

**UNITED STATES COURT OF APPEALS  
FOR THE  
NINTH CIRCUIT**

---

**Docket No. 05-35637**

---

**OREGON NATURAL DESERT ASSOCIATION, *et al.***

Plaintiff-Appellants,

**v.**

**UNITED STATES FOREST SERVICE, *et al.***

Defendant-Appellees,

and

**OREGON CATTLEMEN'S ASSOCIATION, *et al.***

Intervenor-Defendant-Appellees

---

On Appeal From the  
United States District Court for the  
District of Oregon Pursuant to  
28 U.S.C. § 1291

---

---

**OPENING BRIEF OF PLAINTIFF-APPELLANTS**

---

<p><b>Peter M. Lacy (“Mac”)</b> <b>Oregon Natural Desert Association</b> 917 SW Oak Street, Suite 408 Portland, OR 97205 (503) 525-0193 lacy@onda.org</p>	<p><b>Stephanie M. Parent</b> <b>Pacific Environmental Advocacy Ctr.</b> 10015 SW Terwilliger Boulevard Portland, OR 97219 (503) 768-6736 (503) 768-6642 (fax) parent@lclark.edu</p>
---	--

Attorneys for Plaintiff-Appellants  
Oregon Natural Desert Association and Center for Biological Diversity

## **CORPORATE DISCLOSURE STATEMENT**

Appellants Oregon Natural Desert Association and Center for Biological Diversity are non-profit corporations and have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

**CORPORATE DISCLOSURE STATEMENT..... i**

**STATEMENT OF JURISDICTION..... - 1 -**

**STATEMENT OF THE ISSUE PRESENTED FOR REVIEW ..... - 2 -**

**STATEMENT OF THE CASE..... - 2 -**

**STATEMENT OF THE RELEVANT FACTS ..... - 4 -**

**SUMMARY OF THE ARGUMENT ..... - 7 -**

**ARGUMENT..... - 9 -**

**I. STANDARD OF REVIEW ..... - 9 -**

**II. THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION  
OVER ONDA’S CLAIMS BECAUSE THE ANNUAL OPERATING  
INSTRUCTIONS ISSUED BY THE FOREST SERVICE ARE FINAL  
AGENCY ACTIONS SUBJECT TO REVIEW UNDER THE  
ADMINISTRATIVE PROCEDURE ACT..... - 10 -**

**A. Annual Operating Instructions meet the first prong for finality  
because they are the consummation of the Forest Service’s annual  
process for deciding the number and location of livestock allowed  
to graze on a particular allotment. .... - 11 -**

**B. Annual Operating Instructions meet the second prong for finality  
because they establish the rights and obligations of the grazing  
permit holders and affect the legal rights of the permit holders. .... - 16 -**

**1. *The district court erred by misapplying the standard for  
determining whether Annual Operating Instructions are final  
agency action..... - 19 -***

**2. *Annual Operating Instructions establish the rights and obligations  
of the grazing permit holders and affect the legal rights of the  
permit holders. .... - 24 -***

**CONCLUSION..... - 35 -**

**STATEMENT OF RELATED CASES..... - 36 -**

**CERTIFICATE OF COMPLIANCE ..... - 36 -**

## TABLE OF AUTHORITIES

### CASES

<u>Abbott Labs. v. Gardner</u> , 387 U.S. 136 (1967), <u>overruled on other grounds by</u> <u>Califano v. Sanders</u> , 430 U.S. 99 (1977).....	- 17 -
<u>Alaska Dep't of Env'tl. Cons. v. EPA</u> , 244 F.3d 748 (9th Cir 2001) .....	- 12 -
<u>Alaska Dep't of Env'tl. Cons. v. EPA</u> , 540 U.S. 461 (2004).....	- 11 -
<u>Bennett v. Spear</u> , 520 U.S. 154 (1997).....	- 8 -, - 11 -, - 15 -, - 16 -, - 17 -, - 18 -, - 20 -, - 22 -, - 30 -, - 31 -, - 34 -
<u>Buono v. Norton</u> , 371 F.3d 543 (9th Cir. 2004) .....	- 9 -
<u>Cal. Dep't of Educ. v. Bennett</u> , 833 F.2d 827 (9th Cir. 1987).....	- 11 -
<u>Cal. Dep't of Water Res. v. FERC</u> , 341 F.3d 906 (9th Cir. 2003) .....	- 12 -
<u>Careau Group v. United Farm Workers of Am.</u> , 940 F.2d 1291 (9th Cir. 1991) .....	- 10 -
<u>Churchill County v. Babbitt</u> , 150 F.3d 1072, <u>as amended at</u> 158 F.3d 491 (9th Cir. 1998) .....	- 13 -
<u>City of San Diego v. Whitman</u> , 242 F.3d 1097 (9th Cir. 2001) .....	- 17 -, - 20 -
<u>Covington v. Jefferson County</u> , 358 F.3d 626 (9th Cir. 2004).....	- 10 -
<u>Darby v. Cisneros</u> , 509 U.S. 137 (1993).....	- 17 -
<u>Dietary Supplemental Coalition, Inc. v. Sullivan</u> , 978 F.2d 560 (9th Cir. 1992) .....	- 11 -
<u>Ecology Ctr., Inc. v. U.S. Forest Serv.</u> , 192 F.3d 922 (9th Cir. 1999).....	- 11 -
<u>Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.</u> , 266 F.Supp.2d 1101 (N.D. Cal. 2003) .....	- 21 -
<u>FTC v. Standard Oil Co.</u> , 449 U.S. 232 (1980) .....	- 12 -, - 17 -
<u>Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.</u> , 397 F.3d 1217 (9th Cir. 2005) .....	- 9 -
<u>Harrison v. PPG Indus., Inc.</u> , 446 U.S. 578 (1980) .....	- 12 -
<u>Hecla Min. Co. v. EPA</u> , 12 F.3d 164 (9th Cir. 1993) .....	- 12 -, - 18 -
<u>Idaho Watersheds Project v. Hahn</u> , 307 F.3d 815 (9th Cir. 2002) .....	- 12 -, - 17 -, - 20 -, - 30 -
<u>Indus. Customers of N.W. Utilities v. Bonneville Pwr. Admin.</u> , 408 F.3d 638 (9th Cir. 2005) .....	- 12 -, - 15 -, - 17 -, - 18 -, - 34 -
<u>Lujan v. Nat'l Wildlife Fed'n</u> , 497 U.S. 871 (1990) .....	- 11 -
<u>Mobil Exploration &amp; Producing U.S., Inc. v. Dep't of Interior</u> , 180 F.3d 1192 (10th Cir. 1999) .....	- 18 -
<u>Ore. Natural Desert Ass'n v. U.S. Forest Serv.</u> , 312 F.Supp.2d 1337 (D. Or. 2004) .....	- 3 -, - 5 -, - 13 -, - 14 -, - 24 -, - 29 -
<u>Ore. Natural Res. Council v. Harrell</u> , 52 F.3d 1499 (9th Cir. 1995) .....	- 11 -

<u>Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS</u> , 265 F.3d 1028 (9th Cir. 2001) .....	- 21 -
<u>Public Lands Council v. Babbitt</u> , 529 U.S. 728 (2000) .....	- 26 -
<u>Rhode Island v. EPA</u> , 378 F.3d 19 (1st Cir. 2004) .....	- 17 -
<u>Rosales v. United States</u> , 824 F.2d 799 (9th Cir.1987) .....	- 10 -
<u>Steen v. John Hancock Mut. Life Ins. Co.</u> , 106 F.3d 904 (9th Cir. 1997).....	- 10 -
<u>T.W. Elec. Serv. v. Pac. Elec. Contractors</u> , 809 F.2d 626 (9th Cir. 1987).....	- 10 -
<u>Ukiah Valley Med. Ctr. v. FTC</u> , 911 F.2d 261 (9th Cir. 2000) .....	- 17 -, - 21 -, - 26 -, - 30 -
<u>United States v. Peninsula Communications, Inc.</u> , 287 F.3d 832 (9th Cir. 2002) .....	- 9 -
<u>Ventura Packers, Inc. v. F/V Jeanine Kathleen</u> , 305 F.3d 913, 916 (9th Cir. 2002) .....	- 9 -
<u>Whitman v. Am. Trucking Ass’n</u> , 531 U.S. 457 (2001).....	- 12 -, - 15 -

**STATUTES**

16 U.S.C. § 1274(a)(83), (89).....	- 4 -
16 U.S.C. § 1536(a)(2).....	- 20 -
16 U.S.C. § 1536(c)(1).....	- 13 -
28 U.S.C. § 1291 .....	- 1 -
28 U.S.C. § 1292(a)(1).....	- 1 -
28 U.S.C. § 1331 .....	- 1 -
28 U.S.C. § 1346(a)(2).....	- 1 -
43 U.S.C. § 1702(k) .....	- 6 -
43 U.S.C. § 1702(p) .....	- 6 -
43 U.S.C. § 1752 .....	- 6 -
43 U.S.C. § 1752(e) .....	- 26 -
43 U.S.C. § 315b.....	- 26 -
5 U.S.C. § 702.....	- 1 -, - 17 -
5 U.S.C. § 704.....	- 7 -, - 8 -, - 10 -, - 17 -
5 U.S.C. § 706(2)(A).....	- 8 -
Administrative Procedure Act, 5 U.S.C. §§ 701 <i>et seq.</i> .....	- 1 -
Endangered Species Act, 16 U.S.C. §§ 1531–43.....	- 2 -
Equal Access to Justice Act, 28 U.S.C. § 2412 <i>et seq.</i> .....	- 35 -
Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1784 ...	- 5 -
National Environmental Policy Act, 42 U.S.C. § 4321–4370(e) .....	- 1 -
National Forest Management Act of 1976, 16 U.S.C. §§ 1600–14.....	- 1 -
National Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271–87.....	- 1 -
Pub. L. 100-557, <u>codified at</u> 16 U.S.C. § 1274(a)(83), (89).....	- 4 -

**OTHER AUTHORITIES**

63 Fed. Reg. 31,647 (June 10, 1998) ..... - 32 -

**RULES**

Fed. R. App. P. 4(a)(1)(B) ..... - 1 -

**REGULATIONS**

36 C.F.R. § 222.1(b) ..... - 6 -

36 C.F.R. § 222.1(b)(2)..... - 6 -

36 C.F.R. § 222.1(b)(5)..... - 6 -

36 C.F.R. § 222.3(b) ..... - 26 -

36 C.F.R. § 222.3(c)..... - 6 -

36 C.F.R. § 222.4(a)(4)..... - 25 -

36 C.F.R. §222.4(a)..... - 26 -

36 C.F.R., Part 222..... - 5 -

43 C.F.R. § 4100.0-5..... - 32 -

50 C.F.R. § 402.02 ..... - 14 -

## **STATEMENT OF JURISDICTION**

Jurisdiction is proper in the United States District Court under 28 U.S.C. § 1331 because this action is brought against federal defendants United States Forest Service *et al.* for violations of the laws of the United States, including the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, the National Wild and Scenic Rivers Act of 1968 (“WSRA”), 16 U.S.C. §§ 1271–87, the National Forest Management Act of 1976 (“NFMA”), 16 U.S.C. §§ 1600–14, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321–4370(e). The district court also had jurisdiction under 28 U.S.C. § 1346(a)(2) because an agency of the United States is a defendant. The federal government has waived sovereign immunity pursuant to 5 U.S.C. § 702.

This appeal seeks review of the district court’s June 3, 2005 order and opinion and accompanying judgment, which is a final decision disposing of all of Plaintiff-Appellants’ claims without prejudice. Excerpts of Record (“ER”) at 181–208. This court has jurisdiction under 28 U.S.C. § 1291 to review appeals from all final decisions of the district courts of the United States. Plaintiff-Appellants Oregon Natural Desert Association and Center for Biological Diversity timely filed their Notice of Appeal on June 17, 2005. See Fed. R. App. P. 4(a)(1)(B); ER 209–11. Plaintiff-Appellants submit this opening brief pursuant to this court’s June 28, 2005 Time Schedule Order.

## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

Whether Annual Operating Instructions (“AOIs”) issued by the United States Forest Service are “final agency actions” vesting jurisdiction in the district court to review the Forest Service’s actions.

## **STATEMENT OF THE CASE**

The lawsuit underlying this appeal seeks judicial relief ordering the Forest Service to comply with the requirements of the WSRA, NFMA, and NEPA in its management of public lands on and adjacent to the Malheur and North Fork Malheur wild and scenic river corridors in eastern Oregon. Each year, the Forest Service issues Annual Operating Instructions to individuals holding federal term grazing permits. An AOI is a signed agreement issued annually by the Forest Service to a permittee, which sets final authorized dates of grazing, pasture and grazing system rotations, numbers of livestock permitted for the up-coming season, monitoring and reporting requirements, maximum limits of forage use by livestock, and other specific ecological standards that must be met. Included among these are standards tied to key stream and riparian habitat features necessary to protect bull trout, a native salmonid listed as “threatened” under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–43.

Oregon Natural Desert Association and Center for Biological Diversity

(hereinafter collectively referred to as “ONDA”) allege the Forest Service has acted arbitrarily and capriciously by annually authorizing livestock grazing practices within these designated wild and scenic river corridors and their watersheds, which have caused and continue to cause violations of nearly every applicable ecological standard the agency is charged with satisfying in these areas. These failures have resulted in continuing environmental degradation from Forest Service-authorized grazing practices along over thirty-nine miles and more than 10,000 acres of congressionally-designated wild and scenic river corridors—and well beyond those administrative boundaries throughout the rivers’ watersheds. This chronic and continued degradation is in direct violation of the Forest Service’s duties under the WSRA to “protect and enhance” designated river values and to implement the two rivers’ comprehensive river management plans. It also violates the NFMA’s requirement that the agency manage site-specific activities consistently with all Forest Plan requirements. Most importantly, this means complying with the Inland Native Fish Strategy (“INFISH”), an aquatic conservation strategy that establishes management objectives and standards for streams within the range of protected bull trout.

ONDA filed this action on February 18, 2003. In February 2004, the district court ruled in ONDA’s favor on the very question now before this court in denying the Forest Service’s motion to dismiss. Ore. Natural Desert Ass’n v. U.S. Forest

Serv. (“ONDA v. USFS”), 312 F.Supp.2d 1337 (D. Or. 2004)<sup>1</sup>, ONDA filed a motion for preliminary injunctive relief prior to the 2004 grazing season. ER 212–24 (district court docket sheet, Dkt # 79). Following issuance of a 10-day temporary restraining order, on June 10, 2004 the district court denied the request for a preliminary injunction based on an equitable balancing of the harms on the eve of livestock turnout (Dkt # 115). ONDA filed its motion for summary judgment on November 12, 2004 (Dkt # 138) and briefing continued over the course of the next four and a half months. The case then was transferred to a different district judge (Dkt # 160). After a March 29, 2005 hearing, the district court issued its decision on June 3, 2005 (Dkt # 228), granting in part and denying in part the Forest Service’s cross-motion for summary judgment, denying ONDA’s motion for summary judgment, and granting in part and denying in part Intervenor Oregon Cattlemen’s Association’s motion to dismiss. ER 181–207 (Opinion and Order); ER 208 (Judgment). ONDA timely filed its Notice of Appeal on June 20, 2005. ER 209–11.

### **STATEMENT OF THE RELEVANT FACTS**

The Malheur and North Fork Malheur rivers lie within the Malheur National Forest, in eastern Oregon’s Blue Mountains. See Pub. L. 100-557, codified at 16 U.S.C. § 1274(a)(83), (89) (designation of wild and scenic river corridors). Within

---

<sup>1</sup> Note that this opinion is included in the Excerpts of Record at ER 1–9. It is docket number 67 in the district court record. ER 217.

the Malheur National Forest boundaries are livestock grazing allotments, which are governed by the Malheur Forest Plan, a permit system under the Federal Land Policy and Management Act of 1976 (“FLPMA”), 43 U.S.C. §§ 1701–1784, Forest Service grazing regulations, 36 C.F.R. Part 222, and the Annual Operating Instructions. The Malheur Wild and Scenic River corridor includes portions of the Bluebucket and Dollar Basin/Star Glade allotments. The North Fork Malheur Scenic River corridor includes portions of the Spring Creek, North Fork, Flag Prairie, and Ott allotments. Each allotment is further divided into units, which allows the Forest Service to authorize (or not authorize) grazing on certain portions of each allotment at different times and levels of use throughout the grazing season and from one season to the next.

The Forest Service manages grazing practices via a four-part process involving Forest Plan grazing requirements, federally-issued grazing permits, Allotment Management Plans (AMPs), and Annual Operating Instructions (AOIs)<sup>2</sup>. See ONDA v. USFS, 312 F.Supp.2d at 1339–41 (summarizing the separate decision-making processes for permits, AMPs and AOIs). A grazing permit is a “document authorizing livestock to use National Forest System or other lands

---

<sup>2</sup> At the time this action was commenced, the Forest Service referred to its AOIs as “Annual Operating Plans” or “AOPs.” Beginning in 2004, the agency changed the name of these decisions from AOPs to AOIs. The change in title was accompanied by no significant changes in content, form, or function. See, e.g., ER at 191 (n.5) (district court observing same). For convenience, ONDA will refer to all of these annual decisions as AOIs throughout this briefing.

under Forest Service control for the purpose of livestock production.” 36 C.F.R. § 222.1(b)(5); 43 U.S.C. § 1702(p) (same). Permits are issued for periods of ten years. 36 C.F.R. § 222.3(c)(1). The Forest Service issues permits according to a priority system tied to ownership of private “base property” and permits set general limits on allowable numbers of livestock and seasons of use, based on an allotment’s estimated ability to sustain certain average levels of use. See, e.g., id. § 222.3(c)(1)(i), (ii); 43 U.S.C. § 1752 (explaining scope and requirements of grazing permit terms and conditions).

An AMP, in turn, is a long-term, allotment-specific planning document that: (1) prescribes the manner in, and extent to which, grazing operations will be conducted in order to meet multiple-use and other goals and objectives; (2) describes any range improvements (such as watering troughs, pipelines, and fences) in place or to be installed and maintained to meet allotment objectives; and (3) contains any other grazing management provisions and objectives prescribed by the Forest Service. See 43 U.S.C. § 1702(k); 36 C.F.R. § 222.1(b)(2).

Finally, an Annual Operating Instruction is a signed agreement issued annually by the Forest Service to a permittee, which sets final authorized dates of grazing (“season of use”), pasture and grazing system rotations, numbers of livestock permitted for the up-coming season, monitoring and reporting requirements, maximum limits of forage use by livestock, and other specific

ecological standards that must be met. See ER 89–153 (2004 AOIs for allotments at issue). An AOI also may prohibit grazing on some or all of the units within an allotment. See, e.g., ER 104–05 (2004 AOI for Dollar Basin/Star Glade Allotment, specifying no grazing on South Star Glade and Dollar Basin units for 2004 grazing season).

### **SUMMARY OF THE ARGUMENT**

The narrow question before this court is whether the Forest Service’s annual decisions setting the levels and parameters of grazing allowed during each grazing season on each allotment in the Malheur National Forest are “final agency actions” supporting jurisdiction for review under the APA. APA § 704 authorizes judicial review only of “final agency action.” 5 U.S.C. § 704. The district court found that these annual decisions, which the Forest Service issues in the form of Annual Operating Instructions to grazing permit holders, are not final agency actions. It did so by focusing incorrectly only on whether the Forest Service’s decisions affected the legal regime to which the agency is subject, ignoring other significant legal consequences which flow from the Forest Service’s issuance of the AOIs. Application of the proper standard for finality of agency action under APA § 704 shows that AOIs are indeed final agency actions.

Agency action is “final” if it satisfies two conditions: (1) “the action must mark the consummation of the agency’s decision-making process—it must not be

of a merely tentative or interlocutory nature”; and (2) “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (internal citations and quotations omitted). The Forest Service’s decisions encompassed by and in Annual Operating Instructions easily satisfy the two conditions necessary to be reviewable as “final” agency action under APA § 704. First, AOIs represent the completion of the Forest Service’s annual decision-making process that either prohibits grazing or definitively sets how many livestock may graze where on each allotment, and what conditions, including specific ecological standards to protect bull trout and their habitat, apply to a particular year’s grazing. Second, because AOIs set the annual terms and conditions under which a permittee is allowed to graze livestock on the National Forest, AOIs have direct legal consequences for, determine the rights and obligations of, and affect the day-to-day operations of, the grazers who sign these AOIs. These two characteristics demonstrate that AOIs are final agency actions.

In cases where, as here, plaintiffs have asked a district court to “hold unlawful and set aside” an agency’s actions because they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), decisions of this court and the Supreme Court oblige such plaintiffs to challenge discrete, final agency actions. ONDA has done so here, as shown in its

pleadings, arguments, and evidence presented below. ONDA's contention that each Annual Operating Instruction issued for six wild and scenic river corridor allotments on the Malheur National Forest from 2000 through 2004 is unlawful, is a proper challenge to discrete, final agency actions, and does not constitute a broad, "programmatic" challenge which might not support APA jurisdiction. Because the AOIs at issue in this case meet both criteria for final agency action necessary for jurisdiction, and ONDA has properly challenged these site-specific agency actions in its suit, this court should reverse the district court's decision.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This court reviews a district court's determination that it lacked subject matter jurisdiction *de novo*. See Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 1226 (9th Cir. 2005); Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004); United States v. Peninsula Communications, Inc., 287 F.3d 832, 836 (9th Cir. 2002). Where the district court has dismissed for lack of subject matter jurisdiction after a motion for summary judgment, and the issue of jurisdiction and the substantive claims are closely intertwined, as they are in this case, this court reviews the dismissal under the court's standard for reviewing summary judgment motions. See Ventura Packers, Inc. v. F/V Jeanine Kathleen, 305 F.3d 913, 916, 922 (9th Cir. 2002); Steen v. John Hancock Mut. Life Ins. Co.,

106 F.3d 904, 910 (9th Cir. 1997); Careau Group v. United Farm Workers of Am., 940 F.2d 1291, 1293 (9th Cir. 1991); Rosales v. United States, 824 F.2d 799, 803 (9th Cir.1987). This court must view the evidence in the light most favorable to ONDA, and determine whether the evidence presents any genuine issues of material fact and whether the district court correctly applied the law. See Covington v. Jefferson County, 358 F.3d 626, 641 n.22 (9th Cir. 2004); Ventura Packers, 305 F.3d at 916; Steen, 106 F.3d at 910. The court’s concern is whether a rational trier of fact might resolve any factual issues in favor of ONDA. See Covington, 358 F.3d at 641 n.22; T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 631 (9th Cir. 1987).

**II. THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER ONDA’S CLAIMS BECAUSE THE ANNUAL OPERATING INSTRUCTIONS ISSUED BY THE FOREST SERVICE ARE FINAL AGENCY ACTIONS SUBJECT TO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT.**

The APA makes “final agency action for which there is no other adequate remedy in a court” subject to judicial review. 5 U.S.C. § 704. However, the APA does not define “final agency action.” The Supreme Court held in Bennett v. Spear that an agency action is “final” under the APA if it satisfies two conditions: (1) “the action must mark the consummation of the agency’s decision-making process—it must not be of a merely tentative or interlocutory nature”; and (2) “the action must be one by which rights or obligations have been determined, or from

which legal consequences will flow.” 520 U.S. at 177–78 (internal citations and quotations omitted); see also Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 925 (9th Cir. 1999) (citing rule in Bennett v. Spear). Rather than being a bright-line, formalistic test, finality is interpreted in a pragmatic and flexible manner, focusing on the practical and legal consequences of the agency action. See Alaska Dep’t of Env’tl. Cons. v. EPA, 540 U.S. 461, 483 (2004); Ore. Natural Res. Council v. Harrell, 52 F.3d 1499, 1504 (9th Cir. 1995) (citing Dietary Supplemental Coalition, Inc. v. Sullivan, 978 F.2d 560, 562 (9th Cir. 1992)). Some additional discussion of how courts have set out the conditions for final agency action illustrates how the district court misapplied the standards in this case.

**A. Annual Operating Instructions meet the first prong for finality because they are the consummation of the Forest Service’s annual process for deciding the number and location of livestock allowed to graze on a particular allotment.**

An agency action meets the first condition for final agency action if it represents the culmination of the agency’s decision-making process on a particular issue. The concern of the first condition is to ensure that the challenged action “not be of a merely tentative or interlocutory nature” and that courts do not intrude prematurely in an on-going agency decision-making process. Bennett, 520 U.S. at 178; see Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 882 (1990); Cal. Dep’t of Educ. v. Bennett, 833 F.2d 827, 833 (9th Cir. 1987) (“A court looks to whether the

agency action represents the final administrative word to insure that judicial review will not interfere with the agency's decision-making process.”).

Once an agency has completed its decision-making process and “‘rendered its last word on the matter’ in question,” this condition for finality is met. Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 478 (2001) (quoting Harrison v. PPG Indus., Inc., 446 U.S. 578, 586 (1980)). This court has characterized this as a requirement that the action represent “a definitive statement of the agency’s position” on the issue before it. Indus. Customers of N.W. Utilities v. Bonneville Pwr. Admin., 408 F.3d 638, 646 (9th Cir. 2005) (quoting Cal. Dep’t of Water Res. v. FERC, 341 F.3d 906, 909 (9th Cir. 2003)); Hecla Min. Co. v. EPA, 12 F.3d 164, 165 (9th Cir. 1993) (citing FTC v. Standard Oil Co., 449 U.S. 232, 239–40 (1980)). Thus, the first condition for finality is satisfied when an agency issues a document that puts its definitive position on a set of factual issues into effect, such as an order, permit or record of decision authorizing some action. See, e.g., Idaho Watersheds Project v. Hahn, 307 F.3d 815, 828 (9th Cir. 2002) (“the initial agency decisionmaker arrived at a definitive position and put the decision into effect by issuing the sixty-eight permits and allowing grazing to occur under the terms of those permits”); Alaska Dep’t of Env’tl. Cons. v. EPA, 244 F.3d 748, 750 (9th Cir 2001) (finding EPA compliance orders are the agency’s “final position on the factual circumstances upon which the Orders are predicated”); Churchill County v. Babbitt, 150 F.3d

1072, 1080, as amended at 158 F.3d 491 (9th Cir. 1998) (“[t]he FWS has effectuated a final agency action by producing its Record of Decision announcing that it would begin purchasing fifty-five thousand acre feet of water”).

There can be no serious disagreement that the Forest Service’s Annual Operating Instructions satisfy the first condition for final agency action. The district court did not even consider the question in its June 3, 2005 Opinion, thus leaving untouched its evaluation in the February 11, 2004 Opinion that AOIs satisfy this condition of finality. See ONDA v. USFS, 312 F.Supp.2d at 1342–43.

For each allotment on the Malheur National Forest, the Forest Service determines annually how many livestock to allow on which of the allotment’s units and under what conditions. Each year, the Forest Service evaluates the range and river conditions at the end of the grazing season in order to inform the next season’s annual grazing decisions. See, e.g., ER 80 (2003 AOI for Dollar Basin/Star Glade Allotment, stating, “In order to determine this year’s Stocking Rate and Unit Rotation, consideration was given to your Annual Application, the current conditions on the allotment, and recommendations from the Biological Assessment”)<sup>3</sup>; ER 162–63 (2004 End-of-Year Grazing Report, summarizing

---

<sup>3</sup> A “biological assessment” is a document prepared by the Forest Service as part of the ESA § 7 consultation process. 16 U.S.C. § 1536(c)(1). It “refers to the information . . . concerning listed species and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation

monitoring methods, stating one purpose of report is to “[r]ecommend potential management strategies for the 2005 Biological Assessments (BA’s) [sic] and subsequent Annual Operating Instructions”), 169–71 (example of unit-specific recommended management changes, based on 2004 monitoring, for 2005 grazing season on Bluebucket Allotment).

The Forest Service then considers annually variable factors that could not possibly be considered in a 10-year term grazing permit or a long-term allotment management plan, such as drought conditions, timing of rainfall over the course of a given grazing season, the success or failure of habitat restoration projects on a given allotment or unit, current water quality, the degree of risk from grazing to threatened or endangered species such as the bull trout, and permittee compliance with AOI terms and conditions in previous years. See, e.g., ER 164–68 (describing various types of short- and long-term monitoring and evaluation); see also ONDA v. USFS, 312 F.Supp.2d at 1341. The Forest Service also is obligated to consult with the U.S. Fish & Wildlife Service or NOAA Fisheries regarding any species listed under the Endangered Species Act that may be affected by that year’s proposed grazing. 16 U.S.C. § 1536; ER 177–80 (excerpt of U.S. Fish & Wildlife Service’s “Formal and Informal Consultation and Conference on the Effects of Malheur National Forest’s 2004 Grazing Management Program on Bull Trout and potential effects of the action on such species and habitat.” 50 C.F.R. § 402.02.

---

Proposed Critical Habitat”); ER 172–73 (excerpt from Forest Service’s 2004 biological assessment explaining annual consultation process on grazing proposed each year under terms of AOIs).

On the basis of these facts, and, at least in theory, applying its regulatory and statutory mandates, the Forest Service makes a site-specific decision as to how much grazing to allow during the coming season, and under what conditions. The decision is issued as the Annual Operating Instruction for each allotment, setting specific obligations with respect to the number of animals permitted, season of use allowed, pasture move dates, ecological standards, monitoring requirements, and any other site-specific compliance requirements for that year. See ER 89–153 (2004 AOIs). After the Forest Service issues the AOI for a given allotment, and the grazing permit holder signs the AOI, the permittee is allowed to put livestock onto the forest land. There is nothing tentative or interlocutory about the decision. See Bennett, 520 U.S. at 178. With respect to the issues involved in the decision-making process—what level of grazing to allow during the coming year on a given allotment, and under what conditions—the AOI is a “a definitive statement of the agency’s position” on the issue before it, Indus. Customers, 408 F.3d at 646, and its “last word” on the issue for that particular grazing season. Am. Trucking, 531 U.S. at 478. Therefore, as the culmination of the Forest Service’s annual decisions

regarding the utilization of each grazing allotment for the upcoming grazing season, AOIs satisfy the first condition of finality.

**B. Annual Operating Instructions meet the second prong for finality because they establish the rights and obligations of the grazing permit holders and affect the legal rights of the permit holders.**

Courts have observed that the legal consequences necessary to show finality may manifest in any of several different effects that flow from agency actions—any of which is sufficient to satisfy the second condition for reviewable final agency action. In Bennett v. Spear, the Supreme Court listed several ways an agency action could have a legal effect: an action could determine rights or obligations, result in direct and appreciable legal consequences, affect the rights of the relevant actors, or alter the legal regime to which another agency is subject. See 520 U.S. at 178. The second condition for finality was satisfied in Bennett because the last of these effects was present: a biological opinion, issued by the U.S. Fish & Wildlife Service at the request of the Bureau of Reclamation, altered the Bureau’s “legal regime” because it authorized the Bureau to cause degradation to endangered species habitat only if it complied with the terms of the biological opinion. Id.; see also id. 169–70 (describing effect of biological opinion).

This court has articulated several other measures of whether there has been sufficient legal effect to satisfy the second condition for final agency action. For example, a definitive agency decision has been held to be a reviewable final

agency action if it ““inflicts an actual, concrete injury.”” Idaho Watersheds Project, 307 F.3d at 828 (quoting Darby v. Cisneros, 509 U.S. 137, 144 (1993)).

Alternatively, an action is final if the “agency action impose[s] an obligation, den[ies] a right or fix[es] some legal relationship.” City of San Diego v. Whitman, 242 F.3d 1097, 1102 (9th Cir. 2001) (citing Bennett, 520 U.S. at 178). Focusing on the practical aspect of the finality test, this court also has noted that a final decision is one that has a “direct effect on the day-to-day business” of the party that is the subject of the agency decision. Ukiah Valley Med. Ctr. v. FTC, 911 F.2d 261, 265 (9th Cir. 2000) (citing Standard Oil, 449 U.S. at 239); accord Rhode Island v. EPA, 378 F.3d 19, 23 (1st Cir. 2004) (agency action is final when it “conclusively determines the rights and obligations of the parties with respect to the matters at issue.”).<sup>4</sup> Finally, relying again on Standard Oil, this court has noted that an agency

---

<sup>4</sup> In stating this principle of finality, some opinions blur the distinction between whether agency action is “final” for purposes of APA § 704, 5 U.S.C. § 704 (“Actions Reviewable”), and whether the challenger is “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute” under APA § 702, who is thereby entitled to judicial review of the agency action. 5 U.S.C. § 702 (“Right of Review”). See Bennett, 520 U.S. at 177 (cautioning against confusing the question whether an “action is final” with the “separate question whether the petitioners’ harm is ‘fairly traceable’ to the [] action.”). Opinions whose language suggests that the finality standard requires that an action must have an “effect on the day-to-day business’ of the complaining parties” or on “the parties seeking review” trace the formulation back to Standard Oil, 449 U.S. at 239. See, e.g., Indus. Customers, 408 F.3d at 646. However, the Supreme Court in Standard Oil was in turn quoting from the seminal administrative law case of Abbott Labs. v. Gardner, 387 U.S. 136 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977). In

action is final if immediate compliance with the action is expected. See Indus. Customers, 408 F.3d at 646 (citing Standard Oil, 449 U.S. at 239); Hecla Mining, 12 F.3d at 165 (same).

Thus, Bennett's expansive list of possible effects and legal consequences flowing from an agency action, as well as those identified in other decisions, shows that the proper analysis of the second condition for final agency action is whether any legal consequences flow from an agency action. Bennett, 520 U.S. at 178; see Mobil Exploration & Producing U.S., Inc. v. Dep't of Interior, 180 F.3d 1192, 1203 (10th Cir. 1999) (“the second prong of the Bennett finality analysis generally

---

Abbott Laboratories, the Court found the regulations at issue to be final because they had “a direct effect on the day-to-day business of all prescription drug companies.” 387 U.S. at 152. The Court later noted that “nearly all” of the drug companies were petitioners in the case before it. Id. at 154. Yet it focused the finality examination of the effects of the agency action upon the targets of the regulation (all drug companies), and not merely those which had brought suit. Indeed, Abbott Laboratories carefully separated its finality analysis—whether the challenged action was an “authoritative interpretation” with a “direct effect on the day-to-day business” of the parties subject to the regulation, id. at 152—from its later finding that the particular petitioners before it had standing to bring the claim. See id. at 154. In Standard Oil, because the party affected by the action was also the plaintiff challenging it, the Court described the effect as being upon the “complaining parties.” 449 U.S. at 239. This formulation has flowed down through decisions involving parties directly affected by agency actions who are also the plaintiffs challenging the actions, citing other cases which ultimately cite back to Standard Oil. See, e.g., Indus. Customers, 408 F.3d at 646. Abbott Laboratories and Bennett make clear that the focus of the finality test is the *effects on the party which is subject to the agency action, regardless of whether or not that party is also the plaintiff challenging the final action.*

requires the court to examine whether any legal consequences arise from the agency action”).

**1. *The district court erred by misapplying the standard for determining whether Annual Operating Instructions are final agency action.***

In dismissing ONDA’s suit, the district court applied a fundamentally incorrect reading of applicable law to determine whether Annual Operating Instructions are final agency action. After quoting the Bennett test, the district court noted that “[t]he finality test in Bennett looks to the decision-making context to find a final agency position on an issue, and whether any legal consequences result as a practical effect of the agency’s decision.” ER 192–93. This correctly states the test for final agency action developed in Bennett and other decisions interpreting finality for purposes of APA Section 704. However, the district court then leapt to an inexplicable and utterly wrong assertion of the showing necessary to satisfy the second condition for final agency action.

The district court first noted, again correctly, that although the agency might not acknowledge its action as final action, “the practical effect of the decision may carry legal consequences, thereby making it a reviewable final agency action.” ER 193. But the court then followed that observation with a fatal *non sequitur*: “Thus, a final agency action ‘alter[s] the legal regime to which the **action agency is subject**,’ i.e., prior existing ‘rights and obligations’ are reworked or ‘legal

consequences will flow’ from the agency action.” Id. (quoting Bennett, 520 U.S. at 178) (bold alteration in original).<sup>5</sup> The balance of the district court’s analysis of Annual Operating Instructions was based on its faulty premise that *only* if an agency action alters the legal regime to which the *agency* is subject can there be the requisite legal consequences for an action to be final. See ER 193–201.

This premise has no foundation in the case law. The cases discussed in the preceding section make it clear that there are many ways in which legal consequences may flow from an agency’s completed decision and that so long as *some* legal consequence flows from the agency’s decision it is reviewable final action. See, e.g., Bennett, 520 U.S. at 178 (second condition for finality is satisfied if the action determines “rights or obligations,” or results in “legal consequences,” or “alters the legal regime to which the action agency is subject”); Idaho Watersheds Project, 307 F.3d at 828 (definitive agency decision is final if it “inflicts an actual, concrete injury”); City of San Diego, 242 F.3d at 1102 (second condition for finality is satisfied if the “agency action impose[s] an obligation,

---

<sup>5</sup> In Bennett, the term “action agency” is a term of art derived from the ESA consultation that was at issue in that case. See 520 U.S. at 168–69. In the ESA § 7 consultation process, the “action agency” is the agency that proposed to take the action that is the subject of the consultation. 16 U.S.C. § 1536(a)(2) (consultation required for “any action authorized, funded, or carried out by such agency”). The term “action agency” is used to distinguish the agency proposing to take the action from the “consulting agency” (U.S. Fish & Wildlife Service or NOAA Fisheries), i.e., the agency with which the action agency engages in § 7 consultation. Thus, the term “action agency” in Bennett is not intended to be a limitation on the second prong of the test for final agency action under the APA.

den[ies] a right or fix[es] some legal relationship”); Ukiah Valley Med. Ctr., 911 F.2d at 265) (definitive agency decision is final if it has “direct effect on the day-to-day business” of the party subject to the action). If any of these legal consequences flows from a consummated agency decision-making process, the agency action is final.

The district court therefore applied an incorrect and impermissibly narrow standard when it analyzed the Forest Service’s Annual Operating Instructions. An effect on an agency’s legal regime is but one of the many legal consequences that can flow from a final agency action. This is borne out by the fact that although nearly 40 of this Court’s opinions since Bennett involve analyses of final agency action, only one appears to have analyzed the effect of an agency action on the legal regime to which the agency is subject. See Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS, 265 F.3d 1028, 1033–34 (9th Cir. 2001) (finding a “no jeopardy” opinion issued by one agency altered the legal regime to which another agency was subject). In short, the Ninth Circuit’s analytical practice does not support the district court’s standard. Accord Env’tl. Prot. Info. Ctr. v. Pac. Lumber Co., 266 F.Supp.2d 1101, 1122 (N.D. Cal. 2003) (finding argument that an action can be final only if it alters the acting agency’s legal regime “narrows the scope of Bennett beyond reason”).

The district court compounded its error by articulating two additional precepts that are flatly incorrect. First, it stated that “whether an AOI is a final action depends on the AOI’s effect on the Forest Service grazing permit system, not whether the consequences to the permittee are ‘fairly traceable to the [Forest Service’s] action [issuing the AOI].’” ER 193 (quoting Bennett, 520 U.S. at 177). The first clause again misstates the second requirement for finality, while the second clause illustrates perfectly the confusion between whether an agency action is final and the “separate question” of statutory standing, which the same quoted passage of Bennett cautions must be avoided. See supra n.4 (citing Bennett, 520 U.S. at 177).

Second, the district court erroneously stated that “[a]n agency action must do more than affect the permittee to be final: under Bennett, it must alter the legal regime that the Forest Service administers.” Id. This is a fundamental misreading both of the case law in general and of Bennett in particular, as that decision and its progeny clearly contemplate a broad range of effects that satisfy the second condition for finality, including effects on the regulated entity—here the grazers who signed the AOIs. The district court apparently misconstrued the specific effect which Bennett found supported a finding of final action—the effect on the agency’s legal regime—as the exclusive test for satisfying the second condition for finality. This construction of the finality standard is unsupported and erroneous.

This error permeates throughout the district court's analysis of Annual Operating Instructions. See ER 193–94 (“I find that an AOI is not a final agency action because it does not alter the legal regime of a grazing permit by authorizing the Forest Service to deviate from the grazing permit's basic terms and standards or amending legal mandates”), ER 197 (“an AOI does not alter the legal regime for administering a grazing permit”), ER 201 (“It is putting the cart before the horse to say that an AOI changes the legal regime that the Forest Service operates under in administering the grazing permit system.”). Ironically, had the district court applied the correct legal standard, it could only have reached the conclusion that AOIs are final agency action, based on its own observations of the practical effect of the AOIs on the permit holders.

The district court found, for example, that “the AOI has functioned, and continues to function, as a supplemental part of the grazing permit,” and that, prior to 2004, the AOIs expressly included a section entitled: “REVISIONS This Annual Operating Instruction [or Plan] is made part of Part 3 of your Term Grazing Permit.” ER 191 (at n.5). The district court also acknowledged that “[i]ssuing an AOI does gain the Forest Service additional enforcement rights against a permittee beyond those in the grazing permit.” ER 196. Reviewing by way of example the terms of the 2004 AOI for the North Fork Allotment, the district court noted that the “2004 AOI included permit modifications,” including prohibiting grazing on

three units and varying the period of use from the term provided in the grazing permit itself. ER 199.

The district court's observations in the June 3, 2005 Opinion are factually consistent with its February 11, 2004 Opinion, in which the court denied the Forest Service's motion to dismiss. ONDA v. USFS, 312 F.Supp.2d at 1342–1343; ER 4–5. In its earlier decision, applying the correct standard for finality, the district court held that Annual Operating Instructions are indeed final agency action because they are “discrete, site-specific actions taken by the agency from which binding obligations flow.” 312 F.Supp.2d at 1343. As discussed below, AOIs expressly define the particular rights and obligations of the permit holder for each grazing season; the issuance of an AOI has an immediate, concrete effect on the day-to-day business of the grazing permit holder; and both the Forest Service's grazing regulations and the AOI itself contemplate immediate compliance with its terms. The district court was correct in its February 11, 2004 Opinion that the AOIs are final agency actions. Id.

***2. Annual Operating Instructions establish the rights and obligations of the grazing permit holders and affect the legal rights of the permit holders.***

An Annual Operating Instruction satisfies the second condition for final agency action because direct and appreciable legal consequences flow from the Forest Service's issuance of an AOI. Based on the agency's assessment of a given

allotment, the AOI determines the particular rights and obligations of the permit holder for each grazing season. When the Forest Service issues an AOI—and only after it issues an AOI—the permit holder may move livestock onto the public lands under the terms and conditions set forth in the AOI. AOIs therefore have an immediate and concrete effect on the day-to-day operations of the permit holder at the point, each year, at which the AOI becomes incorporated into the permit:

The Annual Operating Instruction (AOI) is used in addition to your Term Grazing Permit. Your AOI will be used to set objectives, implement utilization standards, and modify grazing systems (if necessary) to meet our management and vegetative objectives for each allotment. All requirements of your Term Grazing Permit remain in force, unless specifically noted in the AOI.

ER 99 (Bluebucket Allotment 2004 AOI). By signing the AOI, and putting livestock onto the range, the permit holder expressly agrees to abide by the conditions listed in the AOI—including conditions which forbid grazing at certain times or in certain places. See, e.g., ER 104 (2004 AOI for Dollar Basin/Star Glade Allotment, showing South Star Glade and Dollar units as being rested (i.e., no grazing authorized) for 2004 grazing season). Failure to abide by these new conditions makes the permit holder subject to civil penalties, including the cancellation or suspension of the permit itself. 36 C.F.R. § 222.4(a)(4) (Forest Service may “cancel, modify, or suspend grazing and livestock use permits in whole or in part” if permittee “does not comply with provisions and requirements

in the grazing permit”). Both by authorizing grazing to begin and by dictating the terms by which grazing will occur, an AOI has an immediate, concrete effect on the day-to-day operations of the permit holder. Ukiah Valley Med. Ctr., 911 F.2d at 265.

Forest Service grazing regulations expressly provide that grazing “permits convey no right, title, or interest held by the United States in any lands or resources.” 36 C.F.R. § 222.3(b); see also 43 U.S.C. § 315b (Taylor Grazing Act, providing that grazing preferences “shall not create any right, title, interest, or estate in or to the [public] lands”). Rather, a grazing permit is a revocable license to use public land, granted subject to the conditions the Forest Service decides to impose. Public Lands Council v. Babbitt, 529 U.S. 728, 735 (2000) (explaining that the “conditions placed on permits reflect[] the leasehold nature of grazing privileges”). Because no title or property right vests in the grazing permittee, any privileges the permittee has are defined by the terms of the license. The Forest Service may restrict or suspend these privileges each year through the terms and conditions set in each AOI.<sup>6</sup> Although the 10-year term permit sets the upper limits

---

<sup>6</sup> The authorizing statute provides that the Forest Service “shall incorporate in grazing permits and leases such terms and conditions” the agency “deems appropriate for management of the permitted or leased lands pursuant to applicable law.” 43 U.S.C. § 1752(e). The AOIs state on their face that the AOI is “used in addition to your Term Grazing Permit” and is used to “modify grazing systems (if necessary) to meet our management and vegetative objectives for each allotment.” ER 94. See also 36 C.F.R. §222.4(a)(7), (8) (Forest Service may modify terms and

on allowable numbers of livestock and seasons of use—and thus, at the time the term permit is issued, frames the broad scope of the permittee’s grazing privilege—these parameters are adjusted annually through the AOIs. This annual adjustment of terms and conditions likewise works an adjustment in the permittee’s grazing privilege, and the annual modifications made through AOIs have significant legal consequences.

The most significant legal consequence of an Annual Operating Instruction is that the permit holder is not allowed to enter public land to graze without an AOI. Indeed, the permit holder must file with the Forest Service an annual application to graze livestock:

The permittee will file an Annual Application for Term Grazing permit with the District Ranger. This Application will be validated to cover any proposed changes from the use specified in the paid permit. It will be submitted substantially in advance of the coming grazing season, preferably at the Annual Operating [Instruction] meeting. Approval of the Application, in whole or in part, by the Forest Supervisor (or District Ranger) is part of the permit validation procedure and will be verified in the ensuing Bill for Collection.

ER 32 (permit term and condition); see also ER 28 (Bluebucket Allotment permit specifying that “permittee will allow only the numbers, kind, and class of livestock

---

conditions of permits “to conform to current situations brought about by changes in law, regulation, executive order, development or revision of an allotment management plan, or other management needs” and may modify “seasons of use, numbers, kind, and class of livestock allowed or the allotment to be used under the permit, because of resource condition”).

on the allotment during the period specified in [the permit] or the annual Bill for Collection, including any modifications made” to avoid resource damage).<sup>7</sup> By signing the AOI, the permit holder accepts and agrees to comply with the modified terms and conditions listed in the AOI, and is allowed to place his or her livestock on the allotment. The AOI establishes the actual annual limits and conditions on grazing in each unit of each allotment for a given grazing season.<sup>8</sup> It is the issuance of the AOI that grants the site- and season-specific “rights” of the permit holder—not the general limits set in the permits.

Perhaps more importantly, INFISH grazing standard GM-1, which is part of the Malheur Forest Plan, requires that the Forest Service must:

---

<sup>7</sup> Because the grazing permits for each of the allotments at issue in this case are virtually identical, only the Bluebucket Allotment permits are provided by way of example in ONDA’s Excerpts of Record. There are three separate permittees that graze the Bluebucket Allotment; thus, there are three separate permits (and AOIs each year). See also infra note 13 (referring to other two permits).

<sup>8</sup> For example, on the Dollar Basin/Star Glade Allotment, the Forest Service in 2003 authorized 50 cow/calf pairs to graze the South Star Glade Unit from September 23, 2003 to October 23, 2003, and 116 cow/calf pairs to graze the Dollar Unit from July 6, 2003 to September 2, 2003. ER 87 (2003 AOI). In 2004, the agency elected to rest (i.e., authorize no grazing on) those two units because of concerns over areas of heavy use or failures to meet standards during the 2003 grazing season. ER 104–05 (2004 AOI). See also, e.g., ER 66, 74 (1998 AOI for Dollar Basin/Star Glade Allotment, stating, “Based on the heavy use observed last year [on South Star Glade Unit], earlier use by less cattle would provide more Spring growth on the riparian vegetation and more residual vegetation cover in the Fall” and authorizing 29 cow/calf pairs from August 1, 1998 to October 30, 1998).

Modify grazing practices (e.g., accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent attainment of Riparian Management Objectives or are likely to adversely affect inland native fish. Suspend grazing if adjusting practices is not effective in meeting Riparian Management Objectives.

ER 161. Modifications may include reducing numbers of livestock or “season of use, changes in handling practices or the complete removal of livestock from [designated Riparian Habitat Conservation Areas].” ER 158. Because permits are issued for 10-year periods and the allotment management plans for the six allotments at issue in this case either are extremely outdated or have never been developed at all, see ONDA v. USFS, 312 F.Supp.2d at 1342, n.2, the AOI is the only management tool available with which the Forest Service can modify or suspend grazing. ER 174 (2004 Forest Service biological assessment for Dollar Basin/Star Glade Allotment, stating, “The last range allotment analysis was completed in 1965, however an AMP was not written. Use since then has been directed in the AOI.”).<sup>9</sup>

The Forest Service has the power—and, ONDA argues on the merits, the statutory and regulatory obligation—to modify grazing practices that retard or prevent attainment of Riparian Management Objectives (“RMOs”) and to suspend

---

<sup>9</sup> Further indication that the Forest Service considers the AMPs to be useless, obsolete documents at this point, is that the agency elected not to even produce the ones that do exist as part of the administrative record in the district court.

grazing if those modifications are not effective in meeting RMOs.<sup>10</sup> If, to insure against retarding or preventing attainment of RMOs, the agency were to modify or suspend grazing through an AOI, the only management tool at its disposal on an annual basis, it would quite obviously have an immediate and concrete effect on the day-to-day operations of the permittee. The practical consequences that flow from the AOIs make clear that it is a decisional document that “determines rights or obligations” and has direct and concrete effects on the day-to-day business of the permit holder. Bennett, 520 U.S. at 178; see Ukiah Valley Med. Ctr., 911 F.2d at 265; cf. Idaho Watersheds Project, 307 F.3d at 828 (holding that “allowing actual grazing to occur” under the original terms of newly-issued permits was final agency action).

The magnitude of these potential modifications also is reflected in the Forest Service’s documentation of its annual ESA Section 7 consultation with the U.S. Fish & Wildlife Service over how the Forest Service’s proposed grazing may impact threatened or endangered fish species. ER 177–79 (2004 USFWS BiOp).

---

<sup>10</sup> RMOs are “[q]uantifiable measures of stream and streamside conditions that define good fish habitat, and serve as indicators against which attainment or progress toward attainment of goals will be measured.” ER 159. They include bank stability and overhanging banks (which provide shaded, cool refugia from warm water temperatures and protective cover from predators), stream width-to-depth ratio (a stream cannot be too wide and shallow), pool frequency (slow-moving water in pools is important to rearing juvenile salmonids and to adult salmonids during spawning migrations), and water temperature (ideal trout habitat is between 48 and 59 degrees Fahrenheit). ER 157, 160.

The 2004 BiOp indicates that “[t]he 2004 proposed actions include the season and number of livestock designated on individual Annual Operating Instructions (AOI), based on the average level of animal use from the Term Grazing Permits, and incorporates any needed or desired changes as a result of past use and current conditions.” ER 179 (emphasis added). The BiOp also recites that the “Forest has made significant changes in the management of several allotments” via the 2004 AOI terms and conditions. *Id.* In short, the BiOp makes clear that the Forest Service’s AOI decisions are not minor adjustments, but rather are significant changes that alter the permit holder’s annual grazing “rights or obligations.” *Bennett*, 520 U.S. at 178.

The grazing permit and the 2004 Annual Operating Instruction for the Bluebucket Allotment further illustrate how AOIs shape rights, impose obligations, and have concrete effects on the day-to-day activities of the permit holders, in ways which the underlying permit itself does not (and cannot). ER 26–47 (permit), ER 94–98 (AOI). The permit, which was issued in 1996, states that the 1985 AMP is scheduled for revision and that, prior to completion of the revised AMP, “we will be working with you through the Annual Operating [Instructions] to bring management of the Bluebucket Allotment into consistency with the terms of the Malheur LRMP.” ER 31. The AOI, in turn, provides that it is to be “used in addition to your Term Grazing Permit.” ER 94. The AOI recites that it is used to

“set objectives, implement utilization standards, and modify grazing systems (if necessary) to meet our management and vegetative objectives for each allotment.”

Id.<sup>11</sup>

The Bluebucket Allotment permit allows 160 Animal Unit Months (“AUMs”)<sup>12</sup> from June 1 to September 30—a total of 640 AUMs per year. ER 26. The 2004 Annual Operating Instruction, by contrast, allows the permittee 272 animals from June 1, 2004 to June 20, 2004 on the allotment’s Cougar Unit and 272 animals from June 21, 2004 to July 10, 2004 on the Dry Meadows Unit. ER 94. In other words, the Forest Service made the decision in this 2004 AOI to authorize more livestock for a shorter season of use than allowed by the permit, and to authorize this permittee to graze only two of the allotment’s nine total units.

---

<sup>11</sup> See also, e.g., ER 64 (1998 AOI for Dollar Basin/Star Glade Allotment, stating, “*Beginning this year, standards and habitat objectives for bull trout are detailed for each unit.*”) (italics in original). (The 1998 AOI for the Bluebucket Allotment was not produced as part of the administrative record before the district court.) Most of the permits (and all of the existing AMPs) at issue in this case were issued prior to the 1998 listing of bull trout as threatened species under the ESA. 63 Fed. Reg. 31,647 (June 10, 1998) (final listing rule). Thus, AOIs are the *only* decision-making point at which the Forest Service can modify terms and conditions of annual grazing practices to manage for bull trout consistently with the agency’s ESA obligations. E.g., 16 U.S.C. § 1536(a)(2) (requiring Forest Service to “insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species”).

<sup>12</sup> An AUM is the amount of forage necessary to sustain one cow for one month. See 43 C.F.R. § 4100.0-5.

See ER 175–76 (2004 biological assessment, describing nine separate units on allotment).

One legal consequence of the 2004 AOI for the Bluebucket Allotment is that, despite the general permit’s authorization to graze livestock until the end of September, the permittee in 2004 was only permitted to have livestock on the National Forest until June 10th on one unit, and July 10th on another.<sup>13</sup> If the permittee were to attempt to graze cattle according to the general authorization shown in the permit, rather than the specific terms and conditions detailed in the AOI, the permittee would be subject to penalties under the Forest Service grazing regulations and the terms of the permit. 36 C.F.R. § 222.4(a)(4) (authority of Forest Service to cancel or suspend permit if permittee does not comply with permit terms or federal regulations); ER 28 (“If livestock owned by the permittee are found to be grazing on the allotment in greater numbers, or at times or places other than permitted in Part 1 hereof, or specified on the annual Bill for Collection, the permittee shall be billed for excess use at the unauthorized use rate and may face suspension or cancellation of this permit”). If a permittee grazes livestock without an AOI or fails to comply with the AOI’s terms and conditions, the Forest

---

<sup>13</sup> Note too that two other permittees also use this allotment, on separate units. See ER 89–93, 99–103 (those permittees’ 2004 AOIs), 10–25, 48–63 (those permittees’ permits). Thus, the AOIs also serve to specify which of an allotment’s units each permittee is authorized to graze upon, since the general permit only authorizes numbers and period of use on the “Bluebucket C & H” allotment generically. Cf. ER 26.

Service may enforce that violation via noncompliance and permit actions. ER 149–50 (“Notice of Noncompliance”), 151–53 (“Notice of Permit Action for Non-Compliance”). The expectation that a permittee will immediately comply with the new conditions set in the AOI, evidenced by the permittee’s agreement in writing to do just that, further underscores the finality of the AOI. See Indus. Customers, 408 F.3d at 646.

In short, the Forest Service’s Annual Operating Instructions easily satisfy the Supreme Court’s second condition for finality by being agency actions “by which rights or obligations have been determined” and “from which legal consequences [] flow.” Bennett, 520 U.S. at 178. Based on the Forest Service’s assessment of each allotment and the current management situation, including a site-specific evaluation of stream and riparian conditions impacting protected bull trout and other species, the AOI determines the particular modified terms and conditions under which a permit holder may graze livestock for a given grazing season. Only after the agency issues an AOI may the permit holder move livestock onto the public lands under the terms and conditions of the AOI. Because the district court’s decision is based on the flawed premise that agency action is only final if it alters the legal regime to which the agency itself is subject, and because AOIs determine rights and obligations and have legal consequences for the permit holders, AOIs

are indeed reviewable final agency action giving the district court jurisdiction to review ONDA's claims.

### **CONCLUSION**

For the foregoing reasons, ONDA respectfully requests this court to issue an opinion on *de novo* review that reverses the district court's finding that it lacks subject matter jurisdiction to hear ONDA's claims challenging the Forest Service's issuance of Annual Operating Instructions. ONDA further respectfully requests this court to issue an opinion based on the record that the Forest Service's Annual Operating Instructions are final agency action reviewable under the APA. ONDA respectfully requests that this court remand this matter to the district court for further proceedings consistent with its opinion. ONDA also intends to seek attorney fees for this appeal pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*

Dated October 6, 2005

Respectfully submitted,

---

Peter M. Lacy ("Mac") (OSB # 01322)  
Of Attorneys for Plaintiff-Appellants

### **STATEMENT OF RELATED CASES**

There is one related case currently pending before this court: Ore. Natural Desert Ass'n et al. v. U.S. Forest Serv. et al., No. 05-35689 (D.C. No. CV-03-381-HA). On July 18, 2005, ONDA asked this court to consolidate these two appeals. On August 3, 2005, the court granted that motion in part, consolidating the appeals for calendaring only and retaining the previously established briefing schedules.

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,089 words.

---

Date

---

Peter M. Lacy ("Mac") (OSB # 01322)  
Of Attorneys for Plaintiff-Appellants

## **PROOF OF SERVICE**

I, the undersigned, hereby certify that true and correct copies of Appellants' **OPENING BRIEF** and **EXCERPTS OF RECORD** were transmitted via U.S. First Class Mail on October 6, 2005 to the following parties:

Jennifer Scheller  
Attorney, Appellate Section  
Envtl. & Natural Res. Div.  
Department of Justice  
P.O. Box 23795 L'Enfant Station  
Washington, D.C. 20026

Stephen J. Odell  
Assistant U.S. Attorney  
1000 SW Third Avenue, Suite 600  
Portland, OR 97204-2902

Paul A. Turcke  
Moore Smith Buxton & Turcke, Chartered  
Attorneys at Law  
225 North 9th Street, Suite 420  
Boise, Idaho 83702

Karen Budd-Falen  
Budd-Falen Law Offices, L.L.C.  
300 East 18th Street  
Cheyenne, WY 82001

Elizabeth Howard  
Churchill, Leonard, Lodine & Hendrie, LLP  
605 Center Street, N.E.  
Salem, OR 97308-0804

---

Peter M. Lacy ("Mac") (OSB # 01322)  
Of Attorneys for Plaintiff-Appellants

## ADDENDUM TO APPELLANTS' OPENING BRIEF

### Relevant Statutory Provisions

Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* The relevant portions of Sections 702, 704, and 706 are provided below:

#### **§ 702. Right of Review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. \* \* \*

#### **§ 704. Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

#### **§ 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) 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;

\* \* \*