148] *Id.* at 1237.
[149] *Id.*
[150] *Id.* at 1239.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 1240.
[154] *Id.* at 1237.
[155] *Id.* at 1222-23.
[156] *Id.* at 1223: Upon the order for remand, Paul Cassell, Utah's newest federal judge, will hear the case. Donna Kemp Spangler, *Ruling a victory for foes of ORVs*, Deseret News A12 (Aug. 31, 2002) (available in 2002 WL 25302927).

V. COMMENT

The *Norton* decision "will reverberate around the country,"[157] is what one news source heard Earthjustice attorney, Jim Angell,[158] suggest when he said:

> First BLM ignored its legal duties and then it tried to evade the courts. Nothing doing, said the Tenth Circuit. Now that the has announced that it will be looking over BLM's shoulder, we can only hope that the agency will take its responsibility to protect magnificent public lands from off-road vehicle damage more seriously in the future.[159]

Whether *Norton* will have a legal impact on other Federal Circuits is yet to be seen. However. it is clear that *Norton* affects the country from the perspective that the Tenth Circuit has taken has taken a position affirming meaningful judicial review to protect the degradation of lands owned and used by all Americans.

Degradation of public lands due to ORV use is not new to the Bureau. Executive Orders 11644 and 11989, issued under Presidents Nixon and Carter, respectively, both called for the closure of ORV routes upon a determination by the proper official that such use was causing adverse affects to the public lands.[160] As discussed above, ORV use was specifically addressed in the Bureau's 1979 IMP.[161] More recently, in a 2001 interview, then Secretary of the Interior Bruce Babbit, under whose term SUWA's initial suit had been brought, said, "A terrible threat to these fragile arid landscapes . . . . ORVs are out there creating what they call user-generated roads. You drive enough times down a track and you've got a spontaneous road."[162] One observer explained the ORV problem as follows:

> The Wilderness Society calls off-road vehicles the "single fastest growing threat to the natural integrity of our public lands." Before-and-after photographs . . . detail severe erosion to hillsides, streambeds, and desert sands on public lands throughout the West. Erosion has far-reaching effects. Soil entering streams and rivers, for example, can harm fish habitat. In addition, many ORVs, motorcycles, and other recreational vehicles use inefficient, noisy twostroke engines that pollute vastly more than standard automobiles. Subtler is the impact on wildlife, whose foraging and mating patterns can be affected by the noise and traffic. Motorized vehicles also contribute to the spread of non-native plants, a huge problem in the West.[163]

Additionally, SUWA cites a General Accounting Office study reviewing the implementation of the Executive Orders.[164] According to the study, "off-highway vehicle use was being monitored casually" and "adverse

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[157] *Appeals Court Hands Victory to Conservationists in Utah: Off Road Vehicle Damage Must Be Addressed in Wilderness Quality Areas* Ascribe News (Aug. 29, 2002) (available at 2002 WL 5804368).

[158] *Id.* Mr. Angell argued the *Norton* case on behalf of the plaintiffs before the court of appeals. *Id.*

[159] *Id.* (quoting Earthjustice attorney Jim Angell).

[160] 43 C.F.R. § 8341.2(a) (2002); "The BLM's ORV designation criteria regulations incorporate the terms of Executive Order 11,644 almost verbatim." *Babbit, supra* n. **, at *7; *See generally* Exec. Or. 11, 644, 38 Fed. Reg. 2,877 (1972); Exec. Or. 11,989, 42 Fed. Reg. 26,959 (1977).

[161] *Supra*, at Part III, A.

[162] Interview by John Nielsen with Secretary Bruce Babbit, Secretary of the Interior, (January 2, 2001) (available in 2001 WL 9326025).

[163] Nancy Watzman, *Playground or preserve?* 33 Wash. Mthly. 5 (May 1, 2001) (available in 2001 WL 12169120).

[164] Southern Utah Wilderness Alliance, *SUWA Brings Lawsuit to Force BLM to Protect Wild Lands From Off-Road Vehicle Damage* <http://www.suwa.org/page.php?page_name=Camp_ORV_Latest> (accessed March 9, 2003); *see*

effects were seldom being documented, and needed corrective action . . . ."[165] SUWA also cites Bureau statistics that 94% of Utah's Bureau managed lands are open to ORV traffic, with minimal complete closures.[166]

A. The Nonimpairment Standard

As discussed above, the *Norton* Court held FLMPA's nonimpairment standard to be a mandatory, nondiscretionary duty,[167] concluding that the Bureau's due "deference and discretion do not . . . immunize the BLM from its clear, nondiscretionary duty . . . ."[168] The district court, however, believed that the IMP in some way diluted the statutory standard, saying:

> What the IMP demonstrates is that, while there is a "nonimpairment" mandate. there are management options and levels of response that can be taken to deal with impairment problems. and the choice of response that should be made if impairment occurs is not "clear and certain . . . ministerial and so plainly prescribed as to be free from doubt."[169]

The district court extends this logic in order to uphold the Bureau's actions as partial compliance.[170] Thus, the district court found that "the Plaintiffs are not asserting a genuine failure-to-act claim, but complaints about the sufficiency of the agency action."[171] Meanwhile, the Bureau used the IMP to argue that jurisdiction was improper because the Bureau is entitled to deference in its interpretation of the nonimpairment mandate.[172]

In fact, contrary to the arguments of the district court and the Bureau, the Bureau's own IMP asserts the force of FLMPA's statutory mandate over the Bureau's regulatory discretion:

> These mandates in FLMPA establish *as a matter of law* that, while some development activities are permissible on lands under wilderness review, they are subject to important regulations and must be carefully regulated. All activities except those specifically exempt must be regulated to prevent impairment of wilderness suitability. *If an activity not specifically exempt cannot meet this condition, the activity cannot be permitted* on lands under wilderness review.[173]

This provision of the IMP acknowledges the legal requirement established by FLMPA's nonimpairment mandate. Furthermore, it employs mandatory language to require that the Bureau's regulations satisfy the mandate. If the "condition" (regulation exercised in a manner that prevents impairment) cannot be met, the

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United States General Accounting Office, *Federal Lands ....Information on the Use and Impact of Off-Highway Vehicles....*

[165] *Id.*

[166] Southern Utah Wilderness Alliance, *SUWA Brings Lawsuit to Force BLM to Protect Wild Lands From Off-Road Vehicle Damage* <http://www.suwa.org/page.php?page_name=Camp_ORV_Intro> (accessed March 9, 2003); *see Off Highway Vehicle Area Designations, Fiscal Year 1998,* BLM RECREATION MANAGEMENT INFORMATION SYSTEM (RMIS) REPORTS, March 3, 1999.

[167] *Supra* at Part IV; *see Norton*, 301 F.3d at 1227. "Neither side seriously disputes that the BLM has such a [nonimpairment] duty under the FLMPA, which mandates that the BLM manage WSAs in such a way as not to impair their wilderness values." *Id.*

[168] *Norton,* 301 F.3d at 1228.

[169] *Babbit*, 2000 WL 33914094 at *4.

[170] *See id.* at *5.

[171] *Babbit*, 2000 WL 33914094 at *5.

[172] *Norton,* 301 F.3d at 1227; *see supra* nn. 165-66.

[173] 44 F.R. 72015 (emphasis added).

activity is impermissible regardless of the Bureau's discretion in how it regulates the public lands. Thus, as clarified by the IMP, the Bureau violated FLMPA's nonimpairment standard if it failed to regulate in a manner that prevents impairment, and any colorable impairment claim should be heard as a claim of agency action unlawfully withheld pursuant to § 706(1).

In the instant case and as stated by the district court, "[t]he BLM points out that it is well aware that ORV-caused damage is resulting from cross-country travel in these WSAs . . ." despite the Bureau's regulations designed to protect the suitability of the public lands.[174] Consequently, the *Norton* Court was correct in reversing the district court's dismissal of SUWA's claim for lack of subject matter jurisdiction. Additionally, the court appropriately remanded the case to the district court for a decision on the merits of the case, giving the Bureau its due deference in the interpretation of its own management plans when determining whether ORV use is impairing the federal lands.[175] It appears clear, however, that if the Bureau concedes that damage is occurring to the public lands in a manner that cannot be recovered, the Bureau is in violation of FLMPA and its own IMP as discussed above.

B. The Dissent

Circuit Judge McKay concurred with the majority on SUWA's NEPA claim, but dissented from the majority's treatment of the jurisdictional claims under FLMPA.[176] While the dissent does not contest the existence of a nonimpairment standard, it claims that the facts in *Norton* do not support the conclusion that § 706(1) is proper to challenge an agency's failure to completely comply with its obligations as a failure to act.[177] The dissent's primary objection is that jurisdiction under § 706(1) is determined under a mandamus standard.[178] The mandamus standard requires the plaintiffs to show that they are challenging a "ministerial" agency obligation, defined as a legally mandated act without discretion in its performance.[179] In other words, the discretionary nature of the Bureau's interpretation of the nonimpairment standard precludes subject matter jurisdiction under the APA. The dissent suggests that the majority conceded this point,[180] however, this is not the case. In fact, the majority noted that while mandamus is completely within the discretion of the reviewing court, "once a court determines that an agency 'unlawfully withheld' action, the APA requires that courts compel agency action."[181] Thus, whether the action was ministerial or not was immaterial; rather the Bureau's alleged failure to comply with FLMPA's nonimpairment standard established action unlawfully withheld, which served as jurisdictionally competent basis for judicial review.

The dissent also argues that "[b]ecause nearly every objection to agency action could be cleverly pleaded as agency inaction . . . . [c]omplaints about the sufficiency of agency action *disguised* as failure to act claims are not cognizable pursuant to § 706(1)."[182] However, under the dissent's approach, an agency could "disguise" its inaction by undertaking the most insignificant of partial actions in order to subvert the

[174] *Babbit*, 2000 WL 33914094 at *5.
[175] *See Norton*, 301 F.3d at 1228.
[176] *Norton*, 301 F.3d at 1247. (McKay, J., dissenting in part and concurring in part).
[177] *Id.* at 1243. (McKay, J., dissenting in part and concurring in part).
[178] *Id.* at 1241. (McKay, J., dissenting in part and concurring in part).
[179] *Id.* (McKay, J., dissenting in part and concurring in part).
[180] *Id.* (McKay, J., dissenting in part and concurring in part).
[181] *Id.* at 1226, n. 6.
[182] *Id.* at 1244 (McKay, J., dissenting in part and concurring in part) (emphasis added).

reviewability of § 706(1) claims.[183] Thus, if the majority's "unwarranted expansion of failure to act" results in a deluge of § 706(1) litigation,[184] would not taking the dissent's position give rise to the preclusion of claims by "disguised" partial agency action? And if this is indeed the policy tradeoff, then should not the agencies bear the burden of judicial review rather than denying a deluge of colorable claims that may nevertheless fail on the merits?[185]

According to the dissent, *Norton* has "opened the floodgates of litigation for plaintiffs to challenge any mandatory agency obligation,"[186] and the result, it claims, will be the "syphoning [*sic*] of scarce BLM (and other agencies') resources intended to meet its worthy objectives and obligations to fund increasing unmerited litigation."[187] Additionally, the majority "turns the burden of proving jurisdiction on its head,"[188] by contravening the rule that plaintiffs must prove that an agency failed "to take *any* action reasonably calculated to achieve the ends of its mandate."[189]

Should calamity befall the Tenth Circuit, and the dissent's dark prophecies do, indeed, come true, the court may find that its most prudent choice is to abrogate *Norton* and rely on NEPA's environmental review process to keep arbitrary agency decisions in check. This, however, should not be necessary given *Norton's* careful limitation to jurisdictional issues.

C. "Opposing Impulses": Meaningful Judicial Review versus Agency Discretion

Administrative law struggles with two "opposing impulses": the desire for broad agency discretion, on the one hand, and vigorous judicial review of agency action to preserve the rule of law on the other.[190] In other words, courts traditionally have a duty to provide meaningful judicial review, while agencies require deference in order to function effectively.[191] Commentators Coggins and Glicksman explained the problems with land use plans under FLMPA as follows:

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[183] *See id.* at 1230, n. 10. "[T]he BLM's position would seem to create a 'no-man's-land' of judicial review, in which a federal agency could flaunt mandatory, nondiscretionary duties simply because it might be able to satisfy these duties through some form of non-final action." *Id.*

[184] *Norton*, at 1246. (McKay, J., dissenting in part and concurring in part).

[185] The dissent attacks the majority's use of a hypothetical illustrating the problem with partial compliance because it suggests agency action in bad faith. *Norton,* at 1244, n. 4 (dissent); *see generally Norton,* 1231, n. 12. While it is the author's opinion that the majority's hypothetical does not contemplate the issue bad faith, the dissent clearly expressed its sensitivity to the bad faith argument. Thus, in the "disguised" agency action scenario presented by the author above, the dissent would clearly protest on the ground of agency action in bad faith. It is the opinion of the author that evidence of such bad faith would be virtually impossible for plaintiff's to produce, while the incentive for agencies to protect "scarce . . .resources intended to meet . . . worthy objectives and obligations," *Norton,* at 1246 (McKay, J., dissenting in part and concurring in part), creates an unfounded justification to do so. *Cf. Norton,* at 1239 (where the majority questions the Bureau's sincerity in pursuing NEPA review within the next "several" years, even though the Bureau had already argued an inability to undertake all of its desired planning efforts due to "limited resources and "budgetary woes").

[186] *Id.* at 1246 (McKay, J., dissenting in part and concurring in part).

[187] *Id.* (McKay, J., dissenting in part and concurring in part).

[188] *Id.* (McKay, J., dissenting in part and concurring in part).

[189] *Id.* at 1244 (McKay, J., dissenting in part and concurring in part).

[190] Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: the Alleged Demise and Actual Status of Overton Park's Requirement of Judicial "Review on the Record"* 10 Admin. L.J. Am. U. 179, 181 (1996). "[T]he liberal tradition, or traditional court-centered rule of law culture, is based on separation of powers and due process considerations and implies meaningful review of agency action, contrasting this tradition with regime of practical necessity, expertise, and efficiency which requires deferential review." *Id.* at 181, n. 4.

[191] *See id.*

> FLMPA obviously is a planning statute in substantial measure, but, from the viewpoint of most BLM public land users, it is not a very good planning statute. The agency planners are largely left to their own initiatives and preferences. Because the plans will have the force of law, at least to an extent, such unbridled administrative discretion theoretically seems anachronistic if not unwise. Practically, all federal land users are subjected to unforeseeable risks of bureaucratic whim or aberration. Whether other branches of government can and will oversee the BLM planning process may determine if the process becomes either predictable or meaningful. Congress ordinarily is loathe to participate in or interfere with ongoing planning efforts except in sporadic, ad hoc instances. Remedies, if any, for ill-conceived BLM land use plans thus likely will be questions for judicial resolution.[192]

Thus, courts should be wary to abdicate meaningful judicial review under FLMPA claims.

In *Norton*, the Tenth Circuit performed its judicial function by striking the appropriate balance between the "opposing impulses" by carefully limiting its decision to the issue of subject matter jurisdiction under § 706(1) of the APA.[193] Consequently, the court has effectively said that it will hear a good faith claim based on the presentation of "colorable evidence," though it will not go so far as to encroach on agency discretion by imposing its own judicial "whim or aberration" on the merits of the case.[194] Thus, the dissent's assertions discussed above, while legitimate concerns, are largely unfounded to the extent that *Norton* has changed the face of administrative law.

D. Bureau Decision on ORV Activity in San Rafael

On February 3, 2003, the Bureau released a final decision on ORV activity in the San Rafael Swell.[195] The Route Designation Plan closes 468 miles of secondary ORV routes, while 677 miles will remain open to motorized vehicle access.[196] Manager of the Bureau's Price Field Office, Patrick Gubbins, believes that the plan "strikes the appropriate balance" to promote the principle multiple use, as a total in excess of 2,000 miles of roads and trails are available for ORV use in San Rafael.[197] To ensure compliance with the plan, the Bureau

> will use a combination of increased law enforcement presence, enhanced signing, and new maps. Law enforcement strategies will include a "task force" consisting of rangers from neighboring BLM field offices and supplemental patrols using State Park and Division of Wildlife resources law enforcement officers during Easter and other high use periods. The most promising development to supplement the sole BLM ranger assigned to the Price Field Office is a newly

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[192] Coggins & Glicksman, 2 Pub. Nat. Resources L. § 10F:22 (footnote omitted).

[193] *Norton*, 301 F.3d at 1222-23. "Our remand, however, is a narrow one, concluding only that the district court erred in dismissing this case for lack of subject matter jurisdiction and in concluding, at the motion to dismiss stage, that SUWA failed to state a claim that the BLM had a duty to consider a SEIS based on new circumstances. The merits of the claim will need to be addressed on remand." *Id.*

[194] *See id.*

[195] Utah Bureau of Land Management, *Final Decision on San Rafael Route Designation Plan Released* <http://www.ut.blm.gov/NewsReleases/nrfeb3.html> (accessed March 9, 2003).

[196] *Id.*

[197] *Id.*

> proposed cost share arrangement between the BLM and the Emery County Sheriff that would add a deputy to patrol the San Rafael area on priority basis.[198]

The plan also maintains the status quo at Sid's Mountain area, which, according to Gubbins, has improved thanks to "better signs and increased patrols, but the biggest factor by far . . . is user compliance."[199] While the final decision is still subject to appeal and litigation, Gubbins commented that "[i]t's time [for interest groups and the Bureau] to work together and cooperate, not litigate," in order to make the planned ORV system "an on the ground reality."[200]

VI. CONCLUSION

In *Norton*, the Tenth Circuit Court of Appeals appropriately extended § 706(1) jurisdiction to SUWA's claim that the Bureau failed to satisfy its statutory duty to manage public land in accordance with FLMPA's nonimpairment standard.[201] While judges must be careful not to subjugate matters of agency discretion to judicial decree, likewise, judges must not abdicate their function of providing meaningful judicial review of agency decisions.[202] As a result of *Norton*, agencies operating in the Tenth Circuit have been reminded of a watchful judicial eye that will not hesitate to review a colorable claim of an agency's failure to comply with its mandatory, nondiscretionary statutory mandate.[203]

THOMAS SCHMID

[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Supra* pts. II, IV, V, A.
[202] *Supra* pt V, C.
[203] *Id.*