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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON**

**OREGON NATURAL DESERT  
ASSOCIATION, and OREGON NATURAL  
RESOURCES COUNCIL FUND,**

Plaintiffs,

v.

**UNITED STATES FOREST SERVICE,  
UNITED STATES FISH AND WILDLIFE  
SERVICE, and KAREN SHIMAMOTO,**

Defendants.

**Case No.: 04-3096-CO**

**PLAINTIFFS’ SUR-REPLY IN  
OPPOSITION TO DEFENDANTS’  
MOTION TO DISMISS**

**I. INTRODUCTION**

Plaintiffs file this Sur-Reply with the permission of the Court in order to address new arguments and exhibits presented by Defendants in the Reply in Support of Defendants’ Motion

to Dismiss (“Reply”). For the first time in the Reply, Defendants advance the theory that not only are Annual Operating Instructions (“AOIs”) not final agency actions but additionally neither are the grazing permits and Allotment Management Plans (“AMPs”) final agency actions. Instead, Defendants argue that the sole decision documents giving rise to Plaintiffs’ claims are sporadic environmental assessments prepared pursuant to the National Environmental Policy Act (“NEPA”), which analyze long term management planning for grazing allotments. Defendants’ position is contrary to Forest Service regulations, Ninth Circuit case law and administrative guidance that describe a grazing permit as the instrument that authorizes grazing on National Forest System lands. Moreover, Defendants’ present argument is in conflict with the position that it presented to Judges Jones and Haggerty in the Malheur cases upon which Defendants rely as the principal support for their current Motion to Dismiss. Defendants’ interpretation would leave Plaintiffs with little practical recourse to address ongoing violations of federal law.

## **II. BACKGROUND**

### **A. Procedural Background**

Contrary to the assertions of Defendants, Plaintiffs do not seek wholesale judicial review of the Fremont-Winema grazing program. Plaintiffs specifically challenge the failure of the Forest Service to comply with the requirements of the National Forest Management Act (“NFMA”) in permitting continued grazing on eleven of the nearly one hundred allotments that comprise the Fremont-Winema. On these eleven identified allotments within habitat for protected fish species, the Forest Service has authorized continued grazing without adequate modification despite the fact that grazing on these allotments exceeds established grazing standards and despite the Forest Service’s conclusion that continued grazing on these allotments is likely to adversely affect protected fish species. In addition to Plaintiffs’ claims specific to

eleven allotments, Plaintiffs challenge the failure of the Defendants to comply with the requirements of the Endangered Species Act (“ESA”) and analyze the impacts of the grazing program on protected fish species. While Plaintiffs’ ESA claims address a wider segment of the Fremont-Winema, Defendants do not similarly seek to dismiss these claims as overbroad.

In the original complaint, Plaintiffs identified Annual Operating Instructions (“AOIs”) as the final agency actions giving rise to its NFMA claims on specific allotments. In light of recent decisions, the Plaintiffs amended their complaint to alternatively identify the current term grazing permits and Allotment Management Plans (“AMPs”) for the specific allotments where violations of grazing standards have occurred without adequate modification as agency action giving rise to Plaintiffs’ claims. Defendants’ Memorandum in Support of its Motion to Dismiss (“Def. Memorandum”) focused on the issue of whether AOIs are final agency action and ignored the additional sources of agency action identified by Plaintiffs in the Amended Complaint. Docket No. 40. Plaintiffs’ response identified this shortcoming in Defendants briefing and in reply Defendant submitted twenty-five (25) new exhibits and argument in support. Docket No. 49. Plaintiffs moved to strike these new exhibits and argument presented for the first time in the Reply, or in the alternative for permission to submit a sur-reply. Docket No. 50. The Court granted Plaintiffs’ alternative request and this Sur-Reply follows.

## **B. Standard of Review**

In the Reply, Defendants argue that Plaintiffs fail to distinguish the standard of review that applies to a motion pursuant to 12(b)(1) as opposed to the standard applicable to a 12(b)(6) motion. Reply at 1-3. Defendants argue that the Court must assume lack of subject matter jurisdiction and that the burden lies with the Plaintiffs to prove otherwise. Reply at 1. A review of Ninth Circuit case law demonstrates that the distinction Defendants rely on is not universal.

See, e.g., Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1139 (9th Cir. 2004) (discussing standard of review for all 12(b) motions and limitations of lack of factual development); McNatt v. Apfel, 201 F.3d 1084, 1087 (9th Cir. 2000) (stating court reviews alleged facts favorably to support jurisdiction); Boettcher v. Secretary of Health & Human Services, 759 F.2d 719, 720 (9th Cir. 1985) (same). Moreover, in circumstances where "the jurisdictional issue and substantive claims are so intertwined that resolution of the jurisdictional question is dependent on factual issues going to the merits, the district court should employ the standard applicable to a motion for summary judgment." Autery v. United States, 424 F.3d 944, 956 (9th Cir. 2005) (quoting Rosales v. United States, 824 F.2d 799, 803 (9th Cir. 1987)). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party and must not weigh the evidence or determine the truth of the matters asserted, but must only determine whether there is a genuine issue for trial. Id. In the present matter, Defendants move to dismiss Plaintiffs' claims and offer factual evidence in support its argument that the agency actions that Plaintiffs have identified are not final agency action subject to judicial review. The factual issues presented in support of the motion are intertwined with Plaintiffs' claims that the Forest Service has authorized continued grazing in violation of the law.

### **III. ARGUMENT**

#### **A. NEPA-Based Environmental Assessments Are Not the Exclusive Agency Action Giving Rise to Plaintiffs' Claims.**

There is no dispute as to the standard for determining whether a decision is final agency action subject to judicial review pursuant to the APA. As Defendants relate, Bennett v. Spear, 520 U.S. 154 (1997), establishes two conditions for an agency action to be considered "final": (1) "the action must mark the consummation of the agency's decision making process – it must

not be of a merely tentative or interlocutory nature”; and (2) “the action must be one by which rights or obligations have been determined, or from which legal consequences flow.” 520 U.S. at 177-78 (internal citations and quotations omitted); see also Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 925 (9th Cir. 1999). The determination of finality is a pragmatic and flexible one, in which the court should focus on the practical and legal consequences of the agency action. See Alaska Dep’t of Env’tl. Cons. v. EPA, 540 U.S. 461, 483 (2004); Ore. Natural Res. Council v. Harrell, 52 F.3d 1499, 1504 (9th Cir. 1995) (citing Dietary Supplemental Coalition, Inc. v. Sullivan, 978 F.2d 560, 562 (9th Cir. 1992)).

In the Reply, Defendants acknowledge that Forest Service regulations state that “all grazing and livestock use on National Forest System lands ... must be authorized by a grazing or livestock use permit.” Reply at 9-10 (quoting 36 C.F.R. § 222.3). Forest Service administrative guidance similarly applies this direction and consistently designates grazing permits as the instrument that authorizes an individual to undertake site specific grazing. See, e.g., Forest Service Grazing Permit Administration Handbook, Ch. 90 (“Reply Exhibit 3”) at 13.

Despite this regulatory and administrative guidance, the Forest Service argues in the Reply that all decision points that Plaintiffs have identified in the Amended Complaint as giving rise to its NFMA claims are not final agency actions, but merely the implementation of the authorization to graze that is determined in NEPA-based decision documents. Reply at 12-13. The Defendants then argue that within the last six years the Forest Service has issued a NEPA-based decision for ten of the eleven allotments where grazing violations have occurred and that those decisions constitute the sole basis for Plaintiffs to address ongoing violations of federal law. Reply at 15-17. Implicit in Defendants’ argument is that these NEPA-based decisions are no longer open to challenge by Plaintiffs because the administrative appeal time-frame for these

decisions has passed. What is most surprising is that the Defendants argue in contrast that for the one allotment where no NEPA-based decision has been issued the permit is the final agency action. Reply at 17-18.

Defendants' sole support for its position that NEPA-based decisions are the exclusive decision making point is the Forest Service Handbook. There are several problems with Defendants' reliance on the manual as its sole support. First, the Forest Service Handbook does not provide consistent direction as to the role that permits and AMPs play in the Forest Service grazing program. Defendants cite the Forest Service Handbook for the proposition that grazing permits, AMPs, and AOIs merely implement NEPA-based decisions. However, at the same time, the Forest Service Handbook consistently describes permits as the instruments that authorize site specific grazing and AMPs as establishing terms and conditions for the permits. See, e.g., Reply Exhibit 3 at 13. Second, as Judge Jones' decision in the Malheur case makes clear, the determination of finality is not based on whether the agency acknowledges its action as final action but whether "the practical effect of the decision may carry legal consequences, thereby making it reviewable final agency action." Def. Memorandum Exhibit 6 at 13 (citing Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001)). Third, case law makes clear that the Forest Service Handbook is of limited legal effect. See Western Radio Servs. Co. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996).

**1. Ninth Circuit Case Law Demonstrates that Grazing Permits Are Final Agency Actions.**

To the contrary of Defendants' position in the Reply, case law applying the two conditions of Bennett demonstrates that at the least there is no dispute that term grazing permits are final agency actions subject to judicial review. Moreover, the administrative materials and exhibits relied on by Defendants provide additional support for this conclusion.

In Idaho Watersheds Project v. Hahn, 307 F.3d 815(9th Cir. 2002), a rancher-intervenor sought to dismiss the claims of plaintiffs on the basis that the issuance of grazing permits was not final agency action. 307 F.3d at 828. The plaintiffs' suit challenged the BLM's issuance of sixty-eight grazing permits in violation of NEPA. Id. at 820. In reaching its conclusion that the BLM failed to comply with NEPA in issuing the sixty-eight permits, the district court held that the BLM's issuance of the permits was a "final" agency action. Id. at 824. Upon appeal, the Ninth Circuit upheld the finding of the district court and stated that "the initial agency decisionmaker arrived at a definitive position and put the decision into effect by issuing the sixty-eight permits and allowing actual grazing to occur under the terms of those permits." Id. at 828.

Consistent with the reasoning of the Court in Idaho Watersheds, further case law establishes grazing permits as an end point of agency decision making that is subject to judicial review. In NWF v. Cosgriffe, 21 F.Supp.2d 1211 (D. Or. 1998), as in the present case, the defendant argued that plaintiffs sought to mount a wholesale challenge to the grazing program without identifying a site-specific agency decision. 21 F.Supp.2d at 1221. Based on the particular facts and claims presented in the case, the Court agreed and stated: "plaintiffs cannot challenge the BLM's overall grazing policy ... but instead should have challenged individual grazing permits." Id. (emphasis added); see also High Sierra Hikers Ass'n, 390 F.3d 630, 639 (9th Cir. 2004) (holding that issuance of wilderness special use permit is final agency action). Defendants attempt to compare the permit decision-making process to the challenge of NEPA-based decisions for timber sales where plaintiffs typically challenge the issuance of a NEPA-based decision. Reply at 16. However, the Ninth Circuit has held that the decision to sell timber is final agency action and does not distinguish between the ability to challenge a NEPA-based

decision that analyzes the impacts of the sale and the decision to authorize the sale. See, e.g., Neighbors of Cuddy Mtn. v. Alexander, 303 F.3d 1059, 1067 (9th Cir. 2002).

Consistent with the reasoning of the courts in Idaho Watersheds and NWF v. Cosgriffe, a pragmatic and flexible application of the conditions set forth in Bennett demonstrates that term grazing permits are final agency actions. This is consistent with further case law establishing the parameters of the two conditions for final agency action. For the first prong, case law establishes that the central issue is whether the agency has completed its decision-making process and “rendered its last word on the matter in question.” Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 478 (2001) (internal quotations omitted). The Ninth has characterized this as a requirement that the decision represent “a definitive position” on the issue before it. Indus. Customers of N.W. Utilities v. Bonneville Pwr. Admin., 408 F.3d 638, 646 (9th Cir. 2005); Hecla Min. Co. v. EPA, 12 F.3d 164, 165 (9th Cir. 1993) (citing FTC v. Standard Oil Co., 449 U.S. 232, 239–40 (1980)). See also Idaho Watersheds Project, 307 F.3d at 828 (“the initial agency decisionmaker arrived at a definitive position and put the decision into effect by issuing the sixty-eight permits and allowing grazing to occur under the terms of those permits”).

As to the second condition for final agency action, the Court in Bennett established four ways in which an agency action could have legal effect: an action could determine rights or obligations, result in direct and appreciable legal consequences, affect the rights of the relevant actors, or alter the legal regime to which another agency is subject. See 520 U.S. at 178. The Ninth Circuit has articulated several occasions where there has been sufficient legal effect to satisfy the second condition for final agency action. For example, a definitive agency decision has been held to be a reviewable final agency action if it “inflicts an actual, concrete injury.” Idaho Watersheds Project, 307 F.3d at 828 (quoting Darby v. Cisneros, 509 U.S. 137, 144

(1993)). Alternatively, an action is final if the “agency action impose[s] an obligation, den[ies] a right or fix[es] some legal relationship.” City of San Diego v. Whitman, 242 F.3d 1097, 1102 (9th Cir. 2001) (citing Bennett, 520 U.S. at 178). Focusing on the practical aspect of the finality test, this court also has noted that a final decision is one that has a “direct effect on the day-to-day business” of the party that is the subject of the agency decision. Ukiah Valley Med. Ctr. v. FTC, 911 F.2d 261, 265 (9th Cir. 2000) (citing Standard Oil, 449 U.S. at 239). Finally, relying again on Standard Oil, this court has noted that an agency action is final if immediate compliance with the action is expected. See Indus. Customers, 408 F.3d at 646 (citing Standard Oil, 449 U.S. at 239); Hecla Mining, 12 F.3d at 165 (same).

Forest Service regulations identified by Defendants recognize grazing permits as final agency action. See 36 C.F.R. § 222.3(a) (“Unless otherwise specified by the Chief, Forest Service, all grazing and livestock use on National Forest System lands and on other lands under Forest Service control must be authorized by a grazing or livestock use permit”); 36 C.F.R. § 222.1(b)(5) (defining “grazing permit” as “any document authorizing livestock to use” National Forest System lands). These regulations provide no similar legal authority for the NEPA-based decisions that Defendants argue are the central decisionmaking point. Similarly, the Forest Service Handbook sections provided by Defendants consistently identify grazing permits as the document authorizing grazing to occur. Reply Exhibit 1 at 5, 7, 8, 10; Reply Exhibit 2 at 1, 15; Reply Exhibit 3 at 13. According to these Forest Service administrative materials, the term grazing permits are the final decision of the agency giving rise to legal obligations.

While the Forest Service Handbook states that the permits merely implement NEPA-based decisions, there is no statement to this effect in the permit themselves. See Reply Exhibits 10-25. To the contrary, the permits identify AMPs and the pertinent Land Resource

Management Plan as the source for ongoing legal obligations. Id. The terms and conditions of the permits establish the legal relationship and the potential for modification or suspension of the privilege to graze. See 36 C.F.R. § 222.4. The NEPA-based documents examine the impacts of grazing, but do not comprise the final decision to authorize grazing. This distinction in part derives from the difference in the legal requirements of NEPA, for which the time frame for public involvement and review is limited. See 40 C.F.R. § 1501.8. In contrast, the legal obligations of the Forest Service to comply with NFMA are ongoing and require decisions that account for changes in the resource. For example, NFMA requires that site-specific actions must be consistent with the requirements of the Land and Resource Management Plans (“LRMPs”). 16 U.S.C. § 1604(i). The Fremont-Winema LRMPs in turn have been amended by INFISH, which requires the modification or suspension of grazing practices to respond to changing conditions for riparian areas. The NEPA based documents do not account for the required modifications that must occur on an annual basis, but instead are an analysis of grazing impacts at one point in time. See Reply Exhibits 4-7. In contrast, the permits establish the parameters for AOIs to modify grazing. See Reply Exhibits 10-25. Lastly and perhaps most significantly, in practice NEPA-based decisions are sporadic in nature and provide no consistent opportunity for public review. While Defendants identify NEPA-based decisions that occurred within the last ten years, Defendants argue consistently they are under no legal obligation to complete further NEPA review. Def. Memo at 18-19.

## **2. Defendants Present Conflicting Positions As To Whether A Permit Is A Final Agency Action.**

The Defendants themselves recognize that an application of the standards for determining final agency action demonstrates that grazing permits are final agency actions. In their Reply, Defendants take the surprising position of admitting that for one grazing allotment the issuance

of the term grazing permit is the final agency action. Reply at 17-18. In support of this exception to its position, Defendants cite to the case law discussed in this Sur-Reply that demonstrates that grazing permits are final agency actions. Reply at 18. Without support, Defendants argue that there is a distinction between the circumstance where an agency has prepared a NEPA-based decision and circumstances where no NEPA-based decision exists.<sup>1</sup> The decisions finding permits to be final agency actions make no such distinction. Moreover, as explained above, it is a distinction without merit because the NEPA-based decision serves as a distinct agency action enforcing different legal mandates. Regardless of the preparation of a NEPA-based decision, the grazing permit remains the final agency action authorizing grazing. Similarly, the AOIs are distinct as agency actions authorizing continued grazing in light of annual changes in the resource.<sup>2</sup>

The Defendants' admission that permits are final agency actions is consistent with the position they presented to Judge Jones and Judge Haggerty in the Malheur cases. As indicated in their briefing, Plaintiffs amended the complaint to address the decisions of Judge Jones and Judge Haggerty. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss

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<sup>1</sup> Defendants also include an alternative argument that the Forest Service lacks discretion to modify the terms and conditions of permits because of Congressional legislation. This position belies the fact that regardless of the terms of the permits, the Forest Service can and does exercise discretion by adjusting grazing to address annual changes in the condition of the resource.

<sup>2</sup> Plaintiffs have pled in the alternative that AOIs are final agency action subject to judicial review. Plaintiffs agree with the reasoning presented by Judge King in ONDA v. USFS, 312 F.Supp.2d 1337, 1343 (D. Or. 2004). AOIs are the only final statement of annually authorized grazing for the allotments where violations have occurred. They represent site-specific decisions by the Forest Service to authorize continued grazing in light of annual changes to the resource. This issue is currently on appeal to the Ninth Circuit. Should the Court grant Defendants' motion to dismiss, Plaintiffs reserve the right to appeal this issue along with the matters addressed by Plaintiffs' briefing.

(“Opposition Memorandum”) at 7-9. These decisions base their conclusion that the AOIs are not final agency action in part on the basis that it is the permits themselves that are the final action. Id. In fact, this is precisely the position that defendants presented to Judge Jones in support of their arguments in the Malheur matter. See Excerpt from Defendants’ Reply in Support of Cross-Motion for Summary Judgment on Administrative Record (“Plaintiffs’ Sur-Reply Exhibit 1”) at 10-11 (describing difference between permit and AOI as final agency action); Plaintiffs’ Sur-Reply Exhibit 1 at 13 n.4 (stating that permits without recent AMPs are final agency actions); Excerpt from Transcript for March 29, 2005 Motion Hearing Before the Honorable Robert E. Jones (“Plaintiffs’ Sur-Reply Exhibit 2”) at 33-34 (discussing levels of grazing program decisionmaking process without reference to NEPA-based decisions); Plaintiffs’ Sur-Reply Exhibit 2 at 39-40, 44-48 (describing permit as document that confers authority to graze). See also Excerpt from Brief for Federal Defendant-Appellees, Ninth Circuit Court of Appeal No. 05-35637 (“Plaintiffs’ Sur-Reply Exhibit 3”) at 15 (Ninth Circuit brief of Defendants in Malheur cases stating: “The Forest Service’s decisionmaking process is consummated with its decision on whether and under what parameters to authorize grazing, which in this case occurred upon issuance of the grazing permits for the allotments at issue”); Western Watersheds Project v. Montoya, Case No. CV-04-342-E-BLW (D. Id. April 20, 2005) (“Plaintiffs’ Sur-Reply Exhibit 4”) (addressing arguments of Forest Service that permit is final agency action).

In fact, the Defendants opening brief for this motion to dismiss continued to argue along the same lines. Def. Memorandum at 8, n.2. Plaintiffs amended the complaint to address Defendants’ position, but now Defendants argue that the only decision for Plaintiffs to challenge are the NEPA-based decisions, which occur only sporadically, do not address the Forest Service’s ongoing obligations under NFMA to annually adjust grazing, and are not the

instruments that authorize grazing as established by Forest Service regulations and administrative guidance. These NEPA-based decisions are not the sole decision of the Forest Service addressing its legal obligations under NFMA. The NEPA-base documents provide a statement regarding current compliance with NFMA standards, but do not represent the final decision to authorize continued grazing in compliance with the requirements of NFMA. As to its NFMA obligations, the NEPA-based decisions fail the Bennett requirement that in order for a decision to be final it must be more than tentative or interlocutory in nature. Bennett v. Spear, 520 U.S. at 178. In contrast, the permits authorize continued grazing pursuant to AOIs. The AOIs themselves are the actual statements of what grazing is authorized by the Forest Service on an annual basis.

**B. Defendants' Perceived Shortcomings of the Amended Complaint Do Not Constitute Grounds for Dismissal Pursuant to the Federal Pleading Standard.**

Defendants' Motion to Dismiss is based in large part on its argument that Plaintiffs have failed to identify with particularity actions that give rise to its claims. Defendants argue that Plaintiffs' first four claims do not sufficiently identify any decisionmaking points other than AOIs for the period of 2000-05. Reply at 3. The result, Defendants argue, is that Plaintiffs' claims are overly broad and diffuse similar in type to those dismissed by the Court in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). Id.

Despite Defendants' attempts to gloss over the distinction, these arguments challenge the sufficiency of Plaintiffs' pleadings, as opposed to the issue of whether there is subject matter jurisdiction. The federal pleading standard is set forth at FRCP 8(a)(2). It is well established that the federal pleading standard requires only that Plaintiffs provide Defendants with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson,

355 U.S. 41, 47 (1957). There should be little dispute that Plaintiffs' claims meet this liberal pleading standard. As explained in Plaintiffs' Opposition Memorandum, Plaintiffs' claims are distinct from those examined by the Court in Lujan. Opposition Memo at 11. In the Amended Complaint, Plaintiffs identify eleven allotments where grazing violations have occurred. Docket No. 36 at ¶ 82. Plaintiffs allege that the permits, AMPs, and recent AOIs for these eleven allotments are the decision documents giving rise to Plaintiffs claims. Id. at ¶¶ 86, 89, 94, 96. There is only one current permit for each permit holder on the allotments at issue and there is at most one AMP for each allotment. There is no need for Plaintiffs to distinguish the documents further in order to give Defendants notice of the agency actions that this suit challenges. The Defendants have provided the permits and AOIs as attachments to their briefing, and accordingly, the Defendants cannot argue that they are unable determine which actions the Plaintiffs challenge. Defendants take umbrage at Plaintiffs' characterization that Defendants have refused to produce the record. Reply at 5. However, there is no dispute that it was at the Defendants' urging that no administrative record has been prepared. Plaintiffs are disadvantaged by the lack of access to the records and are forced to rely on Defendants' inclusion of the documents as exhibits for this motion. Through its own diligence, Plaintiffs have identified with particularity the eleven allotments where the Forest Service has authorized grazing in violation of the law. This is hardly a wholesale challenge of the nearly one hundred allotments that comprise the entirety of the Fremont-Winema grazing program.

#### **IV. CONCLUSION**

Plaintiffs respectfully oppose Defendants' Motion to Dismiss. In light of recent District of Oregon decisions, Plaintiffs have amended the complaint to identify multiple, specific final agency actions that are subject to judicial review, which give rise to Plaintiffs' NFMA claims.

Additionally, as argued in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, Congressional enactments do not prevent review of Plaintiffs' fifth and sixth claims and Plaintiffs' eighth claim is within the statute of limitations. Accordingly, Plaintiffs respectfully request the Court deny Defendants' Motion to Dismiss on all grounds.

DATED: November 10, 2005.

Respectfully submitted,

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