

***PCU // Free Assembly Project***

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*~ an Association of Volunteers*

20 March 2022

Christopher French, Deputy Chief:  
– USDA Forest Service  
201 14th Street SW  
Washington, DC 20024

cc: Sandra Watts, Greg Smith, Erin Connelly, Elrand Denson

attn: Meryl Harrell, Deputy Under Secretary – *USDA-NRE*

***The Plan for the Group Use Rule Proposal***

Mr. French and Friends:

Much thanks for convening our March 1 discussion on the pending [Petition to Amend](#) the *Noncommercial Group Use* regulations. It was most helpful in clarifying the parameters and steps involved in the preliminary review by Forest Service and USDA staff.

We now see that this task has been passed on to the Chief's office, and your staff will report recommendations to the Secretary and NRE, where the decisions on how to proceed will be made. You outlined three broad questions that are central for the Department in determining the course of the proposal, going to the merit and feasibility of this rulemaking... *briefly paraphrased*:

- 1) What are the legal effects of the proposal, as a remedy and revised rule?
- 2) What are the policy implications in applying the amended regulation?
- 3) What are the administrative burdens in proceeding, and what efficiencies are achieved?

We all agreed on the public stakes in resolving this tough issue, and planned to reconvene. Our project team has explained the current regulation's impacts, and the workable fix proposed – but we feel it important to respond to these questions and prepare for decisive progress:

***LEGAL NEEDS ~***

•• The *Group Use* regulation is facially unconstitutional, where citizens in voluntary assembly have no legal capacity as a group permit party, and are excluded from lawful special use authorization. National Forest lands are common ground for this First Amendment exercise, and "...*the type of forum in which expressive activity has historically occurred, and in which public expression of views must be tolerated to a maximum extent.*" *U.S. v. Rainbow Family*, 695 F.Supp 294, at 308.

The Petition states the problem in stark terms (p.13):

*"Nowhere else in the law is an individual coerced into a fictional legal association, tort liability, and felony fraud as preconditions of Government-authorized expression."*

•• The *Group Use* controversy is unprecedented in First Amendment law, and decades of litigation have left it unresolved. The regulation was upheld in early rulings, where courts deferred to agency discretion and evaded the issues. Continuing defenses and claims refined the analysis, broke down the "Group" fiction and the fallacy of permit signers with no authority to act for those assembled.

Since 2010 the Forest Service has laid off permit enforcement, but then devised "Design Criteria" directives – re-asserting 'Group' conditions while denying authorization and issuing "Illegal Gathering" declarations. So the regulation still stands in this unsustainable stalemate.

- The Permit has been a core pretext for police harassment; this alleged violation has caused many people to be jailed, cited, chased and chilled in purposes of peaceful expression. 36 CFR 261.10(k). Federal courts have repeatedly found roadblocks and related targeted enforcement tactics against the gatherings to be unconstitutional, but these practices have persisted.<sup>1</sup>

Incident Command compounds these issues, preempting the policy authorities of line Foresters and imposing emergency law on speech. Gatherers endure a recurrent regime of targeted mass prosecutions, with special quasi-court proceedings and mandatory appearances during the event, interfering with expressive activities and depriving due process rights.<sup>2</sup>

- There is a deep history of earnest appeals to NF officials and the NRE UnderSecretary, achieving constructive dialogue and some relief, but not solving the problem.<sup>3</sup> This Petition proffers a creative real solution, curing constitutional harms under APA remedies... the amendments are crafted to work seamlessly within CFR special use provisions and uphold standards of performance.

By defining "Public Assembly" as a distinct special use and mandating Operating Plans as a fitting means of regulation, a fair compliance path is opened to Citizens on public land, and their rights are preserved. This scheme aligns with existing agency procedures, but the 'volunteer' role must be strictly limited to elements of notice and support, and protected from liability.

### ***POLICY BENEFITS ~***

- The proposed rule is informed by the history of the 'Rainbow Gatherings', but does not seek a special exception for "Rainbows" or any entitled group. It creates an enhanced law of general application, enabling authorization of previously excluded NF users, tailored to be content-neutral and serve fair public purposes. Nor does it open to abuse as an easy way around restrictions, where equivalent standards apply and more committed efforts are required.

The terms are broad enough to anticipate future assemblies of diverse creeds... the prospect of 2nd Amendment militants raises concerns. In fact NFS officials face the same possible situations under the current permit rules; the same tests apply, and other protections of law are available: The amended rule does not raise such risks or diminish the agency's ability to manage them.

- The Group Use regulation has disabled cooperation between Foresters and Gatherers for 25 years, to the detriment of NFS policy goals. Enforcement has targeted alleged "leaders" and able medical, water, supply & rehab workers, putting public health, safety and resources at risk, with profound impacts over time – in effect a war of attrition on these expressive gatherings, attacking the

<sup>1</sup> *Park v. Forest Service*, 205 F.3d 1034 (8th Cir. 2000); *Addison v. Forest Service*, 108 F. Supp. 2d 1365, 1366 (M.D. Fla. 2000); *Hadaway v. Tooke*, 18-cv-107-RWS (N.D. Ga. 2018).

<sup>2</sup> *PCU•FAP* has long opposed the Delegation of Authority to Incident Command, putting USFS-LEI in control over public policy – concerns shared historically by responsible Forest Service officials:

<https://www.free-assembly.org/gather/campaigns/ic-speech/>

<sup>3</sup> A series of hard policy critiques went to NRE, c. 2002-14, making a strong record on these issues:

<https://www.free-assembly.org/gather/campaigns/re-critcorr02-08/>

infrastructure, skills, and contributive spirit that sustain them.

The amended rules restore the ability and mutual incentives to cooperate in support of public assembly events, enabling volunteer liaisons in a known process that is workable on both sides, meeting high standards in alliance with NFS resource staff.

- The core objective is to assure care of National Forest resources... it is served by the Operating Plan approach promoted by gatherers 40 years ago, and proposed now to help Foresters do this job cost-effectively. Management demands should be a notch above normal, where selected resource specialists and LEO's may be deployed from the region to assist – with the built-in efficiencies of real-time communication and problem-solving with volunteers on-site.

The new regulation can sustain the good environmental record of the gatherings at less cost. In fact the major tax-paid costs attributed to these events are not caused by activities on the ground, but incurred in 'Incident' budgets absorbed by LEI – where real savings can be achieved.

- The Gatherings are a continuing experiment in *consensual assembly, community, and ecology*. Over 50 years they have received downbeaten and outcast people with support, nourishment, healing and belonging that has changed many lives – and respected the land with site-sensitive encampment & infrastructure, best-practices in impact mitigation, and state-of-the-art restoration.

There is a legacy of field operations know-how in social service and citizen stewardship... this can be a model and resource in 'Resiliency' planning for disaster relief and refugee crises by the USDA/FS and other agencies, and for all Americans in their neighborhoods and towns.

### ***SENSIBLE RULEMAKING ~***

- USDA regulatory procedures were examined up-front in the Petition, Pt. V: *'EXPEDITING THE RULEMAKING PROCESS'* (pp. 25-26). These points were referenced again in the conveyance letter ['Renewing the Petition'](#) when it was resubmitted in Sept. 2021. The intent was to preview the Department's groundrules & tests under APA requirements, and how this proposal could be handled efficiently, with fair priority in light of the deferred need.

In the March 1 meeting, Mr. French posed the Agency's big question – *"Should we do this?"* – in view of the substance of the proposal, and the steps needed to evaluate and enact it. This was the question at the start, with answers on the table... it is a concern that deliberations have come no further in six months, and the intended process is still indefinite.

- In its content and construction, the Petition was crafted to align with the workings of special use regulations *and* USDA rulemaking protocols, in order to simplify and facilitate the review process. The proposed amendments are narrow and precise, do not alter how NGU rules otherwise apply, but correct improper exclusions and actually clarify the CFR language: The first assessment should confirm that this proposal does not require 'Regulatory Impact Analysis' or OMB review.

Under DR 1512-1, the Secretary & NRE have latitude in tracking a proposed rule... it appears in this case that the initial review has been delegated to your able policy staff in the Chief's office. The requisite 'Workplan' can envision a fairly simple process with necessary inputs; whether it is generated from this effort or a separate NRE review, these decisions should be transparent.

- The administrative demands of this rulemaking are eased in accord – distinct from most

regulatory projects with extensive R&D upfront: Here the major work product is *already done...* the Petition embodies deep formative research, and the final CFR changes are carefully composed. USDA staff & resources can be efficiently focused on assessing the line-item revisions and adjunct *Interpretive Rule* guidelines, as elements of a policy reform that is coherent and workable.

This rulemaking can be streamlined, with due heed of notice requirements and useful public input. The Petition is designed to include all the elements of a finished "*Notice of Proposed Rule Making*" (NPRM), readily adaptable for Federal Register publication. It is reasonable to recommend that this proposal be advanced as a Direct or Interim Final Rule.

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We hope these comments are responsive and helpful. To be clear, they expand on ideas already set forth in the Petition: It is self-complete as presented, and the legal, policy & procedural questions at hand are addressed there in full sweep, although broad factual grounds are reserved. Only six Exhibits are attached as proof on key points, to keep the package tight and manageable.

At the same time we understand your obligations in diligent review, and the need to assure that the issues and solutions proposed are amply supported. We can provide further documentation where it may be needed to augment the public record. Please state such requests in the Workplan, and we can assist the review in these areas and other ways going forward.

We look forward to reconvening on March 22, and working well together.

Respectfully,

*Project Volunteers:*

\_\_ Feather Sherman    \_\_ Don Wirtshafter    \_\_ Garrick Beck  
 \_\_ Joanee Freedom    \_\_ George Siemon    \_\_ John McCall  
 \_\_ David Massey    \_\_ Susan Bernstein    \_\_ Adam Buxbaum

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