

No. 07-35559

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON NATURAL DESERT ASSOCIATION, and OREGON
NATURAL RESOURCES COUNCIL FUND,

Appellants-Plaintiffs,

v.

U.S. FOREST SERVICE, U.S. FISH AND WILDLIFE SERVICE, and
KAREN SHIMAMOTO,

Appellees-Defendants.

On Appeal from the United States District Court for the District of Oregon
(Civil No. 04-03096-PA)

APPELLANTS-PLAINTIFFS' REPLY BRIEF

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TABLE OF CONTENTS

I.	Introduction	1
II.	ONDA’s Claims Satisfy the Standard for the Dismissal by Providing a Set of Facts that Entitle Them to Relief.	2
III.	ONDA's Claims Are Distinguishable from the Claims Reviewed by the Court in <i>Lujan</i>	8
IV.	ONDA’s Claims Are Not Programmatic Challenges. Even if ONDA’s Alternative Pattern and Practice Claims Can Be Considered Programmatic, the Claims Remain Ripe for Judicial Review.....	12
VII.	Conclusion	15

TABLE OF AUTHORITIES

Cases

<i>Ecology Center v. Forest Serv.</i> , 192 F.3d 922, 923-26 (9th Cir. 1999)	9
<i>High Sierra Hikers Ass'n v. U.S. Forest Serv.</i> , 390 F.3d 630 (9th Cir. 2004)	6, 11
<i>Lujan v. Nat'l Wildlife Federation</i> , 497 U.S. 871 (1990).	1, 6, 8
<i>Mishler v. Clift</i> , 191 F.3d 998, 1002 (9th Cir. 1999).....	12
<i>Neighbors of Cuddy Mountain v. Alexander</i> , 303 F.3d 1059, 1068 (9th Cir. 2002)).	3, 4, 6, 10, 11
<i>Northcoast Environmental Center v. Glickman</i> , 136 F.3d 660, 669 (9th Cir. 1998).....	10
<i>Ore. Natural Desert Ass'n v. U.S. Forest Serv.</i> , 465 F.3d 977 (9 th Cir. 2006)	1, 7, 9
<i>Ore. Natural Desert Ass'n v. Singleton</i> , 47 F.Supp.2d 1182, 1192-93 (D. Or. 1998).....	15

I. Introduction

Appellants-Plaintiffs, the Oregon Natural Desert Association and the Oregon Natural Resources Council Fund (collectively “ONDA”), appeal the dismissal of their claims challenging identified final agency actions that authorize unlawful grazing on the Fremont National Forest. The Ninth Circuit has recently examined, subsequent to the order on dismissal that is the subject of this appeal, a nearly identical lawsuit filed by ONDA that challenges specific grazing decisions on the Malheur National Forest and has determined that the identified agency actions, annual operating instructions (“AOIs”), are final agency actions subject to judicial review. *Ore. Natural Desert Ass’n (“ONDA”) v. U.S. Forest Serv. (“ONDA”)*, 465 F.3d 977 (9th Cir. 2006). The present complaint is modeled on the claims examined in that case. Supreme Court case law establishes that in order for a challenge to be ripe for review under section 706(2) of the Administrative Procedure Act, the complaint must identify discrete, final agency action. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). ONDA’s claims satisfy this requirement by identifying final agency actions issued by the Forest Service that annually, specifically authorized unlawful grazing on eleven allotments over a period of five years.

Appellees-Defendants (collectively the “Forest Service”) attempt to disregard the basic elements of the complaint by selectively reading and interpreting the complaint to be a masked overly broad programmatic challenge. In so doing, the Forest Service terms ONDA’s National Forest Management Act (“NFMA”) claims as programmatic challenges when in actuality the claims challenge final agency actions that authorize grazing on a small portion of the active Fremont National Forest grazing allotments over a period of five years.¹ The Forest Service’s arguments do not comport with the Supreme Court case law limiting programmatic challenges; nor do the Forest Service’s arguments comport with the standard for dismissal that disfavors dismissal unless it appears beyond a doubt that the plaintiff can plead no set of facts in support of a claim.

II. ONDA’s Claims Satisfy the Standard for the Dismissal by Providing a Set of Facts that Entitle Them to Relief.

The parties agree on the standard for dismissal. In reviewing a motion to dismiss, the court must “construe all allegations of material fact in the light most favorable to the nonmoving party” and a complaint should not be

¹ ONDA has alternatively, separately alleged that the Forest Service has a pattern, practice and policy of violating NFMA. These claims are broader than the first set of claims and are not limited to the five grazing seasons identified in the first set of claims. As discussed *infra*, ONDA does not believe that even these broader “pattern and practice” claims qualify as programmatic challenges.

dismissed “unless it appears beyond doubt that plaintiffs can prove no set of facts in support of its claims that would entitle it to relief.” *See, e.g.,* Answering Brief at 16 (quoting *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1068 (9th Cir. 2002)).

Despite agreement on the governing standard, the Forest Service argues for dismissal of ONDA’s NFMA claims based on its ability to read and interpret the claims in a selective manner in order to present them as programmatic challenges. The Forest Service argues that according to its restrictive reading of the complaint, ONDA’s NFMA claims are merely a masked programmatic challenge of the entire Fremont National Forest grazing program. In its reading of the complaint, the Forest Service seeks to emphasize any statement language that would suggest that ONDA seeks to challenge more than the specific final agency actions identified in the complaint. *See, e.g.,* Answering Brief at 11-12, 17-25.² In so doing, the Forest Service ignores any plausible reading of the complaint that indicates

² The Forest Service argues there is no difference between Claims One and Three and the alternative pleading of these two claims as pattern, practice or policy claims in Claims Two and Four respectively. Answering Brief at 11, 25. This argument fails to recognize that Claims One and Three are temporally limited in scope and challenge only grazing authorized by final agency action for the years 2000 to 2004. ONDA’s pattern and practice claims argue that the Forest Service’s past action indicates a high likelihood that subsequent agency actions will similarly violate the law.

the complaint is properly limited in scope, which is inconsistent with federal pleading standards and the standard for dismissal.

For example, the Forest Service states that the only “fair reading” of ONDA’s NFMA claims is that they are a challenge of the general approach the Forest Service has taken to grazing on the Fremont National Forest.

Regardless of whether this is an accurate application of the limitations of Ninth Circuit and Supreme Court precedent, the Forest Service’s “fair reading” standard is a departure from the accepted standard for dismissal.

See Neighbors of Cuddy Mountain v. Alexander, 303 F.3d at 1068

(“Although the structure of the complaint leaves much to be desired, on a motion to dismiss we construe all allegations of material fact in the light most favorable to the nonmoving party and entertain the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief.”)

The Forest Service applies the same fine-toothed comb to the relief requested in the complaint and argues that ONDA’s failure to specifically request that a particular AOI or grazing permit identified in the complaint be set aside necessitates a conclusion that this is a programmatic challenge. *See Answering Brief* at 12-13. The Forest Service provides no case law to demonstrate that such specific relief is a requisite to survive dismissal.

The Forest Service argues that:

The collection of documents that ONDA alleges violate NFMA track the entire recent history of livestock grazing on [the] Fremont-Winema. The only consistent variable across these documents is that, according to ONDA, in some way fail to implement INFISH management or monitoring standards. Thus, ONDA's attack is not on the particular grazing authorizations per se, but on the Forest Service's failure to insure generally that grazing on the eleven allotments obtains the objectives of the LRMP (and the incorporated INFISH) to the satisfaction of ONDA. That is a programmatic attack, and *Lujan* forbids it as a matter of law.

Answering Brief at 23. This argument is surprising both in its hyperbole regarding the scope of the identified agency actions giving rise to the claims and in way the argument conflicts with the Forest Service's discussion of programmatic versus project-specific decision making. In providing background on grazing management on the Fremont National Forest, the Forest Service states that there are two stages of forest planning and management: the programmatic creation of the land and resource management plans ("LRMPs") versus project specific management that must be consistent with the LRMP. Answering Brief at 3.³ The Forest Service appears to agree that the present claims at issue in this appeal challenge the latter, non-programmatic, decision-making stage. *See, e.g.,*

³ For a more detailed description of the Forest Service's authorization and management of livestock grazing on national forests, see generally *ONDA*, 465 F.3d at 979-82.

Answering Brief at 21 (attempting to distinguish *High Sierra Hikers Ass'n v. U.S. Forest Serv.*, 390 F.3d 630 (9th Cir. 2004), on basis that ONDA's claims do not challenge validity of LRMP but merely its implementation).⁴

The Forest Services' reading is unduly restrictive and does not comport with the standard for dismissal; the question for review is not whether the Forest Service can fashion a reading of the complaint that makes it appear overly broad, but whether any set of facts presented in the claims at issue that make them appropriate for judicial review. *See Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d at 1068. The present complaint provides exactly what is required in order to satisfy the requirements of the Administrative Procedure Act, which is to challenge final agency action that has an actual or immediately threatened effect. *See Lujan*, 497 U.S. at 890-94; *ONDA*, 465 F.3d at 983-91. Claims One and Three challenge the inconsistency of identified final agency actions authorizing grazing on only eleven allotments over a period of five years with the provisions of the Fremont LRMP as amended by INFISH. Claims Two and Four are similarly

⁴The Forest Service states that ONDA makes only "passing reference" to final agency actions, when in fact ONDA's NFMA claims squarely challenge identified final agency actions as the basis of their claims. *See* ER 7, 12-13, 22-25 (¶¶ 20, 43-45, 84-96 of the First Amended Complaint discussing and identifying final agency actions as source of agency authority challenged).

focused on eleven allotments but allege that the pattern and practice indicates subsequent agency actions for this subsection of grazing allotments will similarly be inconsistent with the Fremont LRMP as amended by INFISH.⁵

The Forest Service simply ignores that the complaint provides for a directed and discrete challenge related to identified final agency actions. The Forest Service terms the NFMA claims as a challenge of the Fremont National Forest grazing program, but fails to acknowledge that the claims are directed to only 11 of the approximately 76 grazing allotments involved in the program over a defined period of five years where documented violations of INFISH standards have occurred.

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⁵ The original complaint identified only Annual Operating Instructions (“AOIs”) as the final agency actions authorizing the unlawful annual grazing. CR 1 at ¶¶104, 112. In response to Oregon District Court decisions finding that AOIs are not final agency actions, the complaint was amended to alternatively challenge permits and Allotment Management Plans (“AMPs”) in addition to AOIs as the source of final agency action giving rise to ONDA’s NFMA directed claims. The District Court decisions were later reversed by the Ninth Circuit in *ONDA*, 465 F.3d 977 (9th Cir. 2006), which found that AOIs are final agency actions, making the identification of agency actions other than AOIs unnecessary for the purposes of ONDA’s NFMA claims. Regardless, the amendment of the claims to identify alternative agency actions as the source of the identified unlawful activity did not enlarge the scope of ONDA’s NFMA claims.

III. ONDA's Claims Are Distinguishable from the Claims Reviewed by the Court in *Lujan*.

In *Lujan*, the Supreme Court sought to address circumstances where plaintiffs seek programmatic improvements by court decree without identifying particular, final agency actions as the source of the challenge. *Lujan*, 497 U.S. at 890-94. The Forest Service now seeks to rely on this precaution in order to limit judicial review of claims with significantly different parameters.

The Forest Service argues that ONDA's claims are "a classic programmatic attack barred by *Lujan*". Answering Brief at 15. However, in explaining the *Lujan* decision, the Forest Service states that the focus of the Court in *Lujan* was the complaint's failure to identify final agency action. Answering Brief at 18 (quoting *Lujan*, 497 U.S. at 894: "we intervene in the administration of law only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect.") In so doing, the Forest Service ignores the critical distinction that the present claims identify discrete, final agency actions as the source of their claims. Nor does ONDA purport to challenge the entire Fremont National Forest grazing program as the Forest Service suggests. To the contrary, Plaintiffs challenge site-specific, project-level decisions that are inconsistent with the LRMP. The Ninth Circuit has determined that the challenged decision-making

documents, AOIs and term grazing permits, are final agency actions subject to judicial review. *ONDA*, 465 F.3d at 990.⁶

The additional cases cited by the Forest Service applying *Lujan* consistently only limit challenges that fail to identify final agency action with actual or threatened effect on plaintiffs. *See* Answering Brief at 19. *See, e.g., Ecology Ctr. v. Forest Serv.*, 192 F.3d 922, 923-26 (9th Cir. 1999) (basing decision on failure of claims to identify final agency action);

⁶ The claims in the present lawsuit are nearly identical to the claims the Ninth Circuit found to be ripe for review in *ONDA*:

The 1990 Malheur National Forest Land and Resource Management Plan ("Malheur Forest Plan" or "Forest Plan") designates more than 10,000 acres of national forest land on and adjacent to the North Fork Malheur and Malheur River corridors as livestock grazing allotments. In this action, Oregon Natural Desert Association and Center for Biological Diversity (collectively, "ONDA") challenge the Forest Service's decisions related to its management of livestock grazing on six of those allotments from 2000 to 2004. In its complaint, ONDA alleges that the Forest Service acted arbitrarily and capriciously in violation of 5 U.S.C. § 706(2)(A) by annually issuing AOIs to grazing permit holders for pastures within the protected riparian stretches of the North Fork Malheur and Malheur Rivers. ONDA alleges that the AOIs contain terms that violate the Forest Service's mandatory and non-discretionary duties under the WSRA, the National Forest Management Act of 1976 ("NFMA"), 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1614), the National Environmental Policy Act of 1969 ("NEPA"), 83 Stat. 852 (codified at 42 U.S.C. § 4321 *et seq.*), as well as its own regulations.

ONDA, 465 F.3d at 981.

Northcoast Env'tl. Ctr. v. Glickman, 136 F.3d 660, 669 (9th Cir. 1998)

(quoting *Lujan* for proposition that plaintiffs must identify specific order or at least complete universe of orders to make challenge ripe for judicial review).

An additional case applying *Lujan* and relied on by the Forest Service, *Neighbors of Cuddy Mountain*, is directly analogous to the present matter. In *Neighbors of Cuddy Mountain*, this Court examined claims that alleged violations of NFMA because the Forest Service approved a timber sale despite its forest-wide failure to comply with the requirements of the governing LRMP to monitor populations of protected species and to maintain minimum amounts of old growth habitat. 303 F.3d at 1066. This Court rejected the Forest Service's attempt to compare the reviewed challenges to *Lujan* and upheld the claims as ripe for judicial review because the plaintiffs alleged a sufficient connection between the NFMA violations and site-specific final agency action. *Id.* at 1067.

ONDA's present NFMA claims are not even as broad as the permissible challenges that were at issue in *Neighbors of Cuddy Mountain*. ONDA's claims allege that the Forest Service has violated NFMA by failing to comply with the terms of the Fremont LRMP as amended by INFISH when it issues AOIs and permits allowing grazing on specific grazing

allotments on the Fremont National Forest. Nonetheless, as in *Neighbors of Cuddy Mountain*, ONDA has alleged a sufficient connection between the NFMA violation, failure to comply with INFISH, and the final agency actions that authorize annual grazing.⁷

The Forest Service fails to distinguish in any material way the Ninth Circuit precedent identified by ONDA in its Opening Brief. The Forest Service attempts to distinguish ONDA's reliance *High Sierra Hikers Ass'n v. U.S. Forest Serv.*, 390 F.3d 630,639 (9th Cir. 2004) on the ground that the plaintiffs in *High Sierra Hikers* sought to challenge the validity of the LRMP as opposed to its application on at the project specific level. Answering Brief at 21. This distinction does not assist in the Forest Service's effort to present ONDA's NFMA challenges as programmatic in nature. As in *Neighbors of Cuddy Mountain*, the conclusion of the court in *High Sierra Hikers* was that the broad challenge was permissible because it was directly tied to the specific final agency actions the plaintiffs had challenged. *High Sierra Hikers*, 390 F.3d at 895 (citing *Neighbors of Cuddy Mountain*, 303 F.3d at 1067).

⁷ The Forest Service attempts to equate ONDA's monitoring claims with those rejected by the court in *Ecology Center*, 192 F.3d 922 (9th Cir. 1999). This Court in *Neighbors of Cuddy Mountain* rejected a similar argument in that case finding that a monitoring claim is permissible if it is tied to the lawfulness of a final agency action. 303 F.3d at 1068.

To the extent that the Forest Service also seeks to argue that ONDA fails to sufficiently identify particular harm, ONDA refers the Court to the declarations filed by ONDA in opposition to the motion to dismiss, which provide additional support for the allegations of harm that ONDA sets forth in the complaint. CR 60, 61. The District Court in reviewing these declarations determined in its order on the motion to dismiss that ONDA had adequately established Article III standing by demonstrating that ONDA alleged for the purposes of withstanding dismissal that ONDA has suffered injury in fact that is: (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. CR 66, ER 62-66. Regardless of the supplemental declarations, the allegations of harm in the complaint are sufficient because in reviewing a the motion to dismiss the court must take the allegations of harm set forth in the complaint must as true and construe them in the light most favorable to ONDA. *See Mishler v. Clift*, 191 F.3d 998, 1002 (9th Cir. 1999).

IV. ONDA’s Claims Are Not Programmatic Challenges. Even if ONDA’s Alternative Pattern and Practice Claims Can Be Considered Programmatic, the Claims Remain Ripe for Judicial Review.

The Forest Service consistently argues that ONDA’s NFMA claims are unauthorized programmatic challenges. Yet at the same time the Forest Service argues that ONDA’s claims fail to specifically challenge a

programmatic document. In doing so, the Forest Service attempts to force ONDA's claims into a unique purgatory where no judicial analysis may venture.

ONDA has not set forth a challenge of the Fremont National Forest grazing program. The Forest Service fails to explain how ONDA's claims qualify as programmatic challenges when the claims challenge only project level agency decisions. The scope of the present claims is attributable to the Forest Service's failure to comply with the provisions of the LRMP in authorizing grazing, via final agency actions, on a number of specific allotments on the Fremont National Forest. These failures have harmed ONDA and its members. ONDA has requested relief that is consistent with the scope of the unlawful activity. ONDA's First and Third NFMA claims are limited in both time and space.

The Forest Service insists that it cannot distinguish between this first set of claims and ONDA's alternative pattern and practice claims and attempts to blend all claims for the purposes of its opposition to this appeal. However, there is a significant difference between the two sets of claims. ONDA's First and Third claims challenge final agency actions that were taken by the Forest Service during five grazing seasons, while ONDA's alternative pattern and practice claims allege a continuing challenge of

Forest Service grazing decisions for eleven specific allotments. The latter are not confined in time to the decisions issued for the five grazing seasons as alleged in the First and Third claim and are therefore broader.

Nonetheless, even the broader pattern and practice claims still challenge project specific agency action and should not be considered programmatic.

The scope of the requested relief does not request the court halt the Fremont National Forest “grazing program” but instead requests that the Forest Service ensure that grazing is consistent with the terms and requirements of LRMP for eleven identified allotments. This is precisely how the Forest Service describes a project level challenge: ONDA challenges whether the site-specific actions taken by the Forest Service are consistent with the Fremont LRMP. *Compare with* Answering Brief at 3 (describing programmatic and project level stage of forest planning and management). The relief is tailored to exactly what is required by the LRMP as governed by objective standards and does not seek to have the court interfere in the Forest Service’s discretion in managing grazing on the Fremont National Forest. *See* ER 32 (complaint at ¶ H requesting injunction consistent with precise language and objective criteria of INFISH). ONDA does not request that any programmatic documents be set aside, which

would be more consistent with a programmatic challenge as the Forest Service alleges.

Nonetheless, even if the Forest Service is correct that ONDA's claims should be reviewed as programmatic challenges, merely stating a challenge is programmatic does not mean it is closed to judicial review. *See* Opening Brief at 31-35. The cases explored by ONDA in its Opening Brief establish the parameters for when a programmatic challenge is permissible. If the present claims are in fact programmatic in nature, they are permissible because they seek to challenge the underlying project-specific final agency actions. *See, e.g., Oregon Natural Desert Association v. Singleton*, 47 F.Supp.2d 1182, 1192-93 (D. Or. 1998).

VII. Conclusion

In conclusion, ONDA requests the Court reverse the District Court's dismissal of ONDA's NFMA claims. ONDA's NFMA claims are not programmatic in nature and seek to challenge the issuance of project level final agency actions that authorize unlawful grazing on a portion of Fremont grazing allotments over a limited period of time. ONDA's alternative pattern and practice claims are similarly project level specific and ripe for judicial review.

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Dated: December 7, 2007.

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WORD COUNT CERTIFICATION

Pursuant to FRAP 32(a)(7), counsel for Plaintiffs-Appellants certifies that this opening brief is proportionately spaced, has a typeface of 14 points, and contains 3,501 words, thereby complying with the type-volume limitation.

Dated: December 7, 2007.

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PROOF OF SERVICE

I certify that on December 7, 2007, an original and fifteen (15) copies of APPELLANTS-PLAINTIFFS RELPY BRIEF in Ninth Circuit Case No. 07-35559 were sent by first-class, certified, return receipt requested U.S. mail, postage prepaid, to:

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I certify further that on December 7, 2007, two copies (2) of APPELLANTS-PLAINTIFFS RELPY BRIEF in Ninth Circuit Case No. 07-35559 were served via first class, certified, return receipt requested U.S. mail, postage prepaid, on:

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