PCU //\ Free Assembly Project an Association of Volunteers _/

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25 February 2003

Mark Rey USDA Under Secretary
-- Natural Resources & Environment
Room 217-E, J.L. Whitten Building
1400 Independence Ave, SW
Washington, DC 20250

Re: Policy Letter to the I.C., 6/28/02 --
"Clarification" on Group Uses

Dear Mr. Rey:

Since the current 'Group Use' regulations were proposed in 1993, PCU_/FAP volunteers have been active in analysis and critique of these policies. We have made a strong record of our concerns in Congress and the prior Administration, and we have been close observers on the sordid course of the court cases coming from the 'Rainbow' gatherings.[1]

We are well aware that the legal issues remain tangled and unresolved, and that official actions in the Forest Service's name have become increasingly arbitrary and intractable, imposing severe burdens on participants in these unique public assemblies.

Through hundreds of prosecutions, litigation around the country, and now jailings for lack of a signature, the situation has only devolved into a quagmire of confrontation and fear. With law enforcement officials driving USFS policy on expressive assemblies, this is evidently the intent.

Of course we pay close heed to any new discourses on these concerns, and to any sign of good sense & good faith on the part of policymakers. Your June 28 letter to Mr. Jowers explicitly sought to provide "clarification [on] the noncommercial group use permit", and to state "the Department's position" on the three points in question. It was seen by some to signal a shift toward accommodation on key points; as such it is of special interest. [Attachment 'A']

Unfortunately, the stated positions are wrong: What you proclaim as agency policy is contradicted by the very nature and action of the NGU Permit as a legal instrument.

COUNTERPOINTS /

1) "Designation as a signatory and/or contact" absolutely implies agent capacity and powers within the so-called "group", and in fact creates such powers de novo, regardless of any claims to the contrary. It is immaterial whether a permit signer is presumed to be a 'leader' or 'officer' or 'poobah', or Not: By definition and by whatever name, one walks into a vested agent position on behalf of the named 'group', in the very act of signing.

If the purpose of this 'clarification' is to reverse the past doctrine of 'de facto agency'-- or even to assert that a permit signer need not have any connection to the 'group' -- the logic is flawed and only blurs the boundaries of personal vs. agent standing. Moreover to suggest that the designation of a signer can be made "by the Forest Service" violates the language and whole meaning of the regulation at §251.54(g)(3)(ii)(H)…[2] as well as the foundations of contract law.

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1 Following upon petitions & public appeals during the comment period and thereafter, PCU's definitive analysis of the proposed regulation was presented to USDA officials (including former Under Secretary Jim Lyons) in December 1993: "Group Use Rules for National Forest Lands ~ A Legal & Land Use Review".

2 This cite reflects the 1998 revisions to §251.54 [63 F.R. 65964, 11/30/98]. This provision originally appeared at §251.54(h)(viii) in the 1995 rule publication, and is cited as such in several legal cases as the '8th Criterion' for issuing a NGU permit: "A person or persons 21 years of age or older have been designated to sign and do sign a special use authorization on behalf of the applicant."

2) It is specious to assert that there is "no individual liability whatsoever as a result of a signature…", and Clause 11 of the permit is a direct deception. While liability is nominally shifted to the 'group', the individual signer is still made the responsible agent -- and in the circumstance of a consensual assembly, is in fact the only legal party to a permit.

As observed, individual signers are made personally responsible for 'group' compliance: USFS officials go straight to them repeatedly during the event, and seek to continue contact in this capacity thereafter. Then if costs are assessed on the 'group', the same individual would be sent the bill and held liable for payment as its named agent -- or for a felony for truthfully disclaiming such a role after signing (18 USC 1001). This is liability in fact, regardless of any policy palaver.

3) The FS-2700-3b Permit still requires a named "group" to act as "holder" -- the same stumbling block as always. Agency orthodoxy to date has alleged the so-called 'Rainbow Family' to be a "Group" and required it to be a legal party to the permit. Yet now the Forest Service would disclaim "any judgment or finding as to the nature of the group"? Coercion here devolves into doublespeak:

By regulation, the 'nature of the group' is that it must be an aggregate legal entity, capable of designating agents and holding a permit -- so by definition, a public assembly of unaffiliated people simply lacks such capacities, and cannot comply in this way. In fact the "mere obtaining of a permit in the name of the group" enacts and empowers a fictional entity, and irrevocably annuls the individual standing of the "assembled participants".

In sum, your "clarifications" are legal oxymorons… only further muddling the amorphous scope and arbitrary thresholds of the 'Group Use' regulation, and its impact in abrogating the right of assembly as a personal guarantee under the First Amendment.

Further we question the Under Secretary's unilateral discretion to redefine USDA policy by letter to a Special Agent, and hereby request the legal authorities that give effect to this action.

Any change in applied policy would be expected by an 'Interpretive Rule' at least, as the Forest Service has done in the past. However these points would not get through that process – much less bear up to public review -- because they are unworkable, and moreover unreal: The legal effects of permit signing are intrinsic and instantaneous, and cannot be undone by administrative fiat.

CONSIDERATIONS /

There is dark irony in your letter of 'accommodation' going out on June 28, 2002:

On that day Mr. Jowers set up interagency police roadblocks and gauntlets on Choate Road, right in front of the Rainbow Gathering in Ottawa NF. Forest Service LEO's targeted participants to impede and intimidate access, and even dumped out barrels of drinking water folks were trying to bring in. Many people were systematically detained, searched, inquisitioned, and cited in the operation; some were charged with Group Use violations while still in their cars.

Thereafter LEO's kept issuing §261.10(k) citations widely -- well over 100 of them through the course of the event, right through cleanup.[3] Apparently your letter was taken as support for the regulation as applied, the premise that it was an "illegal gathering", and aggressive enforcement on thresholds even more vague and arbitrary. Certainly it did nothing to restrain police intimidation and interference, or to abate criminal sanctions against First Amendment activities.

And the impacts persist long after the gathering -- due to the I.C.'s tactics of ticketing en masse, and the resultant prosecutions of attendees. There were close to 400 Federal citations in all, many from the unprecedented "Special Closure" of 1.6 square miles of the chosen site.[4]

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3 Our letter to the Supervisor on 11 July '02 protested the continuing citations & harassment of cleanup volunteers, and unreasonable conditions on rehabilitation efforts. It challenged any notion of setting up future liabilities in order to bill the "Rainbow Family" for alleged site damages. [Attachment 'B']

4 A Special Closure Order (No. 5300/07/02/15) was issued on 6/23/02, ostensibly to protect underground remnants of the old Choate townsite and unspecified archeological resources. [Attachment 'C']

Misdemeanor cases are very hard to defend in a remote court, so most people were fleeced by fines, and many who fled in fear or disgust now have warrants. A handful have tried to fight unfair charges, all uphill with poor representation... in October three more good people were hit with jail sentences, now under appeal. Overall, the chilling effects are profound.

These enforcement actions are not a reasonable response to rampant crimes or threats to public safety: This is a war of attrition under color of Forest Service policy, targeted against decent people who assemble in this way. The Group Use Permit is the lynchpin in these tactics -- the regulatory pretext that triggers intensive police presence, intervention by direct official contacts, blanket probable cause, and cumulative criminal charges to burden these people in their lives.

The mandated practice of delegating full 'Incident Command' authorities is also significant -- displacing qualified USFS staff from policy decisions, and putting LEI officials in total control of expressive events on public lands, upon any 'suspicion' that an "illegal gathering" might take place.[5] In this context, the coercive demand for a permit signer creates a wholly untenable legal stalemate:

•• If an individual signs the Noncommercial Group Use Permit ultra vires, without known affiliation and not designated by any 'group', by misrepresenting his capacities he can be sued by peers and he commits a felony (18 USC §1001) -- the impossible Hobbesian Choice.

•• Conversely if the Forest Service issues the NGU permit to a real group entity usurping authority as 'holder', to a de facto 'group' of those assembled with no prior affiliation, or to any other ad hoc or fictional entity with no legal capacities at all -- it is ultimately fraudulent.

The cases so far are convoluted enough, and have not even reached this minefield. U.S. Attorneys and LEO's keep portraying the 'Rainbow Family' as a "group" with "members", using Walks-like-a-Duck inferences on misconstrued hearsay to bury the core issue of personal standing in assembly. But the Government cannot absolve itself of responsibility for the legal standing of those it compels to be parties to the permit.

Understand that gathering participants have always cooperated willingly with Forest Rangers on shared concerns of health, safety, and resource protection, but permits have been signed only under duress and threat of force. Where any contact with officials now leads inexorably to this outcome, the incentives are skewed: The permit requirement disables cooperation and subverts public interests.

DEPARTURES /

The political impetus for your letter is obvious: In various high-level overtures since 1999, concerned folks have sought an accommodation on the Group Use impasse. Some espoused the idea of a "self-designated signer" without liability or agency, a few have applied on this premise, and one gent has tried to wield personal influence in Washington -- all hoping to mollify permit enforcement.

These efforts are well-meaning but misguided: If the FS-2700-3B permit remains the only way to comply, the problem will persist. This is not due to gatherers' stubborn defiance, but rather the agency's myopic fixation on this permit process that does not work for true public assemblies.

The permit is not an end-in-itself, just one means of achieving regulatory ends on NFS lands, among many within the agency's authority. There are proven alternatives for meeting the legitimate purposes of resource protection, public wellbeing, and fair multi-use allocation... and no legal issues of unequal treatment or "singling out" of expressive activities if equivalent, content-neutral standards are applied.

It's time to see the escalating stakes, avert conflict, and think about the big picture:

The Forest Service must change its Group Use policies so that good Americans who join in consensual assemblies can comply in good faith -- and abandon its ruinous course of draconian enforcement, debasement of constitutional rights, and fraud on the public.

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5 Supervisor Robert Lueckel enacted a 'Delegation of Authority' on 6/23/02, conveying local administrative powers in Ottawa N.F. to Incident Commander Malcolm Jowers during the gathering. [Attachment 'D']

By all means, serious dialogue should resume, and PCU_/FAP volunteers have workable ideas to contribute. We are willing to take part in renewed discussions, with these understandings:

~ We can make recommendations from hard research & experience, but cannot 'negotiate'... we advocate public interests, speaking To the Issues but For Nobody, and make no deals.

~ We will address only USDA/USFS officials properly responsible for agency policy... 'Incident Command' and LEI personnel are excluded because they are not authorized or qualified to make policy, and have vested interests in the current enforcement regime.

~ The facts, issues, ideas, & proposals on the table will be publicly disclosed and debated... this allows broad input, and assures accountability to stakeholders and watchful citizens.

We ask the courtesy of a timely response with your reconsidered views and plans.

Please provide useful findings and policy sources related to the concerns expressed here, as well as the legal authorities requested above (Pg.2, Par.6). It helps to put such information on the table for common reference, to better understand policy contexts and real options.

With due respect for your apparent openness and desire to reconcile the 'Group Use' quandary, we hope for sincere progress in a new dialogue, on a new footing.

Thank you for your thoughtful attention.

Respectfully submitted,

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Attachments: A, B, C, D

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