
**BEFORE THE
UNITED STATES FOREST SERVICE**

WASHINGTON, D.C.

**REQUEST FOR COMMENTS REGARDING
PROPOSED DIRECTIVE FOR COMMERCIAL FILMING IN WILDERNESS;
SPECIAL USES ADMINISTRATION**

FR Doc. 2014-21093, Filed 9-3-14

**JOINT COMMENTS OF INTERESTED
MEDIA ORGANIZATIONS AND COMPANIES**

**AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
AMERICAN SOCIETY OF NEWS EDITORS
ASSOCIATED PRESS MEDIA EDITORS
ASSOCIATED PRESS PHOTO MANAGERS
ASSOCIATION OF ALTERNATIVE NEWSMEDIA
DIGITAL MEDIA LICENSING ASSOCIATION
NATIONAL FEDERATION OF PRESS WOMEN
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
NEWSPAPER ASSOCIATION OF AMERICA
RADIO TELEVISION DIGITAL NEWS ASSOCIATION
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
SOCIETY OF ENVIRONMENTAL JOURNALISTS
SOCIETY OF PROFESSIONAL JOURNALISTS
THE NATIONAL PRESS CLUB
WHITE HOUSE NEWS PHOTOGRAPHERS ASSOCIATION**

December 3, 2014

The coalition of media groups listed below appreciate the opportunity to submit our comments in order to address the specific First Amendment-based concerns regarding the Forest Service proposal to incorporate interim directive (ID) 2709.11-2013.1 into Forest Service Handbook (FSH) 2709.11, chapter 40 to make permanent guidance for the evaluation of proposals for still photography and commercial filming on National Forest System Lands. While such guidance is intended to create consistent national criteria to evaluate requests for special use permits related to still photography and commercial filming in congressionally designated wilderness areas, we are gravely concerned that, as written, the final directive will still allow for uncertainty in the permitting process which, in turn, leads to abridgements of the First Amendment rights of the public and the press, some of which were identified in a letter sent to Forest Service Chief Thomas Tidwell on October 1, 2014 by several of those participating in these comments and others (incorporated by reference as Attachment A).

**JOINT COMMENTS OF THE INTERESTED
MEDIA ORGANIZATIONS AND COMPANIES**

INTRODUCTION

We are a coalition of media groups. Some of our organizations are membership organizations, with members including individual journalists, photojournalists, video producers, radio producers, as well as their editors, directors, publishers or corporate entities. Others are media outlets and organizations. Still others are non-member organizations who represent the interests of publications and outlets. All of us are dedicated to exercising and protecting our First Amendment rights as Americans to gather information and images related to matters of public concern and to communicate them to a larger public. We all feel strongly that the management, use, and enjoyment of public lands and resources should be subject to unfettered media coverage and public discussion.

Many of these organizations and/or the entities they represent also engage in significant coverage of issues regarding public lands and the outdoors. Therefore, we share the Forest Service's interest in ensuring the continued enjoyment of these areas and their resources by all.

Organizations in our coalition include:

American Society of Media Photographers
American Society of News Editors
Associated Press
Associated Press Media Editors
Associated Press Photo Managers
Association of Alternative Newsmedia
Digital Media Licensing Association
National Federation of Press Women
National Newspaper Association

National Press Photographers Association
Newspaper Association of America
Online News Association
Radio Television Digital News Association
Reporters Committee for Freedom of the Press
Society of Environmental Journalists
Society of Professional Journalists
The National Press Club
White House News Photographers Association

KEY CONCERNS

Our organizations have an acute interest in helping the Forest Service protect the nation's precious natural resources, provide for multiple public uses and enjoyment of those resources, and allow full and open media coverage consistent with the First Amendment. We look forward to working with the Forest Service to develop a directive that will both preserve the character of our national wilderness areas while upholding the First Amendment rights of citizens and journalists.

In its current state, the proposed directive contains a number of requirements and definitions that we find troubling because of the restraints they place on the ability of journalists to perform their jobs on public lands. We certainly appreciate the Forest Service's reassurances, following the directive's initial release, that these provisions are not intended to apply to newsgathering and should not infringe on First Amendment rights. Thus, we have a number of suggestions for revisions to the directive that will clarify the language so it can achieve its intended purpose without undesirable side effects.

The question is whether these agencies should be issuing permits and collecting fees in these or similar situations? Our view, as explained in more detail in these comments and in our earlier letter is that the answer is almost always "NO."

HISTORICAL BACKGROUND

There is a history behind the issue of commercial filming on public lands. It is worth noting that, before the year 2000, it was actually illegal for federal land management agencies to collect fees for filming on public lands. This was a bonanza for Hollywood.

An example is the 1977 Steven Spielberg movie *Close Encounters of the Third Kind*, which earned a lifetime gross revenue above \$303 million on a production budget of about \$20 million. A key element of the film is the hero's obsession with the Devil's Tower, a national monument in Wyoming administered by the National Park Service. The 1981 Spielberg film *Raiders of the Lost Ark* earned a lifetime gross around \$390 million on a production budget of about \$18 million. Its opening scenes were filmed on National Park Service land in Hawaii. Both films were cited by members of Congress who changed the law in 2000 to direct federal land agencies to collect fees for "commercial filming."

Big Hollywood film operations often involve crews of a hundred or more, dozens of trucks and trailers, tracks, booms, dollies, cables, lights, and generators. Not only do these things risk trampling or damaging the resource and preventing members of the public from enjoying the resource, but they also involve significant administrative and logistical costs for the land conservation unit where filming occurs.

Congress clearly wanted to set right the most egregious problems connected with large-scale commercial filming. But it never meant to snare wildlife photographers or video documentarians in its net. Rep. Joel Hefley (R-CO) introduced a "commercial filming" bill (HR 2993) back in November 1997. It passed the House but not the Senate during that Congress.

Rep. Hefley reintroduced the bill in the next Congress. Legislation authorizing collection of fees was enacted in 2000, eventually becoming PL 106-206 (16 USC 4601-6d). Bill managers assured House members before it passed the House on by a bipartisan vote on May 12, 1999, that “the bill would not affect newsreel or television news activities.” (CR April 12, 1999, pp. H1812-H1813). The record shows clearly that the legislative intent was to recover costs and revenues from profitable Hollywood films by scaling fees to correspond with large impacts on public lands -- rather than to restrict newsgathering or media coverage of public lands. As eventually enacted, the law applied to both U.S. Forest Service and Interior Department lands.

Over the next decade, the law was implemented by regulations at federal agencies that included the National Park Service, the Bureau of Land Management, and the USFS. Those regulations were in turn interpreted by managers of local land units, and significant variation arose in how they were interpreted.

Did the NPS need to issue permits and collect fees when wedding photographs were being taken at the Jefferson Memorial? That was a matter of some controversy. Did Idaho Public Television news crews need permits to cover things happening on non-wilderness National Forest lands? The USFS said yes only this year (<http://www.spokesman.com/stories/2014/sep/27/idaho-public-tv-crews-chafe-at-filming-permits/>).

COMMENTS & RECOMMENDATIONS

The USFS Proposed Directive for Commercial Filming in Wilderness published in the Federal Register September 4, 2014 (hereinafter, the Proposed Directive) cannot be considered in isolation. Instead, it is part of a larger set of USFS special use policies and directives for all USFS lands, expressed in the Forest Service Handbook (2709.11, Chapter 40). Our comments go to the larger policy, beyond what criteria should be applied where a permit is or may be required, but instead to whether a permit should be required at all. Again, our view is that permits should only be required in very limited situations. These include situations where the activities in question would cause unacceptable resource damages (such as through the use of large props or crews), would unreasonably disrupt the public’s use and enjoyment of the site where the activity would occur, or would pose a public health and safety risk.

Journalism, photojournalism, documentaries, or media coverage that only minimally impacts NFS lands and does not limit other public use does *not* require a permit. Top Forest Service officials have stated this, and have also stated that people conducting activities *not* requiring a permit do not even need to check in with local land managers to discuss whether they need a permit. Because this exemption is not explicitly stated in the FSH, it needs to be stated clearly. Additionally, as these activities are not subject to the permit process, the criteria set forth in the Proposed Directive are not applicable to newsgathering.

Our main concern with this directive is that it may limit (or be interpreted to limit) the rights of a free press under the First Amendment to gather news and to inform the public. The USFS commercial filming policy currently lacks strong, broad, and clear exemptions for activities protected under the First Amendment.

The result is that, as applied in the field in recent years, some local NFS land managers have wrongly attempted to limit protected First Amendment activities, despite a self-evident right of those engaged in such pursuits to do so. For example, as recently as August 2014, Idaho Public Television journalists were allowed to record garnet-digging on NFS land -- and then contacted afterward with a Forest Service request to fill out a permit application. To subject public television, which is at heart non-commercial, to commercial filming requirements, is absurd -- but it shows how quickly an ambiguously written policy can be derailed by rigid and literalistic interpretation (or misinterpretation). Because the policies are not clear, they need to be clarified -- with language that cannot be misinterpreted. Good rules are precise and unambiguous. Clear writing matters. A special use permit should not be required for activities involving journalism regardless of whether they are for commercial or non-commercial purposes.

We welcome and support USFS Chief Thomas Tidwell's Nov. 4, 2014, memorandum to USFS managers stating this First Amendment exemption (incorporated by reference as Attachment B). The USFS can and should use this opportunity to formally implement the policies that Chief Tidwell stated in his memorandum. This can be accomplished via a few simple changes to the existing language in the Forest Service Handbook ("FSH"). Generally, the changes focus on:

- Replacing references to "breaking news" in the definitions section of 45.5 (Sections 45.51(a) and 45.52(a)) with "journalism," as redefined in Section 45.5.
- The definition of "Commercial Filmmaking," and associated definitions, should be changed in several ways, including, deleting two items from the list of criteria applied when it has been determined that a permit must be obtained.

We now turn to the specific recommended changes:

I. Replacing references to "breaking news" in the definitions section of 45.5 (Sections 45.51(a) and 45.52(a)) with "journalism," as redefined in Section 45.5.

Sections 45.51(a) and 45.52(a) both identify situations involving still photography and commercial filmmaking where a permit may be required. Both open with a statement to the effect that a special use permit is not required where "breaking news" is involved. However, "breaking news" should not be an exception to the requirement that a still photographer or commercial filmmaker otherwise obtain a permit. The term is too narrow and too difficult to apply in practice.

By implying an inaccurate and unrealistic notion of what constitutes news, the Proposed Directive unnecessarily limits the scope of the kinds of activities that should be exempt from a permitting scheme. For example, wildfires are big stories on many NFS lands. But should non-permit media coverage only be allowed for active fires? Are fires no longer "breaking" when they have been 50 percent contained? Or 90 percent? Shouldn't news coverage include the buildup of excess fuel before fires occur? Prescribed burns? Post-fire erosion and stream pollution? Post-fire regrowth and recovery? None of these stories are "breaking," but all are essential to full public understanding of forest management and wildfire.

Recommendation: Consistent with Chief Tidwell’s statement that “Journalism or media coverage is not to be considered a commercial activity for purposes of the regulations or our permit policies on any NFS lands,” we recommend:

A. The introductions to Sections 45.51(a) and 45.52(a) be rewritten as follows:

45.51(a): “A special use permit is not required for still photography when that activity involves journalism.”

45.52(a)(1): “A special use permit is required for commercial filmmaking (Sec. 45.5) activities on National Forest Service lands (NFS). If the activity presents no more impact on the land than that of the general public, then it shall be exempt from permit requirements. A special use permit **is not required** for broadcasting activities involving journalism regardless of whether or not they are commercial or non-commercial. To further help differentiate between journalism and other activities, the following question should be asked: Is the primary purpose of the filming activity to inform the public, or is it to sell a product for a profit? If the primary purpose is to inform the public, then no permit is required and no fees assessed.

B. Replacing the definition of “breaking news” in Section 45.5 with the following definition of journalism:

Journalism includes, but is not limited to: breaking news, feature stories, explanatory reporting about resource issues on NFS lands, b-roll and stock photography, still and motion documentaries, long-form pieces and background stories. Journalism further includes but is not limited to: photography, filming, and recording for use in any medium of dissemination, whether it be print, visual, broadcast, cable, satellite, online, or other means of reproduction and transmission. However, this list is intended to be non-exclusive and those applying the definition of “news” should err on the side of inclusion and, therefore, consider an activity exempt from the permit requirement when at all possible. Those persons and entities who would **not be required** to seek or obtain a special use permit include, but are not limited to: news organizations or their employees, independent journalists, documentarians or anyone who engages in activities with the intent to gather, assess, create, present or disseminate news and information.

II. The definition of “Commercial Filmmaking” should be changed in several ways, including clearly stating that journalism is not a “commercial” activity and rewriting the definitions of “commercial” filming, “actors,” and “sets and props.”

The definition of “commercial filming” in the FSH is problematic, even if it is not included in the immediate language of the Proposed Directive. Its ambiguous description in the underlying law

leaves the Forest Service with wide discretion on its interpretation. The Forest Service Handbook section on Special Uses (FSH 2709.11) defines commercial filming in Chapter 40 as “Use of motion picture, videotaping, sound-recording, or any other type of moving image or audio recording equipment on NFS lands that involves the advertisement of a product or service, the creation of a product for sale, *or* the use of *actors*, models, sets, or props, but not including activities associated with broadcasting *breaking news*. For purposes of this definition, creation of a product for sale includes a film, videotape, television broadcast, or documentary of historic events, wildlife, natural events, features, subjects or participants in a sporting or recreation event, *and so forth*, when created for the purpose of generating income.” FSH 2709.11, Chapter 45.5(2)(c) (emphasis added).

In contrast to the above, broad protection for journalism-related activities can be accomplished by following Chief Tidwell’s lead in his Nov. 4, 2014, memo, which stated: “*Journalism is not to be considered a commercial activity for purposes of the regulations or our permit policies on any NFS lands.*” We also think this formulation is consistent with Congress’ original legislative intent in PL 106-206.

Therefore, restating the exemption clearly, as discussed above, but also making certain changes to the definition of “commercial filmmaking” will help avoid misunderstanding and misinterpretation around the word “commercial.” Some of those changes include:

- A. Rewrite the definition of “commercial filming” in several ways, including but not limited to clearly stating that journalism is not a commercial activity.

The “or” first sentence of the definition of “commercial filming” indicates that the filming does not have to advertise a product or service or involve the creation of a product for sale in order to be commercial. The definition implies that filming may be commercial if it involves actors, models, sets, or props (however, see our separate comments on the definition of “actor” and the definition of “sets and props”). That does not provide sufficient separation, we think, between those activities which are “commercial” and those which are not. We think this can be achieved by adding a qualification regarding newsgathering activities.

Another issue is that the definition of “creation of a product for sale” within the “commercial filming” definition is vague and could be interpreted to wrongly include newsgathering or media coverage protected by the First Amendment. Defining the creation of a product for sale as including “a film, videotape, television broadcast, or documentary of historic events, wildlife, natural events, features, subjects or participants in a sporting or recreation event, *and so forth*, when created for the purpose of generating income” FSH 2709.11, Chapter 45.5(2)(c)(emphasis added) could encompass recordings of practically anything, and, if selling advertising during a news program is broadly construed as generating income, for example, many activities of newsgatherers would be implicated. Another example might be a long feature documentary by a nonprofit public television company, which might charge for CDs or videotapes of a program that was originally broadcast for free.

Finally, there is also a problem with the way USFS directives and rules discuss sound recording and the use of audio recording equipment on NFS lands. To be clear, the original 2000 law, PL 113-185, is completely silent on audio recording. We take that silence, along with the legislative

history, to mean that Congress clearly intended for audio recording *NOT* to be subject to permits or fees. This makes sense because audio recording, by itself, is a small-scale, no-impact activity. We can only imagine that the USFS contravened the letter and intent of the law in an effort to more fully delineate what constituted “commercial filming,” since most videography or filming also involves audio recording. Sound crews for major filming projects can be significant in size -- but would be regulated anyway as part of a major commercial filming project. There is no need for audio recording to be separated out in rules on special use permits and fees -- in fact, it is illegal.

Recommendation: We recommend that the definition of “commercial filming” should be changed to read:

Commercial Filming. Use of motion picture, videotaping, sound-recording, or any other type of moving image equipment on NFS lands that involves the advertisement of a product or service, the creation of a product for sale, or the use of actors, models, sets, or props, but not including activities associated with newsgathering. For purposes of this definition, creation of a product for sale includes a film, videotape, television broadcast, or documentary of historic events, wildlife, natural events, features, subjects or participants in a sporting or recreation event, and so forth, when created for the primary purpose of generating income, as opposed to engaging in journalism or newsgathering and reporting for the purpose of informing the public.

B. Rewrite the definition of “actor.”

Similarly, the definition of “actor” in the FSH, at 2709.11_40 (45.5.2.a), errs in such a way that it might include an on-camera reporter for a nonprofit public television story. While this language is not explicitly included in the proposed wilderness directive, it nonetheless applies. It needs to be revised. One quick way to accomplish this would be to exclude from the definition of “actor” people who are playing themselves.

In the Handbook, an actor is defined as “An individual who either: (1) Portrays a character or himself/herself in the reenactment of an event or incident, or (2) Narrates a storyline for commercial filming purposes. News broadcasters and correspondents, as well as witnesses, victims, or other parties interviewed by a news broadcaster or correspondent, who appear before a camera in the reporting of breaking news, are not considered actors for purposes of this definition.” FSH 2709.11, Chapter 45.5(2)(a). The second part of that definition indicates that, when “breaking news” is not being reported, news broadcasters/correspondents, witnesses, victims, and other interviewees *are* considered to be actors. Therefore, if a news report does not fall under the very narrow definition of breaking news, then the people who appear on camera are actors, and it all qualifies as “commercial filming.” As a result, the current definition of commercial filming clearly (and wrongly) includes newsgatherers as long as they are not covering “breaking news.” A very simple change can fix this issue, by removing “breaking” before “news.”

Recommendation: We recommend that the definition of “actor” in Section 45.5 be rewritten as:

a. Actor. An individual who either:

- (1) Portrays a character or himself/herself in the reenactment of an event or incident,

or

(2) Narrates a storyline for commercial filming purposes. News broadcasters and correspondents, as well as witnesses, victims, or other parties interviewed by a news broadcaster or correspondent, who appear before a camera in the reporting of news, are not considered actors for purposes of this definition.

C. Rewrite the definition of “sets and props.”

This definition is subject to the same deficiencies and inequities which occur where the term “breaking news” is used elsewhere. Thus, this should be changed to “news”.

Recommendation: We recommend that the definition of “sets and props” be rewritten as:

Items constructed or placed on NFS lands to accommodate commercial filming or still photography, such as backdrops, generators, microphones, stages, lighting banks, camera tracks, vehicles specifically designed to accommodate camera or recording equipment, rope and pulley systems, rigging for climbers, and structures. Sets and props also include trained animals and inanimate objects, such as camping equipment, campfires, wagons, and so forth, when used to stage a specific scene. A set or prop does not include any of the preceding items when they are used to report news, nor does a prop include a hand-held camera or a camera mounted on a tripod.

III. Deleting two items from the list of criteria applied when it has been determined that a permit must be obtained.

The proposed directive gives Forest Service administrators discretion over whether a permit should be issued based on the message that would be conveyed by the filming or photography. Section 45.1c (Evaluation of Proposals) states that a special use permit may be issued when the proposed activity “[h]as a primary objective of dissemination of information about the use and enjoyment of wilderness or its ecological, geological, or other features of scientific, educational, scenic, or historical value.” Basing the granting of permits on the applicant’s message rather than on the impact the filming would directly have on the environment is impermissible under the law.

The public, including journalists, have a First Amendment right to speak and gather news in “public forums.” In public forums, rules about speech are generally limited to time, place, and manner restrictions. Such restrictions must be content-neutral, must be narrowly tailored to serve an important government interest, and must leave open alternative methods of communication. In evaluating whether a forum is public, a court will consider whether it has traditionally been open to all speakers, or if it is tightly controlled or used for a limited purpose. NFS lands should be considered public forums where the restrictions on reporting should be limited to time, place, and manner. The language of the proposed directive is not content-neutral. It gives discretion to the Forest Service to take the permit applicant’s message into account and allows for denial of the application if the message is unsatisfactory in promoting the wilderness.

We understand and acknowledge that the Wilderness Act imposes more stringent standards of stewardship than does the Organic Act of 1897, the Multiple Use Sustained Yield Act of 1960, the Forest and Rangeland Renewable Resources Planning Act of 1974, the National Forest Management Act of 1976, or other laws governing management of NFS lands. Typically, restrictions on activity in wilderness include the use of motor vehicles; mechanized equipment; motorboats; the landing of aircraft, roads, structures, and installations, etc. We have no problem with such restrictions as long as they do not restrict small-scale filming and photography. We do not expect journalists and documentarians to have more access to wilderness lands than the general public.

The Sept. 4 Proposed Directive for Commercial Filming in Wilderness consists primarily of a list of criteria to be used in section 45.1c – “Evaluation of Proposals.” For the most part, we do not object to the criteria in the list, subject to the understanding that they do not apply to journalistic activities or noncommercial media, or activities whose primary purpose is to inform the public about matters related to NFS Wilderness lands.

Recommendation: We recommend that the following be removed from the list of criteria found in 45.51(b) which is applied when deciding when a permit will be issued:

45.1(c)(5)(a): Has a primary objective of dissemination of information about the use and enjoyment of wilderness or its ecological, geological, or other features of scientific, educational, scenic, or historical value (16 U.S.C. 1131(a) and (b));

45.1(c)(5)(c): Is wilderness-dependent, for example, a location within a wilderness area is identified for the proposed activity and there are no suitable locations outside of a wilderness area (16 U.S.C. 1133(d)(6));

CONCLUSION

At stake in this rulemaking is not only protection of Wilderness lands, but also protection of foundational First Amendment rights.

Journalism is not the only expressive activity protected by the First Amendment. Not all documentaries are “news” documentaries, and yet all documentaries are protected by the First Amendment. And in fact, not all journalism involves “news.” While we certainly want newsgathering to be protected and exempted, we think it is a mistake to use “news” as an equivalent to the terms “journalism” or “media” in the USFS commercial filming policy. For example, Ken Burns’ landmark film “The National Parks: America’s Best Idea” is a documentary, but not a news documentary and perhaps not even journalism. Similarly, a documentary about migratory birds in the Klamath National Forest, the devastation of the Emerald Ash Borer in the Ottawa National Forest, or the recovery of Angeles National Forest five years after the Station Fire would not be news. But it would arguably be journalism -- and probably would contribute to public understanding of National Forest resource issues even if it were not journalism.

The USFS, as the law makes clear, has a legitimate interest in protecting the resource itself and in protecting the public’s ability to enjoy and use the resource according to established multiple-use principles. The USFS also has a legitimate interest in recovering any significant costs and

offsetting any administrative burdens imposed by “commercial filming” and related activities on NFS lands. Existing USFS policies correctly try to apply tests to commercial filming activities that discriminate according to their scale, their impact on the resource, their effect on other public use, and their demands on the USFS itself. We are confident that the vast majority of journalistic and documentary coverage of USFS lands will not cause significant detrimental impact in these areas.

It is important that the NFS commercial filming policy protect the ability of videographers, filmmakers, photographers and those recording audio, to engage in those activities on NFS lands -- even if they are not journalists. Environmental groups, trade associations, and others play important roles in expanding public understanding and appreciation of these natural resources. Would Ansel Adams have been required to pay a fee or get a permit to take pictures in the Inyo National Forest (the one containing the Ansel Adams Wilderness)? Would it make a difference if -- some 50 years after his death -- a nonprofit environmental group was using his images on a calendar to raise money? The mere making of money -- by itself and in the absence of other criteria -- is not a good test for whether “commercial filming” fees and permits should apply. The scale of impact on the resource as well as upon other users must also be balanced in making that determination.

Forest Service finalization of the criteria for commercial filming on NFS Wilderness lands should only occur with an explicit commitment to further and deeper revisions of the directives in the Forest Service Handbook to make clear that rules for commercial filming do not limit or infringe on the rights to engage in journalism and newsgathering protected by the First Amendment. At the very least, however, an affirmation of these rights and clear exemption for First Amendment protected activities should be included in the section the USFS proposes to finalize in this rulemaking.

Thank you for the opportunity to comment on this rulemaking process. We trust our recommendations will result in a final directive that satisfies USFS objectives without abridging the First Amendment protections of citizens and journalists.

Respectfully submitted by:

American Society of Media Photographers
American Society of News Editors
Associated Press Media Editors
Associated Press Photo Managers
Association of Alternative Newsmedia
Digital Media Licensing Association
National Federation of Press Women
National Press Photographers Association
Newspaper Association of America
Radio Television Digital News Association
Reporters Committee for Freedom of the Press
Society of Environmental Journalists
Society of Professional Journalists
The National Press Club
White House News Photographers Association

ATTACHMENT A



National Press Photographers Association

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Via Email

October 1, 2014

Thomas L. Tidwell
Chief, U.S. Forest Service
USDA, Forest Service
201 14th Street SW
Washington, DC 20250-1124

RE: Proposed Directive, FSH 2709.11, Chapter 40

Chief Tidwell:

The undersigned seventeen news organizations, photographers' organizations and First Amendment advocacy groups oppose the Forest Service's proposal to make permanent its interim directive on filming in the nation's wilderness areas. We are also troubled by the proposal to apply new criteria in deciding whether to issue a permit for filming in Congressionally-designated wilderness areas.

We are concerned by the proposed permanent directive's vague language and failure to make a clear distinction between still photography, film and videography for newsgathering purposes and "commercial" film and still photography. But even more disconcerting is the imposition of a permitting scheme for news-related photography or videography in the first place, especially when some of the criteria applicable to permits for Congressionally-designated wilderness areas in particular seem to have no relationship to maintenance of the actual wilderness areas and instead are more focused on ensuring films and photos convey a particular image or message.

While we appreciate your most recent statement that the "US Forest Service remains committed to the First Amendment," the language of the "provisions in the draft directive" does not make it clear that it does "not apply to news gathering or activities."

Additionally if the proposed directive "does not apply to news coverage, gathering information for a news program or documentary," as you state in your press release, will the Service still require such individuals or organizations to make application for a permit anyway? And if not, how will the Service determine whether "a project falls outside of that scope," thus triggering the permitting process?

You have stated that you take "First Amendment rights very seriously." But despite your assertion that "the directive pertains to commercial photography and filming only – if you're there to gather news or take recreational photographs, no permit would be required," representatives of the Service have previously deemed editorial/newsgathering photography and filming as being

commercial in nature under the current directive and in fact required a permit for such activity.

Of even greater concern is the fact that a permit could be arbitrarily denied because a member of the Service with such authority might believe that a news story did not comport with the vague notion of protecting “wilderness values.” Again, this seems particularly likely where Congressionally-designated wilderness areas are concerned.

We contend the proposed permanent policy limits far more speech than is necessary to achieve the government’s stated purpose. Not only does requiring a permit for ordinary newsgathering create a chilling effect on freedom of speech and of the press, but also granting the Service the ability to deny such a permit in the case of a journalist or news organization would, we believe, create an unconstitutional licensing obligation or – worse – a prior restraint on those newsgathering activities.

Further, we are concerned not just for individuals traditionally identified as newsgatherers, but also for freelance visual journalists and members of the public who may use cameras on a speculative basis to photograph or film activities on public lands without having an assured media outlet for their work.

The proposed policy’s language regarding payment somehow transforms a visual journalist’s work for editorial photography (even on speculation) into a commercial venture. Therefore, we strongly urge the Forest Service to include us in any public meetings and then continue to work closely with us to craft an unambiguously worded policy that protects not only our natural resources but our First Amendment guarantees.

Thank you very much for your time and attention in this matter. We look forward to your response.

Sincerely,

Mickey H. Osterreicher

Mickey H. Osterreicher
NPPA General Counsel

On behalf of:

American Photographic Artists
American Society of Media Photographers
American Society of News Editors
Associated Press
Associated Press Media Editors
Associated Press Photo Managers
Association of Alternative Newsmedia
Digital Media Licensing Association
National Federation of Press Women

National Newspaper Association
National Press Club
Newspaper Association of America
North American Nature Photography Association
Radio Television Digital News Association
Reporters Committee for Freedom of the Press
Society of Environmental Journalists
Society of Professional Journalists

ATTACHMENT B



Forest
Service

Washington
Office

1400 Independence Avenue, SW
Washington, DC 20250

File Code: 2720

Date:

Route To:

NOV 04 2014

Subject: Commercial Filming and Photography Permits

To: Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs and WO Directors

There has been considerable response to the recent release of a proposed directive for commercial filming in wilderness. The release of the proposed directive raised significant concerns beyond the intended scope of the directive. The intent of this directive is to finalize a consistent set of criteria to be used to justify permitting commercial filming in wilderness within the authorities and restrictions of the Wilderness Act. The proposed directive never intended to restrict the appropriate use of National Forest System (NFS) lands for personal and commercial filming or photography activities. Nevertheless the directive raised significant concerns among journalists and the general public about access and the first amendment. The proposed wilderness directive does not define commercial filming or still photography, but the proposed directive did generate conversation around those activities.

I have spoken with agency leadership, members of the national press, leadership from the Society of Environmental Journalists, and the Outdoor Writers Association of America; and I want to ensure that my intent is clear at all levels of this agency. News coverage on NFS lands is protected by the Constitution, and it is our responsibility to safeguard this right on the lands we manage for all Americans. Journalists provide a critical public service, and this agency will ensure their access in the pursuit of that public service. Journalism is not to be considered a commercial activity for purposes of the regulations or our permit policies on any NFS lands. Journalism includes, but is not limited to: breaking news, b-roll, feature news, news documentaries, long-form pieces, background, blogs, and any other act that could be considered related to news-gathering.

To further help differentiate between journalism and other activities, the following question should be asked: Is the primary purpose of the filming activity to inform the public, or is it to sell a product for a profit? If the primary purpose is to inform the public, then no permit is required and no fees assessed.

I also want to emphasize that commercial photography only requires a permit if the photography takes place at locations where members of the public are not allowed, or uses models, sets, or props.

Commercial film and photography permit fees should be primarily viewed as land-use fees. If the activity presents no more impact on the land than that of the general public, then it shall be exempt from permit requirements.

We have planned a series of public sessions to gain input on the proposed directive to ensure we understand all concerns before issuing a final directive. Please ask any interested parties to consider participating in those sessions so that we can develop a well-informed final directive.



I ask you to help us through your contacts to share and discuss with the public and the media the intent of this proposed directive and those circumstances where a permit is not required. The Agency will fully and carefully address comments from journalists and all other public comments in developing the final directive and associated *Federal Register* notice as part of the rulemaking process. Over the last several weeks, I have had many conversations with agency leaders on this issue, and I have been encouraged by the passionate support within the Forest Service for the value of journalism on America's public lands. Thank you for your continued commitment to reasonable application of the laws and policies that protect these wild places while ensuring access for the people who play such a critical role in our democracy.



THOMAS L. TIDWELL
Chief

