

8 January 2004

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Attn: Officials & Individuals in Counsel

For: The Gathering Policy Powwow
High Noon – 10 January 2004
Haight-Ashbury Library, San Francisco, CA

A POSITION ON THE 'DELEGATION OF AUTHORITY'

Greetings to All Concerned:

I was invited to take part in this discussion of 'Group Use' policies with USDA/USFS officials, but regrettably I am unable to attend. Instead I hope to contribute certain points in writing, bringing prior correspondence with Mr. Rey to the table, and adding the comments herein.

Presented for your reference are two formal letters sent to Mr. Rey in the past year:

- *"Clarification" on Group Uses (2/25/03)*... a response to his June '02 policy directive to the Incident Commander, offering direct 'Counterpoints' and observations on its real effects.
- *Permit 'Negotiations' & Public Health (6/9/03)*... a critique of grounds in the Beck permit signing in Utah, and the attempt to impose redundant State health authorities on Federal land.

These are conveyed to the meeting c/o Tony Nenninger (*U.S. v. Nenninger*, #03-1350, 8th Cir.), with the knowledge that the issues raised are most germane to the discussion. They have been posed to Mr. Rey and not answered, so it is fitting to address them in this forum.

By extension of these arguments, a further issue emerges, not raised publicly to date:

The "Delegation of Authority" to an Incident Commander is improper as a device of 'Group Use' policy – erroneous as to factual grounds and thresholds, biased as applied selectively to 'Rainbow' gatherings, and violating Forest Service mandates & powers.

- 1) Gatherings are arbitrarily defined as "Incidents" in disregard for the track record of good faith performance and negligible impacts. In this way the proper thresholds for such a determination are skewed to the purpose of creating Incident Command powers, as an end in itself. On the pretext that such extreme response is required, much manpower and public expense are absorbed without benefit to public interests. In fact a gathering is not an emergency – it is merely a distinctive special use, warranting sensible USFS management and support a notch above normal operations.
- 2) The annual 'Rainbow Gathering' and many regionals are deemed "Incidents" *prospectively* – by prior determination, without basis in observed conditions or risks – and *selectively* as a matter of

standing Forest Service policy toward this unique type and creed of special use. This is done with foreknowledge that it triggers a large interagency police presence under Incident Command authorities, and targets participants with "proactive" enforcement. Thus the Delegation of Authority is discriminatory in effect, and by intent. It is unlawful to *single out* certain expressive activities in this way, under the 'Group Use' regulation or any other.

3) In recent years there has been a shift of administrative powers to *USFS Law Enforcement & Investigations*, with Special Agents heading the "National Incident Management Team". Forest Service personnel are qualified to protect National Forest lands in broad public interests, but the Delegation of Authority cedes their sanction to unqualified LEO's, acting in narrow enforcement purposes. Arguably this is improper as an abdication of mandated Forest Service powers to a separate agency, with its own chain of command and a different mission. It alters the nature of policy discretion, from grounds of administrative transparency to the secrecy of police work. Moreover as applied to public gatherings, it puts police agencies in primary control over expressive activities – just what the First Amendment was written to *prevent*.

As originally enacted in 1995, the 'Group Use' regulation posed serious obstacles to gatherings, and controversies from the start. It seems no coincidence that the rise of Incident Command to policy power is linked to rule changes that made the problem worse:

In November 1998 the regulation was amended without notice, adding standards for "Second-level screening of proposed uses" at §251.54(e)(5). The conditions in (i) - (iii) create huge discretions for USFS Officers to deny a proposed use, even injecting a new vague "public interest" clause into permit review. The "Confidentiality" clause in (iv) is troubling where an unknown 'self-designated' agent can be concealed from the group or the public. Most blatant, condition (v) explicitly PRECLUDES authorization of a true consensual assembly, where by definition...

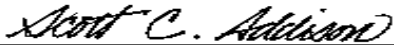
"(v) There is no person or entity authorized to sign a special use authorization and/or there is no person or entity willing to accept responsibility for adherence to the terms and conditions of the authorization." §251.54(e)(5)(v)

In deliberate effect this directly targets assemblies composed of unaffiliated speakers, by their exclusion from any chance of compliance without fraud. 28 USC 1001. Gatherers need immediate relief from this facially invalid provision, even though it has not been directly challenged in court.

In turn its application to gatherings has set loose intensive law enforcement response, to the detriment of constructive cooperation and participants' civil rights, and the greater empowerment of Incident Command. In this light the Delegation of Authority has clearly fostered institutional interests and powers conflicting with legitimate regulatory purposes.

In closing, we hope that this extraordinary meeting is fruitful in the public interest. To this end we urge the Secretary to suspend the Delegation of Authority – restoring qualified Foresters to proper discretion in 'Group Use' policy – as a key element of significant reforms.

Respectfully scribed,


Scott C. Addison, Coordinator