PCU //\ Free Assembly Project
St. Louis, Missouri *www.FREE-ASSEMBLY.ORG*
~an Association of Volunteers

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Dan J. Jiron, Acting Deputy Under Secretary:
– Natural Resources & Environment, USDA eM: djiron@fs.fed.us
1400 Independence Ave. SW – Suite 202-W
Washington, DC 20250

attn: Michiko J. Martin, Acting Director:
Recreation, Heritage, & Volunteer Resources Staff eM: michicojmartin@fs.fed.us
Vicki Christiansen, USFS Interim Chief

[I.] PETITION TO AMEND A NATIONAL FOREST REGULATION

This is a formal Petition to Amend the U.S. Forest Service *'Noncommercial Group Use'* regulation and related special use provisions, 36 CFR 251.50- 251.56, pursuant to the right of petition and relief reserved by the Administrative Procedure Act. 5 U.S.C. §553(e).

It is presented to cure a facial defect in the rules, whereby a broad class of citizens are denied personal standing and precluded from special use authorization as unaffiliated participants in public assembly, or otherwise subjected to compelled association and vicarious liabilities under a fraudulent permit, in violation of Constitutional protections. Amendments I, V, IX, XIV.

It serves the public interest with a decisive remedy to end decades of needless strife & litigation, and the abuse of these regulatory powers to criminalize peaceful expression and prayer.

The Petition is composed in 5 Parts commencing in this overture, with Exhibits appended:

Part II – specific *Code Amendments* are proposed, sanctioning the use of Operating Plans to authorize public assembly, and enabling cooperation to meet high special use standards.
Part III – an *Interpretive Rule* is also proposed, with key points in support of the amendments, to clarify and guide the revised rules as-applied.
Part IV – a *Memorandum* on Group Use policies, the legal dilemmas and proffered solutions...
Part V – the *Rulemaking Process* is examined in how this APA appeal can be expedited.

This Petition goes to the Acting USDA Under Secretary as the presiding public official over U.S. Forest Service affairs, and to the 'RHVR' Staff as the vested policy review body in this process. It is fitting for ***PCU•Free Assembly Project*** to advance it, with a strong public record on these issues, deep research and sustained advocacy in the public interest – mindful of public land stewardship and true agency mandates to be upheld, while excessive regulations and powers must be curbed.

Please respond and advise of intended proceedings in accord with APA requirements.
We hope for your wise cooperation in this worthy project.

Respectfully submitted: Scott C. Addison

Scott C. Addison – Coordinator
– St. Louis, MO 63137
eM: sca@free-assembly.org

[II.] PROPOSED CODE AMENDMENTS: 36 CFR 251.50- 251.56

The Noncommercial Group Use ('NGU') rule is principally defined in §251.54, but certain provisions in contiguous sections directly affect its application, and must be revised in accord. Proposed here are line-item amendments affecting a total of eight (8) paragraphs in the above-cited CFR sections; most are simple surgical edits, all are properly aligned in context and intent, and designed to uphold consistent standards of special use review and compliance.

Below, each amended paragraph is identified and numbered **[#]** for reference, and a brief explanation is provided on the 'Issues' involved and the 'Remedies' needed, in *italics.*
Thereafter the revised CFR text is presented in complete paragraphs for clear context, showing proposed deletions in **~~RED Strikethrough~~** and new language in **BLUE Underscore.**

§-PARAGRAPH ***ISSUES/REMEDIES***
\ CFR TEXT AMENDMENTS

[1] §251.50(e)

The NEPA 'threshold test' must apply to all special uses – where if no significant impacts are foreseen a proposed activity may be exempted from a permit requirement or other formal authorization process.

Noncommercial Group Uses should not be excluded from this prior test, as a matter of lawful parity among all special uses. This has no rational basis, and as a practical matter small 'events' may be indistinguishable in form & scale from routine recreational camping in NFS primitive areas.

(e) ~~For proposed uses other than a noncommercial group use,~~ A special use authorization is not required if, based upon review of a proposal, the authorized officer determines that the proposed use has one or more of the following characteristics:

(1) The proposed use will have such nominal effects on National Forest System lands, resources, or programs that it is not necessary to establish terms and conditions in a special use authorization to protect National Forest System lands and resources or to avoid conflict with National Forest System programs or operations;

* * * * *

[69 FR 41964, July 13, 2004]

[2] §251.51

Definitions... this section establishes pertinent terms for the special use provisions to follow. "Public Assembly" is newly defined as a type of NGU distinguished by the legal condition of participants – unaffiliated "individuals and cohorts" who belong to no 'Group' entity, nor do they comprise one by being there: There is no aggregate legal capacity to act as a permit party or

to designate agents to sign... the elements of such an entity are lacking.

Upon this premise, an alternative means of authorization is mandated for this broad class of real and potential forest users, who assemble voluntarily and retain personal standing. The new definition simplifies and clarifies related amendments in subsequent provisions, and averts vague official discretion to make such a legal determination in review. Treated as a variant form of NGU, equivalent standards of compliance are upheld.

Public assembly – a noncommercial group use open to public participation, comprised of diverse individuals and cohorts without formal affiliation, agent authority, or aggregate legal capacity, gathering in cooperation for purposes of association, expression or prayer.

[3] §251.54(d)(1)

(d) Proposal content— Proponent ID... the authorization process requires a named person to receive notice on behalf of a special use proponent. An authorized "agent" can do so for a group entity; only a willing "volunteer" can serve for a public assembly, acting in a personal capacity.

This role is presumptively "consented" by that individual and peers; it may be informal, but is thus qualified as service in good faith with those assembled and coming from them, and the possibility is reserved that a volunteer may withdraw or be replaced if needed.

(1) *Proponent identification.* Any proponent for a special use authorization must provide the proponent's name and mailing address, and, if the proponent is not an individual, the name and address of the proponent's authorized agent ~~who is authorized~~ or consented volunteer to receive notice of actions pertaining to the proposal.

[4] §251.54(d)(2)(i)(E), (d)(2)(ii)

(2)(i) Required information/Noncommercial group uses— Permit signer... the NGU permit is a legal compact requiring an agent for the 'Group' to sign. This excludes public assemblies from legal authorization, or otherwise construes a fictional group entity and coerces a fraudulent signature where no agent capacities exist.

The remedy is to add the role of "volunteer contact" in subparagraph (E) – consistent with the prior amended paragraph, acknowledging the legal condition of assemblies and setting up an alternative means of authorization in accord. Here "special use authorization" is construed broadly to include permits, operating plans, and other means subject to future innovation. This meets the legal need of the provision.

(2)(ii) All other special uses— capacity tests... USFS officers may request further information from different kinds of proponents to confirm the legal capacity to act as a permit party – down to the minimum formation of a "partnership, association, or other unincorporated entity" (E).

Public assembly lacks such capacity, fails the test, and is thereby precluded from authorization. In the amended scheme, this test properly applies to all special uses: NGU proponents are included to determine if there is an able permit Holder, or if an alternative means of authorization is fitting.

(i) *Noncommercial group uses.* Paragraphs (d)(3) through (d)(5) of this section do not apply to proposals for noncommercial group uses. A proponent for noncommercial group uses shall provide the following:

(A) A description of the proposed activity;

(B) The location and a description of the National Forest System lands and facilities the proponent would like to use;

(C) The estimated number of participants and spectators;

(D) The starting and ending time and date of the proposed activity; and

(E) The name of the person or persons 21 years of age or older who will sign a special use authorization or serve as a volunteer contact on behalf of the proponent.

***(ii) All ~~other~~ special uses.* At a minimum, proposals for special uses other than noncommercial group uses must include the information contained in paragraphs (d)(3) through (d)(5) of this section. In addition, if requested by an authorized officer, a proponent in one of the following categories must furnish the information specified for that category:**

* * * * *

(E) If the proponent is a partnership, association, or other unincorporated entity: a certified copy of the partnership agreement or other similar document, if any, creating the entity, or a certificate of good standing under the laws of the State.

[5] §251.54(e)(4)

Confidentiality— project information... it is necessary to protect proprietary *information received from special use applicants, but this discretion has been abused to conceal permit signers from public gathering attendees.*

Here a narrow exception is added, so that the identity of agents/volunteers and deals they make must be public information available to group members or assembly participants, to protect all NGU's from fraud.

(4) *Confidentiality.* If requested by the proponent, the authorized officer, or other Forest Service official, to the extent reasonable and authorized by law, shall hold confidential any project and program information revealed during pre-application contacts, except

that averred agents or volunteers for a noncommercial group use, and any related agreements or terms they might enter, must be publicly disclosed.

[6] §251.54(g)(3)(ii)(H)

NGU authorization— Permit Signer... this subsection states 8 criteria for granting a Noncommercial Group Use authorization – the last of which requires a signed permit. This provision has been the main point of conflict, abused to criminalize public events and thousands of attendees.

An "alternative means of authorization" must be open for public assembly, allowing volunteers to personally "communicate and cooperate" in compliance. The process may call for a signed Operating Plan or other agreement, or not... the test is met by affirmed volunteers coming forward.

(ii) An authorized officer shall grant an application for a special use authorization for a noncommercial group use upon a determination that:

* * * * *

(H) 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, or have volunteered to communicate and cooperate in an operating plan or other agreed means of authorization for a public assembly.

[7] §251.54(g)(3)(iii)

Permit denial, alternatives— procedures... the conditions of permit denial and recourses are currently set forth in a long paragraph (iii), clumsy and out of logical order. It is proposed to restructure this as 3 paragraphs (iii, iv, v) for clarity – retaining the current language (except for one redundant phrase), and adding new language to address "alternatives" in the first:

Par. (iii) poses an alternative "time, place, or manner" of group use, and the alternative means of authorization for a public assembly. The Operating Plan scheme is presented here, stating general scope & standards applied, and how it takes effect by agreement and general Notice.

Par. (iv) deals with special cases involving environmental review for sensitive areas; the text is left unchanged. Par. (v) puts final denial of authorization last where it belongs, restates the required 48-hour response, and simplifies the language in accord with the agency's intent.

(iii) If an alternative time, place, or manner will allow the applicant to meet the eight evaluation criteria, an authorized officer shall offer that alternative. If the proposed use is a public assembly with no legal capacity to designate agents or act as a group

permit Holder, Forest officers shall work with volunteers and participants to devise and implement an operating plan or other suitable terms of compliance, consistent with the requirements in this section. An operating plan sets forth applied conditions and performance standards based on the scope of the event and features of the chosen site, for the protection of natural resources, public health & safety, and access rights of compatible Forest users. The operating plan takes effect as a special use authorization upon its agreed issuance and general notice to participants, and may be amended for good cause in particular provisions by mutual consent.

(iv) If an application is denied solely under paragraph (g)(3)(ii)(C) of this section and all alternatives suggested are unacceptable to the applicant, the authorized officer shall offer to have completed the requisite environmental and other analyses for the requested site. A decision to grant or deny the application for which an environmental assessment or an environmental impact statement is prepared is subject to the notice and appeal procedures at 36 CFR part 215 and shall be made within 48 hours after the decision becomes final under that appeal process.

(v) If an authorized officer denies an application because it does not meet the criteria in paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this section, the authorized officer shall notify the applicant in writing of the reasons for the denial within 48 hours after its submittal. A denial of an application ~~in paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this section~~ based upon these stated criteria constitutes final agency action, is not subject to administrative appeal, and is immediately subject to judicial review.

[8] §251.56(d)

Liability— Holders... requires payment by the permit Holder for "all injury, loss, or damage", presuming this to be a group entity legally able to assume liability in this way. The amended paragraph acknowledges the alternative condition of public assemblies with no permit Holder, affirming the 'personal and several' liability of attendees. Thereby they are no longer fraudulently subject to 'vicarious liability' created by the NGU permit.

(d) *Liability.* Holders shall pay the United States for all injury, loss, or damage, including fire suppression costs, in accordance with existing Federal and State laws. In the alternative, participants in a public assembly are responsible for their individual actions, and may be held personally and severally liable.

[III.] KEYNOTES FOR AN INTERPRETIVE RULE

The proposed CFR amendments call for modified agency procedures in review and authorization of public assemblies under the 'Group Use' scheme. Accordingly it is further proposed that the Forest Service adopt and issue an Interpretive Rule in conjunction with these amendments, pursuant to 5 U.S.C. 553(b)(A). This would properly serve to advise the public on the agency's construction of the revised regulation, and provide clarifying guidance for USFS staff on the intent and application of these policies in the public interest.

The administration of `public assembly` must stand on certain clear legal premises, and proceed interactively with proponents in ways that are distinct under special use regulations. It is fitting to address these issues in an Interpretive Rule, with adequate details on procedures to operate with fairness and consistency in meeting regulatory purposes.

To these worthy ends, the following points are proposed:

A) Public Assembly:

"Public Assembly" is defined as a variant form of Noncommercial Group Use with no legal capacity to act as a permit party – thus legally requiring an alternative means of authorization aligned with the personal standing of participants, yet still subject to equivalent standards. It is understood as an exercise by U.S. citizens of proprietary right and stewardship on public land, and as a special use for purposes of expression and association in the 'traditional public forum' of the National Forests, protected by the First Amendment.

B) Religious Freedom:

Where citizens assemble for purposes of prayer, they stand under the further protections of the Religious Freedom Restoration Act (RFRA), with official actions subject to a 'strict scrutiny' standard of judicial review. Moreover where the act of gathering peacefully as equals on common ground *is itself an expression of sincere religious belief and shared creed* – this peer relationship is disrupted by any conjured 'group' party and false 'agents' empowered under a permit or other supervening compact – and in turn this poses a substantial burden upon such consensual exercise.

In this circumstance commonly affecting many of those assembled, an alternative means of authorization is further mandated, least restrictive of religious liberty, and considerate of the ability of such proponents to cooperate in stewardship and meet special use standards.

C) Volunteers:

The amended regulation enables one or more 'volunteers' from a public assembly to give notice to Forest officials, to request special use authorization, negotiate terms and communicate on problems and solutions during its course. A volunteer acts in a personal capacity only, in accord

with the co-equal personal standing of participants, and distinct from the delegated powers of an agent for a legally embodied 'Group' proponent sponsoring an event.

The responsibilities of a "volunteer contact", per §251.54(d)(2)(i)(E) as amended, are narrowly defined by policy and agreed terms of authorization – in effect, to serve as a liaison and facilitate cooperations in support, under an 'Individual Volunteer Agreement' adapted to this purpose.

An affirmed volunteer is subject to removal by peers or officials for dereliction, or legal sanctions for malfeasance or fraud, but bears no liability for violations, injury, loss or damage caused by others. Under §251.56(d) as amended, liabilities in public assembly are held strictly personal, not implicating others or ramifying on their rights, and severable from other infractions and claims. Attendees are self-responsible and equally subject to enforcement; recreational users stand in the same position of personal liability, the normal condition of citizens on NFS lands.

D) Operating Plans:

The Operating Plan is acknowledged as a lawful and workable means of special use regulation, and a fitting alternative for authorizing and managing public assembly. 36 CFR §261.1a.
It serves best as a collaborative agreement on the layout and workings of the event, necessary terms & conditions applied, and protocols for communication. Upon site selection, the Plan should be prepared jointly by Forest officials and able volunteers, to assure timely input and promptly resolve issues of circulation, parking, protected areas, logistics, etc. as the event gets underway.

A draft Operating Plan should be presented to participants on-site for input and general approval. Under §251.54(g)(3)(iii) as amended, the *"agreed issuance"* of the final Operating Plan means that one or more affirmed volunteers may sign it in full agreement, or in partial acceptance with an attached statement of disputed terms or official actions, or they may simply defer in assent.
It then takes full effect as a special use authorization by *"general notice to participants"* who will be personally bound by its provisions – as public information posted and distributed to assure adequate notice on-site, and freely available on-request to the general public and press.

E) Cooperation with Resource Staff:

In amending the NGU rules, a core intent is to enable cooperations by Forest Service officials and citizens in public assembly. Forest Rangers and Resource Specialists embody the knowledge and diverse skills needed, and should be deployed to work with participants and resolve problems, with full authority for applied policy decisions to meet regulatory purposes. In turn, those assembled share in legitimate public interests; affirmed and casual volunteers are encouraged to engage with officials in support of the Operating Plan, and transparency in its implementation.

[IV.] MEMORANDUM ON GROUP USE POLICIES

TROUBLED HISTORY OF THE RULE

This initiative arises upon a legacy of controversy predating the 'Group Use' rulemaking, of continuing conflict since it took effect, and of recurrent citizen efforts to challenge it in court and advocate for policy change. The history suggests that the Forest Service's main motive in issuing group permit rules has been to control the "Rainbow Gatherings", and apparently to stop them. Twice such rules promulgated in the 1980s were found unconstitutional, singling out expressive activities and targeting the gatherings with clear animus.

U.S. v. Israel, No. Cr.-86-027-TUC-RMB, Dist. Ariz. May 10, 1986
U.S. v. Rainbow Family, 695 F.Supp 294, 303 E.D. Tex. 1988

The current regulation was proposed in May 1993. Fed.Register, 58:86, 26940, 5/6/93. By July this elicited a public response in Washington DC, where citizens converged to defend their rights with official appeals, comment letters, petitions & protests. *PCU•Free Assembly Project* was formed by volunteers to lobby Congress, and information was advanced into key committees.

This work got results on 11/1/93, when the House Judiciary Committee conveyed a letter to the Secretary of Agriculture, forewarning that the proposed group use regulation was unconstitutional, and urging the Forest Service to adopt a more constructive policy approach. **[EXHIBIT 'A']**
Then in December 1993, *PCU* presented a policy critique to Congress, the USDA & White House: *"Group Use Rules for National Forest Lands – A Legal & Land Use Review".* **[EXHIBIT 'B']**
The analysis accurately foretold the problems the rules would pose, and forestalled enactment.

The final rule was published in late August 1995 and took effect on 9/29/95. Fed.Register, 60:168, 45257, 8/30/95. The first enforcement came in Osceola N.F. in Feb. 1996: The Government again sued the putative "Rainbow Family", seeking to certify a defendant class and assert a sweeping injunction against the gatherings. This legal tactic failed to get class certification or sanctions, only default judgments against 12 "representative" defendants who were served and refused to appear. *U.S. v. Rainbow Family,* Case #96-183-Civ-J-20, M.Dist.Fla (Feb.'96).

The fight escalated from there: In June 1996 the USFS got a fraudulent permit signed in Milwaukee, and mounted massive interagency roadblocks on the annual Gathering in Missouri. That permit was disclaimed by attendees, then nullified by the signer. In July a civil rights lawsuit was filed against the roadblocks, later winning a strong injunction in the Western District. *Park v. Forest Service,* 205 F.3d 1034 (8th Cir. 2000).

Permit enforcement persisted with citations at a North Carolina regional (Fall '96), and the annual Gathering in Oregon (July '97), resulting in ill-starred court cases: A flawed defense in NC was appealed to the Fourth Circuit, and predictably made bad law; similarly a weak civil suit in Oregon went up to the Ninth Circuit and got shut down, never reaching the issues. *U.S. v. Johnson,* 159 F 3d. 892 (4th Cir. 1998); *Black v. Arthur,* 201 F 3d. 1120, 1123-1124 (9th Cir, 2000).

Over the first few years the Feds targeted alleged "leaders" with prosecutions; cooperations were chilled, and defendants struggled in court with unprecedented legal issues, and no resources.

The early cases left the issues misconstrued, as courts evaded the core flaw in the rules as applied to assembly. By 1998–99 there were active permit cases in Missouri, Arizona, Wisconsin, and Pennsylvania, and a second roadblock suit in Florida. More studied defenses tried to establish new factual grounds and arguments, but were stymied by courts disregarding the record and parroting prior appellate dicta. *U.S. v. Nenninger,* No. 03-1350 (8th Cir., 2003); *U.S. v. Linick,* 195 F.3d 538 (9th Cir., 1999); *U.S v. Masel,* 54 F.Supp.2d 903,920; *U.S. v. Kalb,* 234 F.3d 827 (3rd Cir.2000).

In 2001 a zealous Incident Commander escalated enforcement on gatherings in Florida and Idaho, with mass citations against hundreds of people just for being there with no signed permit. These tactics continued at the 2002 Michigan gathering, compounded by renewed roadblocks and a site closure on archaeological pretexts. The next year a permit was signed in Utah, but this failed to curb law enforcement abuses, or to serve any regulatory purposes on the ground.

In January 2004 UnderSecretary Mark Rey met with stakeholders in San Francisco, and discussions started up on accommodating the gatherings with *operating plans,* and changing the regulation in accord. However the chance to innovate for the California '04 Gathering was lost when Rey got a permit signed in DC by backdoor collaborator, who had nothing to do with the event. Then the hardliner head of USFS-LEI intervened and held up policy reviews in DC... so the stalemate persisted, and turned hostile again the following year in West Virginia.

In June 2005 LEO's blockaded the chosen site near Elkins, and cited hundreds of people backed up in small camps miles away. The Gathering moved 70 miles south, and the Federal Court transferred mandatory appearances to Magistrate trials in a nature center across the road, run by Incident Command. Most defendants had to take pleas & fines; those who fought were denied counsel and due process rights… nearly all were convicted. But eight defendants filed appeals with strong arguments on conjured affiliation, the 'group' fiction, permit fraud, and collateral entrapment. Their convictions were overturned on a technicality, avoiding the issues – but their briefs sent an incontrovertible message, exposing the fallacies in the regulatory scheme. *U.S. v. Benedict, et al.,* No. 2:05cr22-26; *U.S. v. Sebesta, et al.,* No. 2:05cr27_29-31, N.Dist.WV (2006).

The ensuing annual Gatherings were beset with police excesses (CO'06, AR'07, WY'08): Road stops and camp intrusions manufactured charges, medical & support volunteers were targeted, mandatory appearances interrupted speech, and magistrate tribunals ramped up. Incident Command preempted civilian policy authorities, and polarized the permit issue again. In Wyoming a routine bust devolved into hard takedowns and gunfire in Kid Village – spurring investigations by the ACLU and USDA Inspector General, and the LEI Director's early "retirement". **[EXHIBIT 'C']**

Going into NM'09, locals made early contact with regional Forest officials hoping to revive a permit alternative. But the USFS again found straw-dog permit signers who posed no conditions, and knew nothing about the gatherings. A stalwart attendee sued the signers in state court, challenging their standing to act for those assembled, as a contract law test within its jurisdiction. The court granted summary judgment against the defendants in July 2011, finding their signatures *"...void and null. Defendants had no legal authority to sign on behalf of the Rainbow Gathering."* In turn the permit itself was nullified after the fact, by law… the fraud on assembly was broken. *Sedlacko v. Law,* #D-101-CV-201001076, First Dist.Court, NM (7/24/11). **[EXHIBIT 'D']**

That outcome was decisive, but the filing of this case over a year before had already changed the game: When the Gathering returned to Pennsylvania in 2010, the Forest Service instituted an Operation and Maintenance Plan in lieu of a permit for the "2010 Peaceful Assembly".
This signaled a recognition on the part of USDA–FS officials that the permit requirement is unworkable for public gatherings, and that public interests are better served by this approach—and it seemed to open a new era of reasonable cooperation to these ends. **[EXHIBIT 'E']**

But this arrangement has proved fragile in its premises, with "group holder" language showing up in OpPlan terms, resumed demands for agent signatures, etc. Law enforcement abuses still persist, subverting its spirit and intent, and it is understood to be entirely discretionary, where the permit requirement may be invoked again at any time, on any pretext or whim.
In effect the "accommodation" has served to defer the issues indefinitely, and arguably to avoid legal challenge and evade solutions completely, and keep the rules intact. As long as the Noncommercial Group Use regulation stands as written, it poses a constitutional hazard.

PRINCIPLES IN SUPPORT OF RULE REVISIONS

The grounds for CFR amendments are the legacy of American public lands -- the old traditions of tribal gatherings, camp meetings, speech and prayer in the 'Cathedral of Nature'… and the modern history of government trusteeship for public tenure, access, and expressive use.

The conjunction of First Amendment protections is pivotal. Like public streets, plazas and parks, the National Forests are acknowledged as a *traditional public forum:*
"*...public Forest Service lands are 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 Noncommercial Group Use regulation has spawned much strife mistaken for defiance, even as opponents abide by resource protections and substantively comply. The legislative authority of the Forest Service to regulate the National Forests is unquestioned, but the *means* are at issue.

It is first understood as a *land use regulation,* fairly conventional in its terms and reliance on the 'Permit' as the device of authorization, common and accepted at all levels of government.

Then it is examined as applied to true citizen 'Assembly' – which is unique as a public land use under the First Amendment, and distinct in the *personal standing* of attendees on the ground and before the law – where it is shown that the Permit cannot work as a legal pact:

Requiring all 'Groups' over 75 to obtain a special use permit ostensibly makes this a law of general applicability – but this presupposes that such a legal entity exists and can act as a permit Holder.

Where no person can sign as an agent for a Group party, authorization will be denied...
yet this is the true legal condition of citizens who assemble voluntarily for expression and prayer, without legal affiliation or membership in any sponsoring organization. No aggregate legal capacity is somehow comprised *ad hoc* by their brief presence and interactions together, nor can such an entity be mandated or contrived for purposes of permit compliance alone.

So this passionate issue of constitutional rights hinges on dry precepts of contract law... and this irony is germane to the message of consensual assembly, as a form of speech in itself.

The inquiry goes to the effects of the NGU regulation *as-applied,* and the workings of the Permit as its exclusive instrument. In turn the *facial* issues in its construction are brought to full focus, and the *Operating Plan* is then examined as a legal and operational remedy.

• De Facto Agency, Vicarious Liability /

"Noncommercial Group Use" is ill-defined, ambiguous as a regulated activity: In common usage the generic term "group" suggests any cluster or aggregation of people, but in this context it must be a formal embodiment with specific legal attributes and capacities. At once this sets up an amorphous test of 'use or occupancy' subject to regulation, any 75 "participants and spectators" in vague proximity, and requires that they comprise a legal entity able to act as a permit party.

Thereupon the regulation has been applied to public gatherings on the premise that anyone attending may be deemed a "de facto agent" upon interacting with officials. One may claim to speak for oneself, but a consented 'Official Contact' is taken as stipulating to representative authority on behalf of the supposed 'Group'. By this doctrine, one is construed to be legally affiliated with others and made liable as a member/agent of the regulatory class upon no legal finding or proof... so good people who came forward to cooperate wound up getting cited and prosecuted.

The laws of agency are specific: A group "principal" must actually exist, a true delegation must be made, and an "agent" must knowingly accept it – without which no agency can be exercised lawfully, nor can it be conjured or commanded by third parties. *BancOklahoma Mortgage Corp. v. Capital Title Co., Inc.,* 194 F.3d 1089, 1104 -1105 (10th Cir. 1999). An individual has no authority to bind another to a contract or other agreement without legal consent**.** See, e.g., *Santa Fe Techs. v. Argus Networks,* 2002-NMCA-030, 131 N.M. 772, 42 P.3d 1221.

Where the government imposes permit terms on a putative `group party`, it cannot disclaim responsibility for the legal ability of that party or its alleged agents to act, or how liabilities devolve. Yet here official discretion conjures agent relationships among attendees by sheer conjecture, and construes these as grounds for personal criminal charges. 36 CFR 261.10(k). This is anomalous as a criminal sanction, violating due process as applied to participants in consensual assembly. *United States vs. Spingola,* 464 F. 2d. 909 (7th Cir. 1992) *(where a person is incapable of causing the filing of a government form, they cannot be held criminally liable for failing to file it).*

This logic extends to the *vicarious liability* incurred by putative `members` – subject to costs, penalties, restrictions, and police presence due to alleged harms or violations by others, and curtailed rights if a permit is revoked or suspended as a result. 36 CFR §251.60(a). There have been few reckonings with this fallacy in the regulatory scheme, but the risks remain:

No legal permit conjures a subject party without proof, engages unknown members in vicarious liability without notice or consent, or takes unilateral force without mutual authorities.

• Compelled Association & Fraud /

Speakers have a First Amendment right to assemble in distinctive public forums of choice and creed. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995). This first implies that attendees cannot be forced to associate with others bearing an unwanted or conflicting message – but in this context, disparate views are not the problem: It is that *any* association forced upon them subverts a core belief in true public assembly, i.e., the creed of *Gathering in Consensus* as citizens and peers, by personal choice.

This shared motive defines their forum, enabling diverse forms of expression in confluence, and it is also a shared *message:* Their 'soapbox' is the act of assembling as equals – for prayer, speech, petition, culture & stewardship, cooperating in self-responsibility, mutual support & respect. In this purpose, the NGU permit demand poses serious First and Fifth Amendment consequences.

Their egalitarian beliefs may be sincere, but do not suffice as proof that rights are infringed. However it is not just an ideology – the nexus of avowed belief and actual legal standing is decisive: Gatherers attend personally... their lack of affiliation is the *a priori* fact that gives rise to consensual expression... they disclaim any 'Group' because *there is none.* By law there is no delegative power among anonymous citizens assembled, nor in transient voluntary 'councils', randomly composed. No leaders can be vested, no agents authorized, no able legal party is embodied by the whole.

Thus the Permit intrinsically impacts public assembly, compels association with an invented Group Holder and vitiates Individual Standing *en masse.* Alleged 'members' are bound to the signer for legal sanction in this exercise, and collaborative workings of the event are fundamentally altered. Under these rules participants face an impossible choice: Either their personal rights of expressive assembly are made revocable privileges, held by a fictional entity that cannot defend them... or they can be barred from public land and prosecuted as criminals.

In turn, an attendee confronted or induced by officials to sign the Permit is put in an untenable 'treaty chief' posture. The enforcement protocol is one of intercession, detainment and 'forced speech' under duress – violating privacy, annulling personal standing by fiat and the right to silence by implied waiver, then posing entrapment in incrimination. That person is forced to affirm a group association and agent authority he does not have, or be prosecuted. It is a systematic subversion of due process, designed to fabricate a perjury or manufacture a misdemeanor.

The caveat is stated right on the NGU Application (FS-2700-3b); it is a felony charge:

> "18 U.S.C. § 1001 makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction. ..."

The bizarre effects of this regulation are revealed: By signing such a permit one waives his own and others' personal standing in assembly... by entering an *ex parte* compact to their detriment, he commits Fraud... and by misrepresenting his authority to act, he violates the law.

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.

• Permit, *Ultra Vires* /

The Noncommercial Group Use Permit is first and foremost a legal instrument requiring an able 'group' party as Holder, and an authorized agent to sign. The Forest Service avers that a signature is required to give the permit legal effect – self-evident as applied to a legally-endowed Group, but an oxymoron otherwise. If these capacities do not exist, the Permit is tantamount to a fraudulent contract: Enacted *ultra vires,* it is void and meaningless with an imaginary Holder lacking the authority of those subjected to its terms.

From the start-up of these rules in 1996, the fraudulent permit signed for the Rainbow Gathering in Missouri foretold things to come. The named entity was unheard-of before that time or outside that document, yet USFS officials *"were willing to accept it as representing Rainbow People." U.S. v. Nenninger,* op.cit.; trial transcript. In similar instances around the country, the Forest Service has repeatedly tried to implement permits on behalf of made-up or ad hoc 'groups' – convoked upon the signature of an alleged 'agent', embodied in name only within the permit and for its purposes, yet binding unknown and involuntary 'members' to its terms.

In fact the resultant compact is anomalous among proper regulatory permits of any kind – at once void in its stated purposes, yet bearing wide collateral impacts under color of law:

~ This permit vests powers and obligations in a fictional party that has no ability to act at law. An aggregate entity must have fixed procedures and discrete delegations to conduct ongoing business, elements that are lacking in an open public assembly.

~ An individual signer is made responsible for 'group' compliance, but has no binding authority over others' actions. Stipulating to agent powers he cannot fulfill, he is held personally accountable for actions on-site, yet with no ability to be a *guarantor* of conduct outside his control.

~ The signer incurs personal liability, despite official disclaimers: The permit nominally shifts liabilities to a hypothetical group party, but as an agent of record he is the only legal party engaged, then subject to claims for misrepresentation or damages, by the government and peers.

~ There are no delegative powers in public assembly; government officials embody the only vested legal capacities in the Permit transaction. So any supposed or self-appointed 'group leader' who comes forward can only derive authority from them, and acts as *their agent* exclusively.

Government officials cannot arbitrarily demand or determine a formal 'Group' affiliation, or define the relationship individuals must have to associate on public land – any more than police can arbitrarily define individuals associating on public streets as criminal gang members subject to dispersal orders. *City of Chicago v. Morales,* 527 U.S. 41 (1999). Further, a person must be *"designated to sign"* a permit by the Group applicant. But if a signer is actually `designated` by NFS officers, whether by backdoor deals or selective enforcement, the meaning of the regulation is skewed outside the law, and the resultant Permit has no authority. §251.54(g)(3)(ii)(H).

That game ended in New Mexico, 2009: Upon no notice of two agents' identities or intent, no disclosure of terms, nor delegation from the supposed group party or the people assembled, the *ultra vires* permit signed in their names was without force. *Sedlacko v. Law,* op.cit.

By such fraud under color of regulation, citizens in assembly are deprived of basic common law rights of personal standing and informed consent in legal obligations incurred.

• 'Time-Place-Manner' Tests /

The government holds the Group Use scheme to be a reasonable *'time, place, & manner'* regulation, subject only to as-applied challenge if a permit is denied. Such a regulation will be upheld only if *"...the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication."* *United States v. Grace,* 461 U.S. 171, 177 (1983); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984). It may be agreed that special use regulations generally support public interests of resource protection, health & safety, and allocation of uses on NFS lands – but here the contested issues are about the operation of the NGU Permit *per se:*

It must fairly address harms that *"...are real, not merely conjectural, and ...will in fact alleviate these harms in a direct and material way." Turner Broadcasting System, Inc. v. F.C.C.,* 512 U.S. 622, 664 (1994). Then crucially, it cannot be substantially more burdensome to speech than necessary to those ends. *U.S. v. O'Brien,* 391 U.S. 367, at 376-377 (1968); *Ward v. Rock Against Racism,* 491 U.S. 781, at 799-800 (1989).

Ultimately the analysis must reach the three prongs of the constitutional test:

(1) The Permit requirement is reasonable as applied to an embodied organization able to apply as a 'group' and legally act as Holder. However it precludes good-faith compliance by those who gather consensually, without delegated authorities In Fact and By Creed. Where no other means of authorization is allowed, it discriminates against this exercise and is not *`content-neutral`*.

(2) The Permit rule should work narrowly to specified regulatory interests – but in fact it is unfit as a means to those ends, and has persistent collateral and contrary effects: Where this restriction results in systematic animus, obstruction, and burdens upon lawful expressive activities, and actually disables cooperation on legitimate public concerns, it is not *`narrowly-tailored`*.

(3) National Forests are public lands suited for consensual gatherings, and common ground for all citizens, in accord with their creed. The Forest Service is trustee for broad public interests and rights in a traditional public forum; unlike private land, there is no proprietary authority to exclude citizens in expressive assembly, and they have no *'alternative channels of communication'.*

• Proof of Prior Restraint /

These problems with the Group Use rules as-applied can be mitigated by refined policies and good judgment, or evaded by shrewd discretionary forbearance; both have been going on since 2010. However the mandate to actually amend the CFR must arise in a compelling facial analysis, showing these rules to pose unconstitutional *prior restraint* on protected speech, as-written.

It is well-settled that any system requiring a license or permit in advance of expression, religious exercise, or "conduct commonly associated with expression" carries a serious danger of censorship. *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 759 (1988). The possibility of close prior review may chill the willingness of speakers even to apply for official permission; then if it is denied due to official bias or personal distaste for this expressive or religious

content, such censorship is too easily concealed if the licensor's decision cannot be measured against clear criteria for issuance or denial of the permit in question. *Id.* at 757-58.
The licensing scheme must contain "narrow, objective, and definite" substantive standards to constrain licensing discretion. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, at 131 (1992); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-52 (1969).

An analysis of the Group Use scheme shows extreme discretions exercised under the rules as applied, and also immanent in the Permit and requirements as stated – with clear chilling effects on peaceful assembly. If properly examined under *Lakewood,* the 'nexus to expression' is obvious, the 'threat of censorship' is painfully real, and the major fallacy of this regulation is revealed in this test:

A 'law of general application' cannot preclude a broad class of speakers from compliance.

In an early experiment, the *Masel* defense advanced 'Rainbow beliefs' against hierarchy and leaders, and argued facial bias and prior restraint in the Permit demand. On these grounds alone, the Court saw no infringement on such beliefs by a routine land use permit, noting that a prior restraint analysis can proceed if the regulation is *"directed narrowly and specifically"* at expressive conduct:
"Neither party has addressed this prong of the test... the query under Lakewood is not simply whether the regulation may occasionally implicate First Amendment activities, it is whether the regulation targets them." U.S v. Masel, 54 F.Supp.2d 903,920; Opinion & Order, 6/24/99; pg.14.

In this way the *Masel* ruling opened prior restraint arguments to proof of the regulation's impact on consensual speech and standing in assembly. It outlined the applicable test:

> "...defendant might have been able to establish that the regulation has a greater impact on expressive activities by presenting evidence showing that applicants seeking to engage in protected expression comprise a substantial portion of the pool of applicants for special use authorizations. *See, e.g., Kentucky Sports Concepts, Inc. v. Chandler*, 995 F.Supp. 767, 772 (W.D. Ky. 1998). ...[Upon such a showing there is] basis to conclude that the... provision presents a substantial opportunity for censorship on an ongoing basis." *Id.,* pp.16-17.

It is relevant to argue the Permit's discriminatory and censorial effect on certain views in light of *Hurley,* but it is compelling where the creed of consensual assembly is shown to align with personal standing in this exercise: Where no 'Group' is embodied with delegated agents to apply, no one can legally *"sign a special use authorization on behalf of the applicant",* as the rule requires, and everyone assembled is thus excluded from any possibility of legal compliance.

On its face, this stricture clearly restrains unaffiliated individuals in this expressive purpose, and all similarly situated Americans are targeted by exclusion, regardless of their beliefs.
Whether by oversight or capricious intent, this regulation bears an intrinsic jurisdictional flaw with respect to NFS 'Users' who are 'Not Groups' – in effect criminalizing true public assembly.

• Expressive Association /

Establishing the legal fact that consensual assembly is targeted by exclusion and faces galling prior restraint under the Group Use scheme – it is then important to understand the full sweep and impact of this problem. It is not just an arcane glitch in U.S. administrative law, nor a uniquely

American 'speed-bump' on the constitutional road... it connects with principles and rights of assembly acknowledged worldwide, and much at-risk in these times —

> *Universal Declaration of Human Rights (1948), Article 20:*
> (1) Everyone has the right to freedom of peaceful assembly and association.
> (2) No one may be compelled to belong to an association.

It was no accident of Eleanor Roosevelt's genius that this is proclaimed as a *personal* right, as in our First Amendment – nor that 'free association' is exalted and 'compelled association' proscribed so succinctly, all at once, capturing the paradox that confounds legal theories.

Freedom of Association is often invoked in conjunction with First Amendment exercise, and it is always implicated in its enactment, but it is not 'enumerated' in the Bill of Rights. Arguably it abides as a Ninth Amendment right "retained by the People" – ancient in legacy, immediate in daily lives and essential to other freedoms – but not preserved as such in law.

The Courts recognize an implicit right of association as a *current conduct* of protected speech, and thereby protected in turn under the First Amendment. *"An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984).

The ability to assemble *"in group effort toward those ends"* is thus all the more at stake. Free voluntary association is a germinal element of cooperative assembly on common ground, reliant on the ability to *go there together*. In turn this endeavor reaches the historical primacy of public lands, and the genesis of the 'traditional public forum' in ancestral rights rooted in the Law of the Commons under feudal domains, not extinguished but embodied in modern statute.

In present-day land use law, regulatory authorities of trustee public agencies are derived from antiqual property powers under common law, narrowed to specific purposes but analogous in effect. When trustee agencies use `regulations` to exert exclusionary proprietary powers on public land, citizens are violated in their ancient and continuing rights of the commons.

In *Morales,* the Supreme Court struck down the City ordinance as a violation of the right of free association, and recognized public streets as a traditional public forum, directly implicating First Amendment rights. *City of Chicago vs. Morales,* 119 S. Ct. 1849 (1999). The Court held: *"...it is imperative that an individual's decision to remain in the public place of his choice is as much a part of his liberty as freedom of movement inside frontiers." Id.* at 1857-58.

The right of association thus stands under the collateral protection of the First Amendment, preserving current speech as a civic necessity, and enabling evolutionary expression that may occur.

But this does not extend to *future speech* that may arise among people in current association, or might be inspired in others, even in silence. We also rely on the hope of discoveries and the prospect of innovations yet unknown, and the natural blooming of creative exchange.

Thus *expressive association* is the heart and motive of true assembly, hereby preserved. Our rights to associate on public land, and to envision future ideas that evolve, are distinctive *hybrid* rights of legacy and prospect under the Ninth Amendment, essential to the commonwealth.

• Standard of Review /

In the spate of early legal challenges on the Group Use rules, courts nominally acknowledged constitutional issues but largely evaded rigorous review. Federal agency claims were received with judicial deference and the presumption of validity, and in net effect the most lenient 'rational basis' test was applied to the regulation and official actions to enforce it. This was at odds with the heightened scrutiny required by the First Amendment. *"[w]here a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force."*
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986).

Since the *'Sedlacko v. Law'* filings in New Mexico, there have been no legal challenges on this regulation because there has been no controversy: As noted, the Forest Service dropped the permit demand for the "2010 Peaceful Assembly" in Pennsylvania, and commenced the discretionary use of operating plans for the Rainbow Gatherings – so an uneasy peace has prevailed so far.

The narrow tort ruling in *'Sedlacko',* in a local state court in Santa Fe, changed the game: Upon the premise of personal standing and proof of fraudulent agents – the NM'09 Permit they signed was void, and the Group Use regulation's legal & constitutional defects were established.
The findings mandated a tough facial analysis of assembly rights and regulatory means.

> IN SUM: *The NGU permit scheme poses prior restraints to all speakers, and the agent requirement excludes a broad class of unaffiliated citizens from lawful special use authorization in public assembly. It is thus content-based and overbroad, vesting unbridled discretion to curtail consensual expression under color of law, or to compel formal association by constructive fraud, in violation of First and Fifth Amendment protections.*

This raises the stakes in review: The regulation fails the *'time-place-manner'* test, so `intermediate scrutiny` properly applied would suffice to overturn it. Any future First Amendment challenge will be clearly *"colorable"* – then examining the elements of prior restraint, and the conjunction of speech & due process issues, there is a mandate for `strict scrutiny`.
This would be amplified in claims under the Religious Freedom Restoration Act (RFRA):

Many people attend consensual gatherings as a religious pilgrimage – to experience the culture of co-equal cooperation as a spiritual awakening, to share the views and devotions of different faiths, to stand in the great silent Circle and dance in loud Celebration on July 4th, and to join daily rites of collaborative work & prayer. The lack of hierarchal legal capacities defines the reality and creed of peaceful assembly, as a religious exercise and a personal right.

That culture is altered by the permit demand requiring designation of agents – putting a substantial burden on such individuals in assembly, in their exercise of sincere religious beliefs as participants. RFRA poses a stringent *'compelling government interest'* test, and requires means of regulation that are *'least restrictive'* of religious liberty. *Sherbert v. Verner,* 374 U.S. 398 (1963).

Similarly claims under the Religious Land Use Act would also invoke strict scrutiny.
As a remedy, operating plans must also adopt *'least restrictive means'* to protect natural resources and public safety, and assure fair special use authorization of such peaceful assembly.

• The OpPlan Alternative /

A proposal to amend the Code of Federal Regulations must be precise in its purposes and language, and the boundaries of its effects. This Petition is crafted with due care:

The mission is to set up an alternative track for authorizing public assembly, to enable Operating Plans for this purpose while maintaining the Permit rules for legally able 'Group' proponents, and leaving other valid provisions intact. Such entities benefit from certain line-items amending review procedures for all NGU proponents – i.e., fairly aligning NEPA & legal capacity tests with other special use standards, and refining the Confidentiality clause for their protection. Otherwise the workings of the regulation are unaltered... the CFR changes are narrow, each for a reason.

Historically stakeholders have advocated Operating Plans under duress from Permit hassles, as a special exception for the Gatherings, outside the standard policy box. In fact this was never a big 'accommodation' or concession of regulatory powers by the Forest Service...
OpPlans are already long-established as a means of special use compliance:

36 CFR §261.1a "Special use authorizations, contracts and operating plans."

So this rule proposal does not demand an exemption or wholly new protocol, it simply adapts a known workable device of National Forest policy, already in-place.

The grounds for OpPlans are explored elsewhere, and elements of their real-time application are outlined in the appended Interpretive Rule (D). Here a few further points are reserved:

• *Procedurally an OpPlan is harder than a Permit...* it is more demanding of time and interaction with officials, with more diffuse responsibilities. Embodied 'groups' will have no stake in posing as 'assemblies' to get around the rules – signing a permit is an easier process.

• *Legally it is more flexible...* an OpPlan can be enacted as a mutual agreement or issued unilaterally by the agency – or a hybrid approach might serve the circumstances of the assembly, proclivities of volunteers, etc. It can be adapted to diverse needs; variations in form do not compromise its effect as a special use authorization, or the eligibility of proponents to receive it.

• *Notice is a critical element...* the OpPlan process is triggered by volunteer notice of an intended public assembly – subject to verification per §251.54(d)(2)(ii)(E), timely cooperation in-draft and notice of terms for acceptance, then effective public notice to those assembled, giving it force.

• *Consultations are time-sensitive...* initial discussions must work promptly, with office and on-site meetings set up for assembly participants and interested members of the public. OpPlan terms must be negotiated and approved before the influx of attendees – then regular communications must be sustained to resolve problems and cooperate on solutions through the course of the event.

In general the workings of operating plans are known and well-founded in special use law – yet this mandated approach for public assemblies must devise new memes, forms, methods and official conduct framed by First Amendment protections, and it invites policy innovations.

The endeavor is simplified by the irony that it need only rediscover old ways of doing things – when Foresters grudgingly accepted the right to gather, then willingly worked with people in the woods to keep things clean, safe, and restored – *before the Regs.* **[EXHIBIT 'F']**

LINE-ITEM RATIONALES

[1] 36 CFR §251.50(e)

With great foresight the National Environmental Policy Act of 1969 (NEPA) set limits on the arbitrary or trivial use of regulatory powers: Activities posing no real threat to lands or resources are exempt; restrictions are properly applied upon a showing that *"significant impact"* could occur, requiring agency oversight and mitigative measures as defined in the rules.

This 'threshold test' is set forth here for special uses in the National Forests, where an authorized officer may determine that a *"proposed use will have such nominal effects on National Forest System lands, resources, or programs that it is not necessary to establish terms and conditions in a [permit]..."*. §251.50(e)(1) The exclusion of Noncommercial Group Uses from the NEPA threshold test has no basis in fact or law – and in effect it singles out expressive gatherings for rigorous permit requirements without recourse. Their stellar record of site cleanup & restoration is made irrelevant where such a fair determination is denied.

Note also that this caveat conflicts with Forest Service findings and policies stated in the final rule publication – where in light of their minimal impacts NGUs are exempted from prolonged 'Environmental Assessment' and 'Environmental Impact Statement' reviews:

" The Department believes it essential to reconcile the First Amendment requirement for a short, specific timeframe with the need to comply with NEPA procedures. Thus, in response to the comments received, the Department gives notice that the Forest Service will categorically exclude authorization of noncommercial group uses from documentation in an EA or EIS under Sec. 31.1b(8) of Forest Service Handbook 1909.15, provided there are no extraordinary circumstances related to or affected by the proposed activity. (emphasis added)

The Department believes that authorization of noncommercial group uses qualifies for categorical exclusion under Sec. 31.1b(8) because noncommercial group uses are short-term, typically for only a few days or weeks, and because they are minor in that they entail readily mitigable environmental disturbance.

Federal Register Vol. 60, pg. 45276 (August 30, 1995)

See also: Forest Service Handbook 2709.11, § 17.44l; and 1909.15, § 31.1b, ¶ 8;

and Federal Register, Vol. 57, pg. 43180 (September 18, 1992). "

The NEPA threshold test mandated in §251.50(e) must apply fairly to initial review of all proposed special uses. Therefore the NGU exception is rightfully stricken.

[2] §251.51

Creating a new CFR Definition of *'Public Assembly'* is a necessary innovation – at once framing the proposed amendments in clear purpose, guiding USFS officers in applying the rules, and constraining vague discretions & bias in review of proponents. It is appropriate to set this forth as a variant form of NGU subject to the same standards, and essential to acknowledge the

distinct legal conditions of such events, based on the personal standing of attendees – in order to enable special use regulation by fitting means.

The choice of this term is a point of deliberation: "Public Gathering" was considered as an alternative, broader in construction, suggesting the pluralism of such events, and the varied purposes of attendees. *'Public Assembly'* is more definitive, aligned with the language and personal rights guarantee of the First Amendment. Upon this principle the amended NGU rule is clearer and a better prototype for other public land use regulations.

Similarly this term might otherwise be characterized by the lack of "...aggregate legal *standing"* to act as a Group entity in a permit, but *"capacity"* is more sweeping and reaches any legal compact. The definition includes purposes of *"association"* to apply broadly with no prior test of expressive intent or content – and of *"prayer"* to acknowledge this common motivation and practice in assembly, and engage rigorous First Amendment protections.

[3] §251.54(d)(1)

'Proponent identification' is the first step of group use review, requiring a legal Person to apply and affirm an intended use to trigger the process. Where the proponent is a sponsoring organization, an AGENT must be identified by name & address; the tests for whether an agent is "authorized" on its behalf are well-defined in contract law. For a public assembly, only a VOLUNTEER can come forward; how someone is "consented" in this role is a more diffuse matter of common law, the means arising in networks of personal interactions on the land.

By definition and in Forest Service programs, "Volunteer" is an individual role, aligned with personal standing in assembly and distinct from an 'agent' position for an embodied 'Group'.

The 'process' is driven by consensual choices and assents among the citizens assembled, reached in accord with peer customs or more often informally between the people plugging in. How they may agree on a volunteer is their private business, rightfully outside the purview of the regulation or official intervention. However if they *disagree* and notify officials that a particular volunteer is disputed, there are real government and public interests in making sure that the person in that role is trustworthy. In the amended CFR language, the meaning of *"consented volunteer"* is appropriate – not as a prior test, but as a mutual protection in the breach.

Enabling a VOLUNTEER (in lieu of an AGENT) to apply for special use authorization sets up the second 'track' for Public Assembly as a variant form of Group Use, leading to a collaborative OPERATING PLAN (in lieu of a PERMIT). There are valid procedural differences, while parity must be upheld in fair treatment of proponents, and the performance standards applied.

The new process and parameters warrant guidance in clear points of an 'Interpretive Rule', as proposed in support of these CFR amendments.

[4] §251.54(d)(2)(i)(E), (d)(2)(ii)

Paragraph (d)(2)(i) states the basic information required in *"proposals for noncommercial group uses"* – including (E) the name of an adult person who will sign a permit for the 'group' proponent. As amended, in the alternative a person may *"serve as a volunteer contact"* for an assembly; this new language maintains parity in the requirements for special use authorization. Here it suffices for someone to be affirmed as a 'contact' person... it is left open whether such a volunteer will actually sign an Operating Plan – which can also take legal effect by other means. Part D of the proposed Interpretive Rule addresses these variations.

Paragraph (d)(2)(ii) is closely related, laying out applicable legal capacity tests for different kinds of special use proponents. It is essential for a Forest official to determine in advance that a proponent is a real entity able to empower legal agents and act as a permit party. The fact that Noncommercial Group Uses are arbitrarily excluded from these tests has been a point of frustration for public gathering participants – and it is a facial defect in the regulation:

While the government has persisted in the allegation that the so-called "Rainbow Family" is an unincorporated association subject to the permit requirement, this test properly applied would show that gatherings lack the legal elements of an able 'group' party. The criteria for the minimal legal formations are set forth in subparagraph (E):

> *(E) If the proponent is a partnership, association, or other unincorporated entity: a certified copy of the partnership agreement or other similar document, if any, creating the entity, or a certificate of good standing under the laws of the State.*

In fact no such document or certificate can be produced for Rainbow gatherings, and under the current rule they would be facially precluded from authorization. Under the amended rule, the same standard can establish such proponents as public assemblies, and confirm the alternative track for special use compliance by Operating Plan or other means of choice.

Therefore at the opening of this paragraph stating the scope of the ensuing tests, one word "~~other~~" is surgically stricken, and the tests are properly applied to "All special uses".

[5] §251.54(e)(4)

It is appropriate that certain project information be held confidential by Forest officials, on request by special use proponents. This paragraph is amended to state a narrow but necessary exception for NGU's – whether an intended group-sponsored event or a public assembly. In either case, the identity of averred agents or volunteers, and substantive representations or agreements made in pre-application contacts, must be disclosed to constituents & citizens as public information on-demand – not requiring a FOIA request and without delay.

This has been an issue in the past, where straw-dog permit signers were concealed from public gathering participants, to the prejudice of their rights and immunities. It is relevant to the amended rule in the future, where inept or ill-motivated 'volunteers' could come forward to skew the compliance process, or sabotage it. Proponent organizations would also benefit from this protection, assuring that stated agents are authorized and acting within their mandate.

The effect of this amendment is simply to preserve crucial points of transparency, and to protect NGU proponents and the Forest Service from fraud. The new language might be refined but the intent is not controversial, and it complements other amendments proposed.

[6] §251.54(g)(3)(ii)(H)

A Noncommercial Group Use must meet eight criteria for special use authorization to be Granted – seven substantive tests (A) - (G) are unchanged, one procedural test is amended: Subparagraph (H) currently requires a Permit Signer for an embodied 'Group' Holder... it is expanded to enable an affirmed Volunteer serving *"an operating plan or other agreed means of authorization for a public assembly."*

In the proposed CFR amendments, this is the first reference to the "operating plan" as the preferred instrument for regulating NGU's on the 'assembly' track. The broad language extends to *"other agreed means of authorization",* allowing for management innovations based on the distinct circumstances, needs and beliefs of proponents, and the reasonable discretion of Forest officials to adopt them. At this stage of review, a known deal is on the table, and one or more volunteers are on-board for this role... upon signing up, the test is met.

However there is a legitimate question of what document a volunteer can or should sign. It might be presumed that if a group agent must sign a special use permit at this point to give it legal effect, parity would mandate a volunteer to sign an operating plan for the same reason – but in fact a volunteer signature has no such effect:

In this capacity one bears no delegated authority from those assembled, nor any ability to enact contracts binding upon them in turn. Moreover an operating plan is fitting for public assembly in part because it does not require a 'second-party' signature – it can be issued and implemented by Forest officials, and can take legal effect upon proper public notice (like a Forest 'Order').

On this basis a volunteer should only have to sign an individual *Volunteer Agreement (e.g., FS-1800-7),* referencing the operating plan and defining certain tasks & obligations in support, but separate from it. This reserves the option for volunteers to also sign the operating plan and take a stronger hand in its applied terms, which might be legally advantageous for participants – yet avoids the hurdle of requiring endorsement in-full:

With one or a few volunteers signed-up, general assent of attendees suffices for the operating plan to take effect as a special use authorization for a public assembly.
This flexible approach is suggested in proposed Interpretive Rules (C) & (D) – addressing variant steps in proceedings but meeting regulatory objectives regardless of the path.

[7] §251.54(g)(3)(iii)

As written this paragraph deals with the circumstances of Permit denial, the presentation of 'time-place-manner' alternatives, available recourse on environmental grounds, and procedures toward final denial subject to judicial review. In the past advocates have advanced the operating

plan in lieu of the permit in this frame, extending the requisite offer of alternatives to the *means of regulation* when a regular permit cannot be signed. This proposal is more thorough in laying groundworks for 'public assembly' as a variant form of NGU – such that a sound application on that track should not reach this point of denial. However in deference to how the rules are structured, it is still the most fitting to detail the 'OpPlan' *alternative* in this paragraph.

This CFR amendment is the most ambitious edit proposed – setting forth several sentences of new language, and restructuring the text for clarity. The current paragraph is poorly composed and confusing... it is revised into three separate paragraphs, preserving the text in a more coherent topical and logical sequence:

• Par. (iii) outlines a workable OpPlan protocol and fair standards of compliance *"consistent with the requirements"* for all special uses, with no preferential treatment if equivalent standards are met. The stated elements are sufficient in this general context of the regulation, and aligned with its public interests as defined by rule and case law. *U.S. v. Linick,* 195 F.3d 538 (1999).

• Par. (iv) and (v) restate environmental review and final denial procedures, respectively, with only cosmetic changes in the text, now clearer in flow and intent.

An OpPlan for an assembly demands real collaboration between foresters and gatherers. The language is deliberate – *"Forest officers shall work with volunteers and participants to devise and implement an operating plan..."* (emphasis added). There are mutual standards of performance in this endeavor, where officials are mandated to enable fair compliance.
A concise statement of scope and process is fitting for the CFR; this alternative policy *as-applied* calls for guidance in more specific provisions of an Interpretive Rule, as proposed.

[8] §251.56(d)

The 'Liability' problem cannot be overlooked: The NGU permit creates 'vicarious liability' for actions of other members of the presupposed `Group` – which in turn must indemnify the government on harms by this `Use`. If there is no `Group`, it all breaks down.

Here public assembly is distinguished by the personal responsibility of participants, in accord with their personal standing as citizens attending voluntarily. They are "severally liable" in that claims against anyone are specific and 'severable' from claims against others.

This principle is posed "in the alternative", but it is not anything new – it simply aligns the Liability clause with the reality of public gatherings, the position of all Forest users, and the rest of the law – where perpetrators of harms or crimes are held responsible, not bystanders.

[V.] EXPEDITING THE RULEMAKING PROCESS

The Administrative Procedure Act states: *"Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."* 5 USC §553(e).

The exercise of this right to amend a National Forest regulation falls under the operating guidelines of Forest Service Manual (FSM) 1013, where general rulemaking requirements of public notice & comment and regulatory review are laid out, and *"Revision of Forest Service Regulations"* is specifically authorized: *"Existing regulations, or segments thereof, may be revised, amended, revoked, removed, or redesignated in response to changing law, regulations, orders, or other circumstances."* FSM 1013.33.

The USDA has no specific protocol for such a Petition; it is one of various ways a new rule or amendment might be initiated, all subject to certain determinations that affect how it will proceed. The agency's "Regulatory Decisionmaking Requirements" define the parameters and process under the broad mandates of Executive Order 12291.

> Departmental Regulation (DR) 1512-1 provides direction to USDA agencies for implementing E.O. 12291. It requires advance notice to the Secretary (or Assistant Secretary) of plans to issue rules, establishes the approvals needed on rules prepared in USDA, and requires review of existing regulations on a 5-year cycle.

The first test is the "classification" of the rulemaking, bearing upon OMB review requirements – whether it is "Major" in farm or small business impacts as defined, "Significant" in policy or budget effects, or "Economically Significant" in various ways. DR 1512-1, §3c(2)-(5).
Otherwise it is deemed "Non-Significant" in those effects, or "Exempt", i.e. – *"regulatory actions... that OMB has exempted from review under Executive Order 12866 because the regulatory actions are highly routine and/or concern non-sensitive subject matter."* §3c(1), (6).

The CFR amendments here proposed work narrowly within the frame of the NGU regulation, and do not alter its purpose or scope, but only modify its application to a broad class of unaffiliated citizens in expressive use. As such this proposal does not constitute a "Major" or "Significant" rule as defined by E.O. 12291, §1(b) or DR 1512-1, and no Regulatory Impact Analysis is required.

Moreover this determination also affects whether a full public 'notice-&-comment' rulemaking is required, or may be waived within the agency's discretion. 5 USC §553(b)(3)(B).
Clearly this proposal qualifies as Non-Significant or Exempt under the above standards:
"Exempt regulatory actions may, after appropriate clearances, be published in the FEDERAL REGISTER without any further consultation with OMB." DR 1512-1, §3c(6).

Accordingly this agency directive affords various means of promulgating a rule or revision, including the customary 'Notice of Proposed Rulemaking' (NPRM) to commence public comment and review proceedings. But arguably these amendments are simple and corrective in nature, and do not constitute a core policy change – and thus might be enacted by 'Direct Final Rule':

> A regulatory action that expedites noncontroversial CHANGES to an EXISTING regulation. Rules that are believed to be noncontroversial and unlikely to result in adverse comments

> may be published in the FEDERAL REGISTER as direct final rules.
> DR 1512-1, §3i.

This procedure has ample protections: The rule is published on the premise that *"no adverse comments are anticipated",* but it also provides for such comments to be submitted:

> ...If the agency receives a written adverse comment or notice of intent to submit a written adverse comment within the prescribed time, a notice of withdrawal of the direct final rule is published in the FEDERAL REGISTER and the agency proceeds with notice and comment rulemaking. DR 1512-1, Appendix E.

In the alternative, the agency can proceed by 'Interim Final Rule': *"A final rule that is not preceded by a NPRM, but that provides the public with an opportunity to participate in the rulemaking proceeding after the final rule has been published. ..."* DR 1512-1, §3g.
This approach might accommodate public concerns and inputs, especially in the concurrent Interpretive Rule as proposed, without the risk of going backwards on a "heckler's veto".

In suggesting these expedited rulemaking procedures, there is no motive to abridge public scrutiny or proper agency review... it is only to minimize the burdens, costs, and timeframes on all sides to get to an optimal outcome. In fact this Petition has been developed in due heed of the most knowledgeable stakeholders in the country, and attorneys most experienced with these issues... and it has been crafted by a seasoned planner to work seamlessly with USFS land use regulations.

The intent was always to make it *good,* and thus to make it *easy* – to put forth CFR amendments and Interpretive provisions that are well-conceived, clear and non-controversial in content & form. The best process would streamline implementation of a ready proposal, with room for final review and refinements from able citizens, organizations, & USDA personnel.

Upon presentment to the USDA Under Secretary for Natural Resources & Environment, this Petition goes directly to the *Recreation, Heritage, & Volunteer Resources* staff – the vested policy review body for special use rules and other National Forest affairs. Their job is to assess the proposal and develop a *"WORKPLAN. The document used to initiate a regulatory action."* –

> The workplan provides a description of the contemplated regulatory action, including objectives, alternatives, and expected results of the regulatory action. The information in the workplan is used to determine the regulatory classification of the regulatory action and designate the appropriate level of oversight. DR 1512-1, §3d.

The Workplan is the locus of information that goes to OMB and USDA regulatory tracking channels, and of *"...instructions that the Under or Assistant Secretary is to review a non-significant regulation before publication in the Federal Register."*

At the outset, it is appropriate that Notice of these proposed rule amendments be published in the Federal Register, with this Petition reprinted in full – to inform the public of this pending action, provide opportunity for input, and ensure transparency in these proceedings.

[*] LIST OF EXHIBITS

EXHIBIT 'A'	House Judiciary Letter to USDA Secretary (11/1/1993) ~ Congressional critique on the proposed NGU Rule	2 pp.
EXHIBIT 'B'	*"Group Use Rules... – A Legal & Land Use Review"* ~ constitutional/environmental policy analysis – 'PCU' (Dec.1993)	26 pp.
EXHIBIT 'C'	ACLU of Wyoming: PRESS RELEASE (10/6/2008) ~ *"Rainbow Family Gathering in Wyoming"*	3 pp.
EXHIBIT 'D'	ORDER – *Sedlacko v. Law & Dearborn* (7/14/2011) ~ First Judicial District Court, Santa Fe County, NM	3 pp.
EXHIBIT 'E'	Operation and Maintenance Plan ~ "2010 Peaceful Assembly" ~ Allegheny National Forest, PA (6/28/2010)	6 pp.
EXHIBIT 'F'	Interior Site Operating Plan ~ Rainbow Peace Gathering 1983 – Ottawa N.F., MI	3 pp.