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December 3, 2014

Commercial Filming in Wilderness
USDA, Forest Service
Attn: Wilderness & Wild and Scenic Rivers (WWSR)
201 14th Street, SW
Mailstop Code: 1124
Washington, DC 20250-1124

Re: Proposed Directive for Commercial Filming in Wilderness; Special Uses Administration
<u>RIN 0596-AD20</u>

Dear Sir or Madame:

This letter is being filed in the above-referenced proceeding on behalf of the forty-four (44) State Broadcasters Associations named at the end of this letter (collectively, the "Associations"). The Associations would like to thank the Forest Service for the opportunity to comment on this important matter.

The Associations represent our nation's free, over-the-air, local radio and television broadcasters who dedicate themselves every day to serving the public interest by providing to the American people emergency alerts, news and other information to inform and educate. The Associations are concerned that certain aspects of the Forest Service's permitting process, including the Proposed Directive as drafted, violate the First Amendment by imposing a prior restraint on the freedom of speech and freedom of the press that are guaranteed by the United States Constitution.

Section 45.5 (Arts) of Chapter 40 – Special Uses Administration describes the circumstances under which an individual must obtain a special use permit in order to conduct still photography or engage in commercial filming activities on National Forest Service lands. Exempt from the permitting process are "News broadcasters and correspondents, as well as witnesses, victims, or other parties interviewed by a news broadcaster or correspondent, who appear before a camera in the reporting of breaking news…." "Breaking News" is defined as "*An event or incident that arises*

suddenly, evolves quickly, and rapidly ceases to be newsworthy" (emphasis added). "Commercial Filming" is defined as "Use of motion picture, videotaping, sound-recording, or any other type of 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 actors, sets, or props, *but not including activities associated with broadcasting breaking news*. For purposes of this definition, 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." (Emphasis added).

The Proposed Directive adds "commercial filming" to Section 45.51b – Evaluation of Proposals, as well as expands the enumerated, exclusionary, criteria to include, *inter alia*, filming that "Would not advertise any product or service…."

As soon as the Proposed Directive was offered for public comment, the media and others raised serious First Amendment concerns. In response, on November 4, 2014, Chief Tidwell sought to assure the public that the US Forest Service is committed to the First Amendment: "To be clear, provisions in the draft directive do not apply to news gathering or activities."[1]

From the Associations' perspective, the only way for the US Forest Service to avoid the prohibition against "prior restraint" on the freedom of speech and freedom of the press that are guaranteed by the United States Constitution, the Forest Service needs to reject its unreasonably narrow definition of "news." For example, the Idaho State Broadcasters Association makes two salient points with respect to the Forest Service's definition of "breaking news," "[c]overage of a forest fire in Idaho would be exempt from filming restrictions while it is burning, but a story about the aftermath of that fire might not be." Furthermore, the Forest Service's "limited definition [of news] does not take into account the varied nature of news coverage including feature stories, sports, documentaries, on-line material and other programming that is produced over a longer period of time." [2]

Given the narrowness of the Forest Service's definition of "news," broadcasters are forced to suffer very significant burdens on their First Amendment

[1] Thomas L. Tidwell, *Commercial Filming and Photography Permits* (November 4, 2014).

[2] Letter from Idaho State Broadcasters Association to Thomas L. Tidwell (November 25, 2014). These points were also made in a letter filed by the Montana FOI Hotline Board, who noted that "the proposed directive fails to make clear the distinction between journalism and commercial activity." *See* Letter from Montana FOI Hotline Board to Elwood York (November 25, 2014).

rights when they seek to engage in bona fide newsgathering activities that do not fit within the current "breaking news" definition. That burden is well illustrated by the Forest Service's own handbook and regulations. First, the request for a permit "must be submitted to the National Forest office two weeks in advance."[3] The application consists of two pages of instructions and fee schedules, and the application itself is four pages.[4] Once the application is filed, the Forest Service must then evaluate the proposal.[5] The proposal must meet the "screening criteria" laid out in Title 36 of the Code of Federal Regulations,[6] which require, among other things, that a corporate applicant provide evidence of its incorporation and good standing, as well as the name and address of each shareholder owning three percent or more of the shares.[7] Finally, the proposals are subject to at least two levels of screening, during which the government evaluates whether the proposed use will interfere with the Forest Service's use or involves a risk to public health or safety, before the applicant receives the special use authorization.[8] While several of the reasons behind the screening process may be sensible for larger scale uses of federal lands, they would not be implicated by members of the news media. Therefore, the Associations encourage the Forest Service to broaden its definition of news from only breaking news to also include newsgathering and dissemination activities.

The Associations are equally concerned about the Proposed Directive's definition of commercial activity. It is so broad as to deny non-commercial, educational public television stations the permit-free ability to produce a variety of programs filmed on location that are aired over their and other noncommercial, educational stations.

The Supreme Court has previously found other licensing systems to violate the constitutional guarantees of free speech and press, holding that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is

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[3] United States Department of Agriculture, *Forest Service, Region 5 – Event Commercial Permits*, http://www.fs.usda.gov/detail/r5/passes-permits/event-commercial/?cid=STELPRDB5349053 (last visited November 24, 2014).

[4] USDA Forest Service, *Commercial Photography & Filming Request*, *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5349111.pdf.

[5] *See Special Uses Handbook*, FSH 2709.11, Amendment No. 2709.11-2008-2 (September 17, 2008), *available at* http://www.fs.fed.us/specialuses/documents/2709.11_40.pdf.

[6] *Id.*

[7] 36 C.F.R. § 251.54(d)(ii)(D)(1)-(2).

[8] *Id.* § 251.54(e)(1), (5).

unconstitutional."[9] The Court's further explanation of these principles is applicable here: "although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places."[10] As the Court described decades ago, actions such as the Proposed Directive will involve too much administrative discretion, and are unrelated to the government's purported interest in protecting wilderness areas. Although the Chief of the U.S. Forest Service released a statement indicating the Forest Service's commitment to the First Amendment,[11] such a promise, in conjunction with the Proposed Directive as presently worded, is unfortunately not enough to assuage the Associations' concerns. Rather, the Forest Service should act on its indicated commitment to the First Amendment by embracing a broad interpretation of newsgathering and journalism that is clearly set forth in its regulations, policies, applications and manual, and declining to adopt the Proposed Directive as drafted.

Based on the foregoing, the Associations respectfully urge the Forest Service to decline adopting the Proposed Directive, consistent with the positions set forth herein.

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

By: /s/
Richard R. Zaragoza
Carly A. Deckelboim

Counsel in this matter for the following State Broadcasters Associations:

[9] *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969).

[10] *Id.* at 153 (citations omitted).

[11] News Release, *US Forest Service Chief: I will ensure the First Amendment is upheld under agency commercial filming directives*, http://www.fs.fed.us/news/releases/us-forest-service-chief-i-will-ensure-first-amendment-upheld-under-agency-commercial (September 25, 2014) (last visited November 21, 2014).

Alabama Broadcasters Association,
Alaska Broadcasters Association,
Arizona Broadcasters Association,
Arkansas Broadcasters Association,
California Broadcasters Association,
Colorado Broadcasters Association,
Connecticut Broadcasters Association,
Florida Association of Broadcasters,
Georgia Association of Broadcasters,
Hawaii Association of Broadcasters,
Idaho State Broadcasters Association,
Illinois Broadcasters Association,
Indiana Broadcasters Association,
Iowa Broadcasters Association,
Kansas Association of Broadcasters,
Kentucky Broadcasters Association,
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South Dakota Broadcasters Association,
Tennessee Association of Broadcasters,
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