‘Group Use’ Rules for National Forest Lands -

A LEGAL & LAND USE REVIEW

~ Analysis and Positions on Amendments to 36 CFR Parts 251 & 261, as proposed by the U.S. Forest Service for public comment:

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PEOPLE FOR COMPASSION AND UNDERSTANDING
Washington, D.C.

-- December 1993 --

'GROUP USE' RULES FOR NATIONAL FOREST LANDS
A Legal & Land Use Review

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• S.C. ADDISON -- Concept & Development
• W. THOMAS -- Contributing Themes

The ideas of W. Thomas and others are dutifully included and gratefully acknowledged.
I take humble responsibility for the final form and sense of this position paper,
and for any perspectives which might neglect the wisdom of my friends. -- SCA

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Background & Scope

On May 6, 1993 the U.S. Forest Service published proposed amendments to 36 CFR Parts 251/261, establishing a permit requirement for assemblies of more than twenty-five people on public lands. The rulemaking is posed as a routine measure to regulate a Special Use in the National Forests, yet no grounds have been demonstrated as a 'rational basis' for imposing such a restriction.

At the same time, the Forest Service must confront a *Constitutional* problem:

> **"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."** U.S. Constitution, Amendment I.

Stating the core motive of its action, the Agency presumes to strike a delicate balance:

> "The purpose of this proposed rule is to regulate noncommercial group events and noncommercial distribution of printed material on National Forest System lands in compliance with First Amendment rights of assembly and free speech."
> *Federal Register,* Vol. 58, No. 86, pg. 26940 *("FR").*

The judicial record is clear: In two previous tests nearly identical versions of this regulation were found to be facially unconstitutional, in separate rulings by Federal District courts.

- *United States v. Israel*, No. Cr.-86-027-TUC-RMB, Dist. Ariz. May 1000, 1986 *("Israel");*
- *United States v. Rainbow Family*, 695 F.Supp. 294, E.D. Tex. 1988 *("Rainbow").*

The preponderance of the Agency's argument is now devoted to explaining how the rewritten rule has been tailored to comply with the prior court opinions. *FR*, pg. 26940.

In fact it merely ploys with legal language, evading accountability for basic constitutional premises and effects. The Forest Service still fails to present any facts that would justify the Government's *"significant interest"* in this unprecedented stricture, and still disregards workable, demonstrated alternatives that must be considered as *"least restrictive means"* to its regulatory ends.

Thus the stated purpose is oxymoronic: If enacted this unnecessary rule would impose a substantial burden on the inalienable freedoms of belief, expression and assembly -- the legacy of natural human rights to join in prayer and communion on the land, long predating the origins of this country -- *by defining the free exercise of those rights as a criminal violation.*

. . . . . .

The logic of this survey responds first to the language of the amendment, as presented in the Federal Register. But because the Forest Service lacks any factual predicate for its proposed rules, the analysis must extend further to the real impact and underlying intent of the rulemaking itself --

~ Since the rules are put forth under the guise of *land use* regulation, it must assess whether they actually serve any legitimate purposes of land and resource protection.

~ And since they are built upon a history of questionable and sometimes draconian *enforcement* tactics on the part of the government, the political motives must also be examined.

Thus the present Review embraces these broader themes within its scope.

The Limits of Authority

Part 251 -- LAND USES

Subpart B

1. Authority.

The Agency's position stands upon its "congressional mandate to protect the national forests", under Title 16 USC (*FR*, pg. 26940). This does not in itself constitute grounds for regulation.

• The Forest Service's congressional mandate is not at issue. The issue -- unaddressed by the proposed rulemaking -- is the long and consistent recognition that rights cannot legally be abridged by decree of executive agencies, e.g.:

> "An act repugnant to the Constitution cannot become law."
>
> *Marbury v. Madison,* 5 (1 Cranch) U.S. 137 (1803). See also, *Morrill v. Jones,* 106 U.S. 467 (1821); *United States v. Greenburgh,* 453 U.S. 114 (1981); Rainbow at 312, n. 6.

Nor did the advent of the Administrative Procedure Act alter this legal axiom. E.g.:

> "The words 'to diminish the Constitutional rights of any person' are omitted as surplusage as there is nothing in the Act that can reasonably be construed to diminish those rights and because a statute may not operate in derogation of the Constitution."
>
> *5 U.S.C. Sec. 559,* Historical and Revision Notes.

In short, the general Congressional authority vested in an agency is not in itself a basis for placing galling constraints on specific forms of public access and expression.

• As a public land use regulation, the proposed rules are subject to the *'rational basis'* test at the heart of land use and environmental law: The agency must show valid reasons to restrain specific uses, structures, or activities -- demonstrating actual impacts and appropriate mitigating measures. This connects to the broader mandates of the law that a *'significant' or 'compelling' government interest* must be established before regulations may be imposed, and that regulations be "well-reasoned":

> "Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action." *Executive Order 12291,* Section 2(a).

The recent passage of the Religious Freedom Restoration Act (H.R. 1308) has emphatically reaffirmed that a compelling Government interest must be shown to justify any regulatory restraint upon the exercise of religion, and this stringent test extends to other First Amendment freedoms.
In this light it should be understood that no findings in prior relevant cases support such an interest.
Nor is any information presented here to establish the need for new regulations to protect the Forests from impacts of group events, or the criteria for the exemption limit of twenty-five people.
In fact the Forest Service disregards its own annual "Rainbow Gathering" reports, which have concluded repeatedly that no significant impacts were incurred from very large events of this kind.

And it ignores the pivotal finding that "...a panoply of statutory and regulatory grounds" already exist to address any legitimate concerns that may arise with regard to group use of public lands. *Rainbow* at 314. See also *Jackson v. Ogilvie,* 325 F.Supp. 864 (D.Ill.1971).

The proposed regulation impacts the First Amendment head-on, yet offers no tangible grounds. The Forest Service circumvents the problem with a sweeping generalization, invoking a circular logic of statutory authority:

> "It is well established that the government may enforce reasonable time, place, and manner restrictions on First Amendment activities. Such restrictions are appropriate where ... they are narrowly tailored to further a significant governmental interest..." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984); *FR*, pg. 26940.

This is a red-herring rationale: The agency's Congressional authority to impose "reasonable restrictions" is not in question. The threshold issue is -- *"What significant government interest?"* Only after a substantive "interest" has been demonstrated can the second question be addressed -- *"Is the restriction narrowly tailored?"*

251.50 Scope.

251.51 Definitions.

Proceeding from the 'rational basis' test as a primary constraint, environmental regulation is directed toward *permanent or consumptive uses* -- actions with continuing impacts upon locales, or resource takings affecting larger social and ecological systems. The authority of the Forest Service operates within this overall rubric of land use law, yet in this rule the catchall category of "Special Use" is expanded to include activities outside its original scope and intent, different in character and impact.

The conceptual trick is played by defining "Group Events" and "Distribution of Printed Material" as *Special Uses,* conferring 'guilt' by association: These harmless expressive activities are linked with other uses whose impacts are known and significant -- and thereby subjected to the same regulatory framework, in parallel to the major-impact uses of timbering, mining and grazing. Thus the Forest Service attempts to mask an illegitimate restraint of the First Amendment, by interpretive *fiat.*

Although this is done in the guise of a comprehensive and content-neutral administrative policy, the *nature* of the activities it would regulate is totally misconstrued in this rationale. In fact the strictures would mitigate no real impacts, but would fall heavily upon those who simply gather benignly on the land as a form of free expression in itself. It also creates a procedural quagmire, opening such assemblies to an array of administrative reviews that are inappropriate in kind and scale. Where such environmental reviews require a reasonable and timely 'threshold determination' on potential impacts, this rule leaves only a broad discretion, bypassing such requirements.
(See further discussion below under §251.54(f).)

The definitions themselves are vague and broadly contrived: Is an activity 'commercial' if kids trade beads or baseball cards? Is bonding required if event costs might be supported in part by donations? Is it a restricted 'distribution of printed material' to give your cousin a newspaper? E.g.:

> *"Commercial use or activity* -- any use or activity on National Forest System lands involving the charge of an entry or participation fee, or the purchase, sale, or exchange of a product or service, regardless of whether the use or activity is intended to produce a profit." §251.51; *FR*, pg. 26945.
>
> "*Distribution of printed material* -- disseminating, posting, affixing, or erecting printed material as defined in this section or soliciting information, views, or signatures in conjunction with the distribution of printed material." §261.2; *FR*, pg. 26946.

These open ended definitions run afoul of the very precedents upon which the agency rests its legal authority -- i.e., (1) that regulations be "narrowly tailored to further a significant governmental interest" *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984), and (2) that they provide "specific and objective standards to guide the licensing authority. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51, 153 (1969). *FR*, pg.26940.

The restraint of "printed material" under Special Use authorities is especially vexing as an administrative intent -- this provision has no basis or purpose in land use management. Arguments that "...Such distribution can occur by posting, affixing or erecting the material, which could damage natural resources if not regulated..." (*FR*, pg. 26941) are speculative, specious, and absurd.

> "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually litter." *Schneider v. State,* 308 U.S. 147, 162.

Most important, this provision would vest a powerful preemptive authority in government officials. The effect would be chilling upon basic Constitutional rights of assembly and expression, and extraordinarily dangerous as a legal precedent.

251.54 Special Use Applications
(a) Preapplication activity

It is not unreasonable to say that "...a proponent is *encouraged* to contact the Forest Service office(s) responsible for management of the affected land as early as possible so that potential constraints can be identified..." (italics added). This would fully suffice to state an Agency policy of cooperation in managing group events. It is unnecessary to impose a permit requirement that is redundant upon existing regulations, and pointless to use coercion where consensus will work.

In fact there is a long history of group events cooperating with the Forest Service in this way, recognizing the legitimate concerns of local rangers and consulting with them on issues of siting, health, and resource protection. Over many years *'Operating Plans'* have been worked out in advance,

and there is a long legacy of good performance, showing that the Agency's true objectives can be met in this way. *(See Attachment A: "Interior Site Operations Plan", Michigan 1983.)* This history is well-known to the Forest Service as a matter of record -- one which they fail to address as offering a viable alternative to its proposed rulemaking.

Moreover it is the obligation of the Agency to explore such options for meeting its legitimate goals, before any regulation may be imposed. This is a well-established principle of administrative law, and it is explicit in the "General Requirements" of Executive Order 12291. It places clear mandates upon "all agencies" in promulgating new regulations:

> "(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
> (b) Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society;
> (c) Regulatory objectives shall be chosen to maximize the net benefits to society;
> (d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen..."
> *Executive Order 12291, Section 2.*

In short, new rulemaking should be the management measure of last resort. Clearly the bureaucratic compulsion to *assert* a permit authority does not comprise a significant government interest, in any case -- especially where the singular effect is to place an undue and unconstitutional burden upon citizens in the exercise of inalienable rights of assembly. This concern is amplified by the further language of this section, which sets up an indefinite process and timeframe for reviewing the Special Use application, open to arbitrary discretion on the part of Forest Service officers.

(e) Application content.

In a similar vein, it may be reasonable in itself to advise the Forest Service of the expected *time, place, size, and nature* of a group event on public land. However if this is to be required "minimum information" of a permit application {*FR*, p. 26941), proponents would bear an undue burden of proof, subject to arbitrary standards and demands for information. Where an "event" might be multifarious and organic in nature, participation unknown, set-up and clean-up times imprecise -- an officer would have the prerogative to arbitrarily delay or deny an application because the information provided is deemed 'inaccurate' or 'inadequate'.

Most important, the Forest Service demands under (E) that an agent be designated "...who will sign a special use authorization on behalf of the applicant". This implies a stipulation that a 'group' be constituted or structured as a legal entity for the purposes of the public agency and its rules. Such a stipulation has no basis in the law. Where individuals uphold and exercise a shared belief in

consensual democracy as the working principle of their assemblies, they may not be forced by Forest Service directive to alter their philosophical grounds: No hierarchy may be imposed, nor any authorities delegated, without violating their freedom of belief in Consensus. And where a permit process itself would intercede in First Amendment rights, it is a further matter of principle that these rights not be renounced by sanctioning one person to sign an application.

(f) Processing applications.

In an administrative view, it is axiomatic that National Forest plans and uses must be consistent with the requirements of other regulations and the findings of other agencies. However the language under (4) sets a confusing procedural trap:

> "If this information is already on file with the Forest Service, it need not be refiled if reference is made to the previous filing date, place and case number." *FR*, p. 26945.

This invokes a huge and indeterminate body of law and policy. It implies that all of this is relevant to a group use review, and apparently places the burden of documenting this material entirely upon the applicant, subject to the whims of the reviewing officer. The Agency's further commentary in the Federal Register extends the trap and makes its motives more obvious:

> "...[The] decision-making process... may trigger extensive statutory and regulatory requirements, including those imposed by the National Environmental Policy Act of 1969..., the Endangered Species Act..., the National Historic Preservation Act... and other laws." *FR*, pg. 26941

Such procedures would be loaded on an already extensive review framework, expanding the scope and process demands that are imposed. In fact *it is the Agency's job* to assure that its regulations are consistent with other law, yet this proviso would again have the effect of placing the burden of this proof upon a 'group event' applicant. It should also be clear that these measures would encumber the agency and taxpayers with the added costs of processing applications and managing records -- and once more create a very loose discretion for the officer. This is a serious due process issue.

Moreover the logic fuels a broad rationalization for any delays in processing that may arise, regardless of any reason or accountability:

> "The time needed to comply with these requirements varies greatly depending on the particular circumstances of each application. ...Consequently, the agency has determined that it would be infeasible and arbitrary to specify a time period in which final agency decision would be made." *FR*, p. 26941.

It is further telling that this rationale directly contradicts USFS policies for implementing regulations under the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ). As amended in 1992, Forest Service Handbook 1909.15 (Environmental Policy and

Procedures Handbook) sets forth *"Classes of Actions Requiring Environmental Impact Statements"* under Chapter 20.6. None of these classes is applicable to transitory group events.
Federal Register 57:182, 9/18/92; pp. 43200-201.

Conversely Chapter 31 identifies *"Categories of Actions Excluded from Documentation";* group uses may be interpreted within the scope of actions defined under this section, e.g.:

> "8. Approval, modification, or continuation of minor, short-term (one year or less) special uses of National Forest lands..." *Id.,* §31.1b(8), pg. 43209.

Alternately such events might fall under §31.2, *"Categories of Actions For Which a Project or Case File and Decision Memo Are Required"* (pg. 43209). Yet such actions are "routine" by definition, not entailing any significant site impacts, and therefore clearly outside the purview of a full environmental review. Either way, the net effect in the proposed 'group use' rules is to create a hollow procedural threat that is clearly proscribed by its own NEPA and CEQ policies.

While the Forest Service stands on the pretense of remedying defects that Federal courts have found in their previous rules, this logic directly evades and defies the mandate for timely due process expressed in the 1988 decision. *Rainbow* at 306-308. In order to justify vagaries in the handling and timing of group event permits, the Forest Service invokes review processes that are inapplicable and unlawful, and still refuses to specify a finite "time period" for permit response.
In sum, this amended rule would be blatantly illegal in scope, more vague, more subject to "unreasonable delay", and thereby more unconstitutional than the last.

The Seven Criteria

(h) Response to applications for noncommercial group events or for the noncommercial distribution of printed material.

This amendment purposes to remedy a flaw in the 1984 rule, which *"...applied different criteria for activities with First Amendment implications than for all other activities..."* . *FR*, pg. 25942. It fails to do so: A separate set of criteria still applies to the 'distribution of printed material'; terms are merely juggled so that all noncommercial group events fall under these tests, apart from other special uses. In fact this language expands the latitude of the Agency to deny access to public land, vesting unbridled discretion in the hands of its "Authorized Officer". The rule apparently disregards the Supreme Court admonition that *"…prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."*
Rainbow at 309-310; citing *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51 (1969).

(1) Seven criteria are set forth for granting a special use authorization; the designated official would have sole prerogative to determine whether the ***'proposed activity...'***

(i) "...is not prohibited [under 36 CFR rules] or by federal, state, or local law..."

"This criterion would allow the agency to deny an application for activity that would violate federal, state, or local law." FR, p. 26942. In short, the *perceived risk* that a law will be broken or a habitat disturbed becomes a basis for denying access rights; the test is entirely speculative, the process wide open to bias, politics, and arbitrary pre-judgment. Note also that the reference to the new prohibitions under 36 CFR part 261, subpart A creates an entirely circular logic within the rules, indicating that a special use permit may be denied on the speculation that a 'crime' of 'distributing literature' might be committed.

The Agency's Federal Register publication documents absolutely no facts to justify a NEED for new rulemaking, over and above existing regulations. This failure should be sufficient in itself to invalidate the proposed CFR amendments. Especially where protective rules already exist to address potential fears, preemptive speculation that a law *might be broken* does not constitute such a need.

> "An undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." *Tinker V. Des Moines School District,* 393 U.S. 503, 508 (1969). *Hague v. C.I.O.,* 307 U.S. 496 (1939)

(ii) "...is consistent or can be made consistent with the applicable and approved land and resource management plan..."

Management plans for National Forests already have the force of law, supported by regulations protecting sensitive environments, habitats, and resources. This fact underlies the finding of the 1988 court that the body of existing regulations was sufficient to the agency's purposes of protecting National Forest lands and resources. In effect, this finding alone overturns the Agency's pretext of any significant or compelling government interest in promulgating these rules.

The actual scope and intent of forest management plans should be understood in this light: Their function is to reconcile demands and set specific limits on major uses, based on environmental and performance standards with which all activities must conform. Here again, it is the duty of the Agency to assure that plans and standards are consistent, to inform prospective users of all relevant provisions in substance, and to prove that actual breaches have occurred to warrant enforcement action. The burden of proof may not be placed upon users before the fact. *Milwaukee Mobilization for Survival v. Milwaukee County Park Comm.,* 477 F.Supp. 1210 (E.D. Wis.1979).

Although management plans are developed and adopted with public input (albeit somewhat narrow), as such the plans do not address "group events" as defined in this rule; they are not expressly

prohibited or limited. Therefore the application of the plans in this regulatory scheme is subject to the protections of the Ninth and Tenth Amendments:

Free assembly on public land is a right 'retained by the people', not to be denied or disparaged by other authorities under the Constitution; and the final stewardship of public land is a power "reserved… to the people", overarching the trustee role of public agencies. *Nothing in forest management plans may be construed as grounds for preempting these rights and powers.*

(iii) "...will not delay, halt, or prevent administrative use... or other scheduled or existing uses..."

Forest management plans are built upon the concept of balancing interests in an ongoing 'multiple use' scenario. Here again the language blurs the fundamental difference between a permanent or consumptive 'use' and a transitory 'group event', which by nature imposes no significant competing demand upon the scheme. In the few instances where existing uses were affected, experience has shown that modest accommodations are easily made by prior agreement. For example, a few temporary adjustments in grazing patterns were worked out to facilitate a 1992 gathering in Colorado, without significant cost or inconvenience to the parties involved.

Yet this provision again sets up a vague discretion, one which bypasses established protocols in environmental law for determining whether impacts of an activity will be significant -- the 'threshold determination' discussed above. This leaves the "officer" in a position of unilateral arbitrary judgment, speculating on a worst-case analysis under pressure to deny access. The 1984 rule was struck down for this reason, and the 1988 court made the point specifically:

> "Although NEPA is unquestionably constitutional, even an otherwise valid statute cannot be applied in a manner designed to suppress First Amendment activity, or out of hostility to a particular group." Rainbow at 325. See also *New York Times v. Sullivan,* 376 U.S. 254, 266, 269-72 (1964); *Buckley v. Valeo,* 424 U.S. 1, 25 (1976); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984)

Despite its pretenses, this amendment offers no remedy. To say that this concern of the court is addressed "...by providing specific examples of how an activity covered by this paragraph could delay, halt, or prevent existing or scheduled activities..." is tantamount to speculative law by analogy. It is no basis for legitimizing preemptive enforcement.

> "...unbridled discretion to choose the regulatory standard to apply in any particular instance my allow the decision-maker to discriminate between groups applying for a permit, based upon his or her subjective biases. The 'very possibility of abuse' will invalidate a regulation requiring a permit for expressive activity."
>
> Rainbow at 323, citing *Niemotko v. Maryland,* 340 U.S. 268, 272 (1951)

(iv) "...would not pose a substantial danger to public health [with respect to] sanitation..., waste..., drinking water..., contamination of the water supply..., handling of food."

Health and sanitation are important and legitimate performance issues, directly relevant to the protective mandate of the Agency. They have also been the first concerns of gathering participants, and a focus of Operating Plans resolved in cooperation with local rangers in advance of many group events. Overall the track record is strong: Large groups and complex logistics have been accommodated with virtually no impacts on National Forest ecosystems, and just one moderate public health incident since the early 1970s.

The circumstances are worth noting: A minor bacterial outbreak at a North Carolina gathering in 1987 was largely attributed to difficult site conditions and leaching from heavy rains; reports indicated some misjudgment by participants, but no *negligence.* A year later this prompted the Rainbow court to recognize the public health concerns and establish a narrowly tailored mandate to insure adequate standards of health practices at "group events". In fact, parts of the *Army Field Manual (FM 21-10)* were incorporated into the record as an explicit reference for future practices. But the court disallowed imposing these concerns as prior review criteria in a new rule, finding this to be redundant upon existing regulations and preemptive of First Amendment rights.

> "...in view of the lack of evidence of irreparable injury in any area other than public health, a total proscription of the gathering would be unjustified. ...Conversely, ...it is a reasonable time, place, and manner restriction to require that the defendants' First Amendment activities not threaten the public health or welfare."
>
> *Rainbow* at 329; citing *Grayned v. City of Rockford,* 408 U.S. 104; *Kovacs v. Cooper,* 336 U.S. 77; *De Jonge v. Oregon,* 299 U.S. 47; *Schenck v. United States,* 249 U.S. 47.

As for how sanitation standards would apply to group events, the court placed reliance upon watershed and disease protections already embodied in environmental and public health codes. Moreover while acknowledging the management interest of the Forest Service, it noted that such concerns normally fall within the expertise and jurisdiction of other agencies. Accordingly the court vested oversight of group event health standards and performance in an agency more fitting to the task, and explicitly removed the Forest Service from direct authority in this area:

> "A neutral agency, the United States Public Health Service, will be designated to inspect the gathering sites and certify that minimum health and sanitation standards are met."
>
> *Rainbow* at 330.

Incomprehensibly, the present rulemaking disregards this Federal Court directive -- Apparently the Forest Service again asserts sole authority over health and sanitation standards for gatherings. Although its *interest* in this area is unquestioned, the motives are suspect in light of the record of Rainbow, 1988. The broader history shows that the Agency has invoked these concerns

rigidly and capriciously, beyond the mandates of reasonable and fair judgment. This has happened in the past, with the obvious intent of discouraging group events and creating a pretext for other law enforcement actions, surveillance, and armed presence.

The Texas court left a clear mandate for raising the standards of environmental health practices at gatherings. No doubt these parameters should be the focus of improved site planning and cooperation for future group events. But the court made it further clear that they may not be invoked as a speculative pretext for denying a permit, nor may the Forest Service abuse this authority to exert a chilling effect upon peaceable assembly.

> Rainbow at 309-310; citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 153 (1969); *Fernandes v. Limmer*, 663 F.2nd 619, 628 (5th Cir.1981); *A.C.O.R.N. v. Municipality of Golden Colo.*, 744 F.2nd 739, 746 (10th Cir.1984); *Rosen v. Port of Portland*, 641 F.2nd 1243, 1246, (9th Cir.1981); *Kramer v. Price*, 712 F.2nd 174, 177 (1983).

> ***(v) "...would not pose a substantial danger to public safety... [on the basis of] potential for physical injury from the proposed activity, ...characteristics of the proposed site, ...existing uses or activities, ...and the adequacy of ingress and egress in case of an emergency."***

It is always incumbent upon forest users to heed safety concerns; these are primary considerations in selecting a site and planning activities. In this outlook potential dangers are understood as problems solvable by knowledge and preparation -- this is the essence of wilderness experience. When accidents occur requiring emergency assistance, there are direct costs to the Agency falling reasonably within its normal operating scope. However the *threat* of accident in a National Forest entails no legal or financial liability to the Agency; therefore it presents no legal or financial *need* to control access on these grounds, and the rule is superfluous. Conversely the issuance of a permit would carry an expressed sanction of the site and event as a whole, and an implied assurance of safety -- possibly engaging public liability for accidents, incidents, or individual misdeeds. The costs to the public that could arise under this scenario have not been assessed.

The 1984 provision asserted a preemptive authority based on a test of "clear and present danger"; it was struck down for being vague and leaving too much discretion in the hands of officials. F.R., pg. 26943. This new language is proposed to remedy that flaw, yet it merely replaces the original general standard with obvious general cases: It lists the common *types of potential danger* -- giving officials plenty to worry about -- but says nothing about the *degree of actual danger* that would warrant a denial of access to public lands. Similarly the test of ingress/egress *"adequacy"* is nearly meaningless, open to biases by which users could be barred from remote sites. The thresholds are left

arbitrary, and agency latitude remains far too broad. Again this allows for a permit to be denied on purely speculative or specious grounds.

(vi) "...does not involve military or paramilitary training or exercises by private organizations or individuals, unless such training or exercises are federally funded."

This is a double-edged sword, ironically befalling those most interested in ploughshares. Ostensibly this test is targeted upon armed 'extremist groups', known or suspected. But given such loose discretion, might it conceivably be invoked against such "paramilitary" groups as Outward Bound, the Boy Scouts, Salvation Army or National Rifle Association ? Could it also proscribe activities like Aikido martial arts seminars or wilderness survival training using the Army Field Manual? It is of further concern that this measure might be applied as a prior restraint against *possible* civil disobedience -- there are already indications of this intent.
Once again the definitions are too vague, and the powers too broad.

It should be understood that this provision does not arise in a vacuum: It is an extension of a Federal policy applied previously in Forest Service 'Land Use' rules published in 1992, amending review authorities and procedures under other sections of 36 CFR Part 251. *Federal Register,* Vol. 57, No. 158; pp. 36618-26 (8/14/92). That rulemaking uses the same language to define a screening criterion for all other classes of Special Use permit applications. *Id.,* § 251.54 (viii); pg. 36624. This condition was first imposed explicitly upon potential users in that framework, and a policy enabling *military priority* on National Forest lands first implied. Within months this purpose was apparent in Mississippi's De Soto National Forest, where the Defense Department set up a gunnery test range and conducted tank exercises, excluding citizen access.

As presented in the current rulemaking, these Government powers would be expanded expressly over First Amendment activities in National Forests. Moreover the exemption of all "federally funded" activities from control implies an unconditional sanction for police, armed forces, and counterinsurgent training on public lands, regardless of where the authority and funding originate. This can be construed to convey upon 'official' military activities a preemptive and exclusive right of access to National Forests, posing a serious Constitutional infringement upon the Second Amendment. Such issues amplify doubts as to the sense, effect, and legality of the proposed regulations.

(vii) "A person or persons 21 years of age or older has been designated to sign and does sign a special use authorization on behalf of the applicant."

As stated above in response to paragraph 251.54(e), the Forest Service has no reason or authority to stipulate that a user group be constituted as a legal entity or structured in its internal interactions to satisfy the dictates of the public agency. This bears directly and heavily upon the 'consensus group', which by definition and intent is not an entity: It is an assemblage of free individuals -- entirely self-responsible as persons before the law -- willfully joining in common activities, mutual care, and the natural human instinct and legal right to gather.

The history shows this provision to be unneeded and misguided: In fact the Agency's own record shows that participants in past consensual events have consulted with local authorities in advance, prepared operating plans and acted in full cooperation. For example, in annual Forest Service reports on the Rainbow Family Gathering of the Tribes, held on National Forest land each July since 1972, District Rangers consistently attest to reliable contacts with the gatherings: Their questions have been answered, their reasonable requests met, problems have been solved together and sites have been left in a clean and natural state. These facts demonstrate a consensual respect and integrity as individuals toward legitimate public interests, common wellbeing, and the land; they do not indicate a compelling need for the law to override rights of free association and consensus, or to impose singular responsibility for potential group actions upon individual participants.
Cox v. Louisiana, 379 US 536 (1965); *Stromberg v. California*, 283 U.S. 359, 369

The Agency insists that "...someone on behalf of the applicant must accept the responsibilities associated with use of National Forest System land." *F.R.*, pg. 26943. Yet having demonstrated no substantive interest behind this stricture, clearly it would fulfill only a self-serving administrative purpose: It is a set-up for conveying personal standing and liability for enforcement action.

This bespeaks an impermissible intent of the government to isolate 'leaders' from the consensus, make them culpable for the real or imagined actions of the group, and expose them to prosecution and penalties under the full weight of the law. Apparently the provision is "compelled" by this motive alone, ignoring the record of viable consensual alternatives for 'Group Use' management. As such it flies in the face of the "least restrictive means" mandate of administrative law.

Moreover in real life this provision fosters a cynical double-bind: Knowing that no 'responsible' person would sign a permit in good sense or conscience -- to assume liabilities for the whole or bargain away primary rights -- the Forest Service seeks to create a circular pretext for enforcement against the entire assembly, again with chilling and preemptive effect.

(2) This paragraph states that if a special use application is denied on the basis of any of the seven criteria,

> "...the authorized officer shall notify the applicant in writing of the reasons for the denial..., [and that this constitutes] ...final agency action and is immediately subject to judicial review." F.R., pg. 26946.

Allegedly this remedies two defects in the 1984 regulations, according to the findings in the 1988 case -- (a) that the grounds for denial must be stated, and (b) that the process "...provide for judicial review of the administrative determination." *Rainbow* at 311-12; F.R., pg. 26940. Yet the language provides no stipulation on the procedure to insure a timely response by the agency, again skirting the mandate of the Texas Court.

> "A decision to grant or deny an application for a noncommercial group event or noncommercial distribution of printed material shall be made without unreasonable delay." 36 CFR §251.54(f)(5); *FR*, pg. 26945.

"Without unreasonable delay" is an unreasonably inspecific timeframe.

> "[A] fixed deadline for administrative action on an application for a permit 'is an essential feature of a permit system.' 24 hours suggested as maximum time for action, permit to be deemed granted if no action is forthcoming within the time limit." *United States v. Abney*, 534 F.2d 984, 986, ftn. 5, citing *Shuttlesworth v. Birmingham,* 394 U.S. 147, 162-164.

Whether an application will be granted is a decision resting solely with the Forest Service officer, who also has an intolerably broad latitude within which he can exercise his pleasure. Moreover judicial recourse is hollow: It is a non-solution if the agency can delay an application past the point of any meaningful remedy or resolution; and it is coercive and chilling where the process of seeking recourse is itself punitive in effect. Given the cost and duress of going to court (especially against the U.S. Government), this proffers undue burdens upon applicants in the exercise of Constitutional rights, upon courts tied up in repressive prosecutions, and upon American taxpayers bearing the cost of litigating wasteful, meritless Forest Service regulations.

251.56 Terms and conditions.

(e) Bonding.

251.57 Rental Fees.

These provisions would exempt *'noncommercial group events and noncommercial distribution of printed material'* from payment of security bonds or use fees. This is appropriate in itself, yet again a broad discretion is vested in officials, and the determination rests upon an extremely loose definition:

"Commercial" is defined as "any activity ...involving ...exchange of a produce or service, regardless of whether the use or activity is intended to produce a profit." *FR*, pg. 26945.
The conditions here are sweeping and the loopholes huge, with little to constrain the Agency's power to impose undue financial burdens on prospective users and impede activities on public land.

Given the known history -- attesting to the Agency's notable propensity to "rigidly enforce" strictures against group events (*Rainbow* at 328) -- it is fair to infer that such vaguely crafted semantics might be used as a pretext to preempt or terminate an 'unwanted' assembly on public lands.

251.60 Termination, revocation, and suspension.

This paragraph establishes the discretion of the authorized officer to suspend, revoke, or terminate a special use authorization. Although it nominally exempts 'noncommercial group events and noncommercial distribution of printed material' from such action, there is no assurance that an officer may not arbitrarily change a prior determination and shut down an event. First of all, "noncommercial" is defined as anything that is not "commercial" -- and therefore it is equally ambiguous. This creates a likely quandary: If a permit is granted for a noncommercial group event and the officer discovers informal trading or donations being accepted, he could then classify this as a 'commercial' activity and revoke the noncommercial permit. In this case the overall event that had received authorization would then stand in violation, with its participants subject to prosecution after having gained approval.

There is a further danger that this could be used to as a pretext to justify physical incursion by officials into a group event in progress, and open it to broader enforcement against participants. Finding an event in violation of a special use authorization could be construed as 'probable cause' for illegal searches, seizures, and detentions; regulations have been used this way in the past on lesser grounds. As such this provision opens the door to abuse of Fourth Amendment protections on a massive scale.

Part 261 -- PROHIBITIONS

Subpart A -- General Prohibitions

261.2 Definitions.

The definitions for *"Printed Material"* and the *"Distribution..."* thereof are restated under this subpart. The overall problems with how these terms are treated under the 'Special Use' designation are discussed above under section 251.51. That they even appear in this CFR amendment as Special Use prohibitions is cause in itself for grave concern, as an issue of prior restraint upon expression.

New York Times Co. v. United States, 403 U.S. 713, 714 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

It is shocking enough that the Forest Service would presume to abridge First Amendment freedoms to disseminate the written word and circulate petitions, under the mantle of forest regulation. That they do so in blatant defiance of Federal Court rulings in direct precedent cases is an outrage. Such insistent disrespect toward judicial opinion bespeaks a repressive temperament in the Agency's administrative scheme, warranting deeper legal scrutiny and decisive political intervention .

261.10 Occupancy and use.

Paragraphs (g) and (h) set forth the prohibition against *"...distributing any printed material without a special use authorization"*, along with specific criteria by which a violation would be defined under this section. The applied standard — *"...delaying, halting, or preventing administrative ... or other scheduled or existing uses"* — creates an extremely broad test for these activities. Loosely construed, virtually any citizen presence on National Forest land might be determined to impede other uses or conflict with the multiple-use management plan. The Forest Service offers no guidelines for resolving possible conflicts in advance, and it ignores available remedies under existing regulations should actual conflicts occur.

Similarly, although "misrepresentation" is also proscribed under existent law, the rule seeks further strictures against *"...misrepresenting the purposes or affiliations of those selling or distributing the material [or] ...the availability of the material without cost or donation."* F.R., pg. 26946. However this particular prohibition also amounts to a "prior restraint on the exercise of First Amendment liberties...", blatantly trammeling the judicial test for "narrowly tailored time, place, and manner restrictions...". *Rainbow* at 329; citing *Near v. Minnesota*, 283 US 697 (1931).

Beyond conferring legal liability upon applicants and contriving further cause for enforcement and prosecutorial action, there is no indication of a legitimate administrative purpose that would explain these restrictions. It would have an especially harsh impact upon 'consensual gathering' events, simply because each individual is responsible for their own actions: No individual can assume liability for the purposes or affiliations of other participants. Nor can any individual have foreknowledge of the actions of others, which may be so diverse and multifarious that it is impossible to foretell or itemize them in applying for authorization.

Nonetheless, the rule would grant law enforcement officials the latitude to construe a simple omission as "misrepresenting" these facts, in order to impose the weight of the law arbitrarily. In this light, these provisions reveal an especially capricious intent toward consensual assemblies on public land, and the natural diversity of expression that is their essence.

The Bigger Picture

A. USE PERMITS: URBAN VS. WILDERNESS AREAS

Obviously there is an overriding *administrative* imperative behind this rulemaking: Having assumed a comprehensive authority to impose permits and fees upon all uses in National Forest areas, the Forest Service bureaucrats are compelled to close the regulatory net. In this strictural world view, group assemblies *must* fall within the same framework of statutory control as other 'Special Uses' and the major extractive activities of the timber, mining, and grazing industries. They are seen as just another source of potential impact, legally equivalent in kind and degree to other realms where the Agency's permit authority is clear, established, and uncontested.

This position builds upon similar authorities in the broader sphere of land use law, extending the continuous fabric of public sector control over public sites. Urban areas offer the classic case in point: When an event is staged on public streets or property in a city, local government agencies have well-established powers to issue permits anticipating impacts (upon traffic, parking, and neighborhoods), and to charge fees offsetting the costs of related public services (utilities, police, disposal, etc.). A more direct predicate lies in the permitting practices of the National Park Service; yet here again the agency is responsible for maintaining an improved and accessible area, and providing support services to the tourist public as 'scenic consumers'. It is also palpable in this context to levy fees upon actual users of National Parks, rather than rely upon full subsidy by the taxpayers at large.

In contrast, a gathering or 'group event' in a remote National Forest imposes no impacts on proximal public uses -- by definition and intent! Moreover to the extent that support services are actually required, realistically they fall well within the scope and scale of normal agency operations. Where the Forest Service has incurred high costs in monitoring such events in the past, it has done so out of its own overreaction and enforcement fervor, unrelated to actual needs.

Therefore the purported reasoning behind this rulemaking breaks down:
By their nature and location, group events and gatherings on remote public lands are distinct in kind from those regulated in urban areas and improved park lands. Unless it can be demonstrated that actual impacts warrant regulation upon a rational basis, it must be assumed in law and administration that they fall outside the purview of conventional permitting authorities; and as courts have consistently recognized, they fall firmly within the bounds of constitutional protections.

B. TARGETED POPULATIONS & EQUAL PROTECTION

The 'Background' discussion presented in the Federal Register claimed that these amendments respond to the mandate of the Arizona court in 1986:

"...the Forest Service has the right to regulate large group activities on government land, but only if the regulation is content-neutral and applies to all large groups. *United States v. Israel,* No. CR-66-027-TUC-RMB (D. Ariz. May 10, 1986)." *FR, pg. 26940.*

Of course the language of the proposed regulation warrants hard scrutiny and critique, but the history of Federal agency performance in this regard should carry significant weight in assessing its real intent and effect. It is beyond the present scope to engage this topic extensively; let it suffice to note some characteristic instances:

[ ] The exclusion of Native Americans from traditional tribal lands is a shameful saga in our history, and it continues in these times. In the past few years alone, severe strictures have been imposed upon Piscatoway burial ceremonies in Maryland, Oglala Sioux sun dances and vision quests in the sacred Black Hills, etc. In these incidents the government has restricted access to public lands, timing of events, and the number of participants; in some cases, there are accounts of a chilling show of force and direct intimidation by enforcement officers.

Recently this concern gained recognition in the U.S. Senate, where the "Native American Free Exercise of Religion Act of 1993" (S. 1021) was introduced in May. This legislation would protect traditional sacred sites from preemption or degradation by other uses, and provide legal recourse where the exercise of belief or ritual is abridged. However it remains unclear how this Congressional intent will affect the standing policies of enforcement agencies, and the selective application of "content-neutral" regulations.

[ ] Rainbow Gatherings have routinely suffered harassment and obstruction throughout their 22-year history. While Gatherers have cooperated well with *local* Rangers, the Forest Service as an agency has deferred to zealous law enforcement and political sentiments in sanctioning roadblocks, searches, seizures, and petty arrests. Considering just a few incidents of the recent history alone:

• Large squads of Vermont state troopers were transferred to the area of the 1991 gathering in that state, jamming local hotels and roads. Traffic enforcement alone created a heavy and obtrusive presence, affecting gatherers and residents alike. Their activities were so disruptive and disturbing that in its 1991 Rainbow Gathering Report, the Forest Service acknowledged complaints by local Vermonters of "an unnecessary show of authority that turned their community into a police state". *Id.,* pg. 26.

• In Colorado in 1992, Rainbow vehicles arriving in the area were afflicted with citations, searches, and some arrests. By several reports, the gathering was under inside surveillance by recognized DEA agents disguised in Forest Service uniforms. "Law enforcement activities were coordinated among 16 different agencies", with a strategy emphasizing "early, heavy presence [and] ...Proactive, not reactive management." *Rainbow Gathering 1992;* USFS Report, pg. 39.

Of the eight agencies directly involved, six of these were identified in the Report and their personnel accounted for, totaling nearly 90 officers. The presence of other enforcement agencies (including the DEA) is acknowledged, but no numbers are disclosed. The Forest Service states 'management costs' of $573,500 for the 1992 Gathering; clearly a major portion of this is attributable to "proactive" law enforcement, however the exact breakdown is not given. *Id.,* pp. 13-14, 34, Appendix.

- There were incidents at both major 1993 gatherings:

In Kentucky a police roadblock was emplaced within 1/4-mile of the parking and 'Welcome Home' area of the gathering. Everyone passing this checkpoint was subjected to videotaping, spot inspection and full ID check (license, registration, and insurance). Fines were exacted from many people, and some were detained for failing to show 'proper papers', with several reports of physical restraint and abuse. A large-scale armed incursion was also attempted, involving various law enforcement and National Guard contingents, and there was heavy helicopter surveillance throughout the gathering.

In Alabama, the State Police set up an encampment within the Gathering, with illegal videotaping of participants, low-altitude overflights, regular armed patrols and random searches. A woman who photographed DEA agents was taken away and physically and sexually harassed by a group of undercover officers. There are also corroborated reports that an unknown substance was sprayed on gathering participants from low-flying aircraft, after which many people suffered illness and digestive disorders.

The list of historic abuses is long, with many instances of harassment, dirty tricks, and intimidation. While officials deny that the pending regulations are targeted against any particular group, the record is self-evident: It indicates a pattern of selective and vehement enforcement against "counter–culture groups" and other 'outsiders' — groups which the Agency documents as being "...bound together by their common belief and desire for peace, love and respect for the planet Earth and all its inhabitants." *USFS Rainbow Gathering Report, 1991;* pg. 16.

Selective Forest Service enforcement in undeniable, and through a series of rulemakings since the early 1980s the Agency has been trying to institute regulations by which consensual gatherings could be preempted entirely. Against this background it is revealing to look at how they implemented the 1988 amendments in order to stop the gathering in Texas that year:

> "[The] second revision of the regulations, in the form of an interim rule to take immediate effect, was published by the Secretary of Agriculture in the Federal Register on May 10, 1988, the day on which the government filed its complaint and application for a temporary restraining order [against the Rainbow Family]. *See* 53 Fed.Reg.16548 (May 10, 1988), amending 36 CFR § 251.50 et seq. (1987)." *Rainbow* at 300.

In part because of this blatant procedural flaw -- on top of the facial First Amendment issues -- the Texas court struck down the 1988 rulemaking as unconstitutional. Yet the Forest Service is now trying to push substantially the same unacceptable rules into law, subtly modified for the fourth time.

In sum, there is strong evidence that these regulations are intended as an obstacle to particular groups in their exercise of First Amendment rights, and as a wedge for invoking further restraints and enforcement against them. As such, the pending rules pose serious implications under the "equal protection" clause of the Fourteenth Amendment.

C. REGULATORY IMPACT

Citing authorities under USDA procedures and Executive Order 12291, the Forest Service determined that this regulation would not be a "major rule". Without offering any specific rationale, the rule is characterized as merely "...technical and administrative changes for authorization of occupancy and use of National Forest System lands." *FR*, pg. 26944.

This has the hue of a whitewash: The Forest Service assumes a unilateral authority to make this determination; in doing so the Agency evades the Regulatory Impact Analysis required of a new major rule, and the fuller scrutiny that this would entail.

Several factors pose questions as to the validity of this finding and how it was derived. First, the exemption from “major rule” status is based upon the narrow threshold test of economic impact alone. No basis is offered for applying this test exclusively, and the factual grounds for stating that "...this proposed rule would have little or no impact on the national economy" are not indicated. *F.R.*, pg. 26944. Moreover there is no consideration of factors in this rulemaking that would be challenged in a Regulatory Impact Analysis or a Regulatory Flexibility Analysis, nor are the "...criteria for making such determinations" prescribed as required. *Executive Order 12291*, Sec.3(a)-(b).

According to the 'General Requirements' of the Order (Section 2), the benefits of a regulation must not be outweighed by the costs. In this vein the Forest Service pointedly ignores the pivotal issues that must be explicitly addressed; most specifically:

> "...A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs."
> *Id.*, § 3(d)(2).

Because this test conditions the main objective of this Order, it must come to play in the primary determination on 'major rule' status. By this test the threshold would easily be crossed: The rule itself would be found to bear serious “adverse effects” upon the free exercise of basic Constitutional rights. Such a cost certainly “cannot be quantified in monetary terms”; it is telling that such a serious adverse impact is opaque to the Forest Service and simply not considered.

> "It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."
>
> *Terminiello v. Chicago,* 337 U.S. 4 (1948); *De Jonge v. Oregon,* 299 U.S. 365.

The sacrifice of Constitutional protections that "set us apart from totalitarian regimes" might well be considered a very steep cost to a free society -- one which the Forest Service has systematically ignored in presenting this reasonless, redundant rule. In fact by raising the specter of criminality over primary rights of assembly, this regulatory scheme strikes at the heart of free thought and diversity of ideas — the central pillars of democracy.

The misuse of the "major rule" test is a subtle ploy for eluding meaningful review of administrative actions, and in effect a coverup of their impacts. This indicates a serious flaw in the process by which these CFR amendments have been advanced; as such it is a rulemaking against the law, with potentially catastrophic effects on the society.

D. RELIGIOUS AND EXPRESSIVE FREEDOM

Previous versions of this rule applied these requirements explicitly to religious activities. The present proposal makes no direct reference to religious activity, yet there is no exemption of such uses from restriction under the broad and vague definition of "noncommercial group event." The agency does not explain how the proposed permit scheme squares with Federal Court decisions which have found permits to be constitutionally unacceptable as applied to religious activity, e.g.:

> "To condition ... the perpetration of religious views or systems upon a license ... is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Cantwell v. Connecticut,* 310 US 303 (1939); *Shuttlesworth v. Birmingham,* 394 US 147.

Congress recently reaffirmed the importance of "free exercise of religion as an unalienable right", amending Title 5 USC 503(C)(1)(b) with the Religious Freedom Restoration Act of 1993. This Act states that " governments should not substantially burden religious exercise without compelling justification... even if the burden results from a rule of general applicability", and requires that any such law "...is the least restrictive means of furthering that compelling government interest." Congress defines its intent by stipulating the legal tests that should apply. *H.R. 1308,* § 2(a) - 3(b).

> "(R)eligious freedom -- the freedom to believe and to practice strange and, it may be, foreign creeds -- has classically been one of the highest values of our society."
>
> *Braunfeld v. Brown,* 366 U.S. 599, 612.

In excluding any *explicit* limits to religious exercise from the current 'group use' rulemaking, the Forest Service attempts a superficial remedy to this flaw in prior versions: This is part of how it

creates the pretense of a “content-neutral” land use regulation, no longer “...distinguish[ing] between expressive conduct ...and other forms of group activity in the National forests.” *Rainbow* at 314. Yet the agency ignores even its own record on the religious content of such events, where groups gather in “...celebration of their bond with the earth and to pray for world peace and healing.” (Rainbow Gathering 1992, USFS Report, pg. 1). In fact its proposed rules would still lay a heavy burden on those who hold sacred the religious practice of pilgrimage to the Sanctuary of Nature in groups of larger than twenty-five -- in itself a unique expression and exercise of belief.

> "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."
>
> *Wisconsin v. Yoder*, 406 U.S. 205, at 234.

This language has further significance: “A way of life” may integrate religious and other forms of free expression, and these are undifferentiated in the judicial view. In this light the protections of the *Yoder* test would certainly extend to a broad range of First Amendment activities including or relating to religious belief. As applied to this Forest Service rulemaking, its legal footing crumbles:

It is the clear intent of Congress that a more stringent test be applied in defining “reasonable” government restriction on rights of expression, which vague claims of “significant “ interest will no longer suffice to justify. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288; *FR*, pg. 26940. It is then explicit on what constitutes a “compelling” interest:

> "(G)overnmental regulation...prompted by religious beliefs or principles ...have invariably posed some substantial threat to public safety, peace or order."
>
> *Sherbert v. Verner*, 374 U.S. 398, at 403.

Contrary to legal precedent, this rulemaking offers no findings of any such “substantial threat”. Against a background where "...a panoply of statutory and regulatory grounds" already exist to address these concerns (*Rainbow* at 314), "...it would plainly be incumbent upon the [agency] to demonstrate that no alternative form of regulation would combat such abuses without infringing First Amendment rights." *Sherbert* at 407.

E. PUBLIC LAND, PUBLIC STEWARDSHIP

A fundamental issue remains legally and historically unresolved beneath the turbulence of the ‘group use’ debate -- *the true ownership of public land in the republic.* Americans believe that the National Forests belong to the citizens, yet the presumption is recurrent in this rulemaking and others that they are *Federal* lands, and as such they are government property. It underlies the unconditional authority assumed by the Forest Service to approve or preempt uses, to grant or deny access.

As it has evolved, the National Forest System bears little resemblance to what was envisioned in its formation. The mission created under the early leadership of Theodore Roosevelt and Gifford Pinchot centered upon the conservation of *public land;* it assumed ownership by the citizens and vested the Forest Service in a *trustee role* on their behalf.

Arguably this original mission has eroded in theory and practice.

The hybrid tenure of the Government *and* the People has been transformed by the expedients of regulation, crudely adapting the known tenets of property law: The permit system itself is an administrative analogue to the legal rights of the private landholder, enabling parallel fees and controls. Seemingly the powers of *ownership* have been carried over by mere inference; the very notion that the government *owns* the National Forests is more an artifact of vested authority than a founding principle. Yet it has gained credence over time, as the ethic of forest conservation has given way to the business of resource management. Especially since the 1930s, when public works programs brought significant improvements to National Forest lands and affirmed the broadest public interest in their wellbeing, the overall drift has been to define these lands as the proprietary domain of the Agency.

In this sense, the new tradition of consensual gatherings in the National Forests has reaffirmed the *proprietary rights of the general public.* Politically this poses a direct threat to the agency's assumed authority, which goes far to explain its knee-jerk regulatory response -- and the vehemence behind it. Ironically the political issue is incidental to a larger and more challenging cultural purpose in the gatherings: *To seek commonality of spirit and enact a new ethos of Earth-centered community, with hands-on stewardship of the land as a founding principle and practice.*

This represents a critical break from the Western legacy of extractive domination over the land, and opens daring new directions in the relationship of Society and Nature. It commences with a commitment to *be there,* to experience the full holy awe of the wilderness in its magnitude and power. It proceeds to taking direct responsibility for the effects of human presence, as individuals and as a group. And over time, it engages a process of learning about how to tread lightly and live *with* the land in a sustainable way. This is a radical departure, and a valuable exploration on behalf of the public at-large and generations to follow.

Taking this idea further, the gatherings embody the germinus of a larger conviction:
That the Public is the ultimate steward of public land. Citizens have the right and obligation to assure that natural resources are shepherded with respect and foresight in the common trust. Free access to National Forests is fundamental to the exercise of proprietary responsibilities in this mission, crucial to the oversight that public stewardship demands.
To the extent that a government authority might exclude such oversight, it cannot be tolerated.

In this light, the emergence and evolution of consensual assemblies on the land may be one of history's most profound experiments in *social ecology.* The fact that participants are conscious and

deliberate in this endeavor is important in itself: It brings to fuller focus the need to protect expressive freedoms within this unique setting, on the understanding that "...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." *Rainbow* at 308.

Moreover this clear intent amplifies the fact that each such gathering is a unique form of free expression as a whole, enacting a founding purpose of the National Forests and other public lands:

That they be held in trust for public use in perpetuity,
to provide the final sanctuary for First Amendment rights of assembly.

This is where those rights must never be encumbered or sacrificed, and always preserved.

CONCLUSION

In closing we contend that this Forest Service CFR proposal fails to meet the criteria of Executive Order 12291, the Administrative Procedure Act, and the Constitution of the United States. The record indicates an unneeded rulemaking -- adverse to the supreme law and spirit of the Nation, embodying an Orwellian logic of social control. It poses an alarming prospect in an emergent pattern of extreme strictures and exercise of police power by the Government.

Consequently we seek review and redress in the appropriate Executive and Congressional bodies, and urge that these regulations be firmly and finally disallowed.

Respectfully submitted,

PEOPLE FOR COMPASSION and UNDERSTANDING
Washington, D.C.