**UNITED STATES OF AMERICA**, Plaintiff, **v. THE RAINBOW FAMILY**, also known as the RAINBOW NATION, et al., Defendants

Civil Action No. L-88-68-CA

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, LUFKIN DIVISION

**695 F. Supp. 294; 1988** U.S. Dist. LEXIS 11060

June 1, 1988, Decided
June 1, 1988, Filed

The **United States of America seeks a preliminary injunction against the defendant Rainbow Family and its members, which would prohibit the defendants in any way from preparing for, or attending, or participating in any Spring Council, Summer Gathering or other meeting of twenty-five or more persons in any National Forest in the State of Texas, unless they have applied for and obtained a "special use" permit from the U.S. Forest Service.**

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Plainly, **if the special use permit regulations are unlawful or unconstitutional, the government's basis for the preliminary injunction evaporates and the injunction must be denied.**

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the **magistrate proposes the following findings and recommendations:**
**1) That the special use permit regulations would apply to any anticipated Rainbow Family council, meeting or gathering of twenty-five or more persons on National Forest lands;**

**2) that the regulations governing special use permits have been lawfully adopted; and**

**3) that the regulations do not violate the defendants' constitutional rights under the First Amendment.**

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**[I]nsofar as the regulatory scheme regarding special use permits distinguishes between expressive conduct, protected by the First Amendment, and other forms of conduct, and to the extent that the regulations do not contain clear and narrowly drawn standards for issuance or denial of permits affecting such expressive conduct, the regulations transgress the First Amendment and cannot be enforced by this court.**

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**Meetings or gatherings are held in many parts of the country throughout the year, and an annual "Summer Gathering" has taken place for the last seventeen years, drawing participants from around the nation and around the world. Participants in such gatherings share many common interests and political values or ideals, and express those shared ideas and interests through Rainbow Family activities**.

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The remaining issues for consideration go to the substance of the plaintiff's motion for preliminary injunction, namely: **whether the government can validly require the defendants to obtain a special use permit before holding any gathering or meeting of twenty-five persons or more in any National Forest in the State of Texas;** whether the government has made the necessary showing to obtain injunctive relief; and whether a preliminary injunction is the only appropriate and available remedy to the government to enforce the special use permit regulations in this instance.

The **defendants have argued throughout these proceedings that they are not subject to the Forest Service's permit requirements, and that the regulations governing special use permits for the National Forest System are unlawful, unconstitutional and without binding effect upon them.**

**A.** ***The Special Use Permit Regulations***

The regulations at issue here, concerning "**special uses" of the National Forest System lands and the instances in which permits for such uses are required, are found at 36 C.F.R. Part 251, Subpart B.** They were **promulgated by the Secretary of Agriculture, pursuant to his statutory authority to prescribe rules and regulations concerning uses and preservation of the lands under the National Forest System.** ***See*** **16 U.S.C. § 472; 16 U.S.C. § 551; 43 U.S.C. § 1740.**

The regulations in Part 251 which define "special uses," and establish the types of uses for which a special use permit is required, were originally published on June 6, 1980, and amended on June 21, 1984. In addition, a second revision of the regulations, in the form of **an interim rule to take immediate effect, was published by the Secretary of Agriculture in the Federal Register on May 10, 1988, the day on which the government filed its complaint and application for a temporary restraining order.** *See* 53 Fed. Reg. 16548 (May 10, 1988), *amending* 36 C.F.R. § 251.50 *et seq*. (1987). It is this second revision of the regulations that defendants contend has not been validly adopted. Because the May 10, 1988, **interim rule alters the previously existing regulations in several respects** central to the issues presented here, a detailed description of the regulations as they appeared before and after the May 10, 1988 revisions is required.

Under the **regulations prior to May 10, 1988, "*All uses* of National Forest System land, improvements, and resources . . . are designated '*special uses*' and must be approved by an authorized officer," with exceptions regarding disposal of timber and minerals and grazing**

**of livestock, which are governed by separate regulations. 36 C.F.R. § 251.50(a)** (June 6, 1980, as amended June 21, 1984)(emphasis added). The regulations provide, however, that a **"special use authorization is *not* required for the noncommercial use or occupancy of National Forest System lands or facilities for camping, picnicking, hiking, fishing, hunting, horse riding, boating, or similar recreational activity," *unless* the activity is one defined as a "recreation event" or as a "special event." 36 C.F.R. § 251.50(c)** (emphasis added).

A **"recreation event," for which a special use permit must be obtained under the regulations, is defined as "a planned, organized, or publicized recreational activity engaged in by a total of ten (10) or more participants and/or spectators, that involves competition, entertainment, or training such as, but not limited to, animal or vehicle races or rallies, dog trials, fishing contests, rodeos, fairs, regattas, and games."** 36 C.F.R. § 251.50(i). A **"special event," for which a special use permit is also required, is defined as "a meeting, assembly, demonstration, parade, or other activity, engaged in by ten (10) or more participants and/or spectators, for the purpose of expression or exchange of views or judgments."** 36 C.F.R. § 251.50(1).

] The regulations, then, define *all* uses of the National Forest lands (with the exceptions relating to timber, minerals, and grazing) as "special uses," but exempt "noncommercial use or occupancy" -- such as camping, hiking, or picknicking -- from the special use permit requirement. All other uses, including "recreation events" (ten or more persons involved in a competitive or entertainment activity), "special events" (ten or more persons engaged in expressive activity), or commercial uses of the forests, must obtain the special use permits.

**Based upon this definitional distinction between "recreation events" and "special events," the regulations prior to May 10, 1988, also established separate standards for the denial or issuance of a special use permit.** A special use permit for any use *other than* a "special event" (*i.e.*, for recreation events or for commercial uses of National Forest lands), may be denied if 1) the proposed use "would be inconsistent or incompatible with the purpose(s) for which the lands are managed, or with other uses;" 2) the proposed use "would not be in the public interest;" 3) the "applicant is not qualified;" 4) the use would "otherwise be inconsistent" with federal or state law; or 5) the "applicant does not or cannot demonstrate technical or financial capacity." 36 C.F.R. § 251.54(h).

As to "special events" themselves, different criteria for the denial or issuance of a special use permit are set forth in the regulations than for other uses. **The regulations provide that a permit application is to be granted *unless* the reviewing officer determines that:**

(1) The special event would conflict with another use which has been previously approved by special use authorization, contract, or approved operating plan . . .; or

(2) The special event would present a clear and present danger to the public health or safety; or

(3) the special event would be of such nature or duration that it could not reasonably be accommodated in the particular place and time applied for; or

(4) The application proposes activities that are contrary to the provisions of Part 261 of this chapter [concerning prohibited uses of National Forest lands and property] or the provisions of any other Federal or State criminal law.

36 C.F.R. § 251.54(i).

Thus, **on their face, the regulations distinguish between expressive and other forms of conduct, and provide different grounds for the approval or denial of a special use permit based upon that distinction.** Because of **this facial differentiation between expressive activity and other forms of group activity in the National Forests, the permit regulations were held invalid under the First Amendment,** two years ago, by the United States District Court for the District of Arizona. *United States v. Israel*, No. CR-86-027-TUC-RMB (May 10, 1986).

The *Israel* ruling prompted the Forest Service to revise the regulations, in the form of the interim rule published May 10, 1988. The interim rule does not alter the general special use permit scheme outlined above; rather, it amends the existing regulations in several respects. Most notably, the **interim rule eliminates the previous distinction between "special event" and "recreation event," and creates instead a single category of "group event" for which a special use permit is required. 53 Fed.Reg. at 16548-50.** A **"group event" requiring a special use permit is defined under the interim rule as "an organized or publicized activity involving, or expected to attract, twenty-five or more persons and the use of National Forest System lands, resources, or facilities."** 53 Fed. Reg. at 16550 (amending 36 C.F.R. § 251.50). The interim rule also adds new provisions concerning "noncommercial printed material," and slightly amends the previous standards contained in § 251.54, regarding approval or denial of special use permits. *Id*.

The preamble to **the interim rule explains that such revisions are intended "to clarify that special use authorization for . . . First Amendment activity will be granted unless certain conditions," specified in the regulations, "are not met."** 53 Fed.Reg. at [*302] 16548.

**The interim rule, however, still makes a fundamental distinction between events involving expressive activity and other forms of "group events," by distinguishing between "group events for the public expression of views" and all other "group events."** For example, the revisions to § 251.54 in the interim rule provide as follows:

(h) *Response to applications for the* ***distribution of noncommercial printed material or for a group event for the public expression of views.*** An authorized officer shall grant an application for authorization of distribution of noncommercial printed material or for a group event for the purposes of public expression of views, **unless the officer determines** that:

(1) The planned event or use would conflict with another use which has been previously approved . . .; or

(2) The **planned event or use would present a clear and present danger to public health or safety**; or

(3) The planned event or use would be of such a nature and duration that it could not reasonably be accommodated in the particular place and time applied for . . .; or

(4) The application proposes activities that are prohibited . . .; or

(5) There is no person or entity authorized to sign a special use authorization on behalf of the group applying for an authorization and/or there is not [sic] person or entity willing to accept responsibility for the group's adherence to the terms and conditions of the permit.

*Id*. (amending 36 C.F.R. § 251.54(i)). Separate criteria for "responses to applications for all other uses" are established, essentially adopting those previously contained at § 251.54(h). *Id*. That is to say, the regulations -- even after the May 10, 1988, revisions -- still make a fundamental distinction between expressive and other activities for purposes of approving or denying a permit application.

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*Validity of the Interim Rule Adoption*

The defendants further object that the present regulations have not been validly adopted, since the interim rule was published on May 10, 1988, to take effect that date, without opportunity for prior notice and comment. The magistrate was directed to take evidence and argument on this objection. He concluded and found that the interim rule was lawfully adopted. *See* Report, at 7-13. However, as explained below, this conclusion and finding [*303] appears to be contrary to the law regarding agency rule making under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. Therefore, the magistrate's [**24] recommendation in this respect shall be, and it is hereby, rejected.

The **APA, which governs agency rule making (including the interim rule** in question here), establishes two requirements, relevant here, before an agency may adopt a rule or regulation pursuant to statutory authority. **First, the APA requires that "general notice of the proposed rule making shall be published in the Federal Register," and interested persons are to be given an opportunity to participate in the rule making through "submission of written data, views, or arguments with or without opportunity for oral presentation."** 5 U.S.C. § 553(b) & (c). **Second, after the proposed rule or regulation has received public comment or participation, the final rule is to be published "not less than 30 days before its effective date. . . ."** 5 U.S.C. § 553(d).

The **interim rule was published on May 10, 1988, and states that it is to take effect upon publication. Moreover, no opportunity was provided for public comment or participation in advance of the publication; rather, the interim rule provides for opportunity to comment from the date of publication until July 11, 1988.** 53 Fed. Reg. at 16548. Thus, it is incontestable that the interim rule was adopted without adhering to the requirements either for prior notice and comment, or for publication thirty days in advance of the date the rule is to take

effect, as specified in 5 U.S.C. § 553(b), (c), and (d).

The APA, however, does provide several exceptions to these comment and publication requirements. Under § 553(b), for example, notice of the proposed rule making and an opportunity for comment or participation need not be provided, if the rule is "interpretive" of a legislative act, if it is a general statement of policy, or if it solely relates to agency organization or procedure. Similarly, notice and comment may be waived "when the agency for good cause finds (and incorporates the finding and brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(A) & (B).

The exceptions to the thirty-day waiting period after publication of a rule, before it takes effect, are analogous. The **waiting period may be omitted where an exemption to a substantive rule is granted; where the rule is "interpretive" or is a statement of policy or agency [**26] procedure; or "as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. § 553(d)(1)-(3).**

The regulations at 36 C.F.R. Part 251 are patently substantive rules, not interpretive rules or related solely to agency procedures. Thus, the only possibly relevant exceptions here to the notice and comment and waiting period requirements are the "good cause" provisions quoted above. **Unless the agency has specifically -- and supportably -- found that public notice and comment was "impracticable, unnecessary, or contrary to the public interest," under § 553(b)(B), *and* that "good cause" existed for the rule to take effect upon publication, under § 553(d)(3), it would appear that the interim rule was not validly adopted or effective on May 10, 1988.** *See Levesque v. Block*, 723 F.2d 175, 187 (1st Cir. 1983); *U.S. Steel Corporation v. U.S. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1979), *clarified* 598 F.2d 915 (1979).

In this respect, the preamble to the interim rule states that
It has been found and determined that advance notice and request for comments would be impracticable and contrary to the public interest. Because of the decision in *United States v. Israel*, the **current rule pertaining to special use authorizations for large group gatherings on the National Forest System is unenforceable.** The summer field season is close at hand and large groups will soon be gathering on the National Forests. It is, therefore, imperative that an enforceable rule be in place so that forest officers have a mechanism, where necessary, to control the impacts of these groups and prevent unnecessary damage or risk to National Forest resources and facilities, and public health and safety.

53 Fed.Reg. at 16549. There is no explicit "good cause" finding with respect to the thirty-day waiting period requirement under § 553(d), although it may be inferred that the same reasons were found by the agency to justify waiver of this requirement. *See Wells v. Schweiker*, 536 F. Supp. 1314, 1323 (E.D. La. 1982).

An agency's profferred rationale of "good cause," for failing to observe the notice and comment period required by 5 U.S.C. § 553(b), should be "closely examine[d]" by a reviewing court.

The Forest Service appears to place the entire weight of its finding that public notice and

comment was not practicable, before the interim rule was promulgated, on the bases that the "summer field season is close at hand, and large groups will soon be gathering on the National Forests," and that the decision in *United States v. Israel* left the special use regulations "unenforceable." Notably lacking from the agency's finding, however, is any discussion of why it has taken the Forest Service exactly *two years* to finally promulgate revisions to the special use regulations, after the *Israel* decision. Two entire summer seasons have taken place in the intervening period, and the interim rule relates no adverse effects from the absence of any amendments to or revision of the regulations in that period. Certainly, there is no showing in the interim rule that the Forest Service's alleged problems with the Rainbow Family in North Carolina in the summer of 1987 were in any way traceable to the *Israel* decision…

In short, it appears that the Forest Service has itself been dilatory in failing to offer the proposed revisions to the special use regulations long before now.

***Constitutionality of the Special Use Permit Regulations***

**Because the interim rule is presently of no effect, the previously promulgated regulations at 36 C.F.R. Part 251 remain operative, without the revisions proposed in the interim rule.** The defendants maintain that both the existing regulations, and as amended by the interim rule, violate their constitutional rights to freedom of speech, assembly, and worship. n2 The following discussion, however, focuses solely on the constitutionality of the existing regulations, and not the interim rule, since the May 10, 1988, revisions have been held ineffective…

First, several individual defendants have claimed that, since the National Forest lands are public lands, the government cannot, under the Constitution, impose any restriction or permit requirement upon their freedom to gather, speak, or camp in the National Forests.

This position must be rejected out of hand. The National Forest System was established by congressional action, and the Secretary of Agriculture has been delegated powers to prescribe rules and regulations governing the uses of Forest Service lands. *E.g.*, 16 U.S.C. § 472, § 551; 43 U.S.C. § 1740.

The power of the Secretary to promulgate and enforce regulations preserving the National Forest environment, including by special use permits, has been repeatedly upheld.

Hence, the defendants must show some specific manner in which the government's regulation of the National Forests infringes upon their constitutional rights, other than the mere act of regulation.

The **defendants' further arguments as to the unconstitutionality of the special use permit regulations are two-fold.**

**First, they argue that the regulations (both the existing version and the interim rule) are facially invalid, because they explicitly distinguish between expressive and other types of activity, and, moreover, impose different requirements for obtaining permits based on whether the activity is expressive or not.**

Second, defendants contend that both versions of the regulations are unconstitutionally vague and standardless, vesting too much discretion in Forest Service officials to deny or approve a permit where expressive activity is concerned, thereby allowing content or viewpoint-based denials of permits to occur. The court is in agreement with defendants in both respects.

**There can be no question that the regulations at 36 C.F.R. Part 251 explicitly distinguish between expressive conduct, which is protected by the First Amendment, and other types of group activity.**

**The definition of a "special event," *vis-a-vis* a "recreation event," and the different statutory procedures for approving or denying a special use permit based upon this dichotomy, demonstrate that the Forest Service has intended to treat expressive activity differently than other types of group activity in the National Forests.**

**Such an explicit regulatory distinction between speech, worship, or associational activity, on the one side, and between other forms of action, on the other side, in and of itself casts the regulatory framework in a highly suspect light.**

In the view of the magistrate, however, the fact that the regulations distinguish between expressive and other forms of activity is not, alone, sufficient to invalidate them. He concludes that the regulations are "content-neutral," and narrowly drawn to promote significant governmental interests in protecting and regulating use of public lands. The magistrate additionally found that the regulations contain sufficiently precise standards for denial or approval of permits to pass constitutional [*308] muster, with the exception of § 251.54(h)(2) (which allows denial of permits for events involving expressive activity where the event "would present a clear and present danger to public health or safety"). *See* Report, at 13-19.

Except for his conclusion that the "clear and present danger" criterion for denial of a special use permit for expressive activity is standardless, and thus unconstitutional, the magistrate's further finding, that the regulations are otherwise constitutionally sound, does not appear to be correct, under established First Amendment principles. Hence, for the reasons set forth below, the magistrate's recommendations as to the constitutionality of the special use permit [**42] regulations shall be, and they are hereby, adopted in part, with respect to the "clear and present danger" criterion, and rejected in part in all other respects.

Although the government apparently disagrees that First Amendment concerns are raised by the special use permit regulations, **it cannot reasonably be disputed that the activities in which the defendants seek to engage are "expressive" in nature and accordingly within the ambit of the First Amendment.** The record fully reflects that the defendants' anticipated councils, gatherings or meetings in the National Forests will involve significant expressive activity. For example, individual defendants have testified that **Rainbow Family gatherings and councils involve exchange of views on many subjects, including political topics, as well as educational seminars and various forms of worship.** Moreover, many of those associated with the Rainbow Family view their very participation or association in such events as political statements (for example, some argue for peace and the ecology, while others are in opposition to

hierarchical, coercive systems of government). Even the act of camping in the National Forests may have political connotations and qualify as protected symbolic activity. *See, e.g., U.S. v. Abney*, 175 U.S. App. D.C. 247, 534 F.2d 984, 985 (D.C.Cir. 1976) (per curiam) (sleeping in Lafayette Park in protest vigil is expressive activity); ***Clark v. Community for Creative Non-Violence*,** 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984) (assuming, but not deciding, that overnight sleeping in connection with demonstration is expressive conduct "protected to some extent by the First Amendment").

**It also cannot reasonably be disputed that the public Forest Service lands are the type of forum in which expressive activity has historically occurred, and in which public expression of views must be tolerated to a maximal extent**. *E.g., Hague v. C.I.O.*, 307 U.S. 496, 83 L. Ed. 1423, 59 S. Ct. 954 (1939)(**use of public streets and parks for exchange of ideas has "from ancient times been a part of the privileges" of citizenship). In contrast to military bases or other government facilities that have been designated for a particular use or function and may be closed to expressive activity**,

**the National Forests are traditionally open to any user seeking to engage in appropriate recreational or other activities, including those involving speech, worship or association.** *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441-42, 108 S. Ct. 1319, 56 U.S.L.W. 4292, 4293, 99 L. Ed. 2d 534 (1988) (historic use of National Forest sites for Indian religious purposes); [**45] *United States v. Beam*, 686 F.2d 252, 256-57 (5th Cir. 1982) (describing various groups' use of National Forest System lands in Texas). Regulation of expressive activity in such a forum must therefore be narrowly tailored as to time, place and manner, and serve substantial governmental interests, as well as leave open ample alternative channels of communication. *Clark, supra*, 468 U.S. at 293; *Perry Education Association v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). Any prior restraint on expressive activity in such a context is particularly suspect. *Perry*, 460 U.S. at 45-46; *Lovell v. Griffin*, 303 U.S. 444, 451, 82 L. Ed. 949, 58 S. Ct. 666 (1938).

**Although duly enacted laws are ordinarily presumed to be constitutional, when a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality.**

**In this light, the explicit regulatory distinction, between expressive activity and all other forms of activity, appears to be in and of itself, an invidious classification by the government, singling out for special treatment the contemplated exercise of free speech, worship, or association. Perhaps most importantly, the facial distinction between expression and other activity "may have the effect of curtailing the freedom to associate [which] is subject to the closest scrutiny,"** *NAACP v. Alabama*, 357 U.S. 449, 460-61, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958), by burdening associations planned for expression of views with special requirements not imposed elsewhere. **Further, the government is free, under the regulations, to find that a proposed event will be "for the purposes of expression or exchange of views or judgments," 36 C.F.R. § 251.50(1), without any apparent limitation on its discretion.** As noted by defendants in their objections, **it is the very existence of such power to discriminate, on the basis of a person's expression of views or association with others, which may render a regulation unconstitutional.** *Kramer v. Price*, 712 F.2d 174, 177

(1983), *vacated as moot*, 723 F.2d 1164 (5th Cir. 1984).

**Although it carries a heavy burden to do so, the government has made no effort to explain or to justify why First Amendment activities are viewed differently under the regulations from other forms of activity, or to prove that the exercise of such rights will *not* be treated differently from other forms of activity.** It follows that the classification system established by the regulations, which on its face singles out expressive conduct and requires that such conduct be treated differently from other activity, is, in itself, invalid under the First Amendment.

Beyond the fact that the structure of the regulatory scheme targets expressive activity, the **regulations do not establish sufficiently precise standards concerning the denial or approval of permit applications where expression is concerned.** In circumstances, such as these, **where the government requires that a permit or license be obtained before a group of persons may gather to engage in expressive activity**, the United States Supreme Court has stated 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 unconstitutional."** *Shuttlesworth [*310] v. City of Birmingham*, 394 U.S. 147, 150-51, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969). **The constitutional problem with standardless discretion, to approve or deny a permit affecting expressive activity, lies in the fact that such a law "creates a threat of censorship that by its very existence chills free speech."** As is well known, **the amount of discretion vested in authorities to grant or deny permits for expressive activity, on the basis of vague or even non-existent criteria, has frequently resulted in invalidation of a statute or regulation under the prior restraint doctrine.**

**The standards in this instance for denial of a special use permit, when expressive activity by a group is concerned (a "special event"),** are quoted above, page 14. They **allow the Forest Service to deny a permit when, for instance, the "special event would present a clear and present danger to the public health and safety,"** or the special event "would be of such nature or duration that it could not be reasonably accommodated in the particular place and time applied for," or when the event "would conflict with another use" previously approved by the Forest Service. 36 C.F.R. § 251.54(i)(1)-(3). **None of these grounds for denial of a permit is further defined, however -- such as the type of "danger" to the public health and safety that is contemplated, when that danger would be "clear and present,"** or when an event would be determined to "conflict" with some other use of the forests. **Neither is there any requirement in the regulations that even a statement of reasons for denial of a permit must be given. Finally, the regulations impose no time frame or deadline for when a special use permit application is to be made, when a decision on such an application must be delivered, or whether any judicial review or appeal is available.**

**it is apparent that the "clear and present danger to public health and safety" ground for denial of a special use permit is standardless, and allows Forest Service officials to deny permits for expressive activity based on their subjective, unbridled discretion.**

Under this criterion, an **official is free to speculate as to the likely effect of some act of speech, association or other expressive activity, before it happens, drawing his or her own conclusions as to what the "public health or safety" may be.**

the **Forest Service is free to speculate or determine in advance whether a proposed event will be for the "purpose of expression or exchange of views or judgments," and thereby invoke the "special events" permit criteria.**

**Since many -- if not all -- group activities will naturally involve some expression of views or exchange of judgments, under these regulations an official has virtually unfettered discretion to invoke the "special events" permit application provisions, with their unique criteria for denial of a permit.**

The **lack of standards relative to when a "special event" permit must be applied for, in contrast to all other "special uses," would, alone, be sufficient to invalidate the regulations on vagueness grounds.**

Likewise, as with **the "clear and present danger" criterion, it would equally be within a Forest Service official's unbridled discretion to determine that a planned event involving expressive activity "would conflict" with some other use of the National Forest, or that it "could not reasonably be accommodated" in a particular time and place applied for.** It is easily foreseeable that either rationale could be readily invoked by an official to deny a permit to a group expressing views anathema to the official's own beliefs. And, although the regulations require that if a permit is denied for either of these reasons, the applicant is to be given "the opportunity to accept an alternative site or time" selected by the Forest Service official, 36 C.F.R. § 251.54(i), **nowhere do the regulations require that a reason for denial of a permit actually be given; therefore, in many cases it may be impossible to tell what the true grounds were for denying a permit application.**

**Furthermore, vesting the official with the discretion to propose an alternative place or time for the expressive activity, of his or her own choosing, is highly repugnant to the First Amendment's spirit of allowing citizens the freedom to decide when and where they wish to exercise their rights to speak, worship, or assemble. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."**

**Because these regulations treat expressive activity in a selective manner, the burden is upon the government to establish that they are narrowly drawn, and that the restrictions are reasonable as to time, place, and manner.**

It has failed to carry those burdens in this instance.

The criteria for denial of a special use permit to groups wishing to engage in expressive activity in the National Forests commit the decision regarding approval or denial to the subjective, virtually unfettered discretion of Forest Service officials, with no requirement that they justify or explain any denial of a permit.

the regulations must be struck down as unconstitutional, to the extent that they impose a prior restraint upon the exercise of First Amendment liberties.

In so holding, the entire regulatory apparatus concerning special use permits is not being voided. "[A] court should refrain from invalidating more of the statute than is necessary . . . . ' Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of the court to so declare, and to maintain the act [**58] in so far as it is valid.'" *Regan v. Time*, 468 U.S. 641, 652, 82 L. Ed. 2d 487, 104 S. Ct. 3262 (1984) (plurality opinion), *quoting El Paso & N.E.R. Co. v Gutierrez*, 215 U.S. 87, 96, 54 L. Ed. 106, 30 S. Ct. 21 (1909). Administrative regulations should be similarly construed to preserve their constitutionality, as far as possible, when a portion of the regulations is found unconstitutional and may be severable without otherwise disrupting the regulations' functions. *Alaska Airlines Inc. v. Brock*, 480 U.S. 678, 107 S. Ct. 1476, 1481, 94 L. Ed. 2d 661 (1987); *Jochum v. Pico Credit Corp. of Westbank, Inc*., 730 F.2d 1041, 1047 (5th Cir. 1984); *Rucker v. Wabash RR Co*., 418 F.2d 146, 149 (7th Cir. 1969).

Thus, only those portions of the regulations at 36 C.F.R. Part 251 which refer explicitly to "special events" are held to be [*313] unconstitutional under the First Amendment -- namely, 36 C.F.R. § 251.50(c), to the extent it includes "special events;" § 251.50(1); § 251.53(a), to the extent it includes "special events;" and § 251.54(i). The remaining provisions in the regulations, including the requirement that special use permits be obtained for any "recreation event" or other "special uses" of the National Forest System land or property, remain valid and enforceable.

[**59] E. *Plaintiff's Remedy at Law*

By virtue of the holdings above -- that the interim rule is not presently in effect, and that the regulations requiring a special use permit for "special events" are unconstitutional -- there is no legal ground for the preliminary injunction demanded by the government. It bears reiterating that the government has solely requested, as preliminary injunctive relief, that the defendants be required to secure a special use permit before they hold or prepare for a Spring Council or Summer Gathering in the National Forests in Texas. n7

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n7 The injunctive relief requested by the plaintiff is phrased solely in terms of the special use permit regulations. The plaintiff, however, in its complaint, also contends that any anticipated Rainbow Family gathering would constitute a public nuisance. Should the government seek to predicate its demanded permanent injunctive relief on this, or other grounds, it may do so at the final injunction hearing.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Denial of the plaintiff's motion for preliminary injunction does not, however, deprive it of other

remedies at law. A perusal of applicable statutes and regulations discloses that several other remedies are available ] to the government for the alleged harms to public health and safety, and to National Forest property or lands, which the government sought to forestall through the issuance of a preliminary injunction.

For example, violations of Forest Service regulations (assuming they are valid and constitutional) are punishable by a fine of up to $ 500.00 and six months imprisonment. 16 U.S.C. § 551; *see also* 36 C.F.R. § 261.16. **Available to the Forest Service is an abundance of unchallenged regulations promulgated for the protection of the National Forests and tailored to control the various abuses that the plaintiff fears, and which are wholly unrelated to the special use permit regulations**. *See, e. g*., 36 C.F.R § 261.3 (prohibiting interference with a Forest Service officer engaging in official duties); 36 C.F.R. § 261.4 (prohibiting public disturbances and disorderly conduct); 36 C.F.R. § 261.9 (prohibiting damage to government property or endangered flora); 36 C.F.R. §§ 261.11 and 261.14(q) (regulating the disposal of refuse and sewage); 36 C.F.R. § 261.12(d) (prohibiting the restriction of access to Forest System roads); 36 C.F.R. § 261.14 (protecting developed recreation and camp [**61] sites). Forest Service personnel are also conferred the power to make arrests, not only to enforce the Forest Service's own regulations, but also for violations of federal and state drug laws and other criminal conduct. *See, e. g*., 16 U.S.C. § 559 (power to arrest for violations of Forest Service regulations); 16 U.S.C. § 559b and § 559c (authorizing Forest Service personnel to investigate, and make arrests for, violations of federal controlled substance laws under 21 U.S.C. §§ 801 *et seq*.); 16 U.S.C. § 559d (authorizing Forest Service personnel to cooperate with federal and state law enforcement officials in the enforcement of federal and state controlled substance laws); 16 U.S.C. § 551a (permitting the Forest Service to cooperate with state officials in the enforcement of state laws and local ordinances).

Additionally, 18 U.S.C. § 1853 makes it a substantive misdemeanor unlawfully to cut or injure trees within the jurisdiction of the Forest Service, and 18 U.S.C. § 1863 imposes criminal sanctions on those who trespass upon National Forest Service lands that lawfully have been closed or restricted pursuant to the Service's regulations. In this regard, executive officers of [**62] the **Service are empowered to close areas of the National Forests, where such action is necessary, for reasons of public health, public safety, fire hazards, or for the protection of threatened vegetation and wildlife. 36 C.F.R. §§ 261.50, 261.52, 261.53.** Such officers may limit a variety of conduct by [*314] restriction and limitation orders, including public nudity. *See* 36 C.F.R. §§ 261.2 and 261.58(j). Besides the criminal sanctions that may be imposed, the Service has the authority to seize, impound, and remove personal property from its forests, in order to protect, and ensure access to, areas within its jurisdiction. 36 C.F.R § 262.12.

Finally, the Assimilative Crimes Act, 18 U.S.C. § 13, if applicable, would give the plaintiff plenary power to enforce state penal laws within federal lands, whenever such state laws are not displaced by analogous federal statute and regulations, or contrary to federal policy. *See United States v. Fesler*, 781 F.2d 384, 390 (5th Cir. 1986), *cert. denied*, 476 U.S. 1118, 90 L. Ed. 2d 661, 106 S. Ct. 1977 (1986); *United States v. Brown*, 608 F.2d 551, 553 (5th Cir. 1979). Consequently, where statutes of the United States and regulations of the Forest Service do not specifically [**63] limit or proscribe conduct, the plaintiff might resort to the penal laws of the State of Texas for authority to maintain public order within its bailiwick.

Conclusion

Although jurisdiction may be exercised over the defendants named in the government's complaint, the motion for a preliminary injunction must be denied. The regulations under which the preliminary injunction is sought have not been validly adopted, insofar as the May 10, 1988, interim rule is concerned. Moreover, **to the extent the regulations distinguish between expressive conduct, such as that at issue here, and other forms of group activity in the National Forests, and to the extent that the regulations do not provide objective and narrowly drawn standards for the issuance or denial of permits for such expressive activity, they are unconstitutional and cannot be enforced.**

Further, it appears that the **government otherwise has available to it a panoply of statutory and regulatory grounds to prevent the alleged harms posed by a gathering or meeting of twenty-five or more defendants on Forest Service lands.** Although these provisions may provide the government with an adequate remedy at law for the harms alleged here, it [**64] is unnecessary to pass upon that question at this point.

As set forth in the order entered herewith, a hearing on the plaintiff's motion for a permanent injunction, pursuant to Federal Rule of Civil Procedure 65, shall be conducted on June 13, 1988, in Tyler, Texas. At that time, the plaintiff may offer evidence relating to its contention that the proposed gathering is subject to injunctive relief, in that it will constitute a public nuisance, and may offer evidence regarding any other alleged ground for relief. Similarly, the defendants may offer evidence and arguments in opposition to the government's contentions that a Rainbow Family Summer Gathering in the National Forests of Texas would result in irreparable harm and should be permanently enjoined.

In accordance with the foregoing, it is therefore

ORDERED that the Report of United States Magistrate, dated May 27, 1988, in regards to plaintiff's motion for preliminary injunction, shall be, and it is hereby, adopted in part and rejected in part, as set forth above. It is further

ORDERED that plaintiff's motion for preliminary injunction shall be, and it is hereby, DENIED.

SIGNED this 1st day of June, 1988.