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*In Praise of a Skeletal APA: Norton v. Southern Utah Wilderness Alliance,
Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*

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Abstract by Raymond R. Janairo

In *Southern Utah*, a group of environmentalists challenged the Bureau of Land Management's (BLM) alleged inaction in protecting wilderness study areas (WSAs). These WSAs were eligible for congressional designation as wilderness lands under the Wilderness Act of 1964. Once lands are designated as WSAs, the Federal Land Policy Management Act of 1976 (FLPMA) requires BLM to manage these areas in order to retain its wilderness characteristics until congressional designation. The basis of the challenge was that BLM "failed this 'non-impairment' standard by neglecting to take several actions necessary to preserve the lands as required by the statute." The Tenth Circuit, in reversing the district court's dismissal of the case, held that this standard was a mandatory duty, which courts had jurisdiction to enforce under the APA. Deciding the case by differentiating between discrete and ongoing actions, the Supreme Court reversed the Tenth Circuit and held that federal courts do not have jurisdiction to review claims that the agency inaction violated FLPMA's non-impairment standard.

The author uses *Southern Utah* to caution those who wish to amend the APA. The author lays a foundation for his recommendations by discussing the Supreme Court's *Southern Utah* decision. The foundation is an analysis of the Supreme Court's jurisprudence regarding agency action, finality and liability and remedial considerations. From this discussion, the author suggests that the diversity of agency actions will make it difficult to make the APA any more precise through amendments. There are limits inherent in statutory language and legislatively prescribed factor tests that advise against amendments to the APA. With regard to statutory language, the author points out the weakness in relying on such amendments, because the Supreme Court's holding turned on "restrictive interpretive canons rather than the framers' vision of a statute that enshrines fundamental principles." Questioning the advantages of legislatively prescribed factor tests, the author goes on to argue that judicially constructed tests "are constantly tested in litigation, which leads to their refinement and alteration as agency action evolves." Moreover, trying to make the APA more precise may have two different effects: ossifying administrative action and becoming meaningless statutes. The author concludes by providing specific examples where APA amendments may be appropriate. Evolution of administrative practice and values may warrant amendment on a "broad level of generality." However, the author also argues that caution should be used when trying to advance more precise procedures or review provisions.