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IN THE SUPREME COURT OF THE UNITED STATES

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GALE NORTON, SECRETARY OF THE :  
INTERIOR, ET AL. :  
Petitioners :  
v. : No. 03-101  
SOUTHERN UTAH WILDERNESS :  
ALLIANCE, ET AL. :  
- - - - -X

Washington, D.C.  
Monday, March 29, 2004

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:03 a.m.

APPEARANCES:  
EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Petitioners.  
PAUL M. SMITH, ESQ., Washington, D.C.; on behalf of the  
Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 03-101, Gale Norton v. Southern Utah Wilderness  
5 Alliance.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONERS

9 MR. KNEEDLER: Mr. Chief Justice, and may it  
10 please the Court:

11 The court of appeals held that respondents could  
12 bring this suit under the Administrative Procedure Act to  
13 challenge the Bureau of Land Management's ongoing  
14 management of vast tracts of public land in Utah divorced  
15 from any specifically identifiable agency action that BLM  
16 had taken or that BLM was obligated to take but had not.

17 The court of appeals relied on section 706(1) of  
18 the APA which authorizes a court to compel agency action  
19 unlawfully withheld or unreasonably delayed.

20 The court of appeals decision is contrary to the  
21 text of 706(1) which is limited to compelling agency  
22 action, not ongoing agency conduct. It is contrary to the  
23 roots of 706(1) in mandamus, which has historically been  
24 limited to the performance -- compelling the performance  
25 of what this Court termed in its seminal Kendall decision

1 precise and definite acts. It is contrary to the APA's  
2 generally applicable limitation of judicial review to  
3 final agency action, not the sort of evaluation and  
4 planning activities at issue here.

5 QUESTION: Well, can -- can we talk about that  
6 for a minute? Certainly an action can be discrete and be  
7 compellable under old mandamus rules without being final  
8 agency action in the narrow -- in the narrow sense.

9 Let's assume a -- a requirement under -- under  
10 the statute that the agency promulgate its regulations by  
11 a certain date. Okay? Now, I -- I'm -- I'm not sure that  
12 that would constitute a failure -- the -- let's say these  
13 regulations are -- are general plans of the sort that are  
14 at issue here so that they would not give rise to any  
15 immediate right of action in that they're not final agency  
16 action. But if the statute says that the agency plan will  
17 be promulgated by a certain date, wouldn't there be a  
18 cause of action to require -- you know, 6 months after  
19 that date the agency still hasn't come out with the plan.  
20 Wouldn't there be a cause of action to compel --

21 MR. KNEEDLER: Well, what you're describing,  
22 either regulations or, for example, a land management  
23 plan --

24 QUESTION: Right.

25 MR. KNEEDLER: -- of the sort at issue here --

1 we -- we agree that that is final agency action. Not --  
2 not everything that is at issue in this case is non-final,  
3 but for example, the --

4 QUESTION: Well, boy, I -- I think you -- I  
5 think you're out of the frying pan into the fire. I -- I  
6 think it's much more useful to the Government to -- to say  
7 that -- that a lawsuit can't be brought as soon as the  
8 plan is adopted, which it could if you call that final  
9 agency action, than it is to say that the failure to  
10 promulgate it can be -- cannot be sued upon because the  
11 promulgation is not final agency action.

12 MR. KNEEDLER: Just because something is final  
13 agency action doesn't mean it's ripe for judicial review.  
14 And that -- that's basically what this Court held in the  
15 Ohio Forestry case where it was a challenge to a  
16 comparable general land use plan that the Forest Service  
17 had promulgated. The plan itself was final agency action,  
18 but the Court said it was not ripe for judicial review  
19 because it did not have any immediate consequences on the  
20 behavior -- behavior of persons.

21 But the court of appeals in this case allowed  
22 706(1) to be used to compel certain conduct that is  
23 certainly not -- probably not even agency action, but  
24 certainly not final agency action, for example,  
25 monitoring. Some of these plans contemplated that -- that

1 BLM personnel would -- would go out and monitor various  
2 activities, not surprisingly in -- in the vast tracts of  
3 land, and the court said that that could be compelled  
4 under 706(1).

5 QUESTION: Well, this -- the case has sort of a  
6 hodgepodge of things in it. Among other things, there's a  
7 claim that the land use plans for San Rafael Mountain and  
8 Henry Mountain require certain very specific things, that  
9 the land use plan, for instance, for one commits the  
10 Bureau of Land Management to finish an off-road vehicle  
11 designation rulemaking by 1992 --

12 MR. KNEEDLER: It --

13 QUESTION: -- and another to engage in a  
14 separate study as a precursor to the off-road vehicle  
15 thing.

16 Now, those are very specific and with time  
17 deadlines required apparently by rules of the BLM?

18 MR. KNEEDLER: No. Well, the -- the latter one  
19 you mentioned, the -- is -- is the monitoring activity  
20 that I was -- that I was referring to. And there -- there  
21 -- the -- the land management plan -- or excuse me -- a --  
22 an off-road vehicle plan for the Henry Mountain area  
23 identified a particular area as something -- an -- an area  
24 of possible concern that BLM was expected to monitor. A  
25 36,000-acre area I -- I believe it was.

1 QUESTION: To make a separate study?

2 MR. KNEEDLER: Well, to -- to monitor and to --  
3 and then it contemplated that the area might be closed if  
4 the monitoring showed adverse consequences. The -- the  
5 plan did not commit a formal study, but in any event a  
6 study.

7 QUESTION: When you say monitor, what -- what  
8 does the BLM look for when it monitors an area?

9 MR. KNEEDLER: Well, it -- someone from the BLM  
10 office would go out to the area to look to see whether  
11 there's been an increase in, let's say, off-road vehicle  
12 use, to -- to inspect whether there's been additional  
13 adverse consequences, to see -- to perhaps watch how  
14 people are using the area. And that's typical oversight  
15 and -- and law enforcement type activity that -- that is  
16 -- is not normally something that a private person  
17 could --

18 QUESTION: Well, how about the other one, that  
19 the BLM has to finish its off-road vehicle use designation  
20 rulemaking by 1992?

21 MR. KNEEDLER: That -- that's not actually a --  
22 a formal rulemaking. And what -- what the -- what the  
23 plan, the resource management plan, for the San Rafael  
24 area contemplated was -- was a whole chart of activities  
25 that the BLM intended to do into the future.

1           The -- FLPMA, the statute at issue here,  
2 identifies resource management plans as designed to  
3 project present and future uses. Project, and that --  
4 that means laying out a general schedule, but the agency  
5 is not thereby imposing on itself a mandatory duty that is  
6 enforceable by any member of the public to require it to  
7 adhere to its schedule.

8           QUESTION: Why isn't that a defense? That is,  
9 they say that what these provisions mean is you promised  
10 to monitor this area and you didn't. Now, you don't think  
11 it did mean that or you think it -- so you -- that's the  
12 defense. But suppose they're right. They say you  
13 promised to promulgate this in 1992. That's what it says,  
14 dah, dah, dah, dah. And you -- and -- and you say that  
15 isn't what it says. Fine, but if they're right about what  
16 it says, can't they bring an action in court?

17           MR. KNEEDLER: Well, with -- with respect to the  
18 -- to the actions under the plan here, which I should  
19 emphasize are just one minor aspect of the broader  
20 challenge here --

21           QUESTION: Those were the two that I -- I  
22 know --

23           MR. KNEEDLER: Right. Those are -- those are --

24           QUESTION: What about those two? They say --

25           MR. KNEEDLER: No.

1 QUESTION: -- in black and white, you said, dah,  
2 dah, dah, and you didn't and -- and therefore we want to  
3 go into court and make sure you do. You -- why can't they  
4 go into court and make that claim?

5 MR. KNEEDLER: Well --

6 QUESTION: And you make a defense it doesn't say  
7 that.

8 MR. KNEEDLER: -- they -- they have and what --  
9 the court of appeals in this case held that based on a  
10 provision of FLPMA, which says that management actions  
11 shall be in conformity with the land use plan, that that  
12 statutory provision obligates the Bureau of Land  
13 Management to carry out every activity identified in the  
14 plan. The court of appeals relied on a statutory  
15 provision.

16 And that statutory provision is inapplicable  
17 here. What that statutory provision means is that any  
18 future site-specific activities that BLM authorizes have  
19 to be consistent with general standards in the plan, but  
20 it -- but it does -- in other words, the standards set the  
21 outer boundaries for what will happen in the future.

22 QUESTION: Even if they're wrong about that, I  
23 thought there's a basic principle: an agency has to  
24 follow its own rules.

25 MR. KNEEDLER: But these -- these --

1           QUESTION: So they say -- they say here is a  
2 rule. It says I will send monitors. It says I will do  
3 this by 1992. Those two things were not done. Therefore,  
4 court, please tell them to do it. Now, as to those two  
5 things, are you saying they have no right to make that  
6 claim in court?

7           MR. KNEEDLER: Yes.

8           QUESTION: Okay. Because. Because why?

9           MR. KNEEDLER: Because land -- a land management  
10 plan is something quite different from a regulation. A --  
11 a land management plan is -- is an identification by the  
12 agency of how -- how it expects things to unfold, again to  
13 project what's going to happen in the future. It is not  
14 imposing on itself a legally binding obligation that is in  
15 turn enforceable by any private party.

16           QUESTION: But why -- why isn't that simply a  
17 defense? I mean, you're -- you're taking the nature of  
18 the -- of the plan as -- as being ultimately nonbinding,  
19 as being precatory on the agency as -- as a jurisdictional  
20 peg to say nobody can even get into court and claim that  
21 they are not following their own rule. And I -- I don't  
22 see how you get from the one point, i.e., the nature of  
23 the plan as precatory, to the jurisdictional point.

24           MR. KNEEDLER: Well, I -- I think it is the  
25 plaintiff's burden under a suit -- in a suit under 706(1)

1 to establish that there is discrete agency action that has  
2 -- that is -- that the agency is obligated to the  
3 plaintiff to take and has not taken. That is part of the  
4 plaintiff's burden. And in this case, the plaintiff --

5 QUESTION: In the -- in the lower court, you  
6 didn't join the motion to dismiss. Did that have anything  
7 to do with this question we're discussing right now?

8 MR. KNEEDLER: No. We didn't join the motion to  
9 dismiss but all of the arguments, as the district court  
10 pointed out, the arguments that -- that we're making here  
11 and that the intervenor made in the motion to dismiss,  
12 were made in -- in opposition to the motion for  
13 preliminary injunction which came along at -- at the same  
14 stage. And the district court --

15 QUESTION: But that would go to the relief or --  
16 or to the -- whether they have a -- a claim for relief.  
17 It wouldn't go to a jurisdictional question.

18 MR. KNEEDLER: But -- but it also -- it -- it  
19 went to whether the district court should enter a  
20 preliminary injunction in the first -- if -- if there was  
21 no basis under 706(1) for the court to entertain the case,  
22 that would certainly be a basis for denying the  
23 preliminary injunction.

24 QUESTION: I -- I don't understand this  
25 discussion of jurisdiction. You're -- you're -- are you

1 claiming that the court couldn't even hear the --

2 MR. KNEEDLER: No. It's --

3 QUESTION: You're saying there's no cause of  
4 action.

5 QUESTION: Yes.

6 MR. KNEEDLER: But it's -- the cause of action  
7 does not lie under 706(1) --

8 QUESTION: Okay. We don't usually call that  
9 lack of jurisdiction.

10 MR. KNEEDLER: Right, but --

11 QUESTION: You acknowledge they can come into  
12 court.

13 MR. KNEEDLER: Right. The -- the district --

14 QUESTION: But the judge should say, get out of  
15 here. You --

16 MR. KNEEDLER: The district court termed it  
17 jurisdiction, but it -- but it -- it I think probably more  
18 accurately would be characterized as a motion to dismiss  
19 for failure to state a claim because there was no final  
20 agency action that BLM was obligated, owed a duty to the  
21 private plaintiffs to take under its land management  
22 plans. Land management --

23 QUESTION: Well, do you take the position that  
24 no land use management plan can ever give rise to an  
25 obligation to any portion of the public to do certain

1 things that the plan says will be done by date X?

2 MR. KNEEDLER: We're -- we're not saying it  
3 would be legally impossible for BLM to impose such a thing  
4 on itself, but BLM has never --

5 QUESTION: If it did, is it actionable possibly?

6 MR. KNEEDLER: It -- it might be, but that would  
7 depend on how the plan -- the particular plan was worded.  
8 But BLM has never understood the plans that it is -- that  
9 is has adopted here to be imposing on itself legal duties  
10 that it owes to the public.

11 QUESTION: Well, I thought you acknowledged that  
12 it -- that it imposes some legal duties; that is to say,  
13 that if -- if the agency took action, took affirmative  
14 action, which would destroy its ability to follow through  
15 on the plan, you know, allowed development in a certain  
16 area that the plan anticipated would be left undeveloped,  
17 that an injunction would lie for that. I thought that's  
18 -- no?

19 MR. KNEEDLER: But -- but if I could explain the  
20 way that would operate. Some plans adopt standards  
21 against which future agency actions are to be measured.  
22 For -- to use an example, suppose a forest plan said that  
23 there couldn't be any timber harvesting.

24 QUESTION: Right.

25 MR. KNEEDLER: BLM could not -- or the Forest

1 Service could not allow timber harvesting within 200 feet  
2 of a stream. And then a particular timber sale came along  
3 in which the Forest Service was allowing trees to be  
4 harvested within 200 feet of the stream.

5 QUESTION: Suppose -- suppose it's --

6 QUESTION: Well, let him answer.

7 QUESTION: Suppose it said you shall protect the  
8 stream.

9 MR. KNEEDLER: The -- the protect the stream  
10 would be a standard against which a timber sale, a  
11 discrete agency action, that takes place on the land  
12 governed by the plans, would be measured, but it is not  
13 itself a legal duty of the sort that is compelled under --  
14 that can be compelled under 706(1).

15 QUESTION: Would -- would you go back to  
16 monitoring for a minute, which may be easier to understand  
17 than the plan? It may be very difficult. It may be  
18 impossible as a matter of legal standards to figure out  
19 how much monitoring is enough. But what if the agency in  
20 an internal document says, we are not going to monitor.  
21 Nobody waste your time going out there monitoring. And  
22 that's the claim that they have refused to monitor. Does  
23 that get them into court?

24 MR. KNEEDLER: No. With respect to  
25 monitoring --

1 QUESTION: Because it's not final agency action?

2 MR. KNEEDLER: It's not final agency action.

3 QUESTION: So it -- it's really not -- going  
4 back to the -- the earlier argument about the plan, what  
5 is fatal, it take it, is not that the -- the duties are --  
6 are, in effect, precatory duties that they don't have  
7 hard-edged enforcement features. The -- what is fatal is  
8 that regardless of what the duties are, even their  
9 fulfillment, would not be final agency action. That's  
10 your ultimate point, isn't it?

11 MR. KNEEDLER: There -- there are two points.  
12 One is that the plans as a general matter do not impose  
13 legally -- legal obligations that are owed to members of  
14 the public. They're internal documents.

15 QUESTION: But you acknowledge that they could,  
16 that some details of some plans could impose --

17 MR. KNEEDLER: What -- what I would acknowledge  
18 would be that if BLM chose in the future to adopt a policy  
19 of putting such things in plans, it would probably have  
20 the authority to do so. But it has not done that to date.

21 QUESTION: But it would still, I take it, on  
22 your argument not be -- raise an issue of final agency  
23 action. So there still would -- would be no authority to  
24 order.

25 MR. KNEEDLER: With respect to monitoring,

1 that's true.

2 QUESTION: No, no. Back to the plan. You said,  
3 all right -- in -- in answer to Justice O'Connor, you  
4 said, all right, they -- they could, in fact, adopt  
5 provisions that are very hard-edged and have absolute  
6 requirements. I take it then that even if they did, your  
7 -- your ultimate answer would be the same. What they are  
8 obligating themselves to do is not final agency action,  
9 and therefore their refusal or -- or failure to do it  
10 would not be the subject of an affirmative order.

11 MR. KNEEDLER: Not across the board. With  
12 respect to monitoring, yes, but if they obligated  
13 themselves to, say, within -- within 1 year we shall issue  
14 an order closing the back 40,000 acres to off-road vehicle  
15 use and we intend that to be a binding obligation,  
16 enforceable by private parties, that would be enforceable  
17 because the order closing the area would be final agency  
18 action. It would carry legal consequences for private  
19 people. But monitoring --

20 QUESTION: Why -- why wouldn't a -- a -- the  
21 adoption of a policy saying that we will never monitor be  
22 final agency action with respect to the duty to monitor?

23 MR. KNEEDLER: Because monitoring itself is not  
24 final agency action. It has no -- it carries no legal  
25 consequences.

1           QUESTION: Mr. Kneedler, the -- Judge McKay in  
2 the Tenth Circuit, dissenting in the Tenth Circuit,  
3 described these land use plans as aspirational and that's  
4 why he thought that they weren't open to private  
5 enforcement. Does that go too far to -- to just to say  
6 these plans are -- are aspirational? They're our wish  
7 list.

8           MR. KNEEDLER: That's basically our position.  
9 Again, the -- the plans can set outer limits of what's  
10 permissible, standards against which future agency actions  
11 can be measured. But within that area, all BLM has done  
12 is project what it intends to use -- to do.

13           If I could call the Court's --

14           QUESTION: Could -- could I come back to the --  
15 to the no harvesting timber within 200 -- 200 yards of a  
16 stream? You -- you think that that one would be  
17 enforceable if a plan contained that provision.

18           MR. KNEEDLER: Yes. That would be -- that would  
19 be a -- because BLM would have intended to impose on  
20 itself a legal -- a legally binding standard. I'm not  
21 saying that it -- that it always is. What I'm saying is  
22 if BLM inserted such a thing in a plan, that could be --

23           QUESTION: What -- what does it have to say? We  
24 -- we intend to be bound? How do you decide which  
25 provisions of a plan are promises and which ones are

1 aspirations? I mean --

2 MR. KNEEDLER: I think --

3 QUESTION: -- land use plans are all  
4 aspirations?

5 MR. KNEEDLER: No. I -- I --

6 QUESTION: Where does it say that?

7 MR. KNEEDLER: I -- I think with future  
8 management activities, it's -- I -- the general rule,  
9 certainly I think the universal rule, is that those are  
10 aspirational. If there are legal standards that future  
11 agency actions have to comply with, those would ordinarily  
12 be binding. I think those are the two presumptive rules.

13 And if I could call the Court's attention to  
14 page 159 of the joint appendix which sets out the relevant  
15 portion of the San Rafael land management plan, at the top  
16 of page 159 it describes -- there's a heading to a chart  
17 that then follows. And that heading is Management  
18 Objective. And then there's table 19 which sets -- which  
19 is entitled Anticipated Implementation and Monitoring of  
20 Plan Decisions. And then it lists a number of pages of  
21 management objectives that BLM intends to carry out.

22 And the particular one at issue here is on page  
23 162 about halfway down the page, rather cryptically  
24 referring to apply ORV designations, document through an  
25 ORV implementation plan. Within 1 year is the schedule.

1 That is not the sort of itemization that could be thought  
2 to give rise to a legally binding duty. It's included in  
3 a whole list of activities, some -- some that are -- that  
4 are part of ongoing activity, some that are -- have  
5 undetermined due dates.

6 QUESTION: Suppose there were the world  
7 convention of ORV's and 100,000 people are going to come  
8 into the area. The agency has no duty. It just sits and  
9 goes out to watch the race?

10 MR. KNEEDLER: Well, what -- no. What would --  
11 what would happen in that situation -- in a lot of  
12 situations there might be a requirement that -- that for a  
13 group of that size, the group obtain a permit to use the  
14 land for a gathering of -- in excess of a certain number  
15 of people. I'm not sure if BLM has a regulation like  
16 that. I know the Forest Service does.

17 QUESTION: Well, do they have to do that? I  
18 mean, Justice Kennedy's question is what if they sit on  
19 their hands and they do nothing. And your answer is,  
20 well, they might do something. They might require a  
21 permit. But what if they want to sit on their hands?

22 MR. KNEEDLER: There -- there are two points to  
23 that. First, someone who -- someone who is concerned  
24 about this visitation by -- by ORV users, whoever may use  
25 the land, could apply to the agency for an order closing

1 the area or prohibiting the entry of people into the area.

2 QUESTION: Okay. Let's assume -- make it --  
3 let's assume the agency says, no, or -- or the agency  
4 doesn't do anything.

5 MR. KNEEDLER: Again --

6 QUESTION: It doesn't -- doesn't even say I will  
7 deny your order. It just sits there.

8 MR. KNEEDLER: If the -- if the agency doesn't  
9 respond, a suit could be brought under 706(1) to compel  
10 the agency to respond. Once the agency renders a decision  
11 on that, then the -- then the --

12 QUESTION: Well, is the response final? Let's  
13 assume they do respond. Is that final agency action?

14 MR. KNEEDLER: Yes. That would be -- that would  
15 be a decision on a discrete request for final agency  
16 action, and at that point a suit could be brought under  
17 706(2) based -- and this is critical -- based on the  
18 agency's application of law to facts and the agency's  
19 rationale. It would a traditional view of agency action.

20 The defect -- a principal defect in this case is  
21 that the plaintiffs have asked and the Tenth Circuit has  
22 ordered the district court in the first instance to hold a  
23 trial about general activities on the ground not divorced  
24 -- not -- not tied to any specific agency action or  
25 decision based on an administrative record. And we think

1 that this is a recipe for chaos.

2 QUESTION: Mr. Kneedler, if you -- the complaint  
3 here was that the agency wasn't doing anything or not  
4 enough about off-the-road vehicles. Now, you have  
5 explained that -- this is getting back into the larger  
6 question and away from the land use plans -- the -- that  
7 this effort states no claim. What could the group have  
8 done? What could the SU -- whatever -- their concern  
9 about these off-the-road vehicles and the agency not  
10 controlling them. What could it have done that would  
11 enable them to trigger agency action and then court  
12 review?

13 MR. KNEEDLER: Well, in -- in two of the  
14 wilderness study areas, in the San Rafael and in the  
15 Parunuweap, BLM issued orders closing some roads within  
16 those areas but not -- leaving others open. SUWA could  
17 have appealed administratively those orders and it could  
18 have then gone to court if those orders stood. SUWA has  
19 not done that.

20 QUESTION: Relying on what?

21 MR. KNEEDLER: Under section 706(2) of the APA.

22 QUESTION: No, but I mean, what -- what  
23 provision of law that would -- would have required them to  
24 close --

25 MR. KNEEDLER: I think the argument would have

1 been that it was -- that it would have been arbitrary and  
2 capricious or that not to close it would -- would not meet  
3 the -- the general statutory standard that wilderness  
4 study areas -- that the Secretary shall manage wilderness  
5 study areas so as not to impair their suitability for  
6 ultimate designation as wilderness. They could go into  
7 court and say that a -- that the denial of a -- of our  
8 request to close the area entirely will -- will cause the  
9 agency not to meet that legal standard.

10 Now, if there was not already an order that had  
11 been issued, as there was there, then what -- then the  
12 proper procedure would be for the parties to present their  
13 request to the agency in the first instance so that the  
14 agency can pass on the question of whether to close it or  
15 not.

16 QUESTION: May -- may I go back to the two  
17 specific things that are described in the papers here?  
18 One, the commitment to monitor a certain area by a certain  
19 time. I understood you to say that would not be  
20 actionable because monitoring is not final agency action.

21 MR. KNEEDLER: That's one of our arguments.

22 QUESTION: But is not the duty to monitor final  
23 agency action? For example, if the statute said you must  
24 monitor this area by January 1992 and they did nothing,  
25 would that not be final agency action that could be

1       actionable?  If the statute said it.

2                   MR. KNEEDLER:  No.  I -- I think it would not  
3       be.  It -- there may be --

4                   QUESTION:  If the statute required a specific  
5       monitoring and they just didn't do it, that would not  
6       be --

7                   MR. KNEEDLER:  Congress could impose a duty on  
8       an agency to do a number of things that would not, in  
9       turn, constitute final agency action.  Not everything  
10      Congress tells an agency to do is final agency action.

11                   QUESTION:  What -- what about the failure to do  
12      it?  Isn't the failure to do it within the deadline  
13      actionable?

14                   MR. KNEEDLER:  No.  A -- a failure to act --

15                   QUESTION:  -- promulgate rules and they do  
16      nothing?

17                   MR. KNEEDLER:  Well, a rule would be final  
18      agency action.  Monitoring, because it has no legal  
19      consequences, is not final agency action.

20                   QUESTION:  Well, suppose it's -- what Congress  
21      is you must, no matter what, promulgate by March 10 --  
22      it's exactly Justice Scalia's question -- 1994 this  
23      tentative, non-reviewable, never-to-be-reviewed  
24      preliminary draft of a vague plan X.  Okay?

25                   (Laughter.)

1           QUESTION: And they just don't do it. That's  
2 where we started this whole questioning. Now, I would  
3 have thought there would be review under this provision if  
4 they just didn't do it, even though the thing they're  
5 supposed to promulgate can never be reviewed.

6           MR. KNEEDLER: No. We think that 706(1) and  
7 706(2) have to be read in tandem, that 706(1) --

8           QUESTION: You -- you don't agree with my  
9 statement. So is there any authority for what you've just  
10 said, that if Congress says definitely you have to do this  
11 by such a date and they don't do it, that's not  
12 reviewable?

13          MR. KNEEDLER: The -- the review occurs under  
14 the APA and the APA is limited to final agency action.

15          QUESTION: What is your best argument for your  
16 tandem point? You just said we -- we think they should be  
17 read in tandem. What's your best argument for that?

18          MR. KNEEDLER: Agency action is used in both  
19 706(1) and 706(2). Section 704 of the APA says -- limits  
20 judicial review to final agency action, and we think that  
21 applies to both 706(1) and 706(2). And then finally the  
22 logic of 706(2), as we explain in the Attorney General's  
23 memorandum, which Court has given deference to,  
24 particularly the Safeway Stores case, explains that the  
25 authority of a court to compel an agency to get on with it

1 and to issue final agency action is essentially derivative  
2 of its ultimate authority to review the final agency  
3 action when it's issued on the basis of the record.

4 If I could, I would like to reserve the  
5 balance --

6 QUESTION: Very well, Mr. Kneedler.

7 Mr. Smith, we'll hear from you.

8 ORAL ARGUMENT OF PAUL M. SMITH

9 ON BEHALF OF THE RESPONDENTS

10 MR. SMITH: Mr. Chief Justice, and may it please  
11 the Court:

12 The Government works very hard in this case  
13 offering a -- an almost bewildering variety of legal  
14 theories all intertwined, all intended to support what  
15 ultimately I submit is an implausible proposition, that  
16 there exists a category of mandatory, clear statutory  
17 duties imposed by Congress on the Federal agencies which  
18 remain totally unenforceable by the courts, unless and  
19 until the agency chooses to engage in some affirmative --

20 QUESTION: Mr. Smith, let's go to the appendix,  
21 page 162, which I believe is one of the things that the  
22 Tenth Circuit dealt with: apply ORV designation  
23 documents; through ORV implementation, et cetera. The  
24 schedule says: within 1 year after approval of RMP. Now,  
25 there's no statutory deadline there, is there?

1           MR. SMITH: No. This is an entirely plan-based  
2 claim in this case, Your Honor, and our claim was that  
3 this plan, read as a whole, taking into account not just  
4 this page but the text on page 154 as well, was fairly  
5 read as a binding commitment that they would do this task  
6 within a year. As it turned out, they did it in 12 years.  
7 They did it in -- in 2003. They finally designated these  
8 routes, which they said they needed to do in their  
9 exercise --

10           QUESTION: Well, supposing in -- on page 162  
11 instead of saying within 1 year, they had said within 12  
12 years. Would you have had any better case? Or would you  
13 -- you'd have a worse case, wouldn't you?

14           MR. SMITH: If they had said that they were  
15 going to do it in 12 years, we wouldn't have had any claim  
16 that they were doing it too late.

17           QUESTION: So -- so there's nothing statutory in  
18 the deadline you're talking about. It's a deadline that  
19 -- that the BLM sets for itself.

20           MR. SMITH: And the statutory argument is that  
21 the statute itself requires them to manage these lands in  
22 accordance with their own plans. That's --

23           QUESTION: But -- but there's nothing in the  
24 statute that requires them to set deadlines.

25           MR. SMITH: Not in -- not in this case, Your

1 Honor. There -- I'm sure there are other provisions that  
2 were required in this case.

3 But there are two -- there are several different  
4 kinds of mandates that we're trying to enforce here: the  
5 statutory mandate under -- of nonimpairment, the -- the  
6 requirement that they abide by their own plans, and also  
7 the NEPA requirement that they take a hard look at -- at  
8 the environmental impact statement requirement when --  
9 when new information comes in.

10 QUESTION: Mr. Smith, can I -- I -- your opening  
11 statement was that it's implausible that there should be  
12 some duties upon agencies that are not enforceable in the  
13 courts. I don't find that implausible at all. I -- I  
14 don't understand the role of the courts to be to oversee  
15 executive action. You have congressional oversight  
16 committees that do that. I understood the role of the  
17 courts to be to vindicate individual rights when they have  
18 been violated.

19 And what the Government is saying here is that  
20 no individual right has been violated until there has been  
21 final agency action. Final agency action is what confers  
22 -- it's -- it's an action that changes the law, that  
23 establishes requirements. And until that happens, there's  
24 no individual right.

25 I'm not willing to accept your proposition that

1 -- that the role of courts is to make sure that agencies  
2 tow the line. That's -- that's the President's role.  
3 It's not ours at all.

4 MR. SMITH: Well, Your Honor, what makes their  
5 -- their position implausible is what Congress actually  
6 did in the Administrative Procedure Act where it very  
7 specifically said that -- that courts have the power to  
8 compel agency action unlawfully withheld and unreasonably  
9 delayed.

10 QUESTION: It's based -- nobody thought that the  
11 APA radically changed the course of -- of judicial review  
12 of administrative action, which had been based on the  
13 prerogative writs such as mandamus and which required an  
14 individual right that had been harmed and -- and a  
15 mandatory duty to that individual.

16 MR. SMITH: And -- and --

17 QUESTION: And one can violate the -- the  
18 directives of Congress without -- without harming any  
19 individual, and when that happens, it's up to the  
20 congressional committees to bring the agency back into  
21 compliance, not -- not these courts.

22 MR. SMITH: With respect, Your Honor, I think  
23 the concept that decides who gets to bring the lawsuit is  
24 the concept of standing, not the concept of individual  
25 rights. And it's no -- there is no argument here that

1 the plaintiffs lacked standing under this Court's  
2 decisions to enforce this mandatory obligation of the  
3 agencies to avoid impairment. And so I think that that's  
4 the right way to think about it.

5           And if you look at the -- the finality concept  
6 and the right role it should be playing here, it's the  
7 inaction that has to be final, not the action that you're  
8 seeking to compel. It's -- their -- their reading of the  
9 statutory text puts the word final in the wrong section.  
10 Finality comes up under section 704 which says final  
11 agency action is subject to judicial review. Agency  
12 action, in turn, is defined as including failure to act.  
13 So as the courts, since the APA has -- was first brought  
14 out, have consistently said you look at whether the  
15 inaction is sufficiently final to decide this is the right  
16 time to bring a lawsuit.

17           QUESTION: I think all the Government is saying  
18 is that the inaction like the action has to be inaction  
19 which causes remediable harm to the individual.

20           MR. SMITH: Absolutely.

21           QUESTION: Just as that doesn't happen with  
22 action unless it's final, the Government says it doesn't  
23 happen with inaction -- with inaction unless what you're  
24 seeking to compel is something that would have conferred  
25 upon you something you have a right to have.

1           MR. SMITH: Well, two points, Your Honor. First  
2 of all, I don't disagree that the concept of harm is a key  
3 part of how you decide whether or not the inaction is  
4 sufficiently final to bring a lawsuit. We want to look at  
5 several things, whether the Congress imposed a deadline or  
6 a continuous duty, as they did here, whether there's  
7 irreparable harm, whether the agency is operating under a  
8 misunderstanding of the statute that is involved. The  
9 courts say in those situations, the practical concept of  
10 finality is used to decide this inaction is sufficiently  
11 serious that we're going to allow review now.

12           QUESTION: Let's take the Federal Communications  
13 Commission. It -- its obligation under -- under its  
14 statute is to regulate broadcasting in the public  
15 interest, convenience, and necessity. You think a lawsuit  
16 could be brought claiming that, you know, for 10, 50  
17 years, the FCC has failed to regulate broadcasting in the  
18 public interest, convenience, and necessity?

19           MR. SMITH: No, Your Honor. There are many  
20 things that are -- that are sufficiently general in -- in  
21 the code that they could not be enforced under section  
22 706(1).

23           QUESTION: How do we determine what's  
24 sufficiently general? I think it's pretty -- pretty  
25 general. The obligations under these statutes seem to me

1 quite general.

2 MR. SMITH: Well, Your Honor, what you do is you  
3 -- you apply the usual techniques of statutory  
4 construction and then you look at the second thing, which  
5 I think it's important that we -- the -- the Court focus  
6 on here. You look at what the agency regulations say the  
7 statute means. And here we have two features of the  
8 regulations which the Government studiously ignores.

9 One specifically deals with how you tell that  
10 off-road vehicles are impairing and the regulation -- the  
11 -- the interim management plan that they promulgated --  
12 and that's at pages 71 and 72 of the joint appendix --  
13 specifically says that any use of off-road vehicles off  
14 the existing ways that existed in 1980 when they  
15 designated these study areas, any use of it is surface-  
16 disturbing and is -- is an impairment that violates the  
17 impairment mandate.

18 QUESTION: Was that a regulation? You -- you  
19 call it a regulation. Was it a regulation?

20 MR. SMITH: It was promulgated based on notice  
21 and comment. It has been treated by every court that's  
22 ever looked at it as a binding regulation. It does not  
23 appear in the C.F.R., Your Honor, but it is -- it is a  
24 much more than a mere --

25 QUESTION: Doesn't it have to appear in the

1 C.F.R. if the agency regards it as a regulation?

2 MR. SMITH: The -- I don't know the answer that  
3 there's a specific rule about that, Your Honor.

4 QUESTION: I think it is.

5 MR. SMITH: It is certainly the -- the document  
6 by which the BLM has committed to guide all of its actions  
7 with respect to this category of land, the wilderness  
8 study areas, and it's been consistently enforced by  
9 courts.

10 QUESTION: No, but something that just -- just  
11 determines internal actions of an agency is not -- is not  
12 regarded as a regulation.

13 MR. SMITH: The other regulation that I think is  
14 important for the Court to focus on is the regulation  
15 dealing with what they're supposed to do when they find  
16 impairment caused by off-road vehicles. And this is in  
17 the C.F.R. It's at 43 C.F.R., section 8341.2(a).

18 QUESTION: Where is that in the joint appendix?

19 MR. SMITH: It is not in the joint appendix,  
20 Your Honor. It is quoted at -- on the top of page 5 of  
21 the other respondents' brief, the other red brief by the  
22 Utah Shared Access Alliance. And I invite the Court to  
23 look there.

24 What the BLM regulations say is that when the  
25 BLM official on site finds that off-road vehicles are

1 causing considerable adverse impacts on a list of things,  
2 including wilderness suitability, which is what we're  
3 talking about with the wilderness study areas, quote, the  
4 agency, quote, shall immediately close the areas affected  
5 to the types of vehicle causing the adverse effect until  
6 the adverse effects are eliminated and measures  
7 implemented to prevent recurrence, unquote. So the -- the  
8 rule is if there's -- if there's impairment being caused  
9 by off-road vehicles, you close it on an emergency basis  
10 and then you consider whether or not you're going to take  
11 other steps to -- to deal with it down the road when you  
12 open it up again.

13 QUESTION: Isn't it slightly more difficult than  
14 that? And this -- this raises a question I was going to  
15 ask you anyway. You -- you said a second ago if -- if the  
16 agency finds, in effect, any impairment and it doesn't do  
17 anything, then -- then one can sue. But the reg you just  
18 quoted referred to considerable adverse impact.

19 And I guess my question was going to be let's  
20 assume we are contemplating a -- a suit. What is the  
21 criterion that one would plead in the -- in the petition  
22 saying they failed to do X, therefore that is tantamount  
23 to inaction or refusal, therefore there should be an  
24 order? What is X? Can we get any clearer than  
25 considerable adverse effect?

1           MR. SMITH: Well, the -- the regulation not only  
2 says that's -- that's what you -- that's what triggers it,  
3 but then it says specifically what they're supposed to do,  
4 which is to close the whole area, including the --

5           QUESTION: If it's considerable.

6           MR. SMITH: Yes.

7           QUESTION: Not -- not if there's -- you know,  
8 one track through the desert is not, I presume, enough.

9           MR. SMITH: Right. And I think that --

10          QUESTION: The criterion then that you'd plead  
11 is there is considerable. We can prove considerable. We  
12 can prove they did nothing. Therefore, order --

13          MR. SMITH: Right. And I think, you know, in  
14 the real world, you bring a suit and you say here's how --  
15 the statute says don't allow any impairment. So it's a  
16 very -- reasonably specific statutory mandate. You have a  
17 regulation that says here's how you find impairment, and  
18 you have a regulation that says when there's a  
19 considerable amount of impairment, here's exactly what you  
20 have to do to fix it.

21          QUESTION: Okay. I have one --

22          QUESTION: Shouldn't you be required to bring a  
23 petition to petition for some specific action --

24          MR. SMITH: Well --

25          QUESTION: -- before just filing a lawsuit?

1           MR. SMITH: Your Honor, there is no procedure  
2 that the BLM has for filing a petition or for doing  
3 anything to trigger any kind of a response. There is no  
4 process of that sort. The most that you can do is -- and  
5 we did this. They -- the letters are in the appendix to  
6 the opposition to cert -- is write a letter to the local  
7 field office.

8           QUESTION: Well, I thought you could -- I  
9 thought the land use plan has the status under the statute  
10 as a rule -- as a rule, and there is a procedure. There  
11 must be a procedure for making a rule.

12          QUESTION: The APA requires a procedure. I  
13 mean, it requires one.

14          QUESTION: Isn't there?

15          MR. SMITH: Your Honor, there is no place to go  
16 get a docket number and get any answer. You send these  
17 letters in and they just sit on people's desks. And  
18 there's also no requirement --

19          QUESTION: You didn't wait for an answer. You  
20 sent in your letters and it wasn't long thereafter that  
21 you brought this suit.

22          MR. SMITH: Well, those letters were part of an  
23 ongoing effort over a period of many years to try to get  
24 them to take this problem.

25          QUESTION: But you didn't -- you -- the -- one

1 difficulty that I have putting a handle on it is -- is  
2 you're saying, agency, overall you're not enforcing the  
3 statute. We want a court order that say -- says enforce  
4 it, which looks to a court quite different than I -- I'm  
5 asking to have this particular area closed, and then the  
6 agency would make a discrete ruling on that particular  
7 area. Instead of saying overall on these four -- whatever  
8 it is -- vast parcels of land, they're not doing the job,  
9 so court, tell them to do the job, and then the court is  
10 supposed to monitor that?

11 MR. SMITH: Well, Your Honor, we -- we brought a  
12 lawsuit that encompassed potentially a -- a substantial  
13 number of these different wilderness study areas and  
14 related areas, but then what -- what happened is we made a  
15 motion for a preliminary injunction as to four and put on  
16 evidence showing the adverse effects in those four and  
17 asked the court to -- to address them and say they're --  
18 they're not -- they're not adhering to their statutory and  
19 regulatory obligations in those four.

20 The Government took the position that even if we  
21 had sued on just one, that -- and the district court  
22 agreed with this -- that because it's an inaction case, no  
23 matter how clear the statutory and regulatory violation  
24 is, there's nothing that can be done --

25 QUESTION: But if you petitioned for an action,

1 that is, you asked the agency to close this area, and they  
2 said no, it seems to me that that would be a final action.

3 MR. SMITH: But they don't say no, Your Honor.  
4 There is no -- they -- what the BLM has done instead over  
5 the -- the long period of time is avoid doing either yes  
6 or no and then coming into court and saying there is no  
7 final agency action.

8 QUESTION: Then -- then you bring an action to  
9 require them to say yes or no. That is the agency final  
10 action that you would be suing for. You bring a suit  
11 saying we've asked this question. You've diddled around  
12 for 2 years and haven't given us an answer. We demand an  
13 answer to this particular discrete question. You -- you  
14 would have had a suit for that.

15 MR. SMITH: Well -- well, perhaps, Your Honor,  
16 but then you end up with an entire set of litigation over  
17 how many -- how much time it is before they have to answer  
18 each particular petition without any kind of statutory or  
19 regulatory guidance of how that process is supposed to  
20 work.

21 QUESTION: But this seems in a way like sort of  
22 the shortcut to say we -- we demand that the BLM comply  
23 with its statutory mandate and we don't like the way  
24 they're doing it. I mean, it -- it seems almost that  
25 general.

1           MR. SMITH: Well, it's -- it's not, though, Your  
2 Honor. We were focusing on a particular mandate, a  
3 particular harm caused by off-road vehicles in particular  
4 places. And we're saying not every shall phrase in the  
5 U.S. Code can be enforced under 706(1), but when you --  
6 when it's very mandatory, where there's irreparable harm  
7 and the Congress clearly was trying to preserve its  
8 prerogative to make these places wilderness areas by  
9 directing that they be continuously managed to maintain  
10 the status quo, under --

11           QUESTION: It's so hard for courts to get into  
12 the business of trying to see if an agency like this is  
13 out there on a day-to-day basis doing what it needs to do.

14           MR. SMITH: Well, it's not -- it's not like  
15 we're trying to take over running the agency, Your Honor.

16           QUESTION: Well, but it -- it sounds that way to  
17 a certain extent, like kind of the court taking over a  
18 prison where they find there's some defect. And what --  
19 what is going to be the role of the Tenth Circuit or of  
20 district court in Utah if -- if you prevail? If they --  
21 they tell the agency to do something, you claim the agency  
22 hasn't done it, they're back on a contempt order like in  
23 the district court here?

24           MR. SMITH: Well, there is obviously going to  
25 have to be some application of judicial review and then

1 some application of -- of the court's power to enforce the  
2 law. The alternative is to say that they can -- they  
3 could ignore the law indefinitely and put up --

4 QUESTION: Or maybe some application could be  
5 made seeking closure of some areas. The -- the exhibits  
6 you furnished are sort of devastating.

7 MR. SMITH: Well, the -- the evidence was quite  
8 clear. There really isn't any doubt about it.

9 QUESTION: It looks pretty terrible.

10 MR. SMITH: Indeed, on -- on page 59 of the --  
11 the appendix to the op to cert, the Government flat  
12 admitted that there had been impairment. It wasn't like  
13 they were ignoring that fact. It's the -- this is a  
14 request for admission. We said admit that there's been  
15 impairment in the wilderness study areas.

16 QUESTION: So is there no mechanism whereby suit  
17 could be brought demanding that a certain area be closed  
18 because of the impairment?

19 MR. SMITH: Your Honor, that's what this suit  
20 was.

21 QUESTION: Why didn't you go -- look, are we  
22 supposed to concentrate on the four areas?

23 MR. SMITH: Well, that's the only part that's  
24 before the Court on that issue.

25 QUESTION: Right, those four areas. As to those

1 four areas, are you saying as to one, two, three, or four,  
2 that the land use plan as it now reads requires them to be  
3 closed in part or in whole and they're not following the  
4 plan?

5 MR. SMITH: We're not --

6 QUESTION: Or are you saying that the land use  
7 plan permits them in part to be open, but we want -- we  
8 think they should be closed? Which is it as to each of  
9 those four?

10 MR. SMITH: At the time the lawsuit was brought,  
11 there was no BLM plan or --

12 QUESTION: No. I'm saying what we're supposed  
13 to decide. You're saying now we can narrow it to these  
14 four areas, and I want to know as to those four areas, am  
15 I supposed to assume that the land use plan as in  
16 documents that are there, as to area one, two, three, or  
17 four, now requires it to be open or whatever you think it  
18 should be and you want to change it or that it's right.  
19 You don't want to change a word of it, but they're not  
20 just enforcing it. Which is it as to one, two, three, and  
21 four?

22 MR. SMITH: It depends on whether you mean now  
23 or --

24 QUESTION: I mean as we're supposed to decide  
25 this case.

1           MR. SMITH: The difficulty, Your Honor, is that  
2 after the lawsuit was brought and as the preliminary  
3 injunction hearing was about to convene, the Government  
4 started exercising the exact emergency --

5           QUESTION: I want you to choose. I don't care  
6 what you say. I just want to know how I'm supposed to  
7 decide the case. Am I supposed to decide the case on the  
8 assumption -- you've narrowed it to four areas -- to area  
9 one. Let's take that. Am I supposed to decide it on the  
10 ground that what you want is you think the land use plan  
11 as written is perfect. You just want them to enforce it.  
12 Or that you want them to change what it says in those  
13 words because you think it's wrong. That's all. I mean,  
14 you must think one or the other or both.

15           MR. SMITH: When the case was brought, there was  
16 no closure order in place, and we were told by the  
17 district court that there is no jurisdiction of the  
18 Federal courts to require that.

19           As we were going through that process, these  
20 closures started to happen. And so I'm -- I'm having  
21 difficulty answering your question --

22           QUESTION: That's -- but I'm asking you how I  
23 should decide it. As I listen to you, you want me to  
24 decide it as it was when the case was brought.

25           MR. SMITH: Yes.

1           QUESTION: That's your view. So then as it was  
2 when the case was brought, what you want is a change in  
3 the wording of the governing documents which I'm thinking  
4 of as land use plan. Yes. Is that yes or no?

5           MR. SMITH: We -- we want an exercise of the  
6 emergency closure which would effectively amount to the  
7 same thing.

8           QUESTION: Okay. Now, my question then -- and  
9 that's what I thought you wanted -- is why isn't the thing  
10 to do, if that's the kind of relief you want, to file a  
11 piece of paper over at the BLM and say, we want this  
12 document amended because it seems to me that this document  
13 has the status of a rule and every agency -- every agency  
14 -- has a procedure through which you can request an  
15 amendment of a rule. Why wouldn't that be the right  
16 procedure rather than to come into court and say we want a  
17 judge to do it first in the first instance?

18          MR. SMITH: Your Honor, if I could refer you to  
19 page 52 of the appendix to our opposition to cert --  
20 that's the orange document I guess -- this is what we did  
21 file with them, seeking the closure of these WSA's. This  
22 is the -- we're looking for the orange op cert, Your  
23 Honor, not the -- the joint appendix. And 52 is an  
24 example of what was done in the effort to get the BLM to  
25 act on -- in -- in accordance with its own statutory and

1 regulatory obligations.

2           And it says, we just wanted to point out to you  
3 there's all this irreparable harm going on. There's ORV's  
4 rampant in these wilderness areas, and as you well know --  
5 this is in the middle of the first paragraph -- 43 C.F.R.,  
6 section 8341.2 -- that's the one I was talking about  
7 before -- directs BLM managers to immediately close areas  
8 suffering considerable adverse effects from ORV use and  
9 abuse. So we brought it to the agency's attention, and  
10 they, as -- as they have done throughout the period,  
11 simply didn't do anything.

12           QUESTION: So if in fact this is the equivalent  
13 of the kind of document I said, then why wouldn't your  
14 lawsuit be to compel them to act on this request in a  
15 timely fashion? Maybe the timely fashion would be in 4  
16 days if it's an emergency. But why wouldn't this lawsuit  
17 be designed to ask them to do what you asked them to do?

18           MR. SMITH: Well, this lawsuit was designed to  
19 ask them to do that. The only real things it seems like  
20 we're talking about here is whether the form of the  
21 lawsuit ought to have been in the form of --

22           QUESTION: Yes, yes. We're only talking about  
23 the form. I agree with that. This whole thing is about  
24 the form. But they're trying to make you go through  
25 certain hoops and to some point, I -- I think the law

1 should give you relief, but it has to be through the right  
2 form.

3 MR. SMITH: But it may well be that the Court  
4 will recognize that all agencies have to respond to these  
5 things and you can sue them. The -- the reality is BLM,  
6 unlike many other parts of the Interior Department,  
7 doesn't have a process for allowing you to petition for an  
8 order and -- and have a formal process for it being  
9 adjudicated.

10 QUESTION: You don't need that to get into  
11 court. The -- you're guaranteed judicial review. A  
12 person suffering legal wrong because of agency action or  
13 adversely affected is entitled to judicial review thereof.  
14 If you write them a letter and they don't have any other  
15 process, and they don't respond to your letter, you can  
16 bring -- you can bring a lawsuit.

17 MR. SMITH: Well, it may well be then that --  
18 that once that's clarified, that this whole dispute will  
19 -- will be a matter of procedural --

20 QUESTION: But it's been clear. I mean, I don't  
21 think that that's been unusual. What hasn't been clear is  
22 that -- is that a court can exercise continuing  
23 supervision of an agency, which is what some of your  
24 requests here would require. What's -- you know, that --  
25 that was never allowed before -- before the APA was

1 enacted because the -- the courts were not allowed to  
2 issue injunctions that required continuing supervision.  
3 And -- and mandamus was a -- a discrete act that -- that  
4 was required.

5 What cases since the APA would -- would you --  
6 you appeal to as -- as showing the authority of the courts  
7 to -- to undertake continuing supervision of an agency?  
8 What -- what's the best case you have?

9 MR. SMITH: Well, there -- there is not a lot of  
10 case law about continuing supervision. There are plenty  
11 of cases out there that say you can direct them to  
12 exercise their discretion. And -- and that's really what  
13 we were --

14 QUESTION: In a discrete matter. In a discrete  
15 matter, but you're -- you're asking to exercise their  
16 discretion in the management of the forests. And -- and  
17 that's -- that's -- I mean, that's putting the -- the  
18 district judge in the place of the -- the Secretary of the  
19 Interior.

20 MR. SMITH: Well, I'm not sure that there's  
21 really a distinction between the two kinds of lawsuits  
22 that we're contemplating here. If we had brought this  
23 case and said, direct them to answer our petition about  
24 why they're still allowing -- they haven't exercised their  
25 emergency closure power in these four places, they -- they

1 -- the court might have said, okay, tell them -- I will  
2 tell them to exercise their emergency closure power. They  
3 then come back with a thing that says, well, we don't  
4 think that ORV use is so bad after all and so we're just  
5 not going to do anything. And then you bring a 706(2)  
6 claim, and you have the same basic issues being litigated.

7 QUESTION: Exactly. But this time it's a -- in  
8 -- in a form recognizable to men, women, and  
9 administrative lawyers.

10 (Laughter.)

11 MR. SMITH: Who don't apparently fall in either  
12 category, Your Honor?

13 (Laughter.)

14 MR. SMITH: Let me -- let me touch a moment on  
15 the land use plan enforcement aspect of it because I  
16 think --

17 QUESTION: But it isn't totally just -- because  
18 what they're worried about is not that you're trying to  
19 get off-road vehicles off the road in certain areas like  
20 here, there, and the other place. What they're worried  
21 about is that you're turning over to a district judge the  
22 generalized job of running the BLM's ORV program. And so  
23 if you can get it to specific things, you destroy what  
24 they're worried about.

25 MR. SMITH: Well, that's one of the things

1 they're worried about. They also apparently, until at  
2 least this morning, wanted to be able to write up these  
3 plans, go through a whole public planning process,  
4 coordinate with the States, do an environmental impact  
5 statement, all of this stuff in the planning process and  
6 then say, the plan, by -- by the way, is never enforceable  
7 if we don't do what we say we're going to do.

8 QUESTION: Why is that unreasonable? I mean,  
9 suppose they get their budget cut. You know, these --  
10 these are all internal documents. This is what we plan to  
11 do, but next year Congress cuts their budget by 50  
12 percent. Is a court going to direct that all of the money  
13 that Interior has left has to be devoted to your pet  
14 project --

15 MR. SMITH: No. The rule would be --

16 QUESTION: -- as opposed to, you know, all of  
17 these other things that need the money for it?

18 MR. SMITH: The rule would be they have to go  
19 through the amendment process, and there -- then you have  
20 an agency action which you can challenge. Their position  
21 is we don't want to do the amendment process because then  
22 we'll have to answer to all these people in public  
23 hearings. We don't have to have -- take any action  
24 because then you'll just go to court and sue us under  
25 706(2). We would rather than amend it -- and maybe we'd

1 have to do another environmental impact statement, et  
2 cetera. We would rather just ignore it and --

3 QUESTION: How -- how can they amend it? The  
4 statute doesn't say that your plans shall -- you know,  
5 given how much money you have, the -- the forests will be  
6 protected. It says you will develop management plans for  
7 the protection of the forests. Period. And so, if  
8 there's no money there, you still have to have the same  
9 plan. They wouldn't be able, when they amended the rule,  
10 to say the reason we're amending is we don't have enough  
11 money to do what ought to be done. The plan would still  
12 have to read the same way. But -- and so if the plan is  
13 enforceable, you are giving a court the power to -- to put  
14 your preference right at the head of the line of all the  
15 money that the agency has to spend.

16 MR. SMITH: No, Your Honor --

17 QUESTION: And that doesn't seem reasonable.

18 MR. SMITH: The way that that gets handled in  
19 the -- in the run of the mine cases in -- in the D.C.  
20 Circuit and elsewhere is at the -- at the point of  
21 equitable discretion. One of the cases we cite, Barr  
22 Laboratories, is a case where somebody tried to say you've  
23 got to approve my generic drug within 60 days because  
24 that's what the statute says, and the D.C. Circuit said,  
25 well, we have jurisdiction under that, under 706(1), but

1 we're not going to order that because there are 16 other  
2 drugs over there that are in the same situation. They  
3 don't have the capacity to get this done, and we're not  
4 going to put them at the head of the line because they  
5 brought the lawsuit first. The courts do have a lot of  
6 power in considering things like finality and then  
7 deciding about what kind of equitable discretion to  
8 exercise -- and the D.C. Circuit case law is quite  
9 sophisticated on this subject -- to decide whether they  
10 want to enforce in the way that is being requested.

11 All we're saying is if there's a duty under the  
12 statute or under the -- the plan, the plan isn't amended,  
13 it ought to be something that you can get into court and  
14 let the judge look at and decide whether this is an  
15 appropriate duty to enforce at this time.

16 QUESTION: But how could the judge look at it  
17 without knowing all the other things that are on the  
18 agency's table given the limited resources? I thought the  
19 BLM's answer here was we realize that the environmental  
20 impact statement is out of date, and over a period of  
21 years, we're going to update those statements. But  
22 frankly, we haven't got the money to do it for every place  
23 now.

24 MR. SMITH: They -- they may well be -- put that  
25 -- that argument forward, if and when we ever have a

1 hearing on this thing. We were dismissed at the -- the  
2 jurisdictional stage here. They call it jurisdiction. It  
3 may well be cause of action.

4 QUESTION: I mean, if -- if we imagine coming  
5 into court, then would everything that's on the agency's  
6 plate have to be presented to the court?

7 MR. SMITH: It would depend on the particular  
8 duty at issue and the kinds of harms that are at issue.  
9 Here we have a specific mandate that says maintain these  
10 places which you, BLM, has -- have designated so Congress  
11 will have the prerogative to make the wilderness areas  
12 when it looks at it. It's -- it's got a very clear,  
13 specific duty and severe irreparable harm that will happen  
14 if the BLM doesn't make it a priority. In those  
15 situations, the Federal courts are much more likely to say  
16 we are going to grant some relief in this -- we are going  
17 to force the BLM, or whoever it is, to follow the  
18 statutory obligations. In many other kinds of situations,  
19 when the agency comes in and says, well, we have 66 other  
20 things like this we should be doing, the courts are much  
21 less likely to do that.

22 We're just saying that there has to be a power  
23 in the Federal courts at some point to compel adherence to  
24 the law when all of the other requirements are set,  
25 standing, finality, a clear mandatory duty which is

1 perhaps better defined in the regulations, as you have  
2 here, all of these things, that if you don't have the --  
3 the residual power in the courts to take action at some  
4 point when the violation gets sufficiently serious and  
5 harmful, then the -- the provision really isn't  
6 enforceable at all. That -- that's the main point we're  
7 trying to make here, Your Honor.

8 QUESTION: That happens all the time under  
9 statutes. I mean, you know, let's assume the FCC is not  
10 doing its job. It's not -- it's not indeed, regulating  
11 broadcasting in the public interest, convenience, and  
12 necessity. It's violating its congressional mandate. Can  
13 you run into court and say, you know, make the FCC  
14 regulate -- broadcast in the public interest, convenience,  
15 and necessity? Certainly you can't.

16 MR. SMITH: Well, that's a perfect example, Your  
17 Honor, of why this issue only arises in certain narrow  
18 circumstances because the FCC takes affirmative agency  
19 actions all the time and you can challenge those as being  
20 arbitrary and capricious and outside the statutory  
21 requirements.

22 The difficulty we were facing here was the  
23 absence of any action to challenge. The agency was using  
24 its own inaction as its defense to being challenged for --  
25 for violating the statute. That's their -- their ultimate

1 purpose. I --

2 QUESTION: Is -- is one way to characterize what  
3 the Government is saying is that they require that every  
4 inaction has some sort of a mirror image in action? And  
5 that's a little a bit hard for me to work with.

6 MR. SMITH: Right. And -- and the -- the  
7 drafters of the APA really did say we think inaction is  
8 sometimes action and that that can be final enough that  
9 you can challenge it. And so -- so we think that's what  
10 the court said and that's what they have done for the last  
11 50 years under the APA. They've looked at is this  
12 inaction sufficiently serious, sufficiently unlawful that  
13 we're going to allow a 706(1) kind of claim to proceed.

14 QUESTION: What's the best case in this Court  
15 for that proposition that inaction can become action?

16 MR. SMITH: Your Honor, I'm actually not aware  
17 of an inaction case in this Court.

18 QUESTION: Thank you, Mr. Smith.

19 Mr. Kneedler, you have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

21 ON BEHALF OF THE PETITIONERS

22 MR. KNEEDLER: Thank you, Mr. Chief Justice.

23 We think that this case is really controlled by  
24 Lujan v. National Wildlife Federation, which really was  
25 the mirror image of this case. It was a situation in

1 which plaintiffs sought to challenge again conduct of BLM  
2 on a programmatic basis, saying that BLM, with respect to  
3 vast tracts of land, had not taken action that -- that the  
4 plaintiffs thought it should take. And this Court held  
5 that, no, such a suit must focus on not only agency  
6 action, discrete action, but final agency action, and you  
7 can't bring about wholesale change in an agency program  
8 under 706(2).

9           It follows, we think, a fortiori under 706(1)  
10 that that cannot be done because 706(1) is essentially  
11 ancillary to 706(2). It is designed to require the agency  
12 to disgorge final agency action if it has a legal  
13 obligation to do it so that once that final agency action  
14 is issued, it can be reviewed under the central provision  
15 of the APA, section 706(2).

16           706(1) is limited to compelling that sort of  
17 action and putting the courts in the position where they  
18 can then review final agency action in the way the  
19 Administrative Procedure Act contemplates, which is on the  
20 basis of the agency's decision, the agency's finding of  
21 fact, its application of law and policy to fact and its  
22 rationale.

23           So this is not just a matter of form. We think  
24 that the difference between the lawsuit that plaintiffs  
25 have brought and the lawsuit that the APA contemplates is

1 critical to the relationship between agencies and courts  
2 under the APA and under the separation of powers under the  
3 Constitution.

4 Plaintiffs' vision would put the courts in the  
5 position in the first instance of finding whether there's  
6 been compliance with the statutory standards. Our view  
7 and the way the APA requires is to submit a request for a  
8 particular order or regulation, let the agency act, and  
9 then review that discrete controversy.

10 All three of the claims in this case that the  
11 plaintiffs have brought would reflect a radical departure  
12 from that view.

13 The first is to compel compliance with a general  
14 statutory standard to manage lands in a particular way.  
15 Management is not agency action. It's like a program,  
16 which this Court said in Lujan could not be reviewed.

17 The claim to require NEPA statements is  
18 independent, not tied to any proposed major Federal  
19 action. They're claiming an ongoing duty to update NEPA  
20 programs.

21 And with respect to the land management program  
22 -- plans, no court has ever held since FLPMA was enacted  
23 and these plans have been utilized that they impose on BLM  
24 a duty owed to members of the public to comply with  
25 schedules, tentative, anticipated schedules, as this

1 document says, of what will be carried out in the future.  
2 This is not just a question of standing and zone of  
3 interest which private people might be able to sue. It's  
4 more fundamental than that. These plans do not impose any  
5 duties owed to any member of the public because they are  
6 designed for internal management by the agency.

7 We are in no way saying that what BLM does is  
8 beyond judicial review, but the plaintiffs are required to  
9 follow the right procedures.

10 QUESTION: What -- what about the letter at page  
11 52 in the brief in opposition?

12 MR. KNEEDLER: 52 was a --

13 QUESTION: Why -- why isn't that specific  
14 enough?

15 MR. KNEEDLER: It -- what the -- what the  
16 respondents did not do was wait for BLM to respond, and in  
17 fact, in March of 2000, before the PI hearing was even  
18 held in this case, BLM issued a closure order that closed  
19 six out of those seven orders and left -- areas and left  
20 one of them open. And SUWA never challenged that.

21 Justice O'Connor, you referred to pictures in  
22 the -- in the joint appendix. And it's important to bear  
23 in mind that those are pictures of areas outside the  
24 wilderness area that are open under the relevant land use  
25 plans to off-road vehicle usage. So there are no

1 restrictions on their use there.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
3 Kneedler.

4 The case is submitted.

5 (Whereupon, at 11:03 a.m., the case in the  
6 above-entitled matter was submitted.)

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