

**FOR PUBLICATION**

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

OREGON NATURAL DESERT  
ASSOCIATION; CENTER FOR  
BIOLOGICAL DIVERSITY,  
*Plaintiffs-Appellants,*

v.

UNITED STATES FOREST SERVICE;  
ROGER W. WILLIAMS, Malheur  
National Forest Supervisor,  
*Defendants-Appellees,*

and

JEFF HUSSEY; SHERRI HUSSEY;  
MARK JOYCE; WENDY L. JOYCE;  
ANTHONY W. JOYCE; KATHERINE  
JOYCE; J&M COOMBS LLC; CHARLES  
DUNTEN; DARWIN DUNTEN; JOHN  
AHMANN; JUDY AHMANN; ELDER  
RANCH, INC.; JOSEPH CRONIN; GAY  
CRONIN; NORMAN ENGERBERG;  
JULIEANN ENGERBERG,  
*Intervenor-Defendants-Appellees.*

No. 18-35514

D.C. No.  
3:03-cv-00213-  
PK

OPINION

Appeal from the United States District Court  
for the District of Oregon  
Michael W. Mosman, District Judge, Presiding

Argued and Submitted February 6, 2020  
Seattle, Washington

Filed May 1, 2020

Before: MILAN D. SMITH, JR. and N. RANDY SMITH,  
Circuit Judges, and JOHN R. TUNHEIM,\* District Judge.

Opinion by Judge Milan D. Smith, Jr.

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### **SUMMARY\*\***

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#### **Environmental Law / Grazing Permits**

The panel affirmed the district court's grant of summary judgment for the U.S. Forest Service and intervenors in an action challenging the Forest Service's issuance of grazing authorizations between 2006 and 2015 on seven allotments in the Malheur National Forest.

The panel held that plaintiffs' challenge to the contested grazing authorizations was justiciable. Specifically, the panel held that plaintiffs' challenge was sufficiently ripe where they challenged a discrete agency action that was harmful to them. Second, the panel held that the dispute was not moot where the challenge concerned the cumulative

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\* The Honorable John R. Tunheim, United States Chief District Judge for the District of Minnesota, sitting by designation.

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

effects of grazing on bull trout habitats and was a sufficiently live controversy which the court could address.

The panel rejected plaintiffs' procedural challenge. Because the Forest Service was not obligated by statute, regulation, or caselaw to memorialize each site-specific grazing authorization's consistency with the Forest Plan, the absence of such a document was not in itself arbitrary and capricious under the Administrative Procedure Act and the National Forest Management Act ("NMFA").

The panel construed plaintiffs' appeal as implicitly challenging the substantive consistency of the challenged grazing authorizations as well.

Inland Native Fish Strategy (INFISH) Standard GM-1 requires the agency to modify its grazing practices to the extent they prevent attainment of Riparian Management Objectives or are likely to adversely affect inland native fish. The panel deferred to the Forest Service's expertise in determining whether, given the many factors at play, and given its extensive monitoring and enforcement activities protecting bull trout habitats, it must modify or suspend grazing activity in order to comply with Standard GM-1. The panel held that the Forest Service did not act arbitrarily or capriciously with respect to the NFMA's consistency requirement as applied to Standard GM-1 in issuing any of the challenged grazing authorizations.

Forest Plan Management Area 3A Standard 5 provides the necessary habitat to maintain or increase populations of management indicator species. The panel held that the Forest Service's ongoing site-specific monitoring, analysis, and enforcement activities aimed at protecting and improving bull trout habitats were reasonable means of

ensuring consistency with Standard 5. The panel concluded that the Forest Service did not act arbitrarily or capriciously with respect to Standard 5 in issuing any of the challenged grazing authorizations.

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### COUNSEL

Peter M. Lacy (argued), Oregon Natural Desert Association, Portland, Oregon; Stephanie M. Parent, Center for Biological Diversity, Portland, Oregon; David H. Becker, Law Office of David H. Becker LLC, Portland, Oregon; for Plaintiffs-Appellants.

Brian C. Toth (argued), Attorney; United States Department of Justice, Washington, D.C.; Stephen J. Odell, Assistant United States Attorney; Billy J. Williams, United States Attorney; Jeffrey B. Clark, Assistant Attorney General; United States Attorney's Office, Portland, Oregon; Val M. McLam Black, Senior Counsel; Stephen Alexander Vaden, General Counsel; Office of the General Counsel, United States Department of Agriculture, Portland, Oregon; for Defendants-Appellees.

Scott W. Horngren (argued) and Caroline Lobdell, Western Resources Legal Center, Portland, Oregon, for Intervenor-Defendants-Appellees.

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**OPINION**

M. SMITH, Circuit Judge:

Plaintiffs-Appellants Oregon Natural Desert Association and Center for Biological Diversity (collectively, ONDA) appeal the district court’s grant of summary judgment for Defendants-Appellees United States Forest Service and Roger W. Williams, Malheur National Forest Supervisor (collectively, the Forest Service). ONDA challenges the Forest Service’s issuance of grazing authorizations between 2006 and 2015 on seven allotments in the Malheur National Forest (MNF). ONDA argues that the Forest Service acted arbitrarily and capriciously in its application of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and the National Forest Management Act (NFMA), 16 U.S.C. § 1604(i), when it failed to “analyze and show” that the grazing authorizations were consistent with the MNF Land and Resource Management Plan (Forest Plan).<sup>1</sup>

While we agree with ONDA that this case is justiciable, we hold that the Forest Service met its procedural and substantive obligations pursuant to the NFMA and the APA in issuing the challenged grazing authorizations, and we affirm the district court’s grant of summary judgment for the Forest Service.

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<sup>1</sup> This case also involves Intervenor-Defendants-Appellees Jeff Hussey et al. (collectively, Intervenor), a group of ranchers whose cattle graze on the allotments in question. For simplicity, we refer only to Defendant Forest Service except where it is necessary to distinguish Intervenor.

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