

THE NINTH CIRCUIT’S INTERPRETATION OF THE
ADMINISTRATIVE PROCEDURE ACT’S FINAL AGENCY ACTION
REQUIREMENT: *OREGON NATURAL DESERT ASSOCIATION V.
UNITED STATES FOREST SERVICE*

by
*Sarah Stauffer Curtiss**

On September 21, 2006, the Ninth Circuit Court of Appeals decided Oregon Natural Desert Association v. United States Forest Service, reversing the Oregon District Court’s decision and concluding that the administrative actions at issue in the case constituted final agency actions under section 704 of the Administrative Procedure Act. This Note examines the Ninth Circuit’s final agency action analysis in Oregon Natural Desert Association v. United States Forest Service, arguing that the Ninth Circuit’s approach—under which even routine agency management tools such as annual operating instructions constitute final agency actions—will make it difficult for agencies to carry out their day-to-day duties and to work out compliance with their statutory mandates. This Note concludes that the Ninth Circuit’s interpretation of the final agency action requirement does not comport with either the purpose of APA review or the practical requirements of managing grazing on the public lands.

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* J.D. 2007, Lewis and Clark Law School; M.A. 2001, University of Chicago; B.A. 2000, Pacific Lutheran University. Thanks to Professor Daryl Wilson for her thoughtful comments and support. Thanks also to my husband, Heath Curtiss, for his editing assistance and sense of humor.

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I. INTRODUCTION

Theodore Roosevelt established the Malheur National Forest in Eastern Oregon on June 13, 1908.¹ Carved out of the Blue Mountains National Forest,² the Malheur encompasses 1.7 million acres in the Blue Mountains.³ Like many other national forests in the National Forest system, the Malheur National Forest contains grazing allotments,⁴ on which the Forest Service (the Service) issues grazing permits pursuant to the National Forest Management Act (NFMA)⁵ and the Federal Land Policy and Management Act (FLPMA),⁶ and where the Secretary of Agriculture is required to “develop, administer and protect the range resources and permit and regulate the grazing use of all kinds and classes”⁷

In conjunction with issuing grazing permits, the Service is responsible for setting the terms and conditions of grazing within the Malheur National Forest,⁸ including, but not limited to, the number of livestock to be grazed and the permitted grazing season.⁹ In carrying out its range management responsibilities on the Malheur National Forest, the Service is guided by the Malheur National Forest Land and Resource Management Plan (Malheur LRMP).¹⁰ The Malheur LRMP sets forest-wide goals which direct the Service to: (1) “[p]rovide a sustained production of palatable forage for grazing by livestock and dependent wildlife species”; (2) “[m]anage rangelands to meet the needs of other resources”; and (3) “[p]ermit livestock use on suitable range

¹ Exec. Order No. 814 (June 13, 1908).

² *Id.*

³ United States Forest Service, Welcome, <http://www.fs.fed.us/r6/malheur/index.shtml>.

⁴ See Hearing on the Forest Service Grazing Program Before the Subcomm. on Public Lands and Forests of the Comm. on Energy and Natural Res. (2004) (statement of Tom Thompson, Deputy Chief, U.S. Department of Agriculture) [hereinafter Statement of Tom Thompson] (estimating that there are grazing allotments on “nearly half of all National Forest System lands, approximately 90 million acres of land in 34 states”).

⁵ 16 U.S.C. § 1604(a), (e) (2000).

⁶ 43 U.S.C. §§ 1701–1785 (2000).

⁷ 36 C.F.R. § 222.1(a) (2006).

⁸ “[A]ll grazing and livestock use on National Forest System lands. . . under Forest Service control *must be authorized* by a grazing or livestock use permit.” 36 C.F.R. § 222.3(a) (2006) (emphasis added).

⁹ 36 C.F.R. § 222.3(c)(1)(vi).

¹⁰ U.S. FOREST SERV., DEP’T OF AGRIC., LAND AND RESOURCE MANAGEMENT PLAN – MALHEUR NATIONAL FOREST (1990).

when the permittee manages livestock using prescribed practices.”¹¹ The Malheur LRMP also sets forth a forest-wide standard to “[m]anage big game and livestock numbers at a level which utilizes available forage while maintaining plant vigor, composition and density.”¹²

In February 2003, the Oregon Natural Desert Association¹³ and the Center for Biological Diversity¹⁴ (collectively, ONDA) sued the Service, alleging that the Service acted arbitrarily and capriciously in issuing annual operating instructions (AOIs), which were formerly known as annual operating plans, to grazing permit holders on specified allotments in the Malheur National Forest along the wild and scenic river corridors of the Malheur and North Fork Malheur Rivers.¹⁵ ONDA alleged that, in issuing the AOIs, the Service acted in violation of the Wild and Scenic Rivers Act of 1968 (WSRA),¹⁶ the National Environmental Policy Act of 1969¹⁷ (NEPA), the National Forest Management Act of 1976¹⁸ (NFMA), the Rescissions Act,¹⁹ and the Administrative Procedure Act²⁰ (APA).²¹ The district court dismissed the action on jurisdictional grounds, concluding that the AOIs were not final agency actions

¹¹ *Id.* at IV-2.

¹² *Id.* at IV-34.

¹³ ONDA is a non-profit organization with offices in Bend and Portland, Oregon. ONDA's mission is to “protect[], defend[], and restor[e] the health of Oregon's native deserts.” Oregon Natural Desert Association, About ONDA, <http://www.onda.org/about>. According to ONDA, its members “regularly use and enjoy the public lands and waters along the Malheur and North Fork Malheur Rivers.” Second Amended Complaint for Declaratory and Injunctive Relief at 4, *Or. Natural Desert Ass'n (ONDA) v. U.S. Forest Serv. (USFS)*, No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005).

¹⁴ The Center for Biological Diversity is a non-profit organization with offices in Tucson and Phoenix, Arizona; Silver City, New Mexico; San Francisco and San Diego, California; Portland, Oregon; and Washington D.C. Center for Biological Diversity, Center Fact Sheet, <http://www.biologicaldiversity.org/swcbd/aboutus/index.html> (follow “Center Fact Sheet” hyperlink). The Center for Biological Diversity works to “secure a future for animals and plants hovering on the brink of extinction, for the wilderness they need to survive, and by extension for the spiritual welfare of generations to come.” Center for Biological Diversity, About the Center for Biological Diversity, <http://www.biologicaldiversity.org/swcbd/aboutus/index.html>. According to the Center for Biological Diversity, its “members and staff have hiked, bird watched, camped and recreated along the Malheur and North Fork Malheur rivers on numerous occasions and plan to return to do so again.” Second Amended Complaint, *supra* note 13, at 5.

¹⁵ *Id.* at 29-30. In his opinion in *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 312 F. Supp. 2d 1337, 1340 n.1 (D. Or. 2004), Jude King noted, “The Forest Service notes that as of this year, the Forest Service no longer issues AOPs. Instead, the Forest Service issues annual operating instructions (“AOIs”).” For purposes of clarity in this Comment, the author refers to these documents as AOIs.

¹⁶ 16 U.S.C. §§ 1271–1287 (2000).

¹⁷ 42 U.S.C. §§ 4321–4370f (2000).

¹⁸ 16 U.S.C. §§ 1600–1614 (2000).

¹⁹ Pub. L. No. 104–19, 109 Stat. 194 (1995).

²⁰ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559, 701-706 (2000)).

²¹ Second Amended Complaint, *supra* note 13, at 28-32.

within the meaning of APA section 704.²²

ONDA appealed, and the Ninth Circuit reversed the district court's determination, holding that the AOIs were final agency actions within the meaning of APA section 704.²³ Reasoning that the AOIs had a "direct and immediate" effect on the "day-to-day business" of the permit holder, the Ninth Circuit concluded that the AOIs "impose[d] substantial and intricate legal obligations on the permit holder."²⁴ Accordingly, the AOIs were final agency actions and were, therefore, subject to judicial review under the APA.²⁵

This Note examines whether the Ninth Circuit erred in concluding that AOIs constitute final agency actions within the meaning of section 704 of the APA.²⁶ Part II focuses on *Oregon Natural Desert Association v. United States Forest Service (ONDA v. USFS)*, describing the background of the case, as well as the majority and dissent's analyses. Part III supplies a brief background on the APA's judicial review provisions and examines *Bennett v. Spear*, in which the United States Supreme Court articulated its test for determining whether an agency action is a final agency action within the meaning of APA section 704. Part IV argues that the Ninth Circuit panel's approach does not comport with prior Supreme Court and Ninth Circuit final agency action precedent or the purpose of APA review because it sanctions broad attacks on agency actions and places the job of agency management firmly in the hands of the courts. Part IV also suggests that the panel's approach in *ONDA v. USFS* is unworkable in the context of grazing management. Finally, Part V argues that the fact that ONDA cannot challenge the underlying grazing permits should not lower the APA's final agency action hurdle with respect to AOIs. This Note concludes that the Ninth Circuit erred in determining that AOIs are final agency actions and subject to judicial review under the APA.

²² Or. Natural Desert Ass'n v. U.S. Forest Serv., No. 03-213-JO, 2005 WL 1334459, at *9 (D. Or. June 3, 2005).

²³ Or. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 990 (9th Cir. 2006).

²⁴ *Id.* (quotation marks omitted).

²⁵ *Id.*

²⁶ This Note does not seek to assess the merits of the public lands grazing program or to document the evolution of grazing regulation on the public lands. The environmental, economic, and cultural value of public lands grazing has been discussed at length in recent years. *See, e.g.*, Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721 (2005) (critiquing federal grazing policy and arguing that grazing is devastating the public lands); Marc Stimpert, *Counterpoint: Opportunities Lost and Opportunities Gained: Separating Truth From Myth in the Western Ranching Debate*, 36 ENVTL. L. 481, 483 (2006) (responding to Donahue's article by defending public lands grazing as "culturally, economically, and environmentally beneficial"). Likewise, the history of public lands grazing has received much attention in scholarly literature. *See, e.g.*, WILLIAM D. ROWLEY, U.S. FOREST SERVICE GRAZING AND RANGELANDS: A HISTORY (1985) (tracing the evolution of public lands grazing on the national forests).

II. OREGON NATURAL DESERT ASSOCIATION V. UNITED STATES FOREST SERVICE

A. Factual and Procedural Background

In February 2003, ONDA sued the United States Forest Service for its past and current decisions to issue AOIs for grazing on federal allotments along the North Fork Malheur and Malheur Rivers.²⁷ Specifically, ONDA alleged that the Service violated the WSRA, NFMA, NEPA, the Rescissions Act, and the APA by

failing to “protect and enhance” the wild and scenic river corridors’ “outstandingly remarkable values,” by failing to insure that . . . grazing practices are consistent with the Forest’s [LRMP] as well as each comprehensive river management plan, and by failing to undertake required environmental analyses for the protection of wildlife, fish, and other river corridor values.²⁸

ONDA sought a declaration that the Service was in violation of the WSRA and that the Service’s issuance of the permits and AOIs without the required environmental analyses was arbitrary and capricious under section 706 of the APA.²⁹ In addition, ONDA sought injunctive relief to compel the Service to: implement comprehensive river management plans; conduct environmental analyses; comply with applicable grazing standards; adopt allotment management plans (AMPs); and to place a moratorium on livestock grazing within the wild and scenic river corridors until the Service implemented new AMPs.³⁰

Shortly after ONDA filed its complaint, both Robertson Ranch³¹ and the Oregon Cattlemen’s Association (OCA)³² moved to intervene in the action.³³

²⁷ *Or. Natural Desert Ass’n*, 2005 WL 1334459, at *2.

²⁸ Second Amended Complaint, *supra* note 13, at 2; for statutory sources, see notes 16–20.

²⁹ *Id.* at 30. The APA imposes a narrow standard of review limited to a determination of whether the agency action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (2000).

³⁰ Second Amended Complaint, *supra* note 13, at 32–35.

³¹ Robertson Ranch holds a term grazing permit which authorizes grazing on the Ott Allotments in the Malheur National Forest. Declaration of Patrick E. Joyce in Support of Motion to Intervene at 3, *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 312 F. Supp. 2d 1337 (D. Or. 2004) (No. Civ. 03-213-KI).

³² The Oregon Cattlemen’s Association was formed in 1913 to “advance the economic, political and social interests of the Oregon Cattle Industry.” Oregon Cattlemen’s Association, President’s Message, <http://www.orcattle.com/main.htm>. The Cattlemen’s mission is to “[p]romote environmentally and socially sound industry practices; [p]romote a positive, contemporary image of the industry[;] [i]mprove and strengthen the economics of the industry; [a]ssure a strong political presence in all areas effecting the industry[;] [and] [p]rotect [the] industry communities and private property rights.” *Id.*

³³ Robertson Ranch Motion to Intervene, *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005); Oregon Cattlemen’s

Robertson Ranch contended that the relief sought by ONDA would “immediately and adversely” affect its operations on the Malheur National Forest.³⁴ The OCA sought intervention on behalf of the grazing permittees whose term grazing permits and AOIs were at issue in the litigation.³⁵ The district court granted both parties’ motions to intervene on July 9, 2003.³⁶

The Service then moved to dismiss, alleging that the court lacked jurisdiction because ONDA had not challenged a final agency action.³⁷ Under the APA, judicial review is only available if the agency action is final.³⁸ Thus, the Service alleged that because the AOIs were not final agency actions, ONDA’s claims were not reviewable.³⁹ Arguing in response that the AOIs at issue were reviewable, ONDA claimed that the AOIs were “site-specific plans which [were] clearly the consummation of the [Service’s] decisionmaking process.”⁴⁰ Judge Garr King denied the Service’s motion,⁴¹ opining that, under *Bennett v. Spear*,⁴² the AOIs were “discrete, site-specific actions taken by the agency from which binding obligations flow.”⁴³ According to Judge King, “Simply because an [AOI’s] authority is drawn from the [term grazing] permit does not make the agency’s decision reflected in the [AOI] any less of a final agency action.”⁴⁴ Thus, ONDA had “sufficiently pleaded challenges to final agency actions.”⁴⁵

After the district court denied the Service’s motion to dismiss, the case was transferred from Judge King to Judge Robert E. Jones.⁴⁶ The parties subsequently filed cross-motions for summary judgment.⁴⁷ The Service again argued that ONDA’s claims failed on jurisdictional grounds because the

Association Motion to Intervene, Or. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005).

³⁴ Declaration of Patrick E. Joyce, *supra* note 31, at 3.

³⁵ See Or. Cattlemen’s Ass’n, et al. Intervenor-Defendant-Appellees’ Brief on Appeal at 2, Or. Natural Desert Ass’n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006) (No. 05-35637).

³⁶ Order Granting Intervenor Robertson Ranch and Oregon Cattlemen’s Association Motions to Intervene, Or. Natural Desert Ass’n v. U.S. Forest Serv., No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005).

³⁷ Or. Natural Desert Ass’n v. U.S. Forest Serv., 312 F. Supp. 2d 1337, 1341 (D. Or. 2004).

³⁸ Administrative Procedure Act, 5 U.S.C. § 704 (2000).

³⁹ *Or. Natural Desert Ass’n*, 312 F. Supp. 2d at 1341.

⁴⁰ *Id.* at 1342.

⁴¹ *Id.* at 1337.

⁴² 520 U.S. 154 (1997); see *infra* notes 111–137 and accompanying text.

⁴³ *Or. Natural Desert Ass’n*, 312 F. Supp. 2d at 1343.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Notice of Case Reassignment, Or. Natural Desert Ass’n v. U.S. Forest Serv., No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005).

⁴⁷ Motion for Summary Judgment, Or. Natural Desert Ass’n v. U.S. Forest Serv., No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005); Cross Motion for Summary Judgment by Robertson Ranch, Or. Natural Desert Ass’n v. U.S. Forest Serv., No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005).

controverted AOIs were not final agency actions and were therefore not reviewable under the APA.⁴⁸

During the motion hearing, Peter Lacy, ONDA's staff attorney, again argued that the AOIs were final agency actions.⁴⁹ Moreover, Mr. Lacy argued that the decision to challenge the AOIs was reasonable because ONDA's members were concerned about "very specific grazing practices and specific damages within . . . wild and scenic river corridors."⁵⁰ As pertinent to this Note, Mr. Lacy argued that it was sensible to challenge the AOIs "because the AOIs have the most specific terms in them [and] the most specific information and decision making."⁵¹ In other words, ONDA made a strategic choice to challenge the AOIs because the AOIs "are really the things that govern whether ecological values will be degraded [or] banks will be damaged."⁵²

In response to Mr. Lacy's argument that ONDA's choice was strategic, Stephen Odell, counsel for the Service, argued that ONDA was merely challenging the AOIs because the organization had no alternative.⁵³ Mr. Odell charged that ONDA was, in a sense, trying to "pound [the] square peg . . . of the AOIs into the round hole of what is a final agency action under the APA."⁵⁴ Although Mr. Odell acknowledged that the Service is currently "woefully behind in completing NEPA analyses on . . . grazing allotments,"⁵⁵ he nonetheless argued that the AOIs are "derivative documents" and not the result of a "distinct decision-making process."⁵⁶ In other words, apart from the term grazing permit, the AOIs have "no independent legal authority," and, therefore, are not final for the purpose of APA review.⁵⁷

At the end of the hearing, Judge Jones encouraged the parties to work out a stipulated agreement.⁵⁸ When the parties were unable to do so,⁵⁹ Judge Jones denied ONDA's motion for summary judgment and granted in part and denied in part the Service's cross-motion.⁶⁰ The court determined that the AOIs constituted agency actions but reasoned that the AOIs were not final because, under *Bennett v. Spear*, the AOIs did not "alter the legal regime" of the underlying permit.⁶¹ According to the court, a "grazing permit authorizes

⁴⁸ *Or. Natural Desert Ass'n*, 2005 WL 1334459, at *3.

⁴⁹ Motion Hearing Transcript of Proceedings at 26, *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005).

⁵⁰ *Id.*

⁵¹ *Id.* at 27.

⁵² *Id.*

⁵³ *Id.* at 28–29.

⁵⁴ *Id.* at 29.

⁵⁵ *Id.* at 30; *see infra* notes 204–211 and accompanying text (explaining how Congress acted to allow the Service to reissue permits without undertaking NEPA analysis).

⁵⁶ Motion Hearing Transcript of Proceedings, *supra* note 49, at 45.

⁵⁷ *Id.* at 46.

⁵⁸ *Id.* at 109.

⁵⁹ Joint Status Report, *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005).

⁶⁰ *Or. Natural Desert Ass'n*, 2005 WL 1334459, at *12.

⁶¹ *Id.* at *5–*6.

changes and modifications to its basic terms and standards to reflect changes in the law or resource[s];” thus, “It is putting the cart before the horse to say that an AOI changes the legal regime that the Forest Service operates under in administering the grazing permit system.”⁶² In other words, AOIs are “resource management tool[s],” not final agency actions.⁶³ Accordingly, the court dismissed ONDA’s claims for lack of subject matter jurisdiction.⁶⁴ On June 28, 2005, ONDA appealed the district court’s APA jurisdictional ruling to the Ninth Circuit Court of Appeals.⁶⁵

B. *Majority Opinion*

On appeal, ONDA argued that the district court erred when it dismissed ONDA’s APA claims for lack of subject matter jurisdiction.⁶⁶ Specifically, ONDA alleged that AOIs are final agency actions under APA section 704 because they “represent the completion of the [Service’s] annual decision-making process” and because they “have direct legal consequences for, determine the rights and obligations of, and affect the day-to-day operations of, the grazers who sign these AOIs.”⁶⁷ Thus, the district court’s jurisdictional determination was squarely before the Ninth Circuit.⁶⁸ The court proceeded by examining first whether the AOIs were agency actions,⁶⁹ and second, whether issuance of an AOI constitutes action that is final⁷⁰ under the test articulated by

⁶² *Id.* at *9.

⁶³ *Id.*

⁶⁴ *Id.* In a related case involving grazing on the Muderers Creek and Blue Mountain Allotments, Judge Ancer Haggerty denied ONDA’s motion for summary judgment. Following Judge Jones’s lead on the final agency action issue, Judge Haggerty concluded that “the AOIs at issue fail both prongs of the *Bennett* test—they neither mark any consummation of the Forest Service’s decision-making process, nor establish any rights or obligations or create by themselves potential legal consequences.” *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, No. 03-381-HA, 2005 WL 1459328, at *6 (D. Or. June 20, 2005). On appeal, the Ninth Circuit referenced its *Malheur* grazing opinion and held that the district court erred in dismissing ONDA’s claims. *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 202 Fed. App’x 244 (9th Cir. 2006).

⁶⁵ While *ONDA v. USFS* was on appeal, ONDA sued the United States Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act (ESA), alleging that the Biological Opinions (BiOps) issued for grazing in the Malheur National Forest were inadequate to protect threatened steelhead and bull trout. *See* Complaint for Declaratory and Injunctive Relief, *Or. Natural Desert Ass’n v. Lohn*, 485 F. Supp. 2d 1190 (D. Or. 2007) (No. Civ. 06-946-KI). According to the organization, the decision to sue under the ESA was an effort to use “other legal tools to address ongoing grazing damage and to protect salmonid habitat” while the organization pursued the *ONDA v. USFS* appeal. Mac Lacy, *Malheur Escapes on Narrow Jurisdictional Ground*, OR. NATURAL DESERT ASS’N, DESERT RAMBLINGS—THE NEWSLETTER OF THE OREGON NATURAL DESERT ASSOCIATION, Summer 2005. This lawsuit is ongoing.

⁶⁶ Opening Brief of Plaintiff-Appellants at 8, *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977 (9th Cir. 2006) (No. 05-35637).

⁶⁷ *Id.*

⁶⁸ *Or. Natural Desert Ass’n*, 465 F.3d at 979.

⁶⁹ *Id.* at 983.

⁷⁰ *Id.* at 983–89.

the United States Supreme Court in *Bennett v. Spear*.⁷¹

Regarding whether the Service's issuance of the controverted AOIs constituted agency action, the Service argued that AOIs are not agency actions because AOIs are not among the "specific categories defined by the APA."⁷² Specifically, the Service argued that AOIs are not agency actions under *Norton v. Southern Utah Wilderness Alliance*⁷³ because an AOI is not "a rule, order, license, sanction, or relief" under APA section 551.⁷⁴ The court rejected the Service's argument, reasoning that, under APA section 551, a license includes "the whole or a part of an agency permit."⁷⁵ As an AOI is part of the term grazing permit, the court reasoned that an AOI is "properly understood to be a license for purposes of determining whether it is an agency action."⁷⁶

The court then examined whether the Service's issuance of the controverted AOIs constituted a final agency action⁷⁷ under the test articulated in *Bennett v. Spear*.⁷⁸ In *Bennett*, the Supreme Court reasoned that in order for action to be final for purposes of APA review, the action must "mark the 'consummation' of the agency's decisionmaking process" and "be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"⁷⁹ Reasoning in pertinent part that an AOI "functions to start the grazing season" and is the Service's "'last word' before the permit holders begin grazing their livestock," the Ninth Circuit determined that the Service's issuance of the AOIs constituted the consummation of the agency's decision-making process.⁸⁰

After determining that the decision to issue the AOIs was the "last word" before grazing,⁸¹ the court addressed the legal effect of the issuance of AOIs.⁸² Finding fault with the district court's determination that an AOI is not a final agency action "because it does not alter the legal regime of a grazing permit,"⁸³ the Ninth Circuit reasoned that an AOI is a final agency action because the obligations contained in an AOI "have a "'direct and immediate . . . effect on the day-to-day business" of" the permit holder."⁸⁴ In other words, because the "AOI imposes substantial and intricate legal obligations on the permit holder," an AOI is a final agency action subject to judicial review under the APA.⁸⁵

⁷¹ 520 U.S. 154 (1997).

⁷² *Or. Natural Desert Ass'n*, 465 F.3d at 983.

⁷³ 542 U.S. 55, 62 (2004).

⁷⁴ *Or. Natural Desert Ass'n*, 465 F.3d at 982.

⁷⁵ *Id.* at 983 (emphasis omitted).

⁷⁶ *Id.*

⁷⁷ *Id.* at 983–89.

⁷⁸ 520 U.S. 154 (1997).

⁷⁹ *Id.* at 178 (italics omitted).

⁸⁰ *Or. Natural Desert Ass'n*, 465 F.3d at 985.

⁸¹ *Id.*

⁸² *Id.* at 986.

⁸³ *Or. Natural Desert Ass'n*, 2005 WL 1334459, at *6.

⁸⁴ *Or. Natural Desert Ass'n*, 465 F.3d at 990 (quoting *Ukiah Valley Med. Ctr. v. Fed. Trade Comm'n*, 911 F.2d 261, 264 (9th Cir. 1990)).

⁸⁵ *Id.* at 990.

With the requisite finding of finality in place, the court reversed and remanded.⁸⁶

C. *Dissenting Opinion*

Senior Circuit Judge Ferdinand Fernandez responded to the majority's opinion with a scathing dissent, reasoning that AOIs merely implement an earlier determination—the term grazing permit—and, thus, are not final agency actions for the purpose of APA review.⁸⁷ According to Judge Fernandez, the review of day-to-day management decisions “is not contemplated by the APA.”⁸⁸

Fernandez opened his dissent by emphasizing that the final agency actions occurred when the Service issued the term grazing permits on the designated allotments and that the term grazing permits expressly provided for the possibility of cancellation or suspension, as well as a mechanism by which the Service could make periodic “changes and adjustments” to protect the land.⁸⁹ In addition, Judge Fernandez emphasized the relevance of the Service's own characterization of its action as “mere management tools” that implement the permit provisions.⁹⁰ Quoting *City of San Diego v. Whitman*,⁹¹ Judge Fernandez reasoned that the agency's “own characterization” provided “an indication of the nature of the action.”⁹² Acknowledging that the court was not “bound” by the Service's characterization of AOIs, Judge Fernandez urged that the Service's characterization was nonetheless probative.⁹³

The dissent then briefly addressed the *Bennett v. Spear* finality test. After

⁸⁶ Environmental organizations claimed victory when the Ninth Circuit decided *ONDA v. USFS*. According to ONDA, “The Ninth Circuit decision restore[d] the right to participate in public land management decisions that impact key spawning and migratory habitat essential to the survival of these long-revered native trout species.” Mac Lacy, *Victory in Ninth Circuit Preserves Public's Right to Participate*, DESERT RAMBLINGS (Or. Natural Desert Ass'n, Bend, Or.), Winter 2006. Likewise, the Western Watersheds Project claimed that the decision would “enable a whole new opportunity to influence and change for-the-better the administration of public lands ranching on Forest Service lands in seven western states located within the Ninth Circuit's jurisdiction.” Western Watersheds Project, WWP Online Messenger # 121, http://www.westernwatersheds.org/news_media/newsmedia_2006/wwp121_newsmedia.html. On the other hand, the decision was not well-received by ranchers and grazing permit holders. Karen Budd-Falen, counsel for intervenor Oregon Cattlemen's Association, claimed that the decision “gives free rein to every anti-grazing individual and group to sue over every AOI every year, for every permittee on every national forest in the nation.” Ms. Budd-Falen further reasoned, “I think this is a disaster for an industry that cares more for the land than all the environmental groups put together.” Debbie Raney, *Appeals Court Decision has Heavy Impact on Grazing Permit Holders*, BURNS TIMES-HERALD, Nov. 14, 2006 (discussing the Ninth Circuit's decision in *ONDA v. USFS*).

⁸⁷ *Or. Natural Desert Ass'n*, 465 F.3d at 991.

⁸⁸ *Id.*

⁸⁹ *Id.* at 990.

⁹⁰ *Id.*

⁹¹ 242 F.3d 1097 (9th Cir. 2001).

⁹² *Or. Natural Desert Ass'n*, 465 F.3d at 990.

⁹³ *Id.*

noting that, in a sense, “it can be argued that each AOI, no matter how trivially it affects the actual grazing of animals under the permit, is final agency action,”⁹⁴ Judge Fernandez reasoned that a “narrower and more pragmatic approach is required.”⁹⁵ According to Judge Fernandez, although an action may look final “on its face,” if it is “merely implementing an earlier truly final determination, it is not final action for APA review purposes.”⁹⁶ Thus, Judge Fernandez characterized the AOIs as “continuing . . . operations” and noted, in pertinent part, that the Supreme Court has “frowned upon broad programmatic attacks on agency action” because such programmatic attacks place day-to-day agency management firmly in the hands of the “supervising court, rather than the agency.”⁹⁷

The dissent then briefly addressed the practical implications of the majority’s determination that AOIs constitute final agency action.⁹⁸ According to Judge Fernandez,

In pragmatic terms, if every AOI for every permit in every allotment every year is to be open to litigation by ONDA, and others, it is a little difficult to see how the grazing program can continue, if the purpose of the program is to feed animals. They need to eat *now* rather than at the end of some lengthy court process.⁹⁹

After waxing that “what is really afoot is an attack by ONDA on the whole grazing program,”¹⁰⁰ Judge Fernandez cautioned the court from being “ensnared” by ONDA’s “little springe.”¹⁰¹

III. THE ADMINISTRATIVE PROCEDURE ACT’S FINAL AGENCY ACTION REQUIREMENT

This Part discusses the evolution and application of the APA’s final agency action requirement. The first section briefly describes the origin and purpose of the final agency action requirement. The second section examines the United States Supreme Court’s decision, *Bennett v. Spear*, in which the Court established the test for determining finality under APA section 704.

A. Review Under the APA

Even before Congress adopted the Administrative Procedure Act, the Supreme Court relied on a doctrine that only “final” agency actions were reviewable. In *Rochester Telephone Corp. v. United States*,¹⁰² Justice

⁹⁴ *Id.* at 990–91.

⁹⁵ *Id.* at 991.

⁹⁶ *Id.*

⁹⁷ *Id.* (quotation marks and citation omitted).

⁹⁸ *Id.* at 991–92.

⁹⁹ *Id.* (footnote omitted).

¹⁰⁰ *Id.* at 992.

¹⁰¹ *Id.*

¹⁰² 307 U.S. 125 (1939).

Frankfurter explained the origins of this doctrine, noting that the judicial abstention in the case was “merely an application of the traditional criteria for bringing judicial action into play.”¹⁰³ Justice Frankfurter explained,

Partly these [traditional criteria] have been written into Article 3 of the Constitution by what is implied from the grant of ‘judicial power’ to determine ‘Cases’ and ‘Controversies.’ Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby . . . Congress has been loathe to authorize review of interim steps in a proceeding.¹⁰⁴

Thus, as pertinent to this Note, the final agency action requirement existed prior to Congress’s enactment of the APA.

On June 11, 1946, in order to “improve the administration of justice” and to set forth a “simple and standard plan of administrative procedure,”¹⁰⁵ Congress enacted the Administrative Procedure Act.¹⁰⁶ Congress included a finality requirement in section 704 of the APA, which provides that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”¹⁰⁷ Section 704 also provides that “[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”¹⁰⁸

Section 501 of the APA defines “agency action” as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act”;¹⁰⁹ however, the statute does not define finality. Thus, even though the Supreme Court has consistently reasoned that there is a strong presumption of judicial review of administrative action,¹¹⁰ this presumption only operates when the agency action at issue is final. The problem lies, therefore, in determining what exactly constitutes a *final* agency action for the purpose of APA review.

B. Bennett v. Spear

In *Bennett v. Spear*,¹¹¹ a group of ranchers and irrigation districts sued the Fish and Wildlife Service (FWS) and the Secretary of the Interior, challenging the FWS’s biological opinion (BiOp), which concluded that the Klamath Project¹¹² was likely to jeopardize the Lost River and Shortnose Suckers.¹¹³

¹⁰³ *Id.* at 131.

¹⁰⁴ *Id.* (citations omitted).

¹⁰⁵ S. REP. NO. 752, at 187 (1945).

¹⁰⁶ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559, 701-706 (2000)).

¹⁰⁷ 5 U.S.C. § 704.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* § 551(13).

¹¹⁰ *Abbott Labs v. Gardner*, 387 U.S. 136, 140–41 (1967) (“[T]he [APA’s] ‘generous review provisions’ must be given a ‘hospitable’ interpretation.” (citation omitted)).

¹¹¹ 520 U.S. 154 (1997).

¹¹² According to the Court, “The Klamath Project, one of the oldest federal reclamation

Under the Endangered Species Act (ESA), federal agencies must ensure that their actions are not likely to jeopardize a threatened or endangered species or to adversely modify its critical habitat.¹¹⁴ If an agency determines that a proposed action may adversely affect a threatened or endangered species, the agency must consult with the FWS, which provides the agency proposing the project with a BiOp.¹¹⁵ The BiOp guides the implementation of the agency action.¹¹⁶

The district court dismissed the complaint on jurisdictional grounds, concluding that the plaintiffs did not have standing because “the recreational, aesthetic, and commercial interests advanced by plaintiffs do not fall within the zone of interests sought to be protected by ESA.”¹¹⁷ The Ninth Circuit Court of Appeals affirmed, opining that the plaintiffs “failed to assert an interest protected by the ESA,” and, thus, had no standing under the APA.¹¹⁸ The United States Supreme Court granted certiorari and, on review, held that the Ninth Circuit erred in affirming the district court’s dismissal on jurisdictional grounds.¹¹⁹ According to the Supreme Court, the “[p]etitioners’ complaint allege[d] facts sufficient to meet the requirements of Article III standing.”¹²⁰

Pertinent to this Note, however, is the Supreme Court’s discussion regarding whether the controverted BiOp constituted a final agency action under section 704 of the APA. Alleging that the action was not justiciable,¹²¹ the Government argued that the BiOp was not a final agency action because it did not “conclusively determine the manner in which Klamath Project water will be allocated.”¹²² Specifically, the Government claimed, “Whatever the practical likelihood that the [Bureau] would adopt the reasonable and prudent alternatives . . . the Bureau was not legally obligated to do so.”¹²³ Moreover, the Government contended that “[e]ven if the Bureau decided to adopt the higher lake levels . . . nothing in the [BiOp] would constrain the [Bureau’s] discretion as to how the available water should be allocated among potential users.”¹²⁴ In other words, the Government argued that the BiOp was not final because it did not demand a particular result.

In response to the Government’s argument, the Court set forth two conditions that must be met for an action to be deemed final under section 704

schemes, is a series of lakes, rivers, dams, and irrigation canals in northern California and southern Oregon.” *Id.* at 158.

¹¹³ *Id.* at 159.

¹¹⁴ 16 U.S.C. § 1536(a)(2) (2000).

¹¹⁵ 16 U.S.C. § 1536(b).

¹¹⁶ *Id.*

¹¹⁷ *Bennett v. Plenert*, Civ. No. 93-6076-HO, 1993 WL 669429, at *5 (D. Or. Nov. 18, 1993).

¹¹⁸ *Bennett v. Plenert*, 63 F.3d 915, 922 (9th Cir. 1995).

¹¹⁹ *Bennett v. Spear*, 520 U.S. 154, 179 (1997).

¹²⁰ *Id.*

¹²¹ *Id.* at 177.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

for the purpose of APA review. First, the Supreme Court reasoned that “the action must mark the ‘consummation’ of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.”¹²⁵ Second, the Court held that “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”¹²⁶ In other words, the agency action must represent the “consummation” of a process and the agency action must have “legal consequences.”¹²⁷

After noting that it was “uncontested that the first requirement [was] met”—the BiOp marked the consummation of the decisionmaking process—the Court explained how the BiOp met the second requirement: “The [BiOp] and [the] accompanying Incidental Take Statement alter[ed] the legal regime to which the action agency [wa]s subject, authorizing it to take the endangered species if (but only if) it complie[d] with the prescribed conditions.”¹²⁸ Thus, the BiOp was a final agency action because it affected the rights of the action agency; the agency charged with “authoriz[ing]” the action.¹²⁹

The Court went on to distinguish the agency action at issue from the agency actions in the cases upon which the Government relied. For instance, the determination that there was no final agency action in *Franklin v. Massachusetts*¹³⁰ was “premised on the observation that the report carried ‘no direct consequences’ and served ‘more like a tentative recommendation than a final and binding determination.’”¹³¹ Likewise, the lack of a final agency action in *Dalton v. Specter*¹³² “followed from the fact that the recommendations were in no way binding on the President, who had absolute discretion to accept or reject them.”¹³³ Thus, according to the Supreme Court, the BiOp at issue in the case was distinguishable from the actions the Government cited because the BiOp had “direct and appreciable legal consequences” on the agency action.¹³⁴

After determining that the BiOp was a final agency action for the purpose of APA review, the Court concluded that the Ninth Circuit erred in dismissing petitioners’ claims, reversed the Ninth Circuit’s judgment, and remanded for

¹²⁵ *Id.* at 177–78 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

¹²⁶ *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

¹²⁷ *Bennett*, 520 U.S. at 178.

¹²⁸ *Id.*

¹²⁹ 16 U.S.C. § 1536(a)(2) (2000) (“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 . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat”)

¹³⁰ 505 U.S. 788 (1992) (holding that report by Secretary of Commerce tabulating results of census was not a final agency action).

¹³¹ *Bennett*, 520 U.S. at 178 (citation omitted).

¹³² 511 U.S. 462 (1994) (holding that base closure recommendations submitted to President by Secretary of Defense were not final agency actions).

¹³³ *Bennett*, 520 U.S. at 178.

¹³⁴ *Id.*

further proceedings.¹³⁵ In sum, under the Supreme Court's holding in *Bennett v. Spear*, an agency action becomes final when the agency has consummated its decision-making process and when rights and obligations are fixed.¹³⁶ Accordingly, to constitute a final agency action for the purpose of APA review, an agency decision cannot be merely "tentative or interlocutory."¹³⁷

IV. THE IMPLICATIONS OF *OREGON NATURAL DESERT ASSOCIATION V. UNITED STATES FOREST SERVICE*

Although the Ninth Circuit grounded its final agency action determination in *ONDA v. USFS* on the final agency action test espoused in *Bennett v. Spear*, the following Part argues that the court's holding is fundamentally flawed. First, the court's decision is too formalistic. In other words, not all actions that appear final are "final" for the purpose of APA review. Second, the court's holding sanctions broad, programmatic attacks on agency actions contrary to United States Supreme Court direction. Third, the decision ignores the agency's own characterization of its action despite the Ninth Circuit's guidance. Finally, the decision is not practical, given the realities of the public lands grazing program.

A. *An Exercise in Formalism*

The first problem with the court's holding in *ONDA v. USFS* is that the decision is too formalistic—read literally, the majority's holding would subject every administrative decision to judicial review. In his dissent, Judge Fernandez conceded that "it can be argued that each AOI, no matter how trivially it affects the actual grazing of animals under the permit, is final agency action."¹³⁸ He explained, "Surely, in some sense it is at least a temporary consummation of the [Service's] process of deciding . . . what steps should be taken to protect the resources while the animals graze upon the land."¹³⁹ Nonetheless, Judge Fernandez warned that such a reading is "too formalistic because, in a sense, every step by an agency or by a permittee is the result of a then final decision and can have legal, as well as physical, consequences."¹⁴⁰ Thus, according to Judge Fernandez, a "more pragmatic approach" is

¹³⁵ *Id.* at 179.

¹³⁶ *Id.*; see also *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 314 F.3d 1146, 1149–50 (9th Cir. 2003) (holding that Forest Service's trail maintenance did not constitute final agency action under section 704 of the APA because trail maintenance "does not 'mark the consummation of the [Forest Service's] decision making process'" (quoting *Bennett*, 520 U.S. at 178)), *vacated on other grounds by Blue Ribbon Coal, Inc. v. Mont. Wilderness Ass'n*, 542 U.S. 917 (2004).

¹³⁷ *Bennett*, 520 U.S. at 178; see also *Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997) (holding that Army's decision to commence trial burns was not final agency action because it merely implemented an earlier truly final agency determination).

¹³⁸ *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 990–91 (9th Cir. 2006).

¹³⁹ *Id.* at 991.

¹⁴⁰ *Id.*

necessary.¹⁴¹

This pragmatic approach is apparent, first of all, in the text of the APA itself. Section 704 provides that “final agency action” is subject to judicial review, but section 704 also provides that “preliminary, procedural, or intermediate agency action[s] or ruling[s]” are “subject to review on the review of the *final agency action*.”¹⁴² Thus, although it could be argued, as Judge Fernandez reasons, that intermediate agency actions such as AOIs constitute final agency actions, the statute expressly provides that preliminary or intermediate actions are subject to review on the final agency action.

Judge Fernandez’s “more pragmatic approach” is also apparent in earlier Supreme Court cases. For example, in *Lujan v. National Wildlife Federation*,¹⁴³ the Court held that the Bureau of Land Management’s (BLM’s) land withdrawal review program was not final agency action because it did not have an “actual or immediately threatened effect.”¹⁴⁴ There, the National Wildlife Federation (Federation) sued the Secretary of the Interior, challenging the BLM’s land withdrawal review program.¹⁴⁵ Alleging that “violation of the law [was] rampant within [the land withdrawal review program],” the Federation cited the BLM’s “failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, [and] failure to provide adequate environmental impact statements.”¹⁴⁶ Generally, the Federation challenged the reclassification of withdrawn lands and the return of other withdrawn lands to the public domain, claiming that such decisions would open lands to mining.¹⁴⁷

Acknowledging that the abuses cited by the Federation might be true, the Court nonetheless rejected the Federation’s argument, reasoning that the Federation could not “seek wholesale improvement of [the] program by court decree, rather than in the offices of the Department or the halls of Congress”¹⁴⁸ According to the Court, the Court intervenes “in the administration of the laws only when, and to the extent that, a specific ‘final agency action’ has an actual or immediately threatened effect.”¹⁴⁹ In other words, despite the potential abuses cited by the Federation, the Supreme Court refrained from acting in the absence of a truly final agency action.¹⁵⁰

¹⁴¹ *Id.*

¹⁴² 5 U.S.C. § 704 (2000) (emphasis added).

¹⁴³ 497 U.S. 871 (1990).

¹⁴⁴ *Id.* at 894.

¹⁴⁵ *Id.* at 875.

¹⁴⁶ *Id.* at 891.

¹⁴⁷ *Id.* at 879.

¹⁴⁸ *Id.* at 891 (emphasis omitted).

¹⁴⁹ *Id.* at 894 (quoting *Toilet Goods Ass’n, Inc. v. Gardner*, 387 U.S. 158, 162 (1967)).

¹⁵⁰ *Id.* at 894. In *Lujan*, the Court acknowledged that the approach adopted by the Court was “understandably frustrating to an organization . . . which has as its objective across-the-board protection of . . . wildlife and the streams and forests that support it.” Nonetheless, the Court explained that its approach “is the traditional, and remains the normal, mode of operation of the courts.” *Id.*

A more pragmatic approach is also apparent in prior Ninth Circuit decisions. In *Montana Wilderness Association v. United States Forest Service*,¹⁵¹ for example, the Montana Wilderness Association¹⁵² sued the Forest Service, alleging that the Service violated the Montana Wilderness Study Act of 1977¹⁵³ “by failing to maintain seven Study Areas’ wilderness character and potential for wilderness designation when it ‘allow[ed], encourag[ed], and/or fail[ed] to act to prevent motorized vehicle use of [the Study Areas].”¹⁵⁴ Specifically, the Montana Wilderness Association alleged that the Service’s “plastic pipe installation, new bridge construction, and reconstruction projects upgrading trails” violated the Montana Wilderness Study Act.¹⁵⁵

To establish subject matter jurisdiction, the Wilderness Association had to “demonstrate that the [Service’s] maintenance activities constitute[d] final agency action.”¹⁵⁶ The Association failed to do so; the Ninth Circuit held that the maintenance work at issue did not constitute final agency action under section 704 of the APA.¹⁵⁷ Applying the final agency action test articulated by the Supreme Court in *Bennett v. Spear*, the Ninth Circuit reasoned that the Service’s maintenance activities merely “implement[ed] its travel management and forest plans.”¹⁵⁸ Moreover, according to the court, “Congress intended forest and travel management plans to be the consummation of the decision making process with regard to trails allowing off-road vehicle access.”¹⁵⁹ Thus, the “maintenance of trails . . . [was] merely an interim aspect of the planning process, not the consummation of it.”¹⁶⁰ Accordingly, the district court erred when it reasoned that the maintenance at issue was final agency action,¹⁶¹ and the Ninth Circuit reversed that portion of the district court’s order.¹⁶²

Other courts of appeals follow a similar pragmatic approach. In *Chemical Weapons Working Group, Inc. v. U.S. Department of the Army*,¹⁶³ for example, a group of environmental plaintiffs sued the Department of the Army (Department), challenging the Department’s decision to operate its incinerators to dispose of chemical weapons. The Tenth Circuit rejected the environmental organizations’ contention that the Department’s decision to “commence trial

¹⁵¹ 314 F.3d 1146 (9th Cir. 2003), *vacated on other grounds by* Blue Ribbon Coal., Inc. v. Mont. Wilderness Ass’n, 542 U.S. 917 (2004).

¹⁵² The Montana Wilderness Association is a non-profit organization committed to “[p]rotecting Montana’s wilderness heritage, quiet beauty, and outdoor traditions, now and for future generations.” Montana Wilderness Association, The Montana Wilderness Association Mission, <http://www.wildmontana.org/mwamission.html>.

¹⁵³ Pub. L. No. 95–150, 91 Stat. 1243 (1977).

¹⁵⁴ *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 314 F.3d 1146, 1149 (9th Cir. 2003).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1150.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ 111 F.3d 1485 (10th Cir. 1997).

burns . . . qualifies as final agency action.”¹⁶⁴ There, the court reasoned, “Plaintiffs provide no indication that the Army . . . ever revisited the question of how precisely it planned to destroy the chemical weapons . . . since its 1989 Final Environmental Impact Statement.”¹⁶⁵ Accordingly, the Department’s decision to burn the chemical weapons was not a final agency action because the Department was merely implementing earlier truly final agency action.¹⁶⁶

Like the alleged abuses inherent in the land withdrawal review program at issue in *Lujan*, the trail maintenance at issue in *Montana Wilderness Association*, and the incineration of chemical weapons at issue in *Chemical Weapons Working Group*, the AOIs at issue in *ONDA v. USFS* are merely implementing earlier truly final agency actions—the permits themselves. Accordingly, the AOIs are not final for the purpose of APA review. As Judge Fernandez explained, “[T]he AOIs are merely a way of conducting the grazing program that was already authorized and decided upon when the permits were issued.”¹⁶⁷ In other words, “The AOIs reflect nothing more sophisticated or final than the ‘continuing (and thus constantly changing) operations’ of the Forest Service in reviewing the conditions of the land and its resources, and assuring that the mandated grazing programs go forward without undue disruption of the resource itself.”¹⁶⁸ Because the AOIs are “intermediate” or “preliminary” actions under section 704 of the APA, the Ninth Circuit erred when it determined that AOIs are final for the purpose of APA review.

B. Sanctioning Broad Programmatic Attacks on Agency Action

The second flaw in the court’s holding in *ONDA v. USFS* is that the decision sanctions broad programmatic attacks on agency action. In his dissenting opinion, Judge Fernandez noted that “the Supreme Court has frowned upon broad programmatic attacks on agency action” because such attacks “empower courts ‘to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.’”¹⁶⁹ In other words, courts are not the appropriate venue in which to attack the day-to-day management activities of the federal agencies.¹⁷⁰

Judge Fernandez based his criticism of the court’s intrusion into the

¹⁶⁴ *Id.* at 1494.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 991 (9th Cir. 2006) (Fernandez, J., dissenting).

¹⁶⁸ *Id.* (quoting *Lujan*, 497 U.S. at 890).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*; see also *Natural Res. Def. Counsel, Inc. v. Hodel*, 624 F. Supp. 1045, 1062 (D. Nev. 1985) (noting that Article III judges are increasingly called upon to become “forestmasters, roadmasters, schoolmasters, fishmasters, prisonmasters, watermasters, and the like” and declining to act as “the rangemaster for about 700,000 acres of federal lands in western Nevada” (citations omitted)).

Service's day-to-day management activities on *Norton v. Southern Utah Wilderness Alliance (SUWA)*,¹⁷¹ in which the Supreme Court cautioned courts to "avoid judicial entanglement in abstract policy disagreements."¹⁷² In *SUWA*, environmental groups sued the Secretary of the Interior, alleging that the BLM had failed to manage off-road vehicles (ORVs) in wilderness study areas (WSAs).¹⁷³ As pertinent to this Note, in deciding whether the federal court's authority to "compel agency action unlawfully withheld or unreasonably delayed"¹⁷⁴ under section 706(1) of the APA extended to the BLM's "stewardship of public lands," the Court discussed the purpose of APA limitations on judicial review.¹⁷⁵

Specifically, in response to *SUWA*'s argument that the nonimpairment mandate contained in section 1782 of the Federal Land Policy and Management Act (FLPMA) requires the total exclusion of ORVs from wilderness study areas, the Court reasoned, "The principal purpose of the APA limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue . . . judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve."¹⁷⁶ Further, the Court noted,

If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into the day-to-day agency management.¹⁷⁷

In other words, the Supreme Court concluded that "pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives" is not the purpose of judicial review under the APA.¹⁷⁸

Like the Southern Utah Wilderness Association, who sought wholesale improvement of the BLM's management of WSAs, ONDA sought wholesale improvement of the grazing program via its efforts to stop the "ongoing, systematic, and chronic violation" of the comprehensive river management plans required under the WSRA.¹⁷⁹ Thus, contrary to Supreme Court direction,

¹⁷¹ 542 U.S. 55 (2004).

¹⁷² *Id.* at 66.

¹⁷³ *Id.* at 60–61. Under FLPMA, the Secretary of the Interior is required to manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c) (2000). In *SUWA*, the plaintiffs alleged that the BLM had violated its nonimpairment obligation under section 1782 by allowing ORV use in certain WSAs. *SUWA*, 542 U.S. at 60–61. The plaintiffs claimed that the agency unlawfully withheld or unreasonably delayed acting on its nonimpairment obligation. *Id.*

¹⁷⁴ 5 U.S.C. § 706(1) (2000).

¹⁷⁵ *SUWA*, 542 U.S. at 57–58.

¹⁷⁶ *Id.* at 66.

¹⁷⁷ *Id.* at 66–67.

¹⁷⁸ *Id.* at 67.

¹⁷⁹ Second Amended Complaint, *supra* note 13, at 3.

the Ninth Circuit has effectively sanctioned ONDA's efforts to obtain "pervasive oversight" by the courts over the "manner and pace" of the Forest Service's compliance with its statutory mandates.¹⁸⁰ Accordingly, the Ninth Circuit erred in finding that management tools such as AOIs constitute final agency action because such judicial "rangemaster[ing]"¹⁸¹ is not contemplated by the APA.

C. Failing to Look at the Agency's Characterization

The third flaw in the court's holding in *ONDA v. USFS* is that the court failed to look at the agency's characterization of its action. In his dissent, Judge Fernandez discussed the fact that ONDA characterizes AOIs as final agency actions, while the Forest Service characterizes AOIs as "mere management tools" which "implement the permits themselves."¹⁸² After considering which of the two characterizations was correct, Judge Fernandez reasoned that he "[could not] ignore the fact that the Forest Service itself believes that all it is doing is implementing the permit provisions."¹⁸³ After first recognizing that courts are not shackled to the agency's interpretation of its action, Judge Fernandez nonetheless concluded that the Service's characterization was instructive.¹⁸⁴

The Ninth Circuit has previously considered the agency's characterization of its action in determining whether an action constitutes a final agency action under section 704 of the APA. In *City of San Diego v. Whitman*,¹⁸⁵ for example, the City of San Diego (the City) sued the Environmental Protection Agency (EPA), alleging that a letter written by the EPA violated the Ocean Pollution Reduction Act (OPRA) because the letter "stated that [the EPA] would apply the provisions of the [OPRA] to the City's as-yet-unfiled application for renewal of a modified National Pollution Discharge Elimination System ("NPDES") permit."¹⁸⁶ According to the City, the letter violated OPRA because Congress did not intend for OPRA to govern applications for renewal.¹⁸⁷

As pertinent to *ONDA v. USFS*, the question before the court in *City of San Diego v. Whitman* was whether the EPA letter constituted a final agency action.¹⁸⁸ In the letter, the EPA noted,

If the City bases its application on its own interpretation of the applicability of OPRA conditions, the City could raise the OPRA issue in an appeal This letter, however, cannot constitute "final agency

¹⁸⁰ *SUWA*, 542 U.S. at 67.

¹⁸¹ *See* *Natural Res. Def. Counsel, Inc. v. Hodel*, 624 F. Supp. 1045, 1062 (D. Nev. 1985).

¹⁸² *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 990 (9th Cir. 2006).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 242 F.3d 1097 (9th Cir. 2001).

¹⁸⁶ *Id.* at 1098.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1101.

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action” for purposes of obtaining judicial review. Final agency action occurs upon completion of the permit appeal process¹⁸⁹

Reasoning that the EPA’s characterization of its own action was instructive,¹⁹⁰ the court determined that the EPA letter failed to satisfy either of the *Bennett v. Spear* requirements for final agency action.¹⁹¹ Thus, the letter did not constitute final agency action.¹⁹²

As in *San Diego*, in *ONDA v. USFS*, the agency’s characterization of its own action is instructive. The controverted AOIs provide:

The Annual Operation 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 your management and vegetative objectives for each allotment. All requirements of your Term Grazing Permit remain in force, unless specifically noted in the AOI.¹⁹³

Further, the Forest Service Manual provides that AOIs are to prescribe “the action that implements management decisions for the current year.”¹⁹⁴ Thus, before litigation began, the Forest Service characterized the AOIs as documents implementing prior decisions, not as products of a distinct decision-making process. Accordingly, even though an agency’s characterization of its own action is not determinative, the Ninth Circuit erred when it failed to give weight to the Service’s characterization of AOIs.

D. An Unworkable Formula

Finally, the Ninth Circuit’s holding in *ONDA v. USFS* is flawed because construing AOIs as final agency actions subject to judicial review under the APA is unworkable. As Judge Fernandez asserted in his dissent,

In pragmatic terms, if every AOI for every permit in every allotment every year is to be open to litigation by *ONDA*, and others, it is a little difficult to see how the grazing program can continue, if the purpose of the program is to feed animals. They need to eat now rather than at the

¹⁸⁹ *Id.* at 1100.

¹⁹⁰ *Id.* at 1101.

¹⁹¹ *See supra* notes 111–137 and accompanying text.

¹⁹² *See also* *Blincoe v. Fed. Aviation Admin.*, 37 F.3d 462, 464 (9th Cir. 1994) (holding that agency’s characterization of its action was relevant in determining whether a letter was a final resolution of plaintiff’s claims where letter noted that determination was “informal finding” and was issued “in an effort to informally resolve the alleged discriminatory policy”) (emphasis omitted).

¹⁹³ Administrative Record at S2752 (on file with author).

¹⁹⁴ U. S. FOREST SERV., FOREST SERVICE MANUAL § 2214.2 (1990). The Forest Service Manual “contain[s] legal authorities, responsibilities, delegations, and general instruction and direction needed on a continuous basis by Forest Service officers at more than one unit to plan and execute programs.” 36 C.F.R. § 216.2 (2007). The Manual is issued by the national headquarters and is “supplemented, as necessary, by Forest Service field offices.” *Id.* However, supplements “are applicable only within the Forest Service organizational jurisdiction for which they are issued.” *Id.*

end of some lengthy court process.¹⁹⁵

In other words, if AOIs are indeed final agency actions and therefore subject to judicial review, the agency is stripped of its ability to carry out its statutory obligations.

Stephen Odell, counsel for the Service, raised a similar point during oral argument on the parties' cross-motions for summary judgment, stating,

We're talking about literally hundreds of head of cattle on thousands of acres across the national forest, and we're talking about live and mobile animals, and we're talking about dynamic variables like weather and other wildlife that also graze these lands. And so, therefore, there has to be some flexibility built in for the Forest Service to work with the permittee cooperatively to manage these allotments in a way that meets the legal standards.¹⁹⁶

Thus, according to the Service, in order to manage its grazing program, it must retain the flexibility to modify term grazing permits on an ongoing basis without going through a formal permit modification process.¹⁹⁷

The Service's rationale seems reasonable. Given the number of permittees and the unpredictability of range conditions, flexibility is not only desirable, it appears necessary. On the Malheur National Forest, AOIs provide this type of flexibility only if exempt from NEPA review. In application, AOIs are used "to set objectives, implement utilization standards, and modify grazing systems (if necessary) to meet . . . management and vegetative objectives for each allotment."¹⁹⁸ For example, AOIs direct stock rotation, list previous monitoring deficiencies, catalog move triggers, and provide for allowable use standards based on resource damage.¹⁹⁹ Accordingly, the Service uses the AOIs as management tools, which function "in addition to" the term grazing permits to help the Service and the permittees to meet the applicable legal standards.²⁰⁰

Without management tools such as AOIs, it is indeed difficult to see how the Service could modify grazing permits to meet its management and

¹⁹⁵ Or. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 991-92 (9th Cir. 2006) (citations and emphasis omitted).

¹⁹⁶ Motion Hearing Transcript of Proceedings, *supra* note 49, at 42-43.

¹⁹⁷ Intervenor-Defendant Oregon Cattlemen's Association (OCA) echoed Judge Fernandez and Mr. Odell's sentiments throughout the litigation. After intervening on behalf of the grazing permittees whose grazing permits and AOIs were contested in the litigation, the OCA argued that the relief ONDA requested "would destroy the ranches and livelihoods of the OCA members dependent upon the use of their allotments and term grazing permits." Or. Cattlemen's Ass'n, et al. Intervenor-Defendant-Appellees' Brief on Appeal at 2 n.1, Or. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006). In its Ninth Circuit brief, the OCA cited Department of Agriculture statistics, which demonstrate that, in 2004, the Department was responsible for 9,000 active grazing permits. *Id.* at 44 n.17. After citing this statistic, the OCA warned: "If th[e] Court determines that AOIs are final agency action, it will create 9,000 more opportunities for environmental groups to challenge the policy of grazing per year." *Id.*

¹⁹⁸ Administrative Record at S2762 (on file with author).

¹⁹⁹ *Id.* at S2762-63.

²⁰⁰ *Id.* at S2762.

vegetative objectives. Given that the condition of the range changes from year to year, grazing permits issued every ten years cannot possibly account for the variability, and it would be overly burdensome to require the Service to issue grazing permits on an annual or bi-annual basis because environmental analysis under NEPA can take years. Thus, in order to feed the animals now “rather than at the end of some lengthy court process,”²⁰¹ some measure of flexibility is required. AOIs provide that flexibility.

V. ONDA'S LAST RESORT OR ONDA'S "LITTLE SPRINGE"

In his dissent, Judge Fernandez speculated that, “what is really afoot is an attack by ONDA on the whole grazing program,”²⁰² and chided the majority that it should not “be ensnared by ONDA’s little springe.”²⁰³ This Part argues that ONDA, facing meager statutory means to challenge the public lands grazing program, convinced the Ninth Circuit that AOIs were final for the purpose of APA review. Unfortunately, a sympathetic Ninth Circuit created a statutory hook that will enable ONDA and others to litigate the vast majority of annual grazing decisions and potentially hamper rangeland objectives nationwide.

A. *Term Grazing Permits*

To take a step back, the Service is admittedly behind on its NEPA mandated environmental analysis of the grazing program on the Malheur National Forest, hampering ONDA’s efforts to challenge what it sees as the broad failings of the public land grazing program. In 1995, Congress passed section 504 of the Rescissions Act,²⁰⁴ which required the Forest Service to establish and adhere to a schedule for completing NEPA analyses on allotments in the Malheur National Forest.²⁰⁵ The Rescissions Act provided that the analyses would be completed by 2010.²⁰⁶

In an effort to protect grazing interests, however, Congress passed a resolution in 2003 that directed the Secretary of Agriculture to: (1) renew those term grazing permits that expired prior to or during 2003 under the same terms and conditions as the previous permits and (2) conduct NEPA analysis when

²⁰¹ *Or. Natural Desert Ass’n*, 465 F.3d at 992.

²⁰² *Id.*

²⁰³ *Id.* A springe is a “noose fastened to an elastic body and drawn close with a sudden spring to catch a bird or other animal.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2210 (1986).

²⁰⁴ Pub. L. No. 104-19, 109 Stat. 194 (1995).

²⁰⁵ 109 Stat. at 212. According to Tom Thompson, Deputy Chief of the National Forest System, the Rescissions Act was necessary because the Forest Service “faced a daunting challenge in 1995 to complete the NEPA process on 6,886 allotments, with approximately ½ of [the] Forest Service grazing permits due to expire.” Statement of Tom Thompson, *supra* note 4, at 2.

²⁰⁶ Pub. L. No. 104-19, 109 Stat. 194 (1995).

the agency is able to accomplish the analysis.²⁰⁷ Thus, the terms and conditions contained in existing grazing permits were to remain in place until the Secretary completed the required NEPA analysis on the allotments attached to those permits. Congress passed a similar resolution in 2004, directing the Secretary to renew grazing permits set to expire between 2004 and 2008.²⁰⁸

By allowing the Service to continue to push back the mandated environmental analyses on its grazing allotments, Congress has undoubtedly made it more difficult for environmental groups to challenge environmental harms caused by grazing in the Malheur National Forest. In fact, during oral arguments before the district court in *ONDA v. USFS*, counsel for the Service expressly acknowledged that “the Forest Service is woefully behind in completing NEPA analysis on these grazing allotments.”²⁰⁹ And while the Service contends that it is making progress on its NEPA analyses of grazing allotments,²¹⁰ the measured pace leaves environmental plaintiffs with few options. Because the Service has, for the last decade, reissued many permits under the same terms and conditions, Congress has effectively prevented environmental organizations like ONDA from suing the Service for environmental harms arising under the public lands grazing program. In other words, as ONDA’s Mr. Lacy explained during oral arguments, “[T]here is no NEPA decision for the plaintiffs to challenge . . . and so that leaves [environmental plaintiffs] logically with the AOIs.”²¹¹

B. Allotment Management Plans

The other problem for environmental plaintiffs is that many of the allotments along the wild and scenic river corridors of the Malheur and North Fork Malheur either do not have AMPs²¹² or the AMPs are outdated. Under FLPMA, “All permits and leases for domestic livestock grazing . . . may incorporate an [AMP] developed by the Secretary concerned.”²¹³ If developed, the AMPs are created in “consultation, cooperation, and coordination with . . . the interested public,”²¹⁴ are “tailored to the specific range condition of the area,”²¹⁵ and are “reviewed on a periodic basis to determine whether [the AMPs] have been effective in improving the range condition of the lands

²⁰⁷ Pub. L. No. 108-7, 117 Stat. 11, 276 (2003).

²⁰⁸ Pub. L. No. 108-108, 117 Stat. 1241, 1307 (2003).

²⁰⁹ Motion Hearing Transcript of Proceedings, *supra* note 49, at 30.

²¹⁰ *See, e.g.*, Statement of Tom Thompson, *supra* note 4, at 2 (noting that, “As of February 2004, approximately 2,300 allotments have NEPA analysis completed” and that the “Service remains committed to completing the environmental analysis on the remaining allotments by the 2010 deadline.”).

²¹¹ Motion Hearing Transcript of Proceedings, *supra* note 49, at 26.

²¹² An allotment management plan, or AMP, is a “documented program developed as an activity plan . . . that focuses on, and contains the necessary instructions for, the management of livestock grazing on specified public lands to meet resource condition, sustained yield, multiple use, economic and other objectives.” 43 C.F.R. § 4100.0-5 (2006).

²¹³ 43 U.S.C. § 1752(d) (2000).

²¹⁴ 43 C.F.R. § 4120.2(a) (2006).

²¹⁵ 43 U.S.C. § 1752(d) (2000).

involved.”²¹⁶ As AMPs constitute final agency actions under the APA, if the Service had developed AMPs for allotments along the Malheur and North Fork Malheur, it would have given ONDA both an opportunity to participate in setting grazing terms and conditions and a jurisdictional hook to challenge grazing practices.

Although AMPs arguably provide environmental plaintiffs an additional opportunity to participate in and, if necessary, to litigate the terms and conditions of grazing on public lands, FLPMA merely provides that term grazing permits “*may incorporate* an allotment management plan.”²¹⁷ Thus, although most of the allotments at issue in *ONDA v. USFS* do not have AMPs, Congress does not require the Service to develop AMPs for every allotment on the Malheur National Forest.²¹⁸ Accordingly, because the Service is not required to develop AMPs, as Mr. Lacy aptly argued before the district court, “AMPs are out of the question for a legal challenge, because either they don’t exist or occurred 20 years or more ago”²¹⁹

Although Congress has made it more difficult for environmental organizations to sue the Service over environmental harms related to public lands grazing by renewing term grazing permits with the same terms and conditions and by allowing the Service to authorize grazing without current AMPs, those facts do not change the APA’s section 704 final agency action requirement. As Service counsel Mr. Odell explained to the district court, “[W]hile the plaintiffs may not like what Congress has done with respect to the issue of judicial review concerning grazing management on allotments pending the completion of the NEPA analyses . . . the reality is [that] Congress has spoken to the question”²²⁰ In other words, Congress’s act of foreclosing judicial review on term grazing permits and failing to require the Forest Service to issue AMPs on every allotment does not somehow transform AOIs into final agency actions for the purpose of APA review.

VI. CONCLUSION

Given the backlog of NEPA analyses, along with outdated or nonexistent AMPs, it is not surprising that environmental groups like ONDA attempt, as counsel for the Service suggested during oral argument, to “pound [a] square peg . . . into [a] round hole.”²²¹ In the context of public lands grazing, it is easy to sympathize with organizations that are seeking to halt what they characterize as the “ongoing, systematic, and chronic violation” of the applicable legal standards.²²² Like other organizations concerned about the environmental impacts of public lands grazing, ONDA is frustrated because, in most cases

²¹⁶ *Id.*

²¹⁷ *Id.* (emphasis added).

²¹⁸ *Id.*

²¹⁹ Motion Hearing Transcript of Proceedings, *supra* note 49, at 26.

²²⁰ *Id.* at 29.

²²¹ *Id.*

²²² Second Amended Complaint, *supra* note 13, at 3.

along the Malheur River, the organization cannot challenge the Forest's LRMP, the allotment's AMP, or the term grazing permit itself. And while that fact reasonably troubles those interested in conserving the wild and scenic river corridors in the Malheur National Forest, as this Note has argued, the APA simply does not sanction the sort of broad, programmatic challenges to agency action that the Ninth Circuit upheld in *ONDA v. USFS*. Further, the fact that ONDA was forced to challenge the AOIs does not transform AOIs into final agency actions.

Contrary to the Ninth Circuit's holding that AOIs are "discrete, site-specific action[s] representing the Forest Service's last word from which binding obligations flow,"²²³ AOIs are not final agency actions under section 704 of the APA. Instead, AOIs are properly understood as management tools that merely operate to implement the provisions contained in the term grazing permits. To conclude otherwise is, as Judge Fernandez reasoned, far too formalistic. Moreover, in the context of public lands grazing, allowing environmental plaintiffs to challenge "every AOI for every permit in every allotment every year"²²⁴ is ultimately unworkable.

But even if the Ninth Circuit panel is correct in its determination that AOIs constitute final agency actions under section 704 of the APA, it is difficult to see how the ability to litigate every AOI on every allotment every year is more than a fraction of a step toward the goal that ONDA is seeking. Perhaps ONDA views the Ninth Circuit's determination as a tactical victory, but if the Service is, as ONDA alleges, truly "engaged in the ongoing, systematic, and chronic violation of the standards and guidelines established a decade ago in the Malheur and North Fork Malheur Wild and Scenic River comprehensive management plans,"²²⁵ attempting to stop these chronic violations and halt grazing one AOI at a time does little to alter the current regulatory regime.

More importantly, ONDA's choice to challenge the AOIs appears unwise as the Service is not statutorily required to issue AOIs within the Malheur National Forest. Because AOIs are not mandatory, it is unclear whether a court decision setting aside the controverted AOIs could affect the grazing authorized by the underlying term grazing permit. Accordingly, if ONDA hopes to prohibit "livestock grazing within the Malheur and North Fork Malheur wild and scenic river corridors, until such time as the corridors have recovered and reduced grazing levels are set that will satisfy the mandatory standards and guidelines,"²²⁶ perhaps the organization would be better served by pursuing its current Malheur grazing case involving alleged violations under the ESA.²²⁷

In conclusion, the Ninth Circuit panel erred in its application of

²²³ *Or. Natural Desert Ass'n*, 465 F.3d at 990.

²²⁴ *Id.* at 991 (Fernandez, J., dissenting).

²²⁵ Second Amended Complaint, *supra* note 13, at 3.

²²⁶ *Id.* at 2.

²²⁷ See *supra* note 65 (describing ONDA's challenge to the Biological Opinions on the Malheur grazing program). Although ONDA's ESA case is ongoing, there is a possibility that it will be dismissed as moot. Judge King heard oral arguments on the government's motion to dismiss on February 2, 2007. The parties are currently awaiting the judge's ruling.

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section 704 of the APA when it determined that AOIs were final agency actions for the purpose of APA judicial review. Despite its sympathy for the well-intentioned plaintiffs, the panel should have abided by the requirements of section 704 of the APA and affirmed the holding of the district court. Because the APA's final agency action requirement is necessary both to preserve judicial resources and to provide the agency the necessary flexibility to carry out its day-to-day duties and to work out compliance with its statutory mandates, reviewing courts must hold fast to the finality requirement. By doing so, the courts will carry on a long tradition of requiring finality before intruding upon management of the administrative agencies²²⁸ and will, more importantly, abide by the applicable legal standards.

²²⁸ See *supra* notes 102–110 and accompanying text.