

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

Docket No. 05-35689

OREGON NATURAL DESERT ASSOCIATION, *et al.*

Plaintiff-Appellants,

v.

UNITED STATES FOREST SERVICE, *et al.*

Defendant-Appellees,

and

DAYVILLE GRAZING 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

REPLY BRIEF OF PLAINTIFF-APPELLANTS

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INTRODUCTION

The Annual Operating Instructions (“AOIs”) set forth the agency’s final decisions with respect to grazing practices and modifications thereof on a particular federal grazing allotment for a particular grazing season and are “final agency action” within the meaning of the Administrative Procedure Act. The Forest Service and Intervenors make abstract, theoretical, and conclusory arguments about the nature of AOIs instead of focusing, as this court must, on their practical effects. Defendants’ arguments fall short because they lack any specific basis in support in the administrative record. Instead, the record reveals that the Forest Service undertakes an annual, systematic decision-making process regarding allowable grazing for the upcoming season, which culminates when the agency issues an AOI for each allotment. The AOIs, in turn, determine the permittees’ rights and obligations on the given allotment for the given year, including not just the final authorized dates of use and numbers of livestock that the Forest Service and Intervenors focus on, but also pasture rotations, grazing system modifications, herding requirements, specific monitoring and reporting requirements, maximum forage use limits, and specific ecological standards that must be met, including stream and riparian standards necessary to protect threatened steelhead. These AOI requirements are, or can be, more specific than and more limiting than the ten-year term grazing permit.

In practice, the Forest Service has effected grazing management change through AOIs, not formal modification of the permit. Thus, the Forest Service’s primary argument – that AOIs merely “implement” decisions already made by the agency when grazing permits were issued – misses the mark. Far from merely implementing a decision made years ago when the ten-year term permits were issued, AOIs represent the culmination of a decision-making process based on monitoring and assessment of current ecological conditions and resource issues. Because of how it develops and uses AOIs in practice, the Forest Service cannot escape the fact that AOIs have the legal consequences of concretely and directly establishing if and how a particular season’s grazing will be conducted.

ARGUMENT

I. THE FOREST SERVICE’S ANNUAL OPERATING INSTRUCTIONS ARE FINAL AGENCY ACTION.

ONDA has shown that the Forest Service decision embodied in AOIs satisfy the two conditions for “final” agency action: (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 and Intervenors wrongly assert that an

AOI merely “implements” requirements previously established in term grazing permits. USFS Br. at 8; OCA Br. at 23.

According to the agency, an AOI does nothing more than “translate the existing substantive requirements into terms of pastures to be used and move dates that will achieve the use standards for that year.” USFS Br. at 9. This oversimplification, however, is presented in a vacuum with no real attempt to ground the argument in the reality of the Forest Service’s actual grazing decision-making process, which the agency repeats each and every year prior to livestock turnout.

The courts do not address whether an action is “final agency action” in the abstract. Instead, they analyze what the nature and effect of the agency decision are in practice. 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)). Indeed, an agency’s refusal to acknowledge final action is unimportant to this court’s review: rather, the Forest Service’s action is final if it represents the consummation of a decision-making process and there are practical legal effects and consequences that flow from the decision. See, e.g., Alaska Dep’t of Env’tl. Cons., 540 U.S. at 483 (noting Court’s pragmatic approach to assessing finality); Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS, 265 F.3d 1028, 1034 (9th Cir.

2001) (holding biological opinion was final action because “[a]s a practical matter, the opinion and its accompanying Incidental Take statement grant immunity to the proposed actions of other agencies”); Alaska Dep’t of Env’tl. Cons. v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (finding EPA order suspending construction permit was final action because it had practical effect of granting EPA enforcement authority in the event the permittee violated the order).

Thus, the content and practical effect of an agency decisional document determine whether it represents a final agency action, not the agency’s own characterization of the document or its effect. Here, the district court got it right the first time when it concluded that “[s]imply because an [AOI]’s authority is drawn from the permit does not make the agency’s decision reflected in the [AOI] any less of a final agency action. . . . I conclude that plaintiffs have sufficiently pleaded challenges to final agency actions.” ER 6.

A. Annual Operating Instructions represent the consummation of the Forest Service’s annual decision-making process for livestock grazing authorization.

The Forest Service’s decision to issue an Annual Operating Instruction meets the first prong for finality because it is the culmination of the agency’s decision-making process as to whether and how livestock grazing is authorized to proceed for a particular grazing season, on an allotment- and unit-specific basis. See Bennett, 520 U.S. at 177–78 (setting out elements of “final” agency action).

Issuance of an AOI is not part of an “ongoing” decision-making process, nor is it merely “implementation” of a decision-making process completed long ago.

Rather, issuance of an AOI represents the Forest Service’s final administrative word on grazing management for a particular year on a specific parcel of the public lands—a decision at a sharply-defined endpoint that definitively states the agency’s position on the issue and the particular factual circumstances before it.

That an Annual Operating Instruction represents the culmination of a discrete decision-making process is evidenced in the administrative record by the fact the Forest Service, each and every year, undertakes a process to evaluate the previous year’s grazing and its impacts and cumulative impacts on range and stream conditions. See ONDA Br. at 13–14 (citing Forest Service documentation and statements in AOIs, End-of-Year Grazing Report, biological assessments and biological opinion to the effect that previous year’s grazing and ecological conditions are used to “determine” subsequent year’s grazing authorization and modifications). This annual process culminates with the defined endpoint at which the Forest Service issues to a grazing permit holder an AOI controlling that season’s grazing.

For example, the Forest Service itself explains that during and after the 2004 grazing season, the agency engaged in specific monitoring and assessment procedures in order to inform the decisions it would make in its 2005 Annual

Operating Instructions. The agency undertook monitoring one of the purposes for which is to “[r]ecommend potential management strategies for the 2005 Biological Assessments (BA’s) and subsequent Annual Operating Instructions (AOI’s) that are consistent with the goals and objectives of the 1995 PACFISH” ER 316. The Forest Service states that its “endpoint indicator” monitoring (measuring things like riparian shrub use, residual stubble height of grasses, and streambank damage) provides information used to make “*year-to-year adjustments* to livestock grazing management practices necessary to meet management objectives.” ER 317. (emphasis added). In other words, the Forest Service engages in a very discrete decision-making process, supported by defined annual monitoring practices, which culminates each spring with a uniquely informed AOI decision based on these data and analyses.

Both the Forest Service and Intervenors focus upon the agency’s authority under its regulations to make formal modifications to a term grazing permit. USFS Br. at 13, 17; OCA Br. at 13-14. But this argument obfuscates the issue: the fact that the agency’s regulations spell out a particular process for formally modifying a permit does not change the fact that, in practice, the Forest Service modifies the rights and obligations of grazers each year by issuing Annual Operating Instructions at the end of a separate and distinct annual decision-making process. For example, the Forest Service issued the Blue Mountain Allotment permit in

1994. ER 83. The Forest Service amended the Malheur Forest Plan by adopting PACFISH in 1995, which includes the PACFISH grazing management standard at issue on the merits – that the Forest Service shall modify or eliminate grazing that retards or prevents attainment of Riparian Management Objectives. ER 258, 275. Steelhead were listed as threatened species under the Endangered Species Act (“ESA”) in 1998, which the Forest Service recognized would require “[s]ignificant changes” to the allotment management. ER 82. Yet, the Forest Service never formally modified the permit. Instead, it effected management changes purported to comply with the PACFISH standard, which requires modification or suspension of grazing, as well as the ESA consultation requirements, when it made annual decisions on grazing management embodied in the AOIs. ER 51 (Opinion and Order explaining the Forest Service’s assertion that the 2004 AOIs comply with the PACFISH requirement to modify grazing because “the 2004 AOIs substantially change the grazing practices on the allotments at issue”); ER 100, 109, 113, 122, 126, 283 (table showing multi-year grazing summary “as per Annual Operating Instructions” with significant changes in the 2003 and 2004 AOIs).

Notwithstanding what the regulations provide for how modifications to permits are *supposed* to be made, the fact remains that the Forest Service, in practice, uses AOIs to modify the terms and conditions of the permits.

In fact, ONDA does not dispute that the Forest Service provides in its generic term grazing permits that those permits may be “suspended or cancelled, in whole or in part,” and that grazing shall be conducted in accordance with the Forest Plan.¹ See e.g., ER 131. What is important to note here is that the Forest Service actually uses the AOI decision-making process to make these types of substantive changes to the grazing the agency authorizes, and rarely invokes its formal regulatory authority to make permit modifications. In the Blue Mountain permit, the Forest Service states that “[w]e will be working with you through the Annual Operating Plan to bring management of the allotments into consistency with the terms of the Malheur FLRMP [Forest Plan]” until the Allotment Management Plan (“AMP”) is completed, at which time the Forest Service stated it would modify the permit. ER 94. The Blue Mountain Allotment has never had an AMP, nor has one been completed, although the Forest Service was scheduled to do so by 2001. *Id.* The fact that there is opportunity to modify the permit formally does not render the AOI decisions nonfinal.

The very language the agency uses to describe the role and function of the AOI belies Defendants’ “merely implements” argument and suggests issuance of

¹ In fact, the latter requirement applies whether it is stated in the permit or not—and certainly applies to grazing conducted under the terms of an AOI. 16 U.S.C. § 1604(i) (site-specific actions shall be managed consistently with forest plan); 36 C.F.R. § 219.10; *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 966 (9th Cir. 2003) (noting that site-specific plans “which are prepared to effect specific, on-the-ground actions” must be consistent with forest plans).

an AOI is indeed a culminating event. See ER 284 (Forest Service biological assessment for the 2004 grazing season, stating “[g]razing *to be authorized* under the proposed actions are the season and number designated on the individual Annual Operating Instructions”) (emphasis added). The Forest Service itself describes its current grazing management as two discrete decision-making points that culminate with their own sets of terms:

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 196 (going on to change grazing management by combining the Middle and South Herds at numbers below those authorized in the permit). While one part of the stated purpose of the AOI is to “implement utilization standards,” that statement is *not limited* to utilization standards that appear in the permit and forest plan, and indeed the AOIs contain specific ecological standards and other requirements stated nowhere in the permits or forest plan. The Forest Service and Intervenor ignore the other purposes expressly stated in the AOIs, namely: (1) “to set objectives” and (2) to “modify grazing systems.” Id. Thus, while Defendants spend the vast majority of their briefing painting a theoretical picture of grazing

permit decisions merely “implemented” by “tools” known as AOIs, these abstract, semantic arguments ignore the key facts critical to assessing finality.²

Intervenors are correct that the permit “establishes the *outside* limits or terms of permittee’s grazing use OCA Br. 25 (emphasis added). However the record before the court is clear that AOIs constrain and modify grazing practices in addition to the outside limits established in the permit. The Annual Operating Instructions at issue in this case have changed the number of livestock, season of use or unit rotations from what appeared on the original term permit. Compare, e.g., ER 81, 131, 203 (permits) with ER 100, 109, 113, 122, 126, 167, 172, 180, 189, 196, 220, 224, 230, 241, 248 (AOIs); see also, e.g., 283 and 290-291(Forest

² The fact that AOIs are not mentioned in the Forest Service’s statutory authority or regulatory scheme has no bearing on the issue before this court. USFS Br. at 4. The Forest Service does issue AOIs. How the agency develops the AOIs, and what their legal effects are, are the only pertinent questions for whether AOIs are final agency action, not whether the agency has formal statutory or regulatory authority to perform the action it actually undertakes. See Barrick Goldstrike Mines, Inc. v. Browner, 215 F.3d 45, 48 (D.C. Cir. 2000) (rejecting proposition that agencies can escape judicial review under the APA by labeling action as “informal”). Moreover, The Forest Service’s references to its guidance documents (Forest Service Manual and Forest Service Handbook) is inapposite. USFS Br. at 12. The guidance documents state that the AOIs implement either allotment management plans (“AMPs”) or “project-level NEPA-based decision[s].” Id. The Blue Mountain Allotment has no AMP or NEPA-based decision. The Murderers Creek Allotment AMP dates to 1983 and relevant AOIs state that if the AMP is outdated, the Annual Operating Plan delineates the grazing system. See, e.g., ER 180. Importantly, the Forest Service guidance documents *do not* state that the AOIs implement the permit.

Service's 2004 biological assessment with tables summarizing changes in numbers, dates, and animal unit months for past 4-year period).

The Forest Service uses its annual AOI decisions to alter other permit conditions, as well. For example, on the Murderers Creek Allotment, the 2000 AOI sets out specific standards for stubble height, shrub use and bank stability that are not included in the permit. ER 168. In addition, the 2000 AOI states that steelhead has been listed as a threatened species and that the grazing where steelhead are present will require mitigation. Id. The Forest Service states that “[t]hese mitigations have been addressed in this Annual Operating Plan.” None of these standards appear in the term grazing permit. See ER 131-132.

Finally, the cases the Forest Service relies on for its argument concerning the first prong of Bennett are easily distinguished. USFS Br. at 10–15. Each of those decisions involved an agency implementing its own prior decision by undertaking (or failing to undertake) internal, ministerial tasks. Mont. Wilderness Ass’n, Inc. v. U.S. Forest Serv., 314 F.3d 1146, 1150 (9th Cir. 2003) (“trail maintenance and improvement work”), vacated by 542 U.S. 917 (2004), and remanded by 376 F.3d 1181 (9th Cir. 2004); Chem. Weapons Working Grp., Inc. v. U.S. Dep’t of the Army, 111 F.3d 1485, 1494 (10th Cir. 1997) (carrying out weapons disposal agency already had decided to undertake); Shawnee Trail Conservancy v. Nicholas, 343 F.Supp.2d 687, 708–709 (S.D. Ill. 2004) (revising map boundaries

of a previously mapped area); Mont. Snowmobile Ass'n v. Wildes, 103 F.Supp.2d 1239, 1242 (D. Mont. 2000) (sending a letter enforcing a forest plan decision to impose a travel restriction).³

Unlike these sorts of ministerial tasks that relate only to the agency's own operations and activities, Annual Operating Instructions controlling annual grazing practices involve an agency decision that has an immediate and concrete effect on the rights, obligations, and day-to-day operations of the parties (the permit holders) whose issue is before the agency—i.e., how much grazing there will be, where that grazing will occur, and at what levels it will be permitted according to geographic, biological, and ecological factors and standards. The decision is consummated by the issuance of signed AOI agreements. See, e.g., ER 236. Perhaps if AOIs *only* affected the Forest Service's own operations, or if they were not the culmination of such an obvious, annually repeated decision-making process, these decisional documents might fit within this line of cases.

Instead, the Forest Service and Intervenors attempt to use the “implements” language from Montana Wilderness Association to bootstrap an argument that is inapplicable to what is, in practice, the agency's annual decision regarding a

³ Neither is the Forest Service's reliance on Idaho Watersheds Project v. Hahn, 307 F.3d 815 (9th Cir. 2002), on point here. In that case, this court held that the Bureau of Land Management's issuance of grazing permits was a final agency action. Id. at 828. Importantly, that case involved *only* a challenge to sixty grazing permits immediately after they were issued (all at once)—there was no issue in that case as to subsequent modifications of rights or obligations through AOIs. See id.

private party's rights and obligations for use of the public lands. In none of the cited cases was there the type of systematic decision-making process to establish private parties' rights and obligations in a given year that is involved in issuing Annual Operating Instructions. Moreover, the fact that the Forest Service's AOI decision-making process takes place on an annual basis does not convert ONDA's challenge to the result of that process into an improper intrusion in the "day-to-day operations" of the agency.⁴ USFS Br. at 10-15, OCA Br. at 36-40. See City of Tacoma v. FERC, 331 F.3d 106, 113 (D.C. Cir. 2003) (holding annual orders issued to long-term hydropower licensee, setting annual overhead costs payable to agency, were final agency action because agency's action had a direct and immediate effect on licensee's day-to-day business). In short, AOIs easily satisfy the first prong of Bennett in that they are the "consummation" of the Forest Service's annual grazing decision-making process, culminating in issuance of a document, signed by the permit holder, providing final authorization of numbers, dates, and site-specific standards—and not an action "of a merely tentative or interlocutory nature." Bennett, 520 U.S. at 178.

⁴ Nor is it dispositive that the move dates in the AOI are tentative and will be based upon ground conditions. USFS Br. at 16. Volume estimates in timber sale decisions also are tentative until the actual trees are marked and measured, yet timber sale decisions are final agency actions.

B. Annual Operating Instructions establish the rights and obligations of grazing permit holders and have legal consequences.

The Forest Service's Annual Operating Instructions also satisfy the second prong of Bennett because AOIs have real, appreciable legal consequences. 520 U.S. at 177–78. The Forest Service argues in conclusory fashion that the permit holders' rights and obligations “were fixed in the underlying permit, which contains the substantive standards the permittee must comply with” and claims the “only things that AOIs add to the permits are more specific dates and number of livestock” USFS Br. at 16. But the Forest Service can point to nowhere in the administrative record where any permit sets out, for example, standards for insuring the agency's grazing will not jeopardize threatened steelhead or their habitat. See, e.g., ER 83. Rather, it is the AOIs that impose the obligation on the permittees to comply with these substantive standards.

In fact, the permits themselves include only generic and identical statements that the permittee will follow the provisions set out in the allotment management plan,⁵ that grazing authorized in the permit may be modified for resource protection or otherwise, and that grazing will only be allowed as set out in the

⁵ There is no AMP for the Blue Mountain Allotment. For the Murderers Creek Allotment, the AOIs clearly state, “the grazing system in your Allotment Management Plan (or if your AMP is outdated, your Annual Operating Plan) needs to be followed”. See e.g. ER 180. The AMP for the Murderers Creek Allotment dates to 1983.

permit *or* annual authorizations. ER 83. The permits contain restatements of percent utilization grazing standards from the 1990 Forest Plan, see, e.g., ER 93, but do not contain the specific use standards subsequently developed to protect steelhead through PACFISH and ESA consultations, which include residual stubble height standards for grasses and bank damage limitations. See, e.g., ER 128 (2004 AOI). Although the Forest Service claims that the AOIs reiterate “some” of the standards “found in the permit[,]” USFS Br. at 12, the fact is that the AOIs contain additional restrictions and standards that are purportedly designed to protect steelhead that are in addition to and not contained within the permit.

Intervenors try to confuse the issue by improperly conflating the *effect* of an Annual Operating Instruction with how the Forest Service *enforces* those obligations. The OCA argues that because the Forest Service has allowed the permittee to violate the terms of the AOI year after year, “[c]learly, the violation of the AOI had no legal consequences for the permittee.” OCA Br. at 35-36. It is this very fact — that Forest Service has not taken action to either modify the permit or further modify or suspend grazing in the following year’s AOI in order to meet the Forest Plan PACFISH grazing standard — of which ONDA complains on the merits.⁶ For purposes of jurisdiction, the Bennett test looks only at whether there

⁶ The 2004 AOI for the allotment at issue states that standards have not been met and certain pastures have been over-utilized for years, cautioning that “[f]ailure to

has been a completed decision and whether that decision has legal consequences. Bennett, 520 U.S. at 177–78. How those consequences ultimately may be enforced is immaterial to the question whether an agency action is final.

Intervenors also mistakenly claim that “there is not a final agency action until there is a final determination that a penalty is due.” OCA Br. at 32 (citing Nippon Miniature Bearing Corp. v. Weise, 230 F.3d 1131 (9th Cir. 2000); Gallo Cattle Co. v. U.S. Dep’t of Agric., 159 F.3d 1194 (9th Cir. 1998)). Both of the cases cited in support of this incorrect statement involved on-going enforcement proceedings. The plaintiff in Nippon filed its challenge too soon because the initial assessment of a penalty was subject to plenary review by the Court of International Trade, and thus did not create any legal obligation. 230 F.3d at 1137. The plaintiff in Gallo was already responsible for paying an assessment; he asked to pay it in a different way (into escrow) and the agency refused his request. 159 F.3d at 1199. This did not alter his obligation to pay. Id. In neither circumstance in these two previous cases did the agency’s action alter any obligation of the plaintiff. See also Nat’l Ass’n of Home Builders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005) (noting that “if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review”); Alaska Dep’t of Env’tl. Cons., 244 F.3d at 750.

meet standards could result in temporary or permanent reductions of AUM’s in future years.” ER 196.

By contrast, Annual Operating Instructions do change the rights and obligations of permit holders by reworking the terms stated in the underlying permit. They modify existing obligations and impose new ones on the permit holders which differ from the privileges established in the original term permit. This is similar, for example, to the situation in Alaska Department of Environmental Conservation, in which this court held that EPA orders were final agency actions where they prohibited a mine operator from further construction on a generator pending compliance with the Clean Air Act by using a better technology. 244 F.3d at 749–50. In that case the challenged agency action was the issuance of the orders, not their enforcement, and this court held that the *effects* caused by imposing these additional conditions beyond those in the mine operator’s permit—halting construction of the generator or proceeding with construction at the risk of significant penalties—were legal consequences that justified holding the orders to be final agency action. *Id.* at 750. Other courts have reached similar conclusions in cases involving agency decisions which imposed new obligations on, or altered the rights of, the subject party. *See, e.g., City of Tacoma*, 331 F.3d at 113 (annual orders issued to long-term hydropower licensee, setting annual overhead costs payable to agency, were final agency action because agency’s action had direct and immediate effect on licensee’s day-to-day business); Allsteel, Inc. v. EPA, 25 F.3d 312, 315 (6th Cir. 1994) (noting that

EPA's order in that case "directed Allsteel to stop all construction—a new obligation, not one directly imposed by statute").

In short, just as the Forest Service's Annual Operating Instructions satisfy the first prong of the Bennett test by marking the consummation of the agency's annual decision-making process for grazing, so do they satisfy the second prong by determining legal rights or obligations and having readily identifiable legal consequences. The AOIs do so by reworking the terms and conditions set out in the underlying term permits, and by imposing significant modifications to those general terms in the form of new or modified livestock numbers, use dates, rotation schedules and pasture move triggers, and ecological standards. Significantly, this includes the fact that the Forest can—and does—reduce or suspend grazing via the AOI decisions. See, e.g., ER 196 (2004 AOI stating that "[f]ailure to meet standards could result in temporary or permanent reductions of AUM's in future years); ER 290 (summary of grazing of middle herd "per Annual Operating Instructions" reductions in cattle numbers from 250 to 220 to 180 and reductions in AUMs from 1089 to 871 to 632); ER 123 (non-use for resource protection); ER 126 (all units except the West Summit "rested," i.e., not grazed). In actual effect, the AOIs *become* the terms and conditions of the underlying permit, each and every year. Thus, AOIs are "final" agency action for purposes of APA review.

II. THE FOREST SERVICE'S AND INTERVENORS' OTHER JURISDICTIONAL ARGUMENTS ARE WITHOUT MERIT.

A. Annual Operating Instructions are “agency action” within the meaning of the APA.

The Forest Service incorrectly argues that the agency’s Annual Operating Instructions are not “agency action.” USFS Br. at 9–14. This argument is wrong because an AOI unmistakably is “agency action” for purposes of APA sections 704 and 551(13). Under the APA, the courts may review “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. An “agency action” “includes the whole or a part of an agency rule, order, license, sanction, relief, *or the equivalent* or denial thereof, or failure to act.” *Id.* § 551(13) (emphasis added).

The Supreme Court has stated unequivocally that the term “agency action” as used in 5 U.S.C. § 704 “is meant to cover comprehensively every manner in which an agency may exercise its power.” Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 478 (2001) (citing FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 238 n.7 (1980)). Intervenor’s statement that the “APA clearly limits ‘agency action’ to the listed categories” in Section 551(13), OCA Br. at 29, therefore is flatly incorrect. It directly contradicts the Supreme Court’s statement in American Trucking, as well as the language of Section 551(13), which includes the “equivalent” of the listed categories of action within the definition of “agency action.” 5 U.S.C. § 551(13).

Similarly, the Forest Service’s argument is disingenuous when it suggests that Norton v. Southern Utah Wilderness Alliance (“SUWA”), 542 U.S. 55 (2004), stands for the proposition that “agency action” is “limited to the specific categories defined by the APA and is properly understood as a ‘circumscribed’ and ‘discrete’ action.” USFS Br. at 9 (citing 542 U.S. at 61–62). In fact, the Court in that case is careful to state that “agency action” includes not only the five listed categories, but also “their equivalents.” 542 U.S. at 62.⁷ It is instructive that *not a single one* of the nearly two dozen cases that the Forest Service and Intervenor cite in the course of making this argument actually holds that the challenged action was not an “agency action” within the meaning of 5 U.S.C. § 551(13). The reason for this is simple: their arguments are foreclosed by the comprehensive interpretation of “action” in both American Trucking and the plain language of the APA itself.

⁷ Note that the Forest Service and Intervenor rely heavily on SUWA throughout their briefing. That decision involved failure to act claims under APA Section 706(1). 542 U.S. at 57–58. This case, of course, deals with a Section 706(2)(A) challenge to final agency actions. See 542 U.S. at 69 (acknowledging that challenges to actions that do not conform to the land use plan, in this case, the Malheur Forest Plan, as amended by PACFISH, are allowed pursuant to Section 706(2)(A)). The Supreme Court has recognized that a plaintiff can challenge “a specific ‘final agency action’ [which] has an actual or immediately threatened effect.” Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 894 (1990); see also infra II.B. (addressing Defendants’ “programmatically” challenge argument). Nothing in SUWA changed the test for “final agency action” as stated in Bennett, and the district court’s original analysis of the issue relied upon Bennett and is unaltered by SUWA. ER 4–5. Finally, the district court decision on appeal here correctly did not rely on SUWA in its analysis of “final agency action.” See ER 191–201 (district court’s discussion of jurisdiction under APA Section 706(2)(A), not once citing SUWA).

Finally, besides the fact that Annual Operating Instructions are unambiguous exercises of agency power⁸, Am. Trucking, 531 U.S. at 478, (evidenced by the binding effect on the permittees and the requirement that permittees sign and agree to be bound by the new AOI terms each year), the baselessness of Defendants’ argument also is clear from the APA definitions section. Under the APA, a “license” “includes the whole or a *part* of an agency *permit* . . . or other form of permission.” 5 U.S.C. § 551(8) (emphasis added). The Forest Service has expressly stated on the face of its AOIs that the instructions “are *made part of* Part 3 of your term grazing permit.” ER 125 (emphasis added).

The fact that the agency eliminated this sentence in its 2004 Annual Operating Instructions—following the district court’s February 11, 2004 ruling that AOIs are “final agency action” in a related case—does not change the basic nature of these agency decisional documents. See, e.g., Appalachian Pwr. Co. v. EPA, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000) (rejecting agency statement on a document disclaiming any legal effect as a “charade” and holding that a document reflecting a settled agency position and having legal consequences for those subject

⁸ Indeed, the Forest Service consults upon its AOIs pursuant to the ESA, which requires consultation on “agency action.” 16 U.S.C. § 1536(a)(2) (“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize . . .”). See ER 276-310 (consultation documents for 2004 grazing).

to regulation may constitute “final agency action for purpose of judicial review).⁹ In fact, the district court specifically found that “[d]espite a change in form for the actual 2004 AOIs, the AOI has functioned, and continues to function, as a supplemental part of the grazing permit.” ER 21 (district court Opinion and Order at 11, n.5). See also Air N. Am. v. Dep’t of Transp., 937 F.2d 1427, 1437 (9th Cir. 1991) (noting “the definition of license in the APA is extremely broad”). In short, just as the district court correctly concluded, because a term grazing permit is a “license” under the APA and an AOI is made, and operates as, a part of the permit, the Forest Service’s AOIs are the equivalent of licenses and therefore “agency action” within the meaning of APA sections 704 and 551(13).

B. ONDA has properly challenged discrete, final agency action and has not made a “programmatic” challenge to Forest Service action.

Both the Forest Service and Intervenors argue that ONDA’s claims constitute an unlawful “programmatic” challenge to the agency’s overall grazing program and policies, or interfere in “day-to-day” management.¹⁰ USFS Br. at 9-

⁹ See also Am. Trucking, 531 U.S. at 478–79 (“Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final”).

¹⁰ OCA suggests that if the AOIs have an effect on the day-to-day business of the permittee, then the AOIs are part of day-to-day management, and judicial review thereof is prohibited. OCA Br. at 36-37. The Supreme Court looks to whether there is a “direct effect . . . on day-to-day business” as an indication of final agency action subject to judicial review. Franklin v. Massachusetts, 505 U.S. 788, 796-97 (1992) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967)).

10, 15; OCA BR. at 37-39. These arguments fail because ONDA properly challenged discrete, final agency actions in the form of the Forest Service's site-specific, annually-issued Annual Operating Instructions, and alleged that those final actions violated federal statutory and regulatory provisions.

ONDA has asserted that specific annual grazing authorizations on two allotments within the Malheur National Forest, were unlawful agency actions that violated the National Forest Management Act, including the Forest Service's own Forest Plan for the Malheur National Forest, as amended by PACFISH. See ER 47, 64 (Opinions and Orders describing ONDA's claims). The district court clearly understood that ONDA is challenging specific agency actions, explaining:

Plaintiffs' evidence suggests that the grazing management on the [two allotments] has failed to meet quantitative standards for stubble height, bank damage, bank stability, shrub use, water temperature, width-to-depth ratio, and pool frequency. Plaintiffs assert that this evidence establishes that the annual grazing authorizations (AOPs and AOIs) from 2000 through 2004 are inconsistent with applicable grazing standards [found in PACFISH].

ER 64. Although the court recognized that "plaintiffs have submitted strong evidence that the Forest Service's management of livestock grazing has caused ecological damage," the court incorrectly concluded that the AOIs are not final

agency actions. ER 62. As a factual matter, ONDA has identified and challenged discrete, site-specific agency actions.¹¹

The Supreme Court has recognized that environmental organizations may challenge “a specific ‘final agency action’ [which] has an actual or immediately threatened effect,” even when “[s]uch an intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole ‘program’ to be revised by the agency in order to avoid the unlawful result that the court discerns.” Lujan, 497 U.S. at 894. See also High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004) (finding plaintiff had properly challenged discrete final agency actions in issuance of special-use permits); Neighbors of Cuddy Mtn. v. Alexander, 303 F.3d 1059, 1067–68 (9th Cir. 2002) (holding site-specific timber sales to be final agency actions). These cases illustrate that a plaintiff may discuss general allegations related to the agency’s management of its programs if it does so in the context of challenging specific final agency actions.

¹¹ As noted in ONDA’s opening brief, where “the jurisdictional issue and substantive claims are so intertwined that resolution of the jurisdictional question is dependent on factual issues going to the merits,” this court reviews the dismissal under the standard for reviewing summary judgment motions. Autery v. United States, 424 F.3d 944, 956 (9th Cir. 2005) (citing Rosales v. United States, 824 F.2d 799, 803 (9th Cir. 1987)); see also ONDA Br. at 10-11 (standard of review). Thus, this court reviews the evidence in the light most favorable to ONDA and determines whether the evidence presents any genuine issues of material fact and whether the district court correctly applied the law. Autery, 424 F.3d at 956 (citing Suzuki Motor Corp. v. Consumers Union of the U.S., Inc., 330 F.3d 1110, 1131–32 (9th Cir. 2003) (*en banc*)). Intervenors dispute this standard of review, arguing that there are “no factual disputes” in this appeal. OCA Br. at 20.

Importantly, ONDA does not in this case aim its challenge at day-to-day operations or general statutory obligations. ONDA challenges the AOIs from 2000 through 2004 on two allotments because the Forest Service authorizes the manner and extent of the grazing in the AOIs and it does so inconsistent with the PACFISH grazing standard, a forest plan requirement. See 16 U.S.C. §1604(i) (requiring that site-specific actions be consistent with forest plan requirements).

At one extreme, courts have dismissed cases where, for example, plaintiffs did not limit their challenges to discrete instances of agency action, but rather identified such actions as “evidence to support [a] sweeping argument that the Forest Service’s . . . management of the Texas forests over the last twenty years violates the NFMA.” Sierra Club v. Peterson, 228 F.3d 559, 567 (5th Cir. 2000) (*en banc*). ONDA’s case lies at the opposite end of the spectrum. Here, ONDA does not challenge the Forest Service’s grazing management in general or even throughout the entire Malheur National Forest. Instead, ONDA argues that the Forest Service violated specific legal requirements when it made certain site-specific, annual grazing decisions on two allotments in the Malheur National Forest.

Much of ONDA’s evidence, combined with the vast administrative record produced by the Forest Service, is aimed at showing that the agency does not measure, from year to year, how close or how far it is from reaching PACFISH

Riparian Management Objectives (“RMOs”) that define acceptable steelhead habitat. Yet, despite the agency’s failure to collect the data it has stated it needs to determine whether current grazing practices are “retarding or preventing attainment of” RMOs, the Forest Service on the allotments at issue here has decided that livestock may graze during each new grazing season and has issued AOIs authorizing such grazing. By not measuring RMOs, the Forest Service has failed to consider a relevant—indeed a critical—factor in its annual grazing decisions. AOIs authorizing annual grazing practices that are thus not “founded on a reasoned evaluation of the relevant factors” are arbitrary and capricious agency action. Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001) (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) (internal quotes omitted)). Where, as here, the Forest Service has “entirely failed to consider an important aspect of the problem,” its decision should be set aside. Defenders of Wildlife v. EPA, 420 F.3d 946, 959 (9th Cir. 2005); see also Native Ecosystems Council v. Dombeck, 304 F.3d 886, 902–03 (9th Cir. 2002).

In short, ONDA’s claims are unmistakably aimed at forcing the Forest Service to issue its annual grazing authorizations for six specific allotments in compliance with the agency’s controlling statutes, regulations, and Forest Plan requirements—and in particular with the PACFISH grazing standard’s direction

that the agency shall modify grazing practices that retard or prevent attainment of RMOs, and suspend grazing where such modifications are not effective in meeting RMOs. ER 275. ONDA's allegations, arguments, and evidence establish the causal connection between the Forest Service's issuance of Annual Operating Instructions and violations of the National Forest Management Act and Forest Plan requirements. This causal connection suffices to make ONDA's claims that AOIs are unlawful final agency actions justiciable, and belies any argument that ONDA has brought an improper programmatic challenge. See Neighbors of Cuddy Mtn., 303 F.3d at 1068 (finding plaintiff had sufficiently shown causal connection between Forest Service's alleged mismanagement and allegedly unlawful approval of individual timber sales). Therefore, ONDA properly has challenged discrete, final agency actions.

CONCLUSION

For these reasons, ONDA respectfully requests this court reverse 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, and holding that AOIs are final agency action reviewable under the APA.

Dated December 5, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this reply brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,850 words.

Date

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PROOF OF SERVICE

I, the undersigned, hereby certify that true and correct copies of Plaintiff-Appellants' **REPLY BRIEF** and **SUPPLEMENTAL EXCERPTS OF RECORD** were transmitted via U.S. First Class Mail on December 5, 2005 to the following parties:

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