

**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

REPLY BRIEF OF PLAINTIFF-APPELLANTS

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INTRODUCTION

In this appeal, ONDA argues that the Forest Service's issuance of Annual Operating Instructions ("AOIs"), which 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, are "final agency action" within the meaning of the Administrative Procedure Act.

In response, the Forest Service and Intervenors, rather than directly answer ONDA's straightforward analysis, make abstract, theoretical, and conclusory arguments about the nature of Annual Operating Instructions instead of focusing, as this court must, on their practical effects. Defendants' argument—that AOIs merely "implement" decisions already made by the agency when grazing permits were issued—falls short because it lacks 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 native trout species. Far from merely implementing a decision made years ago when the 10-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.

In its opening brief, ONDA showed that the Forest Service's Annual Operating Instructions 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 Intervenor wrongfully assert that an AOI merely "implements" requirements previously established in term grazing permits. USFS Br. at 9; OCA Br. at 21. 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 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 5.

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 particular set of 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, and biological assessments 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 that “for grazing activities in 2004 was designed to determine whether or not livestock grazing management is resulting in ‘Near Natural Rates of Recovery’ as defined by [INFISH].” ER 164. 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.” *Id.* (emphasis added). Likewise, the agency’s “riparian objective” monitoring “is designed to address the question of whether or not *management practices currently applied* to the area are achieving the desired results.” *Id.* at 164–65 (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; OCA Br. at 15–16, 21, 38, 39, 43, 44. But these arguments obfuscate 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. 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,” that the “number, kind, and class of livestock may be modified when determined . . . to be needed for resource protection[,]” and that grazing shall be conducted in accordance with the Forest Plan.¹ See ER at 10, 12, 14. 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. ER at 15 (permit provision that “Prior to completion and implementation of the scheduled individual AMP’s [sic], we will be working with you through the [AOIs] to bring management of the Bluebucket Allotment into consistency with the terms of the Malheur LRMP”). The very language the agency uses to describe the role and function of the AOI belies Defendants’ “merely implements” argument and suggests issuance of an AOI is indeed a culminating event. See ER at 173 (Forest Service biological assessment, stating “Grazing *to be authorized* under the proposed actions are the season and number designated on the individual Annual Operating Instructions”) (emphasis added); ER at 174 (“Use

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).

since [AMP was completed in 1965] *has been directed in the AOI*") (emphasis added); SER 121 (a rare formal permit modification, noting that "[t]he conditions of the Annual Operating Plan will remain in affect [sic]"). The Forest Service itself describes its current grazing management as two discrete decision-making points that culminate with their own sets of terms:

The intent is to manage the Bluebucket allotment according to the terms of the Term Grazing Permit *and* the Annual Operating Instructions. These instructions are written per Forest Plan standards and guidelines as amended by PACFISH/INFISH.

ER at 176 (emphasis added) (also going on to state, "Starting in 2004, the permittees will run herds in separate units as follows . . .").

The Annual Operating Instructions themselves state that they are used "in addition to" the term grazing permits—not "to implement" the permits. See, e.g., ER 94. While one part of the stated purpose of the AOI is to "implement utilization standards"—though 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 Intervenors 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, see, e.g., USFS Br. at 2, 7, 8, 12, 15 (referring to AOIs as "tools"),

these abstract, semantic arguments ignore the key facts critical to assessing finality: that the Forest Service actually *does* issue AOIs, for every allotment, every year, and that those AOIs do set new terms and conditions for grazing, every year.²

The Forest Service's completed decisions are clear in the record. Every single Annual Operating Instruction at issue in this case has changed the number of livestock, season of use or unit rotations from what appeared on the original term permit. Compare, e.g., SER 1, 15, 31, 45, 60, 75, 90, 105 (permits) and ER 10, 26, 48 (permits) with ER 89, 94, 99, 104, 110, 115, 121, 126, 132, 138, 143 (2004 AOIs); see also, e.g., ONDA SER³ 2–3 (Forest Service's 2004 biological assessment for Bluebucket Allotment, with tables summarizing changes in numbers, dates, and animal unit months, as well as standards and monitoring requirements, for past 4-year period). The Forest Service uses its annual AOI

² Given that the Forest Service has in fact issued Annual Operating Instructions for every allotment in every year at issue in this case, the facts that "AOIs are not even mentioned in the Forest Service's statutory authority or regulatory scheme," and that the Forest Service is not *required* to issue AOIs, have no bearing on the issue before this court. USFS Br. at 17. 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").

³ "ONDA's Supplemental Excerpts of Record" (filed with this Reply brief).

decisions to alter other permit conditions, as well. For example, on the Dollar Basin/Star Glade Allotment, the 1998 AOI set out, by unit, by area within each unit (e.g., along the “greenline” or in “flood prone areas” and specifying specific stream reaches or riparian areas), and even by vegetation type, specific move triggers and standards for stubble height, shrub use, and bank stability. ER 76–78. In addition, the 1998 AOI for the first time set out specific ecological standards tied to bull trout habitat and survival. ER 72. None of these standards or move triggers appears in the term grazing permit. See SER 1–14. By 2003 and 2004, the Forest Service’s AOI decisions had again similarly changed grazing management for this allotment. ER 104–07 (2004 AOI numbers, dates, units, standards); ER 85–88 (2003 AOI numbers, dates, units, standards).

Finally, the cases the Forest Service relies on for its argument concerning the first prong of Bennett are easily distinguished. USFS Br. at 10–11. 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).⁴

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 93. 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

⁴ 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.

inapplicable to what is, in practice, the agency’s annual decision regarding a 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. USFS Br. at 9, 10, 14, 15, 17. 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.

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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 bull trout or their habitat. See, e.g., SER 1–14 (Dollar Basin/Star Glade Allotment permit). 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, 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 permit *or* annual authorizations. SER 3. The permits contain restatements of percent utilization grazing standards from the 1990 Forest Plan, see, e.g., SER 5, but do not

contain the specific use standards subsequently developed to protect bull trout, which include residual stubble height standards for grasses, riparian shrub use standards (for willow and alder in riparian areas), and bank damage limitations. See, e.g., ER 106–107 (2004 AOI, Dollar Basin/Star Glade Allotment). Although the Forest Service claims that the AOIs reiterate “some” of the standards “found in the permit[,]” USFS Br. at 12 (citing ESA consultation-derived standards in 2004 AOI), the fact is that *none* of the INFISH GM-1 Riparian Management Objective standards or the bull trout ESA consultation standards (stubble height, shrub use, bank damage) appear anywhere in the permits or existing AMPs. See SER 1–121 & ER 10–63 (all grazing permits for the six allotments at issue).

Intervenors try to confuse the issue by improperly conflating the *effect* of an Annual Operating Instruction—it “determines rights and obligations”—with how the Forest Service can *enforce* those obligations. OCA Br. at 25, 44; see also USFS Br. at 17. But the Bennett test looks only at whether there 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. As the district court observed in rejecting the Forest Service’s motion to dismiss, “[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.” ER 5.

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 45 (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.

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.

See, e.g., ER 149 (Forest Service Notice of Noncompliance, citing “[f]ailure to follow the 2004 AOI grazing schedule for pasture moves” and utilization standards violations “as outlined in the Forest Plan *and* your 2004 [AOI],” as violations of *both* permit and AOI) (emphasis added). 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 impose 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 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). 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.

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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.

Both the Forest Service and Intervenors incorrectly argue that the agency's Annual Operating Instructions are not “agency action.” USFS Br. at 9–14; OCA Br. at 24–29. 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)). Intervenors' 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. S. 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 10 (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 62.⁵ 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:

⁵ Note that the Forest Service and Intervenor rely heavily on SUWA throughout their briefing. USFS Br. at 6, 8, 10, 11, 15; OCA Br. at 7, 24, 29, 31, 32, 34–35, 49–50. 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. 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’ “programmatic” 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).

their arguments are foreclosed by the comprehensive interpretation of “action” in both American Trucking and the plain language of the APA itself.

Finally, besides the fact that Annual Operating Instructions are unambiguous exercises of agency power, 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 “Annual Operating Instruction is *made part of Part 3 of your Term Grazing Permit.*” ER 84 (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”—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 to regulation may

constitute “final agency action for purpose of judicial review).⁶ 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 191 (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. USFS Br. at 10, 15; OCA BR. at 29–36. 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

⁶ 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”).

Instructions, and alleged that those final actions violated federal statutory and regulatory provisions.

ONDA's Second Amended Complaint asserts that specific annual grazing authorizations on six allotments along the Malheur and North Fork Malheur wild and scenic rivers within the Malheur National Forest, were unlawful agency actions that violated the National Wild and Scenic Rivers Act and the National Forest Management Act, including the Forest Service's own Forest Plan for the Malheur National Forest. See ER 184–87 (Opinion and Order describing ONDA's claims). The district court clearly understood that ONDA is challenging specific agency actions, explaining:

In February 2003 ONDA filed for declaratory and injunctive relief from the Forest Service's current and past decisions to issue numerous AOIs for grazing on federally-owned pastures that affect protected riparian areas of either the North Fork Malheur River or the Malheur River within the Malheur National Forest. Specifically, ONDA alleged that the AOIs violated the GM-1 Grazing Management standard of the Inland Native Fish Strategy ("INFISH") aquatic plan to "[m]odify grazing practices * * * that retard or prevent attainment of Riparian Management Objectives or are likely to adversely affect inland native fish."

ER 184. The court further recognized that "ONDA alleges that each AOI fosters chronic and continued unlawful violations of the INFISH GM-1 standards" and that "ONDA alleges that the AOI's ecological monitoring standards do not comply with applicable resource management plans as required by WSRA." ER 186. Thus,

as a factual matter, ONDA has identified and challenged discrete, site-specific agency actions.⁷

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

⁷ 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 9–10 (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 23. This is belied by their disputations regarding the nature of ONDA’s claims for relief, as well as the factual descriptions of what an AOI is. See, e.g., OCA Br. at 41 (stating ONDA’s characterization of AOIs is “factually and legally incorrect”), 29–36 (disputing the underlying basis as to what actions ONDA actually challenged in its Complaint).

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. Importantly, ONDA does not in this case aim its challenge at, as Intervenors allege with more than a little hyperbole, "the entire [Forest Service] grazing system." OCA Br. at 32. Rather, as the district court correctly observed, "ONDA challenges four years of AOIs from 2000 up to and including the eleven AOIs issued in 2004 for the affected allotments." ER 187.

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*); see also OCA Br. at 32–33 (citing same). 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 six grazing allotments within and adjacent to the Malheur and North Fork Malheur wild and scenic river corridors.

Moreover, unlike the plaintiffs in Peterson, ONDA uses site-specific evidence of Forest Service management practices to show that the Annual Operating Instructions themselves are unlawful final agency action. Cf. Peterson, 228 F.3d at 567 (evidence merely concerned practices “throughout the Texas forests” and dated back to 1976 implementation of NFMA). Thus, ONDA’s evidence before the district court shows that for the specific allotments, units, and grazing seasons in question, the Forest Service has authorized grazing through its AOIs at levels and in places which violate the Forest Plan and underlying statutory and regulatory requirements. See, e.g., ER 167–68, 217–18, 220 (reference to and description of, declarations containing expert and lay testimony, field assessments, and monitoring data).

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 INFISH Riparian Management Objectives (“RMOs”) that define acceptable bull trout 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, see ER 184, 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 INFISH GM-1 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 161. ONDA’s allegations, arguments, and evidence establish the causal connection between the Forest Service’s issuance of Annual Operating Instructions and violations of WSRA, NFMA, 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.

C. The lack of an administrative appeal provision for Annual Operating Instructions cannot divest a court of jurisdiction under the APA.

Finally, Intervenors make the wholly unsupported argument that an APA challenge to Forest Service-issued Annual Operating Instructions is prohibited because the Forest Service regulations do not provide for administrative appeals of AOIs. OCA Br. at 19, 21, 47–51. Intervenors’ proposition is a radical interpretation of the law because it asserts that if an agency’s regulations do not provide for an appeal of a particular type of agency action this ousts the federal courts’ jurisdiction to review such action—even if the action meets the standard for “final agency action” under the statutory provisions of the APA.

This, of course, would drastically upset the fundamental principle of administrative law that executive agency actions are presumptively reviewable in federal court unless Congress—not the agency—determines there should be no judicial review. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 424–25 (1995) (holding agency action for which there was no administrative review available to

be judicially reviewable and noting that Supreme Court has “stated time and again that judicial review of executive action ‘will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress’”) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)). This court has noted that “[t]he APA allows that agency actions meeting certain criteria for finality are ‘subject to judicial review.’” Idaho Watersheds Project, 307 F.3d at 830 (quoting 5 U.S.C. § 704). Where, as in this case, an agency action meets the criteria for finality that makes the actions subject to judicial review under the APA, it is irrelevant whether agency regulations do or do not provide for administrative review of that action. Thus, this final argument is without merit and the district court has jurisdiction to hear ONDA’s claims targeting Forest Service AOIs.

CONCLUSION

For the foregoing reasons, as well as those stated in Appellants’ opening brief, ONDA respectfully requests this court to issue an opinion reversing 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 November 22, 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 6,947 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 November 23, 2005 to the following parties:

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