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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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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONERS

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

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

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

The court of appeals decision is contrary to the text of 706(1) which is limited to compelling agency action, not ongoing agency conduct. It is contrary to the roots of 706(1) in mandamus, which has historically been limited to the performance -- compelling the performance 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 should protect
8 the 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, I 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 says 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 agents review under this
4 provision if they just didn't do it, even though the thing
5 they're 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 this 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 19 -- in 2003. They finally designated
8 these 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 it -- 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: But the criterion then that you'd
11 plead is there is considerable. We can prove
12 considerable. We can prove they did nothing. Therefore,
13 order --

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

22 QUESTION: Okay. I have one --

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

25 MR. SMITH: Well --

1 QUESTION: -- before just filing a lawsuit?

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

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

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

15 QUESTION: Isn't there?

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

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

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

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

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

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

1 QUESTION: But if you petitioned for an action,
2 that is, you asked the agency to close this area, and they
3 said no, it seems to me that that would be a final action.

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

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

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

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

1 general.

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

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

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

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

25 MR. SMITH: Well, there is obviously going to

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

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

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

10 QUESTION: It looks pretty terrible.

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

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

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

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

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

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

6 MR. SMITH: We're not --

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

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

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

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

25 QUESTION: I mean as we're supposed to decide

1 this case.

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

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

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

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

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

1 MR. SMITH: Yes.

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

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

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

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

1 act on -- in -- in accordance with its own statutory and
2 regulatory obligations.

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

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

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

23 QUESTION: Yes, yes. We're only talking about
24 the form. I agree with that. This whole thing is about
25 the form. But they're trying to make you go through

1 certain hoops and to some point, I -- I think the law
2 should give you relief, but it has to be through the right
3 form.

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

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

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

21 QUESTION: But it's been clear. I mean, I don't
22 think that that's been unusual. What hasn't been clear is
23 that -- is that a court can exercise continuing
24 supervision of an agency, which is what some of your
25 requests here would require. What's -- you know, that --

1 that was never allowed before -- before the APA was
2 enacted because the -- the courts were not allowed to
3 issue injunctions that required continuing supervision.
4 And -- and mandamus was a -- a discrete act that -- that
5 was required.

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

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

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

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

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

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

11 (Laughter.)

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

14 (Laughter.)

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

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

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

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

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

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

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

1 706(2). We would rather than amend it -- and maybe we'd
2 have to do another environmental impact statement, et
3 cetera. We would rather just ignore it and --

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

17 MR. SMITH: No, Your Honor --

18 QUESTION: And that doesn't seem reasonable.

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

1 well, we have jurisdiction under that, under 706(1), but
2 we're not going to order that because there are 16 other
3 drugs over there that are in the same situation. They
4 don't have the capacity to get this done, and we're not
5 going to put them at the head of the line because they
6 brought the lawsuit first. The courts do have a lot of
7 power in considering things like finality and then
8 deciding about what kind of equitable discretion to
9 exercise -- and the D.C. Circuit case law is quite
10 sophisticated on this subject -- to decide whether they
11 want to enforce in the way that is being requested.

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

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

25 MR. SMITH: They -- they may well be -- put that

1 -- that argument forward, if and when we ever have a
2 hearing on this thing. We were dismissed at the -- the
3 jurisdictional stage here. They call it jurisdiction. It
4 may well be cause of action.

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

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

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

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

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

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

23 The difficulty we were facing here was the
24 absence of any action to challenge. The agency was using
25 its own inaction as its defense to being challenged for --

1 for violating the statute. That's their -- their ultimate
2 purpose. And I think --

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

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

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

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

19 QUESTION: Thank you, Mr. Smith.

20 Mr. Kneedler, you have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

22 ON BEHALF OF THE PETITIONERS

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

24 We think that this case is really controlled by
25 Lujan v. National Wildlife Federation, which really was

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

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

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

24 So this is not just a matter of form. We think
25 that the difference between the lawsuit that plaintiffs

1 have brought and the lawsuit that the APA contemplates is
2 critical to the relationship between agencies and courts
3 under the APA and under the separation of powers under the
4 Constitution.

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

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

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

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

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

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

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

11 QUESTION: What -- what about the letter at page
12 52 in the brief in opposition?

13 MR. KNEEDLER: 52 was a --

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

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

22 Justice O'Connor, you referred to pictures in
23 the -- in the joint appendix. And it's important to bear
24 in mind that those are pictures of areas outside the
25 wilderness area that are open under the relevant land use

1 plans to off-road vehicle usage. So there are no
2 restrictions on their use there.

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

5 The case is submitted.

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

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