BEFORE THE
UNITED STATES FOREST SERVICE
WASHINGTON, D.C.

REQUEST FOR COMMENTS REGARDING
PROPOSED DIRECTIVE FOR COMMERCIAL FILMING IN WILDERNESS;
SPECIAL USES ADMINISTRATION

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JOINT COMMENTS OF PUBLIC BROADCASTERS

THE ASSOCIATION OF PUBLIC TELEVISION STATIONS
CORPORATION FOR PUBLIC BROADCASTING
IDAHO PUBLIC TELEVISION
NATIONAL PUBLIC RADIO
OREGON PUBLIC BROADCASTING
PUBLIC BROADCASTING SERVICE

December 3, 2014

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Summary of Comments

The undersigned Association of Public Television Stations, Corporation for Public Broadcasting, Idaho Public Television, National Public Radio, Oregon Public Broadcasting, and Public Broadcasting Service (collectively, "Public Broadcasters") provide or facilitate the provision of non-commercial educational and informational content nationwide. Public Broadcasters include or represent public broadcast stations holding non-commercial educational licenses issued by the Federal Communications Commission, as well as other public broadcast content producers and distributors, who collectively provide valuable non-commercial television, radio, and digital services to the American people. This includes not only programs featuring natural resources, ecological issues, outdoor recreation, and travel across the United States – including on National Forest lands – but also news, documentaries, and long-form pieces that depend on being able to film, photograph, or otherwise record in wilderness areas.

By requiring Forest Service officials to evaluate proposed film projects based on whether they have a "primary objective of dissemination of information about the use and enjoyment of wilderness or its ecological, geological, or other features," the proposed directive calls for unconstitutional content-based regulation. Public Broadcasters support mandates to preserve wilderness as part of federal stewardship of public lands, but that goal is independent of whether photography or filming occurs. Congress may have authorized the Forest Service and other agencies to issue Special Use Permits and to charge fees, but the exercise of those powers is subject to constitutional limits, as Forest Service Chief Tidwell recently recognized.

While it is encouraging to hear from Mr. Tidwell that "news coverage on NFS lands is protected by the Constitution" and that "journalism is not to be considered a commercial activity for purposes of the regulations or [ ] permit policies," this proceeding raises important

constitutional concerns common to all federal agencies with authority in this area. Chief Tidwell's clarification that journalism should be more broadly defined to include "breaking news, b-roll, feature news, news documentaries, long-form pieces, background, blogs, and any other act … related to news-gathering" is important, but it is just the starting point.

Public Broadcasters have experienced under existing directives and rules a discretionary permit process where government officials delay – or deny outright – permission to film and photograph, in violation of the constitutional bar on prior restraints. Forest Service employees are vested with broad discretion to arbitrarily pick and choose among First Amendment activities – with no discernible government interest guiding them – and to make distinctions that are not based on impact to the land. Well-settled First Amendment doctrine, which plainly applies to grants of access to public lands, does not allow government officials this kind of unlimited discretion.

The Forest Service cannot incorporate into its directive – or allow its application to foment – content-based judgments as to whether permits issue. And insofar as the proposed directive entails permit fees, any costs imposed as a general matter must be content- and speaker-neutral, may not impose inconsistent or discriminatory fees on First Amendment activities, and may not "tax" expression by recovering more than the costs of the permitting regime. In the case of Public Broadcasters specifically, the Forest Service should uniformly ***exempt*** filming, photography, and other recording activities from permit fees as provided for under existing regulations and directives.

Public broadcasters thus recommend that the Forest Service use this proceeding to:

- Remove uncertainty and arbitrariness from the issuance of Special Use Permits.

- Create a presumption of allowing photography, filming, and sound recording if it does not impact the land, and a rule that permits ***must*** – not ***may*** – issue, when necessary criteria are met.

- Adopt specific, objective standards for determining if a use will impact land and/or its enjoyment by the public, based on quantifiable criteria such as the number of crew members or the amount of equipment to be used.

- Establish that no permit is required where the filming or photography in question has no more of an impact on the land than that of the general public.

- Prohibit conditioning permits on whether resulting works espouse a given viewpoint, or how footage is used ***after*** it is gathered, in favor of making determinations based solely on actual interaction between the photographer and the wilderness.

- Broaden the news exemption beyond "breaking news" to encompass all "news and information," including public affairs, arts, culture, and news reporting.

- Clarify that even where a public broadcasting entity must obtain a permit, it is exempt from any fees associated with the permitting process, including both usage and cost-recovery fees, so as to avoid inconsistent application across districts and imposition of high "cost recovery" fees unrelated to administering permits.

As permits granted under Public Law 106-206, USDA regulations, and Forest Service Handbook directives specifically regulate filming, photography, and sound recording on public lands, and thus necessarily implicate the First Amendment, the above steps are necessary to balance the mandate to preserve natural resources with the obligation to respect First Amendment rights.

I. INTRODUCTION

A. Interest of the Commenters

1. The Association of Public Television Stations ("APTS") is a nonprofit organization whose members comprise the licensees of nearly all of the nation's Corporation for Public Broadcasting-qualified non-commercial educational television stations. The mission of APTS is to conduct – in concert with member stations – advocacy, planning, research and communications activities in order to achieve strong and financially sound non-commercial television and advanced digital services for the American people.

2. The Corporation for Public Broadcasting ("CPB") is a District of Columbia non-profit corporation created by Congress and funded by the federal government to promote public broadcasting. Since 1968, CPB has been the steward of the federal government's investment in public broadcasting and the largest single source of funding for public radio, television, and related online and mobile services. For approximately $1.35 per American per year, CPB provides essential operational support for the nearly 1,400 locally owned and operated public television and radio stations, which reach virtually every household in the country. CPB itself produces no programming, but supports the production of broadcast programs and other services for multiple digital platforms by thousands of producers and production companies throughout the country – including *Sesame Street*, *PBS NewsHour*, *Frontline*, *Great Performances*, *All Things Considered*, *Morning Edition*, and *Marketplace* – offered by the Public Broadcasting Service, National Public Radio, American Public Media, and Public Radio International. These CPB-funded programs and services reflect our common values and cultural diversity, and address the needs of unserved and underserved audiences around the country in ways not possible with commercial media alone.

3. Idaho Public Television ("IDPTV") is an entity of the State of Idaho governed by the Idaho State Board of Education. The purpose of IDPTV is to provide non-commercial educational and informational content to the people of Idaho. It is licensed by the Federal Communications Commission as a non-commercial educational station. As a government entity, it is exempt from the payment of taxes normally required of commercial entities by the Internal Revenue Service. Each of these oversight entities (State of Idaho, FCC, IRS) in its own way prohibit IDPTV from engaging in commercial activity. IDPTV has been producing news, public affairs and documentary programming for 49 years. Its flagship program *Outdoor Idaho* has been filming in National Forest Service Lands for more than 30 years – including in designated wilderness areas – without restriction and without the need for permits.

4. National Public Radio ("NPR") is a District of Columbia nonprofit membership corporation, and is an award-winning producer and distributor of public radio programming and digital content. NPR strives to create news, informational, and cultural programming that is unique, educational, serves the public good, and addresses a wide range of topics of interest to an otherwise underserved public. The hallmark of NPR programming is authentic sound, so it is important for its reporters and producers to gain access to the sounds of life, whether those sounds come from urban or wilderness environments. NPR has over 260 Members operating more than 1,000 stations across the country, with more than 34 million weekly listeners to all NPR stations. NPR also provides a vibrant array of digital platforms with a devoted audience of about 26 million. NPR podcasts are among the most downloaded in the world, with approximately 60 million downloads per month.

5. Oregon Public Broadcasting ("OPB") is an Oregon nonprofit corporation that produces award-winning educational, cultural, and news programming. It is the licensee of five

non-commercial public television stations and sixteen non-commercial public radio stations, broadcasting throughout Oregon and southwest Washington. OPB's longest-running local television production, *Oregon Field Guide*, has been on the air for over 25 years. *Oregon Field Guide* covers natural resources, ecological issues, outdoor recreation, and travel destinations throughout the Northwest region, including on National Forest lands.

6. Public Broadcasting Service ("PBS"), with its over 350 member stations, offers all Americans the opportunity to explore new ideas and new worlds through television and online content. Each month, PBS reaches nearly 109 million people through television and over 28 million people online, inviting them to experience the worlds of science, history, nature, and public affairs; to hear diverse viewpoints; and to take front row seats to world-class drama and performances.

B. Issues Raised in this Proceeding

The United States Forest Service ("Forest Service") proposes in this proceeding to modify the Forest Service Handbook ("FSH") 2709.11, chapter 40 to establish national criteria for issuing special use permits for still photography and commercial filming on National Forest Service ("NFS") lands. *Proposed Directive for Commercial Filming in Wilderness; Special Uses Administration*, 78 Fed. Reg. 52,626 (Sept. 4, 2014) ("*Proposed Directive*"). This action is taken pursuant to Public Law 106-206, which authorizes the Secretaries of the Interior and Agriculture to require permits and establish reasonable fees for commercial filming activities as well as certain still photography activities on federal lands under their respective jurisdictions.[1]

[1] 16 U.S.C. § 460*l*-6d, Pub. L. No. 106-206, 114 Stat. 314. *See also* Statement of Mitchell J. Butler, U.S. Department of the Interior, before House Comm. on Natural Resources Concerning Permitting Fees for Filming and Photography on Public Lands (Dec. 12, 2007), at 1.

These departments have adopted regulations to implement this grant of statutory authority.[2] These departments are governed by the Wilderness Act of 1964 (16 U.S.C. § 1131 *et seq.*), which states that wilderness areas "shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." 16 U.S.C. § 1133(b).

The current proposal seeks to make permanent the Forest Service guidance for special use permits (and associated fees) for still photography and commercial filming (defined as including audio recording) on National Forest Service lands. It was issued as the third consecutive interim directive, and is based on the understanding that the previous directives "did not provide adequate guidance to review commercial filming in wilderness permit proposals." *Proposed Directive,* 78 Fed. Reg. at 52,627.

The *Proposed Directive* would govern the administration of special use permits issued by the Forest Service for photography and commercial filming to ensure that the activity will not cause unacceptable resource damage, disrupt public use and enjoyment of the site, or pose a health or safety risk. *Id*. The proposal sets forth additional criteria for activity "other than noncommercial still photography" in congressionally designated wilderness areas. Under the *Proposed Directive*, an applicant for a special use permit must have "a primary objective of dissemination of information about the use and enjoyment of wilderness or its ecological, geological, or other features of scientific, educational, scenic, or historical value." *Id*. The applied-for use must be "wilderness-dependent" such that "a location within a wilderness area is identified for the proposed activity and there are no suitable locations outside of a wilderness area." *Id*. And the prospective permittee would "preserve the wilderness character of the area

[2] Department of Interior rules are codified at 43 C.F.R. §§ 5.1-5.12 (areas administered by the National Park Service, Bureau of Land Management, and U.S. Fish and Wildlife Service) and §§ 5.15-5.18 (areas administered by the Bureau of Indian Affairs). Forest Service (USDA) regulations are codified at 36 C.F.R. §§ 251.50-251.54.

proposed for use and would leave it untrammeled, natural, and undeveloped, and would preserve opportunities for solitude of a primitive and unconfined type of recreation."[3]

These criteria would be implemented pursuant to existing regulations defining the activities that would require a special use permit, including what constitutes "commercial filming." Current rules define such activity as:

> Use of motion picture, videotaping, sound recording, or any other moving image or audio recording equipment on National Forest System lands that involves the advertisement of a product or service, the creation of a product for sale, or the use of models, actors, sets, or props, ***but not*** including activities associated with broadcasting breaking news, as defined in FSH 2709.11, chapter 40.

36 C.F.R. § 251.51 (emphasis added). The current Forest Service Handbook explains that the creation of a product for sale "includes a film, videotape, television broadcast, or documentary of historic events, wildlife, natural events, features, subjects or participants in a sporting or recreation event, and so forth, when created for the purpose of generating income." FSH 2709.11, ch. 45.5(2)(c). The exemption for "breaking news, for which no special use permit is required, is limited to an "event or incident that arises suddenly, evolves quickly, and rapidly ceases to be newsworthy."[4]

Permits granted under the authority of Public Law 106-206, USDA regulations, and the Forest Service Handbook directives at issue in this proceeding, relate specifically to the regulation of photography (defined broadly to include sound recordings) on relevant public lands.

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[3] *Id.* Additional criteria would include requirements that the proposed use not involve a motor vehicle, motorboat, or motorized equipment, including landing of aircraft, unless authorized by enabling legislation, not advertise any product or service, and not violate any other rule. *Id.*

[4] FSH 2709.11, ch. 45.5(2)(b). In determining whether photography is "commercial" because "actors" are employed, the Forest Service guidance provides that news broadcasters and correspondents, as well as witnesses, victims, or other parties interviewed by a news broadcaster or correspondent, are not considered actors, *but only to the extent they are involved "in the reporting of breaking news*." *Id.* ch. 45.5(2)(a).

Under this regime, the Forest Service decides (1) whether a permit is required; (2) the conditions under which it is granted or withheld; and (3) how much should be charged. As discussed in the next section, these facts make it necessary to examine the constitutional implications of Forest Service policies.

C. Federal Regulation of Photography and Sound Recordings Necessarily Implicates Constitutional Questions

Public Broadcasters have long supported the environmental values underlying the mandate to "preserve the wilderness character of the area proposed for use and … leave it untrammeled, natural, and undeveloped, and … preserve opportunities for solitude of a primitive and unconfined type of recreation," just as they have supported the environmental values involved in federal stewardship of other public lands under the jurisdiction of the Forest Service and other agencies. It is entirely appropriate that public lands be managed through regulations to ensure that intrusive machinery or equipment does not mar the landscape and to prevent hordes of people from damaging pristine areas. But those goals are entirely independent of whether those lands are to be photographed or sounds recorded. Congress may have authorized the Forest Service and other agencies to issue special use permits and to charge fees, but how those powers are exercised is subject to constitutional limits.

Forest Service Chief Thomas Tidwell recognized this tension with the First Amendment in a Memorandum issued on November 4, 2014. Chief Thomas L. Tidwell, Memorandum, "Commercial Filming and Photography Permits" (Nov. 4, 2014) ("Tidwell Memorandum"). Chief Tidwell noted that the *Proposed Directive* does not define commercial filming or still photography, but that the proposal nevertheless "raised significant concerns among journalists and the general public about access [to wilderness areas] and the first amendment." Accordingly, he sought to reassure those affected that the proposal "never intended to restrict the

appropriate use of National Forest System (NFS) lands for personal and commercial filming or photography activities." As part of this effort, Chief Tidwell also initiated a series of public sessions to receive input on the full implications of the directive.[5]

The Tidwell Memorandum is encouraging for its acknowledgment that "[n]ews coverage on NFS lands is protected by the Constitution" and that "[j]ournalism is not to be considered a commercial activity for purposes of the regulations or our permit policies on NFS lands." *Id*. Public Broadcasters in particular welcome Chief Tidwell's efforts to clarify that journalism should be more broadly defined to include (at least) "breaking news, b-roll, feature news, news documentaries, long-form pieces, background, blogs, and any other act that could be related to news-gathering." We appreciate the Chief's efforts to reach out to the affected communities, and agree with his ultimate point that whether a permit is required should be tied to impact on the land; and where the activity "presents no more impact on the land than that of the general public," it should be exempt from permit requirements. However, as Chief Tidwell acknowledged, the significant concerns that have been raised in this proceeding go "beyond the intended scope of the directive." *Id*. Indeed, the concerns extend beyond the jurisdiction of the Forest Service alone because the permitting system raises constitutional concerns that are common to all the federal agencies with enforcement authority in this area.

By authorizing the government to issue (or deny) permits, to determine who needs a permit in the first place, and to charge fees for those who do, Public Law 106-206 (and other related provisions) impose on the respective federal agencies a delicate responsibility to balance their mandate to preserve natural resources with their obligation to respect constitutional limits

[5] The Forest Service hosted four "listening sessions" for interested parties to participate in informal discussions with U.S. Forest Officials about the *Proposed Directive*. Listening sessions were held November 11, 2014 in Boise, Idaho; November 12, 2014 in Seattle, Washington; November 13, 2014 in Washington, D.C.; and November 20, 2014 in Portland, Oregon.

imposed by the First Amendment. As legislation was being considered that resulted in Public Law 106-206, the Department of Justice made clear that any such permitting authority must comply with the First Amendment.[6] Both the House and Senate Reports on the bill that ultimately passed highlighted the constitutional underpinnings of regulating in this area as well. The Senate Report observed that under existing law, "each agency has different policies and authorities," and that the National Park Service empowered park managers to determine "if a proposed filming or photography activity falls into the category of a normal visitor activity, a First Amendment right or a special park use requiring a permit."[7] The House Report sought to cushion First Amendment concerns by noting the bill "would not affect newsreel or television news activities," and that the permit process "is not to be construed or used in any manner as an authorization by the Secretary for script approval."[8]

The constitutional issues implicated by this permitting scheme go far beyond how broadly the various agencies define "news." They also transcend the specific issues raised by this particular directive, or even the Forest Service rules themselves. Indeed, the authorizing legislation presents inherent First Amendment problems, depending on how it is implemented

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[6] *See*, *e.g.*, Statement of Jack Craven, Director of Lands, Forest Service, United States Department of Agriculture, Before the Subcommittee on National Parks, Historic Preservation, and Recreation of the Senate Committee on Energy and Natural Resources on S. 568 Commercial Film Activities (Mar. 24, 1999) ("The Department of Agriculture defers to the Department of Justice on any constitutional issues with these bills."); Testimony of Stephen Saunders, Deputy Assistant Secretary for Fish and Wildlife and Parks, Before the Subcommittee on National Parks, Historic Preservation, and Recreation of the Senate Committee on Energy and Natural Resources on S. 568 Commercial Film Activities (Mar. 24, 1999) ("the Department of Justice has identified first amendment concerns with S. 568 and S. 338 as currently written").

[7] *Motion Picture Fees in National Park System Units*, S. Rep. No. 106-67, at 2 (1999).

[8] *Providing for the Collection of Fees for the Making of Motion Pictures, Television Productions, and Sound Tracks in National Park System and National Wildlife Refuge System Units*, H.R. Rep. No. 106-75, at 3 (1999).

and enforced by the various agencies involved. For those reasons, the Forest Service is not in a position to resolve all of these issues in this proceeding, which is designed to provide interpretive guidance in its Handbook. However, as Chief Tidwell invited dialogue on a broader range of questions than this specific directive, this proceeding can be used as an opportunity to identify the range of issues involved and to find ways to address them through agency action.[9]

Although the current proceeding is focused specifically on Forest Service regulations for commercial filming in wilderness areas, the *Proposed Directive* must be considered in the general context of issues involving permits and fees for lands under federal jurisdiction. The constitutional concerns detailed below – unbridled discretion over permitting decisions, evaluative criteria calling for content-based discrimination, inadequate definitions of "commercial" activity, and permit fees that are not tied to a specific government interest – ultimately flow from the scheme established under the Wilderness Act and the Act of May 26, 2000. As a result, the permitting practices of the Forest Service's sister agencies – such as the Parks Department and the Fish & Wildlife Service – are relevant to the issues presented in this proceeding.

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[9] Even where constitutional problems may arise from the very nature of Public Law 106-206 because it establishes a permitting system for activity protected by the First Amendment, many constitutional problems may be avoided by adopting a narrowing or limiting construction of the law through the implementing rules. *See Jones v. United States,* 529 U.S. 848, 857 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other … such questions are avoided, our duty is to adopt the latter.") (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("every reasonable construction must be resorted to" rather than one that renders a statute unconstitutional); *United States v. CIO*, 335 U.S. 106, 120-22 (1948) (construing federal expenditure provision as not prohibiting labor union endorsement of candidate in its weekly periodical, noting that "the gravest doubt would arise … as to [the law's] constitutionality" under the First Amendment if it were construed to suppress the publication).

The experience of Public Broadcasters under existing Forest Service directives and rules, as well as those enforced by other agencies pursuant to Public Law 106-206, is directly relevant to this task. Because our journalists, filmmakers, and producers interact with all of these agencies in the course of covering stories on our nation's public lands, we have included representative experiences even beyond the Forest Service to illustrate the problems that arise when permitting procedures – like the ones in the *Proposed Directive* – do not sufficiently incorporate First Amendment protections. Accordingly, these Comments identify areas where problems have arisen in the past, analyze constitutional concerns arising from the law and current proposal, and suggest modifications intended to avoid these difficulties.

II. EXPERIENCE WITH CURRENT RULES HAS REVEALED CONSTITUTIONAL TENSIONS INHERENT IN ENFORCING PERMIT AND FEE REQUIREMENTS FOR PHOTOGRAPHY ON PUBLIC LANDS

There is no question but that the Forest Service may act to preserve federal lands under its jurisdiction for its intended use and to protect the environment. Regulating access to environmentally-sensitive areas, limiting the number of people who may enter, and the conditions of access (*e.g.*, use of vehicles or other equipment) generally make sense. But regulating the act of *photography* in particular is not necessarily related to this environmental mission – and to the extent Congress has authorized the Forest Service to regulate in this area, it must do so based on well-established constitutional principles.

Unfortunately, experience under the existing directives has been marked by lapses in following basic First Amendment rules. Forest Service employees are given broad discretion to permit or burden various types of First Amendment activities, with no discernible government interest guiding the distinctions. As a result, a documentary journalist working for the same educational public television program may be told by one district that her work requires a permit and a fee; by another, that it requires a permit but no fee; and by still another that they will look

the other way and require neither. These distinctions are not based on impact to the land – such as the number of crew members or the amount of equipment – but rather on varying interpretations of what is "commercial" filming, and whether the resulting program will convey a message approved by the Forest Service. We set forth the controlling constitutional principles below, and provide examples where public broadcasters have been hampered by application of the current permitting system.

A. Discretionary Power to Grant or Withhold Permits

1. Public Law 106-206 Singles Out Expressive Activity

Each year the Forest Service receives thousands of individual and business applications for authorization to use NFS land for such activities as water transmission, agriculture, outfitting and guiding, recreation, road and utility rights-of-way, research, and other uses. *See Obtaining a Special-Use Authorization with the Forest Service* (http://www.fs.fed.us/specialuses/documents/broch.pdf). Such a requirement is unexceptional as a matter of environmental management. However, by adding a special-use permit for certain types of photography, Public Law 106-206 expressly singles out activity protected by the First Amendment for a type of licensing requirement. The law provides that the Secretaries of Agriculture and of the Interior "shall require a permit" and "shall establish a reasonable fee for commercial filming activities or similar projects on Federal lands." 16 U.S.C. § 460*l*-6d(a).

The statute does not define what constitutes "commercial filming activities." The respective agencies have adopted definitions for the permit scheme in their various rules and directives, and the Forest Service rules in particular give the agency discretionary authority to

grant or deny special use permits to photographers.[10] Unfortunately, this authority has been used to expand authority in ways that are constitutionally problematic rather than to minimize problems. For example, the law says nothing about sound recordings being subject to permit requirements but provides only that the Secretary "shall establish a reasonable fee for commercial filming activities or similar projects." 16 U.S.C. § 460*l*-6d(a). Nevertheless, Forest Service regulations define the government's mandate to require permits more broadly – rather than narrowly – to include "sound recording" in addition to motion and still photography.[11] 36 C.F.R. § 251.51.

Forest Service regulations, including the *Proposed Directive*, also vest individual Forest Service officials with broad discretion to determine whether a permit is required – and if so, whether to grant one, and how much the permit will cost.[12] The statute sets no limit on how long

[10] *E.g.*, 36 C.F.R. §§ 251.50-251.51; FSH 2709.11, § 45.52a (Special Uses Handbook) ("A special use permit is required for all commercial filming … activities on National Forest System lands[.]").

[11] 36 C.F.R. § 251.51. In a recent rulemaking proceeding, the Interior Department acknowledged that Public Law 106-206 may not specifically extend to sound recordings, but the law authorized the Department to require permits for commercial filming activities "or similar projects," which the Department "interpret[ed] to include audio recording." *Commercial Filming and Similar Projects and Still Photography Activities*, 78 Fed. Reg. 52, 087 (Aug. 22, 2013). It decided to address permit requirements for audio recording via agency-specific regulations. However, this action failed to address the larger constitutional issue – that agencies should seek to avoid constitutional difficulties by adopting narrower constructions of their statutory mandates, not create problems by construing their authority broadly.

The Interior Department's action, and that proposed by the Forest Service here, also does not resolve the question whether the agencies' actions exceed the scope of their statutory authority. Given the plain meaning of the operative phrase "commercial filming," Public Broadcasters dispute the statutory basis for regulating sound recording activities specifically, or non-commercial activities generally, and assume such a basis only for the sake of commenting on the other aspects of the measures proposed for adoption in this proceeding.

[12] The *Proposed Directive* states that special use permits "***may***" – not must – be issued when the proposed activity meets the listed criteria.

an agency may take to consider a permit application, and provides only that the Secretary "shall establish a process to ensure that permit applicants for commercial filming, still photography, or other activity are responded to in a timely manner." 16 U.S.C. § 460*l*-6d(f).

2. The First Amendment Limits Government Licensing of Expression

One of the most well-established principles of First Amendment law is that the government's ability to license the press is extremely limited. The term "license" is understood broadly to apply to any government precondition to engaging in expressive activity, and in exercising such authority, the government is forbidden from wielding arbitrary power. As the Supreme Court explained in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988):

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. … [W]e have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.

Id. at 763-64. *See also Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (law vesting city government officials with broad discretion to deny permits for public demonstrations held unconstitutional); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (ordinance prohibiting solicitation of members for organization without a permit and leaving it to discretion of city officials whether to grant a permit without definitive guiding standards held unconstitutional).

A corollary to the constitutional limitation on arbitrary power is a prohibition on delay in processing permit applications. Where the ability to engage in free expression requires a permit, and approval is delayed or denied, it amounts to a prior restraint. *E.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). The Supreme Court has made clear that "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is

impermissible." *Id*. at 226. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). This is because the failure to place such limitations is a species of unbridled discretion. *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965). Any permitting system that fails to provide for definite limitations on the time within which the licensor must act is constitutionally unsound, because "delay compels the speaker's silence." *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988).

Admittedly, most cases addressing permitting systems for speech have not involved conservation agencies, but there is no federal land management exception to these constitutional rules. Accordingly, in *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012), the U.S. Court of Appeals for the Ninth Circuit held that a photojournalist may assert a First Amendment right to observe horse roundups conducted by the Bureau of Land Management on public lands. The court agreed that it could not "rubber-stamp an access restriction simply because the government says it is necessary." *Id*. at 900. Thus, the Forest Service system for issuing special use permits to photographers must – at a minimum – satisfy First Amendment scrutiny.

3. Public Broadcasters' Experience With Special Use Permits

Public Broadcasters have first-hand experience with the problems that necessarily arise when the government has unbounded ability to set the rules for granting permits for speech. This discretion has led to wildly inconsistent permitting practices among individual districts under the current rules. For example:

- In September 2014, a longtime outdoor journalist and filmmaker was told by a U.S. Forest Service representative for the Caribou-Targhee National Forest that she needed a permit to videotape fall foliage around Bear Lake for an *Outdoor Idaho* series airing on Idaho Public TV. This particular journalist had never been required to obtain a permit for similar coverage in the past. When the journalist inquired why a permit

was necessary for this particular assignment, the representative replied: "We've just been letting you get away with it."[13]

- Between 2006 and 2011, Oregon Public Broadcasting worked on multiple high-profile stories within national forests in Oregon, including research on cougars in the Umatilla National Forest (2006); coverage of the Eagle Cap Extreme Race, a high-profile dogsled race across the Eagle Cap Wilderness (2009); an update on the spotted owl, working with principal researchers from the Pacific Northwest Research Station (2009); "Devil's Staircase," a story about a proposed wilderness area in the Siuslaw National Forest (2009); and a special report on the Oregon Dunes National Recreation Area in the Siuslaw National Forest (2011). Forest Service officials were aware of and/or involved in each of these stories, and no permits were ever requested or required.[14] Yet in 2012, a videographer with OPB was filming along the White Salmon River in the Gifford Pinchot National Forest (Columbia Gorge Scenic Area) for a story about the Condit Dam Removal when he was stopped by a U.S. Forest Service representative. The videographer was filming on publicly accessible national forest land (not wilderness), just steps from the road – and yet he was ordered to stop filming because he did not have a permit.[15]

- Idaho Public Television has faced similar inconsistencies. Bruce Reichert, executive producer for *Outdoor Idaho*, was told by the public information officer for the Boise National Forest said that he would "never" require a permit for *Outdoor Idaho*. In the Soda Springs and Montpelier districts, however, rangers demanded that *Outdoor Idaho* producers fill out permit forms. The inconsistent treatment has affected IDPTV's ability to plan and produce educational shows for the public on public land.

The discretionary permitting process has also fostered a system where government officials have the ability to delay or deny permission to photograph and film. Under the interim directives and similar rules at sister agencies, reporters have been told they need to obtain a permit that will not be available in time for the project – effectively denying permission to proceed with the story. Permits have also been rejected outright. For example:

- In 2011, a Forest Service representative from the Salmon-Challis National Forest told an IDPTV producer for *Outdoor Idaho* that she could not process his request for a permit to

[13] E-mail from Kris Millgate, Owner, Tight Line Media, to Bruce Reichert, Host and Executive Producer, Idaho Public Television (Oct. 20, 2014) (on file with OPB).

[14] E-mail from Ed Jahn, Reporter & Producer, Oregon Public Broadcasting, to Rebecca Morris, VP Legal Affairs, Oregon Public Broadcasting (Oct. 28, 2014) (on file with OPB).

[15] *Id.*

videotape a whitewater river trip in fewer than 30 days – even though the trip was taking place in 12 business days and the representative described the request as "minor in nature."[16]

- In April 2010, a Forest Service representative in the Nez Perce National Forest denied Idaho Public Television permission to film volunteers from the Idaho Aviation Association working on the Moose Creek airstrip. IDPTV was told that they could try to apply for a permit, but it would take 3-5 months to process.[17]

- In 2007, a reporter with OPB seeking to film waterfall rappellers in the Columbia River Gorge National Scenic Area was told that even if he could find a location the Forest Service would approve, it would be "unlikely" that the Forest Service could issue a permit by the planned film date – which was still 30 days away.[18]

- In 2006, a reporter with OPB working on a story about backcountry ski huts in the Wallowa-Whitman National Forest was told by a Forest Service ranger that he was required to obtain a commercial filming permit – which, the ranger insisted, would not be processed in time for the story. The ranger made clear he did not want the story to go forward because he was concerned about attracting additional backcountry users.[19]

Such highly inconsistent treatment cannot be reconciled with the First Amendment and illustrates the need for clearer guidance in this area. In Section III below, we propose reforms to limit such broad discretion and foster uniform enforcement among the districts.

B. Content-Based Criteria for Requiring Permits

The First Amendment imposes the strictest limits on the government when it seeks to regulate based on content because "[t]he essence of this forbidden censorship is content control."

[16] E-mail from Gail Baer, Lands and Non-Recreation Special Uses, U.S. Forest Service, to Bruce Reichert, Host and Executive Producer, Idaho Public Television (Aug. 23, 2011) (on file with OPB).

[17] E-mail from Colleen Back, member of Idaho Aviation Association, to Bruce Reichert, Host and Executive Producer, Idaho Public Television (May 3, 2010) (citing telephone conversation between Colleen Back and Suzanne Cable, Wilderness Program Manager, Moose Creek Ranger Station, Nez Perce National Forest) (on file with OPB).

[18] E-mail from Jennifer A. Wade, Special Use Manager, U.S. Forest Service, to Ed Jahn, Reporter and Producer, Oregon Public Broadcasting (Apr. 11, 2007) (on file with OPB).

[19] E-mail from Ed Jahn, *supra* note 14.

Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972). Such restrictions on expression are subject to strict scrutiny – meaning that they must be "narrowly tailored to promote a compelling government interest" and employ the least restrictive means of regulation. *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 813 (2000). Moreover, regulations that restrict speech based on whether it would promote a particular viewpoint are particularly suspect. *See, e.g., Schacht v. United States,* 398 U.S. 58 (1970) (statute permitting actors to wear a military uniform in a play or movie only "if the portrayal does not tend to discredit that armed force" held unconstitutional). Unfortunately, Forest Service regulations promulgated under Public Law 106-206, as well as the directives of the Forest Service Handbook, have imposed permit requirements based on content. Even more troubling is the fact that Public Broadcasters have been subjected to viewpoint-based permit decisions under the rules.

1. The Definition of "Commercial Photography" is Content-Based

Because Public Law 106-206 requires permits for "commercial filming activities" but does not define that term, it places the burden on the Forest Service through its regulations and directives to develop criteria that can satisfy constitutional scrutiny. And although Chief Tidwell correctly observed the currently proposed wilderness directive "does not define commercial filming or still photography," Tidwell Memorandum at 1, it is essential that those definitions be addressed if the Forest Service hopes to overcome First Amendment problems associated with the rules. Chief Tidwell's announcement that he plans to liberalize the special use permit exemption by defining the term "news" broadly certainly is a step in the right direction, but does not solve the rules' most fundamental problems. Moreover, the fragmented nature of the rules' administration leaves them susceptible to viewpoint-based decisionmaking.

As noted above, Forest Service rules define commercial filming as the "use of motion picture, videotaping, sound recording, or any other moving image or audio recording equipment

on National Forest System lands that involves the advertisement of a product or service, the creation of a product for sale, or the use of models, actors, sets, or props." 36 C.F.R. § 251.51. The current Forest Service Handbook describes the creation of a product for sale expansively to include "a film, videotape, television broadcast, or documentary of historic events, wildlife, natural events, features, subjects or participants in a sporting or recreation event, and so forth, when created for the purpose of generating income." FSH 2709.11, ch. 45.5(2)(c). As explained in greater detail below, the exemption for news (regardless of whether it is defined broadly or confined to "breaking news") only exacerbates the content-based nature of the special use permit regime. And so does the suggestion in the *Proposed Directive* that, to qualify for a permit, the proposed project must have a "primary objective of dissemination of information about the use and enjoyment of wilderness or its ecological, geological, or other features of scientific, educational, scenic, or historical value." *Proposed Directive*, 78 Fed. Reg. at 52,627.

Under the current rules, Public Broadcasters have seen how these criteria operate as a content-based system of censorship. Over the past four years, for example, IDPTV's producers have regularly been denied or restricted access to Forest Service lands because officials deemed IDPTV's projects to be "commercial" activity (and also concluded that its outdoor, documentary, and public affairs programming did not fall within the news exemption). These restrictions and denials have been applied inconsistently across individual forests within Idaho. At times, Forest Service officials decided that IDPTV was clearly a non-commercial entity and free to film without restriction. At other times, Forest Service officials decided that IDPTV should be considered a commercial entity because its employees are paid a salary, or because it fundraises for its operations from private contributions, or because it makes some of its free on-air and on-line content available in a DVD format as a service for viewers at a small cost.

By definition, Public Broadcasters are non-commercial, and should be exempt from the special use permit requirement and fee. *See infra* § III.E. But even if that were not the case, it violates the First Amendment to base permission to engage in expressive activities solely on whether the activity can be labeled "commercial." As the Supreme Court has explained: "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). *See also, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 789 (1985) ("Time and again we have made clear that speech loses none of its constitutional protection even though it is carried in a form that is sold for profit.") (internal quotation marks and citations omitted). The First Amendment requires the government to demonstrate a significant interest in limiting certain "commercial" filming, and that the restrictions in place are narrowly tailored to serve that interest.

There are many instances where Forest Service officials, and officials from their sister agencies, have based permitting decisions on these distinctions between whether a public-broadcasting project is "commercial," regardless of whether that distinction has any bearing on the presumed environmental impact. Moreover, the decision regarding the special use permit all-too-often involves review of programming content:

- In April 2010, a Forest Service representative in the Nez Perce National Forest denied Idaho Public Television permission to film volunteers from the Idaho Aviation Association working on the Moose Creek airstrip. The representative explained that she considered IDPTV to be engaged in "commercial filming" because it used paid employees and would be distributing the video to the public, and that they would have to review the message being presented and decide whether it was necessary to film in the wilderness.[20]

[20] E-mail from Colleen Back, member of Idaho Aviation Association, to Bruce Reichert, Host and Executive Producer, Idaho Public Television (May 3, 2010) (forwarding e-mail exchange between Colleen Back and Suzanne Cable, Wilderness Program Manager, Moose Creek Ranger Station, Nez Perce National Forest) (on file with OPB).

- In May 2010, a Forest Service ranger from the Salmon-Challis National Forest denied permission to film an *Outdoor Idaho* documentary in the wilderness on the grounds that it considered IDPTV to be engaged in "commercial filming." The ranger determined that IDPTV fell within the "commercial" category because it offered DVDs of past shows for sale on its website, even though it is clearly a non-profit entity.[21]

- In May 2010, Idaho Public Television was initially banned from sending a single cameraman to film a student conservation group in the Frank Church River of No Return Wilderness Area. The Salmon-Challis National Forest supervisor told IDPTV that "this sort of filming is commercial, and thus not allowed in the wilderness" – among other reasons, because the station sold its *Outdoor Idaho* videos to help recover production costs, after they were broadcast over the air for free. IDPTV was only allowed to film after Idaho Governor C.L. "Butch" Otter and U.S. Rep. Mike Simpson intervened with the Forest Service on its behalf.[22]

- In July 2013, a journalist with Oregon Public Broadcasting filming a glacier cave for *Oregon Field Guide* was told by the National Parks Service permit officer for Mount Rainier that she needed to get a permit or film elsewhere. The officer stated that unless OPB was covering a "breaking news event" – such as the death of a climber – it would be required to obtain a special use permit and pay the fee.[23]

- In August 2014, Forest Service officials in the Pacific Northwest Region considering a permit request to film a longtime mule packer in the wilderness in commemoration of the 50th anniversary of the Wilderness Act decided that OPB "is a commercial business" subject to restrictions under the Wilderness Act and Forest Service policy. According to a regional manager, the definition of "commercial" filming subject to review under the interim directive would include "[a]ll organizations, including documentary film crews, news organizations, non-profits, and other entities, including private citizens planning to use produced material to raise funds, sell a product, or otherwise realize compensation in any form (including salary during the production)."[24]

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[21] E-mail from Kimberly D. Nelson, District Ranger, Salmon-Challis National Forest (North Zone), to Marcia Franklin, Host and Producer, Idaho Public Television (May 11, 2010) (on file with OPB).

[22] John Miller, *Gov. Otter takes on feds over wilderness filming*, Associated Press, May 19, 2010, *available at* http://www.katu.com/outdoors/news/94543409.html.

[23] E-mail from Amelia Templeton, EarthFix Journalist, Oregon Public Broadcasting, to Morgan Holm, Chief Content Officer, Oregon Public Broadcasting (July 10, 2013) (on file with OPB).

[24] E-mail from Edward "Tyson" Cross, McKenzie River Ranger District, Willamette National Forest, to Jule Gilfillan, Reporter and Producer, Oregon Public Broadcasting (Aug. 12,

Even if the commercial/non-commercial distinction made sense based on environmental impact, it is applied inconsistently.[25] A June 2010 article noted the divergent views between National Parks Service officials in Grand Teton and Forest Service officials in Bridger-Teton National Forest as to what would constitute "commercial" filming. The spokeswoman for Grand Teton explained that the park's policy was to allow more leeway for photographers and video-graphers who were not "impacting park resources" – and that a commercial film permit would be required only for advertisements or "large-scale filming situations" involving lights, equipment, models and props. In the Bridger-Teton National Forest, on the other hand, "policies are a little more rigid." According to the Forest Service spokeswoman, "Any time you're doing any kind of business it requires a permit. … For us, I think, we do require a permit for still photography if it's for the purpose of sale."[26]

2. Permit Applications Are Subject to Viewpoint-Based Review

Under the *Proposed Directive*, an applicant for a special use permit must have "a primary objective of dissemination of information about the use and enjoyment of wilderness or its

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2014) (forwarding e-mail from Lisa Machnik, Wilderness/Wild and Scenic Rivers Program Manager, U.S. Forest Service (Pacific Northwest Region) to Edward "Tyson" Cross, McKenzie River Ranger District, Willamette National Forest, et al. (Aug. 12, 2014)) (on file with OPB).

[25] In fact, the Forest Service *itself* has sponsored commercial photography on wilderness land. In honor of the 50th anniversary of the Wilderness Act, the Forest Service sent professional photographers into the wilderness to shoot images for an art exhibit displayed at the Columbia Center for the Arts in Hood River, Oregon. All of the resulting photos displayed in the exhibit are available for sale. One of the photographers at the exhibit – a Forest Service employee – was selling his photograph of the Badger Creek Wilderness for $350. *See* E-mail from Vince Patton, Producer, Oregon Public Broadcasting, to Rebecca Morris, VP Legal Affairs, Oregon Public Broadcasting (Oct. 22, 2014) (on file with OPB). *See also* U.S. Forest Service, "Art of the Wild Art Show – Celebrating 50 Years of the Wilderness Act," Mar. 25, 2014, *available at* http://www.fs.usda.gov/detail/giffordpinchot/news-events/?cid=STELPRD3794088.

[26] Cory Hatch, *1st Amendment, YouTube meet on public lands*, Jackson Hole News & Guide, June 2, 2010, *available at* http://www.jhnewsandguide.com/news/environmental/st-amendment-youtube-meet-on-public-lands/article_6eee4b1d-7428-530a-b1ad-5669f041642a.html.

ecological, geological, or other features of scientific, educational, scenic, or historical value." *Proposed Directive*, 78 Fed. Reg. at 52,627. The applied-for use must be "wilderness-dependent" such that "a location within a wilderness area is identified for the proposed activity and there are no suitable locations outside of a wilderness area." *Id.* Despite Chief Tidwell's assurances to the contrary, these criteria suggest that the directive would make approval of special use permits contingent on the anticipated content of a particular proposal.

Statements by other Forest Service officials, the practices in various regions, and the experience of Public Broadcasters underscore this concern. For example, Liz Close, the Forest Service's acting wilderness director has been quoted as saying that special use permits for filming or photography are subject to the requirements of the Wilderness Act and that "[i]f you were engaged in reporting that was in support of wilderness characteristics, that would be permitted."[27] Statements like this have led some, like the ACLU's Gabe Rottman, to wonder whether such criteria "could be used arbitrarily by administrators to block filming or photography that depicts the Forest Service – or any other government agency – poorly."[28] Such concerns gain traction as the Forest Service gives its regional supervisors discretion to decide whether a planned video or photo shoot "would meet the Wilderness Act's goals,"[29] and because

[27] Rob Davis, *Forest Service Says Media Needs Photography Permit in Wilderness Areas, Alarming First Amendment Advocates*, Oregonian, Sept. 24, 2014, http://www.oregonlive.com/environment/index.ssf/2014/09/forest_service_says_media_need.html.

[28] Gabe Rottman, *Smokey Says, Get a Permit*, *Shutterbug*, Sept. 26, 2014, http://www.aclu.org/blog/free-speech/smokey-says-get-permit-shutterbug. *See also* Marty Trillhaase, *Dousing the Candles on the Wilderness Birthday Cake*, Lewiston Tribune, Oct. 1, 2014 ("[T]he Forest Service could decide whether to grant or deny those permits depending on whether the applicant intended to promote 'the use and enjoyment of wilderness or its ecological, geological, or other features of scientific, educational, scenic or historic values.'"), *available at* http://lmtribune.com/opinion/article_80c4750a-d693-54a2-ae25-0c1707aef5c7.html.

[29] *See* Davis, *supra* note 27.

permit applications often ask photographers to provide "story boards" or other details about programming content.[30]

It has been the experience of Public Broadcasters that Forest Service officials have sought to review the purpose of proposed projects, expressed opinions on whether access to wilderness areas was "required" for the story, and based decisions on their determination of whether the proposed project would "promote wilderness values." For example, in recent attempts to obtain permission to film in designated wilderness areas, IDPTV was required to explain not just how and where it would film, but what message it would communicate to viewers. Forest Service officials required this information so they could evaluate the nature of the program and the treatment of the subject in order to confirm that it was both non-commercial in nature and consistent with the goal of promoting wilderness values. Other examples include:

- In August 2014, a producer with Oregon Public Broadcasting sought a permit to film a longtime mule packer in the wilderness within the Willamette National Forest, as part of a film commemorating the 50th anniversary of the Wilderness Act. Forest Service officials asked to review a "proposal and script" for the film in order to confirm that the film had the "primary purpose of disseminating information about the use and enjoyment of wilderness."[31]

- In May 2010, Forest Service officials with the Salmon-Challis National Forest denied an Idaho Public Television producer permission to walk a few miles inside the wilderness to shoot video because they decided "the story can be told without going into the wilderness."[32]

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[30] *See* Hatch, *supra* note 26 ("The Bridger-Teton's guidelines also seem to attempt some control over what message is conveyed by the photographs or the film."). In this region, the special use application form directs photographers to "attach narratives and story boards of action in full description needed." *See* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5345213.pdf.

[31] E-mail from Edward "Tyson" Cross to Jule Gilfillan, *supra* note 24.

[32] E-mail from Marcia Franklin, Host and Producer, Idaho Public Television, to Bruce Reichert, Host and Executive Producer, Idaho Public Television, et al. (May 4, 2010) (on file with OPB).

- In 2009, a Forest Service representative demanded that Oregon Public Broadcasting obtain permits to film a program in the Mount Hood National Forest for *Oregon Field Guide*. In order to prepare a permit, the Forest Service representative asked OPB to describe the "purpose of the filming," including whether there was a "specific story you are trying to tell."[33]

To the extent the *Proposed Directive* permits Forest Service officials to evaluate the ***message*** of the proposed film project – whether it has a "primary objective of dissemination of information about the use and enjoyment of wilderness or its ecological, geological, or other features of scientific, educational, scenic, or historical value" – it calls for unconstitutional content-based discrimination.

3. The News Exemption Does Not Solve the Content-Based Nature of the Permit Scheme

One issue that has attracted a great deal of attention in this proceeding is the limited nature of the special permit exemption for news photography. The current directive, FSH 2709.11, chapter 40, does not require a special use permit for "activities associated with broadcasting breaking news," which is defined as an "event or incident that arises suddenly, evolves quickly, and rapidly ceases to be newsworthy." In addition, the definition of "commercial filming," for which a permit is required, includes the creation of "a film, videotape, television broadcast, or documentary of historic events, wildlife, natural events, features, subjects or participants in a sporting or recreation event, and so forth, when created for the purpose of generating income." FSH 2709.11, ch. 45.5. The *Proposed Directive*'s definition of what constitutes "commercial" filming is too broad, and its exception for "breaking news" is too narrow. For example, a documentary about climate change would not fit within this definition to

[33] E-mail from Paul R. Norman, Special Users/Lands, Mt. Hood National Forest, to Kami Horton, Producer, Oregon Public Broadcasting (2009) (on file with OPB).

qualify for an exemption; nor would a special retrospective celebrating the 50th anniversary of the Wilderness Act.

In response to this concern, Chief Tidwell has pledged to define "journalism" more broadly, even though "[t]he proposed wilderness directive does not define commercial filming or still photography." Tidwell Memorandum at 1. Under his proposed approach, "[j]ournalism includes, but is not limited to: breaking news, b-roll, feature news, news documentaries, long-form pieces, background blogs, and any other act that could be considered related to news-gathering." *Id*. This clarification is laudable and its recognition of the First Amendment issues involved in this proceeding is an important step. Unfortunately, it does not address all of the problems associated with vesting Forest Service personnel with the power to exempt certain topics from permit requirements or to base permit decisions on programming content.

Even assuming the news exemption can be expanded and redefined without a formal rulemaking, Chief Tidwell's liberalized approach to journalism leaves many questions unanswered. While "news documentaries" may be exempt from permit requirements, what about other documentaries, such as nature documentaries? And while "long-form" pieces are exempt, what about stories of other lengths? And what information is required to qualify as "news?"

The distinction between "breaking news" and other types of stories within the definition of "commercial" filming presents obvious constitutional problems, but so does the different treatment of journalism and other forms of photography. This is because the First Amendment protects far more than just news or journalism. The Supreme Court has long made clear that freedom of the press is a "fundamental personal right," which "is not confined to newspapers and periodicals." *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452 (1938). *See Glik v. Cunniffe*, 655 F.3d 78, 83-84 (1st Cir. 2011). The public's right to gather information (or to take pictures) "is

coextensive with that of the press." *Id.* at 83 (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (Stewart, J., concurring)). *See also Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."). It is constitutionally illegitimate to base permitting requirements and exclusions on the anticipated use of the information to be gathered. No valid governmental interests are proffered for these content-based distinctions – and none are served by them.

C. Problems With Permit Fees

While the *Proposed Directive* specifically addresses the evaluation of proposed public uses of NFS lands, the Forest Service Handbook chapter in which it would be codified provides for the imposition of land use fees for approved uses. FSH 2709.11, ch. 45.51c, 45.52c. Importantly, fees are to be imposed for authorized uses "unless the holder or the activity qualifies for a fee waiver as provided in FSH 2709.11, chapter 30." *Id.* Therefore, to the extent the directive affects who must obtain a permit, it also determines who must pay a fee to film or take photographs on lands under Forest Service control.

Such fee requirements also trigger constitutional scrutiny because the First Amendment does not permit the government to raise revenue by imposing a tax on expressive activities.[34] Nor may the government impose inconsistent or discriminatory fees on First Amendment

[34] *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (ordinance imposing flat license fee for distribution of religious literature held unconstitutional, where amount of fee was not a "nominal" one "to defray the expenses of policing the activities in question"); *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1205 (11th Cir. 1991) ("The government may not profit by imposing licensing or permit fees on the exercise of first amendment rights … and is prohibited from raising revenue under the guise of defraying its administrative costs.") (internal citations omitted); *Eastern Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) ("Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose.").

activities. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987). Content-based taxes or fees are particularly suspect. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Thus, to the extent the Forest Service permit requirements are arbitrary or content-based, so are the fees associated with the permits.

To the extent these fees – which are not tied to administrative or processing costs – are imposed on photography, filming, or other expressive activity, they are in violation of the First Amendment. According to Forest Service spokesman Larry Chambers, such permits can cost up to $1,500.[35] A filmmaker in Jackson Hole reports that filming ski movies in the backcountry with a hand-held video camera can incur Forest Service fees of $150 per day, plus insurance and processing fees.[36] Such added expenses exert a significant chilling effect on photographers.[37]

While this issue presents a First Amendment problem for the Forest Service and other federal agencies generally, the constitutional dimension of the issue is (or should be) avoided in the case of Public Broadcasters. This is because public broadcasting stations such as those operated by Oregon Public Broadcasting and Idaho Public Television are non-commercial, educational, non-profit entities licensed and governed by the Federal Communications Commission. *See* FSH 2709.11, ch. 31.22. As such, public broadcast stations are entitled to a waiver of usage fees associated with the special use permits. Under the Federal Land Policy and Management Act, 43 U.S.C. § 1764(g), the Forest Service and BLM have historically granted such fee waivers to public broadcasters for the use of National Forest Service Lands. *See, e.g.*, *Fee Schedule for Communications Uses on National Forest System Lands*, 60 Fed. Reg. 55090,

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[35] *See* Davis, *supra* note 27.

[36] *See* Hatch, *supra* note 26.

[37] *Id*. ("For the most part, Hogan says he simply avoids shooting movies on the forest [because of the fees].").

55097-98 (1995). Additionally, Forest Service implementing regulations set out the criteria for full or partial fee waivers for other non-profit associations or non-profit corporations engaged in public or semi-public activity to further public welfare. These criteria inherently encompass public broadcasting,[38] and the corresponding fee waivers help support the important public service that Public Broadcasters offer the American people.

III. PROPOSALS FOR REFORM

Public Broadcasters understand that the Forest Service has become increasingly aware of the constitutional issues raised by the *Proposed Directive* during the ongoing comment period. We were pleased to see Chief Tidwell's acknowledgement of the issue, and agree with his assessment that whether a permit is required should be tied to impact on the land; and where the activity "presents no more impact on the land than that of the general public," it should be exempt from permit requirements. Tidwell Memorandum at 1. But while the Tidwell Memorandum is a step in the right direction, it does not fix the constitutional deficiencies in the *Proposed Directive* as written. Moreover, the issues we identify with the permitting system and fees apply to all permits granted pursuant to Public Law 160-206. Obviously, the Forest Service cannot address all the issues in this proceeding, nor can it determine how other governmental bodies carry out their responsibilities under the law. Nevertheless, Public Broadcasters offer the following specific proposals for reform:

[38] 36 C.F.R. § 251.57(b). The Forest Service Handbook for Special Use Fee Determinations provides for full fee waivers for the authorized use if "[t]he applicant or holder is licensed by the Federal Communications Commission (FCC) as a non-commercial, educational broadcaster and has nonprofit status under section 501(c)(3) of the Internal Revenue Code." FSH 2709.11 § 31.22b.1. Full waivers are also granted if "[t]he holder or applicant is a State or local government entity." FSH 2709.11 § 31.22b.3. The interim Forest Service directives governing the evaluation of proposals for still photography and commercial filming on National Forest Service Lands (which the Forest Service now proposes to adopt permanently) also provide for fee waivers based on the same criteria.

A. Permits Cannot Be Subject to Administrative Discretion

Perhaps the most important clarification the Forest Service can make in this proceeding is to remove uncertainty and arbitrariness from the issuance of Special Use Permits. That would go a long way toward avoiding the kind of unconstitutional unbridled discretion that should be interpreted out of the statute as the Forest Service implements it. One baseline fix in this respect appears in the very first line in the *Proposed Directive* at Section 45.1c in Chapter 40 of FSH 2709.11: rather than stating that "[a] special use permit ***may*** be issued" when the necessary criteria are met, the law should provide that a special use permit ***shall*** issue when stated precon-ditions are satisfied. *Proposed Directive*, 78 Fed. Reg. at 52,627 (emphasis added). Given the First Amendment sensitivities already presented by the law, the presumption must be placed in favor of allowing photography and filming as long as it does not impact the land or the public's enjoyment of it.

And as to meeting the necessary criteria, when determining whether activity stated in a Special Use Permit application would impact the land – and therefore require a permit – Forest Service officials must be guided by adequate standards that are specific, narrow, objective, and definite. As set forth below, those criteria may not include review of the film project's content or message, and may only consider its physical impact on the environment or its impact on the use or enjoyment of the land by other members of the public. The discretion of Forest Service officials to deny a permit based on content or viewpoint, based on the larger project in which photos or footage will appear, or based on criteria having no objective measure, must be wholly eliminated.

B. Permitting Criteria Must Be Content Neutral

The Forest Service should apply its ability to interpret the law to mitigate the above-noted content-based nature of requiring "a primary objective of dissemination of information about the

use and enjoyment of wilderness or its ecological, geological, or other features of scientific, educational, scenic, or historical value." In particular, among other things, permits may not be conditioned on whether a resulting work espouses a particular viewpoint or serves a particular purpose – that is, the "primary objective" must be viewed from as broad a perspective as possible. Permits should not in any way be dependent on how the footage will be used ***after*** it is gathered – instead, it must be focused solely on the gathering itself (*i.e.*, the actual interaction between photographer and wilderness). Officials reviewing a permit application cannot be allowed to base permitting decisions in any way on message, content, or the purpose of a film, television program, or other expressive work into which wilderness footage will eventually be incorporated. Nor may officials require, or ask to review, a script or story board. Any contrary approach would cast Forest Service officials in the prohibited role of censors, and throw the entire permitting regime into grave constitutional doubt.

C. Permitting Criteria Must Relate to the Physical Impact on the Environment or Use and Enjoyment by Other Members of the Public

To avoid providing Forest Service officials from imposing their own judgments on the "value" of a proposed use, or from otherwise applying subjective criteria to Special Use Permit applications, even innocuously, the Directive must incorporate only objective criteria limited to its core basis for promulgation – preventing adverse physical impact to wilderness areas. Specifically, the Forest Service should clarify the grounds on which a proposed use is evaluated, which should be strictly limited to the proposed use's impact on (i) the physical environment and (ii) use and enjoyment by other members of the public.[39]

[39] In issuing such a clarification, the Forest Service should acknowledge that technology has made both photography and audio recording equipment unobtrusive, and on their own, unlikely to have an impact on the land.

As a threshold matter, no permit should be required where the filming or photography in question has no more of an impact on the land than that of the general public. In such circumstances, if the general public and/or non-commercial users may enter and use wilderness areas without prior permission, the fact that some particular individual (or group) will enter armed with film equipment should not affect that calculus. Otherwise, there would be no escaping the conclusion that additional conditions have been unconstitutionally placed on those wishing to photograph or film, simply because they seek to engage in expressive activities.

Even in cases that stand to potentially have more of an impact on the land than that of the general public, thus requiring a Special Use Permit, the criteria for grant must be clear and wholly objective, and preferably easily quantifiable. For example, limitations on crew size tied to policies restricting the number of "heartbeats" in a particular area – as many districts already implement – would be an acceptable, content-neutral ground for evaluation. Review of a Special Use Permit application might also examine the number of days the crew might be present, the extent of public use of the request area in the ordinary course, and/or whether competing uses of the same area have been requested on the same day or adjacent days.

Another reasonable criterion for evaluating a permit might include whether a particular location is open to the public, with greater restrictions (though not a prohibition, unless absolutely, unequivocally necessary) applying to non-public areas. Review of applications might also examine whether the filming project uses sets, models, or props that would impact the physical environment more than a generally permitted use by the general public (such as camping). But in all cases, the criteria must be tied to the physical impact on the wilderness area targeted for use.

D. The Forest Service Should Not Attempt to Establish Exemptions Based on Different Categories of News

The Public Broadcasters agree that the allowance under the Forest Service's news exemption is sound, but we respectfully submit that it should not be limited to "breaking news." *See* 36 C.F.R. § 251.51. The considerations animating the exception for "breaking news" are similarly present for all reporting on matters of public concern, including but not limited to the arts, culture, and public affairs, as well as news reporting in the ordinary course. The Forest Service accordingly should broaden its news exemption to encompass all of these endeavors, under the banner of "news and information" filming and photography.[40]

E. The Forest Service Should Clarify that Film and Audio Recording and Still Photography by Public Broadcast Entities on National Forest System Lands Are Exempt from Otherwise Applicable Permit Fees

Charging a fee as a precondition to engaging in expressive activities necessarily implicates the First Amendment. However, the Forest Service can avoid the more difficult constitutional questions as they relate to public broadcasting simply by recognizing its non-

[40] For example, in the past few years, NPR and its member stations have reported stories that plainly are beneficial to the public interest, but would not constitute "breaking news" per se. These stories include an August 2014 report by NPR member station KQED looking back at the 2013 California Rim fire in Yosemite National Park and its aftermath (Lauren Sommer, "One Year After Calif. Rim Fire, Debates Simmers Over Forest Recovery," KQED (Aug. 18. 2014), *available at* http://www.npr.org/2014/08/18/341391128/one-year-after-calif-rim-fire-debate-simmers-over-forest-recovery); a January 2013 report by member station KUOW about efforts to monitor martens in the Olympic National Forest (Ashley Ahearn, "To Catch a Marten: Seeking Clues in Olympic National Forest," KUOW (Jan. 21, 2013), *available at* http://www.npr.org/2013/01/21/169912767/to-catch-a-marten-seeking-clues-in-olympic-national-forest); a December 2011 report by member station NHPR about cutting Christmas trees in White Mountain National Forest (Elaine Grant, "White Mt. Puts Expedition into X-Mas Tree Search," NHPR (Dec. 11, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=121330929); an August 2009 report by member station APR about Ponderosa pines in Arizona's Coconino National Forest (Daniel Kraker, "Ponderosa Pines: Rugged Trees with a Sweet Smell," APR (Aug. 17, 2009), *available at* http://www.npr.org/2009/08/17/111803772/ponderosa-pines-rugged-trees-with-a-sweet-smell); and a September 2001 NPR broadcast exploring the land traveled by explorers Lewis & Clark ("Lewis & Clark," NPR (Sept. 24, 2001), *available at* http://www.npr.org/templates/story/story.php?storyId=1130198).

commercial nature. The Public Broadcasters submit that the Forest Service should explicitly clarify that, even where a public broadcasting entity must obtain a permit, that entity is exempt from any fees associated with the permitting process, including both usage and cost-recovery fees. The existing Forest Service Handbook fee-setting provisions that accompany the special use permit provisions already provide full fee waivers for public broadcast stations. FSH 2709.11, ch. 31.22b(1).

In addition, this proceeding centers on a proposed directive for "Commercial Filming" in Wilderness. *Proposed Directive*, 78 Fed. Reg. at 52,626. Public broadcasters, conversely and more generally, are, by definition, *non-commercial* entities, *see, e.g.*, 47 U.S.C. §§ 397(6), (11), and provide important public services to the general public. *See* 36 C.F.R. § 58(f)(vi); FSH 2709.11, ch. 31.22b(4). To avoid inconsistent application across districts – and the imposition of high "cost recovery" fees unrelated to the actual cost of administering permits – the Forest Service should explicitly exempt public broadcasting entities categorically from all permitting fees under the Directive.

Conclusion

The version of the commercial filming directive current proposed suffers from significant constitutional infirmities. Were it to be enacted without revision, it would be subject to serious legal challenges. With the reforms put forth in these comments, we believe the Forest Service can craft a better directive that safeguards the nation's wild places from development, without

infringing on the First Amendment rights of Public Broadcasters – along with other journalists, filmmakers, and photographers – to film and photograph in wilderness areas.

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