No. 03-101

In the Supreme Court of the United States

GALE NORTON, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the authority of the federal courts under the Administrative Procedure Act, 5 U.S.C. 706(1), to "compel agency action unlawfully withheld or unreasonably delayed" extends to review of the adequacy of an agency's ongoing management of public lands under general statutory standards and its own land use plans.

PARTIES TO THE PROCEEDINGS

The petitioners in this Court are Gale Norton, Secretary of the Interior; Kathleen Clarke, Director of the Bureau of Land Management; and the Bureau of Land Management. The respondents are:

Southern Utah Wilderness Alliance
The Wilderness Society
The Sierra Club
The Great Old Broads for Wilderness
Wildlands CPR
Utah Council of Trout Unlimited
American Lands Alliance
The Friends of the Abajos
The State of Utah
San Juan County
Emery County
Utah School and Institutional Trust Lands Administration
Utah Shared Access Alliance
Blue Ribbon Coalition
Elite Motorcycle Tour
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The Solicitor General, on behalf of the Secretary of the Interior and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is reported at 301 F.3d 1217. The opinion of the district court (App., *infra*, 55a-76a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2002. A petition for rehearing and rehearing en banc was denied on February 18, 2003 (App., *infra*, 77a). On May 12, 2003, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including June 18, 2003, and on June 6, 2003, Justice Breyer extended that

time to and including July 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 706 of Title 5 provides, in pertinent part:

> 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;
> (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.

STATEMENT

This case concerns the scope of the federal courts' authority under the Administrative Procedure Act (APA) to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). A divided panel of the Tenth Circuit held that a plaintiff may invoke Section 706(1) to challenge the adequacy of an agency's ongoing administra-

tion of a government program (here, an agency's management of certain public lands). The panel held that Section 706(1) is not confined to suits to compel final "agency action" of the sort that is reviewable under Section 706(2). The panel also held that Section 706(1) may be used to enforce generally stated statutory standards, which leave an agency with considerable discretion with respect to their definition and implementation, and to compel the performance of activities contemplated in an agency's own general planning documents, even in the absence of any proposed site-specific action.

1. The Bureau of Land Management (BLM) administers approximately 23 million acres of federal land in the State of Utah. This suit concerns BLM's management of two categories of such land.

The first category consists of "wilderness study areas," or WSAs. In the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1782(a), Congress directed BLM to determine whether any public lands within its supervision were suitable for preservation as wilderness. Since the enactment of FLPMA, BLM has designated 2.5 million acres in Utah as wilderness study areas, of which the President recommended that 1.9 million acres be designated as wilderness. Until Congress acts on that recommendation, BLM is required under FLPMA to manage the wilderness study areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. 1782(c).

To implement that "non-impairment" standard, BLM promulgated the Interim Management Policy for Lands under Wilderness Review, 44 Fed. Reg. 72,014 (1979). Under the Interim Management Policy, BLM is to manage each wilderness study area to prevent it from being "degraded so far * * * as to significantly constrain the Congress's prerogative to either designate [it] as wilderness or release it for other uses." *Id.* at 72,016. The Interim Management

Policy makes clear, however, that "[m]anagement to the non-impairment standard does not mean that lands will be managed as though they had already been designated as wilderness." *Ibid.* Among other things, the Interim Management Policy contains specific provisions with respect to motor vehicle use, restricting such use in wilderness study areas to existing ways and within designated "open" areas. *Id.* at 17,024.

The second category of lands at issue in this case consists of public lands adjacent to the wilderness study areas. Those lands are managed by BLM under general provisions of FLPMA and land use plans. FLPMA requires BLM to develop land use plans for units of public lands under its jurisdiction, see 43 U.S.C. 1712(a) and (c); to "manage the public lands * * * in accordance with the land use plans," 43 U.S.C. 1732(a); and to revise the land use plans "as appropriate," 43 U.S.C. 1712(a).[1]

2. Southern Utah Wilderness Alliance and other organizations (collectively SUWA), which are among the respondents here, filed suit under 5 U.S.C. 706(1) against the Secretary of the Interior, the Director of BLM, and BLM. SUWA claimed that BLM had "failed to perform its statutory and regulatory duties" to protect public lands in Utah from damage allegedly caused by off-road vehicle use. App., *infra*, 3a. SUWA also claimed that BLM had failed to implement provisions of its land use plans relating to management of off-

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[1] On April 11, 2003, the Secretary of the Interior and the Governor of Utah agreed to settle a lawsuit involving the designation of future wilderness study areas in Utah. Under the terms of that settlement, the Secretary acknowledged that her authority to designate wilderness study areas under 43 U.S.C. 1782 expired in 1993. BLM will continue to exercise its authority under 43 U.S.C. 1711 to inventory resources or other values, including wilderness values. The settlement does not apply to any previously designated wilderness study areas or otherwise affect any of the claims ruled upon by the court of appeals in this case.

road vehicles. *Ibid.* SUWA further claimed that BLM had failed to take a "hard look" at whether, pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, it should prepare supplemental environmental impact statements or environmental assessments for areas affected by increased off-road vehicle use. App., *infra*, 3a.

SUWA thereafter filed a motion for a preliminary injunction. The motion sought to compel BLM to prohibit off-road vehicle use in four wilderness study areas and five additional areas. Groups representing the interests of off-road vehicle users intervened to oppose the suit. App., *infra*, 3a-4a.[2]

After an evidentiary hearing, the district court denied SUWA's motion for a preliminary injunction and granted the intervenors' motion to dismiss five counts of the complaint as not cognizable under 5 U.S.C. 706(1). App., *infra*, 55a-76a. The court characterized Section 706(1) as "a very narrow exception to the APA's limitation of judicial review of final agency action," which "has been narrowly construed to prevent judicial intrusion into the day-to-day workings of agencies" and has been understood to provide relief that "is essentially the equivalent of mandamus." *Id.* at 59a. The court consequently reasoned that Section 706(1) affords a remedy only when an agency is subject to a "clear nondiscretionary duty" and "only where there is a genuine failure to act." *Id.* at 59a-60a.

The district court held that SUWA's claim that BLM had failed to prevent impairment of the wilderness study areas was not "a genuine failure-to-act claim" cognizable under

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[2] The intervenors have separately petitioned for certiorari seeking review of the court of appeals' decision in this case. *Utah Shared Access Alliance* v. *Southern Utah Wilderness Alliance*, No. 02-1703 (filed May 19, 2003).

Section 706(1). App., *infra*, 65a; see *id.* at 62a-66a. The court observed that BLM had presented "significant evidence about the steps it is and has been taking to prevent * * * impairment" of those areas, and that even SUWA had acknowledged that BLM was taking some action in that regard. *Id.* at 65a-66a.

Similarly, the district court held that Section 706(1) did not provide a basis for SUWA to challenge BLM's alleged failure to complete monitoring and planning activities called for in its land use plans. App., *infra*, 67a-68a. The court characterized the challenge as one "regarding the sufficiency of BLM's actions, rather than a failure to carry out a clear, ministerial duty." *Id.* at 67a. The court also concluded that noncompliance with a land use plan may be challenged only in connection with "some site-specific action * * * that does not conform to the plan." *Ibid.*

The district court further held that BLM was not required under NEPA to take a "hard look" at whether increased off-road vehicle use required the preparation of supplemental environmental impact statements or environmental assessments. App., *infra*, 74a. The court reasoned that BLM did not have "a clear duty to act under NEPA" to consider the need to supplement its earlier environmental analyses. *Ibid.* "Indeed," the court added, "the decision whether to prepare a supplemental environmental impact statement is the kind of factual question that implicates agency technical expertise and requires courts to 'defer to the informed discretion of the responsible federal agencies.'" *Ibid.* (quoting *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)).

The district court certified its dismissal of the claims as final judgments under Rule 54(b) of the Federal Rules of Civil Procedure. See App., *infra*, 4a & n.1.

3. A divided panel of the Tenth Circuit reversed and remanded the case for consideration of the merits of SUWA's claims. App., *infra*, 1a-54a.

a. The court of appeals held that SUWA could assert a challenge under Section 706(1) to BLM's alleged failure to comply with its duty under FLPMA to manage the wilderness study areas "so as not to impair the suitability of such areas for preservation as wilderness." App., *infra*, 14a (citing 43 U.S.C. 1782(c)). The court concluded that the "agency action" that may be compelled under Section 706(1) includes not only "final, legally binding actions," but also "day-to-day management actions" such as BLM's ongoing management of the wilderness study areas. *Id.* at 15a-16a. While acknowledging that agency action may be compelled under Section 706(1) "only where the agency fails to carry out a mandatory, nondiscretionary duty," *id.* at 10a, the court concluded that the general statutory requirement that BLM manage the wilderness study areas to prevent impairment is mandatory and nondiscretionary, and thus may be enforced in a suit under Section 706(1), *id.* at 13a. The court further held that relief may be warranted under Section 706(1) notwithstanding that BLM has "taken some action * * * to address alleged impairment" of the wilderness study areas. *Id.* at 19a.

The court of appeals also held that Section 706(1) permits a challenge to BLM's alleged failure to complete certain activities specified in its land use plans applicable to the wilderness study areas and public lands adjacent to them. App., *infra*, 24a-32a. The court reasoned that a mandatory, nondiscretionary duty to complete those tasks arises from FLPMA's provision that public lands "shall [be] manage[d] * * * in accordance with the land use plans," 43 U.S.C. 1732(a); from regulations that the court understood to impose a comprehensive, judicially enforceable duty on BLM to "adhere to the terms, conditions, and decisions" of such plans, 43 C.F.R. 1601.0-5(c); and from language in the land use plans stating that off-road vehicle use "will be monitored" in one area and that an off-road vehicle imple-

mentation plan "will be developed" for another area. App., *infra*, 26a. While acknowledging that Congress intended BLM's land use plans "to be dynamic documents, capable of adjusting to new circumstances and situations," *id.* at 27a, the court concluded that BLM "can be held accountable for failing to act as required by the mandatory duties outlined in" such plans, *id.* at 28a. The court also concluded that BLM could be compelled under Section 706(1) to comply with provisions of a land use plan even in circumstances, such as those here, in which BLM is not undertaking any "site-specific project." *Id.* at 28a-29a.

Finally, the court of appeals held that BLM could be compelled under Section 706(1) to take a "hard look" at whether increased off-road vehicle use in certain areas warranted the supplementation of its earlier environmental analyses under NEPA. App., *infra*, 32a-39a. The court found it irrelevant to the availability of relief under Section 706(1) that BLM intended to perform additional NEPA analyses in the near future in connection with its revision of existing land use plans, and that compelling BLM to undertake the NEPA analyses sought by SUWA would divert BLM's resources from other current and planned NEPA activities. *Id.* at 37a-38a; see Gov't C.A. Br. 50-51. Instead, the court concluded that claims of inadequate resources could be raised only as a defense in any contempt proceeding that might arise if BLM failed to carry out a duty after being ordered by the district court to do so. App., *infra*, 38a.

b. Senior Judge McKay dissented in part. App., *infra*, 39a-54a. First, he reasoned that Section 706(1) does not provide a vehicle for "claims challenging an agency's overall method of administration or for controlling the agency's day-to-day activities." *Id.* at 43a. He viewed the majority's decision as "essentially transform[ing] § 706(1) into an improper and powerful jurisdictional vehicle to make program-

matic attacks on day-to-day agency operations." *Id.* at 46a. Second, he reasoned that Section 706(1) authorizes challenges only to "true agency inaction," not agency efforts that merely "fall[] short of completely achieving the agency's obligations." *Ibid.* Finally, he stated that Section 706(1) does not permit plaintiffs to challenge "an agency's failure to meet each and every goal set out in its land use plans," *id.* at 51a, observing that such challenges "would allow plaintiffs of all varieties to substantially impede an agency's day-to-day operations," *id.* at 50a.[3]

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that 5 U.S.C. 706(1) authorizes judicial review of an agency's ongoing administration of a program assigned to it by Congress. That holding rests on a fundamental misunderstanding of what constitutes "agency action" that may properly be the subject of judicial review under the APA; departs substantially from this Court's decision in *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990), concerning the proper scope of judicial review under the APA; and is inconsistent with the Fifth Circuit's decision in *Sierra Club* v. *Peterson*, 228 F.3d 559 (2000) (en banc), cert. denied, 532 U.S. 1051 (2001), which held that a similar programmatic challenge to a federal agency's management of public lands could not be brought under Section 706(1).

Moreover, the Ninth Circuit, in agreement with the Tenth Circuit in this case, recently allowed a comparable programmatic challenge under Section 706(1). See *Montana Wilderness Ass'n.* v. *United States Forest Serv.*, 314 F.3d 1146 (2003). Because the great majority of federal public lands lie in the Ninth and Tenth Circuits, federal agencies that man-

[3] Judge McKay did not dissent from the court of appeals' holding on the NEPA question. App., *infra*, 39a.

age those lands are now suddenly exposed to the sort of broad programmatic challenges that this Court rejected in *National Wildlife Federation*. And, beyond the land-management context, these decisions permit courts to intrude into a wide array of programs conducted by federal agencies under general statutory standards and internal planning documents. This Court's review is therefore warranted to confine Section 706(1) to its traditional role as an extraordinary remedy to compel an agency to complete a discrete regulatory or adjudicatory task of the sort that, when completed, would be reviewable as final agency action under Section 706(2).

A. Section 706(1) Does Not Provide A Vehicle For Judicial Review Of An Agency's Ongoing Programmatic Activity

The APA does not authorize the federal courts to entertain challenges to anything and everything that an agency may do, or fail to do, in the conduct of its business. The APA instead confines judicial intervention to those instances in which the agency has taken, or has a duty to take, a discrete, clearly identified, and definitive action that carries legal consequences.

1. Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. Section 706, the APA provision principally at issue in this case, defines the scope of such review. As relevant here, Section 706 states that "[t]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be" invalid on specified grounds. 5 U.S.C. 706.

Judicial review under the APA is thus limited to "agency action," which the APA defines as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13).[4] All of those examples of "agency action" are discrete products of a focused decision-making process by the agency (*e.g.*, the issuance of a rule, the grant or denial of a license, the imposition of a sanction). The term "the equivalent or denial thereof, or failure to act" is properly understood to refer to similarly discrete actions, under the canon that general terms are known by their more specific companions. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Estate of Keffeler*, 123 S. Ct. 1017, 1025 (2003).

Judicial review under the APA is further limited, absent a specific statute providing otherwise, to "*final* agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704 (emphasis added). This Court has explained that agency action, in order to be "final" and reviewable under the APA, both "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks omitted); accord *Franklin* v. *Massachusetts*, 505 U.S. 788, 797-798 (1992).

Such reviewable "final agency action" is readily distinguishable from an agency's day-to-day administration of its programs, as this Court recognized in *National Wildlife Federation*. That case presented a challenge under Section 706(2) of the APA to "the continuing (and thus constantly changing) operations of the BLM" in considering applications

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[4] See, *e.g.*, 5 U.S.C. 551(4) (defining "rule"); 5 U.S.C. 551(6) (defining "order"); 5 U.S.C. 551(8) (defining "license"); 5 U.S.C. 551(10) (defining "sanction"); 5 U.S.C. 551(11) (defining "relief").

to revoke withdrawals of land from the public domain, reviewing classifications of public land, and developing land use plans. 497 U.S. at 890. The Court held that those activities could not be challenged "*wholesale*" under Section 706(2) because they did not constitute "an identifiable 'agency action'—much less a 'final agency action'"—within the meaning of the APA. *Id.* at 890, 891. "Under the terms of the APA," the Court explained, a plaintiff "must direct its attack against some particular 'agency action' that causes it harm," *id.* at 891, and "cannot demand a general judicial review of [an agency's] day-to-day operations," *id.* at 899. See *id.* at 893 ("[T]he flaws in the entire 'program'"—consisting of "many individual actions"—"cannot be laid before the courts for wholesale correction under the APA.").

2. An agency's "day to day operations" no more constitute reviewable "agency action" that may be "compel[led]" under Section 706(1) than they constitute reviewable "agency action" that may be "set aside" under Section 706(2).

Congress intended the term "agency action" to have the same meaning in Section 706(1) as it has in Section 706(2). Congress provided that "[f]or the purpose of this chapter" —*i.e.*, the judicial review provisions of the APA, including both Section 706(1) and Section 706(2)—"'agency action' ha[s] the meaning given[] [it] by section 551 of this title." 5 U.S.C. 701(b)(2). And even aside from Section 701(b)(2), a term is presumed "to mean the same thing throughout a statute," especially "when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Accordingly, Section 706(1) authorizes a court to compel only the sorts of discrete "agency action" that are described in Section 551(13).

Congress likewise intended Section 704's requirement of "final agency action" to apply to suits under Section 706(1) as well as Section 706(2). Section 704 provides that finality is a condition of "judicial review" under the APA, without distin-

guishing between review under Section 706(2) of an agency's failures to act (a form of "agency action" under Section 551(13)) and review under Section 706(1) of an agency's affirmative acts. Thus, Section 706(1) authorizes a court to compel only final agency action, *i.e.*, action that is conclusive and that carries legal consequences, see *Bennett*, 520 U.S. at 177-178, and that, if taken by the agency rather than withheld, would be reviewable under Section 706(2).

A court may consequently compel an agency under Section 706(1) to issue a rule (see, *e.g.*, *Public Citizen Health Research Group* v. *Commissioner, Food & Drug Admin.*, 740 F.2d 21, 34-35 (D.C. Cir. 1984)), or to make a "final determination" on an administrative complaint (see, *e.g.*, *Brock* v. *Pierce County*, 476 U.S. 253, 259, 260 n.7 (1986)), or to act on a permit application (see, *e.g.*, *Costle* v. *Pacific Legal Found.*, 445 U.S. 198, 220 n.14 (1980)). A court may not, however, compel an agency to conduct its "day-to-day operations," *National Wildlife Federation*, 497 U.S. at 899, such as its ongoing management of public lands, differently from how they are being conducted.

3. The conclusion that Section 706(1) permits courts to compel only discrete "agency action," as defined in 5 U.S.C. 551(13), is supported by the *Attorney General's Manual on the Administrative Procedure Act* (1947), to which this Court has "repeatedly given great weight" in the interpretation of the APA. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (citing cases). In describing Section 706(1) (Clause (A) of Section 10(e) of the APA as enacted in 1946), the *Attorney General's Manual* states:

> Clause (A) authorizing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed", appears to be a particularized restatement of existing judicial practice under section 262 of the

> Judicial Code (28 U.S.C. 377). *Safeway Stores, Inc.* v. *Brown*, 138 F.2d 278 (E.C.A., 1943), certiorari denied, 320 U.S. 797. The power thus stated is vested in "the reviewing court", which, in this context, would seem to be the court which has or would have jurisdiction to review the final agency action. See *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 25 (1943).

Attorney General's Manual 108.

The "existing judicial practice" described in *Safeway Stores* is one permitting a court to compel an agency or official to take a discrete "final action." 138 F.2d at 280. There, the plaintiff sought judicial review of a maximum price regulation promulgated under the Emergency Price Control Act of 1942, contending that the Price Administrator's failure to rule on its protests to the regulation, or even to conduct a hearing on them, should be treated as a denial of the protests. *Id.* at 279. The court held that the governing statute allowed judicial review only after a protest was "actually denied by an overt act of the Administrator." *Id.* at 280. The court went on to observe, however, that a party in the plaintiff's position was not "wholly without remedy in case the Price Administrator improperly delays action upon his protest." *Ibid.* "If the Administrator should unreasonably delay *final action*," the court explained, "it would seem clear that this court, upon a proper showing, may under the authority of Section 262 of the Judicial Code, 28 U.S.C.A. § 377, in aid of its jurisdiction issue an order in the nature of a writ of mandamus directing the Price Administrator to take action upon a pending protest." *Ibid.* (emphasis added). Thus, the *Safeway* court made clear that it could grant mandamus to compel an agency to take action on a discrete matter that had been unreasonably delayed, but only in aid of the court's power to review the "final action" of the agency when it ultimately was issued, not

based on some broader, free-ranging power to oversee agency conduct.

The *Attorney General's Manual*, in stating that the court with jurisdiction to grant relief under Section 706(1) is "the court which has or would have jurisdiction to review the final agency action," proceeds on the same theory and equates the "agency action" that a court may compel under Section 706(1) with the "agency action" that a court may review under Section 706(2). The *Attorney General's Manual* does not contemplate that a court may compel conduct under Section 706(1) of an ongoing programmatic nature.

4. The understanding that Section 706(1) allows courts only to compel discrete "agency action," and not to alter an agency's ongoing course of conduct, is reinforced by the understanding that Section 706(1) allows courts only to grant relief comparable to mandamus. See App., *infra*, 9a-11a & n.5; *id.* at 41a (McKay, J., dissenting in part).

The *Attorney General's Manual* characterizes Section 706(1) as a "codif[cation]" of existing mandamus practice:

> Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, *Safeway Stores, Inc.* v. *Brown*, *supra*, or to assume jurisdiction, *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912), or to compel an agency or officer to perform a ministerial or non-discretionary act. Clause (A) of section 10(e) [*i.e.*, Section 706(1)] was apparently intended to codify these judicial functions.
>
> Obviously, the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. * * * However, as in *Safeway Stores* v. *Brown*,

> *supra*, a court may require an agency to take action upon a matter, without directing how it shall act.

Attorney General's Manual 108. The Senate Judiciary Committee similarly recognized that, under Section 706(1), "[t]he court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion." Staff of the Senate Comm. on the Judiciary, 79th Cong., 1st Sess., *Administrative Procedure Act: Legislative History 79th Congress* 40 (Comm. Print 1945).[5]

When a court is asked to compel discrete "agency action" under Section 706(1)—such as the issuance of a regulation or the disposition of an administrative claim—the court may do so without interfering with the agency's discretion. The court simply orders the agency to take the particular action that has been "withheld" or "delayed," without directing what the substance of the action should be. That is not the case, however, when a court is asked to compel an agency to alter its day-to-day administration of a program, such as its management of public lands. In that situation, the question is not whether the agency has taken action at all, but instead is whether the agency's course of conduct is sufficient to satisfy the general standards in the governing statute or regulations. And the relief is not an order compelling the agency *to act* on a discrete matter, but instead is an order directing the agency *how to act* in a broad range of matters that may come before it in the future, *i.e.*, to take steps on a programmatic basis that are different from, or in addition to, the steps that the agency has considered appropriate. Such a

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[5] Several courts of appeals, including the Tenth Circuit, have analogized Section 706(1) relief to mandamus relief. See, *e.g.*, *Mt. Emmons Mining Co.* v. *Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997); *Independence Mining Co.* v. *Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997); *Potomac Elec. Power Co.* v. *ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

case almost inevitably requires a court to substitute its discretion for that of the agency, and to do so on a grand scale that is incompatible with the measured regime for judicial review of agency action that Congress put in place in the APA and with the separation of powers on which that regime is based.[6]

5. Equating reviewable "agency action" under Section 706(1) with reviewable "agency action" under Section 706(2) promotes the coherent application of the APA. "Almost any objection to an agency action can be dressed up as an agency's failure to act." *Public Citizen* v. *Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1107 (D.C. Cir. 1988); see *Ecology Ctr., Inc.* v. *United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). If "agency action" were to have a more expansive meaning in Section 706(1) than in Section 706(2), a plaintiff could circumvent the limitations on judicial review under Section 706(2) by proceeding instead under Section 706(1). A plaintiff could thereby obtain under Section 706(1) the same sort of "*wholesale* improvement" of an agency program that *National Wildlife Federation* forbids under Section 706(2). Indeed, the very agency conduct found unreviewable under Section 706(2) in *National Wildlife Federation* itself—"failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, * * * failure to provide required public notice, failure to provide adequate environmental impact statements," 497 U.S. at 891—could then be recharacterized and reviewed as agency action

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[6] Indeed, several courts have concluded that Section 706(1) authorizes relief "only when there has been a genuine failure to act" by the agency, and not when only the adequacy of the agency's action is at issue. *Ecology Ctr., Inc.* v. *United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999); accord, *e.g.*, *Sierra Club* v. *Peterson*, 228 F.3d at 568; *Public Citizen* v. *Nuclear Regulatory Comm'n*, 45 F.2d at 1107-1109; *Gillis* v. *Department of Health & Human Servs.*, 759 F.2d 565, 578 (6th Cir. 1985).

"unlawfully withheld or unreasonably delayed" under Section 706(1).

Moreover, if Section 706(1) is properly confined to suits to compel "agency action" of the sort that will be reviewable under Section 706(2) once it becomes final, parties will ordinarily be required to present their requests for such action to the agency in the first instance, see 5 U.S.C. 553(e), rather than go directly to court. The agency then is afforded the opportunity to consider the relevant legal and factual questions, develop an administrative record, and issue a decision on the request to the extent necessary to serve as the basis for any subsequent judicial review. See *Auer* v. *Robbins*, 519 U.S. 452, 459 (1997) (explaining that a complaint about an agency's failure to amend its regulations should have been presented initially to the agency through a petition for rulemaking); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (objections to how an agency conducts its business should generally be presented to the agency so that it may correct any errors).

By contrast, if suits are allowed under Section 706(1) to challenge alleged failures to satisfy general statutory standards, the courts will be called upon to conduct correspondingly broad-ranging factual inquiries into the manner in which the agency operates on a day-to-day basis, rather than to focus on a discrete "agency action" and the reasons given for that action by the agency itself in its administrative decision. That, in fact, is the very course that SUWA has sought and the court of appeals has endorsed in this case. See App., *infra*, 24a. Similarly, in *Montana Wilderness Association*, 314 F.3d at 1152, the Ninth Circuit remanded for a trial in the district court on whether the Forest Service had administered almost one million acres in seven wilderness study areas to maintain their wilderness character and potential for inclusion in the Wilderness System. The result is to stand the APA on its head by giving Section

706(1)—which was intended to be a narrow avenue of relief available only in extraordinary circumstances to compel performance of a discrete and clearly defined legal duty—the broadest scope of all of the judicial review provisions of the APA.

B. The Court of Appeals Erred In Holding That SUWA's Challenges To BLM's Management Of Off-Road Vehicle Use On Public Lands Are Cognizable Under Section 706(1)

The court of appeals held that BLM could be compelled under Section 706(1) to (i) manage wilderness study areas in Utah "in a manner so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. 1782(c); (ii) take a "hard look" at whether off-road vehicle use on certain public lands requires the preparation of supplemental environmental analyses under NEPA, 42 U.S.C. 4322(2)(C), and (iii) perform certain managerial tasks identified in its land use plans. None of those holdings represents a proper application of Section 706(1) under the standards identified above.

1. The court of appeals erred in concluding that Section 706(1) authorizes judicial review of BLM's "day-to-day management" of the wilderness study areas to assure that FLPMA's general non-impairment requirement is being satisfied. App., *infra*, 16a. As *National Wildlife Federation* explains, an agency's "day-to-day operations," and its management of public lands in particular, do not constitute "an identifiable 'agency action'" under the APA, "much less a 'final agency action.'" 497 U.S. at 890. The Court's reasoning in *National Wildlife Federation*, although directed at a claim under Section 706(2), is equally applicable to SUWA's claim under Section 706(1). The APA does not distinguish between those provisions in confining judicial review to "agency action" and, in the absence of a statute to the

contrary, to "final agency action." Thus, as Judge McKay observed, "review under the APA is strictly reserved for cases addressing *specific instances* of agency action or inaction rather than programmatic attacks." App., *infra*, 42a (McKay, J., dissenting in part).

Nor does the court of appeals' holding with respect to the FLPMA claim comport with the settled understanding that Section 706(1) authorizes only relief comparable to mandamus, *i.e.*, "to require an agency to take action upon a matter, without directing how it shall act." *Attorney General's Manual* 108. Neither SUWA nor the court of appeals disputed that BLM was taking some measures to satisfy FLPMA's non-impairment standard. Accordingly, in order to decide whether SUWA would be entitled to any relief on remand, the district court would have to determine whether those measures are sufficient to meet that very general standard and, if not, to order BLM to take different or additional measures. That approach would involve the court in how the agency exercises its discretion on an ongoing programmatic bases, including the exercise of its law-enforcemen functions with respect to violations of its restrictions on off-road vehicle use. See App., *infra*, 46a (McKay, J., dissenting in part) (any remedy granted in this case "would involve the district court in the ongoing review of every management decision allegedly threatening achievement of the nonimpairment mandate").

2. The court of appeals also erred in concluding that BLM could be compelled under Section 706(1) to take a "hard look" at conditions on the ground to determine whether to prepare supplemental environmental impact statements or environmental assessments under NEPA.

NEPA requires an agency to prepare an environmental impact statement only when it is proposing to undertake a "*major Federal action*[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C) (emphasis

added). The agency may undertake an environmental assessment to determine whether the proposed action requires an environmental impact statement. 40 C.F.R. 1501.4(b), 1508.9(a)(1), 1508.13. The agency is required to supplement an existing environmental impact statement or environmental assessment only in response to "significant new circumstances or information relevant to environmental concerns *and bearing on the proposed action or its impacts*." 40 C.F.R. 1502.9(c)(1)(ii) (emphasis added). In that specific context—where the major federal action to which the initial environmental impact statement or environmental assessment was directed has not yet occurred—courts have held that an agency must take a "hard look" at intervening developments to determine whether supplementation is required before the proposed action is taken or completed. See *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989).

An environmental impact statement or environmental assessment is not itself "final agency action" within the meaning of the APA. Standing alone, such NEPA analyses do not establish any rights, obligations, or other legal consequences. See *Bennett*, 520 U.S. at 177-178. They are instead a procedural prerequisite to a particular type of "final agency action"—namely, a decision by the agency to undertake a "major Federal action" that is subject to NEPA. 42 U.S.C. 4332(2)(C). Such "preliminary, procedural, or intermediate agency action" is "not directly reviewable" under the APA, although "it is subject to review on the review of the final agency action." 5 U.S.C. 704. For that reason, an agency's environmental impact statement or environmental assessment—much less an agency's "hard look" at whether even to prepare one—is not the sort of undertaking that may itself be compelled under Section 706(1).

In any event, BLM is not subject to the sort of clear, nondiscretionary duty that may be compelled under Section

706(1) to take a "hard look" at whether to supplement its NEPA analyses for the public lands involved in this case. Such a duty exists only when an agency is proposing to take a "major Federal action," 42 U.S.C. 4332(2)(C), see *Kleppe* v. *Sierra Club*, 427 U.S. 390, 401 (1976), and there is no suggestion that BLM has proposed any "major Federal action" for those lands. SUWA may well believe that BLM *should* take certain action (such as promulgating new regulations governing off-road vehicle use), preceded by an appropriate NEPA analysis, to address the environmental concerns raised in this case. And, if BLM were to take such action, SUWA could seek review of *that* decision, including the NEPA analysis conducted by BLM in connection with it, under *Section 706(2)* provided that ripeness requirements were satisfied. See *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726 (1998). But NEPA imposes no free-standing obligation on BLM to conduct an environmental analysis divorced from a proposed "major Federal action," and SUWA has no free-standing right enforceable under Section 706(1) to compel BLM to do so. The court of appeals therefore erred in holding that BLM violated a clear, nondiscretionary duty by electing to conduct its NEPA analysis in connection with—not independently of—its upcoming revisions of land use plans. App., *infra*, 38a.

3. The court of appeals finally erred in concluding that BLM could be ordered under Section 706(1) to perform two tasks—to monitor off-road vehicle use and to complete an off-road vehicle implementation plan—that BLM undertook to perform in its land use plans applicable to two areas. Such tasks are not "final agency action" that may be compelled under Section 706(1).

This Court has characterized the Forest Service's forest plans, which are the functional equivalent of BLM's land use plans, as "tools for agency planning and management," which are "merely programmatic in nature," subject to continuing

revision and refinement, and "often not fully implemented." *Ohio Forestry*, 523 U.S. at 735-737. The Court recognized that such plans, in and of themselves, "do not command anyone to do anything or to refrain from doing anything"; "do not grant, withhold, or modify any formal legal license, power, or authority"; "do not subject anyone to any civil or criminal liability," and "create no legal rights or obligations." *Id.* at 733. The Court therefore held that a challenge to provisions of a forest plan that allowed certain types of logging within a national forest was not ripe for adjudication, because no such logging could occur until the Forest Service rendered a final administrative decision—which would be reviewable final agency action—to permit logging at a specific site. See *id.* at 733-737.

For similar reasons, the managerial tasks that BLM undertakes to perform in its land use plans are not "final agency action" under the APA. A land use plan is not the "consummation of the agency's decisionmaking process," *Bennett*, 520 U.S. at 177-178 (internal quotation marks omitted), with respect to any site-specific action in the area covered by the plan. Nor does a land use plan create any legal rights or obligations. *Id.* at 178; see *Ohio Forestry*, 523 U.S. at 733. In the portions of the land use plans at issue here, for example, BLM agreed to monitor off-road vehicle use in one area and to prepare an off-road vehicle plan for another area. BLM's performance of those tasks would not "alter the legal regime," *ibid.*, in any respect concerning off-road vehicle use in those areas. It would, at most, provide information or analysis to assist BLM in taking future "final agency action" that would, in turn, have legal consequences for persons seeking to use the affected lands, such as the opening or closing of particular areas to off-road vehicle use. It is such "final agency action" at the end of the decision-making process that would be the basis for judicial review under Section 706(2), not the antecedent monitoring and

planning activities that SUWA seeks to compel in this case under Section 706(1).

Nor does FLPMA's provision that "[t]he Secretary shall manage the public lands * * * in accordance with the land use plan developed by him," 43 U.S.C. 1732(a), suggest that the management tasks described in land use plans are judicially enforceable directly and in their own right. Rather, as relevant here, that provision simply prevents BLM "from approving or undertaking affirmative projects inconsistent with its land use plans." App., *infra*, 49a (McKay, J., dissenting in part); see 43 C.F.R. 1610.5-3(a) ("All future resource management authorizations and actions, as well as budget or other action proposals to higher levels in the Bureau of Land Management and Department, and subsequent more detailed or specific planning, shall conform to the approved plan."). If BLM proposes a site-specific action that is inconsistent with the plan, a person adversely affected may pursue an administrative challenge, see 43 C.F.R. 1610.5-3(b), and seek judicial review of BLM's final decision on that discrete proposal. See *Ohio Forestry*, 523 U.S. at 732-737. Nothing in BLM's regulations, however, confers a right on any private person to challenge alleged deficiencies in BLM's day-to-day managerial performance under land use plans, including the conduct of monitoring and subsidiary planning activities such as those that are the subject of SUWA's challenge.[7]

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[7] The court of appeals relied on 43 C.F.R. 1601.0-5(c) for the proposition that BLM has a judicially enforceable duty to complete all oversight and managerial tasks contemplated in a land use plan. See App., *infra*, 26a, 29a. That regulation, however, is simply a *definition* of the word "consistent," which, in turn, is used as part of the definition of "conformity" or "conformance" in 43 C.F.R. 1601.0-5(b). Neither definition addresses whether BLM must perform general tasks referenced in land use plans, much less imposes an enforceable legal obligation on BLM to do so, as the court of appeals believed. Moreover, the regulation (quoted at

C. Review By This Court Is Warranted To Decide Whether Section 706(1) May Be Invoked To Challenge An Agency's Ongoing Management Of Public Lands And Other Programs

The courts of appeals are divided on whether Section 706(1) furnishes a basis for a programmatic challenge of the sort brought by SUWA here. Contrary to the Tenth Circuit in this case, the Fifth Circuit, sitting en banc, has held that Section 706(1) does not authorize judicial review of an agency's day-to-day management of public lands. *Sierra Club* v. *Peterson*, 228 F.3d at 569.

In *Sierra Club*, the plaintiffs filed suit under Section 706(1) and Section 706(2) of the APA to challenge the Forest Service's management of timber resources under the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*, and specifically its "entire program of allowing timber harvesting in the Texas forests." 228 F.3d at 563. The Fifth Circuit, relying on *National Wildlife Federation*, held that the suit was not cognizable under Section 706(2), because the plaintiffs were advancing a "programmatic challenge[]," not a challenge to "a specific and final agency action." *Id.* at 565-566. "[A]s in *Lujan* [v. *National Wildlife Federation*]," the court explained, the plaintiffs had "impermissibly attempted to 'demand a general judicial review of the [Forest Service's] day-to-day

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p. 24, *supra*) that identifies the agency activities that, when BLM decides to undertake them, must "conform" to the land use plan refer only to "future resource management authorization and actions" (*i.e.*, discrete final agency actions, which SUWA has not challenged in this case) and to budget or other proposals to higher officials and "subsequent more detailed or specific planning" (*i.e.*, planning and programmatic measures, which are not final agency action and therefore are not subject to judicial review under the APA). See 43 C.F.R. 1610.5-3(a).

operations.'" *Id.* at 566 (quoting *National Wildlife Federation*, 497 U.S. at 899).

The Fifth Circuit then held that the plaintiffs' challenge also was not cognizable under Section 706(1) on "the alternative theory that the Forest Service 'failed to act'" to protect timber resources. 228 F.3d at 568. The court acknowledged that, "[i]n certain circumstances, agency inaction may be sufficiently final to make judicial review appropriate." *Id.* at 568. The court explained, however, that "[t]he Forest Service's alleged failure to comply with the NFMA in maintaining Texas's national forests * * * does not reflect agency inaction." *Ibid.* "Instead," the court continued, "the Forest Service has been acting, but the [plaintiffs] simply do not believe its actions have complied with the NFMA." *Ibid.*

In contrast, the Ninth Circuit, consistent with the Tenth Circuit here, has permitted challenges under Section 706(1) to an agency's ongoing management of public lands. *Montana Wilderness Ass'n*, 314 F.3d at 1150-1152. There, the plaintiffs contended that the Forest Service was violating the Montana Wilderness Study Act of 1997, Pub. L. No. 95-150, 91 Stat. 1243, which requires that wilderness study areas in Montana be managed to maintain their wilderness character. The Ninth Circuit held that the suit was not cognizable under Section 706(2), because the Forest Service's challenged conduct "does not fit into any of the statutorily defined categories for agency action," 314 F.3d at 1150 (citing *National Wildlife Federation*, 497 U.S. at 899), and "does not 'mark the consummation of the [Forest Service's] decisionmaking process,'" *ibid.* (quoting *Bennett*, 520 U.S. 177). The court nonetheless held that the suit was cognizable under Section 706(1). The court reasoned that "[t]he simple fact that the Forest Service has taken some action to address the Act is not sufficient to remove the case from section 706(1) review." *Id.* at 1151. Accord *Center for*

Biological Diversity v. *Veneman*, No. 02-16201, 2003 WL 21517980 (9th Cir. July 7, 2003) (holding that an agency could be compelled under Section 706(1) to inventory rivers to assess their suitability for inclusion in the Wild and Scenic Rivers System while recognizing that such an inventory would not constitute final agency action reviewable under Section 706(2)).

* * * * *

This Court's review is warranted in order to make clear that an agency's ongoing programmatic activities are not subject to judicial review under Section 706(1), just as they are not subject to judicial review under Section 706(2); to resolve the inconsistency between this Court's holding in *National Wildlife Federation* and the Tenth Circuit's holding in this case regarding what constitutes reviewable "agency action" and the scope of judicial review under the APA; and to eliminate the disagreement among the courts of appeals as to when Section 706(1) may appropriately be invoked.

This Court has considered similar questions when, as here, a court of appeals has remanded a case to entertain a broad programmatic challenge to agency conduct. See, *e.g.*, *National Wildlife Federation*, 497 U.S. at 881-882; see also *Kleppe*, 427 U.S. at 395-396. Review by this Court is warranted to avoid extended proceedings in the lower courts in this case and others, during which the ability of BLM and the Forest Service to manage public lands throughout the West could be significantly disrupted. The limitations on judicial review under the APA have the critical function of preventing disruption of and judicial intrusion into ongoing agency decision-making and management—and thereby giving effect to the separation of powers under the Constitution. Those limitations therefore must be enforced at the

outset of litigation, as the district court (now reversed by the court of appeals) did in this case.

The question presented in this case is an important and recurring one. The question has thus far arisen principally in the context of challenges to an agency's management of public lands—more than 90% of which lie in the Ninth and Tenth Circuits, which have held that such challenges are cognizable under Section 706(1). The question also has the potential to arise in many other contexts in which plaintiffs may seek to alter an agency's ongoing administration of its programs. See App., *infra*, 43a-44a &n.3 (McKay, J., dissenting in part) (suggesting other such contexts). Whatever the particular context, the use of Section 706(1) endorsed in this case permits courts to engage in wide-ranging review of an agency's entire course of conduct, to order systemic changes in an agency's day-to-day operations that were not even sought from the agency in the first instance, and to divert scarce resources from the activities chosen by the agency, taking into account all relevant interests, to the activities preferred by the most litigious plaintiffs. As this Court recognized in *National Wildlife Federation*, however, plaintiffs "cannot seek *wholesale* improvement of [an agency's] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." 497 U.S. at 891. This Court's review is needed in order to make clear that this principle applies under Section 706(1) as under Section 706(2).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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