

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

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**Docket No. 05-35637**

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**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

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

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**APPELLANTS' RESPONSE TO MOTION TO TRANSFER  
ATTORNEYS' FEES APPLICATIONS TO THE  
DISTRICT COURT**

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On January 19, 2007, Appellants Oregon Natural Desert Association *et al.* (“ONDA”) filed applications seeking awards of attorney fees for judicial proceedings in this and a related appeal. On January 30, 2007, Appellees United States Forest Service *et al.* moved this Court to transfer those attorney fees

applications to the district court or in the alternative to grant an extension of time in which to respond to the applications.

The Forest Service argues primarily that a fee determination by this Court is premature because there is a remand for further district court proceedings and ONDA's victory on the only legal issue before this Court does not make it a "prevailing party" for purposes of fee recovery. The fact that there are further proceedings in district court alone does not require a transfer of the application for attorney fees to the district court. Nor is it logical to assert that ONDA has not prevailed when it received a favorable ruling overturning the district court on the only legal issue before this Court. Nonetheless, it may be a closer question whether ONDA's victory in this Court entitles it to an award at this time for its attorney fees expended on appeal pursuant to the Equal Access to Justice. Even if this Court believes that the request for fees is premature, it has the discretion to retain and stay the request, rather than transfer it to the district court. If this Court should decide to transfer the fees request to the district court, ONDA respectfully requests that the Court do so in a manner that makes it clear that ONDA is not precluded from requesting attorney fees for time expended on this appeal should the district court, on remand, issue final judgment in favor of ONDA.

As for the Forest Service's further arguments that the fee award decision is "best addressed" by the district court and that the claims for fees are "fact-intensive

and complex,” this Court is the most appropriate forum to decide Appellants’ request for attorney fees for work conducted solely on this appeal. This Court easily can decide any legal issues raised, and, to the extent necessary, the Court can refer to the Appellate Commissioner the determination of an appropriate amount of attorneys fees. Cir. R. 39-1.9.

**I. A REMAND ALONE DOES NOT NECESSITATE A TRANSFER OF ONDA’S ATTORNEY FEE PETITION TO THE DISTRICT COURT.**

The Forest Service first argues that a determination of ONDA’s right to fees is “premature” because the case has been reversed and remanded to the district court for proceedings on the merits and no final judgment has been entered. USFS Motion at 2.

First, there has been “final judgment” entered by this Court as defined by EAJA. The Act defines “final judgment” as “a judgment that is final and not appealable . . . .” 28 U.S.C. § 2412(d)(2)(G). This Court’s judgment entered on September 21, 2007 in favor of ONDA is a “final judgment” under EAJA because the Court’s decision cannot be revisited by the district court, and, now that the time to seek rehearing or to petition for certiorari has run, the decision is “not appealable.” Al-Harbi v. I.N.S., 284 F.3d 1080, 1083-84 (9<sup>th</sup> Cir. 2002). EAJA requires that a party seeking an award of fees “shall” submit the application to the court “within thirty days of final judgment.” 28 U.S.C. § 2412(d)(1)(B). ONDA did so here, believing that a failure to do so within the 30 days of this Court’s final

judgment would preclude ONDA from seeking the fees for time expended on the appeal at a later date from the district court.

Second, a remand to the district court for further proceedings alone does not render this Court's judgment non-final, nor does it necessitate a transfer of the request for fees. For example, in Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service, 9<sup>th</sup> Cir. No. 03-35279, this Court entered judgment on August 6, 2004 in which it affirmed in part, reversed in part and remanded to the district court. The agency similarly sought to transfer appellants request for fees pursuant to EAJA to the district court. Id. (motion filed Dec. 21, 2004). But, this Court denied the motion, despite the fact that there were further proceedings on remand in district court. Id. (order filed Jan. 14, 2005).

## **II. THIS COURT'S FINAL JUDGMENT ENTITLES ONDA TO FEES FOR TIME EXPENDED ON THE APPEAL.**

The Forest Service further argues that ONDA's request for fees is premature because this Court decided "only a threshold question," ruling that the Forest Service's Annual Operating Instructions are final agency action and thus subject to challenge pursuant to the Administrative Procedure Act. Ore. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006); Ore. Natural Desert Ass'n v. U.S. Forest Serv., 2006 WL 2711934 (9th Cir. Sept. 21, 2006). USFS Motion at 3. According to the Forest Service, there is no "final judgment" in this action that would allow for an award of attorney fees under EAJA. See 28 U.S.C. §

2412(d)(1)(B) (requiring fee petition within 30 days of a “final judgment” in the action). The Forest Service’s argument is not supported under the plain terms of the EAJA nor under this Court’s decisions interpreting that statute.

EAJA defines final judgment as “a judgment that is final and not appealable.” Id. § 2412(d)(2)(G); see also Al-Harbi v. I.N.S., 284 F.3d at 1082 (9th Cir. 2002). When this Court enters a judgment and the mandate is spread in the district court, that constitutes “final judgment” for purposes of EAJA. See Al-Harbi, 284 F.3d at 1083–84 (agreeing with other circuits that judgment is “final judgment” when government’s right to appeal has lapsed, including expiration of the time in which the government could petition for certiorari). The Forest Service cites Al-Harbi’s conclusion—that final judgment means “there is no longer any possibility that the district court’s judgment is open to attack,” 284 F.3d at 1084—out of context and too narrowly. The district court judgment referred to in that sentence is simply the one that was under appeal, not necessarily a subsequent judgment entered on remand. See id. In other words, final judgment under EAJA is “a final judgment that is final and not appealable” and not “*the* final judgment that is final and not appealable.” 28 U.S.C. § 2412(d)(2)(G).

This is not to say this Court does not have the discretion to transfer fee determinations to the district court. It certainly does, and the Forest Service cites several cases in which the Court did just that. See USFS Memo at 4–5. This even

includes cases like this one, in which this Court reversed a district court's jurisdictional ruling and remanded for further proceedings on the merits. However, those cases are distinct from the present case, and under the circumstances present here it makes sense for the Appellate Court to determine fees incurred for exclusively appellate work for which ONDA prevailed.

The only claim at issue before this Court was a jurisdictional issue: whether the Forest Service's Annual Operating Instructions are "final agency action" subject to challenge under the APA. ONDA v. U.S. Forest Serv., 465 F.3d at 979. Importantly, this is a case in which the jurisdictional issues and the substantive issues are so intertwined that jurisdiction is dependent on resolution of factual issues going to the merits of ONDA's claims. In these types of cases, this Court reviews an appellant's jurisdictional claim through a substantive, "factual" lens. See, e.g., Ventura Packers, Inc. v. F/V Jeanine Kathleen, 305 F.3d 913, 916, 922 (9th Cir. 2002); Steen v. John Hancock Mut. Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997); Careau Group v. United Farm Workers of Am., 940 F.2d 1291, 1293 (9th Cir. 1991); Rosales v. United States, 824 F.2d 799, 803 (9th Cir.1987). In order words, this was a case in which "the jurisdictional issue *is* the merits." Careau Group, 940 F.2d at 1293 (emphasis in original).

This is evidenced by the Court's opinion, which engaged in an extremely detailed, *factual* review of just what a Forest Service Annual Operating Instruction

is and how AOIs function in the agency’s management of livestock grazing on national forest lands. See 465 F.3d at 979–81 (examining the role of AOIs in Forest Service grazing management “as reflected in the administrative record”), 984–86 (further examining function and practical use of AOIs, including extensive analysis of particular AOIs in the record), 987–88 (examining legal effect of AOIs, again by looking to factual evidence in the record), 988–89 (examining role of AOIs in imposing Endangered Species Act bull trout standards). The Court concluded:

The record supports the conclusion that an AOI is a discrete, site-specific action representing the Forest Service's last word from which binding obligations flow. . . . And, as the record demonstrates, the AOI imposes substantial and intricate legal obligations on the permit holder. For these reasons, we hold that an AOI is a final agency action subject to judicial review under § 706(2)(A) of the APA.

Id. at 990.

This is not a case where ONDA’s victory is purely “interlocutory” in nature. See USFS Memo at 4–5. The cases the Forest Service cites to support its argument are not analogous to this case because they typically involve remands for additional administrative proceedings or additional fact-finding by the district court. See Scanlon v. Sullivan, 974 F.2d 107 (9th Cir. 1992) (remand for “additional administrative proceedings” and ordering new findings of fact based on those proceedings); Papizan v. Bowen, 856 F.2d 1455 (9th Cir. 1988) (remanding to agency for “further administrative proceedings”).

By contrast, because the statutes under which ONDA's claims lie in this case (the National Forest Management Act and the Wild and Scenic Rivers Act) do not contain a private right of action, the Forest Service's AOI decisions are reviewed under the APA. 5 U.S.C. § 701 *et seq.*; ONDA v. U.S. Forest Serv., 465 F.3d at 982 (stating same). The APA defines the district court's scope of review, stating: "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . . ." 5 U.S.C. § 706. The "whole record" language refers to the administrative record. See Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–44 (1985). Judicial review is conducted on the basis of the record that was before the agency at the time it made its decision and, with certain exceptions, is limited to that record. See Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). Thus, the district court in this type of record review case has no fact-finding function to perform. Occidental Eng'g Co. v. I.N.S., 753 F.2d 766, 769 (9th Cir. 1985) (district court's function is to determine "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did"). Again, this underscores the significance of ONDA's appellate victory on a key jurisdictional issue that *was* the merits of this appeal.

Finally, it would not be premature for this Court to decide ONDA's fee petition because the Court's AOIs ruling set precedent that will have lasting and

importance significance beyond this case and regardless of whether ONDA prevails on the merits before the district court. At the outset of its opinion, this Court recognized that the Forest Service manages grazing on national forests via three distinct decisionmaking processes: term grazing permits, allotment management plans, and Annual Operating Instructions. ONDA v. U.S. Forest Serv., 465 F.3d at 979. In its briefing, ONDA explained that its ability to challenge the Forest Service’s AOI decisions was critical because: (1) permit decisions are only made once every ten years for a given grazing allotment; and (2) the allotments at issue, like most allotments on the Malheur National Forest, contain either extremely outdated AMPs or no AMP at all. For these reasons, this Court’s decision upholding the public’s right to participate in these critically important annual grazing decisions is significant beyond its immediate impact in this litigation. Accordingly, it would not be premature for this Court to make a determination on ONDA’s fee petition for this important legal victory.

**III. THIS COURT IS PARTICULARLY WELL-POSITIONED TO DETERMINE WHETHER THE FOREST SERVICE’S LEGAL POSITION WAS “SUBSTANTIALLY JUSTIFIED.”**

The Forest Service next argues this Court should not make a determination on ONDA’s petition because whether the Forest Service’s position was “substantially justified”—one of the factors to consider under the EAJA—is a “determination . . . for the district court to make.” USFS Motion at 6 (citing

Hammock v. Bowen, 879 F.2d 498, 504 (9th Cir. 1989), quoting Pierce v. Underwood, 487 U.S. 552 (1988)). But in Hammock, this Court remanded to an agency to consider new evidence the agency had failed to obtain and which was necessary to make a determination on a claimant's disability claim. The Court noted that "no finding has been made that the position of the United States was not substantially justified." 879 F.2d at 504.

Likewise, the Forest Service implies that a remand to the district court is necessary because "when we decide whether the government's litigation position is substantially justified, 'the EAJA ... favors treating a case as an inclusive whole, rather than as atomized line items.'" USFS Motion at 6 citing Al-Harbi v. I.N.S., 284 F.3d 1080, 1084-85 (9<sup>th</sup> Cir. 2002) (quoting United States v. Rubin, 97 F.3d 373, 375 (9<sup>th</sup> Cir.1996) in turn quoting Comm'r, INS, 496 U.S. 154, 161-62 (1990)). All of these cases refer to applying the "substantially justified" test to the district court litigation as a whole, rather than to each phase of litigation in district court. Here, Appellants only seek attorneys fees on appeal. The hours expended are discrete from any of the hours expended in the district court. Whether the Forest Service was "substantially justified" should be applied to the position taken in defense of the appeal in this Court as a whole. Deciding Appellants' request for fees on appeal does not involve "atomizing" parts of the case, nor does it involve piecemeal litigation.

Here, as ONDA explained in its fee petition, there was clear and adverse legal precedent against the Forest Service’s position. See Wilderness Society v. Babbitt, 5 F.3d. 383, 388 (9th Cir. 1993) (presence of adverse legal precedent demonstrates that agency’s position was not substantially justified). The test for final agency action had long been established. See, e.g., Bennett v. Spear, 520 U.S. 154, 177–78 (1997). In the district court, Judge King held that AOIs *are* final agency actions in denying the Forest Service’s motion to dismiss. Ore. Natural Desert Ass’n v. U.S. Forest Serv., 312 F.3d 1337, 1341–43 (D. Or. 2004); see also Ore. Natural Desert Ass’n v. U.S. Forest Serv., 2004 WL 1592606, \*9 (D. Or. 2004) (“Plaintiffs are challenging discrete, final agency actions” in context of ruling on motion for preliminary injunction). The Forest Service nevertheless revived its untenable argument after the district court action was transferred to Judge Jones. This position was not substantially justified. In any event, argument over whether the Forest Service’s position was “substantially justified” is more appropriate in the context of the fee petition, and is largely irrelevant on the agency’s motion to transfer.

**IV. THIS COURT IS WELL-POSITIONED TO DETERMINE THE POTENTIAL FACTUAL DISPUTES IDENTIFIED BY THE FOREST SERVICE.**

Finally, the Forest Service argues this Court should not make a determination on ONDA’s fee petition because the “claims are fact-intensive and

complex.” USFS Motion at 6. The facts the Forest Service refers to concern the reasonableness of the hours claimed and rates requested, entitlement to fees for particular activities, and the total amount claimed in ONDA’s petition. Id. at 6–7. In fact, this Court is in a better position than the district court to review these factual issues concerning the hours spent and the rates sought by ONDA’s attorneys in litigating this appeal in the Ninth Circuit. ONDA questions how the district court could somehow be better situated to make, for example, a factual determination concerning the reasonableness of the hours spent litigating this appeal, when none of the briefing or argument at issue for purposes of ONDA’s fee petition took place in that court.

Moreover, the cases the Forest Service relies upon do not stand for the proposition that these factual issues necessarily must be decided in the district court. USFS Motion at 7 (citing Pierce v. Underwood, 487 U.S. 552, 571 (1988) and McGrath v. County of Nevada, 67 f.3d 248, 255 (9<sup>th</sup> Cir. 1995)). These cases are simply in the context of a review of a district court decision on fees, noting that when the district court addresses factual issues, the standard on appeal is abuse of discretion. These cases do not address whether the Appellate Court can decide a request for attorneys fees on appeal. Clearly, this Court has the authority and expertise to decide Appellants’ request for attorneys fees on appeal. See Cir. Rule 39-2 (expressly providing for the application for fees under EAJA to the Court of

Appeals); see also Cir. R. 39-1.9 (the Court can refer to the Appellate Commissioner the determination of an appropriate amount of attorneys fees).

### **CONCLUSION**

For these reasons, ONDA respectfully requests this Court to deny the Forest Service's Motion to Transfer Attorneys' Fees Applications; however, should this Court decide to transfer the fees request to the district court, ONDA respectfully requests that the Court do so in a manner that makes it clear that ONDA is not precluded from requesting attorney fees for time expended on this appeal should the district court, on remand, issue final judgment in favor of ONDA

Dated February 10, 2007

Respectfully submitted,

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Of Attorneys for Plaintiff-Appellants

## **PROOF OF SERVICE**

I, the undersigned, hereby certify that true and correct copies of **APPELLANTS' RESPONSE TO MOTION TO TRANSFER ATTORNEYS' FEES APPLICATIONS TO THE DISTRICT COURT** were transmitted via U.S. First Class Mail on February 10, 2007 to the following parties:

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