

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

TONY NENNINGER,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES FOREST SERVICE,)
 Abigail Kimbell, Chief of FS,)
)
 MARK REY,)
 in official capacity as Under Secretary)
 for USDA,)
)
 ELLEN HORNSTEIN,)
 individually and in official capacity as)
 FS legal counsel,)
)
 JOHN TWISS,)
 individually and in official capacity as FS)
 law enforcement chief,)
)
 OFFICER LAMPSHIRE,)
 individually and in official capacity in FS)
 law enforcement,)
)
 OFFICER KROGSTAD,)
 individually and in official capacity in FS)
 law enforcement,)
)
 UNKNOWN JOHN AND JANE DOES,)
 individually and/or in official capacities for)
 FS and/or other government agencies,)
)
 Defendants.)

Case No. 07-3028

**STATEMENT OF MATERIAL
FACTS AS TO WHICH THERE
ARE NO GENUINE ISSUES TO
BE TRIED**

The United States of America, represented by Robert C. Balfe, United States Attorney for the Western District of Arkansas, and the undersigned Assistant United States Attorney, on behalf of the United States Department of Agriculture, Forest Service (Forest Service); Abigail Kimbell, Chief of the Forest Service; Mark Rey, Under Secretary, Natural Resources and Environment; Ellen Hornstein in her personal and official capacity as Forest Service legal counsel; John Twiss, in his personal and official capacity as Director of the Forest Service's Law Enforcement and Investigations Staff; Chris Lampshire, in his personal and official capacity as a Forest Service Law Enforcement Officer; and Chad Krogstad, in his personal and official capacity as a Forest Service Law Enforcement Officer, submit this Statement of Material Facts as to which there are no genuine issues to be tried:

1. The Rainbow Family is an unincorporated, loosely structured group of individuals that regularly gathers in undeveloped sites in National Forests.
2. Problems associated with loosely organized conglomerations of 20,000 or more persons in remote areas of the forests are inevitable.
3. In the past, the Forest Service has encountered difficulties stemming from the increasing use of the National Forest System by large groups.
4. Improperly closed latrines, eroded and compacted soil, destruction of vegetation, and litter have been problems at previous gatherings.
5. In the 1987 national Rainbow Family gathering in North Carolina, inadequate sanitation resulted in an outbreak of shigellosis, a form of bacterial dysentery transmitted by contamination from human waste.

6. Two physicians from the Centers for Disease Control in Atlanta visited the 1987 national gathering from July 4–11 and estimated that 65 percent of those remaining suffered from shigellosis.

7. By the middle of August 1987, twenty-five states reported outbreaks of shigellosis traced to persons attending the gathering.

8. In the 1991 national gathering in Vermont, uncovered human waste was left scattered throughout the forest.

9. In the 1992 national gathering in Colorado, latrines were dug too close to open water.

10. Competing or inappropriate proposed uses of the National Forest System by groups other than the Rainbow Family have posed threats to physical safety.

11. To preserve National Forest System resources, to address concerns of health and safety, and to allocate space among competing users, the Forest Service promulgated the noncommercial group use regulation (The Final Rule) in 1995.

12. Those wishing to use or occupy National Forest System lands in noncommercial groups of 75 or more are required to obtain a special use permit to do so.

13. Persons wishing to obtain a permit as described in the previous paragraph must provide minimal information in a short application form, including “[t]he name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent.”

14. In his prosecution for failure to obtain the required permit in connection with the 1998 national Rainbow Family gathering in the Mark Twain National Forest, this same plaintiff unsuccessfully challenged the constitutionality of the Final Rule under the First Amendment.

15. Plaintiff was tried, convicted of failing to obtain the required permit under the Final Rule and a water line permit, and was fined \$50.00.

16. The conviction referred to in the previous paragraph was affirmed on appeal.

17. Annual gatherings of the Rainbow Family have occurred in different National Forests on and around July 4 since 1972. These gatherings draw more than 20,000 participants and last for a month or more. Smaller regional gatherings take place throughout the year in National Forests across the country.

18. An applicant for a noncommercial group use authorization must submit basic information sufficient to allow the Forest Service to make an informal time, place and manner decision.

19. The government has consistently and fairly enforced the Final Rule and other laws and regulations in the context of other noncommercial gatherings on National Forest System lands involving 75 or more people.

20. The checkpoints at the 2006 and 2007 national Rainbow Family gatherings were conducted in compliance with the Forest Service's national vehicle checkpoint policy.

21. All four defendants sued in their personal capacities have been certified by the Attorney General through the U.S. Attorney for the Western District of Arkansas as acting within the scope of their employment.

22. Other than Mr. Krogstad, none of the individual defendants lives or works in Arkansas, nor has any of them lived or worked for any extended period in Arkansas.

23. Mr. Krogstad has recently moved to Arkansas subsequent to when the alleged claims occurred pertaining to him.

24. The individual defendants had no substantial contacts with Arkansas during the time in question.

25. Abigail Kimbell was acting within the scope of her federal employment as an employee of the United States Department of Agriculture with respect to the incidents referred to in the Complaint and Amended Complaint.

26. Ellen Hornstein was acting within the scope of her federal employment as an employee of the United States Department of Agriculture with respect to the incidents referred to in the Complaint and Amended Complaint.

27. Mark Rey was acting within the scope of his federal employment as an employee of the United States Department of Agriculture with respect to the incidents referred to in the Complaint and Amended Complaint.

28. John Twiss was acting within the scope of his federal employment as an employee of the United States Department of Agriculture with respect to the incidents referred to in the Complaint and Amended Complaint.

29. Officer Lampshire was acting within the scope of his federal employment as an employee of the United States Department of Agriculture with respect to the incidents referred to in the Complaint and Amended Complaint.

30. Officer Krogstad was acting within the scope of his federal employment as an employee of the United States Department of Agriculture with respect to the incidents referred to in the Complaint and Amended Complaint.

Respectfully submitted,

ROBERT C. BALFE
United States Attorney

/s/ Claude S. Hawkins, Jr.

By: _____
CLAUDE S. HAWKINS, JR.
Assistant United States Attorney
Arkansas Bar No. 77062
Western District of Arkansas
414 Parker Avenue
P.O. Box 1524
Fort Smith, Arkansas 72902
Telephone: (479) 783-5125
Fax: (479) 785-2442
claude.hawkins@usdoj.gov

OF COUNSEL:

Ellen R. Hornstein
United States Department of Agriculture
Office of the General Counsel
1400 Independence Avenue, S.W.
Stop 1412
Washington, D.C. 20250-1412
(202) 720-9616
ellen.hornstein@usda.gov

Laurie A. Peterson
United States Department of Agriculture
Office of the General Counsel
3201 Federal Building
700 West Capitol Avenue
Little Rock, Arkansas 72201
(501) 324-5246
laurie.peterson@usda.gov

CERTIFICATE OF SERVICE

I, Claude S. Hawkins, Jr., Assistant United States Attorney for the Western District of Arkansas, certify that on January 17, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which sent notification of the filing to the plaintiff:

Tony Nenninger
27 East Stewart Road
Columbia, Missouri 65203
Plaintiff, *Pro Se*

The undersigned further certifies that a true copy of the foregoing document has been mailed, postage prepaid, to the following non-participants in the ECF system:

/s/ Claude S. Hawkins, Jr.

Claude S. Hawkins, Jr.
Assistant United States Attorney