Broad Programmatic Attacks: *SUWA*, the Lower Courts' Responses, and the Law of Agency Inaction

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I. INTRODUCTION: REVIEWABILITY OF AGENCY INACTION

In *Marbury v. Madison*, Marbury's commission was never delivered because Chief Justice Marshall invalidated a portion of the 1789 Judiciary Act.[1] Marshall acknowledged, however, that courts are empowered to issue writs of mandamus.[2] Such writs are "directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, 'to do a particular thing therein specified, which

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1. 5 U.S. 137 (1803).
2. *Id.*

appertains to his office and duty and which the court has previously determined, or at least supposes, to be consonant to right and justice.'"[3] Over two hundred years later, observers and judges still have yet to agree on which agency inactions are "consonant to right and justice" and which are not. For example: A statute calls upon the Bureau of Land Management (BLM) to manage Wilderness Study Areas (WSAs) "in a manner so as not to impair the suitability of such areas for preservation as wilderness."[4] Can there be judicial review under the Administrative Procedure Act (APA)[5] despite the fact that the agency did not take a discernible action? In other words, if the BLM sits idle while the lands are trammeled by outdoor recreational vehicle use, can a court use the above provision to review BLM's inaction? Would this be "consonant to right and justice"? The Supreme Court answered with an emphatic "no" in *Norton v. Southern Utah Wilderness Alliance* (*SUWA*), declaring that there was no legal action to review.[6] As we will see, *SUWA* was not the first agency inaction Supreme Court case. In fact, *Marbury* itself grappled with the same issue.

At the heart of the debate over reviewability of agency inaction is the proper role of courts in the structure of our government. In *Marbury*, Marshall wrote:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.[7]

When can the judiciary oversee the performance of executive duties, and when can it not? Which of these duties are justiciable?

This Comment assesses which statutory directives rise to the level necessary for judicial review. Part II will begin by explaining the significance of judicial review of agency decisionmaking, addressing theories of agency behavior. Part III will then focus on agency inaction, first addressing the Supreme Court's jurisprudence, and then canvassing the recent lower federal court interpretations of *SUWA*, identifying specific cases that have granted review and specific cases that have denied it. Part IV will then summarize the law surrounding agency inaction. Part V concludes with an opinion on the state of the law.

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3. *Id.* at 169 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *110).
4. Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1782(c) (2000).
5. 5 U.S.C. §§ 500-706 (2000).
6. 124 S. Ct. 2373 (2004).
7. Marbury v. Madison, 5 U.S. 137, 170 (1803).

II. AGENCY THEORY AND THE JUDICIAL ROLE

A. Dueling Theories of Agency Behavior

In 1971, Judge Skelly Wright proclaimed that it is a judicial duty "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[8] Seven years later, then-Justice William Rehnquist wrote that "[t]he fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action."[9] These two statements are in diametric opposition to one another, but this should not come as a surprise. Administrative law is rife with cases representing a will to perform bold judicial oversight of agency action, as well as cases illustrating extreme judicial deference to agency action.

This judicial tension can be understood as the manifestation of opposing philosophies regarding agency behavior. One school of thought regards agencies as "uniquely susceptible to domination by the industry they [are] charged with regulating."[10] Thomas Merrill describes this "capture theory" of agency behavior: "Starting in the late 1960s, many federal judges became convinced that agencies were prone to capture and related defects and—more importantly—that they were in a position to do something about it."[11] With Congress delegating so much power to agencies, there was a legitimate fear that the agencies were abusing their authority behind the scenes, without a true democratic check. The power that was once being wielded transparently by the directly elected Congress was now being wielded somewhat secretly by groups of individuals that were putatively, but not truly, accountable by virtue of presidential election. This concern is compounded when agencies appear to be beholden to the "regulated entities more often than the interests of the regulatory beneficiaries."[12]

Ironically, the other side has the same fear concerning abuse of power; however, this group focuses its attention on judicial mismanagement. Then-Judge Scalia wrote in a 1983 law review article:

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8. Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

9. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978).

10. Thomas W. Merrill, *Agency Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997).

11. *Id.*

12. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1714 (2004).

"It may well be, of course, that the judges know what is good for the people better than the people themselves; or that democracy simply does not permit the *genuine* desires of the people to be given effect; but those are not the premises under which our system operates."[13] This line of reasoning was uttered years earlier in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* when then-Justice Rehnquist wrote: "Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment."[14] This school of thought can best be understood through the "presidential control model"; it believes that agencies reflect presidential policies, which in turn, reflect the public's preferences, thereby making agencies majoritarian institutions and efficient microcosms headed by a centralized leader.[15] This theory focuses on agency accountability, "asserting that agency legitimacy is best achieved when agency decisionmaking occurs under the direction of politically accountable officials."[16]

Different eras reflect more or less judicial activism in the review of agency decisionmaking, but the tension between capture theory and presidential control is still present. The question persists whether it is proper for the judiciary to review agency decisions.

B. Agency Inaction

Judicial review of agency inaction provides a great lesson in the conflicting agency accountability philosophies described above. After all, challenges to agency inaction—an agency's failure to abide by its mandates by not taking action—call upon the courts to proclaim not only that the agency should act differently, but also to proclaim that the agency should act at all. This puts courts in the rather uncomfortable position of directing agencies to do something where before they had done nothing. As we will see, inaction must still be "agency action"—that is, "[u]nder the terms of the APA, [a] respondent must direct its attack against some particular 'agency action' that causes it harm."[17] In other words, in order to transform the failure to act into action, that failure must consist of the withholding of a specific required action.[18]

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13. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

14. 435 U.S. at 558.

15. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 485-491 (2003).

16. Bressman, *supra* note 12, at 1675.

17. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990).

18. Norton v. S. Utah Wilderness Alliance (SUWA), 124 S. Ct. 2373, 2379 (2004).

Still, the reality remains the same: reviewability inherently involves the court assuming a seemingly dictatorial role and directing the agency to take action.

It is helpful to simplify the concept of agency inaction. "[A]gency inaction might encompass any instance in which an agency fails to take desired or desirable action."[19] Specifically, it is the withholding of action required by law. It could be the failure to punish a polluter, or the failure to engage in rulemaking by a certain time. It might be the failure to enforce a particular statutory provision. It may be what the Court termed in *SUWA* "broad programmatic attacks," or, in other words, challenges to broader statutory prescriptions.[20] In all of these cases, there is a common challenge. The agency is neglecting to do something that it is supposed to be doing. The problem for the judiciary is deciding first, whether the courts are supposed to tell the agency what to do, and second, figuring out precisely what the agency should be directed to do.

Professor Cass R. Sunstein writes that "of the many innovations in modern administrative law, the recognition of a private right to initiate administrative action may be the most important."[21] After all, "[j]udicial review serves important goals in promoting fidelity to statutory requirements and, where those requirements are ambiguous or vague, in increasing the likelihood that the regulatory process will be a reasonable exercise of discretion instead of a bow in the direction of powerful private groups."[22]

A common problem with judicial review of agency inaction revolves around agency discretion. When an agency takes an action, normally that action is reviewable by a court to determine whether the action was "arbitrary [or] capricious."[23] But with agency inaction, courts are more likely to determine that the agency has absolute discretion on whether to act at all. That is, courts are fairly likely to decide that agency decisions not to act are nonreviewable. However, this is not always the case. As *SUWA* says, "some failure to act claims are remediable."[24] This Comment will next evaluate which agency inactions are remediable through judicial review.

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19. Bressman, *supra* note 12, at 1664.
20. *SUWA*, 124 S. Ct. at 2379.
21. Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 653 (1985).
22. *Id.* at 655.
23. 5 U.S.C. § 706 (2000).
24. *SUWA*, 124 S. Ct. at 2378.

III. THE SUPREME COURT ON AGENCY INACTION

A. Early Decisions

1. *Dunlop v. Bachowski*

In 1973, The United Steel Workers of America (USWA) alleged that the Secretary of Labor failed to act pursuant to the Labor-Management Reporting and Disclosure Act of 1959.[25] The USWA argued that the following language created an enforceable duty:

> The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, . . . bring a civil action against the labor organization as an entity . . . to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary.[26]

In *Dunlop v. Bachowski*, the Court rejected the argument that the language created an "unreviewable exercise of prosecutorial discretion," and casually granted the USWA judicial review in a footnote.[27] The Court relied on the reasoning of the lower court, which had had given merit to the fact that individual rights were implicated, as well as the fact that Congress placed a "clearly defined" duty on the Secretary.[28] The lower court held that enforceability "depends on a rather straightforward factual determination, and we see nothing in the nature of that task that places the Secretary's decision 'beyond the judicial capacity to supervise.'"[29]

Dunlop was an easy case. It did not involve the vindication of a government policy or a societal interest, but rather an individual right. Moreover, the statutory language gave the Court clear factors to review. If the Secretary had probable cause to believe there was a violation, he had to sue the labor organization.[30] Prosecutorial discretion is a type of separation of powers argument whereby the agency argues that it must decide how to best implement the policies that Congress has entrusted it with pursuing, and that pursuit must not be impeded by the judiciary, lest it will not be able to duly complete its job. In *Dunlop*, the Court decided

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25. Dunlop v. Bachowski, 421 U.S. 560, 562 (1975).
26. 29 U.S.C. § 482(b) (2000).
27. 421 U.S. at 567 n.7.
28. Bachowski v. Brennan, 502 F.2d 79, 88 (3d Cir. 1974).
29. *Id.*
30. *See* 29 U.S.C. § 482(b).

that the judiciary could determine if the agency acted within its congressionally determined limits.[31]

What does this case tell us about judicial reviewability of agency inaction under the APA? In a later Supreme Court case, then-Justice Rehnquist said that *Dunlop* had merely assessed whether the statute had precluded judicial review per section 701(a)(1) of the APA.[32]

2. *Heckler v. Chaney*

In *Heckler v. Chaney*, the plaintiffs, death row inmates, sued the Food and Drug Administration (FDA) for not taking enforcement action against Texas and Oklahoma, states that used drugs during execution that had not been approved for such use.[33] The Court distinguished *Dunlop* by stating that Congress had clearly intended reviewability when the Secretary refused to prosecute the labor disclosure standards.[34] Thus, in *Dunlop*, the plaintiffs had rebutted the "presumption of unreviewability" for agency refusals to take enforcement action.[35]

Agency inaction with respect to statutory enforcement generally involves statutory provisions that supply "no meaningful standard against which to judge the agency's exercise of discretion."[36] Moreover, judicial review is normally "unsuitable."[37] According to *Chaney*:

> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it

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31. 421 U.S. at 567-68.

32. Heckler v. Chaney, 470 U.S. 821, 828 (1985). The APA excepts judicial review where "statutes preclude judicial review." 5 U.S.C. § 701(a)(1) (2000).

33. *Chaney*, 470 U.S. at 823. The inmates charged that the drugs were not painless and quick as intended; moreover, they were not administered by trained personnel. *Id.*

34. *Id.* at 833.

35. *Id.*

36. *Id.* at 831.

37. *Id.*

> is charged with implementing, and to the procedures it adopts for implementing that statute.[38]

Normally, the Court conceded, the APA implies a presumption of reviewability. Thus, as the Court had said in *Citizens to Preserve Overton Park v. Volpe*, section 701(a)(2)'s "committed to agency discretion" exception to reviewability "is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply."[39] Agency inaction breeds a reverse presumption: normally courts cannot review those decisions.

The *Dunlop* inmates argued that the FDA did not enforce the provisions proscribing "misbranding" and the introduction of "new drugs," but the court called those arguments "irrelevant," pointing out that the following enforcement provision was completely discretionary because the statute stated: "[The] Secretary is *authorized* to conduct examinations and investigations."[40] In reaching this decision, the Court was clear that it was leaving it up to Congress to decide whether such agency inaction "should be judicially reviewable."[41]

B. Norton v. Southern Utah Wilderness Alliance

In *Norton v. Southern Utah Wilderness Alliance*, various environmental groups challenged the BLM's administration of two million acres of WSAs.[42] At issue was BLM's failure to prevent off road vehicle (ORV) use in those areas.[43] WSAs are lands eligible for induction as wilderness areas.[44] However, only Congress can formally give lands the protected status of wilderness. Once lands become wilderness areas, no commercial enterprises, roads, motorized vehicles, or manmade structures are allowed.[45] WSAs are identified by the Department of the Interior, and recommended to Congress for formal induction.[46]

Before Congress makes its decision, the Federal Land Policy and Management Act (FLPMA) directs that the "Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of

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38. *Id.* at 831-32.
39. *Id.* at 830 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S 402, 410 (1971)).
40. *Id.* at 835 (quoting 21 U.S.C. § 372 (2000)).
41. *Id.* at 838.
42. Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2377-78 (2004).
43. *Id.* at 2377.
44. *Id.*
45. 16 U.S.C. § 1133(c) (2000).
46. *See* 43 U.S.C. § 1782(a) (2000).

such areas for preservation as wilderness."[47] The Southern Utah Wilderness Alliance (Southern Utah) first alleged that BLM violated this FLPMA provision by not prohibiting ORV use.[48] Second, Southern Utah argued that BLM failed to abide by its land use plan, in violation of a FLPMA clause which provides that the "Secretary shall manage the public lands . . . in accordance with the land use plans . . . when they are available."[49] Finally, Southern Utah argued that a supplemental environmental impact statement (EIS) was needed to consider the environmental impacts of ORV use pursuant to the Council on Environmental Quality's regulation requiring an agency to supplement its EIS (in this case, BLM's land use plan) where "[t]here are significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts."[50]

Justice Scalia, writing for a unanimous Court, reversed the United States Court of Appeals for the Tenth Circuit's decision, and rejected each of Southern Utah's claims.[51] Central to the Court's opinion was its analysis of "failure to act" claims under the APA. The Court began its analysis by stating that "[f]ailure to act claims are sometimes remediable under the APA, but not always."[52] Section 704 allows for judicial review of "final agency action," and section 551(13) includes the failure to act in the definition of final agency action.[53] Section 706(1) provides the mechanism for claims of agency inaction by allowing courts to "compel agency action unlawfully withheld or unreasonably delayed."[54]

The Court posited that "failure to act" is "properly understood as a failure to take an *agency action*," which is itself "properly understood to be limited . . . to a discrete action."[55] A discrete action is limited to an "agency rule, order, license, sanction, [or] relief."[56] Moreover, the discrete action must be "legally required," which means that a court can only "compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing *how* it shall act.'"[57] The Court analogized judicial review of failures to act to writs of

47. *Id.* § 1782(c).
48. *SUWA*, 124 S. Ct. at 2380.
49. *Id.* at 2381 (quoting 43 U.S.C. § 1732(a)).
50. *Id.* at 2384 (quoting 40 C.F.R. § 1502.9(c)(1)(ii) (2004)).
51. *Id.* at 2381, 2384-85.
52. *Id.* at 2378.
53. 5 U.S.C. §§ 704, 551(13) (2000).
54. *Id.* § 706(1); *see SUWA*, 124 S. Ct. at 2378.
55. *SUWA*, 124 S. Ct. at 2379 (emphasis added).
56. *Id.* at 2378 (quoting 5 U.S.C. § 551(13)).
57. *Id.* at 2379 (citing ATTORNEY GENERAL'S MANUAL ON ADMINISTRATIVE PROCEDURE ACT 108 (1947)).

mandamus.[58] The Court warned that this rule "precludes . . . broad programmatic attack[s]."[59] In sum, judicial compulsion of agency action must be directed at "discrete agency action demanded by law."[60]

In rejecting Southern Utah's first claim, the Court said that FLPMA's requirement that BLM manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness," does not mandate "with the clarity necessary to support judicial action under section 706(1), the total exclusion of ORV use."[61] This is so because there was no discrete action complained of: "General deficiencies in compliance . . . lack the specificity requisite for agency action."[62]

Addressing Southern Utah's second claim that BLM failed to comply with its FLPMA mandated land use plan, which provided that BLM would conduct "use supervision and monitoring," the Court concluded that there was no "legally binding commitment."[63] The language did not create applicable law; a land use plan is "generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them."[64] The Court left open the question of whether the statement was "sufficiently discrete" and expressed no view of "whether a court could, under § 706(1), enforce a duty to monitor ORV use imposed by a BLM regulation."[65]

Finally, rejecting Southern Utah's last claim, the Court decided that there was no ongoing "major federal action" pursuant to the National Environmental Policy Act (NEPA) because the land use plan was already completed.[66] Thus, unless there is an action, including an amended or revised plan, there is no review.[67]

SUWA involved more than a simple analysis of the APA. Underlying the Court's opinion was an ideology as to the Court's role in agency policymaking. The Court wrote that the purpose of limiting judicial review "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in

58. *Id.* at 2379.
59. *Id.* at 2379-80.
60. *Id.* at 2380.
61. *Id.* (quoting 43 U.S.C. § 1782(c) (2000)).
62. *Id.* at 2381.
63. *Id.* at 2384.
64. *Id.*
65. *Id.* at 2384 n.5.
66. *Id.* at 2384.
67. *Id.*

abstract policy disagreements which courts lack both expertise and information to resolve."[68] The Court continued:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day–to–day agency management.[69]

SUWA sends a strong message about the Court's view of the judicial role in agency decisionmaking processes: agencies are due great deference, and the courts should let them decide how to exercise their discretion. The Court opined that a "judicial decree" would divert valuable energy from other, perhaps more worthy, BLM projects.[70] In short, the judiciary has no role or business in "agency management."[71]

Note the difference between *Chaney* and *SUWA*: *Chaney* held that enforcement actions were excepted from judicial review by section 701(a)(2)'s commitment to agency discretion provision, but *SUWA* was decided on the grounds that the enforcement sought was not actual agency action, that is, it was not nondiscretionary discrete action. The Court could have simply followed *Chaney* and decided that the inaction fell under section 701(a)(2), but instead it carved out a new requirement for "failure to act claims." This new requirement is two-fold. First, and similar to *Chaney*, the duty must be mandated by law. The second requirement is the new addition to the law of agency inaction: the failure to act must be the failure to take discrete agency action. That is, the action must be the sort of action contemplated by the APA. *SUWA* holds that activities such as "monitoring" or "consideration" and preservation of "suitability" are not discrete.[72]

The differences between the challenge in *SUWA* and the challenges in *Dunlop* and *Chaney* are notable.[73] In *SUWA*, the Court called the challenge a "broad programmatic attack."[74] The plaintiffs challenged a policy that affected many, rather than a few, people. Compare this with Rehnquist's statement in *Chaney*: "When an agency refuses to act it generally does not exercise its coercive power over an individual's

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68. *Id.* at 2381.
69. *Id.*
70. *Id.* at 2384.
71. *Id.* at 2381.
72. *Id.* at 2384.
73. Glaringly absent from the *SUWA* decision was any mention of *Chaney* or *Dunlop*.
74. *Id.* at 2379.

property rights, and thus does not infringe upon areas that courts often are called upon to protect."[75] In *Dunlop*, the Court was clear that the agency inaction affected individual rights.[76] The inmates in *Chaney* and the environmental groups in *SUWA* were challenging broader policies—particular inactions in the execution of the agencies' organic statutes.

IV. THE LOWER COURTS REACTION TO *SUWA*

A. There Must Be a Nondiscretionary Duty

In *Shawnee Trail Conservancy v. Nicholas*, a group of outdoor enthusiasts, including ORV users and horseback riders, sued the National Forest Service (NFS) for not abiding by its regulations in the maintenance of the Shawnee National Forest.[77] Plaintiffs' primary grievance was that the NFS did not open up trails in the Shawnee for ORV use.[78] The plaintiffs argued that the following regulations created enforceable duties for the NFS:[79]

(1) "On National Forest System lands, the continuing land management planning process will be used to allow, restrict, or prohibit use by specific vehicle types off roads";[80]
(2) "[I]nformation and maps will be published and made available to the public, describing:
    (a) The regulation of vehicular use.
    (b) Time periods when use is allowed, restricted or prohibited.
    (c) The type of vehicle regulated";[81]
(3) "Forest Supervisors will annually review off-road vehicle management plans and temporary designations implemented since the last annual review. If the plan needs revision, the public will be given the opportunity to participate in the review as stated in [regulation section] 295.3."[82]

The court rejected the plaintiffs' arguments. First, the court held there was no *final* agency action; the NFS was not only complying with a court order regarding compliance with NEPA, but it was also revising its land use plans.[83] Moreover, plaintiffs simply failed to plead that the NFS "genuinely failed to act to comply with any regulation requiring a

75. Heckler v. Chaney, 470 U.S. 821, 832 (1985).
76. Dunlop v. Bachowski, 421 U.S. 560, 562 (1975).
77. 343 F. Supp. 2d 687, 694 (S.D. Ill. 2004).
78. *Id.* at 703.
79. *Id.* at 703-04.
80. *Id.* (quoting 36 C.F.R. § 295.2(a) (2004)).
81. *Id.* (quoting 36 C.F.R. § 295.4).
82. *Id.* (quoting 36 C.F.R. § 295.6).
83. Shawnee Trail Conservancy v. Nicholas, 343 F. Supp. 2d 687, 704 (S.D. Ill. 2004).

discrete, mandatory action or . . . abdicated any statutory travel planning responsibility."[84] The court explained the recent *SUWA* decision, pointing out that it held what the United States Court of Appeals for the Seventh Circuit had already held: a failure to act claim can "only be maintained where there [is] a clear, mandatory, non-discretionary duty to act, not for situations in which a plaintiff is merely dissatisfied with the way an agency exercises its discretion."[85]

The plaintiffs also argued that certain statutory provisions mandated that the NFS build roads. They pointed to the National Forest Roads and Trails Act regulations which stated that "[c]onstruction and maintenance work on forest transportation facilities with appropriated funds shall be directed to what is necessary and economically justified for protection, administration, development, and multiple-use management of the federally owned lands and resources served."[86] Another regulation defined "forest transportation facilities" to include roads and trails, but the court held that this provision was a "broad programmatic mandate" and "rather than establishing a clear duty to act, it sets a goal and directs the Forest Service to work toward that goal."[87] The plaintiffs could point to no language that mandated nondiscretionary duties; therefore, under *SUWA*, they alleged no valid failure to act claims.

Similarly, in *Gros Ventre Tribe v. United States*, a Native American tribe sued BLM to reclaim a gold mining site adjacent to its tribal lands, alleging that BLM had failed to prevent "undue degradation" of lands under FLPMA, thus breaching the federal government's trust obligations by failing to carry out its NEPA and National Historic Preservation Act duties.[88] The district court rejected the argument that BLM owed a trust duty to the adjacent nontribal lands "independent [of some] source of law," and focused solely on the FLPMA claim.[89] The court explained *SUWA* and recounted that "courts may not issue broad declaratory judgments that an agency has failed to comply with its statutory mandate."[90] The court proclaimed that the plaintiffs were asking for broad equitable relief, and that "[e]ven if the court could find law to apply, it would be inserting itself into an ongoing administrative process by exercising its equitable powers to fashion suitable remedies for the

84. *Id.* at 705.
85. *Id.* at 699.
86. *Id.* at 712 (quoting 36 C.F.R. § 212.4(a)).
87. *Id.*
88. 344 F. Supp. 2d 1221, 1227 (D. Mont. 2004).
89. *Id.*
90. *Id.* at 1228.

tribes."[91] The court seemed to shy away because of *SUWA*'s strong message that the judiciary should not entangle itself in "day-to-day agency management."[92] It is clear that FLPMA's command to BLM to prevent "undue degradation" of lands does not rise to the mandate of specificity that the *SUWA* Court demanded.

B. Plans Are Not Discrete

In *Center for Biological Diversity v. Veneman*, the United States Court of Appeals for the Ninth Circuit reconsidered its prior decision after the Supreme Court vacated and remanded the case in light of *SUWA*.[93] The plaintiffs sued under section 706(1) of the APA, alleging that the agency failed to take "action unlawfully withheld."[94] The failure to act claim centered around a statutory provision which required that

> [i]n all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic and recreational river areas, and all river basin and project plan reports submitted to the Congress shall consider and discuss any such potentials.[95]

Although the Ninth Circuit had previously found the case justiciable, the *SUWA* decision set new requirements for such claims of inaction. In light of the new requirements the court found the claim indistinguishable from *SUWA* and held that the plaintiffs had not alleged a failure to perform a "discrete agency action."[96]

Although the duty to "consider and discuss" would seem to be mandatory and nondiscretionary, the court noted that *SUWA* used *Lujan v. National Wildlife Federation* to illustrate that there can be no valid failure to act claim for an alleged "failure to consider multiple use" statutory provision.[97] *National Wildlife Federation*, like *Center for Biological Diversity*, involved a challenge to conducting land use planning in a particular manner.[98] Such challenges, *SUWA* seems to say, are not discrete agency actions.[99] Land use plans are programmatic in nature, not discrete. Similar to NEPA's requirement of "major federal

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91. *Id.*
92. *Id.* (quoting Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2381 (2004)).
93. 394 F.3d 1108, 1109 (9th Cir. 2005).
94. *Id.* at 1110.
95. *Id.* at 1111 (quoting 16 U.S.C. § 1276(d)(1) (2000)).
96. *Id.* at 1113.
97. *Id.* (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990)).
98. *Lujan*, 497 U.S. at 879.
99. *SUWA*, 124 S. Ct. at 2379-80.

action," a plan is not an action.[100] Consider *Kleppe v. Sierra Club*, where Justice Powell wrote that agency activity does not become an action until that activity has reached "sufficient maturity."[101] If a plan were an action, it "would invite judicial involvement in the day-to-day decisionmaking process of the agencies."[102] Compare Justice Powell's comments with Justice Scalia's comment in *SUWA* that the reason for limiting failure to act claims to discrete, legally required actions is so that judges are not injected "into day–to–day agency management."[103]

C. As Long as There Is an Action

In *SUWA*, Justice Scalia wrote that "[a] 'failure to act' is . . . simply the omission of an action without formally rejecting a request."[104] As discussed above, certain agency omissions do not rise to the level of an "action," and thus are not reviewable as "failure to act" claims. However, if the agency is engaging in an action, then courts can review that action, assuming there is law to apply. A typical post-*SUWA* agency defense has been to confuse and attempt to merge the analytically distinct concepts of failure to act claims with actions that involve particular failures.

For instance, *SUWA* did not hold that a land use plan could *never* be used as law to apply to agencies in general; rather, it held that in the absence of agency action, such an amorphous requirement could not be used to *compel* the agency to act.[105] After all, how could a court compel an amorphous command without essentially engineering the command itself? Nonetheless, *SUWA* has been used to prevent plaintiffs from using plans to challenge agency activities as arbitrary even when there is a discrete agency action. In *Environmental Protection Information Center v. Blackwell*, the NFS argued that monitoring objectives contained in the Mendocino National Forest Land and Resource Management Plan (MNF Plan) could not be used to block a timber sale.[106] The district court correctly distinguished *SUWA*:

> While [*SUWA*] and the instant case are similar as both involve monitoring obligations on the part of an agency under a land use or forest plan, there is an important difference between the two. [*SUWA*] dealt with a claim under

100. NEPA § 102(c), 42 U.S.C. § 4332 (2000).
101. 427 U.S. 390, 406 n.15 (1976).
102. *Id.*
103. 124 S. Ct. 2373, 2381 (2004).
104. *Id.* at 2379.
105. *See id.* at 2382.
106. 2004 U.S. Dist. LEXIS 20717, at *100 (N.D. Cal. Oct. 13, 2004).

> 5 U.S.C. § 706(1), which provides a court with the authority to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). In contrast, the instant case is a challenge under § 706(2). *See id.* § 706(2) (providing that a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (D) without observance of procedure required by law"). The instant case entails not a *failure* to act as in [*SUWA*]; rather, this involves a challenge to an affirmative final agency *action*.[107]

The National Forest Management Act (NFMA) requires the NFS to create forest plans for all national forests; the MNF Plan, pursuant to regulation, required the NFS to take certain steps to maintain diversity in the forest, namely "to 'evaluate the most recent inventory of data and compare to Habitat Capability Models' in order 'to assess whether [Management Indicator Species] (MIS) populations are being affected; to determine that selected MIS are appropriate; and to determine whether standards and guidelines are effective.'"[108] The court noted that the "failure to monitor" claim bore a "sufficient causal connection" to the timber sale because the logging would probably bring the MIS (including the northern spotted owl, goshawk, marten, and fisher) below an acceptable level of diversity.[109] The court said that the failure to monitor claim also violated "NFMA's objective of protecting species diversity and viability and violates 36 C.F.R. § 219.9, which requires management steps to safeguard species diversity and viability."[110]

Unlike *SUWA*, the claim in *Environmental Protection Information Center* of a failure to act in accordance with a land use plan was not a stand-alone claim; it was tied to an agency action—a timber sale. In *SUWA*, BLM's failure to stop ORV use in a WSA was not related to discernible and connected agency action. *Environmental Protection Information Center* stands for the proposition that as long as there is an action that is sufficiently related to a requirement imposed on an agency, a court can compel the agency to act in accordance with that requirement, regardless of whether the court could have compelled the agency to act absent the action.[111]

Similarly, in *Oregon Natural Resource Council Fund v. Brong*, the plaintiff challenged a salvaged timber sale made after a forest fire in

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107. *Id.* at *101-*02 (emphasis in original).
108. *Id.* at *81, *99.
109. *Id.* at *99.
110. *Id.* at *106.
111. *Id.*

Medford, Oregon.[112] The plaintiffs based their claim on a provision in the Northwest Forest Plan (NFP) that prohibits logging in riparian reserves, those lands that act as "primary source areas for woods and sediment and potentially unstable areas in headwater areas and along streams."[113] The Medford Resource Management Plan (Medford RMP) incorporated the NFP and required BLM to designate "unstable and potentially unstable" slopes as riparian reserves.[114]

BLM argued that the claim should be interpreted "as a failure to act to implement the Medford RMP claim," and that, therefore, *SUWA* should bar the suit.[115] The court, like the *Environmental Protection Information Center* court, held that the timber sale was an action, and that the claim fell within section 706(2)'s challenge to a final agency action and was not a challenge to the agency's failure to act.[116] Thus, the timber sale was reviewable under the arbitrary or capricious standard.

D. As Long as There Is a Discrete Duty

SUWA admonished against making "broad programmatic attacks" against agency decisionmaking in courts.[117] But how far does *SUWA*'s prohibition extend?

Before the Friant Dam was erected, "[s]o many salmon migrated up the San Joaquin River during the spawning season that some people who lived near the present site of Friant Dam compared the noise to a waterfall."[118] The Friant Dam's construction, completed in 1945, sequestered the river's flow for irrigation and other purposes.[119] A few years after construction ended, the river below the dam had nearly dried up.[120] The salmon's spawning waters were blocked off; once abundant salmon were virtually eliminated.[121] During "wet years" when water actually flows beneath the dam, the salmon, in tune with their nature, attempt to migrate back to their old spawning points, but are blocked by the dam.[122]

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112. 2004 U.S. Dist. LEXIS 23251, at *3-*4 (D. Or. Nov. 8, 2004).
113. *Id.* at *27.
114. *Id.* at *28.
115. *Id.*
116. *Id.*
117. Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2380 (2004).
118. Natural Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 909 (E.D. Cal. 2004).
119. *Id.* at 909.
120. *Id.* at 910.
121. *Id.*
122. *Id.* at 910-11.

In *Natural Resources Defense Council v. Patterson*, the NRDC argued that the Bureau of Reclamation (BOR) failed to let enough water pass through the Friant Dam to support historic fishery levels of salmon. A federal district court in California explained that the Reclamation Act of 1908, through "cooperative federalism," makes the following provision of the California Fish and Game Code applicable to the BOR:

> The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.[123]

The plaintiffs argued that the BOR was not diverting water appropriately; they called upon the court to step in and oversee a big part of the dam's operation. Did *SUWA* bar this sort of broad attack against agency inaction? The BOR argued that it did.[124] The court summarized the *SUWA* decision, explaining that the laws under which the Alliance had sued were discretionary and had not actuated into "legally binding commitments."[125] The court concluded, however, that the principles laid out in *SUWA* were "simply inapplicable."[126] The Reclamation Act, by requiring compliance with state water use law, "directs the bureau to release sufficient water to 'reestablish and maintain' the 'historic fisheries.'"[127] The court stated that "[t]his kind of specific legal duty is a far cry from the general statutory directive that the government endeavor[s] to manage certain of its lands 'so as not to impair the [lands'] suitability for preservation as wilderness.'"[128] The court held that the California Fish and Game Code created a specific duty that the Bureau was required to fulfill and that it failed to take a discrete action.[129]

The California Fish and Game Code required the BOR to let "sufficient water pass over, around or through the dam to keep in good condition any fish that may be planted or exist below the dam."[130] Natural Resources Defense Council did not challenge a discernible activity, rather it argued, and the court held, that the BOR unlawfully failed to act. What is "sufficient water" to keep fish in "good condition"? The answer may not be obvious, but the court held that it

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123. *Id.* at 913 n.3 (quoting CAL. FISH & GAME CODE § 5937 (2004)).
124. *Id.*
125. *Id.* at 916.
126. *Id.*
127. *Id.* (quoting Cal. Trout, Inc. v. Superior Court, 218 Cal. App. 3d 187, 210 (Cal. Ct. App. 1990)).
128. *Id.* (quoting Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004)).
129. *Id.*
130. *Id.* at 913 n.3 (quoting CAL. FISH & GAME CODE § 5937 (2004)).

was clear the BOR had not released sufficient water.[131] Did *SUWA* disallow such broad attacks? The BOR was engaging in a large-scale water diversion program. Should the judiciary have involved itself in a federal agency's administration of its legislatively delegated tasks and goals? Perhaps *SUWA* admonished against such an attack, but it did not *prohibit* a court from entering the fray. The California law imposed a duty on the BOR which the agency abdicated. The court simply enforced what the state legislature and Congress had already agreed upon.

V. CONCLUSIONS

A. The Law of Agency Inaction, SUWA, and the Lower Courts Response

Three Supreme Court decisions help explain the law surrounding agency inaction. First, pursuant to *Dunlop*, does the statute preclude judicial review?[132] Has the legislature evinced an intent to prevent courts from entering the controversy? Second, as *Chaney* instructed, has the plaintiff surmounted the presumption of unreviewability?[133] Finally, *SUWA* asks two questions. The first is very similar to *Chaney*: Is the directive discretionary?[134] *SUWA*'s second question is whether the action withheld is discrete.[135] This inquiry transcends the mere discretionary quality of the command and looks to the nature of the command. Is the activity withheld a rule, order, license, relief, or sanction? In other words, is it an "action" within the parameters of the APA?

SUWA's first requirement is that the directive must rise to the level of a duty, similar to what would be required for a writ of mandamus. *SUWA* itself involved the discretionary directive for the BLM to not "impair" the "suitability" of certain areas for wilderness designation. In *Shawnee Trail Conservancy*, the agency had discretion to decide if roads were "necessary and economically justified."[136] In *Gros Ventre Tribe*, the agency was empowered to determine what "undue degradation" was.[137] We learned from *Chaney* that there is a presumption that agency inaction is unreviewable because it is committed to the agency's discretion.[138]

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131. *Id.* at 925.
132. *See* Dunlop v. Bachowski, 421 U.S. 560, 567 (1975).
133. *See* Heckler v. Chaney, 470 U.S. 821, 833 (1985).
134. *See* Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004).
135. *See id.* at 2381.
136. Shawnee Trail Conservancy v. Nicholas, 343 F. Supp. 2d 687, 712 (S.D. Ill. 2004).
137. Gros Ventre Tribe v. United States, 344 F. Supp. 2d 1221, 1227 (D. Mont. 2004).
138. *See Chaney*, 470 U.S. at 833.

SUWA sharpens this by requiring that the statutory command, as is necessary for a mandamus, be limited to enforcement of a "specific, unequivocal command."[139]

SUWA's second requirement is that the inaction be "discrete," or by APA terms, the withholding of a "final agency action."[140] Thus, the land use plan in *SUWA* could not compel agency action, as it simply required "use supervision and monitoring."[141] Supervising and monitoring ORV use is not, in the Court's view, an action. Similarly, as the Ninth Circuit decided in *Center for Biological Diversity*, a mandate to "consider and discuss" the potential of a river for inclusion in a protected category is not discrete.[142] The inaction did not rise to the level of an action. The Court seemed to admonish plaintiffs to wait until their claims are ripe.

Claims are ripe when there is an agency action to which the failure to act can be connected. For instance, if plaintiffs in *Center for Biological Diversity* had claimed that a certain agency action was arbitrary and capricious, say the BOR had damned the river, then perhaps the plaintiffs could have used the action as evidence of the agency's failure to consider whether to protect the river. This strategy worked in both *Environmental Protection Information Center* and *Oregon Natural Resource Council Fund*. Although the provisions came from land use plans, the plaintiffs married the failure to designate riparian reserves and the failure to monitor certain habitat to the challenged timber sale.[143]

Plaintiffs' claims look destined for dismissal when they have no discrete action to which to tie the failure to act claim. However, inaction can be action. For instance, in *Patterson*, the plaintiffs successfully overcame the presumption against reviewability and met the discrete action requirement by pointing to a statute that required the BOR to let water through a dam in an amount sufficient to restore the historic salmon level in the San Joaquin.[144] The duty was held to be nondiscretionary and discrete. Contrast the discrete order to let water through a dam with the indiscrete action of considering whether to bring

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139. *SUWA*, 124 S. Ct. at 2379 (quoting Interstate Commerce Comm'n v. N.Y., N.H. & H.R. Co., 287 U.S. 178, 204 (1932)).

140. *Id.* at 2381.

141. *Id.* at 2384.

142. Ctr. for Biological Diversity v. Veneman, 2003 U.S. App. LEXIS 27927, at *14-*15 (9th Cir. Jan. 7, 2005).

143. *See* Envtl. Prot. Info. Ctr. v. Blackwell, 2004 U.S. Dist. LEXIS 20717 (N.D. Cal. Oct. 13, 2004); Or. Natural Res. Council Fund v. Brong, 2004 U.S. Dist. LEXIS 23251 (D. Or. Nov. 8, 2004).

144. Natural Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 909 (E.D. Cal. 2004).

a river into a protected class. The consideration of an activity is not an action.

B. Should the Judiciary Review Broad Programmatic Attacks?

In *Chaney* and *SUWA*, the court refused to review agency inactions that, in the Court's opinion, affected the general public rather than individuals. The inactions were, in the Court's view, policy decisions. In 1983, then-Judge Scalia wrote of the "increasingly frequent administrative law cases in which the plaintiff is complaining of an agency's unlawful *failure* to impose a requirement or prohibition on *someone else*,"[145] stating:

> Such a failure harms the plaintiff. . . . But that harm alone is, so to speak, a *majoritarian* one. The plaintiff may *care* more about it; he may be a more ardent proponent of constitutional regularity or of the necessity of the governmental act that has been wrongfully omitted. But that does not establish that he has been harmed distinctively—only that he assesses the harm as more grave, which is a fair subject for democratic debate in which he may persuade the rest of us. Since our readiness to be persuaded is no less than his own (we are harmed just as much) there is no reason to remove the matter from the political process and place it in the courts.[146]

We should be mindful that Scalia was speaking of inaction's standing implications. But, the Court relied on the same concept in *Dunlop*, *Chaney*, and *SUWA*. For instance, in *SUWA*, Justice Scalia revived the idea in *National Wildlife Federation*:

> [R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the [agency] or the halls of Congress, where programmatic attacks are normally made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes *it* harm.[147]

Scalia was directly linking failure to act claims with the concept of standing. Generally, he seems to say, agency inaction will not result in a concrete individualized injury.[148] Of course, standing concepts trace back to the "Case or Controversy" requirement of the Constitution[149] and agency action is gleaned from the APA, but both inquiries lead to the same conclusion for Scalia and the Court: In the end, such a general

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145. *See* Scalia, *supra* note 13, at 894.

146. *Id.*

147. Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2380 (2004) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990)) (second emphasis added).

148. *See id.*

149. *See* U.S. CONST. art. III, § 2, cl. 1.

problem with policy should be addressed by the other branches of the government. This thinking is not new. Recall *Marbury*'s exposition:

> [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.[150]

The line between individual rights and political decisions is certainly blurry and reasonable minds will differ, but does *SUWA*'s contempt of judicial review of "broad programmatic attacks" take into account the power of modern agency decisionmakers and the corresponding lack of scrutiny? Are these generalized grievances always accounted for by Congress or the Executive?

Perhaps all agency inaction should be reviewable under section 706(2)(A) of the APA to determine if the agency inaction was "arbitrary [or] capricious." In *Chaney*, then-Justice Rehnquist pointed out the contradictory nature of section 701(a)(2)'s "committed to agency discretion" exception to review with section 706(2)(A)'s review of abuses of discretion:

> [C]ommentators have pointed out that construction of § [701](a)(2) is further complicated by the tension between a literal reading of § [701](a)(2), which exempts from judicial review those decisions committed to agency "discretion," and the primary scope of review prescribed by § 706(2)(A)—whether the agency's action was "arbitrary, capricious, or an *abuse of discretion*." How is it, they ask, that an action committed to agency discretion can be unreviewable and yet courts still can review agency actions for abuse of that discretion?[151]

Nevertheless, as *Chaney* held, agency inaction is presumed unreviewable. But why shouldn't the agency be called upon to account for its refusal to enforce? Is it really difficult to pony up a reasonable explanation? After all, section 706(2)(A) provides very deferential review.

Professor Sunstein writes that "[t]he rise of the modern regulatory state results in large part from an understanding that government 'inaction' is itself a decision and may have serious adverse consequences for affected citizens."[152] He continues that "[i]n the modern era, the judicial role is to ensure the identification and implementation of statutory values and to guard against factional power over the regulatory

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150. Marbury v. Madison, 5. U.S. 137, 166 (1803).
151. Heckler v. Chaney, 470 U.S. 821, 829 (1985) (citation omitted).
152. Sunstein, *supra* note 21, at 683.

process."[153] These words echo Judge Skelly Wright's famous maxim that it is the judicial duty to ensure that statutory purposes are not "misdirected in the vast hallways of the federal bureaucracy."[154]

Review does not translate into judicial tyranny. A court can review an agency's decision not to act and decide that its inaction was perfectly acceptable. After all, as Justice Stevens wrote in *Chevron, U.S.A. v. Natural Resources Defense Council* with respect to the administration of an agency's tasks, "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[155] As such, judges do not base their decisions on what they would have done, but rather on whether the agency's act was "permissible," or a reasonable construction of their legal authority.[156] If the agency's decision "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[157]

Similarly, "hard look" review does not equate to judicial micromanagement of agency action. As Judge Leventhal wrote in *Greater Boston Television Corp. v. Federal Communications Commission*, in reviewing the application of an agency's legal authority to factual situations, the court will conduct a review to ensure that the agency has taken a "'hard look' at the salient problems" to see if the agency has "engaged in reasoned decisionmaking."[158] However, "[i]f the agency has not shirked this fundamental task . . . the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards."[159] As *Chevron* and *Greater Boston Television* demonstrate, courts take a deferential posture when reviewing agency decisions.

What is wrong with a court looking to ensure that BLM's failure to act to stop ORV use in a WSA was not arbitrary or capricious? Why should a court not conduct a review to see if the agency has taken a "hard look" at the issue? Review assures that the congressional will is not forgotten or "misdirected" by the Executive. The Court's conflation of

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153. *Id.*

154. Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

155. 467 U.S. 837, 866 (1984).

156. *Id.* at 843.

157. *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)).

158. 444 F.2d 841, 851 (D.C. Cir. 1970).

159. *Id.*

standing principles with the review of agency inaction misses the point. Standing doctrine decides the threshold question of whether there is an alleged individual injury. After that, the rationale changes and courts review whether the plaintiff's allegation is legally correct. In the context of inaction, this question turns on whether the agency unlawfully withheld action. *SUWA* holds that this can only occur where an agency has a duty to take a discrete action. This means that any discretionary power or mandatory duty to take indiscrete action is not reviewable. But this approach gives agencies too much unchecked power. It allows the Executive to usurp and subvert Congress. There is nothing new about the Judiciary deciding whether the political branches acted within the bounds of their granted and vested powers. *SUWA* aggrandizes the Executive by derogating from the power of the Judiciary. Compounding this abuse, and as a corollary, the Executive is also aggrandized at the expense of Congress. As the Court strips itself of reviewing power, it abdicates its duty to act as an agent of the Constitution, foolishly refusing to ensure that congressional will is not thwarted.