No. 17-533

In the Supreme Court of the United States

EASON LAND CO., LLC, ET AL., PETITIONERS

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a party who disagrees with an agency's implementation of an unchallenged discretionary decision may bring a claim under 5 U.S.C. 706(1) to compel the agency to implement the decision in a different manner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is available at 2017 WL 2889177. The order of the district court (Pet. App. 34-40) adopting the magistrate judge's findings and recommendation (Pet. App. 6-33) is not published in the Federal Supplement but is available at 2015 WL 1538501. The order of the district court denying reconsideration (Pet. App. 43-46) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2017. The petition for a writ of certiorari was filed on October 5, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners Jesse and Pamela White (the Whites) are lessees of private lands and water rights owned by petitioner Eason Land Co., LLC in eastern Oregon. The Whites also hold an associated grazing permit for three allotments of public land managed by the United States Bureau of Land Management (BLM). Pet. App. 6-7; see C.A. E.R. 303. This case primarily involves an allotment known as Jackies Butte.

The Jackies Butte area "has relatively few water sources, thereby limiting the amount of grazing that can occur." Pet. App. 8. To support grazing and other productive land uses, BLM "constructed and operated various reservoirs beginning in the 1960s." *Ibid.* That construction allegedly impaired the senior water rights of petitioners' predecessors-in-interest, the Easons. *Ibid.* In 1973, BLM and the Easons entered into written agreements addressing this issue. *Ibid.* The Easons agreed "to allow [BLM] to construct and maintain as many water structures and developments as may be necessary for proper management of the Jackies Butte Unit on which [the Easons] control the water right." *Ibid.* (quoting C.A. E.R. 257). The Easons also agreed to interpose no further objection to BLM's "reservoir construction or water use." *Id.* at 54. In return, BLM agreed to grant the Easons expanded grazing rights—namely, an additional 1400 Animal Unit Months (AUMs) of forage beyond the amount allocated under their grazing permits. *Id.* at 8-9.[1] The agreements were

[1] An AUM is "the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." 43 C.F.R. 4100.0-5. The amount of forage authorized for use on public lands under a BLM grazing permit is typically expressed in AUMs.

binding upon successors and assigns, including petitioners. *Id.* at 9; see C.A. E.R. 257.

b. Notwithstanding their agreement to allow BLM to build the reservoirs and use the water, petitioners in 2006 submitted a "call for water" to the Oregon Water Resources Department (OWRD). Pet. App. 9.[2] OWRD then directed BLM to "develop a plan to meet [petitioners' call] and any future calls for water." *Ibid.* BLM prepared an Environmental Assessment (EA) pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, to study "the best course of action to take" to "comply with Oregon State water law by satisfying a senior water right call in a way that fits within the BLM's budget and time limitations." C.A. E.R. 257. The EA explained that BLM has a legal obligation to "release water in response to calls to satisfy senior water rights," but that BLM has "discretion" to decide "how that water would be released." *Ibid.*

After reviewing the options, the EA stated that "there is no economically feasible way of vacating water from [BLM's] reservoirs short of eliminating most of the structures." C.A. E.R. 257. BLM could, however, "retrofit and reconstruct a few of the existing reservoirs to allow for future water delivery." *Ibid.* The EA accordingly proposed that the reservoirs "would either be retrofitted * * * or would otherwise be abandoned." *Ibid.* The EA also proposed cancelling petitioners' 1400 AUMs of supplemental grazing rights because petitioners had breached their 1973 agreement with BLM, and because the "[p]ublic benefits of maintaining the agreement are no longer present in the absence of dependable water in reservoirs to support livestock grazing,

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[2] A "call for water" is a demand for water pursuant to senior water rights. See, *e.g.*, *Colorado* v. *New Mexico*, 467 U.S. 310, 319 (1984).

wild horses, and other public land uses." *Id.* at 258; see Pet. App. 54-55.

In 2008, BLM issued a Proposed Decision adopting the EA's proposal to retrofit or abandon the reservoirs as "the most practical means of complying with Oregon State Water Law and satisfying [petitioners'] call for water." Pet. App. 49. The Proposed Decision explained that petitioners' allotment of 1400 additional AUMs would be proportionally reduced as each reservoir was "removed or retrofitted for water delivery." *Id.* at 49-50. The Proposed Decision explained that a written protest or administrative appeal could be filed contesting the decision. *Id.* at 62-65. No party filed a protest or appeal, and the Proposed Decision accordingly became the Final Decision. *Id.* at 10; see C.A. E.R. 313.

c. Between late 2008 and early 2011, BLM "performed work on 19 of the 20 reservoirs and reduced [petitioners'] 1,400 AUMs accordingly." Pet. App. 11; see C.A. E.R. 296-297 (describing BLM's work and noting that OWRD had "not requested that BLM breach or retrofit" the remaining reservoir). BLM then discontinued the balance of petitioners' supplemental AUMs and asked OWRD for "direction" on any further actions "required of the BLM to satisfy" its obligation to meet petitioners' call for water. Pet. App. 11 (citation omitted). OWRD "thank[ed]" BLM for its "cooperation and for the completion of the plan" and confirmed that BLM's work "would allow timely releases to satisfy downstream senior water right calls." *Ibid.* (internal quotation marks and citation omitted).

Petitioners "nonetheless believed that the BLM had not completed all work described within the EA." Pet. App. 11. Accordingly, petitioners hired a paid consultant to prepare a report on BLM's implementation of the

2008 decision. *Id.* at 12. The consultant concluded that BLM had adequately carried out the decision with respect to some of the reservoirs but had not fully completed removal or retrofitting at others. *Ibid.* Petitioners then asked BLM for a response to their consultant's report. *Ibid.* BLM responded that it was "working closely with OWRD" to address remaining issues and that the agency, "in accordance with direction from OWRD," would "take the necessary actions to release all possible water when a call [is] made." *Ibid.* (citation omitted).

2. a. Petitioners initiated this case against respondents in the District of Oregon in 2014. As relevant here, petitioners alleged that BLM had "unlawfully withheld or unreasonably delayed" implementing the 2008 decision. C.A. E.R. 320-321 (quoting 5 U.S.C. 706(1)).[3] Petitioners asked the district court to order BLM "to immediately remove and retrofit all water projects implicated in the" 2008 decision or, alternatively, to restore petitioners' additional AUMs "in proportion to the amount of water still being stored in BLM's reservoirs." *Id.* at 321. BLM moved to dismiss, contending that the court lacked subject matter jurisdiction over petitioners' claim and that petitioners had failed to state a claim on which relief could be granted. See Pet. App. 15.

b. The district court referred BLM's motion to dismiss to a magistrate judge, who issued findings and a recommendation that the motion be granted. Pet. App. 6-33. The magistrate judge first concluded that petitioners lacked standing because they had not "suffered an injury-in-fact that is concrete, particularized, actual,

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[3] Petitioners' complaint asserted several other claims, see C.A. E.R. 317-322, but petitioners expressly abandon all but the Section 706(1) claim here, see Pet. 33-34.

imminent, and likely to be redressed by a favorable ruling." *Id.* at 17. Specifically, the magistrate judge noted that petitioners had not alleged that BLM had denied "the water they want and/or need to satisfy" their senior water rights. *Ibid.* To the contrary, the magistrate judge noted that OWRD had "reviewed the BLM's work and determined" that BLM's actions were sufficient "to satisfy downstream senior water rights." *Ibid.* (citation omitted). For similar reasons, the magistrate judge concluded that petitioners' claim was not ripe. *Id.* at 17-18.

In the alternative, the magistrate judge concluded that petitioners had failed to state a claim on which relief could be granted. Pet. App. 26-32. The judge noted that a claim under 5 U.S.C. 706(1) can proceed "only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Pet. App. 26 (quoting *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (*SUWA*)). Petitioners, however, did not identify any sources of law that "require the BLM to eliminate or retrofit reservoirs, or reinstate contractually-authorized supplemental AUMs." *Id.* at 27. Indeed, the EA itself recognized that BLM has "discretion" over how to release water to satisfy petitioners' rights. *Id.* at 29 (quoting C.A. E.R. 257). And "both parties" had identified "means outside of those discussed in the EA through which a call for water * * * could be fulfilled," thereby emphasizing "BLM's considerable discretion." *Ibid.* In addition, the magistrate judge noted, petitioners "have recourse with" OWRD as "the state agency charged with administration of the laws governing water resources." *Id.* at 30.

c. The district court issued an order adopting the magistrate judge's findings and dismissing petitioners' complaint. Pet. App. 34-40.

3. The court of appeals affirmed in an unpublished memorandum disposition. Pet. App. 1-5. The court noted that petitioners "do not challenge the substance of" BLM's 2008 decision but instead challenge only "the BLM's implementation of that decision." *Id.* at 3. As the court explained, however, "actions that an agency takes to implement a decision are not, themselves, agency actions within the meaning of" 5 U.S.C. 706(1). Pet. App. 3. Moreover, the court noted, petitioners had not identified "any statute or regulation" requiring BLM to undertake the measures that petitioner sought to compel. *Id.* at 3-4 (citing *SUWA*, 542 U.S. at 65). Those measures were thus not "legally required." *Id.* at 3. Because petitioners did "not challenge a failure to take or unreasonably delay a discrete agency action that is legally compelled," the court concluded, "the district court did not have subject matter jurisdiction over their § 706(1) claim." *Id.* at 4.

ARGUMENT

Petitioners contend (Pet. 12-19) that the court of appeals erred in applying this Court's decision in *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*), to conclude that petitioners had not challenged a discrete and mandatory agency action as required under 5 U.S.C. 706(1). Petitioners are mistaken. The unpublished disposition below correctly held that petitioners' challenge to BLM's implementation of the 2008 decision implicates neither a "discrete" nor a legally "required" action by BLM. *SUWA*, 542 U.S. at 64 (emphasis omitted). That resolution does not conflict with any decision of this Court or any court of appeals. Further review is unwarranted.

1. The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. "[A]gency action" is defined to include "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). Under 5 U.S.C. 706(1), a court has jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed."

In *SUWA*, this Court explained that "a claim under [Section] 706(1) can proceed only where a plaintiff asserts that an agency failed to take [1] a *discrete* agency action" that [2] the agency is legally "*required to take*." 542 U.S. at 64. The first limitation—that an agency action be "discrete"—precludes a claim for general "'programmatic improvements'" and ensures that a plaintiff complies with the APA's text by directing a challenge to "'some particular "agency action" that causes it harm.'" *Ibid.* (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). The second limitation—that the agency action be "legally required"—"rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law)." *Id.* at 65. Together, these limitations mean that the APA "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter,'" but not to "'direct[] *how*'" the agency "'shall act.'" *Id.* at 64 (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (photo reprint 1973) (1st ed. 1947), https://archive.org/details/AttorneyGeneralsManualOnThe

AdministrativeProcedureActOf1947); see also *ibid.* (tracing the APA's standard to the traditional requirements for a writ of mandamus).

Applying this test in *SUWA*, this Court held that a provision of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*, requiring BLM to act "in accordance with" or "conform to" certain land use plans did not give rise to a discrete, legally required obligation that could be compelled under Section 706(1). *SUWA*, 542 U.S. at 69. Although the land use plans at issue in *SUWA* provided that BLM "will take" certain actions that the challengers alleged the agency had not taken, *ibid.* (internal quotation marks omitted), the Court explained that "[g]eneral deficiencies in compliance * * * lack the specificity requisite for agency action," *id.* at 66. Although a land use plan "guides and constrains actions," the Court noted, it "does not (at least in the usual case) prescribe them." *Id.* at 71. Indeed, it "would be unreasonable to think that either Congress or the agency intended otherwise," because requiring rigid adherence to land use plans "would commit the agency to actions far in the future, for which funds have not yet been appropriated." *Ibid.* Moreover, allowing courts to compel the performance of such actions "would lead to pervasive interference with [the agency's] own ordering of priorities," which is "not contemplated by the APA." *Id.* at 67, 71.

2. The court of appeals correctly applied *SUWA* to reject petitioners' claim under Section 706(1). Petitioners do not bring any contract-based claim, and they "do not challenge the substance of the" 2008 decision; rather, they challenge only "the BLM's implementation of that decision." Pet. App. 3; see *id.* at 15 n.5. As the court correctly explained, petitioners' disagreement

with the manner in which BLM implemented the 2008 decision does not implicate any "*discrete*" or "legally *required*" agency action that can be challenged under Section 706(1). *SUWA*, 542 U.S. at 63.

a. Petitioners fail to challenge a "discrete" agency action. *SUWA*, 542 U.S. at 63. BLM adopted its 2008 decision in response to a directive from OWRD to "develop and implement a plan to deliver water from" its reservoirs to satisfy petitioners' call for water and other potential such calls. Pet. App. 48; see *id.* at 9. BLM responded to that general and open-ended directive with a general and open-ended plan to "retrofit and reconstruct a few of the existing reservoirs to allow for future water delivery" and to abandon the others, "in a way that fits within the BLM's budget and time limitations." C.A. E.R. 257. BLM implemented that plan by taking a panoply of different measures to make water available. Specifically, BLM "breached seven reservoirs, removed five reservoirs, installed a diversion structure on one reservoir to discontinue water storage, and retrofitted six reservoirs with a pipe and headgate or siphon." *Id.* at 296.

Against this backdrop, petitioners' generic request that BLM "comply with its 2008 Decision," Pet. 12—a decision implemented through numerous different measures at numerous different reservoirs—is quite different from the "precise, definite act" that a challenger must identify to satisfy the discreteness requirement of Section 706(1). *SUWA*, 542 U.S. at 63 (citation omitted). Petitioners' request is instead comparable to the claim seeking "general enforcement of plan terms" that *SUWA* rejected. *Id.* at 71; see *id.* at 66 (noting that "[g]eneral deficiencies in compliance * * * lack the

specificity requisite for agency action"); accord *National Wildlife Fed'n*, 497 U.S. at 891 (rejecting request for general "programmatic improvements"). Granting petitioners' requested relief would require a court to determine which specific work is needed at which specific reservoirs, and then to order BLM to undertake that work. That is just the sort of "pervasive oversight by federal courts over the manner and pace of agency compliance" that *SUWA* deemed impermissible. 542 U.S. at 67; see *id.* at 71 (noting that such relief would require "pervasive interference with BLM's own ordering of priorities").

Moreover, the court of appeals' holding that the "actions that an agency takes to implement a decision are not, themselves, agency actions within the meaning of § 706(1) of the APA," Pet. App. 3, accords with the lower courts' consistent understanding and application of *SUWA*. For example, in *Village of Bald Head Island* v. *United States Army Corps of Engineers*, 714 F.3d 186, 193 (4th Cir. 2013), the plaintiff did "not challenge the *approval* of the project [in 2000]; rather it challenge[d] the Corps' *performance* of it, particularly focusing on a period in 2010." The Fourth Circuit held that although this "alleged failure was a failure to take 'action' in its broadest sense, it was not a determination—*i.e.*, a 'rule, order, license, sanction, relief, or the equivalent'—that is 'action' as used in the APA." *Id.* at 194 (quoting 5 U.S.C. 551(13)); see also *Fund for Animals, Inc.* v. *U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 20 (D.C. Cir. 2006) (holding that a BLM "strategy" that "represents the sum of 'many individual actions'" is not discrete agency action under *SUWA*) (citation omitted)). Likewise, Ninth Circuit decisions predating the one below have consistently recognizing that an agency's activities

are not "final agency action" where those activities merely "implement" the agency's formal plans. *Wild Fish Conservancy* v. *Jewell*, 730 F.3d 791, 801 (2013); see also, *e.g.*, *California Sportfishing Prot. Alliance* v. *Federal Energy Regulatory Comm'n*, 472 F.3d 593, 599 (2006); *Montana Wilderness Ass'n, Inc.* v. *United States Forest Serv.*, 314 F.3d 1146, 1150 (2003), *vacated on other grounds*, 542 U.S. 917 (2004).

Petitioners attempt to evade *SUWA*'s discreteness limitation by contending that "BLM's failure to comply with its 2008 Decision is a failure to provide 'relief,' which is a type of agency action" under 5 U.S.C. 551(13). Pet. 12 (citation omitted). More specifically, petitioners contend that the relief they seek to compel is "other action" that derives from the 2008 decision. *Ibid.* (citation and emphasis omitted). But petitioners have not challenged the 2008 decision, see Pet. App. 3, and, in any event, the relevant question is not whether petitioners have challenged "agency action" in some general sense, but whether they have identified "*discrete* agency action" that can be compelled under Section 706(1), *SUWA*, 542 U.S. at 64. As explained above, and as the court of appeals correctly held, they have not.

b. Even if petitioners did challenge a discrete agency action, their claim would still fail because they did not challenge an agency action that is "legally required." *SUWA*, 542 U.S. at 63; see Pet. App. 3-4.

As the court of appeals explained, petitioners do "not identify any statute or regulation" that requires BLM to grant them the relief they seek. Pet. App. 3-4. Indeed, the only document that petitioners identify as a potential source of a legally enforceable obligation is the 2008 decision itself. Pet. 16-19. But as noted, petitioners do not challenge the 2008 decision itself. Pet. App.

3. And the 2008 decision does not give rise to any legally required obligations on the part of BLM. To the contrary, the EA proposal that BLM adopted in the 2008 decision, *id.* at 49, explained that BLM has a legal obligation to "release water in response to calls to satisfy senior water rights," but that BLM has "discretion" to decide "how that water would be released," C.A. E.R. 257; see also Pet. App. 29 (magistrate judge relying on this provision). Moreover, as the magistrate judge observed, "both parties" identified "means outside of those discussed in the EA through which a call for water * * * could be fulfilled," thereby emphasizing "BLM's considerable discretion" in deciding how to meet petitioners' water call. Pet. App. 29.

Petitioners have thus identified no "specific, unequivocal command" that requires BLM to undertake the additional work at the reservoirs that petitioners desire. *SUWA,* 542 U.S. at 63 (citation omitted). At most, the 2008 decision includes statements that the agency "'will' take this, that, or the other action," but that is precisely what *SUWA* found insufficiently binding to support a claim under Section 706(1). *Id.* at 69; see *id.* at 72 (explaining that "'will do' projections of agency action set forth in land use plans * * * are not a legally binding commitment enforceable under" Section 706(1)). BLM's only legal duties regarding petitioners' downstream water rights stem from Oregon law, which requires BLM to comply with direction from OWRD to avoid interfering with senior rights. See C.A. E.R. 257. Oregon law, however, does not specify particular actions that BLM must take with respect to any reservoir. Thus, while petitioners may "have recourse with * * * OWRD," they have no recourse with BLM under Section 706(1). Pet. App. 30.

For similar reasons, petitioners' assertion that the 2008 decision operates as an "adjudicatory decision" in their favor that binds BLM is misplaced. Pet. 19. The 2008 decision was not an adjudication in favor of petitioners; it was a discretionary decision undertaken in response to a request from OWRD. Pet. App. 9. Petitioners' only participation in the decision-making process was to "administratively comment[]" on the EA. *Id.* at 10. Consequently, the decision created no rights in favor of petitioners—and no correlative duties in BLM—that are similar to those in the mandamus decisions on which petitioners exclusively rely (Pet. 16-19).

3. In addition to being correct on the merits, the decision below does not warrant this Court's review for several other reasons. Petitioners do not allege any conflict among the courts of appeals regarding application of this Court's decision in *SUWA*. To the contrary, petitioners acknowledge that "the Ninth Circuit is not alone" in its interpretation of Section 706(1). Pet. 25; see also pp. 11-12, *supra*. Petitioners contend that the questions presented have "exceptional importance" for APA adjudication. Pet. 19 (capitalization altered and emphasis omitted). But the court of appeals' resolution of petitioners' claims in a brief, unpublished memorandum disposition belies that assertion, as does the absence of disagreement among the courts of appeals.

Finally, this case is ill-suited for further review because it has minimal practical importance. Petitioners do not contend that BLM has impaired their water rights to such a degree that a call for water based on those rights would not be fulfilled. Indeed, the district court—adopting the magistrate judge's recommendation —concluded that petitioners had failed to establish

their standing or the ripeness of their claim for this reason. See Pet. App. 17-18, 35. Although the government stated in its brief below that the court of appeals need not reach the question of petitioners' standing because petitioners' failure to satisfy the requirements of 5 U.S.C. 706(1) independently warranted dismissal for lack of jurisdiction, see Gov't C.A. Br. 18-19 n.11, the absence of any significant effect on petitioners' underlying water rights further counsels against this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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