Nos. 02-1703 and 03-101

IN THE
Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE, *et al.*,
Petitioners,
v.
SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,
Respondents.

GAIL NORTON, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,
Respondents.

On Petitions for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should accept review of this case at an interlocutory stage when the Bureau of Land Management (BLM) has not been ordered to take any action, and when further proceedings may moot or narrow petitioners' concerns.

2. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM failed to satisfy its mandatory duty to prevent the impairment of four specific wilderness study areas.

3. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM had failed to comply with its mandatory duty to "manage the public lands . . . in accordance with . . . land use plans," when it was undisputed that the agency had not taken the two land use plan actions at issue.

4. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to decide whether BLM violated the National Environmental Policy Act by failing to consider significant increases in off-road vehicle use on specified BLM lands in Utah.

PARTIES TO THE PROCEEDINGS

The following are parties to this proceeding:

1. Petitioners:

Gale Norton, Secretary of the Interior
Kathleen Clarke, Director of the Bureau of Land Management
Bureau of Land Management
Utah Shared Access Alliance
The Blue Ribbon Coalition, Inc.
Elite Motorcycle Tours
Anthony Chatterly

2. Respondents:

Southern Utah Wilderness Alliance
The Wilderness Society
Sierra Club
Great Old Broads for Wilderness
Wildlands CPR
Utah Council of Trout Unlimited
American Lands Alliance
Friends of the Abajos
State of Utah
San Juan County, Utah
Emery County, Utah
Wayne County, Utah
Kane County, Utah
Utah School and Institutional Trust Lands Administration

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Southern Utah Wilderness Alliance, The Wilderness Society, Sierra Club, Great Old Broads for Wilderness, Wildlands CPR, Utah Council of Trout Unlimited, American Lands Alliance, and Friends of the Abajos have no parent companies and issue no corporate stock.

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INTRODUCTION

Petitioners in this case sought the dismissal under Rule 12(b)(1) of Respondents' (collectively "SUWA's") claims that the Bureau of Land Management (BLM) violated three of the agency's mandatory statutory duties: (1) the duty under the Federal Land Policy and Management Act (FLPMA) to prevent the impairment of wilderness study areas (WSAs), 43 U.S.C. § 1782(c); (2) the duty under FLPMA to "manage the public lands . . . in accordance with . . . land use plans," 43 U.S.C. § 1732(a); and (3) the duty under the National Environmental Policy Act (NEPA) to determine whether new information triggers the agency's duty to prepare supplemental environmental analyses. In the course of the proceedings below, BLM admitted that: (1) the agency *was* allowing the four WSAs at issue to be impaired by off-road vehicle (ORV) use; (2) the agency had *not* taken the particular actions set out in the two relevant land use plans; and (3) the agency had *never* considered whether the explosive increase in ORV use required it to prepare supplemental NEPA analyses for the five BLM areas identified by SUWA. BLM App. at 25a-26a, 32a-33a; App. at 58-59.[1] Despite these admissions and the overwhelming evidence that BLM had failed to satisfy these statutory mandates, the agency argues that the district court did not even have authority to consider the merits of SUWA's claims. The Tenth Circuit correctly rejected petitioners' arguments and further review by this Court is unwarranted.

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[1] This brief refers to the Petition for a Writ of Certiorari filed by Gale Norton *et al.* as "BLM Pet." and its appendix as "BLM App." The Petition for a Writ of Certiorari filed by the Utah Shared Access Alliance *et al.* (the "ORV Intervenors") is cited as "ORV Pet." The appendix to the instant opposition to the petitions is cited to as "App."

First, the procedural posture of this appeal renders it an unfit vehicle for Supreme Court review. Because this is an interlocutory appeal of a jurisdictional ruling concerning only a subset of SUWA's claims, the concerns raised in the petitions may be clarified or even mooted through further proceedings in the lower courts. This possibility is particularly acute here because, as often occurs when cases are still at an early pleading stage, SUWA's allegations and asserted bases for relief have evolved since the Tenth Circuit issued its decision. In addition, BLM has itself asserted in the courts below that one of the primary claims at issue in its petition is now moot.

Second, the Tenth Circuit's decision does not conflict with any opinion of this Court or of any court of appeals. BLM's effort to manufacture such a conflict mischaracterizes SUWA's claims and the proceedings below. BLM accuses SUWA of mounting a "wholesale" or "programmatic challenge" to BLM's failure to comply with "general statutory standards." BLM Pet. at 9, 12. This is incorrect. SUWA challenged BLM's failure to comply with three discrete and well-defined statutory mandates based on equally discrete facts concerning ORV use on specific BLM lands. Nor did the Tenth Circuit sanction a "programmatic challenge," as BLM claims. The court simply held that the district court had authority under 5 U.S.C. § 706(1) to consider whether the agency had violated specific statutory requirements.

Third, the issues raised by BLM concerning judicial review are not squarely presented in this case. Because of the factual and legal specificity of SUWA's claims, this case does not offer the Court occasion to decide whether courts may hear a "broad programmatic challenge" to the alleged violation of "general statutory standards." Nor does this case present the question of whether the APA empowers a court to compel non-final agency action because the actions that SUWA seeks to compel are, in fact, "final" under the APA.

Fourth, SUWA's unexceptional APA claims are of the sort that have been addressed routinely by courts in the past. The Tenth Circuit's limited ruling allowing this case to proceed broke no new legal ground by holding that the district court had authority to consider whether BLM had failed to comply with clear statutory mandates.

For all of these reasons, the petitions should be denied.

STATEMENT OF THE CASE

A. Statutory Background

1. FLPMA's Nonimpairment Requirement

In 1976, Congress passed FLPMA, 43 U.S.C. §§ 1701-1784, which governs the management of BLM lands. Among many other things, FLPMA required BLM to review and recommend lands for inclusion within the National Wilderness Preservation System. 43 U.S.C. § 1782(a). In order to be eligible for wilderness designation, an area must generally be at least 5,000 acres in size and "generally appear[] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." 16 U.S.C. § 1131(c).

By 1984, BLM had concluded that 3.2 million acres of its lands in Utah qualified as potential wilderness. These areas are called "wilderness study areas," or "WSAs." Because Congress – the sole body legally capable of designating wilderness areas, 16 U.S.C. § 1132(b) – has not yet designated these areas as wilderness or determined that it will not do so, these 3.2 million acres remain classified as WSAs and must be managed pursuant to § 603(c) of FLPMA, 43 U.S.C. § 1782(c). That section mandates that:

> During the period of review of such areas [*i.e.*, WSAs] and until Congress has determined otherwise, the Secretary *shall continue to manage such lands* according to his authority under this Act

> and other applicable law in a manner *so as not to impair the suitability of such areas for preservation as wilderness.*

43 U.S.C. § 1782(c) (emphases added). Through this requirement – which is referred to colloquially as the "nonimpairment mandate" – Congress has reserved to itself the final say as to whether WSAs ultimately become designated wilderness.

BLM interprets FLPMA's nonimpairment requirement through its Interim Management Policy (IMP). *See Sierra Club v. Hodel*, 848 F.2d 1068, 1086 (10th Cir. 1988), *overruled on other grounds, Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). In the IMP, BLM determined that WSAs are "impaired" in violation of FLPMA whenever ORV riders drive off-road because "the tracks created by the vehicles leave depressions or ruts, compact the soils and trample or compress vegetation." BLM App. at 15a n.7.

2. FLPMA Land Use Planning And The Accompanying Environmental Review Process

The Utah BLM is divided into field offices for purposes of management and administration. FLPMA requires each BLM field office to develop a land use plan for its area pursuant to a process that affords extensive opportunities for public involvement and environmental review under NEPA. *See* 43 U.S.C. § 1712(f) (public participation requirement); 43 C.F.R. § 1610.2 (same). Land use plans specify which activities – from mining to camping – will be permitted, and the location and conditions under which they will be allowed. 43 U.S.C. § 1732(a).

FLPMA mandates that BLM "shall manage the public lands . . . in accordance with . . . land use plans." 43 U.S.C. § 1732(a). This mandatory language is echoed in FLPMA's

implementing regulations, which declare that "[a]ll future resource management authorizations and actions . . . *shall conform to the approved plan*." 43 C.F.R. § 1610.5-3(a) (emphasis added).

Prior to finalizing a land use plan, BLM must comply with the public participation and environmental review requirements of NEPA, which require a federal agency to prepare an environmental impact statement (EIS) for major federal actions, such as land use plans, that may significantly affect the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1500-1508 (NEPA regulations). BLM's NEPA duties do not end once the agency completes its initial EIS for a FLPMA land use plan. NEPA's regulations require federal agencies to "prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R § 1502.9(c)(1)(ii). *See also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

B. The Proceedings Below

ORVs pose a significant threat to the ecological health of the fragile desert lands managed by BLM in Utah and have eroded the soils, trampled vegetation, destroyed cultural relics, harmed water quality, harassed wildlife, and destroyed wildlife habitat. App. at 8-12 (second amended complaint).

Although BLM was required by NEPA to consider the environmental impacts of ORV use when it issued its Utah land use plans and decided where and how ORVs could be used, many of those plans are decades old and were prepared prior to the recent dramatic increase in ORV use in Utah. As a result, BLM's environmental analyses for many of its land use plans in Utah assumed far lower levels of ORV use – and

far less environmental impact – than actually is occurring today.

Even under the less pervasive ORV use of the past, several plans recognized and sought to address the ecological damage done by unrestricted ORV use. Two instances are relevant to these proceedings. The first is the 1991 San Rafael Resource Management Plan, which limited ORV use to designated roads and trails. However, the 1991 Plan left the actual designation of particular routes to a separate San Rafael Route Designation Plan, *which the agency committed to complete by 1992*. That Designation Plan still had not been completed when SUWA filed this case in 1999.

The second relevant land use plan commitment is set out in the 1990 Henry Mountains ORV Implementation Plan. Because BLM was particularly concerned with the damaging impacts of ORVs in the Factory Butte area, the 1990 Plan obligated BLM to conduct an intensive ORV monitoring program to determine whether ORV use should be restricted. BLM App. at 25a. BLM admitted that it had not conducted the required monitoring when SUWA filed this action a decade later. *Id*. at 25a-26a.[2]

Prior to filing this lawsuit, SUWA met with and wrote to BLM personnel to demand that the agency comply with particular legal duties concerning ORV use. SUWA specifically: (1) detailed the environmental damage being caused by ORVs in WSAs; (2) noted that this damage constituted "impairment" under 43 U.S.C. § 1782(c); (3) asked that specific WSAs be closed to ORV travel in order to prevent continued degradation and impairment; and (4)

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[2] Five months after SUWA filed this lawsuit, BLM initiated the long-promised monitoring program at Factory Butte. In addition, on February 3, 2003, BLM released its decade-overdue San Rafael Route Designation Plan. *http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm* (BLM website describing decision).

urged BLM to comply with both of the specific land use plan commitments described *supra* at 6. App. at 50-57.

After failing to convince BLM to comply with its statutory duties, SUWA filed the instant action in late 1999. SUWA's second amended complaint presented ten causes of action under the APA, 5 U.S.C. § 706.[3] In 2000, SUWA moved for a preliminary injunction on four claims, three of which are relevant here: (1) that BLM had violated FLPMA's nonimpairment mandate by allowing ORVs to impair four specific WSAs; (2) that BLM had violated FLPMA's land use plan consistency requirement by failing to complete the San Rafael Route Designation Plan and by failing to conduct intensive ORV-monitoring in the Factory Butte area; and (3) that BLM had violated NEPA by failing to determine whether increases in ORV use triggered the agency's duty to supplement several particularly outdated NEPA analyses. SUWA asked the district court to issue a preliminary injunction prohibiting ORV use within the affected areas.

After hearing testimony, the district court concluded that SUWA had presented "significant evidence" that the alleged impairment "is occurring in the WSAs due to ORV use." BLM App. at 65a. The court ruled, however, that it lacked jurisdiction to consider SUWA's nonimpairment claim because FLPMA leaves BLM with "management options" regarding how the mandate could be satisfied, and because the agency had taken some minimal steps towards satisfying the mandate. *Id*. at 64a, 66a. The court held that it lacked jurisdiction to consider SUWA's land use plan consistency

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[3] On July 23, 2003, SUWA filed a third amended complaint, which did not include several of SUWA's earlier claims, narrowed SUWA's surviving claims, and, unlike its earlier complaints, stated explicitly that BLM's failures were "arbitrary, capricious, and otherwise not in accordance with law." App. at 41-45 (quoting 5 U.S.C. § 706(2)(A)).

claims because, in its view: (1) the agency had taken some steps to comply with those plans; and (2) the claim concerned management actions rather than the administration of future site-specific actions. *Id*. at 67a-68a. Finally, the court believed that it lacked jurisdiction over SUWA's supplemental NEPA claim because such claims involve agency expertise and thus, in the district court's view, could not be enforced pursuant to the APA. *Id.* at 74a. Having dismissed the claims to the extent they applied to the areas addressed in SUWA's preliminary injunction motion, the court denied that motion as moot. *Id*. at 76a. On February 9, 2001, the district court issued a Rule 54(b) certification entering final judgment on the claims raised in SUWA's preliminary injunction motion. App. at 48-49.

The Tenth Circuit, in an opinion written by Judge Ebel, reversed and remanded for further proceedings on the dismissed claims. BLM App. at 1a-39a. The court stated at the outset that, under § 706(1), "federal courts may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty." *Id*. at 10a. Jurisdiction exists in this case, the court concluded, because the duties SUWA seeks to enforce, including the nonimpairment duty, are each mandatory and non-discretionary. *Id*. at 5a, 26a, 34a-35a, 38a. The court rejected BLM's claim that jurisdiction is defeated because FLPMA leaves BLM with some discretion as to how to satisfy the nonimpairment requirement. *Id*. at 12a-15a. While this discretion may go to the merits of SUWA's nonimpairment claim or the propriety of any injunctive relief, it did not deprive the court of jurisdiction. *Id*. at 14a.

The court then rejected BLM's argument that a mandatory statutory duty is unenforceable if an agency may be able to satisfy that duty through non-final action. BLM's position, the court held, "read[s] finality in an inappropriately cramped manner" by ignoring the fact that an agency's failure to carry out a mandatory statutory duty is

equivalent under the APA to a final decision declaring that it will not comply with the duty. *Id*. at 16a-18a. The court also rejected BLM's "final action" argument because: (1) it was inconsistent with case law indicating that a court may compel an agency to satisfy a duty even if the agency has discretion concerning how the duty may be satisfied; (2) it would create a "no-man's land" of judicial review where agencies could flout mandatory statutory duties; and (3) many of the steps that BLM might take to prevent impairment would be final action, including the road closures sought by SUWA in its preliminary injunction motion. *Id*. at 18a n.10.[4]

The court also rejected the argument that an agency can immunize itself from § 706(1) review by taking some steps – no matter how insubstantial or ineffective – towards someday satisfying its statutory mandate. While "BLM should be credited for the actions it has taken to comply with the nonimpairment mandate," the court explained, "it does not follow [that those steps] … deprive[] a court of subject matter jurisdiction to determine whether it has actually fulfilled the statutorily mandated duty and potentially compel action if that duty has not been fulfilled." *Id*. at 20a.

The Tenth Circuit also reversed the district court's ruling that it was unable to review SUWA's land use plan claim. Dismissal was improper, the Tenth Circuit concluded, because "a straightforward reading of the relevant L[and] U[se] P[lans], as well as applicable statutes and regulations,

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[4] BLM states that the Tenth Circuit concluded that courts have jurisdiction over "'day-to-day management actions' such as BLM's ongoing management of the wilderness study areas." BLM Pet. at 7. This is incorrect. The Tenth Circuit's reference to "day-to-day management actions," which BLM quotes in its petition, is drawn from BLM's characterization of the issue in its own Tenth Circuit brief. BLM App. at 15a-16a. The Tenth Circuit never adopted this view of the issue.

suggests that the BLM must carry out specific activities promised in the" plans. *Id*. at 26a-27a. While "BLM can draft L[and] U[se] P[lan]s in a way that optimizes the agency's ability to respond to changing circumstances and conditions . . . , BLM cannot 'ignore the requirements of the . . . Plan'" *Id*. at 27a (quoting *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999)); *see also id.* at 29a-30a (rejecting lower court's view that BLM need only comply with its land use plans when the agency undertakes future, site-specific projects).

While Judge McKay dissented from the majority's nonimpairment and plan consistency holdings, the panel unanimously reversed the district court's dismissal of SUWA's supplemental NEPA claim. The district court, the Tenth Circuit concluded, has jurisdiction over SUWA's claim that unanticipated increases in ORV use in several areas triggered BLM's duty to determine whether the agency must prepare supplemental environmental analyses. *Id*. at 37a-39a.

REASONS FOR DENYING THE PETITION

I. The Procedural Posture Of This Case Renders It An Inappropriate Candidate For Supreme Court Review.

This Court has a long tradition of declining petitions for review in cases whose claims have not each been fully resolved by the lower courts. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari). This tradition is based on the "pruden[ce]" inherent in allowing lower courts to resolve and clarify issues so that this Court may conserve its limited resources. *Id*.; *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (certiorari jurisdiction is "to be exercised sparingly . . . [a]nd, except in

extraordinary cases, the writ is not issued until final decree"); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893). As the Solicitor General has noted many times, where "the court of appeals [has] remanded the case to the district court . . . this Court ordinarily does not review interlocutory decisions." *See, e.g.*, Cert. Op. at 6, *Tocco v. United States*, No. 02-1225 (2003); Cert. Op. at 11, *Hsia v. United States*, No. 99-680 (1999). Where further proceedings remain, issues raised in a petition for a writ of certiorari may be mooted or narrowed in the lower courts, sparing this Court from expending its resources inefficiently. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, Supreme Court Practice § 4.18 at 260 (8th ed. 2002) ("in the absence of [an] unusual factor, the interlocutory nature of a lower court judgment will generally result in the denial of certiorari").

Further proceedings in the courts below may moot or narrow petitioners' concerns in this case. While BLM raises the ominous prospect of intrusive judicial relief that would "significantly disrupt[]" the government's ability to manage the public lands, BLM Pet. at 27, no such relief has been granted in this case. Because SUWA's claims were dismissed at such an early stage, the courts below have never had the opportunity to determine whether SUWA should prevail on the merits, let alone the nature of any appropriate injunctive relief. The Tenth Circuit decided only that SUWA had a right to pursue its claims and the court was at pains to stress the "narrow" nature of its ruling and to emphasize that the merits of SUWA's claims will "need to be addressed on remand." BLM App. at 3a.

On remand, the lower courts might find that SUWA's claims fail on the merits, that equitable considerations do not justify the relief that SUWA seeks, that SUWA is entitled to such relief on wholly separate grounds, or that some other form of injunctive relief is more appropriate. A court might, for instance, order BLM to comply with the nonimpairment

mandate and carry out its land use plan commitments within a specified time and detail consequences for any failure to do so. Alternatively, a court might provide an interpretation of BLM's nonimpairment duty under FLPMA and require the agency to act in light of that interpretation.[5] Given the range of plausible outcomes, it is wholly uncertain to what extent – if any – petitioners' concerns may ultimately present themselves in this litigation. Only by denying the petitions and allowing this case to proceed in the courts below will that uncertainty be resolved.

Further militating against Supreme Court review at this point is the fact that the proceedings thus far have dealt with only a subset of SUWA's claims. *See supra* at 7. Granting the petitions for a writ of certiorari at this point could result in a piecemeal review of just the sort disfavored by this Court. *See Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2557 (2003) (dismissing a writ as improvidently granted and noting that "even if we were to decide the First Amendment issues presented to us today, more First Amendment issues might well remain in this case, making piecemeal review of the Federal First Amendment issues likely") (Stevens, J., concurring in dismissal of writ as improvidently granted). Furthermore, the presence of additional claims raises the possibility that SUWA may win injunctive relief pursuant to one of its as-yet-unadjudicated claims, in which case this Court's efforts would have no impact on the ground in Utah.[6]

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[5] If the court were to take this route, it would be exercising what even BLM admits is a court's legitimate ability to "require an agency to take action upon a matter, without directing how it shall act." BLM Pet. at 16 (quoting Attorney General's Manual on the Administrative Procedure Act (1947) at 108).

[6] The picture here is clouded still further by the fact that SUWA's third amended complaint altered its legal claims by alleging that BLM's inaction has been "arbitrary, capricious, or otherwise not in accordance with law." App. at 41-45 (quoting 5

A final reason for denying review, particularly over SUWA's land use plan consistency claim, is that BLM has begun to implement the provisions that underlie SUWA's claim. *Supra* at 6 n.2. BLM argued below that the agency's compliance with these long-ignored obligations moots SUWA's claim. BLM App. at 31a n.17 (Tenth Circuit acknowledging BLM's mootness argument). This Court ought not spend its scarce resources resolving claims that might be dismissed on remand as moot.

II. The Decision Below Does Not Conflict With Any Decision Of This Court Or Of Any Court Of Appeals.

BLM bases its petition in large part on an alleged conflict between the decision below and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). No such conflict exists.

First, *Lujan* deals exclusively with standing. This is apparent from the opening line of the *Lujan* opinion, which declares that "[i]n this case we must decide whether respondent…is a proper party to challenge actions of the Federal Government." *Lujan*, 497 U.S. at 875. The opinion never cites 5 U.S.C. § 706(1), the section at issue here, and never considers the extent of a court's authority to consider claims that an agency has failed to comply with statutory mandates. Accordingly, there is no direct conflict with *Lujan* which would warrant Supreme Court review.

Second, the portion of *Lujan* upon which BLM relies turned entirely upon the programmatic nature of the plaintiffs' claims in that case. BLM Pet. at 11-12 (discussing *Lujan*, 497 U.S. at 891-94). Rather than challenge any specific agency decision or failure to act, the plaintiffs in *Lujan* sought "wholesale" improvement in the government's so-called "land withdrawal review program," which was

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U.S.C. § 706(2)(A), a provision that is not addressed in either of the petitions to this Court).

plaintiffs' shorthand reference for all of the 1,250 or so discrete public lands management decisions made pursuant to a host of FLPMA requirements. *Lujan*, 497 U.S. at 875-89. Although the plaintiffs alleged that legal violations were rampant within the "program," they did not narrowly challenge the government's failure in any particular instance to comply with any particular statute.[7] Indeed, the claims in that case were so exceptionally broad that the *Lujan* court understood the plaintiffs to be challenging even "actions yet to be taken." *Id*. at 893. Given their exceptional breadth, it is not surprising that the *Lujan* court saw plaintiffs' claims as an attempt at the "wholesale improvement of this program by court decree." *Id*. at 891.

SUWA's claims bear no resemblance to the sweeping programmatic claims raised in *Lujan*. Unlike the plaintiffs in *Lujan*, the three claims pursued in SUWA's preliminary injunction motion challenge BLM's failure to comply in particular respects with specific and well-defined legal duties on particular BLM lands. The first claim alleged that BLM was violating FLPMA's nonimpairment duty in four specific WSAs. *See* BLM App. at 6a-7a n.3. The second claim alleged that BLM's failure to comply with two area-specific land use plan provisions violated FLPMA's land use plan

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[7] BLM cites *Lujan* for the proposition that judicial review is not available to address an agency's failure to revise its land use plans, failure to prepare an adequate EIS, failure to consider multiple uses, and failure to provide the statutorily required public notice. BLM Pet. at 17. BLM misreads *Lujan*. This Court made plain in that case that any of these failures could be challenged on a "case-by-case" basis. *Lujan*, 497 U.S. at 894. What a plaintiff may not do under *Lujan* is to seek the wholesale improvement of an agency's behavior by alleging generally that some agency "program" is riddled with illegality. Because SUWA has challenged BLM's failure to take specific actions for violating specific statutes, the Tenth Circuit's decision below does not conflict with *Lujan*.

consistency requirement. *Id*. at 25a-26a. The third claim alleged that BLM violated NEPA by failing to determine whether dramatic increases in ORV use in five specific areas in Utah triggered the agency's duty to supplement particular NEPA analyses. *Id*. at 32a. Thus, SUWA has done what the *Lujan* plaintiffs did not: it specified clear legal obligations being violated in specific areas and sought to compel specific agency actions to bring BLM into compliance with the law.

BLM's claim that this case conflicts with *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), is similarly unconvincing. BLM Pet. at 9. Like the plaintiffs in *Lujan*, the Sierra Club in *Peterson* raised a sweeping challenge to an agency's entire program. Rather than challenge any particular timber sale on the grounds that it violated a particular statute, the Sierra Club challenged the Forest Service's general management approach over the prior two decades on the Texas national forests. *Id*. at 563-64.

SUWA's claims are entirely different from the program-wide claim pursued by the Sierra Club in *Peterson*. First, while the Sierra Club raised programmatic claims that swept across every acre of the Texas national forests, SUWA's claims target site-specific legal violations. Second, while the Sierra Club tried to use *past* legal violations to enjoin all *future* timber sales – future sales that the Club had not actually proven would be illegal – SUWA seeks site-specific relief that would remedy the existing harm caused by the agency inaction that gave rise to SUWA's claims. Third, whereas the source of the alleged violations in *Peterson* were affirmative agency actions – *i.e*., past timber sales – that the Sierra Club tried to recast, in the alternative, as instances of inaction, the violations complained of by SUWA stem from true failures to act: BLM's failure to prevent cross-country ORV travel from impairing four WSAs, failure to comply with the requirements of two land use plans, and failure to

determine whether new information triggered the duty to prepare five supplemental NEPA analyses.[8]

This case is distinguishable from *Lujan* and *Peterson* in another important respect. Whereas the courts stressed in both of those cases that the plaintiffs could pursue their challenges on a case-by-case basis, BLM's arguments in this case would leave SUWA without any legal remedy. *Lujan*, 497 U.S. at 894; *Peterson*, 228 F.3d at 568-69; *see also id*. at 571-72 (Higginbotham, J., concurring). Before any environmental impact is felt from a land withdrawal or timber sale decision of the sort at issue in *Lujan* or *Peterson*, the agency must take formal action by approving the withdrawal decision or timber sale. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-30 (1998) (discussing two-stage process for timber sales). As the *Lujan* and *Peterson* courts appreciated, such decisions are final agency actions that may be challenged and enjoined in a site-specific case.

The instant case is quite different. Unlike logging and land withdrawals, no additional final agency action is necessary for cross-country ORV use in Utah's WSAs to continue and expand into the future, thereby furthering the impairment of the WSAs that Congress ordered protected.

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[8] ORV Intervenors suggest that the decision below is inconsistent with *Ecology Center. Inc. v. United States Forest Service*, 192 F.3d 922 (9th Cir. 1999), which they insist stands for the proposition that courts lack jurisdiction under § 706(1) if an agency has taken *some* action towards someday satisfying its statutory duty. ORV Pet. at 25. However, in *Montana Wilderness Ass'n v. United States Forest Serv.*, 314 F.3d 1146, 1151 (9th Cir. 2003), *petitions for cert. filed*, 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No. 03-109); 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No. 03-123), a subsequent Ninth Circuit panel (which included two of the judges from *Ecology Center*), rejected this reading of *Ecology Center*. *See also Center for Biological Diversity v. Veneman*, 335 F.3d 849, 857 (9th Cir. 2003).

Because no further agency action is required, SUWA may *never* have the opportunity to challenge BLM's violation of the nonimpairment requirement in the context of an affirmative challenge to an agency action.[9] Therefore, if SUWA cannot challenge an agency's violation of the nonimpairment mandate under 5 U.S.C. § 706(1), the agency could evade judicial review indefinitely by allowing ORVs to impair WSAs and never taking any final agency action to prevent the impairment.

III. The Issues That BLM Raises In Its Petition Are Not Presented In This Case.

BLM asks this Court to grant its petition for a writ of certiorari so that the Court may resolve two questions concerning judicial review: (1) whether a court may hear a "broad programmatic challenge" to the alleged violation of "general statutory standards"; and (2) whether a court may hear a challenge to agency inaction when the missing action would not itself be a "final agency action" under the APA. Neither issue, though, is presented in this case.

As pointed out above, none of the claims pursued by SUWA in the preliminary injunction proceedings was "general" or "programmatic" in nature. Rather, SUWA challenged BLM's failure to take a specific action or meet a

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[9] ORV Intervenors' suggestion that SUWA could challenge individual trail closure decisions, ORV Pet. at 19, ignores the fact that this case challenges BLM's failure to impose just such restrictions. Furthermore, the fact that BLM has taken *some* final actions concerning ORV use somewhere in Utah – mostly in response to this lawsuit – does not mean that SUWA can pursue its nonimpairment claims through 5 U.S.C. § 706(2)(A) challenges to final agency action, as the ORV Intervenors assume. In a challenge to the adequacy of a discrete ORV closure in one corner of Utah, SUWA could not argue that the closure violates the law because it fails to adequately protect WSAs in another corner of the State.

specific legal requirement in a specific area. *See supra* at 14-16. Because none of these claims presents a "programmatic challenge" or involves "general" statutory duties, BLM's concerns with judicial review of such claims cannot justify Supreme Court consideration.

Nor does this case give rise to BLM's second concern: whether a court may hear a challenge to an agency's failure to take non-final action.[10] In its motion for preliminary injunction, SUWA asked the court to order BLM to close several WSAs to ORV travel in order to prevent the impairment of the areas in violation of 43 U.S.C. § 1782(c). This Court has explicitly recognized that such road closure decisions are final agency actions subject to APA challenge. *Ohio Forestry*, 523 U.S. at 738-39; *see also Mausolf v. Babbitt*, 125 F.3d 661, 669-70 (8th Cir. 1997); BLM App. at 18a n.10 (describing other final actions that BLM might take to prevent impairment).

BLM's assertion that SUWA is seeking to compel non-final agency action through its land use plan consistency claim is likewise unavailing.[11] BLM is simply wrong when it relies upon *Ohio Forestry* for the proposition that all land use plan provisions, including those invoked by SUWA in this case, are merely "antecedent … planning activities" that do not "create any legal rights or obligations." BLM Pet. at 23-24. In fact, while this Court held in *Ohio Forestry* that a challenge to the logging allowed by a particular forest plan was not ripe for review because no trees could be cut until a

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[10] BLM does not argue that there is a circuit split concerning whether a court may compel non-final action. Indeed, the agency fails to provide a single citation to case authority from any level that holds that only "final" action may be compelled.

[11] Since the filing of this lawsuit, BLM has begun to comply with the two management commitments whose performance SUWA sought to compel in this case. *See supra* at 6 n.2.

second stage of decision-making had taken place, *Ohio Forestry*, 523 U.S. at 732-37, this Court recognized that forest plans do make some decisions that have an immediate impact and that those decisions may be challenged immediately, *id*. at 738-39.

The land use plan decisions at issue here are just the sort of final actions recognized in *Ohio Forestry*. Contrary to BLM's assertion that the San Rafael Route Designation Plan would not "alter the legal regime … in any respect concerning off-road vehicle use," BLM Pet. at 23 (quoting *Ohio Forestry*, 523 U.S. at 733), the route designation decisions made in that document determine which routes will be closed and which will be open to ORV use by the public. *See* http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm (announcing that the route designation decision leaves 677 miles of vehicle routes open to ORVs and closes 468 miles to ORVs). Such route closure orders are explicitly mentioned in *Ohio Forestry* as the sort of planning decision that may be challenged immediately. *Ohio Forestry*, 523 U.S. at 738-39.[12] Indeed, the government itself admitted in its briefing and again at oral argument in *Ohio Forestry* that road closure decisions made in plans may be challenged immediately. *Id*. at 739.[13]

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[12] The San Rafael Route Designation Plan is, in fact, the subject of several pending challenges by ORV advocates before the Interior Board of Land Appeals. *See Huck v. BLM*, IBLA No. 2003-169; *Telepak v. BLM*, IBLA No. 2003-170; *Norton v. BLM*, IBLA No. 2003-171; *Southeastern Utah OHV Club v. BLM*, IBLA No. 2003-172.

[13] BLM also seeks review on the basis of its belief that FLPMA's plan consistency provision requires only that independent future projects approved by the agency be consistent with the applicable land use plan and that BLM need not comply with specific affirmative management commitments made by the agency in its plans. BLM Pet. at 24. This argument goes to the

BLM's concern that SUWA seeks to compel non-final agency action in its supplemental NEPA claim is similarly misplaced. BLM is simply incorrect when it asserts that the NEPA decision document sought by SUWA is not a final agency action. BLM Pet. at 21. An agency's decision whether or not it will prepare a supplemental NEPA document marks the end of that decision-making process and, as such, has always been treated by this Court and others as a final and challengeable action. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989); *South Trenton Residents Against 29 v. Federal Highway Admin.*, 176 F.3d 658, 662-64 (3rd Cir. 1999); *Hughes River*, 81 F.3d at 442-46; *Village of Grand View v. Skinner*, 947 F.2d 651, 657 (2d Cir. 1991).[14] There is no circuit split or other reason to

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merits of SUWA's claims and has nothing to do with subject matter jurisdiction. In any case, the Tenth Circuit rightly rejected BLM's argument as contrary to the "simpl[e] and straightforward[]" terms of FLPMA and its regulations. BLM App. at 29a. 43 C.F.R. § 1610.5-3(a) states that "*[a]ll future resource management* authorizations and *actions* . . . *shall* conform to the approved plan." (Emphasis added.) Because the 1990 Henry Mountains ORV Implementation Plan declares that BLM will conduct intensive monitoring at Factory Butte, the only way that BLM can "conform" its management actions to this provision is to do the promised monitoring. By the same token, because the 1991 San Rafael Resource Management Plan decides that BLM will limit ORV use to designated trails in the San Rafael area, the agency can "conform" its actions to the plan only by following through with the trail designations.

[14] BLM's claim that SUWA's supplemental NEPA challenge is not related to any final agency action also ignores the ongoing impact of decisions made in the land use plans at issue in this case. Based on the NEPA analyses that accompanied the adoption of the land use plans, those plans provided that millions of acres would be open to unrestricted ORV use. The impacts of those decisions are not limited to the moment the plans were adopted, but rather are felt throughout the life of the plans. Thus, far from being

justify reviewing this consistent treatment of supplemental NEPA claims.[15]

IV. The Tenth Circuit's Decision To Allow SUWA's Unexceptional APA Claims To Proceed Is Consistent With The Treatment Of Such Claims By Other Courts.

Section 706(1) empowers courts to compel federal agencies to comply with mandatory statutory duties. FLPMA unquestionably imposes such a duty by mandating that BLM "shall" manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("any contention that the relevant provision of [law] . . . is discretionary would fly in the face of its text, which uses the imperative 'shall'").

It is well settled that § 706(1) may be used to compel an agency to exercise its discretion when the exercise of that discretion is statutorily required. For example, in the 1947 Attorney General's Manual on the APA, the authors noted in their discussion of § 706(1) that "a court may require an agency to take action upon a matter, without directing how it

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"divorced from" any major federal action, as BLM claims (BLM Pet. at 22), SUWA's supplemental NEPA claim is tied to the effects of major federal actions that are still having significant ongoing environmental impacts.

[15] BLM also objects that SUWA's supplemental NEPA claim could "intrude" upon BLM's planning activities, thereby diverting its resources "from the activities chosen by the agency." BLM Pet. at 10, 28. If anything, this argument goes to the merits or relief for the NEPA claim; it has nothing to do with a court's authority under the APA. Moreover, if jurisdiction over failure-to-act claims turned on whether an agency would choose to focus on other activities, jurisdiction would never exist because failure-to-act claims, by definition, involve an agency that has chosen to ignore its statutory duty and spend its resources elsewhere.

shall act." Attorney General's Manual on the Administrative Procedure Act, at 108 (1947). SUWA's nonimpairment claim fits this "mandatory-exercise-of-discretion" paradigm perfectly; SUWA asked the district court to compel BLM to exercise its management discretion so as to satisfy the agency's mandatory duty under FLPMA to prevent the impairment of four specific WSAs. [16]

The unexceptional nature of SUWA's nonimpairment claim is underscored by the many analogous cases in which courts have considered inaction claims under the APA. For example, in *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987), then-Judge Breyer held that HUD's failure to comply with its ongoing statutory obligation to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" set forth in the Fair Housing Act was subject to judicial review under § 706(1). *Id.* at 151, 160. In doing so, Judge Breyer concluded that the APA's "broad presumption in favor of judicial review of agency action" is not overcome by the agency's discretion concerning precisely how to discharge its

[16] BLM asserts that SUWA's claims should be rejected because doing so will force the public to first petition BLM for a change in land management under 5 U.S.C. § 553(e), thus affording agencies the opportunity to make a final challengeable decision regarding the public's concerns. BLM Pet. at 18. This argument suffers from many flaws. First, SUWA did, in fact, request that BLM comply with its statutory duties to restrict ORV in many of the areas at issue here. *See* text *supra* at 6-7. This case arose when BLM failed to respond. Second, quite apart from § 553(e)'s rulemaking procedure, the APA specifically provides for challenges to agency inaction. *See* 5 U.S.C. § 551(13) (challengeable "agency action" includes the "failure to act"). Third, § 553(e) applies only to petitions for new rules and has nothing to do with forcing an agency to comply with existing law and regulation, as SUWA is seeking to do in this case.

legal duties. *Id*. at 157 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967)).

The principle that a plaintiff may challenge an agency's failure to comply with a statutory duty that involves the exercise of agency discretion has been recognized by appellate courts across the nation. *See Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Auth.*, 339 F.3d 702, 712-14 (8th Cir. 2003); *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21, 32-35 (D.C. Cir. 1984); *Center for Biological Diversity v. Veneman*, 335 F.3d 849, 853-57 (9th Cir. 2003) (court has the power under 5 U.S.C. § 706(1) to compel Forest Service to comply with duty to consider the effects of its planning decisions on 57 identified rivers); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) (compelling the Fish and Wildlife Service under § 706(1) to designate Endangered Species Act "critical habitat" even though the designation decision involves an exercise of discretion and agency expertise); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 349-52 (8th Cir. 1985) (permitting review under APA of Secretary of Agriculture's failure to implement disaster relief programs); *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (upholding action against HEW under APA for failure to enforce antidiscrimination provisions of Title VI).

The Ninth Circuit reached the same conclusion in *Montana Wilderness Ass'n v. United States Forest Service*, 314 F.3d 1146 (9th Cir. 2003), in which the court affirmed the district court's authority to decide whether the Forest Service violated a comparable nonimpairment duty in its management of WSAs in Montana. In that case, the government argued, as it does here, that the courts may not hear a challenge under § 706(1) to the agency's failure to satisfy this mandatory duty because the statute does not prescribe the precise manner in which the Forest Service is to satisfy this nonimpairment requirement. *Id.* at 1151. Judge

Trott, writing for a unanimous panel, rejected the government's characterization of the nonimpairment requirement as a "general" statutory duty and instead concluded that it:

> establishes a management directive requiring the Forest Service to administer the Study Areas to "maintain" wilderness character and potential for inclusion in the Wilderness System. . . . [*T]he Forest Service's duty to maintain wilderness character and potential is a nondiscretionary, mandatory duty that it may be compelled to carry out under section 706(1).*

Montana Wilderness, 314 F.3d at 1151 (emphasis added).

As these cases demonstrate, Congress often imposes a mandatory duty to achieve or avoid some end without saying exactly how the agency must satisfy that mandate. These mandatory duties are as binding and justiciable under the APA as any others.[17] Contrary to BLM's suggestion, treating them as such is in no way contrary to the mandamus principles from which it claims § 706(1) was derived. BLM Pet. at 15-17. Courts may issue writs of mandamus even if a statute leaves an agency with some discretion about how to

[17] BLM warns darkly that such inaction claims will "almost inevitably" require a court to substitute its judgment for an agency on a "grand scale." BLM Pet. at 17. The agency's fear is unwarranted. The court's role in assessing such inaction claims is simply to determine whether, in fact, the agency is meeting the statutory requirement (in this case, preventing the impairment of the specific WSAs), and, if necessary, to fashion appropriate injunctive relief. Far from "significantly disrupt[ing]" public lands management, BLM Pet. at 27, the public would be forcing BLM to manage those lands in keeping with Congress's command. This is exactly the role that the APA's review provisions are meant to allow the courts to play.

satisfy a mandatory requirement. As this Court has recognized, mandamus may be used "to compel action, when refused, *in matters involving judgment and discretion . . . .*" *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930) (emphasis added). *See also Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 832 (9th Cir. 2002) ("While it is true that the writ of mandamus is chiefly used to compel the performance of a ministerial duty, '[i]t also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion'") (quoting *Miguel v. McCarl*, 291 U.S. 442, 451 (1934)); *Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995) (*"even in an area generally left to agency discretion*, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In these situations, *mandamus will lie when the standards have been ignored or violated*") (quoting *Carpet, Linoleum & Resilient Tile Layers v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981)) (emphasis added); *Flynn v. Schultz*, 748 F.2d 1186, 1194 (7th Cir. 1984); *Davis Assocs., Inc. v. Secretary, Dep't of Hous. & Urban Dev.*, 498 F.2d 385, 389 & n.5 (1st Cir. 1974); *Edgerton v. Kingsland*, 168 F.2d 128, 130 (D.C. Cir. 1947).

This is exactly the case here. Congress imposed a nonimpairment requirement in FLPMA. While FLPMA may leave BLM with discretion regarding how to satisfy this mandate in particular situations, the statute unquestionably removes BLM's discretion to permit impairment. The Tenth Circuit's conclusion that the district court had the authority to review BLM's compliance with the nonimpairment mandate does not warrant Supreme Court review.

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

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