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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N et al., Case No. 03-CV-213-KI

Plaintiffs,

v.

UNITED STATES FOREST SERV. et al.,

Defendants,

and

**[PROPOSED] SUR-REPLY OR IN THE
ALTERNATIVE SUPPLEMENTAL
MEMORANDUM ON THE ISSUE OF
FINAL AGENCY ACTION**

ROBERTSON RANCH et al.,

Intervenor-Defendants,

and

OREGON CATTLEMEN’S ASS’N,

Intervenor-Defendants.

INTRODUCTION

Plaintiffs Oregon Natural Desert Association and Center for Biological Diversity (hereafter “ONDA”) request that this Court retain its earlier ruling that Annual Operating Instructions are final agency action subject to judicial review pursuant to Section 706(2) of the Administrative Procedure Act (APA). 5 U.S.C. § 706(2). The Supreme Court’s decision in Norton v. Southern Utah Wilderness Alliance, concerning Section 706(1) of the APA is not controlling and did not affect Judge King’s earlier analysis. The AOI decisions meet the test of finality established in Bennett v. Spear and applied by Judge King. Moreover, the Forest Service itself treats AOIs as a final decision where it determines the manner in which grazing will occur consistent with its duties. Finally, as a practical matter, the AOI decision is the most appropriate decision for judicial review and the proximate cause of ONDA’s harm as compared to the grazing permit or other grazing decisions.

I. **THE INTERVENING SUPREME COURT DECISION DOES NOT CHANGE THIS COURT’S PRIOR ANALYSIS THAT ANNUAL OPERATING INSTRUCTIONS ARE FINAL AGENCY ACTIONS FOR PURPOSES OF JUDICIAL REVIEW.**

In its March 21, 2005 letter, the Court included two issues of particular concern here: one questioning whether Annual Operating Instructions¹ are final agency action for judicial review under Section 706(2)(A) of the APA and Bennett v. Spear, 520 U.S. 154 (1997); and another indicating that Norton v. Southern Utah Wilderness Alliance (“SUWA”), 124 S.Ct. 2373 (2004), controls judicial review pursuant to Section 706(1) of the APA. The Court’s distinction in its letter between Sections 706(1) and 706(2) is an important one that may have been blurred

¹AOIs were formerly known as Annual Operating Plans (AOPs). Plaintiffs are not aware of any evidence in the administrative record explaining the change in nomenclature. The AOPs and AOIs in the record demonstrate that the content of the AOIs did not change substantively

at oral argument or in the briefing. Importantly, Judge King did not rely upon Mont. Wilderness Ass'n v. U.S. Forest Service, 314 F.3d 1146 (9th Cir. 2003), called into question by SUWA, in reaching the conclusion that AOIs are final agency actions subject to judicial review pursuant to Section 706(2) of the APA.

At oral argument, the Court indicated that it is inclined to dismiss Plaintiffs' claims because it does not believe that AOIs are final agency actions pursuant to Section 706(2). The Court further explained that it would revisit Judge King's earlier ruling that AOIs are final agency actions because the SUWA decision had intervened and abrogated the Ninth Circuit's decision in Mont. Wilderness Ass'n. However, SUWA concerns Section 706(1), and Judge King did not rely upon Montana Wilderness to hold that AOIs are final agency actions reviewable pursuant to Section 706(2). See Ore. Natural Desert Ass'n v. U.S. Forest Serv., 312 F.Supp.2d 1337, 1343 (D. Or. 2004) (citing Montana Wilderness in the first section of the opinion on final agency action only for holding that Forest Service's "routine maintenance work" on trails was not a final agency action subject to review). Judge King's reasoning with respect to Section 706(2) relies upon Bennett v. Spear, and is unaltered by SUWA, which addressed claims of "failure to act" pursuant to Section 706(1). The only portion of Judge King's earlier opinion that may be affected is the second half of the opinion addressing Section 706(1) and Plaintiffs' "failure to act" claims. But because Plaintiffs pled each claim pursuant to Section 706(2), and several claims only in the alternative pursuant to Section 706(1), Plaintiffs' right to judicial review remains. See Second Amended Compl. at ¶¶ 87, 91, 95, 101. Moreover, Judge Haggerty also ruled post-SUWA that AOIs are final agency action and judicially reviewable pursuant to APA Section 706(2). Ore. Natural Desert Ass'n v. U.S. Forest Serv., No. 03-381-HA, slip op. at

18–19 (July 15, 2004) (Dkt # 85) (holding plaintiffs’ challenge to discrete, final agency actions pursuant to APA § 706(2) as valid under SUWA, including decisions to authorize grazing annually).

Finally, the law of the case doctrine counsels against reversing this Court’s earlier ruling. Under the law of the case doctrine, a court should not reopen issues decided in earlier stages of the same litigation. Messenger v. Anderson, 225 U.S. 436, 444 (1912). A court may reconsider previously decided questions where there has been an intervening change of controlling authority. Leslie Salt Co. v. U.S., 55 F.3d 1388, 1393 (9th Cir. 1995). However, Judge King did not rely upon Mont. Wilderness for his final agency action analysis, and SUWA does not control ONDA’s claims brought pursuant to Section 706(2) of the APA. Therefore, this Court’s earlier ruling holding that AOIs are final agency action subject to judicial review should not be disturbed.

II. ANNUAL OPERATING INSTRUCTIONS ARE FINAL AGENCY ACTIONS SUBJECT TO JUDICIAL REVIEW.

For agency action to be considered final and subject to judicial review pursuant to Section 706(2) of the Administrative Procedure Act (APA), the action: (1) must mark the “consummation of the agency’s decision making process”; and (2) must be “one by which rights or obligations have been determined or from which legal consequences flow.” Bennett v. Spear, 520 U.S. 154, 177 (1997)(internal quotes omitted). Here, the AOIs meet the Bennett v. Spear test. Moreover, the AOI decision is the most detailed, site-specific decision that is the proximate cause of harm to ONDA. The AOI decision is justiciable and the most appropriate decision for judicial review.

A. The AOI Is The Consummation Of The Forest Service's Decisionmaking

As discussed further below, the Forest Service makes multiple decisions to manage grazing on the Malheur National Forest, beginning with land use allocation decisions at the forest plan level and becoming more specific through the permit, the Allotment Management Plan (AMP), and finally, most specific for each year at the AOI level. It is hard to imagine a more final decision. Once the AOI is completed, the cows are allowed to graze. The Forest Service has argued that because it can make adjustments during the grazing season, the AOI decisions are not final. However, this has no bearing on whether the initial AOI decision is the “consummation” of this Forest Service decisionmaking process. In Bennet v. Spear, for example, the Supreme Court held that a biological opinion is a final agency action even though a BiOp's Incidental Take Statement may be revisited or altered at any time during the life of the BiOp. 520 U.S. at 178. See also PAR 6781–82 (2004 BiOp requiring Forest Service to reinitiate consultation under certain circumstances, including if “the agency action is subsequently modified in a manner that causes an effect to the listed species”).

B. The AOI Determines Rights or Obligations or Legal Consequences Flow From It.

Each AOI decision establishes rights or obligations and legal consequences flow from it for both the holder of the grazing permit for that particular allotment and the Forest Service. These rights, obligations and legal consequences are all indicia of finality, making judicial review appropriate. However, as explained more fully below, ONDA seeks judicial review of the Forest Service's obligations embodied in the AOI – the NFMA duty to act consistent with the forest plan requirements. ONDA does not seek to enforce the obligations of the grazing permittees. This distinction does not render the AOIs a non-final agency action for purposes of judicial review under APA Section 706(2). Bennett v. Spear, 520 U.S. at 171 (allowing a

challenge to the Fish & Wildlife Service’s biological opinion for violating the Endangered Species Act as final agency action where legal consequences flowed to a different agency).

The rights, obligations and legal consequences that flow from the AOI to the grazing permittee are clear. OCA states that “[t]here can be no AOI without a term permit to which it can attach.” OCA Reply at 17 (Dkt.# 215). This is true, however, this truism ignores that there can be no grazing on the allotment each year without the AOI. The permittee cannot enter the allotment to graze until it has an AOI. See, e.g., BAR 733–47, DBAR 583–88, FPAR 1075–85, OTTAR 770–75, SCAR 1468–84, NFAR 686–690 (2004 AOIs). Thus, the AOI determines the manner in which the grazing permittee is allowed to graze a particular allotment in a particular year. The AOI is a signed agreement between the permittees and the Forest Service. See Ore. Natural Desert Ass’n v. U.S. Forest Serv., 312 F.Supp.2d 1337, 1343 (D. Or. 2004); see also Forest Guardians v. U.S. Forest Serv., No. CIV 00-612 TUC RCC (Order, filed Oct. 16, 2002); Forest Guardians v. U.S. Forest Serv., No. CIV 00-612 TUC RCC (GEE) (Report and Recommendation, filed July 22, 2002) (attached to Plaintiffs’ Notice of Suppl. Authority, Dkt # 65). If a permittee grazes livestock without an AOI or outside of the authorized terms and conditions of the AOI, the permittee is subject to sanction via Noncompliance and permit actions. See, e.g., BAR 028–29 (“Notice of Noncompliance”), 154–56 (“Notice of Permit Action for Non-Compliance”). The fact that the compliance action involves the grazing permit does not render the AOI any less final. The rights, obligations and legal consequences of the AOI are concrete indicia of an action that is final, making the AOI appropriate for judicial review. Bennett, 520 U.S. at 178.

It is important to clarify that the rights, obligations and legal consequences of the AOI to the permittee indicate finality, even though ONDA is not seeking to enforce the legal obligations against the permittee. The action at issue in Bennett v. Spear was a biological opinion. The biological opinion was the result of Endangered Species Act (ESA) consultation between the Bureau of Reclamation (BOR) and the U.S. Fish & Wildlife Service (FWS) concerning the effects of BOR's operation of the Klamath Irrigation Project on a listed fish species. 520 U.S. at 157. Plaintiffs sued FWS, claiming the biological opinion violated FWS's ESA duty to consider the best available science. The Court held that biological opinion was final agency action because it altered "the legal regime to which the action agency [BOR] is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions." Id. at 178. Thus, the biological opinion created legal obligations for BOR, rendering the biological opinion final agency action for purposes of a challenge against FWS for violating the ESA. Likewise, in this action, the AOIs determine a legal regime with legal consequences for the permittees, indicating the action is sufficiently final to make it an appropriate point for judicial review of the Forest Service's AOI decision to determine if it complies with the Forest Service's legal duties under NFMA.²

In short, the AOI is the most site-specific decision for the manner in which grazing will occur each year in order to be consistent with the Malheur forest plan, including the INFISH grazing standard and other forest plan and statutory requirements. In the AOI, the Forest Service

²If the grazing permittee violates the terms of the AOI, the Forest Service may enforce the AOI. Where the Forest Service does not take any action for the violation, either through permit modification or cancellation, or by modifying the numbers or manner of grazing in the next AOI, the violations of AOIs are evidence that grazing is not meeting forest plan requirements.

obligates itself to the manner of grazing that purports to meet its legal duty under NFMA that every instrument that allows use of the National Forest will be consistent with the forest plan. 16 U.S.C. §1604(i). On the merits in this action, ONDA argues that the AOI decisions do not meet the forest plan requirements and are otherwise unsupported. Consequently, those decisions should be found to be arbitrary, capricious and not in accordance with NFMA.

C. The Forest Service Treats AOIs As Final Agency Actions

This Court, in its letter to counsel emailed March 21, 2005 indicated that the Ninth Circuit takes a pragmatic approach to finality. As a practical matter, the Forest Service treats AOIs as a decisionmaking point where it can direct grazing management to be consistent with and meet forest plan requirements and affect outcomes in addition to, or beyond, the ten-year term grazing permit. In a letter to members of the public regarding development of AMPs for several allotments on the Malheur National Forest, the agency explains:

Livestock grazing within the National Forest portion of the project area has been managed over the years under individual annual operating plans (AOPs). Where livestock grazing was found to conflict with other resource values, the conflict was addressed through changes to the AOP.

Letter from Forest Supervisor, Roger Williams, to members of the public (Aug. 15, 2002) (Attachment 1). In the term grazing permit for the Bluebucket allotment at issue in this case, the Forest Service states, “we will be working with you through the Annual Operating Plans to bring management of the Bluebucket into consistency with the terms of the Malheur LRMP.” BAR 022 (Attachment 2). These non-litigation statements demonstrate the Forest Service views the AOI as a decision where it can decide the manner of grazing that will occur consistent with its forest plan requirements. Thus, it is also an appropriate decision for judicial review to determine

whether the Forest Service is acting consistent with the forest plan requirements in accordance with the National Forest Management Act (NFMA). 16 U.S.C. § 1604(i).

Moreover, the Forest Service, pursuant to the ESA, consults with the U.S. Fish & Wildlife Service and NOAA Fisheries upon its annual grazing decisions See PAR 6731 (2004 USFWS BiOp stating that opinion analyzes potential effects to bull trout “from the Forest Service’s proposed 2004 grazing management activities”). This consultation occurs each year, based on the specific grazing authorizations the Forest Service decides upon in its annual AOI decisions. Id. 6731–33 (summarizing consultation history). In fact, the 2004 BiOp indicates that “[t]he 2004 proposed actions include the season and number of livestock designated on individual Annual Operating Instructions (AOI) . . . and incorporates any needed or desired changes as a result of past use and current conditions.” Id. at 6733 (emphasis added). The BiOp also observes that the Forest Service “has made significant changes in the management of several allotments and has developed conservation measures that will minimize or eliminate the adverse effects of livestock grazing on bull trout.” Id. In short, the BiOp makes clear that the changes the Forest Service makes in its annual AOI decisions are far from minor adjustments to permit terms, but rather are significant changes that alter legal rights and obligations with respect to each year’s grazing management. See also PAR 6735–37 (summarizing Forest Service’s allotment-specific conservation measures for 2004 grazing program), 6737 (discussing pasture standards and move triggers included in 2004 AOIs), 6765–70 (summarizing allotment-specific effects of 2004 proposed grazing, including Forest Service’s 2004 determination, based on changes made in 2004 AOIs, of whether that year’s proposed grazing is likely to adversely affect bull trout). Thus, despite the Forest Service’s legal argument to this court that AOIs are not final agency actions, the Forest Service’s actions speak louder than their arguments.

III. THE AOI IS THE MOST APPROPRIATE GRAZING MANAGEMENT DECISION FOR JUDICIAL REVIEW BECAUSE THE SITE-SPECIFIC DECISION ESTABLISHES THE MANNER OF GRAZING EACH YEAR THAT CAUSES ONDA HARM.

The Court asked at oral argument what other decisions are available for ONDA to challenge and suggested the permit decision may be the most appropriate decision for judicial review. ONDA provides this post-hearing brief to further detail the nature of the Forest Service's livestock grazing decisions and explain why the AOIs are the most appropriate decision for ONDA's claims that the Forest Service has failed to issue decisions consistent with the Malheur forest plan requirements and therefore has acted in a manner that is arbitrary, capricious and not in accordance with law.

The Forest Service makes grazing authorization decisions on the Malheur National Forest at several levels: the forest plan, the allotment management plan (AMP), the grazing permit, and the Annual Operating Instructions (AOIs). Each of these decisions is a distinct final agency action with unique rights, obligations and legal consequences. Each may be subject to judicial review, depending on whether the decision is ripe and otherwise justiciable. However, judicial review of the forest plan, permit or AMP decision, if allowed, does not preclude judicial review of the AOI decision, which makes different management decisions more particularly tied to ONDA's harm.

Forest Plan Decisions

At the most general level, the Forest Service makes a land use allocation decision about what lands within the forest boundaries are capable of providing for grazing and suitable for grazing use in its Land and Resource Management Plan (LRMP or "forest plan") decision. The Malheur National Forest issued its forest plan decision in 1990 and allocated all the allotments at

issue here as suitable for grazing use. In 1995, the Malheur National Forest amended its forest plan to incorporate the requirements of INFISH, including the grazing management standard at issue here, to manage grazing in a manner that does not prevent or retard attainment of the riparian management objectives (RMOs). SPAR 0004, 0007.

Defendants and Defendant-Intervenors suggested at oral argument that ONDA could challenge the forest plan decision to allocate these lands to grazing. If the Forest Service does not provide sufficient support or basis for the land use allocation decision, this decision may be judicially reviewable. However, ONDA does not challenge the forest plan allocations of lands available for grazing, so long as the grazing ultimately authorized is consistent with forest plan requirements such as the INFISH grazing standard. Whether grazing decisions are consistent with forest plan requirements occurs at later, more site-specific decisionmaking point. ONDA did not challenge the forest plan amendment adopting INFISH because the amendment is beneficial, not harmful, to ONDA and its members' interests.

Grazing Permits

A grazing permit is a “document authorizing livestock to use National Forest System or other lands under Forest Service control for the purpose of livestock production.” 36 C.F.R. § 222.1(b)(5). Permits generally are issued for periods of ten years. *Id.* § 222.3(c)(1). Permits set general limits on allowable numbers of livestock and seasons of use, based on an allotment's estimated ability to sustain certain average levels of use. See, e.g., *id.* § 222.3(c)(1)(i), (ii); 43 U.S.C. § 1752 (explaining scope and requirements of grazing permit terms and conditions).

For example, the grazing permit for the Bluebucket Allotment, issued to Thomas C. Howard in May, 1996, generally limits grazing authorization to a ceiling of 160 cattle from June

1 to September 30.³ BAR 017 (Attachment 2). This particular permit also contains special terms and conditions requiring consistency with the Malheur LRMP and consistency with the 1985 AMP. BAR 021–022. If the permit had not provided for consistency with the forest plan and AMP requirements, ONDA could have challenged the permit for a violation of the National Forest Management Act (NFMA), 16 U.S.C. 1604(i).⁴ Importantly, the permit further explains that the 1985 AMP is scheduled for revision and that prior to completion of the revised AMP, “we will be working with you through the Annual Operating Plans to bring management of the Bluebucket into consistency with the terms of the Malheur LRMP.” BAR 022 (Attachment 2). This permit language demonstrates that the Forest Service interprets AOPs (now AOIs) to be a further, more specific, grazing management decision that must also be consistent with LRMP requirements in accordance with NFMA. 16 U.S.C. 1604(i).

Allotment Management Plans

An AMP is a long-term, allotment-specific planning document that: (1) prescribes the manner in, and extent to which, grazing operations will be conducted in order to meet multiple-use and other goals and objectives; (2) describes any range improvements (such as watering troughs, pipelines, and fences) in place or to be installed and maintained to meet allotment objectives; and (3) contains any other grazing management provisions and objectives prescribed by the Forest Service. 36 C.F.R. § 222.1(b)(2). The AMP is an appropriate decisionmaking point to plan grazing management to meet the long-term requirements and objectives of the Malheur

³The Forest Service issued this permit without any environmental analysis specific to the grazing on this allotment pursuant to the National Environmental Policy Act (NEPA).

⁴If a plaintiff had attempted to bring a claim that this permit is not consistent with the forest plan requirement, the Forest Service would likely argue that such a decision is beyond the scope of the permit decision because the decision of whether, how and when to allow grazing

forest plan and for judicial review. However, the AMPs at issue here are either so dated that they precede the 1990 LRMP and the 1998 INFISH amendment, or they are nonexistent. See Pl. Br. at 38–39. Therefore, ONDA could not have challenged these particular AMPs for the harm being caused by grazing since 2001.

AOIs

Finally, an AOI is a signed agreement issued annually by the Forest Service to a particular permittee, which sets final authorized dates of grazing (“season of use”), pasture and grazing system rotations, numbers of livestock permitted for the up-coming season, monitoring and reporting requirements, and maximum limits of forage use by livestock. AOIs set site-specific grazing management practices and standards that are not included in any of the more general or prior decisions. For example, the 2004 AOI for the Bluebucket allotment provides that the AOI is “used in addition to your Term Grazing Permit.” BAR 738 (Attachment 3). The Forest Service states that the AOI is used to “modify grazing systems (if necessary) to meet our management and vegetative objectives for each allotment. Id. As compared to the permit, which allows 160 AUMs⁵ from June 1 to September 30 (640 AUMs), the 2004 AOI allows Howard 272 AUMs from June 1 to June 20 on the allotment’s Cougar Unit and 272 AUMs from June 21 to July 10 on the Dry Meadows Unit. In other words, the Forest Service made the decision in this 2004 AOI to authorize more livestock for a shorter season of use than allowed by the permit, in order to meet objectives. (Whether the grazing management scheme in the 2004 AOI decision is supported adequately by information in the administrative record to demonstrate consistency with the INFISH and other requirements in the forest plan, or otherwise surpass the arbitrary and

each year does not occur until the AOI.

⁵An AUM is the amount of forage necessary to sustain one cow for one month. 43 C.F.R.

capricious standard, is at issue on the merits.) The OCA concurs that the AOI “describes how such grazing under the term permit will occur that season.” OCA Reply at 17 (Dkt. #215). It is precisely the manner of grazing that is specifically and distinctly authorized by the AOI that causes ONDA’s harm, and the Forest Service makes that decision each year in the AOI, not the permit.

As the court noted in its letter to counsel, the Ninth Circuit has taken a pragmatic view of finality under Bennett v. Spear. As a practical matter, limiting judicial review to the decision made at the level of the ten-year grazing permit, and precluding review of the AOI decision, would allow grazing management decisions that cause ONDA harm to proceed unchecked. Nor would this harm be remedied at the end of ten years if the permit is renewed. The term grazing permit decision would again only make the general decisions about the upper limit of AUMs and greatest extent of the grazing season, while decisions about units grazed, actual length of season, and other management tools, are made at the level of the AOI.

Even if ONDA were to challenge a grazing permit, there are practical reasons why the Forest Service’s annual AOI grazing decisions must also be actionable. In the most stark example, imagine that the Forest Service issues an AOI that allows 1600 AUMs total, but during months completely outside the permitted grazing season and states that the permittee is not required to manage that grazing consistent with the INFISH GM-1 standard. Clearly, this action is not in accordance with the Forest Service’s duty pursuant to NFMA that site-specific actions be consistent with forest plan requirements. Yet, a bright-line holding that AOIs are not final agency actions would preclude a challenge to this AOI decision.

In a less stark hypothetical, imagine that for the first three years of the ten-year permit the Forest Service issues AOIs that allow grazing only in units that do not border the North Fork Malheur Scenic River, while resting (excluding from grazing) units along the river corridor to allow riparian vegetation and streambanks to recover. Then in years four, five and six, the Forest Service allows the River pastures to be grazed in each AOI. Monitoring shows that the grazing use on the river is causing damage that is inconsistent with the INFISH forest plan requirement. Nonetheless, in year seven of the permit, the Forest Service issues an AOI that allows the same grazing management and use of the river units. Allowing ONDA to challenge the permit, but not the AOI, would mean that the AOI decision, which is likely inconsistent with the Forest Plan and causing ONDA harm, could proceed unchecked. Given the many indicia that the AOI is final agency action, this Court cannot ignore the practical effects of declining to review the AOI decisions at issue here.

CONCLUSION

Based on the foregoing, ONDA respectfully requests that this Court retain its earlier ruling that AOIs are final agency actions subject to judicial review pursuant to Section 706(2) of the APA.

DATED this 15th day of April, 2005.

Respectfully submitted,

s/ Stephanie M. Parent

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