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Southern Utah Wilderness Alliance v. Norton: The Continuing Battle to Hold the Bureau of Land Management Accountable for Off-Road Vehicle Damage

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SOUTHERN UTAH WILDERNESS ALLIANCE V. NORTON: THE CONTINUING BATTLE TO HOLD THE BUREAU OF LAND MANAGEMENT ACCOUNTABLE FOR OFF-ROAD VEHICLE DAMAGE

I. INTRODUCTION

Motorized off-road vehicle (ORV) use on the 264 million acres of public land administered by the Bureau of Land Management (BLM) has increased substantially in recent years. The effect of ORV use on the environment raises a current and controversial issue. Thirty years ago, President Richard Nixon signed Executive Order 11,644 in an attempt to control the use of ORVs for the purpose of protecting natural resources, providing safety for recreationists and minimizing conflicts among the various uses of the land. According to the Southern Utah Wilderness Alliance (SUWA), Executive Order 11,644 has been generally ignored, leading to the adoption of regulations by the Department of Interior.
that sought to enforce the Order. These regulations directed BLM to designate all public lands as open, limited, or closed to ORVs; to designate trails available for ORV use with a focus on environmental issues such as endangered species and impairment of wilderness; and to monitor the effects of ORV use on public land resources. Despite Department of Interior regulations, SUWA claims that BLM has done little to regulate the use of ORVs on public lands, including those areas proposed for wilderness designation.

In *Southern Utah Wilderness Alliance v. Norton*, the United States Court of Appeals for the Tenth Circuit decided whether BLM violated the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA) by failing to properly manage ORV use on federal lands classified by BLM as Wilderness Study Areas (WSA), or as having “wilderness qualities.” The Tenth Circuit in *Norton* concluded that the district court erred both in dismissing the case for lack of subject matter jurisdiction and in concluding that SUWA failed to state a claim that BLM had a duty to consider a Supplemental Environmental Impact Statement (SEIS) based on new circumstances. Conservationists considered the Tenth Circuit’s decision a victory, claiming that BLM should be held more accountable for its failure to protect wilderness areas from ORV damage.

This Note focuses on three claims against BLM addressed by the Tenth Circuit in *Norton*. The first claim involves whether BLM has a statutory duty to manage WSAs according to the nonimpairment requirement of FLPMA. The second claim focuses on

4. See *BLM Ignores Existing Laws*, supra note 3 (providing background on reasons for Southern Utah Wilderness Alliance’s [hereinafter SUWA] claims against BLM); see also 43 C.F.R. §§ 8341-43 (2002) (explaining regulations established by Department of Interior to implement Executive Order 1644).

5. See *BLM Ignores Existing Laws*, supra note 3 (addressing various responsibilities of BLM after establishment of regulations by Department of Interior).

6. See *Southern Utah Wilderness Alliance, Campaign: Off-Road Vehicle - Introduction*, supra note 2 (providing basis for SUWA suit against BLM).

7. 301 F.3d 1217 (10th Cir. 2002).

8. Id. at 1222 (identifying general issue addressed by court of appeals).

9. See id. at 1222-23 (noting disagreement of Tenth Circuit in *Norton* with district court’s dismissal).


11. See *Norton*, 301 F.3d at 1222 (identifying three claims against BLM). For further discussion of the three primary claims involved in *Norton*, see infra notes 75-127 and accompanying text.

12. See id. at 1223-24 (explaining general issue involved in first claim by SUWA against BLM).
whether BLM failed to carry out its mandatory duty to manage several areas in accordance with its own land use plans (LUPs). The third claim deals with NEPA and BLM's alleged failure to take a "hard look" at information suggesting a substantial increase in ORV use.

Part II of this Note provides a brief summary of the facts of Norton. Part III explains the ORV problem, the role of BLM and the primary legislation at issue, namely FLPMA, NEPA, and section 706 (1) of the Administrative Procedure Act (APA). Part IV discusses the Tenth Circuit's analysis in Norton of the applicable statutes and relevant case law applied to BLM's alleged failure to act. Part V involves a critical analysis of the Tenth Circuit's findings and an additional focus on the dissenting opinion. Finally, Part VI presents the impact of the Tenth Circuit's holding in Norton on BLM and other administrative agencies, the future of remaining wilderness areas and the implications for recreational ORV users.

II. FACTS

In 1972, President Richard Nixon signed Executive Order 11,644, directing federal agencies, including BLM, to "designate specific areas and trails on public lands where ORVs may or may not be permitted; locate ORV trails to minimize damage to the soil, streams, vegetation, and wildlife habitat; set a deadline for making those designations; and monitor the effectiveness of the designations." To reaffirm this Order, which had been generally ignored, President Jimmy Carter issued a second, more explicit declaration.
Executive Order 11,989. Order 11,989 directed agencies to close areas or trails to ORV use when such vehicles were causing or might cause "considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat, or cultural or historic resources of particular areas or trails of public lands." The Department of Interior regulations eventually implemented these Orders by directing BLM offices to classify all public lands as open, limited or closed to ORVs, and to designate trails available for ORV use based on resource protection needs, safety of all users or public lands and minimization of conflicts among land users. In 1995, the United States General Accounting Office reviewed implementation of the Executive Orders in Utah and eight other locations across the country and found a lack of effective monitoring of ORV use, failure to document adverse effects and a disregard of necessary corrective actions.

In October 1999, SUWA brought suit in the United States District Court of Utah against BLM, claiming that it had unsuccessfully performed its statutory and regulatory duties by failing to prevent harmful environmental effects associated with the use of ORVs. SUWA sought relief under the APA claiming that BLM should be compelled under section 706(1) to carry out mandatory, nondiscretionary duties required by both FLPMA and NEPA. The district court allowed a group of ORV users to intervene in the suit, and SUWA subsequently filed a second amended complaint asserting ten causes of action against BLM and
seeking to have the district court compel agency action under APA section 706(1). The district court denied the preliminary injunction requests, rejected SUWA’s arguments and dismissed the relevant claims for lack of subject matter jurisdiction. The district court implied that BLM could not be compelled to comply with provisions in a land use plan promulgated pursuant to the FLPMA unless or until BLM undertook or authorized an “affirmative project” that conflicted with a specific LUP requirement. The district court concluded that BLM did not abuse its discretion in determining that an SEIS was unnecessary based on new information about increased ORV use. On appeal, the Tenth Circuit Court of Appeals reversed the holdings and remanded the case to the district court.

III. BACKGROUND

*Southern Utah Wilderness Alliance v. Norton* focuses on BLM’s duties under various statutes, such as FLPMA, NEPA, and section 706(1) of the APA, and addresses whether BLM adhered to these duties. To fully understand SUWA’s claims against BLM, it is necessary to discuss the ORV issue as well as the pertinent Acts and their implications.

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27. See id. (adding that SUWA filed second amended complaint). For a further discussion of APA § 706(1), see *infra* notes 55-62 and accompanying text.

28. See Norton, 301 F.3d at 1223. In response to this motion, the Recreationists explained that the claims were not actionable under § 706(1) and should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. *Id.*

29. See id. The district court based its conclusion on the reasoning that as long as an agency is taking some action toward fulfilling mandatory, nondiscriminatory duties, agency action may not be compelled pursuant to section 706(1) of the APA. *See id.*

30. See id. (noting district court’s view of compulsion of agency action regarding land use plans [hereinafter LUPs]).

31. See id. (expressing district court’s opinion that supplemental environmental impact statement [hereinafter SEIS] was not necessary).

32. See id. The Tenth Circuit noted that the remand was narrow, concluding only that the district court erred in dismissing the case for lack of subject matter jurisdiction and in concluding that that SUWA failed state a claim that BLM had a duty to consider an SEIS based on new circumstances. *Id.*

33. See Norton, 301 F.3d at 1223 (addressing general issues discussed in *Norton*).
A. Off-Road Vehicles and Bureau of Land Management Responsibilities

Off-Road Vehicle use happens to be one of the most environmentally destructive outdoor recreational activities. In addition to creating noise pollution, ORVs "leave a trail of destruction involving the soils, vegetation, wildlife, and air quality." ORV use has grown exponentially in the past decade and is becoming the single-fastest growing threat to the nation's public lands. Technological advances, the development of a well-organized ORV lobby and the establishment of ORV routes on public lands have facilitated this growth.

The Bureau of Land Management acts as the nation's largest public landowner and manages 264 million acres of land, approximately one-eighth of the land in the United States. BLM currently permits various types of ORV use on over ninety percent of the land under its jurisdiction, allowing ORV use to increase and causing the problem to mushroom. Although BLM has the authority to implement a successful management program through existing executive orders and regulations, critics claim that BLM's existing strategies are weak and ineffective. According to conservationists, the "BLM has repeatedly failed to make required trail designations . . . has consistently failed to make required findings


35. Id. The Wilderness Society states that ORVs include motorcycles, All-Terrain Vehicles (ATVs), 4-wheel drive vehicles if used off-road, snowmobiles and personal watercraft such as jet skis. See Wilderness Society, Off-Road Vehicles: Our Campaign, at http://www.wilderness.org/standbylands/orv/#ORVs (last visited Jan. 20, 2003).

36. See National Problem, supra note 34 (noting severity of ORV problem on natural integrity of public lands).

37. See id. (identifying increase in ORV use and reasons for growth of problem).


40. See id. (explaining Wilderness Society's claim that BLM has failed to implement effective management program despite its power to do so).
regarding the minimization of environmental impacts and it lacks adequate procedures for monitoring current ORV use.41

B. The Federal Land Policy and Management Act

In 1976, Congress recognized the need to provide guidance in the management of public lands and created a complex and comprehensive statute known as the Federal Land Policy and Management Act.42 FLPMA prompted the establishment of a national policy requiring land to be managed "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological value."43 FLPMA essentially shifted BLM policy away from transferring property and resources to private interest and toward favoring federal ownership and management of public lands.44

1. Designating Potential Wilderness

FLPMA created "wilderness" as a possible category for BLM land by compelling BLM to analyze its land for possible wilderness qualities and requiring protection of land with such qualities.45 FLPMA created a two-pronged inventory process to establish wilderness areas on BLM land.46 First, BLM would conduct an initial inventory during which the Secretary of the Interior would identify wilderness inventory units, defined as roadless areas of five thousand acres or more that may have wilderness characteristics.47 Second, BLM would conduct an intensive inventory of these units to determine whether they possessed wilderness characteristics that

41. See ORVs on BLM Lands, supra note 38. "Executive Orders 11644.44 and 11989 were issued with the goal of establishing policies for controlled and safe use of ORVs on public lands, including a mandate to designate trails on which the use of ORVs may not be permitted for fear of adverse effects on wilderness characteristics." Id.
42. See Rocky Mountain Oil & Gas Ass’n v. Watt, 696 F.2d 734, 737-38 (10th Cir. 1982) (discussing creation of FLPMA as means of managing BLM lands).
45. Id. at 211 (focusing on FLPMA’s creation of wilderness as possible category for BLM land).
46. See Utah v. Babbitt, 137 F.3d 1193, 1198 (10th Cir. 1998) (noting creation of FLPMA’s two-pronged inventory process).
47. Id. (discussing process by which “wilderness” is established on BLM lands through initial inventory).
would require them to be designated as WSAs.\footnote{48} FLPMA then mandated that the Secretary of the Interior would review the WSAs within fifteen years and recommend to the President the WSAs suitable for preservation as wilderness.\footnote{49} The FLPMA provides that only Congress can designate land for wilderness preservation, and until it does so, BLM must continue to manage WSAs “in a manner so as not to impair the suitability of such areas for preservation as wilderness.”\footnote{50}

2. \textit{Nonimpairment Mandate Under FLPMA}

FLPMA requires an immediate and continuous obligation on the part of BLM to ensure that areas designated as WSAs be managed in a way that guarantees the land satisfies the definition of wilderness at the time Congress makes a decision on the area.\footnote{51} Under this nonimpairment mandate, BLM may only authorize “nonimpairing” activity in the WSAs.\footnote{52} Such activity must meet two criteria to be considered nonimpairing.\footnote{53} First, the activity must be temporary in nature so that it does not “create surface disturbance or involve permanent displacement of structures.”\footnote{54} Second, after the activity terminates, the wilderness values must not have been degraded to a degree that significantly constrains Congress’s right to decide if the area is suitable for preservation as wilderness.\footnote{55}

\footnotesize
\begin{itemize}
\item \footnote{48} Id. (noting second phase of establishing wilderness areas on BLM land under FLPMA).
\item \footnote{49} 43 U.S.C. § 1782(a) (2000); see also Babbitt, 137 F.3d at 1198 (discussing “reporting” phase involving Secretary’s recommendations to U.S. President and President’s recommendations to Congress). Under FLPMA, the President has two years after receiving the Secretary’s report to submit to Congress his recommendations on designating certain areas as wilderness. See 43 U.S.C. § 1782(b) (describing Presidential recommendation for designation as wilderness).
\item \footnote{50} 43 U.S.C. § 1782(c) (stating status of lands during period of review and determination).
\item \footnote{51} See Sierra Club v. Hodel, 848 F.2d 1068, 1075 (10th Cir. 1988) (noting that obligation on BLM to manage WSA is immediate and continuous).
\item \footnote{52} See \textit{Interim Management Policy and Guidelines for Land Under Wilderness Review}, 44 Fed. Reg. 72,014, 72,021-22 (Dec. 12, 1979) (describing aspects of BLM’s interim management policy).
\item \footnote{53} See id. at 72,022 (noting two criteria for consideration as nonimpairing).
\item \footnote{54} See \textit{id.} (identifying first criteria of temporal nature).
\item \footnote{55} \textit{See id.} (explaining second criteria for consideration as nonimpairing).
\end{itemize}
C. Administrative Procedure Act Section 706(1)

In 1946, Congress created section 706(1) of the APA to remedy agency delay and inaction. APA Section 706(1) provides that federal courts shall "compel agency action [that is] unlawfully withheld or unreasonably delayed." Agency action is "unreasonably delayed" when the agency has no concrete deadline and is governed only by general timing provisions. "Unlawfully withheld" agency action exists when an agency fails to comply with a statutorily imposed deadline. Under either of these categories, federal courts may order agencies to act only when the agency fails to carry out a mandatory, nondiscretionary duty.

Courts have noted a difference between compelling agency action and ordering a particular outcome, and have held that even if an agency is compelled to act, it still maintains discretion over the specific outcome of the action. To avoid the possibility of judicial abuse, the Senate Committee on the Judiciary emphasized that section 706(1) was not intended to permit judicial interference in the administrative process by directing agencies to reach specific outcomes. The congressional intent of section 706(1) was to avoid violating the separation of powers by directing the agencies' exercise of discretion.

58. Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999) (explaining when agency action is considered "unreasonably delayed").
59. See id. (describing when agency action is considered "unlawfully withheld").
60. See id. at 1190-91 (identifying when federal courts can order agencies to act). Some courts, however, have held that an agency cannot be compelled to act under § 706(1) if there is evidence that it took some partial action. See Ecology Ctr., Inc. v. United States Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999) (holding where relief was not granted under § 706(1) because Forest Service merely failed to conduct its duty under forest plan and NFMA Regulations); see also Public Citizen v. Nuclear Regulatory Comm'n, 845 F.2d 1105, 1108 (D.C. Cir. 1988) (holding that cautioned courts against entertaining § 706(1) claims where agency took some partial action); see e.g., Nevada v. Watkins, 939 F.2d 710, 715-16 (9th Cir. 1991) (holding that issuance of preliminary guidelines for evaluating nuclear waste disposal was not final agency action because of Congressional intent).
61. See Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1172 (10th Cir. 1997) (noting difference between compelling agency action and ordering particular outcome).
62. Miaskoff, supra note 56, at 637 (clarifying intention of Senate Committee regarding scope of § 706(1)).
63. See id. at 658 (showing Congress's attempt to avoid offending separation of powers).
D. National Environmental Policy Act

In 1969, Congress established NEPA as a national policy to "encourage productive and enjoyable harmony between man and his environment, promote efforts which will prevent or eliminate damage to the environment and biosphere . . . and to enrich the understanding of the ecological systems and natural resources important to the Nation." NEPA contains several "action forcing" procedures, including section 102(2)(C), designed to achieve these goals. Section 102(2)(C) states that all federal agencies must prepare an environmental impact statement (EIS) on every legislative proposal and other major federal action that significantly affects the quality of human surroundings.

Prior to the EIS preparation, however, an agency may prepare an environmental assessment (EA) to conclude whether the proposed action will significantly affect the environment. If there is a finding of "no significant impact" by the proposed action, then the agency need not prepare a full EIS. Therefore, the primary goal of NEPA centers on ensuring that government agencies perform an effective evaluation of relevant information about the potential impact of a proposed agency action on the environment and disclose this information to the public.

Federal regulations require the preparation of an SEIS or supplemental EA in situations where the agency makes substantial changes in the proposed action that are relevant to environmental

66. 42 U.S.C. § 4332(c) (2000). The EIS must describe the potential environmental impacts of the proposed action, any unavoidable adverse environmental impacts of the action, any alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible commitments of resources that would arise from the action. See Holy Cross Wilderness Fund v. Madi- gan, 960 F.2d 1515, 1521 (10th Cir. 1992) (discussing requirement of EIS under NEPA).
67. Friends of the Bow v. Thompson, 124 F.3d 1210, 1214 (10th Cir. 1997) (explaining right of agency to prepare environmental assessment [hereinafter EA]). Although NEPA does not mention EAs, the Council on Environmental Quality has issued regulations that govern agency decisions regarding whether to prepare an EIS, and those regulations also outline the requirements for preparing EAs for less significant agency actions. See id.
68. Id. (stating when agency makes finding of no significant impact, or "FONSI," it need not prepare full EIS).
concerns or when significant new circumstances arise relevant to environmental issues. Courts have recognized, however, that it is only necessary to develop an SEIS or supplemental EA when the subsequent information raises new concerns of sufficient gravity to warrant another look at the environmental consequences.

When an agency decides not to develop an SEIS or supplemental EA, courts employ a two-part analysis by applying a "hard look" test followed by a review of the agency's decision under the APA's arbitrary and capricious standard. Under the "hard look" test, courts determine whether the agency took a "hard look" at the new information by considering various factors, such as whether the agency obtained expert opinions from inside and outside the agency, gave careful scientific scrutiny, and responded to all legitimate concerns raised. The arbitrary and capricious standard of review is narrow and focuses on whether the agency considered all relevant factors in its decision-making.

IV. NARRATIVE ANALYSIS

A. Majority Opinion

In Norton, the Tenth Circuit concluded that the district court erred in dismissing the case for lack of subject matter jurisdiction. The Tenth Circuit addressed three primary claims against BLM relevant to the appeal. First, the Tenth Circuit examined whether BLM failed to comply with the duties imposed by the FLPMA. Second, the court considered the plaintiff's claim that BLM refused to implement specific actions outlined in its land management

71. Wisconsin v. Weinberger, 745 F.2d 412, 418 (7th Cir. 1984) (stating limitation on requirement to prepare SEIS or supplemental EA).
72. Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1777 (9th Cir. 1990) (showing agency cannot ignore possible significance of new information); see also Marsh, 490 U.S. at 377 (noting two-part analysis in situations when agency decides not to develop SEIS or supplemental EA).
73. See Marsh, 490 U.S. at 378-85 (describing two-part "hard look" test).
76. See id. at 1222. For a further discussion of the three primary claims in Norton, see infra notes 74-127 and accompanying text.
77. See id. at 1223 (listing first SUWA claim that court addressed in Norton).
plans. Third, the court addressed SUWA’s claim that BLM did not pass NEPA’s “hard look” test when it refused to consider information regarding increased ORV use.

1. Failure to Comply with Federal Land Policy and Management Act’s Nonimpairment Requirement

SUWA argued that even if BLM has considerable discretion over how to address activity that causes impairment, it could still be ordered to comply with the FLPMA nonimpairment mandate. In concluding that BLM has a mandatory, nondiscretionary duty to manage WSAs in accordance with FLPMA’s nonimpairment requirement, the Tenth Circuit analyzed BLM and the Recreationists’ three primary arguments. In general, these three arguments asserted that ORV use in the relevant lands is not subject to section 706(1) review and cannot be considered impairment under FLPMA.

BLM first argued that the Interim Management Policy (IMP) for lands under wilderness review gives the agency discretion in how and whether to act, thus exempting BLM’s inactions from review under section 706(1). BLM next contended that section 706(1) may only be invoked where “final, legally binding actions... have been unlawfully withheld or unreasonably delayed.” Finally, BLM stated that SUWA’s claim challenged the competence of BLM’s efforts to prevent impairing activity caused by ORV use rather than a claim that BLM has failed to act.

The Tenth Circuit addressed the first argument stating that the agency missed the primary issue, namely whether BLM has a non-discretionary, mandatory duty that it may be compelled to carry out

78. See id. (noting second SUWA claim that court addressed in Norton).
79. See id. (adding third SUWA claim that court addressed in Norton).
80. See Norton, 301 F.3d at 1227 (presenting SUWA claim against BLM that it must comply with nonimpairment mandate of FLPMA even if it retains discretion over means of prevention).
81. See id. at 1223-24. In its conclusion, the court also noted that SUWA presented a colorable claim that BLM’s present management may be violating the FLPMA’s mandate and thus dismissal of the claim for lack of subject matter jurisdiction under section 706(1) was inappropriate. See id. at 1224.
82. See id. at 1227 (stating general position of BLM and Recreationists regarding FLPMA claim).
83. Id. (presenting first of BLM’s arguments regarding FLPMA claim).
84. Id. (noting second of BLM’s arguments regarding FLPMA claim).
85. See Norton, 301 F.3d at 1227 (mentioning third and final BLM argument regarding FLPMA claim).

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under section 706(1).\textsuperscript{86} According to the Tenth Circuit, BLM correctly argued that a court must give considerable deference to the agency's interpretation of the nonimpairment mandate, and the court is limited in its power to compel the agency to take specific steps to prevent impairment.\textsuperscript{87} The Tenth Circuit stated that BLM incorrectly assumed that its discretion over the implementation of FLPMA's nonimpairment mandate made the obligation discretionary.\textsuperscript{88} According to the court, such deference does not immunize BLM from its clear nondiscretionary duty to manage the lands, as compelled by section 706(1), when impairment exists.\textsuperscript{89}

With respect to BLM's second argument, the Tenth Circuit disagreed with the agency's assertion that a court may only compel agency action under section 706(1) if the "unlawfully withheld" action would itself be considered a "final" action under APA section 704.\textsuperscript{90} The Tenth Circuit rejected BLM's argument that section 706(1) is available only for final actions that are "unreasonably delayed" or "unlawfully withheld," and not those involving "day-to-day management actions," such as dealing with ORV use.\textsuperscript{91} The Tenth Circuit stated that when an agency has an obligation to carry out a mandatory, nondiscretionary duty and fails to meet a statutory deadline or unreasonably delays in carrying out the action, the inaction becomes a "final agency action."\textsuperscript{92} Thus, BLM's failure to comply with FLPMA's nonimpairment mandate can be considered

\textsuperscript{86} See id. BLM argued that the district court's dismissal of SUWA's claim for lack of subject matter jurisdiction was proper because BLM has "considerable discretion... to determine both what constitutes impairment and what action to take if it finds that impairment is occurring or is threatened." \textit{Id.}

\textsuperscript{87} See \textit{id.} at 1228. Specifically, the court noted that it must defer to the agency's interpretation unless this interpretation is unconstitutional, plainly erroneous or inconsistent with the regulation. \textit{See id.}

\textsuperscript{88} See \textit{id.} The court stated that BLM's arguments go to the merits of the suit and to the possible remedy if impairment is found, not to whether federal courts possess subject matter jurisdiction under the APA to order compliance with the FLPMA. \textit{Id.}

\textsuperscript{89} See \textit{id.} (holding that district court must compel BLM to comply if impairment is found). The court held that whether ORV use in the region is impairing WSAs is a question for the district court on remand, but if impairment is found, the court must compel the agency to comply with its duty. See generally \textit{Forest Guardians v. Babbitt}, 174 F.3d 1178 (10th Cir. 1999) (requiring reviewing court to compel agency action unlawfully withheld or unreasonably delayed).

\textsuperscript{90} See \textit{Norton}, 301 F.3d at 1228-29 (addressing court's rejection of BLM's final action argument).

\textsuperscript{91} See \textit{id.} at 1229 (finding BLM's finality argument unpersuasive).

\textsuperscript{92} See \textit{id.} According to the court, such agency inaction is essentially the same as if an agency had issued a final order declaring that it will not complete its legally required duty. \textit{See id.}
a final action under section 704 and would be subject to compul-
sion under section 706(1). 93

The Tenth Circuit also rejected BLM's third argument that
even if a mandatory duty to prevent ORV impairment exists, com-
pulsion under section 706(1) is inappropriate because BLM took
some partial action to address the problem. 94 The Tenth Circuit
emphasized that even though BLM took some action to address im-
pairment, that fact does not sufficiently remove the case from sec-
tion 706(1) review. 95 Although BLM cited Ninth Circuit precedent
to support its argument, this precedent did not persuade the court,
which differentiated those cases from the case at bar. 96

Specifically, the Tenth Circuit distinguished Norton from the
holding of Ecology Center, Inc. v. United States Forest Service 97 by stating
the irrelevance as to whether requiring a federal agency to comply
with its own regulations would discourage that agency from enact-
ing the regulation in the first place. 98 The court likewise contrasted
the Norton facts from those of Public Citizen v. Nuclear Regulatory Com-
mission 99 by stating that BLM did not assert that it had taken final
agency action that should have triggered a statute of limitations bar-

93. See id. at 1229-30 (stating BLM's failure to carry out mandatory, nondiscre-
tionary duties by established deadline or reasonable time period may be consid-
ered final agency action even if duty was carried out through some "non-final"
action).

94. See id. at 1230-32 (rejecting BLM's third argument).

95. Norton, 301 F.3d at 1230. The court was reluctant to hold that an agency
cannot be compelled to fulfill its mandatory legal duty simply because it made
some effort to meet its legal obligations. Id.

96. Id. at 1231. BLM cited Ninth Circuit precedent in support of its conten-
tion that a court cannot compel further action under section 706(1) as long as the
agency undertakes some corrective action. See Ecology Ctr., Inc. v. United States Forest
Serv., 192 F.3d 922 (9th Cir. 1999) (holding where relief was not granted under
§ 706(1) because Forest Service merely failed to conduct its duty under forest plan
and NFMA Regulations); see also Nevada v. Watkins, 939 F.2d 710 (9th Cir. 1991)
(holding that issuance of preliminary guidelines for evaluating nuclear waste dis-
posal was not final agency action because of Congressional intent); Public Citizen v.
Nuclear Regulatory Comm’n, 845 F.2d 1105 (D.C. Cir. 1988) (cautioning courts
against entertaining § 706(1) claims where agency took some partial action).

97. See Ecology Ctr., 192 F.3d at 922 (refusing to make Forest Service conduct
monitoring activities in strict compliance with forest plan and federal regulations
because doing so may discourage Service from producing ambitious forest plans).

98. Norton, 301 F.3d at 1231. The court stated that the relevant inquiry is
whether the agency unlawfully withheld or unreasonably delayed a legally required
nondiscretionary duty. Id.

99. See Public Citizen, 845 F.2d at 1105 (holding that issuance of nonbonding
regulations was intended to be final agency action, which triggered statute of
limitations).
ring SUWA's claim.\textsuperscript{100} The Tenth Circuit also distinguished \textit{Norton} from \textit{Nevada v. Watkins},\textsuperscript{101} which involved a clear congressional determination of specific conduct deemed not to be final agency action.\textsuperscript{102}

In concluding its analysis of the first claim against BLM, the court affirmed that BLM has a mandatory, nondiscretionary duty to prevent the impairment of WSAs.\textsuperscript{103} In the Tenth Circuit's summary of BLM's three arguments, it held that although BLM could theoretically prevent impairment from ORV use by means other than final agency action, and although it did take steps to prevent the impairment, the district court still has subject matter jurisdiction under section 706(1) to consider the issue.\textsuperscript{104}

2. Refusal to Implement LUPs

SUWA's second claim against BLM alleged that the agency failed to carry out a mandatory duty to manage several areas "in accordance with [its] land use plans."\textsuperscript{105} In its analysis, the Tenth Circuit first rejected BLM's argument that it did not have a mandatory, nondiscretionary duty to carry out the activities described in the disputed land use plans.\textsuperscript{106} According to the court, this contention conflicted with the wording of the relevant LUPs and suggested that BLM must carry out specific activities.\textsuperscript{107} The Tenth Circuit affirmed that BLM cannot ignore LUPs, even though

\textsuperscript{100} \textit{Norton}, 301 F.3d at 1232. The court disagreed with BLM's interpretation of \textit{Public Citizen}; that any time an agency takes some steps toward fulfilling a legal obligation, it is exempt from section 706(1) review. \textit{Id.}

\textsuperscript{101} \textit{See Nevada v. Watkins}, 939 F.2d at 710 (holding that issuance of preliminary guidelines for evaluating nuclear disposal site was not final agency action because Congress, in Nuclear Waste Policy Act, declared that such conduct should not be deemed final agency action).

\textsuperscript{102} \textit{Norton}, 301 F.3d at 1232 (explaining reason for rejecting \textit{Watkins} comparison).

\textsuperscript{103} \textit{Id.} at 1233. The court stated that SUWA presented "colorable evidence suggesting that ongoing ORV use has or is impairing the . . . wilderness value [of the disputed WSAs], possibly in violation of FLPMA's nonimpairment mandate." \textit{Id.}

\textsuperscript{104} \textit{Id.} (summarizing analysis of first claim against BLM under FLPMA).

\textsuperscript{105} \textit{Id.} (noting second claim by SUWA against BLM).

\textsuperscript{106} \textit{Norton}, 301 F.3d 1217 at 1234 (rejecting BLM's first argument that no mandatory duty to follow LUPs exists).

\textsuperscript{107} \textit{Id.} The LUPs for Factory Butte and San Rafael use the language "'will be monitored' for ORV use" and "that an ORV implementation plan 'will be developed.'" \textit{Id.}
they are meant to be flexible documents and can be drafted to optimize the agency’s ability to respond to changing circumstances.\textsuperscript{108}

BLM’s second argument, that it must only comply with LUPs when undertaking a future site-specific project, likewise did not convince the Tenth Circuit.\textsuperscript{109} The court reasoned that nothing in FLPMA indicates BLM must comply with LUPs only when BLM undertakes a future, site-specific project.\textsuperscript{110} Despite their claims that certain regulatory provisions declare that future management actions must adhere to approved plans, the Tenth Circuit opined that such regulations do not free BLM from implementing actions promised in the LUPs.\textsuperscript{111}

The Tenth Circuit used its previous discussion of partial compliance for the nonimpairment claim and rejected BLM’s third argument that it could not be compelled under section 706(1) because there had not been a complete failure to perform a legally required duty.\textsuperscript{112} The Tenth Circuit ultimately found that the district court erred when it dismissed SUWA’s claims based on BLM’s failure to implement LUPs.\textsuperscript{113}

3. Failure to Take a “Hard Look” Under the National Environmental Policy Act

Finally, SUWA claimed that BLM failed to take a “hard look” at information suggesting a substantial increase in ORV use in the disputed areas.\textsuperscript{114} The Tenth Circuit concluded that the district court applied the wrong analysis and incorrectly held that the court could

\textsuperscript{108} Id. at 1234-35. The court also held that “BLM’s right . . . to amend or alter existing LUPs does not free the agency from carrying out present obligations.” Id. at 1235.

\textsuperscript{109} Id. at 1235 (rejecting BLM’s second argument that compliance with LUPs is only necessary when it undertakes future site-specific project).

\textsuperscript{110} Id. FLPMA states, “[T]he Secretary shall manage the public lands . . . in accordance with the land use plans developed by him.” 43 U.S.C. § 1732(a) (2000).

\textsuperscript{111} Norton, 301 F.3d at 1235. BLM’s inaction carries the same affect as if the agency had taken an affirmative or future action contrary to its LUP obligations. See id.

\textsuperscript{112} For further discussion on the court’s analysis of partial compliance, see supra notes 80-113 and accompanying text.

\textsuperscript{113} Norton, 301 F.3d at 1236 (providing court’s conclusion regarding second claim against BLM that it failed to adhere to its LUPs).

\textsuperscript{114} Id. at 1236-40. SUWA claims that under section 706(1), BLM should be compelled to take a “hard look” at the information to determine if an SEIS or supplemental EA is warranted. Id. at 1236-37.

http://digitalcommons.law.villanova.edu/elj/vol14/iss2/5
not order BLM to take a "hard look" at SUWA’s information. In making this determination, the Tenth Circuit addressed the appropriateness of SUWA’s claim as well as BLM’s claim that it could not be compelled to take a "hard look" at increased ORV use because of plans to conduct a NEPA analysis within the next several years, subject to resource constraints.

The Tenth Circuit held that SUWA properly raised its "hard look" claim at the district court level by distinguishing the first and second steps of a supplemental NEPA review. The court found that SUWA focused its claim on BLM’s failure to take a "hard look" and not whether BLM acted in an arbitrary and capricious manner by refusing to prepare a supplemental NEPA analysis. The court noted that BLM understood SUWA was asserting a “failure to take a ‘hard look’ claim” since it responded accordingly.

The Tenth Circuit disagreed with BLM’s assertion that the court could not require it to take a “hard look” at increased ORV use because the agency planned on completing a NEPA analysis sometime in the future. According to the Tenth Circuit, this intent to fulfill its NEPA obligations at a later date did not address its current failure to act. The court also rejected BLM’s claim that it should not be compelled to take a “hard look” at present ORV use because of budgetary constraints by noting that an agency’s financial constraints do not relieve it of its mandatory duties.

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115. Id. at 1237-40. The district court later suggested that SUWA was seeking to compel BLM to produce an SEIS by refusing SUWA’s “hard look” claim. Id. at 1237.

116. Id. The court noted that BLM does not specifically dispute on appeal that the alleged ORV use requires a “hard look” and concedes that a nation-wide revision of its land management plans is necessary. Id. at 1237.

117. Id. at 1239. The first step of supplemental NEPA review is whether an agency took a “hard look” at the new information; the second step is whether the agency acted arbitrarily and capriciously in not issuing an SEIS or supplemental EA. Id.

118. Norton, 301 F.3d at 1239 (supporting effective focus of SUWA in challenging BLM’s failure to take “hard look”).

119. Id. (strengthening court’s holding that SUWA was asserting “failure to take a ‘hard look’ claim.”).

120. Id. at 1239-40 (expressing court’s conclusion regarding BLM initiating future NEPA action).

121. Id. at 1239 (demonstrating court’s reluctance to accept BLM future action argument).

122. Id. “An agency’s lack of resources to carry out its mandatory duties . . . does not preclude a court from compelling action under § 706(1).” Forest Guardians v. Babbitt, 174 F.3d 1178, 1189 (10th Cir. 1999).
budgetary constraints also raised serious questions about the likelihood of a future "hard look" actually occurring.\textsuperscript{123}

In considering all of the relevant claims against BLM, the Tenth Circuit reversed the district court's decision and remanded the case for proceedings consistent with its opinion.\textsuperscript{124} The court ultimately found that the district court erred in its conclusions that BLM had taken some steps toward addressing alleged impairments from ORVs; therefore, it lacked subject matter jurisdiction under APA section 706(1).\textsuperscript{125} The court held, moreover, that the district court incorrectly concluded that BLM is only bound by LUP requirements when it undertakes "affirmative future actions" that contradict LUP duties.\textsuperscript{126} Lastly, the court determined that the district court misconstrued the nature of SUWA's "hard look" claim under NEPA.\textsuperscript{127}

B. Dissenting Opinion

According to Judge McKay of the Tenth Circuit Court of Appeals, the court should have upheld the dismissal by the district court for lack of subject matter jurisdiction regarding the FLPMA nonimpairment claim because the obligation is ministerial in nature.\textsuperscript{128} Further, he concurred in the district court's dismissal under the LUP claim because it was based on a non-existent duty.\textsuperscript{129}

The dissent argued that the majority misconstrued BLM's nonimpairment obligation by expanding the scope of section 706(1) to include ministerial agency obligations.\textsuperscript{130} The dissent noted that the majority's position directly contradicted the Supreme Court mandate that APA review is reserved for cases addressing specific instances of agency action or inaction rather than broad-based at-
tacks. According to the dissent, the majority opinion "transforms section 706(1) into an improper and powerful jurisdictional vehicle to make programmatic attacks on day-to-day agency operations." The dissent also disagreed with the majority's assertion that BLM must achieve every single aspect of any LUPs it adopts. The dissent claimed that BLM need not meet each and every specific goal set forth in its LUPs and that they are merely aspirational in nature. According to Judge McKay, allowing "plaintiffs to challenge a LUP under the guise of a failure to act because each and every objective of the land use plan has not been met would allow plaintiffs of all varieties to substantially impede an agency's day-to-day operations."

V. CRITICAL ANALYSIS

In Norton, the Tenth Circuit broadened the scope of section 706(1), permitting challenges to any mandatory agency obligation and expanding the section's failure-to-act requirement. While the court's remand concerning the "hard look" claim under NEPA seems logical and persuasive, the majority opinion lacks strength with respect to its other arguments regarding section 706(1) and BLM's land use plans.

A. Expansion of Scope of Section 706(1) and Failure to Act

Despite the majority's argument that the district court's dismissal for lack of subject matter jurisdiction was inappropriate, the dissent persuasively argued to the contrary, alleging that the Tenth Circuit wrongly expanded APA section 706(1). The majority appeared to side step the fact that relief under section 706(1) is only an appropriate remedy when an agency has failed to perform a...
nondiscretionary ministerial duty. The majority conceded several points establishing that FLPMA’s nonimpairment duty is, not ministerial in nature. The majority’s decision also seemed to conflict with Supreme Court precedent, which holds that section 706(1) cannot be used for claims challenging an agency’s overall method of administration or controlling the agency’s daily activities.

The Tenth Circuit reluctantly exempted BLM from section 706(1) review based on the argument that section 706(1)’s failure-to-act requirement includes agency action failing to achieve all of the agency’s obligations in their entirety. The majority disregarded each case the BLM used for support, thus misinterpreting BLM’s argument that section 706(1) jurisdiction exists only when there has been a genuine failure to act. The court inappropriately applied section 706(1), basing its decision on BLM’s failure to have total success with its obligations rather than on a complete failure to act.

B. Land Use Plans and Failure to Act under Section 706(1)

The Tenth Circuit came to a controversial conclusion by holding that once BLM develops a LUP it must achieve every aspect of the plan. While the court persuasively argued that BLM had a mandatory, nondiscriminatory duty to carry out the activities described in the disputed LUPs, the court stretched the limits of its holding by stating that BLM must achieve every aspect of its plans. As the dissent stated, the majority’s opinion would entitle

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139. See id. at 1240 (asserting that injunctive relief under § 706(1) is governed by similar standard as mandamus relief).

140. See id. at 1228 (noting majority establishment that FLPMA nonimpairment is non-ministerial).


142. See Norton, 301 F.3d at 1243. The dissent alleges that the Appellants may not use § 706(1) to challenge an agency’s failure to completely comply with its obligations as a “failure to act.” See id.

143. See id. at 1244 (noting court’s failure to address point made by BLM in citing particular Ninth Circuit cases).

144. See id. (summarizing court’s inappropriate conclusion relying on failure of agency to have complete success in its obligations).

145. See id. at 1233-37 (addressing court’s analysis regarding BLM duties under land use plans).

146. See id. (noting view of court regarding requirement of full implementation of LUPs). The dissent makes a persuasive argument identifying the lack of case law supporting the majority view and that the court failed to cite any opinions supporting its view. See id. at 1240-47 (McKay, J., concurring in part, dissenting in
appellants to challenge any failure to live up to every aspiration expressed in BLM’s land use plans.\textsuperscript{147} Despite the dissent’s opinion, this could have the proper effect of providing an incentive for agencies to make every attempt to comply with their LUPs, rather than engaging in minor acts just to argue that they are exempt from section 706(1) jurisdiction.

C. “Hard Look” Claim under the National Environmental Policy Act

The Norton court correctly remanded the NEPA “hard look” claim to determine whether BLM had actually failed to review information suggesting a substantial increase in ORV use.\textsuperscript{148} In its analysis of this claim, the Tenth Circuit provides ample case law supporting the necessity of preparing an EIS under NEPA or the possibility of first preparing an EA.\textsuperscript{149} The court correctly noted that SUWA’s challenge focused on BLM’s failure to “take a hard look” and not whether BLM acted arbitrarily or capriciously in refusing to prepare a supplemental NEPA analysis.\textsuperscript{150}

The Tenth Circuit also presented a compelling argument regarding its dismissal of BLM’s claims of future NEPA action.\textsuperscript{151} First, the Tenth Circuit correctly dismissed BLM’s argument that the court could not compel it to take a “hard look” at increased ORV use because it planned on doing a NEPA analysis “in the near future.”\textsuperscript{152} Second, the court effectively rejected BLM’s attempt to use budgetary shortfalls to justify why it should not be required to

\textsuperscript{147} See Norton, 301 F.3d at 1244-45 (McKay, J., concurring in part, dissenting in part) (addressing relevance of dissent’s argument regarding result of majority’s holding).

\textsuperscript{148} Id. at 1245 (McKay, J., concurring in part, dissenting in part). The dissent concurred with the majority conclusion and analysis regarding the NEPA “hard look” claim. \textit{See id.}

\textsuperscript{149} See id. at 1237-40 (noting court’s reliance on substantial case law to support necessity of preparing EIS or EA); \textit{see also Friends of the Bow v. Thompson}, 124 F.3d 1210, 1214 (10th Cir. 1997); \textit{Holy Cross Wilderness Fund v. Madigan}, 960 F.2d 1515, 1521 (10th Cir. 1992).

\textsuperscript{150} Norton, 301 F.3d at 1238-39 (determining SUWA position upheld by court regarding “hard look” claim). The court also correctly asserted that SUWA’s argument that BLM take a “hard look” was justified based on significant new circumstances. \textit{Id.}

\textsuperscript{151} See id. at 1239-40 (discussing court’s reaction to BLM claims that it need not take “hard look” because of intent to pursue NEPA action in near future).

\textsuperscript{152} See id. at 1239 (stating court’s rejection of BLM argument of future action precluding compulsion to take “hard look”).
review suggested increases in ORV use. Lastly, the court disclosed an apparent inconsistency in BLM's arguments that, while it has significant budgetary limitations hindering its ability to take action, it still intends to take future action.

VI. IMPACT

Primarily, Norton may impact future BLM practices and practices of other agencies subject to the jurisdiction of APA section 706. Specifically, the Tenth Circuit's decision "puts BLM on notice that it can no longer hide behind half-hearted measures to protect Utah's wilderness quality lands." By holding BLM to a higher standard of accountability, the Tenth Circuit has put BLM in the position that it must act on its responsibilities to avoid potential litigation. While the decision may provide an incentive for BLM to act more effectively in its role, it could also "open the floodgates of litigation" for plaintiffs to challenge any failure to completely achieve goals that BLM sets for itself.

The Norton decision could lead to more restrictions for recreational off-road vehicle users, particularly in BLM lands in Utah. After Norton, at least in Utah, BLM must begin to more effectively assert its purpose and concentrate on limiting ORV use in wilderness areas. The outcome of this pressure could result in stricter

153. See id. at 1239-40 (emphasizing court's dismissal of BLM argument of budgetary constraints precluding compulsion to take "hard look").
154. See id. at 1239 (noting inconsistency of BLM argument that it has severe monetary constraints yet claims that it intends to perform NEPA analysis).
155. For a further discussion of the impacts of the Norton case, see infra notes 155-165 and accompanying text.
158. See id. at 1246 (McKay, J., concurring in part, dissenting in part) (identifying positive and negative aspects of Norton holding). The dissent asserts the point that the court has established that "any failure of BLM (no matter how slight) may provide jurisdiction for a 'failure to act' challenge pursuant to § 706(1)' and that "BLM's (and other agencies') failure to achieve each and every aspiration of its land use plans with completely successful results opens it to potential litigation for 'failing to act.'" Id. at 1247 (McKay, J., concurring in part, dissenting in part).
160. See Appeals Court Hands Victory, supra note 156 (stating opinion on implication of holding of Norton court).
laws and regulations imposed on ORV users and closing off certain public land areas from ORVs.\textsuperscript{161} Such restrictions could spur a policy that roads remain closed unless marked open.\textsuperscript{162}

Essentially, the \textit{Norton} court asserts that BLM will not be permitted to use excuses and legal arguments as defenses for its failure to live up to its responsibilities.\textsuperscript{163} The case moves in the right direction towards holding BLM accountable for failing in its mission to "sustain the health, diversity, and productivity of the public lands for the use and enjoyment of present and future generations."\textsuperscript{164} \textit{Norton} also serves as a signal to ORV users, and the general public, that the unauthorized and unbridled destruction of our nation's wilderness areas will no longer be tolerated.\textsuperscript{165}

\textit{Nicholas J. Hilosky}

\textsuperscript{161} \textit{See} Southern Utah Wilderness Alliance, \textit{Campaign: Off-Road Vehicle - Executive Summary, supra} note 159 (describing possible reforms suggested by SUWA that could arise out of \textit{Norton}).

\textsuperscript{162} \textit{See} Penelope Purdy, \textit{Monitoring ORVs Not an Easy Job}, DENVER POST, Feb. 11, 2001, at G1, \textit{available at} http://63.147.65.175/opinion/purdy0211.htm (noting one environmentalist solution to close roads unless told otherwise).

\textsuperscript{163} \textit{See} Southern Utah Wilderness Alliance \textit{v. Norton}, 301 F.3d 1217, 1222-23 (10th Cir. 2002) (setting out Tenth Circuit's holding in \textit{Norton} against BLM).


\textsuperscript{165} \textit{See} Appeals Court Hands Victory, \textit{supra} note 156 (asserting that Norton decision "is a tremendous step forward for spectacular at-risk Utah public lands").