



November 20, 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

Via Email: reply_lands@fs.fed.us.

These comments, on behalf of the Outdoor Writers Association of America, respond to the U. S. Forest Service's proposal to incorporate interim directive (ID) 2709.11-2013.1 into Forest Service Handbook (FSH) 2709.11, chapter 40 to make permanent guidance for the evaluation of proposals for still photography and commercial filming on National Forest System Lands. Specifically, the criteria used to evaluate requests for special use permits related to still photography and commercial filming in congressionally designated wilderness areas (79 FR 52626).

This is a formal written follow-up to an Oct. 3, 2014, telephone conference call between Forest Service Chief Tom Tidwell and representatives of the Outdoor Writers Association of America – the nation's oldest and largest association of professional outdoor communicators.

OWAA Executive Director Tom Sadler and OWAA President Mark Freeman participated in the call with Chief Tidwell. In our discussion, the three of us agreed that the intent of the rules requiring permits for filming in federally designated wilderness areas was not to encumber working journalists in the news-gathering process, but to regulate commercial operations such as advertisements and movies.

Based on that discussion and a review of the rule language, the OWAA strongly believes the language should specifically exempt professional journalists, either working on media staff, working on an assignment for a media outlet or gathering information, images or footage with the intent to publish or air them in a media outlet.

To this effect, the OWAA proposed the following language for paragraph 5 (changes are in *red italics*):

“5. Meets the following additional criteria, if the proposed activity, *other than the constitutionally protected activity of journalists* (36 CFR 251.51), would be in a Congressionally designated wilderness area.”

We also suggest that you add two definitions to the language, one defining “constitutionally protected activity of journalists” and one defining “journalist.” The first definition incorporates some of the language Chief Tidwell spelled out in his Nov. 4 letter stating his intentions for the rule. The second definition acknowledges the various kinds of journalists currently working in federally designated wilderness areas.

“Constitutionally protected activity of journalists,” as used in these regulations, includes gathering information and images for breaking news, feature news, news documentaries, long-form pieces, background, blogs and any activity by journalists constituting part of such processes.”

“Journalists” include those on the staffs of media outlets, those who freelance material to media outlets and those who blog. This includes those who are collecting information and images either on assignment or who are doing so on speculation of future publishing or airing.

The first definition specifically addresses the diverse forms that the news-gathering process takes when OWAA members and other journalists report on and from wilderness areas. The second definition clearly reflects the range of outdoor communicators and their professional circumstances now common among those informing the public about wilderness areas and wilderness values.

Adding the specific exemption and these definitions is important because they best reflect the industry of today and the future. While the term “filming” may have been intended to mean movies or commercials, the language currently proposed, without our suggested additions, appears to encompass virtually all activities by nearly all outdoor communicators working today. Even newspaper staffers now routinely shoot videos – sometimes with just their smartphones – as an extra medium published with traditional articles and photos on newspaper websites.

Based on our conversation with Chief Tidwell, including these activities in the permitting process is not the intent of the rule. The changes we suggest are therefore required to capture Chief Tidwell’s intent.

Our suggested additions will remove the types of ambiguities OWAA members have seen when the current interim rules have been interpreted differently at different times and in different regions. OWAA members also report that freelancers and communicators on media staffs have received different decisions on whether their work in a federally designated wilderness area – and even on general national forest lands – requires a permit, despite working on nearly identical assignments. This serves no positive end.

The clearly stated exemption and definitions also help ensure that the permanent rule does not accidentally put the Forest Service in the position of risking violation of the First Amendment’s guarantee of freedom from prior restraint. The temporary regulation’s current language, without our suggested additions, can and has led to forest supervisors believing it is their duty to make sure a journalist is following the wilderness filming requirements before that activity occurs. This can lead and has led to supervisors improperly requiring that a journalist apply for a permit for the supervisor’s review to determine whether the planned news-gathering activity meets

wilderness criteria. This constitutes an unprecedented review of a journalist's activities prior to news gathering and publishing and a violation of First Amendment protections against prior restraint by government.

To that end, OWAA also recommends a modification of section 251.50, which defines the scope of these regulations. OWAA proposes the following (changes are in *red italics*):

(c) A special use authorization is not required for noncommercial recreational activities, such as camping, picnicking, hiking, fishing, boating, hunting, and horseback riding, or for noncommercial activities involving the expression of views, such as assemblies, meetings, demonstrations, and parades, *or for constitutionally protected activity of journalists*, unless:

(1) The proposed use is a noncommercial group use as defined in §251.51 of this subpart;

(2) The proposed use is still photography as defined in §251.51 of this subpart; or

(3) Authorization of that use is required by an order issued under §261.50 or by a regulation issued under §261.70 of this chapter.

OWAA members appreciate and value the Forest Service, and specifically Chief Tidwell, reaching out and requesting our input in codifying rules that restrict the improper commercialization of federally designated wilderness areas without restraining the reporting dynamics of outdoor communicators. Our work brings real wilderness to life for Americans, our readers and viewers and owners of these spectacular lands.

Respectfully,

A handwritten signature in black ink, appearing to read "MCFreeman". The signature is fluid and cursive, with a prominent "M" and "F".

Mark Freeman
President
Outdoor Writers Association of America