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Is the Glass Half Empty or Half Full? Challenging Incomplete Agency Action under Section 706(1) of the Administrative Procedure Act

Christina Larsen*

I. INTRODUCTION

In the past several years, environmental plaintiffs have watched courts apply Section 706(1) of the Administrative Procedure Act in a manner supporting the idea that “[s]ection 706 of the APA, which specifies standards of review for... agency determinations, is a disorderly mess of ambiguous and overlapping standards.”¹ Plaintiffs bringing claims under section 706(1) of the APA have found themselves awash in a sea of judicial inconsistency, as courts debated and backpedaled over the meanings of “final action” and “failure to act.” This confusion has been especially apparent in public land management cases on the Ninth Circuit Court of Appeals.

The source of the uncertainty most likely derives from the statute itself. While section 706(2) of the APA allows a court to set aside final agency action that is “arbitrary, capricious, an abuse of discretion, or... short of statutory right,”² section 706(1) allows a court to compel agency action, where the agency has “unlawfully withheld or unreasonably delayed” action.³ For example, under section 706(2) a court may set aside a final agency action, such as the decision to conduct a timber sale, if the agency took that action without complying with applicable statutory standards—such as the requirement that it prepare an Environmental Impact Statement (“EIS”) under the National Environmental Policy Act (“NEPA”).⁴ Under section 706(1), a court may compel action *unlawfully withheld* or *unreasonably delayed*. An action may be considered unlawfully withheld, if, for example, an agency is required by statute to file a report, and fails to do so. An action may be considered unlawfully withheld if it violates a date-specific deadline; it is unreasonably delayed if it violates a non date-specific deadline.⁵

Because relief is unavailable under section 706(2) unless an agency has taken discrete “final action,”⁶ and unavailable under section 706(1) unless

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1. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review* “*On the Record*,” 10 Admin. L. J. Am. U. 179, 181 (Spring 1996).

2. 5 U.S.C. § 706(2) (2004) [hereinafter “APA”].

3. 5 U.S.C. § 706(1) (2004).

4. *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998).

5. *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1226 n. 5 (10th Cir. 2002).

6. “Two conditions must be met for administrative action to be considered final under APA 704: (1) Action should mark the consummation of agency’s decision making process; and (2) action should be one by which rights or obligations have been determined or from which legal consequences flow.” *Bennett v. Spear*, 520 U.S. 154, 177 (1997).

an agency has failed to act, claims brought where an agency took partial, allegedly inadequate action towards a congressionally mandated goal can fall into limbo. Indeed, “[t]he dividing line between agency action that has been unlawfully withheld and is therefore subject to mandatory injunction and an agency failure to act that is not yet reviewable as final agency action is not always clear.”⁷

Both the Ninth and Tenth Circuit Courts of Appeals have recently, and correctly, identified agency recalcitrance in the face of a clear statutory duty as the standard for section 706(1) threshold jurisdiction in situations where an agency has taken partial action. In both *Montana Wilderness Association v. United States Forest Service*⁸ and *Southern Utah Wilderness Alliance v. Norton*,⁹ these courts held agencies failed to act under their statutory mandates to preserve the wilderness qualities of several wilderness study areas. Although both the Forest Service and the Bureau of Land Management (“BLM”) claimed to have taken action towards statutorily mandated goals, the courts characterized those efforts as half-steps that could not be considered meaningful action.¹⁰ Although both agencies argued the actions they had taken removed their shortcomings from section 706(1) jurisdiction, the courts identified the crux of the issue in the following manner: the agencies had a duty to act, and failed to do so in any meaningful way. Both courts have held that partial action and “half-steps” towards a congressionally mandated goal constitute a failure to act.¹¹

Opponents of judicial review of agency inaction (for example, the federal government) argue this trend inappropriately widens judicial review, allowing courts to invade arenas properly left to executive expertise and discretion.¹² Nonetheless, “administrative inaction occurs at least as often as administrative action [and] its effects can be just as influential.”¹³ Agencies often set policy by doing nothing at all.¹⁴ The APA’s framers did not intend ambiguities in sections 706(1) and 706(2) to serve as loopholes, allowing agencies that made “half-steps” towards compliance with statutory mandate to evade judicial review. Nor did Congress intend its land management legislation to be effectively ignored by agencies giving mere lip service to statutory mandate. Invoking jurisdiction under section 706(1) jurisdiction, where an agency has taken only partial actions towards statutory compli-

7. George Cameron Coggins & Robert L. Glicksman, *Flexible Deference* 1 Pub. Nat. Resources L. § 8:24 n. 2 (2004).

8. 314 F.3d 1146 (9th Cir. 2003) [hereinafter *MWA*].

9. 301 F.3d 1217 (10th Cir. 2002) [hereinafter *SUWA*].

10. See *MWA*, 314 F.3d 1146 at 1151; *SUWA*, 301 F.3d 1217 at 1236.

11. *Id.*

12. Br. of Pet. at 18, *Norton v. Southern Utah Wilderness Alliance* __ U.S. __ (forthcoming 2004).

13. Peter H. A. Lehner, *Judicial Review of Administrative Action*, 83 Colum. L. Rev. 627, 689 (1983).

14. Catherine Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines under Section 706(1)*, 42 Wm. & Mary L. Rev. 1545, 1545-46 (2001).

ance, is appropriate and necessary to give regulations the power Congress intended them to wield, for:

When the will of Congress is not properly implemented, people lose both the benefit of legislative action and faith in the ability of the government to effectuate social change. Judicial review of agency nonimplementation of a statute is both necessary and proper to give effect to the congressional intent and to assure the legitimacy of the administrative system.¹⁵

This article examines the Ninth Circuit's evolution in its approach to section 706(1) claims brought by environmental plaintiffs in the past decade. Part two discusses the text and legislative history of the APA, asserting that review of agency inaction, even where an agency has taken some action, is consistent with the framers' intent to attain a balance and separations of powers in government through broad judicial review, and not to create vast categories of unreviewable inaction. Part three discusses recent cases on the Ninth Circuit, illustrating the difficulties courts face in determining review under section 706(1), as well as a Tenth Circuit case, whose appeal has taken these issues to the U.S. Supreme Court. Part four discusses the government's arguments on appeal, and concludes that the Ninth and Tenth Circuit's views on section 706(1) jurisdiction are consistent with the APA's purpose, "to afford a remedy for every legal wrong."¹⁶

II. THE ADMINISTRATIVE PROCEDURE ACT

The text of the APA, its legislative history, and section 706(1)'s roots in the mandamus action, show Congress intended to provide judicial review when agencies fail to act despite a legislative mandate. Although some common law has characterized section 706(1) "failure to act" provisions as very narrow, carefully delineated exceptions to the final action requirements of section 706(2),¹⁷ a careful reading of the text shows congress clearly intended courts to hold agencies accountable for inaction, especially recalcitrance in the face of a clear duty. A more restrictive reading, rendering judicial review unavailable where an agency has taken some action, or given lip service to a Congressional mandate, flies in the face of the balance of powers doctrine, and Congressional intent.

Neither the history nor the text of the APA, however, is always straightforward. The passage of the APA has been characterized in recent scholar-

15. Lehner, *supra* n. 13, at 689.

16. See H.R. Rpt. 1980 at 251 (May 3, 1946); Sen. Rept. 752 at 193 (Nov. 19, 1945).

17. Br. of Respt. Utah Shared Access Alliance, et. al., at 10-11, *Norton v. Southern Utah Wilderness Alliance* __ U.S. __ (forthcoming 2004) (citing *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871 (1990)).

ship as “nothing less than a pitched political battle for the life of the New Deal.”¹⁸ As proponents and opponents of the bill debated and finally compromised to produce the APA, they left some provisions, notably those outlining judicial review, purposefully vague.¹⁹ Notwithstanding sometimes vague statutory language, the framers’ intent to afford a remedy for every legal wrong remains clear.

A. *Text of the Administrative Procedure Act*

Although the text of the Administrative Procedure Act does not define final agency action, it clearly provides remedy for agency inaction. It is necessary to look at the APA’s judicial review provisions, and their “overlapping standards,”²⁰ before engaging in debate concerning threshold jurisdiction under section 706(1).

The APA is a jurisdictional statute, providing the framework for judicial review when an agency is accused of violating statutory mandate. It does not provide an independent source of judicial review, but must be used in conjunction with another statute. A look at the text of the judicial review portions of the APA shows Congress indeed “intentionally wrote some provisions broadly to provide courts with a measure of flexibility in interpreting the Act.”²¹

Section 701 enunciates the purpose of the APA’s judicial review provisions, which is to provide review unless precluded by statute, or unless “agency action is committed to agency discretion by law.”²² Section 702 states the broad principal 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.”²³

Section 706 provides guidelines for the scope of judicial review of agency action, and inaction.²⁴ Under section 706(1), a court may “compel agency action unlawfully withheld or unreasonably delayed.” Section 706(2) allows a court to

set aside agency action, findings and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

18. George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. U. L. Rev.* 1557, 1560 (1996).

19. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *Tex. L. Rev.* 113, 130 (1998).

20. Young, *supra* n. 1.

21. Duffy, *supra* n. 19.

22. 5 U.S.C. § 701(a) (2004).

23. *Id.* at § 702.

24. *Id.* at § 706.

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right...²⁵

Importantly, section 704 restricts judicial review under the APA to “final agency action for which there is no other adequate remedy in court.”²⁶ This has become an important element of the debate over section 706(1) jurisdiction—agencies argue that because they have taken some measures to effect a statutory goal, they have neither taken a final action under section 706(2), nor completely failed to act under section 706(1). The statute, however, does not define “final” agency action. To add to the confusion, an agency’s failure to act is listed as an example of agency action.²⁷

The definitions of the terms used in the APA’s judicial review provisions are found in section 551 of the APA. “Agency 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*...”²⁸ This list, rather than serving as an exhaustive and exclusive enumeration, merely gives examples of agency actions subject to judicial review.

Sections 706(1) and 706(2) are the provisions applied by plaintiffs most often in administrative law.²⁹ However, distinctions between the two provisions can blur, where agency action is defined to include a failure to act.³⁰ The principle that judicial review must be limited to final agency action becomes less clear when applied to agency inaction. Must inaction be a “final” inaction, or must the action the agency was supposed to have taken itself be a final action to trigger review under section 706(1)? The text of the APA, and common law, suggest the former. Section 704 limits judicial review to “final agency action,” which, when applied to section 551(13), would provide that courts may review any final failure to act.³¹ Moreover, the Supreme Court has held that finality is to be determined in a “pragmatic,” “flexible” manner.³² Despite the apparently overlapping standards of sections 706(1) and 706(2), the text of the APA clearly provides distinct remedies for both agency action and inaction.

25. *Id.* at § 706 (1), (2).

26. *Id.* at § 704.

27. *Id.* at § 551 (13).

28. *Id.* (emphasis added).

29. Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 316 (3d ed., American Bar Association 1998).

30. 5 U.S.C. § 551(13).

31. Br. of Amici Curiae Professors of Administrative and Environmental Law in Support of Resp. Southern Utah Wilderness Alliance, et. al. at 11, *Norton v. Southern Utah Wilderness Alliance* __ U.S. __ (forthcoming 2004) [hereinafter Br. of Amici Curiae].

32. *Abbot Laboratories v. Gardner*, 387 U.S. 136, 149-50 (1967).

B. Legislative History of the Administrative Procedure Act

Much of the confusion related to applying sections 706(1) and 706(2) may lie in the APA's embattled history. Congress enacted the APA in 1946 in response to the myriad regulations of the New Deal. Politicians who opposed New Deal politics "wanted to ensure judicial review of agency decisions, while [proponents of the New Deal] wanted agency autonomy."³³ The terms of the APA were hotly contested, judicial review especially so. In the end, the APA was cast as a mere "restatement" of existing common law—a creature with something less than the force of a true statute.³⁴

The APA became a compromise in which courts regulated agencies, but left the agencies broad decision-making discretion.³⁵ However, the legislative history of the APA indicates Congress intended courts to compel agencies to implement legislation. In their final report of 1941, the Attorney General's Committee on Administrative Procedure noted that judicial review was rarely available to compel effective enforcement of the law by administrators, and that "the problems of whether the administrator's refusal to take action is reviewable remains."³⁶ The APA as it was finally drafted addressed this problem. Although earlier bills introduced while Congress considered the APA gave the issue of agency inaction short shrift, the bill that ultimately passed contained broad judicial review provisions, consistent with the framers' intent to "afford a remedy for every legal wrong."³⁷ The Committee report on this bill, S.7, a Bill to Improve the Administration of Justice by Prescribing Fair Administrative Procedures, addressed the problem of agencies ignoring congressional guidelines. The bill defined agency action to include "failure to act," and noted that this definition was intended to "assure complete coverage of every form of agency power, proceeding, action or inaction."³⁸

The Attorney General's Manual on the APA also discussed the passage of the APA's judicial review clause, noting "the purpose of the bill was to give the courts a tool with which they could force the agency to act according to congressional will."³⁹ Lawmakers who passed the APA intended section 706(1) to provide a remedy for "lengthy delays resulting in a circumvention of legislation"⁴⁰—whether or not those delays were accompanied by partial action.

33. Zaller, *supra* n. 14, at 1573 n. 12.

34. *Id.* at 1550.

35. *Id.* at 1573.

36. Br. of Amici Curiae, *supra* n. 31, at 6 (citing *Attorney General's Committee on Administrative Procedure, Final Report* 76 (1941)).

37. H.R. Rept., *supra* n. 16.

38. See Sen. Rept., *supra* n. 16, at 197-198.

39. Zaller, *supra* n. 14, at 1549.

40. *Id.*

III. CASE LAW

Recent trends on the Ninth and Tenth Circuit Courts of Appeals may signal a changing judicial view of section 706(1) jurisdiction. Although some courts maligned section 706(1) “failure to act” claims in the 1990’s as “sufficiency claims”—lawsuits in which whiny plaintiffs could “dress up” almost any objection to an agency action as an agency’s failure to act—⁴¹ recently, both the Ninth and Tenth Circuits have proven friendlier to 706(1) claims. In *SUWA*, the Tenth Circuit Court of Appeals held “the mere fact the BLM ha[d] taken some action to address impairment [of Wilderness Study Areas’ wilderness characteristics] is not sufficient, standing alone, to remove this case from section 706(1) review...”⁴² Soon after, in *MWA*, the Ninth Circuit held “[t]he simple fact that the Forest Service has taken some action to address [its statutory obligation] is not sufficient to remove this case from section 706(1) review.”⁴³ Both courts addressed situations in which agencies took partial action towards compliance with a statutory mandate. To these courts, the cup containing the agency’s action was half empty rather than half full—the agencies apparently had failed to act to a greater degree than they had acted. The courts focused on the agencies’ omissions rather than commissions, signaling a change from earlier interpretations of the scope of section 706 judicial review, and raising the question of exactly how much action could still be considered “inaction” under section 706(1). Although courts clearly must analyze the action an agency has taken in a section 706(1) case, these cases show the correct question for threshold jurisdiction is that of whether the agency had a clear statutory duty to act, and whether the agency’s omissions constitute a failure to comply with that duty.

A. *Ecology Center*

For example, in *Ecology Center v. United States Forest Service*,⁴⁴ plaintiff environmental group brought both section 706(1) and 706(2) claims against the Forest Service, alleging both that the Forest Service’s inadequate monitoring efforts should be construed as final agency action, and that the Forest Service failed to act by inadequately monitoring the Kootenai National Forest (“KNF”) as required by its Forest Management Plan. Under the National Forest Management Act (“NFMA”), the Forest Service was required “to manage the national forests by preparing ‘land and resource management plans’ to guide land use management on each for-

41. *Public Citizen v. Nuclear Regulatory Comm’n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988); see also *Nevada v. Watkins*, 939 F.2d 710, 714 n. 11 (9th Cir. 1991); *Ecology Center Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999).

42. *SUWA*, 301 F.3d 1217 at 1230-31.

43. *MWA*, 314 F.3d 1146 at 1151.

44. 192 F.3d 922 (9th Cir. 1999).

est.”⁴⁵ The KNF adopted the Kootenai National Forest Plan (“Plan”) in 1987, and the terms of the Plan required the Forest Service to produce regular reports containing monitoring data⁴⁶ that would enable the Forest Service to make “periodic determinations and evaluations of the effects of management practice.”⁴⁷ The Forest Service published reports, as required by the Plan, every year except 1988 and 1993, and following the years it missed, published combined two-year reports.⁴⁸

Plaintiff contended the Forest Service’s failure to monitor the KNF in accordance with the Plan constituted a “final agency action,” triggering jurisdiction under section 706(2).⁴⁹ The court disagreed, characterizing the Forest Service’s actions as “only steps leading to an agency decision, rather than the final action itself.”⁵⁰ The court cited to the Supreme Court’s *Bennet v. Spear* test, holding the following two conditions must be met for an administrative action to be considered final under the APA: “(1) the action should mark the consummation of the agency’s decision making process; and (2) the action should be one by which rights or obligations have been determined or from which legal consequences flow.”⁵¹ Here, the court reasoned plaintiffs could not meet the *Bennet v. Spear* criteria, where monitoring (the complained-of action) was several steps removed from final agency action, and where although monitoring was a mandatory duty under the Plan, legal consequences did not necessarily flow from that duty, nor did rights or obligations arise from it.⁵² Although plaintiff contended it suffered actionable harm as a result of the Forest Service’s inadequate monitoring, which prevented plaintiff from obtaining information necessary to participate in overseeing the Forest Service’s actions under NFMA, the court found that because NFMA did not provide for any public participation requirements in the conduct of monitoring, plaintiff “demand[ed] general judicial review” of the Forest Service’s day-to-day operations.⁵³

The court also dismissed plaintiff’s section 706(1) claim, holding plaintiff could not show a genuine failure to act.⁵⁴ Here, the court chided plaintiff for attempting “to evade the finality requirement with complaints about the sufficiency of an agency action ‘dressed up’ as agency’s failure to act.”⁵⁵

45. *Id.* at 923 (citing 16 U.S.C. § 1604(a) (1996)).

46. *Id.* at 924 (noting, “[t]he Plan set forth 39 specific parameters—such as trends in recreation, wildlife habitat and populations, recovery of endangered species, acres of noxious weed infestation, and acres of timber harvest—to be monitored on an annual, biannual or quarterly basis, subject to the availability of funds”).

47. 192 F.3d at 923-24 (citing 36 C.F.R. § 219.11).

48. *Id.* at 924.

49. *Id.*

50. *Id.* at 925

51. *Id.* (citing *Bennet v. Spear*, 520 U.S. 154, 177 (1997)).

52. *Id.* at 925.

53. *Id.* (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 899 (1990)).

54. *Id.* at 926.

55. *Id.* (citing *Nevada v. Watkins*, 939 F.2d 710, 714 (9th Cir. 1990)).

The court held although the Forest Service had “failed to conduct its duty in strict conformance with the Plan and with NFMA Regulations,” plaintiff had not pleaded a genuine section 706(1) claim, because the Forest Service had “performed extensive monitoring and provided detailed reports recounting its observations.”⁵⁶ Because the court did not want to “discourage the Forest Service from constructing ambitious Plans by holding them to those plans too strictly...” it affirmed the lower court’s decision, and held plaintiff failed to establish jurisdiction under either section 706(1) or section 706(2).⁵⁷

To the *Ecology Center* court, the glass was half full rather than half empty—although the Forest Service may not have obeyed its statutory mandate to the letter, it satisfied the court that it had acted to a greater degree than it had failed to act. Moreover, the *Ecology Center* court characterized the Forest Service’s duty under NFMA as aspirational rather than mandatory, stating, “to hold the Forest Service liable under § 706(1) for each oversight... would discourage the Forest Service from producing ambitious forest plans.”⁵⁸ The *Ecology Center* court not only emphasized the importance of the action the Forest Service had taken towards its goals mandated by NFMA, it de-emphasized the importance of NFMA’s mandate to formulate and adhere to forest plans, and the need for the Forest Service to adhere to its own regulations.

B. ONRC Action

In *ONRC Action v. Bureau of Land Management*, plaintiff environmental organizations brought a failure to act claim against the BLM, but did so under section 706(2) rather than section 706(1) of the APA.⁵⁹ Plaintiffs relied on section 551(13)’s inclusion of “failure to act” in the APA’s definition of agency action, claiming that the BLM failed to act when it refused to change the status quo on BLM lands awaiting an EIS, and by refusing to institute a moratorium on projects that would impact future ecosystem management strategies on BLM land.

In 1994, the Forest Service and BLM proposed to develop an ecosystem management system for public lands east of the Cascade Mountains in Oregon and Washington, in response to President Clinton’s mandate “to develop a scientifically sound and ecosystem-based strategy for management of these lands.”⁶⁰ To this end, the Forest Service and BLM were to conduct an EIS to generate alternatives that could be selected and result in amendment or revision of applicable BLM Resource Management Plans

56. *Id.*

57. *Id.*

58. *Id.*

59. 150 F.3d 1132 (9th Cir. 1998).

60. *Id.* at 1134.

("RMP").⁶¹ During the EIS development process, the Forest Service implemented an interim screening process for proposed forest sales to preserve alternatives on the lands it administered, but the BLM did not take similar action.⁶²

Plaintiffs filed a petition with the BLM, requesting a moratorium on old growth logging activities, certain land exchanges, and juniper eradication, in order to preserve alternatives while the EIS was pending.⁶³ Plaintiffs argued BLM's refusal to institute the moratorium constituted a violation of the NEPA, which requires the preservation of alternatives during the EIS process.⁶⁴ BLM responded to plaintiffs' petition with a two-page letter, indicating that plaintiffs needed to raise their concerns in site-specific challenges to individual projects, and BLM was continuing its actions under its existing program statements.⁶⁵

ONRC argued the decision not to change the status quo was a final agency action challengeable under the APA, relying on two U.S. Supreme Court cases that held certain inaction equated to agency action.⁶⁶ The court, however, distinguished the cases, because there, the lack of action was based on an evaluation of the merits and a reasoned decision not to act.⁶⁷ The court found that here, where "plaintiffs failed to point to 'a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations,' there was no agency action on which to base their challenge under the APA."⁶⁸ Plaintiffs had attempted to force BLM into a reviewable final action by submitting the petition, but the court found that even the agency's response to the petition did not qualify as a final action, because BLM never entered into an evaluative process in answering the petition.⁶⁹ Rather, the response letter was informational in nature.

Here, the Ninth Circuit focused on whether the agency had made a reasoned, deliberate decision to act or not to act. It found that because plaintiffs could not "point to a deliberate decision to act or not to take action," it could not demonstrate BLM had taken a final agency action, regardless of whether or not a site-specific project was involved.⁷⁰

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1134-35.

65. *Id.* at 1135.

66. *Id.* at 1136 (citing *City of Chicago v. United States*, 396 U.S. 162, 166-67, 90 S.Ct. 309 (holding that agency decision not to take action was not "inaction" but rather a decision on the merits resulting in a reviewable agency action); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 140-42, 59 S.Ct. 754 (eliminating the distinction between "affirmative orders" and "negative orders" because "dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status").

67. *Id.*

68. *Id.* (citing *Lujan*, 497 U.S. at 890).

69. *Id.* at 1136.

70. *Id.* at 1137.

The court also addressed the issue of whether or not BLM had failed to take actions mandated by NEPA and the Federal Land Policy Management Act (“FLPMA”). Although the court cited to section 706(1) of the APA, plaintiffs tried to obtain judicial review of agency inaction via section 706(2).⁷¹ Because section 551(13) defines agency inaction as a “failure to act,” plaintiffs attempted to attack the agency’s inaction under section 706(2). This tactic was unsuccessful. The court focused on whether BLM had a clear duty to act under NEPA or FLPMA—which it concluded BLM did not, because NEPA gave only a qualified mandate that BLM should take no action that would adversely impact the environment while an EIS for a new management plan was pending.⁷² Because an existing management plan covered the lands at issue while the EIS was pending, the court found BLM’s actions fit into an exception articulated under the regulations interpreting NEPA—the action in question was covered by an existing program statement.⁷³ The court also disagreed with plaintiffs’ contention that BLM shirked its duty under FLPMA, to “adequately monitor and update its management plans before relying on them in making land management systems.”⁷⁴ Again, as in *Ecology Center*, the court found the applicable statute—here, FLPMA—did not provide a statement of clear statutory duty, but rather “general guidance during decisions on management actions...”⁷⁵

Because ONRC could not convince the court BLM had taken any final actions, or failed to meet any clear statutory duty under NEPA or FLPMA, the court concluded it had no statutory standing under the APA.⁷⁶ Again, the court construed statutory language as providing guidelines rather than mandates, and emphasized interpretations of final agency action that rendered review under section 706 unavailable, despite evidence that the BLM’s inaction could cause irreparable harm to ecosystems the agency was bound to protect.

C. Montana Wilderness Association

The Ninth Circuit’s decision in *MWA* signaled a change in the court’s approach to 706(1) claims brought where an agency had taken partial action. The *MWA* court held plaintiff wilderness associations had a colorable claim under section 706(1) “failure to act” provisions of the APA, despite the fact the Forest Service had taken “some action” to address its duties under the 1977 Montana Wilderness Study Act (“MWSA”).⁷⁷ In doing so, the Ninth Circuit revisited the issue of threshold jurisdiction under APA

71. *Id.*

72. *Id.* at 1138.

73. *Id.*

74. *Id.* at 1139.

75. *Id.*

76. *Id.* at 1140.

77. *MWA*, 314 F.3d 1146 at 1151.

section 706, weakening its earlier holding in *Ecology Center*, and potentially breathing new life into section 706(1) claims.⁷⁸

In *MWA*, plaintiff wilderness associations challenged the Forest Service's interim management of seven Wilderness Study Areas ("WSA"s). The MWSA charged the Forest Service with maintaining the WSAs' wilderness characteristics until the time when Congress decided to designate the WSAs as wilderness, or release them for other use.⁷⁹ Plaintiffs alleged the Forest Service violated the MWSA by failing to maintain the WSAs' wilderness characteristics, and thus their potential for wilderness designation, when it "allowed, encouraged, and/or failed to act to prevent motorized vehicle use of the Study Areas beyond what existed in 1977."⁸⁰ Plaintiffs also alleged the Forest Service acted arbitrarily and capriciously by maintaining WSA trails in a manner that encouraged increased off-road vehicle ("ORV") use, which eroded the WSAs' wilderness characteristics.⁸¹

While the district court found the Forest Service both acted arbitrarily and capriciously under section 706(2)(a) and failed to act under section 706(1), the Ninth Circuit did not completely agree. The court of appeals analyzed plaintiffs' section 706(2) claim first, and found the Forest Service's specific trail maintenance could not be construed as final agency action, because it did not "mark the consummation of the [Forest Service's] decision-making process."⁸² The court found the legislative history of the MWSA suggested Congress intended forest and travel management plans to be the consummation of the decision making process; thus maintenance of trails designated by those plans was merely an interim aspect of the planning process, not its consummation.⁸³ The court also turned to the APA's definitions, holding trail maintenance did not fit any statutorily defined categories for agency action.⁸⁴

The court, however, looked more favorably on plaintiffs' section 706(1) claim, finding judicial review appropriate where plaintiffs showed "'agency recalcitrance in the face of a clear statutory duty or of such a magnitude that it amounts to an abdication of statutory responsibility.'"⁸⁵ The Forest Service argued its duties under MWSA were discretionary, rendering judicial review inappropriate.⁸⁶

The *MWA* court took pains to distinguish *ONRC* and *Ecology Center*. In *ONRC*, the Ninth Circuit found BLM action was not subject to judicial review, because unlike the MWSA, FLPMA is not a "clear statutory man-

78. Interview with Sarah McMillan, Attorney, Tuholske Law Office (March 27, 2003).

79. 314 F.3d at 1148 (citing Pub. L. 95-150, 91 Stat. 1243 (1977)).

80. *Id.* at 1149.

81. *Id.*

82. *Id.* at 1150 (citing *Bennet v. Spear*, 520 U.S. 154, 177).

83. *Id.*

84. *Id.* (citing 5 U.S.C. § 551(13)).

85. *Id.* (citing 150 F.3d at 1137).

86. *Id.* at 1151.

date”—it merely sets forth policy statements and general guidance. In contrast, the court found the MWSA did more than provide mere policy statement or general guidance; it established a management directive requiring the Forest Service to administer WSAs so as to “maintain” wilderness character and potential for inclusion in wilderness system.⁸⁷ Unlike the requested moratorium in *ONRC*, the Forest Service’s duty to maintain wilderness character and potential was a nondiscretionary, mandatory duty that it could be compelled to carry out under section 706(1).

The *MWA* court distinguished *Ecology Center* on additional grounds. The *Ecology Center* court held the Forest Service had not failed to act by falling short of its NEPA-imposed monitoring duties and its own implementing regulations, because it had “performed extensive monitoring and provided detailed reports recounting its observations,” even though it “failed to conduct its duty in strict conformance with regulation.”⁸⁸ The *MWA* court found the Forest Service had not performed its obligations in the “extensive and detailed manner” it had in *Ecology Center*, holding “[t]he simple fact that the Forest Service has taken some action to address the Act is not sufficient to remove this case from section 706(1) review.”⁸⁹

The *MWA* court thus emphasized not only the nature of the mandate with which the Forest Service was bound to comply, but also the quality of the action it took in any efforts towards compliance. The court held the Forest Service had a “duty... to maintain a specified goal,” and that the record did “not demonstrate that the Forest Service performed its obligations in an extensive and detailed manner.” Partial action towards a goal satisfied the *Ecology Center* court; it did not satisfy the *MWA* court. Although the *MWA* court distinguished *ONRC* and *Ecology Center*, it appears to have departed from the reasoning it applied in those earlier cases.

D. Southern Utah Wilderness Alliance

These Ninth Circuit cases show the difficulty of discerning a true failure to act, and a clear congressional mandate. *MWA* provided some clarity after *ONRC* and *Ecology Center*, but left the issues surrounding review of inaction under section 706(1) largely unresolved. A Tenth Circuit opinion, preceding *MWA* by only a few months, has provided the vehicle that has taken these issues to the U.S. Supreme Court. The Court heard oral argument March 29, 2004 and should issue a decision in June 2004.

SUWA v. Bureau of Land Management was brought under facts very similar *MWA*, addressing interim management of wilderness study areas.⁹⁰ In *SUWA*, plaintiffs sued the BLM for violating FLPMA and NEPA by not

87. *Id.*

88. *Id.*

89. *Id.*

90. 301 F.3d 1217 (10th Cir. 2002).

properly managing ORV use in WSAs. As with the Forest Service in MWA, the BLM was responsible for managing lands designated by Congress as WSAs. FLPMA charged the agency with a mandatory duty to “manage [WSAs]... in a manner so as not to impair the suitability of such areas for preservation as wilderness.”⁹¹ As in MWA, the agency had taken some steps towards protecting wilderness qualities in WSAs, such as closing certain roads to ORVs, and posting signs indicating ORV use was prohibited in certain areas.⁹²

SUWA alleged BLM had failed its duty to protect the WSAs’ wilderness characteristics by allowing escalating ORV use to damage wilderness qualities. Plaintiffs claimed BLM had violated its clear, nondiscretionary duty under FLPMA to manage WSAs in such a way that their wilderness values were not impaired, and asked the court to compel BLM to comply with this nonimpairment mandate.⁹³

BLM argued action could not be compelled under § 706(1) of the APA because the mandate was discretionary—and insisted it possessed discretion not only over *how* it would act, but *whether* it would act.⁹⁴ BLM also contended § 706(1) jurisdiction could be invoked only where “final, legally binding actions have been... unlawfully withheld or unreasonably delayed.”⁹⁵ Third, BLM argued SUWA did not challenge a true failure to act on BLM’s part, but merely the sufficiency of BLM’s efforts to prevent impairment.⁹⁶

The court first acknowledged that although it must give BLM considerable deference in its interpretation of the nonimpairment mandate, the nonimpairment obligation remained mandatory, and BLM’s actions were appropriate for judicial review.⁹⁷ Moreover, although BLM possessed discretion over the manner in which it implemented the mandate, it did not possess discretion over *whether* to implement the mandate.⁹⁸

The court also found BLM “read finality in an inappropriately cramped manner” when it argued section 706(1) only applied to “final, legally binding actions that have been unlawfully withheld or unreasonably delayed.”⁹⁹ The court rejected BLM’s argument that under section 706(1) the action to be compelled must itself be a final action. Instead, the court reasoned, when an agency unreasonably delays in fulfilling its duty to carry out a mandatory, nondiscretionary duty, or if an established statutory duty lapses, “the agency’s inaction under these circumstances is, in essence, the same as if

91. *Id.* at 1224-25 (citing 43 U.S.C. § 1782(c)).

92. *Id.* at 1230.

93. *Id.* at 1221.

94. *Id.* at 1227.

95. *Id.*

96. *Id.*

97. *Id.* at 1227-28.

98. *Id.* at 1228.

99. *Id.* at 1228-29.

the agency had issued a final order or rule declaring that it would not complete its legally required duty.”¹⁰⁰ Thus, when an agency fails to carry out a mandatory, nondiscretionary duty either by an established deadline or within a reasonable time period, this failure constitutes final agency action, “even if the agency may have hypothetically carried out its duty through some ‘non-final’ action.”¹⁰¹

Finally, like the *MWA* court, the *SUWA* court held “partial efforts toward completing a legally required duty do not prevent a court from compelling action under 706(1).”¹⁰² The *SUWA* court reasoned that adopting BLM’s argument, that taking *some* action removes a claim from section 706(1) review, would create the rule that “as long as an agency makes some effort to meet its legal obligations, even if that effort falls short of satisfying the legal requirement, it cannot be compelled to fulfill its mandatory, legal duty.”¹⁰³ Although the court conceded BLM should be credited for actions it had taken to comply with the mandate, it did not consider those actions an escape hatch from section 706(1) jurisdiction. Unlike the *MWA* court, the *SUWA* court openly disagreed with the *Ecology Center* opinion. While the *Ecology Center* court had refused to compel the Forest Service to act in strict compliance with its forest plan and federal regulations, reasoning that to do so “would discourage the Forest Service from producing ambitious forest plans,” the *SUWA* court rejected such policy considerations.¹⁰⁴ For the *SUWA* court, the question was whether the agency had unlawfully withheld a legally required, nondiscretionary duty—not “whether certain outcomes would be discouraged or encouraged.”¹⁰⁵

The *SUWA* court also addressed the cases the *Ecology Center* court had cited for its proposition that plaintiffs brought a mere sufficiency case, challenging the adequacy of the Forest Service’s action, rather than attempting to compel true inaction. For example, *Ecology Center* quoted *Public Citizen v. Nuclear Regulatory Commission*, which warned that “[a]most any objection to agency action can be dressed up as an agency’s failure to act,” and “caution[ed] courts against entertaining section 706(1) suits where an agency has taken some action.”¹⁰⁶ The *Ecology Center* court also cited the Ninth Circuit case, *Nevada v. Watkins*, which used *Public Citizen*’s “dressed up” language.¹⁰⁷ The *SUWA* court, however, readily distinguished both cases from the one at bar.

In *Public Citizen*, the court noted, the Nuclear Regulatory Commission had issued nonbinding regulations pertaining to training nuclear power

100. *Id.* at 1229.

101. *Id.* at 1229-30.

102. *Id.* at 1236.

103. *Id.* at 1231.

104. *Id.* (citing 192 F.3d at 926).

105. *Id.*

106. *Id.* at 1232 (citing 845 F.2d 1105, 1108 (D.C. Cir. 1988)).

107. *Id.* (citing 939 F.2d 710 (9th Cir. 1991)).

plant personnel, rather than the binding regulations it was required by statute to issue. Appellants in that case sued to compel the agency to issue binding regulations, but they did not do so in time. Federal statute required an appellant challenging final agency action or an alleged failure to act to bring suit within 180 days of the agency's decision or inaction. Here, appellants missed that deadline, and the court's analysis focused on whether issuance of the non-binding regulations were sufficient to start the 180 day statute of limitations, not whether the agency's issuance of non-binding regulations insulated it from section 706(1) review.¹⁰⁸

The *SUWA* court also found *Nevada v. Watkins* inapposite, because the *Watkins* court simply held issuing preliminary guidelines for a nuclear regulatory disposal site was not a final agency action, where the Nuclear Waste Policy Act specifically declared such action could not be deemed final agency action.¹⁰⁹ The *SUWA* court, lacking such a clear congressional determination, rejected BLM's contentions that either case stood for the proposition that because BLM took some steps to address impairment caused by ORV use, it was immune from section 706(1) review.¹¹⁰ The *SUWA* court, like the *MWA* court, held that partial steps towards completion of a goal did not constitute the sort of action that would remove an issue from section 706(1) jurisdiction.

Judge McKay dissented at length, writing that the majority's opinion inappropriately expanded section 706(1) jurisdiction.¹¹¹ The dissent argued this expansion would lead to the "unwarranted conclusion that any mandatory agency obligation is amenable to attack pursuant to [section] 706(1) of the APA."¹¹² The dissent compared the court's ability to grant injunctive relief under section 706(1) to mandamus relief, which is available "to compel an administrative agency to act where it has failed to perform a nondiscretionary, ministerial duty."¹¹³ Although Judge McKay agreed with the majority that the BLM's FLPMA duty was both mandatory and continuous, he asserted that it was not a ministerial duty, which can involve no "exercise of personal judgment upon the propriety of the act."¹¹⁴ Because the BLM had a substantial amount of discretion in the way it carried out its nonimpairment mandate, the dissent found its duty not even "remotely" ministerial and thus inappropriate for review under section 706(1).¹¹⁵ Judge McKay also took issue with the majority's "unwarranted expansion of 'failure to act,'" which, he argued, extended the APA's definition of failure to act to include "not only true agency inaction, but also all agency action

108. *Id.* (citing 845 F.2d at 1107, 1108).

109. *Id.* (citing 939 F.2d at 714 n. 11).

110. *Id.* at 1233.

111. *Id.* at 1240.

112. *Id.*

113. *Id.* (citing *Marathon Oil Co., Inc. v. Babbitt*, 117 F.3d 1170 (10th Cir. 1997)).

114. *Id.* at 1241 (citing *Webster's Third Internat'l Dictionary* (1986)).

115. *Id.*

which falls short of completely achieving the agency's obligations."¹¹⁶ The dissent returned to the language employed by the *Ecology Center* and *Watkins* courts, classifying plaintiff's claims as "complaints about the sufficiency of an agency action disguised as failure to act claims."¹¹⁷ To the dissent, the "essential inquiry" when considering whether section 706(1) jurisdiction should be invoked, is whether agency took any action "reasonably calculated to achieve the ends of its mandate."¹¹⁸

IV. CONCLUSION

The BLM appealed the Tenth Circuit's decision, and the Supreme Court heard oral arguments March 29, 2004. Its decision will have profound implications for public land management, especially in wilderness study areas, where the present actions or inactions of agencies will determine these lands' suitability for future wilderness designation. The Court's decision should answer the questions of jurisdiction over an agency's partial action, and what exactly constitutes final action in land management cases.

The government argues that under section 706(1) of the APA, courts may compel only the same sort of final agency action that a court may "set aside" under section 706(2).¹¹⁹ Under the government's logic, because the APA confines judicial review to challenges to final agency action, and defines agency action as "includ[ing] the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act,"¹²⁰ the term "failure to act" is "properly understood to refer to a failure to promulgate a rule, issue an order, or take other discrete action of the sort identified in [s]ection 551(13)."¹²¹ The APA, however, does not limit "failure to act" to the failure to take such a final discrete formal action.¹²² Instead, by enabling courts to compel action unlawfully withheld or unreasonably delayed, section 706(1) provides remedy for a final failure to act, not a failure to take a discrete final action. For 706(1) to apply, an agency must have withheld an action unlawfully, or delayed that action so unreasonably it has effectively failed to act, whether or not the contemplated action, if taken, would itself be a "final" action.

The government also asserts that because compelling action under section 706(1) is analogous to mandamus practice, it "does not permit a court to interfere with an agency's judgment or discretion,"¹²³ and therefore only non-discretionary or "ministerial" action may be compelled under section

116. *Id.* at 1243.

117. *Id.* at 1244.

118. *Id.*

119. *See* Br. of Pet., *supra* n. 12, at 15.

120. *Id.* at 15 (*citing* 5 U.S.C. § 551(13)).

121. *Id.* at 15-16.

122. Br. of Amici Curiae, *supra* n. 31, at 10.

123. *See* Br. of Pet., *supra* n. 12, at 12.

706(1).¹²⁴ The government correctly notes that under 706(1), a court may compel an agency to act, but may not tell it how to act in matters of administrative discretion.¹²⁵ The concept of administrative discretion, however, should not be stretched to exempt an agency from review where it has ignored congressional mandate. Even traditional mandamus practice admits of shades of gray in the quality of an agency's discretion. Although in mandamus actions the action to be commanded must be "ministerial," or involve no element of "discretion," preeminent administrative scholar Louis Jaffe cautioned:

"[T]he notion that each administrative act can be classified a priori either as 'ministerial' or 'discretionary' is unsound and unworkable... The classification is illusory... [T]he fact that there may be discretionary elements present does not, or at least should not, exclude judicial review, whether by mandamus or other appropriate remedy, where legally irrelevant or forbidden considerations have determined the decision."¹²⁶

Certainly agencies like the Forest Service or the BLM, as land management experts, possess discretion over the way in which they implement congressional mandates. They do not, however, possess the discretion to decide whether or not to implement those mandates—be it the BLM's non-impairment mandate under FLPMA, or the Forest Service's duty under the MWSA, to maintain the wilderness characteristics of wilderness study areas.

Although the government cautions that allowing review of an agency's partial actions towards a congressional mandate will create a claim "ever ripe" for review, it is the converse that should be of concern. If courts are not permitted to review an agency's failure to comply with statutory mandate—simply because the agency has taken some steps, no matter how feeble, towards that mandate—legitimate claims will never be ripe, and agencies will be able to shirk congressional command with impunity.

124. *Id.* at 26-29.

125. *Id.* at 22.

126. Louis L. Jaffe, *Judicial Control of Administrative Action* 181 (Little, Brown and Company, Boston 1965).